

***Crawford v. Washington* and *Davis v. Washington*'s Originalism:
Historical Arguments Showing
Child Abuse Victims' Statements to
Physicians are Nontestimonial and
Admissible as an Exception to the
Confrontation Clause**

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Under *Crawford v. Washington* and *Davis v. Washington*, the Supreme Court has created a new interpretation of the right of confrontation that holds out-of-court testimonial statements inadmissible without cross-

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In order to make quotations from eighteenth century sources more easily readable, corrections have been made to archaic spellings; otherwise, all materials in quotes are as stated in the original.

examination. In order to determine if statements for purposes of medical diagnosis and treatment should continue to be an exception to confrontation, this Article reviews the historical evidence cited by the Court. The Court's originalist analysis holds that the only exception for what the Court refers to as "testimonial statements" is the exception for dying declarations. This Article establishes that a significant number of confrontation exceptions existed for testimonial statements in 1791, which indicates that *Crawford's* central holding—that the Founders intended the Confrontation Clause to be an absolute bar to the admission of out-of-court testimonial statements—is inaccurate. The historical evidence also indicates that statements for purposes of medical treatment and diagnosis were a confrontation exception in 1791 and should continue to be an exception today. This Article also asserts that the definition of testimonial statements should be limited to formal statements taken by law enforcement officers or their agents and outlines how agency law should be used as part of the Court's new interpretation of confrontation.

I. INTRODUCTION

Imagine you are the parent of a three-year-old girl who has been sexually assaulted and you have taken her to a physician for medical care. You want justice for your daughter, but the court rules that she is not competent to understand the oath; thus the court will not allow her to testify at trial.¹ Or, imagine that the court has found your daughter competent to testify, but a psychologist has told you that your daughter will suffer serious and perhaps long-lasting psychological trauma if she is forced to face her rapist in the courtroom. You tell the prosecutor that you and your daughter still want the case prosecuted in order to protect other children from being sexually assaulted. Can the prosecutor proceed to trial by having the doctor testify about what your daughter told the physician? Given the Supreme Court's interpretation of the right of confrontation, can the prosecutor proceed to trial even if your daughter is unavailable to testify and be cross-examined?

Since the United States Supreme Court decision in *Crawford v. Washington*,² prosecutors have been scrambling to introduce out-of-court statements of witnesses without violating *Crawford's* new interpretation

1. See, e.g., FED. R. EVID. 601 and 603; 18 U.S.C. § 3509(c) (2000) (explaining child competency examinations).

2. 541 U.S. 36 (2004).

of confrontation.³ *Crawford* holds that when an out-of-court statement of an unavailable witness is testimonial, the Sixth Amendment requires that the accused be given a prior opportunity to cross-examine the witness.⁴ Among the confrontation exceptions widely used before the *Crawford* decision—which the Court had found to be “firmly rooted” and, thus, did not violate confrontation—were statements for purposes of medical diagnosis and statements to a treating physician.⁵ The continued use of the medical exception to confrontation is particularly important in child abuse cases because some young children will be unavailable, either because they are found to be incompetent⁶ or because they find it very difficult, and sometimes traumatizing, to testify in court.⁷

II. CRAWFORD V. WASHINGTON’S ORIGINALISM

A. Justice Scalia Declares That *Crawford* is Based on the Original Intent of the Founders

Justice Scalia bases *Crawford*’s holding on what he states is the original intent of the Founders in establishing the Confrontation Clause.⁸ The Court in *Crawford* concludes that the Founders would not have allowed testimonial statements to be admissible in court because the admission of testimonial statements would have violated a defendant’s right of confrontation and cross-examination.⁹ Based on

3. See *id.* at 51-53, 69.

4. *Id.* at 53-54.

5. See *White v. Illinois*, 502 U.S. 346, 356, 356 n.8 (1992). Hereinafter only the words “medical exception” will be used in lieu of the longer title: “statements for purposes of medical diagnosis and statements to a treating physician.” Arguably, one can do an analysis for statements for medical diagnosis or statements to a treating physician and treat them as two separate exceptions. See generally Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257 (1989).

6. See American Prosecutors Research Institute (APRI), INVESTIGATION AND PROSECUTION OF CHILD ABUSE 327-28 (3d ed. 2004).

7. See 1 JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES §§ 3.01, 3.05[C] (2005).

8. See *Crawford*, 541 U.S. at 54 (stating that the right of confrontation in the Sixth Amendment admits “only those exceptions established at the time of the founding.”). “We must therefore turn to the historical background of the Clause to understand its meaning.” *Id.* at 43. “The founding generation’s immediate source of the [confrontation] concept, however, was the common law.” *Id.*

9. *Id.* at 53-54 (“[T]he Framers would not have allowed admission of testimonial statements . . .”). “It is questionable whether testimonial statements would ever have

Crawford's originalist reasoning, if certain testimonial statements were exceptions to confrontation at the time of the Founders, these testimonial statements should be admissible today.¹⁰ Although the Court declined to give a comprehensive definition to the term "testimonial," the Court did state that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."¹¹ The Court also indicated that plea allocutions are testimonial.¹² The Court's use of the term "testimonial" appears to be directed at statements taken by law enforcement when the circumstances objectively indicate to a reasonable person that the statements could be used in a later criminal prosecution.¹³

In *Crawford* Justice Scalia stated that the only testimonial statement admissible in 1791 when the witness was unavailable was a dying declaration.¹⁴ He stated that if the existence of dying declarations as a testimonial statement must be accepted on historical grounds, it is only because the dying declarations exception is one of a kind.¹⁵ Given *Crawford's* originalist methodology, in order to determine whether statements under the medical exception should continue to be an exception to confrontation or whether the statements are testimonial and thus inadmissible without confrontation, it is necessary to examine the historical record and determine if *Crawford's* historical interpretation is correct.¹⁶

B. Other Confrontation Exceptions Allowed for Admissibility of Statements Taken by Justices of the Peace and at Coroner's Inquests When Necessity Could Be Shown

As support for his position in *Crawford* that testimonial statements were not admissible when the witness was unavailable at trial and there had been no prior opportunity for cross-examination, Justice Scalia addressed the issue of whether the Marian statutes (so called because

been admissible on that ground in 1791" *Id.* at 58 n.8. "Where 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 . . ." *Id.* at 61.

10. *See id.* at 56 n.6 (observing that dying declarations existed in 1791).

11. *Id.* at 68.

12. *Id.* at 65.

13. *Id.* at 51-53.

14. *Id.* at 56 n.6.

15. *Id.* ("If this exception must be accepted on historical grounds, it is *sui generis*.").

16. *See The Supreme Court, 2003 Term: Leading Cases*, 118 HARV. L. REV. 316, 323-24 (2004) (indicating that because *Crawford* is an originalist interpretation it requires "a renewed analysis of the historical evidence" rather than a parsing of "the dicta within the court's opinion").

they were passed during the reign of Queen Mary) had created an exception for the admissibility of pretrial depositions at trial.¹⁷ The Marian statutes were originally used to admit sworn depositions taken before justices of the peace and statements made at a coroner's inquest if necessity could be shown. Necessity existed in instances of death or witness unavailability.¹⁸ The Marian statutes only allowed admissibility without confrontation when the requirements of the statutes were met. When necessity could be shown, these depositions were used at trial, even though no confrontation and cross-examination occurred.¹⁹ In *Crawford* Justice Scalia stated that depositions were not admissible without an opportunity for cross-examination, even if the requirements of the Marian statutes were met.²⁰ Justice Scalia's *Crawford* opinion

17. *Id.* at 43-47. A good description and explanation of the Marian statutes is given in JOHN LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 1-125 (1974) [hereinafter LANGBEIN, PROSECUTING CRIME].

18. See 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 605 (Thomas Leach ed., 6th ed. 1788).

19. See, e.g., 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 52, 284-285 (1736); GEOFFREY GILBERT, THE LAW OF EVIDENCE 99-100 (1st ed. 1754).

20. *Crawford*, 541 U.S. at 46-47, 47 n.2. Justice Scalia cites an 1808 treatise for the proposition that whether a confrontation exception existed for statements taken at a coroner's inquest was a point that had not been "expressly decided in any reported case." *Id.* at 47 n.2 (quoting THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 64, n.(m) (3d ed. 1808)). Justice Scalia then cites American cases written over half a century after the ratification of the Confrontation Clause, and Cooley's treatise, which was written over three quarters of a century after 1791, for the proposition that "[w]hatever the English rule, several early American authorities flatly rejected any special status for coroner statements." *Id.* (citing *State v. Houser*, 26 Mo. 431, 436 (1858); *State v. Campbell*, 30 S.C.L. (1 Rich.) 124 (1844); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 318 (1st ed. 1868)). Actually, the English and early American authorities show Scalia's historical analysis is mistaken and support the admissibility of coroner statements as a confrontation exception well after the ratification of the Confrontation Clause.

Justice Scalia cites the third edition of Peake, *supra*, at 65 n.(m), for the proposition that early American law was undecided on the admissibility of coroner statements. See *Crawford*, 541 U.S. at 47 n.2. But Justice Scalia fails to note what the rest of the footnote in Peake's treatise stated: "[N]evertheless the practice has been to admit them after the death of the witness, without inquiring whether the party was present or not; and notwithstanding the objection of counsel, they were received by Mr. B. Hotham, in the King and Puresoy [*King and Puresoy*] Maidstone Sum. Aff. 1794." PEAKE, *supra*, at 65 n.(m). Justice Scalia also fails to refer to the text that cites footnote (m). After referring to the Marian statutes, Peake goes on to state in the main text: "In like manner depositions taken before a coroner, have, in cases of death, or absence beyond sea, of the witness, and where there is reason to believe the prisoner has sent them away, been used on a trial for murder." *Id.* at 47.

An earlier edition of Peake's treatise, an American edition published in 1802, does not contain the statement about the point not having been "expressly decided in any reported

holds that by the time of the ratification of the Sixth Amendment, the opportunity for cross-examination was required in all cases, even if the Marian statutes stated several exceptions.²¹ English case law from that period flatly contradicts Justice Scalia's assertion.

In *King v. Flemming & Windham*,²² the Twelve Judges upheld the criminal conviction of individuals who raped a girl under the age of twelve, even though no confrontation and no cross-examination had occurred at trial.²³ No confrontation or cross-examination took place because, at the time of trial, the girl was dead.²⁴ Justice Scalia's *Crawford* analysis would indicate that the girl's deposition was a testimonial statement and should not have been admissible without an opportunity for either cross-examination at the time the deposition was taken or cross-examination at trial. Although the accused were present at the time the girl's deposition was taken before the justice of the peace, the record does not show that the accused were given an opportunity for cross-examination.²⁵ Nor does the deposition indicate that the girl was

case." THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 41 n.(m) (1802). The 1802 American edition also contains the same quote from the third edition that states that depositions before the coroner may be used in certain cases when the witness is unavailable. *See id.* at 41. Even though the 1802 edition's text is contrary to the position for which Justice Scalia is arguing, one would think as an originalist he would have wanted to cite the earlier edition, which was published on a date closer to the ratification of the Confrontation Clause. It appears Justice Scalia does not do so because the earlier edition contradicts his opinion that the matter was undecided in 1791. If one is doing an originalist analysis, Cooley's treatise can hardly be reasonably considered an "early American authority." *See* COOLEY, *supra*; *see also* Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 180 n.234 (2005) ("No one could seriously propose that sources from the latter half of the nineteenth century constitute evidence of the original meaning of a provision of the Bill of Rights.").

21. *Crawford*, 541 U.S. at 46-47. John H. Langbein, one of the foremost scholars of early Anglo-American criminal procedure, states that the ultimate rationale of the hearsay rule, promoting cross-examination, was "not settled until well into the early nineteenth century." JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 233 (2003) [hereinafter LANGBEIN, *ORIGINS*]. Langbein acknowledges there is an overlap between hearsay and American confrontation doctrine, but he is "puzzled at the failure of the English common law to identify and develop the confrontation policy as a matter of doctrine." *Id.* at 233-34 n.241. Professor Randolph N. Jonakait rejects Justice Scalia's view that the Sixth Amendment constitutionalized English common law procedures and argues the origins of the Confrontation Clause are largely American. *See* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995).

22. 2 Leach 854, 168 Eng. Rep. 526 (Cr. App. 1799).

23. *Id.* at 854-56, 168 Eng. Rep. at 526-27.

24. *Id.* at 854, 168 Eng. Rep. at 526.

25. *See id.* at 854-56, 168 Eng. Rep. at 526-27.

cross-examined by the accused.²⁶ At trial, the assize judge²⁷ ruled that the Marian statutes did not require the sworn deposition to be signed because the deposition was under oath, and it was admissible even though the girl was unavailable to testify.²⁸ On appeal, the Twelve Judges upheld the assize judge's trial ruling that the Marian statutes allowed the admissibility of the girl's sworn deposition.²⁹ Defense counsel did not even argue that a confrontation right had been violated because the girl had not been cross-examined.³⁰ Instead, counsel argued that the girl's deposition was not evidence and that even if the girl's deposition was evidence, the deposition was still inadmissible because the girl had not signed it.³¹

Flemming and Windham's Case demonstrates that at least until 1799, English courts considered the Marian statutes to create exceptions to confrontation and cross-examination. The case is also important because it shows that in cases of sexual assault on a child who was unavailable to testify at trial, confrontation and cross-examination were not always required. But the case also shows that Justice Scalia is mistaken in his overall historical analysis of the right of confrontation. In *Crawford* Justice Scalia states that *King v. Paine*,³² a 1696 case, settled the issue of whether there was a requirement for the right of confrontation and cross-examination under the common law.³³ Justice Scalia also stated

26. *See id.* at 854-55, 168 Eng. Rep. at 526.

27. Assize judges originally consisted of twelve individuals who gave a verdict based on their own investigation. Later, the use of the title "assize" was given to the court, time, or place where judges tried cases with the assistance of a jury from a particular county. *See* BLACK'S LAW DICTIONARY 110 (5th ed. 1979).

28. *Flemming and Windham*, 2 Leach at 855, 168 Eng. Rep. at 526-27.

29. *Id.* at 856, 168 Eng. Rep. at 527.

30. *See id.* at 854-56, 168 Eng. Rep. at 526-27.

31. *Id.* at 855, 168 Eng. Rep. at 526. Interestingly, a surgeon also gave testimony in the case. The case states, "The surgeon who examined both the girl and the prisoners, deposed that the two prisoners were diseased with a 'lues,' a venereal disease, as was the girl. *Id.* at 854, 168 Eng. Rep. at 526. "[F]rom [the evidence of a witness named Bynton], and the evidence of the surgeon who examined the girl, and also of her father and mother, it appeared that both the prisoners had been connected with the girl against her will, and that they had penetrated her body . . ." *Id.* Defense counsel only objected to having the deposition of the girl introduced as evidence. *Id.* at 855, 168 Eng. Rep. at 526. It appears that defense counsel did not object to the surgeon's repeating any out-of-court statements made by the girl to the surgeon so that the physician could form an opinion or diagnosis shortly after the rape occurred. *See id.* at 854-56, 168 Eng. Rep. at 526-27. *Flemming and Windham's Case* is an example of an early authority showing that in child sexual assault cases, physicians were able to give opinions based on information obtained from their patients.

32. 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1696).

33. *See Crawford*, 541 U.S. at 45-46.

that “by 1791 even the statutory-derogation view had been rejected with respect to justice-of-the-peace examinations.”³⁴ In support of this proposition, Justice Scalia cites *King v. Woodcock*³⁵ and *King v. Dingler*.³⁶ Because *Flemming and Windham’s Case* was decided in 1799, *Paine*, *Woodcock*, and *Dingler* cannot stand as the controlling authorities Justice Scalia believes them to be.³⁷ *Flemming and Windham’s Case* is not the only legal precedent that shows Justice Scalia is mistaken.³⁸

34. *Id.* at 54 n.5.

35. 1 Leach 500, 168 Eng. Rep. 352 (Old Bailey 1789).

36. 2 Leach 561, 168 Eng. Rep. 383 (Old Bailey 1791); *see also Crawford*, 541 U.S. at 54 n.5.

37. *See Davies*, *supra* note 20, at 120-89 (indicating that after a careful and thorough review of *Paine* and other cases cited in *Crawford*, Justice Scalia misinterpreted the applicability of these cases to the Marian statute’s confrontation exceptions). Justice Scalia states that *Woodcock* and *Dingler* show that by 1791, “courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases.” *Crawford*, 541 U.S. at 46. Actually, both cases merely hold that in order for depositions to be admissible when the witness is unavailable at trial, the justice of the peace had to take the depositions in the manner those courts interpreted as being required by the Marian statutes. *See Woodcock*, 1 Leach at 502, 168 Eng. Rep. at 353; *Dingler*, 2 Leach at 562, 168 Eng. Rep. at 384. Admittedly, the decisions held the depositions should be taken by the justice of the peace in the defendant’s presence, but neither case held that the defendant had to be given the right of cross-examination at the time of the deposition in order for the statement to be used at trial when the witness was unavailable to testify.

Woodcock, 1 Leach at 502, 168 Eng. Rep. at 353, does not refer to cross-examination but states that a deposition should not be admissible if the accused was not present and he “had no opportunity of contradicting the facts” in the deposition. Of course, an accused could contradict the accuser’s statement simply by addressing the justice of the peace after the accuser spoke. *Woodcock* upheld the convictions because the deposition was admissible as a dying declaration. *See Woodcock*, 1 Leach at 503-04, 168 Eng. Rep. at 503-04. Although *Dingler* does refer to cross-examination, *Dingler*, 2 Leach at 562, 168 Eng. Rep. at 384, the judges in *Flemming and Windham’s Case* must have considered that language to be dicta. If the judges in *Flemming and Windham’s Case* had interpreted *Dingler’s* holding to be that an opportunity for cross-examination was required they should have reversed the convictions.

38. The Marian statutory confrontation exceptions only applied to felony cases. As the leading scholar of the Marian statutes notes, the “scheme itself concerns exclusively felony and manslaughter.” *See LANGBEIN, PROSECUTING CRIME, supra* note 17, at 75. *Paine* only applied to misdemeanor cases and was widely interpreted in both England and America as only applying to these cases. *See, e.g., GILBERT, supra* note 19, at 100; *HAWKINS, supra* note 18, at 606. William Hawkins’s treatise summarizes the case law on the use of sworn depositions and addresses the Marian statutes. Hawkins states,

[I]t is said to have been adjudged in the seventh year of Will. 3. by the court of king’s bench upon advice with the justices of the common pleas, upon an indictment for a libel, that depositions taken before a justice of peace relating to the fact could not be given in evidence, though the deponent were dead; and that the reason why such depositions may be given in evidence in felony, depends upon

Justice Scalia states in *Crawford* that according to English authorities, by 1791 a number of the confrontation exceptions that existed under the Marian statutes were considered in “derogation of the common law.”³⁹ By “derogation” one assumes Justice Scalia means “[t]he partial repeal or abolishment of a law, as by a subsequent act which limits its scope or impairs its utility and force.”⁴⁰ However, even if the Marian statutes were in derogation of the common law, English courts could not use the common law to repeal, abolish, or control them. As Justice Scalia has

the statutes of Philip and Mary [the Marian statutes]; and that this cannot be extended farther than the particular case of felony.

HAWKINS, *supra* note 18, at 606.

For decades after the ratification of the Confrontation Clause, additional treatises widely used in America continued to state that depositions taken pursuant to the Marian statutes were admissible in felony but not misdemeanor cases. *See, e.g.*, 2 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 585 (Garland Publ'g 1978) (1816) (“It seems that the statutes [i.e. the Marian statutes] which authorize the justices to take them extend only to cases of manslaughter and felony; and therefore they are not admissible in case of a mere misdemeanor, or for publishing a libel, or in any civil action, information, or appeal.”); S.M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 277-78 (1st American ed. 1816) (indicating that depositions “may be given in evidence . . . for the same felony” yet “cannot be given in evidence on indictment for misdemeanor”). In the first evidence treatise written by an American, Thomas Starkie summarizes the case law on the use of depositions at trial: “Such depositions [the depositions taken under the Marian statutes] are not admissible, except in case of felony; and therefore, upon an information for a libel, a deposition taken by a magistrate in the defendant’s absence cannot be read.” 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 491-92 (2d ed. 1828). Phillipps cites *Paine* as his authority for the proposition that depositions are not admissible in misdemeanor cases, PHILLIPPS, *supra*, at 277, and Starkie’s quotation also cites *Paine* as its authority, *see* STARKIE, *supra*, at 492 n.(u); *see also* Davies, *supra* note 20, at 174-75, 175 n.225. Starkie’s and Phillipps’s citations to *Paine* indicate Justice Scalia has misread *Paine*: the Founders would not have considered *Paine* to be applicable to the Marian statutorily-created confrontation exceptions.

39. *Crawford*, 541 U.S. at 46.

40. BLACK’S LAW DICTIONARY, *supra* note 27, at 399. If derogation means a repeal or abolishment of a law by a subsequent act, the Marian statutes were not in derogation of the common law. The Marian statutes were not passed after the development of the English common law doctrine of confrontation but instead were passed in the 1550s, well before the *Paine* decision that Justice Scalia claims “settled” the law of cross-examination in 1696. *See* LANGBEIN, PROSECUTING CRIME, *supra* note 17, at 26 (noting that “[t]he law of evidence neither prohibited nor even seriously circumscribed the use of deposition evidence. Depositions elicited through Council investigations were freely admissible—for example, confessions of accomplices and imputations of accusing witnesses who did not appear at trial.”). Even under Justice Scalia’s interpretation, English common law development of the right of cross-examination was subsequent to the Marian statutes. When passed by Parliament, the Marian statutes did not repeal, abolish, impair, or limit the common law right of cross-examination because the right was not in existence in 1554 or 1555. As the common law right of confrontation and cross-examination developed, the Marian statutes were “grandfathered in” as confrontation exceptions.

acknowledged elsewhere, English courts did not have the ability to use judicial review to repeal, abolish, or control the application of statutes passed by Parliament.⁴¹ *Flemming and Windham's Case*, a 1799

41.

Professor Wood accepts as orthodoxy Lord Chief Justice Coke's statement in *Dr. Bonham's case* (1610) that "in many cases, the common law will controul Acts of Parliament and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void." It was not orthodoxy at all, but an extravagant assertion of judicial power, scantily supported by the authorities cited, vehemently criticized by contemporaries, and seemingly abandoned by Coke himself in his *Institutes*.

ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129-30 (1997) (footnotes omitted) (quoting *Dr. Bonham's Case*, 8 Co. Rep. 114a, 118a, 7 Eng. Rep. 646, 652 (K.B. 1610)). "To the contrary, it was accepted (Lord Chief Justice Coke in *Dr. Bonham's case* notwithstanding) that courts were in principle bound by statutory enactments." *Id.* at 131. Justice Scalia further noted:

As Professor J.H. Baker describes it, "[l]ittle more was heard in England of judicial review of statutes, and Coke's doctrine of 1610 was whittled down into a presumption to be applied only where a statute was ambiguous or in need of qualification by necessary implication." . . . [C]onstruing statutory ambiguities to be harmonious with the common law is quite different from ignoring plain texts that contradict the 'right and reason' of the common law.

Id. at 130 (quoting J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 242, 242 (3d ed. 1990)).

Decades after ratification of the Confrontation Clause, English Courts did begin to construe the Marian statutes strictly and hold that the accused should have an opportunity not only to be present but an opportunity for cross-examination if the deposition was to be admissible at trial. *See, e.g., Rex v. Smith*, [1817] Holt 614, 615, 171 Eng. Rep. 357, 360 (Nisi Prius 1817) (noting "[the Marian statute] did not mention the prisoner's presence at all. Undoubtedly, however, the decisions established the point, that the prisoner ought to be present, that he might cross-examine."). *Smith*, however, is ambiguous because the accused waived any cross-examination, and his waiver was the basis for the holding. *Id.* at 357. The common law courts began to reason that the opportunity for cross-examination was a requirement for admissibility of the deposition not because the Marian statutes were in derogation of the common law, but because the Marian statutes did not mention the right of cross-examination.

Interestingly, although the court in *Smith* cites *King v. Radbourne*, 1 Leach 457, 168 Eng. Rep. 330 (Old Bailey 1787), as the basis for its holding that the opportunity for cross-examination is a requirement for later admissibility of the deposition at trial, that was not the holding in *Radbourne*. The *Radbourne* Court held that depositions of the accuser taken by the justice could be introduced if, at the time of trial, the accuser was dead. 1 Leach at 462, 168 Eng. Rep. at 333. In *Radbourne* "the deposition was taken in the hearing of the prisoner, and of course the question [whether an opportunity for cross-examination was required] did not arise." STARKIE, *supra* note 38, at 488 n.(c). In fact, the court in *Radbourne* held that if the deposition was taken in the accused's presence, then it was admissible at trial; furthermore, the issue of cross-examination was not even raised by defense counsel. *See Radbourne*, 1 Leach at 460-63, 168 Eng. Rep. at 332-33. It appears the common law courts began requiring that the suspect be present at the deposition, and

decision, shows that Justice Scalia is mistaken when he states that “by 1791 even the statutory-derogation view had been rejected with reference to justice-of-the-peace examinations.”⁴²

Flemming and Windham’s Case also demonstrates that Chief Justice Rehnquist’s concurring opinion in *Crawford* is more historically accurate. Chief Justice Rehnquist stated that the concern of the Founders in preventing the admissibility of out-of-court statements was not so much based on an English common law right of confrontation but on the fact that such statements were not made under oath.⁴³ At that time, the oath was given much more importance than perhaps some would ascribe

then only later, well after 1791, did the courts begin to require that the suspect be given an opportunity for cross-examination at the time of the deposition. In 1848 Parliament amended the Marian statutes to explicitly state that the accused must have the opportunity for cross-examination of the accuser at the deposition if the deposition was to be admissible when the accuser was unavailable at trial. See *Crawford*, 541 U.S. at 47.

42. *Crawford*, 461 U.S. at 54 n.5. Justice Scalia cites an 1854 case which states an opportunity for cross-examination at the time of a deposition was required based on an “equitable construction of the law” as part of his argument the Marian statutes were in derogation of common law. See *Crawford*, 461 U.S. at 47 (citing *The Queen v. Beeston*, 29 L. & Eq. R. 527, 529 (Ct. Crim. App. 1854)) (Jervis, C.J.) (also reported at 405 Dears, 179 Eng. Rep. 782, 785 (Ct. Crim. App. 1854)). *Beeston*, however, was decided over sixty years after the ratification of the Confrontation Clause and does not support an originalist argument this “equitable construction” occurred by 1791. When *Beeston* refers to an “equitable construction of the law” having occurred, it refers to an equitable construction of the law having occurred by the time Parliament acted in 1848 to make cross-examination a requirement of the Marian procedures by statute. See *Beeston*, Dears at 407, 179 Eng. Rep. at 785. *Beeston* was rebutting the argument that cross-examination was only required in 1854 because of statutes passed by Parliament in 1848. See *id.* An equitable construction of the common law requirement for cross-examination did not become established until after ratification of the Confrontation Clause.

Analysis by scholars who have reviewed the requirement of cross-examination and the Marian statutes also supports the conclusion that an opportunity for cross-examination only became a common law requirement for admissibility of depositions after 1791. See DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL 1800-1865*, 120 (1998) (“At the time of the Prisoners’ Counsel Act [1836] it was established at common law, although only recently, that the prisoner had a right to be present when the depositions were taken, and to question the witnesses”); David Freestone & J.C. Richardson, *The Making of English Criminal Law: (7) Sir John Jervis and His Acts*, 1980 CRIM. L. REV. 5, 11 n.30-31 (indicating that depositions had been admitted in a 1824 murder case although neither accused, who were charged jointly, had been allowed to be present at the taking of the pretrial depositions of the other, but citing other nineteenth century cases that held cross-examination was necessary for deposition admissibility); W. Wesley Pue, *The Criminal Twilight Zone: Pretrial Procedures in the 1840s*, 21 ALBERTA L. REV. 335, 336, 361 n.180 (1983) (citing cases from the 1800s indicating cross-examination became a requirement for deposition admissibility in the nineteenth century and the 1848 statute “simply made ‘law’ of existing court ‘practices’” at that time).

43. *Crawford*, 541 U.S. at 69-72 (Rehnquist, C.J., concurring).

to it today.⁴⁴ English and early American authorities also indicate Chief Justice Rehnquist's historical analysis about the admissibility of depositions taken by justices of the peace and coroner statements is more accurate than the majority opinion.⁴⁵

44. See James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 LAW & HIST. REV. 95, 102-07 (1994). Oldham refers to one of the leading evidence treatises of the time, which stated that statements not under oath were not evidence and that since hearsay statements were not made under oath, they should not be considered evidence. *Id.* at 102-03; see GEOFFREY GILBERT, THE LAW OF EVIDENCE 152 (3rd ed. 1769). The issue was not one of confrontation but one of admissibility under the common law of evidence.

At one time, the oath was not only considered to ensure reliability of evidence, but was itself the evidence. In the Middle Ages, defendants proved their innocence by gathering together people who would swear under oath that they believed the defendant had not committed the crime. See SADAKAT KADRI, THE TRIAL 19-20 (2005). These gatherings, known as compurgation, often would involve the participants swearing upon saint's relics. Defendants who swore under oath they had not committed the offense were absolved of guilt because it was believed God was observing the event, and no one would lie knowing the result of lying would be to spend eternity in hell. *Id.*

45. See *infra* notes 55-75 and accompanying text; HAWKINS, *supra* note 18, at 605. Starkie addressed the issue of the use of statements taken before justices of the peace and at coroner inquests in his American treatise. See STARKIE, *supra* note 38, at 484-92. Starkie, writing as late as 1828, interprets several cases as requiring that a deposition taken before a justice of the peace be taken in the accused's presence for it to be admissible at trial if the witness was unavailable. *Id.* However, it is not altogether clear that in 1791 the Founders would have considered that the physical presence of the defendant was required in all cases involving statements to justices of the peace if the depositions were to be admissible when the witness was unavailable at trial. Professor Davies has carefully reviewed all published statements regarding Marian depositions that were available in 1787, the year of the framing of the Confrontation Clause, and none of these make any reference to the requirement that the arrestee be present when the witness's deposition is taken by a justice of the peace. See Davies, *supra* note 20, at 170-71. "The silence in the treatises as to the presence of the arrestee is significant because it strongly suggests that the arrestee played no role in Marian deposition practice." *Id.* at 171. Even if physical presence was a requirement, Starkie does not state that the cases held that the opportunity of cross-examination, in addition to the defendant's physical presence at the deposition, was also a requirement for admissibility of justice of the peace statements. See STARKIE, *supra* note 38, at 485-92.

Thomas Peake's first edition of his evidence treatise has no mention of cross-examination at the time of the appearance before the justice of the peace as being a requirement for later admissibility if the witness is unavailable at trial. See THOMAS PEAKE, A COMPENDIUM ON THE LAW OF EVIDENCE 38-41 (Garland Publ'g 1979) (1st ed. 1801). Other widely relied-on evidence treatises also show that an opportunity for cross-examination at the time a deposition was taken was not a requirement for later admissibility. See GILBERT, *supra* note 19, at 100; HAWKINS, *supra* note 18, at 605-06.

If the opportunity for cross-examination when the justice of the peace took the deposition was a requirement for admissibility of an unavailable witness's deposition at trial, one would think that these evidence treatises would have stated such. Starkie's review of the case law as late as 1828, along with these treatises, provides compelling evidence that in 1791 the opportunity for cross-examination at the time the justice of the peace or coroner

Legal sources indicate that during the 1600s, the physical presence of the witness in front of the defendant, even at a trial, was only required at the time the witness took the oath.⁴⁶ At Sir Walter Raleigh's trial, legal procedure did not give defendants the right of cross-examination; Raleigh did not even ask to be allowed to cross-examine his accuser, Cobham.⁴⁷ Raleigh only requested that Cobham be produced before him in court.⁴⁸ It is unlikely that the opportunity for cross-examination was the reason a deposition by the justice of the peace was supposed to be taken in the defendant's presence:

[C]oncern about the want of cross-examination remained a muted theme in criminal practice throughout the eighteenth century. The first judicial mention of that rationale for excluding what we would call hearsay that has come to my attention in the *Session Papers* turns up in 1789, in the decade when the use of defense counsel was becoming frequent.⁴⁹

It is unlikely that concern about cross-examination at the time the deposition was taken existed in England during the 1700s because defense attorneys were rarely present, even at felony trials.⁵⁰ If defense attorneys were rare at felony trials, they also probably were not present at the taking of the depositions pursuant to Marian procedures.

took the statement was not a requirement for admissibility at trial when the witness was unavailable.

If the opportunity for cross-examination by the defense existed as a right at Marian hearings in 1791, then the accused should have had a right to counsel at the Marian hearings in order for counsel to conduct cross-examination of any witnesses. Presence of defense counsel, however, was not considered a right but left totally to the discretion of the justices of the peace well into the early nineteenth century. See *Rex v. Borron*, 3 B. & A. 432, 438, 106 Eng. Rep. 721, 723 (K.B. 1820) ("An attorney has no right even to be present at such an inquiry [a Marian hearing]"); *Cox v. Coleridge*, 1 B. & C. 37, 43, 107 Eng. Rep. 15, 17 (K.B. 1822) ("Nor can the presence of an attorney be requisite, in order to examine witnesses for the prisoner; for it does not appear that the prisoner has any right to examine witnesses in this stage of the case. If the magistrate proceeds under the Statute of Ph. & M., he must examine the witnesses on oath"); see also *Pue*, *supra* note 42, at 339, 353, 362 ("It would seem that magistrates frequently (if not usually) exercised their discretion against an accused's right to legal assistance").

46. See Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 529, 539-40 (1994).

47. *Id.* at 545.

48. *Id.*; see also Daniel Shaviro, *The Confrontation Clause Today in Light of Its Common Law Background*, 26 VAL. U. L. REV. 337, 342 (1991).

49. LANGBEIN, *ORIGINS*, *supra* note 21, at 245 (footnotes omitted).

50. *Id.* at 256. Langbein notes: "Although defense counsel was allowed from the 1730s, most of the felony caseload remained lawyer-free throughout the eighteenth century (and long beyond). Then as now, most criminal defendants were paupers, unable to afford lawyers." *Id.*

Since the accused usually was not trained in the law, cross-examination by the accused was unlikely to be very helpful.⁵¹ It was not until defense lawyers became greater participants at trial that cross-examination came to be considered an important right for the defense.⁵²

If there was a requirement for the accused to be present when the justice of the peace took a deposition, it may have been because of precedents in the 1600s establishing that the defendant be present when the witness took the oath at a jury trial. The right of cross-examination at jury trials had not been established by these precedents and was not part of Marian procedures, which were established by statutes in 1554-1555.⁵³ Nothing in the history of the Marian procedures indicates that an opportunity for cross-examination by the accused was considered to be a pretrial right when a witness was deposed by a justice of the peace.⁵⁴ Cross-examination clearly was not an established right for

51. *Id.* at 271.

52. *See generally id.* at 67-172. If any opportunity for cross-examination at the taking of the deposition existed, it was an opportunity for cross-examination of a witness by a justice of the peace and not an accused. *Cf.* LANGBEIN, ORIGINS, *supra* note 21, at 31 (indicating that in England during the early 1700s, defense lawyers could only address matters of law, so trial judges did intervene episodically to cross-examine witnesses). The English rule against defense counsel did not apply to misdemeanor cases. *Id.* at 36. In parts of America, the English practice was not followed, and defense attorneys could cross-examine witnesses at trial. *Id.* at 40 & n.146.

53. *See* Phil. & M., c. 13 (1554) (Eng.); 2 & 3 Phil. & M., c. 10 (1555) (Eng.).

54. Even if at the time of the Founders the accused was required to be present, there still was not necessarily a requirement for the accused to have an opportunity for cross-examination. The most likely reason for having the accused present at the taking of the witness's deposition was that it allowed the justice of the peace to question and challenge the accused based on what the accuser said. The accused may have been allowed to speak and to give a response addressed to the justice of the peace after the deponent was examined but before the justice drafted the affidavit. Case law as late as 1814 supports this interpretation. *See* *Rex v. Forbes*, [1814] Holt 599, 599, 171 Eng. Rep. 354, 354 (Nisi Prius 1814) (indicating that the accused's presence was necessary at a deposition "so that he may know the precise words [the accuser] uses, and observe throughout the manner and demeanour with which he gives his testimony"). *Forbes* states nothing about the right of the accused to have an opportunity for cross-examination as being a requirement for later admissibility of a deposition at trial. Statements made by the accused before a justice of the peace were not under oath. *See* LANGBEIN, ORIGINS, *supra* note 21, at 51-52. The accused was not allowed to testify under oath at trial because defendants were considered to have an interest in the outcome. *Id.*

If the accused had been allowed to cross-examine witnesses when a deposition was taken before justices of the peace, those depositions or affidavits should reflect such cross-examinations. *See* LANGBEIN, PROSECUTING CRIME, *supra* note 17, at 91 (recognizing that "[i]t became customary for [justices of the peace] to put an indented heading on examinations, disclosing the date and place of the examination and the names and titles of the examiners and examinees."). Scholars who have studied the Marian statutes have not referred to finding any manuscripts, affidavits, or depositions indicating that the

coroner's inquests because there was no requirement that the coroner's inquest even be held in the defendant's presence.⁵⁵

accused was given the opportunity to cross-examine witnesses when justices of the peace took depositions. *See generally, e.g.*, LANGBEIN, PROSECUTING CRIME, *supra* note 17, at 1-125. Treatises from the time of the Founders do not indicate justices of the peace were to give the accused an opportunity for cross-examination at the time of the deposition. *See supra* note 45. Nor did justice of the peace manuals indicate that an accused was to be given the right of cross-examination. *See, e.g.*, A NEW CONDUCTOR GENERALIS, 153 (Albany, D. & S. Whiting 1803); WILLIAM GRAYDON, THE JUSTICES AND CONSTABLES ASSISTANT BEING A GENERAL COLLECTION OF FORMS OF PRACTICE; INTERSPERSED WITH VARIOUS OBSERVATIONS AND DIRECTIONS—TOGETHER WITH A NUMBER OF ADJUDGED CASES, RELATIVE TO THE OFFICES OF JUSTICE OF THE PEACE AND CONSTABLE 122-23 (Harrisburg, John Wyeth 1805). The depositions and affidavits do reflect that it was the justice of the peace who conducted the examination and examined or cross-examined any witnesses in order for the justice to prepare the deposition or affidavit. *See* LANGBEIN, PROSECUTING CRIME, *supra* note 17, at 1-125 (Langbein provides a verbatim copy of a 1519 deposition at 98-103).

The purpose and history of the Marian statutes also indicate that it is unlikely the statutes were used to give the arrestee an opportunity to cross-examine witnesses. The purpose of the Marian statutes was to establish bail procedures and a record to act as a check on the discretion of justices of the peace so they would not abuse their authority by inappropriately releasing arrestees when bail or detention was justified. *Id.* at 6-11, 111. The appearance before the justice of the peace was a preliminary procedure only. *See id.* at 65. Justices of the peace focused on incriminating evidence. *Id.* at 18-19. Under the statutes, justices of the peace had limited powers to release any suspect because only persons exercising commissions of "gaol delivery," usually assize judges, could discharge accused felons. *See id.* at 7. ("The JP had only two options when someone had been accused of an undoubted felony. He could jail the accused or bail him. He could not discharge him."). Given the limited releasing power of justices of the peace and the purposes of the statutes, allowing an opportunity for cross-examination by the accused would have had limited utility.

55. *See infra* notes 56-59. Chitty, writing as late as 1816, states that physical presence of the defendant was required for a deposition taken by a justice of the peace to be admissible at trial if the witness was unavailable, but that the defendant's physical presence was not necessary for the admissibility of statements taken at a coroner's inquest. *See* CHITTY, *supra* note 38, at 586-87. Chitty states that the defendant's physical presence was not required at a coroner's inquest "because the coroner is an officer appointed on behalf of the public, and will be presumed to have acted properly in all matters within his jurisdiction." *Id.* at 587. Chitty does not state that the opportunity of cross-examination is a requirement for the admissibility of statements taken by justices of the peace or coroners if the witness is unavailable at trial. *Id.*

Phillipps's treatise, also printed in 1816, citing English authorities, states that under the Marian statutes, "it has been resolved unanimously by all the judges, that . . . [if] any of the witnesses . . . have been examined before the coroner, . . . their depositions may be read on the trial of the prisoner," when the witness is dead or unavailable. PHILLIPPS, *supra* note 38, at 279.

It does not appear from the report of either of the cases above cited, whether the depositions were taken by the coroner in the presence of the prisoner. But it seems to be the prevailing opinion, that they are admissible, though the prisoner

The reasoning in *Flemming and Windham's Case*, which dealt with statements to justices of the peace, can also be applied to statements made at a coroner's inquest because both are confrontation exceptions under the Marian statutes.⁵⁶ Admissibility of statements taken at a coroner's inquest when a witness was unavailable at a later trial is especially relevant to the medical exception to confrontation because coroner inquests were considered medico-legal proceedings.⁵⁷ Coroner inquests often involved proceedings where physicians gave medical opinions to the coroner's jury based on the physician's diagnosis of a patient's condition or cause of death.⁵⁸ At a later trial, physicians were allowed to give the same opinions and state their diagnosis just as they

may have been absent at the time of taking the inquisition.

Id. Phillipps raised the cross-examination issue and stated that the lack of cross-examination did not prevent depositions taken by the coroner from being admitted at trial.

Id. Phillipps cited English authorities for the proposition that generally "depositions are not evidence, where there cannot be a cross-examination . . . 'yet, if the witnesses examined on a coroner's inquest be dead or beyond sea, their deposition may be read. . .'" *Id.* at 279-80.

56. A sworn deposition was admissible at trial

if it be made out by oath to the satisfaction of the court, that such [witness] is dead, or unable to travel, or kept away by the means or procurement of the prisoner, and that the examination offered in evidence is the very same that was sworn before the coroner or justice, without any alteration whatsoever.

HAWKINS, *supra* note 18, at 605. Starkie, writing as late as 1828, notes that a deposition taken at a coroner's inquest was admissible at trial when the witness was unavailable even if it had been taken when the prisoner had not been present at the inquest. *See* STARKIE, *supra* note 38, at 487-92. Starkie noted that it was believed the coroner's inquest statements were different from those taken by a justice of the peace because statements made at an inquest were publicly made on matters so notorious everyone was presumed to have notice of the inquest and because the coroner was considered to be a higher officer than the justice of the peace. *See id.* at 487-88. Starkie criticizes the use of statements from a coroner's inquest, and states it should be a matter of "grave and serious consideration" "when the question arises" whether it ought to be supported, but his treatise acknowledges that the Marian statutes remained valid. *Id.* at 491-92. As of 1828, sworn coroner statements were admissible even when the witness was unavailable at trial. *Id.* Although it can be argued that if one has notice of a coroner's inquest, one has had notice of an opportunity to cross-examine inquest witnesses, prior opportunity for confrontation and cross-examination were not requirements for later admissibility at trial. *See id.* at 491.

57. *See, e.g.*, Mark Jackson, *Suspicious Infant Deaths: The Statute of 1624 and Medical Evidence at Coroners' Inquests*, in *LEGAL MEDICINE IN HISTORY* 64, 65 (Michael Clark & Catherine Crawford, eds. 2004).

58. *Id.* at 75 (indicating that during the 1760s and 1770s, physicians were increasingly being called as witnesses in infanticide cases to give an opinion on whether the infant was alive when born).

had at a coroner's inquest.⁵⁹ Hearsay was often used at a coroner's inquest.⁶⁰

C. Crawford's Analysis Does Not Support Crawford's Interpretation of Confrontation Exceptions in 1791

Chief Justice Rehnquist also was more historically accurate than the majority opinion when he referred to many confrontation exceptions as being in existence in 1791, while also acknowledging that the law of confrontation and its exceptions was still evolving.⁶¹ Ironically, the majority in *Crawford* also acknowledges that in 1791 there were at least three confrontation exceptions for statements, even if testimonial: dying declarations,⁶² forfeiture by wrongdoing,⁶³ and spontaneous declarations.⁶⁴

59. *Id.* at 69.

60. *See id.* at 72. (“[D]epositions contain details of preliminary inquiries made in the neighbourhood before official intervention, and include accounts of the questioning of suspects by their neighbours.”)

61. *See Crawford*, 541 U.S. at 73-74 (Rehnquist, C.J., concurring).

