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Introduction to the Symposium

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CRAWFORD AND BEYOND: REVISITED IN DIALOGUE

INTRODUCTION

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

Robert M. Pitler**

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

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

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

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

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

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

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

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

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

\(^6\) Id. at 61.

\(^7\) 541 U.S. at 53–54.

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

THE CONSTITUTIONAL TEXT AND HISTORY

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

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

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

\(^9\) Crawford, 541 U.S. at 42.  
\(^10\) Id. at 51.  
\(^11\) Id. at 43.  
\(^12\) Id. at 43.  
\(^13\) Id. at 50.  
\(^14\) Id.
pointing to two particular settings.\footnote{Id.}

In the notorious political treason trials of the sixteenth and seventeenth centuries, judicial and executive officers of the Crown conducted secret private ex parte examinations of suspects, co-conspirators, accomplices, and other witnesses.\footnote{See James Fitzjames Stephen, 1 A History of the Common Law of England, 325 (London, McMillan & Co. 1883).} In particular, throughout the Crawford opinion, reference is made to the 1603 treason trial of Sir Walter Raleigh\footnote{See 541 U.S. at 44, 50, 52, 62.} at which an otherwise available co-conspirator, Lord Cobham, had “testified” through the introduction of his ex parte examination and two letters he sent to the judges presiding at the trial; Raleigh’s demands for Cobham to make his accusation in person proved futile.\footnote{The Trial of Sir Walter Raleigh, 2 Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783 1, 15–16, 23 (T.B. Howell ed., T.C. Hansard 1816) [hereinafter: How. St. Tr.]. It appears that torture or threats of it was used against other witnesses to secure oral or written statements against Raleigh. Id. at 19, 22. Unmentioned by Justice Scalia is a witness at the Raleigh trial, an ocean pilot named Dyer, who testified to a conversation he had in Lisbon with a Portuguese gentleman, who said that Raleigh and Cobham would cut the King’s throat before he could take the throne. 2 How. St. Tr. at 25. The confrontation and hearsay implications of this statements is explored later in this Symposium. See Robert P. Mosteller, Confrontation as Criminal Procedure: Crawford’s Birth Did Not Require that Roberts had to Die, 15 J.L. & Pol’y 685, 712–16 (2007); see also Introduction, Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past, 71 Brook. L. Rev. 1, 8 n.28 (2005) [hereinafter Introduction].}

\footnote{Id.}

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

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

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

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

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

21 *Crawford*, 541 U.S. at 45–46.

22 See id. at 44–47. But see Thomas Y. Davies, *What Did the Framers Know and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 Brook L. Rev. 105, 189–215, 120–188 (2005) (there is no historical basis for the testimonial/non-testimonial distinction and there was no rigid, common law cross-examination requirement regarding Marian examinations). Subsequently, Professor Davies and Robert Kry, who served as Justice Scalia’s law clerk for the October 2003 term of the Court (during which *Crawford* was decided), engaged in a spirited, illuminating and engrossing debate over the existence of a common law right of confrontation with respect to Marian examinations offered at trial. *Compare Robert Kry, Confrontation Under the Marian Statutes: A Reply to Professor Davies*, 72 Brook L. Rev. 493 (2006), with Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford’s Cross-examination Rule: A Reply to Mr. Kry*, 72 Brook. L. Rev. 557 (2007).

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

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

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

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In his article, University of Tennessee Professor Thomas Y.

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

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


26 Id. at 72.

27 Id. at 73.

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

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

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

Moreover, Professor Jonakait points out that nothing in the

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

TESTIMONIAL STATEMENTS

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

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

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39 Id. at 491 (noting a trial court’s statement that if a private journal of a defendant were produced, it would be admissible against its author but not against any other defendant).

40 Id.

41 Id.

42 Crawford, 541 U.S. at 75.

43 Id. at 68.

44 See id; Davis v. Washington, 126 S.Ct. 2266, 2273 (2006). Curiously, the Crawford opinion omitted affidavits and plea allocutions from the testimonial category, even though they were mentioned earlier in the opinion as being testimonial. 541 U.S. at 68. Subsequently in Davis, the Court recognized the testimonial nature of an affidavit, 126 S.Ct. at 2280, and other courts have had no difficulty holding plea colloquies testimonial. See, e.g., United States v. McClain, 377 F.3d 219, 222 (2d Cir. 2004).

