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## Criminal Procedure: Face-to-Face Confrontation in Child Sex Abuse Prosecutions

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CRIMINAL PROCEDURE:  
FACE-TO-FACE CONFRONTATION IN  
CHILD SEX ABUSE PROSECUTIONS\*

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

An Iowa trial court convicted defendant of engaging in lascivious acts with two young girls.<sup>1</sup> Pursuant to an Iowa statute designed to protect child victims from the trauma of facing the offender in court,<sup>2</sup> a screen separated the defendant from the two girls during their testimony.<sup>3</sup> The screen allowed the defendant to observe the girls,<sup>4</sup> but prevented the girls from seeing the defendant.<sup>5</sup> The Iowa Supreme Court affirmed the conviction, rejecting defendant's contention that the use of the screen violated the confrontation clause of the sixth amendment of the United States Constitution.<sup>6</sup> The United States Supreme Court reversed the state court's decision<sup>7</sup> and HELD, use of the screen violated the defendant's confrontation rights because it denied him a face-to-face encounter with the witnesses.<sup>8</sup>

In response to the increasing incidence of child sexual abuse,<sup>9</sup> many states have passed laws to facilitate the prosecution of these cases.<sup>10</sup>

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\*I would like to dedicate this comment to my parents, Joann and Irvin Meyers, for their constant encouragement and support.

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

2. IOWA CODE § 910A.14 (1987). The statute provides, in part: "The Court may require a party be [sic] confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during testimony, but does not allow the child to see or hear the party." *Id.*

3. 108 S. Ct. at 2799.

4. *Id.* The Court noted that the combination of the screen and lighting adjustments enabled the defendant "dimly to perceive the witnesses . . ." *Id.*

5. *Id.*

6. *Id.* at 2800 (citing *Coy v. Iowa*, 397 N.W. 2d 730 (1986)). The Iowa Supreme Court also rejected defendant's due process argument that the screen made him appear guilty, thereby denying him a presumption of innocence. *Id.* The instant Court considered it unnecessary to reach this issue because the defendant's constitutional right to confront the witnesses had been violated. *Id.* at 2803.

7. *Id.* The Court remanded the case to the Iowa Supreme Court to determine whether the violation was harmless error. *Id.*

8. *Id.* Justice Scalia wrote for the majority. *Id.* at 2799. Justice O'Connor filed a concurring opinion with which Justice White joined. *Id.* at 2803. Justice Blackmun filed a dissenting opinion with which Chief Justice Rehnquist joined. *Id.* at 2805.

9. See D. FINKELHOR, CHILD SEXUAL ABUSE 1-3 (1984) (survey results); O'Brien, *Television Trials and Fundamental Fairness: The Constitutionality of Louisiana's Child Shield Law*, 61 TUL. L. REV. 141 n.2 (1986).

10. Bulkley, *Background and Overview of Child Sexual Abuse: Law Reforms in the Mid-1980's*, 40 U. MIAMI L. REV. 5, 6-10 (1985). As of October, 1985, twenty-five states had

Most of these laws protect child witnesses from the trauma inherent in both the harsh courtroom atmosphere and the prospect of facing the offender again.<sup>11</sup> The laws provide for videotaped and closed-circuit testimony, procedures which help shield child witnesses and enable them to testify more effectively.<sup>12</sup> Some states have also passed special hearsay exceptions, allowing the admission of out-of-court statements made by victims of child sexual abuse.<sup>13</sup> Although these reforms promote prosecutorial efficiency and protect child victims, they threaten to erode the criminal defendant's right to confront adverse witnesses.<sup>14</sup> Consequently, courts must examine these reforms in light of the confrontation guarantees of the sixth amendment.<sup>15</sup>

