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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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Table of Contents:

Introduction............................................................................................................. 2
I. The Bedingfield Case.................................................................................. 6
   A. The Reported Opinion................................................................................. 6
   B. Various Contemporary Accounts and Commentaries .......................... 9
   D. Res Gestae Analysis................................................................................. 19
II. Modern Confrontation Jurisprudence and its Relations to Domestic Violence Prosecutions.................................................................30
   A. The Supreme Court’s New Approach to Confrontation ...................... 30
   B. Modern Approaches to Defining and Prosecuting Domestic Violence... 41
   C. The Practical Effect of Crawford and Its Progeny on Domestic Violence Prosecution..................................................................................................49
III. Bedingfield’s Applicability to Confrontation Questions Posed by Domestic Violence Cases.................................................................51
   A. The Parallels between Bedingfield’s Res Gestae Analysis and Crawford’s Definition of “Testimonial Statements”.................................................... 51
   B. The Mismatch Between Such Rigid Doctrinal Approaches and the Realities of Domestic Violence ............................................................... 54
   C. Strategies for Hearing the Voices and Respecting the Wishes of Domestic Violence Victims ............................................................................. 59
IV. Revisiting The Crucial Question of Reliability: The Unfairness to the Accused of the Limited Nature of Crawford’s “Testimonial” Approach 69
Conclusion ............................................................................................................ 73

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INTRODUCTION

“O Aunt, see what Bedingfield has done to me.” This was the declaration of Eliza Rudd, a widow and owner of a laundry service, as she emerged from her private room with her throat slashed early one Tuesday morning in July 1879.¹ 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.² Rudd died a few minutes after the police arrived.³ At trial, Bedingfield, who survived, claimed that Eliza Rudd had attempted to kill him, and then killed herself.⁴ Despite his plea of innocence, the jury convicted Bedingfield after seven minutes of deliberation, and he was hanged before the end of the year.⁵

The content of Rudd’s statement was never admitted (though the fact that she made a statement shortly after the incident was briefly mentioned in the opinion as refuting the defendant’s suicide theory).⁶ According to the court,

¹Murder and Attempted Suicide at Ipswich, THE IPSWICH J., July 12, 1879, available at Gale Document Number Y3202578458. The phrase has been reported with slight variations. The Ipswich Tragedy, THE IPSWICH J., Sept. 20, 1879, available at Gale Document Number 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 “O dear, Aunt, look here what Bedingfield has done to me.”) According to the case reporter, it was “See what Harry has done.” 14 Cox Crim. Cas. 341, 345 n.(b) (Crown Ct. 1879); but cf. James B. Thayer, Bedingfield’s Case: Declarations as a Part of the Res Gestae, 14 AM. L. REV. 817, 826 (1880) (following concurrent news reports of the statement as being “O, Aunt, See what Bedingfield has done to me”).
²See Murder and Attempted Suicide supra note 1.
⁴14 Cox. Crim. Cas. 341, 344 (1879).
⁵The Ipswich Murder – Sentence of Death, THE IPSWICH J., Nov. 15, 1879. The determination of guilt was based primarily on forensic evidence. See infra notes 82-86 and accompanying text.
⁶Bedingfield, 14 Cox Crim. Cas. at 344-45.
Rudd’s declaration was neither part of the *res gestae*\(^7\) nor a dying declaration, and hence fell within the category of inadmissible hearsay.\(^8\) 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.\(^9\)

*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; one-hundred and thirty 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 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

\(^{7}\) *Res gestae* literally means “things done.” 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 – What is Happening – to the Confrontation Clause*, 15 J.L. & POLY 587, 601 (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”) (footnote omitted).

\(^{8}\) *Bedingfield*, 14 Cox. Crim. Cas. at 342-43.

alacrity, and 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 address the United States 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. It briefly presents the United States 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.

Parts 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 Supreme 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. It also notes the ironies, absurdities, and unintended consequences of the Court’s rigid approach.

Part IV uses *Bedingfield* to argue that the Court’s focus on testimonial statements, and its refusal to consider issues of reliability, may readily admit many unconfronted statements that are questionable and unfair to the accused. Because there is a serious question whether the controversial statement in *Bedingfield* was ever made, this case illustrates the dangers of such unconfronted testimony and the troubling fact that, under the new confrontation jurisprudence, many 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 unconfronted 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 unconfronted and unreliable declarations into evidence.
I. THE BEDINGFIELD CASE

A. The Reported Opinion

Rudd is never named in the reported opinion, but instead is identified as a “woman at Ipswich” and referred to as “she” or “the deceased.” We learn that the unnamed deceased is a widow, laundress, employer (she has two assistants), and fornicator. We infer that last fact because the prisoner “had relations with the deceased woman,” and the court implies that they were intimate. Bedingfield, though named, is mostly referred to as “the prisoner.” His occupation and marital status are not presented by the opinion. He lived in the neighborhood, but not with Rudd.

The source of 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.” Conflict had obviously arisen before. Bedingfield “had uttered violent threats against her, and had distinctly threatened to kill her by

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10 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 legal strategies of the parties. Because the reporters, not the judges themselves, transcribe the oral opinions, such records may not be as accurate in conveying the judge’s remarks as modern reporters are. By this, I do not mean to implicate that modern courts always get the facts right, merely that they document their factual assumptions and reasoning, and an agreed version of events and arguments form the template of the court’s legal determinations.
11 Bedingfield, 14 Cox Crim. Cas. at 341.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
cutting her throat.” Rudd was sufficiently frightened that she asked a “policeman to keep his eye on her house.” The policemen “heard the voice of a man in great anger” around ten o’clock at night at Rudd’s house.

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. Upon returning from the spirit shop, Bedingfield entered Rudd’s room where Rudd remained. Rudd’s assistants were in the yard. A minute or two later, “the deceased suddenly emerged from the house towards the women with her throat cut.”

Interestingly, in the reports of the remarks of Chief Justice 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. One has to read the notes of the court reporter, various newspaper accounts, or Thayer’s critique to learn Rudd’s alleged statement, “O, Aunt see what Bedingfield has done to me.”

Bedingfield considered and rejected two distinct theories for admitting Rudd’s statement. First, it discussed whether the statement was part of the res

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18 Id.
19 Id. at 342.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
gestae. This concept refers to "words spoken, thoughts expressed, and gestures made . . . so closely connected to occurrence or event in both time and substance as to be a part of the happening."26 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.”27 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.”28

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.29 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.30

28 Id. at 342-43.
29 Id. at 343 (the statement was not admissible because “it did not appear that the woman was aware that she was dying.”).
30 Id. at 344. (Justice Cockburn is quoted as saying of Rudd: “she 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.”).
B. Various Contemporary Accounts and Commentaries

Because there are serious limitations in the reported cases of Bedingfield’s era and in relying on the reporters’ version of the case, it is particularly useful to consult other sources for the facts and legal disputes in the case. The contemporary accounts provide much additional information, occasionally shedding a very different light on the facts.31 First, we learn more about the dramatis personae. Eliza Rudd was 45 years old when she died, 32 and Bedingfield was 46 when the incident occurred. 33 The key state’s witness was Rudd’s employee, Sarah Rodwell. 34 Other witnesses included various neighbors, policemen, Rodwell’s son, 35 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.” 36

We learn that Bedingfield had been a friend of Rudd’s late husband, who had died two years previously. 37 Bedingfield, out of proclaimed loyalty to his deceased friend, continued to look out for Eliza Rudd, and “undertook to see that

31 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 centre between York and London for North Sea trade, and was the setting for Charles Dickens’ Pickwick Papers. CHARLES DICKENS, PICKWICK PAPERS: VOL. 1 xxviii (University Society 1908) (1837). The London papers carried shorter squibs about the crimes, but were more engaged in the post-conviction legal wrangling and pleas for clemency.
32 Murder and Attempted Suicide at Ipswich, supra note 1.
34 The Ipswich Tragedy, supra note 1.
35 Id.
36 Id.
37 Id.
Rudd was not imposed upon.”

