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COMMENTS

Protecting the Innocent: Confrontation, *Coy v. Iowa*, and Televised Testimony in Child Sexual Abuse Cases

INTRODUCTION

The sexual abuse of children produces a wider range of emotions than most problems facing our society today.¹ In recent years, the American public has become acutely aware of this problem,² and its disturbing proportions.³ Naturally, state legislatures have been called upon to respond to this crisis.⁴ The result is a bewildering array of statutes designed to facilitate the successful prosecution of child sexual abusers.⁵ This Comment focuses on judicial treatment of these statutes.

Initially, this Comment addresses the problems encountered in prosecuting such cases and the legislative response thereto.⁶ Part I also introduces the tension between such legislative efforts and the constitutional rights of the accused.⁷ Next, this Comment examines

¹ See generally Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985); Armstrong & Gillig, *Responding to Child Sexual Abuse and Exploitation: The Kentucky Approach*, 16 N. KY. L. REV. 17 (1988).

² See Note, *supra* note 1, at 806 ("The McMartin Preschool scandal and others that followed have quickened public sensitivity to the issue . . .") (citations omitted).

³ See J. SELKIN & P. SCHOUTEN, *THE CHILD SEXUAL ABUSE CASE IN THE COURTROOM: A SOURCE BOOK 1* (1987) ("The number of reported cases of child sexual abuse has increased seventeen-fold over the past decade."); see also D. WHITCOMB, E. SHAPIRO, & L. STELLWAGEN, *WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS 1-4* (1985) (citing several studies conducted on the incidence of child sexual abuse).

⁴ See D. WHITCOMB, E. SHAPIRO, & L. STELLWAGEN, *supra* note 3, at iii. Perhaps the earliest request for legislative, as well as judicial intervention was Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969).

⁵ See *infra* notes 19-27 and accompanying text.

⁶ See *infra* notes 13-30 and accompanying text.

⁷ See *infra* notes 28-30 and accompanying text.

a recent United States Supreme Court decision, *Coy v. Iowa*,⁸ which deals with a state statute similar to those at issue here.⁹ Part III provides an analysis of several state court opinions that attempt to reconcile *Coy* with their own statutes.¹⁰ This is the primary focus of the Comment, revealing the copious problems states face in this area. Finally, this Comment addresses the constitutionality of such statutes,¹¹ and offers some useful and constitutionally viable alternatives designed to alleviate many of the problems of prosecuting child sexual abuse cases.¹²

I. PROBLEMS, SOLUTIONS, AND MORE PROBLEMS

Child sexual abuse cases are undoubtedly among the most difficult to prosecute successfully.¹³ In addition to other problems,¹⁴ the prosecutor is frequently forced to rely heavily on the testimony of the child, as there are rarely any other witnesses to the abuse.¹⁵ Thus, often the entire case rests on the testimony of the alleged victim.¹⁶ Many researchers and commentators have suggested that the trauma associated with testifying in open court in the presence of the defendant, judge, and jury is nearly as great as that associated with the abuse itself.¹⁷ Indeed, many cases never go to trial for fear of such trauma.¹⁸

⁸ 487 U.S. 1012 (1988). See *infra* notes 32-70 and accompanying text.

⁹ See *infra* notes 21-22 for an extensive list of the statutes.

¹⁰ See *infra* notes 71-114 and accompanying text.

¹¹ See *infra* notes 110-14 and accompanying text.

¹² See *infra* notes 115-24 and accompanying text.

¹³ See Whitcomb, *Child Victims in Court: The Limits of Innovation*, 70 JUDICATURE 90, 90-91 (1986).

¹⁴ Other problems include the child's competency to testify, the child's memory, possible susceptibility to suggestion, and the sensitive nature of the testimony to be provided. See generally Melton, *Sexually Abused Children and the Legal System: Some Policy Recommendations*, 13 AM. J. FAM. THERAPY 61 (1985).

¹⁵ See Forman, *To Keep the Balance True: The Case of Coy v. Iowa*, 40 HASTINGS L.J. 437, 437 (1989).

¹⁶ See Note, *Victims of Child Sexual Abuse in the Courtroom: New Utah Rules and Their Constitutional Implications*, 15 J. CONTEMP. L. 81, 82 (1989).

¹⁷ See J. MYERS & N. PERRY, *CHILD WITNESS LAW AND PRACTICE* 383-87 (1987) (citing what has been referred to as the "second victimization" of the child); see also D. WHITCOMB, E. SHAPIRO, & L. STELLWAGEN, *supra* note 3, at 17-20.

