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Taking "Blind Shots at a Hidden Target": Witness Anonymity in the United Kingdom

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TAKING "BLIND SHOTS AT A HIDDEN TARGET": WITNESS ANONYMITY IN THE UNITED KINGDOM

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Abstract: Witness intimidation has become an increasing problem in the United Kingdom, and as a result, British courts have allowed witnesses to testify anonymously in cases where they are fearful of testifying. Recently, the House of Lords overturned a murder conviction based on anonymous witness testimony on the grounds that it rendered that trial unfair. Parliament responded by codifying the power to grant witness anonymity as it existed before the Law Lords' decision. The use of anonymous witnesses raises questions about the right of a defendant to confront the witnesses before him or her, a right that has its history in English common law and is guaranteed by the European Convention on Human Rights. This Comment argues that the use of anonymous witness testimony violates a defendant's right to confrontation, and proposes possible alternatives.

Introduction

On June 18, 2008, the House of Lords ruled that a series of protective measures used to conceal the identity of prosecution witnesses "hampered the conduct of the defence in a manner and to an extent which was unlawful and rendered the trial unfair."[1] The decision had instant effects in the United Kingdom, jeopardizing dozens of criminal proceedings and bringing to a halt a murder trial at London's Central Criminal Court which had already cost the government £6 million.[2] Parliament responded almost immediately by creating a statutory framework for witness anonymity;[3] it passed The Criminal Evidence

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[1] R v. Davis, [2008] UKHL 36, (2008) 1 A.C. 1128, 1130 (H.L.) (U.K.). Lord Bingham, in his opinion, notes that anonymous witness testimony forces the defendant to "take blind shots at a hidden target." *Id.* at 1149.

[2] *A Matter of Justice*, Economist, June 28, 2008, at 63. The decision applies to criminal cases in England, Wales, and Northern Ireland. *Law "to Change" on Witness Rules*, BBC News, June 21, 2008, http://news.bbc.co.uk/2/hi/uk_news/7467058.stm (last visited Apr. 1, 2009).

[3] David Howarth, *The Criminal Evidence (Witness Anonymity) Act 2008*, 8 Arch. News 6, 7 (2008).

(Witness Anonymity) Act 2008 (Witness Anonymity Act) on July 21, 2008, a mere month and three days after the decision from the Lords of Appeal.[4] The temporal relationship between the decision and the Act speaks to an inherent contradiction in British courts: that "the principle of open justice is England's most enduring contribution to the law of other nations,"[5] yet British judges have precluded defendants from knowing the identity of a testifying adverse witness.[6]

Part I of this Comment provides a background on *Davis* and the protective measures used during the trial. This section also discusses the House of Lords' ruling and the reaction in the United Kingdom, including a brief outline of the Witness Anonymity Act. Part II focuses on whether the right to confrontation truly exists in British courts and the competing public policy concerns that have driven courts in the United Kingdom to allow anonymous witness testimony. Part III analyzes in more detail the Witness Anonymity Act and its attempt to provide judges with the power to order the same protective measures the House of Lords held were unfair in *Davis*. This section focuses on whether the Witness Anonymity Act has struck the proper balance between witness protection and defendants' rights. In doing so, it looks at the Witness Anonymity Act from the perspective of U.S. jurisprudence on the issue of confrontation. Lastly, this Comment discusses whether the Witness Anonymity Act can be amended to properly protect both the rights of defendants and the witnesses who testify against them.

I. Background

A. *The Case of Iain Davis: Trial and First Appeal*

Iain Davis was convicted of two counts of murder in the Central Criminal Court on May 25, 2004.[7] The New Year's Day murders,[8] and the subsequent trial, received substantial media coverage.[9] Despite

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[4] *Id.* at 6. The Lords of Appeal (also referred to as Law Lords) is the United Kingdom's equivalent to the United States Supreme Court. Ruth Bader Ginsburg, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 26 St. Louis U. Pub. L. Rev. 187, 193 (2007).

[5] Stefano Maffei, The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous and Vulnerable Witnesses 144 (2006).

[6] *Id.* at 197.

[7] R v. Davis, [2008] UKHL 36, (2008) 1 A.C. 1128, 1136 (H.L.) (U.K.).

[8] R v. Davis, [2006] EWCA Crim. 1155, (2006) 2 Cr. App. R. 32, 471 (U.K.).

[9] *See, e.g.*, Jason Bennetto, *One Bullet Kills Two Men at New Year Party*, Independent (London), Jan. 3, 2002, at 8; Nick Hopkins, *Woman, 19, Shot in Head in Mobile Phone Theft*,

Davis' claim that he had left before the shooting,[10] three witnesses, who were friends of one of the victims, identified Davis as the shooter.[11] These witnesses claimed that they feared for their lives if it became known that they had identified the defendant.[12] The trial judge and Court of Appeal, after an investigation, accepted the claims and ordered that the following special measures be taken: the witnesses each give evidence under a pseudonym; their addresses, personal details, and any identifying information be withheld from the defendant and his counsel; defendant's counsel be prohibited from asking the witnesses any questions which might lead to their identification; the witnesses give evidence from behind screens so that only the judge and jury can see them; and the defendant only be able to hear a mechanical distortion of their voices.[13]

Prior to trial, the defense was provided with information on each witness, disclosing any previous convictions as well as "any links the police were able to discover between each of them and any other prosecution witness."[14] In addition, the prosecution and the police investigation team informed the court that they had no information indicating that the victim's family was orchestrating the testimony of the witnesses, nor that the witnesses had any motive to falsely implicate Davis.[15]

On appeal to the Court of Appeal, Davis' counsel argued that the trial was unfair, and that the measures ordered by the trial court were contrary to English common law and Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[16] In an opinion dismissing the appeal, Sir Igor

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GUARDIAN (London), Jan. 3, 2002, at 8; *Single Bullet Kills Two Partygoers*, BBC NEWS, Jan. 2, 2002, http://news.bbc.co.uk/2/hi/uk_news/England/1737828 (last visited Apr. 1, 2009).

