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## Sex, Threats, and Absent Victims: The Lessons of Regina v. Bedingfield for Modern Confrontation and Domestic Violence Cases

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## ARTICLE

### SEX, THREATS, AND ABSENT VICTIMS: THE LESSONS OF *REGINA V. BEDINGFIELD* FOR MODERN CONFRONTATION AND DOMESTIC VIOLENCE CASES

Aviva Orenstein\*

*In 2004, Crawford v. Washington, authored by Justice Scalia, revolutionized the law of confrontation by requiring that, aside from two discrete exceptions, all testimonial statements (those made with the expectation that they will serve to prosecute the accused) be subject to cross-examination. This new interpretation of the Sixth Amendment's Confrontation Clause has profoundly affected domestic violence cases, making it much harder to prosecute them successfully.*

*Although Justice Scalia's approach to confrontation is new, it is strikingly similar to the analysis in Regina v. Bedingfield, a notorious English murder case, which excluded from the evidence an alleged statement by the murder victim. The analysis of the res gestae hearsay exception, which was central to excluding the victim's statement in Bedingfield, focused on the timing of her statement, her intent in making it, and whether an ongoing emergency existed when the declaration was made. Justice Scalia's rigid, formalistic approach to testimonial statements in Davis v. Washington, another in the line of new confrontation cases, is analogous and ultimately as confusing and unworkable as Bedingfield's res gestae analysis.*

*Although Bedingfield arose in 1879, its facts, replete with verbal abuse, intoxication, unheeded pleas for police protection, and ultimately, murder when the victim tried to break off the relationship, resonate with modern experiences of domestic violence. Both the Bedingfield case and Justice Scalia's confrontation jurisprudence fail to account for the practical*

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\* Professor of Law, Indiana University Maurer School of Law. I would like to thank Hannah Buxbaum, Michael Grossberg, Seth Lahn, Julia Lamber, Leandra Lederman, Jody Madeira, Debra Orenstein, and Sylvia Orenstein, for their comments on earlier drafts. Thanks also to Karen McEwen of the School of Library Science for unearthing old accounts of the Bedingfield case; Joshua Fix, Judith Reckelhoff, and Megan Shipley, for outstanding research assistance; and Amanda McKinney for secretarial and moral support. This Article is dedicated to my husband, David Szonyi, who belies the wisdom quoted in *The Daily News* (London) in 1879, that "when the parties are man and wife, no additional motive for murder need be sought." See *infra* note 83 and accompanying text.

realities of domestic violence cases and ignore the voices of victims who cannot or will not testify on their own behalf. The facts of *Bedingfield*, which present a serious question whether the victim's statement was ever uttered, demonstrate another flaw in Justice Scalia's new approach. In addition to being too rigid in rejecting unfronted testimonial statements, the new confrontation doctrine is also too lax regarding nontestimonial statements, which now receive no constitutional protection at all.

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#### INTRODUCTION

"Oh, aunt, see what *Bedingfield* has done to me."<sup>1</sup> This was the declaration of Eliza Rudd, a widow and owner of a laundry service, as she

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1. *Murder and Attempted Suicide at Ipswich*, IPSWICH J., July 12, 1879, at 7, available at Gale, Doc. No. Y3202578458. Rudd's phrase has been reported with slight variations. See *The Ipswich Tragedy*, IPSWICH J., Sept. 20, 1879, at 7, available at Gale, Doc. No. Y3202579060 ("Dear Aunt, look what *Bedingfield* has done to me" from Sarah Rodwell, and another version from a passing-by ten-year-old, John Arthur Shimmon, "Oh, dear, Aunt,

emerged from her private room with her throat slashed early one Tuesday morning in July 1879.<sup>2</sup> When the police arrived, Rudd was unable to speak, but she pointed to the room where her accused killer and lover, Henry Bedingfield, was found unconscious with his own throat cut.<sup>3</sup> Rudd died a few minutes after the police arrived.<sup>4</sup> At trial, Bedingfield, who survived, claimed that Eliza Rudd had attempted to kill him, and then killed herself.<sup>5</sup> Despite his plea of innocence, the jury convicted Bedingfield after seven minutes of deliberation, and he was hanged before the end of the year.<sup>6</sup>

The content of Rudd's statement was never admitted.<sup>7</sup> According to the court, Rudd's declaration was neither part of the *res gestae*<sup>8</sup> nor a dying declaration, and hence fell within the category of inadmissible hearsay.<sup>9</sup> Despite the guilty verdict, the exclusion of Rudd's declaration raised a furor, generating angry letters to the *Times* of London, various pamphlets both criticizing and defending the decision, and a three-part article by the American evidence luminary James B. Thayer.<sup>10</sup>

*Bedingfield* has everything: sex, threats, gore, femicide, and dramatic statements that might actually never have been uttered. In addition to its obvious drama and contentiousness, however, *Bedingfield* illuminates vital issues in evidence law, especially those surrounding declarations by victims of domestic violence who are unavailable to testify. Domestic violence cases, especially those that end in murder, continue to present special challenges for evidence law; 130 years later, too little has changed in the lives of women who experience intimate partner violence and must deal with the law's inadequate response. *Bedingfield* raises questions concerning the use of out-of-court statements by absent declarants and the

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look here what Bedingfield has done to me.”). According to the case reporter, it was, “See what Harry has done!” *R v. Bedingfield*, (1879) 14 Cox Crim. Cas. 341 (Crown Ct.) at 345 n.(b) (Eng.). *But cf.* James B. Thayer, *Bedingfield's Case.—Declarations as a Part of the Res Gesta* (pt. I), 14 AM. L. REV. 817, 826 (1880) (following concurrent news reports of the statement as being “O aunt, see what has been done to me”).

2. *Murder and Attempted Suicide at Ipswich*, *supra* note 1.

3. *Id.*

4. *The Ipswich Tragedy*, *supra* note 1.

5. *Bedingfield*, 14 Cox. Crim. Cas. at 344.

6. *The Ipswich Murder.—Sentence of Death*, IPSWICH J., Nov. 15, 1879, at 7, available at Gale, Doc. No. Y3203579514. The determination of guilt was based primarily on forensic evidence. *See infra* notes 84–88 and accompanying text.

7. *Bedingfield*, 14 Cox Crim. Cas. at 344–45. However, the fact that Rudd made a statement shortly after the incident was briefly mentioned in the opinion as refuting the defendant's suicide theory. *Id.*

8. *Res gestae* literally means “things done.” *Infra* note 28. It is a common-law concept that excepts from the hearsay definition acts done and statements made that accompany an event. *See* Jeffery L. Fisher, *What Happened—And What is Happening—to the Confrontation Clause?*, 15 J.L. & POL'Y 587, 601 (2007) (defining *res gestae* as “those circumstances which are the automatic and undisguised incidents of a particular litigated act, and which are admissible when illustrative of such act” (citation omitted)).

9. *Bedingfield*, 14 Cox. Crim. Cas. at 342–43.

10. *See* Thayer, *supra* note 1; James B. Thayer, *Bedingfield's Case.—Declarations as a Part of the Res Gesta* (pts. II & III), 15 AM. L. REV. 1, 71 (1881). For a discussion of Thayer's contribution to the modern evidence law and scholarship, see Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CALIF. L. REV. 2437 (2000).

victim's right to "speak from the grave"—all of which mirror thorny issues in modern evidence law. Had the *Bedingfield* case occurred today, it certainly would not have been settled with the same alacrity. Yet, the case would pose many of the same difficult questions of relations between the sexes, motive for murder, proof of guilt, admissibility of evidence, and even the wisdom of the death penalty. Today, however, we would also have to consider the U.S. Supreme Court's new Confrontation Clause jurisprudence. Although itself not a confrontation case, *Bedingfield* offers important insights into our current Sixth Amendment debates.

Part I of this Article presents the *Bedingfield* case, assesses the reliability of Rudd's famous statement, and analyzes the *res gestae* issue central to *Bedingfield*. Part II presents the changes in modern confrontation jurisprudence with a focus on domestic-violence prosecutions. Part II briefly presents the Supreme Court's new confrontation jurisprudence, which requires, with two limited exceptions, that all testimonial statements must be cross-examined. Part II then defines domestic violence, reviews the lively and important debate about "no-drop" prosecutions, and explains the significant practical effects of the new jurisprudence of domestic-violence cases.

Part III demonstrates how the *res gestae* hearsay exception, central in *Bedingfield*, illuminates the various difficult questions posed by the Court's new confrontation jurisprudence. The practical realities of domestic-violence cases undermine the logic and theory of the new confrontation jurisprudence, challenging the easy dualisms and neat categories that undergird both the old *res gestae* doctrine and the Court's new approach. Part III argues that *Bedingfield's* *res gestae* analysis is strikingly similar to the Court's approach to testimonial statements and is equally unworkable. This Part explores how both *Bedingfield* and our modern confrontation jurisprudence fail to hear the voices of victims who cannot or will not testify on their own behalf. Part III also notes the ironies, absurdities, and unintended consequences of the Court's rigid approach.

Part IV uses *Bedingfield* to argue that the Court's sole focus on testimonial statements, and its refusal to consider issues of reliability, may readily admit many unconflicted statements that are questionable and unfair to the accused. Because there is a serious question whether the controversial statement in *Bedingfield* was ever made, the case illustrates the dangers of such unconflicted testimony and the troubling fact that, under the new confrontation jurisprudence, *nontestimonial* statements receive no constitutional protection at all. Taken together, Parts III and IV rely on *Bedingfield* to make the case that the Court's new approach to confrontation is both too rigid in rejecting the admission of all unconflicted testimonial statements and too lax regarding *nontestimonial* statements. Interestingly, this mirrors the criticism leveled at *res gestae* at the end of the nineteenth century and the beginning of the twentieth, which was simultaneously criticized both for its rigidity of application and for allowing too many unconflicted and unreliable declarations into evidence.

I. THE *BEDINGFIELD* CASEA. *The Reported Opinion*

Rudd is never named in the reported opinion,<sup>11</sup> but instead is identified as a “woman at Ipswich” and referred to as “she” or “the deceased.”<sup>12</sup> We learn that the unnamed deceased is a widow, laundress, employer (she has two assistants), and fornicator.<sup>13</sup> We infer that last fact because the prisoner “had relations with the deceased woman,”<sup>14</sup> and the court implies that they were intimate. Bedingfield, though named, is mostly referred to as “the prisoner.”<sup>15</sup> His occupation and marital status are not presented by the opinion.<sup>16</sup> He lived with his wife approximately a half-mile away from Rudd.<sup>17</sup>

The conflict between the accused and the victim arose when Bedingfield “had conceived a violent resentment against her on account of her refusing him something he very much desired, and also as appearing to wish to put an end to these relations.”<sup>18</sup> Conflict had obviously arisen before. Bedingfield “had uttered violent threats against her, and had distinctly threatened to kill her by cutting her throat.”<sup>19</sup> Rudd was sufficiently frightened that she asked a “policeman to keep his eye on her house.”<sup>20</sup> The policemen “heard the voice of a man in great anger” around ten o’clock at night at Rudd’s house.<sup>21</sup>

Early the next morning, Bedingfield returned to Rudd’s house, where they were alone for a while. He went out to a “spirit shop” and Rudd was found by one of her assistants lying on the floor, “her head resting on a footstool.”<sup>22</sup> Upon returning from the spirit shop, Bedingfield entered Rudd’s room where Rudd remained.<sup>23</sup> Rudd’s assistants were in the yard.<sup>24</sup>

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11. *Regina v. Bedingfield* is reported in Volume XIV of the Reports of Cases in Criminal Law, which covers cases from 1877 to 1882. The reporter, W.F. Finlason, Esq., Barrister-at-Law, provides a mixture of factual summary and paragraphs that purport to recount statements made by Lord Chief Justice Alexander Cockburn. In addition, the reporter provides footnotes explicating legal questions, expanding on the facts, and discussing the legal strategies of the parties. Because the reporters, not the judges themselves, transcribed the oral opinions, such records may not be as accurate in conveying the judge’s remarks as are modern reporters. By this, I do not mean to imply that modern courts always get the facts right, merely that they document their factual assumptions, reasoning, and an agreed version of events and arguments form the template of modern courts’ legal determinations.

12. *Bedingfield*, 14 Cox Crim. Cas. at 341.

13. *See id.*

14. *Id.*

15. *Id.*

16. *See generally id.*

17. *The Ipswich Murder.—Sentence of Death*, *supra* note 6.

18. *Bedingfield*, 14 Cox. Crim. Cas. at 341.

19. *Id.*

20. *Id.* at 342.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

A minute or two later, “the deceased came suddenly out of the house towards the women with her throat cut.”<sup>25</sup>

Interestingly, in the reports of the remarks of Lord Chief Justice Alexander Cockburn, the court never recounted the disputed statement itself. Rather, Chief Justice Cockburn mentioned almost coyly that, after Rudd emerged from the house with her throat cut, Rudd “said something, pointing backwards to the house” to her female employee.<sup>26</sup> One has to read the notes of the court reporter, various newspaper accounts, or Thayer’s critique to learn Rudd’s alleged statement, “Oh, aunt, see what Bedingfield has done to me.”<sup>27</sup>

*Bedingfield* considered and rejected two distinct theories for admitting Rudd’s statement. First, it discussed whether the statement was part of the *res gestae*. This concept refers to words spoken, thoughts expressed, and gestures made “immediately following [an act] and so closely connected with it as to form in reality a part of the occurrence.”<sup>28</sup> Chief Justice Cockburn held that *res gestae* did not apply because the timing was off. He explained that Rudd’s cry “was not part of anything done, or something said while something was being done, but something said after something done.”<sup>29</sup> By contrast, a statement uttered by the deceased “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 . . . and after the act was completed.”<sup>30</sup>

Second, *Bedingfield* refused to admit Rudd’s final words as a dying declaration. It held that Rudd was insufficiently aware of her impending death to have formed the correct state of mind to qualify for the exception.<sup>31</sup> Given the state of medicine in 1879, it might seem odd that someone with blood spewing out of her jugular vein, thyroid arteries cut, and her trachea severed would have any doubt she was a goner, but according to Chief Justice Cockburn, things just happened too fast.<sup>32</sup>

### B. Various Contemporary Accounts and Commentaries

Because the reported cases of *Bedingfield*’s era present serious limitations, it is particularly useful to consult other sources for the facts and legal disputes in the case. The contemporary accounts provide much

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25. *Id.*

26. *Id.*

27. *Murder and Attempted Suicide at Ipswich*, *supra* note 1.

28. BLACK’S LAW DICTIONARY 1423 (9th ed. 2009) (quoting *State v. Fouquette*, 221 P.2d 404, 416–17 (Nev. 1950)). *Res gestae* literally means “things done.” *Id.*; see Fisher, *supra* note 8.

29. *Bedingfield*, 14 Cox Crim. at 342.

30. *Id.* at 342–43.

31. *Id.* at 343 (holding that the statement was not admissible because “it did not appear that the woman was aware that she was dying”).

32. *Id.* at 344. Justice Cockburn is quoted as saying of Rudd: “[S]he had no time to consider and reflect that she was dying; there is no evidence to show that she knew it, and I cannot presume it.” *Id.*

additional information, occasionally shedding a very different light on the facts.<sup>33</sup> First, we learn more about the *dramatis personae*. Eliza Rudd was forty-five years old when she died,<sup>34</sup> and Bedingfield was forty-six when the incident occurred.<sup>35</sup> The state's key witness was Rudd's employee, Sarah Rodwell.<sup>36</sup> Other witnesses included various neighbors, policemen, Rodwell's son,<sup>37</sup> and a ten-year-old boy, who testified before the magistrates that he walked past Rudd's house the morning of the murder on his way to school, saw Rudd and Rodwell, and claimed that he heard Rudd say, "Oh, dear, Aunt, look here what Bedingfield has done to me."<sup>38</sup>

We learn that Bedingfield had been a friend of Rudd's late husband, who had died two years previously.<sup>39</sup> Bedingfield, out of proclaimed loyalty to his deceased friend, continued to look out for Eliza Rudd, and "undertook to see that Mrs. Rudd was not imposed upon."<sup>40</sup> Bedingfield clearly had business associations with Rudd, keeping pigs in her yard,<sup>41</sup> hanging and taking in laundry,<sup>42</sup> and delivering the laundry with Rudd's pony and trap (cart) around the neighborhood.<sup>43</sup> He complained that he was underpaid and unappreciated.<sup>44</sup>

Bedingfield was married and claimed that he, his wife, and Rudd often took meals together.<sup>45</sup> Apparently, meals were not all they shared. According to a policeman who took a statement, Bedingfield said: "She have kissed me in the presence of my wife, and told me that she loved me better than she ever loved her husband."<sup>46</sup> Leaving nothing to the

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33. Newspaper accounts occurred primarily in *The Ipswich Journal*, which dedicated lots of coverage to this hometown murder. Ipswich, one of England's oldest towns, served as the main center between York and London for North Sea trade, and was the setting for Charles Dickens's *The Pickwick Papers*. CHARLES DICKENS, *THE POSTHUMOUS PAPERS OF THE PICKWICK CLUB* ch. xxii (The Heritage Press 1938) (1837). The London papers carried shorter squibs about the crime, but were more engaged in the post-conviction legal wrangling and pleas for clemency.

34. *Murder and Attempted Suicide at Ipswich*, *supra* note 1.

35. *The Execution of Henry Bedingfield*, IPSWICH J., Dec. 6, 1879, at 10, available at Gale, Doc. No. Y3202579710.

36. See *The Ipswich Tragedy*, *supra* note 1.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* It is unclear from the newspaper report whether this is the gloss of the journalist or somehow gleaned from the statements of the prosecuting attorney. *Henry Bedingfield*, IPSWICH J., Dec. 9, 1879, at 2, available at Gale, Doc. No. Y3202579719 ("He had promised his victim's husband, in some way or other, that he would look after her and assist her when she was left alone.").

