PROSECUTING BATTERERS AFTER *CRAWFORD*

Tom Lininger[*]

[*] Assistant Professor, University of Oregon School of Law (J.D., Harvard Law School; B.A., Yale University). The author is grateful for comments from Sarah Buel, Jeffrey Fisher, Richard Friedman, Jennifer Mnookin, Laird Kirkpatrick, Roger Kirst, Robert Mosteller, Tamara Piety, and Myrna Raeder. Of course, the author is solely responsible for any mistakes in this Article.

INTRODUCTION

THREE cases decided in the summer of 2004 illustrate the dramatic impact of *Crawford v. Washington*,[1] a United States Supreme Court ruling that restricts the use of hearsay evidence in criminal trials when the declarant is unavailable for cross-examination.[2] In *State v. Courtney*, the defendant appealed his conviction for domestic assault.[3] The evidence indicated that he had choked his former girlfriend until she lost consciousness. He had beaten her so severely that her blood splattered on the bedroom walls. She woke up with her head in a toilet.[4] Her six-year-old daughter described the assault in an interview conducted by a child-protection worker. The trial court admitted a videotape of this interview. Citing *Crawford*, the appellate court reversed the defendant's conviction because the daughter was not available for cross-examination at trial.[5]

In *People v. Adams*, the defendant appealed his conviction for inflicting corporal injury upon a cohabitant.[6] The prosecution's evidence showed that the defendant had battered his pregnant girlfriend, forced her to the floor, and pushed his knee down on her abdomen while she pleaded with him to spare her baby's life.[7] The

[1] 124 S. Ct. 1354 (2004). *Crawford* held that a "testimonial" hearsay statement is inadmissible against the accused unless the declarant is presently available for cross-examination, or is presently unavailable but was once available for cross-examination. A more detailed discussion of *Crawford* follows in Part I infra.

[2] Note that the factual summaries for the following three cases derive in part from evidence excluded by the appellate courts. The public record has not conclusively established the facts of these cases.

[3] 682 N.W.2d 185 (Minn. Ct. App. 2004), review granted, No. A03-790 & A03-791, 2004 Minn. LEXIS 575 (Minn. Sept. 29, 2004).

[4] Id. at 190.

[5] Id. at 196–97.

[6] 16 Cal. Rptr. 3d 237 (Ct. App.), review granted, 99 P.3d 2 (Cal. 2004).

[7] Id. at 239.

victim gave a statement to police on the day of the incident, but the prosecution was not able to subpoena her as a trial witness. The prosecution introduced her hearsay statements to the police in lieu of her live testimony at trial. The appellate court vacated the defendant's conviction, holding that the admission of the victim's hearsay statements violated *Crawford*.[8]

In *People v. Kilday*, the jury found the defendant guilty of battering and torturing his girlfriend.[9] Evidence introduced at trial showed that the defendant had cut the victim repeatedly with pieces of glass. He had also burned her with an iron on several occasions.[10] She gave a statement to the police on the day of the defendant's arrest, but she later refused to cooperate with the prosecution, indicating that the defendant had threatened to retaliate against her.[11] The prosecution relied on her hearsay statements to police, and the appellate court vacated the conviction under *Crawford*.[12]

These three cases are not isolated examples of *Crawford*'s effect on domestic violence prosecutions. Indeed, within days[13]—even hours[14]—of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past. For example, during the summer of 2004, half of the domestic violence cases set for trial in Dallas

[8] Id. at 243–44.

[9] No. A099095, 2004 WL 1470795 (Cal. Ct. App. June 30, 2004), vacated in part, 20 Cal. Rptr. 3d 161 (Ct. App. 2004).

[10] Id. at *3–4.

[11] Id. at *6 n.8. The government failed to present a timely argument that the defendant's wrongdoing had forfeited his confrontation rights.

[12] Id. at *7. On reconsideration, the appellate court found that some of the victim's statements to police should be admissible, but others should be excluded. The appellate court reaffirmed its reversal of the defendant's conviction on several counts, including torture and inflicting corporal injury on a cohabitant. *Kilday*, 20 Cal. Rptr. 3d at 163–64.

[13] See, e.g., Corona v. Florida, 124 S. Ct. 1658 (Mar. 22, 2004); People v. Zaruzua, No. H025472, 2004 WL 837914, at *3–4 (Cal. Ct. App. Apr. 20, 2004); Hale v. State, 139 S.W.3d 418, 420 (Tex. App. June 9, 2004).

[14] Robin Franzen, Ruling on Hearsay Evidence Guts Cases, The Oregonian, Mar. 11, 2004, at A1 ("When a domestic assault trial began Monday morning without the victim's cooperation, a Multnomah County judge ruled that hearsay statements against the defendant were admissible. But that afternoon, after the high court's ruling [in *Crawford*], Forman, who works for Multnomah Defenders Inc., successfully asked the judge to exclude the statement. The case was dismissed.").

County, Texas, were dismissed because of evidentiary problems under *Crawford*.[15]

In a survey of over 60 prosecutors' offices in California, Oregon, and Washington,[16] 63 percent of respondents reported the *Crawford* decision has significantly impeded prosecutions of domestic violence.[17] Seventy-six percent indicated that after *Crawford*, their offices are more likely to drop domestic violence charges when the victims recant or refuse to cooperate.[18] Alarmingly, 65 percent of respondents reported that victims of domestic violence are less safe in their jurisdictions than during the era preceding the *Crawford* decision.[19]

Why is *Crawford* creating such a burden for prosecutions of domestic violence? There is nothing intrinsically wrong with the *Crawford* decision. Its reasoning is difficult to refute, and its fealty to early constitutional history is admirable. *Crawford*'s deleterious effect cannot be blamed on its doctrinal analysis, but is primarily a consequence of the Supreme Court's abrupt departure from recent jurisprudence under the Confrontation Clause. *Crawford* represents a sudden shift in the constitutional fault lines underlying the statutory framework of the states' evidence codes. Statutory hearsay law is now misaligned with constitutional confrontation law, and the incongruities are more problematic in domestic violence prosecutions than in any other context.[20]

[15] Robert Tharp, Domestic Violence Cases Face New Test: Ruling That Suspects Can Confront Accusers Scares Some Victims From Court, Dallas Morning News, July 6, 2004, at 1A.

[16] This survey was conducted by researchers at the University of Oregon School of Law between October 22, 2004, and January 31, 2005. The survey involved 64 counties that include approximately 90 percent of the total population in California, Oregon, and Washington. For more details about the survey, see Appendix 1.

[17] App. 1, question 1.

[18] App. 1, question 3.

[19] App. 1, question 5. Respondents expressed concern that *Crawford* is causing dismissals and emboldening batterers to continue their abuse. Respondents also cited the risk of pretrial violence by defendants who recognize the heightened importance of the victims' live testimony at trial. See App. 1, questions 16–17. This Article will argue that the increased threat to victims' safety is not a permanent problem created by *Crawford*, but is instead a temporary condition that will abate with changes in statutes and prosecutorial practices to meet the new confrontation requirements.

[20] See Wendy N. Davis, Hearsay, Gone Tomorrow?: Domestic Violence Cases at Issue as Judges Consider Which Evidence to Allow, A.B.A. J., Sept. 2004, at 22, 22 ("By far the biggest impact [of the *Crawford* opinion] is likely to be in domestic vio-

Prior to *Crawford*, many state legislatures had fashioned special hearsay exceptions for cases involving domestic violence, and courts had liberally admitted hearsay statements by domestic violence victims under traditional hearsay exceptions.[21] This solicitous treatment of hearsay reflected an understanding that a high proportion of domestic violence victims (and family members who witness domestic violence) recant or refuse to cooperate after initially complaining to the police. Their reluctance may be due to a number of factors, including fear of retaliation, economic dependence on the batterer, and concern about the possibility that the state would remove children from a household that has experienced domestic violence.[22] Approximately 80 percent of victims decline to assist the government in prosecutions of domestic violence cases.[23] Rather than abandon such prosecutions when victims become reluctant, legislatures and courts have permitted "evidence-

lence and child abuse cases, where victims don't always come to court."). *Crawford* arguably has hindered prosecutions of adult-on-adult domestic violence more than prosecutions of child abuse. In child abuse cases, prosecutors are often able to call the alleged victims to the stand, but a high proportion of battered women refuse to testify altogether. Consequently, *Crawford* derails more domestic violence cases than child abuse cases. M.S. Enkoji, Ruling Could Add a Hurdle to Abuse Cases, Sacramento Bee, Aug. 4, 2004, at A1, available at 2004 WLNR 17435671 (citing local study by Professor John Myers of the McGeorge School of Law). Prosecutors handling child abuse cases may be able to mollify reluctant child witnesses by allowing them to testify via closed-circuit television—an option that is generally unavailable for adult victims of domestic violence. See David L. Hudson Jr., New Clout for Confrontation Clause, A.B.A. J. E-Report, April 30, 2004, available at http://www.irclaw.org/newsletter.htm (last accessed Feb. 28, 2005).

[21] Admission of hearsay evidence in domestic violence cases was fairly commonplace before the *Crawford* ruling. Amy Karan & David M. Gersten, Domestic Violence Hearsay Exceptions in the Wake of *Crawford v. Washington*, Juv. & Fam. Just. Today, Summer 2004, at 20, 20–22. For examples of hearsay statutes (and proposed statutes) applicable in cases involving domestic violence, see infra note 31. The survey of prosecutors' offices in California, Oregon, and Washington found that 54 percent had relied on testimonial hearsay in more than half of all domestic violence prosecutions before *Crawford*. After *Crawford*, only 32 percent of the offices relied on testimonial hearsay in more than half of domestic violence prosecutions. App. 1, questions 6 & 8.

[22] For a more thorough discussion of why domestic violence victims and their family members do not cooperate with prosecutors, see infra Section II.A.1.

[23] See People v. Brown, 94 P.3d 574, 576 (Cal. 2004).

based prosecutions" that allow the government to present certain types of hearsay to the jury in lieu of live testimony.[24]

Crawford calls into question many of the strategies previously used by prosecutors in domestic violence cases. If the victim is unavailable to testify at trial, *Crawford* requires that judges exclude certain categories of pretrial statements by the victim.[25] Several district attorneys,[26] defense attorneys,[27] judges,[28] victims' advocates,[29] and scholars[30] have predicted a significant reduction of evidence-based prosecutions because of *Crawford*. The momentum to expand statutory hearsay exceptions for domestic violence cases appears to be waning.[31]

[24] The term "evidence-based prosecutions" refers to prosecutions that do not require live testimony by victims. These prosecutions rely on alternative evidence including out-of-court statements by victims, such as 911 calls, statements to responding officers, and written statements in applications for civil restraining orders.

[25] *Crawford* only applies to "testimonial" statements. For a full explanation of this term, see infra Section I.B.

[26] Matthew T. Mangino, Protecting Victims of Abuse: Confrontation Right May Jeopardize Safety of Children, Domestic Violence Victims, Pa. L. Wkly., June 14, 2004, at 8, available at http://www.lcdaonline.com/lcda/news/view_article.asp?id=273 (noting the opinion of the author, the district attorney of Lawrence County in Pennsylvania, that the *Crawford* decision "will undoubtedly make the prosecution of some criminal cases more difficult," including domestic violence cases); Cathy Redfern, Rape Case Voided: Statements Can't Be Used If Witness Isn't Available, High Court Rules, Santa Cruz Sentinel, May 1, 2004, at http://www.santacruzsentinel.com/archive/2004/May/01/local/stories/02local.htm (quoting District Attorney Bob Lee). See also Adam M. Krischer, "Though Justice May Be Blind, It Is Not Stupid": Applying Common Sense to *Crawford* in Domestic Violence Cases, The Prosecutor, Nov./Dec. 2004, at 14, 14 ("*Crawford* . . . threatens to remove this tool [of evidence-based prosecutions] from the hands of prosecutors across the country.").

[27] Phil Studenberg, Midlife America's Midlife Crisis, The Oregon Defense Attorney, April/May 2004, at 2; David Feige, Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution, Slate, Mar. 12, 2004, at http://www.slate.com/id/2097041/.

[28] Karan & Gersten, supra note 21, at 22–23.

[29] Nicole A.F. Lindenmyer, *Washington v. Crawford*: Must Crime Victims Testify Against the Defendant?, Battered Women's Legal Advocacy Project Technical Assistance Packet 4 (2004), at http://www.bwlap.org/taps/crawford.pdf (last accessed Feb. 28, 2005); see also Sybil Hebb, Written Testimony for Hearing before Oregon Interim Judiciary Committee (June 9, 2004) (on file with the Virginia Law Review Association).

[30] Robert P. Mosteller et al., Updated Teaching Notes for Evidence Cases and Materials (2004); Erwin Chemerinsky, Court Bars Out-of-Court "Testimonial" Statements, Trial, July 2004, at 82, 85; Enkoji, supra note 20, at A1 (quoting Professor Myers).

[31] Until *Crawford*, the trend in many states had been "to rely upon and expand the application of hearsay exceptions in domestic violence cases." Karan & Gersten, su-

This Article will suggest legislative reforms that would adapt the states' evidence codes to the new constitutional requirements in order to facilitate effective prosecutions of domestic violence.[32] Of course, there can be no "legislative fix" for the Supreme Court's interpretation of constitutional law. Nonetheless, state court proce-

pra note 21, at 21. For example, California and Oregon created special hearsay exceptions for statements by victims of domestic violence. Cal. Evid. Code § 1370 (West Supp. 2005); Or. Rev. Stat. § 803(26) (2003 & Supp. 2004). In August 2003, Illinois added a new hearsay exception for domestic violence cases, which combined the language of Federal Rule of Evidence ("FRE") 804 and FRE 807 into a residual hearsay exception for unavailable victims of domestic violence. 725 Ill. Comp. Stat. 5/115-10.2a (Supp. 2004). The trend to create new hearsay exceptions for domestic violence cases appears to have stalled recently. In late 2003, the Michigan Legislature was considering whether to adopt such an exception, S.B. 233, 92d Leg., Reg. Sess. (Mich. 2003), available at http://www.legislature.mi.gov/documents/2003-2004/billintroduced/senate/pdf/2003-SIB-0233.pdf., but the proposal died in committee. Kim Kozlowski, Domestic Abuse Laws May Toughen, Detroit News, Aug. 12, 2003, at A1; SB 233: Exempt Statements by Domestic Violence Victims From Hearsay Rule, Public Policy Update (Mich. Coalition Against Domestic & Sexual Violence, Okemos, Mich.), Fall/Winter 2003, at 1, 3 (on file with the Virginia Law Review Association). In 2004, a Vermont legislator introduced a similar bill, H.R. 379, 2003–04 Leg., Reg. Sess. (Vt. 2003), but no progress has been made since the *Crawford* ruling. E-mail from Rep. Willem Jewett (Aug. 9, 2004) (copy on file with author); Bill as Introduced, at http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2004/bills/intro/H-379.htm (last accessed Feb. 28, 2005). In New Jersey, a state supreme court panel declined to recommend a proposed hearsay exception for domestic violence cases, apparently because of concerns related to the *Crawford* decision. Mary P. Gallagher, Bid to Step Up Judge's Role in DV Warrants, 175 N.J. L.J. 1273, 1280 (2004).

