Crawford, Davis, and Way Beyond

Richard D. Friedman

University of Michigan Law School, rdfrdman@umich.edu

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INTRODUCTION

Until 1965, the Confrontation Clause of the Sixth Amendment to the United States Constitution hardly mattered.1 It was not applicable against the states, and therefore had no role whatsoever in the vast majority of prosecutions. Moreover, if a federal court was inclined to exclude evidence of an out-of-court statement, it made little practical difference whether the court termed the statement hearsay or held that the evidence did not comply with the Confrontation Clause.

But the Supreme Court's decision in Pointer v. Texas2 to apply the Clause to the states meant that, potentially at least, the Clause mattered a great deal. The Court could invoke the Clause, as it did in Pointer itself, to hold that evidence of a statement could not be admitted in a state prosecution, notwithstanding that the evidence complied with the state's hearsay law.3 And the steady liberalization of hearsay law, which was advanced by adoption of the Federal Rules of Evidence in 1975 and by subsequent codifications based on those Rules adopted by most of the states, increased the potential significance of the Confrontation Clause; it meant that black-letter hearsay law

* Ralph W. Aigler Professor of Law, University of Michigan Law School.

1 The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

2 380 U.S. 400 (1965).

3 See also, e.g., Barber v. Page, 390 U.S. 719 (1968).
would pose no obstacle to some statements that the federal courts might nonetheless determine to violate the confrontation right.

The impact of the Clause was limited, however, by the fact that the Supreme Court did not have a good conception of what the Clause meant. The Clause seemed to require the exclusion of some hearsay, but treating it as excluding all hearsay would be intolerable. The Court floundered, eventually articulating in *Ohio v. Roberts*\(^4\) a rationale that the Clause was meant to exclude only unreliable hearsay, and leaning heavily on the established and expanding body of hearsay exemptions to determine what was reliable.\(^5\) Consequently, the Clause still had only a very limited effect. The lower courts usually could find a basis for admitting a statement, either by fitting it within an exemption or making a case-specific determination of reliability.\(^6\) And, though the Supreme Court occasionally swooped down and held the admission of a given statement to be a violation of the Clause,\(^7\) the law was highly unpredictable because it was not rooted in any solid underlying theory.\(^8\)

*Crawford v. Washington*\(^9\) changed the landscape dramatically. In *Crawford*, the Supreme Court held that the Confrontation Clause does not constitutionalize the prevailing law of hearsay.\(^10\) Rather, it enunciates a simple and long-standing procedural rule: A prosecution witness must give testimony in

\(^{4}\) 448 U.S. 56 (1980).

\(^{5}\) *Id.* at 66 ("Reliability can be inferred without more where the evidence falls within a firmly rooted hearsay exception.").

\(^{6}\) Note the catalogue of cases reviewed in *Crawford v. Washington*, 541 U.S. 36, 63-65 (2004).


\(^{8}\) *Crawford v. Washington*, 541 U.S. 36, 63 (2004) ("The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations."); *Id.* at 68 n.10 ("the *Roberts* test is inherently, and therefore permanently, unpredictable").

\(^{9}\) 541 U.S. 36 (2004).

\(^{10}\) *Id.* at 60-62.
the presence of the accused, subject to cross-examination.\textsuperscript{11} Therefore, if an out-of-court statement is testimonial in nature, it may not be admitted against an accused unless the accused has had (or forfeited) an opportunity to examine the witness, and even then it will be accepted only if the witness is unavailable to testify at trial.\textsuperscript{12}

Doctrinally, the transformation was remarkably broad and swift. The upshot is that we are at the threshold of a new era. This is the first time that the Confrontation Clause really has a substantial impact in itself; put another way, this is the first time that the distinction between the commands of the Clause and the contents of ordinary hearsay law will really be significant. Many basic questions will have to be rethought, or approached completely from scratch. That is intellectually very exciting. Moreover, because the change is so new and broad, fears that the testimonial approach will prove to be as indeterminate as the reliability-oriented approach that it replaced are, I believe, misguided. The reliability approach was incoherent and failed to express any principle worth protecting. Therefore, it was, as Justice Scalia said in \textit{Crawford}, permanently unpredictable.\textsuperscript{13}

Given that the new world of the testimonial approach is a little more than two years old, one cannot expect that by now all significant questions would have been resolved and that the lower courts would all apply those resolutions smoothly and consistently. Indeed, in arguing \textit{Hammon v. Indiana},\textsuperscript{14} I suggested that the Court not try to do too much all at once; rather, the Court should be attempting to build a framework that will last for centuries, and it is more important that it be built well

\begin{itemize}
\item[\textsuperscript{11}] Id. at 59.
\item[\textsuperscript{12}] Id. \textit{Crawford} also holds out the possibility that statements fitting within the "dying declaration" exception to the hearsay rule might fall outside the confrontation right. Id. at 56 n.7. In my view, the proper way to handle dying declarations is through the doctrine of forfeiture rather than by creating an exception to the right.
\item[\textsuperscript{13}] Id. at 68 n.10.
\end{itemize}
than that it be built quickly.\textsuperscript{15} And in the end, just as in \textit{Crawford}, the Court decided \textit{Hammon} and its companion, \textit{Davis v. Washington},\textsuperscript{16} without offering a comprehensive definition of what "testimonial" means. Now, though, we have some additional guideposts: The statements at issue in \textit{Hammon} are testimonial, while the key ones at issue in \textit{Davis} are deemed not to be.

In Part I of this Article, I discuss \textit{Davis} and \textit{Hammon} and the fundamental question of how a court should determine whether a statement is testimonial. I conclude that the \textit{Davis} opinion is consistent with what I believe is the best approach, one that asks what the anticipation would be of a reasonable person in the position of the declarant. Part II analyzes ambiguities in the operational test created by \textit{Davis}. I believe that the "ongoing emergency" doctrine stated by \textit{Davis} was intended to be quite narrow, but that lower courts are likely to treat it quite broadly. Part III then discusses whether a statement can be testimonial only if it was made formally. \textit{Davis} appeared to point in different directions with respect to this question. I conclude that on the best view of the case either there is no formality requirement or, if there is such a requirement, it adds nothing to the requirement that the statement be made in anticipation of prosecutorial use. In Part IV, I offer a brief draft of an opinion that the Court might have written, reaching the same results that it did in \textit{Davis} and \textit{Hammon} but yielding less leeway for manipulation by the lower courts. Part V summarizes some of the other major issues that must be resolved in coming years to generate a sound and coherent understanding of the confrontation right. Finally, Part VI presents interrelated thoughts on pedagogy and law reform. I contend that the confrontation right should drive the discussion of hearsay in Evidence courses, and that the transformation of confrontation doctrine should cause us to consider radically reshaping the ordinary law of hearsay.

\textsuperscript{15} Transcript of Oral Argument at 63, Hammon v. Indiana, 126 S. Ct. 2266 (2006) (No. 05-5705), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-5705.pdf (hereinafter "Hammon Transcript").

\textsuperscript{16} 126 S.Ct. 2266 (2006).
I. Davis, Hammon, and Framework Questions

The holdings of the Supreme Court in Davis and Hammon are better, I believe, than the results most of the lower courts had reached, but not as good as they should have been.

In Hammon, the police came to the Hammon house in response to a domestic disturbance call. Though Amy Hammon at first denied that anything was wrong, she gave them permission to enter. They saw signs that there had been an altercation, and Hershel Hammon told them that he and Amy had had an argument, but he denied that it had become physical. One officer remained with Hershel while the other spoke with Amy in another room. This time, in response to further questioning, she said that Hershel had hit her. Amy failed to appear at Hershel’s trial on a domestic battery charge, and so the prosecution, over Hershel’s objection, offered the officer’s account of what Amy had told her. Hershel was convicted, the Indiana courts affirmed, but the United States Supreme Court reversed.

If Hammon had lost in the Supreme Court, then we would have created a system in which a complainant could create evidence for trial simply by making an accusation to a police officer in her living room, at least so long as the accused was not in the same room and was in the presence of another officer. The Supreme Court would have endorsed the toleration, demonstrated by most courts in the years before Crawford and by many even afterwards, of a practice that should be deemed a core violation of the Confrontation Clause.

That practice, which Bridget McCormack and I have labeled “dial-in testimony,” took advantage of the Court’s pre-Crawford holding that a statement deemed to fit within the jurisdiction’s hearsay exception for spontaneous declarations was exempt from the Confrontation Clause. By invoking some remarkably generous interpretations of the hearsay exception, courts routinely admitted accusatory statements made to authorities, even if made hours after the incident and even if the ac-

cuser was present but did not testify. Moreover, many courts, presumably having gotten so accustomed to the practice, found it almost unthinkable to do without it and continued to tolerate it after Crawford. But once one understands and accepts in good faith the transformation wrought by Crawford, Hammon becomes an easy case, and the opinion of the Court reflects that fact.

Davis was plainly a much tougher case. When the complainant, Michelle McCottry, spoke to a 911 operator, she was still in distress, the assault having allegedly occurred just moments before—so recently that she spoke in the present tense. She was not yet protected by a police officer, and the accused remained at large.

Nonetheless, I thought that Davis should have won. In arguing our respective cases, Jeff Fisher, who was Davis’s counsel, and I contended for a simple, intuitively appealing proposition that would have clarified the law greatly if it had been adopted: that an accusation of crime made to a police officer or other law enforcement official is testimonial.

But the Supreme Court declined to take so broad a view. The Court enunciated a test that, while not comprehensive, it regarded as adequate to resolve these cases:

Statements are nontestimonial when made in the course of police interrogation under circumstances

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19 Note, for example, the set of cases in which the Supreme Court, after deciding Davis and Hammon, granted certiorari, vacated, and remanded for reconsideration. These are analyzed in a memorandum prepared by the Public Defender Service for the District of Columbia and available at http://confrontationright.blogspot.com/search?q=o%27toole.

20 126 S. Ct. at 2278 (Hammon "much easier" than Davis, the statements being "not much different" from those found to be testimonial in Crawford).

21 Id. at 2279.

objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.\textsuperscript{23}

Even under this test, I think Davis should have won. It appears to me that the purpose of the conversation—on the parts both of McCottry and of the 911 operator—was not to provide immediate protection to McCottry. In fact, Davis was evidently leaving the house as the call began, McCottry expressed no fear that he would return in the immediate future, and the operator told her that the police were first \textit{going to find the accused} and then \textit{come talk to the complainant}.\textsuperscript{24} Had the operator been concerned that the accused was likely to return to the house in the immediate future, then her statement to McCottry would make no sense at all; rather than roaming the streets of the city looking for the accused, at least one officer should have been posted to the house in case he returned there. Clearly, the aim of the state's agents, and presumably also the desire of the complainant, was that the accused be arrested and that sanctions—at least for violating the restraining order mentioned in the call by the complainant, and perhaps also for criminal violations—be imposed on him.

More fundamentally, though, I do not believe that the decisive question in deciding whether a statement is testimonial should be one of "primary purpose," either of the declarant or of the state agents. Determining a "primary purpose" is of course a difficult matter because so often, as Justice Thomas correctly pointed out in his dissent, the questioner has more than


\textsuperscript{24} Id. at 2271. In fact, it appears that the officers did go directly to McCottry, but that was not the anticipation of the parties to the conversation. Id.
one important purpose, and they may meld together.\textsuperscript{25} Labeling
one purpose after the fact as primary seems to be a rather arbi-
trary exercise\textsuperscript{26}—and thus the test invites manipulation to en-
hance the chance that the evidence will be received.\textsuperscript{27}

Furthermore, why should the purpose of the questioner mat-
ter? I have previously stated at length reasons why, in determin-
ing whether a statement is testimonial, the witness’ perspective
should be the crucial one.\textsuperscript{28} And, curiously, it seems the
\textit{Davis} Court agreed. Dispelling one of the fallacies adopted by
some lower courts in the wake of \textit{Crawford}, the Court made
very clear that statements made absent interrogation—
volunteered statements or ones made in response to open-ended
questions—may be testimonial.\textsuperscript{29} Further, the Court stated, “And

\textsuperscript{25} \textit{Id.} at 2283 (“In many, if not most, cases where police respond to a
report of a crime, whether pursuant to a 911 call from the victim or other-
wise, the purposes of an interrogation, viewed from the perspective of the
police, are \textit{both} to respond to the emergency situation \textit{and} to gather evi-
dence.”).

\textsuperscript{26} \textit{Id.} at 2284-85.

\textsuperscript{27} Of course, even the test that I think is optimal, based on the reason-
able anticipation of a person in the position of the declarant, is potentially
manipulable. \textit{See}, \textit{e.g.}, State v. Stahl, 855 N.E.2d 834 (Ohio 2006). Indeed,
in some circumstances a test based on the primary purpose of the questioner
is more likely to lead to a conclusion that the statement is testimonial, be-
cause whatever the understanding of a reasonable person in the declarant’s
position, it is not reasonably deniable that the questioner solicited the state-
ment for forensic purposes. \textit{See}, \textit{e.g.}, State v. Justus, 205 S.W.3d 872 (Mo.
2006). Nevertheless, I believe that a test based on the primary purpose of the
questioner will be more subject to manipulation, because often the ques-
tioner—frequently a police officer or some other repeat witness who is part of
the criminal justice system—will learn to recite a formula that will give a
friendly court cover for concluding that the questioner’s primary purpose was
not forensic.

\textsuperscript{28} \textit{See} Richard D. Friedman, \textit{Grappling with the Meaning of “Testimo-
nial,”} 71 BROOK. L. REV. 241, 255-59 (2005) [hereinafter \textit{Grappling}].

were no more willing to exempt from cross-examination volunteered testimony
or answers to open-ended questions than they were to exempt answers to de-
tailed interrogation.”). In \textit{Grappling}, \textit{supra} note 28, at 263-66, adapted from a
posting titled “The Interrogation Bugaboo” that I made to The Confrontation
Blog, \url{http://confrontationright.blogspot.com/} (Jan. 20, 2005, 1:12 EST), I have
of course even when interrogation exists . . . it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”

So how do we reconcile these divergent statements? I am inclined to believe that the Court (or at least a substantial portion of it) does recognize that the declarant’s perspective is the better one, and that at least the Court has not rejected that perspective. Consider this thought experiment. Suppose there is a statement not made in response to interrogation that, under whatever the applicable test may be, is testimonial; as I have just noted, Crawford explicitly recognized that there are such statements, and plainly the test for determining that such statements are testimonial can have nothing to do with interrogation. Now suppose that the same statement is made in identical circumstances except that it is in response to an interrogation conducted primarily for the purpose of resolving an ongoing emergency. So now the statement is characterized as nontestimonial under Davis. But why would the purpose of the interrogator preempt whatever the underlying standard was that led to the statement being characterized as testimonial absent the interrogation? Most likely, I believe, the Court does recognize (or would if forced to confront the matter) the existence of some broad, underlying standard that has nothing to do with an interrogator’s purpose. Such a view is easily consistent with a perception that if the statement is taken in response to an interrogation conducted largely to resolve an emergency, the probability is very small that the statement would be characterized as testimonial under that underlying standard.

In this view, Davis is perfectly compatible with a general test based on the anticipation of a reasonable person in the position of the declarant. The Court might well believe that, if a statement is made in response to an interrogation and the interrogation was conducted primarily for the purpose of resolving an emergency, then it is highly unlikely that a reasonable person in discussed the fallacy that only statements made in response to interrogation can be testimonial.

30 126 S. Ct. at 2274 n.1.
the declarant’s position would anticipate that the statement would be used for prosecution; it might be unlikely both because the circumstances that govern the interrogator also affect the declarant, and because the fact and nature of the interrogation govern the declarant’s understanding of the situation. And the Court might believe that the interrogator’s purpose is more easily determinable in this setting than is the declarant’s understanding.

