CRAWFORD AND BEYOND: REVISITED IN DIALOGUE

INTRODUCTION

(“It’s déjá vu all over again”* with Davis twists)

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This symposium issue of the Journal of Law and Policy is devoted to articles addressing the Sixth Amendment Confrontation Clause limitations on the admissibility of hearsay evidence. These articles derive in large part from papers presented and commentary given by their authors at a September 29, 2006 Brooklyn Law School conference, “Crawford and Beyond: Revisited in Dialogue.”1 As the program began, there was an air of déjà vu because, only a year and a half earlier, many of those present had attended “Crawford and Beyond: Exploring the Confrontation Clause in Light of Its Past.”2

The 2005 conference focused on the landmark decision in Crawford v. Washington,3 which dramatically changed the Court’s


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1 The hypotheticals considered throughout the all-day conference can be found at http://www.brooklaw.edu/crawford/hypotheticals.

2 Articles and essays from the 2005 symposium were published in 71 BROOK. L. REV. 1–427 (2005).

interpretation of the Confrontation Clause and its application to hearsay statements sought to be introduced against a criminal defendant. The change in approach was brought about by the abandonment of the Ohio v. Roberts indicia of reliability framework previously used to determine confrontation/hearsay issues.\(^4\) Justice Scalia’s opinion for the seven-justice Crawford majority found the Roberts reliability standard wanting because its “subjective” and “unpredictable” nature led to a “proven capacity” and “unpardonable vice” of lower courts admitting the very kinds of uncross-examined hearsay that the Confrontation Clause was designed to exclude.\(^5\) According to Crawford, the Confrontation Clause requires cross-examination of a hearsay declarant, not a judicial inquiry into the reliability of a hearsay statement.\(^6\)

Crawford replaced the Roberts approach with a history-based categorical exclusion of out-of-court “testimonial” hearsay statements made by “witnesses,” \textit{i.e.} declarants, who do not testify at trial, unless the prosecution demonstrates that that witness is presently unavailable to testify and that the defendant had a prior opportunity to cross-examine the declarant.\(^7\)

The 2006 “Crawford and Beyond” conference, of course, again spotlighted Crawford principles—this time Davis v. Washington provided increased wattage.\(^8\) Justice Scalia, again writing for the Court, sought to refine one subcategory of testimonial statements—those obtained by police interrogation—and addressed other confrontation/hearsay issues as well. This introductory essay seeks to present an integrated version of Crawford-Davis confrontation

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\(^4\) 448 U.S. 56, 66 (1980) (indicia of reliability is present if a statement is within a firmly rooted hearsay exception or the statement bears particularized guarantees of trustworthiness).

\(^5\) See Crawford, 541 U.S. at 63–65 (mentioning grand jury testimony, accomplice and conspirator plea colloquies, affidavits, and custodial confessions of accomplices).

\(^6\) \textit{Id.} at 61.

\(^7\) 541 U.S. at 53–54.

\(^8\) 126 S.Ct. 2266 (2006).
principles with specific references to the articles presented in this Symposium.

THE CONSTITUTIONAL TEXT AND HISTORY

The Sixth Amendment provides that: “[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.”\(^9\) Guided by an 1828 dictionary, the Crawford majority concluded that witnesses against an accused are those who bear testimony, and testimony, in turn, typically means “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”\(^10\) Consequently, only the declarant of a “testimonial” hearsay statement is a witness within the meaning of the Confrontation Clause. To the majority, this definition reflected the main historical concern of the Confrontation Clause.

Justice Scalia emphasized that it was English history and the common law that guided the Framers of the Confrontation Clause.\(^11\) According to Crawford, the principal evil sought to be addressed by that Clause was the prosecution’s introduction at trial of hearsay statements of non-testifying declarants, obtained through private ex parte examinations by judicial and executive officers of the crown. These examinations were conducted under the “civil-law mode of criminal procedure,”\(^12\) the hallmark of the continental inquisitorial system.\(^13\) In contrast, the English common law tradition focused on live, in-court testimony, with the opportunity for adversarial testing.\(^14\)

Nonetheless, Justice Scalia noted that, at times, elements of the civil mode of criminal procedure found their way into English practice,

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\(^9\) Crawford, 541 U.S. at 42.
\(^10\) Id. at 51.
\(^11\) Id. at 43. The political, religious, social, cultural and legal cultural history of confrontation in England is an exceedingly rich and complex one, with a cast of colorful characters, memorable events and institutions thoroughly explored in Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure §§ 6341–43 at 183–346 (West Publishing Co. 1997) [hereinafter Wright & Graham].
\(^12\) 541 U.S. at 50.
\(^13\) Id. at 43.
\(^14\) Id.
pointing to two particular settings.\textsuperscript{15}

In the notorious political treason trials of the sixteenth and seventeenth centuries, judicial and executive officers of the Crown conducted secret private ex parte examinations of suspects, co-conspirators, accomplices, and other witnesses.\textsuperscript{16} In particular, throughout the Crawford opinion, reference is made to the 1603 treason trial of Sir Walter Raleigh\textsuperscript{17} at which an otherwise available co-conspirator, Lord Cobham, had “testified” through the introduction of his ex parte examination and two letters he sent to the judges presiding at the trial; Raleigh’s demands for Cobham to make his accusation in person proved futile.\textsuperscript{18}

\textsuperscript{15} Id.
\textsuperscript{16} See JAMES FITZJAMES STEPHEN, 1 A HISTORY OF THE COMMON LAW OF ENGLAND, 325 (London, McMillan & Co. 1883).
\textsuperscript{17} See 541 U.S. at 44, 50, 52, 62.
\textsuperscript{18} The Trial of Sir Walter Raleigh, 2 COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783 1, 15–16, 23 (T.B. Howell ed., T.C. Hansard 1816) [hereinafter: HOW. ST. TR.]. It appears that torture or threats of it was used against other witnesses to secure oral or written statements against Raleigh. \textit{Id.} at 19, 22. Unmentioned by Justice Scalia is a witness at the Raleigh trial, an ocean pilot named Dyer, who testified to a conversation he had in Lisbon with a Portuguese gentleman, who said that Raleigh and Cobham would cut the King’s throat before he could take the throne. \textit{Id.} at 25. The confrontation and hearsay implications of this statements is explored later in this Symposium. See Robert P. Mosteller, \textit{Confrontation as Criminal Procedure: Crawford’s Birth Did Not Require that Roberts had to Die}, 15 J.L. & POL’Y 685, 712–16 (2007); see also Introduction, Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past, 71 Brook. L. Rev. 1, 8 n.28 (2005) [hereinafter Introduction].

Though not a lawyer, Raleigh had read the law while a prisoner in the tower awaiting trial. 2 How. St. Tr., \textit{supra} note 18, at 16; The Trial of Sir Walter Raleigh, in 1 DAVID JARDINE, HISTORICAL CRIMINAL TRIALS 418 (1832) [hereinafter JARDINE]. At the trial, he acquitted himself (the judges did not) quite admirably and eloquently, including his constant verbal jousting with Attorney General Coke, and in particular, his demand for Cobham’s presence and accusation to his face. See 2 How. St. Tr., \textit{supra} note 18 at 16, 19, 22; JARDINE, \textit{supra} note 18, at 420. Raleigh concluded that Cobham’s presence would not be required if “my accuser were dead or abroad; but he liveth and is in this very house.” JARDINE, \textit{supra} note 18, at 448–49. Moreover, many of Raleigh’s objections to hearsay and multiple hearsay were well-framed and on the mark, including that all the hearsay rested on Cobham’s accusation. See 2 How. St. Tr., \textit{supra} note 18, at 20; JARDINE, \textit{supra} note 18, at 429, 430, 436. Raleigh’s post-conviction activities tell a fascinating fourteen-year story which is briefly recounted. Introduction, \textit{supra} note 18, at 8 n.9; see also 2 How. St. Tr., \textit{supra} note 18, at 31–33, 55–59; JARDINE, \textit{supra} note 18, at 476–79.
The civil law mode of criminal procedure was also present in the more ordinary, everyday criminal case, in which justices of the peace, under the authority of the sixteenth century Marian statutes, conducted pretrial release, bail and committal hearings, examining witnesses, accomplices and suspects.19 The examinations were reduced to writing and subsequently read as evidence at trial.20

According to Justice Scalia, by 1791, when the Sixth Amendment was ratified, if not long before, a series of English statutory reforms and judicial decisions had developed a limited common law confrontation right.21 That right encompassed the kinds of testimonial hearsay statements produced by the treason prosecutions and the Marian preliminary examination, but no other nontestimonial hearsay statements.22

The Crawford majority also briefly touched upon the use of controversial examination practices in the colonies and the reactions to them.23 Despite these American references, Justice Scalia had no

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19 Crawford, 541 U.S. at 43. Over time, the Marian examinations became ever more inquisitorial, sometimes even involving the use of torture, leading to a “dictatorship of the JPs.” See 30 Wright & Graham, supra note 11, § 6342 at 229–313.

20 Crawford, 541 U.S. at 44 (citing 2 Matthew Hale, Pleas of the Crown 284 (1736)).

21 Crawford, 541 U.S. at 45–46.

22 See id. at 44–47. But see 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, 189–215, 120–188 (2005) (there is no historical basis for the testimonial/non-testimonial distinction and there was no rigid, common law cross-examination requirement regarding Marian examinations). Subsequently, Professor Davies and Robert Kry, who served as Justice Scalia’s law clerk for the October 2003 term of the Court (during which Crawford was decided), engaged in a spirited, illuminating and engrossing debate over the existence of a common law right of confrontation with respect to Marian examinations offered at trial. Compare Robert Kry, Confrontation Under the Marian Statutes: A Reply to Professor Davies, 72 Brook L. Rev. 493 (2006), with Thomas Y. Davies, Revisiting the Fictional Originalism in Crawford’s Cross-examination Rule: A Reply to Mr. Kry, 72 Brook. L. Rev. 557 (2007).

23 Crawford, 541 U.S. at 47–49 (describing the Virginia Governor’s private issuance of commissions to conduct ex parte examinations of witnesses against particular individuals, John Adams’s condemnation of ex parte examinations during the Admiralty Court smuggling trial of John Hancock, and many of the revolutionary American declarations of rights that included confrontation provisions. For a comprehensive study of confrontation in America from the colonial experience to the
doubt that it was the English common law right of confrontation to which the Sixth Amendment referred. 24

The historical record supported a second proposition, stated Justice Scalia: “. . . the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” 25

Concurring in Crawford, Chief Justice Rehnquist, joined by Justice O’Connor, remained unconvinced that the Confrontation Clause mandated the categorical exclusion of all solicited testimonial statements. 26 Given that the law during the time of the Framers was not fully settled, the Chief Justice thought it “odd” to conclude that the Framers “created a cut-and-dried rule with respect to the admissibility of testimonial statements . . . .” 27 The Chief Justice also emphasized that the distinction between testimonial and nontestimonial statements was no more based in history than the Ohio v. Roberts reliability framework. 28

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In his article, University of Tennessee Professor Thomas Y. adoption of the Sixth Amendment, see Wright & Graham, supra note 11 § 6344 at 348 (“. . . the history of confrontation in America was not a reflection of its history in England but a refraction of that history . . . . the light of English development of confrontation was bent as it passed through the prism of colonial experience.”).

24 Crawford, 541 U.S. at 43 (citing early American decisions reflecting the English confrontation right with respect to depositions); see also Mattox v. United States, 156 U.S. 237, 243 (“We are bound to interpret the [Confrontation Clause] in light of the law as it existed at the time it was adopted, not as reaching out for new guarantees of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject,—such as his ancestors had inherited and defended since the days of Magna Charta.”). But see Wright & Graham, supra note 11, § 6348 at 784 (“It is misleading if not mistaken to say that the Sixth Amendment was intended to adopt the common law.”).

26 Id. at 72.
27 Id. at 73.
28 Id. at 69–76. Perhaps most important to Chief Justice Rehnquist was the long term uncertainty that would surely be created by this new testimonial/nontestimonial formula, id., and his belief that the Roberts framework was more than adequate to address the confrontation issues prescribed in Crawford. Id. at 75–76.
Davies concludes that Framing-Era authorities indicate that the introduction of unsworn hearsay statements violated basic principles of common-law criminal evidence, based in turn on the confrontation right. Accordingly, Crawford’s testimonial/nontestimonial formulation “does not reflect the Framers’ design,” and permitting the introduction of “nontestimonial” hearsay is “inconsistent with the basic premises that shaped the Framers’ understanding of the right.”

According to Professor Davies, only two kinds of out-of-court statements were admissible: a sworn statement of an unavailable witness and a dying declaration—the functional equivalent of a sworn statement. After analyzing the historical cases discussed in Davis and Crawford, Professor Davies concludes that neither decision identified a single example of a Framing-Era case that admitted unsworn hearsay against a criminal defendant.

In his article, New York Law School Professor Randolph N. Jonakait observes that if Framing-Era views (including those shortly after the Framing) are to control the meaning of the Confrontation Clause, it is “American views from that era that are most important, and the best sources of American viewpoints and ideas are American cases, not English cases.” Professor Jonakait proceeds to examine extensively two early American cases, concluding that the American courts of the Framing Era enforced a general ban on hearsay as being “no testimony” and recognized very few hearsay exceptions.

Moreover, Professor Jonakait points out that nothing in the

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30 Id.
31 Id.
32 Id. at 354.
33 Id.
34 Id. at 448.
36 Id. at 478–83, 484–93.
37 Id. at 491.
38 Id. at 493.
Framing-Era cases reflects Crawford’s testimonial/nontestimonial distinction. Professor Jonakait acknowledges that the early American cases do not speak directly to the right of confrontation, but the cases he cites directly show the Framing Era’s judicial concern about the use of out-of-court statements in a criminal case and the general bar to their admissibility.

TESTIMONIAL STATEMENTS

Crawford did not articulate an overarching definition of “testimonial,” leaving that “for another day.” The majority simply noted that, at a minimum, the category included testimony before the grand jury, or prior trial or preliminary hearing testimony, and statements produced by police interrogations—the “modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.” Davis, like Crawford, did not provide a comprehensive definition of “testimonial.”

The category of testimonial statements is not limited to those mentioned in Crawford. Indeed, looking to an old, non-modern practice, Davis added to the testimonial list volunteered accusatory statements to the government. Significantly, testimonial statements of

39 Id. at 491 (noting a trial court’s statement that if a private journal of a defendant were produced, it would be admissible against its author but not against any other defendant).
40 Id.
41 Id.
42 Crawford, 541 U.S. at 75.
43 Id. at 68.
44 See id: Davis v. Washington, 126 S.Ct. 2266, 2273 (2006). Curiously, the Crawford opinion omitted affidavits and plea allocutions from the testimonial category, even though they were mentioned earlier in the opinion as being testimonial. 541 U.S. at 68. Subsequently in Davis, the Court recognized the testimonial nature of an affidavit, 126 S.Ct. at 2280, and other courts have had no difficulty holding plea colloquies testimonial. See, e.g., United States v. McClain, 377 F.3d 219, 222 (2d Cir. 2004).
45 Davis, 126 S.Ct. at 2274, n.1 (“The Framers were no more willing to exempt from cross-examination volunteered testimony . . . than they were to exempt answers to detailed interrogation.” Also noting that Lord Cobham’s letter to the commission at Raleigh’s trial was plainly not the product of sustained questioning). Still, Cobham
this kind are certainly not produced by the kind of ex parte examination or abuse at which the Confrontation Clause is primarily, but, as the Court made clear, not exclusively, directed.46

A. Statements Elicited By Police Interrogation

To the *Crawford* and *Davies* majority, “[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England.”47 Despite the resemblance language, *Davis* makes clear that “[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”48 The *Crawford* majority observed that, like the testimonial category of statements, the subcategory of police interrogation-produced statements has many possible definitions. Still, no further definition was required because Sylvia Crawford’s recorded (Miranda-warned) statement, knowingly given in response to

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46 *Davis*, 126 S.Ct. at 2279 n.6 (“Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests.” *Cf.* Oral Argument in Hammon v. Indiana, No. 05-5705 at 32 (corruption of a statement by interrogation or other abuse was not the only concern of the Founders who “I think believed in a judicial system, at least in criminal cases, where the person has the right to cross-examine his accuser.” (Remarks of Scalia, J.). *Id.* at 33 (One of the concerns of the Confrontation Clause is witnesses who have a motive to frame the defendant and do so even though there is no police abuse in securing the statement) (Remarks of Kennedy, J.). Still *Davis*, leaves that the Confrontation Clause is only offended by “the trial use of, not the investigatory collection of, ex parte testimonial statements.” 126 S.Ct. at 2279 n.6.

47 *Crawford*, 541 U.S. at 52; *see also Davis*, 126 S.Ct. at 2278.

48 126 S.Ct. at 2278 n.5.
structured police questioning, would have qualified under any conceivable definition.49

Subsequently, in *Davis*, Justice Scalia shifted focus from “police interrogations” to interrogations by “law enforcement officers,”50 observing that the *Crawford* Court “. . . had immediately in mind . . . interrogations solely directed at establishing the facts of a past crime, in order to identify . . . the perpetrator.” Justice Scalia continued, “[t]he product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory . . . of the interrogating officer, is testimonial.”51

As noted, *Davis*, like *Crawford*, did not provide a comprehensive definition of testimonial, but it did further refine the meaning of police interrogation in two distinct settings, cautioning that its holding was limited to deciding *Hammon* and *Davis*.52

i) Statements are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, and the circumstances objectively indicate that there is no ongoing emergency to justify the interrogation.53

Responding to a domestic disturbance, the police went to the private home of Amy and Herschel Hammon where they encountered

49 *Crawford*, 541 U.S. at 53 n.4. The use of “knowingly” implies that the declarant must know that he or she is speaking to law enforcement. See also *Davis*, 126 S.Ct. at 2275 (indicating the nontestimonial nature of statements made unwittingly to a government informant) (citing Bourjailly v. United States, 483 U.S. 171, 181–84 [1987]); see also *Crawford*, 541 U.S. at 58 (same). The Court, however, has never expressly held that there is such a requirement, and the issue remains open.

50 *Davis*, 126 S.Ct. at 2274.

51 Id. at 2276 (“. . . we do not think it 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.”) (emphasis in original).

52 Id. at 2273 (“[W]e are not attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogations—as either testimonial or nontestimonial . . . .”); see also id. at 2278 n.5 (repeating a similar caution limiting the holdings to a resolution of the “cases before us and those like them.”).

53 Id. at 2273–74.
a calm domestic setting with no apparent emergency. After an initial police inquiry, speaking with the husband and then separating him from his wife, and following some prompting and prodding, Amy Hammon described her husband’s assault which had apparently provoked the domestic disturbance call. Justice Scalia, for the majority, noted that during this questioning, the officer was no longer seeking to determine “what is happening” but rather, “what happened." This questioning was testimonial in nature because “[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime . . . .”

Like the custodial questions and answers in *Crawford*, Ms. Hammon’s statements deliberately recounted, in response to police questioning, how past, potentially criminal, events began and progressed, and the questioning took place soon after the described events transpired. To the Court, “[s]uch statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial.” Put another way, “the evidentiary products of the *ex parte* communications [of Amy Hammon and Sylvia Crawford] aligned perfectly with their courtroom analogues.” Notably, the *Davis* majority rejected a more flexible approach to the introduction of interrogation-produced statements in a domestic violence setting, reflecting its general view that “[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from

54 *Id.* at 2278.
55 *Id.* Justice Thomas dissented in *Hammon* and summed up his numerous concerns by observing that the unpredictable primary purpose standard adopted by the Court was neither “workable, nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause.” *See* 126 S.Ct. at 2281–85. Justice Scalia responded that the Court’s approach was still a work in progress and, for the cases decided, the test is objective and quite workable. *Id.* at 2285. Moreover, observed Justice Scalia, the dissent had proposed nothing remotely workable other than a vague distinction between “formal” and “informal” statements which was but a mere form of words. *Id.*

56 *Davis*, 126 S.Ct. at 2278 (emphasis in original).
57 *Id.* at 2277.
58 *Id.* at 2279–80.
the confrontation requirement to be developed by the courts.”

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In her article, University of Maine Professor Deborah Tuerkheimer views the Davis Court’s focus on description of past events as inappropriate in domestic violence settings because the nature of domestic violence is not episodic. Put simply, the “continuing” nature of domestic violence does not lend itself to the Court’s “binary” framework in which declarants either “cry for help” or “provide information.” Professor Tuerkheimer argues that in domestic violence cases, a battered woman must often provide information regarding “past events” and past violence in order to prevent imminent violence. Whether an emergency exists, in such cases, cannot be determined without an understanding of the context of domestic violence cases; therefore, emergency and past abuse are inextricably intertwined such that domestic violence victims cannot seek help without describing the past events. In Professor Tuerkheimer’s judgment, the Court’s testimonial characterization of statements describing past events, will, in the domestic violence context, result in exclusion of statements that are, in fact, cries for help.

ii) “Statements are nontestimonial [for purposes of the Confrontation Clause] 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.”

Davis involved a 911 call and plea for help while the caller

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61 Id. at 733 n.21.
62 Id. at 732.
63 Id. at 732–33.
64 Id. at 728, 735–36.
65 Davis, 126 S.Ct. at 2268–69.
(Michelle McCottry) was being assaulted by her former boyfriend, Adrian Davis. Once she began talking to the 911 operator, Davis fled and, as he was fleeing, Ms. McCottry identified Davis by name in response to the operator’s inquiry.

Characterizing the 911 call as a cry for help and viewing the circumstances objectively, the Court recognized that Ms. McCottry “simply was not acting as a witness; she was not testifying.”66 What she said was not a “weaker substitute for live testimony” at trial;67 rather, this was an emergency call for police assistance against a bona fide physical threat68 that, in relevant part, described the offense as it was occurring. Objectively viewed, the primary purpose of the 911 operator’s questions and the information provided by the caller was to secure police assistance to an ongoing emergency, not to prove or establish past events.69

The opinion seemingly recognized that the statements Ms. McCottry made after the emergency had subsided—when Davis had fled—were testimonial and should be redacted.70 Still, as Ms. McCottry reported Davis’ flight, the operator asked a nontestimonial question to secure the identity of the assailant so that the dispatched officers would know whether they may encounter a violent individual, and Ms. McCottry gave a nontestimonial response in naming Davis.71

For the purposes of the Davis opinion, the Court assumed in a footnote (but did not decide) that questioning by 911 operators were acts of the police.72 That same footnote goes on to state that, like Crawford, the holding in Davis makes it “unnecessary to consider whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’”73

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66 Id. at 2277 (emphasis in original) (citations omitted).
67 Id.
68 Id. at 2276. The emphasis on the statement as describing ongoing events is not captured by the Court’s holding. See 126 S.Ct. at 2288, set forth at note 53, supra.
69 Id.
70 Id. at 2277.
71 Id. at 2276.
72 Id. at 2274 n.2.
73 Id.
In “Crawford, Davis and Way Beyond,” University of Michigan Law School Professor, Richard Friedman, a leading confrontation scholar who represented Hammon before the Supreme Court, finds the primary purpose of both the interrogator and the witness to whom he/she is speaking ill-suited to define a testimonial police interrogation. He so concludes because determining primary purpose is quite difficult since the interrogator often has more than one purpose, and the multiple purposes may be inextricably intertwined. Thus, after-the-fact labeling of one purpose as primary is an arbitrary exercise which invites judicial manipulation to ensure that the statement will be held admissible.

Professor Friedman rhetorically inquires why the existence of police interrogation should turn on the purpose of the interrogator when, as he has argued at length, it is the witness’s perspective that should be controlling. Moreover, he points out that the Davis Court recognized as much when it observed: “And 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.” Thus, concludes Professor Friedman, Davis is perfectly compatible with his approach, which focuses on anticipation of the statement’s prosecutorial use from the perspective of a hypothetical reasonable person possessing all of and only the information known to the declarant at the time of questioning. He concludes that his approach would be less prone to manipulation by the prosecution-favoring lower courts and that nothing in the hypothetical reasonable person approach is in any way inconsistent with Davis.

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74 Richard Friedman, Crawford, Davis and Way Beyond, 15 J.L. & Pol’y 553, 559 (2007).
75 Id. at 559–60.
76 Id.
77 Id. at 560. See Richard Friedman, Grappling with the Meaning of “Testimonial,” 71 Brook. L. Rev. 241, 255-59 (2005).
78 Friedman, supra note 74 at 560–61 (citing Davis, 126 S.Ct. at 2274 n.1).
79 Id. at 561–63.
80 Id.
81 Id. at 572.
Professor Friedman is also concerned that the ambiguity in the terms “primary purpose” and “ongoing emergency,” along with the manner in which the Court applied them in *Hammon* and *Davis*, will encourage judges to manipulate the *Crawford-Davis* framework to admit accusatory statements in much the same fashion as did the discarded *Roberts* standard. Nevertheless, he expresses the hope that manipulation will be limited by the *Davis* requirement that the witness must be describing events as they are actually happening.

In her article, Southwestern Law School Professor Myrna Raeder finds that the “primary purpose of the interrogation” approach is almost as arbitrary as the discarded *Roberts* reliability framework. Professor Raeder is also concerned that the Court’s objective standard could be manipulated to mask improper motives by of law enforcement officials.

In his article, Stanford University Law School Professor Jeffrey Fisher, who represented Crawford and Davis before coming to academia, views “the emergency/non-emergency dichotomy [as] the wrong touchtone to resolve disputes about statements describing fresh criminal activity.” Additionally, Professor Fisher thinks that there is very little, if any, relevance in resolving the testimonial issue by focusing on the primary purpose of the interrogation. At least in scenarios not dealing with police interrogation, he is doubtful about the soundness of the reasonable person test because it could easily lead to inconsistent results and is too easily judicially manipulable.

Turning to other features of *Davis*, Professor Fisher proposes a two-prong framework for assessing the testimonial nature of statements to police officers describing recent criminal events. First, he looks to the common law evidentiary *res gestae* doctrine that

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82 Id. at 563.
83 Id. at 563–64.
85 Id. at 777.
87 Id. at 617–18.
88 Id.
encompasses statements describing ongoing activity as well as statements “made immediately thereafter in direct consequence to these occurrences but excluding descriptions of completely past occurrences.” The second prong calls for a determination of whether, in making the statement in question, the declarant is doing precisely what a witness does at trial: answering questions rather than volunteering statements to an official. Professor Fisher then proceeds to apply this framework to settings beyond fresh accusations to police officers, including statements to private victims’ service organizations, medical personnel, and victims’ parents.

In his article, University of Nebraska Law Professor Roger Kirst examines the decisions in Davis and Hammon to articulate practical rules to guide day-to-day judicial decision making in the real world. Professor Kirst explains that the different outcomes in Davis and Hammon turn on whether the speaker was facing an ongoing emergency when she spoke. Thus, to Professor Kirst, it is crucial to determine what constitutes the end of an emergency. He notes that different kinds of emergencies, e.g. seeking medical care or prevention of a threatened or ongoing assault, as well as the identity of the declarant, e.g. victim or bystander, may, though not necessarily, require different modes of analysis. For further guidance, Professor Kirst then examines cases in which certiorari was denied or in which the writ was granted, the judgment vacated, and the case

89 Id. at 590.
90 Id. at 608–09. (“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.”). For a modern day return to traditional “res gestae” evidentiary principle to address Crawford’s Confrontation Clause concern about spontaneous statements (541 U.S. at 58, n.8), see State v. Branch, 865 A.2d 673, 690-91 (N.J. 2005).
91 Fisher, supra note 86, at 614–16.
92 Id. at 616.
93 Id. at 616–26.
95 Id. at 641–44.
96 Id. at 644.
97 Id.
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remanded in light of *Davis*.98

He then restates *Davis* as rules,99 and looks at the cases on remand
and other post-*Davis* decisions to assess *Davis* in a variety of factual
settings.100 Professor Kirst concludes by examining *Davis* in the
context of overall confrontation doctrine.101

Professor Myrna Raeder concludes that the so-called bright line
“primary purpose test” has and will continue to prove difficult to
apply, creating special problems and uncertainties in domestic violence
cases.102 In her view, “primary purpose” gives little guidance to
lower courts in determining what qualifies as an ongoing emergency
and whether the statement helps to resolve it.103 Consequently, the
lack of guidance has led to an overbroad and inconsistent
interpretation of what qualifies as an emergency.104 Professor Raeder
believes that whether there is an ongoing emergency may well and
unacceptedly turn on whether the 911 operator asks questions in the
present or past tense.105 She further notes that many decisions
seemingly hinge on whether the defendant is still at home, while
others indicate that the emergency is not over if the defendant could
return.106 These results, she argues, fail to follow the “Supreme
Court’s narrow view of context in assessing whether an emergency
existed in *Hammon*.”107

98 *Id.* at 644–62.
99 *Id.* at 662–63.
100 *Id.* at 644–77.
101 *Id.* at 677–83.
102 Raeder, *supra* note 84, at 788–89.
103 *Id.* at 764.
104 *Id.* at 766–67.
105 *Id.* at 765.
106 *Id.* at 771.
107 *Id.*
Testimonial Statements to Private Persons

All of the statements at issue in *Crawford* and *Davis* were made to the government. Certainly it is reasonable to read the two cases as requiring government involvement in the making of the statements, if only as a passive recipient—it—at least until the Court holds otherwise. Nonetheless, *Davis* cited a case that arguably raises a question about the need for governmental involvement.

According to the majority opinion, relying on common law English cases, *Davis* sought “to cast McCottry in the unlikely role of a witness.”108 Justice Scalia quickly noted that none of the cited cases involved statements made during an ongoing emergency.109 He then gave as an example *King v. Brasier*,110 in which a five year-old girl, Mary Harris, immediately on her returning home, described the circumstances of a sexual assault to her mother and a woman lodger in their home.111 The next day, the five year-old, accompanied by her mother, went to the defendant’s lodgings, where she identified him.112 The statements were subsequently held inadmissible, and Justice Scalia observed that *Brasier* would be helpful to *Davis* “if the relevant statement had been the girl’s screams for aid as she was being chased by her assailant; however, by the time the victim got home, her story was an account of past events.”113

In his article,114 Professor Richard Friedman posits that Justice Scalia, in distinguishing *Brasier*, “[appeared] to endorse it” as involving a testimonial statement, even though that the statement was not made to a law enforcement officer.115 Indeed, Professor Friedman contends that *Brasier* had itself referred to the five year-old’s accusation as testimony,116 and Professor Jeffrey Fisher agrees.117

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109 Id.
111 *Davis*, 126 S.Ct. at 2277.
113 *Davis*, 126 S.Ct. at 2277.
114 Friedman, *supra* note 74, at 564.
115 Id.
116 Id. at 564–65 n.43.
Moreover, according to Professor Friedman: “Brasier made no new law . . . rather its significance is that it reflects the common understanding . . . at the time . . . of the framing of the Sixth Amendment that an out-of-court accusation, even one made very soon after the event, was testimonial in nature and therefore not admissible.”\textsuperscript{118} He continues that “such a deeply seated understanding of the confrontation right should be given considerable weight in determining the Clause’s modern meaning.”\textsuperscript{119}

In contrast to the Friedman-Fisher view, Professor Thomas Davies points to the reporting of the rulings in Brasier as illustrating the dangers of working with reports of English criminal trials from the late eighteenth century.\textsuperscript{120} Professor Davies asserts that the 1815 version of Brasier, relied upon by the Petitioners’ briefs and opinion in Davis, was very different from the original report published in 1789.\textsuperscript{121} That original report indicated that Brasier was convicted on the unsworn testimony of the five year-old girl who testified at trial, and the issue was resolved in the defendant’s favor because unsworn testimony could not be received at trial. There was, however, neither mention of the child’s statements to her mother and lodger,\textsuperscript{122} nor of the error in receiving them into evidence.

Professor Davies concludes that it was not until well after the framing that the later version of Brasier could have come, if it ever did, to the attention of the Framers.\textsuperscript{123} Professor Davies rejects the idea that the later version of Brasier and its purported testimonial language could be relied upon to show the English practice during the Framing Era.\textsuperscript{124} He does so because, as far as the Framers could have

\textsuperscript{118} Friedman, supra note 74, at 565.
\textsuperscript{119} Id.
\textsuperscript{120} Davies, supra note 29, at 428.
\textsuperscript{121} Id. at 438–41. In addition, to the 1789 and 1815 reports of Brasier, there was also an 1800 footnote to the 1789 report and an 1806 report of the case in a treatise that made mention of the child’s statements. For a discussion of the several reports of Brasier, see Mosteller, supra note 117, at 927–31.
\textsuperscript{122} See Davies, supra note 29, at 438–39 n.217.
\textsuperscript{123} Id. at 438–39.
\textsuperscript{124} Id. at 465.
known, “the issue of what could constitute admissible evidence in the case of a child rape victim who was too young to be sworn, was understood to be a uniquely difficult and unsettled question.”\footnote{Id. at 444.}

Finally, Professor Davies views the 1815 version of \textit{Brasier}, regarding the mother’s statements, as having neither said nor implied anything about the distinction between testimonial and nontestimonial evidence.\footnote{Id. at 443–44.} Rather, he concludes that the later version of the \textit{Brasier} decision “simply restated the same blanket exclusion of unsworn hearsay evidence that was also set out by the treatises and manuals of the time.”\footnote{Id. at 444.}

Professor Randolph Jonakait concludes that \textit{Brasier} reflects nothing more than the principle “that out-of-court statements from an incompetent witness could not be admitted in a criminal trial.”\footnote{Jonakait, supra note 35, at 474–77.} Moreover, “[\textit{Brasier}] says nothing about the hearsay rule generally, hearsay exceptions or the right of confrontation”;\footnote{Id. at 472.} it takes “a highly creative, and perhaps a highly anachronistic eye to find a confrontation meaning in \textit{Brasier}.”\footnote{Id. at 474; see also Mosteller, supra note 117 at 931 (\textit{Brasier} “played no direct role in shaping confrontation because the Framers could not possibly have known about it as a hearsay/confrontation case, and it therefore could not have affected their thinking. . . . The [\textit{Brasier}] judges gave no indication of being concerned as to whether the statement was testimonial, nor do they take note of any of the circumstances that . . . might lead to treating the statement as testimonial.”).}

Finally, on the meaning of \textit{Brasier}, Anthony Franze, a co-author of an amicus brief on behalf of the National Association of Counsel for Children in \textit{Davis v. Washington}, offers a slightly different perspective in his Symposium article.\footnote{Anthony Franze, \textit{The Confrontation Clause and Originalism’s Lessons from King v. Brasier}, 15 J.L. & Pol’y at 495 (2007).} Mr. Franze reviews the common law before and after \textit{Brasier}, as well as treatises and subsequent cases to see the meaning given to \textit{Brasier} following its publication. From this, he concludes that \textit{Brasier} has no place in confrontation doctrine.\footnote{Id. at 508–09.}
Mr. Franze further reasons that it is unlikely the Framers would have been aware of any version of Brasier and, in light of “the legal authorities that were available in Framing-Era America, they [well could] have understood that hearsay accounts by parents, doctors and acquaintances concerning statements made by child sex abuse victims would be admissible in criminal trials without regard to whether the statements would now be considered ‘testimonial’ or ‘non testimonial.’” Finally, Mr. Franze argues that Brasier demonstrates some of the practical limitations of originalism as an interpretative construct for constitutional criminal procedure decisions.134

Formality

In Crawford the Court describes testimonial statements as being formal135 and solemn136 in nature. The structured, tape-recorded custodial interrogation of Sylvia Crawford following a Miranda warning was apparently formal enough for the seven-justice majority in Crawford,137 and a unanimous Court in Hammon agreed.138 To be sure, the Crawford interrogation was more formal than the in-home interrogation of Amy Hammon. Still, “[i]t was formal enough that Amy [Hammon]’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].”139 To the Davis majority, “[t]he solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe

133 Id. at 500.
134 Id. at 500–02.
136 Id.
137 See id. at 53 n.4, 61, 65 (the opinion never expressly characterizes the statement as formal, though its descriptions imply that characterization, as does its recognition that the statement is testimonial, whatever the definition).
138 Davis v. Washington, 126 S.Ct. 2266, 2278 (2006) (Chief Justice Roberts and Justice Alito, who had replaced the Crawford concursers, Chief Justice Rehnquist and Justice O’Connor, joined the Davis majority, and Justice Thomas also agreed that Sylvia Crawford’s Miranda-warned custodial statement was testimonial in nature).
139 Id. at 2278.
Finally, *Davis* contrasts the calm and tranquil interrogations of *Hammon* and *Crawford* to the frantic statements of McCottry in *Davis*, in an environment that was neither tranquil nor safe.  

In dissent, Justice Thomas argued that a living room conversation with a police officer hardly bears the formality or solemnity of formalized testimonial materials or, for that matter, the solemnity present during the police interrogation of a person, *i.e.* Sylvia Crawford, following a warning that anything said can be used against him or her in a court of law.  

Mr. Justice Scalia responded to Justice Thomas: “We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers—who perform investigative and testimonial functions once performed by examining Marian magistrates.” Justice Scalia concluded: “It imports sufficient formality, in our view, that lies to [police] officers are criminal offenses.” Notably, Justice Scalia nowhere suggests that the person being interrogated need even be aware that lying to a police officer is a criminal offense, and if the declarant is unaware of the status of the person to whom he or she is speaking, then there is no crime.  

The *Hammon* holding and the Scalia-Thomas exchange denote a malleable formality requirement, at least with respect to police

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140 *Id.* at 2276; *see also id.* at 2279, n.5 (“It imports sufficient formality, in our view that lies to such officers are criminal offenses.”). *But see* Robert P. Mosteller, *Softening the Formality and Formalism of the Testimonial Concept*, 19 REGENT L. REV. 429, 441 n.55, 442 n.57 (2007) (“these statutes [making it unlawful to lie to the police] have no relationship to the concerns of the Confrontation Clause and a system that uses them as a dividing line for coverage would be absolutely ahistoric” and illogical because “the states' treatment of this crime is far from uniform.”).  
141 *Davis*, 126 S.Ct. at 2277.  
142 *Id.* at 2282–83 n.5.  
143 *Id.* at 2278. *See Robert P. Mosteller, Softening the Formality and Formalism of the Testimonial Statement Concept*, 19 REGENT L. REV. 429, 438–39 (that lies are crimes equaling formality is “curious,” “bizarre” and “inexplicable,” coming “largely out of the blue” with the potential of providing a significant limitation on the scope of testimonial statements).  
144 *See* Mosteller, *supra* note 143, at 445–46.
interrogation-produced statements. Unless abandoned or made less stringent, however, formality may prove an insurmountable obstacle to deciding that accusatory statements to private individuals are nontestimonial.

* * *

Given the formality discussion and the Hammon holding in Davis, Professor Richard Friedan concludes that there is no rule that the testimonial nature of a statement turns on its formal nature.

Moreover, even if there is a formality requirement, Professor Friedman is satisfied by a showing that it would be objectively apparent to a reasonable person that the interrogation was being held for prosecutorial purposes.

Law Enforcement Reports and Expert Testimony Based upon a Testimonial Statement Disclosed to the Jury

In Crawford, Justice Scalia declared that business records, “by their nature, were not testimonial.” Neither the Crawford nor Davis majority opinions make any reference to public records or reports.

True, some governmental records and reports may be akin to the nontestimonial private business records. On the other hand, some modern day governmental reports that are created for evidentiary purposes—e.g. DNA, fingerprints, blood alcohol level, ballistics, chemical composition and weight of substances—are a far cry, if not a completely separate and distinct species, from nontestimonial private business records of 1791.

\[\text{\underline{145 Id.} at 434 (\textit{Davis} “clearly eliminated some of the extreme readings of formality and generally softened the requirement”).}\]

\[\text{\underline{146 Friedman, supra note 74, at 571.}}\]

\[\text{\underline{147 Id.}}\]

\[\text{\underline{148 Crawford v. Washington, 541 U.S. 36, 56 (2004). Justice Scalia also concludes that, at the time of the Framing, there was a hearsay exception for business records. \textit{Id. But see} Davies, supra note 29, at 365–66 (questions the existence of any such exception during the Framing-Era).}}\]

\[\text{\underline{149 But see Crawford, 541 U.S. at 76 (Rehnquist, C.J.) (noting with approval the majority’s nontestimonial characterization of business and “official” records).}}\]
These governmental reports, and the scientific tests and techniques that produce their findings and results, also bear little, if any, kinship or resemblance to statements of witnesses and accomplices secured by the civil law modes of criminal prosecution. Moreover, they are not produced by police interrogation.

Still, both Crawford and Davis leave no doubt that there are other subcategories of testimonial evidence than the few mentioned in the two opinions.\(^\text{150}\) Also, Crawford cautioned that “[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse.”\(^\text{151}\) Further, Davis warned that “restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”\(^\text{152}\)

In her symposium article, U.C.L.A. Professor Jennifer Mnookin addresses Crawford’s impact on the admissibility of expert evidence in two recurring settings.\(^\text{153}\) She first discusses the introduction of written forensic reports without the live testimony of a report’s preparer.\(^\text{154}\) Second, she examines situations in which a testifying expert seeks to disclose hearsay of other individuals\(^\text{155}\) upon which the testifying expert has relied in reaching his or her conclusion.\(^\text{156}\)

At the outset of her article, Professor Mnookin notes that “while Davis does not . . . speak directly to the question of expert evidence under Crawford, its turn to a ‘primary purpose test’ may influence how courts assess whether laboratory reports and matters upon which experts rely are testimonial.”\(^\text{157}\) She also explains why characterizing such reports as business records does not, automatically, resolve the

\(^{150}\) Id. at 68; Davis v. Washington, 126 S.Ct. 2266, 2273 (2006).

\(^{151}\) 541 U.S. at 56 n.7; see also id. at 53 (expressing concern about the risk posed by “the involvement of government officers in the production of testimonial evidence”).

\(^{152}\) 126 S.Ct at 2278 n.5.


\(^{154}\) Id. at 797–801.

\(^{155}\) Id. at 800.

\(^{156}\) Id. at 865–69.

\(^{157}\) Id. at 793–94 n.10. See also George Fisher, Evidence 458 (Foundation Press Supp. 2006–07).
testimonial issue.\textsuperscript{158}

As for the testimonial nature of forensic reports or laboratory test results (in some jurisdictions called certificates of analysis), she concludes—after a thorough examination of the arguments on both sides—that most of these reports are testimonial in nature, requiring the previously uncross-examined preparer to testify at trial.\textsuperscript{159} She acknowledges, however, that the “great majority of courts analyzing expert disclosure issues . . . by hook or by crook, [are] holding that these [reports and] disclosures are not testimonial.”\textsuperscript{160}

As for the situation in which a testifying expert seeks to support his or her opinion by disclosing a testimonial statement of another expert or non-expert, Professor Mnookin concludes that the value of these out-of-court statements rests in the truth of the facts asserted in them. Thus, she concludes, disclosing such statements to the trier of fact violates the Confrontation Clause. Again, with one notable New York exception, she expresses disappointment over the decisions.\textsuperscript{161}

In the final part of her article, Professor Mnookin recognizes certain situations in which there is a genuine need for the admissibility of a testimonial report, and she offers some suggestions seeking to balance that need against the goals and purposes of \textit{Crawford}.\textsuperscript{162} Included among these suggestions is that perhaps in certain settings, the immutability of the \textit{Crawford} principles should be modified.\textsuperscript{163}

\textit{Nontestimonial Statements}

\textit{Crawford} offered both general and specific examples of nontestimonial statements, such as business records,\textsuperscript{164} statements in furtherance of a conspiracy,\textsuperscript{165} off-hand overheard remarks,\textsuperscript{166} casual

\begin{itemize}
\item \textsuperscript{158} Mnookin, \textit{supra} note 153, at 794, 829–32.
\item \textsuperscript{159} See \textit{id.} at 806; \textit{see generally, id} at 809–842.
\item \textsuperscript{160} \textit{Id.} at 843.
\item \textsuperscript{161} \textit{Id.} at 823–25 (citing \textit{People v. Goldstein}, 6 N.Y.3d 119, 843 N.E.2d 727 (2005)).
\item \textsuperscript{162} \textit{Id.} at 858–62.
\item \textsuperscript{163} \textit{Id.} at 860.
\item \textsuperscript{164} \textit{541 U.S. 36, 56} (2004).
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.} at 51.
\end{itemize}
remarks to an acquaintance, statements by one prisoner to another blaming defendant for his incarceration, and statements made unwittingly to an FBI informant.

The majority opinion was a study in deliberate ambiguity as to whether the Confrontation Clause is exclusively concerned with testimonial statements or if it encompasses nontestimonial hearsay as well. Given this ambiguity, most state and federal courts had concluded that the admissibility of nontestimonial hearsay statements is still governed by the Ohio v. Roberts indicia of reliability framework.

Subsequently in Davis, after noting that it had not been necessary to resolve the question in Crawford, Justice Scalia stated: “We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay.” In so doing, he sought to put the final nail in

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167 Id.
170 Compare Crawford, 541 U.S. at 53 (“Even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object. . . ”), with id. at 68 (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law–as does [Ohio v.] Roberts and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”). Compare id. at 50 (“This [testimonial] focus also suggests that not all hearsay implicates the Sixth Amendment’s core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.”), with id. at 51 (“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.”); see 541 U.S. at 61 (while the analysis in Crawford casts doubt on Confrontation Clause protection for nontestimonial statements, there is no need to definitively resolve the issue because Sylvia Crawford’s statement is testimonial under any definition). Chief Justice Rehnquist had no doubt that the Crawford majority “choosing the path it [did] of course overturned Roberts.” 541 U.S. at 75.
Despite the relative clarity of the opinion, some state and federal courts still use the *Roberts* framework to test the admissibility of nontestimonial statements.

Finally, in *Whorton v. Bockting*, an unanimous Court held that *Crawford* was not a “watershed decision implicating fundamental fairness and accuracy,” and thus undeserving of retroactive application in a collateral proceeding. In that opinion, Justice Alito, for a unanimous Court, nailed the *Roberts* coffin shut.

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173 See *id.* at 2273 (“It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.”); *id.* (“Only [testimonial] statements . . . cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause.”); *id.* at 2274 (“A [testimonial] limitation so clearly reflected in the text of the [Sixth Amendment] must fairly be said to mark out not merely its ‘core,’ but its perimeter.”). *See also* 126 S.Ct. at 2275 n.4 (“We overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.”); 126 S.Ct. at 2280 (“*Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings” via the forfeiture doctrine).

174 *But see* James J. Duane, *The Cryptographic Coroner's Report on Ohio v. Roberts*, 2006 Fall C RIM. JUST. 37, 37–38 (2006) (Justice Scalia’s statement of overruling, “like the Da Vinci code, was one you have to look quite closely to find. . . . It is hard to imagine how [overruling *Roberts*] could have possibly been announced any more subtly or indirectly without using some foreign language.”).

175 *See, e.g.*, Middleton v. Roper, 455 F.3d 838, 857–58 n.6 (8th Cir. 2006); State v. Blue, 717 N.W.2d 558, 565 (N.D. 2006). Within two weeks of each other, two panels of the Seventh Circuit, with one judge in common, reached sort of different conclusions. *Compare* United States v. Thomas, 453 F.3d 838, 844 (7th Cir. 2006) (nontestimonial statements, which continue to be evaluated under *Ohio v. Roberts*, implicate the confrontation right), *with* United States v. Tolliver, 454 F.3d 660, 665 n.2 (7th Cir. 2006) (*Davis* “appears” to have held that nontestimonial statements are not subject to the Confrontation Clause).


177 *Id.* (“*Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause. . . . Under *Crawford*, . . . the Confrontation Clause has no application to [out-of-court nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability.”). As seen from the text in note 170, *supra*, *Crawford* did not overrule *Roberts* with respect to protection for unreliable nontestimonial statements. *See* Mosteller, *supra* note 18, at 700 n.56.
In his symposium article, Duke University Professor Robert Mosteller mourns the loss of Confrontation Clause protection provided by *Roberts* for unreliable nontestimonial accusatory hearsay statements. In particular, he points to the Court’s holding in *Idaho v. Wright* that the Confrontation Clause had been violated by the introduction at trial of a young child’s accusatory statements that had been elicited by the leading question of a pediatrician, and which were not otherwise supported by the *Roberts* required particularized guarantees of trustworthiness.

Professor Mosteller argues problematic hearsay of this ilk is on the periphery of the confrontation right, presenting a “functionally related” problem that ought to lend itself to Confrontation Clause protection, even if not as complete as that required for core violations. In support of his argument, *inter alia*, he points to other areas of constitutional criminal procedure in which additional types of protections have been guaranteed, the historical relationship between confrontation and hearsay, the ambiguities of the Raleigh trial involving three different hearsay kinds of statements, and the difficulty and uncertainty of translating history, channeling the Framers, and applying it all in a modern context.

Professor Mosteller acknowledges that with *Roberts’* demise, constitutional protection against problematic nontestimonial hearsay

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178 Mosteller, *supra* note 18, 15 J.L. & Pol’y at 686. Of course, Professor Mosteller would be more than satisfied if the Court brought unreliable accusatory statements to private individuals under the testimonial umbrella, but he is doubtful the Court will do so. See Mosteller, *supra* note 117, at 948. The testimonial nature of such statements is considered in the text accompanying notes 108–34, *supra*.

179 497 U.S. 805, 818–25 (1990). The decision in *Wright* is notable by the *Crawford* majority’s failure to discuss or even mention it. See Introduction, *supra* note 18, at 1, 3–4 n.11. The confrontation violation in *Wright* might also be present under *Crawford* because there was evidence in the record that the pediatrician was acting at the behest of the police, and the child has spent the night before the interview in police custody. See Margaret A. Berger, *DeConstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 603–04 (1992).

180 Mosteller, *supra* note 18, at 701–02.

181 *Id.* at 701–03.

182 *Id.* at 712–18 (Cobham’s ex parte examination and letters to the Privy Council, and the trial testimony of an ocean pilot describing a Lisbon conversation with a Portuguese gentleman, discussed in note 18, *supra*).

183 *Id.* at 19–22.
statements must find another home. That new home may be the Due Process Clause, which, unlike the Confrontation Clause, is concerned with the reliability of evidence. Whether a hearsay statement is within a firmly-rooted hearsay exception has no relevance in a due process reliability inquiry.

Forfeiture

In dictum, Crawford accepted “the rule of forfeiture by wrongdoing [which] extinguishes confrontation claims on essentially equitable grounds.” In Davis, the Court reiterated that acceptance.

As noted earlier, Davis rejected a more flexible testimonial standard for statements made by domestic violence victims. Lower courts, however, may well be more responsive to greater flexibility with regard to forfeiture in the domestic violence setting, given the invitation to do so by Davis: domestic violence crimes are “notoriously susceptible to intimidation or coercion of the victim to
ensure that she does not testify at trial.”190 The opinion continued: “when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.”191

In related dicta, the Court touched upon procedural aspects of forfeiture. Thus, while “tak[ing] no position on the standards necessary to demonstrate such forfeiture,”192 Davis went out of its way to note that “. . . federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine,193 have generally held the Government to the preponderance-of-the-evidence standard [and] [s]tate courts tend to follow the same practice.”194 Moreover, the advisory and dicta-prone majority noted that if a hearing on forfeiture is required, “hearsay evidence, including the unavailable witness’s out-of-court statements, may be considered.”195

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In his article, University of South Carolina Professor James Flanagan’s primary argument is that forfeiture by wrongdoing, which he believes should instead be called “waiver by misconduct,” should not occur without the defendant’s intent to cause a witness’s unavailability.196 Professor Flanagan acknowledges that Crawford’s

190 Id.
191 Id. at 2279–80.
192 Id. at 2280.
193 On its face, FRE 804(b)(6) requires an intent to prevent a witness from testifying as an element of forfeiture. Post Davis, whether constitutional forfeiture requires that same intent has divided the courts. Compare, e.g., State v. Mason, 162 P.3d 396, 404 (Wash. 2007) (no intent required), with People v. Moreno, 160 P.3d 243, 245–47 (Colo. 2007) (intent required). See also People v. Stechly, 870 N.E.2d 333, 350–52, 353 (Ill. 2007) (requiring an intent but noting that there may be an exception in homicide cases) (authorities on both sides collected).
194 Davis, 126 S.Ct at 2280 (emphasis supplied and citation omitted). But see Davis, 162 P.3d at 404 (requiring clear and convincing evidence establishing that the accused’s wrongdoing has caused the unavailability of the declarant); People v. Geraci, 85 N.Y.2d 359, 367, 649 N.E.2d 817 (1995) (same).
195 126 S.Ct. at 2280.
references to the doctrine of waiver as “forfeiture by wrongdoing” implied that intent was irrelevant and that confrontation rights could be terminated whenever the witness’s absence could be traced to the defendant’s wrongdoing. As a result, post-Crawford lower court decisions expanded the doctrine far beyond prior precedent and history.198

The Davis opinion corrected this misimpression, concludes Professor Flanagan, when it “all but stat[ed] that the estoppel doctrine is limited to witness-tampering cases.”199 Professor Flanagan also notes that Justice Scalia’s use of such words as “procure” and “coerce” with regard to silencing witnesses describes “purposeful acts” on the part of the defendant, as does the reference to interference with the “judicial process.”200 Professor Flanagan concludes: “Davis seems to have clearly adopted the intent to prevent testimony element.”201

Professor Deborah Tuerkheimer focuses on the need to reconceptualize the forfeiture doctrine as it applies to domestic violence cases and their hallmark abusive relationships.202 In many of those cases, she points out, the abuse that rendered the victim unavailable had occurred even before the crime charged was committed.203 Consequently, there is an absence of traditional witness tampering and the abuse involved is not always identified as misconduct. Accordingly, she reasons that to properly address forfeiture principles in domestic violence settings, courts must recognize and acknowledge patterns of violence and abuse. In this regard, Professor Tuerkheimer emphasizes the crucial need to consider the relationship between the abusing defendant and the abused victim in determining whether the defendant has caused the victim to be

197 Id. at 874.
198 Id. at 875–78.
199 Id. at 878.
200 Id. at 880–82.
201 Id. at 887. Professor Flanagan further argues that courts should require a “but for” causal connection between the defendant’s act and the witness’s unavailability, and he sets forth several reasons for a stronger causal relationship. Id. at 891.
202 Tuerkheimer, supra note 60, at 746.
203 Id. at 747.
Professor Myrna Raeder views an intent to prevent a person from testifying as not being required when that person has been murdered, but should be required in domestic violence cases when a domestic violence victim fails to appear at trial. Professor Raeder rejects the arguments that forfeiture should be presumed and that particularized evidence should be required to establish that the defendant caused the victim’s absence with the intent to prevent the victim from testifying. She also notes that placing the burden on defendant to prove a lack of coercion or misconduct seems particularly unfair because of the inherent difficulties in proving a negative. Finally, Professor Raeder, like Professor Tuerkheimer, advocates for an expanded relevance standard with respect to forfeiture in domestic violence cases—including evidence of abusive patterns, individual acts of abuse, prior charges of abuse, prior recantations by the victim, and evidence of post-traumatic stress disorder.

The above highlights of the articles from this symposium barely scratch the surface of the confrontation treasures in store for the reader. Also awaiting Crawford-philes is a seemingly endless flow of state and federal confrontation/hearsay decisions, at least a few of which will end up in the Supreme Court. Indeed this past June, a petition for certiorari was filed with respect to the testimonial nature of laboratory reports. Doubtless other cases will reach the Court, as it seeks, “in a process that will take decades,” to fashion a comprehensive Confrontation Clause Code of Evidence. Crawford and Beyond III et seq. will be waiting patiently in the wings. Put another way, “It ain’t over ‘till it’s over.”

204 Id. at 748.
205 Raeder, supra note 84, at 778–79.
206 Id. at 780–81.
207 Id.
208 Id.
209 Compare, State v. March, 216 S.W.3d 663, 666 (Mo. 2007) (laboratory report that substance tested was cocaine prepared solely to be introduced at trial is “testimonial” as it bears all the characteristics of an ex parte affidavit) cert pet. pending No. 06-1699, sched. for conf. 9/24/07, with Commonwealth v. Verde, 827 N.E.2d 701, 705 (Mass. 2005) (public laboratory report identifying a tested substance as cocaine is a nontestimonial public record).
210 Friedman, supra note 74, at 586.
211 YOGI BERRA, supra *, at 121.
NOT “THE FRAMERS’ DESIGN”: HOW THE FRAMING-ERA BAN AGAINST HEARSAY EVIDENCE REFUTES THE CRAWFORD-DAVIS “TESTIMONIAL” FORMULATION OF THE SCOPE OF THE ORIGINAL CONFRONTATION CLAUSE

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INTRODUCTION

According to proponents, an originalist approach to constitutional interpretation injects discipline into constitutional decision-making.1 At least in criminal procedure, this claim is

1 Originalists also assert that the original understanding of a
unrealistic. Instead, the originalist claims that have appeared in recent criminal procedure decisions have usually reflected the ideological proclivities of the justices who made them, but have rarely resembled the historical legal doctrines that actually shaped the Framers’ understanding.2

The divergence between originalist claims and historical doctrine has been particularly apparent in two recent decisions that construed the Sixth Amendment Confrontation Clause3 with regard to the admission of hearsay evidence in criminal trials. In the 2004 decision *Crawford v. Washington*,4 and again in the 2006 decision *Davis v. Washington*,5 Justice Scalia asserted in opinions for the Court that “the Framers’ design”6 for the scope of the confrontation right was that the right should regulate the admission as evidence in criminal trials of only “testimonial” out-of-court statements, but not apply at all to less formal, “nontestimonial” hearsay evidence.

As a practical matter, it seems likely that the narrow scope accorded to the confrontation right in *Crawford* will allow prosecutors considerable room to use hearsay evidence in criminal cases rather than produce the person who made the out-

constitutional provision is entitled to heightened normative status as the content that was actually adopted. Given that stance, it is appropriate that claims of original meaning should be made only if there is clear historical evidence supporting the claim. See Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford’s “Cross-Examination Rule”; A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 571-73 (2007).


3 In relevant part, the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI. That provision explicates an aspect of the provision in the Constitution that provides that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.” U.S. CONST. art. III, § 2, cl. 3.


5 126 S.Ct. 2266 (2006)

6 *Crawford*, 541 U.S. at 68.
of-court statement as a trial witness, even when the person who made the hearsay statement is readily available to be called. Thus, the Crawford formulation of the limited scope of the right appears to mean that criminal defendants will often be deprived of meeting face to face the available declarant who made the out-of-court statement and will also be deprived of cross-examining the declarant in the view of the jury. Is that outcome really consistent with the framing-era doctrine that shaped the Framers’ understanding of the confrontation right?

Plainly not. Although Justice Scalia endorsed formulating the Confrontation Clause to permit “only those [hearsay] exceptions established at the time of the founding,”7 he did not follow through on identifying such exceptions in Crawford or Davis.8 If he had actually canvassed the framing-era evidence authorities, he would have discovered that framing-era evidence doctrine imposed a virtually total ban against using unsworn hearsay evidence to prove a criminal defendant’s guilt.9 Although

7 Id. at 54.
8 The absence of historical evidence regarding the claims in Crawford about the scope of the confrontation right may not be immediately apparent because Justice Scalia did mention a few of the relevant authorities when he discussed the so-called “cross-examination rule” that Crawford construed as the substantive content of the confrontation right regarding the admission of testimonial hearsay in criminal trials. See Crawford, 541 U.S. at 42-50. However, Justice Scalia did not discuss the framing-era authorities when he discussed the limitation of the scope of the confrontation right to testimonial, rather than nontestimonial, hearsay. See id. at 50-53.
9 I refer to “unsworn hearsay” for clarity, although that usage is actually redundant in framing-era parlance, because hearsay was defined simply as an unsworn out-of-court statement by someone other than the defendant. See, e.g., infra text accompanying notes 124, 137, 144. One difficulty in writing about the historical evolution of hearsay doctrine is that the doctrinal definition of hearsay has changed over time.

Today, hearsay is typically defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801 (c). For a discussion of the features of that definition, see, e.g., JONES ON EVIDENCE: CIVIL AND CRIMINAL §§ 24:2-24:31 (Clifford S. Fishman ed., 7th ed. 2000). However, the eighteenth-century legal authorities did not include the qualification that the statement be offered “for the truth of the matter
framing-era law did permit some hearsay evidence to be admitted regarding certain specific issues in civil lawsuit trials, those exceptions were not understood to apply to criminal trials. Instead, as of 1789, a dying declaration of a murder victim was the only kind of unsworn out-of-court statement that could be admitted in a criminal trial to prove the guilt of the defendant. Otherwise, the hearsay “exceptions” that now constitute a prominent feature of criminal evidence law had not yet been invented. Instead, nineteenth-century judges invented the hearsay exceptions that now apply to criminal trials only after the framing. Hence, it is clear that the Framers did not design the Confrontation Clause so as to accommodate the admission of unsworn hearsay statements.

Indeed, the framing-era authorities indicate that admission of hearsay statements would have violated basic principles of common-law criminal evidence. In particular, the framing-era sources indicate that the confrontation right itself prohibited the use of hearsay statements as evidence of the defendant’s guilt. The condemnations of hearsay that appeared in prominent and widely used framing-era authorities typically recognized that the admission of a hearsay statement would deprive the defendant of the opportunity to cross-examine the speaker in the presence of the trial jury, and that opportunity to cross-examine was understood to be a salient aspect of the confrontation right. Thus, the framing-era sources actually suggest that the Framers would not have approved of the hearsay exceptions that were later invented because the Framers would have perceived such exceptions to violate a defendant’s confrontation right.

Hence, Crawford’s testimonial formulation of the scope of the confrontation right does not reflect “the Framers’ design.” Rather, Crawford’s permissive allowance of unsworn hearsay is inconsistent with the basic premises that shaped the Framers’ understanding of the right. Thus, whatever might be said for or asserted.” Rather, the historical authorities cited in this article simply defined hearsay to include any unsworn out-of-court statement. I speculate that the offered-for-the-truth qualification was added to the definition of hearsay when the “res gestae” concept was developed during the nineteenth century. See infra note 279.
against *Crawford’s* formulation as a matter of contemporary constitutional policy, the fictional character of the historical claims made in that opinion constitute further evidence that originalism is a defective approach to constitutional decision-making.

**OVERVIEW OF THIS ARTICLE**

This article documents the fictional character of *Crawford’s* historical claim that the scope of the original Confrontation Clause reached only testimonial but not nontestimonial hearsay statements.\(^\text{10}\) Part I briefly reviews the originalist claims in *Crawford* and *Davis*, calling particular attention to the point that Justice Scalia did not base his originalist claim regarding the limited scope of the confrontation right on direct evidence of the treatment of hearsay statements in the framing-era legal authorities, but rather based it only on “reasonable inference[s]” that he drew from the general history of the right and from the use of the term “witnesses” in the text of the Clause. I argue, however, that the validity of his “reasonable inference[s]” actually depends upon whether framing-era law recognized exceptions to the ban against hearsay that would have permitted

\(^{10}\) I have previously criticized the originalist claims made in *Crawford* about the scope of the confrontation right in Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOKLYN L. REV. 105, 189-206 (2005).

In my previous article, I argued that there was no historical basis for *Crawford’s* distinction between “testimonial” and “nontestimonial” hearsay, but I accepted the view, evident in some recent historical commentary, that hearsay exceptions were still “embryonic” at the time the Bill of Rights was framed. *See id.* at 196-200. However, further research on framing-era doctrine indicates that the hearsay exceptions that are now pertinent to criminal trials were not merely underdeveloped but virtually non-existent at the time of the framing. Hence, the criticisms in my prior article actually understated the fictional character of *Crawford’s* originalist claims about the testimonial scope of the original Confrontation Clause. The fictional character of the Court’s justification for restricting the scope of the right is significant because it increasingly appears that the restriction of the confrontation right to only “testimonial” but not “nontestimonial” hearsay will be the more important aspect of *Crawford’s* originalist formulation. *See infra* note 291.
the admission of unsworn, informal hearsay statements.

Part II examines the framing-era legal authorities to explicate how framing-era law actually treated the admissibility of out-of-court statements. According to those authorities, the only two kinds of out-of-court statements that constituted admissible criminal evidence involved either a sworn statement of an unavailable witness (in the case of a Marian witness examination of a deceased witness) or a functionally sworn statement of an unavailable witness (in the case of a dying declaration of a murder victim). However, those authorities did not identify any exceptions to the ban against using unsworn out-of-court statements, or even sworn statements of available witnesses, as evidence of the defendant’s guilt. Indeed, the framing-era authorities did not treat the ban against hearsay and the confrontation right as being analytically independent of one another. Rather, those authorities treated the defendant’s right to cross-examine—that is, the confrontation right—as one of the principles that required the ban against the use of hearsay statements to prove a defendant’s guilt. Hence, Crawford’s insistence on defining the scope of the confrontation right without regard to the law of evidence at the time of the framing is itself a departure from the Framers’ understanding of the right.

Next, Part III closely examines the few historical cases that were discussed in Davis, and argues that what judges actually ruled in those cases is consistent with the description of historical evidence doctrine set out in Part II, rather than with the testimonial formulation of the confrontation right set out in Crawford. In particular, I note that the two cases that were identified in Davis for excluding an out-of-court statement both did so on the ground that the statement was not properly sworn, not because the statement was “testimonial” rather than “nontestimonial” in character. Additionally, a prominent framing-era source indicates that the only case identified in Crawford or Davis that might appear to admit a nontestimonial hearsay statement under an “excited utterance” or “res gestae” exception actually involved a very different consideration. The bottom line is that neither Crawford nor Davis identified a single
example of a framing-era case that actually admitted unsworn hearsay as evidence of a criminal defendant’s guilt.

The contrast between the ban against admitting unsworn hearsay evidence of a defendant’s guilt during the framing era and the variety of exceptions that now frequently permit use of hearsay evidence in criminal trials poses an obvious question: when and why did post-framing judges invent the current hearsay exceptions? Part IV offers additional evidence that the current hearsay exceptions post-date the framing, and speculates as to some of the reasons why nineteenth-century judges departed from the original confrontation right by allowing the use of hearsay evidence.

Finally, the article concludes by arguing, as I have on prior occasions, that originalism is a fundamentally flawed approach to constitutional interpretation in criminal procedure issues because originalists fail to grasp—or to admit—the degree to which legal doctrine and legal institutions have changed since the framing.11

11 For clarity, let me stress that I am not an originalist and do not criticize Justice Scalia’s formulation of the original Confrontation Clause to advocate an alternative originalist program for criminal procedure. Rather, I do not think it is either feasible or desirable to return to the original conception of that Clause or the other criminal procedure provisions in the Bill of Rights. See, e.g., Davies, supra note 10, at 206-17; Thomas Y. Davies, Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right” in Chavez v. Martinez, 70 TENN. L. REV. 987, 1043-1045 (2003) [hereinafter, “Davies, Fifth Amendment”]; Davies, supra note 2 at 436-37; Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 MICH. L. REV. 547, 740-750 (1999) [hereinafter “Davies, Fourth Amendment”].

My point is simply that a Justice should not invoke “the Framers’ design” as an elevated normative justification for criminal procedure rulings unless there is actually clear evidence of the original meaning in the authentic framing-era sources. Fictional originalist claims cannot provide legitimate justifications for constitutional rulings.
I. THE ORIGINALIST CLAIMS ABOUT THE SCOPE OF THE CONFRONTATION CLAUSE IN CRAWFORD AND DAVIS

In modern doctrine, the relationship between the allowance of hearsay evidence and the confrontation right presents a conundrum: how can the admission of hearsay evidence in criminal trials be justified given that the defendant can neither meet the out-of-court declarant face-to-face nor cross examine the out-of-court declarant in the view of the jury? The Supreme Court previously recognized that conundrum when it stated that “a literal reading of the Confrontation Clause would ‘abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.’”

In Crawford, Justice Scalia purported to solve the conundrum by reference to “the Framers’ design” for a testimonial confrontation right. In Davis, Justice Scalia then repeated the same originalist formulation when he undertook to explain the testimonial boundary of the cross-examination right announced in Crawford. The most significant feature of the originalist claims about the testimonial scope of the confrontation right in these two cases is that Justice Scalia did not base his formulation of “the Framers’ design” on “direct evidence” of the common-law confrontation right as it was understood in 1789, but instead only drew “reasonable inference[s]” about the scope of the right.

A. Crawford’s Testimonial Formulation of “the Framers’ Design”

Writing for the Court in 2004 in Crawford, Justice Scalia construed the confrontation right to be fairly strict in substance,

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12 Maryland v. Craig, 497 U.S. 836, 848 (1990) (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)). Note, however, that the term “long” in the passage quoted in the text does not precisely identify how far back in time the implied ban against hearsay exceptions had been rejected as being “too extreme.”

13 See infra note 47.
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but narrow in scope. With regard to the substance of the right, Justice Scalia asserted that the Framers intended to limit the use of out-of-court statements according to a “cross-examination rule”: that is, the Clause would bar the use of an out-of-court statement in a criminal trial unless (1) the declarant was unavailable to testify at trial and (2) the defendant had had a prior opportunity to cross examine the declarant.14 (I have previously criticized Crawford’s originalist claims regarding the cross-examination rule, but I do not address that aspect further in this article.15)

In contrast to the relatively strict substance accorded the confrontation right,16 Justice Scalia announced a narrow conception of the scope of the right. Justice Scalia described the use as evidence in criminal trials of formal out-of-court statements such as ex parte depositions as the “principal evil” targeted by the Clause17 and as the “core concern” addressed in the Clause.18 Thus, he asserted that the regulation of this type of hearsay, which he labeled “testimonial” hearsay, was the Framers’ “primary object.”19 Moreover, he asserted that, because the Framers were “focused” on testimonial hearsay,20 the Framers could not have intended for the Confrontation Clause to impede the admissibility of informal, “nontestimonial hearsay” at all. On that basis, the Court’s opinion in Crawford strongly suggested that the admissibility of nontestimonial hearsay statements does not implicate a constitutional standard but rather should be determined only by the (usually state) law

15 See infra note 120.
16 I describe Crawford’s cross-examination rule as a “relatively strict” standard because the requirement of an opportunity to cross-examine prior to trial is not actually equivalent to an opportunity to cross-examine in the presence of the trial jury. However, the latter was the historical understanding of the confrontation right. See, e.g., infra note 23, quoting the Supreme Court’s earlier iteration of the historical standard.
17 Crawford, 541 U.S. at 50.
18 Id. at 51, 60.
19 Id. at 53.
20 Id. at 51.
of hearsay evidence itself.\(^{21}\) (Although these statements about the scope of the right took the form of dicta in \textit{Crawford}, the Court subsequently adopted that formulation as law in \textit{Davis}.)\(^{22}\)

\textit{1. The Road to Crawford’s Testimonial Formulation}

Justice Scalia’s \textit{Crawford} opinion did not invent the narrowed, testimonial formulation of the scope of the confrontation right. A number of prior Supreme Court opinions had asserted that the Framers had been primarily concerned with preventing trial by \textit{ex parte} deposition.\(^{23}\) However, the Court deviated from that view in the 1980 ruling \textit{Ohio v. Roberts},\(^{24}\) under which it more or less merged confrontation analysis with hearsay analysis.\(^{25}\) Subsequently, the \textit{Roberts} formulation was

\(^{21}\) \textit{Id.} at 68.

\(^{22}\) In \textit{Crawford}, Justice Scalia concluded that that case did not present a vehicle for authoritatively ruling on the scope of the right because the hearsay statement at issue was so obviously “testimonial” that it would be subject to the confrontation right under any construction of the scope of the Confrontation Clause, and thus the issue of the scope of the right was not properly before the Court. 541 U.S. at 53. However, because the two cases decided in \textit{Davis} presented closer questions regarding the applicability of the right, the \textit{Davis} opinion clearly ruled that the scope of the confrontation right is limited to testimonial hearsay statements. Davis v. Washington, 126 S.Ct. 2266, 2274-76 (2006).

\(^{23}\) For example, in 1895, the Supreme Court stated that:

The primary object of [the Confrontation Clause] was to prevent depositions or \textit{ex parte} affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.


\(^{24}\) 448 U.S. 56 (1980).

\(^{25}\) See \textit{e.g.}, Daniel J. Capra, \textit{Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford}, 105 COLUM. L.
widely criticized as robbing the confrontation right of any independent substance.26

Perhaps to place a restrictive view of the confrontation right on a firmer constitutional footing, the Justice Department proposed a narrow, purportedly textualist construction of the scope of the Confrontation Clause in a 1992 amicus brief in White v. Illinois.27 In response, Justice Thomas endorsed limiting the scope of the confrontation right to what he termed “testimonial materials” in a concurring opinion in White, which Justice Scalia joined.28 Thereafter, several commentators also endorsed proposals to limit the scope of the right with regard to hearsay evidence.29 Of course, Justice Scalia’s Crawford opinion limited the scope of the right in a similar fashion, but the originalist rationale he offered for his “testimonial” formulation

26 See e.g., Randolph N. Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 UCLA L. REV. 557, 575 (1988) (concluding that the Roberts approach made the Confrontation Clause “a mere vestigial appendix of hearsay doctrine”); David E. Seidelson, The Confrontation Clause, the Right Against Self-Incrimination and the Supreme Court: A Critique and Some Modest Proposals, 20 DUQ. L. REV. 429, 433 (1982) (concluding that the Roberts approach made the Confrontation Clause “nothing more than a ‘constitutional hearsay rule’ subject to many exceptions”).

27 Brief for the United States as Amicus Curiae Supporting Respondent at 17-29, White v. Illinois, 502 U.S. 346 (1992) (arguing that the term “witnesses” in the Confrontation Clause indicates that it should apply only to those persons who provide in-court testimony or the functional equivalent in the form of affidavits, depositions, confessions, etc).


differed significantly from that presented in prior proposals.

The previous proponents of a testimonial construction who took an originalist approach had assumed that framing-era law recognized hearsay exceptions and, thus, that the Framers must have framed the confrontation right to allow for such exceptions. For example, when Justice Thomas endorsed limiting the Confrontation Clause to only testimonial hearsay statements in White, he rested that proposal on an assumption that hearsay exceptions already existed during the framing era: “there is little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation.” However, although Justice Thomas assumed that the framing-era confrontation right was analytically independent of hearsay analysis, he did not actually identify any hearsay exceptions that had emerged by the date of the framing.

Similarly, when Professor Amar advocated a restriction of the confrontation right to testimonial hearsay statements, he also premised that proposal on the assumption that “surely all hearsay cannot be unconstitutional [because a]t common law, the traditional hearsay ‘rule’ was notoriously unruly, recognizing countless exceptions to its basic preference for live testimony.” However, like Justice Thomas, Amar also provided no examples of those “countless exceptions.”

Perhaps because the testimonial formulation of the confrontation right seemed to depend upon the purported existence of framing-era criminal hearsay exceptions, the Solicitor General’s amicus brief in Crawford undertook to document such exceptions. However the listing offered in that

30 Although Professor Friedman’s article did briefly describe the early history of the confrontation right to the middle of the seventeenth century, it did not address the relationship between the confrontation right and hearsay evidence at the time of the framing. See Friedman, supra note 25, at 1022-25.


32 AMAR, CRIMINAL PROCEDURE, supra note 29, at 94.
brief distorted historical doctrine.\textsuperscript{33} Moreover, Chief Justice

\textsuperscript{33} The text of the amicus brief of the United States asserted that:

The hearsay rule [] is a feature of evidence law applicable to all litigants in both civil and criminal proceedings. The “appreciation of the impropriety of using hearsay statements” took increasing hold in England during the 17\textsuperscript{th} century; and by the early 18\textsuperscript{th} century, the general prohibition against admitting hearsay declarations “received a fairly constant enforcement.” 5 J. Wigmore [Evidence], §1364, at 18 [Chadbourne rev. ed. 1974]. \textit{From the outset, however the hearsay rule was subject to well recognized (and enduring) exceptions.}

Brief of the United States as Amicus Curiae Supporting Respondent at 12-13, Crawford v. Washington, 541 U.S. 36 (2004) (emphasis added). In an accompanying footnote, the amicus brief asserted the following specific exceptions:

At least the following exceptions had taken shape by the late 18\textsuperscript{th} century: dying declarations, regularly kept records, co-conspirator declarations, evidence of pedigree and family history, and various kinds of reputation evidence. See Patton v. Freeman, 1 N.J.L. 113,115 (N.J. 1791) (co-conspirator declarations); 5 J. Wigmore, [Evidence], § 1430, at 275 [Chadbourne rev. ed. 1974] (dying declarations); id. § 1518, at 426-428 (regularly kept records); id. § 1476, at 350 (declarations against interest by deceased persons); id. § 1476, at 352-358 (statements of fact against penal interest); id. § 1480, at 363 (pedigree and family history); id. § 1580, at 544 (reputation evidence); 3 J. Wigmore, supra, § 735, at 78-84 (past recollection recorded). See also 3 W. Blackstone, Commentaries on the Law of England 368 (1768).

\textit{Id.} at 13 n. 5 (repeating claims about framing-era hearsay exceptions previously made in Brief of the United States as Amicus Curiae Supporting Respondent at 24 n. 14, White v. Illinois, 502 U.S. 346 (1992)).

These passages distorted the law of hearsay in 1789 in a variety of ways. To begin with, the amicus brief erred in suggesting that historical hearsay exceptions applied equally in civil and criminal trials. To the contrary, the confrontation right incorporated in the Sixth Amendment pertained to \textit{criminal} trials and it was understood at the time of the framing that the hearsay exceptions allowed in trials of civil lawsuits did \textit{not} apply to evidence in criminal trials. See \textit{infra} note 162 and accompanying text. Hence, civil hearsay exceptions had no bearing on the confrontation right.

Likewise, the brief’s suggestion that Blackstone endorsed hearsay exceptions was overstated. Blackstone actually indicated that hearsay
exceptions that applied in civil lawsuit trials were quite limited, but did not mention hearsay being admissible in criminal trials at all. The passage cited in the amicus brief, which appeared in Blackstone’s discussion of civil lawsuits, the subject of volume three of his Commentaries, actually stated:

So no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as proof of any general customs, or matters of common tradition or repute) the courts admit of hearsay evidence, or an account of what persons deceased have declared in their lifetime: but such evidence will not be received of particular facts.

3 BLACKSTONE, supra, at 368 (emphasis added). That is hardly a ringing endorsement of hearsay exceptions even in civil trials.

Additionally, the only historical hearsay exception identified in the Solicitor General’s amicus brief that was actually pertinent to evidence in criminal trials was that for dying declarations; however, even that exception was limited to the declaration of a “murder victim.” See infra text accompanying notes 147-154. The other exceptions the brief mentioned that might appear to be pertinent to criminal trials actually were not recognized in framing-era sources. For example, the citation in the amicus brief of the 1791 New Jersey decision in Patton v. Freeman as authority for a “co-conspirator declarations” exception was misleading. Patton was a civil damages lawsuit for fraud, not a criminal case; the court prefaced its rulings by noting that the case was “a civil action” involving “the interests of the plaintiff in a civil suit.” The case simply did not address admissible criminal evidence. As I explain below, at the time of the framing, statements of co-conspirators could sometimes be admitted to prove the general existence of a conspiracy but could not be admitted to prove the defendant’s personal involvement in it. See infra note 126.

There is also no basis for the assertion in the Solicitor General’s brief that framing-era sources recognized an exception for “statements against penal interest.” Instead, the passage by Wigmore cited in the amicus brief as authority for that exception actually claimed only that a broad exception for “declarations of facts against interest” (presumably in civil trials) emerged “from 1800 to about 1830”—that is, after the framing—and noted that the exception was subsequently limited “to exclude the statement of a fact subjecting the declarant to a criminal liability, and [was] confined to statements of facts against either pecuniary or property interest.” 5 Wigmore, supra, §1476, at 350-51. Likewise, the Wigmore passage cited by the amicus brief as authority for this claim (“§1476, at 352-358”) actually sets out nineteenth-century American state cases that addressed this issue and usually ruled “the confession” (that is, the statement against penal interest) inadmissible.

The reference in the amicus brief to an exception for “regularly kept
Rehnquist effectively threw cold water on that listing when he quoted what a prominent framing-era evidence authority had actually written on the subject of hearsay.

2. Chief Justice Rehnquist’s Historical Observation

In a concurring opinion in *Crawford*, Chief Justice Rehnquist opposed replacing the *Roberts* approach with the testimonial formulation adopted by the majority. In setting out his opposition, the Chief Justice pointed out that Justice Scalia’s testimonial formulation actually had no roots in framing-era law. In particular, the Chief Justice quoted a statement in the leading framing-era evidence treatise to the effect that “hearsay is no evidence” and correctly interpreted that to mean that unsworn out-of-court statements, made by anyone other than the accused, were generally not considered substantive evidence upon which a criminal conviction could be based.34 Thus, the Chief Justice concluded that “unsworn testimonial [hearsay] statements were treated no differently at common law than were nontestimonial [hearsay] statements.”35 Rather, the historical sources indicated that there was a general bar against the admission of unsworn records” was also exaggerated. Even in civil lawsuit trials, there was no broad exception for “regularly kept records” during the framing era; rather, there was only a narrow allowance for the admission of the “shop book” of a tradesman in a lawsuit over non-payment for goods. So far as I can determine, no framing-era authority suggested that the narrow “shop-book” exception was relevant to a criminal trial. See infra note 43.

In sum, except for the “dying declaration” exception, there was no substance to the historical claims the Solicitor General’s amicus brief made regarding supposed framing-era criminal hearsay exceptions.


35 *Crawford*, 541 U.S. at 71.
hearsay statements in a criminal trial.\textsuperscript{36} Nevertheless, Chief Justice Rehnquist did not consistently adhere to the implications of the framing-era doctrine that “[h]earsay is no evidence.” Rather, in later statements in his concurring opinion he suggested that there had “always” been hearsay exceptions, but did not identify them.\textsuperscript{37} Even so, the

\textsuperscript{36} The phrase “general bar” is actually Justice Scalia’s interpretation of Chief Justice Rehnquist’s position, but I think it is an accurate summation. See id. at 52 n. 3.

\textsuperscript{37} Chief Justice Rehnquist undertook to discredit the historical pedigree of the testimonial formulation while defending the previous formulation of the confrontation right in \textit{Roberts}. His opinion initially conceded that \textit{neither} the \textit{Roberts} formulation nor Justice Scalia’s testimonial formulation was consistent with framing-era law. Id. at 69 (“The Court’s distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine”).

However, in a subsequent passage, the Chief Justice ignored the implication of the framing-era rule that he had quoted to the effect that “hearsay is no evidence” and instead asserted that “[b]etween 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed [so] there were always exceptions to the general rule of exclusion [of out-of-court statements], and it is not clear . . . that the Framers categorically wanted to eliminate further ones.” Id. at 73 (citing modern historical commentaries previously cited id. at 69 n. 1, including, among others, \textsc{John H. Langbein}, \textsc{The Origins of Adversary Criminal Trial} 238-39 (2003) [hereinafter, \textsc{Langbein, Adversary Trial”}; 5 \textsc{John H. Wigmore}, \textsc{Evidence} § 1364, 17, 19-20, 19, n. 33 (Chadbourne rev. ed. 1974); \textsc{T.P. Gallanis}, \textsc{The Rise of Modern Evidence Law}, 84 \textsc{Iowa L. Rev.} 499, 534-35 (1999); \textsc{Robert P. Mosteller}, \textsc{Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions}, 1993 \textsc{U. Ill. L. Rev.} 691, 738-46; \textsc{Stephan Landsman}, \textsc{Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England}, 75 \textsc{Cornell L. Rev.} 497, 506 (1990), and \textsc{John H. Langbein}, \textsc{Criminal Trial before the Lawyers}, 45 \textsc{U. Chi. L. Rev.} 263, 291-293 (1978)). Notably, however, the Chief Justice did \textit{not} identify any framing-era authority that actually identified hearsay exceptions under which unsworn out-of-court statements could be admitted to prove a criminal defendant’s guilt. Rather, the Chief Justice’s statement that modern histories show that “there were always exceptions” to the exclusion of hearsay statements was too broad insofar as it failed to distinguish between civil and criminal evidence. To the extent that general statements in the modern commentaries the Chief Justice cited might appear to indicate that there were legally recognized hearsay
Chief Justice’s quotation of historical doctrine undercut the previous originalist assumption that there must have been framing-era hearsay exceptions, and thus undermined the previous originalist testimonial formulations of the confrontation right.

3. Justice Scalia’s Historical Assertions

Like the Chief Justice, Justice Scalia also made inconsistent statements in *Crawford* regarding framing-era hearsay exceptions. At one point, Justice Scalia wrote that the Confrontation Clause “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”

Shortly thereafter, he followed the Chief Justice in asserting that “[t]here were always exceptions to the general rule of exclusion’ of hearsay evidence” and also asserted that “[s]everal [hearsay exceptions] had become well established by 1791.” In that context, Justice Scalia specifically asserted that hearsay exceptions had existed for “business records” and for “statements in furtherance of a conspiracy.”

exceptions that applied in framing-era criminal trials (other than dying declarations of murder victims) those statements were overbroad and incorrect, as the review of framing-era authorities set out in Part II of this article demonstrates.

38 *Crawford*, 541 U.S. at 54 (citing Mattox v. United States, 156 U.S. 237, 243 (1895); cf. State v. Houser 26 Mo. 431, 433-35 (1858)).
39 Id. at 56 (quoting id. at 73 (Rehnquist, C.J., concurring)).
41 After quoting Chief Justice Rehnquist’s assertion that “[t]here were always exceptions to the general rule of exclusion” of hearsay evidence, Justice Scalia wrote:

Several [hearsay exceptions] had become well established by 1791. See 3 Wigmore [EVIDENCE] §1397, at 101 [2d ed. 1923]; Brief for the United States as Amicus Curiae 13 n. 5. Most of the hearsay examples covered statements that by their nature were not testimonial—for example business records or statements in furtherance of a conspiracy. We do not infer that
Scalia offered no significant support for those historical claims. The general statements he cited as evidence that there had been relevant hearsay exceptions in 1791 were overgeneralized or insubstantial, and the specific examples he offered were overblown: even in civil lawsuits, framing-era sources did not recognize anything like the modern “business records” exception, and framing-era sources consistently stated that a

the Framers thought exceptions would apply even to prior testimony.

541 U.S. at 56.

Justice Scalia cited a passage by Dean Wigmore and the amicus brief of the United States as authority for his general claim that “several [hearsay exceptions] had become well established by 1791.” See 541 U.S. at 56 (passage quoted supra preceding note). However, neither of those sources constituted valid support for that claim.

The passage from Wigmore that Justice Scalia cited merely made a broad assertion that there were “a number of well established [hearsay exceptions] at the time of the earliest [American state] constitutions,” but did not actually identify any such exception. See 3 Wigmore, supra, § 1397, at 101 [2d ed. 1923], cited 541 U.S., at 56. Notably, Wigmore’s discussion did not distinguish between hearsay exceptions relevant to civil lawsuit trials and those relevant to criminal trials. Hence, his statement was too general to indicate that there had been hearsay exceptions applicable to criminal trials.

Additionally, the listing of purported framing-era hearsay exceptions in the amicus brief of the United States was insubstantial and erroneous, as described supra note 33.

Contrary to Justice Scalia’s suggestion, even in civil lawsuits there was no broad framing-era hearsay exception for “business records.” Rather, framing-era authorities recognized only that the “shop-book” of a merchant could be admitted as evidence to prove delivery of goods in civil lawsuits, in lieu of live testimony, provided two conditions were met: (1) the action for payment was brought within a year of the transaction, and (2) the clerk who regularly entered the accounts had died, and his handwriting in the book could be identified. Even in that circumstance, however, framing-era authorities referred to shop-book evidence as “written evidence” rather than as “hearsay.”

For example, in 1767, a leading treatise on evidence in trials in civil lawsuits stated the following in a discussion of written evidence:

Before we conclude with written Evidence, it is proper to take Notice of [the statute] 7 Jac. c. 12, which enacts, That the Shop-book of a Tradesman shall not be Evidence after a Year. However, it is not Evidence of itself within the Year, without
co-conspirator’s unsworn statement was not admissible to prove a criminal defendant’s personal guilt.44

Notwithstanding these assertions, at other points in Crawford, Justice Scalia seemed to question whether there had been framing-era hearsay exceptions that could be relevant to criminal trials. For example, he expressed a note of skepticism

some Circumstances to make it so. As if it be proved that the Servant who wrote it is dead, and that it is his Hand-Writing, and that he was accustomed to make the entries.

BATHURST, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 265-66 (1767) (“nisi prius” refers to trial jurisdiction).

In 1768, Blackstone essentially repeated Bathurst’s description of the conditions for admitting shop-book entries into evidence in his discussion of evidence in civil lawsuits:

So too, books of account, or shop-books, are not allowed of themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory: and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence: for as tradesmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompanied with such other collateral proofs of fairness and regularity, the best evidence that can then be produced . . . . However, this dangerous species of evidence is not carried so far in England as abroad; [because] the statute 7 Jac. I c. 12, (the penners of which seem to have imagined that the books of themselves were evidence at common law) confines this species of proof to such transactions as happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unravelled and adjusted.

3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 368-69 (1st ed. 1768) (citing “Law of nisi prius. 266”).


44 See infra note 126 and accompanying text.
as to whether there had been a framing-era “excited utterance” exception,\textsuperscript{45} and he noted that a commentary on the Confrontation Clause had previously concluded that the exception for dying declarations “was the only recognized criminal hearsay exception at common law.”\textsuperscript{46}

In still another passage, Justice Scalia seemed to adopt the position that it did not really matter what hearsay exceptions did or did not exist at the time of the framing. In a footnote responding to the Chief Justice, Justice Scalia asserted that the absence of “direct evidence” regarding the Framers’ view of the admissibility of unsworn hearsay evidence was not a problem for originalist analysis because the Framers’ design for the application of the confrontation right to hearsay exceptions \textit{that had not existed} at the time the Sixth Amendment was adopted could nevertheless be “estimated” by making “reasonable inference[s].”\textsuperscript{47}

\begin{footnotesize}
\begin{enumerate}
\item Crawford v. Washington, 541 U.S. 36, 58 n. 8 (2004) (suggesting that the historical spontaneous declaratiojn hearsay exception was narrow “to the extent the hearsay exception for spontaneous declarations existed at all”).
\item Id. at 56 n. 6 (quoting FRANCIS HELLER, THE SIXTH AMENDMENT 105 (1951) (emphasis in \textit{Crawford}). I concur with Professor Heller’s conclusion on this point, as indicated in Part II of this article.
\item Justice Scalia wrote:
\textit{... even if, as [the Chief Justice] claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference. [... ] Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly admissible unsworn testimony) involves some degree of estimation—what The Chief Justice calls use of a “proxy”—but that is hardly a reason not to make the estimation as accurate as possible. Even if, as The Chief Justice mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.}
\textit{Crawford}, 541 U.S. at 52 n. 3 (emphasis added).
\end{enumerate}
\end{footnotesize}
4. Justice Scalia’s “Reasonable Inferences”

In the text of his opinion, Justice Scalia offered two inferences regarding the Framers’ design for the confrontation right, one based on the language of the Confrontation Clause, and one based on the general history of the right. With regard to the text, Justice Scalia asserted that a distinction between testimonial and nontestimonial hearsay statements was implied by the use of the term “witnesses” in the Confrontation Clause. Drawing selectively on the definitions in a historical dictionary, he asserted that the use of “witnesses” in the text of the Confrontation Clause implied that the Framers were concerned only with statements that amounted to “testify[ing],” and thus inferred that “witnesses” revealed the Framers were concerned only with regulating “testimonial” statements, but not with the admission of more casual, nontestimonial hearsay statements.48

However, Justice Scalia’s textual analysis was unduly selective insofar as he ignored other definitions of “witness.”49 Additionally, he ignored a pertinent feature of historical usage—it does not appear that framing-era sources even used “testimonial” as an adjective, let alone as a designation for a category of hearsay.50 Thus, there is no reason to think that the


49 I have previously noted that Justice Scalia selectively discussed only one of the definitions of the verb “witness” but ignored broader definitions of the noun “witness” that appeared in the same dictionary. See Davies, supra note 10, at 193-94. For a more thorough criticism of this aspect of Crawford, see Randolph N. Jonakait, “Witnesses” in the Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process, 79 TEMPLE L. REV. 155 (2006).

50 Examination of framing-era sources indicates that the adjective “testimonial” was not used to describe a category of legal evidence during that period. In fact, those sources make it doubtful that “testimonial” was even used as an adjective during that period.

The only definitions of “Testimonial” that appear in early dictionaries treat it only as a noun indicating a writing that a person could produce to confirm their good character or conduct. Samuel Johnson defined
Framers conceived of the category of “testimonial hearsay.” Indeed, the restrictive concept of a “testimonial” statement that

“"TESTIMONIAL" only as a noun meaning “A writing produced by any one as an evidence for himself.” 2 A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johnson ed. 1755) (pages unnumbered). Likewise, Noah Webster defined “TESTIMONIAL” only as a noun meaning

“[a] writing or certificate in favor of one’s good character or good conduct. Testimonials are required on many occasions. A person must have testimonials of his learning and good conduct, before he can obtain a license to preach. Testimonials are to be signed by persons of known respectability of character.”

2 A N AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster ed. 1828) (pages unnumbered). Justice Scalia quoted a definition of “TESTIFY” that appears on the same page of this dictionary in Crawford, 541 U.S. at 51, but did not discuss the definition of “TESTIMONIAL” that appeared almost immediately below “TESTIFY.”

Likewise, word-searches of the digital versions of the framing-era treatises on evidence law do not reveal any usage of the term “testimonial.” Word searches of the framing-era treatises and manuals on criminal procedure reveal only a single usage: they use the word “testimonial” only when quoting the statute of 39 Eliz. c. 17, which used “testimonial” as a synonym for a military “pass.” See e.g., 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 691 (1736) (quoting the statute as making a felony “[i]dle or wandering soldiers coming from sea not having a testimonial under the hand of a justice of the peace, setting down the time and place of his landing, place of his landing and birth, and limiting a time a time for his passage thither . . . “); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 116 (1719) (same); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (1st ed. 1769) (describing 39 Eliz. c. 17 as requiring soldiers to have “a testimonial or pass from a justice of the peace”). In light of framing-era usage, there is no reason to think the Framers used or even conceived of the term “testimonial” hearsay.

In fact, Simon Greenleaf still did not use the term “testimonial” at all in the early editions of his leading nineteenth-century American evidence treatise. See SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (1st ed., three volumes published 1842, 1846, 1853). In the 1857 and 1892 editions, Greenleaf did use the term “testimonial,” but only as the name for a document. See 1 id. at 623 n. 1 (8th ed. 1857) (referring to a South Carolina statute regulating use of any “foreign testimonial, probate, certificate, &c” as evidence); 1 id. at 632-33 n. 17 (15th ed. 1892) (same). However, Greenleaf did use “testimonial” in a broader sense in his 1899 edition, as discussed infra note immediately following.
Justice Thomas introduced in *White*, and that Justice Scalia employed in *Crawford*, appears to have been unprecedented. When the term “testimonial” came into use as an adjective in evidence discourse, it simply referred to any statement in which the words of the speaker communicated information.51

The same narrow usage of “testimonial” as a term for a document is evident in LEXIS and WESTLAW searches of nineteenth-century Supreme Court case reports: in seventeen reports either the justices or counsel used the term “testimonial” as a noun referring to a record or certificate, while in one counsel used “testimonial” as an adjective in arguing that because a “verbal sale” of slaves was “null” under Louisiana law, “testimonial proof” of the sale instead of written evidence “shall not be admitted.” Zacharie v. Franklin, 37 U.S. 151, 157 (1838). In that instance, “testimonial proof” obviously referred simply to oral testimony as opposed to written evidence.

51 In the 1899 edition of his evidence treatise, Simon Greenleaf began to use “testimonial” in two ways that had not appeared in earlier editions. First, he subdivided all evidence into either “testimonial” or “circumstantial” evidence, and thus used “testimonial” to refer to all evidence in which “the factum probandum” [that is, the fact to be proved] is “directly attested by those who speak from their own actual and personal knowledge of its existence” as opposed to a fact “to be inferred from other facts, satisfactorily proved.” See 1 GREENLEAF, supra note 50, at 24 (16th ed. 1899). This notion of “testimonial evidence” appears throughout this edition. For example, Greenleaf used “testimonial” in this broad sense of a witness’s statement based on personal knowledge when he wrote in a later passage that “the vital and determinative” reason for “rejecting hearsay assertions” was “the desirability of testing all testimonial assertions by the oath and by cross-examination.” 1 id. at 184.

Additionally, Greenleaf also used “testimonial” in a slightly narrower sense when he wrote that the hearsay rule barred only “testimonial assertions” but not testimony about “utterances” when “the very fact in question is whether such things were written or spoken.” 1 id. at 185. His point appears to be the equivalent of the modern notion that an out-of-court statement is hearsay only if it is offered “to prove the truth of the matter asserted.” See supra note 9. However, Greenleaf clearly did not use “testimonial” in the restrictive sense that *Crawford* does because he treated all statements that asserted any fact as “testimonial” assertions: “when the assertion of A that fact x exists because A says that it does, A’s utterance is offered testimonially, i.e. as if A were a witness to fact x, and the Hearsay rule here requires that A’s assertions, to be receivable, must be made under oath and subject to cross examination.” 1 id.

In contrast to *Crawford*, modern Fifth Amendment self-incrimination
Justice Scalia also drew a second inference from the general history of the confrontation right. Like opinions in some earlier Supreme Court confrontation cases, he asserted that the general history revealed a “focus” on regulating the admission of out-of-court statements of a formal, testimonial nature such as *ex parte* depositions, and inferred that this “focus” meant that the Framers would have been concerned only with regulating the admission of similar testimonial hearsay, but would not have been at all concerned with the admission of less formal, nontestimonial hearsay statements.\(^{52}\)

Notably, however, Justice Scalia’s historical assertions regarding “the Framers’ design” were based only on these inferences rather than on actual historical evidence. Although he endorsed defining the scope of the confrontation right according to “those [hearsay] exceptions established at the time of the founding,”\(^{53}\) he did not actually follow through and canvas the framing-era legal authorities to determine whether criminal hearsay exceptions existed during that period. Thus, the claim he made in *Crawford* about “the Framers’ design” for the scope of the confrontation right was not actually historical; rather, Justice Scalia’s originalist claim was essentially hypothetical.

Indeed, instead of delineating what hearsay exceptions did—or did not—exist at the time of the framing, Justice Scalia made several statements that implied that the original understanding of the confrontation right was disconnected from the Framers’ understanding of the treatment of hearsay in the law of evidence,\(^{54}\) and then drew his “reasonable inference[s]” to...
predict how the Framers would have dealt with unsworn hearsay evidence regardless of whether framing-era law had permitted the admission of any such evidence.

B. “The Framers’ Design” in Davis

Although Crawford asserted that “the Framers’ design” was to limit the confrontation right solely to testimonial hearsay, but not to nontestimonial hearsay, the Crawford opinion shed little light on the boundary between the two. The Court undertook to provide guidance on the boundary between testimonial and nontestimonial hearsay in the 2006 rulings in Davis and the companion case, Hammon v. Indiana. Justice Scalia again wrote for the Court.

The assumption evident in those claims—that is, the assumption that the Framers of the Sixth Amendment anticipated that the law of evidence would be unstable—is dubious as a historical matter. Justice Scalia offered no historical evidence of any such expectation, and I know of none. Rather, because there had been no significant change in the strict doctrinal ban against admitting hearsay evidence during the prior century, as I discuss below in Part II, it does not appear that the Framers had any reason to anticipate any change in the ban against hearsay or the creation of hearsay exceptions.

Crawford did identify some modern examples of hearsay statements that would always be “testimonial”: accomplice confessions, plea allocutions by accomplices, grand jury testimony, prior trial testimony, preliminary hearing testimony, and police interrogations. Crawford, 541 U.S. at 64, 68.

The companion case was Hammon v. Indiana, 126 S. Ct. 1457, No. 05-5705 (2006), reported in Davis, 126 S.Ct. at 2272 (2006).

Justice Thomas concurred in part and dissented in part in Davis. In accord with his concurring opinion in White, Justice Thomas would have limited the “testimonial” hearsay to only quite formal statements such as depositions or affidavits. Davis, 126 S.Ct. at 2281-84. Thus, he dissented from the ruling that the statements made during the police interview in Hammon were “testimonial” and subject to the confrontation right. Id. at 2285. Because Justice Thomas’s application of the testimonial/nontestimonial
In the companion decision in *Hammon*, the Court held that an out-of-court statement that a victim of domestic abuse made during a police interview that immediately followed an episode of domestic violence was testimonial in character because the statement was taken “primarily” for use in a prosecution; thus, the admission of that statement through the testimony of another witness, when the declarant herself was available but did not testify at trial, violated the defendant’s right under the Confrontation Clause.\(^{58}\)

However, in *Davis* itself, the Court found that a hearsay statement identifying an attacker in a recording of a 911 call was not testimonial in character because it was made during an episode of domestic violence and thus was not made primarily for use in a prosecution. On that basis, the Court concluded that the statement identifying the attacker that was made in that call, by a victim who was available but nevertheless did not testify at Davis’s trial, was not subject to the Confrontation Clause at all.\(^{59}\) Hence, the statement was deemed admissible simply because it complied with Washington state law regarding admission of hearsay evidence.

In the course of his opinion in *Davis*, Justice Scalia essentially repeated the hypothetical originalist claims he had previously made in *Crawford* and added an additional inference. Specifically, Justice Scalia asserted—in the negative—that “We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined [in *Crawford*],”\(^{60}\) and cited twelve state cases, all but one of which hearsay distinction was more extreme than Justice Scalia’s, the historical criticisms that I direct to Justice Scalia’s claims all apply with as much force to Justice Thomas’s more restricted treatment of the confrontation right. Hence, I generally do not discuss Justice Thomas’s position. But see infra note 121.

\(^{58}\) *Davis*, 126 S.Ct. at 2272-73, 2278-79.
\(^{59}\) *Id.* at 2270-72, 2276-78.
\(^{60}\) *Davis*, 126 S.Ct. at 2274. Along a similar vein, Justice Scalia asserted that:

Most of the American cases applying the Confrontation Clause
were decided in the nineteenth century. Notably, however, *Davis* still did not identify endorsements of criminal hearsay exceptions in framing-era sources.

In fact, the briefing in *Davis* actually revealed the absence of such exceptions. Because *Crawford* had cast the testimonial scope of the confrontation right as though it were a historical matter, one can safely assume that the lawyers who briefed those cases for the parties, the Solicitor General’s office, and the other amici, diligently searched for historical examples of the inadmissibility of testimonial hearsay or the admissibility of nontestimonial hearsay. However, the results were rather paltry and one-sided.

or its state constitutional or common-law counterparts 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.

*Id.* at 2275-76. However, this statement followed a recitation of Supreme Court decisions dating from 1879 to 1970, which are plainly too distant from 1789 to constitute valid evidence of the original understanding of the Confrontation Clause.

61 *Davis*, 126 S.Ct. at 2274-75 n. 3.


63 In some respects counsel found too much insofar as they identified English sources that were not available in framing-era America. In particular, several of the parties and amici cited accounts of eighteenth-century English trials in the Old Bailey in London that were published in the Old Bailey Sessions Papers (hereinafter “OBSP”). That material is now also available on-line as “Proceedings of the Old Bailey.” For examples, see *infra* notes 71, 237.

However, those trial accounts, which were published as pamphlets at the end of each of the eight sessions of the Old Bailey held each year, were written for a general readership rather than to record legal rulings per se. As a result, the thoroughness of the accounts varies and accounts often omitted legal aspects and rulings made during the trials. Hence, although individual cases in the Old Bailey Sessions Papers were occasionally referred to in English cases or in post-framing treatises, those publications did not have the status of legal authorities in their own right. For a description of the OBSP accounts, see LANGBEIN, ADVERSARY TRIAL, *supra* note 37, at 180-90.
The briefs did identify two late eighteenth-century English cases that excluded out-of-court statements that might now be labeled testimonial hearsay. The cases included the 1779 English ruling in *King v. Brasier* and the 1791 ruling in *King v. Dingler*. Even on that side of the search, the results were sparse insofar as both cases had previously been identified in *Crawford*. Moreover, the reports of those cases were published too late to have informed the Framers’ understanding of the confrontation right when the Confrontation Clause was framed in mid-1789. *Brasier* was initially published in London in late 1789, shortly after the framing, while *Dingler* was not published until 1800.

So far as I can determine, there is no reason to think that the OBSP accounts were available in framing-era America. Hence, although these accounts provide a treasure-trove of information for historians currently interested in historical English legal practices, they do not seem to be pertinent evidence of the original meaning of American constitutional protections.

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67 See Davies, *supra* note 10, at 160.
68 *Brasier* was reported in the first edition of Leach’s Cases in Crown Law that was published in 1789. See Leach (first ed. 1789) 346. However, that volume could not have been published prior to May 1789 because it reports a case from April 1789. See Davies, *supra* note 10, at 160. In addition, there was at least a six-month delay between the publication of the second edition of Leach’s Cases in Crown Law in 1792, and the last case reported in that volume which was decided in the summer of 1791. See Davies, *supra* note 1, at 564 n. 23. Assuming that the delay in the publication of the second edition was fairly typical, it is likely that the first edition would not have been published until near the end of 1789. *Id.* I am indebted to Mr. Robert Kry for the information as to the date of the final case that appeared in the second edition.

As I explain below, the initial account of the trial ruling in *Brasier* was substantially altered and corrected in later editions, and the version cited in *Crawford* and *Davis* was not published until 1815. See infra note 217 and accompanying text.

69 The 1791 ruling in *Dingler* occurred subsequent to the date of the final case reported in Leach’s 1792 second edition, and it was not reported in that edition. However, Leach’s 1792 edition did mention *Dingler* in a
Even putting this objection aside, however, the noteworthy aspect of the two cases was that neither described the excluded statements as “testimonial.” In fact, neither even described the excluded statements as “hearsay.” Hence, as discussed in more detail below, neither case provided historical support for Crawford’s restriction of the scope of the confrontation right to testimonial out-of-court statements.70

Even more significantly, the briefs in Davis did not identify a single valid example of a pre-framing published case report or treatise that endorsed the admission of any unsworn out-of-court statement that could now be deemed to be “nontestimonial hearsay.”71 Thus, counsel did not locate any historical evidence marginal note at the end of the report of King v. Woodcock, Leach (1792 ed.) 397, 401 n. (a) (Old Bailey 1789). In Woodcock, the court first concluded that the examination of a deceased victim was not admissible as a Marian witness examination, but left it to the jury to decide whether the deceased was sufficiently under the apprehension of death for her statement to be admissible as a dying declaration. The marginal note read: “(a) Same point: Dingler’s Case at O[ld] B[alley] September Session 1791; and by Mr. J[justice] Gould [the presiding trial judge] was decided accordingly upon the authority of this case [that is, Woodcock].” Note, however, that there was some ambiguity in the note as to which of the two rulings in Woodcock was the “same point” ruled on in Dingler.

No report of Dingler was published until Leach’s 1800 third edition—eleven years after the framing of the Sixth Amendment. Because I did not have access to a copy of Leach’s second edition when I wrote my previous article on Crawford, I simply assumed that Dingler probably appeared in the 1792 second edition. See Davies, supra note 10, at 157. That turns out not to have been the case. I am indebted to Mr. Robert Kry for the information about the contents of the second edition.

70 For a more detailed discussion of these points, see infra notes 208-239 and accompanying text.

71 It may initially appear that such cases were found in the Old Bailey Sessions Papers. The Solicitor General’s brief in Davis cited two 1755 cases in the Old Bailey Sessions Papers that purportedly permitted the admission into evidence of statements that victims of assaults made to other persons after the assault. See Brief of the United States as Amicus Curiae Supporting Respondent at 25 n.4, Davis v. Washington, 126 S. Ct. 2266 (2006).

However, Petitioner’s Reply Brief in Hammon, at 7, pointed out that these two 1755 cases actually involved murder trials, and thus may very well have involved dying declarations. As explained below, dying declarations
for that half of Crawford’s testimonial/nontestimonial distinction. Put another way, no one identified any situation in which the Framers would have had any occasion to consider whether the Confrontation Clause would allow admission of “nontestimonial hearsay.” Moreover, the absence of historical cases that admitted unsworn hearsay is important because it undermines the logic of Justice Scalia’s “reasonable inference[s]” about “the Framers’ design” for the scope of the confrontation right.

C. Why the Absence of Framing-era Hearsay Exceptions Is Important

As noted above, Justice Scalia based his claim that the confrontation right was limited to testimonial hearsay only on “reasonable inference[s],” not on direct evidence from framing-era legal authorities. He did not undertake to identify evidence of hearsay exceptions in framing-era legal sources, but instead proceeded as though the existence or nonexistence of such exceptions did not matter. However, that treatment ignored the degree to which the logical validity of the “reasonable

were not viewed as unsworn hearsay, but were deemed to be admissible evidence under the theory that the awareness of imminent death was the functional equivalent of an oath. See infra notes 151-153 and accompanying text.

