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Introduction to the Symposium

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CRAWFORD AND BEYOND: REVISITED IN DIALOGUE

INTRODUCTION

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

*Robert M. Pitler***

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

* YOGI BERRA, *THE YOGI BOOK: I DIDN’T REALLY SAY EVERYTHING I SAID* 30 (Workman Publishing 1998).

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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).

³ 541 U.S. 36 (2004).

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," *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

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 *Id.* at 61.

⁷ 541 U.S. at 53–54.

⁸ 126 S.Ct. 2266 (2006).

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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,

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.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.¹⁶ In particular, throughout the Crawford opinion, reference is made to the 1603 treason trial of Sir Walter Raleigh¹⁷ 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.¹⁸

¹⁵ *Id.*

¹⁶ See JAMES FITZJAMES STEPHEN, 1 A HISTORY OF THE COMMON LAW OF ENGLAND, 325 (London, McMillan & Co. 1883).

¹⁷ See 541 U.S. at 44, 50, 52, 62.

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. *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. 2 HOW. ST. TR. at 25. The confrontation and hearsay implications of this statements is explored later in this Symposium. See Robert P. Mosteller, *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., *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., *supra* note 18 at 16, 19, 22; JARDINE, *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, *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., *supra* note 18, at 20; JARDINE, *supra* note 18, at 429, 430, 436. Raleigh’s post-conviction activities tell a fascinating fourteen-year story which is briefly recounted. Introduction, *supra* note 18, at 8 n.9; see also 2 How. St. Tr., *supra* note 18, at 31–33, 55–59; JARDINE, *supra* note 18, at 476–79.

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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

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

* * *

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.”).

²⁵ *Crawford*, 541 U.S. at 53–54.

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.

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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.²⁹ Accordingly, *Crawford's* testimonial/nontestimonial formulation “does not reflect the Framers’ design,”³⁰ and permitting the introduction of “nontestimonial” hearsay is “inconsistent with the basic premises that shaped the Framers’ understanding of the right.”³¹ According to Professor Davies, only two kinds of out-of-court statements were admissible: a sworn statement of an unavailable witness³² and a dying declaration—the functional equivalent of a sworn statement.³³ 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.³⁴

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.”³⁵ Professor Jonakait proceeds to examine extensively two early American cases,³⁶ concluding that the American courts of the Framing Era enforced a general ban on hearsay as being “no testimony”³⁷ and recognized very few hearsay exceptions.³⁸

Moreover, Professor Jonakait points out that nothing in the

²⁹ 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, 352 (2007).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 354.

³³ *Id.*

³⁴ *Id.* at 448.

³⁵ Randolph N. Jonakait, *The (Futile) Search for a Common Law Right of Confrontation: Beyond Brasier’s Irrelevance to (Perhaps) Relevant American Cases*, 15 J.L. & POL’Y 471, 473 (2007).

³⁶ *Id.* at 478–83, 484–93.

³⁷ *Id.* at 491.

³⁸ *Id.* at 493.

Framing-Era cases reflects *Crawford's* testimonial/nontestimonial distinction.³⁹ Professor Jonakait acknowledges that the early American cases do not speak directly to the right of confrontation,⁴⁰ 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.⁴¹

TESTIMONIAL STATEMENTS

Crawford did not articulate an overarching definition of "testimonial," leaving that "for another day."⁴² 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."⁴³ *Davis*, like *Crawford*, did not provide a comprehensive definition of "testimonial."

The category of testimonial statements is not limited to those mentioned in *Crawford*.⁴⁴ Indeed, looking to an old, non-modern practice, *Davis* added to the testimonial list volunteered accusatory statements to the government.⁴⁵ 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

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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 *Davis* 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

was a prisoner when he wrote the letter, and the details of how it came to be written are nowhere set forth except that at trial, one commissioner stated the letter was voluntary “and not extracted from the Lord Cobham upon any hopes of promise or pardon.” 2 HOW. ST. TR., *supra* note 18, at 29. In addition to a letter, a volunteered statement could take the form of an affidavit, an in-person oral statement, an audio or video recording. See *Hammon v. Indiana*, No. 05-5705, Oral Argument, Mar. 20, 2006, 32–37 (comments and questions of Justices Scalia, Souter and Chief Justice Roberts); see also *State v. Jensen*, 727 N.W.2d 518, 527–28, 528–29 (Wis. 2007) (holding testimonial both voice-mail messages to police by victim that defendant was trying to kill her, and statements in the victim’s letter given to a neighbor with instructions to turn it over to the police if anything happened to her).

