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CONFRONTATION AND KABUKI

*David Alan Sklansky**

There is an old Jewish joke about a man who takes his mother to a fancy restaurant and later asks her what she thought of the meal. “It was fine,” she says, “what there was of it.” “Were the portions too skimpy?” the son asks. “Oh,” his mother responds, “there was plenty . . . such as it was.”

Reading the Supreme Court’s recent decision interpreting and applying the Confrontation Clause can make you feel a little like the son in that story. You begin to wonder what parts of the argument deserve to be taken seriously. But the ambiguity isn’t about quantity versus quality. It has to do with the significance of original intent.

Beginning with *Crawford v. Washington*,¹ the Supreme Court’s confrontation jurisprudence has been famously and quite explicitly originalist. The Court has insisted that the Confrontation Clause should be interpreted as it was originally understood—no matter how inconvenient or unjust the results may now seem. At the same time, the Court has suggested in its jurisprudence that the result dictated by an originalist reading of the Confrontation Clause is not, actually, inconvenient or unjust. *Mirabile dictu*, the originalist reading always turns out to be the best reading on policy grounds as well—the reading, that is to say, that best promotes what might be thought to be the underlying purposes of the Confrontation Clause while also taking account of considerations of administrability and practicality. There is no hard choice, the Court continues to rediscover, between originalism and pragmatism.

All of this raises questions about how sincere and how

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¹ *Crawford v. Washington*, 541 U.S. 36 (2004).

meaningful it is when the Court appeals to history in its confrontation decisions. Originalism lacks cash value if it never leads the Court to results it would otherwise avoid: “[i]f originalism never requires judges to reach results that they would not reach using some other theory, it does no independent work.”² The extended discussions of common-law precedents in the confrontation cases begin to look like rhetorical kabuki, a bit of stylized theater to dress up what are really, at bottom, arguments about something else entirely.

Were it only so. If debates about original meaning were just ceremonial, they would do little damage. They would be irrelevant to the main event, disconnected, like a cartoon before the feature film. But the rhetorical kabuki in confrontation cases is more complicated—more like the Jewish mother’s complaints about the restaurant. It involves shifting repeatedly between two modes of discourse—one pragmatic and one historical—in a way that avoids the need for either set of arguments to bear the full weight of the Court’s conclusions.

To get a feel for the rhetorical back-and-forth, it is helpful to compare the oral arguments in the Court’s recent confrontation cases with the opinions later released in these cases. I will do that in the first part of this essay. (Focusing on oral argument is a little artificial, of course. What about the briefs? But bear with me. I will get to them later.) The pattern in the oral arguments and the decisions is complicated: sometimes the argument focused on policy and the opinions on history; sometimes the opposite; sometimes both focused on history; and sometimes both seemed more concerned with policy. The second part of the essay will briefly discuss the implications of the rhetorical and methodological shifts discussed in the first part. There are advantages, of course, to eclecticism, and well-known reasons not to obsess about consistency. Sometimes what looks like an unwillingness to be pinned down is really a sophisticated and advantageous dialectic. But not always.

² Louis Michael Seidman, *This Essay Is Brilliant/This Essay Is Stupid: Positive and Negative Self-Reference in Constitutional Practice and Theory*, 46 UCLA L. REV. 501, 550 (1998).

I.

When *Crawford* was argued before the Justices, common law hardly came up at all. The Court pressed the lawyers on the nature and implications of their positions: what precedents would need to be reconsidered if their arguments were accepted, and what future cases might come out differently? Crawford's counsel referred fleetingly to the trial of Sir Walter Raleigh.³ The Deputy Solicitor General appearing for the United States as amicus curiae was also asked about Raleigh, but only in passing, as the basis for a hypothetical designed to test how far the government would go in tying admissibility under the Confrontation Clause to reliability.⁴ Counsel for the State of Washington, toward the beginning of his argument, made halting reference to "the history surrounding the Confrontation Clause and how we got to have the right to confrontation," but the Court did not pursue the matter.⁵ Virtually all of the Court's questions focused on practicalities: how different tests would operate in practice, what it would mean to depart from or to adhere to the framework for confrontation analysis set forth in *Ohio v. Roberts*⁶—the framework that the petitioner in *Crawford* had asked the Court to reconsider, and that the Court ultimately abandoned.