¹⁸ See Comment, *Sixth Amendment—Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 783 (1988) ("[A]n attorney, who had reviewed between seventy-five and eighty cases of child abuse . . . testified that nearly ninety percent of the child abuse cases were dismissed because children could not cope with the prospect of facing the defendant, relatives and strangers in a courtroom." (citing *State v. Sheppard*, 484 A.2d 1330, 1333 (N.J. Super. Ct. Law Div. 1984) (footnotes omitted)).

Recognizing the legal system's predicament, state legislatures began passing legislation designed to facilitate successful prosecution of these cases.¹⁹ A second, and paramount, goal of this legislation was to lessen the trauma of in-court testimony on the unfortunate victims of such abuse.²⁰ Children, it was assumed, were ill-prepared for the psychological pressures often encountered on the witness stand.

The resulting statutes allow the child to testify via closed-circuit television²¹ or by means of a videotaped deposition.²² Typically, the child is taken to a room outside the courtroom, together with the judge, attorneys, and possibly the defendant.²³ The defendant,

¹⁹ Apparently, the first such statute of this kind was drafted by the Texas state legislature. See TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon 1989). Portions of the original statute were found unconstitutional in *Long v. State*, 742 S.W.2d 302, 323 (Tex. Crim. App. 1987). The statute was then amended. See generally 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 (1988) (discussing the Texas child shield law and its amendments following a Texas court decision declaring the former law unconstitutional).

²⁰ "In enacting the challenged statute, the Iowa legislature stated its purpose: to 'assure the fair and compassionate treatment of victims' and to 'protect them from intimidation and further injury, [and to] assist them in overcoming emotional and economic hardships resulting from criminal acts . . .'" Brief for Appellee, *Coy v. Iowa*, 487 U.S. 1012 (1988), at 13 (citing 1986 Iowa Acts ch. 1178).

²¹ See ALA. CODE § 15-25-3 (Supp. 1988); ALASKA STAT. § 12.45.046 (Supp. 1989); ARIZ. REV. STAT. ANN. § 13-4253 (Supp. 1988); CAL. PENAL CODE § 1347 (West Supp. 1989); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1989); FLA. STAT. ANN. § 92.54 (West Supp. 1989); GA. CODE ANN. § 17-8-55 (Supp. 1989); HAW. R. EVID. 616 (1985); ILL. REV. STAT. ch. 38, para. 106A-2 (Smith Hurd Supp. 1988); IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1989); IOWA CODE ANN. § 910A.14 (West Supp. 1989); KAN. STAT. ANN. § 22-3434 (1986); KY. REV. STAT. ANN. § 421.350 (Bobbs-Merrill Supp. 1988); LA. REV. STAT. ANN. § 15:283 (West Supp. 1990); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1989); MASS. ANN. LAWS ch. 278, § 16D (Law Co-op. Supp. 1989); MINN. STAT. ANN. § 595.02(4) (1988); MISS. CODE ANN. § 13-1-405 (Supp. 1989); N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1989); N.Y. CRIM. PROC. LAW § 65.00 - .30 (McKinney Supp. 1990); OHIO REV. CODE ANN. § 2907.41 (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 753 (West Supp. 1990); PA. CONS. STAT. ANN. § 5985 (Purdon Supp. 1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); TENN. CODE ANN. § 24-7-116 (Supp. 1989); TEX. CODE CRIM. PROC. ANN. § 38.071 (Vernon Supp. 1990); UTAH CODE ANN. § 77-35-15.5 (Supp. 1989); VT. R. EVID. 807 (1989); VA. CODE ANN. § 18.2-67.9 (1988).

²² See ARK. STAT. ANN. § 16-44-203 (1987); COLO. REV. STAT. § 18-3-413 (1986); DEL. CODE ANN. tit. 11, § 3511 (1985); MICH. COMP. LAWS ANN. § 600.2163a (West Supp. 1988); MO. ANN. STAT. §§ 491.680, 492.304 (Vernon Supp. 1989); MONT. CODE ANN. §§ 46-15-401 to 403 (1989); NEB. REV. STAT. § 29-1926 (1989); NEV. REV. STAT. ANN. § 174.227 (Michie 1989); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1988); N.M. STAT. ANN. § 30-9-17 (1984); S.C. CODE ANN. § 16-3-1530(G) (Law Co-op. 1984); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1985); WIS. STAT. ANN. § 967.04 (West Supp. 1989); WYO. STAT. § 7-11-408 (1987).

