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## *The Confrontation Right Across the Systemic Divide*

RICHARD D FRIEDMAN\*

IN HIS NOTABLE work, *Evidence Law Adrift*, Mirjan Damaška identified three pillars of the common law system of determining facts in adjudication, and examined these through a comparative lens: the organisation of the trial court; the phenomenon of temporally compressed trials; and a high degree of control by parties and their counsel. In reviewing the book, I suggested that a strong concept of individual rights was another critical feature of the common law system, especially in its American variant and especially with respect to criminal defendants.<sup>1</sup>

In this essay, I will explore how these four features play out in the Anglo-American and Continental system with respect to one right that has been of particular interest to me, the right of a criminal defendant to be confronted with the witnesses against him.

This right has long been one of the central aspects of the common-law system of criminal jurisprudence. Nevertheless, for much of the last two centuries the right has been swallowed up and nearly lost in the rule against hearsay. Commentators have often regarded the hearsay rule, which has no real counterpart outside the common law system, as a product of the jury system, what Damaška calls the divided trial court. I contend, however, that the hearsay rule reflected a broadening, and in effect a dilution, of the confrontation right, which had been established long before and was entirely independent of the jury system. The great breadth of the hearsay rule was attributable to the increased role of criminal defence lawyers, an aspect of the party control discussed in depth by Damaška. But a rule so broad could not be maintained rigorously

\* Many thanks to Christopher Miller, for very helpful research in unfamiliar territory.

<sup>1</sup> 'Anchors and Flotsam', Book Review of M Damaška, *Evidence Law Adrift* (1998) 107 *Yale Law Journal* 1921.

without yielding absurd results, and so the hearsay rule became relatively porous. As a consequence, the meaning of the confrontation right was virtually lost. Perhaps ironically, a basically sound conception of the right, as a critical aspect of the law governing the procedure for witnesses giving testimony, emerged in Continental Europe, under the European Convention on Human Rights, in dealing with systems unencumbered by a rule against hearsay. More recently, the decision of the United States Supreme Court in *Crawford v Washington*<sup>2</sup> has also established a basically sound conception of the right under the Confrontation Clause of the Sixth Amendment to the United States Constitution. Although I have described both the European and American conceptions as basically sound, they are substantially different from each other. As one might expect, the American right is more categorical in nature. Also, two of Damaška's pillars, party control and the compressed nature of the common law trial, make salient particular issues that are of less importance in the Continental system: who produces the witness to testify and the timing of confrontation.

\* \* \*

If an adjudicative system is to be rational, it must depend on the testimony of witnesses. Once the Catholic Church withdrew its support of the irrational ordeals as a method of proof in 1215, it became virtually inevitable that the adjudicative systems of the western world would develop procedures governing how witnesses would give testimony. The courts of Continental Europe tended to take testimony in writing behind closed doors, out of the presence of the parties, to prevent intimidation by the parties.<sup>3</sup> But the English courts took a different path. The presence of a jury did not prescribe this path. Indeed, the English followed the course of the ancient Hebrews<sup>4</sup> and Romans,<sup>5</sup> which did not rely on juries, and took testimony out in the open, in the presence of the adverse party. In the 16th century, Thomas Smith famously described the heart of a criminal trial as an 'altercation' between accuser and accused.<sup>6</sup> And for centuries, English commentators and judges proclaimed the open, confrontational nature of the English criminal trial as a key superiority of their system of criminal adjudication over its Continental counterpart.<sup>7</sup> This principle was emphasised in numerous treason statutes that required prosecution witnesses to be brought 'face to face' with the accused. The practice of presenting the

<sup>2</sup> 541 US 36 (2004).

<sup>3</sup> See RC Van Caenegem, 'History of European Civil Procedure' in M Cappelletti (ed) 16 *International Encyclopedia of Comparative Law* 2, 77 (Boston, Mohr, 1973).

<sup>4</sup> See Deuteronomy 17:6, 19:15–18.

<sup>5</sup> See Acts 25:16.

<sup>6</sup> T Smith, *De Republica Anglorum* (1583) M Dewar ed, (Cambridge, CUP, 1982) 114.