41. *The Ipswich Tragedy*, *supra* note 1 (voluntary statement made by Bedingfield to police while he was in the hospital).

42. *The Execution of Henry Bedingfield*, *supra* note 35.

43. *Id.*

44. *The Ipswich Tragedy*, *supra* note 1 ("[S]he had money from me every week, and what work I done for her, twenty pounds would not pay me." (quoting Bedingfield)).

45. *Id.* ("Me and my wife frequently had supper at hers, and she frequently had tea at ours." (as quoted by the police officer who took a statement from Bedingfield at the hospital)).

46. *Id.* The prisoner was not entitled to testify at the inquest or the trial, but his voluntary statements to the police were reported in the papers.



imagination, Bedingfield added: “We have been as man and wife together; we have slept together, and she have been towards two children by me.”<sup>47</sup>

At the magistrate’s inquest, a policeman testified that he had been called to Rudd’s house the night before her murder.<sup>48</sup> According to Bedingfield, he visited Rudd the next morning because he needed to borrow one pound, and his wife would not give it to him.<sup>49</sup> Per Rudd’s request, he brought her a razor to cut away her corns (thereby explaining the presence of the instrument of Rudd’s death).<sup>50</sup> Although it is not at all clear from the reported opinion, all contemporaneous versions of the events concur that after a brief conversation with Rudd, Bedingfield departed to get her some brandy after Rudd had fainted during an argument.<sup>51</sup> The court’s account of “her refusing him something he very much desired”<sup>52</sup> might seem to modern ears to be a delicate way of describing an argument over sexual favors, but there is general concurrence among the various newspaper sources that the two fought over the use of Rudd’s pony and trap.<sup>53</sup>

In Bedingfield’s version of events, Rudd flew into a jealous rage when he told her of yet a third woman whom he had impregnated.<sup>54</sup> She slapped him and while he was sitting on her lap, ostensibly facing forward, she cut his throat with the razor he had brought.<sup>55</sup> He claimed: “I never cut her throat; she cut her’s and mine too. I was sitting on her knee; she cut my throat, and I fell down on the floor unconscious.”<sup>56</sup>

Throughout, Bedingfield repeatedly proclaimed his innocence, asking, “Do you think I could do that deed, as good friends as we were?”<sup>57</sup> He also expressed surprise: “I did not think she would have done such a thing. She

47. *Id.* There is no record of any children from their affair, so it is probable that Rudd miscarried.

48. *Id.*

49. *The Ipswich Murder.—Sentence of Death*, *supra* note 6. Bedingfield told a policeman that he first asked his wife for one pound, but she refused. *Id.* Bedingfield added that “if it had not been for my wife perhaps that [Rudd’s supposed attack on Bedingfield] would never have occurred.” *Id.*

50. *The Ipswich Tragedy*, *supra* note 1.

51. *Murder and Attempted Suicide at Ipswich*, *supra* note 1.

52. *R v. Bedingfield*, (1879) 14 Cox Crim. Cas. 341 (Crown Ct.) at 341 (Eng.).

53. *The Ipswich Tragedy*, *supra* note 1 (noting that even Bedingfield himself alludes to this when he commented that “if she had given me the pony and cart it would not have paid me for what I have done for her”).

54. Bedingfield is quoted by the policeman as reporting the following conversation between himself and Rudd:

Bedingfield: “You know a young woman had a child by me.”

Rudd: “I heard so.”

Bedingfield is then reported to have said to the policeman to whom he gave the statement that “Mrs. Rudd told me if she knew I spoke to [the young woman] again, she would run a knife into me. She has slapped my face—that the women know [possibly referring to Rudd’s assistants]—and if she had given me the pony and cart it would not have paid me for what I have done for her.” *Id.*

55. The direction of the cut on Bedingfield could only be explained if they were both facing the same direction—something the lap sitting would have accounted for.

56. *Id.*

57. *Id.*

was a deceitful woman.”<sup>58</sup> In the accounts of Bedingfield’s final moments before his execution, Bedingfield continued to proclaim his innocence.<sup>59</sup> The actual execution, the first in Ipswich since 1863, sixteen years previously, was closed to the general public.<sup>60</sup> But a reporter assured the readers of *The Ipswich Journal* that: “We have, however, good reason for knowing that the wretched man made no confession. On the contrary, that to the last he persisted in his innocence, and insisted that justice had not been done him.”<sup>61</sup>

*C. What Happened in Ipswich? Evaluation of the Evidence and Bedingfield’s Guilt*

Justice was swift for Bedingfield, but, according to some, not necessarily sure. The coroner’s inquest was held the same day Rudd died.<sup>62</sup> Bedingfield was tried and convicted on November 13, 1879, and hanged on December 3, 1879.<sup>63</sup> One would never guess from the reported opinion or the arguments over evidence that, in addition to the flap about the admissibility of Rudd’s final statement, there was significant concern about justice for Bedingfield. Over six hundred people signed a petition to the Home Office praying for a commutation of Bedingfield’s sentence, though some of those making the request may have been motivated by opposition to the death penalty, rather than belief in Bedingfield’s innocence.<sup>64</sup>

The Reverend Samuel Garratt, vicar of St. Margaret’s Church in Ipswich, wrote a long letter to several of the London papers pleading for clemency.<sup>65</sup> Interestingly, he first death-qualified himself,<sup>66</sup> explaining that he did “believe death by man’s hands to be the Divinely-appointed punishment for murder.”<sup>67</sup> The Vicar wrote passionately of Bedingfield’s innocence: “I am so convinced that he has been convicted under a mistake that I dare not be silent.”<sup>68</sup>

The arguments against Bedingfield’s guilt mustered by the Vicar concerned motive, the physical circumstances, and the creation of

58. *Id.*

59. *The Execution of Henry Bedingfield*, *supra* note 35.

60. *Id.*

61. *Id.*

62. *Murder and Attempted Suicide at Ipswich*, *supra* note 1.

63. *The Execution of Henry Bedingfield*, *supra* note 35.

64. *The Ipswich Murder*, DAILY NEWS (London), Dec. 1, 1879, at 3, available at Gale, Doc. No. Y3203348238.

65. Samuel Garratt, Letter to the Editor, *The Bedingfield Case*, DAILY NEWS (London), Nov. 29, 1879, at 2, available at Gale, Doc. No. Y3203348198; see *The Condemned Man Henry Bedingfield*, IPSWICH J., Dec. 2, 1879, at 4, available at Gale, Doc. No. Y3202579678.

66. To “death qualify” in modern parlance means to agree in principle with the death penalty. In capital cases, prosecutors are allowed to excuse for cause jurors who are not death-qualified. See generally Sam Kamin & Jeffrey J. Pokorak, *Death Qualification and the True Bifurcation: Building on the Massachusetts Governor’s Council’s Work*, 80 IND. L.J. 131 (2005).

67. Garratt, *supra* note 65.

68. *Id.* The Vicar stated that “Bedingfield has not been proved guilty, nor do I think he is guilty.” *Id.*

reasonable doubt.<sup>69</sup> The Vicar questioned why Bedingfield had committed his crime during the day with plenty of witnesses, when he could have murdered Rudd the night before.<sup>70</sup> The Vicar claimed that no motive had been demonstrated for Bedingfield to murder Rudd, whereas Bedingfield had assigned a motive for Rudd to attack him.<sup>71</sup> Bedingfield, according to the Vicar, seemed tenderly concerned about Rudd's welfare and even "fetch[ed] her a cordial because she was faint and ill—a strange precursor to cutting her throat."<sup>72</sup> According to the Vicar, when Rudd was pointing to the back room where Bedingfield lay, it was "not to denounce him as a murderer, but to implore help for him."<sup>73</sup>

The Vicar from Ipswich, in protesting the innocence of Bedingfield, made another observation worth considering. He was convinced that "what really influenced the minds of the jury was the evidence ruled by the Lord Chief Justice to be inadmissible, but which probably all of them had heard, and which . . . if admitted, [would] be fatal to the prisoner."<sup>74</sup> This is a reference to the impact of Rudd's alleged final statement, which the Vicar believed was inappropriately influential on the jury because of its emotional power. Rudd's alleged statement had been quoted extensively (with minor variations) in the newspapers so it is not fanciful to think, as the Vicar clearly did, that the jurors may have heard about Rudd's statement outside the courtroom. Even in 1879, apparently, people legitimately wondered if sensational cases covered in the press could be fair and truly tried.

Significantly, the Vicar also contested the forensic evidence, pointing out that Bedingfield's claim that he was sitting on Rudd's lap explains the direction of the incision.<sup>75</sup> He cited evidence from the Coroner's inquest that the depth of Rudd's wound would have prevented her from talking at all, and any accounts of what she said would necessarily be a fabrication.<sup>76</sup>

Furthermore, the testimony of Sarah Rodwell, the primary witness to the famous and controversial statement, "Oh, aunt, see what Bedingfield has done to me,"<sup>77</sup> invites questions about Rodwell's veracity. At the Coroner's Inquest, which, as noted above, happened the same day as the murder, Rodwell said under oath:

Bedingfield has been backwards and forwards to the deceased's house for the past two years to see after [Rudd's] pony and other business matters. He was paid for the services he thus rendered. I know of no other reason for his visits, and I always understood there was a good feeling existing between the parties. I never heard him threaten to do violence to her, nor have I heard her threaten to use any violence whatever against herself. As

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Murder and Attempted Suicide at Ipswich, supra* note 1.

to the cause of the injuries on the deceased's body I cannot give any evidence.<sup>78</sup>

By the time of the magistrate's inquest in September, however, Rodwell had a specific and very relevant memory of Bedingfield's violent threat against Rudd. Rodwell was the only one to allege that Bedingfield threatened Rudd the night before,<sup>79</sup> claiming that Bedingfield said: "Before you shall have anybody come here in my place I'll cut your ——— throat."<sup>80</sup> How do we explain the discrepancy? One possibility is that at the time of the Coroner's Inquest, the very day of Rudd's death, Rodwell was shaken. More probably, Rodwell was trying to protect Rudd's reputation and to keep the sexual nature of Bedingfield and Rudd's relationship under wraps. There is also, however, the possibility that Bedingfield never threatened Rudd with cutting her throat at all, and this was just Rodwell's way of securing Bedingfield's conviction.<sup>81</sup>

Persuasive as the impeachment of Rodwell is, arguments about Bedingfield's lack of motive, however, are wildly unconvincing. As one newspaper commentary brilliantly observed: "[W]hen the parties are man and wife, no additional motive for murder need be sought, and though Bedingfield and Mrs. Rudd were not man and wife, yet they were living in an equally close relation of a less legitimate kind."<sup>82</sup> Clearly, when people are emotionally entangled and in a sexual relationship, one does not need to search far for murderous impulses. Furthermore, there appeared to be significant evidence concerning constant fighting between Rudd and Bedingfield.<sup>83</sup>

Similarly, the forensic arguments for innocence are unpersuasive. Medical experts testified that Rudd's wound could not have been self-inflicted and that Bedingfield had wielded the razor that cut both their throats.<sup>84</sup> A surgeon who was on the scene to pronounce Rudd's death also performed a post-mortem examination and testified that the injury was not self-inflicted because of the "[g]reat violence [which] must have been

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78. *Id.*

79. *The Ipswich Tragedy*, *supra* note 1.

80. *Id.* I am guessing that the excised word that the paper would not print is "damn." This testimony is picked up by the court in the opinion, and Rodwell was cross-examined by the defense attorney at trial regarding her testimony at the Coroner's inquest.

81. Another possible indication of Rodwell's lack of veracity is that her own son, James Rodwell, age sixteen, contradicted her version of that morning's events, challenging his mother's assertion that Bedingfield had been the subject of discussion at the breakfast table. *Murder and Attempted Suicide at Ipswich*, *supra* note 1.

82. DAILY NEWS (London), Nov. 15, 1879, at 5, available at Gale, Doc. No. Y3203347839 (untitled article beginning "The murder of Eliza Rudd by Henry Bedingfield") (attributing the quote to Stephen's Evidence).

83. *The Ipswich Murder.—Sentence of Death*, *supra* note 6 (discussing the "standing quarrel" concerning payment for Bedingfield's services).

84. *R v. Bedingfield*, (1879) 14 Cox Crim. Cas. 341 (Crown Ct.) at 344 (Eng.). To credit Bedingfield's claim of innocence, one would have to believe that Rudd pulled out the razor while Bedingfield was sitting on her lap. Rudd's son testified before the magistrates that Rudd had bad knees and could not have supported a fully grown man on her lap. *The Ipswich Tragedy*, *supra* note 1.

used.”<sup>85</sup> By contrast, Bedingfield’s wound was shallower (hence his survival) and “was of the character common in suicidal wounds.”<sup>86</sup>

The razor identified as the weapon used to slash Bedingfield and Rudd was found curled in Bedingfield’s bloody fingers; a matching razor was found in his pocket.<sup>87</sup> As the prosecutor observed to the magistrates, “It was a most ridiculous suggestion that the woman could cut her own head nearly off and then lean over the prisoner and place a razor in his hand in the manner in which it was found.”<sup>88</sup> The prosecutor had a point; nowhere does the Vicar deal with the problem of the razor in Bedingfield’s hand.

Ultimately, the facts leave one with the impression that Bedingfield was indeed guilty of murder. The forensic evidence, primitive by modern standards, nevertheless seems highly persuasive. Indeed, in all the subsequent evidentiary commentaries that argue about the admissibility of the famous statement, “Oh, aunt, see what Bedingfield has done to me,”<sup>89</sup> Bedingfield’s guilt is presumed. It is the admissibility of this statement, rather than Bedingfield’s innocence or guilt that is central to this case’s place in evidence history.

Yet, the facts of the case raise an interesting question whether the statement was ever made. Serious questions exist regarding the credibility of Rodwell, the chief witness to the statement. Even more troubling, the Vicar and others made a persuasive argument that, with her throat cut so severely, it was unlikely that Rudd could talk at all. Both surgeons who testified at the inquest so opined, though they later retreated a bit upon cross-examination. One said: “In that condition, I should say it was impossible for her to have uttered an exclamation.”<sup>90</sup> The second testified that in his opinion, Rudd “could not have spoken with her head in any position whatever. . . . I think there would be nothing more than a sound of wind rushing through the windpipe. The muscles of the larynx being

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85. *Murder and Attempted Suicide at Ipswich*, *supra* note 1. Dr. Webster Adams testified that he found Rudd “with a deep incised wound in the throat, extending obliquely from the left up towards the right ear, severing all the large vessels on the right side, also the trachea.” *Id.* He opined that “the wound was inflicted from behind by the right hand, as the wound under the left ear is superficial, but as it progresses towards the right ear the wound becomes very deep.” *Id.* A few months later, Dr. Adams gave similar testimony in front of the magistrates, but he said that he “could not say whether much violence was used in inflicting [the] wound.” *The Ipswich Tragedy*, *supra* note 1. Branford Edwards, another surgeon who also attended the post-mortem and who testified at the Coroner’s Inquest, similarly testified that it “probably was not a suicidal wound.” *Id.* In addition, Rudd did not seem the type to take her own life. Dr. Adams knew Rudd personally (she was his laundress) and noted that “[t]he woman was always very cheerful, and I never thought her of a suicidal tendency.” *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Murder and Attempted Suicide at Ipswich*, *supra* note 1.

90. *The Murder at Ipswich*, IPSWICH J., July 19, 1879, at 3, *available at* Gale, Doc. No. Y3202578524 (statement of Dr. Webster Adams); *accord* Garratt, *supra* note 65 (quoting the Doctor’s statement).

divided she lost the strength to articulate.”<sup>91</sup> These doctors also predicted Bedingfield would die of his wounds,<sup>92</sup> so clearly they did not know everything. Nevertheless, the infirmity of Rodwell as a witness, whose recollection one scholar deems “strikingly convenient,”<sup>93</sup> and the medical testimony lead to the conclusion that Rudd’s statement was manufactured.

If it is true, as I suspect, that Rudd actually said nothing, this absence of utterance is more than an historical irony—another academic argument over nothing. If, indeed, Rudd never uttered these famous words, it was especially fortunate that they were never introduced. The rule against hearsay did its job of protecting the jury from hearing manufactured, out-of-court statements. Ultimately, however, the truth of what happened in Ipswich in 1879 is overshadowed by the evidence arguments spurred by those events.

#### D. Res Gestae Analysis

Rudd’s statement, “Oh, aunt, see what Bedingfield has done,”<sup>94</sup> presents a classic example of hearsay. Rudd made her statement out of court and the prosecution wanted to offer it for the truth of the matter asserted, which is to say, that Bedingfield had done the deed of cutting her throat. As with many out-of-court statements, there is some ambiguity, and Rudd was dead so she could not clarify its meaning.<sup>95</sup> Historically, however, there has been little debate as to the meaning of Rudd’s famous utterance,<sup>96</sup> and instead scholars and jurists debated whether her statement was admissible as part of the *res gestae* to prove Bedingfield’s attack.

Statements that qualify as part of the *res gestae* were connected so closely to the event that they were deemed part of the action, and hence admissible despite the hearsay rule. Courts struggled with the definition of *res gestae*, a term that, according to Professor Charles T. McCormick, began to be cited in the early 1800s.<sup>97</sup> Professor John Pitt Taylor, in his evidence treatise, explained the central question: “[W]hether the circumstances and declarations offered in proof were so connected with the

91. *The Murder at Ipswich*, *supra* note 90 (statement of Dr. Branford Edwards). This statement was also quoted by the Vicar in his letter to the editor. Garratt, *supra* note 65. The Vicar’s quotations of the surgeons’ statements are slightly different from those reported in *The Ipswich Journal* article, but they contain the same information. *Id.*

92. *Murder and Attempted Suicide at Ipswich*, *supra* note 1.

