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# CLOSED-CIRCUIT TELEVISION TESTIMONY FOR THE SEXUALLY ABUSED CHILD: THE RIGHT TO AVOID CONFRONTATION?

## I. INTRODUCTION

The California Legislature enacted Penal Code section 1347 to protect child victims of sexual abuse.<sup>1</sup> The statute concerns the victim's testimony against the alleged assailant in all criminal proceedings.<sup>2</sup> It permits contemporaneous direct and cross-examination to be conducted by two-way closed-circuit television.<sup>3</sup> Under the section 1347 procedure, the child is located outside the courtroom and out of the presence of the defendant.<sup>4</sup> Attorneys communicate questions to the child from the courtroom via closed-circuit television, and the child responds to the courtroom in the same manner.<sup>5</sup> The procedure substitutes live two-way television for in-court testimony.

This comment analyzes the issue of whether section 1347 denies defendants the sixth amendment right to confrontation.<sup>6</sup> First, it describes problems of prosecuting a sexual abuse case with a child victim. Second, it defines the right to confrontation and explains section 1347. Next, it considers judicial standards of review for determining whether section 1347 unconstitutionally infringes a defendant's right to confrontation. Finally, the comment recommends several proposals aimed at improving the statute and insuring the

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1. CAL. PENAL CODE § 1347 (West 1985). The statute became effective May 18, 1985. The intent of the Legislature in enacting this section is to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In employing the statute, the court will be required to balance the rights of the defendant against the need to protect a child witness.

2. "[T]he court in any criminal proceeding . . . may order the testimony of a minor ten years of age or younger . . . to be taken by . . . two-way closed-circuit television." *Id.* at § 1347(b).

3. Closed-circuit television is an installation in which the signal is transmitted by wire to a limited number of receivers. See WEBSTER'S NEW COLLEGIATE DICTIONARY 211 (3d ed. 1973).

4. CAL. PENAL CODE § 1347(b) (West 1985).

5. *Id.*

6. The California Public Defenders Association and California Attorneys for Criminal Justice are two groups who will mount legal efforts to overturn the new law. A lobbyist for the groups said the new law interferes with the defendant's right to confront his or her accuser. L.A. Daily J., May 21, 1985, at 2, col. 3.

defendant's right to confrontation. The first proposal is a higher proof burden to permit use of the procedure. The second and third proposals are additions to the statute; one suggests a specific method of executing the procedure, and the other addresses a problem which arises when the defendant opts for self-representation. The last proposal suggests banning the statute if it significantly infringes the defendant's right to confrontation.

## II. BACKGROUND

Child sexual abuse has grown to extraordinary proportions in recent years.<sup>7</sup> Since the first major sexual abuse case,<sup>8</sup> prosecutors have forced cases to trial, rather than dismiss them to spare embarrassment of young victims.<sup>9</sup> The cases are exceptionally difficult to prosecute because the child victim is usually the only witness to the crime.<sup>10</sup> He or she may be found incompetent to testify, or upon testifying may be unable to recall crucial details or relate them to the jury.<sup>11</sup> Children are easily confused by cross-examination. They are reluctant witnesses and sometimes retract prior testimony to absolve an assailant who is a family member.<sup>12</sup> Child therapists argue steadfastly that children often fall apart or retract their accusations on the witness stand because they are frightened of the defendants.<sup>13</sup> Parents sometimes decline to press charges rather than subject their abused children to litigation requiring repetition of a traumatic episode.<sup>14</sup> Undoubtedly, the criminal justice procedure creates potential for secondary victimization<sup>15</sup> of the sexually abused child.

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7. Studies indicate that during childhood approximately 20% of all females and 10% of all males are sexually molested by an adult. D. FINKELHOR, *SEXUALLY VICTIMIZED CHILDREN* 53 (1979) (citing survey results).

8. In September, 1983, charges of sexual abuse were brought against an employee of the Virginia McMartin Preschool in Manhattan Beach, California. Six other employees were later arrested and charged with 208 counts of child molestation and conspiracy involving 42 children. *NAT'L L.J.*, Sept. 10, 1984, at 1, col. 1.

9. *L.A. Daily J.*, Jan. 18, 1985, at 1, col. 5.

10. Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 *CRIM. JUST. J.* 1 (1983).

11. See A. YARNEY, *THE PSYCHOLOGY OF EYEWITNESS TESTIMONY* 204-05 (1979) (arguing that children possess inferior long-term and short-term memories).

12. D. FINKELHOR, *CHILD SEXUAL ABUSE* 2-3 (1984).

13. *L.A. Daily J.*, Jan. 18, 1985, at 1, col. 6.