The Court did so in an opinion that paid far more attention

³ Transcript of Oral Argument at 17, 56, *Crawford*, 541 U.S. 36 (No. 02-9410).

⁴ *Id.* at 28. Counsel for the United States responded to the inquiry by saying he "doubt[ed] seriously that . . . Sir Walter Raleigh's case would come out differently under our approach." *Id.* He meant, presumably, that the approach the United States was urging the Court to adopt—limiting the Confrontation Clause to "testimonial statements and their functional equivalent," *id.* at 23—would condemn the outcome in Raleigh's case, just like the Court's traditional approach. He didn't really mean that Raleigh's case would come out the same way it in fact came out, with Raleigh convicted and sentenced to death based on an out-of-court statement provided by his alleged co-conspirator. But it is a sign of how little history mattered during the oral argument of *Crawford* that no one on the Court bothered to clarify this.

⁵ *Id.* at 37–38.

⁶ *Ohio v. Roberts*, 448 U.S. 56 (1980).

to history and to common-law cases than had been paid at oral argument. The common-law background of the Confrontation Clause was, in fact, the principal subject of Justice Scalia's opinion for the Court in *Crawford*: he spent considerably more pages discussing that history than he spent on the Court's own precedents or on how the *Roberts* test had operated in practice. Justice Scalia did suggest that *Roberts* had worked badly: the results it produced were unpredictable and inconsistent. What was worst about those results, though, is that they diverged from the common-law holdings that Justice Scalia suggested the Confrontation Clause was intended to codify.⁷ The oral argument in *Crawford* was intensely practical in its focus; the Court's opinion in *Crawford* was pointedly historical and originalist.

Two years after deciding *Crawford*, the Court returned to the Confrontation Clause in a pair of cases consolidated for oral argument and decision, *Davis v. Washington* and *Hammon v. Indiana*.⁸ The lawyers took their cues from *Crawford*, and common law received a fair bit of attention in the oral arguments of these two cases. Counsel for Davis discussed the treatment of "hue and cry" reports in the seventeenth century.⁹ The Solicitor General's office, appearing again as amicus curiae, said that a 911 call—the evidence at issue in *Davis*—differed from a Marian examination.¹⁰ Both Justice Breyer and Justice Scalia asked the Deputy Solicitor General about a set of seventeenth-century "hue and cry" cases relied upon by Davis. These cases suggested that reports of ongoing crimes to law enforcement officers were not admissible.¹¹ Justice Scalia invoked Raleigh's case when questioning counsel for the State of Washington.¹² The lawyer for Washington, in turn, tried to focus the Court on whether introducing evidence from a 911 call "resemble[d] . . . inquisitorial abuses."¹³ Counsel for Hammon

⁷ See *Crawford*, 541 U.S. at 54 n.5, 63–65.

⁸ *Davis v. Washington*, 547 U.S. 813 (2006).

⁹ Transcript of Oral Argument at 6, 56–58, *Davis*, 547 U.S. 813 (No. 05-5224).

¹⁰ *Id.* at 43.

¹¹ *Id.* at 49–50.

¹² *Id.* at 29.

¹³ *Id.* at 31–32.

discussed Old Bailey cases¹⁴ and the limited development of hearsay law in the eighteenth century.¹⁵ Counsel for Indiana dealt at length with Raleigh's case, examinations by Marian magistrates, and the light these abuses shed on what "the Founders were concerned about"; his point was that questioning by police officers at the scene of a domestic disturbance—the context of the statements at issue in *Hammon*—differed from the kinds of things the Confrontation Clause was intended to prohibit.¹⁶ On the other hand, counsel for the United States, appearing as amicus curiae in *Hammon*, did not mention history or common law. His entire argument, and all of the questions the Court put to him, concerned the workability of a definition of "testimonial" that excluded statements obtained "in response to police questions that are reasonably necessary to determine whether an emergency exists."¹⁷ This was the focus of the rebuttal argument by Hammon's lawyer, too, but he couched it in terms of keeping "the confrontation right . . . robust, as the Framers intended."¹⁸ All in all, history and common law played a much larger role in the *Davis* and *Hammon* arguments than they had when *Crawford* was argued before the Court. In fact, Indiana's Solicitor General told the Court that the "important lesson from *Crawford*" was that in interpreting the Confrontation Clause the question should be "[w]hat does history tell us the Founders were concerned about?"¹⁹

The Court pushed back. Justice Scalia, who wrote the Court's opinions in *Crawford*, *Davis*, and *Hammon*, cautioned at oral argument against "overread[ing] *Crawford*" by concluding "that the only thing the Confrontation Clause was directed at was the kind of abuse that . . . occurred in the case of Sir Walter

¹⁴ Transcript of Oral Argument at 14, *Hammon v. Indiana*, 547 U.S. 813 (2006) (No. 05-5705).