In the landmark case of *Mattox v. United States*,<sup>16</sup> the Supreme Court considered the purpose and scope of the confrontation clause.<sup>17</sup> In *Mattox*, a federal trial court allowed the prosecution to read into evidence transcripts of testimony from a prior trial.<sup>18</sup> The testimony was that of two prosecution witnesses who died following the first trial.<sup>19</sup> The Supreme Court affirmed the defendant's conviction, deciding that this procedure sufficiently preserved the confrontation clause guarantees.<sup>20</sup> The Court stated that the main purpose of the clause

legislation providing for the use of videotaped testimony from a preliminary hearing or deposition, and sixteen states allowed children to testify at trial through closed-circuit television. *Id.* In addition, eighteen states had adopted special hearsay exceptions for child witnesses. *Id.*

11. See *id.* See also Whitcomb, *Child Victims in Court: The Limits of Innovation*, 70 JUDICATURE, Aug.-Sept., 1986, at 90 (describing a variety of existing and proposed courtroom innovations that might help protect child witnesses).

12. See Bulkley, *supra* note 10, at 7; O'Brien, *supra* note 9, at 148-51.

13. See Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 29-32 (1985); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 811-13 (1985).

14. See Mlyniec & Daly, *See No Evil? Can Insulation of Child Sexual Abuse Victims be Accomplished Without Endangering the Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115 (1985); O'Brien, *supra* note 9; Note, *supra* note 13.

15. U.S. CONST. amend. VI states, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

The confrontation clause was incorporated to the states in *Pointer v. Texas*, 380 U.S. 400 (1965).

16. 156 U.S. 237 (1895). Justice Brown wrote the majority opinion.

17. *Id.* at 242-44.

18. *Id.* at 240. Defendant was initially convicted of murder, and, following an appeal, the case was remanded for a new trial. *Id.* at 238.

19. *Id.* at 240.

20. *Id.* The Court stated: "The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Id.* at 243.

was to prevent the use of *ex parte* affidavits or depositions against a criminal defendant.<sup>21</sup> According to the Court, the presence of witnesses permits the defendant to cross-examine them and allows the jury to observe their demeanor.<sup>22</sup>

The Court specifically noted that the *Mattox* defendant had a chance to see the witnesses at the first trial,<sup>23</sup> which implied that the constitutional guarantee contemplated a face-to-face encounter. The Court, however, maintained that the right to confrontation was not absolute.<sup>24</sup> Rather, it asserted that strict adherence to the language of the provision must sometimes yield to "considerations of public policy and the necessities of the case."<sup>25</sup>

The Supreme Court also considered the defendant's constitutional right to confront witnesses in *California v. Green*.<sup>26</sup> In *Green*, the Court affirmed a conviction in which the trial court admitted into evidence a witness's testimony from a preliminary hearing.<sup>27</sup> This testimony conflicted with the witness's testimony at trial.<sup>28</sup> Relying on *Mattox*, the Supreme Court stated that the literal right to confront the witness at trial lay at the core of the confrontation clause.<sup>29</sup> The Court, however, recognized that certain circumstances might require courts to be flexible when applying this principle.<sup>30</sup> In *Green*, admission of the prior testimony satisfied the defendant's confrontation rights because the witness who testified at the preliminary hearing<sup>31</sup> was available for cross-examination at trial.<sup>32</sup> According to the *Green* Court, confrontation ensures that (1) the witness testified under oath, (2) the defendant cross-examined the witness, and (3) the jury observed the

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21. *Id.* at 242.

22. *Id.* at 242-43.

23. *Id.* at 240.

24. *Id.* at 243. More recent cases supporting the notion that the confrontation clause is not absolute include *Ohio v. Roberts*, 448 U.S. 56, 62-65 (1980), and *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

25. 156 U.S. at 243. The Court asserted that protecting the safety of the public by admitting such testimony warranted an exception to the defendant's right to confront the witness at trial. *Id.*

26. 399 U.S. 149, 155 (1970).

27. *Id.* at 152. The use of the prior testimony was necessary because the witness was uncooperative and evasive at trial. *Id.* at 151.

28. *Id.* at 152.

29. *Id.* at 157-58.

30. *Id.* at 160-62.