14. Note, *The Testimony of Child Victims in Sex Abuse Prosecution: Two Legislative Innovations*, 98 *HARV. L. REV.* 806, 807 (1985).

15. Secondary victimization, as used here, is intended to identify components of the legal proceedings that are capable 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 the court, the acquittal of the accused for want of

The California Legislature enacted Penal Code section 1347 to reduce the potential for secondary victimization of abused children.<sup>16</sup> The statute focuses on protecting the victim's rights during examination and cross-examination.<sup>17</sup> It attempts to balance the rights of the children against the defendant's right to confrontation,<sup>18</sup> and to maintain the judicial integrity of the criminal defense procedure.

### A. *Right to Confrontation*

The sixth amendment of the United States Constitution guarantees that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witness against him."<sup>19</sup> The right to confrontation applies to the states through the fourteenth amendment.<sup>20</sup> The fact that the clause appears in the Bill of Rights reflects the Framers' belief that confrontation is a fundamental right, essential to a fair trial in criminal prosecution.<sup>21</sup> Moreover, United States Supreme Court decisions consistently emphasize the necessity for cross-examination as protection for criminal defendants.<sup>22</sup>

The confrontation clause requires the accuser's appearance at trial for several reasons. First, it enables the defendant to confront the witness face to face in the presence of the jury.<sup>23</sup> Second, it permits the jury to examine the demeanor of the accuser and the manner in which he testifies.<sup>24</sup> Third, it prevents the use of *ex parte* affidavits and depositions in lieu of personal examination.<sup>25</sup> Finally,

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corroborating evidence to the child's trustworthy testimony, and the conviction of a molester who is the child's parent or relative. See Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 984 (1969).

16. CAL. PENAL CODE § 1347(a) (West 1985).

17. *Id.* at § 1347(a)-(b).

18. *Id.* at § 1347(a).

19. U.S. CONST. amend. VI.

20. *Pointer v. Texas*, 380 U.S. 400, 403 (1965) ("We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the states by the Fourteenth Amendment." *Id.*).

21. *Id.* at 404.

22. *Id.* See, e.g., *Kirby v. United States*, 174 U.S. 47, 55-56 (1899); *Alford v. United States*, 282 U.S. 687, 692 (1931); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959); *In re Oliver*, 333 U.S. 257, 273 (1948); *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965).

23. *Mattox v. United States*, 156 U.S. 237, 242 (1895). The defendant was convicted of murder but the decision was reversed and remanded for a new trial. The confrontation issue arose when, at the new trial, the government read into evidence the testimony of two witnesses from the former trial, who had since died. The testimony provided strong evidence and the defendant was convicted again.

24. *Id.*

25. *Id.* The following quote from *Mattox* is frequently used to demonstrate the rights under the confrontation clause:

The primary object of the constitutional provision . . . was to prevent dep-

it forces the witness to testify under oath.<sup>26</sup> Ultimately, the confrontation clause intends to enhance the truth-seeking process by having the accuser present at trial.<sup>27</sup>

The confrontation clause constitutionally guards against flagrant abuses, trials by anonymous accusers and absentee witnesses.<sup>28</sup> Having established a broad principle, the Framers anticipated it would be supplemented, as a matter of common law, by the rules of evidence.<sup>29</sup> Thus, whether or not a witness is "available" under the rules of evidence, affects the defendant's right to confront the accuser.<sup>30</sup> An available witness must testify in court, but an unavail-

ositions or *ex parte* affidavits . . . from being used against the prisoner in lieu of personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they look at him, and judge his demeanor upon the stand and the manner in which he gives his testimony, whether he is worthy of belief.

*Id.* at 242-43.

26. *California v. Green*, 399 U.S. 149, 158 (1970). Respondent was convicted of furnishing marijuana to a minor, in violation of California law, chiefly on the basis of evidence consisting of prior inconsistent statements made by the minor at respondent's preliminary hearing and to a police officer. The Court ruled the purposes of the confrontation clause were satisfied since the witness testified at the trial under oath and was subject to cross-examination.

27. Cross-examination is the "greatest legal engine ever invented for discovery of truth." J. WIGMORE, EVIDENCE § 1367 (1940).

28. *Green*, 399 U.S. at 179. A famous example is provided by the trial for treason of Sir Walter Raleigh in 1603. A crucial element of evidence against him consisted of statements of one Cobham, implicating Raleigh in a plot to seize the throne. Raleigh had since received a written retraction from Cobham and believed that Cobham would now testify in his favor. After a lengthy dispute over Raleigh's right to have Cobham called as a witness, Cobham was not called, and Raleigh was convicted. *Id.* at 157 n.10, reprinted from J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326, 333-36 (1883).