It also should be noted that the Solicitor General’s Brief was grossly inconsistent in citing the cases from the Old Bailey Sessions Papers because only a few pages earlier it had objected to Petitioner’s citation of aspects of the 1787 trial in King v. Radbourne that were reported only in “The Proceedings of the Old Bailey.” Brief of the United States as Amicus Curiae at 22-23, Davis v. Washington, 126 S.Ct. 2266 (2006). However, as discussed supra note 54, the latter is simply the title of the on-line version of the Old Bailey Sessions Papers that the Solicitor General’s brief cited itself! Note, for example, that the internet citations given for both sources in the U.S. amicus brief are the same.

Actually, none of the Old Bailey trial accounts in these sources constitute valid evidence of the Framer’s understanding of the Confrontation Clause because there is no evidence that these informal, uncollected reports, which were published in London at the end of each of the eight sessions each year, were available to any significant degree in framing-era America. See supra note 63.
inference[s]” drawn in *Crawford* was contingent upon there having been significant criminal hearsay exceptions in framing-era law.

Consider the inference that Justice Scalia drew in *Davis* from the observation that the early American cases that invoked the Confrontation Clause or the common-law right to confrontation involved statements that would now be deemed testimonial statements.\footnote{\textit{Davis}, 126 S. Ct. at 2274 & n. 3.} He suggested that this pattern in the early cases, as well as in later Supreme Court opinions, indicated that the scope of the Confrontation Clause was limited to formal testimonial hearsay.\footnote{\textit{Id.} at 2274-76. \textit{See supra} notes 60, 61 and accompanying text.} However, the significance of the sample consisting of twelve “early” cases that he cited is dubious for a variety of reasons,\footnote{One deficiency is that reported cases, usually from state supreme courts, hardly provide a valid sample of the issues litigated in the trial courts. Another is that the determination of whether an “early” case involved the “common-law counterpart” of the Confrontation Clause is a matter of judgment. Rulings that now appear to involve hearsay were not always described as such, and some “early” state cases that may have involved the admission of informal hearsay did not record the ground of the objection to evidence. \textit{See e.g.}, Commonwealth v. M’Pike, 57 Mass. (3 Cush.) 181 (1849). In that case, the defendant objected to the admission of a second-hand report of what a deceased victim had said. It would appear to have been an objection to hearsay, but there is no indication in the case report of the ground on which that objection was based. \textit{Id.} at 182. Did the defendant complain that his confrontation right was violated, or his right to cross-examination? There is no way to know.} not the least of which is that most of the cases were hardly “early” in the sense of being proximate in time to the framing era.\footnote{The “early” state cases that Justice Scalia cited in *Davis* were generally the same as those he had previously cited in *Crawford*. \textit{Compare} *Davis*, 126 S.Ct. at 2274-75 n. 3, \textit{with Crawford}, 541 U.S. at 49-50. Only one of those twelve cases was decided prior to 1800; most are from the 1830s, 1840s, and 1850s. Hence, they are too far removed from the framing to constitute plausible evidence of the Framers’ understanding. \textit{See} Davies, \textit{supra} note 10, at 179-82. Moreover, two of the cited cases did not actually involve confrontation issues. \textit{See} Davies, supra note 1, at 626 n. 273.} Additionally, as a logical matter, no implication can be
drawn from a pattern of cases that involved only formal sorts of out-of-court statements unless there had been framing-era hearsay exceptions under which informal as well as formal out-of-court statements could have been admitted at trials. Litigation and case reports tend to reflect unsettled or active issues. There were active issues regarding the boundaries of admissible formal, sworn out-of-court statements, so it is not surprising to find cases litigating those issues. If there had been recognized hearsay exceptions that applied to informal, unsworn statements, one would expect that they would also have given rise to issues regarding the admission of informal hearsay statements. Thus, if there had been recognized criminal hearsay exceptions, a pattern in which confrontation litigation occurred only regarding formal, sworn out-of-court statements, but not informal hearsay statements, might indicate that the confrontation right was not understood to apply to informal, nontestimonial hearsay statements.

However, how could one logically infer that the Framers would not have applied the Confrontation Clause to “nontestimonial hearsay” if framing-era law did not yet recognize any exceptions under which informal, unsworn hearsay could arguably have constituted admissible evidence in criminal trials in any event? If framing-era law permitted the

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76 See, e.g., infra notes 211-214 and accompanying text (discussing the window during which sworn Marian witness examinations could be properly taken); infra note 285 (discussing the admissibility of a deceased witness’s testimony at a prior trial).

77 The amicus brief filed by the Solicitor General’s office in Davis contains a claim that exposes the same difficulty:

[A] casual remark to a neighbor, offered to prove the truth of the assertion, presumably would have been excludable as hearsay at the time of the framing of the Confrontation Clause. But as Crawford establishes, because that statement is not testimonial, its introduction does not implicate the core concerns of the Confrontation Clause.

Brief of the United States as Amicus Curiae Supporting Respondent at 23, Davis v. Washington, 126 S.Ct. 2266 (2006). However, if casual hearsay was inadmissible anyway in 1789, what basis would there be for defining the “core concerns of the Confrontation Clause” to reach only testimonial
admission of only some forms of sworn out-of-court statements, but strictly excluded unsworn hearsay statements, that prohibition itself would completely explain the pattern that Justice Scalia claimed—without shedding any light on the Framers’ understanding of the scope of the confrontation right itself.

Indeed, if framing-era evidence doctrine had made an oath a necessary requisite for admissible criminal trial evidence, one would expect that a lawyer with even a minimal understanding of criminal evidence would not have attempted to proffer an unsworn out-of-court hearsay statement as evidence in a criminal trial. Hence, one would not expect that much discussion of how the confrontation right applied to statements that could now be termed unsworn, nontestimonial hearsay would have occurred in framing-era criminal trials. Thus, an absence of recognized hearsay exceptions applicable to unsworn hearsay at the time of the framing would completely explain why the “early” (but post-framing) confrontation cases that Justice Scalia identified involved only formal, sworn out-of-court statements. Indeed, if that were the case, his “reasonable inference” would amount only to a false dichotomy.

The logic of the two “reasonable inference[s]” that Justice Scalia drew in Crawford is equally contingent on the existence of framing-era hearsay exceptions that would have allowed the admission of unsworn, informal hearsay. The apparent “focus” on formal and usually sworn out-of-court statements in the famous early English treason cases that gave rise to the confrontation right might shed light on the understanding of the scope of that right if informal, unsworn out-of-court statements had also been admissible. In that case, the application of the right to the one, but not the other, would illuminate the right’s scope. However, if informal, unsworn hearsay had always been inadmissible simply as a matter of evidence doctrine, that would not be the case.78

hearsay?

78 In Crawford, Justice Scalia pointed to the admission of Cobham’s unsworn letter in Raleigh’s trial as though that “paradigmatic confrontation violation” disproved Chief Justice Rehnquist’s suggestion that the oath was a
Likewise, the inference Justice Scalia drew to the effect that the use of the term “witnesses” in the Confrontation Clause denoted a concern with only formal, “testimonial” statements, was also contingent on the nature of the statements that were potentially admissible under framing-era evidence doctrine. If informal, unsworn hearsay statements were always inadmissible in criminal trials, and only persons who possessed direct personal knowledge of relevant facts could be admitted to testify in trials, then persons who could offer only second-hand, hearsay information could not have been admitted as “witnesses.” Thus, the absence of hearsay exceptions would also suffice to explain why the Framers were content to address only “witnesses” in the Confrontation Clause. The Framers cannot be expected to have drafted the Confrontation Clause to take account of a scenario—the admission of unsworn hearsay statements—if they had no reason to think that scenario could ever occur.

Hence, the “reasonable inference[s]” that Justice Scalia drew...
in *Crawford* do not actually escape the historical issue of whether there were significant framing-era exceptions to the ban against hearsay evidence in criminal trials. Rather, one cannot assess the Framers’ conception of the confrontation right unless one searches out “direct evidence” of the treatment of out-of-court statements in the framing-era sources that Justice Scalia ignored. What do those sources tell us? They tell us that there was good reason for Justice Scalia to abandon the earlier assumption that a variety hearsay exceptions were recognized at the time of the framing. As Justice Scalia acknowledged—albeit in a footnote—that assumption was demonstrably false.80

II. The “Direct Evidence” of Hearsay and Confrontation During the Framing Era

Framing-era sources document two important features of framing-era evidence law. First, they show that the only kinds of out-of-court statements that could be admitted in criminal trials to prove a defendant’s guilt were *sworn or functionally sworn* statements made by genuinely *unavailable* witnesses, but that unsworn hearsay was not permitted to be used as evidence of the defendant’s guilt. Second, they also document that it was understood that the confrontation right was one of three principles that each required the ban against admitting unsworn hearsay in criminal trials. In other words, the framing-era authorities do not indicate that the Framers would have distinguished between the general ban against hearsay and the confrontation right; rather, the sources indicate that the ban against hearsay evidence was understood to be a salient feature of the confrontation right. Hence, the Framers never had any reason to draw any distinction between the right to confrontation and the ban against unsworn hearsay. Rather they understood that the latter was a component of the former.

In this part, I document the historical evidence for this

80 See supra note 46 and accompanying text (noting that Justice Scalia cited a 1950 commentary that had concluded that “dying declarations” were the “only” form of admissible criminal hearsay at the time of the framing).
description of the framing-era treatment of out-of-court statements. I begin with a few preliminary comments regarding the sources of evidence of the Framers’ understanding of the confrontation right and the language in which the confrontation right was addressed in those sources. I then offer a brief preview of the framing-era criminal evidence regime before systematically working through the pertinent sources.

A. Recovering the Framing-Era Understanding of the Confrontation Right

Where does one find evidence of the Framers’ understanding of the confrontation right? Unfortunately, the Framers did not leave us much in the way of legislative history. However, of course, there were confrontation provisions in the state declarations of rights that were adopted prior to the federal Bill of Rights, but they are unhelpful insofar as they were framed in language as general as the Sixth Amendment Confrontation Clause itself. See infra notes 91-93 and accompanying text.

Unfortunately, surviving statements about the confrontation right made during the Ratification debates of 1787-1788 are also scarce. In Crawford Justice Scalia did quote a 1787 Letter of a Federal Farmer as though it were a direct antecedent of the Confrontation Clause applicable to criminal trials, but the appearance that the Letter addressed the confrontation right was largely the product of editing rather than the letter’s original content. Justice Scalia portrayed the Letter in Crawford as follows:

[A] prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of “written evidence” while objecting to the omission of a vicinage right: “Nothing can be more essential than the cross examining of witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth.” R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787). The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.

541 U.S. at 49 (citation omitted).

However, the passage quoted in Crawford actually appeared in a discussion of “[t]he trials by jury in civil causes.” Letter IV by the Federal Farmer (Oct. 12, 1787) (emphasis added), reprinted in CONTEXTS OF THE
NOT THE FRAMERS’ DESIGN

because there is little doubt that the Framers intended to preserve the important elements of common-law jury trial in the Constitution and Sixth Amendment, it is generally safe to

CONSTITUTION 706, 710 (Neil H. Cogan, ed. 1999). The Federal Farmer stated that he did not place much weight on the need to be tried by one’s neighbors, and then wrote that it was important for trials in civil “causes” (that is, lawsuits) to be held in the vicinity for the convenience of obtaining oral testimony from witnesses so that it would not be necessary to resort to the use of depositions:

the trial of facts in the neighborhood is of great importance in other respects. Nothing can be more essential than the cross-examining witnesses, and generally before the triers of the facts in question. The common people can establish facts with much more ease with oral than written evidence; when trials of facts are removed to a distance from the homes of the parties and witnesses, oral evidence becomes intolerably expensive, and the parties must depend on written evidence, which to the common people is expensive and almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth.

Id. Although this passage reflects the general importance attached to oral testimony and cross-examination, it did so in the context of expressing concern about the expected use of depositions as evidence in trials in civil lawsuits.

Invocations of the right to common law were ubiquitous during both the Revolutionary period, during which the state declarations of rights were adopted, and during the Ratification period itself when the need for a federal Bill of Rights was debated. See, e.g., Declaration and Resolves of the First Continental Congress, October 14, 1774, reprinted in CONTEXTS OF THE CONSTITUTION, supra note 72, at 414 (12.1.4.6) (“Resolved, N.C.D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.”); Northwest Territory Ordinance, Art. 2 (1787), reprinted in CONTEXTS OF THE CONSTITUTION, supra note 72, at 414-15 (12.1.4.8) (“the inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law”). Additionally, Richard Henry Lee, one of the most prominent advocates of a federal Bill of Rights called for a Bill of Rights to guarantee freedom of the press, religious liberty, jury trial in civil cases, and “Common Law securities.” See Letter to Samuel Adams (October 27, 1787), reprinted in 2 THE LETTERS OF RICHARD HENRY LEE 456-57 (James C. Ballagh ed.
assume that the Framers undertook to preserve at least the rights that common-law authorities identified in the criminal jury trial.83

As a result, the best evidence we have of the Framers’ understanding of the confrontation right are the descriptions of the principles of evidence in criminal trials that appeared in the legal authorities that were widely used in America during the framing-era itself—that is, during the period from the start of the drafting of the state declarations of rights in 1776 through the framing of the Federal Bill in 1789.84 Because there were few

1914), quoted in Davies, supra note 2, at 339 n. 311).

83 The discussion of the original understanding in this article is incomplete insofar as it does not deal with a large topic that I am not yet prepared to address: what the Framers meant when they required, in Article III in the original Constitution that “the trial of all Crimes . . . shall be by Jury.” See U.S. CONST. art. III, § 2, cl 3. It is unlikely that the Framers meant only that a petit jury had to be the final decision maker in a criminal trial. It is far more likely that they understood “trial by jury” to incorporate at least the basic features associated with a common-law criminal prosecution. As a result, it is doubtful that they thought that the provision of a confrontation right in the Sixth Amendment added anything to the guarantee of jury trial already in the Constitution. Rather, it is far more likely that they viewed the Confrontation Clause in the Sixth Amendment as simply making that feature of the jury trial right more explicit. Thus, it is likely that the Framers would have understood the common-law principles of criminal evidence discussed in this article to be part of the broader constitutional guarantee of trial by jury guaranteed by Article III of the Constitution as well as the confrontation right itself. I say that the Framers intended to preserve “at least” the basic common-law protections of the jury trial in the Sixth Amendment because it is possible that they meant to guarantee more than that, but implausible that they meant to guarantee less than that. Thus, Justice Scalia’s assertions that the original Confrontation Clause should be construed independently of the law of evidence (see supra note 54) fails to take into account the Framer’s larger understanding of “trial by jury.”

84 Because the federal Bill of Rights was based largely on the state provisions adopted between 1776 and 1780, one must be very cautious about treating any statement that first appears in an English source published after 1775 as evidence of original meaning. See Davies, supra note 10, at 153-55. Additionally, the date of the framing (1789) is the relevant cutoff date for materials that could have informed the original meaning; not of the date of ratification (1791) that is sometimes invoked in Supreme Court opinions, including Crawford. See id. at 158-60.
published case reports dealing with evidentiary rulings during that period (though there are some from the decades following the framing), the most significant authorities are the legal treatises on criminal procedure and evidence and the derivative works, especially justice of the peace manuals, abridgments, and legal dictionaries, that framing-era Americans consulted.

B. Identifying the Confrontation Right in the Historical Sources

The search for the common-law confrontation right in the framing-era sources is complicated somewhat by the fact that the framing-era sources seldom used “confrontation” terminology.

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85 There were virtually no pre-framing published reports of American cases. See Davies, supra note 10, at 124 n. 55. Moreover, published reports of ordinary English criminal trials in which evidence rulings were made were not available until Leach’s Crown Cases appeared in late 1789, after the Confrontation Clause was already framed. See supra note 68.

86 Professor Kenneth Graham has argued in several commentaries that the confrontation right in the Sixth Amendment was much more of a home-grown understanding arising from the abuses associated with civil law procedure in the colonial vice-admiralty courts than an enactment of an English common-law right derived from Raleigh’s Trial. See, e.g., Kenneth Graham, Confrontation Stories: Raleigh on the Mayflower, 3 OHIO. ST. J. CRIM. L. 209 (2005) [hereinafter “Confrontation Stories”]; Kenneth Graham, The Right to Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 CRIM. L. BULL. 99 (1972). See also 30A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE EVIDENCE § 6341-348.

For example, Graham has asserted that “English common law has never recognized a right of confrontation.” Confrontation Stories, supra, at 209. I think that is an overstatement. It may be that English sources did not commonly use that terminology, but the framing-era English treatises did recognize the components of the confrontation right, as I discuss in this article. Additionally, while there is no doubt that American experience with the vice-admiralty courts contributed to the value that the American Framers placed on jury trial, I do not see how that alters the fact that the principal sources that informed the Framers’ understanding of the law of jury trials were the English common-law treatises. Hence, I think those treatises, and the manuals derived from them, must be central to any account of the original Sixth Amendment Confrontation Clause.
As I explain below, the framing-era treatises refer to the main features of the confrontation right when they discuss the requirements that evidence in criminal trials be given in the presence of the defendant and be subject to cross-examination in the view of the jury. However, they usually do not use the term “confrontation” itself.

It appears that the terminology of a “confrontation” right traces to Matthew Hale’s mid-seventeenth-century endorsement of the “opportunity of confronting the adverse witnesses” as one of the virtues of common-law jury trial. William Blackstone probably gave that phrasing additional visibility in 1768 when he repeated Hale’s endorsement of the value of “the confronting of adverse witnesses” as a means of “clearing up of truth” in trials.

Although confrontation terminology does not seem to appear in other English treatises, it is likely that George Mason drew

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87 See also Langbein, Adversary Trial, supra note 37, at 234 n. 241 (2005) (commenting on being “puzzled at the failure of the English common law to identify and develop the confrontation policy as a matter of doctrine”).

88 The lack of framing-era discussions that actually used the term “confrontation” right may partly account for the conventional view that the history of the right is especially obscure. See, e.g., California v. Green, 399 U.S. 149, 173-74 (1970) (Harlan J., concurring) (stating that “[t]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause”); Randoph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L. J. 77, 77 (1995).

89 Matthew Hale, The History and Analysis of the Common Law of England 258 (first published posthumously in 1713; written sometime before Hale’s death in 1676).


Blackstone’s influence on framing-era American thought was substantial. The initial edition of the four volumes of his Commentaries was reprinted in Philadelphia in 1771-1772. See Eldon Revare James, A List of Legal Treatises Printed in the British Colonies and the American States Before 1801, 170-71 (1934). There were some 1,557 American subscribers. See Lawrence M. Friedman, A History of American Law 88-89 (1973).
upon the statements by Hale and Blackstone when he articulated the defendant’s right “to be confronted with the accusers and witnesses” as an essential criminal trial right in the 1776 Virginia declaration of rights.\(^{91}\) Thereafter, variations on that phrasing were repeated in several other state declarations of rights\(^{92}\) (though some used the alternative formulation of a right to “meet” adverse witnesses “face to face”\(^{93}\)). James Madison also drew upon Mason’s phrasing when he referred to a trial right of the accused “to be confronted with his accusers, and the witnesses against him” when he proposed the proto-Sixth Amendment in June, 1789.\(^{94}\) The First Congress then shortened Madison’s seemingly redundant references to “accusers” and “witnesses” to the right of the accused “to be confronted with the witnesses against him.”\(^{95}\) Although the framing-era legal

\(^{91}\) See HELEN HILL, GEORGE MASON: CONSTITUTIONALIST 136, 137-38 (1938) (quoting Section 8 of Mason’s draft for the Virginia Declaration of Rights); Virginia Declaration of Rights § 8 (1776), reprinted in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 413 (Neil H. Cogan, ed. 1997) [hereinafter “COMPLETE BILL”].

\(^{92}\) See Pennsylvania Declaration of Rights § IX (1776), reprinted in COMPLETE BILL, supra note 91, at 411; Delaware Declaration of Rights § 14 (1776), reprinted in id. at 402; Maryland Declaration of Rights § VII (1776), reprinted in id. at 403; North Carolina Declaration of Rights § VII (1776), reprinted in id. at 410; Vermont Constitution Ch. I (1777), reprinted in id. at 413.

\(^{93}\) See Massachusetts Declaration of Rights § XII (1780), reprinted in COMPLETE BILL, supra note 91, at 404; New Hampshire Bill of Rights § XV (1783), reprinted in id. at 405.

\(^{94}\) See COMPLETE BILL, supra note 91 at 385. Madison had been a member of the committee of the Virginia legislature that drafted the 1776 Virginia Declaration of Rights. See Hill, supra note 91, at 135. Thus, it is not surprising that he drew upon the Virginia phrasing.

\(^{95}\) U.S. CONST. amend. VI (framed, 1789; ratified, 1791). Professor Graham has suggested that the elimination of “accusers” was substantive. See Graham, Confrontation Stories, supra note 86. However, it appears that the term “accusers” would have been redundant with “witnesses” in criminal proceedings in 1789, because an accuser would have been permitted and required to testify as a witness at the defendant’s trial. There does not seem to be any direct evidence as to why the First Congress deleted “accusers” from Madison’s draft language.
authorities had rarely used that confrontation terminology, they had discussed the salient features of what the Framers called the confrontation right.

C. The Framing-Era Ban Against Hearsay Evidence

As noted above, the important sources for recovering the Framers’ understanding of the confrontation right are the framing-era editions of treatises on criminal law and evidence, and the framing-era editions of derivative works such as justice of the peace manuals, abridgments, and legal dictionaries, especially the four major justice of the peace manuals that were printed and widely used in the American colonies and states between 1764 and 1789. Conveniently, virtually all of those sources (though not all editions of the sources) have recently become available on-line.

96 It is important to consult the pre-framing editions of treatises. Relying upon post-framing editions of treatises that were initially published prior to the framing can result in serious errors because new material was sometimes added, or alterations were sometimes made, to the pre-framing text. Indeed, sometimes pre-framing authorities were added to post-framing editions. See, e.g., Davies, supra note 2, at 310-14 (discussing Justice Souter’s erroneous reliance in Atwater v. Lago Vista, 532 U.S. 318 (2001), on preframing statements that had been added to post-framing editions of treatises that had been initially published before the framing, as though the added statements were evidence of the Framers’ understanding of arrest law).

97 The four manuals are identified infra note 160. For a discussion and listing of the English and American justice of the peace manuals, see Davies, supra note 2 at 278-281 nn. 121, 122.

98 With a few exceptions, the various editions of the legal treatises and manuals are now available in word-searchable formats in on-line subscription services. English treatises and manuals published between 1700 and 1800 are available on-line in The Eighteenth Century Collections Online http://www.gale.com/EighteenthCentury/ (this collection is also available in microfiche). American manuals from that period are available in Early American Imprints, Series 1, available at http://www.readex.com/readex/product.cfm?product=247 (this series is also available in microfiche). English and American legal publications from the nineteenth century are available in The Makings of Modern Law http://www.gale.com/ModernLaw. It should be noted, however, that word-searching the historical sources
A brief preview of the framing-era criminal evidence regime may help to keep the trees from obscuring the forest. As I detail in the following pages, the framing-era legal authorities did draw a distinction regarding the admissibility of out-of-court statements as evidence of a defendant’s guilt, but it was almost the opposite of the testimonial/nontestimonial distinction drawn in *Crawford* and *Davis*. The framing-era sources indicated that two types of out-of-court statements that now would usually be “testimonial” under *Crawford* were admissible as evidence of a criminal defendant’s guilt. However, *unsworn* out-of-court statements, a category that would seem to include the “nontestimonial hearsay” category that is admissible under *Crawford*, were not admissible as evidence of a defendant’s guilt under framing-era evidence law.

The two forms of admissible out-of-court statements both involved statements by persons who could not be produced as witnesses at trial. One was the written summary of a sworn Marian examination of a person who had been a witness against the defendant at the time of his arrest but who could not be produced at trial because of death, serious illness, or interference by the defendant.\(^9\) The other form of admissible out-of-court statement was a dying declaration of a murder victim. Although the latter was not technically a sworn statement, the declarant’s appreciation of impending death was viewed as being the functional equivalent of an oath.\(^{10}\) Thus, the admissible out-of-court statements that could be used to prove a defendant’s guilt were confined to sworn or functionally sworn statements by witnesses who were genuinely unavailable to testify at trial. (However, there was an unsettled issue regarding the admissibility of unsworn statements by young

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\(^9\) Marian procedure was used when a person arrested for a felony was either bailed or committed to jail to await trial. For a brief description of Marian procedure, see infra note 116; Davies, *supra* note 10, at 126-29.

\(^{10}\) See, e.g., *infra* notes 153, 210 and accompanying text.
children who were victims of crime.101)

Conversely, “hearsay” was defined to include all unsworn out-of-court statements made by anyone other than the defendant (the defendant’s out-of-court statements were always admissible and were not labeled “hearsay”).102 Unlike modern doctrine, the framing-era definition of “hearsay” was not limited to out-of-court statements that were offered to prove the truth of what was said; that refinement does not appear in the framing-era authorities.103 Rather, the framing-era authorities simply indicated that unsworn statements were banned as evidence of a criminal defendant’s guilt.104

Put the other way, except for a dying declaration of a murder victim, there was no recognized exception to the ban against admitting unsworn hearsay as evidence of a defendant’s guilt in a felony trial. That point is sometimes obscured by a variety of recognized exceptions under which hearsay statements could be admitted to prove certain issues that could arise in trials of civil lawsuits. However, those exceptions were inapplicable to criminal trials.105

Instead, the framing-era authorities recognized only two limited-purpose exceptions to the ban against unsworn hearsay that applied in criminal trials, neither of which permitted direct evidence of the defendant’s guilt. One limited-purpose exception was a corroboration/impeachment exception: prior out-of-court statements made by a witness who testified at trial could be admitted either to corroborate or impeach that witness’s trial testimony. The other limited-purpose exception allowed the use of hearsay statements to prove background facts that did not go directly to the defendant’s personal guilt; specifically, this

101 See infra notes 232-239 and accompanying text.
102 See infra text accompanying notes 124, 129, 137,144.
103 See supra note 9, infra note 279.
104 However, there was a unique controversy during the eighteenth century as to whether a child victim of rape or molestation could testify without oath if the child were too young to take an oath. See infra notes 231-239 and accompanying text.
105 See infra note 162 and accompanying text; see also infra notes 145, 185.
exception permitted hearsay evidence to be used to prove the general existence of a conspiracy, but not the defendant’s actual participation in it. (Thus, this exception was not equivalent to the modern co-conspirator statement hearsay exception.)

Framing-era sources articulated three somewhat overlapping rationales for the strict ban against admitting unsworn hearsay statements as evidence of a criminal defendant’s guilt. One was that such statements were presumptively untrustworthy because they were unsworn. A second rationale was that hearsay statements did not constitute the “best evidence” of the facts because the person who repeated a statement made by someone else did not have the direct personal knowledge that was required for legal evidence. The third rationale—which is most obviously identified with the confrontation right—was that admitting a hearsay statement would deny the defendant an opportunity to cross-examine, in the presence of the trial jury, the person who actually made the statement. Because of the requirement that all evidence in felony trials be presented in the

106 The modern co-conspirator hearsay exception, as formulated in Fed. R. Evid. 801 (d)(2)(E), states that an out-of-court statement is not hearsay if it is offered “by the opponent of a party” (that is, the prosecutor in a criminal case) as “a statement by a coconspirator of a party during the course and furtherance of the conspiracy.” State evidence codes generally track this federal definition, but with some variations. See, e.g., 4 JONES ON EVIDENCE: CIVIL AND CRIMINAL 544-552, §§ 27:38-27:41 (Clifford S. Fishman, ed. 7th ed. 2000).

Cases recognizing this exception date back at least to the 1880s. See, e.g., 4 id. at 544 n. 82. However, it does not appear that this hearsay exception was recognized during the early nineteenth century. See, e.g., 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 295 (4th ed. 1848) (stating that “the declarations of a conspirator or accomplice are receivable against his fellows, only when they are either in themselves acts, or accompany and explain acts, for which the others are responsible; but not when they are in the nature of narratives, descriptions, or subsequent confessions”).

107 Professor Langbein has also noted that the eighteenth-century sources gave three main reasons for disapproving hearsay: (1) hearsay was not best evidence, (2) hearsay was not sworn, (3) hearsay meant “that the out-of-court declarant had not been subjected to cross-examination.” See LANGBEIN, ADVERSARY TRIAL, supra note 37, at 179-80.
presence of the defendant, the cross-examination rationale for the ban against hearsay appears to have applied more rigorously to criminal trials than to civil trials.

These rationales for the ban against hearsay and the absence of any hearsay exceptions regarding evidence of the defendant’s guilt (except dying declarations) are evident in the discussions of the admissibility of out-of-court statements that appear in the principal framing-era sources. Let me begin with the leading treatises and then review the justice of the peace manuals.

1. Hawkins’s Pleas of the Crown

The second volume of Serjeant William Hawkins’s *Pleas of the Crown*, which was first published in 1721 and reissued in subsequent editions through the eighteenth century, was widely regarded as the leading work on criminal procedure and criminal evidence at the time of the framing. In a chapter on
evidence in criminal trials, Hawkins explicitly set out two basic requirements for valid criminal evidence and implied a third.

At the outset of his evidence chapter, Hawkins stated a requirement for valid criminal evidence as an overarching premise for his discussion of criminal trial evidence; that it was a “settled rule” that in felony trials “no evidence is to be given against a prisoner but in his presence.” This principle prohibited repetitions of the abuses associated with earlier treason trials, such as that of Sir Walter Raleigh, in which out-of-court statements were admitted as evidence despite the availability of the declarants to testify in person at the trial.

example, one study of the libraries of four Massachusetts lawyers who were in practice at the time of the American Revolution found that Hawkins’s treatise was one of only a few works that all four owned. See Richard S. Eckert, “The Gentlemen of the Profession”: The Emergence of Lawyers in Massachusetts, 1630-1810, 256-57, 547 (1991). Likewise, Hawkins’s Treatise was still viewed as authoritative in the decades following the framing. For example, Chief Justice John Marshall also cited Hawkins’s treatise as authority in a prominent 1807 treason trial. See infra note 126.

110 Hawkins opened his chapter on criminal trial evidence by stating: “[a]s to the Nature of Evidence, so far as it more particularly concerns Criminal Cases, having premised that it is a settled Rule, That in Cases of Life no Evidence is to be given against a Prisoner but in his Presence; . . .”2 Hawkins, supra note 108, at 428 (1721 ed.); 2 id. at 428 (1771 ed.); 2 Leach’s Hawkins, supra note 108, at 602 (1787 ed.); 4 id. at 418 (1795 ed.).

111 Hawkins commented that:

There are many Instances in the Reigns of Queen Elizabeth and King James the first, wherein the Depositories of absent Witnesses were allowed as Evidence in Treason and Felony, even where it did not appear, but that the Witnesses might have been produced viva voce. And it was adjudged in the Earl of Strafford’s Trial, that where Witnesses could not be produced viva voce, by Reason of Sickness, &c. their Depositions might be read for or against the Prisoner on a Trial of High Treason, but not where they might have been produced in Person.

2 Hawkins, supra note 108, at 430 (1721 ed.); 2 id. at 430 (1771 ed.); 2 Leach’s Hawkins, supra note 108, at 605 (1787 ed.). In the margin to this section, Hawkins cited, among others, Strafford’s Trial, “State Trials [1719 ed.], Vol. 2. fol[io] 593, 622 to 627, 644, 647, 651” (1680); and “Sir Walter Raleigh’s Trial [1 St. Tr. (1719 ed.)], fol[io] 181, 182” (1603). Note
Thus, out-of-court statements of available witnesses were never admissible as evidence of a defendant’s guilt.

Hawkins also stated a second requirement; that “evidence for the king must in all cases be upon oath.” Therefore, there was a complete ban against admitting unsworn testimony against a criminal defendant. This principle reflected the assumption that testimony was not trustworthy unless it was given under the threat of eternal damnation that attended a lie told under oath. The requirement of an oath was also a source of the ban against admitting hearsay evidence; indeed, “hearsay” was defined to include any unsworn out-of-court statement.

Additionally, Hawkins also implicitly drew upon a third principle that the terms “evidence” and “witnesses” implicitly carried during the eighteenth century: only a person who had direct personal knowledge of the facts or events could qualify to give evidence in a criminal trial. Although Hawkins did not explicitly discuss this point, other treatises referred to this as the “best evidence” principle or rule, and Thomas Leach later

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that Hawkins indicated that the reading of depositions of available witnesses in treason trials was banned starting with Strafford’s trial in 1680.

112 2 HAWKINS, supra note 108, at 434 (1721 ed.); 2 id. at 434 (1771 ed.); 2 LEACH'S HAWKINS, supra note 108, at 612 (1787 ed.) (emphasis added).

113 Under framing-era law, non-Christians could be admitted as witnesses provided they followed some religion, but atheists could not. Children could not be admitted unless they were mature enough to appreciate the prospect of eternal damnation for lying under oath, and adults who had not had religious instruction were sometimes also deemed inadmissible as witnesses. See, e.g., The King v. White, 1 Leach 430, 168 Eng. Rep. 317 (Old Bailey 1789) (ruling that although a potential witness said he had heard there was a god and believed that he could be hung for lying at a trial, he was inadmissible as a witness because “he had never learned the catechism” and thus “was altogether ignorant of the obligations of an oath, a future state of reward and punishment, the existence of another world, or what became of wicked people after death”).

114 See infra note 144 and accompanying text. During the eighteenth century, “best evidence” referred to a broad principle of evidence. Thus, that term historically carried a much broader meaning than the term “best evidence” is accorded in contemporary evidence rules, such as the “original writing rule” codified in Rule 1002, FED. R. EVID.
added an explicit statement of this “best evidence” requirement to Hawkins’s treatise when he revised that work in 1787.\textsuperscript{115}

Thus, evidence in criminal trials had to take the form of sworn oral testimony, by a person with direct knowledge of the facts testified to, given in the presence of the defendant, and subject to cross-examination by the defendant in the presence of the jury. Conversely, unsworn hearsay statements could not be admitted as evidence of the defendant’s guilt, but only to corroborate or impeach testimony already given by another witness at the trial, or to prove the general existence of a conspiracy or similar background fact.

With that overview, let me review the specific statements that Hawkins made about out-of-court statements in criminal evidence.

\textit{a. The Admissibility of a Marian Examination of an Unavailable Witness}

Hawkins identified only one kind of out-of-court statement that could be admitted as evidence of a defendant’s guilt: the written record of a sworn Marian witness examination given by a person who subsequently became genuinely unavailable to testify at trial. Under the Marian statutes, justices of the peace were not only authorized but required to take and record in writing the sworn “information” of the complainant and any supporting witnesses whenever a felony arrest was made, and coroners were required to do likewise regarding witnesses who testified at inquests of homicides.\textsuperscript{116} Hawkins stated that the

\textsuperscript{115} See \textit{infra} note 154.

\textsuperscript{116} Marian procedure, which was a standard feature of felony prosecutions in England and in the American colonies and most of the original states, was created by the Marian statutes, enacted in the mid-sixteenth century during the reign of Mary Tudor (hence, the term “Marian”). See 1 & 2 Phil. & Mar. c. 13, § IV (1554); 2 & 3 Phil. & Mar., c. 10, § II (1555). The statutes provided the procedure to be followed when a person arrested for a felony or manslaughter was brought before a justice of the peace to be bailed or committed to gaol (that is, jail) to await trial. The statutes required the justice of the peace to whom the “prisoner” (that is, arrestee) was taken, to take the sworn “information” of the witnesses who
written record of a Marian witness examination\textsuperscript{117} was admissible as evidence in a felony trial if the witness was genuinely unavailable.\textsuperscript{118} Because the Marian statutes required witness examinations to be taken under oath, such examinations carried an indicia of trustworthiness. Probably for that reason, Hawkins did not refer to Marian examinations as “hearsay.”

However, Marian examinations were admissible only if the declarant was genuinely unavailable—that is, dead, too seriously ill to travel, or kept away by the defendant.\textsuperscript{119} Because of the unavailability of the witness, the written record of a witness examination became the best evidence that could be had and thus was admissible of necessity. Although there is some controversy regarding the precise procedure required for Marian witness examinations as of 1789,\textsuperscript{120} there is no doubt that such made the arrest, as well as the unsworn “examination” of the arrestee, to reduce those statements to writing, and to certify those records to the next session of the felony trial court (either the court of “gaol-delivery” or “sessions of the peace,” depending on the specific felony). The Marian statutes also required coroners to take, record, and certify to the trial court the sworn information of witnesses at inquests into homicides. For a more detailed description, see Davies, \textit{supra} note 10, at 126-30.

\textsuperscript{117} Modern commentaries typically refer to Marian witness examinations as “depositions,” and the historical sources sometimes did so. However, because use of the deposition label can lead to confusion, and because the historical sources usually used the term “examination,” I refer to these witness statements as Marian witness “examinations.” See Davies, \textit{supra} note 1, at 580 n. 80.

\textsuperscript{118} 2 \textsc{Hawkins}, \textit{supra} note 108, at 429 (1721 ed.); 2 id. at 429 (1771 ed.); 2 \textsc{Leach’s Hawkins}, \textit{supra} note 108, at 605 (1787 ed.). See also Davies, \textit{supra} note 108, at 146-48.

\textsuperscript{119} See 2 \textsc{Hawkins}, \textit{supra} note 98, at 429 (1721 ed.); 2 id. at 429 (1771 ed.); 2 \textsc{Leach’s Hawkins}, \textit{supra} note 98, at 605 (1787 ed.)

\textsuperscript{120} Whether the admissibility of the written record of a Marian witness examination depended upon the defendant’s having had an opportunity to cross-examine the witness when the examination was taken, as Justice Scalia claimed in \textit{Crawford}, is a contested point. Justice Scalia asserted in \textit{Crawford} that the Marian “statutory derogation” of a broad common-law cross-examination right had been “rejected” in English law by 1791. \textit{Crawford}, 541 U.S. at 54-55 n. 5. In my previous article, I argued that claim was prochronistic because, although a cross-examination rule did become a part of Marian procedure in English law sometime after the framing of the federal
examinations were admissible only if the witness was unavailable to testify at trial.\footnote{It is unclear why Justice Thomas persists in asserting that Marian witness examinations were the target of the Confrontation Clause. Justice Thomas’s rhetoric conveys the impression that the Framers would have thought there was an unsettled issue as to whether Marian depositions might be admitted in lieu of live testimony by an available witness. That simply was not the case. As Hawkins indicated, the admissibility of a Marian witness examination had been limited to unavailable witnesses in a ruling in 1680, more than a century prior to the framing. See supra note 111. Thus, the framing-era rule permitted the admission of a Marian witness examination in a common-law criminal jury trial only in the unusual circumstance in which a witness had died, become seriously ill, or was kept away by the defendant. Otherwise, evidence at trial had to be given \textit{viva voce} in the presence of the prisoner. Thus, the rule of admissibility of Marian witness examinations of genuinely unavailable witnesses did not threaten to turn criminal trials into trial by deposition. Notably, neither Justice Thomas nor Justice Scalia has identified any pre-framing complaints about the admissibility of Marian examinations of genuinely unavailable witnesses. I have not located any such complaint prior to 1794. See Davies, \textit{supra} note 10, at 186.} Thus, although the admissibility

Bill of Rights, no cross-examination requirement for Marian witness examinations had appeared in any of the published treatises or case reports that were available in America by the time of the 1789 framing.\footnote{Mr. Robert Kry, who clerked for Justice Scalia during the term when \textit{Crawford} was decided, has responded to my criticism of Justice Scalia’s originalist claim regarding the “cross-examination rule” aspect of \textit{Crawford}. See Robert Kry, \textit{Confrontation Under the Marian Statutes: A Response to Professor Davies}, 72 BROOK. L. REV. 493 (2007). I do not think the historical materials Mr. Kry has identified regarding the evolution of Marian practice in London alter my previous conclusions that no cross-examination rule for Marian procedure had been recognized in English law as of the 1789 framing of the Sixth Amendment Confrontation Clause and that no such rule had come to the Framers’ attention by that date. See Davies, \textit{supra} note 1 (responding in detail to Kry’s arguments, and specifically noting that Kry’s evidence indicates only that a controversy regarding cross-examination in Marian witness examinations had arisen in London as of 1789, not the settled rule Justice Scalia asserted in \textit{Crawford}, and that Kry has not identified significant evidence that Americans would have been aware even of that controversy as of 1789). However, Mr. Kry has not addressed the criticism in my prior article regarding \textit{Crawford}’s originalist testimonial formulation of the scope of the confrontation right, which I further elaborate in this article.} Mr. Robert Kry, who clerked for Justice Scalia during the term when \textit{Crawford} was decided, has responded to my criticism of Justice Scalia’s originalist claim regarding the “cross-examination rule” aspect of \textit{Crawford}. See Robert Kry, \textit{Confrontation Under the Marian Statutes: A Response to Professor Davies}, 72 BROOK. L. REV. 493 (2007).

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However, Mr. Kry has not addressed the criticism in my prior article regarding \textit{Crawford}’s originalist testimonial formulation of the scope of the confrontation right, which I further elaborate in this article.
of a Marian witness examination did contravene the usual principle that a defendant was entitled to cross-examine, face-to-face, all adverse witnesses in the presence of the jury,\textsuperscript{122} that deviation seems to have been permitted because of the presumed trustworthiness of the statement in light of its having been taken under oath, and the potential importance of the evidence that would otherwise be lost. The admissibility of Marian examinations of unavailable witnesses also served an important practical purpose; the admissibility of a witness’s preserved written information removed a defendant’s incentive to kill or otherwise obstruct the appearance of an adverse witness.\textsuperscript{123}

\textit{b. The Ban Against Hearsay}

Hawkins also discussed the general ban against hearsay evidence in criminal trials and identified the two limited-purpose exceptions to that ban. He stated the general ban against the admission of hearsay statements as evidence in a criminal trial as follows:

\begin{quote}
As to . . . How far Hearsay is Evidence: It seems agreed That what a Stranger [that is, an out-of-court declarant] has been heard to say is in Strictness no Manner of Evidence either for or against a Prisoner, not only because it is not upon Oath, but also because the other side had no Opportunity of a cross Examination; and therefore it seems a settled Rule, That it shall never be made use of but only by way of Inducement or Illustration of what is properly Evidence . . . .
\end{quote}

Thus, Hawkins defined all unsworn out-of-court statements as “hearsay” and also stated that such statements were

\begin{flushleft}\textsuperscript{122} Hawkins did not explicitly refer to cross-examination in the presence of the jury, but other commentators did. See, e.g., HALE, \textit{quoted supra} note 89; BLACKSTONE, \textit{quoted supra} note 90.\textsuperscript{123} See Davies, \textit{supra} note 10, at 148.\textsuperscript{124} 2 HAWKINS, \textit{supra} note 108, at 431 (1721 ed.); 2 \textit{id}. at 431 (1771 ed.); 2 LEACH’S HAWKINS, \textit{supra} note 108, at 606-07 (1787 ed.).\end{flushleft}
inadmissible not only because they were unsworn (and thus unreliable), but also “because the other side had no opportunity of a cross-examination.” The latter statement makes it clear that Hawkins did not treat the ban against hearsay as being distinct from the in-the-presence/confrontation principle; rather, he treated admitting hearsay—unsworn out-of-court statements—as a violation of the principle that all evidence in criminal trials had to be given in the presence of the defendant. Hawkins’s linkage of the ban against hearsay to the right to cross-examine is particularly significant because it was repeated in all of the prominent framing-era American justice of the peace manuals.125

c. The Two Limited-Purpose Hearsay Exceptions

Hawkins identified only two exceptions to the ban against admitting hearsay evidence, and each was confined to a specific use. One allowed hearsay statements to be used “by way of inducement or illustration of what is properly evidence” and the other allowed hearsay statements to be used to corroborate (or impeach) the testimony a witness had already given at trial. Those are the only instances in which Hawkins indicated that hearsay statements could be admissible.

Although Hawkins’s statement that hearsay can “be made use of . . . by way of inducement or illustration of what is properly evidence . . .” may seem mysterious, the marginal citations that accompany this point indicate that Hawkins was referring to the use of hearsay statements to prove the general existence of a conspiracy—but not to prove the defendant’s personal involvement in it.126 This seems to have been a

125 See infra notes 190-193.

126 The meaning of Hawkins’s reference to the allowance of hearsay statements “by way of inducement or illustration of what is properly evidence” (see supra quotation in the text at note 124) is explained by Hawkins’s citations in the margin to five seventeenth-century treason trials. In each, the court allowed witnesses (usually persons who admitted some involvement in the plot) to repeat hearsay statements that showed the general existence of a conspiracy against the government, but indicated that such statements were not to be treated as evidence of the defendant’s own guilt.
See 2 Hawkins, supra note 108, at 431 (1721 ed.), citing: (1) Tryal of Richard Langhorn, 2 State Tryals (1st ed. 1719) 325, 328, 332, 333 (Old Bailey 1679) (reporting, in this Popish Plot trial, that witnesses who were involved were allowed to repeat hearsay statements regarding the general existence of a plot to kill the king; however, in one instance when a hearsay statement regarding the defendant was made, the court instructed the jury that that statement was “no evidence” against the defendant); (2) Trial of Thomas Knox and John Lane, 2 State Tryals (1st ed. 1719) 410, 414-15 (K.B. 1679) (reporting, in this Popish Plot trial, that the admission of hearsay evidence regarding statements made by a conspirator who had “run away” was contested, and the court ruled that the prosecution should first present some evidence of acts by the defendants and then could use the hearsay evidence to prove the circumstances in which the defendants had acted); (3) Tryal of Lord Russell, 3 State Tryals (1st ed. 1719) 133, 144, 145 (K. B. 1683) (reporting, in this Rye House Plot trial, that when a witness gave a long narrative about the existence of a conspiracy which included hearsay statements about the defendant, the defendant objected to “a great deal of Evidence by Hearsay” and the court responded that “[t]his is nothing against you, I declare it to the Jury”); (4) Tryal of Algernone Sidney, 3 State Tryals (1st ed. 1719) 207, 210 (K.B. 1683) (reporting, in this Rye House Plot trial, that when defendant objected to admission of evidence not about himself, the court cited the Popish Plot trials as precedent for admitting evidence of the general design of a conspiracy; when the witness then recounted some hearsay statements about the defendant himself, the defendant objected and the court ruled that “this Evidence does not affect you, and I tell the Jury so”); (5) Tryals of Charnock, King, and Keyes, 4 State Tryals (1719 ed.) 1, 33 (Old Bailey 1695) (reporting, in a Jacobite plot trial, that the court instructed the jury that hearsay accounts of statements made by others involved in the plot were “not Evidence” against the individual defendants, but were “good Proof” of the existence of the plot itself). The same citations appear in later editions. See 2 id. at 431 (1771 ed.); 2 Leach’s Hawkins, supra note 108, at 606 (1787 ed.) All of these defendants were convicted of treason and executed. For historical background on the Popish Plot trials and the Rye House Plot trials, see Langbein, Adversary Trial, supra note 37, at 69-72, 75-76.

Unlike the modern co-conspirator statement exception, in each of these cases the court limited the use of hearsay to the general existence of a conspiracy, but instructed the juries that the hearsay evidence was not to be considered as evidence of the defendant’s personal involvement.

This limited understanding of the use to which hearsay evidence of a conspiracy could be admitted was still evident in Chief Justice Marshall’s rulings in the Burr Conspiracy trials of 1807. Marshall premised his ruling by stating that “courts will always apply the rules of evidence to criminal
pragmatic response to the difficulty that would otherwise have been encountered in proving the existence of a conspiracy involving more than a few persons.\textsuperscript{127} However, this framing-era exception was not equivalent to the modern co-conspirator hearsay exception because a co-conspirator’s hearsay statement could not be used to prove the defendant’s own involvement in the conspiracy.\textsuperscript{128} Although some later works suggest that this exception could allow the use of hearsay to prove other background facts, Hawkins mentioned only proof of a conspiracy.

The only other hearsay exception Hawkins mentioned appeared at the end of his passage on hearsay, quoted above:

\begin{quote}
Yet it seems that what the Prisoner had been heard to say at another Time may be given in Evidence for him as well as against him, and also what a Witness
\end{quote}

prosecutions so as to treat the defence with as much liberality and tenderness as the case will admit.” United States v. Burr, 25 Fed. Cas. 187, 191 (Cir. Ct. D. Va. 1807) (No. 14,696). He then noted that there was an exception to the rule against hearsay evidence “for the purpose of proving the conspiracy” but noted that the hearsay “is not to operate against the accused, unless brought home to him by [nonhearsay] testimony drawn from his own declarations or his own conduct.” \textit{Id.} at 193. On that basis, he then ruled that the hearsay evidence proffered was inadmissible in the case at hand. \textit{Id.} at 195. Although Marshall did not cite authorities in this specific discussion, he discussed the proof of the existence of a conspiracy hearsay exception in the same way that Hawkins had, and also cited “2 Hawk. P.C.” as authority for several later points in the same proceeding. \textit{Id.} at 196, 197. Hence, there is no doubt he was conversant with Hawkins’s treatment and regarded it as authoritative.

A comparable use of hearsay evidence to prove that a mutiny occurred was allowed in The Ulysses, 24 Fed. Cas. 515, 516-17 n.2 (1800).

However, Hawkins’s reference to the use of hearsay “by way of inducement or illustration of what is properly evidence” may have been applied more loosely during the early nineteenth century. \textit{See infra} notes 171, 200, 257.

\textsuperscript{127} The treason trials that Hawkins cited, see \textit{supra} note 126, had typically involved a significant number of alleged participants. The primary example was the “Popish Plot” trials of 1678-80. For a description, see \textsc{Langbein, Adversary Trial}, \textit{supra} note 37, at 69-75.

\textsuperscript{128} \textit{See supra} note 126, \textit{infra} notes 134, 163.
hath been heard to say at another Time, may be given in Evidence in order either to invalidate or confirm the Testimony which he gives in Court.\textsuperscript{129}

This impeachment/corroboration exception was quite limited. It did not permit a hearsay statement to be admitted independently as direct evidence of a defendant’s guilt. Rather, the only hearsay statements that were admissible were those that were previously made out-of-court by a person who had testified under oath as a witness at trial. Thus, the hearsay declarant was actually subject to cross-examination by the defendant during the trial.

In sum, Hawkins identified only three instances in which out-of-court statements were admissible in criminal trials. The only form of out-of-court statement that was admissible as “proper\textsuperscript{[]} evidence”—that is, as evidence of the defendant’s guilt—was a sworn Marian examination of a genuinely unavailable witnesses. In contrast, Hawkins did not identify any instances when unsworn hearsay statements were admissible to prove the guilt of the defendant.

2. Bacon’s Abridgment

A summary of Hawkins’s statements regarding the rule against hearsay also appeared in an “abridgment” published by Matthew Bacon in 1736:

It seems agreed, that what another has been heard to say is no Evidence, because the Party was not under Oath; also, because the Party who is affected thereby, had not an Opportunity of Cross-examining; but such Speeches or Discourses may be made use of by Way of Inducement or Illustration of what is is properly Evidence.

\textsuperscript{129} 2 HAWKINS, supra note 108, at 431 (1721 ed.) (emphasis added); 2 id. at 431 (1771 ed.); 2 LEACH’S HAWKINS, supra note 108, at 606-07 (1787 ed.). Note that the use of a defendant’s own unsworn statements was not regarded as hearsay and posed no difficulty because the defendant’s statements were neither required nor permitted to be taken on oath.
Also, what a Witness hath been heard to say at another Time, may be given in Evidence, in order either to invalidate or confirm the Testimony he gives in Court.\footnote{2 MATTHEW BACON, THE NEW ABRIDGMENT OF THE LAW 313 (1st ed. 1736) (citing “2 Hawk. P. C. 431 [1st ed.]”). This summary appears without change in 2 id. at *313 (6th ed., T. Cunningham ed. 1793). For bibliographic information, see 1 MAXWELL, supra note 108, at 16.}

The restrictive treatment of out-of-court statements that is evident in Hawkins’s treatise is also evident in the other treatises on evidence doctrine that were available in framing-era America. In particular, those sources also state a rigid ban against hearsay evidence in criminal trials.


A 1717 treatise titled The Law of Evidence, which was published anonymously but is attributed to William Nelson, was written more or less contemporaneously with that by Hawkins.\footnote{WILLIAM NELSON, THE LAW OF EVIDENCE (1717). This work was initially published in 1717 and subsequent editions were published in 1735 and 1744. See 1 MAXWELL supra note 108, at 379. I quote and cite the 1744 edition.} Like Hawkins, Nelson also recognized the admissibility of sworn Marian examinations of deceased witnesses.\footnote{See NELSON, supra note 131, at 120, 277 (1744 ed.).} Also like Hawkins, Nelson stated a strong ban against unsworn hearsay. Specifically, Nelson wrote that “[a] Witness shall not give Evidence of what he has heard another say, (For Hearsay is not to be admitted,)” but like Hawkins, he recognized the limited-purpose corroboration exception,\footnote{Nelson’s treatise stated the hearsay rule as follows:

12. A Witness shall not give Evidence of what he has heard another say, (For Hearsay is not to be admitted, except as No. 7. supra.) Yet [in a treason trial] The Acts and Speeches of others admitted as Evidence against a Prisoner. (Sed quare Legem? [But query whether legal?])

Id. at 270 (citations omitted, emphasis in original). The exception in “No. 7” referred to in the above passage was the corroboration exception:}
also mentioned the allowance of hearsay for the limited purpose of proving the general existence of a conspiracy. However, Nelson did not identify any other exceptions to the ban against unsworn hearsay evidence.

4. Gilbert’s Law of Evidence

Chief Baron Geoffrey Gilbert’s treatise, *The Law of Evidence*, was written more or less contemporaneously with Hawkins’s and Nelson’s, but was published posthumously several decades later in 1754, and reissued in several later editions, including a 1788 New York printing. Unlike

7. Hearsay is admitted for Evidence where it is to establish another Witness’s Testimony; as where a second swears he heard the first Witness declare the same Thing formerly. *Id.* (citation omitted). See also *id.* at 181 (“Though a Hear-say was not to be allowed as direct Evidence, yet it might be made use of to this Purpose, viz. to prove that [a witness] was constant to himself; whereby his Testimony was corroborated”).

134 Nelson’s treatise also noted that hearsay could be used to prove the existence of a conspiracy but not the defendant’s personal involvement in it:

11. Hearsay from others is not to be applied immediately to the Prisoner; however those Matters that are remote at first, may serve to prove there was a general Conspiracy to destroy the King and Government; and so was the constant Rule and Method about the Popish Plot, first to produce Evidence of the Plot in General. *Id.* (citation omitted).

135 GEOFFREY GILBERT, THE LAW OF EVIDENCE (1754). The title “Chief Baron” indicated that Gilbert was chief judge of the Court of Exchequer. Gilbert’s treatise was reprinted in several later editions with little alteration except for the pagination. I cite the 1777 London edition to show continuity. For bibliographic information, see 1 MAXWELL, *supra* note 108, at 379. Gilbert’s treatise was also printed in Philadelphia in 1788 [hereinafter “GILBERT (1788 Philadelphia ed.)”]. *See* JAMES, *supra* note 90, at 184. Examination of that edition indicates that it was a reprinting of the London 1777 edition.

Capel Lofft edited a substantially expanded four volume edition of Gilbert’s Law of Evidence in 1791-1796. Because it is so altered, I cite this work separately: GEOFFREY GILBERT, THE LAW OF EVIDENCE (Capel Lofft ed. 1791) [hereinafter LOFFT’S GILBERT.] For bibliographic information, see
Hawkins, Gilbert dealt with evidence in both civil and criminal matters, and gave predominance to the former. Nevertheless, Gilbert’s treatment of out-of-court statements was essentially the same as that set out by Hawkins and Nelson.

Like Hawkins and Nelson, Gilbert recognized that Marian witness examinations of unavailable witnesses were admissible as evidence in felony trials. Also like Hawkins and Nelson, Gilbert offered a strong (if wordy) ban against hearsay evidence, which he defined to include any unsworn out-of-court statement:

The Attestation of the Witness must be to what he knows, and not to that only which he hath heard, for a mere Hearsay is no Evidence, for ‘tis his Knowledge that must direct the Court and Jury in the Judgment of the Fact, and not his mere Credulity, which is very uncertain and various in several Persons; For Testimony being but an Appeal to the Knowledge of another, if indeed he doth not know he can be no Evidence: Besides tho’ a Person testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath; and if a Man had been in Court and said the Thing and had not sworn it, he had not been believed in a Court of Justice; for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without Oath, an Oath that there was such a speech makes it no more than a bare speaking, and so of no Value in a Court of Justice, where all Things were determined under the Solemnities of an Oath . . .

1 Maxwell, supra note 108, at 379.
136 Gilbert, supra note 135, at 100 (1754 ed.), discussed in Davies, supra note 10, at 144-45.
137 Gilbert, supra note 135, at 107-08 (1754 ed.); id. at 149-50 (1777 ed.); id. at 149-50 (Philadelphia 1788 ed.). Capel Lofft located this passage under the heading “Of Secondary Evidence; or, Hearsay in Criminal Cases.” 2 Lofft’s Gilbert, supra note 135, at 889 (1791 ed.). This is the passage that Chief Justice Rehnquist quoted from Gilbert’s 1769 edition in Crawford, 541 U.S. at 70 n. 2, discussed supra note 32 and accompanying text.
The first part of this passage reflects the “best evidence” principle—a person who can only repeat someone else’s account does not have the sort of direct knowledge that is required for valid evidence; hence, he cannot qualify as a witness. The second part condemns hearsay for the inherent untrustworthiness of an unsworn statement. However, perhaps because he was not primarily concerned with criminal evidence, Gilbert did not identify the absence of cross-examination or the lack of testimony in the presence of the defendant as deficiencies in hearsay.

Gilbert identified only a single exception under which hearsay could be admitted as evidence—the limited-purpose corroboration exception also mentioned by Hawkins and Nelson. At the end of the passage quoted above, Gilbert wrote:

But tho’ Hearsay be not allow’d as direct evidence, yet it may be in Corroboration of a Witness’s Testimony, to shew that he affirmed the same thing before on other occasions, and that he is still consistent with himself; for such Evidence is only in Support of the Witness that gives in his Testimony upon Oath.138

Interestingly, however, Gilbert presented this corroboration exception under the heading of “One Witness, Hearsay Evidence,” suggesting that the exception applied only in an instance where only a single witness was available to give evidence on a matter.139 Perhaps because he was not primarily concerned with criminal evidence, Gilbert did not mention the limited-purpose exception for proving the general existence of a

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138 GILBERT, supra note 135, at 108 (1754 ed.); id. at 150 (1777 ed); id. at 150 (1788 Philadelphia ed.); 2 LOFFT’S GILBERT, supra note 135, at 890 (1791 ed.).

139 GILBERT, supra note 135, at 106, 108 (1754 ed.); id. at 147, 150 (1777 ed.); id. at 147, 150 (1788 Philadelphia ed.). Gilbert included a margin citation at this passage to “Skin 402,” the citation for Thompson v. Trevanion, which I discuss infra notes 244-247 and accompanying text. Thus, Gilbert treated Thompson as involving the corroboration hearsay exception, rather than as involving a spontaneous declaration or res gestae hearsay exception.
conspiracy.

5. The Bathurst and Buller Treatises

Two additional English evidence treatises appeared in the mid eighteenth century, although they were so closely related that they constituted virtually the same work. Henry Bathurst’s *The Theory of Evidence*, which acknowledged heavy borrowing from Nelson and Gilbert, was published anonymously in 1761.\(^{140}\) That work was then totally incorporated into a somewhat larger treatise, *An Introduction to the Law Relative to Trials at Nisi Prius*, which was published anonymously in 1767 but, starting with the 1772 edition, was published under the name of Francis Buller, Bathurst’s nephew.\(^{141}\) A New York edition of this latter treatise was published in 1788.\(^{142}\)

Like Gilbert’s treatise, those by Bathurst and Buller were primarily concerned with evidence in civil litigation.

\(^{140}\) Henry Bathurst, *Theory of Evidence* (1761). There was no later edition of this work under this title. See 1 Maxwell, supra note 108, at 378.

\(^{141}\) Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (1772). (Nisi Prius referred to trial jurisdiction.) The incorporation of the contents of *The Theory of Evidence* into the later Nisi Prius treatise was well known. See Richard Waley Bridgman, *A Short View of Legal Bibliography* 230-31 (1807) (noting that the contents of *The Theory of Evidence* were “generally understood to have been afterwards engrafted on” the Nisi Prius treatise). The initial editions of the Nisi Prius treatise are attributed to Bathurst, but his nephew, Francis Buller, is identified as the author starting with the 1772 edition, and this work is often cited as Buller’s. See 1 Maxwell, supra note 108, at 378 (entry 1; Theory of Evidence incorporated into An Introduction to the Law of Nisi Prius); id. at 335 (entries 1 & 3; discussing 1767 & 1772 editions of An Introduction to the Law Relative to Trials at Nisi Prius and attributing 1772 edition to Buller). There were also some later editions published by others, sometimes titled An Institute of the Law Relative to Trials at Nisi Prius. For simplicity, I cite the 1772 edition identifying Buller as the author.

\(^{142}\) Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (reprinted by Hugh Gaine, New York, 1788) [hereinafter “Buller (1788 New York ed.”)]. See James, supra note 90, at 184.
Nevertheless, they did recognize the admissibility of Marian examinations of genuinely unavailable witnesses in felony trials. The Bathurst and Buller treatises also stated a strong ban against hearsay evidence while recognizing the exception for the limited purpose of corroboration of a trial witness’s testimony:

Hearsay is no Evidence, for no Evidence is to be admitted but what is upon Oath; and if the first Speech was without Oath, another Oath that there was such Speech, makes it no more than a bare Speaking, and so of no Value in a Court of Justice. Beside, if the Witness is living, what he has been heard to say is not the best Evidence. But though Hearsay be not to be allowed as direct Evidence, yet it may in Corroboration of a Witness’s testimony, to shew that he affirmed the same Thing before on other Occasions, and that he is still constant to himself.

Following this passage, these works then listed several cases:

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143 The Theory of Evidence stated:

If the Witnesses examined on a Coroner’s Inquest are dead, or beyond Sea, their Depositions may be read; for the Coroner is an Officer appointed on behalf of the Public, to make Inquiry about the Matters within his Jurisdiction; and therefore the Law will presume the Depositions before him to be fairly and impartially taken.—And by [the Marian statutes] Justices of the Peace shall examine of Persons brought before them for Felony, and of those who brought them, and certify such Examination to the next Goal-Delivery; but the examination of the Prisoner shall be without Oath, and the others upon Oath, and these Examinations shall be read against the Offender upon an Indictment, if the Witnesses be dead.

Bathurst, supra note 140, at 33-34 (1761). See also Buller, supra note 141, at 238 (1772 ed); Buller, supra note 142, at 242 (1788 New York ed.).

144 Bathurst, supra note 140, at 111; Buller, supra note 141, at 289-90 (1772 ed.) (same passage with minor stylistic changes); Buller, supra note 142, at 294 (1788 New York ed.) (same). Note that the language in the statement regarding the corroboration exception was taken almost verbatim from that by Gilbert, quoted supra text accompanying note138.
specific issues on which hearsay evidence was admissible in civil lawsuits, including legitimacy, ancestry, whether a person was dead, pedigree, “prescription” (that is, a claim to land based on long occupancy), customary right-of-ways, or reputation as to a title.\textsuperscript{145} However, none of these issues were pertinent to criminal

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\textsuperscript{145} The paragraph that immediately follows that quoted in the text identifies civil litigation hearsay exceptions as follows:

So where the Issue is on the Legitimacy of the Plaintiff or Defendant, it seems the Practice to admit Evidence of what the Parents have been heard to say, either as to their being or not being married, and with Reason, for the Presumption arising from the Cohabitation is either strengthened or destroyed by such Declarations, which are not to be given in Evidence directly, but may be assined the Witness as a Reason for his Belief one Way or the other. But in \textit{Pendrel} and \textit{Pendrel}, Hil. 5. G. 2. Lord \textit{Raymond} would not suffer the Wife’s Declarations, that she should not know her Husband by Sight, &c. to be given in Evidence till after she had been produced on the other Side. So Hearsay is good Evidence to prove, who is my Grandfather, when he married, what Children he had, &c. of which it is not reasonable to presume I have better Evidence. So to prove my Father, Mother, Cousin, or other Relation beyond the Sea, is dead, and the common Reputation and Belief of it in the Family gives Credit to such Evidence; and for a Stranger it would be good Evidence if a Person swore that a Brother or other near relation had told him so, which Relation is dead. In Ejectment between the Duke of \textit{Athol} and Lord \textit{Asburnham}, E. 14. G. 2. Mr. Sharpe, who was Attorney in the Cause, was admitted to prove, what Mr. \textit{Worthington} told him he knew and had heard in regard to the Pedigree of the Family, Mr. \textit{Worthington} happening to die before the Trial. So in Questions of Prescription, it is allowable to give hearsay Evidence in order to prove general Reputation; and where the Issue was a Right to a Way over the Plaintiff’s Close, the Defendants were admitted to give Evidence of a Conversation between Persons not interested, then dead, wherein the Right to the Way was agreed. In Ejectment the Plaintiff derived his Title from Lord \textit{R}. in whom he laid a Presentation of one \textit{Knight}; the Bishop set up a Title in himself, and traversed the \textit{Seisin} of Lord \textit{R}. The Plaintiff gave in Evidence an Entry in the Register of the Diocese of the Institution of \textit{Knight}, in which there was Blank in the Place, where the Patron’s Name is usually inserted, upon which he
prosecutions. Like Gilbert’s treatise, the Bathurst and Buller treatises did not mention the existence-of-a-conspiracy exception that Hawkins and Nelson had discussed.

6. Viner’s Abridgment and the Dying Declaration Exception

None of the treatises mentioned so far had recognized any exception under which unsworn hearsay could be admitted as evidence of a criminal defendant’s guilt. The first such exception, for a dying declaration by a murder victim, was introduced into the treatise literature around 1750 when Charles Viner published volume 12 of his twenty-three volume General Abridgment of Law and Equity. Viner stated that “Hearsay from others is not to be applied immediately to the prisoner” and that “hearsay [is] not to be

offered parol Evidence of the general Reputation of the Country, that Knight was in by the Presentation of Lord R. Upon a Bill of Exceptions, this came on Error into K[ing’s] B[ench] where the better Opinion was, that the Evidence was allowable; the Register which was the proper Evidence being silent. A Presentation made by Parol, may be transmitted to Posterity by Parol, and that creates a General Reputation.

BATHURST, supra note 140, at 111-113; BULLER, supra note 141, at 290-91 (same passage with minor stylistic changes); BULLER, supra note 142, at 294-95 (1788 New York ed.) (same).

No similar list of hearsay exceptions appeared in Gilbert’s Treatise, until Capel Lofft added a passage derived from the passage quoted above in his 1791 revision of Gilbert’s treatise. See 1 LOFFT’S GILBERT, supra note 135, at 279 (1791 ed.).

Capel Lofft explicitly noted that these hearsay exceptions were inapplicable in criminal trials when he published an enlarged edition of Gilbert’s treatise in 1791. See infra note 162 and accompanying text.

146 Capel Lofft explicitly noted that these hearsay exceptions were inapplicable in criminal trials when he published an enlarged edition of Gilbert’s treatise in 1791. See infra note 162 and accompanying text.

147 CHARLES VINER, GENERAL ABRIDGMENT OF LAW AND EQUITY. The twenty-three volumes were published between 1741 and 1753. See 1 MAXWELL, supra note 108, at 20. I have been unable to establish the precise publication date of volume 12, which dealt with the topic of evidence, and which was sometimes published and sold separately. See 1 MAXWELL, supra, at 379. R. Kelham published an index to the twenty-three volumes as the twenty-fourth volume in 1758. See 1 id. at 19.
allowed as direct evidence."\textsuperscript{148} He also recognized the limited-purpose exceptions for proof of the existence of a conspiracy\textsuperscript{149} and for corroboration.\textsuperscript{150} However, he added a new exception for a dying declaration that, for the first time, permitted unsworn hearsay to be admitted as evidence of a defendant’s guilt in a criminal trial:

11. In the case of murder, what the deceased declared after the wound given, may be given in evidence. Coram King Ch. J. apud. Old Bailey, 1720. the King v. Ely.

12. In Trowter’s Case, Pasch. 8 Geo. B.R. the Court would not admit the declaration of the deceased which had been reduced into writing to be given in evidence without producing the writing.\textsuperscript{151}

No similar dying declaration exception had been noted by Hawkins or the other evidence treatises. The explanation is suggested by the dates of the cases that Viner cited as authority for the exception: an unreported 1720 ruling in the Old Bailey and a 1722 (“Pasch. 8 Geo.”) ruling in King’s Bench (“B.R.”)

\textsuperscript{148} 12 VINER, \textit{supra} note 147, at 118 (page numbering according to first edition) (emphasis in original).

\textsuperscript{149} Viner wrote:

4. Hearsay from others is not to be applied immediately to the prisoner; however those matters that are remote at first may serve to prove there was a general conspiracy to destroy the King and Government; and so was the constant rule and method about the Popish plot, first to produce evidence of the plot in general; by Ch. J. cites Sidney’s Case, Try. per Pais, 56.

\textsuperscript{150} id. (emphasis in original).

\textsuperscript{151} id. 118-19 (page numbers of first edition).
which was not published until 1730. Thus the case authority for a dying declaration exception appeared a bit too late to have been included in the treatises by Hawkins, Nelson, or Gilbert.

Viner did not discuss the rationale for the hearsay exception for dying declarations, but a 1787 commentator suggested that a dying declaration was admissible because the declarant’s apprehension of imminent death would stimulate the same fear that a false accusation would result in eternal damnation as would an oath, and thus that the exception should apply only when the declarant actually apprehended his imminent “dissolution” (death). Thus, a dying declaration of a murder victim was viewed as carrying the same assurance of truthfulness and reliability as an oath. Moreover, because the information of the dying murder victim often constituted the “best evidence,” or even the only evidence, regarding the identity of the murderer and circumstances of the crime, such statements were admitted “of necessity,” not withstanding that they could not meet the usual in-the-presence/cross-examination requirement for evidence at criminal trials.

152 Viner’s reference to “Trowter’s Case” was to the 1721 King’s Bench ruling in King v. Reason and Tranter. Two reports of that case were published. The earliest appeared in 6 State Trials 195 (2nd ed. Supplement 1730) [reprinted 16 How St. Tr. 1, 24-38]. See 1 MAXWELL, supra note 108, at 369 (indicating that the sixth volume of State Trials was first published in 1730). The second report appeared in Strange 499 (1st ed. 1755) [reprinted 1 Str. 499 (3rd ed. 1795), 93 Eng. Rep. 659, 659-60]. See 1 MAXWELL, supra, at 309 (indicating that Strange’s Reports were first published in 1755).

153 Thomas Leach added a section on the admissibility of dying declarations and a note setting out the rationale for that exception when he edited the 1787 revision of Hawkins’s treatise. See, 2 LEACH’S HAWKINS, supra note 108, at 619, n. “(10)” (1787 ed.) (commenting that a dying declaration can be admitted only if “the party is sensibly appreciative of approaching dissolution” when the declaration is made). In Crawford, Justice Scalia wrote that “The existence of [the dying declaration] exception as a general rule of criminal hearsay law cannot be disputed” and described dying declarations as a “sui generis” hearsay exception. Crawford v. Washington, 541 U.S. 36, 56 n. 6 (2004).

154 Thomas Leach added the section on dying declarations in his 1787 revision of Hawkins’s treatise immediately after a section he added setting out the “best evidence” principle. 2 LEACH’S HAWKINS, supra note 108, at 619
7. **Burn’s Justice of the Peace Manual**

The more salient passages in the treatises by Hawkins, Nelson, Gilbert, Viner, Bathurst, and Buller were also set out in justice of the peace manuals, a sort of legal encyclopedia covering topics relevant to that office. These works were often more substantial than the term “manual” may suggest. The leading English justice of the peace manual during the last half of the eighteenth century was Richard Burn’s *The Justice of the Peace and Parish Officer*, first published in 1755 and reissued in numerous later editions by Burn to 1785. Because Burn drew upon all of the treatises, abridgments, and earlier manuals, his four-volume manual provides a fairly comprehensive summary of late eighteenth-century criminal evidence law.

Like the treatises, Burn noted the admissibility of Marian examinations of witnesses who were dead, too ill to travel, or kept away by the defendant, and the admissibility of a dying declaration of a victim “[i]n the case of murder.” Like the treatises, he also stated the general ban against hearsay evidence and the limited-purpose corroboration exception. However, like the treatises by Gilbert, Bathurst, and Buller, Burn omitted the limited-purpose exception that allowed hearsay to be

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155 **RICHARD BURN, JUSTICE OF THE PEACE AND PARISH OFFICER** (four volumes, 1755). Numerous further editions were published during the eighteenth century. For simplicity, I usually cite the 1764 edition, but call attention to any changes from that edition by citing later editions. For bibliographic information, see 1 *MAXWELL*, supra note 108, at 225-26 (entry 15); *BRIDGMAN*, supra note 141, at 42-43.

Blackstone recommended that students interested in the role of the justice of the peace in criminal procedure consult “Dr Burn’s *Justice of the Peace*; wherein [the student] will find every thing relative to this subject, both in asncient and modern practice, collected with great care and accuracy, and disposed in a most clear and judicious method.” 1 *BLACKSTONE*, supra note 90, at 343 (1st ed. 1765).

156 1 *BURN*, supra note 155, at 336 (1764 ed.).

157 1 *id.* at 345.

158 1 *id.* at 345. *See also infra* text accompanying notes 184-186.
admitted to prove the existence of a conspiracy.159

8. Framing-era American Justice of the Peace Manuals

Burn’s manual is an especially important source regarding the framing-era American understanding of criminal evidence doctrine because the four principal justice of the peace manuals that were published in America between 1765 and 1789 each reprinted Burn’s treatment of admissible criminal evidence.160

159 Burn initially quoted Hawkins’s passage on hearsay in his 1755 first edition, which included Hawkins’s statement that hearsay could be admitted “by way of inducement or illustration of what is properly evidence.” See 1 Burn, supra note 155, at 292 (1755 ed.) (quoting 2 HAWKINS, supra note 108, at 431 (1721 ed.); passage quoted supra text accompanying note 124). However, Burn did not link that exception to proof of the existence of a conspiracy as Hawkins had.

After publication of The Theory of Evidence in 1761, however, Burn replaced Hawkins’s passage on hearsay with the passage on hearsay in that treatise, which did not mention the allowance of hearsay “by way of inducement or illustration of what is properly evidence.” See 1 Burn, supra note 155, at 345 (1764 ed.), quoting BATHURST, supra note 140, at 111-12.

160 Framing-era Americans were likely to have consulted one of the four substantial justice of the peace manuals that were published in America between 1765 and 1789, each of which borrowed heavily from Burn’s English manual. The earliest of these was CONDUCTOR GENERALIS (Woodbridge N.J. 1765; printed by James Parker, “[o]ne of his Majesty’s Justices of the Peace for Middlesex County, in New-Jersey”) [hereinafter PARKER’S CONDUCTOR] (examination indicates the section on “Evidence” in this work selectively reprinted material from Burn’s 1762 edition). Parker’s treatment of “Evidence” was also reprinted in two later 1788 New York printings of this manual with different pagination but apparently without any updating of the material on “Evidence” to later editions of Burn’s manual: THE CONDUCTOR GENERALIS (New York, 1788; printed by Hugh Gaine) [hereinafter “Gaine’s CONDUCTOR”]; CONDUCTOR GENERALIS (New York, 1788; printed by John Patterson for Robert Hodge) [hereinafter “Hodge’s CONDUCTOR”].

There were also three other prominent manuals, each of which was based on later editions of Burn’s manual: JOSEPH GREENLEAF, AN ABRIDGMENT OF BURN’S JUSTICE OF THE PEACE AND PARISH OFFICER (Boston, 1773); RICHARD STARKE, OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE (Williamsburg, 1774); and JOHN FAUCHAUD GRIMKE, SOUTH CAROLINA JUSTICE (Philadelphia, 1788)(published anonymously but attributed to Judge
Thus, directly or indirectly, Burn’s summary of criminal evidence was probably the most widely available source on the subject in framing-era America.

9. Summary of the pre-framing treatises and manuals

In sum, the treatises and justice of the peace manuals that were available in framing-era America identified only two kinds of out-of-court statements that could be admitted as evidence of a defendant’s guilt in a criminal trial: a sworn Marian Grimke; see Davies, supra note 10, at 185 n. 256). There were some earlier less substantial manuals, as well as a shorter and superficial 1774 justice of the peace manual for North Carolina: James Davis, The Office and Authority of a Justice of the Peace (New Bern, N.C., 1774).

Like Burn, the four substantial American manuals each noted the admissibility of Marian examinations of deceased or otherwise unavailable witnesses. See Parker’s Conductor, supra, at 165; Greenleaf, supra, at 118; Starke, supra, at 143; Grimke, supra, at 184; Gaine’s Conductor, supra, at 137-38; Hodge’s Conductor, supra, at 168.

Like Burn, the substantial American manuals each stated the general ban against hearsay, the corroboration exception, and the dying declaration of a murder victim exception; however they did not all identify the limited purpose exception for proof of a conspiracy. The three printings of Conductor Generalis quoted Burn’s passage on dying declarations and the passage on hearsay and the corroboration exception that Burn initially quoted from Hawkins’s treatise: see Parker’s Conductor, supra, at 170; Gaine’s Conductor, supra, at 142; Hodge’s Conductor, supra, at 173. The Hawkins passage quoted in these printings of Conductor Generalis also mentioned the allowance of hearsay “by way of inducement or illustration of what is properly evidence,” but did not contain any explanation of that exception, and did not link it to proof of the existence of a conspiracy as Hawkins had (see supra note126).

The other three manuals by Greenleaf, Starke, and Grimke quoted passages on dying declarations, hearsay and the corroboration exception from recent editions of Burn’s manual. Thus, they quoted the passage on hearsay from The Theory of Evidence that Burn substituted for the Hawkins passage in Burn’s 1764 edition (see infra notes 185-186 and accompanying text). As a result, they made no mention of the limited hearsay exception for statements “by way of inducement or illustration of what is properly evidence.” See Greenleaf, supra, at 127; Starke, supra, at 144, 150; Grimke, supra, at 194-95.
examination of an unavailable witness or a dying declaration of a murder victim. Both involved (1) either an oath or the functional equivalent of an oath, and (2) the genuine unavailability of the witness. However, none of the framing-era authorities recognized any other exception to the ban against hearsay evidence under which unsworn hearsay statements could be admitted as evidence of the defendant’s guilt. Rather, most of these works recognized only a limited-purpose corroboration exception, and some also recognized that hearsay could be used to prove background facts such as the general existence of a conspiracy, though not the defendant’s part in it.

However, except for dying declarations, all of the modern criminal hearsay exceptions are missing from these works (and even the dying declaration exception was limited to statements made by murder victims). For example, none of the preframing sources mentioned the modern “res gestae,” “spontaneous declaration,” “declaration against interest,” or statement of a co-conspirator exceptions that could now fall within Crawford’s “nontestimonial hearsay” category. Rather, the modern exceptions under which “nontestimonial” hearsay can now be admitted against a criminal defendant did not exist when the Confrontation Clause was framed in 1789. In fact, hearsay exceptions for criminal trials are still absent even from the leading treatises that were published in the decades following the American framing.

10. Post-Framing English Treatises

When Capel Lofft published an enlarged edition of Gilbert’s Law of Evidence in London in 1791, he repeated the strong ban against use of hearsay evidence, noted the cross-examination rationale for that ban (though he did not use the term “cross-examination”), and explicitly commented that the hearsay exceptions “which have their place in civil, do not apply in

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161 My conclusion is essentially consistent with that which Professor Heller announced in 1951. See supra note 46 and accompanying text.
NOT THE FRAMERS' DESIGN

criminal cases.”¹⁶² Lofft also noted that hearsay could be

¹⁶² Capel Lofft’s revisions of Gilbert’s treatise, published in London in 1791, clearly indicated that no exceptions beyond the limited-purpose exceptions for corroboration and for proof of the existence of a conspiracy had been recognized by that date. Although Lofft inserted a passage identifying the various hearsay exceptions for civil litigation noted by Bathurst and Buller, he stated that those exceptions were not pertinent to criminal cases when he restated Gilbert’s definition of “hearsay.” He began the discussion under the heading of “Of Secondary Testimony; or, Hearsay in Criminal Cases” as follows:

We have seen in general that Hearsay is not Evidence: but we have had occasion at the same time to observe some Exceptions to this Rule, such as the Proof of ancient Custom or Pedigree, where the Nature of the Thing to be proved supposes a failure of direct living Testimony. But these and other Exceptions, which have their place in civil, do not apply to criminal Cases: and therefore in these the Attestation of the Witness must be to what he knows, and not to that only which he has heard; for a mere hearsay is no Evidence . . . .

2 Lofft’s Gilbert, supra note 135, at 889 (1791 ed.) (emphasis added). At the end of this passage Lofft repeated Gilbert’s original statement of the ban against hearsay, quoted supra text accompanying note 137. (A peculiarity of Lofft’s edition is that the material he added is indicated by quotation marks along the left margin but the original material by Gilbert is presented without those marks.) Shortly thereafter, he indicated the linkage between the ban against hearsay and the defendant’s right to cross examine by noting that a person who testified to his own knowledge, unlike a person who testified only to hearsay information, “incur[red] the Risque of Cons[utation].” 2 id. at 890 (there is an apparent typographical error; a high “s” appears instead of an “f,” but “Consutation” was not and is not a recognized word).

Lofft also restated Gilbert’s statement of the corroboration exception (though he emphasized the potential for impeachment by noting that the absence of a complaint by the alleged victim immediately after a personal injury would carry a strong implication that the crime had not occurred). 2 id. at 890.

In addition, Lofft also added a passage incorporating Hawkins’s existence-of-a-conspiracy exception (discussed supra note 126), but noted that the hearsay evidence of a conspiracy could not be admitted “to charge the Prisoner [that is, defendant] in particular.” 2 id. at 891. However, the limited purpose exceptions for corroboration and proof of a conspiracy are the only two exceptions to the ban on hearsay that Lofft discussed in his section on hearsay in criminal cases.
admitted for the limited purposes of proving a conspiracy, 163 or
by way of corroborating the testimony of a witness, 164 but only
hinted that a dying declaration exception applied in criminal
trials. 165

The three principles of evidence that Hawkins had described
as requiring the strong ban against unsworn hearsay were also
evident in Thomas Peake’s A Compendium of the Law of
Evidence, published in London in 1801. Peake made the
following general statement about hearsay:

The Law . . . always requires the sanction of an oath:
It further requires [the witness’s] personal attendance
in Court, that he may be examined and cross
examined by the different parties, and, therefore, in
cases depending on parol [i.e., oral] evidence, the
testimony of persons who are themselves conusant of
the facts they relate, must in general be produced; for
the relation of one who has no other knowledge of
the subject than the information he has received from
others, is not a relation upon oath; and moreover the
party against whom such evidence should be
permitted, would be precluded from his benefit of
cross examination. 166

As in the previous evidence treatises, the specific hearsay
exceptions that Peake identified were not pertinent to criminal

163 2 id. at 891 (“But Hearsay maybe Evidence of Inducement in matters
that do not constitute the Crime, and are of a general Nature. As that there
was a Plot, a Conspiracy, a Disaffection; but not to charge the Prisoner in
particular”).
164 2 id. at 890.
165 In his discussion of hearsay in civil lawsuits, Lofft commented that
“what a deceased person said on his death-bed touching the Cause of his
Death” was admissible evidence. See 1 id. at 280. However, he did not
repeat that point when discussing hearsay in criminal cases. See 2 id. at 889-
91.
166 THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 7-8
(1801) (“relation” in this passage means “account” or “speaking”). Note that
the reference to a person “conusant of the facts they relate,” that is, a person
with direct personal knowledge, amounts to a version of the framing-era
“best evidence” principle.
Joseph Chitty’s *Practical Treatise on the Criminal Law*, which was published in London in 1816,\(^{168}\) and reprinted in America in 1819,\(^{169}\) also still described the treatment of out-of-court statements in criminal trials in essentially the same terms that Hawkins had used in 1721. Chitty noted the admissibility of Marian witness examinations of unavailable witnesses,\(^ {170}\) stated the strong rule against hearsay evidence and the cross-examination rationale for that prohibition, and recognized the two limited-purpose exceptions for corroboration and “inducement or illustration of more substantial testimony” (although, unlike Hawkins, he did not link the latter specifically

\(^{167}\) Peake listed the recognized hearsay exceptions as follows:

The few instances in which this general rule [against hearsay] has been departed from, and in which hearsay evidence has been admitted, will be found, on examination, to be such as were, in their very nature, incapable of positive and direct proof. Of this kind are all those which can only depend on reputation. The excluding of hearsay evidence in questions of pedigree, prescription, or custom, would prevent all testimony whatsoever; for the evidence of any living witness of what passed within the short time of his own memory, would often be insufficient in the former instance, always in the latter; and there is no other way of knowing the evidence of deceased persons, than by the relation of others, of what they have been heard to say. In these cases, therefore, the law departs from its general rule, and receives evidence of the declarations of deceased persons, who, from their situation, were like to know the facts; and also the general reputation of the place or family most interested to preserve in memory the circumstances attending it. Any thing which shews such reputation is, on a question of this sort, received in evidence, though oftentimes wholly inadmissible in other cases.

*Id.* at 8-9. ("[P]rescription" refers to a claim to land based on constant occupation.)

\(^{168}\) *Joseph Chitty, A Practical Treatise on the Criminal Law* (London 1816).


\(^{170}\) 1 *Chitty*, *supra* note 168, at 72-79; 1 *Chitty*, *supra* note 169, at *72-79.*
to proof of the general existence of a conspiracy). Chitty also noted the exception for the “dying declaration of a party murdered” as “one great and important exception” to the rule against admitting hearsay evidence relating to a criminal defendant’s guilt. As noted above, Thomas Leach had previously added the dying declaration exception to his 1787 revision of Hawkins’s treatise.

11. Post-framing American Cases

Reported American cases from the decades following the framing also seem to confirm that the modern hearsay exceptions had not yet appeared on the scene. Professor Randolph N. Jonakait surveys those cases in another article in this symposium issue. Although Jonakait finds that relevant, available American case law from the decades immediately

1 Chitty wrote the following regarding hearsay:

There is no general rule better established in the law of evidence, then that mere statements of what was uttered by a stranger, cannot be admitted to prove any circumstance on the trial. For the law admits of no evidence but such as is delivered upon oath, and the original expressions were not only uttered when the speaker was not under that obligation, but are liable to be forgotten, misunderstood, and unconsciously altered, by the party who repeats them. Besides, if the original speaker be living, this statement of his words is not the best evidence, which, we have seen, the courts will require; and the prisoner loses the benefit of cross-examination, which is of such eminent service in discovering the true color of the circumstances related. . . . But hearsay may be used as inducement and illustration of more substantial testimony. And the declarations of a witness, at another time, may be adduced to invalidate or to confirm his evidence; by showing that he varies in his statement; or has maintained a uniform consistency in his narration.

1 CHITTY, supra note 168, at 568-69.

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1 id. at 569-70.

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following the framing about evidentiary practices in criminal cases “is slight,” he reports that there is evidence of the general rule against unsworn hearsay evidence in the cases we do have. Although participants in those cases sometimes made loose but unspecific assertions that there were “many exceptions” to the general rule against hearsay (perhaps referring to the civil hearsay exceptions), the hearsay evidence that actually was contested in the criminal trials that Jonakait identifies involved either background or general information that did not go directly to the defendant’s guilt of a crime (that is, Hawkins’s hearsay as “inducement or illustration of what is properly evidence”), corroboration of a witness’s in-court testimony, or dying declarations of murder victims. Thus, the exceptions that Jonakait finds in the post-framing cases seem to be limited to the exceptions identified in the treatises. Like the treatises and manuals, the post-framing American cases

175 Id. at 483.
176 See, e.g., id. at 479 (noting an exchange in a 1794 case that indicated that the proposition that hearsay is generally inadmissible “went unchallenged by the prosecutor and was readily accepted by the court”). See also id. at 485 (noting that statements by the judge in an 1800 federal criminal trial indicated that hearsay “was usually banned”).
177 Id. at 479 (discussing judge’s statement in State v. Baynard, 1794 W.L. 184 (Del. O.& T. 1794).
178 See, e.g., id. at 478-80 (noting that in State v. Bayard, 1794 W.L. 184 (Del. O.&T. 1794), the prosecutor sought to admit hearsay on the ground that it was not “substantive evidence” itself but rather was offered “introductory to that which was good legal evidence” to explain the narrative).
179 See, e.g. id. at 486, n.43 (discussing hearsay rulings in State v. Norris, 1796 W.L. 327 (N.C. Super. L. & Eq. 1796) and The Ulysses, 24 F. Cas. 515 (D. Mass. 1800).
180 See, e.g., id. at 481 n.30 (discussing a ruling regarding the dying declaration hearsay exception in Respublica v. Langcake & Hook, 1795 W.L. 708 (Pa. 1795).
181 Jonakait also found that depositions were deemed inadmissible in criminal cases unless the parties consented, which tends to confirm that the admissibility of Marian witness examinations was understood to be sui generis. See id. at 487 (discussing ruling in The Ulysses, 24 F. Cas. 515, 516 n.2 (D. Mass. 1800).
Jonakait identified do not reveal anything like the modern variety of criminal hearsay exceptions.

12. Summary

Taken together, the framing-era treatises and manuals, the treatises from the decades immediately after the framing, and the post-framing American cases all present a strikingly consistent treatment of a strong prohibition against use of unsworn out-of-court statements as evidence of a defendant’s guilt. Except for dying declarations of murder victims, they did not permit unsworn hearsay statements to be admitted as evidence of a defendant’s guilt. Rather, the only other exceptions they allowed were the limited-purpose exceptions for corroboration (or impeachment) of the testimony of a witness who had already testified at trial, or for background information such as the general existence of a conspiracy, that did not bear directly on the defendant’s guilt of a crime. The bottom line is that none of these historical authorities identified any hearsay exceptions that would have permitted any unsworn, “nontestimonial” hearsay statement to be admitted as evidence of a criminal defendant’s guilt.

The absence of framing-era hearsay exceptions that relate to proof of the defendant’s guilt demonstrates that the “reasonable inferences” that Justice Scalia announced in Crawford and Davis regarding “the Framers’ design” for cross-examination cannot be valid. Indeed, the historical sources provide even stronger evidence of that invalidity. The originalist testimonial formulation announced in Crawford and repeated in Davis was rooted in the foundational premise that the law of hearsay statements was analytically distinct from the confrontation right. However, that is not how the framing-era authorities treated those subjects. Rather, the framing-era authorities indicated that the confrontation right itself required that unsworn hearsay statements be inadmissible.
D. How the Confrontation Right Required the Ban Against Hearsay

As noted above, Serjeant Hawkins observed in 1721 that an unsworn hearsay statement was inadmissible in a criminal trial “not only because it is not upon oath, but also because the other side had no opportunity of a cross examination.” In other words, if the statement of an out-of-court declarant—a “stranger” in Hawkins’s terminology—were to be admitted, a criminal defendant would be deprived of the right to cross-examine the maker of the statement in the view of the jury, one of the key features of the confrontation right.

When Burn published the first edition of his manual in London in 1755, he included Hawkins’s passage on the ban against hearsay, including the statement that hearsay was banned “because the other side hath no opportunity of a cross examination.” When Bathurst’s The Theory of Evidence became available a few years later, however, Burn’s 1764 edition replaced Hawkins’s passage on hearsay with the more extensive discussion of hearsay, and the listing of the civil litigation hearsay exceptions, that appeared in The Theory of Evidence. However, Burn made a significant alteration in the
latter. Because Bathurst had not mentioned the cross-examination rationale for the rule against hearsay, Burn retained a paraphrase of Hawkins’s statement of the cross-examination rationale and inserted it into the discussion of hearsay that he otherwise borrowed from *The Theory of Evidence*. The phrase Burn added is set out in italics:

> It is a general rule, that hearsay is no evidence; for no evidence is to be admitted but what is upon oath; and if the first speech was without oath, another oath that there was such a speech, makes it no more than a bare speaking, and so of no value in a court of justice; and besides, the adverse party had no opportunity of a cross examination; and if the witness is living, what he had been heard to say is not the best evidence that the nature of the thing will admit.  

Thus, all of the editions of Burn’s leading manual treated the right to cross-examine adverse witnesses as requiring the ban against hearsay evidence.

It is highly likely that the American Framers also understood that the confrontation right itself required the ban against

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reasonable to presume that there is better evidence. So to prove that a man’s father or other kinsman beyond the sea is dead, the common reputation and belief of it in the family gives credit to such evidence; and for a stranger it would be good evidence, if a person swore that a brother or other near relation had told him so, which relation is dead. So in questions of prescription, it is allowable to give hearsay evidence, in order to prove general reputation; and where the issue was of a right to a way over the plaintiff’s close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed.

1 *id.* at 345 (1764 ed.) (citing “*Theory of Evid.* 111, 112” and paraphrasing Bathurt’s discussion of civil hearsay exceptions quoted *supra* note 145). This passage on exceptions to the ban against hearsay is unchanged in later editions. *See, e.g.*, 1 *id.* at 529 (1785 ed.).

186 1 *BURN, supra* note 155, at 345 (1764 ed.) (emphasis added); 1 *id.* at 529 (1785 ed.). Compare the italicized clause to the Hawkins passage quoted *supra* text accompanying note 124.
hearsay evidence regarding a criminal defendant’s guilt. For one thing, the Framers would have consulted Hawkins’s treatise because it was the leading work on criminal law and procedure during the entire eighteenth century and the pertinent passage on hearsay appeared in all of the eighteenth century editions of that work,\(^{187}\) as well as in the summary of Hawkins’s views in Bacon’s Abridgment.\(^ {188}\)

Moreover, Hawkins’s treatment of the hearsay ban as a consequence of the right of cross-examination also appeared, directly or indirectly, in each of the significant justice of the peace manuals published in America during the framing period.\(^ {189}\) The 1765 printing of Conductor Generalis in New Jersey and the 1788 printings of that work in New York each quoted Hawkins’s passage on hearsay itself.\(^ {190}\) The other three manuals quoted Burn’s altered quotation of the ban against hearsay from The Theory of Evidence, including his reference to the loss of cross-examination. Joseph Greenleaf included that passage when he published his Abridgment of Burn’s Justice in Boston in 1773;\(^ {191}\) Richard Starke included that passage when he published his Office and Authority of a Justice of the Peace in Williamsburg in 1774;\(^ {192}\) and Judge John Faucheaud Grimke also included that passage in his South Carolina Justice, which was printed in Philadelphia in 1788.\(^ {193}\) Thus, the linkage between the confrontation right and the ban against unsworn hearsay appeared in the justice of the peace manuals published for New England, New York and the mid-Atlantic states, Virginia, and South Carolina, as well in the works by Hawkins and Burn themselves (both of which appear to have been imported by Americans in significant numbers\(^ {194}\)).

\(^{187}\) See supra note 124 and accompanying text.

\(^{188}\) See supra note 130 and accompanying text.

\(^{189}\) One shorter and less substantial manual published in North Carolina in 1774 did not discuss hearsay at all. See supra note 160.

\(^{190}\) See supra note 160.

\(^{191}\) GREENLEAF, supra note 160, at 127.

\(^{192}\) STARKE, supra note 160, at 250.

\(^{193}\) GRIMKE, supra note 160, at 194.

\(^{194}\) One can make an admittedly crude estimate as to whether an English
Additionally, the linkage between a criminal defendant’s right to cross-examine adverse witnesses and the ban against hearsay evidence was also stated in several other widely used legal works. For example, Matthew Bacon’s summary of Hawkins’ passage on hearsay—that hearsay “is no evidence . . . because the party who is affected thereby had not an opportunity of cross-examining”—was repeated in the framing-era editions of the leading legal dictionaries (really more like encyclopedias) published by Giles Jacob and Timothy Cunningham. Given publication was imported in significant numbers by counting the number of surviving copies of the work that are currently found in American public libraries. That number can be derived from the Worldcat listing of the Online Computer Libraries Center. See Online Computer Libraries Center, http://www.oclc.org (last visited Mar. 18, 2007).

A search of that source revealed 163 copies of preframing editions of Hawkins’s PLEAS OF THE CROWN (99 from the first through the 1771 editions and 64 of the 1787 edition edited by Thomas Leach (including a 1788 Dublin reprinting of that edition). A similar search located 150 copies of the 16 preframing-editions of Burn’s manual (133 from the first through the 1785 edition and 17 of the 1788 edition).

By comparison, a similar search revealed 33 copies of Nelson’s treatise, 61 of Gilbert’s plus 30 of the 1788 New York edition, 15 of Bathurst’s, and 81 of Buller’s plus 39 of the 1788 New York edition. I am indebted to my colleague Professor Sibyl Marshall for this information.

See supra text accompanying note 130.

196 1 Giles Jacob, A Law Dictionary (Owen Ruffhead & J. Morgan, eds., 10th ed. 1773) (pages unnumbered; entry on “Evidence II,” subsection “3. Of parol, presumptive, and hearsay evidence”); 1 id. (T.E. Tomplins, ed., 1797 ed.) (same). There were a number of earlier editions, see 1 Maxwell, supra note 108, at 9; however, I cannot locate this passage in earlier editions of this dictionary; rather, it appears to have been added when Ruffhead and Morgan revised it in the early 1770s.


197 1 Timothy Cunningham, A New and Complete Law Dictionary or General Abridgment of the Law (2d ed. 1777) (entry for “Evidence,” subsection “5. Of parol, presumptive, and hearsay evidence”); 1 id. (3rd ed. 1783) (same). The first edition of Cunningham’s dictionary was published in 1764-1765; see 1 Maxwell supra note 108, at 8. However, I have been unable to locate that edition.
all of these sources, it seems highly likely that framing-era American lawyers and judges understood the ban against unsworn hearsay evidence to be a component of a criminal defendant’s right to confront adverse witnesses.\footnote{My conclusion that the connection between the right to confrontation (in the form of a criminal defendant’s right to cross-examine at trial) and the ban against unsworn hearsay evidence was well established during the eighteenth century and certainly during the framing era (1775-1789) may appear to contrast with descriptions of the development of hearsay doctrine that Professors Gallanis and Langbein have given in other recent historical commentaries. However, the differences seem to reflect only the different historical sources that were consulted. On the basis of a review of historical English evidence treatises, Professor Gallanis concluded that the cross-examination rationale for the hearsay rule “appeared first in Lofft’s 1791 revision of Gilbert, although only in connection with criminal cases.” Gallanis, supra note 37, at 533, citing 2 GEOFFREY GILBERT, THE LAW OF EVIDENCE 890 (Capel Lofft ed., London, 1791) (cited as LOFFT’S GILBERT in this article) (stating that a witness at trial “incur[s] the Risque of Con[fl]utation”) (there is an apparent typographical error in the original; see supra note 162). That statement by Professor Gallanis has also been quoted in LANGBEIN, ADVERSARY TRIAL, supra note 37, at 245 (2003). The explanation for the seeming difference between Gallanis’s discussion of the cross-examination rationale and mine is simply that Gallanis only undertook to summarize the statements that appeared in evidence treatises themselves, but did not review the discussions of hearsay and the references to the cross-examination rationale for the hearsay rule that appeared in criminal procedure treatises such as Hawkins’s treatise, or in other kinds of legal publications such as Bacon’s Abridgment, Burn’s manual, or the law dictionaries by Jacob and Cunningham. Moreover, because Gallanis was interested only in the contents of the English evidence treatises per se, he also did not consult the framing-era American justice of the peace manuals which also articulated the cross-examination rationale for the ban against hearsay evidence. Hence, as Professor Gallinis has confirmed to me by e-mail, his statement should be understood only as specific description of the hearsay rationales that appear in English evidence treatises, but not as a statement dating the first appearance of the cross-examination rationale for the ban against hearsay. Gallanis’s study simply did not address the eighteenth-century criminal procedure publications in which the cross-examination rationale appeared. Likewise, the seeming differences between my statements about the appearance of the cross-examination rationale for the hearsay rule and some of those made by Professor Langbein also appear to arise from the different}
The linkage between the cross-examination right and the ban on hearsay that we each examined. Thus, although Professor Langbein did note that Hawkins had noted the cross-examination rationale for the hearsay rule as early as 1721, see Langbein, Adversary Trial, supra note 37, at 238, and that cross-examination was one of the three rationales for the confrontation right during the eighteenth century, see id. at 180, he commented, based on his examination of the surviving records of trials in London’s Old Bailey, that recorded objections to hearsay were still uncommon in eighteenth-century criminal trials in that court, that “concern about the want of cross-examination remained a muted theme in criminal practice throughout the eighteenth century,” and that “[t]he first judicial mention of [the cross-examination] rationale for excluding what we could call hearsay . . . in the [surviving records of criminal trials in the Old Bailey] turns up in 1789.” Id. at 233-238 (citing the passage from Woodcock quoted infra text accompanying note 215). Likewise, he suggested that “[o]nly in the middle of the nineteenth century did the consensus form that the doctrinal basis of the hearsay rule was to promote cross-examination.” Id. at 180.

My assessment is that Langbein’s observations simply show that one cannot accurately recover historical doctrinal understandings from the records of statements made during criminal trial proceedings themselves. It is not surprising that discussions of the rationale for the hearsay rule are not particularly apparent in the surviving trial records. For one thing, the surviving accounts of Old Bailey trials are far from complete prior to the 1780s and hardly amount to a transcript. See id. at 182-89. Moreover, precisely because the hearsay rule was settled as a doctrinal matter and rested on three rationales, there would have been little reason for counsel or the judge to discuss those rationales in the course of trials. Indeed, some of the trial records that did show the exclusion of hearsay evidence did not indicate that either the judge or counsel actually even bothered to use the term “hearsay,” let alone discuss the rationale for that rule. See, e.g., infra text accompanying notes 253-256. Those cursory applications of the hearsay rule during trials suggest that the rule was so well understood that neither counsel nor the judge thought any discussion of the basis for the rule was necessary.

Additionally, it would seem that the heightened prominence accorded the cross-examination rationale for the hearsay rule that Langbein reports during the nineteenth century might be explained as readily in terms of the diminishing importance accorded to the other rationales for the hearsay rule – that is, the diminishing significance of the oath and the relaxation of the “best evidence” principle—as in terms of any increased assignment of importance to the cross-examination rationale per se. Thus, the fact that cross-examination emerged as “the” rationale for hearsay in the nineteenth century does not mean that cross-examination did not earlier constitute one of several salient doctrinal grounds for the hearsay rule at the time of the framing.
against hearsay also was still prominent in the criminal evidence treatises published in the decades that immediately followed the framing. In addition to the recognition of the cross-examination rationale for the hearsay ban in the treatises by Lofft, Peake, and Chitty mentioned above, Leonard MacNally’s 1802 treatise also treated the ban against hearsay evidence as flowing from the requirement that all criminal evidence had to be given in the defendant’s presence.

A statement by Chief Justice John Marshall also demonstrates that Americans still understood that the ban against hearsay was a component of the confrontation right in the decades following the framing of the Confrontation Clause. In an 1807 evidentiary ruling in one of the trials that arose from the Burr conspiracy, Marshall said the following in a discussion in which he also cited Hawkins’s treatise as authority:

The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than him against whom the proceedings are instituted has generally been deemed all essential to the correct

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199 See, e.g., the 1791 statement by Lofft, quoted supra note 162; the 1801 statement by Peake, quoted supra text accompanying note 166; the 1816 statement by Chitty, quoted supra note 171.

200 LEONARD MACNALLY [sometimes cited as M’NALLY], THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 360 (Dublin 1802). In the first “rule” in his chapter on “parol” (oral) evidence, MacNally combined Hawkins’s statements regarding the requirement that criminal evidence be presented in the defendant’s presence and Hawkins’s statement of the ban against hearsay: “No evidence can be received against a prisoner but in his presence: and therefore it is agreed that what a stranger has been heard to say, is in strictness no manner of evidence, either for or against the prisoner.” Id., citing “2 HAWK. P.C. ca. 46” (see passages quoted supra, text accompanying notes 110, 124). MacNally then continued: “The reasons assigned as the grounds of this [hearsay] rule are, because such evidence is not upon oath: and also because the party, who would be affected by such evidence, had no opportunity of cross examination.” Id. (citations omitted).

However, MacNally then recognized (as the second rule of oral evidence) “[b]ut hearsay evidence may be made use of by way of inducement or illustration of what is properly evidence.” Id. (citations omitted).
administration of justice. I know not . . . why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in the preservation of which all are more concerned. I know of none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.\(^{201}\)

Marshall made that statement in the context of deciding whether an unsworn hearsay statement proffered by the prosecution fell within the limited-purpose exception that allowed hearsay to be used to prove the general existence of a conspiracy. He went on to rule that the proffered hearsay statement went beyond those bounds because it implicated the defendant personally, and thus was inadmissible.\(^{202}\)

Although Justice Scalia did his best in \textit{Crawford} to evade the plain import of Marshall’s statement, what Marshall said leaves no doubt that he understood that the ban against admitting hearsay evidence of a defendant’s guilt was required by the defendant’s constitutional confrontation right.\(^{203}\) Indeed,


\(^{203}\) Justice Scalia wrote:

Although Chief Justice Marshall made one passing reference to the Confrontation Clause, the case was fundamentally about the hearsay rules governing statements in furtherance of a conspiracy. The “principle so truly important” on which “inroad[s]” had been introduced was the “rule of evidence which rejects mere hearsay testimony.” Nothing in [Marshall’s] opinion concedes exceptions to the Confrontation Clause’s exclusion of testimonial statements as we use the term.


Justice Scalia’s characterization that Marshall made only a “passing reference” to confrontation but that the principle at issue was only the rule
Marshall was simply stating the same understanding that the legal authorities of the period also stated. Marshall’s understanding of the confrontation-hearsay linkage was essentially the same as that set out by Hawkins, Burn, the American justice of the peace manuals, the legal dictionaries, and the post-framing treatises. Given the consistency among those authorities, it seems highly likely that Marshall’s statement reflected a continuation of the pre-framing understanding of that linkage.

Thus, contrary to statements in Crawford and Davis that seem to deny a connection between the confrontation right and against hearsay rather than the confrontation right was merely a false dichotomy. Marshall plainly linked the prohibition against hearsay to the constitutional confrontation right. Additionally, Marshall’s statement did not indicate that there were “inroad[s]” which “had been introduced” regarding the ban against use of hearsay to prove a defendant’s own guilt. The only use of hearsay at issue in Burr was the limited-purpose exception that allowed hearsay to prove the general existence of a conspiracy, but not to prove the defendant’s involvement, and Marshall excluded the hearsay statement in question because it reflected directly on the defendant. Thus, Marshall applied the rule against hearsay, not the limited-purpose exception. See supra note 126. As of 1807, there were still no recognized hearsay exceptions (other than a dying declaration of a murder victim) that would have permitted hearsay to be admitted as evidence of a defendant’s guilt, so it is apparent that Marshall did not refer to any “inroad[s]” of that sort. Thus, the limited-purpose proof-of-the-existence-of-a-conspiracy exception that Marshall actually discussed was not the equivalent of the modern statements in furtherance of conspiracy exception.

Chief Justice Rehnquist’s concurring opinion in Crawford also mischaracterized Marshall’s statement in Burr. The Chief Justice quoted Marshall’s statement in the context of asserting that “there were always exceptions to the general rule of exclusion [of hearsay]” and suggested that Marshall’s statement “recognized that [the confrontation] right was not absolute, acknowledging that exceptions to the exclusionary component of the hearsay rule, which [Marshall] considered an ‘inroad’ on the right to confrontation, had been introduced.” Crawford, 541 U.S. at 74 (Rehnquist, C.J., concurring). Again, however, that rendition overstated the situation regarding historical hearsay exceptions. Marshall had not referred to any exception that would permit use of hearsay to prove a defendant’s guilt, as the Chief Justice’s statements implied.
the hearsay ban, the framing-era authorities did not divorce the ban against unsworn hearsay from the cross-examination right that is central to confrontation. The direct historical evidence that Justice Scalia did not consult in either Crawford or Davis reveals that the hearsay ban was understood to be a requirement of the confrontation right.

Hence, however “reasonable” the originalist inferences that Justice Scalia drew in Crawford might have appeared when viewed in isolation, they collide head-on with the evidentiary doctrine that actually shaped the Framers’ understanding of the confrontation right. Admitting unsworn, “nontestimonial” hearsay was not part of “the Framers’ design.”

