

THE USE OF CLOSED-CIRCUIT TELEVISION TESTIMONY IN CHILD SEXUAL ABUSE CASES: A TWENTIETH CENTURY SOLUTION TO A TWENTIETH CENTURY PROBLEM

In an effort to protect the sexually abused child-witness from the further trauma of live testimony, the California Legislature recently enacted Penal Code section 1347. This section allows the use of closed-circuit television to transmit the child witness' testimony to the courtroom from another location. This and similar statutes have been challenged on several constitutional grounds, most notably as being a violation of the Confrontation Clause of the sixth amendment. Questions have also been raised on whether this procedure violates a defendant's due process rights. This Comment examines these constitutional issues and concludes that Penal Code section 1347 is consistent with the constitutional protections afforded by the Confrontation and Due Process Clauses.

INTRODUCTION

The incidence of child sexual abuse has been reported with alarming frequency in recent years.¹ Though predominantly nonviolent in nature,² these crimes often result in serious psychological and emo-

1. See, e.g., *Studies Find Sexual Abuse of Children is Widespread*, N.Y. Times, May 13, 1982, at C1, col. 1, C10, col. 2 (an American Humane Society study showed a 200% increase in the reporting of sexual abuse from 1976 to 1980); Girdner, *Out of the Mouths of Babes*, 5 CAL. LAW., June 1985, at 57, 58 (reports by California's central child abuse registry show the annual number of reported child abuse cases has risen ninefold, from 5000 to 45,000 in the past decade); *A Hidden Epidemic*, NEWSWEEK, May 14, 1984, at 33 ("[S]omewhere between 100,000 to 500,000 American children will be molested this year.").

2. Schultz, *Diagnosis and Treatment - Introduction*, in THE SEXUAL VICTIMOLOGY OF YOUTH 39, 40 (L. Schultz ed. 1980) (no more than 5% to 10% of sexual abuse involves physical injury); see also Flammang, *Interviewing Child Victims of Sex Offenders*, in THE SEXUAL VICTIMOLOGY OF YOUTH 175, 177 (L. Schultz ed. 1980) (the

tional damage to the victimized child.³ Sexual abuse commonly destroys the child's sense of well-being, undermining the basic foundation for healthy growth and development.⁴ The interests of society are best served by the unrestrained prosecution of these offenders, while at the same time, protecting the child from further trauma.⁵

Convicting offenders frequently is difficult;⁶ the crime almost always occurs in secrecy,⁷ leaving the victimized child as the only witness.⁸ The prosecutor's problem is compounded when the offender is a parent, relative, or an acquaintance of the child.⁹ The traumatic nature of the courtroom litigation process¹⁰ is amplified when the

lack of the use of force tends to explain why the suspected abuser often states the child was not hurt).

3. Fontana, *Sexual Child Abuse*, in *DEALING WITH SEXUAL CHILD ABUSE* 1 (Nat'l Comm. for Prevention of Child Abuse 2d ed. 1982); Libai, *Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 980-81 (1969).

4. Holtzman, *Making the System Work*, WORKING WOMAN, Aug., 1984, at 70; see also Summit, *Sexual Child Abuse, the Psychotherapist and the Team Concept*, in *DEALING WITH SEXUAL CHILD ABUSE* 19 (Nat'l Comm. for Prevention of Child Abuse 2d ed. 1980) (Child sexual abuse "does form the basis of a substantial portion of both child and adult psychopathology."); V. DE FRANCIS, *PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS* 160 (American Humane Ass'n 1969) (reporting that 58% of the sexually abused children studied had developed feelings of inferiority and lack of self-worth).

5. These competing interests can be better reconciled by legislative innovation. Legislative measures which protect the immediate victim from the additional trauma inflicted by the judicial process will logically result in more and better witnesses, and a correspondingly higher conviction rate. One commentator has noted:

To prevent the perpetuation of child abuse, alternatives are needed which adequately address the special needs and abilities of children. Children must be protected from exposure to the risk of severe emotional trauma and a system which precludes many child abuse cases from ever reaching the courts Many of these cases are never litigated due to the inherent problems in the current system.

Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 CRIM. JUST. J. 1, 47-48 (1983); see also Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 826 (1985) ("Discouragingly low conviction rates merely confirm what is intuitively clear: that child victims, even when competent to testify and not removed from the court system by their parents, make reluctant and undependable witnesses.").

6. Bulkley, *The Law and Child Sexual Abuse*, in *DEALING WITH SEXUAL CHILD ABUSE* 3 (Nat'l Comm. for Prevention of Child Abuse 2d ed. 1982).

7. See Flammang, *supra* note 2, at 177.

8. *Id.* at 178; Stevens & Berliner, *Special Techniques for Child Witnesses*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 246, 248 (L. Schultz ed. 1980).

9. See generally V. DE FRANCIS, *supra* note 4 (75% of the offenders were a relative, neighbor or person with whom the child had frequent contact); Sgroi, *Sexual Molestation of Children: The Last Frontier in Child Abuse*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 25, 29 (L. Schultz ed. 1980) (citing a survey showing the offender was a parent or parent-substitute in 80% of the cases studied).

10. See Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643 (1982); Note, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?* 89 DICK. L. REV. 721 (1984); Libai, *supra* note 3, at 984. Libai noted:

Psychiatrists have identified components of the legal proceedings that are capa-

child must confront the assailant again in person¹¹ and relive the experience by telling the details of the abuse in a public setting.¹² As a result, the victimized child may refuse to testify or may testify ineffectively.¹³ When these problems are combined with the routine lack of medical or physical evidence,¹⁴ and the uncertain competency or credibility of the child,¹⁵ a prosecutor is faced with a difficult task in obtaining a conviction.¹⁶ The prosecutor is further hindered by the

ble of putting a child victim under prolonged mental stress and endangering his emotional equilibrium: repeated interrogations and cross-examination; facing the accused again; the official atmosphere in court; the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony; and the conviction of a molester who is the child's parent or relative.