29. *Green*, 399 U.S. at 179.

30. CAL. EVID. CODE § 240 (West 1985). Section 240 provides:

"Unavailable as a witness". (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is:

- (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant;
- (2) Disqualified from testifying to the matter;
- (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity;
- (4) Absent from the hearing and the court is unable to compel his attendance by its process; or
- (5) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying.

*Id.*

able witness is excused from testifying.

This rationale is based in logic and anchored in precedent.<sup>31</sup> In *West v. Louisiana*,<sup>32</sup> the United States Supreme Court reviewed early confrontation decisions and emphasized "availability" as the thread that tied the decisions together.<sup>33</sup> Furthermore, Justice Harlan concluded in *California v. Green*,<sup>34</sup> that in a criminal case, a state may not use hearsay<sup>35</sup> when the declarant is "available."<sup>36</sup>

Since the confrontation guarantee is limited by the availability rule, cross-examination is not mandated in every case.<sup>37</sup> In *Ohio v. Roberts*,<sup>38</sup> the Supreme Court stated that a literal reading of the confrontation clause would require the exclusion of any statement made by a declarant not present at trial.<sup>39</sup> But, if thus applied, the clause would abrogate virtually every hearsay exception, a result rejected as unintended and too extreme.<sup>40</sup>

Invariably, Supreme Court cases dealing with the right to confrontation involve hearsay evidence. *Roberts* establishes two requirements for admitting the out-of-court statements of a declarant who does not testify. First, the state must demonstrate that the declarant is "unavailable."<sup>41</sup> Second, the hearsay evidence must bear

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31. *Green*, 399 U.S. at 183 (Harlan, J., concurring).

32. 194 U.S. 258 (1904). The confrontation issue arose in this case because a district attorney read into evidence the testimony from a preliminary hearing of one Thebaud, after having proved that he was permanently absent from the state and was a non-resident thereof, and that his attendance could not be procured.

33. *Green*, 399 U.S. at 183 (Harlan, J., concurring).

34. *Id.* at 172.

35. "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. CAL. EVID. CODE § 1200 (West 1985).

36. *Green*, 399 U.S. at 183 (Harlan, J., concurring).

37. *Id.* at 182. The Supreme Court, in *Mattox*, 156 U.S. 237 (1895), recognized dying declarations and the trial testimony of a of a subsequently deceased witness as exceptions to the confrontation clause. In justifying these exceptions, the Court stated that "general rules of law . . . must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 243.

38. 448 U.S. 56 (1980). *Roberts* was charged with forgery of a check and with possession of stolen credit cards. Defense counsel questioned his own witness at a preliminary hearing and attempted to elicit from the witness that she gave permission to the defendant to use the check and credit cards. The witness denied this. The defendant's attorney did not ask to have the witness declared hostile and did not request permission to cross-examine her. The confrontation issue arose when the witness did not appear at trial and the witness' previous testimony was submitted into evidence.

39. *Id.* at 63.

40. *Id.*

41. *Id.* at 66. The test of unavailability is whether a state is powerless to compel a witness' attendance. *Mancusi v. Stubbs*, 408 U.S. 204, 210 (1972) (citing *Barber v. Page*, 390 U.S. 719 (1968)).

adequate "indicia of reliability."<sup>42</sup>

A number of United States Supreme Court decisions illustrate when the right to cross-examine is mandatory.<sup>43</sup> In *Pointer v. Texas*,<sup>44</sup> a defendant convicted of robbery brought a sixth amendment challenge to his conviction. The trial court had permitted the prosecutor to read into evidence a transcript of the preliminary hearing, which included the victim's testimony.<sup>45</sup> The defendant was not represented by counsel at the preliminary hearing and did not cross-examine the witness. The victim left the state and was "unavailable" at the time of trial.

Based upon these facts, the Supreme Court found that the defendant had been denied the right to confrontation.<sup>46</sup> The Court also stated that the case would have been quite different if the victim's statement had been taken at a full-fledged hearing which afforded the defendant a complete and adequate opportunity to cross-examine.<sup>47</sup> Consequently, it can be implied that the right to confrontation can be satisfied with adequate cross-examination outside the courtroom prior to trial.