III. THE CASES CITED IN CRAWFORD AND DAVIS

What of the historical English cases that were discussed in Crawford and Davis? Do they alter the picture of the Framers’ understanding of the confrontation right that emerges from the framing-era treatises and manuals? Do they cast doubt on the description of framing-era law presented above? If one actually pays attention to what the cases say, rather than to the modern glosses imposed on them during the arguments in Davis, one finds that the statements that appear in the case reports are consistent with the treatment of out-of-court statements in framing-era treatises and manuals.

A. The Historical Treatment of the Purportedly “Testimonial” Cases

Let me begin with the two cases that were discussed in Davis as though they might be examples of the exclusion of testimonial hearsay statements, King v. Dingler, and King v. Brasier. See supra note 54.

See supra notes 48-52 and accompanying text.

See supra note 126 S.Ct. at 2277.


As explained above, neither of these cases were published early enough to constitute valid evidence of the Framers’ understanding. In fact, the actual publication stories of these two cases amply illustrate the pitfalls of attempting to base claims about original meaning upon late eighteenth-century English cases. The cases are relevant here only insofar as they provide a check on the evidentiary regime spelled out in the framing-era treatises and manuals.

1. Dingler

Although no one seems to have been aware of it when Davis was argued, the 1791 ruling in the Old Bailey in Dingler was never published, and thus never available to Americans, until 1800—eleven years after the Sixth Amendment was framed. Hence, it plainly did not inform the original meaning of the Confrontation Clause in 1789. Nevertheless, Justice Scalia discussed Dingler in Davis as though the exclusion of the out-of-court statement of the deceased victim was an example of the exclusion of a “testimonial” hearsay statement. However, that is not the reason the English judge gave when he ruled the statement inadmissible.

In Dingler a justice of the peace had taken and recorded the statement of a victim of an assault after the assailant had been arrested and committed to jail to await trial. The victim subsequently died prior to the trial, and the issue was the admissibility of the victim’s statement. The victim’s statement did not constitute a dying declaration because she had not been aware of impending death when it was made. Thus, the issue was whether it was admissible as a sworn Marian witness examination. As noted above, the framing-era evidence authorities recognized that sworn Marian examinations of

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208 See supra note 69.
209 Davis, 126 S.Ct. at 2277.
210 Dingler, 2 Leach (4th ed. 1815) at 563, 168 Eng. Rep. at 384 (noting that prosecuting counsel conceded that the victim’s statement was not a dying declaration).
deceased witnesses could be admitted in felony trials. However, because that rule of admissibility was grounded in the statutory authority for justices of the peace to take such examinations, issues could arise as to whether a statement by a deceased person had actually been taken within the statutory window for exercising Marian authority. This was the issue that was actually argued in Dingler.

The Marian statutes provided for the taking of sworn statements of witnesses at the time of a felony arrest, when the justice of the peace was required to decide whether the arrestee should be released, bailed, or committed to jail to await trial. However, the victim’s statement in Dingler was taken a day after the defendant was arrested and committed to jail. Thus, at Dingler’s trial, his counsel objected that the victim’s statement was inadmissible because, not having been taken in connection with the arrest, it was outside the scope of Marian authority and not properly sworn. Dingler’s counsel offered the 1789 Old Bailey ruling in King v. Woodcock as authority for his position.

In Woodcock, in turn, the trial judge had ruled that a deceased victim’s out-of-court statement could not be admitted at trial as a Marian examination because, having been taken separately from, rather than in connection with, the defendant’s arrest, the procedure was “extrajudicial” and, thus, the victim’s statement was not “upon oath, judicially taken.” The presiding trial judge at Dingler’s trial accepted that ruling as authority and excluded the victim’s statement on the basis of

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211 See supra text accompanying notes 116-123, 132, 136, 143, 156; see also note 160.
212 Dingler, 2 Leach (4th ed. 1815) at 562-63, 168 Eng. Rep. at 383-84, noting that defense counsel cited the case of King v. Woodcock, 1 Leach (4th ed. 1815) 500, 168 Eng. Rep. 352 (Old Bailey 1789). Woodcock was initially published in the first edition of Leach’s reports. See Leach (1st ed. 1789) 437. That volume was probably published in late 1789, after the framing of the Sixth Amendment. See supra note 68. Unlike some of the other cases reported in Leach’s first edition, there were no significant alterations of the Woodcock report in the later editions.
The significant point for present purposes is that neither the ruling in Dingler nor that in Woodcock made any reference to the “testimonial” character of the excluded statement or to any other aspect of the character of what was said. Likewise, neither of the cases said anything that might suggest that an unsworn, nontestimonial hearsay statement could ever be admitted as evidence. To the contrary, the presiding judge in Woodcock made a statement that identified only two forms of out-of-court statements that could be admitted as to a defendant’s guilt:

> The most common and ordinary species of legal evidence consists in the depositions of witnesses taken on oath before the Jury, in the face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give. But beyond this kind of evidence there are also two species which are admitted by law: The one is the dying declaration of a person who has received a fatal blow: the other is the examination of a prisoner, and the depositions of the witnesses who may be produced against him, taken officially before a Justice of the Peace, by virtue of [the Marian statute], which authorizes Magistrates to take such examinations and directs that they shall be returned to the Court of Gaol Delivery. This last species of deposition, if the deponent should die between the time of examination and the trial of the prisoner, may be substituted in the room of that viva voce testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact.215

Significantly, the only two kinds of out-of-court statements that the judge in Woodcock identified as admissible evidence of a

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defendant’s guilt—a dying declaration of a murder victim and a sworn Marian witness examination of an unavailable witness—are precisely the same as the only two kinds identified in the treatises and manuals.216

Dingler and Woodcock do not reveal the “testimonial” end of a distinction between “testimonial” and “nontestimonial” hearsay. Rather, they simply reflect an across-the-board rule that no statement could be offered as evidence in a criminal case, even from an unavailable declarant, unless it was made under a valid oath, or the equivalent of an oath in the case of a dying declaration. Thus, these cases underscore that unsworn out-of-court statements were never admissible as evidence of a defendant’s guilt, and that out-of-court statements of available witnesses were never admissible, either.

2. Brasier

The reporting of the 1779 rulings in Brasier also illustrates the hazards of working with reports of English criminal trials from the late eighteenth century. The version of Brasier that was relied upon in the briefs and opinion in Davis was substantially different from the report that Thomas Leach initially published in 1789. It appears that Leach got the facts of the trial wrong in the first version; the version of Brasier that now appears in the English Reports and that everyone used in Davis is a corrected account that was not published until 1815.217 Hence, it is patent

216 See supra text accompanying notes 116-123, 151-154.
217 The initial one-page report of Brasier appeared in Leach (1st ed. 1789) 346. That report was published in late 1789 after the framing. See supra note 68 The initial report stated that Brasier had been convicted of rape on the basis of the unsworn trial testimony of the child-victim, “an infant under seven years of age” who was too immature to be sworn. The trial judge allowed the admission of the child’s testimony but then “respired” (that is, delayed) entering judgment on Brasier’s conviction and took the issue to the Twelve Judges. The Twelve Judges then unanimously overturned the conviction and ruled “[t]hat no testimony whatever can be legally received except upon oath,” but also stated, as a rule for future trials, that an infant victim of a crime even younger than seven might be sworn if the child could appreciate the consequences of the oath. The ruling of the Twelve Judges
that the account discussed in Davis could not have informed American framing-era thinking. Nevertheless, the corrected account does shed some light on late eighteenth-century English hearsay doctrine.

The report of Brasier stated rulings in two courts: first, a ruling admitting evidence in a felony trial at the Assizes in Reading (that is in a felony trial comparable to that held at the

was:

That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath: for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent, their testimony cannot be received.

Id.

However, in the 1800 third edition, Leach inserted a footnote into the earlier report of Brasier to the effect that further information indicated that the child had not testified at all, but that the mother and another witness had testified as to what the child had told them. 1 Leach (3rd ed. 1800) at 237 n. (a). The note indicates that the revised information came from “a manuscript of this case, in the possession of a gentleman at the bar” (possibly Edward Hyde East who had access to the judges’ unpublished manuscripts. See infra notes 223-224 and accompanying text).

Then in the 1815 fourth edition, which is reprinted in the English Reports—that is, the version that was actually cited and discussed in Davis, 126 S.Ct. at 2277—Leach gave a fuller corrected account of the trial proceedings. 1 Leach (4th ed. 1815) 199, 168 Eng. Rep. 202. The corrected report even identified a different trial judge and location: the initial 1789 report identified Justice Gould at the York Assizes, but the revised 1815 account identified Justice Buller at the Reading Assizes.

I am indebted to Professor Robert Mosteller for calling the inconsistency of the reports of Brasier in the various editions of Leach’s reports to my attention, as well as for calling my attention to the discussion by East, discussed in the text below. For a more detailed discussion of the changes in Leach’s reports of Brasier, see Robert P. Mosteller, Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them,” 82 IND. L.J. 919, 925-35 (2007).
Old Bailey in London\textsuperscript{218}, and then the more authoritative, quasi-appellate ruling by the Twelve Judges in London.\textsuperscript{219} In the corrected account of Brasier that was cited and discussed in \textit{Davis}, the evidence at Brasier’s trial was described as follows:

The case against the prisoner was proved by the mother of the [child victim], and by another woman who lodged with her, to whom the child, immediately on her coming home, told all the circumstances of the injury which had been done to her: and there was no fact or circumstance to confirm the information which the child had given, except that the prisoner lodged at the very place which she had described, and that she had received some hurt, and that she, on seeing him the next day, had declared that he was the man; but she was not sworn or produced as a witness on the trial.\textsuperscript{220}

However, Leach reported that when Brasier’s conviction was reviewed and reversed by the Twelve Judges, they stated “[t]hat no testimony whatever can be legally received except upon oath,” but went on to say (presumably as advice for future trials) that a child victim of a crime even younger than seven might be sworn if the child could appreciate the consequences of

\textsuperscript{218} The Old Bailey was the London-area equivalent of the provincial assize courts, that is a felony trial court. See Langbein, \textit{Adversary Trial}, supra note 37, at 16-17.

\textsuperscript{219} The Twelve Judges were composed of the combined benches of the three common-law superior courts at Westminster: King’s Bench, Common Pleas, and Exchequer. These were also the judges who presided at felony trials in the Old Bailey and on Assizes. See \textit{Langbein, Adversary Trial}, supra note 37, at 212-13.

When novel or unsettled issues arose in trials, the presiding judge could “respite” (delay) the judgment in the case and refer the question to the collective judgment of the combined judges. Because there was no writ of error in criminal cases, this was the primary mode of review in criminal cases. See \textit{id}. The Twelve Judges were also sometimes referred to as the Court of Exchequer Chamber. See 3 \textit{Blackstone}, supra note 90, at 55-56 (1st ed. 1768).

\textsuperscript{220} Brasier, 1 Leach (4th ed. 1815) at 199; 168 Eng Rep. at 202.
the oath. Leach also added in his corrected report that “[t]he Judges determined, therefore, that the evidence of the information which the infant had given to her mother and the other witness, ought not to have been received”; that is, that the unsworn “information” of the child could not not be repeated by anyone else at trial.

There is also another even fuller account of Brasier, not mentioned in Davis, that was published in 1803 by Edward Hyde East. East’s account indicated that the Twelve Judges were not initially unanimous as to the final rulings. Specifically, it indicated that two of the judges initially thought that the mother might testify to what the child said immediately after the rape “because it was part of the fact or transaction itself.” (This is the earliest indication of the res gestae concept I have come across in a criminal case.) However, most of the judges rejected that view in their initial discussion, and ultimately the judges unanimously rejected it.

221 The account of the ruling of the Twelve Judges is essentially the same in Leach’s various reports of Brasier. Because the child-victim had not actually testified at the trial, and because Brasier could not be retried, the statements of the Twelve Judges regarding the minimum age at which a child had sufficient “discretion” to take an oath can only have been forward-looking dicta to provide direction for future trials. The only statement the judges made regarding Brasier’s own trial was that the mother could not testify to the child’s statements as a substitute for the child testifying herself. Thus, the ruling overturning Brasier’s conviction carried a clear message that a valid conviction could be obtained in future child rape cases only if the living child victim testified in person at the trial.

222 Brasier, 1 Leach (4th ed. 1815) at 200, 168 Eng. Rep. at 202-03.

223 See 1 Edward Hyde East, A Treatise of the Pleas of the Crown 443-44 (London, 1803) (discussing Brasier in the context of a larger discussion of evidence in child rape cases). East’s account of Brasier was apparently based on manuscript accounts of the case by judges Gould and Buller. See East’s marginal note, 1 id. at 443 (“MS Gould and Buller Js”) and the Preface and listing of the manuscripts on which the work was based, 1 id. at v-xv.

224 According to East’s account of Brasier, there was initially a difference of opinion among the judges. Most of the judges were of the view that the mother’s hearsay evidence was inadmissible, but that even a child under seven might be sworn if it appeared she was “capable of distinguishing
Does the ruling in *Brasier* tell us anything about *Crawford*’s originalist testimonial/nontestimonial hearsay distinction? In *Davis*, counsel for *Davis* argued that the hearsay account of the child’s statements that had been excluded in *Brasier* were comparable in character to the statements contained in the 911 call in *Davis* itself, and thus that the statements to the 911 operator should be deemed to fall within *Crawford*’s “testimonial” category and be inadmissible.\(^{225}\) However, Justice Scalia rejected the comparison between the statements made by the child in *Brasier* and the statements made during the 911 call in *Davis*. Specifically, Justice Scalia noted that the child’s statements in *Brasier* were not made “during an ongoing emergency” but were only an “account of past events,” and thus were dissimilar from those made during the ongoing emergency situation in *Davis* itself. Thus, Justice Scalia commented that the

between good and evil.” However, two judges, Gould and Willes, were of the view that a child under seven could never be sworn but that the mother’s account of the child’s statements should have been admitted because, the statement “being recently after the fact [that is, the rape], so that it excluded a possibility of practicing on her, it was a part of the fact or transaction itself and therefore admissible” (that is, what would now be termed *res gestae*). One other judge, Buller, took the view that the mother’s evidence should have been admissible “if by law the child could not be examined under oath.” 1 *id.* at 443-44. (This is the earliest mention of a *res gestae* exception in a criminal case that I have located, though that term was not used—but note that most of the judges still rejected it.)

East indicated that the judges later met and “unanimously agreed that a child of any age, if she were capable of distinguishing between good and evil, might be examined on oath; and consequently that evidence of what she had said ought not to have been received. And that a child of whatever age cannot be examined unless sworn.” 1 *id.* at 444. Thus, the *res gestae* treatment was ultimately rejected by all of the justices.

East also added that “[i]t does not however appear to have been denied by any in the above case that the fact of the child’s having complained of the injury recently after it was received is confirmatory evidence.” 1 *id.* (emphasis added). This would appear to be a reference to the limited-purpose corroboration hearsay exception; that is, if the child testified under oath, statements she made after the rape could be testified to by another witness to confirm that the child’s account at trial was consistent with her earlier statements.

\(^{225}\) *Davis*, 126 S.Ct. at 2277.
exclusion of the hearsay evidence in Brasier would have been “helpful” in Davis’s attempt to exclude the 911 statements only “if the relevant statement had been the girl’s screams for aid as she was being chased by her assailant.”

The important point for assessing the originalist claims in Crawford and Davis, however, is simply that the historical ruling in Brasier was not based on the context in which the child’s statements had been made; rather, the Twelve Judges ruled that the mother’s account of the child’s unsworn statements was inadmissible as hearsay regardless of the context. Thus, the ruling actually reported in Brasier neither said nor implied that any distinction could be drawn between testimonial or nontestimonial hearsay in 1779. Indeed, the mere fact that the judges used the term “testimony” when they ruled that “no testimony whatever” could be admitted without oath did not refer to Crawford’s “testimonial” category—any statement made by a witness during a trial constituted “testimony” in 1789, regardless of whether its content might now be characterized as being “testimonial” or “nontestimonial” under Crawford’s scheme. Indeed, the ultimate ruling of the Twelve Judges—

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226 Id. It may be noteworthy that Justice Scalia did not say whether the girl’s “account of past events” to her mother in Brasier amounted to a testimonial statement under Crawford. That silence would seem to reflect the Court’s disinclination to decide in Davis whether a statement to a private person can constitute a testimonial statement under Crawford. See id. at 2274 n. 2.

227 As Chief Justice Rehnquist previously noted, the ruling in Brasier drew no distinction between kinds of hearsay statements. Crawford, 541 U.S. at 69-70 (Rehnquist, C.J., concurring).

228 I mention this rather obvious point only because I have heard discussions in which the judges’ use of the rather general term “testimony” in the ruling of the Twelve Judges in Brasier was arbitrarily equated with the narrower meaning assigned to “testimonial” in Crawford. However, it is patent in the context that the judges used “testimony” simply as a generic term for any statement made by a witness during a trial. Any statement made by a witness in court would constitute “testimony” (what else would one call it?), regardless of the content or character of the statement. As noted above, it does not appear that “testimonial” was ever used to designate a category of evidence at the time of the framing; in fact, it does not appear that “testimonial” was even used as an adjective. See supra notes 50, 51.
that the mother could not recite the unsworn statement of the child because “no testimony whatever can be legally received except upon oath”—did not leave room to admit any unsworn hearsay statement.\textsuperscript{229} The Twelve Judges simply restated the same blanket exclusion of unsworn hearsay that also was set out by the treatises and manuals of the time.\textsuperscript{230}

However, a question remains: if there was a blanket prohibition against hearsay evidence, why did the trial judge permit the mother to testify at all in Brasier? The answer appears to be that the issue of what could constitute admissible evidence in the case of a child rape victim who was too young to be sworn was understood to be a uniquely difficult and unsettled question.\textsuperscript{231} On the one side, the likelihood that the child would be the only source of information about the crime presented a case for allowing that evidence somehow to come in as a matter of necessity. For example, writing in the mid 1600s Sir Matthew Hale had opined that a child’s unsworn information might be admitted, or that a parent might be allowed to recount the child’s account (though Hale thought the latter was the less preferable option).\textsuperscript{232} Moreover, Blackstone had initially

\textsuperscript{229} Recall the statements in the evidence treatises to the effect that a sworn recitation of an unsworn statement could not cure the unsworn character of the original “bare speaking.” See supra text accompanying notes 137 (GILBERT), 144 (BATHURST and BULLER).

\textsuperscript{230} As discussed above, dying declarations of murder victims, which were viewed as having been made under circumstances equivalent to an oath (see supra note 153 and accompanying text), were the only category of hearsay that could be admitted to prove the guilt of the defendant. See, e.g., supra notes 172, 215 and accompanying text.

\textsuperscript{231} See LANGBEIN, ADVERSARY TRIAL, supra note 37, at 239-41 (noting that no formal exception to the hearsay rule was developed for child rape cases because allowing hearsay was too hard to reconcile with the core policies underlying the hearsay rule, the oath and cross-examination).

\textsuperscript{232} 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 634-35 (published 1736; written sometime prior to Hale’s death in 1676). In addition to suggesting that a child rape victim under the age of twelve might be permitted to testify under oath (as had been allowed in trials of witches), Hale suggested that a young child might be permitted to testify without oath. However, Hale suggested that a rape conviction should not be based on such unsworn testimony unless there was some additional corroborating evidence.
endorsed Hale’s views in 1769\textsuperscript{233} (though he later reversed and took the opposite position after he participated as one of the Twelve Judges in the Brasier decision).\textsuperscript{234} Hawkins offered only an ambiguous statement on the subject.\textsuperscript{235}

On the other side, several reported cases had taken the view that the admission of a child’s unsworn testimony plainly violated the basic requisites of criminal evidence, and that this was also the case if a parent was admitted as a sworn witness to recite a child’s unsworn information. By the late eighteenth

\textsuperscript{1} id. Hale also left open the possibility that a parent might testify to what a young child had reported, though he suggested that was second best to hearing from the child directly. 1 id. The fact that Hale probably wrote his treatise sometime around 1665 is significant, however, because the law of hearsay may not have been much developed at that time. Rather, Hawkins traced the requirement that all evidence be presented under oath in the presence of the prisoner to 1680. See supra note 111.

In the second volume of this treatise, Hale also suggested that “an infant of tender years may be examined without oath, where the exigence of the case requires it, as in case of rape, buggery, witchcraft.” 2 HALE, supra, at 279.

\textsuperscript{233} 4 BLACKSTONE, supra note 90, at 214-15 (1st ed. 1769). Blackstone probably repeated this position through his eighth London edition in 1778, which was published prior to the 1779 decision in Brasier. I have not located that edition, but I have confirmed that Blackstone made no change as of the 1775 seventh London edition. See 4 id. at 214-15 (7th ed. 1775).

Blackstone’s initial statement is important for assessing the American understanding of this issue because of the large number of Americans who purchased copies that were printed in Philadelphia in 1771-1772. See supra note 90. There was no subsequent American printing of Blackstone’s Commentaries until 1790 (that is, until after the framing of the Bill of Rights). See JAMES, supra note 90, at 185 (entry 69).

\textsuperscript{234} Blackstone was one of the Twelve Judges who decided Brasier in 1779, so he amended the statement in his ninth London edition in 1783 to reflect that decision. See 4 BLACKSTONE, supra note 90, at 214-15 (9th ed. 1783). The 1783 9th edition was the last in which Blackstone personally made alterations. See 1 MAXWELL, supra note 108, at 28.

\textsuperscript{235} 2 HAWKINS, supra note 108, at 434 (1771 ed.) (stating “[t]hat want of discretion [that is, maturity] is a good exception against a witness; on which account alone it seems, That an infant may be excepted against; for in some cases an infant of nine years of age has been allowed to give evidence”).
century, most of the authorities seem to have opined that a prosecution could be based on a child-victim’s information only if the child was old enough to be sworn and personally testified under oath. However, there are indications that trial rulings on the issue during the eighteenth century went both ways.

The Twelve Judges had taken up the issue of whether a young child-victim could testify a few years before Brasier in a 1775 case, but had not resolved it at that time. Hence, it

236 King v. Travers, 2 Str. 700, 700-01; 93 Eng. Rep. 793, 793-94 (K.B. 1726); Omychund v. Barker, 1 Atk. 21, 29; 26 Eng. Rep. 15, 20 (Chancery 1744). Burn appears to have altered his discussion of the admissibility of statements by child rape victims on the basis of these cases. As late as the 1764 edition, Burn’s manual simply noted Hale’s statements allowing the admission of the child’s information. See 1 BURN, supra note 155, at 342 (1764 ed.). However, in 1766 he altered his rendition of Hale’s position by removing the words “without oath” from the end of a statement that “in many cases an infant of tender years may be examined,” and by adding a new statement that “[b]ut in no case shall an infant be admitted as evidence without oath. Str. 700. Tracy Atk. 29.” See 1 id. at 475 (1766 ed).

237 The amicus brief of the National Association of Counsel for Children supporting respondents Washington and Indiana in Davis and Hammon reported that cases described in the Old Bailey Sessions Papers show that young child victims sometimes were permitted to testify without oath and that other witnesses sometimes were permitted to testify about out-court statements by child victims. See Brief for the National Association of Counsel for Children as Amicus Curiae Supporting Respondents at 19-22, n. 13, Davis v. Washington, 126 S.Ct. 2266 (2006). See also Anthony J. Franze, The Confrontation Clause and Originalism: Lessons from King v. Brasier, 15 J.L. & Pol’Y 495, passim (2007) (reporting that in some of the Old Bailey trials involving young child victims, the child was permitted to testify without oath, but that in some the child was prevented from testifying, while in others family members, doctors, neighbors, or others were sometimes allowed to repeat what the child victim had said out-of-court). See also LANGBEIN, Adversary Trial, supra note 37, at 239-40.

238 See Powell’s Case, Leach (1st ed. 1789)114 (1775). Leach’s initial report indicated that the defendant was convicted of rape on the basis of the unsworn testimony of an infant between six and seven years of age, but that Justice Gould reserved the case for the Twelve Judges because, especially in criminal cases, “no evidence can be legal unless it is given upon oath.” This initial report stated that “[t]he question was under consideration [by the Twelve Judges], and the prisoner was pardoned,” but no express opinion was given on the point.
appears that the issue of a parent’s hearsay testimony arose in *Brasier* because the law remained *uniquely* unsettled as to what evidence could be admitted in a child rape prosecution. However, it was not unsettled after *Brasier*: the Twelve Judges came down on the side of enforcing the principles of evidence even in the hard case of the child-victim, albeit while signaling that in future trials some flexibility could be shown in determining whether a child victim was mature enough to be sworn.239

However, the report of *Powell* in Leach’s 1800 third edition is quite different. In that report, the child testified without being sworn, but “the prisoner was *acquitted* upon her testimony.” 1 Leach (3rd ed. 1800) at 128 (emphasis added). Nevertheless, the trial judge “mentioned the case to the Judges; and the majority of them were of opinion that in criminal cases no testimony can be received except upon oath.” Id. at 128-29. Thus, assuming the latter report is correct, there was a split of opinion among the judges on this issue as late as 1775, only four years prior to *Brasier*.

239 The conflict among the authorities regarding the admissibility of a young child victim’s information regarding a rape makes it problematic how framing-era Americans would have evaluated legal authority on that issue. The opinion in *Brasier* was not published until late 1789. See supra note 68. The only information available about *Brasier* by the date of the framing in 1789 was the alteration that Blackstone had made in the 1783 edition of his *Commentaries*. See supra note 234. However, it seems unlikely that Americans would have imported many copies of Blackstone’s editions between 1782 and 1789; instead, most of the copies of Blackstone’s *Commentaries* then in circulation in America would have been of the 1771-1772 Philadelphia reprint of Blackstone’s earlier 1769 edition.

Moreover, even if Americans learned of *Brasier* from the later editions of Blackstone’s *Commentaries*, that ruling was made by an English court after American independence, so it would not have been part of the common law absorbed by the American states in 1775 or 1776. Thus Americans may have given more weight to Blackstone’s earlier statement.

On the other hand, as noted above, Burn had revised his statement on the issue in the 1766 edition of his justice of the peace manual to the effect that a child’s information could not be admitted except under oath, and had cited early eighteenth-century cases to that effect. See supra note 236. A number of the framing-era justice of the peace manuals printed in America repeated Burn’s revised statement and his citations to the earlier cases. See *Greenleaf*, supra note 160 at 124; *Starke*, supra note 160, at 144-45; *Grimke*, supra note 160, at 191. However, the 1765 through 1788 printings of *Conductor Generalis* continued to quote Burn’s earlier statement endorsing
The significant point for present purposes is that the ruling in *Brasier*, like the rulings in *Dingler* and *Woodcock*, did not draw on any historical distinction between testimonial and nontestimonial hearsay. Rather, the actual rulings in all three cases consistently confirmed the basic doctrinal rule that unsworn hearsay statements were inadmissible as evidence of a criminal defendant’s guilt.

**B. The Absence of Cases that admitted “Nontestimonial” Hearsay**

The other and more telling aspect of the search for historical cases in *Davis* and *Hammon* is the absence of any example of a historical case that admitted any unsworn out-of-court statement that could now be labeled a “nontestimonial” hearsay statement. As noted above, no such case was identified in the briefing in *Davis*. Moreover, it appears that the only case of that sort identified in *Crawford* probably involved a different consideration.

In *Crawford*, Justice Scalia suggested that the 1694 trial ruling in *Thompson et Ux v. Trevanion*\(^{240}\) might be an example of what is now termed the “excited utterance” or “spontaneous declaration” hearsay exception. Specifically, Justice Scalia quoted from the ruling of the trial judge in *Thompson* when Justice Scalia commented that “to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made ‘immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.’”\(^{241}\)

*Thompson* may now appear to have involved a spontaneous declaration hearsay exception. The entire report was as follows:

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\(^{240}\) Thompson v. Trevanion, Skin. 402, 90 Eng. Rep. 179 (Nisi Prius 1694), discussed in *Crawford*, 541 U.S. at 58 n. 8.

\(^{241}\) *Crawford*, 541 U.S. at 58 n. 8, quoting *Thompson*, Skin. 402, 90 Eng. Rep. 179 (Nisi Prius 1694).
Ruled upon evidence, that a mayhem may be given in evidence, in an action of trespass of assault, battery, and wounding, as an evidence of wounding per Holt Chief Justice; and in this case he also allowed, that what the wife said immediately upon the hurt received, and before that she had time to devise or contrive any thing for her own advantage, might be given in evidence; quod nota; this was at Nisi Prius in Middlesex for wounding of the wife of the plaintiff.242

A similarly cryptic report also appears in Holt’s King’s Bench Reports.243

On its face, this report indicates that someone other than “the wife of the plaintiff” testified as to “what the wife said immediately upon the hurt received.” Thus, it may appear that this is a case in which a hearsay account of the wife’s statement was testified to by another witness under a spontaneous declaration exception, albeit in a civil rather than criminal trial. However, that is not how Gilbert characterized the issue in Thompson.

As Petitioner’s brief in Davis noted, Gilbert’s evidence treatise cited Thompson as an example of the allowance of hearsay for corroboration that applied when there was a single witness;244 that is, the limited-purpose corroboration exception

243 The other report of Thompson states:
Holt C. J. Ruled upon Evidence, that a Mayhem may be given in Evidence in an Action of Trespass of Assault, Battery and Wounding, as an Evidence of Wounding. And in this Case he also allowed, that what the Wife said immediate upon the hurt received, and before she had Time to devise or contrive any thing for her own Advantage, might be given in Evidence.
Thompson v. Trevanian, Holt K.B. 286, 90 Eng. Rep. 1057 (Nisi Prius 1694). (Chief Justice Holt was not the author of these reports; rather, they were called “Holt’s King’s Bench Reports” because they report cases from the period when Holt was chief justice.)

discussed above. Gilbert’s classification of the case suggests that the wife (possibly as the only witness to her wounding) had testified under oath during the trial, and that the out-of-court statements she had made “immediately upon the hurt received” were then recited by another witness simply to corroborate the wife’s trial testimony. Although the Thompson report has more than its share of mysteries—or perhaps because it has more than its share—Gilbert’s nearly contemporaneous interpretation should be accorded considerable weight. Hence, it does not to corroborate a single witness contains the citation “Skin. 402,” the citation to Thompson.

245 See supra text accompanying note 138.

246 There is another cite to Thompson that is quite mysterious. Matthew Bacon’s 1736 Abridgment cited “Skin. 402” in the margin next to his paraphrase of Hawkins’s statement that hearsay was no evidence, but that hearsay might “be made use of by Way of Inducement or Illustration of what is properly Evidence.” See 2 BACON, supra note 120, at 313 (compare passage quoted supra text accompanying note 120). However, it is hard to see any way to read the wife’s statement in Thompson as illustrating what is otherwise proper evidence. Bacon apparently had access to Gilbert’s still unpublished manuscripts, so it is likely that the “Skin 402” cite came from Gilbert’s evidence manuscript. It may be a simple case of Bacon’s printer having placed the “Skin 402” citation in the margin next to the wrong paragraph in the text, because the paragraph that follows in Bacon’s Abridgment sets out the corroboration hearsay exception to which Gilbert had cited “Skin. 402.” See 2 id. (passage quoted supra text accompanying note 130).

247 Of course, one might wonder why, if Thompson involved only the corroboration exception, the judge bothered to note that the wife’s prior statement was “immediately upon the hurt received”? My hunch is that this was prompted because allowing the wife to testify at all involved an exception to the usual rule that, in civil cases, an interested party—which the wife was as a co-plaintiff with her husband—usually could not be admitted as a witness. Exceptions to that rule were permitted, however, in criminal prosecutions for assault where the interested party was the only possible source of information as to what happened. My hunch is that something like that criminal exception was involved here. (Indeed, it is possible that the opening statement in the report “that a mayhem may be given in evidence” may be a cryptic reference to the crime of mayhem or even to a conviction for that crime. “Mayhem” referred to a disabling wound.) Hence, my hunch is that the trial judge thought that, because the wife was an interested party and her testimony already involved an exception, it was appropriate to put
appear that *Thompson* was actually an example of a spontaneous declaration hearsay exception.

Additionally, whatever *Thompson* actually involved, the case report seems to have lurked in obscurity prior to the framing of the Confrontation Clause in 1789. Petitioner’s reply brief in *Hammon* noted that *Thompson* was never cited by any reported English decision prior to 1805. As a result, it appears that the only way a framing-era American lawyer would have been likely to have discovered the case was through Gilbert’s citation.

some additional limit on the corroboration of a party’s testimony by hearsay evidence about the party’s prior out-of-court statements.

It should be noted that although Petitioner’s Brief in *Hammon* dismissed *Thompson* as being too obscure to matter, it rejected Gilbert’s characterization of *Thompson* as a corroboration case as “inapposite.” That dismissal seems to have been based partly on the assumption that the citation was posthumously added by the editor rather than by Gilbert himself, and partly on the assumption that exceptions were never made to the rule that an interested party could not be a witness in a civil lawsuit for damages. See Brief of Petitioner at 25 n. 26, *Hammon* v. Indiana, 126 S.Ct. 2266 (2006). I am doubtful that either objection has much weight. I know of no reason why the margin cite was not one that Gilbert made himself—it appeared in the first edition of Gilbert’s treatise, and the editor who published the treatise described the contents as Gilbert’s own work without alterations (of course, even Gilbert’s editor was in a better position to know what the cryptic report referred to than we now are). Second, I think it is quite plausible that the admissibility of an assault victim as a witness in a criminal proceeding could have leaked over into a related civil suit for assault, as well.


249 Legal research was far more difficult during the framing-era than it is today. In particular, there were no general digests to locate pertinent cases. Rather, each volume or set of case reports typically had its own table of subjects. Thus, research was time-consuming. Additionally, few Americans would have had access to anything like a comprehensive collection of the English case reporters. Instead, a framing-era American lawyer or judge probably started research with a treatise or justice of the peace manual and then looked to the cases cited in the margins of those authorities, if they had access to those reporters. Hence, it seems likely that a framing-era American lawyer would have located Thompson only through the marginal citation in Gilbert’s treatise—assuming the lawyer had access to a set of Skinner’s reports. Notably, no copies of Skinner’s reports are identified in one study of
The fair conclusion seems to be that framing-era Americans were probably unaware of Thompson, but were unlikely to have thought it was authority for a spontaneous declaration or res gestae hearsay exception even if they somehow did become aware of it.

Once the confusion over Thompson is dealt with, the net result is that no brief or opinion in Davis or Crawford identified even a single published framing-era case report that actually admitted an unsworn out-of-court statement that might now be described as “nontestimonial hearsay.” The obvious explanation for that absence, given the absence of pertinent criminal hearsay exceptions in the discussions in the treatises, is that the criminal hearsay “exceptions” that are now prominent features of evidence law simply had not yet been invented when the Bill of Rights was framed. Available evidence regarding the post-framing appearance of criminal hearsay exceptions also points to that conclusion.

IV. WHEN WERE THE HEARSAY EXCEPTIONS INVENTED?

When did judges actually invent the hearsay exceptions that are now part of criminal evidence law? And did those judges take the confrontation right into account when they invented those exceptions? Based on available clues, it does not appear that the judges who fashioned the modern exceptions gave much thought to the conflict between the new exceptions and the earlier understanding of the confrontation right.

the libraries of eighteenth-century Massachusetts lawyers. See ECKERT, supra note 109, at 551-55.

250 Justice Scalia did recognize that a “dying declaration” was admissible evidence at the time of the framing, and that such declarations might be either testimonial or nontestimonial under Crawford’s scheme, See Crawford, 541 U.S. at 56 n. 6.

251 The recognized exceptions pertained only to certain specific issues in civil lawsuits. See supra text accompanying note 162.
A. The Hearsay that English Juries “Heard”

As discussed above, framing-era evidence authorities state a virtually total ban (that is, except for dying declarations of a murder victim) against admitting unsworn hearsay statements as evidence of a defendant’s guilt. Because it seems safe to assume that the American Framers were concerned with legal doctrine when they framed the Confrontation Clause, it also seems safe to assume that the legal doctrine of the time informed their actual design for the Confrontation Clause. Hence, the reasonable conclusion is that the original Confrontation Clause incorporated the doctrinal ban against unsworn hearsay evidence.

Of course, there has always been some slippage between legal doctrine and legal practice, and there are reasons to think that the “gap” between doctrine and practice was at least as large in 1789 as it is today. For one thing, not all defendants were represented by counsel, so hearsay often may have gone unchallenged during criminal trials. For another, the absence of systematic forms of appellate review in criminal cases meant that trial judges retained considerable discretion as to whether to adhere to doctrine in admitting evidence at trial.

We know very little about the way framing-era criminal trials were actually conducted in the American states. However, recent historical research has shed considerable light on how criminal trials were conducted in London in the 1780s. Although one cannot assume that English trials, and particularly London trials, shed direct light on framing-era American trial practices, the English practices are indirectly relevant insofar as they shed light on doctrinal developments. That is so because English evidence doctrine almost certainly did influence American doctrinal developments during the nineteenth century.

What does the recent research on English trials show about when and how hearsay exceptions emerged? Unsurprisingly, it shows that the doctrinal rule against hearsay was inconsistently enforced during the eighteenth century. The surviving criminal
trial records, primarily the Old Bailey Sessions Papers, are inadequate to support a quantitative assessment of how frequently the hearsay rule was enforced. However, the accounts of Old Bailey trials do provide clear examples of judges or defense counsel cutting off a witness who was about to repeat a potentially material out-of-court statement made by someone other than the defendant.

For example, Professor Langbein has related a 1783 trial for theft of iron goods in which a constable who discovered the stolen goods stated that he “asked Mrs. Dunn whose they were,” at which point defense counsel interjected that “You must not tell us what she said” and the judge said “No, certainly not.” Professor Gallanis has identified similar rulings. For example, in a 1780 trial involving theft of wood, a witness for the prosecution stated that the defendant had told him he had bought the wood in question from John Gibbons (recall that testimony about a defendant’s own statement did not constitute hearsay), but when the witness started to repeat what Gibbons had told him (which would constitute hearsay), the judge inquired if Gibbons was going to testify and, being told he was not, told the witness “You must not tell us what he said.” In other instances, however, the judge did not succeed in preventing the reciting of a hearsay statement but either told the jury the out-of-court statement was “no evidence” or simply commented that the witness should not have repeated the statement.

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252 See supra note 63 (the Old Bailey Sessions Papers are abbreviated as “OBSP” in the notes following).

253 Trial of William Jones, OBSP December 1783, no. 102, at 130, 131, described in Langbein, Adversary Trial, supra note 37, at 243.

254 Trial of Francis Hall, OBSP January 1780, no. 83, at 110, 113, identified by Gallanis, supra note 37, at 535 n. 263.

255 See, e.g., Trial of John Mills, OBSP January 1785, no. 253, at 291 (reporting, in a case involving theft of a lottery ticket, that a servant testified that he knew relevant directions “[b]ecause I heard my master say so” and either defense counsel or the judge stated “[t]hat is no evidence at all”), identified in Gallanis, supra note 37, at 535 n. 263.

256 See, e.g., Trial of John Gould, OBSP January 1780, no. 46, at 61, identified in Gallanis, supra note 37 at 535 n. 263.
In still other instances, however, witnesses repeated hearsay statements without prompting objection or comment, so Old Bailey juries sometimes heard hearsay testimony despite the doctrinal prohibition against it. For example, Professor Langbein has reported that records of Old Bailey trials indicate that juries often heard hearsay regarding what Langbein calls “pursuit hearsay”—that is testimony regarding statements that were made regarding the discovery and arrest of the accused. Thus, there is little doubt that a witness sometimes repeated a hearsay statement during his or her narrative account.

In addition, the enforcement of the prohibition against hearsay was limited by the absence of appellate review, and by the still fairly informal structure of the trial process itself. Although defense counsel were appearing more frequently in criminal trials in London by the 1780s, the question-and-answer format of the modern trial was still not fully developed. As a result, there was less opportunity for judges to filter the admissibility of statements in advance than in the modern trial. Because witnesses often simply narrated what they had to tell, it seems likely that witnesses who had been admitted to testify as to their own direct knowledge of events might also have mentioned another person’s unsworn statement in the course of their narrative testimony.

Indeed, the regulation of hearsay was especially limited by the fact that evidentiary points were still argued in the presence of the jury as the trial progressed. Thus, although counsel or a judge could sometimes prevent a witness from reciting patent hearsay, in other instances the only remedy for improper hearsay testimony was for the judge to admonish the jury to disregard or discredit such statements.

257 Langbein also cites a 1744 Irish case in which Hawkins’s statement that hearsay could be used “by way of inducement or illustration of what is properly evidence” was applied rather loosely. See Langbein, Adversary Trial, supra note 37, at 239, n. 272.
258 Id. at 234-35.
259 Id. at 239, n. 275.
260 Id. at 249.
261 See Davies, supra note 10, at 198-99.
It would hardly be surprising, in that setting, if judges sometimes gave a pass to hearsay evidence that did not seem terribly material—a precursor of sorts to a harmless error approach. Likewise, it also would not be surprising if the sort of incidental hearsay evidence that slipped into jury trials as “pursuit hearsay” and such was of the sort that would later fall within “res gestae” or “spontaneous declaration” hearsay exceptions when those exceptions were invented. On the other hand, because judges had more control over admitting witnesses than over statements, it seems unlikely a person would have been admitted as a witness in a late eighteenth century trial if the person had nothing to offer but hearsay statements.262 (Thus, it does not appear that a person in the position of the 911 operator in Davis, who had only second-hand information, would have been permitted to testify at all in 1789.)

Moreover, although hearsay testimony happened, those instances still constituted departures from evidence doctrine during the late eighteenth century. The accounts of the Old Bailey trials appear to be consistent with the statements in the treatises and manuals insofar as they do not reveal any legally authorized hearsay “exceptions” (beyond dying declarations). That is significant because the important inquiry for assessing the original understanding of the Confrontation Clause is not so much the degree to which the rule against unsworn hearsay was adhered to in practice, but how legal doctrine defined the legal standard for admissible evidence at the time of the framing.

B. When Did Hearsay Exceptions Begin to Apply to Criminal Trials?

Obviously, evidence law now recognizes a variety of hearsay exceptions that are pertinent to criminal trials. When were they first formally recognized? And why?

An 1869 Supreme Court opinion indicates that judges began

262 However, pursuant to the corroboration exception, a witness could have been admitted who could only provide hearsay that corroborated or impeached statements previously made by other witnesses who had testified at a trial. See, e.g., supra text accompanying notes 129, 138, 144.
to recognize new doctrinal hearsay exceptions sometime during the first half of the nineteenth century—but well after the 1789 framing of the Confrontation Clause. The evidentiary issue in *Insurance Company v. Mosley* arose from a claim brought under an accidental death insurance policy. Four days before his death, the insured person had told his wife and son that he had suffered an accidental fall. Those statements were the only evidence that he died because of an accident, and thus were the only basis for a claim under the policy. At trial, the court permitted the decedent’s wife and son to repeat the deceased’s statements, and they won a judgment. On appeal, the defendant insurance company objected to the admission of those hearsay statements into evidence. The Supreme Court upheld the admission of the statements as “*res gestae*.” What is interesting for present purposes is how little authority the justices could muster to justify that conclusion in 1869.

Justice Swayne’s *Mosley* opinion identified an 1849 Massachusetts criminal manslaughter case, *Commonwealth v. M’Pike*, in which a stabbing victim’s out-of-court statement had been admitted under a “*res gestae*” formulation. However, the Massachusetts court itself had cited no precedents for that ruling.

In addition, Justice Swayne cited an 1834 English criminal case, *King v. Foster*, in which the defendant was charged with manslaughter for running over one Ferrall in a “cabriolet.”

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263 75 U.S. (8 Wall.) 397 (1869).

264 57 Mass. (3 Cush.) 181 (1849). The defendant had been convicted of manslaughter for the stabbing of the defendant’s wife. The court ruled that “[t]he admission in evidence of [a hearsay account of] the statement of the party injured, as to the cause and manner of the injury which terminated in her death, may be sustained upon the ground that the testimony was of the nature of the *res gestae*”; that “[t]he period of time, at which these acts and statements took place, was so recent after the receiving of the injury, as to justify the admission of the evidence as a part of the *res gestae*”; and that “[i]n the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding judge.” *Id.* at 184 (emphasis in original).

Foster, a waggoner testified for the prosecution that he did not see the accident, but he heard the victim groan and went to him and asked what was the matter, and the victim made a statement to him. Presumably the statement of the victim incriminated Foster—the case report does not actually recite what the victim said. The English appellate judges ruled that the statement was properly admitted, but they cited only one precedent, an 1805 English trial ruling in an insurance case, *Aveson v. Kinnaird.*

Moreover, the judges’ familiarity with that precedent appears to have been serendipitous; Justice Park, who delivered the ruling in Foster, had earlier been one of the counsel in *Aveson.*

Significantly, this trail of authority seems to extend back no farther than *Aveson* in 1805. The issue in *Aveson* had involved the health and insurability of the decedent at the time a life insurance policy was taken out. The evidence at trial seems to have amounted to dueling hearsay: because the medical doctor whom the insured’s beneficiary called as a witness had based his professional opinion that the insured was in good health largely on the unsworn statements that the insured had made to him, the trial court judge permitted the defendant insurance company to call as a witness an acquaintance of the insured to whom the insured had confided that she was not at all in good health.

*Aveson* appears to have been the first formally reported recognition of the “*res gestae*” hearsay exception. The only authority that the trial judges in *Aveson* could muster was the 1694 *Thompson* case, which they interpreted—probably incorrectly—as having authorized the admission of an excited utterance. Nobly, *Aveson* appears to have been the first

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267 See Brief of Petitioner at 30-32, Hammon v. Indiana, 126 S.Ct. 2266 (2006). There is no mention of “*res gestae*” in the treatises by Hawkins, Gilbert, Bathurst, or Buller, or in Blackstone’s Commentaries. However, references to “*res gestae*” became fairly common in evidence treatises published in the 1820s. See Brief of Petitioner, supra, at 30-31.

268 As discussed supra notes 241-247 and accompanying text, it appears that *Thompson* actually allowed the hearsay account of the victim’s statement to be admitted under the corroboration exception.
court decision to cite Thompson as authority. Whatever else one might say of the Aveson ruling, the rationale had little to do with the admission of hearsay evidence in criminal cases.

A variety of other indications also suggest that the recognition of the “res gestae” and “spontaneous declaration” exceptions in criminal cases occurred sometime after the 1805 ruling in Aveson. For example, although Professor Gallanis concluded that a variety of hearsay exceptions were evident in English rulings between 1780 and 1799, the list he recites did not include examples of hearsay exceptions that applied in criminal trials other than Marian witness examinations, dying declarations, and the limited-purpose corroboration exception (each of which was recognized in the treatises). In particular, Gallanis did not report indications of exceptions for statements against penal interest or by co-conspirators, nor for excited

269 See supra note 248 and accompanying text.

270 Gallanis noted hearsay exceptions pertaining to various issues that could arise in civil lawsuits including the settlement (that is, residence) of a pauper, general reputation and character, prescriptions (that is, claims to land based on long occupation), other property rights, marriages, and customs. Gallanis, supra note 37, at 536-37. Gallanis’s list of civil hearsay exceptions is comparable to that which appeared in the treatises and the justice of the peace manuals. See, e.g., supra notes145, 162, 185.

271 See supra text accompanying notes 118, 129, 151.

272 Out of court statements by accomplices or co-conspirators, including the Marian examinations taken of an accomplice when he was arrested, were inadmissible against any other defendant because they were unsworn. Thus, the rule was that a confession could be admitted only against the person who confessed, but not against anyone else. See e.g., 2 HAWKINS, supra note 108, at 429 (1771 ed.); LEACH’S HAWKINS, supra note 108, at 603-04 (1787 ed.). However, an accomplice could be admitted as a prosecution witness and testify under oath at trial. See Davies, supra note 10, at 196-97 n. 298 (discussing Tong’s Case, Kelyng J. 17, 84 Eng. Rep. 1061 (K.B. 1662)). It may appear that a deceased accomplice’s confession was admitted contrary to this rule in King v. Westbeer, 1 Leach 12, 168 Eng. Rep. 108 (Old Bailey 1739); however, in that case the accomplice had not only “made a full confession in writing,” which was presumably unsworn and inadmissible, but had also “given information upon oath against the prisoner [pursuant to the Marian statutes].” Id. In other words, the accomplice had given a sworn Marian examination against Westbeer as a witness in that case; because the
utterances or spontaneous declarations, though he did describe a bankruptcy case as an example of “res gestae” (although the case report never used that term).

There are other indications that hearsay exceptions in criminal cases still were not recognized during the early nineteenth century. As noted above, the English criminal evidence treatises that were published in the early decades of the nineteenth century still did not recognize any hearsay exceptions.

273 Gallanis concluded that “[b]y the close of the eighteenth century . . . the contours of the modern rule against hearsay were largely in place.” Gallanis, supra note 37, at 535. However, that conclusion would not appear to be applicable to the hearsay exceptions that were pertinent to criminal trials.

274 Gallanis identified a 1794 bankruptcy case, Bateman v. Bailey, 5 T.R. 512, 513, 101 Eng. Rep. 288 (K.B. 1794), as an example of a “res gestae” hearsay exception. Gallanis, supra note 37 at 535 n. 266. The evidentiary ruling in that case was “that a bankrupt cannot be called as a witness to prove his bankruptcy, but that ‘what was said by him at the time in explanation of his own act may be received into evidence.’” Id. Some early nineteenth century treatises did identify Bateman as an example of a “res gestae” ruling. See, e.g., S.M. Phillipps, A Treatise on the Law of Evidence 102 (London, 1814).

However, the term “res gestae” did not appear in Bateman itself. Likewise, there was no mention of “hearsay” in that report. Rather, on the face of the report it appears that the issue may have been peculiar to bankruptcy law. Because of concerns about fraudulent manipulations, bankruptcy could not be initiated by the bankrupt at that time. See Thomas E. Plank, The Constitutional Limits of Bankruptcy, 63 Tenn. L. Rev. 487, 510-13 (1996). Thus, it is possible that the concern that gave rise to the issue in Bateman was that allowing a third person to testify to what a bankrupt said about a condition of bankruptcy (for example, the person’s avoidance of creditors) might allow the bankrupt to end-run the prohibition against the bankrupt personally initiating bankruptcy. That may be the concern in the case because the opposition to the allowing the third person’s recitation of the bankrupt’s statement was that it could open a door to “fraud.” Bateman, 5 T.R. at 513, 101 Eng. Rep. at 288. Hence, it is not clear whether Bateman involved a res gestae analysis, or whether that characterization was simply a gloss applied to it prochronistically in later commentaries.
beyond dying declarations and the limited-purpose corroboration and existence-of-a-conspiracy exceptions that had been recognized in the earlier treatises. However, some other English commentaries began to mention “res gestae” in civil cases. Even so, briefs in Davis and Hammon identified several English criminal cases from the 1830s that still prohibited admission of the content of a crime victim’s apparently spontaneous out-of-court statements (although it appears that judges sometimes side-stepped the rule).

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275 See supra text accompanying note 172 (discussing Chitty’s 1816 treatise).
276 See supra text accompanying notes 163, 164, 171.
277 See PHILLIPPS, supra note 274, at 102 (1814 ed.) (stating that “[h]earsay is often admitted by way of inducement of illustration of what is properly evidence, or, as part of the res gestae” but citing only rulings in civil lawsuits). In his 1817 third edition (I have not located the second edition), Phillipps also treated Brasier as though it were an example of res gestae in a criminal case. Id. at 219 (1817 ed.). However, Phillipps misstated the ruling in Brasier as though the mother’s testimony had been ruled proper, when it was actually ruled to have been illegal and inadmissible. See supra text accompanying note 222. The fact that Phillipps could identify a criminal example of res gestae only by misstating the ruling in Brasier suggests that res gestae had not yet become an accepted doctrine in criminal evidence.
278 For example, the petitioner’s brief in Davis cited Rex v. Wink, 172 Eng. Rep. 1293 (1834) (trial judge ruled that a constable could not be asked the name of the robber that a robbery victim had told him several hours after the robbery, but that the constable could testify as to whether he went in search of any person “in consequence of the [victim] mentioning a name to him”). The petitioner’s brief attempted to treat that ruling as an aspect of “hue and cry” or a hue and cry “report.” See Brief for Petitioner at 20, Davis v. Washington, 126 S.Ct. 2266 (2006). However, there is no mention of hue and cry in the case report and that characterization appears to reflect a misunderstanding of the hue and cry procedure for arrests, which was likely obsolete by that date.

Similarly, the Petitioner’s brief in Hammon noted that an 1830 English treatise and English cases decided in the 1830s and 1840s indicated that witnesses could testify to the fact that an alleged rape victim had made complaints shortly after the alleged incident but that such witnesses still could not testify to the contents of her statements, including the name of the person she identified as the perpetrator. See Brief for Petitioner at 29-30 nn. 36, 37, Hammon v. Indiana, 126 S.Ct. 2266 (2006).
Thus, the available evidence allows considerable confidence that there were no pre-framing hearsay exceptions relevant to criminal cases other than dying declarations and the limited-purpose exceptions for corroboration or for proving the general existence of a conspiracy or similar background facts.

C. Why Were Hearsay Exceptions Invented?

Why did nineteenth-century judges move away from the strict doctrinal ban against hearsay and invent the variety of hearsay exceptions that now often permit unsworn out-of-court statements to be admitted in criminal trials? The change probably reflects the combined effects of a number of factors and developments, and I can only speculate.

Part of the explanation may lie in increasing judicial acceptance of relativistic and probabilistic notions of truth and proof. That shift probably made some hearsay evidence seem more acceptable than it had in the past. Additionally, it seems fairly obvious that the significance accorded to the oath as an indicia of reliability declined during the nineteenth century, and that would have removed one of the earlier supports for the strict ban against the admission of unsworn statements.

Changes in trial procedures may also have contributed to the acceptance of hearsay exceptions. The rigid doctrinal ban against hearsay may not have had that great an effect on the outcomes of criminal trials when defendants were often unrepresented by counsel, evidentiary practices were less formal, and trial judges exercised considerable discretion. It is possible that the ban against hearsay evidence became more costly—either in the sense of making the prosecution’s case more cumbersome or in the sense of preventing convictions of accused persons—when the criminal trial became increasingly adversarial and formalized as the nineteenth century progressed. Hence, those changes may have created pressures for creating hearsay exceptions, as well as for restricting the concept of hearsay to out-of-court statements offered for the truth of what was said.279

279 The modern definition of hearsay reaches only those out-of-court
Changes in other aspects of criminal procedure may also have fed into the recognition of hearsay exceptions. For example, the institutionalization of a police prosecutor or public prosecutor may have created a “repeat player” who could press for relaxation of the hearsay ban. Additionally, the shift from the accusatorial criminal procedure of the framing-era to modern investigatory procedure and the accompanying invention and institutionalization of police departments and public prosecutor offices may have given a new gloss of reliability to hearsay information obtained by official sources and may also have increased pressures to admit hearsay evidence.

Unlike the constables of the eighteenth century, the new police officers of the nineteenth century were expected to be more proactive in ferreting out crime. In particular, unlike the eighteenth-century constable who usually made an arrest only after another person had charged that a crime had been committed “in fact,” the new police officers of the nineteenth century were authorized to arrest on their own assessment of “probable cause” — a relaxed standard that implied room to use second-hand hearsay information. As a result, it seems likely that police testimony would have generated even more statements that are offered into evidence “for the truth of the matter asserted.” See supra note 9. That qualification is not stated in any of the definitions of hearsay that appeared in any of the eighteenth-century authorities discussed in this article. It would appear that the qualification was developed in connection with the articulation of the res gestae concept during the early nineteenth century. The distinction between a hearsay statement, and an out-of-court statement constituting “original” evidence or res gestae is evident in mid- and late-nineteenth century discussions of hearsay. See, e.g., 1 Simon Greenleaf, A Treatise on the Law of Evidence §§ 98-102, 108 (Boston, 4th ed., 1848); 1 id. at 185 (16th ed. 1899).


For an overview of the post-framing shift from accusatory to investigatory criminal procedure, see Davies, supra note 2, at 419-35.

See Davies, Fourth Amendment, supra note 11, at 627-39.

Indeed, the change in the law that permitted police officers to use hearsay information to justify warrantless arrests eventually undermined the framing-era ban against using hearsay information to justify the issuance of arrest or search warrants. See id. at 650-51 n. 287.
“pursuit hearsay” during nineteenth-century trials than Professor Langbein observed in accounts of eighteenth-century trials. 284

Whatever the explanation, it seems fairly evident that nineteenth-century judges gave more priority to facilitating the introduction of evidence of a defendant’s guilt than to enforcing the previously rigorous conception of the confrontation right. In a very real sense, American judges rejected the original understanding of the Confrontation Clause during the nineteenth century—though they obviously did not admit as much. 285 That rejection, in turn, is the source of the hearsay-confrontation conundrum that has been a constant in the Supreme Court’s interpretation of the Confrontation Clause since the Supreme

284 See supra text accompanying note259; see also the indirect allowance of pursuit hearsay in the 1834 Wink case discussed supra note 278.

285 The fact that trial testimony came to be recorded in written transcripts may have also played a role. During the eighteenth century, although the written record of a sworn Marian witness examination of a deceased witness was admissible as evidence, see supra notes 116-123 and accompanying text, oral testimony purporting to recite the sworn testimony a deceased witness had given in a prior trial was inadmissible as hearsay. The reason was that the oral nature of an account of prior trial testimony made it inferior in reliability to the written record of an examination or deposition. See Davies, supra note 10, at 180 n. 235.

However, the objection regarding the unreliability of oral accounts of prior trial testimony was undercut when trial testimony began to be recorded in writing. Thus, a number of the nineteenth century American cases that discussed the confrontation right did so in the context of justifying a rule change to allow admission of sworn testimony that a deceased witness had given in a prior trial. However, because that form of evidence still did not conform to the earlier emphasis on the importance of cross-examination in the presence of the trial jury, the opinions that were written to justify that change tended to downplay the significance of the earlier emphasis on cross-examination in the presence of the trial jury and instead treated the opportunity for cross-examination at a previous trial as though that satisfied the confrontation right. As a result, those cases tended to give a truncated account of the connection between the rule against hearsay and the confrontation right. For example, Mattox seems to have introduced the inaccurate historical notion that the confrontation right was aimed merely at preventing trial by ex parte depositions as a means of downplaying the concept of cross-examination in the presence of the trial jury. See supra note 23.
Court first began to hear criminal appeals in the late nineteenth century.286

The bottom line is that Crawford and Davis cannot have invoked an authentic understanding of the original Confrontation Clause because the original understanding is no longer compatible with modern criminal evidence or procedure. The distinction between testimonial and nontestimonial hearsay may appear to be a convenient way to adjust the confrontation right to the post-framing invention of the hearsay exceptions that now permit far greater admission of hearsay evidence than the Framers ever imagined. However, that convenience hardly makes the distinction part of the original Confrontation Clause.

Crawford and Davis depart from the Framers’ design when they allow the admission of unsworn hearsay in criminal trials. Even if one sets aside the historical requirement of an oath, they depart from the Framers’ design insofar as they allow second-hand, hearsay evidence to be admitted that tends to prove the guilt of the defendant. Crawford and Davis limit the scope of the confrontation right in ways the Framers would neither have imagined nor endorsed.

CONCLUSION

Given the holdings in Crawford and Davis, it is plain that the testimonial/nontestimonial hearsay distinction is now a central feature of the law of the Confrontation Clause. It is highly improbable that the Court will revisit that treatment. However, accurate investigations of authentic framing-era law will not provide any guidance as to how that distinction should now be applied. Contrary to Crawford’s claims, the confrontation right was not limited to “testimonial hearsay” at the time of the framing, and framing-era sources did not draw any distinction between testimonial and nontestimonial hearsay. Hence, authentic history cannot shed any light on how the distinction

286 There generally was no appellate review of felony convictions prior to the late nineteenth century, and the Supreme Court itself did not review criminal convictions until the 1880s. See, e.g., Erwin C. Surrency, History of the Federal Courts 312-14 (2d ed. 2002).
should now be applied—unless it is to suggest that the disparity between the testimonial scheme and the original understanding of the right could be reduced by redefining the “testimonial” category to include any statement that constituted material evidence of a defendant’s guilt, regardless of whether it was made to a government officer or private person.

Rather, the hypothetical originalist claims in *Crawford* and *Davis* are significant primarily for what they demonstrate about originalism itself. In particular, the hypothetical character of those claims reveals a defect that commonly infects originalist claims—the denial of the degree to which legal doctrine and institutions (and almost everything else) has changed since the framing. Originalism is dependent upon the historical fiction that the content of constitutional rights can somehow have remained constant when the law that shaped and informed the content of those rights plainly has not.

As noted above, Justice Scalia asserted in *Crawford* that “[a]ny attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation . . . but that is hardly a reason not to make the estimation as accurate as possible.”287 In a similar vein, Justice Scalia has more recently asserted that “[t]here is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change. . . . This reference to changeable law presents no problem for the originalist.”288

The “problem” of changeable law would matter for originalists, however, if originalist claims were actually confined to authentic history. The difficulty with recovering or applying the original confrontation right is not, as Justice Scalia’s comments suggest, a matter of making an “estimation” of how the Framers would have applied a constitutional provision “to a phenomenon that did not exist at the time of the adoption.” Rather, the difficulty lies in attempting to apply a constitutional

287 *Crawford*, 541 U.S. at 53 n. 3 (emphasis added).
provision to a post-framing phenomenon such as the invention of criminal hearsay exceptions that actually contravenes the framing-era law that shaped the Framers’ understanding of the constitutional provision. The difficulty lies in applying the Confrontation Clause to hearsay exceptions that violate the Framers’ expectations and design.

No amount of clever speculation can uncover “our unchanging Constitution” because the Constitution does not hover out there someplace—rather, constitutional rights have always drawn their content from the relevant bodies of “changeable law” (though it is doubtful that the Framers’ anticipated how changeable evidence law would turn out to be289). Additionally, Supreme Court justices have been revising both the law and the Constitution for more than two centuries.290

The result is that we could not to “return” to even an approximation of the original Confrontation Clause unless we were willing to repeal the hearsay exceptions that judges have invented since the framing. Obviously, we are not going to do that. Undoubtedly there are good reasons not to abandon those exceptions wholesale. That being the case, however, originalism cannot be more than a distraction from the policy concerns that

289 It is doubtful, however, that the Framers anticipated that the law of evidence or jury trial would change significantly in the future. See supra note 54.

290 The notion of an “unchanging Constitution” can only constitute a rhetorical device today because it cannot be seriously entertained as a description of our constitutional history. The Supreme Court has been revising the Constitution in myriad ways for more than two centuries. For example, I hope to soon publish an article explaining how the Marshall Court itself effectively rewrote Article III to fabricate an opportunity to rule that a statute was unconstitutional in Marbury v. Madison in 1803. Likewise, as I have previously documented, the modern Supreme Court has moved the standards for lawful criminal arrests from “due process of law” in the Fifth Amendment, which the Framers understood to preserve common-law arrest requirements, to the Fourth Amendment, which was understood to be only a specific ban against general warrants themselves in 1789. That transposition then allowed the justices to relax the constitutional arrest standard to probable cause, and to press “due process” into service as a surrogate for “privileges and immunities.” See Davies, supra note 10, at 216 n. 344. It is several centuries too late to speak of an “unchanging Constitution.”
we—and the justices—have more reason to be concerned about.

Hence, it is time for everyone to stop pretending that Crawford’s restriction of the scope of the confrontation right is other than the policy and political choice that it is.\textsuperscript{291} Crawford’s

\textsuperscript{291} The ideological content of Crawford’s purportedly originalist scheme looks quite different depending on which aspect of the decision one thinks will have the most practical importance. The “cross-examination rule” that regulates the admission of testimonial hearsay is a pro-defendant feature that imbues the confrontation right with more substance than it had under the previous Roberts regime. For example, that standard is the basis for the exclusion of the statements made during police interrogations in both Crawford and Hammon. Thus, some early commentaries on Crawford have tended to describe it as thought it were a pro-defendant ruling.

However, the complete withdrawal of the confrontation right from nontestimonial hearsay is plainly a pro-prosecution feature in so far as it allows state courts or legislatures to take a very permissive approach to admitting nontestimonial hearsay in criminal trials. For example, the restrictive interpretation of the scope of the Confrontation Clause in Crawford permitted the admission of the hearsay statements made in the 911 call in Davis, even though those statements constituted crucial evidence against the defendant.

As a student of criminal procedure, I suspect that the restricted scope assigned to the confrontation right in Crawford and Davis will turn out to be the most important aspect of those rulings. Viewed against the overall pro-prosecution trajectory of criminal procedure developments over the last two centuries, and especially during the last several decades, I think it is likely that further rulings in the Supreme Court (or the justices’ acquiescence in lower court rulings) will define the large mass of hearsay evidence to be only nontestimonial hearsay that is entirely exempt from the confrontation right.

For example, although Davis left the issue open, it seems likely that future developments will clarify that only statements that are made to government agents can be deemed to be testimonial and subject to the cross-examination rule. See Davis, 126 S.Ct. at 2274 n. 2. Indeed, in Crawford, Justice Scalia described the Marian examinations taken by the justice of the peace as the primary target of the Confrontation Clause (see supra note 17 and accompanying text), and then announced that the Confrontation Clause applied to police “interrogations” because such interrogations bore “a striking resemblance” to justice of the peace examinations. Crawford, 541 U.S. at 52 (discussed in Davies, supra note 10, at 202-04). That formulation leaves the door open for the justices to decide in future cases that the Confrontation Clause applies only to interrogations by government agents. For example, it will not be surprising if the justices conclude that even accusatory statements
testimonial scheme for limiting the confrontation right is decidedly not “the Framers’ design.”

made to private persons do not sufficiently “resemble” framing-era examinations conducted by justices of the peace to fall within the scope of the confrontation right.

Additionally, the ruling in Davis itself shows that not all statements made to government agents will be deemed to be testimonial. Rather Davis indicates that statements made to police officers will be testimonial only when the “primary purpose” of the police interview was to obtain information for a prosecution and concludes that statements made in police interviews will “often” be nontestimonial. 126 S.Ct. at 2279 (emphasis in original).

Similarly, it seems likely that the justices will create (or allow lower courts to create) a variety of exceptions that will permit the admission of testimonial hearsay even when the unavailability and cross-examination requirements are not met. For example, although Davis left the parameters of the “forfeiture” exception to the confrontation right for another time, it did announce in dicta that hearsay (presumably including testimonial hearsay) could be admitted in a forfeiture hearing itself. Id. at 2279-80.

Thus, it seems likely that the Court may define the scope of the Confrontation Clause so narrowly in future cases that the cross-examination rule applicable to only “testimonial” hearsay will have very limited practical significance—especially as law enforcement professionals learn how to avoid that characterization.
THE (FUTILE) SEARCH FOR A COMMON LAW RIGHT OF CONFRONTATION: BEYOND BRASIER’S IRRELEVANCE TO (PERHAPS) RELEVANT AMERICAN CASES

Randolph N. Jonakait

INTRODUCTION

Recent interpreters of the Sixth Amendment’s Confrontation Clause have “Frankensteined” Rex v. Brasier back into new life. For over two centuries, no one seems to have thought the 1779 English case important for understanding the U.S. Constitution, but now some see Brasier as infusing fresh content into the Sixth Amendment’s right of confrontation.

Crawford v. Washington1 first breathed the life back into Brasier. Even though the Framers of the Constitution hardly discussed it,2 Crawford asserted that the Confrontation Clause “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”3 This assertion assumes

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3 Crawford, 541 U.S. at 54. See also id. at 43 (noting that “The founding generation’s immediate source of the [confrontation] concept . . . was the common law”). Id.

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that there was a common law right of confrontation and implies that cases can be found that shed light on this common law right.\(^4\)

For some who accept these assumptions, *Brasier* is such a ruling, and although not mentioned by the Supreme Court in the eighteenth, nineteenth or twentieth centuries, the Court’s two recent Confrontation Clause cases have *Brasier* references,\(^5\) as do briefs to the Court and academic discussions.\(^6\) Fairly read, however, *Brasier* says nothing about the Confrontation Clause. If a common law right of confrontation is to be found, we must look elsewhere for the content of that right.

Part I of this Article identifies the most straightforward reading of *Rex v. Brasier*. The decision was based on the principle that out-of-court statements from an incompetent witness could not be admitted in a criminal trial. The case says nothing about the hearsay rule generally, hearsay exceptions, or the right of confrontation.

Part II discusses a Framing-Era American case, *State v. Baynard*,\(^7\) that is quite similar to, and consistent with *Brasier*. *Baynard* excluded out-of-court statements from a witness who would have been incompetent to testify in court, and it confirms that *Brasier* said little, if anything, about a right of confrontation. *Baynard* does, however, indicate that American courts of the Framing Era had a general prohibition on hearsay.

Part III contends that if Framing Era views are to control the

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\(^4\) See Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 227 (2005): *Crawford* has assumed that the Confrontation Clause was incorporating a common law right of confrontation; therefore, an English common law right of confrontation must be discoverable. The cited English cases are assumed to be the most relevant ones for determining the English right, and then a right of confrontation is found in them. Without those assumptions, that right is not apparent.

\(^5\) See infra at note 13.

\(^6\) See infra at notes 11-15, 19.

\(^7\) 1794 WL 184 (Del. O. & T. 1794).
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meaning of today’s Confrontation Clause, it is American views from that era that are the most important, and the best sources of American viewpoints and ideas are American cases, not English cases. This section will examine in detail one such case, The Ulysses,8 while briefly referring to other, similar cases that rule on the admissibility of out-of-court statements, and will explore how American courts in the Framing Era enforced a general prohibition on hearsay and recognized only limited hearsay exceptions.

I. REX v. BRASIER

In the 1779 case of Rex v. Brasier, Brasier was convicted of assault with intent to commit rape of a girl under seven years old. The girl did not testify and “was not sworn or produced as a witness on trial.” Instead, the girl’s mother and a woman who lodged with the mother testified that the girl “immediately on her coming home, told all the circumstances of the injury which had been done her. . . .” The case went to the Twelve Judges,9 who rendered a unanimous, single-paragraph opinion, concluding that “the evidence of the information which the infant, had given to her mother the other witnesses, ought not to have been received.” The court’s full reasoning stated:

That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict

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9 See John Langbein, The Origins of Adversary Criminal Trial 212-13 (2003). Langbein writes:
When a point of difficulty arose that a trial judge was reluctant to decide on his own, especially when capital sanctions were involved and the convict would otherwise be promptly executed, the judge could defer sentencing and refer the question to a meeting held back in London of all the judges, commonly twelve, of the three common law courts.

Id.
examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath . . . , for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath their testimony cannot be received. The Judges determined, therefore, that the evidence of the information which the infant had given to her mother and the other witness, ought not to have been received.10

Certainly, at first glance, the case is not an application of the common law right of confrontation. The court neither said that it was applying such a right, nor did the court indicate that such a right existed. The opinion gave no inkling that the statement was inadmissible because it had not been confronted, or that its admission would deny the accused cross-examination. Cross-examination and confrontation go without mention, and the opinion does not even refer to the disputed evidence as hearsay. The case made no general pronouncements about out-of-court statements, much less about hearsay exceptions.

It seems to take a highly creative, and perhaps a highly anachronistic, eye to find a confrontation meaning in Brasier.11 Instead, the clearest rules from the case are that there is no fixed age at which a child can be sworn in to testify and that a child under seven years old can be sworn in to testify if the trial court’s “strict examination” reveals that she understands the nature and consequences of an oath.12

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10 The decision concludes by noting that the “prisoner received a pardon. . . . .” See generally, King v. Brasier, 1 Leach 199 (K.B. 1779).


12 Brasier has been cited by American courts for the proposition that a
Brasier clearly indicates that it was improper to admit the child’s out-of-court statements. The court’s rationale, however, cannot be meaningfully ascribed without answering now unanswerable questions. For example, had the child been produced at trial, and the court examined her and concluded that she could be sworn, would her out-of-court statements have been admissible?13

We cannot know whether the court was declaring that what today would be known as an excited utterance was inadmissible. Statements were made to the mother and the lodger “immediately” upon the girl coming home, but the opinion does not say exactly how long after the assault the girl made these statements, and whether the assertions would today qualify as an excited utterance exception to the hearsay rule is unclear.14

The facts point out the lack of substantial corroboration for the girl’s statements by stating that “there was no fact or circumstance to confirm the information which the child had given, except that the prisoner lodged at the very place which she had described, and that she, on seeing him the next day, had

13 The brief for Davis in Davis v. Washington contended that when the Constitution was adopted, evidence of a fresh complaint of a sexual assault was not admissible unless the victim testified. To support that proposition, the brief referred to Brasier, saying “Thus, for instance, the King’s Bench in 1779 held that an alleged victim’s complaint made to her mother ‘immediately upon coming home’ from an alleged assault was inadmissible because the victim was not sworn or produced as a witness on the trial.” Davis v. Washington, Brief for Petitioner, 2005 U.S. S.Ct. Briefs LEXIS 965, *53-54. In the reply brief, Davis asserted that Brasier held that the “children’s out-of-court statements were admissible only if they testified.” Davis v. Washington, Reply Brief for Petitioner, 2006 U.S. S.Ct. Briefs LEXIS 305, at *18.

14 Cf. Hammon v. Indiana, Brief for Petitioner, 2005 U.S. S.Ct. Briefs LEXIS 949, 45, which concludes that Brasier’s holding demonstrates that “at the time of the Framing, there was no special rule allowing admissibility of accusatorial statements because they were made under stress of excitement.” Id. at 45.
declared that he was the man... There is no way to tell why the court put such an emphasis on the absence of confirming evidence, or whether additional corroboration would have made the statement admissible.

The opinion only states that the girl was neither sworn nor produced “on the trial.” Brasier does not mention whether the girl was produced and sworn at a pretrial proceeding. If the opinion was indicating anything about the admissibility of sworn, pretrial statements, we cannot tell.

*Brasier* did state that “testimony” not under oath could not be received and that if children “are found incompetent to take an oath, “their testimony cannot be received.” The court then concluded that the out-of-court statements should not have been admitted. Perhaps the court was equating hearsay with “testimony.” If so, *Brasier* might have modern importance because *Crawford*’s reading of common-law history led it to conclude that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused . . . “ *Crawford* went on to conclude that the Confrontation Clause’s core concern was with statements used against an accused akin to those from an *ex parte* deposition or examination, which the Court labeled “testimonial,” and held that out-of-court testimonial statements of an absent declarant can only be admitted if the accused had had an opportunity to cross-examine the declarant. Thus, if *Brasier* was equating the girl’s statements with unsworn


18 *Id.* at 51-52.
testimony, and in doing so was elucidating a common-law right of confrontation, the case might tell us something about what should be currently considered testimonial.19

The assumptions necessary to reach this modern meaning, however, ought to give substantial pause. Occam’s razor suggests that the simplest explanation should be accepted, and the simplest explanation for Brasier is that it was only holding that the attempted end-run around the competency rules by admitting the out-of-court statements from one who was not shown to be a competent witness was not valid. The opinion says nothing about the admissibility of hearsay from a witness who is capable of taking an oath,20 and does not say anything at

19 Davis v. Washington, 126 S. Ct. 2266, 2273-74 (2006), did not state a comprehensive definition of “testimonial” but did conclude:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that 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 the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions.

Id. The Court rejected Davis’ reliance on Brasier because it did not involve a statement made during an ongoing emergency, concluding, “The case would be helpful to Davis if the relevant statement had been the girl’s screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of a past event.” Id. at 2277.

Chief Justice Rehnquist, concurring in the result in Crawford, cited Brasier for the proposition that “[u]nder common law, although the courts were far from consistent, out-of-court statements made by someone other than the accused and not taken under oath, unlike ex parte depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based.” Crawford, 541 U.S. at 69.

20 Cf. Hammon v. Indiana, Brief for Petitioner, supra note 14, at 44 (noting that “the manifest premise of the judges’ discussion was that if the speaker had been an adult it would have been plainly improper for other persons to relay her accusations—her ‘testimony’—to court. . .”) Id. See also Richard D. Friedman, Crawford, Davis, and Way Beyond, 15 J. L. & Pol’y 553, 565 (2007) (noting that “[a] premise of the [Brasier] debate was that if she had been an adult the statement could not have been used. . .”).
all about the content of the Confrontation Clause.

The crucial question, of course, is not what Brasier’s rationale truly was, but how Americans would have treated a comparable situation in the Framing Era. If a conception of the common law was constitutionalized in the Confrontation Clause, it would have been the American conception of that law. And while attention has been paid to the English case, none seems to have been paid to a quite similar Framing-Era American case, the Delaware decision of State v. Baynard. In Baynard, hearsay was excluded not because it did not fit into an exception and not because it was not confronted, but because the out-of-court declarant was incompetent to testify at the trial.

II. State v. Baynard

In Baynard, a prosecution witness in a 1794 murder trial testified that he had a conversation with the deceased on the evening of the killing that concerned the deceased’s going to the defendant’s house. The defendant Baynard “objected to this evidence as hearsay. . . .” The defense counsel argued that the out-of-court statements did not fall within any hearsay exception, including explanatory evidence and dying declarations.

The prosecutor responded that the hearsay was being offered,

not as in every respect regular evidence in itself, but as it would come in as introductory to that which was

\[ \text{Id.} \]

\[ \text{Id.} \]

\[ \text{Id.} \]

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good legal evidence. . . . Very frequently narratives would be quite unintelligible, if it were not permitted to relate circumstances, which though illegal as substantive evidence, may tend to introduce and explain what is admissible.²⁴

The court agreed with the defense that hearsay was generally inadmissible, but also seemed to indicate that the particular hearsay at issue might ordinarily be admissible: “Though the rule be general that hearsay evidence is illegal, yet this rule is subject to many exceptions. It would frequently be impossible to take advantage of legal evidence, without an occasional admission of hearsays to explain a narrative of facts.”²⁵

This looks very much like a modern evidentiary debate. The defense objects to an offered out-of-court statement as hearsay and contends that it must be excluded since it does not fit into any exception. The prosecution replies that the statement is not being offered as “substantive” evidence, but that it should be admitted solely to complete a narrative—an argument that seems to say that it was not being offered for the truth of the matter asserted. This call and refrain clearly emanate from the scripture

²⁴ Id.
²⁵ Id. at *1. In addition, the court stated, “It is proper also to give his preface to his story, in most cases without interruption.” Id. See generally Jonakait, supra note 2, at 161 (discussing an 1800 New York murder trial, stating that witnesses generally started their testimony not by responding to questions, but by delivering a narrative, which was sometimes interrupted by a judge or opposing counsel, but the interruptions seem to have been limited to clarifying ambiguities in the narrative and at the conclusion of the narrative, however, questions and answers took over like in the modern format).

See also Thomas Y. Davies, Not “The Framers’ Design:” How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause, 15 J. L. & Pol’Y 349, (2007) (discussing the contention that hearsay often appeared in eighteenth-century English trials and concluding, “[b]ecause witnesses often simply narrated what they had to tell, it seems likely that witnesses who had been admitted to testify as to their own direct knowledge of events might also have mentioned another person’s unsworn statement in the course of their narrative testimony.”).
that hearsay is generally not admitted, a proposition so clear in Baynard that it went unchallenged by the prosecutor and was readily accepted by the court. The case further indicates that the rule was considerably developed by the time of the case, for all the participants agreed that there were accepted exceptions to the general ban that went beyond dying declarations. Indeed, the court noted that hearsay “is subject to many exceptions.”

Even though the Baynard court suggested that the offered hearsay might ordinarily be admissible, the court excluded the evidence because of the second ground tendered by the defense, which was that since the decedent-declarant was a slave, he could not have testified at the trial against the white defendant, and therefore his hearsay should not be admitted:

[I]t is illegal evidence as proceeding originally from the mouth of a Negro, and now offered against a white person in the trial of a criminal charge of a capital nature. It would be absurd to receive that as evidence at second hand which could not be received, even on oath administered in court from the original person.

The court agreed, first noting that state laws had limited the privileges of blacks and then concluding:

While these laws and this system continue in force, it

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27 Id.
28 The court listed some of the laws:
Many of our laws recognize the servile state of Negroes among us and seem to require them to be deprived of many privileges enjoyed by white persons. By a law made very early after the settlement of our government, Negroes were not allowed the trial by jury, nor to carry arms, meet in companies, etc. . . . An additional penalty is inflicted on the criminal intercourse of the sexes. . . . No Negro can be employed to whip a white person. . . . By our Constitution, . . . suffrages at elections are confined to free white persons.

Id. at *1.
would be both illegal and impolitic to admit the testimony of Negroes in any cases whatever wherein white persons are interested . . . . Therefore the witness can not give in evidence anything which he heard from Negro Richard.29

A creative interpretation of Baynard could maintain that since the court concluded that the slave could not have testified in court, and since it held that his hearsay could not be admitted, the court was in essence determining that the out-of-court statements were “testimonial,” much as a creative interpretation of Brasier contends. But of course, the court’s decision did not depend upon the character of the hearsay. Indeed, the court suggested that the same hearsay from a white decedent may have been admissible, and the hearsay was not excluded because it was “testimonial.” The court’s decision indicates nothing about when hearsay was “testimonial” or that anything depended on such a label. While it can be deduced that hearsay that “explain[ed] a narrative of facts” was then admissible as were dying declarations, Baynard says nothing about the admissibility of other out-of-court statements. The case was not about the right of confrontation, a general necessity for

29 Id. at *1. The Delaware courts did not always exclude blacks from testifying against whites in criminal cases. See State v. Bender, 1793 WL 548 (Del.Quar. Sess.). Where a white man was charged with assaulting a free black woman, the court noted that Delaware statutes prohibited free blacks from testifying against whites but also granted free blacks the right “to obtain redress in law and equity for any injury to their person or property.” Bender, 1793 WL 548 at 1. The court concluded that a criminal charge was a method of seeking such redress, and where the free black person was the only witness to the assault, she could testify. The court continued, “[W]e do not mean to say that a Negro is a witness between two whites, nor in cases like the present one when other proof can be procured, but only in the case where justice must otherwise fall.” Bender, 1793 WL 548 at *1. The case is also reported at State v. Bender, 1793 WL 550 (Del.Quar.Sess.); State v. Bender, 1793 WL 551 (Del.Quar.Sess.); State v. Bender, 1793 WL 554 (Del.Quar.Sess.); and State v. Bender, 1794 WL 556 (Del.Quar.Sess.) But cf. State v. Farson, 1794 WL 570 (Del.Quar.Sess.) (noting that a free black called by defendant and charged with assaulting a white person was prohibited from testifying).
an opportunity for cross-examination, or whether the hearsay at issue would otherwise have been admissible; rather, the case concerned witness competency. The court concluded, similarly to Brasier, that if a person would not have been a competent in-court witness, then that person’s out-of-court statements were not admissible.\textsuperscript{30} Baynard, an American product of the Framing Era, says little, if anything, about the right to confrontation and confirms that Brasier said even less.

While these two cases are not truly informative about the Framing Era views that led to the Confrontation Clause, that does not mean that examinations of early cases should cease if that age’s understandings are held to control modern interpretations of confrontation. The real goal should be not to gain a better understanding of the English views, but of American conceptions of the proper use of out-of-court

\textsuperscript{30} Baynard, 1794 WL 184 at *1. See also Respublica v. Langcake and Hook, 1795 WL 708 (Pa.). In a trial for “maihem (sic) and assault and battery,” the defense sought to admit as a dying declaration the out–of-court statements of the father of one of the defendants. Respublica, 1795 WL 708 at *1. The court concluded that hearsay was generally inadmissible but that there were exceptions. Among the exceptions were “the declarations of the deceased person on an indictment for murder, founded principally on the necessity of the case.” Respublica, 1795 WL 708 at *2. Apparently the court did not limit this principle just to the declarations of the victim of the homicide, or at least the court did not find the father’s declaration inadmissible on that ground. Instead, the court refused to admit the evidence because the necessary necessity was absent, “there having been several witnesses present at the different transactions.” Respublica, 1795 WL 708 at *2. The court, however, went on to find an independent ground for exclusion, one that mirrored the rulings in Brasier and Baynard. The court noted that the declarant Thomas Langcake had been bound over as one of the participants in the crime and that he would have been indicted if he had not died before the indictments were returned. If indicted he would have been an interested party and could not have testified. The court concluded, “If indicted and alive, Thomas Langcake could not have been admitted as a witness to disprove the present charge. His declarations shortly before his death surely cannot be received in evidence. . . .” Respublica, 179 WL 708 at *2. Once again, if the declarant would have been an incompetent in-court witness, his hearsay could not be admitted. See generally Respublica, 179 WL 708.
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statements in criminal trials. The Framers could only have put their own views into the Sixth Amendment.

English cases may tell us something about that American understanding, but it would not be surprising in a world of little and difficult communication across the sea that American views would not be precisely the same as English notions. Furthermore, as I have contended elsewhere, American criminal procedure had diverged in significant ways from English procedure by the time of the Constitution to provide Americans with a more robust adversary system than England. The Sixth Amendment, at least in part, rejected English procedures and constitutionalized practices that had already emerged in the colonies and new states. If the Confrontation Clause’s purpose was to help ensure a fast-emerging American adversary system, then American sources must be especially examined, and so far the historical debates engendered by Crawford and Davis have not truly focused on the American law of the period.

Unfortunately, relevant and available American case law from the Framing Era about evidentiary practices in criminal cases is slight, but the information that does exist should be weighed for what light it can bring to the American use of out-of-court statements.

32 For example, the Sixth Amendment guarantees a right to counsel when that right did not exist in England. See id. at 94-96. See also U.S. CONST. amend. VI.
33 See Randolph N. Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 UCLA L. REV. 557, 622 (1988) (“correctly interpreted, the confrontation clause . . . is one of a bundle of rights that assures the accused the protection of our adversary system. It assures the accused the right to the adversarial testing of the prosecution’s evidence”).
III. *The Ulysses*

*The Ulysses* stands as a rare example of American case law from the Framing Era which concerns evidentiary practices in criminal cases. The case involved Captain Lamb, a cruel and incompetent Captain, or at least that is what the mutineers maintained. Eight months after *The Ulysses*, a merchant ship, had sailed from Boston, the crew revolted, put the captain in irons, and placed first officer John Salter in command. Ten days after the revolt the ship arrived on the west coast of North America where two other Boston captains interceded, and Lamb was restored to command. When *The Ulysses* returned to Massachusetts, three officers and two seamen were indicted “for feloniously confining the master of *The Ulysses*, and endeavoring to excite a revolt in the ship.”

Although the defense contended that the defendants’ actions were justified, the jury convicted the charged officers and seamen. While these events have little significance today, the court’s opinion contains a long footnote about evidentiary determinations made during the trial. These rulings by an American federal court, which gave no indication that it was making new law, less than a decade after the adoption of the Sixth Amendment, should be of interest since many concerned hearsay issues and perhaps say something about Framing Era views of confrontation.

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36 Id.
37 Id. at 516.
38 Of course, *The Ulysses*, decided after the Sixth Amendment was adopted, could not have been an inspiration for the Confrontation Clause, but the views held in 1800 were unlikely to differ significantly from those held but a few years earlier. Cases like *The Ulysses* would seem to reflect the common understandings of the law in the Framing Era. This mirrors an argument that *Brasier* has importance for interpreting confrontation even if the Framers were unaware of it. See Davies *supra* note 25, at 89 (noting that *Brasier* “and all other cases first reported in Leach’s Crown Cases were published too late to have come the Framers’ attention prior to the framing of the Confrontation Clause in 1789”). Champions of *Brasier*, however,
The starting point for The Ulysses, as it was for Baynard, was the general inadmissibility of out-of-court statements, although the federal court announced the prohibition in somewhat disguised fashion. The Ulysses court stated, “What others said, when the defendants were not present to contradict, is no testimony.” Hearsay, in other words, was usually banned.

While prohibiting most out-of-court statements, the court’s ruling leaves open the possibility that something like tacit admissions were admissible, and clearly at least some of the defendants’ direct admissions could be entered into evidence. The court stated, “If the defendants, before the accusation, were said to have used expressions, which they did not deny, it is good evidence, because it is a confession, that they did utter the expressions.”

maintain that it is important because it indicates the common understanding of the law in the Framing Era. See Friedman, supra note 16, at 116. Friedman notes that:

We should not be distracted by the question of whether Brasier was known in the United States at the time the Sixth Amendment was drafted or adopted. In the respect relevant to the inquiry here, Brasier makes no new law. Rather, its significance is that it reflects the common understanding of the time.

Friedman, supra note 16, at 116. Surely, however, American cases tell us what the relevant views were better than English decisions. See generally Friedman, supra note 16, at 116.

39 The Ulysses, 24 F.Cas. at 516 n.2. Other courts of that era also stated that hearsay was not generally admissible in criminal cases. See United States v. Robins, 27 F.Cas. 825, 837 (D.S.C. 1799) (noting that hearsay is not admissible in cases “affecting . . . life or limb . . .”).

40 The Ulysses, 24 F.Cas. 515, 516 n.2 (C.C.D. Mass. 1800) (No. 14,300). One issue concerning an admission in The Ulysses depended on whether statements could be attributed to a defendant, but after concluding that they could be, the statements were admitted and the court found that:

It was doubted whether the log book was the record of the mate, or of the captain. Captains of vessels were produced, who testified, that the log book is always considered as a record of truth; that it is the duty of a mate to keep one for the inspection of the owners of the ship; the mate is not bound to insert therein
The court also noted, “It was not permitted, that witnesses should testify, to what others said of the defendants, unless they were present. It was not permitted to testify, what others said, respecting expressions, used by defendant, unless they were present.”\(^{41}\) The court was limiting the use of out-of-court statements, but there is some ambiguity in the limitation. Perhaps the court was stating that hearsay could be admitted only if the in-court declarant was present when the hearsay was uttered. If so, the rulings prohibited multiple hearsay statements but nothing more. That interpretation would conflict with the ruling that statements made outside the presence of the defendant were not permitted.\(^{42}\) Instead, the second ruling more sensibly says that hearsay reports of defendants’ admissions were not admissible unless the in-court witness also heard the admissions. The “they” refers to “witnesses,” not “others.” The key phrase in the first statement is “what others said of the defendants,” which apparently means hearsay reports of the defendants’ actions. The court, to be consistent with its general ban on out-of-court statements, was ruling that the in-court witness could report hearsay only if the in-court witness had firsthand knowledge of the defendants’ actions reported in the hearsay.

any thing false, even though commanded by the captain, and therefore a log book may be taken as the confession of the mate.

*Id.*

In State v. Wells, 1790 WL 349 (N.J.), the court recognized that admissions could be powerful evidence and should be admitted. The court rejected the defendant’s contention that evidence of his oral confession should not be admitted because his written confession had already been introduced, concluding that if the defense position were adopted:

this monstrous consequence would ensue, that if a criminal had twenty times acknowledged the commission of a fact, and should afterwards refuse to confess it, upon an examination before the justice, for the very purpose of preventing any proof of his former acknowledgments, he would, by his own act, defeat the ends of justice.

Wells, 1790 WL 349 at *4.

\(^{41}\) 24 F.Cas. at 516 n.2.

\(^{42}\) See *supra* note 32 and accompanying text.
Both rulings appear to permit the hearsay only when the out-of-court statements would corroborate what the in-court witness testified to. This conclusion is buttressed by the court’s specific ruling that admitted prior out-of-court statements of an in-court witness not just to impeach, but also to corroborate the witness. The court stated, “Evidence to show, that a witness has given an account of a transaction, similar to what he has testified, is good corroboration of his testimony. And so vice versa.”

The Ulysses court also made a number of rulings about depositions that undercut Crawford’s conclusion that a deposition could be validly admitted in the Framing Era if the defendant had the opportunity to cross-examine the witness at the statement’s taking and if the declarant were unavailable. The Ulysses court stated a different general proposition about depositions: “In criminal prosecutions, depositions are not admitted as regular evidence, unless by mutual consent.” A

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43 See also State v. Norris, 1796 WL 327, at *4 (N.C. Super. L & Eq. 1796) (describing where a prosecutor was allowed to impeach his own witness with prior statements).

44 The Ulysses, 24 F.Cas. 515, 516 n.2 (D. Mass. 1800). The court, however, did not allow all impeachment by prior statements. It was claimed that the witness P. Robinson “had told the American consul, in Canton, a story differing in some considerable circumstances from the testimony which had given in court.” Id. The court, however, would not allow questioning about this, stating “he was not bound to criminate himself.” Id. On the other hand, Robinson’s account of the events written shortly after the captain’s reinstatement was admitted to corroborate his in-court testimony. Id.

45 Id. Some Framing Era cases did not admit defendant’s statements made in an examination before trial if the statements were not properly recorded. See, e.g., State v. Grove, 1794 WL 80 (N.C. Super. L & Eq. 1796) (noting that a defendant’s examination before a magistrate was not admitted because it was not recorded within two days) and United States v. Maunier, 26 F.Cas 1210 (C.C.D.N.C. 1792) (describing how a defendant’s examination before trial was not admitted because it was not signed by the prisoner). See also State v. Wells, 1 N.J.L. 424, 1790 WL 349, at *4 (N.J. 1790) (noting that the court takes “the law to be, that parole evidence of the confession before the justice would be improper. . .

But see State v. Irwin, 1794 WL 105, at *1 (N.C. Super. L & Eq. 1794), where the court
concern over cross-examination was part of the animating force for this mutual-consent rule. In *The Ulysses*, parties had agreed to the taking of a deposition from one Sturges, but after its apparent completion, “some addition was made to it.” The prosecutor John Davis objected to the deposition’s admission, and the court excluded the evidence, stating, “Though this addition might have been true, yet Mr. Davis had no opportunity to cross-examine Sturgis on this point.”

Other cases from the era indicated the importance of cross-examination and its connection to hearsay. See, *e.g.*, State v. Webb, 1794 WL 98 (N.C. Super. L. & Eq. 1794), where the court refused to admit a deposition not because it was labeled “testimonial” evidence but because of the “rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine. . . .” Webb, 1794 WL 98, at *1.

One court of the era recognized that out-of-court statements should be admitted when cross-examination of the absent declarant would have been to no purpose. Schwartz v. Thomas, 1795 WL 529 (1795). In a slander action, the court admitted a letter from an absent declarant indicating that he had heard of the slander. The proponent of the letter said it was offered not for showing that the defendant had uttered the slander but to prove the extent of damages by establishing that the slander had spread. One of the judges concluded, “If the letter had not only stated that the report was known to the writer but had also averred that the plaintiff[[-in-error] had *propagated the report*, such averment would have been inadmissible to prove this latter fact. . . .” Schwartz, 1795 WL 529, at *3. Since, however, cross-examination of the letter writer could not have undercut the probative force of the letter to show the slander’s circulation, the letter was admissible. The judge stated:

> that the report had circulated so as to come to the knowledge of the writer, is as clearly established by the letter itself, as if he had deposed to the same effect . . . , and no cross examination
Even when there was an opportunity for cross-examination at the deposition, however, a deposition was still not admissible without mutual consent. Defendant Salter had offered a deposition from someone not named. The court noted that the deponent had relevant evidence, and the defendant had no legal method of detaining the deponent. This time no mention was made that the prosecutor had been denied the opportunity to cross-examine the deponent, but even so, the court indicated that it could not admit the deposition without the prosecutor’s consent. The court simply stated, “I have said, depositions are not legal evidence in criminal prosecutions.” The court, however, did show a concern that the defendant received a fair trial and obtained the prosecutor’s consent. The opinion noted,

If the attorney for the district will not agree to the admission of this deposition, the cause must be continued. A similar determination of Lord Mansfield was quoted, in which he was said to have asserted, if the deposition were not admitted, the cause should be continued forever. The attorney agreed.  

Schwartz, 1795 WL 529, at *3. The other judge similarly concluded: this case is very different from what it would have been, had the letter been produced to prove the speaking of the words, or the propagation of the report by the defendant. In the one case the party might have derived benefit from the cross examination of the writer, in the present case, it would have been impossible.

Schwartz, 1795 WL 529, at *4.

47 24 F.Cas. at 516, n.2.
48 The Ulysses, 24 F.Cas. 515, n.2 (D. Mass. 1800). See also United States v. Moore, 26 F.Cas. 1308 (D. Pa. 1801), where the defendant was charged with a shipboard manslaughter. Defense asked for the trial to be delayed because two witnesses had shipped out again but were expected back at the next court term. The defense lawyers said that they had proposed to the prosecutor that depositions of the witnesses be taken where the prosecutor could have cross-examined, but the prosecutor refused to participate in the deposition. The prosecutor opposed the continuance stating that the defense should have moved to have their witnesses bound over as he had done with a
Another ruling on depositions stated, "Where there are several defendants, and one consents to the taking of a deposition, that deposition may not affect the other defendants, who did not consent to the taking of the deposition." 49 A deposition was not admissible simply because the accused might have been cross-examined at a deposition, for presumably if the defendants had consented, they would have been able to cross-examine at the out-of-court proceeding. Instead, the mutual consent did more than simply preserve cross-examination; it allowed the parties to choose to have the cross-examination in front of the jury. 50

number of prosecution witnesses, concluding that a trial delay would be unfair to the prosecution witnesses who were jailed pending the trial. After arguments about whether the defense would have had the authority to have their witnesses committed, the court continued the trial and ordered the release of the prosecution witnesses on the condition that their depositions be taken with the opportunity for defense cross-examination at the depositions. See generally Moore, 26 F.Cas. 1308.

49 24 F.Cas. at 516, n.2.

50 The Ulysses, 24 F.Cas. 515, n.2 (D. Mass. 1800). Defense attorneys of that era were arguing not just the importance of cross-examination, but the importance of cross-examination in front of the jury deciding the case. See United States v. Moore, 26 F.Cas. 1308 (D. Pa. 1801), where after the court suggested that depositions of prosecution witnesses could be taken, defense counsel responded:

We have great objections to the depositions of these sailors. We wish to examine them in court and before the jury. We have good reason to suspect a conspiracy among them to fix this crime on the defendant. They have evinced the greatest heat and resentment towards him. A viva voce examination before the jury is necessary to our safety. On depositions, though we cross-examine, we shall lose the manner, appearance, temper, &c., of the witnesses, so important in weighing their credit.

Moore, 26 F.Cas. at 1308. See also United States v. Smith, 3 Wheeler C.C. 100, 27 F.Cas. 1192, 1218 (D. N.Y. 1806), where defense counsel refused to consent to a commission examining absent witnesses and insisted on the importance of cross-examination in front of the jury, stating:

Even in civil cases, I have more than once had occasion to lament the inroads that are made upon oral testimony, by the increased use of written depositions; and I am convinced that the
Perhaps most important in light of *Crawford*, the court nowhere indicated that the “testimonial” factor weighed into its decisions whatsoever, or that the court was even aware of such a concept. Indeed, the last of the court’s rulings on hearsay indicated that nothing depended on whether the out-of-court statements were “testimonial” or not. The court stated, “Where a private journal was produced, that journal may be used against its author, but not against the other defendants.” A private journal is not the product of interrogation, much less governmental questioning. It bears little if any resemblance to an *ex parte* affidavit or deposition. Even though today it would be “nontestimonial” hearsay and could be admitted without violating the Confrontation Clause, it was not admissible against those who had not written it. That ruling, of course, followed from the court’s general proposition that hearsay was not admissible; that is “what others said [including another defendant], when the defendants were not present to contradict, is no testimony.”

The *Ulysses* says nothing directly about the right of confrontation, but it does show a Framing Era court’s concern about the use of out-of-court statements in a criminal case. Most important was its general prohibition of such evidence. The court allowed breaches to the ban, but they were quite limited with the court only permitting admissions, depositions taken by mutual consent, and out-of-court statements that would corroborate or impeach in-court testimony.

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The latter frequently prevent the discovery of truth. Everyone knows that when a witness is examined in open court, the manner in which he answer, and the manner in which he declines to answer, are matters of public observation; and that cross-examination may draw out more than could be obtained by studied and written answers to written interrogatories.

*Smith*, 27 F.Cas. at 1215.

51 The *Ulysses*, 24 F.Cas. at 516, n.2.

52 *Id.*

53 At least one American judge cast doubt about the admissibility of a deposition even if it had been properly taken. See *State v. Moody*, 1798 WL 93 (N.C. Super. L. & Eq.), where in a murder trial, statements made by the
Of course, the case does not state whether excited utterances about an ongoing emergency from an absent declarant were admissible or not. The case is silent on the distinction drawn in *Davis*, but the case certainly undercuts the notion that the deceased on the day after he was wounded to a Justice of the Peace were offered as dying declarations. Since, however, the declarant did not die until weeks later, the court did not admit the statements because they were not made when the declarant was without hope of life. Judge Haywood, however, suggested that the statements might be admissible as an examination under oath before a Justice of the Peace. The defense attorney objected that the declarant was first examined and then later sworn to the truth of the contents, rather than being sworn before he was examined. Judge Haywood, “thinking there might be something in [the defense] objection, did not insist upon receiving the testimony.” *Id.* at *1. While this might indicate that a deposition could be admitted when the proper forms were followed, the other judge gave broader grounds for the exclusion, which would have prevented its admission even if the deposition had been properly taken. Judge Stone stated, “I cannot think this paper is receivable at any rate; how is it possible a man can be a witness to prove his own death?” *Id.*

The fact that courts had expressed concerns over admitting hearsay does not mean that courts did not also admit hearsay without reporting an explanation. *See, e.g., State v. Negro George, 1797 WL 403 (Del.Quar.Sess.)* (describing where the report summarizes the testimony of many witnesses some of whom report the out-of-court statements of others). Thus, a prosecution witness testified that the owner of the defendant slave stated shortly after the crime that he (the owner) believed the defendant had been on the plantation at the relevant time. The reported opinion does not indicate any objection to this hearsay, but the owner’s declaration was exculpatory, and the owner later testified to the same effect. The prosecution witness, however, also testified that defendant’s mother stated that the defendant had shoes, an important issue because shoe prints had been found near the crime scene. This hearsay, however, seems to have been an explanation of the in-court testimony of how the witness came to compare the defendant’s shoes to the imprints at the scene. The witness testified that after the mother’s statement, the defendant produced his shoes, and the witness told the jury about the comparison he made. The hearsay was not the central evidence for the prosecution, which relied on the identification of the victim. *Id.*

*See also State v. Lough, 1803 WL 750 (Del Quar.Sess.)* (noting that in a trial for horse stealing, a witness said that when he saw the horse someone else told him that it was stolen and the evidence was not crucial because the owner of the horse had already testified as to its theft).
admissibility of hearsay in the Framing Era depended on whether or not out-of-court statements were “testimonial.” Indeed, the court gave no indication that the court was even aware of such a distinction.

Perhaps most important, nothing in *The Ulysses* or any of the other cases cited here or that have been discussed in the aftermath of *Crawford* and *Davis* demonstrate that Framing Era prosecutions were upheld or even undertaken when the crucial evidence against the accused was an out-of-court statement of an absent witness, whether or not that hearsay was “testimonial.” The thought of such prosecutions never seems to have even occurred then.55

What *The Ulysses* and the various cases previously discussed suggest is that American courts were seeking to provide fair, adversarial trials, and decisions about the use of out-of-court statements were just part of that concern. What *The Ulysses* should really teach is that the hearsay determinations of the Framing Era cannot be meaningfully analyzed apart from an analysis of the evolving criminal trial system as a whole, and that the Confrontation Clause should not be interpreted as if it can be segregated from related provisions in the Constitution.56

CONCLUSION

If a common law right to confrontation existed, it cannot be found in *Rex v. Brasier*, as some have contended. That case articulates no general principles about hearsay or confrontation. The similar American case of *State v. Baynard*, however, does suggest that in American courts during the Framing Era courts were announcing that hearsay was generally inadmissible, and *The Ulysses* further indicates that hearsay exceptions in American courts during that period were limited. Most

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55 *See supra* note 54.

56 *See Jonakait, supra* note 2, at 198 (noting that *Crawford’s* definition of “witnesses” in the Confrontation Clause conflicts with the use of that term in other parts of the Constitution and “*Crawford’s* analysis ignores confrontation’s Sixth Amendment context.”).
important, however, for the modern eye, none of the discussed cases show any concern over a distinction between “testimonial” and “nontestimonial” hearsay.

Perhaps the approach of Crawford and Davis is a good one, but it is not one that has proven support from the historical record. We cannot know if the Framers of the Confrontation Clause would have found the distinction that the Court has articulated between the companion cases in Davis important, because the Framers, for practical purposes, said nothing about how they viewed that constitutional provision. But nothing in the historical record so far brought forth indicates that the distinction would have made any sense to them at all. Instead, what Crawford and Davis have done, it seems, is to launch something like a new common law of evidence where the language of those decisions has to be parsed without real reference to history or Sixth Amendment principles, for guidance on how new cases should be decided.
THE CONFRONTATION CLAUSE
AND ORIGINALISM:
LESSONS FROM KING V. BRASIER

Anthony J. Franze

“Marry, Sir, they have committed false report”
—WILLIAM SHAKESPEARE, MUCH ADO ABOUT NOTHING, act 5, sc. 1.

INTRODUCTION

When a national children’s rights organization asked me to draft an amicus brief in Davis v. Washington\(^1\) to alert the Supreme Court to the impact its decision interpreting the Confrontation Clause may have on child abuse prosecutions, I had no idea it was going to thrust me back in time to the laws and practices of seventeenth and eighteenth century England. It was not long, however, before I made the acquaintance of Sir

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\(^1\) 126 S. Ct. 2266 (2006). The Davis decision addressed two cases argued in tandem, Washington v. Davis, 111 P.3d 844 (Wash. 2005) (en banc) and Hammon v. Indiana, 829 N.E.2d 444 (Ind. 2005). This article refers to the cases collectively as “Davis.”
Walter Raleigh, the Privy Council, and the Marian statutes. History, I was reminded, has become central to confrontation doctrine since the Supreme Court’s 2004 decision in *Crawford v. Washington*. And not just any history. Justice Scalia, writing for the *Crawford* majority, made clear that what matters is the “original meaning” of the Confrontation Clause—an interpretation “faithful to the Framers’ understanding.”

In *Crawford*, the defendant was tried for attempted murder, and the Court addressed whether the admission of a recorded statement by the defendant’s wife, who did not testify at trial because of a state law marital privilege, violated the defendant’s Sixth Amendment confrontation right. Finding the existing confrontation framework “unpredictable,” “amorphous,” and inconsistent with “historical principles,” the *Crawford* Court crafted a new confrontation test that distinguishes between “testimonial” and “nontestimonial” hearsay:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay

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3 Id. at 59-60.
4 Id. at 38, 40, 68.
5 Id. at 60-63. In *Crawford*, the Court overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), which “condition[ed] the admissibility of all hearsay evidence on whether it falls under a ‘firmly rooted hearsay exception’ or bears ‘particularized guarantees of trustworthiness.’” Id. at 60 (quoting *Roberts*, 448 U.S. at 66). The Court determined that the *Roberts* framework conflated the constitutional requirements with the law of hearsay, strayed from historic principles, and was inherently flawed:

[The *Roberts* reliability] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations. Reliability is an amorphous, if not entirely subjective, concept . . . . The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.

Id. at 63; accord Whorton v. Bockting, 127 S. Ct. 1173, 1179 (2007) (discussing *Crawford* overruling *Roberts* in the context of finding that the *Crawford* rule could not be applied retroactively).
Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.\textsuperscript{6}

Two years later, \textit{Davis} presented the Court’s first opportunity to define the parameters of “testimonial,” something \textit{Crawford} expressly left “for another day.”\textsuperscript{7} At issue in \textit{Davis} was whether a recording of a 911 call as well as an affidavit and hearsay statements made during a police interview admitted at trial in two domestic violence cases were “testimonial.”\textsuperscript{8} Adhering to \textit{Crawford’s} originalist approach,\textsuperscript{9} the parties’ and amici’s briefs in \textit{Davis} focused on framing-era history.

Nearly all of the \textit{Davis} briefs\textsuperscript{10} discussed a 1779 child rape

\textsuperscript{6} \textit{Crawford}, 541 U.S. at 68.

\textsuperscript{7} \textit{Id. (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).}


\textsuperscript{9} \textit{Crawford}, 541 U.S. at 68.