Id. (citations omitted). Discussing the traumatic nature of testifying from the witness stand, one judge noted:

Have you ever been up there? . . . It's a strange experience, even for an adult. Your palms start to sweat as you listen to this guy, and you say, what is he trying to do to me? The trauma we're proposing to inflict on these kids . . . we should do all we can to lessen that, consistent with the rights of the accused.

Girdner, *supra* note 1, at 92 (quoting Fourth District California Court of Appeal Justice Robert E. Rickles of San Bernardino).

11. See, e.g., L. HOLSTROM & A. BURGESS, *THE VICTIM OF RAPE* 163, 226 (1978) ("Some victims reacted visibly to seeing the defendant. One became visibly nervous as the defendant, his family, and friends came in and sat down behind her in the courtroom."); see also Bowers, *Libai's Child Courtroom: Is It Constitutional?*, 7 J. Juv. L. 31 (1983). The author stated:

It is common courtroom practice for the defense attorney to try to force the child to look at the accused by standing beside the defendant during cross-examination and asking the child questions which forces him or her to look in that direction. While this experience is often very traumatic, defense attorneys have been known to use even greater pressure on the child. For example, in one Riverside County courtroom a twelve year old girl was asked to step down in front of the jury box and demonstrate *the position* in which she was forced to lie while being molested by the accused. While she was demonstrating this position, the accused, the jury and the spectators watched.

Id. at 34 (emphasis in original).

12. T. McCahill, L. Meyer & A. Fischman, *THE AFTERMATH OF RAPE* 211 (1979); L. Holstrom & A. Burgess, *supra* note 11, at 170.

13. See L.A. Daily J., Feb. 3, 1984, at 3, col. 1.

14. See Flammang, *supra* note 2, at 177. Most sexual acts against children consist of petting, fondling, and oral copulation; none necessarily require the use of physical violence, thereby leaving the victim physically unscarred, and leaving little medical evidence.

15. See Bulkley, *supra* note 6, at 8 (the child's lack of credibility or competency is often due to "limited cognition or verbal abilities" or "alleged suggestibility"); see also Avery, *supra* note 5, at 6-13. Although many commentators attribute children's suspected lack of competency or credibility to their "tendency to fantasize" or their tendency to be "less truthful than adults," studies cited by Avery tend to disprove these assumptions. One study cited found "little correlation between age and honesty." Avery also states: "[A child is] unlikely to fantasize about sexual activity because it is not within the child's realm of experience." *Id.* at 12.

16. See Bulkley, *supra* note 6, at 8; Chaze, *Now, Nationwide Drive to Curb*

reluctance of parents to expose their child to the trauma inherently part of the legal process.¹⁷

Public awareness of the need to protect victimized child witnesses from the additional trauma of the legal process is growing.¹⁸ In response, state legislatures have enacted procedures designed to minimize the effects of "legal process trauma."¹⁹ These procedures include closing the courtroom during the child's testimony,²⁰ creating

Child Abuse, U.S. NEWS & WORLD REP., Oct. 1, 1984 at 73.

17. See Note, *supra* note 5, at 807 ("[P]arents sometimes decline to press charges rather than subject their abused child to the ordeal of extended litigation requiring endless repetition of a painful and best forgotten episode."); Parker, *supra* note 10, at 651 ("Many parents, realizing how grueling the criminal process can be, fail to report sexual assaults in order to protect their children from courtroom trauma."); see also J. MACDONALD, RAPE OFFENDERS AND THEIR VICTIMS 128 (1971).

18. See generally Avery, *supra* note 5; Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Abuse Cases*, 89 DICK. L. REV. 645 (1985); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985).

19. "Legal process trauma" is the term given by Libai to all damaging psychological effects that arise as a result of the child's involvement with the legal system following the report of the abuse. Included are the effects resulting from interviews by the police, prosecutor, medical personnel, as well as the effects from testifying during the various stages of the criminal proceedings. See Libai, *supra* note 3, at 983. In 1985 the California Legislature enacted Penal Code section 868.8 which set forth, in part, these legislative findings and declarations:

(a) The Legislature hereby finds and declares that it is necessary to provide alleged child molestation victims with additional consideration and different treatment from that which is afforded to adults. The Legislature intends, by this act, to provide minors under the age of 11 who are alleged sexual offense victims with certain additional rights and protections during their involvement with criminal proceedings. The Legislature also urges the news media to use restraint in revealing the identity of these alleged victims, especially in particularly sensitive cases.

(b) The Legislature further finds and declares that some researchers believe that the alleged child molestation victim who is required to testify in court may experience psychological stress in discussing the alleged offense, that traditional court procedures may fail to take into account the potential damage to the child witness, that these procedures might exacerbate any damage already done to the child, and that judges who deal with child molestation cases should receive training in the psychological and social issues of child molestation, the basic principles of child protection and development, and techniques that may make the child more cooperative and thus aid the truth-gathering process.

(c) The Legislature further finds and declares that innovative approaches in the legal system's handling of alleged child sexual abuse cases should be adopted to prevent additional trauma to the child. The Legislature finds that some researchers believe that traditional courtroom settings intimidate child witnesses and thus may hinder the truth-gathering process; that in order to elicit information most effectively and to maintain the child's cooperation it may be necessary to create new courtroom configurations, designed to respond to the child's size, limited capacity to communicate, and special needs for comfort, support, and reassurance.

1985 Cal. Stat. c. 1174, § 1, p. 1-2.

20. See, e.g., CAL. PENAL CODE § 868.7 (West 1986) (operative Jan. 1, 1987).

This section allows closure during the testimony of a witness who is:

a minor and the complaining victim of a sex offense, where testimony before the general public would be likely to cause serious psychological harm to the

new hearsay exceptions,²¹ permitting the use of leading questions with child witnesses,²² permitting the use of videotape to record the victimized child's testimony for use at trial,²³ and allowing a support person to offer aid and comfort to the child witness during testimony.²⁴

California has been a leader in the movement to protect the child witness, recently enacting Penal Code section 1347.²⁵ This statute gives the trial court discretion to allow child testimony via two-way closed-circuit television (CCTV). CCTV permits contemporaneous testimony and full cross-examination while keeping the child physically removed from the courtroom.²⁶ The statute authorizes the use of CCTV when the victimized child is ten years of age or younger,²⁷ the testimony includes the facts of an alleged sexual offense committed on or with the child,²⁸ and the court finds, by clear and convincing evidence, that the impact of one or more enumerated factors is so substantial as to effectively make the minor unavailable as a witness.²⁹

witness and where no alternative procedures, including, but not limited to, video taped deposition or contemporaneous examination in another place communicated to the courtroom by means of closed-circuit television, are available to avoid the perceived harm.

