

CONFRONTATION AND FAIRNESS

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I. INTRODUCTION

I will make and try to defend three assertions today. The first is that the right to confrontation should have something to do with fairness. The second is that the current debate over the meaning of the Confrontation Clause has marginalized considerations of fairness. The third is that this is regrettable.

II. RALEIGH’S CASE AND THE CODE OF ABILENE

The proposition that confrontation has something to do with fairness will, I hope, strike many if not most of you as obvious. It certainly has seemed obvious to lots of people for a very long time. The treason conviction of Walter Raleigh became infamous not because Raleigh seemed clearly innocent but because the failure to bring Lord Cobham to the courtroom, despite Raleigh’s repeated request to have his accuser “face to face,” seemed flagrantly unjust.¹ The right to confrontation sits in the Sixth Amendment surrounded by rights that all appear to be aimed, and that the Supreme Court has repeatedly said are aimed, at safeguarding the fairness of criminal proceedings: the right to a speedy and public trial, the right to an impartial jury, the right to be informed of the nature of the charges, the right to call defense witnesses, and the right to

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1. CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE* 414-16 (1957); 1 DAVID JARDINE, *CRIMINAL TRIALS* 418 (Research Publ’ns ed., 1985) (1832), *microformed on* Fiche 9274-84 (Nineteenth Century Legal Treatises, Primary Source Microfilm); Allen D. Boyer, *The Trial of Sir Walter Raleigh: The Law of Treason, the Trial of Treason and the Origins of the Confrontation Clause*, 74 *MISS. L.J.* 869, 888-94 (2005).

assistance of counsel.² And the connection between fairness and confrontation, in particular, has retained to this day a great deal of intuitive appeal.

Some of you are no doubt familiar with President Eisenhower's description of what he learned growing up in Abilene, Kansas. Eisenhower said that Abilene had a code, and it was to "meet anyone face to face with whom you disagree."³ In the United States, Eisenhower said, "if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind."⁴ Eisenhower made those comments in the fall of 1953, in the thick of the McCarthy Era, in a speech to the B'nai B'rith marking the fortieth anniversary of the Anti-Defamation League. So no one lost the point when he warned that "if we are going to continue to be proud that we are Americans, there must be no weakening of the code by which we have lived . . . by the right to meet your accuser face to face."⁵

Twelve years later, when the Supreme Court ruled unanimously in *Pointer v. Texas* that the right to confrontation was incorporated in the Due Process Clause of the Fourteenth Amendment, Justice Hugo Black's opinion for the Court called confrontation and cross-examination "essential" and "fundamental."⁶ Essential and fundamental for what? "[F]or the kind of fair trial which is this country's constitutional goal."⁷

For Justice Black as for President Eisenhower, confrontation was part of a distinctly *American* ideal of fairness. But, you do not have to be American to appreciate the link between fairness and confrontation. When Justice Scalia wrote for a majority of the Supreme Court in *Coy v. Iowa* that "something deep in human nature" regarded confrontation as "essential" to the fair adjudication of criminal charges, he supported that claim with references to Roman law and the early common law of England.⁸ More recently, the European Court of Human Rights has ruled that fairness in a criminal proceeding generally requires that evidence "be produced at a public hearing, in the presence of the accused," and that the accused be allowed "to challenge and question" the prosecution's witnesses.⁹

2. See, e.g., *Coy v. Iowa*, 487 U.S. 1012, 1017-19 (1988); *Pointer v. Texas*, 380 U.S. 400, 403-06 (1965).

3. President Dwight D. Eisenhower, Remarks upon Receiving the America's Democratic Legacy Award at a B'nai B'rith Dinner in Honor of the 40th Anniversary of the Anti-Defamation League (Nov. 23, 1953), available at <http://www.presidency.ucsb.edu/ws/?pid=9770>.

4. *Id.*

5. *Id.*

6. *Pointer*, 380 U.S. at 405.

7. *Id.*

8. *Coy v. Iowa*, 487 U.S. 1012, 1015-19 (1988).