45 Davis, 126 S.Ct. at 2274, n.1 (“The Framers were no more willing to exempt from cross-examination volunteered testimony . . . than they were to exempt answers to detailed interrogation.” Also noting that Lord Cobham’s letter to the commission at Raleigh’s trial was plainly not the product of sustained questioning). Still, Cobham
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this kind are certainly not produced by the kind of ex parte examination or abuse at which the Confrontation Clause is primarily, but, as the Court made clear, not exclusively, directed.46

A. Statements Elicited By Police Interrogation

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

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

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

47 Crawford, 541 U.S. at 52; see also Davis, 126 S.Ct. at 2278.
48 126 S.Ct. at 2278 n.5.
structured police questioning, would have qualified under any conceivable definition.\footnote{Crawford, 541 U.S. at 53 n.4. The use of “knowingly” implies that the declarant must know that he or she is speaking to law enforcement. See also Davis, 126 S.Ct. at 2275 (indicating the nontestimonial nature of statements made unwittingly to a government informant) (citing Bourjailly v. United States, 483 U.S. 171, 181–84 [1987]); see also Crawford, 541 U.S. at 58 (same). The Court, however, has never expressly held that there is such a requirement, and the issue remains open.}

Subsequently, in \textit{Davis}, Justice Scalia shifted focus from “police interrogations” to interrogations by “law enforcement officers,”\footnote{Davis, 126 S.Ct. at 2274.} observing that the \textit{Crawford} Court “. . . had immediately in mind . . . interrogations solely directed at establishing the facts of a past crime, in order to identify . . . the perpetrator.” Justice Scalia continued, “[t]he product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory . . . of the interrogating officer, is testimonial.”\footnote{Id. at 2276 (“. . . we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman \textit{recite} the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition.”) (emphasis in original).}

As noted, \textit{Davis}, like \textit{Crawford}, did not provide a comprehensive definition of testimonial, but it did further refine the meaning of police interrogation in two distinct settings, cautioning that its holding was limited to deciding \textit{Hammon} and \textit{Davis}.\footnote{Id. at 2273 (“[W]e are not] attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogations—as either testimonial or nontestimonial . . . .”); see also id. at 2278 n.5 (repeating a similar caution limiting the holdings to a resolution of the “cases before us and those like them.”).}

\begin{itemize}
\item[i)] Statements are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, and the circumstances objectively indicate that there is no ongoing emergency to justify the interrogation.\footnote{Id. at 2273–74.}
\end{itemize}

Responding to a domestic disturbance, the police went to the private home of Amy and Herschel Hammon where they encountered
a calm domestic setting with no apparent emergency. After an initial police inquiry, speaking with the husband and then separating him from his wife, and following some prompting and prodding, Amy Hammon described her husband’s assault which had apparently provoked the domestic disturbance call. Justice Scalia, for the majority, noted that during this questioning, the officer was no longer seeking to determine “what is happening” but rather, “what happened.”

This questioning was testimonial in nature because “[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime . . . .”

Like the custodial questions and answers in Crawford, Ms. Hammon’s statements deliberately recounted, in response to police questioning, how past, potentially criminal, events began and progressed, and the questioning took place soon after the described events transpired. To the Court, “[s]uch statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial.”

Put another way, “the evidentiary products of the ex parte communications [of Amy Hammon and Sylvia Crawford] aligned perfectly with their courtroom analogues.”