<sup>7</sup> Eg, *Case of the Union of the Realms*, Moore (1604) (KB) 790, 798, 72 ER 908, 913, per Popham CJ; S Emlen, Preface to *State Trials* (1730); M Hale, *History of the Common Law* (c 1670) CM Gray ed, (Chicago, Chicago UP, 1971) 163–64.

testimony of prosecution witnesses at trial, in the presence of the accused and subject to adverse questioning, was not followed with perfect regularity, but it clearly was the norm well before 1700. The practice came to America with the English settlers, and in an environment in which criminal defence lawyers played a larger role than in England, it thrived. Indeed, most of the early state constitutions established the practice as a right of the accused; some of these used the time-honoured 'face to face' formula, and others, drawing on Hale and Blackstone, used phrasing very similar to that which was later incorporated in the Sixth Amendment to the Constitution in 1791 as part of the Bill of Rights.<sup>8</sup> This is the Confrontation Clause, which provides: 'In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'

Notice that on its face the Clause governs how witnesses shall testify, for testifying is what witnesses do, and indeed in many languages 'testimony' and 'witness' have the same root. The Clause does *not* speak in terms of hearsay. It was not a constitutionalisation of the rule against hearsay, and it could not very well have been, because though courts and commentators had long spoken of such a rule in general terms it was still in an amorphous and embryonic state when the Clause was adopted. During the last two decades of the 18th century and the first few of the 19th, however, the rule rapidly expanded, and elaborations of it became far more sophisticated. Initially, the decisive force seems to have been the growing role of criminal defence lawyers,<sup>9</sup> though the doctrine soon kept pace on the civil side. Believing fervently in the value of cross-examination, lawyers did not limit their desire for it to adverse witnesses. Any time an out-of-court statement was offered against them to prove that what the statement asserted was true, they perceived the potential value of cross-examining the maker of the statement. And so the modern concept of hearsay, 'an out-of-court statement offered to prove the truth of a matter asserted in it', was first articulated.<sup>10</sup> And indeed, the conception went even beyond that. In the famous 1838 case of *Wright v Tatham*,<sup>11</sup> the scope of the hearsay rule reached its high water mark, extending not only to assertions of a proposition but also to conduct that did not assert the proposition at issue but appeared implicitly to reflect the actor's belief in that proposition.

<sup>8</sup> See RD Friedman and B McCormack, 'Dial-In Testimony' (2002) 150 *University of Pennsylvania Law Review* 1171, 1207.

<sup>9</sup> TP Gallanis, 'The Rise of Modern Evidence Law' (1999) 84 *Iowa Law Review* 499.

<sup>10</sup> The following passage from 1 SM Phillipps, *A Treatise on the Law of Evidence* 7th edn (London, Butterworth, 1829) 229 is not found in earlier editions (including the 6th edition of 1824): 'Hearsay is not admitted in our courts of justice, as proof of the fact which is stated by a third person'.

<sup>11</sup> 5 Cl & F 670, 7 ER 559, 47 Rev Rep 136 (HL 1838).

A rule so extensive could not feasibly be enforced with rigour; it would have caused the exclusion of too much evidence. Although beginning in the early 19th century there has been a tendency to attribute the hearsay rule to the presence of a jury, there is no persuasive reason to discern such a connection.<sup>12</sup> Indeed, there is no good basis for believing that as a presumptive matter the introduction of hearsay evidence relevant to a material proposition will lead a jury away from rather than closer to the truth; on the contrary, it appears that the exclusionary rule, shutting the eyes and ears of the trier of fact to evidence that is often highly probative, impairs, slows, and adds unnecessary expense to the truth-determining process.<sup>13</sup> And so over most of the 19th and 20th centuries the trend was to ease the rule against hearsay, by adding and broadening exemptions to it and by establishing the power of the trial court to except individual statements from it on a case-specific basis. This trend was fostered by the dominant evidence scholar of the first part of the 20th century, John Henry Wigmore. Lost in this development was a clear sense of the confrontation right as a relatively narrow procedural principle governing the giving of testimony by witnesses against an accused. But a flicker remained, keeping alive some intuitive sense of the ancient right so central to our system.