²³ See, e.g., KY. REV. STAT. ANN. § 421.350(3) (Bobbs-Merrill Supp. 1988) ("[T]he testimony of the child [shall] be taken in a room other than the courtroom . . . Only the

if allowed to be present, is blocked from the view of the child while the testimony is given.²⁴ If the defendant is not allowed to be present,²⁵ he or she is kept in another room where the child's testimony can be viewed on a television screen.²⁶ Depending on the procedure used, the testimony is either preserved on tape for later introduction at trial or simultaneously broadcast to the jury.²⁷

These statutes, designed to ease the pain of testifying in the presence of the accused, potentially conflict with the defendant's constitutional right to confrontation.²⁸ The conflict implicates the explicit, literal right to confront witnesses at the time of trial, which the Supreme Court has noted "forms the core of the values furthered by the Confrontation Clause."²⁹ As the purpose behind confrontation is the advancement of the "truthfinding function"³⁰ of a criminal trial, this conflict is of paramount importance to the defendant. Recently, the United States Supreme Court addressed this conflict.³¹ The result, far from satisfactory, has only muddied the waters.

II. THE COY DECISION

In August 1985, John Avery Coy was arrested and charged with sexually assaulting two thirteen-year-old girls.³² At trial, the

attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony.").

²⁴ See, e.g., ARIZ. REV. STAT. ANN. § 13-4253(A) (Supp. 1988) ("The court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant.").

²⁵ For the present analysis, whether or not the defendant is present at this stage is largely inconsequential. However, see *infra* notes 106-09 for a discussion of what constitutes "presence."

²⁶ See, e.g., VA. CODE ANN. § 18.2-67.9(D) (1988) ("The child's testimony shall be transmitted by closed-circuit television into the courtroom for the defendant, jury, judge and public to view.").

²⁷ Compare ALA. CODE § 15-25-3 (Supp. 1988) (closed-circuit testimony) with ARK. STAT. ANN. § 16-44-203 (1987) (videotaped deposition later admitted in evidence at trial).

²⁸ U.S. CONST. amend. VI states in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." In *Pointer v. Texas*, 380 U.S. 400, 403 (1965), the Supreme Court held that the sixth amendment is binding upon the states under the fourteenth amendment.

²⁹ *California v. Green*, 90 S. Ct. 1930, 1934-35 (1970). A complete sixth amendment analysis of the issue is beyond the scope of this Comment. However, such an analysis is undertaken in 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 (1987-88).

³⁰ *Lee v. Illinois*, 106 S. Ct. 2056, 2062 (1986).

³¹ *Coy*, 487 U.S. 1012.

³² *Id.* at 1014.

state made a motion, pursuant to a recently enacted statute,³³ to allow the girls to testify behind a screen or using closed-circuit television.³⁴ The trial court authorized use of the statutory procedure that allowed a large screen to be placed between the defendant and the girls during their testimony.³⁵ The girls could not see Coy and he could see them only "dimly."³⁶ After unsuccessfully attacking the constitutionality of the procedure in the state courts,³⁷ Coy sought review in the United States Supreme Court.

By a 6-2 decision,³⁸ the Court reversed Coy's conviction, finding a clear violation of his confrontation right.³⁹ Justice Scalia, writing for the majority, traced the history of the "literal" right to confront witnesses⁴⁰ and concluded that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"⁴¹

Justice Scalia reiterated that the rights conferred by the confrontation clause are not absolute,⁴² but noted that exceptions had been made previously only to those rights *implicit* in the clause.⁴³ This, however, is not the same as "identify[ing] exceptions, in light of other important interests, to the irreducible literal meaning of the clause."⁴⁴ The Court refused to consider whether any such exceptions exist.⁴⁵ Since the Iowa statute imposed a generalized

³³ IOWA CODE ANN. § 910A.14 (West Supp. 1989) (enacted in 1985).

³⁴ *Coy*, 487 U.S. at 1014.

³⁵ *Id.*

³⁶ *Id.*

³⁷ The Supreme Court of Iowa affirmed Coy's conviction. *State v. Coy*, 397 N.W.2d 730, 735 (Iowa 1986).

³⁸ Justice Scalia delivered the opinion of the Court, in which Justices Brennan, White, Marshall, Stevens, and O'Connor joined. Justice O'Connor filed a concurring opinion in which Justice White joined. Justice Blackmun dissented and was joined by Chief Justice Rehnquist. Justice Kennedy, although appointed by this time, did not participate in the decision.

³⁹ *Coy*, 487 U.S. at 1020 ("It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter.").

