THE RIGHT OF CONFRONTATION: WHAT NEXT?

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The late Professor Charles T. McCormick, in his esteemed text on the law of evidence, comments that the constitutional provisions guaranteeing to an accused the right to confront the witness against him have been interpreted as merely codifying the common law right of cross-examination.[1] This interpretation has been widespread respecting the confrontation clauses of many of the state constitutions, but was that the full and only purpose of the authors of the federal Bill of Rights? This is far from an insignificant question, for the federal confrontation guarantee of the sixth amendment must today be "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[2]

Among the several rights of persons accused of crimes which are enumerated in the sixth amendment are such fundamental and vastly significant rights as trial by jury, compulsory process, and assistance of counsel. Each of these has an extensive and well-documented pre-Bill of Rights history, so that the broad purposes and specific intents which motivated their inclusion in the amendment are reasonably clear. Oddly, however, the right of an accused "to be confronted by the witnesses against him" is seldom mentioned in early historical documents. The precise source of this use of the word "confront" is obscure, and the remembered harms or injuries suffered or feared by the colonists which impelled them to add this right to the panoply of guarantees of the sixth amendment cumulate at best to only a sketchy relevant historical background. It is not too surprising, therefore, to discover that the exact import of the federal right to be "confronted" by witnesses has been varyingly conceived over the years.[3]

Of course, recourse to the history of a legislative or constitutional provision is unnecessary to determine its intended meaning if its

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1. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 19 (1954).

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

3. To cite only two examples, in one of the earliest United States Supreme Court cases construing the right, it was concluded that it should be interpreted in the light of the law, presumably the hearsay rule and its exceptions, existing at the time the Constitution was adopted, and not as reaching out for new guaranties of the rights of the citizen, Mattox v. United States, 156 U.S. 237 (1895); and later it was held not to serve as a rigid and inflexible barrier against

language is complete, precise, and unlimited, and encompasses the full matter. Unfortunately, this is not the case respecting the confrontation clause. There is universal agreement that this provision was not intended by its drafters to be absolute and complete, but was meant to be qualified by certain limitations serving the necessities of proof. As expressed by Professor Wigmore, the constitution-makers merely "indorsed the general principle," naming and describing it "sufficiently to indicate what was intended," and assumed that the exceptions were so well established that they would cause no difficulty.[4] Certainly logic supports this position, for no indication is found of the existence of any purpose to outlaw the long-recognized admissibility of certain types of evidence which are directly contrary to the letter of the confrontation provision, such as, for example, dying declarations.[5]

A purist interpretation of the intended import of the confrontation clause would therefore seem to be to admit of no exceptions to the right of an accused to meet the witnesses against him face to face during his trial except those which were clearly recognized by the law as it existed when the Bill of Rights was adopted. This approach has, however, had only an early following.[6] The more popular construction has been to

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orderly development of reasonable and necessary exceptions, Kay v. United States, 255 F.2d 476 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958). *See also* text *infra*.

Respecting the types of information which are subject to the confrontation clause, however, there has been little dispute. In Kirby v. United States, 174 U.S. 47, 55 (1899), the Court limited its scope to facts which can be primarily established by witnesses. Similarly, in Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437, 29 Am. Dec. 608, 608-09 (1836), the type of information was described as "evidence . . . which could be given orally in the presence of the accused." Also, in Curtis v. Rives, 123 F.2d 936 (D.C. Cir. 1941), it was commented that the right should be restricted so as to affect only the proof of those facts which are provable by witnesses. Doubtlessly what should be encompassed, although not clearly so stated, is evidence which depends for its probative value upon the testimonial credibility of some person for, as noted in text material accompanying note 38 *infra*, enhancing, testing, and evaluating this credibility are the basic purposes of the right.

4. 5 WIGMORE, A TREATISE ON EVIDENCE § 1397, at 130-31 (3d ed. 1940) [hereinafter cited as WIGMORE].

5. *E.g.*, Mattox v. United States, 156 U.S. 237, 243 (1895):

> Many of [the Constitution's] provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected.

And Robertson v. Baldwin, 165 U.S. 275, 281 (1897):

> [T]he first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.

6. *See principally* cases cited notes 42-46 *infra*. The approach is, of course, also inadvisable.

split the right to confront accusers into two elements, a right personally to cross-examine the adverse witnesses and a right to compel them to give their testimony while face to face with the accused and the jury, and then to give each of these components differing values. The right of cross-examination, which at the time of the adoption of the Bill of Rights was firmly entrenched in the common law, is, under this construction, assigned prime importance and made subject only to long-standing exceptions recognized by the common law of evidence. On the other hand, the right to compel actual physical confrontation is relegated to a subordinate and disposable value.[7] The crystallization of this view was doubtlessly due to Professor Wigmore's writings, wherein he asserts that the right of confrontation is no more and no less than the common law right of cross-examination, whereas the right to compel the witness to stand face to face with the accused and the jury is a secondary and accidental advantage not included in the original and fundamental object of the Bill of Rights provision. Consequently, he continues, the presence of the witness before the tribunal may be dispensed with if necessary without violating the confrontation sanction.[8]