Bedingfield clearly had business associations with Rudd, keeping pigs in her yard, hanging and taking in laundry, and delivering the laundry with Rudd’s pony and trap (cart) around the neighborhood. He complained that he was underpaid and unappreciated.

Bedingfield was married and claimed that he, his wife, and Rudd often took meals together. Apparently, meals were not all they shared. According to a policeman who took a statement from Bedingfield, 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.” Leaving nothing to the imagination, Bedingfield added: “We have been as man and wife together; we have slept together and she have been towards two children by me.”

At the magistrate’s inquest, a policeman testified that he had been called to Rudd’s house the night before her murder. There was evidence that while not

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38 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, THE IPSWICH J., Dec. 9, 1879, available at Gale Document Number Y3202579719 (“He had promised the victim’s husband, in some way or other, that he would look after her and assist her when she was left alone.”).

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

40 The Execution of Henry Bedingfield, supra note 33.

41 The Ipswich Tragedy, supra note 1.

42 Id. (“She had money from me every week and what work I done for her twenty pounds would not pay me.”).

43 The Ipswich Tragedy, supra note 1 (“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).

44 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.

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

46 Id.
drunk, Bedingfield had been drinking that night. 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. 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). 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. The court’s account of “her refusing him something he very much desired” 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.

In Bedingfield’s version of events, Rudd flew into a jealous rage when he told her of yet a third woman he had impregnated. She slapped him and while

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47 Murder and Attempted Suicide at Ipswich, supra note 1.
48 The Ipswich Murder, supra note 5 Bedingfield told a policeman that he first asked his wife for one pound, but she refused. Id. Bedingfield added that “[i]f it had not been for my wife, perhaps that [Rudd’s alleged “attack” on Bedingfield] would never have occurred.” Id.
49 The Ipswich Tragedy, supra note 1.
50 Murder and Attempted Suicide at Ipswich, supra note 1.
51 Bedingfield, 14 Cox Crim. Cas. at 341.
52 The Ipswich Tragedy, supra note 1 (even Bedingfield himself alludes to this when he commented that “if she had given me that pony and cart it would not have paid me for what I have done for her.”).
53 Id. 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 that if she knew I spoke to her [the young woman] again, she would run a knife into me. She has slapped my face – that the women know [possibly
he was sitting on her lap, ostensibly facing forward, she cut his throat with the razor he had brought. He claimed: “I never cut her throat; she cut hers and mine too. I was sitting on her knee; she cut my throat and I fell down on the floor unconscious.”

Throughout, Bedingfield repeatedly proclaimed his innocence, asking, “Do you think I could do that deed, as good friends as we were?” He also expressed surprise: “I did not think she would have done such a thing. She was a deceitful woman.” In the accounts of Bedingfield’s final moments before his sentence was carried out, Bedingfield continued to proclaim his innocence. The actual execution, the first in Ipswich since 1863, sixteen years previously, was closed to the general public. 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.”

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54 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.
55 The Ipswich Tragedy, supra note 1.
56 Id.
57 Id.
58 The Execution of Henry Bedingfield, supra note 33.
59 Id.
60 Id.
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. Bedingfield was tried and convicted on November 13, 1879, and hanged on December 3, 1879. 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.

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. Interestingly, he first death-qualified himself, explaining that he did “believe death by man’s hands to be the Divinely-appointed punishment for murder . . .”

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61 Murder and Attempted Suicide at Ipswich, supra note 1.
62 The Execution of Henry Bedingfield, supra note 33.
65 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).
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.”  

The arguments against Bedingfield’s guilt mustered by the Vicar concerned motive, the physical circumstances, and the creation of reasonable doubt. 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. 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. Bedingfield, according to the Vicar, seemed tenderly concerned about Rudd’s welfare and even “fetched her a cordial because she was faint and ill – a strange precursor to cutting her throat.” 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.”

The Vicar from Ipswich, in protesting the innocence of Bedingfield made another observation worth considering. He was convinced that “what really influenced the mind of the jury [was] inadmissible evidence which all of them probably knew.” 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

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67 Id. The Vicar stated that “Bedingfield has not been proved guilty, nor do I think he is guilty.”
68 Id.
69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
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 of the trial. 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.\footnote{Id.} 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.\footnote{Id.}

Furthermore, the testimony of Sarah Rodwell, the primary witness to the famous and controversial statement, “O Aunt, see what Bedingfield has done to me,” invites questions about her 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 to the cause of the injuries on the deceased body I cannot give any evidence.\footnote{Id.}

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,\textsuperscript{77} claiming that Bedingfield said: “Before you shall have anybody come here in my place, I’ll cut your ---- throat.”\textsuperscript{78} 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.\textsuperscript{79}

Persuasive as the impeachment of Rodwell is, arguments about Bedingfield’s lack of motive, however, are wildly unconvincing. As one newspaper commentary brilliantly observed: “when 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, they were having an equally close relationship of a less legitimate kind.”\textsuperscript{80} 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 the constant fighting between the Rudd and Bedingfield.\textsuperscript{81}

\textsuperscript{77} \textit{The Ipswich Tragedy, supra} note 1.

\textsuperscript{78} 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.

\textsuperscript{79} Another possible indication of Rodwell’s lack of veracity is that her own son, James Rodwell, age 16, contradicts her version of that morning’s events, challenging his mother’s assertion that Bedingfield had been the subject of discussion at the breakfast table. \textit{Murder and Attempted Suicide at Ipswich, supra} note 1.

\textsuperscript{80} \textit{The Daily News} Nov. 15, 1879 (untitled article beginning “The murder of Eliza Rudd by Henry Bedingfield . . .”) (attributing the quote to Stephen’s Evidence).

\textsuperscript{81} \textit{The Ipswich Murder – Sentence of Death, supra} note 5 (discussing the “standing quarrel” concerning payment for Bedingfield’s services).
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. 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 used.” By contrast, Bedingfield’s wound was shallower (hence his survival) and “was of the character common in suicidal wounds.”

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. 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

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82 14 Cox. Crim. Cas. 341, 344 (1879). 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.
83 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, also the trachea.” 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.” Murder and Attempted Suicide at Ipswich, supra note 1. A few months later, 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 “the woman was always very cheerful, and I never thought her of a suicidal tendency.” Id.
84 Id.
85 Id.
The prosecutor had a point; nowhere does the Vicar deal with the problem of the razor in Bedingfield’s hands.

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, “O Aunt, see what Bedingfield has done to me,” 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 of 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 was 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 that:

“In my opinion a person with such an injury could not have exclaimed at all, much less utter a sentence.”

The second testified that in his opinion, that 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

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86 Id.
muscles of the larynx being divided she lost the strength to articulate.” These doctors also predicted Bedingfield would die of his wounds, so clearly they did not know everything. Nevertheless, the infirmity of Rodwell as a witness, whose recollection one scholar deems “strikingly convenient” 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, “O Aunt, see what Bedingfield has done,” 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 and could not

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88 *The Murder at Ipswich*, supra note 87 (statement of Dr, Bramford Edwards). Edwards added: “it would be physically impossible for the woman to have spoken, whatever position she held her head in after the larynx was divided. She could have made no other sound than the rushing of air through the windpipe.” This statement was also quoted by the Vicar in his letter to the editor. Samuel Garratt, Letter to the Editor, *supra* note 87. 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.*

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

clarify its meaning. Historically, however, there has been little debate as to the meaning of Rudd’s famous utterance, 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 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 McCormick, began to be cited in the early 1800s. Professor James Taylor in his Evidence treatise explained the central question: “whether the circumstances and declarations offered in proof were so connected with the main fact under consideration, as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction.”

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, “O Aunt, See what Bedingfield has done to me” could mean “O 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).

But see David Wilde, supra note 90 (arguing unconvincingly based on an event involving Vincent van Gogh and Paul Gauguin that Rudd could have been the aggressor yet still blamed Bedingfield).