\textsuperscript{10} \textit{See} Brief of Petitioner Hershel Hammon, \textit{Davis}, 126 S. Ct. 2266 (No. 05-5705), 2005 WL 3597706; Brief of Respondent, \textit{Davis}, 126 S. Ct. 2266 (No. 05-5705), 2006 WL 271825; Reply Brief of Petitioner Hershel Hammon, \textit{Davis}, 126 S. Ct. 2266 (No. 05-5705), 2006 WL 615151; Brief for Petitioner, \textit{Davis}, 126 S. Ct. 2266 (No. 05-5224), 2005 WL 3598182; Brief of Respondent, \textit{Davis}, 126 S. Ct. 2266 (No. 05-5224), 2006 WL 271825; Reply Brief for Petitioner, \textit{Davis}, 126 S. Ct. 2266 (No. 05-5224), 2006 WL 542177. For the amici briefs that discuss \textit{Brasier}, see Brief for the United States as Amicus Curiae Supporting Respondent, \textit{Davis}, 126 S. Ct. 2266 (No. 05-5224), 2006 WL 303911; Brief for the States of Illinois et al. as Amici Curiae in Support of Respondents, \textit{Davis}, 126 S. Ct. 2266 (Nos. 05-5224, 05-5705), 2006 WL 303912; Brief of Amicus Curiae, the National Association of Counsel for Children (NACC) in Support of Respondents, \textit{Davis}, 126 S. Ct. 2266 (Nos. 05-5224, 05-5705), 2006 WL 284227. The author was counsel of record for amicus NACC and would like to thank Professor Thomas D. Lyon of the University of Southern California Law School as well as Raymond LaMagna and Jacob Smiles for their contributions to the brief, including some of the initial research on \textit{Brasier} discussed in this article.
case, King v. Brasier. In Brasier, Mary Harris, a child under seven years old, “immediately on her coming home,” told her mother and a woman lodging in the home that the defendant had sexually assaulted her. At the defendant’s trial for assault with intent to commit a rape, the child “was not sworn or produced as a witness.” Mary’s mother and the lodger, however, testified that Mary told them she had been assaulted and had identified the defendant as the perpetrator. The jury convicted the defendant, but the trial judge referred the case to the Twelve Judges for review, a practice analogous to a modern day appeal. The Twelve Judges unanimously reversed the conviction, holding that “no testimony whatever can be legally received except upon oath” and “therefore, that the evidence of the information which the infant had given to her mother and the other witness, ought not to have been received.”

The defendants in Davis naturally argued that Brasier proved, at common law, hearsay statements made “immediately” after an assault were characterized as “testimony” forbidden from evidence. Thus, they reasoned, Brasier showed that the 911 call and statements to the police—even if considered excited utterances—would be “testimonial” and barred from evidence in 1779, over a decade before ratification of the Confrontation Clause in 1791.

12 Id. at 202, 1 Leach at 200.
13 Id.
14 Id.
15 As Professor Langbein has explained, “[w]hen a point of difficulty arose that a trial judge was reluctant to decide on his own . . . the judge could defer sentencing and refer the question to a meeting held back in London of all the judges, commonly twelve, of the three common law courts.” JOHN H. LANGBEIN, THE ORIGINS OF ADVISORY CRIMINAL TRIAL 212-13 (2003).
17 See infra text accompanying notes 31-35.
18 Id. Although the Supreme Court often treats “original meaning” as an inquiry into the generally accepted meaning that a provision in the Bill of Rights had at the time of ratification in 1791, some argue that 1789, the date the Sixth Amendment was framed, is the appropriate cut-off date. See infra
Writing for the *Davis* majority, Justice Scalia found no need to address any spontaneous declaration exception to confrontation and instead adopted a new standard for “testimonial”—limited to the situations presented—that focused on whether the “primary purpose” of the out-of-court statement was to assist police in responding to an “ongoing emergency.” Justice Scalia’s opinion, however, did briefly mention *Brasier*, implicitly suggesting that the case may be instructive to confrontation issues in other contexts, including one of the principal questions *Davis* left unresolved: whether statements made to private individuals rather than government officials can ever be “testimonial.”

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19 *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006). In *Davis*, the Court adopted the following test, limiting it to the factual contexts presented in the cases:  
Without attempting to produce an exhaustive classification of all conceivable statements . . . it suffices to decide the present cases to hold as follows: 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.

*Id.* The Court held that the 911 recording admitted against defendant Davis was nontestimonial under this test because, “the circumstances of [the victim’s] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency.” *Id.* at 2277. The Court found the affidavit and hearsay admitted against defendant Hammon, however, was “testimonial” since it was “entirely clear from the circumstances that the interrogation was part of an investigation into possibly past criminal conduct . . . . There was no emergency in progress . . . . Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime . . . .” *Id.* at 2278.

20 *Id.* at 2277.

21 In *Davis*, the Court expressly declined to address whether statements to non-law enforcement personnel can ever be testimonial: “For the purposes of this opinion (and without deciding the point), we consider [911 operators’]
Part I of this article traces the common law before and after *Brasier* and argues that the case has no place in confrontation doctrine, under an originalist approach or otherwise. When read in context, *Brasier* is not about confrontation at all. Rather, the case concerns unique framing-era law governing the competency of children to take the oath and give sworn—or unsworn—testimony at trial. More fundamentally, the report of *Brasier* discussed in *Davis* could not have influenced the Framers’ understanding of confrontation because it was not in print until 1815, over two decades after the framing and ratification of the Sixth Amendment. The 1815 report was a revised version of reports of the case in print from 1789 until 1799. The earlier versions made no mention of any hearsay and, indeed, reported that the child testified at trial, essentially taking the case outside the realm of confrontation.

It is plausible, moreover, that the Framers would not have been aware of any report of *Brasier* and—given the legal authorities that were available in framing-era America—would have understood that hearsay accounts by parents, doctors, and acquaintances concerning statements made by child sexual abuse victims would be admissible in criminal trials without regard to whether the statements would now be considered “testimonial” or “nontestimonial.”

Part II argues that *Brasier* serves as an apt case study on some of the practical limits of originalism as a basis for criminal procedure. That the entire debate over *Brasier* is based on a
CONFRONTATION AND ORIGINALISM

report of the case that did not exist in 1791—and that the
original report eluded the parties, the Solicitor General’s office,
amici, and the Supreme Court in Davis as well as most
academics who have analyzed the case over the years—raises
questions about a framework that essentially requires lawyers
and judges to become amateur historians. To be sure,
originalists readily acknowledge that there may be difficulties in
determining original meaning and applying it to modern
circumstances.27 Even so, that may discount the practical reality
that criminal lawyers in the trenches—and the judges deciding
these issues—cannot reasonably be expected to have the time to
find, much less trace the origins of, each and every common law
case that seems significant to the confrontation issue before
them. That is particularly the case given that many historical
sources are not readily available without resort to specialized

Clause, 15 J.L. & POL’Y 349 (2007) [hereinafter Davies, Not the Framers’
Design]; 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, 105, 156-62 (2005) [hereinafter Davies, What Did the Framers
Know]; Thomas Y. Davies, Revisiting the Fictional Originalism in
Crawford’s “Cross-Examination Rule”: A Reply to Mr. Kry, 72 BROOK L.
REV. 557 (2007) [hereinafter Davies, Revisiting Fictional Originalism];
Kenneth Graham, Confrontation Stories: Raleigh on the Mayflower, 3 O HIO
ST. J. CRIM. L. 209 (2005); 30A CHARLES ALAN WRIGHT & KENNETH W.
GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 6371.2 (Supp. 2006);
Randolph N. Jonakait, The Too-Easy Historical Assumptions of Crawford v.
Washington, 71 BROOK. L. REV. 219 (2005); Rodger W. Kirst, Does
Crawford Provide a Stable Foundation for Confrontation Doctrine?, 71
BROOK L. REV. 35 (2005). For views supporting originalism or the history in
Crawford, see Robert Kry, Confrontation under the Marian Statutes: A
Response to Professor Davies, 72 BROOK L. REV. 493 (2007); Stepanos
Bibas, Originalism and Formalism in Criminal Procedure: The Triumph of
Justice Scalia, the Unlikely Friend of Criminal Defendants?, 94 GEO. L.J.
183 (2005).

27 E.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL
and uncertainties of determining original meaning and applying it to modern
circumstances are negligible compared with the difficulties and uncertainties
of the philosophy which says that the Constitution changes . . . . The
originalist, if he does not have all the answers, has many of them. The
Confrontation Clause, for example, requires confrontation.”).
subscription databases or rare book collections. Given the nature of the sources, it may even be possible for advocates with time and resources to construct a compelling case of “original meaning” for either side of an issue.

All of this is not to say that history is irrelevant to an understanding of confrontation or other rights. Nor is the fact that a legal framework is difficult to apply necessarily a sound basis to abandon it. Still, the question remains whether the real-world limitations of anchoring a legal framework rigidly to “original meaning” will result in shorthand legal tests, selective advocacy, results-oriented decision-making, and the very “unpredictable” and “amorphous” framework *Crawford* sought to replace.

I. MUCH ADO ABOUT *BRASIER*

A. *The Brasier Case*

The *Brasier* case as set forth in the English Reports and discussed by the litigants and Supreme Court in *Davis* is short enough to set forth in full:

This was a case reserved for the opinion of the Twelve Judges, by Mr. Justice Buller, at the Spring Assizes for Reading, in the year 1779, on the trial of an indictment for an assault with intent to commit a rape on the body of Mary Harris, an infant under seven years of age.

The case against the prisoner was proved by the mother of the child, and by another woman who lodged with her, to whom the child, immediately on her coming home, told all the circumstances of the injury which had been done to her: and there was no fact or circumstance to confirm the information which the child had given, except that the prisoner lodged at the very place which she had described, and that she had received some hurt, and that she, on seeing him the next day, had declared that he was the man; but
she was not sworn or produced as a witness on the trial.

The prisoner was convicted; but the judgment was respited, on a doubt, created by a marginal note to a case in Dyer’s Reports (Dyer, 303, b, in marg; 1 Hale, 302, 634; 2 Hale, 279; 11 Mod. 228; 1 Atkins, 29; Foster, 70; 2 Hawk. 612; Gilb. L. E. 144); for these notes having been made by Lord Chief-Justice Treby, are considered of great weight and authority; and it was submitted to the Twelve Judges, Whether this evidence was sufficient in point of law?

The Judges assembled at Serjeants’-Inn Hall 29 April 1779, were unanimously of opinion, That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath (see White’s case, post, 430, Old Bailey October Session, 1786), for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received. The Judges determined, therefore, that the evidence of the information which the infant had given to her mother and the other witness, ought not to have been received.—The prisoner received a pardon (see the case of Rex v. Travers, 2 Strange, 700).  

28 King v. Brasier, 168 Eng. Rep. 202, 202-03, 1 Leach 199, 199-200 (K.B. 1779). As discussed infra notes 110-13 and accompanying text, the report on Brasier changed over time. The litigants and Court in Davis cited only the version reprinted in the English Reports.
B. How Brasier Became a Topic of Debate

Only recently did Brasier become a significant topic of confrontation discourse. It was not cited by the Crawford majority and for the two years following Crawford, little was said in cases or commentary about Brasier.

In Davis, however, the defendants argued that Brasier supported reversal of their convictions, each focusing primarily

29 Chief Justice Rehnquist, however, cited Brasier in his concurring opinion. Crawford v. Washington, 541 U.S. 36, 69-70 (2004) (Rehnquist, C.J., concurring). Chief Justice Rehnquist used Brasier to support his argument that the majority’s “distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine.” Id. at 69. Specifically, Chief Justice Rehnquist cited Brasier for the proposition that at common law “out-of-court statements made by someone other than the accused and not taken under oath . . . were generally not considered substantive evidence upon which a conviction could be based.” Id. Chief Justice Rehnquist reasoned that the Framers thus would not have considered these statements in the same league as statements given under oath and likely would not have had the same concerns about the admission of unsworn statements, even “testimonial” ones. See id. at 70-71 & n.4 (“[I]t is far from clear that courts in the late 18th century would have treated unsworn statements, even testimonial ones, the same as sworn statements.”).

30 Westlaw’s legal databases from the date Crawford was decided in March 2004 until certiorari was granted in Davis in October 2005 reveal no citations or discussions of Brasier. On Confrontation Blog, however, Professor Richard D. Friedman noted,

I have been commenting on very recent cases, but here is R. v. Brasier, 1 Leach 199, 168 E.R. 202, a case from 1779 that has been much cited over the years. It bears on the treatment not only of fresh accusations but also of statements made by children and of accusations made to private care-givers. The report is as it stands in the English Reports, later annotations and all.

on the Twelve Judges’ determination that “no testimony whatever can be legally received except upon oath”\(^{31}\) and “therefore, that the evidence of the information which the infant had given to her mother and the other witness, ought not to have been received.”\(^{32}\) These statements, the defendants argued, proved two main propositions. First, that the out-of-court accusatory statements made by young Mary Harris over a decade before the Confrontation Clause’s ratification were characterized as “testimony” and should not have been admitted in evidence at trial. Second, Mary Harris’s hearsay statements were excluded even though they were made “immediately” after the alleged offense, refuting any “excited utterance” or spontaneous declaration exception to confrontation at common law. Defendant Hammon made a more expansive argument, suggesting that \textit{Brasier} showed that statements made to non-government personnel can be “testimonial” and fall within the scope of the Confrontation Clause:

\begin{quote}
The manifest premise of the judges’ discussion [in \textit{Brasier}] was that if the speaker had been an adult it would have been plainly improper for other persons to relay her accusations—her “testimony”—to court . . . . \textit{Brasier} clearly reflects the law of its time, and it held squarely against admissibility notwithstanding the presence of several factors, absent in [this] case, that might have been argued to point the other way—the demonstration of immediacy, and the facts that the speaker was a child, that her audience was not government officials, and that she was not responding to questioning.
Thus, at the time of the Framing, there was no special rule allowing admissibility of accusatorial statements because they were made under the stress of excitement.\(^{33}\)
\end{quote}


\(^{32}\) \textit{Id.} at 203, 1 Leach at 200.

\(^{33}\) Brief of Petitioner Hershel Hammon, \textit{supra} note 10, at *27-28
In response to arguments by amici, both defendants acknowledged that eighteenth century trials in London’s Old Bailey court reflected repeated instances where child hearsay concerning sexual abuse was admitted into evidence.\textsuperscript{34} Each, however, argued that Brasier “changed the rules, holding that sufficiently mature children could testify at trial, characterizing the out-of-court accusation made by the child there as testimonial, and so excluding it.”\textsuperscript{35} (footnote omitted). Hammon’s reply brief reiterated that Brasier illustrated “a non-controversial understanding that (putting aside the age of the child) the accusation was testimonial in nature . . . .” Reply Brief of Petitioner Hershel Hammon, \textit{supra} note 10, at *8 n.9. Hammon also acknowledged, however, that “[h]ow this history should now affect admission of statements made by children is, of course, a question that this Court need not reach here. Other considerations as well, not presented here, might affect how the confrontation right is applied with respect to child witnesses.” \textit{Id.} at *8 n.10 (citing Sherman J. Clark, \textit{An Accuser-Obligation Approach to the Confrontation Clause}, 81 Neb. L. Rev. 1258, 1280-85 (2003)). Hammon’s counsel, Professor Friedman, as well as other academics, have recognized that different considerations may apply when the statements are by children. See Richard D. Friedman, \textit{Grappling With the Meaning of “Testimonial,”} 71 Brook. L. Rev. 241, 272-73 (2005); Richard D. Friedman, \textit{The Conundrum of Children, Confrontation, and Hearsay}, 65 Law & Contemp. Probs. 243, 249-52 (2002); see also Brief Amicus Curiae of Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park, in Support of Petitioner, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754958, at *22 n.12; Brief Amicus Curiae of the ACLU and the ACLU of Virginia, in Support of Petitioner, Lilly v. Virginia, 527 U.S. 116 (1999) (No. 98-5881), 1998 WL 901782, at *26 & n.44. Though the history surrounding Brasier suggests that out-of-court statements of children should receive special treatment under the Confrontation Clause, that issue is beyond the scope of this article.

\textsuperscript{34} Reply Brief of Petitioner Hershel Hammon, \textit{supra} note 10, at *8; Reply Brief for Petitioner [Davis], \textit{supra} note 10, at *9.
\textsuperscript{35} Reply Brief of Petitioner Hershel Hammon, \textit{supra} note 10, at *7-8; \textit{accord} Reply Brief for Petitioner [Davis], \textit{supra} note 10, at *9 (“The NACC brief (at 19-21), mentions other Old Bailey cases involving children’s statements to family members, but the King’s Bench implicitly disapproved these cases in [Brasier]. There, the full King’s Bench held that children’s out-of-court accusations were admissible \textit{only if they testified}. Since the victim there had not been, in fact, ‘sworn or produced as a witness at trial,’ her
The Court in Davis did not address any of these arguments. It did, however, make one reference to Brasier. Responding to defendant Davis’s argument that Brasier supported treating the victim’s statements to the 911 operator as testimonial, the Court said that Brasier “would be helpful to Davis if the relevant statement had been the girl’s screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.”

Professor Friedman, counsel for one of the defendants in Davis and a leading confrontation scholar, has interpreted this reference in Davis as an “apparent endorsement” of Brasier. Friedman argues that the reference is significant because “neither the immediacy of the statement, the youth of the declarant, nor the private status of the audience removes the statement from the protections of the confrontation right, and that is as it should be.”

Already, a state high court has relied on the Court’s reference to Brasier to support its holding that statements to non-law enforcement personnel can be “testimonial”:

[I]n Davis the Court cited as authority decisions suggesting that statements made to non-law-enforcement individuals may be testimonial and also be subject to Confrontation Clause limitations . . . . Furthermore, the Court said that readers should not infer from the opinion that “statements made in the absence of any interrogation are necessarily accusatory statement was inadmissible.”

38 Id. at 5; accord Richard D. Friedman, Crawford, Davis, and Way Beyond, 15 J.L. & Pol’y 553, 564 (2007) (“[N]otwithstanding the immediacy of the report—and 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.”).
39 See discussion supra note 21.
nontestimonial.” Until the U.S. Supreme Court holds otherwise, we interpret the Court’s remarks to imply that statements made to someone other than law enforcement personnel may also be properly characterized as testimonial.40

What Brasier means, therefore, is not simply a matter of academic debate. But to understand the true meaning of the case (to the extent possible), it must be read in the context of the law of the time.

C. What Brasier Really Means (Probably)

Though academics debate the nuances of “originalism,” the Supreme Court often treats “original meaning” as an inquiry into the generally accepted meaning that a provision in the Bill of Rights had at the time of ratification in 1791.41 In Crawford, the Court examined the laws and practices of sixteenth through eighteenth century England, as well as early post-ratification state decisions that “shed light upon the original understanding of the common law right.”42 Though Davis arguably retreated somewhat from Crawford’s detailed historical focus,43 the Court still sought to divine how the common law would treat the out-of-court statements at issue.44

If the same analysis is applied to Brasier, the relevance of the case to the Sixth Amendment confrontation right largely collapses. Contextually, the Brasier statement, “no testimony whatever can be legally received except upon oath,”45 did not

41 Davies, What Did the Framers Know, supra note 26, at 105, 156-62 (noting that Supreme Court opinions often refer to the 1791 ratification date but sometimes instead refer to the “framing” or “drafters” and 1789).
43 Cf. Davis v. Washington, 126 S. Ct. 2266, 2278 n.5 (2006) (“Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”).
44 Id.
characterize the child’s hearsay statements as “testimony,” or, for that matter, even refer to the child’s statements at all. Further, the testimony of the child’s mother and the lodger did not appear in any report until well after ratification, rendering post-ratification interpretations of Brasier on hearsay mostly irrelevant.

1. The Law Leading Up to Brasier

To understand Brasier, the case must be read in the context of seventeenth and eighteenth century English law governing child competency. Before Brasier, courts followed a general rule that a child under nine years old was incapable of taking the oath and giving sworn testimony—effectively an irrebuttable presumption of incompetency. A leading case on the issue was Rex v. Travers, decided in 1726 (but first reported in 1755). There, the defendant was indicted for the rape of a six-year-old girl, a capital offense. In the defendant’s first trial, the judge refused to swear the child as a witness, and the defendant was acquitted. Based on the same alleged conduct, the defendant was then re-indicted for “assault with intent to ravish,” a misdemeanor and non-capital offense. The Travers court

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48 Id.

49 Id. The indictment for a lesser offense after an acquittal was permitted during that time. As one commentator who studied rape trials during the eighteenth century explained:

A court could try the rape defendant on either a felony or a misdemeanor charge, but not on both in the same trial. This position had its support in the rule that those accused of felonies, unlike those accused of treason or misdemeanours, had, in theory at least, no right to be defended by counsel.... [T]he felony/misdemeanour rule was applied quite rigorously in the Old Bailey from the middle of the [eighteenth] century on....

...
considered whether the same general rule that prohibited children under nine years old to be sworn in capital cases also applied in trials for misdemeanor offenses.\(^5^0\) Chief Judge Raymond held that the same presumption of incompetency applied:

>[A] person who could not be a witness in the one case, could not in the other. The reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish betwixt right and wrong: no person has ever been admitted as a witness under the age of nine years, and very seldom under ten.\(^5^1\)

Under the rules of double jeopardy which prevailed at the time, a defendant acquitted on a capital charge could subsequently be tried for the same fact, if the subsequent charge was non-capital. Those acquitted of rape could be, and sometimes were, tried for the misdemeanour of assault with intent to commit rape.


\(^{50}\) *Travers*, 93 Eng. Rep. at 793-94, 2 Strange at 700-01.

\(^{51}\) *Id.* at 794, 2 Strange at 701. Two arguments were made in favor of allowing the child to be sworn:

[1] Hale’s P.C. says, that the examination of one the age of nine years has been admitted: and [2] a case at the Old Bailey 1698, was cited, where upon such an indictment as this, Ward Chief Baron admitted one to be a witness, who was under the age of ten years, after the child had been examined about the nature of an oath and had given a reasonable account of it.

*Id.*, 2 Strange at 700-01. Chief Judge Raymond appeared to respond to each point, first by refuting reliance on the 1698 Old Bailey case that reportedly allowed a child to testify on the ground that a later Old Bailey case prohibited unsworn testimony. Raymond noted that in a 1704 case, “this point was thoroughly debated in the case of one Steward, who was indicted upon two indictments for the rapes upon children” and the court barred the alleged victims aged ten and six years old from taking the oath. *Id.* at 794, 2 Strange at 701. He next noted that the only support existing for swearing a ten-year-old was Hale’s treatise. *Id.* These points are relevant because the reporter annotations in *Brasier* cite to *Travers* and Hale. *See* King v. Brasier, 168
The court held that the child was not permitted to testify and “there not being evidence sufficient without her, the defendant was acquitted.”

The Travers case is relevant not only for its explicit holding establishing an irrebuttable presumption of incompetency for children under a particular age, but also for its implicit holding on a companion issue: whether an incompetent child could provide testimony unsworn. Specifically, throughout the eighteenth century, debate and confusion existed over whether children who were incompetent to take the oath should nevertheless be permitted to testify unsworn in certain types of cases. The issue appears to have been prompted by an influential treatise of the era, Sir Matthew Hale’s The History of the Pleas of the Crown. Hale argued that children presumed incompetent to take the oath should be allowed, at least in child sexual abuse cases, to testify unsworn. Hale gave two principal reasons for allowing unsworn testimony. First, in a point with modern relevance, he argued that unsworn testimony should be allowed...
because “[t]he nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed . . . .” \textsuperscript{56} Second, and most notably, Hale argued that children should be permitted to testify unsworn because the law permitted admission of hearsay of children reporting abuse, so courts may as well hear from the children directly:

Because if the child complain presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken, yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself, than to receive it as second-hand from those that swear they heard her say so; for such a relation may be falsified, or otherwise represented at the second-hand, than when it was first delivered. \textsuperscript{57}

Hale’s treatise, written sometime before 1676, but not published until 1736, \textsuperscript{58} was cited repeatedly for his arguments in favor of hearing unsworn testimony from child victims. Both William Blackstone and Francis Buller, who were among the Twelve Judges who decided \textit{Brasier} in 1779, cited Hale’s arguments in their respective treatises. Various editions of Blackstone’s Commentaries from the first edition (of the relevant volume) in 1769 until the 1783 ninth English edition that was changed to reflect \textit{Brasier}, \textsuperscript{59} provided as follows:

\begin{quote}
\textsuperscript{56} 1 \textit{Hale}, supra note 53, at 634.
\textsuperscript{57} \textit{Id.} at 634-35. Although advocating that courts allow child witnesses to testify unsworn, Hale stated that concurrent proof was still required to prove the offense and that sworn or unsworn testimony alone was insufficient to convict a defendant of rape. \textit{Id.} at 635 (“But in both these cases, whether the infant be sworn or not, it is necessary to render their evidence credible, that there should be concurrent evidence to make out the fact, and not to ground a conviction singly upon such an accusation with or without oath of an infant.”).
\textsuperscript{58} E.g., P.R. Glazebrook, \textit{Introduction} to 1 \textit{Hale}, supra note 53.
\textsuperscript{59} See discussion infra text accompanying note 117 (quoting 1783 ninth English edition that was updated to discuss \textit{Brasier}).
\end{quote}
[I]f the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath; and, even if she hath not, it is thought by Sir Matthew Hale that she ought to be heard without oath, to give the court information; though that alone will not be sufficient to convict the offender. And he is of this opinion, first, because the nature of the offence being secret, there may be no other possible proof of the actual fact; though afterwards there may be concurrent circumstances to corroborate it, proved by other witnesses: and, secondly, because the law allows what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof; and there is much more reason for the court to hear the narration of the child herself, than to receive it at second hand from those who swear they heard her say so.60

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60 4 WILIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 214 (1st ed. 1769). The English first edition of volume four, which contained the quoted passage, was published in 1769. This passage remained in subsequent editions until the English ninth edition of volume four, published in 1783, which was updated to discuss Brasier. 1 MAXWELL & MAXWELL, supra note 46, at 27-28. This English 1783 ninth edition was the last to contain Blackstone’s alterations before he died.

The American first edition of Blackstone’s Commentaries, published in Philadelphia in 1772, was the same as the first 1769 English edition of volume four, and contained the passage quoted. The next American edition was published in Worcester in 1790 and was the same as the 1783 English ninth edition, which contained Blackstone’s final alterations and revision discussing Brasier. ELDON REVARE JAMES, A LIST OF LEGAL TREATISES PRINTED IN THE BRITISH COLONIES AND THE AMERICAN STATES BEFORE 1801 16-17 (Harvard Univ. Press 1934).

By most accounts, however, before the first American edition was ever published in 1772, over 1,000 copies of prior English editions were imported into the colonies. Randy J. Holland, Anglo-American Templars: Common Law Crusaders, 8 DEL. L. REV. 137, 148 (2006); accord Steve Sheppard,
Similarly, the various editions of Buller’s treatise, *An Introduction to the Law Relative to Trials at Nisi Prius*, cited Hale from the 1772 edition until it was updated in the 1790 edition to discuss *Brasier*, for the possibility that courts might receive unsworn testimony from children:

> [I]t seems to be settled, that a Child under the Age of ten shall in no Case be admitted; but after that Age,

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*Casebooks, Commentaries, and Carmudgeons: An Introductory History of Law in the Lecture Hall*, 82 *Iowa L. Rev.* 547, 561 (1997) (“The Commentaries were an immediate success in America. Robert Bell, a Philadelphia printer, sold subscriptions for fifteen hundred copies throughout America, even though Americans had already bought more than one thousand copies of English editions . . . . For the next five decades, scores of annotated Commentaries poured forth.” (footnotes omitted)); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1, 5 (1996) (“One thousand copies of the English edition of Blackstone were sold in the American Colonies before the first American edition appeared in 1772. This edition supplied another 1400 sets at a substantially lower price; and one year before the Declaration of Independence, Edmund Burke remarked in Parliament that nearly as many copies of the Commentaries had been sold on the American as on the English side of the Atlantic.” (footnotes omitted)). The Commentaries unquestionably influenced the Framers. See, e.g., Alschuler, *supra* at 2 (“[A]ll of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in [Blackstone’s Commentaries].” (citations omitted)); Reid v. Covert, 354 U.S. 1, 23 (1957) (“[T]wo of the greatest English jurists, Lord Chief Justice Hale and Sir William Blackstone . . . . exerted considerable influence on the Founders . . . .”). It is likely that at the time of the framing any number of editions were in use. For an example of the numerous and tangled history of the various editions, see generally *The Law Library Microform Consortium* at http://www.llmc.com/yale.htm#page_11 (bibliography of Yale’s Blackstone Collection).

61 This treatise was actually a revision of Henry Bathurst’s *The Theory of Evidence* (1761), which Bathurst later republished in expanded form in 1767 in *An Introduction to the Law Relative to Nisi Prius*. Buller was Bathurst’s nephew and took over the treatise under his own name in 1772. There were multiple editions over the next several decades. See *Langbein, supra* note 15, at 212 n.150; T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 *Iowa L. Rev.* 499, 531 n.238 (1999).

62 See infra text accompanying note 129 (quoting 1790 edition that was updated to discuss *Brasier*).
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if the Child appear to have any Notion of the Obligation of an Oath, after there has been a Foundation laid by other Witnesses to induce a Suspicion, the Child shall be admitted to prove the Fact. Doubtless the Court will more readily admit such a Child in the Case of a personal Injury (such as Rape) than on a Question between other Parties; and perhaps, in Such Case, would even admit the Infant to be examined without Oath [margin cite to Hale]; for certainly there is much more Reason for the Court to hear the Relation of the Child, than to receive it at second hand from those that heard it say so. In Cases of foul acts done in secret, where the Child is the Party injured, the repelling their Evidence entirely is, in some Measure, denying them the Protection of Law . . . .63

Hale’s argument also made its way into criminal trials. In Omychund v. Barker64 in 1744 (first reported in 1765), for example, counsel cited Hale as support for the proposition that unsworn testimony can be received in evidence.65 The judges rejected the argument on the ground that Hale’s rule had not been followed in trials in London’s Old Bailey court.66

The Old Bailey trials,67 however, reflect otherwise. In child

63 FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 288-89 (London, W. Strahan & M. Woodfall Printers to the King) (1772).

64 1 Atk. 21 (K.B. 1744). The first three volumes of the Atkyns reporter were published in 1765. 1 MAXWELL & MAXWELL, supra note 46, at 344.

65 Omychund, 1 Atk. at 29.

66 Id. (“Lord Chief Justice Lee interrupted the Attorney General, and said, it was determined at the Old Bailey upon mature consideration, that a child should not be admitted as evidence without oath. Lord Chief Baron Parker likewise said, it was so ruled at Kingston assizes before Lord Raymond, where upon an indictment for a rape he refused the evidence of a child without oath.”). The latter is a reference to the Travers case. See supra text accompanying notes 46-52.

67 “The Old Bailey was the London-area equivalent of the provincial assize court.” LANGBEIN, supra note 15, at 17. The court had a heavy caseload:
rape prosecutions, the Old Bailey Session Papers\textsuperscript{68} report trials from 1678,\textsuperscript{69} 1720,\textsuperscript{70} 1762,\textsuperscript{71} 1766,\textsuperscript{72} 1768,\textsuperscript{73} and 1769\textsuperscript{74}

\begin{quote}
[T]he Old Bailey sat eight times a year whereas assizes sat twice a year. In the later seventeenth and early eighteenth centuries the Old Bailey, which was the felony trial court for London and the surrounding county of Middlesex, processed between twelve and twenty jury trials per day through a single courtroom.
\end{quote}

\textit{Id.}

\textsuperscript{68} The Old Bailey Session Papers (“OBSP”) are pamphlet accounts of trials that were produced for the general public. LANGBEIN, supra note 15, at 182-90. These reports varied in format and detail over time and have many limitations, including that they summarize the trials, reflect only a selection of cases, and focus primarily on the underlying facts, not the legal practices and procedures in place. See id.; accord Gallanis, supra note 61, at 553-54 (“For the years before 1800, the OBSP are particularly useful . . . . In the nineteenth century, however, the OBSP tended increasingly to summarize the testimony presented at trial, rather than reproducing it in a more verbatim fashion.”). Professor Langbein has noted that rape cases often were reported with more detail in the OBSP, perhaps in the publishers’ efforts to cultivate a popular market. LANGBEIN, supra note 15, at 198. For a study of rape trials in the Old Bailey from 1730 to 1830, see Simpson, supra note 49, at 188.

\textsuperscript{69} Rex v. Arrowsmith, OBSP (Dec. 11, 1678), available at http://www.oldbaileyonline.org/html_units/1670s/t16781211e-2.html. The child witnesses in \textit{Arrowsmith} ultimately testified under oath, but the case reflects that the trial judge determined that receiving unsworn testimony was proper. \textit{Id.} Specifically, the defendant was charged with rape of an eight-year-old. The victim and nine-year-old friend were initially heard unsworn. \textit{Id.} The jury expressed concern that they were unsworn since the only other evidence was hearsay. \textit{Id.} The court defended the admission of the unsworn testimony, telling the jury that “in regard to such Offenders never call other to be by while they commit such actions, they could expect no other Testimony from the Party injured, which they had, and with it an eye Witness, both whom they forbore to Swear, because of the tenderness of their Age; but if they insisted upon, they should be Sworn.” \textit{Id.} The court had the children sworn and reexamined them, and the defendant was convicted of rape. \textit{Id.}

\textsuperscript{70} Rex v. Beesley, OBSP (Apr. 27, 1720), available at http://www.oldbaileyonline.org/html_units/1720s/t17200427-38.html. The defendant was charged with rape of a ten-year-old girl. \textit{Id.} The court asked the child if she understood the oath, and she did not. \textit{Id.} Nevertheless, the court permitted her to testify, and she stated that the defendant had sexually assaulted her on two occasions. \textit{Id.} The court also permitted hearsay evidence of a witness who testified “that the Girl told her the Prisoner had done the Wrong complained of.” \textit{Id.} The defendant was acquitted. \textit{Id.}
wherein the court permitted child victims of sexual abuse to testify unsworn. In *Rex v. Stringer*, for instance, the defendant was charged with rape of a seven-year-old girl.\(^75\) “The child was examined, but not upon oath, who said she carried a pot down into the cellar, the prisoner there took her and set her on a box and kissed her, and put his private parts to her’s, but did not put it into her.”\(^76\) The defendant was acquitted of the capital offense of rape, but re-indicted for the misdemeanor offense of assault with the intent to commit a rape.\(^77\)

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\(^{71}\) *Rex v. Smith*, OBSP (Apr. 21, 1762), available at http://www.old-baileyonline.org/html_units/1760s/t17620421-11.html. The defendant was charged with rape of a five-year-old girl. The “child [was] examined but not sworn” and testified that the defendant “said I must not tell my mamma. He laid me down on my back and hurt my groin, and put his cock to me.” *Id.* The defendant was permitted to cross-examine the child and ultimately was acquitted of rape, but “detained to be tried at Hick’s-hall for an assault with an intent to commit a rape on the child.” *Id.*

\(^{72}\) *Rex v. Brophy*, OBSP (Sept. 3, 1766), available at http://www.old-baileyonline.org/html_units/1760s/t17660903-38.html. The defendant was charged with rape of a ten-year-old girl. At trial, a witness testified that, after originally denying anyone had assaulted her, the girl “said it was Ned.” *Id.* A doctor testified that “[s]he said the man had been concerned with her, mentioning the name Brophy; upon which I asked her where; she said in the cellar; she told me the day, but I do not recollect it.” *Id.* The defendant cross-examined the witnesses. The child testified, “not upon oath” about the rape. The defendant was found guilty and sentenced to death. *Id.*


\(^{74}\) *Rex v. Gyles*, OBSP (Apr. 5, 1769), available at http://www.old-baileyonline.org/html_units/1760s/t17690405-49.html. The defendant was charged with rape of an eight-year-old girl. “The child was examined but not upon oath; the account she gave was short of proving the fact. Acquitted.” *Id.*

\(^{75}\) *Stringer*, OBSP.

\(^{76}\) *Id.*

\(^{77}\) One review of child rape cases reported in the OBSP found that most of the cases resulted in acquittal. *See* Simpson, supra note 49, at 188 (finding 82 percent acquittal rate in rape cases involving victims under ten years old). One explanation for the low conviction rate may be that conviction required proof of penetration. 1 HALE, supra note 53, at 628 (“To make a rape there
On the other hand, several other Old Bailey reports reflect that children often were not permitted to testify unsworn. In many of these trials, the children's accounts were the only evidence, and defendants were acquitted.78

must be an actual penetration . . . .”). Some of the Old Bailey trials reflect concern over proof of penetration. See case cited infra note 81. Beyond the evidentiary difficulty of proving penetration, acquittal rates may be explained, in part, on “the sense that juries may have thought the capital sanction too hard . . . .” LANGBEIN, supra note 15, at 240 n.276. This view is consistent with a practice reflected in some OBSP cases, where the jury acquitted the defendant of rape, but the defendant was detained for another trial for assault with the intent to commit a rape, a non-capital misdemeanor offense. See cases cited supra and infra notes 71, 73, 78 (Foster), 82-88, 102. The practice of retrial on misdemeanor charges also suggests that while unsworn testimony of a child or hearsay statements by themselves were not considered sufficient to convict for a capital crime, they might have been considered sufficient for misdemeanor offenses. See cases cited infra notes 82 (issuing a sentence for the misdemeanor charges), 93 (finding the prisoner guilty of assault).

78 E.g., Rex v. Linsey, OBSP (Sept. 12, 1750), available at http://www.oldbaileyonline.org/html_units/1750s/t17500912-29.html (reporting case involving defendant charged with rape of a seven-year-old; “The child was not capable of being admitted to give its evidence upon oath, and there being no other evidence, the prisoner was acquitted.”); Rex v. White, OBSP (June 25, 1752), available at http://www.oldbaileyonline.org/html_units/1750s/t17520625-30.html (reporting case involving defendant charged with rape of an eleven-year-old; a doctor testified about the presence of a venereal disease, but the “child could not be examined upon oath, not knowing the nature of an oath. The prisoner was acquitted.”); Rex v. Foster, OBSP (Dec. 12, 1764) available at http://www.oldbaileyonline.org/html_units/1760s/t17641212-63.html (reporting case involving defendant charged with rape of a five-year-old; “The Surgeon that had inspected the child did not appear, nor any one else that had inspected her; and the child being too young to be examined, the prisoner was Acquitted. He was detained to be tried for an assault with intent to commit a Rape.”); Rex v. Crother, OBSP (Sept. 7, 1774), available at http://www.oldbaileyonline.org/html_units/1770s/t17740907-63.html (reporting case involving defendant charged with rape of a four-year-old; “The girl being too young to give her testimony upon oath, the prisoner who is but twelve years of age, was Acquitted.”); Rex v. Davies, OBSP (Sept. 11, 1776), available at http://www.oldbaileyonline.org/html_units/1770s/t17760911-71.html (reporting case involving defendant charged with rape of a six-year-old; “There was no evidence to prove the charge but the testimony of the child, who was not of sufficient age to be
In most of the child rape trials in the Old Bailey Session Papers, however, the court followed the practice, identified by Hale, of allowing hearsay of “incompetent” children to be admitted as evidence. Reports from trials in 1721, 79 1724, 80 1735, 81 1750, 82 1751, 83 1754, 84 1757, 85 1765, 86 1768, 87 and examined under oath. Not guilty.

79 Rex v. Robbins, OBSP (Jan. 13, 1721), available at http://www.old-baileyonline.org/html_units/1720s/t17210113-28.html. The defendant was charged with rape of a seven-year-old girl. The child’s mother testified that the child said, “the Prisoner [had] put his finger into the place where she made Water, and also put the thing with which he made Water, into the Place where she made Water.” Id. The jury acquitted the defendant after hearing from several witnesses. Id.


81 Rex v. Gray, OBSP (Sept. 11, 1735), available at http://www.old-baileyonline.org/html_units/1730s/t17350911-53.html. The defendant was charged with rape of an eight-year-old girl. The child’s mother testified that upon examining the child’s genitals, which showed symptoms of venereal disease, the child “fell on her Knees, and said that one Gray did it.” Id. After hearing testimony from doctors concerning the lack of evidence of penetration, the jury acquitted the defendant. Id.

82 Rex v. Tankling, OBSP (July 11, 1750), available at http://www.old-baileyonline.org/html_units/1750s/t17500711-25.html. The defendant was charged with rape of a girl under four years old. A doctor testified that:

I examined the child and the prisoner, they were both foul. The child said, the prisoner hurt her very much with his cock . . . .

. . . .

The infant not being capable of giving evidence, the prisoner was acquitted; and by order of the court there was another indictment preferred against him at Hicks’s-hall for an intent to commit rape, and giving the child the foul disease. The prisoner was there cast to be confined in the prison of Newgate [for] three years . . . .

Id.

83 Rex v. Larkin, OBSP (July 3, 1751), available at http://www.old-baileyonline.org/html_units/1750s/t17510703-21.html. The defendant was charged with rape of a ten-year-old girl. A neighbor testified that the child “said, he was very impudent,” and another woman who lived with the neighbor “went on and confirmed her account.” Id. The child “was not admitted to be sworn,” and the defendant acquitted, but indicted for a
1771 reflect that child victims’ family members, doctors, neighbors, or others were allowed to testify about what children had told them. In 1724, for instance, the defendant in Rex v. Nichols was on trial for the rape of a five-year-old girl. The misdemeanor. *Id.*

84 Rex v. Kirk, OBSP (May 30, 1754), available at http://www.old-baileyonline.org/html_units/1750s/t17540530-36.html. The defendant was charged with rape of a girl under seven years old. “[T]he child being so young and not knowing the nature of an oath, could not be examined.” *Id.* The child’s mother, however, testified that “[t]he child told me he used to put his hands up her petticoats,” and another woman testified that “[t]he child told me he had done it to her as mentioned by the last evidence.” *Id.* The court ultimately concluded that “[t]here being no other evidence against the prisoner than hearsay from the child’s mouth it was not judged sufficient; he was therefore acquitted, but detained to be tried on another indictment at Hick’s-Hall for an assault with an intent to commit a rape.” *Id.*

85 Rex v. Crosby, OBSP (Dec. 7, 1757), available at http://www.old-baileyonline.org/html_units/1750s/t17571207-14.html. The defendant was charged with rape of a ten-year-old girl. The child’s mother testified that the child said, “Mr. Crosby did it, the day his wife went to the hospital, and left me there; he got into bed and call[ed] me to him. I went to him. Then he pulled me to him, and put his c-k in me there, and hurt me sadly.” *Id.* The court noted that “the child being but nine years and three quarters old, and not being examined upon oath, he was acquitted; but detained to be tried next session for an assault upon the child with an intent to commit a rape.” *Id.*

86 Rex v. Tibbel, OBSP (Oct. 16, 1765), available at http://www.old-baileyonline.org/html_units/1760s/t17651016-2.html. The defendant was charged with rape of a four-year-old girl. The child’s mother testified that “I asked her who had hurt her? She said, Sam had hurt her, that is the prisoner . . . .” *Id.* Other witnesses testified that the defendant had confessed to raping the child. The jury acquitted the defendant, but he was detained to be tried for assault with intent to commit a rape. *Id.*

87 Rex v. Allam, OBSP (Sept. 7, 1768) available at http://www.old-baileyonline.org/html_units/1760s/t17680907-40.html. The defendant was charged with rape of an eight-year-old girl. The child’s mother testified that “the child then said, William Allam had had to do with her in the shed two days before . . . .” *Id.* The defendant was acquitted, but detained to be tried for assault with intent to commit a rape. *Id.*


89 Rex v. Nichols, OBSP (Feb. 26, 1724), available at http://www.old-
child did not appear, but her mother testified that the child “told her the Prisoner had made her kneel upon his knees had taken up her coats, and had hurt her sadly.”\textsuperscript{91} A doctor was permitted to testify “that the child did say it had been done to her by the Prisoner.”\textsuperscript{92} The court reportedly found that “[t]he child being too young to swear to the fact, the jury acquitted him of the rape, but found him guilty of the assault.”\textsuperscript{93} Nearly fifty years later, in \textit{Rex v. Craige},\textsuperscript{94} a defendant was on trial for the rape of a girl who was under ten years old. The girl’s neighbor testified, she said “I will tell you who it was if you won’t tell my dada; I said I would not, but would tell her mama. She said it was Mr. Craige.”\textsuperscript{95}

Further reflecting the inconsistent application of law during this period, a few Old Bailey reports show that hearsay of child victims was deemed inadmissible. In 1754,\textsuperscript{96} during the trial of the defendant for rape of a nine-year-old girl, the child’s mother started to testify that she tried to get the child to explain what had happened to her, but the court intervened, stating “[y]ou must not tell what the girl said, that is not evidence.”\textsuperscript{97}

Beyond these reports of actual trials, the issue concerning allowing unsworn testimony was reflected in the 1770 edition of an influential English justice of the peace manual. This manual cited \textit{Travers} and \textit{Omychund} for the proposition that unsworn testimony of children could not be admitted “as evidence,” but cited Hale in support of allowing unsworn testimony to provide information to the court “where the exigence of the case

\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} OBSP (July 3, 1771), \textit{available at} http://www.old-baileyonline.org/html_units/1770s/t17710703-33.html.
\textsuperscript{95} Id. The defendant ultimately was acquitted of rape but detained for trial for assault with intent to ravish a different child.
\textsuperscript{97} Id.
requires it . . . especially in cases of rape, buggery, and such crimes as are practiced upon children.”

98 1 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 487 (11th ed. 1770). The first edition in 1755 simply cited Hale in support of allowing unsworn testimony:

But if an infant be of age of 14 years, he is as to this purpose, of the age of discretion, to be sworn as a witness; but if under that age, yet if it appear, that he hath a competent discretion, he may be sworn. 2 H.H. 278.

And in many cases an infant of tender years may be examined without oath, where the exigence of the case requires it; which possibly, being fortified with concurrent evidences, may be of some weight; especially in cases of rape, buggery, and such crimes as are practiced upon children. 2 H.H. 279, 284.

1 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 190 (1st ed. 1755); cf. 2 HALE, supra note 53, at 279 (“But in many cases an infant of tender years may be examined without oath, where the exigence of the case requires it, as in case of rape, buggery, witchcraft . . . .”). By the eighth edition in 1764, the quote remained the same, but a citation to the Travers case, which was first published in 1755, was added. 1 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 342 (8th ed. 1764) (“especially in cases of rape, buggery, and such crimes as are practiced upon children. 2 H.H. 279, 284. Str. 700.”); see also supra notes 46-52 and accompanying text (discussing Travers).

The 1766 tenth edition was updated to incorporate the Travers and Omychund decisions. The following shows how the 1766 edition was updated from the prior editions:

But if an infant be of age of 14 years, he is as to this purpose of the age of discretion, to be sworn as a witness; but if under that age, yet if it appear, that he hath a competent discretion, he may be sworn. 2 H.H. 278.

And in many cases an infant of tender years may be examined without oath, where the exigence of the case requires it; which possibly, being fortified with concurrent evidences, may be of some weight; especially in cases of rape, buggery, and such crimes as are practiced upon children. 2 H.H. 279, 284. Str. 700.

But in no case shall an infant be admitted as evidence, without oath. Str. 700 [Travers], Tracy Atk. 29 [Omychund].

The changes reflected in the 1766 tenth edition are not entirely clear given that the deletion of the words “without oath” may suggest that no unworn testimony could be received. More likely, the 1766 manual is attempting to
By 1775, the issue was coming to a head. In King v. Powell, the defendant was tried for rape of a six-year-old. Since the child was presumed by law incompetent, “she was admitted to give her evidence against the prisoner without being sworn,” but the defendant was acquitted nonetheless. Judge Gould “mentioned the case to the [Twelve] Judges; and the majority of them were of opinion, that in criminal cases no

reconcile Hale’s views with Travers and Omychund and drawing a distinction between admitting unsworn testimony as “evidence” rather than as “information” that would be insufficient to secure a conviction.

American justice of the peace manuals were based on Burn’s manual and many were copied verbatim from Burn’s 1770 (or later) editions’ discussion of unsworn testimony. See Joseph Greenleaf, An Abridgment of Burn’s Justice of the Peace and Parish Officer 124 (Boston 1773); Richard Starke, The Office and Authority of a Justice of Peace 144 (Virginia 1774); John Grimke, The South Carolina Justice of Peace 192 (1788); Eliphalet Ladd, Burn’s Abridgement or The American Justice 143 (1792); William Waller Hening, The New Virginia Justice 177-78 (1795). At least a few manuals, however, were copied verbatim from earlier editions and contain a discussion of unsworn testimony identical to the 1755 edition of Burn’s manual quoted above. James Parker, Conductor Generalis 167 (Woodbridge, N.J. 1764); Conductor Generalis 170 (New York 1788, printed by John Patterson for Robert Hodge); The Conductor Generalis 140 (New York, 1788, printed by Hugh Gaines). I am indebted to Professor Davies for alerting me to these sources.

100 Id. at 157, 1 Leach at 110. A reporter’s annotation in Powell provides:

(a) Lord Hale, vol i. page 634 says, That if an infant appear unfit to be sworn, the Court ought to hear her information without oath; but he admits that such evidence is not of itself sufficient testimony to convict, because it was not upon oath. In the argument in Omychund v. Barker, Mich Term 1744, it was said by L.C. J. Lee, that it was determined at the Old Bailey, upon mature consideration, that a child cannot be admitted as a witness except upon oath; and L.C.B. Parker likewise said, that it was so ruled at Kingston Assizes before Lord Raymond [Travers], where, upon and indictment for a rape, he refused the evidence of a child without oath, 1 Atkins, 21. See also the case of The King v. Steward, 1 Strange, 701, and The King v. Brasier, post, Summer Assize, Reading, 1778.

Id. at 158, 1 Leach at 111.
testimony can be received except upon oath.\textsuperscript{101} Thus, by 1775, a split court of the Twelve Judges suggested in essentially dicta (since the defendant in Powell was acquitted)\textsuperscript{102} that an

\textsuperscript{101}Id. at 158, 1 Leach at 110.

\textsuperscript{102}Like Brasier, however, the version of Powell in the first edition of Leach’s Crown Cases differed from the version in the English Reports. The first version reported that the defendant was convicted. See Davies, Not the Framers’ Design, supra note 26, at 446 n.238. In 1793, a much more detailed account of defendant Powell’s trial appeared in a reporter that collected reports of trials involving “adultery, incest, imbecility, ravishment.” See 2 Cuckold’s Chronicle 440-46 (1793). This report indicates that the trial judge in Powell recognized a longstanding dispute over whether to allow unsworn testimony, but allowed the child to testify unsworn so that the issue could finally be resolved by the Twelve Judges if the defendant was convicted. The judge reportedly quoted the section of Hale’s treatise advocating the admission of unsworn testimony and noted a conflict with the Travers case which had precluded the admission of such testimony. The judge noted, however, that Travers was decided before Hale’s treatise was published. Id. at 441. The court also reportedly decided not to be bound by Travers since he was aware of a dispute among the Twelve Judges concerning the admission of unsworn testimony:

I should have thought myself bound by that case [Travers], if I had not known the question much doubted of, and debated among the [Twelve] Judges: some hold it one way, and some another. I do think it is a point that ought to be considered and settled. I am at present inclined to follow the opinion of the King and Travers, but am aware that case is not approved by all the Judges; and therefore, in so very important a question of this, I think, in point of prudence, it should be settled; for we have too many instance of offenses of this kind.

Id. at 442. The judge reportedly also addressed Hale’s view about child hearsay:

With regard to admitting the declaration of the child to the mother, Lord Hale speaks of that as a clear and settled thing; for, he says, if you hear the child at second hand, she should be heard also at first hand . . . . I am of the present of opinion, not only to hear the evidence of the woman [the child’s mother], but likewise to examine the child without oath: and, if the matter rests upon that, make a case for the opinion of the Judges.

Id at 442. The judge allowed the child’s mother to testify about what the child had told her and also permitted the six-year-old child to testify unsworn. Id. at 442-43, 445. “The Jury, however, brought him in Not
incompetent child should not be permitted to testify unsworn. Four years later, the Twelve Judges decided *Brasier*.

2. *Brasier* Read in Context

In 1779, the Twelve Judges considered *Brasier*, another case involving a young child who was presumed incompetent under the rule followed in the *Travers* case. Read divorced from the child competency issues of the time, *Brasier* appears to address only two issues. First, the case appears to address the age at which a child may be sworn. The Twelve Judges rejected the rule in *Travers* and held, “there is no precise or fixed rule as to the time within which infants are excluded from giving evidence.”103 Second, the *Brasier* case appears to address a hearsay question, where the court held that “no testimony whatever can be legally received except upon oath” and then stated that the trial judge should have excluded the testimony of the mother and lodger.104

Considered in the context of Sir Matthew Hale’s argument that children should be permitted to testify unsworn, the pre-*Brasier* Blackstone and Buller commentary, the inconsistent treatment of unsworn statements in the Old Bailey trials, and *Powell*’s recognition of division on the issue, *Brasier* also should be interpreted as resolving the prevailing issue about unsworn testimony. This is important because it reflects that the statement “no testimony whatever can be legally received except upon oath”—which many have assumed characterized the hearsay as “testimony” and therefore relevant under *Crawford*’s

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104 Id. at 202, 1 Leach at 200.
testimonial/nontestimonial dichotomy—was simply referring to
the ability of young Mary Harris or any other incompetent child
to testify unsworn. The Twelve Judges were stating that no one
can give testimony if not sworn, not that the hearsay was
“testimony.”

The Brasier report itself confirms as much by including in
the reporter’s annotations citations to the relevant pages in
Hale’s treatise,\textsuperscript{105} the Omychund case,\textsuperscript{106} the Travers case,\textsuperscript{107} and
other sources\textsuperscript{108} that addressed whether children could testify

\textsuperscript{105} See supra notes 53-57 and accompanying text.
\textsuperscript{106} See supra notes 64-66 and accompanying text.
\textsuperscript{107} See supra notes 46-52 and accompanying text.
\textsuperscript{108} The reporter notes in Brasier cite to several sources:

The prisoner was convicted; but the judgment was respited, on a
doubt, created by a marginal note to a case in Dyer’s Reports
(Dyer, 303, b, in marg; 1 Hale, 302, 634; 2 Hale, 279; 11
Mod. 228; 1 Atkins, 29; Foster, 70; 2 Hawk. 612; Gilb. L. E.
144); for these notes having been made by Lord Chief-Justice
Treby, are considered of great weight and authority; and it was
submitted to the Twelve Judges, Whether this evidence was
sufficient in point of law?

The citations to Hale reference the pages involving the age at which a
child can be sworn and Hale’s argument that a child should be permitted
to testify unsworn. See supra notes 53-57 and accompanying text (quoting 1
Hale 634 and 2 Hale 279). The cite to “11 Mod, 228” is Young v.
Slaughterford, which involved a question concerning the age at which a child
could be sworn. The cite to “1 Atkins, 29,” is the Omychund case, in which
the court addressed Hale’s argument about children being unsworn. See supra
text accompanying notes 64-66 (discussing Omychund). The cite to “Foster,
70” is reference to The Case of William York, involving a prosecution of a
ten-year-old for the murder of a five-year-old. The relation to Brasier is
unclear, though perhaps because the boy confessed and declarations
containing hearsay of his confessions were admitted, it related to the ability
of a court to hear unsworn testimony. Next are references to Hawkins and
Gilbert’s treatises, which discuss the age at which a child may be sworn.
Finally, the marginal note was based on a note in Dyer’s Report at 303b.
That page of Dyer’s I located (likely a different edition) contains no relevant
discussion. But the next page contains a reference to a child rape case that
“[a] man of sixty years old who had a wife, was arraigned at Newgate . . .
for the rape of a girl then of the age of seven years, and no more; and was
unsworn.

More importantly, it is possible (albeit questionable) that the child in Brasier did, in fact, testify unsworn. To be sure, the report of Brasier in the English Reports that was discussed by the Supreme Court and litigants in Davis states that Mary Harris “was not sworn or produced as a witness on the trial.” In the course of my discussions about Brasier with Professor Thomas Davies, however, he identified an earlier report of Brasier that appeared in the 1789 first edition of Leach’s Crown Cases. This original report says nothing about the mother and the lodger providing out-of-court statements of Mary Harris, but instead indicates that the child testified unsworn:

This was a case reserved for the opinion of the Twelve Judges, by Mr. Justice Gould, at the Summer Assizes for York in the year ____, [blank in original] on the trial of an indictment for a rape on the body of an infant under seven years of age. The information of the infant was received in evidence against the prisoner; but as she had not attained the years of presumed discretion, and did not appear to possess sufficient understanding to be aware of the dangers of perjury, she was not sworn.

The prisoner was convicted; but the judgment was respited, on a doubt, Whether evidence, under any circumstances whatever, could be legally admitted in a criminal prosecution except upon oath?

The Judges were unanimously of opinion, That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of

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found guilty by apparent evidence of divers women and a surgeon, and the girl herself; and hanged by the neck.” 3 Dyer 304a n.51. Since the child was under nine, presumably she was incompetent as a matter of law, but permitted to testify unsworn. In one of the reports concerning Powell’s case, which reported that the Twelve Judges were split on whether a child could testify unsworn, the trial judge reportedly noted a case reported at page 304 of Dyer in its analysis of the on-going debate about unsworn testimony of children. See CUCKOLD’S CHRONICLE, supra note 102, at 441.

seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath: for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent, their testimony cannot be received.\textsuperscript{110}

Upon further research, I located two other Leach’s reports of the case from 1792 and 1800, respectively. These versions differed slightly from the 1789 report, but similarly state that Mary Harris testified at trial.\textsuperscript{111}

\textsuperscript{110} Id. (emphasis added). There were four editions of Leach’s Cases in Crown Law: the first edition (1730-1789), second edition (1730-1791), the third edition (1730-1800), and the fourth edition (1730-1815). 1 MAXWELL & MAXWELL, supra note 46, at 303. The English Reports reprinted only the fourth edition of Leach’s likely because it was viewed as the most accurate. ROY M. MERSKY AND DONALD J. DUNN, FUNDAMENTALS OF LEGAL RESEARCH 512 (8th ed. 2002) (“English Reports . . . . This is a reprint of the nominate reports from 1220 to 1865. When there were competing sets of reports, the editors included only the set they deemed most accurate.”); see also JOHN WILLIAM WALLACE, THE COMMON LAW REPORTERS 430 (Soule and Bugbee eds. 1882) (describing Leach’s: “There are editions in 1789, 1792, 1800, and perhaps other years; the best and most complete is in 2 vols. 8vo, 1815.”).

\textsuperscript{111} The following shows how the 1792 report in Leach’s was updated from the 1789 report:
This was a case reserved for the opinion of the Twelve Judges, by Mr. Justice Gould, at the Summer Assizes for York in the year 1778, on the trial of an indictment for a rape on the body of an infant under seven years of age. The information of the infant was received in evidence against the prisoner; but as she had not attained the years of presumed discretion, and did not appear to possess sufficient understanding to be aware of the dangers of perjury, she was not sworn.
The prisoner was convicted; but the judgment was respited, on a
doubt, Whether evidence, under any circumstances whatever, could be legally admitted in a criminal prosecution except upon oath?

The Judges assembled at Serjeants-Inn Hall 12, April 1779, were unanimously of opinion, That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath: for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received. They determined, therefore, that the information of the infant, which had been given in evidence in the present case, ought not to have been received.

King v. Brasier, 1 Leach 182-83 (K.B. rev. ed. 1792). The following shows how the 1800 report was updated from the 1792 report.

This was a case reserved for the opinion of the Twelve Judges, by Mr. Justice Buller Gould, at the Summer Assizes for Reading York in the year 1778, on the trial of an indictment for a rape on the body of an infant under seven years of age.

The information of the infant was received in evidence against the prisoner; but as she had not attained the years of presumed discretion, and did not appear to possess sufficient understanding to be aware of the dangers of perjury, she was not sworn. [reporter's footnote]

The prisoner was convicted; but the judgment was respited, on a doubt, created by a marginal note to a case in Dyer's Reports, for these notes having been made by Lord Chief Justice Treby, are considered of great weight and authority; and it was submitted to the Twelve Judges, Whether evidence, under any circumstances whatever, could be legally admitted in a criminal prosecution except upon oath?

The Judges assembled at Serjeants-Inn Hall 12, April 1779, were unanimously of opinion, That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination
In total, there is the original report in the 1789 edition of Leach’s,\textsuperscript{112} slightly different versions in the 1792 and 1800 editions of Leach’s,\textsuperscript{113} and a fourth version in the 1815 edition of Leach’s. This last version from 1815 was reprinted in the English Reports and typically is cited today as the Brasier case. Again, these reports reflect material changes over time. In the 1789 and 1792 reports, the child testified unsworn and Leach’s made no mention of the mother, lodger, or any hearsay. The 1800 report changed the trial court and judge. More important, while the body of the report remained similar to the prior 1789 and 1792 reports and stated that the child testified unsworn, a footnote was added indicating that additional information about the case was located in manuscript notes: \textsuperscript{114} “It appears by a

\footnote{by the Court, to possess a sufficient knowledge of the nature and consequences of an oath [reporter’s footnote]: for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received. They determined, therefore, that the \textit{information} of the infant, which had been given in evidence in the present case, ought not to have been received.

[first footnote]: It appears by a manuscript note of this case, in the possession of a gentleman at the bar, that the child’s evidence was not received at all; but that the mother and another witness gave evidence of what the child had said at the time.

[second footnote]: See White’s Case, post.}

\textit{Brasier}, 1 Leach 237 (K.B. rev. ed. 1800).\textsuperscript{112} \textit{Brasier}, 1 Leach 346 (K.B. 1789 ed.).\textsuperscript{113} \textit{Brasier}, 1 Leach 182-83 (K.B. rev. ed. 1792); \textit{Brasier}, 1 Leach 237 (K.B. rev. ed. 1800).\textsuperscript{114} For a discussion of how manuscript notes kept by lawyers, judges, or others may differ from case reports, see generally James Oldham, \textit{Detecting Non-Fiction: Sleuthing Among Manuscript Case Reports for What was Really Said in Law Reporting in Britain} (1995) (noting discrepancies between printed reports and manuscript notes kept by judges, lawyers, and others and analyzing five cases to show how manuscripts can alter the understanding of printed case reports).
manuscript note of this case, in the possession of a gentleman at the bar, that the child’s evidence was not received at all; but that the mother and another witness gave evidence of what the child had said at the time.” Finally, the 1815 report stated in the body of the report both that Mary Harris did not testify and that hearsay of the mother and lodger was received at trial.

These multiple versions and changes over time are important from an original meaning context because, assuming the Framers even referred to the law of child competency when considering confrontation rights, the only Leach’s reports of Brasier in print at the framing in 1789 and ratification in 1791 did not mention hearsay. Nor did the Leach’s reports in print the year after ratification in 1792. Simply put, before, during, and immediately after 1791, the Framers likely would have understood Brasier as concerning only child competency and not the admission of out-of-court statements.

What about the hearsay testimony of the mother and the lodger? Again, the reports of the case in Leach’s until 1800 made no mention of hearsay. I did locate, however, some post-Brasier/pre-ratification English sources that suggest generally, with no mention of the mother and lodger, that Brasier involved hearsay. The 1783 English edition Commentaries of William Blackstone (one of the Twelve Judges who considered Brasier), for instance, provided: “[I]t is now settled [Brasier’s case, before the twelve judges, P. 19 Geo. III] that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath . . . .” But Blackstone’s discussion of Brasier does not appear to have been widely considered even in

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115 Brasier, 1 Leach 237 (K.B. rev. ed. 1800).

116 Some framing-era reports of Brasier suggest an understanding that Mary Harris testified, but even some of those reports reflect an inconsistent understanding of the case. An annotation accompanying the Travers case, for instance, suggests that Mary Harris was sworn: “Brasier’s case, where an infant of 5 years old was held a good witness by all the Judges, she appearing to be acquainted with the nature of the obligation of the oath.” Rex v. Travers, 93 Eng. Rep. 793, 794, 2 Strange 700, 701 (K.B. 1726).

117 See Blackstone, supra note 60 (1783 English edition).
England before 1791. For example, Burn’s 1785 justice of the peace manual appears to reference Brasier (not by name), but made no mention of hearsay.118 Similarly, Barry’s English justice of the peace manual from 1790 discusses Brasier, indicates that Mary Harris testified at trial unsworn, and does not mention hearsay.119 After 1791, however, the 1793 update of Burn’s justice of the peace manual summarizes Blackstone’s discussion of Brasier and hearsay, but it is questionable whether that or any post-1785 version of Burns would have been available in the states.120 Further, a 1793 English treatise also

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118 4 RICHARD BURN, THE JUSTICE OF THE PEACE 69 (15th ed. 1785). Burn’s manual notes Hale’s argument for allowing unsworn testimony and Hale’s rationale that “the law allows what the child told her mother or other relations to be given in evidence . . . and there is much more reason for the court to hear the narration of the child herself, than to receive it second hand from those who swear they heard her say so.” Id. (citation omitted). The manual discusses Blackstone’s view on the age of incompetency (from the edition of Blackstone before Brasier was added) and makes what likely is a reference to Brasier: “But after all, it is said to have been determined lately by all the judges upon conference, that in no case shall the testimony of an infant be admitted without oath.” Id. at 71. Later editions replace this reference with a more detailed account of Brasier. See discussion infra note 120.

119 3 EDWARD BARRY, THE PRESENT PRACTICE OF A JUSTICE OF THE PEACE 521 (1790). Barry’s description appears to be based in part on Richard Burn’s 1785 (15th edition) manual, though it adds a more detailed discussion of Brasier. See discussion supra note 118. I was unable to locate a copy of the 16th edition of Burn’s published in 1788, which may include the same text as Barry.

120 The 1793 update to Burn’s justice of the peace manual, supra note 118, deleted the following passage from a prior edition which appeared to reference Brasier: “But after all, it is said to have been determined lately by all the judges upon conference, that in no case shall the testimony of an infant be admitted without oath.” The 1793 edition replaced this passage with the following, which cited to Blackstone as the source: “Finally, It is now settled by all the twelve judges upon conference, in Brasier’s case, E. 19. G. 3, that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath . . . .” JOHN BURN, JUSTICE OF THE PEACE (18th ed. 1793) (revised edition of works of Richard Burns, his father).
discussed *Brasier* but made no mention of hearsay. ¹²¹ All of this suggests that *Brasier* was not widely considered as involving hearsay in England before or shortly after 1791.

Even assuming Blackstone’s short reference to *Brasier* was a reliable indicator of framing-era understanding in England before ratification, however, it does not show that child hearsay was considered “testimonial.” Blackstone merely recognized, without any discussion of the facts in the case, that (1) a child could not testify unsworn; and (2) no hearsay of an unsworn child could be received in evidence. Blackstone did not say hearsay is “testimony.” Also, the principal rationale for excluding unsworn testimony, or second-hand accounts of unsworn hearsay, was a concern that an incompetent child may not understand right from wrong. ¹²² That says nothing about cross-examination and is more akin to a reliability concern, a consideration the *Crawford* court rejected in confrontation analysis. ¹²³

In sum, the law in England before *Brasier* allowed out-of-court statements of children to be admitted into evidence and that law was the predicate for an ongoing debate over child competency issues, including the age at which children should be sworn and whether children should be permitted to testify unsworn. *Brasier* was understood in England as resolving the

¹²¹ A 1793 treatise I located simply reported the 1789 Leach’s version of *Brasier* (which makes no mention of the mother and lodger) as addressing the age at which a child could be sworn and prohibition on unsworn testimony. *Peter Lovelass, The Trader’s Safeguard: A Full, Clear, and Familiar Explanation of the Law* 276 (1793). As for Blackstone, it is questionable whether Blackstone’s reference to *Brasier* and hearsay would have influenced the Framers, since most of the editions of Blackstone in the states did not contain it and it is doubtful the other sources discussing Blackstone would have been widely available, or available at all in the states before 1791. See discussion supra note 60 (discussing use of Blackstone’s Commentaries in the colonies).

¹²² See *Rex v. Travers*, 93 Eng. Rep. 793, 2 Strange 700 (K.B. 1726) (“The reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish betwixt right and wrong”); see also supra notes 46-52 and accompanying text.

¹²³ See discussion supra note 5.
age of capacity and unsworn testimony issue. As for the issue concerning out-of-court statements, there does not appear to be a general understanding in England in 1791 that Brasier changed the rule concerning whether hearsay was admissible, in large part because most reports of the case of the time do not even mention hearsay. To the extent the hearsay in Brasier was known at the time, moreover, none of the analysis focused on confrontation, hearsay, or cross-examination. Indeed, if the child in Brasier did in fact testify unsworn, as the 1789 and 1792 reports in Leach’s suggest, there likely would be no confrontation issue at all. When a witness appears, testifies, and the defendant has the opportunity to cross-examine, the only constraint is hearsay principles, not the Confrontation Clause.124

D. How Brasier was Understood In the Years After It Was Decided

In Crawford, the majority looked not only to the law leading up to ratification to determine the original meaning of the Confrontation Clause, but also “[e]arly state decisions [that] shed light upon the original understanding of the common-law right” as well as nineteenth century treatises.125 Conducting a post-ratification analysis of how Brasier was understood in England or the states reveals that much depends on which report of the case was being reviewed. Further complicating matters, one of the most often cited reports of Brasier was not the 1789, 1792, 1800, or 1815 reports in Leach’s or the short reference in Blackstone’s Commentaries, but rather, a report of the case that appeared in a popular treatise from 1803.

1. Brasier and Child Competency Issues

Regardless of the report of Brasier at issue, both before and

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124 E.g., Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) (“[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements”).

125 Id. at 49.
after 1791 the case principally was understood in England and the states as resolving child competency issues. Two of the first treatise references to Brasier discussed the case in terms of child competency. As noted, in 1783 Blackstone, one of the Twelve Judges who considered Brasier, referenced the case as resolving issues concerning the age at which a child could be sworn, rejecting Hale’s view that children should be permitted to testify unsworn, and precluding the admission of hearsay of an incompetent child. Blackstone, however, did not mention the mother or the lodger and did not expressly state whether Mary Harris had been permitted to testify unsworn. Likewise, Sir Francis Buller’s treatise was revised in 1790 to incorporate Brasier into its discussion of child competency issues. Citing the 1789 Leach’s report of Brasier, Buller describes the case as holding, “that a child of any age if she were capable of distinguishing between good and evil might be examined on oath, and consequently, that evidence of what she had said ought not to be received.” This description is notable not only because it makes no mention of the mother or lodger and any hearsay, but also because Buller (according to the 1800 and 1815 reports) was the trial judge in Brasier who referred the case to the Twelve Judges (which also included Buller) for review.

Early state cases similarly cited Brasier for child competency issues. Courts cited the case to support no presumptive limit on the age at which a child could be sworn, a result ultimately

126 See supra note 117 and accompanying text.
127 See supra note 117 and accompanying text.
128 See supra note 63 and accompanying text (quoting earlier edition of Buller treatise).
129 FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 293 (London, A. Strahan & M. Woodfall Law Printers to the King, corrected 5th ed. 1790).
130 E.g., State v. True Whittier, 21 Me. 341, 347 (1842) (“It was at one time considered, that an infant, under the age of nine years could not be permitted to testify. Rex v. Travers, Stra. 700. And that between the ages of nine and fourteen years it was within the discretion of the Court to admit or not, as it should or should not be satisfied of the infant’s understanding and moral sense. It was finally determined in Brazier’s case, [citing East’s 1803
followed by the U.S. Supreme Court in 1895 when it adopted Brasier and upheld a trial court’s decision finding a five-year-old competent to testify in a murder case.131 Courts also cited Brasier as resolving the issue about whether children could testify unsworn, such as in an 1814 Delaware case, which contrasted Hale’s view on allowing a child to testify unsworn with Brasier.132 Similarly, the Alabama Supreme Court in 1841, citing the 1789 Leach’s report of Brasier noted that, “In Lord Hale’s time, it was common to examine children of tender years, without swearing them. This practice was overturned in 1779, in Brazier’s case, when the judges were unanimously of the opinion that no testimony whatever, could be legally

131 Wheeler, 159 U.S. at 525.
132 State v. Miller, 1 Del. Cas. 512, 512 (Del. 1814) (“In this case a child about nine years old, who knew not the nature or obligation of an oath, was not admitted to testify. For, 1 Hale P.C. 634 (examined by court without oath); contra, Brazier’s Case, Bull N.P. 293 . . . .”).
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received, except when given on oath.”

2. Brasier and Hearsay

In the hundred years following framing and ratification of the Sixth Amendment, treatises and courts employed various interpretations of Brasier’s exclusion of the mother and lodger’s hearsay. As noted, there was confusion in the eighteenth century about whether Brasier involved hearsay. Leach’s 1789 and 1792 reports of Brasier made no mention of the out-of-court statements (or the mother and lodger), though Blackstone in 1783 made a general reference to hearsay. By 1800, Leach’s report began to mention hearsay (first in a footnote) and Blackstone’s report was appearing in other treatises, but the association of Brasier and hearsay appears not to have taken hold in England until 1803 when a new report of the case appeared in Edward Hyde East’s, A Treatise of the Pleas of the Crown. Citing the manuscript notes of Buller and Gould of the Twelve Judges (and the “amended” 1800 edition of Leach’s which contained the footnote mentioning the mother and lodger),

133 State v. Morea, 2 Ala. 275 (1841) (citing the 1789 version of Brasier). By 1901, however, confrontation rhetoric began finding its way into the oath issues. In State v. Lugar, 88 N.W. 333 (Iowa 1901), the defendant was charged with prostitution and a witness who inadvertently was not sworn gave “damaging” testimony against her. The court found that the admission of unsworn testimony was reversible error, citing the 1789 version of Brasier as a case reflecting that no unsworn testimony can be admitted. The decision, however, tied the oath issue to confrontation:

The constitution of this state guaranties to every man accused of a crime the right to be confronted with the witnesses against him, and this would be but a barren right, and afford the defendant no protection, if such witness may testify without being sworn, or without any way being subject to the penalties of perjury.

Id. at 334.

East set forth another version of *Brasier*, this one adding new details about the trial and review by the Twelve Judges not present in any of the prior reports. Because of its importance, East’s discussion is set forth in full:

The last case which has occurred on this doubtful subject is that of William Brazier, who was tried for assaulting Mary Harris, an infant of five years old, with intent to ravish her. The case on the part of the prosecution was proved by the mother of the child and another woman who lodged with her, to whom the child immediately on her coming home told all the circumstances of the injury done to her, and described the prisoner, who was a soldier, as the person who had committed it; but she did not know his name.

The next day the prisoner was called from the guard by the serjeant, and shewn to the child, who immediately said that was the man. Two other soldiers had been before shewn to her, of whom she at once denied any knowledge. There was no fact or circumstance to confirm the account given by the girl that the prisoner was the man who committed the offense, except that he lodged where she described. That she had received some hurt was proved by a surgeon as well as by the two women. The child was coming from school when the prisoner attacked her. The school did not break up till four o’clock, and she was at home before five, and had no conversation or communication with the mother before she had told all that had passed. The prisoner was convicted.

But Mr. Justice Buller reserved the above statement of facts for the opinion of the judges, whether this evidence ought to have been received, or was sufficient in point of law to be left to the jury. On the first day of Easter term 1779 the judges met on this subject, when all of them except Gould and Willes, Js. held that this evidence of the information of the child ought not to have been received, as she herself
was not heard on oath; as to which some, particularly Blackstone, Nares, Eyre and Buller Js. thought that if she appeared on examination to have been capable of distinguishing between good and evil, she might have been sworn. But as to that, others, particularly Gould and Willes Js. held that the presumption of law of want of discretion under the age of seven is conclusive; so as not to admit an infant under that age to be sworn on any examination as to her capacity. And as the information or narration from the child, Gould and Willes Js. held that it being recently after the fact, so that it excluded a possibility of practicing on her, it was a part of the fact or transaction itself, and therefore admissible: and Buller J., held the same, if by law the child could not be examined on oath. But as to what happened the next day, Gould J., thought it not admissible, by reason of the danger of her being influenced in the interval.

But on the 29th [of] April all the judges being assembled, they unanimously agreed that a child of any age, if she were capable of distinguishing between good and evil, might be examined on oath; and consequently that evidence of what she had said ought not to have been received. And that a child of whatever age cannot be examined unless sworn. The prisoner was pardoned.

It does not however appear to have been denied by any in the above case, that the fact of the child’s having complained of the injury recently after it was received is confirmatory evidence.135

The East treatment of Brasier, therefore, departs significantly from the 1789 and 1792 reports in Leach’s. It cites the 1800 edition of Leach’s, which included a footnote mentioning a “manuscript note” of the case, suggesting that the mother and another witness provided hearsay. (The manuscript

135 1 EAST, supra note 134, at 443-44.
might be the notes of Buller and Gould cited by East). East is ambiguous on whether Mary Harris testified unsworn, yet reflects that the Twelve Judges were addressing both the age at which a child could be sworn and Hale’s argument that a child could testify unsworn. By italicizing the reference to the mother and the lodger, East may have been attempting to acknowledge that other reports did not mention them, and the emphasis was meant to put the issue to rest. Finally, East’s report appears to suggest an exception to barring admission of hearsay statements of unsworn children: evidence that the child had complained shortly after the rape, but not the details of the offense, might be admissible as “confirmatory evidence.”

The East report of Brasier became one of the most cited accounts of the case and resulted in Brasier being interpreted in nineteenth century treatises and cases for various propositions concerning hearsay law. For instance, the 1816 edition of Phillipps’s Law of Evidence cited East’s report of Brasier in its discussion of res gestae, noting that “on an indictment for rape, what the girl said recently after the fact (so that it excluded a possibility of practicing on her), has been held to be admissible in evidence, as part of the transaction.” Similarly, as various

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136 Id. at 444.
137 S.M. PHILLIPPS, TREATISE ON THE LAW OF EVIDENCE 202 (John A. Dunlap ed., New York, Gould, Banks & Gould 1816). The 1838 edition of the treatise cites the East and 1815 reports of Brasier in the section concerning the law of competency:

A more reasonable rule has since been adopted, and the competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess. In Brasier’s case, on an indictment for assaulting an infant five years old with the intent to ravish her, all the judges agreed, that children of any age might be examined upon oath, if they were capable of distinguishing between good and evil, and possessed of sufficient knowledge of the nature and consequences of an oath, but that they could not in any case be examined without oath. This is now the established rule, as well in criminal, as in civil cases, and it applies equally to capital offences as to offences of inferior nature.

S. MARCH PHILLIPPS & ANDREW AMOS, A TREATISE ON THE LAW OF
state-amici in *Davis* noted, the 1824 edition of Thomas Starkie’s influential treatise, *A Practical Treatise on the Law of Evidence*, cited *Brasier* for the proposition that, “where an immediate account is given, or complaint made, by an individual, of a personal injury committed against him, the fact of making the complaint immediately, and before it is likely that anything should have been contrived and devised for the private advantage of the party, is admissible in evidence; as upon an indictment for rape . . .”

Cases from the late nineteenth century likewise cited East’s report of *Brasier* in terms of *res gestae*. Some courts permitted admission of testimony that the child had reported the offense soon after it occurred, but did not allow hearsay concerning the details of the crime; other courts more liberally allowed

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138 See Brief for the States of Ill. et al., supra note 10, at *7-8.

139 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 149 (1st ed. 1824).

140 Id.

141 In *State v. Ivins*, 36 N.J.L. 233 (N.J. 1873), the defendant was tried for attempt to ravish an adult woman and the trial court permitted the admission of hearsay concerning both the fact that the complaint was made immediately after the occurrence and the particulars of the defendant’s alleged conduct. The court found that “the rule that in trials for rape, the fact that the woman alleged to have been violated, made complaint soon after the occurrence, is admissible as evidence on the part of the prosecution, is entirely settled, and is very familiar in practice. To this extent, hearsay evidence becomes admissible, and this departure from the ordinary rule seems justifiable on the ground, that in the natural course of things, if a woman has thus been foully wronged, she will almost necessarily disclose the fact.” *Id.* The court addressed whether this exception in rape cases should apply in attempts to commit a rape. “There does not appear to be much authority upon the subject, but the little that there is, favors the admissibility of the evidence. Brazier’s Case, reported in 1 East P.C. 443, tends evidently to this result . . . .” *Id.* at 234. The court applied the same rule for rape and attempted rape cases. Notably, with regard to whether hearsay of the victim’s details of the offense were admissible, the court held that “[i]t is every day’s practice to exclude such narrations in trials for rape.” *Id.* at 235. Similarly, in *Hornbeck v. State*, 35 Ohio St. 277 (1879), the defendant was charged with intent to commit a rape and the alleged child victim was found
hearsay concerning the details of the offense. In Kenney v. State, 79 S.W. 817 (Tex. Crim. App. 1903), the defendant was charged with the rape of a three-year-old. At trial, the child was deemed incompetent and the child’s mother was permitted to testify that the child told her the defendant had committed the offense. The court found that:

For aught that appears, the assault complained of had just been committed, and the child released by appellant, when she appeared before her mother and made said declarations. So that, so far as the time is concerned, while it was not exactly contemporaneous with the main fact (i.e., the outrage), yet it was so proximate to that event, and at least the first portion of the declaration apparently so spontaneous, as to make it come within the rule of res gestae, as laid down by this court.

Id. at 818. The court recognized that by not requiring a contemporaneous declaration it was departing from the common law, but nonetheless found the hearsay statements res gestae. The court also addressed the appellant’s argument that, since the child was incapable of giving sworn testimony, hearsay of what an incompetent witness said likewise should not be received. The court held, however, that “wherever the testimony of an infant is a part of the res gestae, it is introduceable, notwithstanding the fact that the witness was incompetent to take an oath.” Id. The court distinguished common law cases following a different rule on the ground that they did not involve res
Other courts and commentators of the period cited Brasier for a more limited proposition. St. George Tucker’s 1803 American edition of Blackstone’s Commentaries (based on the 1783 English edition) arguably suggested that the case simply meant that if a child lacked the capacity to be sworn, the statements the child told others likewise could not be received.\textsuperscript{143} Phillipps’s treatise took a similar view: “When a child from defect of understanding or instruction is unfit to be sworn, it follows as a necessary consequence, that any account, which it may have given to others, of the transaction, ought not to be admitted.”\textsuperscript{144} There were also cases to the same effect.\textsuperscript{145} gestae. It referenced East’s version of Brasier in support of admitting hearsay of those unsworn as res gestae: “it had been considered, allowable on an indictment for an assault on an infant five years old with intent to ravish her, to give evidence of the child having complained of the injury recently thereafter . . . .” \textit{Id.} at 819. The conviction was affirmed. A dissenting opinion argued that the majority’s decision was not sound and the law was clear that “the statement of an incompetent witness, a child, made immediately after the occurrence [is] inadmissible.” \textit{Id.} at 820 (Davidson, P.J., dissenting). The dissent claimed this was the rule at common law, citing East’s report of Brasier and the Travers case. The judge quoted nearly the entire section of East describing Brasier and concluded that “at common law [there was] the unqualified rule rejecting this character of testimony.” \textit{Id.} at 822.

\textsuperscript{143} See 5 St. George Tucker, Blackstone’s Commentaries 214.
\textsuperscript{144} Phillipps, supra note 137, at 6 (1838 ed.).
\textsuperscript{145} See Oregon v. Tom, A Chinaman, 8 Or. 177, 180 (1879) (“The rule that the declarations of one incompetent to testify cannot be admitted in evidence, is now the established doctrine in the States of the Union . . . .”) (discussing Blackstone’s reference to Brasier)). In Weldon v. State, 32 Ind. 81 (1869), the court held that it was error to admit declarations of an incompetent child to prove charges of assault and battery with intent to commit a rape. The court noted that Hale argued to allow children to testify unsworn and that parents were permitted to testify about the child’s account of the rape, but that these ideas had been rejected:

That being the true rule in case of a person immature in intellect, I cannot see why the reason of the rule does not apply with as much force to exclude all evidence of the declarations, assertions, or signs made . . . by a person who is incompetent to be sworn as a witness.

\textit{Id.} at 83. Notably, Weldon quotes another case for the following: “At the
Still, some treatises and cases interpreted Brasier’s exclusion of hearsay on best evidence/necessity-type grounds. In other words, the mother and lodger’s testimony was excluded principally because the court had not first attempted to see whether the secondary evidence was needed when it failed to assess Mary Harris’s capacity to take the oath. In 1827, for instance, Jeremy Bentham, citing the 1800 Leach’s report of Brasier, suggested that the hearsay of the mother and lodger was excluded because the trial judge had not tried to determine whether the child was competent to testify:

[T]wo conditions precedent have been annexed. One is, that the child shall have taken oath; i.e. gone through the same ceremony by which testimonial relation is preceded in other instance. To this operation, had it been performed [in Brasier], there could have been no objection.146

Though much later in time, a court in 1911 interpreted Brasier in a similar way:

As far back as Brazier’s Case, 1 East P.C. 443, it seems to have been virtually allowed that in such cases proof of the complaint and its details might be received, though in that instance it was held improper because the child was not shown incompetent to testify; which in effect was saying . . . that a rule of evidence dictated by necessity becomes inapplicable wherever that necessity does not exist.147

146 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 149 (1827). Because the treatise relied on the 1800 report of the case, it appears to assume the child in Brasier testified. See id. (“For, with the approbation of the twelve judges, in the case of an infant of no more than seven years old [citing 1800 report of Brasier and another case] (how much under is not said), this evidence was received.”).

147 Commonwealth v. Zypa, 3 Berks 350 (Pa. O & T 1911), available at 1911 WL 3681. In Zypa, the defendant was charged with raping a seven-
Finally, some courts interpreted *Brasier* as involving the right to submit hearsay corroborating a witness’s testimony. In 1850, the Supreme Court included East’s report of *Brasier* in a string cite in support of the proposition that where a witness is impeached with a prior inconsistent statement, evidence that the witness previously gave a consistent statement is inadmissible.\(^\text{148}\)

...year-old girl, the child was deemed incompetent, and the court permitted the girl’s mother to recount statements the girl had made about the alleged rape. The court addressed the issue of whether “it was proper to receive and submit to the jury evidence of what the child had said concerning the injury done her as proof of defendant’s guilt.” *Id.* at *1*. The court discussed several relevant legal principles. First, the court noted the rule allowing hearsay testimony of the act that the complaint of the rape was made, but excluding the substance of the details of the offense. *Id.* Second, the court noted the rule that where the witness had testified and the testimony attacked, courts allowed the admission of hearsay to corroborate the testimony. *Id.* at *2-3*. Third, the court found that where the witness was unavailable because of lack of competence because of young age, “necessity” might permit such testimony since otherwise perpetrators would benefit simply because of the nature of the crime and age of their victims. *Id.* at *4*. The court found that (East’s report of) *Brasier* supported admission of such statements, even though the statements there were excluded because the court failed to determine if the child was competent:

As far back as Brazier’s Case, 1 East P.C. 443, it seems to have been virtually allowed that in such cases proof of the complaint and its details might be received, though in that instance it was held improper because the child was not shown incompetent to testify; which in effect was but saying... that a rule of evidence dictated by necessity becomes inapplicable wherever that necessity does not exist.

*Id.* at 5. Fourth, the court noted cases considering hearsay statements made spontaneously after events might be admitted as *res gestae*. *Id.* at 6. The court ultimately held that hearsay of a rape victim may be received in connection with other evidence that tended to show a rape was committed and that the accused was in a position to commit it. *Id.* at 7. Though finding no error in the admission of the testimony, the court vacated the conviction on the ground that hearsay tending to exculpate the defendant was not admitted and, because it too was *res gestae*, it should have been admitted to give the jury a full picture of the situation. *Id.* at 7-8. Beyond that, other circumstances, including the unpreparedness of the defendant’s lawyer and the incompetency of an interpreter warranted a retrial. *Id.*

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\(^{148}\) Conrad v. Griffey, 52 U.S. 480, 490-91 (1850) (*But in other places,
This may suggest that the Supreme Court understood that 
Brasier involved the child testifying and the exclusion of the 
testimony of the mother and lodger was based on the testimony’s 
status as improper prior consistent statements of the child.

Thus, post-ratification interpretation of 
Brasier in England 
and the states on hearsay is as diverse as it is irrelevant to the 
understanding of the case in 1791, given that most 
interpretations of the case were based on East’s 1803 modified 
report or on the altered 1815 Leach’s report that appeared more 
than a decade after ratification of the Confrontation Clause.

II. LESSONS FROM BRASIER?

Putting aside my interpretation of 
Brasier, the case serves as 
an apt case study on the practical issues of a criminal procedure 
framework that requires overworked prosecutors, defense 
lawyers, and judges to determine the “Framers’ design” to 
resolve what statements are, and are not, “testimonial” under 
the Confrontation Clause.

The most striking example of the practical problem with 
determining authentic original meaning is that all participants in 
Davis failed to note that the reports of 
Brasier in print at 
ratification, wherein the child reportedly testified, effectively 
takes the case out of the realm of confrontation analysis. That 
the entire debate is based on the potentially flawed premise that 
the child did not appear at trial is telling. It illustrates that 
research into historic sources is essentially a specialty, foreign to 
as in England, such evidence, though at one time considered competent, and 
especially in criminal cases, is now even there excluded.” (citing, among 
others, Brazier’s Case, 1 East P.C. 444) (citations omitted)); see also Head 
v. State, 44 Miss. 731, 751 (1870) (“For the purpose of discrediting a 
itness, it is competent to prove that he made discordant statements, at other 
times and places, but to reestablish creditability, or to support what he has 
deposed on the trial, it is inadmissible to prove that he has made substantially 
the same statements, to a third person. Many years ago the British courts 
received such testimony; afterwards its propriety was doubted, and finally 
repudiated. The weight of authority and reason is against it.” (citing, among 
other cases, East’s version of 
Brasier)).

149 See supra notes 109-13 and accompanying text.
most in practice, and it counsels against lending too much weight to sources that, in many respects, may have the reliability of a modern day Internet blog. Though legal historians might know to look for earlier editions or manuscripts of reported cases, and may be able to explain how and why changes such as those in Brasier occurred over time, criminal lawyers in the trenches—and the judges deciding these issues—cannot reasonably be expected to have the time to find, much less trace the origins of, each and every common law case that seems significant to the confrontation issue before them.

Indeed, many common law sources are not readily accessible. Simply tracking down the multiple reports of Brasier and determining which versions were available from 1789 to 1791 required consultation with a legal history scholar and assistance from my law firm’s London office library as well as a law school library where I have research privileges. It required sources from specialized subscription databases and obtaining materials (unavailable on-line) from the rare book collections of libraries and historical societies.

Brasier also illustrates another practical issue with a rigid originalism-based legal framework: determining the date at which to view the “Framers’ understanding.” As noted, to make this determination the Supreme Court often looks at 1791, the year that the Bill of Rights was ratified. Others have persuasively argued that “the original meaning has to refer to the public meaning of the text at the time the First Congress approved the language of the amendments—the date the text was framed.” Under this approach, September 25, 1789, the date when the text of the Bill of Rights including the Confrontation Clause was approved by the First Congress, becomes the

150 See Davies, Not the Framers’ Design, supra note 26, at 390 n.96 (“Relying upon post-framing editions of treatises that were initially published prior to the framing can result in serious errors because new material was sometimes added, or alterations were sometimes made, to the pre-framing text”).

151 See supra author’s footnote.

152 See supra note 18.

153 Davies, What Did the Framers Know, supra note 26, at 158.
After the cutoff date is determined, moreover, there is debate about how long before or after that date treatise and case discussions reliably reflect the Framers’ understanding of the law.

These timing issues have practical significance, again illustrated by *Brasier*. The first report in *Brasier* that appeared in Leach’s Crown Cases became available in London no earlier than May 1789. Accordingly, given the communication difficulties of the era, it is unlikely that the original report of *Brasier* (even if it had been the same as the 1815 report) would have reached the First Congress in Philadelphia before September. Unaware of *Brasier*, the Framers likely would have understood the law as set forth in Sir Matthew Hale’s treatise and as restated in English and early American editions of Blackstone’s Commentaries that flooded the states and that

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154 See id. at 159.

155 Compare Davies, *What Did the Framers Know*, supra note 26, at 179-80 (arguing that state cases decided more than a few decades after the framing are invalid evidence of original meaning) with Kry, *supra* note 26, at 47 (disagreeing with Professor Davies concerning whether post-ratification sources are valid evidence of original meaning). Mr. Kry, for instance, takes issue with Professor Davies’s argument that the *Radbourne, Woodcock,* and *Dingler* decisions from post-1787 “are not valid evidence of original meaning because the reports would not have been widely available in the United States when the Sixth Amendment was framed.” Kry, *supra* note 26, at 522 (citing Davies, *What Did the Framers Know*, supra note 26, at 153-62). Kry responds that “[b]ecause colonial lawyers were directly exposed to English practices and ideas, English evidence is relevant whether or not it appeared in a published treatise or case report shipped to the colonies,” particularly where a case in question merely embodied preexisting English law. *Id.* (“*Radbourne, Woodcock,* and *Dingler* do not purport to change Marian committal procedure in any way they simply confirm what that procedure already was”). Davies, in turn, replies that “Hening made no mention in 1794 of *Radbourne* or *Woodcock*, five years after the reports of those cases were initially published in Leach’s reports of Old Bailey cases (*Dingler* still had not been published).” Davies, *Revisiting Fictional Originalism*, supra note 26, at 620. The timing debates are particularly relevant in *Brasier*, which reflected a change in law. Whether the Framers were aware of the case as opposed to the law reported by Hale and Blackstone is significant.

156 See *supra* notes 109-12 and accompanying text.

followed Hale’s view that “the law allows what the child told her mother, or other relations, to be given in evidence.” As the Supreme Court recognized fifty years ago, “two of the greatest English jurists, Lord Chief Justice Hale and Sir William Blackstone . . . exerted considerable influence on the Founders . . . .” Indeed, colonial justice of the peace manuals, which “were probably the sources regarding criminal procedure that were most accessible to members of the Framers’ generation,” arguably reflected some debate over whether children in sexual abuse cases could testify unsworn, but made no mention of Brasier or otherwise questioned Hale’s recognition that the law allowed child hearsay in sexual abuse cases. On the other hand, there was some reference to Brasier and hearsay in later editions of Blackstone, so one cannot foreclose some knowledge of the case in America beyond Leach’s reports. But even the post-Brasier English sources

158 See supra note 60 and accompanying text. The defendants in Davis acknowledged that before Brasier courts often admitted hearsay testimony of children in rape cases, but reasonably concluded that Brasier changed the rules. See discussion supra note 35 and accompanying text. To be sure, there was a notable absence in Old Bailey reports after Brasier where hearsay was admitted in rape cases. On the other hand, this may not reflect any change in practice of the time, but rather, how cases were reported. “After about 1790, most reports of such cases in the Old Bailey Proceedings give no details of the offense, and often do not give even the name of the victim. It is likely that many cases after this date represented instances of child molestation.” Simpson, supra note 49, at 191-92. Further, in the years following Brasier, courts bent over backwards to find young children competent to testify, going so far as to defer trials while children deemed incompetent received instruction on the nature and consequences of taking the oath. See Commonwealth v. Lynes, 8 N.E. 408 (Mass. 1886). In short, even if Brasier did change the rules in England, it is questionable whether that was generally understood in 1791 in England, much less the states.

159 Reid v. Covert, 354 U.S. 1, 26 (1957).


161 See discussion supra notes 98, 118-20.

162 See discussion supra notes 117, 120.
before and immediately after ratification were inconsistent on the
discussion of Brasier, with some citing only to the report of the
case where Mary Harris testified and others noting Blackstone’s
generalized reference to hearsay. Conflicting sources and
multiple editions of case reporters and treatises, therefore,
require the virtually impossible determination of what sources
the Framers would and would not have considered, something
particularly difficult where, as with Brasier, the case would have
reflected a change in the common law concerning out-of-court
statements. Simply put, even if Brasier did change the rules in
England, it is questionable whether that was generally
understood in 1791 in England, much less the states.

Finally, the law shortly after ratification, as the Court
reviewed in Crawford, would bear little on the Framers’
understanding. Post-framing law and commentary dealt
principally with the 1803 report of Brasier in East or the 1815
report reprinted in the English Reports, which injected the case
into the law of hearsay.163

All of this is not to say that history is irrelevant to an
understanding of confrontation or other rights, or to suggest that
every historical inquiry will be as complex as Brasier.164 Nor is

163 See supra Part I.D.2.
164 That said, a recent dialogue between Professor Davies, who criticized
the history relied on by Justice Scalia’s majority opinion in Crawford, and
Robert Kry, Justice Scalia’s law clerk during the Crawford term, reflects
practical complexities similar to those illustrated by Brasier. In a recent
article, Professor Davies makes a persuasive historical argument that the
Supreme Court’s history in Crawford was inaccurate. Davies, Not the
Framers’ Design, supra note 26. Mr. Kry’s rebuttal relies on impressive
research into framing-era law and practices. Kry, supra note 26. Reading
both pieces, I imagined how a busy prosecutor or defense lawyer could be
expected to properly research similar historic issues, or how a law clerk or
judge would get to the bottom of the competing arguments in the pieces
(considering caseload demands). Mr. Kry’s rebuttal, for instance, included
analyses of multiple editions of several cases (several of limited general
availability) that changed over time (like Brasier). He also scoured the Old
Bailey Session Papers, obtained committal depositions from the London
Metropolitan Archives, and engaged in an analysis of how Sir Francis Buller
(the trial judge in Brasier) incorrectly reported certain cases. See Kry, supra
note 26, at 18-19, 28.
the fact that a legal framework is difficult to apply necessarily a sound basis to abandon it.

The question remains, however, whether the real-world limitations of requiring proof of “original meaning,” as the exclusive analytical mode will encourage unwarranted assumptions about cases or lead to the creation of shorthand tests based on inauthentic history, such as the recent state high court case that simply presumed that Brasier meant that statements to non-law enforcement personnel could be testimonial in nature.^{165}

Eighteenth century authorities such as Brasier change over time, as courts and scholars rely on different versions of the case or misinterpretations of the case found in treatises. Given the nature of the sources, it may be possible for advocates to construct a compelling case of “original meaning” for either side of an issue in cases where the common law is not clear. The framework, therefore, may well lead to the very “unpredictable” and “amorphous” framework^{166} Crawford sought to replace.

CONCLUSION

There may never be a consensus on what Brasier really meant at the time of the framing, which is something originalists can probably live with.^{167} A more basic question is whether a legal framework that requires lawyers and judges to essentially become historians could in fact be no better than the “reliability” approach overruled by Crawford. To be sure, the reliability framework was far from perfect. Yet, the current rigid history-based doctrine, which requires the time to locate and digest complex, unfamiliar historic materials that are filled with traps for the unwary, appears no better suited to limit short-hand legal tests, selective interpretation by advocates, and results-oriented decision-making. The current framework, moreover, may provide a means to legitimize such practices by shrouding them in “history,” authentic or not.

^{165} See supra text accompanying note 40.
^{166} See supra note 5.
^{167} See discussion supra note 27.
CRAWFORD, DAVIS, AND WAY BEYOND

Richard D. Friedman*

INTRODUCTION

Until 1965, the Confrontation Clause of the Sixth Amendment to the United States Constitution hardly mattered. 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. Texas 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. 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

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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* 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. 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. And, though the Supreme Court occasionally swooped down and held the admission of a given statement to be a violation of the Clause, the law was highly unpredictable because it was not rooted in any solid underlying theory.

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

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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.”).


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”).


10 Id. at 60-62.
the presence of the accused, subject to cross-examination. 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.

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 Crawford, permanently unpredictable.

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 Hammon v. Indiana, 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

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11 Id. at 59.
12 Id. 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.
13 Id. at 68 n.10.
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{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.\(^{23}\)

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 going to find the accused and then come talk to the complainant.\(^{24}\) 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


\(^{24}\) 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. Labeling one purpose after the fact as primary seems to be a rather arbitrary exercise—and thus the test invites manipulation to enhance the chance that the evidence will be received.

Furthermore, why should the purpose of the questioner matter? I have previously stated at length reasons why, in determining whether a statement is testimonial, the witness’ perspective should be the crucial one. And, curiously, it seems the Davis Court agreed. Dispelling one of the fallacies adopted by some lower courts in the wake of 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. Further, the Court stated, “And

25 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 otherwise, the purposes of an interrogation, viewed from the perspective of the police, are both to respond to the emergency situation and to gather evidence.”).

26 Id. at 2284-85.

27 Of course, even the test that I think is optimal, based on the reasonable anticipation of a person in the position of the declarant, is potentially manipulable. See, 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, because whatever the understanding of a reasonable person in the declarant’s position, it is not reasonably deniable that the questioner solicited the statement for forensic purposes. See, 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 questioner—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.


29 Davis v. Washington, 126 S. Ct. 2266, 2274 n.1 (2006) (“The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.”). In Grappling, supra note 28, at 263-66, adapted from a posting titled “The Interrogation Bugaboo” that I made to The Confrontation Blog, 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 discusses 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 indications 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 re-
daction 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 deter-
mve (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 com-
ing 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 tes-

36 Id. at 2277.
37 Id. at 2278.
38 Id.
39 Id. at 2279.
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.\(^\text{44}\) *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.”\(^\text{45}\) This holding is highly significant given how often, as in *Davis*,

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\(^\text{44}\) 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*).

\(^\text{45}\) 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.”

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 *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. 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 *Davis* opinion are that the dividing line between testimonial and nontestimonial should lie much closer to the situation in *Davis* than to that in *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 *Hammon*.

### III. Formality

In *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

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46 Id. at 2279 (quoting Hiibel v. Sixth Judicial Dist. Ct. of Nev., 542 U.S. 177, 186 (2004)).

CRAWFORD, DAVIS AND WAY BEYOND

were testimonial. 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. I believe this conclusion is fallacious and even wrong-headed.

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 Davis and 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 Crawford, understood the point, but he articulated it with some force. I would have offered

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48 541 U.S. at 53 n.4.

49 This was, for example, the view of the Indiana Court of Appeals in 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.”).


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.

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,
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.\(^\text{52}\) 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.”\(^\text{53}\)

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-


\(^{53}\) 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.*
requirement. It merely lists the difference in formality as one of four factors justifying a different result between the two cases.\textsuperscript{54} 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.\textsuperscript{55}

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.”\textsuperscript{56}

But the Court immediately rejected that argument: the English cases were not limited to “prior court testimony and formal depositions,”\textsuperscript{57} 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

\textsuperscript{54}See \textit{id}. at 2276-77.

\textsuperscript{55}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 decriminalizing 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.

\textsuperscript{56}\textit{id}. at 2275-76.

\textsuperscript{57}\textit{id}. at 2276.
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

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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-
requirement—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.66

(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.67

(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

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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

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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-

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72 E.g., State v. Jensen, 727 N.W.2d 518, 34-35 (Wis. 2007); People v. Giles, 55 Cal. Rptr.3d 133 (2007).
pend, at least in part, on the same factual issue, so be it.

(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.\(^{73}\) 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.\(^{74}\) 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.\(^{75}\) 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

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\(^{73}\) Fed. R. Evid. 104(a).

\(^{74}\) See supra pp. 124-25.

\(^{75}\) Cf. Lego v. Twomey, 404 U.S. 477 (1972) (holding that preponderance standard is sufficient constitutionally for determining voluntariness of confession).
while still communicative, and arguably for a shorter period, the prosecution ought to arrange a deposition.  

(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

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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.78 Thus, after an historical nod to

78 541 U.S. at 62, 68.
cases like Raleigh, 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.

(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. Street 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 opinion or to show the course of an investigation.

(4) Is the confrontation problem really relieved, as the Supreme Court held in California v. Green and reaffirmed in Crawford, 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.

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

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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-

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.91

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 superfluosity 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?”

91 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. Washington2 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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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

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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

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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 (“[i]t 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.\(^{15}\) 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.\(^{16}\) 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


\(^{16}\) See infra notes 32-53 and accompanying text.
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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

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.  

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 *Davis*, none of the parties or *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 *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.” 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. Finally, shortly after the Bill of Rights was adopted, South Carolina’s highest law court explained that:

Charges for criminal offences are most generally

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22 2 Hale, *supra* note 18 at 99-100; 4 Blackstone, Commentaries, at 294; *see also* 1 JAMES STEPHEN, 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).

23 *See* Brief for Petitioner at 18-19.

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

25 Henry Roscoe, *A Digest of the Law of Evidence in Criminal Cases* 23 (3rd Am. ed. 1846) (describing *Rex v. Wink*, 172 Eng. Rep. 1293 (1834)). The judge in *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.” *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. *See id.*
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,

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].”32 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.33 If a statement merely related or narrated a past occurrence, it fell outside the res gestae.34

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.35 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.36

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32 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 368 n.25 (J. Chitty ed. 1826). See also 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 EUSTACHIUS STRICKLAND, A TREATISE ON EVIDENCE 397 (1830).

34 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.”).


36 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

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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.42

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

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”).
THE CONFRONTATION CLAUSE

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
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. 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).

52 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

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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 loathe 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 “outcry” 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. “60 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.” 61 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.” 62 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. 63

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

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).
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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. 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. Trevanian*, 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.” 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. 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” 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.

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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;
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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.\(^75\) 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).

\(^75\) 3 Wigmore, supra note 67, at §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, \(i.e.,\) 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, 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; \(i.e.,\) we believe that Doe shot the pistol, or that the bell was rung, \(because\) 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.82 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.83 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.”84 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.85 (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

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.” 86 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.” 87

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, 88 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. 89

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

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,96 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.97 These holdings include decisions—directly contrary to the common law *res gestae* doctrine—that victims’ statements identifying who recently shot them are admissible.98 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.99 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 (holding that a domestic violence victim’s statements to responding officers were not testimonial because there “was no emergency *in progress* when the officers arrived); State v. Parks, 142 P.3d 720, 721 (Ariz. App. 2006) (finding witness’s statement to responding officer was testimonial in part because the officer “was not seeking to determine ‘what is happening’ but rather ‘what happened.’”); State v. Cannon, 2006 WL 3787915 (Tenn. Crim. App. Dec. 27, 2006) (holding that statements to responding officers were testimonial because the officers “spoke with the victim in order to learn about past conduct and not in order to address an instantaneous emergency”); Santacruz v. State, 2006 WL 2506382 (Tex. App. Aug. 31, 2006) (concluding that statements in 911 call describing assault 10-15 minutes after events ended were testimonial).

96 See supra notes 85-87 and accompanying text.

97 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”).


is nontestimonial.\textsuperscript{100}

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.”\textsuperscript{101}

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

\textsuperscript{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 \textit{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 \textit{Crawford} and \textit{Davis}.

\textit{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.”105 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.”106

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.107

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.”108 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.\footnote{Richard D. Friedman, Grappling with the Meaning of “Testimonial,” 71 BROOK. L. REV. 241, 251-53 (2005).} 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...
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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.113

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.114

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

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. 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” and especially who perpetrated them, must be considered testimonial.

C. Children’s Statements to Parents

Under the reliability-based framework of *Ohio v. Roberts*, 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

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118 See *Crawford*, 541 U.S. at 43-44, 53 (discussing the Marian statutes).
120 448 U.S. 56 (1980).
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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 at 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.\footnote{Davis v. Washington, 126 S. Ct. 2266, 2277 (2006) (quoting United States v. Inadi, 475 U.S. 387, 394 (2006)).} 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.\footnote{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.}

The Davis opinion, in fact, favorably discusses a Founding-era English case that supports this analysis. In King v. Brasier,\footnote{1 Leach 199, 168 Eng. Rep. 202 (1779).} 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."\footnote{Id. at 200.} The next day, she identified a neighbor as her attacker. The King’s Bench held that the child’s statements were
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.
Appendix A

Transcript of 911 Call in Davis\textsuperscript{132}

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

\textsuperscript{132} This appears at pages 8-13 of the Joint Appendix in \textit{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.
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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.

CONFRONTATION RULES AFTER
DAVIS V. WASHINGTON

Roger W. Kirst*

INTRODUCTION

In 2006, the United States Supreme Court began refining the Sixth Amendment Confrontation Clause doctrine it announced two years earlier in Crawford v. Washington.1 In Crawford, the Court held that the prosecution could not use a custodial statement of an accomplice who was not cross-examined at the time the statement was made, and could not be cross-examined at trial.2 In his opinion for the Court in Crawford, Justice Scalia described the core concern of the Confrontation Clause as the use of “testimonial” statements by the prosecution.3 In a single 2006 opinion that decided both Davis v. Washington and Hammon v. Indiana, the Court considered whether a statement to the police in a 911 call or at a crime scene is testimonial.4 The Court affirmed the holding of the state court in Davis5 that the prosecution could use certain statements of a domestic violence victim to a 911 operator. The Court rejected the

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2 Id. at 68-69.
3 Id. at 51-52.
holding of the state court in *Hammon*\(^6\) that the prosecution could use statements of a domestic violence victim to a responding police officer at the crime scene.

The Court’s focus in *Davis* was how to distinguish between statements to the police that can be used by the prosecution even if the declarant cannot be cross-examined and statements to the police that violate the Confrontation Clause if the declarant does not appear at trial. Part I of this Article will discuss how accurate and practical rules for 911 calls and statements at a crime scene can be distilled from the language of *Davis* and the Supreme Court’s disposition of several other petitions for certiorari in light of *Davis*.