[10] *Davis*, 1 A.C. at 1136.

[11] *Davis*, 2 Cr. App. R. at 471.

[12] *Davis*, 1 A.C. at 1137.

[13] *Id.*

[14] *Davis*, 2 Cr. App. R. at 474. The court went on to state:

> In reality there was vast disclosure of relevant material including, for example, a list of all the party goers who were known to the police, the previous convictions of each prosecution witness, and the identity of all the information available to the police of each and every individual said to be "implicated" in this shooting.

Id.

[15] *Id.* at 473.

[16] *Davis*, 1 A.C. at 1137.

Judge, the Head of Criminal Justice and President of the Queen's Bench Division at the time,[17] stated that:

> Without for one moment suggesting that counsel was not faced with unwanted difficulties, and accepting that there were one or two matters which might have been investigated more closely, our conclusion is that the anonymity ruling did not prevent proper investigation with the witnesses, and before the jury, of the essential elements of the defence case.[18]

B. *The House of Lords Judgment and the Fallout*

The House of Lords sent lawmakers into a frenzied panic with its decision in *Davis*.[19] Basing their judgment on the right to confrontation in English common law, recent United Kingdom authorities on protective measures, and the ECHR, the Law Lords clearly determined that the protective measures used in *Davis* deprived the defendant of a fair trial.[20] There was less clarity, however, about the future use of protective measures in British courts.[21] Lord Mance indicated that "further relaxation of the basic common-law rule" of confrontation was for Parliament to determine,[22] and he was joined in this view by Lord Rodger of Earlsferry, though Lord Rodger did not pass judgment on whether such Parliamentary action was in fact needed.[23]

There has been much confusion regarding the long-term implications of the Law Lords' decision,[24] due in part to the absence of a de-

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[17] Her Majesty's Court Service, http://www.hmcourts-service.gov.uk/cms/1287.htm (last visited Apr. 1, 2009).

[18] *Davis*, 2 Cr. App. R. at 479.

[19] *See A Matter of Justice*, *supra* note 2, at 63.

[20] *See Davis*, 1 A.C. at 1137–49.

[21] *See id.* Lord Bingham of Cornhill did not expressly comment on the validity of protective measures, only stating that, "a trial so conducted cannot be regarded as meeting ordinary standards of fairness." *Id.* at 1149. Lord Brown of Eaton-Under-Heywood issued perhaps the most declaratory statement, noting that, "the creeping emasculation of the common law principle must be not only halted but reversed." *Id.* at 1160.

[22] *Id.* at 1173–74.

[23] *Id.* at 1153 ("But Parliament is the proper body both to decide *whether* such a change is now required, and, if so, to devise an appropriate system which still ensures a fair trial.") (emphasis added).

[24] *Compare* Jack Straw, Lord Chancellor and Sec'y of State for Justice, Statement on the Anonymity of Witnesses (June 26, 2008), http://www.justice.gov.uk/news/announcement 260608a.htm [hereinafter Jack Straw Statement] ("[T]he Law Lords decided that there was not sufficient authority in common law to provide for the current arrangements for the admission of anonymous evidence . . . .") (last visited Apr. 1, 2009), *with* Howarth, *su-*

finitive ruling on the future of protective measures.[25] What is clear is the immediate effect the judgment has had in the British courts and the government.[26] On June 24, six days after the judgment in *Davis*, a £6 million trial of two men accused of killing London businessman Charles Butler, in which four witnesses had testified anonymously, was halted halfway through the trial.[27] The judge, in discharging the jury, stated, "[l]ast Wednesday, the House of Lords decided in a very far-reaching judgment that evidence from anonymous witnesses cannot be admitted."[28] The judgment in *Davis* led the Crown Prosecution Service to suspend all cases where anonymous witnesses were used, and caused many in the legal and criminal justice communities to believe that some of Britain's most dangerous convicted criminals would seek appellate review of their trials.[29]

In response, lawmakers, led by Secretary of State for Justice Jack Straw, pushed through emergency legislation to "make sure that, where necessary, anonymous evidence can continue to be given so that we can bring the most violent and dangerous criminals to justice."[30] The Witness Anonymity Act was not heavily debated in Parliament, largely due to the recognition that witness intimidation posed a real threat and a measured response was necessary.[31]

The Act, in section 1, provides "for the making of witness anonymity orders in relation to witnesses in criminal proceedings"[32] and abolishes the common law power of a court to make an order for withhold-

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pra note 3, at 6 ("All these judges seem to be saying that a common law power exists but that limits exist on its proper exercise.").

[25] *See Davis*, 1 A.C. at 1137–49; Howarth, *supra* note 3, at 6.