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 *Bourjaily 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 (“[We 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.

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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."⁵⁴ 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"⁵⁵

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."⁵⁶ Put another way, "the evidentiary products of the *ex parte* communications [of Amy Hammon and Sylvia Crawford] aligned perfectly with their courtroom analogues."⁵⁷ Notably, the *Davis* majority rejected a more flexible approach to the introduction of interrogation-produced statements in a domestic violence setting,⁵⁸ 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.

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the confrontation requirement to be developed by the courts.”⁵⁹

* * *

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.⁶⁰ 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.”⁶¹ 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.⁶² 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.⁶³ 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.⁶⁴

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.*”⁶⁵

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

⁵⁹ Crawford v. Washington, 541 U.S. 36, 54 (2004).

⁶⁰ Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and its Loss*, 15 J.L. & POL’Y 725, 737 (2007).

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.

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(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

* * *

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.⁷⁴ 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.⁷⁵ 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.⁷⁶

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.⁷⁷ 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.”⁷⁸ 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.⁷⁹ He concludes that his approach would be less prone to manipulation by the prosecution-favoring lower courts⁸⁰ and that nothing in the hypothetical reasonable person approach is in any way inconsistent with *Davis*.⁸¹

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.

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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.⁸² 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.⁸³

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.⁸⁴ Professor Raeder is also concerned that the Court’s objective standard could be manipulated to mask improper motives by of law enforcement officials.⁸⁵

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.”⁸⁶ 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.⁸⁷ 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.⁸⁸

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

⁸² *Id.* at 563.

⁸³ *Id.* at 563–64.

⁸⁴ Myrna Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POLY 759, 775-76 (2007).

⁸⁵ *Id.* at 777.

⁸⁶ Jeffrey Fisher, *What Happened and What is Happening to the Confrontation Clause?*, 15 J.L. & POL’Y 587, 590 (2007).

⁸⁷ *Id.* at 617–18.

⁸⁸ *Id.*

encompasses statements describing ongoing activity⁸⁹ as well as statements “made immediately thereafter in direct consequence to these occurrences but excluding descriptions of completely past occurrences.”⁹⁰ 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:⁹¹ answering questions rather than volunteering statements to an official.⁹² 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.⁹³

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.⁹⁴ Professor Kirst explains that the different outcomes in *Davis* and *Hammon* turn on whether the speaker was facing an ongoing emergency when she spoke.⁹⁵ 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,⁹⁶ as well as the identity of the declarant, *e.g.* victim or bystander,⁹⁷ 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.

⁹⁴ Roger Kirst, *Confrontation Rules after Davis v. Washington*, 15 J.L. & POL’Y 635, 636 (2007).

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 unacceptably 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

¹⁰⁸ *Davis v. Washington*, 126 S.Ct. 2266, 2277 (2006).

¹⁰⁹ *Id.*

¹¹⁰ 1 Leach 199, 168 Eng. Rep. 202 (1779).

¹¹¹ *Davis*, 126 S.Ct. at 2277.

¹¹² 168 Eng.Rep. 202 (1779).

¹¹³ *Davis*, 126 S.Ct. at 2277.

¹¹⁴ Friedman, *supra* note 74, at 564.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 564–65 n.43.

¹¹⁷ Fisher, *supra* note 86, at 593. See also Robert B. Mosteller, *Testing the Testimonial Concept, and Exceptions to Confrontation: “A Little Child Shall Lead*

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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.”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.”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.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 1789.¹²¹ 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 the mother and lodger,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.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.¹²⁴ He does so because, as far as the Framers could have

Them,” 82 IND. L.J. 909, 927 (2007) (the child’s statement to her mother was testimony and could not be received because the child was not under oath).

¹¹⁸ Friedman, *supra* note 74, at 565.

¹¹⁹ *Id.*

¹²⁰ Davies, *supra* note 29, at 428.

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.

¹²² See Davies, *supra* note 29, at 438–39 n.217.

¹²³ *Id.* at 438–39.