2 Taylor Evidence §§ 525, 526 (quoted in Coffin v. Bradbury, 35 P. 715, 721 (Idaho 1894)); see also 6 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1767, at 182 (3d ed.1940) (“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.”). See Coffin v. Bradbury, 35 P. 715, 721 (Idaho 1894) (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.”).
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.”  


Edmund M. Morgan began his classic article, *A Suggested Classification of Utterances Admissible as Res Gestae*, 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.’”  

96 31 YALE L.J. 229 (1922).

97  *Id.* at 229.

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

99 Ironically, Justice Scalia, author and promoter of the new approach to confrontation leveled the same criticism at the previous confrontation doctrine he overruled.  *See* United States v. Crawford, 541 U.S. at 60 (criticizing Ohio v. Roberts for being both too broad and too narrow).
As to ambiguity, Wigmore declaring the phrase *res gestae* to be “not only entirely useless, but even positively harmful,” explained that it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. In a fit of candor, however, one court acknowledged that this ambiguity was seductive in its malleability, 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.’” 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 that hearsay looks to exclude.

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 that 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

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100 Wigmore, supra note 94§ 1767, at 182.
101 Id.
102 Gray v. State, 456 A.2d 1290, 1297, 1298 (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).
103 Id.
104 See Orenstein, supra note 95 at 177; Tom Lininger, Reconceptualizing Confrontation After Davis, 85 Tex. L. Rev. 271, 282 (“The exception for excited utterances was the single most important evidentiary rule for prosecutors in domestic violence cases during the era preceding Crawford.”).
crime; the act by the perpetrator was already complete, and the statement was not made in the presence of the accused.\textsuperscript{105} Apparently, precise contemporaneity was vital in \textit{Bedingfield}. As Cockburn explained, a statement like “Don’t Harry” would constitute part of the \textit{res gestae}.\textsuperscript{106} “Look what Harry did,” however would just be an inadmissible remembrance of things past.\textsuperscript{107}

In contrast, John Pitt Taylor, a contemporary legal treatise writer who initiated a spirited discussion of the \textit{Bedingfield} case in the \textit{Times} of London, argued that Rudd’s statement fell squarely within \textit{res gestae}.\textsuperscript{108} According to

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\textsuperscript{105} \textit{Bedingfield}, 14 Cox. Crim. Cas. at 342.
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} Lord 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 \textit{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 favor shall have been removed, a restriction on the 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 \textit{Bedingfield}. See \textit{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 Lord Cockburn raises an interesting historical and policy question seemingly ignored by the Court in \textit{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 accused witness rule was changed, didn’t it make sense to at least revisit the policy calculations where the witness had something to say and was truly unavailable?

\textsuperscript{108} \textit{Bedingfield} also presents a window into the culture of evidence scholarship. The reactions to \textit{Bedingfield} are replete with academic back-biting that makes modern scholarly discourse seem tame if not milktosy by comparison. The opinion and the discussion of the case presently starkly clinical, hyper-intellectual approaches to an underlying tragedy, a hallmark of legal scholarship today as well. 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.
Taylor, Rudd’s running from the room was part of the action – an inseparable aspect of the crime. Taylor also rejected the notion that the *res gestae* had to transpire in front of the accused.\textsuperscript{109}

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:\textsuperscript{110}

> Whatever act, or series of acts, constitute, or in point of time immediately accompany and terminate in, the principal act charged as an offense against the accused,

\textsuperscript{109} Pitt-Taylor, supra note 108.

\textsuperscript{110} 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.
from its inception to its 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 construction, – 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.\textsuperscript{111}

One can certainly understand Taylor’s comment that, after perusing the Chief Justice’s definition, he found himself “enveloped in a fog.”\textsuperscript{112}

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.”\textsuperscript{113} Most American jurists applying res gestae found the Bedingfield rule “an unreasonably strict construction.”\textsuperscript{114}

\textsuperscript{111} A. E. Cockburn, A Letter to John Pitt Taylor, Esq. 18 (Vacher & Sons) (1879).
\textsuperscript{113} See State v. Murphy, 17 A. 998, 998-99 (1889) (referring to Bedingfield as “much criticized” and “taking extreme ground.”) But see People v. Ah Lee, 9 P.C.L.J. 390, 1882 WL 1684, at *1, *5 (Cal. 1882) (holding that victim’s statement that “hallooed murder” after victim was stabbed was not part of the res gestae and commending Bedingfield: “we think that the line which separates statements which are admissible in evidence as a part
In *Travelers’ Insurance Co. of Chicago v. Mosley*, the United States 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. The Court held that the 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 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.”

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

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116 Although *Traveler’s* 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 part of the *res gesta*” Thayer, Pt. I supra note 9 at 828. “[N]o distinction between civil cases and criminal cases as the admission of declarations as part of the *res gesta* has yet been made out, and it is very late in the day to adventure upon such an enterprise.” *Id.* at 829.

117 *Travelers’ Ins. Co. of Chi.*, 75 U.S. at 407.
distorted.” Referring to *res gestae*, the Court observed: “The tendency of recent adjudication is to extend, rather than to narrow, the scope of the doctrine.”

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.”

American courts, although they were more flexible than their English counterparts, continued to struggle with what fell within *res gestae*, and refused to admit mere narratives of past events under the doctrine. 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.”

According to Thayer Rudd’s declaration was made sufficiently close in time to be admissible.

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118 Id. at 408.
119 Id.
120 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* [sic], 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, 1880 WL 5656, at *3 (1880).
121 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.”).
122 Thayer, supra note 9, 15 Am. L. rev. at 84.
123 Id.
Over time, influenced by Thayer and Wigmore, courts did not insist on precise contemporaneity. 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*. 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. 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.

Modern courts rarely employ the term *res gestae*, 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

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124 See Coffin v. Bradbury, 35 P. 715, 721 (Idaho 1894) (“the decided weight is that time is not necessarily a controlling element or principle in the matter of res gestae”).
125 Thayer, supra note 9, 15 Am. L. Rev. at 83.
126 Wigmore, supra note 94.
128 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 . . . .”).
the matter asserted. 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. 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.” It 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 thereafter.” 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.

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129 See id. at 671-72 (listing seven different modern manifestations of res gestae including the nonhearsay uses of verbal acts, verbal parts of acts, implied assertions); see, e.g., Deparvine v. State, 995 S.2d 351, 362 n.7 (Fla. 2008) (including in res gestae “part of a relevant transaction the offered evidence of which has no hearsay aspect”).
130 Municipality of Bethel Park v. W.C.A.B. (Willman), 636 A.2d 1254, 1258 (Pa. Commw. Ct. 1994) (“res 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.”).
131 FED. R. EVID. 803(2). MCCORMICK supra note 3 at § 268.
132 FED. R. EVID. 803(1).
133 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 as to be admissible without requiring imposition of the time and expense associated with production of a declarant if available, 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.
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 RELATIONS TO DOMESTIC VIOLENCE PROSECUTIONS**

A. The Supreme Court's New Approach to Confrontation

In *Crawford v. Washington*, the Supreme Court reshaped our understanding of the protections offered by the Sixth Amendment right to confront witnesses. *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. *Crawford*’s focus on “testimonial” statements represented a new approach. The opinion is steeped in history and standard strives to effectuate the original intent of the Sixth Amendment, emulating the common law at the time the amendment was originally written.

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135 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.
136 *See* Melendez-Diaz v. Mass., 129 S. Ct. 2527 (2009) (“In *Crawford*, after reviewing the Clause's historical underpinnings, we held that it guarantees a defendant's right to confront those ‘who “bear testimony”’ against him. 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* notes 281-282 and accompanying text.
137 *Crawford*, 541 U.S. at 68 (Justice Scalia explained that the Confrontation Clause is “most naturally read as a reference to the right of confrontation at common law,
Crawford explicitly overruled Ohio v. Roberts, which admitted out-of-court statements as long as they bore “adequate ‘indicia of reliability.’” Justice Scalia, who authored Crawford and all the recent confrontation opinions, rejected the reliability inquiry and derided it as “inherently and therefore permanently unpredictable.” 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.’” Crawford focused on the procedural nature of the confrontation right, explaining that: “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.” 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

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admitting only those exceptions established at the time of the founding.”). Scalia’s originalist approach has been attacked for its lack of wisdom and its method. 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, 350 (2007) (“the originalist claims that have appeared in recent criminal procedure decisions have usually reflected the ideological proclivities of the justices who made them, but have rarely resembled the historical legal doctrines that actually shaped the Framers' understanding.”).

