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Purpose as a Guide to the Interpretation of the Confrontation Clause

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I agree with most of the points raised by Professor Friedman's contribution to this symposium.[1] I applaud the change from *Ohio v. Roberts* to *Crawford v. Washington*, and I was one of the law professors who signed the Friedman amicus brief in *Crawford*.[2] But I differ from him about the approach that should be used in interpreting *Crawford*.

Professor Friedman does not seem to be completely comfortable with giving a purposive interpretation to the Confrontation Clause or with exploring the reasons for providing confrontation. In the paper presented here, he states that "[t]he purpose of the Confrontation Clause is to assure that prosecution testimony be given under prescribed conditions, most notably that it be in the presence of the accused and subject to cross-examination."[3] This statement

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[1] Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241 (2005).

[2] Ohio v. Roberts, 448 U.S. 56 (1980); Crawford v. Washington, 541 U.S. 36 (2004).

[3] Friedman, *supra* note 2, at 245. *Compare id. with* Richard D. Friedman, *Children as Victims and Witnesses in the Criminal Trial Process: The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 247 (2002). Professor Friedman's pre-*Crawford* article criticized the "reliability" approach of *Ohio v. Roberts*:

> The Confrontation Clause is not a constitutionalization of the law of hearsay, with all its oddities. It does not speak of reliability or of exceptions. The confrontation right reflects a belief, central to our system of criminal justice, that a witness against a criminal defendant should give testimony under prescribed conditions – under oath, in the presence of the accused, subject to cross-examination, and, if reasonably possible, in open court. And this right should be recognized – as the language of the Confrontation Clause suggests – as categorical and not subject to exceptions.

Id. Roberts adopted a purposive approach to Confrontation doctrine. Ohio v. Roberts, 448 U.S. 56, 65 (1980). As interpreted, the *Roberts* approach did not provide much protection or guidance. One possible reaction to the shortcomings of *Roberts* is to abandon the attempt to articulate an overall purpose. In my view, *Roberts* was a

describes procedural elements of confrontation, but it does not tell us why they are desirable. I think we should go a step further and ask "*Why* provide a procedure with cross-examination in the presence of the accused?" Where the text of the Confrontation Clause does not clearly resolve an issue, we should be guided by a concept of purpose.[4]

The primary purpose of the Confrontation Clause is to prevent injustice caused by abuse of state power.[5] Absence of confrontation facilitates the abuse of state power in at least three ways:

1. Secrecy – Preventing the defendant from learning facts about the declarant, hearing the declarant's whole story, or learning about the circumstances under which the story was given.
2. Falsehoods – Presenting a false account of the declarant's story or the conditions under which it was produced.
3. Undue influence – Pressuring the declarant with torture, abuse or intimidation, or taking advantage of vulnerabilities of the declarant.

To some extent, the mere appearance of the declarant provides a modicum of protection against these abuses. The declarant who has been pressured by the prosecution may

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failure not because it adopted a purposive approach, but because its delineation of purpose focused on reliability instead of the danger of abuse of state power, and because its guidelines were not sufficiently categorical.

[4] *See* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 560-01 (1992). Critiquing the cases interpreting *Ohio v. Roberts*, Professor Berger argued that the Court's opinions overlooked the core concern of the Bill of Rights in preventing government oppression. *Id.* at 557-61. She did not claim that she could prove that the drafters of the Bill of Rights intended that specific interpretation, noting the sparseness of the historic record. *Id.* at 562. Moreover, she would not advocate a narrow intentionalist approach to constitutional interpretation even if the historical record were more clear. *Id.* Instead, she advocated attributing to the Confrontation Clause a general purpose of giving "the accused and the public [the ability] to monitor, curb, and expose prosecutorial abuse," pointing out that this interpretation was historically plausible, consistent with a unitary view of the Bill of Rights, and compatible with the results of the Court's precedent, if not always with the language of its opinions. *Id.* at 562-63.

[5] *See id.* at 560-61. It may also be accurate to say that the purpose of the Clause is to protect truth-finding. *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 688 (1996). But I believe that the purpose is to deal with a particular kind of threat to the truth. The Clause was limited to criminal proceedings and framed with a view toward injustices such as those exhibited in the Raleigh trial. *See* Trial of Sir Walter Raleigh, 2 How. St. Tr. 1 (1603). I think it is reasonable and wise to see abuse of state power as the core concern, one calling for a confrontation procedure not constitutionally required in other types of legal proceedings, and calling for truth-finding safeguards that might be unnecessary if we could trust police, judges, and prosecutors to resist political influence and popular outrage.

recant spontaneously. In cases in which there is a danger of abuse of state power, even demeanor evidence may have some value. Scholars have expressed well-founded skepticism about demeanor as a lie detector, that is, about the ability of triers of fact to detect lying through cues such as nervousness, eye aversion, and hesitation. Lab experiments suggest that triers of fact are unlikely to be able to reach accurate results based on these cues.[6] However, when one imagines accusations based upon intimidation, demeanor may be more useful. The fact that a witness might display psychological or physical signs of torture if the witness were presented in court might have some value in deterring this form of abuse, as would the fact that the witness might recant and make an accusation of intimidation if allowed to testify in open court. The experimental evidence does not rebut this possibility, nor could it, within the bounds of ethical experimentation.