In *Douglas v. Alabama*,<sup>48</sup> the petitioner and an alleged accomplice were tried separately for assault with intent to murder. The accomplice was called as a state witness in the petitioner's trial, but refused to testify on grounds of self-incrimination. The prosecutor, over the petitioner's objection, read the accomplice's confession into evidence. The jury convicted the petitioner.<sup>49</sup> The Court held that the inability to cross-examine the accomplice about the confession denied the petitioner the right to cross-examination guaranteed by the confrontation clause.<sup>50</sup>

Undeniably, the right to confrontation is a fundamental and essential right. As demonstrated, however, it is not absolute, but is

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42. 448 U.S. at 66. A state can demonstrate reliability by showing either that the evidence falls within a firmly established hearsay exception or that it bears particularized guarantees of trustworthiness.

43. *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415, 418-20 (1965). In *Douglas* the petitioner and an alleged accomplice were tried separately in Alabama state court for assault with intent to murder. The Court held that the petitioner's inability to cross-examine the alleged accomplice about the accomplice's purported confession denied the petitioner the right to confrontation.

44. 380 U.S. 400 (1965).

45. *Id.* at 401-02.

46. *Id.* at 406.

47. *Id.* at 407.

48. 380 U.S. 415 (1965).

49. *Id.* at 417.

50. *Id.* at 419.

limited by the availability of the accuser.<sup>51</sup> Equally undeniable is the necessity to protect sexually abused child witnesses from a potentially traumatic cross-examination. Thus, the Legislature faces the dilemma of protecting the well-being of the children while guaranteeing the defendant's right to confrontation.

### B. *California Penal Code § 1347*

Faced with the difficulties of prosecuting child sexual abuse cases, the California Legislature enacted Penal Code section 1347.<sup>52</sup> By providing judges with the discretion to employ this procedure, the Legislature expressly intended to protect the rights of a child witness, the rights of the defendant and the integrity of the judicial process.<sup>53</sup>

Section 1347 allows the court, upon motion<sup>54</sup> in any criminal proceeding involving a sexual offense,<sup>55</sup> to order the testimony of a minor who is ten years of age or younger<sup>56</sup> to be taken by contemporaneous examination and cross-examination, in another place.<sup>57</sup> Such testimony is then communicated to the courtroom by a two-way closed-circuit television.<sup>58</sup> The statute defines the preliminary requirements needed to employ the procedure.<sup>59</sup> The minor's testimony must involve recitation of the facts of an alleged sexual abuse committed on or with the minor.<sup>60</sup> In addition, the child must be "unavailable" as a witness.<sup>61</sup> The statute enumerates criteria in which the prosecution must clearly and convincingly prove that a child is unavailable as a witness unless closed-circuit television is used.<sup>62</sup>

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51. *See supra* note 41 and accompanying text.

52. CAL. PENAL CODE § 1347 (West 1985).

53. *Id.* at § 1347(a).

54. *Id.* at § 1347(b).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at § 1347(b)(1).

61. *Id.* at § 1347(b)(2).

62. Section 1347(b)(2) provides:

(2) The impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (D), inclusive, is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit television is used.

(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

Prior to enactment of section 1347, a judge in a major sexual abuse case<sup>63</sup> ruled that children could testify through closed-circuit television.<sup>64</sup> However, the judge was forced to overturn this ruling when *Hochheiser v. Superior Court*<sup>65</sup> was decided.

In *Hochheiser*, a defendant charged with engaging in lewd conduct with a minor sought a writ of prohibition.<sup>66</sup> The writ attempted to restrain the trial court from enforcing its order directing the complaining witness to testify outside the courtroom using closed-circuit television.<sup>67</sup> The court of appeal held that the trial court erred in ordering the use of closed-circuit television.<sup>68</sup> It stated that closed-circuit television is a far-reaching innovation that is more appropriately left to the Legislature for initial consideration because closed-circuit television testimony raises significant constitutional issues which potentially affect the defendant's right to confrontation.<sup>69</sup>

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 a crime.

(C) Infliction of great bodily injury upon the victim during the commission of a 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 in or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary in order to obtain the minor's testimony.

CAL. PENAL CODE § 1347(b)(2)(A)-(D) (West 1985).

63. See *supra* note 8 and accompanying text.

64. L.A. Daily J., Jan. 18, 1985, at 20, col. 2.

65. 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984). The case presented an issue of first impression concerning the power of the trial court, in the absence of specific statutory enabling legislation, to promulgate radically new procedures for alleged minor victims to testify via closed-circuit television.

66. *Id.*

67. *Id.* at 780, 208 Cal. Rptr. at 274. The prosecution presented testimony by the victim's parents in support of using closed-circuit television to prevent psychological harm. The father of ten year old T.B. testified at a preliminary hearing that his son, who was "shy about his private parts," had said he did not want to talk about the incident in front of a lot of people. The father also testified T.B. "went through several nights of nightmares and a round of bed-wetting." *Id.*

68. *Id.* at 787, 208 Cal. Rptr. at 276.