This view is supported by the fact that in *Davis* the Court slipped easily into speaking about the call from the viewpoint of the declarant. According to the Court, “McCottry’s call was plainly a call for help against bona fide physical threat,”31 and “[s]he was seeking aid, not telling a story about the past.”32 Similarly, in discussing *Crawford*, the Court spoke of factors that “strengthened the statements’ testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events . . . .”33

This view also gains strength with a focus on an ambiguity in the declarant-perspective test that has not received much open discussion.34 When we speak of the anticipation of a reasonable person in the declarant’s position, we are referring to a hypothetical person who has all the information about the particular situation that the declarant does, and no more. Thus, if the declarant is speaking to an undercover police officer, the hypothetical person would not know that her audience is collecting information for use in prosecution.

But the question then is whether the anticipation of the reasonable person should be assessed (a) from the vantage point that the declarant actually occupied, speaking in the heat of the moment, or (b) as if she considered the probable use of her statement after the fact, reflecting calmly while sitting in an armchair. Arguably, the better perspective is from the armchair, because that would help the Confrontation Clause achieve its

31 *Id.* at 2276.
32 *Id.* at 2279.
33 *Id.* at 2278 (emphasis added).
goal of preventing the creation of a system that allows prosecutors to use testimony not given subject to confrontation. The armchair view is a very tough sell, however. The path of least resistance is to conclude that the heat-of-the-moment view is the proper one, because it focuses on the actual circumstances of the declarant when she made the statement. And, to the extent the Davis Court focused on the intent or anticipation of the declarant, it seems clearly to have taken the heat-of-the-moment view.

I believe that even under that view the statements in Davis should have been deemed testimonial. But the opposite conclusion is certainly plausible; a caller in McCottry's position might not, in the heat of the moment, consider the prospect of prosecutorial use of her statements unless her attention was called to it. In short, it may well be that the Court's conclusion that McCottry's statement was not testimonial rested on a perception that a reasonable person in her position would not, in the heat of the moment, anticipate prosecutorial use. I therefore do not think we can draw from Davis any inference adverse to general application of the declarant-perspective approach.

II. OPERATIONAL AMBIGUITIES

A test relying on the terms "primary purpose" and "ongoing emergency" is extremely ambiguous, and the Davis Court deepened the ambiguity when it applied the test to the cases before it. I am afraid that this ambiguity will encourage many post-Davis courts to approach cases, as they did in the Roberts era and in the brief Crawford-to-Davis era, by looking for whatever toehold they can find to admit accusatory statements that were made absent an opportunity for confrontation.

Some aspects of the Davis opinion should, however, counsel a conscientious court to treat the "ongoing emergency" doctrine restrictively. The Court emphasized that "McCottry was speaking about events as they were actually happening"—and if this is not strictly accurate, the Court's emphasis on the point is all

the more significant. Indeed, though the Court gave various indica-
tions of when the emergency ended in *Davis*, it explicitly said the emergency ended “when Davis drove away from the premises”; subsequent statements would be testimonial, and redaction would be necessary.\(^{36}\)

Furthermore, the Court explicitly regarded *Hammon* as a “much easier” case—suggesting that the statements in *Davis* were close to the line and those in *Hammon* were not.\(^{37}\) The Court said that when the officer elicited Amy Hammon’s oral accusation of her husband, “he was not seeking to determine (as in *Davis*) ‘what is happening,’ but ‘what happened.’”\(^{38}\) And it was sufficient for the result that “Amy’s statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation.”\(^{39}\)

Moreover, the Court’s treatment of *King v. Brasier*,\(^{40}\) an English case from 1779, is highly significant. There, as the *Davis* Court indicated, a young girl, “immediately on her coming home” after an assault, told her mother about the incident.\(^{41}\) The Supreme Court distinguished *Brasier*, while appearing to endorse it. The case would be helpful to *Davis* if it more closely resembled the facts of his case, the Court said, “[b]ut by the time the victim got home, her story was an account of past events.”\(^{42}\) Thus, notwithstanding the immediacy of the report—and also notwithstanding the facts that the declarant was a young child and that her audience included no law enforcement officers—the statement was testimonial. Significantly, that is just how the *Brasier* court referred to the child’s accusation, as testimony.\(^{43}\)

\(^{36}\) *Id.* at 2277.

\(^{37}\) *Id.* at 2278.

\(^{38}\) *Id.*

\(^{39}\) *Id.* at 2279.

\(^{40}\) 1 Leach 199, 168 Eng. Rep. 202 (1779).

\(^{41}\) *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006) (*quoting* 1 Leach 199, 168 Eng. Rep. 202). The *Davis* court describes the girl as a rape victim, but the report of the case indicates that the crime was attempted rape.

\(^{42}\) *Id.* at 2277.

\(^{43}\) 168 E.R. at 202-03 (holding that because “no testimony whatever can
The significance of *Brasier* for present purposes does not depend on whether the case was known in the United States at the time the Sixth Amendment was drafted or adopted.\(^{44}\) *Brasier* made no new law relevant to the inquiry here; rather, its significance is that it reflects the common understanding of the time.

The debated question in *Brasier* was whether, given the declarant’s youth, her out-of-court statement could be admitted. A premise of the debate was that if she had been an adult the statement could not have been used, because to allow it to be used would be to tolerate admission against the accused of testimony given out of court.

Thus, *Brasier* indicates that a common understanding at the time of the framing of the Sixth Amendment was that an out-of-court accusation, even one made very soon after the event, was testimonial in nature and therefore not admissible. Whatever the merits of originalism may be, in general or more narrowly as a method for construing the Confrontation Clause, such a deeply seated understanding of the confrontation right should be given considerable weight in determining the Clause’s modern meaning.

A conscientious court should therefore be persuaded not to stretch the idea of “ongoing emergency” very far at all. Yet a court inclined to do so—and I believe most are—has some material to work with, beyond the notorious looseness in the term “emergency.”

In *Davis*, the Court held that “even . . . the operator’s effort to establish the identity of the assailant” was necessary to resolve the emergency, “so that the dispatched officers might know whether they would be encountering a violent felon.”\(^{45}\) This holding is highly significant given how often, as in *Davis*,

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\(^{44}\) Cf. 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, 157 n.163 (2005) (contending that Framers of the Confrontation Clause could not have known about *Brasier*).

\(^{45}\) 126 S.Ct. at 2276.
an identification statement is critical to the prosecution, but it strikes me as dubious. Would the officers, knowing no more than that they were trying to find someone accused of having just committed a violent crime of passion, be lax in their precautions? My skepticism is deepened by the fact that there is no indication that the 911 operator searched Davis' record before the officers found him.

Further, the Court noted that officers at a potential crime scene "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim."\(^{46}\) Preliminary indications lend force to the anticipation that courts frequently will seize upon this language as a license to admit any statement made before the accused is in custody or at least in the presence of an officer. It is significant that in \textit{Hammon} itself the Indiana Supreme Court had held the statement admissible on the ground that it was necessary to allow the officers to secure and assess the situation.\(^{47}\) The United States Supreme Court rejected that conclusion, of course—but there is not much ground for confidence that in similar circumstances other lower courts would not reach the same conclusion that the Indiana Supreme Court did.

In short, most of the indications from the \textit{Davis} opinion are that the dividing line between testimonial and nontestimonial should lie much closer to the situation in \textit{Davis} than to that in \textit{Hammon}. Nonetheless, I believe that until the Supreme Court intervenes once again, most of the lower courts will place that line much closer to the situation in \textit{Hammon}.

\section*{III. Formality}

In \textit{Crawford}, the Supreme Court pointed to the formality of the circumstances under which Sylvia Crawford made her statements as a factor supporting the conclusion that the statements

\(^{46}\) \textit{Id.} at 2279 (\textit{quoting} Hübel v. Sixth Judicial Dist. Ct. of Nev., 542 U.S. 177, 186 (2004)).

were testimonial.\textsuperscript{48} Some lower courts took this language for more than it was worth, by treating formality as a prerequisite for a statement to be considered testimonial.\textsuperscript{49} I believe this conclusion is fallacious and even wrong-headed.\textsuperscript{50}

In brief, formalities, including the oath and opportunity for cross-examination, are required conditions of acceptable testimony. A statement is not rendered non-testimonial by the absence of formalities; rather, if the statement is genuinely testimonial in nature, the lack of formalities makes the statement unacceptable. A rule that only formal statements will be characterized as testimonial is therefore theoretically backwards. Moreover, it creates a perverse incentive: those wanting to give or take testimony without it being subjected to confrontation could simply do so informally.

Thus, I had hoped that the decisions in \textit{Davis} and \textit{Hammon} would put to rest the notion that to be characterized as testimonial a statement must meet some standard of formality. My hopes were raised at argument, because not only was it obvious that Justice Scalia, the author of \textit{Crawford}, understood the point, but he articulated it with some force.\textsuperscript{51} I would have offered

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{48} 541 U.S. at 53 n.4.
\item \textsuperscript{49} This was, for example, the view of the Indiana Court of Appeals in \textit{Hammon}. 809 N.E.2d 945, 952 (2004) ("It appears to us that the common denominator underlying the Supreme Court's discussion of what constitutes a 'testimonial' statement is the official and formal quality of such a statement.").
\item \textsuperscript{50} For a fuller discussion of my view on this subject, see \textit{Grappling}, supra note 28, at 266-69, adapted from a Posting of Richard D. Friedman of "The Formality Bugaboo," to The Confrontation Blog, http://confrontationright.blogspot.com.
\item \textsuperscript{51} Note the following dialogue between Justice Scalia and Thomas Fisher, the Indiana Solicitor General, shortly after Justice Scalia had posed a hypothetical involving an unsolicited accusatory affidavit.

\begin{quote}
JUSTICE SCALIA: . . . [S]urely the affidavit isn't—isn't what's magical. I mean, I'm going to change my hypothetical. The person recites his accusation on a tape recorder and mails the tape to the court. Now, are you going to say, well, it's not an affidavit? You'd exclude that as well, wouldn't you?

MR. FISHER: Well, I—I don't know that I would because,
\end{quote}
\end{enumerate}
\end{footnotesize}
long odds at that point against the result that Justice Scalia would write an opinion for a majority of the Court that preserved even the possibility of a formality requirement. And yet that is just what happened.

The *Davis* opinion appears to be the product of considerable compromise, and one of the chief pieces of evidence on point is the superficial ambiguity with which it deals with formality. In distinguishing *Davis* from *Crawford*, the Court relied in part on the greater formality of the circumstances under which the statement in *Crawford* was made.\(^5\)\(^2\) Moreover, in responding to Justice Thomas, who would have imposed quite a stringent formality test, the Court said in a footnote, "We do not dispute that formality is indeed essential to testimonial utterance."\(^5\)\(^3\)

Prosecutors would be unwise, however, to celebrate the adoption of a meaningful formality requirement. The comparison of *Davis* and *Crawford* does not purport to adopt any such re-

again, you’ve got the—you’ve got the form that *Crawford* was concerned about. The affidavit is the classic form.

JUSTICE SCALIA: That would make no sense at all. I mean, that—that is just the worst sort of formalism. If you do it in an affidavit, it’s—it’s bad, but if you put it on a tape, it’s— it’s good. I—I cannot understand any reason for that. Hammon Transcript at 34-35.


\(^5\)\(^3\) *Id.* at 2278 n.5. One other passage could breed confusion in this context. The Court quoted a paragraph from *Crawford* that included the statement, "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not," *Id.* at 2274 (*quoting* *Crawford v. Washington*, 541 U.S. 36, 51 (2004)), and then said, "A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter." *Id.* In context, it is clear that the "limitation so clearly reflected in the text of the constitutional provision" is to testimonial statements, not to formal statements made to government officers. The passage addressed the question “whether the Confrontation Clause applies only to testimonial hearsay.” *Id.* As in *Crawford*, the Court offered formal statements to government officers as the clearest example of testimonial statements, not as the exclusive one; indeed, in the same discussion, the Court explicitly reserved the question “whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’” *Id.*

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quirement. It merely lists the difference in formality as one of four factors justifying a different result between the two cases.\footnote{See id. at 2276-77.} With respect to the Court’s response to Justice Thomas, it is important to note that declining to dispute a proposition is not the same thing as asserting it. Moreover, in the context in which the Court responded to Justice Thomas, the discussion was essentially \textit{dictum}, because it was not necessary for the Court to resolve whether there was a formality requirement; the discussion came during the Court’s analysis of \textit{Hammon}, from which Justice Thomas dissented on the ground that the statement was not sufficiently formal, and the Court held that indeed it was.\footnote{The Court said, in support of this conclusion, “It imports sufficient formality, in our view, that lies to [police] officers are criminal offenses.” \textit{Id.} at 2278 n.5. Of course, the Court did not mean to suggest that if lies to police officers were not criminal offenses, then statements to them could not be testimonial. Among other problems, that rule would allow states to eviscerate the confrontation right. One could, for example, easily imagine a state de-criminalizing false accusations of domestic violence made to the police, to protect alleged victims from the supposed threat of prosecution and (in fact) to obviate the necessity for them to testify subject to confrontation.}

The \textit{Davis} opinion also contains three other passages that lend great force to the conclusion that either there is no formality requirement or, if there is one, it adds nothing to the requirement that the statement be made in anticipation of prosecutorial use. First, the Court noted that most of the early cases imposing confrontation requirements “involved testimonial statements of the most formal sort—sworn testimony in prior judicial proceedings or formal depositions under oath—which invites the argument that the scope of the Clause is limited to that very formal category.”\footnote{\textit{Id.} at 2275-76.}

But the Court immediately rejected that argument: the English cases were not limited to “prior court testimony and formal depositions,”\footnote{\textit{Id.} at 2276.} and the Court cited to the passage in \textit{Crawford} in which it said, “We find it implausible that a provision which concededly condemned trial by sworn \textit{ex parte} affidavit thought...
trial by *unsworn ex parte* affidavit perfectly OK."\(^{58}\) Similarly, the *Davis* Court added that it is not "conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."\(^{59}\) Exactly right. This is why I have said that the argument for a formality requirement is wrong-headed.

Second, in comparing *Hammon* with *Crawford*, the Court acknowledged that "the *Crawford* interrogation was more formal," but asserted that none of the features that made it so "was essential to the point" that Sylvia Crawford’s statements were testimonial.\(^{60}\) The Court noted that those features (that the interrogation "followed a *Miranda* warning, was tape-recorded, and took place at the station-house") "strengthened the statements’ testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events."\(^{61}\) The Court then said that in *Hammon* "[i]t was formal enough that Amy’s interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his ‘investigat[ion].’"\(^{62}\) These factors do not fit easily in the "formal" category—but they clearly demonstrate that the shared understanding of the conversation was that Amy Hammon was creating evidence that would likely be used in prosecution.

Finally, in responding to Justice Thomas, the Court criticized a formality test, noting that his dissent "has not provided anything that deserves the description ‘workable’—unless one thinks that the distinction between ‘formal’ and ‘informal’ statements qualifies."\(^{63}\) Moreover, the Court pointed out that Justice Thomas "even qualifies that vague distinction by acknowledging that the Confrontation Clause ‘also reaches the use of technically

\(^{58}\) 541 U.S. at 52 n.3.
\(^{60}\) Id. at 2278.
\(^{61}\) Id.
\(^{62}\) Id.
\(^{63}\) Id. at 2278 n.5
informal statements when used to evade the formalized process.' . . .'>64

Perhaps the Court believes that a statement that is testimonial in nature inevitably will be attended by some formal aspect, particularly if the Court's conception of formality is very broad. Or perhaps all formal means to the Court in this context is that the circumstances are such as to give notice that the statement will be used in prosecution. In any event, it seems unlikely that the Court will interpret formality to mean more than a showing of such circumstances—which means that formality will turn out merely to be an odd way of phrasing what, under the optimal view, should be the critical question in determining whether a statement is testimonial.

In short, it appears that Davis prescribes no stringent rule that a statement can be testimonial only if it is formal. If there is a formality requirement, it is satisfied by demonstrating that it was objectively apparent to the declarant that the interrogation was being held for prosecutorial purposes.