139 Id. at 66. This test was satisfied if the out-of-court statement falls within “firmly rooted hearsay exception or bears particularized guarantees of trustworthiness. Id. (citations omitted).
140 Crawford, 541 U.S. at 68 n.10 (emphasis in original).
141 Roberts, 448 U.S. at 61.
142 Id. at 61.
confront witnesses was written)\(^{143}\) and forfeiture by wrongdoing, whereby the accused forfeits his confrontation right by intentionally procuring the witness’s absence.\(^{144}\)

Although everything turns on the definition, \textit{Crawford} did not fully explain what constituted a “testimonial statement.”\(^{145}\) In delineating which statements are “testimonial” the Court focused primarily on whether the declarant anticipated that law enforcement would use the statement to prosecute the accused.\(^{146}\) Post-\textit{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

\(^{143}\) \textit{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.”). \textit{See generally}, Orenstein, \textit{Her Dying Words} ___ ILL. L. REV. ___ (forthcoming 2010).

\(^{144}\) \textit{Crawford}, 541 U.S. at 63 (“For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds...”).

\(^{145}\) The Court itself noted that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” 541 U.S. 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 Rehnquist predicted in his concurrence in the judgment that the immediate effect of \textit{Crawford} was immense confusion as to what sorts of statements were “testimonial.” \textit{Id.} at 75-76 (Rehnquist, C.J. concurring in the judgment) (citations omitted). Many commentators agree. \textit{See, e.g.,} Note, Jennifer B. Sokoler, \textit{Between Substance and Procedure: A Role for the States’ Interest 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”); Myrna Raeder, \textit{Domestic Violence Cases after Davis: Is the Glass Half Empty or Half Full?} 15 J. L.& PUB. POL. 759, 760 (2007) (“Crawford’s failure to define what is testimonial led to two years of judges reading tea leaves and reaching contrary results.”).

\(^{146}\) \textit{Crawford}, 541 U.S. at 51-52 (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 (Thomas, J., dissenting))). 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,” \textit{Id.} at 52. (quoting the Brief for National Association of Criminal Defense Lawyers et al. as \textit{Amici Curiae}). Tellingly, the Court did not attempt to craft a definition of its own, but quoted from the parties and amici. \textit{See id.}
declarant initiated contact with law enforcement authorities; the location where and context in which the declarant gave the statement to law enforcement agents, and the structure and formality of the questioning. 147

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. 148 In some senses, such statements seem testimonial because they reported 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 149 and may be targeted to the victim’s safety rather than conducted for the purpose of generating evidence, and hence do not seem testimonial.

The Court addressed the testimonial nature of statements made by domestic violence victims to police in Davis v. Washington and its companion case, Hammon v. Indiana. 150 Davis involved a 911 emergency call placed by a victim during a violent incident with her former boyfriend. During the call, the

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148 Davis, 547 U.S. 817 (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.

149 Ultimately, the Court did not rely on formality as a touchstone for determining whether a statement is testimonial. See Davis, 547 U.S. 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., dissenting).

150 547 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.
victim told the 911 operator that Davis had just run out the door after hitting her. The 911 operator asked numerous questions including Davis’ full name, birthday, purpose for visiting the victim’s residence, and the context of the assault.\textsuperscript{151} Upon arrival, the police observed the victim’s “shaken state,” the “fresh injuries on her forearm and face,” and her “frantic efforts to gather her belongings and her children so that they could leave the residence.”\textsuperscript{152} Because the victim did not appear at Davis’ 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.\textsuperscript{153} Over Davis’ 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.\textsuperscript{154}

Similarly, \textit{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.”\textsuperscript{155} She allowed the police to enter, and they found evidence of a struggle in the living room. The accused was in the kitchen.\textsuperscript{156} The officers separated the victim and the accused and again asked the victim what had occurred.\textsuperscript{157} Though the accused attempted to interrupt, Ms. Hammon eventually described the violent

\begin{itemize}
\item \textsuperscript{151} \textit{Id.} at 818.
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.} at 819.
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Id.}
\end{itemize}
incident, and completed and signed a battery affidavit. 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.

Denying any attempt to “produce an exhaustive classification of all conceivable statements,” the Court strove to differentiate testimonial from nontestimonial statements in the domestic violence context, using the *Davis* and *Hammond* 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.” 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.”

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.” 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

158 Id. at 820.
159 Id.
160 Id. at 821.
161 Id.
162 Id.
163 Id. at 827.
station) was facing an ongoing emergency.\(^{164}\) McCottry’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.”\(^{165}\) The Court concluded that McCottry was “speaking about events *as they were actually happening*, rather than ‘describ[ing] past events.’”\(^{166}\) The Court conceded that “one *might* call 911 to provide a narrative report of a crime absent any imminent danger,” but decided that McCottry (as opposed to Amy Hammon), was plainly making “a call for help against a bona fide physical threat.”\(^{167}\) The circumstances of the interrogation in *Davis* “objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency.”\(^{168}\) Therefore, the Court held that McCottry’s initial statements on the 911 call were nontestimonial.\(^{169}\)

*Hammon* was dispatched easily because, according to the Court, there was “no emergency in progress.”\(^{170}\) The Court explained that the officer questioning Amy Hammon “was not seeking to determine (as in *Davis*) ‘what is happening,’ but rather ‘what happened.’”\(^{171}\) The Court acknowledged that exigencies

\(^{164}\) *Id.* at 827.

\(^{165}\) *Id.* (emphasis in original).

\(^{166}\) *Id.* (emphasis in original).

\(^{167}\) *Id.* (emphasis in original).

\(^{168}\) *Id.* 828.

\(^{169}\) 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 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 “Stop talking and answer my questions.” *Id.* at 818.

\(^{170}\) *Id.* at 829.

\(^{171}\) *Id.* at 830. As the Court explained: “Amy’s [declarant’s] narrative of past events was delivered at some remove in time from the danger she described. And after Amy
surrounding a domestic violence call “may often mean that ‘initial inquiries’ produce nontestimonial statements.” But it distinguished Hammond, where the declarant’s statements “were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation.”

Because the focus of Crawford had been 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, 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. 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.”

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. However, the mere fact that the victims’ statements were made “at an alleged crime scene and were ‘initial inquiries’ is answered the officer's questions, he had her execute an affidavit, in order, he testified, ‘[t]o establish events that have occurred previously.”’ Id. at 832.

172 Id. at 832.
174 547 U.S. at 828 (citing 1 Leach at 200, 168 Eng. Rep., at 202).
175 Id.
176 Id. at 827 (“the difference in the level of formality between the two interviews [in Davis and Crawford was] striking”).
Instead, the court focused on the intention of the victim and police, and 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 his dissent, argued that the line the majority tried to draw between emergencies and report of past events, relying on primary motives, is blurry and impossible to apply. He made a persuasive case that Amy Hammond was as much in danger at the moment she made her declaration as was McCottry. Although Davis certainly considered the declarant’s point of view, noting that the victim was “seeking aid, not telling a story about the past,” 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. Many scholars agree that Davis is unsound and unworkable.