See also N.H. REV. STAT. ANN. § 634-A:8 (Supp. 1981).

21. See, e.g., WASH. REV. CODE § 9A.44.120 (Supp. 1984).

22. See, e.g., CAL. EVID. CODE § 767(b) (West Supp. 1986).

23. See, e.g., CAL. PENAL CODE § 1346 (West Supp. 1986); N. M. STAT. ANN. § 30-9-17(a) (Supp. 1984).

24. See, e.g., CAL. PENAL CODE § 868.5 (West Supp. 1986).

25. *Id.* § 1347.

26. *Id.* § 1347(b).

27. *Id.*

28. *Id.* § 1347(b)(1).

29. The enumerated factors are:

(a) Threats of serious bodily injury to be inflicted on the minor or a family member, of incarceration or deportation of the minor or a family member, or of removal of the minor from the family or dissolution of the family, in order to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding or to prevent the minor from reporting the alleged sexual offense or from assisting in criminal prosecution.

(b) Use of a firearm or any other deadly weapon during the commission of the crime.

(c) Infliction of great bodily injury upon the victim during the commission of the crime.

(d) Conduct on the part of the defendant or defense counsel during the hearing or trial which causes the minor to be unable to continue his or her testimony. In making the determination required by this section, the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evi-

The statute contains safeguards to prevent the indiscriminate and arbitrary use of CCTV testimony. But despite the recognized need to protect child victims, and the care with which the statute was drafted, the use of CCTV raises substantial constitutional issues. Courts have traditionally held that a face-to-face meeting is an essential element of a defendant's right to confront witnesses.³⁰ Some commentators argue that CCTV use may violate a defendant's due process rights.³¹ Nevertheless, the state's substantial and compelling need to protect child sexual abuse victims must be balanced against the constitutional rights of a defendant. These two interests need not be mutually exclusive. This Comment explores these issues, and concludes that CCTV does not significantly impair a defendant's rights, and therefore, such use is constitutionally permissible.

THE CONFRONTATION CLAUSE

The sixth amendment of the Constitution guarantees criminal defendants the right to confront adverse witnesses.³² This requirement is binding upon the states through the fourteenth amendment.³³ Historically, the Confrontation Clause's primary objective seemed to be to prevent the use of *ex parte* affidavits and depositions as the sole evidence in criminal trials.³⁴ Legal commentators have suggested that the Confrontation Clause arose in response to the abuses of the trial of Sir Walter Raleigh.³⁵ Raleigh was executed for treason following a trial conviction based solely upon *ex parte* affidavits.³⁶ The government failed to produce witnesses against Raleigh, nor was he allowed to call witnesses in his own behalf.³⁷ Minimally, the Confrontation Clause was designed to provide cross-examination and personal examination of witnesses in all criminal proceedings.³⁸

Modernly, confrontation generally serves two basic functions: 1) to permit defendants to cross-examine adverse witnesses,³⁹ and 2) to permit juries to determine witnesses' credibility by their demeanor

dence that the special procedure described in this section is necessary in order to obtain the minor's testimony.

Id. § 1347(b)(2).

30. See *infra* notes 47-78 and accompanying text.

31. See *infra* notes 102-10 and accompanying text.

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

33. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

34. *Mattox v. United States*, 156 U.S. 237, 242 (1895).

35. See F. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 104-05 (1951). But see *California v. Green*, 399 U.S. 149, 176-79 (1970) (Harlan, J., concurring) ("Heller's approach, resting as it does essentially on assertion, is . . . [not] . . . persuasive as a historical reading.")

36. Parker, *supra* note 10, at 687 n.219.

37. *Id.*

38. See *Mattox*, 156 U.S. at 244.

39. *Pointer*, 380 U.S. at 404.

during testimony.⁴⁰ Although the rights of confrontation and cross-examination are generally considered fundamental to a fair trial,⁴¹ they are not absolute rights.⁴² For example, in *Mattox v. United States*,⁴³ the defendant was convicted of murder. His conviction was overturned and the case remanded for a new trial. The second trial resulted in a hung jury and a third trial was ordered. At the third trial Mattox was convicted largely on the prior testimony of two witnesses who had subsequently died. Mattox challenged the use of the prior testimony, claiming it should not have been admitted because he was unable to confront the witnesses. The Supreme Court rejected this challenge, in part because Mattox had an opportunity to confront the witnesses at the first trial. The Court noted:

[G]eneral rules [of law] of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case

. . . .
A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.⁴⁴

Following *Mattox*, considerations of public policy and necessity may be sufficient to qualify a constitutional right in appropriate circumstances. Indeed, dying declarations⁴⁵ are admissible into evi-

40. *Mattox*, 156 U.S. at 243. In *Douglas v. Alabama*, 380 U.S. 415, 416-19 (1965), the Court reaffirmed the dual purpose of the Confrontation Clause, citing *Mattox* and *Pointer*.

41. See *Pointer*, 380 U.S. at 405.

42. As applied by the Supreme Court, the confrontation right is not an absolute right; nor does it have an unqualified scope. See *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (To give confrontation an unqualified scope "would abrogate virtually every hearsay exception."). Unconditionally worded constitutional rights are generally applied in a practical, rather than strict, manner. For example, in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1981), the Supreme Court stated: "Although the right of access to criminal trials is of constitutional stature, it is not absolute." The Court had earlier held, in *Dennis v. United States*, 341 U.S. 494, 503 (1951), that the first amendment rule that Congress make no law abridging free speech "is not an unlimited, unqualified right, but . . . must, on occasion, be subordinated to other values and considerations." Similarly, the confrontation right has not been strictly applied. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (the confrontation right is subject to balancing with other interests)); *Parker v. Randolph*, 442 U.S. 427, 430-32 (1972) (the denial of confrontation may be harmless error); *Mattox v. United States*, 156 U.S. 237, 243 (1875) (rules such as the confrontation right occasionally may have to give way to public policy considerations and necessity); *United States v. Carlson*, 547 F.2d 1346, 1357-59 (8th Cir. 1976) (the confrontation right can be waived in various ways).