The foundations Wigmore cites for these conclusions are far from convincing.[9] Additionally, it is well to remember that the authors of the sixth amendment did not provide that "in all criminal prosecutions the accused shall enjoy the right . . . to cross-examine witnesses against

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[T]he established exceptions had gone through a gradual and at times confusing development by the 1790's, and others were still in the process of being refined. To create a constitutional rule based on an arbitrary date when the law was quite unclear would seem to run counter to the notion of a gradual constitutional reevaluation . . . . Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 746-47 (1965).

7. *E.g.*, Matthews v. United States, 217 F.2d 409 (5th Cir. 1954); Gamble-Skogmo, Inc. v. FTC, 211 F.2d 106 (8th Cir. 1954). Note the following language in Douglas v. Alabama, 380 U.S. 415, 418 (1965): "Our cases construing the clause hold that . . . an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation."

8. WIGMORE §§ 1395-97, 1399.

9. Although cross-examination is doubtless a principal aspect of the right of confrontation, the authorities cited by Wigmore simply do not support his conclusion that requiring the witness to face the jury was actually secondary or accidental. It is noteworthy that he provides only one citation in this connection which antedates the Federal Bill of Rights and which uses the word "confront"—Duke of Dorset v. Girdler, Finch's Prec. Ch. 531, 24 Eng. Rep. 238 (1720)—and it is most equivocal. WIGMORE § 1395, at 123. It has been suggested that Wigmore's construction was the most convenient at the time. Semerjian, *The Right of Confrontation*, 55 A.B.A.J. 152 (1969). In a footnote Wigmore himself comments that in the earlier and *more emotional* periods, actual confrontation was supposed, "more often than it now is," to be able to unstring the nerves of a false witness, which seems to indicate that he personally considered this aspect of the right of little value. WIGMORE § 1395, at 126 n.2. This may have affected his conclusions.

him," but instead selected, deliberately we must assume, the phrase "to be confronted by the witnesses against him." The obvious question is why the more precise term was not used if cross-examination was all that was actually and nonaccidentally intended? It is suggested that this question justifies another look for historical markers indicating the true purpose of this phrase.

One historian attributes the concern of the authors of the federal Bill of Rights that the right of confrontation be accorded in all criminal cases to the flagrant example of unfairness suffered by Sir Walter Raleigh in his trial in England in November 1603 for treason.[10] He was convicted almost exclusively on the written evidence of one of his enemies who had clearly plotted against him but who did not appear at the trial. The effect of this case, however, almost two centuries later when the right of confrontation was included in the Bill of Rights, is extremely doubtful. Despite the notorious case, none of the early colonial documents seem concerned with the right. For example, the *Massachusetts Body of Liberties of 1641* obviously reflected how American concepts of individual liberties had been molded during the early colonial period. Although it dealt with such subjects as selection of juries, self-incrimination, speedy trials, and "inhumane, Barbarous or cruel" punishments, it made no mention of the right of an accused to face the witnesses against him.[11]

Other authorities find some connection between the Leveller[12] pamphlets, which were printed in the mid-17th century in England and distributed in the colonies, and the later enunciated right of confrontation.[13] These tracts were widely circulated in the colonies and were obviously most influential. Additionally, it is true that some of them did argue for the right of an accused to come face to face with his accusers. For example, one published in 1653 entitled *The Just Defence of John Lilburn [sic]* complained most stirringly of the conviction of Lilburne by an Act of Parliament without any semblance of a trial and of the procedures in a later hearing in which the principal evidence offered against him was his own coerced testimony. This pamphlet insisted:

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10. F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1951).

11. THE COLONIAL LAWS OF MASSACHUSETTS 33-61 (W. Whitmore ed. 1890).

12. A political faction in England in the mid-17th century which advocated the levelling of all ranks and the establishment of a more democratic government.

13. *E.g.*, I. BRANT, THE BILL OF RIGHTS ch. 18 (1965).

> The ancient known right and law of England being, that no man be put to his defence at law, upon any mans bare saying, or upon his own oath, but by presentment of lawful men, *and by faithful witnesses brought for the same face to face . . . .*[14]

Despite these and similar arguments—and certainly instances of unfairness in trials occurred in the colonies themselves—no insistence upon the right of confrontation appeared in colonial government documents during the 17th century. Even the "most famous of all colonial constitutions,"[15] the *Pennsylvania Charter of Privileges of 1701*, which accomplished a marked advance over English law by according accused persons the right to counsel and the right, to the same extent as held by prosecutors, to summon witnesses in their defense, did not mention the concept of confrontation.[16]