Judges, lawyers, and scholars will inevitably ask how much guidance *Davis* might provide on confrontation questions the Supreme Court did not address. Part II of this Article will describe the cautions in *Davis* against extrapolating from its specific holding to broader rules for other kinds of statements, and will assess what *Davis* might add in the search for broader confrontation doctrine.

Some questions about interpreting the Confrontation Clause were answered in *Davis*, but the scope of the opinion must be kept in proper perspective. Part III of this Article will describe how a more recent case on the Court’s docket, *New Mexico v. Forbes*,\(^7\) illustrates the convoluted history of the Supreme Court’s ongoing search for stable confrontation doctrine.

I. STATEMENTS BY VICTIMS OF VIOLENCE

The resources for interpreting *Davis* include the Supreme Court’s disposition of several other petitions for certiorari in light of *Davis*, but the starting point must be the facts of the case and the language of the opinion.

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\(^7\) 2007 WL 632910 (U.S. 2007).
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A. Reading the Court’s Opinion

1. The Facts in Davis and Hammon

The first report of domestic violence in Davis was made in a conversation between a 911 operator and a woman who answered the telephone when the operator called back after a call to 911 was terminated before anyone spoke. The woman told the operator that “He’s here jumpin’ on me again.” She gave the assailant’s name as Adrian Martell Davis.

Upon arriving at the scene, two responding police officers observed that the caller was very upset, that she had fresh injuries, and that she was frantically gathering her belongings and children to leave the residence. The officers did not see Davis at the scene. At the time, Davis was subject to a domestic no-contact order. A charge of violating the order was elevated to a felony by an allegation of an assault.

At trial in Davis the two responding police officers testified about what they observed at the crime scene, but they did not see Davis at the scene, so they could not identify him as the assailant. The woman who had called 911 did not appear as a witness. In her place, the prosecution offered the tape recording of the 911 telephone call, which the trial court held was an excited utterance and admitted over the defendant’s confrontation objection. The defendant’s conviction on the basis of the 911 recording was affirmed by the Washington Supreme Court after it rejected the confrontation objection raised by Davis. That court concluded that a victim’s emergency 911 call is not testimonial if the apparent purpose is “a call for help to be rescued from peril” and if it does not appear to be “generated by a desire to bear witness.”

8 See Davis, 126 S. Ct. at 2270-71.
9 Id. at 2271.
10 See id.
11 See id.
12 See id.
14 Id. at 849.
Hammon also involved a report of domestic violence. However, the statement in Hammon came later in that incident than the statement in the Davis incident because the prosecution did not introduce the initial report that caused the dispatcher to send officers to the location. Instead, the prosecution in Hammon introduced accusations of assault that were made to the officers at the scene by Amy Hammon, the woman who was later named as the victim.

The scene the officers found in Hammon was similar in some ways to the scene in Davis—they also found a frightened woman and signs of recent violence. The scene was also different in two important ways—Amy Hammon initially said nothing was wrong instead of immediately making an accusation against the assailant, and the alleged assailant was still present at the scene. The statement by Amy that accused Hammon of being the assailant was made while one officer talked to Amy as the other officer remained with Hammon. Hammon was eventually charged with domestic battery and a probation violation by committing a battery.

At trial in Hammon, the responding officer who had interviewed Amy at the scene testified about Amy’s accusations, but Amy did not appear. The trial court admitted Amy’s statement as an excited utterance and convicted Hammon in a bench trial. On appeal, the Indiana Supreme Court rejected Hammon’s confrontation objection. That court concluded that Amy’s oral statement at the scene was not testimonial because it was not “given or taken in significant part for purposes of preserving it for potential future use in legal proceedings.” The Indiana court described Amy’s statement as instead part of a “preliminary investigation in which the officer was essentially attempting to determine whether anything requiring police action had occurred, and, if so, what . . . in the process of . . .

15 See Davis, 126 S. Ct. at 2272.
16 See id.
17 See id.
19 Id. at 456.
accomplishing the preliminary tasks of securing and assessing the scene.”

2. Applying Davis to the Facts Before the Court

In his majority opinion for the Court, Justice Scalia described the issue as whether the interrogation produced a testimonial statement governed by the rule in Crawford. He first examined the facts of Davis. Justice Scalia described a major distinction between Crawford and Davis as the fact that Crawford had involved interrogation “solely directed at establishing the facts of a past crime” while the initial interrogation in a 911 call is “ordinarily . . . designed primarily . . . to describe current circumstances requiring police assistance.”

In his discussion, Justice Scalia identified four more differences between the facts of Davis and the interrogation in Crawford. First, the caller in Davis was describing “events as they were actually happening” rather than events that had occurred. Second, the 911 caller in Davis faced an ongoing emergency, while there was no emergency when the statement was made in Crawford. Third, the questions and answers in Davis were necessary to resolve the emergency, while in Crawford they involved past events. Fourth, the statements in Davis were frantic and made in a setting that apparently was not safe instead of in an interview room in a police station as in Crawford.

Together the circumstances of Davis established that the primary purpose at the beginning of the 911 call was “to enable police assistance to meet an ongoing emergency.” That meant that the statements of the 911 caller were not testimonial, at

20 Id. at 458.
21 See Davis, 126 S. Ct. at 2276.
22 Id.
23 See id.
24 Id.
25 See id. at 2276-77.
26 Id. at 2277.
least until the emergency ended, “when Davis drove away from
the premises.”27 The statements that were made after Davis left
“could readily be maintained” to have been testimonial, but the
petition for certiorari had not raised any question about the later
portion of the 911 call so the Court did not address it.28 The
Supreme Court’s agreement with the Washington Supreme Court
that the initial statements were not testimonial meant that the
Court affirmed the Washington judgment.

The Supreme Court reached the opposite conclusion in
Hammon because that interrogation was similar to the
interrogation in Crawford and distinguishable from the 911 call in
Davis. The formalities of the statement in Crawford such as
the Miranda warning, tape-recording, and location in a police
station were not present in Hammon, but Justice Scalia explained
that none was an essential difference.29 The similarities the
Court stressed were that in neither Crawford nor Hammon was
the defendant present during the interview and in both cases the
statements were answers to police questions about past events.
The Court explained that the statement in Hammon was made
when there was no emergency in progress, it was made by a
person who was then protected by the presence of the police
officers, and it described past events.30

The Supreme Court directly addressed the conclusion of the
Indiana court that “responses to initial inquiries by officers
arriving at a scene are typically not testimonial.”31 It rejected
that conclusion if it meant that “virtually any” response would
be nontestimonial. Instead, the Court stated only that “often” a
response would be nontestimonial. The Court stressed that a
nontestimonial statement would involve a declarant making a
statement to officers as “a cry for help” or “the provision of
information enabling officers immediately to end a threatening
situation.”32 Both the fact that the statement was made at an

28 Id.
29 See id. at 2278.
30 See id.
31 Id. at 2279.
32 Id.
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alleged crime scene and that it was made during initial inquiries were described as immaterial.33

In his separate opinion, Justice Thomas argued that Justice Scalia had provided a test for identifying a testimonial statement that would be unpredictable and not workable.34 Justice Scalia’s direct response was a reminder that he had not tried to provide an exhaustive test, and an assertion that the Davis test was workable for “the cases before us and those like them.”35 He also repeated his earlier statements that the Davis test was “objective.”36

3. The Tests Defined and Rejected in Davis

Justice Scalia confidently predicted in Davis that distinguishing testimonial and nontestimonial statements will be “no great problem” because “trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial.”37 Trial judges faced with this novel task, lawyers trying to anticipate how a judge will rule on an objection, and appellate courts reviewing the results might prefer a little more guidance about what to do with variations on the facts described in Davis.

It is possible to find practical guidance in Davis that will be both substantially accurate in typical cases and not overly complicated. A key element in the Court’s definition of testimonial and nontestimonial statements is an “emergency.” The most significant factor that explains why the outcome in Davis was different from the outcome in Hammon is whether the speaker was facing an ongoing emergency at the time. As a result, one important question is, when does an emergency end?

The Court described a nontestimonial statement as one made

34 Id. at 2280 (Thomas, J., concurring in the judgment in part and dissenting in part).
35 Id. at 2278 n.5.
36 Id.
37 Id. at 2277.
when the speaker was “facing an ongoing emergency.” In discussing why the facts of *Davis* involved an ongoing emergency, Justice Scalia described how the 911 caller was “speaking about events as they were actually happening” and making “a call for help against a bona fide physical threat.” He also explained that the statements were necessary to “resolve the present emergency” and that the speaker was in an environment that was not then safe. He repeated that it was an emergency and that she was seeking emergency assistance. After the operator had the information to address “the exigency of the moment” he explained that “the emergency appears to have ended (when Davis drove away from the premises).” The assailant’s departure from the scene was significant for Sixth Amendment purposes, because “[i]t could readily be maintained that, from that point on, [her] statements were testimonial.”

Justice Scalia described an entirely different scene in *Hammon*—Amy made her statement while “[t]here was no emergency in progress.” She made her accusations to one officer in the living room while another officer remained with Hammon in the kitchen, keeping Amy and Hammon separated. Amy’s statement was testimonial because she was protected by the police who were present. Her statement did not provide information to end a threatening situation immediately; the immediate threat and danger had ended when the officers arrived and separated Amy and Hammon.

The focus on the immediate danger to the speaker at the time of the statement was highlighted by Justice Scalia’s comparison of the facts of *Davis* with the facts of *Hammon*. In *Davis* the declarant was not protected because she was alone waiting for the police to arrive; she was possibly in immediate danger until he left the scene. In *Hammon* the declarant was protected because one officer was with her and another was with the

38 Id. at 2276.
40 Id. at 2277.
41 Id.
42 Id. at 2278.
43 See id.
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alleged assailant in another room.

The definition of emergency in Davis did not include the time the officer was gathering information after the end of the immediate attack, even if the officer was trying to protect the victim from similar harm in the future. That exclusion was deliberate. The State had argued in its brief in Hammon for an “immediate safety” rule that would include statements made after the attack when the police were determining if the victim needed shelter or other assistance.44 The Solicitor General had argued in an amicus brief that an officer could still be “securing the scene” while trying to protect the victim from a repeated flare-up of violence.45

Justice Thomas endorsed this broader view of what constitutes an emergency when he argued in his separate opinion that Justice Scalia had ignored the possibility that the violence could resume if the police departed without taking any steps to prevent a recurrence.46 Justice Thomas argued that meeting an emergency could include determining whether the assailant was still a continuing danger. Under his argument, the definition of a nontestimonial statement could include a statement made after the police had the suspect under control, but while Justice Thomas clearly raised the issue, he wrote only for himself. The language of Davis limited the category of nontestimonial statements to those made while the speaker was facing an ongoing emergency, and described the emergency as ending when either the suspect had left the scene or the suspect was under police control.47

The inquiry about when an emergency ends raises related questions, such as whether the declarant’s specific role in the emergency matters. The explanation that the Davis facts involved a nontestimonial statement because it was made while the speaker was facing an ongoing emergency does not

46 See id. at 2284 (Thomas, J., concurring and dissenting).
47 Id. at 2277-78.
necessarily mean that every statement made during an emergency will be nontestimonial. The rule in *Davis* may not apply if the statement was made during an emergency or about an emergency by a bystander who was not personally at risk or under a threat of harm. At the same time, the explanation in *Davis* does not necessarily mean that every statement by a bystander is testimonial.

Another related question is whether the kind of emergency makes a difference. The explanation that the *Davis* facts involved an ongoing physical threat, that the environment was not safe at the time of the 911 call, and that the emergency ended when the assailant drove away was a description of a specific kind of emergency. Subsequent statements seeking medical care might colloquially be considered statements about an emergency, but they would not be about the kind of emergency that was described in *Davis*.

B. The Supreme Court’s Application of Davis

At the end of June 2006, the Supreme Court disposed of eighteen petitions for certiorari that raised confrontation issues, each of which the Court had held while *Davis* and *Hammon* were argued and decided. In eight of the cases the Court granted the petition, vacated the judgment, and remanded the case for reconsideration in light of *Davis*.48 This disposition is known by

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the acronym of a “GVR.” In all eight GVR cases, the petition had been filed by a defendant. The other ten cases in which the petition was denied included five petitions filed by the prosecution\(^49\) and five petitions filed by a defendant.\(^50\) There were only seventeen defendants in the eighteen petitions because both the prosecution and the defendant filed petitions in a Massachusetts case to obtain Supreme Court review of pre-trial rulings; each petition raised a separate question about a different statement so each is counted.\(^51\) The Court’s denial of certiorari in one other case in which there was a confrontation issue in the state appellate opinion is not applicable here because confrontation was not the question presented in the petition for certiorari.\(^52\)


In October 2006 the Supreme Court disposed of two more similar cases, entering a GVR order “in light of Davis” on both a petition filed by a defendant and a petition filed by a state. In each case the petition had been filed before Davis but the case was not ready for the Court’s discussion at the time Davis was announced.

It is both difficult and unwise to draw any conclusions about the Court’s reasons for a single disposition of a petition by either a GVR or a denial. By their nature, such dispositions are not based on full briefing and oral argument, and there is no explanation from the Court. The GVR order identified Davis as the reason for remanding the ten aforementioned cases for reconsideration, but that does not necessarily mean that each previous opinion reached an incorrect result on its facts. At the same time, the denial of certiorari does not necessarily mean that the result in a case or the court’s reasoning in the previous opinion was correct. A petition may be denied either because the facts do not present the issue or because there is some question about whether the Court would have jurisdiction. However, in each of these twenty cases the Supreme Court docket shows that the petition had been distributed to the Justices for discussion once or twice before being distributed again after Davis was announced. The docket shows that in each case the Court requested a response to the petition if a response had not been filed. These twenty cases were also a selected subset of the confrontation cases filed after the Court granted certiorari in Davis and Hammon; other petitions that raised unrelated confrontation issues were denied during the 2005 term.

56 The Supreme Court docket can be found from the Supreme Court’s web site at http://www.supremecourtus.gov/docket/docket.html.
The disposition of the twenty petitions with ten GVR’s and ten denials shows that the Court sorted the petitions after Davis was announced. Even though the Court did not explain why it sorted the petitions as it did, this is a large enough group that it is worthwhile to consider the facts and dispositions of the cases to determine if there is any pattern that might provide further guidance about the Court’s understanding of the rules in Davis.

1. Statements at the Crime Scene to Responding Officers

a. Comparing Hembertt and Lewis

The strongest pattern can be found in the dispositions of the cases that resembled Hammon. Those were cases that included a statement at the scene of a crime to a responding police officer. The Court entered a GVR order in June 2006 in eight of these cases in which the trial court had admitted a statement that appeared to be testimonial under the test in Davis—either the defendant had left the scene before the statement was made or the defendant was under police control at the time of the statement. The Court denied the petition by a defendant in the one case in which the trial court admitted a statement at the scene that appeared to be nontestimonial under the test in Davis—it was made while the defendant was still at the scene but was not under police control. This pattern can be illustrated by comparing the Court’s different dispositions of a case from Nebraska and a case from North Carolina.

The defendant’s petition was denied in Hembertt v. Nebraska, a domestic assault case that began with a 911 dispatcher directing two patrol officers to a residence to check on the well-being of a resident. At the scene, the officers were contacted at first by a man who said he had made the 911 call and then by a woman who was bruised and “crying, hysterical,

57 See infra notes 65-69, 87-94 and accompanying notes and text.
58 See infra, notes 59-64 and accompanying notes and text.
trembling . . .” The woman declared that she had been beaten and threatened with a knife, that this had happened moments before the officers arrived, and that the assailant was still inside the house. The officers stopped the woman’s report in order to locate the alleged assailant in the house. Inside the house they found Hembertt and arrested him. The officers then interviewed the complainant. The complainant did not appear as a witness at trial. The State’s evidence was the testimony of one responding officer who reported the initial accusation of the complainant. The trial court found the initial accusation was an excited utterance, and overruled the defendant’s hearsay and confrontation objections. The trial court did not allow the officer to testify about the accusations the alleged victim had made in the interview after the defendant was in custody.

The Nebraska Supreme Court affirmed Hembertt’s conviction after rejecting his confrontation argument. The state court concluded that the initial accusations were nontestimonial because they were not the product of structured police questioning, they were made by a frightened declarant when the area and suspect were still unsecured, they were not made in anticipation of eventual prosecution, and they were made to assist in securing the scene and apprehending the suspect.

In contrast to the disposition in Hembertt, a GVR order was entered for the defendant’s petition in Lewis v. North Carolina, a case of assault and breaking and entering that also began with a dispatcher sending an officer to a reported crime scene. At the scene, the officer met a woman who was bruised and “in shock.” The woman reported that she had been assaulted, described the assault, and provided some identifying information about the woman who committed the assault. A police detective

61 Id. at 476-77.
62 Id. at 476.
63 Id. at 477.
64 Id. at 483.
67 Id. at 833.
later conducted another interview of the victim at the hospital. The victim’s death before trial made her unavailable as a witness.68 Instead, the prosecution called the responding police officer and the detective to testify about the accusations of the victim. Both hearsay statements were admitted under the State’s residual hearsay exception.69

The North Carolina Supreme Court affirmed the conviction without endorsing all of the trial court’s rulings. The appellate court concluded that the statement to the detective in the hospital was a product of structured police questioning, but that admitting this statement was only harmless error.70 The court also concluded that the initial statement at the crime scene to the responding officer was not testimonial because there was no formal interrogation or structured police questioning. Instead, the responding officer was fulfilling his role “to collect preliminary information to understand what purportedly took place, determine if medical attention [was] required, secure the crime scene, and possibly identify a perpetrator.”71 The North Carolina court quoted the Nebraska opinion in Hembertt that described statements made to secure the scene and apprehend the suspect as not testimonial.72

The different outcomes in Hembertt and Lewis invite a search for an explanation. Some differences can be set aside. For example, the state court opinion in Lewis included a lengthy discourse on forfeiture, but that would not explain the GVR—the North Carolina court declared that forfeiture was not an issue because the State had stipulated that the defendant did not cause the declarant’s death.73 In Lewis, the post-arrest accusation was admitted at trial and eliminated on appeal as harmless error, while in Hembertt the post-arrest accusation was excluded at trial; but Davis did not provide any new rules about assessing

68 Id. at 832.
69 Id.
70 Id. at 844.
71 Id. at 841.
72 State v. Lewis, 619 S.E.2d 830, 842 (N.C. 2005) (citing State v. Hembertt, 696 N.W.2d 473, 483 (Neb. 2005)).
73 Id. at 832 n.1.
whether an error was harmless. The trial court admitted the initial accusation in *Hembertt* as an excited utterance, while the trial court in *Lewis* invoked the residual hearsay exception, but *Davis* and *Crawford* have emphasized that confrontation analysis is not tied to hearsay categories.

The different outcomes can be explained using the language of *Davis*. In *Lewis*, the assailant was gone by the time the officer arrived at the scene. The immediate threat of danger to the speaker was over. The state court’s explanation in *Lewis*—that the victim’s statement was nontestimonial because the officer was conducting preliminary questioning to understand and secure the scene, to determine the need for medical attention, and to identify a perpetrator—described reasons that did not fit the definition of an emergency adopted in *Davis*. Those facts of *Lewis* were a close match to the facts of *Hammon*, and none of the facts resembled the continued danger the declarant in *Davis* was facing before the police arrived.

In contrast to *Lewis*, the assailant in *Hembertt* had not left the scene when the responding officers arrived. The complainant in *Hembertt* had somewhat more protection from the presence of the officers than the 911 caller had in *Davis*, but neither the complainant nor the officers in *Hembertt* were in an environment as secure as the scene in *Hammon*. The complainant faced an emergency that had not yet ended. The officers in *Hembertt* were informed that the assailant was still nearby, and there was no way the officers could know whether the assailant was armed or otherwise dangerous until they found him. In fact, at *Hembertt*’s trial the officer testified that he stopped the complainant’s story until he had located and obtained control over the suspect.74 The facts of *Hembertt* appear to present a good illustration of what *Davis* described as a nontestimonial “provision of information enabling officers immediately to end a threatening situation.”75

74 *Hembertt*, 696 N.W.2d at 477.
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b. Other Dispositions of Cases Involving Statements at the Scene

The Massachusetts Attorney General made a concerted effort to convince the United States Supreme Court to adopt a broader definition of nontestimonial statements than it eventually did in Davis. In petitions for certiorari in three different cases, Massachusetts argued that Crawford should be limited to formal statements, and that excited utterances in response to an officer’s preliminary inquiries at a crime scene should be considered nontestimonial. In each petition, Massachusetts cited Hembertt for the proposition that only structured police questioning produces a testimonial statement, but the Supreme Court’s denial of the defendant’s petition in Hembertt was not matched with a GVR in any of the Massachusetts cases. Instead, the Supreme Court denied certiorari in all three Massachusetts cases. The difference between Hembertt and the Massachusetts cases were the facts of each case.

Commonwealth v. Gonsalves involved a prosecution for a domestic assault in which the prosecutor had filed a motion in limine to allow introduction of a statement the complainant made to an officer who responded to a report of a disturbance. The complainant subsequently invoked the Fifth Amendment and became unavailable as a witness. The trial court’s ruling that the statement to the officer was testimonial and inadmissible under Crawford was affirmed by the Massachusetts Supreme Judicial Court in a ruling on the Commonwealth’s pretrial petition for relief. The appellate opinion concluded that the complainant’s statement to the responding officer was

77 833 N.E.2d 549 (Mass. 2005).
78 Id. at 551.
79 Id. at 551-52, 562.
testimonial because, “as the defendant already had left, there was no active conflict at the time the officers arrived.”\footnote{Gonsalves, 833 N.E.2d at 552.} For that reason, the officer’s questioning was interrogation under \textit{Crawford} and the statement was testimonial.

On the same day, the Massachusetts court applied its conclusion in \textit{Gonsalves} in two similar cases. In \textit{Commonwealth v. Rodriguez},\footnote{833 N.E.2d 134 (Mass. 2005).} four officers responded to a family dispute; two officers interviewed the defendant outside his home and two officers spoke to the complainant and other family members inside. The accusations by the complainant and his sister were made while the defendant was under police control.\footnote{Id. at 134.} The Massachusetts Supreme Judicial Court concluded that the statements were testimonial; the declarants did not testify at trial so admitting the statements was a violation of the right of confrontation.\footnote{Rodriguez, 833 N.E.2d at 135.}

In \textit{Commonwealth v. Foley}\footnote{833 N.E.2d 130 (Mass. 2005).} there were two responding officers to a domestic dispute. The first officer to enter the house asked only, “Where is he?” The first officer arrested the suspect after a child pointed to a bedroom, and turned the suspect over to the custody of a second officer outside the home.\footnote{Id. at 132.} Only after the arrest had taken place did the first officer talk to the complainant to assess the situation and determine if medical attention was needed; that was when the complainant made the accusation used at trial. The Massachusetts Supreme Judicial Court concluded that the statement to the first officer was testimonial because it was made after the scene was secure.\footnote{Foley, 833 N.E.2d at 133.}

The denials of certiorari in the three Massachusetts cases and in \textit{Hembertt} were consistent. The denials in the Massachusetts cases did not disturb the conclusion that a statement to the police is testimonial if made after the suspect had left the scene or was
under police control. The denial in Hembert did not disturb the conclusion that a statement to the police is not testimonial if the victim still faces a threat from the assailant. The denials also identify what the Supreme Court was defining as the end of the emergency.

GVR orders were entered for several other defense petitions in addition to the petition in Lewis. Those GVRs were consistent with the apparent pattern in Lewis, Hembert, and the Massachusetts cases on when the emergency was at an end. For example, in Thomas v. California, the suspect fled the scene of a domestic assault before the police arrived; the police had the scene secured when the alleged victim made the accusations. In Forrest v. North Carolina, the police responded to a hostage situation in which Forrest appeared to be holding his aunt; the aunt made the challenged statements after the police ended the hostage situation and arrested the defendant. The facts in two other GVR cases involved statements of witnesses after the defendant fled the scene. In Castellanos v. California, the defendant had jumped out of the stolen car he was driving and was trying to escape from a pursuing deputy when a passenger in his car made the particular statement to another deputy. In Billingslea v. United States, the witness described someone who had come into his store shortly after a robbery at a nearby bank; by that time the suspect had apparently fled the area and could not be located by several responding police officers.

The facts in two other cases in which a GVR order was entered based on a defendant’s petition are not as clear, but it appears that neither involved a statement by a declarant who was still facing an emergency. In each case, nothing in the state

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88 126 S. Ct. 2977 (2006) (No. 05-6102) (reversing and remanding State v. Forrest, 611 S.E.2d 833 (N.C. 2005)).
90 126 S. Ct. 2980 (2006) (No. 05-7998) (reversing and remanding United States v. Billingslea, 144 F. App’x 98 (11th Cir. 2005)).
court opinion or the filings in the Supreme Court suggests that the responding officers were concerned about the safety of the scene or locating the defendant at the time the challenged statement was made. For example, in Warsame v. Minnesota\textsuperscript{91} the state court concluded that the entire statement of an alleged victim of domestic abuse was nontestimonial even though the responding officer met the victim on the street two or three houses from the scene of an alleged domestic assault. The opinion did not specify when in the conversation the officer learned that the defendant had left in a car, but it also did not describe any reason the victim might have been facing an immediate threat at the time of the statement. And in Anderson v. Alaska,\textsuperscript{92} the victim of the assault fled the scene, met the responding officers at a nearby motel, and returned with them so that the officers could check on a second victim. The state court opinion did not state whether the suspect was still at the scene, but it did not suggest that the officers were concerned about the presence of the suspect at the scene.

The eighth case in which a GVR order was issued was Wright v. Minnesota.\textsuperscript{93} Wright also involved a domestic assault and statements made by a complainant and her sister to the responding officers after the defendant was in custody. Fitting this disposition in the pattern is a bit more complicated than the other seven GVRs, because the prosecution had introduced a tape and transcript of a 911 call that was made after the defendant had left the scene, but before he had been apprehended. As in Davis, the 911 callers in Wright expressed fears that the defendant might return and cause further harm.\textsuperscript{94} However, while the 911 call appears to be admissible under Davis, the Minnesota Supreme Court had not decided if the 911 call alone was sufficient and had not decided if admitting the

\textsuperscript{91} 126 S. Ct. 2983 (2006) (No. 05-8778) (reversing and remanding State v. Warsame, 701 N.W.2d 305 (Minn. Ct. App. 2005)).


\textsuperscript{93} 126 S. Ct. 2979 (2006) (No. 05-7551) (reversing and remanding State v. Wright, 701 N.W.2d 802, 804-05 (Minn. 2005)).

\textsuperscript{94} Wright, 701 N.W.2d at 804.
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later statements to the responding officers was harmless error. The issue that most probably led to the GVR in Wright was the State’s use of the testimonial statements to the responding officers, and not the admission of the 911 call.

The dispositions after Davis of the cases in which a statement was made at the scene of the crime did not expand on the Davis answers to the related questions about the required role of the declarant in the emergency. Where the facts showed there was an ongoing emergency that created an immediate threat to the declarant, the Supreme Court did not vacate the appellate opinion that found a nontestimonial statement. The GVR dispositions in the cases in which a statement was made at the scene of the crime involved statements that were made when the immediate threat of violence or injury was over for the declarant, as well as for others at the scene. Both the GVRs and the denials of certiorari in the cases involving statements at the scene of the crime are consistent with the facts in Davis of an emergency that involved a threat of harm to the declarant. In some GVR cases and denials of certiorari, the injured victim needed medical treatment, but the pattern of the dispositions does not suggest that the Court considered the need for post-assault medical treatment to create an emergency when it sorted the petitions for disposition after Davis.

c. October 2006 Dispositions

The Supreme Court disposed of two additional petitions with GVRs in light of Davis at the beginning of the 2006 term, three days after the conference on confrontation at the Brooklyn Law School at which this Article was first presented. One petition was filed by the defendant and one by the State; both cases involved statements at the scene of the crime. These dispositions were consistent with the pattern in the cases the Court had sorted in June 2006 immediately after Davis.

In Cross v. Kentucky, the appellate court had allowed the

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prosecution to use a statement by the victim of an assault to a responding police officer; the victim had earlier told the 911 dispatcher that the perpetrator had left the scene in a cab. 96 The GVR is consistent with the explanation in Davis that a statement is testimonial if it is made after the departure of the suspect brings the emergency to an end, and removes the immediate threat of injury to the caller.

In Texas v. Mason, 97 the appellate court had reversed a conviction on confrontation grounds because the prosecution in a domestic violence case had introduced the statement of the complainant to the responding police officer, even though the complainant did not testify at trial. 98 Many of the facts in Mason were similar to the facts in Hammon, with one important difference: the reported opinion describes the responding officer as speaking to the complainant before speaking to Mason, but it does not describe where Mason was located. The brief filed by Mason in the Supreme Court described the officer as first talking to the complainant when she answered the door, and then talking to Mason in the bedroom where he was sitting on the bed and appearing to have been asleep. 99 This description of the facts makes Mason analogous to Hembertt and unlike Hammon on the issue of whether the police had control of the scene at the time of the statement. The accusation was made when the complainant was still at risk of attack, so it was not testimonial under the Davis definition. It appears that the Texas opinion was granted a GVR order because the state court had applied the Confrontation Clause to exclude a victim’s accusation at the scene that was admissible under Davis.
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2. 911 Calls

There were two cases the Supreme Court sorted for disposition after Davis involving only a 911 call. In both cases, the Court denied the defendant’s petition for certiorari. The pattern in these cases is consistent with the pattern in the cases involving a statement at the scene. In addition, these cases highlight the importance of the related question about the required role of the declarant.

The case that most clearly matched the facts of Davis was United States v. Brito. In Brito, there were two calls made to 911, one from a man in an office who heard gunshots in a saloon parking lot and one about the same incident from a woman in a passing car. The man who made the first 911 call was not apparently at any risk from the shooter, but that man testified at trial; there was no confrontation issue about that call. The second 911 call came from an anonymous woman who did not testify at trial. The tape of that 911 call included statements that supported the government’s case as well as this comment:

But I was just saying to my son when I was getting in the car that I didn’t come to Brockton to die. And when I was pulling out and backing out driving down the street, he pointed a gun at me and acted like he was shooting at my car.

The caller then continued by describing where the shooter was standing and what his gun looked like.

Brito was convicted of possession of a firearm by a convicted felon and by an illegal alien, so there was no victim as in Davis or in the other domestic violence cases. Nevertheless, the 911 call supports an objective finding that the 911 caller appeared to be facing an immediate threat from an armed man at the time she made the statements about what was then


101 Id. at 56.

102 Id.

103 Id.
happening. The First Circuit held that the second 911 call did not create a confrontation violation. The Supreme Court’s denial of certiorari in *Brito* is consistent with the *Davis* description of a nontestimonial statement as one made while the declarant was facing an immediately threatening emergency.

In the second case involving only a 911 call, *Massey v. Lamarque*, the declarant in the 911 call was not facing the kind of immediate emergency as in *Davis*. *Massey* involved a murder prosecution for a shooting outside of an apartment building. The prosecution’s evidence included statements by an 11-year-old girl who went to an apartment after the shooting and talked to the 911 operator who had called back because an earlier call had been hung-up. Other evidence showed that the shooter had immediately fled the scene. Nothing in the 911 conversation indicated that the 11-year-old had been threatened or feared for her own safety, but no one foresaw the need to present evidence on the issue raised by *Davis*.

Other facts in *Massey* make it more difficult to know how to classify the denial of certiorari. *Massey* was not a direct appeal from the state court conviction. The conviction in *Massey* had been affirmed by a California District Court of Appeal in an opinion that rejected a hearsay objection to the 911 call, but did not mention confrontation or any federal constitutional issue.

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104 Id. at 62-63.
107 Id.
109 See id.
This petition was filed after Massey lost his statutory habeas action in federal court. In a memorandum written before Crawford, the United States Magistrate Judge recommended rejecting the confrontation claim because the 911 tape was a spontaneous statement that was admissible under a firmly rooted hearsay exception, and that therefore it had adequate indicia of reliability. The Ninth Circuit, in an unsigned and unpublished memorandum opinion, found that the 911 tape was not testimonial, with a citation to an earlier Ninth Circuit opinion which stated that 911 calls were not the evil at which the Confrontation Clause was directed.

The facts of Massey appear closer to the facts of Hammon than Davis, and the Ninth Circuit’s explanation is not supported by Davis. This might suggest that the Ninth Circuit’s conclusion in Massey should be reconsidered after Davis, but Massey’s handwritten pro se petition was denied instead of being granted a GVR order. There are two possible explanations for this result. One is that in sorting the cases after Davis, the Court saw no difference between a 911 call from someone facing an immediate threat and a 911 call from a frightened child who was not facing a threat herself. The other explanation is that the confrontation issue was not sufficiently preserved and presented. The confrontation issue had not been raised in state court and the federal courts had avoided deciding whether it was properly preserved. In addition, other witnesses to the shooting did testify. The state appellate opinion did not have any reason to discuss whether any constitutional error was harmless, but it had suggested that any error in the hearsay ruling was harmless.

The second explanation appears to be the more likely reason for the Court’s denial, which means that the disposition of Massey should not be considered as suggesting that a 911 call can be nontestimonial under Davis if the 911 caller is not facing any danger.

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110 Id. at 10 (Appendix B to Petition for Certiorari, Massey v. Lamarque., 126 S. Ct. 2979 (2006)).
111 See Massey v. Lamarque, 2005 WL 1140025, at *1 (citing Leavitt v. Arave, 383 F.3d 809, 830 n. 22 (9th Cir. 2004)).
The few cases involving 911 calls may not answer every question, but they are a reminder that *Davis* did not endorse the routine admission of all 911 calls. In fact, the Court did deny a defendant’s Petition in one other post-*Davis* case that involved a 911 call. This case has not been included in this analysis because the state court’s finding that the confrontation issue had not been preserved makes it doubtful that the denial of certiorari was based on the facts. If the Court did consider the facts, the denial would be fully consistent with *Davis*. The declarant was facing an immediate emergency because the 911 call apparently was made during a domestic dispute as the defendant was trying to force his way into the caller’s home.

3. Other Kinds of Statements

After *Davis* the Court denied the petitions for certiorari in three cases that involved facts unlike those in *Davis*. In *Texas v. Russo*, the State argued that it should be able to use Prison Discipline Records as business records without providing the defendant with an opportunity to confront the declarants. In *Texas v. Lee*, the State asked the Court to allow the prosecution to use the statement of an accomplice during a custodial interrogation because it was the product of informal questioning. In *Gonsalves v. Massachusetts*, the defendant challenged a state court conclusion that a victim’s hearsay statement to her mother was not testimonial. Each case is a reminder that there are still many unresolved issues after

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*Crawford* and *Davis*, but there is no pattern that might provide further information about interpreting *Davis*.

The last disposition to be discussed is an example of the importance of considering the facts of a case before accepting the language of an opinion as an authoritative holding. The facts of *Greene v. Connecticut*\(^{118}\) involved a gang shooting in which Greene sprayed a crowd with 70 bullets from an assault weapon before he fled the scene.\(^{119}\) He was eventually convicted of manslaughter, two conspiracies, five counts of first degree assault, and possession of an assault weapon; he also plead guilty to three counts of theft of a firearm.\(^{120}\) One of the persons assaulted was Harris, a bystander who later spoke to an officer at the scene. After a lengthy discussion of confrontation doctrine, the state court concluded that Harris’ statement was nontestimonial hearsay.\(^{121}\) The only issue in Greene’s petition was the state court’s interpretation of confrontation doctrine, with a request to hold the case until *Davis* and *Hammon* were decided.

However, the closest the state court opinion in *Greene* came to describing a hearsay statement by Harris was this answer from the officer after the prosecutor asked who had approached him at the scene of the shooting: “A black man, I believe his name was Mr. [Harris] who stated - he came up to me and said he was shot in the foot, in the right foot, and there was a hole in his boot and he was grazed.”\(^{122}\) After testifying about that statement, the officer testified that he had the fire department examine Harris, and that Harris declined an ambulance because he could go to the hospital on his own.\(^{123}\) Another officer testified there was a report on the police radio of a sixth victim, and hospital records confirmed that Harris did have a bullet in

\(^{118}\) 126 S. Ct. 2981 (2006) (No. 05-8187) (denying review of State v. Greene, 874 A.2d 750 (Conn. 2005)).

\(^{119}\) See *Greene*, 874 A.2d at 757.

\(^{120}\) See id. at 755-56.

\(^{121}\) Id. at 771-76.

\(^{122}\) See id. at 772.

\(^{123}\) Id.
his foot.\textsuperscript{124} The defendant did not object to this evidence, and
did not cross-examine either officer about Harris.\textsuperscript{125}

The first question in \textit{Greene} should have been whether there
was an out-of-court statement offered for its truth. The officer’s
observation provided direct evidence that Harris had been shot.
Harris did not say Greene shot him, or even when or where he
had been shot. The statement by Harris explained why the
officer looked at Harris’ foot and had the fire department look at
his foot, but that nonhearsay use of the statement does not raise
a confrontation issue. As a result, the petition by Greene
involved a state court opinion that apparently reached the right
result even if for the wrong reason, an issue that affected only a
minor part of the charges in the case, and facts that did not
present a confrontation issue. The defendant asserted another
confrontation violation in the admission of Harris’ statements at
the hospital, but the state court opinion did not discuss that issue
and neither the state court opinion nor the petition for certiorari
mentions any objection to that evidence. For all these reasons,
the denial of certiorari in \textit{Greene} provides no guidance for
interpreting \textit{Davis}.

\textbf{C. Restating Davis as Rules}

Justice Blackmun provided valuable advice in \textit{Ohio v. Roberts}
when he suggested that any confrontation rule should
consider “the need for certainty in the workaday world of
conducting criminal trials.”\textsuperscript{126} Every condition, exception, and
modification that might make a rule a bit more accurate may at
the same time make it too complex to be applied consistently.
Trying to state every condition in a single rule may produce a
rule that is awkward or inaccurate in practice. Since the end of
an ongoing emergency is the most dominant factor in the
Court’s confrontation analysis of a victim’s statement at the
scene of domestic violence, the effect of \textit{Davis} and the post-

\begin{footnotesize}
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\begin{itemize}
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{See State v. Greene, 874 A.2d 750, 772 (Conn. 2005).}
\item \textsuperscript{126} 448 U.S. 56, 66 (1980).
\end{itemize}
\end{footnotesize}
CONFRONTATION RULES AFTER DAVIS

Davis dispositions on the admissibility of the complainant’s accusation at the scene of a crime of violence can be restated in this way:

A complainant’s accusation about domestic or other violence that has just occurred is TESTIMONIAL if made to responding police officers after the suspect has left the scene or after the suspect is under police control. Such an accusation to the responding police officers is NONTESTIMONIAL if made while the complainant is still facing an immediate threat of further violence or injury.

The emphasis in Davis on the vulnerability of that specific 911 caller and the apparent pattern in the post-Davis dispositions suggest that the admissibility of a 911 call reporting a crime of violence can be restated in this way:

A complainant’s accusation about domestic or other violence in a 911 call is NONTESTIMONIAL if it reports a crime that is ongoing at the time of the call, or if it reports a crime that has just occurred and the caller still appears to be at immediate risk of further assault. Such an accusation in a 911 call is TESTIMONIAL if the violence has ended and the caller is not at immediate risk of further assault before the police respond.

These rules provide guidance that is both accurate and workable in a trial court for typical cases of domestic violence and similar crimes of violence. They may not provide guidance for statements in other kinds of cases or even for domestic violence cases with atypical facts, but the Supreme Court has not determined how the Confrontation Clause applies in every case. The language of Davis will undoubtedly be quoted as other courts try to decide whether other kinds of statements are testimonial or nontestimonial. The post-Davis dispositions provide no further assistance in determining whether such extrapolation beyond the facts of Davis will produce accurate rules.
D. Initial History of the Post-Davis GVRs

The Eleventh Circuit wrote the first opinion on remand in the GVR cases in a per curiam decision that reversed the conviction in *United States v. Billingslea* and remanded the case to the district court for a new trial.\(^{127}\) The opinion explained that the particular statement was testimonial under the test in *Davis* because there was no ongoing emergency at the time, and the only purpose of the interrogation was to obtain evidence of an earlier crime.\(^{128}\) The court held that admitting the statement was a confrontation violation because the defendant could not confront the unavailable declarant at trial and the defendant did not have a prior opportunity to cross-examine the declarant at the time of interrogation.\(^{129}\)

In contrast to the action of the Eleventh Circuit in *Billingslea*, the California appellate court that reexamined its analysis in *People v. Castellanos* after the GVR continued to adhere to its earlier conclusion that there was no confrontation violation. The court found that the facts before it were closer to the facts of *Davis* than to the facts of *Hammon*.\(^{130}\) The statement in dispute was an accusation by a passenger in the car in which Castellanos had been trying to escape from pursuing officers. After Castellanos jumped out of the still-moving car and tried to run away, an officer went to the car to check on the other occupants.\(^{131}\) After the passenger was handcuffed, the passenger volunteered her perspective on the incident with several statements.\(^{132}\) One statement was an accusation that Castellanos had tried to hit an officer with the car when he drove away from an earlier traffic stop.\(^{133}\)

The California appellate court did not discuss whether the

\(^{127}\) No. 03-12483, 2006 WL 3201100 (11th Cir. Nov. 7, 2006).

\(^{128}\) See id. at *2.

\(^{129}\) See id.


\(^{131}\) Id.

\(^{132}\) Id.

\(^{133}\) See id.
emergency that created a threat of harm to the passenger ended when Castellanos abandoned the car and tried to flee on foot. Instead, the court declared that the important fact was the lack of interrogation by the police before the passenger made the accusation.\(^{134}\) That particular interpretation appears to have been rejected by footnote 1 of \textit{Davis}, in which Justice Scalia stated that the lack of interrogation was not sufficient to define a statement as nontestimonial.\(^{135}\) The \textit{Davis} footnote equated volunteered answers and responses to open-ended questions as equally objectionable as actual interrogation if the declarant is never subject to cross-examination. The California appellate court made no effort to explain how its view about interrogation was supported by or consistent with \textit{Davis}. As a result, the California appellate opinion on remand from the GVR has the appearance of a rather weak effort to avoid recognizing that the end of the emergency meant the accusation was a testimonial statement under the definition in \textit{Davis}.

The Minnesota Court of Appeals in \textit{State v. Warsame} also adhered to its earlier holding that the prosecution could use an accusation by a victim that the defendant had threatened to kill her to prove a felony charge of Terroristic Threats.\(^{136}\) The statement was made to an officer at the scene by the victim after the defendant had left with the victim’s sister.\(^{137}\) After the prosecution could not locate the victim, the trial court ruled that \textit{Crawford} made the victim’s statement inadmissible.\(^{138}\) That pretrial ruling was reversed on an appeal by the prosecution.\(^{139}\)

The appellate court held that an initial police-victim interaction at the scene does not involve interrogation, and that a resulting statement is not testimonial. On remand from the GVR, the appellate court accepted the State’s concession that the victim was no longer facing an ongoing emergency at the time she made some of her accusation, but it still concluded that her

\(^{134}\) See \textit{id}.


\(^{137}\) \textit{Id.} at 639

\(^{138}\) \textit{Id}.

\(^{139}\) \textit{State v. Warsame}, 701 N.W.2d 305 (Minn. Ct. App. 2005).
entire accusation was not a testimonial statement.140 The Minnesota court reinterpreted the facts in Warsame as involving not one but three separate emergencies—the threat to the victim who made the accusation, the threat to the sister who had left the scene in the defendant’s car, and the threat to a second sister who was in the residence with a small cut to her hand.141 The threats to the sisters had barely been mentioned in the same court’s prior opinion.142 The court declared that the declarant did not have to be facing her own emergency at the time of the statement.143 All that was required was that there be an emergency—at another location and involving some other person—as long as that other emergency was related to the declarant’s situation so that questioning the declarant might clarify the other emergency.144 The court also did not require that the defendant be creating a threat at the time—the possible need for medical attention to the sister’s cut finger was enough for the emergency to continue.145 The Minnesota court made no effort to support this interpretation of Davis with any language from that opinion, leaving Warsame as another example of an appellate court’s effort to avoid applying the holding of Davis.

Later opinions on remand in other GVR cases recognized that a statement to the police after the emergency ends is testimonial under the test in Davis. In People v. Thomas, a California court concluded that a statement was testimonial because it was made to the police after the defendant had left the scene.146 In State v. Wright, the Minnesota Supreme Court concluded that a statement was testimonial because it was made to the police after the defendant was in custody.147 However, the Minnesota court also concluded that the dividing line between a testimonial and nontestimonial statement did not have to be the

140 Warsame, 723 N.W.2d at 641.
141 Id. at 641-42.
142 Warsame, 701 N.W.2d at 307.
143 Warsame, 723 N.W.2d at 641.
144 Id. at 641-42.
145 Id. at 642.
147 726 N.W.2d 464, 476 (Minn. 2007).
exact moment the suspect was taken into police custody.\textsuperscript{148} In \textit{Wright} the court allowed the prosecution to use statements made by a 911 caller as the 911 operator was trying to reassure the caller that the emergency had ended, that the suspect really was in police custody, and that the caller could hang up.\textsuperscript{149} The 911 operator was not interrogating the victim after the emergency was over, a fact that distinguished this case from the 911 operator’s continued questioning that \textit{Davis} suggested might have produced a testimonial statement.\textsuperscript{150}

Each appellate opinion on remand in \textit{Thomas} and \textit{Wright} also directed the trial court to conduct a hearing to determine if the defendant had forfeited his confrontation right by coercing the declarant from testifying. The Minnesota court in \textit{Wright} concluded that the prosecution could introduce new evidence at the hearing, and rejected the defendant’s objection that expanding the record after conviction violated due process.\textsuperscript{151} The California court in \textit{Thomas} also stated that the prosecution could present evidence of coercion at an evidentiary hearing, without discussing whether the defendant could object to new evidence offered by the prosecution at such a hearing.\textsuperscript{152} On this issue there was no guidance in \textit{Davis}, which left the forfeiture issue in \textit{Hammon} for decision on remand without stating whether forfeiture had to be shown by evidence already in the record.\textsuperscript{153} The Indiana Supreme Court did not discuss the possibility of a separate hearing on forfeiture, because it remanded the case to the trial court for a new trial.\textsuperscript{154}

A marked contrast to the opinions that interpret, apply, or extend \textit{Davis} to the specific facts of the case can be found in the opinion on remand in \textit{Cross v. Commonwealth}.\textsuperscript{155} This opinion from a Kentucky appellate court first presented nineteen

\begin{itemize}
\item \textsuperscript{148} \textit{Id.} at 474.
\item \textsuperscript{149} \textit{Id.} at 475.
\item \textsuperscript{150} See \textit{Davis v. Washington}, 126 S. Ct. 2266, 2277 (2006).
\item \textsuperscript{151} \textit{State v. Wright}, 726 N.W.2d 464, 480-82. (Minn. 2007).
\item \textsuperscript{153} \textit{Davis}, 126 S. Ct. at 2280.
\item \textsuperscript{154} \textit{Hammon v. State}, 853 N.E.2d 277 (Ind. 2006).
\item \textsuperscript{155} 2007 WL 121823 (Ky. Ct. App. 2007).
\end{itemize}
paragraphs reciting the facts and an extended quotation of ten paragraphs from *Davis*. The opinion then concluded in a single short paragraph that a 911 call is nontestimonial if the caller is seeking emergency assistance; that meant there was no confrontation violation in admitting the statement of a 911 caller who reported that the assailant had left the scene in a taxicab.\textsuperscript{156} The Kentucky court neither quoted the paragraph in *Davis* that described the emergency as ending when the assailant left the premises,\textsuperscript{157} nor discussed its apparent failure to apply the definition of an emergency set out in *Davis*.

E. Applications of *Davis* by Other Courts

The initial group of post-*Davis* cases has provided a variety of explanations for deciding whether there was an ongoing emergency at the time a victim or witness made a statement to the police. On their facts, many of these cases reach results that are consistent with the rule that a statement by a victim after the suspect has left the scene or after the police have control of the suspect is testimonial and therefore not admissible without confrontation at trial. Other opinions show resistance to the Court’s definition of the end of an emergency.

1. Statements to Officers at the Crime Scene

After *Davis*, several opinions discussed whether a statement at the scene to a responding officer was testimonial. For example, the Supreme Court of West Virginia concluded that the victim of a domestic dispute made a testimonial statement to responding officers because “[t]here was no emergency in progress when the deputies arrived, and the defendant had clearly departed the scene when the interrogation occurred.”\textsuperscript{158} In a habeas case, a federal district court concluded that a child who had witnessed a domestic assault made a testimonial

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\textsuperscript{156} Id. at *6.\\
\textsuperscript{157} *Davis*, 126 S. Ct. at 2277.\\
\textsuperscript{158} State v. Mechling, 633 S.E.2d 311, 323 (W. Va. 2006).
\end{flushright}
statement because she spoke to a responding officer “when there was no emergency in progress. [The victim] was being treated for her injuries by paramedics and Petitioner had been arrested and taken out of the house.”¹⁵⁹ A Kansas appellate court reached a consistent conclusion without discussion in ruling that a child’s statements about sexual abuse that were made to an officer well after the incidents had occurred were testimonial.¹⁶⁰ The Oregon Court of Appeals reversed a conviction in a domestic abuse case because the prosecution rested on an accusation at the scene by the victim who did not testify; the statement had been made after the “defendant was gone. The emergency had dissipated, and the girlfriend was under no threat of immediate harm.”¹⁶¹ Several other courts have concluded that a statement is testimonial if it is made after the emergency has ended.¹⁶²

Other appellate courts have recognized the importance of identifying the end of the emergency, finding that a statement was not testimonial in cases in which the responding officers did not have control of the suspect. For instance, in Vinson v. State,¹⁶³ a case whose facts resembled those of Hembert,¹⁶⁴ the Nebraska case in which the Petition for Certiorari was denied, the complainant met the responding officer and made the first accusations before the defendant entered the room. The court concluded that this accusation and subsequent accusations the complainant made after the officer saw the defendant were nontestimonial because they were all made at a time when the officer did not feel the scene was safe, and was still assessing

¹⁶¹ State v. Miles, 145 P.3d 242, 244 (Or. Ct. App. 2006).
¹⁶⁴ See supra text accompanying notes 59-60.
whether he needed back-up assistance and whether he needed to place the defendant in the patrol car.\footnote{Vinson v. State, Nos. 01-05-00784-CR, 01-05-00785-CR, 2006 WL 2291000 at **7-9.}

Some appellate courts have defined an emergency more broadly than the \textit{Davis} facts. In \textit{People v. Carpenter},\footnote{No. E038769, 2006 WL 2278763, at *2 (Cal. Ct. App. Aug. 8, 2006).} the responding officer was not able to interview the victim until he found a Spanish interpreter. The statements were made at the hospital when there was no longer any apparent threat that the declarant might be injured. The court rested its conclusion that there was the proper kind of emergency on the officer’s testimony that there might still be an ongoing emergency at the crime scene because: “there was an inordinate amount of blood at the location for there being only one victim . . . I was worried there may be other family members or small children that were unaccounted for . . .”\footnote{Id., at *6.} In \textit{Garcia v. State}, the appellate court concluded there was an ongoing emergency even though the domestic assault had ended and the defendant had left the scene, because the defendant had taken the parties’ child when he left and the complainant feared the child might have been injured when the defendant grabbed him from her.\footnote{No. 03-04-00718-CR, 2006 WL 3841539, at *4 (Tex. App. Dec. 29, 2006).} In \textit{State v. Alvarez}, an Arizona appellate court followed the same reasoning in finding that a statement to officers by an injured victim identifying his assailants was not testimonial, even though the assault had ended and the assailants had fled; the court found it was sufficient that the victim still faced a medical emergency.\footnote{See State v. Alvarez, No. 2 CA-CR 2002-0084, 2006 WL 2790029, at *6 (Ariz. Ct. App. Sept. 29, 2006).}

The opinion of the Eighth Circuit in \textit{United States v. Clemmons} illustrates a similar effort to define an emergency more broadly than a threat of further injury to the declarant.\footnote{United States v. Clemmons, 461 F.3d 1057, (8th Cir. 2006).}
CONFRONTATION RULES AFTER DAVIS

This case involved a felon in possession of a firearm conviction in which the government’s evidence included the statement of an absent witness to a responding officer that the defendant had shot the witness. The responding officers had found the victim lying on the ground with a gunshot wound, talking on his cell phone in a calm voice. Nothing in the opinion suggested that the shooter was still present at the scene, or that the officers were concerned that the suspect was present and a threat to their safety. However, the court concluded that the statement was nontestimonial under *Davis* because the officer described his purpose in interrogating the victim as “[t]o investigate, one, his health to order him medical attention, and, two, try [] to figure out who did this to him.” The court then declared, “Any reasonable observer would understand that [the victim] was facing an ongoing emergency and that the purpose of the interrogation was to enable police assistance to meet that emergency.” This sentence describes the “emergency” from a different perspective than the Supreme Court considered in *Davis*.

There were also cases in which the courts found that a statement at the scene was nontestimonial even though it was made after the defendant had left the scene or was under police control. For instance, a Wisconsin appellate court in a domestic assault case concluded that statements of the victim were nontestimonial without discussing whether the emergency had ended before the victim spoke to the responding officer. Nothing in the opinion suggested that the officers were concerned that the suspect was still on the premises; instead the court focused on whether the declarant would have expected her excited utterances to be used at trial. A few other opinions presented a similar focus on the excitement of the victim. The

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171 *Id.* at 1058-59.
172 *Id.* at 1060-61.
174 *Id.*
common thread in these opinions is the absence of any discussion of whether the emergency had ended at the time the statement was made. That silence is a confirmation that there is no guarantee that the details of a definition adopted by the Supreme Court and applied by the Supreme Court in sorting the next twenty cases will be even recognized by other courts.

2. 911 Calls

Some appellate cases in which the challenged statement was made in a 911 call have followed the distinction between an ongoing emergency and a report after the emergency has ended. In two cases the, 911 caller was apparently facing an ongoing emergency. One court concluded that a statement was nontestimonial in a case in which the 911 call from a cell phone reported an intoxicated driver who had just thrown a beer bottle at the caller.176 Another court reached a similar conclusion about a 911 caller whose complaint that he had been rammed more than once by an intoxicated driver “described events as they were actually happening.”177 In addition, the importance of the end of the emergency under Davis was recognized by a Texas court that concluded that a 911 caller made a testimonial statement where the caller’s report of a domestic assault at her own house was made ten to fifteen minutes after the assault, when she and her children were at her mother’s house and there was little or no threat of imminent danger.178

As for the cases involving statements at the scene, not every case involving a 911 call used the Davis definition of an emergency to determine if a statement was testimonial. In State v. Camarena, the Oregon Court of Appeals concluded that an accusation of domestic assault in a 911 call that was made a minute after the assault was not testimonial because the facts were more similar to Davis than to Hammon.179 The opinion did

not directly discuss the significance of the 911 caller’s immediate statement that the assailant “took the car and he left.”\textsuperscript{180} Instead, the opinion simply asserted that it was more likely the caller was seeking protection against renewal of the assault than just reporting a past crime, a statement without any apparent support in the transcript of the 911 call quoted in the opinion. The opinion then declared that the intent of the declarant did not matter since “the dispositive distinction . . . is the primary purpose of the interrogation.”\textsuperscript{181} Moreover, the opinion did not explain why this proposition negated the fact the emergency had ended.

In several other opinions the courts did not discuss whether a nontestimonial statement had to be made by a declarant who was facing an immediate emergency. For instance, an Ohio court declared the purpose of a 911 call was to meet an ongoing emergency without mentioning the location of the defendant at the time; he clearly was gone when the police arrived.\textsuperscript{182} The Seventh Circuit concluded that a 911 call was a nontestimonial statement where the caller was describing an ongoing gun battle outside her apartment.\textsuperscript{183} The court mentioned that the caller did not identify herself because she was concerned for her own safety,\textsuperscript{184} but the facts do not suggest there was an immediate threat to the 911 caller. An Oregon court similarly did not discuss any threat to the 911 caller in reviewing a conviction for being a felon in possession of a firearm where the 911 call by the defendant’s mother was a report that he had threatened to shoot himself.\textsuperscript{185} An appellate court in California concluded that a statement in a 911 call by the sister of an assault victim during the assault was not testimonial without discussing whether the sister also was being threatened.\textsuperscript{186} Finally, an appellate court in

\textsuperscript{180} Id. at 269.
\textsuperscript{181} Id. at 275 (emphasis in original).
\textsuperscript{183} See United States v. Thomas, 453 F.3d 838, 844 (7th Cir. 2006).
\textsuperscript{184} Id. at 841-42.
\textsuperscript{185} See State v. Skiles, 139 P.3d 1006 (Or. Ct. App. 2006).
\textsuperscript{186} See People v. Campos, No. B186815, 2006 WL 3198793, at **6-7
Mississippi concluded that a 911 call by the defendant’s wife in which she reported that she had just seen the defendant abducting the wife’s friend and driving away was not testimonial because the wife was trying to initiate an investigation of the current situation and not recounting a past crime.\(^{187}\)

**F. An Initial Appraisal**

Identifying the pattern in the post-\textit{Davis} certiorari dispositions does not necessarily add any explanation beyond the language of \textit{Davis} for the Court’s decision to make the existence of an ongoing emergency such an important factor in the confrontation analysis of statements by domestic violence victims. However, it is possible to consider some effects of that decision.

First, the rules provided by \textit{Davis} for 911 calls and statements to responding officers have refined prior confrontation doctrine. In \textit{White v. Illinois},\(^{188}\) the Supreme Court held that there was no confrontation violation when the prosecution used an excited utterance of an available declarant. The Court in \textit{White} limited the grant of certiorari to the confrontation question,\(^{189}\) so it did not define an excited utterance and did not have to decide whether the statements in the case were actually the proper kind of excited utterances. In \textit{Crawford}, the majority opinion by Justice Scalia cast doubt on \textit{White} and suggested that an excited utterance had to be made “immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.”\(^{190}\) \textit{Davis} modified both of these prior discussions without mentioning either \textit{White} or the \textit{Crawford} gloss on \textit{White}. After \textit{Davis}, a statement by a declarant who is still under the stress of a startling event may fit within the excited utterance


\(^{189}\) \textit{Id.} at 351 & n. 4.

hearsay exception, but those facts will not resolve the confrontation question. The statement will be testimonial, even if the declarant is still under stress, if the emergency ended when the suspect fled or the officers had the suspect under control.

Second, the phrasing of Davis appears to minimize the need to choose in most cases between the intent of the questioner or the intent of the declarant in identifying a testimonial statement. Neither should matter in a typical case because the rules depend on an objective interpretation of the circumstances in which the statement was made. Justice Scalia illustrated that process by making assumptions about what a typical person would have been thinking and intending in the circumstances described in the record. Perhaps that leaves the door open for a contrary conclusion, only on substantially different facts. A defendant might show that the circumstances were atypical because either the questioner or declarant was explicitly trying to create a substitute for future testimony instead of trying to resolve the immediate emergency. The prosecution might show that the emergency was more extensive than in most similar circumstances.

In addition, the rule in Davis has provided a substitute for judicial evaluation of reliability, the perceived defect in Roberts that Crawford sought to eliminate. However, Davis has raised several questions of its own. Did Davis make confrontation doctrine more predictable and consistent? Does Davis support Justice Scalia’s emphasis that whether a statement is testimonial depends on facts beyond the control of the prosecution or police? Some actual cases suggest the complexity of answering these questions. For example, in the Nebraska prosecution in Hembert191 there was still an ongoing emergency because the two responding officers met the victim first, while in the Massachusetts prosecution in Rodriguez192 the emergency came to an end more quickly because two of the four responding officers contacted the victim and two located the suspect. These cases demonstrate that the application of Davis may depend on

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191 See supra text accompanying notes 59-60.
192 See supra text accompanying note 81.
how many officers are dispatched to a complaint or on the
officers’ strategy in responding at the scene.

The rule in *Davis* can also make the application of
confrontation doctrine depend on the declarant’s choice of
words. A declarant who wants the prosecution of a domestic
batterer to succeed without the testimony of the declarant should
tell the responding officer immediately about the details of the
crime and the identity of the assailant before the officers locate
the assailant. Such a declarant should not immediately tell the
responding officers that the assailant has ended the immediate
emergency by leaving the scene. Conversely, a declarant who
wants to preserve the option to preclude the prosecution of the
batterer by ignoring a summons should ask the responding
officer for protection but not explain the details of the crime or
identify the assailant as the specific cause of any injury until the
officer has the assailant under control. A 911 caller who says
the assailant has left the scene similarly would preserve the
option to block the prosecution by ignoring a subpoena, while a
911 caller who expresses fear that the assault will continue or
resume would permit the prosecution to proceed on the basis of
the nontestimonial statement.

The defendant’s conduct at the scene can sometimes also
affect the confrontation analysis. For instance, the defendant in
the Nebraska prosecution in *Hembert* could have converted
the victim’s nontestimonial statement into a testimonial statement
that would have been excluded on a confrontation objection by
coming out of the residence immediately, so the responding
officers would know they had control before the victim made an
accusation.

The purpose of considering these factual variations is neither
to suggest that declarants will often try to game the system with
strategic decisions about what to say and how to say it, nor to
suggest that the Court’s holding in *Davis* can be easily
manipulated by law enforcement training. The purpose is rather
to ask whether the test is likely to regularly lead to outcomes
that are consistent with the policies the rule is intended to

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193 *See supra* text accompanying notes 59-60.
implement. On that basis, the different outcomes from these factual variations appear quite removed from any original purpose of the Confrontation Clause. Crawford described the principal evil as the civil-law mode of criminal procedure that used ex parte examinations as evidence against the accused.\footnote{See Crawford v. Washington, 541 U.S. 36, 50 (2004).} Davis reemphasized that “it is the trial use of, not the investigatory collection of, ex parte testimonial statements which offends [the Confrontation Clause].”\footnote{Davis v. Washington, 126 S. Ct. 2266, 2279 n. 6 (2006) (emphasis in original).} What Davis did not explain is why its test appears to depend on how statements are collected.

The factual variations also highlight how much the discussion of the objective circumstances in which a statement was made directs attention away from confrontation as a right of the defendant. Perhaps the Justice who lamented that an earlier Court used “reasoning [that] abstracts from the right to its purposes, and then eliminates the right”\footnote{Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting).} should ask if the rule in Davis illustrates the danger of abstracting from the right to a surrogate that eliminates any mention of the person who holds the right created by the constitutional text.

II. \textit{Davis} and Overall Confrontation Doctrine

The Davis opinion discussed overall confrontation doctrine in the course of applying the Confrontation Clause to the specific facts of Davis and Hammon. Other courts and attorneys now must determine whether they can apply the language of Davis beyond its facts.

The Davis opinion often warns the reader not to expect to find a global statement of confrontation doctrine. The analysis begins with an explicit self-limitation that it is addressing the topic “[w]ithout attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as
either testimonial or nontestimonial.” 197 This is followed with a further warning about the scope of the opinion because “it suffices to decide the present cases to hold” 198 with a rule only for certain kinds of police interrogation. This limitation is explained with a footnote that the holding refers to interrogations because those are the facts “in the cases presently before us.” 199 Lest someone consider Davis as establishing whether a 911 operator is always a law enforcement officer for confrontation purposes, another footnote made clear that Davis assumed that the 911 operator was part of law enforcement: “For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police.” 200 Davis said that in both Crawford and Davis, the holding “makes it unnecessary to consider whether and when statements to someone other than law enforcement personnel are ‘testimonial.’ ” 201 On the facts of Davis, the Court decided only whether the early portion of the 911 call was testimonial because the Petition for Certiorari “asked [the Court] to classify only [the caller’s] early statements identifying Davis as her assailant.” 202

In a direct response to the argument by Justice Thomas in his dissenting opinion that the Davis test was unworkable, Justice Scalia repeated his statement that “our holding is not an ‘exhaustive classification of all conceivable statements . . . ’” 203 but that it was “rather a resolution of the cases before us and those like them.” 204 He defended his rule as “the rule we adopt for the narrow situations we address.” 205 His concluding remarks about the possibility that Hammon had forfeited his right to assert a confrontation objection began with the caution that “[w]e take no position on the standard necessary to

197 Davis, 126 S. Ct. at 2273.
198 Id.
199 Id. at 2274 n. 1.
200 Id. at 2274 n. 2.
201 Id.
202 Id. at 2277
204 Id.
205 Id. at 2278-79 n. 5.
demonstrate such forfeiture.\textsuperscript{206}

Justice Scalia’s ten-fold caution about the limited issue addressed in \textit{Davis} may not stop other courts and lawyers from invoking the language in \textit{Davis} on other confrontation issues. Small differences between the phrasing in \textit{Crawford} and \textit{Davis} may draw particular attention. For example, in \textit{Davis}, Justice Scalia restated the \textit{Crawford} holding that a custodial statement of an accomplice who did not appear at trial was inadmissible without confrontation because it was testimonial.\textsuperscript{207} In \textit{Davis}, he wrote a broader statement when he stated that “[o]nly” a testimonial statement can “cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that . . . is not subject to the Confrontation Clause.”\textsuperscript{208} Justice Scalia did not mention in \textit{Davis} that \textit{Crawford} had not used the word “only” to limit the scope of the Confrontation Clause to testimonial statements; \textit{Crawford}’s phrasing was that testimonial statements were the “primary object” of the Confrontation Clause.\textsuperscript{209} In \textit{Davis}, Justice Scalia followed a quotation from \textit{Crawford} about the “focus” of the Confrontation Clause on testimonial hearsay with the stronger assertion that testimonial hearsay was “[a] limitation so clearly reflected in the text of the constitutional provision [that it] must fairly be said to mark out not merely its ‘core’ but its perimeter.”\textsuperscript{210}

Justice Scalia bolstered his statement in \textit{Davis} that testimonial hearsay was the perimeter of the right of confrontation with historical evidence not presented in \textit{Crawford}. He asserted: “We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined.”\textsuperscript{211} That might be a useful hypothesis for examining the

\begin{flushleft}
\textsuperscript{206} \textit{Id.} at 2280.
\textsuperscript{207} \textit{See id.} at 2273 (quoting \textit{Crawford} v. Washington, 541 U.S. 36, 53-54 (2004)).
\textsuperscript{208} \textit{Id.}
\textsuperscript{209} \textit{Crawford}, 541 U.S. at 53.
\textsuperscript{210} \textit{Davis} v. Washington, 126 S. Ct. 2266, 2274 (2006).
\textsuperscript{211} \textit{Id.} at 2274-75.
\end{flushleft}
historical record, but there are at least two reasons to ask how much it supports the proposition for which it was offered. First, the value of evidence that a particular doctrine was not used depends on whether there were instances where it could have been used and was deliberately not used. The same result would follow if there was no occasion to use the doctrine, or if those who might have used the doctrine were not the ones who knew about it. Second, it is not a true statement about history. For example, Chief Justice Marshall sitting as a Circuit Justice excluded evidence of private conversations that were offered as co-conspirator statements in the well-known prosecution of Aaron Burr. These questions about the historical argument suggest caution in expecting *Davis* to serve as a reliable source for new issues.

The final discussion in *Davis* about the standard for determining a possible forfeiture of the right of confrontation provides a strong contrast with the many cautions about the limited issues addressed in *Davis*. The discussion provides greater detail than might have been expected for what is labeled as advisory dictum on an issue that might or might not arise on remand. The Indiana courts had not relied on forfeiture and the parties had not briefed the issue. Justice Scalia did not discuss why the forfeiture doctrine was supported by the historical evidence he presented in *Crawford*; he also did not explain how this nontextual interpretation was consistent with the text of the Confrontation Clause.

Omissions from *Davis* also may have an effect on the development of confrontation doctrine for other facts. *Davis* did not mention *Idaho v. Wright*, a prosecution for child sexual abuse in which Justice Scalia joined Justice O’Connor’s majority opinion that found a confrontation violation in the prosecution use of a child victim’s hearsay statements. *Davis* was consistent with *Crawford*, which also omitted *Wright*, even though Justice

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213 *Davis*, 126 S. Ct. at 2279-80.

Scalia’s majority opinion in *Crawford* cataloged the Court’s other confrontation opinions.

**III. LOOKING AHEAD**

A Petition for Certiorari that became a new hold on the Court’s docket also provides an apt illustration of the Supreme Court’s search for stable confrontation doctrine. The facts of this case began with a 1982 death that led to the murder conviction of Ralph Earnest on the basis of a custodial confession of his alleged confederate. On appellate review, the New Mexico Supreme Court reversed that conviction on the basis of *Douglas v. Alabama*, because the defendant never had an opportunity to cross-examine the declarant. The State’s 1985 Petition for Certiorari resulted in an order for GVR by the Court for reconsideration in light of *Lee v. Illinois*, the case in which Justice Brennan’s majority opinion discussed the interlocking confession theory. This was an atypical GVR, because Justice Rehnquist added a concurring opinion joined by three other Justices. In his concurrence, he suggested that *Douglas* had been supplanted in part by *Ohio v. Roberts* and that after *Lee*, the proper test was not cross-examination, but rather, reliability. The *Earnest* opinion was the high-water mark for the reliability theory in the Supreme Court, attracting four votes but not a majority. It was also the last confrontation opinion before Justice Scalia joined the Court.

On remand, the New Mexico Supreme Court affirmed the

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217 See Earnest, 703 P.2d at 872.
219 See id. at 649 (Rehnquist, J., joined by Burger, C.J., and Powell & O’Connor, II., concurring).
221 See New Mexico v. Earnest, 477 U.S. at 649-50.
conviction. This time the defendant filed what was the second Petition for Certiorari in the case; it was denied. The denial of Earnest’s habeas corpus petition in federal court was eventually affirmed by the Tenth Circuit in 1996. The defendant then filed the third Petition for Certiorari in his case; it also was denied.

After Crawford, Earnest filed a new petition for a writ of habeas corpus in state court. The New Mexico District Court concluded that Crawford was retroactive and granted the petition. The New Mexico Supreme Court affirmed the order that the State release Earnest or elect to retry him. The court described the situation and its conclusion:

It is beyond dispute that since Crawford, the rest of the nation knows now what the New Mexico Supreme Court announced in 1985: under the Sixth Amendment, statements from an alleged accomplice to an officer are inadmissible unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant.

* * *

Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest’s case twenty years ago has now been vindicated, which entitles him to the same new trial he should have received back then.

The State of New Mexico then filed the fourth Petition for Certiorari in this case. That petition was distributed for the

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225 Earnest v. Dorsey, 87 F.3d 1123 (10th Cir. 1996).
228 See id.
229 Id.
230 Id. at 146, 148-49.
231 Petition for Writ of Certiorari, New Mexico v. Forbes (U.S., No. 05-644, Nov. 17, 2005).
CONFRONTATION RULES AFTER DAVIS

Court’s Conference of May 11, 2006, as was the petition in *Whorton v. Bockting* raising the same retroactivity issue; only the Petition in *Whorton* was granted. The Court took no action on the petition of New Mexico for several months while *Whorton* was being decided. During the time the New Mexico petition was on hold in the United States Supreme Court, the State of New Mexico tried to obtain an untainted conviction of Earnest by calling the hearsay declarant as a witness at the new trial. When the declarant refused to testify, the State released Earnest from prison. After the Court held in *Whorton* that *Crawford* is not retroactive, it denied the New Mexico petition. That ended the prosecution of Earnest. This resolution may be further evidence that the 1987 opinion in *Earnest* in particular was a step in the wrong direction, but there is still more work to be done as the courts undertake the complex task of reevaluating all the confrontation doctrine developed in recent decades.

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234 See id.
CONFRONTATION AS CONSTITUTIONAL CRIMINAL PROCEDURE: CRAWFORD’S BIRTH DID NOT REQUIRE THAT ROBERTS HAD TO DIE

Robert P. Mosteller*

INTRODUCTION

This essay has changed in basic nature between when it was first presented at this symposium. It was initially about the conflict between the Confrontation Clause in Ohio v. Roberts,¹ which provided the basis for Confrontation Clause analysis for over two decades, and the Clause as seen in the 2004 decision, Crawford v. Washington.² I had no doubt that Crawford was dominant, and virtually no question that Justice Scalia intended to vanquish Roberts completely.

The issue was whether, as a matter of constitutional criminal procedure, Roberts “had to die.” My conclusion was that Roberts was in very good company when one looks at the general range of modern constitutional criminal procedure doctrines derived from the Fourth, Fifth, and Sixth Amendments. In particular, I believed that Idaho v. Wright,³

* Chadwick Professor of Law, Duke Law School. I wish to thank Craig Bradley, Erwin Chemerinsky, Randy Jonakait, Rick Lempert, Roger Kirst, Jeff Powell, and Andy Taslitz for their helpful comments on an earlier draft of this essay. I also wish to thank the participants in the Brooklyn Law School Symposium for lively debate and helpful insight, and my research assistant Allison Hester-Haddad.

¹ 448 U.S. 56 (1980).
which rested on Roberts, contains an important concept worthy of continued life—unreliable and accusatory hearsay should be required to pass at least a minimal screening process under the Confrontation Clause of the Sixth Amendment before it could be used against a criminal defendant without confrontation. I hoped that Roberts would be allowed to continue to provide supplementary protection for nontestimonial hearsay that was facially problematic and that this essay might in some small way provide support for Roberts’ continued life within the federal Confrontation Clause. The preceding paragraph is written largely in the past tense. This is because as I was completing the editing of this essay, the Supreme Court decided Whorton v. Bockting, 4 which states in unmistakable terms that Roberts is dead and that the Confrontation Clause of the Sixth Amendment has no role in excluding unreliable hearsay that is nontestimonial. 5

When I read the Bockting opinion, it brought to mind a story from my first year at Yale Law School. A friend there, let me call him Dave, had many interests outside of legal studies. As we approached our first semester exams, some classmates worried that Dave had not spent the necessary hours studying. He entered one particularly difficult exam, and to everyone’s amazement, he almost immediately began writing on the very lengthy and difficult single question that comprised the exam. He later told us he began writing quickly in order to avoid panic. Unfortunately for Dave, deep into the exam, he learned of the death of the party around whom he had structured his exam answer. Judging correctly that it was too late to start over, Dave tore a page from his bluebook, wrote on it “had X not died,” placed that piece of paper in the front of his bluebook, and kept writing. There was nothing else that could be done. Fortunately, Yale’s first semester exams are pass/fail, and Dave passed. He has gone on to be a very successful attorney. I now figuratively insert that bluebook page, and suggest that readers examine this essay as they would “had Roberts not died.”

5 See infra notes 51-53 and accompanying text.
After the strong suggestion in *Davis* of *Roberts*’ demise, I did not entirely understand the apparent happiness of liberal leaning academics. I believe *Roberts*’ death should be mourned rather than celebrated. The end of such supplemental protection under the federal Constitution is unfortunate, and it makes this essay in many ways an “academic” exercise, which it presumably will be during my lifetime with regard to the federal Constitution. I nevertheless recommend this essay and what is now a thought experiment to readers as part of *Roberts*’ decent burial. Moreover, the arguments presented here are not irrelevant. State supreme courts have the power to preserve *Roberts*-type protection under their states’ confrontation clauses, which need not move in lockstep with the United States Supreme Court, particularly when that Court goes beyond the clarity of historical sources and ignores important values. Additionally, now that the Supreme Court has stated that unreliability is not a direct concern of the Sixth Amendment’s Confrontation Clause, as matters of policy, the legislatures can and should structure statutory protections to guard against unreliable nontestimonial hearsay.

The basic *Crawford* approach, whether or not precisely correct in formulation, remedies an inadequacy in constitutional protection of the core confrontation right. Accordingly, I do not disagree with the proposition that *Crawford* is roughly “right.” However, I do not accept that *Roberts* was all wrong in providing lesser supplementary protection outside the core concerns embodied in the testimonial concept. Given the obvious and widely recognized inadequacy of *Roberts*’ protection for the confrontation right, one might wonder why—or whether—the decision would have been worth preserving. I was in fact most

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6 See generally Robert P. Mosteller, *Softening of the Formality and Formalism of the “Testimonial” Statement Concept*, 19 *Regent U. L. Rev.* 429 (2007) (discussing some of the advances of *Davis* against the possibility of an extremely formal and formalistic definition but also noting some of the remaining problems with even a “softened” definition anchored in formality).

7 I am not alone in finding value in its residual protections. See Laird C. Kirkpatrick, *Nontestimonial Hearsay After Crawford, Davis, and Bockting*, 19 *Regent U. L. Rev.* 367 (2007) (arguing the multiple ways that *Roberts*
concerned with preserving Wright, which has not been officially interred, but likely has no future under Crawford.\textsuperscript{8}

In Wright, the court excluded highly problematic statements by a child that were accusatory and secured by leading questions asked by a pediatrician, rather than a police officer, as violating the Confrontation Clause under Roberts. Situations analogous to that in Wright, whether or not declared to involve testimonial statements, should but are not likely to be scrutinized under the Confrontation Clause.\textsuperscript{9} Hopefully, such scrutiny (or some

\textsuperscript{8} Of course, it is not possible to know if Wright will be preserved by the Supreme Court, but its future is realistically bleak. Its focus is the unreliability of the out-of-court statement, which Bockting excludes from Confrontation Clause scrutiny. 127 S. Ct. at 1183. Ominously, Scalia had not cited Wright at all in either Crawford or Davis, although he cited many other recent cases which he endorses in result if not in approach. Crawford, 541 U.S. at 58-60. Moreover, the case does not exhibit the types of features that clearly brings it within the testimonial concept (questioning by a police officer), and the private status of the doctor who received the statement and the arguable primary purpose of his questioning of the child—to conduct a medical examination—would support treating it as nontestimonial. See generally Robert P. Mosteller, Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them,” 82 IND. L.J. 919 (2007) (examining the developing consensus among the lower courts to include some statements by children, such as those to police officers, within the testimonial concept and to exclude others, such as those to doctors, and the potential decisive impact of Davis’ focus on the questioner’s “primary purpose” in resolving the treatment of children’s statements).

\textsuperscript{9} If one had the power to move the Supreme Court toward revision of Roberts as a true supplemental protection outside the core defined by testimonial statements, rather than its preservation to offer protection against highly problematic accusatory hearsay, I might try to reformulate Roberts’ dimensions to redefine its relationship to hearsay exceptions, for example, and give review under it somewhat more rigor. My sense, however, is that mere preservation without reform will be difficult enough, if not impossible. I choose here take on one largely hopeless task at a time. Perhaps the testimonial statement concept will be developed in future cases to be broad enough that many of my concerns about problematic, typically highly accusatory hearsay, will be met directly because these problematic statements will be defined as testimonial. Despite the largely positive direction of Davis in softening the testimonial statement concept in terms of its formality and
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scrutiny) will continue in some courts and through other legal mechanisms.

Part I and Part II of this essay compare the approaches set forth in *Crawford* and *Roberts*. I accept that *Crawford*’s core concept may be anchored firmly in constitutional history, but that did not necessarily render *Roberts* wrongheaded or an unfit constitutional outlier. Of course, originalism dictates that *Roberts* (and likely *Wright*) must die, but that is equally true of much of the rest of modern constitutional criminal procedure based on the Bill of Rights. In Part III, I examine the story of Sir Walter Raleigh, certain aspects of which the Court relied upon in *Crawford* to establish the new Confrontation Clause jurisprudence. However, the Court in that case conveniently omitted other problematic hearsay introduced against Raleigh history, which lends support to a somewhat broader confrontation right. Part IV describes the difficulties

formalism, which unfortunately may be almost inherent in a definition built around the testimonial concept, I fear a confrontation jurisprudence that covers exclusively testimonial statements will be inadequate. *See generally* Mosteller, *supra* note 6 (noting the positive movement of *Davis* but the uncertainty of the future course of the definition given the continued commitment to formality as a necessary element and the difficulty of providing appropriately broad coverage of problematic accusatory hearsay while remaining at all true to the word “testimonial”).

*10* Although the detail of the Framers’ primary concern is at best difficult to pin down and more likely impossible to determine, I believe that at a somewhat broader level it is clear that the Confrontation Clause was written as part of the effort to reject the inquisitorial model of trial and accordingly that it firmly rejected *ex parte* examinations that were part of the civil-law mode of criminal procedure. *See Crawford*, 541 U.S. at 50. That leads to exclusion of “testimonial statements” in their narrow definition, but would also extend to other areas, such as accusatorial statements that might provide a more useful shorthand. *See Robert P. Mosteller, “Testimonial” and the Formalistic Definition—the Case for an “Accusatorial” Fix*, 20 CRIM. JUST. 14 (Summer 2005). *See generally infra* note 94.

*11* In *Davis v. Washington*, 126 S. Ct. 2266 (2006), Justice Scalia focused on one isolated part of the Raleigh story as proof by itself of the Framers’ intent:

The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed
confronted in the process of translation that is inherent in the originalist approach, and proposes ways of negotiating this process.

I. THE FUNDAMENTAL DIFFERENCE BETWEEN THE CRAWFORD AND ROBERTS APPROACHES

Crawford’s transformation of confrontation analysis from a broad but weak reliability based system to a regime that offers far more powerful protection for the narrow class of testimonial statements was a stunning development. I begin by describing the new system and then set out and critique the old methodology.

A. The Crawford Approach

In Crawford, the Supreme Court created a new paradigm for Confrontation Clause analysis with regard to the admission of out-of-court statements. In an opinion authored by Justice Scalia, the Court applied the Clause with real rigor to a subset of such out-of-court statements, which it termed “testimonial” statements. Relying on history, dictionary definitions, and his own brand of originalism, Scalia found support for a focus on such statements in the use of the word “witnesses” in the text of the Sixth Amendment, which guarantees the accused in a criminal case the right “to be confronted with the witnesses

interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning. Raleigh’s Case, 2 How St. Tr. 1, 27 (1603)).

Id. at 2274 n.1. Surely the Cobham letter is part of the Raleigh story, but we have no indication that the Framers thought it particularly significant and certainly no indication that the words of the Constitution are designed to cover volunteered statements because of the injustice of receiving such evidence. Scalia has no more evidence that the Cobham letter should define the right than admission of the hearsay accusation from the Portuguese gentleman, see infra Part IV, which is nontestimonial under his terminology and which he conveniently completely ignores.
Justice Scalia observed that history reflected a special concern by the Framers for the use of statements that were of a “testimonial” character: “[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”

He cited two specific examples: first, the use of statements taken from accusers by the examining magistrates under the Marian Statutes in the sixteenth century, and second, the accusations of Lord Cobham against Sir Walter Raleigh in his treason trial, who had implicated him in both an examination before the Privy Council and in a letter to it.

With respect to the dictionary and its insight into the meaning of the constitutional language, Justice Scalia wrote:

> The text of the Confrontation Clause reflects this focus. It applies to “witnesses” against the accused—in other words, those who “bear testimony.” “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of...”

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12 U.S. CONST. amend. VI.
13 *Crawford*, 541 U.S. at 50.
14 *Id.* at 44, 50.
15 Justice Scalia states that Cobham “had implicated [Raleigh] in an examination before the Privy Council and in a letter.” *Crawford*, 541 U.S. at 44. Cobham’s accusation was obtained through interrogations in the Privy Council on three different occasions. 1 DAVID JARDINE, CRIMINAL TRIALS 410 n.† (1832) (indicating interrogations on July 16, 19, and 20, 1603). Cobham wrote two letters to the Council, which were read at Raleigh’s trial. One letter was dated July 29, 1603, which was written after his examination on July 20, and was used to “fortify the Lord Cobham’s accusation against” Raleigh. *Id.* at 422-23. The second, a much more damning letter that implicated Raleigh directly, was written in November during the trial. *Id.* at 444-46. See Robert P. Mosteller, Crawford v. Washington, *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 545 (2005). Again in *Davis*, Scalia refers to only one letter, stating “[p]art of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning.” *Davis*, 126 S. Ct. at 2274 (citing Raleigh’s Case, 2 How. St. Tr. 1, 27 (1603)). The letter described in his cited source is the latter of the two, which directly accuses Raleigh.
establishing or proving some fact.” 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.\footnote{\textit{Crawford}, 541 U.S. at 51 (quoting 1 N. \textsc{Webster}, \textsc{An American Dictionary of the English Language} (1828)).}

From these sources and his originalist perspective, Scalia adopted the testimonial statement approach. He left for another day a comprehensive definition of such statements, stating that “it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”\footnote{\textit{Id.} at 68.}

The Court slightly amplified the coverage of testimonial statements in \textit{Davis v. Washington}.\footnote{126 S. Ct. 2266 (2006).} The Court stated that:

\begin{quote}
Statements are not testimonial 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 is to establish or prove past events potentially relevant to later criminal prosecution.\footnote{\textit{Id.} at 2273-74. In the formulation of the test in \textit{Davis}, Scalia appears to perform several subtle alterations in his test from the text of Webster’s dictionary on which he bases the test. First, he shifts from an apparent focus on the intent of the speaker (“made for the purpose of establishing or proving”) to that of the police who solicited the statement (“primary purpose of the interrogation”), and he de-emphasized the importance of the formality of the statement (“a solemn declaration or affirmation”) by applying it to an oral statement made in the field to a police officer that Justice Thomas, in dissent, believed deviated from the historical examples exemplified by the formality of proceedings before the examining magistrates under the Marian Statutes. \textit{Id.} at 2280-82 (Thomas, J., dissenting). \textit{See} Mosteller, \textit{supra} note 6, at 447-49; Robert P. Mosteller, \textit{Davis v. Washington} and \textit{Hammon v. Indiana}: \textit{Beating Expectations}, 105 \textsc{Mich. L. Rev. First Impressions} 6, 7-9 (2006), http://students.law.umich.edu/mlr/firstimpressions/vol105/mosteller.}
\end{quote}
CONFRONTATION AS CRIMINAL PROCEDURE

*Crawford* set out strict standards for dealing with testimonial statements and stated that in order to admit such statements without confrontation, “the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” While the goal of the Confrontation Clause is to ensure reliability, it protects as “a procedural rather than a substantive guarantee. It commands, not that evidence is reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” Thus, unless a testimonial statement fits into one of a limited number of exceptions, it must be excluded unless the declarant is unavailable and the statement was subjected to earlier confrontation, or the declarant is brought into the courtroom and is subject to cross-examination.

**B. The Roberts Approach**

*Roberts* also begins with the words of the Sixth Amendment, but reflects a facially far broader notion of the phrase “witnesses against him” than Scalia’s interpretation of the phrase in *Crawford*. Justice Blackmun’s opinion for the Court stated: “If one were to read this language literally, it would require, on objection, the exclusion of any statement made by a declarant not at trial.” He concluded that, although the Clause “was

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pdf.

20 *Crawford*, 541 U.S. at 68.

21 *Id.* at 61.

22 Among these limited exceptions are that the statement is not used for its truth, *Crawford*, 541 U.S. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)), and that the defendant forfeited his right to confrontation by wrongdoing, *id.* at 62 (citing Reynolds v. United States, 98 U.S. 145, 158-59 (1979)), the latter of which the Court seemed in *Davis* to encourage domestic abuse prosecutors to use. *Davis*, 126 S. Ct. at 2280. For the other exceptions, *see* 2 *McCormick, Evidence* § 252, at 163-64 (6th ed. 2006).

23 Ohio v. Roberts, 448 U.S. 56, 63 (1980). I do not consider in my treatment of the issue the excellent research and arguments by Professor Randy Jonakait that Scalia’s use of the definition offered by Webster for the word testimonial is selective and that an equally reasonable definition would have covered all hearsay statements as *Roberts* did. *See* Randolph N.
intended to exclude some hearsay,” an approach that excluded virtually every hearsay statement was inconsistent with historical practice and had been rejected “as unintended and too extreme.” Instead, Roberts recognized that the case law had established a set of principles that reflected a compromise between competing interests: on the one hand, a preference for face-to-face confrontation, the right to cross-examination, and a concern for accuracy and integrity in the fact-finding process, and on the other, concerns of public policy and necessity reflected by the need for effective law enforcement and the clear formulation of evidentiary rules and procedures.\(^\text{25}\)

Roberts found that the Confrontation Clause imposes two types of requirements.\(^\text{26}\) First, the Framers’ preference for face-to-face accusation translated into a requirement that the prosecution either produce the declarant or demonstrate his or her unavailability.\(^\text{27}\) Later cases concluded that this was not in fact a general requirement, but applied only to a limited class of hearsay statements and most clearly only to prior testimony.\(^\text{28}\)

The second requirement, trustworthiness, proved the more lasting and fundamental element of the system. Where

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Jonakait, “Witnesses” in the Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process, 79 TEMP. L. REV. 155, 198 (2006). Although quite plausible in my judgment, Professor Jonakait’s message is a bit more sweeping than my effort simply to say Roberts is within the fold of many contemporary criminal procedure protections and should not be rejected because of its failure to meet Scalia’s exacting, and I believe, contestable standards.

\(^\text{24}\) Roberts, 448 U.S. at 63.

\(^\text{25}\) Id. at 63-64.

\(^\text{26}\) See generally 2 MCCORMICK, supra note 22, § 252, at 159.

\(^\text{27}\) Roberts, 448 U.S. at 65.

\(^\text{28}\) In United States v. Inadi, 475 U.S. 387, 394 (1986), the Court held that unavailability need not be shown for coconspirator statements because they have “independent evidentiary significance” that made them superior to what could be obtained if the declarant testified at trial. In White v. Illinois, 502 U.S. 346, 355-56 (1992), the Court applied that rationale to statements admitted under the excited utterance and “medical examination” exception, and effectively generalized the elimination of the unavailability requirement to a large group of hearsay exceptions, including all those in Rule 803 of the Federal Rules of Evidence. See 2 MCCORMICK, supra note 22, § 252, at 160.
unavailability is shown and no confrontation is provided, Roberts looked to the underlying purpose of the Clause “to augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence.”29 The statement could be introduced if the hearsay was “marked with such trustworthiness that ‘there is no material departure from the reason of the general rule.’”30 Justice Blackmun’s opinion argued that “certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’”31 Hearsay could be introduced without confrontation if judged to be trustworthy because that judgment was seen as making cross-examination unnecessary.

The opinion’s reliability test was formulated as follows: “Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”32

C. Critique of Roberts

Leaving aside for a moment Crawford’s scorn for Roberts,33 the Roberts system of confrontation analysis is rather easily criticized on a number of levels. In terms of its effectiveness as protection for defendants either to enforce a guarantee of confrontation, which I suggest should be the primary goal of the Clause,34 or to exclude unreliable hearsay in the absence of confrontation, which is a necessary remedy for violation and an inducement to providing confrontation, it was largely a failure. While in theory the confrontation right under Roberts provided broad coverage, it often resulted in scant protection as a

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29 448 U.S. at 65.
30 Id. at 65 (quoting Synder v. Massachusetts, 291 U.S. 97, 107 (1934)).
31 Id. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).
32 Id. at 66.
33 See infra, notes 39-41 and accompanying text.
34 See generally Mosteller, supra note 6.
practical matter.\textsuperscript{35}

For hearsay other than prior testimony, the rights of face-to-face confrontation and cross-examination were easily ignored when faced with hearsay other than prior testimony. \textit{Roberts} and its progeny allowed the prosecution to admit most hearsay that fell within established hearsay exceptions without any effort to produce even readily available declarants.\textsuperscript{36} It required absolutely no showing of trustworthiness for statements admitted under the long list of established hearsay exceptions that \textit{Roberts} itself colorfully lampooned as “‘an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists,’”\textsuperscript{37} and allowed ad hoc balancing for the scrutinized statements that fell within non-traditional exceptions or problematic expansions of traditional exceptions.

Only occasionally did \textit{Roberts} provide protection even against facially problematic hearsay. The Supreme Court excluded hearsay in several cases involving accusatory statements by co-defendants under police interrogation admitted as statements against interest,\textsuperscript{38} and in \textit{Wright},\textsuperscript{39} the Court excluded highly accusatory statements secured by leading questions from a child witness/victim, which in the lower courts had been admitted under Idaho’s catch-all exception.

\textit{Crawford} described \textit{Roberts’} departure from historical principles as twofold. First, \textit{Roberts} was too broad in that it applied to hearsay that was not \textit{ex parte} testimony and thus was “far removed from the core concern of the clause;” it was also

\begin{itemize}
\item[\textsuperscript{35}] See Mosteller, \textit{supra} note 6, at 6 (describing briefly the weaknesses of \textit{Roberts} and comparing it to the more vigorous protections provided by \textit{Crawford} for an important group of problematic hearsay statements, but considering \textit{Roberts} “better than nothing” and occasionally offering protection from problematic hearsay).
\item[\textsuperscript{36}] 2 \textsc{McCormick}, \textit{supra} note 22, \S\ 252, at 159-60.
\item[\textsuperscript{37}] \textit{Roberts}, 448 U.S. at 62 (quoting Edmund M. Morgan & John M. Maguire, \textit{Looking Backward and Forward at Evidence}, 50 \textsc{Harv. L. Rev.} 909, 921 (1937)).
\item[\textsuperscript{39}] Idaho v. Wright, 497 U.S. 805 (1990).
\end{itemize}
too narrow in that it often admitted *ex parte* testimony under a malleable reliability standard, which “often fail[ed] to protect against paradigmatic confrontation violations.” 40 *Crawford* repeatedly criticized *Roberts* as effectively standardless, stating accurately, for example, that “[r]eliability is an amorphous, if not entirely subjective, concept.” 41 Second, and more damning, was *Roberts’* admission of “core testimonial statements that the Confrontation Clause plainly meant to exclude,” referring here to accusatory statements made by a co-defendant under police interrogation, which the Court in *Lilly v. Virginia* 42 had earlier indicated was highly problematic. 43 This failure is truly damning for *Roberts* as a primary test for guaranteeing confrontation.

Later in the term, in *United States v. Gonzalez-Lopez*, 44 Scalia returned to a criticism of *Roberts*’ “functional” approach in a case concerning another aspect of the Sixth Amendment—whether denial of a defendant’s right to appointed counsel of his choice was subject to harmless error analysis if it did not undermine the fairness of the trial. He stated:

> What the Government urges upon us here is what was urged upon us (successfully, at one time . . .) with regard to the Sixth Amendment’s right of confrontation—a line of reasoning that “abstracts from the right to its purposes, and then eliminates the right.” 45

40 *Crawford*, 541 U.S. at 60.

41 *Id.* at 63.

42 527 U.S. 116 (1999) (ruling that admission of non-testifying accomplice’s confession violated confrontation right under *Roberts*).

43 *Crawford*, 541 U.S. at 63 (observing that despite the *Lilly* plurality’s suggestion that accomplice confessions could not survive under *Roberts* analysis, *Lilly*, 527 U.S. at 137, courts continued to routinely admit such statements). The Court cited a study by Roger Kirst that accomplice statements were admitted more than one-third of the time in the seventy-five cases he examined, Roger W. Kirst, *Appellate Court Answers to the Confrontation Question in Lilly v. Virginia*, 53 Syracuse L. Rev. 87, 104-05 (2003).


45 *Id.* at 2562 (citing Ohio v. Roberts, 448 U.S. 56 (1980); Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting)).
As noted above, Scalia’s opinion in Crawford indicated clear displeasure with Roberts, and he raised the issue of its survival by first observing that the analysis in Crawford had cast doubt on the decision in White v. Illinois,46 inter alia, not to limit the Confrontation Clause to testimonial statements. However, he avoided resolution of the issue because the Court was not required to decide its survival as to nontestimonial statements in order to rule that a new system applied to testimonial statements such as those in Crawford.47 Near the end of his opinion in Crawford, Scalia allowed that as to nontestimonial hearsay, “it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does Roberts.”48 But again he raised the specter of total obliteration, noting that “an approach that exempted such statements from Confrontation Clause scrutiny altogether would also provide such flexibility.”49

The continued viability of Roberts was not directly at issue in the consolidated cases of Davis and Hammon, the Supreme Court’s second decision under its new paradigm, because admission of the statements in Davis and Hammon did not turn on Roberts’ application. The statements in Hammon were excluded because they were found to be testimonial, despite Roberts’ acceptance of those statements.

The situation in Hammon was precisely the same as in Crawford, where the Court effectively overruled Roberts as to statements in the core area of confrontation concern, but left it unaffected outside that core.50 In Davis, other statements were ruled admissible under the Confrontation Clause because they were considered nontestimonial. Roberts would likewise have admitted those statements because they fit within a firmly rooted hearsay rule—excited utterances.51 Thus, under both Crawford

47 541 U.S. at 61.
48 Id. at 68.
49 Id.
50 Id. at 61, 68.
51 In its opinion in State v. Davis, 111 P.3d 844 (Wash. 2005), the Supreme Court of Washington noted that “[r]elying on Ohio v. Roberts . . . ,
and Roberts the results would have been identical to that in Davis, and no occasion would arise to rule on the continued validity of Roberts.

Nevertheless, again in an opinion by Scalia, the Davis Court signaled its displeasure with Roberts and announced its demise, albeit somewhat obscurely. The opinion stated: “It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.”\(^\text{52}\) Also, referring to its focus on testimonial hearsay in Crawford, it stated: “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.”\(^\text{53}\) Thus, in dicta, Davis laid Roberts to rest and declared the Confrontation Clause inapplicable to hearsay that is not testimonial. Although I recognized that even dicta can sound the death knell of a previous holding, I hoped it was more than an “academic” exercise to argue for its survival.\(^\text{54}\)

the Court of Appeals held that the trial court properly classified the 911 call as an excited utterance, which is a firmly rooted exception to the hearsay rule and thus satisfies the requirements of reliability.” \(\text{Id.}\) at 847. Davis did not challenge the correctness of the determination that the Confrontation Clause had not been violated in Roberts. See Brief for the Petitioner, Davis v. Washington, 126 S. Ct. 2266 (2006) (No. 05-5224) (citing Roberts at three points but not relying on it in any fashion to support reversal of the conviction).

\(^\text{52}\) Davis, 126 S. Ct. at 2273.

\(^\text{53}\) \(\text{Id.}\) at 2274.

\(^\text{54}\) Although Scalia’s statements about Roberts’ demise were arguably clear, the early decisions by lower courts were not uniform after Davis and prior to Bockting. United States v. Thomas, 453 F.3d 838, 844 (7th Cir. 2006), State v. Davis, 148 P.3d 510, 515-16 (Kan. 2006), and State v. Blue, 717 N.W.2d 558, 565 (N.D. 2006), state that Roberts continues to apply to nontestimonial statements. However, United States v. Tolliver, 454 F.3d 660, 665 n.2 (7th Cir. 2006), which was decided by the same circuit as Thomas shortly after it, noted that Davis “appears to have resolved the issue, holding that nontestimonial hearsay is not subject to the Confrontation Clause” but found it unnecessary to address the issue because there was no dispute that if the statements were nontestimonial the Clause was not violated, and United States v. Felix, 467 F.3d 227, 231 (2d Cir. 2006), ruled that Davis made it
Whorton v. Bockting\textsuperscript{55} unmistakably buries Roberts and makes its destruction and the elimination of any supplemental protection to nontestimonial hearsay part of the reasoning of the case, which cannot be characterized as dicta. Bockting repeatedly states, without limitation, that Crawford overruled Roberts.\textsuperscript{56} However, the most telling and significant portion of the opinion explains why Crawford does not implicate the fundamental fairness and accuracy of the trial and therefore should not be considered a “watershed rule” that would make it retroactive.

The Court stated:

With respect to testimonial out-of-court statements, Crawford is more restrictive than was Roberts, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under Roberts, there may have been cases in which courts erroneously determined that testimonial statements were reliable.\ldots But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford’s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the clear that confrontation only applied to testimonial statements. See generally James J. Duane, The Cryptographic Coroner’s Report on Ohio v. Roberts, 21 CRIM. JUST. 37 (Fall 2006) (describing correctly the demise of Roberts albeit by cryptic statements in Davis). Whether the justices who joined Scalia’s opinion recognized fully the import of his language, and more importantly, whether they appreciated the implications of that statement for a case like Wright is a matter of some uncertainty. I recognize these are thin reeds on which to depend, but they provide some possibilities for the future.

\textsuperscript{55} 127 S. Ct. 1173 (2007).

\textsuperscript{56} Id. at 1179, 1182-83. These statements seem plainly inaccurate as to nontestimonial statements. In Crawford, the Court stated on that issue that “we need not definitively resolve whether it survives our decision today.” 541 U.S. at 61.
Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.\textsuperscript{57}

Thus, \textit{Bockting} frees nontestimonial hearsay from scrutiny under the federal Confrontation Clause and lays \textit{Roberts} to rest. Now, I turn to either what might have been “had \textit{Roberts} not died” and to an examination of what state supreme courts and legislatures should consider in examining the constitutional and statutory protects against unreliable hearsay.

II. TWO-PART CONSTITUTIONAL PROTECTION—GREATER PROTECTION FOR THE CORE RIGHT AND LESSER PROTECTION FOR A FUNCTIONALLY RELATED PROBLEM

Constitutional criminal procedure recognizes doctrines under the Fourth, Fifth, and Sixth Amendments that principally protect individual from violations by the government of core constitutional rights.\textsuperscript{58} Although inconsistent with strictly originalist interpretations and hardly elegant, the Court in the second half of the twentieth century, particularly during the Warren Court era, expanded these doctrines to protect additional areas outside of but related to the core concern.\textsuperscript{59} In these latter

\textsuperscript{57} \textit{Whorton}, 127 S. Ct. at 1183 (emphasis added).

\textsuperscript{58} These core rights include the protection of the home against searches in the absence of probable cause and a warrant under the Fourth Amendment, protection of a suspect against being forced under penalty of contempt to testify in court against herself under the Fifth Amendment, and the holding of secret trials under the Sixth Amendment. \textit{U.S. CONST.} amend IV, V & VI.

\textsuperscript{59} As I have read e-mails from my colleagues in evidence scholarship, I have been struck by how many of them with liberal political and doctrinal leanings seem to embrace with some enthusiasm Justice Scalia’s originalism as exhibited in \textit{Crawford} and \textit{Davis}. My reaction is different, which I attribute to the fact that I am also anchored in criminal procedure, and see the potentially quite negative impact of this mode of reasoning on the broad set of criminal procedure rights that were created during the Warren Court revolution and are largely treated as part of accepted law today.

I attribute at least part of this difference between my reaction and what I perceive as that of a larger number who appear to welcome \textit{Roberts}’ demise to the fact that within constitutional criminal procedure and even within the
situations, something of a functional approach was often used in fashioning the dimensions of the expanded modern right,\(^{60}\) sometimes resulting in a somewhat lower degree of protection outside the core right.\(^{61}\)

A strong *Crawford*-based analysis protecting the core and a weaker *Roberts*-based analysis protecting a broader area would

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60 See *Katz v. United States*, 389 U.S. 347 (1967) (abandoning the trespass and property law basis of the Fourth Amendment previously employed and protecting conversation in telephone booth, the Court recognized the importance of the public telephone in private communication).

61 Compare *New Jersey v. Portash*, 450 U.S. 385 (1978) (ruling that as to statements obtained in a pure violation of the Fifth Amendment through formal compulsion, impeachment was not permitted) with *Harris v. New York*, 401 U.S. 222 (1971) (permitting impeachment with statements obtained in violation of the expanded right under *Miranda v. Arizona*, 384 U.S. 436 (1966)).
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differ principally from the development of other criminal procedure doctrines in the chronological order of when the core and the secondary rights were recognized. The normal pattern is for the core right to be recognized relatively early and to enjoy continued protection into the modern era. Additional rights are extrapolated from the core right at a later time, and often justified as an application of the original intention to the changed circumstances of modern life.\(^{62}\) Confrontation Clause protection, by contrast, has involved a reversal of the temporal development of the otherwise familiar two-part pattern, and perhaps it is this distinction that gives *Crawford* its special attraction for some who see it as the only appropriate protection.

Before 2004, there was a good argument to be made that the Confrontation Clause under *Roberts* provided less protection to the areas with which the Framers were particularly concerned. While the protection was broader than the Framers had envisioned, that was not remarkable in the context of other modern rights. More unusual was that the strong protection the Framers intended to provide to areas of core concern was not effectively guaranteed by the Warren Court or under the *Roberts* decision, and it was not until very recently in *Crawford* that the Court first provided such strong protection. Such a failure of core protection is atypical, and in its attractive affirmative holding *Crawford* accomplished the restoration of a constitutional commitment to guarantee confrontation. Thus, *Crawford* is “right” to that extent. Its suggested destruction of *Roberts*, however, was of a different character. An originalist perspective would call for such a destruction, but no more so than for most other expansions of rights in modern criminal procedure, such as *Miranda*,\(^{63}\) which have not been obliterated.


\(^{63}\) 384 U.S. 436 (1966). See infra note 64 and accompanying text, see also infra notes 66-95 and accompanying text.
A. The Primacy of Constitutional Commitments to Prohibit Conduct in Original Intent

In his book on the structure of constitutional law, Professor Jed Rubenfeld\(^{64}\) provides a way to visualize this dichotomy between that which is clearly on solid constitutional grounds and that which is ahistoric but hardly uncommon or unjustifiable as a matter of constitutional interpretation, suggesting an “impossibly simple distinction:”

Specific understandings about a constitutional right can take two different forms: There can be specific laws or practices that the right is understood to prohibit; and there can be specific laws or practices that the right is understood not to prohibit. Virtually all the important historical understandings of the former kind—specific understandings of what a right prohibited—are alive and well throughout constitutional law, playing a foundational role in the doctrine. By contrast, where constitutional doctrine has departed from important historical understandings, it has virtually always departed from understandings of the latter kind—concerning what a right did not prohibit.\(^{65}\)

Professor Rubenfeld labels constitutional understandings about what constitutional rights are understood to prohibit as “Application Understandings,” and he labels the historical understanding of what the rights did not prohibit as “No-Application Understandings.”\(^{66}\) He sees originalism as treating all understandings as equally binding, but flawed for that very reason.\(^{67}\) Application Understandings are foundational or core


\(^{65}\) See RUBENFELD, supra note 64, at 13.

\(^{66}\) Id. at 14.

\(^{67}\) Id. at 15.
understandings. They are fundamental commitments that are not to be disregarded, and Rubenfeld believes the pattern of cases show they indeed have rarely been disregarded. No-Application Understandings are not “commitments” but are rather “intentions,” which can and have been disregarded.

Rubenfeld sees judges building frameworks around the paradigmatic Applications Understanding, and in that process occasionally breaking free from No-Application Understandings.

B. Examples of the Dichotomy in Faithfulness to Historical Practices in Constitutional Criminal Procedure

Rubenfeld looks briefly at contemporary constitutional criminal procedures, which he characterizes correctly as “notoriously untethered to original understandings or practices.” In this field, the Supreme Court dramatically expanded constitutional guarantees governing police procedure regarding searches, arrests, and questioning far beyond the original understanding, while leaving foundational applications intact to play a central role in development of the doctrine.

As to the Fourth Amendment, the clearest historical view is that the amendment was intended to prohibit “general warrants,” which is an Application Understanding. That Understanding remains a basis for invalidating insufficiently particularized

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68 Id. at 14. The discussion in the text concerns provisions that prohibit, which is the nature of most of the Bill of Rights provisions. As to constitutional provisions that grant power, Application Understandings are the inverse—they are understandings of what that provision authorized. No-Application Understandings in this context are understandings of what the constitutional provision did not authorize. Id.

69 He recognizes only two areas of possible counterexamples, both having to do with “powers” rather than rights. One involves the contracts clause and the other the declaration-of-war clause. Id. at 67-68.

70 RUBENFELD, supra note 66, at 14-15.

71 Id. at 16.

72 Id. at 32.

73 Id.
warrants. According to Rubenfeld, it also provided the general source for expansion into areas not covered at the time of the framing through a general principle derived from it: “that the Fourth Amendment stands against unconstrained police discretion and unjustified intrusions into personal privacy.” He continues:

By contrast, the Fourth Amendment’s No-Application Understandings have been systematically forgotten. For example, as Akhil Amar has emphasized, one of the most important original understandings of the Fourth Amendment was that it did not generally prohibit warrantless searches or seizures. The Amendment was intended to limit the issuance of warrants, which were viewed with suspicion because they immunized searches and seizures from subsequent attack in court. . . . Today, [this] No-Application Understanding has been jettisoned. Modern Fourth Amendment doctrine holds that warrantless searches are presumptively unconstitutional . . . .

Case law on self-incrimination under the Fifth Amendment has followed a similar pattern. The detail of the original understanding is obscure and unknown, and “all we know with certainty about the historical meaning of the privilege is its foundational paradigm case: the practice of interrogating an accused under oath while threatening harsh sanctions against him for refusal to answer.”