[26] *See* Richard Edwards, *Jack Straw to Unveil Emergency Law to Stop Collapse of Trials*, DAILY TELEGRAPH (London), June 25, 2008, *available at* http://www.telegraph.co.uk/news/uknews/2194206/Jack-Straw-to-unveil-emergency-law-to-stop-collapse-of-trial.html [hereinafter Edwards, *Emergency Law*]; Richard Edwards, *£6m Trial for Murder of Charles Butler Collapses After Lords Anonymity Ruling*, DAILY TELEGRAPH (London), June 24, 2008, *available at* http://www.telegraph.co.uk/news/uknews/2188070/and1636m-trial-for-murder-of-Charles-Butler-collapses-after-Lords-anonymity-ruling.html [hereinafter Edwards, *Charles Butler Murder*].

[27] Edwards, *Charles Butler Murder*, *supra* note 26.

[28] *Id.*

[29] *Id.* It was estimated that up to 600 applications for witness anonymity had been, or were being made in pending trials, and that up to 40 cases were being prepared for appeal. Edwards, *Emergency Law*, *supra* note 26.

[30] Press Release, Ministry of Justice, Witness Anonymity - Emergency Legislation Receives Royal Assent Today (July 21, 2008), *available at* http://www.justice.gov.uk/news/newsrelease210708a.htm.

[31] *See* Howarth, *supra* note 3, at 7.

[32] Criminal Evidence (Witness Anonymity) Act, 2008, c.15, § 1(1) [hereinafter Witness Anonymity Act].

ing the identity of a witness from the defendant in a criminal proceeding.[33] As described in the Act, a witness anonymity order allows the court to use any or all of five enumerated protective measures.[34] The Act goes on to list three conditions that must be satisfied, taking into account the interests of the witness, the defendant, and justice as a whole.[35] In addition, the Act provides that it shall apply to proceedings which are currently in progress at the time the Act is passed.[36] Finally, the Act includes a provision to block any appeal brought on the grounds that the court had granted a witness anonymity order.[37]

II. Discussion

A. *The Right to Confront Witnesses in British Courts*

1. Confrontation in the Common Law

The foundation of the right to confrontation can be traced back to Roman law.[38] On the continent of Europe, with its rich history of civil law and private examination of witnesses,[39] there rarely existed such a concept prior to the twentieth century.[40] In England, the common law tradi-

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[33] *Id.* § 1(2). The Act extends to England, Wales, and Northern Ireland. *Id.* § 15(2).

[34] *See id.* § 2(2)(a)–(e). Despite the ease with which one can draw the inference that the Witness Anonymity Act was specifically intended to overturn *Davis*, this notion disappeared from Parliament's pen. *Compare* Explanatory Notes to the Criminal Evidence (Witness Anonymity) Bill as Introduced in the House of Commons, July 3, 2008, para. 50 ("It aims to restore the law to, broadly, the position it was believed to be prior to *Davis*."), *with* Explanatory Notes to the Criminal Evidence (Witness Anonymity) Bill, July 8, 2008, para. 54 ("This Bill puts on a statutory footing a power for the courts to grant witness anonymity orders in criminal proceedings where this is consistent with the right of a defendant to a fair trial.").

[35] *See* Witness Anonymity Act, § 4(2)–(5).

[36] *See id.* § 9(1)(b).

[37] *See id.* § 11(2)(a); Explanatory Notes to the Criminal Evidence (Witness Anonymity) Act, July 21, 2008, para. 50.

[38] Coy v. Iowa, 487 U.S. 1012, 1015 (1988); *see* Daniel H. Pollitt, *The Right of Confrontation: It's History and Modern Dress*, 8 J. Pub. L. 381, 384 (1959). Both Justice Scalia, in his majority opinion in *Coy*, and Pollitt point to the New Testament for evidence of confrontation in Roman law: the Roman Governor Festus stated, "I told them that it was not the custom of the Romans to hand over anyone before the accused had met the accusers face to face and had been given an opportunity to make a defense against the charge." *Acts* 25:16 (NRSV); *see Coy*, 487 U.S. at 1015. Some argue that the idea of confrontation extends as far back as the writings of the Hebrews. *See* Maffei, *supra* note 5, at 13; Natalie Kijurna, Note, Lilly v. Virginia*: The Confrontation Clause and Hearsay— "Oh What a Tangled Web We Weave . . . ,"* 50 DePaul L. Rev. 1133, 1138 (2001).

[39] *See* Crawford v. Washington, 541 U.S. 36, 43 (2004).

[40] *See* Maffei, *supra* note 5, at 16.

tion favored open proceedings and a "face-to-face" "altercation" between the witness and the accused.[41] Such a concept could be found in early forms of English dispute resolution predating what we now refer to as trial by jury.[42] As the concept of a trial evolved in England, so too did the role of witnesses, who were now seen as an integral part of judicial proceedings, and whose presence could be compelled by the court.[43]

By the late sixteenth century, the right to confrontation was becoming a customary part of English trials.[44] Still, criminal proceedings in England were not immune from continental civil code influence.[45] Defendants accused of treason were not given the right to confront their accusers, despite statutes to the contrary.[46] The most notorious case was that of Sir Walter Raleigh, whose request to "call my accuser before my face" was not well-received by the court.[47] By the mid-seventeenth century, however, the right to confrontation was enjoyed in nearly all criminal cases, regardless of the charges, as the common law began to predominate.[48] Sir James Fitzjames Stephen noted that "[i]n every case, so far as I am aware, the accused person had the witnesses against him produced face to face, unless there was some special reason (such as sickness) to justify the reading of their depositions."[49]

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[41] *See* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1022–23 (1998). The description of this process as an "altercation," as Friedman notes, comes from Thomas Smith's *De Republica Anglorum*. *Id.* at 1023.

