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Remember the Ladies and the Children Too

CRAWFORD'S IMPACT ON DOMESTIC VIOLENCE AND CHILD ABUSE CASES

Myrna Raeder[†]

I. INTRODUCTION

*Crawford's*¹ testimonial approach has had a dramatic impact on domestic violence and child abuse cases. This should come as no surprise, since *Crawford's* view of the Confrontation Clause is grounded in the policies and practices in place in 1791, without any regard for weighing or interpreting those underlying confrontation concerns through the lens of the modern era. A purely historic approach to confrontation ignores the significant societal changes that have resulted in the criminalization of domestic violence and child abuse. Original intent focusing exclusively on 1791 retreats to a time when voices of outsiders, including women and children were not included in creating evidentiary or constitutional policy.²

Even though *Crawford* involved a state conviction, the opinion does not even look to practice in 1868 when the Fourteenth Amendment “extended the strictures of the Fifth and Sixth Amendments to the States.”³ In 1791, the United States had no organized police force, let alone medical or forensic protocols in criminal cases. *Crawford* also ignores the impact of videotape, two-way television, telephone, email, audiotape, typewriters, and computerized records in creating

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¹ *Crawford v. Washington*, 541 U.S. 36 (2004).

² Feminist jurisprudence and critical race theory critique the absence of women and minorities from policymaking. See, e.g., Myrna Raeder, *Introduction to Symposium on Evidence Law: Race and Gender in Evidentiary Policy, and The New Courtroom*, 28 SW. U. L. REV. 157, 158-63 (1999) (discussing literature).

³ *Portuondo v. Agard*, 529 U.S. 61, 65 (2000) (mentioning practice at both timeframes).

easy access to out-of-court statements that did not exist in 1791. Today, technology provides the means of producing all manner of hearsay that was not available in an earlier age. Extensive use of hearsay is now the norm, not the exception. Moreover, competency rules and evidentiary standards were much more restrictive then, resulting in an additional reliability check that does not exist in a world of expansive hearsay exceptions. Ironically, in 1791, effective cross-examination was often limited because the defendant either had no counsel or counsel's cross-examination was restricted.⁴ Jury trials of the time were quite short; often less than one hour.⁵ Thus, the attempt to impose the 1791 Confrontation Clause on the twenty-first century criminal justice system without consideration of the many societal differences was sure to create the havoc that *Crawford* has wrought.

In domestic violence cases, a purely historic approach ignores the reality that in 1791 the "Rule of Thumb" was common: "as [the husband] is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of chastisement, in the same moderation that a man is allowed to correct his apprentices or children."⁶ *Crawford's* originalist approach eschews the question of what the founding fathers would have thought of a world that espouses zero tolerance for domestic violence, one in which 911 protocols are routine, as are pro- or mandatory-arrest policies, no-drop prosecutions, criminal contempt convictions for violation of protective orders, expansive hearsay exceptions and in some states reporting requirements for medical personnel. Instead, under *Crawford*, the confrontation right looks backward, not forward.

Similarly, child abuse prosecutions were a rarity in 1791. Not only was molestation not recognized as a significant societal problem, but the old adage that children should be seen but not heard extended to the courtroom. Even well into the twentieth century, statutes often disqualified children under seven from testifying, and in some states children as old as twelve could be barred. In contrast, minimal competency rules now dominate, and some states permit unsworn testimony of

⁴ See, e.g., John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1197 n.140 (1996) (discussing sources indicating between a quarter and a third of defendants had counsel at the Old Bailey by the end of the eighteenth century).

⁵ John H. Langbein, Remarks to AALS Evidence Section (Jan. 2005).

⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 444 (Chicago & London, Univ. of Chicago Press 1765).

child abuse victims,⁷ or simply declare child victims as competent to testify.⁸ Today, mandatory reporting requirements exist in all fifty states, eighteen of which include anyone who suspects child abuse.⁹ Therapeutic and forensic interviewing by doctors, social workers and psychologists who are employed by the state or referred by agents of the state are common. In addition, child hearsay exceptions and expansive interpretation of firmly rooted exceptions routinely permit the voices of children to be heard, whether or not they testify. Yet, the return to 1791 silences the voices of children who do not appear at trial, unless they were subject to prior cross-examination or the right has been forfeited.

Ironically, looking backwards to determine what is “testimonial” provides no more certainty than the earlier *Roberts*¹⁰ reliability test. For example, one judge, trying to evaluate whether statements by a nontestifying child to her grandmother concerning sexual assault perpetrated upon her by a juvenile were testimonial, noted “[t]he quagmire we are left in, however, is that the *Crawford* Court does not pinpoint a specific definition of the amorphous concept of what ‘testimonial statements’ might include.”¹¹ Not only are courts reaching opposite conclusions on similar facts, but the very reach of the Confrontation Clause is in doubt. On the one hand, if the Court ultimately defines testimonial narrowly, and also jettisons any confrontation test for nontestimonial hearsay, the defendant will have even less ability to exclude hearsay than under *Roberts*¹² and its progeny. On the other hand, if testimonial hearsay is interpreted broadly, the hearsay that is excluded may confound society’s ability to hold some types of perpetrators responsible for their crimes, unless forfeiture of the confrontation right is also viewed expansively.

As a feminist who is also concerned about the defendant’s right to confrontation, I have long pondered the

⁷ See, e.g., FLA. STAT. § 90.605(2) (1999); N.Y. CRIM. PROC. LAW § 60.20(2) (McKinney 1999).

⁸ See, e.g., ALA. CODE § 15-25-3(c) (1999); CONN. GEN. STAT. § 54-86h (1999); UTAH CODE ANN. § 76-5-410 (1999); see generally Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017 (2000).

⁹ See NATIONAL CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFORMATION, U.S. DEP’T OF HEALTH AND HUMAN SERVS., CURRENT TRENDS IN CHILD MALTREATMENT REPORTING LAWS 3 (2002).

¹⁰ *Ohio v. Roberts*, 448 U.S. 56 (1980).

¹¹ *In re E.H.*, 823 N.E.2d 1029, 1035 (Ill. App. Ct. 2005).

¹² *Roberts*, 448 U.S. 56.

proper balance to ensure that the voices of women and children are heard, without eviscerating the ability of the defendant to confront live complainants, and not just second hand witnesses. I face a tension between my desire to lower the incidence of domestic violence and child abuse and my view that testimonial hearsay should be interpreted broadly in light of technology and the adoption by states of expansive hearsay exceptions that make the government responsible for the existence of admissible hearsay. While it is obvious that interrogation produces testimonial hearsay, there has been little, if any, discussion of the government's role in creating the hearsay exceptions that permit private individuals to make accusations that in 1791 would not have been admissible. In other words, it is not helpful to define testimonial statements by reference to rules that do not contemplate the admission of most hearsay that is currently received at trial. Yet, *Crawford* did not ask how the drafters would have viewed the constitutionality of admitting of such legislatively approved hearsay in the absence of the declarant. Thus, beyond the issue of 911 calls to the police is the admission of purely private statements that would not have seen the light of day in 1791.

People v. Moscat,¹³ one of the early influential cases finding a 911 call by a domestic violence victim seeking rescue was not testimonial, astutely recognized that the historically grounded testimonial approach did not provide the urgent guidance needed to apply the Sixth Amendment to a twenty-first century world. However, my longstanding concern that cross-examination is a significant right that has been eviscerated by the *Roberts* approach, leads me to reject *Moscat*'s expansive exclusion of excited utterances from the protection of the Confrontation Clause. Yet, the difficulty with any approach that broadly interprets testimonial statements is that under *Crawford* it silences the voices of women and children by regressing to a world that typically treated them as chattel. While I am not as optimistic as Professor Mosteller that *Crawford* will eventually result in more pretrial cross-examination and trial witnesses,¹⁴ I view this transition to a new mode of Confrontation Clause analysis as an opportunity to rethink how we approach domestic violence and child abuse cases.

¹³ 777 N.Y.S.2d 875, 878 (Crim. Ct. 2004).

¹⁴ See Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 533-614 (2005).

This essay critiques the testimonial approach, presents my view of how testimonial statements should be defined, and discusses current trends affecting domestic violence and child abuse litigation. I also explore forfeiture, waiver, and opening the door to testimonial statements. Rather than fighting *Crawford*, holding out for the most strained interpretations that permit the use of statements by denying their testimonial effect, I suggest embracing evidentiary creativity, exploring new hearsay exceptions for declarants who testify, determining whether Rule 404(b) is being adequately used,¹⁵ and expanding expert testimony to permit background about battering and child abuse.¹⁶

More globally, I propose restructuring domestic violence prosecutions into separate tracks in order to devote scarce criminal justice resources to the most dangerous offenders. The Risky Violent Offender prosecutorial track would apply to cases resulting in death, rape or other serious physical injuries, weapons-based offenses, multiple victim abusers, defendants with previous convictions, and defendants who meet defined criteria of dangerousness. Other crimes typically charged as misdemeanors would be further separated into a Diversionary and a Middle track for all other cases. Finally, I suggest best practices that are most likely to permit child testimony.

II. THE *CRAWFORD* FRAMEWORK

A. *Crawford's Testimonial/Nontestimonial Divide*

As I have already alluded, my disagreement with the testimonial approach to confrontation is that the common law

¹⁵ I have long been opposed to outright propensity evidence in sexual abuse cases. See Myrna S. Raeder, A.B.A. *Criminal Justice Section Report to the House of Delegates*, 22 FORDHAM URB. L.J. 343 (1995) (supporting resolution opposing Federal Rules of Evidence 413-415). However, I support the use of Rule 404(b) in such cases. See Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1493 (1996) [hereinafter Raeder, *Simpson and Beyond*].

¹⁶ See Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 709 n.76 (2003) [hereinafter Lininger, *Evidentiary Issues*]; Tom Lininger, *Prosecuting Batterers after Crawford*, 91 VA. L. REV. 747 (2005) [hereinafter Lininger, *Prosecuting Batterers*]; Myrna S. Raeder, *The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147, 152 (1997) [hereinafter Raeder, *The Better Way*]; Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 790 (1996) [hereinafter Raeder, *The Double-Edged Sword*]; Raeder, *Simpson and Beyond*, *supra* note 15.

in 1791, or even that of 1868, should not set the standard. Instead, the appropriate question is how the historic Confrontation Clause concerns would be interpreted in light of modern technology and context. Just as the Eighth Amendment is interpreted according to evolving standards of decency,¹⁷ the Confrontation Clause should not be tied to a static framework. In other words, the approach in *Maryland v. Craig*,¹⁸ a case permitting an accommodation to permit a child witness to testify out of the presence of the defendant, is more suited to interpreting the Sixth Amendment in situations never contemplated in 1791. As *Craig* noted, “[w]e have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process.”¹⁹ *Craig* was quite practical, citing *Kirby v. United States*²⁰ for the proposition that “[i]t is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case.”²¹

Thus, *Craig* permitted denial of face-to-face confrontation when “necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”²² The opinion held “that a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court,”²³ a result not likely to have been reached in 1791. While *Craig* may be discounted as not involving “core” confrontation values, it is unclear why originalism applies selectively to some parts of the amendment, and indeed only to some amendments.

It is not a sufficient response for originalists to tell us to amend the Constitution if we don’t like where the doctrine leads us. The power of the Constitution is that it is a living document.²⁴ *Crawford* rejects that strength, and with it, the

¹⁷ See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1190 (2005).

¹⁸ 497 U.S. 836 (1990).

¹⁹ *Id.* at 849.

²⁰ 174 U.S. 47 (1899).

²¹ *Id.* at 61.

²² 497 U.S. at 850.

²³ *Id.* at 853.

²⁴ See generally Eric R. Claeys, *The Limits of Empirical Political Science and the Possibilities of Living-Constitution Theory for a Retrospective on the Rehnquist Court*, 47 ST. LOUIS U. L.J. 737 (2003).

flexibility that is essential to applying old doctrine to new situations. Obviously, the Court will be called upon to clarify its approach. At that point, the winners and losers will clearly emerge, but in the meantime, we must adopt practices that provide the best opportunity for successfully prosecuting domestic violence and child abuse cases, while recognizing the renewed importance of cross-examination.²⁵

Undoubtedly, *Crawford's* ambiguity was caused by the realpolitik of needing to obtain a majority, given that Justice Scalia's previous forays into Confrontation Clause originalism were supported only by Justice Thomas.²⁶ Thus, *Crawford* offers something for everyone. It mentioned three potential standards:

1. "[E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."²⁷
2. "[E]xtrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."²⁸
3. "[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."²⁹

These definitions vary significantly, and the selection of one will have a major impact on the scope of the Confrontation

²⁵ In the *Roberts* era, commentators, including myself, railed against the devaluation of cross-examination in a doctrinal approach based on reliability. Now, prior cross-examination has not simply regained its earlier luster, but has become a rigid requirement for admission of testimonial statements by unavailable declarants.

²⁶ See, e.g., *Lilly v. Virginia*, 527 U.S. 116, 144 (1999).

²⁷ *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting Brief for Petitioner at 23, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)).

²⁸ *Id.* at 51-52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)).

²⁹ *Id.* at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Respondent at 3, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)).

Clause. The first definition focuses on the declarant's perspective in giving the statement, while the second gives confrontation the narrowest content. Finally, the third appears to afford the most protection for defendants by imposing an objective witness standard. *Crawford* did not choose which criteria to apply, offering the following guidance:

1. Statements taken by police officers in the course of interrogations are testimonial under even a narrow standard.³⁰
2. "The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace. In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class."³¹
3. Interrogation extends "not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."³²

As a result, the Court held that Sylvia Crawford's "recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition."³³ Regardless of definition or scope, *Crawford* will catch some statements to private individuals in its testimonial net. Historically, Cobham's hearsay was not the only out of court statement introduced at Sir Walter Raleigh's trial.³⁴ Shouldn't we be concerned about the statements of the pilot, Dyer, who repeated what a Portugese gentleman had told him about the King never being crowned, because Raleigh and Cobham were

³⁰ *Id.* at 51.

³¹ *Id.* at 53.

³² *Rhode Island v. Innis*, 446 U.S. 291, 292 (1980) (cited in *Crawford*, 541 U.S. at 53 n.4).

³³ *Crawford*, 541 U.S. at 53.

³⁴ See, e.g., Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100-01 (1972).

going to cut his throat?³⁵ This statement was made to a private individual, but was clearly accusatory, either from the perspective of the declarant or a reasonable observer.

In the child abuse context, it is easy to posit examples of testimonial hearsay when a private individual acts as an agent or proxy for the government. This might occur in mandatory reporting contexts or where a child welfare agency joins with the prosecution to investigate cases. Arguably, some will view *Idaho v. Wright*³⁶ as such a case. “In *Wright*, the Court found that a defendant’s right to confrontation was violated by admission of statements made in part by a child declarant to a physician.”³⁷ Professor Margaret Berger has noted that the Solicitor General admitted that the questioning in *Wright* was by an agent of the prosecution in his amicus brief in *White v. Illinois*,³⁸ another case discussing confrontation concerns raised in a child abuse context:

[T]he questioning in that case [*Wright*] occurred after the declarant had been taken into custody by the police, and the state court’s characterization of the questioning suggest that it was designed to develop evidence in a criminal case The questioning therefore may be regarded as functionally equivalent to other forms of official interrogation that result in statements by a “witness.”³⁹

While I am obviously not a fan of the testimonial approach, now that it controls, I actually substantially agree with Professor Richard Friedman’s broad view of what is testimonial.⁴⁰ Yet, so much of hearsay is accusatory in the colloquial understanding of that term, it is unlikely that the Court would adopt a view that would significantly change the way trials currently look. In other words, a narrow interpretation of testimonial is more in keeping with the Court’s repeated admonition that the states are laboratories for social change, and its prior approval of all manner of “firmly rooted” hearsay. However, *Crawford* has made clear that as to

³⁵ *Id.*; The Trial of Sir Walter Raleigh, 2 Howell’s State Trials 1, 25 (1603).

³⁶ 497 U.S. 805 (1990).

³⁷ See Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 602 (1992).

³⁸ 502 U.S. 346 (1992).

³⁹ Berger, *supra* note 37, at 613 n.191 (quoting Brief for the United States as Amicus Curiae Supporting Respondent at 28 n.18, *White v. Illinois*, 502 U.S. 346 (1992) (No. 90-6113)).

⁴⁰ See, e.g., Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4 (2004).

the “core” concerns of the Confrontation Clause, a “broad modern hearsay exception” will not save a testimonial statement.⁴¹

B. Why Nontestimonial Hearsay Should Not Be Freely Admitted at Trial

Crawford offers even less guidance as to how courts should approach nontestimonial hearsay. Like a seer of old, Justice Scalia obliquely pronounces: “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”⁴²

What does this mean? If *Roberts* does not apply, regardless of whether a broad or narrow view of testimonial emerges, *Crawford* opens the possibility of large amounts of hearsay receiving no constitutional second-look at all. Justice Scalia savaged *Roberts*’ reliability test in *Crawford*: “The [reliability] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations. Reliability is an amorphous, if not entirely subjective, concept.”⁴³ Why would he leave open the possibility that *Roberts* and its progeny are still constitutionally appropriate, even to statements not at the core of Confrontation Clause concerns? Again the cynical answer is to obtain a majority, but realistically, *Roberts* provides a cost-free *pro forma* stamp of approval for all firmly rooted hearsay of unavailable declarants.⁴⁴ Only *Wright* provides any relief to defendants by subjecting nontraditional exceptions to a review for indicia of reliability.⁴⁵ Yet, the *Crawford* majority opinion made no reference to *Wright*. It is unlikely that Justice Scalia forgot about the case, since Chief Justice Rehnquist suggested that a simple reference to *Wright* could have explained the

⁴¹ *Crawford v. Washington*, 541 U.S. 36, 56-57 n.7 (2004).

⁴² *Id.* at 68.

⁴³ *Id.* at 63.

⁴⁴ See, e.g., *State v. Hembertt*, 696 N.W.2d 473, 484-85 (Neb. 2005), *petition for cert. filed*, No. 05-5981 (U.S. Aug. 19, 2005).

⁴⁵ *Idaho v. Wright*, 497 U.S. 805, 817-18 (1990).

reversal in *Crawford* without any need for restructuring the Confrontation Clause analysis.⁴⁶

There is a more nuanced possibility for the absence of *Wright* in the majority opinion. The only holding questioned by *Crawford* was *White v. Illinois*,⁴⁷ in which some of the admitted hearsay included a child's statement to an officer.⁴⁸ In other words, none of the other cases reached an incorrect result, even though their reliance on *Roberts'* framework was wrong. Therefore, because *Wright* was not specifically overruled, its holding, reversing a conviction where a child's statements to a doctor were admitted at trial,⁴⁹ is still good law. Since the statements were made to a private individual, the only rationale for supporting reversal appears to be that nontraditional hearsay is subject to a check for reliability. However, if *Wright* is recharacterized as testimonial due to the police selecting the physician, the basis for its holding that nontraditional hearsay must be subject to a separate reliability review could be rejected, like the *Roberts* rationale, without having to overrule the case. This recharacterization would accord with the position taken by the Solicitor General's previously referenced amicus brief in *White*.⁵⁰ While such an approach would expand the range of testimonial statements, particularly in child hearsay cases, it would also eliminate the argument that Supreme Court precedent requires a Sixth Amendment review of nontestimonial hearsay.

While I agree with *Crawford's* recognition that confrontation is primarily a procedural right,⁵¹ and acknowledge that reliability tends to be more a due process concern, it is imperative to retain a reliability review given a testimonial approach. First, there is a vast difference between trial practice in 1791 compared to today. Common law judges distrusted jurors and restricted access to evidence. They had

⁴⁶ *Crawford*, 541 U.S. at 76 (Rehnquist, C. J., concurring).

⁴⁷ 502 U.S. 346 (1992).

⁴⁸ *Crawford*, 541 U.S. at 58 n.8.

⁴⁹ *Wright*, 497 U.S. at 827 ("Given the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception, we agree with the court below that the State has failed to show that the younger daughter's incriminating statements to the pediatrician possessed sufficient 'particularized guarantees of trustworthiness' under the Confrontation Clause to overcome that presumption." (internal citations omitted)).

⁵⁰ Brief for the United States as Amicus Curiae Supporting Respondent at 18, *White v. Illinois*, 502 U.S. 346 (1992) (No. 90-6113)).

⁵¹ *Crawford*, 541 U.S. at 61.

stricter competency rules, and fewer hearsay exceptions.⁵² Early Supreme Court cases recognized how the fear of perjury impacted trial practice. For example, *Benson v. United States* posited that “the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors.”⁵³

Post-*Crawford*, it has been noted that *Roberts* and its progeny “seem to be alive and well as to nontestimonial hearsay.”⁵⁴ As previously mentioned, to the extent that the hearsay is introduced pursuant to a firmly rooted exception, the result is an automatic pass, so there is no incentive to reject the test. Even when *Wright* applies, reversals are not assured.⁵⁵ But assuming that reliability is required, are courts bound by the *White/Wright* definition, or can *Crawford*'s extended dalliance with history be used to support a reliability check with some bite? For years, I have contended that nontraditional uses of firmly rooted hearsay exceptions must be analyzed under *Wright* not *White*.⁵⁶ This would result in nontraditional hearsay being subject to a reliability check, regardless of which exception allowed for its admission. Certainly the reference to *White* in *Crawford* implies that for confrontation purposes, flexible interpretations of excited utterances do not satisfy the exception as understood in 1791.⁵⁷ Therefore, any argument that a true excited utterance is

⁵² See, e.g., *id.* at 56; *Miles v. United States*, 103 U.S. 304, 310 (1880); *Queen v. Hepburn*, 11 U.S. 290, 295-96 (1813).

⁵³ *Benson v. United States*, 146 U.S. 325, 336 (1892).