69. *Id.* at 785-87, 208 Cal. Rptr. at 276-79. (specifically stating that the ruling does not reach constitutional issues).

As a result of the ruling in *Hochheiser*,<sup>70</sup> the therapists, prosecutors and parents involved in the major sexual abuse case, discussed *supra*, urged the Legislature to approve closed-circuit testimony.<sup>71</sup> They argued that children would sustain permanent emotional damage if forced to testify in the presence of the defendant.<sup>72</sup> The proponents of the legislation point out that most children are frightened of the defendants.<sup>73</sup> "These kids are terrified," said Kee McFarlane, a nationally prominent child therapist.<sup>74</sup> "They are absolutely terrified."<sup>75</sup>

Opponents of section 1347 vigorously have fought for the right to have defendants present when children testify.<sup>76</sup> They claim the law interferes with the defendant's right to confront his or her accuser.<sup>77</sup> The opponents claim that allowing a witness to testify from outside the courtroom gives the jury the impression that the defendant is so dangerous, the victim cannot be allowed to sit in the same room.<sup>78</sup>

A defense attorney in the case said that the issue is particularly acute with his client because the evidence against her is the alleged victim's identification of her assailant.<sup>79</sup> If the child only views the defendant through a television monitor, the ability of the accuser to make a credible identification will be fatally impaired.<sup>80</sup>

From the foregoing, it is apparent that California Penal Code section 1347 is a controversial procedure because it potentially denies defendants the fundamental right to confrontation. The balance of this comment considers how courts may address this issue.

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70. *Id.* at 777, 208 Cal. Rptr. at 273.

71. L.A. Daily J., Jan. 18, 1985, at 1, col. 6.

72. *Id.* "Although children have testified in court in sexual molestation cases before in Los Angeles, the *McMartin* case is seen as pivotal because it involves a large number of young children who were allegedly frightened into years of silence and submission by death threats." *Id.*

73. *Id.*

74. *Id.* ("Kee McFarlane, . . . has been instrumental in aiding the Los Angeles district attorney in prosecuting the *McMartin* case. McFarlane interviewed the students from the *McMartin* school and helped prosecutors determine whether the children had been molested." *Id.*).

75. *Id.*

76. *Id.*

77. L.A. Daily J., May 18, 1985, at 2, col. 3.

78. *Id.* ("[D]efense lawyers [also] contend that there is no scientific evidence to prove the assertion that testimony in court can cause emotional and psychological harm." *Id.*).

79. *Id.*

80. *Id.*

### III. ANALYSIS

A challenge claiming section 1347 violates a defendant's right to confrontation raises an issue of first impression. Therefore, the analytical structure used to resolve the challenge is undetermined. The following analysis suggests and applies three judicial options for resolving the issue: an absolute ban,<sup>81</sup> equal protection<sup>82</sup> and the direct use of strict scrutiny if the statute infringes a defendant's right to confrontation.<sup>83</sup>

At the outset of the analysis, it is important to note that any constitutional challenge must satisfy three preliminary requirements before a court can address the issue on its merits: jurisdiction, justiciability and government action.<sup>84</sup> This analysis assumes the requirements are satisfied and only considers the issue on its merits.

#### A. *Absolute Ban*

A ban requires a court to strike down a statute as unconstitutional if the court deems it a significant infringement of a particular right.<sup>85</sup> Thus, the crucial question in the present situation is whether

81. The absolute ban approach was applied by the concurrence in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part), when addressing reverse racial discrimination under equal protection: "[A]ny statute must be stricken that stigmatizes any group or singles out those least well represented in the political process to bear the brunt of a benign program." *Id.* at 361.

82. See GUNTHER, *CONSTITUTIONAL LAW CASES AND MATERIALS* 586-93 (10th ed. 1983) [hereinafter GUNTHER].

83. For an example of a direct use of strict scrutiny to protect a constitutional right, see *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1981): "Where . . . the state attempts to deny the right of access [of the press to criminal trials] in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 606-07. See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-03 (1979); *NAACP v. Button*, 371 U.S. 415, 438 (1963).

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Jurisdiction presents no problem in this situation because it is a criminal prosecution. Furthermore, state courts may be called upon to review the constitutionality of . . . state . . . laws in the course of deciding cases before them. . . . Decisions from state courts are reviewable by the United States Supreme Court . . . where a state statute is drawn in question on grounds of its being repugnant to the Constitution.