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177 Id.
178 Id. at 839-842 (Thomas, J., concurring in the judgment in part and dissenting in part).
179 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.
180 Id. at 831.
181 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 104 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, 767 (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.”).
182 See, e.g., Lininger, supra note 104 at 274 (“the 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 145, at 762 (“Davis' bright line is illusory and hard to apply.”); Yee, supra note 181 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.”).
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*,\(^1\) 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,”\(^2\) noting that cases “where the accused makes the declarant unavailable through intimidation or other means, forfeiture is an option.”\(^3\)

Two years after *Davis*, in *Giles v. California*,\(^4\) the Court addressed the forfeiture issue, which is a longstanding equitable principle in Anglo-American jurisprudence.\(^5\) Justice Scalia, writing for the majority for the third time in as many cases, addressed the circumstances of forfeiture. In *Giles* the accused was charged with murdering his girlfriend, Brenda Avie. Weeks before Avie’s death 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 kill her with a knife.\(^6\) Three weeks later, Giles did kill Avie, claiming that he acted in


\(^{2}\) *Davis*, 541 U.S. at 833. The Court added: “We take no position on the standards necessary to demonstrate such forfeiture.” *Id.*

\(^{3}\) *Id.*


\(^{5}\) See *Reynolds v. United States*, 98 U.S. 145, 148-50 (1879) (former testimony of wife admitted where accused had kept his wife away from home so that she could not be subpoenaed to testify).

\(^{6}\) 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
self-defense. At his murder trial, Giles supported his self-defense claim by describing Avie “as jealous, vindictive, aggressive, and violent.” To rebut Giles’ claim of self-defense and impeach his testimony, the State introduced into evidence the Avie’s uncross-examined statements to police weeks before the killing.

Although the Justices agreed that the victim’s statements were testimonial, 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. Giles held that not every homicide case automatically opens the door to admitting the victim’s former testimonial statements. To do so would ignore the historic intent requirement and deprive the accused of his confrontation rights. The dissent questioned Giles’ 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.\textsuperscript{195} The dissent questioned 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.\textsuperscript{196}

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.”\textsuperscript{197} It often involves physical violence, sexual coercion, emotional abuse, and economic control.\textsuperscript{198} I am concerned here with the type of domestic violence that involves criminal conduct, such as rape, assault

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\textsuperscript{195} Id. at 2703-04. (Breyer, J., dissenting.)
\textsuperscript{196} Id. at 2704, 2707.
\textsuperscript{197} ABRAMS, CAHN, ROSS & MEYER, CONTEMPORARY FAMILY LAW 327 (2d Edition 2008).
\textsuperscript{198} ELIZABETH M. SCHNEIDER, CHERYL HANNA, JUDITH G. GREENBERG & CLAIRE DALTON, 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 Theonnes, Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey, U.S.D.O.J., Office of Justice Programs, National Institute of Justice, 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.").
\end{flushleft}
or murder. One-third of all adult American women will experience at least one physical assault by a partner. 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 tends not to cause serious injury or fear.

Intimate partner violence has always existed in western culture, but historically remained officially unnoticed and outside the purview of public concern. 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 intrafamily brutality. Divorce courts contributed to fuller awareness and open discussion of domestic violence, and a social movement against wife-beating developed that is traceable in the politics and literature of the nineteenth century. Generally, domestic violence was

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199 Other aspects such as emotional abuse and psychological coercion are legitimate societal concerns, but are difficult to address through law.
201 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 & Theonnes, supra note 198 at 17 (“women were significantly more likely than men to report being victimized by an intimate partner. . . [and] differences 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.”)
202 ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 13-20 (offering historical perspectives from Roman Times to the present).
203 LISA SURRIDGE, BLEAK HOUSES: MARTIAL VIOLENCE IN VICTORIAN FICTION (2005) 146 (“divorce 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 wide as mistress of the house.”).
understood primarily as a social problem of the lower classes – concerning the likes of Bill Sikes\textsuperscript{204} and Henry Bedingfield, although it certainly can be documented in all ethnicities, races,\textsuperscript{205} and social strata.\textsuperscript{206}

What society used to minimize as family discord or domestic disputes, 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, it now denominates as violence.\textsuperscript{207} 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 1970’s was to take

\textsuperscript{204}The villain in Charles Dickens’ \textit{Oliver Twist}, who beats and finally kills the good-hearted prostitute, Nancy.

\textsuperscript{205}\textit{See} Riva B. Siegel, \textit{“The Rule of Love”: Wife Beating as Prerogative and Privacy}, 105 \textit{YALE L.J.} 2117 2138 (1999) (documenting disproportionate judicial interest in wife beating among African Americans and the poor and noting that as wife beating emerged as a “law and order” issue, class- and race-based discourses about marital violence became even more pronounced.”).

\textsuperscript{206}Domestic violence interacts with culture, race, immigration status and religion, but occurs in diverse families. SCHNEIDER ET. AL., supra note 198 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. \textit{Id.} at 145. Recent scholarship has shown that even Victorian literature about good middle class families also intimated if not fully described tales of domestic violence. Kate Lawson and Lynn Shankinovsky, \textit{The Marked Body: Domestic Violence in Mid-Nineteenth-Century Literature} (Albany: State University of NY Press 2002) (discussing domestic violence in Victorian literature).

\textsuperscript{207}\textit{See} Emily J. Sack, \textit{Battered Women and the State: The Struggle for the Future of Domestic Violence Policy}, 2004 \textit{Wis. L. REV.} 1657, 1661 (2004) (“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.”); Reva Siegal, \textit{“The Rule of Love”: Wife Beating as Prerogative and Privacy}, 105 \textit{YALE L.J.} 2117 (1996) (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).
such violence seriously. 208 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, 209 and changing social attitudes towards gender roles and the relationship between the sexes, domestic violence is now studied by many disciplines (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 prosecutions are notoriously difficult to win. Part of the problem may be residual patriarchal social attitudes about women’s roles or about the government’s interference with family privacy. However, another aspect of the difficulty in such prosecutions is that victims of intimate violence often do not testify. 210 They regularly recant, refuse to testify, or simply fail to appear. According to some estimates, as many as 80% of domestic violence cases pre-Crawford did not involve live in-court testimony by the victims. 211 The

209 See, e.g., Thurman v. City of Torrington, 595 F. Supp. 1521(D. Conn. 1984) (awarding 2.3 million dollars in damages for 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, 17 AM. U. J. GENDER, SOC. POL. & L. 685, 690-91(citing Thurman 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.”).
210 Myrna Raeder, Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse 71 BROOK. L. REV. 311, 329 (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.”).
211 People v. Brown, 94 P.3d 574, 576 (Cal. 2004) (expert testified that eighty to eighty five percent of battered women ‘actually recant at some point in the process.’). This is what Professor Myrna Raeder has aptly termed the “witness-lite/hearsay-heavy approach.” Raeder, supra note 210 at 329.
reasons for this high rate are varied and complicated. A victim of intimate partner violence may still love the perpetrator\textsuperscript{212} and may not want to send him to jail. 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 of that she might lose her children\textsuperscript{213} or the batterer is her only source of housing or income.\textsuperscript{214} 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.\textsuperscript{215} Finally, and most importantly, the victim may still fear the accused and distrust the legal system’s ability to protect her from his

\textsuperscript{212}Raeder, supra note 145, at 760.
\textsuperscript{213}See GOODMAN & EPSTEIN, supra note 201 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 210 at 364 (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, \textit{Why Parents Who Batter Win Custody: Battered spouses take aim at a controversial custody strategy}, NEWSWEEK (Sept. 25, 2006). 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. Women who leave battering relationship are often financially disadvantaged and sometimes experience psychological or addiction problems. They can appear unbalanced and unprepared to care for their children. See generally Martha Mahoney, \textit{Legal Images of Battered Women: Redefining the Issue of Separation}, 90 MICH. L. REV. 1(1991); Naomi R. Cahn, \textit{Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions} 44 VAND. L. REV. 1041 (1991).
\textsuperscript{214}See G. Kristian Miccio, \textit{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.”).
\textsuperscript{215}Phylliss Craig-Tailor, \textit{Lifting the Veil: The Intersectionality of Ethics, Culture and Gender Bias in Domestic Violence Cases}, 32 RUTGERS L. REV. 31 (2008); but see Sack, supra note 207 at 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, \textit{Mandatory Arrest}, in 3 Encyclopedia of Crime and Punishment 1023, 1027 (David Levinson ed., 2002).
wrath. Because much violence is animated 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. 216

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. 217 Such prosecution policy depended heavily upon the admissibility of the victim’s out-of-court-statements to police and 911 operators. 218 Under the old Roberts regime, 219 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.