⁵⁴ *Davis v. State*, No. 03-04-00014-CR, 2005 WL 1173964, at *6 (Tex. App. May 19, 2005). See, e.g., *United States v. Hendricks*, 395 F.3d 173, 182 (3d Cir. 2005); *United States v. Holmes*, 406 F.3d 337, 348 (5th Cir. 2005); *Horton v. Allen*, 370 F.3d 75, 85 (1st Cir. 2004); *Evans v. Luebbbers*, 371 F.3d 438, 444-45 (8th Cir. 2004); *United States v. McClain*, 377 F.3d 219, 221 n.1 (2d Cir. 2004); *State v. Rivera*, 844 A.2d 191, 200-01 (Conn. 2004); *Demons v. State*, 595 S.E.2d 76, 80 (Ga. 2004); *State v. Vaught*, 682 N.W.2d 284, 292 (Neb. 2004).

⁵⁵ Compare *People v. Garrison*, 109 P.3d 1009, 1013 (Colo. Ct. App. 2004) (no reversal for statement admitted under residual exception), with *Miller v. State*, 98 P.3d 738, 745 (Okla. Crim. App. 2004) (reversal where declaration against interest to friend was admitted).

⁵⁶ See Myrna S. Raeder, *The Effect of the Catch-alls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 LOY. L.A. REV. 925, 941-42 (1992); Myrna S. Raeder, *Hot Topics in Confrontation Clause Cases and Creating a More Workable Confrontation Clause Framework Without Starting Over*, 21 QUINNIPIAC L. REV. 1013, 1014 (2003); Myrna S. Raeder, *White's Effect on the Right to Confront One's Accuser*, 7 CRIM. JUST. 2, 56 (1993).

⁵⁷ *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004).

nontestimonial, even when made to the police, would not save a modern excited utterance.

If the concerns underlying *Wright* still resonate with the Court, several possible reliability approaches spring to mind: (1) retain *Wright* as is; (2) retain *Wright*, but permit corroboration; or (3) adopt a modified historic approach that would permit testimonial hearsay to the extent it would have met a hearsay exception in 1791. The approach that would cause the least dislocation is to retain *Wright* as is. Since *Crawford* encourages experimentation by states to create more exceptions so long as the declarant testifies or the statement is nontestimonial,⁵⁸ the Court might hesitate jettisoning *Wright*. In other words, without any requirement of trustworthiness, a strict prosecutorial restraint view of *Crawford* is more likely to result in trials that include substantial amounts of potentially unreliable nontestimonial evidence, whether offered under ad hoc hearsay exceptions or expansively interpreted traditional exceptions.

However, *Wright* has been thoroughly criticized for excluding corroboration from the confrontation mix, since corroboration appears to support reliability, and as a practical matter, harmless error analysis will encompass such evidence. Because *Crawford* tells us that nontestimonial hearsay does not concern core confrontation values, slightly modifying the existing test would not require historic justification. Moreover, the rejection of corroboration in *Wright* appeared based on hearsay analysis.⁵⁹ Now that confrontation has been decoupled from hearsay, the rationale to reject corroboration is lessened. Alternatively, because the reliability check is really based on due process rather than confrontation grounds, corroboration should not be excluded. However, this latter justification would require the Court to provide an explanation of what due process means in the trial process, a topic it has approached somewhat inconsistently on a case by case basis in the context of a defendant's right to present a defense.⁶⁰

⁵⁸ See *id.* at 56, n.7 (noting that testimonial hearsay could not be saved by a broad, modern hearsay exception, even if that exception might be justifiable in nontestimonial circumstances).

⁵⁹ *Idaho v. Wright*, 497 U.S. 805, 806 (1990).

⁶⁰ Compare *Montana v. Egelhoff*, 518 U.S. 37, 38 (1996) (plurality approach to due process), with *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (due process includes "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf"). See also *United States v. Scheffer*, 523 U.S. 303, 315-17 (1998).

I am hopeful that *Crawford*'s progeny may permit more flexibility in interpretation than its originalism suggests, because it is unclear whether all of the justices in the *Crawford* majority fully considered the potential consequences of a testimonial approach for trial practice; particularly, the decreased ability to obtain convictions where neither the state nor the defendant has engaged in any misconduct resulting in the unavailability of the declarant. The more pragmatic justices might balk at a broad interpretation of testimonial that would result in an absolute rule that such evidence would be excluded whenever the declarant is unavailable, but they might equally look askance at providing an automatic pass for all other hearsay. Such views could presage a very narrow reading of testimonial, but might also suggest a compromise that retreats from an absolutist version of the confrontation right to one that also permits otherwise testimonial hearsay that was available in 1791.

For example, Justice Scalia indicates that excited utterances were interpreted very narrowly as applying to *res gestae*, not after the fact descriptions.⁶¹ The other few existing exceptions would have also been confined to the type of information that justified the theoretical underpinning for the rule, uncorrupted by the modern shift toward liberal admission of hearsay. Permitting such hearsay, regardless of cross-examination, might actually encourage states to narrowly interpret their hearsay exceptions, requiring nontraditional hearsay to be admitted by exceptions that often require trustworthiness, even if the Court does not ultimately retain a reliability check for nontestimonial hearsay. For example, *State v. Branch*⁶² recently narrowly construed excited utterances to exclude a statement by a child in response to a question by police. *Branch* noted, "our analysis is informed by the principles undergirding the Confrontation Clause jurisprudence of our federal and state constitutions."⁶³ While it may be naïve to believe that the pendulum is finally swinging back to less hearsay after decades favoring liberal admission of out of court statements, *Branch* may presage a rethinking about hearsay analysis, not simply confrontation.⁶⁴

⁶¹ *Crawford*, 541 U.S. at 58 n.8.

⁶² 865 A.2d 673, 688-90 (N.J. 2005).

⁶³ *Id.* at 690.

⁶⁴ See also *United States v. Arnold*, 410 F.3d 895, 901 (6th Cir. 2005) (not an excited utterance where no proof of the amount of time between the incident and the

Another wild card that is just beginning to surface is the role of state constitutions in regulating nontestimonial hearsay. Whether or not reliability is required under the federal constitution, a state can always provide more protection for criminal defendants under its own constitution, and in a post-*Crawford* world, this need not be linked to a *pro forma* pass for firmly rooted hearsay.

III. DOMESTIC VIOLENCE CASES

A. *The Empirical Evidence Concerning Domestic Violence*

While the aggressive prosecution of batterers has undoubtedly played a significant role in nearly halving nonfatal intimate violence against women between 1993 and 2001,⁶⁵ the numbers are still distressing, and some of the decline in aggravated assaults may be illusory.⁶⁶ Intimate partner violence comprised 20% of violent crime against women in 2001,⁶⁷ and family violence accounted for about 1 in 10 of all violent victimizations from 1993-2002.⁶⁸ In 1993, women were victimized in approximately 1.1 million non-fatal violent crimes.⁶⁹ By 2001, this figure declined to 588,490 incidents.⁷⁰ Simple assault comprised nearly 72% of the total.⁷¹ The number of women killed yearly by their intimates fell less dramatically during that timeframe to 1247 from 1581.⁷² An analysis of 2002 homicide data found that for female victims

911 call, and noting that use of the exceptions must be closely scrutinized to protect the defendant's right to confront accusers); *People v. Victors*, 819 N.E.2d 311, 319 (Ill. App. Ct. 2004) (not an excited utterance where a five minute discussion with backup officer took place before statement was made).

⁶⁵ See CALLIE MARIE RENNISON, U.S. DEP'T OF JUST., INTIMATE PARTNER VIOLENCE, 1993-2001, at 2 (NCJ 197838) (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>.

⁶⁶ See, e.g., Jill Leovy, *LAPD Gave Misleading Crime Data*, L.A. TIMES, Aug. 30, 2005, at B1 (correcting previous error consolidating all domestic assaults, regardless of whether aggravated or simple, substantially overstated decline in violent crime).

⁶⁷ RENNISON, *supra* note 65, at 1.

⁶⁸ MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUST., FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 1 (NCJ 207846) (June 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>. It should be noted that family violence is a broader term than domestic violence and includes all types of violent crime committed by an offender who is related to the victim either biologically or legally, through marriage or adoption.

⁶⁹ RENNISON, *supra* note 65, at 1.

⁷⁰ *Id.*

⁷¹ See *id.* at Table 1.

⁷² *Id.* at 2.

who knew their killers, 61% were wives or intimate acquaintances of their killers.⁷³

Statistics from other sources are even higher, indicating that approximately one in five women is victimized repeatedly.⁷⁴ While the extent of battering during pregnancy is not clear, homicide is the second leading cause of death in pregnant women.⁷⁵ According to the 2000 National Violence Against Women Survey, 25% of women and 8% of men are subject to violence by an intimate during their lifetime.⁷⁶ That survey estimated that approximately 1.5 million women are battered or raped annually by their partners,⁷⁷ and about 1/3 of these women are injured enough to require medical treatment.⁷⁸ Twenty percent of women, moreover, who need treatment are pregnant at the time.⁷⁹ Finally, a large amount of intimate partner victimizations are not reported to the police.⁸⁰ Some claim that as much of 50% of domestic violence goes unreported.⁸¹

B. *The Criminalization of Domestic Violence*

Coinciding with the emergence of feminism, the Battered Women's Movement became prominent in the 1970s and by the 1990s resulted in significant statutory and policy changes to ensure the prosecution of domestic violence crimes, provide shelters for battered women and their children, and modify self-defense definitions to include women who kill their

⁷³ VIOLENCE POLICY CENTER, WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2002 HOMICIDE DATA 7 (2004), available at <http://www.vpc.org/studies/wmmw2004.pdf>.

⁷⁴ See, e.g., Tri-Town Council on Youth and Family Services, <http://tritowncouncil.org/DOMESTICVIOLENCE.html> (last visited Aug. 17, 2005).

⁷⁵ Jeani Chang et al., *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States, 1991-1999*, 95 AM. J. PUB. HEALTH 471 (2005), abstract at <http://www.ajph.org/cgi/content/abstract/95/3/471>.

⁷⁶ PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUST. AND THE CENTERS FOR DISEASE CONTROL AND PREVENTION, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 26 (NCJ 183781) (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

⁷⁷ *Id.*

⁷⁸ *Id.* at v.

⁷⁹ Aili Mari Tripp & Ladan Affi, *Domestic Violence in a Cultural Context*, 27 FAM. ADVOC. 32, 33 (Fall 2004).

⁸⁰ PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 49 (NCJ 181867) (2000).

⁸¹ CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUST., INTIMATE PARTNER VIOLENCE 1 (NCJ 178247) (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf>.

batterers.⁸² Previously, domestic violence calls often resulted in few arrests and prosecutions as well as low conviction rates. In addition, the Violence Against Women Act (VAWA)⁸³ was passed, and since 1995, its office within the Department of Justice has provided more than \$1 billion in grants “to train personnel, establish specialized domestic violence and sexual assault units, assist victims of violence, and hold perpetrators accountable.”⁸⁴ Funding for studies and programs aimed at reducing domestic violence has also been provided.

Newly adopted police, prosecutorial and judicial practices dramatically transformed domestic violence litigation during the last twenty years.⁸⁵ Warrantless misdemeanor arrests are now the rule. Pro arrest or mandatory arrest policies are common, as are no-drop prosecutions, regardless of any contrary wishes of complainants. Protective orders are routinely, though not invariably, enforced by criminal contempt.⁸⁶ In some urban jurisdictions, domestic violence courts exist, a number of which consolidate all related cases regardless of whether brought in civil, criminal or in juvenile court.⁸⁷ Similarly, in some urban settings, prosecutorial offices have made domestic violence a priority, assigning prosecutors and advocates to domestic violence units.⁸⁸ Typically, courts and prosecutorial offices specializing in domestic violence have

⁸² See generally Raeder, *The Double-Edged Sword*, *supra* note 16; Raeder, Simpson and Beyond, *supra* note 15.

⁸³ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 and 42 U.S.C. (1994)).

⁸⁴ Office on Violence Against Women, <http://www.ojp.usdoj.gov/vawo/about.htm> (last visited Sept. 25, 2005).

⁸⁵ See generally Phyllis Goldfarb, *Intimacy and Injury: Legal Interventions for Battered Women*, in THE HANDBOOK OF WOMEN, PSYCHOLOGY, AND THE LAW (Andrea Barnes ed., 2005).

⁸⁶ Horror stories can still occur. See, e.g., *Town of Castle Rock v. Gonzales*, 125 S.Ct. 2796 (2005) (husband murdered his three children after police repeatedly failed to respond to estranged wife’s complaints that he had violated a protective order; Court found no basis for civil rights liability).

⁸⁷ See, e.g., Judge Lowell D. Castleton et al., *Ada County Family Violence Court: Shaping the Means to Better the Result*, 39 FAM. L.Q. 27 (Spring 2005); see generally EMILY SACK, FAMILY VIOLENCE PREVENTION FUND, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES (2002), available at http://endabuse.org/programs/healthcare/files/FinalCourt_Guidelines.pdf; Jennifer Thompson, Comment, *Who’s Afraid of Judicial Activism? Reconceptualizing a Traditional Paradigm in the Context of Specialized Domestic Violence Court Programs*, 56 ME. L. REV. 407 (2004).

⁸⁸ See generally Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1673 (2004).

produced higher conviction rates in comparison to jurisdictions where domestic violence is treated like any other assault.⁸⁹

It became obvious relatively quickly in the fight against domestic violence that the major impediment to obtaining convictions was that the majority of battered women did not want to testify. Even when they appeared at trial, they often recanted their accusations and generally were bad witnesses, resulting in relatively few convictions.⁹⁰ As a result, aided by the *Roberts* approach to confrontation, prosecutors developed what is known somewhat misleadingly as “evidence based” or “victimless” prosecutions.⁹¹ In other words, hearsay exceptions for excited utterances, medical statements, or ad hoc exceptions for trustworthy hearsay permitted prosecution in the absence of the victim through the testimony of police and medical personnel. Sometimes statements made in application for protective orders would be introduced, not simply the order itself.⁹² Cases relied on these second-hand witnesses, and also included photographs of injuries, medical testimony, and in some jurisdictions expansive use of prior acts of domestic violence offered under Rule 404(b) or domestic violence exceptions. On occasion, a Battered Woman Syndrome (BWS) expert would explain why the woman stayed with her batterer or had recanted her accusatory statements, thereby rehabilitating the credibility of the victim who had testified or whose hearsay had been impeached by her prior inconsistent statements.

In retrospect, this effort to hold batterers accountable for their actions did not create uniformly good results for battered women. In some instances, women have virtually been forced to testify or face jail under material witness or bench warrants when they ignore subpoenas,⁹³ and both the

⁸⁹ See *id.* at 1673-74.

⁹⁰ See, e.g., JOANNE BELKNAP & DEE L.R. GRAHAM, U.S. DEPT OF JUST., FACTORS RELATED TO DOMESTIC VIOLENCE COURT DISPOSITIONS IN A LARGE URBAN AREA 11 (NCJ 202564), in DOMESTIC VIOLENCE RESEARCH: SUMMARIES FOR JUSTICE PROFESSIONALS (Barbara E. Smith ed., Dec. 2003), available at <http://www.ncjrs.gov/pdffiles1/nij/202564.pdf>; Lininger, *Prosecuting Batterers*, *supra* note 16, at 768-69.

⁹¹ See generally Andrew King-Ries, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301 (2005).

⁹² See *People v. Thompson*, 812 N.E.2d 516, 521 (Ill. App. Ct. 2004) (holding that statements made by a domestic violence victim in an order of protection, which were introduced at trial, were testimonial and violated the Constitution's Confrontation Clause).

⁹³ See, e.g., Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 402 (2001).

effect and the effectiveness of such policies began to be questioned.⁹⁴ In other words, the bottom line is that the vast majority of female domestic violence victims still do not want to prosecute their batterers. While batterers were getting convicted in higher percentages due to the witness-lite/hearsay-heavy approach, particularly in jurisdictions with domestic violence courts, some battered women's advocates starting noticing more ominous trends. Besides more women being arrested for domestic violence and judges granting mutual protective orders,⁹⁵ women were being charged criminally for endangering their children who witnessed their abuse; and even when they were not charged, their children might be removed from the home and placed in foster care.⁹⁶ A few researchers concluded that the empirical evidence indicated that some classes of women were put at greater risk by aggressive prosecution, particularly in misdemeanor cases where defendants were released pretrial, or received probation or short sentences.⁹⁷

⁹⁴ See, e.g., MARY A. FINN, EFFECTS OF VICTIMS' EXPERIENCES WITH PROSECUTORS ON VICTIM EMPOWERMENT AND RE-OCCURRENCE OF INTIMATE PARTNER VIOLENCE (NCJ 202983) (Feb. 2004), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/202983.pdf>; see also NAT'L DIST. ATTORNEYS ASS'N, POLICY POSITIONS ON DOMESTIC VIOLENCE 9 (adopted Oct. 23, 2004) (recommending discretionary policies, rather than written no drop policies), available at <http://www.ndaa.org/newsroom/index.html>.

⁹⁵ See, e.g., Sandy Chestnut, *The Practice of Dual Arrests in Domestic Violence Situations: Does It Accomplish Anything?*, 70 MISS. L.J. 971 (2001); Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 23-24 (2004); Andrea D. Lyon, Comment, *Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan*, 5 MICH. J. GENDER & L. 253 (1999); Sack, *supra* note 88.

⁹⁶ See, e.g., *Nicholson v. Scoppetta*, 820 N.E.2d 840, 844 (N.Y. 2004) (clarifying that neglect is not established solely when a child has witnessed her mother's domestic abuse and therefore routine filing of neglect on this ground was unjustified). See also Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565 (2004); FAMILY VIOLENCE PREVENTION FUND, IDENTIFYING AND RESPONDING TO DOMESTIC VIOLENCE: CONSENSUS RECOMMENDATIONS FOR CHILD AND ADOLESCENT HEALTH (updated August 2004), available at <http://endabuse.org/programs/healthcare/files/Pediatric.pdf>; Beth A. Mandel, *The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence in Nicholson v. Williams*, 73 U. CIN. L. REV. 1131 (2005); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 667 (2003).

⁹⁷ See Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1 (1992). See also Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 467 n.3-4 (2003); Deborah Epstein,

Moreover, large percentages of women continued to live with their batterers. While I believe the get-tough domestic violence policies contributed to the overall decrease in domestic homicides and decreasing incidents of domestic violence, the one-size-fits-all approach clearly disadvantaged some women, disempowered others and did not uniformly lead to lesser risks of violence.

C. *Post-Crawford Realities in Domestic Violence Prosecutions*

Crawford brought trials without complainants to an abrupt halt. Generally, prosecutors estimate that approximately 80% of victims are uncooperative.⁹⁸ Thus, in *Crawford*'s wake, some localities were reportedly dropping 50% of domestic violence cases.⁹⁹ Indeed, a recent survey of prosecutors in several jurisdictions by Professor Lininger disclosed significant difficulties in prosecuting domestic violence cases after *Crawford*.¹⁰⁰ Unsurprisingly, a number of domestic violence cases were reversed because testimonial hearsay had been introduced.¹⁰¹ However, an even more dramatic impact is the anecdotal view that many domestic violence cases are no longer being prosecuted because of their perceived difficulty to win after *Crawford*.¹⁰²

We are unlikely to see a return of pure "evidence based" trials. Despite the hopes of some, we cannot ignore the elephant in the room. While not every statement of an absent domestic violence victim will be excluded, enough will be to

Procedural Justice: Tempering the State's Response to Domestic Violence, 43 WM. & MARY L. REV. 1843 (2002) (discussing batterers). Cf. Laura Dugan et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate-Partner Homicide*, 37 LAW & SOC'Y REV. 169, 191-92 (2003) (finding aggressive prosecutorial policies lead to fewer deaths, except that deaths of white females increase when policies state a willingness to prosecute violators of protective orders).

⁹⁸ See Lininger, *Evidentiary Issues*, *supra* note 16 (cited by the Court of Appeals decisions in *Stancil v. United States*, 866 A.2d 799, 807 (D.C. 2005), *vacated by In re Stancil*, 878 A.2d 1186 (D.C. 2005) (en banc), and *Fowler v. State*, 809 N.E.2d 960, 965 (Ind. Ct. App. 2004), *vacated by* 829 N.E.2d 459 (Ind. 2005)).

⁹⁹ Robert Tharp, *Domestic Violence Cases Face New Test: Ruling that Suspects Can Confront Accusers Scares Some Victims from Court*, DALLAS MORNING NEWS, July 5, 2004, at 1A.

¹⁰⁰ See generally Lininger, *Prosecuting Batterers*, *supra* note 16, at 750.

¹⁰¹ See, e.g., *State v. Livanavage*, No. LC2003-000903-001 DT, 2005 WL 947879, at *3 (Ariz. Super. Jan. 24, 2005); *Stancil*, 866 A.2d at 813.

¹⁰² Lininger, *Prosecuting Batterers*, *supra* note 16, at 750; Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-vamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington*, 50 S.D. L. REV. 41, 66 (2005).

require a reassessment of current practices. In retrospect, such an examination may prove beneficial to the integrity of the criminal justice system as well as to defendants, and also provides an opportunity to revisit the issues that are important to battered women. For example, one could critique pre-*Crawford* prosecutors as taking the easy way out and denigrating the role that cross-examination of live witnesses plays in the criminal justice system. Why bother dealing with difficult witnesses whose credibility might be questioned when hearsay and secondary evidence wins cases that might be lost if the complainant actually testified? Yet, the absence of key witnesses is in conflict with the precept that confrontation “contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.”¹⁰³ We do not want to foster the perception that domestic violence cases provide second hand justice by second hand witnesses.