⁴⁰ *Id.* at 1015-20. Justice Scalia quoted from the Bible, the writings of Shakespeare, and the speeches of President Eisenhower.

⁴¹ *Id.* at 1017 (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

⁴² *Id.* at 1020.

⁴³ *Id.* at 1020-21 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (cross-examination); *Ohio v. Roberts*, 448 U.S. 56, 63-65 (1980) (excluding out-of-court statements); and *Kentucky v. Stincer*, 107 S. Ct. 2658 (1987) (asserting confrontation right at some point in proceedings other than trial).

⁴⁴ *Id.* at 1021.

⁴⁵ *Id.*

presumption of trauma on all child witnesses in sex abuse cases, and was only recently enacted,⁴⁶ the Court could not sustain it as an exception "firmly . . . rooted in our jurisprudence."⁴⁷ The Court concluded by remanding the case to the Iowa Supreme Court to determine if the error was harmless beyond a reasonable doubt.⁴⁸

Justice O'Connor, concurring in the decision,⁴⁹ clearly defined her position on the constitutionality of statutes calling for televised testimony.⁵⁰ She noted that many such statutes raise no confrontation claim, since the testimony is taken in the presence of the accused.⁵¹ According to Justice O'Connor, even the literal right to face-to-face confrontation is not absolute⁵² and may give way to an "important public policy"⁵³ if a court makes a "case-specific finding of necessity . . ."⁵⁴ The protection of child witnesses is, to her, "just such a policy."⁵⁵ Thus, if there is an individualized finding of potential trauma to a child witness in a prosecution for sexual abuse, the "strictures of the confrontation clause may give way . . ."⁵⁶ She concluded with a prediction that in future cases "[t]he primary focus . . . likely will be on the necessity prong," that is, whether the procedure used is necessary to further an important state interest.⁵⁷ This suggestion has become the well-worn peg upon which state courts have hung their hats.⁵⁸

Justice Blackmun, dissenting,⁵⁹ found no sixth amendment violation,⁶⁰ and rejected the majority's interpretation of the "con-

⁴⁶ See IOWA CODE ANN. § 910A.14 (1989) (enacted in 1985).

⁴⁷ *Coy*, 487 U.S. at 1021 (quoting *Bourjaily v. United States*, 107 S. Ct. 2775, 2783 (1987) (citing *Dutton v. Evans*, 91 S. Ct. 210 (1970))). Even here, though, Justice Scalia noted that this standard applies only to exceptions to the implicit guarantees of the clause.

⁴⁸ *Id.*

⁴⁹ Justice O'Connor was joined by Justice White.

⁵⁰ *Coy*, 487 U.S. at 1022-25 (O'Connor, J., concurring).

⁵¹ *Id.* at 1023 (citing ALA. CODE § 15-25-3 (Supp. 1988); GA. CODE ANN. § 17-8-55 (Supp. 1989); N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (McKinney Supp. 1990); CAL. PENAL CODE ANN. § 1347 (West Supp. 1989)).

⁵² *Id.* at 1022.

⁵³ *Id.* at 1025.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See, e.g., *People v. Thomas*, 770 P.2d 1324, 1327-28 (Colo. App. 1988); *Craig v. State*, 560 A.2d 1120, 1124-29 (Md. 1989), *cert. granted*, ____ U.S. ____, 110 S. Ct. 834 (1990); *State v. Davidson*, 764 S.W.2d 731, 733-34 (Mo. App. 1989). The *Craig* case squarely presents to the Court the issue addressed in this Comment.

⁵⁹ Justice Blackmun was joined by Chief Justice Rehnquist.

⁶⁰ *Coy*, 108 S. Ct. at 1034 (Blackmun, J., dissenting).

stellation of rights provided by the confrontation clause."⁶¹ He concluded, quite simply, that "the ability of a witness to see the defendant while the witness is testifying does not constitute an essential part of the protections afforded by the Confrontation Clause."⁶² Adhering strictly to the view that the clause embodies only a "preference for face-to-face confrontation,"⁶³ the dissent posited that the confrontation clause "difficulties" presented by this case were "no more severe than others this Court has examined."⁶⁴ The dissent also agreed with Justice O'Connor's assertion that the important public policy of protecting child witnesses outweighs the "narrow" right asserted by the defendant,⁶⁵ but parted company with her on the adequacy of a generalized presumption of trauma.⁶⁶ According to the dissenters, such presumptions are "commonplace" and no stricter requirements should be placed on the states in these cases.⁶⁷