IV. THE OPINION THAT MIGHT HAVE BEEN WRITTEN

In this Part, I will summarize much of the discussion above by presenting a synopsis of what I might have produced had I been a law clerk under instructions to draft an opinion holding for Hammon but against Davis:

Petitioners ask us to adopt the principle that an accusation made to a known law enforcement officer is necessarily testimonial. For the most part, that principle holds, but we are unwilling to adopt it as an inflexible rule. Determining whether a statement is testimonial must take into account the actual circumstances of the declarant when she makes the statement. In Davis, McCottry began speaking just after a frightening incident had occurred, while she was unprotected and in clear distress, and while her alleged assailant was not only at large but nearby; thus, in

64 Id. (quoting in part Thomas, J., dissenting in part).
describing his conduct, she began speaking in the present tense. We do not believe that, until she acknowledged that he was driving away, the attention of a reasonable person in her position and in the heat of that moment would likely be focused on the ultimate prosecutorial use of her statement. From that moment on, but not until then, her statements should be deemed testimonial.

Hammon is a much easier case. By the time Amy Hammon made her accusation, she was with a police officer in one room and her husband was with another officer in another room. The fact that the officer who was with her immediately asked for an affidavit simply confirmed what any reasonable person in her position would have understood already—that when she told a police officer that her husband had assaulted her, the statement was likely to be used for prosecution.

Such an opinion would, I believe, have been less likely than is the actual Davis opinion to be manipulated by lower courts in favor of the prosecution. But there is nothing in Davis that prevents the Supreme Court from interpreting the Confrontation Clause in the way this hypothetical draft does. Before Davis, it was apparent that a strong message from the Supreme Court was necessary to demonstrate that the lower courts should not treat the new doctrine staked out by Crawford as a mere linguistic curio that ultimately poses no insuperable obstacle to the same types of results that had been commonplace beforehand. The same remains true after Davis.

V. OTHER ISSUES

The issues discussed thus far in this article will continue to be tremendously important in Confrontation Clause jurisprudence. But there is a wide range of other issues that also will be very important and controversial and will need to be resolved in coming years. This Part sets forth a catalogue—which does not purport to be exhaustive—of some of these issues, together with
summary thoughts on each. Note that, although the first few of these bear on the question of what statements are testimonial, the others raise more procedural concerns.

(1) To what extent should statements by government agents, including autopsy and laboratory reports, be considered testimonial? It seems clear to me that such statements made in contemplation of prosecution of a particular crime must be considered testimonial. But courts have not always so held.65

(2) To what extent may statements other than to law enforcement personnel—to other government agents and to private persons—be characterized as testimonial? Davis, like Crawford, does not resolve the matter definitively. But a rule that only statements to law enforcement personnel or only to government agents could be considered testimonial would be a disaster. It would allow a witness to use another type of person as an intermediary to relay testimony to court, and avoid the need to take an oath, face the accused, or submit to cross-examination. This scenario is not unrealistic; we may be sure that victims’ rights organizations would often seize the opportunity to relieve complainants of the burdens of testifying in court.

(3) To what extent, if any, should the age, maturity, and mental condition of a declarant be considered in determining whether she can be a witness for purposes of the Confrontation Clause and whether particular statements by her are testimonial? On the one hand, it may seem odd for the question of whether a statement is testimonial to be determined as if the declarant had the understanding of a competent adult when in fact she is a child or a person of deficient intelligence. On the other hand, if the standard for determining whether a statement is testimonial is based, as I believe it should be, on the perspective of a reasonable person in the position of the declarant, then consistent


I would also consider as testimonial a certificate validating an instrument such as a radar gun, because it is made in contemplation of use in prosecutions. That it is made in contemplation of multiple prosecutions does not seem to me to alter the situation materially. But see Rackoff v. State, 637 S.E.2d 706 (Ga. 2006). This is, however, a closer question.
application of the standard probably would require disregarding the particular declarant's deficiencies. With respect to extremely young children, however, I believe that there is a plausible argument that they may be incapable of being witnesses within the meaning of the Confrontation Clause.

(4) In what situations can the state be estopped from denying the testimonial nature of a statement because an interrogator or state agent withheld from the declarant information that would have made apparent the likely prosecutorial use of the conversation? Assuming, again, that the critical question is the understanding of a reasonable person in the position of the declarant, then the state or some other agent attempting to create evidence for prosecution will sometimes have an incentive to hide from a declarant the likely prosecutorial use of the declarant's statements. Suppose the declarant is not suspected of wrongdoing, and the agent believes that she would make a conscientious decision not to volunteer testimony against the accused. Then if the agent hides the prosecutorial intent to secure a statement that would be testimonial, given knowledge of that intent, the state probably should be estopped from denying that the statement is in fact testimonial. But if the declarant makes the statement in furtherance of a criminal activity, such as a conspiracy, then there should be no estoppel.

(5) To what extent, if any, may the state attempt to constrain exercises of the confrontation right intended only to impose costs on the prosecution? This strikes me as a very difficult topic. There are situations in which (a) a conscientious court would recognize that a given type of written statement is testimonial, but (b) the expense of producing the author as a live witness is considerable, and (c) the accused appears to have no plausible expectation that confrontation will do him any good. In such a situation, the accused may nevertheless be tempted to insist on the right to confrontation, reckoning that if producing the witness is costly to the prosecution but cost-free to the defense then the prospect of confrontation improves the accused's bargaining power. Perhaps the state may attempt to restrain such exercises of the right, but this is far from clear. Moreover, defining what are acceptable constraints—perhaps some kind of good faith re-
quirement—and the situations in which they may be imposed are not easy matters. I am not sure whether opening this Pandora’s box would be worthwhile in the end.\[6\]

(6) To what extent, if any, may the state impose on the accused the burden of securing an opportunity for confrontation? The state should be allowed to argue that the accused waives the confrontation right if he does not make a timely demand that the witness be produced. And perhaps, at least if the prosecution gives notice that it intends to rely on a witness but there is reason to believe that the witness will not be available to testify at trial, the accused may be held to have waived the confrontation right if he does not demand an opportunity to depose the witness before trial. Beyond this, however, the accused should not be required to create his own opportunity to “be confronted with” (note the passive phrasing) an adverse witness. In particular, the confrontation rights of the accused should not be deemed satisfied by giving him the opportunity to subpoena the witness.\[7\]

(7) What standards govern the adequacy of a pretrial opportunity for cross-examination? One effect of Crawford, as courts, legislatures, and lawyers adjust to it, should be a substantial increase in the number of depositions taken to preserve testimony. Suppose such a deposition is offered immediately after the incident in question, and by the time of trial the witness is unavailable to testify. In this situation, the accused may well contend that the early opportunity to examine the witness was inadequate. Such a contention, I believe, should be resolved not by a per se rule—either that early timing does or does not render the


opportunity inadequate—but on the facts of the particular case. That is, the accused should be required to demonstrate with particularity how a later opportunity for confrontation would have been materially superior.

Another situation in which adequacy is an issue arises when the accused has a prior opportunity to examine the witness, but not necessarily the motivation to conduct the examination as if it were for trial purposes. This occurs, for example, in jurisdictions that allow depositions for discovery; the lower courts are divided on the question of whether the opportunity to take a discovery deposition suffices for the Confrontation Clause if the witness is unavailable at trial. If the answer is in the affirmative, then a careful defense attorney will have to seize every opportunity to take a deposition, lest the witness becomes unavailable and a prior testimonial statement becomes admissible with no further opportunity for confrontation. This could radically increase the expense of criminal proceedings. The prosecution probably should bear the burden of determining when there is a sufficiently strong chance that the witness will become unavailable to warrant a prompt confrontational proceeding.

(8) If the accused has been identified as a suspect and not arrested, or has not been identified, may the prosecution preserve the testimony of a witness? Suppose the prosecution identifies a person as a suspect in a murder but does not yet have enough evidence to arrest him, and a key witness may later become unavailable. The prosecution ought to be able to preserve that witness’s testimony by giving the suspect notice and taking the witness’s deposition. Now suppose that the authorities have identified the suspect as the murderer, but that he has managed to avoid arrest. The state probably ought to be able to appoint counsel who could examine the witness at a deposition in case the witness later becomes unavailable. The accused has not had a chance to be face to face with the witness, but probably the

accused should bear that risk in this situation.

The question becomes more difficult if the accused has not yet been identified. Even in this situation, it may be clear that whoever the accused is, the testimony of the witness would be harmful to him and in what way. If so, it is possible to imagine a solution. For example, suppose a pathologist performs an autopsy on a person who died of a gunshot wound and writes a report concluding that the wound came from close range but was not self-inflicted. Whoever the eventual defendant may be, this statement—which I believe is clearly testimonial—will be harmful to him. Now suppose the court appoints provisional counsel for the eventual (but as yet unidentified) defendant to examine the pathologist at a deposition. If the accused is later identified and brought to trial, and the pathologist is then unavailable, then the deposition should be admitted against the accused unless he is able to show at that time particular circumstances why the opportunity for cross-examination was inadequate given provisional counsel’s lack of knowledge at the time of the deposition of who his client was.

(9) To what extent does the Confrontation Clause apply to the sentencing phase of a capital case, and to what extent is there a right—based perhaps in the Due Process Clause—to confront declarants whose statements are testimonial in nature and are introduced against the accused in criminal proceedings other than the trial? John Douglass has argued that “the whole of the Sixth Amendment applies to the whole of a capital case.”

Thus, the confrontation right would apply not only at the guilt phase of a capital trial but also at the sentencing phase—determining both whether the defendant is eligible for the death penalty and whether that penalty actually ought to be imposed. Not all courts have been willing to go that far. Beyond arguments applicable only to capital cases—based on the unified nature of capital trials at the time of the Framers—there is another

sort of argument that applies more broadly to other proceedings in a prosecution. Suppose that at a suppression hearing a witness for the prosecution gave direct testimony and then the court excused her on the ground that her testimony was too reliable to require cross-examination. Even if the Confrontation Clause does not apply to that hearing, it seems likely that denial of an opportunity for cross-examination would violate the accused's constitutional rights. And if that is true, then at least arguably the same principle should apply if the witness gave testimony before rather than at the hearing.

(10) What standards and procedures should govern forfeiture of confrontation rights? Among the many important questions on this topic are the following:

(a) Must the conduct that allegedly rendered the witness unavailable to testify subject to confrontation have been motivated in significant part by the accused's desire to achieve that result? At least with respect to serious intentional wrongful conduct by the accused, the answer should be negative. The idea behind the forfeiture doctrine is that the accused cannot complain about a situation caused by his own wrongdoing. For example, if the witness is unavailable because the accused murdered her, it should not be a defense to a forfeiture argument to say that the accused did not murder her for the purpose of rendering her unavailable.

(b) May the conduct that allegedly rendered the witness unavailable to testify subject to confrontation have been the same conduct with which the accused is charged? Yes. There is no good reason why not. The argument that applying forfeiture doctrine in this context would be question-begging—that is, assuming the matter at issue—is based on a misconception. The judge determines the question of forfeiture. The jury (if there is one) determines guilt. Those are separate determinations. If both de-


72 E.g., State v. Jensen, 727 N.W.2d 518, 34-35 (Wis. 2007); People v. Giles, 55 Cal. Rptr.3d 133 (2007).
(c) May the challenged statement itself be used in demonstrating forfeiture? Yes. Under the principle of Federal Rule of Evidence 104(a), the judge in determining a preliminary issue of fact may rely on any evidence not privileged.\footnote{Fed. R. Evid. 104(a).} That includes the statement in issue. Now, of course, the accused contends that the statement is testimonial in nature (and unless it is, there is no need to reach the forfeiture issue). Under the principle discussed above, the confrontation right might be held to apply even at this preliminary hearing.\footnote{See supra pp. 124-25.} Logically, then, there appears to be an infinite regress. In the end, though, the court will decide either that the accused has forfeited the right or that he has not. In the first case, use of the statement both at the preliminary hearing and at trial does not violate the accused's rights and in the second case, the statement will not be presented at trial, so there will not be a violation.

(d) What is the standard of persuasion for demonstrating that the accused forfeited the confrontation right? It may be that the Supreme Court will require only that the prosecution satisfy the "preponderance of the evidence" standard in proving the factual predicates for forfeiture—that is, demonstrate that those predicates are more likely true than not.\footnote{Cf. Lego v. Twomey, 404 U.S. 477 (1972) (holding that preponderance standard is sufficient constitutionally for determining voluntariness of confession).} Given the right at stake, a higher standard, perhaps "clear and convincing evidence," might be more appropriate.

(e) To what extent is the prosecution foreclosed from claiming forfeiture because it failed to mitigate the problem? In particular,

(i) If the witness is dead, when is the prosecution foreclosed from claiming forfeiture if it did not arrange for a deposition? It may seem grotesque to arrange for a deposition of a dying person, but the authorities have never shown much compunction about taking a statement from a victim even in the final moments of life. Certainly if the victim lingers for days
while still communicative, and arguably for a shorter period, the prosecution ought to arrange a deposition.\textsuperscript{76}

(ii) If the prosecution is contending that the witness is intimidated, what procedures must the government pursue to assure that as much of the confrontation right as possible has been preserved? For example, to what extent must it exert coercion against the witness, and must it attempt to secure cross-examination without the witness’ testimony? These questions can be excruciatingly difficult. The court probably should not conclude that the witness is unavailable to testify because the accused has intimidated her unless the court has attempted to compel the witness to testify—not simply by serving her with a subpoena, but by enforcing it, if necessary, with the contempt sanction. This is not a move that a court can take lightly unless it is very confident that it can protect the witness. And it is unimaginable in the case of a child witness—though the court should consider sanctions against anyone who has exerted influence over the child to prevent her from testifying.

The matter is complicated because, even if the witness is unwilling to testify in the usual manner—in the presence of the accused and subject to cross-examination, in open court at trial—that does not mean that no aspect of the confrontation right can be preserved. To the extent that the state has not attempted all reasonable means of securing the witness’ testimony subject to some form of confrontation, the conclusion that the accused has caused the lack of confrontation should be deemed erroneous as a matter of constitutional law. Perhaps at an earlier time the witness would have been willing to testify at a deposition, and so arguably the prosecution should be held accountable for failing to offer one then if it had information suggesting that she might be unwilling to testify later. Also, perhaps the witness would be willing to testify subject to cross-examination so long as the accused was not present or in the judge’s chambers, and

these possibilities ought to be explored.

If forfeiture doctrine is left unconstrained, it could swallow much of the confrontation right. I do not believe that the proper method for constraining forfeiture doctrine lies in artificially limiting the type of misconduct that can be considered to forfeit the right, or limiting the type of evidence that can be used to prove forfeiture. An elevated standard of persuasion might be of some help, but probably not very much. The key, I believe, is to require that before the court concludes that the accused has forfeited the confrontation right, the state (including the prosecution and the court) must take reasonable steps to preserve however much of the confrontation right as is feasible.

VI. PEDAGOGY AND LAW REFORM

This Part will set forth a few interrelated thoughts transcending the application of *Crawford* and *Davis* to criminal prosecutions. I will approach these from the point of pedagogy, but my interest goes beyond the relatively parochial question of how law professors should teach this material to practical, though long-term, matters of law reform.

First, should the confrontation right be addressed in courses in Criminal Procedure or in Evidence, or in both? I firmly believe the answer is both. *Crawford* makes clear that the confrontation right is not a mere rule of evidence but a fundamental principle of *procedure*. Therefore, it has significant procedural consequences long before a case ever comes to trial. For example, *Crawford* should push criminal justice systems more in the direction of facilitating depositions for the preservation of testimony.

At the same time, the confrontation right must occupy a significant place in a course on Evidence. Before *Crawford*, many Evidence teachers spent a great deal of time on the rule against

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77 541 U.S. at 42 ("bedrock procedural guarantee"). See also id. at 61 ("[T]he Clause 'is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner . . . .'").
hearsay and little or no time on the confrontation right. This approach always struck me as intellectually timid, because to a very large extent when the rule against hearsay justifiably calls for exclusion of evidence, the driving force is the confrontation right. Even so, before Crawford the approach could be justified on pragmatic grounds by teachers who did not want to look beyond the law as it then stood, for the confrontation right rarely required exclusion of evidence that standard hearsay doctrine would permit. After Crawford, however, the confrontation right clearly has independent force. In my view, this change makes it utterly irresponsible to teach hearsay law without spending a great deal of time on the confrontation right, if for no other reason than that the right effectively preempts many of the results that hearsay law might otherwise seem to prescribe. It would be absurd, for example, to spend time examining the “excited utterance” exception and all the expansive interpretations that courts have given it without recognizing that many of those applications are now rendered unconstitutional.