Moreover, domestic violence trials with absent complainants were viewed by some as producing problematic results for families. Court appearances, jail time, and a conviction might interfere with the batterer’s employment and housing opportunities, lessening his crucial role in providing financial sustenance to the family, without necessarily lowering the likelihood that the batterer would reoffend. The goal was not to see the batterer punished, but to stop the violence and, where feasible, to maintain family unity. In contrast, for some women’s advocates, the focus on family unity was seen as part of the problem, not the solution.¹⁰⁴

In any event, post-*Crawford*, more effort will be necessary to obtain victim cooperation. Failing cooperation, prosecutors will have to assign more resources to obtaining other witnesses or sources of admissible evidence. For example, jailhouse conversations may contain admissions of the defendant or be useful under a forfeiture theory if the victim refuses to testify. A few post-*Crawford* cases also appear to carefully scrutinize proffers of unavailability required by hearsay exceptions when the prosecutor attempts

¹⁰³ Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (quoting Lee v. Illinois, 476 U.S. 530, 540 (1986)).

¹⁰⁴ See, e.g., Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL’Y & L. 921, 946 (2003) (noting that clergy would often counsel women to return to their batterers in order to preserve family unity).

to introduce nontestimonial hearsay.¹⁰⁵ Thus, close enough for government work may not be good enough to demonstrate a good faith attempt to produce the declarant.

IV. EXCITED UTTERANCES—THE WORKHORSE OF DOMESTIC VIOLENCE CASES

A. *Categorical Exclusion Versus Case-by-Case Analysis*

A large percentage of the hearsay admitted in domestic violence cases is offered as excited utterances of absent complainants. Many of these statements are made to law enforcement either via 911 calls, in person as volunteered statements to officers arriving at the scene, or as a result of questioning, either at the scene or later. Because bright line rules make a judge's work easier and the law more predictable, one immediate response to *Crawford* has been to view excited utterances categorically.¹⁰⁶ This appears to assume they would all be nontestimonial, though in the case of 911 calls, one might argue the opposite result is more appropriate. Either way, the difficulty with the categorical approach is how to define the categories. A host of possibilities exist, including:

1. All excited utterances volunteered to officers who were on routine patrol.
2. All excited utterances made in response to officers securing a crime scene.
3. All excited utterances made during a preliminary investigation.
4. All excited utterances made via 911 calls while a crime is in progress.
5. All excited utterances not made at the station or otherwise formalized by audio or videotape.
6. All excited utterances that would meet the narrow definition of what was permitted in 1791: *res gestae*, not a narrative of a past occurrence.

¹⁰⁵ See, e.g., *People v. Cloud*, No. D042386, 2004 WL 1895022 (Cal. Ct. App. Aug. 25, 2004).

¹⁰⁶ See, e.g., *People v. Moscat*, 777 N.Y.S.2d 875, 879 (Crim. Ct. 2004).

7. *Res gestae* only to officers arriving at a crime scene.

8. All excited utterances as determined by state law.

As Professor Mosteller suggests, indicating the range of possibilities demonstrates the unhelpfulness of this approach given the myriad of factual settings.¹⁰⁷ The argument favoring automatic categorization of excited utterances as nontestimonial considers it inherently contradictory to view excited utterances as testimonial. The Indiana Court of Appeals explained this point in *Hammon*:¹⁰⁸

[T]he very concept of an ‘excited utterance’ is such that it is difficult to perceive how such a statement could ever be ‘testimonial.’ ‘The underlying rationale of the excited utterance exception is that such a declaration from one who has recently suffered an overpowering experience is likely to be truthful.’ To be admissible, an excited utterance ‘must be unrehearsed and made while still under the stress of excitement from the startling event.’ ‘The heart of the inquiry is whether the declarants had the time for reflection and deliberation.’ An unrehearsed statement made without time for reflection or deliberation, as required to be an ‘excited utterance,’ is not ‘testimonial’ in that such a statement, by definition, has not been made in contemplation of its use in a future trial.¹⁰⁹

Categorical exclusion of excited utterances was first suggested in *People v. Moscat*,¹¹⁰ an early post-*Crawford* 911 case that has become influential, despite later criticism that the decision played fast and loose with the facts in the case.¹¹¹ A number of post-*Crawford* cases treat excited utterances categorically.¹¹² While this approach has simplicity in its favor,

¹⁰⁷ See Mosteller, *supra* note 14, at 567-68 (providing examples and discussion of police questioning practices, indicating that a model based structured questioning is not serviceable).

¹⁰⁸ *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004).

¹⁰⁹ See *id.* at 952-53 (internal citations omitted). The Indiana Supreme Court rejected this all or nothing approach, and vacated the opinion in *Hammon v. State*, 829 N.E.2d 444, 453 (Ind. 2005).

¹¹⁰ 777 N.Y.S.2d 875, 879-80 (Crim. Ct. 2004) (911 call is part of the criminal incident itself and qualifies as an excited utterance because the caller had no opportunity to reflect and falsify account of events). See also *People v. Corella*, 18 Cal.Rptr.3d 770, 776-77 (Ct. App. 2004).

¹¹¹ Sabrina Tavernise, *Legal Precedent Doesn't Let Facts Stand in the Way*, N.Y. TIMES, Nov. 26, 2004, at A1.

¹¹² See, e.g., *Anderson v. State* 111 P.3d 350, 354-55 (Alaska Ct. App. 2005); *State v. Anderson*, No. E2004-00694-CCA-R3-CD, 2005 WL 171441, at *4 (Tenn. Crim. App. Jan. 27, 2005) (juveniles flagged down officer; “Because an excited utterance is a

it ignores the fact that many modern excited utterances are broader than excited utterances of yore. It also ignores the context in which the statement was made, which seems antithetical to *Crawford*.

A growing number of courts now appear to agree that excited utterances cannot be excluded automatically from confrontation review.¹¹³ For example, the court in *Commonwealth v. Gray*¹¹⁴ relied on the rationale first raised by *Lopez v. State*¹¹⁵ to hold that a statement does not lose its character as testimonial merely because the declarant was excited at the time it was made. *Lopez* recognized that while excited utterances are likely to be reliable, “under *Crawford*, reliability has no bearing on whether a statement was testimonial. Some testimonial statements are reliable and others are not.”¹¹⁶

Lopez explained its reasoning as follows:

a startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect. In this situation, the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made.¹¹⁷

Similarly, the Court of Appeals in *Stancil v. United States*¹¹⁸ refused to “automatically” exclude all excited utterances from the class of testimonial statements following the rationale in *Lopez*.

reactionary event of the senses made without reflection or deliberation, it cannot be testimonial in that such a statement has not been made in contemplation of its use in a future trial.”); *People v. Spade*, No. A105918, 2005 WL 240867, at *7 (Cal. Ct. App. Jan. 28, 2005) (“In our view, *Crawford* is inapplicable to this case because spontaneous statements made to a responding officer are not ‘testimonial’ in nature.”); *State v. Cannaday*, No. 04AP-109, 2005 WL 736583, at *6 (Ohio Ct. App. Mar. 31, 2005) (expanding this view even further in finding that *Crawford* does not apply to “common-law exceptions to the hearsay rule, such as excited utterances.”); see also discussion of conflicting case law on this issue in *Hammon*, 829 N.E.2d at 453.

¹¹³ See, e.g., *Hammon*, 829 N.E.2d at 453; *State v. Wright*, 701 N.W.2d 802, 811 (Minn. 2005); *State v. Hembertt*, 696 N.W.2d 473, 482 (Neb. 2005) (some excited utterances are testimonial, others are not), *petition for cert. filed*, No. 05-5981 (Aug. 19, 2005); *State v. Davis*, 111 P.3d 844, 846 (Wash. 2005) (911 cases should be assessed on a case-by-case basis); *Commonwealth v. Gray*, 867 A.2d 560, 575-77 (Pa. Super. Ct. 2005); *State v. Parks*, 116 P.3d 631, 638-39 (Ariz. Ct. App. 2005).

¹¹⁴ 867 A.2d 560 (Pa. Super. Ct. 2004).

¹¹⁵ 888 So. 2d 693 (Fla. Dist. Ct. App. 2004).

¹¹⁶ *Id.* at 699.

¹¹⁷ *Id.* at 699-700.

¹¹⁸ 866 A.2d 799, 809 (D.C. Ct. App. 2005), *vacated by In re Stancil*, 878 A.2d 1186 (D.C. 2005) (en banc).

The case-by-case analysis appears to be more doctrinally sound than automatic exclusion, particularly since excited utterances were extremely limited in 1791, unlike today, as Justice Scalia mentioned, when questioning whether *White's* holding was sound.¹¹⁹ In *White*, the statement made by the child to the police officer occurred after the incident, and after disclosures to the babysitter and the mother.¹²⁰ Thus, Justice Scalia implicitly relied on a case-by-case approach in his discussion. Moreover, in *Siler v. Ohio*,¹²¹ the Supreme Court vacated a conviction resting on the admission of an excited utterance by a child, and remanded for further consideration in light of *Crawford*, a result that belies the notion that a categorical exclusion for excited utterances is inherent in the *Crawford* analysis.

Applying *Crawford* on a case-by-case basis to determine the definition of testimonial has been described as a “grueling job.”¹²² Ironically, the case-by-case approach does not assure how the court will rule in an individual case, because in light of the expansion of the excited utterance exception, its testimonial nature depends on the circumstances in which the particular statement was made. Indeed, when such statements are made in person by declarants to police officers, they should be scrutinized carefully to determine if and when the statements morph from volunteered cries for help to products of police interrogation.

Moreover, *Crawford's* case specific analysis appears to ensure that the Fifth and Sixth Amendment definition of what is testimonial will diverge. *Crawford* provides a reference to *Rhode Island v. Innis*¹²³ for the proposition that interrogation is intended in its colloquial sense.¹²⁴ In this context, such a reference should be interpreted to mean that custodial interrogation a la *Miranda v. Arizona*¹²⁵ is not required. Such a distinction is important since most of the police questioning related to excited utterances in domestic violence cases is neither aimed at suspects, nor custodial. For example, in

¹¹⁹ *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004).

¹²⁰ *White v. Illinois*, 502 U.S. 346, 349-50 (1992).

¹²¹ 125 S. Ct. 671 (2004).

¹²² *Davis v. State*, No. 03-04-00014-CR, 2005 WL 1173964, at *4 (Tex. Crim. App. May 19, 2005).

¹²³ 446 U.S. 291 (1980).

¹²⁴ *Crawford*, 541 U.S. at 53 n.4.

¹²⁵ 384 U.S. 436, 466 (1966).

People v. Dennison,¹²⁶ a pre-*Crawford* case, the Colorado Supreme Court held that “an on-the-scene investigation, or questioning which enables an officer to determine what has happened and who has been injured, is not an interrogation under *Miranda* or its progeny.”¹²⁷ If custodial questioning is required, none of these statements would be testimonial, unless the Court adopted a broader definition that treated traditional custodial interrogation as only one way of producing an extrajudicial statement given to the police.

Some prosecutors are already arguing that custodial questioning is a prerequisite for testimonial statements. Limiting the confrontation right to custodial interrogation would provide little protection to core Confrontation Clause concerns. *Miranda* is of relatively recent vintage, and while constitutionally based,¹²⁸ it cannot dictate the contours of a right based on different values. *Miranda* provides a bright line rule for law enforcement practices, while *Crawford* is a trial right enforced by lawyers and judges. Some courts have recognized that the terms “interrogation” and “testimonial” may be quite different for Confrontation Clause purposes post-*Crawford*, than when used in other contexts.¹²⁹

B. Lack of Formality Does Not Preclude an Excited Utterance from Being Testimonial

Lack of formality is sometimes mentioned as a separate reason for treating excited utterances as not being testimonial. Under this rationale, *Crawford* only applies to police interrogations made as part of “a relatively formal investigation where a trial is contemplated.”¹³⁰ Thus, where the victim had just been shot, and the police were trying to learn the circumstances of the shooting, the statements were admitted, because “[n]o suspect was under arrest, and the police had not yet determined whether a crime had been committed. The interviews with Shufford [the victim] were not recorded, and there was no ‘structured police questioning.’”¹³¹

¹²⁶ 918 P.2d 1114 (Colo. 1996).

¹²⁷ *Id.* at 1116.

¹²⁸ *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

¹²⁹ *See, e.g., State v. Hembertt*, 696 N.W.2d 473, 481-82 (Neb. 2005).

¹³⁰ *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Ct. App. 2004).

¹³¹ *People v. Compton*, No. B163293, 2005 WL 236841, at *5 (Cal. Ct. App. Jan. 26, 2005) (quoting *Crawford v. Washington*, 541 U.S. 36, 53 n.4 (2004)).

In contrast, the Court of Appeals in *Stancil v. United States* rejected a formality requirement, relying on *Crawford*'s discussion that suggested interrogation included any questioning in a structured environment, meaning that an excited utterance made to an officer at the scene could be testimonial.¹³²

A few courts seem to suggest formality is a requirement, rather than an indicator, but this would appear foreclosed under any but the narrowest *Crawford* definitions. For example, *People v. Cage*¹³³ found a five-year-old child's statement to a police officer at a hospital was not formal and therefore nontestimonial:

We cannot believe that the framers would have seen a 'striking resemblance' between Deputy Mullin's interview with John at the hospital and a justice of the peace's pretrial examination. There was no particular formality to the proceedings. Deputy Mullin was still trying to determine whether a crime had been committed and, if so, by whom. No suspect was under arrest; no trial was contemplated. Deputy Mullin did not summon John to a courtroom or a station house; he sought him out, at a neutral, public place. There was no 'structured questioning,' just an open-ended invitation for John to tell his story. The interview was not recorded. There is no evidence that Deputy Mullin even so much as recorded it later in a police report. Police questioning is not necessarily police interrogation. When people refer to a 'police interrogation,' however colloquially, they have in mind something far more formal and focused.¹³⁴

This type of analysis places form over substance. The absence of a police force was the prime reason that formality was required to obtain statements in 1791. Thus, it is perfectly understandable why modern police questioning bears little resemblance to earlier judicial practice. *Crawford* tells us that interrogation is referred to colloquially. Today, one can be interrogated and can make accusatory statements without any formality at all. Thus, while formality may suggest a statement is testimonial, its absence alone does not render the statement nontestimonial. Similarly, the extent of questioning is a legitimate factor, which has led some courts to consider a statement made in response to minimal questioning as

¹³² 866 A.2d 799, 811-12 (D.C. 2005), *vacated by In re Stancil*, 878 A.2d 1186 (D.C. 2005) (en banc).

¹³³ 15 Cal. Rptr. 3d 846 (Ct. App. 2004), *review granted and opinion superseded*, 99 P.3d 2 (Cal. 2004).

¹³⁴ *Id.* at 856-57.

nontestimonial.¹³⁵ However, equating minimal questioning with an absence of formal interrogation to justify finding a statement is nontestimonial is inappropriate, since some statements that lack formality may be intended to bear witness against the accused by reference to the alternative definitions of testimonial presented in *Crawford*.

C. *Appellate Trends Concerning Excited Utterances to Police Officers*

Ironically, *Crawford* raises the same specter of unpredictability that Justice Scalia scathingly branded as the reason why *Roberts* failed to protect core Confrontation Clause values. While the decisions take different approaches, *People v. King*¹³⁶ recently opined that almost all cases have concluded that initial statements volunteered by excited declarants are not testimonial. In reaching this result, courts have focused on the distress of the declarant, the desire to obtain assistance, as well as the lack of formality and the unstructured nature of the questioning. Similarly, the Court of Appeals in *Stancil* rejected a broad view that any statements to police were testimonial, saying “it is unlikely that the Court intended the term to embrace contacts with the police that do not amount to interrogations.”¹³⁷ However, even here complete uniformity does not exist.¹³⁸

Results are more mixed when the focus shifts from the immediately volunteered statements to all excited statements in field investigations, in some measure due to the variety of

¹³⁵ See *Anderson v. State*, 111 P.3d 350, 354 (Alaska Ct. App. 2005).

¹³⁶ *People v. King*, No. 02CA0201, 2005 WL 170727, at *6 (Colo. Ct. App. Jan. 27, 2005) (holding that a statement is nontestimonial where made to police officer in “noncustodial setting and without indicia of formality”) (citing cases); see also *Commonwealth v. Gray*, 867 A.2d 560, 565, 571 (Pa. Super. Ct. 2005) (holding that statements were nontestimonial where pregnant victim approached officers and said she was assaulted and her mother stabbed by mother’s boyfriend); *Rogers v. State*, 814 N.E.2d 695, 699, 701-02 (Ind. Ct. App. 2004) (holding statements made to police within seven minutes of the incident nontestimonial); *People v. Bryant*, No. 247039, 2004 WL 1882661, at *1 (Mich. Ct. App. Aug. 24, 2004) (per curiam) (holding *Crawford* inapplicable because police questioning of victim in obvious physical pain was not interrogation); *Wilson v. State*, 151 S.W.3d 694, 698 (Tex. Crim. App. 2004) (holding that where declarant approached officers, nervous and about to cry upon seeing her wrecked car, “any questions posed to her by the police were in the context of answering her questions and determining why she was upset”).

¹³⁷ 866 A.2d at 811.

¹³⁸ See, e.g., *Lopez v. State*, 888 So. 2d 693, 699 (Fla. Dist. Ct. App. 2004).

different circumstances that are encompassed by that term.¹³⁹ The Court of Appeals in *Stancil*¹⁴⁰ attempted to chart a middle course that treats as testimonial “a declarant’s knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings.”¹⁴¹ Thus, police response to emergency calls, securing the scene, and preliminary questioning to determine what happened, produce nontestimonial statements under *Stancil*, in contrast to testimonial statements that result from structured questioning of victims or witnesses to a crime after the emergency has passed.¹⁴²

Other courts have adopted this distinction between statements made to police officers while they are “securing the scene” and those taken later.¹⁴³ The *Stancil* court noted that “once the scene has been secured, and once the officers’ attention has turned to investigation and fact-gathering, statements made by those on the scene, in response to police questioning, tend in greater measure to take on a testimonial character[.]”¹⁴⁴ *People v. Victors*¹⁴⁵ simply asked whether the statement by the complainant to the officer was being used to

¹³⁹ See *Davis v. State*, No. 03-04-00014-CR, 2005 WL 1173964, at *6-9 (Tex. Crim. App. May 19, 2005) (discussing conflicting caselaw). Compare *Stancil*, 866 A.2d 799, *Lopez*, 888 So. 2d at 694, *Moody v. State*, 594 S.E.2d 350, 352, 354 n.6 (Ga. 2004) (holding that interrogation includes the field investigation of witnesses by police shortly after the commission of a crime in a case where a jealous man kills the woman with whom he had a sexual relationship), and *Pitts v. State*, 612 S.E.2d 1, 5 (Ga. Ct. App. 2005) (holding that statements made to deputies after they arrested defendant at scene were testimonial), with *Davis v. State*, No. 2-03-305-CR, 2005 WL 183141, at *3 (Tex. Crim. App. Jan. 27, 2005) (holding statements are not testimonial where wife voluntarily made 911 call after discovering a body and voluntarily informed police officer who came to interview her of the statements that her common-law husband made to her. These statements were neither the product of custodial interrogation nor responses to “tactically structured police questioning.”); *People v. Compton*, No. B163293, 2005 WL 236841, at *5 (Cal. Ct. App. Jan. 26, 2005) (holding that statements made to officer at crime scene and hospital are nontestimonial); *People v. Mackey*, 785 N.Y.S.2d 870, 874 (App. Div. 2004) (holding that preliminary field investigations lack the requisite formality to constitute a police interrogation).

¹⁴⁰ 866 A.2d 799 (D.C. 2005).

¹⁴¹ *Id.* at 812 (citing *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004)).

¹⁴² *Id.* at 810-12.

¹⁴³ See, e.g., *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 555-56 (Mass. 2005) (“questioning by law enforcement agents, whether police, prosecutors, or others acting directly on their behalf, other than to secure a volatile scene or to establish the need for or provide medical care, is interrogation in the colloquial sense.”).

¹⁴⁴ *Stancil*, 866 A.2d at 813.

¹⁴⁵ 819 N.E.2d 311 (Ill. App. Ct. 2004).

prove an element of the offense, in finding it testimonial.¹⁴⁶ The highest courts in several states are beginning to reach this issue.¹⁴⁷

Doctrinally, it appears sound to treat statements that would have met the narrow 1791 definition of excited utterances as nontestimonial when made to police officers who come upon the scene or are flagged down by the declarant while the incident is still in progress, since the combination of true excitement and need for assistance appears to negate any testimonial aspect. Thus, I agree that the excited utterance was nontestimonial in *Stancil v. United States*,¹⁴⁸ where the officers arrived to find the defendant's daughter screaming with a knife in her hand pointing it at the defendant stating "stop hurting my mommy, stop hurting my mommy, I'm not going to let you hurt mommy any more."¹⁴⁹ She was told to drop the knife, complied and burst into tears. However, statements made beyond those heard by the police as they enter the crime scene should be considered testimonial either by reference to the reasonable observer approach, or due to the investigative purpose of the officer. It is fairly disingenuous to claim that the officer doesn't know a prosecution is likely to occur when the jurisdiction has a pro or mandatory arrest policy in domestic violence cases.

Similarly, *Davis v. Texas*¹⁵⁰ rhetorically asked "[s]urely, a reasonable 51-year-old declarant . . . would have known that her accusations made to a uniformed police officer would be passed on to prosecutorial authorities to be used against appellant."¹⁵¹ Thus, *Davis* identified such statements as serving "either or both of two primary objectives—to gain immediate official assistance in terminating an exigent situation and to provide information to aid investigation and

¹⁴⁶ *Id.* at 320 ("[T]estimonial evidence encompasses out-of-court statements that are offered to establish or disprove an element of the offense charged or a matter of fact.").

¹⁴⁷ For example, the California Supreme Court has granted review in *People v. Kilday*, 20 Cal. Rptr. 3d 161 (Cal. Ct. App. 2004), *review granted and opinion superseded*, 105 P.3d 114 (Cal. 2005), and in *People v. Cage*, 15 Cal. Rptr. 3d 846 (Ct. App. 2004), *review granted and opinion superseded*, 99 P.3d 2 (Cal. 2004), to address issues concerning police questioning. *See also State v. Wright*, 701 N.W.2d 802 (Minn. 2005).