Notably, the Davis majority rejected a more flexible approach to the introduction of interrogation-produced statements in a domestic violence setting, reflecting its general view that “[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from

54 Id. at 2278.
55 Id. Justice Thomas dissented in Hammon and summed up his numerous concerns by observing that the unpredictable primary purpose standard adopted by the Court was neither “workable, nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause.” See 126 S.Ct. at 2281–85. Justice Scalia responded that the Court’s approach was still a work in progress and, for the cases decided, the test is objective and quite workable. Id. at 2285. Moreover, observed Justice Scalia, the dissent had proposed nothing remotely workable other than a vague distinction between “formal” and “informal” statements which was but a mere form of words. Id.
56 Davis, 126 S.Ct. at 2278 (emphasis in original).
57 Id. at 2277.
58 Id. at 2279–80.
the confrontation requirement to be developed by the courts.”

* * *

In her article, University of Maine Professor Deborah Tuerkheimer views the Davis Court’s focus on description of past events as inappropriate in domestic violence settings because the nature of domestic violence is not episodic.60 Put simply, the “continuing” nature of domestic violence does not lend itself to the Court’s “binary” framework in which declarants either “cry for help” or “provide information.”61 Professor Tuerkheimer argues that in domestic violence cases, a battered woman must often provide information regarding “past events” and past violence in order to prevent imminent violence.62 Whether an emergency exists, in such cases, cannot be determined without an understanding of the context of domestic violence cases; therefore, emergency and past abuse are inextricably intertwined such that domestic violence victims cannot seek help without describing the past events.63 In Professor Tuerkheimer’s judgment, the Court’s testimonial characterization of statements describing past events, will, in the domestic violence context, result in exclusion of statements that are, in fact, cries for help.64

ii) “Statements are nontestimonial [for purposes of the Confrontation Clause] when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”65

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

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

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

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

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

* * *

66 Id. at 2277 (emphasis in original) (citations omitted).
67 Id.
68 Id. at 2276. The emphasis on the statement as describing ongoing events is not captured by the Court’s holding. See 126 S.Ct. at 2288, set forth at note 53, supra.
69 Id.
70 Id. at 2277.
71 Id. at 2276.
72 Id. at 2274 n.2.
73 Id.
In “Crawford, Davis and Way Beyond,” University of Michigan Law School Professor, Richard Friedman, a leading confrontation scholar who represented Hammon before the Supreme Court, finds the primary purpose of both the interrogator and the witness to whom he/she is speaking ill-suited to define a testimonial police interrogation.74 He so concludes because determining primary purpose is quite difficult since the interrogator often has more than one purpose, and the multiple purposes may be inextricably intertwined.75 Thus, after-the-fact labeling of one purpose as primary is an arbitrary exercise which invites judicial manipulation to ensure that the statement will be held admissible.76

Professor Friedman rhetorically inquires why the existence of police interrogation should turn on the purpose of the interrogator when, as he has argued at length, it is the witness’s perspective that should be controlling.77 Moreover, he points out that the Davis Court recognized as much when it observed: “And of course, even when interrogation exists . . . it is in the final analysis the declarant’s statements not the interrogator’s questions that the Confrontation Clause requires us to evaluate.”78 Thus, concludes Professor Friedman, Davis is perfectly compatible with his approach, which focuses on anticipation of the statement’s prosecutorial use from the perspective of a hypothetical reasonable person possessing all of and only the information known to the declarant at the time of questioning.79 He concludes that his approach would be less prone to manipulation by the prosecution-favoring lower courts80 and that nothing in the hypothetical reasonable person approach is in any way inconsistent with Davis.81

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

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

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

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

82 Id. at 563.
83 Id. at 563–64.
85 Id. at 777.
87 Id. at 617–18.
88 Id.
encompasses statements describing ongoing activity\(^\text{89}\) as well as statements “made immediately thereafter in direct consequence to these occurrences but excluding descriptions of completely past occurrences.”\(^\text{90}\) The second prong calls for a determination of whether, in making the statement in question, the declarant is doing precisely what a witness does at trial:\(^\text{91}\) answering questions rather than volunteering statements to an official.\(^\text{92}\) Professor Fisher then proceeds to apply this framework to settings beyond fresh accusations to police officers, including statements to private victims’ service organizations, medical personnel, and victims’ parents.\(^\text{93}\)