93. David Wilde, *Hearsay in Criminal Cases: Res Gestae and Dying Declarations: R v Bedingfield Revisited*, 4 INT’L J. EVIDENCE & PROOF 107, 115 n.33 (2000).

94. *Murder and Attempted Suicide at Ipswich*, *supra* note 1.

95. It is possible that Rudd meant something other than accusing Bedingfield of slitting her throat. If one were to believe Bedingfield’s defense that Rudd attacked him and then she committed suicide, the statement, “Oh, aunt, see what Bedingfield has done to me” could mean “Oh, aunt, see what Bedingfield has driven me to do.” See David M. Tanovich, *Starr Gazing: Looking into the Future of Hearsay in Canada*, 28 QUEEN’S L.J. 371, 405 (2003) (presenting this alternate hypothesis).

96. *But see* Wilde, *supra* note 93, 111–12 (arguing, based on an event involving Vincent van Gogh and Paul Gauguin, that Rudd could have been the aggressor and yet still blamed Bedingfield).

97. 2 MCCORMICK ON EVIDENCE § 268 (John William Strong ed., 4th ed. 1992).

*main fact* under consideration, as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction.”<sup>98</sup>

The term *res gestae* captured the interest and inspired the ire of many evidence greats in addition to James Thayer, who decried its “convenient obscurity.”<sup>99</sup> Edmund M. Morgan began his classic article, *A Suggested Classification of Utterances Admissible as Res Gestae*,<sup>100</sup> by noting that “[t]he marvelous capacity of a Latin phrase to serve as a substitute for reasoning . . . [is] nowhere better illustrated than in the decisions dealing with the admissibility of evidence as ‘*res gestae*.’”<sup>101</sup> Similarly, Judge Learned Hand remarked, “as for ‘*res gestae*,’ it is a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms.”<sup>102</sup>

The dismissiveness and contempt of scholars for the phrase *res gestae* derives from two apparently opposite factors: (1) the ambiguity of the phrase that led to over-inclusiveness whereby too many out-of-court statements were admitted; and (2) the perceived narrowness of the English approach that led to under-inclusiveness. As I argue in Part III, the same contradictory problems beset the modern Supreme Court’s definition of testimonial statements.<sup>103</sup>

As to ambiguity, Professor John Henry Wigmore, declaring the phrase *res gestae* to be “not only entirely useless, but even positively harmful,”<sup>104</sup> explained that “it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both.”<sup>105</sup> In a fit of candor,

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98. 1 JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE: AS ADMINISTERED IN ENGLAND AND IRELAND §§ 525, 526 (London, William Maxwell & Son, 7th ed. 1878) (quoted in *Coffin v. Bradbury*, 35 P. 715, 721 (Idaho 1894)); see also *Washington v. State*, 118 So. 2d 650, 653 (Fla. Dist. Ct. App. 1960) (“‘Res Gestae,’ is a Latin term translated literally as ‘things done’; and it embraces the circumstances, facts, and declarations which are incident to the main fact or transaction and which are necessary to demonstrate its character. It also includes words, declarations, and acts so closely connected with a main fact in issue as to constitute a part of the transaction.” (citing H.C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 266, at 644 (5th ed. 1956))); *Coffin*, 35 P. at 721 (explaining that *res gestae* statements are “declarations made, under circumstances to warrant the court in presuming that they grew out of the litigated issue, and illustrate the true character of the transaction, and were dependent upon it, were not designedly made, or devised for a self-serving purpose, are evidentiary facts, and are not within the general rule applicable to hearsay testimony”).

99. Thayer (pt. II), *supra* note 10, at 9; see Aviva Orenstein, “MY GOD!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CALIF. L. REV. 159, 167 n.16 (1997).

100. 31 YALE L.J. 229 (1922).

101. *Id.* at 229.

102. *United States v. Matot*, 146 F.2d 197, 198 (2d Cir. 1944).

103. Ironically, Justice Scalia, author and promoter of the new approach to confrontation leveled the same criticism at the previous confrontation doctrine he overruled. See *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (criticizing *Ohio v. Roberts*, 448 U.S. 56 (1980), for being both too broad and too narrow).

104. 6 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1767, at 182 (3d ed. 1940).

105. *Id.*

however, one court acknowledged that this ambiguity was seductive in its malleability,<sup>106</sup> explaining that “sometimes the shibboleth was an easy way for a practical-minded court to say, ‘We frankly can’t figure out whether the statement is admissible under Theory A or Theory B, but we don’t really care because it is admissible in either event.’”<sup>107</sup> Courts clearly admitted valuable evidence under a *res gestae* theory when they could think of no other way of admitting out-of-court statements. Like its descendant, the excited utterance, *res gestae* was the “garbage pail of hearsay exceptions,” the last place to dump evidence otherwise excluded by hearsay.<sup>108</sup>

Interestingly, the other criticism of *res gestae* was that courts applied it too grudgingly. No small amount of this negative assessment of *res gestae* derives from *Bedingfield* itself and other cases like it in which the use of *res gestae*, particularly in the English cases, seemed picayune and unnecessarily restrictive. According to Chief Justice Cockburn, Rudd’s declaration failed to fit into the category of *res gestae* because her statement was not exactly concurrent with the crime; the act by the perpetrator was already complete, and the statement was not made in the presence of the accused.<sup>109</sup> Apparently, precise contemporaneity was vital in *Bedingfield*. As Cockburn explained, a statement like “Don’t, Harry!” would constitute part of the *res gestae*.<sup>110</sup> “Look what Harry did,” however, would just be an inadmissible remembrance of things past.<sup>111</sup>

106. *Gray v. State*, 456 A.2d 1290, 1297 (Md. Ct. Spec. App. 1983) (“One almost longs nostalgically for the discredited label of ‘res gestae,’ notwithstanding its utter repudiation in polite academic circles. Its sin was its elusive ambiguity. Ironically, that ambiguity may also have been its occasional virtue.” (footnote omitted)).

107. *Id.* at 1298.

108. Orenstein, *supra* note 99, at 177; see Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 282 (2006) (“The exception for excited utterances was the single most important evidentiary rule for prosecutors in domestic violence cases during the era preceding *Crawford*.”).

109. *R v. Bedingfield*, (1879) 14 Cox Crim. Cas. 341 (Crown Ct.) at 342 (Eng.).

110. *Id.*

111. Chief Justice Cockburn’s last observation, regarding the fact that the statement was not made in the presence of the accused, reflected, at least in part, the party witness rule. Just as the accused enjoyed a privilege against self-incrimination, there was in England at the time of *Bedingfield* a ban on the accused’s testifying on his own behalf. The party was simply not allowed to testify at all. Since *Bedingfield* could not speak, it seemed unfair to admit Rudd’s last declaration. In fact, Cockburn noted in his pamphlet that, “Possibly, when the inability of an accused person to give evidence in his own favour shall have been removed, a restriction on the admissibility of statements made against him in his absence, and which unanswered may operate to his prejudice . . . may be advantageously removed in the interest of justice.” A. E. COCKBURN, A LETTER TO JOHN PITT TAYLOR, ESQ. 16 (Vacher & Sons) (1879). This point was noted by an American judge in rejecting *Bedingfield*. *State v. Thompson*, 34 S.W. 31, 38 (Mo. 1896) (“As the law now permits the accused to testify, the reason for the rigid exclusion of evidence like this has been greatly shaken. Even Lord Chief Justice Cockburn, whose ruling in *Bedingfield*’s Case was at variance with many English and American precedents on this question, and has been rejected both by our courts and law writers, conceded that if the prisoner could testify the rule should be relaxed.”).

This observation by Chief Justice Cockburn raises an interesting historical and policy question seemingly ignored by the Court in *Crawford* and its progeny. How much of the insistence that witnesses be cross examined in court stemmed from the concern that the accused could not testify at all? Once the party-witness rule was changed, it arguably made



In contrast, John Pitt Taylor, a contemporary legal treatise writer who initiated a spirited discussion of the *Bedingfield* case in *The Times* of London, argued that Rudd's statement fell squarely within *res gestae*.<sup>112</sup> According to Taylor, Rudd's running from the room was part of the action—an inseverable aspect of the crime. Taylor also rejected the notion that the *res gestae* had to transpire in front of the accused.<sup>113</sup>

Lord Chief Justice Cockburn's explanation, expanded upon in his pamphlet defending his *Bedingfield* decision, is in itself sufficient grounds to deem the doctrine unwieldy. I quote a full paragraph (that is also just one sentence) to offer the reader a sense of the density—one might say impenetrability—of Cockburn's description of the doctrine<sup>114</sup>:

Whatever act, or series of acts, constitute, or in point of time immediately accompany and terminate in the principal act charged as an offence against the accused, from its inception to its

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sense to at least revisit the policy calculations where the witness had something to say and was truly unavailable.

112. J. Pitt-Taylor, Letter to the Editor, *The Law of Evidence as Expounded by the Lord Chief Justice*, *TIMES* (London), Nov. 17, 1879 (available on Hein Online). *Bedingfield* presents a window into the culture of evidence scholarship. The reactions to *Bedingfield* are replete with academic back-biting that makes modern scholarly discourse seem tame if not milquetoasty by comparison. Thayer's three-part article on the *Bedingfield* case will quickly disabuse modern legal scholars of any misplaced nostalgia for a kinder, gentler age of scholarship.

The Chief Judge of England responded with acrimony when his opinion in *Bedingfield* was criticized in *The Times* of London. The Chief Judge issued pamphlets and newspaper editorials mocking Taylor and Simon Greenleaf, who were both evidence treatise writers, after Taylor publicly criticized the opinion. Chief Justice Cockburn expressed outrage at the forum and charged anyone who disagreed with him with naiveté and poor research skills. Taylor responded in kind, arguing that the Chief Justice's attack was "neither consistent with your dignity, your generosity, nor your justice." JOHN PITT TAYLOR, A LETTER TO THE LORD CHIEF JUSTICE OF ENGLAND, G.C.B.: IN REPLY TO HIS LORDSHIP'S LETTER ON THE *BEDINGFIELD* CASE 3 (William Maxwell & Son) (1880). In addition to Taylor, the *Times* of London received Letters signed by: "Lex," "A Barrister Present at the Trial," "Long Robe," and others who just signed with their initials. Given Chief Justice Cockburn's fury at being challenged, it is not entirely surprising that many of his critics preferred to remain anonymous. For an entertaining discussion of this debate and Chief Justice Cockburn's petulance, see Roderick Munday, *The Judge Who Answered His Critics*, 46 *CAMBRIDGE L.J.* 303 (1987).

In writing about the *Bedingfield* case, Thayer was snide about many fellow legal scholars. For instance, of the treatise writer, Greenleaf, Thayer observes: "Greenleaf's general conceptions were not original,—they were English." Thayer (pt. III), *supra* note 10, at 74. Thayer proceeded to assess the work of this derivative scholar's treatment of *res gestae*: "Greenleaf has thus helped to give a vague reach and diffusion to the doctrine." *Id.* at 76. Thayer approved of the term "evidentiary facts," which he denoted as "[o]ne of Bentham's words, which unlike many of those ugly creations, has passed into good legal usage." *Id.* at 81 n.1. At another juncture, tracing the history of the phrase *res gestae*, Thayer noted that "[w]e find it first in the mouth of Garrow and Lord Kenyon,—two famously ignorant men." Thayer (pt. II), *supra* note 10, at 10 n.1. Aside from the vituperative tone the scholarly discussions of the case presented a starkly clinical, hyper-intellectual approach to an underlying tragedy, a hallmark of legal scholarship today as well.

113. PITT TAYLOR, *supra* note 112, at 16–17.

114. The rest of the pamphlet is easy to read and jaunty, if condescending in tone. Tellingly, even a stylist like Cockburn could not render the *res gestae* doctrine comprehensible.

consummation or final completion, or its prevention or abandonment—whether on the part of the agent or wrong-doer, in order to its performance, or on that of the patient or party wronged in order to its prevention—and whatever may be said by either of the parties during the continuance of the transaction, with reference to it—including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive—as *e.g.*, in the case of flight or applications for assistance—form part of the principal transaction and may be given in evidence as part of the *res gestae* or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer—actual or constructive—has ceased, through the completion of the principle act or other determination of it by its prevention, or its abandonment by the wrong-doer—such as *e.g.* statements made with a view to the apprehension of the offender—do not form part of the *res gestae*, and should be excluded.<sup>115</sup>

One can certainly understand Taylor’s comment that, after perusing the Chief Justice’s definition, he found himself “enveloped in a fog.”<sup>116</sup>

*Bedingfield* influenced American law by negative example. *Bedingfield*’s close attention to timing was much criticized on this side of the Atlantic. Wigmore, the father of the excited utterance, pronounced the *Bedingfield* limitation on *res gestae* erroneous, and predicted that it would “almost certainly not be followed in this country.”<sup>117</sup> Most American jurists applying *res gestae* found the *Bedingfield* rule to be “an unreasonably strict construction.”<sup>118</sup>

In *Insurance Co. v. Mosley*,<sup>119</sup> the Supreme Court applied the concept of *res gestae* to the declarations of the deceased made shortly after he received a mortal injury regarding the cause of his injury.<sup>120</sup> The Court held that the

115. COCKBURN, *supra* note 111, at 19.

116. PITT TAYLOR, *supra* note 112, at 20–21.

117. 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES § 1756, at 2266 n.6 (1904); *see* *State v. Murphy*, 17 A. 998, 998–99 (R.I. 1889) (referring to *Bedingfield* as “much criticised” and “tak[ing] extreme ground”). *But see* *People v. Ah Lee*, 60 Cal. 85, 87, 92 (1882) (holding that victim’s statement that “hallooed murder” after victim was stabbed was not part of the *res gestae* and commending *Bedingfield*: “[W]e think that the line which separates statements which are admissible in evidence as a part of the *res gestae* from those which are admissible only as dying declarations, is well defined by Mr. Chief Justice Cockburn.”).

118. *Murray v. Boston & Me. R.R.*, 54 A. 289, 291 (N.H. 1903). But, as one might expect, there were variations in the jurisprudence and some American courts did follow the strictures of *Bedingfield*, particularly on the west coast. *See, e.g., Coryell v. Clifford F. Reid, Inc.*, 4 P.2d 295 (Cal. Dist. Ct. App. 1931) (following *Ah Lee*, 60 Cal. 85). After reviewing the cases, my view is that the majority rule favored a loosened timing requirement. *But see generally* Fisher, *supra* note 8 (focusing on the cases that did require precise contemporaneousness).

119. 75 U.S. (8 Wall.) 397 (1869).

120. *Mosley* is a civil, not a criminal, case. Thayer explained that although in criminal cases “evidence against an accused person must be given in his presence” that rule “is nowhere, in either country, held to cut down the admission of declarations which are a part of the *res gesta*.” Thayer, *supra* note 1, at 828. “[N]o distinction between civil cases and

declarant's statement to his wife that he had fallen down the back stairs and hit his head was competent evidence in the lawsuit against the insurance company. Justice Noah Haynes Swayne, writing for the majority, had no trouble holding that the declarant's statements as to his then-existing physical condition were admissible as verbal acts. More controversially, he held that the declarant's later statement as to what caused the injury were part of the *res gestae* explaining: "To bring such declarations within this principle, generally, they must be contemporaneous with the main fact to which they relate. But this rule is, by no means, of universal application."<sup>121</sup> Insightfully, the Court explained that: "In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted."<sup>122</sup> Referring to *res gestae*, the Court observed: "The tendency of recent adjudications is to extend rather than to narrow, the scope of the doctrine."<sup>123</sup> With more optimism than was warranted for the benighted *res gestae* doctrine, the Court opined: "Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority."<sup>124</sup>

American courts, although they were more flexible than their English counterparts, continued to struggle with the definition and application of *res gestae*, and refused to admit mere narratives of past events under the doctrine.<sup>125</sup> In his article on the *Bedingfield* case, Thayer acknowledged that "difficult questions may arise as to contemporaneousness. There can seldom be a perfect coincidence of time . . ."<sup>126</sup> According to Thayer, Rudd's declaration was made sufficiently close in time to be admissible.<sup>127</sup>

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criminal cases as to the admission of declarations as a part of the *res gesta* has as yet been made out, and it is very late in the day to adventure upon such an enterprise." *Id.* at 829.

121. *Mosley*, 75 U.S. at 407.

122. *Id.* at 408.

123. *Id.*

124. *Id.* In 1880, the Supreme Court of South Carolina similarly explained the rule with an explicit caveat that the timing need not be exactly contemporaneous:

To make declarations a part of the *res gestae*, they must be contemporaneous with the main fact, not, however, precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous.

*State v. Belcher*, 13 S.C. 459, 463–64 (1880).

125. See *Westcott v. Waterloo, C.F. & N. Ry. Co.*, 155 N.W. 255, 258 (Iowa 1915) ("The doctrine has not been as closely applied in this country, and it is not required that the declaration be contemporaneous with the act, but all courts hold that it must be spontaneous, and not a narrative of past events. It must appear that the interval of time did not afford an opportunity to premeditate and fabricate."); see, e.g., *Herren v. People*, 62 P. 833, 834 (Colo. 1900) (rejecting *res gestae* where the "purported declarations were neither spontaneous nor voluntary. They were in response to questions asked, and were clearly narrative of a past event, in no sense explanatory of the principal fact, or connected with it.").

126. Thayer (pt. III), *supra* note 10, at 84.

127. *Id.* at 89.