¹⁴⁸ 866 A.2d 799.

¹⁴⁹ *Id.* at 802.

¹⁵⁰ No. 03-04-00014-CR, 2005 WL 1173964 (Tex. Crim. App. May 19, 2005).

¹⁵¹ *Id.* at *10.

possible prosecution arising from the situation.”¹⁵² *Davis* recognized the difficulty of drawing a definitive line between testimonial and nontestimonial hearsay in this context, but punted, finding harmless error in light of the defendant’s trial testimony confirming most of the incident.¹⁵³

While *State v. Wright*¹⁵⁴ agreed that a reasonable citizen interacting with a police officer would likely know any statement made might be used at trial, the *Wright* court rejected this view of testimonial statements as contrary to *Crawford*’s intended result and analysis. Instead, *Wright* listed eight factors as helpful to analyze field examinations: (1) whether the declarant was a victim or an observer; (2) the declarant’s purpose in speaking with the officer (e.g., to obtain assistance); (3) whether the police or the declarant initiated the conversation; (4) the location where the statements were made (e.g., the declarant’s home, a squad car, or the police station); (5) the declarant’s emotional state when the statements were made; (6) the level of formality and structure of the conversation between the officer and declarant; (7) the officers’ purpose in speaking with the declarant (e.g., to secure the scene, to determine what happened, or to collect evidence); and (8) if and how the statements were recorded.¹⁵⁵ Ironically, this analysis supported the *Wright* court’s finding that a field statement was not testimonial, even though the defendant was in custody at the time it was made, and the officers took notes and evidence while interviewing the victim. This seems reminiscent of approaches to *Roberts*, positing factors that could be used by different courts to reach opposite results.

*State v. Mason*¹⁵⁶ proposed a simpler test, acknowledging the importance of deciding whether the statement was made as part of the incident or part of the prosecution by requiring trial courts to ascertain (1) whether the declarant initiated the statement; (2) the formality of the setting; and (3) the declarant’s purpose in making the statement.¹⁵⁷ Other courts

¹⁵² *Id.*

¹⁵³ *Id.* at *10-11.

¹⁵⁴ 701 N.W.2d 802, 814 (Minn. 2005).

¹⁵⁵ *Id.* at 812-13.

¹⁵⁶ 110 P.3d 245 (Wash. Ct. App. 2005).

¹⁵⁷ *Id.* at 249.

appear to adopt a totality approach without necessarily defining fixed factors to be analyzed in every case.¹⁵⁸

Any confrontation approach that requires discerning the intent of the declarant is likely to prove difficult to administer or result in the categorical exclusion of excited utterances. For example, the Indiana Court of Appeals in *Fowler* concluded that the classification of a statement as an excited utterance supports the conclusion that the statement is nontestimonial in nature because it was made under the stress of the event, not with intent or knowledge that the statement might later be used at trial.¹⁵⁹ The *Mason*¹⁶⁰ court viewed the witness' purpose in initiating police contact and making the statement as the central issue, holding that "statements made while in peril for the purpose of seeking protection, rather than for the purpose of bearing witness, are not testimonial."¹⁶¹ However, given that in many states excited utterances are interpreted expansively, as *Stancil* indicates, mere excitement does not predict the declarant's state of mind.

Moreover, since the declarant will always be absent at trial, it will be difficult to assess her subjective intent, unless we have other witnesses or her own statements at a later time. The court in *Gray* cites *Lopez* as indicating that whether a statement falls within an objective observer category depends on the purpose for which it is made, not on the emotional state of the declarant.¹⁶² Some courts appear to conflate a subjective and objective approach. The court in *State v. Hembertt*¹⁶³ indicated that a declarant who responds to police questioning, "structured and conducted for the purpose of producing evidence in anticipation of a potential criminal prosecution, should reasonably anticipate his or her testimony being used against the accused."¹⁶⁴ Similarly, while the Indiana Supreme Court viewed the motivation of the questioner as more important than that of the declarant, it noted that "if either is principally motivated by a desire to preserve the statement it is

¹⁵⁸ See *Hammon v. State*, 829 N.E.2d 444, 454-56 (Ind. 2005) (discussing different approaches employed to distinguish testimonial and nontestimonial hearsay).

¹⁵⁹ *Fowler v. State*, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004), *vacated by* 829 N.E.2d 459 (Ind. 2005).

¹⁶⁰ See *supra* note 156 and accompanying text.

¹⁶¹ *Mason*, 110 P.3d at 249.

¹⁶² *Commonwealth v. Gray*, 867 A.2d 560, 576 (Pa. Super. Ct. 2005).

¹⁶³ 696 N.W.2d 473, 485 (Neb. 2005).

¹⁶⁴ *Id.* at 482 (emphasis added).

sufficient to render the statement “testimonial.”¹⁶⁵ Thus, the subjective motivation of the person taking the statement or the objectively evaluated purpose of the goals of the procedure being followed by that individual is sufficient.¹⁶⁶ If subjective intent is viewed from the perspective of an objective declarant in her circumstances, the context is still important to avoid finding such statements are nontestimonial, when in fact some of them may bear witness against the accused. Professor Méndez has identified a number of obstacles to predicting declarant’s mental state under either a subjective or objective approach.¹⁶⁷

D. Excited Utterances Made in 911 Calls Should Be Viewed Sceptically

Numerous cases have held that 911 calls are nontestimonial because they are victim initiated, and the intention of the citizen is to be rescued.¹⁶⁸ The call is viewed as part of the incident in progress, providing the declarant with no time for contemplation. *People v. Moscat*,¹⁶⁹ probably the most influential 911 case, characterized such calls as “the electronically augmented equivalent of a loud cry for help. The Confrontation Clause was not directed at such a cry.” *Fowler v. State*,¹⁷⁰ another early post-*Crawford* case, noted that *Crawford* is limited to police “interrogation,” not all police questioning.¹⁷¹ The *Fowler* court concluded that the victim’s 911 statement was nontestimonial because it was not given in a formal setting, was not given during any type of pretrial hearing or deposition, was not contained within a formalized document, and questioning at the scene did not qualify as a classic police

¹⁶⁵ *Hammon v. State*, 829 N.E.2d 444, 456 (Ind. 2005).

¹⁶⁶ *Id.*

¹⁶⁷ Miguel A. Méndez, *Crawford v. Washington: A Critique*, 57 STAN. L. REV. 569 (2004); see also Major Robert Wm. Best, *To Be or Not To Be Testimonial? That Is the Question*, 2005 APR ARMY LAW. 65, 78-79 (arguing focus on subjective expectation of a 911 caller is incorrect in determining whether statement is testimonial).

¹⁶⁸ See *State v. Davis*, 613 S.E.2d 760, 768-72 (S.C. Ct. App. 2005) (reviewing several cases involving the testimonial nature of 911 calls); see also King-Ries, *supra* note 91 (arguing for broad admission of 911 calls and preliminary statements to the police).

¹⁶⁹ 777 N.Y.S.2d 875, 880 (Crim. Ct. 2004).

¹⁷⁰ 809 N.E.2d 960, 963 (Ind. Ct. App. 2004), *vacated by*, 829 N.E.2d 459 (Ind. 2005) (holding that a victim’s statement was nontestimonial because it lacked “official and formal quality of such a statement”).

¹⁷¹ *Id.* at 963.

interrogation.¹⁷² In *Pitts v. State*,¹⁷³ the 911 statements were viewed as not made for the purpose of establishing or proving a fact regarding some past event, but for the purpose of preventing or stopping a crime as it was actually occurring. The caller there requested that police come to her home to remove Pitts, who she said had broken into her house.¹⁷⁴ Similarly, *State v. Wright*¹⁷⁵ held that statements made during a 911 call were not testimonial because the caller wanted protection from an immediate danger.

In contrast, *People v. Cortes*¹⁷⁶ concluded that 911 calls are testimonial, based on a number of factors: the police prepare the public to use 911 to report crimes; information is given on what to report, operators use protocols for obtaining information, and calls are recorded and preserved. Therefore, regardless of what the caller believes, the purpose of the information is for investigation, prosecution and potential use at a judicial proceeding.¹⁷⁷ The technology even permits the operator to see the caller's telephone number if a land line is used. In *Cortes*, Judge Bamberger conducted a thorough historical review to bolster her conclusions. Surprisingly, this opinion has not received the same degree of attention as *Moscat*. Many 911 decisions do not mention or try to distinguish *Cortes*, possibly viewing it based on a unique 911 system or New York state constitutional law. However, the federal constitutional analysis has general application, and most of the significant features of 911 systems nationwide are substantially similar.¹⁷⁸ While *Cortes* concerned a witness to a crime, rather than a victim, which makes it more likely the statement is testimonial, this fact should not result in all 911 calls by victims being nontestimonial.¹⁷⁹

¹⁷² The Indiana Supreme Court affirmed on different grounds, holding that because the declarant's refusal to continue testifying was not challenged by the defendant, he forfeited his right to confront her. 829 N.E.2d at 471.

¹⁷³ 612 S.E.2d 1 (Ga. Ct. App. 2005).

¹⁷⁴ *Id.* at 2.

¹⁷⁵ 686 N.W.2d 295, 302 (Minn. Ct. App. 2004), *aff'd*, 701 N.W.2d 802, 811 (Minn. 2005).

¹⁷⁶ 781 N.Y.S.2d 401 (Sup. Ct. 2004).

¹⁷⁷ *Id.* at 415.

¹⁷⁸ *See, e.g.*, materials at National Emergency Number Association website, at http://www.nena9-1-1.org/PR_Pubs/Devel_of_911.htm (last visited Sep. 6, 2005).

¹⁷⁹ *See also* *State v. Powers*, 99 P.3d 1262 (Wash. Ct. App. 2004) (finding a call testimonial where its purpose was to report a crime, but was not a call for help); *see generally* Richard Friedman, Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1242-43 (2002) (distinguishing between two primary objectives in making a 911 call—gaining immediate official assistance and providing information to aid

Ultimately, the prosecutorial aspects of 911 calls are such that only the initial cry for help should be considered nontestimonial. Identification of the perpetrator and any response to questions beyond what happened should be considered testimonial. *People v. West*¹⁸⁰ provides a framework for analyzing 911 calls, which recognizes that 911 calls must be parsed, and that some statements may be testimonial while others are not. *West* held a rape victim's "statements made to the 911 dispatcher concerning the nature of the alleged attack, . . . medical needs, and her age and location are not testimonial in nature, and were properly admitted at trial."¹⁸¹ These statements, given immediately after her brutal assault and while she was in shock, were to request medical and police assistance, to gather information about the situation and to secure medical attention for her, "not to produce evidence in anticipation of a potential criminal prosecution."¹⁸² In contrast, *West* held that statements describing her vehicle, the direction in which her assailants fled, and the items of personal property they took were testimonial in nature.¹⁸³ The difference turned on the fact that the statements were made in response to questions posed by the dispatcher for the stated purpose of involving the police, which implicated the central concerns underlying the Confrontation Clause.

While not all courts distinguish excited utterances made in person to police officers from those made in 911 calls, as *Cortes* suggests, there are reasons that support interpreting 911 calls narrowly in considering whether they are testimonial. This includes:

1. The technology is widely publicized as a way to communicate with police to obtain assistance;
2. All calls are recorded and preserved;
3. The land line phone number and location of the call is revealed to the operator; and

investigation—and suggesting that this difference be a controlling factor in determining the admissibility of the statements).

¹⁸⁰ 823 N.E.2d 82 (Ill. App. Ct. 2005).

¹⁸¹ *Id.* at 91.

¹⁸² *Id.* at 92.

¹⁸³ *Id.*

4. Most 911 protocols dictate questions that go beyond ascertaining an emergency and determining location to serve investigative purpose.

Similarly, in *People v. Dobbin*,¹⁸⁴ the court found 911 statements to be testimonial because the caller who had witnessed a robbery was officially reporting a crime to the government agency, could objectively expect to be called as a witness, and was asked a series of over fifteen questions by “Police Operator 1521.”¹⁸⁵ While the fact that the caller is a bystander, rather than the victim, makes an even stronger case for finding statements testimonial, 911 calls by victims should be considered testimonial as to their accusatory aspects. Generally, it is a crime to interfere with a 911 call.¹⁸⁶ Even though this criminalization emphasizes the role the government plays in creating and preserving this type of hearsay and the fact that an objective observer would expect the call to be used prosecutorially, the case that mentioned this fact did not recognize its potential impact on the testimonial analysis. Indeed, the call in question was considered nontestimonial.¹⁸⁷

Arguably, the very nature of 911 raises the “core” Confrontation Clause concern of preventing anonymous accusers in Star Chamber proceedings. For example, the Court of Appeals’ decision in *State v. Wright*¹⁸⁸ argued that “there is a cloak of anonymity surrounding 911 calls that encourages citizens to make emergency calls and not fear repercussion.”¹⁸⁹ While this fact was used to favor its holding that the call was nontestimonial, this rationale appears to support the opposite conclusion.

My view is that the prosecutorial aspects of 911 calls are such that only the initial cry for help should be considered nontestimonial. In other words, because 911 calls have a dual purpose—obtaining help and initiating a criminal investigation of the crime—the calls must be parsed depending on their function. Therefore, the identity of the perpetrator or any

¹⁸⁴ 791 N.Y.S.2d 897, 900 (Sup. Ct. 2004).

¹⁸⁵ *Id.* at 901-02.

¹⁸⁶ *See Pitts v. State*, 612 S.E.2d 1, 6 (Ga. Ct. App. 2005) (multiple hang-ups in rapid succession were enough to establish crime).

¹⁸⁷ *Id.*

¹⁸⁸ 686 N.W.2d 295 (Minn. Ct. App. 2004), *aff’d*, 701 N.W.2d 802 (Minn. 2005).

¹⁸⁹ *Id.* at 302.

information obtained as a result of questioning by the 911 operator would be viewed as testimonial, while information about the nature of the injury would not. This type of approach has been used in other hearsay contexts, most analogously in declarations against penal interest. For example, in *Williamson v. United States*,¹⁹⁰ the Court required each statement in a narrative to be viewed separately to determine whether it was disserving or self-serving. Indeed, in *State v. Davis*,¹⁹¹ the Washington Supreme Court recently cited *Williamson* in recognizing that 911 calls may contain both nontestimonial and testimonial statements.¹⁹² However, *Davis* considered the immediate identification of the assailant as nontestimonial, where this type of information appears unnecessary to the basic goal of providing assistance.

In summary, doctrinally, a narrow reading of *res gestae* volunteered to police officers arriving to secure the scene supports the admission of such statements as nontestimonial on an outcry theory. I have more difficulty about how to treat 911 calls, due to their mixed purposes. Not only do they act as *Moscat's* electronically augmented equivalent of a "loud cry for help," but the government also uses the 911 system as an investigative tool and promotes its ability to provide anonymity to accusers. This dual use warrants an approach that considers as nontestimonial only the introductory plea for help that explains the nature of the emergency. Therefore, the identity of the perpetrator or any information obtained as a result of questioning by the 911 operator should be viewed as testimonial. It should also be remembered that even in the absence of the complainant, the admission of testimonial excited utterances identifying a batterer can be harmless error, because they either repeat information in excited utterances made to private individuals or admissions of the defendant, or there is other admissible evidence. So far, courts have not been willing to extend any of the testimonial definitions to private individuals outside of the child abuse context.¹⁹³

¹⁹⁰ 512 U.S. 594, 599 (1994).

¹⁹¹ 111 P.3d 844 (Wash. 2005) (en banc).

¹⁹² *Id.* at 851.

¹⁹³ See, e.g., *People v. Compan*, 100 P.3d 533, 538 (Colo. Ct. App. 2004), *cert. granted*, No. 04SC422, 2004 WL 2376474 (Colo. Oct 25, 2004) (extensive statements made by domestic violence victim to a friend admitted as excited utterances were not testimonial).

V. OTHER HEARSAY EXCEPTIONS FREQUENTLY USED IN DOMESTIC VIOLENCE CASES

A. *Statements for Medical Diagnosis and Treatment*¹⁹⁴

Statements for medical diagnosis and treatment are also staples in child abuse and domestic violence cases. While a number of jurisdictions have permitted the identity of the perpetrator to be admitted under Rule 803(4) in child abuse cases, several courts have also extended the medical exception in this fashion on the theory that in domestic violence situations, the physician's knowledge that the assailant was a family or household member affects the treatment protocol, including discharge to an appropriate environment.¹⁹⁵

United States v. Joe,¹⁹⁶ which admitted statements to a physician identifying the victim's estranged husband as having raped her, explained why this use of Rule 803(4) was appropriate. According to *Joe*,

All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser. The physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ when the abuser is a member of the victim's family or household. In the domestic sexual abuse case, for example, the treating physician may recommend special therapy or counseling and instruct the victim to remove herself from the dangerous environment by leaving the home and seeking shelter elsewhere. In short, the domestic sexual abuser's identity is admissible under Rule 803(4) where the abuser has such an intimate relationship with the victim that the abuser's identity becomes 'reasonably pertinent' to the victim's proper treatment.¹⁹⁷

Post-*Crawford*, the key issue will be whether identifying the perpetrator is testimonial. At least one court has taken this view in relation to a woman raped in a case where domestic violence was not implicated. In *People v. West*,¹⁹⁸ statements made to doctors regarding the nature of the alleged

¹⁹⁴ For additional discussion regarding medical diagnosis and treatment statements in child abuse cases, see Part VI.

¹⁹⁵ See, e.g., *State v. Sims*, 890 P.2d 521, 523 (Wash. Ct. App. 1995); *Nash v. State*, 754 N.E.2d 1021, 1025 (Ind. Ct. App. 2001). But see *People v. Swinger*, 689 N.Y.S.2d 336, 340 (Crim. Ct. 1998) (admitting domestic violence victim's statements identifying who assaulted her under business records exception).

¹⁹⁶ 8 F.3d 1488, 1494-95 (10th Cir. 1993).

¹⁹⁷ *Id.* at 1494-95.

¹⁹⁸ 823 N.E.2d 82, 89 (Ill. App. Ct. 2005).

attack, and the cause of her symptoms and pain were viewed as nontestimonial, but statements of fault or identity were rejected as testimonial, because they implicate the core concerns protected by the Confrontation Clause.¹⁹⁹

In contrast, other cases view all statements within Rule 803(4) as nontestimonial. Indeed, the complainant's use of a specialized healthcare facility designed to provide expert care to victims of violent sexual assault, where she gave a statement identifying the perpetrator, did not render the nurse's testimony as testimonial in *State v. Stahl*.²⁰⁰ More typically, some courts appear to treat any statements in medical records as nontestimonial, whether relying on Rule 803(6), 803(4), or a combination thereof. In *People v. Rogers*,²⁰¹ hospital records containing a rape victim's statements were assumed to be admissible as business records. Similarly, a sexual assault information sheet that had a dual purpose of investigation and treatment of the victim's potential physical and psychological injuries did not violate *Crawford* since "the history was germane to treatment, [so] it falls within the traditional business records exception."²⁰²

Simply relying on *Crawford*'s reference to business records as covering statements "that by their nature were not testimonial"²⁰³ appears misguided. Unlike 1791, business records now include opinions and diagnoses, as well as double hearsay of declarants who have no business duty to report when the additional layer of hearsay fits within some other exception. A more reasoned approach would be to treat dual purpose documents as testimonial where their investigative aspects are significant.

Recognizing that business records prepared for litigation should be analyzed differently, *Rogers* did hold that a report giving results of testing on victim's blood was improperly admitted as a business record, in a prosecution for first-degree rape and first-degree sodomy.²⁰⁴ The court considered the report to be testimonial even though it was generated by a private laboratory that conducted the tests, because it was requested by and prepared for law enforcement for the purpose

¹⁹⁹ *Id.* at 89-90.

²⁰⁰ No. 22261, 2005 WL 602687, slip op. at *7 (Ohio App. Mar. 16, 2005).

²⁰¹ 780 N.Y.S.2d 393 (App. Div. 2004).

²⁰² *Id.*

²⁰³ *Crawford v. Washington*, 541 U.S. 36, 56 (2004).

²⁰⁴ *Rogers*, 780 N.Y.S.2d at 396.

of prosecution, and it was the basis for expert testimony as to the victim's intoxication level, which was directly related to her ability to consent.²⁰⁵ Similarly, in *Smith v. State*,²⁰⁶ admission of autopsy evidence and an autopsy report without testimony by the medical examiner who performed the autopsy violated the Confrontation Clause where the manner of death was an element of the crime and the defendant claimed the killing was in self-defense. In contrast, several cases have held a certified copy of an autopsy report is nontestimonial.²⁰⁷ It is difficult to understand how an autopsy report would not fit within the declarant/objective witness definitions, if not within the functional equivalent of an *ex parte* affidavit test.

To the extent that the doctor has a reporting duty in domestic violence cases, the argument can be made that the statements are testimonial, either because the doctor is an agent of the police or because an objective witness would view the statements as available for prosecution. In addition, VAWA has sponsored research on improving medical records in domestic violence cases.²⁰⁸ If a doctor adopts the protocols suggested to aid healthcare providers to "help victims" by selecting what to record and implicitly what to ask, and how to record the statements, it is also arguable that the resulting recording of the victim's statements becomes testimonial.²⁰⁹

B. *Dying Declarations*

While only a small percentage of domestic violence cases result in a female being killed, a third of all female single victim killings are carried out by their male intimates, as well as nearly two-thirds of nonstranger killings of females.²¹⁰ Ironically, dying declarations may be less of a factor in

²⁰⁵ *Id.* at 396-97.

²⁰⁶ 898 So. 2d 907, 917 (Ala. Crim. App. 2004).