And now, in light of Davis, I will make a stronger statement: It does not make much sense to teach confrontation after teaching hearsay. Rather, the two should be integrated, with the confrontation right being emphasized first—just as historically it was well developed long before modern hearsay law took shape—and driving the organization of coverage. Again, taking the hearsay exception for excited utterances as an example, it clearly would be a mistake to work through its contours and only at some later time say, “Many of those applications really do not matter, because they would be unconstitutional.”

Evidence teachers are going to have to work out a sound integrated approach over time, but here is what tentatively strikes me as a sensible approach:

(1) The natural starting point is the basic confrontation principle enunciated by Crawford—that testimonial statements cannot be used against an accused if he has not had (or forfeited) an opportunity for confrontation. Thus, after an historical nod to

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78 541 U.S. at 62, 68.
cases like Raleigh,79 Crawford itself is a good place to begin.

(2) Then it makes sense to delve into the question of what "testimonial" means, and this of course calls for discussion of Davis. This also would be a good time to discuss the difference between accomplice confessions, which are testimonial, and conspirator statements, which are not testimonial—in my view because they are not made in anticipation of prosecutorial use. Other bounds on the doctrine may then be examined.80

(3) When does a testimonial statement not pose a confrontation problem because it is offered for some ground other than the truth of a matter it asserts? Tennessee v. Street81 is a natural case for discussion here, as are questions such as whether or when a testimonial statement may be admitted in support of an expert opinion82 or to show the course of an investigation.83

(4) Is the confrontation problem really relieved, as the Supreme Court held in California v. Green84 and reaffirmed in Crawford,85 by the appearance of the witness at trial, even though the witness does not testify to the substance of the prior statement? Understanding this problem helps one realize why, as in Federal Rule of Evidence 801(d)(1), rulemakers have hesitated to eliminate the hearsay bar to all prior statements of a witness who testifies at trial.86

(5) When should a witness be deemed unavailable? Several of the Supreme Court’s pre-Crawford cases—including Ohio v. Roberts87—are still good law on this point, and Federal Rule of

79 Raleigh’s Case, 2 How. St. Tr. 1 (1603).
80 Crawford, 541 U.S. at 56.
83 See, e.g., United States v. Eberhart, 434 F.3d 935 (7th Cir. 2006).
86 Rule 801(d)(1) exempts from the hearsay rule limited categories of prior statements of a trial witness—some prior inconsistent statements, some prior consistent statements, and most prior statements of identification—but does not create a general exemption for prior statements of a trial witness. Fed. R. Evid. 801(d)(1).
87 448 U.S. 56, 75 (1980) (holding (dubiously) that the witness whose
Evidence 804(a), which prescribes standards of unavailability for purposes of the hearsay rule, could be discussed here.

(6) What is an adequate opportunity for cross-examination? Materials related to Federal Rule of Evidence 804(b)(1) may come in here, as does the interesting question of whether a discovery deposition suffices for the confrontation right.

(7) What constitutes a sufficient ground for forfeiture, and what procedures must be followed before the right may be deemed forfeited? Cases involving dying declarations would fit in well here.

This outline demonstrates that a full exploration of issues related to the confrontation right does not depend on prior examination of hearsay law. On the contrary, not only does the confrontation right stand on its own, but discussion of the confrontation right helps explain some aspects of hearsay doctrine; in some cases the discussion may give the doctrine better grounding and in others it may help expose its weaknesses.

After this canvass of the confrontation right, it is possible to work relatively quickly through the most significant issues related to hearsay when the confrontation right is not at issue. Not only as teachers, but also as scholars and potential law reformers, the question we should constantly be asking in this realm is, "Is this really necessary?" That is, once we have protected the confrontation right, as Crawford does, by a separately articulated doctrine that does not depend on hearsay law, do we need the elaborate structure of hearsay doctrine with its complex defi-

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prior testimonial statement was at issue was unavailable under the circumstances).

88 That Rule excepts a statement from the hearsay rule if the declarant is unavailable to testify at trial, the statement is prior testimony, and "the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(d)(1) (emphasis added).


90 E.g., State v. Meeks, 88 P.3d 789 (Kans. 2004).
nition of hearsay and its remarkably long and intricate set of exemptions? My own feeling is that outside the context in which the confrontation right properly applies—testimonial statements offered against criminal defendants—much hearsay ought to be admitted, and that to the extent exclusion is warranted it ought to be under a doctrine much more open-textured than the one we have now.

Probably, a softer form of the confrontation doctrine should apply to testimonial statements offered against litigants other than a criminal defendant. Working out the shape of such a doctrine could be a significant challenge for the next generation of evidence scholarship. Beyond that, the judgment of admissibility should depend on a case-by-case assessment of factors such as the probative value of the statement, the probability that cross-examination would be useful, and the relative abilities of the parties to produce the declarant as a live witness.\(^9\)

Indeed, I am hopeful that over the next few decades pressure will mount to move hearsay law in this direction. I base this hope on anticipation that, now that hearsay law is no longer necessary to do the work that the Confrontation Clause should perform, its silliness and superfluousness will become more apparent. And I believe the development will be advanced greatly if Evidence teachers organize coverage around the confrontation right and then ask, “What further hearsay law, if any, do we need?”

\(^9\) Some years ago, in two articles, one bearing a particularly unfortunate name, I made a preliminary attempt to reconceptualize the hearsay doctrine, outside the context where the Confrontation Clause applies, according to the factors suggested in the text. See Richard D. Friedman, Toward a Partial Economic, Game-theoretic Analysis of Hearsay, 76 MINN. L. REV. 723 (1992); Richard D. Friedman, Improving the Procedure for Resolving Hearsay Issues, 13 CARD. L. REV. 883 (1991). I believe much of the analysis in those articles remains sound, but I did not then explore the possibility of a softer form of confrontation doctrine applying to testimonial statements offered against parties other than a criminal defendant.
CONCLUSION

The pair of cases decided under the name of *Davis* confirms that *Crawford* is for real. That is, *Crawford* not only requires courts to adopt a new way of thinking and expressing themselves about the Confrontation Clause, but it also causes a change of results, even some results that courts had reached routinely and almost casually in recent years. The result in *Hammon* is one of those; before *Crawford*, Amy Hammon’s statement was easily admissible, and after *Crawford* the statement is quite plainly inadmissible.

Ideally, the court would have reversed the conviction in *Davis* itself on the basis that an accusation made to a law-enforcement officer is testimonial within the meaning of *Crawford*. The facts of that case, however, made reversal unappealing. The Court could have written an opinion holding that the statements at issue were not testimonial but explicitly examining the matter from the point of view of a reasonable person in the position of the declarant; an opinion taking this approach might have relied on the perception that in the heat of the moment a reasonable person in McCottry’s position would not have anticipated evidentiary use of her statements. The opinion actually written by the Court is consistent with that approach, however. Similarly, although the Court did not deny that a statement must be formal to be testimonial, the opinion may easily be read not to create a formality requirement that has independent significance.

Fresh accusations will continue to create controversial questions under *Crawford*, but there is a wide variety of other issues, many of them procedural, that must be resolved before we have a sturdy, comprehensive doctrine of the Confrontation Clause. The process will take decades, and it will require repeated intervention by the Supreme Court. Meanwhile, even as the courts are reconceptualizing the confrontation right, academics should consider possible transformations in the law of hearsay. Now that the confrontation right has its own independent footing, hearsay law is not necessary to protect it. Much of the law of hearsay that does not involve testimonial statements should wither away over the next few decades. What remains should bear none of the complexity and haphazard quality that have plagued generations of students and lawyers.
WHAT HAPPENED—AND WHAT IS HAPPENING—TO THE CONFRONTATION CLAUSE?

Jeffrey L. Fisher*

INTRODUCTION

The Supreme Court’s opinion in *Davis v. Washington*,¹ like in *Crawford v. Washington*² before it, is obviously the product of compromise. I do not mean to suggest that any Justices switched or traded votes to reach greater unanimity in the two cases decided in the *Davis* opinion. Rather, the opinion contains multiple and somewhat distinct threads of reasoning that do not naturally fit together and, therefore, that presumably reflect different Justices’ divergent theoretical points of view. So the question remains: when exactly do statements made by victims or other witnesses, in close proximity to potentially criminal activity, trigger the Confrontation Clause?

This much we know: the Confrontation Clause gives defendants the right to be confronted with the “witnesses” against them—in other words—with those persons whose “testimony” the prosecution offers against defendants.³ In order to safeguard this right, the Clause prohibits the prosecution from

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* Associate Professor of Law (Teaching), Stanford Law School. The historical portions of this paper are drawn to a substantial degree from the brief I filed for the petitioner in *Davis v. Washington*, 126 S. Ct. 2266 (2006). In that respect, I thank Lissa Shook for her assistance in researching and crafting that brief.

3 U.S. CONST. amend. VI.
introducing out-of-court "testimonial" statements unless the declarants are unavailable and defendants had a prior opportunity to cross examine them.\(^4\)

Statements a person makes in response to police questioning at the stationhouse are testimonial.\(^5\) In addition, the Court held in *Hammon v. Indiana*, one of the two cases resolved in the *Davis* opinion, that accusatory statements that a woman made in response to police officers' initial inquiries upon responding to the scene of a suspected assault—while the woman was no longer in immediate danger—were testimonial.\(^6\)

By contrast, the Court also held in *Davis v. Washington*, the other case resolved in the *Davis* opinion, that statements a woman made to a 911 operator describing an ongoing domestic disturbance and identifying her alleged assailant as he fled were not testimonial, although the Court advised that "[i]t could readily be maintained" that statements she made later in the call, once the alleged assailant drove away from the premises, were testimonial.\(^7\) The Court in *Davis* also laid down a generalized test for cases such as these:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.\(^8\)

There is much murkiness in the many components of that proffered dichotomy. And that murkiness does not dissipate when one digs into the opinion. The Court employed three

\(^4\) *Crawford*, 541 U.S. at 68.
\(^5\) *Id.* at 53.
\(^6\) *Davis*, 126 S. Ct. at 2278-79.
\(^7\) *Id.* at 2276-77.
\(^8\) *Id.* at 2273-74.
dominant strains of reasoning to elucidate and apply its dichotomy—each of which, at least at first glance, does not seem entirely consistent with the others. First, the Court distinguished statements given during an "ongoing emergency" from those given after such an emergency was over.\(^9\) Second, the Court distinguished between statements describing "what is happening" from those describing "what happened."\(^{10}\) Third, the Court distinguished between statements that do not operate as "‘a weaker substitute for live testimony’ at trial" from those that do align with their "courtroom analogues"—in other words, the Court distinguished those statements that do not function like witness testimony from those that "do precisely what a witness does on direct examination."\(^{11}\)

In the six months following Davis, most courts have relied primarily, if not exclusively, on the emergency/nonemergency dichotomy to resolve cases involving fact patterns that fall in between the two situations that Davis involved.\(^{12}\) Some courts have relied on the past/present dichotomy.\(^{13}\) No court has relied on the "what-a-witness-does" test.

This preference for the emergency idea is understandable. We have entered a brave new world of confrontation jurisprudence in which virtually no judges have experience applying even its basic governing principles. It makes sense that judges gravitate toward a concept that at least seems to strike a familiar note with respect to other areas of criminal procedure. For example, the Fourth Amendment’s warrant requirement contains an exception for "exigent circumstances,"\(^{14}\) and the Fifth Amendment’s Self-Incrimination Clause allows the

\(^{9}\) Id.; compare Id. at 2276 (stating that declarant in Davis “was facing an ongoing emergency” at the beginning of the call) with id. at 2277 (“the emergency appears to have ended” when Davis drove away); id. at 2278 (“[t]here was no emergency in progress” when Amy Hammon spoke to police officers).

\(^{10}\) See id. at 2276-78.

\(^{11}\) Davis, 126 S. Ct. at 2277-78 (emphasis added).

\(^{12}\) See infra notes 91-100 and accompanying text.

\(^{13}\) See infra notes 91-95 and accompanying text.

\(^{14}\) See infra note 101 and accompanying text (discussing this exception).
government to introduce confessions police obtain without Miranda warnings when the police interrogated the suspect in the midst of a public safety emergency.\(^\text{15}\) Furthermore, the unadorned concept of an emergency is flexible enough that many appellate courts can recite it, comfortable in the knowledge that as a test, it will not stand in the way of reaching their desired, pre-Crawford result: upholding the admission of absent victims' statements alleging potentially criminal behavior, often some kind of domestic violence.

But this Article contends, however, that the emergency/non-emergency dichotomy is the wrong touchstone for resolving disputes over statements describing fresh criminal activity. It does so by drawing on history to make sense of the Davis opinion. While the aggressive prosecution of domestic violence cases gives this issue a modern urgency, the problem of whether to admit statements describing fresh criminal activity is hardly new. In particular, prosecutors in the nineteenth century frequently tried to introduce statements by victims who had just been assaulted, shot or stabbed (but who did not think they were so seriously wounded as to be giving dying declarations). Courts resolved disputes over the admissibility of these statements exclusively by reference to the past/present dichotomy—or as it was known then, the res gestae doctrine. Under the res gestae doctrine, statements describing ongoing activity were admissible, but statements concerning completed events were not.\(^\text{16}\) It is that doctrine that not only properly carries the right to confrontation forward to the post-Crawford era, but also that best synthesizes the various strands of the Davis opinion itself.

This Article proceeds in three parts. Part I surveys courts' historical treatment of fresh descriptions of potentially criminal events, focusing especially on courts' development of the res gestae doctrine. This part makes clear that the res gestae doctrine, contrary to some current assumptions, was more than simply a hearsay principle; rather, it was deeply rooted in confrontation law and values. Part II demonstrates that the res


\(^{\text{16}}\) See infra notes 32-53 and accompanying text.
gestae doctrine best synthesizes the various strands of Davis and, indeed, provides the only coherent and workable rule for administering the Confrontation Clause in cases falling in between the two fact patterns described in Davis. Part III offers some final thoughts on the implications of grounding Davis in its res gestae rhetoric. Not only should this doctrinal recognition require some lower courts to scrutinize more rigorously cases involving fresh accusations, but it also should inform their analyses of cases involving other types of currently controversial hearsay statements, such as statements to medical personnel, private victims' services organizations, and other private and quasi-private parties.

I. THE RES GESTAE DOCTRINE

Ever since people have inflicted injuries upon other people, victims and witnesses of such acts have sought to report them to others as soon as possible—in order (among other reasons) to seek help, to assign blame, and to set in motion the process of law enforcement. A survey of courts' historical treatment of such statements in criminal cases reveals that for decades, if not centuries, courts drew a sharp line between those statements that described ongoing events (or were made in immediate reaction to them), and those that narrated past occurrences. Furthermore, courts took this approach not just as a matter of hearsay law, but in order to safeguard the confrontation right.

A. Fresh Reports in the Founding Era

Professional police forces did not exist during the Founding Era. Nevertheless, victims of alleged crimes during that period had opportunities—and often an obligation—to immediately

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report felonious acts to local constables or bailiffs. Such an oral report was commonly called a "hue and cry." These prompt reports, like reports to authorities in modern times, were taken very seriously: it was a crime in itself to give "false information" to a constable. A hue and cry, also like 911 calls and reports to responding police officers today, typically served a dual function of assisting in apprehending a potentially dangerous suspect and triggering a prospective criminal prosecution. As Sir Matthew Hale explained the situation in common law England:

1. The party that levies [the hue and cry] ought to come to the constable of the vill[age], and give him notice of a felony committed, and give him such reasonable assurance thereof as the nature of the case will bear.

2. If he knows the name of him that did it, he must tell the constable the same.

3. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances that he knows, which may conduce to his discovery.