216 See Raeder, supra note 210 at 329 (“empirical 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”). GOODMAN & EPSTEIN, supra note 201 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 their children”) (citations omitted); Carol E. Jordan, Intimate Partner Violence and the Justice System: An Examination of the Interface, 19 J. INTERPERSONAL VIOLENCE 1412, 1415-16 (2004): Callie Marie Remnison & Sarah Welchans, Bureau of Justice Statistics, Publ’n No NCJ 178247, Intimate Partner Violence 5 (2003) (“divorced or separated persons were subject to the highest rate of intimate partner victimization”) at http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf (cited in ABRAMS, CAHN, ROSS & MEYER, supra note 197 at 328).

217 See Sack, supra note 207 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.”) (footnotes omitted); but See generally, Richard D. Friedman & Bridget McCormack, Dial in Testimony 150 U. PA. L. REV. 1171, 1181-1200 (2002) (pre-Crawford article questioning the fairness and constitutionality of prosecutions based on 911 calls).

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

219 See supra notes 138-139 and accompanying text.
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 such 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.\(^{220}\) Many favor no-drop policies, arguing that mandating such prosecutions sends a message that such violent behavior toward intimates is intolerable, and the perpetrator has committed a crime against the state.\(^{221}\) 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 domestic violence differently from victims of other crimes.\(^{222}\) By adopting a no-

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\(^{220}\) 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 (2009) (“Domestic violence law and policy prioritizes the goals of policymakers and battered women’s advocates—safety and batterer accountability—over the goals of individual women looking for a way to address the violence in their relationships. The shift of decisionmaking authority has profoundly negative implications for the autonomy of women who have been battered and reflects the influence of dominance feminism on the battered women’s movement.”); Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Women’s Prosecutor and Other More Modest Proposals*, 7 UCLA Women’s L.J. 183, 191 (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.”). See Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 Fla. S. U. L. Rev.1 (2009) (“domestic violence law and policy should respect the rights of individual women to choose whether and how to use the criminal and civil legal systems”).

\(^{221}\) SCHNEIDER ET. AL., supra note 198 at 328; Hanna, *No Right to Choose*, supra note 218, at 1884 (“If we reject mandated participation because it would ‘revictimizing,’ we neither account for the women’s strength and resilience nor acknowledge the political and social context in which battering occurs.”).

\(^{222}\) Hanna, *No Right to Choose*, supra note 218 at 1891.
drop policy and taking the decision out of the victim’s hands, the government can limit abusers’ attempts to bully women into dropping charges.\footnote{Schneider et al., Domestic Violence and the Law: Theory and Practice, supra note 198 at 328 (quoting police officers that the solution to the vexing problem of escalating violence post-arrest was “to take the responsibility out of the hands of the victim and place it with the States where it belongs.”) (quoting Casey G. Gwinn and Sgt. Anne O’Dell, Stopping the Violence: the Role of the Police Officer and the Prosecutor, 20 W. St. U. L. Rev. 297 (1993)); Lininger, supra note 104 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”).} 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.\footnote{Hanna, supra note 218 at 1891. (“When a batterer and his defense counsel know that a victim’s failure to cooperate may result in case dismissal, they control the judicial process.”).}

However, strong counterarguments disfavor mandatory prosecution. Prosecutors sometimes use heavy-handed tactics to assure the victim’s testimony at trial.\footnote{See Raeder, supra note 210 at 328-29 (women who refuse to testify have faced threats of imprisonment and criminal charges for child endangerment; some women have been jailed as material witnesses.); 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.”).} When women suffer violence from intimates, they often also suffer loss of control over their movements and choices. Some argue that it is intrusive, paternalistic,\footnote{See, e.g., Goodman & Epstein, supra note 201 at 75 (“the 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.”).} and even dangerous\footnote{See Raeder, supra note 210 at 329 (“empirical 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”).} 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 weak that they are incapable of making rational choices.\textsuperscript{228} Such mandatory prosecution deprives women of agency and replicates the loss of power and emotional abuse they experience in their intimate relationship.\textsuperscript{229} No-drop policies can create a safety concern whereby women who do not wish to press charges may decline to call police for assistance during an attack.\textsuperscript{230} In fact, some feminists have even hailed \textit{Davis} because it represented an end to the disrespect of the victims represented by no-drop prosecutions.\textsuperscript{231}

C. The Practical Effect of \textit{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 \textit{Crawford} and \textit{Davis}.\textsuperscript{232} If

\begin{itemize}
\item \textsuperscript{228} \textit{See} Miccio, \textit{supra} note 214, at 241-242 (“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.”).
\item \textsuperscript{229} Linda Mills, \textit{Killing Her Softly: Intimate Abuse and the Violence of State Intervention}, 113 HARV. L. REV. 550, 595 (1990) (“a dynamic between the state and the batted woman emerges that distinctly mimics the violent dynamic in the battering relationship.”).
\item \textsuperscript{230} \textit{See} GOODMAN & EPSTEIN, \textit{supra} note 201 at 76 (“by 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.”); \textit{cf.} Mills, \textit{supra} note 229 at 595 (“[M]andatory interventions deny the battered woman an important opportunity to partner with the state to help ensure her future safety.”).
\item \textsuperscript{231} See Kimberly D. Bailey, \textit{The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence}, 2009 B.Y.U.L. REV. 1.
\item \textsuperscript{232} “In a survey of over 60 prosecutors' offices in California, Oregon, and Washington, 63 percent of respondents reported the \textit{Crawford} decision has significantly impeded prosecutions of domestic violence. Seventy-six percent indicated that after \textit{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
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.\(^{233}\) Whereas issues of gender constituted part of the subtext in Crawford,\(^ {234}\) 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. Justice Scalia was particularly adamant that public policy concerning domestic violence could not sway the constitutional command. 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.”\(^ {235}\) 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

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) (footnotes omitted); Lininger, supra note 104181 at 280-81 (“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.”).

\(^{233}\) I do not discuss the most recent confrontation case, again authored by Justice Scalia, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2531 (2009), which deals with the right to confront forensic experts. It differs in tone and subject from the triumvirate of Crawford, Davis, and Giles, though its focus on testimonial statements and avowed disinterest in the practical effects on prosecutions perpetuates important themes of those cases.

\(^{234}\) See Orenstein, supra note 143 n. ___ (analyzing the role of gender in the spousal privilege that prevented Sylvia Crawford from testifying).

\(^{235}\) Crawford, 541 U.S. at 2692. To be fair, the dissent reads forfeiture more broadly but never intended to dispense with Crawford. See Giles, 128 S. Ct. at 2696 (Breyer, J., dissenting).
should have one Confrontation Clause (the one the Framers adopted and \textit{Crawford} described) for all other crimes, but a special, improvised Confrontation Clause for those crimes that are frequently directed against women?\textsuperscript{236}

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. \textit{Bedingfield’s} Applicability to Confrontation Questions Posed by Domestic Violence Cases

A. The Parallels between \textit{Bedingfield’s} Res Gestae Analysis and \textit{Crawford’s} Definition of “Testimonial Statements”

\textit{Davis’} intellectual enterprise in figuring out which victims’ statements are testimonial is eerily similar in tone and content to \textit{Bedingfield’s} debate concerning \textit{res gestae}.\textsuperscript{237} In revisiting and expanding upon \textit{Crawford’s} definition of testimonial, \textit{Davis} distinguished those “facing an ongoing emergency” from those who are interrogated “after the event...had occurred.”\textsuperscript{238} \textit{Davis} contrasts cases where the declarant “was speaking about events \textit{as they were actually happening},” with statements that are merely “describ[ing] past events,”\textsuperscript{239} or as it

\textsuperscript{236} \textit{Giles}, 128 S. Ct. at 2693. This portion of the majority opinion was not joined by Justices Souter or Ginsburg. \textit{Id.} at 2694 (Souter, J, concurring in part).
\textsuperscript{237} In fact, Jeffrey L. Fisher, an attorney who argued \textit{Davis} before the Supreme Court, 2006 WL 542177, oral arguments at 2006 WL 766735, suggests the Court has simply revived the doctrine of \textit{res gestae}, by focusing on the past/present or happening/happened elements of a situation. \textit{See} Fisher, \textit{supra} note 27.
\textsuperscript{238} \textit{Davis}, 547 U.S. at 827.
\textsuperscript{239} \textit{Id.} (citations omitted, emphasis in original).
later explains the distinction, between “'what is happening’” versus “'what happened.'”  