Finally, Justice Blackmun addressed Coy's due process claim, concluding that the screen was not inherently prejudicial.⁶⁸ Despite the fact the courtroom lights were dimmed and a panel of bright lights were focused on the screen, Justice Blackmun nonetheless concluded "[i]t [was] unlikely that the use of the screen had a subconscious effect on the jury's attitude toward appellant."⁶⁹ Additionally, the dissent believed it important that the trial court gave the jury a "helpful" instruction, which insured that no "improper inference" would be drawn from the use of the screen.⁷⁰

III. THE AFTERMATH OF COY

Relying on *Coy v. Iowa*, several state courts have upheld the constitutionality of their child witness statutes.⁷¹ Others, also rely-

⁶¹ *Id.* at 1028.

⁶² *Id.* at 1030.

⁶³ *Id.* at 1031.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1032.

⁶⁶ *Id.* at 1033.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1034. The majority declined to address this issue. *Id.* at 1021.

⁶⁹ *Id.* at 1035 (Blackmun, J., dissenting).

⁷⁰ *Id.*

⁷¹ See, e.g., *State v. Bonello*, 554 A.2d 277 (Conn. 1989); *Glendening v. State*, 536 So. 2d 212, 214 (Fla. 1988), *cert. denied*, ____ U.S. ____, 109 S. Ct. 3219 (1989); *State v. Hoversten*, 437 N.W.2d 240, 241 (Iowa 1989), *cert. denied*, ____ U.S. ____, 110 S. Ct. 212 (1989).

ing on *Coy*, have declared their statutes unconstitutional.⁷² This is not particularly surprising given *Coy*'s unique facts⁷³ and its divergent rationales.⁷⁴ Though state court treatment of *Coy* is not surprising, it is quite disturbing.

The story of Robert James Tafoya is, unfortunately, illustrative.⁷⁵ Tafoya was convicted of several sexual offenses perpetrated against six young girls and one adult woman.⁷⁶ At trial, the State invoked a statute⁷⁷ and court rules⁷⁸ that allowed the victims to testify via videotape.⁷⁹ The statute required that the deposition be taken "in the presence of . . . the defendant."⁸⁰ The trial court, apparently interpreting this phrase to require only that the defendant see the child, placed the defendant in a "control booth" so that the victims could not see him.⁸¹ He could see the witnesses and was able to communicate with his attorney.⁸² Prior to *Coy*, the Court of Appeals of New Mexico affirmed the conviction, finding no violation of the procedure mandated by the statute⁸³ and no confrontation clause violation.⁸⁴ Shortly thereafter, New Mexico's highest court denied *certiorari*.⁸⁵

Tafoya then sought review in the United States Supreme Court.⁸⁶ The Court granted the writ of *certiorari*, vacating and remanding the case for further consideration in light of *Coy*.⁸⁷ On remand, the state court again affirmed Tafoya's conviction.⁸⁸ The court

⁷² See, e.g., *State v. Murphy*, 542 So. 2d 1373, 1376 (La. 1989); cf. *Commonwealth v. Bergstrom*, 524 N.E.2d 366 (Mass. 1988) (decided while *Coy* was pending, holding state statute unconstitutional as a violation of the state confrontation clause; court's reasoning strikingly similar to that employed in *Coy*).

⁷³ The Iowa statute at issue in *Coy* was the only one in existence authorizing that particular screening method. *Coy v. Iowa*, 487 U.S. 1012, 1023 (1988) (O'Connor, J., concurring).

⁷⁴ See *supra* notes 32-70 and accompanying text.

⁷⁵ See *State v. Tafoya*, 729 P.2d 1371 (N.M. Ct. App. 1986) [hereinafter *Tafoya I*].

⁷⁶ *Id.* at 1372-73.

⁷⁷ N.M. STAT. ANN. § 30-9-17 (1984).

⁷⁸ N.M. DIST. CT. R. 5-504; N.M. CRIM. P.R. 29.1.

⁷⁹ *Tafoya I*, 729 P.2d at 1373.

⁸⁰ N.M. STAT. ANN. § 30-9-17(A) (1984).

⁸¹ *Tafoya I*, 729 P.2d at 1373.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1375.

⁸⁵ *Tafoya v. State*, 728 P.2d 845 (N.M. 1986).

⁸⁶ *Tafoya v. New Mexico*, ____ U.S. ____, 108 S. Ct. 2890 (1988).