[32] For purposes of this Article, the term "domestic violence" means violence between adults who are presently in an intimate relationship, or who were formerly in such a relationship. *Crawford* poses significant hurdles for several other categories of criminal prosecution, most notably prosecutions of child abuse. This Article will not address child abuse for a number of reasons. First, space limitations would prevent a comprehensive discussion of both domestic violence and child abuse. Second, the confrontation problems that arise in child abuse cases may be addressed with tools that are unavailable in domestic violence cases, such as remote testimony via closed circuit television. See Maryland v. Craig, 497 U.S. 836 (1990). Third, prosecutions of child abuse cases are more likely to involve preliminary hearings than prosecutions of domestic violence cases, because the latter are often misdemeanor cases. App. 1, question 14. Fourth, the majority of states have enacted "tender years" exceptions to their hearsay rules, e.g., *Snowden v. State*, 846 A.2d 36, 39 n.7 (Md. Ct. Spec. App. 2004) (listing examples of such statutes), while very few states have enacted specific statutory exceptions for domestic violence between adults. See supra note 31. Finally, *Crawford* affects domestic violence cases more than child abuse cases because domestic violence victims refuse to testify more often than do child abuse victims. See supra note 20. Notwithstanding the foregoing distinctions and qualifications, some of the proposals offered in this Article may prove useful in the context of child abuse prosecutions.

dures can be molded in many ways so that they better fit the contours of the *Crawford* rule. First and foremost, state legislatures should create more opportunities for cross-examination of victims in preliminary hearings, depositions, and other pretrial proceedings. The Supreme Court has indicated that cross-examination in these settings, and not just at trial, is sufficient to satisfy the Sixth Amendment in certain circumstances.[33]

Other reforms are necessary as well. All states should allow expert testimony on the psychological effects of domestic violence, so that juries are not perplexed by the spectacle of reluctant witnesses testifying for the prosecution. The states must do a better job protecting victims from threats and continued abuse before trial. Legislators should diversify the charges that prosecutors can bring in domestic violence cases, so that the options include charges for which the testimony of battered women is not necessary.

The portion of this Article that may engender the greatest controversy is its recommendation that state legislatures should actually *expand* the scope of admissible hearsay in prosecutions of domestic violence. The *Crawford* ruling has, in essence, created a cross-examination predicate for previously unrestricted hearsay exceptions (to the extent that the government invokes these exceptions to offer "testimonial" statements against the accused). In the context of criminal trials, the hearsay exceptions under Federal Rule of Evidence ("FRE") 803 now incorporate an overlay of confrontation requirements, more akin to FRE 801(d)(1) (prior statements of testifying witnesses),[34] FRE 803(5) (recorded recollection of a testifying witness),[35] and FRE 804(b)(1) (prior testimony of a witness whom the accused has cross-examined).[36] *Crawford*'s guarantee of cross-examination should embolden state legislators to widen statutory hearsay exceptions, not circumscribe them. Indeed, one of the major reasons why the framers of the Federal Rules took a cautious approach to admitting hearsay was their fear that

[33] See *Crawford*, 124 S. Ct. at 1365–68; California v. Green, 399 U.S. 149, 165 (1970). For further authority on this point, see infra Section III.A.

[34] Virtually all states have an evidentiary rule patterned after FRE 801(d)(1). David F. Binder, Hearsay Handbook § 39:2 (West 4th ed. 2003).

[35] Most states have adopted a version of FRE 803(5). Binder, supra note 34, § 15:2.

[36] Most states have adopted a version of FRE 804(b)(1). Binder, supra note 34, § 33:2.

criminal defendants would be unable to cross-examine their accusers.[37] Now that *Crawford* has mandated cross-examination of all declarants who give testimonial statements in criminal cases, the parameters of statutory hearsay exceptions should be set with reference to traditional policy concerns such as necessity and reliability;[38] the statutory hearsay exceptions no longer need to function as a backstop for a weak Confrontation Clause.[39]

This Article will present its argument in several steps. Part I will analyze *Crawford* against the backdrop of the Supreme Court's confrontation jurisprudence over the prior two decades. Part II will focus on the unique challenges posed by prosecutions of domestic violence, and the necessity for admitting hearsay in these prosecutions. Finally, Part III will offer suggestions for legislative reforms, and will consider possible objections to those proposals.

I. GETTING CONFRONTATIONAL: THE SUPREME COURT REDISCOVERS THE CONFRONTATION CLAUSE

In *Crawford*, the Supreme Court revitalized the Confrontation Clause in criminal proceedings where the government offers hearsay evidence against the accused. To appreciate the significance of

[37] Professor Richard Friedman, whose scholarship greatly influenced the Supreme Court majority in *Crawford*, has written that "the use of hearsay law to reflect a confrontation right that should be articulated separately will tend to result in hearsay law that is too stringent in excluding hearsay." Richard D. Friedman, Confrontation and the Definition of Chutzpa 31 Isr. L. Rev. 506, 512 (1997). Professor Friedman notes that when the Federal Rules of Evidence were drafted in 1975, the drafters' uncertainty about the enforcement of constitutional confrontation rights led them to take "a rather traditional approach to hearsay law," so that the rules themselves could help to protect defendants' confrontation rights. Id. at 512–13. See also 2 McCormick on Evidence § 245, at 373–75, § 251, at 383–84 (John W. Strong ed., 5th ed. 1999) (stating that the overriding objective of hearsay law is to provide opportunity for cross-examination of the declarant at some point). As *Crawford* has eliminated doubts about the transcendent importance of constitutional confrontation rights, now is an ideal time to reform statutory hearsay law in order to address the concerns raised by Professor Friedman in 1997. This argument will be developed further, see infra Section III.B.

[38] See 5 Wigmore on Evidence §§ 1421–22 (James H. Chadbourn ed., rev. ed. 1974); 6 id. § 1690; Myrna S. Raeder, The Double-Edged Sword: The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond, 69 S. Cal. L. Rev. 1463, 1512 (1996).

[39] See Thomas J. Reed, *Crawford v. Washington* and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule, 56 S.C. L. Rev. 185, 216 (2004).

this ruling, it is useful to survey briefly the case law that preceded *Crawford*.

A. Two Decades of Dormancy

Between 1980 and 2004, the Confrontation Clause[40] became increasingly anemic. Except in a limited number of cases, the Confrontation Clause rarely presented any impediment to the admission of hearsay against the accused. To the extent that courts addressed confrontation issues at all in rulings on hearsay evidence, the discussion was usually perfunctory. The Confrontation Clause had virtually no impact on the admission of hearsay outside of two contexts: declarations against interest by third parties implicating the accused[41] and statements admissible under the residual hearsay exception.[42]

The seminal decision in this period was *Ohio v. Roberts*, a 1980 Supreme Court ruling.[43] The Court devised a two-part test for the admission of hearsay under the Confrontation Clause. First, "the prosecutor must either produce, or demonstrate the unavailability of, the declarant whose statements it wishes to use against the defendant."[44] Second, if the declarant is unavailable, the statement must have been made under circumstances providing sufficient "indicia of reliability." The *Roberts* Court further noted that sufficient reliability to satisfy the Confrontation Clause "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[45] In sum, *Roberts* conditioned the admission of hearsay on an "unavailability" test and a "reliability" test, dispensing with the latter whenever the prosecution invoked a "longstanding" hearsay exception.

[40] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

[41] See Fed. R. Evid. 804(b)(3) and its state analogs.

[42] See Fed. R. Evid. 807 (combining former Rules 803(24) and 804(b)(5)), as well as its state analogs.

[43] 448 U.S. 56 (1980).

[44] Id. at 65.

[45] Id. at 66.

In *United States v. Inadi*,[46] the Court weakened the unavailability test set forth in *Roberts*. The Court limited the application of *Roberts*'s unavailability test to instances involving the use of the prior testimony exception (which, of course, already incorporated an unavailability requirement).[47] Reviewing the admissibility of a co-conspirator's statements, the Court found that such statements "provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court."[48] The Court also noted that the benefits of an unavailability rule for co-conspirator declarants would be negligible and the burdens substantial, and concluded, "the Confrontation Clause does not embody such a rule."[49]

In *White v. Illinois*, the Supreme Court applied the same reasoning to hearsay admitted under the exception for spontaneous declarations and for statements made to obtain medical treatment.[50] The Court held that the Confrontation Clause imposed no unavailability requirement. Taken together, *Inadi* and *White* seemed to eliminate entirely the unavailability requirement for hearsay admitted under "unrestricted" exceptions of FRE 803 (exceptions based on the theory that certain out-of-court statements should be admissible whether or not the declarant testifies at trial).

In *Bourjaily v. United States*, the Court focused on the second prong of the *Roberts* test: the "reliability" requirement.[51] The Court determined that the rule admitting co-conspirator statements was firmly enough rooted in American jurisprudence that a trial court need not evaluate the reliability of such statements in every case. The Court opined that, as a general matter, the longevity of a hearsay exception determines whether the exception is "firmly rooted." In other words, hearsay admissible under old hearsay exceptions is necessarily reliable because the exceptions are old. Once again the Court simplified—and eroded—the constitutional requirements for the admission of hearsay against the accused.

[46] 475 U.S. 387 (1986).
[47] Fed. R. Evid. 804(b)(1).
[48] *Inadi*, 475 U.S. at 395.
[49] Id. at 400.
[50] 502 U.S. 346 (1992).
[51] 483 U.S. 171 (1987).

In fact, during the *Roberts* era, the Court only found two hearsay exceptions to be unworthy of inclusion on the list of "firmly rooted" exceptions. The first of these was the residual hearsay exception. In *Idaho v. Wright*, the Court found that Idaho's version of FRE 807 is, by definition, not "firmly rooted," because the purpose of this exception is to cover unusual hearsay that falls outside the scope of the traditional hearsay exceptions.[52] Accordingly, when the prosecution offers evidence under the residual hearsay exception, the prosecution must show "particularized guarantees of trustworthiness."[53] These guarantees must be found in the totality of circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief."[54] Mere corroboration of the statement with independent evidence would not be sufficient.[55]

In *Lilly v. Virginia*, the Supreme Court considered the admissibility of an accomplice's custodial confession that also implicated the defendant.[56] The Court held that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule."[57] Far from having "particularized guarantees of trustworthiness,"[58] such statements "are inherently unreliable . . . because an accomplice often has a considerable interest in 'confessing and betraying his cocriminal.'"[59] These statements are "given under conditions that implicate the core concerns of the old ex parte affidavit practice—that is, when the government is involved in the statements' production, and when the statements describe past events that have not been subjected to adversarial testing."[60]

The Supreme Court's confrontation analysis during the *Roberts* era drew criticism from academics[61] and even some lower court

[52] 497 U.S. 805, 817 (1990).
[53] Id. at 818.
[54] Id. at 820.
[55] See id.
[56] 527 U.S. 116 (1999).
[57] Id. at 134.
[58] Id. at 133.
[59] Id. at 131.
[60] Id. at 135.
[61] Akil Amar, The Constitution and Criminal Procedure: First Principles 125–31 (1997); Carol A. Chase, The Five Faces of the Confrontation Clause, 40 Hous. L. Rev. 1003, 1054 (2003); Richard D. Friedman, Confrontation: The Search for Basic Princi-

judges[62] who felt the Sixth Amendment demanded more rigorous enforcement. Three shortcomings of the *Roberts* framework are particularly striking. First, *Roberts* and its progeny brought a utilitarian perspective to confrontation law that is highly atypical of constitutional interpretation. Rather than insisting on cross-examination for its own sake as a libertarian or deontological imperative, the Supreme Court probed beyond the language of the Sixth Amendment to divine that the Framers of the Constitution were simply trying to ensure the reliability of evidence. In other words, the ends (ensuring reliability of evidence) were more important than the means (cross-examination). If trial courts could achieve the objective of reliability without employing the particular means of cross-examination, the Sixth Amendment was malleable enough to abide this approach. Justice Scalia would later point out the absurdity of such teleological reasoning: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because the defendant is obviously guilty."[63]

Second, even assuming that the *raison d'etre* of the Confrontation Clause is simply to guarantee the reliability of evidence, *Roberts* and its progeny created very ineffectual safeguards to accomplish this objective. In fact, confrontation analysis under *Roberts* did not impose *any* additional requirement for hearsay offered under a "firmly rooted" hearsay exception. In 1997, Professor Richard Friedman commented on the virtually superfluous role that the Confrontation Clause had come to play:

> The meaning of the Confrontation Clause is an enigma. In recent years, the Supreme Court has shown a tendency to construe it nearly in conformity with the hearsay sections of the Federal Rules of Evidence. That is, if the declarant's out-of-court statement, offered to prove the truth of what she asserted, is offered

ples, 86 Geo. L.J. 1011, 1013 (1998); Laird C. Kirkpatrick, Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement, 70 Minn. L. Rev. 665 (1986); 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 (2002).

[62] See, e.g., State v. Moore, 49 P.3d 785, 789 (Or. 2002) (declining to follow *Inadi* and *White*).

[63] *Crawford*, 124 S. Ct. at 1371.