In his article, University of Nebraska Law Professor Roger Kirst examines the decisions in *Davis* and *Hammon* to articulate practical rules to guide day-to-day judicial decision making in the real world.\(^\text{94}\) Professor Kirst explains that the different outcomes in *Davis* and *Hammon* turn on whether the speaker was facing an ongoing emergency when she spoke.\(^\text{95}\) Thus, to Professor Kirst, it is crucial to determine what constitutes the end of an emergency. He notes that different kinds of emergencies, *e.g.* seeking medical care or prevention of a threatened or ongoing assault,\(^\text{96}\) as well as the identity of the declarant, *e.g.* victim or bystander,\(^\text{97}\) may, though not necessarily, require different modes of analysis. For further guidance, Professor Kirst then examines cases in which certiorari was denied or in which the writ was granted, the judgment vacated, and the case

\(^{89}\) *Id.* at 590.

\(^{90}\) *Id.* at 608–09. (“Only the res gestae concept was developed in order to interlock with constitutional restrictions respecting the introduction of out-of-court testimony against criminal defendants.”). For a modern day return to traditional “res gestae” evidentiary principle to address *Crawford’s* Confrontation Clause concern about spontaneous statements (541 U.S. at 58, n.8), see *State v. Branch*, 865 A.2d 673, 690-91 (N.J. 2005).

\(^{91}\) *Fisher*, *supra* note 86, at 614–16.

\(^{92}\) *Id.* at 616.

\(^{93}\) *Id.* at 616–26.


\(^{95}\) *Id.* at 641–44.

\(^{96}\) *Id.* at 644.

\(^{97}\) *Id.*
remanded in light of *Davis*.  
He then restates *Davis* as rules, and looks at the cases on remand and other post-*Davis* decisions to assess *Davis* in a variety of factual settings. Professor Kirst concludes by examining *Davis* in the context of overall confrontation doctrine.  

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

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

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

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

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

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109 Id.
111 Davis, 126 S.Ct. at 2277.
113 Davis, 126 S.Ct. at 2277.
114 Friedman, supra note 74, at 564.
115 Id.
116 Id. at 564–65 n.43.
117 Fisher, supra note 86, at 593. See also Robert B. Mosteller, Testing the Testimonial Concept, and Exceptions to Confrontation: “A Little Child Shall Lead
Moreover, according to Professor Friedman: “Brasier made no new law . . . rather its significance is that it reflects the common understanding . . . at the time . . . of the framing of the Sixth Amendment that an out-of-court accusation, even one made very soon after the event, was testimonial in nature and therefore not admissible.”\(^{118}\) He continues that “such a deeply seated understanding of the confrontation right should be given considerable weight in determining the Clause’s modern meaning.”\(^{119}\)

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

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

\(^{118}\) Friedman, supra note 74, at 565.

\(^{119}\) Id.

\(^{120}\) Davies, supra note 29, at 428.

\(^{121}\) Id. at 438–41. In addition, to the 1789 and 1815 reports of Brasier, there was also an 1800 footnote to the 1789 report and an 1806 report of the case in a treatise that made mention of the child’s statements. For a discussion of the several reports of Brasier, see Mosteller, supra note 117, at 927–31.

\(^{122}\) See Davies, supra note 29, at 438–39 n.217.

\(^{123}\) Id. at 438–39.

\(^{124}\) Id. at 465.
known, “the issue of what could constitute admissible evidence in the case of a child rape victim who was too young to be sworn, was understood to be a uniquely difficult and unsettled question.”125

Finally, Professor Davies views the 1815 version of Brasier, regarding the mother’s statements, as having neither said nor implied anything about the distinction between testimonial and nontestimonial evidence.126 Rather, he concludes that the later version of the Brasier decision “simply restated the same blanket exclusion of unsworn hearsay evidence that was also set out by the treatises and manuals of the time.”127