⁸⁷ *Id.*

⁸⁸ *State v. Tafoya*, 765 P.2d 1183, 1187 (N.M. Ct. App. 1988), *cert. denied*, ____ U.S. ____, 109 S. Ct. 1572 (1989) [hereinafter *Tafoya II*].

reasoned that since there was ample evidence establishing the trauma the children would face if required to testify in open court and in the physical presence of the defendant, the case was easily distinguishable from *Coy*.⁸⁹ This same rationale was offered by the court in its first opinion affirming the conviction.⁹⁰ The court, while paying lip service to Justice Scalia's opinion, was apparently comfortable relying heavily on Justice O'Connor's concurring opinion in *Coy*.⁹¹

The *Tafoya* case is illustrative of the standard now followed in many states regarding the constitutionality of child witness statutes in the wake of *Coy*.⁹² Armed with a scalpel and the hands of a skilled surgeon, state courts today are carving out their own interpretations of *Coy*. Gleaning support from O'Connor's concurring opinion, several states have "camouflaged by case law and nibbled by necessity"⁹³ one of the most fundamental and essential rights guaranteed to those accused of a crime.

A. *Analysis of State Court Opinions*

The state court opinions upholding the constitutionality of child witness statutes consistently focus on the necessity issue, i.e., the demonstration of some sort of trauma to the child if forced to testify in front of the defendant.⁹⁴ However, inconsistencies run rampant on the issues of the degree of potential trauma necessary⁹⁵

⁸⁹ *Id.* at 1185-86.

⁹⁰ *Tafoya I*, 729 P.2d at 1374-75.

⁹¹ *Tafoya II*, 765 P.2d at 1186 ("Although the majority opinion in *Coy* does not expressly state that a strong showing of necessity could, in another case, overcome a defendant's confrontation rights, 'nothing in the Court's opinion conflicts with this approach.' " (quoting *Coy*, 108 S. Ct. at 2805 (O'Connor, J., concurring))).

⁹² *See, e.g.*, *State v. Jarzbek*, 554 A.2d 1094 (Conn. 1989); *In re J.D.S.*, 436 N.W.2d 342 (Iowa 1989); *State v. Crandall*, 555 A.2d 35 (N.J. Super. Ct. App. Div. 1989).

⁹³ *United States v. Benfield*, 593 F.2d 815, 818 (8th Cir. 1979).

⁹⁴ *See, e.g.*, *State v. Eaton*, 769 P.2d 1157 (Kan. 1989). The defendant's conviction was reversed because the trial court erroneously held that the Kansas statute did not require a finding that the child witness would be "so traumatize[d] . . . as to prevent the child from reasonably communicating or would render the child unavailable to testify." *Id.* at 1167-68. The court upheld the constitutionality of the statute by implying a need requirement for future cases. *Id.* at 1164.

⁹⁵ *Compare* *People v. Rivera*, 535 N.Y.S.2d 909 (N.Y. Sup. Ct. 1988) (sufficient for court to make findings of necessity by its own conclusions and observations) *with* *State v. Eastham*, 530 N.E.2d 409 (Ohio 1988) (*per curiam*) (trial court findings were not sufficiently particularized to support a finding of necessity).

and the method of proof required.⁹⁶ One state focuses not on the injury the child may suffer, but on the reliability of the child's testimony if forced to face the accused.⁹⁷ Inconsistencies aside, these approaches all share the same grave problems, stemming in large part from the unwarranted assumptions underlying their rationales.

First, these decisions are uniformly based on the assumption that child witnesses, especially in cases involving sexual abuse, are inherently different from adult witnesses.⁹⁸ Though many commentators agree,⁹⁹ scientific evidence on this point is inconclusive.¹⁰⁰ Indeed, some researchers conclude there is little difference between the testimonial capacities of children and those of adults.¹⁰¹

Second, research on the potential trauma suffered by a child victim as a result of testifying against the accused is equally inconclusive.¹⁰² Some studies have shown that, while certainly not true in all cases, physically confronting the accused in court can be therapeutic for the child.¹⁰³ Clearly, any child sexual abuse victim called upon to testify will be somewhat traumatized. The same can be said of the adult rape victim, the murder witness, or any number of other witnesses. While perhaps unfortunate, this is an established component of the truth-finding process of a criminal trial.

⁹⁶ Compare *State v. Chisholm*, 755 P.2d 547 (Kan. 1988), *vacated*, ___ U.S. ___, 109 S. Ct. 486 (1988) (no expert testimony offered to prove necessity of invoking statute) with *State v. Crandall*, 555 A.2d 35, 39-40 (N.J. 1989) (in the absence of reasons to the contrary a child witness should be evaluated by a psychiatrist to determine potential trauma if the defendant so requests).

