Preparing the World for the Child: California's New Child Sexual Abuse Law

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COMMENTS

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INTRODUCTION

Child sexual abuse has recently gripped the nation's attention. The increase in reports and the subsequent increase in legal action have transformed a formerly unobtrusive event into a new crusade. The insidious and sexual nature of the crime, combined with its victims being members of a protected class of society, has fueled a unified and organized attack against those who sexually prey on children.

The nature of sexual child abuse, however, has made a swift victory impossible. Major studies have shown that in most cases children are sexually abused by someone they know and trust such as a parent, parent figure, or relative. Additionally, studies show...
that child sexual abuse by family members is less likely to be reported than child sexual abuse by strangers.\(^9\) Add to these facts the reality that many sexually abused children are too young to understand or to communicate their victimization adequately to the authorities\(^10\) and the probability of successful prosecution is dim.

The reality, however, is that sex cases generally have a tradition of pretrial prejudice and of a guilty verdict on relatively slight evidence, particularly when the accuser is a child.\(^11\) Even if an accusation does not end in a conviction, or even a trial, the accused virtually always suffers public shame, often resulting in strained marital relations.\(^12\) The accused may sometimes lose his or her job.\(^13\) Additionally, the accused may spend huge sums of money in the defense of a serious felony charge which ultimately is found to be unsubstantiated or false.\(^14\) Consequently, a conflict has arisen between the competing goals of protecting the accused and protecting the accuser.

California has responded to the wake of sensational disclosures of widespread child sexual abuse by enacting Penal Code section 1347.\(^15\) This new statute allows children ten years old or younger to testify via two-way closed-circuit television.\(^16\) Proponents of this unusual procedure contend that it will make testifying less traumatic for the child.\(^17\) Moreover, if the child feels safe and comfortable, she\(^18\) will more accurately relate her story and more ef-

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9. Cerkovnik, supra note 8, at 702.
11. D. MacNamara & E. Sagarin, supra note 4, at 77.
13. Id.
14. Two former McMartin Preschool teachers say that eighteen months of legal battles have "wiped out their finances and made them objects of unspeakable contempt." One of them has had legal expenses in excess of $200,000. L.A. Daily J., Sept. 30, 1985, at 2, col. 5.
15. CAL. PENAL CODE § 1347 began as Senate Bill 46. The bill was authored by Senator Art Torres (D-Los Angeles), and became law on May 20, 1985.
18. "For every ten girl victims there is one boy victim." J. Barkas, Victims 130 (1978). But see Groth, Hobson and Gary, The Child Molester: Clinical Observations, reprinted in S. Smith, Children's Story: Children in Criminal Court 89 (1985), where the authors found that, "[p]readolescent boys and girls are at equal risk of being sexually victimized . . . ."; and Mann, The Assessment of Credibility of Sexually Abused Children in Criminal Court Cases, 1985 Am. J. Forensic Psychiatry 9, where the author stated
fectively aid in the prosecution of the abuser.¹⁹

Notwithstanding its noble intentions, California's new statute does not solve the emotional and legal problems inherent in sexual child abuse cases. Further, the statute threatens basic tenets of criminal justice such as the defendant's constitutional right to confront complaining witnesses.²⁰ In part I, this Comment will explore the statute itself including its procedure, legislative history, and criteria for use.²¹ Part II will examine the actions other states have taken in addressing this issue.²² Finally, Part III will critically examine the actual benefit which section 1347-type legislation gives to child witnesses and will conclude with suggestions for future disposition of sexual child abuse cases.²⁴

I. CALIFORNIA PENAL CODE SECTION 1347

The reasons behind California's new law are various. Before discussing why California adopted Penal Code Section 1347, however, identifying at this point just what the newly enacted statute entails is helpful.

that prior to age eighteen, one out of four girls and one out of five boys have had sexual contact with an adult.

19. This conclusion is premised on the fact that "[t]here is usually no medical evidence to corroborate the crime. Children who are victims of sexual abuse by a parent or adult family member are rarely forcibly assaulted." J. BULKLEY, supra note 1, at 113.

20. Constitutional themes which recur throughout this Comment will not be treated in depth as they are beyond the scope of this work. For a discussion of these issues, see generally Coppel, supra note 17, and Note, The Testimony of Child Victims in Sex Abuse Prosecutions: Two New Innovations, 98 HARV. L. REV. 806 (1985).

21. The confrontation clause of the sixth amendment provides: "[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. The California Constitution states: "The defendant in a criminal trial has the right . . . to be confronted with the witnesses against the defendant." CAL. CONST. art. I, § 15.

The touchstone federal case entitling the defendant to a face-to-face confrontation with his accuser is United States v. Benfield, 593 F.2d 815 (8th Cir. 1979). In Benfield, the court, noting the precedents set in Dowell v. United States, 221 U.S. 325 (1911), Kirby v. United States, 174 U.S. 47 (1899) and Mattox v. United States, 156 U.S. 237, (1895), stated: "The right of cross-examination reinforces the importance of physical confrontation. Most believe in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge." 593 F.2d at 821.

