Videotape in Criminal Proceedings

James P. Barber

Philip R. Bates

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation

Available at: https://repository.uchastings.edu/hastings_law_journal/vol25/iss4/9

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
Videotape in Criminal Proceedings

By JAMES P. BARBER* and PHILIP R. BATES**

A California jury recently viewed the testimony of an eyewitness to a murder. Making this event unique was the fact that the witness was deceased and his testimony was presented on videotape. While this by-product of the communications field has become well-known to the public, it only recently found its way into the legal process as an evidentiary tool both in civil and criminal trials.

A trial generally can be defined as an adversary proceeding conducted in such a fashion that the truth may be ascertained and the proceedings justly determined. Any technological device used in the courtroom is subordinated to, and used in support of, this fact-finding process. Videotape, if it is to be of any value to the legal community, necessarily must be used only as an aid in the trial process. Videotape is an extremely effective device for recording and transcribing events, as the broadcasting industry has demonstrated. However, putting the reproduction tool in the hands of a cameraman rather than a stenographer does not insure that the recorded transcription will occur unbiased.

Because of the television stigma associated with videotape and the very real possibility of intentional or inadvertent distortion of recorded events, videotape has not attracted as avid a following in the

---

* A.B., 1967, University of California, Santa Barbara; J.D., 1973, Hastings College of the Law, University of California; Member, California Bar.
** A.B., 1970, University of California, Los Angeles; J.D., 1973, Hastings College of the Law, University of California; Member, California Bar.

1. People v. Moran, Crim. No. 15807 (Super. Ct., Contra Costa County, Cal., filed Dec. 27, 1972). The Superior Court order permitting the use of videotape read in pertinent part: "The court, after considering the motions of the People and the defendant, makes the following order: . . . . (2) That William Pifer [the deceased witness] is an unavailable witness as defined in section 240 of the Evidence Code [of California]. (3) That after personally viewing and hearing the audio-visual tapes, the court finds that the production is of such quality and the sound is of sufficient clarity that to use the tapes is entirely proper, and the court directs that the entire tapes shall be shown without being edited." Id., Court order of Mar. 2, 1973, at 1.
judiciary as it has elsewhere. Nevertheless, videotape has found significant use in the courtroom. Obviously, the more fertile area for exploration and experimentation with the use of videotape is in civil proceedings. Criminal trials present a more difficult setting because of the more strict constitutional and evidentiary standards involved.

Surprisingly, a number of courts have rendered decisions on the use of videotape in criminal trials and have set a course of judicial thinking which is both wise and logical. Generally, the courts reason that videotape is a combination of tape recordings and motion pictures, both of which have already found recognition and acceptance in criminal trials. As such, videotape should be subject to no more restrictive scrutiny than its predecessors. Consequently, the case law has been favorable to the use of videotape in criminal proceedings and has shown that the issues involved deal more with evidentiary problems than constitutional issues. In spite of the embryonic state of the art, there are surprisingly few legal impediments to the use of videotape in courtrooms. The following sections analyze some of the issues involved, with particular emphasis on California and federal law.


3. In an address to the Pennsylvania Bar Association on June 26, 1971, Federal District Court Judge Joseph F. Weis, Jr., stated: "I presided over three trials in which videotape depositions were used. In each instance the witness was a physician who could not be available for the trial, two of them being from out of town.

"A videotape presentation is far superior to the customary deposition which is read to a jury. The difference between the two indeed is startling.

"During November, last year, a case was tried before me where the depositions of two New York doctors were read. Because the jury could not agree on a verdict, there was a retrial in January and this time videotape depositions of these two physicians were used instead of the routine type.

"Since I had an opportunity to see the same testimony presented in two different ways, it was easy to make a comparison. The effect of seeing the witnesses, making
Pretrial Use

To date, criminal videotape cases have involved the use of videotape principally in a pretrial setting. Courts, hearing cases involving the tapping of confessions,\(^4\) lineups,\(^5\) scenes of the crime\(^6\) and police actions,\(^7\) have had little trouble upholding the use of videotape in spite of the obvious opportunity for prejudicially altering the finished product. When put in proper perspective these decisions are not as radical as they may seem. The law involving videotape is merely a part of the evolving law of evidence regarding the use of mechanical recording devices. Motion pictures were introduced into the courtroom shortly after the

judgments of their credibility and accuracy depending on tone of voice, hesitancy in answering, facial expressions, and general appearance cannot be overestimated.

...\n
"The bar as a whole has not responded as eagerly as I had hoped. The attorneys who have used videotape are most enthusiastic about it but there is a reluctance on the part of many to try this new device."

...\n
"As of this time, I have noticed no general tendency to substitute videotape medical testimony for that of the live witness.

"From the standpoint of the doctor, of course, the advantages in scheduling the deposition at a time when it would not conflict with his surgical or office schedule is obvious.

"In one of the cases, a physician from Columbus, Ohio came to Pittsburgh on a Sunday morning, completed the videotape deposition, and returned to his home immediately afterwards. He was quite pleased with this manner of handling his testimony which did not require him to interrupt a busy schedule during the week following.

...\n
"After my experience with audio visual presentations and sitting through a number of Jackson vs. Denno type hearings which as you know are concerned with the voluntariness of confessions in criminal trials, I find it hard to justify the taking of a confession by a police department in its headquarters by any means other than videotape. It is so much superior to the painfully typed question and answer statement and reveals so much of demeanor, hesitancy or spontaneity that many of the hearings on voluntariness could be eliminated or drastically shortened."

California Superior Court Judge Raymond R. Roberts, in a speech before the San Fernando Valley Bar Association, reported on the rise in the use of videotape in the field of law both in and out of the courtroom. The Los Angeles County Sheriff's Department is now using a videotaping van for taking confessions, analyzing testing practices used by experts to aid in their cross-examination, supervising drunk driving tests, preserving testimony of immature witnesses, and recording search and seizure evidence. Los Angeles Daily Journal, Dec. 4, 1973, at 19.

4. Hendricks v. Swenson, 456 F.2d 503 (8th Cir. 1972); State v. Hendricks, 456 S.W.2d 11 (Mo. 1970) (same case); Paramore v. State, 229 S.W.2d 855 ( Fla. 1969); State v. Lusk, 452 S.W.2d 219 (Mo. 1970) (dictum).
turn of the century. Since then, motion pictures have gained wide acceptance in the legal community and are generally admissible into evidence under proper circumstances. Sound recordings entered the legal picture later, but have nevertheless reached a point where they have received wide acceptance. However, the standards of admissibility for sound recordings are more stringent than those for motion pictures because of the greater possibility of tampering.