¹⁵ *Id.* at 20.

¹⁶ *Id.* at 31–34, 36–39, 44–48.

¹⁷ *Id.* at 48–59.

¹⁸ *Id.* at 61; *see also id.* at 62–63 (suggesting that the questioning in *Hammon* "resembled inquisitorial practices . . . in a key respect" and that the interpretation of the Confrontation Clause should take into account "the system of private prosecution" in place when the Bill of Rights was adopted).

¹⁹ *Id.* at 31.

Raleigh.”²⁰ It would be “the worst sort of formalism,” Justice Scalia suggested, to make admissibility of a statement hinge on how closely it resembled the evidence produced in a Marian examination.²¹ And the Court pushed back when deciding these cases, too. Justice Thomas reasoned that neither a 911 call nor police questioning at the scene of a domestic disturbance sufficiently resembled a Marian examination to be barred by the Confrontation Clause: there was no “formalized dialog,” there were no *Miranda* warnings, the declarants were not in custody, there were no other “indicia of formality,” and there was “no suggestion that the prosecution attempted to offer the . . . hearsay evidence at trial in order to evade confrontation.”²² But Justice Thomas wrote for himself and in partial dissent. Justice Scalia’s opinion for the majority cited some eighteenth-century (and nineteenth-century) cases, but mostly in support of the notion that the Confrontation Clause applied only to “testimonial” statements, and not for aid in determining what a testimonial statement was—or whether, in particular, a 911 call or police questioning at the scene of a domestic disturbance counted as testimonial.²³ On those questions, the Court relied mostly on arguments about what kind of rule would be sensible and would fit well with the basic idea that a statement was “testimonial” if it was a “substitute for live testimony.”²⁴ Responding to Justice Thomas, Justice Scalia reasoned that “[i]t imports sufficient formality . . . that lies to [police] officers are criminal offenses.”²⁵ But that argument was plainly makeshift. The real point was that, in Justice Scalia’s words, “[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”²⁶

Giles v. California,²⁷ argued to the Court two years after

²⁰ Transcript of Oral Argument, *supra* note 9, at 32–33.

²¹ Transcript of Oral Argument, *supra* note 14, at 35.

²² *Davis*, 547 U.S. at 840 (Thomas, J., concurring in the judgment in part and dissenting in part).

²³ *See id.* at 824–25 & n.3 (majority opinion).

²⁴ *Id.* at 830.

²⁵ *Id.* at 830 n.5.

²⁶ *Id.*

²⁷ *Giles v. California*, 554 U.S. 353 (2008).

Davis and *Hammon*, also concerned statements made to police officers responding to a call about domestic violence. Giles was charged with murdering his former girlfriend, who had told the police three weeks earlier that Giles had attacked her and threatened to kill her. The question was whether the Confrontation Clause barred the introduction of the out-of-court statements even if the judge concluded that, as the indictment charged, the declarant's unavailability was due to the defendant's wrongdoing. Everyone agreed that there was an equitable forfeiture exception to the confrontation requirement, but the defendant claimed that it should be limited to cases where the wrongdoing was *aimed* at preventing the declarant from testifying in court. Oral argument in *Giles* focused heavily on common-law history: the question that received the most attention was whether pre-1791 common-law courts would have admitted out-of-court accusations on the ground that the defendant had procured the accuser's absence, even though there was no proof that the defendant had been motivated by a desire to prevent the accuser from testifying.²⁸ Counsel for Giles—and Justice Scalia—repeatedly claimed that there were no common-law cases directly supporting that proposition,²⁹ and counsel for the State of California did not disagree; his claim was simply that the logic of the common law suggested these accusations would apply even when no intent to prevent testimony was shown.³⁰

If the parties in *Giles* concurred that the resolution of the case should turn on eighteenth-century understandings, not everyone else was convinced. Professor Richard Friedman, who had argued for the defendant in *Hammon*, filed an amicus brief supporting the State of California in *Giles*; he wanted the Court to interpret the confrontation right in a way “that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly

²⁸ See, e.g., Transcript of Oral Argument at 33, *Giles*, 554 U.S. 353 (2008) (No. 07-6053).