California courts have followed this federal lead. See, e.g., Herbert v. Superior Court, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981).

Many law review articles have been written on the accused's right of confrontation in the face of videotaped or closed-circuit testimony. See Symposium Issue: Child Abuse and the Law, 89 DICK. L. REV. 577; Comment, Libal's Child Courtroom: Is it Constitutional?, 7 J. JUV. L. 31, 31-39 (1983); Note, supra note 19, at 806-27; Comment, supra note 10.

22. See infra notes 25-111 and accompanying text.

23. See infra notes 112-28 and accompanying text.

24. See infra notes 129-37 and accompanying text.
A. The Procedure

Penal Code section 1347 allows the court in any criminal proceeding, upon motion, to order the testimony of a child 10 years old or younger to be taken by contemporaneous examination via two-way closed-circuit television. The child’s testimony must involve the recitation of facts surrounding an alleged sexual offense. Section 1347 allows the defendant to subject the child’s testimony to contemporaneous cross-examination.

According to that code section, the child will testify from a location other than the courtroom, and his or her image will be transmitted live to the judge, jury and counsel. In the room with the child will be a support person, a non-uniformed bailiff and a court representative. Separate videotapes will record the images of the child and the support person. The child’s examination is taken under oath and the defendant’s image is transmitted live to the witness via two-way closed-circuit television.

26. Id. § 1347(b)(1).
27. Id. § 1347(b).
28. Id.
29. Id. § 1347(e). The support person is designated pursuant to CAL PENAL CODE § 868.5 (Deering Supp. 1986), which states in pertinent part:
(a) Notwithstanding any other provision of law, a prosecuting witness 16 years of age or under in a case involving a violation of Section 243.4, 261, 273a, 273d, 285, 286, 288, 288a, 289, or 647a or a violation of Subdivision (1) of Section 314, shall be entitled for support to the attendance of a parent, guardian, or sibling of his or her own choosing, whether or not a witness, at the preliminary hearing and at the trial, during the testimony of the prosecuting witness. The person so chosen shall not be a person described in Section 1070 of the Evidence Code unless the person is related to the prosecuting witness as a parent, guardian, or sibling and does not make notes during the hearing.
(b) If the person so chosen is also a prosecuting witness, the prosecution shall present, on noticed motion, evidence that the person’s attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness. Upon that showing, the court shall grant the request unless information presented by the defendant or notice by the court establishes that the support person’s attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony.
(c) The testimony of the person so chosen who is also a prosecuting witness shall be presented before the testimony of the prosecuting witness. The prosecuting witness shall be excluded from the courtroom during the person’s testimony. Whenever the evidence given by the person would be subject to exclusion because given before the corpus delicti has been established, the evidence shall be admitted subject to the court’s or the defendant’s motion to strike that evidence from the record if the corpus delicti is not later established by the testimony of the prosecuting witness.

In addition, the support person will be instructed not to coach, cue, or influence the testimony of the minor. Id. § 1347(d)(4).
30. Id. § 1347(e) The court representative is appointed by the court after consultation with the prosecution and defense.
31. Id. § 1347(h). This ostensibly preserves the defendant’s right of confrontation.
32. Id. § 1347(h). These tapes will be destroyed after five years. Id. § 1346(g).
When the court orders the testimony of a minor to be taken via two-way television, the court must first make a brief statement on the record, outside of the jury’s presence, of the reasons supporting the order. The court then must tell the jury members that “they are to draw no inferences from the use of two-way closed-circuit television as a means of facilitating the testimony of the minor.” Also outside of the jury’s presence, the court must instruct counsel that they may make no comment during trial regarding the use of the two-way television procedures.

B. Legislative Intent

Prior to section 1347’s enactment, existing California law contained provisions for:

(i) videotaping the preliminary hearing testimony of a minor 15 years of age or less in specified cases and for admission of the videotape as evidence at trial;

(ii) excluding the public by using methods including closed-circuit television or videotaped depositions at a preliminary hearing in certain cases involving sex offenses;

(iii) prohibiting state and local governments from requiring and requesting a complaining witness in a sex offense case to take a polygraph examination; and

(iv) prohibiting trial courts from ordering complaining witnesses to submit to psychiatric or psychological examinations to assess credibility.

In addition, Penal Code section 288(c) requires the court to control the mode of interrogation of a witness and to consider the needs of a child victim of a lewd or lascivious act. Under section 1347, the court must do whatever is necessary and constitutionally permissible “to prevent psychological harm to the child.”

The intent of the California legislature in enacting section 1347 is summarized in that section’s opening line:

33. The statement shall set forth the reasons “with sufficient specificity to permit meaningful review and to demonstrate that discretion was exercised in a careful, reasonable, and equitable manner.” Id. § 1347(d)(1).

34. Id. § 1347(d)(2).

35. Id. § 1347(d)(3).

36. Id. § 1346.

37. CAL. PENAL CODE § 868.7 (Deering 1983).

38. Id. § 637.4.


40. CAL. PENAL CODE § 288(c) (Deering 1985) provides: “In any arrest or prosecution under this section the peace officer, the district attorney, and the court shall consider the needs of the child victim and shall do whatever is necessary and constitutionally permissible to prevent psychological harm to the child victim.”