⁹⁷ *Bonello*, 554 A.2d at 280; see also *Eaton*, 769 P.2d at 1167-68 (focusing on child witness' ability to communicate).

⁹⁸ See, e.g., *State v. Sheppard*, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984):

An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of a black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse.

Id. at 1332. *But cf. Bergstrom*, 524 N.E.2d at 374 ("For constitutional purposes, no principled distinction can be drawn between a child witness and any other class whom the Legislature might in the future deem in need of special treatment.") (footnote omitted).

⁹⁹ See D. WHITCOMB, E. SHAPIRO, & L. STELLWAGEN, *supra* note 3, at 13-20.

¹⁰⁰ See Melton, *supra* note 14, at 62, 66.

¹⁰¹ *Id.* at 62 (citing studies).

¹⁰² *Id.* at 66; see also *Bergstrom*, 524 N.E.2d at 369 n.4 (citing Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 87 (1985)).

¹⁰³ See Melton, *supra* note 14, at 65 (citing studies); see also Bulkey, *Introduction, Background and Overview of Child Sexual Abuse*, 40 U. MIAMI L. REV. 5, 10 (1985).

Third, and perhaps most disturbing, is the assumption of truth accorded the child's testimony.¹⁰⁴ The belief that a child will not be able to testify in front of the accused because of fear, trauma, or unreliability assumes that the child's version of the events is true. Specifically, judges and prosecutors now accept as true a child's allegation of sexual abuse, since (so the assumption goes) any change in the testimony would make it untrue. This reasoning is not only illogical, it is unconstitutional. The jury, not the judge, is to assess credibility and accept or reject witnesses' testimony. The more logical approach, and the one that is constitutionally mandated, is to assume nothing concerning the child witness' testimony. The truthfulness of the victim's testimony should be evaluated by the same processes used to examine other testimony, which includes subjecting the witness to confrontation with the accused. Confrontation, after all, is designed to ensure, not defer, truthful testimony.¹⁰⁵

Yet another problem with the use of these statutes is their application in individual cases. Again, relying on the concurring opinion in *Coy*,¹⁰⁶ some courts have upheld their statutes on the ground that the defendant is present during the taking of the child's testimony.¹⁰⁷ This approach ignores one simple fact: if the defendant is present, the statute serves no purpose whatsoever. Perhaps this explains the strained interpretation of "presence" offered by cases like *Tafoya*.¹⁰⁸ Such judicial gloss serves only to aggravate the problem.¹⁰⁹

In the final analysis, implementation of these procedures denies the jury information critical to its decision. If the child's testimony

¹⁰⁴ This assumption is particularly disturbing where, as here, guilt may be proven solely by the testimony of the alleged victim. See *supra* notes 13-18 and accompanying text.

¹⁰⁵ See *supra* note 30 and accompanying text.

¹⁰⁶ *Coy*, 487 U.S. at 1023 (O'Connor, J., concurring) ("Initially, many such procedures may raise no substantial Confrontation Clause problems since they involve testimony in the presence of the defendant.").

¹⁰⁷ See, e.g., *Rivera*, 535 N.Y.S.2d at 912 (Court upholds statute "because it permits the witness to see the defendant and vice versa, albeit, through a closed circuit television."); cf. *People v. Tuck*, 537 N.Y.S.2d 355, 356 (N.Y. App. Div. 1989) (although New York's statute was not involved, court held that child witness could testify from a table located near the jury as long as the defendant was present).

¹⁰⁸ See *supra* notes 75-91 and accompanying text.

¹⁰⁹ If "presence" does not require the child to see (or at least be able to see) the defendant, it is obviously logical to conclude that the sixth amendment has not been violated, since the defendant was "present." This analysis misinterprets the Constitution because it reduces confrontation to a meaningless procedure, which is satisfied if the defendant is isolated behind a screen or in a "control booth."

is preserved on videotape and presented as evidence at trial, the jury is denied the opportunity to assess the demeanor of the child in the physical presence of the accused. Similarly, they are unable to view the accused's response to the testimony at the time it is given.¹¹⁰ Even when simultaneous closed-circuit testimony is broadcast to the jury from another room, the advantages of physically assessing demeanor are reduced to a "face—to television screen—to face" encounter.¹¹¹

Although the child witness statutes are laudable in purpose, they are an unconstitutional infringement on the defendant's right to confrontation. The defendant, not the witness, is guaranteed this protection. Though the states have legitimate interests in effective law enforcement and in the protection of children victimized by sexual abuse,¹¹² such interests cannot justify a violation of the defendant's constitutional rights. After all, "[i]t is a truism that constitutional protections have costs."¹¹³ Physical confrontation comes at such a cost because "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 coached by a malevolent adult."¹¹⁴

IV. ALTERNATIVE APPROACHES

Despite concerns to the contrary,¹¹⁵ declaring child witness statutes unconstitutional would not unduly inhibit legislative innovations in the area of child sexual abuse cases. Several other alternatives are available to ameliorate any trauma suffered by the child while preserving the rights of the accused.