²⁹ See *id.* at 8, 20, 25, 33.

³⁰ See, e.g., *id.* at 34–35, 38–40.

hamper prosecution of crime.”³¹ At oral argument in *Giles*, moreover, Justice Breyer tried to get California’s lawyer to argue that “maybe we shouldn’t follow completely the common law” as it existed in 1791: “maybe we have to assume an intent to allow the Confrontation Clause to evolve as the law of evidence itself evolves.”³² But even California’s lawyer would not go that far; the most he would suggest is that the Court should “take account . . . of situations that the common law might not have faced or might not have recognized as representing a problem of relevant evidence to a crime.”³³

The decision in *Giles* was as originalist as the argument. The Court reaffirmed what it had said in *Crawford*—that the Confrontation Clause should be read “as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding”³⁴—and, for once, was willing to start and end with common law . . . almost. Toward the end of his opinion for the Court, Justice Scalia suggested there would be an uncomfortable element of bootstrapping in admitting an out-of-court accusation against a murder defendant by the defendant’s alleged victim on the ground that the judge believed the defendant was guilty of murdering the victim. But this was something of a digression, intended to cast doubt on the suggestion that a broad rule of forfeiture would make more sense than a narrower rule tied to a purpose behind the defendant’s alleged wrongdoing.³⁵ The vast bulk of Justice Scalia’s opinion was devoted to an inquiry into the bounds of the forfeiture exception at common law before the Confrontation Clause was adopted. He was openly scornful, in fact, of the suggestion that the Court could recognize new exceptions to the confrontation requirement based on the underlying objective of the right.³⁶ He lost his majority on this point. Justice Souter and

³¹ Brief of Richard D. Friedman as Amicus Curiae Supporting Respondent at 2, *Giles*, 554 U.S. 353 (No. 07-6053).

³² Transcript of Oral Argument, *Giles*, *supra* note 28, at 34–35.

³³ *Id.* at 35.

³⁴ *Giles*, 554 U.S. at 358 (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

³⁵ *Id.* at 374.

³⁶ *See id.*

Justice Ginsburg joined all but that part of Justice Scalia's opinion, and Justice Souter wrote a short concurring opinion, joined by Justice Ginsburg, that put more weight on the undesirability of a broader rule of forfeiture.³⁷

Moreover, Justice Breyer, joined by Justice Stevens and Justice Kennedy, argued in dissent in *Giles* that practicalities weighed heavily against the rule adopted by the Court. The dissenters thought that the right to confrontation should be forfeited whenever the witness's unavailability was due to the defendant's misconduct, regardless of what the defendant's purpose had been in killing the witness or otherwise making her unavailable. The dissenters argued that the most "conclusive" justifications for their position included considerations of policy and the "basic purposes and objectives" of the confrontation right.³⁸ Nonetheless, even the dissenters felt compelled to argue at length about how the forfeiture question would be resolved under "17th-, 18th-, and 19th-century law of evidence."³⁹ And two of the justices in the majority signaled an inclination to take originalism even further than Justice Scalia. Justice Thomas wrote separately to reiterate the view he had expressed in *Davis*, that the Confrontation Clause applied only to statements made in a context "sufficiently formal to resemble the Marian examinations."⁴⁰ Justice Alito said that he, too, was "not convinced that the out-of-court statement at issue [in *Giles*] fell within the Confrontation Clause in the first place"; but he joined the majority's analysis because the State of California had conceded that question.⁴¹ On the whole, therefore, the opinions in *Giles* were highly originalist, just as the argument in that case had been.

The Court returned to the Confrontation Clause the following year in *Melendez-Diaz v. Massachusetts*.⁴² The question was whether prosecutors could introduce a sworn certificate of examination from a state forensic chemist who did not testify

³⁷ *Id.* at 379–80 (Souter, J., concurring in part).

³⁸ *Id.* at 384, 403 (Breyer, J., dissenting).

³⁹ *Id.* at 390.

⁴⁰ *Id.* at 378 (Thomas, J., concurring) (quoting *Davis v. Washington*, 547 U.S. 813, 840 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part)).

⁴¹ *Id.* at 378 (Alito, J., concurring).