> against an accused, the Court will almost certainly perceive the Confrontation Clause as posing no barrier if the hearsay sections of the Federal Rules do not . . . .[64]

Finally, in those rare cases when the Supreme Court required the prosecution to show "particularized guarantees of trustworthiness"—that is, when the prosecution relied on the residual hearsay exception or the exception for accomplice confessions implicating the accused—the Supreme Court provided very little guidance as to what proof was necessary to meet this threshold test. The Supreme Court indicated that mere corroboration was insufficient,[65] but there was no clear, predictable list of requirements. The assessment of reliability was highly subjective, leading to inconsistent results.

In sum, the "*Roberts* test" was not much of a test at all. In the case of a firmly rooted hearsay exception, confrontation analysis was simply a formality under *Roberts* (as modified by *Inadi* and *White*). Where the government did not invoke a firmly rooted hearsay exception, *Roberts* presented an amorphous standard to determine whether the evidence had sufficient "indicia of reliability." Under either scenario, *Roberts* seemed to abdicate the Supreme Court's responsibility for regulating the admission of hearsay that could violate a defendant's confrontation rights. *Roberts* represented the worst of both worlds—utilitarianism without the utility.

B. Deracinating the "Firmly Rooted" Hearsay Exceptions

In 1999, the State of Washington charged Michael Crawford with committing first-degree assault against Kenneth Lee. The State alleged that Mr. Crawford stabbed Mr. Lee with a knife. Police arrested Mr. Crawford and his wife Sylvia on the night of the stabbing. Officers read both Mr. and Mrs. Crawford their *Miranda* rights and took separate statements from each of them.[66]

In his statement, Mr. Crawford indicated that he and Mrs. Crawford had gone in search of Mr. Lee on the night in question. Mr.

[64] Friedman, supra note 37, at 509–10.
[65] Idaho v. Wright, 497 U.S. 805, 822 (1990).
[66] *Crawford*, 124 S. Ct. at 1357.

Crawford believed that Mr. Lee had raped Mrs. Crawford. Mr. and Mrs. Crawford eventually found Mr. Lee in his apartment. A fight broke out between Mr. Crawford and Mr. Lee. During this fight, Mr. Lee appeared to reach for a weapon, and then Mr. Crawford stabbed Mr. Lee in self-defense.[67]

Mrs. Crawford's statement was similar to her husband's. She said that she had led Mr. Crawford to Mr. Lee's apartment.[68] She said that Mr. Crawford and Mr. Lee fought at the apartment, but Mrs. Crawford said that Mr. Lee's hands were empty during the fight. This divergence from Mr. Crawford's story was potentially disastrous for Mr. Crawford, undermining his self-defense claim.

During Mr. Crawford's trial, Mrs. Crawford did not testify because of Washington's marital privilege, which generally bars a spouse from testifying without the other spouse's consent.[69] This privilege does not apply to a spouse's out-of-court statements admissible under a hearsay exception, however. The State sought to introduce Mrs. Crawford's tape-recorded statement to police. The State argued that this statement was admissible as a statement against penal interest because Mrs. Crawford was theoretically exposing herself to prosecution for leading Mr. Crawford to Mr. Lee's apartment, and thereby abetting the assault.[70] Mr. Crawford objected that admission of this statement would violate his Sixth Amendment right to confront witnesses against him.

The trial court decided to admit Mrs. Crawford's statement. Concluding that Washington Rule of Evidence 804(b)(3) was not a "firmly rooted" hearsay exception, the trial court required the government to show that the statement bore "particularized guarantees of trustworthiness" sufficient for admission under *Roberts*. The trial court ruled for the government on this point, noting that Mrs. Crawford was not shifting blame, but rather was corroborating her husband's story.

The Washington Court of Appeals reversed, finding that the facts did not demonstrate the trustworthiness of this evidence. The Washington Supreme Court then reinstated the conviction. Central to the Washington Supreme Court's ruling was the conclusion that

[67] Id.
[68] Id. at 1357–58.
[69] Id. at 1357 (citing Wash. Rev. Code § 5.60.060(1) (1994)).
[70] Id. at 1358 (citing Wash. R. Evid. 804(b)(3) (2003)).

Ms. Crawford's statement "interlocked" with Mr. Crawford's own confession. In other words, the numerous similarities between the two statements bolstered the reliability of Ms. Crawford's statement.[71]

When the case reached the U.S. Supreme Court, Justice Scalia wrote the majority opinion. He began by tracing the confrontation right's origins in Roman law and English common law. Justice Scalia noted that the Framers of the Constitution intended for the Confrontation Clause to prevent abuses such as the ex parte examinations in the trial of Sir Walter Raleigh.[72]

The majority opinion in *Crawford* considered the possibility that the Framers only intended the confrontation right to apply to in-court testimony. The Court rejected this notion. "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."[73]

In the most important portion of the majority opinion, the Court distinguished "testimonial" from "nontestimonial" out-of-court statements. The term "testimonial" referred to witnesses against the accused—in other words, those who "bear testimony." "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[74]

A precise definition of "testimonial" proved elusive in *Crawford*. The majority noted three possible formulations of testimonial statements: (1) "'*ex 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'";[75] (2) "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'";[76] and

[71] Id.
[72] Id. at 1360.
[73] Id. at 1364.
[74] Id.
[75] Id. (quoting Brief for Petitioner at 23).
[76] Id. (quoting *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment)).

(3) "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[77] Without choosing between these three formulations, the Court noted that they all "share a common nucleus and then define the Clause's coverage at various levels of abstraction around it."[78] In the Venn diagram sketched by the *Crawford* majority, the three formulations intersected in a few areas that undeniably deserved the label "testimonial": ex parte testimony at a preliminary hearing, before a grand jury, or at a prior trial; and statements taken by police officers in the course of interrogations.[79] "These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."[80] Definition by example would have to suffice in *Crawford*, because Justice Scalia readily admitted that he could not provide a "comprehensive" definition of the term "testimonial."[81]

Crawford's taxonomy of testimonial and nontestimonial hearsay was vitally important, because only the former would be subject to stricter confrontation rules. If the government offered a testimonial out-of-court statement against the accused, the Confrontation Clause could not abide the admission of this statement unless (1) the declarant were presently unavailable as a witness, and (2) the defendant had "a prior opportunity for cross-examination" of the declarant.[82] However, if the government offered nontestimonial hearsay against the accused, then the Supreme Court would "afford the States flexibility in their development of hearsay law."[83]

There was surely no love lost for *Roberts* in the *Crawford* opinion. While the *Crawford* majority believed that *Roberts* reached the right outcome in admitting testimony from a preliminary hearing at which the defendant had an opportunity for cross-examination, the *Crawford* Court disagreed strongly with the rationale used by the *Roberts* Court. The *Crawford* majority complained that the reliability prong of the *Roberts* test required

[77] Id. (quoting Brief of Amici Curiae National Association of Criminal Defense Lawyers et al. at 3).
[78] Id.
[79] Id. at 1364, 1374.
[80] Id. at 1374.
[81] Id. at 1374 n.10.
[82] Id. at 1365.
[83] Id. at 1374.

judges to make subjective, unpredictable determinations, and that *Roberts* deviated from the Framers' intent to provide categorical protection from ex parte interrogations of witnesses. "The unpardonable vice of the *Roberts* test" was its "demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[84] Indeed, many lower courts were citing the very factors that made certain out-of-court statements testimonial in support of reliability.[85]

As Justice Scalia had indicated fourteen years earlier in *Maryland v. Craig*,[86] he deplored the utilitarian calculus of *Roberts* and its progeny. The object of confrontation may be (at least in part) to guarantee reliability, but the courts should not deny confrontation by determining that the evidence in question is sufficiently reliable. "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[87] The Benthamite nightmare of dispensing with rights because they are "unnecessary" did not require any further discussion than Justice Scalia's apt analogy to abolishing jury trials.[88]

[84] Id. at 1371.

[85] Id. at 1372.

[86] 497 U.S. 836 (1990). In *Craig*, the Supreme Court reviewed the propriety of testimony by closed-circuit television in a prosecution for child abuse. The majority concluded that the defendant's interest in face-to-face confrontation must give way to the state's interest in protecting child witnesses from the trauma of testifying in the courtroom. Id. at 847–57. Writing in dissent, Justice Scalia argued that a barrier between the defendant and a testifying witness "is explicitly forbidden by the constitutional text; there is simply no room for interpretation with regard to 'the irreducible literal meaning of the [Confrontation] Clause.'" Id. at 865 (Scalia, J., dissenting) (quoting Coy v. Iowa, 487 U.S. 1012, 1020–21 (1988)). Justice Scalia rejected the majority's argument that the apparent reliability of the child's remote testimony eliminated the need for face-to-face confrontation. According to Justice Scalia, "[t]his reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation." Id. at 862 (Scalia, J., dissenting).

[87] *Crawford*, 124 S. Ct. at 1370.

[88] Id. at 1371. Jeremy Bentham, the most famous exponent of utilitarianism, proposed to abolish the attorney-client privilege because it does not protect the innocent, who have nothing to hide. 5 Jeremy Bentham, Rationale of Judicial Evidence 303 (F.B. Rotham & Co. 1995) (1827).

Crawford emphatically repudiated the notion that evidence admissible under "firmly rooted" hearsay exceptions must automatically satisfy the Confrontation Clause. Such an approach was too broad, applying the same mode of analysis whether or not the hearsay consisted of ex parte testimony.[89] "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence."[90]

Justice Scalia's majority opinion went so far as to suggest, in dictum, that *White* may have been wrongly decided. In *White*, the Supreme Court had upheld the admission of an excited utterance by a child victim to an investigating police officer. According to the *Crawford* Court, "[i]t is questionable whether testimonial statements would ever have been admissible on that ground in 1791."[91] The *Crawford* ruling expressly "casts doubt on [the *White*] holding" regarding the admissibility of testimonial statements that fall within the hearsay exception for excited utterances.[92]

Turning to the facts presented in the *Crawford* case, the Court found that Mrs. Crawford's statement to police during custodial interrogation was "testimonial" in nature. She could reasonably have foreseen that her statement would be used by the prosecution in a criminal trial. The prosecution's use of her statement was analogous to the historical "use of *ex parte* examinations as evidence against the accused."[93] Because her statement was testimonial, and because the defendant lacked any opportunity to cross-examine her, the admission of this statement violated the Confrontation Clause.[94]

In sum, *Crawford* reasserted the Sixth Amendment's primacy in regulating the admissibility of hearsay evidence offered against the accused. No longer would the tail of statutory evidence law wag the dog of the Constitution. *Crawford* stated a transcendent rule of exclusion. Testimonial hearsay might surmount the hurdles posed by statutory hearsay exceptions, but unless the government met *Craw-*

[89] *Crawford*, 124 S. Ct. at 1369.
[90] Id. at 1370.
[91] Id. at 1368 n.8.
[92] Id. at 1370.
[93] Id. at 1363.
[94] Id. at 1374.

ford's requirements, that hearsay would not be admissible in a criminal trial.

C. Crawford*'s Ironies*

While generally sound, the *Crawford* opinion is ironic in many respects. Most conspicuous is the inability of the *Crawford* majority to fashion a clear, bright-line rule defining testimonial hearsay. Justice Scalia had previously inveighed against amorphous standards in his opinions and in his scholarship.[95] He insisted that the Supreme Court should provide readily discernible parameters to lower courts and to practitioners, in order to enhance predictability and minimize the trial judges' discretion.[96] Justice Scalia warned that "vague standards are manipulable."[97] After all of these admonitions, the omission of a bright-line rule in *Crawford* is striking indeed. Concurring only in the judgment in *Crawford*, Chief Justice Rehnquist expressed his fear that the difficulty of discerning "testimonial" hearsay would cause consternation for "tens of thousands of prosecutors."[98] Justice Scalia himself acknowledged the imprecision of the term "testimonial," but responded that the new test "can hardly be any worse than the status quo."[99] When asked during a lecture in April 2004 to predict the future direction of confrontation law after *Crawford*, Justice Scalia responded candidly: "Nobody knows."[100] One might argue that the *Crawford* ruling did not eliminate the unpredictability and subjectivity of the *Roberts* test: *Crawford* just relocated the ambiguity from the reliability test to the definition of testimonial hearsay.

The *Crawford* ruling is ironic in another respect: While Justice Scalia devoted a huge portion of the opinion to lambasting the *Roberts* Court, and suggesting that *Roberts* is unworkable in any context, the *Crawford* ruling left *Roberts* unscathed as the controlling authority for a substantial amount of hearsay evidence admitted in criminal trials. In fact, among the approximately 500 federal

[95] Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1179–80 (1989).
[96] *Crawford*, 124 S. Ct. at 1370–71.
[97] Id. at 1373.
[98] Id. at 1378 (Rehnquist, C.J., concurring in the judgment).
[99] Id. at 1374 n.10.
[100] Clifford Fishman, A Student's Guide to Hearsay 5 (2d ed. Supp. 2004).

and state court opinions applying *Crawford* between March 8, 2004, and December 31, 2004, nearly one-third of the courts reaching the merits have distinguished *Crawford* on the ground that the statement in question is not testimonial, and many of these courts have applied the *Roberts* framework as if *Crawford* had never been decided.

One last irony in *Crawford* is that, while Justice Scalia's historical analysis chronicled government abuses dating back to the trial of Sir Walter Raleigh, the unavailability of the declarant in *Crawford* was actually the fault of the defendant. Mr. Crawford invoked, and then refused to waive, the marital communications privilege that prevented his wife from testifying.[101] After the trial court rejected the government's argument that Mr. Crawford had waived his confrontation right, the government did not pursue this issue on appeal, and the Supreme Court made clear that it "expressed no opinion" on the matter.[102] The decision that many observers hail as a restraint on government abuses actually owes its origins to gamesmanship by the defendant.

These peculiarities do not alter the conclusion that *Crawford*, overall, is a salutary development in confrontation law. Breaking from the *Roberts* era was bound to be a messy undertaking. Perhaps the Supreme Court could have waited for a case presenting better facts on which to ground the revised confrontation jurisprudence, or the Court could have allowed a less sudden transition from the *Roberts* era, or the Court could have clarified the new testimonial/nontestimonial dichotomy without relying so heavily on the lower courts to work out the details. Addressing these concerns might have necessitated further delay, however, or might have prevented *Roberts*'s critics from mustering a majority of five Justices. *Crawford* is imperfect, but it is a commendable advancement of confrontation jurisprudence.