²⁰⁷ *See, e.g.,* Denoso v. State, 156 S.W.3d 166, 182 (Tex. App. 2005) (alternatively finding harmless error); *People v. Durio*, 794 N.Y.S.2d 863, 867-68 (Sup. Ct. 2005).

²⁰⁸ *See, e.g.,* NANCY E. ISAAC & V. PUALANI ENOS, NAT'L INST. OF JUST., DOCUMENTING DOMESTIC VIOLENCE: HOW HEALTH CARE PROVIDERS CAN HELP VICTIMS (NCJ 188564) (Sept. 2001), available at <http://www.ncjrs.gov/pdffiles1/nij/188564.pdf>.

²⁰⁹ *Id.*

²¹⁰ VIOLENCE POLICY CENTER, WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2002 HOMICIDE DATA 3 (Sept. 2004), available at <http://www.vpc.org/studies/wmmw2004.pdf>; *see also* RENNISON, *supra* note 65, at 2.

domestic violence cases because the deaths often occur at home with no witnesses.

Crawford appears to give an automatic pass to dying declarations as being *sui generis* without determining whether the rationale is one of forfeiture, necessity, or some type of moralistic imperative.²¹¹ This view has been almost universally adopted by the courts that have reached the question.²¹² For example, in *People v. Monterroso*,²¹³ the California Supreme Court held that dying declarations do not violate confrontation, noting that “[d]ying declarations were admissible at common law in felony cases, even when the defendant was not present at the time the statement was taken.” *Monterroso* cites *State v. Houser*²¹⁴ stating:

to exclude such evidence as violative of the right to confrontation ‘would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitably set at naught [sic].’²¹⁵

Only one case has denied admission to a testimonial dying declaration, claiming “there is no rationale in *Crawford* or otherwise under which dying declarations should be treated differently than any other testimonial statement.”²¹⁶ Regardless of the lack of historical or other justification, I would be amazed if the Court rejected testimonial dying declarations, not only because of the necessity underlying the exception, but because most of these statements appear to fit the forfeiture approach courts have adopted concerning murdered declarants.

C. *Prior Inconsistent Statements*

If the victim testifies, jurisdictions vary as to what type of prior inconsistent statements can be admitted substantively. This issue is significant because so many of the women who testify in domestic violence cases recant. While approximately

²¹¹ 541 U.S. 36, 56 n.6 (2004).

²¹² See *State v. Martin*, 695 N.W.2d 578, 584 (Minn. 2005).

²¹³ 101 P.3d 956, 971-72 (Cal. 2004), *cert. denied*, 74 U.S.L.W. 3203 (2005).

²¹⁴ 26 Mo. 431 (1858).

²¹⁵ *Monterroso*, 101 P.3d at 972 (citing *Houser*, 26 Mo. at 438).

²¹⁶ *United States v. Jordan*, No. CRIM. 04-CR-229-B, 2005 WL 513501, at *3 (D. Colo. Mar. 3, 2005).

seventeen states permit any inconsistent statements substantively, the remainder tend to follow the federal model which requires a sworn statement in a proceeding.²¹⁷ Professor Lininger has suggested amending the rule to include sworn affidavits as is required in Oregon.²¹⁸ For example, in *State v. Thach*,²¹⁹ the court noted that the sworn affidavit admitted in a domestic violence case was properly admitted substantively and since the victim testified, the Confrontation Clause was not implicated. I agree that such an amendment is desirable in jurisdictions that do not freely admit prior inconsistent statements. However, I have never understood the benefit of the oath and proceeding requirements in Rule 801(d)(1)(A), given the vast amount of other hearsay made admissible by the Rules. Indeed, the fact that inconsistent statements may be permitted for impeachment, but not substantively, has caused mischief in other contexts when the claim is made that the impeachment evidence is being introduced solely to apprise the jury of otherwise inadmissible evidence.

When the inconsistent statement is the only proof of an essential element, sufficiency questions may arise in some jurisdictions. In California, the substantial evidence test adopted by *People v. Cuevas*²²⁰ rejected the earlier rule requiring corroboration of out-of-court identifications and held that the sufficiency of an out-of-court identification to support a conviction is to be determined under the substantial evidence test.

The admission of prior inconsistent statements typically does not pose a confrontation problem because the declarant is present at trial, resulting in *United States v. Owens*²²¹ rather than *Crawford* governing the analysis. While *Crawford* did not specifically reference *Owens*, it cited *California v. Green*²²² for the proposition that “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”²²³ *Green* specifically held that admission of a prior

²¹⁷ See CLIFFORD S. FISHMAN, 4 JONES ON EVIDENCE §§ 26.5-26.7 (7th ed. 2000 & Supp. 2004).

²¹⁸ Lininger, *Prosecuting Batterers*, *supra* note 16, at 803-05.

²¹⁹ No. 30757-0-II, 2005 WL 103136, at *4 (Wash. Ct. App. Jan. 19, 2005).

²²⁰ 906 P.2d 1290, 1304 (Cal. 1995).

²²¹ 484 U.S. 554, 560 (1988).

²²² 399 U.S. 149 (1970).

²²³ *Crawford v. Washington*, 541 U.S. 36, 59-60 n.9 (2004) (citing *Green*, 399 U.S. at 162).

inconsistent statement did not violate the Confrontation Clause when the declarant was given an opportunity to explain or deny it.²²⁴ The only potential wrinkle is when the witness is essentially mute at trial, which is typically not the case with a domestic violence complainant, who is either evasive, denies making the statement, or claims she lied because she was jealous or otherwise annoyed with the alleged battered. Recently, *Fowler v. State* held that a complainant in a domestic violence case who took the stand, but refused to answer questions with no claim of privilege, was available for cross-examination under *Crawford* if no effort was made to have her held in contempt or otherwise compelled to respond.²²⁵ While her statements were admitted as excited utterances, this mode of analysis would also appear to apply to prior inconsistent statements.

D. *Ad Hoc Hearsay Exceptions*

California and Oregon have ad hoc hearsay exceptions directed towards domestic violence victims. For example, California has an exception for statements that narrate, describe or explain the infliction or threat of physical injury upon the declarant, which were made at or near the time of the incident.²²⁶ The California exception is limited to cases in which the declarant is unavailable. Oregon's statute permits statements made up to twenty-four hours later.²²⁷ Both require that the statement be made to specific categories of individuals such as law enforcement or other governmental or medical personnel, unless in writing.²²⁸ To the extent that a statute has no application, other than to create a testimonial statement, it will not survive a constitutional challenge. However, Oregon's exception also applies to statements made by testifying declarants,²²⁹ and both apply to written or trustworthy statements that are arguably nontestimonial.²³⁰ Thus, even if

²²⁴ *Green*, 399 U.S. at 162.

²²⁵ 829 N.E.2d 459, 465-67 (Ind. 2005).

²²⁶ See CAL. EVID. CODE § 1370(a)(1) & (3) (West 2001). While broader than domestic violence, the section was enacted as a reaction to the O.J. Simpson case, and has been applied primarily in the domestic violence context.

²²⁷ OR. REV. STAT. § 40.460 (26)(a) (2002).

²²⁸ See CAL. EVID. CODE § 1370(a)(5); OR. REV. STAT. § 40.460 (26)(a)(A).

²²⁹ See OR. REV. STAT. § 40.460.

²³⁰ See CAL. EVID. CODE § 1370 (a)(4) & (5); OR. REV. STAT. § 40.460(5), (18), (28).

unconstitutional in a particular application, the statute itself is not unconstitutional.²³¹ In addition, if a state has enacted a Rule 807 catch-all, which permits the admission of trustworthy hearsay in the court's discretion, the exception would also apply in a number of domestic violence settings, and has been used to admit diaries.²³² Post-*Crawford* reversals have occurred in cases admitting statements pursuant to California's domestic violence exception.²³³

Determining what is testimonial when the statement is not made in a law enforcement context will be problematic until the Court articulates its definition of what other types of statements are accusatory. Whether from the perspective of a declarant or an objective observer, factual distinctions will still be important. For example, many women's advocates tell domestic violence victims to keep a diary so that if anything happens, their voices will be heard. Even in a reliability framework, some of these diaries were questioned as being self-serving.²³⁴ If child custody or alimony was a consideration, such knowledge would appear to make the diary testimonial, admissible only if a forfeiture rationale applies. Other women may keep a diary without any expectation of its potential use in a prosecution.²³⁵

After *Crawford*, ad hoc hearsay exceptions for recorded victim statements to police still provide the necessary evidence to convict when the complainant testifies, even if she recants, since *Crawford* clearly leaves *Owens*²³⁶ intact. For the confrontation analysis, it does not matter that the victim recants as trial, or what exception the hearsay is admitted under, so long as she testifies and is subject to cross-

²³¹ See, e.g., *People v. Compton*, No. B163293, 2005 WL 236841, at *4 (Cal. Ct. App. Jan. 26, 2005) (section 1370 is not unconstitutional since it is not invalid under every construction post-*Crawford*).

²³² See, e.g., *United States v. Treff*, 924 F.2d 975, 982-83 (10th Cir. 1991) (pre-*Crawford* case which upheld admission of a diary under the residual hearsay exception, even though the declarant's attorney had advised the declarant to begin keeping the diary in anticipation of litigation, because the diary contained circumstantial guarantees of trustworthiness).

²³³ See, e.g., *People v. Pantoja*, 18 Cal. Rptr. 3d 492, 494 (Ct. App. 2004); *People v. Zarazua*, No. H025472, 2004 WL 837914, at *1 (Cal. Ct. App. Apr. 20, 2004).

²³⁴ See, e.g., *United States v. Lentz*, 282 F. Supp. 2d 399, 423 (E.D. Va. 2002) (rejecting diary in light of the hotly contested divorce proceeding, which gave the decedent a reason to fabricate or misrepresent her thoughts).

²³⁵ See, e.g., *Parle v. Runnels*, 387 F.3d 1030, 1037 (9th Cir. 2004) (diary admitted pursuant to CAL. EVID. CODE § 1370 was not testimonial and satisfied *Wright* test).

²³⁶ 484 U.S. 554 (1988).

examination, since the jury is able “to assess her demeanor as she attempted to deny or explain away the prior statements.”²³⁷

Pre-*Crawford*, my suggestion that a new hearsay exception be adopted concerning domestic violence was cautiously limited to domestic violence murder cases.²³⁸ After *Crawford*, though, I am inclined to argue for a broader domestic violence exception based on trustworthiness. The Supreme Court does not appear to have backed away from its stance encouraging states to expand hearsay exceptions. Therefore, jurisdictions should be urged to adopt a broad domestic violence hearsay exception permitting trustworthy statements concerning any incident of domestic violence or fear induced by the actions of the defendant. Such an exception should not contain availability limitations to avoid being unconstitutional in all applications.²³⁹ If any timing restriction is added, admission should be confined to statements made within the past five years. As with the catch-all exception, notice of the intent to introduce evidence pursuant to this exception should be required. The benefit of such an approach is that the complainant’s statements would be admissible if the witness is available at trial, without regard to limitations that might otherwise be imposed on prior inconsistent statements. More significantly, if the declarant is unavailable at trial and the statement is deemed testimonial, it may still be admitted in a specific case if the forfeiture doctrine applies.

VI. EXCEPTIONS TO THE TESTIMONIAL BAN IN DOMESTIC VIOLENCE CASES

A. *Prior Opportunity to Cross-Examine Unavailable (Adult) Declarants*

Crawford permits testimonial statements of unavailable declarants, if the defendant had a “prior opportunity for cross-examination.”²⁴⁰ The traditional ways of satisfying this standard are through testimony at a prior trial or preliminary hearing in the same case. While I agree with Professor Mosteller that we should attempt to create more opportunities

²³⁷ *People v. Martinez*, 23 Cal. Rptr. 3d 508, 519 (Ct. App. 2005).

²³⁸ Raeder, *Simpson and Beyond*, *supra* note 15, at 1512-17.

²³⁹ *Cf. People v. Pirwani*, 14 Cal. Rptr. 3d 673 (Ct. App. 2004) (elder abuse statute unconstitutional, where it admitted only testimonial statements).

²⁴⁰ *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

for pretrial cross-examination,²⁴¹ I am not as confident as he is of the practicalities of such an approach. Even in Florida, where defendants can take either a discovery or a preservation of testimony deposition, conflict has arisen about whether the discovery deposition satisfies confrontation in the absence of the declarant at trial. *Lopez v. State*, a domestic violence prosecution, held that a discovery deposition does not satisfy the Confrontation Clause because the defendant is not entitled to use the deposition substantively and is not on notice that the deposition will perpetuate testimony, so the focus is different from cross-examination at trial.²⁴² In contrast, in *Blanton v. State*,²⁴³ a child abuse case in which the defendant did not introduce the discovery deposition at trial, and could have requested a deposition to perpetuate testimony, the admission of testimonial hearsay was not found to be a Confrontation Clause violation.

There has been some discussion about a statutory amendment in Florida to satisfy *Crawford*.²⁴⁴ While *Blanton* might also be read to shift the burden to the defendant to call the declarant, most courts appear to be rejecting this approach.²⁴⁵ *Roberts* mandates that a preliminary hearing must present an adequate opportunity for cross-examination. The major failing in Florida appears to be that the discovery deposition cannot be used substantively at trial. This could be remedied by an amendment permitting substantive use by the defendant when the declarant is unavailable and the declarant's statement is introduced at trial.²⁴⁶

Limited cross-examination in preliminary hearings also impacts the ability to survive a Confrontation Clause challenge for testimonial hearsay. *Blanton* asks, but does not decide if the opportunity for cross-examination has to be meaningful. But, what is its purpose if it is simply a ritual? For example, the court in *People v. Fry*²⁴⁷ held that preliminary hearing testimony violated *Crawford* when introduced at trial because

²⁴¹ See Mosteller, *supra* note 14, at 609-10.

²⁴² 888 So. 2d 693, 701 (Fla. Dist. Ct. App. 2004).

²⁴³ 880 So. 2d 798, 799-801 (Fla. Dist. Ct. App. 2004).

²⁴⁴ See John F. Yetter, *Wrestling with Crawford v. Washington and the New Constitutional Law of Confrontation*, 78 FLA. B. J. 26, 31 (Oct. 2004).

²⁴⁵ See, e.g., *State v. Cox*, 876 So. 2d 932, 938 (La. Ct. App. 2004); *Bratton v. State*, 156 S.W.3d 689, 693-94 (Tex. App. 2005).

²⁴⁶ See Yetter *supra* note 244, at 31 (suggesting stipulation or advance waiver permitting substantive use at trial).

²⁴⁷ 92 P.3d 970 (Colo. 2004).

such hearings in Colorado do not present an adequate opportunity for cross-examination.²⁴⁸ In contrast, other jurisdictions have viewed cross-examination at a probable cause hearing as sufficient.²⁴⁹ To the extent that preliminary hearings do not provide for adequate cross-examination in felony cases, jurisdictions should consider amending their procedures to survive a *Crawford* challenge. To limit the impact of such revisions on state practice, expanded hearings could apply only to those categories of cases most likely to result in witnesses not appearing for trial, such as domestic violence and child abuse cases, as well as to the most serious felonies.

Judges Karan and Gersten have suggested establishing a fast track procedure for cross-examination of domestic violence statements.²⁵⁰ If I were defense counsel, it is unclear that post-*Crawford* I would ask for a deposition unless I was sure that the declarant intended to testify. However, the prosecutor might, in domestic violence cases, routinely set an early perpetuation deposition. In most jurisdictions, depositions in domestic violence cases would require a statutory amendment. It is unclear how many states would enact such a procedure, particularly when in misdemeanor cases the declarant would not otherwise be required to appear before trial. Moreover, it is often difficult for a woman to appear, given childcare or job responsibilities, as well as ambivalence as to whether to proceed at all. A fast track trial setting of 30 to 45 days in misdemeanor cases might prove a better route to providing witness attendance, especially if a support team ensured that the witnesses would be available, or if not, providing for rescheduling before the trial date and without the need for the witness to appear and be told to come again.

Attempts to set trials even sooner would likely meet constitutional objections under a due process rationale by defense counsel who could claim that they had insufficient time

²⁴⁸ *Id.* at 981; see also *State v. Stuart*, 695 N.W.2d 259, 266-67 (Wis. 2005) (limited cross-examination at preliminary hearing rendered prior testimony inadmissible at trial).

²⁴⁹ See, e.g., *State v. Crocker*, 852 A.2d 762, 787 (Conn. App. Ct. 2004); *People v. Hernandez*, No. 253227, 2005 WL 562807, at *3 (Mich. Ct. App. Mar. 10, 2005); see also *State v. Stuart*, 695 N.W.2d 259, 265-67 (Wis. 2005) (limited cross-examination at preliminary hearing rendered prior testimony inadmissible at trial).

²⁵⁰ Judge Amy Karan & Judge David M. Gersten, *Domestic Violence: Hearsay Exceptions in the Wake of Crawford v. Washington*, 13 NCJFCJ 20, 23 (2004).

to investigate the case and present a defense.²⁵¹ Ironically, the prosecution might also be disadvantaged by immediate trials, since in a world of scarce resources, investigation and preparation of domestic violence misdemeanors may require more time in order to obtain evidence to meet the government's burden of proof. For example, medical records and personnel as well as the complainant and police officer would need to be available.

Even when full cross-examination has occurred, this has not ensured admission in the absence of the declarant. In *State v. Hale*,²⁵² the court found a Confrontation Clause violation when evidence was admitted as prior testimony, but was cross-examined by a codefendant at a separate trial. In other words, this very defendant must cross-examine the declarant. While this result appears harsh, it accords with the limitation that prior testimony is limited to cases in which the defendant has previously cross-examined the witness. Recently, using the catch-all exception, cases have expanded the introduction of prior testimony beyond its historic confines. As a matter of constitutional dimension, if states can expand their hearsay exceptions, it appears highly ritualistic to argue that the testimony should be lost because a person with the same motive and opportunity as the defendant was the cross-examiner. However, *Crawford* clearly disapproved of cases in which the declarant's prior testimony was examined by other counsel.²⁵³

B. *Waiver of Confrontation and Harmless Error*

Post-*Crawford*, defendants can still waive the right to confrontation by not raising the issue at trial, by opening the door, or as a result of trial strategy. For example, when the defendant in *State v. Lasnetski* called his wife to testify at trial, he waived his right to challenge her testimonial hearsay, even though he claimed his decision was not voluntary because it was a result of the court's erroneous pretrial ruling.²⁵⁴ In domestic violence cases, opening the door is often significant to

²⁵¹ See, e.g., *United States v. Nixon*, 418 U.S. 683, 712 (1974); *Washington v. Texas*, 388 U.S. 14, 18-19 (1967).

²⁵² 691 N.W.2d 637, 647 (Wis. 2005).

²⁵³ 541 U.S. 36, 64-65 (2004) (citing *State v. Bintz*, 650 N.W.2d 913, 918-20 (Wis. Ct. App. 2002) and *State v. McNeill*, 537 S.E.2d 518, 523-24 (N.C. Ct. App. 2000)).

²⁵⁴ *State v. Lasnetski*, 696 N.W.2d 387, 393-94 (Minn. Ct. App. 2005) (trial strategy acted as waiver).

introducing a dead victim's statements that demonstrate her state of mind. In other words, such statements are typically inadmissible because her state of mind is not relevant to any issue at trial.²⁵⁵ However, when the defense claims that the decedent committed suicide, or her death was accidental or a result of self-defense, it opens the door to the declarant's state of mind.²⁵⁶

While opening the door is uncontroversial regarding nontestimonial hearsay, some may question whether its use is foreclosed concerning testimonial hearsay in the absence of any misconduct by the defendant, since opening the door is an evidentiary rule, rather than constitutional in nature. *United States v. Cromer*²⁵⁷ cites *Crawford* for the proposition that the Confrontation Clause is not dependent upon the law of Evidence.²⁵⁸ Therefore, "the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation."²⁵⁹ I disagree with the proposition that trial strategy cannot waive rights of constitutional dimension. For example, *Michigan v. Lucas*²⁶⁰ held that excluding evidence of defendant's past sexual conduct with the victim for failure to comply with rape shield's notice and hearing is not a per se violation of the Sixth Amendment. If trial strategy could result in the loss of a constitutional right pre-*Crawford*, there is no reason to require a different result post-*Crawford*.

A few post-*Crawford* decisions have recognized the continuing viability of this doctrine. For example, in *People v. McMillian*,²⁶¹ the defense counsel's questioning of an officer in a robbery trial led to the disclosure of an out of court testimonial

²⁵⁵ See Raeder, *Simpson and Beyond*, *supra* note 15, at 1506-17; see, e.g., *Commonwealth v. Levanduski*, No. 937 EDA 2004, 2005 Pa. Super. LEXIS 497, at *14-23 (Mar. 31, 2005) (Five-page torn-up letter found in trash was not testimonial, but was inadmissible because it fit no hearsay exception. State of mind exception rejected because content was being introduced for its truth that the decedent who was shot with his own gun, feared his common-law wife and her lover, and predicted that if he was found dead, it would not be suicide.).

²⁵⁶ See, e.g., *People v. Abordo Espinosa*, No. A102886, 2005 WL 941454, at *5 (Cal. Ct. App. Apr. 25, 2005) (evidence of domestic violence relevant to rebut defense theory that shooting occurred in heat of passion in response to nagging, rather than as the culmination of a pattern of abuse).

²⁵⁷ 389 F.3d 662 (6th Cir. 2004).

²⁵⁸ *Id.* at 679 (citing *Crawford*, 541 U.S. at 61).

²⁵⁹ *Id.*

²⁶⁰ 500 U.S. 145, 152 (1991).

²⁶¹ No. 244711, 2004 WL 979701, at *9 (Mich. Ct. App. May 6, 2004).

statement. Similarly, in *Le v. State*,²⁶² the Court held that by calling witnesses to testify about the decedent's statements, the defendant opened the door for the State to call a rebuttal witness to contradict the defense witnesses' testimony.