[42] *See* Pollitt, *supra* note 38, at 385–86 (analogizing certain components of trial by order, oath, and battle with the current conceptions of confrontation). In the early forms of the trial by jury, the jurors were themselves witnesses. *Id.* at 386. It was not until the sixteenth and seventeenth centuries that juries became the triers of facts presented through evidence. *See* 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 127 (1926). Today, juries are no longer used in civil cases in the United Kingdom (except for defamation cases). Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 880 (2005).

[43] *See* HOLDSWORTH, *supra* note 42, at 178.

[44] *See* Pollitt, *supra* note 38, at 387–89.

[45] *See* MAFFEI, *supra* note 5, at 14 ("At that time, the continental inquisitorial style was also making its way to England and Wales. Some equity courts and the Star Chamber adhered to the secret procedures of the Inquisition.").

[46] *See* Pollitt, *supra* note 38, at 388. It is noteworthy that Article III, section 3 of the United States Constitution states that "No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." U.S. CONST. art. III, § 3, cl. 1.

[47] *See Crawford*, 541 U.S. at 44. Interestingly, the right to cross-examine adverse witnesses at trial was codified by Parliament over fifty years before Sir Raleigh's trial. *See* MAFFEI, *supra* note 5, at 13–14.

[48] *See* HOLDSWORTH, *supra* note 42, at 230.

[49] 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 358 (1883).

The notion that, by the eighteenth century, a right to confrontation was an established element of English common law has wide support among English commentators.[50] In fact, the right was established at the this time in many American colonies.[51] The presence of a right to confrontation in the common law, coupled with the absence of a clear authority establishing such a right, reflected recognition in England that a certain level of morality should be included in the search for justice.[52]

2. Confrontation in the ECHR

A right to confrontation also exists under Article 6 of the ECHR.[53] Article 6 broadly secures a right to a fair trial[54] and enumerates five minimum rights, including a person's right "to examine or have examined witnesses against him . . . ."[55] The right to confrontation is generally satisfied under the ECHR so long as the accused has the opportunity to cross-examine an adverse witness.[56] In *Kostovski v. Netherlands*, the European Court of Human Rights (European Court) held that the right to confrontation does not necessarily require the opportunity to examine a witness at trial, so long as the opportunity was available at some other point in the proceedings.[57] Nevertheless, the right to confrontation under the ECHR must be understood in light of Article 6's main objective.[58] Thus, while the European Court has found violations of Article 6(3)(d) in cases involving anonymous witness testimony,[59] it has declined to find a violation where it has concluded that the trial was essentially fair.[60]

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[50] *See* R v. Davis, [2008] UKHL 36, (2008) 1 A.C. 1128, 1138 (H.L.) (U.K.) (citing a number of prominent authorities who had recognized the practice).

[51] *See* Alvarado v. Superior Court, 5 P.3d 203, 213 n. 7 (Cal. 2000). The Virginia Bill of Rights, adopted in 1776, was the earliest colonial declaration of the right to confrontation. *See* Francis H. Heller, The Sixth Amendment to the Constitution of the United States: A study in Constitutional Development 23 (1951).

[52] *See* Stephen, *supra* note 49, at 358–59.

[53] *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(3)(d), 213 U.N.T.S. 221, 228 [hereinafter European Convention].

[54] *See* Stephanos Stavros, The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights 42 (1993).

[55] *See* European Convention, *supra* note 53, art. 6(3)(d).

[56] Human Rights and Criminal Justice 639–40 (Ben Emmerson et al. eds., 2d ed. 2007).

[57] App. No. 11454/85, 12 Eur. H.R. Rep. 434, 448 (1990).

[58] *See* Can v. Austria, App. No. 9300/81, 7 Eur. H.R. Rep. 421, 422 (1985).

[59] *See, e.g.*, Windisch v. Austria, App. No. 12489/86, 13 Eur. H.R. Rep. 281, 287–88 (1991).

[60] *See, e.g.*, SN v. Sweden, App. No. 34209/96, 39 Eur. H.R. Rep. 13, 316–17 (2004); Asch v. Austria, App. No. 12398/86, 15 Eur. H.R. Rep. 597, 607 (1993).

In 1998, Parliament passed the Human Rights Act (H.R.A.) "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights . . . ."[61] Under the H.R.A, British courts are bound by the ECHR and thus a defendant may assert a right to confrontation under Article 6(3)(d).[62] Prior to the incorporation of the ECHR into domestic law, aggrieved defendants could petition the European Commission of Human Rights directly under Article 25 of the ECHR.[63] With the passing of the H.R.A., Parliament intended for British courts to consider the rights of the ECHR in their decision making process.[64] Clause 6 of the H.R.A. makes it "unlawful for a public authority to act in a way which is incompatible with a Convention right"[65] and later lists as a public authority "a court or tribunal."[66] In addition, courts must take into account judgments of the European Court when "determining a question which has arisen in connection with a Convention right."[67] Finally, under the H.R.A., a person can rely on Convention rights in legal proceedings if that person claims that a public authority has acted contrary to clause 6,[68] thus providing them with a forum to air their grievances in the United Kingdom.[69]

B. *Witness Anonymity*

Although the United Kingdom holds a prominent place in the history of the right to confrontation, it is understood that the right is not

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[61] Human Rights Act, 1998, c. 42, References & Annotations; *see* SEC'Y OF STATE FOR THE HOME DEP'T, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, 1997, Cm. 3782, ch. 2.1 [hereinafter RIGHTS BROUGHT HOME] ("The essential feature of the Human Rights Bill is that the United Kingdom will not be bound to give effect to the Convention rights merely as a matter of international law, but will also give them further effect directly in our domestic law.").