41. S.B. 46, at 2. The bill’s author notes that existing law defines oral examination as being in the presence of the jury and secures to a defendant the right to confront and cross-examine witnesses.
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. . . . 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.\textsuperscript{42}

On signing the bill into the law, Governor George Deukmejian\textsuperscript{43} said that it "provides a means to help ease the trauma to some children who face having to reopen the terrible memories of sexual abuse in a court of law."\textsuperscript{44}

With all the existing California provisions geared toward assisting the child witness in sexual abuse cases, what prompted the legislature to adopt the "unusual court procedures" now contained in California Penal Code section 1347? Perhaps the two most catalytic events triggering that code section's enactment were the McMartin Pre-School\textsuperscript{45} and Hochheiser cases.\textsuperscript{46}

On March 22, 1984, seven employees of the McMartin Pre-School were arrested and charged with 208 counts of child molestation.\textsuperscript{47} The nature and number of allegations made the case especially notorious, and therefore politically remarkable.\textsuperscript{48} Parents of the allegedly abused children lobbied the legislature to enact a closed-circuit testimony provision to enable their children to avoid exposure to what the parents viewed as potentially harmful courtroom proceedings.

Meanwhile, in November 1984, the California Court of Appeal refused to allow the use of closed-circuit television for the nine and ten-year-old complaining witnesses in Hochheiser v. Superior Court.\textsuperscript{49} The prosecutor requested the use of the two-way television system on the day of trial.\textsuperscript{50} Defense counsel objected and filed a writ of prohibition, stating that the procedure would de-

\textsuperscript{42.} CAL. PENAL CODE § 1347(a) (Deering Supp. 1986) (emphasis added).
\textsuperscript{43.} Former Attorney General of California, elected Governor in 1982 and re-elected in 1986.
\textsuperscript{45.} This case has yet to go to trial.
\textsuperscript{48.} The allegations included animal slaughtering to assure the children's silence and sexual games such as "naked move star," in which a young boy supposedly took off his clothes in front of cameras. Authorities later claimed that the pre-school existed solely for the purposes of sexual abuse and child pornography. San Diego Union, Oct. 2, 1985, at A-3, col. 2-3.
\textsuperscript{50.} Id. at 781, 208 Cal. Rptr. at 275.
prive the defendant of a fair trial and that the notice was not timely. 51 The prosecution then presented the testimony of the two boys' parents to show that the closed-circuit television was necessary to prevent psychological harm to the two boys. 52 The trial court allowed the procedure based on the "inherent power of the court" to regulate its proceedings. 53

Hochheiser presented an issue of first impression in California concerning the "power of the trial court to promulgate radically new procedures" 54 regarding the testimony of minors in sex offense cases. The appellate court found that the trial court had erred in ordering the use of closed-circuit television and hence issued a peremptory writ of prohibition. 55 The court reasoned that authorizing closed-circuit testimony should be left to the "considered judgment of the Legislature." 56

The court was concerned primarily about the lack of physical confrontation when such a procedure is used. 57 The court was also concerned that the procedure might adversely affect the presumption of innocence "by creating prejudice in the minds of the jurors towards the defendant similar to that created by the use of physical restraints on a defendant in the jury's presence." 58 Finally, the court reasoned that neither Evidence Code section 765, 59 nor Penal Code section 288(c) 60 encompassed such testimony. 61 The

51. Id.
52. Id. The father of ten-year-old T.B. testified that his son was "shy about his private parts" and had said he did not want to talk about the incident in front of a lot of people. After the preliminary hearing, T.B. experienced several nights of nightmares and bed-wetting which had since tapered off. His father had not talked with T.B. about testifying since that time, over a year earlier.

The mother of eight-and-a-half to nine-year-old S.W. testified that her son was "totally distraught" after testifying at the 1982 preliminary hearing. He reverted back to baby-like behavior such as wanting to wear diapers. When she approached S.W. about testifying in June 1984, he "burst into tears" and told her that he would not go back to court and did not know anything. He also seemed to be eating less.

53. Id. at 782-83, 208 Cal. Rptr. at 276.
55. Hochheiser, 161 Cal. App. 3d at 794, 208 Cal. Rptr. at 284.
56. Id. (quoting Reynolds v. Superior Court, 12 Cal. 3d 834, 837, 528 P.2d 45, 46, 117 Cal. Rptr. 437, 438 (1974)).
57. Hochheiser, 161 Cal. App. 3d at 786 n.2, 208 Cal. Rptr. at 278 n.2. The court noted that "a careful reading of the cases [indicates] that physical confrontation is an element of sixth amendment guarantees."
58. Id. at 787, 208 Cal. Rptr. at 279. The court was also concerned about distortion of the witness' testimony and the potential that the jury might give more credibility than is desired to the televised testimony. Id. at 786-87, 208 Cal. Rptr. at 279.
59. CAL. EVID. CODE § 765(a) (Deering 1986) provides: "The court shall exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment."
60. See supra note 40 for the provisions of CAL. PENAL CODE § 228(c).
court held that this Evidence Code section governed only witness questioning within the courtroom. The court also found that it could not "imply from the broad, open-ended language in [Penal Code section 288] subdivision (c) that the Legislature intended such a fundamental change in . . . law which would abrogate traditional statutory rights to the presence of the testifying witness in the courtroom with the defendant."