In the homeland of the hearsay rule, the trend towards lenience went so far, beginning with the Civil Evidence Act 1968, as to virtually eliminate the hearsay rule in civil cases. The resulting dichotomy, a body of traditional hearsay law in criminal cases but not in civil cases, has been ascribed to another dichotomy, the presence of the jury in most English criminal trials but not in civil litigation. As suggested above, however, I find that explanation unpersuasive; I believe rather that Parliament has not abolished the hearsay rule in criminal prosecutions because of some sense that at the core of the rule is a valid principle central to the common law system of criminal adjudication. And yet, because that principle is usually not well understood or even articulated, Parliament has hacked away at the rule in the criminal context as well in a manner seemingly designed to shrivel the confrontation right. Thus, for example, Criminal Justice Act 1988 s 23 allowed several categories of statements made by an unavailable declarant and embodied in a document, including a statement that 'was made to a police officer or some other person charged with the duty of investigating offences or charging offenders'. It is hard to imagine a provision better crafted to allow prosecution witnesses who might later

<sup>12</sup> I have developed this point in R Friedman, 'No Link: the Jury and the Origins of Confrontation Right and the Hearsay Rule' in JW Cairns and G McLeod (eds), *The Dearest Birth Right of the People of England: The Jury in the History of the Common Law* (Oxford, Hart Publishing, 2002) 93.

<sup>13</sup> See also R Friedman, 'Thoughts from Across the Water on Hearsay and Confrontation' [1998] *Criminal Law Review* 697, 700–01.

become unavailable to give testimony in precisely the way that their ancestors three and four centuries ago prided themselves would *not* be allowed. And yet, Criminal Justice Act 2003 s 116 has since gone much further, establishing what amounts to a general exception for first-hand hearsay of statements made by a declarant deemed unavailable.

In the United States, the trend towards weakening the hearsay rule reached a culmination of sorts with the adoption of the Federal Rules of Evidence in 1975. The Rules narrowed the definition of hearsay, rejecting the rule of *Wright* so that only assertions of a proposition could be deemed hearsay; they chose broad versions of existing exceptions and incorporated others that were not yet well established; and they explicitly authorised courts to exempt statements from the exclusionary rule on the basis of case-specific factors. Although the shape of some of the exemptions appears to reflect an implicit sense of the confrontation right, the rules draw rather little explicit distinction between criminal and civil cases, or between statements that might be deemed to be the testimony of witnesses and other hearsay.

And what of the expression of the confrontation right in the Sixth Amendment? Until 1965, the Confrontation Clause could not matter very much at all with respect to out-of-court statements. It was only applicable to federal courts, and a court inclined to rule that admission of a given statement would violate the Clause could easily find that admission would violate ordinary hearsay law. But after the Supreme Court ruled that the Clause was applicable against the states,<sup>14</sup> the Clause had great potential significance: although the Supreme Court, or any federal court acting on a petition for *habeas corpus*, still lacked the authority to hold that a state court had violated the state's hearsay rule by admitting a statement against an accused, it could hold that the same act had violated the Confrontation Clause. The trouble, though, was that the confrontation right had become so shrouded by the hearsay rule that the Supreme Court had no clear conception of what it meant. After a decade and a half, the Court ventured to articulate a general theory, under which the Clause was meant to sort out reliable from unreliable hearsay: reliability could be inferred without more if the statement in question fitted within a 'firmly rooted' hearsay exception, and even if this condition were not met the Clause might be satisfied if the statement were deemed to have sufficient 'individualized guarantees of trustworthiness'.<sup>15</sup> This doctrine left the Confrontation Clause almost completely limp, as little more than an easily evaded constitutionalisation of the hearsay rule.

<sup>14</sup> *Pointer v Texas*, 380 US 400 (1965).

<sup>15</sup> *Ohio v Roberts*, 448 US 56 (1980).

