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Legal History for a Dummy

A COMMENT ON THE ROLE OF HISTORY IN JUDICIAL INTERPRETATION OF THE CONFRONTATION CLAUSE

Peter Tillers[†]

I struggled quite a bit over what I should talk about today. I know a little bit about exploratory fact investigation¹ and about related matters such as induction and what philosophers of science call the logic of discovery.² I thought about discussing the worrisome implications of *Crawford v. Washington*³ for constitutional regulation of early phases of criminal investigation,⁴ and I considered talking about the possibility that *Crawford* might further weaken the already

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¹ See, e.g., Peter Tillers & David Schum, *A Theory of Preliminary Fact Investigation*, 24 U.C. DAVIS L. REV. 931 (1991).

² Today the notion of a logic of discovery is much discussed. Karl Popper, perhaps inadvertently, deserves credit for first popularizing this notion. See KARL POPPER, *LOGIK DER FORSCHUNG* (1934) (the word “Forschung” is best translated as “research” or “investigation,” but the first English translation of Popper’s book rendered the title “The Logic of Scientific Discovery.” See KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (Basic Books, 1959)).

³ 541 U.S. 36 (2004).

⁴ Truth-oriented federal constitutional constraints on preliminary phases of criminal investigation are already de minimis. See, e.g., *California v. Trombetta*, 467 U.S. 479 (1984) (no due process violation because government failure to preserve breath samples in a drunk driving case was not done in bad faith). It is possible – if not inevitable – that the skepticism voiced by the Court in *Crawford* about the possibility of appellate assessment of the trustworthiness of testimonial evidence augurs continuing or even heightened reluctance by the Court to require the judiciary to police the trustworthiness of police investigation in the name of due process. Of course, *Crawford* does cast a backward shadow – it does influence pretrial police investigation – but the size of that shadow may be rather small because relatively few types of pretrial statements may turn out to be “testimonial” for the purposes of a Crawfordized, or Friedmanized, Confrontation Clause. (By speaking of Friedmanization, I am referring to Professor Richard Friedman’s substantial role in persuading the Supreme Court to revamp its Confrontation Clause jurisprudence.) In any event, under any interpretation of *Crawford* – whether narrow or broad – the Confrontation Clause has no application to tangible evidence that does not contain symbols deposited by human beings that are designed to communicate information – to evidence such as blood, fingerprints, glass fragments, tire tracks, footprints, and images recorded by automatic cameras.

faint prospect that the Court might use the general due process guarantee to scrub criminal investigation of some pathologies that John Langbein complains about,⁵ as well as other pathologies that do not seem to worry him nearly as much.⁶ But as alluring as this topic is, it has nothing to do with the topic under discussion in this symposium. So I have decided to stick to the assigned topic—the role of history in the interpretation and elaboration of the Confrontation Clause.

But my decision not to go off on a tangent dooms me to play the role of a Harold Carswell; I have to be a kind of academic version of Harold Carswell. Carswell, you may recall, was one of Richard Nixon's nominees to the Supreme Court. You will also recall that Senator Roman Hruska spoke out in defense of that unsuccessful nomination and nominee. Hruska, a Phi Beta Kappa graduate of Creighton University, said:

Even if [Carswell] was mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Cardozos and Frankfurters and stuff like that there.⁷

This, alas, is the role I have to play – the role of a Harold G. Carswell – because I know practically *nothing* about legal history, and the little I once knew I have forgotten.

But what's the point of having an ignoramus involved in this symposium? Being an ignoramus, I struggled over this question. After due deliberation, I concluded that even an ignoramus can contribute to an understanding of the role of history in constitutional argument about the Confrontation Clause. How can that be?

You might think of me as a cheap stand-in for Justice Scalia.⁸ I know what some of you are thinking. You're thinking, "I know Justice Scalia. In any event, I know

⁵ John Langbein worries most about the degradation of evidence by partisan lawyers in an adversary system such as ours. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); see also JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 331-34 (2003).

⁶ John Langbein does not worry nearly as much about *unimaginative* investigation. But imagination is essential to effective investigation. See Tillers & Schum, *supra* note 1, at 934; see also Peter Tillers, *The Fabrication of Facts in Investigation and Adjudication* (1998), <http://tillers.net/fabrication.html>.

⁷ Warren Weaver, Jr., *Carswell Attacked and Defended as Senate Opens Debate on Nomination*, N.Y. TIMES, Mar. 17, 1970, at 21. But see Bret Stephens, *In Praise of Mediocrity*, JERUSALEM POST, July 16, 2002, at 16B ("Hruska was on to something.").