However, cross-examination is probably more important than mere observation of the declarant. Although it is not a cure-all, it can help prevent abuses by allowing adversarial testing and the elicitation of concessions, and by enhancing the display of demeanor.

On cross-examination, sometimes a witness can be led into asserting facts that can be disproven,[7] or into conceding

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[6] *See* Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1088 (1991); *see also* PAUL EKMAN, TELLING LIES 213 (2d ed. 1992); ALDERT VRIJ, DETECTING LIES AND DECEIT (2000); R.C.L. Lindsay, Gary L. Wells & Fergus J. O'Connor, *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses*, 13 LAW & HUM. BEHAV. 333, 337 (1989); Roger C. Park, *Empirical Evaluation of the Hearsay Rule*, *in* ESSAYS FOR COLIN TAPPER 91, 92-99 (Peter Mirfield & Roger Smith eds., 2003); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 20-23 (1997); James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 930 (2000).

[7] The notorious Detective Fuhrman in the O.J. Simpson trial provides one example. On cross-examination of the allegedly racist detective, defense counsel got Fuhrman to deny that he had used the word "nigger" in the past ten years. Christopher B. Mueller, *Introduction: O.J. Simpson and the Criminal Justice System on Trial*, 67 U. COLO. L. REV. 727, 733 (1996). When conclusive proof to the contrary emerged, the prosecution's whole case was seriously damaged. *Id.* at 733. For other examples of this "commit and contradict" tactic, see FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 85-89 (4th ed., Touchstone 1997) (1903) (on cross-examination, an expert witness claimed that an authoritative treatise supports his position, and is discredited when lawyer produces the treatise and expert cannot show where treatise supports him); *id*. at 136-38 (witness claimed crucial meeting made him late for school, and on cross confirmed and amplified story by saying he had been marked late at school; cross-examiner was allowed to point out that the all city schools were closed on December 28 and to ask witness for an explanation how he could have gone to school that day; witness had no answer); 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1368, at 39 (Chadbourn rev., Little Brown and Co. 1974) (witness testified on cross that he weighed arsenic by shot and found some missing, lawyers

facts because the witness fears that lies can be disproved. Testing can include asking the witness to describe facts that the witness could be expected to know if the witness's other testimony were true, or to show knowledge and skill consistent with claimed expertise. For example, a witness who claims to have been in the house of the accused could be asked to describe its interior.[8] A child who has been led into false testimony could be tested for suggestibility by a cross-examination that amounts to a suggestive interview.[9] The cross-examiner of an honest witness can often hope for concessions, as can the cross-examiner of a witness who is afraid to lie for fear of being contradicted. The witness who is testifying under compulsion from the prosecution may be eager to offer concessions.

In the O.J. Simpson trial, for example, Kato Kaelin, a houseguest at Simpson's estate, was called as a witness for the prosecution. Some of his testimony was favorable to the prosecution: he had seen Simpson before the murders, his contact with Simpson ended in plenty of time for Simpson to have committed the murders, and he had heard thumps on the wall of his living quarters at a time that would connect Simpson with the bloody glove found nearby. Nonetheless, Kaelin was a disappointment to the prosecution. Perhaps because he resented threats that he would be prosecuted if he did not cooperate in the investigation, Kaelin seemed to shade his testimony toward the defense on other points. For instance,

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gathered samples of shot from local grocers, finding that different parcels of shot varied more in weight than the weight of the allegedly missing arsenic).

[8] For examples of this type of cross-examination, see JOHN HENRY WIGMORE, THE SCIENCE OF JUDICIAL PROOF § 248 (3d ed. 1937) (Surratt's trial; witness testified he saw the accused in a hotel in Elmira, but was unable to describe hotel or other features of Elmira); *id.* (Langton's trial; servant who testified where employer was in crucial month was not able to say where he was in other months, explaining "the question that I came for, my lord, did not fall upon that time"); *id.* (Hillmon's trial; witness was able to say that Hillmon was missing a tooth but not whether other acquaintances were missing teeth).