[101] *Crawford*, 124 S. Ct. at 1357–58.
[102] Id. at 1359 n.1.

II. DOES GREATER CONFRONTATION IN COURT MEAN GREATER CONFRONTATION AT HOME?

A. Crawford*'s Potential to Hinder Prosecutions of Domestic Violence*

As noted in the introduction to this Article, the seismic shift in constitutional confrontation law has destabilized the overlaying framework of statutory hearsay law. The states' hearsay exceptions and courtroom procedures, designed during the *Roberts* era to conform to then-existing constitutional interpretations, are suddenly misaligned with the new constitutional terrain. *Crawford*'s impact has been particularly great on prosecutions of domestic violence, because these cases are more likely than others to rely on hearsay statements by accusers who may recant or refuse to cooperate with the prosecution at the time of trial. The following Sections will address the unique challenges posed by domestic violence prosecutions, and will explain why *Crawford* could greatly undermine such cases if current prosecutorial practices continue and if legislatures do not adapt their evidence codes to address the new constitutional requirements.

1. Violent Abusers, Silent Accusers

Victims of domestic violence are more prone than other crime victims to recant or refuse to cooperate after initially providing information to police. Recent evidence suggests that 80 to 85 percent of battered women will recant at some point.[103] In 1995, a nationwide survey found that prosecutors believed most domestic violence victims did not cooperate fully in the prosecution of their abusers.[104] This Article's survey of all district attorneys' offices in

[103] People v. Brown, 94 P.3d 574, 576 (Cal. 2004); see also Douglas E. Beloof & Joel Shapiro, Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence, 11 Colum. J. Gender & L. 1, 3 (2002) (noting estimates that 90% of domestic violence victims recant); Lisa Marie De Sanctis, Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence, 8 Yale J.L. & Feminism 359, 367 (1996) (noting that victims do not cooperate with the prosecution in 80 to 90% of domestic violence cases).

[104] David J. Rebovich, Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions, *in* Do Arrests and Restraining Orders Work? 176, 190 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

California, Oregon, and Washington found that 91 percent of respondents believed victims of domestic violence are generally more likely to be noncooperative than cooperative when subpoenaed by the prosecution.[105] Even before *Crawford*, research showed that the most common reason for dismissal of domestic violence prosecutions in Brooklyn and Milwaukee was victims' failure to make court appearances or to testify against the defendants.[106]

The reasons why victims refuse to cooperate with the prosecution are manifold, but chief among them is the risk of reprisals by the batterers. One study found that batterers threaten retaliatory violence in as many as half of all cases, and 30 percent of batterers actually assault their victims again during the predisposition phase of prosecution.[107] In fact, data show that the time when a victim decides to break free a violent relationship is the most dangerous time; it is the time when the majority of domestic violence homicides occur.[108] Consider the example of Paula Benitez, who testified against her ex-husband when he violated a restraining order. She left the courthouse to feed the parking meter on her lunch break, and he murdered her before she could return to court.[109]

In some cases, a victim's reluctance to assist the prosecution may result from her economic dependence on the batterer. She may fear that her family would be unable to make ends meet if the primary breadwinner went to jail.[110] Fifty percent of battered women drop below the poverty line when they leave their abusers.[111] One

[105] App. 1, question 13.

[106] Robert C. Davis, Barbara E. Smith & Caitilin R. Rabbitt, Increasing Convictions in Domestic Violence Cases: A Field Test in Milwaukee, 22 Just. Sys. J. 61, 62 (2001).

[107] Randall Fritzier & Lenore Simon, Creating a Domestic Violence Court: Combat in the Trenches, 37 Ct. Rev. 28, 33 (2000); see also Eve S. Buzawa & Carl G. Buzawa, Domestic Violence: The Criminal Justice Response 88 (James A. Inciardi ed., 2d ed. 1996).

[108] Counsel for Oregon Law Center, *in* Hearing Before Oregon Interim Judiciary Committee, June 9, 2004 (on file with the Virginia Law Review Association); Hebb, supra note 29; see also Tonya McCormick, Note, Convicting Domestic Violence Abusers When the Victim Remains Silent, 13 BYU J. Pub. L. 427, 433 (1999) ("[T]he time of greatest danger for an abused woman occurs when she leaves her husband or partner.").

[109] Editorial, Failed by the System, Eugene Register-Guard, Feb. 25, 2004, at A12.

[110] Davis, Smith, & Rabbitt, supra note 106, at 62; see also Fowler v. State, 809 N.E.2d 960, 965 (Ind. Ct. App. 2004); People v. Moscat, 777 N.Y.S.2d 875, 878 (Crim. Ct. 2004).

[111] De Sanctis, supra note 103, at 368.

study found that in 42 percent of domestic violence cases, batterers threatened to reduce their economic support of victims as retaliation for continued assistance to the prosecution.[112] In a recent case, after the prosecution won a conviction by proving that the defendant had tied up his girlfriend and beaten her repeatedly, the victim actually testified for the defendant at the sentencing hearing, claiming that he was "a perfect provider."[113]

Other factors that may lead victims to recant or refuse to cooperate include continued emotional attachment to batterers,[114] reluctance to break up families,[115] religious and cultural views of relationships,[116] concern that the state will take custody of the victims' children,[117] fear that the batterers and/or the victims will be deported,[118] "learned helplessness" based on repeated abuse,[119] and a genuine belief that no crime has occurred.[120]

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[112] Buzawa & Buzawa, supra note 107, at 88–89.

[113] People v. Thompson, 812 N.E.2d 516, 520 (Ill. App. Ct. 2004).

[114] *Moscat*, 777 N.Y.S.2d at 878; see also People v. Price, 15 Cal. Rptr. 3d 229, 236 (Ct. App. 2004) (noting that some battered women may choose not to end the abusive relationship because "some love the battering person and want to try to make the relationship work").

[115] *Moscat*, 777 N.Y.S.2d at 878; see also *Price*, 15 Cal. Rptr. 3d at 236 ("Some victims want to keep their children in a family setting . . . .").

[116] Jennice Vilhauer, Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence, 27 Fordham Urb. L.J. 953, 960 (2000).

[117] Id.; see also Buzawa & Buzawa, supra note 107, at 88 ("[V]ictims with their own substance abuse problems or who had perhaps neglected or abused their children . . . were threatened with loss of their family.").

[118] Margot Mendelson, The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women, 19 Berkeley Women's L.J. 138, 178–80 (2004).

[119] Lenore E. Walker, The Battered Woman 88–89 (1979); see also Mary Ann Douglas, The Battered Woman Syndrome, *in* Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence 39, 42 (Daniel J. Sonkin ed., 1987) (explaining that battered women may abort attempts to stop violence because of the belief that the attempts are useless). Walker's theory has drawn criticism on various grounds, including the concern that this perspective underestimates the rationality of battered women. See, e.g., Elaine Chiu, Confronting the Agency in Battered Mothers, 74 S. Cal. L. Rev. 1223, 1259–60 (2001) ("Once the range of goals [a battered woman may contemplate] is expanded, the behavior of battered women can be better appreciated as rational.").

[120] The accuser may come to believe that the conduct at issue does not actually constitute a crime. Alternatively, the accuser may recant because the original accusation was a fabrication. It is important to note, however, that false reporting of domestic violence occurs infrequently. Tonia Ettinger, Domestic Violence and Joint Custody: New York is Not Measuring Up, 11 Buff. Women's L.J. 89, 104 (2003) (quoting

In a typical domestic violence case, these various factors do not deter cooperation with law enforcement in the immediate aftermath of the abuse, but they begin to bear heavily on the victim in a matter of days.[121] Thus the "window of opportunity" for cooperation between the victim and law enforcement may close quickly in a domestic violence case.

2. The Importance of Hearsay in Prosecutions of Domestic Violence

Most of the respondents to the survey of district attorneys' offices in California, Oregon, and Washington reported that their offices relied on testimonial hearsay in more than half of all domestic violence prosecutions prior to *Crawford*.[122] Hearsay has often been the linchpin of the prosecution's proof in these cases.[123]

Prosecutions of domestic violence rely heavily on hearsay for three reasons. First, when the victim is unable or unwilling to testify about the abuse she has suffered, hearsay may provide the only account of what really happened. The physical evidence in a domestic violence case is often scant, and it is susceptible to many different explanations. Hearsay helps to "connect the dots" when the victim's testimony is unavailable. The quantum of proof in a domestic violence prosecution may be so low that the absence of hearsay necessitates dismissal.[124]

Second, the government's use of hearsay in domestic violence prosecutions diminishes the incentive for abusers to intimidate and otherwise manipulate victims while awaiting trial. If live testimony of victims were indispensable in prosecutions of domestic violence,

American Psychological Association, Report of the American Psychological Association Presidential Task Force on Violence and the Family 12 (1996)).

[121] One study showed that up to 60% of domestic violence cases are abandoned due to noncooperation of the victim/witness. Robert C. Davis, Victim/Witness Noncooperation: A Second Look at a Persistent Phenomenon, 11 J. Crim. Just. 287, 288 (1983).

[122] App. 1, question 6.

[123] Karan & Gersten, supra note 21, at 21, 23; see also Davis, supra note 20, at 22 (noting the greatest impact of *Crawford* will be had on domestic abuse and child abuse cases).

[124] Even when the accuser and the defendant remain adversarial, and both testify at trial, a domestic violence prosecution often boils down to a "he said, she said" confrontation. Mustering proof beyond a reasonable doubt in such circumstances is difficult indeed. But if the jury hears only the defendant's side of the story, the likelihood of a conviction is very remote.

these victims would face constant pressure and cajoling from abusers who know that the prosecution cannot go forward without the victims' cooperation. On the other hand, the possibility that hearsay would supplant victims' testimony reduces the enticement for witness tampering, because the government could still prosecute the abusers without the victims' live testimony.[125]

Third, the use of hearsay at trial may spare victims the ordeal of "revictimization" on the witness stand. Testifying victims must relive the trauma of domestic violence by describing it in court. They must endure the badgering of both defense attorneys and prosecutors.[126] These hardships may dissuade victims from filing complaints in the first place. On the other hand, it is important to put such considerations in perspective. The American criminal justice system is founded on the notion that crime victims must bear witness against the accused. In-court testimony may be unpleasant for victims, but it is the price of engaging the criminal justice system to hold criminals accountable.

While live testimony of victims is generally preferable, the criminal justice system must continue to rely occasionally on the use of some hearsay—at least as a last resort—in prosecutions of domestic violence.

3. Constraints on "Evidence-Based" Prosecutions After Crawford

Many observers have argued that *Crawford* is causing a decline in "evidence-based" prosecutions of domestic violence.[127] In the first year after *Crawford*, prosecutors reported that they were dismissing a higher number of domestic violence cases than in the preceding years. This Article's survey of 64 prosecutors' offices in California, Oregon, and Washington found that 76 percent of the offices were more likely to dismiss domestic violence charges when the victim was unavailable or refused to cooperate.[128] In Dallas County, Texas, judges are dismissing up to a dozen domestic violence cases per day because of evidentiary problems related to

[125] Krischer, supra note 26, at 14.

[126] Id. Where the government cannot rely on hearsay and must subpoena all witnesses, this compulsion rankles victims. Fowler v. State, 809 N.E.2d 960, 965 (Ind. Ct. App. 2004).

[127] See supra notes 26–30 and accompanying text.

[128] App. 1, question 3.

Crawford.[129] A public defender in the Bronx put it this way: "When the complainant in a domestic violence case insists she's not coming and just wants to drop the charges, I'll just smile as the judge says, 'Case dismissed.'"[130]

To understand why *Crawford*'s effect is so significant, it is necessary to explore why a large proportion of the evidence used in prosecutions of domestic violence might meet *Crawford*'s definition of "testimonial" hearsay. This analysis will set the stage for a later discussion about the need to equip prosecutors with new tools so that they can continue to charge and convict batterers.

a. 911 Calls

Prior to *Crawford*, prosecutors in domestic violence cases frequently introduced tape recordings of victims' calls to 911 operators. The admissibility of this evidence is dubious after the *Crawford* decision. Indeed, the survey of West Coast prosecutors found that 56 percent reported greater difficulty introducing 911 calls into evidence in domestic violence cases after *Crawford*.[131] In other areas of the country, prosecutors have also complained about their inability to introduce 911 tapes in some cases after *Crawford*.[132]

Courts addressing the admissibility of 911 calls after *Crawford* have diverged widely. One line of cases has held that 911 calls are nontestimonial and beyond the reach of *Crawford*. The most prominent of these cases is *People v. Moscat*.[133] In *Moscat*, the prosecution charged the defendant with domestic assault. The police had responded to the complainant's residence after she had made a call to 911 indicating that the defendant was assaulting her. By the time of trial, it became apparent that the accuser would not testify. The defendant moved in limine to exclude the recording of the 911 call on the ground that its admission would violate *Crawford*. The court agreed with the government that the 911 call was not testimonial in nature, and therefore *Crawford* did not require

[129] Tharp, supra note 15, at 1A.
[130] Feige, supra note 27.
[131] App. 1, question 9.
[132] See, e.g., Leonard Post, Prosecutors Feel Broad Wake of *Crawford*, Nat'l L.J., Dec. 13, 2004, at 1 (discussing greater reluctance of Brooklyn judges to admit 911 calls).
[133] 777 N.Y.S.2d 875 (Crim. Ct. 2004).

exclusion. Among other considerations, the *Moscat* court emphasized that the victim had initiated the communication (rather than the police), and her motive was to be rescued from peril, not to bring criminal charges against the defendant. The 911 call was essentially "a loud cry for help." There was no analogy to be drawn with "modern formal police interrogations, such as the tape-recorded station house interrogation in *Crawford*."[134] A number of other courts throughout the United States followed the analysis of the *Moscat* ruling,[135] although later investigation would reveal that many of the factual assumptions on which *Moscat* rested were inaccurate.[136]

Two months after the *Moscat* ruling, another court in the same jurisdiction reached an entirely different result. In *People v. Cortes*, the prosecution sought to introduce a 911 call by a witness to a murder.[137] The defendant cited *Crawford* to claim that admission of the call would violate his confrontation rights. The court carefully analyzed the nature and purpose of 911 calls. The court concluded that while a caller to 911 intends to summon assistance from police, the caller also should realize that the call could be used in criminal proceedings. Questioning by the 911 operator is not different in any meaningful way from the police interrogation that *Crawford* classified as testimonial. The judge in *Cortes* went so far as to assert that a "911 call reporting a crime preserved on tape is the modern equivalent, made possible by technology, to the depositions taken by magistrates or JPs under the Marian committal statute" of

[134] Id. at 880; see also id. at 879–80 (developing the idea that a 911 call is not testimonial).