First, sex abuse cases can be given priority on court dockets to reduce the amount of time the child spends in the judicial system.¹¹⁶ This benefits not only the child, but all other parties as well, since the child presumably will have a clearer memory of the incident. Second, many commentators have advocated a joint investigative

¹¹⁰ See *supra* notes 21-27 and accompanying text.

¹¹¹ *Commonwealth v. Willis*, 716 S.W.2d 224, 234 (Ky. 1986) (Stephens, C.J., dissenting).

¹¹² *Coy*, 487 U.S. at 1025 (O'Connor, J., concurring).

¹¹³ *Id.* at 2802.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2806 (Blackmun, J., dissenting).

¹¹⁶ See D. WHITCOMB, E. SHAPIRO, & L. STELLWAGEN, *supra* note 3, at 105-06 (making recommendations and citing statutes).

effort in following up reports of sexual abuse.¹¹⁷ This would decrease the amount of time and trauma associated with repeatedly conveying the details of the abuse to all the individuals involved in the pre-trial investigation.¹¹⁸

Once a case proceeds to trial, other options are available to accommodate the needs of the child witness. For example, the appointment of a "court guardian" to assist in and explain the proceedings to the child can be quite beneficial.¹¹⁹ Not only would this put the child at ease, but it also would impress upon him or her the seriousness of the proceeding, thus strengthening the truth-finding function of the trial. If necessary, court-supervised counselling should be made available to the child.¹²⁰ This should not be limited to remedial counselling, but should include preventive counselling to monitor any potential problems the child may experience. Finally, the court atmosphere should be as informal and comfortable as possible. This will minimize the natural intimidation experienced by most child witnesses.¹²¹ For example, minor changes in the physical layout of the courtroom may put the child more at ease.¹²²

One final note is in order. Despite replete commentary and case law in this area, there is a disturbing paucity of comment on the most important part of the problem—the prevention of child sexual abuse. This crime is one that feeds upon itself, as more than eighty-percent of child sexual abusers were themselves victims of abuse as children.¹²³ Education, information, and financial resources must be made available to combat the further spread of child sexual abuse. Thus, in order to treat the disease, and not the symptoms, legislatures should first enact legislation aimed at prevention.¹²⁴ With this in mind, the twin goals of protecting the child victim and insuring the integrity of the criminal justice system can be achieved.

¹¹⁷ See *id.* at 99-104.

¹¹⁸ See *id.*

¹¹⁹ See *id.* at 89-97.

¹²⁰ See *Bergstrom*, 524 N.E.2d at 378.

¹²¹ *Id.*

¹²² See, e.g., *Tuck*, 537 N.Y.S.2d at 356 (child inaudible from witness stand, so court allowed chair to be moved in front of jury with back to defendant). Radical changes in the courtroom are neither necessary nor proper. Cf. Libai, *supra* note 4, at 1016-18.

¹²³ Armstrong & Gillig, *supra* note 1, at 20 (citing KENTUCKY CHILD SEXUAL ABUSE AND EXPLOITATION PREVENTION BOARD, ANNUAL REPORT 1 (1986)).

¹²⁴ See *id.* at 20-25 for Kentucky's response in the area of prevention.

CONCLUSION

Statutes aimed at easing the burden of testifying on the victims of child sexual abuse miss the mark. Sacrificing the rights of the accused for the comfort of the victim is an unprecedented step in the wrong direction. Though the ends are legitimate, the means chosen to those ends are fatally flawed. Allowing child victims to testify via videotaped deposition or by means of closed-circuit television unconstitutionally infringes upon the defendant's right to confrontation.

Protecting victims of child sexual abuse is a weighty interest worth pursuing. Protecting the defendant, however, is constitutionally mandated. Both of these obligations can be fulfilled by the state without harm to one another. Once this is realized, the states can and should fashion appropriate legislation designed to achieve those ends. Only then will the means survive.

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