Constables, in turn, were required to use the information provided to orchestrate pursuits and arrests of suspects, and

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18 See 2 SIR MATTHEW HALE, HISTORIA PlACITORUM CORONAE: A HISTORY OF THE PLEAS OF THE CROWN 98-100 (1st Am. ed. 1847) [hereinafter 2 Hale].

19 Id. I am grateful to Tim O'Toole and others at the Public Defender Service of the District of Columbia for suggesting this historical parallel.

20 Id. at 101; compare, e.g., WASH. REV. CODE § 9A.84.040 (false reports to police unlawful); with State v. Hopkins, 117 P.3d 377, 384 (Wash. App. 2005) (Quinn-Brintnall, C.J., dissenting) (noting that false report statutes apply to 911 calls).

21 2 Hale, supra note 18, at 100; see also 2 id. at 100 n.(c) (citing other sources in accord); 4 William Blackstone, Commentaries on the Laws of England 294 (1768) ("The party raising [a hue and cry] must acquaint the constable of the vill[age] with all the circumstances which he knows of the felony and the person of the felon.").
sometimes to initiate investigations.\textsuperscript{22}

There can be little doubt that the substance of hues and cries would have been persuasive evidence in criminal prosecutions—and sometimes critical evidence when declarants became unavailable to testify. Yet even though I detailed the hue and cry practice in my opening brief in \textit{Davis},\textsuperscript{23} none of the parties or \textit{amici} to the litigation were able to uncover a single instance of a court allowing such an out-of-court statement to be introduced against a criminal defendant.

In the few reported cases in which courts addressed the subject, English and American courts agreed that such statements could not be introduced without the declarant also testifying in court. For instance, in 1779, the King’s Bench held unanimously in \textit{King v. Brasier} that an alleged victim’s complaint made to her mother “immediately upon coming home” from an alleged assault was inadmissible because “no testimony whatever may be legally received except upon oath” and the victim was “not sworn or produced as a witness on the trial.”\textsuperscript{24} A later English case ruled that a constable “could not be asked [at trial] what name [an alleged robbery victim] mentioned” when the victim reported the crime to him.\textsuperscript{25}

Finally, shortly after the Bill of Rights was adopted, South Carolina’s highest law court explained that:

\begin{quote}
Charges for criminal offences are most generally
\end{quote}

\begin{footnotesize}
\textsuperscript{22} 2 Hale, \textit{supra} note 18 at 99-100; 4 Blackstone, Commentaries, at 294; \textit{see also} 1 James Stephen, \textit{A History of the Criminal Law of England} 224 (1883) (recounting case in which a murder victim’s butler “fetch[ed]” the local magistrate “just as he was going to bed” to bring him to the crime scene).

\textsuperscript{23} \textit{See} Brief for Petitioner at 18-19.

\textsuperscript{24} King v. Brasier, 1 Leach 199, 200 (K.B. 1779).

\textsuperscript{25} Henry Roscoe, \textit{A Digest of the Law of Evidence in Criminal Cases} 23 (3rd Am. ed. 1846) (describing \textit{Rex v. Wink}, 172 Eng. Rep. 1293 (1834)). The judge in \textit{Wink} did allow the constable to testify as to “whether, in consequence of the prosecutor [that is, the victim, since this was a private prosecution] mentioning a name to him, he went in search of any person and, if he did, who it was.” \textit{Wink}, 172 Eng. Rep. at 1293. But it is unclear whether the victim testified at trial, so as to alleviate any confrontation concern this testimony would have raised. \textit{See id.}
\end{footnotesize}
made by the party injured, and under the influence of the excitement incident to the wrong done, and however much inclined the witness may be to speak the truth, and the magistrate to do his duty in taking the examination, his evidence will receive a coloring in proportion to the degree of excitement under which he labors, which the judgement [sic] may detect, but which it is impossible exactly to describe, and we know too how necessary a cross examination is to elicit the whole truth from even a willing witness; and to admit such evidence without the means of applying the ordinary tests, would put in jeopardy the dearest interests of the community.26

The strong implication of these passages is that neither the need to apprehend dangerous individuals nor the declarants' "excitement" as a result of alleged injuries in any way exempted their statements reporting crimes to persons of authority from confrontation restrictions.27 The King's Bench perceived such reports as "testimony," and the South Carolina Court of Appeals spoke of the need to submit such reports to "the ordinary tests," such as "cross examination."

But one can deduce only so much from three reported cases. This is especially so in light of the scant reporting style of early English cases and courts' general hostility at the time to admitting any hearsay evidence whatsoever.28 It is necessary,

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27 Indeed, it appears that hue and cry reports were not even thought to be a sufficient basis to impose pretrial restraints on a suspect's liberty. In order to justify detaining a suspect in prison pending trial, the Marian bail and committal statutes required accusers to give statements under oath and subject to magistrates' questioning. See Crawford, 541 U.S. at 44; Directions to Justices of the Peace, 84 Eng. Rep. 1055 (1708). When accusers later became unavailable for trial, prosecutors sometimes tried to introduce these examinations (though by the time of the Founding era, such examinations were admissible only if the defendant had been afforded the opportunity to cross-examine). See Crawford v. Washington, 541 U.S. 36, 46-47 (2004).

28 A prominent eighteenth century treatise on evidence proclaimed the general principle that "a mere Hearsay is no Evidence." GEOFFREY GILBERT,
therefore, to look slightly ahead in time in order to fill out this picture.

B. The Nineteenth Century Ripening of the Res Gestae Concept

As the nineteenth century progressed, courts relaxed their attitudes somewhat toward hearsay evidence, to the point where they allowed several exceptions to the rule. At the same time, it became increasingly common for prosecutors to seek to introduce victims' statements describing criminal conduct such as shootings, when the victims were unavailable to testify at trial.

Whatever the reason for this uptick in reported cases, courts' resolutions of disputes over these fresh statements provides a window into how the common law right to confrontation (as incorporated into state law) was thought to operate in this context at the time. It is safe to assume that courts would not have applied any hearsay exception to permit testimonial evidence to be introduced in criminal cases because they would have thought doing so would contravene the right to confrontation. Indeed, some courts explicitly relied on

THE LAW OF EVIDENCE 99 (Garland Pub. 1979) (1754). To the extent that any hearsay exceptions were truly established prior to the Founding, not a single criminal procedure or evidence treatise suggested that out-of-court statements describing criminal conduct were admissible, no matter how contemporaneously made with the event described. See, e.g., THOMAS PEAKE, A COMPENDIUM ON THE LAW OF EVIDENCE 8 (1801) (listing hearsay exceptions and not mentioning anything related to spontaneous declarations).

29 See Wigmore on Evidence § 1420 (collecting several decisions from the nineteenth century extolling the value of creating exceptions to the hearsay rule).

30 It may have been, interestingly enough, due in part to the advent of the handgun industry; Smith & Wesson opened its doors in 1852 and began mass-marketing handguns shortly thereafter. See Roy G. Jenks, History of Smith & Wesson (10th ed. 1977); About Smith and Wesson, http://www.smith-wesson.com (follow “About Us” hyperlink; then follow “View History” hyperlink).

confrontation principles in resolving these cases.

In the early nineteenth century, English and American treatises formally began to divide statements that were, in the words of one treatise, "part of the res gestae," in which a statement "is itself a fact," from those that were "mere oral assertion[s]." As another treatise put it: contemporaneous declarations "respecting the motives or objects he had in view of doing" the act were admissible, but assertions made "subsequent to the doing the acts" were not. If a statement merely related or narrated a past occurrence, it fell outside the res gestae.

Rich Friedman and Bridget McCormack have explained how the res gestae concept interlocks with the common law right to confrontation—and specifically with the traditional insistence that witness testimony be given subject to cross examination. But Professor Friedman's and Professor McCormack's research covering the nineteenth century concerned almost exclusively civil cases. As a result, they could only speculate that the right to confrontation was actually a driving force causing courts to distinguish between statements that were a part of ongoing events from those that described purely past events.

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32 See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 368 n.25 (J. Chitty ed. 1826). See also 2 JOSEPH GABBETT, A TREATISE ON CRIMINAL LAW 468 (1843) (finding statement admissible if it was "itself a part of the transaction" but not if it is offered to prove "a distinct fact").

33 See EUSTACHIUS STRICKLAND, A TREATISE ON EVIDENCE 397 (1830).

34 See 1 FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES § 266, 691 ("The rule before us, however, does not permit the introduction under the guise of res gestae of a narrative of past events, made after events are closed.").

35 See id. at 1216 ("We suspect that, though the courts generally spoke in terms of the accuracy of statements, another consideration [namely, the
A thorough review of criminal cases in the latter part of the nineteenth century makes it clear that courts rigorously scrutinized the temporal nature of fresh reports of potentially criminal conduct with an eye toward safeguarding the right to confrontation. Courts allowed witnesses at trial to recount victims’ cries for help and identifications of their attackers made while the declarants were being attacked. But courts did not allow hearsay statements into evidence when the statements did nothing more than describe completed events. In one case from California, for instance, a police officer ran 140 yards to the scene of a shooting that had just occurred, where the victim told the officer that the defendant had shot her. The victim died before trial, so the prosecutor put the officer on the stand to repeat the victim’s statement. The California Supreme Court held that the statement was inadmissible. Invoking Wharton’s Treatise on Criminal Evidence—the leading authority at the time—the California Supreme Court explained that “narrative[s] of past events, made after the events are closed” fall outside of the res gestae and that “[a]t the time the [victim’s declaration] was made, the shooting had been done, and the assailant had escaped the scene of the shooting.” In other words, “[t]he declaration was not the fact talking through the party, but the party’s talk about the facts.” As such, it could not be used as substantive evidence against the accused.

Courts treated reports to private parties (which were much more common) the same way. In one typical case, a man was shot in his home. A few minutes later, family members and friends responded to help him. He told them to “[g]o for a doctor,” and then, in response to someone’s question, identified confrontation right’s requirement that testimony be given subject to cross-examination] tended to motivate them.”).

38 People v. Wong Ark, 30 P. 1115 (1892).
39 It is unclear when the victim died, but the California Supreme Court expressly held that the victim’s statement “was not admissible as a dying declaration.” Id. at 1115.
40 Id.
41 Id. at 1115-16.
his shooter. The victim subsequently died, and the prosecutor moved to include the victim’s statements at trial. The Indiana Supreme Court held that the latter statements constituted “no part of the res gestae, and were not admissible as such,” explaining:

It can not, with any propriety, be said, that the statements made by the deceased, after the crime had been fully completed, that Prince Jones shot him, served in any degree to illustrate the character of the main fact, the shooting. They were the simple statements of the deceased, narrative of what had already transpired, and important only as indicating the person by whom the main fact had been perpetrated.

... 

We attach no special significance to the fact that the declarations were made, not contemporaneously with, but a few minutes after, the shooting, further than that it shows, in connection with the substance of the statements, that they were purely narrative of what had already transpired. 

A statement, in sum, saying, “Prince Jones, don’t shoot me!” may have been admissible, but telling a third party that “Prince Jones just shot me” was not.

Numerous other homicide and similar cases during this period reached analogous results, making clear that it was irrelevant whether an accusatory statement “was made so soon after the occurrence as to exclude the presumption that it has been fabricated” or whether “it was made under such circumstances as to compel the conviction of its truth.”

Nor did it matter whether a victim’s statement was made moments after an incident “with a view to the apprehension of the

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42 Jones v. State, 71 Ind. 66, 8-9 (as cited by Westlaw) (1880).

43 Mayes v. State, 1 So. 733, 735 (Miss. 1877); see also State v. Carlton, 48 Vt. 636, 643 (1876) (finding it was irrelevant whether statement was made “so soon after that the party had not time, probably, to imagine or concoct a false account”).
offender." If a victim's statement identified the perpetrator of a "completed" criminal act, most courts held that the statement, "however nearly contemporaneous with the occurrence," fell outside the res gestae and was strictly inadmissible. Thus, courts excluded not only victims' reports of who had just shot them, but also bystanders' fresh reports of such events; victims' statements identifying their assailants moments after being stabbed; a robbery victim's statement identifying the perpetrator "directly after" an attack, and other assault victims' statements moments after receiving their injuries and identifying their attackers.

There were some state courts that did not define the res gestae concept quite as tightly as the majority did. In a much

44 People v. Ah Lee, 60 Cal. 85, 92 (1882); see also State v. Davidson, 30 Vt. 377, 384 (1858) (noting that a statement suggesting need to pursue suspect inadmissible).

45 Davidson, 30 Vt. at 384-85.

46 In addition to the cases just discussed, see State v. Estoup, 39 La. Ann. 219, 221 (La. 1887) (shooting victim's statement "a few minutes after receiving the wound").

47 Elder v. Arkansas, 65 S.W. 938, 939 (Ark. 1901) (describing a case in which a bystander made a statement to the responding police, one hour after the shooting occurred and the assailant had fled).

48 Mayes, 1 So. at 735-36; see also Ah Lee, 60 Cal. at 89-91; Kraner v. State, 61 Miss. 158, 161 (1883).

49 Davidson, 30 Vt. at 384-85.

50 State v. Pomeroy, 25 Kan. 349, 350-51 (1881); Parker v. State, 35 N.E. 1105 (Ind. 1894) (finding a statement made by the deceased inadmissible because it reported a past occurrence, even though the statement was made to his wife immediately after the attack, as she was running downstairs to assist him); State v. Hendricks, 73 S.W. 194 (Mo. 1903) (discussing statement of assault victim upon returning home and describing assault to his wife fell outside res gestae because it was unconnected to event: "No one can read that statement and denominate it anything else than a narrative. It sounds just like the narrative of a difficulty months after it occurred.").

51 See State v. Murphy, 17 A. 998 (1889) (holding that statements that were made 30 seconds and 10-15 minutes after the assault were admissible as within res gestae because "they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction as to form a
criticized decision, for instance, the Massachusetts Supreme Judicial Court upheld the admission of a stabbing victim's statement identifying his assailant after he ran to his neighbor's apartment upstairs to seek help.\(^5\) Nonetheless, even these courts legitimate part of it, and to receive credit and support as one of the circumstances which accompanied and illustrated the main fact which was the subject of inquiry before the jury"); State v. Robinson, 27 So. 129, 130-31 (La. 1900) (describing statement made thirty seconds after shooting); Kirby v. Commonwealth, 77 Va. 681 (1883) (describing declarations made probably within two minutes, after the shot was fired); Territory v. Callaghan, 6 P. 49, 54-55 (Utah 1885) (statement a few seconds after shooting); State v. Morrison, 68 P. 48, 51 (Kan. 1902) (detailing reports taking place three to five minutes after stabbing to first responders); Commonwealth v. Werntz, 29 A. 272 (1894) (reporting statement to police surgeon a few minutes after stabbing).

\(^5\) See Commonwealth v. McPike, 3 Cush. 181 (Mass. 1849); accord Commonwealth v. Hackett, 2 Allen 136 (Mass. 1861) (applying McPike to another case). McPike was roundly criticized as without legal or logical foundation. See 1 Francis Wharton, A Treatise on the Law of Evidence in Criminal Issues § 262, at 503 & n.14 (10th ed. 1912) (stating that McPike “cannot be sustained” and that “[t]he better rule is that when the transaction is over, no matter how short may have been in the interval, and the assailant is absent, declarations by the assailed . . . are not part of the res gestae”); Binns v. State, 57 Ind. 46, 51 (1877) (showing same and refusing to follow McPike); Mayes, 1 So. at 734-35 (same); Ah Lee, 60 Cal. at 88-92 (same). The Texas Court of Appeals also took a very broad view of the res gestae doctrine. See Irby v. State, 7 S.W. 705, 706 (Tex. App. 1888) (describing statement given to father 15 to 20 minutes after shooting admissible); Kenney v. State, 79 S.W. 817, 819 (Tex. Ct. App. 1903) (describing case in which a child's report to mother several minutes after rape was admissible). But the high court in Texas never endorsed these rulings, and no other court ever treated them—grounded, as they were, exclusively in Texas precedent—as authoritative.