62. *See id.* at 56 n.6. In addition to *Crawford's* citation of English cases, an early American evidence treatise also refers to dying declarations. *See PHILLIPPS, supra* note 38, at 200-01. Justice Scalia declined to explicitly hold that dying declarations should be considered a confrontation exception even though he acknowledged that the exception clearly existed in 1791, even for testimonial statements. *See Crawford*, 541 U.S. at 56 n.6. An earlier Supreme Court decision has already done so. In *Mattox v. United States*, 156 U.S. 237 (1895), the Court held that both dying declarations and the admission of prior testimony were proper exceptions because they were Confrontation Clause exceptions at the time the Sixth Amendment was enacted and were justified by necessity. *Id.* at 243-44. If one includes the Court's acknowledgement in *Mattox* that prior testimony is an exception, then along with the three exceptions acknowledged in *Crawford*, the Court has acknowledged at least four exceptions to confrontation that include statements that can be considered testimonial and that existed in 1791. Interestingly, *Mattox* does not claim that the admission of prior testimony or dying declarations is dependent on some kind of testimonial analysis, but simply that the exceptions existed in 1791, and thus they are valid confrontation exceptions. *Id.* at 244.

63. *Crawford*, 541 U.S. at 62. “[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds . . .” *Id.* Forfeiture by wrongdoing is a very old confrontation exception and was well established by the Founder's era. *See, e.g.,* Lord Morley's Case, 6 How. St. Tr. 769, 770 (H.L. 1666); *see also* MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF THE TRIAL OF THE REBELS IN THE YEAR 1764, IN THE COUNTY OF SURRY AND OF OTHER CROWN CASES: TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW 337 (2d ed. 1791). Given that prior depositions were usually taken by justices of the peace, who the Court in *Crawford* states were the equivalent of modern police, *Crawford*, 541 U.S. at 52, forfeiture by wrongdoing statements clearly meet *Crawford's* definition of testimonial.

64. *Crawford*, 541 U.S. at 58 n.8. Instead of explicitly addressing whether spontaneous statements were an exception to confrontation, even for statements that *Crawford* considers to be testimonial, Justice Scalia claims that it is “questionable” whether the

If one considers the three confrontation exceptions for testimonial statements acknowledged by *Crawford*, along with the additional confrontation exceptions that stood under the Marian statutes, it is clear that a significant number of confrontation exceptions existed in 1791, even for statements that fit *Crawford's* definition of a testimonial statement. A complete analysis of *Crawford* and the history of all the confrontation exceptions that existed in 1791 is beyond the scope of this Article. It must be noted, however, that *Crawford's* analysis of the number of exceptions and much of its historical analysis is seriously flawed. One of the major errors of *Crawford's* historical analysis is the apparent assumption that English common law cases and state trials were controlling authorities for law in the American colonies and that there was one reception of English common law throughout America. Justice Scalia refers to the English cases as having “settled” the matter of when confrontation and cross-examination were required.⁶⁵

All of the English decisions cited throughout *Crawford* were decisions by courts that did not have appellate jurisdiction over the American colonies. These cases were not controlling in America because the appellate jurisdiction of English courts was limited to the realm of England.⁶⁶ Appellate review of American colonial courts' decisions

statements would have been admissible in 1791 because the statements had to be made immediately and before the person could contrive anything for her advantage. His argument only addresses the foundation for which statements qualified for the exception in 1791. The confrontation exception did exist, even for testimonial statements, if the proper foundation was laid, so long as the statements qualified for the spontaneous statements exception, which the Court's citation of *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1693), implicitly acknowledges. *Id.* Town constables, sheriffs, or others whom the Court in *Crawford* would consider to be the equivalent of modern police, did sometimes hear spontaneous declarations, and under those circumstances spontaneous declarations fit *Crawford's* definition of testimonial. Nonetheless, spontaneous declarations that were testimonial statements were admissible in 1791. See *infra* notes 120-43 and accompanying text.

65. See *Crawford*, 541 U.S. at 46 (“*Paine* had settled the rule requiring a prior opportunity for cross-examination as a matter of common law . . .”).

66. See 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 93 (Univ. of Chi. Press facsimile ed. 1979) (1765). “The kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only.” *Id.* “And therefore the common law of England, as such, has no allowance or authority there [the American colonies]; they being no part of the mother country, but distinct (though dependent) dominions.” *Id.* at 105; see also, e.g., *Pancoast's Lessee v. Addison*, 1 H. & J. 350, 350-59 (1802). American colonies were “out of the realm” of England. *Id.* at 353. “The situation of England and Scotland before the union, was similar or nearly so to the actual situation of Maryland and Pennsylvania. The latter were separated by an ideal or mathematical line—the former were different realms or sovereignties—governed by

rested solely with the monarch in Privy Council.⁶⁷ When Parliament acted as a court, Americans believed its jurisdiction was also limited to the kingdom of England.⁶⁸ Because appeals to the Privy Council were rare in criminal cases, decisions of each colonial appellate court were, almost always, final for that colony.⁶⁹ A review of Privy Council records from 1680 through 1783 shows the Privy Council issued no opinions on cases appealed from the thirteen American colonies regarding confrontation rights or exceptions to confrontation in criminal cases.⁷⁰

different laws.” *Id.* at 356. The most glaring example that English common law was not considered controlling in the colonies is, of course, slavery. In a 1772 decision, *Somerset v. Stewart*, 20 How. St. Tr. 1, 80-82 (K.B. 1772), Lord Mansfield held that slavery in England was incompatible with the common law; the case had no effect on slavery in the colonies.

67. See BLACKSTONE, *supra* note 66, at 105 (“They [the American colonies] have courts of justice of their own, from whose decisions an appeal lies to the king in council here in England.”).

68. See JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 281-286 (1991) (indicating that the colonialists believed Parliament did not have authority to try colonialists for treason or other alleged crimes committed outside the realm of England); cf. 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 256 (Univ. of Chi. Press facsimile ed. 1979) (1769) (“The high court of parliament. . . is the supreme court in the kingdom. . . . As for acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them.”).

69. See J. R. Pole, *Reflections on American Law and the American Revolution*, 50 WM. & MARY Q. 123, 147 (1993) (“The laws of England were administered through a unified jurisdiction with its center in Westminster But the condition of the colonies was fundamentally different: each of them was a separate jurisdiction. Within the very broad limits of the prohibition against laws repugnant to the laws of England and subject to royal disallowance, their legislatures made separate and different laws; their courts, whose judgments were unlikely to receive attention in England, were exceptionally free to go their own ways.”). Which laws were considered to be “repugnant to the laws of England” was in the eye of the beholder. The existence of slavery was repugnant to English common law, yet slavery continued to exist in the colonies.

70. See 2 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES (W.L. Grant & James Munro eds., 1910); 3 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES (Krause 1966) (1910); 4 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES (James Munro ed., 1911); 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES (James Munro ed., 1912); see also JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 240-56 (1965). In a review of a petition from the West Indies, the Council reversed a sentence of a naval Court Martial and referenced that the Lieutenant had been found guilty without knowing what crime he had been accused of and “who was his accuser.” 3 ACTS OF THE PRIVY COUNCIL, COLONIAL SERIES, *supra* at 794-95 (Oct. 9, 1744 and Aug. 9, 1744). The Lieutenant’s Counsel, however, waived any complaints against the procedures of the Court Martial, but only appealed from the imposition of the sentence. See *id.* at 795 (Oct. 9, 1744). The Privy Council record reflects that the Lieutenant apparently acted lawfully in not carrying out an order to shoot another

Reception of English common law varied throughout the colonies, and later throughout the United States, because each colony considered its laws to be separate from the laws of other colonies.⁷¹ Some Americans also argued that even Privy Council decisions were not binding on them unless they agreed to and accepted such decisions.⁷² It was the American colonialist disagreement with English law and the degree to which English law was applicable to them that led to the Revolution.⁷³

Accordingly, to determine which confrontation exceptions existed before 1776 and how the confrontation right was applied in America, Privy Council records and appellate and trial court records in each colony should be examined. In determining the right of confrontation

Lieutenant, and it appears that there was no basis for a Court Martial to begin with.

71. See *West v. Louisiana*, 194 U.S. 258, 262-64 (1904) (holding that, at that time, the Sixth Amendment did not apply to state proceedings and the states had the right to alter their common law right of confrontation at any time and were not tied to any confrontation procedures that existed at common law); *United States v. Worrall*, 2 U.S. 384, 394 (C.C.D. Pa. 1798) (stating that each colony judged for itself which parts of the common law applied to it: "Hence, he who shall travel through the different states, will soon discover, that the whole of the common law of England has been no where introduced; that some states have rejected what others have adopted; and that there is, in short, a great and essential diversity. . . . The common law, therefore, of one State, is not the common law of another; but the common law of England, is the law of each State, so far as each State has adopted it . . ."); *Wheaton v. Peters*, 29 F. Cas. 862, 871 (C.C.E.D. Pa. 1832) (No. 17,486) ("[I]t has not been contended, it could not be, that the whole common law of England, as it exists there, has ever been received in the United States, or in any one of them. Parts of it only have been adopted, and the evidence of such adoption is to be sought in 'legislative acts, in judicial decisions, or constant usage.'"). In *Pointer v. Texas*, 380 U.S. 400 (1965), the Court reversed *West* and held the Sixth Amendment's Confrontation Clause does apply to the states. *Id.* at 406-07.

The Revolution allowed the new American states to be free from necessary dependence on English precedent. Every state had to decide if English law remained in force in whole or in part. See Bruce H. Mann, *The Evolutionary Revolution in American Law: A Comment on J.R. Pole's "Reflections,"* 50 WM. & MARY Q. 168, 173 (1993). Several of the new American states passed statutes that allowed English statutes and common law previously in place to 1776 to remain subject to American innovations or variations. *Id.* The reception statutes did not settle the underlying questions of which British acts applied to the colonies in the first place or what the common law was on any particular point. *Id.*

72. See, e.g., Arthur M. Schlesinger, *Colonial Appeals to the Privy Council*, 279-97, 28 POL. SCI. Q. 279, 279-97 (March 1913) and 433-50 (June 1913) (indicating that many colonialists disputed that the Privy Council had any appellate jurisdiction and evasion of Council decisions was common); REID, *supra* note 68, at 279-80 (indicating the colonists argued the Crown needed the consent of the colonists before English troops could legally be placed in a colony).

73. REID, *supra* note 68, at 193-94 (indicating that the colonialists did not consider themselves subject to parliamentary supremacy because the colonies were not part of the realm of England; appeals from the colonial courts were not to the House of Lords but to the King in Privy Council, showing that Americans were not viewed as part of the realm).

and its exceptions after July 4, 1776, the state appellate and trial court records should be examined. For the Founders, English common law cases and state trial decisions were only persuasive authorities—both before and after the Revolution.⁷⁴

Justice Scalia's numerous citations of English cases, when he should have focused primarily on American cases, indicates perhaps the "original intent" of English judges, but not necessarily the original intent of the Founders. Because many states did not have published reports of appellate decisions before 1791, the available historical evidence is currently lacking to support Justice Scalia's sweeping claim that the law of confrontation and its exceptions in America was "settled" before 1791.⁷⁵ The few American cases cited by Justice Scalia in *Davis v. Washington*⁷⁶ are not particularly persuasive if one is doing an originalist analysis.⁷⁷ The apparent lack of established case law and

74. Use of English common law, of course, did play an important role in the development of law in America. For Americans, however, English common law cases were not considered controlling unless Americans adopted them and used them as precedents. See, e.g., 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 42 (Arno Press 1972) (1795) ("Our ancestors having settled this country without the aid of the British crown, were under no obligation to obey the government, or observe the laws of the country, from whence they emigrated [The] voluntary reception of the English laws, by general consent of the people, is the only foundation of their authority."); 2 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 62-63 (1965) (stating that Delaware, Maryland, Massachusetts, New Hampshire, New York, New Jersey and Rhode Island had state constitutions which stated that only those parts of the common law which had been developed in America after 1776 should be in force, unless otherwise indicated). Some held that only English common law before 1601 should be considered binding in America because that was the year colonization had begun. See CHROUST, *supra*, at 61 n.203.

75. See note 78 *infra* and accompanying text.

76. 126 S. Ct. 2266 (2006).

77. In *Davis* Justice Scalia cites a few American cases to support his position that under his use of the term "testimonial," the use of testimonial statements in 1791 required confrontation and cross-examination at the time of trial or beforehand. See *id.* at 2274-75 & n.3; see also *Crawford*, 541 U.S. at 49-50 (indicating that Justice Scalia uses many of the same cases cited in *Davis* in *Crawford*). In the *Davis* footnote, Justice Scalia cites eight cases in which depositions of witnesses were held inadmissible. See *Davis*, 126 S. Ct. at 2275 n.3. All of the cases he cites were decided after the ratification of the Confrontation Clause, and the last three cases he cites were all decided more than fifty years after the Clause's ratification. See *id.* These last three cases cannot reasonably be considered to be authorities for what the views of the Founders were in 1791. Two of these cases are not even on point. Both *People v. Newman*, 5 Hill 295 (N.Y. Sup. Ct. 1843) and *State v. Houser*, 26 Mo. 431 (1858), involve cases where courts ruled the depositions were inadmissible because the deponent was still alive. *Newman*, 5 Hill at 295-96; *Houser*, 26 Mo. at 439-41. Under the Marian statutes, if the witness was alive and no showing of necessity was made due to witness unavailability, the depositions would not have been admissible either. See HAWKINS, *supra* note 18, at 605 (stating that a deposition is

admissible only if the court is satisfied the witness is unable to travel).

In the other case, *State v. Campbell*, 30 S.C.L. (1 Rich.) 124 (1844), the court states that it is

to modern decisions, that we are to look for our practical doctrines in respect to evidence, in criminal as well as commercial cases, and by no means so much to the old English cases . . . when a supposed felon had no counsel, no process to enforce the attendance of his witnesses, and no right to have them sworn in court.

Id. at 130. In other words, *Campbell* reflects the “modern” view of 1844 and does not base its holding on an originalist analysis of what the law was in 1791.

The five cases Justice Scalia cites that were decided within fifty years of the Confrontation Clause’s ratification do not help his position either. In *State v. Webb*, 2 N.C. (1 Hayw.) 103 (1794), the court stated that its holding was dependent on a state statute that did not allow for admissibility of a deposition if the defendant was not present when the deposition was taken. *See id.* at 104. The court’s opinion contains dicta about the common law right of confrontation, but the court states it will not allow an exception for admissibility of the deposition taken when the defendant was not present and the witness is unavailable at trial when “the act has not expressly said so.” *Id.*

In *State v. Atkins*, 1 Tenn. (1 Overt.) 229 (1807), the court stated that its interpretation was based on the state constitution. *See id.* at 229. *Atkins* involved a case where the deposition was taken in the defendant’s absence. *Id.* If the Marian statutes had been complied with and the deposition had been taken in the defendant’s presence, it would have been admissible. Another Tennessee case, cited by Justice Scalia, makes this clear. In *Johnston v. State*, 10 Tenn. (2 Yer.) 58 (1821), where the reporter refers to the case as in effect overruling *Atkins*, the court states that if the Marian procedures are complied with, the deposition of a witness unavailable at the time of trial was admissible. *See id.* at 58-59.

Finn v. Commonwealth, 26 Va. (5 Rand.) 701 (1827), merely holds that if no showing of necessity has been made due to the witness being unavailable, as required by the Marian statutes, then a deposition is not admissible. *Id.* at 708. In *Finn* the deponent was alive at the time of trial but was out of the state. *See id.* at 707-08. *State v. Hill*, 20 S. C. L. (2 Hill) 607 (App. 1835), is not on point because it does not involve a deposition taken under oath before a justice of the peace (it was taken by the Attorney General). *See id.* It also involved the statements of a witness who was out of the commonwealth but still alive. The Marian statutes required a showing of necessity and this requirement was not met in *Finn* or *Hill*. Neither case had a claim that the unavailable witness was unable to travel. *See, e.g., HAWKINS, supra* note 18, at 605 (indicating that a deposition would be admissible if court is satisfied witness is dead, unable to travel, or kept away by procurement of the prisoner).

Commonwealth v. Richards, 35 Mass. (18 Pick.) 434 (1837), is based on the deposition not containing the exact words of the witness. *See id.* at 436-39. In *Richards* because the accused was present when the deposition was taken at a preliminary examination, the court held that no constitutional violation had occurred when the deposition was admitted at trial. *See id.* at 435. Under the Marian statutes, the deposition had to contain the witness’s same words as stated before the justice of the peace. *See, e.g., HAWKINS, supra* note 18, at 605 (stating that depositions are admissible at trial if “the examination offered in evidence is the very same (g) that was sworn before the coroner or justice, without any alteration whatsoever”). The result in *Richards* would have been the same under the Marian statutes; the case simply supports the proposition that the depositions had to be in the same words used by the witness for it to be admissible under the Marian procedures.

published appellate decisions in America indicates that confrontation rights and exceptions were still inchoate and evolving.⁷⁸

The greater the number of confrontation exceptions that existed in 1791—for statements that *Crawford's* analysis indicates should be testimonial—the greater the implausibility of Justice Scalia's central holding: that the Founders intended the right of confrontation to be an absolute bar to the admission of out-of-court testimonial statements without confrontation and cross-examination. The significant number of confrontation exceptions, even for statements that *Crawford* considers testimonial, also provides additional support for the existence of the medical exception in 1791. After all, it was simply one of a significant number of confrontation exceptions that existed at the time of the Founders.

Some of these cases, including *Richards*, have dicta about confrontation and cross-examination, but dicta does not constitute the holding of a case. None of these cases advances Justice Scalia's overall argument that some form of a testimonial statements test that required cross-examination was being used.

78. Justice Scalia's historical analysis illustrates the shortcomings of using traditional legal research methodologies in attempting to find original intent of the Founders. Historians studying the colonists and the Founders draw mostly on manuscript court records, "while nineteenth and twentieth century scholars—most of whom teach in law schools—depend heavily on printed appellate decisions." Cornelia Hughes Drayton, *Turning Points and the Relevance of Colonial Legal History*, 50 WM. & MARY Q. 7, 9 (1993). "For the latter group, the absence of written opinions and printed court reports for the colonial period means that precedent, doctrine, and the influence of individual judges cannot be traced as they can for the post-1790 period." *Id.* at 9; see also Hendrik Hartog, *Distancing Oneself From the Eighteenth Century: A Commentary on the Changing Pictures of American Legal History*, in *LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW* 229, 253 (Hendrik Hartog ed., 1981) (indicating that published American appellate decisions "are simply not available . . . prior to the end of the eighteenth century [L]acking appellate opinions there was no way for a centralized legal structure to control the decisions of local legal institutions").

If Justice Scalia wanted to do an actual originalist analysis, he should have examined American colonial appellate and trial court records or manuscripts for the period before 1776 and American state appellate court and trial court records for the period after 1776 and through at least 1791. These court records should have been examined before he went on to review English authorities that are only persuasive authority. Both John Langbein and James Oldham have shown that review of manuscript sources can be highly useful in discerning what the law was during certain periods. See generally John H. Langbein, *Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHIC. L. REV. 1 (1983); JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* (1992).

D. Under an Originalist Analysis the Determination of Whether a Statement is Testimonial Should Be Made in Light of the Founders' Intent and the Purpose of the Confrontation Clause

Many arguments regarding which statements should be considered testimonial ignore the originalist justification of *Crawford's* holding and the purpose of the Bill of Rights.⁷⁹ The Court in *Crawford* cites Sir Walter Raleigh's case and other treason trials from England as examples of government abuses that necessitated the Confrontation Clause.⁸⁰ *Crawford* acknowledges that the Confrontation Clause's focus does not apply to private parties:

79. See *Crawford*, 541 U.S. at 43-45. The Founders were not concerned about abuses by private prosecutors in America because, from 1776 on, private parties were not prosecuting cases. See Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 223 n.14 (2005) (stating that by the Revolution, public prosecution in America was standard). The Founders were concerned about abuses by federal prosecutors. See *id.* at 224. The Bill of Rights came into being because of "concerns about the new federal government." *Id.* The Founders were not concerned about the actions of state officials. See, e.g., *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (acknowledging that the Confrontation Clause was not applied to the states until 1965).

Since the majority of criminal cases were tried before state judges, if the Founders believed judges' rulings on admissibility of testimonial statements constituted "state action," as Professor Richard D. Friedman argues admissibility rulings are, one would think the Founders would have required the Confrontation Clause to apply to state judges and not solely to the federal government. See Richard D. Friedman, *Grappling With the Meaning of Testimonial*, 71 BROOK. L. REV. 241, 262 n.42 (2005). As even Professor Friedman's citations acknowledge, the Bill of Rights usually does not apply to the action of private parties. See *id.*

Other Supreme Court decisions also support limiting the application of the Bill of Rights in the criminal justice area, including the Confrontation Clause, to the actions of law enforcement and not extending it to private individuals unless the private individuals are acting as agents of law enforcement. See *United States v. Jacobson*, 466 U.S. 109 (1984); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (indicating that the Fourth Amendment's history shows it is intended as a restraint on the activities of sovereign authority and not on private seizures); see also generally, 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 14.4, at 525 (3d ed. 1999) ("Almost all of the constitutional protections of individual rights and liberties restrict only the actions of governmental entities. . . . [T]he amendments to the Constitution which protect individual liberties only have been applied to the actions of the state or federal governments.").

Normally, in order for statements to be suppressed, some coercive law enforcement activity must exist. See *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); see also *United States v. Bolden*, 461 F.2d 998, 999 (8th Cir. 1972) (holding that *Miranda* requirements do not apply to questioning by private persons); *United States v. Wilkerson*, 460 F.2d 725, 735 (5th Cir. 1972) (explaining that *Miranda* warnings are not required when private investigators do questioning).

80. See *Crawford*, 541 U.S. at 49-51.

An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.⁸¹

The Court in *Crawford* also notes, “[T]he Framers had an eye toward politically charged cases like Raleigh’s—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear.”⁸²

In arguing that testimonial statements should not be limited to those made to law enforcement or its agents, Professor Richard D. Friedman states that “if we imagine a world without prosecutors . . . that should not mean the destruction of the confrontation right.”⁸³ Public prosecution agencies will not be eliminated in the foreseeable future, however, and it is unlikely that law enforcement will allow victim rights organizations or private persons to take over the law enforcement function in child abuse cases.⁸⁴ Law enforcement and human services agencies are obligated by statute to investigate child abuse cases.⁸⁵ Professor Akhil R. Amar has rightfully criticized the invocation of “the specter of a clever private accuser seeking to get his story before the jury while denying the accused’s right to confront the accuser in the courtroom” as something that “sidesteps a powerful counterargument

81. *Id.* at 51.

82. *Id.* at 68.

83. Friedman, *supra* note 79, at 262.

84. *See id.* It makes no sense to create definitions of testimonial based on imagined hypotheticals that are unlikely to come true. The Supreme Court properly confines itself to actual “cases and controversies,” which helps it to ensure the full development of cases before it grants review. *See* U.S. CONST. art. III, § 2. For many reasons, including political ones, the prosecution function will remain in the government’s hands. Even if one believed private prosecutions could occur, agency doctrine should be able to adequately address such situations.

