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. 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...
assistance of counsel. 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." 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." 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."

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." Essential and fundamental for what? "[F]or the kind of fair trial which is this country's constitutional goal."

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. 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.

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4. Id.
5. Id.
7. Id.
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

10. See Coy, 487 U.S. at 1017.
Confrontation Clause—like the rest of the Sixth Amendment—"is to ensure a
fair trial." 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. 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. 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. 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. 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.

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.
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.
\(^{19}\) 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).
\(^{22}\) 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.” The ordinary working assumption of the law is that ambiguous language should be interpreted with an eye to its underlying aims. 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 interested 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. 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. 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. 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, 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.


26. See id. at 1151 n.1.

27. See id. at 1151.

does not make sense to think of the Sixth Amendment as a set of safeguards aimed narrowly at ensuring accurate verdicts.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{33} I want to use the remainder of my time to make a different point.

\textsuperscript{29} See Sklansky, Anti-Inquisitorialism, supra note 19, at 1691-92.
\textsuperscript{30} Bryant, 131 S. Ct. at 1170-77 (Scalia, J., dissenting).
\textsuperscript{31} See id. at 1152-53.
\textsuperscript{32} See Bullcoming v. New Mexico, 131 S. Ct. 2705, 2712-19 (2011).
\textsuperscript{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." 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." 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."

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—involvements of the Confrontation Clause are usually rejected out of hand. 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. 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.

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").
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.

40. See id. at 247.