[9] One leading authority, John E.B. Myers, suggests that the cross-examiner should test the child by, in effect, doing a suggestive interview. John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 PAC. L.J. 801, 887 (1987). He recommends that the cross-examiner display a friendly, low-key demeanor, seeking to establish rapport with the child, while reinforcing answers favorable to the cross-examiner with nods or other signs of approval. *Id.* at 878-79. He gives an example from a transcript in which the lawyer induced the child to say that they had met before and that the lawyer was wearing a red suit with stripes around the legs, facts that were not true. *Id.* at 887.

during cross-examination by the defense, he described Simpson as laid-back and relaxed shortly before the murders occurred.[10]

Tests, however, can backfire, so they are not always the best tactic for cross-examination. Ordinarily, in fact, lawyers are cautious about using them. In a normal case, the cross-examiner is best off following the prevailing take-no-chances approach, under which the lawyer puts a fact to the witness that the witness cannot deny and whose answer is known ahead of time.[11] For example, rather than, "Describe what you saw inside the house," the more typical cross-examination question would be something like, "It was dark, wasn't it?" A take-no-chances cross-examination can be persuasive, but it is not essential to the preservation of justice.

In thinking about the Confrontation Clause, we need to think about the extraordinary case: the one in which there is a danger of abuse of state power, such that cross-examination serves as a safeguard against overreaching. Cross-examination prevents overreaching when it adds something new, something that cannot otherwise be shown as evidence. It is the resort of the defendant who is at such a disadvantage that he can take chances, as Sir Walter Raleigh did when he said that he would put his whole case on Lord Cobham's testimony if they would but produce Cobham from "the house hard by."[12]

Even Justice Scalia's opinion in *Crawford* shows signs of being open to a functional approach, so long as the assessment is filtered through the eyes of the Framers. In responding to Chief Justice Rehnquist's lament that the fact that a statement is testimonial does not make it any less reliable, he wrote:

> Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.[13]

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[10] *See* JEFFREY TOOBIN, THE RUN OF HIS LIFE 123 (1996).

[11] For expositions of the take-no-chances approach, see STEVEN LUBET, MODERN TRIAL ADVOCACY 105-21 (2d ed. 1997) and THOMAS A. MAUET, TRIAL TECHNIQUES 252 (5th ed. 2000).

[12] Trial of Sir Walter Raleigh, 2 How. St. Tr. 1 (1603); *See* JON R. WALTZ & ROGER C. PARK, CASES AND MATERIALS ON EVIDENCE 97-98 (10th ed. 2004) (quoting J.G. PHILLIMORE, HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 157 (1850) (providing an account of the Raleigh trial).

[13] *Crawford*, 541 U.S. at 56 n.7.

There are dangers, though, in using a functional approach instead of an historical/conceptual one. It is possible that judges will use a functional approach to water down the right to confrontation, whereas an unexplained historical/conceptual approach might hold its ground a while longer. But, for those who are in favor of protecting the rights of the accused, it is awkward to switch back and forth between interpretive approaches depending upon the results that they reach. I think it is better to argue forthrightly for safeguards and explain the reasons for them. History can be an uncertain friend, and unless we really are convinced of the superiority of eighteenth century procedures and penalties, we should prefer to interpret constitutional text in light of general purposes.

The task of interpreting the concept of "testimonial" evidence has fallen mostly on state court trial judges and the justices of state intermediate appellate courts. These judges may have intellectual attainments that rival those of the Justices of the United States Supreme Court, but they lack the Supreme Court's platoon of law clerks and its amicus briefs, not to mention its ability to control its docket. If their interpretations of terms left undefined by the Supreme Court are to be guided by anything other than instinct and dictionary definitions, that guidance should come from analogies drawn against the background of a concept of purpose. It is unrealistic to expect these judges and the lawyers who appear before them to research English procedural history or the intent of the Framers. Doing that research would deprive judges of time needed for other tasks imposed upon them by higher courts, such as learning the scientific method in order to screen expert testimony.

What difference would it make if judges focused on the danger of abuse of state power? In child abuse cases, a concern about state misconduct might lead to concern about whether the child was subjected to suggestive interviewing, and not whether the child was old enough to understand that the interview might lead to prosecution.[14] In both child and adult cases, judges might be more likely to allow casual hearsay that

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[14] *Compare* Berger, *supra* note 3, at 566 ("In these kinds of cases the Confrontation Clause should be interpreted to restrain prosecutors from using suggestive, manipulative questioning techniques."), *with* Friedman, *supra* note 2, at 249-51 (suggesting tentatively that a child's response to suggestive questioning could be considered nontestimonial if the child was too young to realize that the statement might be used prosecutorially).

did not involve state agents to pass Confrontation Clause muster. Moreover, substitutes for face-to-face confrontation could be assessed by whether they allowed testing, probing for concessions and a view of demeanor. The fact that prior proceedings offered in evidence were videotaped would ordinarily be a factor in favor of saying that the constitutional right was satisfied, as opposed to being a factor that cut the other way because the taping made the prior proceeding more formal. But particular results are not the focus of my comment. The central point is that we should not give up on a functional approach to confrontation just because the *Ohio v. Roberts* approach did not work out. What is needed is an approach with more safeguards, not an approach that is shy about articulating rationales for providing confrontation.