85. The Child Abuse Prevention and Treatment Act (“CAPTA”), as amended, mandates that all fifty states have procedures in place for investigating child maltreatment cases. 42 U.S.C. § 5106a (Supp. III 2003). CAPTA states that law enforcement or human services agencies “shall” investigate child maltreatment cases. *See id.* at 42 U.S.C. § 5106(b)(2) (Supp. III 2003). State statutes also use CAPTA’s mandatory language. For a summary of such statutes, see NATIONAL CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFORMATION, 2003 CHILD ABUSE AND STATUTES SERIES STATUTES-AT-A-GLANCE: REPORTING PROCEDURES 1-42 (2003), available at The Child Welfare Information Gateway, http://www.childwelfare.gov/systemwide/laws_policies/search/index.cfm (last visited Mar. 15, 2007).

rooted in the basic principle of constitutional structure: the Constitution is mainly addressed to *state* action.⁸⁶

Broadening the definition of “testimonial statement” to include statements taken not only by law enforcement, but also to its agents,⁸⁷ provides sufficient flexibility to guard against abuses. Professor Friedman has criticized the use of agency theory by the courts on grounds that:

refusing to deem a statement to be testimonial unless it was made to a government agent might be mitigated by stretching the meaning of “government agent”. . . . But such manipulations are not a satisfactory resolution of the problem because they require generous use of the term “government agent” and because they cannot reach all situations in any event.⁸⁸

The claim that agency doctrine cannot be used to adequately address the issue is belied, however, by court decisions that have used agency doctrine in determining the degree of law enforcement’s involvement in similar situations.

Courts are well-equipped to apply the doctrine of agency law in determining whether an out-of-court statement is testimonial under *Crawford*. Courts have used agency doctrine in cases to decide whether a private party acted as an agent of police for purposes of determining whether a *Miranda* warning was required and to determine whether a search warrant was necessary.⁸⁹ There is no reason why courts cannot use agency doctrine in determining whether a statement is testimonial. Applying the testimonial doctrine to statements, even when not made to law enforcement or its agents, would result in an overbroad application of the Confrontation Clause, which legal scholars have criticized.

86. Akhil R. Amar, *Confrontation First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1048 (1998). Professor Amar also doubts that Friedman’s related argument—that the word “witness” as used in the Confrontation Clause includes out-of-court accusers—has deep roots in constitutional history: “He [Friedman] does not point to any specific early sources of his proposal” to treat out-of-court accusers as witnesses. *Id.* Amar notes that the use of other language in the Sixth Amendment and in Article III, Section Three’s Treason Clause, as well as the history of those clauses, support a definition of “witness” that is limited to those who testify in court and not to those who make out-of-court statements. *Id.* at 1046-48. *Crawford* rejects Amar’s position on the meaning of “witness.” See *Crawford*, 541 U.S. at 50-51.

87. For reasons discussed elsewhere in this Article, however, physicians should not be considered agents of law enforcement when examining a child abuse victim for purposes of diagnosis or treatment. See *infra* notes 198-222 and accompanying text.

88. Friedman, *supra* note 79, at 262-63.

89. See generally 2 WAYNE R. LAFAYE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE §§ 6.10(c), 3.1(h) (2d ed. 1999).

The judge should not be considered a state actor for testimonial purposes.⁹⁰ Nor should any constitutional violation be considered to occur when the court makes an admissibility ruling. The judge is not a party to the litigation or a law enforcement officer; the judge does not perform a policing role.⁹¹ The judge is not acting as a part of the executive branch to protect public safety. Similarly, the court is not a witness and does not take the statement that is being offered by the prosecution. Court rulings on admissibility are judicial functions and should not be considered to result in the statement being testimonial.⁹² The Court in *Crawford* reasoned that the Confrontation Clause protects

90. Professor Friedman argues the judge should be considered a state actor and the trial court's admissibility rulings should be used to determine whether a statement is testimonial. See Friedman, *supra* note 79, at 261-62 n.42.

91. See Fenner v. State, 846 A.2d 1020, 1025 n.4 (Md. 2004) (holding that "a judge is not a 'law enforcement officer,' as such officers are contemplated in *Miranda*").

92. Justice Scalia stated that a testimonial test must be used because trial courts do not have the ability to effectively distinguish between reliable and unreliable statements. See *Crawford*, 541 U.S. at 60-65. "The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability." *Id.* at 62. If trial courts cannot be trusted to rule on admissibility of statements based on a reliability standard, then arguably trial courts cannot be relied on to effectively rule on admissibility based on determining what statements are testimonial, especially when the Court in *Crawford* states that "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. Nor does *Davis v. Washington* appear to provide much assistance to trial courts, as the Court declined again to give a precise definition of "testimonial." See *Davis*, 126 S. Ct. at 2273-74.

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.* at 2273-74. If trial courts do not have the ability to accurately perform reliability analysis, they also do not have the ability to accurately determine the "primary purpose" when police interview individuals, either during ongoing emergency situations or non-emergency situations.

If one is trying to reduce the degree to which constitutional decisions are made based on "mere judicial determination[s] of reliability," *Crawford*, 541 U.S. at 62, or mere judicial findings, *Crawford* and *Davis* have not created a new confrontation paradigm that is an improvement over the reliability analysis as used in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The Court's unwillingness to provide a clear definition of testimonial may be due to Justice Scalia's inability to muster a majority of the Court for any one definition. The Court's failure to provide a clear definition results in an evolving testimonial analysis used thus far by the Court that is just as vague as the reliability analysis under *Roberts*.

against the civil mode of criminal procedure, with its use of *ex parte* affidavits and depositions which are made by or to executive branch officials.⁹³ In *Crawford* the Court's reasoning and the history it cites do not show that the Founders considered a court's ruling on possible admissibility of testimonial statements to constitute state action.⁹⁴

Given that the Court in *Crawford* held that trial judges have erroneously made contradictory rulings on admissibility based on reliability,⁹⁵ it is surprising to hear arguments that a trial court's evidentiary rulings on admissibility of testimonial statements constitute state action and should determine whether a statement is testimonial.⁹⁶ If accepted, this argument would result in statements being deemed testimonial when admitted into evidence and not testimonial when not admitted into evidence.⁹⁷

Arguably, a witness might believe that a statement made to the police could be used in court.⁹⁸ But if a witness is not talking to law enforcement but to a private party, it is unreasonable to assume the witness should know the statement could be used in a later criminal prosecution.⁹⁹ Furthermore, in *Davis v. Washington*, the Court made clear that

93. *Crawford*, 541 U.S. at 50.

94. Neither Professor Friedman nor the Court have cited any common law cases or authorities from the Founders' era that hold that a trial court's actions in determining admissibility constitute state action for purposes of determining whether a statement is testimonial.

95. *Crawford*, 541 U.S. at 63-65.

96. See Friedman, *supra* note 79, at 261-62 & n.42. Since *Crawford* the lower courts have made contradictory holdings on which statements should be considered testimonial. See Brooks Holland, *Testimonial Statements under Crawford: What Makes Testimony . . . Testimonial?* 71 BROOK. L. REV. 281, 282 (2005). "Yet, as the diversity of judicial decisions interpreting *Crawford* demonstrates, *Crawford* fails to identify a clear commonality to 'testimony' that accurately defines when a statement is 'testimonial' instead of something else that is produced when a person speaks about facts or opinions." *Id.*

97. Perhaps surprisingly, Friedman rejects similar reasoning:

A standard that labeled a statement as testimonial because it was actually used in prosecution would make no sense; it would mean that any out-of-court statement offered by the prosecution at trial to prove the truth of what it asserts—that is, any hearsay—is testimonial.

To determine whether a statement is testimonial, therefore, we must figuratively stand at the time of the statement and look forward in time towards the prosecutorial process.

Friedman, *supra* note 79, at 251.

98. "A statement made knowingly to the authorities that describes criminal activity is almost always testimonial." Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1042 (1997).

99. Professor Friedman is right in arguing that when the witness believes the person is a private party and has no reason to believe the person is a government agent, the statement should not be considered testimonial even when the private party is an

not all statements made to law enforcement will be held to be testimonial. The Court in *Davis* held that for purposes of its analysis, it would consider the actions of 911 dispatchers to be actions of the police.¹⁰⁰ Nonetheless, because the call was made during an ongoing emergency and was asking for assistance, the statements made by the caller were deemed nontestimonial.¹⁰¹

III. *DAVIS V. WASHINGTON'S ORIGINALISM*

A. *Under Davis 911 Calls for Medical Help Should Be Admissible Under the Medical Exception*

In *Davis v. Washington*,¹⁰² the Court was given an opportunity to further clarify its holding in *Crawford*. In *Davis* the Court had to decide if a 911 emergency telephone call was testimonial and thus inadmissible when the declarant was unavailable at trial.¹⁰³ The caller was reporting a domestic disturbance, and at some point the call was ended. The dispatcher reversed the call and spoke to Adrian McCottry, who reported that her boyfriend had assaulted her and had just left the residence.¹⁰⁴ At the time of trial, as often happens in domestic violence cases, Ms. McCottry did not appear to testify.¹⁰⁵ The trial court allowed the 911 audiotape telephone calls to be played for the jury on grounds that the calls constituted an exception to the hearsay rule and the Confrontation

undercover law enforcement agent.

[E]licitation by the State is, in itself, enough to treat a person's statement as testimonial. We might be made wary of drawing that conclusion by the fact that, if consistently applied in the adult realm, it would presumably render subject to the Confrontation Clause many statements made by conspirators of the accused who did not know that their listeners were informants or undercover police officers. . . . There is no persuasive reason to treat differently the human source who, while recognizing that she is providing information in the course of the conversation, does not regard the conversation as testimonial in nature.

Richard D. Friedman, *Children as Victims and Witnesses in the Criminal Trial Process*, 65 *LAW & CONTEMP. PROBS.* 243, 251 (2002).

100. *Davis*, 126 S. Ct. at 2274 n.2. The Court stated, "For purposes of this opinion (and without deciding the point), we consider [the dispatcher's] acts to be acts of the police." *Id.* It must be acknowledged that Professor Friedman's arguments and analysis as cited herein were made well before the *Davis* decision was handed down.

101. *See id.* at 2276. In filing the decision, the Court issued a joint opinion with another case, *Hammon v. Indiana*. For purposes of this Article, the case will be referred to simply as *Davis v. Washington*.

102. 126 S. Ct. 2266 (2006).

103. *Id.* at 2270-71.

104. *Id.*

105. *Id.* at 2271.

Clause.¹⁰⁶ The Court upheld the conviction, holding that the 911 call was a nontestimonial statement.¹⁰⁷

The other case in the joint opinion, *Hammon v. Indiana*,¹⁰⁸ also involved domestic violence. In *Hammon* the police were dispatched to a reported domestic disturbance at the home of Hershel and Amy Hammon.¹⁰⁹ When the police arrived, Ms. Hammon was on the front porch but told them “nothing was the matter,” though police observed she appeared “somewhat frightened.”¹¹⁰ She gave police permission to enter the home, and they observed broken glass that appeared to be from a gas heating unit.¹¹¹ Her husband, who was in the kitchen, told police that he and his wife had “been in an argument” but that “everything was fine now.”¹¹² Police separated the two and spoke privately with each of them.¹¹³ Ms. Hammon signed a battery affidavit, adding by hand: “Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn’t leave the house. Attacked my daughter.”¹¹⁴ Ms. Hammon did not appear at trial. The defense objected to the admission of the affidavit on grounds that it violated the defendant’s right to confront and cross-examine his accuser.¹¹⁵ The Court reversed the conviction on grounds that the affidavit was a testimonial statement.¹¹⁶ The differing results in each case can be explained by the analysis the Court used for both.

The Court’s analysis in *Davis* appears to contain four factors: (1) the declarant was speaking about events as they were actually happening rather than describing past events,¹¹⁷ (2) any reasonable listener would recognize the declarant was facing an ongoing emergency,¹¹⁸ (3) the elicited statements were necessary to resolve the present emergency rather than simply to learn what had happened in the past,¹¹⁹ and (4) the declarant’s answers in *Davis* were frantic, not tranquil, and she was

106. *Id.*

107. *Id.* at 2276-78.

108. 126 S. Ct. 2266.

109. *Id.* at 2272.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 2279-80.

117. *Id.* at 2276.

118. *See id.* at 2277.

119. *Id.*

not in a safe environment; in *Hammon*, as in *Crawford*, the difference in the level of formality between the two statements was striking.¹²⁰

The decision in *Davis* is important in analyzing the medical exception because many 911 telephone calls involve calls for medical assistance or are made during a medical emergency. If a caller reports an injured child or infant who is not breathing and answers questions from the dispatcher, including queries about how the child was injured, the entire statement should be admissible as nontestimonial.¹²¹ In such situations the caller is usually speaking of events as they happen and during an ongoing emergency. Dispatcher questions about how and by whom the child was injured are necessary for a tentative medical diagnosis, in order for the dispatcher to decide if paramedics or an ambulance should be sent, and to help resolve the ongoing emergency. Often the dispatcher will give advice on first aid or even instruct the caller to perform cardiopulmonary resuscitation (CPR) or take other action. Finally, the medical emergency call is not made in a tranquil environment; such statements are not the equivalent of the kind of formalized statements in *Crawford* and *Hammon*.

Medical calls should be considered admissible under the medical exception, especially when the dispatcher is a paramedic or an ambulance service dispatcher and even when the facts do not meet the four factors enumerated in *Davis*. In making a 911 call during a medical emergency, the medical exception should apply because the caller is requesting medical assistance and treatment. In these situations, the dispatcher is acting, in effect, as an agent of a physician or a hospital and for the purpose of providing an initial medical diagnosis and medical care. Even when the dispatcher is not a medical professional, if the caller is seeking medical assistance or help, the statements should be admissible under the medical exception.¹²²

120. *Id.* at 2276-78. In *Crawford* the statement that was held to be testimonial was an audiotape statement of the defendant's wife, which was taken during custodial police interrogation and implicated the husband in an assault case. *See Crawford*, 541 U.S. at 38-40.

121. The primary purpose of such a call is to obtain medical assistance; thus, under *Davis*, the caller's statements should be considered nontestimonial. *See infra* notes 241-43, 270. The dispatcher asks questions for the primary purpose of helping the caller obtain medical care for the injured person.

122. *See* 2 MCCORMICK ON EVIDENCE § 277, at 233-36 (John W. Strong ed., 5th ed. 1999) (stating that as long as the statements are made in order to receive medical care, even statements made to non-physicians are admissible under the medical exception).

B. In Davis, Under an Originalist Interpretation, the Court Should Have Used a Spontaneous Declarations Analysis and Not a Res Gestae Analysis

Much of the Court's analysis in *Davis v. Washington* shares characteristics of traditional common law spontaneous declarations or *res gestae* analysis.¹²³ *Res gestae* was a somewhat muddled concept that used one Latin phrase—meaning “things done”—to describe different types of out-of-court statements under one label, and it later evolved into other specific exceptions.¹²⁴ The *res gestae* rule held that statements made spontaneously and concurrently with the incident were inherently credible and admissible because they were spontaneous.¹²⁵ *Res gestae* began its development as a confrontation exception before the ratification of the Constitution.¹²⁶

Under the four-factor analysis used by the Court in *Davis*, the Court's holding can be justified on originalist grounds if one uses *res gestae* or spontaneous declarations as the rationale because the statements were made spontaneously and concurrently with the incident.¹²⁷ The

123. For example, statements made to police during an “ongoing emergency” are admissible as nontestimonial hearsay. See *Davis*, 126 S. Ct. at 2276-77. “A 911 call . . . is ordinarily not designed primarily to ‘establish or prove’ some past fact, but to describe current circumstances requiring police assistance.” *Id.* at 2276. “McCottry’s frantic answers were provided over the phone, in an environment that was not tranquil, or even . . . safe.” *Id.* at 2277.

124. See Tere E. Foster, *Present Sense Impressions: An Analysis and a Proposal*, 10 LOY. U. CHI. L.J. 299, 304-05 (1979). An early American treatise also refers to “*res gestae*.” See PHILLIPPS, *supra* note 38, at 201-02.

125. See Note, *The Present Sense Impression Hearsay Exception: An Analysis of Contemporaneity and Corroboration Requirements*, 71 NW. U. L. REV. 666, 666-67 (1976) (indicating early decisions often required the declarations on intent and mental state to accompany the happening of the event, but courts sometimes “lengthened” the event under theories based on *res gestae* doctrine).

126. See *Ship Money Case*, 3 How. St. Tr. 825, 988 (1637) (stating counsel argued for the truth of a historian as being *res gestae*); *The Trial of John Horne Tooke*, 25 How. St. Tr. 437, 440 (1794). In *Aveson v. Kinnaird*, the court cites the 1694 case of *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694), as a case holding that out-of-court statements may “be given in evidence as part of the *res gestae*.” *Aveson v. Kinnaird*, 6 East 188, 193-94, 102 Eng. Rep. 1258, 1261 (K.B. 1805). Wigmore also refers to *Trevanion*, which *Crawford* also cites, but as an example of spontaneous declarations, *Crawford*, 541 U.S. at 58 n.8, as the earliest use of the *res gestae* doctrine by an English court. See 6 WIGMORE, EVIDENCE § 1768, at 183 (3d ed. 1940). The third edition, the last edition written by Wigmore, focuses solely on common law cases, unlike later editions, which incorporate federal and state rules of evidence. In doing an originalist analysis, it is important to look at confrontation exceptions as they were in 1791, or shortly thereafter, and not through the prism of rules of evidence, which were created well after 1791.

127. See *infra* notes 128-47.

Court's analysis in *Davis* has the effect, however, of conflating the common law exceptions of spontaneous declarations and *res gestae* into one confrontation exception. In applying the rationale of *res gestae* and spontaneous declarations analysis, without using those terms, the Court's analysis does not follow the Founders' understanding and use of the spontaneous declarations exception.

In implying that the victim's statements to the dispatcher might, at some point, become testimonial and thus inadmissible, the Court in *Davis* confused the requirements of the two exceptions.¹²⁸ Justice Scalia's opinion in *Davis* held that the utterance must be strictly contemporaneous with the cause of the emergency and made at a time before the exciting influence loses its effect. Wigmore considers this contemporaneousness doctrine to be part of the "Verbal Act" doctrine and states that it applies to only *res gestae* analysis.¹²⁹ Under the verbal act doctrine, utterances that accompanied the act or the conduct to which it was desired to give legal effect were admissible.¹³⁰ When the act was considered to have no intrinsic legal significance, its legal importance or tenor could be ascertained by looking at the words that accompanied it.¹³¹ This time limitation—requiring that the statements accompany the verbal act—does not exist for spontaneous declarations.¹³² The spontaneity of verbal declarations is dependent on the declarant still being under the stress or excitement produced by the startling event or issue.¹³³

128. See *Davis*, 126 S. Ct. at 2277 (2006).

In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when *Davis* drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial

Id. Of course, *Davis* could have returned at any time. McCottry probably did not consider the emergency "over" until the police arrived, which is probably the earliest point at which she would have felt safe. Dispatchers usually tell the caller to stay on the line until the police arrive because in domestic abuse calls, the dispatcher does not consider the emergency to be over and the caller to be safe until that point.

129. See 6 WIGMORE, *supra* note 126, § 1750, at 142.

130. *Id.* § 1745, at 132-33.

131. See *id.*

132. *Id.* at 133.

133. *Id.* Justice Scalia also misinterprets a case that the Founder's generation might have considered as supporting the admission of all 911 statements in *Davis* under a *res gestae* analysis. In *Davis* Justice Scalia states that *King v. Braiser*, 1 Leach 199, 168 Eng. Rep. 202 (K.B. 1779) did not involve statements during an ongoing emergency. *Davis*, 126 S. Ct. at 2277. Justice Scalia notes: "The case would be helpful to *Davis* if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events." *Id.* The

Under an originalist analysis, all of a 911 tape should be admissible if the victim is still under the stress or excitement of the influencing event or issue, as was the victim in *Davis*.¹³⁴ *Thompson v. Trevanion*,¹³⁵ which *Crawford* cites,¹³⁶ illustrates that Justice Scalia has confused the requirements of the two exceptions. In *Trevanion* the statements were made after the wife was stabbed by the husband; they were not made during the stabbing.¹³⁷ The case states that the wife's statements were made "immediate[l]y upon the hurt received, and before . . . she had time to devise or contrive anything for her own advantage."¹³⁸ The declarant's statements must be contemporaneous with, if anything, the pain or hurt received; it is not required that the statements be contemporaneous with the actual infliction of the injuries. The pain and excitement caused by the stabbing did allow the wife's statements to be admissible, and *Trevanion* did not impose a requirement that the verbal declarations accompany the stabbing.¹³⁹ Because the spontaneous declarations exception existed in 1791, under an originalist analysis, all of the 911 tape should be admissible as long as the declarant is under the stress and excitement of the event, which Ms. McCottry was.

C. The Entire 911 Call Should Be Admissible Under Hue and Cry

Another common law doctrine that shows Justice Scalia's analysis to be mistaken is that of "hue and cry."¹⁴⁰ During the time of the

court in *Brasier* did not address the issue of whether the statements were admissible as part of an "ongoing emergency" under a *res gestae* analysis. *Brasier*, 1 Leach 199, 168 Eng. Rep. 202. Phillip's treatise states that the statements in *Brasier* should be considered part of one ongoing transaction. "So, on an indictment for a rape, what the girl said recently after the fact, (so, that it excluded a possibility of practising on her), has been held to be admissible in evidence, as a part of the transaction." PHILLIPPS, *supra* note 38, at 202. However, contrary to what Phillipps states, the Court in *Brasier* did not actually apply *res gestae* analysis because it held that normally evidence should be received from the girl while under oath. *Brasier*, 1 Leach at 199, 168 Eng. Rep. at 203.

134. See *Davis*, 126 S. Ct. at 2271 ("[T]he trial court admitted the recording of her exchange with the 911 operator."); *State v. Davis*, 111 P.3d 844, 847 (Wash. 2005) (indicating that the trial court found the 911 call to be admissible as an "excited utterance").

135. *Skin*, 402, 90 Eng. Rep. 179.

136. *Crawford*, 541 U.S. at 58 n.8.