Commencing approximately with the French and Indian War (1754-63), serious weaknesses and instances of unfairness in the British imperial administration of the colonies markedly increased. Although these affected many aspects of colonial society, the most significant for the purposes of this discussion were enactments of the Parliament in England which directly or indirectly affected adversely the right of trial by jury in the colonies. The earliest of these was the Stamp Act of 1765, which imposed offensive stamp duties on various documents, papers, circulars, playing cards, and other items, but which also contained the "most grievous innovation"[17] of enforceability in courts of admiralty, nonjury tribunals which operated under unique rules of their own. This latter feature of the Act was designed to avoid the jury system and apparently so because juries in the colonies were often sympathetic towards persons engaged in avoidance of just such taxes as were sought to be imposed.[18] This Act was soon repealed but not until after a Stamp Act Congress had been assembled in the colonies and had issued a resolution protesting its enactment.

Following almost on the heels of the Stamp Act was a resolution of the British Parliament to the effect that all alleged traitors in the colonies, particularly such as those who had instigated the

14. THE LEVELLER TRACTS: 1647-1653, at 454 (W. Haller & G. Davies eds. 1944) (emphasis added).

15. 2 E. CHANNING, A HISTORY OF THE UNITED STATES 322 (1908).

16. 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3076-81 (F. Thorpe ed. 1909).

17. These are the words of John Adams quoted in DOCUMENTS OF AMERICAN HISTORY 57 (3d ed. H. Commager 1943).

18. SOURCES OF OUR LIBERTIES 263 (R. Perry & J. Cooper eds. 1959).

Massachusetts Circular Letter of 1768,[19] should be taken to England to be tried for treason.[20] This, of course, would have denied those accused the right to a trial by a jury selected from men from the locality where the crime allegedly occurred, would most drastically have limited their right to challenge the jurors, would have effectively denied to them their right to call witnesses for their defense,[21] and would have made it virtually certain that witnesses for the prosecution would give their testimony by deposition. Then in 1772 Parliament enacted a law to protect His Majesty's dockyards in the New World, and again provided that persons alleged to have committed acts of destruction could be tried either in England or where the offense was committed.[22] Next, in 1774 Parliament passed the Massachusetts Government Act, which directed that juries would be selected by county sheriffs instead of by the communities involved.[23] This was unacceptable to the colonists since the sheriffs were appointed and removed by the royal governor, and the Act therefore gave to the crown effective control over the functioning of the jury system.

During this time, in the years from 1765 to 1769, Sir William Blackstone had published the four volumes of his *Commentaries on the Laws of England*, which were destined to become a classic. These volumes were avidly sought in the colonies and had inestimable impact there on the development and growth of the law and legal attitudes. It is most significant to note, as the colonists must have noted, this scholar's opinion of confrontation:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can

19. *Id.* 276.

20. R. FROTHINGHAM, THE RISE OF THE REPUBLIC OF THE UNITED STATES 231-32 (7th ed. 1899).

21. Which had been conferred in cases of treason by the Trial of Treasons Act, 7 Will. 3, c. 3, § 7 (1695).

22. 12 Geo. 3, c. 24 (1772).

23. 14 Geo. 3, c. 45 (1774).

> never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance; for besides the respect and awe, with which his presence will naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue. In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike when their depositions are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it.[24]

In 1774, the First Continental Congress took under consideration the grievances of the colonies and commenced preparing petitions and memorials to the King, Parliament, and others. Among other items, addresses were composed, and one dated October 26, 1774, directed to the inhabitants of Quebec in an effort to obtain their support for the American cause, contained this statement respecting the right to trial by jury:

> The next great right is that of trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the *characters of the witnesses, upon a fair trial, and full enquiry, face to face, in open Court, before as many of the people as chuse to attend*, shall pass their sentence upon oath against him; a sentence that cannot injure him, without injuring their own reputation, and probably their interest also; as the question may turn on points, that, in some degree, concern the general welfare; and if it does not, their verdict may form a precedent, that, on a similar trial of their own, may militate against themselves.[25]

24. 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (1768).

25. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 107 (W. Ford ed. 1904) (emphasis added).

Although the formal *Declaration and Resolves* adopted by the First Continental Congress in October of 1774 did not specifically detail the rights which the colonists would demand, the recital of grievances it contained did include the employment of courts of admiralty to try causes arising within the colonies and the permissible trial of colonists in England for offenses committed in America.[26] Similarly, the *Declaration of the Causes and Necessity of Taking Up Arms*, issued on July 6, 1775, listed those grievances prominently among the complaints.[27]