There are problems, however, in applying the abhorrence of

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74 Id.
75 RUBENFELD, supra note 64, at 33.
76 Id. at 33. Professor Donald Dripps provides a telling critique, not of Amar’s central conclusion regarding the importance of the general warrant, but of the complexity of how to interpret that history in the light of changed circumstance of the Fourteenth Amendment that applied the right to the states, and the failure of tort remedies in this new environment. See Donald Dripps, Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down that Wrong Road Again,” 74 N.C. L. REV. 1559 (1996).
77 RUBENFELD, supra note 64, at 33.
the core concern represented by the historical practice of “‘subjecting those charged with crime to the cruel trilemma of self-accusation, perjury or contempt’ that defined the operation of the Star Chamber.”78 To control custodial police interrogation, modern self-incrimination doctrine must leap over some substantial historical barriers. The suspect arrested and interrogated by the police would not have been viewed as “remotely comparable to the Star Chamber scenario” where the oath was considered critical because he faced eternal damnation if he perjured himself.79 Indeed, the historical evidence indicates that questioning not done under oath was not prohibited by the privilege against self-incrimination.80 Professor Yale Kamisar notes a further problem. The arrested and interrogated suspect is not under compulsion in a form historically recognized, which was understood to be legal compulsion, since “he was threatened neither with perjury for testifying falsely nor contempt for refusing to testify at all.”81 Thus, the interrogation situation is a No-Application Understanding, but Miranda82 nonetheless rests on the Fifth Amendment.83

Another example of the expansion of rights in modern constitutional criminal procedure contrary to historical understandings in the Sixth Amendment itself is the right to counsel discussed in Johnson v. Zerbst84 and Gideon v. Wainwright.85 To modern lawyers, the pattern of the right to counsel in England prior to the middle of the nineteenth century, from which the United States departed, is positively bizarre.

78 Id. at 34 (quoting Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990)).
79 Id. at 34-35.
81 YALE KAMISAR, POLICE INTERROGATION AND CONFESSION 37 (1980).
83 Id. at 458 (claiming an “intimate connection between the [Fifth Amendment’s] privilege against compulsory and police custodial questioning,” upon which the Miranda remedy rests).
84 304 U.S. 458 (1938).
In ordinary criminal cases, the right to counsel was restricted to the right of an individual, not to be appointed counsel, but to be represented by retained counsel of his choice. However, even that limited right was seemingly turned on its head as compared to our conception, which grants counsel in serious cases rather than minor cases. In contrast, English practice only clearly allowed a defendant to be represented by retained counsel in misdemeanor cases, while in felony cases, most of which were at least nominally capital cases, the defendant was prohibited from retaining counsel. The difficulty of defending this position, which was based on the theory that the court was a neutral in criminal trials where charges were generally brought by private individuals, led to judicial exceptions such as the right of counsel to argue legal points and frequently to take other actions as well.

The specific history of the right to counsel in the framing process is extremely limited and not terribly helpful. What does seem clear is that the constitutional provision was intended to give defendants the right to bring their retained counsel into court to represent them in all federal criminal cases. In United States v. Gonzalez-Lopez, Justice Scalia stated that the “right to select counsel of one’s choice . . . has been regarded as the root meaning of the constitutional guarantee.” He contrasts this

86 See generally William M. Beane, The Right to Counsel in American Courts 8-9 (1955). The exception was the right to two appointed counsel in cases of treason, which was granted through legislation in 1695. Id. at 9.
87 Id. at 8-9.
88 Id. at 9-11 (noting that, although practices differed between individual cases, defense counsel was permitted to perform an increasing number of functions during the eighteenth century, which sometimes included direct and cross-examination, but was consistently barred from addressing the jury at the conclusion of the evidence).
89 Id. at 32 (stating that “[t]he constitutional provision meant, at a minimum, that defendants in federal courts had the right to retain their own counsel”).
91 Id. at 2563. In support of this proposition, which seems clearly correct, he cites Wheat v. United States, 486 U.S. 153, 159 (1988); Andersen
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core meaning from other aspects of the right that are “derived from the Sixth Amendment’s purpose of ensuring a fair trial.”

Earlier in that opinion, Scalia first articulated and then rejected the distinction between the core right and the right based on fairness of the trial in a way that reflects his view of the Confrontation Clause. He acknowledged the government’s point that the rights within the Sixth Amendment have the purpose of ensuring a fair trial, but rejected any implication that specific guarantees could be disregarded if the trial was fair on the whole. He stated his point as follows:

What the Government urges upon us here is what was urged upon us (successfully, at one time . . .) with regard to the Sixth Amendment’s right of confrontation—a line of reasoning that “abstracts from the right to its purposes, and then eliminates the right.” Since, it was argued, the purpose of the Confrontation Clause was to ensure reliability of evidence, so long as the testimony hearsay bore “indicia of reliability,” the Confrontation Clause was not violated.

Something on the order of the confrontation right as recognized in Crawford as part of the core meaning of the Confrontation Clause, and in Professor Rubenfeld’s terminology, it is an Application Understanding entitled to recognition as a paradigm case. In contrast to Rubenfeld’s observation that with rare exceptions Supreme Court decisions have honored Application Understandings, the Court initially got this one wrong. While I am not yet convinced that either the paradigm case is accurately covered as a testimonial statement, or that if


92 United States v. Gonzalez-Lopez, 126 S. Ct. at 2563.

93 Id. at 2562 (quoting Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting)).

94 I have argued elsewhere that the concept of “accusatory” statements has some historical basis and either as a supplement or an alternative would be useful in defining statements within the core area of concern of the
covered the nomenclature of “testimonial” is accurately descriptive.\textsuperscript{95} Crawford makes an important correction in giving vigor to the confrontation right as a procedural right when core values are concerned. Scalia’s point quoted above is thus largely accurate and quite telling. The core procedural right was abstracted to a principle of fairness–here reliability–and in that amorphous form, it was ineffective in providing protection even to core cases.

Having corrected the paradigm case does not at all mean, however, that abstracting the right as part of an extension to Confrontation Clause. See Mosteller, supra note 6, at 16-17, 747-49. However, if the Davis opinion is a guide, the Court seems uninterested in using such terminology to describe the invigorated core of confrontation despite being given substantial opportunity to do so. The brief for Petitioner Hammon contained some version of “accuse” or “accusation” over one hundred times; the brief for Petitioner Davis presented this terminology over seventy times. Brief for Petitioner in Davis v. Washington, No. 05-5224; Brief for Petitioner in Hammon v. Indiana, No. 055705. And the concept I have advocated regarding accusatory statements to police officers was specifically presented by Professor Friedman in oral argument as Hammon’s counsel. Transcript of Oral Argument in Hammon v. Indiana, No. 05-5705, at 27 (March 20, 2006). However, Justice Scalia did not embrace either the limited version regarding police officers or more generally ascribe utility to accusatory statements in describing or defining the scope of the Confrontation Clause. His opinion in Davis did not use the terms “accusatorial,” “accusatory,” or “accusation” a single time, Davis, 126 S. Ct. at 2270-81, and Justice Thomas uses “accusers” only to describe the historical practices under the Marian Statutes, where that category of individuals had special place. Id. at 2281, 2282 (Thomas, J., dissenting).

\textsuperscript{95} As the definition of “testimonial” statements was further developed in Davis it appears to me more sensible, but less “testimonial.” Scalia moves the focus of whose perspective matters from that of the speaker to that of the questioner, and he diminishes the importance of the formality of the statement. See Mosteller, supra note 6, at 7-9. It appears sufficient that the statement be secured in a non-emergency situation by a known investigative officer for the purpose of establishing a past fact. Davis, 126 S. Ct. at 2278, n.5. That is quite far from what “testimonial” would appear to convey and, as Justice Thomas noted in his dissent, not what was indicated by the initial statement of the concept in White v. Illinois. Davis, 126 S. Ct. at 2282-83 (Thomas, J., dissenting) (citing his definition of “testimonial” in White, 502 U.S. at 365 (Thomas, J., concurring). The current form is, I believe, superior, but it would likely be better described by other terminology.
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cover No-Application Understandings is wrong. That is in essence what the Court did in *Johnson v. Zerbst* and *Gideon v. Wainwright* under the Sixth Amendment’s right to counsel.

First, in *Johnson*, the court interpreted the Sixth Amendment, not historically, but as a guarantee of fairness. Then, in *Gideon*, through the language of fundamental rights essential to a fair trial, the Court declared that the Sixth and Fourteenth Amendments guaranteed the right to appointment of counsel in the states as to all felonies because such a right was essential to a fair trial.

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96 The Court in declaring the defendant to have been denied his Sixth Amendment right when not offered appointed counsel stated:

The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not “still be done.” It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to “... the humane policy of the modern criminal law...” which now provides that a defendant “... if he be poor, ... may have counsel furnished him by the state, ... not infrequently ... more able than the attorney for the state.”

304 U.S. at 462-63. The language is of fairness in a modern age.

97 Justice Black stated:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant’s need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*: “The right to be heard would be, in many cases, of little avail if it did not comprehend the
It is hardly irrational to derive from the Confrontation Clause’s procedural guarantee that defendants may test witness’ testimony, whose purpose is to ensure fairness and reliability, the principle that the confrontation right is concerned with ensuring reliability or trustworthiness in evidence. Outside the core area of protection, a guarantee that helps force confrontation or excludes particularly problematic hearsay statements from a person whom the defendant cannot confront is well in line with the additional types of protections guaranteed in other areas of constitutional criminal procedure. It cannot be said that such a right is historically grounded, but as noted above, such extrapolation from the historical core is in good company. Moreover, such protection does not threaten in any fashion the core procedural right Crawford guarantees.

III. AMBIGUITY IN THE MAJOR HISTORICAL ANTECEDENT TO THE CONFRONTATION RIGHT

The treason trial of Sir Walter Raleigh is cited by Justice Scalia as one of the major historical events that was known to the Framers and that influenced their fashioning of the Confrontation Clause.98 In telling of this event, Scalia emphasizes the admission of certain hearsay that fits his

372 U.S. at 344-45 (citing 287 U.S. 45, 68-69 (1932)). Again, this is language of fairness.

98 Crawford, 541 U.S. at 44, 50.
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testimonial model. However, other hearsay was also admitted against Raleigh, which is almost certainly nontestimonial. That latter hearsay, which could suggest a broader confrontation right, is omitted. Scalia’s very narrow, clear, and definitive account of the story amounts to a selective recitation that arguably produces an erroneously narrow confrontation doctrine.

In the Raleigh story, there are “testimonial statements,” as Scalia characterizes them, that might well have concerned the Framers. Scalia cites the use of a letter by Lord Cobham as proof not only of the Framers’ concern, but also of the specific construction that should be given to the Confrontation Clause. On the question of whether interrogation is required, he states in *Davis* with apparent total confidence based on the use of this letter that the “Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.”99 This assertion reflects remarkable certainty and selectivity.

On the other hand, Raleigh protested the admission of other hearsay, which appears almost certainly not to be testimonial under Scalia’s construction of the term, but it is unnoticed and unmentioned in the historical accounts in both *Crawford* and *Davis*. It is difficult to understand the origin of this certainty that the Framers were not concerned about that other, arguably even more outrageous, hearsay. The omitted part of the Raleigh story challenges the clarity of Scalia’s version of history and his confident assertions that the Framers had only a core constitutional concern with regard to testimonial statements.100

The other hearsay also illustrates a further ambiguity, which is the subject of the next section. It involves the “translation” of history into its contemporary constitutional meaning and the

99 126 S. Ct. 2274 at n.1.

100 If the core constitutional concern were not only with the narrow class of testimonial statements necessarily defined by *Crawford* (i.e., “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations,” *Crawford*, 541 U.S. at 68), but defined the core to include “accusatory” statements as well, both types of complaints in the Raleigh story would fit.
interaction between the development and understanding of hearsay law at the time of the framing of the Bill of Rights as compared to its definition and admissibility today. It also explores how those differences would have impacted the Framers’ intentions for the Clause and how the earlier different treatment of hearsay should affect our interpretation of the role of historical meaning as applied to an altered, modern setting.

Scalia concentrates on Lord Cobham, who gave several statements to members of the Privy Council and who wrote two incriminating letters to the Council regarding the case. Raleigh insisted on, but was denied, the right to confront Cobham. Scalia focuses exclusively on this aspect of the story.

There was a witness produced against Raleigh, one Dyer, who did not provide his own firsthand accusations against Raleigh but rather recounted the accusations of another person, who was not identified by name and did not testify. Dyer, a ship pilot who had been in Lisbon, Portugal during the time of the alleged conspiracy to topple the king, testified:

> Being at Lisbon, there came to me a Portugal gentlemen who asked me how the King of England did, and whether he was crowned? I answered him that I hoped our noble King was well and crowned by this, but the time was not come when I came from the coast for Spain. “Nay,” said he, “your King shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned.”

Sir W. Raleigh: This is the saying of some wild Jesuit or beggarly Priest; but what proof is it against me?

Attorney General [Sir Edward Coke]: It must per force arise out of some preceding intelligence, and shows that your treason had wings.

Sir W. Raleigh: If Cobham did practise with Arenberg, how could it but be known in Spain? Why did they name the Duke of Buckingham in Jack Straw’s Rebellion, and the Duke of York in Jack
Cade’s, but to give countenance to the treasons?\footnote{JARDINE, \textit{supra} note 15, at 436. The testimony is recited with slight differences in Howell’s State Trials. The exchange is given as follows:}

Professor Myrna Raeder has noted the significance of this statement. She argues that, in terms of the historical record, both Cobham’s hearsay and that of the Portuguese gentlemen were received in Raleigh’s trial, and asks why we should not be then concerned with both.\footnote{Myrna Raeder, \textit{Remember the Ladies and the Children Too}, 71 \textit{BROOK. L. REV.} 311, 318 (2005).} She assumes, correctly in my judgment, that the second type of hearsay might not be covered by the testimonial concept since it was “made to a private individual, but was clearly accusatory, either from the perspective of the declarant or a reasonable observer.”\footnote{\textit{Id.} at 319.}

Writing long before \textit{Crawford} was decided, Professor Roger Park noted that, even if the Raleigh trial had a major impact on the Framers, it is ambiguous in providing guidance on the scope of the Confrontation Clause. If intended to prohibit the conduct in Raleigh’s trial, the accusations of Cobham should not be admitted. Professor Park suggests “that anonymous rumors from
declarants without personal knowledge should be excluded as well.” 104

Raleigh was not a lawyer and was not permitted to have an attorney in his treason trial. Thus, it is unfair to hold him to the legal knowledge of the time, particularly in responding immediately to the accusation from Dyer, which he likely did not know would be produced. However, several scholars have interpreted Raleigh’s response as an objection not to the lack of confrontation but rather, at least initially, to the insignificance of the statement. Professor Kenneth Graham sees Raleigh’s response as going to “weight rather than admissibility,” 105 and Professor Robert Pitler notes the lack of complaint about confrontation, which he suggests alternatively might have been due to the fact that Raleigh was arguing instead the absence of probative value, or because he may have sensed the testimonial statement distinction—a difference between a private person’s statement and “government secured, ex-parte examined statements.” 106

One may reasonably argue that Dyer’s hearsay has limited importance because the evidence is weak. Indeed, in Raleigh’s initial summation to the jury, he stated that “[f]or all that is said to the contrary, you see my only accuser is the Lord Cobham . . . .” 107 However, Professor Graham notes that

106 Robert M. Pitler, Introduction, 71 Brook L. Rev. 1, 8n.28 (2005). I take modest issues with one of Professor Pitler’s suggestions, or at least do so from the perspective of those who are firmly convinced Scalia is recounting a view of the Clause clearly known to the Framers and their progenitors. Professor Pitler suggests that noting this distinction between testimonial and nontestimonial statements would have been “prescient.” Those who claim the distinction to be the clear interpretation of what I believe is a murky historical record would say, I believe, that Raleigh was merely observing that distinction, which was obvious to those in Raleigh’s time and as to the Framers, and to us now after Crawford.
despite the fact that his contemporaries thought none of the evidence proved Raleigh’s guilt, he was still convicted. The fact that he was convicted on what is argued to be inadequate evidence does not inspire confidence that this hearsay was in fact insignificant evidence. Some commentators have observed that this was the corroborating evidence that the prosecutor, Sir Edward Coke, offered in response to Raleigh’s protestations that if Lord Cobham were produced there would be no need for corroboration.

Given the concentration of attention on the accusation of Lord Cobham both by Raleigh and by those who have commented on the case, I accept that Cobham’s statements were likely the central concern of those troubled by the lack of confrontation in Raleigh’s case. Dyer’s recitation of the accusations of the Portuguese gentleman was, however, also there as part of the historical record, and no commentator has demonstrated that it was not also of concern to the Framers.

As Raleigh’s biographer observed, the introduction of Dyer’s hearsay was “the crowning absurdity” of the trial. Justice Scalia’s omission of it from the historical account is surely a selective analysis of that history, which carries with it obvious dangers of misunderstanding of and lack of appreciation for the

108 Graham, supra note 105, at 101.
110 WILLARD M. WALLACE, SIR WALTER RALEIGH 210 (1959). See also CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE—HEARSAY AND CONFRONTATION § 6342, at 268 n.610 (1997) (noting both the weakness of the evidence as hearsay evidence in the form of an opinion from a person who could not have had personal knowledge, but also recognizing that it was cited as absurd in Raleigh’s biography). Wallace stated further: “The case against Raleigh was falling of its own flimsiness when the prosecution attached significance to such evidence.” WALLACE, supra note 110, at 210. But again there is discord between the position that the case was falling apart and the fact that Raleigh was convicted, and the real possibility that evidence mattered to the conviction.
full range of the Framers’ concerns.

IV. APPLICATION OF ORIGINALISM IN A CHANGED WORLD: THE PROBLEM OF KNOWING AND TRANSLATING

In his concurrence and dissent in *Crawford*, Chief Justice Rehnquist cited an aspect of an article that I had written in support of his argument that it is difficult to apply the historical understanding regarding confrontation from a world with a very different treatment of hearsay to the modern day.111 Rehnquist was arguing that unsworn statements made to police officers, such as those offered in *Crawford*, would not have been admitted in evidence at the time of the framing because they were not made under oath, a safeguard the absence of which bars admission of the hearsay as well as the additional consideration of it under the right of confrontation.112

Rehnquist argued that any classification of particularly suspect statements beyond that of sworn affidavits and depositions, such as Scalia makes, is somewhat arbitrary since unsworn statements were treated no differently than nontestimonial statements, and there was no special concern with a broad category of testimonial but unsworn statements.113 He objected to this “mere proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today.”114 Scalia responded:

Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation—what the Chief Justice calls use of a “proxy,” . . . but that is hardly a reason not to make

112 *Id.* at 70-71.
113 *Id.* at 71.
114 *Id.*
the estimation as accurate as possible. Even if, as The Chief Justice mistakenly asserts, there was no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.115

Later in Davis, Scalia made a similar point in rejecting Justice Thomas’ argument that the statement to a police officer in the field was not sufficiently formal, unlike the depositions taken by Marian magistrates, which were characterized by a high degree of formality. Scalia stated, “restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”116

Rehnquist uses the term “proxy.” Scalia speaks of “estimation.” Still others term this process “translation.”117 Regardless of the label, this is the process by which the original purpose is effectuated in a changed and changing world.118 As Scalia’s use of it indicates, it is a tool that at least modestly flexible originalists can use.119

This process, which I will call translation, is obviously necessary unless the Constitution is to become irrelevant to modern life. It is, nonetheless, fraught with great difficulty and uncertainty unless one has the ability to “channel” the Framers.120 With respect to confrontation, one must first

115 Id. at 52 n.3.
116 Davis, 126 S. Ct. at 2278 n.5.
117 See Lessig, supra note 62.
118 RUBENFELD, supra note 64, at 9.
119 See also Lessig, supra note 62, at 1167-68 (discussing “translation” as a tool of originalist interpretation).
120 Although such translation is, I believe, almost always difficult, it is particularly difficult in some situations where the world is so different that it is virtually impossible to imagine what the Framers would have thought of the new environment. The Fourth Amendment appears to be one of those almost impossible situations, although creative authors can and do draw interesting insights that they present with an enormous number of caveats. See, e.g., Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547 (1999); George C. Thomas III, Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment, 80 Notre Dame L. Rev. 1451 (2005).
determine what the law of confrontation was at the time of the framing, which can be complicated by its interaction with hearsay restrictions. Then, one must determine what the Framers knew about the law,[^121] and ascertain how the provision adopted was designed to remedy whatever problem was perceived. Finally, moving to the process of translation, one needs to determine how best to effectuate the Framers’ intentions in a changed context.

I contend that the difficulty of knowing for certain how this translation should operate is another reason why Roberts should have been permitted to operate outside the core area of concern. The Court may well have picked a slightly inaccurate tool—the testimonial statement concept—to effectuate the intent of the Framers, running the risk that in the process of giving a detailed definition to the term it may make mistakes of translation.

The Court has twice refused to give a comprehensive definition of testimonial statements. If history and translation offered a clear definition, surely the Court would have set out that rule. But obviously an enormous number of legitimate questions are not answered and if honestly treated cannot be definitively decided.

For example, we do not yet know if the government must have a role in creating the statement, and if it does, whether the speaker must know he or she is talking to a government agent. We do not yet know whether the intention involved must be

[^121]: Professor Davies argues, (1) that much of what Justice Scalia says about the law at the time the Confrontation Clause was proposed and adopted is in error, and (2) that particularly as to what the English law that Scalia cites was at the critical time, the Framers would have had great difficulty knowing it. See generally Thomas Y. Davies, *What Did the Framers Know, and When Did they Know It? Fictional Originalism in Crawford v. Washington*, 71 Brook. L. Rev. 105 (2005). See also generally Thomas Y. Davies, *Not “The Framers’ Design:” How the Framing Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & Pol’y 349 (2007). Whether one accepts each of the points that Davies makes or not, the accumulation of evidence that he provides for inaccuracy in understanding the law from a different era and the difficulty of attributing questionable knowledge to the Framers is to my examination extremely persuasive.
viewed from the perspective of the speaker or of the government agent. We do not yet know what type of formality is required. The list of unknowns is not unlimited, but it is lengthy and includes many questions of substantial importance. While history gives us clues as to these answers, it yields very few certainties.

Moreover, even as to statements that are not testimonial, it is unclear how the Framers would have reacted to a modern world where, as Rehnquist noted, hearsay is much more admissible and ordinarily given weight that likely would have appeared foreign to the Framers. For example, in Crawford, Scalia states that the spontaneous declaration exception was much narrower at the time of the framing than it is today.123

The Framers therefore could not have contemplated whether the Confrontation Clause should apply to the vast range of excited utterances that are today introduced with great frequency and with apparently persuasive impact because most of those statements would have been inadmissible in the Framers’ world on hearsay grounds. The Court suggested that the spontaneous declaration made to a police officer in White v. Illinois124 might be excluded as a testimonial statement,125 but would the Framers have excluded such statements made to family members as well? We cannot know because it is unclear that the law permitted admission of either at the time of the framing.

Therefore, we may only make a realistic and appropriately modest claim about our ability to know what information was available to the Framers, their understanding of it, and their intentions, and then attempt to translate and properly apply such

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122 Rehnquist contended that, although courts were inconsistent, “out-of-court statements made by someone other than the accused and not taken under oath, unlike ex parte depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based.” Crawford, 541 U.S. at 69 (Rehnquist, C.J., concurring in the judgment and dissenting from the analysis).

123 Crawford, 541 U.S. at 58 n.8 (stating that to be admissible the statement needed to be “immediat[ely] upon the hurt received,” (quoting Thompson v. Trevanion, Skin. 402, 90 Eng. Rep. 179 (K.B. 1693))).

124 502 U.S. at 349-51.

125 Crawford, 541 U.S. at 58 n.8.
understandings to modern practices. These limitations call for a weaker additional system, such as that set forth in Roberts, to screen problematic hearsay. The statement may be regarded as suspect either because it is facially unreliable or because it is only barely outside the definition of testimonial statements, and in either situation, the defendant lacked the procedural protection of an opportunity to confront the witness against him.

CONCLUSION

The Roberts approach, as developed and weakened by later Supreme Court decisions, provided incomplete protection of the confrontation right. However, as to the troubling hearsay presented in Wright, it proved adequate to exclude the hearsay. As noted earlier, where the Framers established a procedural protection to help ensure the reliability of evidence by face-to-face confrontation and cross-examination, it is hardly ridiculous to have a residual protection where face-to-face confrontation and cross-examination are not afforded to test facially unreliable statements (the functional equivalent of a witness) admitted against the accused. Crawford was right to note that judges were not to be entrusted with admitting the most historical suspect statements simply because the judge believed the statement to be reliable. The Framers feared judges could not be broadly trusted to protect individual rights, and

126 The hearsay involved accusatory statements by a young child solicited by a pediatrician using suggestive questions. Id. at 826. Wright does not stand alone. One area where Roberts has been used reasonably frequently to exclude problematic hearsay involves statements of children in sexual abuse cases. See Robert P. Mosteller, The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases, 65 LAW & CONTEMP. PROBS. 47, 84-85 (Winter 2002) (examining treatment of federal circuits under Roberts in child sexual abuse cases and noting Eighth Circuit’s particular concern where no treatment interest is shown by the child).
127 The Court described the Framers’ distrust of judges as follows: We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They
therefore it was theoretically and factually correct to fear that judges would do a poor job in providing protection through their ad hoc approach to reliability. However, charging judges with the duty to exclude particularly unreliable hearsay that has not been confronted as supplemental protection was no more prohibited by the Framers than *Miranda*. *Roberts* did nothing to harm the core protection that *Crawford* and *Davis* describe and begin to define.

*Roberts* is gone, and with it almost certainly, is *Wright*. They were, however, in good company with other aspects of contemporary constitutional criminal procedure that, although inconsistent with originalist analysis, remain valid doctrine. *Roberts* and *Wright* should have been permitted to continue to “live” within the federal Confrontation Clause and to provide their modest but important supplemental protection. Perhaps some part of their sound functional concept that highly problematic hearsay should be subject either to confrontation or to an examination as to reliability will find a home elsewhere. Unfortunately, the protection of the Confrontation Clause of the Sixth Amendment is to be determined solely by interpretation of the word “testimonial.”

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knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. . . . By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh’s—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts’* providing any meaningful protection in those circumstances.

*Crawford*, 541 U.S. at 67-68.
A RELATIONAL APPROACH TO
THE RIGHT OF CONFRONTATION
AND ITS LOSS

Deborah Tuerkheimer∗

INTRODUCTION

Battering is fundamentally different from violence between non-intimates.1 Domestic violence is widely understood—outside the law—as an ongoing pattern of conduct defined by both physical and non-physical manifestations of power.2 Yet, by tacit

∗ Associate Professor of Law, University of Maine School of Law; A.B., Harvard College, 1992; J.D., Yale Law School, 1996. This Article condenses and updates the ideas first expressed in Deborah Tuerkheimer, Crawford’s Triangle: Domestic Violence and the Right of Confrontation, 85 N.C. L. REVIEW 1 (2006). I am grateful to Laurence Busching, Richard Friedman, Brooks Holland, Tom Lininger, Lois Lupica, Joan Meier, Robert Pitler, Myrna Raeder, Frank Tuerkheimer, Jennifer Wriggins, and Melvyn Zarr for their helpful comments on earlier incarnations of this piece, and to Judith Lewis for her invaluable research assistance.

1 Violence between non-intimates is paradigmatic criminal conduct and lies in contrast to domestic violence, which, in important respects, lies outside the bounds of traditional criminal law structures. For a discussion of the features that define “paradigmatic” crime, see Deborah Tuerkheimer, Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence, 94 J. CRIM. L. & CRIMINOLOGY 959, 971-74 (2004) [hereinafter Remedying the Harm of Battering]. Although child abuse and elder abuse share many of the dynamics distinguishing battering from conventional crime, and much of the discussion which follows applies to violence in intimate relationships generally, I focus here on adult partner abuse and the law’s response to it.

2 Psychologist Mary Ann Dutton has elaborated on the dynamics of domestic violence as follows:
default to analogy and precedent, our legal system equates domestic violence with paradigmatic non-domestic violence, resulting in an odd disconnect between the law and life outside of it.

This observation is particularly true in the Sixth Amendment context, where notions of domestic violence underlying contemporary Confrontation Clause jurisprudence are sufficiently inaccurate as to fatally undermine the coherence of both doctrine and theory. As scholars, practitioners, and courts struggle to discern the meaning of the Supreme Court’s recent pronouncement in *Davis v. Washington*, my critique focuses on

Abusive behavior does not occur as a series of discrete events. Although a set of discrete abusive incidents can typically be identified within an abusive relationship, an understanding of the dynamic of power and control within an intimate relationship goes beyond these discrete incidents. To negate the impact of the time period between discrete episodes of serious violence—a time period during which the woman may never know when the next incident will occur, and may continue to live with on-going psychological abuse—is to fail to recognize what some battered woman experience as a continuing “state of siege.”


3 See supra note 1 (explaining term).

4 The jurisprudence is incoherent insofar as its defining construct cannot be applied meaningfully in the domestic violence realm, though it may indeed be compatible with paradigmatic crime. The irony is that, as a categorical matter, battering prosecutions will most often present the need for trial without the testimony of a victim. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 768 (2005) (“[R]ecent evidence suggests that 80 to 85 percent of battered women will recant at some point.”). See also Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. Review 1, 14-18 (2006) [hereinafter *Crawford’s Triangle*] (discussing causes and manifestations of victim non-cooperation). If a framework for Confrontation Clause challenges fails in these cases, in my view it cannot be seen as adequate.

the underlying conceptual framework as inherently flawed.

The Court has promulgated an invalid test for “testimonial statements” by incorporating a model of discrete, episodic violence that is incompatible with the ongoing nature of abuse. In essence, the Court has defined the term in a manner that does not and cannot measure what it purports to in domestic violence cases.

In the discussion which follows, I examine cases and commentary treating the right of confrontation in victimless domestic violence prosecutions. My objective in doing so is to expose the assumptions underlying the application of Crawford v. Washington to the battering sphere. This Article argues that the Court has failed to acknowledge the continuing course of conduct that characterizes domestic violence.

A full appreciation of the dynamics of domestic abuse and attention to the context of the relationship that embeds victim and defendant results in what this Article will refer to as a “relational approach” to Confrontation Clause analysis. This Article develops the relational approach by analyzing the two doctrinal questions that will continue to arise most frequently in the post-Crawford era: (1) when is a statement testimonial, and (2) when has a defendant forfeited his right of confrontation?

Part I critiques the Davis Court’s definition of “testimonial”

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6 Many domestic violence victims become reluctant or unwilling to assist with prosecutorial efforts after a batterer’s arrest, creating the need for prosecution without reliance on a victim’s testimony, or so-called “victimless prosecution.” Tuerkheimer, Crawford’s Triangle, supra note 4, at 2 n.3. I use this term advisedly, as it tends to obscure the fact that someone was indeed victimized by the conduct at issue in the case, notwithstanding her absence from the trial. It seems to me that “victim absent” would be a preferable way of describing prosecutions now referred to as “victimless.” Nevertheless, to adhere to convention and avoid unnecessary confusion, I will continue to use the accepted term.


8 My use of the word relational in this context is not derived from the scholarly tradition of relational feminism. Rather, it is way of characterizing an approach to understanding the Confrontation Clause that views the alignment of relationships between accuser, accused, and state as central to its descriptive and normative aspirations. See infra Part V.
for its complete inattention to the dynamics of battering. This Part argues that decontextualized determinations of exigency—and continued adherence to an inapt dualism—will inevitably skew the disposition of Confrontation Clause challenges. In evaluating whether a hearsay statement is testimonial, the Court has adopted a theoretical framework that posits a binary relationship between “crying for help” and “providing information” for investigatory purposes.9

However, in the domestic violence realm, the dichotomy is false. By this contention, I mean to suggest more than that officers and victims have “mixed motives” that are often difficult to discern.10 Rather, from the perspective of battered women, the meaning of “exigency”—a construct deeply embedded in the now-reigning definition of testimonial—is distinct from that experienced by victims of other types of crimes.11 In order for the exigency confronting a battered woman to be resolved, she must often provide information regarding past violence; she does so in order to prevent imminent violence. Thus, the two functions conceived of by courts (“crying for help” and “providing information”) as distinct, and indeed binary, are not only practically inseverable, but are conceptually so as well. By failing to account for this reality, the dominant judicial approach has resulted, and will continue to result, in the classification as “testimonial” of many statements by domestic violence victims that are, in fact, cries for help in response to immediate danger.

Part II examines the lower courts’ treatment of the testimonial question in Davis’ immediate aftermath in order to

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9 See Davis, 126 S. at 2279.
10 Id. at 2283 (Thomas, J., concurring in the judgment in part and dissenting in part) (“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 otherwise, the purposes of an interrogation, viewed from the perspective of the police, are both to respond to the emergency situation and to gather evidence. Assigning one of these two ‘largely unverifiable motives,’ primacy correct word here? requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible.”) (internal citation omitted).
11 For a more extended analysis of this proposition, see Deborah Tuerkheimer, Exigency, 49 ARIZ. L. REV. (forthcoming 2007).
illustrate defects in the Court’s framework for classifying testimonial hearsay. It must be conceded, however, that even a properly contextualized analysis of the definitional question will lead to the exclusion of out-of-court statements that, while admissible in victimless prosecutions before \textit{Crawford}, will now be properly categorized as testimonial. New attention must therefore be given to the rule of forfeiture by misconduct, which precludes a defendant from asserting confrontation rights where he is responsible for procuring the witness’ absence from trial. As the advancement of forfeiture arguments in domestic violence cases becomes increasingly commonplace,\footnote{The \textit{Davis} Court’s recent reiteration of the principle of forfeiture and its \textit{dictum} discussing evidentiary standards applicable to forfeiture hearings will further accelerate the development of law in this area. \textit{See} \textit{Davis}, 126 S. Ct. at 2279-80.} the doctrine—as yet, undeveloped in the battering realm—must evolve.

Part III argues that judicial forfeiture determinations should take into account the characteristics that distinguish domestic violence from other types of criminal tampering. This Part provides a conceptual roadmap for this doctrinal transformation suggesting that as courts begin to formulate a forfeiture framework applicable to domestic violence cases, reliance on precedent and analogy inevitably will subvert the rule’s equitable rationale. This Part reveals that the influence of batterers over victims departs in important ways from the traditional witness tampering paradigm; in most abusive relationships, “tampering” conduct is inexorably bound up in the violent exercise of power that is itself criminal. Without acknowledging the patterned nature of domestic abuse, courts cannot correctly interpret the meaning of forfeiture. Thus, fidelity to the theoretical underpinnings of the doctrine demands new consideration of how it applies to victimless domestic violence prosecutions.

Finally, Part IV offers a theory of how the preceding discussion might help to conceptualize the meaning of the confrontation right. While undermining the notion that ensuring evidence “reliability” is the exclusive function of the right of confrontation, \textit{Crawford} erected no new governing theoretical framework. In the face of this void, the need to articulate a
normative vision of confrontation has never been more compelling. This Part suggests that when the realities of domestic violence are attended to, a new paradigm for Confrontation Clause jurisprudence—one that is, in essence, relational—can be discerned. Adopting a relational approach to confrontation has the potential to transform how we think about the value of confrontation in domestic violence prosecutions and beyond.

I. Davis and the False Primacy of Past “Events”

The conceptual tension that underlies the definition of testimonial hearsay derives from an uncritical acceptance of what one court expressly termed “the dichotomy between a plea of help and testimonial statements.”13 In the domestic violence context this dichotomy is false. Often, a battered woman’s safety depends entirely on the intervention of law enforcement: she

13 State v. Powers, 99 P.3d 1262, 1265 (Wash. 2004). In an important article pre-dating Crawford, Richard Friedman and Bridget McCormack describe the operative theoretical construct as follows:

Now consider statements made in 911 calls and to responding police officers. A reasonable person knows she is speaking to officialdom—either police officers or agents whose regular employment calls on them to pass information on to law enforcement, from whom it may go to the prosecutorial authorities. The caller’s statements may therefore serve either or both of two primary objectives—to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous, situation, and to provide information to aid investigation and possible prosecution related to that situation. In occasional cases, the first objective may dominate—the statement is little more than a cry for help—and such statements may be considered nontestimonial . . . . The more the statement narrates events, rather than merely asking for help, the more likely it is to be considered testimonial.

Richard D. Friedman & Bridge McCormack, Dial-In Testimony, 150 U. PA. L. REV. 1171, 1241-42 (2002). The authors do not limit their discussion to the domestic violence context, although much of their attention is directed specifically at the problem referred to as “dial-in testimony” of domestic violence victims. Id. at 1180-1200.
RELATIONAL APPROACH TO CONFRONTATION

needs police protection because without assistance the violence will continue. Put differently, a domestic violence victim’s safety may be wholly contingent on her communication with police; her “narration of events” linked inexorably to resolving—however temporarily—the danger posed by her batterer.14 Unlike victims of episodic crimes, a battered woman may “cry for help” because it is the only possible way for her to experience a moment of safety, however brief.

The “cry for help” may sound much like a narration of events because it is: a victim is describing battering that will, in all likelihood, continue in the absence of some action by law enforcement.15 From her perspective, if she does not describe the crime to the police, it is simply not “over,” nor is she safe.16 And even when she does recount the incident, assuming


15 The ongoing pattern of physical and non-physical conduct that characterizes battering is often escalated by a victim’s attempt to increase her control over her life. In my experience prosecuting and supervising domestic violence cases in the New York County District Attorney’s Office, I found this to be especially true of acts triggering the intervention of law enforcement. See Martha M. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 5-6 (1991) (“[A]t the moment of separation or attempted separation—for many women, the first encounter with the authority of law—the batterer’s quest for control often becomes most acutely violent and potentially lethal.”). Cf. Brief of Amici Curiae National Network to End Domestic Violence et al. in Support of Respondent at 7, Davis v. Washington, 126 S. Ct. 2266 (2006) (Nos. 05-5224 and 05-5705), 2006 U.S. S. Ct. Briefs LEXIS 198, at *19 (“Pursuing prosecution, thus, is not only an assertion of autonomy, it directly defies the abuser’s control, exposing the victim to considerable risk of violence.”). By asserting that violence will likely continue absent some action on the part of law enforcement, I do not mean to imply that an arrest will, in all or even most cases, bring about a permanent cessation of violence. See infra note 17 (acknowledging uncertainty regarding deterrent effects of arrest in domestic violence cases). Rather, arrest provides battered women with a reprieve, however temporary, that is of value for a variety of reasons.

16 See, e.g., Brief of Amici Curiae National Network to End Domestic Violence, supra note 15, at 48 n.20 (“It is not uncommon for domestic abusers to threaten their victims that they will kill them if they call the
the police are able to make an arrest, there is every reason to believe that—after a respite—the battering will continue. The domestic violence victim’s exigency extends beyond what might appear to an outside observer—or even to the “reasonable person” unfamiliar with the culture of this particular battering relationship—to be the “end” of the criminal incident. The exigency she experiences requires a narration of past events in order to resolve the immediate danger they precipitated. This reality fatally undermines judicial reasoning predicated on the “crying for help” versus “providing information to law enforcement” rubric.

Rather than reject this reasoning, the Supreme Court recently reified it in Davis. According to Justice Scalia, writing for the

police . . . .”) (citing Director of Milwaukee County District Attorney’s Office Domestic Violence Unit).

17 Domestic violence victims are rarely (if ever) able to predict with certainty the impact of law enforcement involvement on future abuse. See generally note 15. Indeed, there is considerable controversy regarding the deterrent effects of arrest in battering relationships. See, e.g., Joan Zorza, Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies, 28 NEW ENG. L. REV. 929 (1994); Eve Buzawa & Carl Zuawa, Arrest is No Panacea, CURRENT CONTROVERSIES ON FAMILY VIOLENCE 337 (Gelles & Loseke eds., 1993). See also ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 184-88 (2000) (discussing broader implications of mandatory arrest and no-drop prosecution policies).

Accepting as a phenomenological matter that a constant danger characterizes the lives of many battered women does not mean as a practical matter that the period of exigency relevant to the Confrontation Clause analysis should be considered to extend indefinitely. As is true of most difficult criminal law questions, lines must be drawn. See Deborah W. Denno, Crime and Consciousness: Science and Involuntary Acts, 87 MINN. L. REV. 269, 274 (2002) (remarking that “[t]here are many line-drawing dilemmas throughout the criminal law”). Ideally, these lines are drawn in a manner that corresponds to underlying empirical realities.

18 After Davis, the focus of judicial inquiry now would seem to be on the “circumstances objectively indicating . . . the primary purpose of the interrogation,” although “it is in the final analysis the declarant’s statements, not the interrogator’s questions” that remain at the heart of the Confrontation Clause. 126 S. Ct. at 2273-74.

19 See generally id.
RELATIONAL APPROACH TO CONFRONTATION

majority, a statement is nontestimonial if uttered “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.”20 Conversely, if the “primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution”—i.e., there is “no ongoing emergency”—a resulting statement is testimonial.21 Where a victim is in need of police action to confront the danger presented by her batterer—a danger that, given the continuing nature of the violence, is no less “exigent” simply because one prosecutable crime has already occurred22—the narrative of events necessary to trigger law enforcement assistance is classified as testimonial hearsay.

In this manner, the passage of an “event” essentially becomes one proxy for the resolution of exigency. Yet tensions within the opinion regarding what counts as an “event” are left

20 Id. at 2273.

21 Id. Adopting this binary standard, the Court affirmed the state court ruling in Davis, holding that the “primary purpose” of the 911 call “was to enable police assistance to meet an ongoing emergency”; but it reversed the state court holding in Hammon, classifying the challenged statements to the responding police officers as “part of an investigation into possibly criminal past conduct.” Id. at 2278. By totemically incanting the language of crisis—“ongoing emergency,” “imminent danger,” “call for help against bona fide physical threat,” “present emergency,” “frantic answers,” “environment that was not . . . . safe”—the Court purported to differentiate Michelle McCrotty’s words from Amy Hammon’s and to justify its definition of the latter as testimonial. Id. at 2276-78. Since “Amy’s statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation,” id. at 2279, their admission at trial constituted a violation of the defendant’s Confrontation Clause rights.

22 Indeed, given the escalating nature of domestic violence, where one crime has just occurred, a victim’s circumstances may be even more “exigent.” See Mahoney, supra note 15, at 5-6 (“[a]t the moment of separation or attempted separation—for many women, the first encounter with the authority of law—the batterer’s quest for control often becomes most acutely violent and potentially lethal.”) Cf. Brief of Amici Curiae National Network to End Domestic Violence, supra note 15, at *19 (“Pursuing prosecution, thus, is not only an assertion of autonomy, it directly defies the abuser’s control, exposing the victim to considerable risk of violence”).
unresolved by the majority’s unwillingness to concede that the concept is subject to interpretation. The Court leaps to an analysis premised on tense—that is, on whether the “event” is past or present—without pausing to consider what must have passed for a statement to be considered testimonial. In this way, the Court’s employment of a seemingly neutral term (“event”) functions to conceal its outcome-determining effect. The assumption that “events” have either happened or “are actually happening” obscures the utter subjectivity of this determination, begging the question of what qualifies as an “event.”

If “event” were defined as narrowly as possible—i.e., as the infliction of physical injury—it might be possible to identify when an event had terminated. While a number of passages in the opinion suggest that the Court is flirting with adopting this constricted view (by references to “past criminal events” and the like), it ultimately concludes—as it must—that “event” must be defined more broadly, at the very least, to encompass “a threatening situation” or “ongoing emergency.” After all, Davis already had left the home moments before McCrotty, the victim, described the assault to the 911 operator. Yet somehow, the Court is able to view her as “speaking about events as they were actually happen[ing].”

Beyond the ambiguity surrounding the device of “event,” Davis rests on the fallacy that exigency can be discerned without reference to context. In contrast, the opinion of Justice Thomas, concurring in the judgment in Davis and dissenting in Hammon, expressly contemplates the dynamics of domestic violence. Consider the following passage:

[The fact that the officer in Hammon was investigating Mr. Hammon’s past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action. It is hardly remarkable that Hammon did not act abusively towards his wife in the presence of the officers and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on

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23 See Davis, 126 S. Ct. at 2271 (2006); State v. Davis, 111 P.3d 844, 846 (Wash. 2005).
24 Davis, 126 S. Ct. at 2276.
25 In contrast, the opinion of Justice Thomas, concurring in the judgment in Davis and dissenting in Hammon, expressly contemplates the dynamics of domestic violence. Consider the following passage:
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_Indiana_, the consolidated companion case to _Davis_, is instructive in this regard. _Hammon_ involved the admissibility of a statement made by Amy Hammon to a police officer responding to the crime scene. The statement relayed information regarding an assault by the victim’s husband. By purporting to differentiate Michelle McCrotty’s words from those of Amy Hammon, the Court justified its definition of the latter as testimonial and the former as non-testimonial. In some respects, this result is not surprising. After all, Michelle McCrotty is more readily analogized to victims of paradigmatic crime: Her attacker had just recently fled, while Amy Hammon’s was still in the house during the police investigation. But this does not mean that exigency can only be experienced as it was by Michelle McCrotty. Amy Hammon’s story is not unlike those of countless battered women unable to communicate with law enforcement “about events as they [are] actually happening.” Yet the whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as “past conduct” back into an “ongoing emergency.”

_Id._ at 2284-85.


27 _Davis_, 126 S. Ct. at 2278-79.

28 Apropos of this observation, the Court’s reference to the 1779 English case of _King v. Brasier_ is curious. See _id._ at 2277. By suggesting that a young rape victim’s “screams for aid as she was being chased by her assailant” would properly be deemed nontestimonial, the Court seems willing to consider the possibility that safety—as opposed to the current infliction of a crime—is the relevant construct. What eludes the Court is the extent to which the dynamics of domestic violence raise safety concerns that are distinct from those presented by paradigmatic crime. A domestic violence victim may, in effect, be screaming for aid as she is being functionally chased by her assailant; yet provided the physical assault has ended, the Court would presumably characterize the statement as one which described past events and was, therefore, testimonial.

29 _Id._ at 2276. Hershel Hammon apparently broke the telephone during his attack on his wife. _Id._ at 2272. For obvious reasons, it is quite common for batterers to destroy or disable the telephone during episodes of acute physical violence. Even if a phone is in working order during an attack, it should come as no surprise that victims are rarely able to make a call to 911 in the midst of a beating.
Court’s inability (or unwillingness) to contemplate her perspective allowed it to proclaim with certainty: “It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct.”\(^{30}\) As “there was no emergency in progress”\(^{31}\) (apparently because the responding officer “heard no arguments or crashing and saw no one throw or break anything”\(^{32}\)) and “there was no immediate threat”\(^{33}\) once the officers arrived, it was clear to the Court that “the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime.”\(^{34}\) And thus, Amy Hammon was “cast . . . in the unlikely role of a witness.”\(^{35}\)

The portion of \textit{Davis} treating \textit{Hammon} may well be criticized for its application of the Court’s newly articulated definition of testimonial to the facts. But Amy Hammon could not “seek aid” without “telling a story about the past.” (After all, the police could do nothing to protect her from her husband were Amy simply to have requested assistance because she feared him.) My contention, therefore, is that the Court’s test is inherently defective.\(^{36}\) By equating the past commission of a crime with the resolution of exigency—in essence, by propounding the primacy of tense\(^{37}\)—the Court negates the


\(^{31}\) Id.

\(^{32}\) Id.

\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) See id. at 2277. This language comes from the portion of the opinion where the Court, rejecting \textit{Davis’} Confrontation Clause challenge, dismisses the argument that Michelle McCrotty’s statement was testimonial. \textit{Id.} The Court correctly observes that McCrotty’s “\textit{ex parte} communication” was not “aligned” with “[its] courtroom analogues,” concluding that “[n]o ‘witness’ goes into court to proclaim an emergency and seek help.” \textit{Id.}

\(^{36}\) See supra note 4.

\(^{37}\) See, e.g., \textit{Davis}, 126 S. Ct. at 2279 (“McCrotty’s present-tense statements showed immediacy; Amy’s narrative of past events was delivered at some remove in time from the danger she described.”). See also supra notes 23-24 and accompanying text (critiquing ambiguity surrounding Court’s use of “event”).
realities of battering.\textsuperscript{38}

The definition of testimonial embodies assumptions about the nature of crime that are false in the battering realm. Incorporating a model of discrete, episodic physical violence that is incompatible with ongoing, multi-dimensional abuse, the Court formulates a standard for classifying testimonial hearsay that cannot be truly mapped onto domestic violence cases. Faced with the task of implementing a meaningless construct, judges are left with only unattractive options. They may grapple with the messy truth of ongoing emergencies—thereby confronting the inherent unworkability of the standard announced by \textit{Davis}, and the inevitably \textit{ad hoc} nature of decisions purporting to implement it. Alternatively, they may ignore the contextualized nature of ongoing emergencies, thereby maintaining the illusion of a rule by law (not judges), but at the cost of jurisprudential integrity.

II. \textbf{AFTER \textit{DAVIS}}

It is still too early to predict judicial reaction to the new regime. Nevertheless, cases decided in the immediate wake of \textit{Davis} suggest lower court resistance to the Court’s tacit equation of battering with other types of crime.\textsuperscript{39} The decisions treating

\textsuperscript{38} One way of addressing the problem I am identifying here would be to define domestic violence more accurately in the criminal code; that is, to criminalize the ongoing, patterned exercise of power and control that is battering. I have proposed such a statute, and explained at length the limitations of the current criminal law’s incident-based physical injury-focused response to domestic violence. See generally, Tuerkheimer, \textit{Remedying the Harm of Battering}, supra note 1; Deborah Tuerkheimer, \textit{Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later}, 75 GEO. WASH. L. REV (forthcoming 2007) (manuscript at 16-17, on file with author) (discussing relationship between Court’s recent 6th Amendment jurisprudence and proposed substantive criminal law reform).

\textsuperscript{39} As of November 17, 2006, approximately 140 lower court decisions have cited \textit{Davis}, although a number of these citations simply reflect remand orders, rather than treatment of \textit{Davis} on the merits. (This figure also does not include grant, vacate and remand orders issued by the United States Supreme Court.) About a quarter of these cases involve prosecutions for
on-scene statements to responding police officers mostly have determined that the hearsay is non-testimonial.40 These cases are more significant for what their application of Davis reveals about the test itself, and the ways in which courts may attempt to navigate its failings, than for their outcomes.

The case of Vinson v. State41 is illustrative of what might be seen as a judicial inclination to apply Davis’ test in a manner that more adequately accounts for the dynamics of battering than does the Davis opinion itself.42 In Vinson, the police responded
to the scene “within 10 to 15 minutes” of a 911 hang-up call and were told by the victim, who appeared to have recent injuries, that she had been assaulted by her boyfriend. 43 Soon after, the defendant entered the room, where he remained during the course of much of the ensuing conversation between the police and the victim. 44 All of the victim’s statements were deemed non-testimonial. 45

With respect to the victim’s initial description of the incident, the Vinson court, noting the victim’s “bloodied appearance,” and that “the deputy knew that, only minutes before, a woman in that same apartment had been yelling for police assistance while a man denied that any problem existed,” concluded that “the deputy’s asking only what had happened was tantamount to his having asked whether an emergency existed or whether [the victim] needed assistance.” 46 Citing Davis, the court emphasized that “[t]he Confrontation Clause does not prohibit questioning when, as here, its purpose, viewed objectively, is to ascertain if there is an ongoing emergency.” 47

In classifying the deputy’s subsequent questioning of the complainant (“the extent and formality of which is not revealed”), the court viewed the defendant’s sweaty, shirtless, and “very excited” appearance, as well as his interaction with the injured victim (i.e., his “implicit order” that she “answer in a certain way so that he would not be taken to jail”) as an “indicat[ion] that the ‘elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past.” 48 Thus, in Vinson,

44 The record was “somewhat unclear as to exactly when appellant was removed from the apartment,” but the court interprets the evidence to suggest that the defendant was present when all of the challenged statements were made. Id., at *6 n.3. For the possible significance of this observation, see infra note 50 and accompanying text (discussing perpetrator presence as possibly evolving proxy for emergency).
46 Id., at *23.
47 Id.
48 Id. at *24 (citing Davis v. Washington, 126 S. Ct. 2266, 2276 (2006))
the court was able to find an outlet for the pressure created by a doctrinal framework incompatible with the facts presented by a typical battering case.

The opinion in *State v. Rodriguez*\(^{49}\) similarly reflects what may be a willingness on the part of the lower courts to adapt *Davis* to the realities of domestic violence.\(^{50}\) At issue in *Rodriguez* were statements made by a domestic violence victim to the police when officers first responded to the scene and on the day following that initial interaction. In finding the statements describing the past assault to be non-testimonial, the court emphasized that the victim was not “motivated by anything other than [a] desire to get help and secure safety,” and that her “trauma” belied the notion that she had a “conscious expectation” that her words would later be used against the defendant.\(^{51}\) Statements made to the police the following day were also deemed nontestimonial, since the defendant—who, unbeknownst to police, was present at the scene at the time of the questioning—“was . . . still a severe threat to [the victim’s] safety.”\(^{52}\)

Again, it is too soon to forecast with certainty whether, and how, lower courts will make workable a framework that cannot be meaningfully applied to the facts presented by a typical domestic violence case.\(^{53}\) That said, consider the possibility that a perpetrator’s presence at the crime scene at the time the

(emphasis in original). Testimony by the deputy that “the scene did not feel safe until after appellant had been secured and back-up had arrived” also impacted the court’s determination. *Id.* at *29.

\(^{49}\) 722 N.W.2d 136 (Wis. App. Ct 2006).

\(^{50}\) Given the relatively small sample size of written opinions involving domestic violence and treating *Davis* to date, my assessment of how the lower courts may be negotiating its defects is necessarily tentative.

\(^{51}\) *Rodriguez*, 722 N.W.2d at 148.

\(^{52}\) *Id.* After the police left the scene the previous day, the defendant returned home and attempted to stab the victim and her child. See *id.* at 141.

\(^{53}\) Without specifically identifying the fundamental incoherence of the *Davis* test, one court has observed that “within the context of the fact patterns before the Court, the *Davis* Court crafted some diffuse guidelines which, because of the Court’s circumlocution, we must now attempt to distill into practical rules.” *State v. Mechling*, 633 S.E.2d 311, 319 (W. Va. 2006).
challenged statements are made might generally become accepted as a proxy for an “ongoing emergency,” and the perpetrator’s absence from the scene viewed as presumptive evidence that a crisis has been resolved.\(^{54}\) Under this rubric, the ongoing nature of battering would, to an extent, be acknowledged and employed to somewhat mitigate Davis’ shortcomings.

It should be emphasized that any such mitigation would be partial: a batterer’s departure from a crime scene (often in response to a victim’s call to police) hardly means that the danger of imminent harm to the victim has dissipated; absent arrest, in many cases, the threat remains real. And yet, lower court recognition that “ongoing emergencies” in domestic violence cases encompass situations in which—notwithstanding police presence—a batterer is still on the scene when the victim recounts what occurred would represent a significant departure from the Supreme Court’s limited understanding of the dynamics of domestic abuse.

If courts manipulate Davis to allow for a more empirically-based classification of hearsay as testimonial/nontestimonial, perhaps the ultimate impact of the decision may be largely conceptual. But it would be premature to reach this conclusion. Indeed, the Court’s orders granting certiorari, vacating the judgment, and remanding cases for further proceedings in Davis’ immediate aftermath do not bode well for judicial reasoning

\(^{54}\) Compare, e.g., State v. Vinson, Nos. 01-05-00784-CR and 01-05-00785-CR, 2006 Tex. App. LEXIS 7036, at *27 (Tex. App. Aug. 10, 2006) (mentioning specifically perpetrator’s presence and behavior as indicating an “ongoing and dangerous situation”), with Mechling, 633 S.E.2d at 323 (noting that “the defendant had clearly departed the scene” when the victim was questioned, and concluding that the officers’ questioning of the victim “was part of an investigation into possibly criminal past conduct”). See also Commonwealth v. Gonsalves, 883 N.E.2d 549, 561 (Mass. 2005), cert. denied, 126 S. Ct. 2982 (2006) (“[B]y the time the officers arrived, although the complainant remained upset, the situation had diffused. The testifying officer stated that he was informed the assailant was no longer present. Nothing in the record indicates that his questioning of the complainant was designed to secure the scene.”).
predicated on an accurate perception of battering.\footnote{This type of order is issued only when “intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.” Lawrence v. Chater, 516 U.S. 163, 167 (1996).} (The domestic violence cases that fall into this category resulted in the classification of on-scene statements as nontestimonial and effectively undermined the notion that an emergency is over when the beating ends.\footnote{See, e.g., People v. Thomas, No. A104336, 2005 WL 2093065, at *5 (Cal. App. 1st Dist. Aug. 31, 2005) (finding that victim made statements “shortly after the incident, while she was crying and frightened, and described the beating and the circumstances that immediately led up to it;” officer “was responding to a report of a crime and trying to find out what had happened and who was responsible”); State v. Warsame, 701 N.W.2d 305, 312 (Minn. Ct. App. 2005) (holding that victim, who was “on her way to the police station near her house when she encountered [police] . . . explained that all of the phone lines at her house had been cut;” because “[h]er assailant was still at large, and she was injured,” it was “evident” to the court that “she was seeking police protection and assistance”); State v. Wright, 701 N.W.2d 802, 814 (Minn. 2005) (mentioning that victim was “primarily concerned” about the defendant’s “ability to harm [her] in the future, and not with the criminal penalties that he might face for his actions that night.”).} While many lower courts will continue to embrace the false dualisms upon which \textit{Davis} was erected, in all likelihood, an uneasy judicial equilibrium will be reached; one which reflects but somewhat moderates the core defects of \textit{Davis}.

Regardless of how the contortions manifest themselves, the “ongoing emergency” framework will continue to distort analysis of the threshold definitional question. Moreover, even if courts were to adopt the contextualized approach that I have suggested, there undoubtedly will be hearsay that is properly defined as testimonial.\footnote{It may be that the discrepancy between what an evidentiary code requires and what the testimonial approach to confrontation demands has grown wider, particularly in the realm of domestic violence prosecution. When considering the scope of this discrepancy, it is worth noting the recent expansions of hearsay exceptions often used in victimless prosecution. For example, state v. Wright, 701 N.W.2d 802, 814 (Minn. 2005) (mentioning that victim was “primarily concerned” about the defendant’s “ability to harm [her] in the future, and not with the criminal penalties that he might face for his actions that night.”).} Since some theoretical divergence is
inevitable—and because, as a practical matter, the wholesale judicial rejection of familiar templates seems unlikely—the next frontier for the victimless prosecution of domestic violence is forfeiture.

III. EVOLVING FORFEITURE

A criminal defendant whose wrongdoing has procured the absence of his victim at trial is deemed to have forfeited his right to confrontation. This rule—expressly “approved” by the Court in both Crawford and, more recently in Davis—instance, California and Oregon have “ad hoc hearsay exceptions directed toward domestic violence victims” that allow certain statements of a declarant describing the infliction of physical injury or threat of physical injury against her provided the statement was made close in time to the incident. Myrna Raeder, Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases, 71 BROOK L. REV. 311, 353 (2005). See also CAL. EVID. CODE. §1370(a)(1) & (3) (West 2001); OR. REV. STAT. §40.460(26)(a)(2002).

58 “Wrongful conduct obviously includes the use of force and threats, but it has also been held to include persuasion and control by a defendant, the wrongful nondisclosure of information, and a defendant’s direction to a witness to exercise the fifth amendment privilege.” Steele v. Taylor, 684 F.2d 1193, 1201 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983). See infra notes 73-80 and accompanying text for further discussion of defining wrongdoing in the domestic violence context.

59 See infra note 91 (discussing unavailability analysis meaningfully applied to domestic violence cases).

60 “Some courts speak of the defendant as having waived the confrontation right, but this is inaccurate: It is not necessarily so that an accused who has acted in the ways described here as knowingly, intelligently, and deliberately relinquished the right.” Richard D. Friedman, Confrontation and the Definition of Chutzpah, 31 ISR. L. REV. 506 (1997) [hereinafter Confrontation].


62 See supra note 12 (noting Davis’ reiteration of the vitality of the
"extinguishes confrontation claims on essentially equitable grounds," precluding an accused from "complain[ing] about the consequences of his own conduct."

A judicial finding of forfeiture results in the admission at trial of out-of-court statements that would otherwise be excluded pursuant to the Confrontation Clause.

Crawford's testimonial approach to hearsay—and, more generally, its "restoration" of the Confrontation Clause protection—instantly creates the prospect of a newly robust forfeiture doctrine, and provides an impetus for its re-envisioning. As a consequence of the Court's unequivocal forfeiture doctrine)).

63 Crawford, 541 U.S. at 62.
64 See Friedman, Confrontation, supra note 60, at 516. Richard Friedman has stated:

The proper basis for this principle is not, as some courts have suggested it is, the broad dictum that no one should profit by his own wrong. As an ideal, that is probably true, but in some cases exclusion of the evidence on confrontation grounds will not be necessary to guarantee that the accused does not profit by his own wrong, and in some cases such exclusion will not be sufficient to guarantee that result . . . . A more satisfying explanation may be that the accused that should not be heard to complain about the consequences of his own conduct. Thus, the accused ought not be able to cause exclusion of the secondary evidence on the ground that he has been unable to confront and examine the declarant when his own conduct accounts for that inability.

Id.

66 As Myrna Raeder observes, "Crawford virtually invited prosecutors to raise claims of forfeiture when facing Confrontation Clause challenges."

Raeder, supra note 57, at 361.
67 In contrast to the abundance of cases treating the testimonial question, post-Crawford forfeiture case law is still remarkably undeveloped. In my view, the discrepancy is reflective of the practical challenge of recalibrating understandings of the bench and prosecutorial bar with respect to how constitutional forfeiture applies to domestic violence cases. It also suggests that this is a uniquely opportune moment for considered reflection on how
"decoupling" of the constitutional right from the evidentiary code, constitutional forfeiture must be given its own doctrinal space. Indeed, the dramatically changed approach to the best to effect forfeiture’s normative potential in a new jurisprudential era.

68 Raeder, supra note 57, at 363.

69 When considering the introduction of hearsay statements against a criminal defendant in a post-Crawford era, it is important to bear in mind that, while evidentiary admissibility does not dictate constitutionality, neither does constitutional acceptability resolve evidentiary issues.

70 See Raeder, supra note 57, at 363 (“In my view, we need to separate the forfeiture hearsay exception from the constitutional forfeiture doctrine.”).

Since Davis was decided, a number of courts have reiterated that constitutional forfeiture—unlike its evidentiary counterpart (codified at Fed. R. Evid. 804(b)(6))—does not require specific intent to procure a witness’ trial absence. See, e.g., State v. Jensen, No. 2004AP2481-CR, 2007 WL 543053, at *12-14 (Wis. 2007) (rejecting argument that specific intent requirement applies to constitutional forfeiture by wrongdoing doctrine); People v. Giles, 2007 Cal. LEXIS 1913, at *32 (Cal. 2007) (“[F]orfeiture principles can and should logically and equitably be extended to . . . cases in which an intent-to-silence element is missing.”). See also State v. Brooks, No. W2004-02834-CCA-R3-CD, 2006 Tenn. Crim. App. LEXIS 668, at *26 (Aug. 31, 2006) (“[U]nlike the forfeiture by wrongdoing exception to the hearsay rule, a defendant’s intent is irrelevant with respect to the forfeiture by wrongdoing exception to the Confrontation Clause”); Mechling, 633 S.E.2d 311, infra note 53. Cf. People v. McClain, No. 6302/02, 2006 N.Y. Misc. LEXIS 2013, at *12 (N.Y. Sup. Ct. May 10, 2006) (holding that the rule of forfeiture “simply provides that by killing another, a defendant forfeits his or her right to raise a confrontation clause challenge”); People v. Jackson, Crim. No. B183306, 2006 Cal. App. Unpub. LEXIS 7544, at *13 (Cal. Ct. App. Aug. 28, 2006) (“Because [the victim’s] unavailability was caused by [the defendant’s] intentional criminal act, [the defendant] cannot be heard to complain that he was deprived of the opportunity to confront and cross-examine him.”). See also State v. Romero, 133 P.3d 842 (N.M. Ct. App.), cert. granted, 146 P.3d 809 (N.M. 2006). In Romero, a prosecution for murder of the defendant’s former wife, the appellate court noted its disagreement with the state Supreme Court precedent holding that proof of Confrontation Clause forfeiture requires a showing of a specific intent to procure the witness’ absence. The intermediate court remarked, “we suspect that our Supreme Court may not have fully considered the pros and cons of imposing the intent to silence requirement in all cases involving forfeiture by wrongdoing.” Id. at 854. The New Mexico Supreme Court has granted certiorari to review the decision and specifically to revisit the boundaries of constitutional forfeiture. See State v. Romero, 113 P.3d 346 (N.M. 2005); E-
Confrontation Clause means that the forfeiture doctrine also must be conceptualized anew.

The need for this reexamination of forfeiture occasioned by Crawford is particularly critical in domestic violence cases, where the ongoing course of conduct which characterizes abusive relationships undermines both evidentiary and classic constitutional forfeiture analysis. Without an appreciation of how battering is different from other types of crime, judicial decision-making—which tends to default to reason by way of precedent and analogy—will invariably fall short. Thus, defining the contours of a constitutional forfeiture doctrine with meaning in the domestic violence realm requires an evolution in judicial reasoning.

Courts may be beginning to recognize this imperative. For instance, in State v. Mechling, the West Virginia Supreme Court, in remanding a domestic violence conviction for a determination on forfeiture grounds, noted that “[a]n accused’s coercion or intimidation of a victim of domestic violence so as to trigger forfeiture can take many forms,” including pre-charge conduct, conduct not specifically directed at procuring trial absence, and conduct which can only be understood when viewed in context. Predicated on an understanding of the nature of battering and the ways in which it is distinct from other types of crime, the Mechling court’s observations may be

mail from Joel Jacobsen, Assistant Attorney General, New Mexico Attorney General’s Office, to Deborah Tuerkheimer, Associate Professor of Law, University of Maine School of Law (June 29, 2006, 14:31:00 EST) (on file with author).

71 See Crawford’s Triangle, supra note 4, at Part III.A.
72 See Crawford’s Triangle, supra note 4, at Part III.B.
74 By “falling short,” I mean that in victimless domestic violence prosecutions, the equitable promise of forfeiture will remain largely unfulfilled. See supra notes 63-64 and accompanying text (noting normative underpinnings of forfeiture doctrine).
75 See generally Mechling, 633 S.E.2d at 311.
76 Id. at 326.
viewed as an effort to begin to develop a forfeiture doctrine grounded in reality.

For judges to apply the principle of forfeiture faithfully to domestic violence cases requires acknowledgment that, as a general proposition, abuse victims are absent from trials for reasons different from those that tend to cause other types of witnesses to become unavailable. The divergence of battering from a stranger violence template challenges existing conceptions of forfeiture in two fundamental ways. First, in many battering relationships, abuse occurring prior to the crime for which the defendant is being tried causes the victim’s non-cooperation. Second, what causes a victim to absent herself from trial may not be readily identified as “misconduct.” Put differently, forfeiture in domestic violence cases raises questions of chronology and of how to discern a defendant’s misconduct. After elaborating on each inquiry, I will address how forfeiture in domestic violence cases might be proven.

A. The Problem of Time

Often, a domestic violence victim’s absence from trial is caused by conduct on the part of the defendant that has occurred prior to, or even during, the commission of the crime with which he is charged. Threats to harm, or even kill a woman if she ever calls the police or testifies for the prosecution, are used as mechanisms of control by countless batterers. These threats

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77 Asserting that an accurate understanding of the dynamics of battering should shape the contours of the forfeiture doctrine is perfectly consistent with a commitment to a requirement that, in each particular case, an individualized forfeiture determination must be made. See infra note 86 and accompanying text.

78 This dynamic is one of a number of reasons that a requirement that the defendant specifically intend to procure a witness’s absence from trial is particularly inapt in the domestic violence context. See supra note 66 and accompanying text (discussing judicial refusal to import this evidentiary construct to constitutional realm).

79 See Lininger, supra note 4, at 769 ("The reasons why victims refuse to cooperate with the prosecution are manifold, but chief among them is the risk of reprisals by the batterers. One study found that batterers threaten
may be explicit or implicit. They are often leveled against the victim’s children and other family members, and they are no less real or powerful than the classic witness tamperer’s call from jail by virtue of having been announced prior to the crime for which the batterer happens to be standing trial. Indeed, it is often impossible to isolate the “tampering conduct” from the crime itself, since the nature of the relationship between a batterer and his victim often renders superfluous acts aimed specifically at procuring trial absence.

We see, then, that the conventional notion that someone who witnesses a crime later becomes subject to a defendant’s efforts to prevent her testimony is often inapt in the domestic violence context; the chronology that comports with reality is not nearly so linear.

B. The Problem of “What Counts”

In some cases, of course, the defendant engages in misconduct occurring after the charged crime in a manner that retaliatory violence in as many as half of all cases. . . .” (citing Randall Fritzier & Lenore Simon, Creating a Domestic Violence Court: Combat in the Trenches, 37 FAM. CT. REV. 28, 33 (2000), available at http://aja.ncsc.dni.us/courtrv/review.html)).

The discussion that follows tends to support the proposition that existing criminal law definitions of domestic violence fail to capture the full spectrum of battering conduct. See generally Tuerkheimer, Remedying the Harm of Battering, supra note 1.

80 See supra note 2 and accompanying text. While it is often impossible to identify a “tampering” behavior that is distinct from an abusive course of conduct (even as a theoretical matter), this is not always the case. Many batterers engage in efforts specifically targeted at procuring the unavailability of the victim at trial—for instance, threatening to kill her if she cooperates with prosecutorial efforts. See, e.g., State v. Wright, 701 N.W.2d 802, 807 (Minn. 2005) (mentioning defendant who menaced girlfriend with gun made calls from jail threatening that “if she doesn’t do what he wants someone will come over to her house and do something to her”). Even when a batterer behaves in ways that correspond more closely to traditional understandings of “tampering,” however, his actions are embedded in a relationship characterized by the violent exercise of power.
causes the victim’s unavailability. Yet here, too, the difficulty of importing the “tampering” construct to the domestic violence context—where the significance of a particular act is deeply embedded in a relationship—becomes readily apparent.

In marked contrast to the archetypical tampering case, where courts have little trouble seeing the likely effect of a murder defendant’s call from jail threatening to kill a witness if she testifies, the meaning ascribed by a domestic violence victim to conduct by her abuser can rarely be understood or evaluated without reference to the abusive relationship.

This tension relates to a concern articulated by the lower court in Hammon:

The question will probably also frequently arise as to what amounts to “wrongdoing” by a defendant in such a scenario, i.e., will only physical “wrongdoing” (another battery) by a defendant suffice, or can psychological pressure on a victim not to cooperate be enough, and if so, how is such pressure to be measured?

This question cannot be answered in the abstract, and the fact-dependent nature of the inquiry can hardly be overstated.

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82 Here, the question of what “misconduct” constitutes a forfeiture of confrontation rights is put in starkest relief, although the inquiry is relevant regardless of when the (mis)conduct which caused the victim’s absence occurred in relation to the charged crime.

83 “[R]elationship provides the terrain on which a batterer’s system of domination is enacted; relationship is essential to grasping the full measure of harm inflicted by the abuser and suffered by the victim; relationship connects and organizes what might otherwise appear to be random acts.” Tuerkheimer, Remedying the Harm of Battering, supra note 1, at 973-74. See Karla Fischer et al., The Culture of Battering and the Role of Mediation in Domestic Violence Cases, 46 SMU. L. REV. 2117, 2120 (1993) (“In battering relationships . . . cultural components become an extension of the pattern of domination itself . . . . A gesture that seems innocent to an observer is instantly transformed into a threatening symbol to the victim of abuse. It is a threat that carries weight because similar threats with their corresponding consequences have been carried out before, perhaps many times.”).

With regard to the reasoning process itself (as opposed to its outcome), however, it may be said that without an appreciation of the importance of context, and a sense of the patterned nature of battering, judicial forfeiture decisions will be unduly restrictive. Unless the dynamics of abuse are taken into account, the principle of forfeiture cannot be faithfully applied to domestic violence cases. Insight into the nature of battering is thus essential for the equitable underpinnings of the rule to be realized.

C. Proving Forfeiture

Accepting that in many, if not most, victimless domestic violence prosecutions a batterer’s conduct over time has caused the victim’s unavailability does not answer the question of how judges are to determine whether a particular defendant has forfeited his constitutional rights.85 One fundamental requirement is an evidentiary hearing at which the prosecution has the burden of proving that the defendant’s misconduct caused the victim’s unavailability.86 In my prosecutorial experience, many victims

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85 Cf. Raeder, supra note 57, at 361 (“Some prosecutors are already arguing that domestic violence cases by their very nature involve forfeiture when the victim does not testify. They claim defendants invariably either actually threatened complainants or, given the circumstances of their relationships, such women are afraid that their testimony will cause further violence (emphasis added).”). Apropos of a concern that domestic violence victims’ statements will be categorically immune from Confrontation Clause challenge, Tom Lininger has aptly observed that “not every [domestic violence] assault carries with it the threat of reprisals if the victim cooperates with law enforcement. If courts were to presume such tampering in every domestic violence case, the forfeiture exception would swallow the rule of confrontation.” Tom Lininger, Yes, Virginia, There is a Confrontation Clause, 71 BROOK. L. REV. 401, 407 (2005).

86 Importantly, “forfeiture cannot be assumed without specific evidence linking a defendant to a complainant’s failure to testify at trial.” Raeder, supra note 57, at 361. “Specific evidence,” in my view, contemplates proof of how the particular defendant on trial, by his battering conduct, caused the victim’s unavailability. This requisite linkage should go some way to alleviating fears that forfeiture will be too radically expanded by a categorical domestic violence exception to the default requirement of confrontation.
are, at some point in the process, quite candid about their reasons for wishing charges to be “dropped”; their hearsay statements are generally admissible at a forfeiture hearing.\(^{87}\)

Other evidence might include orders of protection, family court petitions and transcripts, prior police reports, and expert testimony on the effects of battering.\(^{88}\)

In many victimless prosecutions, provided an accurate judicial conception of what may constitute forfeiture, the burden of proving that the defendant’s misconduct procured the complainant’s trial absence will be satisfied.\(^{89}\) Yet \textit{Crawford} and its progeny present domestic violence prosecutors with a difficult dilemma: in order to successfully advance a forfeiture argument, extreme measures to procure the victim’s trial attendance may be required.\(^{90}\) As understandings of forfeiture in the battering realm evolve, the law regarding witness unavailability may concomitantly develop in a manner that accounts for the particularities of domestic violence.\(^{91}\) But in the meantime, in

\(^{87}\) \textit{Fed. R. Evid.} 104(a) (in making a determination regarding questions of admissibility, the court “is not bound by the rules of evidence except those with respect to privileges.”).

\(^{88}\) \textit{See} Adam M. Krischer, “Though Justice May be Blind, It Is Not Stupid”: Applying Common Sense to \textit{Crawford} in Domestic Violence Cases, 38 \textit{Prosecutor} 14, 15 (2004) (describing various other ways of proving a batterer’s responsibility for procuring victim unavailability, including prison phone records, jailhouse phone recordings, voicemail messages, e-mail, and eyewitnesses to threats).

\(^{89}\) Even so, as litigation strategies shift in the wake of \textit{Davis}, the prosecutorial resources which will be expended to prove forfeiture should not be underestimated. \textit{See} Raeder, \textit{supra} note 57, at 364-65 (discussing costs associated with proving forfeiture, and questioning “whether such resources would be available for misdemeanors, which encompass a large percentage of the domestic violence caseload”).

\(^{90}\) Again, a judicial determination that a defendant forfeited his right of confrontation requires a finding of witness unavailability. \textit{See supra} note 59 and accompanying text.

\(^{91}\) Without purporting to resolve the issue, it is worth observing that what “reasonableness” requires in the domestic violence context may be distinct. More specifically, the “reasonableness” of prosecutorial efforts to secure the trial participation of a domestic violence victim may be partly dependent on whether the dynamics of battering warrant any degree of
many victimless prosecutions, these necessary measures to procure a victim’s presence at trial will be undertaken—often reluctantly, and often unsuccessfully—forcing judges to apply an equitable doctrine to conduct that is in essence different from crimes that occupy a more historically privileged, less equivocal place in our criminal justice system.92

A meaningful rule of forfeiture contemplates these distinguishing features and acknowledges their incompatibility with the traditional forfeiture framework, contesting law’s systemic inattention to relationship.93 Application of forfeiture principles to domestic violence thus requires no radical reworking of doctrinal foundations. Rather, the potential for a reasoned forfeiture analysis lies in enhanced judicial understanding of the underlying facts and a willingness to accept the obsolescence of conventional witness tampering paradigms.

deference to the victim’s expression of non-cooperation. Must a prosecutor subpoena a victim for trial in order to satisfy the “unavailability” prong of forfeiture analysis? If a victim fails to appear in response to a subpoena, must she be arrested and brought to court? Must a subpoenaed victim be arrested in anticipation of her testimony? These questions are not simply academic: after Crawford, prosecutors are increasingly relying on material witness warrants to ensure the availability of victims at trial. See Lininger, Prosecuting Batterers After Crawford, supra note 4, at 1365 n. 70. Whether the “unavailability” component of the Confrontation Clause analysis should be analyzed differently in domestic violence cases is a question with which courts and commentators will likely grapple for some time.

92 See supra note 1; Tuerkheimer, Remedying the Harm of Battering, supra note 1, at 969-71.

93 For a forfeiture analysis that reflects judicial awareness of these dynamics, see People v. Santiago, No. 2725-02, 2003 WL 21507176 (N.Y. Sup. Ct. April 7, 2003). With the sole exception of Santiago (which was decided before Crawford), I have found no written opinion in a domestic violence case that conceptualizes forfeiture in the manner that I am advocating.
IV. A RELATIONAL APPROACH TO THE CONFRONTATION RIGHT AND ITS LOSS

The approach to confrontation that this Article has described may best be characterized as “relational.” 94 As a method of analyzing what the right of confrontation entails, the relational question is critical in prosecutions involving domestic violence. When engaging in the threshold “testimonial” inquiry, taking into account the dynamics of domestic abuse challenges conventional notions of exigency derived from and related to paradigmatic crime between strangers. Consideration of the relational question yields a similar reconfiguration of doctrinal parameters in the forfeiture area, where precedent and analogy are inadequate to the task of implementing the equitable principles underlying the rule. A relational view of forfeiture requires contemplation of the connection between the defendant and victim when determining whether the defendant’s misconduct caused the victim’s unavailability at trial. Attending to the context of the relationship essential to battering thus impacts how the confrontation right is operationalized, a matter of great import to the future prosecution of domestic violence.

More broadly, a relational approach also may influence how we view the meaning of the confrontation right. By synthesizing my critiques of the “testimonial” inquiry and of the forfeiture doctrine, an understanding of the right that is itself relational in nature emerges. In conclusion, I offer an outline of the normative implications of this argument.

The meaning of confrontation is largely dependent on the configuration of relationships between the accuser, state, and accused—a variable scarcely noticed by courts or commentators. Theories of confrontation do not remark on this triangle (accused-accuser-state), which implicitly frames the conceptual analysis. Rather, Confrontation Clause jurisprudence and scholarship tend to presume particular alliances: accuser with state against accused.

94 See supra note 8 (qualifying use of “relational”).
We can see how integral this default arrangement is to the “paradigmatic Confrontation Clause violation” suffered by Sir Walter Raleigh.95 In the case against Raleigh, the relationship between the state and accuser was such that the prosecution could very well have produced Lord Cobham, the quintessential accuser, to testify. Tacitly invoking this alliance, Raleigh argued, “[I]t is strange to see how you press me still with my Lord Cobham, and yet will not produce him . . . . He is in the house hard by, and may soon be brought hither; let him be produced . . . .”96

In prosecutions for paradigmatic crime, the relational triangle may be generally characterized in this manner: the accuser is “in the house hard by;” or aligned with the state against the accused. In the victimless domestic violence realm, however, the same cannot be said. Indeed, quite the opposite is true: in most cases where the prosecution is proceeding without a victim,97 allegiances underlying the relational triad are essentially inverted; the accuser is metaphorically, and often physically, in the house with the accused. This inversion has real consequences for the functioning of the confrontation right.

Fundamentally, what it means to be an “accuser”98 may be

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95 Crawford v. Washington, 541 U.S. 36, 52 (2004) (noting that the Confrontation Clause “was directed [at] . . . notorious treason cases like Raleigh’s;” “Raleigh’s trial has long been thought a paradigmatic confrontation violation.”).


97 In the vast majority of victimless prosecutions, it is the preferences of domestic violence victims, as opposed to the strategic maneuvering of prosecutors, that drive this aspect of prosecutorial decision-making. See supra note 4 (noting high percentage of uncooperative domestic violence victims).


   Somewhat inexplicably, in my judgment, one aspect that [Crawford’s] historical treatment and preliminary definition leaves out is my particular focus on accusers and accusatory statements, as opposed to testimonial statements. I believe there
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different when the witness is a victim of domestic violence as inquiry into the “testimonial” nature of a statement shows. Consistent with the conventional model of crime—which also seems to resonate with the Crawford majority99—the providing of information regarding past criminal conduct to law enforcement transforms a victim/witness into an accuser. By participating in an effort to apprehend (and, therefore, prosecute) the perpetrator, she has allied herself with the state, thus triggering attendant obligations under the Confrontation Clause.100

should be a role for the concept of ‘accusatory’ hearsay in the analysis because it better describes the core concern of the Confrontation Clause than does the testimonial concept . . . . On the other hand, I recognize that the decisional moment has been reached and that, despite my arguments, the concept of testimonial statements, rather than accusatory hearsay or accusatory statements, has been the dominant paradigm. Moreover, if testimonial is defined using the amicus definition in Crawford and, appropriately interpreted, it will include most accusatory hearsay. (citation omitted) Thus, I focus on testimonial statements. Nevertheless, I believe the concept of accusatory statements is quite useful in helping to identify those statements that should be identified as testimonial.

Id.99 See Crawford, 541 U.S. at 51 (“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. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.”).

100 In support of his position that the conduct of the declarant, as opposed to the participation of a government agent, renders a statement testimonial, Richard Friedman has made the following helpful observation: If . . . the source of the information is a human who does understand its likely use, we can say that she was playing a conscious, knowing role in the criminal justice system, providing information with the anticipation that it would be used in prosecution - and that certainly sounds a lot like testifying. Furthermore, without such understanding on the part of the declarant, the situation lacks the moral component allowing the judicial system to say in effect, “You have provided information
In most domestic violence cases, as we have seen, no such alliance inheres in a victim’s invocation of the law enforcement apparatus. Viewed narrowly, a battered woman who recounts a criminal incident to police may be considered an “accuser”; but her actions have a different meaning when seen in context. Classifying this type of hearsay as nontestimonial reflects awareness that a domestic violence victim has not permanently shifted her allegiance from the defendant by asking for police protection and, accordingly, that she is not an “accuser” in the Confrontation Clause sense of the word.

A similar theoretical claim may be articulated with respect to a reconceived forfeiture doctrine. The contextualized judicial determination that I have urged asks whether the alliances underlying the conventional relational triad have been inverted and, if so, whether the defendant’s battering behavior is causal in the shift. If so, he may not assert a Confrontation Clause challenge; the default mandate of state production of the “accuser” makes little sense where the accused’s own misbehavior is responsible for perverting the paradigmatic relational structure.

*Crawford* teaches that confrontation has a function beyond ensuring the reliability of evidence.\(^{101}\) While theoretical perspectives on the value of the right are varied,\(^{102}\) I contend that the identification of a relational triangle has implications across the conceptual spectrum, enhancing our understanding of how best to advance whatever the chosen norm. Across

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with the knowledge that it may help convict a person. If that is to happen, our system imposes upon you the obligation of taking an oath, saying what you have to say in the presence of the accused, and answering questions put to you on his behalf.”


\(^{101}\) See *Crawford*, 546 U.S. at 61.

\(^{102}\) See Tuerkheimer, *Crawford’s Triangle*, supra note 4, at 59-61 (summarizing various normative perspectives on the right of confrontation, including the individual dignity theory, the “accuser/obligation” approach, the limited government model, and a utilitarian “truth seeking” understanding of the right.).
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theoretical orientations, a relational perspective speaks to what implementation of the confrontation right requires.\textsuperscript{103}

CONCLUSION

The departure of domestic violence from a traditional crime archetype shows that a particular vision of relationships has, until now, animated our sense of what the Constitution requires. Toward the end of discerning whether confrontation furthers its intended normative purpose, a relational inquiry reveals that the meaning of “absent accuser” is distinct in the battering context. Similarly, a relational approach to forfeiture contemplates whether, by his battering behavior, a defendant has reconfigured the conventional alignment of the accused-accuser-state triad. By exposing a conceptual triangle that frames Confrontation Clause challenges, the relational insight thus advances our understanding of the confrontation right and how its promise may best be realized.

\textsuperscript{103} For application of this argument to competing visions of the function of confrontation, see \textit{id}. 
DOMESTIC VIOLENCE CASES AFTER DAVIS: IS THE GLASS HALF EMPTY OR HALF FULL?

Myrna S. Raeder*

INTRODUCTION

The revolution wrought by the 2004 Supreme Court decision in Crawford v. Washington1 had its most dramatic impact on domestic violence cases. Crawford prohibited courtroom use of “testimonial” statements by unavailable witnesses who were not previously subjected to cross-examination, unless the defendant forfeited the right to confrontation by causing the witness’ absence.2 Since the vast majority of victims of domestic violence do not cooperate with the prosecution,3 and statements made to the police in such circumstances are arguably testimonial, Crawford spelled disaster in cases where victims did not testify.

Numerous reasons have been offered for why these women initially call the police and then subsequently refuse to testify in court.4 While women want to stop the violence, and calling upon the police may be the most likely way to ensure this result, other

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2 Id. at 62, 68.
3 Remember the Ladies, supra note *, at 328-30; State v. Mechling, 633 S.E.2d 311, 324-25 (W. Va. 2006).
4 Remember the Ladies, supra note *, at 364; Mechling, 633 S.E.2d at 324-25.
complex motivations are also at play. For example, their batterers are often the fathers of their children, who they love and hope will reform. In misdemeanor cases, where the punishment is not likely to be lengthy, some women view a conviction as jeopardizing their batterer’s ability to hold a job and support the family. Other, more sinister reasons for their nonappearance include threats or physical violence aimed at preventing their testimony and Post Traumatic Stress Disorder (PTSD) caused by their repeated abuse.

In an earlier era, prosecutions would end when women refused to cooperate, but in recent years, zero tolerance for domestic violence has gained wide community support. This resulted in no-drop policies by prosecutorial agencies, and so-called victimless prosecutions in which a woman’s excited pleas for help on 911 calls, and to police at crime scenes, were admitted along with testimony by police officers and medical personnel concerning any bruises or other indications of violence. Statements by the absent victims satisfied the pre-\textit{Crawford} reliability based approach to the Confrontation Clause adopted by \textit{Ohio v. Roberts}.

In contrast, after the first wave of dismissals and reversals caused by \textit{Crawford}, victim’s advocates worried that the testimonial approach would return us to the days when domestic violence was considered a private concern, not a public outrage. Instead, \textit{Crawford}’s failure to define what is testimonial led to two years of judges reading tea leaves, and reaching contrary outcomes. To the relief of prosecutors, a number of courts began to admit victims’ excited utterances made in 911 calls and to the police in the field, finding them to be “nontestimonial.” These courts reasoned that such statements were simply cries for help, not police interrogation, or they were too informal to resemble the \textit{ex parte} affidavits or prior testimony that had been

\begin{itemize}
\item[5] See generally \textit{Remember the Ladies, supra} note *, at 325-30.
\item[6] \textit{Id.} at 327-28, 368.
\item[7] \textit{Id.} at 328.
\item[9] \textit{Remember the Ladies, supra} note *, at 333-47.
\end{itemize}
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traditionally excluded by the Confrontation Clause.\textsuperscript{10}

In \textit{Davis v. Washington}\textsuperscript{11} the Court has finally addressed these issues, and rendered a split decision that satisfies neither the prosecution nor the defense. \textit{Davis} combined two separate domestic violence cases, in which neither of the female victims appeared at trial. The decision unanimously affirmed the admission of a 911 call in \textit{Davis},\textsuperscript{12} but with only one dissent,\textsuperscript{13} rejected the admission of statements in \textit{Hammon}\textsuperscript{14} made by the defendant’s wife who spoke excitedly to an officer in person at the scene. To reach these results, \textit{Davis} adopted a “primary purpose” test for determining whether a statement is testimonial, which provides that when the circumstances objectively indicate that there is no ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, a statement is testimonial.\textsuperscript{15}

The defense will be pleased that \textit{Davis} held that volunteered statements were products of interrogation and employed an objective evaluation of motivation for determining if a statement is testimonial, which arguably favors a broader view of confrontation. However, treating dual purpose statements as nontestimonial in the absence of a primary motivation to create testimony clearly favors the government, because it denies the defendant the ability to cross-examine declarants who make such statements. For example, defendants will not be able to cross-examine absent complainants who made damning statements against them whenever the primary motivation of the interrogation was to obtain assistance during an ongoing emergency.

Conversely, prosecutors will be pleased that the new test focuses on the \textit{primary} purpose of the interrogation, rather than requiring that police assistance to meet an ongoing emergency be

\begin{footnotes}
\item[10] Id. at 333-36.
\item[12] Id. at 2280 (affirming State v. Davis, 111 P.3d 844 (Wash. 2005)).
\item[13] See id. at 2280-81.
\item[14] Id. (reversing Hammon v. State, 829 N.E.2d 444 (Ind. 2005)).
\item[15] Id. at 2273-74.
\end{footnotes}
the sole motivation. However, prosecutors may be concerned about the apparent focus on the police officer’s motivation, not merely the motivation of the absent witness. Moreover, Davis did not create a separate category for domestic violence cases, which means that testimonial statements are still barred unless a victim testifies, or there is specific evidence that the defendant caused the victim’s absence from trial.17

Judges will likely find that Davis’ bright line is illusory and hard to apply. Indeed, Justice Thomas called the test unworkable, and it appears no more predictable than the reliability standard that Crawford abandoned. Moreover, Justice Scalia, who authored both Crawford and Davis, recognized that the nature of the statement may change once the exigency is over, requiring courts to carefully redact statements. At a minimum, Davis settled that the identity of an assailant who is battering a victim as she calls 911 is admissible. It also should ensure that the admission of any statement in response to police questioning after the threat has ended, such as when the assailant flees or has been separated from the victim, is problematic when the victim does not appear at trial, and no evidence of forfeiture exists.

After Davis, prosecutors will continue to dismiss or lose cases where the testimonial statements are key, unless they take the drastic step of arresting victims who ignore their subpoenas, a step that punishes victims for the crimes of their abusers. Moreover, given the testimonial approach, it makes sense to reevaluate how domestic violence felonies and misdemeanors are being litigated across America. In a world of limited prosecutorial resources, decisions may need to be made about

16 Id.
17 Id. at 2279-80.
18 Id. at 2285 (Thomas, J., concurring in part and dissenting in part).
19 See Crawford, 541 U.S. at 63-64 (discussing the subjectivity of the reliability test).
20 See id. at 2277-78.
21 Id. at 2277.
22 See id. at 2279. See infra Part IV.
23 See Remember the Ladies, supra note *, at 367-73.
identifying which cases to vigorously pursue in the criminal justice system, and which to refer to quasi-criminal diversionary programs.

The remainder of this Article will briefly explore Davis’ impact on the following topics in the context of domestic violence litigation: (1) assessing whether a statement made to law enforcement personnel is testimonial; (2) assessing whether a statement made to someone other than law enforcement personnel is testimonial; (3) difficulties with the Crawford/Davis approach; (4) establishing forfeiture and other procedural issues; and (5) suggestions for prosecutors in light of Davis. In addition to critiquing Davis and identifying trends in the appellate case-law, criteria will be suggested to help determine whether or not a statement is testimonial, and when forfeiture is appropriate.

I. ASSESSING WHETHER A STATEMENT MADE TO LAW ENFORCEMENT PERSONNEL IS TESTIMONIAL

Crawford established the testimonial framework, but gave little guidance as to how to interpret it in the domestic violence context, where the statements are not made by suspects in custody, but by victims frantically seeking help. As a result, many courts found such statements far removed from the governmental abuse that seemed at the root of Crawford’s concerns.24 In contrast, Davis presented two typical domestic violence fact patterns that populate one-third of the criminal calendars in urban jurisdictions,25 and overwhelmingly rely upon complainants who are uncooperative.26 Davis addressed 911 calls as well as field investigations, but its holding was generalized, focusing more on the context in which the statements were made than their method of transmission. The Davis test is deceptively

24 Id. at 333-47.
26 See Remember the Ladies, supra note *, at 330.
simple:

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.\(^27\)

While this standard still is capable of wide variation in interpretation, at least a few things are set. First, 911 calls can be testimonial, regardless of who employs the operator. Second, 911 calls and preliminary field investigations can generate testimonial statements despite their lack of formality. Whether Justice Thomas will be proven correct in his view that the standard is unworkable\(^28\) will depend on how the Supreme Court refines it in light of likely conflicts among lower courts in defining ongoing emergencies. However, in its current version, the standard is little more than a tautology: a statement is not testimonial when needed to resolve an ongoing emergency, and testimonial when not needed to resolve it. The Court gives few concrete suggestions about how to identify an ongoing emergency or determine if the statement helps to resolve it, other than Justice Scalia’s reference to the instinctive ability of officers to distinguish between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence.\(^29\) In the same vein, Davis cavalierly pronounces “testimonial statements are what they are.”\(^30\) In other words, paraphrasing Justice Stewart’s *bon mot* concerning pornography,\(^31\) we will know whether statements

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\(^{27}\) *Davis*, 126 S. Ct. at 2273-74.  
\(^{28}\) *Id.* at 2285 (Thomas, J., concurring in part and dissenting in part).  
\(^{29}\) *Id.* at 2277.  
\(^{30}\) *Id.* at 2279 n.6.  
help resolve an ongoing emergency when we hear them.

The absence of any reference to medical emergencies, despite such mention in pre-\textit{Davis} cases,\textsuperscript{32} would seem to indicate a narrow view of nontestimonial statements made to police officers. Yet, while statements made well after the incident should be fairly easy to discern, some courts are already viewing emergencies expansively. This is understandable since the transcript of the 911 tape in \textit{Davis} indicates that the defendant left shortly after the start of the call, but the Court did not indicate when the call morphed into being testimonial, claiming that the only question it certified related to the defendant’s identity, which occurred at the beginning of the call.\textsuperscript{33}

\textit{Davis} emphasized that the caller was speaking in the present tense, and that the operator needed information to determine what danger the officers would face in resolving the dispute.\textsuperscript{34} This was contrasted to the field investigation in \textit{Hammon} where the victim denied any problem and was separated from the defendant when she admitted her husband assaulted her.\textsuperscript{35} Since \textit{Davis} indicated that information “needed to address the exigency of the moment”\textsuperscript{36} was not testimonial, concern has been voiced that officers and operators will tailor their questions to obtain evidence rather than to resolve the emergency in order to ensure admissibility at trial.\textsuperscript{37} It seems hypertechnical that admission of a statement might rest on whether the questioner asks what is happening, rather than what happened, but \textit{Davis} leaves open the possibility of such a result.

Courts have recognized that the \textit{Davis} analysis is “flexible and inherently fact based, and the existence or lack of government interrogation does not necessarily determine whether

\textsuperscript{33} 126 S. Ct. at 2277.
\textsuperscript{34} \textit{Id.} at 2276.
\textsuperscript{35} \textit{Id.} at 2278.
\textsuperscript{36} \textit{Id.} at 2277.
\textsuperscript{37} \textit{The Supreme Court—2005 Term Leading Cases}, 120 \textit{Harv. L. Rev.} 125, 217 (2006) [hereinafter \textit{Leading Cases}].
a statement is testimonial.38 Several decisions have attempted to distill a multifactor test from Davis and some focus on statements to police. For example, a statement is not testimonial if: (1) the victim spoke about the events as they were actually happening; (2) the victim faced a bona fide physical threat; (3) the questions and answers viewed objectively were necessary to resolve the present emergency, rather than simply learn what previously happened; (4) there was a significant difference in the formality of questioning between frantic answers given in a potentially unsafe environment by phone when compared to the calm station house questioning in Crawford.39 Other decisions speak more generally: a statement is testimonial if (1) it would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; (2) the circumstances objectively indicate that a statement taken during interrogation by a law enforcement officer was made when there was no ongoing emergency, and the primary purpose was to prove past events rather than to enable police assistance to meet an ongoing emergency; and (3) the focus of analysis was more on the witness’ statement, and less upon any interrogator’s questions.40 However, such tests do not necessarily foretell the outcome of a specific case.

In the Crawford and Beyond symposium, Professor Kirst ably attempted to predict the future of Confrontation Clause analysis by divining the results of the post-Davis certiorari dispositions.41 Several themes emerged, including the defendant’s presence or absence from the scene of the incident, and whether or not he was under police control.42 However, it is unclear that these will ultimately provide the bright lines that could make an ongoing emergency test easy to apply. Already

40 Mechling, 633 S.E.2d at 321-22.
42 Id.
the pre-\textit{Davis} tendency to find all 911 calls by distraught victims to be nontestimonial has reappeared in the post-\textit{Davis} cases.

For example, \textit{People v. Walker}\textsuperscript{43} held that a 911 call was a call for help, even though it was made by a neighbor to whom the victim fled seeking help after she escaped from her home by jumping from a second-story balcony while the defendant slept.\textsuperscript{44} The victim told her neighbor that she could not return home, which indicated that the specific incident was over. Indeed, the defendant claimed that the victim had waited two hours after the beating to ensure the defendant was asleep before fleeing.\textsuperscript{45} Thus, \textit{Walker} seems to take a more global view that the emergency is resolved only when the defendant is captured.

Although \textit{Walker} briefly mentioned questions about whether the couple’s child was present, it gave no indication of where the child was, or that any violence had been threatened to the child.\textsuperscript{46} Ironically, the opinion did not discuss whether the neighbor could have testified to what the victim had initially said, although it held that the neighbor’s written narrative of the victim’s statement given to the police when they arrived, was testimonial.\textsuperscript{47} The conviction was reversed because the details supplied by the later oral and written information provided to the police were found to be testimonial, but the 911 holding should not be considered surplusage. In other words, it suggests a pattern that is likely to be repeated in evaluating other 911 calls, such as \textit{State v. Wright}, in which the Minnesota Supreme Court\textsuperscript{48} found that the latter part of a 911 call, after the victim’s sister was told the defendant was in custody, was nontestimonial because the goal was to reassure her and her sister that the defendant had really been apprehended, not to create testimony.\textsuperscript{49}

\textsuperscript{44} \textit{Id.} at *1.
\textsuperscript{46} \textit{Walker}, 2006 WL 3365521.
\textsuperscript{47} \textit{Id.} at *4.
\textsuperscript{48} No. Ao3-1197, 2007 WL 177690 (Minn. Jan. 25, 2007).
\textsuperscript{49} \textit{Id.} at *9-10.
Similarly, it is unclear whether the focus on assessing the emergency will result in every initial statement of a 911 call being deemed nontestimonial. Justice Scalia separated the investigatory collection of *ex parte* testimonial statements by the police from their attempted use at trial in violation of the Confrontation Clause. Recognizing the distinction between trial and investigatory use of 911 calls appears to permit a more cautious approach to evaluating their admissibility, encouraging judges to evaluate the tenor of the entire statement. Looking only at the investigatory function could arguably justify admitting the first sentence of every conversation, because the caller always has to explain the nature of the incident in order for the operator to determine how to resolve the perceived emergency. Calling a statement nontestimonial until the operator can figure out whether the danger is past or present would effectively deny the right of cross-examination based on the sentence structure and speech pattern of the caller, hardly a principled distinction for separating Sixth Amendment wheat from chaff.

Yet this is already what some courts are doing. For example, in *State v Camarena*, the victim called 911, hung up, and when the operator called her back to ask if there was a problem, she answered, “Yeah, my boyfriend hit me but then he left.” Before providing details she also specified he had departed by car. Evaluating the totality of the circumstances, *Camarena* held that the victim’s initial response as well as her response concerning the nature of the injuries were not testimonial because they occurred immediately after the assault, the defendant could have returned, it was likely that the victim was seeking assistance against a possible renewal of the attack, and the level of formality of the interrogation was unlike that in *Crawford* and *Hammon*. Thus, Justice Scalia appears unduly

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50 126 S. Ct. at 2279 n.6.
52 *Id.* at 269.
53 *Id.*
54 *Id.* at 275.
optimistic that ongoing emergencies are easy to spot.

Indeed, I would not be surprised if pressure emerges to change the typical 911 script to better fit with Davis by specifically asking as the first question whether the caller is presently in danger. The second question would be what is the nature of the ongoing emergency, before more identifying details are requested. As a practical matter, most emergency systems will display the address of the caller even without an inquiry. Davis also expressed concern that the police need to know the identity of the assailant in order to assess the threat to their own safety and danger to the potential victim. However, this information can be revealed by asking if the individual is known to have access to a weapon or currently appears to be on drugs, as opposed to asking the identity of the defendant or specific details of the defendant’s conduct. If the defendant is armed and the incident is still in progress, Davis suggests that his identity is needed to end the emergency, but in other circumstances identity appears only necessary to decide whom to prosecute. Given that the 911 system is considered a proxy for police involvement, we should expect the defense to challenge the order and content of questions that appear designed to produce nontestimonial statements despite Justice Scalia’s belief that emergencies are immutable and not affected by police conduct.

For example, in Vinson v. Texas, the victim’s identification of her boyfriend as her assailant to an officer at the scene was held to be nontestimonial, in part because the officer said he didn’t feel safe until backup arrived, in a situation where the defendant entered the room and yelled at the victim who was recently and badly injured. One would assume that the officer

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55 126 S. Ct. at 2279.
56 See, e.g., Lile v. State, No. 79A02-0601-CR-31, 2006 WL 3306004, at *3 (Ind. App. Nov. 15, 2006) (affirming admission of 911 call made after defendant killed first victim, where caller was hiding under bed before defendant dragged her out and forced her into car).
57 Davis, 126 S. Ct. at 2279 n.6.
59 Id. at *8-10.
could have controlled or separated the defendant, placing him in
the squad car until he finished assessing the situation. Distinguishing
the facts in Hammon because the assailant was not present during the
interview seems fairly disingenuous, given that Hammon also tried
to intervene and was separated from his wife.  

Even reading certiorari dispositions concerning field investigations
indicates that the dividing line between testimonial and nontestimonial
statements is not as obvious as Davis would suggest. For example,
pre-Davis, in State v. Hembertt, the Nebraska Supreme Court upheld
the admission of a detailed statement made by a woman to police
responding to a 911 call. The victim volunteered such an amount of
detail that the officers stopped her to locate the assailant. The
emergency was not considered to be over until the defendant was
found inside. However, were the details of the assault necessary to
resolve the emergency? The Supreme Court denied certiorari, upholding
the conviction, although numerous other cases were vacated. While
one can never know the reason for a denial, Hembertt sends a message
that admission of detail is not fatal to a conviction, whether because
it is not error or harmless error, and encourages courts to find
statements to be nontestimonial whenever the defendant remains
in the home, even though the victim is outside and no longer in
danger.

Defining the scope of the emergency also proved difficult in
State v. Warsame, which held that statements made to two
officers were nontestimonial, although the victim’s first words
revealed, “My boyfriend just beat me up.” The court reasoned
that the woman’s sister who was in the fleeing vehicle with the
defendant might be in danger, although the victim did not claim
she was kidnapped. It was also unclear what happened to another
sister who was at the house where the victim had been

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60 Davis, 126 S. Ct. at 2278.
61 696 N.W.2d 473, 479 (Neb. 2005).
63 723 N.W.2d 637 (Minn. App. 2006).
64 Id. at 642.
65 Id. at 641-42.
beaten. In deciding where to draw the line, the court concluded that the ongoing emergency “need not be limited to the complainant’s predicament or the location where she is questioned by police.” Thus, the complainant’s entire narrative was considered nontestimonial.

Another questionable result in a domestic violence case was reached in *State v. Rodriguez*, which held that statements to an officer on two separate occasions were nontestimonial cries for help, although on both occasions the statements were made outside of the presence of the defendant. Indeed, the same result would have been justified by a forfeiture analysis, given the victim’s statements about being threatened by the defendant and his family, and that the police couldn’t protect her or her child. Only the statement that the defendant was inside the home underneath the couch with a knife appears arguably nontestimonial.

Yet even this points out the difficulty with the standard. As previously mentioned, many judges understandably view the emergency as ongoing until the defendant is apprehended for purposes of determining whether statements are testimonial, despite the fact that the victim is out of harm’s way. Thus, the confrontation right seems dictated by the fortuity of whether the defendant is still at home, rather than has fled. Some courts go further, suggesting the emergency is not over if he could return. Such results appear totally out of keeping with the Supreme Court’s narrow view of context in assessing whether an emergency existed in *Hammon*, and quite different from the nontestimonial statement of a victim running out of an apartment screaming, “that’s him, that’s him. He’s the one that just hit me.” In that case, the officers acted as Justice Scalia

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66 See id.
67 Id. at 641.
68 State v. Warsame, 723 N.W.2d 637, 643 (Minn. App. 2006).
70 Id. at 140-41.
71 Id. at 141.
envisioned, securing the defendant in the police car before asking the victim for details, which were deemed testimonial.73

II. ASSESSING WHETHER A STATEMENT MADE TO SOMEONE OTHER THAN LAW ENFORCEMENT PERSONNEL IS TESTIMONIAL

Whether Crawford and Davis leave a gaping hole in Confrontation Clause protection by which statements made to people having no relationship to law enforcement can march in without any regulation is unresolved. Outside of the child abuse context, cases generally reject protection for statements made to private individuals.74 Several domestic violence cases have found such statements to be nontestimonial.75 However, Davis specifically left open whether statements made to someone other than law enforcement personnel are testimonial.76 Realistically, when a victim cries out for help to those around her such as neighbors, relatives, friends, acquaintances, or strangers on the street, the question will focus on what assistance the victim hopes to receive. Only when it appears that the cry is to obtain police aid for a completed criminal act will the calls likely be considered testimonial.77 In many cases, the confidant is not the person who calls the police, suggesting that the statement is not testimonial.78 This should help the prosecution, although it has

73 Id. at *5.
74 Compare Compan v. People, 121 P.3d 876 (Colo. 2005) (finding that domestic violence victim’s statements to friend not testimonial) with King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779) (holding that the admission of a young rape victim’s statements to her mother was error; cited with approval in Davis). See also Idaho v. Wright, 497 U.S. 805, 817-18 (1990) (excluding child’s statements to private pediatrician as violating Confrontation Clause; holding implicitly approved in Crawford, 541 U.S. at 58-59).
75 See, e.g., Lile v. State, 2006 WL 3306004, at *1-3 (finding voice message to daughter as she saw defendant return with shotgun was nontestimonial).
76 Davis, 126 S. Ct. 2266, 2274 n.1.
77 See State v. Mechling, 633 S.E.2d 311, 323-24 (W. Va. 2006) (remanding to determine if statements of domestic violence victim to neighbor who called 911 were testimonial).
78 See, e.g., Commonwealth v. Gonsalves, 833 N.E.2d 549, 561-62
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troubling implications about the devaluation of cross-examination and live witnesses whenever the police are not involved. It also suggests inclusion of testimonial statements at trial may be viewed as harmless error when they duplicate admissible information. However, some courts appear to reject harmless error when the additional information provides persuasive details.79

Another frequent source of testimony in domestic violence cases comes from medical personnel and records. Again, the question arises as to whether both the victim’s statements and the doctor’s diagnosis can be admitted if the declarant is absent from trial. Some courts determine whether the examination and questioning was for a “diagnostic purpose” and whether the “statement was the by-product of substantive medical activity.”80 Most decisions concerning medical statements occur in child abuse cases.81 However, a few domestic violence and rape cases appear to find such statements nontestimonial when the physician has no role in investigating the assault,82 or when the statements describe the rape and resulting injuries but do not identify the defendant.83

Questions are also raised when victims are subjected to sexual assaults and are then sent to a forensic unit for evaluation, which would appear to implicate testimonial concerns. Even here, some courts consider statements made to forensic nurses or to medical personnel in forensic units to be nontestimonial, despite their likely use for purposes of

(Mass. 2005).


prosecution. In discussing medical records, Clark v. State found that it could not properly evaluate if the statements were testimonial because it was not clear who made them and whether they were volunteered or elicited for purposes of medical diagnosis. Thus, more detailed record keeping may be necessary to determine admissibility.