A lone English criminal case also suggested that a statement describing a recently completed incident might be admissible, see Rex v. Foster, 6 Car. & P. 325 (1834), but it, too, met with a strong rebuke. See also, 1 Horace Smith, Roscoe's Digest of the Law of Evidence in Criminal Cases 28 (8th Am. ed. 1888) (describing that a broad reading of the decision is "difficult to reconcile with established principles"). In a subsequent English case, a court made clear that the res gestae rule remained strict. There, a victim, no more than one or two minutes after having her throat cut, exclaimed to her aunt (who was just outside the house), "See what Harry has done!" The court
agreed with the majority of state courts concerning the governing standard, as encapsulated by Wharton’s treatise:

The *res gestae* may be (therefore) defined as those circumstances which are the automatic and undisguised incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist, as we will see, of sayings and doings of any one absorbed in the event, whether participant or bystander. They may comprise things left undone, as well as things done. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself.\(^{53}\)

While some courts, in short, allowed that a report made immediately after a criminal event could be considered part of the *res gestae*, it was common ground that the report was admissible only to the extent it was necessarily considered part of the event, not the product of independent contemplation.

There can be little doubt that the *res gestae* doctrine, as reflected in these cases, was shaped by a desire to protect the right to confrontation. One mid-century treatise explained that “[t]he principle of th[e] rule” rejecting all “hearsay reports of transactions given by persons not produced as witnesses is that such evidence requires credit to be given to a statement made by a person who is not subject to the ordinary tests enjoined by law for ascertaining the correctness and completeness of his

ruled the declaration inadmissible. The court explained that “[a]nything uttered by the [victim] at the time the act was being done would be admissible, as, for instance, if she had been heard to say something, as ‘Don’t, Harry!’ But here it was something stated by her after it was all over, whatever it was, and after the act was completed.” Regina v. Bedingfield, 14 Cox Crim. Cas. 341, 342-45 (Crown Ct. 1879).

\(^{53}\) 1 Wharton’s, Criminal Evidence, *supra* § 259. See Werntz, 29 A. at 597 (citing this passage); Robinson, 27 So. at 132 (following Wharton’s treatise); Kirby, 77 Va. at 687 (same); McPike, 3 Cush. at 181 (statement fell inside *res gestae* because it was uttered “immediately after the occurrence”).
testimony”—namely, to “oath” and “cross-examination.” Thus, in a case holding inadmissible a manslaughter victim’s statement identifying the alleged perpetrator moments after being shot, the Vermont Supreme Court made explicit what was implicit in the treatises and in many other opinions of the time:

The wisdom and justice of this rule in the administration of criminal law must be apparent. The general rule is, that no evidence can be received against the prisoner except such as is taken in his presence. . . . [To] admit the declarations of the party injured, made in the absence of the party accused, and without the right of cross examination, at a period of time so far subsequent to the happening of the act or transaction about which the declarations are made that the party might have invented them, would be depriving the accused of one of the most important safeguards the law has given him for his protection.

Other courts invoked similar language. Even when a court

54 3 Simon Greenleaf, A Treatise on the Law of Evidence § 124, at 148 (1842) [hereinafter Greenleaf].
55 Carlton, 48 Vt. at 643-44.
56 See Harris v. State, 1 Tex. Ct. App. 74, 80-81 (1876) WL 9028 at *4 (“The principle of the rule [excluding evidence outside the res gestae] is that such evidence requires credit to be given to a statement made by a person who is not subjected to the ordinary tests enjoined by the law for ascertaining the correctness and completeness of his testimony—namely, that oral testimony should be delivered in the presence of the court, or a magistrate, under the moral and legal sanctions of an oath, and where the moral and intellectual character, the motives and deportment, of the witness can be examined, and his capacity and opportunities for observation, and his memory, can be tested by a cross-examination.”); People v. Simonds, 19 Cal. 275, 278 (1861) (“It is true that it has been sometimes said declarations of a party at the time of doing an act, which is legal evidence, are admissible as parts of the res gestae, but this rule does not apply to admit, as against third persons, declarations of a past fact, having the effect of criminating the latter. If so, any felon caught with stolen property might criminate an innocent man, by declaring that he obtained the property from such person, or that such third person was associated with the declarant in the criminal
with a more expansive view of the *res gestae* doctrine than most allowed the admission of an accusatory statement made immediately after the event at issue, it emphasized that this did not violate the defendant’s right to confrontation because what the declarant “said and did, in natural consequence of the principal transaction, become original evidence”—that is, contemporaneous with the transaction itself.\(^{57}\)

Genuine *res gestae* statements, in short, may have been exempt from confrontation requirements, but courts were loath to go any further.

There was only one recognized exception (aside from dying declarations) to the prohibition against admitting declarations outside of the *res gestae*: in cases in which “a person ha[d] been in any way outraged”—most often in rape cases, but also apparently in other cases lacking any sexual component—the fact that this person made a complaint right after the event happened was admissible.\(^{58}\)

Sometimes courts admitted only the fact that the alleged victim complained, and occasionally courts permitted the substance of such complaints to corroborate the victim’s trial testimony.\(^{59}\)

But this “outrage” exception actually proved the rule that introducing any declaration accusing someone of committing a completed criminal act implicated the right to confrontation. For it was settled that if the victim did not testify, evidence of the fresh complaint—even to a relative or friend—“was not admissible, and only the fact that a complaint was made could

\(^{57}\) State v. Murphy, 17 A. 998, 999 (R.I. 1889).


be admitted.” Recall, for instance, the King’s Bench’s holding in *Brasier* that an alleged victim’s complaint made to her mother upon coming home from an alleged assault was inadmissible because the victim was “not sworn or produced as a witness on the trial.” Nearly a century later, an American court held that an alleged victim’s statements that her parents elicited soon after an alleged assault with intent to commit rape were inadmissible because the declarant did not testify and the statements were “not [made] in the presence of the accused.” It is hard to miss the confrontation rhetoric in these decisions. Thus, even as courts gradually discarded the supposition that victims of certain violent acts typically would complain right after they happened, they adhered to the restriction against introducing absent victims’ fresh complaints.

C. The Modern Creation of the Excited Utterance Doctrine

During the same time that courts in criminal cases were rigorously excluding absent declarant’s statements that reported past events—no matter how agitated or excited the declarant had

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60 2 *McCormick on Evidence* § 272.1, at 223 (4th ed. 1992) (emphasis added); 3 Russell, supra note 58, at 249 (same); 3 *Greenleaf*, supra note 54, at § 213 (“The complaint constitutes no part of the *res gestae* . . . and where she is not a witness in the case, it is wholly inadmissible.”); Roscoe, supra note 25, at 23 (same).

61 *King v. Brasier*, 1 Leach 199, 200 (K.B. 1779).

62 *Weldon v. State*, 32 Ind. 81, 82 (1869).

63 See *Regina v. Guttridges*, 173 Eng. Rep. 916 (1840) (finding fresh complaint to friend inadmissible because witness was not available to testify); *Regina v. Megson*, 173 Eng. Rep. 894 (1840) (describing where the complaint made “as soon as [alleged victim] returned home” was inadmissible “to [show] who committed the offence” because she did not testify at trial); *People v. McGee*, 1 Denio 19, 22-24 (N.Y. 1845) (reversing conviction because alleged victim’s complaint to housekeeper “immediately after the offense is supposed to have been perpetrated” was improperly admitted in light of fact alleged victim did not testify at trial); *Hornbeck v. State*, 35 Ohio St. 277, 280-81 (1879) (reversing conviction because alleged victim’s fresh complaint was introduced without her testifying at trial); *Elmer v. State*, 20 Ariz. 170 (1919) (same).
been—one must note for the sake of completeness that some courts in civil cases occasionally extended the scope of the *res gestae* doctrine to cover statements made, as the Supreme Court put it in *Insurance Co. v. Mosley*, “almost contemporaneously with [an injury’s] occurrence.” Instead of seriously arguing that such statements were—as the *res gestae* concept requires—part of the events themselves, the Supreme Court justified the statements’ admission primarily on the ground that “[i]n the ordinary concerns of life, no one would doubt the truth” of declarations made shortly after disruptive events. A few late nineteenth century state criminal cases invoked similar reliability-based reasoning, albeit usually in decisions involving statements that the courts also legitimately deemed to be part of the underlying transactions.

Writing the first edition of his influential treatise in 1904, Wigmore recognized that decisions such as *Mosley* could not really be explained by the common-law *res gestae* doctrine. But instead of rejecting these cases as strays, Wigmore accepted their results and advanced, for the first time, the notion that the “stress of nervous excitement . . . stills the reflective facilities” and renders statements under that condition “particularly trustworthy,” thereby warranting exemption from the hearsay rule. Even putting aside questions concerning the validity of Wigmore’s psychological assumptions, Wigmore’s treatise took

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64 75 U.S. (8 Wall.) 397, 408 (1869) (emphasis added). Not all courts did so, however. For state civil cases refusing into the twentieth century to extend the *res gestae* concept in this manner, see Friedman & McCormack, *supra* note 35, at notes 167-75 (citing various cases).

65 *Mosley*, 75 U.S. (8 Wall.) at 408.

66 See, e.g., *Territory v. Callaghan*, 6 P. 49, 54 (Utah 1885) (noting that “[n]o time had elapsed for the fabrication of a story.”); *Robinson*, 27 So. at 130 (finding no opportunity for “fabrication”).

67 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 1745-47, at 2247-50 and § 1796, at 2320 (1904).

68 *Id.* § 1747, at 2250.

69 For a synthesis of the criticisms of these assumptions, see Aviva Orenstein, “*My God!*: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159, 178-82 (1997).
two further steps that were simply wrong.

First, Wigmore claimed that statements reporting past events while under the stress of excitement were comparable to the statement that the court admitted in the noted 1694 case of Thompson v. Trevanion,70 and thus that the idea of "excited utterances" had some historical pedigree. Thompson was a civil case in which the court upheld the admission of a woman's declaration "immediat[ely] upon the hurt received, and before [she] had time to devise or contrive anything to her own advantage."71 In contrast to Wigmore, most Founding-Era commentators did not take the case's four-sentence nisi prius report to mean that the declarant's statement was admitted in her absence to prove that the defendant injured her.72 But even if the statement was used this way, the court's holding would have been a fairly standard res gestae ruling. The reporter's phrase "immediat[ely] upon the hurt received"73 is most naturally read to mean that the statement was made so simultaneously with being injured that it was part of the event itself—the victim's direct response to being assaulted.74

71 Id.
72 One treatise assumed that the declarant's statement simply described her injury and was not accusatory. See 3 Russell, supra note 58, at 248 & n.1. Another believed that the statement was admitted solely to show she complained but not to prove how it happened. See 1 Thomas Starkie, A Practical Treatise on the Law of Evidence, pt. II, § 30, at 149 (1826). Still another assumed that the declarant testified at trial, so that her out-of-court statement was nothing more than corroborative evidence. See Geoffrey Gilbert, The Law of Evidence 108 (1754). See generally Insurance Co. v. Mosley, 75 U.S. (8 Wall.) 397, 418 (1869) (Clifford, J., dissenting) (noting that Thompson is "so imperfectly reported that [it] can hardly be said to be reliable").
74 Dictionaries during the Founding era support this interpretation. See A Universal Etymological English Dictionary (1783) (defining "immediate" as "[w]hich follows without any thing coming between; that follows or happens presently; that acts without means"); Complete and Universal English Dictionary (1792) ("In such a state with respect to something else, as to have nothing in between; without any thing intervening;
Second, Wigmore did not distinguish between civil and criminal cases in advancing the new reliability-based hearsay exception for excited utterances. Wigmore openly acknowledged that, in contrast to classic *res gestae* statements, narrative statements describing actions that had just completed were "testimonial," as he used that term.\textsuperscript{75} But even when such statements reported criminal acts to governmental agents, Wigmore did not perceive this as posing Confrontation Clause concerns in ensuing criminal prosecutions. He thought the Clause did "not prescribe what kinds of testimonial statements . . . shall be given infrajudicially"; this depended, in his view, exclusively "on the law of evidence for the time not acting by second causes. Instant, or present, as applied to time."). I am indebted to Rich Friedman for supplying this thought and this research. Indeed, courts as late as the 1880's observed that reading *Thompson* to support the admissibility of an absent witness's declaration describing a truly completed act for the truth of the matter asserted would have been "difficult to reconcile with established principles." Smith, *supra* note 58, at 28; see also *Mayes v. State*, 1 So. 733, 734 (Miss. 1887) (refusing to interpret *Thompson* this way); *People v. Ah Lee*, 60 Cal. 85, 89 (Cal. 1882) (same).

\textsuperscript{75} 3 Wigmore, *supra* note 67 § 1746, at 2248-49; see also id. § 1796, at 2320 ("[W]hat [courts] do in this instance is to admit extrajudicial assertions as testimony to the fact asserted.") (emphasis added). Wigmore explained:

Whenever, therefore, an [excited] utterance is used as testimony that the fact asserted in it did occur as asserted, \textit{i.e.}, on the credit of the speaker as a credible person, it is being used testimonially, and is within the [general] prohibition of the Hearsay rule.

Now this testimonial use is precisely the use that is made of the present class of statements. . . . [T]hey clearly do involve the testimonial use of the assertion to prove the truth of the fact asserted,—for example, \textit{when the injured person declares who assaulted him} or whether the locomotive bell was rung, or when the bystander at an affray exclaims that the defendant shot first. Such statements are genuine instances of using a hearsay assertion testimonially; \textit{i.e.}, we believe that Doe shot the pistol, or that the bell was rung, \textit{because} the declarant so asserts—which is essentially the feature of all human testimony.

3 Wigmore, *supra* note 67, at §1746, at 2249 (first emphasis added).
being.”

*Crawford,* however, expressly rejected Wigmore’s toothless view of the Confrontation Clause and held that the Confrontation Clause does not depend on “the vagaries of the rules of evidence, much less [on] amorphous notions of ‘reliability.’” Therefore, while the perceived reliability of certain out-of-court statements describing completed events afforded a legitimate theoretical basis in cases beyond the reach of the Sixth Amendment to allow the admission of such statements, the excited utterance exception has nothing to teach us about the scope of the Confrontation Clause. Only the *res gestae* concept was developed in order to interlock with constitutional restrictions respecting the introduction of out-of-court testimony against criminal defendants.

II. THE *DAVIS* OPINION

It is readily apparent that *Davis* fits within the common-law *res gestae* tradition. The Court explicitly held that statements describing to agents of law enforcement “what happened” are testimonial, but that statements describing “what is happening” are not. To be sure, I argued in the case that the Court should define the “what is happening” category narrowly—limiting it, as many courts did at common law, to statements describing the alleged crime itself in progress. But the Court, consistent with the other courts’ broader construction that the *res gestae* concept encapsulates not only statements describing events in progress, but also those made immediately after in direct consequence to such events, held that the 911 caller’s statements describing events as the assailant fled were not testimonial.

The Court also defended its ruling on two other grounds.

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76 *Id.* § 1397, at 1755.
78 *Id.* at 61.
79 *Id.* at 2278.
80 *See* Brief for Petitioner at 12.
81 *See supra* notes 51-53 and accompanying text.
First, the Court emphasized that police statements elicited in order to address an "ongoing emergency" are not testimonial, but that when no such emergency exists and police elicit statements for investigatory purposes, statements are testimonial. Second, the Court explained that statements that "do precisely what a witness does on direct examination" are testimonial, while those that do not align with any courtroom analogues are not. But, as I shall now contend, neither of these ideas, viewed in isolation, has force as an organizing principle for confrontation jurisprudence. Only by understanding the Davis opinion through the prism of the res gestae doctrine can the opinion's otherwise loose strands be synthesized.

A. "Ongoing Emergency"

Consider first the concept of an "ongoing emergency." Other than offering the label, the Court tells us very little about what constitutes an ongoing emergency. So perhaps the best indicators can be found in the actual results of Davis and Hammon v. Indiana, its companion case.

The Court in Davis held that an ongoing emergency existed while the 911 caller described her alleged assailant in action. But the Court also indicated in rather explicitly worded dicta that as soon as "Davis drove away from the premises" and the operator asked the caller to describe how the alleged assault had begun and progressed, the caller's statements were testimonial. (By viewing Appendix A, a transcript of the entire 911 call, the reader can see exactly where the Court suggests the caller's statements became testimonial.)