State Senator Art Torres (D-Los Angeles) introduced Senate Bill 46 to the California state legislature in 1984, responding primarily to the McMartin uproar and to the Hochheiser decision. "Of the dozens of so-called protection bills which flooded the legislature [that] session, [Senate Bill] 46 was among the most restrained in the blows struck against due process guarantees." Another bill which would have permitted the use of hearsay testimony by children age ten and under in cases where there is corroboration was rejected by the Public Safety Committee. After a great deal of debate and amendment, Senate Bill 46 became California Penal Code section 1347.

C. Criteria for Use of TV Testimony

In order to implement the unusual procedures of Penal Code section 1347, the court must first make all of the following findings:

1. The minor's testimony will involve a recitation of the facts of an alleged sexual offense committed on or with the minor.
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 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 drafting the statute, the legislature intended that the court exercise its discretion in invoking section 1347 only when "the facts and circumstances in the individual case present compelling evidence of the need to use these unusual procedures." In doing so, the court necessarily must balance the rights of the defendant against the need both to protect a child witness and to preserve the court's "truthfinding function." As a practical matter, however, nearly every child under eleven who is a victim of sexual abuse and who is deemed competent to testify could qualify to give his or her testimony via two-way closed-circuit television.

Part one of the test for implementation of section 1347 procedures is necessarily found in every sex offense case: It is tautological that the testimony of a sexual child abuse victim should include a recitation of the facts of an alleged sexual offense.

Part two of the test, while apparently limiting the implementation of closed-circuit testimony, remains so general as to allow nearly all children to come within the parameters of Penal Code section 1347. The child witness need meet only one of the four factors (A, B, C, or D) to satisfy part two of the test.

68. CAL. PENAL CODE § 1347(b) (Deering Supp. 1986) (emphasis added).
69. Id. § 1347(a).
70. Id.
71. CAL. PENAL CODE § 1347 does not alter the basic requirements of witness competency as given by CAL. EVID. CODE §§ 700-704. (Deering Supp. 1986). The pertinent portions of the Evidence Code, §§ 700 and 701 are as follows:

§ 700. General rule as to competency
Except as otherwise provided by statute, every person is qualified to be a witness and no person is disqualified to testify to any matter.

§ 701. Disqualification of witness
A person is disqualified to be a witness if he is:
(a) Incapable of expressing himself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or
(b) Incapable of understanding the duty of a witness to tell the truth.

Note that there is no minimum age requirement for witnesses in the Evidence Code.
**Factor A**

The first factor of part two addresses the various types of pressure put on the child not to report sexual abuse or, once reported, not to testify.\(^2\) The majority of child sexual abuse victims is included in this broad subdivision. The types of coercion listed by the legislature mirror the very reasons why child sexual abuse often goes unreported. Part of the "sexual abuse paradigm"\(^3\) is that the abuser threatened or somehow coerced the victim to remain silent about his or her sexual involvement.\(^4\) Therefore, more often than not, there will be evidence that such coercion has occurred.

Interestingly, the language of the statute does not expressly limit "threats" to pressure put on the child by the defendant. That a family member of the child, for instance, an older sibling or mother,\(^5\) might try to prevent the child from testifying to preserve what is left of the family is not uncommon. In such a case, it would be illogical and unfair to then implement procedures which "penalize"\(^6\) the defendant for something he did not do.

A child's experience not fitting within the ambit of factor A likely would occur where (a) the abuser rewarded the victim for nondisclosure,\(^7\) or (b) the child's own misunderstanding of the abuse prevented him or her from coming forward.\(^8\) In the former situation, the abuser appears to be the model parent or friend to the child. Thus, no threats are needed to keep the child silent about the deviant part of their relationship. In the latter situation, the child would be either too young or otherwise incapable of understanding the abuse, and most likely incompetent\(^9\) to testify at all.

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\(^2\) Factor "A" does not lend itself to an easy description because of its breadth. Indeed, this is part of the problem with it as a criterion.

\(^3\) It would be impossible to identify a set of signs from which to tell whether a particular child is "at risk" of sexual molestation. The best we can do is formulate a model or paradigm, which includes: frequent occurrence within a family generation after generation, unwillingness of the mother to accept the fact that incestuous molestation has taken place and threatening of the child to maintain his or her silence. S. SMITH, CHILDREN'S STORY: CHILDREN IN CRIMINAL COURT 2-6 (1985).

\(^4\) J. BULKLEY, supra note 1, at 113.

\(^5\) "The mother will often side with the man and do everything possible to undermine the child." She, too, was often abused as a child. S. SMITH, supra note 73, at 3.