Over time, influenced by Thayer and Wigmore, courts did not insist on precise contemporaneity.<sup>128</sup> The two scholars differed in their explanation for the break with *Bedingfield*. For Thayer, the closeness in time and relatedness of the words to the action sufficiently justified the inclusion of the statement as *res gestae*.<sup>129</sup> Wigmore, who was Thayer's student, demanded that the statement be prompted by a startling event. According to Wigmore, the startling nature of the event guaranteed trustworthiness that mere timing or spontaneity could not replicate.<sup>130</sup> Thus, Thayer is the granddaddy of the modern present sense impression—an excited utterance sans the excitement (but with closer attention to the timing); Wigmore is the champion of the excited utterance (he disdained the present sense impression). A generation later, Professor Edmund Morgan commented that insisting on exact contemporaneousness for all such statements was impractical, and embraced both exceptions.<sup>131</sup>

Modern courts rarely employ the term *res gestae*;<sup>132</sup> it is a relic that served as a transitional device in the evolution of various hearsay exceptions and in honing the definition of hearsay. Some types of *res gestae*, such as verbal acts, are not classified as hearsay at all because they are not being offered for the truth of the matter asserted.<sup>133</sup> Other doctrinal descendants of *res gestae* fall within modern exceptions, including excited utterance, present sense impression, then-existing state-of-mind, and statements made for medical diagnosis.<sup>134</sup> Unquestionably, as a matter of hearsay doctrine, courts today would consider Rudd's statement an excited utterance, that is, an out-of-court statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."<sup>135</sup> It probably would also have qualified as a present sense impression, which is defined as an out-of-court declaration "describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately

128. See *Coffin v. Bradbury*, 35 P. 715, 721 (Idaho 1894) ("[T]he decided weight is that time is not necessarily a controlling element or principle in the matter of *res gestae*.").

129. Thayer (pt. III), *supra* note 10, at 83.

130. WIGMORE, *supra* note 104, § 1756, at 164.

131. See Edmund M. Morgan, *Res Gestae*, 12 WASH. L. REV. 91, 96–98 (1937); Morgan, *supra* note 100, at 236–37. For an erudite discussion of the scholarly history of *res gestae* in America, see *Deparvine v. State*, 995 So. 2d 351, 362–63 (Fla. 2008).

132. See, e.g., *Cassidy v. State*, 536 A.2d 666, 670 n.4 (Md. Ct. Spec. App. 1988) ("In this case, we will not rely upon the undifferentiated phrase *res gestae*, because that umbrella term covers a wide variety of analytically distinct rationales." (quoting *Moore v. State*, 338 A.2d 344, 346 n.1 (Md. Ct. Spec. App. 1975))).

133. See *id.* at 671–72 (listing seven different modern manifestations of *res gestae* including the nonhearsay uses of verbal acts, verbal parts of acts, and implied assertions); see, e.g., *Deparvine*, 995 So. 2d at 362 n.7 (including in *res gestae* "part of a relevant transaction the offered evidence of which has no hearsay aspect" (quoting Edmund M. Morgan, *The Law of Evidence, 1941–1945*, 59 HARV. L. REV. 481, 568 (1946))).

134. *Municipality of Bethel Park v. Workmen's Comp.* Appeal Bd., 636 A.2d 1254, 1257 (Pa. Commw. Ct. 1994) ("[R]es gestae is no longer itself a specific hearsay exception. Rather, it is a generic term which encompasses four distinct exceptions: (1) declarations as to present bodily conditions; (2) declarations as to present mental states or emotions; (3) excited utterances; and (4) present sense impressions.").

135. FED. R. EVID. 803(2); see also 2 MCCORMICK, *supra* note 97, § 268.

thereafter.”<sup>136</sup> In both cases, from a hearsay perspective, the availability of the declarant to testify is immaterial and the proponent of the evidence need not call the declarant to the witness stand.<sup>137</sup>

Excited utterances and present sense impressions pose significant problems for the modern confrontation doctrine, however, and *Bedingfield*, though it presents no helpful solutions, anticipates those very problems.

## II. MODERN CONFRONTATION JURISPRUDENCE AND ITS RELATION TO DOMESTIC VIOLENCE PROSECUTIONS

### A. *The Supreme Court's New Approach to Confrontation*

In *Crawford v. Washington*,<sup>138</sup> the Supreme Court reshaped our understanding of the protections offered by the Sixth Amendment right to confront witnesses.<sup>139</sup> *Crawford* held that an out-of-court “testimonial” statement may be used against the accused only if the declarant is either (1) available for cross-examination, or (2) proved unavailable, and the testimonial statement was subject to cross-examination by the accused previously.<sup>140</sup> *Crawford*'s focus on “testimonial” statements represented a new approach. The opinion is steeped in history and strives to effectuate the original intent of the Sixth Amendment, emulating the common law at the time the amendment was originally written.<sup>141</sup>

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136. FED. R. EVID. 803(1).

137. Federal Rule of Evidence 803 sets forth exceptions to the hearsay rule, including the excited utterance exceptions, for which availability of the declarant is immaterial. Rule 803 exceptions have been considered either sufficiently trustworthy to be admissible without requiring imposition of the time and expense associated with production of a declarant, or of a type where cross-examination of the declarant would purportedly provide no additional information to the fact finder. The constitutionality of admitting at least some excited utterances and present sense impressions where the declarant is not called to testify has been called into question by *Crawford v. Washington*, 541 U.S. 36 (2004).

138. 541 U.S. 36 (2004).

139. The Confrontation Clause of the Sixth Amendment provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI.

140. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009) (“A witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.”). The practical effect of *Crawford* was to limit the admissibility of so-called “testimonial” statements. The Court has subsequently made clear that nontestimonial statements present only hearsay, and not confrontation, concerns. See *infra* note 316 and accompanying text.

141. *Crawford*, 541 U.S. at 54. Justice Scalia explained that the Confrontation Clause is “most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.” *Id.* Scalia’s originalist approach has been attacked for its lack of wisdom and its method. In a series of articles, Professor Thomas Davies has convincingly argued that Justice Scalia’s historical account is flawed and that *Crawford*'s approach to unsworn hearsay is inconsistent with the basic premises that shaped the Framers’ understanding of the confrontation right. See Thomas Y. Davies, *Not “the Framers’ Design”*: *How the Framing-Era Ban against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL’Y 349, 355 (2007) [hereinafter Davies, *Not the Framers’ Design*] (arguing that a testimonial versus nontestimonial distinction does not accurately reflect the Founders’ approach to confrontation, and that Justice Scalia’s

*Crawford* explicitly overruled *Ohio v. Roberts*,<sup>142</sup> which admitted out-of-court statements as long as they bore “adequate ‘indicia of reliability.’”<sup>143</sup> Justice Scalia, who authored *Crawford* and all the recent confrontation opinions, rejected the reliability inquiry and derided it as “*inherently*, and therefore *permanently*, unpredictable.”<sup>144</sup> He emphasized that “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”<sup>145</sup> *Crawford* focused on the procedural nature of the confrontation right, explaining: “To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>146</sup> *Crawford* indicated only two potential exceptions to its rules limiting the admission of testimonial statements against the accused: dying declarations (which were admitted at the time the Sixth Amendment right to confront witnesses was written)<sup>147</sup> and forfeiture by wrongdoing, whereby the accused forfeits his confrontation right by intentionally procuring the witness’s absence.<sup>148</sup>

Although everything turns on the definition, *Crawford* did not fully explain what constitutes a “testimonial statement.”<sup>149</sup> In delineating which

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originalism is a “fundamentally flawed approach to constitutional interpretation in criminal procedure issues because originalists fail to grasp—or to admit—the degree to which legal doctrine and legal institutions have changed since the framing”); Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of Giles’ Forfeitures Exception to Confrontation Were or Were Not “Established at the Time of the Founding”*, 13 LEWIS & CLARK L. REV. 605, 610, 663 (2009) (deriding “the purely fictional character of *Crawford*’s purportedly originalist claim regarding the testimonial/nontestimonial hearsay distinction” and noting that “during the nineteenth century and most of the twentieth century[,] . . . forfeiture by wrongdoing plainly was limited to *prior sworn and confronted testimony*” and Scalia’s forfeiture exception would expand the Framers’ approach); 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, 107–08, 205 (2005) (arguing that there is no historical basis for the restriction of the confrontation right to only “testimonial” hearsay; the cross-examination rule derived from the application of Marian statutes was actually a legal development that occurred after the framing of the Sixth Amendment).

142. 448 U.S. 56 (1980).

143. *Id.* at 66 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972)). This test was satisfied if the out-of-court statement falls within a “firmly rooted hearsay exception” or bears “particularized guarantees of trustworthiness.” *Id.* (citations omitted).

144. *Crawford*, 541 U.S. at 68 n.10.

145. *Id.* at 61.

146. *Id.*

147. *Id.* at 56 n.6. (“The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed.”). See generally Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411.

148. *Crawford*, 541 U.S. at 62 (“For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds.” (citing *Reynolds v. United States*, 98 U.S. 145, 158–59 (1878))).

149. The Court itself noted that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Id.* at 68. It did not need to decide the question because Sylvia *Crawford*’s statements to police at the station were “testimonial” by any measure. Chief Justice William Rehnquist predicted in his concurrence in the judgment that

statements are “testimonial” the Court focused primarily on whether the declarant anticipated that law enforcement would use the statement to prosecute the accused.<sup>150</sup> Post-*Crawford*, amid serious confusion, various lower courts struggled with the definition of “testimonial” and focused on additional factors such as: the role of the government in generating the evidence; whether the declarant initiated contact with law-enforcement authorities; the location and context in which the declarant gave the statement to law enforcement agents; and the structure and formality of the questioning.<sup>151</sup>

Of the many questions *Crawford* left open in its failure to define the term “testimonial,” among the most difficult arose in domestic-violence cases. Specifically, lower courts wrestled with the testimonial quality of 911 calls and on-site interviews of victims by police.<sup>152</sup> In some senses, such statements seem testimonial because they report criminal conduct to police, and an objective declarant could reasonably expect such statements would be available for use at a later trial. On the other hand, 911 calls and on-the-scene interviews by police are less formal<sup>153</sup> and may be targeted to the victim’s safety rather than conducted for the purpose of generating evidence, and hence do not seem testimonial.

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the immediate effect of *Crawford* would be immense confusion as to what sorts of statements were “testimonial.” *Id.* at 75–76 (Rehnquist, C.J., concurring in the judgment) (citations omitted). Many commentators agree. *See, e.g.*, Myrna S. Raeder, *Domestic Violence Cases after Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL’Y 759, 760 (2007) (“*Crawford*’s failure to define what is testimonial led to two years of judges reading tea leaves, and reaching contrary outcomes.”); Jennifer B. Sokoler, Note, *Between Substance and Procedure: A Role for States’ Interests in the Scope of the Confrontation Clause*, 110 COLUM. L. REV. 161, 173 (2010) (discussing *Crawford*’s “failure to fully define the contours of the concept embedded at the heart of the new Confrontation Clause framework: testimonial statements”).

150. *Crawford*, 541 U.S. at 51–52 (reasoning that at their core, testimonial statements include “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions” (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment))). Beyond this list of obvious, formal testimonial statements, the court included other “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 52 (quoting Brief for Nat’l Ass’n of Criminal Def. Lawyers et al. as Amici Curiae Supporting Petitioners at 3, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21754961). Tellingly, the Court did not attempt to craft a definition of its own, but quoted from the parties and amici. *See id.*

151. *See, e.g.*, Gary M. Bishop, *Testimonial Statements, Excited Utterances and the Confrontation Clause: Formulating A Precise Rule After Crawford and Davis*, 54 CLEV. ST. L. REV. 559 (2006); Josephine Ross, *Crawford’s Short-Lived Revolution: How Davis v. Washington Reins In Crawford’s Reach*, 83 N.D. L. REV. 387 (2007).

152. *Davis v. Washington*, 547 U.S. 813, 817 (2006) (explaining its mission “to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are ‘testimonial’ and thus subject to the requirements of the Sixth Amendment’s Confrontation Clause”).

153. Ultimately, the Court did not rely on formality as a touchstone for determining whether a statement is testimonial. *See id.* at 826. Justice Thomas dissented in *Davis*, advocating a test that looked for “formalized dialogue . . . statements sufficiently formal to resemble the Marian examinations.” *Id.* at 840 (Thomas, J., concurring in the judgment in part and dissenting in part).

The Court addressed the testimonial nature of statements made by domestic violence victims to police in *Davis v. Washington*<sup>154</sup> and its companion case, *Hammon v. Indiana*.<sup>155</sup> *Davis* involved a 911 emergency call placed by a victim during a violent incident with her former boyfriend. During the call, the victim told the 911 operator that Davis had just run out the door after hitting her. The 911 operator asked numerous questions including Davis's full name, birthday, purpose for visiting the victim's residence, and the context of the assault.<sup>156</sup> Upon arrival, the police observed the victim's "'shaken state,'" the "'fresh injuries on her forearm and her face,'" and her "'frantic efforts to gather her belongings and her children so that they could leave the residence.'"<sup>157</sup> Because the victim did not appear at Davis's trial despite the prosecution's attempt to secure her in-court testimony, the State's only live, in-court witnesses were the two responding officers, neither of whom had witnessed the incident.<sup>158</sup> Over Davis's objections, the trial court admitted the recording of the victim's 911 call and convicted Davis of a felony violation of a domestic no-contact order.<sup>159</sup>

Similarly, *Hammon*, the companion case, involved statements made to law enforcement personnel who responded to a reported domestic disturbance. When the officers arrived, they found the victim, Amy Hammon, on the porch appearing "'somewhat frightened,'" although she told them "'nothing was the matter.'"<sup>160</sup> She allowed the police to enter, and they found evidence of a struggle in the living room. The accused was in the kitchen.<sup>161</sup> The officers separated the victim and the accused and again asked the victim what had occurred.<sup>162</sup> Though the accused attempted to interrupt, Ms. Hammon eventually described the violent incident, and completed and signed a battery affidavit.<sup>163</sup> Amy Hammon did not appear at trial and the State, over the accused's objections, called the officer who questioned her to describe what she told him.<sup>164</sup>

Denying any attempt to "produce an exhaustive classification of all conceivable statements,"<sup>165</sup> the Court strove to differentiate testimonial from nontestimonial statements in the domestic violence context, using the

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154. 547 U.S. 813 (2006).

155. 547 U.S. 813 (2006). In *Davis* and *Hammon*, the Court acknowledged that it had to refine its definition of "testimonial statements" because the "character of the statements in the present cases is not as clear, and these cases require us to determine more precisely which police interrogations produce testimony." *Id.* at 822.

156. *Id.* at 818.

157. *Id.* (quoting *State v. Davis*, 111 P.3d 844, 847 (Wash. 2005) (en banc), *aff'd*, 547 U.S. 813 (2006)).

158. *Id.* at 818–19.

159. *Id.* at 819.

160. *Id.* (quoting *Hammon v. State*, 829 N.E.2d 444, 446–47 (Ind. 2005), *rev'd sub nom.* *Davis v. Washington*, 547 U.S. 813 (2006)).

161. *Id.*

162. *Id.*

163. *Id.* at 820.

164. *Id.*

165. *Id.* at 822.



*Davis* and *Hammon* cases to illustrate the distinction. According to the Court, nontestimonial statements are “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.”<sup>166</sup> Statements are testimonial, however, “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.”<sup>167</sup>

Applying this standard to *Davis* and *Hammon*, the Court concluded that “the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to ‘establis[h] or prov[e]’ some past fact, but to describe current circumstances requiring police assistance.”<sup>168</sup> In addition, “any reasonable listener” would recognize that the declarant in *Davis* (as opposed to Sylvia Crawford, who gave her statement while safely ensconced in a police station) “was facing an ongoing emergency.”<sup>169</sup> The victim’s interrogation in *Davis* elicited statements that were “necessary to be able to *resolve* the present emergency, rather than simply to learn . . . what had happened in the past.”<sup>170</sup> The Court concluded that the victim was “speaking about events *as they were actually happening*, rather than ‘describ[ing] past events.’”<sup>171</sup> The Court conceded that “one *might* call 911 to provide a narrative report of a crime absent any imminent danger,” but decided that the victim in *Davis* (as opposed to Amy Hammon) was plainly making “a call for help against a bona fide physical threat.”<sup>172</sup> The circumstances of the interrogation in *Davis* “objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency.”<sup>173</sup> Therefore, the Court held that the victim’s initial statements on the 911 call in *Davis* were nontestimonial.<sup>174</sup>

*Hammon* was dispatched easily because, according to the Court, there was “no emergency in progress.”<sup>175</sup> The Court explained that the officer questioning Amy Hammon “was not seeking to determine (as in *Davis*) ‘what is happening,’ but rather ‘what happened.’”<sup>176</sup> The Court

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166. *Id.*

167. *Id.*

168. *Id.* at 827.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 828.

174. *Id.* at 829. Once the declarant started answering specific questions posed by the dispatcher regarding non-emergency matters, however, that part of the interview became a testimonial statement. *Id.* at 828–29. The 911 call involved spontaneous statements by the declarant as well as answers to questions regarding the alleged perpetrator’s date of birth, preceded by the exhortation from the 911 operator to “[s]top talking and answer my questions.” *Id.* at 818 (quoting Brief for Petitioner at 42, *Davis v. Washington*, 547 U.S. 813 (2006) (No. 05-5224), 2005 WL 3598182).

175. *Id.* at 829.

176. *Id.* at 830. As the Court explained: “Amy’s narrative of past events was delivered at some remove in time from the danger she described. And after Amy answered the officer’s questions, he had her execute an affidavit, in order, he testified, ‘[t]o establish events that

acknowledged that exigencies surrounding a domestic violence call “may often mean that ‘initial inquiries’ produce nontestimonial statements.”<sup>177</sup> But it distinguished *Hammon*, where the declarant’s statements “were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation.”<sup>178</sup>

Because the focus of *Crawford* had been on the original intent of the drafters of the Sixth Amendment, and Justice Scalia wrote extensively about the common-law right to confront accusers, the accused in *Davis* attempted to apply old English cases. The Court specifically distinguished *King v. Brasier*,<sup>179</sup> an English case from 1779, that excluded the out-of-court statement of a young rape victim, who “‘immediately on her coming home, told all the circumstances of the injury’ to her mother.”<sup>180</sup> The Court explained that *Brasier* “would be helpful to *Davis*” in excluding the out-of-court-statement if *Brasier* had concerned “the girl’s screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.”<sup>181</sup>

The Court also noted the level of formality and contrasted the calm, formal police station statement of *Crawford* with the frantic impromptu nature of the 911 call in *Davis*.<sup>182</sup> However, the mere fact that the victim’s statements were made “at an alleged crime scene and were ‘initial inquiries’ is immaterial.”<sup>183</sup> Instead, the court focused on the intention of the victim and police, as well as the timing of the incident, to determine whether the statement was an account of past criminality or a cry for immediate police protection.