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

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

125 Id. at 444.
126 Id. at 443–44.
127 Id. at 444.
129 Id. at 472.
130 Id. at 474; see also Mosteller, supra note 117 at 931 (Brasier “played no direct role in shaping confrontation because the Framers could not possibly have known about it as a hearsay/confrontation case, and it therefore could not have affected their thinking. . . . The [Brasier] judges gave no indication of being concerned as to whether the statement was testimonial, nor do they take note of any of the circumstances that . . . might lead to treating the statement as testimonial.”).
132 Id. at 508–09.
Mr. Franze further reasons that it is unlikely the Framers would have been aware of any version of Brasier and, in light of “the legal authorities that were available in Framing-Era America, they [well could] have understood that hearsay accounts by parents, doctors and acquaintances concerning statements made by child sex abuse victims would be admissible in criminal trials without regard to whether the statements would now be considered ‘testimonial’ or ‘non testimonial.’”\footnote{Id. at 500.} Finally, Mr. Franze argues that Brasier demonstrates some of the practical limitations of originalism as an interpretative construct for constitutional criminal procedure decisions.\footnote{Id. at 500–02.}

**Formality**

In *Crawford* the Court describes testimonial statements as being formal\footnote{Crawford v. Washington, 541 U.S. 38, 51–52 (2004).} and solemn\footnote{Id.} in nature. The structured, tape-recorded custodial interrogation of Sylvia Crawford following a *Miranda* warning was apparently formal enough for the seven-justice majority in *Crawford*,\footnote{See id. at 53 n.4, 61, 65 (the opinion never expressly characterizes the statement as formal, though its descriptions imply that characterization, as does its recognition that the statement is testimonial, whatever the definition).} and a unanimous Court in *Hammon* agreed.\footnote{Davis v. Washington, 126 S.Ct. 2266, 2278 (2006) (Chief Justice Roberts and Justice Alito, who had replaced the *Crawford* concurs, Chief Justice Rehnquist and Justice O’Connor, joined the *Davis* majority, and Justice Thomas also agreed that Sylvia Crawford’s *Miranda*-warned custodial statement was testimonial in nature).} To be sure, the *Crawford* interrogation was more formal than the in-home interrogation of Amy Hammon. Still, “[i]t was formal enough that Amy [Hammon]’s interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his investigat[ion].”\footnote{Id. at 2278.} To the *Davis* majority, “[t]he solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe
Finally, *Davis* contrasts the calm and tranquil interrogations of *Hammon* and *Crawford* to the frantic statements of McCottry in *Davis*, in an environment that was neither tranquil nor safe.\(^{141}\)

In dissent, Justice Thomas argued that a living room conversation with a police officer hardly bears the formality or solemnity of formalized testimonial materials or, for that matter, the solemnity present during the police interrogation of a person, *i.e.* Sylvia Crawford, following a warning that anything said can be used against him or her in a court of law.\(^{142}\)

Mr. Justice Scalia responded to Justice Thomas: “We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers—who perform investigative and testimonial functions once performed by examining Marian magistrates.” Justice Scalia concluded: “It imports sufficient formality, in our view, that lies to [police] officers are criminal offenses.”\(^{143}\) Notably, Justice Scalia nowhere suggests that the person being interrogated need even be aware that lying to a police officer is a criminal offense, and if the declarant is unaware of the status of the person to whom he or she is speaking, then there is no crime.\(^{144}\)

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

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\(^{140}\) *Id.* at 2276; *see also id.* at 2279, n.5 (“It imports sufficient formality, in our view that lies to such officers are criminal offenses.”). *But see* Robert P. Mosteller, *Softening the Formality and Formalism of the Testimonial Concept*, 19 *Regent L. Rev.* 429, 441 n.55, 442 n.57 (2007) (“these statutes [making it unlawful to lie to the police] have no relationship to the concerns of the Confrontation Clause and a system that uses them as a dividing line for coverage would be absolutely ahistoric” and illogical because “the states’ treatment of this crime is far from uniform.”).

\(^{141}\) *Davis*, 126 S.Ct. at 2277.

\(^{142}\) *Id.* at 2282–83 n.5.

\(^{143}\) *Id.* at 2278. See Robert P. Mosteller, *Softening the Formality and Formalism of the Testimonial Statement Concept*, 19 *Regent L. Rev.* 429, 438–39 (that lies are crimes equaling formality is “curious,” “bizarre” and “inexplicable,” coming “largely out of the blue” with the potential of providing a significant limitation on the scope of testimonial statements).