[135] People v. Aubrey, No. E035037, 2004 WL 2378400, at *7 (Cal. Ct. App. Oct. 25, 2004); People v. Corella, 18 Cal. Rptr. 3d 770, 776 (Ct. App. 2004); State v. Wright, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004); People v. Conyers, 777 N.Y.S.2d 274, 276–77 (Sup. Ct. 2004); People v. Isaac, No. 23398/02, 2004 WL 1389219, at *4 (N.Y. Dist. Ct. June 16, 2004); State v. Banks, No. 03AP-1286, 2004 WL 2809070, at *3–4 (Ohio Ct. App. Dec. 7, 2004); accord Leavitt v. Arave, 383 F.3d 809, 830 n.22 (9th Cir. 2004) (providing similar analysis in dictum).

[136] *Moscat*'s recitation of several facts was incorrect. The person who called 911 was actually a neighbor, not the victim. Further, the call was made nine hours after the assault. The prosecution eventually abandoned this case because of evidentiary problems. Yet *Moscat* became the most frequently cited decision on the admissibility of 911 calls after *Crawford*. Sabrina Tavernise, Legal Precedent Doesn't Let Facts Stand in the Way, N.Y. Times, Nov. 26, 2004, at A1.

[137] 781 N.Y.S.2d 401 (Sup. Ct. 2004).

which the *Crawford* majority complained.[138] Because the defendant never had a chance to cross-examine the caller, the Sixth Amendment required the exclusion of the 911 call. Other courts have adopted similar reasoning to exclude 911 calls as testimonial hearsay.[139]

The fact that two courts in the same jurisdiction could reach diametrically opposite conclusions on the same issue does not give much hope for consistent, predictable application of *Crawford* to 911 calls. Commentators continue to spar over this issue,[140] and the outcome of pending litigation is difficult to predict.[141]

There are two reasons advocates for domestic violence victims should not pin their hopes on the outcome of this debate. First, the uncertainty surrounding the admissibility of 911 calls makes the success of prosecutions very speculative in the short term. While trial judges have occasionally characterized 911 calls as nontestimonial, that conclusion has rested as much on expediency as on sound doctrinal analysis, and it is unclear whether the U.S. Supreme Court or the state supreme courts will continue to indulge such rulings. Over half of the West Coast prosecutors' offices involved in this Article's survey still encountered difficulty in offering 911 calls six months after *Crawford*,[142] so the viability of this strategy is not promising. If prosecutors continue to rely heavily on 911 calls, and a substantial number of defendants win at trial or on appeal, victims may be discouraged from filing complaints.

Second, if victims' advocates seek to revise 911 protocols to conform more closely to *Crawford*'s requirements, this strategy may

[138] Id. at 415–16.

[139] E.g., State v. Powers, 99 P.3d 1262, 1263–66 (Wash. Ct. App. 2004).

[140] Compare Richard Friedman & Bridget McCormack, Dial-In Testimony, 150 U. Pa. L. Rev. 1171, 1242 (2002) ("A reasonable person [who calls 911] knows she is speaking to officialdom—either police officers or agents whose regular employment calls on them to pass information on to law enforcement, from which it may go to prosecutorial authorities."), with Karan & Gersten, supra note 21, at 22 ("Emergency 9-1-1 calls are fundamentally different from the testimonial statements defined by the majority in *Crawford*.").

[141] The Washington Supreme Court heard oral argument in *State v. Davis*, No. 73893-9 (Wash. May 10, 2004) on September 14, 2004. In *Davis*, the court is reviewing the trial court's admission of a 911 call as hearsay evidence in a domestic violence prosecution. Jeffrey Fisher, the Seattle attorney who successfully argued the *Crawford* case before the U.S. Supreme Court, is also involved with *Davis*.

[142] App. 1, question 9.

undermine the ability of police to respond to emergencies. Currently, training manuals for 911 operators encourage them to question callers in order to elicit important information about the emergency, the location of the caller, and any continuing threat to the caller's safety.[143] This active questioning by a government agent may increase the likelihood that a 911 call falls within the definition of a "testimonial" statement. Yet from the standpoint of rescuing battered women in danger, it is hardly preferable for the 911 operator to play a passive role, hoping that the frantic caller provides useful information in an unguided narrative. The Hobson's choice between preserving evidence and responding effectively to emergencies must be avoided.

In sum, 911 calls appear to be a precarious basis for "evidence-based" prosecutions of domestic violence. The classification of these calls as "testimonial" or "nontestimonial" is an issue that will probably not be settled for years, if at all.

b. Verbal Statements to Responding Officers

The survey of West Coast prosecutors found that since the *Crawford* ruling, 87 percent of respondents have encountered greater difficulty in introducing victims' hearsay statements elicited by investigating officers at the scene of the alleged domestic abuse.[144] To understand the reasons for this difficulty, it is helpful to review briefly the succession of Supreme Court opinions applying the Sixth Amendment to excited utterances.

Prior to *Crawford*, prosecutors offering excited utterances were easily able to meet the requirements of the Confrontation Clause. The Supreme Court's ruling in *White*[145] had virtually eliminated the confrontation test for "firmly rooted" hearsay exceptions such as the exception for excited utterances.[146] But *Crawford* raised consid-

[143] See, e.g., Brief of Amicus Curiae Washington Association of Criminal Defense Lawyers app., at 1–7, State v. Davis, No. 73893-9 (Wash. May 10, 2004) (appending Valley Communications Center Standard Operating Procedures as of March 3, 1998) (copy on file with the Virginia Law Review Association); see also People v. Cortes, 781 N.Y.S.2d 401, 405–06 (Sup. Ct. 2004) (reproducing protocols from web sites of various law enforcement agencies).

[144] App. 1, question 11.

[145] White v. Illinois, 502 U.S. 346 (1992). See supra note 50 and accompanying text.

[146] Fed. R. Evid. 803(2) defines an excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excite-

erable questions about prosecutors' reliance on excited utterances to police. Dictum in *Crawford* suggested that the Supreme Court had doubts about the continued vitality of *White*.[147] Justice Scalia indicated that testimonial hearsay may not have been admissible as an excited utterance in 1791, the baseline year from which the Court now derived its confrontation analysis.[148] Justice Scalia also expressed his belief that the temporal proximity of an exciting event and the declarant's utterance must be very close. He cited *Thompson v. Trevanion*[149] (a domestic violence case preceding the adoption of the Constitution) and indicated that an excited utterance should be virtually contemporaneous with the startling stimulus[150]—a temporal requirement that may prove prohibitive in domestic violence cases where the struggle usually ends before the officers arrive.

On December 6, 2004, the Supreme Court cast further doubt on *White*'s holding. In *Siler v. Ohio*, the Court vacated and remanded a judgment by an Ohio appellate court upholding the defendant's conviction for murder.[151] The prosecution's evidence indicated that the defendant had killed his wife by hanging her.[152] The prosecution relied on a hearsay statement by the victim's three-year-old son, who told police that he had seen the defendant putting a noose around the victim's neck. The boy did not testify at trial. The trial court admitted the boy's hearsay statement as an excited utterance, and the Ohio appellate court upheld the conviction despite the defendant's challenge under the Sixth Amendment.[153] In the wake of *Crawford*, the Ohio Supreme Court denied review of this convic-

ment caused by the event or condition." All states have adopted an analog of FRE 803(2), although "a few states interpret the exception more narrowly than do the federal courts." David F. Binder, Hearsay Handbook § 9:2 (4th ed. 2004).

[147] *Crawford*, 124 S. Ct. at 1370.

[148] Id. at 1368 n.8.

[149] Id. (citing Thompson v. Trevanion, 90 Eng. Rep. 179 (K.B. 1694)).

[150] Id.

[151] 125 S. Ct. 671 (2004).

[152] The public record has not conclusively established the facts of this case. The factual summary presented here derives in part from evidence deemed inadmissible by the U.S. Supreme Court. An alternative explanation may be that the investigators misunderstood the child, or that the child may have been highly suggestible.

[153] State v. Siler, No. 02COA028, 2003 WL 22429053, at *14 (Ohio Ct. App. Oct. 24, 2003).

tion,[154] but the U.S. Supreme Court granted certiorari and remanded the case to the Ohio Court of Appeals for further proceedings consistent with *Crawford*. In so ruling, the Court repudiated the notion that an excited utterance will automatically pass the *Crawford* test.

The post-*Crawford* decisions by lower courts have taken three different approaches in evaluating excited utterances to police officers. One approach treats such statements like any other statement to police, and suggests that the key consideration is whether the declarant should have foreseen the use of the statement in a criminal prosecution.[155] A second approach posits that statements in response to officers' preliminary questions are not testimonial because this questioning is distinguishable from "formal interrogation."[156] A third line of cases suggests that excited utterances, by their very nature, cannot be treated as testimonial, because the declarant lacks the clarity of mind to contemplate future use of her statement in a criminal prosecution.[157] Only the first of these three approaches seems faithful to *Crawford*;[158] the latter two

[154] The Ohio Supreme Court refused to allow Siler's appeal a few weeks after *Crawford*. 805 N.E.2d 539 (Ohio 2004). The court also denied reconsideration two months later. 809 N.E.2d 34 (Ohio 2004).

[155] People v. Matamoros, No. B171776, 2004 WL 3016821, at *6–7 (Cal. Ct. App. Dec. 30, 2004); People v. Zarazua, No. H025472, 2004 WL 837914, at *1–5 (Cal. Ct. App. Apr. 20, 2004); Lopez v. State, 888 So. 2d 693, 699–700 (Fla. Dist. Ct. App. 2004); People v. Victors, 819 N.E.2d 311, 320–21 (Ill. App. Ct. 2004); Heard v. Commonwealth, No. 2002-CA-002494-MR, 2004 WL 1367163, at *5 (Ky. Ct. App. June 18, 2004); Wall v. State, 143 S.W.3d 846, 851 (Tex. App. 2004).

[156] People v. Ford, No. A104115, 2004 WL 2538477, at *7 (Cal. Ct. App. Nov. 10, 2004); People v. Kilday, 20 Cal. Rptr. 3d 161, 173–74 (Ct. App. 2004); People v. Newberry, No. E035199, 2004 WL 2335232, at *3 (Cal. Ct. App. Oct. 18, 2004); People v. Magdaleno, No. B169360, 2004 WL 2181412, at *9 (Cal. Ct. App. Sept. 29, 2004); People v. Mackey, 785 N.Y.S.2d 870, 873–74 (Crim. Ct. 2004); Gonzalez v. State, No. 04-03-00819-CR, 2004 WL 2873811, at *4 n.4 (Tex. App. Dec. 15, 2004).

[157] United States v. Brown, 322 F. Supp. 2d 101, 105 n.4 (D. Mass. 2004); Hammon v. State, 809 N.E.2d 945, 952–53 (Ind. Ct. App. 2004); State v. Barnes, 854 A.2d 208, 208–12 (Me. 2004); State v. Wright, 686 N.W.2d 295, 305 (Minn. Ct. App. 2004); State v. Forrest, 596 S.E.2d 22, 26–29 (N.C. Ct. App. 2004); State v. Banks, No. 03AP-1286, 2004 WL 2809070, at *3 (Ohio Ct. App. Dec. 7, 2004); Rivera v. State, No. 04-03-00830-CR, 2004 WL 3015165, at *1–2 (Tex. App. Dec. 30, 2004); accord People v. Isaac, No. 23398/02, 2004 WL 1289219, at *4 (N.Y. Dist. Ct. June 16, 2004); see also Krischer, supra note 26, at 17 n.20. But see Lopez v. State, 888 So. 2d 693, 699 (Fla. Dist. Ct. App. 2004).

[158] See Richard D. Friedman, Truth and Its Rivals in the Law of Hearsay and Confrontation, 49 Hastings L.J. 545, 561 (1998); Robert P. Mosteller, *Crawford v. Wash-*

evoke the facile, formalistic analysis of the *Roberts* era, and condition the confrontation right upon the particular investigative strategies chosen by police, rather than according this right the sacrosanct status required by *Crawford*.

Courts that scrutinize victims' statements to responding officers look to a long list of considerations, and apply these considerations inconsistently.[159] For example, some courts hold that the informality of communication between the police and the declarant is a factor that militates in favor of admissibility;[160] other courts flatly reject this notion.[161] Some courts focus on whether an adversarial relationship exists between the declarant and the police;[162] this consideration is immaterial to other courts.[163] Some courts decline to apply *Crawford* to statements given in a neutral, noncustodial setting;[164] other courts find that statements by out-of-custody declarants are still testimonial.[165] Some courts hold that the declarant's initiation of communication with police makes her statement non-

ington: Encouraging and Ensuring the Confrontation of Witnesses, 39 U. Rich. L. Rev. 511, 556–57 (2005).

[159] As in the case of 911 calls, courts in the same jurisdiction have reached opposite conclusions when considering virtually identical facts. Compare Cassidy v. State, 149 S.W.3d 712, 716 (Tex. App. 2004) (finding that an officer's conversation in hospital with a witness one hour after an assault was not testimonial), with Wall v. State, 143 S.W.3d 846, 851 (Tex. App. 2004) (finding a very similar statement to be testimonial and acknowledging disagreement with *Cassidy*).

[160] E.g., People v. Lugo, No. E033252, 2004 WL 2092018, at *5–6 (Cal. Ct. App. Sept. 20, 2004); People v. Cage, 15 Cal. Rptr. 3d 846, 856–57 (Ct. App. 2004), review granted, 99 P.3d 2 (Cal. 2004); Fowler v. State, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004); Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004); People v. Newland, 775 N.Y.S.2d 308, 309 (App. Div. 2004); State v. Forrest, 596 S.E.2d 22, 27 (N.C. Ct. App. 2004).