A few cases have noted that videotape is merely a combination of motion pictures and sound recordings. It is logical that the case law regarding videotape should build upon the prior law regarding these other two media. Some attention has been given to the differences among the three methods, but the courts have generally glossed over these distinctions. Nonetheless, it should not be troublesome that the courts pay little or no attention to these technical distinctions. Although some technical differences do exist, certain aspects of videotaping have even been recognized as giving more accurate results than motion pictures. The test is reliability. As long as the traditional constitutional and evidentiary standards of admissibility are met, there is nothing inherent in the nature of videotape recordings that would compel their exclusion in judicial proceedings.

Confessions

To stop here, however, is to ignore some of the legal problems that the use of videotape does create. Some of these problems manifest themselves when a confession is videotaped and subsequently played for a jury at trial. There are two aspects to the Fifth Amend-

8. According to one commentator, the year was 1915 and the case was Glyn v. Western Feature Film Co. Ltd., 114 L.T.R. (n.s.) 354 (1915). Paradis, supra note 2, at 235 & n.1.
9. See generally Annot., 62 A.L.R.2d 686 (1958). See also Hutchins v. Florida, 286 So. 2d 244 (Fla. 1973), in which it was stated: "Where not otherwise prejudicial, the use of sound moving pictures, as a scientific advance in presentation of evidentiary matter at trials, has generally been viewed with approval." Id. at 246.
11. A proper foundation is laid for sound recordings if it is shown that (1) the recording device was capable of taking testimony, (2) the operator was competent, (3) the recording was authentic and correct, (4) no alterations had been made, (5) the recording was properly preserved, (6) the speakers are identified and (7) the testimony was given voluntarily. Id. at 1027-28. In contrast, motion pictures need only satisfy item (3) above. See C. McCORMICK, LAW OF EVIDENCE 533-34 & n.71 (2d ed. 1972) [hereinafter cited as McCORMICK].
ment's privilege against self-incrimination: the policies underlying the scope of its coverage and the more pragmatic consideration of the kind of information that is barred by the amendment.

The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The source of this right is found in sixteenth century English law, where the maxim *nemo tenetur prodere, or accusareseipsum* (no man is bound to accuse himself) was propounded as a protest against inquisitorial methods which apparently were used to suppress certain political and religious beliefs. Its original purpose was merely to require a proper accusation before the individual could be compelled to answer questions. The concept quickly developed into the privilege as we know it today under an accusatorial system: in any proceeding an individual may refuse to answer any question where the answer thereto might be used or might uncover further evidence against him.

The United States Supreme Court's decision in *Miranda v. Arizona*, prohibiting the use of statements against an accused before his rights have been read to him, has rekindled a discussion of the policies underlying the privilege. The concern over the scope of the privilege is not new and, as in the past, it has commanded the attention of great legal minds. Mr. Justice Goldberg concisely and comprehensively summarized the traditional rationales of the privilege in *Murphy v. Waterfront Commission*. They are (1) an unwillingness to subject suspects to the cruel dilemma of self-accusation, perjury or contempt, (2) a preference for an accusatorial rather than an inquisitorial system of criminal justice, (3) a fear of eliciting self-incriminating statements by inhumane means, (4) a sense of fair play which dictates leaving the individual alone until there is good cause to disturb

14. U.S. Const. amend. V.


18. Id.


him and which requires the prosecution to shoulder the entire load, (5) a respect for the human personality and the right to a private enclave in which to lead a private life, (6) a distrust of self-deprecatory statements and (7) a realization that a shelter for the guilty may also protect the innocent.21

Since Murphy, changes in the membership of the Court and criticism from esteemed members of the legal community22 have made it difficult to chart with any accuracy the direction the Court will take in future decisions. Former California Chief Justice Traynor was critical of Fifth Amendment interpretations even before the Miranda decision.23 He has advocated that the courts giving interpretations to the privilege should seek a middle ground which would afford protection to the individual against the state without simultaneously thwarting efforts of the state to prosecute crime effectively.24 One proposal made by Justice Traynor to help reach this middle ground was to require

21. Id. at 55.

22. In a recent article, Judge Friendly has been critical of the lack of any discussion of the pros and cons in the Supreme Court's decisions concerning the privilege. Fifth Amendment Tomorrow, supra note 16. He points out that the privilege is somewhat of an anomaly in the battery of privileges generated by our courts. Other privileges, for example, those which protect communications between husband and wife, attorney and client, doctor and patient, preserve and protect relationships possessing social value. While these privileges have failed to receive broad interpretation, the privilege against self-incrimination, which involves the relationship between the state and the accused, has received an expanded interpretation. The great difference in result (i.e., greater protection for those suspected of crime) is not completely explained by the differences in the relationships involved. Id. at 680, n.48. Moreover, while the other privileges conform with our notions of decent conduct, the privilege against self-incrimination runs against social mores which impose a duty to answer with the truth, to respond to questions and to get an incident off of one's chest. Id. at 680. The privilege also may impede the search for the truth by preventing interrogation of the guilty by the unjustly accused. Id. at 680-81. There are other inconsistencies that surface upon an objective investigation of this rule of law. For instance, Professor Mayers suggests that it is far more cruel to require a mother to testify against her son than it would be to compel him to testify against himself. L. Mayers, SHALL WE AMEND THE FIFTH AMENDMENT? 168-69 (1959). Yet that is the state of our law. Judge Friendly has subsequently commented that he would now "not at all regret having [his] proposal for constitutional amendment placed on the back burner until we see what the Burger Court will do." Friendly, Time and Tide in the Supreme Court, 2 CONN. L. REV. 213, 220 (1969). In this article Judge Friendly noted that the Court has the means available for changing course without being false to the spirit or letter of the privilege. Id. at 219. See also Comment, Chief Justice Burger: Whither Now the Supreme Court?, 15 S.D.L. REV. 41 (1970).


police to make either "tape or stenographic recordings of interrogations." Indeed, the videotaping of such interrogations would present courts with more accurate and complete records of the circumstances under which confessions are made and would assist the bench in its decision making process.

There exists a second plane on which the privilege has received attention, regarding which there is far less controversy. The issues involved at this level of discussion stem from the United States Supreme Court's decisions in Schmerber v. California and United States v. Wade. These decisions make a distinction between "communications" and "testimony" on the one hand and "real or physical evidence" on the other; the Fifth Amendment bar generally applies to the former but not the latter. The term "testimony" includes that extracted by compulsion from the accused's mouth. "Real evidence," on the other hand, includes such evidence as fingerprints, photographs, measurements, voice and handwriting exemplars and appearances in court which might include standing, assuming a stance, walking, gesturing or other similar actions.

Mere appearance in court has never been considered testimony in the constitutional sense and, therefore, photographs of individuals for identification purposes are not barred by the Fifth Amendment because they portray—and can only portray—an individual's looks. Sound motion picture and videotape recordings are subject to the same evidentiary standards as photographs because of the similarity of the media. However, such recordings take on constitutional proportions when they portray confessions, considered testimony in the most traditional sense, and therefore subject to the Fifth Amendment privilege.