J. NOWAK, R. ROTUNDA, J. ROTUNDA, J. YOUNG, *CONSTITUTIONAL LAW* 20, 25 (1983).

In order for a claim to be justiciable, it must "present a real and substantial controversy which unequivocally calls for adjudication of the rights claimed." *Poe v. Ullman*, 367 U.S. 497, 509 (1961) (Brennan, J., concurring). The government action in the present situation is the enactment of the statute.

85. See *Braunfeld v. Brown*, 360 U.S. 599, 607 (1960).

section 1347 infringes a defendant's right to confrontation.

The threshold issue is what criteria are used to make this determination. Case law can provide authority to support arguments with respect to the appropriate criteria, however, as discussed,<sup>86</sup> cases where defendants claimed denial of the right to confrontation involved hearsay evidence.<sup>87</sup> The focus was on the trustworthiness of hearsay submitted into evidence without the defendant's cross-examination of the unavailable declarant. The present situation is distinguished from those cases because it involves contemporaneous examination and cross-examination. Thus, simply using the criteria employed in the hearsay cases is inappropriate for the present situation. However, advocates can look to those cases for the essential elements of the right to confrontation.

Advocates claiming significant infringement of the right to confrontation might focus on *Mattox v. United States*.<sup>88</sup> This case indicates that face to face confrontation between the accuser and the defendant, in the presence of the jury, is an essential element of the right to confrontation.<sup>89</sup>

Challengers might argue that because the statute mandates the use of television, it significantly infringes the right to confrontation in various ways. First, the procedure denies the jury a full opportunity to observe the demeanor of the witness. The jury observes only what the camera reveals. If the television projects the witness' face, the jury is unable to notice the wringing of hands or a nervously tapping foot. The statute's general requirements compound this problem by failing to specifically address crucial details regarding execution of the procedure. Excluded details include camera angles, number of cameras used, and whether broad scenes, close-ups or something in-between most accurately conveys the witness' image.<sup>90</sup>

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86. See *supra* notes 41-51 and accompanying text.

87. *Pointer*, 380 U.S. 400 (1965); *Mattox*, 156 U.S. 237 (1895); *Green*, 399 U.S. 149 (1970); *West*, 194 U.S. 258 (1904); *Roberts*, 448 U.S. 56 (1980); *Douglas*, 380 U.S. 415 (1965).

88. 156 U.S. 237 (1895). See *supra* notes 23-25 and accompanying text.

89. 156 U.S. at 244 ("The substance of the constitutional protection is preserved to the prisoner . . . seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.*).

90. *Hochheiser*, 161 Cal. App. 3d at 786, 208 Cal. Rptr. at 278, states:

[T]here are serious questions about the effects on the jury of using closed-circuit television to present the testimony of an absent witness since the camera becomes the juror's eyes, selecting and commenting upon what is seen. . . . [T]here may be significant differences between testimony by closed-circuit television and testimony face to face with the jury because of distortion and exclusion of evidence.

Second, challengers may argue that the procedure critically handicaps the defendant's ability to cross-examine the witness. Face to face confrontation enables a defendant to pressure a witness into telling the truth. The witness might not feel this pressure from an electronic image. The witness avoids confrontation with the defendant and merely confronts a camera. The accuser never looks into the defendant's eyes, but only at a television screen.

Third, television may critically hamper a witness' ability to identify the defendant. A person appears slightly different on television. The jury can never be sure the accuser has accurately identified the defendant.

Opponents of section 1347 may thus argue that television causes fundamental changes in human perceptions, reactions and judgments. The totality of the circumstances indicates that two-way closed-circuit television does not preserve a defendant's essential right to confront his accuser. It infringes face to face confrontation, an essential element of the right, and creates a sufficient negative impact to justify an absolute ban of the statute.

On the other hand, proponents can rebut the preceding arguments by claiming *Green*,<sup>91</sup> not the dicta in *Mattox* cited by the opponents, defines the essential elements of the sixth amendment right. *Green* lists three essential criteria to protect the right. First, the witness must testify under oath,<sup>92</sup> and this is satisfied by section 1347(h). Second, the witness must submit to cross-examination.<sup>93</sup> Proponents will contend that section 1347 fulfills this requirement because its ultimate purpose is to accommodate examination and cross-examination. The last criterion states a jury must observe the witness' demeanor.<sup>94</sup> Section 1347(b)(3) satisfies this criterion by requiring that the television accurately communicate the image and demeanor of the minor to the judge, jury, defendant and attorneys. Thus, the proponents of section 1347 can maintain that, under the totality of the circumstances, the defendant is afforded the right to confrontation, and the statute is constitutional.