In August of 1774 a convention had been assembled in Virginia to handle general executive and legislative affairs of the colony. This body adopted two important resolutions in the spring of 1776. One instructed the Virginia delegates in the Continental Congress to propose the issuance of a declaration of independence, and the other called for the appointment of a committee to draft a constitution and a declaration of rights for Virginia.[28] Mr. George Mason, a planter from Fairfax County, Virginia, was appointed a member of that committee and assumed leadership in drafting the required documents. That Mr. Mason was fully aware of the grievances of the colonies against England and completely sympathetic with them is undoubted. As early as June of 1766 he had transmitted a letter to the *Public Ledger* in London, addressed to the Committee of Merchants in London in response to a letter by that committee which had been published in the colonies, and signed "A Virginia Planter." In that letter he stated:

> We do not deny the supreme authority of Great Britain over her colonies; but it is a power which a wise legislature will exercise with extreme tenderness and caution, and carefully avoid the least imputation or suspicion of partiality. Would to God that this always had been, that it always may be the case! To make an odious distinction between us and our fellow-subjects residing in Great Britain, by depriving us of the ancient trial, by a jury of our equals, and substituting in its place an arbitrary civil-law court—to put it in the power of every sycophant and informer . . . to drag a freeman a thousand miles from his own country (whereby he may be deprived of the benefit of evidence) to defend his property before a judge, who, from the nature of his office, is a creature of the ministry, liable to

26. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (C. Tansill ed.), H.R. DOC. No. 398, 69th Cong., 1st Sess. 4-5 (1927).

27. *Id.* 12.

28. *Id.* 19-20.

> be displaced at their pleasure, whose interest it is to encourage informers, as his income may in a great measure depend upon his condemnations, and to give such a judge a power of excluding the most innocent man, thus treated, from any remedy (even the recovery of his costs) by only certifying that *in his opinion* there was a *probable* cause of complaint; and thus to make the property of the subject, in a matter which may reduce him from opulence to indigence, depend upon a word before unknown in the language and style of laws! Are these among the instances that call for our expression of "filial gratitude to our parent-country"?[29]

Mr. Mason was doubtlessly the principal author of the *Bill of Rights* which was presented to the Virginia Convention on May 27 and which was passed unanimously on June 12, 1776. Section 8 of that document provided:

> That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, *to be confronted with the accusers and witnesses*, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men *of his vicinage*, without whose unanimous consent he cannot be found guilty . . . .[30]

In swift succession thereafter the colonies of Pennsylvania, Delaware, Maryland, North Carolina, and Vermont drafted and adopted constitutions and bills (or declarations) of rights, in 1780 Massachusetts followed, and in 1784 New Hampshire completed the list prior to the time the Federal Constitution was adopted. The language used by the colonies naturally differed, but *all included a confrontation guarantee*, only North Carolina's *Declaration of Rights* differing in any substantive way. Each provision read:[31]

Pensylvania:	"to be confronted with the witnesses"
Delaware:	"to be confronted with the accusers or witnesses"

29. 1 K. ROWLAND, THE LIFE OF GEORGE MASON 383-84 (1892).

30. 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3812-19 (F. Thorpe ed. 1909) (emphasis added).

Hugh Blair Grigsby is reported to have written about the Virginia *Bill of Rights*:

> Some of its expressions may be gleaned from Sydney, from Locke, and from Burgh; but when Mason sat down in his room in the Raleigh Tavern to write that paper, it is probable that no copy of the reply to Sir Robert Filmer, or of the Essay on Government, or of the Political Disquisitions, was within his reach. The diction, the design, the thoughts are all his own. 1 K. ROWLAND, THE LIFE OF GEORGE MASON 247 (1892).

31. SOURCES OF OUR LIBERTIES chs. 23-29 (R. Perry & J. Cooper eds. 1959).

Maryland:	"to be confronted with the witnesses against him"
North Carolina:	"to confront the accusers and witnesses with other testimony"
Vermont:	"to be confronted with the witnesses"
Massachusetts:	"to meet the witnesses against him face to face"
New Hampshire:	"to meet the witnesses against him face to face"

Despite strong sentiment for inclusion in the Federal Constitution of an enumeration of the fundamental rights of individuals which had been enunciated in the various colonial declarations of rights, a motion to accomplish this was defeated during the formation of the Constitution at the Federal Convention of 1787. The principal objection appeared to be that the state declarations were sufficient to protect the liberties of the citizens.[32] As a consequence, a few of the rights which had been in jeopardy in the previous three decades were guaranteed in the Constitution itself,[33] but that document was not accompanied by any bill of rights. This absence, however, evoked some of the strongest protests to the ratification of the Constitution by the states, and the sentiment for a complete bill of rights continued even after ratification.[34] On June 8, 1789, therefore, James Madison introduced several constitutional amendments in the House of Representatives, one of which submitted language to insure the right of an accused person to be confronted "with his accusers, and the witnesses against him."[35] Finally, to complete the history, on December 15, 1791, the sixth amendment was adopted with minor changes from Madison's proposal.

As mentioned earlier, this background is sketchy and leaves many questions unanswered. It does, however, appear fully sufficient to support the conclusion that the immediate and perhaps paramount

32. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (C. Tansill ed.), H.R. DOC. NO. 398, 69th Cong., 1st Sess. 716 (1927).