The courts have acknowledged both aspects of recorded confessions by requiring that a double foundation must be laid before they are admitted into evidence. Initially, it must be shown that the statements

25. Id. at 678.
27. 388 U.S. 218 (1967).
28. Schmerber v. California, 384 U.S. at 764. The Court noted that this was not a hard and fast rule. However, it has been so applied. See City of Piqua v. Hinger, 15 Ohio St. 2d 110, 238 N.E.2d 766 (1968).
30. 8 J. WIGMORE, EVIDENCE § 2265 (McNaughton rev. 1961).
31. Photographs are dubbed demonstrative evidence because they are tangible items capable of inspection by direct use of the senses. However, they are normally identified and authenticated by testimonial evidence. McCORMIC, supra note 11, at 528-31.
32. See, e.g., Hendricks v. Swenson, 456 F.2d 503, 505-06 (8th Cir. 1972).
were made freely and voluntarily without compulsion or inducement of any sort.\textsuperscript{33} This insures that any testimony given will not be used against an accused without an intelligent waiver of the Fifth Amendment privilege. Secondly, the recording must be shown to be an accurate reproduction of the events that occurred.\textsuperscript{34} Two early cases, \textit{Commonwealth v. Roller}\textsuperscript{35} and \textit{People v. Hayes},\textsuperscript{36} together forming the cornerstone upon which other case law has been built, allowed sound motion pictures of confessions by suspects charged with larceny and manslaughter, respectively. Both courts reasoned that movies were no longer a novelty and that the judiciary had a duty to avail itself of aid from modern technology in its search for the truth.

Analogous reasoning is applicable to confessions recorded on videotape, as illustrated by the Supreme Court of Florida in \textit{Paramore v. State}.\textsuperscript{37} The defendant in that case was charged with first degree murder. He had been given the \textit{Miranda} warnings and the entire interview was recorded on videotape. Against assertions that he was falsely induced to testify and that no continuity of possession of the tape was shown, the court, citing \textit{Hayes}, upheld the admissibility of the videotaped confession.

More recently, \textit{Paramore} was followed in \textit{Hendricks v. Swenson}.\textsuperscript{38} Again, the charge was first degree murder. After exhausting his state remedies,\textsuperscript{39} the defendant appealed to the Eighth Circuit Court of Appeals from a denial of his writ of habeas corpus by the district court. In a two-to-one decision, the court of appeals affirmed denial of the writ and rendered an informative opinion on the use of videotape in criminal proceedings. Brushing aside the dissent’s worry regarding the entertainment stigma associated with videotape and television, the majority emphasized the different purposes involved, the one to entertain and the other to present evidence. The defendant had been fully advised of his rights and there was no evidence of coercion. Furthermore, the defendant was made aware of the use, mechanics and effect of videotape before the taping began. Far from distorting the image of the defendant as the dissent intimated, videotape was felt by the majority to be “a modern technique to protect the defendant’s rights.” It would show to the jury evidence of physical abuse or strain on the

\textsuperscript{33} \textit{Id.} at 504-05.
\textsuperscript{34} \textit{Id.} at 506.
\textsuperscript{35} 100 Pa. Super. 125 (1930).
\textsuperscript{36} 21 Cal. App. 2d 320, 71 P.2d 321 (1937).
\textsuperscript{37} 229 So. 2d 855 (Fla. 1969).
\textsuperscript{38} 456 F.2d 503 (8th Cir. 1972).
\textsuperscript{39} See \textit{State v. Hendricks}, 456 S.W.2d 11 (Mo. 1970).
part of the defendant in ways that typewritten statements could not. In the court's words:

We believe [videotape is] a part of the procedure for obtaining justice, and emphasize the importance of a trial truly presenting the facts as they exist. We believe this is best done whether videotape is used or whether the witnesses testify in court by presenting the events and parties as they are.40

The Hendricks court, following in Chief Justice Traynor's path, felt strongly enough about the use of videotape in the criminal court to urge that "to the extent possible, all statements of the defendant should be so preserved . . . ."41, including the Miranda warnings. As mentioned earlier, various commentators have been critical of the Supreme Court's decisions regarding the privilege against self-incrimination.42 Judge Friendly, of the U.S. Court of Appeals for the Second Circuit, suggested that we might follow Judge Schaefer's proposal to have the courts supervise prearraignment police interrogations.43 Such suggestions are shrouded by considerations of social policy and police procedures that are beyond the scope of this brief overview. From what has been said, however, it is clear that there are no constitutional obstacles to the use of videotaped confessions in criminal proceedings. Rather than impede the cause of criminal justice, such recordings enhance it by bringing the trier of fact as close as possible to the event under consideration. The problems are then reduced to matters of evidentiary consideration, that is, whether the videotape accurately reproduced the interview. A complete and objective portrayal, including a reading of the Miranda warnings, should reduce the risk of error in criminal trials that involve confessions. Finally, use of videotape in the interrogation stage of the proceeding should provide an empirical body of knowledge on which to base sound policy decisions.

Other Ex Parte Evidentiary Uses

The case law concerning the use of videotape in criminal proceedings does not end with confessions. Other cases have followed the Paramore decision, allowing videotape recordings into evidence in other essentially ex parte situations. This small body of law has paral-

40. 456 F.2d at 506.
41. Id.
42. See text accompanying notes 23-45 supra.
43. Fifth Amendment Tomorrow, supra note 16, at 713-16. For a discussion of Judge Friendly's view on the Fifth Amendment bar against self-incrimination, see note 22 supra.
leled earlier development of the law regarding motion pictures as demonstrative evidence in criminal proceedings. The earlier case law admitted motion pictures into evidence to show the defendants re-enacting the crime,44 the demeanor of a witness at a Senate hearing45 or after an arrest for drunk driving,46 the defendant entering the house of the person he was alleged to have bribed,47 the defendant's residence48 or scenes of a bank robbery in progress.49 One court permitted the prosecution to rerun the film, stop it, reverse it and make comments about it during closing argument.50

Courts have allowed introduction of video recordings as demonstrative evidence of scenes of the crime,51 identification at a lineup52 and the pursuit of a trail of blood left by the thief.53 In doing so, they have ruled that the videotape operator need not have any special training or skill,54 that no continuity of possession need be shown55 and that the authenticity and accuracy of the portrayal could be done by a witness other than the operator.56 The evidentiary standard of admissibility, once again, is that the videotape recording be a true and accurate reproduction of the events it purports to represent.57 Like other forms of evidence, videotapes may be admitted for limited purposes, and the presence of hearsay in the recording does not preclude its admission so long as the jury is properly instructed to disregard the objectionable material.58