What changed in this flash of an instant? Certainly not the fact that the caller was in danger or that a suspected felon was on the loose. Rather, the Court tells us that the caller switched from describing events "as they were actually happening" to

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82 Davis v. Washington, 126 S. Ct. 2266, 2273-74, 2276-78.
83 Id. at 2277-78 (emphasis added).
84 Id. at 2273-74.
85 Id. at 2277.
describing “what happened in the past.” In other words, the statements elicited at the beginning of the call “describe[d] current circumstances,” while those at the end “describe[d] past events.”

The Court also held in Hammon that no ongoing emergency existed where the police questioned a suspected recent victim of domestic violence while other officers detained her husband in the next room. Although Justice Thomas noted in his dissent that the violence that the officers suspected had just occurred might have resumed if the officers had left without doing anything, the eight-Justice majority “easi[ly]” concluded that no ongoing emergency existed while the officers questioned the suspected victim because there was no “immediate threat” or disturbance in progress.

This strong res gestae orientation requires us to take a closer look at the curious phrase “ongoing emergency.” The phrase brings to mind a scene in the movie A Few Good Men. Jack Nicholson, the colonel at a military base where a marine had been killed, testifies at the resulting court marshal that he believed before the killing that the marine had been in danger. Tom Cruise, the lawyer cross-examining him, asks whether Nicholson means that the marine had been in “grave danger.” Nicholson replies, “Is there any other kind?” One might ask the same question about an “ongoing emergency.” Doesn’t the presence of an emergency, by definition, connote something that is ongoing?

I think not—at least as the Court is using the term. Rather than being a needless redundancy once the word “emergency” is in play, the word “ongoing” is really the dominant word here. The difference between the statements at the beginning of the call in Davis and the statements at the end of the call (as well as those in Hammon) is not whether some kind of “emergency” existed (if we define that concept, as the dictionary does, as a

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86 Id. at 2276.
87 Id.
88 Davis, 126 S. Ct. at 2285-85 (Thomas, J., dissenting).
89 Id. at 2278.
set of circumstances that "calls for immediate action" or "a pressing need" for assistance). The difference is whether the events the caller was describing were "ongoing" or not. Accordingly, the word "emergency" is really just a more specific version of the word "events"—a natural focal point in the context of a 911 call since the general purpose of calling 911 is to report emergencies.

Some courts in the wake of Davis have already attained this insight. In State v. Kirby, for example, a man allegedly assaulted a woman, forced her into her car, and drove off. The woman managed to escape when the man pulled over to check a noise in the car, and she drove back home. She then reported and described the kidnapping on the phone to the police and told them she needed medical assistance. After the trial court allowed into evidence the entire 911 call, as well as an interview minutes later with responding officers, the State argued on appeal that the statements were nontestimonial because "an ongoing public safety emergency and a possible medical emergency" existed while the statements were made.

The Connecticut Supreme Court rejected this argument. The court reasoned that such an elastic definition of ongoing emergency "would render virtually any telephone report of a past violent crime in which the suspect was at large, no matter the timing of the call," a report of an ongoing emergency and thus nontestimonial. Here, the victim's statements "consisted of her account of what had happened to her in the recent past, rather than what was happening at the time of the call" and the ensuing on-the-scene interview. As such, they had to be considered testimonial. Other courts have resolved similar cases with like reasoning.

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91 908 A.2d 506, 523 (Conn. 2006).
92 Id. at n.19.
93 Id.
94 Id. at 523; see also id. at 524 (showing an analysis of a on-the-scene interview).
95 See, e.g., State v. Mechling, 633 S.E.2d 311, 323 (W. Va. 2006)
But many courts have resolved cases falling in between the facts of *Davis* and *Hammon* by applying expansive notions of the emergency concept, untethered to the *res gestae* doctrine. Some courts, notwithstanding *Davis*’ strong suggestion to the contrary,\(^\footnote{See supra notes 85-87 and accompanying text.}\) have held that a person’s statements describing past events to law enforcement are nontestimonial whenever a potentially violent assailant has fled the scene of the crime and is still on the loose.\(^\footnote{State v. Ayer, 2006 WL 3511787 (N.H. Dec. 7, 2007) (holding that witness’s statements to officers responding to a shooting were nontestimonial because the assailant “was loose”); State v. Camarena, 145 P.2d 267, 275 (Or. App. 2006) (finding victim’s statements to officers were not testimonial, even though assailant had left, because he could have returned); State v. Washington, 2006 WL 3719447, at *4 (Minn. App. Dec. 19, 2006) (concluding that victim’s statements to responding officer were nontestimonial because “the assailant was still at large and posed an ongoing threat”).}\) These holdings include decisions—directly contrary to the common law *res gestae* doctrine—that victims’ statements identifying who recently shot them are admissible.\(^\footnote{See United States v. Clemmons, 461 F.3d 1057 (8th Cir. 2006); Head v. State, 2006 WL 3489041 (Md. App. Dec. 5, 2006).}\) Indeed, the New York Court of Appeals has explicitly held that the temporal nature of a responding officer’s questioning—there, asking “What happened?”—is irrelevant to whether a victim’s response is testimonial.\(^\footnote{People v. Bradley, 8 N.Y.3d 124 (N.Y. 2006).}\) So long, the court reasoned, as a responding officer is motivated more by a desire to assure public safety than to investigate a crime, anything a person says to him
The problem with such decisions is that it is hard to understand how a state of emergency, standing alone, is enough to make a person's description of criminal activity to a law enforcement agent nontestimonial. These courts are surely right that immediate law enforcement action is necessary whenever someone is in danger of incurring domestic violence or a potentially violent person is on the loose. In the parlance of Fourth Amendment law, such situations constitute "exigent circumstances." 

But the purpose of the Fourth Amendment is to regulate police officers, and the purpose of the exigent circumstances doctrine is to allow police officers to take actions (such as conducting warrantless searches) that they would not otherwise be allowed to take. Neither of these concerns has anything to do with the Confrontation Clause. The Confrontation Clause regulates trial procedures, and the purpose of the Clause is to

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100 It is worth reproducing in full the critical passage of the court's opinion:

Defendant emphasizes that Mayfield's question to Dixon was in the past tense: He said "what happened?" not "what's happening?" From this, and from the fact that no attacker was in sight at the moment, defendant would have us infer, in the words of Davis, that "there [was] no . . . ongoing emergency, and that the primary purpose of the interrogation [was] to establish or prove past events...." We do not find the inference a likely one. The officer's purpose in questioning Dixon is shown more persuasively by the facts that came to his attention—a 911 call, a distressed and injured woman—and by the action he took after Dixon answered his question—entering the apartment, without lingering to find out more detail—than by his choice of tense. Any responsible officer in Mayfield's situation would seek to assure Dixon's safety first, and investigate the crime second. Because Dixon's statement was made when the officer could reasonably have assumed, and apparently did assume, that he had an emergency to deal with, her statement was not testimonial under Crawford and Davis.

Id. at 127-28.

ensure that prosecution witnesses testify in court. While the Fourth Amendment operates by means of an exclusionary rule in order to deter police misconduct, the Confrontation Clause operates by means of an exclusionary rule in order to safeguard the trial process.

This explains why the Supreme Court acknowledged in *Davis* that “it is in the final analysis the declarants’ statements . . . that the Confrontation Clause requires us to evaluate.”\(^{102}\) The presence of an “ongoing emergency” is not important because it reveals police motives or allows officers to do something they otherwise would not have the power to do. Instead, the presence of an ongoing emergency is important only insofar as it indicates that a declarant’s statement describing criminal activity can fairly be described as part of the event itself, rather than a report or a narrative of it. If the law were otherwise, statements reporting serious criminal activity or accusing others of violent crimes would always be nontestimonial until a suspect was in custody and unable to cause further harm. Even more to the point, if the law were otherwise, *Hammon* would have had to come out the other way and the Court could never have indicated that the latter part of the 911 call in *Davis* was nontestimonial. Yet the emergencies in those cases were limited to the criminal events themselves, and when those events ceased occurring, statements describing how they had transpired were testimonial.

**B. What a Witness Does**

The common law *res gestae* doctrine similarly informs *Davis’* explanation that statements describing fresh criminal activity are testimonial when they mimic “what a witness does on direct examination”\(^{103}\)—that is, when “the evidentiary products of the *ex parte* communication align perfectly with their courtroom analogues.”\(^{104}\) In particular, the Court reasoned that


\(^{103}\) *Id.* at 2278.

\(^{104}\) *Id.* at 2277.
Amy Hammon's statements to the responding officers were testimonial because they were "an obvious substitute for live testimony." By contrast, the Court explained that the statements at the beginning of the 911 call in Davis were not testimonial because "[n]o 'witness' goes into court to proclaim an emergency and seek help."

Lower courts and commentators have been virtually silent concerning this strain of the Davis opinion, perhaps because they do not know what to make of it. One might say that what a witness does is give testimony under a highly formal and ritualized set of circumstances, and that absent such trappings a person is not providing a substitute for live testimony. On the other hand, one might say that what a witness does is relay his experiences and observations to another person, and that whenever a person does that in a manner later useful to a prosecution, the words are testimonial. The problem with each of these hypotheses, of course, is that the Court already has held that neither accurately captures the testimonial principle.

The key, once again, to unlocking the Court's ambiguous guidance lies in its res gestae rhetoric. Right after the Court noted the resemblance between Amy Hammon's statements and classic testimonial statements, the Court explained that her statements "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." Now that is what a witness does. A witness tells a person of authority what happened.

That is what the 911 caller in Davis did in the second half of the call as well. While the caller used the present tense in the beginning of the call to describe events in progress, she used the past tense in the second part of the call to describe why and how Davis had assaulted her. We rarely term someone who is

105 Id. at 2278.
106 Id. at 2277.
107 Compare Id. at 2275 (describing how testimonial statements are not limited to those "of the most formal sort") with Crawford, 124 S. Ct. at 1364 (noting that "a person who makes a casual remark to an acquaintance" is not a "witness").
108 Davis, 126 S. Ct. at 2278.
describing ongoing events as a witness; such a person, even if speaking at some remove from the events, is more like a play-by-play announcer. But we commonly call someone who tells a person at arms length what happened—even if it just finished happening and the declarant is still on the scene—a witness.

Lest there be any doubt, think again, as the Court suggests, about what occurs during direct examination at a trial. Perhaps the most commonly asked question during direct examination in a criminal case is “what happened?” Indeed, the second most commonly asked question may be “what happened next?” In purely functional terms, anyone who answers these kinds of questions is acting like a witness—at least when the person asking the questions is a person of authority who is acting in that capacity.

III. BEYOND FRESH ACCUSATIONS TO LAW ENFORCEMENT

Conceptualizing the confrontation right as interlocking with the res gestae doctrine not only brings clarity to the right in the realm of fresh accusations to agents of law enforcement, but it also sharpens our understanding of the right in other areas. Three types of statements, in particular, that have generated substantial litigation appear more clearly testimonial when analyzed through a res gestae lens: (1) statements to employees of private victims’ services organizations; (2) statements to medical personnel; and (3) children’s statements to their parents. Each of these categories of statements, of course, is worthy in its own right of a separate article. But it seems worthwhile to briefly sketch the implications of Davis’ res gestae approach for each.

A. Statements to Employees of Private Victims’ Services Organizations

Recent years have seen a proliferation of privately operated victims’ services organizations—organizations such as sexual assault resource centers and child abuse assessment centers. All of these organizations work to some degree with law
enforcement, but none, by definition, is an actual arm of the government. The organizations are designed to offer comfort and support to crime victims and to help them navigate the legal process. An integral component of delivering those services, of course, is conducting detailed interviews and discussions with victims concerning what happened to them.

The majority of courts since Crawford was decided have held that victims' statements to private victims' services personnel are testimonial, especially when such personnel interview victims in coordination with law enforcement. Some courts, however, have taken a different approach, holding that statements in these settings are not testimonial because they are made to nongovernmental personnel who are motivated more by therapeutic purposes than investigative or prosecutorial intent. These assumptions that traditional law enforcement goals do not motivate private victims' services organizations are certainly debatable. But it is hard to say that they are clearly wrong.

Private victims' services organizations try to accomplish a host of interrelated goals, and discerning which goal primarily motivates any single organization at any single moment is no easy task. If a court really wants to uphold the admissibility of a statement to such an organization, there is very little in an abstract "primary purpose" inquiry that squarely forecloses that result.

One might argue in response to these concerns, as Rich Friedman does, that if we put purposes aside and ask whether a

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reasonable declarant would have “anticipated” that her statements would be available for prosecutorial use, then the answer is clearly “yes” and the declarant’s statements are thus clearly testimonial. But even assuming that Davis permits courts to base their decisions on declarants’ reasonable anticipations, this expectation-based inquiry still seems inadequate to deal with these kinds of statements. Whenever courts are given license to surmise—based usually on little or no direct evidence—what was (or reasonably would have been) in an actor’s mind, courts are bound to reach inconsistent results. Any court intent in reaching a particular result can simply pronounce what a certain actor would have anticipated, and there is no firm proof that an aggrieved party can bring forward to challenge that result.

More importantly, the reasonable anticipation test—at least standing alone—appears to lead to unacceptable results. Imagine that the police set up, or invite an existing enterprise to operate as, what I will call an “undercover” victims’ services organization. The organization advertises itself as strictly a counseling establishment, and tells victims that nothing they say there will be transmitted to law enforcement or is allowed to be introduced in a court of law. Under such circumstances, one would be hard pressed to say that a reasonable declarant talking to such an organization would anticipate that their statements could be used as a substitute for their live testimony in court. Yet it seems palpably incorrect to say that their statements would not be testimonial.

The res gestae analysis in Davis makes these tricky cases easy. Whatever may be in the declarants’ or questioners’ minds when they participate in interviews at private victims’ services centers, it is undeniable that the declarants are doing exactly what a witness does. They are recounting past events to a person of authority. The statements are entirely removed from the events themselves. And, in the words of Davis, “the evidentiary products” of these interviews “align[] perfectly with their

courtroom analogues. It thus is plain that the declarant's statements are testimonial.

B. Statements to Medical Personnel

Statements that people make to doctors and nurses who are at least in part treating their injuries present similar issues. Medical services personnel are typically private employees but they also often work in conjunction with law enforcement. Sometimes police officers accompany or direct suspected victims of crime to the hospital and explicitly ask doctors or nurses to collect evidence. Even when police officers are not so directly involved at the time medical examinations take place, many doctors and nurses operate as specialists designed to look for signs of certain crimes, such as sexual assaults or child abuse. Nearly all doctors and nurses perform their duties under state laws that require them to report cases of suspected abuse to the police.

As in the context of private victims' services organizations, courts are divided over whether statements describing criminal activity to medical personnel are testimonial. Most, but not all courts have held that when the police are directly involved in presenting the injured party for the examination, the injured party's statements are testimonial.

But absent such explicit involvement, the vast majority of

112 Davis, 126 S. Ct. at 2277.
114 See People v. Harless, 125 Cal. App. 4th 70 (2004), rev. granted, 109 P.3d 69 (Cal.), rev. dismissed, 119 P.3d 962 (Cal. 2005) (finding statement to doctor "in the course of the district attorney's investigation of child abuse" testimonial); State v. Krasky, 721 N.W.2d 916 (Minn. App. 2006) (same). But see State v. Stahl, 855 N.E.2d 834 (Ohio 2006) (holding in a 4-3 opinion that rape victim's statement to nurse collecting rape kit in coordination with police not testimonial); Commonwealth v. DeOliveira, 849 N.E.2d 218 (Mass. 2006) (finding child's statements to doctor examining for signs of abuse after the police were involved were not testimonial, but state law excluded identification of perpetrator so court did not address whether those statements would have been testimonial).
courts have held that statements to doctors or nurses—even when they are expressly asking questions to determine whether a patient has been criminally harmed—are nontestimonial. These courts reason that medical personnel are primarily interested in attending to the health and safety of the people they examine, and that people telling treating physicians and nurses how they were injured would not expect those statements to be used in a criminal prosecution.