⁸ Justice Scalia was the author of the Court's opinion in *Crawford*.

something about you, Tillers, and I know this much: Tillers, you're no Scalia!"

I confess that I'm no Justice Scalia. In particular, I confess that I can't begin to match Scalia's historical learning. But this fact just proves my point because even Justice Scalia's formidable historical learning wasn't good enough!

The papers presented by Professors Kirst⁹ and Davies¹⁰ for this conference make a convincing case that Justice Scalia got some important parts of his legal history wrong and that some of Scalia's mistakes were elementary from a historian's point of view.¹¹ Although Professors Kirst and Davies agree that history was misused in *Crawford*, the precise moral each draws from this differs.¹² Professor Kirst's paper suggests that the remedy for the Court's misuse of history is for the Court to avail itself of better historical scholarship – scholarship that gives a truer (and broader) picture of the original purpose, or intended meaning, of the Confrontation Clause. Professor Davies, by contrast, hints that the appropriate remedy for the Court's abuse of history is for the Court to (largely) abandon the use of history (at least for the interpretation of some constitutional rules or principles).

⁹ Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35 (2005).

¹⁰ Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005).

¹¹ Professor Davies argues that Chief Justice Rehnquist, in dissent, did somewhat better than Justice Scalia, but that Rehnquist's historical scholarship also suffered from grievous flaws. See Davies, *supra* note 10, at 113-14.

¹² Professors Kirst and Davies point to different errors in Justice Scalia's legal history and they draw different lessons from the distinct errors that they identify. Professor Davies identifies errors more pertinent to the purposes of my little peroration because, although Professor Kirst's paper makes a very plausible case that the Framers saw the Confrontation Clause as a broad – or “political” – ideal, it is practically incontestable that Justice Scalia did commit the historical errors that Professor Davies identifies and it is hard to avoid Davies' conclusion that a competent legal historian would not have committed the errors that Justice Scalia committed.

My comment does not address the question of whether an accurate rendition of the historical record or whether reliance on a different swath of human history would support the result that the Court reached in *Crawford*. My comment addresses only the question of the extent to which the Court should rely on its understanding of centuries-old legal precedents and practices to fashion and interpret constitutional guarantees in the twenty-first century. For this purpose it is pertinent that the historical account that Justice Scalia constructed was demonstrably incorrect.

Although I think Justice Scalia got his legal history wrong, it does not necessarily follow that I think that *Crawford* is an unwelcome decision. This comment does not address the more general question of whether *Crawford* is a good thing. (My answer would be a qualified one; I would say that the answer depends on how *Crawford* is read and on its implications. See *supra* note 4.)

Professor Kirst's argument suggests that the appropriate remedy for the Court's shabby historical scholarship is *better historical scholarship for and on the Court*. I suspect that this remedy will *not* work. The reason for my skepticism is that I think there is an important sense in which cutting-edge historical scholarship *was* available to the Court. If the Court's reliance on history was something more than mere ad hocery and more than a makeweight, the historical distortions and mistakes found in *Crawford* (and in similar decisions) occurred not only because the Court didn't know how to *do* legal history, but also because the Court didn't know how to *use* legal history. Crudely put, the problem is that the Court couldn't have recognized good legal history even if it had fallen over it.

It's time for ignoramus Tillers to make a reappearance. If the Scalias of the judicial world can't get their legal history straight, it's practically certain that the Harold Carswells and Peter Tillerses of the world can't do so either. Ignoramuses ("ignorami"?) like me don't know how to do good legal history. Furthermore, ignoramuses can't tell the difference between good legal history and bad legal history; consequently, they don't know how to sniff out the good historical stuff.

I don't mean to suggest that the current Justices of the Supreme Court are as ignorant of legal history as I am. In this respect they are surely at least a step or two above the Carswells and the Tillerses of the world. I doubt, however, that any of them are much better at their legal history than Scalia and Rehnquist. Indeed, I suspect that in this respect some of them are at least a notch or two below Scalia and Rehnquist. If I am right about that, I have to agree with Professor Davies: *It is unlikely that the Supreme Court will ever get its legal history straight.*

The problem here resembles a problem that arises under *Daubert v. Merrell Dow Pharmaceuticals*,¹³ a decision that requires federal trial judges to serve as "gatekeepers" and use *their own wits* to allow good science into federal courtrooms and to keep junk science out: How can you get amateurs to make sound professional judgments? If you can't do that, how do you get amateurs to make sound judgments about the credentials and conclusions of professionals?

¹³ 509 U.S. 579, 592-93 (1993).

There is no easy answer to this puzzle. The history of judicial use of history suggests it is not easy to turn sow's ears into silk purses.