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.”¹²⁵

Finally, Professor Davies views the 1815 version of *Brasier*, regarding the mother’s statements, as having neither said nor implied anything about the distinction between testimonial and nontestimonial evidence.¹²⁶ Rather, he concludes that the later version of the *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.”¹²⁷

Professor Randolph Jonakait concludes that *Brasier* reflects nothing more than the principle “that out-of-court statements from an incompetent witness could not be admitted in a criminal trial.”¹²⁸ Moreover, “[*Brasier*] says nothing about the hearsay rule generally, hearsay exceptions or the right of confrontation”;¹²⁹ it takes “a highly creative, and perhaps a highly anachronistic eye to find a confrontation meaning in *Brasier*.”¹³⁰

Finally, on the meaning of *Brasier*, Anthony Franze, a co-author of an amicus brief on behalf of the National Association of Counsel for Children in *Davis v. Washington*, offers a slightly different perspective in his Symposium article.¹³¹ Mr. Franze reviews the common law before and after *Brasier*, as well as treatises and subsequent cases to see the meaning given to *Brasier* following its publication. From this, he concludes that *Brasier* has no place in confrontation doctrine.¹³²

¹²⁵ *Id.* at 444.

¹²⁶ *Id.* at 443–44.

¹²⁷ *Id.* at 444.

¹²⁸ Jonakait, *supra* note 35, at 474–77.

¹²⁹ *Id.* at 472.

¹³⁰ *Id.* at 474; *see also* Mosteller, *supra* note 117 at 931 (*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 [*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.”).

¹³¹ Anthony Franze, *The Confrontation Clause and Originalism’s Lessons from King v. Brasier*, 15 J.L. & POL’Y at 495 (2007).

¹³² *Id.* at 508–09.

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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.’”¹³³ 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.

¹³⁵ *Crawford v. Washington*, 541 U.S. 38, 51–52 (2004).

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* concurers, 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.

[criminal] consequences that can attend a deliberate falsehood.”¹⁴⁰ 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.¹⁴¹

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.¹⁴²

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.”¹⁴³ 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.¹⁴⁴

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

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.

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interrogation-produced statements.¹⁴⁵ 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 Friedman concludes that there is no rule that the testimonial nature of a statement turns on its formal nature.¹⁴⁶

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.¹⁴⁷

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.”¹⁴⁸ Neither the *Crawford* nor *Davis* majority opinions make any reference to public records or reports.¹⁴⁹ 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.

¹⁴⁵ *Id.* at 434 (*Davis* “clearly eliminated some of the extreme readings of formality and generally softened the requirement”).

¹⁴⁶ Friedman, *supra* note 74, at 571.

¹⁴⁷ *Id.*

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. *Id.* But see Davies, *supra* note 29, at 365–66 (questions the existence of any such exception during the Framing-Era).

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.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.”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.”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.¹⁵³ She first discusses the introduction of written forensic reports without the live testimony of a report's preparer.¹⁵⁴ Second, she examines situations in which a testifying expert seeks to disclose hearsay of other individuals¹⁵⁵ upon which the testifying expert has relied in reaching his or her conclusion.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.”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.

¹⁵³ Jennifer Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL'Y at 791, 797 (2007).

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).

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testimonial issue.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.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.”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.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 *Crawford*.¹⁶² Included among these suggestions is that perhaps in certain settings, the immutability of the *Crawford* principles should be modified.¹⁶³

Nontestimonial Statements

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

¹⁵⁸ Mnookin, *supra* note 153, at 794, 829–32.

¹⁵⁹ *See id.* at 806; *see generally, id.* at 809–842.

¹⁶⁰ *Id.* at 843.

¹⁶¹ *Id.* at 823–25 (citing *People v. Goldstein*, 6 N.Y.3d 119, 843 N.E.2d 727 (2005)).

¹⁶² *Id.* at 858–62.

¹⁶³ *Id.* at 860.

¹⁶⁴ 541 U.S. 36, 56 (2004).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 51.

remarks to an acquaintance,¹⁶⁷ statements by one prisoner to another blaming defendant for his incarceration,¹⁶⁸ and statements made unwittingly to an FBI informant.¹⁶⁹

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.¹⁷⁰ 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.¹⁷¹

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.”¹⁷² In so doing, he sought to put the final nail in

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 57, (citing *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970)); *accord Davis v. Washington*, 126 S.Ct. 2266, 2775 (2006).