*People v. Ko*²⁶³ raised this issue in a case where the defense to murdering a former girlfriend was for the defendant to blame his current girlfriend. In its direct case, the prosecution offered "testimony by a detective recounting statements made by the girlfriend that a bloody shirt found at the murder scene belonged to her, but was often worn by defendant, and that the bloody pants found there belonged to defendant."²⁶⁴ The court found that the defendant opened the door to the admission of the entire statement concerning the clothing found at the murder scene by raising the issue of the clothing in his opening statement and in seeking leave in his opposition to the People's in limine motion, to introduce the girlfriend's statement that the shirt found belonged to her. Once the defendant insisted upon introducing the portion of the statement regarding the girlfriend's ownership of the shirt, the entire statement became admissible to avoid misrepresentation. The court reasoned that "[a] contrary holding would allow a defendant to mislead the jury by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context."²⁶⁵ *Ko* viewed the doctrine of opening the door as having an equitable basis, even if the behavior cannot be described as misconduct. However, not all defense strategies will rise to the level that will permit rebuttal by testimonial statements.²⁶⁶

Given that *Crawford* completely changed the Confrontation Clause landscape, it was predictable that the government would turn to harmless error as the only way to prevent a massive number of reversals of convictions that were obtained in a world ruled by reference to trustworthiness, not testimonial statements. Indeed, harmless error appears alive

²⁶² No. 2002-DP-01855-SCT, 2005 WL 977007, at *24 (Miss. Apr. 28, 2005); see also *State v. Harris*, 871 A.2d 341, 345-46 (R.I. 2005) (defendant's use of witness statement to police in cross-examination waived confrontation issue on appeal).

²⁶³ 789 N.Y.S.2d 43 (App. Div. 2005).

²⁶⁴ *Id.* at 44.

²⁶⁵ *Id.* at 45.

²⁶⁶ See, e.g., *People v. Ryan*, 790 N.Y.S.2d 723, 726 (App. Div. 2005) (cross-examination in robbery trial did not leave misleading impression).

and well after *Crawford*. While one might assume that the admission of testimonial statements would be prejudicial enough to doom most attempts to demonstrate harmless error, many cases have survived reversal on this ground.²⁶⁷

C. *The Role of Forfeiture in Domestic Violence Cases*

Crawford virtually invited prosecutors to raise claims of forfeiture when facing Confrontation Clause challenges by opining,

[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.²⁶⁸

Some prosecutors are already arguing that domestic violence cases by their nature involve forfeiture when the victim does not testify. They claim defendants invariably either actually threaten complainants or, given the circumstances of their relationships, such women are afraid that their testimony will cause further violence.²⁶⁹ It is likely that forfeiture will be a factor in a number of domestic violence cases, and prosecutors are correct to worry that the testimonial approach gives defendants more incentive to keep women from testifying. However, forfeiture cannot be assumed without specific evidence linking a defendant to a complainant's failure to testify at trial.²⁷⁰ In other words, even though empirical evidence from the Quincy Project, which tracked court-restrained male abusers, found high percentages of physical and economic threats by abusers to women who cooperated with the police as well as threats of loss of children,²⁷¹ this does

²⁶⁷ See, e.g., *Sparkman v. State*, No. CACR 04-268, 2005 WL 1231710 (Ark. Ct. App. May 25, 2005) (child abuse); *People v. Abordo Espinosa*, No. A102886, 2005 WL 941454, at *5 (Cal. Ct. App. Apr. 25, 2005); *State v. Courtney*, 696 N.W.2d 73, 81 (Minn. 2005); *Davis v. State*, No. 03-04-00014-CR, 2005 WL 1173964, at *11 (Tex. App. May 19, 2005) (not yet released for publication); *State v. Davis*, 111 P.3d 844, 851 (Wash. 2005) (domestic violence cases).

²⁶⁸ *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

²⁶⁹ See, e.g., Adam Krischer, *Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to Crawford in Domestic Violence Cases*, 38 PROSECUTOR 14, 15-16 (2004).

²⁷⁰ See Hutton, *supra* note 102, at 72.

²⁷¹ See E.S. BUZAWA & C.G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 88 (James A. Inciardi, 2d ed. 1996) (examined victim, incident, abuser, and defendant characteristics for 663 restraining order cases over a two-year period).

not provide evidence in an individual case connecting the defendant to the woman's failure to appear.

Crawford cites *Reynolds*, a witness tampering case, for its acceptance of forfeiture.²⁷² It is unclear how broadly *Reynolds* will be interpreted since the actual case involved both witness tampering and a declarant who had been previously cross-examined.²⁷³ Therefore, in light of *Crawford's* holding, the evidence would have satisfied confrontation without any need to invoke forfeiture. Historically, forfeiture was also limited to witness tampering cases.²⁷⁴ Post-*Crawford*, several courts have applied the doctrine to admit statements of murdered victims, where witness tampering is not involved.²⁷⁵ In *United States v. Garcia-Meza*,²⁷⁶ where the defendant was charged with stabbing his wife to death, the Court specifically noted that the federal forfeiture hearsay exception's requirement, that the defendant intended to prevent the witness from testifying, did not control the constitutional analysis of forfeiture.

It should be noted that in most domestic violence murder cases the doctrine is being used constitutionally to overcome the testimonial bar rather than to provide a hearsay exception, since forfeiture hearsay exceptions are generally limited to witness tampering.²⁷⁷ In other words, some other exception, such as an excited utterance or a catch-all ensures the reliability of the statement. For example, in *People v. Moore*,²⁷⁸ a domestic violence homicide case, the decedent's statement was admitted as an excited utterance to a police officer. The court found that the victim's unavailability to testify was because of her death and that her death was the result of defendant's action, forfeiting his right to claim a confrontation violation.²⁷⁹ *State v. Meeks*,²⁸⁰ a murder case not

²⁷² *Crawford*, 541 U.S. at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879)).

²⁷³ *Reynolds*, 98 U.S. at 150.

²⁷⁴ See generally James F. Flanagan, *Forfeiture By Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459 (2003); John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835 (1996).

²⁷⁵ See, e.g., *People v. Taylor*, No. A095412, 2005 WL 715973, at *3-4 (Cal. Ct. App. Mar. 30, 2005) (summarizing case law).

²⁷⁶ 403 F.3d 364, 370 (6th Cir. 2005).

²⁷⁷ See, e.g., FED. R. EVID. 804(b)(6).

²⁷⁸ 117 P.3d 1, 7 (Colo. Ct. App. 2004).

²⁷⁹ *Id.* at 11.

²⁸⁰ 88 P.3d 789 (Kan. 2004).

involving domestic violence, where the statement appeared to be a dying declaration to a police officer, reached the same result.²⁸¹ The California Supreme Court has granted review to determine whether a defendant forfeited his Confrontation Clause claim regarding admission of the victim's prior statements concerning an incident of domestic violence because the defendant killed the victim, thus rendering her unavailable to testify at trial, and whether the doctrine applies where the alleged "wrongdoing" is the same as the offense for which the defendant was on trial.²⁸²

Is there justification for not requiring witness tampering in the forfeiture context when a defendant is charged with murder of the declarant? *Crawford* left the door open to permit a dying declaration exception to the testimonial approach. As a practical matter, many of the forfeiture cases fit the same rationale. The difference is that dying declarations are narrowly focused statements made with knowledge of impending death, and do not admit the decedent's other relevant hearsay. In my view, we need to separate the forfeiture hearsay exception from the constitutional forfeiture doctrine. The forfeiture hearsay exception should be limited to witness tampering because it has the potential to admit unreliable evidence.²⁸³ However, forfeiture as a constitutional doctrine should apply to admit testimonial hearsay that otherwise fits an existing exception when the declarant has been killed, and evidence identifies the defendant as the perpetrator. The hearsay would already have met a reliability check, either by category (e.g., excited utterance) or, if it is an ad hoc exception, by a trustworthiness or corroboration requirement embedded in the exception.

However, I question whether totally unreliable hearsay should come in by forfeiture, but believe that a constitutional witness tampering requirement for cases in which the victim is alleged to have been killed by the defendant deserves justice in

²⁸¹ *Id.* at 791, 794-95 (citing Brief for Law Professors Sherman J. Clark et al. as Amici Curiae Supporting Respondent at 24, n.16, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410); Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506, 516 (1997)).

²⁸² *People v. Giles*, 102 P.3d 930 (Cal. 2004) (statement was admitted pursuant to California Evidence Code Section 1370 discussed *supra* at text accompanying note 226).

²⁸³ *See, e.g., Com. v. Edwards*, 830 N.E.2d 158, 170 n.21 (Mass. 2005) (noting that there may be some statements so lacking in reliability that their admission would raise due process concerns).

the same way that the exclusion of a dying declaration on testimonial grounds is not viewed as a constitutional option. Particularly in the domestic violence context, the victim is likely to be at home, rather than in some public place where people would hear her final words. Thus, prior statements concerning her abuse that are otherwise admissible act as the equivalent of dying declarations.

In contrast, constitutional forfeiture of a live declarant should require a witness tampering rationale since that nexus is necessary for an approach that is not based on a knowing waiver, nor is compelled by the historic record. The problem in determining if forfeiture has occurred is that the declarant is absent, so we will often not have statements by her establishing threats by the defendant. Studies have found that many women do face pressure, but that is not evidence that a particular defendant intimidated the witness. Other reasons may cause her absence including: her emotional ties to the batterer, the potential loss of financial support for herself and her children if he is convicted, or her belief that she can control the battering by the use of an arrest without prosecution. In addition, in a growing number of cases, she may worry that her batterer's prosecution will result in her children being placed in foster care or in her facing charges of child endangerment.²⁸⁴ Immigrant women also worry about deportation of their spouses or themselves even though changes in 1994 to VAWA permit domestic violence victims who are the spouses of citizens or permanent residents to apply for permanent residency.²⁸⁵

The Court of Appeals in *Hammon v. State*²⁸⁶ recognized the difficulty of providing evidence of forfeiture. It questioned the definition of "wrongdoing" by a defendant, asking if another battery was required, or whether psychological pressure on a victim not to cooperate is enough, and if so, how is such pressure to be measured?²⁸⁷ Psychological pressure should be sufficient since that is how the defendant maintains control of

²⁸⁴ See sources cited *supra* note 96.

²⁸⁵ See, e.g., Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 68, 77-79 (2003); Deborah A. Morgan, Comment, *Access Denied: Barriers to Remedies Under the Violence Against Women Act for Limited English Proficient Battered Immigrant Women*, 54 AM. U. L. REV. 485 (2004).

²⁸⁶ 809 N.E.2d 945 (Ind. Ct. App. 2004), *vacated on other grounds*, 829 N.E.2d 444, 453 (Ind. 2005).

²⁸⁷ *Id.* at 951-52 n.3.

the battered woman and is a recognized feature of the cycle of violence and post-traumatic stress disorder (PTSD).²⁸⁸ These pressures often result in a victim's lack of cooperation. Thus, in determining forfeiture, evidence that a woman suffers from PTSD should be considered a significant factor. Previous history should also be factored into the analysis, including prior charges of abuse and any previous recantations by the declarant.

Unfortunately, prosecutors may need to expend more resources to obtain evidence of forfeiture in cases involving battered, rather than dead, victims. This could require sending an advocate or officer to talk to the complainant or to neighbors who may have information. Adam Krischer has provided a number of valuable suggestions about obtaining evidence to support forfeiture.²⁸⁹ For example, phone records subpoenaed from jail may reveal tapes or explain a recantation at trial. Voicemail messages, e-mail, or caller ID logs indicating large numbers of calls may also be useful. However, it is unclear whether such resources would be available for misdemeanors, which encompass a large percentage of the domestic violence caseload.

The forfeiture decision is a preliminary fact question for the judge, so unless state practice requires admissible evidence, the court can consider hearsay in its determination. Because forfeiture can have a significant impact at trial, a few states require clear and convincing evidence for the preliminary showing. However, this standard is no longer favored in constitutional analysis. Since voluntariness of confessions and *Miranda* violations are determined by a preponderance of the evidence,²⁹⁰ it is difficult to argue that forfeiture requires a higher standard, whether in a hearsay exception or for constitutional purposes. Indeed, the only constitutional right that currently appears to impose a clear and convincing evidence standard is found in the nearly forty-year-old decision of *United States v. Wade*.²⁹¹

²⁸⁸ See generally Raeder, *The Double-Edged Sword*, *supra* note 16.

²⁸⁹ Krischer, *supra* note 269, at 15.

²⁹⁰ *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (*Miranda*); *Lego v. Twomey*, 404 U.S. 477, 488-89 (1972) (voluntariness).

²⁹¹ 388 U.S. 218 (1967) (independent evidence that an identification was based on observations of the suspect other than at the improperly held pretrial lineup).

D. *Rehabilitating a Recanting Witness*

When the complainant recants, besides the use of prior inconsistent statements, and admissible hearsay,²⁹² counsel should consider expert evidence to explain the effects of the cycle of violence. I have argued elsewhere that this evidence should not be limited to BWS testimony.²⁹³ It is difficult for jurors and even judges to understand why a woman would lie in court and subject herself to potential perjury charges to protect the person who battered her. A judge explained:

One of your prosecutors said something to me that really helped my view. It relates to what you're talking about, what you see at ground zero when the officer is out there and then what the victims do later. She said that we all have to recognize that it's easier for the victim to lie to us, the judge, the prosecutor, the lawyers, than it is for her to lie to her abuser.²⁹⁴

In addition, prosecutors should consider obtaining information such as that suggested by Adam Krischer in supporting claims of forfeiture.²⁹⁵ For example, subpoenaing phone records from jail may reveal tapes that explain why a victim recanted. Voicemail messages, e-mail, or caller ID logs indicating large numbers of calls may also be useful. In *People v. Martinez*,²⁹⁶ the tape and transcript of the victim's conversation with the defendant and her son-in-law during a jail visit after the preliminary hearing disclosed the defendant repeatedly apologizing and her repeatedly telling him she loved and needed him. They talked about how to get this incident behind them and reunite and her son-in-law said the two of them would have to "get a story going and . . . make sure it sounds right."²⁹⁷ While the legal basis for the impeachment was not mentioned, it appears to go to the issue of bias, which would permit extrinsic evidence.

²⁹² No confrontation problem exists when the declarant testifies at trial. See, e.g., *United States v. Green*, 125 Fed. Appx. 659, 662 (6th Cir. 2005) (because domestic violence complainant testified at trial, no need to determine if her 911 statements were testimonial in nature).

²⁹³ See Raeder, *The Better Way*, *supra* note 16, at 150; Raeder, *The Double-Edged Sword*, *supra* note 16, at 816.

²⁹⁴ *Feature: A Roundtable Discussion on Domestic Violence*, 42 HOUSTON LAW. 24, 32 (2004) (quoting Judge Warne).

²⁹⁵ Krischer, *supra* note 269, at 15.

²⁹⁶ 23 Cal. Rptr. 3d 508, 513 (Ct. App. 2005).

²⁹⁷ *Id.*

VII. REVISIONING THE DOMESTIC VIOLENCE PROSECUTORIAL MODEL BY ADOPTING A MULTI-TRACK SYSTEM

As the preceding discussion has demonstrated, while society has recently devoted substantial resources to eliminating domestic violence, the combination of practical and constitutional constraints on holding batterers accountable justifies reconsidering the role of the criminal justice system in combating domestic violence. For at least a decade, uncooperative complainants have been viewed as a problem, and the criminal justice response to domestic violence as the panacea. While dangerous batterers must be held accountable, it is unclear that we are using our limited resources wisely in misdemeanors. Even more distressing, we appear not to be able to easily distinguish the truly dangerous offenders from those who are a lesser threat and are also more likely to be reeducated.²⁹⁸ In a time frame of limited public resources, we cannot do more with less, particularly in the post-*Crawford* era. Thus, we must be smarter about identifying dangerous offenders, changing the process and penalties for misdemeanants, and bettering the lives of women and children by making sure they are survivors, rather than victims. I view my suggestions as consistent with the long standing trend towards “coordinated community response,”²⁹⁹ which combines prosecutorial and private resources to better serve battered women. Indeed, much of what I advocate is not new,³⁰⁰ but is simply more focused on a criminal justice response in the wake of *Crawford*, when it has become clear that the “evidence” based prosecutorial approach is no longer the best strategy.

However, before reaching the question of how domestic violence cases should be categorized, we must evaluate how

²⁹⁸ See Sack, *supra* note 88, at 1736 (discussing studies).

²⁹⁹ See *id.* at 1725-36.

³⁰⁰ See generally *id.* See also THE CONFERENCE OF STATE COURT ADMINISTRATORS (“COSCA”), POSITION PAPER ON SAFETY AND ACCOUNTABILITY: STATE COURTS AND DOMESTIC VIOLENCE (Nov. 2004) (discussing problems and approaches and providing a blueprint for judicial action that includes adopting statewide models for domestic violence courts, a plan for a multi-jurisdictional response, multi-agency partnerships, sufficient resources, judicial training, and a National Plan), available at <http://cosca.ncsc.dni.us/PositionPapers/SafetyAccountability-DomesticViolence-Nov-04.pdf> [hereinafter COSCA Report]. Based on the report, the Conference of Chief Justices agreed to establish a national action plan concerning domestic violence (Resolution 32 adopted Jan. 2005, available at <http://ccj.ncsc.dni.us/DomesticViolenceResolutions/SafetyandAccountabilityStateCourtsandDomesticViolence.pdf>).

mandatory arrest and no-drop policies are working.³⁰¹ Can the police really identify the primary offender, or are they simply arresting both parties? Similarly, is there empirical data about how many women really lose their children to foster care or are being charged with child endangerment due to their victimization? What are the relative advantages and disadvantages for women and the system in obtaining criminal versus civil protective orders; what type of enforcement should be provided for a breach; and how does *Crawford* impact the decision for a civil rather than criminal remedy? While mutual protective orders have been very problematic for women, current practice sometimes makes this the easy option and gives some batterers a legal weapon to be used against their victims. No one wants to return to days when domestic violence was ignored, but if battered women are being disadvantaged by the policies that were instituted on their behalf, it is time to reassess whether the best policies are in place. Since there is a good deal of literature and some empirical data on both sides of the divide,³⁰² one possibility is to

³⁰¹ See, e.g., Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281 (1997); Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B. C. THIRD WORLD L. J. 159 (2003); Holly Maguigan, *Wading Into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427 (2003); Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L. J. 183 (1997); Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will it Work This Time?*, 31 PEPP. L. REV. 709 (2004); Jessica Dayton, Note, *The Silencing of a Woman's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L. J. 281, 284-85 (2003); Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295 (2004).

³⁰² See, e.g., ANGELA GOVER et al., U.S. DEP'T OF JUST., LEXINGTON COUNTY DOMESTIC VIOLENCE COURT: A PARTNERSHIP AND EVALUATION (NCJ 204023) (2004), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/204023.pdf>; NAT'L INST. OF JUST., VIOLENCE & VICTIMIZATION RESEARCH DIVISION, COMPENDIUM OF RESEARCH ON VIOLENCE AGAINST WOMEN 1993-2004 (2005), available at http://www.ojp.usdoj.gov/nij/vawprog/vaw_portfolio.pdf; DOMESTIC VIOLENCE RESEARCH: SUMMARIES FOR JUSTICE PROFESSIONALS (NCJ 202564) (Barabara Smith ed., 2003), available at <http://www.ncjrs.gov/pdffiles1/nij/202564.pdf>; NAT'L INST. OF JUST., LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS (NCJ 171666) (1998), available at <http://www.ncjrs.gov/pdffiles/171666.pdf>; VIOLENCE AGAINST WOMEN AND FAMILY VIOLENCE: DEVELOPMENTS IN RESEARCH, PRACTICE, AND POLICY (NCJ 199701) (Bonnie Fisher, ed., 2004), available at <http://www.ncjrs.gov/pdffiles1/nij/199701.pdf>. See generally JEFFREY FAGAN, NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT (NCJ 157641), THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS (1996), available at <http://www.ncjrs.gov/pdffiles/crimdom.pdf>.

create a government-sponsored National Conference or Commission that would include representatives of the major stakeholders in the domestic violence criminal justice community, whose mission would be to go beyond a discussion of best practices, and instead struggle with the difficult task of drafting principles or model legislation that promote uniform policy and standards.³⁰³

In terms of prosecution, I propose that the traditional criminal justice track be divided into three separate tracks. Ideally, all domestic violence cases would be kept together, regardless of the track.³⁰⁴ In other words, simply prosecuting some cases as felonies, rather than misdemeanors, will not be optimal if the cases are dispersed among prosecutors and judges. Also, victim advocates are required to ensure the cases do not get lost and that necessary services are provided. The Risky Violent Offender Track would apply to cases resulting in death, rape or other serious physical injuries, weapons-based offenses, multiple victim abusers, defendants with previous convictions, and defendants who meet defined criteria of dangerousness. It would provide a social service network to surviving battered women and their children. Advocates would help them navigate the court system and encourage their cooperation. Early preliminary hearings would be set in felonies to provide an opportunity for cross-examination to minimize the loss of key evidence if the woman refuses to testify at trial. Misdemeanors would be set within thirty to forty-five days to ensure the greatest likelihood of obtaining the complainant's testimony. Women would be subpoenaed, but material witness or bench warrants would be issued only in the most serious cases, which would be determined by protocols. Advocates would also help document evidence of forfeiture and look for additional sources of evidence that might be suggested by phone records, or transcripts of jailhouse visit conversations.

Federal as well as state weapons-based offenses would be considered for the Risky Violent Offender Track, because these are often both easier to prove and carry significant

³⁰³ Cf. COSCA Report, *supra* note 300. My suggestion for a National Conference is somewhat broader than that proposed by the Conference of Chief Justices since it encompasses law enforcement as well as judicial responses.