⁴² *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

and was not subject to cross-examination; the Court concluded this practice was unconstitutional. Unlike the oral argument in *Giles*, the oral argument in *Melendez-Diaz* was highly focused on present-day concerns. History took a back seat. Justice Breyer, who had dissented in *Giles*, made plain at the *Melendez-Diaz* oral argument that he was less interested in “what happened in the year 1084” than in “what’s a workable rule.”⁴³ Justice Scalia, in contrast, said that he *was* “interested in the history,” because the point of *Crawford* was “that the content of the Confrontation Clause is not what we would like it to be, but what it historically was when it was enshrined in the Constitution.”⁴⁴ But none of the other Justices seemed terribly interested in history at the oral argument; the bulk of the questioning—including most of Justice Scalia’s questions—focused on practicalities: how a rule could be formulated, what incentives it would create for lawyers and their clients, and how burdensome it would be for the government. Counsel for the defendant—Professor Jeffrey Fisher, who had also represented the defendants in *Crawford* and in *Davis*—made no effort to steer the discussion back to history and common law. The Attorney General of Massachusetts began her argument for the State by asserting that the certificates at issue were “official records” of “independently verifiable facts” and therefore would have been “admissible at common law.”⁴⁵ A few minutes later Justice Souter and then Justice Scalia pressed her on that claim, but only briefly.⁴⁶ The questioning quickly returned to questions of administrability, feasibility, the nature of scientific testing, and the underlying purposes of the confrontation right. This also was the predominant focus of the questioning of the United States Assistant Solicitor General, appearing as *amicus curiae*.⁴⁷

The Court split 5-4 in *Melendez-Diaz*. Justice Scalia wrote for the majority, striking down the Massachusetts practice of

⁴³ Transcript of Oral Argument at 17, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591).

⁴⁴ *Id.* at 23.

⁴⁵ *Id.* at 29.

⁴⁶ *Id.* at 33–34.

⁴⁷ *Id.* at 48–58.

allowing prosecutors to rely on sworn certificates of analysis from chemists who never appeared in court or were subject to cross-examination. Justice Kennedy, joined by Chief Justice Roberts, Justice Alito, and Justice Breyer, wrote a sharp dissent, complaining that confrontation doctrine was becoming “formalistic,” “wooden,” and “pointless.”⁴⁸ Both opinions appealed to pre-1791 common law but spent more time debating whether it made sense to distinguish scientific analysts from what Justice Kennedy called “ordinary,” “conventional” witnesses, who have “personal knowledge of some aspect of the defendant’s guilt.”⁴⁹ The dissent argued that extending the confrontation right to scientific analysts gave defendants a “windfall . . . unjustified by any demonstrated deficiency in trials” and would cause widespread disruption of forensic investigations and criminal prosecutions.⁵⁰ Justice Kennedy contended that framing-era common law supported exempting lab analysts from the Confrontation Clause. He analogized forensic scientists to copyists, whose affidavits that their copies were true and accurate “were accepted without hesitation” by common-law courts, even when the affidavits were prepared specifically for use in a criminal prosecution.⁵¹ But this was a relatively small part of his argument. Most of his argument had to do with what kind of rule made most sense on grounds of policy, balancing the defendant’s legitimate interests against the burdens placed on courts, prosecutors, and analysts.

Perhaps as a consequence, Justice Scalia devoted much of his majority opinion in *Melendez-Diaz* to arguing that giving defendants a right to confront forensic analysts in court would be neither disruptive nor prohibitively expensive, and that the confrontation would help defendants protect themselves against fraudulent, misleading, or mistaken laboratory results. He also spent time arguing about common-law precedents, maintaining that the closest analogs to forensic lab reports at common law were not copyists’ affidavits but “a clerk’s certificate attesting to

⁴⁸ *Melendez-Diaz*, 129 S. Ct. at 2544, 2547 (Kennedy, J., dissenting).

⁴⁹ *Id.* at 2543.

⁵⁰ *Id.* at 2549–50.