[161] E.g., People v. Kilday, 20 Cal. Rptr. 3d 161, 173 (Ct. App. 2004); People v. Zazura, No. H025472, 2004 WL 837914, at *5 (Cal. Ct. App. Apr. 20, 2004).

[162] E.g,, People v. McMillan, 816 N.E.2d 10, 13–17 (Ill. App. Ct. 2004); Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004); Jahanian v. State, 145 S.W.3d 346, 350 (Tex. App. 2004).

[163] E.g., *Kilday*, 20 Cal. Rptr. 3d at 170; Brawner v. State, 602 S.E.2d 612, 614 n.2 (Ga. 2004).

[164] E.g., People v. Cage, 15 Cal. Rptr. 3d 846, 856 (Ct. App. 2004), review granted, 99 P.3d 2 (Cal. 2004).

[165] E.g,, People v. Sisavath, 13 Cal. Rptr. 3d 753, 757–58 (Ct. App. 2004); People v. Vigil, 104 P.3d 258, 262 (Colo. Ct. App. 2004); Moody v. State, 594 S.E.2d 350, 353–54 (Ga. 2004); In re T.T., 815 N.E.2d 789, 800–01 (Ill. App. Ct. 2004).

testimonial;[166] other courts do not treat such statements any differently from a police-initiated conversation.[167] Some courts imply that a statement is not testimonial when officers listen passively;[168] other courts do not ascribe much significance to the ardor of the officers' questioning.[169] Some courts refuse to rely heavily on any of the above-listed factors; these courts worry that such an approach could invite manipulation by police, who could circumvent *Crawford* by conducting their questioning in the "preferred" setting.[170]

In determining whether statements to police are testimonial, courts show varying interest in the intent of the parties to the conversation. Some courts place great emphasis on the motivation of the interviewers to gather evidence;[171] other courts show little interest in the motivation of the interviewers.[172] Some courts find a statement to be nontestimonial if the declarant's primary motive was not to provide a statement for use by the prosecution, but rather to avoid imminent danger;[173] other courts reject the "primary motivation" test, and consider whether an objective person in the

[166] E.g., Leavitt v. Arave, 383 F.3d 809, 830 n.22 (9th Cir. 2004); People v. Lugo, No. E033252, 2004 WL 2092018, at *5–6 (Cal. Ct. App. Sept. 20, 2004); State v. Barnes, 854 A.2d 208, 208–12 (Me. 2004); People v. Mackey, 785 N.Y.S.2d 870, 873–74 (Crim. Ct. 2004); State v. Forrest, 596 S.E.2d 22, 27–28 (N.C. Ct. App. 2004); Wilson v. State, 151 S.W.3d 694, 698 (Tex. App. 2004).

[167] E.g., United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004); Henry v. State, 604 S.E.2d 469, 472 (Ga. 2004).

[168] See, e.g., People v. Lee, 21 Cal. Rptr. 3d 309, 314 (Ct. App. 2004).

[169] When officers take an active role in questioning a declarant, some courts still find that the statement is nontestimonial. E.g., Gonzalez v. State, No. 04-03-00819-CR, 2004 WL 2873811, at *4 n.4 (Tex. App. Dec. 15, 2004); Cassidy v. State, 149 S.W.3d 712, 714 (Tex. App. 2004). On the other hand, some courts deem victims' statements to be testimonial even when police play a more passive role. E.g., People v. Victors, 819 N.E.2d 311, 320–21 (Ill. App. Ct. 2004).

[170] See, e.g., In re T.T., 815 N.E.2d 789, 802 (Ill. App. Ct. 2004).

[171] E.g., United States v. Saner, 313 F. Supp. 2d 896, 901–02 (S.D. Ind. 2004); People v. Wang, No. B164939, 2004 WL 2955856, at *3 (Cal. Ct. App. Dec. 22, 2004); People v. Kilday, 20 Cal. Rptr. 3d 161, 170 (Ct. App. 2004); Snowden v. State, 846 A.2d 36, 47 (Md. Ct. Spec. App. 2004); State v. Bell, 603 S.E.2d 93, 115–16 (N.C. 2004).

[172] E.g., People v. Ruiz, No. B169642, 2004 WL 2383676, at *9 (Cal. Ct. App. Oct. 26, 2004), review granted (Jan. 19, 2005); People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 (Ct. App. 2004).

[173] E.g., People v. Conyers, 777 N.Y.S.2d 274, 276–77 (Sup. Ct. 2004); People v. Mackey, 785 N.Y.S.2d 870, 873–74 (Crim. Ct. 2004); cf. State v. Lewis, 603 S.E.2d 559, 562 (N.C. Ct. App. 2004) (holding that a statement taken at a police investigation and used to identify the assailant was testimonial in nature).

declarant's shoes would have expected that her statement would be available for use at trial.[174]

In sum, the lower courts' treatment of victims' statements to responding officers is unpredictable—just as unpredictable, perhaps, as the courts' analyses of reliability during the *Roberts* era.[175] The Supreme Court has backed away from its prior approach of liberally admitting excited utterances. Under these circumstances, prosecutors will take a tremendous risk if they continue to stake "evidence-based prosecutions" on hearsay statements by victims to responding officers.

c. Written Statements

Some prosecutors of domestic violence cases have relied on written hearsay statements by victims. These statements might include affidavits to initiate criminal prosecutions or applications for civil restraining orders. Such statements are even more likely to warrant classification as "testimonial" than are 911 calls or verbal statements to police.

For example, in *People v. Thompson*, a woman who suffered significant injuries at the hands of her fiancé sought a civil restraining order to prevent him from coming near her.[176] The application for the restraining order required her to write a statement describing the assault. The government simultaneously initiated a criminal prosecution based on the same conduct, but by the time of the criminal trial, the accuser refused to testify. The prosecution then tried to introduce the written statement that the accuser had submitted with her application for the civil restraining order. The defendant denied the allegations in that statement. The appellate

[174] E.g., *Ruiz*, 2004 WL 2383676, at *9; *Sisavath*, 13 Cal. Rptr. 3d at 758; In re Rolandis G., 817 N.E.2d 183, 189 (Ill. App. Ct. 2004). But see People v. Cage, 15 Cal. Rptr. 3d 846, 856 (Ct. App. 2004), review granted, 99 P.3d 2 (Cal. 2004); State v. Nix, No. C-030696, 2004 WL 2315035, at *18 (Ohio Ct. App. Oct. 15, 2004).

[175] During the *Roberts* era, when prosecutors invoked hearsay exceptions that were not firmly rooted, courts considered several factors to determine whether the evidence was reliable. Sometimes two courts would cite the same factors in reaching opposite conclusions about reliability. *Crawford*, 124 S. Ct. at 1371. Ironically, nine months after *Crawford*, a similar list could be prepared to show the courts' divergent approaches in judging whether victims' statements to responding officers are testimonial.

[176] 812 N.E.2d 516 (Ill. App. Ct. 2004).

court reversed the defendant's conviction for domestic battery, ruling that the written statement was testimonial hearsay.[177]

Courts have treated other written statements by alleged victims of domestic violence as testimonial. In particular, affidavits and complaints filed to initiate criminal prosecutions for domestic violence seem to meet *Crawford*'s definition of "testimonial."[178]

It is a safe bet that very few formal written statements by victims of domestic violence can evade classification as testimonial hearsay. These statements will be extremely difficult to admit unless the declarants are available for cross-examination.[179] Once again, *Crawford* has dealt a significant blow to the prior practice of introducing victims' hearsay statements in lieu of live testimony.

B. The Myth That Crawford *Vindicates Victims' Autonomy*

The foregoing analysis has shown that *Crawford* could significantly impede prosecution of domestic violence cases when victims recant or refuse to testify at trial. Surprisingly, a few commentators have welcomed this development as a restoration of self-determination to the women whose complaints launch the investigation and prosecution of domestic violence cases.

David Feige went so far as to suggest that *Crawford* empowers battered women. "Whether he knew it or not, Scalia has, in essence, radically shifted the balance of power from prosecutors to reluctant complainants, giving alleged victims more control over the cases of their own victimization and greater freedom from the paternalistic philosophy of prosecution that the *Roberts* rule enabled."[180] Feminist author Wendy McElroy hailed *Crawford* as "affirm[ing] the power of victims of domestic violence to exercise control over their own cases—specifically over whether or not to

[177] Id. at 552; accord People v. Williams, No. B166308, 2004 WL 2180822, at *14 (Cal. Ct. App. Sept. 29, 2004) (Malano, J., dissenting).

[178] Hammon v. State, 809 N.E.2d 945, 952 n.5 (Ind. Ct. App. 2004) (noting that an affidavit was mistakenly admitted, but that the error was harmless); see also State v. Clark, 598 S.E.2d 213, 219–20 (N.C. Ct. App. 2004); Suamarron v. State, 150 S.W.3d 701, 705–07 (Tex. App. 2004).

[179] State v. Bell, No. 28784-6-II, 2004 WL 1775580, at *5 n.3 (Wash. Ct. App. Aug. 10, 2004) (noting there is no *Crawford* problem where affiant was available to testify at trial).

[180] Feige, supra note 27.

pursue charges."[181] These comments draw from a line of scholarship raising concerns that prosecutorial overreaching could prevent the dismissal of cases where the victims' reasons for reluctance actually deserve credence.[182]

Without delving deeply into the complex policy questions raised by a "no-drop" prosecutorial strategy,[183] two points deserve mention here. First, the so-called "autonomy" of the accuser is illusory in many domestic violence cases. Some victims face ongoing duress, and some have endured prolonged battery that results in a state of "learned helplessness."[184] When the victim in *People v. Kilday* suffered repeated torture at the hands of her intimate partner, and then told police, "I deserve this,"[185] is it fair to ascribe to her the autonomy posited by Feige and McElroy?

Second, even when victims of domestic violence do not suffer from any coercion or diminished capacity, they lack standing to waive criminal charges against the accused. The government, not the victim, is the plaintiff in prosecutions of domestic violence. The state has a duty to seek punishment of batterers, irrespective of whether the victims are willing to cooperate in prosecuting their assailants.

III. LEGISLATIVE REFORMS NEEDED AFTER *CRAWFORD*

The upheaval wrought by *Crawford* necessitates a thorough retrofitting of evidence codes and courtroom procedures so that they meet constitutional requirements while enabling effective prosecutions of domestic violence. Three categories of reforms merit consideration. First, legislatures should expand opportunities for pretrial cross-examination of hearsay declarants. Second, legislatures should enlarge the scope of admissible hearsay in certain circumstances where *Crawford*'s assurance of cross-examination will prevent any unfair burden on defendants. Finally, legislatures should

[181] Wendy McElroy, Supreme Court Ruling May Impact Domestic Violence Cases (Mar. 31, 2004), at http://www.ifeminists.net/introduction/editiorials/2004/0331.html.

[182] E.g., Martha Minow, Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice, 32 New Eng. L. Rev. 967, 977 (1998).

[183] See Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 Harv. L. Rev. 1849, 1891 (1996).

[184] See supra note 119 and accompanying text.

[185] 20 Cal. Rptr. 3d 165 (Ct. App. 2004).

enact other miscellaneous measures to protect battered women before trial and to open other avenues of recourse besides conventional assault prosecutions. These proposals will be discussed separately below.

A. Proposals to Facilitate Pretrial Cross-Examination

Crawford leaves no doubt that cross-examination is a prerequisite for the admission of testimonial hearsay statements (unless the defendant's wrongful conduct has somehow forfeited his right to confront his accuser).[186] Interestingly, *Crawford* does not require that the cross-examination occur at trial. Rather, Justice Scalia's opinion in *Crawford* indicates repeatedly that "a prior opportunity for cross-examination" would solve any *Crawford*-related problems attending the admission of a testimonial hearsay statement.[187]

The challenge is to establish new junctures for cross-examination so that courts can enforce the Confrontation Clause without excluding evidence. These new junctures would be particularly useful if they fell between the time of the victim's initial statement to police (the moment of greatest candor) and the time of trial (the moment of greatest reluctance). These junctures should not precede the initial appearance, so that indigent defendants can secure the assistance of counsel.

What sort of prior cross-examination will suffice under *Crawford*? The requirements are surprisingly lenient. Prior cross-examination need not have covered every facet of the case that now interests defense counsel.[188] The prior cross-examination need not have been skillful or zealous in order to be minimally adequate under *Crawford*.[189] As one appellate court recently observed, "*Crawford* mandates only the 'opportunity' for the examination. Whether and how that opportunity is used is within the control of the accused, and he should not be heard to complain about an op-

[186] For further discussion of forfeiture, see infra Section III.B.3.

[187] *Crawford*, 124 S. Ct. at 1365–68; see also Richard D. Friedman, Adjusting to *Crawford*: High Court Decision Restores Confrontation Clause Protection, 19 Crim. Just. 4, 11 (2004).

[188] People v. Sharpe, No. B169924, 2004 WL 1771481, at *4–5 (Cal. Ct. App. Aug. 9, 2004); Commonwealth v. Sena, 809 N.E.2d 505, 515 (Mass. 2004).

[189] United States v. Owens, 484 U.S. 554, 559 (1988); Blanton v. State, 880 So. 2d 798, 802 (Fla. Dist. Ct. App. 2004).

portunity squandered."[190] The prior cross-examination need not have been close in time to the declarant's original statement, as long as both the hearsay statement and the later cross-examination are presented at trial.[191] The prior cross-examination need not have occurred after defense counsel completed investigation of the case and gathered all the information necessary to permit a thorough cross-examination.[192] The prior cross-examination need not even have involved the attorney who ultimately represents the defendant at trial.[193] While the foregoing circumstances are not ideal from a practical standpoint, they do not raise concerns that are cognizable under present interpretations of the Confrontation Clause.

