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WHAT HAPPENED—AND WHAT IS HAPPENING—TO THE CONFRONTATION CLAUSE?

*Jeffrey L. Fisher**

INTRODUCTION

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

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

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

¹ 126 S. Ct. 2266 (2006).

² 541 U.S. 36 (2004).

³ U.S. CONST. amend. VI.

introducing out-of-court “testimonial” statements unless the declarants are unavailable and defendants had a prior opportunity to cross examine them.⁴

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

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

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

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

⁴ *Crawford*, 541 U.S. at 68.

⁵ *Id.* at 53.

⁶ *Davis*, 126 S. Ct. at 2278-79.

⁷ *Id.* at 2276-77.

⁸ *Id.* at 2273-74.

THE CONFRONTATION CLAUSE

589

dominant strains of reasoning to elucidate and apply its dichotomy—each of which, at least at first glance, does not seem entirely consistent with the others. First, the Court distinguished statements given during an “ongoing emergency” from those given after such an emergency was over.⁹ Second, the Court distinguished between statements describing “what is happening” from those describing “what happened.”¹⁰ Third, the Court distinguished between statements that do *not* operate as “‘a weaker substitute for live testimony’ at trial” from those that do align with their “courtroom analogues”—in other words, the Court distinguished those statements that do not function like witness testimony from those that “do precisely *what a witness does* on direct examination.”¹¹

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

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

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

¹⁰ See *id.* at 2276-78.

¹¹ *Davis*, 126 S. Ct. at 2277-78 (emphasis added).

¹² See *infra* notes 91-100 and accompanying text.

¹³ See *infra* notes 91-95 and accompanying text.

¹⁴ See *infra* note 101 and accompanying text (discussing this exception).

government to introduce confessions police obtain without *Miranda* warnings when the police interrogated the suspect in the midst of a public safety emergency.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*

¹⁵ See *New York v. Quarles*, 467 U.S. 649 (1984).

¹⁶ See *infra* notes 32-53 and accompanying text.

THE CONFRONTATION CLAUSE

591

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.¹⁷ Nevertheless, victims of alleged crimes during that period had opportunities—and often an obligation—to immediately

¹⁷ See, e.g., Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 314 (1998) (“Large-scale professional police forces did not exist prior to the latter half of the nineteenth century”); Crawford v. Washington, 541 U.S. 36, 53 (2004) (noting that “England did not have a professional police force until the 19th century”).

report felonious acts to local constables or bailiffs.¹⁸ Such an oral report was commonly called a “hue and cry.”¹⁹ 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.²⁰ 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.²¹

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

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.”).

THE CONFRONTATION CLAUSE

593

sometimes to initiate investigations.²²

There can be little doubt that the substance of hues and cries would have been persuasive evidence in criminal prosecutions—and sometimes critical evidence when declarants became unavailable to testify. Yet even though I detailed the hue and cry practice in my opening brief in *Davis*,²³ 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."²⁴ A later English case ruled that a constable "could not be asked [at trial] what name [an alleged robbery victim] mentioned" when the victim reported the crime to him.²⁵ Finally, shortly after the Bill of Rights was adopted, South Carolina's highest law court explained that:

Charges for criminal offences are most generally

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,

²⁶ State v. Hill, 20 S.C.L. 607, 1835 WL 1416, at *2 (S.C. App. 1835).

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,

THE CONFRONTATION CLAUSE

595

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.²⁹ 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,³⁰ 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.³¹ 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).

³¹ *See* Crawford v. Washington, 541 U.S. 36, 56 (2004) ("There is scant

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

evidence” that courts at the time of the Founding invoked any hearsay exceptions “to admit *testimonial* statements against the accused in a *criminal* case.”); see also *Printz v. United States*, 521 U.S. 898, 905 (1997) (detailing that the government’s failure to use a “highly attractive” practice for years following the Founding gives “reason to believe” the practice was considered unconstitutional).

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

³³ 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.”).

³⁵ Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1212-17 (2002).

³⁶ See *id.* at 1216 (“We suspect that, though the courts generally spoke in terms of the accuracy of statements, another consideration [namely, the

THE CONFRONTATION CLAUSE

597

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.³⁷ But courts did not allow hearsay statements into evidence when the statements did nothing more than describe completed events. In one case from California,³⁸ 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,³⁹ 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.”⁴⁰ In other words, “[t]he declaration was not the fact talking through the party, but the party's talk about the facts.”⁴¹ As such, it could not be used as substantive evidence against the accused.

Courts treated reports to private parties (which were much more common) the same way. In one typical case, a man was shot in his home. A few minutes later, family members and friends responded to help him. He told them to “[g]o for a doctor,” and then, in response to someone's question, identified

confrontation right's requirement that testimony be given subject to cross-examination] tended to motivate them.”).