[62] *See* MAFFEI, *supra* note 5, at 99, 143. *But cf.* R(D) v. Camberwell Green Youth Ct., (2005) 1 W.L.R. 393, 397 (H.L.) (U.K.) ("It is, however, sufficiently accurate to make one anticipate that the introduction of article 6(3)(d) will not have added anything of significance to any requirements of English law for witnesses to give their evidence in the presence of the accused.").

[63] *See* HUMAN RIGHTS AND THE EUROPEAN CONVENTION 8–9 (Brice Dickson, ed., 1997); Conor Mulcahy, Note, *Unfair Consequences: How the Reforms to the Rule Against Hearsay in the Criminal Justice Act 2003 Violate a Defendant's Right to a Fair Trial Under the European Convention on Human Rights*, 28 B.C. INT'L & COMP. L. REV. 405, 410 (2005).

[64] Andrew Ashworth, *The Impact on Criminal Justice*, *in* THE IMPACT OF THE HUMAN RIGHTS BILL ON ENGLISH LAW 146 (Basil S. Markesinis, ed., 1998).

[65] Human Rights Act, § 6(1).

[66] *Id.* § 6(3)(a).

[67] *Id.* § 2(1)(a).

[68] *See id.* § 7(1)(b).

[69] *See* RIGHTS BROUGHT HOME, *supra* note 61, ch. 2.3.

absolute.[70] In response to the violence in Northern Ireland in the 1970s, Parliament passed legislation limiting an accused's right to confront witnesses,[71] though it refrained from codifying measures to prevent disclosure of a witness's identity.[72] Since then, witness intimidation has become a major problem in the United Kingdom,[73] and the establishment of special measures to deal with this problem has been a joint project of the courts[74] and Parliament.[75] Any question as to the power of the courts to shield a witness's identity seemed to be answered in 2006, when Sir Igor Judge stated that "the discretion to permit evidence to be given by the witnesses whose identity may not be known to the defendant is now beyond question."[76]

Prior to the enactment of the Witness Anonymity Act, a judge's discretion to allow a witness to testify anonymously was governed by *R v. Taylor*,[77] and later clarified by the Court of Appeal in *Davis*.[78] Under *Taylor*, a judge would consider a number of factors: the grounds for the witness's fear, the importance of the evidence to the prosecution and whether it would be unfair to exclude it, the creditworthiness of the witness, and whether there would be any undue prejudice to the accused.[79] Upon a request for witness anonymity, a judge balanced the necessity of protecting a witness's identity with "potential or actual disadvantages faced by the defendant in consequence of any anonymity ruling."[80] There was, however, no bright-line test for the judge to apply,

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[70] *See* William E. O'Brian, *The Right of Confrontation: U.S. and European Perspectives*, 121 L.Q.R. 481, 494 (2005).

[71] *See* Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 5 (allowing the admission of written statements made and signed in the presence of a constable when the maker of the statement was unavailable for reasons such as death).

[72] *See* Sec. of State for Northern Ireland, Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland, 1973, Cmnd. 5185, para. 20 (suggesting to Parliament that measures such as screening and withholding the name and address of the witness would "gravely handicap" the accused's counsel).

[73] *See* Jack Straw Statement, *supra* note 24.

[74] *See id.*

[75] *See, e.g.*, Criminal Justice Act, 2003, c. 44, § 116; Youth Justice and Criminal Evidence Act, 1999, c. 23, §§ 17, 23–29.

[76] R v. Davis, [2006] EWCA 1155, (2006) 2 Cr. App. R. 32, 466 (U.K.).

[77] *See* Human Rights and Criminal Justice, *supra* note 56, at 567.

[78] *See Davis*, 2 Cr. App. R. at 466–67.

[79] Human Rights and Criminal Justice, *supra* note 56, at 567.

[80] *See Davis*, 2 Cr. App. R at 466.

and while certain factors were to be considered, ultimately, the decision came down to the specifics of the case.[81]

In addition, British courts have drawn some guidance from decisions of the European Court, which noted in *Doorson v. Netherlands* that although Article 6 did not require the consideration of the interests of witnesses, "[c]ontracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled."[82] There is, however, a major difference between the European Court and British courts when considering the importance of the anonymous witness evidence to the case.[83] The European Court has held that there cannot be a reliance on anonymous witness testimony when it is "decisive" to the outcome of the case.[84] British judges, on the other hand, consider the importance of the anonymous witness testimony to the prosecution.[85] With the passing of the Witness Anonymity Act, the divergent practices of the European Court and British courts now seem to work in tandem.[86] Under section 4 of the Act, a witness anonymity order may not be granted unless, *inter alia*, "it is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that it is important that the witness should testify . . . ."[87] But, in making such a determination, the court must consider whether the evidence will be the "sole or decisive" evidence that implicates the defendant.[88]

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[81] *See id.* at 467. As one example, the court noted that "[i]f satisfied that this witness is indeed independent, but unfit to give live evidence, the judge may admit his or her evidence, anonymously, and in statement form." *Id.* Nevertheless, "if the decisive evidence comes from an unidentified witness who cannot be cross-examined . . . the judge may decide that the evidence should not be admitted." *Id.*

[82] *See* App. No. 20524/92, 22 Eur. H.R. Rep. 330, 331 (1996).