\(^6\) While not a "penalty" as penalties usually are defined, § 1347's requirement of a special jury instruction, etc., show that there is a real danger that the televised testimony procedure prejudices the defendant.

\(^7\) Child molesters often buy silence. These payoffs are often seen by the outside world as signs of a loving relationship, thereby reinforcing the molesting situation. S. SMITH, supra note 73, at 5.

\(^8\) These children would probably have a difficult time meeting the threshold witness requirements of the Evidence Code as well. See supra note 71.

\(^9\) See supra note 71 for the provisions of the CAL. EVID. CODE dealing with the competency of witnesses.
Factors B and C

At first glance, the second and third factors of part two appear to preclude the use of closed-circuit television for many children. Child sexual abuse, as previously mentioned, is usually perpetrated by a person close to the child who has the child's trust.\(^\text{80}\) Therefore, the use of a firearm or other deadly weapon or the infliction of great bodily injury upon the victim rarely occurs in child sexual cases.\(^\text{81}\)

The prosecution, however, can make arguments which could greatly enlarge the application of these two factors. First, almost anything can be considered a deadly weapon if the perpetrator intends it to be such.\(^\text{82}\) Case law is replete with circumstances where a seemingly innocent object has been considered a deadly weapon.\(^\text{83}\) To a small child, could the accused's hands be considered deadly weapons?

Second, and even more ambiguous than the term "deadly weapon," is the notion of "serious bodily injury" in the context of child sexual abuse cases. For example, would the injury caused by the vaginal or anal penetration of a small child be deemed part of the offense?\(^\text{84}\) Or would it also, for the purposes of Penal Code section 1347, be considered serious bodily injury? Similarly, what if, as a consequence of the molestation, the child contracts a venereal disease?\(^\text{85}\) Given the protection afforded the child within Penal Code section 1347, the above examples could be considered "serious bodily injury," and as a result, many more children would be able to testify via closed-circuit television.\(^\text{86}\)

In sum, the first three factors of part two seem over-encompass-

\(^{80}\) See supra note 4.

\(^{81}\) There is a small percentage (less than 3 percent) of molesters who may be described as "sadistic," in whom aggression is paired with sexual arousal. Adams, Molestor Myths and Stereotypes: Understanding Child Sexual Abuse, FORUM, May-June, 1985, at 11.

\(^{82}\) See CAL. PENAL CODE § 245 (Deering 1984).

\(^{83}\) See, e.g., Tennessee v. Garner, 471 U.S. 1 (1985). Deadly weapons range from guns to knives to baseball bats to rope.

\(^{84}\) Child sexual abuse offenses occur when the following statutes are violated: CAL. PENAL CODE § 261.5 (Deering 1985) (statutory rape); § 285 (Deering 1985) (incest); § 286 (Deering Supp. 1986) (sodomy); § 288 (Deering 1985) (lewd and lascivious acts); § 288a (Deering Supp. 1986) (oral copulation); and § 289 (Deering Supp. 1986) (penetration of genital or anal opening by a foreign object).

\(^{85}\) Many times, the symptoms of gonorrhea, syphilis and herpes are the unfortunate results of abuse which lead family members, school teachers or doctors to discover the sexual abuse of a child. That no cases of AIDS have been reported as transmitted through child sexual abuse is interesting to note. The Sexual Offender and the Child Victim, supra note 6.

\(^{86}\) Many of these questions will be answered in future cases; however, presently there is such uncertainty that § 1347 will be available in an extraordinary number of trials.
ing and ambiguous. If greatly amended and clarified, they could perhaps serve as adequate criteria for the use of section 1347. For instance, if factor A were limited only to coercion of the child by the defendant, then that criterion would be more consistent with the legislature's goal of protecting the child from further ill treatment by the defendant. The final factor, however, is not so easily reformed. As drafted, the last criterion is so outrageous—and constitutionally suspect—that it should be deleted entirely. That criterion is factor D.

Factor D

Factor D, the final factor of part two, arguably qualifies any remaining child witness to testify via two-way television. Factor D states that "[c]onduct 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" 87 will terminate the necessity for the child's in-court testimony and start the cameras rolling.

The statute gives courts some guidance in making their decisions to permit testimony via television:

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 evidence that the special procedure described in this section is necessary in order to obtain the minor's testimony. 88

Nowhere in the statutory guidelines does the legislature explain what it intended by the word "conduct" when referring to the defendant and defense counsel in factor D. Therefore, practically speaking, what conduct will violate factor D?

Imagining conduct by the defendant which would violate section 1347(b)(2)(D) is relatively simple. For example, threatening gestures 89 made by the defendant which impede the child's testimony could be sufficient to cause the use of two-way contemporaneous examination. But what about facial expressions or even posture? And what if the child is simply extraordinarily timid? The problem compounds when considering the role of defense counsel. If the possibility of television testimony is based on the actions of the defendant's attorney in addition to the defendant, once again

88. Id. § 1347(b).
89. Examples of threatening gestures arguably include shaking one's fist in the direction of the witness, or drawing a finger across the throat.
the defendant is penalized for something he did not do.90

California courts already have within their power the authority to regulate the behavior of the participants during a trial.91 A judge may hold the defendant or counsel in contempt of court if his or her behavior has a deleterious effect on the witness or the legal process. Additionally, judges may admonish defense counsel for objectionable behavior.