³⁷ See *Crookham v. State*, 5 W. Va. 510 (1871).

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

599

offender.”⁴⁴ 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.⁴⁵ Thus, courts excluded not only victims’ reports of who had just shot them,⁴⁶ but also bystanders’ fresh reports of such events;⁴⁷ victims’ statements identifying their assailants moments after being stabbed;⁴⁸ a robbery victim’s statement identifying the perpetrator “directly after” an attack;⁴⁹ and other assault victims’ statements moments after receiving their injuries and identifying their attackers.⁵⁰

There were some state courts that did not define the *res gestae* concept quite as tightly as the majority did.⁵¹ In a much

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

⁴⁵ *Davidson*, 30 Vt. at 384-85.

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

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

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

⁴⁹ *Davidson*, 30 Vt. at 384-85.

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

⁵¹ *See* *State v. Murphy*, 17 A. 998 (1889) (holding that statements that were made 30 seconds and 10-15 minutes after the assault were admissible as within *res gestae* because “they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction as to form a

criticized decision, for instance, the Massachusetts Supreme Judicial Court upheld the admission of a stabbing victim's statement identifying his assailant after he ran to his neighbor's apartment upstairs to seek help.⁵² 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

THE CONFRONTATION CLAUSE

601

agreed with the majority of state courts concerning the governing standard, as encapsulated by Wharton's treatise:

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

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

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

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

⁵³ 1 Wharton's, *Criminal Evidence*, *supra* § 259. See *Werntz*, 29 A. at 597 (citing this passage); *Robinson*, 27 So. at 132 (following Wharton's treatise); *Kirby*, 77 Va. at 687 (same); *McPike*, 3 Cush. at 181 (statement fell inside *res gestae* because it was uttered “immediately after the occurrence”).

testimony”—namely, to “oath” and “cross-examination.”⁵⁴ 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.⁵⁵

Other courts invoked similar language.⁵⁶ 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

THE CONFRONTATION CLAUSE

603

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

fact.").

⁵⁷ State v. Murphy, 17 A. 998, 999 (R.I. 1889).

⁵⁸ 1 Horace Smith, ROSCOE'S DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES 28 (8th Am. ed. 1888); see also 3 WILLIAM OLDNALL RUSSELL, TREATISE ON CRIMES AND MISDEMEANORS 248-49 (9th ed. 1877). [hereinafter Russell]

⁵⁹ See Rex v. Clarke, 171 Eng. Rep. 633 (1817) (finding only fact of complaint admissible); Regina v. Walker, 174 Eng. Rep. 266 (1839) (same); Regina v. Osborne, 174 Eng. Rep. 622 (1842) (same); 3 Greenleaf, *supra* note 54, at § 213 (corroboration permissible); 3 Russell, *supra* note 58 at 249 (same).

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).

THE CONFRONTATION CLAUSE

605

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.”⁶⁴ 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.⁶⁵ 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.⁶⁶

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.⁶⁷ 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.⁶⁸ Even putting aside questions concerning the validity of Wigmore’s psychological assumptions,⁶⁹ Wigmore’s treatise took

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

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

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

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

⁶⁸ *Id.* § 1747, at 2250.

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

two further steps that were simply wrong.

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

⁷⁰ *Skin*. 402, 90 Eng. Rep. 179 (K.B. 1694).

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”).

⁷³ 90 Eng. Rep. at 179.

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;

THE CONFRONTATION CLAUSE

607

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 § 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.”⁷⁶

Crawford, however, expressly rejected Wigmore’s toothless view of the Confrontation Clause⁷⁷ and held that the Confrontation Clause does not depend on “the vagaries of the rules of evidence, much less [on] amorphous notions of ‘reliability.’”⁷⁸ 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.⁷⁹ 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.⁸⁰ 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,⁸¹ 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.

⁷⁶ *Id.* § 1397, at 1755.

⁷⁷ See *Crawford v. Washington*, 541 U.S. 36, 50-51, 67-68 (2004).

⁷⁸ *Id.* at 61.

⁷⁹ *Id.* at 2278.

⁸⁰ See Brief for Petitioner at 12.

⁸¹ See *supra* notes 51-53 and accompanying text.

THE CONFRONTATION CLAUSE

609

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.

THE CONFRONTATION CLAUSE

611

set of circumstances that “calls for immediate action” or “a pressing need” for assistance).⁹⁰ 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*,⁹¹ 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.⁹²

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.⁹³ 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.⁹⁴ As such, they had to be considered testimonial. Other courts have resolved similar cases with like reasoning.⁹⁵

⁹⁰ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 741 (1993).

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”).

⁹⁸ See *United States v. Clemmons*, 461 F.3d 1057 (8th Cir. 2006); *Head v. State*, 2006 WL 3489041 (Md. App. Dec. 5, 2006).