33. Such as the right to trial of crimes by jury in the state where the crime was committed. U.S. CONST. art. III, § 2, cl. 3.

34. SOURCES OF OUR LIBERTIES 420 (R. Perry & J. Cooper eds. 1959); R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS: 1776-1791 ch. 7 (1955); Black, *The Bill of Rights and the Federal Government*, in THE GREAT RIGHTS 48 (E. Cahn ed. 1963).

35. SOURCES OF OUR LIBERTIES, *supra* note 34, at 423.

impetus for inclusion of the right of confrontation in the Virginia *Bill of Rights of 1776* was the legislatively expressed intentions of the British to try colonists in England for crimes allegedly committed in the colonies, which would inevitably have involved the use of depositions or *ex parte* affidavits by the prosecution. The use of a deposition does not, of course, necessarily deny to the accused the right to face the witness and to test his testimony by cross-examination. Instead, the vice of a deposition is that it does not compel the witness to "stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[36] Thus, when George Mason used the word "confront," he doubtlessly meant to require the meeting of witnesses face to face, and not, as argued by Professor Wigmore, to create a right the requirement of which is satisfied if only an opportunity for cross-examination has been accorded.[37]

If an accused in a criminal prosecution is physically confronted by the witnesses against him, he will enjoy at least three advantages: (1) being face to face with the giver of adverse testimony, which may to some extent insure a greater degree of honest and uncolored evidence, (2) having the witness face to face with the triers of fact so that they may observe his demeanor and mode of testifying and thereby more validly judge his credibility, and (3) conducting the cross-examination of the witness personally and in the presence of the triers of fact.[38] If the colonial legislatures had not intended that accused have the benefit of all these advantages, the indications are that they would have tailored their bill of rights language to fit their purposes. Certainly the precision of phraseology in the Virginia *Bill of Rights* supports this conclusion, as does the character and personality of its principal author, Mr. Mason. Even though he did not follow the profession of law, as a young man he read law extensively in the office of a close friend, and he devoted much of his entire adult life to political endeavors. Major William Pierce, also a delegate to the Federal Convention in 1787, described him in these words:

> Mr. Mason is a Gentleman of remarkable strong powers, and possesses a clear and copious understanding. He is able and

36. Mattox v. United States, 156 U.S. 237, 242-43 (1895).

37. WIGMORE § 1399.

38. *See, e.g.*, Note, *The Use of Prior Recorded Testimony and the Right of Confrontation*, 54 IOWA L. REV. 360, 365 (1968).

> convincing in debate, steady and firm in his principles, and undoubtedly one of the best politicians in America. Mr. Mason is about 60 years old, with a fine strong constitution.[39]

Of course, if the word "confrontation" had by 1776 acquired in law the special legal connotation of a procedure intended to insure nothing substantial but the right of cross-examination, the interpretation of Professor Wigmore would be much more understandable; but no record of any such usage has been found. Additionally, it is to be remembered that the authors of the bills of rights of Massachusetts and New Hampshire, although adopting much of Mr. Mason's language, rejected the word "confront" for the more graphic and explicit "to meet the witnesses against him face to face."

Leaving for the moment the thought that the right of confrontation of the sixth amendment should guarantee all aspects and benefits of actual physical confrontation during the trial, what of the well-known exceptions that were intended? We cannot, of course, rely exclusively on the common law as it existed in 1787, for in some instances depositions were admissible against a criminal accused under that law,[40] whereas, as demonstrated above, the "primary object of the constitutional provision . . . was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . ."[41]

The earlier federal cases speak of "exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit,"[42] exceptions treated as competent testimony "from time immemorial,"[43] exceptions "well established before the adoption of the Constitution, and . . . not intended to be abrogated,"[44] certain "well

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39. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, *supra* note 32, at 104.

40. West v. Louisiana, 194 U.S. 258 (1904). *See also* 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 401 (1819): "It seems that the statutes which authorize the justices to take them [depositions] extend only to cases of manslaughter and felony; and therefore they are not admissible in case of a mere misdemeanour, or for publishing a libel . . . ."; and cases collected in WIGMORE § 1398, at 136-37 n.4.

41. Mattox v. United States, 156 U.S. 237, 242 (1895). *See also* Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437, 29 Am. Dec. 608 (1836), where the true purpose of the right of confrontation was stated to be "to exclude any evidence by deposition, which could be given orally in the presence of the accused"; Dowdell v. United States, 221 U.S. 325, 330 (1911).