Justice Thomas, in dissent, argued that the line the majority tried to draw between emergencies and reports of past events, relying on primary motives, is blurry and impossible to apply.<sup>184</sup> He made a persuasive case that Amy Hammon was as much in danger at the moment she made her declaration as was the victim in *Davis*.<sup>185</sup> Although *Davis* certainly considered the declarant’s point of view, noting that the victim was

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have occurred previously.” *Id.* at 832 (quoting Brief of Petitioner Herman Hammon at 36, *Hammon v. Indiana*, 547 U.S. 813 (2006) (No. 05-5705), 2005 WL 3597706).

177. *Id.* (quoting *Hammon v. State*, 829 N.E.2d 444, 453, 457 (Ind. 2005), *rev’d sub nom. Davis v. Washington*, 547 U.S. 813 (2006)).

178. *Id.*

179. 168 Eng. Rep. 202 (L.R.C.C.R.); 1 Leach 199 (1779). For an excellent discussion of the Court’s misuse of this case, see Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them”*, 82 IND. L.J. 917, 923–33 (2007).

180. *Davis*, 547 U.S. at 828 (quoting *Brasier*, 168 Eng. Rep. at 202; 1 Leach at 200).

181. *Id.*

182. *Id.* at 827 (“[T]he difference in the level of formality between the two interviews [in *Davis* and *Crawford*] is striking.”).

183. *Id.* at 832 (quoting *Hammon v. State*, 829 N.E.2d 444, 453, 457 (Ind. 2005), *rev’d sub nom. Davis v. Washington*, 547 U.S. 813 (2006)).

184. *Id.* at 840–42 (Thomas, J., concurring in the judgment in part and dissenting in part).

185. *Id.* at 841 n.6 (noting that some of the factors on which the Court distinguishes *Davis*, such as the fact that Hammon was separated from her attacker and that the events in *Hammon* were already over, apply equally to *Davis*).

“seeking aid, not telling a story about the past,”<sup>186</sup> the case is confusing because it seems to shift focus from the expectations of the declarant, which was the key factor in *Crawford* to, at least in part, the intent of the investigator.<sup>187</sup> Many scholars agree that *Davis* is unsound and unworkable.<sup>188</sup>

Post-*Davis*, lower courts scrambled to apply the murky standards to the myriad of domestic violence cases on their dockets. Courts and commentators also latched onto the issue of forfeiture, which was left open in *Crawford*,<sup>189</sup> and which *Davis* hinted might address some of the prosecutorial concerns about intimidation of victims. *Davis* acknowledged that domestic violence is a “type of crime [that] is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.”<sup>190</sup> The Court noted that in cases where the accused makes the declarant unavailable through intimidation or other means, forfeiture is an option.<sup>191</sup>

Two years after *Davis*, in *Giles v. California*,<sup>192</sup> the Court addressed forfeiture, a longstanding equitable principle in Anglo-American jurisprudence.<sup>193</sup> Justice Scalia, writing for the majority for the third time in as many cases, addressed the circumstances by which an accused can forfeit the right to confrontation. In *Giles* the accused was charged with murdering his girlfriend, Brenda Avie. Weeks before her death, Avie made tearful statements to police responding to a domestic violence report that Giles had choked her, punched her in the face and head, and threatened to

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186. *Id.* at 831.

187. Without so acknowledging, the Court switched its focus from the declarant to the government agent. In *Crawford*, the focus was on what Sylvia Crawford believed would happen with her statement. In *Davis* and *Hammon*, the purpose of the police investigator was equally if not more important than the intent of the declarant in ascertaining the testimonial quality of the statement. See Lininger, *supra* note 108, at 280; Ellen Liang Yee, *Confronting the “Ongoing Emergency”: A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729, 766 (2008) (“Notwithstanding the Court’s claim that the inquiry is focused on ‘the declarant’s statements, not the interrogator’s questions,’ the opinion also repeatedly referred to whether the questioner’s conduct can generate or produce testimonial statements.” (quoting *Davis*, 547 U.S. at 822 n.1)).

188. See, e.g., Lininger, *supra* note 108, at 274 (“[T]he *Davis* ruling accomplished a rare feat: it caused consternation among both prosecutors and defense attorneys. Commentators on all sides expressed their disappointment that the Court had not devised a comprehensive, easily administrable set of rules for the confrontation of accusers.”); Raeder, *supra* note 149, at 762 (“*Davis*’ bright line is illusory and hard to apply.”); Yee, *supra* note 187, at 733 (“The Court’s approach provides insufficient guidance to assist lower courts in determining which facts indicate the presence of an ‘ongoing emergency,’ particularly in the context of domestic violence.” (quoting *Davis*, 547 U.S. at 822)).

189. See *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

190. *Davis*, 547 U.S. at 832–33. The Court added: “We take no position on the standards necessary to demonstrate such forfeiture.” *Id.* at 833.

191. *Id.* at 833; see Orenstein, *supra* note 147, at 1435.

192. 128 S. Ct. 2678 (2008).

193. See *Reynolds v. United States*, 98 U.S. 145, 148–50 (1878) (admitting former testimony of wife where accused had kept his wife away from home so that she could not be subpoenaed to testify).

kill her with a knife.<sup>194</sup> Three weeks later, Giles did kill Avie, claiming that he acted in self-defense.<sup>195</sup> At his murder trial, Giles supported his self-defense claim by describing Avie “as jealous, vindictive, aggressive, and violent.”<sup>196</sup> To rebut Giles’s claim of self-defense and impeach his testimony, the State introduced into evidence Avie’s uncross-examined statements to police weeks before the killing.<sup>197</sup>

Although the Justices acted on the assumption that the victim’s statements were testimonial,<sup>198</sup> the Court addressed whether by merely killing the victim (something the accused acknowledged that he did, allegedly in self-defense) the accused forfeited his right to confront her prior statements. Reviewing the old common-law cases, the Court ruled that to fall within the forfeiture doctrine, the accused must intend to procure the declarant’s absence and prevent the witness from testifying.<sup>199</sup> *Giles* held that not every homicide case automatically opens the door to admitting the victim’s former testimonial statements.<sup>200</sup> To do so would ignore the historic intent requirement and deprive the accused of his confrontation rights.<sup>201</sup> The dissent questioned *Giles*’s focus on the accused’s subjective intent to make the declarant unavailable and instead advocated an objective test of whether a reasonable accused would recognize that his actions would render the witness unavailable, arguing that such an objective test would be consonant with the equitable notion of forfeiture.<sup>202</sup> The dissent questioned Justice Scalia’s historical account of forfeiture and disdained his exercise of “trying to guess the state of mind of 18th Century lawyers,” particularly when applied to a cause of action—domestic battery—that was unheard of two hundred years ago.<sup>203</sup>

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194. Such statements of fear by women anticipating their demise by the violent hands of a specific individual who intends to do the declarant harm do not qualify as dying declarations—it is not even a close question. Even where, as in *Giles*, a declaration anticipates murder days or weeks before a homicide, it fails the strictures of the dying declaration exception, because death is neither certain nor imminent. See Orenstein, *supra* note 147, at 1420–23.

195. *Giles*, 128 S. Ct. at 2681. The victim had no weapon, suffered some defensive wounds, and was shot while lying on the ground. *Id.*

196. *Id.* at 2695 (Breyer, J., dissenting).

197. *Id.*

198. *Id.* at 2682 (majority opinion). Actually, some of the Justices expressed doubts about the testimonial nature of Avie’s prior statement, which was made at a crime scene, but for the sake of argument, all nine Justices assumed without deciding that the statement was testimonial because the issue had been conceded below. *Id.*

199. *Id.* at 2683–84.

200. See *id.* at 2688.

201. Another less persuasive argument concerned the role of the judge in determining a preliminary fact that was also an ultimate fact for the jury. “The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury.” *Id.* at 2686. Here the Court referred to the fact that in order to trigger a finding of forfeiture, the judge must make a preliminary finding by a preponderance of the evidence that the accused killed the victim and hence forfeited his confrontation right. *Id.* at 2691–92. This would pose problems in cases where the accused denied killing the victim.

202. *Id.* at 2703–04 (Breyer, J., dissenting).

203. *Id.* at 2707.

*B. Modern Approaches to Defining and Prosecuting Domestic Violence*

Domestic violence is defined as a “pattern of attempts to exercise coercive control over an intimate partner.”<sup>204</sup> It often involves physical violence, sexual coercion, emotional abuse, and economic control.<sup>205</sup> I am concerned here with the type of domestic violence that involves criminal conduct, such as rape, assault, or murder.<sup>206</sup> One-quarter of all adult American women will experience at least one physical assault by a partner.<sup>207</sup> Although there are certainly situations where men are victims, the focus here is on violence against women; domestic violence against men is rarer, and the violence is much less likely to cause serious injury or fear.<sup>208</sup>

Intimate partner violence has always existed in western culture, but historically remained officially unnoticed and outside the purview of public concern.<sup>209</sup> Changes in nineteenth century Anglo-American family law that, for the first time, permitted divorce but required proof of good cause, opened a window to the private, often hidden, stories of intra-family brutality.<sup>210</sup> Divorce courts contributed to fuller awareness and open discussion of domestic violence, and a social movement against wife

204. DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 327 (2d ed. 2009).

205. ELIZABETH M. SCHNEIDER ET AL., *DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE* 7 (2d ed. 2008) (“Although domestic violence is often thought of as primarily physical . . . abusers commonly combine physical abuse with psychological, financial, or other forms of abuse, such as isolation.”); see PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE, *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 5 (2000)*, available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (discussing “the myriad behaviors that persons may use to control, intimidate, and otherwise dominate another person in the context of an intimate relationship,” including “verbal abuse, imprisonment, humiliation, stalking, and denial of access to financial resources, shelter, or services”).

206. Other aspects such as emotional abuse and psychological coercion are legitimate societal concerns, but are more difficult to address through law.

207. NAT’L COAL. AGAINST DOMESTIC VIOLENCE, *DOMESTIC VIOLENCE FACTS 1 (2007)*, available at [http://www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf); see also TJADEN & THOENNES, *supra* note 205, at iii (“Nearly 25 percent of surveyed women and 7.6 percent of surveyed men said they were raped and/or physically assaulted by a current or former spouse, cohabiting partner, or date at some time in their lifetime . . .”).

208. See LISA A. GOODMAN & DEBORAH EPSTEIN, *LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE* 9 (2008) (distinguishing between “situational couple violence,” where both intimate partners occasionally engage in hitting, slapping, and throwing things, and “intimate terrorism” where the perpetrator tends to be a male who controls and coerces the female inducing fear and causing serious injury); TJADEN & THOENNES, *supra* note 205, at 17 (“[W]omen were significantly more likely than men to report being victimized by an intimate partner . . . [D]ifferences between women’s and men’s rates of physical assault by an intimate partner become greater as the seriousness of the assault increases. . . . [Women] were 7 to 14 times more likely to report that an intimate partner beat them up, choked or tried to drown them, or threatened them with a gun or knife.”).

209. See ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 13–20 (2000) (offering historical perspectives from Roman times to the present).

210. LISA SURRIDGE, *BLEAK HOUSES: MARITAL VIOLENCE IN VICTORIAN FICTION* 146 (2005) (“[D]ivorce court made public acts of ‘private’ cruelty covering the gamut from name-calling to violence, imprisonment, rude treatment in front of servants or children, and inappropriate treatment of the wife as mistress of the house.”).

beating developed that is traceable in the politics and literature of the nineteenth century. Generally, domestic violence was understood primarily as a social problem of the lower classes—concerning the likes of Bill Sikes<sup>211</sup> and Henry Bedingfield—although it certainly can be documented in all ethnicities, races,<sup>212</sup> and social strata.<sup>213</sup>

What society used to minimize as family discord, treated merely as a private matter to be dictated by the head of household—who up until modern times could legitimately threaten and use violence against his wife—now denominates as violence.<sup>214</sup> As attitudes towards domestic violence changed, the phenomenon of intimate partner abuse became not just a social problem, but also a crime. Part of the feminist agenda in the 1970s was to take such violence seriously.<sup>215</sup> Because of increased awareness of the harm caused by domestic violence, lawsuits by citizens against police departments for failure to protect them from such violence,<sup>216</sup> and changing social attitudes towards gender roles and the relationship between the sexes, domestic violence is now studied by many disciplines

211. Bill Sikes is the villain in Charles Dickens's *Oliver Twist*, who beats and finally kills the good-hearted prostitute, Nancy.

212. See Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2138–39 (1996) (documenting disproportionate judicial interest in wife beating among African Americans and the poor and noting that "[a]s wife beating emerged as a 'law and order' issue, class- and race-based discourses about marital violence became even more pronounced").

213. Domestic violence interacts with culture, race, immigration status, and religion, but occurs in diverse families. SCHNEIDER ET AL., *supra* note 205, at 97–127. It unquestionably exists among the privileged, who may experience more shame as victims and who despair of getting help because their batterers may wield power and influence in the community. *Id.* at 145–46. Recent scholarship has shown that even Victorian literature about good middle class families also intimated, if not fully described, tales of domestic violence. See, e.g., KATE LAWSON & LYNN SHAKINOVSKY, *THE MARKED BODY: DOMESTIC VIOLENCE IN MID-NINETEENTH-CENTURY LITERATURE* (2002) (discussing domestic violence in Victorian literature).

214. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1661 ("At the time of this country's founding, wife-beating was approved as integrally connected to a system in which wives ceased to exist as independent legal entities upon marriage. Because husbands could be held responsible for their wives' conduct, it was believed that they had the right to control their wives' behavior, through physical violence if necessary." (citations omitted)); Siegel, *supra* note 212, at 2138–41 (discussing the Anglo-American common law of chastisement, and noting that when wife beating became illegal, the common law erected various immunities and doctrines of privacy to insulate the status quo and limit women's ability to challenge their batterers with criminal or tort law).

215. See generally SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982); SCHNEIDER, *supra* note 209.

216. See, e.g., *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1524–27 (D. Conn. 1984) (holding for the plaintiff based on police failure to respond to domestic violence where the victim had a protective order and for failure to intervene while witnessing the husband's extreme violence against his wife). This case is credited with changing municipal policies about domestic violence. See, e.g., Sara R. Benson, *Failure to Arrest: A Pilot Study of Police Response to Domestic Violence in Rural Illinois*, 17 AM. U. J. GENDER SOC. POL'Y & L. 685, 690–91 (2009) (citing *Thurman*, and the \$2.9 million in damages awarded to the plaintiff therein, as one of a "few widely publicized court cases holding police or police departments liable for a failure to protect domestic violence victims [that] motivated some states to enact mandatory arrest laws").

(criminology, psychology, sociology, gender studies, and law) and is treated much more seriously by the legal system and by society as a whole.

Nevertheless, domestic violence prosecutions are notoriously difficult to win. Part of the problem may be residual patriarchal social attitudes about male prerogative, women's roles, or family privacy. However, another aspect of the difficulty in such prosecutions is that victims of intimate violence often do not testify.<sup>217</sup> They regularly recant, refuse to testify, or simply fail to appear.<sup>218</sup> The reasons for this high rate are varied and complicated. A victim of intimate partner violence may still love the perpetrator and may not want to send him to jail.<sup>219</sup> Alternatively, the victim may feel embarrassed and humiliated and be unwilling to testify about the abuse. The victim may also decline to testify because she is afraid that she might lose her children<sup>220</sup> or because the batterer is her only source of housing or income.<sup>221</sup> Women of color may be suspicious of the justice system and be unwilling to participate in what they perceive as a racist system of prosecution and punishment.<sup>222</sup> Finally, and most

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217. Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 328 (2005) ("It became obvious relatively quickly in the fight against domestic violence that the major impediment to obtaining convictions was that the majority of battered women did not want to testify. Even when they appeared at trial, they often recanted their accusations and generally were bad witnesses, resulting in relatively few convictions." (citation omitted)).

218. *People v. Brown*, 94 P.3d 574, 576 (Cal. 2004) (quoting expert testimony that 80–85% of battered women "actually recant at some point in the process").

219. Raeder, *supra* note 149, at 760.

220. See SCHNEIDER, *supra* note 209, at 168 ("Custody has always been an important issue for battered women because, above all, they fear losing their children to the batterer."). This is not an unfounded fear. See Raeder, *supra* note 217, at 364 (noting that a victim may rightfully "worry that her batterer's prosecution will result in her children being placed in foster care or in her facing charges of child endangerment"); Sarah Childress, *Fighting Over the Kids: Battered Spouses Take Aim at a Controversial Custody Strategy*, NEWSWEEK, Sept. 25, 2006, at 35. It is common for abusive men to threaten a victim's children or to scare the victim into believing that she will lose custody of her children if she leaves him. As to the latter threat, although many states have presumptions against awarding custody to batterers or use domestic violence as a negative factor in awarding custody, wife-battering fathers prevailed in 40% of contested cases. SCHNEIDER, *supra* note 209, at 169 (quoting Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 44–45 (1991)). Women who leave battering relationships are often financially disadvantaged and sometimes experience psychological or addiction problems. They can appear unbalanced and unprepared to care for their children. See generally Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991); Mahoney, *supra*.

221. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 307 (2005) ("If we listen to women survivors, we learn that they stay for myriad reasons—fear of reprisal, fear of losing their children, economic concerns, emotional ties to the batterer or his family, lack of social or familial support, and lack of a place to go." (citations omitted)).