44. *E.g.*, People v. Dabb, 32 Cal. 2d 491, 197 P.2d 1 (1948); Grant v. State, 171 So. 2d 361 (Fla. 1965); cert. denied, 384 U.S. 1014 (1966).
46. *E.g.*, Lanford v. People, 159 Colo. 36, 409 P.2d 829 (1966); State v. Strickland, 276 N.C. 253, 173 S.E.2d 129 (1970) (reversed for failure of court to conduct voir dire on the question of whether the taped statements were voluntarily and understandingly made); City of Piqua v. Hinger, 15 Ohio St. 2d 110, 238 N.E.2d 766 (1968); Housewright v. State, 154 Tex. Crim. 101, 225 S.W.2d 417 (1949).
57. *Id.* at 7-8, 498 P.2d at 699-700.
58. *Id.* at 9, 498 P.2d at 700.
Videotaping Perfunctory Witnesses

These illustrations by no means exhaust the possible uses of videotape in the criminal process. There are many aspects of the criminal process that particularly lend themselves to the use of videotape techniques. The entire California criminal discovery process is essentially a creature of the courts. Consequently, the bench will continue to be instrumental in shaping the course and scope of discovery in criminal cases. While depositions have not played a significant role in the development of criminal cases, ex parte statements have inherent value not only for developing and analyzing strengths and weaknesses of a case but also for possible future impeachment value.

Before an accused can be held over for trial in a prosecution by information, there must be a preliminary hearing to determine whether there exists reasonable or probable cause in the belief of the guilt of the accused. The preliminary hearing is an adversary proceeding where there is a right to counsel and a right to use evidence obtained therein at trial. However, many of the witnesses at this hearing perform merely perfunctory functions, for example, identification of evidence, establishment of a chain of custody for certain evidence and verification of administrative records such as police blotter reports. Often, testimony concerning these matters goes unchallenged by the defendant. Where there is no prejudice to the defendant, there is no reason why such testimony cannot be videotaped prior to the preliminary hearing with only counsel present for later use at the hearing. Any objectionable testimony can be taken subject to any objections which might be made at the actual hearing.

Testimony of this nature is taken with a view to its use at a courtroom proceeding. It would therefore be subject to rules of evidence and courtroom procedure. Gathering the necessary witnesses for the preliminary hearing may be a task of major proportions. Allowing the testimony of perfunctory witnesses to be prerecorded on

60. See generally Nakell, Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations, 50 N.C.L. REV. 437 (1972).
64. E.g., California v. Green, 399 U.S. 149 (1970) (concerning CAL. EVID. CODE § 1235 (West 1966)).
videotape would prove to be an expedient that would contribute to the convenience of witnesses and reduce the possibility of delay in criminal prosecutions. The admissibility of such evidence is always within the sound discretion of the trial court; determinations of admissibility should be made out of the hearing of the jury. 65

The criminal justice system has not become an entertainment center since the advent of motion pictures. Similarly, there will be no stampede to purchase videotape recorders as their use in courtrooms becomes less of a novelty. Videotape, like other technological advances, will become part of the legal process in much the same manner as it has in other areas such as science and education. Through intelligent supervision of videotape recordings, judges will assist juries as well as themselves by presenting more accurate and truthful information on which to base decisions.

Depositions

Depositions have not played a significant role in the disposition of criminal cases. Perhaps this can be attributed to a conflict between the time-consuming discovery process associated with civil trials and the mandate for a speedy trial, 66 or the traditional concept that witnesses should be present at the trial of an accused. 67 Nevertheless, the use of depositions in criminal proceedings is a much more limited proposition than it is in civil cases. 68 The purpose here is not to explore the possible uses of discovery and depositions in the criminal process; rather, it is merely to advocate the use of videotape depositions where depositions are otherwise allowed in written form only. 69

At the outset, videotape depositions must be distinguished from prerecorded videotape testimony. The former has as its primary purpose the discovery of evidence. Only secondarily is it used as a substitute for live testimony. Furthermore, it is procedurally governed by rules of discovery and not rules of court. On the other hand, the

66. Both federal (FED. R. CRIM. P. 50) and state (CAL. PEN. CODE § 1050 (West 1970)) provisions implement constitutional mandates for a speedy trial. Traditionally, criminal actions are prepared by reliance on interviews with witnesses. Cf. B. WITKIN, CALIFORNIA EVIDENCE § 1056 (2d ed. 1966).
69. But see Hendricks v. Swenson, 456 F.2d 503, 505 (8th Cir. 1972) where the court, in a criminal case, stated: "No valid distinction exists between the use of a deposition taken by video tape and the use of a statement taken by video tape."
primary use of prerecorded videotape testimony is as evidence at the trial.

Rule 15(d) of the Federal Rules of Criminal Procedure provides an example for more archaic state systems whose rules antedate the advent of videotape. The rule provides that a deposition shall be taken "in the manner provided in civil actions" under the Federal Rules of Civil Procedure and that the court may so direct at the request of the defendant. Rule 30(b)(4) of those rules was amended in 1970 to provide that in civil cases a deposition may be "recorded by other than stenographic means" upon the motion of either party. Prior to the amendment, one court had specifically refused to allow a videotape deposition; however, since the amendment's adoption, courts have allowed both videotape and audio depositions, subject to certain judicially imposed limitations, of course, to protect the integrity of the recording. When the case and statutory law are juxtaposed, it is obvious that there are no legal impediments to the use of videotape depositions in criminal proceedings.

70. E.g., Cal. Pen. Code §§ 1335-45, 1349-62 (West 1970). In criminal proceedings, material witnesses may be deposed if because of illness there is reasonable grounds that they will be unable to attend trial (Id. §§ 1335-45), or if the witness resides out of state (Id. §§ 1349-62) (defendant only). Depositions may be used at trial if the witness is otherwise unavailable (Id. §§ 1345, 1362) or by stipulation of the parties. People v. Risenhoover, 70 Cal. 2d 39, 447 P.2d 925, 73 Cal. Rptr. 533, cert. denied, 396 U.S. 857 (1968). However, the depositions must be reduced to writing (Cal. Pen. Code §§ 1343-45, 1357 (West 1970)).