³⁰⁴ For discussion of a dedicated high volume misdemeanor domestic violence court, see Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W. ST. U. L. REV. 1 (2000).

penalties.³⁰⁵ Charging federal felonies specifically targeting domestic violence should also be more vigorously encouraged.³⁰⁶ Working relationships should be set up between federal and state prosecutors, so that appropriate state violators can be referred for federal weapons or kidnapping prosecutions, as well as for interstate domestic violence offenses. The initial challenge will be to correctly identify risky offenders who have the potential to escalate violence and pose a significant threat to the lives of the complainants. Formulas to aid in such identification currently exist and standards should be developed on a national level to ensure the best research and uniformity of practice.³⁰⁷

States should also review their evidence rules to ensure the admission of appropriate expert testimony concerning the effects of battering.³⁰⁸ If necessary, Rule 404(b) should be amended to admit prior domestic violence evidence as to the same victim.³⁰⁹ As I have argued elsewhere, propensity evidence should not be allowed, but motive, plan, and identity evidence should be widely received. As previously mentioned, a broad domestic violence hearsay exception should be enacted. Counseling and social services for the women, including advice on employment and educational options should be provided. Coordination between social services and criminal justice victim services should also be encouraged. If the criminal justice system cannot actually provide these services, it should be able to refer women to existing social programs, so they do not have to find their own way through the different bureaucracies.

The remaining cases would be divided into two tracks, again within a system where domestic violence cases are kept together. One track would be diversionary for offenders with

³⁰⁵ Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 599-600 (2003).

³⁰⁶ See, e.g., DUROSE, *supra* note 68, at 51 (from 2000-2002, only 757 suspects were referred for federal prosecution for violations of federal domestic violence laws).

³⁰⁷ See, e.g., Judge Amy Karan et al., *A Lawyer's Guide to Assessing Dangerousness for Domestic Violence*, 78 FLA. B.J. 55 (Mar. 2004); JANICE ROEHL ET AL., INTIMATE PARTNER VIOLENCE RISK ASSESSMENT VALIDATION STUDY: THE RAVE STUDY PRACTITIONER SUMMARY AND RECOMMENDATIONS: VALIDATION OF TOOLS FOR ASSESSING RISK FROM VIOLENT INTIMATE PARTNERS, (NCJ 209732) (May 2005), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/209732.pdf>.

³⁰⁸ See Raeder, *The Better Way*, *supra* note 16, at 151, 160; see also Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Batterering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 999-1002 (2004).

³⁰⁹ See Raeder, *Simpson and Beyond*, *supra* note 15, at 1505; see also Tuerkheimer, *supra* note 308, at 989-98.

no more than two arrests and no previous domestic violence convictions. The other track would be for cases in which women do not want to press charges from the outset and the batterer does not fit whatever violent offender profile is used in the jurisdiction. While there has been discussion about the effectiveness of batterer's programs, the Diversionary Track would require completion of an approved anger management program that incorporates education about the dynamics of battering. In this regard, more attention must be given to the content of such programs to ascertain their effectiveness.³¹⁰ In addition, employment counseling would be available and the defendant would be expected to financially provide for his family. Appropriate programs or referrals would be provided for the women to better understand their options. Unlike the Risky Violent Offender Track, where an unstated goal is to have the woman realize that she and her children ultimately need to leave the batterer when it is safe to do so and to develop an interim safety plan, the Diversionary Track would function like a social service safety net for families that will likely remain intact if the violence is stopped.

The final track would include other cases not fitting within either the Risky Violent Offender or Diversionary Track. This Middle Track would mainly consist of misdemeanors, but could include felonies with perceived evidentiary problems, or where the injury is serious, but the defendant does not fit the dangerous offender profile. It might also include cases where the defendant refuses diversion. In my view, even in this track a woman's decision not to prosecute should be honored in light of the literature on victim autonomy and the lack of empirical evidence indicating any correlation with lessening violence and prosecutorial no-drop policies.³¹¹ The discussion by the Court of Appeals in *Fowler* on this point is instructive:

³¹⁰ Amanda Dekki, Note, *Punishment or Rehabilitation? The Case for State-Mandated Guidelines for Batterer Intervention Programs in Domestic Violence Cases*, 18 ST. JOHN'S J. LEGAL COMMENT. 549 (2004).

³¹¹ See, e.g., Eve Buzawa et al., *Responses to Domestic Violence in a Pro-Active Court Setting*, in DOMESTIC VIOLENCE RESEARCH: SUMMARIES FOR JUSTICE PROFESSIONALS, *supra* note 302, at 20 (concluding that for first-time offenders and less serious cases, courts should honor a victim's wishes to have the case dismissed); see also Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 569-70 (1999); Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 318-21 (2004).

[J]ust before trial, Officer Decker apparently had threatened A.R. with a charge of filing a false police report if she refused to testify against Fowler. The prosecutor also asked the trial court to direct A.R. to answer his questions regarding whether Fowler had battered her, which the trial court refused to do. Given the psychological complexities of domestic violence cases, it is not at all clear to us that such an approach in trying to “encourage” a victim to testify is desirable. One recent scholarly article estimates that between eighty and ninety percent of domestic violence victims recant their accusations or refuse to cooperate with a prosecution. The reasons why a victim might choose to recant or not cooperate are varied and complex, including a fear of additional violence by the abuser, a belief that the abuser will “change” if no prosecution occurs, and legitimate economic concerns if the abuser was the primary financial provider and is facing prison time.³¹²

Indeed, the Indiana Supreme Court’s decision in *Fowler* agreed that domestic violence victims should not be placed in the situation of being intimidated not only by the batterer, but also by the State and its representatives. However, the Indiana Supreme Court also opined that the Court of Appeals understated the problem because a threat to file charges for making a false crime report is only appropriate if the prosecutor has reason to believe the complainant lied, which in turn would mean that no prosecution of the defendant is proper.³¹³ Ultimately, the goal for the Middle Track should be to provide social services and encourage women to leave the batterer or create viable safety plans, and to cooperate with the criminal prosecution. Similar to the timing for the Risky Violent Offender Track, misdemeanors should be set for trial within thirty to forty-five days to ensure the maximum possibility of cooperation by the victim.

Beyond a tracking system, Professor Donna Coker has suggested that spending VAWA money to increase the economic resources available to women might provide better results than our current prosecutorial practices.³¹⁴ Resort to

³¹² *Fowler v. State*, 809 N.E.2d 960, 965 (Ind. Ct. App. 2004) (citing Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 709 n.76 (2003)); see also *United States v. Gilbert*, 391 F.3d 882, 886 (7th Cir. 2004) (Defendant convicted of possession of a firearm conviction, which was reversed due to the admission of the defendant’s estranged wife’s statement pursuant to a residual exception. In *Gilbert*, the wife attempted to recant the statements shortly after the search, claiming that the officers had threatened her and that she feared she would lose her five children.).

³¹³ 829 N.E.2d 459, 471 (Ind. 2005).

³¹⁴ Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 858 (2001); see also Donna

mediation and restorative justice reconciliation approaches should be carefully considered, but only employed in circumstances where the complainant would not be disadvantaged.³¹⁵ Ultimately, we need to empower women and provide families with opportunities to help them reinvision their own lives.

The criminal justice system has an important role in stopping family violence, punishing risky offenders, providing disincentives for misdemeanor batterers, and giving appropriate defendants a chance to turn around their lives through diversion. In many places, though, we seem to be merely going through the motions. Most domestic violence cases are treated as misdemeanors, and those batterers who are arrested and jailed tend to receive short jail terms, without regard to whether this makes them more dangerous or conversely more likely to lose their jobs. Complainants' wishes also tend to be devalued, with little assistance either to the women or to the family unit. We should view *Crawford* as an opportunity to re-evaluate how the system is working, fix whatever is broken, and not be afraid to try new approaches to ensure a better life for women and children at risk.

VIII. CHILD ABUSE

A. *The Empirical Evidence Concerning Child Abuse*

Like domestic violence, the explosion in child abuse prosecutions is a relatively recent phenomenon. Prior to 1963, child abuse reporting laws were nonexistent, but by 1967, each of the fifty states had enacted mandatory reporting of child abuse laws.³¹⁶ In 1974, Congress passed the Child Abuse

Coker, *Addressing Domestic Violence Through a Strategy of Economic Rights*, 24 WOMEN'S RTS. L. REP. 187, 187-89 (Summer/Fall 2003).

³¹⁵ See, e.g., Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. REV. 2117 (1993); C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 295-96 (2004); Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53 (Spring 2005); Smith, *supra* note 104; Dekki, *supra* note 310; Alana Dunnigan, Comment, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. REV. 1031 (2003); Sarah Krieger, Note, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235 (2002).

³¹⁶ NAT'L CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFO., U.S. DEP'T OF HEALTH AND HUMAN SERVS., CURRENT TRENDS IN CHILD MALTREATMENT REPORTING

Prevention and Treatment Act (“CAPTA”), which required states to mandate the reporting of child abuse and demonstrate the existence of specific programs and procedures in order to qualify for possible federal grants under the Act.³¹⁷ Most states specify which professionals are required to report, increasing the list of mandatory reporters to include nurses, dentists, social workers, school personnel, child care providers, law enforcement officers, clergymen, and even pharmacists, firefighters, and paramedics. Approximately eighteen states require any person who suspects abuse to report it to the proper authorities.³¹⁸

While the domestic violence statistics dwarf those for child abuse, these cases grip the public because they involve exploitation of the most vulnerable victims. The introductory findings to the 2003 revision of CAPTA state that each year, approximately 900,000 American children are victims of abuse and neglect, and that approximately nineteen percent of those children suffered physical abuse, ten percent suffered sexual abuse, and five percent suffered emotional maltreatment.³¹⁹ Defying many perceptions, a third of child victimizers in state prison had committed their crime against their own child and half had a relationship with the victim as a friend, acquaintance, or other relative.³²⁰ Thirty percent reported they had multiple victims.³²¹ Three-quarters of the violent victimizations of children took place in either the victim or offender’s home.³²²

Child abuse cases are often difficult for prosecutors to win because the abuse takes place in secret, there is typically no physical evidence of abuse in molestation cases not

LAWS 1 (2002) [hereinafter CURRENT TRENDS IN CHILD MALTREATMENT REPORTING LAWS].

³¹⁷ Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. §§ 5101-5119).

³¹⁸ See CURRENT TRENDS IN CHILD MALTREATMENT REPORTING LAWS, *supra* note 316; Asaph Glosser et al., The Lewin Group, *Statutory Rape: A Guide to State Laws and Reporting Requirements* 12 (2004), available at http://www.lewin.com/Lewin_Publications/Human_Services/StateLawsReport.htm.

³¹⁹ Keeping Children and Families Safe Act of 2003, Pub. L. 108-36, 117 Stat. 800 (amending CAPTA); see also U.S. DEP’T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 2003, <http://www.acf.hhs.gov/programs/cb/publications/cm03/cm2003.pdf>.

³²⁰ LAWRENCE A. GREENFIELD, U.S. DEP’T OF JUST., CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS 10 (1996), available at <http://www.usdoj/bjs/pub/pdf/cvvoat.pdf> (last visited Aug. 24, 2005).

³²¹ *Id.* at 9.

³²² *Id.* at 12.

involving penetration, and even rape may not provide physical evidence because children heal quickly and the crime is often reported well after it occurred. The fact that children disclose in stages also increases the likelihood of inconsistencies in the child's testimony. In addition, questioning by a family member, doctor, psychologist, or police officer may be perceived as leading, producing unreliable answers. Like domestic violence victims, children often recant. Thus, the testimony of young children is viewed more skeptically by jurors than that of adults because of concerns over suggestibility, manipulation, coaching, or confusing fact with fantasy.³²³ Similarly, a study by Professor Myers, a leading expert concerning child abuse, noted a higher reversal for hearsay introduced in child abuse than other types of cases.³²⁴

Unlike domestic violence, some argue that *Crawford* will have a minimal impact on child abuse trials because such cases may not be winnable in the absence of the child, and therefore prosecutors had always been selective in their choice of cases. For example, another study by Professor Myers of forty-two child sexual abuse trials found that child witnesses testified live in court in each trial, "suggesting that prosecutors are reluctant to take child sexual abuse cases to trial unless the victim is available to testify."³²⁵ In this regard, *Maryland v. Craig* permits prosecutors to have some children testify from a different location via some type of television arrangement or simply placed in the courtroom with a screening device, if they can demonstrate particularized need showing that the child would be fearful of testifying in the defendant's presence.³²⁶ To the extent that *Crawford* does not result in revisiting *Craig*, this also ensures cross-examination for testimonial statements. While empirical data appears to suggest that when children are shielded their reliability increases, the downside is that the jury may find the child less credible.³²⁷

³²³ See generally Myrna S. Raeder, *Navigating Between Scylla and Charybdis: Ohio's Efforts to Protect Children Without Eviscerating the Rights of Criminal Defendants—Evidentiary Considerations and the Rebirth of Confrontation Clause Analysis in Child Abuse Cases*, 25 U. TOL. L. REV. 43 (1994) [hereinafter Raeder, *Navigating Between Scylla and Charybdis*].

³²⁴ John E.B. Myers et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 LAW & CONTEMP. PROBS. 3, 44-45 (2002).

³²⁵ John E.B. Myers et al., *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCHOL. PUB. POL'Y & L. 388, 411 (1999).

³²⁶ 497 U.S. 836, 855 (1990).

³²⁷ See Dorothy F. Marsil et al., *Child Witness Policy: Law Interfacing with Social Science*, 65 LAW & CONTEMP. PROBS. 209, 238-39 (2002).

Over the years, a number of decisions have involved absent child witnesses, including two of the most important *Roberts'* progeny: *Wright* and *White*. Generally, children may be deemed incompetent due to an inability to discern truth from falsity, or because they cannot communicate with the jury. In addition, some prosecutors, parents, and psychologists believe that requiring a child to testify revictimizes the child and inflicts additional trauma that may result in slowing the child's recovery. While the empirical basis for this claim is not decisive,³²⁸ many believe that children should only be subjected to cross-examination when there is no other viable alternative.³²⁹ Ironically, some children recover more quickly when the jury validates their testimony by convicting the defendant, and are retraumatized by an acquittal, factors not part of any Confrontation Clause analysis.³³⁰

Whether or not the child testifies, child abuse cases, like domestic violence cases, rely heavily on excited utterances and exceptions for medical diagnosis and treatment. However, even given expansive interpretations of those exceptions, when a child is the declarant, virtually every state has a child hearsay exception, or uses a catch-all to permit hearsay that would otherwise be barred. Twenty states allow such exceptions regardless of whether the child-witness is or is not available to testify; four states allow the exceptions only if the child is available to testify; and eight states allow the exceptions only if the child is unavailable to testify.³³¹ Some states have also adopted exceptions that apply to the videotaping of child interviews typically by law enforcement, psychologists, social workers or others employed by the local child services agency.³³² This is designed to show juries that

³²⁸ See, e.g., Gail D. Cecchettini-Whaley, Note, *Children as Witnesses after Maryland v. Craig*, 65 S. CAL. L. REV. 1993 (1992) (surveying psychological literature); see also JOHN E.B. MYERS, 1 MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES 135 (2005) (discussing psychological research).

³²⁹ See, e.g., John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 MICH. L. REV. 1709, 1724 (1990) (challenging the stereotype that claims "[f]or most victims, confrontation with the legal system is a second and separate trauma, a process of revictimization").

³³⁰ See, e.g., Rachel I. Wollitzer, *Sixth Amendment - Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 785-86 (1988); Cecchettini-Whaley, *supra* note 328, at 2005 (surveying psychological literature).

³³¹ TASK FORCE ON CHILD WITNESSES, AM. BAR ASS'N CRIMINAL JUST. SECTION, THE CHILD WITNESS IN CRIMINAL CASES 40 (2002).

³³² See, e.g., IND. CODE ANN. § 35-37-4-6 (2004); MINN. STAT. ANN. § 595.02. (2000); MO. ANN. STAT. § 492.304; TEX. CODE CRIM. PROC. ANN. art. 38.071 (2005).

the child has not been misled by suggestive questioning techniques, when the child does not testify.

B. The Effect of Mandatory Reporting Requirements

Regardless of which exception the hearsay is admitted under, after *Crawford*, if a child does not testify, the deciding factor for confrontation analysis is whether the statement is considered testimonial. This is complicated by a characteristic not as prevalent in domestic violence cases: the existence of mandatory reporting of child abuse in all fifty states.³³³ Most states specify which professionals are required to report, and many have increased the list of mandatory reporters to include nurses, dentists, social workers, school personnel, childcare providers, law enforcement officers, clergymen, and even pharmacists, firefighters, and paramedics.³³⁴ As previously mentioned, approximately eighteen states require any person who suspects abuse to report it to the proper authorities.³³⁵

Ironically, after years of being troubled by arguably unreliable child hearsay being admitted pursuant to *White*, my difficulty with *Crawford* is not that hearsay accusing a defendant will be received as nontestimonial because the child is too young to understand its accusatory content. Now, any child hearsay coming in under an ad hoc exception will typically require trustworthiness and if shoehorned into a tradition exception, the defendant is no worse off than under *White*. Instead, I am distressed that a testimonial approach undoes the entire way in which we currently approach child abuse cases.³³⁶ In other words, mandatory reporting arguably makes any reporter a government proxy, virtually excluding all hearsay of unavailable children. I have been surprised that some courts make no mention of these statutes in analyzing whether a child's statements are testimonial. For example, in *State v. Vaught* the statement of a victim to a physician that "[defendant] put his finger in her pee-pee" was not considered testimonial.³³⁷

³³³ See generally CURRENT TRENDS IN CHILD MALTREATMENT REPORTING LAWS, *supra* note 316, at 1.

³³⁴ *Id.* at 3-4.

³³⁵ *Id.* at 4-5, 5 n.16.

³³⁶ See Hutton, *supra* note 102, at 70-71.

³³⁷ 682 N.W.2d 284, 286, 291 (Neb. 2004); accord *State v. Scacchetti*, 690 N.W.2d 393, 397 (Minn. Ct. App. 2005) (statement to nurse practitioner who identified child after emergency room physician suspected abuse).

Similarly, in *People v. Cage*, a case involving an older child who suffered a substantial cut in a dispute with his mother, the court found statements made to a doctor were nontestimonial because the objective reasonable person test asks whether a reasonable person would have expected his statements to the doctor to be used prosecutorially.³³⁸ The *Cage* court viewed the possibility that someone would pass information to police as not enough, completely ignoring that in many jurisdictions the doctor has an obligation to report physical as well as sexual abuse of children. Indeed the Department of Justice's Law Enforcement Guide suggests that to encourage reluctant physicians to get involved in cases of abuse, they should be reminded that "all 50 States and the District of Columbia have enacted legislation regarding immunity from civil or criminal liability for persons who, in good faith, make or participate in making a report of child abuse or neglect."³³⁹

I have always questioned the admissibility of a statement by a child abuse victim attributing fault to a member of the victim's immediate household under the medical exception. However, many states view such statements as relevant to the prevention of recurrence of injury to the child.³⁴⁰ Therefore, I am not troubled that such statements would likely be suppressed under a true testimonial approach.

In contrast, more traditional symptoms and descriptions of medical problems may now be transformed into testimonial statements unless courts view the accusation narrowly as just including the identification of the perpetrator, as opposed to explaining the nature of the injuries caused. *In re T.T.*,³⁴¹ made this distinction and considered statements as nontestimonial where they did not accuse or identify the perpetrator of the assault. Therefore, the child's explanation of how she was penetrated, descriptions of the pain, and the offender's use of a lubricant were relevant in assessing how the doctor reached her opinion that G.F. sustained sexual abuse and was in accord

³³⁸ 15 Cal. Rptr. 3d 846, 855 (Ct. App. 2004), *cert. granted*, 99 P.3d 2 (Cal. 2004).

³³⁹ OFFICE OF JUVENILE JUST. AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUST., LAW ENFORCEMENT RESPONSE TO CHILD ABUSE 8 (reprint 2001) (1997).

³⁴⁰ *State v. Sims*, 890 P.2d 521, 523 (Wash. Ct. App. 1995); *Blake v. State*, 933 P.2d 474, 477 n.2 (Wyo. 1997) ("[A]n overwhelming majority of jurisdictions, including at least thirty-two states and four federal circuits, allow into evidence statements regarding the identity of the perpetrator in child physical or sexual assault cases.").

³⁴¹ 815 N.E.2d 789, 804 (Ill. App. Ct. 2004).

with the statutory hearsay exception for statements, made by a patient with a selfish interest in treatment, for the purpose of medical diagnosis and treatment:

Those statements were not accusatory against respondent at the time made and, thus, do not trigger enhanced protection under the confrontation clause. Respondent's primary focus on G.F.'s entire statement to Dr. Lorand as testimonial, because an objective witness would reasonably believe the statement would be available for use at a later trial, misses the mark. Such an analysis overlooks the crucial "witnesses against" phrase of the confrontation clause and casts too wide a net in categorizing nonaccusatory statements by sexual assault victims to medical personnel as implicating the confrontation clause's core concerns regarding government production of ex parte evidence against a criminal defendant.³⁴²

Not all courts agree. In *People v. Vigil*,³⁴³ a child's hearsay statements to a physician were deemed testimonial where the physician questioned the child and was a member of a child protection team and a frequent prosecution witness in child abuse cases. As a result, the doctor could only testify regarding his observations and physical findings. *State v. Fisher*³⁴⁴ attempted to harmonize some of the conflicting cases by noting a distinction as to whether the statements to a physician are made for forensic as opposed to treatment purposes, but overlooked the effect of mandatory reporting requirements in its analysis. While I would expect the defense bar to argue that statements to all mandatory reporters are testimonial, an absolute ban on all statements made to medical personnel concerning child abuse would be quite troubling. Looking to the nature of the statement appears more in keeping with *Crawford* when the physician is not part of a prosecutorial forensic team or otherwise motivated to obtain an accusatory statement.

