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pp. **44–49**

What Happened—and
What Is Happening—to the
Confrontation Clause

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A leading Supreme Court litigator and nationally recognized expert on criminal procedure, Jeffrey L. Fisher has argued numerous cases in the U.S. Supreme Court and has participated in the certiorari and merits stages of dozens of others. His successes include winning the landmark cases of *Blakely v. Washington*, in which the Court held the Sixth Amendment right to a jury trial applies to sentencing guidelines, and *Crawford v. Washington*, in which he persuaded the Court to adopt a new approach to the Constitution's Confrontation Clause. In 2006, *The National Law Journal* named Professor Fisher one of the "100 Most Influential Lawyers in America." Earlier in his career, he clerked for U.S. Supreme Court Justice John Paul Stevens. He is co-director of the law school's acclaimed Supreme Court Litigation Clinic.

The following is an excerpt from Professor Fisher's paper "What Happened—and What Is Happening—to the Confrontation Clause" (*Journal of Law & Policy*, 2007).

INTRODUCTION

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

This much we know: the Confrontation Clause gives defendants the right to be confronted with the "witnesses" against them—in other words—with those persons whose "testimony" the prosecution offers against defendants. In order to safeguard this right, the Clause prohibits the prosecution from introducing out-of-court "testimonial" statements unless the declarants are unavailable and defendants had a prior opportunity to cross-examine them.

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

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

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the

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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.

There is much murkiness in the many components of that proffered dichotomy. And that murkiness does not dissipate when one digs into the opinion. The Court employed three dominant strains of reasoning to elucidate and apply its dichotomy—each of which, at least at first glance, does not seem entirely consistent with the others. First, the Court distinguished statements given during an “ongoing emergency” from those given after such an emergency was over. Second, the Court distinguished between statements describing “what is happening” from those describing “what happened.” Third, the Court distinguished between statements that do not operate as “a weaker substitute for live testimony at trial” from those that do align with their “courtroom analogues”—in other words, the Court distinguished those statements that do not function like witness testimony from those that “do precisely what a witness does on direct examination.”

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

This preference for the emergency idea is understandable. We have entered a brave new world of confrontation jurisprudence in which virtually no judges have experience applying even its basic

governing principles. It makes sense that judges gravitate toward a concept that at least seems to strike a familiar note with respect to other areas of criminal procedure. For example, the Fourth Amendment’s warrant requirement contains an exception for “exigent circumstances,” and the Fifth Amendment’s Self-Incrimination Clause allows the government to introduce confessions police obtain without Miranda warnings when the police interrogated the suspect in the midst of a public safety emergency. Furthermore, the unadorned concept of an emergency is flexible enough that many appellate courts can recite it, comfortable in the knowledge that as a test, it will not stand in the way of reaching their desired, pre-Crawford result: upholding the admission of absent victims’ statements alleging potentially criminal behavior, often some kind of domestic violence.

This Article contends, however, that the emergency/nonemergency dichotomy is the wrong touchstone for resolving disputes over statements describing fresh criminal activity. It does so by drawing on history to make sense of the *Davis* opinion. While the aggressive prosecution of domestic violence cases gives this issue a modern urgency, the problem of whether to admit statements describing fresh criminal activity is hardly new. In particular, prosecutors in the nineteenth century frequently tried to introduce statements by victims who had just been assaulted, shot or stabbed (but who did not think they were so seriously wounded as to be giving dying declarations). Courts resolved disputes over the admissibility of these statements exclusively by reference to the past/present dichotomy—or as it was known then, the *res gestae* doctrine. Under

the *res gestae* doctrine, statements describing ongoing activity were admissible, but statements concerning completed events were not. It is that doctrine that not only properly carries forward the right to confrontation to the post-Crawford era, but also that best synthesizes the various strands of the Davis opinion itself. . . .

There was only one recognized exception (aside from dying declarations) to the prohibition against admitting declarations outside of the *res gestae*: in cases in which “a person ha[d] been in any way outraged”—most often in rape cases, but also apparently in other cases lacking any sexual component—the fact that this person made a complaint right after the event happened was admissible. Sometimes courts admitted only the fact that the alleged victim complained, and occasionally courts permitted the substance of such complaints to corroborate the victim’s trial testimony.

But this “outcry” exception actually proved the rule that introducing any declaration accusing someone of committing a criminal act implicated the right to confrontation. For it was settled that if the victim did not testify, evidence of the fresh complaint—even to a relative or friend—“was not admissible, and only the fact that a complaint was made could be admitted.” Recall, for instance, the King’s Bench’s holding in *Brasier* that an alleged victim’s complaint made to her mother upon coming home from an alleged assault was inadmissible because the victim was “not sworn or produced as a witness on the trial.” Nearly a century later, an American court held that an alleged victim’s statements that her parents elicited soon after an alleged assault with intent to commit rape were inadmissible because the declarant did not testify and the statements were “not [made] in the presence of the accused.” It is hard to miss the confrontation rhetoric in these decisions. Thus, even as courts gradually discarded the supposition that victims of certain violent acts typically would complain right after they happened, they adhered to the restriction against introducing absent victims’ fresh complaints.