*Davis* compares “a narrative report of a crime absent any imminent danger,” where the interrogator seeks to “simply learn what had happened in the past” with “a call for help against bona fide physical threat elicited “to resolve the present emergency.”  

Was the victim “seeking aid” or “telling a story about the past”?  

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.  

Justice Scalia’s analysis in *Davis* parallels directly the question in *Bedingfield* where Lord 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. Lord 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.”  

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.”  

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240 *Id.* at 830.  
241 *Id.* at 827 (emphasis in original).  
242 *Id.* at 831.  
243 *Id.* (citations omitted).  
244 *Bedingfield*, 14 Cox. Crim. Cas. 342-343.  
245 *Id.* at 342.
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.\textsuperscript{246}

In his critique of Cockburn’s opinion in \textit{Bedingfield}, John Pitt Taylor suggested that timing did not matter “so long as the woman was giving alarm and seeking assistance.”\textsuperscript{247} Even if she knew that Bedingfield was no longer able to inflict harm, her statement would be part of the \textit{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 \textit{Bedingfield’s res gestae} discussion, continue to confound current confrontation jurisprudence. As it turns out, we are still puzzling over questions similar to those raised in \textit{Bedingfield} but we have substituted one incomprehensible phrase (“\textit{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 – but the problem is further confounded by the insensitivity to context and the realities of domestic violence.

\textsuperscript{246} Thayer, \textit{supra} note 9, 15 Am. L. Rev. at 89.
\textsuperscript{247} Pitt-Taylor, \textit{supra} note 108.
B. The Mismatch Between Such Rigid Doctrinal Approaches and the Realities of Domestic Violence

Looking carefully at Bedingfield and the three modern confrontation cases that involved domestic violence – Davis, Hammond and Giles – we can trace the disconnect between our psycho-social understanding of domestic violence on the one hand, and Lord 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 still happening.” 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.) \(^{248}\) Therefore, the distinction between reporting out of fear “to enable police assistance to meet an ongoing emergency” \(^{249}\) and

\(^{248}\) *See supra* note 216 and accompanying text (discussing increased danger when women try to leave violent relationship or attempt to seek legal remedies).

\(^{249}\) Davis, 547 U.S. at 822.
reporting to instigate a legal response “to establish or prove past events”\textsuperscript{250} 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 \textit{Davis} of an ongoing emergency fails to account for the dynamics of intimate partner violence or the reality experienced by its victims.\textsuperscript{251} She explains that from a battered woman’s perspective, the meaning of “‘exigency’ – a construct deeply embedded in the reigning definition of testimonial – is distinct from that experienced by victims of other types of crimes.”\textsuperscript{252} The Court’s distinct, binary purposes for making a statement – “crying for help” versus “providing information” are practically and conceptually inseverable. 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.\textsuperscript{253} Therefore, “a domestic violence victim’s safety may be wholly

\textsuperscript{250} \textit{Id.}

\textsuperscript{251} Deborah Tuerkheimer, \textit{A Relational Approach to the Right of Confrontation and Its Loss}, 15 J. L. & PUB. POL. 725, 726 (2007) (Court’s understanding of domestic violence is “sufficiently inaccurate as to fatally undermine the coherence of both doctrine and theory.”) She 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. \textit{Id. at} 726-27. Tuerkheimer argued that the test for “testimonial statements” incorporates “a model of discrete, episodic violence that is incompatible with the ongoing nature of abuse,” \textit{id. at} 727, and reveals “complete inattention to the dynamics of battering.” \textit{Id. at} 728.

\textsuperscript{252} \textit{Id.} (footnote omitted).

\textsuperscript{253} \textit{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
contingent on her communication with police; her ‘narration of events’ linked inexorably to resolving – however temporarily – the danger posed by her batterer.”

Similarly, Tuerkheimer criticizes the insistence on the existence of a discrete event, noting that under the Court’s new definition, “either the event is ongoing or completed entirely.”

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 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” 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 fits into, we must again engage in the reasoning predicated on the ‘crying for help versus ‘providing information to law enforcement’ rubric.”

254 Id. at 731. (Unlike victims of episodic crimes, a battered woman may make a report because it is the only possible way for her to experience a moment of safety, however brief.”).

255 Id. at 734.

256 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 least one commentator believes it reflects an attempt to get liberal Justices on board. Tom Lininger, 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).
type of binary thinking that Lord 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, it excluding it from the *res gestae* and making it testimonial.

The *Davis* Court repeatedly refers to its inquiry as “objective.”257 For instance, it explains that: “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.” 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.’”258 In a similar vein, the formality of the declarant’s statement in *Crawford* made the testimonial quality “more objectively apparent.”259 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

257 *Davis*, 547 U.S. at 826 (emphasis added).
258 *Id.* at n.5 (internal citations omitted; emphasis of *those* in the original; emphasis of *objective* added).
259 *Id.* at 826.
done.”

Even Justice Thomas in dissent cannot help noting the “Court’s repeated invocation of the word ‘objectiv[e]’ to describe its test.”

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. 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. 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 dynamic 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 statement he deems testimonial because the emergency is over, is actually still in danger when she talks with police. The facts of the case, as recounted by Justice Scalia, indicate that the accused repeatedly tried to interrupt Amy Hammon’s conversation with police – trying to

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260 Id. at 830 (emphasis added).
261 Id. at 849 (Thomas, J, dissenting) (internal references omitted).
262 See Orenstein, My God! supra note 95 at 189.
263 See Katherine T. Bartlett, Feminist Legal Methods, reprinted in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 370, 371.
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.” 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 McCottry, 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

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264 Davis, 547 U.S. at 820.
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. Rudd is not even named in the official court opinion. Her last words, naming her murderer, are silenced by the official opinion. 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,

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265 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, 2001 WL 850119 (Wash. App. Div. 2) at *3. 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. Crawford v. Washington, Brief for Petitioner, 2003 WL 21939940 at *5 n. 1.

266 As discussed above, see supra notes 87-88, and accompanying text, there is some serious question whether those words were ever uttered. However, the reason for excluding Rudd’s alleged statement had nothing to with its reliability, but with its timing and the fact that it was deemed neither a dying declaration nor part of the res gestae.
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. 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.

But if, instead, we were to affirmatively notice the domestic violence context, what would a feminist analysis add to our understanding? 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. A feminist approach would express interest and concern about the victim’s desires and personal understanding of her situation. Obviously, the focus of confrontation is the right of the accused, not the victim’s desires. Nevertheless, it is valuable to at least notice the effect on victims and attempt to understand cases where the accused do not wish to testify.

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 finances, reputation) create pressure not to testify, or when direct threats conspire to render her silent. In *Davis*, it was uncertain what the victim wanted. Michelle McCottry, the victim in *Davis* had secured a no-contact order against the accused, indicating that the

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267 Orenstein, *supra* note 143 at ___.

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accused had previously threatened her and she had sought legal help. However, the facts indicate that that McCottry did not desire to testify against her former boyfriend. McCottry hung up when she originally called 911 and only spoke to the dispatcher when the dispatcher called back.\textsuperscript{268} She also covered her face when the police attempted to photograph her injuries.\textsuperscript{269} Although she “initially cooperated with the prosecutor's office, the State was unable to locate McCottry at the time of trial.”\textsuperscript{270} We do not know whether McCottry was disinterested, afraid of the accused, or hoped not to get him in trouble. In any case, she did not cooperate with the prosecution.