C. *Children Aren't Required to Understand the Accusatory Effect of Their Statements*

Although it has been argued that the developmental literature indicates that young children do not reasonably understand that statements made in forensic interviews would

³⁴² *Id.*

³⁴³ 104 P.3d 258, 265-66 (Colo. Ct. App. 2004), *cert. granted*, No. 04SC532, 2004 WL 2926003 (Colo. Dec. 20, 2004).

³⁴⁴ 108 P.3d 1262 (Wash. Ct. App. 2005).

be used at trial,³⁴⁵ courts appear to be using the objective observer standard, rather than focusing on the child's expectations. While *State v. Snowden*³⁴⁶ imposed an objective person test, it rejected use of an objective child, which would have insulated "statements by a young child made in an environment and under circumstances in which the investigators clearly contemplated use of the statements at a later trial." *Snowden* called such an approach "an exception that we are not prepared to recognize." *People v. Sisavath* also rejected the notion that "an 'objective witness' should be taken to mean an objective witness in the same category of persons as the actual witness—here, an objective four-year-old."³⁴⁷

Even disclosures to close family members could be considered testimonial under the objective observer approach. For example, the *In re E.H.*³⁴⁸ court found complaints to the children's grandmother were testimonial because they were the impetus for filing the petition against E.H. and were accusatory statements offered at trial. In contrast, *People v. R.F.*³⁴⁹ made a blanket holding that statements of a child to family members are not testimonial. The California Supreme Court in *People v. Griffin* also noted that a child victim's statements to a friend at school were not testimonial and provided no further explanation.³⁵⁰ *State v. Purvis*³⁵¹ noted that the fact that parents turn over information about crimes to the police "does not transform their interactions with their children into police investigations."³⁵² Given the tendency of many courts to treat statements to private individuals as nontestimonial regardless of the type of case,³⁵³ it may be that a

³⁴⁵ Allie Phillips, *Child Forensic Interviews after Crawford v. Washington: Testimonial or Not?*, 39 PROSECUTOR 17 (Aug. 2005) (arguing for a reasonable child standard and rejecting an objective person standard for children under the age of 10).

³⁴⁶ 867 A.2d 314, 329 (Md. 2005).

³⁴⁷ 13 Cal. Rptr. 3d 753, 758 n.3 (Ct. App. 2004); *accord* *State v. Grace*, 111 P.3d 28, 38 (Haw. Ct. App. 2005).

³⁴⁸ 823 N.E.2d 1029 (Ill. App. Ct. 2005), *cert. granted*, No. 100202, 2005 Ill. LEXIS 814 (May 25, 2005).

³⁴⁹ 825 N.E.2d 287, 295 (Ill. App. Ct. 2005).

³⁵⁰ 93 P.3d 344, 372 n.19 (Cal. 2004).

³⁵¹ 829 N.E.2d 572 (Ind. Ct. App. 2005).

³⁵² *Id.* at 579.

³⁵³ *See, e.g., State v. Aaron L.*, 865 A.2d 1135, 1145 n.21 (Conn. 2005) (finding a statement of a two-and-a-half-year-old victim to mother was not testimonial); *Herrera-Vega v. State*, 888 So. 2d 66, 69 (Fla. Dist. Ct. App. 2004) (finding a spontaneous statement of three year old child to mother was not testimonial, nor was repetition of that statement to father minutes later); *State v. Manuel*, 697 N.W.2d 811,

significant amount of child hearsay will still be admissible because family members are typically the ones to whom abuse is originally disclosed.

D. Crawford's Impact on Multidisciplinary Forensic Teams

Crawford appears to undo the use of multidisciplinary teams in child abuse, which the Department of Justice has encouraged for the last ten years. In this approach “[s]ocial workers, physicians, therapists, prosecutors, judges and police officers all have important roles to play.”³⁵⁴ Interagency protocols are encouraged with guidelines indicating the role of each of the principal agencies.³⁵⁵ Indeed, this effort has been extremely successful. More than forty states have legislation concerning joint investigation and cooperation between law enforcement and social services and authorizing multidisciplinary teams.³⁵⁶

Such teams have been instrumental in improving the skills of interviewers and reducing the number of interviews. Professor Myers indicates that reducing interviews ensures that vulnerable children are not put under additional stress and lowers the likelihood that unnecessarily suggestive questions will be asked.³⁵⁷ Now *Crawford* has turned these best practices into a textbook for creating testimonial statements when the child does not testify. Indeed, statements to a Department of Children and Family Services’ (DCFS) agent have been found to be testimonial. “[W]here DCFS works at the behest of and in tandem with the State’s Attorney with the intent and purpose of assisting in the prosecutorial effort of an alleged sexual assault on a child, DCFS functions as an agent

822-23 (Wis. 2005) (discussing general case law and finding statement to girlfriend not testimonial).

³⁵⁴ LAW ENFORCEMENT RESPONSE TO CHILD ABUSE 1, *supra* note 339, at 3.

³⁵⁵ *Id.* See generally THE GREENBOOK NATIONAL EVALUATION TEAM, THE GREENBOOK DEMONSTRATION INITIATIVE INTERIM EVALUATION REPORT, at app. A (Dec. 2004), available at http://www.thegreenbook.info/documents/Greenbook_Interim_Evaluation_Report_2_05.pdf (listing recommendations from federal initiative to address domestic violence and child maltreatment).

³⁵⁶ Legislation Mandating or Authorizing the Creation of Multidisciplinary/Multi-Agency Child Protection Teams (current as of November 5, 2004), available at http://www.ndaa-apri.org/pdf/statutes_legislation_mandating_multidisciplinary_teams_2004.pdf (last visited Oct. 2, 2005).

³⁵⁷ John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 17 (1996).

of the prosecution.”³⁵⁸ Similarly, in *In re Rolandis G.*,³⁵⁹ where the child made a statement describing the sexual abuse to a child advocacy worker while a police officer watched through a “two-way mirror” the court held that the statement was testimonial.³⁶⁰ Most recently, *State v. Snowden*³⁶¹ found a statement testimonial where it resulted from a joint investigation by the Montgomery County Police Department and the Child Protective Services for Montgomery County. While I do not disagree with these decisions on legal grounds, it is clear that we must recognize that statements made to multidisciplinary teams will not be admitted unless the child testifies. As a result, we must think about how to ensure such testimony or otherwise provide admissible evidence to protect our most vulnerable children.

Similarly, post-*Crawford*, videotaped interviews by forensic teams have generally been found to be testimonial.³⁶² *United States v. Bordeaux*³⁶³ specifically noted that because the statements may also have “a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.” Professor Mosteller has discussed the possibility that videotaped interviews will fall into disuse since they will not provide an avenue for admission of the child’s statement.³⁶⁴ I am more hopeful, for two reasons. First, because such statutes typically apply to children who testify as well as to those who do not, the prosecutor will still have an incentive to bolster the credibility of testifying children by showing their interviews were nonsuggestive. While I recognize the counter to this is that prosecutors may want to hide suggestive interviews, I think that jurors may question

³⁵⁸ *In re T.T.*, 815 N.E.2d 789, 801 (2004).

³⁵⁹ 817 N.E.2d 183 (Ill. App. Ct. 2004).

³⁶⁰ *Id.* at 188.

³⁶¹ 867 A.2d 314, 330 (Md. 2005).

³⁶² *See, e.g.*, *People v. Vigil*, 104 P.3d 258, 262 (Colo. Ct. App. 2004), *cert. granted*, No. 04SC532, 2004 WL 2926003 (Colo. Dec 20, 2004); *In re R.A.S.*, 111 P.3d 487 (Colo. Ct. App. 2004) (child victim’s statements to police investigator during forensic interview were testimonial); *State v. Mack*, 101 P.3d 349 (Or. 2004) (en banc) (child witness’s statements to government caseworker during police-directed interview were testimonial). *But see* *People v. Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (child victim’s response to interviewer’s question was not testimonial where interviewer was not government employee), *cert denied*, 688 N.W.2d 829 (2004). *See also* *State v. Davis*, 613 S.E.2d 760, 775-76 (S.C. Ct. App. 2005) (summarizing child abuse cases).

³⁶³ 400 F.3d 548, 556 (8th Cir. 2005).

³⁶⁴ Mosteller, *supra* note 14, at 529-30.

the absence of videotapes when the technology is available. Moreover, I do not believe that prosecutors want to manipulate children into believing they are abused if in fact they are not, and they have an interest in ensuring best practices for forensic interviews. Second, the empirical evidence indicates that in actual trials, jurors rated the videotaped interview as important in their decision to believe the child victim/witness at trial.³⁶⁵

E. Opportunity for Cross-Examination of Child Witnesses

Post-*Crawford*, if a child does not testify, the chances of winning at trial plummet because significant types of child hearsay will be eliminated. After years of worrying about too much child hearsay being admitted via traditional exceptions so that it receives no reliability check, I have come full circle and wonder how we can provide any justice to abused children who do not testify. Because some of these children are very young, they might not meet even minimal competency standards. At least seven states currently provide for victims of child abuse to testify without any finding of competency.³⁶⁶ Yet do these provide for an opportunity for effective cross-examination?

This is not an academic issue. Pre-*Crawford*, the Ninth Circuit upheld the admission of cross-examined videotaped testimony of a child, finding that the “[i]ncapacity to understand the duty to testify truthfully does not automatically offend the Confrontation Clause when the witness in question is a young child.”³⁶⁷ In contrast, *Purvis v. State*³⁶⁸ found that a witness who is unable to appreciate the obligation to testify truthfully cannot be effectively cross-examined for *Crawford* purposes. The child in *Purvis* was incompetent due to being developmentally disabled.³⁶⁹ This disability did not prevent the court from upholding the admission of the child’s nontestimonial statements, which were cross-examined at a hearing held pursuant to the state’s Protected Persons Statute.³⁷⁰ This issue was deferred in *State v. Carothers*,³⁷¹

³⁶⁵ Myers et al., *supra* note 325.

³⁶⁶ Lyon, *supra* note 8, at 1023.

³⁶⁷ Walters v. McCormick, 122 F.3d 1172, 1175 (9th Cir. 1997).

³⁶⁸ 829 N.E.2d 572, 581 (2005).

³⁶⁹ *Id.* at 577.

³⁷⁰ *Id.* at 584-85.

since the court found a confrontation claim to be premature where the defendant argued that the four-year-old child would be unable to remember and testify at the time of trial as to the statements she gave to a child advocate, to law enforcement and to her mother. Obviously, this question is bound to recur in other cases.

Despite *Owens*, which rejected a confrontation challenge for declarants who testify, defendants have sensed that their best challenge to a testifying child is to claim that the opportunity for cross-examination was not adequate. *United States v. Spotted War Bonnet*,³⁷² a pre-*Crawford* opinion, indicated that if “a child is so young that she cannot be cross-examined at all, or if she is ‘simply too young and too frightened to be subjected to a thorough direct or cross-examination’[,] the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause.”

Most courts appear to interpret *Crawford* as not requiring memory of all of the particulars of the abuse. For example, *State v. McClanahan*³⁷³ held that a second grader subject to substantial cross-examination did not pose a confrontation problem. In other words, the fact that a child’s memory may be imperfect does not make her ‘unavailable’ as a witness for the purposes of the Confrontation Clause. In *People v. Harless*,³⁷⁴ although a child’s memory at the time of trial was somewhat selective, her partial failure of recollection did not prevent her from explaining her prior statements or preclude the jury from assessing her demeanor and determining whether her prior statements or her trial testimony was more credible. Accordingly, the defendant was found to have an opportunity for effective cross-examination.

Not responding to a handful of questions also does not render the child unavailable.³⁷⁵ Although in *State v. Yanez*,³⁷⁶ the child did not remember what she told the adults or what the defendant did to her, the court found her available for Confrontation Clause purposes, permitting the admission of

³⁷¹ 692 N.W.2d 544, 549 (S.D. 2005).

³⁷² 933 F.2d 1471, 1474 (8th Cir. 1991) (internal citations omitted).

³⁷³ No. 50866-1-I, 2004 WL 723283, at *4 (Wash. Ct. App. Apr. 5, 2004).

³⁷⁴ 22 Cal. Rptr. 3d 625, 637 (Ct. App. 2004), *cert. granted*, 26 Cal. Rptr. 3d 568 (2005).

³⁷⁵ *State v. McKinney*, 699 N.W.2d 471, 480 (S.D. 2005).

³⁷⁶ No. A04-276, 2005 WL 894649, at *3 (Minn. Ct. App. Apr. 19, 2005).

her videotaped statements to a social worker and deputy that included graphic descriptions of the abuse. A similar result occurred in *State v. Price*.³⁷⁷

*People v. Sharp*³⁷⁸ demonstrates how a seemingly wise defense strategy can backfire. The defense decided to forego cross-examination about specifics of the alleged abuse after the child failed to respond on direct to the details of the abuse. Because the child answered all of the questions the defense posed on cross-examination, the court held that her statements were governed by *Owens*, rather than *Crawford*.³⁷⁹ *Sharp* left open what legal consequences would ensue if she had answered some, but not all, of those questions.³⁸⁰ It is troubling that the uncommon situation in *Owens*, of a testifying adult having no memory of the incident, may now becoming commonplace when young children testify.

A few post-*Crawford* cases have found Confrontation Clause violations despite the child's presence at trial. In *People v. Couturier*,³⁸¹ limiting the cross-examination of a child witness at trial, concerning questions about notes that she wrote to the defendant after the alleged abuse saying she loved and missed him, violated the defendant's right of confrontation where there was no corroborating physical evidence or witness testimony, making the trial a credibility contest. *In re T.T.* found a child was unavailable to testify after she froze on the stand when asked to recount the alleged incidents of abuse.³⁸² Although the child responded to general questions from prosecutor about her family and school, and explained how she came to be at alleged perpetrator's house on the dates of the alleged assaults, when questions became more specific regarding the assaults, she stopped answering questions, even after a recess was taken so that her mother could console her.³⁸³

Some challenges arise in the context of a child who testifies at a preliminary hearing, but not at trial, since *Crawford* permits testimonial statements of an unavailable declarant if there was an opportunity for prior cross-

³⁷⁷ 110 P.3d 1171, 1175 (Wash. Ct. App. 2005).

³⁷⁸ 825 N.E.2d 706, 713 (Ill. App. Ct. 2005).

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ No. 252175, 2005 WL 323680 (Mich. Ct. App. Feb. 10, 2005) *vacated*, 704 N.W.2d 463 (Mich. 2005).

³⁸² *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 2004).

³⁸³ *Id.* at 797-98.

examination. In *People v. Osio*,³⁸⁴ where a child testified to only one of seven counts at the preliminary hearing, the opportunity for cross-examination was considered insufficient. Similarly, in *Bockting v. Bayer*³⁸⁵ the Ninth Circuit recently held that admission of a child's hearsay statement to a detective warranted habeas relief where the statement was critical in view of the victim's testimony at the preliminary hearing claiming not to remember what happened.

Although the evolving case law on adequacy of cross-examination is not necessarily consistent, the findings appear highly fact-specific. Ultimately, a number of children who are found incompetent or freeze are rendered voiceless not because of their own inability to testify, but because lawyers and judges treat these children like mini adults who they assume will understand language and concepts that are developmentally inappropriate.³⁸⁶ Given *Crawford*, the goal should not be to obtain less child hearsay, or do away with forensic interviews, or attempt to avoid the testimonial ban, but rather to make a more concerted effort to ensure that children are comfortable in the courtroom and able to testify.³⁸⁷

F. *The Intersection of Craig and Crawford*

To the extent that a child is afraid to testify in the presence of the defendant, prosecutors must continue to rely on *Maryland v. Craig*.³⁸⁸ So far, there has been no frontal judicial attack on *Craig* even though *Crawford* clearly has a vision of the Confrontation Clause that rejects the type of balancing approach that *Craig* applied.³⁸⁹ It must be remembered, however, that *Craig* requires that the child must be "traumatized, not by the courtroom generally, but by the presence of the defendant."³⁹⁰ Thus, where that element is unclear, a Confrontation Clause violation will be established. It appears that some courts are including any trauma induced

³⁸⁴ No. H026953, 2005 WL 1231402, at *7 (Cal. Ct. App. May 25, 2005).

³⁸⁵ 399 F.3d 1010, 1022 (9th Cir. 2005).

³⁸⁶ See, e.g., Thomas D. Lyon et al., *Reducing Maltreated Children's Reluctance to Answer Hypothetical Oath-Taking Competency Questions*, 25 LAW & HUM. BEHAV. 81 (2001).

³⁸⁷ See, e.g., Lyon, *supra* note 8, at 1071; ANN M. HARALAMBIE, CHILD SEXUAL ABUSE IN CIVIL CASES: A GUIDE TO CUSTODY AND TORT ACTIONS 312-15 (1999).

³⁸⁸ 497 U.S. 836 (1990).

³⁸⁹ *Id.* at 853.

³⁹⁰ *Id.* at 856.

by testifying in their evaluation. For example, the Military Rules of Evidence explicitly requires remote testimony for children who literally could not meet the *Craig* standard.³⁹¹ In *United States v. Turning Bear*,³⁹² a pre-*Crawford* case, testimony via closed circuit television was found to violate the Confrontation Clause because the decision was based in part on the child's fear of the jury, rather than of testifying in the presence of her father. This holding was reaffirmed post-*Crawford* in *United States v. Bordeaux*, which also involved testimony via closed circuit television that was permitted where the child's fear related in part to testifying in front of a jury.³⁹³ The court in *Bordeaux* also noted "confrontation' via a two-way closed circuit television is not constitutionally equivalent to face-to-face confrontation."³⁹⁴

Courts vary significantly about the nature and extent of the showing justifying in-court restrictions, as well as who can establish it.³⁹⁵ Some judges have even permitted prosecutors to make the representation concerning trauma, although one well respected commentator has recommended that the judge talk to the child.³⁹⁶ Justices Scalia and Thomas have dissented from the denial of certiorari in two cases involving interpretation of *Craig* that they characterized as "confrontation-via-TV."³⁹⁷ In one, a fifteen-year-old teenager indicated she was not afraid of the defendant, but "can't be near him."³⁹⁸ The other protected a child whose mother and doctor indicated that the six-year-old wanted to testify and because the testimony would be limited to another girl's abuse, not her own, neither expected the child to suffer additional emotional distress.³⁹⁹

³⁹¹ See Major Edward J. O'Brien, *Are Courts Martial Ready for Prime Time? Televised Testimony and Other Developments in the Law of Confrontation*, 2000 ARMY LAW. 63, 66-67 (May 2000).

³⁹² 357 F.3d 730, 736 (8th Cir. 2004).

³⁹³ 400 F.3d 548, 553-54 (8th Cir. 2005).

³⁹⁴ *Id.* at 554.

³⁹⁵ See Dorothy F. Marsil et al., *Child Witness Policy: Law Interfacing with Social Science*, 65 LAW & CONTEMP. PROBS. 209, 239 n.285 (2002) (citing cases).

³⁹⁶ See Jean Montoya, *Lessons from Akiki and Michaels on Shielding Child Witnesses*, 1 PSYCHOL. PUB. POL'Y & L. 340, 342-43, 356-66 (1995).

³⁹⁷ *Marx v. Texas*, 953 S.W.2d 321 (Tex. App. 1997), *aff'd*, 987 S.W.2d 577 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 1034 (1999).

³⁹⁸ *Danner v. Kentucky*, 963 S.W.2d 632 (1998).

³⁹⁹ *Marx*, 987 S.W.2d 577 (Tex. Crim. App. 1999).

G. *Forfeiture in Child Abuse Cases*

Forfeiture can also play a role in child abuse cases. However, the difficulty is that often the child is pressured by the parent who is not the defendant, typically the mother. This occurs because the abuse may result in the mother having to make a choice of living with her male intimate and having the child removed from the home, or giving up the male to retain custody of her child. Because the penalties for child abuse are so great, on occasion the family refuses to believe the child. Similarly, children who are old enough to understand the ramifications of making the complaint may recognize at some point that they would rather live at home than be placed in foster care. Another issue that arises concerning forfeiture is that most abusers tell the child to keep their relationship a secret, and some abusers threaten the child to prevent disclosure.⁴⁰⁰ If the child's unwillingness to testify results from those original threats, the threats should be admissible to demonstrate forfeiture even though the tampering was prior to disclosure. However, if the child is otherwise incompetent, the coercion does not supply a direct link to any witness tampering at trial.

H. *Reassessing the Admission of Child Abuse Evidence*

States have been fairly aggressive in permitting expert evidence and prior acts of defendants in child sex abuse cases. Advances in medical technology may also produce physical evidence of abuse. However, jurors still expect to hear from the child. Elsewhere, I have discussed what I view as the appropriate use of expert testimony and prior acts of criminal defendants in child abuse cases,⁴⁰¹ but *Crawford's* impact cannot be overstated in cases where children do not testify. Because the multidisciplinary approach to interviewing children is an important feature of child abuse litigation, more attention must be given to qualifying children as witnesses, and preparing them so that they do not freeze when testifying.

⁴⁰⁰ See Tom Harbinson, *Using the Crawford v. Washington "Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases*, 1 REASONABLE EFFORTS 3 (2004), available at http://www.ndaa-apri.org/publications/newsletters/reasonable_efforts_volume_1_number_3_2004.html.

⁴⁰¹ See Raeder, *Navigating Between Scylla and Charybdis*, *supra* note 323.

IX. CONCLUSION

Whether *Crawford's* impact on domestic violence and child abuse prosecutions was intended or not, it is significant. Unlike Abigail Adams, the ladies will not sit by quietly asking to be remembered.⁴⁰² Instead, the advocates on behalf of battered women and abused children should view *Crawford* as an opportunity to reassess current practices and restructure the way in which the criminal justice system responds to these cases.

⁴⁰² Letter from Abigail Adams to John Adams (March 31, 1776), in 1 ADAMS FAMILY CORRESPONDENCE 370 (L.H. Butterfield et al. eds., 1963) ("In the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors.").