¹⁶⁹ 541 U.S. at 58 (citing *Bourjailly v. United States*, 483 U.S. 171, 181-84 [1987]); *accord Davis*, 126 S.Ct. at 2275.

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.

¹⁷¹ *See, e.g., United States v. Hinton*, 423 F.3d 355, 358 n.1 (3d Cir. 2005); *United States v. Saget*, 377 F.3d 223, 227 (2d Cir. 2004), *cert denied*, 543 U.S. 1079, 125 S.Ct. 938 (2005); *State v. Manuel*, 697 N.W.2d 811, 814-28 (Wis. 2005).

¹⁷² *Davis v. Washington*, 126 S.Ct. 2266, 2274 (2006).

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the coffin.¹⁷³ Despite the relative clarity of the opinion,¹⁷⁴ some state and federal courts still use the *Roberts* framework to test the admissibility of nontestimonial statements.¹⁷⁵

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.¹⁷⁶ In that opinion, Justice Alito, for a unanimous Court, nailed the *Roberts* coffin shut.¹⁷⁷

* * *

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 CRIM. 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).

¹⁷⁶ 127 S.Ct. 1173, 1182–89 (2007).

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.¹⁷⁸ 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.¹⁷⁹

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,¹⁸⁰ the historical relationship between confrontation and hearsay,¹⁸¹ the ambiguities of the Raleigh trial involving three different hearsay kinds of statements,¹⁸² and the difficulty and uncertainty of translating history, channeling the Framers, and applying it all in a modern context.¹⁸³

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

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.

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statements must find another home.¹⁸⁴ That new home may be the Due Process Clause, which, unlike the Confrontation Clause, is concerned with the reliability of evidence.¹⁸⁵ Whether a hearsay statement is within a firmly-rooted hearsay exception has no relevance in a due process reliability inquiry.¹⁸⁶

Forfeiture

In dictum, *Crawford* accepted “the rule of forfeiture by wrongdoing [which] extinguishes confrontation claims on essentially equitable grounds.”¹⁸⁷ In *Davis*, the Court reiterated that acceptance.¹⁸⁸

As noted earlier, *Davis* rejected a more flexible testimonial standard for statements made by domestic violence victims.¹⁸⁹ 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

¹⁸⁴ See *id.* at 723.

¹⁸⁵ See *California v. Green*, 399 U.S. 149, 187 n.20 (1970) (Harlan, J. concurring) (“Due process does not permit a conviction . . . on . . . [hearsay] evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court. . . . [W]here the prosecution’s entire case is built upon hearsay testimony of an unavailable witness . . . the defendant would be entitled to a hearing on the reliability of the testimony.”); *White*, 502 U.S. at 363–64 (Thomas, J. concurring) (reliability of hearsay “is more properly a due process than a confrontation concern.”). See Andrew Z. Teslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20 CRIM. JUST. 39, 54 (Summer 2005) (post-*Crawford* assurance of reliability is embraced by free standing Due Process, *i.e.* not encompassed by a specific provision of the Bill of Rights). See generally Jerrold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court’s Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 397 (2001) (Supreme Court free-standing due process rulings “tend to focus on the value of adjudicatory fairness [looking primarily to protect against the conviction of the innocent].”).

¹⁸⁶ Teslitz, *supra* note 185, at 49.

¹⁸⁷ 541 U.S. 36, 62 (2004) (citing *Reynolds v. United States*, 98 U.S. 145, 158–59 (1897)).

¹⁸⁸ 126 S.Ct. 2266, 2280 (2006).

¹⁸⁹ *Id.*

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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

* * *

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.

¹⁹⁶ James Flanagan, *Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing: Davis v. Washington and the Necessity of the Defendant’s Intent to Intimidate the Witness*, 15 J.L. & POL’Y 863, 864–65 (2007).

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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.¹⁹⁷ 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.

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unavailable.²⁰⁴

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.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷ 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.²⁰⁸

* * *

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.²⁰⁹ Doubtless other cases will reach the Court, as it seeks, “in a process that will take decades,”²¹⁰ 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.”²¹¹

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.