42. Mattox v. United States, 156 U.S. 237, 243 (1895).

43. *Id.*

44. Kirby v. United States, 174 U.S. 47, 61 (1899).

recognized exceptions,"[45] and exceptions "within the ruling of the cases,"[46] and the holdings generally follow the common law rules of evidence. The first apparent break with this interpretation appeared in dictum in the case of *Snyder v. Massachusetts*,[47] wherein Mr. Justice Cardozo, citing a state case,[48] commented that the exceptions to the sixth amendment right of confrontation "are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule."[49] Finally, following a series of confrontation cases in which the accused was denied any opportunity to cross-examine, or at least an opportunity to do so effectively,[50] the Supreme Court in the landmark case of *Bruton v. United States*[51] cast substantial doubt that the common law exceptions to the hearsay rule are the exceptions to the right of confrontation which currently must be recognized. The Court at one place commented, "[W]e intimate no view whatever that such exceptions [recognized exceptions to the hearsay rule] necessarily raise questions under the Confrontation Clause."[52] At another place, in referring to an extrajudicial statement which under the common law theory of the hearsay rule would be inadmissible because not subject to cross-examination, the Court remarked that the "reason for excluding this evidence as an *evidentiary* matter also requires its exclusion as a *constitutional* matter." (Emphasis provided by the Court.)[53] In his concurring opinion, Mr. Justice Stewart concluded that "A basic premise of the Confrontation Clause . . . is that certain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount, that jurors

45. Dowdell v. United States, 221 U.S. 325, 330 (1911); Robertson v. Baldwin, 165 U.S. 275, 281 (1897). Compare also Salinger v. United States, 272 U.S. 542 (1926).

46. Delaney v. United States, 263 U.S. 586, 590 (1924).

47. 291 U.S. 97 (1934).

48. Commonwealth v. Slavski, 245 Mass. 405, 140 N.E. 465 (1923).

49. 291 U.S. at 107. Similarly, in Kay v. United States, 255 F.2d 476, 480 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958), the United States Court of Appeals for the Fourth Circuit stated: "[The sixth amendment] was intended to prevent the trial of criminal cases upon affidavits, not to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule." The case held that a certificate showing the result of a test of the alcoholic content of a sample of defendant's blood was admissible in evidence and its admission did not violate the defendant's right of confrontation.

50. Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965); Brookhart v. Janis, 384 U.S. 1 (1966); Parker v. Gladden, 385 U.S. 363 (1966); McCray v. Illinois, 386 U.S. 300 (1967); United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

51. 391 U.S. 123 (1968).

52. *Id.* at 128 n.3.

53. *Id.* at 136 n.12.

cannot be trusted to give such evidence the minimal weight it logically deserves . . . ."[54]

Is it possible to pinpoint with any degree of certainty what was actually intended by the confrontation clause? Can we project ourselves back to those troubled times between 1776 and 1791, reconstruct in imagination the affronts to dignity and the rights of freemen which the colonists suffered and conclude with any assurance of accuracy what was in their minds? Certainly it is an inadequate answer to say that all that was intended was to prevent the trial of criminal cases upon depositions, for these were intelligent men, fully aware that the documents they were composing would be of critical importance to themselves and their children, and that unclear language would materially diminish the chances of success of their grand undertaking.[55]

It is undoubted that the basic objectives of the Bill of Rights were to secure the maximum degree of fairness in criminal trials which was obtainable without effecting a major overhaul of the British system of administration of justice but by maintaining—or perhaps even intensifying—its essence which attaches the greatest weight and importance to the oral testimony of witnesses. It is therefore suggested that the clearly announced right of an accused to meet his accusers face to face was intended to be literally accorded except only as qualified by judicial necessity—that is, unless physical confrontation as an element of fairness is found impossible and a substitute is necessary in order to avoid completely a failure of justice.[56] In other words, going back again to the language of *Mattox v. United States*,[57] exceptions to the right of confrontation should be admitted "not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice."[58]

The Supreme Court decision in *Barber v. Page*,[59] decided only

54. *Id.* at 138.

55. That is, they intended that all the words of the Constitution have meaning. *Cf., e.g.*, Wright v. United States, 302 U.S. 583 (1938); United States v. Butler, 297 U.S. 1 (1936); Myers v. United States, 272 U.S. 52 (1926).

56. Even as recently as Pointer v. Texas, 380 U.S. 400, 407 (1965), the Supreme Court enumerated only two recognized exceptions to the right of confrontation, dying declarations and testimony at a former trial, both of which are based on the concept of necessity. Continuing, however, the Court stated, "There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses," but did not elucidate further.

57. 156 U.S. 237 (1895).

58. *Id.* at 244.