C. THE MODERN CREATION OF THE EXCITED UTTERANCE DOCTRINE

During the same time that courts in criminal cases were rigorously excluding absent declarant’s statements—no matter how agitated or excited—that reported past events, one must note for the sake of completeness that some courts in civil cases occasionally extended the scope of the *res gestae* doctrine to cover statements made, as the Supreme Court put it in *Insurance Co. v. Mosley*, “almost contemporaneously with [an injury’s] occurrence.” Instead of seriously arguing that such statements were—as the *res gestae* concept requires—part of the events themselves, the Supreme Court justified the statements’ admission primarily on the ground that “[i]n the ordinary concerns of life, no one would doubt the truth” of declarations made shortly after disruptive events. A few late nineteenth century state criminal cases invoked similar reliability-based reasoning, albeit usually in decisions involving statements that the courts also legitimately deemed to be part of the underlying transactions.

Writing the first edition of his influential treatise in 1904, Wigmore recognized that decisions such as *Mosley* could not really be explained by the common-law *res gestae* doctrine. But instead of rejecting these cases as strays, Wigmore accepted their results and advanced, for the first time, the notion that the “stress of nervous excitement. . . stills the reflective facilities” and renders statements under that condition “particularly trustworthy,” thereby warranting exemption from the hearsay rule. Even putting aside questions concerning the validity of Wigmore’s psychological assumptions, Wigmore’s treatise took two further steps that were simply wrong.

First, Wigmore claimed that statements reporting past events while under the stress of excitement were comparable to the statement that the court admitted in the noted 1694 case of *Thompson v. Trevanion*, and thus that the idea of “excited utterances” had some historical pedigree. Thompson was a civil case in which the court upheld the admission

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of a woman’s declaration “immediat[ely] upon the hurt received, and before [she] had time to devise or contrive anything to her own advantage.” In contrast to Wigmore, most Founding-Era commentators did not take the case’s four-sentence *nisi prius* report to mean that the declarant’s statement was admitted in her absence to prove that the defendant injured her. But even if the statement was used this way, the court’s holding would have been a fairly standard *res gestae* ruling. The reporter’s phrase “immediat[ely] upon the hurt received” is most naturally read to mean that the statement was made so simultaneously with being injured that it was part of the event itself—the victim’s direct response to being assaulted.

Equally important, Wigmore did not distinguish between civil and criminal cases in advancing the new reliability-based hearsay exception for excited utterances. Wigmore openly acknowledged that, in contrast to classic *res gestae* statements, narrative statements describing actions that had just completed were “testimonial,” as he used that term. But even when such statements reported criminal acts to governmental agents, Wigmore did not perceive this as posing Confrontation Clause concerns in ensuing criminal prosecutions. He thought the Clause did “not prescribe what kinds of testimonial statements. . . shall be given infrajudicially”; this depended, in his view, exclusively “on the law of evidence for the time being.”

Crawford, however, expressly rejected Wigmore’s toothless view of the Confrontation Clause and held that the Confrontation Clause does not depend on “the vagaries of the rules of evidence, much less [on] amorphous notions of ‘reliability.’” Therefore, while the perceived reliability of certain out-of-court

statements describing completed events afforded a legitimate theoretical basis in cases beyond the reach of the Sixth Amendment to allow the admission of such statements, the excited utterance exception has nothing to teach us about the scope of the Confrontation Clause. Only the *res gestae* concept was developed in order to interlock with constitutional restrictions respecting the introduction of out-of-court testimony against criminal defendants.

II. THE DAVIS OPINION

It is readily apparent that Davis fits within the common-law *res gestae* tradition. The Court explicitly held that statements describing to agents of law enforcement “what happened” are testimonial, but that statements describing “what is happening” are not. To be sure, I argued in the case that the Court should define the “what is happening” category narrowly—limiting it, as the many courts did at common law, to statements describing the alleged crime itself in progress. But the Court, consistent with the other courts’ broader construction that the *res gestae* concept encapsulates not only statements describing events in progress, but also those made immediately after in direct consequence to such events, held that the 911 caller’s statements describing events as the assailant fled were not testimonial.

WHILE THE AGGRESSIVE PROSECUTION OF DOMESTIC VIOLENCE CASES GIVES THIS ISSUE A MODERN URGENCY, THE PROBLEM OF WHETHER TO ADMIT STATEMENTS DESCRIBING FRESH CRIMINAL ACTIVITY IS HARDLY NEW. IN PARTICULAR, PROSECUTORS IN THE NINETEENTH CENTURY FREQUENTLY TRIED TO INTRODUCE STATEMENTS BY VICTIMS WHO HAD JUST BEEN ASSAULTED, SHOT OR STABBED (BUT WHO DID NOT THINK THEY WERE SO SERIOUSLY WOUNDED AS TO BE GIVING DYING DECLARATIONS).