\(^{144}\) *See* Mosteller, *supra* note 143, at 445–46.
interrogation-produced statements. Unless abandoned or made less stringent, however, formality may prove an insurmountable obstacle to deciding that accusatory statements to private individuals are nontestimonial.

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Given the formality discussion and the Hammon holding in Davis, Professor Richard Freidman concludes that there is no rule that the testimonial nature of a statement turns on its formal nature. Moreover, even if there is a formality requirement, Professor Friedman is satisfied by a showing that it would be objectively apparent to a reasonable person that the interrogation was being held for prosecutorial purposes.

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

In Crawford, Justice Scalia declared that business records, “by their nature, were not testimonial.” Neither the Crawford nor Davis majority opinions make any reference to public records or reports. True, some governmental records and reports may be akin to the nontestimonial private business records. On the other hand, some modern day governmental reports that are created for evidentiary purposes—e.g. DNA, fingerprints, blood alcohol level, ballistics, chemical composition and weight of substances—are a far cry, if not a completely separate and distinct species, from nontestimonial private business records of 1791.

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145 Id. at 434 (Davis “clearly eliminated some of the extreme readings of formality and generally softened the requirement”).
146 Friedman, supra note 74, at 571.
147 Id.
148 Crawford v. Washington, 541 U.S. 36, 56 (2004). Justice Scalia also concludes that, at the time of the Framing, there was a hearsay exception for business records. Id. But see Davies, supra note 29, at 365–66 (questions the existence of any such exception during the Framing-Era).
149 But see Crawford, 541 U.S. at 76 (Rehnquist, C.J.) (noting with approval the majority’s nontestimonial characterization of business and “official” records).
These governmental reports, and the scientific tests and techniques that produce their findings and results, also bear little, if any, kinship or resemblance to statements of witnesses and accomplices secured by the civil law modes of criminal prosecution. Moreover, they are not produced by police interrogation.

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

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

At the outset of her article, Professor Mnookin notes that “while Davis does not . . . speak directly to the question of expert evidence under Crawford, its turn to a ‘primary purpose test’ may influence how courts assess whether laboratory reports and matters upon which experts rely are testimonial.” She also explains why characterizing such reports as business records does not, automatically, resolve the
testimonial issue. 158

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

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

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

Nontestimonial Statements

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

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158 Mnookin, supra note 153, at 794, 829–32.
159 See id. at 806; see generally, id at 809–842.
160 Id. at 843.
161 Id. at 823–25 (citing People v. Goldstein, 6 N.Y.3d 119, 843 N.E.2d 727 (2005)).
162 Id. at 858–62.
163 Id. at 860.
165 Id.
166 Id. at 51.
remarks to an acquaintance,\textsuperscript{167} statements by one prisoner to another blaming defendant for his incarceration,\textsuperscript{168} and statements made unwittingly to an FBI informant.\textsuperscript{169}

The majority opinion was a study in deliberate ambiguity as to whether the Confrontation Clause is exclusively concerned with testimonial statements or if it encompasses nontestimonial hearsay as well.\textsuperscript{170} Given this ambiguity, most state and federal courts had concluded that the admissibility of nontestimonial hearsay statements is still governed by the \textit{Ohio v. Roberts} indicia of reliability framework.\textsuperscript{171}

Subsequently in \textit{Davis}, after noting that it had not been necessary to resolve the question in \textit{Crawford}, Justice Scalia stated: “We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay.”\textsuperscript{172} In so doing, he sought to put the final nail in

\textsuperscript{167} \textit{Id.}


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


CRAWFORD AND BEYOND: INTRODUCTION

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

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

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

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

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


177 Id. (“Crawford overruled Roberts because Roberts was inconsistent with the original understanding of the meaning of the Confrontation Clause. . . . Under Crawford, . . . the Confrontation Clause has no application to [out-of-court nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability.”). As seen from the text in note 170, supra, Crawford did not overrule Roberts with respect to protection for unreliable nontestimonial statements. See Mosteller, supra note 18, at 700 n.56.
In his symposium article, Duke University Professor Robert Mosteller mourns the loss of Confrontation Clause protection provided by Roberts for unreliable nontestimonial accusatory hearsay statements.\(^{178}\) In particular, he points to the Court’s holding in Idaho v. Wright that the Confrontation Clause had been violated by the introduction at trial of a young child’s accusatory statements that had been elicited by the leading question of a pediatrician, and which were not otherwise supported by the Roberts required particularized guarantees of trustworthiness.\(^{179}\)