43. 156 U.S. 237 (1895).

44. *Id.* at 243.

45. In *Mattox*, the Court noted:

[T]here could be nothing more directly contrary to the letter of the [confronta-

dence, and certain other hearsay testimony⁴⁶ may survive challenges based upon a defendant's confrontation rights, even though the declarant is not present in the courtroom and is not subject to cross-examination.

THE CCTV-CONFRONTATION CLAUSE CONFLICT

Although the use of CCTV as a means of transmitting testimony allows defendants ample opportunity for cross-examination, its use may still interfere with the right of confrontation. Several cases indicate that the physical presence of adverse witnesses in the courtroom is an essential part of the defendant's sixth amendment rights.⁴⁷ The first case to espouse a face-to-face requirement was *Mattox v. United States*.⁴⁸ According to *Mattox*, the accused should have the opportunity to compel the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."⁴⁹ Although the Court held that the opportunity for face-to-face confrontation was not absolute, other early confrontation cases commonly employed similar language.⁵⁰

A consideration of the technological context in which these cases

tion] provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility.

Id. at 243-44.

46. The Federal Rules of Evidence (FRE) contain 24 exceptions to the hearsay rule that can be invoked regardless of whether the declarant is available for cross-examination. These exceptions include present sense impressions, recorded recollections, records of regularly conducted activity, and public records and reports. *See* FED. R. EVID. 803. There are five additional exceptions in the FRE that can be used only if the declarant is unavailable. These include former testimony and statements against interests. *See* FED. R. EVID. 804. Many states have enacted rules of evidence similar to the FRE. *See, e.g.,* OKLA. STAT. ANN. tit. 12, §§ 2803-2804 (1980); CAL. EVID. CODE § 1228 (West Supp. 1986).

47. *Mattox v. United States*, 156 U.S. 237 (1875); *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979); *Herbert v. Superior Court*, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981).

48. 156 U.S. 237 (1895).

49. *Id.* at 242-43, cited with approval in *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

50. *See, e.g., Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) ("[T]he privilege to confront one's accusers and cross-examine them face to face . . ."); *Dowdell v. United States*, 221 U.S. 325, 330 (1911) ("[O]nly such witnesses as meet him face to face at the trial . . ."); *Kirby v. United States*, 174 U.S. 47, 55 (1899) ("[W]itness . . . upon whom he can look while being tried . . ."). In *Snyder*, however, Justice Cardozo recognized limitations on the rights of confrontation, stating that "the privilege of confrontation [has not] at any time been without recognized exceptions The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule." *Snyder*, 291 U.S. at 107.

were decided may diminish the impact of the physical presence requirement. All of these cases were decided prior to 1935. The courts could not have conceived of an alternative to the witness' physical presence that would substantially comply with the purposes of the Confrontation Clause. The face-to-face requirement, therefore, was the only available means to protect the confrontation rights of the accused.

In 1979 the Eighth Circuit reaffirmed the requirement of a face-to-face meeting between an adverse witness and the accused. In *United States v. Benfield*,⁵¹ the defendant was convicted for misprison of felony for his failure to report the kidnapping of a woman. A psychiatrist testified that the victim could not endure the court procedure, and the trial court permitted the prosecution to videotape her deposition in her hospital room; she was deceived into believing that the defendant was not present. Although the defendant was not in the room, he was allowed to observe the proceedings on a monitor, and was provided with a buzzer as a means to halt the proceedings and confer with counsel. The court held that Benfield's confrontation rights were violated by the admission of the deposition into evidence, stating:

Normally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge.⁵²

In *Herbert v. Superior Court*,⁵³ decided before the enactment of Penal Code section 1347, a California appellate court used similar "face-to-face" language.⁵⁴ In *Herbert*, the defendant was prosecuted for child sexual abuse; the child witness "was disturbed by the number of people in the courtroom and in particular with the presence of the defendant."⁵⁵ The trial judge ordered that the defendant and witness be seated in such a manner that they could hear but not see each other. The defendant was required to raise his hand if he could not hear or wanted to confer with counsel. The California Court of

51. 593 F.2d 815 (8th Cir. 1979).

52. *Id.* at 821.

53. 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981).

54. Section 1347 was approved by the Governor on May 18, 1985, was filed with the Secretary of State on May 20, 1985, and went into effect immediately. See 1985 Cal. Stat. c. 43, p. 1.

55. *Herbert*, 117 Cal. App. 3d at 664, 172 Cal. Rptr. at 853 (quoting the trial record).

Appeal found this arrangement abridged the defendant's confrontation rights, holding that a face-to-face meeting between the witness and defendant was required.⁵⁶ The *Herbert* court reasoned that:

The historical concept of the right of confrontation has included the right to see one's accuser face-to-face, thereby giving the fact-finder the opportunity of weighing the demeanor of the accused [sic] when forced to make his or her accusation before the one person who knows if the witness is truthful. A witness' reluctance to face the accused may be the product of fabrication rather than fear or embarrassment.⁵⁷

Despite the "face-to-face" language, these cases differ in nature from cases where CCTV is used to present testimony in accordance with Penal Code section 1347. *Benfield* involved a deposition where the jury was not present to observe the actual testimony and the court was concerned that the witness was deceived into believing that the defendant was not present.⁵⁸ The *Benfield* court also recognized the possibility of confrontation right exceptions, stating: "What curtailment or diminishment might be constitutionally permissible depends on the factual context of each case, including the defendant's conduct Any exception should be narrow in scope and based on necessity or waiver."⁵⁹ *Benfield*, therefore, must not be construed to require a face-to-face meeting as a matter of constitutional mandate; the lack of a face-to-face meeting was deemed unjustified solely upon the unique facts of the case.