59. 390 U.S. 719 (1968).

shortly before *Bruton v. United States*, was a significant step toward recognition of this view of the right of confrontation. In that case the transcript of testimony of a witness at a prior judicial proceeding against the same accused was introduced. The accused had been afforded an opportunity to cross-examine the witness at the earlier proceeding. The witness, at the time of trial, was incarcerated in a federal prison in a different state, and no attempt was made to secure his presence. The Court, after acknowledging that various courts and commentators had theretofore concluded that the mere absence of a witness from the jurisdiction was sufficient ground for admission of the former testimony, held that, whatever may have been the accuracy of that theory at one time, it no longer has any validity. The rule was then announced that a witness is not "unavailable" for the purposes of the former testimony exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.[60]

It is interesting to note that the Court does not predicate this decision upon the common law rules as they existed at the time of the adoption of the Constitution,[61] or upon any construction of the intent or purpose of the confrontation clause. Instead, the rationale, insofar as stated, is simply this: the confrontation right is an essential and fundamental requirement of a fair trial; as such, it may not be dispensed with lightly; therefore, failure of the state authorities to make a good-faith effort to avail themselves of various means of seeking the presence of the witness at the trial results in the former testimony of the witness being inadmissible as an exception to the right of confrontation.

This case is clearly a positive movement toward recognition that there is a requirement to satisfy, if at all possible, that facet of the right of confrontation which provides the jury an opportunity to judge the credibility of a witness by observing his demeanor while testifying,[62] and that exceptions to this requirement should be based only on necessity. This case, together with the suggestions contained in *Bruton v. United States*[63] that the Court does not consider itself bound by the

60. *Id.* at 724-25.

61. Certainly the requirement of unavailability was much stricter at that time than later. Note, *e.g.*, the following language from United States v. Angell, 11 F. 34, 43 (C.C.D.N.H. 1881): The fair meaning of the sixth amendment is that at the trial the accused "shall be confronted with the witnesses against him, if they be alive."

62. In summary the Court stated, "The right to confrontation is basically a trial right. It includes *both* the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." 390 U.S. 719, 725 (emphasis added).

63. 391 U.S. 123 (1968).

recognized exceptions to the hearsay rule,[64] may presage a new look at some of the current evidentiary rules which were adopted because they serve judicial administrative convenience and possibly provide some guarantee of trustworthiness but which clearly deny to the accused the full satisfaction of his right of confrontation.

An outstanding example of the movement of another court in this direction is the California Supreme Court's decisions in *People v. Johnson*, handed down in 1968,[65] and *People v. Green*, handed down in 1969.[66] In both cases a prior inconsistent statement of a witness made before trial was admitted as evidence of truth of the matters asserted, as opposed to being admitted for impeachment purposes only, and this action was held violative of the confrontation rights of the accused.

The rule in California permitting the admission as substantive evidence of statements previously made by a witness that are inconsistent with his testimony at the hearing originated with section 1235 of the *California Evidence Code of 1965*.[67] The comment by the Law Revision Commission in justification of the rule was:

> Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. . . . The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court.[68]

In the first case to consider this rule, testimony of two witnesses before the grand jury (which testimony, of course, had not been subjected to the test of cross-examination) was admitted in evidence as inconsistent with their testimony at the hearing. The Supreme Court of California held in a unanimous opinion that the sixth amendment

64. Notes 51-53 *supra* and associated text material.

65. 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), *cert. denied*, 393 U.S. 1051 (1969).

66. 70 A.C. 696, 451 P.2d 422, 75 Cal. Rptr. 782 (1969).

67. CAL. EVIDENCE CODE ANN. § 1235 (West 1966).

68. Law Revision Commission, *Comment*, CAL. EVIDENCE CODE ANN. § 1235, at 221 (West 1966).

right of confrontation is not satisfied when the defendant's opportunity to conduct a cross-examination of the evidence against him is restricted to a time 3 years after the evidence is given and to a place in which it is judged by a wholly different tribunal. After having reviewed several United States Supreme Court decisions, including its decision in *Barber v. Page*,[69] the court concluded:

> These rulings emphasize the high court's belief in the importance of ensuring the defendant's right to conduct his cross-examination before a *contemporaneous* trier of fact, i.e., before the same trier who sits in judgment on the truth of the witness' direct testimony as it is spoken from the stand.[70]

Although not expressly so characterized, the conduct of cross-examination before the "contemporaneous" trier of fact is nothing more or less than providing that trier the opportunity to observe the demeanor of the witness and his mode of testifying and thus more validly to judge his credibility, Wigmore's "secondary" aspect of confrontation.

In the second case the prior statement of the witness had been given at a preliminary hearing at which the defendant had been accorded an opportunity to cross-examine. Again, and despite this earlier opportunity to cross-examine, the court held the admission of the evidence violative of the right of confrontation. This time, however, the rationale was much more completely spelled out:

> It is elementary that the role of cross-examination is not simply to elicit a bald contradiction of the witness' direct testimony, a rare occurrence at best, but to focus the attention of the trier of fact on the witness' demeanor as he relates his story and then defends his version against the immediate challenge of the opposing attorney. By cross-examination "the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[71]

The result of this view of the right of confrontation was the conclusion

69. 390 U.S. 719 (1968).