⁵¹ *Id.* at 2552–53.

the fact that the clerk had searched for a particular relevant record and failed to find it”—certificates that Justice Scalia said were admissible only if the clerk was “subject to confrontation.”⁵² But the points on which Justice Scalia placed most emphasis in *Melendez-Diaz*—the points with which he began his opinion for the Court and the points to which he returned at the end of the opinion—had to do with what Justice Scalia took to be the basic logic of *Crawford*, that statements prepared as substitutes for testimony cannot be admitted against a criminal defendant without an opportunity for confrontation.⁵³

The Court’s most recent confrontation cases are *Michigan v. Bryant*⁵⁴ and *Bullcoming v. New Mexico*,⁵⁵ each of which was argued and decided in the October 2010 term. The question in *Bryant* was whether *Crawford* and *Davis* allowed the introduction in a homicide trial of statements the victim made after he was shot to police officers who responded to the scene (the Court answered yes); the question in *Bullcoming* was whether *Melendez-Diaz* permitted the prosecution to introduce a forensic report based on machine-generated lab results if the analyst who prepared the report did not appear in court, but another analyst from the laboratory did (the Court said no). Aside from scattered references to the prosecution of Sir Walter Raleigh when *Bryant* was argued before the Court,⁵⁶ common law played little role in the oral argument of either of these cases. Professor Jeffrey Fisher, representing *Bullcoming*, started his oral argument by appealing to the “text, purpose, and history of the Confrontation Clause,”⁵⁷ but then spent virtually all of his time arguing how the purposes of the confrontation guarantee could best be furthered and a workable and administrable doctrinal line drawn. This was the focus of the argument in *Bryant* as well, notwithstanding the references to Raleigh’s case.

⁵² *Id.* at 2539 (majority opinion).

⁵³ *See id.* at 2531–32, 2542.

⁵⁴ *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

⁵⁵ *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011).

⁵⁶ Transcript of Oral Argument at 31, 32, 36, 49, *Bryant*, 131 S. Ct. 1143 (No. 09-150).

⁵⁷ Transcript of Oral Argument at 3, *Bullcoming*, 131 S. Ct. 2705 (No. 09-10876).

Common law was a minor theme of the opinions in these cases, too. Perhaps this was because these were the first significant confrontation cases the Court has decided since *Crawford* in which Justice Scalia did not write for the Court. Justice Sotomayor wrote the majority opinion in *Bryant*, and Justice Scalia was in dissent. Justice Scalia was part of the majority in *Bullcoming*, but Justice Ginsburg wrote the Court's opinion. Even Justice Scalia's dissenting opinion in *Bryant*, though, focused more on the purposes of the confrontation guarantee, and the administrability of the line drawn by the Court, than on the intricacies of pre-1791 common law. This was also the focus of Justice Ginsburg's majority opinion in *Bullcoming*, which Justice Scalia joined.

Justice Ginsburg wrote a short, separate dissent in *Bryant*. She agreed with Justice Scalia that the victim's statements in that case were "testimonial" and therefore the Court was wrong to find them admissible without confrontation. Justice Ginsburg also drew attention, though, to the fact that pre-1791 common law allowed certain "dying declarations" to be admitted against homicide defendants, notwithstanding the absence of confrontation. That issue had not been preserved by the prosecutors in *Bryant*, but Justice Ginsburg suggested that in a case where the issue *had* been preserved, the Court should consider whether the Confrontation Clause incorporated the "dying declaration" exception and what its contours were.⁵⁸ Nonetheless, for Justice Ginsburg as for the rest of the Court, the major concerns in *Bryant* and *Bullcoming* seemed to be doctrinal and pragmatic, not historical.

II.

Crawford was argued looking forwards and decided looking backwards. *Davis* and *Hammon* were argued looking backwards and decided looking forwards. *Giles* was argued looking

⁵⁸ *Bryant*, 131 S. Ct. at 1177 (Ginsburg, J., dissenting). The Court had suggested in *Giles*, and in *Crawford* itself, that the "dying declaration" exception might indeed be incorporated into the constitutional guarantee of confrontation. See *Giles v. California*, 554 U.S. 353, 358, 362 (2008); *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004).

backwards and decided looking backwards. *Melendez-Diaz* was argued looking forwards, mainly, and decided looking forwards, mainly. So were *Bryant* and *Bullcoming*, only more so. Sometimes the advocates focus on common law, sometimes on concerns of practicality, administrability, and fundamental purposes. The same goes for the Court. Sometimes the lawyers are on the same page as the Justices, sometimes not.

All of this might be thought unremarkable. Everyone knows that judging is an eclectic enterprise, combining attention to prior decisions and drafters' intentions with assessments of workability, social costs and benefits, and underlying rationales. It is to be expected that certain of these considerations will receive greater emphasis at one time, other considerations at another time.