The *Benfield* court intimated that innovations such as CCTV testimony might be constitutionally permissible, stating:

Today's decision should not be regarded as prohibiting the development of electronic video technology in litigation. Where the parties agree to a given procedure or where the procedure more nearly approximates the traditional courtroom setting, our approval might be forthcoming.⁶⁰

The *Herbert* scenario is also distinguishable from situations where CCTV testimony is used under section 1347. The *Herbert* court may have been influenced by the unique facts of the case. For example, the record did not show that the child's condition required the use of a blocked seating arrangement, or that the defendant intimidated the child. The witness was not under oath, and neither the defense nor the prosecution requested the unusual seating arrangement.⁶¹ In a typical section 1347 scenario, CCTV use must be necessary, it must

56. *Id.* at 671, 172 Cal. Rptr. at 860. *But see* *State v. Strable*, 313 N.W.2d 497 (Iowa 1981) (upholding a similar procedure).

57. *Herbert*, 117 Cal. App. 3d at 671, 172 Cal. Rptr. at 860.

58. The court noted that "the witness was apparently unaware that her testimony was being monitored by the defendant . . . [and because] the accuracy of her perception was crucial to the Government's case . . . [t]he partial confrontation allowed was inadequate to test those features of her testimony." *Benfield*, 593 F.2d at 822.

59. *Id.* at 821.

60. *Id.*

61. *Herbert*, 117 Cal. App. 3d at 670-71, 172 Cal. Rptr. at 859-60.

be requested by the prosecutor or the court, and the child must be under oath. Thus, although the *Herbert* decision employs the language of a face-to-face requirement, its holding is of limited applicability.

The California Second District Court of Appeals has also indicated that a face-to-face meeting may be constitutionally required. In *Hochheiser v. Superior Court*,⁶² the court issued a writ of prohibition restraining the trial court from enforcing its order allowing the use of CCTV for taking the testimony of a child victim in a sexual abuse case. In its decision, made prior to the enactment of section 1347, the court recognized some of the constitutional concerns raised by CCTV testimony and stated in a footnote: "It would appear from a careful reading of the cases that *physical* confrontation is an element of Sixth Amendment guarantees."⁶³ Despite this language, the court failed to rule on the constitutional issues, but disallowed the procedure on the narrow grounds that it was not statutorily authorized.⁶⁴

A number of courts, however, have rejected a strict face-to-face requirement. In *Kansas City v. McCoy*,⁶⁵ the Missouri Supreme Court indicated that a witness' physical presence in the courtroom is not constitutionally required. In *McCoy*, the defendant had been tried and convicted for the possession of marijuana, a violation of a municipal regulation. The trial court allowed an expert witness to testify via CCTV. The state supreme court ruled that this testimony was properly admitted and did not violate the defendant's confrontation rights. The court noted that although the witness was not physically present in the courtroom, "[h]is image and voice were there . . . for the defendant to see and hear and, by the same means, simultaneously for him to be seen and heard by the witness."⁶⁶

Under Penal Code section 1347, CCTV will be used to convey the testimony of the main complaining witness when the defendant is facing serious criminal charges. In these respects, *McCoy* cannot be considered strong authority for the constitutionality of CCTV use

62. 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984).

63. *Id.* at 786 n.2, 208 Cal. Rptr. at 278 n.2.

64. *Id.* at 794, 208 Cal. Rptr. at 284. The court noted that "[s]uch a major step should be taken, 'if at all, only upon the considered judgment of the Legislature.'" *Id.* at 794 (quoting *Reynolds v. Superior Court*, 12 Cal. 3d 834, 837, 528 P.2d 45, 46, 117 Cal. Rptr. 437, 438 (1974)).

65. 525 S.W.2d 336 (Mo. 1975).

66. *Id.* at 339.

under the statute.⁶⁷ Indeed, the *Benfield* court noted, "Among the more disturbing aspects of the [*McCoy*] decision is that there was no showing of extraordinary circumstances necessitating reliance on the procedure."⁶⁸

A New Jersey case, *State v. Sheppard*, also rejected the face-to-face rationale and approved the use of CCTV in a child sexual abuse case.⁶⁹ In *Sheppard*, the prosecution moved to use CCTV to convey the child victim's testimony. The court granted the motion and outlined the procedures to be followed. The system to be used was a one-way closed-circuit television system. The child was to be unable to see or hear anything in the courtroom, including the defendant. The defense and prosecuting attorneys were to be present in the room with the child during the examination and cross-examination.⁷⁰ Although these procedures differ significantly from the procedures required by section 1347, the New Jersey court held that the procedures would adequately protect the defendant's confrontation rights.⁷¹

Section 1347 requires the defendant's image to be broadcast contemporaneously to the child during his or her testimony.⁷² This provides greater confrontation than a one-way system. Section 1347 is slightly more troubling by its requirement that the attorneys elicit the testimony from the courtroom⁷³ rather than from the testimonial room,⁷⁴ although this method still allows adequate cross-examination, which is the core of confrontation rights.⁷⁵

67. The *McCoy* holding was narrowly confined to one expert's testimony in a case involving the violation of a municipal ordinance. *See id.*

68. *Benfield*, 593 F.2d at 822 n.11; *see also* Hochheiser v. Superior Court, 161 Cal. App. 3d at 783 n.1, 208 Cal. Rptr. at 276-77 n.1 (agreeing with the *Benfield* court's criticism).

69. 197 N.J. Super. 411, 484 A.2d 1330 (N.J. Super. Ct. Law. Div. 1984).

70. *Id.* at 442, 484 A.2d at 1349. In contrast, section 1347 requires that the "defendant's image shall be transmitted live to the witness via two-way contemporaneous closed-circuit television." *See* CAL. PENAL CODE § 1347(h) (West Supp. 1986).

71. 197 N.J. Super. at 432-35, 484 A.2d at 1342-43.