9. *P.S. v. Germany*, App. No. 33900/96, 36 Eur. H.R. Rep. 61, 1143 (2001), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59996>; see *Kostovski v. Netherlands*, App. No. 11454/85, 12 Eur. H.R. Rep. 434, 447-48 (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57615>; Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21

The claim I am trying to defend is that confrontation has something to do with fairness. You may have noticed that some of the language I have quoted goes further than that and suggests that confrontation is *essential* to fairness, at least in a criminal trial. I do not want to quarrel with that stronger claim, but I am not going to defend it, either. I do not need it for the larger argument I want to make. Nor do I need or want to argue that confrontation suffices, all by itself, to make a criminal trial fair. Obviously, a trial can be terribly unfair even if it has all the confrontation the defendant could want.

All I want to insist on at this point is that there is a connection between confrontation and fairness. More precisely, my claim is that confrontation is an *element* of fairness, although maybe not an essential element. In other words, confrontation is valued for the role it plays in making criminal trials fair. It may be valued for some other reasons, too. But fairness is, or should be, a big part of the story.

You have probably also noticed, maybe with annoyance, that I have not defined fairness. Again, I do not think I need to for purposes of the argument I am advancing. But I do need to point out that fairness is not the same thing as accuracy or reliability. Accuracy is an *aspect* of fairness: one reason we may call particular procedures unfair is that they seem unreliable. It does not seem *fair* to find someone guilty using a procedure that runs too large a risk of convicting the innocent. And one reason that confrontation seems so strongly connected to fairness is that giving the defendant the opportunity to challenge evidence is usually one of the best ways to learn if there is anything wrong with the evidence.

But when we say that procedures are fair, we are not *just* saying that they are likely to be accurate. Fairness is not *just* about reliability. It has to do with other values, too: with acting evenhandedly, with treating people with dignity, with giving them autonomy and voice, with avoiding authoritarian abuse. Confrontation speaks to those values, too. That is why Justice Scalia was right in *Coy v. Iowa* to identify confrontation with “something deep in human nature,” not just with the practicalities of fact-finding.¹⁰

III. BULLCOMING AND BRYANT

I hope, again, that much of what I have said so far has seemed obvious. I hope it is uncontroversial that confrontation is valued for the role it plays in making criminal trials fair. The Supreme Court has certainly treated that proposition as uncontroversial, saying repeatedly that the purpose of the

QUINNIPIAC L. REV. 777, 801-03 (2003); David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 35 [hereinafter Sklansky, *Hearsay's Last Hurrah*]; Sarah J. Summers, *The Right to Confrontation After Crawford v. Washington: A "Continental European" Perspective*, 2 INT'L COMMENT. ON EVIDENCE, no. 1, art. 3, 2004, at 1, 10.

10. See *Coy*, 487 U.S. at 1017.

Confrontation Clause—like the rest of the Sixth Amendment—“is to ensure a fair trial.”¹¹ Justice Ginsburg treated that point as beyond dispute when she wrote for the Court last year in *Bullcoming v. New Mexico*—and so did Justice Kennedy, writing in dissent.¹²

Nonetheless—and this is my second assertion—despite this broad agreement that the right to confrontation should have something to do with fairness, the structure of the current debate over the meaning of the Confrontation Clause has been pushing considerations of fairness to the sidelines. At least that is true of the debate over the Confrontation Clause among the members of the Supreme Court. The blame for this does not rest entirely with the doctrine of *Crawford v. Washington*, although *Crawford* is certainly part of the problem.¹³ The critics of *Crawford* bear some of the responsibility as well.

It might not be immediately obvious why *either* side of this controversy should be in tension with the idea that confrontation has to do with fairness. The current debate over the Confrontation Clause—the debate that split the Court in *Bullcoming* and, more messily, in last year’s other big confrontation case, *Michigan v. Bryant*—is sometimes described as a debate between formalism and functionalism, with *Crawford* standing for formalism and its critics taking the side of functionalism.¹⁴ A debate of that kind does not need to marginalize considerations of fairness. Fairness—like any other value—can be pursued either through formal rules or through flexible, open-ended standards.