[83] *See* Human Rights and Criminal Justice, *supra* note 56, at 567.

[84] *See id.*; *see also* Eur. Consult. Ass., *Concerning Intimidation of Witnesses and the Rights of the Defence*, Recommendation No. R(97) 13, para. 13 (1997) ("When anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the evidence of such persons.").

[85] *See* Human Rights and Criminal Justice, *supra* note 56, at 567 ("The evidence must be sufficiently important to make it unfair for the Crown to proceed without it.").

[86] *See* Witness Anonymity Act, 2008, c.15, §§ 4(5)(a) & 5(2)(c).

[87] *Id.* § 4(5)(a).

[88] *Id.* § 5(2)(c).

III. Analysis

The European Court has held that the use of anonymous witness testimony is not always incompatible with Article 6(3)(d).[89] In its report on the Witness Anonymity Bill, and consistent with the European Court's jurisprudence, Parliament's Joint Committee on Human Rights concluded that "the Bill contains adequate protections for the right to a fair trial and does not therefore risk incompatibility with Article . . . 6(3)(d) ECHR."[90]

Contrary to the European Court and Parliament's opinion on the matter, the granting of a witness anonymity order under the Witness Anonymity Act is in conflict with the right of confrontation and denies a defendant the fundamental right to a fair trial.[91] The relevant considerations to be regarded by the judge under section 5 do little to improve upon the common law guidelines that existed prior to *Davis* and the Witness Anonymity Act.[92] In addition, the use of anonymous witnesses creates secondary effects which increase the prejudice to the defendant.[93] Thus, while British judges have generally resisted the approach to confrontation used in U.S. courts,[94] the interests of justice would be better served by adopting Sixth Amendment jurisprudence and the importance placed on effective cross-examination as a guide to credibility and the truth.[95]

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[89] *See* Van Mechelen v. Netherlands, App. Nos. 21363/93, 21364/93, 21427/93, & 22056/93, 25 Eur. H.R. Rep. 647, 673 (1998) (citing Doorson v. Netherlands, App. No. 20524/92, 22 Eur. H.R. Rep. 330, 358 (1996)).

[90] Joint Committee on Human Rights, Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill, 2007–8, H.L. 153 & H.C. 950, at 13.

[91] *Cf.* R v. Davis, [2008] UKHL 36, (2008) 1 A.C. 1128, 1150 (H.L.) (U.K.) (finding the protective measures used rendered the trial unfair). A comparison of the protective measures used in *Davis* with the measures enumerated in the Witness Anonymity Act reveals that they are in fact, the same. *Compare id.* at 1137, *with* Witness Anonymity Act, § 2(2)(a)–(e).

[92] *Compare* Human Rights and Criminal Justice, *supra* note 56, at 567 (listing the factors relevant to the judge's discretion under *Taylor*), *with* Witness Anonymity Act, § 5(2)(a)–(e).

[93] *See, e.g.*, Holbrook v. Flynn, 475 U.S. 560, 569 (1986) (possible inferences drawn by the jury from measures taken to isolate the defendant); Robert E. Goldman, The Modern Art of Cross-Examination 3 (1993) (inability of defense counsel on cross-examination to adapt his questioning based on the witness's demeanor).

[94] *See* R(D) v. Camberwell Green Youth Ct., [2005] UKHL 4, (2005) 1 W.L.R. 393, 399 (H.L.) (U.K.) ("It is for the people of the United States, and not for your Lordships, to debate the virtues of the Sixth Amendment in today's world.").

[95] *See* Maryland v. Craig, 497 U.S. 836, 846 (1990) ("The combined effect of . . . elements of confrontation—physical presence . . . cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence . . . is reliable and subject to . . . rigorous adversarial testing . . . .").

A. *Witness Credibility Becomes a Non-issue*

When an accusing witness testifies anonymously, the right to confrontation is violated and the accused loses the opportunity to effectively cross-examine the witness.[96] A witness anonymity order creates two problems: first, the credibility of the witness is predetermined before that witness goes before the jury,[97] and second, once the witness takes the stand, the defense is limited in discrediting the witness's testimony.[98]

Absent knowledge of the witness's identity, the defense is severely limited in challenging the credibility of the witness,[99] and thus cannot properly cross-examine them.[100] Because an anonymity order handicaps the defendant,[101] the Witness Anonymity Act provides that a judge must consider the credibility of a witness before issuing the order.[102] In support of an application for an order, it is the duty of the prosecutor to provide the court with all relevant material "including material that may tend to cast doubt on the credibility, reliability or accuracy of the witness's evidence."[103] If there is an issue of a witness's credibility, however, it has historically been and should continue to be the role of the jury to resolve such issues. [104] It can hardly be said that the credibility of a witness is better determined by a review of "relevant material" than by

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[96] *See* 2 Jeremy Bentham, Rationale of Judicial Evidence: Specially Applied to English Practice 413–14 (1827) ("The operation has two professed objectives . . . the other is, that an opportunity may be afforded to the defendant, in addition to whatever testimony may have been delivered to his disadvantage, to obtain the extraction of such other part . . . of the facts within the knowledge of the deponent, as may operate in his favour.").