A greater problem presented by factor D is that the defendant's constitutional right to the effective assistance of counsel92 is jeopardized. This right places conflicting burdens on defense counsel in child sexual abuse cases which he or she must reconcile. On one hand, defense counsel should vigorously cross-examine all witnesses. On the other hand, defense counsel must moderate the cross-examination or the judge will remove the witness from the courtroom and from the physical presence of the jury.93

California appellate courts now give broad review to claims of ineffective assistance of counsel. The standard formerly was that so long as the trial was not "a farce or a sham,"94 the defendant's constitutional rights were deemed satisfied. An appellate court looked only to the fairness of the trial as a whole.

Today, the standard is much more stringent, and an appellate court scrutinizes the quality of representation given to the accused throughout the case.95 The California Supreme Court in People v. Pope96 adopted the rule that "a defendant is entitled to the reasonably competent attorney acting as his diligent conscientious advocate."97 As a result, defense counsel's performance at trial has been criticized more often and for more reasons, especially regarding cross-examination.98 To be deemed competent, counsel arguably must thoroughly cross-examine all witnesses.

In many child sexual abuse cases, the alleged victim is the only

90. While attorneys act on behalf of their clients and have authority to legally bind them, a client can be punished only for his own crime.
97. Id. at 423, 590 P.2d at 856, 152 Cal. Rptr. at 738 (quoting United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973)).
98. Semel, supra note 95, at 22. The scope of the appellate court's review includes any cross-examination done by counsel at the preliminary hearing as well as at trial. Because the preliminary hearing is a vital discovery tool, cross-examination of witnesses, including the alleged victim, should be thorough.
witness against the accused, so vigorous cross-examination is crucial to a diligent defense. However, the threat of televised testimony likely will hamper counsel’s efforts. “How much is too much?” is a question which will nag at defense attorneys and perhaps inhibit their aggressive advocacy. Realistically, the problem of counsel bullying a child witness is a fear fueled by a few horror stories, but seems to remedy itself through its own inherent penalty. Neither judges nor jurors look with smiling approval on an attorney badgering a child, especially a child who allegedly has been sexually abused. Therefore, even in the absence of section 1347’s provisions, the defense counsel’s interest in a successful cross-examination is best served by launching a tempered attack on the child’s testimony.

Unavailability

Finally, the court’s decision permitting the use of closed-circuit television turns on a finding that the child is otherwise unavailable. When will a child be deemed “unable to continue his or her testimony?” Given the emotional nature of the testimony coupled with the strange courtroom surroundings, the child likely will cry or become quiet during the course of the cross-examination. The statute says that “the minor’s refusal to testify shall not alone” deem the unusual procedure necessary. But, will refusal coupled with tears plus difficulty in extracting his or her testimony be enough?

In determining whether the child is “unavailable” to testify in open court, an examination of Penal Code section 1346(d) is informative. The language of section 1346(d) should be applicable, according to the California Attorney General, since section

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99. Deputy District Attorney Glenn Stevens, a prosecutor in the McMartin Pre-School case, alleges that defense counsel “badgered” a child witness. He gives the example of one child whose direct examination lasted one and one-half hours being cross-examined for seventeen days. L.A. Daily J., Sept. 30, 1985, at 20, col. 3.

100. “Courtroom procedures in America . . . have given rise to an etiquette whereby one seldom attempts to impeach the testimony of the child for such effort, it is believed, antagonizes jury or judge and does the defendant more harm than good.” D. MacNamara & E. Sagarin, supra note 4, at 76.


103. Cal. Penal Code § 1346(d) (Deering Supp. 1986) provides that: If at the time of trial the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the meaning of Section 240 of the Evidence Code, the court may admit the video tape of the victim’s testimony at the preliminary hearing as former testimony under Section 1291 of the Evidence Code.
1347 directly follows it, and since section 1346(d) is not specifically limited to Evidence Code section 240.104 The language of section 1346(d) expands the scope of unavailability beyond Evidence Code section 240 by including the phrase "medically unavailable" to its definition. A court wishing to use the section 1347 procedures can make the requisite finding of unavailability based on "some showing" that the child will suffer significant trauma if required to testify in open court.

Such a radical departure from the normal courtroom procedure must have more definite criteria for implementation to avoid derogation of any party's rights. While legitimate to reserve some discretion in the court, the criteria of Penal Code section 1347 are so easily satisfied that closed-circuit television can almost always be used. In essence, the court seems to be obliged to grant the use of the section 1347 measures on the insistence of the prosecutor because of the liberal and ambiguous language of the statute's criteria for implementation.105 This result is especially unsettling because the effects of the two-way television testimony are not known.