74. For an in depth analysis of the potential barriers to the use of videotape in recording depositions in civil trials, see Kornblum, Videotape in Civil Cases, 24 Hastings L.J. 9, 14-26 (1972).
75. In Hutchins v. Florida, 286 So. 2d 244 (Fla. 1973), a deposition by videotape was taken of a prosecution witness in a felony drug case. It was stipulated by both the defendant and the prosecution that the witness would be legitimately unavailable for the trial. Defendant and his counsel were present at the deposition with opportunity to cross-examine. Florida statutory law provided for the recording of testimony "by mechanical means" but contemplated the transcription of such testimony and the presentation of that transcript at trial. The prosecution did not transcribe the videotaped deposition but rather showed the videotape itself at the trial. Claiming a lack of precedent for such a presentation and a violation of the defendant's right to confront the witness at trial, the defendant objected to the videotape showing. In ruling that the admissibility of the videotaped testimony was not prejudicial error, the Florida court stated: "If the previously taken and preserved testimony of the witness, unable to be present was admissible at the trial, it has not been shown how its submission by video tape, as distinguished from a written transcription of the questions and an-
Presentation of Testimony by Videotape

The use of videotape as an accurate, efficient and economical means of presenting evidence is not limited to tapes of ex parte statements or tapes of physical evidence, scenes, or events. This discussion began with reference to a witness whose likeness, voice and observations were presented at trial before a jury some time after the witness had died. As in that case, videotape offers the opportunity to present testimony in a manner legally indistinguishable from that in which it has been presented for centuries. The factual distinction, and the basis for the advantages of presenting testimony in this manner, is that the witness need not be physically present. The constitutionality of this procedure is established in the following sections through an analysis of the constitutional considerations it raises.

The Confrontation Clause

The Sixth Amendment's confrontation clause states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." An argument can be made that this clause, applicable to the states through the Fourteenth Amendment, militates against an "electronic" confrontation. Does the defendant confront a witness whose testimony has been pre-recorded and later shown to the jury? The answer to the question would seem obvious if it were not for the fact that there has been much debate and little resolution on the more basic question of precisely what does the confrontation clause require?

By offering two different constructions of the word "witnesses," one can arrive at two diametrically opposed constructions of the clause. If "witnesses" means exclusively those who appear in court to testify, then a defendant has a right to be confronted by them, and by no one else. Blithe application of the maxim of judicial construction, expressio unius est exclusio alterius, that is, the statement of the one is to the exclusion of all others, would lead to the conclusion that while a defendant can demand the appearance of witnesses, he can do nothing about affiants or deponents. There is case authority, how-

76. See text accompanying note 1 supra.
77. U.S. CONST. amend. VI.
ever, to the effect that trial by affidavit is exactly the evil which the confrontation clause was drafted to prevent.\textsuperscript{80} On the other hand, "witnesses" can be read to include all who offer evidence. In that case, admission of a dying declaration would be prohibited by the confrontation clause, for the defendant can make no fruitful demand that he be confronted by the declarant. Yet such declarations have been said not to violate the constitutional requirement.\textsuperscript{81}

No court has adopted either construction of the confrontation clause outlined above. Unfortunately, that rejection is as far as the unanimity goes. Unable to find a suitable definition of the clause which offers precision, the courts and writers are given to discussions of the "main thrust" or "underlying rationale"; still, there appears to be no unanimity. At least five positions have been put forward to explain the content of the right to be confronted by one's accusers. There is much overlap, and no one position alone can explain the results of the cases.

Recent decisions suggest that the right to cross-examine witnesses is at the heart of the right to be confronted.\textsuperscript{82} Much is made by proponents of this view of the truth-finding capabilities of an aggressive counsel matched with a halting witness. Indeed, long before the Sixth Amendment was held to apply to the states, the United States Supreme Court indicated that the right to examine witnesses was a Fourteenth Amendment right included in due process.\textsuperscript{83} Yet the confrontation clause is clearly not congruent with the right to cross-examine. Dying declarations are apparently not violative of the clause,\textsuperscript{84} and there is clearly no opportunity for cross-examination. On the other hand, even though there may have been cross-examination of a witness at a previous hearing, the clause prohibits a reading of that testimony into the record absent a showing that the state has made all due efforts to procure the witness's attendance and the witness remains unavailable.\textsuperscript{85}

Many have sought to establish a definitional relationship between hearsay and the confrontation clause. The similarity of concerns which underlie both the evidentiary exclusionary rule of hearsay and

\textsuperscript{81} Kirby v. United States, 174 U.S. 47, 61 (1899); see Mattox v. United States, 156 U.S. 237, 243-44 (1895).
\textsuperscript{83} In re Oliver, 333 U.S. 257, 273 (1947).
\textsuperscript{84} See cases cited note 81 supra.
the constitutional right to be confronted are obvious. In hearsay testimony, a statement made other than by a witness while testifying is offered to the trier of fact to prove the truth of the matter stated. Since that statement by definition is not subject to contemporaneous cross-examination, the question arises whether a defendant has a constitutionally protected right to be confronted by a hearsay declarant, and, absent such confrontation, whether the declaration is constitutionally inadmissible. Among the courts and writers who have found a close relationship between confrontation and hearsay, some have suggested that the relevant measure of the constitutional provision is the extent of the hearsay rule at the time the Sixth Amendment was adopted, while others argue that the Sixth Amendment implicitly embraced the then existing rule together with whatever changes were wrought through judicial evolution.

The problems with either approach are manifold. If we are to accept the first proposition, that the confrontation clause merely wrote into the Constitution the then-existing hearsay rule, we must wonder why the framers felt drawn to such circumspection. Rather than enter into an historical analysis of the hearsay rule, the courts have tended to ignore this construction of the clause. The second proposition, that the clause embraced the hearsay rule as it had developed and was to develop, is equally questionable and equally without support. That a fluid rule of evidence would gain equal stature with other portions of the Bill of Rights is, at best, dubious. The cases indicate no absolute congruence with the hearsay rule, either as it existed then or exists today. Certain matters are held to offend the clause even when they come within an exception to the hearsay rule.

Another approach to an explanation of the clause has been that reliable testimony will not offend the protected right. This notion appears to be an offshoot of the hearsay approach, as most exceptions to that rule appear to be based on presumptive reliability. A man

86. See Mattox v. United States, 156 U.S. 237, 243 (1895).
87. 5 J. WIGMORE, EVIDENCE § 1397, at 130-31 (3d ed. 1940).
88. There is apparently much doubt as to the extent of the hearsay rule and its exceptions at the time the Sixth Amendment was adopted. Compare F. HELLER, THE SIXTH AMENDMENT 105 (1951), with 5 J. WIGMORE, EVIDENCE § 1397, at 130 (3rd ed. 1940).
89. Thus numerous cases have found constitutional inadmissibility under the Sixth Amendment where the evidence was arguably admissible under a hearsay exception. See, e.g., Bruton v. United States, 391 U.S. 123 (1968); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965).
90. See Mattox v. United States, 156 U.S. 237, 243-44 (1895); cf. 75 YALE L.J. 1434 (1966).
would not die with a lie on his lips, and therefore his dying declarations are admissible.\textsuperscript{91} Similarly, an excited utterance is admissible,\textsuperscript{92} as are declarations against interest since no man would make a declaration against his penal interests that was false.\textsuperscript{93} This idea that testimony of presumptive reliability will pass constitutional muster is untenable, for the language of the clause itself admits of no such construction and provides no such blanket exception to the literal right of confrontation. Accordingly, no case has been found which rests its holding of Sixth Amendment conformity upon the reliability of tendered evidence. If reliability is any sort of constitutional yardstick, it would seem better housed in the due process clause, with its apparently broader scope.\textsuperscript{94}