72. CAL. PENAL CODE § 1347(h) (West Supp. 1986).

73. *Id.*

74. It has been noted that some "attorneys expressed reservations about their ability [to adequately] cross-examine witnesses from whom they were physically separated." G. COLEMAN, *THE IMPACT OF VIDEO USE ON COURT FUNCTION: A SUMMARY OF CURRENT RESEARCH AND PRACTICE* 18 (1977) (footnote omitted). One defense attorney stated, "I think taking the lawyer out of the picture is . . . not fair . . . The observation of the attorney would be less if he's watching it through a camera." Interview with Ed Applebaum, defense attorney, in San Diego, California (Oct. 12, 1985). These criticisms, however, may be the result of a lack of familiarity with the techniques of cross-examination via CCTV, rather than an inherent limitation in the procedure itself.

75. *See, e.g.,* Pointer v. Texas, 380 U.S. at 406-07 ("[A] major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him."); Bruton v. United States, 391 U.S. 123, 136 (1968) (emphasizing that the error arose because "the declarant does not testify and cannot be tested by cross-examination"). *But see, e.g.,* California v. Green,

Limits on the Right to Cross-Examine

The right to cross-examination is not unlimited. Traditionally, trial judges are given wide discretion to relieve a witness from nervousness or fear.⁷⁶ The Supreme Court has recently reaffirmed that cross-examination is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation."⁷⁷ CCTV does not restrict cross-examination, it merely alters the procedure by which it is traditionally performed. As the *Sheppard* court noted: "[T]here is, in fact, no curtailment of cross-examination, only a restriction upon the means of transmitting questions and answers."⁷⁸ Therefore, it is unlikely that CCTV testimony will be found unconstitutional on the grounds that it unduly interferes with cross-examination.

To summarize, the main purposes of a physical presence requirement are to provide the defendant with an opportunity for cross-examination,⁷⁹ which helps elicit more truthful testimony, and to allow the fact-finder an opportunity to adequately judge the demeanor of the witness.⁸⁰ The use of CCTV allows full and adequate cross-examination. Face-to-face confrontation, however, may diminish, rather than enhance the prospect of obtaining the truth when the victims are young and extremely vulnerable.⁸¹ By reducing the

399 U.S. 149, 173 (1970) (Harlan, J., concurring) ("If confrontation is to be equated with the right to cross examine, it would transplant the ganglia of hearsay rules and their exceptions into the body of constitutional protections.")

76. See *Alford v. United States*, 282 U.S. 687, 694 (1931). (suggesting that the court has a duty to protect a witness "from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him").

77. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

78. *Sheppard*, 197 N.J. Super. at 435, 484 A.2d at 1344.

79. As Professor Wigmore explained:

The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of the questions and obtaining immediate answers. That this is the true and essential significance of confrontation is clear.

5 J. WIGMORE, EVIDENCE § 1395 (Chadbourn rev. ed. 1974); see also *California v. Green*, 399 U.S. 149, 158 (1969).

80. See *California v. Green*, 399 U.S. 149, 158 (1969); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

81. See Note, *Parent-Child Incest: Proof at Trial Without Testimony by the Victim*, 15 U. MICH. J.L. REF. 131, 137 (1981); Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1751-52 (1983); see also 1985 Cal. Stat. c. 1174, § 1, p.2 ("The Legislature finds that some researchers believe that traditional courtroom settings intimidate child witnesses and thus may hinder the truth-gathering process.").

trauma experienced by child witnesses during testimony, CCTV can actually *enhance* the truth-eliciting function of confrontation, while affording the child some protection against further psychological or emotional harm.

If the objective in requiring a face-to-face meeting between the witness and the accused is to intimidate the witness by the presence of the defendant, those demanding the witness' physical presence will have succeeded in transforming the right of confrontation into a right of intimidation. This cannot be what the framers of the Constitution had in mind, since courts have long held that the right of confrontation is waived through intimidation.⁸² For example, the Eighth Circuit Court of Appeals has held that the grand jury testimony of an unavailable witness was properly admitted at the trial, where the defendant's intimidation caused the witness to refuse to testify.⁸³ In *United States v. Carlson*, the Eighth Circuit found that under these circumstances the defendant's confrontation rights were not violated, even though the defendant never had an opportunity to cross-examine the witness.⁸⁴ Where CCTV can adequately convey the demeanor of the witness, no reason exists to find the procedures prescribed by section 1347 constitutionally impermissible, despite the lack of the witness' physical presence in the courtroom.

DEMEANOR

In *California v. Green*,⁸⁵ the Supreme Court indicated that demeanor evidence is an important element of sixth amendment rights. Confrontation "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility."⁸⁶ There is some question about the ability of CCTV to accurately convey demeanor evidence.⁸⁷ This raises confrontation and due process concerns.

82. See *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); see also *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979) ("[C]oercion can constitute voluntary waiver of the right of confrontation."); *Black v. Woods*, 651 F.2d 528, 531 (8th Cir. 1981) (The accused "forfeited his confrontation right by a pattern of conduct that resulted in [the witness'] fear . . .").

83. *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

84. *Id.*

85. 399 U.S. 149 (1970).

86. *Id.* at 158.

87. See *Hochheiser*, 161 Cal. App. 3d 777, 786, 208 Cal. Rptr. 273, 278 (1984); Comment, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OR. L. REV. 567 (1976). But see Note, *Video-Tape Trials: A Practical Evaluation and a Legal Analysis*, 26 STAN. L. REV. 619 (1974) ("[M]ost comments suggest that video tape adequately transmits the demeanor of the witness and the dramatic components of his testimony.").