Consider the Minnesota Court of Appeals’ decision in In the Matter of A.J.A. Parents of a five-year-old suspected that he had been abused and called the police. The detective who came to the house, after consulting with the local prosecutor’s office, suggested to the parents that they take their son to a local

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115 See People v. Vigil, 127 P.3d 916 (Colo. 2006) (showing a child’s statements to physician examining for signs of abuse not testimonial); State v. Scacchetti, 711 N.W.2d 508 (Minn. 2006) (showing the same in nurse’s examination at hospital unit designed to examine for signs of abuse); State v. Brigman, 632 S.E.2d 498 (N.C. App. 2006) (noting that a child’s statements to doctor examining for signs of abuse not testimonial); Griner v. State, 899 A.2d 189 (Md. App. 2006) (demonstrating that a child’s statements to nurse after police involved not testimonial); Hobgood v. State, 926 So.2d 847 (Miss. 2006) (showing that a statement to pediatrician was nontestimonial, although had police been involved when examination took place, “then it might be possible for the statements to implicate the Confrontation Clause); United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) (noting that a child’s statements to a doctor wholly unconnected to law enforcement were not testimonial); State v. Vaught, 682 N.W. 2d 284 (Neb. 2004) (holding that statement to doctor identifying perpetrator was not testimonial because “there was [no] indication of government involvement in the initiation or course of the examination”); State v. Moses, 119 P.3d 906 (Wash. App. 2005) (same); Foley v. State, 914 So.2d 677 (Miss. 2005) (same); People v. Cage, 15 Cal. Rptr. 3d 846 (Cal. App. 2004) (same), rev. granted (Cal. 2004); State v. Fisher, 108 P.3d 1262 (Wash. App. 2005); State v. Lee, 2005 WL 544837 (Ohio. App. March 9, 2005) (same), appeal allowed, 836 N.E.2d 1227 (Ohio 2005). But see Medina v. State, 143 P.3d 471 (Nev. 2006) (holding that statements to medical personnel examining for signs of abuse are testimonial because such personnel are required to report suspicions to law enforcement); In re T.T., 815 N.E.2d 789 (Ill. App. 2004) (noting that statements “identifying respondent as perpetrator” were testimonial, but statements describing physical condition were not).

medical clinic that performed child abuse evaluations. The parents did so.

At the clinic, medical personnel conducted a detailed physical and oral evaluation, at which the child told a nurse that the defendant touched him inappropriately. Although there were no physical signs of abuse, the nurse reported the child’s allegations to the police pursuant to the state’s mandatory reporting requirement. After the trial court held that these statements could not be admitted in the absence of the alleged victim testifying at trial, the appellate court reversed on the grounds that the interviewer’s primary purpose was to ensure the child’s health, safety, and well-being, and the child would not have anticipated his statements would have been available for later use at a trial.117

For anyone who cares about protecting the confrontation right, this result should be deeply troubling. By referring a suspected victim of abuse to a medical facility, the police and local prosecutor were able to generate a detailed statement that they could use to prosecute the alleged abuser without ever giving the defendant a chance to question his accuser. Law enforcement, in effect, designed a system (an easily replicable one, at that) in which someone accusing another of crime never needed to testify in court.

Even taking away this direct governmental involvement, allowing the state to introduce the child’s statement to the nurse without putting the child on the stand poses profound Sixth Amendment problems. Especially when considered against the backdrop of mandatory reporting laws, allowing such a procedure threatens to turn doctors and nurses into surrogate witnesses in child abuse and possibly other types of cases. The role of medical personnel would not be altogether different from interrogating magistrates’ under the Marian statutes, whose job it was to conduct ex parte investigatory interviews with witnesses in felony cases and to certify the results to the court, so the court could decide how to proceed and whether to detain

117 Id.
the suspects pending trial.118

But neither a “primary purpose” test nor a “reasonable anticipation” standard clearly illuminates why these kinds of statements to medical personnel should be considered testimonial. It is obviously true that doctors and nurses are interested in safeguarding health and well-being, and it is foolhardy if not impossible to assess how exactly that interest interlocks with effective law enforcement or when one thing predominates over the other. It also is at least debatable when reasonable people receiving a medical evaluation would anticipate that their descriptions to treating doctors and nurses would expect that the descriptions would be available for use in an ensuing criminal investigation or trial.

Once again, Davis’ res gestae analysis brings the picture into clearer focus. When a person submits to a detailed and structured interview with someone who is trying, at least in part, to discern whether they have been criminally harmed, that should be all we need to know. The declarant is not under any immediate threat and is narrating purely past events. Furthermore, the evidentiary product that results is functionally equivalent to testimony on direct examination. Even if certain snippets of medical interviews—such as descriptions of physical symptoms—are nontestimonial, descriptions, as Davis puts it, of “how potentially criminal past events began and progressed”119 and especially who perpetrated them, must be considered testimonial.

C. Children’s Statements to Parents

Under the reliability-based framework of Ohio v. Roberts,120 most states enacted special hearsay exceptions to deal with childrens’ allegations of abuse. Generally speaking, these exceptions provided that any allegation of abuse was admissible in a criminal case, so long as the trial court deemed the

118 See Crawford, 541 U.S. at 43-44, 53 (discussing the Marian statutes).
120 448 U.S. 56 (1980).
allegation sufficiently "trustworthy." Moreover, such out-of-court allegations could be—and routinely were—introduced even when courts later deemed the child-declarants incompetent to testify at trial because they did not know the difference between a truth and a lie.

In the wake of Crawford, every court to address the issue has held that allegations of abuse made to police officers or other governmental personnel associated with law enforcement (personnel often specially trained to interview children) are testimonial. At the same time, courts uniformly have held that a child's statements to family members (usually parents, but sometimes other relatives) describing abuse are nontestimonial, at least when made before the police are involved. Courts

121 See Wash. Rev. Code § 9A.44.120.

122 For one example of such a case, see State v. C.J., 63 P.3d 765 (Wash. 2003), in which the court held that a child's allegations of abuse to his mother and a police officer were admissible even though the child was incompetent to testify and was "unable to characterize the difference between truthful and false statements." Id. at 767.


124 See, e.g., Hobgood v. State, 926 So.2d 847 (Miss. 2006) (noting that statements to police were testimonial but not statements to relatives before police were involved); In re Rolandis G., 817 N.E.2d 186 (holding that statement to mother were not testimonial where "[t]here is no indication that [mother] suspected he had been the victim of a crime and that she was attempting to elicit evidence for a future prosecution"); People v. R.F., 2005 WL 323718 (Ill. App. Feb. 10, 2005) (concluding in a divided decision that child's accusation to mother and grandmother was not testimonial); State v. Walker, 118 P.3d 935 (Wash. App. 2005) (holding that statement to child's mother was not testimonial); State v. Shafer, 128 P.3d 87 (Wash. 2006) (showing same regarding statements to mother and family friend). Appellate courts have not yet grappled with situations in which family members have elicited statements from children after the police are involved for use in a criminal prosecution, but it is not hard to imagine such a scenario and why it
have distinguished between statements made to governmental personnel and those made to family members on the grounds that only the former are associated with law enforcement and people would not expect that statements made to family members would be used for investigatory or prosecutorial purposes.

Even accepting those assumptions as correct, *Davis* provides reason for questioning the accuracy of courts' holdings that children's descriptions to parents of past abuse are always nontestimonial. Children's statements describing abuse—especially when the product of probing questioning by parents—function quite nicely as a "'weaker substitute for live testimony' at trial."¹²⁵ Children are doing exactly with their parents what a witness does with a lawyer in court: answering questions designed to elicit whether they have been criminally harmed and, if so, to describe how that harm occurred. While parents are not governmental actors, they are people of authority in their children's eyes—the people to complain to when something is wrong and needs to be fixed.¹²⁶

The *Davis* opinion, in fact, favorably discusses a Founding-era English case that supports this analysis. In *King v. Brasier*,¹²⁷ a child, "immediately upon her coming home," told her mother that she had been sexually assaulted and described "all the circumstances of the injury which had been done to her."¹²⁸ The next day, she identified a neighbor as her attacker. The King's Bench held that the child's statements were

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¹²⁶ Indeed, the common law *res gestae* cases even excluded adults' statements describing completed criminal events to other private parties, in part because the statements bore such a close functional resemblance to testimony on direct examination. See supra notes 37-63 and accompanying text.


¹²⁸ *Id.* at 200.
inadmissible in the absence of the child taking the stand at trial, for “no testimony whatever”—apparently including out-of-court testimonial statements”—can be legally received except upon oath.” The Supreme Court in Davis accepted this holding, indicating that the child’s statement to her mother was testimonial—as opposed to the 911 caller’s description of ongoing events—because “by the time the victim got home, her story was an account of past events.” That is, the statement was not part of the res gestae.

Some appellate courts may think that classifying children’s accusations such as these as testimonial would lead to harsh or even unacceptable results. Child abuse is a horrible crime, the thinking goes, and many guilty people might not be prosecuted if the government were unable to introduce their out-of-court accusations as substantive evidence in trials. This is a highly emotional and intellectually challenging problem. But let me put two propositions on the table that somewhat mollify the impact of Davis’ suggestion that many children’s descriptions of abuse are testimonial.

First, precisely because child abuse is such a deplorable crime, we should be vigilant about protecting a few basic procedural rights, lest our passions get the best of us. Imagine for a moment that the neighbor in Brasier was innocent and that the child’s uncle actually assaulted her, but the child was afraid to tell her mother this because her uncle was her mother’s brother. I think we would all agree that if the statements were admitted and accepted, the trial would have caused a grave miscarriage of justice. By far the best chance for avoiding that injustice would have been requiring confrontation. Prosecutors, in short, will sometimes pursue charges based on untrue accusations, and we need to have a way of ferreting those cases out.

Second, it is important to recognize that the confrontation problem in a large percentage of these cases appears to be one of the government’s own making. Children who tell their parents

129 Id.
130 Davis, 126 S. Ct. at 2277.
they have been abused are unable to testify in court because state laws, in the form of competency requirements, say they are unable to testify. The Supreme Court has never decided whether such competency requirements render children “unavailable” for purposes of the Confrontation Clause. But even if they do, I am not aware of any constitutional reason why states need to demand that children understand an oath or even that they demonstrate that they know the difference between a truth and a lie in order to testify in court. The Confrontation Clause may well require an oath when possible, but as with the requirement that witnesses testify at the trial itself, this requirement may not be unyielding when at least cross-examination is possible. Indeed, it strikes me as rather perverse for states so willingly to accept the legitimacy of children’s out-of-court narratives while simultaneously deeming that anything they might say in court—where the defendant would actually have a chance to ask questions too—would be useless. By relaxing competency requirements, states could not only foster the introduction of evidence at child abuse trials, but also provide defendants with a way of challenging that evidence and the jury with a means for assessing it.

CONCLUSION

The lesson of the failed Roberts framework is that the confrontation right needs to be protected with doctrine that reflects confrontation values. Courts should heed that lesson when interpreting and applying the Davis decision. Assessing simply whether an “emergency” existed while a person described potentially criminal events does not meaningfully help determine whether introducing the person’s statement in a criminal trial would make the person a “witness” against the

131 The Court expressly reserved this issue in Idaho v. Wright, 497 U.S. 805, 816 (1990). This issue has not only Sixth Amendment implications, but Due Process implications as well, since a defendant has a constitutional right to put witnesses on the stand who are necessary to presenting a defense. See Chambers v. Mississippi, 410 U.S. 284 (1973).
defendant. Nor does examining any questioner’s primary purpose in eliciting such an out-of-court statement materially assist in that inquiry. Rather, the best way to determine whether introducing a fresh accusation—or any other out-of-court statement describing potentially criminal events—against a criminal defendant triggers the Confrontation Clause is to ask whether the person was narrating completed events to a person of authority. That is what a “witness” does and what Davis describes as producing testimonial evidence.
This is Liz Hennekay of the Valley Communications Center. Today's date is February 6, 2001, and the time is 1340 hours. The following taped incident has been recorded from the Valley Communications master disk of February 1, 2001 at 1154 hours.

[unknown] [Hang up] . . [unintelligible] 

[new phone call; ringing]

911 Operator: Hello.
Complainant: Hello.

911 Operator: What's going on?
Complainant: He's here jumpin' on me again.

911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?
Complainant: I'm in a house.

911 Operator: Are there any weapons?
Complainant: No. He's usin' his fists.

911 Operator: Okay. Has he been drinking?
Complainant: No.

911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?
Complainant: I'm on the line.

911 Operator: Listen to me carefully. Do you know his

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132 This appears at pages 8-13 of the Joint Appendix in Davis.
last name?

Complainant: It's Davis.

911 Operator: Davis? Okay, what's his first name?

Complainant: Adran

911 Operator: What is it?

Complainant: Adrian.

911 Operator: Adrian?

Complainant: Yeah.

911 Operator: Okay. What's his middle initial?

Complainant: Martell. He's runnin' now.

[unintelligible]

911 Operator: Listen, listen. What direction is running?

Complainant: He's in a car.

911 Operator: What car?

Complainant: I don't know.

911 Operator: What color?

Complainant: It's blue or gray or somethin'.

911 Operator: What direction?

Complainant: He's riding up the street.

911 Operator: Okay. What direction?

Complainant: Goin' down, this is a dead-end street.
911 Operator: It’s a dead-end street, so he’s going out the dead end?
Complainant: Yeah.
911 Operator: Is he alone?
Complainant: No.
911 Operator: How many people in the car with him?
Complainant: I don’t know. He just ran out the door after he hit me.
911 Operator: Okay. Do you need an aid car?
Complainant: No, I’m all right.
911 Operator: Okay sweetie.

[redaction]
911 Operator: Stop talking and answer my questions.
Complainant: All right.
911 Operator: Okay. Do you know his birth date?
Complainant: 8/13/65.
911 Operator: Okay, I’m having trouble understanding you.
Complainant: 8/13/65. I’ve gotta close my door. My...

[child’s voice in background] [unintelligible]
Child: Hi Daddy.
911 Operator: Hi. Can I talk your mommy?
Child: Yeah.
911 Operator: Okay. Go get mommy. Thank you, sweetie.

Child: [unintelligible]

911 Operator: Okay. Go get mommy.

[child’s voice in background] [unintelligible]

2nd Child: Hello.

911 Operator: Hi. Where’s the grownup in the house.

2nd Child: [unintelligible] my mommy.

911 Operator: Where’s your mommy. Is she inside or outside the house?

2nd Child: Uh, walking(?).

911 Operator: She’s where.

Complainant: Hello.

911 Operator: Hi. We’re gonna check the area first, okay? And then they’re gonna come talk to you. Is this your ex-husband or a boyfriend?

Complainant: Yes.

911 Operator: Well, which one—ex-husband?

Complainant: Boyfriend.

911 Operator: Okay, sweetie. Did he force his way into the house—or. . .

Complainant: No. I’m movin’ today. He said he was comin’ to get his stuff. Somebody else came over here, so he tried arguing with me about that. So then I told him, “Look, I gotta go. You gotta go.”

911 Operator: Um-hmm.
Complainant: So then he jumped up and started beating me up in front of him. I don’t know what he was trying to prove.

911 Operator: Okay, . . .

[redaction]

Complainant: . . . I told him not to come.

911 Operator: Okay.

Complainant: I told him over and over.

911 Operator: Okay. Okay. Take a deep breath. I need to find out restraining order, so I need your last name. What is it?

Complainant: M-c-C-o-t-t-r-y.

911 Operator: M-c-C-o-r-t. . .

Complainant: M-c-C-o-t-t-r-y.

911 Operator: Okay. And your first name?

Complainant: Michelle.

911 Operator: Michelle. And your middle initial?

Complainant: I don’t have one.

911 Operator: Okay. What’s your birth date.

Complainant: 5/10/69.

911 Operator: Okay. Is your door locked?

Complainant: Yes.

911 Operator: Okay.

[redaction]
911 Operator: ... put that in the call. They’re gonna check the area for him first, and then they’re gonna come talk to you. Okay.

Complainant: All right.