Justice Harlan, with characteristic scholarship, has presented what is perhaps the most satisfactory measure for explaining past cases and resolving new challenges. He suggested that the clause "reaches no farther than to require the prosecution to produce any available witness whose declarations it seeks to use at a criminal trial."\textsuperscript{95} While the Sixth Amendment, as construed in recent decisions, appears to go further, it at least goes this far. This underlying idea of availability explains why the former testimony of a witness is not sufficient when that witness is himself available,\textsuperscript{96} and why it is constitutionally sufficient when the witness is deceased\textsuperscript{97} even though the defendant's right to cross-examination is lacking in both situations.\textsuperscript{98} If the witness is available, then the prosecution has an affirmative duty to produce him.\textsuperscript{99} Although the words he will utter may be the same as those which might have been read into the transcript, the jury will have an opportunity to observe him.

We come now to the use of videotape, and to the question of whether its use may violate the accused's right to confront his witnesses. Because the right may be waived, the Sixth Amendment presents no barriers to the defendant who desires to offer testimony on

\begin{itemize}
\item \textsuperscript{91} McCormick, \textit{supra} note 11, at 680-81.
\item \textsuperscript{92} Id. at 704-09.
\item \textsuperscript{93} Id. at 673-75.
\item \textsuperscript{94} 75 \textsc{Yale L.J.} 1434, 1438 (1966).
\item \textsuperscript{95} California v. Green, 399 U.S. 149, 174 (1970) (concurring opinion) (emphasis in original).
\item \textsuperscript{96} Barber v. Page, 390 U.S. 719 (1968).
\item \textsuperscript{97} Mattox v. United States, 156 U.S. 237 (1895).
\item \textsuperscript{98} Id. at 243.
\item \textsuperscript{99} See Barber v. Page, 390 U.S. 719 (1968). Thus, in a sense, the confrontation clause can be viewed as a standard for prosecutorial behavior. See 75 \textsc{Yale L.J.} 1434, 1439 (1966).
\end{itemize}
his behalf to the jury by videotape. Where the prosecution desires to offer testimony in this manner, the defendant might object, arguing that he is entitled to have the witness appear before the jury and be cross-examined before them. A simple description of the possible mechanics of pre-taping testimony can meet this objection.

An expert witness may find it impossible to attend trial at a certain time. A witness for the prosecution may be threatened, and his safety may depend upon a lack of knowledge of his whereabouts. Or, more unlikely but obviously possible, a witness may be dying. In all these instances, important needs could be met by videotaping the testimony of such witnesses. The defendant, his counsel, the prosecu-

100. Hutchins v. Florida, 286 So. 2d 244, 246 (Fla. 1973) where the defendant in a felony drug case made this contention.

101. In the recent case of United States v. Talbott, 58 F.R.D. 212 (N.D. Ohio 1973), the defendant moved to videotape the testimony of a psychologist. The psychologist refused to testify in person at the trial for the $300.00 maximum compensation that a federal district court judge is authorized to allow for the payment of experts in an indigent criminal case. See 18 U.S.C. § 3006A(e)(3) (1970). However, the psychologist would have consented to being videotaped for $300.00. In denying the defendant's motion, the court, per Judge Lambros, stated: "This motion presents a question of first impression for the Court. On one hand, the videotaping of experts would result in a substantial savings to the Government in light of the rising fees for psychologists and psychiatrists time. On the other hand, Rule 15(e) of the Federal Rules of Criminal Procedure appears to authorize the admission of such videotaping only when the witness would not be available to testify. Technically, the expert in this case could be subpoenaed to testify. Furthermore, his compensation in excess of the amount which may be authorized by this Court will be paid, if approved by the Chief Judge of the Circuit.

"The first alternative, that of subpoenaing the witness, is unacceptable to the Court. If subpoenaed, the expert witness might well be hostile. . . .

"The second alternative, that of approval of an excess amount by the Chief Judge, is still available to the defendant. Given this Circuit's statements in Tate [United States v. Tate, 419 F.2d 131 (6th Cir. 1969)], the Court feels that payment in excess of $300.00 will be approved if warranted.


In a letter to the authors on April 30, 1973, Judge Lambros expressed the following sentiments: "Speaking generally, I favor a re-examination of Rules 15(e) and 26 which require 'live' testimony of all available witnesses. As a practical matter, the Rules preclude the use by defendants of videotaped expert testimony. This can and does impose a hardship on indigent defendants who are limited, without approval of the Chief Judge of the Circuit, to $300 per expert. 18 U.S.C. § 3006A(e)(3). It is sometimes the case that experts will provide videotaped testimony for that fee but will not provide in-court testimony for the same amount.

"I do not wish, however, at this time, to advocate an abolition of Rule 26 without also suggesting an alternative provision which would safeguard the rights of cross-examination and confrontation and without further investigation into the effects of videotape on the witness and jury."
tion and the judge, if his presence is required, could meet at nearly any location they choose, and videotape the proceedings. The content of the testimony, rules of evidence and the cross-examination of the witness would be in no way affected. The tape would then be played at the trial, at which time the jury could observe the witness's demeanor at least as meticulously as if he were physically in their presence. Questions of hearsay do not arise, for the tape is not a transcription of an out-of-court declaration. The "trial" includes both the taping session and the presentation of the tape to the jury. The "court" includes both the room in which the jury observes the testimony and the room in which the testimony was taped. For these same reasons, questions of availability do not arise. The witness is available, and he is testifying before the jury. Cross-examination, the most central feature of the confrontation clause, at least according to the recent cases, takes place, albeit on tape, before the jury. Its effectiveness as a truth-discovering device is not affected at all.103

The Sixth Amendment became part of the Constitution in 1789; it therefore is not surprising that the words of the Sixth Amendment do not proscribe the use of videotape, so its omission is not significant. It is a strong argument, however, that in none of the manifold attempts to describe the content of the right to be confronted is there any theme or consideration which militates against the use of taped testimony. Indeed, the concerns expressed in all approaches are met and served by this technological advance.