Sometimes the debate about *Crawford* is described differently, as a debate between originalism and a kind of pragmatic, living constitutionalism.¹⁵ But that kind of debate does not need to sideline fairness either. A pragmatist can care about fairness. And the history of the Sixth Amendment, like the rest of the Bill of Rights, is famously murky. So an originalist reading of the Confrontation Clause could start from the proposition that it was aimed at making trials fair and could use that aim as guidance in fleshing out the content of the right to confrontation—not by assuming that anything fair counts as adequate confrontation, but by interpreting the right in ways that promote the underlying objective of fairness.¹⁶

So a debate about formalism versus functionalism, or originalism versus pragmatism, could be a debate in which considerations of fairness played a large role. But that is not the debate we have about the Confrontation Clause today. We have a debate between a particular *kind* of formalism, a particular

11. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2708 (2011); *accord, e.g., Coy*, 487 U.S. at 1017-20; *Pointer*, 380 U.S. at 403-06.

12. *See Bullcoming*, 131 S. Ct. at 2716, 2725.

13. *See Crawford v. Washington*, 541 U.S. 36 (2004).

14. *See Bullcoming*, 131 S. Ct. at 2723-28; *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

15. *See Bullcoming*, 131 S. Ct. at 2723-28.

16. *See id.*

kind of originalism, and a particular *kind* of functionalism, a particular *kind* of pragmatism.

On one side, we have *Crawford*, which does not stand just for interpreting the Confrontation Clause the way it was intended and originally understood. It stands also for the view that the Confrontation Clause was intended and originally understood to codify and to constitutionalize the particular protections that common law gave criminal defendants against hearsay evidence.¹⁷ On the other side, we have a focus not so much on fairness but on one particular aspect of fairness—namely, reliability.

Reliability was, of course, the touchstone of confrontation analysis under the approach rejected and overturned in the *Crawford* case—the approach of *Ohio v. Roberts*.¹⁸ Dissatisfaction with *Roberts* was the reason *Crawford* was greeted so enthusiastically and the reason it took several years for criticism of the new doctrine to coalesce.¹⁹ So it is disheartening to see the critics of *Crawford* returning, as if by habit, to a focus on reliability.

Justice Kennedy's dissent in *Bullcoming* repeatedly paired fairness with reliability: the Confrontation Clause and the Sixth Amendment in general, he said, “are designed to ensure a fair trial *with reliable evidence*.”²⁰ That formulation left open the possibility that the content of the Confrontation Clause should be assessed with attention *both* to reliability *and* to fairness, but elsewhere Justice Kennedy spoke only of reliability, and he never suggested elements of fairness beyond reliability. The true focus seemed to be reliability. The same can be said, only more so, of Justice Sotomayor's majority opinion in *Michigan v. Bryant*, which repeatedly suggested that the reliability judgments embodied in “standard rules of hearsay” should guide confrontation analysis.²¹ All of this talk about reliability made it easy for Justice Scalia, dissenting in *Bryant*, and for Justice Ginsburg, writing for the majority in *Bullcoming*, to defend *Crawford* by treating the alternative as a return to *Roberts* and reliability.²²

I have said that confrontation should be understood as connected with fairness, and I have complained that the debate in *Bryant* and *Bullcoming* seems disconnected from fairness, except for the limited dimensions of fairness that have to do with accuracy. Now, you might say I am conflating goals and implementation. Just because a constitutional provision is *aimed* at securing a particular value does not necessarily mean that judges should consult that value

17. *See id.* at 51.

18. *See Ohio v. Roberts*, 448 U.S. 56, 65-68 (1980).

19. *See* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1648-49, 1655 (2009) [hereinafter Sklansky, *Anti-Inquisitorialism*].

20. *Bullcoming*, 131 S. Ct. at 2725 (Kennedy, J., dissenting) (emphasis added).

21. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011).

22. *See Bullcoming*, 131 S. Ct. at 2713; *Bryant*, 131 S. Ct. at 1174 (Scalia, J., dissenting).

when interpreting the provision. Maybe the best way to promote the underlying purpose of the provision is to give strict and literal effect to its terms.

The problem is that it is not at all obvious what the strict and literal meaning is of the constitutional language granting a criminal defendant the right “to be confronted with the witnesses against him.”²³ The ordinary, working assumption of the law is that ambiguous language should be interpreted with an eye to its underlying aims.²⁴ Interpreting the Confrontation Clause without regard for its purpose seems like a bad idea. It seems like a good way to allow the purpose to get lost.

Even if you agree with me that the Confrontation Clause should be interpreted with an eye toward fairness, you might doubt that, in practice, a focus on fairness is all that different than a focus on accuracy. So you might think that fairness concerns are adequately represented in the debate over the Confrontation Clause because they coincide with the concerns voiced by *Crawford* skeptics like Justice Kennedy and Justice Sotomayor.