During the *Roberts* era, state legislatures did not create many opportunities for pretrial cross-examination of victims, particularly in prosecutions of domestic violence. In the survey of district attorneys' offices in California, Oregon, and Washington, 71 percent of respondents indicated that under current law, pretrial cross-examination occurs in less than half of all domestic violence prosecutions.[194] Over the last decade, many states have actually *reduced* pretrial opportunities for cross-examination of victims. States such as California have adopted laws that allow the prosecution to present hearsay in preliminary hearings, in part to reduce the expense of prosecutions and in part to spare victims the hardship of testifying any more than necessary.[195] The vehemence with which Kobe Bryant's prosecutors resisted the suggestion that his accuser testify in a preliminary hearing exemplifies the prosecutors' reluctance to present any sensitive testimony in such a forum.[196] Furthermore, in

[190] *Blanton*, 880 So. 2d at 802.

[191] Id. at 801.

[192] State v. Crocker, 852 A.2d 762, 784–87 (Conn. App. Ct. 2004).

[193] People v. Sharpe, No. B169924, 2004 WL 1771481, at *4–5 (Cal. Ct. App. Aug. 9, 2004); *Crocker*, 852 A.2d at 787; People v. Tincher, No. 246891, 2004 WL 1460687, at *3 (Mich. Ct. App. June 29, 2004).

[194] App. 1, question 18.

[195] See Crime Victim's Justice Reform Act, Initiative Measure Proposition 115 (approved by California voters on June 5, 1990), codified in pertinent part at Cal. Penal Code § 872 (West Supp. 2005) (allowing magistrates to base probable cause finding in whole or in part upon hearsay statements related by police).

[196] Motion to Quash Subpoena Served on Jane Doe and Request for Forthwith Ruling Before October 9, 2003, Preliminary Hearing, People v. Bryant, No. 03-CR-204 (Colo. Cir. Ct. Eagle County filed Sept. 9, 2003) (copy on file with author).

recent years a number of states have adopted constitutional amendments forbidding the pretrial deposition of crime victims by defendants.[197]

The states' efforts to insulate victims from pretrial cross-examination raise an important question: Is pretrial cross-examination unfair to victims? To be sure, pretrial cross-examination imposes additional burdens on accusers, who are already distraught because of their recent victimization. They might need to miss work or spend more time away from their families. If they have suffered significant injuries, their appearance in court might interfere with their convalescence. A traumatic experience during pretrial cross-examination might diminish the likelihood that a victim will appear to testify at trial. Moreover, the prospect of cross-examination on two separate occasions might seem so onerous as to create yet another disincentive to reporting domestic violence.

Yet pretrial cross-examination is preferable to the exclusive reliance on trial testimony to satisfy *Crawford*'s requirements. There are four strong reasons to facilitate more opportunities for pretrial cross-examination of victims. First, if prosecutors wait until trial to present victims for cross-examination, the risk is high that victims will not appear at all or will recant. Most victims' willingness to take part in court proceedings diminishes as time passes after the date of the abuse. If the first opportunity for cross-examination does not occur until six months after the arrest, then the victim is less likely to testify, in which case the Confrontation Clause may allow the assailant to escape with impunity and resume his abuse.

Second, the defendant is more likely to plead guilty if the victim gives testimony at an early stage of the prosecution. Indeed, the survey of prosecuting attorneys who supervise domestic violence cases found that some offices prefer to "show their cards" by calling victims to testify at pretrial hearings, in the hope that defendants will recognize the strength of the government's case before trial.

[197] E.g., Ariz. Const. art. 2, § 2.1.5 (adopted 1990); Idaho Const. art 1, § 22(8) (adopted 1994); La. Const. art. 1, § 25 (adopted 1998); Oregon Const. art. 1, § 42(1)(c) (adopted 1999).

Third, pretrial cross-examination may avoid the regrettable practice of jailing victims on material witness warrants in order to guarantee their appearance at trial. One respondent to the survey lamented her reliance on material witness warrants: "Unfortunately, some of the victims have had to remain in custody until the trial, which is a terrible message we are sending to the victim, her children, the defendant and society."[198] If cross-examination of the victim takes place before trial, the urgency for securing the victim's appearance at trial diminishes, and the need for a material witness warrant diminishes as well.

Fourth, pretrial testimony reduces the incentive for witness tampering. When the victim has given testimony before trial, her absence at trial will not necessarily help the defendant; it will merely permit the introduction of her pretrial testimony (assuming the defendant had an adequate opportunity for cross-examination).[199] If the victim changes her story by the time of trial, the prosecution can offer the pretrial testimony for impeachment and for its truth.[200] Faced with these realities, a defendant would have little incentive to threaten or coerce a victim during the period between the pretrial testimony and the trial. By contrast, if the victim were scheduled to appear for the first time at trial, the temptation for tampering would be much higher.

Creating new opportunities for pretrial confrontation will require a number of statutory reforms. Set forth below are three proposals to facilitate pretrial cross-examination of victims in appropriate circumstances.

1. Nonwaivable Preliminary Hearings

In many prosecutions, the first opportunity to present the victim's testimony arises at the preliminary hearing.[201] Defendants

[198] E-mail accompanying response to questionnaire, infra App. 1, (Oct. 25, 2004) (on file with author).

[199] Fed. R. Evid. 804(b)(1). Most states have adopted a version of this rule. Binder, supra note 34, § 33.2. See also Fed. R. Evid. 804(b)(6) (admitting hearsay when declarant has wrongfully procured absence of witness). Only ten states have adopted an analog of Fed. R. Evid. 804(b)(6). See infra, Section III.B.3.

[200] Fed. R. Evid. 801(d)(1)(A). Most states have adopted a version of this rule. Binder, supra note 34, § 39:2.

[201] The traditional function of a preliminary hearing is to assess whether the prosecution has shown probable cause to believe that the defendant committed the charged

may want to waive such hearings altogether in the hope of preserving a *Crawford* objection for appeal.[202] Legislators should foreclose any gamesmanship by requiring both parties' consent to waive preliminary hearings.[203] If the hearings are nonwaivable, the prosecution will always be able to afford the defendant an opportunity to confront his accuser—at least in a case for which a preliminary hearing is required. The new nonwaivable preliminary hearings would provide insurance that at least some evidence from the victim could be usable by the prosecution at trial, even if the victim were not available as a trial witness.

The seminal case addressing confrontation issues in preliminary hearings is *California v. Green*.[204] There, a 16-year-old witness named Melvin Porter had testified for the prosecution during a preliminary hearing. The witness became evasive at trial, however, and claimed that he could not remember details because he was on LSD at the time of the alleged crime. The prosecutor introduced excerpts from the preliminary hearing at which the witness had tes-

offense. E.g., Fed. R. Crim. P. 5. This hearing typically takes place shortly after the defendant's arrest, unless the government opts to dispense with the preliminary hearing by obtaining a grand jury indictment. Id. In most jurisdictions, a defendant can waive a preliminary hearing by conceding the issue of probable cause.

[202] For example, in *People v. Matamoros*, No. B171776, 2004 WL 3016821 (Cal. Ct. App. Dec. 30, 2004), the defendant waived a preliminary hearing in his robbery trial, and then complained on appeal that he was denied a right to confront the alleged victim. The appellate court noted, "Defendant had no prior opportunity to cross-examine [the alleged victim] because he waived his right to a preliminary hearing." Id. at *7 n.14. Despite the fact that the defendant voluntarily gave up an opportunity to cross-examine his accuser, the appellate court found a *Crawford* violation. Id. at *7 (noting that the error was harmless, however). See also People v. Zarazua, No. H025472, 2004 WL 837914, at *3 (Cal. Ct. App. Apr. 20, 2004). It is important to note that the trials in *Matamoros* and *Zarazua* predated *Crawford*; one can only expect that after *Crawford* more defendants would hope to transmute the lead of a foregone preliminary hearing into the gold of a Sixth Amendment violation supporting reversal of their convictions on appeal.

[203] A few states have already adopted this rule. Arizona includes the following language in Rule 5.1 of the Arizona Rules of Criminal Procedure: "A preliminary hearing may be waived by written waiver, signed by the defendant, his or her counsel and the prosecutor." See also Utah R. Crim. P. 7(h)(1). In Oklahoma, the state has a right to conduct preliminary hearings whether or not the defendant wishes to waive these hearings. Okla. Stat. tit. 22, § 258 (2004); State v. Martin, 959 P.2d 982, 985 (Okla. Crim. App. 1998). But see New Mexico ex rel. Whitehead v. Vescovie-Dial, 950 P.2d 818, 819–20 (N.M. Ct. App. 1997) (holding that the state has no right to require that preliminary hearing be held despite defendant's waiver).

[204] 399 U.S. 149 (1970).

tified. The Supreme Court held that the admission of this evidence did not violate the defendant's rights under the Confrontation Clause. The *Green* ruling included this oft-quoted passage:

> Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether [Green] had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; [Green] was represented by counsel—the same counsel in fact who later represented him at the trial; [Green] had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.[205]

Green settled the question of whether cross-examination at a preliminary hearing could allow the admission of the hearing transcript at trial, and numerous cases have applied the *Green* rule after *Crawford*.[206] But can cross-examination at a preliminary hearing suffice to permit the use at trial of a hearsay statement given by a crime victim to a police officer before the hearing? The answer seems to be yes. *Crawford* identified pretrial cross-examination as a cure for the evils of testimonial hearsay, and then *Crawford* listed police interrogation as one category of testimonial hearsay, so it seems reasonable to infer that cross-examination in a preliminary hearing would permit the prosecution to introduce at trial any statements elicited in police interrogation prior to the hearing (assuming that these statements were the subject of cross-examination at the hearing).

The government used such a strategy in *People v. Price*.[207] There, the accuser initially told police that her husband had tried to stran-

[205] Id. at 165.

[206] E.g., United States v. Avants, 367 F.3d 433, 444–47 (5th Cir. 2004); People v. Saechao, No. C042595, 2004 WL 2307116, at *8 (Cal. Ct. App. Oct. 14, 2004); People v. Sideris, No. B167750, 2004 WL 1926040, at *8 (Cal. Ct. App. Aug. 31, 2004); State v. Crocker, 852 A.2d 762, 784–87 (Conn. App. Ct. 2004); State v. Young, 87 P.3d 308 (Kan. 2004); People v. Laws, No. 245454, 2004 WL 2877325, at *3 (Mich. Ct. App. Dec. 14, 2004); People v. Tincher, No. 246891, 2004 WL 1460687, at *3 (Mich. Ct. App. June 29, 2004); Primeaux v. State, 88 P.3d 893, 905–06 (Okla. Crim. App. 2004).

[207] 15 Cal. Rptr. 3d 229 (Cal. Ct. App. 2004).

gle her. Shortly after making this statement, she changed her mind about assisting the prosecution, and she asked that the government drop the charges against her husband. The prosecution persisted with the charges and called her as a witness at the defendant's preliminary hearing. Her testimony at that hearing was favorable to the defendant in many respects. At trial, the government called her again as a witness. She was so recalcitrant at this time that the court declared her to be unavailable. The government introduced her hearsay statement made to the police, and the defendant introduced a transcript of cross-examination at the preliminary hearing regarding her hearsay statement made to the officers. When the defendant later appealed his conviction, claiming that the admission of the victim's statement to the police had violated the Confrontation Clause, the appellate court held that the cross-examination at the preliminary hearing was adequate under *Crawford*.[208] Other trial courts have also approved the prosecution's use of a victim's statements to police where the defendant had an opportunity to cross-examine the declarant during a preliminary hearing, but not at trial.[209]

To be sure, the use of preliminary hearings for cross-examination of victims is not a panacea for *Crawford*-related problems in domestic violence prosecutions. One limitation of this strategy is that many domestic violence cases, especially low-level assaults, are charged as misdemeanors. The survey of West Coast prosecutors found that in 82 percent of respondents' jurisdictions, more than half of domestic violence charges are misdemeanors.[210] Preliminary hearings are generally unavailable for misdemeanor cases.

Further, it is important to note that some jurisdictions have expressed doubts about the adequacy of cross-examination at pre-

[208] Id. at 237–39.

[209] E.g., People v. Flippin, No. A098086, 2004 WL 1879998, at *6 (Cal. Ct. App. Aug. 24, 2004); People v. Ochoa, 18 Cal. Rptr. 3d 365, 373 (Ct. App. 2004); cf. People v. Lee, No. 245455, 2004 WL 2877319, at *6 (Mich. Ct. App. Dec. 14, 2004) (finding no *Crawford* violation where trial court admitted transcripts of testimony by government witness at both preliminary hearing and earlier grand jury session; even though defendant could not cross-examine witness before grand jury, later opportunity for cross-examination at preliminary hearing was sufficient for government to offer both transcripts into evidence at trial).

[210] App. 1, question 14.

liminary hearings. In *People v. Fry*,[211] the Colorado Supreme Court held that a defendant's cross-examination of a government witness at a preliminary hearing did not satisfy the demands of the Confrontation Clause. The court noted that preliminary hearings are "limited to matters necessary to a determination of probable cause," and are not intended to provide an opportunity for a "mini-trial." The court worried that, "as a practical matter, defense counsel may decline to cross-examine witnesses at the preliminary hearing, understanding that the cross-examination would have no bearing on the issue of probable cause."[212] The ruling in *Fry*, however, stands at odds with most jurisdictions' position on the sufficiency of preliminary hearings under the Confrontation Clause.[213] In addition, the *Fry* court's concern that defense counsel will not exploit the opportunity for cross-examination at a preliminary hearing seems less worrisome for prosecutions commencing after the date of the *Crawford* decision, especially once the practice of "fronting" victims to satisfy *Crawford* becomes more widespread.

2. Special Hearings for Cross-Examination

Rather than convert preliminary hearings to serve a function for which they were not intended, a more sensible solution might be to schedule ad hoc hearings solely for the purpose of exposing the victim to cross-examination by the defense. A bill now pending before the Oregon Legislature would allow the prosecution to request such a hearing where the declarant's availability as a trial witness seems doubtful (the grounds for foreseeable unavailability would include the possibility of recanting or refusing to cooperate in a domestic violence prosecution). The court would schedule the hearing within five judicial days of the prosecution's request. Before the hearing, the prosecution would need to provide the defense with a police report detailing the prior hearsay statements that would be the subject of the hearing. The defendant would examine the victim as if at trial. A judge would be present to adjudi-

[211] 92 P.3d 970 (Colo. 2004).

[212] Id. at 977.