137. See *Thompson*, *Skin*, at 402, 90 Eng. Rep. at 179.

138. *Id.*

139. The statements in travail confrontation exception also supports this analysis. See *infra* notes 157-62.

140. See MICHAEL DALTON, *THE COUNTRY JUSTICE* 248 (1618) (photo. reprint ed. 2003) (stating that a woman that is "ravished" ought to raise hue and cry or complain presently to some credible persons). "Hue and cry" also referred to raising an alarm:

Founders, the degree to which hue and cry was admissible as a confrontation exception was fluctuating.¹⁴¹ Some common law courts of the Founders' time believed hue and cry statements were admissible even when the declarant was unavailable.¹⁴² These courts considered such hue and cry statements a form of spontaneous declarations and thus admissible.¹⁴³ Under hue and cry, statements could be admissible

Every Justice of the Peace may cause Hue and Cry, fresh pursuit, and search to be made, upon any Murder, Robbery, Theft, or other felony committed: and this may be done by force. . . . Note, that all Hue and Cry ought to be made from town to town, and from country to country, and by horse-men and foot-men; otherwise it is no lawful pursuit.

Id. at 56-57. Probably the best illustration of hue and cry is from Dickens:

This was all done in a minute's space, and the very instant that Oliver began to run, the old gentleman, putting his hand to his pocket, and missing his handkerchief, turned sharp round. Seeing the boy scudding away at such a rapid pace, he very naturally concluded him to be the depredator, and, shouting "Stop thief!" with all his might, made off after him, book in hand. But the old gentleman was not the only person who raised the hue and cry. . . .

"Stop thief! stop thief!" There is a magic in the sound. The tradesman leaves his counter, and the carman his waggon; the butcher throws down his tray, the baker his basket, the milkman his pail, the errand boy his parcels, the schoolboy his marbles, the paviour his pick-axe, the child his battledore: away they run, pell-mell, helter-skelter, slip-dash, tearing, yelling, and screaming, knocking down the passengers as they turn the corners, rousing up the dogs, and astonishing the fowls; and streets, squares, and courts re-echo with the sound.

"Stop thief! stop thief!" The cry is taken up by a hundred voices, and the crowd accumulate at every turning. Away they fly, splashing through the mud, and rattling along the pavements; up go the windows, out run the people, onward bear the mob: a whole audience desert Punch in the very thickest of the plot, and, joining the rushing throng, swell the shout, and lend fresh vigor to the cry, "Stop thief! stop thief!"

CHARLES DICKENS, *OLIVER TWIST* 76-77 (Philip Horne, ed., Penguin Books 2003) (1837).

141. See 5 WILLIAM BLACKSTONE, *COMMENTARIES* 210-15, 292-94 (St. George Tucker ed., Rothman Reprints 1969) (1803) (showing that Blackstone referred to the doctrine but did not state whether the statements were admissible only as corroboration of a woman's testimony or came in substantively as a confrontation exception even when the declarant was unavailable). Whether hue and cry statements could be used when the declarant was unavailable was unsettled law, not resolved until forty-eight years after the ratification of the Confrontation Clause. See *R. v. Walker*, 2 Moo. & Rob. 212, 213-14, 174 Eng. Rep. 266, 266 (Nisi Prius 1839) (stating that only the complaint itself and not the details of the rape were admissible, and even then the complaint was only admissible for corroborative purposes); see also 6 WIGMORE, *supra* note 126, § 1760, at 172.

142. See 6 WIGMORE, *supra* note 126, § 1760, at 171. Hue and cry statements, if taken up by others in addition to the victim—a crowd for example—were a confrontation exception in 1791. See, e.g., *King v. Gordon*, 21 How. St. Tr. 485, 535-36 (K.B. 1781); 1 STARKIE, *supra* note 38, at 48 (stating that the cry of a mob is admissible if the cry is part of the transaction).

143. See WIGMORE, *supra* note 126, § 1760, at 171.

after a rape as long as the victim went to the authorities as soon as possible after the incident.¹⁴⁴

Emergency 911 calls bear a striking resemblance to common law hue and cry statements. In both cases, the declarant's statements can be made to the authorities or overheard by the authorities, and both are usually made under the stress of an exciting event. In both cases, an individual is calling for help and raising an alarm. There is no requirement under hue and cry that the statements be contemporaneous with the assault or rape itself. Justice Scalia's *Davis* contemporariness requirement for 911 calls is not historically accurate when applied to statements that would have been admissible in 1791 as hue and cry or spontaneous declarations. If one uses an originalist analysis, Justice Scalia's *Davis* contemporariness analysis is mistaken unless one confines oneself solely to the Court's interpretation of *res gestae* analysis.¹⁴⁵

But the Court in *Davis* does not refer to spontaneous declarations, hue and cry or *res gestae* analysis, because acknowledging that additional confrontation exceptions existed in 1791 undercuts the Court's own historical analysis in *Crawford*, which claims that the only confrontation exception for testimonial statements in 1791 was dying declarations.¹⁴⁶

144. Justice Scalia's *Crawford* analysis indicates that the Founders would have considered statements to police to be less reliable than statements made to others. See *Crawford*, 541 U.S. at 52-53. The actual use of hue and cry in 1791 illustrates that Justice Scalia's analysis is mistaken. Statements under hue and cry were considered more reliable when made to the authorities as soon as possible after the event. See 5 BLACKSTONE, *supra* note 141, at 210-15. Because hue and cry statements could be made to constables or justices of the peace, the Founders would not have considered law enforcement involvement, in itself, to have made the statements less reliable. Constables did exist in England during the time of the Founders; if Justice Scalia's analysis is correct, hue and cry statements to constables, or overheard by constables, would have been considered less reliable—not more reliable.

145. Even under an originalist *res gestae* analysis, the Court's reasoning is questionable. The 911 telephone call constitutes one ongoing transaction, and the caller was relaying the "immediate terror of personal violence" that occurred from the actions of the perpetrator. See, e.g., *Aveson*, 6 East at 193-94, 102 Eng. Rep. at 1261. Under *res gestae* analysis, the entire phone call should be admissible—whether the dispatcher asked questions or not. During the time of the Founders, when a perpetrator was still at large, the length of the ongoing transaction under *res gestae* or hue and cry analysis did not end simply because a constable at the scene asked questions of the victim. During a chase of a perpetrator, one can readily envision a constable, or crowd, asking the victim questions, such as: Which way did the perpetrator go? How was he dressed? What did he look like? What happened?

146. See *Crawford*, 541 U.S. at 56 n.6.

It appears that the *Davis* case, one the Court purportedly uses to clarify the law, may result in the revival of the *res gestae* doctrine.¹⁴⁷

IV. THE MEDICAL EXCEPTION EXISTED IN THE FOUNDERS' ERA

A. *The Medical Exception Evolved from the Present Sense Impression Exception*

A careful review of the law shows that statements under a medical exception were considered admissible at the time of the Founders and were admitted especially in murder and rape cases.¹⁴⁸ The medical exception evolved from the “present sense impression” and “present

147. The *res gestae* doctrine, although in existence in 1791, became less commonly used in the twentieth century because “[t]he exposition of this Exception might well be approached with a feeling akin to despair. There has been such a confounding of ideas, and such a profuse and indiscriminate use of the shibboleth ‘*res gestae*’, that it is difficult to disentangle the real basis of principle involved.” 6 WIGMORE, *supra* note 126, § 1745, at 131.

148. See *Earl of Pembroke’s Trial*, 6 How. St. Tr. 1309, 1325, 1327, 1331, 1336, 1346 (1678) (holding that statements regarding pain and cause of a wound by a dying man to bystanders and physician admissible: “[T]here are little circumstances, which are always allowed for evidence in such cases, where men receive any wounds to ask them questions while they are ill, about it, who hurt them.”); *Cannings Trial*, 19 How. St. Tr. 283, 478 (1754); *Aveson*, 6 East 186, 102 Eng. Rep. 1258 (K.B. 1805) (upholding the admission of statements of an unavailable witness based on the medical exception).

It was then objected by the plaintiff’s counsel that what she [the patient] said was not evidence: but the learned Judge admitted the evidence, considering that what the surgeon called on the part of the plaintiff had sworn as to the state of health of Mrs. Aveson was in a great measure founded on her answers to his inquiries, and as in general any opinion of the state of health of a person must partly be formed on the account which such person gives of his complaints.

Aveson, 6 East at 189, 102 Eng. Rep. at 1259.

The opinion of a medical man upon the state of a person’s health, which is the object of inquiry, is evidence per se from the necessity of the case; therefore the grounds of his opinion are collaterally let in as evidence also, in which light only the answers of the wife to his inquiries become examinable. And there is less ground for suspicion of the truth of such answers given to a professional man, whose advice is presumed to be asked with a view to be acted upon, and where the party therefore has a direct personal interest to answer truly, than where loose conversations are held with other persons, from which no consequence is expected to ensue.

Id. at 194, 102 Eng. Rep. at 1261; see also Stephen Landsman, *One Hundred Years of Rectitude: Medical Witnesses at the Old Bailey, 1717-1817*, 16 LAW & HIST. REV. 445, 445-94 (1998); THOMAS FORBES, *SURGEONS AT THE BAILEY: ENGLISH FORENSIC MEDICINE TO 1878*, 89, 107-08 (1985).

mental state” exceptions.¹⁴⁹ Initially, the common law admitted spontaneous expressions of pain and suffering without regard to whom the declarant made the statements.¹⁵⁰ A spontaneous statement of pain and suffering, even as related by someone other than the injured person, was considered to offer the best evidence of the suffering and its true character; the declarant’s reconstruction of the pain in the courtroom was considered less trustworthy than statements made while the person felt the injury.¹⁵¹

Common law courts generally recognized the present sense impression exception, but few common law courts explicitly distinguished it from spontaneous declarations or *res gestae*.¹⁵² *Crawford* acknowledges that the spontaneous declarations exception existed in 1791.¹⁵³ Statements to physicians often were just as spontaneous as statements to witnesses of an injury, because the declarant, who was often in pain, would blurt out the truth with no dissembling.¹⁵⁴ Necessity also justified admission of the statements because no one else but the patient could describe where or when the patient felt the pain or report another individual’s present sense impressions or subjective mental state.¹⁵⁵

149. See, e.g., *Tooke*, 25 How. St. Tr. at 440; *Rawson v. Haigh*, 2 Bing. 99, 130 Eng. Rep. 242 (C.P. 1824); see also *The Present Sense Impression Hearsay Exception*, *supra* note 125, at 666-77 (early decisions often required that the declarations of intent and mental state accompany the happening of the event, but courts sometimes “lengthened” the event under theories based on the *res gestae* doctrine). Sometimes the statements were considered admissible because present sense impressions and state of mind exceptions were not considered to be hearsay. *The Present Sense Impression Hearsay Exception*, *supra* note 125, at 634.

150. See, e.g., *Goodwin v. Harrison*, 1 Root 80, 81 (Conn. 1781) (allowing the mother in a civil action to state the daughter’s complaints as an exception to hearsay “founded upon the necessity of the case”); see also William H. Theis, *The Doctor as Witness: Statements for Purposes of Medical Diagnosis or Treatment*, 10 LOY. U. CHI. L.J. 363 (1979).

151. Theis, *supra* note 150, at 363-64.

152. See *Foster*, *supra* note 124, at 304-05. An early American treatise also refers to *res gestae*. See PHILLIPPS, *supra* note 38, at 201-02; see also 6 WIGMORE, *supra* note 126, §§ 1747-51.

153. See *Crawford*, 541 U.S. at 58 n.8.

154. Theis, *supra* note 150, at 364.

155. See *Aveson*, 6 East at 194-95, 102 Eng. Rep. at 1261.

The opinion of a medical man upon the state of a person’s health, which is the object of the inquiry, is evidence per se from the necessity of the case; therefore, the grounds of his opinion are collaterally let in as evidence also, in which light only the answers of the wife to his inquiries become examinable. . . . What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing.

Id.; see also Mosteller, *supra* note 5, at 260 n.8.

Another early common law exception, whose rationale was similar to *res gestae* and present sense impressions, was the exception for statements in travail. The statements in travail exception used the reasoning that such statements were similar to spontaneous declarations, and the painful circumstances provided some guarantee of sincerity.¹⁵⁶ Statements in travail were statements made by a woman from the time the pains of childbearing commenced until her delivery.¹⁵⁷ A mother's statements made while in labor, naming and accusing the father, were admissible at trials in "bastardy" cases.¹⁵⁸ Cases involving statements in travail were considered to be criminal in nature and an exception to confrontation; they were admissible under American common law during the 1600s and 1700s.¹⁵⁹ English common law also recognized the exception.¹⁶⁰ The other rationale for admissibility was necessity. Necessity was considered to exist because the mother was sometimes disqualified as an interested party.¹⁶¹ Both American and English cases show that the statements in travail exception to confrontation existed in 1791.

One reason for the exceptions of spontaneous declarations or *res gestae*, present sense impressions, statements in travail, and the medical exception, was that they shared a common characteristic. These declarations were often made "immediat[ely] upon the hurt received and before [the declarant] had time to devise or contrive anything for her own advantage."¹⁶²

156. See 4 WIGMORE, *supra* note 126, § 1141, at 230-31.

157. See BLACK'S LAW DICTIONARY, *supra* note 27, at 1344.

158. See, e.g., *Hitchcock v. Grant*, 1 Root 107, 108 (Conn. 1788) ("charging the man in the time of her travail an essential requisite"); *Warner v. Wiley*, 2 Root 490, 490 (Conn. 1788) (stating that John had begotten her with child "in fornication" and "was arrested"); *Davis v. Salisbury*, 1 Day 278, 282 (Conn. 1804) (indicating that these cases are criminal in nature); *Drowne v. Stimpson*, 2 Mass. 441, 443 (1807) (stating that the suit is based on "[a]n Act for the punishment of fornication, and for the maintenance of bastard children"); *Commonwealth v. Cole*, 5 Mass. 517, 518 (1809) (indicating that the mother is "*particeps criminis*" to the fornication).

159. See 4 WIGMORE, *supra* note 126, § 1141, at 230-31; see also Helen Brock & Catherine Crawford, *Forensic Medicine in Early Colonial Maryland, 1633-83*, in LEGAL MEDICINE IN HISTORY 25, 36 (Michael Clark & Catherine Crawford, eds. 2004). "The birth of a bastard was proof of illicit sex and was investigated as a crime but also because it was feared that the child would become a charge on the community." Brock & Crawford, *supra*, at 36. "[A] considerable number of such cases were brought to court, mainly on the basis of hearsay and circumstantial evidence." *Id.*

160. See, e.g., *Bishop of Lincoln's Trial*, 3 How. St. Tr. 769, 773 (1637).

161. See 4 WIGMORE, *supra* note 126, § 1141, at 230.

162. *Crawford*, 541 U.S. at 58 n.8 (quoting *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694)).

B. In Giving a Medical Diagnosis or Opinion, Physicians Could Testify About Patient's Out-of-Court Statements If the Physician Relied on Them In Forming the Opinion

By the time of the Founders, physicians in England were allowed to give expert opinions when testifying.¹⁶³ Physicians were also allowed to offer expert opinions in America.¹⁶⁴ Medical experts gave opinions on insanity that were based on out-of-court statements of witnesses who did not testify.¹⁶⁵ Physicians also offered opinions on cause of death in infanticide cases, the cause of death or illness in poisoning cases, and the cause of inflammations.¹⁶⁶ Physicians were also allowed to testify

163. See *Folkes v. Chadd*, 3 Doug. 157, 157, 99 Eng. Rep. 589, 589 (K.B. 1783) (holding by Lord Mansfield stating that those with special training in the sciences can give an expert opinion); see also, e.g., 1 GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 301 (1791); PEAKE, *supra* note 45, at 137 (stating that a physician may give an opinion on the effects of a disease and its consequences); FORBES, *supra* note 148, at 40-48 (stating that medical experts, including midwives, began testifying as early as the thirteenth century, and the practice was well established in England in the Middle Ages); David Harley, *The Scope of Legal Medicine in Lancashire and Cheshire, 1660-1760*, in *LEGAL MEDICINE IN HISTORY* 45 (Michael Clark & Catherine Crawford, eds. 2004) (midwives and medical men had been called upon for centuries to give expert testimony even though there were no treatises on legal medicine until the late eighteenth century).

164. See Brock & Crawford, *supra* note 159, at 25-44; SHARON BLOCK, *RAPE AND SEXUAL POWER IN EARLY AMERICA* 111-13 (2006) (indicating that trial manuscripts from the 1700's show physicians gave opinions on whether an alleged victim's injuries were consistent with rape). Additional early American cases, although later than 1791, also show that the practice of allowing physicians to give opinions was widely accepted. See, e.g., *Hathorn v. King*, 8 Mass. 371, 371-72 (1811) ("The physicians may be inquired of, whether, from the circumstances of the patient, and the symptoms they observed, they are capable of forming an opinion of the soundness of her mind, and if so, whether they from thence conclude that her mind was sound or unsound; and in either case, they must state the circumstances or symptoms from which they draw their conclusions."); *Dickinson v. Barber*, 9 Mass. 225, 225-26 (1812) (stating that depositions of physicians in a civil insanity case must state facts upon which the opinion is based to be admissible and facts either they or others testified to).

165. See JOEL P. EIGEN, *WITNESSING INSANITY: MADNESS AND MAD DOCTORS IN THE ENGLISH COURT* 133-60 (1995); 1 NIGEL WALKER, *CRIME AND INSANITY IN ENGLAND: THE HISTORICAL PERSPECTIVE* 66-72 (1968); see generally R.A. HOUSTON, *MADNESS AND SOCIETY IN EIGHTEENTH-CENTURY SCOTLAND* (2000); ROY PORTER, *MIND-FORG'D MANACLES: A HISTORY OF MADNESS IN ENGLAND FROM THE RESTORATION TO THE REGENCY* (1987); DANA RABIN, *IDENTITY, CRIME AND LEGAL RESPONSIBILITY IN EIGHTEENTH-CENTURY ENGLAND* (2004).

166. See, e.g., 1 LEONARD MACNALLY, *THE RULES OF EVIDENCE ON PLEAS OF THE CROWN* 329-35 (Philadelphia, P. Byrne 1804); Catherine Crawford, *The Emergence of English Forensic Medicine: Medical Evidence in Common Law Courts, 1730-1830* (April 1987) (unpublished Ph.D. dissertation, Oxford University) (on file with the Author).

about what a child rape victim stated, even when the child did not testify under oath.¹⁶⁷

Connecticut may have allowed a child witness's out-of-court statement to be admissible at trial, at least if the out-of-court statement was under oath:¹⁶⁸ "In England, it has been decided, that on an indictment for a rape, the deposition of a girl taken before the committing magistrate and signed by him, may, after her death be read in evidence . . . provided she was sworn, and appeared competent"¹⁶⁹

167. See, e.g., LANGBEIN, ORIGINS, *supra* note 21, at 239-41 & n.277 (stating that Old Bailey Sessions papers show that in 1726, 1741, and in 1753, physicians were allowed to state what the child told them about being raped even though the child did not testify). In America, it appears that physicians were also allowed to testify about what they were told by children who had been raped. See, e.g., JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 645 n.140 (1944) (citing Trial of James Gaines, Ms. Mins. SCJ. 1754-57 (Engr.) 112, 115, 116) (indicating child also testified but not under oath).

Some who adopt an originalist methodology might argue one should not cite historical sources after 1791, because the Founders could not have consulted authorities published beyond that date. *Crawford*, however, cites a large number of materials published after 1791 for the proposition that these materials are authorities for what the Founders' views were in 1791. See *Crawford*, 541 U.S. at 49-50. The Court in *Davis* also cites a number of materials published after 1791. Because an originalist like Justice Scalia refers to materials published after 1791 in his opinions, Justice Scalia and originalist defenders of *Crawford* and *Davis* can hardly consistently argue that it is inappropriate for others to do so. See *Crawford*, 541 U.S. at 47 n.2, 49, 50-51; see also *Davies*, *supra* note 20, at 193 n.291.

This Article does cite several sources published after 1791 as authority that the medical exception to confrontation existed in 1791. Citation of these sources is justifiable. First, unlike many of the materials cited by Justice Scalia, the original historical sources cited as authorities for this article were published shortly after 1791, and all were published within thirty-seven years of the Confrontation Clause's ratification. A significant number of the Founders, including those at the state ratifying conventions, lived for several decades after 1791. It is only reasonable to assume that if these Founders, and those who ratified the amendment in the state conventions, thought that the existence of the medical exception violated the "original understanding" of the Confrontation Clause and its exceptions, they would have publicly indicated such.

Nor should one attempting to discern the views of the Founders limit oneself only to materials written by 1791 for the Founders' views of the Bill of Rights, or 1788 for their views of the Constitution. See, e.g., HAROLD HOLZER, LINCOLN AT COOPER UNION: THE SPEECH THAT MADE ABRAHAM LINCOLN PRESIDENT (2004) (indicating that Abraham Lincoln researched the views of the Founders by relying on many sources, including those written after 1788, to make a persuasive argument that the Founders did not support the expansion of slavery into the territories).

168. See ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL AND CIVIL CASES 125-26 (Arno Press 1792) (1810).

169. *Id.* at 125-26. Zephaniah Swift's well-known American treatise cites as its authority *King v. Fleming and Windham*, 2 Leach. 854, 168 Eng. Rep. 526 (Cr. App. 1799). Importantly, in *Fleming and Windham's Case*, the assize trial judge cited the

Other American jurisdictions may have allowed very young children to testify even when not under oath.¹⁷⁰ It appears that these American jurisdictions did not follow the English case that is often cited for the rule that all testimony must be given under oath.¹⁷¹ Instead, these jurisdictions may have accepted Sir Matthew Hale's position that the necessity of the oath should not be required when very young children have been sexually assaulted. Hale, a widely respected former Lord Chief Justice of the Court of King's Bench, believed that even if the child did not have the ability to understand the oath, the child should still be allowed to testify because of necessity.¹⁷²

Printed reports of early American appellate court decisions were not widely available until after 1791.¹⁷³ One can nonetheless glean an understanding of early American law by reviewing American justice of the peace manuals.¹⁷⁴ Several of these early manuals describe the medical exception, indicating that physicians could give opinions based on the statements of others: "[P]ersons of skill may speak not only as to facts, but may give their opinions in evidence. Thus, the opinion of a medical man is evidence as to the state of a patient."¹⁷⁵ A Pennsylvania manual indicated, "Though witnesses can in general speak only as to facts, yet in questions of science, persons versed in the subject, as physicians, may deliver their opinions upon oath, on the case proved by the other witnesses."¹⁷⁶ A Massachusetts manual stated, "Thus a

Marian statutes for his authority to allow the girl's earlier sworn statement to be admitted even though the girl had not signed the deposition. 2 Leach at 855, 168 Eng. Rep. at 526-27.