[97] *See generally* Witness Anonymity Act, § 5 (requiring the judge to determine the witness's credibility before issuing a witness anonymity order).

[98] *See* Kostovski v. Netherlands, App. No. 11454/85, 12 Eur. H.R. Rep. 434, 448 (1990) ("If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable.").

[99] *See id.*; *see also* Smith v. Illinois, 390 U.S. 129, 131 (1968) ("Yet when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives.") (citations and internal quotations omitted).

[100] *See Smith*, 390 U.S. at 131 ("To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.").

[101] *See* The Attorney Gen.'s Office, Attorney General's Guidelines: The Prosecutor's Role in Application for Witness Anonymity Orders B1 (2008), http://www.attorneygeneral.gov.uk/default.htm (click on "Publications" link; then scroll down and locate the hyperlink in the "Freedom of Information - Disclosure Log 2008") (last visited Apr. 1, 2009) [hereinafter Attorney General Guidelines].

[102] *See* Witness Anonymity Act, § 5(2)(b) & (d).

[103] Attorney General Guidelines, *supra* note 101, at B3.

[104] *See* George Fisher, *The Jury's Rise as a Lie Detector*, 107 Yale L.J. 575, 577 (1997).

a face-to-face confrontation with the defendant, and his attorney, in the courtroom.[105] Indeed, cross-examination is a "critical tool" that allows a defendant to undermine the credibility of a witness.[106]

Under the Witness Anonymity Act, the judge essentially "vouches" for the witness and deems credibility a non-issue.[107] A normally credible witness, however, can be mistaken, and their testimony can suffer from a number of infirmities.[108] The manner in which a cross-examiner chooses to conduct himself when questioning the witness can affect the witness's demeanor on the stand[109] and the jury's perception of that witness's testimony.[110] When an anonymous witness testifies from behind a screen, the defense cannot observe the witness's demeanor and tailor its questioning accordingly.[111] More troubling is the notion that the demeanor of an anonymous witness, shielded from the defense, may not be indicative of his truthfulness.[112] While the Witness Anonymity Act conditions witness anonymity orders on a defendant's receiving of a fair trial,[113] it compromises a defendant's ability to challenge the credibility of an anonymous witness and thus impermissibly provides a structure in which the truth may be buried.[114]

B. *The Inference of Guilt*

Section 7 of the Witness Anonymity Act gives the judge very broad discretion to give an appropriate warning to the jury "to ensure that the fact that the order was made in relation to the witness does not prejudice the defendant."[115] Such a warning is inadequate to prevent the

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[105] *See* Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (discussing how confrontation allows the jury to draw its own conclusion about the truth of the witness's testimony).

[106] *See* Kentucky v. Stincer, 482 U.S. 730, 744 (1987).

[107] *Cf.* U.S. v. Young, 470 U.S. 1, 18 (1985) (impropriety of a prosecutor vouching for the credibility of a witness).

[108] *See* Susan Rutberg, *Conversational Cross-Examination*, 29 Am. J. Trial Advoc. 353, 362–63 (2005); *see also* Laurence H. Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 958 (1974) (listing the testimonial infirmities).

[109] *See* Francis L. Wellman, The Art of Cross-Examination 10–11 (4th ed. 1936). The witness's demeanor "traditionally has been believed to furnish trier and opponent with valuable clues." Fed. R. Evid. Art. VIII advisory committee's note.

[110] *See* Goldman, *supra* note 93, at 2.

[111] *See id.* at 3.

[112] *See Coy*, 487 U.S. at 1019.

[113] Witness Anonymity Act, § 4(4).

[114] *See* Howarth, *supra* note 3, at 7 ("[B]ut there are more practical reasons for distrusting the evidence of witnesses whose credibility cannot easily be challenged. Anonymised witnesses make it possible for old scores to be settled . . . .").

[115] Witness Anonymity Act, § 7(2).

jury from drawing the inference that, if a witness needs to be "protected," the defendant must be dangerous and a criminal.[116]

The U.S. standard for determining whether courtroom procedures are prejudicial offers an alternative. The courts will look at whether "an unacceptable risk is presented of impermissible factors coming into play."[117] In *Coy v. Iowa*, for example, a sexual abuse case involving the screening of child witnesses, the defendant contended that the use of screens would make him appear guilty.[118] Although the majority did not deal with this issue (finding it unnecessary to do so because the screens violated the confrontation clause), the dissent was satisfied with the judge's instruction and noted that "[a] screen is not the sort of trapping that generally is associated with those who have been convicted."[119] While a judge's instruction may have been enough to overcome any prejudice when a defendant is merely screened off from a child witness, it arguably is less effective when the entire range of protective measures under the Witness Anonymity Act is used.[120] A screen used in a case like *Coy* may signal to the jury that a witness would be upset or traumatized by seeing the defendant,[121] but the additional measures of voice modulation and withholding the witness's identity from the defendant (under the Witness Anonymity Act) makes it more likely that the jury will draw the reasonable, yet impermissible, inference that the defendant remains a danger to the witness.[122] Such prejudice cannot be cured by a judge's instruction.[123]

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[116] *See* Howarth, *supra* note 3, at 7.