Demeanor and Confrontation

CCTV may distort demeanor evidence through the camera angle chosen, the scope of the image, the lighting, and various other production techniques.⁸⁸ The camera unintentionally "becomes the juror's eyes, selecting and commenting upon what is seen."⁸⁹ Although these concerns are valid, the effects can be controlled with proper safeguards on the procedures and equipment to be employed. Section 1347 does not enumerate specific safeguards, but generally provides: "[T]he equipment available for use of two-way closed-circuit television [s]hould accurately communicate the image and demeanor of the minor to the judge, jury, defendant or defendants, and attorneys."⁹⁰ The procedural problems are not insurmountable. The mechanics may be determined, by either the trial judge or stipulation, prior to taking the child's testimony. The camera can be placed at a height and distance that approximates the jurors normal view of the witness stand.⁹¹ With proper planning, the effects of CCTV on demeanor evidence can be minimized.⁹²

The ability to accurately portray the witness' demeanor on television is a primary concern—the subtle nuances of nonverbal communication which aid in the jurors' assessment of witness credibility may be lost in the televising process.⁹³ Empirical studies, case law, and commentators, however, tend to discount the effects of television on demeanor evidence.⁹⁴ For example, a series of studies conducted

88. See generally G. MILLERSON, *THE TECHNIQUE OF LIGHTING FOR TELEVISION AND MOTION PICTURES* 47 (1972) ("Composition, camera angle, light direction, colour renderings, will all effect the viewer's impressions and attitudes to what he sees in the picture."); H. BETTINGER, *TELEVISION TECHNIQUES* 67 (Cornburg rev. ed. 1955) ("[M]erely by the choice of camera angles it is possible (a) to build a subject up; (b) to present it in a normal 'eye-to-eye' manner; or (c) to play it down.").

89. *Hochheiser*, 161 Cal. App. 3d at 786, 208 Cal. Rptr. at 278; see also G. MILLERSON, *supra* note 88, at 198.

90. CAL. PENAL CODE § 1347(b)(3) (West Supp. 1986).

91. In the *Sheppard* case, the court attached to the decision allowing CCTV testimony an appendix fully outlining the procedures to be employed, including the size of the television monitors to be viewed by the defendant, jury, judge and public. See *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984).

92. The California statute affords the defendant further protection by requiring the testimony to be recorded on video-tape. The videotape may then be used during appellate review to determine whether any procedural techniques subjected the defendant to prejudice. See CAL. PENAL CODE § 1347(d)(5) (West Supp. 1986).

93. "The medium cannot capture the total psychological and physical essence of a witness—persuasiveness, credibility, hesitancy, and forcefulness are indicated through arm, hand, or eye movements or other bodily changes . . ." Brakel, *Video-tape in Trial Proceedings: A Technological Obsession?*, 61 A.B.A.J. 956, 957 (1975).

94. See *People v. Moran*, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974); *State*

by Gerald Miller and Norman Fontes concerning the effects of videotape evidence on juror perceptions found that "there is no evidence to suggest that the use of videotape exerts any deleterious effects on the juror responses studied"95 The authors concluded that "[t]he use of videotape in the courtroom to present witness testimony does not significantly affect juror judgments of the veracity of the testimony presented."⁹⁶

A number of appellate decisions are in accord. For example, in a California case, *People v. Moran*,⁹⁷ the videotape of a witness' preliminary hearing testimony was introduced at trial. The defendant argued that the medium failed to provide adequate demeanor evidence, resulting in a denial of his confrontation rights. The *Moran* court rejected the argument, stating: "Conceding that testimony through a television set differs from live testimony, the process does not significantly affect the flow of information to the jury. Videotape is sufficiently similar to live testimony to permit the jury to properly perform its function."⁹⁸ The New Jersey court in *State v. Shepard*,⁹⁹ also rejected this challenge, recognizing that "a videotaped presentation has the capacity to present clear, accurate, and essentially appropriate transmissions of images and sound to defendant, the judge, the jury, and the public."¹⁰⁰

Although imperfect, CCTV testimony is capable of accurately conveying the demeanor of the witness, which aids the jury in assessing witness credibility.¹⁰¹ One difference between CCTV testimony and live testimony actually may aid rather than hinder the defendant. Arguably, a "live" appearance by a child-victim can have substantially greater emotional impact on the jury than a video image; in this case, CCTV testimony can only work in favor of the defendant. Even without this potential advantage to the defendant, the differences are not so significant as to render a statute, such as Penal Code section 1347, constitutionally infirm.

v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984); G. MILLER & N. FONTES, *VIDEOTAPE ON TRIAL—A VIEW FROM THE JURY BOX* (1979); Ryan & Cassan, *Television Evidence in Court*, 122 AM. J. PSYCH. 655 (1965) ("States of emotion, powers of judgment, quality of attention, memory capacity and general conduct can be directly observed by the jury.").

95. G. MILLER & N. FONTES, *supra* note 94, at 207.

96. *Id.* at 212. "[T]he two studies indicate that accuracy in detecting deception was not significantly affected by the mode of presenting testimony; in fact, we stressed that high levels of nonverbal information may actually hamper attempts to assess witness veracity. By far the most interesting result was the relatively low level of accuracy across all presentation modes, a finding which suggests that jurors are probably not notably effective in determining whether a witness is testifying truthfully." *Id.* at 205.

97. 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974).

98. *Id.* at 410, 114 Cal. Rptr. at 420.

99. 197 N.J. Super. 411, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984).

100. *Id.* at 431, 484 A.2d at 1342.

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

CCTV AND DUE PROCESS

Procedural changes such as CCTV may affect a defendant's right to due process.¹⁰² The Due Process Clause of the Constitution requires a fair trial.¹⁰³ A showing of actual bias or prejudice generally is required before a procedure will be deemed to violate due process.¹⁰⁴ Although fairness does not require a perfect trial,¹⁰⁵ if the procedure is inherently unfair, a showing of actual bias may not be necessary.¹⁰⁶

The California court in *People v. Moran*¹⁰⁷ considered whether the use of videotape is inherently unfair. In *Moran*, the videotape of a witness' testimony at a preliminary hearing was introduced at trial. On appeal, the defendant argued that the "technical distortions of the medium" and "its failure to accurately transmit the demeanor of the witness"¹⁰⁸ violated his due process rights. The court, while conceding the televised testimony differed somewhat from live testimony, noted that the "advantages and disadvantages of the 'filtering' effect of the medium fall equally on both sides."¹⁰⁹ The court concluded: "Therefore, its use is 'fair' and there is no inherent unfairness Fair new procedures that facilitate proper factfinding are allowable, although not traditional."¹¹⁰ Given the similarity of CCTV to videotape, this finding logically should be extended to CCTV testimony. Thus, the capacity of CCTV to accurately transmit the demeanor and other components of the witnesses' testimony would seem to satisfy due process requirements.