D. Unknown Effects of Section 1347

How jurors will react to television testimony is not yet known. They will be instructed by the court to "draw no inferences from the use of the two-way closed-circuit television as a means of facilitating the testimony of the minor."106 Practically, however,

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104. Memo from Office of Attorney General, supra note 101. CAL. EVID. CODE § 240(a) and (b) (Deering 1986) state:
(a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:
(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her 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 or her attendance by its process.
(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her 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 or her statement for the purpose of preventing the declarant from attending or testifying.

105. San Diego Deputy District Attorney Jay Coulter opined that the District Attorney's office would probably use the two-way television testimony "very sparingly," as it lessens the impact of the child's testimony at trial. Remarks, THE SEXUAL OFFENDER AND THE CHILD VICTIM, supra note 6.

drawing no inferences may not be possible for the jurors. In fact, they may speculate that the defendant must be some sort of a "monster" if the court will not allow the child to testify in the same courtroom as the defendant. Such conscious or unconscious speculations by the jurors translate the presumption of innocence into a presumption of guilt.\footnote{107}

Additionally, the televised testimony might even be given greater weight and credibility by virtue of its presentation. There exists a phenomenon referred to as "status-conferral" where information received by television is believed more than if delivered live.\footnote{108} The reality is that children sometimes do lie,\footnote{109} and where the child is the only witness against the accused, bringing the child's falsehoods to the judge and/or jury's attention is imperative. The defendant's ability to do so through the strange video environment,\footnote{110} however, may be stifled by Penal Code section 1347.

The effect that the cameras will have on the child and his or her appreciation of the solemnity of the courtroom proceedings is also unknown. From a very young age, children are told, "it's only TV," and that what is on the screen is "just pretend." In the percentage of cases where the child's allegations are false, the defendant must uncover the fact that the child is lying. The video environment, however, may reinforce the child's fantasy, insulating him or her from the purifying effect of a face-to-face challenge.\footnote{111}


\footnote{109} A small percentage, less than ten percent, of child sexual abuse reports are false. These false reports cause the alleged perpetrators not only humiliation, but also the expenditures of large sums of money in their defense. The false reports often ultimately cause the breakup of marriages and the loss of the alleged perpetrators' jobs. McGlinn & Girsh, \textit{Why Children Make False Accusations of Sexual Abuse}, SAN DIEGO TRIAL LAW. A. TRIAL BAR NEWS, Jan. 1986, at 24.

\footnote{110} Arguably, there are significant differences between testimony via closed-circuit television and live testimony. The camera lens becomes the jurors' eyes and can affect their perception of the witness's demeanor and credibility. \textit{Hochheiser}, 161 Cal. App. 3d at 786, 208 Cal. Rptr. at 278-79.

\footnote{111} "Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge." Herbert v. Superior Court, 117 Cal. App. 3d 661, 670, 172 Cal. Rptr. 850, 855 (1981).
II. RESPONSES IN OTHER STATES

California is not the first state to adopt the two-way closed-circuit television procedure. As of this writing, four other states (Kentucky, Louisiana, Maryland and Texas)\(^{112}\) have enacted similar statutes, and Ohio has a bill pending.\(^{113}\) In addition, the New Jersey Superior Court, without any enabling legislation, recently has permitted the procedure's use in a child sexual abuse case in *State v. Sheppard*.\(^{114}\)

The New Jersey court did an extensive survey of existing law before reaching its decision in *Sheppard*.\(^{115}\) The court also held an evidentiary hearing before allowing the television testimony. At this hearing, the state produced numerous witnesses, including a forensic psychologist, two attorneys with experience in the prosecution of child abuse cases, and a video expert all supporting the use of the video.\(^{116}\) While defense counsel cross-examined each witness, he did not introduce any evidence.\(^{117}\)

The *Sheppard* court reached its decision after employing a balancing test between the "confrontation right of the defendant against the 'right' of a child victim to testimonial protection."\(^{118}\) The court distinguished *United States v. Benfield*\(^{119}\) and *Herbert v. Superior Court*\(^{120}\) to hold that the use of televised testimony "will not unduly inhibit the defendant's right of confrontation," and that the testimony of a child victim of sexual abuse is an appropriate "exception" to the confrontation clause.\(^{121}\)

Other procedures have been implemented in many states to fa-
cilitate the child's testimony. Fourteen states have statutes providing for the videotaping of the child's testimony for later use in courts. Aside from constitutional problems, the flaw in that system is that in most cases, the videotape is made in a smaller room, thereby making the child closer to the defendant. Also, a judge is not present to monitor the behavior of the participants. In some cases, too, the child may have to go through more depositions and/or interviews, taking more time than he or she would have spent on the stand at trial.

A further time-consuming and potentially traumatic experience for the child is the process by which he or she is found unable to testify, thereby allowing for the alternatives such as videotape or two-way television testimony. The child may have to endure a battery of medical and psychiatric tests by examiners for the prosecution and the defense. Again, the procedure of such examinations is not as easily monitored as are procedures within a courtroom, and are at least as traumatic.

Nine states have hearsay exceptions limited to child sexual abuse victims. These laws provide that a child's out of court statement is admissible if the court finds it sufficiently reliable and the child is either unavailable to testify, or testifies in court. Again, constitutional questions aside, the child either would be subjected to the previously mentioned lengthy availability procedure or would be required to testify anyway.