But they do not. Take *Bryant*, for example. The Justices argue at length about whether the officers who responded to the shooting were responding to an emergency or building a case, about whether the shooting victim was trying to get help or to ensure his assailant’s conviction, and about which intentions should matter.²⁵ None of this has any strong bearing on the fairness of allowing the victim’s statement into evidence because there is no allegation, by anyone, that the police or the prosecutors or the trial judge or even the victim did anything to deny the defendant his right to confront the victim in court.²⁶ This is not a case in which the prosecutors were trying to substitute an out-of-court interview for in-court testimony. This is a case in which the victim was unavailable for cross-examination at the time of trial through no fault of the government and through no fault of anyone who could conceivably be said to have been working with the government.²⁷ The only kind of unfairness the defendant can allege is the unfairness associated with the unreliability of hearsay evidence, and that is a thoroughly dubious basis for a constitutional rule of exclusion—in part because hearsay is at least as reliable as lots of other evidence routinely admitted against criminal defendants,²⁸ and in part because it

23. U.S. CONST. amend. VI. For better or worse, the meaning of “confrontation” in the Sixth Amendment has been relatively settled for decades. I think it is worth questioning whether effective confrontation in an age of scientific evidence requires more than cross-examination in the courtroom. See Sklansky, *Hearsay’s Last Hurrah*, *supra* note 9, at 71-77. But the larger interpretive difficulties associated with the Confrontation Clause lie in determining when people who do not testify at trial should nonetheless be treated as “witnesses against” the defendant and what limits there are, if any, on the “right” to confront such witnesses. See Sklansky, *Anti-Inquisitorialism*, *supra* note 19, at 1645-46.

24. See Sklansky, *Anti-Inquisitorialism*, *supra* note 19, at 1653.

25. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1156-67, 1170-72, 1176-77 (2011).

26. See *id.* at 1151 n.1.

27. See *id.* at 1151.

28. See Sklansky, *Hearsay’s Last Hurrah*, *supra* note 9, at 17-19.

does not make sense to think of the Sixth Amendment as a set of safeguards aimed narrowly at ensuring accurate verdicts.²⁹

IV. LOSING SIGHT OF FAIRNESS

The “primary purpose” question in *Bryant*—whether the victim’s statements were made in response to an ongoing emergency or to lay the groundwork for prosecution—was critical for the dissenters because they thought it determined whether the statements would be admissible under late-eighteenth-century common law.³⁰ The question mattered for the majority, too, because it influenced whether the statements fell within the logic of the modern hearsay exception for excited utterances.³¹ But the question had little relevance to the fairness of *Bryant*’s trial. If we defined the right to confrontation with an eye to its underlying purpose of ensuring a fair trial, it is unlikely we would make it turn on which of two equally legitimate reasons the government had for interviewing a witness who is now, through no fault of the government, unavailable.

And that is the third and final suggestion I want to make today: squeezing fairness out of the debate over the Confrontation Clause has had regrettable consequences. It has made this corner of constitutional doctrine increasingly surreal and disconnected from practical concerns—not just practical concerns of reliability, but practical concerns of fairness, the concerns that have long been thought to be the point of confrontation.

I think that was true in *Bullcoming* as well as in *Bryant*. I think if the Court had been focused on fairness in *Bullcoming*, instead of eighteenth-century hearsay law or the reliability of the prosecution’s evidence, it would have been harder to dismiss the suggestion of the New Mexico Supreme Court that the central issue in the case should be how to give the defendant a full and meaningful opportunity to challenge the operation and output of the gas chromatograph responsible for the most important evidence against him.³² But I will not develop that argument further today, nor will I try to spell out here, in any detail, what confrontation doctrine might look like if it was constructed with an eye to fairness.³³ I want to use the remainder of my time to make a different point.

29. See Sklansky, *Anti-Inquisitorialism*, *supra* note 19, at 1691-92.

30. *Bryant*, 131 S. Ct. at 1170-77 (Scalia, J., dissenting).

31. See *id.* at 1152-53.

32. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2712-19 (2011).