222. Phyliss Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Culture, and Gender Bias in Domestic Violence Cases*, 32 RUTGERS L. REC. 31, 48–49 (2008). But see Sack, *supra* note 214, at 1679 n.108 ("Although the reluctance of women of color to call police is often asserted, actual studies of victim reporting show that African American women call police in domestic violence situations at a rate higher than white women." (citing Joan Zorza, *Mandatory Arrest*, in 3 ENCYCLOPEDIA OF CRIME AND PUNISHMENT 1023, 1027 (David Levinson ed., 2002))).

importantly, the victim may still fear the accused and distrust the legal system's ability to protect her from his wrath. Because much violence is motivated by a desire to control, domestic violence victims confront an increased risk when they try to leave the abuser; in fact, the most dangerous time for a woman and the highest risk for murder is when she attempts to leave or shortly after.<sup>223</sup>

Before *Crawford*, many jurisdictions, facing the reality that many victims do not testify, followed “no-drop” policies in which they would prosecute “victimless”—otherwise known as “evidence-based”—cases even if the victim did not testify.<sup>224</sup> Such prosecution policy depended heavily upon the admissibility of the victim's out-of-court statements to police and 911 operators.<sup>225</sup> Under the old *Roberts* regime,<sup>226</sup> it was relatively easy to admit such statements, even if the victim did not testify and was therefore not subject to cross-examination concerning her statement.

Even before *Crawford* changed the legal landscape, scholars and activists debated the wisdom of such “no-drop” policies. Are such prosecutions respectful of the woman's interest, pursuing the violent offender and preserving the victim's voice by admitting her prior statements? Conversely, are prosecutions without the victim's cooperation subversive of her choices and disrespectful of her assessment of risk, given the increased danger women face when they try to leave? The rich literature on the “no-drop” prosecution policy touches upon many conflicting values. Many favor no-drop policies, arguing that mandating such prosecutions sends a message that such violent behavior toward intimates is intolerable, and that the perpetrator has committed a crime against the state.<sup>227</sup> The state does not drop other types of cases merely because the victim would prefer not to participate, and it is arguably sexist and patronizing to treat victims of

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223. See ABRAMS ET AL., *supra* note 204, at 328 (citing CALLIE MARIE RENNISON & SARAH WELCHANS, BUREAU OF JUSTICE STATISTICS, PUBL'N NO. NCJ 178247, INTIMATE PARTNER VIOLENCE 5 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv.pdf> (“[D]ivorced or separated persons were subjected to the highest rates of intimate partner victimization.”)); GOODMAN & EPSTEIN, *supra* note 208, at 76 (“Substantial data show that separation from the batterer is the time of greatest risk of serious violence and homicide for battered women and for their children.” (citations omitted)); Carol E. Jordan, *Intimate Partner Violence and the Justice System: An Examination of the Interface*, 19 J. INTERPERSONAL VIOLENCE 1412, 1413–14 (2004).

224. See Sack, *supra* note 214, at 1673–74 (“No-drop policies, as well as other innovations in domestic violence prosecution, have increased the prosecution rate of these cases, and some studies show that they have lowered recidivism.” (citations omitted)). *But see generally* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1182–1200 (2002) (pre-*Crawford* article questioning the fairness and constitutionality of prosecutions based on 911 calls). This is what Professor Myrna Raeder has aptly termed the “witness-lite/hearsay-heavy approach.” Raeder, *supra* note 217, at 329.

225. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1903 (1996) (advocating use of 911 tapes to prove battery where the victim will not testify).

226. See *supra* notes 142–43 and accompanying text.

227. SCHNEIDER ET AL., *supra* note 205, at 328; Hanna, *supra* note 225, at 1884 (“If we reject mandated participation because it would be ‘revictimizing,’ we neither account for the women's strength and resilience nor acknowledge the political and social context in which battering occurs.” (citations omitted)).



domestic violence differently from victims of other crimes.<sup>228</sup> By adopting a no-drop policy and taking the decision out of the victim's hands, the government can limit abusers' attempts to bully women into dropping charges.<sup>229</sup> Leaving the victim with the choice whether to prosecute the case could endanger the victim further and perpetuate the power dynamic between the abuser and the victim.<sup>230</sup>

However, strong counterarguments disfavor mandatory prosecution.<sup>231</sup> Prosecutors sometimes use heavy-handed tactics to assure the victim's testimony at trial.<sup>232</sup> When women suffer violence from intimates, they often also suffer loss of control over their movements and choices. Some argue that it is intrusive, disempowering,<sup>233</sup> and even dangerous<sup>234</sup> to use victims' statements when they have chosen not to testify. The patronizing implication is that women who choose not to testify are so traumatized or

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228. Hanna, *supra* note 225, at 1891.

229. SCHNEIDER ET AL., *supra* note 205, at 328 (quoting police officers that the solution to the problem of escalating violence post-arrest was "to take the responsibility out of the hands of the victim and place it with the State where it belongs" (quoting Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 310 (1993))); Lininger, *supra* note 108, at 294 (explaining the view that "vacillating accusers are not exercising moral autonomy, but rather are submitting to a pattern of abuse and intimidation that has undermined their self-determination; according to this view, a no-drop policy is necessary to vindicate the accuser's autonomy" (citation omitted)).

230. Hanna, *supra* note 225, at 1891 ("When a batterer and his defense attorney know that a victim's failure to cooperate may result in case dismissal, they control the judicial process.").

231. For views criticizing no-drop policies, see Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 45 (2009) ("[D]omestic violence law and policy should respect the rights of individual women to choose whether and how to use the criminal and civil legal systems."); *id.* at 4 ("Making safety the primary goal of legal interventions is intuitively appealing and explains policies like mandatory arrest. But th[is] goal[] of advocates, policymakers, and system actors might differ from those of women who have been battered."); Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 191 (1997) (criticizing mandatory prosecutions because they may "align the battered woman with her batterer, to protect him, and to further entrench her in the abusive relationship").

232. See *Fowler v. State*, 809 N.E.2d 960, 965 (Ind. Ct. App. 2004) (discussing pressure put on victim to testify or face false reporting and observing that "[g]iven the psychological complexities of domestic violence cases, it is not at all clear to us that such an approach in trying to 'encourage' a victim to testify is desirable"); Raeder, *supra* note 217, at 328–29 (noting that women who refuse to testify have faced threats of imprisonment and criminal charges for child endangerment; some women have been jailed as material witnesses).

233. See, e.g., GOODMAN & EPSTEIN, *supra* note 208, at 75 ("[T]he victim is swept into a process over which she has little control. Her own wishes and needs become largely irrelevant to that process, even when she fears that prosecution will provoke the batterer into retaliatory abuse against her, when she needs her partner's economic support to keep her family afloat, or when she fears that her partner will be deported as a result of the prosecution.").

234. See Raeder, *supra* note 217, at 329 ("[E]mpirical evidence indicated that some classes of women were put at greater risk by aggressive prosecution, particularly in misdemeanor cases where defendants were released pretrial, or received probation or short sentences." (citations omitted)).

weak that they are incapable of making rational choices.<sup>235</sup> Such mandatory prosecution deprives women of agency and replicates the loss of power and emotional abuse they experience in their intimate relationship.<sup>236</sup> No-drop policies can create safety concerns whereby women who do not wish to press charges may decline to call police for assistance during an attack.<sup>237</sup> In fact, some feminists have even hailed *Davis* because it represented an end to the disrespect of the victims represented by no-drop prosecutions.<sup>238</sup>

### C. *The Practical Effect of Crawford and Its Progeny on Domestic Violence Prosecution*

The no-drop strategy, dependent as it is on out-of-court statements by the absent victim, is significantly harder to effectuate post-*Crawford* and *Davis*.<sup>239</sup> If the court deems the statement testimonial, then the woman must appear and be subject to cross-examination; if she does not appear, and the case does not involve forfeiture or dying declarations, then the prosecutor has no case.

The Court in *Davis* seemed fully aware of the practical effect the ruling would have on the prosecution of domestic violence cases.<sup>240</sup> Whereas

235. See Miccio, *supra* note 221, at 241–42 (“A dominant and troubling theme that has emerged within the Protagonist bloc is that such practices are necessary because battered women are incapable of making a ‘rational’ choice while being traumatized by the violence. Mandatory practices then serve as a necessary shield—not just from the violence of individual males, but from what is perceived as survivor powerlessness.” (citations omitted)).

236. Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 595 (1999) (“[A] dynamic between the state and the battered woman emerges that distinctly mimics the violent dynamic in the battering relationship.”).

237. See GOODMAN & EPSTEIN, *supra* note 208, at 76 (“[B]y coercing victims’ participation in the prosecution, the government may teach them to distrust the criminal justice system in general. This experience may well make them far less likely to contact police or prosecutors in the future, which in turn may leave them more trapped than ever in their violent homes.”); cf. Mills, *supra* note 236, at 595 (“[M]andatory interventions deny the battered woman an important opportunity to partner with the state to help ensure her future safety.”).

238. See generally Kimberly D. Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 BYU L. REV. 1.

239.

In a survey of over 60 prosecutors’ offices in California, Oregon, and Washington, 63 percent of respondents reported the *Crawford* decision has significantly impeded prosecutions of domestic violence. Seventy-six percent indicated that after *Crawford*, their offices are more likely to drop domestic violence charges when the victims recant or refuse to cooperate. Alarming, 65 percent of respondents reported that victims of domestic violence are less safe in their jurisdictions than during the era preceding the *Crawford* decision.

Tom Lininger, *Prosecuting Batterers after Crawford*, 91 VA. L. REV. 747, 750 (2005) (citations omitted); see Lininger, *supra* note 108, at 281 (“The Supreme Court’s recent interpretations of the Confrontation Clause have hindered many categories of prosecutions, but none more significantly than prosecutions of domestic violence.” (citation omitted)).

240. I do not discuss the most recent confrontation case, again authored by Justice Scalia, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), which deals with the right to confront forensic experts. It differs in tone and subject from the triumvirate of *Crawford*,

issues of gender constituted part of the subtext in *Crawford*,<sup>241</sup> they are, by necessity, unmistakably and frankly addressed in *Davis*. Similarly, in *Giles*, the issue of forfeiture was closely linked to the domestic violence context in which the case arose.<sup>242</sup> Justice Scalia was particularly adamant that public policy concerning domestic violence could not sway the constitutional command.<sup>243</sup> He positively disdained the suggestion, which he attributed to the dissent, that “a forfeiture rule which ignores *Crawford* would be particularly helpful to women in abusive relationships—or at least particularly helpful in punishing their abusers.”<sup>244</sup> Justice Scalia decried the notion that domestic violence cases be treated differently:

In any event, we are puzzled by the dissent’s decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women?<sup>245</sup>

This acknowledgement of the new jurisprudence’s effect on domestic violence cases and the Court’s determination not to modify the confrontation right to accommodate the special needs and circumstances of domestic violence victims translates into a new legal landscape where the crucial question is whether the victim’s statements can be categorized as testimonial.

### III. *BEDINGFIELD*’S APPLICABILITY TO CONFRONTATION QUESTIONS POSED BY DOMESTIC VIOLENCE CASES

#### A. *The Parallels Between Bedingfield’s Res Gestae Analysis and Crawford’s Definition of “Testimonial Statements”*

*Davis*’s intellectual enterprise in figuring out which victims’ statements are testimonial is eerily similar in tone and content to *Bedingfield*’s debate concerning *res gestae*.<sup>246</sup> In revisiting and expanding upon *Crawford*’s definition of testimonial statements, *Davis* distinguished those made “facing an ongoing emergency” from those generated “after the events . . . had occurred.”<sup>247</sup> *Davis* contrasts cases where the declarant “was speaking about events *as they were actually happening*,” with statements that are

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*Davis*, and *Giles*, though its focus on testimonial statements and avowed disinterest in the practical effects on prosecutions perpetuates important themes of those cases.

241. See Orenstein, *supra* note 147, at 1448 n.244 (analyzing the role of gender in the spousal privilege that prevented Sylvia Crawford from testifying).

242. *Giles v. California*, 128 S. Ct. 2678, 2692–93 (2008).

243. *Id.*

244. *Id.* at 2692. To be fair, the dissent reads forfeiture more broadly but never intended to dispense with *Crawford*. See *id.* at 2696 (Breyer, J., dissenting).

245. *Id.* at 2693 (majority opinion).

246. In fact, Jeffrey L. Fisher, an attorney who argued *Davis* before the Supreme Court, suggests the Court has simply revived the doctrine of *res gestae* by focusing on the past/present or happening/happened elements of a situation. See generally Fisher, *supra* note 8.

247. *Davis v. Washington*, 547 U.S. 813, 827 (2006).

merely “describ[ing] past events,”<sup>248</sup> or as the Court later explains the distinction, between ““what is happening”” versus ““what happened.””<sup>249</sup> *Davis* compares “a narrative report of a crime absent any imminent danger,” where the interrogator seeks “simply to learn . . . what had happened in the past” with “a call for help against a bona fide physical threat” elicited “to resolve the present emergency.”<sup>250</sup> Was the victim “seeking aid” or “telling a story about the past”?<sup>251</sup> Only testimonial statements, those “not designed primarily to ‘establis[h] or prov[e]’ some past fact, but to describe current circumstances requiring police assistance” trigger the Sixth Amendment confrontation right.<sup>252</sup>

Justice Scalia’s analysis in *Davis* parallels directly the question in *Bedingfield* where Chief Justice Cockburn analyzed the scope of an incident. When did the event begin? When did it end? These are crucial questions for English *res gestae* doctrine in 1879 and no less so for the United States Supreme Court in 2006. Chief Justice Cockburn explained in the *Bedingfield* opinion that Rudd’s cry “was not part of anything done, or something said while something was being done, but something said after something done.”<sup>253</sup> By contrast, a statement uttered “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 . . . and after the act was completed.”<sup>254</sup>

Chief Justice Cockburn also focused on the question of ongoing emergency, explaining:

If a party assailed should succeed in escaping from the immediate attack and presence of his assailant, and should, while apprehending immediate danger, make a declaration in his flight, with a view to obtaining assistance, such declaration would be admissible, but not so if the declaration were made after all pursuit or danger had ceased.<sup>255</sup>

In his critique of Chief Justice Cockburn’s opinion in *Bedingfield*, John Pitt Taylor suggested that timing did not matter “so long as the woman was giving alarm and seeking for assistance.”<sup>256</sup> Even if she knew that *Bedingfield* was no longer able to inflict harm, her statement would be part of the *res gestae*, according to Taylor, if Rudd were seeking help in having her throat bound up.

These issues of defining the scope of an event, delineating the timing, and determining whether the emergency is ongoing, all raised in *Bedingfield*’s *res gestae* discussion, continue to confound current confrontation jurisprudence. As it turns out, we are still puzzling over

248. *Id.* (citations omitted).

249. *Id.* at 830.

250. *Id.* at 827.

251. *Id.* at 831.

252. *Id.* at 827 (alteration in original) (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

253. *R v. Bedingfield*, (1879) 14 Cox Crim. Cas. 341 (Crown Ct.) at 342 (Eng.).

254. *Id.* at 342–43.

255. COCKBURN, *supra* note 111, at 20.

256. PITT TAYLOR, *supra* note 112, at 8.

questions similar to those raised in *Bedingfield* but we have substituted one incomprehensible phrase (“*res gestae*”) for another (“testimonial”). As scholars and practitioners are discovering, this concept of “testimonial” statements is unfortunately equally opaque and unworkable. The problem is not merely that intent of declarants, timing of declarations, and scope of events are notoriously slippery to define—all of which are true. The problem is further confounded by the insensitivity to context and the realities of domestic violence.

*B. The Mismatch Between Rigid Doctrinal Approaches and the Realities of Domestic Violence*

Looking carefully at *Bedingfield* and the three modern confrontation cases that involved domestic violence—*Davis*, *Hammon*, and *Giles*—we can trace the disconnect between our psycho-social understanding of domestic violence on the one hand, and Chief Justice Cockburn’s conception of *res gestae* and the current Court’s confrontation jurisprudence on the other. The new confrontation standard, as well as the old *res gestae* approach, divide victims’ statements into neat but fairly useless categories of “testimonial/action is over” versus “emergency-based/event” is ongoing. A critique of this dualism probably holds true for every type of violent crime, where elimination of danger and prosecution of wrongdoers may be twin motivations of both the victims and the police. The line is particularly hard to draw, however, in domestic violence cases, and the Court demonstrates its insensitivity to the experiences of domestic-battery victims, and hostility to any special treatment for such cases.

Where there is a sustained pattern of violence and the dynamic of the relationship is marked by an ongoing struggle for dominance and control, the victim may live in constant fear. A woman who reports to the police may feel genuinely fearful as she does so. Indeed, the fact of making a report places her in significantly greater danger.<sup>257</sup> Therefore, the distinction between reporting out of fear “to enable police assistance to meet an ongoing emergency”<sup>258</sup> and reporting to instigate a legal response “to establish or prove past events”<sup>259</sup> makes little psychological or practical sense.

Commentators have demonstrated and bemoaned the mismatch between the Supreme Court’s approach to confrontation and the realities of prosecuting domestic violence. Professor Deborah Tuerkheimer forcefully argues that the Court’s constricted notion in *Davis* of an ongoing emergency fails to account for the dynamics of intimate partner violence or the reality experienced by its victims.<sup>260</sup> She explains that from a battered

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257. See *supra* note 223 and accompanying text (discussing increased danger when women try to leave violent relationships or attempt to seek legal remedies).

258. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

259. *Id.*

260. Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and Its Loss*, 15 J.L. & POL’Y 725, 726 (2007) (arguing that the Court’s understanding of domestic violence is “sufficiently inaccurate as to fatally undermine the coherence of both doctrine

woman's perspective, the meaning of "'exigency'—a construct deeply embedded in the now-reigning definition of testimonial—is distinct from that experienced by victims of other types of crimes."<sup>261</sup> The Court's distinct, binary purposes for making a statement—"crying for help" versus "providing information"—are practically and conceptually inseparable.<sup>262</sup> As Tuerkheimer explains, for women who experience domestic violence the line between past and present violence is not a bright or distinct one; in talking to police, victims are indeed addressing an emergency, even if they employ past events to explain the history of continuing violence or to explain their fear.<sup>263</sup> Therefore, "a domestic violence victim's safety may be wholly contingent on her communication with police; her 'narration of events' linked inexorably to resolving—however temporarily—the danger posed by her batterer."<sup>264</sup> Similarly, Tuerkheimer criticizes the insistence on the existence of a discrete event, noting that under the Court's new definition, "'events' have either happened or 'are actually happening'."<sup>265</sup>

In his comments on *Davis* and *Giles*, Justice Scalia is near apoplectic at the suggestion that domestic violence cases be treated differently from other crimes. Scalia does not address the hard truth that what is testimonial is an inherently difficult and subtle determination with regard to domestic violence. He acknowledges the importance of context of domestic violence briefly and only for determining forfeiture, not in adding any nuance to the definition of "testimonial"<sup>266</sup> or sophistication in how it is applied. The entire jurisprudence, though steeped in history and justified by an appeal to originalism, essentially devolves into inflexible categories replete with dualistic thinking. Short on nuance and hostile to issues of policy, Scalia's world divides all out-of-court statements into two categories: testimonial and nontestimonial. To determine which category an out-of-court statement

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and theory"). Tuerkheimer argues that the Court's understanding of what constitutes an emergency must be expanded to take account of ongoing domestic violence situations like that in *Hammon*. *Id.* at 726–27. She argues that the test for "testimonial statements" incorporates "a model of discrete, episodic violence that is incompatible with the ongoing nature of abuse" and reveals "complete inattention to the dynamics of battering." *Id.* at 727–28.

261. *Id.* at 728 (footnote omitted).

262. *Id.*

263. *Id.* at 732 ("The exigency she experiences requires a narration of past events in order to resolve the immediate danger they precipitated. This reality fatally undermines judicial reasoning predicated on the 'crying for help' versus 'providing information to law enforcement' rubric.").

264. *Id.* at 731 ("Unlike victims of episodic crimes, a battered woman may 'cry for help' because it is the only possible way for her to experience a moment of safety, however brief.").

265. *Id.* at 734.

266. In *Giles*, Justice Scalia did acknowledge the domestic violence context as important in evaluating witness intimidation for the forfeiture question. This one concession to the context of the case is out of character with the rest of his opinions, and at least one commentator believes it reflects an attempt to get liberal Justices on board. Tom Linger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 885 (2009) (postulating that the sensitivity to domestic-violence victims, which was out of character with the rest of the opinion was designed to win over votes from other Justices).

fits into, we must again engage in the type of binary thinking that Chief Justice Cockburn applied in *Bedingfield*. If the emergency is ongoing and the declarant is seeking help, then the statement is part of the *res gestae* and nontestimonial; if the crisis is over and she is merely reporting a crime, then it is not part of those things done that are intimately bound up with the statement, excluding it from the *res gestae* and making it testimonial.

The *Davis* Court repeatedly refers to its inquiry as “objective.”<sup>267</sup> For instance, it explains: “The question before us in *Davis*, then, is whether, *objectively considered*, the interrogation that took place in the course of the 911 call produced testimonial statements.”<sup>268</sup> In responding to the dissent, Justice Scalia reminds Justice Thomas and all other readers “that our holding is not an ‘exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation,’ but rather a resolution of the cases before us and those like them. For *those* cases, the test is *objective* and quite ‘workable.’”<sup>269</sup> In a similar vein, the formality of the declarant’s statement in *Crawford* made the testimonial quality “more *objectively* apparent.”<sup>270</sup> Later in the opinion Justice Scalia concludes of the *Hammon* facts: “*Objectively viewed*, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, precisely what the officer *should* have done.”<sup>271</sup> Even Justice Thomas in dissent cannot help noting the “Court’s repeated invocation of the word ‘objectiv[e]’ to describe its test.”<sup>272</sup>

The emphasis on objectivity is a red flag for anyone concerned with the rights and interests of women. Feminist jurisprudence is skeptical about appeals to neutrality and objectivity, which often unthinkingly promote a male archetype as the norm and treat women who do not fit that norm as the irrational other.<sup>273</sup> Modern feminism, which is devoted to respecting women’s voices and experience, has developed methods for unveiling gender implications of rules that appear to be neutral or claim to be objective.<sup>274</sup> Reliance on self-proclaimed objectivity can serve to ignore the effects of rules on women; it often masks deep insensitivity to the particular experiences of women.

More troubling and more pervasive throughout the analyses of *Davis*, *Hammon*, and *Giles*, is the extent to which Justice Scalia reveals himself to be unaware of and uninterested in the dynamics of domestic violence. This lack of understanding affects not only the test itself (differentiating a cry for help during ongoing emergency from a report to police about a completed crime), but also the application of the test. In assessing the facts of *Hammon*, Justice Scalia misses major cues that Amy Hammon, whose

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267. *Davis v. Washington*, 547 U.S. 813, 826 (2006).

268. *Id.*

269. *Id.* at 830 n.5 (emphasis of “*objective*” added) (citations omitted).

270. *Id.* at 830 (emphasis added).

271. *Id.* (emphasis added).

272. *Id.* at 839 (Thomas, J., dissenting) (citations omitted).

273. See Orenstein, *supra* note 99, at 189.

274. See Katharine T. Bartlett, *Feminist Legal Methods*, reprinted in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 370, 371 (1991).

statement he deems testimonial because, according to him, the emergency is over, is actually still in danger when she talks with police. The facts of the case indicate that the accused repeatedly tried to interrupt Amy Hammon's conversation with police—trying to coach her answers, interfere with her ability to report, and control her behavior. Amy Hammon also reported that the accused broke the phone and “[t]ore up my van where I couldn’t leave the house.”<sup>275</sup> This classic domineering and isolating behavior—without phone or transportation she is stuck at home and cannot escape or seek aid—indicates that Amy Hammon was still in danger (in some ways much more so than the victim in *Davis*, whose assailant had already run off). A willingness to understand the particular facets of a domestic violence emergency is essential to any fair application of the new confrontation test. Appeals to objectivity miss the mark.

*C. Strategies for Hearing the Voices and Respecting the Wishes of Domestic-Violence Victims*

*Bedingfield* and the confrontation cases have some interesting commonalities beyond their doctrinal similarities. They reflect larger patterns in their underlying factual circumstances, the social backdrop against which these facts occur, and the legal discourse surrounding them. Reading *Bedingfield* today reminds us of the intractability of domestic violence and the challenges of prosecuting it. It is unsettling to encounter a tale of domestic violence from 1879 that reads as if grabbed from today's headlines. Rudd's story is an eerily familiar one, replete with verbal abuse, alcohol, and, ultimately, murder when she tries to break off the relationship. This violent pattern of the jilted man who first murders the object of his unattainable desire, and then, clumsily and ineffectually, tries to kill himself, resonates with modern readers, as do Rudd's unheeded pleas for police protection before her fatal attack. Today, perhaps Rudd would have picked up the phone to dial 911, and perhaps her lover would have used a gun rather than a razor. Otherwise, however, the underlying story of the *Bedingfield* case sadly is recognizable to us today. Rather than merely bemoan the fact that we seem to have made little progress in 130 years, we should view the familiarity of *Bedingfield's* facts as an invitation to acknowledge the challenges and problems of proof in cases that involve violence between intimates.

*Bedingfield* inspires important questions about gender that illuminate our modern confrontation cases. In various ways, the women of *Davis*, *Hammon*, and *Giles* remain like Eliza Bedingfield in 1879: unheard.<sup>276</sup>

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275. *Davis*, 547 U.S. at 820.

276. Arguably, Sylvia Crawford also remains unheard as well because her testimony was excluded by the spousal testimonial privilege. I do not include *Crawford* in this discussion because Sylvia Crawford was not the victim in the case and suffered no violence at the hands of her accused husband. Although her out-of-court statement was effectively silenced, there are strong indications that she did not wish her statement to be used. Sylvia's statement to the police included her belief that her husband Michael is "'one of the most fair people you'll ever meet' and that he was her 'best friend.'" *State v. Crawford*, No. 25307-1-II, 2001



Rudd is not even named in the official court opinion. Her last words, naming her murderer, are silenced by the official opinion.<sup>277</sup> They do not aid in convicting her killer. As understood by the *Bedingfield* court, the rigors of evidence law preclude us from hearing her. However, expert testimony—the voice of men, professionals, science, and authority—is welcomed in the courtroom. Those voices secure Bedingfield’s conviction.

As I have noted elsewhere, the term “declarant” is an antiseptic legalistic word that serves to dehumanize and neuter the speaker.<sup>278</sup> It helps us forget the context of male violence against intimate partners and focus on the acontextual evidence puzzle of determining which statements are testimonial. Aside from forfeiture, narrowly understood to encompass only intentional attempts by the accused to make the witnesses unavailable, the new jurisprudence does not inquire or care about why the victim did not testify.

What if, instead, we were to affirmatively notice the domestic violence context; what would a feminist analysis add to our understanding? A feminist approach would express interest and concern about the victim’s desires and personal understanding of her situation.

Obviously, the central focus of confrontation must be the right of the accused, not the victim’s desires. But the Confrontation Clause can encompass multiple values and interests; it is only Justice Scalia’s recent approach that has marginalized every concern except the historic common-law approach. *Crawford*’s originalist approach is wrong-headed not only because of the mounting evidence that Justice Scalia misperceived the historical record,<sup>279</sup> but because his narrow view does not account for other important values and actors involved in the confrontation process.

In *Maryland v. Craig*,<sup>280</sup> a case in 1990, the Court acknowledged the concerns of victims in the confrontation process, permitting the use of one-way, closed-circuit television to display a witness’s testimony despite the absence of eye contact between the witness and the accused.<sup>281</sup> *Craig* found that the child-witness testifying about abuse would suffer trauma if she had to look at the accused.<sup>282</sup> The Court approved of Maryland’s procedure by which the six-year-old girl testified in a room with only the

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WL 850119, at \*3 (Wash. Ct. App. July 30, 2001). Additionally, Sylvia Crawford was a potential accused, and would have probably invoked her Fifth Amendment right against self-incrimination. This argument was made by the accused in his petition to the Supreme Court, and the petitioner noted that, after his trial, Sylvia was also charged with a crime based on the stabbing incident. Brief for Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21939940 at \*5 n.1.

277. As discussed above, there is a serious question as to whether those words were ever uttered. *See supra* notes 90–93 and accompanying text. However, the reason for excluding Rudd’s alleged statement had nothing to do with concern about its reliability, but with formal analysis that it did not fit the criteria of dying declarations or *res gestae*.

278. Orenstein, *supra* note 147, at 1447 (referring to the term “declarant” as an “abstract, bloodless term”).

279. *See supra* note 141.

280. 497 U.S. 836 (1990).

281. *Id.* at 840–41.

282. *Id.* at 857.

prosecutor, defense attorney, camera operators and a person to provide moral support for the child.<sup>283</sup> The judge and the accused were in the courtroom watching the testimony on television, and the accused could communicate with his attorney.<sup>284</sup> The *Craig* Court declared that the right of the accused to face-to-face confrontation is not absolute.<sup>285</sup> Writing for the majority, Justice O'Connor explained: "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."<sup>286</sup> Arguing from this policy of reliability (a perfectly appropriate approach pre-*Crawford* under *Ohio v. Roberts*), Justice O'Connor held that the purposes of the Confrontation Clause were satisfied by the witness's physical presence, oath, subjection to cross-examination, and by the availability of demeanor evidence.<sup>287</sup> The Sixth Amendment established a "preference for face-to-face confrontation at trial;"<sup>288</sup> however, this preference "must occasionally give way to considerations of public policy and the necessities of the case."<sup>289</sup> Justice Scalia abhorred the result and reasoning of *Craig*, but it has not yet been overruled.<sup>290</sup> *Craig*'s reliance on *Roberts* makes it seem doomed, and most commentators believe that it will be reversed in light of *Crawford*.<sup>291</sup> However, recent case law has upheld *Craig* despite *Crawford* challenges.<sup>292</sup> *Craig* reminds us that it is valuable to at least notice the effect on victims and attempt to understand cases where the accused do not wish to testify.

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283. *Id.* at 841–42, 851.

284. *Id.* at 841–42.

285. *Id.* at 844.

286. *Id.* at 845.

287. *Id.* at 846.

288. *Id.* at 849 (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

289. *Id.* (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

290. Justice Scalia authored a blustering dissent to *Craig*, joined by the liberal wing of the Court, Justices William Brennan, Thurgood Marshall, and John Paul Stevens:

Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court.

*Id.* at 860–61 (Scalia, J., dissenting).

291. See Marc C. McAllister, *The Disguised Witness and Crawford's Uneasy Tension with Craig: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence*, 58 DRAKE L. REV. 481, 507 (2010) ("[T]he *Crawford* ruling, which soundly denounced the reliability-based analysis endorsed by *Craig*, suggests the stage has been set for *Craig*'s demise." (citing David M. Wagner, *The End of the "Virtually Constitutional"?* *The Confrontation Right and Crawford v. Washington as a Prelude to Reversal of Maryland v. Craig*, 19 REGENT U. L. REV. 469, 470 (2007))); Wagner, *supra*, at 470 ("*Crawford v. Washington* contains dicta incompatible with *Maryland v. Craig* and portends that aberrant decision's downfall.").

292. See Eileen A. Scallen, *Coping with Crawford: Confrontation of Children and Other Challenging Witnesses*, 35 WM. MITCHELL L. REV. 1558, 1591 n.195 (2009) (discussing several cases upholding *Craig* after *Crawford*).

A key issue in harkening to the voices of women relates to the question of agency. Given the fraught dynamics of violent intimate relationships, it will sometimes be difficult to know when a woman truly does not wish to press charges, when circumstances (such as finances, family ties, reputation) create pressure not to testify, or when direct threats conspire to render her silent. In *Davis*, it was uncertain what the victim wanted. The victim in *Davis* had secured a no-contact order against the accused, indicating that the accused had previously threatened her and she had sought legal help. However, the facts indicate that the victim did not desire to testify against her former boyfriend. She hung up when she originally called 911 and only spoke to the dispatcher when the dispatcher called back.<sup>293</sup> She also covered her face when the police attempted to photograph her injuries.<sup>294</sup> Although the victim “initially cooperated with the prosecutor’s office, the State was unable to locate [the victim] at the time of trial.”<sup>295</sup> We do not know whether she was disinterested, afraid of the accused, or hoped not to get him in trouble.

Amy Hammon seems easier to figure out. She remained married to the accused. Although she was subpoenaed by the prosecutor, she failed to appear at trial.<sup>296</sup> In fact, she wrote the court regarding the accused’s sentencing:

In answer to your letter there has been no damages or bills. As for sentencing, I would like my husband, Hershel Hammon, to receive counseling [sic] and go to AA, because it has helped him in the past. I would like to see him put on probation to ensure that it happens and where he can still work to help financially and be here to help with our children. I also need his help around the house for we’re remodeling the house and plan to sell it so we can move out of town. I love my husband, I just want to see him stop drinking. I do not feel threatened by his presence.<sup>297</sup>

From a practical and policy perspective, the failure to inquire why the accused is unavailable (other than focusing on the intent of the accused to make her so) seems odd. The need for the statement is greatest when the victim is physically unable to testify because of illness or death. That a victim (one who is not prevented by the accused) affirmatively chooses not to testify raises some additional arguments opposing admission of the evidence. Although the crime is against the state, and is not the private right of an individual citizen, there may be good reasons to hesitate to use the evidence of a reluctant absent witness. If the victim is ambivalent or opposed to testifying, it seems less fair to use her testimony. Arguably, part of the ambivalence could be because the victim was untruthful or she

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293. As the Supreme Court of Washington noted, “a hang-up call often signals that the caller is in grave danger.” *State v. Davis*, 111 P.3d 844, 850 (Wash. 2005) (en banc), *aff’d*, 547 U.S. 813 (2006).

294. *State v. Davis*, 64 P.3d 661, 663 (Wash. Ct. App. 2003).

295. *Davis*, 111 P.3d at 847.

296. *Hammon v. State*, 829 N.E.2d 444, 447 (Ind. 2005), *rev’d sub nom. Davis v. Washington*, 547 U.S. 813 (2006).

297. *Id.* at 448 n.3.

otherwise cannot stand by her prior statements. It could also be because the victim has changed her mind or calculated her chances for long-term safety are worse if she testifies.

If the accused directly threatens her or otherwise procures the witness's absence, then *Giles* clearly provides a forfeiture theory for admitting the victim's statements. Given the nature of domestic violence, which is often marked by hyper-vigilance to the moods and needs of the batterer and regular accommodations to mollify him, applying the *Giles* standard will be tricky. Intimidation can take many forms, and courts will need to be aware that not only physical force, but also credible threats to harm the victim or her children, or to separate the victim from them will count as the type of intimidation that should trigger forfeiture. Justice Scalia recognized that violent acts

often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine.<sup>298</sup>

In his concurrence in part, Justice David H. Souter opened the door for an expansive interpretation of intentionally procuring absence in domestic violence cases. He opined that “the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process.”<sup>299</sup> Justice Souter explained: “If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.”<sup>300</sup>

Professor Tom Lininger has suggested a standard for evaluating when an accused intentionally renders a witness unavailable. He has tailored his practical guidelines to the realities of domestic violence. He proposes that courts find “the requisite intent where the defendant has violated a restraining order, committed any act of violence while judicial proceedings are pending, or engaged in a prolonged pattern of abusing and isolating the victim.”<sup>301</sup> This very sensible and practical approach has much to recommend in terms of preventing batterers from intimidating their intimate

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298. *Giles v. California*, 128 S. Ct. 2678, 2693 (2008).