31. *Id.* at 159-60.

32. *Id.* at 162. The Court rejects the notion that only cross-examination contemporaneous with the testimony can satisfy the confrontation guarantee. *Id.* at 159.

witness's demeanor while testifying.<sup>33</sup> In rejecting defendant's constitutional challenge, the Court emphasized that these confrontation values were adequately preserved under the circumstances of the case.<sup>34</sup>

While it described and justified the basic confrontation right, *Green* offers trial courts little guidance regarding the specific kind of physical encounter that the confrontation clause guarantees. However, the Eighth Circuit Court of Appeals recently considered the sufficiency of an indirect encounter between witness and defendant. In *United States v. Benfield*,<sup>35</sup> a kidnapping victim testified by videotaped deposition to avoid the trauma of facing the defendant in court.<sup>36</sup> The defendant's lawyer attended the deposition and cross-examined the witness.<sup>37</sup> The defendant watched the deposition on a monitor, and could electronically signal the lawyer for consultation.<sup>38</sup> The witness could not see the defendant, and was probably unaware of his presence in the building.<sup>39</sup> The court held that the arrangement did not adequately protect the defendant's confrontation rights.<sup>40</sup> According to the court,

33. *Id.* at 158. Professor Wigmore offers the following explanation of the confrontation right: "Now confrontation is, in its main aspect, *merely another term for the test of cross-examination*. It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential." 5 J. WIGMORE EVIDENCE § 1365, at 28 (Chadbourn rev. ed. 1974).

Wigmore further explains:

There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the *judge* and the *jury* are enabled to obtain the elusive and incommunicable evidence of a *witness' deportment while testifying*, and a certain subjective moral effect is produced upon the witness . . . . This secondary advantage, however, does not arise from the confrontation of the *opponent* and the witness; it is not the consequence of those two being brought face to face. It is the witness' presence before the *tribunal* that secures this secondary advantage .

. . .

*Id.* § 1395 at 153-54.

34. *Green*, 399 U.S. at 157-58.

35. 593 F.2d 815 (8th Cir. 1979).

36. *Id.* at 817. The kidnapping victim in *Benfield* was an adult. *Id.* However, her psychiatrist testified that because of her abduction-related psychiatric problem, she should not testify unless the court could arrange for a less stressful environment. *Id.*

37. *Id.*

38. *Id.* The defendant was given a buzzer device with which he could halt the proceedings and confer with his lawyer outside the deposition room. *Id.*

39. *Id.*

40. *Id.* at 821. The Court was particularly concerned that excluding the defendant from the deposition room would deny him the opportunity to actively participate in his defense. *Id.* For a more extensive consideration of the use of televised testimony, see *Hochheiser v. Superior Court*, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (Cal. Dist. Ct. App. 1984) (use of two-way,

"[m]ost believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge."<sup>41</sup> The court maintained that the language of the confrontation clause unambiguously required both a face-to-face meeting and the opportunity to cross-examine the witness.<sup>42</sup> The *Benfield* court, however, attempted to limit the impact of its decision.<sup>43</sup> Without setting specific guidelines, the court asserted that innovations of this sort might be acceptable if they more closely resemble a traditional courtroom setting.<sup>44</sup>

The New Jersey Superior Court permitted such an innovation in *State v. Sheppard*.<sup>45</sup> The court allowed a child victim of sexual abuse to testify at trial from a nearby room using one-way video equipment.<sup>46</sup> Both attorneys were in the room with the child.<sup>47</sup> The defendant, judge, and jury watched the testimony on courtroom monitors.<sup>48</sup> The child witness could not see the defendant.<sup>49</sup> The court concluded that the arrangement did not unduly restrict the defendant's confrontation rights,<sup>50</sup> nor did it significantly interfere with the flow of information to the jury.<sup>51</sup> The court contended that the arrangement deprived the defendant of nothing except eye contact, which the confrontation clause excuses.<sup>52</sup> Citing *Mattox*, the *Sheppard* court suggested that considerations of public policy and necessity sometimes outweigh an incidental

closed-circuit television violated defendant's confrontation rights). *But see* *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975) (approved the use of expert testimony via closed-circuit television despite confrontation clause challenge).