170. See JOHN HAYWOOD, *THE DUTY AND AUTHORITY OF JUSTICES OF THE PEACE IN THE STATE OF TENNESSEE* 68 (1810) (stating that if a child under twelve does not understand the obligations of the oath "she ought to be heard without oath to give the court information," but additional evidence must be added in order to convict); JAMES PARKER, *THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE* 140 (1792) (especially in rape cases and "such crimes as are practiced on children," young children may be examined without oath); HENRY POTTER, *THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE, AND A GUIDE TO SHERIFFS, CORONERS, CLERKS, CONSTABLES, AND OTHER CIVIL OFFICERS ACCORDING TO THE LAWS OF NORTH CAROLINA* 256 (Raleigh, Joseph Gales 1816) (indicating that even if a child does not understand the oath, she should testify anyway, but there should be concurrent evidence in order to convict).

171. See *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (K.B. 1779). Given that *Brasier* was decided three years after the Declaration of Independence, it should not be surprising that states did not follow its reasoning.

172. See HALE, *supra* note 19, 634-35. Hale also argued that in such cases there must be concurrent evidence of the offense having occurred. See *id.* at 634.

173. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 79, 282-92 (1973).

174. See *id.* at 287.

175. *THE NEW HAMPSHIRE JUSTICE OF THE PEACE* 165 (Concord, Isaac Hill 1824).

176. GRAYDON, *supra* note 54, at 118.

physician who has not seen the particular patient, may, after hearing the evidence of others, be called to prove on his oath, the general effects of the disease described by them; and its probable consequences in the particular case”¹⁷⁷

According to an early, well-recognized evidence treatise by Phillipps:

In general, the opinion of a witness is not evidence: he must speak to facts. But on questions of science or trade, or others of the same kind, persons of skill may speak not only as to facts, but are allowed also to give their opinions in evidence. Evidence of character is founded on opinion, and an opinion of a medical man is evidence as to the state of a patient.¹⁷⁸

Phillips also states, “On trials for murder, by poisoning, the evidence of medical men is frequently required to determine, whether the deceased came to his death by poison.”¹⁷⁹ Phillips also states, “Where the opinions of physicians are given in evidence, the facts on which they ground their opinions must be stated.”¹⁸⁰ The first treatise on evidence law written by an American specifically referred to surgeons and those having medical skills as being able to give opinions based “upon a consideration of all the symptoms and circumstances of the case.”¹⁸¹

Statements under the medical exception should also be admissible today because, even under an originalist analysis, confrontation and cross-examination was not always considered necessary, especially in cases involving the sexual assault of children.¹⁸² Zephaniah Swift’s treatise on evidence law indicates that even as late as 1810, statements admissible under the Marian statutes were considered to create exceptions to confrontation and cross-examination when necessity existed, such as the unavailability of a child rape victim who died before trial.¹⁸³ Phillipps and Swift’s citations of the 1799 *Flemming and*

177. RODOLPHUS DICKINSON, A DIGEST OF THE COMMON LAW, THE STATUTE LAWS OF MASSACHUSETTS, AND OF THE UNITED STATES, AND THE DECISIONS OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, RELATIVE TO THE POWERS AND DUTIES OF THE JUSTICES OF THE PEACE 131 (Deerfield, John Wilson 1818).

178. PHILLIPPS, *supra* note 38, at 208.

179. *Id.* at 208-09 n.(b).

180. *Id.*

181. 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 73 (2d ed. 1828).

182. See generally LANGBEIN, ORIGINS, *supra* note 21, at 238-42. “The Old Bailey also tolerated flagrant hearsay in rape prosecutions involving a child victim who was not competent to testify because she was too young to appreciate the significance of her oath.” *Id.* at 239.

183. See SWIFT, *supra* note 168, at 125-26. Phillipps’s first American edition was published in 1816, and it cited *Flemming and Windham’s Case*. PHILLIPPS, *supra* note 38,

Windham's Case shows that the doctrine of the case was known in the newly independent United States.

C. *The Medical Exception Allowed Physicians to Testify About the Out-of-Court Statements of Patients Even When the Statements of Patients Were Not Made Under Oath*

One commentator argues that physicians in 1791 were allowed to give an opinion based only on evidence introduced through testimony that was given under oath in the courtroom.¹⁸⁴ While there are some cases

at 277 n.1.

184. See Ross A. Oliver, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington*, 55 HASTINGS L.J. 1539, 1548-49 (2004).

“The expert witness could testify only if necessary to provide information that was beyond the ken of the average juror, could testify only in response to a hypothetical question, could not assume anything that was not already in evidence, and could not offer an opinion on the ultimate issue before the jury.”

Experts at common law were likewise limited in the information upon which they could base their opinion to personally known facts or facts in evidence presented in the expert's presence or through a hypothetical question.

Id. at 1548.

Mr. Oliver's authorities for his argument consist of one 1901 law review article and a 1998 evidence law treatise. See *id.* at 1548 n.61. Although the evidence law treatise he cites does refer to one 1760 case, that case stands only for the proposition that the physician must specify the specific facts already in evidence upon which the surgeon bases his opinion. See *Rex v. Ferrers*, 19 How. St. Tr. 886, 942-44 (1760).

A case Oliver appears to rely on, *United States v. Dukagjini*, 326 F.3d 45 (2d Cir. 2002), actually affirmed the defendant's conviction and found that if any error occurred, it was harmless. See *id.* at 59-63. In *Dukagjini* the court acknowledged that expert testimony can stray over the line into violating confrontation rights if the conclusions are too sweeping and rely too much on inadmissible out-of-court statements. See *id.* at 53. The court also stated, however, that normally “expert witnesses can testify to opinions based on hearsay or other inadmissible evidence if experts in the field reasonably rely on such evidence in forming their opinions. . . .” *Id.* at 57 (quoting *United States v. Locasio*, 6 F.3d 924, 938 (2d Cir. 1993)). The doctrine of allowing the testimony to be admissible if experts in the field reasonably rely on it is an old one. See, e.g., *Aveson*, 6 East 186, 102 Eng. Rep. 1258. “And there is less ground for suspicion of the truth of such answers given to a professional man, whose advise is presumed to be asked with a view to be acted upon, and where the party therefore has a direct personal interest to answer truly” *Id.* at 194, 102 Eng. Rep. at 1261. “What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing.” *Id.* at 195, 102 Eng. Rep. at 1261.

Professor Mosteller also raises similar concerns about expert witnesses—especially physicians—and confrontation exceptions, but he also focuses on the differences between the Federal Rules of Evidence and common law at the time the rules were adopted. See Mosteller, *supra* note 5. For an argument similar to Oliver's, but one that focuses on laboratory reports, see Bradley Morin, *Science, Crawford, and Testimonial Hearsay:*

that are ambiguous on this point, the overall historical record is not. First, a significant number of cases allowed physicians to form an opinion and give a medical diagnosis based on out-of-court statements that clearly were not under oath.¹⁸⁵ A physician could give an opinion based on out-of-court statements if he had personally heard the out-of-court statements when they were made; the physician could through his own testimony put the out-of-court statements into evidence by testifying under oath about what the patient had told him.¹⁸⁶ Physicians were not limited to hypothetical questions but could actually state their opinion of a diagnosis of a particular person or the specific cause of death.¹⁸⁷ Second, widely accepted confrontation exceptions, such as dying declarations, spontaneous statements or *res gestae*, past recollection recorded,¹⁸⁸ and co-conspirator statements, did allow the admissibility of out-of-court statements that had not been made under oath. Prior statements admitted under the forfeiture by wrongdoing Confrontation Clause exception were admitted when made under oath and were admissible even if not under oath.¹⁸⁹

Applying the Confrontation Clause to Laboratory Reports, 85 B.U. L. REV. 1243 (2005). For a further response to these types of arguments, see Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583 (1987).

185. See, e.g., *Earl of Pembroke's Trial*, 6 How. St. Tr. at 1325-36 (holding that a dying man's statements not under oath when made to a doctor were admissible); *Cannings Trial*, 19 How. St. Tr. at 478; *Aveson*, 6 East at 189, 102 Eng. Rep. at 1259 (holding that an unavailable witness's statements that were not under oath when made to her doctor were admissible under the medical exception).

186. See *Aveson*, 6 East at 189, 102 Eng. Rep. at 1259.

187. See *supra* notes 159-79 and accompanying text.

188. Statements under past recollection recorded were admissible even though the statements were not always made under oath. The exception was widely used by 1791. See, e.g., *Scroop's Trial*, 5 How. St. Tr. 1034 (1660); *Sir Henry Vane's Trial*, 6 How. St. Tr. 119 (1662). The early English common law cases tended to conflate present recollection refreshed with past recollection recorded; however, by the time of the ratification of the Confrontation Clause, the two concepts were beginning to be distinguished. Past recollection recorded statements were admissible even if not taken on oath. See, e.g., *Ryerson v. Grover*, 1 N.J.L. 459 (1795); *Pigot v. Holloway*, 1 Binn. 436 (Pa. 1808).

189. The Court in *Crawford* states that it accepts the use of the forfeiture by wrongdoing exception to confrontation by the Court in *Reynolds v. United States*, 98 U.S. 145 (1879). *Crawford*, 541 U.S. at 62. *Reynolds* is an example where the prior statements were been made under oath. In *Motes v. United States*, the Court indicated that depositions that were neither cross-examined nor taken under oath would violate confrontation unless procurement had occurred. 178 U.S. 458, 471-74 (1900). The Court in *Davis* reiterated the Court's language in *Crawford* that forfeiture by wrongdoing is an exception to the Confrontation Clause. *Davis*, 126 S. Ct. at 2279-80. The Court also suggested that it might accept the preponderance of the evidence standard of proof in forfeiture cases and that hearsay would be admissible at such hearings. See *id.*; see

Commentators have argued that under Federal Rule of Evidence 703, a modern expert can rely on facts that are not testified to in court but cannot state the specific facts upon which the expert bases his or her opinion unless those facts are already in the record.¹⁹⁰ It is claimed that in criminal cases, this information, if not in the record, is testimonial hearsay because the facts or data on which the expert depends may be unreliable.¹⁹¹ Although experts can be cross-examined about their opinions, there is a danger the jury will accept the facts upon which the experts reached their opinions as truthful, not as merely the facts used to form an opinion.¹⁹² This argument is in part based on the claim that under the common law, hearsay was not an acceptable basis for expert testimony. But the historical record shows that under common law in 1791, such statements were admissible when the physicians testified about them and used them to help them form their opinion.¹⁹³ Furthermore, under an originalist analysis of testimonial statements, it is not the common law of the 1970s that existed at the time the federal rules of evidence were created that is of importance, but the confrontation exceptions under common law that existed in 1791.

D. Confrontation and Cross-Examination of the Patient's Out-of-Court Statements Was Not Required

An English case from 1779, *King v. Brasier*,¹⁹⁴ can be misinterpreted to mean that no testimony could be admitted without confrontation and cross-examination. A careful reading of *Brasier*, however, shows that this interpretation is inaccurate. In *Brasier* the mother and a lodger testified about what a girl told them about a sexual assault. The court ruled that because no testimony can be received except upon oath, the conviction had to be reversed.¹⁹⁵ If the girl had testified under oath

generally Tom Harbinson, *Using the Crawford v. Washington "Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases*, REASONABLE EFFORTS, vol. 1, No. 3 (2004), available at http://www.ndaa.org/publications/newsletters/reasonable_efforts_volume_1_number_3_2004.html (last visited Mar. 15, 2007).

190. See Oliver, *supra* note 184, at 1550-53.

191. *Id.* at 1553.

192. See *id.* at 1555.

193. Under common law, physicians were required to state the underlying facts upon which they based their opinion or diagnosis. See, e.g., *Aveson*, 6 East at 188-89, 102 Eng. Rep. at 1259 (holding that testimony of a surgeon was proper when he was able to state specific facts upon which he based his opinion, including what the patient told him about her condition); *Hathorn*, 8 Mass. at 371-72 (indicating that physicians must state facts or symptoms from which they draw their conclusions); PHILLIPPS, *supra* note 38, at 208-09 n.(b).

194. 1 Leach 199, 168 Eng. Rep. 202 (K.B. 1779).

195. *Id.* at 200, 168 Eng. Rep. at 202.

and if a record showed that she understood the oath, that evidence could have been received.¹⁹⁶ If one reads *Brasier* along with *Flemming and Windham's Case*, which was decided in 1799, it is clear that *Brasier* stands only for the rule that testimony normally should be received on oath. *Brasier* does not stand for the rule that confrontation and cross-examination is always required at trial because *Flemming and Windham's Case* upheld the admissibility of a sworn deposition in a child rape case when the victim was dead, even though no cross-examination occurred at the time the deposition was taken or at trial.

Brasier also does not stand for the rule that all testimony must always be under oath, because courts continued to uphold the use of dying declarations, spontaneous declarations or *res gestae*, past recollection recorded, statements in travail, and conspirator statements—all of which existed as confrontation exceptions by 1791. None of these exceptions required that the out-of-court statements be made under oath. Under the common law in 1791, there was no absolute requirement that all statements be made under oath and testified to in the courtroom. To be considered evidence, statements usually had to be under oath, but common law doctrine had exceptions based on necessity. The existence of the exceptions that allowed statements not made under oath to be admissible in 1791 also supports the view that statements under the medical exception did not have to be made under oath and based solely on testimony in the courtroom.

V. STATEMENTS UNDER THE MEDICAL EXCEPTION ARE NOT TESTIMONIAL

A. *Physicians Are Not Law Enforcement Agents*

In *Davis v. Washington*,¹⁹⁷ the Court indicated that in applying the Court's analysis of confrontation in *Crawford* and its determination of whether out-of-court statements are testimonial, the Court would consider whether the individuals to whom the statements are made are agents of law enforcement.¹⁹⁸ Courts are beginning to address whether

196. See *id.*, 168 Eng. Rep. at 202-03.

197. 126 S. Ct. 2266 (2006).

198. The Court in *Davis* stated:

If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. . . . [O]ur holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are "testimonial."

physicians can act as agents of law enforcement, thus rendering any statements made to physicians testimonial.¹⁹⁹ In several cases it has been argued that when a law enforcement officer takes a child to the physician, the police officers, physicians, and victims all believe the statements could be used in a later criminal prosecution, thus making the physician an agent of law enforcement.²⁰⁰

The argument that physicians are agents of law enforcement in this context is inconsistent with fundamental principles of agency law. Agency requires a free choice on the part of the agent in entering into the agency relationship with the principal.²⁰¹ An agency relationship also requires that the agent act in the principal's best interests at all times.²⁰² The agent owes an ethical and legal duty, similar to that involved in a fiduciary relationship, to act on behalf of the principal.²⁰³ The agency relationship is based on an agreement between the agent and principal.²⁰⁴ Agency also requires that the agent be under the control of the principal.²⁰⁵

At least one court has concluded that although a physician may freely choose to belong to a multidisciplinary child abuse team, that choice does not mean the physician has established an agency relationship with

Id. at 2274 n.2.

199. *See, e.g.*, *People v. Vigil*, 104 P.3d 258, 265 (Colo. Ct. App. 2004), *rev'd*, 127 P.3d 916 (Colo. 2006); *Commonwealth v. DeOliveira*, 849 N.E.2d 218, 222-24 (Mass. 2006).

200. *See, e.g.*, *United States v. Ureta*, 41 M.J. 571, 576-77 (A.F. Ct. Crim. App. 1994), *aff'd*, 44 M.J. 290 (C.A.A.F. 1996), *cert. denied*, 519 U.S. 1059 (1997) (explaining that physician's and victim's knowledge that statements could be used for forensic and medical purposes does not make the statements inadmissible); *DeOliveira*, 849 N.E.2d at 225 (holding that when police were not present at examination and did not instruct doctor on how to do the examination, statements to doctor were not testimonial even when doctor had talked to police and knew the statements could be used in a later criminal proceeding); *State v. Scacchetti*, 711 N.W.2d 508, 515 (Minn. 2006) ("[T]he mere fact that Edinburgh may be called to testify in court regarding sexual abuse cases does not transform the medical purpose of the assessments into a prosecutorial purpose . . ."); *see also* *State v. Bobadilla*, 709 N.W.2d 243, 254 (Minn. 2006), *cert. denied*, 127 S. Ct. 382 (2006) (explaining that when declarant or child protection worker is not acting in a substantial degree to produce a statement for trial, statements are nontestimonial). Children know that they go to the doctor for a medical purpose and to get medical care. *See, e.g.*, *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 2004).

201. *See, e.g.*, HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, *HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP* 3 (1979); WARREN A. SEAVEY, *HANDBOOK ON THE LAW OF AGENCY* 2 (1964).

202. *See* REUSCHLEIN & GREGORY, *supra* note 201, at 10-11.

203. *See id.* at 3.

204. *See, e.g.*, SEAVEY, *supra* note 201, at 3.

205. *Id.*

police.²⁰⁶ Merely being a member of an interdisciplinary team does not result in a physician operating under the control of law enforcement. Likewise, the physician has no agreement with police that the physician will act as an agent of the police when police bring a patient to the hospital. Doing an act that benefits someone does not, by itself, establish an agency relationship. Arguably, it benefits law enforcement when the physician records what the patient tells him or her. Even if the physician believes that the statements could be used in a later criminal prosecution and that the statements might benefit law enforcement, that belief does not show that the physician's actions are being controlled by law enforcement. An agency relationship requires more.²⁰⁷

A physician's obligation is always to look after the best interests of the patient: "A physician shall, while caring for a patient, regard responsibility to the patient as paramount."²⁰⁸ From the time of Hippocrates, physicians have taken a solemn oath to act in the best interests of the patient.²⁰⁹ Even in the modern era, the ethics of the Hippocratic Oath are considered binding: "To the Hippocratic physician, nothing and no one was more important than the patient; this has always been a guiding principle of clinical medicine. Other patients, future patients, and the rest of mankind have been secondary considerations when a doctor is making decisions at the bedside of the sick."²¹⁰ Physicians who fail in their duty to always act in the patient's best interests are subject to disciplinary actions and can even lose their license to practice medicine.²¹¹

206. See, e.g., *People v. Vigil*, 127 P.3d 916 (Colo. 2006) (holding that a physician's membership in a child protection team, absent direct and controlling police presence, does not make a physician an agent of police).

207. See REUSCHLEIN & GREGORY, *supra* note 201, at 23. Physicians will document what the patient tells them, whether the physician is a member of an interdisciplinary team or not, and regardless of who brings the child to the physician. Physicians are trained to always document whenever they take patient history because it is part of providing medical care and because it is in the patient's best interests to do so.

208. AMERICAN MEDICAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION PRINCIPLES OF MEDICAL ETHICS VIII (2001), available at <http://www.ama-assn.org/ama/pub/category/2512.html> (last visited Mar. 15, 2007).

209. See SHERWIN B. NULAND, *DOCTORS: THE BIOGRAPHY OF MEDICINE* 26 (1995). As the Hippocratic Oath states: "I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous." *Id.*

210. *Id.* at 487.

211. See Kara M. McCarthy, *Doing Time for Clinical Crime: The Prosecution of Incompetent Physicians as an Additional Mechanism to Assure Quality Health Services*, 28 SETON HALL L. REV. 569, 583-86 (1997).

The physician's primary duty to always act on behalf of the patient's best interests prevents a physician from acting as an agent of law enforcement or the government. Agency requires an agreement or contract between parties, and no such agreement exists between physicians and law enforcement. The physician cannot release matters considered part of the physician-patient privilege without the patient's consent.²¹² The physician is bound both ethically and legally to act in the best interests of the patient—not law enforcement.

Additional rationales establish that physicians are not agents of law enforcement. Law enforcement does not pay physicians' salaries. Usually, physicians' salaries do not come from any governmental entity but are paid for by private health insurance organizations.²¹³ Physi-

212. Only two exceptions exist to the physician-patient privilege. Although a mandatory reporter statute or court order may require a physician to disclose very specific information, the physician-patient privilege still remains and does not allow public release but only limited release to the agency referred to in the statute or to the court, which is usually only for *in camera* review. Both the court and the agency act to preserve patient confidentiality as much as possible. For a further analysis of mandatory reporter laws, see *infra* notes 218-20 and accompanying text.

213. See ROY PORTER, *THE GREATEST BENEFIT TO MANKIND: A MEDICAL HISTORY OF HUMANITY* 656-63 (1997). Even when a patient's physician's fees are paid by the government, i.e., Medicare, acting on behalf of the patient does not cause that physician to be an agent of law enforcement. Receiving a government salary does not make a physician an agent of law enforcement because receiving a salary does not in itself result in an agency relationship. *Cf. Arizona v. Evans*, 514 U.S. 1 (1995) (explaining that error by court clerk resulting in an arrest when warrant had been quashed should not result in suppression when police acted on the information); *People v. Scott*, 117 Cal. Rptr. 925 (Cal. Ct. App. 1974) (holding that exclusionary rule was not applicable when publicly employed airport manager observed marijuana while looking in a car, even though he enforced safety regulations but actual law enforcement and criminal investigations were left to police); *State v. Smith*, 763 P.2d 632 (Kan. 1988) (explaining that items found by publicly employed garbage collector should not be suppressed because there is no law enforcement action); *Commonwealth v. Ira I.*, 791 N.E.2d 894 (Mass. 2003) (holding that school officials acting within the scope of their employment and not as instruments of the police are not required to give *Miranda* warnings prior to questioning a student during a school investigation); *Commonwealth v. Allen*, 480 N.E.2d 630 (Mass. 1985) (explaining that nurse talking with hospitalized arrestee does not require *Miranda* warnings); *Commonwealth v. Cote*, 444 N.E.2d 1282 (Mass. App. Ct. 1983) (holding that meter reader employed by municipally owned public utility is not law enforcement and suppression not appropriate); *State v. Tinkham*, 719 A.2d 580 (N.H. 1998) (holding that the fact a principal intended to turn over evidence of criminal conduct to police or told police she was going to question a student does not make the teacher an agent of police); *Utah ex. rel. A.R. v. C.R.*, 982 P.2d 73 (Utah 1999) (stating that the exclusionary rule does not apply to child protection proceedings because the primary focus is to protect abused children and punishment of the parents is not the purpose of the proceeding).

cians are not usually trained in forensic interviewing.²¹⁴ In a large number of cases, physicians do not diagnose child sexual abuse but have “undetermined” findings.²¹⁵ Physicians use objective guidelines for diagnosing whether a child has been sexually abused.²¹⁶ The use of objective guidelines and the large number of cases with “inconclusive” findings shows that physicians are not acting to assist law enforcement but are attempting to make a medical diagnosis and provide medical care.