[117] *See* Estelle v. Williams, 425 U.S. 501, 505 (1976).

[118] 487 U.S. at 1015; *see* Brief for Appellant at 3, Coy v. Iowa, 487 U.S. 1012 (1988) (No. 86-6757) ("While placing a criminal defendant in shackles or prison garb during trial necessarily suggests to the jury that he is generally dangerous, use of a screening barrier in this case communicated to the jury that appellant was a *specific danger* to the child witnesses . . . .") (citation omitted).

[119] *Coy*, 487 U.S. at 1035 (Blackmun, J., dissenting). Justice Blackmun also found support for his opinion in the trial judge's "helpful" instruction that the jury "draw no inferences of any kind from the presence of that screen." *Id.*

[120] *See Holbrook*, 475 U.S. at 569 (discussing the inherent prejudice that may result when a jury draws a "wider range of inferences" from the courtroom practices).

[121] *See* 487 U.S. at 1020.

[122] *See* Howarth, *supra* note 3, at 7. It can further be argued that if witness intimidation is as prevalent as supporters of the Witness Anonymity Act contend, then it is even more likely that a juror will draw an inference that is prejudicial to the defendant. *See, e.g.*, Jack Straw Statement, *supra* note 24 (noting the increase in witness intimidation in serious crimes).

[123] *See, e.g.*, FED. R. EVID. 105 advisory committee's note (explaining the ineffectiveness of a limiting instruction when the prejudicial effect to the defendant is too great).

C. *Can Parliament Make the Unfair Fair?: Corroboration and Forfeiture*

The interests of justice may be better protected if Parliament considers two approaches that have been accepted abroad and may improve upon the fairness of trials involving anonymous witnesses: corroboration of the anonymous witness's evidence,[124] and "forfeiture by wrongdoing."[125] The New Zealand Evidence Act 2006, which served as a primary example of anonymous witness legislation for Parliament,[126] requires that a judge consider, *inter alia*, "whether there is other evidence that corroborates the witness's evidence."[127] If anonymous testimony, which suffers from the same infirmities as hearsay evidence, was corroborated by additional evidence from a non-anonymous source, the reliability and credibility of the anonymous witness's testimony would be less problematic.[128]

The interests of justice could also be better served if Parliament were to consider other methods of protecting witnesses,[129] and allow anonymous witness testimony only where the defendant has forfeited the right to confrontation by attempting to prevent the witness from testifying.[130] Only briefly touched upon in *Davis*,[131] the consideration of "forfeiture by wrongdoing" would be a return to a doctrine rooted in English common law.[132] The implementation of this rule would no doubt raise its own issues,[133] but as Lord Carswell noted, that "may require further argument on some future occasion."[134]

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[124] Evidence Act 2006, 2006 S.R. No. 69, § 110(5)(f) (N.Z.).

[125] Fed. R. Evid. 804(b)(6).

[126] Explanatory Notes to the Criminal Evidence (Witness Anonymity) Bill as Introduced in the House of Commons, July 3, 2008, para. 61.

[127] Evidence Act 2006, § 110(5)(f).

[128] *See, e.g.*, Idaho v. Wright, 497 U.S. 805, 831 (1990) (Kennedy, J., dissenting) ("[W]hatever doubt the Court has with the weight to be given the corroborating evidence . . . is no justification for rejecting the considered wisdom of virtually the entire legal community that corroborating evidence is relevant to reliability and trustworthiness."); *see also* Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 Va. L. Rev. 149, 170 (1995) (discussing why the majority's holding in *Idaho v. Wright* was consistent with Justice Kennedy's position on corroboration in the dissent).

[129] Malcolm Swift, *Witness Anonymity: A Slippery Slope*, Times (London), June 27, 2008, http://business.timesonline.co.uk/tol/business/law/article4226732.ece (last visited Apr. 1, 2009).

[130] *See* Giles v. California, 128 S.Ct. 2678, 2683 (2008).

[131] *Davis*, 1 A.C. at 1158–59 (Lord Carswell).

[132] *See Giles*, 128 S.Ct. at 2683.

[133] *See Davis*, 1 A.C. at 1159 (Lord Carswell) (discussing what standard of proof would be necessary to establish that the defendant was responsible for intimidating the witness (citing R v. Sellick, [2005] EWCA Crim. 651, (2005) 2 Cr. App. R. 15, 231 (U.K.))); How-

Conclusion

The decision in *Davis* has brought the issue of confrontation to the forefront of legal debate in the United Kingdom. Parliament has expressed its clear intent to preserve the use of witness anonymity with the passing of the Witness Anonymity Act, which will not expire until the end of 2009 (at the earliest). With little or no difference between the Witness Anonymity Act and the protective measures held to be unfair in *Davis*, Parliament has simply codified the pre-existing common law system for anonymous witnesses. The right to confrontation, born in England and preserved in the ECHR, has seemingly lost its protection. By adopting the U.S. approach to confrontation, the United Kingdom can return to basic principles that are essential to a fair trial. Until then, defendants will be severely handicapped by a system that allows the truth to remain as hidden as the witnesses who bury it.

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arth, *supra* note 3, at 9 (discussing the difficulty of reconciling "safety" and "fear" with regards to witness intimidation).

[134] *Davis*, 1 A.C. at 1159.