Professor Mosteller argues problematic hearsay of this ilk is on the periphery of the confrontation right, presenting a “functionally related” problem that ought to lend itself to Confrontation Clause protection, even if not as complete as that required for core violations. In support of his argument, inter alia, he points to other areas of constitutional criminal procedure in which additional types of protections have been guaranteed,\(^{180}\) the historical relationship between confrontation and hearsay,\(^{181}\) the ambiguities of the Raleigh trial involving three different hearsay kinds of statements,\(^{182}\) and the difficulty and uncertainty of translating history, channeling the Framers, and applying it all in a modern context.\(^{183}\)

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

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

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

\(^{180}\) Mosteller, supra note 18, at 701–02.

\(^{181}\) Id. at 701–03.

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

\(^{183}\) Id. at 19–22.
statements must find another home.\textsuperscript{184} That new home may be the Due Process Clause, which, unlike the Confrontation Clause, is concerned with the reliability of evidence.\textsuperscript{185} Whether a hearsay statement is within a firmly-rooted hearsay exception has no relevance in a due process reliability inquiry.\textsuperscript{186}

\textit{Forfeiture}

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

As noted earlier, \textit{Davis} rejected a more flexible testimonial standard for statements made by domestic violence victims.\textsuperscript{189} Lower courts, however, may well be more responsive to greater flexibility with regard to forfeiture in the domestic violence setting, given the invitation to do so by \textit{Davis}: domestic violence crimes are “notoriously susceptible to intimidation or coercion of the victim to

\textsuperscript{184} See \textit{id.} at 723.

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

\textsuperscript{186} Teslitz, \textit{supra} note 185, at 49.


\textsuperscript{188} 126 S.Ct. 2266, 2280 (2006).

\textsuperscript{189} \textit{Id.}
ensure that she does not testify at trial.”\(^{190}\) The opinion continued: “when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.”\(^{191}\)

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

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

\(^{190}\) \textit{Id.}

\(^{191}\) \textit{Id.} at 2279–80.

\(^{192}\) \textit{Id.} at 2280.

\(^{193}\) On its face, FRE 804(b)(6) requires an intent to prevent a witness from testifying as an element of forfeiture. Post \textit{Davis}, whether constitutional forfeiture requires that same intent has divided the courts. \textit{Compare, e.g.,} State v. Mason, 162 P.3d 396, 404 (Wash. 2007) (no intent required), \textit{with} People v. Moreno, 160 P.3d 243, 245–47 (Colo. 2007) (intent required). \textit{See also} People v. Stechly, 870 N.E.2d 333, 350–52, 353 (Ill. 2007) (requiring an intent but noting that there may be an exception in homicide cases) (authorities on both sides collected).

\(^{194}\) \textit{Davis}, 126 S.Ct at 2280 (emphasis supplied and citation omitted). \textit{But see} \textit{Davis}, 162 P.3d at 404 (requiring clear and convincing evidence establishing that the accused’s wrongdoing has caused the unavailability of the declarant); People v. Geraci, 85 N.Y.2d 359, 367, 649 N.E.2d 817 (1995) (same).