The varied responses of the states in this short survey illustrate the complexities of this issue and the evasiveness of a quick solution. However, a hard look must be taken at the actual results of the procedures because so far, these procedures appear to not help the child so much as hurt the integrity of the judicial process.

122. States which provide for video taping children's testimony include: Alaska, Arizona, Arkansas, California, Colorado, Florida, Kentucky, Maine, Montana, New Mexico, South Dakota, Texas and Wisconsin. Courts in Iowa may allow such a procedure in juvenile proceedings where a petition alleges that the child is in need of assistance. Virginia allows videotaping procedures in lieu of live testimony if the accused consents. Whitcomb, Assisting Child Victims in the Courts: The Practical Side of Legislative Reform, in PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES 28 n.12 (1985).

123. Whitcomb, supra note 122 at 19.

124. Id. Not all states require a showing of unavailability for the child. However, each state using videotaping procedures requires some showing that "justice requires" a departure from typical proceedings.

125. Id.

126. States which have such hearsay exceptions are Arizona, Colorado, Illinois, Indiana, Kansas, Minnesota, South Dakota, Utah, and Washington. Id. at 27.

127. Id. at 17.

128. If our goal truly is to help deserving and helpless victims, why not implement this procedure for rape victims or other violent crime victims? Surely they are just as deserving of our sympathetic treatment. The fact is that the trauma experienced by these
III. DOES SECTION 1347 HELP THE CHILD?

Ostensibly, the purpose of California Penal Code section 1347 is to reduce the trauma of testifying in court for the child witness. The argument is that television testimony will reduce the child's trauma, thereby increasing his or her availability and accuracy as a witness. As a result of more accurate testimony, proponents contend that more convictions will be obtained.

That the courtroom experience per se is the cause of further traumatization of the child victim is, however, far from certain. Indeed, through sensitive and thorough preparation of the child for his day in court, the experience may even be a cathartic or a releasing one. Judge Sandra Baxter Smith, herself an abused child, spoke out in opposition to Senate Bill 46. She has written a book which recommends that before trial, the prosecutor acquaint the child with courtroom procedure and the physical layout. She also suggests that the prosecutor visit an empty courtroom with the child prior to trial and introduce the child to the judge and the bailiff.

Research indicates that what is most traumatizing to the child, besides the actual abuse, is our reaction to the abuse. The child's trust and confidence in the adults around him or her has been violated. Part of the mending process can and should begin in the courtroom. The child needs to know that adults can protect him or her through the legal system. Through proper preparation, the child can understand that he or she is safe in the courtroom, even with the accused present.

Penal Code section 1347, and other statutes like it, do not fully integrate the child victim into the court proceeding in which he or she is the main focus. By excluding the child from the regular court process, the child may think that he or she, rather than the accused, has done something blameworthy. Such a failing

victims, children included, need not necessarily be exacerbated by the judicial process. Our focus, then, should be on helping these victims within the system, not abandoning well-reasoned principles and procedures in the midst of a hysterical reaction to a certain crime and victim.

129. Coppel, supra note 17.
130. "Out of a misplaced desire to protect the child, most people, including prosecutors, have a tendency to treat a molestation victim like a china doll." S. Smith, supra note 73, at 9.
132. S. Smith, supra note 73, at 15.
133. D. MacNamara & E. Sagarin, supra note 4, at 91-92.
134. The violation of the child's trust, in addition to his or her body, is especially significant, since the child is most often abused by a person close to him or her. See supra note 4.
135. S. Smith, supra note 73, at 13.
makes all the straining against traditional procedures seen in section 1347 useless and counterproductive.

The focus of any sexual child abuse statute must be to prepare the child for in-court testimony. Penal Code section 1347 touches upon this idea in subsection (f) where it requires the judge, child, support person, prosecutor and defense counsel to meet prior to the two-way testimony. The meeting is to explain the court process to the child and to allow the attorneys to develop a rapport with the child, facilitating later questioning. Further, by the time the child testifies, he or she probably has recounted the testimony several times, also lessening the trauma associated with the experience of live testimony. The foregoing practices aimed at aiding the child in his or her testimony within the court system must be encouraged. Meanwhile, legislation such as Penal Code section 1347, which derogates an individual’s right to a fair trial, must be vigourously opposed.

IV. CONCLUSION

In the midst of the current crusade against child sexual abuse, the California legislature’s enactment of Penal Code section 1347 raises some serious constitutional and practical questions about its effect on the defendant. While well-intentioned, the relief that section 1347 offers the child witness is misplaced and unnecessary. Additionally, the latitude and ambiguity of the statute’s criteria for use of the two-way closed-circuit television procedure will bewilder courts and attorneys alike in the statute’s application.

Child sexual abuse, by its invisible nature, is a frustrating crime to address. Hysteria created by our recently increased awareness of the crime, however, has provoked a hasty and over-reaching legislative response. What is needed now is calm, rational consideration of solutions which more clearly focus on the practical and legal issues surrounding child sexual abuse cases.

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137. Id.