70. People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 120, 68 Cal. Rptr. 599, 608 (1968).

71. People v. Green, 70 A.C. 696, 451 P.2d 422, 427, 75 Cal. Rptr. 782, 787 (1969). The quotation by the court is from Mattox v. United States, 156 U.S. 237, 242-43 (1895).

of the court that to be effective and constitutionally adequate cross-examination must be conducted at the same time as the direct testimony is given and before the same trier who must ultimately pass on the credibility of the witness and the weight of that testimony. The court excepted only a legal showing of necessity, such as the actual unavailability of the witness at the hearing.

Another instance of the broader view of the right of confrontation is provided in the opinion of Judge John F. Onion, Jr., in the Texas Court of Criminal Appeals case of *Schepps v. State*.[72] Probably on the basis of a misinterpretation of a provision in the penal code of that state, the rule was adopted in Texas approximately in 1880 that, where the defendant is indicted as an accomplice and tried separately, the confessions and admissions of the principal offender are admissible in his case.[73] The gist of this rule was that under these circumstances the confession could be admitted to prove the guilt of the principal of the offense as if he were on trial with the accomplice, but that it would not be evidence against the defendant for any other purpose. In holding the rule violative of the right of confrontation, Judge Onion commented:

> While the Sixth Amendment does not prevent the carving out of new exceptions, it does embody the requirements of *real necessity* and adequate guarantees of trustworthiness as essential to all exceptions to the rule, present or future, for otherwise legislative bodies and courts could abolish the right of confrontation by simply making unlimited exceptions to the hearsay rule.[74]

Continuing, he found no real necessity for the rule, and concluded that it must give way to the constitutional right of confrontation. In summary, he stated:

> Certainly it may be argued that none of [the decisions cited] involved the admissions of an alleged principal's confession at the separate trial of an accomplice, but we cannot waltz around the important constitutional issue here involved and validly distinguish the cases by simply color matching the facts. We cannot adopt the luxury of merely saying this case involved the use of examining trial testimony, this one did not; that case was a joint trial, this one was not.[75]

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72. 432 S.W.2d 926 (Tex. Crim. App. 1968).
73. Simms v. State, 10 Tex. Crim. 131 (1881); Arnold v. State, 9 Tex. Crim. 435 (1880).
74. 432 S.W.2d at 941 (emphasis added).
75. *Id.* at 943.

Finally, the opinion of the United States Court of Appeals for the Fifth Circuit in the case of *Evans v. Dutton*[76] is worthy of consideration. Georgia has a statute which provides:

> After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.[77]

Relying on this provision, the trial court in Evans' case admitted into evidence the extrajudicial statement of one Williams, the co-conspirator of Evans, that "if it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now." Although this statement had been made after the basic criminal purpose of the combination had been completed, the fact that the conspirators were at the time of the statement still concealing their identity and guilt apparently brought the statement within the Georgia construction of "pendency of the criminal project."

Following the denial of relief in a habeas corpus proceeding in the United States district court, Evans took his case to the United States court of appeals. That court carefully reviewed the recent Supreme Court cases dealing with the right of confrontation, including *Barber v. Page*,[78] and concluded:

> We therefore think it clear that, if an accused is to be deprived of the right to confront and to be confronted by the witnesses against him, there must be salient and cogent reasons for the deprivation. A criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of fact. . . . We have searched in vain for a reason to justify the abridgment of the right to confrontation . . . in this case.[79]

The court pointed out that the generally recognized exceptions to the hearsay rule have developed from a painful process of rationalizing the denial of confrontation.[80] These rationalizations are now being reevaluated, and this new look is with the purpose of giving the confrontation clause of the sixth amendment the full content of meaning which its authors intended. Therefore, but with considerable

76. 400 F.2d 826 (5th Cir. 1968).
77. GA. CODE ANN. § 38-306 (1954).
78. 390 U.S. 719 (1968).
79. 400 F.2d at 830.
80. *Id.*

temerity, the following restatement of the intended scope and content of the right of confrontation is offered: If evidence of significant import is offered against the accused in a criminal trial, and if it depends for its probative value upon the testimonial credibility of some person, that person must present the evidence in person. Exceptions to this rule may be recognized when, and only when, the ideal of fairness as served by the full satisfaction of all aspects of physical confrontation is outweighed by the necessity to avoid a complete failure of justice.

If this is an accurate synthesis of the right, the rules of evidence in criminal trials may be in for a much more comprehensive overhaul than they have seen to date. Each item of information which is offered against an accused, unless presented by a witness who is before the court and drawn from his own testimonial knowledge, may well be required to answer to the test of necessity. Probably falling before this muster (in addition to those which have presumably already fallen) may be such old familiar friends as declarations against interest, writings containing past recollection recorded, evidence of reputation, and statements of sense impressions; and probably being circumscribed by more stringent limitations to insure that they are not resorted to unnecessarily may be business entries and certain official records, dying declarations, former reported testimony, spontaneous exclamations, and judicial notice. Finally, after nearly two centuries, George Mason's right of confrontation may be given its intended meaning.