102. The fourteenth amendment of the Constitution provides, in part: "[No] State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

103. *Estes v. Texas*, 381 U.S. 532, 543 (1965).

104. *Id.* at 542; see *In re Murchison*, 349 U.S. 133, 136 (1955).

105. *Lutwak v. United States*, 344 U.S. 604, 619 (1952) ("A defendant is entitled to a fair trial but not a perfect one.").

106. *Estes*, 381 U.S. at 542 ("[A]t times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.").

107. 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974).

108. *Id.* at 410, 114 Cal. Rptr. at 420.

109. *Id.*

110. *Id.* (citations omitted).

BALANCING THE DEFENDANT'S RIGHTS AND THE PROTECTION OF THE CHILD

In order to protect children from harm, the state has traditionally acted as a "super-parent" under the doctrine of *parens patriae*.¹¹¹ Within this context, the California Legislature enacted section 1347 to protect child victims of sexual abuse from the additional trauma inflicted by testifying in open court. In enacting this statute, the legislature has carefully considered the state's interest in protecting child victim witnesses.¹¹² Absent a compelling interest, the state cannot justify a limitation on a defendant's constitutional rights. Alteration of a defendant's rights must be carefully scrutinized and balanced against the purpose for the change to determine if the benefits outweigh the harm.¹¹³

The Supreme Court has recognized that the scope of constitutional protections "must occasionally give way to considerations of public policy and the necessities of the case."¹¹⁴ In doing so, the Court noted that "[a] technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant."¹¹⁵ The Confrontation Clause affords the defendant substantial constitutional protections and cannot be tampered with lightly. Nevertheless, the plight of child sexual abuse victims may well justify some modification of these rights.

The Supreme Court has recognized the compelling nature of a state's interest in "safeguarding the physical and psychological well-being of a minor."¹¹⁶ This interest can be served by allowing CCTV

111. For an explanation of *parens patriae*, see R. MNOOKIN, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 84 (1978). *Parens patriae* originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants, idiots and lunatics. In the United States, the phrase traditionally refers to the sovereign role of the state as the guardian of persons under legal disability. See *State v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir. 1971).

112. CAL. PENAL CODE § 1347(a) provides:

It is the intent of the Legislature in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant against the need to protect a child witness and to preserve the integrity of the court's truth-finding function. This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these unusual procedures.

See also 1985 Cal. Stat. c. 1174, § 1, p. 1-2.

113. *Mattox v. United States*, 156 U.S. 237, 243 (1985).

114. *Id.*

115. *Id.*

116. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). The Court in *Globe*, however, struck down a state law requiring mandatory closure of the

testimony under procedures which preserve the defendant's essential rights. CCTV merely denies the defendant physical face-to-face confrontation with the witness. The underlying purposes of confrontation, however, will be satisfied. The child is under oath and subject to full cross-examination. The child's demeanor is conveyed to the trier of fact. Furthermore, placing the child in a more relaxed atmosphere may help elicit more reliable evidence.¹¹⁷ On balance, therefore, the statute should be found constitutional.

One additional benefit of CCTV use may accrue to the defendant—the protection of the right to public trial.¹¹⁸ Because the child can testify from outside the courtroom, it may no longer be necessary to close the courtroom to the public and press as a means of protecting the child.¹¹⁹ Thus, CCTV may enhance a sixth amendment right of the defendant, while at the same time protect the child from further trauma.

CONCLUSION

Justice Cardozo recognized that some limitations may be placed on confrontation: "The privilege of confrontation [has not] at any time been without recognized exceptions The exceptions are not even static but may be enlarged from time to time if there is no material departure from the reason of the general rule."¹²⁰ The *Mattox* court acknowledged that "considerations of public policy and the necessities of the case" may be sufficient to justify limiting the confrontation right.¹²¹ Surely the protection of these once abused children should be sufficient to justify the minor limitations CCTV use imposes upon confrontation.

courtroom during the testimony of minor victims in criminal sex offense trials. The Court held that the state's interest did not justify a *mandatory* closure, but noted that a law which allows a trial court to determine closure on a case by case basis would ensure "that the constitutional right of the press and public will not be restricted except where necessary" and would be permissible. *Id.* at 609.

117. See *supra* note 81 and accompanying text.

118. The sixth amendment of the Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . ." U.S. CONST. amend. VI.

119. CAL. PENAL CODE § 868.7 provides that a closed hearing is permissible if the witness is a minor who is a victim of a sexual offense and "no alternative procedures including . . . contemporaneous examination in another place communicated to the courtroom by means of closed-circuit television are available to avoid the perceived harm." *Id.* at § 868.7(a)(1) (effective Jan. 1, 1987) (West 1984).

120. *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934).

121. *Mattox*, 156 U.S. at 243; see also *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (the confrontation right is subject to balancing with other interests).

Society has a substantial and compelling need to protect child sexual abuse victims from further psychological and emotional harm. Society also has a compelling need to preserve the rights of defendants. These two needs, however, are not mutually exclusive. They must be balanced against each other, and their respective weights determined. Indeed, since CCTV can be used without any substantial infringement of a defendant's rights and because the need to protect the victimized child witness is overwhelming, the scale must tip towards the child.

The introduction of technology into the legal arena frequently has met with resistance, hindered not only by the usual resistance to change, but also by the precedential nature of our legal system. One court has observed that "the television camera is a stranger only in the slower moving apparatus of justice."¹²² This does not have to be the case. California has taken a large step forward with the introduction of this statute, employing a twentieth century solution to a twentieth century problem. Other states are well advised to follow this lead. Our children are unable to protect themselves; only through innovation and perseverance can we begin to combat the pervasive ill of child sexual abuse.

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122. *People v. Moran*, 39 Cal. App. 398, 411, 114 Cal. Rptr. 413, 420 (1974).