Besides, it oversimplifies matters to look only at oral arguments. Each of the Court's recent confrontation cases was briefed not just by the parties but by amici, and the briefs reliably argued from a range of perspectives. In each of these cases, some briefs gave close attention to history and common law, others raised arguments about the underlying purpose of confrontation, and still others focused on concerns of practicality and administrability. Most of the briefs, of course, were themselves eclectic in the kinds of arguments they raised.

So one way to understand the nature of the argumentation in the confrontation cases is this: lots of different kinds of arguments were made in each case, some backward-looking and some forward-looking. Inevitably, certain arguments wound up getting a disproportionate amount of attention at oral argument. There is a limited amount of time for oral argument, and the entire range of considerations raised in the briefs cannot be canvassed. So the questioning winds up focusing on arguments that, for one reason or another, strike one or more Justices as particularly strong, particularly weak, particularly confusing, or particularly interesting. Those may or may not wind up being the points on which the Court leans most heavily when deciding the case. But just because a consideration gets less emphasis at oral argument, or in the Court's written decision, does not mean the Court is neglecting it. There is a dialectic in these cases, as in all cases the Court decides: a back-and-forth consideration of,

say, history on the one hand and policy on the other. There is nothing nefarious or troubling about the fact that different kinds of arguments seem more compelling, or more worthy of discussion, in different cases or at different times.

In fact, the process can be advantageous: policy considerations and appeals to history can operate as useful checks on each other. That is one way to read the progression from *Crawford* to *Davis*: the Court confronted what *Crawford*'s originalism would look like if taken to an extreme, and (except for Justice Thomas) refused to go that far. Instead, a majority of the Court, led by Justice Scalia, seemed to decide in *Davis* that the Confrontation Clause needed to be read with enough flexibility to keep it relevant.

But much, if not most, of the methodological back-and-forth in the recent confrontation cases has operated less helpfully. It has taken the form of a kind of rhetorical kabuki, making the Court's reasoning harder to pin down, harder to argue with, harder—in a word—to confront. The Court claims that it is bound by the original understanding of the Confrontation Clause, that the clause was originally understood to codify eighteenth-century common law, and that therefore the Court must follow the rules of eighteenth-century common law, no matter how inconvenient or unjust those rules may now seem. That way of framing the issues suggests that inquiries into fairness and practicality are irrelevant, except perhaps as evidence about what eighteenth-century common law is likely to have required. But the Court repeatedly acts as though fairness and practicality matter in their own right. Indeed, the Court often acts—especially at oral argument—as though fairness and practicality are what matter most. Sometimes common law trumps considerations of policy, but sometimes it seems to be the other way around.

It is possible, of course, that the Court has consistently taken account of both original intent and present-day practicalities when interpreting the Confrontation Clause. Perhaps the Court has tried, in each of its recent confrontation cases, to read the Sixth Amendment in a way that strikes a kind of equilibrium between historical fidelity and its own assessment of the dictates of fairness and practicality. There might not be anything wrong

with that. Lots of people think that the Court *should*, and maybe even must, approach the Constitution in this way: balancing different methodologies against each other, sacrificing purity for a rough, incompletely theorized kind of common sense. Other people, including at times some members of the Court, are skeptical of that kind of multi-factored analysis, finding it too manipulable and indeterminate.

But that debate can be put to one side. Regardless of whether it makes sense for the Court to try to balance originalism and pragmatism on a case-by-case basis, there is little to be said for making the attempt and not admitting it. If you say that history matters, but that fairness and accuracy matter, too, and that both kinds of considerations will be taken into account, then you can no longer dismiss considerations of either kind as ultimately beside the point. You can be held responsible, too, for the particular way in which you combine considerations of history with considerations of present-day practicalities. And you commit yourself to defending your interpretative methods in all of their particulars: your reliance on history (to whatever degree you rely on it, and in whatever manner), the weight you put on considerations of justice, fairness, and practicality, and the way in which you combine these disparate considerations and—crucially—resolve any conflicts between them. If, on the other hand, you insist at times that what really matters is history, and you act at other times as though what really matters is present-day practicality, then you brush aside arguments about history by talking about fairness and what makes sense, and you belittle arguments about fairness and what makes sense by retreating to history. The food was fine, what there was of it; there was plenty, such as it was.