In the present situation, regardless of the criteria used, and until there is empirical evidence, the efficacy of the statute in affording the defendant the right to confrontation remains an unanswered question. Section 1347 has never been employed, thus there are no

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*Id.*

91. 399 U.S. 149 (1970). See *supra* note 26 and accompanying text.

92. 399 U.S. at 158.

93. *Id.*

94. *Id.*

concrete facts to consider. This analysis is not intended to exhaust definitive arguments, but rather to illustrate the framework of an absolute ban. The important aspect of the analysis is that the statute is stricken as unconstitutional if the court deems it a significant infringement of the defendant's right to confrontation.

### B. *Equal Protection*

The fundamental rights strand of equal protection<sup>95</sup> is the second judicial option considered in this analysis. The threshold issue is whether the statute classifies a certain group by treating them differently than the rest of society. If there is a classification, the analysis proceeds with an examination of the government's justification for the classification.

Section 1347 facially classifies criminal defendants accused of sexually abusing a child ten years of age or younger because it singles these people out for special treatment. The statute potentially denies these defendants the right to confront the child face to face in the presence of a jury. It subjects them to a different trial process from all criminal defendants. No other defendants face the possibility of an accusing witness testifying via closed-circuit television. Assuming that the court determines there is a classification, the analysis next proceeds with an examination of the government's justification for the classification.

Initially, this consists of two issues: whether the right involved is a fundamental right, and whether there is a significant infringement of that right. As with an absolute ban, if there is no infringement, the statute is upheld as constitutional. However, unlike an absolute ban, under equal protection, if there is a significant infringement, the statute is subject to means-ends scrutiny<sup>96</sup> instead of automatic repeal. If the right infringed is fundamental, the test is strict scrutiny. If the right is not fundamental, the test is a rational relationship.<sup>97</sup>

Under *San Antonio Independent School District v. Rodriguez*, the right to confrontation is a fundamental right because it is an explicit constitutional right.<sup>98</sup> The more difficult issue is whether

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95. See GUNTHER, *supra* note 82, at 787-89.

96. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

97. *Id.*

98. *Id.* at 33-34. In this case, the Court indicated that a fundamental right for purposes of equal protection "is a right . . . explicitly or implicitly guaranteed by the Constitution." *Id.* The right to confrontation is explicitly guaranteed in the Constitution. See *supra* note 19 and accompanying text.

there is a significant infringement of the right. As demonstrated in the absolute ban analysis, this issue cannot be resolved until the statute has been applied. However, if it is assumed section 1347 infringes a fundamental right, the government must demonstrate that the statute satisfies strict scrutiny.<sup>99</sup>

Strict scrutiny operates on the presumption that the statute is unconstitutional and thereby places the burden of proving the constitutionality of the statute on the government. It demands a compelling government interest, with means that are narrowly tailored to achieve the interest.<sup>100</sup> Furthermore, there cannot be a less onerous alternative for achieving this interest.<sup>101</sup>

Legislative history indicates that section 1347 is intended to protect the rights of child victims.<sup>102</sup> It is reasonable to presume that a court would consider this a compelling interest.<sup>103</sup> Thus, the arguments will focus on whether section 1347 is narrowly-tailored and the least onerous alternative for achieving the interest. Some examples of alternatives less onerous than closed-circuit television are allowing the defendant to leave the courtroom when the child testifies or placing the defendant outside the child's eyesight. The absence of a less onerous alternative demonstrates that the means are narrowly drawn.

As with the infringement issue, these issues cannot be resolved until the statute has been applied. The means and potential alternatives can be considered in the abstract, but ultimately a concrete determination must be based on the facts of a particular case.

### C. *Infringement-Strict Scrutiny*

The final judicial option is a two-step analysis which consists of two elements of equal protection. Under the first element, the court must consider whether the statute significantly infringes a right. If there is no infringement, the statute is upheld as constitutional. However, if there is an infringement, the second element requires the government to demonstrate that the statute satisfies strict scrutiny; otherwise the statute is struck down as unconstitutional.

The analysis does not consider any issues that are not addressed in equal protection. However, it more directly arrives at the use of

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99. See GUNTHER, SUPRA note 82, at 787-89.

100. 411 U.S. at 16-17.