As the millennium closed, however, there were some encouraging signs, because three justices of the Supreme Court indicated their willingness to rethink the doctrine, and to recapture the original meaning behind the Confrontation Clause.<sup>16</sup> And then in the *Crawford* case came the great transformation. Seven out of nine justices signed on to an opinion discarding the old rubric. No longer could the Confrontation Clause be satisfied by a judicial determination that the statement at issue was reliable. Rather, the Court interpreted the Clause in accordance with its clear language and its original meaning, as a procedural provision governing the method by which witnesses give their testimony. The Court therefore detached the meaning of the Clause from the hearsay rule; the focus of the Clause, the Court recognised, was not on all hearsay statements but only on those characterised as *testimonial*, a category the bounds of which it left undetermined for the time being.<sup>17</sup> Within that category, however, the Clause states a firm rule: a testimonial statement cannot be introduced against an accused unless he has had an opportunity to be confronted with and cross-examine the witness who made the statement, and even if that condition is satisfied a testimonial statement made out of court cannot be introduced against the accused unless the witness is unavailable to testify in court. The Court explicitly indicated that the accused could forfeit the confrontation right, by wrongful conduct rendering the witness unavailable, and it suggested the possibility that certain dying declarations might be admissible even absent an opportunity for confrontation, as an historically justified *sui generis* exception to the general rule, but these two qualifications, and in my view they are part of the same one,<sup>18</sup> were the only ones indicated by the Court.

<sup>16</sup> *White v Illinois*, 502 US 346, 358 (1992) (Thomas J, with Scalia J, joining, concurring in part and concurring in the judgment); *Lilly v Virginia*, 527 US 116, 140 (1999) (Breyer J, concurring), 143 (Scalia J, concurring).

<sup>17</sup> *Crawford* also left deliberately undecided whether the Confrontation Clause imposed any strictures at all on non-testimonial statements. In *Davis v Washington*, 126 S Ct 2266 (2006), it answered that question in the negative. This is the proper answer, in my view. (For a contrary perspective, see SJ Summers, 'The Right to Confrontation After *Crawford v Washington*: A Continental European Perspective' (2004) 2 *International Commentary on Evidence*, Issue 1, Art 3.) The confrontation right governs the manner in which prosecution witnesses give testimony. If an out-of-court statement is not testimonial in nature, then, though there may be other reasons why it should not be admitted, it is simply not within the ambit of the confrontation right. At the same time, a sensible concept of the right depends on its recognition that a statement is testimonial if made, no matter how informally or to whom, in circumstances in which a reasonable declarant would anticipate a reasonable likelihood of evidentiary or prosecutorial use. Failure to recognise this point would allow, and encourage, testimony made informally or through private intermediaries but without an opportunity for confrontation. See below n 25.

<sup>18</sup> The traditional justification for the dying declaration exception to the hearsay rule, that no one would wish to meet his Maker with a lie on his lips, is unpersuasive. The better reason for admitting some dying declarations is that the accused rendered the witness unavailable by striking the blow that later killed her. I have explored this idea in various places, including a

Among the questions left open by *Crawford* the most obvious, and one that the Court has already begun to answer, in *Davis v Washington*,<sup>19</sup> is that of what testimonial means. But there are many others as well, involving matters such as the adequacy of prior opportunities for cross-examination, the standards to be applied to child witnesses, and the substantive and procedural principles governing the determination of forfeiture.<sup>20</sup> It will take decades for the Supreme Court to work out these problems and develop a sound framework for the confrontation right. But at least now it is on the right course.

Unfortunately, no other country in the common-law world has yet followed the lead of the United States, though perhaps they will in time. But, and here is what, in the grand historical sweep, appears to be a large and delicious irony, in England, where the confrontation right was such a point of pride for centuries, the courts and Parliament are now constrained against ignoring the right altogether by doctrine issued by a court sitting in France.<sup>21</sup>

\* \* \*

Article 6, paragraph 1 of the European Convention on Human Rights provides in general terms that litigants have a right to ‘a fair and public hearing’ and paragraph 3(d) more specifically guarantees the right of a criminal defendant ‘to examine or have examined witnesses against him’. I will not attempt to discuss here why this latter provision was adopted, what changes in national procedures its drafters contemplated it would require,<sup>22</sup> or why it lay virtually dormant for several decades. The key fact is that since *Unterpertinger v Austria*,<sup>23</sup> in which the European Court of Human Rights first found a violation of the Convention because of the lack of an opportunity for cross-examination,<sup>24</sup> a steady trickle of cases

blog post entitled *Forfeiture: The Standard of Proof and the Reflexive Case*, <http://confrontationright.blogspot.com/2007/08/standard-of-review-for-limitations-on.html> (July 20, 2007).