33. I should point out, though, that interpreting the Confrontation Clause with an eye toward fairness need not mean, and probably should not mean, interpreting it to be satisfied whenever the procedures in a particular case seem fair under all the circumstances. The point is that glosses on the Confrontation Clause, like the ones adopted in the *Crawford* line of cases, would be assessed in significant part by how well or poorly they advance the underlying goal of ensuring fair trials. See Sklansky, *Anti-Inquisitorialism*, *supra* note 19, at 1653-55.

Divorcing the Confrontation Clause from considerations of fundamental fairness has not only warped the content of the right to confrontation but also stunted its reach. In the years following President Eisenhower's speech to the B'nai B'rith, the procedures followed in employment cases involving alleged "security risks" were forcefully and sometimes successfully challenged on the ground that, as a matter of logic and basic fairness, the right to confrontation set forth in the Sixth Amendment "applie[d] with equal vigor to civil proceedings."³⁴ The Supreme Court made clear in one of those cases, decided in 1959, that the principles of basic fairness underlying the Confrontation Clause were implicated whenever any kind of governmental action, whether a criminal prosecution or an administrative or regulatory proceeding, "seriously injures an individual, and the reasonableness of the action depends on fact findings."³⁵ Eleven years later, in *Goldberg v. Kelly*, the Court applied that reasoning when ruling that welfare recipients facing a termination of their benefits have a due process right "to confront and cross-examine the witnesses relied on by the department."³⁶

But that was before the Confrontation Clause took leave of fairness, first to flirt with reliability and then to take up residence with eighteenth-century hearsay law. Today, even in high-stakes civil cases—cases involving civil commitment, say, or the termination of parental rights—invocations of the Confrontation Clause are usually rejected out of hand.³⁷ Because the Confrontation Clause is no longer understood as a constituent of fundamental fairness, it is generally treated as having no implications outside of criminal cases.

In fact, even the sentencing phase of a criminal case—even the sentencing phase of a *capital* case—is generally understood to fall outside the purview of the Confrontation Clause. The Sixth Amendment right to counsel—which has always been understood and applied as a mechanism of fairness—applies and has always applied to the sentencing phase of a criminal trial.³⁸ But the confrontation right does not. This particular limitation on the reach of the confrontation principle cannot be laid at the feet of *Roberts* and *Crawford*,

34. Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 401 (1959); see Robert B. McKay, *The Right of Confrontation*, 1959 WASH. U. L.Q. 122, 128-67.

35. *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959); see also, e.g., *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103 (1963) (recognizing a right to confrontation in character and fitness proceedings for bar admission because "procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood").

36. *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

37. See, e.g., *Cabinet for Health & Family Servs. v. A.G.G.*, 190 S.W.3d 338, 344-47 (Ky. 2006) (concerning termination of parental rights); *In re T.W.*, 139 P.3d 810, 813 (Mont. 2006) (concerning termination of parental rights); *In re Commitment of Polk*, 187 S.W.3d 550, 555-56 (Tex. App.—Beaumont 2006, no pet.) (concerning civil commitment). But cf. *In re C.B.*, 574 So. 2d 1369, 1374 (Miss. 1990) (extending confrontation right to parent accused of sexual abuse in a custody proceeding).

38. See *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012); *Gideon v. Wainwright*, 372 U.S. 335, 341-44 (1963).

because it predates them, stretching back to the Supreme Court's 1949 decision in a case called *Williams v. New York*.³⁹ *Williams* reasoned that the confrontation right should not apply in a sentencing proceeding, even a capital sentencing proceeding, because modern theories of punishment required a less formal, more open-ended inquiry.⁴⁰ Some of the theories of punishment relied upon by *Williams* have long since gone out of fashion, and it is doubtful they supported the decision in the first place. Nonetheless the *Williams* doctrine survives.⁴¹ And *that*, I think, can be blamed in part on *Roberts*, on *Crawford*, and on the continuing failure to tie the interpretation and application of the Confrontation Clause to ideas about fairness.

V. CONCLUSION

The right to confrontation should be interpreted with an eye to the job that can most sensibly be assigned to it. That job has to do, first and foremost, with fairness—not with reliability *per se*, but not with preserving eighteenth-century hearsay rules, either.

39. *Williams v. New York*, 337 U.S. 241 (1949).

40. *See id.* at 247.

41. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1967 (2005).