III. DIFFICULTIES WITH THE CRAWFORD/DAVIS APPROACH

A major problem with Davis’ focus on ongoing emergencies is that it ignores a question that is key to any sound Confrontation Clause analysis: whether cross-examination would serve an important function at trial. Instead, claiming historical justification, which has been challenged both by then-Chief Justice Rehnquist in Crawford, and by the historian Thomas Davies, Davis asks why the statement was made, as if sincerity alone was at the heart of the right to confrontation. Even Justice Scalia softened his rigidly originalist Crawford analysis when he stated in Davis, “[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.” In the Crawford and Beyond symposium, Professor Tuerkheimer correctly critiques Davis as being out of sync with the realities of domestic violence, which she suggests would be better served by a relational approach that

84 See, e.g., State v. Stahl, 855 N.E.2d 834, 836-37 (Ohio 2006) (holding rape victim’s statements to nurse practitioner at forensic unit were nontestimonial); see generally, Allie Phillips, HealthCare Providers’ Roles After Crawford, Davis & Hammon, 40 PROSECUTOR 18 (Oct. 2006) (discussing forensic nurse case law and suggesting ways to ensure statements are considered to be nontestimonial).
86 541 U.S. at 69-74 (concurring in judgment).
88 126 S. Ct. at 2278 n.5.
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acknowledges the context of the battering relationship. However, in my view the testimonial approach cannot easily accommodate that shift doctrinally. Unfortunately, this approach, which is rooted in a timeframe when women were still subject to the common law rule of thumb which permitted a husband to beat his wife with a rod “no thicker than his thumb,” is not likely to produce a result favorable to domestic violence victims. Therefore, while I agree with Professor Tuerkheimer about the importance of forfeiture, I would also rethink the domestic violence litigation framework, targeting criminal justice resources to obtain more pretrial cross-examination, and encourage women to testify, even if they recant their accusations.

The testimonial approach ignores the classic role of cross-examination in exposing mistake, and in the case of modern expansive interpretations of excited utterances, highlighting the possibility of fabrication. It also downplays the function of cross-examination and face-to-face confrontation as to nontestimonial hearsay. This is particularly troubling given that the world of the founding fathers had very little hearsay in contrast to the liberal creation of modern hearsay exceptions by federal and state governments. The fact that most of today’s hearsay could not be admitted in 1791 seems not to be factored into the current Confrontation Clause analysis, even though the newly minted and expansively interpreted hearsay exceptions are surely a product of the same government that the founders distrusted enough to adopt the Confrontation Clause.

The practical difficulty in modern Confrontation Clause analysis is how to harmonize the right of confrontation with modern trial practices that thrive on hearsay. The reliability approach of Roberts and its progeny totally denigrated the right of cross-examination and live testimony. Yet Crawford and

91 Remember the Ladies, supra note *, at 312.
92 Id. at 367-73.
Davis have substituted an approach that is almost arbitrary in its result, with the potential of unfairly harming both the prosecution and the defense. Confrontation is absolutely required for statements labeled “testimonial,” regardless of the absence of any fault by the prosecution in failing to secure cross-examination, even when such statements are both reliable and the only evidence on the disputed issue. For example, it does not matter that the unavailable victim died unexpectedly in an unrelated accident, even though the victim was the only eyewitness to the crime and the other evidence is inconclusive as to the defendant’s guilt. Yet confrontation is denied for all other statements, even when cross-examination is critical, with at best a reliability check for statements that are admitted via hearsay exceptions that are not firmly rooted. Thus, the focus is not on the impact of the statement to the defense and the criticality of cross-examination, but on the abstract notion of whether the statement is defined as testimonial.

In contrast, an accusatory approach to defining what is testimonial, as had been suggested by Professor Mosteller, 

93 See Remember the Ladies, supra note *, at 323-25 (arguing that nontestimonial hearsay should be reviewed for reliability, whether under Idaho v. Wright, 497 U.S. 805, 817-18 (1990), or under a due process rationale). While Davis asserts that testimonial statements define the perimeter, not simply the core of the right to Confrontation, 126 S. Ct. at 2274, this dicta is not necessary to its holding, since an excited utterance would not require any additional reliability analysis under the Roberts’ progeny. Moreover, Crawford did not challenge the holding in Wright, excluding unreliable hearsay of a child to a private doctor, which would appear to be an incorrect result unless the statement was testimonial. Post-Davis cases are split as to whether nontestimonial hearsay must be reliable. See generally James J. Duane, The Cryptographic Coroner’s Report On Ohio v. Roberts, 21 CRIM. JUST. 37 (Fall, 2005). However, in Whorton v. Bocktin, 127 S.Ct. 1173, 1183 (2007), Justice Alito unequivocally states that under Crawford, “the Confrontation Clause has no application to such [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability.”

94 See generally Robert P. Mosteller, “Testimonial” and the Formalistic Definition—The Case for an “Accusatorial” Fix, 20 CRIM. JUST. 14 (Summer, 2005); Robert P. Mosteller, Crawford’s Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases, 71 BROOK.
appears closer to satisfying concerns about the need for cross-examination, as well as promoting the fairness values associated with requiring witnesses to appear at trial and face the accused when testifying. *Davis’* concentration on discerning primary intent in situations that clearly manifest equally strong ties to the dual goals of obtaining help and assisting the prosecution will simply create a new set of crazy quilt results that will no doubt be as unpredictable, and in some cases as unfair, as those produced by *Roberts*.

Moreover, to the extent that the objective test results in ignoring an improper subjective motivation of an officer to create testimony to be used at trial, it could result in decisions that are viewed as unjust. In other words, the objective test adopted by *Whren v. United States* ⁹⁵ and its progeny in the Fourth Amendment context has provoked an outcry because it could allow a car stop when probable cause exists, despite the decision of an officer to stop the defendant for an improper purpose, such as racial profiling.⁹⁶ Similarly, some fear that an objective Sixth Amendment standard could also mask potential prosecutorial misconduct. Given the ambiguous references in *Crawford* and *Davis* about whether interrogation should be viewed from the officer’s perspective even if the declarant is unaware of the improper motivation, one would hope that while the declarant’s intent should typically control the confrontation analysis, that improper police motivation would also result in a statement being deemed testimonial. It has been suggested that the Court should exclude evidence if it is found that police officers systematically attempt to evade the Confrontation Clause.⁹⁷ This would be in accord with *Missouri v. Seibert*, which excluded a confession obtained by a technique that “by any objective measure reveal[ed] a police strategy adapted to

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⁹⁷ *Leading Cases*, supra note 37, at 220.
undermine the *Miranda* warnings.”

IV. ESTABLISHING FORFEITURE AND OTHER PROCEDURAL ISSUES

*Davis* reiterated *Crawford*’s suggestion that forfeiture could result in admitting testimonial statements that were otherwise banned by the Confrontation Clause, on equitable grounds. While *Davis* refused to treat domestic violence differently from other cases in the testimonial analysis, it recognized that “[t]his particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.” Such offending conduct was described as “undermin[ing] the judicial process by procuring or coercing silence from witnesses and victims.” Moreover, the defendant was said to “have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.”

I stand by my earlier views of forfeiture, that intent should not be required in cases where the defendant has murdered the victim. Despite the fact that historically, forfeiture was limited to witness-tampering cases, after *Crawford* most courts have applied the doctrine to admit statements of murdered domestic violence victims, where witness tampering is not involved.

For example, in *United States v. Garcia-Meza*, the Court

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99 126 S. Ct. at 2280.
100 Id. at 2279-80.
101 Id. at 2280.
102 Id.
103 Remember the Ladies, supra note *, at 363-64.
105 See, e.g., Gonzalez v. State, 195 S.W.3d 114 (Tex. 2006) (discussing caselaw, but not resolving issue of whether intent is necessary).
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specifically noted that the federal forfeiture hearsay exception’s requirement that the defendant intended to prevent the witness from testifying did not control the constitutional analysis of forfeiture. In other words, constitutional forfeiture is not restricted by the statutory requirements of Federal Rule of Evidence 804(b)(6). *Mattox v. United States* rejected a Confrontation Clause challenge to the admission of the prior testimony of two witnesses in a murder trial who had died before the retrial. Rereading *Mattox* reinforces my belief that, as is often expressed in other contexts, the Constitution is not a suicide pact. In discussing the relationship of death to confrontation, *Mattox* noted that such rules of law, “however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.”

My only hesitation about abandoning intent is Justice Scalia’s brief mention in *Davis* that forfeiture was codified by Federal Rule of Evidence 804(b)(6), since that would appear to equate the rule with the constitutional doctrine.

This dicta, however, was general and did not address interpreting forfeiture in domestic violence cases when the victim’s death is often accomplished in ways that are aimed at frustrating prosecution. Previous violence and threats instill fear in the victims who downplay their risk of continuing danger, and their murders are often accomplished at home without witnesses. These victim’s statements are best analogized to the dying declarations of individuals whose deaths are witnessed. After *Davis*, courts have continued to approve of the use of forfeiture in murders implicating domestic violence without requiring any intent to prohibit her from testifying at trial.


108 *Id.* at 240.

109 *Id.* at 243.

110 *See Remember the Ladies, supra* note *, at 363-64.

111 *See People v. Giles*, 152 P.3d 433 (Cal. 2007) (finding forfeiture where defendant claimed self defense in killing former girlfriend and her statements concerned an unrelated claim of domestic violence); State v.
State v. Romero, a pre-Davis decision that was bound by jurisdictional case law that required intent for establishing forfeiture, discussed what it characterized as compelling reasons as to why a showing of intent to procure silence should not be required in cases where the defendant has killed the witness. Citing cases that applied forfeiture without a showing of intent, Romero noted two reasons to reject intent: (1) cases confused forfeiture with waiver, and (2) forfeiture is equitable, and does not hinge on the defendant’s motive. While I question whether totally unreliable hearsay should come in by forfeiture, practically, the evidence being admitted in domestic violence homicides comes in via what Roberts would have called firmly rooted exceptions such as excited utterances, or ad hoc trustworthiness exceptions that would meet any constitutionally based reliability test. In other words, they are not being admitted via the forfeiture exception.

Most domestic violence forfeiture cases will relate to live victims who do not appear. In such cases, I agree that the traditional definition of forfeiture that requires intent to procure the absence or silence of the witness should be followed. Unfortunately, it is often difficult to identify the cause for the victim’s nonappearance at trial. As State v. Mechling noted, some victims fear retaliation, which can include threats not only to the victim, but also to the victim’s children.

Indeed, some women fear that the batterers will claim custody of their child or cause the victim to come under scrutiny of the child welfare system. The suggestion of some prosecutors that forfeiture should be presumed when a domestic violence victim is absent from trial has not gained any judicial support. I disagree that battering relationships can by themselves establish
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forfeiture because I believe that individualized evidence is required. I am also uncomfortable with applying a presumption of forfeiture for unavailable domestic violence victims, since the burden of proof should be on the prosecutor, rather than on the defendant, because it is difficult to prove a negative. In other words, requiring the defendant to show there were reasons other than coercion for the victim’s absence may be more difficult than requiring the prosecution to establish evidence of intimidation. However, I recognize that if the presumption only affects the burden of production, and not the burden of persuasion, the defendant could rebut it by any evidence of another reason the complainant did not appear.

Even decisions such as Mechling that appear receptive to forfeiture require fact-based evidence of forfeiture in the specific case. However, the specific pattern of abuse in each case should be considered in the forfeiture analysis because it provides the context for understanding the pressure that is brought to bear by the defendant on the victim in the case. Thus, previous history should be factored into the analysis, including prior charges of abuse, and any previous recantations by the declarant. Similarly, evidence of further abuse after the incident should be considered as conduct aimed at procuring absence or lack of cooperation even when no direct threat can be demonstrated. Moreover, PTSD should be considered a significant factor in deciding forfeiture, since the victim’s hypersensitive responses can be traced to the defendant’s initial conduct. As Mechling pointed out, decisions concerning forfeiture are most difficult when the batterer’s actions, such as threats about her never calling the police, precede the current domestic charge.

Davis suggested, without deciding, that forfeiture would be decided by a preponderance of the evidence standard, but did not discuss any distinction between the showing necessary for a

117 633 S.E.2d at 324-26.
118 See, e.g., id. at 325.
119 Id.
120 126 S. Ct. at 2280.
decision made pursuant to a federal evidentiary rule as opposed to a constitutional mandate. Indeed, the Court ignored state decisions requiring a clear and convincing evidence standard. However, since the voluntariness of confessions and *Miranda* violations are determined by a preponderance,\(^{121}\) it is difficult to argue that forfeiture requires a higher standard, whether in a hearsay exception or for constitutional purposes. The only constitutional right that currently appears to impose a clear and convincing evidence standard is found in the nearly 40-year old decision of *United States v. Wade,* which permitted the government to establish by clear and convincing evidence that a constitutionally defective in-court identification was based upon observations of the suspect apart from the lineup identification held without counsel.\(^{122}\) *Davis* also indicated that hearsay evidence, including the unavailable witness’ out-of-court statements, may be considered at any forfeiture hearing,\(^{123}\) but left open whether such statements alone can establish forfeiture, or whether additional evidence is required.

Interestingly, *Mechling* discounts prosecution claims that domestic violence convictions can never be obtained without the use of the victim’s statements because convictions are routinely obtained in murder cases without such statements.\(^{124}\) However, this ignores the reality that the government allocates more resources to murder prosecutions than to domestic violence cases, particularly misdemeanors. Generally, prosecutors will be forced to expend more resources to obtain evidence of forfeiture. This could require sending an advocate or officer to talk to the complainant or to neighbors who may have information. Adam Krischer has provided a number of valuable suggestions about obtaining evidence to support forfeiture.\(^{125}\)

\(^{122}\) 388 U.S. 218 (1967).
\(^{123}\) 126 S. Ct. at 2280.
\(^{124}\) 633 S.E.2d at 325, n.13.
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For example, phone records subpoenaed from jail may reveal tapes or explain a recantation at trial. Voicemail messages, e-mail, or caller ID logs indicating large numbers of calls may also be useful. However, in a world of limited prosecutorial resources, proving forfeiture in misdemeanor cases, which encompass a large percentage of the current domestic violence caseload, will likely be difficult, reinforcing my view that we must rethink domestic violence prosecutions.

Other procedural issues also come into play. For example, *Davis* recognized that some of the 911 statements may have been testimonial, but suggested that *in limine* hearings could be used to redact or exclude the testimonial portions of the statements. In this context, some attempts at parsing statements may result in a determination that admission of the redacted statement would be misleading, supporting exclusion for undue prejudice. *State v. Kirby*, a case where the victim was kidnapped by a friend of her husband, recognized that:

some isolated portions of the telephone call, specifically when the complainant described to Gomes the injuries and chest pains that affected her at the time of the conversation, are not testimonial in nature and, therefore, would not by themselves be barred under *Crawford*. We conclude, however, that the telephone recording remains inadmissible in its entirety because the recording is so heavily dominated by testimonial statements that redacting them in accordance with the procedure directed in *Davis v. Washington* . . . would leave the nontestimonial portions of the conversation without any meaningful context.

Thus, attorneys must focus not only on whether statements

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126 See, e.g., *State v. Jens*, 724 N.W.2d 702 (Table), No. 2005AP2144, 2006 WL 3007498, at ¶ 27 (Wis. App. Oct 24, 2006) (dealing with audiotapes of telephone conversations where defendant discussed ways for victim to avoid subpoena forfeited right to complain about her not testifying).

127 126 S. Ct. at 2277-78.

128 908 A.2d 506 (Conn. 2006).

129 Id. at 523 n.18.
are testimonial, but also on whether they can be effectively excised from otherwise admissible nontestimonial narratives.

V. SUGGESTIONS FOR PROSECUTORS IN LIGHT OF DAVIS

Obviously, the shift in Confrontation Clause analysis makes the testimony of the victim at trial or preliminary hearing critical. Thus, the continued support of victim’s advocates and coordinators remains a key component to successful prosecution, and given the cost to the system and to victims’ autonomy, these criminal justice resources should be allocated to risky offenders and felonies, with diversion being the route for less serious cases, or those with significant evidentiary problems.130 Moreover, while the vast majority of domestic violence complainants have suffered psychological injuries beyond the incident in question, it would be unrealistic to assume that everyone who complains about a particular incident is telling the truth.

Anecdotally, the most common causes of lying or exaggeration relate to anger over male infidelity or child custody disputes. Thus, prosecutors must use their independent judgment in evaluating whether the victim is being entirely forthcoming about the entire nature of the incident as well as whether the refusal to cooperate is because a lying complainant has had a change of heart. In other words, the need for confrontation is not eliminated simply because the case relates to domestic violence, even if most allegations are likely true and many domestic violence victims do not call the police, let alone testify.131

It is well known that even when the complainant is a true victim of domestic violence, it is likely that she will recant when


she testifies at trial. While prior inconsistent statements are typically admitted to impeach her credibility, it is their substantive use that is necessary for successful domestic violence prosecutions. Only a minority of states permit the substantive use of all prior inconsistent statements of witnesses. Therefore, prosecutors should support efforts to enact such an exception, which in conjunction with expert testimony and the introduction of the defendant’s prior bad acts, will increase the probability of conviction. Typically, there will be enough circumstantial evidence to meet any challenge based on the sufficiency of evidence when the prior inconsistent statement provides a key element. In this regard, some states apply a totality of the circumstances approach to reviewing the evidence for sufficiency to uphold verdicts even where the inconsistent statement provides the only evidence of identity of the defendant. In jurisdictions where prior inconsistent statements must be given under oath in a proceeding to be used substantively, prosecutors should have the victim testify at a preliminary hearing, even if they typically indict defendants or are permitted to use hearsay at preliminary hearings.

In addition, because of the likelihood the victim will refuse to testify, evidence of witness intimidation should always be sought to support an argument of forfeiture. However, even if the complainant testifies and recants, intimidation evidence should be admissible as going to the bias of the witness. Such evidence should survive a prejudice challenge since, as in United States v. Abel, its probative value is extremely high in that it explains the reason for the change of testimony in a way that jurors can understand, as opposed to the less intuitive explanation by experts as to why women do not readily leave their batterers.

133 See Clifford S. Fishman, 4 JONES ON EVIDENCE §§ 26.5-26.7 (7th ed. 2000 & Supp. 2004); Remember the Ladies, supra note *, at 351-52.
A few prosecutors I have talked to over the years believe that because women will virtually always downplay their abuser’s conduct, it is better not to ask the woman for her version of the facts before trial, and instead simply let the woman testify. The explanation for why she has recanted her initial statement to the police is offered via expert testimony, other evidence and jury argument. While this approach might be considered controversial, those who use it believe that complainants are more likely to testify when they can retain their dignity and do not feel doubly battered by the system. As a result, focusing on the other evidence of abuse is felt to produce more convictions than arguing with the victim. In a post-Davis world, any approach that encourages women to testify should be considered.

Only if cross-examination at the preliminary hearing is limited will such testimony present a Crawford/Davis problem when introduced at trial because of the absence of the witness.136 Indeed, where statutory limits on preliminary hearing testimony exist, even if prosecutors are loath to urge expansion of testimony at all preliminary hearings, they could in select cases indicate to the judge that they will not object to full cross-examination, providing the opportunity necessary to meet a later challenge if the witness does not appear at trial. While a statute that only permits full examination in domestic violence, but not other cases, might be questionable, creating a statutory exception that allows full cross-examination for any case in which the victim is uncooperative should pass constitutional muster. All such cases, whether domestic violence or otherwise, would warrant preservation of cross-examined testimony as quickly as possible after the incident. In this regard, the statute could include a presumption that full cross-examination of domestic violence victims should be permitted in light of the empirical evidence of their non-cooperation.

Finally, as Professor Lininger and I have argued, more use

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136 Remember the Ladies, supra note *, at 355-58 (discussing the difference between limited and full cross-examination at preliminary hearings); Cf., Howard v. State, 853 N.E.2d 461, 468-70 (Ind. 2006) (discovery deposition satisfied Crawford).
should be made of federal prosecutions for gun possession.\textsuperscript{137} Large numbers of individuals are prohibited from owning a weapon because they have been convicted of a qualifying domestic violence misdemeanor or are subject to a qualifying protective order.\textsuperscript{138} The federal penalties for violating these statutes are typically greater than sentences for domestic violence assaults.\textsuperscript{139} Moreover, such prosecutions typically do not require the domestic violence victim to testify, because they focus on the prohibited possession of the weapon in light of the qualifying offense or protective order.\textsuperscript{140} Currently relatively few federal domestic violence weapons related charges are prosecuted, given the large number of individuals who run afoul of such bans.\textsuperscript{141} Joint efforts by state and federal prosecutors are needed to target dangerous domestic violence offenders who would otherwise escape conviction due to witness non-cooperation. In addition, many states do not criminalize weapon possession by domestic violence offenders. Enacting such laws pose a way to ensure that domestic violence offenders do not escape conviction.

When convicting a defendant in the absence of the victim appears problematic, it may be possible to forgo a new criminal case if he has previously committed other crimes, whether domestic violence related or not. The key is whether he is still subject to probation, parole or supervised release, since his conduct will also violate the conditions of his release. Such violations are easier to prove because they are typically established by a preponderance of the evidence,\textsuperscript{142} rather than by the more exacting beyond a reasonable doubt standard. More importantly, revocations are not subject to evaluation under the

\textsuperscript{137} Myrna S. Raeder, Domestic Violence in Federal Court: Abused Women as Victims, Survivors and Offenders, 19 FED. SENTENCING RPRTR. 91, 94 (Dec. 2006); see generally Tom Lininger, A Better Way to Disarm Batterers, 54 HASTINGS L.J. 525 (2003).
\textsuperscript{138} Raeder, supra note * at 92.
\textsuperscript{139} Id. at 92-93.
\textsuperscript{140} Id. at 95.
\textsuperscript{141} Id. at 92-93.
\textsuperscript{142} See, e.g., Hammon v. State, 829 N.E.2d 444, 447 (Ind. 2005).
Confrontation Clause, which is considered a trial right.\(^{143}\) Therefore, cross-examination can be denied for good cause,\(^{144}\) which would likely be established by the unavailability of the declarant. In other words, hearsay is usually acceptable evidence, unless so unreliable as to raise due process concerns. Given \textit{Roberts}' endorsement of the reliability of firmly rooted hearsay exceptions, the excited utterances that are the bread and butter of domestic violence prosecutions would undoubtedly meet any due process reliability test. Ironically, according to the recital of the facts in \textit{Davis}, Hammon was also found guilty of violating his probation.\(^{145}\) However, neither the Indiana Supreme Court nor the United States Supreme Court discussed whether his sentence was longer than permitted solely for the violation of probation, even though Hammon's one-year sentence for the new battery was suspended for all but 20 days, and he was ordered to complete a drug and alcohol evaluation and counseling program.\(^{146}\) Of course, unless the defendant has previously been convicted of a felony, any potential sentence will not reflect the seriousness of many domestic violence crimes, though revocations have the benefit of imposing swift and predictable incarceration.

\textbf{CONCLUSION}

\textit{Crawford} left many unanswered questions about how to define testimonial statements in domestic violence cases, where victims typically make frantic 911 calls or greet police officers with frightened pleas for help when they arrive at the scene. Since most domestic violence victims do not cooperate with the prosecution, the two years after \textit{Crawford} produced conflicting

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  \item \(^{144}\) Black v. Romano, 471 U.S. 606, 612 (1985) (holding that probationer is entitled under due process to cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation).
  \item \(^{145}\) 126 S. Ct. at 2272-73.
  \item \(^{146}\) \textit{Hammon}, 829 N.E.2d at 447.
\end{itemize}
decisions about the admissibility of their excited utterances and doomed many domestic violence prosecutions. In \textit{Davis}, the Court addressed the two most common domestic violence scenarios, 911 calls and field investigations. Unfortunately, \textit{Davis}’ bright line for evaluating testimonial statements is likely to prove illusory given the vagueness of its definition of ongoing emergencies. In addition, courts must grapple with whether intent is necessary to justify forfeiture. Nobody scored a knockout punch in \textit{Davis}: prosecutors must assume that most statements of unavailable declarants made after the incident to police are inadmissible, regardless of how excited the declarant is; defense counsel must assume that most 911 calls will be admitted, and may increasingly find that nontestimonial statements are no longer tested for reliability; domestic violence victims must assume that the context of their abuse will be ignored in evaluating whether they face an ongoing emergency; and judges must continue to read tea leaves until the Supreme Court’s inevitable next foray into Confrontation Clause jurisprudence.
EXPERT EVIDENCE AND THE CONFRONTATION CLAUSE AFTER CRAWFORD V. WASHINGTON

Jennifer L. Mnookin*

INTRODUCTION

In 2004, in the landmark case of Crawford v. Washington,1 the Supreme Court dramatically transformed its approach to the Confrontation Clause of the Sixth Amendment, which guarantees to criminal defendants the right to confront witnesses against them.2 Prior to Crawford, rather little hearsay evidence was held to violate the Confrontation Clause. The previous framework for evaluating the Confrontation Clause, put into place by the 1980 decision in Ohio v. Roberts,3 permitted the use of hearsay in criminal cases under the Confrontation Clause so long as the evidence either fell into a “firmly rooted” hearsay exception, or bore “particularized guarantees of trustworthiness.”4 As the jurisprudence developed, nearly all of the hearsay exceptions were pronounced by the courts to be “firmly rooted,” and in the relatively unusual circumstance that otherwise admissible

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* Professor, UCLA School of Law. Thanks to Richard Friedman, David H. Kaye, Kenneth Graham, Lisa Griffin, and Robert Pitler for helpful conversations, as well as participants in the conference. Portions of Part II previously appeared in David H. Kaye, David E. Bernstein and Jennifer L. Mnookin, The New Wigmore: Expert Evidence (supplement, 2006). For helpful research assistance, I thank Hal Melom, Rachel Kleinberg, and Michael Madigan.

2 U.S. Const, amend VI.
3 448 U.S. 56 (1980).
4 Id. at 66.
hearsay was not firmly rooted, judges had a great deal of
discretion with which to determine whether the evidence bore
the necessary “particularized guarantees of trustworthiness.” 5
Prior to Crawford, evidence passed Confrontation Clause muster
so long as it was adequately reliable, and reliability could either
be “inferred without more” because the evidence fit into a
longstanding hearsay exception (and hence was firmly rooted),
or, if it did not, courts could analyze the question of reliability
directly, and this reliability determination also answered the
Confrontation Clause inquiry. 6

Crawford dramatically refocused the lens for analyzing
Confrontation Clause claims. Jettisoning the Ohio v. Roberts
spotlight on reliability, the opinion substituted an altogether
different inquiry: was the evidence in question “testimonial”—
meaning, roughly, was it made in circumstances that suggested
that it was akin to testimony or would be available for use at
trial? 7 If a prior statement is testimonial and the declarant is not
testifying at trial, the hearsay may be introduced against a
criminal defendant only if the declarant is unavailable and the
defendant had a prior opportunity to cross-examine the
declarant. 8 If the prior statement is not testimonial, then the
Confrontation Clause is not implicated, at least not under the
Federal Constitution. 9

While the court in Crawford did not precisely delimit the
boundaries of “testimonial,” it explained in general terms:

Various formulations of this core class of
“testimonial” statements exist: “ex parte in-court

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5 Id.
6 Id.
7 Crawford, 541 U.S. at 37, 53-54.
8 541 U.S. at 53-54.
9 See Davis v. Washington, 126 S. Ct. 2266, 2274 (2006) (“We must
decide, therefore, whether the Confrontation Clause applies only to
testimonial hearsay . . . . The answer to the first question was suggested in
Crawford, even if not explicitly held: ‘The text of the Confrontation Clause
reflects this focus [on testimonial hearsay]. . . .’ 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.”) (internal citations omitted).
testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;” “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . .” These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, ex parte testimony at a preliminary hearing.10

10 Crawford, 541 U.S. at 51-52 (internal citations omitted). Scholars and courts quickly began to try to define the outer boundaries of the testimonial. For early efforts, see, e.g., Richard D. Friedman, Grappling with the Meaning of “Testimonial”, 71 BROOK. L. REV. 241 (2005); Richard D. Friedman, The Confrontation Clause Re-Rooted and Transformed, 2004 CATO SUP. CT. REV. 439; Robert P. Mosteller, Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses, 39 U. RICH. L. REV. 511 (2005). This past term, Davis v. Washington offered additional thoughts on how to identify testimonial hearsay, at least in the context of statements made in response to interrogation by law enforcement personnel:

- 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.

Davis, 126 S. Ct. at 2273-74. While Davis explicitly stated that “testimonial” statements could extend beyond police interrogations, it did not provide any direct guidance for use in other settings. Id. at 2274 n.1. While Davis does not, therefore, speak directly to the question of expert evidence under
Whatever the precise definition, the core idea of “testimonial” relates to the expected purpose of the statement at the time of its utterance. Was the statement made in circumstances that suggest its likely future relevance as testimony in a criminal prosecution? Often, a statement’s path from utterance to legal evidence is serendipitous and unexpected—imagine, for example, that someone reports on her state of mind to a friend, and that information later turns out, surprisingly to both the original speaker and hearer, to be relevant in a legal case; or suppose that a company, which keeps its accounts as a matter of course, later finds its business relevant to a lawsuit. In these circumstances, such statements are clearly not testimonial as the Court understands the term. By contrast, if the circumstances in which a given statement was made suggest that this information is likely to be useful as legal evidence—if, indeed, to quote Davis v. Washington, the Supreme Court’s 2006 decision further explicating Crawford in the context of police interrogations and statements made to 911, the statement’s “primary purpose” is to generate a statement that may have later legal relevance, then the statement is clearly testimonial.11

Obviously, this look to “primary purpose” does not resolve the question of the boundary of the testimonial; some materials, such as affidavits, depositions, and formal confessions, clearly fall inside its perimeter, while others, such as many business records or most statements made for the purpose of medical diagnosis will not. Still other statements will fall neither squarely inside nor outside, and their placement will depend on how the definition of the testimonial is further honed over time, as well as assumptions and factual determinations about the particular statement and its purposes.

Whatever the precise definition of “testimonial,” Crawford

11 Id. at 2273-74. Davis limits its attention to statements made in the course of police interrogation, but it would not be surprising if this “primary purpose” test were to be extended beyond this application.
has, without doubt, given additional backbone to the previously rather spineless operation of the Confrontation Clause. But like all significant constitutional reinterpretations, it has also raised as many questions as it has answered, and almost immediately after the opinion was issued, both courts and legal academics began wrestling with its implications. Defining the limits of “testimonial” was obviously an important question: figuring out which statements fall within the box labeled “testimonial” and which lie safely outside. Myriad other questions arose as well. Did the Confrontation Clause prohibit only evidence that fit into the category of “testimonial,” or was there some residual role for the earlier approaches with respect to non-testimonial hearsay? Should the expectation of likely future legal use be assessed objectively or subjectively, and should it be analyzed from the vantage point of the declarant, the listener, or both? How would Crawford affect particular domains of criminal law, such as, for example, domestic violence prosecutions, in which the growing trend towards “evidence-based prosecutions” meant that typically the prosecution went forward even if the victim recanted or refused to testify? Was Scalia’s originalist account of the Confrontation Clause’s history plausible or persuasive? Courts pondered, academics ruminated, symposia (like this one) sprouted.

This article focuses on one domain within the post-Crawford universe that has received rather little academic scrutiny: the

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12 In Davis, the Court makes clear that the inquiry into whether a statement is testimonial should be made based on an objective assessment of the circumstances rather than the subjective intent of the declarant. 126 S. Ct. at 2273. Davis also states that the focus on testimonial statements reflects “not merely its ‘core’ but [the] perimeter” of the Confrontation Clause; non-testimonial hearsay therefore does not raise Confrontation problems under the Federal Constitution. Id. at 2274.

intersection of expert evidence with the Confrontation Clause. Crawford was celebrated by some as bringing clarity and intellectual coherence to an area that had become riddled by both inconsistency and intellectually unjustifiable legal fictions. However, a close look at the area of intersection between expert testimony and the Confrontation Clause suggests that such sanguine predictions may have been premature. As I shall show, the area of expert/Crawford intersection has become a serious practical concern: a great many lower court opinions have wrestled with the potential Confrontation Clause implications of expert evidence that includes statements that might be classified as testimonial. Most of these courts have endeavored to find ways around Crawford’s dictates; unfortunately, most of the arguments proffered by these courts are deeply intellectually unsatisfying.

Part I of this Article will briefly describe the ways in which expert evidence issues and the Confrontation Clause tend to intersect. Part II will describe and critique several arguments that lower courts have been making in an effort to avoid restricting these forms of evidence under Crawford. In this section, my purpose is not to assess the inherent intellectual legitimacy of Crawford’s approach. Rather, taking Crawford itself as a given, I wish to examine whether and to what extent the various approaches taken by lower courts to the problems related to expert evidence are intellectually justifiable. Unfortunately, as we shall see, these dominant approaches are, for the most part, not grounded in a legitimate reading of Crawford. Finally, Part III will offer some preliminary suggestions toward intellectually more viable approaches for evaluating expert evidence under the Confrontation Clause post-Crawford, attempting to balance Crawford’s goals and purposes against the genuine need for the continued availability of forensic evidence.

14 See, e.g., Stephanos Bibas, Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?, 94 GEO. L. J. 183, 192 (2005) (noting that “The previous case law had been a mess,” and that “Crawford at least provides a principle and a coherent inquiry for adjudicating Confrontation Clause disputes.”).
EXPERT EVIDENCE AND CONFRONTATION

I. THE INTERSECTION OF CONFRONTATION CLAUSE CONCERNS AND EXPERT EVIDENCE

When does the Confrontation Clause intersect with issues concerning the admissibility and use of expert evidence? There are two recurring scenarios in which expert evidence may raise Crawford issues. First, expert evidence is sometimes introduced without any live testimony at all, through the use of a certificate of analysis or some other statutorily-approved method for introducing expert evidence via affidavit. Second, testifying experts often wish to disclose information upon which they have relied in order to form their conclusions, and sometimes, especially in the forensic science setting, this disclosed evidence may itself constitute testimonial hearsay. This second category can be further subdivided into two subcategories: first, when experts reveal tests performed or information provided by other experts; and second, when experts rely upon information provided to them by non-experts in circumstances that make the underlying statements at least arguably testimonial. Each of these scenarios will be unpacked below in somewhat more detail.

A. Expert Testimony Without A Witness

In many—indeed, most—jurisdictions, statutes explicitly permit the introduction of some kinds of routinely generated expert evidence by forensic scientists without any testimony at all.15 For example, a prosecutor might be permitted to offer a certificate of analysis written by a forensic scientist describing the evidence that was tested, the analyses that were done, and the conclusions reached. These statutes hand to prosecutors the option of proving key forensic facts by document in lieu of live testimony. Some states permit certificates of analysis only in

15 For a useful description of the widespread use of certificates of analysis and the constitutional problems they generate, see Metzger, supra note 13. According to Metzger, all but six jurisdictions in the United States have some kind of statute permitting certificates of analysis in at least some circumstances. Id. at 478.
particular instances, such as to prove the results of a blood or breath alcohol tests, or to establish that the breath detection machine used was properly calibrated, or to disclose the chemical composition of possible narcotics, but other states permit the use of such certificates for any tests conducted by forensic scientists.\footnote{While many states restrict the use of certificates of analysis to particular circumstances, typically the identification of a controlled substance or matters relating to DUI, such as breath alcohol test results and calibration records, several state statutes permit essentially all laboratory reports or forensic science findings to be admitted via certificate. For examples of the latter, see, e.g., Ala. Code §12-21-300 (2006); Ark. Code Ann. §12-12-313 (2006); Iowa Code. §691.2 (2006); Tex. Code Crim. Proc. Ann. Art. 38.41 (Vernon 2006); Va. Code Ann. §19.2-187 (2006).}

Practically speaking, these statutes mean that the fact that a substance found on the defendant’s person was tested and determined to be cocaine of a specified quantity might, at the prosecutor’s prerogative, be proven by waving an official-looking paper that says so before the jury, rather than presenting live testimony subject to cross examination. In those states that permit very broad use of certificates of analysis, written evidence without live testimony might even be used to establish matters such as the conclusion that the casings found at the crime scene match the gun found in the defendant’s nightstand, or the determination that the defendant’s fingerprint or DNA matched the evidence located at the scene. When a certificate of analysis is used, the written statement may wholly substitute for putting a witness on the stand.

Nearly half of those states that permit certificates of analysis require the prosecutors to provide the defense with advance notice of an intent to use a certificate of analysis, and many (but by no means all of these states) do have opt-out provisions that allow the defendant to insist that the state offer live testimony in lieu of the certificate. However, some of these opt-out provisions are quite narrowly drawn, often requiring the defense to do something more than simply make the demand for the opportunity for confrontation. Take, for example, Alabama’s statute, which requires defense counsel not only to certify a
EXPERT EVIDENCE AND CONFRONTATION 799

good-faith intent to cross-examine the witness at trial, but also to alert the court to the “basis upon which the requesting party intends to challenge the findings.”

The Confrontation Clause issues potentially raised by the use of certificates of analysis are obvious. If these certificates are testimonial, then the use of paper evidence instead of live testimony by witnesses violates the Confrontation Clause unless the declarant is unavailable and the defense had a prior opportunity for cross-examination. Apart from retrials after a successful appeal or a hung jury, it is unlikely that the defendant would have had such an opportunity. So in the vast bulk of cases, the only way that these statutes can pass constitutional muster post-\textit{Crawford} is if either (1) the evidence is not considered to be testimonial; or (2) if, in the minority of states that require advance notice to the defendant and permit some kind of opt-out procedure, the defendant’s failure to invoke the available pre-trial mechanisms to challenge the prosecution’s use of a certificate is understood as a legitimate waiver of her Confrontation Clause rights.

\begin{itemize}
\item[17] \textit{Ala. Code. §12-21-302.}
\item[18] For an important early article on the Confrontation Clause issues relating to the use of such certificates, see Paul C. Giannelli, \textit{Expert Testimony and the Confrontation Clause}, 22 \textit{CAP. U. L. REV.} 45, 84 (1993). For the most detailed post-\textit{Crawford} analysis, see Metzger, \textit{supra} note 13.
\item[19] There are several courts that have held that such opt-out procedures make the use of certificates of analysis permissible under \textit{Crawford}. See, \textit{e.g.}, City of Las Vegas v. Walsh, 124 P.3d 203 (Nev. 2005). The opt-out provision at issue in \textit{Walsh} required the defendant to establish to the court’s satisfaction that “[a] There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and (b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined.” This, to my mind, is deeply problematic: exercising the Confrontation right should not require as a prerequisite that the defendant persuade the Court that she has a sufficiently valuable reason for doing so. Though careful discussion of this point is beyond the scope of this Article, assuming (as I argue), that the content of a certificate of analysis is properly understood as testimonial and hence is within \textit{Crawford}’s purview, surely the statutes that require either a good faith basis for cross-examination or even a good faith intent to cross-examine ought to be seen as constitutionally problematic. Some courts have made the still more disturbing argument that
\end{itemize}
Certainly, a straightforward analysis of these certificates would suggest that they are testimonial. After all, their central purpose is precisely to substitute for live testimony at trial. That is, in fact, their very raison d’etre: the whole idea of the certificates is to be used in lieu of the testimony that would otherwise be necessary. Even if “testimonial” evidence were defined as narrowly as possible, it is difficult to see how certificates of analysis could fall outside the definition. They are indeed a kind of “ex parte in court testimony,” a form of “formalized testimonial materials,” in essence, a form of affidavit. It is almost unimaginable that a principled way could be found to distinguish them as a category from other kinds of clearly testimonial statements.

Nonetheless, as Part II will illustrate, many courts are rejecting this straightforward analysis and attempting to find some way to preserve the use of these certificates notwithstanding Crawford. While these arguments will be detailed in the following Part, it is worth noting at the outset that if Crawford were interpreted to bar the use of certificates of analysis, it would be an inconvenience for prosecutors, certainly, but it would be unlikely to create insurmountable obstacles to the introduction of the underlying evidence.

because the defendant could subpoena the author of the laboratory report at no cost if she chose to, the state may use a certificate in lieu of calling a witness to the stand. See, e.g., State v. Campbell, 719 N.W.2d 374 (N.D. 2006). This form of burden-shifting offers an extremely weak form of protection of the Confrontation right, and is difficult to reconcile with Crawford’s emphasis.

However, this does not mean that all forms of routine waivers ought to be prohibited. While it is true that even a statute that requires a defendant to object to the prosecution’s planned use of a certificate is not cost-free for a defendant, a simple demand requirement, in which the defendant need not give a reason, persuade the court, or have a lawyer affirm any actual intent to cross-examine, might offer a reasonable way to balance efficiency concerns against the protection of the defendant’s opportunity to cross-examine. Careful consideration of the legitimacy of waiver options is, however, beyond the scope of this Article. In Part II, I focus instead on the question of whether certificates of analysis are properly understood as testimonial.

See the variety of definitions on offer in Crawford, 541 U.S. at 51-52.
Certificates of analysis are, in essence, a shortcut to the process of proof, so prohibiting them would force the prosecutor to take the long way around. But it would not do more than that. Removing a shortcut would increase costs and this in turn might to some extent affect the balance of power between defendant and prosecutor, which might in turn have some affect on each party’s willingness to negotiate or the precise terms of plea bargains. Eliminating or curtailing the use of certificates of analysis would obviously increase the costs of prosecution to some extent; that, of course, is generally true of any increase in constitutional protection afforded to defendants. But abolishing or restricting them would be unlikely to cause massive logistical or practical problems. Strong evidence on this point is provided by a simple fact: at present, several states (including the most populous state, California) do not permit the use of certificates of analysis at all, and yet the criminal trial process in these jurisdictions does somehow manage to function. In addition, even if certificates of analysis are properly understood to be testimonial, it might be possible to develop constitutionally permissible waiver procedures under which their use would be allowed unless the defendant opted out of permitting the state to use them.

B. Expert Basis Evidence

Rule 703 of the Federal Rules of Evidence permits experts to rely upon inadmissible evidence “if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,” and most states have similar provisions.\(^{21}\) This Rule means that the information that helps shape or form the expert opinion does not itself need to be admissible in evidence, so long as it is the kind of information that experts in the field would typically use for reaching conclusions or opinions like this one. The logic justifying the rule is essentially a form of deference to legitimate expertise: if the expert herself can assess whether a particular piece of

\(^{21}\) **FED. R. EVID.** 703.
information is worth being considered as part of the basis for her conclusion, why should the court second-guess this judgment by the expert, especially if it is a judgment that conforms with the customary norms of the expert’s community? 22

A related but distinct question is whether an expert may disclose the information upon which she has relied to form her opinion to the jury, even if that information is itself otherwise inadmissible. The strongest argument in favor of disclosure is to create the possibility for educating the jury by making the expert’s conclusion and reasoning more transparent. If the jury does not know the underlying facts or bases for an expert’s conclusions, it is difficult to see how the jury could rationally assess the plausibility of the expert’s judgment. Without such disclosure, the jury may have little choice but to defer (or not) to an expert’s credentials, and to assess her demeanor rather than unpack her arguments. Without disclosure, the jury may lack the fundamental building blocks that could permit it to evaluate the substantive merits of the expert’s conclusion. 23 If we want to encourage, or indeed even permit, rational evaluation of an expert’s conclusions by the jury, permitting the disclosure of basis evidence would appear to be a very good idea.

However, this strong argument in favor of permitting disclosure is matched by an equally strong argument against it: if disclosure is permitted, it is likely to become a mechanism by which savvy lawyers funnel otherwise inadmissible hearsay evidence to the jury. Permitting disclosure of all matters upon which an expert has reasonably relied would risk opening the door to a great deal of hearsay evidence, and could turn the expert into a conduit for large quantities of otherwise inadmissible, and potentially prejudicial, information. At an extreme, parties might even introduce an expert precisely for the purpose of getting before the jury evidence that would otherwise

22 See generally Advisory Committee Note, Fed. R. Evid. 703.
be prohibited.\textsuperscript{24}

In short, so long as experts may rely on inadmissible factual matters as the bases for their conclusion, there is an inevitable tension between jury education and adherence to the rest of the rules of evidence.\textsuperscript{25} In practice, the dominant approach has been to permit disclosure of an expert’s basis evidence subject to a balancing test.\textsuperscript{26} Prior to the year 2000, many courts applied that Rule 403 balancing test so familiar to every student of evidence, and looked to whether the probative value of disclosure was “substantially outweighed by the danger of unfair prejudice,


\textsuperscript{25} For further discussion of this issue, see \textit{David Kaye, David Bernstein, and Jennifer Mnookin, The New Wigmore: A Treatise on Evidence: Expert Evidence} §3.7 (2004).

\textsuperscript{26} See generally id.
confusion of the issues, or misleading the jury.” In 2000, Federal Rule of Evidence 705 was amended to address concretely the issue of disclosure, and reversed the Rule 403 balancing test, making non-disclosure the default, unless the probative value of disclosure substantially outweighs the harm of non-disclosure. A few states have followed the federal rule, but most have not amended their equivalent state rule, and at present disclosure practices vary significantly across jurisdictions. Notwithstanding Rule 705 and the existence of rules of some kind on this point in many states, on-the-ground practices with respect to the extent of expert disclosures vary tremendously, even within jurisdictions, and are typically not very closely regulated by appellate courts.

As the cases concerning Crawford and expert evidence themselves reveal, however, there is no doubt that a great deal of expert basis evidence is regularly being disclosed to juries—and it is this disclosure that potentially raises the Confrontation Clause concern. When an expert details the statements made by an out-of-court declarant, the defendant does not have the chance to cross-examine the witness whose statements are relayed to the jury. To be sure, it is frequently the case that the hearsay basis for an expert’s testimony will not be testimonial under any reasonable definition of the term. When a doctor relies on other medical records made in the course of treatment, or an appraiser relies on comparable prior sales, or an expert in

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27 Fed. R. Evid. 403. For cases articulating this standard, see, e.g., Guillory v. Dontar Indus. 95 F. 3d 1320, 1331 (5th Cir. 1996); Gong v. Hirsch, 913 F. 2d 1269, 1273 (7th Cir. 1990).

28 Federal Rule of Evidence 705 now reads, “Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the courts determine that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.” A few states have followed suit, but many have left their equivalent rules unchanged. See Kaye et al., supra note 23 at §3.8.2.

29 To give an example, Pennsylvania and Rhode Island make disclosure of the basis of an expert opinion both admissible and mandatory, whereas Minnesota restricts disclosure to civil cases and even then only permits it when “the underlying data is particularly trustworthy.” See Pa. R. Evid., 704; R.E. R. Evid. 703; and Minn. R. Evid. 703.
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gang structure relies on interviews conducted with former gang members over many years and not related to the particular case, no plausible understanding of “testimonial” would encompass these statements. They were not made in circumstances that would suggest that they were going to be used in a trial as a substitute for live testimony, nor were they spoken with the expectation that they would be used to prove some fact in court.

However, in other circumstances, a portion of an expert’s basis may well fit within the category of “testimonial.” While the variety of potential circumstances is great, two recurring categories of evidence that are implicated by Crawford are described briefly below: a testifying expert’s description of the findings of other forensic experts; and an expert’s disclosure of statements learned during the process of investigating the case.

Note that there may be a Crawford problem even when there is no problem with disclosure under Rules 703 and 705. In some cases, the matters upon which experts rely may be hearsay that is admissible under some other exception. Prior to Crawford, disclosure of this evidence would not have been problematic (unless the hearsay exception that applied was not firmly rooted, in which case a reliability analysis would have been necessary if the evidence was understood to have been introduced substantively for the truth of its contents). But Crawford changes this analysis: even if the basis evidence fits into some legitimate hearsay exception, while it does not fall into Rule 705’s limitations on disclosure (or any state equivalent), if the underlying evidence is testimonial, it may still be barred by Crawford. Moreover, even in those states that have heretofore permitted or even required disclosure of an expert’s basis on direct testimony, if the disclosure is testimonial, the Confrontation Clause must obviously trump.

1. Experts Reporting the Case-Specific Findings of Other Experts

On many occasions, the forensic expert who testifies in court is not the person who actually conducted the forensic tests in the case. One person might carry out a toxicological analysis, a
DNA test, or an autopsy, while an altogether different person stands before the jury to provide testimony, often another employee in the same laboratory. Sometimes the testifying witness is the original analysts’ supervisor or successor, or it might just be the staff member who happened to be free to come to court that day, or perhaps the person already testifying in some other case that day and hence conveniently available to do double duty; or possibly it is whichever laboratory analyst is thought to be best at testifying before the jury. Typically, this testifying witness’s conclusions derive primarily from looking over the laboratory results of the non-testifying expert. In such a circumstance, courts often permit the testifying witness to describe in detail the tests conducted by others, and frequently also permit the actual test reports themselves to be formally introduced into evidence and presented to the jury.

The potential Crawford issues are clear. If an expert testifies about tests she has personally conducted, there is obviously no Confrontation Clause problem: the expert is on the stand and available for cross-examination. But when an expert reports to the jury detail and substance of tests conducted by others, is she relaying constitutionally prohibited testimonial hearsay? In order to permit such testimony, a court would need to be able legitimately to claim that the evidence was either not hearsay or not testimonial. Otherwise, Crawford would bar such disclosures, unless either the expert who actually conducted the tests was also testifying, or the original expert was unavailable and the defendant had been afforded a prior opportunity to cross-examine.

As with certificates of analysis, a straight-faced reading of Crawford seems to make it difficult to avoid the conclusion that at least some of this expert basis evidence is testimonial. In the next Part, I will explore in some detail why it is not plausible to conclude that expert basis evidence of this sort is not hearsay. And certainly these reports are produced in clear contemplation of future legal proceedings. Unlike certificates of analysis, which are truly intended to substitute for testimony, with

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30 See generally Part II.
forensic science reports of these kinds it is frequently contemplated that someone’s testimony will accompany the report. 31 But if it is not the declarant herself who testifies, then the report is certainly operating as “ex parte in court testimony.”

It is worth noting that, were Crawford construed to apply to these situations, most of the time it would be a logistical inconvenience for the prosecution but not an insurmountable problem. Much of the time, it would be feasible to introduce forensic science testimony through the particular forensic scientist who conducted the test. It might put pressure on laboratories to hire only those forensic scientists who had appealing courtroom demeanors, and it might frequently be inconvenient—imagine for example a number of small-scale drug trials happening the same day, for which it would be far easier to send one person to court rather than the four different people who had conducted the actual tests at issue.

Sometimes, however, compliance would be more than an inconvenience. When the original author of the report was genuinely unavailable, Crawford’s dictates could pose a serious problem of proof. Any time a forensic scientist quit her job, moved to another state, or died, there would be a backlog of cases for which she had done the tests but that had not yet gone to trial—how would these tests now be introduced into evidence? Particularly in those areas where there is frequently a long lag time between forensic examination and prosecution—take murder cases, for example, in which many years might regularly separate the autopsy and arrest, much less the trial itself—Crawford’s requirements could create severe difficulties if no work-around was available.

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31 Note, however, that in some jurisdictions, forensic science reports are regularly introduced without accompanying testimony, accompanied by some certification, the details of which depend on the state. See Metzger, supra note 13 at 486-88 and accompanying notes.
2. Expert Disclosures of Non-Expert Basis Evidence

*Crawford* concerns can also arise in those cases in which experts testifying on behalf of the prosecution have interviewed subjects in the course of gathering information and preparing their testimony for the particular case. Imagine, for example, that a forensic psychologist interviews friends and relatives of the defendant about her behavior around the time of the crime in order to assist in her assessment of the defendant’s sanity. Or, in a criminal case arising from a vehicular accident, an accident reconstruction expert might base his opinion partly on affidavits made by witnesses to the authorities, or might go out herself to conduct interviews with onlookers. A gang expert might examine statements made by suspects under interrogation, or might conduct interviews with former gang members to learn more about operational details of the gang to which the defendant is thought to belong.

Myriad additional examples could be generated; the point is that when an expert retained by the prosecution gathers statements from people who know that she is an expert retained by the prosecution, or uses statements gathered by the police, these statements may quite possibly fall within the boundaries of the testimonial. If so, then any expert disclosure of the substance of these statements might also run afoul of *Crawford*. Note, however, that whether basis evidence of this sort is testimonial is a closer question than the earlier two categories, because it is typically less formalized, and depending on the circumstances, it might, from the declarant’s perspective, not be as obviously made in anticipation of litigation or understood to be a potential substitute for testimony. If, as the definition of testimonial is further honed, the “formalized” nature of the statements is thought to be central, then some utterances of these sorts might be outside the definition’s boundaries. By contrast, if the key question is whether either a reasonable listener or declarant would have expected the information to be used prosecutorially, then these kinds of expert basis evidence would often be testimonial.
How much of a practical impediment would it be to bar these kinds of disclosure by experts? In some circumstances, the underlying evidence upon which the expert relies might be independently admissible. Obviously if the same individuals upon whom the expert relies are also testifying and hence available for cross-examination, this cures any potential *Crawford* problem. In other instances, experts might be permitted to rely upon such evidence but not disclose it—an expert might explain to the jury that her conclusions about the gang structure were based in part on transcripts of an interrogation by the police with other gang members, without describing the details of what these interrogations revealed. This, to be sure, gives the jury less information with which to substantively evaluate the expert’s conclusion; it pushes the jury further toward the deference pole of the deference/education axis. It also raises the intriguing question of whether the logic of *Crawford* places any limitations on the reliance upon testimonial evidence, or simply limits its in-court disclosure, but serious discussion of this question is beyond the scope of this Article.

II. AVOIDING REALITY: COURTS’ EFFORTS TO CATEGORIZE EXPERT BASIS EVIDENCE AND CERTIFICATES OF ANALYSIS AS NON-TESTIMONIAL

Prior to *Crawford*, most cases downplayed any Confrontation Clause concerns wrought by expert reliance upon or disclosure of hearsay, or by the use of certificates of analysis. Some of the arguments typically proffered by courts included the following: (1) when the evidence is admitted for the limited purpose of helping the jury evaluate the expert’s basis, it is not offered for the truth of its contents and hence, because it is not hearsay, the Confrontation Clause is not implicated; (2) frequently, the facts disclosed by the expert are such that the

32 A few courts did find such testimony to violate the Sixth Amendment. *See, e.g.*, State v. Towne, 453 A.2d 1133 (Vt. 1982) (finding that expert’s testimony that another non-testifying doctor agreed with him, coupled with prosecutor’s emphasis of this point, amounted to a violation of defendant’s confrontation rights).
assistance to the defendant from confrontation would have been limited; (3) the availability of a testifying expert for cross-examination is an adequate substitute for cross-examining the hearsay declarant; and (4) because the basis for allowing the expert’s reliance under Rule 703 is reliability, the disclosed information should also be deemed reliable enough to eliminate Confrontation Clause concerns. Some courts even tried to argue that that reliance on factual matters by an expert under Rule 703 was a firmly rooted hearsay exception. Given that Rule 703 is not explicitly framed as a hearsay exception at all, this argument was especially persuasive.

In the two years since Crawford, many state and federal courts have confronted cases involving expert reliance upon and disclosure of matters that are at least arguably testimonial, as well as numerous cases involving the continued use, post-Crawford, of certificates of analysis. A handful of courts have concluded, sometimes reluctantly, that Crawford bars the use or disclosure of such evidence. Most of the time, however, courts have held that the Confrontation Clause does not bar either disclosure by experts or the use of certificates of analysis.

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33 See, e.g., Barrett v. Acevedo, 169 F. 3d 1155 (8th Cir. 1999) (suggesting that disclosure of basis was for a purpose other than the truth of its contents and hence neither hearsay nor a violation of the Confrontation Clause); Reardon v. Manson, 806 F. 2d 39 (2d Cir. 1986) (finding sufficient indicia of reliability to justify use and disclosure of hearsay by expert and emphasizing defendant’s opportunity to cross-examine expert).


35 As State v. Rogovich, 932 P.2d 794 (Ariz. 1997), correctly noted, “[b]ecause Rule 703 is not a hearsay exception . . . it is certainly not firmly rooted.” Id. at 798. Rule 803, the federal rule against hearsay, makes hearsay inadmissible “except as provided by these rules or other rules prescribed by the Supreme Court pursuant to statutory authority.” One could argue that Rule 703 and Rule 705, which, prior to their amendment in 2000, implicitly permitted disclosure at least some of the time, were “other rules” under Rule 803, and thus, they operated as a legitimate hearsay exception. This argument is strained but not wholly preposterous; however, even if these rules created an implicit hearsay exception, it would be difficult to claim with a straight face that it was a firmly-rooted one.
Perhaps surprisingly, many courts have continued to make precisely the same arguments that they made prior to *Crawford*.

A close look at several of the arguments mustered by the courts who deem such evidence non-testimonial or otherwise find *Crawford* inapplicable shows them to be generally unpersuasive, sometimes even disingenuous. Even if reliance on testimonial evidence by experts continues to be permissible under *Crawford*, it is difficult to justify disclosure of this testimonial basis to the factfinder. In this section, I will describe and evaluate the stratagems by which state and federal courts are attempting to limit *Crawford*’s applicability to forms of expert evidence. I will give particular attention to the argument that an expert’s factual basis disclosures are not hearsay at all, for this claim is an especially tempting, though in my view unjustifiable, way for courts to avoid creating a *Crawford* problem.

**A. The Evidence is Introduced for a Non-Hearsay Purpose**

Prior to *Crawford*, many courts permitted experts to describe the substance of the sources upon which they relied, arguing that not only were there no Confrontation Clause issues at stake in such disclosures, but that these disclosures were actually not even hearsay at all. This issue commonly arose when courts had to decide whether to permit experts to disclose matters upon which they relied, but that were not independently admissible under some hearsay exception. As I described in Part I, Rule 703 of the Federal Rules of Evidence explicitly permits experts to rely upon inadmissible evidence “if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,” and most state evidence rules contain similar provisions.\(^{36}\) When an expert relies on inadmissible evidence that fits the confines of the rule, can she tell the jury about the basis for her conclusions? Can she disclose this otherwise inadmissible evidence to them?

Certainly, prior to *Crawford* and the revisions to Rule 705 that shifted the balancing testing federal court to favor non-

\(^{36}\) FED. R. EVID. 703.
disclosure, courts were regularly in the habit of permitting experts to disclose the factual foundation for their conclusions. When such evidence was admitted, it led to a related question: what, precisely, was the evidentiary status of this disclosed foundation? Once disclosed, was it formally “in evidence” for all purposes, including to prove the truth of its contents? Or, was it available only for some more limited purpose, and if so, what might this purpose be? One approach taken by courts—and which some courts are continuing to employ, even after Crawford—was to suggest that the disclosure of the expert’s basis was actually permitted not for the truth of its contents, but only for a more limited purpose: to help the jury assess the expert’s opinions and conclusions.

Rules of limited admissibility are commonplace in evidence law. They inevitably invite questions about whether they actually work—whether it is plausible to believe factfinders capable of the mental gymnastics necessary to consider a piece of proffered information for one purpose while wiping it clear out of their minds when ruminating upon some other question for which common sense might deem the item of evidence relevant. There are many places where the Rules of Evidence ask juries to cut distinctions finer than ordinary—or for that matter, perhaps even extraordinary—minds are capable: for example, when evidence of a testifying defendant’s prior convictions are ostensibly admitted to shed light on her credibility, but not her general character or her propensity to commit crime.\(^37\) In general, courts operate as if limited admissibility does work, even in those cases when reasonable minds might doubt that it actually can, though occasionally the fiction of limited admissibility seems too blatantly fictional to tolerate.\(^38\) But when it came to figuring out how to treat basis evidence disclosed by an expert witness, courts had both a doctrinal and practical need to find a way to see the evidence as admitted only for a limited purpose, rather

\(^37\) See, e.g., Fed. R. Evid. 609.

\(^38\) See, e.g., Bruton v. United States, 391 U.S. 123 (1968) (finding that an out-of-court confession by a co-defendant accomplice, implicating the defendant, is barred by the Confrontation Clause unless the accomplice testifies and is available for cross-examination at trial).
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than generally admitted for the truth of its contents.

Why so? First, the practical difficulty: the obvious danger with permitting disclosure by experts of their basis evidence is that attorneys may attempt to “funnel” otherwise inadmissible evidence in through experts; to get before the jury materials that otherwise would be excluded. While subjecting disclosure to some kind of balancing test might reduce this danger, another protection, albeit a small one, might be offered by refusing to treat these disclosures as substantive evidence of the truth of their contents. This would, for example, prevent an attorney from relying on a fact disclosed by an expert but otherwise not in evidence in her closing argument. Nor could such a disclosure be considered to establish the legal sufficiency of the evidence for any element of the crime charged. Although whether these limitations offered any substantial protection against expert funneling might be doubtful, at least at the margins they encouraged parties to introduce what evidence they could through other channels rather than simply having the expert disclose it as part of her factual basis.

Moreover, prior to Crawford, this “not for the truth of its contents” stratagem offered the added benefit of making the Confrontation Clause issue easy. Doctrinally, if expert disclosures of basis evidence were treated as substantive evidence offered to prove the truth of their contents, then they were, functionally, a form of hearsay that fit no articulated exception. As a matter of statutory interpretation, clearly this would have suggested a lack of artful drafting: if they were an admissible form of hearsay, why was there no corresponding hearsay exception?39 A more serious problem, however, would be that given that there was no explicit hearsay exception, these disclosures could not be seen to fit a firmly rooted hearsay exception, and thus, in criminal cases when the disclosures were

39 Some have argued that there should be an explicit hearsay exception. See, e.g., Paul R. Rice, Inadmissible Evidence as a Basis for Expert Testimony: A Reply to Professor Carlson, supra note 24; Paul R. Rice, The Allure of the Illogic: A Coherent Solution for Rule 703 Requires More than Redefining “Facts or Data”, supra note 24 (suggesting possibility of a new hearsay exception for expert basis materials).
offered by experts testifying for the prosecution, the Confrontation Clause jurisprudence of the time—requiring “particularized guarantees of trustworthiness”—would have been implicated. 40 Making such a determination would have at a minimum added a layer of complexity to the decision whether to permit disclosure of the basis evidence, and in many cases, it might not have been plausible to argue that there were particularized guarantees of reliability, as opposed to more structural indicators merely suggesting that the category of evidence is typically reliable.

Recall that the very basis for permitting expert reliance on inadmissible evidence under Rule 703 is the assumption that qualified experts themselves can adequately determine whether facts within their purview are worthy of reliance, whether or not they conform to the precise dictates of the rules of evidence. 41 Indeed, in many circumstances, it may be every bit as reasonable to think that an expert’s basis evidence is as reliable as evidence that fits, for example, the “excited utterance” exception or evidence admitted under Rule 803(3) and the Hillmon doctrine regarding someone’s future intent (both of which courts have deemed “firmly rooted”). 42 Recall further that prior to Crawford, the protections of the Confrontation Clause were not, to say the least, terribly robust.

Moreover, the jurisprudence that followed Ohio v. Roberts was filled with jurisprudential moves that could only be understood as legal fictions. For example, the Court declared that all firmly rooted hearsay exceptions met the necessary reliability standard ipse dixit; that any firmly rooted hearsay exception was sufficiently reliable was, in essence, an

40 Occasionally courts did try to suggest that basic evidence disclosed by experts fell into a firmly rooted hearsay exception—a rather incredible claim, considering the nonexistence of any formal hearsay exception on the matter.

41 Fed. R. Evid. 703.

42 See, e.g., Hayes v. York, 311 F.3d 321, 324 (4th Cir. 2002) (finding North Carolina’s state of mind exception to be firmly rooted for Confrontation Clause purposes, relying in part on the long history of the Hillmon doctrine).
irrebuttable presumption, taken as true as a matter of law.\textsuperscript{43} The courts were willing to see nearly all the main hearsay exceptions (except for the residual exception\textsuperscript{44} and the Rule 804 exception for statements against interest\textsuperscript{45}) as firmly rooted—and even when the specific contours of a hearsay exception were tinkered with via judicial opinion or by revision to the Rule, courts still found these recently modified versions of the exceptions to remain firmly rooted!\textsuperscript{46} Considering this approach to the Confrontation Clause in aggregate, for courts to be forced into a detailed Confrontation Clause analysis in order to permit disclosure by an expert would have seemed at odds with the generally meager protections it appeared to offer criminal defendants against hearsay. It would have meant that the protection turned out to be especially robust in a place where the arguments for it were, if not weakest, then certainly no stronger than in many other settings.

If only there were some way to see disclosures by experts in terms that would not implicate the Confrontation Clause, this peculiar result could be avoided. The courts invented such a method: if the disclosure of basis evidence by experts was not hearsay at all, as a corollary, it was by definition outside of the Confrontation Clause’s purview.

This commonly made argument went like this: when experts tell the jury about the matters upon which they relied, they are not disclosing this information in order for the jury to make a decision about its truth. Rather, these disclosures happen for an (allegedly) separate purpose: to help the jury evaluate the credibility of an expert. The jury will better be able to determine if the expert has adequate grounds for her conclusion, and whether she warrants being believed, by hearing about the

\textsuperscript{43} As \textit{Ohio v. Roberts} put it, it could be “inferred without more.” \textit{Roberts}, 448 U.S., at 66.

\textsuperscript{44} See generally \textit{Idaho v. Wright}, 497 U.S. 805, 817 (1990).


\textsuperscript{46} See, e.g., \textit{Bourjaily v. United States}, 483 U.S. 171, 183 (1987) (rejecting the idea that the court’s modification of how co-conspirator statements could be established to the judge had any effect on whether the exception was firmly rooted).
expert’s sources—not only the categories of information upon which she relied, but the substance. Therefore, when this substance is disclosed, it is introduced for the ostensibly non-hearsay purpose of aiding the factfinder in her evaluation of the expert testimony. Because the information is not being introduced for the truth of its contents, it is not actually hearsay at all, and any potential Confrontation Clause problem disappears into thin air.

The problem with this argument is that notwithstanding its frequent invocation by courts, it makes almost no sense. To be sure, the jury might have better grounds for evaluating the expert’s testimony if it hears about the data upon which the expert relied for her conclusion. But part of a rational evaluation of the expert will thus entail an evaluation of her sources—which will inevitably involve a judgment about the likelihood that the sources themselves are valid and worthy of reliance. In other words, to decide how much to credit the expert’s sources, the jury should, logically, first assess the odds that they are reliable. And what is this but a judgment about the likely truth of their contents? Using the information for the permissible purpose of evaluating the expert thus necessarily requires a preliminary determination about the information’s truth. The permitted purpose is therefore neither separate nor separable from an evaluation of the truth of the statement’s contents.

To say that evidence offered for the purpose of helping the jury to assess the expert’s basis is not being introduced for the truth of its contents rests on an inferential error. To make rational use of this evidence, a factfinder must first assess the likelihood that it is worth relying upon. Having done so, she may then build upon this first inference in order to assess the likely reliability of the expert’s conclusions. The second inference is what is permitted by the allegedly non-hearsay purpose for the evidence. But this second judgment relies upon the first, and the first is inherently a judgment about the likely truth of the underlying basis. The fact that this underlying judgment about the truth is then subsequently used in making another judgment does not mean that the evidence is being used for a non-hearsay purpose.
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To see this point more clearly, consider an example from outside the expert context. Suppose a witness took the stand and testified, “John was extremely drunk the night of April 13th.” Imagine that the foundation for this opinion was not that the witness had seen John slurring his words or imbibing large quantities of alcohol, but rather, that a friend, whom the witness had seen that night had reported to him that earlier that evening, John had consumed seven drinks in the span of two hours. This friend’s statement, if relayed to the court by the witness, would obviously be hearsay. The fact that it informed the witness’ judgment about John’s drunkenness would not somehow make it non-hearsay, or suggest that it was being introduced for a purpose other than the truth of its contents, assuming that the purpose of the witness’ testimony was to assert the conclusion that John was drunk. 47 As a logical matter, the jury can only believe the witness’ conclusion about John’s drunkenness if it also credits what the witness’ friend told him. This is quite clearly a judgment about the truth of the matter asserted. By contrast, if the witness had behaved in a particular way toward John that evening because he believed him to be drunk, and that behavior by the witness was itself relevant to the case, then the statement could be introduced for the non-hearsay purpose of the effect on the listener—it would be introduced not to establish that John was drunk, but rather to inform our understanding of why the witness behaved as he did. The mere fact that the friend had said this to the witness would then be relevant for understanding the witness’s actions—whether or not the words spoken by the friend were accurate or true. But there is no parallel to this “effect on listener” argument that holds up in the context of expert basis evidence. The basis evidence is not being introduced to explain the expert’s actions, but rather to explain her conclusions. And assessing the conclusions is a judgment about reliability, a determination about truth.

When Confrontation Clause jurisprudence was rather

47 Of course, if this was the witness’ sole basis for his opinion of drunkenness, the opposing party could also object for lack of personal knowledge. In the expert context, there is no requirement under the federal rules of personal knowledge of underlying facts.
toothless, this claim that expert basis evidence was being introduced for a purpose apart from the truth of its contents could have been seen as fictional but harmless, just another fiction of a piece with the rest of the striking fictions that operated within the doctrine. Given how little hearsay was thought to be problematic under *Ohio v. Roberts*, an approach that resulted in treating expert disclosures on par with most other forms of hearsay, was, at least arguably, a practical compromise even if it strained logic and common sense.

Under *Crawford*, however, a reliability determination is neither a necessary nor even a permissible inquiry for determining whether evidence meets the Confrontation Clause. Therefore, whatever confidence a court might have about the likely reliability of an expert’s basis evidence is, quite simply, beside the point. Moreover, the stakes in making the hearsay/non-hearsay determination have increased. Prior to *Crawford*, if a court deemed an expert’s disclosure or basis evidence to be hearsay, that would have triggered analysis under both the hearsay rule and under the Confrontation Clause. Frequently, the disclosed evidence would have met the requirements of one of the exceptions to the hearsay rule—for example, forensic science reports could be deemed business records (so long as the court did not think that the fact that they were produced by litigation did not prevent them from falling within the exception’s confines); statements made to the police by excited onlookers to an accident, and later used by an accident reconstructionist, might well be excited utterances; statements made by family members to a psychiatrist might fall into the exception for statements made for purposes of medical diagnoses or treatment. These are, of course, just examples—the point is that whenever the basis evidence fit into a firmly rooted hearsay exception, admitting the evidence as permitted hearsay posed no Confrontation Clause issue. Moreover, under the Rule

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48 Certainly some scholars did not see it as harmless. See, for example, the several articles by Ronald Carlson, supra note 24.

49 To be sure, some judges resisted treating expert disclosures in this manner even before *Crawford*. See, e.g., the strongly worded dissent in United States v. Corey, 207 F.3d 84, 105 (1st Cir. 2000).
803 exceptions, whether or not the hearsay declarant would have been available to testify was irrelevant.50

Often, then, permitting the evidence in under Rule 703 was simply a useful shortcut for evidence that could have been admitted in other ways. Indeed, the Advisory Committee Note to Rule 703 explicitly explains Rule 703 in these terms:

Thus a physician in his own practice bases his diagnoses on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records and X rays. Most of them are admissible in evidence, but only with the expenditures of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.51

Whenever evidence could have been introduced under a firmly-rooted hearsay exception, admitting it instead under Rule 703 to explain the expert’s conclusions might have operated as a shortcut that reduced the need for authentication, but it was nothing more. (Much of the time, indeed, both courts and attorneys may well have seen an expert’s disclosures as explicitly or implicitly coming in under a delineated hearsay exception, and reserved the argument that the evidence was not being introduced for the truth of its contents for those circumstances when either the evidence clearly required additional authentication to meet an exception, or when no exception applied.)

Even when the evidence did not fall into a firmly rooted hearsay exception, under the earlier approach to the

50 The use of the exceptions delineated under FED. R. EVID. 803 does not require any showing of unavailability, unlike those delineated under FED. R. EVID. 804. As a matter of evidence law there is, therefore, no preference for non-hearsay as opposed to hearsay with respect to materials permitted under the 803 exceptions.

51 Advisory Committee’s Note, FED. R. EVID. 703.
Confrontation Clause it could well still have been admissible. The question would then have been whether it could legitimately have been introduced under the residual exception, Rule 807, or the equivalent state provision. Rule 807 requires evidence to have “circumstantial guarantees of trustworthiness” equivalent to those in place for the delineated hearsay exceptions. It could certainly be argued that the reasonable reliance by a qualified expert—especially, post-*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 52 coupled with the court’s determination of adequate reliability to warrant admissibility of the conclusions—would meet Rule 807’s requirements. At least as a technical matter, Rule 807’s requirement of “circumstantial guarantees of trustworthiness” equivalent to those found in the delineated hearsay exceptions might not be precisely the same as the “particularized guarantees of trustworthiness” required under *Roberts*, but even if the contours of Confrontation Clause analysis were slightly different than those surrounding the use of the residual exception, the foundational questions motivating both inquiries were the same: necessity and reliability were the touchstones for both. Thus, meeting the one standard would usually, as a practical matter, mean meeting the other as well. Indeed, it was precisely the frequent conflation of the hearsay standard with the Confrontation Clause standard, coupled with an anxiety that a judicial determination of reliability was substituting for the constitutional guarantee of confrontation, that led commentators to argue—and the Court in *Crawford* to agree—that Confrontation Clause jurisprudence needed an overhaul.

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52 509 U.S. 579 (1993). *Daubert*, the first of the Supreme Court’s trilogy on expert evidence, made clear that courts have a gatekeeping responsibility under the Federal Rules, in order to assure that expert evidence proffered at trial is sufficiently valid and reliable. *Id.* at 589. *Daubert* rejected the notion that the older *Frye* test, which focused on whether the expert evidence was “generally accepted” in the relevant expert community was incorporated into the Federal Rules, and instead, building upon a general gloss of the words “scientific . . . knowledge,” suggested a number of criteria (including “general acceptance” by which the courts could evaluate expert evidence). *Id.* at 584-87.
Thus, pre-\textit{Crawford}, even if courts had abandoned the abracadabra of pronouncing some disclosures by experts to be admissible as non-hearsay, most basis evidence disclosed by experts would have been able to be introduced in some way, though the degree of necessary rigmarole and judicial scrutiny of the reliability of the statements would surely have increased. Permitting experts to disclose matters to the jury for the ostensibly non-hearsay purpose of helping them to evaluate the expert’s reasoning probably did not lead with great frequency to the disclosure of matters that could not have been introduced through some other logic as well. And even when it did, in a judicial environment in which the theoretical foundation of the Confrontation Clause was reliability (coupled to some extent with necessity), admitting purportedly reliable basis evidence was, as a conceptual matter, relatively unproblematic, whatever the awkward doctrinal logic through which it came in.

Along comes \textit{Crawford}. Because \textit{Crawford} no longer uses reliability as a touchstone, the implicit justification for an approach that was never entirely coherent falls apart. Before \textit{Crawford}, when courts indulged in the fiction that expert disclosures were introduced for a purpose distinct from the truth of the matter asserted, they were admitting evidence that often would have been admissible on some other grounds. Even if it would not have been able to fit another exception, assuming that the reliance by the expert was in fact reasonable, the evidence probably had as much of a structural guarantee of reliability as plenty of admissible hearsay.\footnote{Note that I am by no means suggesting that the materials relied upon by experts are generally reliable. I mean to express no view on this point. But I see no reason to believe that statements upon which qualified experts reasonably rely are any less likely to be reliable, as a general matter, than, say, excited utterances, or statements made for the purposes of medical diagnosis. To be sure, within a system of party-appointed adversarial experts, we may have good reason to be worried about whether expert reliance takes place in good faith, and there are no doubt many occasions on which highly compensated experts are prepared to rely on materials that are not, in fact, worthy of reliance. Still, the justification for Rule 703 is quite explicitly the likely reliability of the evidence, a justification structurally analogous to that supporting many of the Rule 803 hearsay exceptions. The empirical
animating concern of the doctrine, the “not for the truth of the contents” argument was a fiction, yes, but a fiction consistent with the underlying values animating how the Confrontation Clause was understood.

Quite clearly, Crawford changes this analysis. When the focus on reliability is replaced by an inquiry into whether a statement is “testimonial,” the already doubtful justifications for the “not for the truth of its contents” argument for admitting experts’ basis evidence fall away entirely. The axes for analysis have shifted from reliability and necessity to an altogether different concern. Moreover, under Crawford, that some of this hearsay disclosed by an expert might also fit into a delineated and firmly rooted hearsay exception becomes irrelevant: no longer does whether an exception is firmly rooted make any difference to the constitutionality of hearsay introduced against a criminal defendant. If a basis statement upon which an expert relies is testimonial, its use is unconstitutional whether or not it also fits within a hearsay exception, and whether or not it is reliable. Given this, to pretend that expert basis statements are introduced for a purpose other than the truth of their contents is not simply splitting hairs too finely or engaging in an extreme form of formalism. It is, rather, an effort to make an end run around a constitutional prohibition by sleight of hand.

Unfortunately, even after Crawford, courts in a number of jurisdictions are continuing to claim that expert’s basis evidence is introduced for a purpose other than the truth of its contents, in order to avoid confronting the potential Crawford problem with such testimony. The very first court to face the issue of expert basis evidence post-Crawford intimated that it could be introduced for the ostensibly non-hearsay purpose of explaining the expert’s testimony.54 A number of other courts have gone on

54 United States v. Stone, 222 F.R.D. 334 (E.D. Tenn. 2004). To be fair, in this case, it is not clear whether the court meant to permit only reliance (and disclosure at the opposing party’s discretion on cross-examination), or was permitting disclosure on direct testimony as well (presumably subject to the balancing test of Rule 705). In Stone, a federal
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to claim explicitly that when an expert discloses the basis for her opinions, no *Crawford* issue is raised, because she is merely introducing it to help the jury evaluate the expert’s testimony.\(^{55}\)

district court admitted the expert testimony of an IRS agent in a criminal tax fraud case even though this testimony was based partly on statements made by company employees to a criminal tax investigator. The district court found that it was not clear from the record whether the defendant had an opportunity at the time these statements were made to cross-examine the declarants, nor was there evidence as to whether the declarants were presently unavailable to testify. Nonetheless, the court found no Confrontation Clause problem:

Even if the particular Benton Manufacturing employees are not “unavailable” and even if the statements they gave to IRS criminal investigator Bohannan during the interviews Ms. Cantrel attended are “testimonial” as contemplated by the Court in *Crawford*, the statements may nevertheless be used by Ms. Cantrel in forming her expert opinions because they would not be used to establish the truth of the matters the employees asserted. Rather, if defense counsel were to elicit the statements from Ms. Cantrel on cross-examination, the purpose of the out-of-court statements would not be for hearsay purposes but rather would be for evaluating the merit of the opinions Ms. Cantrel offered on direct examination. Because *Crawford* explicitly maintained the Confrontation Clause’s inapplicability to statements used at trial for purposes other than establishing the truth of the matter asserted, Ms. Cantrel could rely on the employees’ statements in forming her opinions.

On the one hand, *Stone* refers to eliciting the information on cross-examination: if this is truly all the court means to permit, there is nothing problematic about this. Clearly the defense can if it chooses inquire into the basis for the prosecution’s experts’ conclusions on cross-examination. On the other hand, the logic of the court’s reasoning—that disclosing the statements could be for the purpose of assessing the merits of the opinions, and this is a purpose separate from the truth of the statements’ contents—would seem to apply equally to disclosure on direct examination, and hence, would intimate that such disclosure was not prohibited by *Crawford*. Moreover, the court seems to conflate expert use and expert disclosure. Though there may be an argument that *Crawford* should prevent not simply disclosure but expert reliance on testimonial evidence, this is surely a relatively separate question from, and a far closer question than, that of expert disclosure of testimonial evidence under the guise of claiming that it is not for the truth of its contents.

\(^{55}\) See, *e.g.*, People v. Thomas, 130 Cal. App. 4th 1202 (2005); State v.
In some of these cases, the “not for the truth of its contents” argument borders on the truly preposterous. Take for example, a series of cases in North Carolina about the admissibility of forensic science reports conducted by one expert, but introduced into evidence by someone other than the person who ran the tests and wrote the report. One such case was *State v. Jones*, in which a forensic chemist testified in court that a substance found in the defendant’s possession was cocaine. The basis for her conclusion was a laboratory analysis conducted by another agent who did not testify. The testifying witness detailed the testing methodology used by the nontestifying expert and explained that she reasonably relied on this test in concluding that the substance was cocaine. The laboratory report conducted by the other agent was also admitted by the trial court into evidence. Over the defendant’s objection that this violated the Confrontation Clause, the state appellate court in an unpublished opinion insisted that *Crawford* did not apply because the laboratory analysis was only “adm itted to demonstrate the basis of the expert opinion . . . [and] not admitted for the purpose of proving the truth of the matter asserted.”

This is surely nonsense. The expert’s in-court testimony was, in essence, “this laboratory report written by someone else, which reports on the tests that were conducted, reliably informs me that the substance is cocaine, and therefore I can reliably inform you that it is cocaine.” In fact, the report and the accompanying notes were the testifying witness’ only basis for judging the substance to be cocaine. The expert’s judgment that the substance was cocaine could be accurate *if and only if* the report by the other nontestifying agent determining the substance to be cocaine was itself accurate. It cannot be seriously doubted that the report was coming in both to demonstrate the basis of the expert opinion *and* for the truth of its contents—if it were

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not true, the expert in fact had no basis at all for her conclusion. The expert was not even aggregating multiple disparate sources of evidence, or making novel inferences from the basis evidence—instead, he was basically parroting the conclusions reached in the report itself. One can sympathize with a court’s desire to permit the disclosure of basis evidence that is probably reliable, such as a routine analysis of drug composition. But to pretend that it is not being introduced for the truth of its contents simply strains all credibility.

New York’s highest court has been the first court explicitly to reject the “not for the truth of its contents” argument with respect to expert basis evidence post-\textit{Crawford}. In \textit{People v. Goldstein},\textsuperscript{57} the Court stated:

\begin{quote}
The claim that the [statements made to Hegarty, the expert] were not hearsay is based on the theory that they were not offered to prove the truth of what the interviewees said. . . . Here, according to the People, the interviewees’ statements were not evidence in themselves, but were admitted only to help the jury in evaluating Hegarty’s opinion, and thus were not offered to establish their truth. We find the distinction the People make unconvincing. We do not see how the jury could use the statements of the interviewees to evaluate Hegarty’s opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution’s goal was to buttress Hegarty’s opinion, the prosecution obviously wanted and expected the jury to take the statements as true. Hegarty herself said her purpose in obtaining the statements was “to get to the truth.” The distinction between a statement offered for its truth and a statement offered to shed light on an expert’s opinion is not meaningful in this context.\textsuperscript{58}
\end{quote}

In a relatively unusual move, the \textit{Goldstein} court considered this issue \textit{sua sponte}. But its answer was spot on: courts should

\textsuperscript{57} 6 N.Y.3d 119 (2005).
\textsuperscript{58} \textit{Id.} at 127-28.
not be able to avoid analysis of the *Crawford* issues present when prosecution experts disclose the substance of their sources on direct examination, through the fictional claim that such statements are offered for a purpose other than their truth.

I have addressed this argument in particular detail because it reflects such a dramatic temptation for courts facing the issue of expert basis evidence post-*Crawford*. While it would not, of course, provide a way around *Crawford* for certificates of analysis, it would essentially eliminate all expert basis issues from *Crawford*’s purview. If expert basis evidence is disclosed for a non-hearsay purpose, then any potential *Crawford* problem with its disclosure entirely disappears. And because this way of framing expert disclosure has been a longstanding legal fiction, it beckons seductively as a potential solution to these *Crawford* issues. But it is simply not possible for a jury to make use of an expert report that is disclosed as a source by another expert, or even of statements upon which the expert has relied, without first judging their likely accuracy. Unless a court can actually detail a chain of inferences that makes the disclosure useful for a genuinely non-hearsay purpose (i.e., a purpose that does not require a preliminary assessment of the likely accuracy of the source) then the seductive charms of this poorly reasoned argument should be resisted.

In some post-*Crawford* cases, courts have made a subtler and more plausible argument—that *Crawford* does not prohibit experts from referring in fairly general terms to the kinds of sources on which they relied.59 When only the general nature of

59 See, e.g., In re Julio D., No. G033550, 2004 Cal. App. LEXIS 10962, 2004 WL 2786375 (Cal. Ct. App. Dec. 6, 2004) (unpublished opinion reasoning that when information was “presented in generalized form as the basis for the experts’ opinions, *Crawford* was not violated”); People v. Ortiz, No. D042552, 2005 Cal App. LEXIS 3255, 2005 WL 851716, at *8 (Cal. Ct. App. Apr. 12, 2005) (unpublished opinion finding that an expert’s mention of and reliance on field investigation reports and other hearsay matters did not violate *Crawford* “because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases an opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert’s opinion.” It is unclear from the opinion whether these field reports were simply
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the sources is described, the argument that the information is introduced strictly to help the factfinder assess the expert’s testimony is stronger, especially when the expert has relied on an array of different kinds of sources, only some of which are even arguably testimonial. This argument, however, cannot justify a detailed recital of the substance of the testimonial evidence on which the expert has relied.60

To be sure, some litigants might argue that if describing the general kinds of evidence is permissible for a non-hearsay purpose, then describing their contents ought also to be, for whatever use the former might have for helping the jury understand the expert is equivalently provided by the latter as well. In other words, if telling the jury that an expert’s opinion was based on five particular sources without detailing their actual contents might help the jury assess whether these sources are of a kind likely to provide useful information for the expert’s conclusions, the jury could use a substantive description of the five sources for this same purpose, without actually relying on a judgment about the truth of the contents. But this argument should fail. It is, in fact, structurally analogous to the argument mentioned or whether their contents were described in detail; only the former could be justified as a non-hearsay use.

60 When the expert opinion consists of nothing beyond agreement with the conclusions of another expert’s report, this distinction between the nature of the expert’s sources and their content dissolves. If, in State v. Jones, No. COA03-976, 2004 WL 1964890 (N.C. Ct. App. Sept. 7, 2004) (unpublished opinion), for example, the court had permitted the expert to testify that the substance was cocaine and the basis of the expert’s conclusion was a careful examination of another expert’s toxicological report, that would, in essence, be disclosing the contents of this other report even if the report itself were not admitted. See also State v. Delaney, 613 S.E.2d 699 (N.C. Ct. App. 2005) (permitting one expert to testify that he reviewed the methodology used by another in testing drugs, and relied on the colleague’s analysis to reach his judgment that the substances in question were marijuana and opium). In cases like these, distinguishing between category and content may be a distinction without a difference. However, in those many cases when an expert’s judgment derives from multiple testimonial inputs, permitting the expert to delineate the categories without disclosing the contents may be a sensible method for respecting Confrontation Clause values while simultaneously permitting expert reliance on inadmissible materials when reasonable.
the government attempted to make in *Old Chief v. United States*\(^{61}\): that because the government had a need to prove that the defendant had committed a prior felony as an element of a “felon in possession” charge in the present case, it ought also to be able to prove the name of the felony in question notwithstanding the defendant’s offer to stipulate the existence of his previous conviction.

The Court in *Old Chief* appropriately rejected this argument, essentially acknowledging that while parties ought to have substantial leeway to prove their cases in the way they chose, at the same time, courts had to consider the existence of “evidentiary substitutes,” alternative ways to prove the same matter with equivalent probative value and less prejudicial impact.\(^{62}\) Just as in that case an offer to stipulate provided the equivalent probative value of naming the particular disclosed crime, while greatly lessening the danger of an unfairly prejudicial character inference, here too, describing the categories of evidence without detailing the contents reduces the chances that the jury will make substantive inferences about the truth of their contents, inferences which are impermissible under *Crawford* whenever the basis evidence is testimonial.

In *Old Chief*, the Court recognized that the name of the prior felony committed by the defendant was relevant under Rule 401, because the felony, if introduced by name, would help prove that he violated the felon-in-possession law.\(^{63}\) But a stipulation

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\(^{62}\) *Id*. As the Court put it:

On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.

*Id*. at 182-83.

\(^{63}\) *Id*.
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or admission that the defendant had indeed previously been convicted of a felony that would count under the felon-in-possession law, without providing the actual name of the prior felony, would have virtually the same probative value. This alternative form of proof had a side benefit: substantially reducing the danger that the jury would impermissibly think that because the defendant had committed an assault before, he was more likely to have committed this assault with which he was now charged—an impermissible character inference under our evidentiary rules.\footnote{Id. For the rules governing character evidence, see generally Federal Rules of Evidence 404-405.} For permissible inferences, this evidentiary substitute was just as good, and it avoided providing information to the jury that it would be quite likely to misuse.

A virtually identical argument applies with respect to expert basis evidence under \textit{Crawford}. Even assuming that experts may legitimately disclose to the jury the kinds of information on which they have relied, this ought not to mean that they may disclose the substance of this basis when it is testimonial. To be sure, disclosing the \textit{substance} of the expert’s basis evidence does also reveal the \textit{category}, and hence, is strictly speaking relevant for the purpose of helping the expert to evaluate the legitimacy of the kinds of evidence made use of by the expert, just as the name of the felony was appropriately recognized by Souter as relevant in \textit{Old Chief}. But just as prohibiting disclosure of the name of the felony in \textit{Old Chief} protected the jury from impermissible inferences, disclosing only the category of testimonial expert basis evidence protects the jury from the danger that they will impermissibly attempt to assess the truth of the testimonial basis evidence without a chance to cross examine the actual declarant.

\begin{enumerate}
\item \textit{Business Records as an Exception to Crawford}
\end{enumerate}

Many Courts have attempted to avoid \textit{Crawford}’s strictures with respect to both forensic science reports and certificates of analysis by making recourse to a supposed business records
exception to the Confrontation Clause’s dictates. To be sure, Crawford does state that some hearsay is not testimonial. It notes that “[m]ost of the hearsay exceptions [recognized in 1791] covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.” Certainly, a bill, a receipt, a demand letter, or other commercial writings not prepared with an eye toward criminal litigation would not be “testimonial” within the meaning of Crawford. But it is extravagant to read

65 See, e.g., Perkins, 897 So. 2d at 462–465 (finding that autopsy report fits into a business-record exception to Crawford); Commonwealth v. Verde, 827 N.E.2d 701, 703 (Mass. 2005) (calling drug certificate “akin to a business record”); People v. Durio, 794 N.Y.S.2d 863 (Sup. Ct. 2005) (exempting autopsy report from Crawford under business-record exception); State v. Thackaberry, 95 P.3d 1142, 1145 (Or. Ct. App. 2004) (reasoning that because a laboratory report “may be analogous to, or arguably even the same as, a business or official record,” it might not be testimonial under Crawford, and hence it was not plain error for the trial court to admit a toxicology report in the absence of an objection); Rollins v. State, 866 A. 926 (Md. Ct. App. 2005) (autopsy report nontestimonial under business records exception so long as the findings reported are “routine, descriptive and not analytical,” but not if they report “contested conclusions”); United States v. Bahena-Cardenas, 411 F.3d 1067 (9th Cir. 2005) (warrant of deportation nontestimonial because it was like other routine, objective public records, such as birth certificates) People v. Meras, No. F044043, 2005 WL 1562735 (Cal. Ct. App. July 5, 2005) (unpublished opinion noting that DNA laboratory results are business records and hence not testimonial under Crawford); People v. Fajardo, No. F045640, 2005 WL 1683615 (Cal. Ct. App. July 18, 2005) (unpublished opinion); State v. Cutro, 618 S.E. 2d 890 (S.C. 2005) (considering autopsy reports public records and hence nontestimonial); State v. Windley, 617 S.E. 2d 682 (N.C. Ct. App. 2005); Green v. DeMarco, 812 N.Y.S. 2d 772 (Sup. Ct. 2005) (declaring foundational breath test certificates business records that do not implicate the core concerns of the Confrontation Clause despite an “incidental” litigation purpose); State v. Kronich, 128 P. 3d 119 (Wash Ct. App. 2006) (finding a department of licensing record asserting that defendant’s license was revoked nontestimonial as a business and/or public record); State v. Forte, 360 N.C. 427, 435 (N.C. 2006) (asserting that business records, including forensic science laboratory reports, are nontestimonial because they “are neutral, are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse.”)

66 Crawford, 541 U.S. at 61.
this dictum as creating a generalized business-records exception to the application of *Crawford*. The fact that most business and public records are not testimonial does not exempt those that are from *Crawford’s* dictates. There is simply no logical basis for a *per se* business records exception to the reach of the Confrontation Clause. (Note, though, that Chief Justice Rehnquist, in his concurrence, elevates the dictum of the majority opinion into a genuine exception, writing, “To its credit, the Court’s analysis of ‘testimony’ excludes at least some hearsay exceptions, such as business records and official records.”67 But Rehnquist’s say-so does not make it so, and Rehnquist’s concurrence in the judgment is largely an argument against the majority’s approach, as he objects both to the substitution of the testimonial for the earlier inquiry into reliability, and the decision to create an “immutable category of excluded evidence.”68)

Recall that the core idea of *Crawford* is that when the state procures evidence expected to be used as substantive evidence incriminating a criminal defendant, that evidence is testimonial. Forensic science laboratory reports are surely testimonial in this sense, and so are certificates of analysis. With the latter, in fact, their very *raison d’etre* is to be a substitute for testimony; they are overtly designed as a shortcut, a way to prove something without having to introduce live testimony. Both certificates of analysis and forensic test reports in general are made with an explicit eye toward eventual prosecution. Their purpose is to provide information that will be useful both to identify the perpetrator of a criminal act (through, for example, DNA identification, fingerprinting, or ballistics evidence), or to identify the criminality of an act (by, for example, analyzing drugs, or blood alcohol levels, or the cause of death of a victim), but in addition and concomitant with their investigatory purposes, these tests are surely conducted in significant part precisely in order to provide legal evidence in court.

Forensic scientists and those requesting their services know

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67 *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring).
68 *Id.* at 74.
full well that the information may be used as testimony, and this is true regardless of whether the test is performed by government employees or an independent laboratory. As one of the few courts that has correctly deemed these tests testimonial wrote, “[b]ecause the test was initiated by the prosecution and generated by the desire to discover evidence against defendant, the results were testimonial.”

If courts continue to permit certificates of analysis and forensic evidence reports without requiring the testimony of their creator through a supposed business records exception, they will be eroding whatever claims to increased coherence Crawford appeared to offer. It is true that most business records are not produced in settings in which their future use as evidence is a primary purpose, and accordingly, most business records are therefore not testimonial. But records created by law enforcement personnel or those hired to provide support to law enforcement processes—a group that would surely include both state forensic scientists and those at private laboratories hired to perform forensic tests for the prosecution—ought to fall into the category of the “testimonial,” even if they are also appropriately understood to be business records for the purpose of the relevant hearsay exception.

2. Cross-Examination of the Expert as an Adequate Substitute for Cross-Examination of the Declarant

Prior to Crawford, courts sometimes concluded that the opportunity to cross-examine the expert, rather than the hearsay declarant, satisfied Confrontation Clause concerns even when the basis evidence was disclosed by the expert on direct examination. After Crawford, this view is untenable; if the basis

69 People v. Rogers, 780 N.Y.S. 2d 393, 397 (App. Div. 2004); see also State v. Crager, 844 N.E.2d 390 (Ohio Ct. App. 2005) (rejecting the argument that all business records are exempt from Crawford); Belvin v. State, 922 So. 2d 1046 (Fla. Dist. Ct. App. 2006) (rejecting the state’s argument that a breath test affidavit memorializing a nontestifying breath test technician’s procedures and observations in administering the test were nontestimonial hearsay).
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for the expert’s testimony is “testimonial,” then substituted cross-examination cannot be constitutionally adequate. Several courts have nonetheless continued to suggest that expert disclosure of basis information does not raise Confrontation Clause concerns because the expert, though not the declarant, is available for cross-examination.\(^\text{70}\)

The idea that cross-examining the expert is an adequate substitute for confronting the expert’s sources directly is one of the rationales underlying Rule 703’s willingness to permit experts to rely on inadmissible information. This justification exists alongside a necessity justification, based upon the recognition that experts invariably rely in part on hearsay, in the books they have read, the courses they have studied, the experiences from which they have learned. One might therefore worry that if cross-examining the expert were not understood to be a substitute for cross-examining the underlying basis evidence itself, it could lead to a kind of infinite regress, a need to call witness after witness in order to get to the root of whatever it was that the expert relied upon. This fear, however, is unwarranted: even applying \textit{Crawford} strictly, there is no grave danger that in order to satisfy Confrontation Clause concerns, the prosecutor would need to call a stream of additional witnesses.

\(^{70}\) See, e.g., State v. Jones, 603 S.E.2d 168, 2004 WL 1964890 (N.C. Ct. App. Sept. 7, 2004) (unpublished opinion quoting with approval a pre-\textit{Crawford} state case emphasizing that the opportunity to cross-examine the expert satisfies the Sixth Amendment); State v. Leonard, No. 2004-1609, 2005 WL 1039635 (La. Ct. App., Apr. 27, 2005) (defendant’s Confrontation Clause right was satisfied because he had an opportunity to cross-examine the prosecution’s expert, even though the testifying expert was not the one who had conducted the autopsy and written the autopsy report); State v. Delaney, 613 S.E. 2d 699 (N.C. Ct. App. 2005) (finding no \textit{Crawford} problem in part because the testifying expert was available for cross-examination about his reliance on the tests and reports performed by others); People v. Thomas, 130 Cal. App. 4th 1202 (2005) (noting “the expert is subject to cross-examination about his or her opinions”); State v. Durham, 625 S.E.2d 831, 833 (N.C. Ct. App. 2006) (finding no violation of the confrontation right when the expert is available for cross-examination, notwithstanding the testifying expert’s reliance upon and disclosures regarding an autopsy conducted by others.).
witnesses to justify every matter upon which an expert has relied. *Crawford*, after all, applies only to testimonial evidence. Most general expertise gained through study, reading, and experience will *not*, in fact be testimonial, and even a good deal of case-specific information will frequently not be testimonial either. Hence, all of these matters can be relied upon by the expert and—subject to the application of Rule 705 or the state equivalent—even disclosed without triggering problems under *Crawford*.

However, in those instances when an expert’s basis evidence *is* testimonial, cross-examining the expert cannot be deemed a constitutionally adequate substitute under *Crawford* for being able to confront whoever actually issued the testimonial statements. It is not that cross-examination of the expert about the basis will necessarily lack utility. Questioning the expert about the reasons for her reliance on the statements and the reasonableness of this reliance might well give a factfinder useful information for evaluating the likely reliability of both the expert and the underlying basis. But *Crawford* is quite clear: “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.” 71 Cross-examining the expert cannot therefore satisfy *Crawford’s* requirements with respect to the testimonial basis evidence, any more than cross-examining a detective who took an affidavit can substitute for cross-examining the declarant. *Crawford’s* language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial.

To see why this is so, imagine the same issue outside of the expert context: it is abundantly clear that under *Crawford* the policeman who interrogates a witness cannot testify about the substance of the witness’ statement in lieu of having the witness herself take the stand. If such substituted cross-examination were generally permitted, it would erode *Crawford’s* very foundations, for it would provide a way around confrontation of the witness herself in nearly all cases involving formalized

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71 *Crawford*, 541 U.S. at 62.
testimonial materials. Moreover, at least in the non-expert context, the substitute witness might be someone personally present when the affidavit or statement was made, and therefore someone with personal knowledge about its circumstances and context. By contrast, when one expert testifies on a report made by someone else, most of the time they were not even present when the tests reported on were conducted and memorialized!

As I shall suggest in Part III, there may nonetheless be some reason to distinguish substituted cross-examination of an expert about a report from the substituted cross-examination of non-expert witnesses, though the opinions permitting substituted cross-examination do not yet, for the most part, develop this point with any care. Perhaps over time, the Supreme Court will be willing to find that in some limited circumstances, the cross-examination of an expert may substitute for the cross-examination of his sources, even when the source’s statements do fit within the category of testimonial evidence. However, it is difficult to see how such an expansion could be wrought without a nod toward the same values that underpin Rule 703: reliability and necessity, both of which are rejected as justifications under Crawford. In any event, Crawford as written offers no plausible justification for this position; in Part III, I will begin to explore whether there are rational grounds for treating substituted cross-examination differently in the context of expert testimony.

3. Crawford’s Impracticality

Some courts have tried to justify their decisions that forensic science reports, other expert basis testimony, or certificates of analysis are not testimonial, even though they were produced explicitly for future use in the courtroom, by asserting that no matter what Crawford might seem to dictate, any other conclusion is simply too impracticable. Hauling every forensic

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72 See, e.g., People v. Durio, 794 N.Y.S.2d 863 (Sup. Ct. 2005) (detailing impracticality of treating autopsy reports as testimonial hearsay, especially because they are non-replicable and so much time may pass between test and testimony that the medical examiner is unlikely to have independent recollection apart from the report itself); State v. Cunningham,
expert who writes a report into court to testify simply cannot be constitutionally required, they suggest, especially because routine forensic tests are likely in most circumstances to be reliable.

The quandary over these issues is understandable. It may be a significant drain on limited forensic science budgets to require that every forensic test be presented in court by whoever actually performed the test, unless that examiner is unavailable and the defendant had a prior opportunity for cross-examination. In some cases, strictly complying with *Crawford* might be not just inconvenient but impossible. Many years can pass between the preparation of an autopsy report in a homicide case and the apprehension and trial of the perpetrator.  

By this point, the medical examiner who prepared the report might have moved out of state, changed professions, or even died. How can such a person testify or even provide an opportunity for cross-examination? Certainly, as the Kansas Supreme Court pointed out, excluding an autopsy report in a case in which the pathologist who conducted the test years earlier is now unavailable or deceased is indeed a “harsh” result, considering that autopsies are conducted “in an environment where the medical examiner would have little incentive to fabricate the results.”

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903 So. 2d 1110 (La. 2005) (noting that twenty marijuana cases might be processed during each session of night court in Orleans Parish, and asserting that making defendants take a small procedural step (e.g., subpoenaing the testing expert) is reasonable because these matters “often are not in dispute”).  

73 See *Durio*, 794 N.Y.S.2d at 863.  

74 State v. Lackey, 120 P. 3d 332, 351 (Kan. 2005). As another court put it, “[a]t oral argument, in this Court, defense counsel was given a hypothetical about a situation in which the maker of an autopsy report dies before the date of trial. Defense counsel stated that, even in that situation, the maker of the autopsy report would still be required to meet *Crawford* standards, and in the maker’s absence, the State would be required to prove the victim’s death in another manner. This is unacceptable in practical application.” *Rollins v. State*, 897 A.2d 821 (Md. 2006). Note that it may not be quite so clear as the *Lackey* court would have it that medical examiners have little incentive to fabricate. While the vast majority of forensic professionals no doubt perform their jobs with care and integrity, the
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Following *Crawford* strictly can seem especially nonsensical when there is little chance that the actual declarant, the author of the forensic report, will still have any independent memory of conducting the test by the time of trial, either because many years have passed or because the volume of similar tests makes it unlikely that the expert will retain a specific memory of the one in question. In this case, any expert who testifies about the report will most likely be relying wholly on what has been memorialized within the report itself. When this recognition combines with the widespread and often (though by no means always) warranted belief that forensic science tests are likely to be conducted in a reliable manner, excluding the autopsy, blood analysis, or whatever test is at issue because the declarant is unavailable may seem like constitutional overkill.

The inefficiency of requiring live testimony from the actual person who conducted the test may point to a cogent critique of *Crawford’s* formalism. However, *Crawford* is quite explicit on this point:

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.\(^{75}\)

Moreover, within the judicial hierarchy, it is not for trial courts to reject the Supreme Court’s test simply because of its impracticable, or even harsh, consequences.

Even taking *Crawford’s* dictates seriously, the fact that experts can rely on inadmissible evidence without disclosing it would often permit a surrogate expert to express a conclusion to

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close connections between forensic scientists and the prosecution can create structural incentives for the forensic scientists to produce results that please the prosecution—and in some cases this has indeed even meant fabrication.\(^{75}\) *Crawford*, 541 U.S. at 61.
the jury based on the inadmissible report. Although the jury would not be able to see or hear about the details of the report itself, *Crawford* does not prohibit some expert other than the declarant from considering the report in the course of her expert evaluation. Perhaps over time Courts will find a way to hone Confrontation Clause jurisprudence to permit disclosure in certain circumstances, especially when the report’s author is genuinely unavailable, but for the moment, refusing to apply *Crawford* simply because of its impractical consequences should not be a legitimate option for the lower courts.

4. Disclosure of Objective or Factual Results

Several courts have attempted to distinguish matters of opinion and judgment from factual, unambiguous, and objective reports. In *State v. Lackey*, for example, the Kansas Supreme Court distinguished between “factual, routine, descriptive and nonanalytical findings,” which it deemed non-testimonial, and “contested opinions, speculations and conclusions derived from these objective findings,” which the court viewed as

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76 For examples of this argument, see *Louisiana v. Garner*, 913 So. 2d 874 (La Ct. App. 2005) (emphasizing that testifying witness was rendering his own opinion and judgment, not merely repeating the autopsy report prepared by another); *State v. Barton*, 700 N.W. 2d 93, 97 (Wis. Ct. App. 2005) (holding that confrontation right is satisfied “if a qualified expert testifies as to his or her independent opinion, even if the opinion is based in part on the work of another.”). In *Barton*, however, while the trial court did not admit the report itself, it did permit the witness to testify about the test performed by the non-testifying expert, the procedures used and the results achieved. This degree of detail cannot be justified under *Crawford*.

77 See, e.g., *People v. Orpin*, 796 N.Y.S.2d 512, 517 (Just. Ct. 2005) (recognizing the practical concerns but pointing out that “the current Court’s formalistic approach to interpreting the guarantees of the Sixth Amendment provides little room for accommodation of the pragmatic issues its decisions might raise in the day-to-day administration of criminal justice.”). However, this opinion was attacked collaterally in *Green v. DeMarco*, 812 N.Y.S.2d 772 (Sup. Ct. 2005) (holding that although not all business records can be admitted as nontestimonial under *Crawford*, a statutorily mandated maintenance certificate for a breath testing machine can be).

78 *120 P. 3d 332 (Kan. 2005).*
testimonial.79 These courts are, in essence, narrowing the applicability of the business records exception to the hearsay rule as an escape valve under *Crawford*. Instead of finding that business records are *per se* exempt from the testimonial, they are taking a closer look at the nature of the record. These courts believe facts and objective findings by experts are admissible even without an opportunity for confrontation, whereas opinions and inferences should be redacted from a report and excluded unless *Crawford*’s dictates are met.

The core idea underlying these opinions is that the more a laboratory finding looks like a factual observation, “an objective finding which would have been observed and recorded by any trained individual in that field,” the less useful cross-examination is likely to be.80 The underlying logic asks: when there is not room for judgment, interpretation, or difference in opinion, what precisely would be gained by pressing the recorder on the stand about the matter recorded? In addition, there is obviously a strong reliability undercurrent underpinning these opinions, a belief that the more straightforward and unambiguous the matter recorded, the more confident we can be that the methods and processes used to make the record can help to assure its reliability.81

79 *Id.* at 351; see also United States v. Bahena Cardenas, 411 F.3d 1067, 1075 (9th Cir. 2005) (warrant of deportation not testimonial because it was “routine, objective, cataloging of an unambiguous factual matter”); Rollins v. State, 866 A.2d 926, 948 (Md. Ct. Spec. App. 2005), aff’d, 897 A.2d 821 (finding no Confrontation Clause concern for statements of fact conditions objectively ascertained); North Carolina v. Huu the Cao, 626, S.E.2d. 301, 305 (N.C. Ct. App. 2006) (holding that laboratory reports are nontestimonial business records “only when the testing is mechanical. . . and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst.”); State v. Melton, 625 S.E.2d 609, 612 (N.C. Ct. App. 2006) (forensic science reports are nontestimonial business records if they report “objective fact obtained through a mechanical means”).


81 This is on occasion explicit. See, e.g., *Rollins*, 897 A.2d 821; People v. Fajardo, No. F045640, 2005 WL 1683615 (Cal. Ct. App. Jul 18, 2005) (unreported opinion finding demeanor evidence would not be helpful to assess
However, there is less to these arguments than meets the eye. First, the reliability justification, while perhaps intuitively appealing, is explicitly taken off the table in Crawford itself. Crawford’s critique of Ohio v. Roberts is precisely that it permitted “a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability,” and Crawford explicitly rejected such “surrogate means” for assessing reliability. Moreover, having a judge make a determination about whether the matter is fact or opinion, unambiguous or subject to interpretation, analytical or nonanalytical is, in essence, delegating to the judge the power to decide whether cross-examination and confrontation are warranted in a particular instance. This seems as unjustifiable under Crawford’s approach as a direct judicial determination of reliability. In addition, the premise is itself controversial: the idea that descriptive and non-analytical findings are not themselves open to differences in judgment or interpretation is itself a matter upon which people’s reasonable judgments may differ. And certainly, given the disclosure of a number of scandals in which “factual” reports of forensic science laboratories or medical examiners turned out to have been faked or otherwise misreported, it is not plausible to say that in no circumstance could confrontation and cross-examination be helpful with respect to seemingly unambiguous factual findings contained in laboratory reports.