<sup>19</sup> 126 S Ct 2266 (2006).

<sup>20</sup> I have laid out some of the pending issues in a blog post, *Pending Crawford Issues*, <http://confrontationright.blogspot.com/2006/11/pending-crawford-issues.html> (12 November 2006), and in *Crawford, Davis, and Way Beyond*, 15 *JL & Policy* 551 (2007).

<sup>21</sup> See C Tapper, *Cross and Tapper on Evidence* 11th edn (London, Butterworths, 2007) 645, 664–6. The tendency of courts in the United Kingdom appears to be to interpret the national statutes stringently enough and the Convention leniently enough that the two do not conflict. See B Emmerson, A Ashworth and A Macdonald, *Human Rights and Criminal Justice* 2nd edn (London, Sweet & Maxwell, 2007) 643–53.

<sup>22</sup> Continental procedures are very diverse, a point emphasised in Summers, above n 17. While confrontations between accused and prosecution witnesses have been ‘not uncommon’ in some Continental systems, it is also clear that the Convention has had a significant impact in requiring confrontation. *Ibid* 2.

<sup>23</sup> Series A, No 110, App No 9120/80 (ECHR 1986), (1991) 13 EHRR 175.

<sup>24</sup> See M Holdgaard, ‘The Right to Cross-Examine Witnesses: Case Law under the European Convention on Human Rights’ (2002) 71 *Nordic Journal of International Law* 83, 83 n1.



emanating from Strasbourg has addressed the question of the circumstances in which an accused must have an opportunity to be confronted with the prosecution witnesses. Several points about this body of law, especially in comparison to its American counterpart, are significant here.

First, this is clearly a doctrine governing the procedure under which prosecution witnesses give testimony, pure and simple. To be effective, a right meant to ensure that witnesses testify in proper judicial proceedings must reach witnesses who effectively testify *outside* such proceedings; the European Court has not had difficulty recognizing this idea.<sup>25</sup> The doctrine developed by the Court is one of confrontation, and the Court has referred to it as such.<sup>26</sup> It does not purport to create a rule against hearsay, and the Court's discussion does not refer to that rule or to any doctrines from the common law countries. Indeed, it seems probable that the absence of any controlling hearsay rule left the landscape uncluttered and made it easier for the Convention and the Court to articulate a straightforward doctrine on the examination of witnesses. And so, though it is ironic it may not be surprising that the European Court began establishing this doctrine nearly two decades before *Crawford* and while law reformers in England and other parts of the common law world were dismantling the hearsay rule with little heed for the confrontation principle.

Second, the European Court perceives a 'principle of equality of arms inherent in the concept of a fair trial and exemplified in paragraph 3(d)';<sup>27</sup> similarly, the Court has said that Articles 6(1) and 6(3)(d) are 'aimed at securing equality between the defence and the prosecution in criminal proceedings'.<sup>28</sup> Although some American observers talk about a 'level playing field', the savvier ones recognise that this is a myth in criminal procedure:<sup>29</sup> the prosecution has some advantages, the defence has others, and the two sets are not commensurable. Equality is not a significant part of the rhetoric of the confrontation right in the common law system. The confrontation right is much older than the right to call witnesses in one's

<sup>25</sup> Eg, *Mild and Virtanen v Finland*, App Nos. 39481/98, 40227/98 (ECHR 26 Jul 2005). Summers, above n 17, 8–9, suggests that the European right is construed more broadly than the American right in one important respect. Statements to a doctor describing criminal activity, such as a statement by a child describing sexual abuse, are considered non-testimonial by some American courts, but Summers contends that they would be within the purview of the Convention. In my view, a statement describing a crime made to a doctor should ordinarily be considered testimonial as fully as if the statement were made to the police, because in all probability the doctor will act as a conduit to the criminal justice system.

<sup>26</sup> See *Saïdi v France*, App No 14647/89, [1994] 17 EHRR 251 (ECHR 1993) ('The lack of any confrontation deprived him in certain respects of a fair trial.')