101. *Id.*

102. See supra note 1 and accompanying text.

103. *Globe Newspaper*, 457 U.S. at 607.

strict scrutiny because there is no requirement that the statute is a classification or the right involved is fundamental. Thus, a challenger of section 1347 need only demonstrate a significant infringement of the right to confrontation to compel strict scrutiny. As with equal protection, the questions of whether there is an infringement and whether the statute satisfies strict scrutiny, remain unanswered. Resolution depends on application of the procedure, a conviction, and a challenge that the procedure unconstitutionally infringes the right to confrontation.

#### IV. PROPOSALS

Penal Code section 1347 must require a stricter standard of proof regarding the child's unavailability as a witness in order to withstand a constitutional challenge. Furthermore, it must include a provision regarding the specific execution of the procedure and address the situation which arises when the defendant opts for self-representation. Finally, the appropriate standard of review with respect to the right to confrontation is an absolute ban.

##### A. *Increase Proof Requirement*

Section 1347 requires clear and convincing evidence that the child is unavailable as a witness to permit the use of closed-circuit television.<sup>104</sup> The proof requirement must be heightened to the beyond a reasonable doubt standard because this statute impairs a fundamental right and must require the strictest standard of proof to justify its application. Finally, the beyond a reasonable doubt standard strengthens the statute's ability to withstand a constitutional challenge because it minimizes doubt as to whether the use of closed-circuit television is warranted.

##### B. *Specific Method of Execution*

A second proposal is an amendment to the statute which delineates a specific method of execution. The amendment must include specific language concerning camera angles, number of cameras used, scope of the image projected and similar items. This necessitates consultation with television experts. The California Legislature should tap the expertise of the television industry and solicit information prescribing the most efficient method to execute the procedure. It is quite likely that experts can define a formula which virtually guar-

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104. CAL. PENAL CODE § 1347 (West 1985).

antees the accurate transmission of the witness' image and demeanor to the courtroom. A uniform method with specific requirements creates less chance for error in the application of the procedure. Ultimately, it helps ensure the defendant's right to confrontation by guaranteeing effective communication during cross-examination.

### C. *Appoint Counsel*

The next recommendation addresses the situation which arises when the defendant opts for self-representation. Section 1347 permits the judge to question the child in chambers to aid in his determination of whether the use of closed-circuit television is warranted.<sup>105</sup> The prosecutor and defense counsel may submit questions for the child and attend the session, but the defendant is excluded from the process. Thus, when the defendant opts for self-representation, he is excluded from any *in camera* questioning of his accuser. The California Legislature should simply add a provision to section 1347(f) which directs the court to appoint counsel for the limited role of attending this meeting. This does not infringe on the defendant's right to self-representation and ensures the presence of defense counsel at the session.

### D. *An Absolute Ban as the Standard of Review*

The final proposal recommends an absolute ban as the standard of review in cases involving the right to confrontation and section 1347. Thus, if a court determines section 1347 significantly infringes a defendant's right to confrontation, the statute is struck down as unconstitutional. This is an appropriate response because the right to confrontation is guaranteed by the Bill of Rights.<sup>106</sup> The Framers of the Constitution balanced the social cost of the right of confrontation against the benefits to society and determined the right to confrontation is a fundamental right. An absolute ban as the standard of review insures a defendant this fundamental right and thus preserves the integrity of the judicial criminal system.

While protecting the rights of sexually abused children is essential, this goal should not be accomplished at the expense of a fundamental right or the integrity of the judicial system. Furthermore, if the statute is deemed unconstitutional, the onus would be placed on the Legislature to enact laws which both protect the rights

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105. *Id.* at § 1347(c)(3).

106. *See supra* notes 20-21 and accompanying text.

of child victims and insure fundamental rights.

## V. CONCLUSION

California Penal Code section 1347 attempts to protect child victims of sexual abuse from traumatic cross-examination by allowing contemporaneous testimony via two-way closed-circuit television. However, the statute may infringe a defendant's constitutional right to confrontation. The confrontation issue may arise when the procedure is employed and the criminal defendant is convicted.

This comment proposes amendments and a stricter burden of proof to strengthen the statute with respect to a confrontation challenge. It addresses both the importance of protecting child victims and the necessity to preserve the integrity of the judicial system by ensuring a defendant the right to confrontation. Finally, this comment recommends an absolute ban as the standard for reviewing the confrontation issue because it advances both these goals. A ban upholds the statute if there is no infringement of the right to confrontation. If there is an infringement, the statute is struck down as unconstitutional, preserving a defendant's constitutional right and judicial integrity while placing the onus on the Legislature to address the needs of child victims with effective laws.

Child victims of sexual abuse must have protection. It is the responsibility of the Legislature and the judiciary to provide this protection while preserving the fundamental rights of defendants and the judicial integrity of the criminal justice system.

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