Though the majority in California v. Green104 dealt in terms apparently simplistic enough to prompt Harlan's historical treatise in a separate concurrence,105 they managed to state three of the most salutary effects of the confrontation clause:

Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of the truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.106

Viewing these three factors, and all factors mentioned to this point, it is fruitless to argue that the confrontation clause in any way inveighs

103. See text cited in note 75 supra for a description of the recent case of Hutchins v. Florida, 286 So. 2d 244 (Fla. 1973) involving this very situation.
105. Id. at 172.
106. Id. at 158.
against the use of videotaped testimony. Rather, this technological tool offers a means of insuring that a jury can view testimony which they otherwise might have been unable to view. It further offers a witness the opportunity to be "available" through videotape when he might otherwise be unavailable, or when his physical appearance would work hardship on himself or the parties. Finally, the jury is guaranteed a clear and unobstructed view of testimony, and the confrontation clause has never been held to demand more.

Public Trial

Aside from guaranteeing a defendant the right to be confronted by the witnesses against him, the Sixth Amendment requires that in all criminal proceedings, there must be a public trial.107 This concept is so firmly embedded in our jurisprudence that few modern cases arise in assertion of the right. Yet is it conceivable that a defendant, faced with incriminating testimony presented on videotape to a jury, could complain that his right to a public trial would be infringed. This is, however, an objection of no vitality.

The right to a public trial is as easily understood as the result of its denial. The opposite of a public trial is a secret trial, a proceeding analogous to the Spanish Inquisition, to the English Court of the Star Chamber or to the French lettre de cachet.108 The right to a public trial is afforded as a check upon the tribunal and as insurance that excesses shrouded in secrecy will not occur.109 Because of the overriding importance of public trials, the cases allowing exclusion to any degree are based upon compelling interests. Thus, the press may be limited during trial to protect the defendant from unfair publicity;110 some spectators may be removed to avoid harassment or intimidation of a witness;111 or an airline hijacker "profile" may be introduced in camera to preserve its value.112

Our question, however, is not whether videotaped testimony will, in a given case, come within an exception to the nearly absolute right

107. U.S. CONST. amend. VI.
109. Id. at 270. See 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827).
to a public trial. Indeed, where the purpose of the taped procedure is to protect the witness from physical harm, there seems little doubt that its use would be permitted. The question is whether the use of videotaped testimony impinges at all upon the right to a public trial. Clearly, it does not.

The crux of the right is an avoidance of secret proceedings, an assurance that those who conduct criminal proceedings do so in the light of day. If testimony is taped, even in surroundings of the strongest security, and later played in open court before a jury, the press and spectators, the presentation is no less public than if the witness were in physical attendance. As we suggested earlier, the “trial” is the taping session and the presentation of the tape. When the testimony in question is presented in open court, when the witness’s demeanor is observable by all, then the right to a public trial is untouched.

Ethical Considerations

We have shown to this point that the use of videotape in criminal proceedings is clearly not constitutionally proscribed. A lesser but not insignificant potential barrier to the use of videotape to record trials may arise in the ethical prohibitions against photography in the courtroom. Canon 35 of the Canons of Judicial Ethics provides:

The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings, are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

The genesis of this proscription is not difficult to understand. In early 1935, Bruno Hauptmann was tried for the kidnapping of Charles Lindbergh’s child. After a spate of pretrial publicity which today doubtless would be grounds for reversal, the media accompanied the defendant and television in a courtroom and if it is to be given binding force, total. Flashbulbs, cameras, wires and members of the press gave the trial the appearance of a Hollywood premier. Stung by the resulting criticism of the Hauptmann experience, the American Bar Association adopted Canon 35 in 1937.

113. See cases cited note 111 supra.
114. See notes 108-109 and accompanying text supra.
115. ABA CANONS OF JUDICIAL ETHICS No. 35.
If Canon 35 represents an absolute prohibition of photography and television in a courtroom and if it is to be given binding force, then the use of videotape to record judicial proceedings is impossible. Yet we can conclude that the prohibition in Canon 35 is not absolute, and that no court is bound by a literal interpretation of the language. First, as indicated by the circumstances attending its adoption, Canon 35 was concerned with guaranteeing a litigant a fair trial, unfettered by boisterous attempts to present a blow-by-blow description to a curious public. What must be preserved is the dignity of the proceedings, the freedom from distraction of the witnesses, and the avoidance of public misconception.

While the language of Canon 35 was clear in its broad prohibition, it lacked binding force upon the courts. Since dignity, decorum and fairness were the considerations leading to the canon, it was the presence or absence of those factors rather than the strict interpretation of Canon 35 which was at issue upon appeal in a case where the trial judge had allowed televising of part of the proceedings. Clearly, then, a transgression of the literal boundaries of the canon was not grounds for reversal. The proposals we make here for the use of videotape in the courtroom are limited only by the impact such use would have upon an essentially fair trial.

Regardless of the import of Canon 35, the American Bar Association has recognized technological advancements and the need for greater judicial efficiency in its more recent statement on the propriety of audiovisual media in judicial proceedings. Canon 35 was directed to allaying sensationalism; the heated arguments which surrounded it concerned “fair trial versus free press.” Most of the opponents of the rule argued for the public’s right to be made aware of proceedings in its courtrooms and for First Amendment protection for the news media. Its proponents needed to point only to the excesses of the media in certain trials, and to raise the argument that a trial, and most particularly a criminal trial, was so important to the

120. See text accompanying note 125 infra.
123. E.g., Daly, Radio and Television News and Canon 35, 6 Neb. S.B.J. 121 (1957).
rights of the accused that any desire to educate the public was vastly overbalanced.¹²⁴

While this debate still has vitality, it is one into which we need not enter here. We are concerned with the use of videotape not to show the interested public what takes place, but rather to present to the jury testimony of witnesses who are unavailable for live appearance in the courtroom or who would be seriously inconvenienced by such appearance; to present confessions which carry with them evidence as to their voluntariness; to present ex parte statements which will offer greater clarity than a dry printed transcript; to prerecord testimony and present it in continuous sequence to the jury, avoiding long recesses, arguments, and attendant jury boredom; and to record the entire proceeding in court in order to acquire a record totally devoid of transcriptive error for use in preparation of appeal, on appeal, and possibly on retrial. These are purposes consonant with sound judicial administration and, significantly, with the newly adopted Canon 3A(7) of the Code of Judicial Ethics promulgated by the American Bar Association:

A judge should prohibit broadcastings, televisualing, recording, or taking photographs in the courtroom and areas adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize: (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration . . . .¹²⁵

The prohibition of cameras or other electronic recording devices in the courtroom is aimed strictly at preventing a sensational, vaudevillian atmosphere which would deprive a defendant of a fair trial. That the rigidity of this prohibition is still open to debate does not concern us here. We propose the wider use of video technology in criminal proceedings for its value in the accurate presentation and preservation of evidence and for furthering the interests of judicial administration. There are no ethical considerations which militate against these purposes.¹²⁶

¹²⁶ The Conference of California Judges Ethics Committee opined that it would be ethically proper to videotape an entire misdemeanor trial, with the consent of the parties, outside the presence of the jury, and later to present the trial on tape to the jury:

"Nothing in the present California Canons of Judicial Ethics prevents the videotaping of courtroom proceedings by unobtrusive cameras solely for judicial administrative purposes and not for broadcast when to guarantee the condition that there be no
Conclusion

We have mentioned throughout this article various ways in which videotape technology might be used in the criminal process. Lest the reader be overwhelmed by visions of cameras and cables strewn randomly across the body of our jurisprudence, a recapitulation of those uses should be offered.