<sup>27</sup> *Bonisch v Austria*, Series A, No 92, App No 8658/79, [1987] 9 EHRR 191 (ECHR 1985).

<sup>28</sup> *Asch v Austria*, Series A, No 203-A, App No 12398/86, [1993] 15 EHRR 597 (ECHR 1991).

<sup>29</sup> See HR Uviller, *The Tilted Playing Field: Is Criminal Justice Unfair?* (New Haven, Yale UP, 1999).

defence, which even now many defendants do not invoke. The confrontation right is based not on a concept of equality between prosecution and defence but rather on a deep-seated belief that an essential condition to make prosecution testimony acceptable is that the accused have a chance to confront and examine the witness.

Third, as suggested by the passages quoted in the last paragraph, the European Court regards the confrontation right developed under Article 6(3)(d) of the Convention as an instantiation of the general right to a fair trial under Article 6(1), and in a weak sense; that is, the overall question is whether the accused has had a fair trial, and a denial of confrontation is a factor to be taken into account in making that assessment.<sup>30</sup> By contrast, under *Crawford*, as discussed above, the right is categorical: if a statement is testimonial in nature, then (putting aside the possibility of forfeiture and the case of dying declarations) it cannot be admitted against an accused unless he has had an opportunity to cross-examine and the witness is unavailable. To be sure, American appellate courts will not reverse a conviction on the basis of a confrontation violation if they deem the error to be harmless, and they are often rather aggressive in so deeming. But the harmless-error doctrine does not avoid the fact of a violation, and it can only be invoked by an appellate court. An American court could *not* legitimately say, 'It is unclear whether admitting this statement, which is testimonial in nature and as to which the accused has not had confrontation, would alter the outcome of the trial, but overall the defendant has had a fair trial, so there is no violation'.

The fuzzier nature of the European right manifests itself in various ways.<sup>31</sup> One is that in some circumstances unavailability of the witness through the fault of neither party is deemed enough to excuse the absence of an opportunity for confrontation;<sup>32</sup> by contrast, under *Crawford*, only if the witness's unavailability was caused by the wrongful conduct of the accused (and, under the recent case of *Giles v California*<sup>33</sup>, only if the conduct was designed to have that effect) can it excuse the absence of an opportunity for cross-examination. Another manifestation is that the European right is less likely than its American counterpart to be deemed violated if the witness in question does not appear to be central to the case.<sup>34</sup>

<sup>30</sup> See Holdgaard, above n 24, 85.

<sup>31</sup> Summers, above n 17, complains about insufficiently predictable 'judicial self regulation' under the decisions by the Strasbourg Court.

<sup>32</sup> Eg, *Gossa v Poland*, App No 47986/99 (ECHR 9 Jan 2007).

<sup>33</sup> 126 S Ct 2678 (2008).

<sup>34</sup> Eg, *Trivedi v UK*, App No 31700/96, [1997] EHRLR.521 (Eur Comm Human Rts 1997) 'The Commission ... emphasised that Mr C's statements were not the only evidence in the case to show [a critical fact].'

Fourth, because of the difference between common law and Continental systems in the role of the parties in the litigation, one of the key features stressed by Damaška, it may possibly be appropriate for the systems to adopt different attitudes towards rules allowing defendants to call witnesses to testify at trial. Under *Crawford*, if the prosecution does not provide an opportunity for confrontation, it should not be a sufficient answer that the accused could have called the witness to the stand himself.<sup>35</sup> An accused who puts on the stand a hostile witness whose statement has already been admitted against him runs a great risk that he will have little or nothing to show for the effort, in which case the move will almost certainly backfire. The risk is indeed so great that defence counsel virtually never do it, though if the prosecution were to put the same witness on the stand defence counsel would almost certainly ask at least a few questions on cross-examination. The opportunity to call the witness to testify, therefore, should not be regarded as an adequate substitute for the opportunity to cross-examine a prosecution witness. By contrast, in the Continental system, in which there is much less association of parties with witnesses and much less structuring and party control of questioning, perhaps it is acceptable to provide that the witness will not be brought to trial unless the accused takes the initiative to produce her.<sup>36</sup>