41. *Benfield*, 593 F.2d at 821.

42. *Id.* See also *Herbert v. Superior Court of Cal.*, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (Cal. Dist. Ct. App. 1981) (rearrangement of courtroom so that defendant and witness could not see one another violated defendant's confrontation rights).

43. 593 F.2d at 821. The court specifically stated that its decision did not preclude all uses of videotaped or televised testimony. *Id.*

44. *Id.*

45. 197 N.J. Super. 411, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984).

46. *Id.* at 415, 484 A.2d at 1332.

47. *Id.*

48. *Id.*

49. *Id.* at 432, 484 A.2d at 1343.

50. *Id.* at 433, 484 A.2d at 1343.

51. *Id.* at 430, 484 A.2d at 1341. According to the court, videotaped presentations can "present clear, accurate, and evidentially appropriate transmissions of images and sounds to defendant, the judge, the jury, and the public." *Id.* at 431, 484 A.2d at 1342. *But see* Comment, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OR. L. REV. 567 (1976) (discussion of how video techniques can alter the viewer's perception of the witness).

52. 197 N.J. Super. at 431, 484 A.2d at 1343. The court asserts that no case establishes eye contact as a confrontation requirement.

encroachment on the confrontation guarantee.<sup>53</sup> The court concluded that the state's interests in protecting child witnesses and efficiently prosecuting child sexual abuse cases justified the use of video testimony.<sup>54</sup>

In the instant case, the Supreme Court refused to balance a right it considered explicit in the sixth amendment.<sup>55</sup> Instead, the Court examined the literal meaning of the word "confront" to determine the kind of encounter to which the criminal defendant was entitled.<sup>56</sup> The Court explored the Latin origins of the word,<sup>57</sup> Shakespeare's writings,<sup>58</sup> and Justice Harlan's concurring opinion in *Green*<sup>59</sup> to establish the meaning of "confront."<sup>60</sup> According to the Court, the confrontation clause guaranteed a flesh-and-blood meeting between the witness and accused.<sup>61</sup> Consequently, the screen used to block the witness's view of the defendant violated this right to direct confrontation.<sup>62</sup>

The Court justified its literal reading of the clause in a similarly informal fashion. Referring to age-old expressions,<sup>63</sup> human nature,<sup>64</sup> and the remarks of an ex-President,<sup>65</sup> it demonstrated the value of a face-to-face meeting with one's accusers. The Court stated that this confrontation "serve[d] ends related both to appearance and to reality,"<sup>66</sup> suggesting that it promoted honest and reliable testimony as

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53. *Id.* at 426, 484 A.2d at 1339. The *Sheppard* opinion provides an extensive consideration of the need to protect child sexual abuse victims. *Id.* at 431-32, 484 A.2d at 1342.

54. *Id.* at 432-35, 484 A.2d at 1342-44. In addition, the court asserts that the use of video technology often improves the quality and reliability of the child's testimony. *Id.* at 434-35, 484 A.2d at 1343-44.

55. *Coy v. Iowa*, 108 S. Ct. 2798, 2800-03 (1988).

56. *Id.* at 2800-01.

57. *Id.* at 2800. The Court determined that "the word 'confront' ultimately derives from the prefix 'con-' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons' (forehead)." *Id.*

58. *Id.* The Court refers to a line from Shakespeare's *Richard II* in which Richard calls for a face-to-face meeting between an accuser and the accused. *Id.*

59. *Id.* The Court cites to Justice Harlan's concurring opinion in *California v. Green*, 399 U.S. 149, 175 (1970) in which he asserted that a simple reading of the sixth amendment supports the right to a face-to-face meeting between defendant and witness. 108 S. Ct. at 2800-01.

60. *Id.* at 2800.