1. Once the accusatory stage has been reached by a potential criminal defendant, any confession or statement which he offers, together with his *Miranda* warnings, should be taped. The product would be more meaningful to the trier of fact than would be a written transcript, and would further aid the preliminary determination of voluntariness.

2. Lineups, showups, views of scenes or views of the crime itself can be preserved on tape and presented at trial, removing the element of testimonial mistake or inconsistency.

3. Though the use of depositions in criminal practice is limited, where depositions are taken, they should be videotaped. This would allow review of a deponent's demeanor and his testimony by the attorney, would eliminate transcriptive errors and, if the deposition is used at trial, would be preferable to a written transcript.

4. Perfunctory evidence at preliminary hearings, such as chain of custody evidence, corpus evidence (for example, testimony of a burglary victim that his house was entered without permission and that certain goods were taken) or other testimony which normally goes unchallenged, could be recorded, upon motion, at the convenience of the parties and witnesses and made a part of the record. This would be particularly advantageous in eliminating police man hours spent on a broadcast the judge have full control of all of the film and the party doing the taping guarantee that the tape will not be used in any manner for commercial or broadcast purposes.

"In rendering this opinion the Committee considered Canon 30 . . . ."

"The Committee also considered the Proposed Final Draft of the American Bar Association Code of Judicial Ethics, Canon 3 A (7) . . . ."

"Consideration was given to the fact that in the past the obtrusiveness of television cameras has been a major objection, that carrying the broadcast live was an objection and third that public broadcast was a major objection.

"The Committee carefully considered the first paragraph of Canon 30 and felt that the experimental purpose requested by the judge and bearing in mind the fact that new methods may be required in order to meet new times felt that there was no improper interference with judicial proceedings when the video-taping was accomplished by unobtrusive cameras, when the taping was not for broadcast but was solely for judicial administrative purposes and when the judge had full control of the manner of the taping and of the tape produced."

"In rendering this opinion the Committee considered Canon 30 . . . ."

"The Committee also considered the Proposed Final Draft of the American Bar Association Code of Judicial Ethics, Canon 3 A (7) . . . ."

"Consideration was given to the fact that in the past the obtrusiveness of television cameras has been a major objection, that carrying the broadcast live was an objection and third that public broadcast was a major objection.

"The Committee carefully considered the first paragraph of Canon 30 and felt that the experimental purpose requested by the judge and bearing in mind the fact that new methods may be required in order to meet new times felt that there was no improper interference with judicial proceedings when the video-taping was accomplished by unobtrusive cameras, when the taping was not for broadcast but was solely for judicial administrative purposes and when the judge had full control of the manner of the taping and of the tape produced."
witness stand when no controversy exists as to a policeman's testimony.

5. Actual testimony, given in the presence of the defendant, counsel, and judge, with full direct and cross-examination and in full conformity with procedural rules, could be taped out of the presence of the jury. It then could be presented in proper sequence before the jury and in a setting open to the public. Such a procedure would protect an endangered witness, eliminate the inconvenience to an expert witness, and lower costs to the party presenting the expert testimony. Finally, the testimony of a witness whose future availability is in doubt would be preserved.

6. A final proposed use of videotape is the recordation of the entire trial. This can be done unobtrusively and without running afoul of any ethical considerations. The advantages are a transcript free of error and an immediate transcript for use in preparation of an appeal. Furthermore, part or all of the tape, excluding only those portions which contain legal error, could be used upon retrial.

To embrace technological change and avail oneself of its benefits without proper consideration of possible disadvantages is to follow a course which has too often led to an unnecessarily negative reaction. While we are not proposing here that juries do nothing but observe a television screen, we are suggesting that they receive much of their information through this medium. Is anything lost? Jerome Frank suggested that very few facts floated through a trial; instead, witnesses offered subjective views from memory, and jurors received subjective impressions in listening so that the verdict represented an opinion—the jury's—of an opinion—the witness's.127 He felt that a trial could best be explained as a gestalt, that is, the whole being greater than the sum of its part and not explicable through examination of any particular component.128 Input, Frank suggested, was from so many sources that mathematical reformulation of the process was impossible.129 By narrowing the jury's focus to testimony coming through a video monitor, we may be limiting input which has heretofore contributed to the synergistic result. We may also be proposing a medium which itself affects the psychological impact of the messages it carries.

By raising these considerations, we do not abandon our advocacy. We merely urge that the legal profession closely observe all results of this innovation. Contemporaneous with the expanding use of vid-

128. Id. at 165-85.
129. Id. at 190.
eotape in legal proceedings should be research, specifically conducted for the bar, which evaluates the effects, both objective and subjective, of videotape in the courtroom. If Frank’s analysis is correct, then by using videotape and video monitors, we may be distilling the essential factors and removing irrelevant input, thereby improving the fact-finding process. Again, this is worthy of research.

Our concern here is that the many benefits available through video technology not be lost due to resistance based on nebulous fears. The criminal law is not frozen. In *California v. Green*, Chief Justice Burger concurred separately

only to emphasize the importance of allowing the States to experiment and innovate, especially in the area of criminal justice. If new standards and procedures are tried in one State their success or failure will be a guide to others and to the Congress.130

We are proposing experimentation not for its own sake, but to achieve the benefits which each proposal outlined above can offer. Because of a number of sensational trials, cameras in the courtroom have received a bad name, just as, over centuries of practice, traditional courtroom justice has received a good name. Video technology, we believe, offers benefits without jeopardy to the criminal process. Writing for the Yale Law Journal in 1908, Justice H. B. Brown used words which now serve as an interesting metaphor:

The automobile has much to contend against in its offensive characteristics, and above all, in the arrogant disregard of the rights of others with which it is often driven; but new inventions may obviate some of these difficulties, and a few sharp lessons from the courts may inculcate more respect for the rights of others. Whatever the outcome may be, every true admirer of the horse will pray that it may not be the extinction or dethronement of the noblest of all domestic animals.131

Far from signaling the “extinction or dethronement” of traditional courtroom justice, videotape helps to preserve it. As discussed in this article, the potential of videotape in criminal proceedings is too great to ignore. It is hoped that this article will help encourage the use of videotape so that its potential will be realized.