Similarly, another of the pillars emphasised by Damaška, the compressed nature of the common law trial, makes salient in the common law system another issue that may be less important in the Continental system, the timing of the opportunity for confrontation. Under *California v Green*,<sup>37</sup> a pre-*Crawford* decision that is presumably still good law in this respect, an opportunity to cross-examine the witness at a preliminary hearing satisfies the confrontation right if the witness is unavailable to testify at trial.<sup>38</sup> That is an unfortunate result, I believe, because the functions of the preliminary hearing and of the trial are so distinct that, even though the accused formally has an opportunity to pose questions at the hearing, hardly ever does defence counsel engage in a complete cross-examination; indeed, if counsel tried to do so, the judge would probably put a short stop

<sup>35</sup> See, eg, *Thomas v US* 914 A 2d 1 (DC 2006), and my blog posts *Pending Cert Petitions*, <<http://confrontationright.blogspot.com/2007/01/pending-cert-petitions.html>> (3 January 2007) accessed 18 June 2008; *Shifting the Burden, Take 2*, <http://confrontationright.blogspot.com/2006/08/shifting-burden-take-2.html> (2 August 2006); and *Shifting the Burden*, <http://confrontationright.blogspot.com/2005/03/shifting-burden.html> (16 March 2005). Some cases have, however, taken the contrary view, eg, *State v Campbell*, 719 NW 2d 374 (ND 2006), *cert denied*, 127 S Ct 1150 (2007).

<sup>36</sup> Note the cases discussed in Holdgaard, above n 24, 103.

<sup>37</sup> 399 US 149 (1970).

<sup>38</sup> *Crawford* explicitly reaffirmed another aspect of *Green*, that the confrontation right is not violated by introducing an earlier statement if the witness testifies at trial, even if the witness's direct testimony is inconsistent with the prior statement. I believe both these aspects of *Green* are ill-considered.

to the exercise.<sup>39</sup> But if one regards the Continental system as creating a less sharp functional distinction between steps in the process, then arguably it is more justifiable to hold, as the European Court does, that an opportunity for examination at a preliminary hearing satisfies the confrontation right.<sup>40</sup>

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The American and Continental traditions are very different, not only in the institutional respects emphasised by Damaška but also in their constitutional styles, and particularly in their treatment of individual rights. For this reason, I doubt that within the foreseeable future the contours of the confrontation right as developed in the two systems will become much closer than they are now; the categorical American right will presumably remain stronger than its European counterpart.

The interesting question is what will happen in the United Kingdom. It is there that the confrontation right first flourished and reached maturity, and there that for centuries the right was a particular matter of pride. But the rule against hearsay subsumed the right, and eventually became so broad that inevitably it, along with the right, was greatly diluted; as a result the right was little understood and nearly forgotten. In the United States, the text of the Confrontation Clause provided a reminder of the nature of the right, and ultimately its mandate caused a historically minded Supreme Court to give the right new life in accordance with its historical meaning. In the United Kingdom there is no comparable text, and the only operative mandate comes from the European Convention and the cases construing it. The path of least resistance would be to obey the commands of that jurisprudence and do nothing more. But perhaps *Crawford*, by effecting a virtual rediscovery of the confrontation right in the former colonies, will eventually lead to a similar phenomenon in the mother country as well.

<sup>39</sup> In a blog post titled *Opportunity for Cross-Examination at Preliminary Proceedings*, <http://confrontationright.blogspot.com/2007/08/opportunity-for-cross-examination-at.html> (29 August 2007), I posed the question of how often counsel engaged in complete cross-examination at preliminary hearings. The responses suggest that they hardly ever do so and that sophisticated defence counsel avoid later problems by confirming that the judge would not allow them to.

<sup>40</sup> Eg, *Vozbigov v Russia*, App No 5953/02 (ECHR 26 Apr 2007). See also, eg, *Delta v France*, Series A, No 191-A, App No 11444/85, [1993] 16 EHHR 574 (ECHR 1990) (accused should have an 'adequate and proper opportunity' for confrontation 'either at the time the witness makes his statement or at some later stage of the proceedings').