The agency relationship requires that the principal have the ability to control the actions of the agent; however, physicians are not under the control of law enforcement.²¹⁷ Agency also requires that the principal be liable for the actions of his agent; however, law enforcement is not

214. One commonly-used text used to teach health care providers about taking patient history and examinations has only one page and a half, out of a total of 862 pages, specifically describing how to talk with children. See LYNN S. BICKLEY & PETER G. SZILAGYI, *BATES' GUIDE TO PHYSICAL EXAMINATION AND HISTORY TAKING* 52-53 (8th ed. 2003).

215. For example, data from one medical organization show that a diagnosis of “not abuse” or “inconclusive” is made in approximately fifty percent of all cases. Letter from Dr. Mark Hudson, Midwest Children’s Resource Center, Children’s Hospitals and Clinics of Minnesota to author (December 4th, 2006) (letter on file with author) (letter covers from March 2005 through March 2006).

216. See generally Nancy Kellogg, M.D., *American Academy of Pediatrics Clinical Report: The Evaluation of Sexual Abuse in Children*, 116 *PEDIATRICS* No. 2, 506 (2005) (studying the objective guidelines for determining whether abuse occurred).

217. See *DeOliveira*, 849 N.E.2d at 225.

Patricia’s statements cannot persuasively be said to have been made in response to police interrogation. Although police officers were present at the hospital, there is no indication in the record that they were present during the doctor’s examination of Patricia, or that they had instructed the doctor on the manner in which his examination should proceed. Nothing in the record would support a determination that the doctor acted as an agent of law enforcement. Indeed, the doctor’s testimony as to his role as a physician entirely independent from law enforcement, and the judge’s findings in connection with his medical evaluation of Patricia, are all to the contrary.

Id.

Although the examination and the medical report may have investigative value, the clinician must make it clear to child protection and law enforcement that the purpose for examining a child suspected of being abused is to diagnose and treat any residual consequences of the alleged sexual contact that may be found.

Martin A. Finkel, *Documentation and Report Formulation: The Backbone of the Medical Record*, in ANGELO P. GIARDINO, ELIZABETH M. DATNER & JANICE B. ASHER, *SEXUAL ASSAULT: VICTIMIZATION ACROSS THE LIFESPAN—A CLINICAL GUIDE* 189, 190 (2003). If law enforcement officers are present when a doctor wishes to speak to a patient who has been sexually assaulted, “[l]aw enforcement officers should be excused from the room.” ROBERT E. RAKEL, *TEXTBOOK OF FAMILY PRACTICE* 83 (6th ed. 2002).

liable for the actions of physicians. Doctors cannot ethically be agents of law enforcement and always act in the patient's best interests.

Physicians' obligations as mandated reporters of child abuse under state statutes do not result in physicians acting as agents of law enforcement.²¹⁸ When acting as mandated reporters, physicians do not freely enter into an agency relationship by simply reporting abuse as they are required to do by law. Making a report is also not a voluntary act because it is required by statute. Mandatory reporter statutes do not create an agency relationship because agency requires more than a communication about the existence of possible abuse. The mandatory reporter statutes do not relieve physicians of their ethical obligations or change the physician-patient relationship. Following the mandatory reporter statute is also acting in the patient's best medical interests. A physician has a duty to make sure that an abused child does not go back into a situation where the child's health or life may be endangered.²¹⁹ Physicians report because it is in their patients' best interests to do so.

Physicians are neither members nor agents of law enforcement. The *Crawford-Davis* requirement for a statement to be considered testimonial—that the statements be made to law enforcement—is therefore not met when a victim of child abuse is taken to a physician for evaluation and diagnosis.²²⁰

218. Professor Robert Mosteller argues mandated reporter statutes make physicians agents of law enforcement. See Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 574 (2005); see also Friedman, *supra* note 79, at 263 (2005) (stating that "perhaps" a doctor mandated to report should be considered a government agent).

219. See, e.g., *United States v. Renville*, 779 F.2d 430, 438 & n.13 (8th Cir. 1985) (holding that physicians have a legal duty to prevent abuse reoccurrence); *State v. Robinson*, 735 P.2d 801, 810 (Ariz. 1987) (explaining that effective treatment and diagnosis may require that the victim avoid contact with the abuser to avoid future abuse and ensure recovery from past abuse). Because the physical and emotional trauma of abuse can be a recurrent pattern, physicians must attempt to identify the abuser in order to provide the medical treatment of avoiding further abuse. See also Marilyn J. Maag, *A Child's Statements Naming An Abuser Are Admissible Under the Medical Diagnosis or Treatment Exception to the Hearsay Rule*, 53 U. CIN. L. REV. 1155, 1168 (1984).

220. Nor does *Crawford's* stated rationale of deterring law enforcement misconduct apply to statements taken by physicians. See *Crawford*, 541 U.S. at 52-53, 67-68; see also e.g., *People v. Geno*, 683 N.W.2d 687, 691-92 (Mich. Ct. App. 2004) (holding children's response to non-governmental interviewer not testimonial); see generally MYERS, *supra* note 7, § 7.22, at 638 n.637.

B. The Definition of Testimonial Statement Should Require That It Be a Formal Statement Taken by Law Enforcement or Agents of Law Enforcement

The reasoning in *Crawford* regarding testimonial statements analysis appears to be based on arguments and writings of several leading legal academics.²²¹ Many insightful arguments have been made that Confrontation Clause analysis had become too convoluted and complicated in the pre-*Crawford* era.²²² Several of these arguments regarding the proper definition of a testimonial statement, however, are misplaced and should not be adopted by the Court.²²³ All of these arguments are relevant in analyzing whether statements under the medical exception should be considered testimonial. A statement should be considered testimonial only when it is a formal statement taken by law enforcement or agents of law enforcement.²²⁴

In determining whether a statement is testimonial, one commentator has argued that “the bottom line question is what the witness anticipated.”²²⁵ This standard, however, based solely on what a witness anticipated, without also requiring that the statement be taken by law

221. See *Crawford*, 541 U.S. at 60-61 (citing AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 125-31 (1997); Richard D. Friedman, *supra* note 98).

222. See, e.g., Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 448-50, available at <http://www.cato.org/pubs/scr/2004/confrontationclause.pdf> (last visited Mar. 15, 2007). In addition to the articles cited here, Professor Friedman has written many others on Confrontation Clause analysis. See, e.g., Richard D. Friedman, *Confrontation Rights of Criminal Defendants*, in *PROCEEDINGS OF THE FIRST WORLD CONFERENCE ON NEW TRENDS IN CRIMINAL INVESTIGATION AND EVIDENCE* 533, 533-41 (J.F. Nijboer & J.M. Reijntjes eds., 1997); Richard D. Friedman, *Lilly v. Virginia: Glimmers of Hope for the Confrontation Clause?*, INT'L COMMENTARY ON EVIDENCE, July 10, 2000, available at <http://www.bepress.com/ice/vol1/iss2/art6/> (last visited Mar. 15, 2007); Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J.L. REFORM 695 (2002); Richard D. Friedman, *Thoughts From Across the Water on Hearsay and Confrontation*, 1998 CRIM. L. REV. 697; Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS L.J. 545 (1998).

223. Because the Court has held that testimonial analysis is the law of the land, this Article will limit itself to discussing how “testimonial” should be defined with reference to the medical exception. Whether testimonial analysis based on an originalist methodology is the best approach for Confrontation Clause analysis of interpreting when confrontation exceptions should apply is another issue.

224. See Friedman, *supra* note 79, at 259-63, for arguments that government involvement should not be necessary for a statement to be considered testimonial. See notes 90-101 *supra* and accompanying text for a further analysis of this argument.

225. Friedman, *supra* note 79, at 262.

enforcement or its agent, is too vague to be practical.²²⁶ Often the victim or witness of an act is unable to anticipate that this act will result in criminal charges. For example, in cases involving "date rape," "statutory rape," incest cases, cases with mentally-impaired victims, asleep or unconscious victims, and young child victims, the victim is often in shock and unsure if the behavior is criminal. It may take some time for the victim to comprehend that she has been raped.²²⁷ Prosecutors do not always agree on which behaviors or cases should result in criminal charges or criminal prosecution, and it is unrealistic to think members of the general public should be able to do so, especially before law enforcement has become involved. Use of an "anticipatory test," without the requirement of the involvement of law enforcement or its agents, is no less vague than the reliability standard criticized in *Crawford*.

In determining whether a statement should be considered testimonial, it is appropriate to consider, as one factor, what a witness anticipates about the statement. However, the witness's anticipation that the acts could be used in a later prosecution, or that the behavior could be criminal, should not be sufficient in itself to make the statement testimonial.²²⁸ This position is supported by the existence of the co-

226. Professor Friedman has argued for a testimonial test, in part because he states it would prevent overbroad application of the Confrontation Clause. See Friedman, *supra* note 98, at 1030-32; Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506, 512-14 (1997).

227. See generally ROBIN WARSHAW, *I NEVER CALLED IT RAPE* (1988). Throughout history, members of the public have disagreed about which behaviors should be considered rape and what degree of proof should be required for an accusation to be considered true. See, e.g., SUSAN ESTRICH, *REAL RAPE* 28, 42-46 (1987) (stating that women's allegations of rape were regarded as inherently suspicious and the allegation had to be corroborated; jurors could not convict on the testimony of a woman alone); Barbara S. Lindemann, "To Ravish and Carnally Know": *Rape in Eighteenth-Century Massachusetts*, 10 SIGNS 63, 79 (1984) (stating that women were taught from childhood to defer to men, and usually the only cases reported and prosecuted were those where the community acknowledged a sexual attack had taken place).

228. Professor Friedman argues otherwise: "If a statement is made in circumstances in which a reasonable person would realize that it likely would be used in an investigation or prosecution of a crime, then the statement should be deemed testimonial." Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1240-41 (2002). Selling cocaine is illegal, but as Friedman rightfully argues, if the suspect does not know an undercover agent is involved, then any statements made to the undercover agent should be considered nontestimonial. As the cocaine example illustrates, however, Friedman's positions are contradictory. Believing the behavior is criminal, e.g., selling cocaine, does not make the statement testimonial if it is made to an undercover agent. But Friedman also argues that if the statements are made when a person believes the statements could be used to investigate a crime, or in the prosecution of a crime, then that

conspirator exception.²²⁹ By the time of the Founders' era, it was well established that the statements of coconspirators that were made in furtherance of the conspiracy were an exception to confrontation.²³⁰ If the Founders had believed that it was enough to make statements inadmissible if the individual anticipated that statements could be used in an investigation or that the behavior was criminal, the Founders would never have allowed use of the coconspirator exception. Similarly, even if a physician, law enforcement, or the child believes that the child's statements to the physician could be used in an investigation or later prosecution, that alone does not make the child's statements testimonial.

Davis v. Washington also indicates that the Court does not consider the declarant's knowledge of the possibility of an investigation, or of the criminality of the behavior, to be, in itself, controlling. The declarant in *Davis* knew she was the victim of a crime, an assault,²³¹ but that knowledge did not make her call during an ongoing emergency testimonial.²³² Her primary purpose in making the call was to get help.²³³

alone should make the statements testimonial. This, of course, contradicts his position that statements to an undercover agent are nontestimonial. Most persons know selling cocaine is criminal, and thus, by inference most persons know that any time one engages in criminal behavior one could be prosecuted in court; yet, that should not result in the statements being considered testimonial. Coconspirators almost always know which behavior is criminal; the behavior is part of a conspiracy because the conspirators do not want the criminal behavior to become public. Even though conspirators know the behavior is criminal, or could result in an investigation, the Founders accepted the use of the coconspirator's statements as an exception to confrontation. Based on *Crawford's* originalist methodology, Friedman's argument is unconvincing.

229. *Crawford*, 541 U.S. at 56.

230. *See id.*; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.4, at 525 (2d ed. 1986) (stating that the crime of conspiracy is an ancient one). The admissibility of coconspirator statements was "purely [a question] of criminal law, or of conspiracy as affecting joint civil liability, and its solution is not to be sought in any principle of Evidence." 4 WIGMORE, *supra* note 126, § 1079, at 130-31. The Founders' generation did not use the rationale that coconspirator statements were nontestimonial and an exception to confrontation because the declarant did not know he was speaking to law enforcement; they held the statements to be admissible because the defendant was in privity with the coconspirator, and thus joint liability was appropriate. *See, e.g.*, *Guy v. Hall*, 7 N.C. (3 Mur.) 150, 151-52 (1819) (indicating that statements made by agents may be used against those in privity with those agents).

231. *See Davis*, 126 S. Ct. at 2271 (quoting the victim telling the dispatcher, "He's here jumpin' on me again," and when asked if the defendant had a weapon, the victim replied: "No. He's usin' his fists.").

232. *Id.* at 2277.

233. *Id.* at 2271, 2277.

Language about casual statements not being considered testimonial in concurring opinions in *Lily v. Virginia*²³⁴ and *White v. Illinois*²³⁵ also supports the view that mere knowledge that the behavior is criminal should not result in statements being viewed as testimonial.²³⁶

Arguments that casual statements should be considered testimonial are especially unpersuasive when young children are witnesses or victims.²³⁷ Young children often do not even know a crime has been committed when they are assaulted.²³⁸ One commentator has argued

234. 527 U.S. 116, 140-43 (1999) (Breyer, J., concurring).

235. 502 U.S. 346, 358-66 (1992) (Thomas & Scalia, JJ., concurring in part and concurring in the judgment).

236. Clearly, statements made to private persons, such as family or friends, even if about behaviors that could be considered criminal, should not be considered testimonial. Even if the statements are about criminal behaviors, most reasonable persons would believe that statements made to private persons, such as family or friends, are casual. In *White*, Justice Thomas went further and correctly suggested that in some situations, even casual statements to police should not be considered testimonial. *See id.* at 364.

Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties. Few types of statements could be categorically characterized as within or without the reach of a defendant's confrontation rights. Not even statements made to the police or government officials could be deemed automatically subject to the right of confrontation (imagine a victim who blurts out an accusation to a passing police officer, or the unsuspecting social-services worker who is told of possible child abuse).

Id. In his *Davis* opinion, concurring in part and dissenting in part, Justice Thomas highlighted some of the difficulties with the Court's reasoning. *See Davis*, 126 S. Ct. at 2283 (Thomas, J., concurring in the judgment in part and dissenting in part) (indicating that the Court's decision results in an indiscernible hierarchy of purpose that actually examines the function of the statement when police usually have indiscernible multiple purposes for asking questions).

237. *See DeOliveira*, 849 N.E.2d at 225 ("Logic informs that a six year old child can have little or no comprehension of a criminal prosecution in which the child's words might be introduced as evidence . . .").

238. *See id.* at 226. ("On this record, there is nothing to indicate that Patricia even recognized the criminality of the defendant's sexual contacts with her.") Professor Friedman himself acknowledges that very young children often do not know a statement could be used in court:

It is tempting to conclude without analysis that, given that the child is a human, she should be treated as a witness, like adult humans or older children who make statements alleging criminal conduct . . . Suppose a child is so young that she has no sense that what she is reporting is wrongful conduct . . . It seems dubious to say that the children in these cases were acting as witnesses . . . Certainly these children are providing information, but people do that all the time—completing business records, advancing conspiracies, and so forth—without the communication being testimonial.

Friedman, *supra* note 99, at 250; *see Allie Phillips, A Ray of Hope in the Wake of Crawford v. Washington: An Analysis of Bobadilla v. Minnesota*, Part 2 of 2, UPDATE, vol. 18, No. 12

for an even more amorphous standard for young children. He argues that for these victims, the statement should be considered testimonial if the child could know “that she was reporting wrongdoing and that some adverse consequences—including that Mommy would get mad—would be visited on the wrongdoer.”²³⁹ This proposed standard is even more vague and overly broad than the “anticipatory test” discussed above.

For young children, many behaviors exist that could be considered wrongful but would not result in a case going to court—for example, fighting with a sibling. For a child, adverse consequences visited on the wrongdoer could include a “time out,” having to go to bed early, or simply having to apologize. Such a vague standard would result in an overbroad application of which statements should be considered to be testimonial. If statements are testimonial based on a child anticipating Mommy could get mad, the number of testimonial statements would be boundless—almost any statement any child makes could be considered testimonial.

C. The Medical Exception Applies Even Without Treatment and Diagnosis

Use of the medical exception has been criticized when it results in the admission of statements given to the physician for purposes of diagnosis when the declarant has no belief she will receive treatment.²⁴⁰ The criticism is that such statements are simply taken to gather evidence and do not have the degree of trustworthiness that is necessary for a confrontation exception to properly exist.²⁴¹

This criticism is based on a misplaced premise about medical examinations and the importance of patient history. Physicians are taught that taking patient history is one of the important parts of any examination and spend a considerable amount of time learning how to do so effectively.²⁴² Patient history is considered the most likely portion of an examination to provide a diagnosis.²⁴³ Often the patient’s

(2006), available at http://www.ndaa.org/publications/newsletters/update_vol_18_number_12_2006.pdf (last visited Mar. 15, 2007) (providing a list of cases that have held that young children do not understand that their statements could be used at trial); Allie Phillips, *Child Forensic Interviews after Crawford v. Washington: Testimonial or Not?*, 39 THE PROSECUTOR 17 (July/August 2005) (discussing the psychological literature indicating that young children do not understand their statements could be used in court).

239. Friedman, *supra* note 79, at 273.

240. See Mosteller, *supra* note 218, at 601.

241. *Id.* at 602.

242. See, e.g., BICKLEY & SZILAGYI, *supra* note 214, at 1-57, 79.

243. One study shows that in 80% of all medical cases the final diagnosis is evident from the patient history alone. See RAKEL, *supra* note 217, at 247.

condition, such as the location of an ache, is only ascertainable by asking the patient because the perception of the symptom is subjective. The fact that the patient's complaint is based on a subjective feeling of pain does not make the statement any less valid for use in medical diagnosis and treatment.

This criticism also overemphasizes the role of physician treatment. Many patients visit physicians for routine checkups or for preventive care, instances during which no diagnosis of illness is made and no treatment is given.²⁴⁴ Hippocrates urged physicians to often provide no treatment, based on his dictum "*primum non nocere*" ("First, do no harm"), as nature itself was considered the best healer.²⁴⁵ Physicians often make a diagnosis but provide no treatment, or are unable to make a diagnosis, and wait to see if the patient's condition resolves on its own.²⁴⁶ Frequently, a physician will refer a patient to another physician for additional consultation when unsure of the diagnosis or what treatment should be given.²⁴⁷ In cases involving sexually assaulted children, children are often examined to assure parents and the child that no physical harm has occurred and that the child has not been infected with a sexually transmitted disease. A finding of no physical injuries is a medical diagnosis just as much as a finding of injuries. In all of these cases, the medical exception still applies even if no treatment is given or the patient has no expectation of treatment being given.

It is also claimed that if the child does not know he or she is seeing the physician for medical and treatment purposes, then the exception does not apply.²⁴⁸ However, it should be sufficient for the exception to apply if the child is told he or she is seeing a doctor or going to a doctor's

244. See *id.* at 14. In order based on frequency, the seven most common principal reasons for physician visits are: general medical examinations; progress visits, not otherwise specified; cough; routine prenatal examinations; postoperative visits; symptoms referable to throat; and well baby examinations. *Id.* Increasingly, physicians are stressing preventive care, see *id.* at 183-211, and patient education as important aspects of medical care although no diagnosis or treatment may be given, see *id.* at 253-62.

245. See NULAND, *supra* note 209, at 15-16 ("[I]ntervention is best kept minimal, if indeed it is required at all.").

246. "The Hippocratic physician understood that the power which he called Nature is a formative, constructive, and curative power; the human body tends to heal itself." *Id.* at 15.

247. Many Health Maintenance Organizations (HMOs) and insurance plans require the patient's "primary physician" to make a referral before the patient can consult with a medical expert. In these cases the patient's problems are often not diagnosed by the primary physician, and the patient has received no treatment.

248. See Mosteller, *supra* note 5, at 292-94.

office.²⁴⁹ Very young children are familiar with going to the doctor to get checkups, to be examined for sore throats or ear infections, and to receive immunizations. As every parent and physician knows, very young children often become scared on being told they are going to visit the doctor; many children ask if they will be given shots. Children's concerns about getting shots and about doctor visits indicate that even very young children understand they go to the doctor for medical purposes and for medical care. Since children understand they go to the doctor for medical care it follows they understand the importance of being truthful to the doctor.

Physicians are taught that good patient care requires them to introduce themselves and explain to a child patient what the physician is doing and why.²⁵⁰ Physicians are also taught that children as young as three to four years old can participate verbally as well as physically in their own healthcare, and that children can and will respond relevantly to seriously-posed questions about themselves.²⁵¹ Physicians tell the child patient, in effect, "We are taking care of you." The critical factors are that a physician-patient relationship exists and that the physician provides medical care—not whether a diagnosis or treatment is provided.²⁵²

249. See, e.g., *In re Daniel W.*, 130 Cal. Repr. 2d 412, 416 (Cal. Ct. App. 2003) (indicating that the child was told that he was going to the hospital so the doctor would fix it so it wouldn't hurt); *In re T.T.*, 815 N.E.2d at 794, 803-04; *State v. Larson*, 472 N.W.2d 120, 126 (Minn. 1991) (stating that the child knew she was in a doctor's office for an exam). Young children know they go to the doctor to get medical care and for a medical purpose.

250.

Children continually need to know what is happening and what is going to happen to them in the immediate future. Their anxiety will be significantly reduced when physicians take time to explain what they are doing, what they are going to do, and, when they engage the child as an active participant, as much as the clinical situation and good judgment will allow.

William H. Hetznecker, Marc A. Formen & Jorge H. Daruna, *Psychologic Disorders: The Clinical Interview (History)*, in NELSON TEXTBOOK OF PEDIATRICS 66, 67 (Robert E. Behrman, Robert M. Kliegman, & Hal B. Jenson eds., 16th ed. 2000). "Initial or casual encounters with young children are often made easier when introduced in a whisper" *Id.*

251. *Id.* ("When children are old enough, at 4-5 yr, form the habit of discussing with them their symptoms, diagnoses, and treatments in terms they can understand.")