Furthermore, the logic, if taken seriously, would extend well beyond the forensic science setting. The claim of a bystander, made to a policeman interrogating witnesses after a bank robbery has concluded, that he saw three men wearing grey report’s credibility).

82 Crawford, 541 U.S. at 61.
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overcoats and masks enter the bank at 10:30 a.m. is every bit as factual and non-analytic as a forensic report. And yet just about any judge would recognize that such statements surely fall squarely into the category of the testimonial under *Crawford*. Attempting to graft an inquiry into whether the matter at issue is factual or interpretive onto *Crawford*’s focus on the testimonial would either lead to enormous inconsistencies across categories, exclude large amounts of testimonial evidence from the purview of the Confrontation Clause, or both.

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In this Section, I have described a variety of judicial efforts to continue to permit both certificates of analysis and the disclosure of expert reports and other basis evidence even when the declarant is not available on the stand. None of these arguments, however, is persuasive. Some of them—such as arguing that basis evidence is not hearsay because it is not being introduced for the truth of its contents, or suggesting that there is a per se business records exception, or that *Crawford* should treat factual claims different from opinions—are intellectually incoherent. The claim that *Crawford* is impractical may be accurate, but it is not actually an argument—it is better, perhaps, considered as a plea for reconsidering *Crawford*’s scope, or as a call for the development of arguments that could mitigate its consequence. Perhaps an argument can be made to distinguish substituted cross-examination in the expert context, but it is simply untenable that *Crawford* could mean that substituted cross-examination is, as a general matter, a legitimate alternative for cross-examining the hearsay declarant: this would permit any testimonial statement into court so long as someone present when the earlier statement was made is on the stand to answer questions about it!

One of the key purposes of this Article is to invite the lower courts to rethink their willingness to rely on these arguments. There are already sufficiently large numbers of cases relying upon precisely these arguments that some courts are, unfortunately, beginning not even to argue these points with care, instead merely relying on the allegedly persuasive
authority of other courts’ reasoning. If this trend continues, it will have a real cost: a too-thoughtless pragmatism will have trumped principled application of the underlying principle at stake in *Crawford*. In a great many cases, the forensic evidence against a defendant may in fact be the most powerful proof on offer by the prosecution. Moreover, forensic science evidence has, to some degree, been under attack for having significantly less rigorous scientific foundations than most would presume, and there have been more than a few recent scandals involving overclaimed results or downright fraud. These forms of expert testimony should not, for Confrontation Clause purposes, get a free pass, or be presumed because of their subject matter to be outside of *Crawford*’s dictates.

III. TOWARD A MORE NUANCED UNDERSTANDING OF TESTIMONIAL EVIDENCE AND ITS LIMITS IN THE CONTEXT OF EXPERT TESTIMONY

What, then, is the alternative? One alternative is simple and obvious: recognize certificates of analysis and the disclosure of some basis evidence by experts as testimonial. While many courts have attempted to find ways around *Crawford*’s seemingly expansive approach to the Confrontation Clause, a minority of courts have been willing to recognize that some expert basis testimony or reports and documents prepared by experts are indeed testimonial. 84 In a sense, these courts’ analyses are

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84 See, e.g., People v. Goldstein, 843 N.E. 2d 727 (Ct. App. N.Y. 2005); People v. Pena, 128 Cal. App. 4th 1219 (2005) (finding a statement by a co-defendant that implied that an attack was gang related and implicating members of a particular gang was admitted, and relied upon by expert, in violation of *Crawford*); People v. Rogers, 780 N.Y.S.2d 393 (App. Div. 2004) (finding a blood alcohol test done on a rape victim to be testimonial and not admissible under the business records exception to the hearsay rule); People v. Hernandez, 794 N.Y.S.2d 788 (Sup. Ct. 2005) (finding a report by an unavailable latent fingerprint examiner to be testimonial and hence excluded under *Crawford*); City of Las Vegas v. Walsh, 124 P.3d 203 (Nev. 2005 (finding the affidavit of a healthcare professional to be testimonial); Napier v. State, 820 N.E.2d 144 (Ind. Ct. App. 2005) (finding the admission of defendant’s breath test results without live testimony of officer who
among the most straightforward. They often simply ask whether the statement was a pretrial statement that the declarant would reasonably expect to be used prosecutorially; if the answer is affirmative, they find that *Crawford* applies.85 In addition, several of these opinions have usefully and appropriately challenged the assumption that seems to inform many of the other cases; that cross-examination of the declarant who conducted a routine laboratory test is unlikely to be helpful.86

In recognizing that such evidence is indeed testimonial, and thus problematic under *Crawford*, these courts are initiating an important line of analysis. They should be lauded for facing the issues raised by *Crawford* head-on, for confronting conducted test to violate *Crawford*; Shiver v. State, 900 So. 2d 615 (Fla. Dist. Ct. App. 2005) (finding an affidavit about a breath test to be testimonial); Ohio v. Crager, 2005 Ohio 6868 (2005) (DNA test is testimonial); Belvin v. State, 922 So. 2d 1046 (Fla. Dist. Ct. App. 2006) (portions of breath test affidavit pertaining to nontestifying breath test technician’s procedures and observations in administering test were testimonial hearsay requiring prior opportunity for cross-examination under *Crawford*); State v. Carpenter, 882 A.2d 604 (Conn. 2005) (testimonial, but introduction was harmless error); State v. Berezansky, 899 A.2d 306 (N.J. Super Ct. 2006) (blood analysis testimonial).

85 See, e.g., State v. Crager, 844 N.E.2d 390 (2005) (DNA test is testimonial because “a reasonable person could conclude that the report would later be available for use at trial”); State v. Berezansky, 899 A.2d 306 (N.J. Super Ct. 2006) (finding introduction of laboratory analysis of blood without live testimony to be a Confrontation Clause violation because it was introduced “to prove an element of the crime and offered in lieu of producing the qualified individual who actually performed the test.”).

86 See, e.g., State v. Berezansky, 899 A.2d 306 (N.J. Super Ct. 2006) (noting that neither the neutrality nor the reliability of a state laboratory analysis can be presumed); People v. Orpin, 796 N.Y.S.2d 512, 517 (Just. Ct. 2005) (noting “the truth seeking value of cross-examination in this context is not merely theoretical. Substantial problems with DWI testing in this state were uncovered in the 1990s, and there have also been recent problems even with reliability of the FBI laboratory’s analyses. Subjecting the persons who conduct these calibration tests to the ‘crucible of cross examination’ will help ensure the reliability of their work and protect the integrity of the judicial system by avoiding convictions based on faulty breath test results.”), collaterally attacked, Green v. DeMarco, 812 N.Y.S.2d 772 (Sup. Ct. 2005).
Confrontation Clause concerns without subterfuge. This approach is without a doubt the most consistent with the constitutional logic that underlies Crawford itself.

By contrast, as the previous Part showed, the great majority of courts analyzing expert disclosure issues under Crawford are, by hook or by crook, holding that these disclosures are not testimonial under Crawford. To get there, they are sometimes forced to make arguments that overreach any reasonable interpretation of Crawford (e.g., the business records exception); rely on distinctions that Crawford’s analysis suggests should not be meaningful (e.g., objective/subjective; substituted cross-examination); or invent distinctions without logical foundation (e.g., arguing that disclosure is not for the truth of its contents). Unfortunately, the arguments on offer to evade Crawford are not logically coherent, and sometimes even border on the disingenuous. Furthermore, these solutions are reminiscent of the very approach to the Confrontation Clause that Crawford was attempting to eliminate—an effort to use categorical labels without analysis as a substitute for the protection of the value of cross-examination. It would seem, therefore, that testimonial basis evidence and certificates of analysis ought to be prohibited under this new approach to Confrontation.

And yet...

Perhaps there is still more to say. While recognizing that some expert basis evidence and certificates of analysis do meet any coherent definition of the testimonial, at the same time, it is difficult not to sympathize with the frustration of the Kansas Supreme Court in State v. Lackey at the thought of excluding an autopsy report whose author had died before trial. Even if general hand-waving in the direction of “impracticality” seems strikingly inconsistent with Crawford’s bright-line rule approach, the impulse to find some way around Crawford’s dictates, for at least some subset of these cases, is not only strong, but understandable.

One way to put the point is this: even if we must reject a vague claim of impracticality as a justification for dispensing with what Crawford seems otherwise to require, is there any degree to which practicality and efficiency concerns do
legitimately intersect with the Confrontation right? Are there ever times when Confrontation should be dispensed with even for evidence that is testimonial—either because it is practically impossible or because it is highly inconvenient and extremely unlikely to be useful, or both? This is one of Rehnquist’s chief concerns in his concurrence: that the court has lost sight of the link between cross-examination and likely accuracy; that “[b]y creating an immutable category of excluded evidence, the Court adds little to a trial’s truth-finding function.”

The difficulty is that for the judge to make this decision—to decide that this is a circumstance in which cross-examination is unlikely to yield benefits or to increase accuracy appears to be precisely what Crawford disallows: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”

So where are we left? If we return to the beginning, and look at the kind of information that is problematic under Crawford, just how impractical would it be to apply Crawford strictly? How often would it be merely an inconvenience? What are the circumstances in which it is likely to be not merely an annoyance but a serious problem of proof? In what settings, if any, is Crawford intellectually troubling if taken to its logical extreme?

As I indicated in Part I, in most circumstances, complying with Crawford would be an inconvenience, but no worse. It would mean that the actual authors of forensic science reports would have to testify about them in court in order to introduce them into evidence. It would further mean that the use of certificates of analysis would have to be substantially curtailed. These would be inconveniences, to be sure, though in the many cases in which the matters established by, say, a certificate of analysis were uncontested, defendants might well frequently be prepared to waive their confrontation clause rights and nothing in Crawford suggests the impermissibility of waiver. While not

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87 Crawford, 541 U.S. at 75.
88 Id. at 69.
meaning to devalue the extent to which a strict application of *Crawford* might be irritating both to prosecutors and forensic scientists, to generally exempt these categories of evidence from the category of the testimonial would be intellectually unjustifiable under *Crawford’s* own logic.

To be sure, Rehnquist’s question—how much gain in accuracy do we purchase through the application of this strict rule?—is a fair one. But the ability to cross-examine the actual creator of a forensic science report, for example, rather than merely cross-examining another expert who has done no more than eyeball the report, could well reveal additional weaknesses, discrepancies, or other reasons to have less confidence in the evidence than would otherwise have been apparent. There is no reason to believe that the matters upon which experts rely ought to be intrinsically exempt from *Crawford’s* dictates when they are disclosed.

However, there are certain subcategories of evidence that would be banned under this strict application that might make us think that *Crawford* itself needs some kind of modification, lest it become formalism without any clear benefit or purpose. Two of these deserve particular mention.

First, one line of cases has struggled with whether certain kinds of fairly routine, ministerial documentation ought to be subject to *Crawford*. For example, breath test machines are typically required by statute to be calibrated on a regular basis, and when they are calibrated, the technician who does so typically fills out a form certifying that the calibration has been completed. Thus the issues arises: in a DUI case, can the document certifying that the machine was properly calibrated be admitted without giving the defendant the opportunity to confront the human being who conducted the calibration? Does it really make sense that the Constitution requires the prosecutor to haul into court the technician who filled out this form, to confirm that she did what the certificate claims? When we require the person who is simply doing quality assurance tests on the machinery to come into court for each and every DUI trial, we may truly have gone too far.

Why so? What is the difference between calibrating an
Intoxilyzer machine and conducting a DNA test? The most salient distinction is that the former is done without a focus on any particular case. As a number of courts have recognized, while the records created to establish calibration are made in expectation that they will be available for use in criminal trials, they are not created with an eye to any particular trial, any particular crime, or any particular defendant. This is in sharp contrast to certificates reporting the result of a particular breath test and the circumstances in which it was conducted. These, unlike the calibration records, make an accusation. The calibration evidence neither exculpates nor inculpates; it is, rather, a foundational requirement statutorily required in order to use the machine for evidentiary purposes.

In fact, almost all of the courts who have confronted breath test calibration evidence have found it not to be testimonial. Some of these courts have partly relied on some mixture of the arguments described in the previous section. Several of these arguments—such as the alleged business records exception to Crawford, or the claim that because these are “objective” findings rather than subjective—prove far too much. If those arguments apply here, where do they stop, and why?

But a number of the opinions concerning calibration evidence and other forms of routine, non-case specific documentation have begun to develop a significantly more promising way around Crawford in circumstances such as these, building on the notion that the application of the Confrontation Clause, even post-Crawford is limited to accusations against the defendant. If evidence is developed not for any particular case, not with an eye toward inculpating any particular defendant, but rather as part of the routine quality control processes of law enforcement, perhaps it is not appropriate to deem it “testimonial” in the first place. Certainly breath test calibration certifications are made with an eye toward the courtroom; it is not only foreseeable that they will be used as evidence, but it is one of their most important purposes. But as one court points out, “[u]nlke police or prosecutorial interrogators, the technicians have no demonstrable interest in whether the certifications produce evidence that is favorable or adverse to a particular
defendant. The certifications are “not done for the purpose of any particular prosecution.” They contain “the power to exonerate as well as convict”—after all, the breath test can exculpate only if it is in proper working order. They accuse no one in particular of anything in particular, and in this sense they are “neutral in character.” Indeed, these certifications often pre-date the criminal act itself. If they lack an “accusatory purpose,” then perhaps their use without the opportunity to confront does not violate the Confrontation Clause.

This line of argument is an intriguing method for potentially limiting the Confrontation Clause’s reach. It is, of course, in part a response to concerns about practicality, but it is a response anchored within a framework for understanding the purposes of confrontation, rather than using practicality as an argument in its own right. Crawford itself does not suggest that whether a statement is accusatory bears on whether it is testimonial—indeed, the word “accusation” or “accusatorial” does not appear in either Crawford or Davis. Nonetheless, this is a potential direction in which the doctrine could develop that could substantially be reconciled with Crawford’s present structure. If the court made explicit that only evidence that was

91 State v. Forte, 629 S.E.2d 137, 143 (N.C. 2006); see also Commonwealth v. Walther, 189 S.W.3d 570, 575 (Ky. 2006).
94 There are, however, numerous references in the opinion to confronting one’s “accusers.” See generally, Crawford, 448 U.S. at 36.
95 For an argument in favor of an “accusatorial” approach to the Confrontation Clause, see §6371.2 of 30A Wright & Graham, Federal Practice and Procedure: Evidence (Pocket Part, 2007), also available in draft as Kenneth Graham, The Short(?) Happy(?) Life of Crawford v. Washington, at http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1033&amp;context=uc_law); see also Robert P. Mosteller, “Testimonial” and the Formalistic Definition—The Case for an “Accusatorial” Fix, 20 CRIM. JUST., Summer 2005, at 14.
created to bear witness against the perpetrator of a particular criminal act fit into the category of the testimonial, then these calibration records could legitimately fall outside of the Confrontation Clause’s purview. Limiting the Confrontation Clause’s operation to accusations, broadly defined, would not be inconsistent with the principles that underlie Crawford.

This approach would create a new set of questions surrounding the definition of an accusation. Is a DNA test determining that two samples match an accusation? What about an autopsy report? Should accusations consist only of those statements that literally accuse a specific person of an act, or should they reach all testimonial evidence created for the purpose of either adducing evidence useful for prosecuting a particular trial or investigating a specific criminal act? Only the latter, I would suggest, is justifiable; otherwise, Crawford’s scope would be tremendously and unjustifiably narrowed. (Imagine, for example, police interviews with victims of a burglary, in which the victims describe what was taken, the state of their home, et cetera, but make no literal accusation against a specific person. Surely such statements should still be testimonial; they are developed for the investigation of a particular case, even if the statement does not accuse a named human being of a criminal act. Similarly, forensic science evidence produced for a specific case should be testimonial even if, like an autopsy report, it may not accuse a particular person.) Under such an appropriately broad definition, most laboratory reports would still remain testimonial. But it would mean that routine equipment checks and quality assurance methods engaged in by forensic science laboratories could, depending on statutory requirements, be introduced by certificate rather than through live testimony notwithstanding the Confrontation Clause.

One could certainly argue against such a limitation to the testimonial. After all, only if the machine is properly calibrated can its test results be relied upon; indeed, considering how

96 For a sharply worded critique emphasizing the manipulability of the idea of an accusation, see the dissenting opinion in Luginbyhl v. Commonwealth, 628 S.E. 2d, 74, 81-82 (Va. Ct. App. 2006).
automatic in operation breath test machines have become, the chance to cross-examine about calibration could arguably seen more important than the opportunity to cross-examine the person who conducted the actual breath test. Breath tests themselves have virtually become “black boxes”—an officer simply inputs a driver’s license, the suspect breathes into the machine, and a breath ticket pops out indicating the alcohol level found through the test process. For the officer conducting such a test, there is virtually no room for the exercise of discretion or judgment. But this reported breath alcohol level will of course only be accurate if the machine is properly calibrated and in working order, so one could argue that issues of maintenance and calibration are at least as salient as the particular result spit out by the machine.

My purpose here, however, is not to argue whether calibration records ought to fall within or outside the boundaries of the testimonial. Rather, I simply wish to show that this is one place where there is an intellectually viable argument for excluding them from the definition of the testimonial—and to suggest that if we believe that they ought to be excluded from Confrontation Clause protections, it would be far better to develop a principled limitation to Crawford than to jimmy up a general business records exception that makes no intellectual sense.

The second, and frankly still more concerning, circumstance under Crawford occurs when the maker of a forensic science report is genuinely unavailable. While it may be troubling to have the prosecutor elect not to call the expert who conducted the test, how ought the analysis to change if the expert is no longer living, or no longer works for the laboratory in question? When the expert is genuinely unavailable through no fault of the prosecution, exclusion of the test under the Confrontation Clause because of the defendant’s inability to confront its maker might seem an excessively strict interpretation of what the Constitution

97 This description applies, for example, to the BAC Datamaster breath testing machines which are used in Los Angeles County. Thanks are due to Barry Fisher and Catherine Navetta of the Los Angeles County Crime Laboratory for showing me how these machines operate.
requires. This is especially so when the test has been conducted far enough in the past (such as, for example, an autopsy conducted years before the suspect was apprehended) that even were she available, the expert who conducted it is very unlikely to have any independent memory of what he or she put to paper so long ago. In this circumstance, cross-examination is unlikely to be particularly fruitful; the initial test was conducted in circumstances that give little reason for fabrication; and other experts can at least report on the plausibility of the finding and their appropriate interpretation.

Let us return to the example of an autopsy conducted in the distant past. Imagine, for example, an autopsy appropriately conducted by the medical examiner, and further imagine that key findings are not only reported on but carefully measured, documented, and photographed. Now imagine that a decade passes, or even longer, and a suspect is finally located. Meanwhile, the medical examiner has died. Frankly, even were she still living, how likely is it that she would have a usefully specific memory of conducting that autopsy, separate from what she had recorded? In addition, the careful documentation can be interpreted by other qualified experts, perhaps almost as well as she would have been able to interpret it herself. When (1) the expert is truly unavailable; (2) even if the expert were available, it is not likely that she would have an independent memory of what she recorded; and (3) the evidence was created in circumstances that suggest its likely (though of course not certain) trustworthiness, does Crawford truly mean that we must nonetheless exclude this test? Must the autopsy conducted a decade or two earlier by a now-deceased medical examiner actually be excluded?

This result would indeed seem troubling. The autopsy report is the best present evidence we have about the cause and circumstances of the victim’s death. There is no way to conduct the test again at the present time. And the reason that so much time has passed—increasing the odds of both the unavailability of the medical examiner and the lack of memory even were she available—is precisely because the perpetrator has managed to evade the law.
And yet the autopsy report, unlike the calibration records, really does squarely fit into the category of the testimonial. This cannot and should not be doubted. It is created as part of an ongoing investigation in order to produce evidence. It is prepared with an eye toward future criminal prosecution. Though we may not know at the time it is conducted against whom it will serve as testimony, it is meant to serve as testimony against someone in particular, the perpetrator of the murder. If it is introduced without the testimony of the person who created it, the report is indeed being used as a surrogate for testimony.

To be sure, most courts confronting autopsy reports are electing not to deem them testimonial, again, largely by using a business records exception or deciding that objective findings are not subject to Crawford. The Court has thus far rejected several certiorari petitions on precisely the question of whether autopsy reports are testimonial; eventually, however, this is certainly an issue that will have to be confronted (no pun intended).

If the Court is unwilling to create a general business records exception to Crawford (as it should be, for this would mark a return to the ad hoc, fiction-filled approach that is precisely what the Court was trying to leave behind in the move away from Ohio v. Roberts), what are the plausible alternatives? One possibility is for some other expert to rely upon the report but not disclose it—to provide conclusions about the cause of death but not evidence-based reasons in support of these conclusions. While this might fulfill the letter of Crawford, it would be an unfortunate result: the jury would be deprived of any access to a form of evidence that is far more detailed and precise than the testifying expert’s conclusions. Moreover, the expert’s opinion would only be warranted if the report itself was warranted; so if the report is inadmissible as testimonial hearsay, it is not altogether clear we should permit reliance upon it as a sole source of information.

What else might we do? Crawford itself raises and then appears to reject the possibility of a special exception for coroner statements: the opinion notes, “There is some question whether the requirement of a prior opportunity for cross-
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examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes. ... Whatever the English rule, several early American authorities flatly rejected any special status for coroner statements.²⁹⁸

The autopsy example forces us to consider whether despite what Crawford says, there ought ever to be circumstances in which unavailability and necessity should continue to play a role in Confrontation Clause analysis. Perhaps there ought to be a kind of “best evidence” rationale for continuing to permit the autopsy report even when its creator is unavailable.²⁹⁹ Under this rationale, when the person who conducted a forensic test is unavailable to testify, the first step ought to be to have someone conduct a retest if it is technologically feasible. But when retesting is not a viable alternative, ought there not to be some way to use the original test in court notwithstanding the absence of its creator?

²⁹⁸ Crawford at 46. Indeed, one of the cases discussed in Crawford, State v. Campbell, 30 S.C.L. 124 (1844) deals explicitly with information received at a coroner’s inquest. The question was whether testimony taken by the coroner and put into writing can be introduced at trial without the declarant’s presence, and the opinion answers in the negative on Confrontation Clause grounds. To a certain extent, this case is not apropos: the issue is not whether the coroner need testify, but rather whether the declarant must. But it would be interesting to know whether physical findings by the coroner and reported upon were able to be introduced at common law without the coroner himself. In other words, one possible “out” for some of these scenarios might possibly be a turn to history. Perhaps coroner’s physical findings (rather than reports of what others said at an inquest) were permitted even when the coroner did not testify.

However, whatever the history showed, there would be something deeply odd about taking an originalist approach in this situation. The kinds of physical observations available to a nineteenth century coroner are so dramatically different from the kinds of scientific findings offered by forensic scientists today that it is far from clear that even if one generally approved of originalism as a method for answering such questions of constitutional scope, this would be a circumstance where viewing our past traditions as binding our present understanding was appropriate.

I will suggest two possible options. First, perhaps we could create the possibility for some kind of pre-trial cross-examination of the medical examiner. Perhaps after autopsies in which the cause of death is found to be murder, there could be a public opportunity for a cross-examination of the medical examiner who conducted the tests. To be sure, most of the time, if no one had yet been charged in the case, it is unlikely that anyone would come forward to conduct a cross-examination! But perhaps the creation of this pre-trial opportunity, coupled with unavailability of the medical examiner at trial, would suffice under *Crawford* to permit the use of the records.\textsuperscript{100}

Alternatively, and in my view better, especially given the problem of the lack of an actual defendant at the time of the hearing, we can imagine a narrowly drawn necessity exception to the Confrontation Clause in circumstances such as these. What if, upon a showing of necessity, the prosecutor were permitted to use a substitute expert to interpret autopsy report and present it to the jury? The use of the substitute expert could be subject to a jury instruction informing jurors that they were free to consider the lack of an opportunity to hear directly from the writer of the report in assessing the credibility of the contents of the report.\textsuperscript{101} To my mind, this is the more appealing approach, because it responds directly to the nature of the expert evidence and avoids the partly fictional nature of a preliminary opportunity to cross-examine. With a detailed autopsy, in which all findings were both carefully documented, recorded, measured, and photographed, a substitute expert really is a reasonable second-best solution—especially given that the

\textsuperscript{100} For an argument suggesting the use of such a mechanism in domestic violence prosecutions, see Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 791-94 (2005). Of course, in domestic violence cases, there is not typically any question about the identity of the alleged perpetrator.

\textsuperscript{101} The jury would, of course, be free to consider this point even without a jury instruction saying so, and in any event it is not clear that jury instructions make a great deal of difference. But at the margins, pointing out the unavailability of the original declarant might usefully remind jurors to assess the evidence with a critical eye.
original expert is not likely to have a significant actual memory of the tests anyway. This procedure would protect the Confrontation right by requiring the prosecutor to use the forensic expert or medical examiner who conducted the test whenever it is possible to do so, but would permit cross-examination of another expert when there was no feasible alternative. This approach would not permit prosecutors to game the system by choosing their most courtroom-friendly technicians instead of the ones who actually conducted a particular test. But it would, at the same time, allow some degree of practical flexibility in order to continue to put the best available evidence before the factfinder in criminal prosecutions.

This approach, to be sure, is not overtly justified by *Crawford* and *Davis*, which at present provide no space for considerations of necessity, unavailability, or reliability. Staunch advocates of *Crawford*’s new regime might therefore resist such a move, as it takes a definite, if limited, step back toward the very ideas that *Crawford* has left behind. But recognizing some kind of necessity exception for evidence that, because of its expert nature and because of the way that it has been carefully memorialized by the original expert, truly can, to a substantial if imperfect extent, be adequately interpreted by a surrogate expert would be a reasonable way to continue to permit autopsies and forensic findings (that cannot be retested), even in the absence of the original tester. This approach would represent a narrowly drawn and intellectually honest approach to the problem. It would recognize correctly that autopsies and other forensic science reports are indeed testimonial. It would establish a preference for hearing in court from the declarant when possible. But it would also allow a second best solution when it was both necessary and justifiable. Surely a narrowly drawn, necessity-based, exception to *Crawford*’s prohibition on testimonial evidence would be more jurisprudentially justifiable than general and vague pronouncements about practicality, or claims of a general (and unjustified) business records exception to the Confrontation Clause, or, still worse, the wholly nonsensical fiction that expert basis evidence is introduced for an ostensibly non-hearsay purpose.
CONCLUSION

More than two years have now passed since the Supreme Court dramatically recast its orientation to the Confrontation Clause in *Crawford*. What is most striking in the context of those expert evidence issues that intersect with the Confrontation Clause is just how resistant lower courts have been to taking *Crawford* at face value. A significant majority of those courts faced with questions about the admissibility of either certificates of analysis or basis evidence that is produced with an eye toward testimony by a person not present in court have resorted to strained and dubious arguments in order to avoid restricting these forms of proof.

The Court may well not at all have had the implications for forensic science evidence in mind when it decided *Crawford*. It is certainly possible that the justices did not intend to effect change in how these forms of evidence were handled at trial. But the logic underlying *Crawford* simply cannot justify a wholesale exemption of these forms of proof from the category of the testimonial. If it looks like a duck, quacks like a duck, and swims like a duck, one ought to have a very good justification for determining that the aquatic beast in question is not a duck after all. Unfortunately, most of the arguments that courts have put forward simply do not succeed in offering coherent or logical ways to justify treating forensic science reports, other kinds of expert basis evidence produced in circumstances suggesting their possible use as future testimony, or certificates of analysis, as non-testimonial.

The argument that basis evidence is being introduced for the non-hearsay purpose of helping the jury assess the expert fails to recognize that this allegedly non-hearsay purpose necessarily requires a preliminary assessment of the likely truth of the underlying matter. How can I use the basis evidence for assessing the expert without first assessing whether the basis evidence itself is worthy of credence? The fact that I may build on this first inference about the quality of the basis evidence in order to make a second inference about the quality of the
expert’s conclusions does not at all mean that my use of the basis evidence is for a purpose other than the truth of its contents. This approach either misunderstands the definitions of hearsay, misunderstands the nature of inferential thought, or both. Only if a court can actually detail a line of reasoning for which the basis evidence is useful that does not require a preliminary determination of its truth ought the courts to be able to resort to this argument; at least until now, no court has succeeded in doing so.

The argument that there is a per se business records exception to Crawford defies the decision’s internal logic. Simply because most business records are not testimonial ought not to mean that those few that do that fit the category are nonetheless exempt simply because they also fit the contours of that hearsay exception.

While Crawford does lead to some practical difficulties, these may often not be so severe as is feared by courts and prosecutors understandably anxious about change. And even if Crawford is impractical, this does not justify the lower courts in ignoring its dictates. To be sure, in those limited instances when Crawford may create significant logistical and practical difficulties that threaten our process of proof, there may be an argument for limiting or rethinking Crawford’s boundaries, but this ought to be done both carefully and coherently, not simply based on general and sometimes overstated anxieties about practicality.

Arguing that testimony from a substitute expert witness avoids a Crawford problem is similarly problematic. Quite clearly Crawford prohibits testimonial substitutes in the non-expert context. A police interrogator’s in-court testimony cannot possibly justify the admission of testimonial statements by the person interrogated, nor, more generally, can testimonial hearsay become admissible just because someone with knowledge relevant to the testimonial statement other than the declarant takes the stand. If cross-examination of a substitute expert is ever to be an option, it must depend on some meaningful ways in which expert evidence is distinct from other kinds of proof; otherwise, such a rule would virtually swallow
Similarly, the effort to exclude “objective” findings from \textit{Crawford}'s purview is not satisfactory. Plenty of non-expert observations are descriptive and non-analytical; indeed, as a general matter, the rules of evidence exhibit a strong preference for factual descriptions by percipient witnesses rather than interpretations and opinions. If there is something distinct about forensic science reports that might warrant thinking about confrontation issues differently in this context, it cannot simply be that they are fact-based or facially objective. Moreover, delegating to judges the task of separating factual findings from interpretive ones goes deeply against the grain of \textit{Crawford}'s reasoning. Precisely the arguments through which \textit{Crawford} resists permitting judges to make determinations about reliability as the basis for determining whether confrontation is required would caution equally strongly against asking courts to distinguish factual claims from interpretive ones to decide whether the need for confrontation applies.

I claim, therefore, that none of these arguments succeeds as a justification for finding these kinds of expert evidence to be non-testimonial. There is, however, one argument that a number of lower courts have offered that is more successful. Sometimes the evidence at issue has been produced in a setting in which it can be fairly understood as non-accusatorial. When a technician fills out a report certifying that she has calibrated a particular piece of machinery, or a former gang member describes general contextual information about the structure of the gang to a police detective outside of the confines of a particular case, it is, I think, fair to view this information as non-testimonial, even though the words were spoken or written with the clear knowledge that they might be useful for testimony at some point in the future. The salient difference in these settings and analogous ones is that the statements at issue do not relate simply to a particular case or incident, but rather, have a significantly more abstracted and attenuated quality. While they could potentially be relevant to any number of future cases, these statements were not made with a view toward any one case in particular or any definable instance of wrongdoing. \textit{Crawford},
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...to be sure, does not make this question of whether a statement is accusatorial explicitly relevant to its analysis of what is testimonial. But a limit on the Confrontation Clause that emphasized that only accusations, broadly understood, were subject to its confines, could be grafted onto *Crawford* without any great difficulty or loss of internal coherence. While this modification would eliminate a number of more ministerial kinds of expert documents from *Crawford*’s purview, let me be clear: the vast majority of otherwise testimonial expert basis evidence and many certificates of analysis could not be excluded from the definition of the testimonial on this ground.

Apart from this possible limitation, I would argue that testimonial expert evidence should be recognized as testimonial. That sounds tautological, even obvious. And yet, far too many courts have refused to recognize the point. There is simply no reason why any of these forms of expert evidence should get a free pass, or be understood as obviously exempt from the Confrontation Clause’s purview. Indeed, often forensic science evidence will be the strongest evidence offered against a defendant; if we take confrontation values seriously, this may in fact be an especially important site in which to assure that the defendant has the possibility for cross-examination.

That said, there may still be both reasons and possible methods for dispensing with the confrontation right in some circumstances. With certificates of analysis, an important question ought to be whether some waiver procedures ought to pass constitutional muster. Though I have not considered that issue in any detail, it is certainly true that there are many cases in which the key issue at trial does not at all relate to the reliability of the forensic evidence. To require live testimony in every case, even when both parties agree on the forensic science facts, may well be a significant waste of resources. Stipulations can, of course, be one way around this issue. But it may make sense to go further: waiver procedures that would let the prosecutor use a certificate of analysis unless the defendant requests otherwise could offer a practical way to both permit and limit the use of such certificates without any testimony. However, the burden imposed on the defendant by these waiver...
provisions ought to be minimized.

A second possible way to get around the limitations imposed by *Crawford* would be to create additional pre-trial mechanisms for cross-examination. If this made sense anywhere, it would likely be in the context of autopsies, in which there may frequently be a significant passage of time between the autopsy of a victim and the indictment of a defendant in the case. After an autopsy found that the cause of death was murder, there could be notice of a public hearing in which the medical examiner would be available for cross-examination. Would anyone representing an uncharged suspect show up at these hearings? Probably not, but so be it. By merely creating the opportunity, the prosecution could argue that the medical examiner’s report should be admissible at trial, should the medical examiner herself turn out to be available.

This potential procedural innovation is, however, more clever than useful. It could possibly pass constitutional muster under *Crawford*, but it is an inelegant solution. In practical terms, it would simply be make-work for medical examiners, while providing little actual possibility of confrontation for defendants who were charged at some point subsequent to the hearing, and who might not even have been suspects at the point when the hearing occurred. To be sure, there is no particular reason to feel sorry for the guilty defendant who did not avail herself of the opportunity to cross-examine at this pretrial hearing because, at the time of the hearing, she had still evaded justice or even suspicion, but this pre-trial mechanism would offer little assistance to the subsequently-charged innocent defendant either.

The better solution would be a narrowly drawn exception to *Crawford* in circumstances that meet three conditions. When (1) the expert who conducted the original test is legitimately unavailable; (2) the expert memorialized the results of the original test in a form that another expert in the field can reasonably understand and interpret; and (3) a retest by an available scientist is infeasible, then the courts should permit a qualified substitute expert to disclose and to interpret the original results for the jury, even though the report itself is testimonial.
This solution appropriately balances the defendant’s constitutional interest in confrontation with the public interest in accurate adjudication. It prevents the state from cherry-picking the forensic experts it uses for testimony, or from offering critical evidence without any testimony at all. It also recognizes that substitute experts are only a second-best solution; when possible, the defendant ought to be given the opportunity to cross-examine the experts who actually produced the report. But it also recognizes that substitute experts are a second-best solution. Especially when considerable time elapses between test and testimony, the actual expert who did conduct the test is likely to lack an independent memory of the tests administered. To be sure, this will sometimes hold true for non-experts as well: a witness to a crime who makes a statement shortly thereafter may, by the time of trial, have little memory of what occurred apart from what is captured by the statement itself. But in the expert context, a substitute witness with adequate training will typically be able to use her expertise usefully to interpret the results documented by the original expert—perhaps not quite as well as the original creator of the report, but well enough that we should permit it when necessary. Part of what makes someone expert in the relevant forensic field is precisely that they have had training in how to produce and interpret such reports. Note that I am neither assuming nor presuming the reliability of forensic science evidence—there have been far too many incidents of both innocent error and malfeasance in the forensic sciences for their reliability simply to be taken as a given. But the shared procedures and routines for documentation of results within a particular laboratory ought, at least in principle, to make a substitute expert a reasonable interpreter of a forensic science report when, and only when, the actual creator is unavailable.

This proposed solution does reflect a certain degree of backpedaling—a small move away from Crawford, and back toward the dual foci of necessity and reliability that Crawford ostensibly left behind. It also injects into Crawford’s formalism a degree of functionalist analysis—but Davis, in quite a different context, has already begun to add functionalist inquiries (e.g.,
what was the primary purpose of the statement?) to the Confrontation Clause inquiry. As a practical matter, it is almost unthinkable that courts will be prepared to exclude the autopsy report from long ago, written by an expert now truly unavailable. The real question is not whether most courts will find some way to permit such evidence—for they almost certainly will—but whether the courts will make careful and intellectually justifiable distinctions in order to permit under the Confrontation Clause a limited amount of testimonial evidence in delineated circumstances. If they choose instead to rely, for example, on the fiction that expert basis evidence is not hearsay, or to invent a generalized business records exception to the Confrontation Clause, they will be making use of the same kinds of inelegant, ad hoc, and jerry-rigged doctrinal creations that prompted Crawford itself. That would be both avoidable and a shame.
FORESHADOWING THE FUTURE OF FORFEITURE/ESTOPPEL BY WRONGDOING: DAVIS V. WASHINGTON AND THE NECESSITY OF THE DEFENDANT’S INTENT TO INTIMIDATE THE WITNESS

James F. Flanagan*

INTRODUCTION

Justice Scalia’s refusal to define “testimonial” evidence or to explain the enigmatic reference to “forfeiture by wrongdoing” in Crawford v. Washington1 continues to raise significant practical and policy issues in the reformulation of the right of confrontation, particularly in domestic violence prosecutions. Forfeiture by wrongdoing is the most significant exception to the exclusion of testimonial hearsay. Despite its importance, the only reference to the doctrine in Crawford appeared in Justice Scalia’s discussion of the defects of the reliability standard of Ohio v. Roberts,2 and was addressed only to distinguish forfeiture’s essentially equitable rationale from Roberts’ reliability standard. The Court adopted it in a parenthetical without any discussion of its elements or the extensive case law on the topic. The discussion is short: “For example, the rule of

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2 448 U.S. 56 (1980).
forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See Reynolds v. United States, 98 U.S. 145, 158-59, 25 L.Ed 244 (1879).”

Crawford & Beyond: Revisited in Dialogue, the second Crawford focused symposium organized by Professor Robert Pitler at Brooklyn Law School and held on September 29, 2006, explored the developing scope of “testimonial” and also focused on the aforementioned exception to Crawford, the constitutional doctrine originally known as waiver by misconduct, and now commonly referred to as forfeiture by wrongdoing.

This doctrine provides that a defendant who deliberately acts to prevent a witness from testifying loses any right to object to the admission of the witness’ testimonial hearsay statement on constitutional or evidentiary grounds. This doctrine has always

3 Crawford, 541 U.S. at 62.
4 The modern case law, beginning in 1976, generally referred to the doctrine as “waiver”, although some cases used the term “forfeiture”, and others used both terms interchangeably. Federal Rule 804(b)(6) which codified the doctrine as a rule of evidence was originally titled “waiver by misconduct”, but was later changed to “forfeiture by misconduct.” James F. Flanagan, Confrontation, Equity, and the Misnamed Exception for “Forfeiture” by Wrongdoing, 14 WM. & MARY BILL RTS. J. 1193, 1209-18 (2005) [hereinafter The Misnamed Exception for “Forfeiture” by Wrongdoing].
required that the defendant specifically intend to prevent the witness from testifying, and was previously limited to cases of deliberate witness tampering. However, Crawford’s characterization of this doctrine as “forfeiture” by wrongdoing has created an unfortunate misperception about its scope, prompting some courts to expand the doctrine beyond its original use in witness tampering cases to admit any victim’s testimonial hearsay, provided the defendant can be found responsible for the witness’ unavailability to testify for any reason.

This expansion of the doctrine thus creates a broad exception to the Confrontation Clause for all testimonial hearsay from an unavailable victim. In the lower courts, a conflict is emerging between this expanded rule of forfeiture and that expressed in Reynolds v. United States and the pre-Crawford cases, which held that the right of confrontation can only be lost by deliberate action aimed at preventing the witness from testifying.

This article focuses on the intent element of the constitutional forfeiture or estoppel by wrongdoing doctrine. Part I briefly


6 See infra notes 25-34 and accompanying text.

7 Flanagan, The Misnamed Exception for “Forfeiture” by Wrongdoing, supra note 4, at 1218-23; infra notes 40-50 and accompanying text.

8 98 U.S. 145 (1878).

recapitulates the doctrine’s development, with emphasis on the principal precedent, *Reynolds v. United States*,\(^\text{10}\) and follows with the effect that *Crawford’s* brief reference to the doctrine has had by implying that it could be used in any case in which the defendant can be held responsible for the witness’s unavailability for any reason. Part II analyzes the post-*Crawford* opinion in *Davis v. Washington*\(^\text{11}\) and concludes that the Court views the doctrine as directed against witness tampering, which is consistent with the pre-*Crawford* case law that required the defendant’s intent to prevent testimony. Part III then addresses some procedural issues the Court will have to consider as it further defines the doctrine, including the causal link between the defendant’s acts and the witness’s unavailability for trial, the need for a hearing to determine admissibility, and whether additional foundation evidence beyond the hearsay itself is necessary to admit victim hearsay. Finally, Part III addresses the point that, under current applications of the doctrine, the finding that the defendant was responsible for the witness’ unavailability to testify not only allows the prosecution to admit the absent witness’ hearsay, but under Federal Rule of Evidence 804(a), precludes the defendant from offering any of the victim’s hearsay. This article argues that the defendant’s right to present a defense, most recently reaffirmed in *Holmes v. South Carolina*\(^\text{12}\) overcomes this rule of evidence, so that a defendant cannot be precluded from offering admissible evidence under that rule simply because he was the procuring cause of the witness’ unavailability.

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\(^{10}\) *Reynolds*, 98 U.S. at 145.

\(^{11}\) 126 S. Ct. 2266, 2270 (2006).

I. ESTOPPEL BY WRONGDOING AND CRAWFORD’S EXPANSIVE EFFECT ON THE DOCTRINE

A. Short Note on Terminology and the Tyranny of Labels

Words matter, and this article deliberately uses the term “estoppel by wrongdoing” to describe the doctrine by which a defendant may lose his right to confrontation by acting against a witness, rather than the term used by Justice Scalia in Crawford—“forfeiture by wrongdoing.” The principal reason is to avoid what Justice Cardozo called the “tyranny of labels.” The key issue in determining the scope of the doctrine is the necessity of the defendant’s intent to prevent the witness from testifying. Labeling the rule as one of forfeiture all but assumes that intent is irrelevant to the loss of the right to confrontation. The term forfeiture connotes an automatic and unintentional loss of a right upon the happening of a specified condition. The courts reaching this decision after Crawford rely heavily on the term forfeiture to justify that result. Moreover, this simplistic analysis makes it easy to ignore the historical and constitutional reasons for an intent element. I have argued that the constitutional doctrine is better viewed as one of waiver, but using that term may be viewed as assuming my

15 Peter Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L. Rev. 1214, 1214-15 (1977) (distinguishing between constitutional rights that may be unknowingly forfeited by a guilty plea from constitutional rights that can only be deliberately waived based upon the interest of the state in being able to retry the defendant).
16 See, e.g., People v. Giles, No. S129852, 2007 WL 635716 at *9 (Cal. Sup. Ct. March 5, 2007) (rejecting defendant’s argument that doctrine is based on waiver by pointing to term “forfeiture” used in Crawford).
17 Flanagan, The Misnamed Exception for “Forfeiture” by Wrongdoing, supra note 4, at 1203-23 (tracing the history of the doctrine from its English antecedents to modern case law, the adoption of Fed. R. Evid. 804(b)(6),
conclusion, just as forfeiture assumes that intent is irrelevant. To avoid a debate dominated by value laden terms, the Article uses the more neutral and more accurate name of estoppel by wrongdoing. Crawford mentioned its equitable origins and Professor Friedman has argued that the doctrine is based on estoppel. Estoppel accommodates both waiver and forfeiture while also incorporating the rich traditions of equity that may be necessary to define the contours of this important constitutional doctrine. I will refer to the rule that one may lose confrontation rights by conduct against witnesses as one of estoppel by wrongdoing, or of confrontation estoppel, unless direct citation requires otherwise.

B. A Short History of the Constitutional Doctrine of Estoppel by Wrongdoing

Reynolds v. United States is the principal Supreme Court precedent used to determine whether the defendant loses the right to confrontation because of conduct against a witness. Reynolds was a case of “intentional” witness tampering because the defendant deliberately concealed the location of his second wife during a bigamy prosecution to prevent her from being subpoenaed in his second trial. The Court found that his acts were an intentional waiver of his right to confrontation. Chief Justice Waite noted that Reynolds had been given every chance to reveal the location of the witness, but chose not to do so: “Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption

and to Crawford and arguing that the cases are based on express or implied waiver, and that the description as “forfeiture” was made erroneously and without analysis).

18 Crawford, 541 U.S. at 62.
19 Friedman, Chutzpa, supra note 5 at 516-17.
20 Flanagan, The Misnamed Exception for “Forfeiture” by Wrongdoing, supra note 4, at 1241-45 (arguing that equitable considerations help define the doctrine, and may impose obligations on the prosecution when it seeks to invoke it.).
21 98 U.S. 145 (1878).
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is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own.”

The opinion also used an estoppel rationale based upon the defendant’s deliberate choice to conceal the witness. The Constitution “grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege.”

The Court also stated that the doctrine is triggered by the defendant’s wrongful act: “The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony.”

The admitted wrong in Reynolds was the defendant’s deliberate concealment of the witness, which supported the waiver and estoppel rationales.

The constitutional rule stated in Reynolds was that a deliberate intention to prevent a witness from testifying supports the loss of confrontation as to that witness. This principle had little impact until the Sixth Amendment became applicable to the states nearly 90 years later in the 1960s. In the 1970s, the lower courts began facing deliberate witness tampering in drug

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22 Id. at 160.

23 Id. at 158. The Court also recognized that the judicial process had legitimate and lawful responses to such conduct. “If therefore, when [the witnesses are] absent by [the defendant’s] procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.” Id. The modern cases, faced with more brutal organized crime and drug conspiracies see witness tampering as a direct attack on the judicial system. See e.g., United States v. White, 116 F.3d 903, 912 (D.C. Cir. 1997) (stating that the “forfeiture principle, as distinct from the Confrontation Clause, is designed to prevent a defendant from thwarting the normal operation of the criminal justice system); United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984) (describing the murder of a witness as “behavior which strikes at the heart of the justice system itself”).

24 Reynolds, 98 U.S. at 159.

25 See Pointer v. Texas, 380 U.S. 400, 403 (1965) (“We hold today that the Sixth Amendment’s right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment”).
and organized crime cases and the prosecution often offered the absent witness’ hearsay. The courts used Reynolds to resolve the defendant’s Sixth Amendment claims by concluding that deliberate witness intimidation waived the right of confrontation.26

As in Reynolds, the modern cases all involved acts against declarants because of their status as witnesses. All the cases mentioned the victim’s status as an actual or potential witness or the defendant’s acts against a witness.27 As in Reynolds, the rationale was that the defendant expressly or implicitly waived the right by deliberate conduct inconsistent with actually desiring to confront that witness.28 No pre-Crawford case held that the Confrontation Clause was satisfied merely because the defendant was the procuring but unintentional cause of the witness’ absence.29 In fact, the courts refused to extend estoppel by

26 Flanagan, Forfeiture by Wrongdoing, supra note 5 at 466-69.
27 See, e.g., United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996) (stating that “intent to deprive prosecution of testimony need not be the actor’s sole motivation.”); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (stating test is whether defendant procures a witness’ absence); United States v. Potamitis, 739 F.2d 784, 788 (2d Cir. 1984) (stating defendant waives confrontation right “when his own conduct is responsible for a witness’ unavailability at trial”); Rice v. Marshall, 709 F.2d 1100, 1101 (6th Cir. 1983) (stating declarant was an expected witness against defendant), cert. denied, 465 U.S. 1034 (1984); United States v. Mastrangelo, 693 F.2d 269, 271 (2d Cir. 1982) (stating declarant was murdered on way to testify); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982) (stating that a “defendant who causes a witness to be unavailable for trial for the purpose of preventing that witness from testifying also waives his right of confrontation”); Steele v. Taylor, 684 F.2d 1193, 1198-99 (6th Cir. 1982) (stating that defendant has procured his wife’s refusal to testify); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979) (stating “the law should not permit an accused to subvert a criminal prosecution by causing witnesses, not to testify at trial”) (emphasis added); United States v. Carlson, 547 F.2d 1346, 1358 (8th Cir. 1976) (noting that defendant acted only when he learned that declarant was going to testify at his trial). See also, United States v. Jordan, No. Crim, 04-CR-229-B 2005 WL 513501 at *6 (D. Colo. Mar. 3, 2005) (stating that no Fed. R. Evid. 804(b)(6) case holds that a murder whose byproduct is the unavailability of a witness is covered by the rule).
28 Id.
29 A few pre-Crawford cases, taken in isolation, may be viewed as
wrongdoing to ordinary manslaughter cases, or to apply it when the defendant acted for reasons unrelated to potential testimony. Thus, the Supreme Court in Reynolds, as well as federal and state appellate courts, articulated and applied a constitutional standard based on express or implied waiver or estoppel inferred from the defendant’s knowing misconduct against a potential witness. This approach was consistent with prior constitutional cases because the Supreme Court has always viewed the loss of confrontation rights as based on principles of supporting a true forfeiture theory. One court held that a defendant’s slaying of a government agent in an exchange of gunfire during a bungled arrest was sufficient to avoid a Confrontation Clause claim. Interestingly, the court described it as a waiver of his right of confrontation. United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985). Another speaks of the doctrine without mentioning an intent to prevent testimony. See United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (convicting defendant of intentionally tampering with declarant/witness under federal witness tampering statute). United States v. Miller, 116 F.3d 641, 648 (2d Cir. 1997) (suggesting that intent was relevant but not necessary).

Commonwealth v. Laich, 777 A.2d 1057, 1064 n.4 (Pa. 2001) (rejecting misconduct exception in manslaughter prosecution); Wyatt v. State, 981 P.2d 109, 115 n.11 (Alaska. 1999) (recognizing that forfeiture by misconduct does not apply to domestic homicide); Cf. State v. Jarzbek, 529 A.2d 1245, 1253 (Conn. 1987) (stating that “The constitutional right of confrontation would have little force, however, if we were to find an implied waiver of that right in every instance where the accused, in order to silence his victim uttered threats during the commission of the crime for which he is on trial.”); People v. Maher, 677 N.E.2d 728, 731 (N.Y. 1997) (holding that the exception does not apply to murder unrelated to testimony). People v. Flowers, 667 N.Y.S.2d 546, 547 (App. Div. 1997) (same). See also Commonwealth v. Edwards, 830 N.E.2d 158, 175 (Mass. 2005) (refusing to apply forfeiture doctrine to defendants who did not arrange for witness’s absence).

United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979) (holding that accessory who did not threaten defendant did not waive confrontation rights); United States v. Houlihan, 887 F. Supp. 352, 363-64 (D. Mass. 1995) (holding that codefendant Fitzgerald participated in murder as favor for another gang but did not intend to prevent victim from testifying); State v. Hansen, 312 N.W.2d 96, 105-06 (Minn. 1981) (finding no proof that this defendant threatened witnesses).
waiver, express or implied, rather than a true forfeiture.32

Furthermore, the estoppel or waiver rationale was doctrinally necessary to address Confrontation Clause claims because the reliability standard of Ohio v. Roberts33 was inapplicable to victim hearsay offered under estoppel by wrongdoing. As Justice Scalia noted in Crawford, there was never a claim that intimidated witness statements were reliable,34 and this evolving doctrine could not be considered a “firmly rooted” hearsay exception. Lacking any claim of reliable hearsay to satisfy Roberts, the only rationale to support the loss of confrontation rights was waiver or estoppel.

In practice, however, constitutional analysis became largely irrelevant. With estoppel by wrongdoing the courts soon concluded that a factual finding of witness tampering resolved both constitutional and evidence claims, shifting the focus to the evidence of witness tampering.35 Roberts essentially eliminated confrontation claims arising from other hearsay because its reliability standard was easy to meet under the rules of evidence.36 Thus, confrontation issues became evidence issues.37

34 Crawford, 541 U.S. at 62.
35 United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1979) (“A valid waiver of the constitutional right is a fortiori a valid waiver of an objection under the rules of evidence.”). Other courts quickly followed Balano. See United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982); United States v. Emery, 186 F.3d 921 926-27 (8th Cir. 1999); United States v. White, 116 F.3d 903, 911-12 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d. 1271, 1279-80 (1st Cir. 1996); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992).
36 Crawford, 541 U.S. at 62-69.
37 Several of the speakers at the symposium noted this trend. See Margaret Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 Minn. L. Rev. 557 (1992); Richard D. Friedman, Confrontation: The Search for Basic Principles, 86
Reflecting this trend, Federal Rule of Evidence 804(b)(6), originally titled Waiver by Misconduct but promulgated as Forfeiture by Wrongdoing, was adopted in 1996. Nevertheless, both the evidence rule and the constitutional rule required a specific intent to procure the unavailability of the witness. Similarly, the states adopted an intent element when they promulgated rules of evidence or adopted the estoppel doctrine by judicial decision. Consequently, the rules of evidence stated the constitutional standard for loss of confrontation rights.


Advisory Committee on Evidence Rules, Minutes of the Meeting of April 22, 1996.

See Id. The rule does not exclude as hearsay any “statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” Id. See generally, FED. R. EVID. 804(b)(6).

MIL. R. EVID. 804(b)(6); UNIF. R. EVID. 804(b)(6); DEL. R. EVID. 804(b)(6); HAW. R. EVID. 804(b)(7); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); OHIO R. EVID 804(B)(6); PA. R. EVID. 804(b)(6). TENN. R. EVID. 804(b)(6) (deleting “acquiescence”). The governor of Maryland proposed a comparable provision in 1994, but it was not adopted. Paul W. Grimm & Jerome E. Deise, Jr., Hearsay, Confrontation, and Forfeiture by Wrongdoing: Crawford v. Washington, A Reassessment of the Confrontation Clause, 35 U. BALT. L.F. 5, 41 (2004). After Crawford, Oregon amended its version of the evidence rule to delete the intent requirement when the party caused the witnesses’ unavailability by criminal conduct. OR. REV. STAT. 40.465. California enacted an estoppel provision in 1985 that was more restrictive than rule 804(b)(6). CAL. EVID. CODE § 1350.


Some courts depreciate the importance of Rule 804(b)(6) in determining the constitutionality of the doctrine of estoppel by wrongdoing by
Thus, the history of estoppel by wrongdoing from Reynolds to the modern case law, including the rules of evidence, always required the defendant’s knowledge of the declarant’s status as a witness and intentional efforts to prevent that witness from testifying. 43

Crawford did not discuss or change the constitutional standard for estoppel by wrongdoing. In the two sentences that mentioned the doctrine, Justice Scalia cited as authority only Reynolds, a witness tampering case. Perhaps relying on the title of Rule 804(b)(6), however, he referred to the doctrine as forfeiture by wrongdoing,44 which had immediate consequences.

Forfeiture implied that intent was irrelevant, and that confrontation rights could be terminated whenever the witness’ absence could be traced to the defendant, although a by-product and unintended consequence of the defendant’s act.45 In particular, it suggested that confrontation rights could be lost, not only in witness tampering cases, but in any prosecution where the defendant could arguably be found responsible for the witness’ absence. Professor Richard Friedman had argued that the intent to prevent testimony was unnecessary for forfeiture by wrongdoing.46 Moreover, some language in Reynolds, if it were arguing that a constitutional standard should not depend upon the “vagaries of the Rules of Evidence.” United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005). In doing so, they ignore the history which clearly shows that the evidence rule is the constitutional standard.

43 See supra notes 25-34 and accompanying text.

44 The two sentences were short and enigmatic. “For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See Reynolds v. United States, 98 U.S. 145, 158-59, 25 L.Ed 244 (1879).” Crawford, 541 U.S. at 62 (2004).

45 Adam M. Krischer, Though Justice May be Blind, It Is Not Stupid, 38 PROSECUTOR 14 (Nov. Dec. 2004) (arguing that perpetrators of domestic violence automatically forfeit their right to confront their victims).

46 Friedman, Chutzpa, supra note 5, at 518 n. 25 (taking into account defendant’s accidental collision affecting witness on way to court); Id. at 519 n. 30 (noting that legitimate advice to claim a privilege may avoid forfeiture only if witness is a close relative). Fed. R. Evid. 804(b)(6) used the term in the title, and it first appeared in a footnote in an opinion where the Sixth
freed from its facts and the other rationales that supported the decision, seemed to justify a strict approach because “no one shall be permitted to take advantage of his own wrong.” Since Crawford directly impacted domestic violence prosecutions, it was inevitable that the outer limits of forfeiture would be emphasized in those cases.

The immediate reaction of some state courts was the application of estoppel by wrongdoing to homicide cases, in part because this approach avoided difficult decisions on what constitute testimonial statements. The first case interpreting

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47 Reynolds, 98 U.S. at 159.


49 Many of the post-Crawford cases used forfeiture to avoid the testimonial issue. United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005) (avoiding decision on whether excited utterance was testimonial); People v. Baca, No. E032929 2004 WL 2750083 at *10 (Cal. Ct. App. Dec. 2 2004) (avoiding whether identification was testimonial); People v. Jiles, 18 Cal. Rptr. 3d 790, 795 (Cal. Ct. App. 2004) (avoiding issue of dying declaration as testimonial); State v. Meeks, 88 P.3d 789, 793-94 (Kan. 2004) (avoiding issue of whether response to police question was testimonial); People v. Giles, 19 Cal. Rptr. 3d 843 (Cal. Ct. App. 2004) (avoiding issue of whether casual statements to police are testimonial); Gonzalez v. State, 155 S.W.3d 605, 609 (Tex. Ct. App. 2004) (avoiding issue of whether statements to police were testimonial).
Crawford, State v. Meeks, was decided six weeks after Crawford. In Meeks, the Supreme Court of Kansas admitted the homicide victim’s identification of his assailant. The court extended earlier witness tampering precedent in Kansas to uphold the introduction of the decedent’s identification of his assailant, principally relying on the maxim that “the law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him.” The California Court of Appeals had a similar response in People v. Giles, a domestic homicide case where it was conceded that there was no evidence that the defendant killed the victim to prevent her testimony. The court peremptorily rejected the defendant’s argument that such proof was required by precedent, in favor of an argument relying on forfeiture principles. The California Supreme Court affirmed the decision, again relying principally on its title as a forfeiture. Several other state courts and at

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50 88 P.3d 789 (Kan. 2004).
51 Id. at 792-93.
52 Id. at 794; State v. Gettings, 769 P.2d 25, 28 (Kan. 1989).
54 Id. at 848.
55 Id. The court further noted that:

Although the [Houlihan] opinion contains language suggesting that a killing must be motivated by a desire to silence the victim to trigger a forfeiture of the right of confrontation, we see no reason why the doctrine should be so limited to such cases. Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness’s unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.

Id. at 843, 848, 848n.3 (citing U.S. v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996)).
56 “Defendant’s argument relating to the intent requirement rests on the premise that the forfeiture by wrongdoing doctrine is, in essence, not based
least one federal court also adopted the strict view that any act by the defendant which had the effect, albeit unintended, of preventing testimony would trigger a forfeiture of confrontation rights. As in Meeks and Giles, these courts relied on the argument that the defendant should not benefit from his wrongful conduct, ignoring the witness tampering facts in Reynolds and other cases that were based on principles of waiver and estoppel flowing from the defendant’s voluntary choice.

on broad forfeiture principles, but instead on waiver principles. However, the United States Supreme Court has characterized the rule in question as a ‘forfeiture’ that ‘extinguishes confrontation claims on essentially equitable grounds,’ not a waiver (Crawford, supra, 541 U.S. at [p. 62, 124 S. Ct. 1354].” People v. Giles, No. S129852, 2007 WL 635716 at *9 (Cal. Sup. Ct. March 5, 2007).


59 Id. (arguing that the defendant, regardless of intent, “would benefit through his own wrongdoing if such a witness’ statements could not be used against him); People v. Baca, No. E032929 2004 WL 2750083 at *12 n.6 (Cal. Ct. App. 2004) (questioning intent element by contending that if the forfeiture rule is to further the maxim that “no one shall be permitted to take advantage of his own wrong (citation omitted) than the motivation for the wrongdoing is irrelevant.”); People v. Moore, 117 P.3d 1, 5 (Colo. Ct. App. 2004) (stating that under the forfeiture rule a person is not to benefit from his wrongful prevention of testimony); Gonzales v. State, 155 S.W.3d. 603, 610 (Tex. Ct. App. 2004) (adopting language of People v. Giles, 19 Cal. Rptr. 3d at 848, that a defendant whose wrongful act renders a witness unavailable for trial benefits from his conduct if he can use the witness’ unavailability to exclude otherwise admissible hearsay statements regardless of intent). The maxim also is cited in many cases where the intent to prevent testimony was required. In those cases, however, the courts also referred to waiver, estoppel, and other rationales that emphasized the deliberate nature of the act. E.g., United States v. Dhinsa, 243 F.3d 635, 652 (2d Cir. 2001) (citing maxim and equity and need for fit incentives for defendants); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982) (finding waiver by deliberate murder of witness and citing maxim); United States v. Mastrangelo, 693 F.2d 269, 272-73 (2d Cir. 1982) (citing maxim but remanding for consideration of whether defendant waived right by participating in murder of witness in any
This post-\textit{Crawford} case development expanded the doctrine beyond prior precedent and history, creating new questions for the Court to address.

\section*{II. \textit{Davis v. Washington}—Foreshadowing the Future of the Estoppel Doctrine}

\textit{Davis v. Washington}\textsuperscript{60} was the Supreme Court’s first return to \textit{Crawford} and provided an opportunity to address the scope of the terms “testimonial” and estoppel by wrongdoing. Justice Scalia authored the opinion as he had in \textit{Crawford}, and he narrowed the definition of testimonial, all but stating that the estoppel doctrine is limited to witness-tampering cases.\textsuperscript{61} The issue in \textit{Davis},\textsuperscript{62} and its companion case \textit{Hammond v. Indiana},\textsuperscript{63} was whether statements made in a 911 call in \textit{Davis}, and at the crime scene in \textit{Hammond}, were testimonial statements under \textit{Crawford}.\textsuperscript{64} The majority drew the line based on the objective purpose of the inquiry.

Statements are non-testimonial 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.\textsuperscript{65}

\textsuperscript{60} 126 S. Ct. 2266 (2006).
\textsuperscript{61} \textit{See infra} notes 70-92 and accompanying text.
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.} at 2270.
\textsuperscript{65} \textit{Id.} at 2273-74.
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The Court in Davis held that the victim’s identification of her assailant to the operator in the initial stage of a 911 call was not testimonial because it was made to the operator during an ongoing emergency.66 The statements in Hammond, on the other hand, were deemed testimonial, having been made after the police arrived, had separated the husband-assailant from the victim, and learned from her that things were “fine.” The Court concluded that the police were not reacting to an emergency but were investigating and establishing the historical facts of the situation.67 Davis’ broad definition of testimonial statements reflects an expansive view of the Confrontation Clause.

Perhaps anticipating criticism for the broad definition of testimonial statements, the Court discussed the estoppel by wrongdoing doctrine in section IV of its opinion in Davis. The states and others had argued that domestic violence cases required “greater flexibility in the use of testimonial evidence”68 and that the higher incidence of witness intimidation in those cases required a narrow definition of testimonial. “When this occurs, the Confrontation Clause gives the criminal a windfall.”69 This windfall argument is another form of the rationale in Reynolds70 that “no one shall be permitted to take advantage of his own wrong” and is often relied upon to justify on strict forfeiture grounds the loss of confrontation rights in the all too typical domestic homicide case.71

The Court rejected the windfall argument and its analogue, the benefits rationale: “We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.”72 Constitutional rights would have no meaning if they were available only when they provided no protection.73 Moreover, to consider constitutional rights as

66 Id. at 2276-78.
67 Id. at 2278-79.
69 Id. at 2280.
70 98 U.S. 145, 159 (1878).
71 See supra note 61.
72 Davis, 126 S. Ct. at 2280 (citation omitted).
73 Michael J. Polelle, The Death of Dying Declarations in a Post-
benefits of the crime misstates their importance as fundamental, pre-existing protections inherent in citizenship.\textsuperscript{74} In rejecting the windfall and benefits arguments, the Court rejected the principal rationale underlying the strict rule of forfeiture, which views intent as irrelevant.

The \textit{Davis} opinion then discussed estoppel by wrongdoing in a context that emphasized its witness tampering underpinnings.

But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have a duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in \textit{Crawford}; that “the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.”\textsuperscript{75}

That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.\textsuperscript{76}

The opinion identifies the evil addressed by the estoppel doctrine as acts that undermine the judicial process, specifically by procuring or coercing silence from witnesses. The terms “coercing” and “procuring” refer to intentional action specifically directed toward achieving a goal.\textsuperscript{77} In this context, constitutional rights are not “benefits” of a crime. Defendants do not commit crimes to obtain constitutional rights. They are preexisting and inherent rights accorded defendants in our courts by the Constitution.

\textsuperscript{74} Faretta \textit{v.} California, 422 U.S. 806, 819, 829-30 (1975) (identifying notice, confrontation, and compulsory process as personal rights).

\textsuperscript{75} 541 U.S. at 62, 124 S. Ct. 1354 (\textit{citing Reynolds}, 98 U.S. at 158-59).

\textsuperscript{76} \textit{Davis}, 126 S. Ct. at 2280.

\textsuperscript{77} Procure is defined as “to care for, take care of, attend to, look after; to put forth or employ care or effort; to do one’s best; to endeavor, labour, to use means; take measures.” VII Oxford English Dictionary (1989). Coerce is defined as: “to constrain or restrain (a voluntary or moral agent) by the
those terms describe purposeful acts intended to produce the silence of the witnesses. The words, and the Court’s discussion, are inconsistent with any theory that the defendant’s intent is irrelevant or that merely being the proximate cause of the witness’ unavailability is sufficient grounds to support the loss of confrontation rights.

The paragraph’s focus on judicial integrity reflects the particularly heinous nature of witness tampering and its effect on the judicial process. Witness tampering attacks the judicial process because the consequences multiply beyond the original perpetrator and victim to other witnesses against that perpetrator, and its in terrorum effect reverberates among all those who might testify against violent criminals. Not only may the defendant be guilty of the original crime, but witness intimidation is an additional violation that makes it more difficult to prosecute the first crime, as well as the subsequent intimidation of the witnesses to that crime. In contrast, an ordinary homicide, while a tragedy for the victim and the family and a crime against society that demands prosecution, is not an attack on the judicial process, which remains available and unhindered in determining if criminal sanctions are appropriate.

By pointing to the judicial process, the Court necessarily limits estoppel by wrongdoing to the defendant’s deliberate acts taken after the crime because of the victim’s status as a potential witness, and intended to prevent that testimony. The judicial process begins with the crime and includes the investigation that gathers the evidence and introduces it at trial.78 Justice Scalia

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78 The judicial process includes pre-indictment activity because Constitutional rights, such as the Fourth Amendment, provide constant protection and are enforced later at the trial. Mapp v. Ohio, 367 U.S. 643 (1961) (suppressing evidence seized as the result of an illegal search). Likewise, the Miranda warnings, and Due Process restrictions against suggestive photographic or lineup identifications, apply before formal charges are instituted. Miranda v. Arizona, 384 U.S. 436 (1966) (requiring warnings about self-incrimination and right to counsel when questioned in custody); Simmons v. United States, 590 U.S.377 (1968) (holding that impermissibly suggestive identifications are subject to the Due Process Clause if made
states that constitutional rights are balanced with responsibilities. The defendant does not have to cooperate with the state in either the investigation or the trial.\textsuperscript{79} The state may not compel self-incrimination,\textsuperscript{80} and at trial the defendant may stand mute\textsuperscript{81} and the government has the burden of proving guilt beyond a reasonable doubt.\textsuperscript{82} But neither may the defendant interfere with the state’s efforts by making witnesses to the crime unavailable. “One who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”\textsuperscript{83} The Court is clearly speaking of the post-crime activities of the defendant. The estoppel doctrine applies only when the defendant interferes with the judicial process; there is no suggestion that it applies when the defendant’s acts toward the victim are unrelated to potential testimony. Any homicide investigation and prosecution by its nature takes place without the decedent, but the commission of that crime has never been considered sufficient to automatically lose any constitutional right, including the right of confrontation.\textsuperscript{84} If it were, it would smack of dispensing with before counsel appointed). The Sixth Amendment protections of the right of counsel, to proper venue, and to confrontation, are trial rights that are triggered by the formal charges. The estoppel doctrine also applies before arrest or formal charges. It even applies although an investigation is not pending, and there is no indictment, so long as the defendant acts because there is a possibility that the witnesses would testify. United States v. Miller, 116 F.3d 641, 668 (2d Cir. 1997) (holding that an ongoing criminal proceeding in which declarant was to testify is not required); United States v. Houlihan, 92 F.3d 1271, 1279-80 (1st Cir. 1996) (holding estoppel by wrongdoing applies to potential witnesses). It would be an artificial distinction to suggest that witness intimidation before arrest, arraignment, or indictment is not an attack on the integrity of the judicial system.

\textsuperscript{79} Davis, 126 S. Ct. at 2280.

\textsuperscript{80} U.S. Const. amend. V.

\textsuperscript{81} Griffin v. California, 380 U.S. 609 (1965) (holding that the defendant’s right not to testify includes the right not to have comment on that decision).

\textsuperscript{82} In re Winship, 397 U.S. 358, 375 (1970) (holding that proof beyond a reasonable doubt is required by the Due Process clause).

\textsuperscript{83} Davis, 126 S. Ct. at 2280.

\textsuperscript{84} The dying declaration exception to the hearsay rule may also be an exception to the testimonial standard established by Crawford, 541 U.S. at 56
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constitutional rights because of a defendant’s obvious guilt. Even those post-
*Crawford* cases that argue for a strict forfeiture rationale do not justify it as an attack on the judicial process. Rather, they maintain that the defendant should not benefit from his own wrongdoing,\(^85\) that is, the original homicide.

The second paragraph of section IV of the *Davis* opinion provides direct evidence that the estoppel doctrine is limited to deliberate witness intimidation.

We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard. State courts tend to follow the same practice. Moreover, if a hearing on forfeiture is required, *Edwards*, for instance, observed that ‘hearsay evidence, including the unavailable witness’s out-of-court statements, may be considered.’ The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the ‘reliability’ of *ex parte* statements more easily than they could show the defendant’s procurement of the witness’s absence. *Crawford*, in overruling *Roberts*, did not destroy the ability of the courts to protect the integrity of their proceedings.\(^86\)

That the opinion states that Federal Rule of Evidence 804(b)(6) codifies the constitutional estoppel by wrongdoing doctrine necessarily means that it is aimed at witness tampering, and that it also includes the specific intent requirement found in that rule. The Advisory Committee to the Federal Rules of Evidence concluded early in its discussions that “codifying the

\(^n.6.\) But it has never been viewed as forfeiture of constitutional rights. The homicide is only one element of the exception, and standing alone, does not lead to the admissibility of the dying declaration. *See infra* notes 105-110 and accompanying text.

\(^85\) *See supra* note 61.

\(^86\) *Davis*, 126 S. Ct. at 2280 (citations omitted).
doctrine was desirable as matter of policy in light of the large number of witnesses who are intimidated or incapacitated so they do not testify.” The rule was a direct response to almost 20 years of federal case law dealing with witness intimidation in organized crime and drug conspiracies. As drafted and as adopted, the Rule always required that the defendant specifically intend to prevent the witness from testifying. The Advisory Committee thought that the limited application of the Rule was so clear that it rejected a comment to the Rule specifically mentioning witness tampering. Given the rejection of the windfall argument, the focus on judicial integrity, and the statement that Rule 804(b)(6) codifies that doctrine, the only logical conclusion is that estoppel by wrongdoing is limited to witness tampering just as the Federal Rule is so limited.

87 FED. R. EVID. 804 Advisory Committee’s Note (May 4-5, 1995). The Advisory Committee Note to the Rule also identified witness-tampering as its rationale. “This recognizes the need for a prophylactic rule to deal with abhorrent behavior ‘which strikes at the heart of the justice system itself.’” United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984). Mastrangelo involved a witness killed on his way to testify. Id.

88 Flanagan, Forfeiture by Wrongdoing, supra note 5, at 477-79. The final Rule differed from the initial draft only in that it referred to “forfeiture” rather than waiver by wrongdoing, and changed the language from “a party who has engaged or acquiesced in wrongdoing,” to “a party that” to clarify that the rule also applied to the government. Id. at 478-79.


90 Additional, although limited, circumstantial evidence comes from the cases mentioned in the last paragraph. All involved witness tampering or significant questions of intent. Reynolds, of course, was a witness tampering case. The Court also cited Commonwealth v. Edwards, 830 N.E.2d 158, 172 (2005), in which the Massachusetts Supreme Court adopted the estoppel doctrine, including the requirement that the defendant must intend to prevent the witness from testifying. Id. at 175. Also mentioned was Scott v. United States, 284 F.3d 758 (7th Cir. 2002) which applied only Federal Rule 804(b)(6) because the defendant did not assert a confrontation claim. Id. at 762. In both cases there was evidence of the defendant’s desire that the witness not testify, and of contact with the witness, but there were difficult questions of whether the witness elected not to testify for independent reasons that were not chargeable to the defendant. Thus, all the estoppel cases cited
The second paragraph of section IV of the *Davis* opinion discusses procedural issues. The Court notes that both state and federal courts generally require the government to demonstrate the elements of estoppel by a preponderance of the evidence. Furthermore, Justice Scalia states that if a hearing is required on the issue, at least one state supreme court permits the use of hearsay evidence, including the absent declarant’s hearsay statements, in determining the hearsay’s admissibility. Neither of these issues is particularly controversial and the Court approved of the preponderance standard on questions of the admissibility of evidence in *Bourjaily v. United States*.91 Similarly, Federal Rule of Evidence 104(a) authorizes courts to consider the statement itself in determining its admissibility, except in cases of privilege. Most courts have thus adopted the preponderance standard,92 although some have applied higher standards.93 Generally, trial judges have considered the estoppel issues in a separate hearing.94 The proffered victim hearsay is often in Section IV involved deliberate witness-tampering, which is unlikely to be a coincidence.

94 United States v. Price, 265 F.3d 1097, 1100 (10th Cir. 2001); United States v. Cherry, 217 F.3d. 811, 813 (10th Cir. 2000); United States v. Thai, 29 F.3d 785, 814-15 (2d Cir. 1994); United States v. Aguiar, 975 F.2d 45,
important and the testimony and arguments can be a mini-trial of
the defendant’s responsibility for the act. Some courts, such as
the Second Circuit and the high courts of New York and
Massachusetts, require a hearing, while other courts do not.

The discussion of estoppel by wrongdoing in Davis supports
only the proposition that the Court believes that an intent to
tamper with a witness is a prerequisite to the application of the
estoppel doctrine, and that acts that have the unintended
consequence of making the witness unavailable, as in an
ordinary homicide case, do not result in the forfeiture of the
right to object to victim hearsay. The Court did not explicitly
hold that intent was required, but by finding that Federal Rule
804(b)(6), which contains that element, codifies the doctrine, it
came as close to that conclusion as possible. Likewise, the
Court’s view that the doctrine is aimed at attacks on the judicial
integrity of the system implicitly excludes ordinary criminal acts
against individuals that unintentionally make the person
unavailable as a witness. This result is consistent with the prior
case law on estoppel, and with the Court’s view that
Confrontation rights must be waived, whether explicitly or

47 (2d Cir. 1992); United States v. Smith, 792 F.2d 441, 442 (4th Cir.
1986); United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1979); United
States v. Carlson, 547 F.2d 1346, 1353 (8th Cir. 1976); United States v.
Houlihan, 887 F.2d 352, 356 (D. Mass. 1995); United States v. White, 838
1518 (S.D.N.Y. 1983); United States v. Mastrangelo, 533 F. Supp. 389
1979).

55 United States v. Dhinsa, 243 F.3d 635, 656 (2d Cir. 2001); United
States v. Miller, 116 F.3d. 641, 668-69 (2d Cir. 1997) (finding error to admit
hearsay evidence without evidentiary hearing, but harmless under the facts
of this case); Commonwealth v. Edwards, 830 N.E.2d 158, 175 (Mass. 2005);
People v. Johnson, 711 N.E.2d 967, 968-69 (N.Y. 1999) (holding that
hearing required unless overwhelming evidence supports clear and convincing
link between defendant and witness’ unavailability).

56 See United States v. Johnson, 219 F.3d 349, 356 (4th Cir. 2000)
(using meeting with counsel to discuss proof); United States v. Emery, 186
F.3d 921, 926 (8th Cir. 1999) (admitting evidence subject to later proof of
witness’ murder); Crutchfield v. United States, 779 A.2d 307, 329-32 (D.C.
2000) (approving proffer of expected testimony).
FORESHADOWING THE FUTURE OF FORFEITURE

implicitly, to be lost; they cannot be lost simply because there is evidence that the defendant committed a crime.\textsuperscript{97} Completely missing from the discussion is any hint that intent is irrelevant to the estoppel doctrine, or that forfeiture follows automatically from a determination that the defendant is responsible for the witness’ unavailability. \textit{Davis} seems to have clearly adopted the intent to prevent testimony element. For the Court to reverse course at this point would require a major reformulation of the rationale and purpose of the estoppel doctrine, and the rejection of the well established historical record that admitted absent witness hearsay only when the defendant intended to prevent the witness from testifying.\textsuperscript{98}

Moreover, a rejection of the intent element would also abandon \textit{Crawford}’s grounding in the history of the Confrontation Clause. All of the English and early American cases cited in \textit{Reynolds} were witness tampering cases.\textsuperscript{99} Nor does English history provide any basis for the true forfeiture doctrine espoused in some post-\textit{Crawford} cases. At the time the Bill of Rights was drafted, English law provided only two instances in which an unavailable victim’s statement could be admitted against a defendant as substantive evidence, neither of which provides any support for a true forfeiture principle.\textsuperscript{100} Sworn depositions in felony cases produced in conformity with the Marian statutes could be admitted if the witness was dead or unable to appear, but not merely because the witness was

\textsuperscript{97} Flanagan, The Misnamed Exception for “Forfeiture” by Wrongdoing, \textit{supra} note 4 at 1223-29.

\textsuperscript{98} The Court is speaking with one voice on this issue, as it did when it accepted the estoppel by wrongdoing doctrine in \textit{Crawford}. Chief Justice Rehnquist and Justice O’Connor concurred in \textit{Crawford}, 541 U.S. at 69-76, and Justice Thomas concurred only in \textit{Davis}, 126 S. Ct. at 2280-85. Both opinions discussed the estoppel doctrine using the collective “we” and the concurring justices did not comment on the estoppel doctrine in either case.

\textsuperscript{99} Flanagan, \textit{Forfeiture by Wrongdoing}, \textit{supra} note 5 at 462-66.

unavailable. Crawford, however, squarely held that the Confrontation Clause was directed against the Marian statutes, and particularly the creation of uncross-examined evidence by the government.

The dying declaration provided the other means to admit absent victim hearsay as substantive evidence. As a principle of evidence, the dying declaration is based on the declarant’s knowledge of impending death.

The principle of this exception to the general rule is founded partly on the awful situation of the dying person, which is considered to be as powerful over his conscience as the obligation of an oath, and partly on the supposed absence of interest on the verge of the next world, which dispenses with the necessity of cross-examination. But before such declarations can be admitted in evidence against a prisoner, it must be satisfactorily proved, that the deceased, at the time of making them, was conscious of his danger, and had given up all hope of recovery.

As Professor Davies has noted, English law treated the statements by one full of awe at approaching death as the functional equivalent of a statement taken under oath. Thus, the dying declaration and the Marian statutes were sufficient to take these statements out of the rule that prohibited the admission of unsworn statements. Courts in America accepted dying declarations, and the Supreme Court recognized this
exception to the Confrontation Clause based on its history. The Court referred to the admissibility of dying declarations from “time immemorial,” asserting that “no one would have the hardihood at this day to question their admissibility.”

The dying declaration is not a precursor to the forfeiture doctrine. It is based on the inherent reliability of the dying declarant’s statement, and not upon the defendant’s intent to prevent testimony found in Reynolds, or on the forfeiture analysis that emerged after Crawford. At most, the dying declaration exception supports the proposition that some limited victim hearsay as to the cause of death could be deemed consistent with the Confrontation Clause. To transmogrify it into a justification for the forfeiture principle shifts its rationale from the mental state of the declarant to the act of the defendant (regardless of the mental state) and expands a narrow exception for explaining the cause of death in only homicide prosecutions to a general rule which would admit all victim statements for any purpose. These structural changes are far beyond the history and precedent of the dying declaration. Despite the rise of the

dying declarations of the deceased are receivable in evidence, if it appear that he was conscious of his being in a dying state at the time he made them”); CHITTY, Vol. 1 A PRACTICAL TREATISE ON THE CRIMINAL LAW 569 (1841) (stating that the dying declaration is the “one great and important exception” to the hearsay rule); PEAKE, COMPENDIUM ON THE LAW OF EVIDENCE 14-16 (3rd ed. 1812) (dying declaration admissible “for murder where the deceased, while in the declared apprehension of death, or in such imminent danger of it as must necessarily have raised that apprehension in his mind”); PHILLIPS, TREATISE ON THE LAW OF EVIDENCE 275-200 (1816) (“The dying declarations of a person who has received a mortal injury, are constantly admitted in criminal prosecutions.”).


108 Professor Richard Friedman suggests that dying declarations may be better rationalized as an example of the forfeiture principle. He argues that this approach preserves the clarity and simplicity of the “testimonial” approach, avoids an exception based on history, and accepting the traditional, and unpersuasive, argument for the reliability of dying declarations. Richard D. Friedman, Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection, 19 CRIM. JUSTICE 4, 12 (Summer 2004). Certainly, a true forfeiture principle would subsume dying declarations, but that is using the post-Crawford appearance of the true forfeiture argument
forfeiture argument in the 1990s and its adoption by some post-
Crawford cases, the limited exception of the dying declaration
does not provide any historical justification or pedigree for the
modern forfeiture doctrine.

III. FORESHADOWING THE FUTURE DEVELOPMENT OF THE
CONSTITUTIONAL DOCTRINE ESTOPPEL BY WRONGDOING

A. The Intent Element and the Link Between the Defendant’s
Act and the Witness’s Refusal to Testify

Davis answers the most pressing issue about the
constitutional doctrine of confrontation estoppel: the intent
element. The doctrine requires proof of intent to prevent
testimony before a defendant can lose the right to confront a
witness or object to a hearsay statement by a victim. However,
the nexus between the defendant’s acts and the witness’ refusal
to testify is not well defined in the case law. A few courts have
held that the defendant has the intent to prevent testimony if the
victim’s potential testimony was “a factor” in the decision to act
against the witness. Another formulation asks whether witness
intimidation was in “any way” a motivation. At the same
time, the courts have specifically rejected any requirement that
witness tampering be the sole motive for intimidation. The
courts do not seem to have addressed the link in the context of
today to rationalize the long history of dying declarations that were
admissible under a different theory than forfeiture. It does not establish that
forfeiture is derived from the exemption for dying declarations.

109 United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001); United
States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996); United States v.
Johnson, 219 F.3d 349, 356 (4th Cir. 2000).

110 State v. Romero, 133 P.3d 842, 856 (N.M. Ct. App. 2006), aff’d.
No. 29,690 (N.M. March. 15 2007), http://www.supremecourt.nm.org/
slipopinions, cert. granted, 134 P.3d 120 (N.M. 2006).

111 United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001); United
States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996).
the witness’ decision, perhaps because there was generally strong proof that the defendants caused the witness’ unavailability for trial.

Basing a loss of constitutional rights whenever witness tampering was “a” factor in the defendant’s decision is a test so flexible and so easily satisfied that it suffers from the same defect that Crawford found in the reliability standard of Ohio v. Roberts.\textsuperscript{112} Applied strictly, a minimal test of causation means that intimidation and refusal will produce forfeiture even though the wrongful acts were not a primary or even a significant reason for either the defendant’s threats or the witness’ refusal to testify. A stronger causal connection between the defendant’s act and the witness’ response is necessary. Moreover, the issue of intent is so critical that other procedural protections are necessary. A hearing should be required before admitting these statements, and the victim’s hearsay statement itself should not be the sole basis for admitting it.\textsuperscript{113}

\textbf{B. The Nexus Between the Defendant’s Intention and Act and the Witness’ Refusal to Testify}

The homicide case Gonzalez v. State illustrates the potential for the marginalization of the intent element as well as the need for a strong causal connection.\textsuperscript{114} The Texas Court of Appeals initially held that the intent requirement was unnecessary.\textsuperscript{115} On appeal to the Texas Court of Criminal Appeals, that court noted the competing arguments regarding the intent element, but avoided the issue by finding that the defendant had the requisite intent when the defendant killed the victims during a burglary.


\textsuperscript{113} See, e.g, Deborah Tuerkheimer, \textit{A Relational Approach to Confrontation}, \textit{Symposium Materials} at 202 n.80) (suggesting the need for an evidentiary hearing on the estoppel argument).

\textsuperscript{114} Gonzalez v. State, 195 S.W. 3d 114 (Tex Crim. App. 2006).

and theft. The facts, fairly interpreted, do not show intent to prevent witness testimony. The defendant entered a home near that of his grandmother and fatally wounded Maria and Baldomero Herrera before stealing their truck. Mrs. Herrera identified the defendant to the responding officer by his unusual hair color and his relationship to a neighbor. Gonzalez was arrested the same day driving the pickup truck with Mr. Herrera’s address book in his pocket and Mrs. Herrera’s blood on his clothes. Other than seeing each other in the area, the defendant and his victims apparently had no prior contact, and there was no pending matter about which they would testify against the defendant. Nevertheless, the court found that the killing was intended to prevent testimony simply because the victims could identify him.

The court’s conclusion was based on three elements: (1) the victims could identify the defendant because of his distinctive hair color and relationship to a neighbor; (2) the defendant entered their home without a disguise; and (3) the murders were particularly violent, as both victims were shot at close range. None of these factors is characteristic of intent to prevent testimony, nor do they distinguish between a murder motivated by expected testimony and one motivated by greed, rage, or revenge. In fact, the same arguments support a finding of intent to prevent testimony in every homicide. Here the victims did have a preexisting basis to identify the defendant, but all surviving crime victims have the potential to identify the perpetrator. Therefore, if these victims are killed in the course of a crime, all defendants can be assumed to have the requisite intent to prevent testimony. Likewise, the defendant’s lack of disguise is not a reliable indicator of the defendant’s motivation for the crime. Here, the court found the lack of disguise proof of the defendant’s awareness of the risk of identification, which

\[117\] Id.
\[118\] Id. at *1-3.
\[119\] Id. at *7.
\[120\] Id.
supplied a motive to satisfy the estoppel rule. However, a defendant’s decision to wear a disguise would reflect greater concern about possible identification, and arguably an even greater motive to silence the witness. Intent, then, can be found regardless of the presence or absence of a disguise. Finally, and unfortunately, murders, particularly first-degree double murders by gunshot, are inevitably violent acts. Characterizing a murder as a violent act is not an adequate premise for a finding of intent to prevent the victims from testifying. The court clearly assumed the intent element by an extremely tenuous causal chain that will supply the requisite intent for estoppel by wrongdoing in any violent homicide.

The Texas Court of Criminal Appeals, Texas’ highest criminal court, had obvious reasons for its specious reasoning. The assumption of witness tampering intent allowed the court to avoid both speaking on an issue the Supreme Court had yet to address and reversing a conviction for a heinous crime when there was little doubt of the defendant’s guilt. Even assuming that these are legitimate motives, the case also illustrates the pressures that courts face in ruling on proof of intent and the strong desire to find a way to admit evidence that is clearly testimonial. Routine acceptance of such reasoning will leave the intent element with little meaning or effect, and estoppel by wrongdoing will swallow Crawford’s revitalized Confrontation Clause in domestic violence cases. Similarly, a standard of causation that requires only that potential testimony be a factor in the defendant’s act eliminates the causation element even when there are other, much more likely reasons for the act.

The more common and more difficult question of causation arises when the witness could testify but does not, leaving the court to determine whether the witness’ refusal is due to defendant’s acts or the witness’ own unrelated reasons. The witness’ motivation is always an issue, even if the Court ultimately concludes that estoppel by wrongdoing does not require the defendant to intend to prevent the witness from testifying. In every claim of confrontation estoppel there must always be proof that the defendant’s act was the procuring cause of the witness’ refusal to testify. Estoppel cannot be applied if
the defendant’s threats were made well before the crime against the potential witness\textsuperscript{121} or were not received by the victim.\textsuperscript{122} Likewise, when the witness refuses to testify for his own reasons, the defendant cannot be estopped to object to the hearsay.\textsuperscript{123}

Domestic violence prosecutions are the most problematic because many victims—by some accounts 80 to 90 percent—do not cooperate with the prosecution.\textsuperscript{124} Consequently, some have

\begin{footnotesize}
\begin{enumerate}
  \item State v. Romero, 133 P.3d 842, 856 (N.M. Ct. App. 2006), aff’d, No. 29,690 (N.M. March 15, 2007), http://www.supremecourt.nm.org/
The slip opinion presents these facts because the defendant’s threats were made three months before the couple met during the holidays. Despite the fact that the defendant had threatened her about going to the police three months before, it strains logic to conclude that the homicide involved in the case was related to these threats in any way. The New Mexico Supreme Court remanded the case for a determination of the defendant’s intent while noting that it was unlikely that he had the intent to prevent her from testifying. \textit{Id.} at 15.
  \item State v. Washington, 521 N.W.2d 21, 42 (Minn. 1994) (finding no proof that declarant heard threats).
  \item United States v. Williamson, 792 F. Supp. 805, 810 (M.D. Ga. 1992) (noting that evidence that defendant paid witness’ attorneys fees insufficient to show that defendant had procured witness’ unavailability through witness’ assertion of Fifth Amendment because he had independent reason to refuse to testify because testimony could affect pending appeal), \textit{aff’d}, 981 F.2d 1262 (11th Cir. 1992), \textit{rev’d on other grounds}, 512 U.S. 594 (1994).
  \item While it is uncontested that many domestic violence victims do not cooperate, the authorities do not define what cooperation means or indicate what percentage may be attributed to the defendant or to the election of the victim. \textit{See}, \textit{e.g.}, People v. Brown, 94 P.3d 574, 576 (Cal. 2004) (noting that an expert testified that 80-85 percent of victims recant at some point); People v. Gomez, 85 Cal. Rptr. 2d 101, 105 (Cal. Ct. App. 1999) (noting that an expert witness testified that 80 percent of domestic violence witnesses recant, change, or minimize the incident); Douglas E. Beloof & Joel Shapiro, \textit{Let the Truth be Told; Proposed Hearsay Exceptions to Admit Domestic Violence Victims’ Out of Court Statements As Substantive Evidence}, 11 \textit{COLUM J. GENDER & L.} 1, 3-4 (2002) (citing expert testimony); Lisa Marie De Sanctis, \textit{Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence}, 8 \textit{YALE J. L. & FEMINISM} 359, 367 (1996) (citing interview with prosecutor in contact with expert witnesses throughout the country)
\end{enumerate}
\end{footnotesize}
argued that a battering relationship should be sufficient to conclude that the defendant was the cause of the witness’ decision, and consequently he has no right of confrontation regarding that victim’s hearsay. This argument is wrong in theory and in practice because it necessarily requires evidence that every battering relationship produces unavailability. Without a precise one-to-one relationship between abuse and unavailability, an unknown number of defendants would arbitrarily lose their Sixth Amendment rights. There is no dispute that a large number of victims in battering relationships do not testify, but correlation is not causation.

Logically, there are three potential causes for a witness’ failure to testify when available: (1) the defendant’s actions; (2) the witness’s independent decision; and (3) actions of third parties or other intervening events, including the state’s failure to bring the witness to court. Commentators recognize that defendants are not the only cause of the failure of witnesses to testify and that witnesses often refuse to testify because of legitimate concerns about privacy, possible self-incrimination, prior inconsistent statements, or the desirability of preserving pre-existing relationships. Mere reluctance to testify should


126 United States v. Olivares, 1997 WL 257479, at *2 (S.D.N.Y 2004) (holding that the government is responsible for abscending witness’ absence when it ignored statute requiring potential witness awaiting sentencing to be held pending sentence and released him).


128 Maryland v. Craig, 497 U.S. 836, 856 (1990) (finding that special protections for child witness are not available solely because of the normal anxiety of testifying); Contreras v. State, 910 So. 2d 901 (Fla. Dis. Ct. App. 2005) (holding that child witness is not unavailable because of generalized claims of trauma and mental anguish from testifying).
not be chargeable to the defendant under any reasonable theory of causation. The advocates for automatic loss of confrontation rights must establish this strong causal link to support that proposition.\textsuperscript{129}

As argued above, a causation test that is satisfied only by proof that the defendant’s act was “a” factor for the witness’ unavailability is too easily satisfied. There are great pressures to minimize the causal link because of the perceived need for the testimony, so it is necessary to clearly articulate this link if the intent element is to be meaningful. Proper application of the burden of proof standard requires articulating how it should be applied in this context. The preponderance standard is often viewed as requiring that the critical fact be “more likely than not” or “more probably true than not.”\textsuperscript{130} If the defendant’s conduct is more likely than not the cause of the witness’ unavailability, then other potential causes are by definition less likely, and vice versa. I suggest that courts articulate and apply a “but for” test when evaluating both the defendant’s motivation for acting against a person and the witness’ failure to testify. This test asks whether the defendant would have acted against the witness but for the potential for testimony against him. Similarly, it asks whether the witness would have testified but for the defendant’s intimidation. By articulating a test that focuses on the predominant factor, rather than just “a” factor,

\textsuperscript{129} Distinguishable from the argument that the battering relationship is per se proof of causation for witness unavailability, is the proposition that evidence of the nature of the battering relationship may be part of the proof that establishes the defendant’s responsibility for the witness’ refusal to testify. Professor Tuerkheimer argues persuasively that an understanding of the domestic relationship is essential to a proper evaluation of the evidence about the cause of a refusal to testify, and places in context acts that otherwise might seem benign or unrelated to the potential testimony. Deborah Tuerkheimer, \textit{A Relational Approach to Confrontation}, SYMPOSIUM MATERIALS at 177. Professor Tuerkheimer makes clear that specific causation must be established between the defendant and the victim’s refusal to testify, and as I understand her position, views evidence of the battering relationship as necessary to understand the evidence, but not sufficient in itself to establish the cause of the witness’ refusal to testify. \textit{Id} at 202.

\textsuperscript{130} Mueller & Kirkpatrick, EVIDENCE, §3.3 at 109 (3d ed. 2003).
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the courts can directly address the causal link and will be less likely to marginalize the intent element, and more likely to seek evidence to support the conclusion.131

Of course, issues of proximate cause are difficult to capture completely in words, many issues of fact are difficult to quantify, and any language is likely to be somewhat imprecise. However, such language is important because it provides guidance to the court in close cases. Articulating a test that emphasizes the causal link between the defendant and the witness is particularly important with confrontation estoppel because admissibility issues are subject to review under the abuse of discretion standard, which is highly deferential to the trial judge.132 For all but the rare case, the trial judge’s decision on questions of causation will survive on appeal, and words that convey more than a minimal connection are necessary to prevent an over-broad estoppel by wrongdoing doctrine.

Another reason for a clearly articulated causation test is the state’s role in the trial process. The Sixth Amendment places the obligation on the government to produce the witnesses at trial.133 Although the constitutional standard is low and requires only a good faith effort to obtain the presence of the witness,134 a minimal causation element for estoppel by wrongdoing further reduces the government’s obligation, and has the perverse incentive of undermining the government’s desire to search out and find the witness when testimonial hearsay is available. Officers and prosecutors need not further investigate the crime, and the trial may be easier because the prosecution introduces

131 See United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982) (remanding for hearing to determine if defendant in custody was responsible for murder of witness), on remand, 561 F. Supp. 1114 (E.D.N.Y. 1983) (ruling that evidence of prior statements and acts supported waiver of hearsay and constitutional rights) aff’d, 722 F.2d 13 (2d Cir. 1983) (affirming after remand).
133 Barber v. Paige, 390 U.S. 719 (1968) (noting that the government was required to produce witness whose location was known).
testimonial hearsay through law enforcement personnel who may be perceived to be neutral and more credible than the declarant, and the hearsay cannot be modified or recanted by the absent declarant. Several commentators at the *Crawford* symposium noted the desirability of an enhanced standard for determining the unavailability of a witness. A strong causal requirement for confrontation estoppel advances this goal and emphasizes the need for sufficient proof to support confrontation estoppel.

C. Declarant Hearsay as the Foundation for Admissibility of Victim Hearsay

Justice Scalia noted in *Davis* that other courts have considered hearsay, including victims’ statements, in determining the elements of confrontation estoppel. In many cases, the declarant’s own statements are the only proof establishing the defendant’s responsibility for the witness’ absence and in particular the fact that the defendant’s act was motivated by a desire to prevent testimony. Unresolved is whether the declarant’s hearsay statements can be the sole

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135 Muller & Kirpatrick opine the following:

Of course a prosecutor who has useful hearsay might prefer to offer it, since bringing the speaker to court may be hard or costly or time-consuming. Disappointing as well: The speaker may be frightened or reluctant, and testifying visibly on the record under oath and subject to cross may persuade him to back away from what was more easily said in private to a sympathetic audience of prosecutors and agents. Hence prosecutors sometimes prefer to offer statements rather than produce the speaker, and it is not always easy to distinguish between the effort one might make to find and produce a speaker and an effort to show he cannot be produced.


136 *Davis*, 126 S. Ct. at 2273; *FED. R. EVID.* 104(a).

137 United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982); United States v. Balano, 618 F.2d 624, 628-29 (10th Cir. 1979); United States v. Carlson, 547 F.2d 1346, 1353 (8th Cir. 1976).
foundation for their admissibility. Requiring independent evidence avoids the circular argument that inadmissible hearsay can be the foundation for admitting the otherwise inadmissible hearsay. More importantly, independent evidence enhances the reliability of the admissibility decision and of the evidence admitted, and becomes particularly important with confrontation estoppel because this exception is not founded on any claim that the hearsay is reliable, or that the circumstances in which the statements were made are inherently reliable. In fact, these testimonial statements are often made by witnesses with conflicting interests. These arguments supported the amendment of Federal Rule 801(d)(2) in 1997 to provide that the hearsay statement of a co-conspirator, agent, or employee was not sufficient to establish the relationship necessary for admission against the principal.

138 Compare U.S. v. Emery, 186 F.3d 921, 927 (8th Cir. 1999) (expressing doubt that foundation requires evidence independent of the hearsay and finding sufficient independent evidence) with United States v. White, 116 F.3d 903, 914 (D.C. Cir. 1997) (leaving undecided whether foundation can rest exclusively on hearsay). The testimony sometimes includes double hearsay. See Steele v. Taylor, 684 F.2d 1193, 1207 (6th Cir. 1982) (Taylor, J., dissenting) (noting that declarant’s statements were of what she had heard other defendants say); Cotto v. Herbert, 331 F.3d 217, 226 (2d Cir. 2003) (noting that officers testified to the defendant’s statements that he had heard that his family was threatened and to the statements of the defendant’s mother and sister about threats they received).

139 Many declarants in drug and organized crime cases are co-conspirators who have their own reasons for cooperating with the government that may affect the reliability of their statements. Flanagan, Forfeiture by Wrongdoing, supra note 5 at 471 n. 71-72. See State v. Romero, 133 P.3d 842, 863-64 (N.M. 2006), cert. denied 134 P.3d 120 (N.M. 2006) (noting that untrue and self-serving statements are made in domestic violence prosecutions and citing cases).

140 The Advisory Committee on the Federal Rules recommended adopting the amendment to Rule 801(d)(2) and Rule 804(b)(6) at the same meeting but in separate discussions without any mention or indication in the minutes that the members saw the topics as related. Certainly there is no indication that the Committee rejected a requirement in Rule 804(b)(6) that there be some independent evidence of the predicate facts that support admitting the hearsay statements. Advisory Committee on Evidence Rules, Minutes of the Meeting of May 4-5 1995.
The need for a clear articulation of the nexus between act and unavailability of the witness, and the need for a foundation based on more than hearsay itself, also suggests that a pre-trial hearing on the issue of confrontation estoppel is necessary. The Court highlighted, but did not decide the issue in *Davis*.\(^{141}\)

While an absolute rule requiring a hearing may generate problems in isolated cases, the arguments in favor of a hearing are persuasive. The major problems in the application of confrontation estoppel revolve around proof of the appropriate connection between the defendant’s acts and the witness’ unavailability. In every case there must be proof of intent to prevent testimony, and likewise, if the victim refuses to testify that it was the result of that intimidation. The case law suggests that when hearings are held and the issues addressed directly, sufficient evidence to support the forfeiture doctrine is available.\(^{142}\)

**D. Estoppel by Wrongdoing and Rule 804(a)**

The finding that the defendant procured the witness’ absence bars any objection to victim hearsay, and also precludes the defendant from introducing other hearsay statements of the unavailable victim under Rule 804(a).\(^{143}\)

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\(^{141}\) *Davis*, 126 S. Ct. at 2279-80.

\(^{142}\) Flanagan, *Forfeiture by Wrongdoing*, supra note 5, at 506 (reviewing evidence of Mastrangelo’s involvement developed on remand).

\(^{143}\) FED. R. EVID. 804(a)(5) (detailing that a witness is not unavailable if absence is procured by proponent of hearsay). The defendant may offer victim hearsay admissible under Rules 801, 803, or 807 because those rules do not have an unavailability requirement. Rule 106 allows the defendant to offer other portions of a written or recorded hearsay statement that are necessary to place the previously offered testimony in context. This is apparently so even if the latter statements are otherwise inadmissible. United States v. Houlihan, 92 F.3d 1271, 1283 (1st Cir. 1996); *See also* Dale A. Nance, *Verbal Completeness and Exclusionary Rules under the Federal Rules of Evidence*, 75 TEX. L. REV. 51 (1996). It does not authorize the admission of other parts of the statements that are neither explanatory nor relevant to the previously admitted portions of the testimony. United States v. Marin, 669 F.2d 73, 84-85 (2d Cir. 1982); United States v. Houlihan, 887 F. Supp.
that exculpates the defendant is barred because the prosecution retains its rights to object to hearsay proffered by the defendant.\textsuperscript{144} Holmes v. South Carolina\textsuperscript{145} suggests that this evidentiary limitation is unconstitutional. There, the Court held arbitrary and unconstitutional South Carolina’s rule barring the defendant from introducing evidence of a third party’s responsibility for the crime when the prosecution’s evidence of guilt was strong. The rule was justified on relevance grounds, but as the Court recognized, the fact that the prosecution’s evidence of guilt, if credited, was strong, does not mean that the defense evidence was not relevant and probative; in fact, when considered by a trier of fact, it might undermine the perceived strength of the government’s case.\textsuperscript{146}

The restriction in Rule 804(a) serves a legitimate function when the wrongdoer proffers the absent witness testimony first. At the time, it prevents that party from creating and then taking advantage of a witness’s absence to introduce hearsay, a less reliable form of evidence, and arguably provides some deterrence against such wrongdoing by others contemplating similar action. When applied after the prosecution has admitted victim hearsay under the estoppel rationale, the rule suffers the same defects found in Holmes. First, exclusion is not based on relevance or other Rule 403 grounds, but on the preliminary finding (by a preponderance of the evidence) that the defendant is responsible for the witness’s absence. Second, as in Holmes, it is arbitrary to argue that the strength of the government’s case justifies excluding the victim’s exculpatory statements when offered by the defendant. The strength of the government’s case can only be evaluated by considering all of the evidence, and the defense evidence might significantly undercut that finding. Even

\textsuperscript{352, 366 (D. Mass. 1995).}

\textsuperscript{144} United States v. White, 838 F. Supp. 618, 625 n.10 (D.D.C. 1993) (finding that only defendant waived right); Sweet v. United States, 756 A.2d 366, 379 (D.C. Cir. 2000) (holding that a defendant responsible for witness’s absence may not admit absent witness, exculpatory statement); Wisconsin v. Frambs, 460 N.W.2d 811 (Wis. 1990) (same).

\textsuperscript{145} 126 S. Ct. 1727 (2006).

\textsuperscript{146} Id. at 1734-35.
if the judge considered all of the victim’s statements in deciding
the estoppel issue, the trier of fact must make the ultimate
decision of guilt and innocence (beyond a reasonable doubt) and
the rule prevents the jury from hearing admittedly relevant,
probative, and exculpatory evidence that undercuts the
government’s case. This infringes on the defendant’s right to
present a defense, whether found in the Due Process Clause or
the Sixth Amendment. The exclusion of exculpatory victim
statements cannot be sustained by arguing that the rule retains a
legitimate purpose at this point. The purpose of the rule has
been served because the defendant was not able to proffer the
victim’s statements first. As for deterrence, it strains logic to
argue that the exclusion of evidence some months after the
alleged wrongdoing serves any deterrence function for the
defendant, nor does it genuinely serve a deterrent function for
others who are unlikely to be deterred by the better known and
more severe criminal law sanctions. Whatever shreds of
justification survive the introduction of a victim’s testimony
cannot outweigh the constitutional right to present a defense that
includes other relevant, and potentially contradictory or
exculpatory statements of the absent witness.

Holmes, as applied to the last sentence of Rule 804(a),
means that the defendant is not barred from asserting that the
declarant is unavailable under that Rule. Admissibility of the
absent victim’s statement depends upon satisfying one of the
Rule 804 exceptions. Prior testimony, dying declarations, and
statements against interest are now available to the defendant,
and may be the basis of admitting other victim hearsay. The
exception for prior testimony may be particularly useful because
many prior victim statements might have been made in earlier
proceedings, including preliminary hearings and grand juries.

147 Id. at 1731.
148 Rule 804(b)(1) requires that the testimony be in a proceeding in
which the party against whom the testimony is offered “had an opportunity or
similar motive to develop the testimony by direct, cross or redirect
examination.” United States v. Foster, 128 F.3d 949, 954 (6th Cir. 1997).
There is case authority that grand jury testimony can be admitted against the
government. Id. at 954-56.
Similarly, many victim statements arise in circumstances where the exculpatory value to the defendant exposes the declarant to potential criminal or civil prosecution.

This issue also throws some light on the so-called “reflexive” use of victim hearsay in cases in which the defendant is charged with the crime that produced the witness’ unavailability. The concern is that the pre-trial ruling on the defendant’s responsibility for the crime will affect the trial of the case. The usual response is that the evidence decision is made by the judge, and the finding of guilt is made by the jury so that one does not affect the other. Rule 804 provides one instance in which the pre-trial finding does affect the jury by excluding exculpatory evidence offered by the defendant under that Rule, and where the judge would be aware of evidence favorable to the defendant but the jury would not. The solution is not to bar the reflexive use of the victim’s statements, but to admit all such victim statements that satisfy the rule regardless of the limitation in Rule 804(a).

CONCLUSION

Justice Scalia’s decision to leave the key issues of the definition of testimonial and the scope of estoppel by wrongdoing to future opinions has led to great uncertainty about Crawford’s application in many circumstances. Davis provides a strong indication on the scope of estoppel by wrongdoing and all but holds that it is aimed at witness tampering and cannot be expanded to apply when the defendant’s actions have the

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149 Friedman, Chutzpa, supra note 5, at 521-25.
150 Id. at 23-24. Courts have had little problem with the reflexive use of victim hearsay. See e.g., United States v. Thai, 29 F.3d 785, 814 (2d Cir. 1994) (murder as part of extortion); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (showing conspiracy to import heroin and witness tampering); United States v. Houlihan, 887 F. Supp. 352, 355-56 (D. Mass. 1995) (showing drug conspiracy and murder in furtherance of racketeering); United States v. White, 838 F. Supp. 618, 625 (D.D.C. 1993) (noting that declarant’s statement were admissible as if declarant was testifying in court). Generally the jury would be aware of the reasons for the declarant’s absence in those cases.
unintended effect of making a witness unavailable. This will be controversial because *Crawford* has its greatest impact on domestic violence prosecutions and there is great pressure to admit the absent victim testimony. At the same time, confrontation is a core value of the Constitution. *Crawford* has made the Confrontation Clause meaningful as to testimonial statements. Moreover, the Court seems to have rejected an argument based solely on the need for the testimony. The need argument was raised, but as Justice Scalia noted in *Davis*: “We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.”¹⁵¹ Constitutional rights that provide no protection have no meaning. As the constitutional doctrine of estoppel by wrongdoing develops, the courts will have to address this intent element, and the nexus between the defendant’s acts and the witness’ decision not to appear or testify. Proper proof of this link, as well as the procedural protections of a pretrial hearing and a requirement of evidence in addition to the hearsay statement itself to support admissibility appear necessary to the proper operation of estoppel by wrongdoing.

¹⁵¹ *Davis*, 126 S. Ct. at 2280 (citation omitted).