⁹⁹ *People v. Bradley*, 8 N.Y.3d 124 (N.Y. 2006).

THE CONFRONTATION CLAUSE

613

is nontestimonial.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."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

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

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

Id. at 127-28.

¹⁰¹ See *Georgia v. Randolph*, 126 S. Ct. 1515, 1525 (2006); *Brigham City v. Stuart*, 126 S. Ct. 1943, 1946-47 (2006).

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

¹⁰² *Davis v. Washington*, 126 S. Ct 2266, 2274 n.1 (2006).

¹⁰³ *Id.* at 2278.

¹⁰⁴ *Id.* at 2277.

THE CONFRONTATION CLAUSE

615

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

THE CONFRONTATION CLAUSE

617

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.¹⁰⁹ 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.¹¹⁰ 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

¹⁰⁹ See *State v. Blue*, 717 N.W.2d 558 (N.D. 2006) (reporting statements to private forensic interviewer working "in concert with or as an agent of" the police); *People v. Sharp*, ___ P.3d ___, 2006 WL 3635393 (Colo. App. Dec. 14, 2006); *State v. Pitt*, 147 P.3d 930 (Or. App. 2006); *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. App. 2004) (describing child's statement to child interview specialist at private victim assessment center); *In re Rolandis G.*, 817 N.E.2d 183 (Ill. App. 2004) (detailing child's statements to private child abuse investigator).

¹¹⁰ See *State v. Cannon*, ___ S.W.3d ___, 2006 WL 3787915 (Tenn. Crim. App. Dec. 27, 2006) (describing rape victim's statement to sexual assault center employee working in conjunction with police not testimonial); *People v. Geno*, 261 Mich. App. 624 (2004) (noting that a child's statement to director of Children's Assessment Center was not testimonial).

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.¹¹¹ 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

¹¹¹ Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 251-53 (2005).

THE CONFRONTATION CLAUSE

619

courtroom analogues.”¹¹² 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.

¹¹³ *See Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001) (referencing and approving of such laws).

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.¹¹⁵ 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.*¹¹⁶ 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).

¹¹⁶ 2006 WL 2474267 (Minn. App. Aug. 29, 2006).

THE CONFRONTATION CLAUSE

621

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

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

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

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

¹¹⁷ *Id.*

the suspects pending trial.¹¹⁸

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

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

C. Children’s Statements to Parents

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

¹¹⁸ See *Crawford*, 541 U.S. at 43-44, 53 (discussing the Marian statutes).

¹¹⁹ *Davis v. Washington*, 126 S. Ct. 2266, 2278 (2006).

¹²⁰ 448 U.S. 56 (1980).

THE CONFRONTATION CLAUSE

623

allegation sufficiently “trustworthy.”¹²¹ 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.¹²²

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.¹²³ 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.¹²⁴ 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.

¹²³ See, e.g., *Flores v. State*, 120 P.3d 1170 (Nev. 2005) (utilizing statements made to a police officer); *People v. Vigil*, 127 P.3d 916 (Colo. 2006) (utilizing statements made to a police officer); *Hobgood v. State*, 926 So. 2d 847 (Miss. 2006) (same); *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005) (utilizing statements to “forensic interviewer” testimonial); *People v. Warner*, 14 Cal. Rptr. 3d 419 (Cal. App. 2004) (working with statements made to a child interview specialist); *L.J.K. v. State*, 942 So. 2d 854 (Ala. Crim. App. 2005) (same).

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

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

would raise serious questions. *Cf.* *State v. Brigman*, 615 S.E.2d 21 (N.C. App. 2005) (holding that foster mother's taped interview with child was not testimonial).

¹²⁵ *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006) (quoting *United States v. Inadi*, 475 U.S. 387, 394 (2006)).

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

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

¹²⁸ *Id.* at 200.

THE CONFRONTATION CLAUSE

625

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.”¹²⁹ 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.”¹³⁰ That is, the statement was not part of the *res gestae*.

Some appellate courts may think that classifying childrens’ 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 childrens’ 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.¹³¹ 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).

THE CONFRONTATION CLAUSE

627

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.

628

*JOURNAL OF LAW AND POLICY**Appendix A**Transcript of 911 Call in Davis*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.

911 Operator: 911. Hello, 911.
[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

¹³² This appears at pages 8-13 of the Joint Appendix in *Davis*.

THE CONFRONTATION CLAUSE

629

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.

630 *JOURNAL OF LAW AND POLICY*

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.

THE CONFRONTATION CLAUSE

631

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.

632 *JOURNAL OF LAW AND POLICY*

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]

THE CONFRONTATION CLAUSE

633

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.

911 Operator: Okay. Bye-bye.