252. See MYERS, *supra* note 7, § 7.15[D][7] (providing a thorough review of cases that address this subject).

D. Videotaping Statements to Physicians Does Not Constitute Manufacturing Evidence

Another contention is that the use of videotaping “to record hearsay highlights a critical feature that demands special treatment—the use of a hearsay exception in a purposeful effort to manufacture evidence.”²⁵³ It is acknowledged that some videotapes can be used for therapeutic purposes but that there are cases where they are not used for diagnostic or therapeutic purposes and are not the byproduct of substantive medical activity.²⁵⁴ Critics argue such medical videotapes “should not be treated qualitatively differently than those made exclusively for prosecutorial purposes.”²⁵⁵

Recording a child’s statement on videotape is simply a different method of memorializing the child’s statements. The only difference between a physician’s handwritten notes and videotaping is that videotaping allows the child’s demeanor to be recorded on videotape, as well as the exact questions the child is asked. But the physician could record his or her observations of the child’s demeanor in the medical

253. See Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 775 (1993).

254. *Id.* at 775-76. Medical and therapeutic purposes, however, justify the use of videotapes whenever children who have been possibly abused are interviewed by medical professionals. See, e.g., *State v. Bobadilla*, 709 N.W.2d 243, 255 (Minn. 2006), *cert. denied*, 127 S. Ct. 382 (2006) (“Given the clear need to limit a child’s exposure to stressful and confusing interviews, and the accompanying need to accurately assess risks to the child, there is a compelling need for a single recorded assessment interview solely in order to best protect the health and welfare of the child.”).

255. Mosteller, *supra* note 253, at 775-76. Professor Mosteller claims that the prosecutorial and medical purposes are intermingled, that the mandatory reporter laws turn medical interviews into statements for the prosecutorial function, that questions about the identity of the perpetrator are not different from questions police ask, and that because many of these interviews are conducted by “trauma teams,” this results in the interviewers being functionally part of the prosecutorial team. *Id.* at 776. The mandatory reporter and identity of the perpetrator issues have been addressed elsewhere in this Article. See *supra* notes 218-20 and accompanying text. Arguments based on the physician’s belonging to an interdisciplinary or “trauma” team is addressed at *supra* notes 206-07. The intermingled purpose argument is addressed at *supra* notes 197-219 and accompanying text. Assuming *arguendo* that there is a mixed purpose when a physician or nurse practitioner asks a patient questions, under *Davis*, the statements are not testimonial if the primary purpose is not to establish or prove past events potentially relevant to later criminal prosecution. See *Davis*, 126 S. Ct. at 2276-78. Medical videotapes used by physicians and nurses are different than other videotapes because physicians do not make such videotapes “exclusively for prosecutorial purposes.” It must be acknowledged that *Davis* had not been decided at the time Professor Mosteller made his “mixed purpose” arguments.

notes. If the physician wishes, she or he can record in the handwritten notes the exact words she or he uses in asking questions. The manner of recording medical statements should not result in a different constitutional analysis. Medical records are made in as accurate a fashion as possible; videotaping the statements to make their memorialization even more accurate should not render the statements testimonial.

A physician's decision to record a patient's statements on videotape or in writing is not "manufacturing" evidence. The word "manufacture" can be defined as to "invent or fabricate."²⁵⁶ A physician does not invent or fabricate what a child states but simply accurately records it. If the physician told the child what to say or purposefully altered a videotape so it did not accurately record what the patient told the doctor, then it could be said that the physician manufactured evidence. Ironically, when a doctor tries to use what is perhaps the best method of memorialization of the child's statements—videotaping—it is argued that this memorialization is manufacturing evidence.

Nor should use of videotaping be considered to create such a level of formality for the statement as to render it testimonial. In *Davis* the 911 call was audiotaped; that level of formality is similar to that of videotaping. The only difference is that the videotape records a patient's demeanor in addition to the patient's statements. The Court in *Davis* ruled that the audiotaped 911 call was not testimonial.²⁵⁷ Videotaped statements should also be considered nontestimonial because their level of formality is similar to that of audiotapes. Nor should the level of formality, in and of itself, render a statement testimonial. As *Crawford* and *Davis* indicate, testimonial analysis requires the weighing of several factors.

E. The Medical Exception Should Apply to Statements Made to Non-Physician Medical Professionals

The medical exception also applies to statements made to other medical personnel who provide health care, such as phlebotomists, x-ray technicians, paramedics, social workers, and nurses.²⁵⁸ Statements

256. See THE NEW OXFORD AMERICAN DICTIONARY 1042 (2001). Another definition of "manufacture" is to "make (something) on a large scale using machinery." *Id.* Using this definition is also inaccurate. The physician records the statement, and if the physician does so accurately, it is the patient who makes the statement. To assert that accurately recording a witness statement is making evidence is a distortion of what is occurring when the physician records statements made by patients.

257. *Davis*, 126 S. Ct. at 2277.

258. See, e.g., *State v. Saunders*, 132 P.3d 743, 748-49 (Wash. Ct. App. 2006) (indicating that statements to paramedics are nontestimonial and admissible under medical exception); see also MCCORMICK, *supra* note 122, § 277, at 235 (indicating the statement need not have

made to Sexual Assault Nurse Examiners (“SANE”), Sexual Assault Response Team (“SART”) members, and other forensic nurses should be considered nontestimonial for the same reasons that statements to physicians are considered nontestimonial.²⁵⁹ A SANE’s primary purpose is to provide medical care for his or her patient, who has been the victim of sexual or other abuse.²⁶⁰ Admittedly, part of the SANE’s role is also to gather evidence of sexual assault or injuries to the patient. However, sexual assault is a medical diagnosis,²⁶¹ and medical care is given based on that diagnosis. Gathering evidence for purposes of making that medical diagnosis should not result in the patient’s statements being considered testimonial merely because the statements could be used in a later criminal prosecution.²⁶²

been made to a physician; it can be made to others, such as ambulance drivers, family members, psychologists, social workers, etc., as long as it is made in order to receive medical care).

259. *See supra* notes 197-252 and accompanying text.

260. *See, e.g.*, OREGON STATE BOARD OF NURSING, REGISTERED NURSE SCOPE OF PRACTICE AS A SEXUAL ASSAULT NURSE EXAMINER OF PEDIATRIC PATIENTS POLICY STATEMENT, available at <http://oregon.gov/OSBN/pdfs/policies/Sane.pdf> (last visited Mar. 15, 2007) (indicating it is within the nurse’s scope of practice for the nurse practitioner to initiate prophylactic treatment, including treatment for sexually transmitted diseases or for possible pregnancy and to make findings on whether a diagnosis of sexual abuse can be made); INTERNATIONAL ASSOCIATION OF FORENSIC NURSES (IAFN), PEDIATRIC EDUCATIONAL GUIDELINES FOR SEXUAL ASSAULT NURSE EXAMINERS, (indicating that it is within the SANE nurse’s protocol and clinical skills to provide “evaluation and treatment for pediatric sexual assault/abuse patients,” including treatment for sexually transmitted diseases and pregnancy and assessment of trauma and interventions for that trauma).

261. *See, e.g.*, *Griffen v. State*, 243 Ga. App. 282, 285-86, 531 S.E.2d 175, 180 (2000) (stating that SANE with over 20 years experience in obstetrics and gynecology, specialized training in examining victims of sexual assault, and 100 previous examinations was qualified to render medical opinions as an expert in the field of sexual assault examinations); *Chevez v. State*, No. 05-98-01904-CR., 2000 WL 1618459, at *2-*3 (Tex. Crim. App. Oct. 31, 2000) (holding that SANE was allowed to give medical opinion regarding causation of hymenal condition when SANE took a 48-hour course over three weekends on sexual assault, performed three supervised examinations, conducted 20 independent examinations, and periodically met with other nurses and doctors to review cases).

262. *See, e.g.*, *Foley v. State*, 914 So. 2d 677, 683-85 (Miss. 2005) (holding that a five-year-old’s statement to a physician was nontestimonial); *State v. Fisher*, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005) (holding that 29 month old’s statement to pediatrician was nontestimonial); *Griner v. State*, 899 A.2d 189, 205-08 (Md. Ct. Spec. App. 2006) (stating that four year old’s statements to pediatric nurse was nontestimonial); *State v. Lee*, No. 22262, 2005 WL 544837 (Ohio Ct. App. March 9, 2005) (indicating that statements to sexual assault nurse are nontestimonial and thus admissible when victim first went to police, but then during treatment, no officers accompanied her and were not present during the examination); *State v. Stahl*, 855 N.E.2d 834, 836-46 (Ohio 2006) (statements to forensic violent-emergencies nurse are nontestimonial, even when police took the victim to the hospital and the police were present during the statement, because police are not

In *Davis* the Court held that even if 911 dispatchers are considered to be the police, statements made to the dispatchers are not testimonial if the circumstances objectively indicate that the primary purpose involved is to obtain assistance during an ongoing emergency.²⁶³ Similarly, even if any statements made to the SANE could be used in a later prosecution, where the circumstances objectively indicate that the primary purpose of the SANE's questioning is for medical care, the statements should be deemed nontestimonial. SANEs cannot act as agents of law enforcement because the SANE's duty is always to act in the best interests of the patient.²⁶⁴

F. Medical Statements Are Nontestimonial

To be admissible after *Crawford*, medical exception statements must be found to be nontestimonial. *Crawford* and *Davis* provide support for considering medical exception statements to be nontestimonial.²⁶⁵ In order for statements to be deemed testimonial, *Crawford* and *Davis* require that the statements be such that a reasonable person would

allowed to ask questions during the exam); *Commonwealth v. Brown*, No. 3082-05-01, 2006 Va. App. LEXIS 152, at *10 (Va. Ct. App. April 20, 2006) (indicating that statement to SANE was admissible as nontestimonial because it was made in a non-adversarial setting). *But see* *State v. Krasky*, 721 N.W.2d 916, 922-923 (Minn. Ct. App. 2006), *rev. granted* 2006 Minn. Lexis 901 (Minn. Dec. 20, 2006) (indicating that SANE nurse interview of six year old was testimonial when the nurse acted "in concert" with police investigation, the suspected abuse happened two years previously, and parental rights of the alleged perpetrator were terminated); *Medina v. State*, 131 P.3d 15, 20-21 (Nev. 2006) (SANE nurse is acting as a police agent or operative because she testified that she is a "forensic nurse" and because she gathers evidence for the prosecution for later use in criminal prosecutions); *State v. Romero*, 133 P.3d 842, 858-60 (N.M. Ct. App. 2006), *cert. granted*, 134 P.3d 120 (N.M. Apr. 10, 2006) (indicating that when three weeks elapsed between the incident and examination and because police made medical appointment for victim a reasonable person would know statements made to SANE could be used later in court even if victim was seeking, in part, medical treatment).

263. *Davis*, 126 S. Ct. at 2276-77.

264. The Hippocratic Oath and other medical ethics rules apply to nurses as well as physicians because nurses are considered agents of physicians when providing medical care under a physician's supervision.

265. *See, e.g.*, *United States v. Peneaux*, 432 F.3d 882, 895-96 (8th Cir. 2005) (stating that *Crawford* analysis supports medical statements being considered nontestimonial); *United States v. Kappell*, 418 F.3d 550 (6th Cir. 2005); *see also Ex parte C.L.Y.*, 928 So. 2d 1069 (Ala. 2005); *People v. Cage*, 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004); *Douglas v. State*, 913 So. 2d 1234 (Fla. Dist. Ct. App. 2005); *People v. West*, 823 N.E.2d 82 (Ill. App. Ct. 2005); *Griner v. State*, 899 A.2d 189 (Md. Ct. Spec. App. 2006); *Commonwealth v. DeOliveira*, 849 N.E.2d 218 (Mass. 2006); *State v. Scacchetti*, 711 N.W.2d 508 (Minn. 2006); *State v. Vaught*, 682 N.W.2d 284 (Neb. 2004); *State v. Lewis*, 616 S.E. 2d 1 (N.C. Ct. App. 2005); *State v. Fischer*, 108 P.3d 1262 (Wash. Ct. App. 2005); *see generally* Mosteller, *supra* note 218, at 600-08.

objectively know from all the circumstances that the statements could be used in a later criminal prosecution, are primarily made for that purpose, and are made to someone in law enforcement.²⁶⁶ None of these requirements is met when statements are made to medical personnel.

Statements made by a patient to a physician are made in order for the physician to make a medical diagnosis and sometimes—but not necessarily—to obtain treatment. Because a reasonable person would objectively know from the circumstances that statements made to a physician are for medical purposes, and are private and confidential, a reasonable person would normally not believe that the statements could be used in court.²⁶⁷

The decision to make public a statement made by a patient to a physician, or to waive the medical privilege, belongs to the patient.²⁶⁸ Because of the medical privilege, the patient, not law enforcement, decides whether statements will be made public. Clearly, a medical doctor is not a law enforcement officer. Accordingly, patient statements are not the kind of statements a reasonable person would objectively know from the circumstances could be used in a later criminal prosecution; thus, they are not testimonial.

The Court in *Crawford* also implied that the statements made under the medical exception may be considered nontestimonial. The Court in

266. See *Crawford*, 541 U.S. at 51-52; *Davis*, 126 S. Ct. at 2273-74. In *Davis*, in determining whether the statements made during a 911 call were testimonial, the Court stated it would not attempt an exhaustive classification of all conceivable statements as either testimonial or nontestimonial. *Davis*, 126 S. Ct. at 2273-74. *Davis* further clarified *Crawford* by indicating that the Court would consider whether the statements were made “when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* *Davis* stated that police interrogation, as opposed to the police merely conversing with someone, is not always required for a statement to be considered testimonial. See *id.* at 2274 n.1.

267. Health care providers must inform patients that patient statements to physicians and other medical records are confidential. See Health Insurance Portability and Accountability Act (HIPAA), 45 C.F.R. §§ 164.500, 520 (2002). The patient is also told the privilege to waive confidentiality and privacy belongs to the patient, not the doctor. See *id.* Most states have laws that also provide a medical privilege. See generally 1 MCCORMICK, *supra* note 122, §§ 98-105. A physician’s obligation to preserve patient confidentiality is also part of the Hippocratic Oath: “Whatever I see or hear, professionally or privately, which ought not to be divulged, I will keep secret and tell no one.” PORTER, *supra* note 213, at 65. Accordingly, if a noncooperative witness declines to waive the medical privilege, the statements would not be admissible under most states’ statutes or rules of evidence even though the statements are nontestimonial and thus admissible as an exception to confrontation.

268. See generally 8 WIGMORE, *supra* note 126, § 2386.

Crawford noted that admitting the statements to the police officer in *White v. Illinois*²⁶⁹ resulted in that case being in tension with *Crawford*.²⁷⁰ The Court in *Crawford* did not, however, indicate that admitting statements made to the medical doctor and nurse in *White* was in tension with *Crawford*.²⁷¹ In *White* Justices Thomas and Scalia concurred in part, concurred in the judgment, and appear to have approved of the idea that statements to the physician were admissible as an exception to confrontation.²⁷² Given these concurrences, it appears likely that the Court may recognize that statements under the medical exception are nontestimonial.

G. Medical Records Qualify For the Business Records Exception

In *Crawford* Justice Scalia cited business records as an example of statements that are an exception to confrontation because they are nontestimonial.²⁷³ Based both on *Crawford's* reference to the business records exception and the originalist analysis that exceptions that existed in 1791 are exceptions to confrontation today, medical records should be considered to be nontestimonial and admissible.²⁷⁴

269. 502 U.S. 346 (1992).

270. *Crawford*, 541 U.S. at 58 n.8

271. The Court in *Crawford* described *White* as being a case “which involved, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations.” *Id.*

272. *See White*, 502 U.S. at 364-65 (Thomas & Scalia, JJ., concurring in part and concurring in the judgment). The concurring opinion focuses on the statements to the police officer as possibly falling in the category of testimonial and makes no direct reference to the medical exception. *See id.*

273. *Crawford*, 541 U.S. at 56.

274. *See, e.g.*, *Smith v. State*, 898 So. 2d 907, 916 (Ala. Crim. App. 2004) (indicating that autopsy report admissible as business record); *Rollins v. State*, 866 A.2d. 926, 945 (Md. Ct. Spec. App. 2005) (stating that autopsy report is a business record and thus nontestimonial); *Commonwealth v. Verde*, 827 N.E.2d 701, 705-06 (Mass. 2005) (holding that admission of drug certificates does not implicate confrontation rights); *Commonwealth v. Lampron*, 839 N.E.2d. 870, 874-75 (Mass. App. Ct. 2005) (stating that admission of medical records permissible under *Crawford*); *Eslora v. State*, No. 04-04-00112-CR, 2005 Tex. App. LEXIS 2564, at *10-*12 (Tex. Crim. App. April 6, 2004) (indicating that medical records are business records and nontestimonial).

The business records exception—i.e., the “shopkeeper’s exception”—goes back to 1791. *See PHILLIPPS, supra* note 38, at 194-99, 194 n.(a), 198 n.(a) (“Shop-books are admitted in many of the states as evidence of goods sold and delivered, or of work and labor.”); *see also Riche v. Broadfield*, 1 Dall. 16, 16-17 (Pa. 1768) (holding that strict evidence laws should not be extended to “mercantile transactions”).

VI. CONCLUSION

A review of confrontation exceptions and common law evidence cases shows that the right of confrontation in 1791 was much more complicated than many commentators and the *Crawford* and *Davis* opinions acknowledge. Confrontation and cross-examination was normally required, but exceptions existed. The oath was normally required, but again, there were exceptions. The Confrontation Clause did not apply to the states where most criminal cases were prosecuted in 1791, so little case law interpreting the Sixth Amendment existed. At least five of the thirteen new states did not even have confrontation clauses in their state constitutions or declarations of rights at the time of the Revolution.²⁷⁵ Evidently, lawmakers in those states were willing to leave the right of confrontation up to what *Crawford* refers to as the common law “vagaries of the rules of evidence.”²⁷⁶

In *Crawford* Justice Scalia stated that whether an out-of-court statement should be admissible without violating confrontation should be determined based on an originalist analysis. The determination of whether a statement is testimonial should be made in light of the Founders’ intent and the purpose of the Confrontation Clause. Any definition of “testimonial” used today should require that the statements be taken by law enforcement or agents of law enforcement. Otherwise, any rule to determine whether statements are testimonial will be so vague as to be unworkable and impractical. The significant number of exceptions for testimonial out-of-court statements at the time of the Founders indicates that *Crawford’s* historical analysis is seriously flawed. The Court’s analysis in *Davis* is also flawed. Under an originalist analysis, the entire 911 call in *Davis* should have been admissible as a spontaneous declaration, *res gestae*, or hue and cry, because these exceptions existed in 1791.

Many 911 calls also qualify as statements under the medical exception because the caller is requesting medical help or treatment. The medical exception existed at the time of the Founders. It evolved from the present sense impression exception and present mental state exception. By 1791 physicians were allowed to testify about a patient’s out-of-court statements if the patient’s statements were relied on by the physician in forming his or her opinion. Physicians were also able to testify about

275. See *Crawford v. Washington*, 541 U.S. 36, 48-49 (2004) (*Crawford* cites eight of the thirteen states as guaranteeing the right of confrontation).

276. *Id.* at 61 (“Where 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.’”).

the out-of-court patient statements even when the patient statements were not made under oath. The medical exception allowed for the admissibility of patient out-of-court statements without confrontation and cross-examination. The wide use of the medical exception at the time of the Founders indicates that the Founders would not have considered statements under the medical exception to be testimonial. Accordingly, under an originalist analysis, medical exception statements should be admissible today without confrontation and cross-examination.

A physician's ethical obligation to the patient prevents a physician from acting as an agent of law enforcement. Because non-physician medical professionals act as agents of physicians, statements made to them also qualify for the medical exception. The medical exception applies to patient statements even when the patient has received no treatment because the physician does make some kind of diagnosis. Furthermore, physicians are not manufacturing evidence when recording a patient's statements but simply using another form of memorialization. Statements under the medical exception also qualify for the business records exception. Because the Court has already stated that business records are not testimonial, medical records should also qualify as an exception to confrontation.

As Chief Justice Rehnquist's concurring opinion in *Crawford* accurately points out, at the time of the ratification of the Sixth Amendment, hearsay law was still evolving.²⁷⁷ The Founders' understanding of the right of confrontation and its exceptions was also evolving. What was not evolving was the Founders' commitment to justice. The Preamble of the Constitution states that one of the Founders' goals was to "establish Justice."²⁷⁸ Justice results when the guilty are held accountable, while at the same time protecting the constitutional rights of all, including the innocent. The two goals should not be considered mutually exclusive.²⁷⁹

277. *Crawford*, 541 U.S. at 71 n.1 (Rehnquist, C.J., concurring).

278. The Founders also wanted to ensure domestic tranquility and promote the general welfare, also a goal of the criminal justice system:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America.

U.S. CONST. pmbl.

279. Professor Susan Estrich has perhaps stated it best:

Society obviously has an interest in not tolerating the techniques of a police state, but it also has an interest in ensuring that the state is capable of imposing responsibility for wrongs. It is better that ten guilty men go free than one

The existence of a significant number of confrontation exceptions in 1791, which *Crawford* either implicitly or explicitly acknowledges as being testimonial, and the other exceptions that can be discerned if one carefully interprets the historical evidence, show that the Founders' generation believed confrontation exceptions were required in order to achieve justice.²⁸⁰ Although *Crawford* does not address the issue, exceptions for dying declarations, forfeiture by wrongdoing, spontaneous declarations or *res gestae*, the Marian statute exceptions—including statements before justices of the peace and statements at a coroner's inquest—the coconspirator exception, statements in travail, the medical exception, and others were clearly used during the Founders' era to ensure the attainment of “the twofold aim (of criminal justice) . . . that guilt shall not escape or innocence suffer.”²⁸¹ If we are to achieve justice for child abuse victims and for society, we should acknowledge that statements under the medical exception should continue to exist as an exception to the confrontation right today.

innocent man be punished; but it is best of all if the ten guilty are punished while the innocent man goes free.

SUSAN ESTRICH, *GETTING AWAY WITH MURDER* 96-97 (1998). If the Founders intended that confrontation be considered an absolute right, that out-of-court statements cannot be introduced no matter what the reason, they would not have allowed the use of dying declarations, spontaneous declarations, forfeiture by wrongdoing, statements in travail, the medical exception, and the use of other exceptions that existed in 1791. Nor would they have allowed admissibility without confrontation for statements that were introduced for reasons other than to prove the truth of the matter asserted in the statement. Because the Founders did allow statements to be admitted when these confrontation exceptions applied, the Founders did not consider confrontation to be an absolute right without exceptions, even when the statements were testimonial.

280. The Marian statutes were probably passed by Parliament because of Parliament's concerns about the inability to prosecute felony cases when the victim was unavailable because the victim had been threatened or murdered. See generally LANGBEIN, *ORIGINS*, *supra* note 21, at 55.

281. *United States v. Nixon*, 418 U.S. 683, 709 (1974) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)) (first alteration in original).