61. *Id.* at 2800-01. *But cf.* *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (suggesting that the confrontation clause establishes only a "preference" for face-to-face confrontation).

62. 108 S. Ct. at 2802.

63. *Id.* at 2801-02. The Court offers the following: "Look me in the eye and say that." *Id.* at 2801. "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" *Id.* at 2802.

64. *Id.* at 2801.

65. *Id.* The Court refers to remarks made by President Eisenhower concerning the tradition in his hometown that accusations be made face-to-face. *Id.*

66. *Id.* at 2801.

well as the perception of fairness to the defendant.<sup>67</sup> Prior decisions, the Court explained, reflected this common-sense interpretation of the clause.<sup>68</sup> These decisions acknowledged the defendant's literal right to face the witness at trial.<sup>69</sup>

The instant case further established that the Court would not lightly disregard this face-to-face confrontation right.<sup>70</sup> The state argued that this right must yield to the need to protect victims of child sexual abuse; the Court responded by adhering to its literal interpretation of the confrontation clause.<sup>71</sup> Because the right to a face-to-face encounter was explicit in the sixth amendment, it was less susceptible to compromise or exception than were other confrontation guarantees.<sup>72</sup> Courts need not strictly protect such safeguards as the right to cross-examine, which was only implied in the confrontation clause.<sup>73</sup> While the Court contemplated possible exceptions to the face-to-face encounter guarantee, it indicated that they would be rare.<sup>74</sup> Furthermore, the trial court in the instant case made no specific finding that the witnesses needed protection.<sup>75</sup> The Court asserted that a general need to protect witnesses, like that underlying the statute, was insufficient to vitiate the confrontation clause.<sup>76</sup>

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67. *Id.* at 2801-02. The Court also refers to *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (language suggests that confrontation serves symbolic goals related to society's perception of fairness).

68. 108 S. Ct. at 2801. The Court relies on the following cases that contain language suggesting a right to a face-to-face confrontation: *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (asserting that confrontation clause provides both the right to conduct cross-examination and the right to physically face the witness at trial); *California v. Green*, 399 U.S. 149, 157-58 (1970) (asserting that a literal right to a face-to-face meeting is at the core of confrontation clause guarantees); *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (interpreting a provision of the Philippine Bill of Rights as substantially the same as the confrontation clause and including a guarantee of a face-to-face encounter at trial).

69. 108 S. Ct. at 2801.

70. *Id.* at 2803.

71. *Id.* at 2802-03.

72. *Id.*

73. *Id.* In addition to cross-examination, the Court identifies the right to exclude out-of-court statements and the right to face-to-face confrontation during proceedings other than the actual trial, as examples of less protected safeguards that are more susceptible to exception. *Id.*

74. *Id.* at 2803.

75. *Id.*

76. *Id.* The Court relies on the reasoning in *Bourjaily v. United States*, 107 S. Ct. 2775, 2782-83 (1987), that in the absence of an exception "firmly . . . rooted in our jurisprudence," more than a generalized finding of necessity is required. *Id.* *But see Coy*, 108 S. Ct. at 2809 n.6 (Blackmun, J., dissenting) (asserting that general legislative exceptions to confrontation clause guarantees are commonplace). *See generally Goldman, Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C.L. REV. 1 (1987) (criticizing the use of the "firmly rooted" concept).



By explicitly relying on the literal sixth amendment right to face-to-face confrontation,<sup>77</sup> the instant Court avoided the balancing approach of *Mattox*<sup>78</sup> and *Green*.<sup>79</sup> In *Mattox* and *Green*, the Court weighed the accused's confrontation rights against competing interests of policy and need.<sup>80</sup> In those cases, the Court initially identified the underlying purposes of the confrontation clause.<sup>81</sup> It then determined whether the questioned procedure impaired those objectives.<sup>82</sup> If the procedure essentially preserved the confrontation rights, the Court considered whether it served a purpose that justifiably infringed on absolute confrontation values.<sup>83</sup> This approach enabled the Court to maintain the integrity of the confrontation clause,<sup>84</sup> while allowing it some flexibility to decide individual cases.