299. *Id.* at 2695 (Souter, J., concurring in part).

300. *Id.*

301. Lininger, *supra* note 266, at 865. Intimidation can take many forms, and courts will need to be aware that not only physical force, but credible threats to harm the victim, harm the victim's children, or separation of the victim from her children, will count as the type of intimidation that should trigger forfeiture. *Id.* at 868–69.

partners. It works particularly well in cases like *Giles* where the witness is dead.

By assuming duress under such broad circumstances, however, Lininger arguably undermines rather than respects some victims' choices. Essentially, Lininger's approach presents another venue in which to debate the wisdom and underlying assumptions of no-drop policies. His criteria for finding forfeiture may ignore the victim's perspective and her agency in the interest of securing a conviction. A live victim's desire not to testify could be an informed and deliberate silence that arguably should be honored. One potential danger with Lininger's innovative and otherwise admirable approach is that it not only sacrifices confrontation, but also may do so in direct opposition to the wishes and grim experiences of the victim who made the statement.

Such concerns do not arise in cases like *Giles* or *Bedingfield* where the victims were not uncooperative, but instead suffered the ultimate unavailability: death. Here I favor entirely the Lininger proposal that essentially allows the victim to speak from the grave. This seems particularly fair (and forfeiture is after all an equitable remedy) where the accused himself rendered the victim unconfontable. *Giles* rejected a forfeiture standard triggered merely by the accused's killing the victim and insisted that the accused must have intended to procure the witness' absence.<sup>302</sup> In addition to its historical arguments about the scope of forfeiture, the majority in *Giles* was concerned that judges would have to predetermine guilt to apply the law of forfeiture.<sup>303</sup> As the Court explained: "The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury."<sup>304</sup> In *Giles*, however, such a preliminary determination would not have been onerous or intrusive. *Giles* readily admitted to killing the victim,<sup>305</sup> but claimed self-defense. By contrast, *Bedingfield* did not admit to killing Rudd. In terms of fairness, there is a certain basic fairness in admitting Avie's statement in *Giles*, since *Giles* himself does not contest that his own act (however justifiable in his version of events) rendered her unavailable. If *Bedingfield* were to be believed, however, he was not the source of Rudd's unavailability; she committed suicide. This distinction is important and *Bedingfield's* facts illustrate that *Giles* was arguably wrongly decided and that the court could have adopted a narrow forfeiture doctrine where the accused admits killing and rendering the victim forever silent.

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302. *Giles*, 128 S. Ct. at 2688.

303. See *supra* note 201 and accompanying text. This sort of preliminary determination of an ultimate fact happens all the time under Federal Rule of Evidence 104. See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

304. *Giles*, 128 S. Ct. at 2686.

305. He couldn't have done otherwise, since his "niece and grandmother ran outside and saw *Giles* standing near Avie with a gun in his hand." *Id.* at 2681.

Another commonality between *Bedingfield* and *Giles* is the defendant's strategy of blaming the victim. *Giles*'s claim of self-defense is similar to the sort of *chutzpah* displayed by *Bedingfield* who claimed that Rudd attempted murder and that he was merely the unsuspecting victim sitting on her lap. In *Bedingfield*, because of the party-witness rule, the accused was unable to take the stand in his own defense; allowing the unopposed and uncontradicted voice from the grave seemed unfair. In *Giles*, the accused had the opportunity to testify; only the victim was silenced, unable to use her former statements to refute his version of events.

This distinction between *Giles* and *Bedingfield* highlights the anachronistic and acontextual character of Justice Scalia's approach. There is no acknowledgment in *Giles* that for the historical cases on which the opinion rested, criminal defendants were not permitted to testify at all. Therefore, allowing the absent victim's statements into evidence seemed particularly unfair. With the abolition of the party-witness rule in the mid-nineteenth century, the accused was allowed to take the witness stand in his own defense, and the fairness calculus, particularly in situations of forfeiture, might reasonably come out differently. Indeed, Justice Scalia's atomized, acontextual originalism is problematic because so much has changed not only in society<sup>306</sup> but also in evidence procedure. Even Chief Justice Cockburn indicated that if the limitations on the testimony of the accused were ever lifted, he might support introduction of the statement of the absent victim.<sup>307</sup>

The current relationship between confrontation jurisprudence and domestic violence is fraught not only with insensitivity and misapplied history, but also with paradox and terrible consequences. As Justice Breyer observed in dissent, the *Giles* ruling "creates evidentiary anomalies and aggravates existing evidentiary incongruities";<sup>308</sup> it gives batterers a great benefit for killing their victims instead of just injuring them (which would allow them to testify later).<sup>309</sup> Similarly, Professor Lininger cites the paradox of *Giles* that "the more the criminal justice system insists upon live testimony by the accuser, the less likely it is that she will actually appear in court."<sup>310</sup> The accused, who already is engaging in a struggle for dominance and control over his partner, will become aware that the prosecution cannot proceed without the victim's testimony. Lininger argues persuasively that this will increase witness tampering.<sup>311</sup> Justice

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306. See Raeder, *supra* note 217, at 312 ("Crawford's originalist approach eschews the question of what the founding fathers would have thought of a world that espouses zero tolerance for domestic violence, one in which 911 protocols are routine, as are pro- or mandatory-arrest policies, no-drop prosecutions, criminal contempt convictions for violation of protective orders, expansive hearsay exceptions and in some states reporting requirements for medical personnel. Instead, under *Crawford*, the confrontation right looks backward, not forward.").

307. See *supra* note 111.

308. *Giles*, 128 S. Ct. at 2699 (Breyer, J., dissenting).

309. *Id.*

310. Lininger, *supra* note 266, at 871.

311. *Id.*

Scalia, however, has made perfectly clear that any such practical concerns—about the ability to prosecute, the potential dangers witnesses might face, or the cost/benefit analysis of insisting that the accused show up—are out of bounds when it comes to the command of confrontation.

Justice Scalia may not like special rules for domestic violence cases, but the violence between intimate partners is not the same as a garden-variety assault. A relationship that is structured around the abuser's dominance and control is, *de facto*, different, and cannot be equated with random or opportunistic violence. The messy aspects of relationships defy Scalia's inflexible and uniform definitions.

Ironically, the new confrontation jurisprudence will often correlate negatively with domestic-violence victims' desires about whether to participate in their batterers' prosecution. The Constitution, as divined by *Crawford*, treats each statement in a manner exactly the opposite of the declarant's desires.

In *Giles*, it is fair to conjecture that Avie would have liked her statements, made weeks before her death, to be used in prosecuting her murderer. She made the effort to report Giles's threats and violence to police and clearly expected her report to be used against him. The unfronted testimonial statement of Avie is excluded—even though there is little question that she would have desired its admission, and tragically her wishes carry less weight now that she is no longer alive. At the risk of infuriating Justice Scalia, I also note that such statements, recorded by law enforcement and often reduced to writings that are signed by the victim, are more reliable than excited statements made to friends and bystanders in moments of anxiety and extreme agitation. Ironically, such victims' statements to police—formal testimonial statements that are most likely to represent the wishes and intent of the victim and that are most likely to be reliable—are the least likely to be admitted, under the new *Crawford* jurisprudence.

By contrast, it seems that the victims in *Davis* and *Hammon* may not have wished their statements to be used; they just needed police assistance. At least some victims' advocates would support honoring that wish. The Court has made clear that off-hand comments to friends do not run afoul of the Confrontation Clause and all such nontestimonial statements are outside the purview of constitutional protection.

#### IV. REVISITING THE CRUCIAL QUESTION OF RELIABILITY: THE UNFAIRNESS TO THE ACCUSED OF *CRAWFORD*'S LIMITED "TESTIMONIAL" APPROACH

Applying the facts of *Bedingfield* to the Court's new jurisprudence is an edifying, if somewhat demoralizing, exercise. On a purely doctrinal level, Rudd's statement, "O, aunt, etc." does not qualify as testimonial. When Rudd supposedly made her famous statement, it was to a friend immediately after receiving a mortal injury. She did not appear to be calling for the police, or even asking anyone to transmit an accusation to the authorities. There is no reason to suppose that Rudd expected her statement

to be used in a legal proceeding. Her case would seem to present only hearsay issues, and *Crawford* has made clear that confrontation is distinct from hearsay.<sup>312</sup>

Post-*Crawford*, a lively debate ensued among evidence scholars over whether any constitutional protection remained for nontestimonial statements.<sup>313</sup> *Davis*, however, has put the debate to rest. *Davis* explains:

A critical portion of [*Crawford*], and the portion central to resolution of the two cases now before us, is the phrase ‘testimonial statements.’ Only statements of this sort cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.<sup>314</sup>

The new confrontation jurisprudence clearly indicates that statements such as the one Rudd allegedly made present no constitutional question. Although many have focused on the new exclusions under *Crawford*, it is worthwhile to take note of how many unopposed out-of-court statements no longer present any constitutional question whatsoever, and are relegated to the vagaries of hearsay law.<sup>315</sup>

In fact, in *Giles*, Scalia attempted to mollify those concerned with the exclusion of the dead victim’s statement that the new approach would not cripple domestic violence prosecutions because most statements will not fall under the testimonial rubric. *Giles* observed that “only *testimonial* statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules.”<sup>316</sup> Hence the many statements of murder victims made to friends, doctors, etc., not uttered for the purpose of creating testimonial evidence against the accused, are not testimonial and receive only the protection of whatever hearsay rules various jurisdictions provide.

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312. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

313. See generally Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford’s Birth Did Not Require that Roberts Had to Die*, 15 J.L. & POL’Y 685 (2007).

314. *Davis v. Washington*, 547 U.S. 813, 821 (2006).

315. Lininger, *supra* note 108, at 326 (“Testimonial hearsay has attracted the Court’s attention, but the Court cannot seem to discern a constitutional role in the regulation of nontestimonial hearsay.”). Concededly, the pre-*Crawford* approach to such evidence under *Roberts* would probably have admitted these statements as well. See *supra* notes 142–43 and accompanying text. *Roberts*’s focus on reliability took an unfortunate turn whereby all “firmly rooted hearsay exception[s]” were presumed to bear “indicia of reliability.” *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). *Crawford* rightfully decoupled confrontation from hearsay, but *Crawford*’s total inattention to reliability is problematic.

316. *Giles v. California*, 128 S. Ct. 2678, 2692–93 (2008); see *id.* at 2694 (Alito, J., concurring) (“The Confrontation Clause does not apply to out-of-court statements unless it can be said that they are the equivalent of statements made at trial by ‘witnesses.’”); Raeder, *supra* note 217, at 324 (noting the “automatic pass” for all nontestimonial hearsay).



This is hardly comforting for civil libertarians who are concerned for the rights of the accused.<sup>317</sup> The Court seems to be taking the Sixth Amendment seriously, but only in a very small range of cases, interpreting the clause strictly but extending confrontation's reach exceedingly narrowly.<sup>318</sup> As Professor Robert P. Mosteller has recently observed, the Court has "left many unreliable, incriminating, and accusatory hearsay statements offered against a criminal defendant admissible and unregulated, despite the complete absence of confrontation."<sup>319</sup>

Looking at the facts surrounding Rudd's alleged statement in *Bedingfield*, it is troubling that today Rudd's sworn statement to a police officer would not be admitted, but her alleged cry to a friend would present no Confrontation Clause problem whatsoever. Although *Bedingfield* can be read as an indictment of silencing victims, it can also be read as a cautionary tale of admitting unconfrosted, unreliable statements. Current hearsay exceptions do not screen for trustworthiness or reliability<sup>320</sup> and the excited utterance exception is considered notoriously unreliable.<sup>321</sup> The current regime, hyper-focused on the dangers of testimonial statements, has proven totally uninterested in affording confrontation in other circumstances. Given the suspicion that Rudd probably never uttered her famous dying phrase, it is troubling to imagine that there is no constitutional protection and no residual interest in reliability.<sup>322</sup> The Court's overvaluing of process, preoccupation with history, and

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317. Relatedly, some critics of *Davis* express concern about the rights of the accused and argue that a judge's discretion to identify an ongoing emergency simply reinvigorates the vague, manipulable, and unpredictable standards Justice Scalia claimed to eliminate in overruling *Roberts*. See, e.g., Michael D. Cicchini, *Judicial (In)Discretion: How Courts Circumvent the Confrontation Clause Under Crawford and Davis*, 75 TENN. L. REV. 753, 764 (2008); Lininger, *supra* note 108, at 280. Feminists, who are aware of the injustices caused by stereotypes and stigmas, must be concerned with the rights of the accused. See Raeder, *supra* note 217, at 313–14 ("As a feminist who is also concerned about the defendant's right to confrontation, I have long pondered the proper balance to ensure that the voices of women and children are heard, without eviscerating the ability of the defendant to confront live complainants, and not just second-hand witnesses.").

318. Lininger, *supra* note 108, at 274 (noting the "lamentable asymmetry in confrontation law: the right to confront declarants of testimonial hearsay was now too strong, while the right to confront declarants of nontestimonial hearsay was now too weak").

319. Robert P. Mosteller, *Giles v. California: Avoiding Serious Damage to Crawford's Limited Revolution*, 13 LEWIS & CLARK L. REV. 675, 676 (2009); see also Davies, *Not the Framers' Design*, *supra* note 141, at 350–51 ("As a practical matter, it seems likely that the narrow scope accorded to the confrontation right in *Crawford* will allow prosecutors considerable room to use hearsay evidence in criminal cases rather than produce the person who made the out-of-court statement as a trial witness, even when the person who made the hearsay statement is readily available to be called."); Raeder, *supra* note 217, at 320 ("*Crawford* opens the possibility of large amounts of hearsay receiving no constitutional second-look at all.").

320. See Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, The Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 907 n.266 (1992) (reprinted at 142 F.R.D. 519).

321. See generally Orenstein, *supra* note 99.

322. See Raeder, *supra* note 217, at 321 ("[I]t is imperative to retain a reliability review given a testimonial approach.").

abandonment of any concern with reliability display how out of touch the current jurisprudence is with both the interests of victims and the rights of the accused.

#### CONCLUSION

*Bedingfield* is certainly interesting in its own right as a riveting tale, an evidence-law conundrum, and an historical peek into the doctrinal split between English and American hearsay doctrine. *Bedingfield* is also important because it demonstrates the intractability of evidence problems regarding domestic violence victims. How can we hear the voices of victims in a respectful way that acknowledges their agency and experience? How do we avoid rewarding perpetrators for silencing the intimate partners whom they have rendered unavailable? How can we develop a rational, predictable, and principled system that admits some uncontroverted out-of-court statements, protecting both the rights of the accused and the safety of the victim?

Because three of the recent confrontation cases involve domestic violence with female victims as the star no-show witnesses, women have played a prominent, if unsought role in the Supreme Court's new confrontation jurisprudence. In addition to looking at the problem doctrinally, therefore, it is important to realize that these confrontation cases involve social phenomena, where the women's identity and stories often become lost in the shuffle. There is a danger that these victims will be voiceless, and their concerns will be ignored. We can rightfully question the ability of courts to address the complicated dynamics of domestic violence, as long as they adhere to the rigid *Crawford* framework. We can also challenge the reported case law for its failure to capture the richness of the facts and the effect of domestic violence on women's lives, and instead use these personal tragedies as an opportunity for an extended history lesson, abstract constitutional exegesis, and debate over doctrine. Nowhere in Justice Scalia's doctrinal complexity is there room to consider the wishes of the victim, whose cry for protection in time of crisis may later be used to enhance the power of the state against her intimate partner.

Finally, *Bedingfield* teaches us that rigid categories are unhelpful and failure to inquire about reliability can undermine truth-seeking and severely prejudice the accused. No one is served by the false dichotomies upon which *Crawford* and its progeny rely. Victims find their situations caricatured and grafted onto ill-fitting categories. Procedural fairness has triumphed so absolutely as the dominant value in confrontation that no one dare ask whether any substantive fairness results. The forbidden question of reliability—while subjective, complex, potentially gendered in its own right, and certainly poorly applied under *Roberts*—is nevertheless a valid and compelling goal of evidence law. We must design a more rational, real-world system for deciding which out-of-court statements are admitted despite the lack of confrontation.

Uncontroverted statements by victims of domestic violence are truly problematic for evidence law—but not for the reasons Justice Scalia

imagines. The value to the prosecution, the unfairness to the accused, and the potential for either value or danger for the victim indicate that such statements pose complicated evidentiary, constitutional, and policy problems that cannot be resolved by resort to facile and rigid categories. *Crawford* performed an important service by decoupling confrontation from hearsay and encouraging us to take the Sixth Amendment seriously. By insisting on unworkable categories of dubious historical legacy and by reading the term testimonial to apply so narrowly, however, *Crawford* has rendered the Confrontation Clause irrelevant in many situations. Ironically, one of the key areas where *Crawford* will insulate the accused from evidence is when women seek help from police to stop the violence in their homes. Paradoxically, the more a woman affirmatively tries to seek legal redress, the less her voice will be heard in the courtroom. Shouts of fear or requests for help during a battering episode (where the woman may just wish to be safe and does not wish to create evidence against the accused) will, however, not be subject to any constitutional screen.

The *Roberts* test was broken, but *Crawford* has offered us the wrong fix. Given *Crawford* and its progeny, there is nothing short of expanding forfeiture and dying declarations that scholars can propose to expand the admissibility of testimonial statements. To address the fact that no constitutional protection exists for the many nontestimonial statements uttered by victims, the law of evidence will have to rely on hearsay rules.<sup>323</sup> In doing so, it perhaps can do what *Crawford* studiously avoids—thinking about reliability, fairness, and hearing the voices of victims.

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323. See Lininger, *supra* note 108, at 308.