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.\textsuperscript{271} 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.\textsuperscript{272}

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

\textsuperscript{268} As the Supreme Court of Washington noted, “a hang-up call often signals that the caller is in grave danger,” State v. Davis, 154 Wash.2d 291,303, 111 P.3d 844, 850 (2005).
\textsuperscript{269} 116 Wash. App. 81, 85, 64 P.3d 661, 663.
\textsuperscript{270} Id.
\textsuperscript{272} Id. at 448, n.3.
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 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 her 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.”

In his concurrence in part, Justice 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. 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.”

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.” This very sensible and practical approach has much to recommend it in terms of preventing batterers from intimidating their intimate partners. It works particularly well in cases like *Giles* where the witness is dead.

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273 *Giles*, 128 S. Ct. at 2693.

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

275 Lininger, *supra* note 256 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.*
By assuming duress under such broad circumstances, however, Lininger arguably undermines some victims’ choices, rather than respecting them. 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 considerations do not apply in cases like Giles or Bedingfield. In these cases, the victims were not uncooperative; rather, they suffered the ultimate unavailability: death. Here I favor entirely the Lininger proposal that essentially allows the victim to speak from the grave. This seem particularly fair (and forfeiture is after all an equitable remedy) where the accused himself rendered the victim unconfrontable. 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. 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.276 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

276 See supra note 194 and accompanying text. This sort of preliminary determination of an ultimate fact happens all the time under Fed. R. Evid 104. See Bourjaily v. United States, 483 U.S. 171 (1987).
defendant is guilty as charged, does not sit well with the right to trial by jury.”

In *Giles*, however, such a preliminary determination would not have been onerous or intrusive. Giles readily admitted to killing the victim, but claimed self-defense. By contrast, Bedingfield did not admit to killing Rudd. In terms of fairness, there is a certain basic parity 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. By contrast, Bedingfield denied killing Rudd. If Bedingfield were to be believed, he was not the source of Rudd’s unavailability; she committed suicide. This distinction is important and *Bedingfield’s* facts illustrate that it might have been fair in *Giles* to hear the prior statement of Avie whom Giles admittedly shot to death, and rendered forever silent.

A final commonality between *Bedingfield* and *Giles* is the accused strategy of blaming the victim. Giles’ 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*, the accused was unable to take the stand in his own defense allowing the unconfronted and uncontradicted voice from the grave seemed unfair. In *Giles* the accused had the opportunity to testify; only the victim is rendered silent and unable to via her former statements to refute his version of events.

Furthermore, *Giles*’ analysis of forfeiture and use of victim’s statements seems anachronistic and acontextual. Scalia does not acknowledge that many of

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277 *Giles*. 128 S. Ct. at 2686, 2694.
278 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.
the historical cases that *Giles* cites, the accuseds were not permitted to testify at all, so 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 but in evidence procedure. Even Lord 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.

The Court’s current relationship between confrontation jurisprudence and domestic violence is fraught not only with insensitivity to the domestic violence context, 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”; it gives batterers “a great benefit” for killing their victims instead of just injuring them (which would allow them to testify later). Similarly, Lininger cites the paradox of *Giles* that “the more the criminal justice system insists upon live testimony by the

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279 See Raeder *supra* note 210 at 312 (2005)(“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.”).

280 See *supra* note 107.

281 *Giles* at 2699 (Justice Breyer, C.J. dissenting).

282 *Id.*
accuser, the less likely it is that she will actually appear in court.”

The accused, who is already 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. Justice 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. 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’ threats and violence to police and clearly expected her report to be used against him. By contrast, it seems that McCottry and Hammon may not have wished their statements to be used; they just needed police assistance. At least some victims’ advocates would support

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283 Lininger, supra note 256 at 871.
284 Id.
honoring that wish. The Constitution, as divined by Crawford treats each statement in a manner exactly the opposite of the declarant’s desires. The Court has made clear that off-hand comments to friends do not run afoul of the Confrontation Clause and all such nontestimonial statement are outside the purview of constitutional protection. By contrast, the unconfronted 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 extremis. Ironically, victims’ statements to police – formal testimonial statements that are most likely to represent the wishes and intent of the victim and are most likely to be reliable – are the least likely to be admitted, under the new Crawford jurisprudence.

IV. **REVISITING THE CRUCIAL QUESTION OF RELIABILITY: THE UNFAIRNESS TO THE ACCUSED OF THE LIMITED NATURE OF CRAWFORD’S “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.\textsuperscript{285}

Post-Crawford a lively debate ensued among evidence scholars whether any constitutional protection remained for nontestimonial statements.\textsuperscript{286} 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.”\textsuperscript{287} 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 unconfronted out-of-court statements no longer present any constitutional question whatsoever, and are relegated to the vagaries of hearsay law.\textsuperscript{288}

In fact, in Giles, Scalia attempted to mollify us that the new approach

\textsuperscript{285} Crawford, 541 U.S. at 51.
\textsuperscript{286} See Robert P. Mosteller, Confrontation as Constitutional Criminal Procedure: Crawford’s Birth Did Not Require that Roberts Had to Die, 15 J.L. & POL. 685 (2007).
\textsuperscript{287} Davis, 547 U.S. at 821.
\textsuperscript{288} Lininger, supra note 104 at 327 (“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 135-136, 213 and accompanying text. Roberts focus on reliability took an unfortunate turn whereby all “firmly rooted hearsay exceptions” were presumed to bear “indicia of trustworthiness.” Crawford rightfully decoupled confrontation from hearsay, but Crawford’s total inattention to reliability is problematic.
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.”\(^{289}\) 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.

This is hardly comforting for civil libertarians who are concerned for the rights of the accused.\(^ {290}\) 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.\(^ {291}\) As Professor Robert Mosteller has recently observed, the Court has “left many unreliable, incriminating, and accusatory hearsay statements offered against a criminal

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\(^{289}\) *Giles* 128 S. Ct. at 2692-93. *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.’”). *See Raeder,* *supra* note 210 at 324 (noting the “automatic pass” for all nontestimonial hearsay).

\(^{290}\) 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 104 at 280. Feminists, who are aware the injustices caused by stereotype and stigma must be concerned with the rights of the accused. *See Raeder,* *supra* note 210 at 313-314 (“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.”).

\(^{291}\) Lininger, *supra* note 104 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.”).
defendant admissible and unregulated, despite the complete absence of confrontation.”

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 unconfronted, unreliable statements. Current hearsay exceptions do not screen for trustworthiness or reliability and the excited utterance exception is considered notoriously unreliable. The current regime, hyper-focused on the dangers of testimonial statements, has proven totally uninterested in affording confrontation in other circumstances. Given my conclusion 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. The Court’s overvaluing of process, the preoccupation with history, and the abandonment of any concern with reliability display how out of touch the current jurisprudence is with both the

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292 Robert P. Mosteller *Giles v California: Avoiding Serious Damage to Crawford’s Limited Revolution*, 13 LEWIS & CLARK L. REV. 675, 676. See also Davies *supra* note 137 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 210 at 320 (“Crawford opens the possibility of large amounts of hearsay receiving no constitutional second-look at all.”).


294 See generally, Orenstein, *supra* note 95.

295 See Raeder, *supra* note 210 at 321 (“it is imperative to retain a reliability review given a testimonial approach”).
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 from silencing the intimate partners whom they have rendered unavailable? How can we develop a rational, predictable, and principled system that admits some unconfronted 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. These victims remain voiceless, and their concerns are not heeded. 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 lessons, abstract constitutional exegesis, and debate over doctrine. Nowhere in Scalia’s doctrinal complexity is there room to consider the wishes of the victim whose cry for protection in time of crisis may 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.

Unconfronted 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 request 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. In doing so, it perhaps can do what Crawford studious avoids – think about reliability, fairness, and hearing the voices of victims.

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296 See Lininger, supra note 104 at 308id.