Had the instant court undertaken a balancing approach, it would have weighed the defendant's narrow confrontation interest — eye contact with the witness — against the state's interests in protecting child sexual abuse victims and effectively prosecuting the offenders. The Iowa trial court, like those in *Benfield* and *Sheppard*, shielded the witness in a way that minimally restricted the defendant's confrontation with the witnesses. The defendant argued that the use of the screen violated his right to be in view of the witnesses while they testified.<sup>85</sup> In all other respects, the defendant fully confronted the

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77. See *supra* notes 55-62 and accompanying text.

78. See *supra* notes 16-25 and accompanying text.

79. See *supra* notes 26-34 and accompanying text.

80. The policy considerations in *Mattox* and *Green* involved the need to admit testimony from witnesses who had testified on the matter but were now unavailable. See *Mattox v. United States*, 156 U.S. 237, 238 (1895) (witnesses no longer alive); *California v. Green*, 399 U.S. 149, 152 (1970) (uncooperative witness). Recently the Court used a similar balancing approach in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). In *Ritchie*, the Court considered whether a defendant charged with child sexual abuse was entitled to examine the child's confidential social services file. *Id.* at 51. The Court weighed the public interest in protecting sensitive information of this type against the burden on the defendant of preparing his defense without the information. *Id.* at 60-61. The Court concluded that the defendant could effectively cross-examine the child without the information in the file, and therefore, his confrontation rights were satisfied. *Id.* at 53-54.

81. See *supra* notes 21-23 & 29-34 and accompanying text.

82. See *supra* notes 20-23 & 31-34 and accompanying text.

83. See *supra* notes 24-25 & 28-30 and accompanying text.

84. For recent discussions of the Court's interpretation of the confrontation clause, see Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523 (1988); Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988); Massaro, *The Dignity Value in Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863 (1988).

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

witnesses.<sup>86</sup> Furthermore, none of the confrontation purposes identified in *Green*<sup>87</sup> were sacrificed by the use of the screen. The children testified under oath, in front of the jury, and were cross-examined by the defendant.<sup>88</sup>

The instant Court, however, ignored how minimally the screen restricted actual confrontation between the defendant and witness. Focusing on the literal meaning of the clause,<sup>89</sup> the Court concluded that the procedure blatantly violated confrontation guarantees.<sup>90</sup> The Court discounted the value of mutual eye contact between witness and defendant as a means to ensure reliable testimony. While the Court intimated that face-to-face confrontation encouraged more conscientious testimony,<sup>91</sup> it failed to evaluate the potential truth-finding value in the jury's observation of the witness's response to seeing the defendant. Instead, the Court referred to literature, anecdote, and human nature,<sup>92</sup> suggesting that fairness to the defendant compels a face-to-face encounter.<sup>93</sup> The Court, however, briefly mentioned this "fairness" value;<sup>94</sup> it relied primarily on its literal reading of the confrontation clause.<sup>95</sup>

Rather than closely examining confrontation values, the instant Court simply interpreted the word "confront" to mean a physical face-to-face encounter.<sup>96</sup> It assigned the flesh and blood encounter guarantee a preferred status among confrontation rights.<sup>97</sup> Other safeguards, such as the hearsay exclusion of out-of-court statements, did not enjoy a protected status.<sup>98</sup> Therefore, they had been excepted by the Court.<sup>99</sup> Yet, admitting out-of-court statements often necessarily denies face-to-face confrontation.<sup>100</sup> Similarly, most hearsay exceptions prevent confrontation.<sup>101</sup> Furthermore, the Court's position offers no guarantee

86. *See id.* at 2799-2800.

87. *See supra* note 33 and accompanying text.

88. 108 S. Ct. at 2799-2800.

89. *See supra* notes 55-61 and accompanying text.

90. 108 S. Ct. at 2802.