\(^{195}\) 126 S.Ct. at 2280.

references to the doctrine of waiver as “forfeiture by wrongdoing” implied that intent was irrelevant and that confrontation rights could be terminated whenever the witness’s absence could be traced to the defendant’s wrongdoing.\footnote{Id. at 874.} As a result, post-\textit{Crawford} lower court decisions expanded the doctrine far beyond prior precedent and history.\footnote{Id. at 875–78.}

The \textit{Davis} opinion corrected this misimpression, concludes Professor Flanagan, when it “all but stat[ed] that the estoppel doctrine is limited to witness-tampering cases.”\footnote{Id. at 878.} Professor Flanagan also notes that Justice Scalia’s use of such words as “procure” and “coerce” with regard to silencing witnesses describes “purposeful acts” on the part of the defendant, as does the reference to interference with the “judicial process.”\footnote{Id. at 880–82.} Professor Flanagan concludes: “\textit{Davis} seems to have clearly adopted the intent to prevent testimony element.”\footnote{Id. at 887.} Professor Flanagan further argues that courts should require a “but for” causal connection between the defendant’s act and the witness’s unavailability, and he sets forth several reasons for a stronger causal relationship. \textit{Id.} at 891.

Professor Deborah Tuerkheimer focuses on the need to reconceptualize the forfeiture doctrine as it applies to domestic violence cases and their hallmark abusive relationships.\footnote{Tuerkheimer, \textit{supra} note 60, at 746.} In many of those cases, she points out, the abuse that rendered the victim unavailable had occurred even before the crime charged was committed.\footnote{Id. at 747.} Consequently, there is an absence of traditional witness tampering and the abuse involved is not always identified as misconduct. Accordingly, she reasons that to properly address forfeiture principles in domestic violence settings, courts must recognize and acknowledge patterns of violence and abuse. In this regard, Professor Tuerkheimer emphasizes the crucial need to consider the relationship between the abusing defendant and the abused victim in determining whether the defendant has caused the victim to be

\footnote{Id. at 747.}
unavailable.\textsuperscript{204}

Professor Myrna Raeder views an intent to prevent a person from testifying as not being required when that person has been murdered, but should be required in domestic violence cases when a domestic violence victim fails to appear at trial.\textsuperscript{205} Professor Raeder rejects the arguments that forfeiture should be presumed and that particularized evidence should be required to establish that the defendant caused the victim’s absence with the intent to prevent the victim from testifying.\textsuperscript{206} She also notes that placing the burden on defendant to prove a lack of coercion or misconduct seems particularly unfair because of the inherent difficulties in proving a negative.\textsuperscript{207} Finally, Professor Raeder, like Professor Tuerkheimer, advocates for an expanded relevance standard with respect to forfeiture in domestic violence cases—including evidence of abusive patterns, individual acts of abuse, prior charges of abuse, prior recantations by the victim, and evidence of post-traumatic stress disorder.\textsuperscript{208}

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The above highlights of the articles from this symposium barely scratch the surface of the confrontation treasures in store for the reader. Also awaiting Crawford-philes is a seemingly endless flow of state and federal confrontation/hearsay decisions, at least a few of which will end up in the Supreme Court. Indeed this past June, a petition for certiorari was filed with respect to the testimonial nature of laboratory reports.\textsuperscript{209} Doubtless other cases will reach the Court, as it seeks, “in a process that will take decades,”\textsuperscript{210} to fashion a comprehensive Confrontation Clause Code of Evidence. Crawford and Beyond III \textit{et seq.} will be waiting patiently in the wings. Put another way, “It ain’t over ‘till it’s over.”\textsuperscript{211}

\textsuperscript{204} \textit{Id.} at 748.

\textsuperscript{205} Raeder, \textit{supra} note 84, at 778–79.

\textsuperscript{206} \textit{Id.} at 780–81.

\textsuperscript{207} \textit{Id.}

\textsuperscript{208} \textit{Id.}

\textsuperscript{209} \textit{Compare}, State v. March, 216 S.W.3d 663, 666 (Mo. 2007) (laboratory report that substance tested was cocaine prepared solely to be introduced at trial is “testimonial” as it bears all the characteristics of an ex parte affidavit) \textit{cert pet. pending} No. 06-1699, \textit{sched. for conf.} 9/24/07, with Commonwealth v. Verde, 827 N.E.2d 701, 705 (Mass. 2005) (public laboratory report identifying a tested substance as cocaine is a nontestimonial public record).

\textsuperscript{210} Friedman, \textit{supra} note 74, at 586.

\textsuperscript{211} \textsc{Yogi Berra}, \textit{supra} *, at 121.