91. *See supra* notes 63-67 and accompanying text.

92. *See supra* notes 58 & 63-65 and accompanying text.

93. *See supra* notes 66-67 and accompanying text.

94. *See Massaro, supra* note 84, at 894-97.

95. *See supra* notes 55-62 and accompanying text.

96. 108 S. Ct. at 2800.

97. *See id.* at 2802-03.

98. *See supra* notes 72-74 and accompanying text.

99. *Id.*

100. *See* 108 S. Ct. at 2807 (Blackmun, J., dissenting).

101. *See Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (asserting that if the confrontation clause is given an unqualified scope, virtually all hearsay exceptions would be abrogated); Graham, *supra* note 84, at 539.

that the witness and accused will exchange eye contact. Nothing compels a witness to look at the defendant, even in the absence of a shield.<sup>102</sup> If the guarantee of eye contact is so fundamental to confrontation, perhaps the Court should ensure that it occurs.<sup>103</sup>

The instant opinion ignored the state's interests in protecting child witnesses and facilitating child sexual abuse prosecutions. Often, only the child victim witnesses the incident, which makes the child's testimony crucial to the prosecution's case.<sup>104</sup> The child's testimony is frequently either ineffective or unavailable because the trial process inhibits and intimidates the child witness, especially when the witness encounters the offender in court.<sup>105</sup> The instant court simply acknowledged that such trauma may occur.<sup>106</sup> To insist that a specific protective need be found before the Court will consider an exception to the face-to-face confrontation right<sup>107</sup> suggests that the Court was unwilling to view these dangers as important policy concerns.<sup>108</sup> According to the Court, the risks of witness trauma and prosecutorial inefficiency are the price of constitutional guarantees.<sup>109</sup>

Courts should not trample the rights of the accused in their haste to curb child sexual abuse. However, the instant Court's literal interpretation of the confrontation clause sacrifices a thorough consideration of the countervailing interests. By abandoning the analysis used in prior cases, the instant decision casts doubt over many legal reforms taking place across the country.<sup>110</sup> Most of these reforms provide procedures, such as televised testimony, that compromise face-to-face confrontation to a greater degree than the one-way screen.<sup>111</sup> The

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102. The Court acknowledges that the confrontation clause does not guarantee eye contact. 108 S. Ct. at 2802. However, the Court points out that the trier of fact can observe whether the witness chooses to look at the defendant and, from that observation, draw its own conclusions. *Id.*

103. Justice Blackmun's dissent points out this apparent inconsistency by suggesting that a blind witness could never satisfactorily be confronted at trial. *Id.* at 2808 (Blackmun, J., dissenting).

104. O'Brien, *supra* note 9, at 142; *see also* Note, *supra* note 13, at 806-07.

105. *See* O'Brien, *supra* note 9, at 142-43; Note, *supra* note 13, at 806-07, 807 n.15.

106. 108 S. Ct. at 2802. For a thorough consideration of the problem of trauma in child sex abuse prosecutions, see Marks, *Victimizing the Child Victim: Vermont Rule of Evidence 807 and Trauma in the Courtroom*, 11 VT. L. REV. 631 (1986).

107. 108 S. Ct. at 2803.

108. The Court explains that exceptions to the face-to-face right exist only to protect important public policy concerns. *Id.* Finding no exception in the instant case, the Court appears to reject the need to protect child witnesses as an overriding public policy. *See id.*

109. *Id.* at 2802.

110. *See supra* notes 10-12 and accompanying text.

111. *Id.*

instant case creates an absolute right for the defendant to confront an available, testifying witness in person and without obstruction.<sup>112</sup> Thus, any attempt to shield a child from the defendant at trial will likely fall to a constitutional challenge.

*Jeffrey Meyers*

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112. Even in concurrence, Justice O'Connor recognizes the potentially great impact of the instant case on child-shielding procedures and rejects the idea that the confrontation right is absolute. 108 S. Ct. at 2804 (O'Connor, J., concurring).

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