[213] The dissent in *Fry* observed that the majority's "blanket prohibition against the use of preliminary hearing statements at trial" will "set this jurisdiction apart from virtually every other jurisdiction in the country." Id. at 982 (Coats, J., dissenting) (citing numerous cases).

cate objections and impose reasonable limits on the scope of cross-examination.[214]

[214] An early draft of the Oregon bill includes the following provisions:

Section 1. (a) Whenever a victim or witness has previously made a statement that the district attorney believes is testimonial under the United States Constitution and for which there is a hearsay exception under the Oregon Evidence Code, upon the motion of the district attorney the Circuit Court shall conduct a hearing allowing a suspect or criminal defendant an opportunity to cross-examine the victim or witness regarding any such statement if the district attorney wants to admit such evidence in a future criminal case and the district attorney believes that a victim or witness may:

(1) Die;
(2) Become mentally or physically unable to testify;
(3) Recant his or her testimony;
(4) Make him or herself unavailable; or
(5) Otherwise be unavailable.

Section 2. In a hearing described in Section 1 of this Act, the district attorney is entitled to examine the victim or witness. The scope and manner of any examination, or re-direct examination by the district attorney or cross-examination by the defense shall be such as would be allowed in the trial itself.

Section 3. (1) The district attorney shall give to the party or parties reasonable written notice of the time and place for the hearing, unless such notice is given in court and on the record. The notice shall state the name of each person to be examined. A copy of any statement made by the victim or witness shall be provided promptly to the suspect or defendant. A court shall redact from such statement any portion that (a) could endanger the physical safety of the victim or witness, or (b) subject the victim or witness to further economic loss. If notice is given in court, a hearing date shall be set immediately.

(2) Notice of the hearing can be given in open court, in writing to the defendant or suspect or by publication if the defendant or suspect intentionally avoids service, intentionally absconds the jurisdiction in order to avoid service or detection, or changes his or her identity to avoid detection or prosecution.

(3) If the defendant or suspect is in custody, the officer having custody of the person shall be notified of the time and place of the hearing and shall produce the person for the hearing. A defendant or suspect may waive his or her right to be present.

(4) A defendant or suspect not in custody shall have the right to be present at the examination, but a knowing failure to appear after notice shall constitute a waiver of the right. A defendant or suspect who forgets about the hearing also shall be deemed to have waived his or her opportunity to cross-examine the witness or victim. Once served, the burden is on the suspect or defendant to show they were physically unable to attend the hearing. The district attorney shall set the hearing date and may include the date in the initial notice.

(5) A circuit court judge shall conduct the hearing. The hearing shall be held no sooner than one judicial day, but no more than 5 judicial days after notice is given to the suspect or defendant. The court shall expedite the hearing if the district attorney demonstrates that the victim or witness, because of physical or

By invoking this procedure, the government would be able to use two categories of hearsay statements by victims. First, the government would be able to use the victim's testimony at the hearing itself. Second, the government would be able to introduce the declarant's hearsay statements preceding the hearing (assuming that the government provided the defendant in a timely manner with a recording or written report detailing the statements).[215]

No published opinion has considered whether *Crawford* would abide this procedure. However, the prosecution used analogous tactics in *People v. Holloway*.[216] There, the prosecution foresaw that an important witness might be unavailable during a murder trial. This witness, a police officer, testified at a "conditional hearing" before trial (the hearing was "conditional" because the witness's testimony would only be introduced at trial on the condition that he were unavailable for good cause). At the pretrial hearing, the defendant availed himself of the opportunity to cross-examine the government witness. The government later introduced a videotape of the hearing at trial after demonstrating to the satisfaction of the court that the witness was unavailable to testify. The appellate court quickly dismissed the defendant's protests under the Confrontation Clause because *Crawford* itself allowed the admission of

mental deterioration, may be unavailable unless the hearing is expedited. If a court, at the request of the suspect or defendant, continues the matter beyond the time limit set by this section and the victim or witness becomes unavailable, the defendant or suspect is deemed to have waived his or her right to cross-examine the victim or suspect.

(6) The suspect or defendant is entitled to have an attorney present and participate during the hearing. If the suspect has not been formally charged, the city or the county of the agency doing the investigation shall be responsible for the costs of the attorney fees if the suspect cannot afford to hire an attorney. The court shall appoint an attorney from the court appointed contract list and the city or county shall be responsible for the unit cost established by the Public Defense Services Commission under ORS 151.216. If the city or county does not have a contract lawyer that has unit costs, the court shall appoint an attorney and pay that lawyer at a rate to be determined by the schedule of compensation established by the Public Defense Services Commission.

(on file with the Virginia Law Review Association).

[215] See supra notes 206–08 and accompanying text (indicating that cross-examination during a pretrial hearing suffices to allow the use at trial of those hearsay statements as to which the defendant cross-examined the declarant during the pretrial hearing).

[216] No. A100614, 2004 WL 1168023 (Cal. Ct. App. May 26, 2004).

testimonial hearsay if "the witness is unavailable and the defendant *had prior opportunity for cross*."[217]

Apart from meeting the requirements of *Crawford*, the proposal of ad hoc hearings for pretrial cross-examination offers several distinct advantages. The court would not need to hold such hearings at the same time as the court's busy calendar of preliminary hearings. The very nature of the hearing would put parties on notice as to its purpose. The hearing could take place at a later stage of the prosecution than a preliminary hearing, which by law must occur within a day or two of the defendant's arrest. The ad hoc hearing would afford defense counsel more time for preparation than would a preliminary hearing. Further, the government could not schedule an ad hoc hearing without providing defense counsel with a police report setting forth the details of the statement. The scope of the hearing would not be limited to a determination of probable cause. For critics who hold the same concerns that the Colorado Supreme Court expressed in *Fry*, the ad hoc hearing offers a much more attractive forum for pretrial cross-examination than does the preliminary hearing.

3. Depositions

It is possible that the increased use of pretrial depositions could meet the demands of *Crawford*, but this strategy would require revisions in federal and state evidence codes. Currently, Federal Rule of Criminal Procedure 15 only allows pretrial depositions "in extraordinary circumstances." While some state legislatures allow pretrial depositions to preserve testimony in criminal cases, the grounds for taking such depositions generally do not include the possibility that the witness might recant or refuse to cooperate at trial. Such restrictive rules are inappropriate after *Crawford* has greatly raised the stakes of confrontation. A better rule would be to allow pretrial depositions in certain categories of cases as a routine matter. Where possible, pretrial depositions should be videotaped, so that jurors at trial could observe the demeanor of the witnesses who testified at the depositions.

The few reported post-*Crawford* cases involving pretrial depositions have found this procedure adequate to satisfy the Confronta-

[217] Id. at *5.

tion Clause. In *Liggins v. Graves*, the defendant challenged his conviction for murdering a child.[218] He claimed that the trial court erroneously admitted a transcript of a witness's deposition taken two years after the murder and six months before trial. The witness was not available for cross-examination at trial due to mental infirmity. The U.S. District Court for the Southern District of Iowa found that the admission of the transcript comported with *Crawford*, even though the witness had exhibited signs of mental infirmity during the deposition as well.[219]

Another relevant case, *Blanton v. State*, arose from allegations that the defendant sexually assaulted his 11-year-old daughter.[220] The girl made a statement to police about her father's actions. Later, the defendant deposed the victim regarding these allegations. By the time of trial, the girl was unavailable to testify due to post-traumatic stress syndrome. The trial court admitted a recording of the girl's statement to police. The defendant cited *Crawford* in his appeal and claimed that the admission of the girl's statement to police violated his confrontation rights. The appellate court held that the pretrial deposition was sufficient for *Crawford*'s requirements, even though the defendant complained that his attorney was not very zealous in the deposition.[221]

In *Howard v. State*, the defendant appealed his conviction for molesting a minor girl.[222] Defense counsel deposed the girl before trial, although the defendant himself was not present. At trial, the girl began testifying, but she suddenly became very distraught and could not continue. The trial court determined that she was unavailable as a trial witness. The court admitted her deposition testimony in lieu of further live testimony. On appeal, the defendant insisted that this procedure had violated his confrontation rights under *Crawford*. The appellate court found no *Crawford* violation, because the deposition had afforded an opportunity for cross-examination, even though the defendant himself had not attended the deposition.[223]

[218] No. 4:01-CV-40166, 2004 WL 729111 (S.D. Iowa Mar. 24, 2004).
[219] Id. at *7.
[220] 880 So. 2d 798 (Fla. Dist. Ct. App. 2004).
[221] Id. at 801.
[222] 816 N.E.2d 948 (Ind. Ct. App. 2004).
[223] Id. at 958–59.

From the victim's standpoint, cross-examination at depositions may be preferable to cross-examination at other pretrial hearings. Nicole Lindenmyer of the Battered Women's Legal Advocacy Project has written that victims of domestic violence find depositions to be less traumatic than testimony at trial. "Depositions are usually much less stressful" argues Lindenmyer, because "the victim may have her own attorney present, and she can take breaks as often as needed."[224] Lindenmyer urges that advocates for domestic violence victims should "encourage prosecutors to take the deposition of the witness in case she is unavailable for trial."[225]

There are a few noteworthy disadvantages to depositions. Chief among them is the wide scope of questioning by the attorneys, who are unfettered by direct judicial supervision. In addition, parties must bear the costs of transcribing depositions, which could be significant where the defendant wishes to conduct an extensive cross-examination. Finally, a number of states' constitutional provisions prohibit pretrial depositions of victims in criminal cases;[226] in these states, a statute permitting pretrial depositions would only be useful as to witnesses other than crime victims.

Videotaped deposition testimony has its detractors. The Fifth Circuit raised the following concerns in *Aguilar-Ayala v. Ruiz*:

> Only through live cross-examination can the jury fully appreciate the strength or weakness of the witness' testimony, by closely observing the witness' demeanor, expressions, and intonations. Videotaped deposition testimony, subject to all of the rigors of cross-examination, is as good a surrogate for live testimony as you will find, but it is still only a substitute. Even the advanced technology of our day cannot breathe life into a two-dimensional broadcast. Trial by deposition steps hard on the right of criminal defendants to confront their accusers.[227]

[224] Lindenmyer, supra note 29, at 4.

[225] Id.

[226] E.g., Ariz. Const. art. 2, § 2.1.5 (adopted 1990); Idaho Const. art 1, § 22(8) (adopted 1994); La. Const. art. 1, § 25 (adopted 1998); Or. Const. art. 1, § 42(1)(c) (adopted 1999). For an interstate comparison of victims' rights measures, see the website for the National Victims' Rights Constitutional Amendment Network, at http://www.nvcan.org/canswy.html (last accessed Mar. 1, 2005).

[227] 973 F.2d 411, 419 (5th Cir. 1992).

In response to these concerns, however, it is important to remember that the alternative to videotaped testimony is not necessarily live testimony; the proper comparison is between videotaped testimony and no testimony at all. By requiring unavailability as a condition for the admission of deposition testimony in a criminal trial, *Crawford* has appropriately relegated such testimony to a second-tier status.

In sum, legislators preparing to respond to *Crawford* must give the Supreme Court what it wants: more cross-examination. That cross-examination can come during trial or before trial. The pretrial option is attractive because it minimizes the likelihood that witnesses will be lost pending trial, and it quickly disseminates information that could lead to a plea or other pretrial disposition. Legislatures should take the necessary steps to expand pretrial cross-examination in domestic violence cases, subject to reasonable conditions that protect victims from harassment.

B. Proposals to Expand Scope of Admissible Hearsay

In the first few months after *Crawford*, some defendants[228] and commentators[229] suggested that courts should declare unconstitutional those specialized hearsay exceptions for cases involving domestic violence, child abuse, and elder abuse. So far, the courts have generally declined to follow this suggestion, except when the statute in question could only be applied in a manner that violates *Crawford*. For example, an appellate court in California recently overturned that state's hearsay exception for statements by dependent adults,[230] because the only statements that could qualify under the statutory criteria would necessarily offend the *Crawford* rule.[231]

[228] People v. Espinoza, No. H026266, 2004 WL 1560376, at *6 (Cal. Ct. App. July 13, 2004); People v. Zarazua, No. H025472, 2004 WL 837914, at *3 (Cal. Ct. App. Apr. 20, 2004); People v. Argomaniz-Ramirez, 102 P.3d 1015 (Colo. 2004) (en banc).

[229] Karan & Gersten, supra note 21, at 22; Patrick A. Tuite, Ruling Signals Limits on Hearsay, Chi. Daily L. Bull., May 26, 2004, at 5. See also Brian MacNamara, Re-Examining New York's Hearsay Exceptions in Light of *Crawford*, N.Y. L.J., Mar. 29, 2004, at 4.

[230] Cal. Evid. Code § 1380 (West Supp. 2005).

[231] People v. Pirwani, 14 Cal. Rptr. 3d 673 (Ct. App. 2004).

The courts' general reluctance to strike down statutory hearsay exceptions after *Crawford* seems sensible. The mere possibility that a hearsay statute could be applied unconstitutionally does not mean that the statute is unconstitutional on its face. For example, courts have known for decades that prosecutors could possibly invoke FRE 801(d)(2)(A) to introduce admissions in violation of the *Bruton* rule,[232] but courts have handled this issue on a case-by-case basis rather than striking down the rule as unconstitutional. Consider also the statutory hearsay exception for declarations against penal interest: Although the Supreme Court held twice in five years that the government had violated the Sixth Amendment by introducing declarations against interest that implicated a third party,[233] the Supreme Court did not strike down FRE 804(b)(3) or its state counterparts as unconstitutional. If statutory language can be applied in two ways—one constitutional and one unconstitutional—the preferable approach is to leave the statute intact, but to provide clear judicial guidance for case-by-case analysis. The specialized hearsay statutes for domestic violence cases are susceptible to unconstitutional application in some circumstances, but in many other circumstances the use of these statutes will not violate *Crawford*. Hence, courts should not strike the statutes down categorically.

Far from requiring the decimation of novel hearsay statutes, the Supreme Court's decision in *Crawford* should embolden legislatures to consider *expanding* the scope of admissible hearsay in appropriate circumstances. *Crawford* identified a problem—the lack of cross-examination when courts admit testimonial hearsay—and then *Crawford* solved that problem by insisting on cross-examination. Viewed as a solution rather than as a problem, the *Crawford* decision actually liberates state legislatures to consider new hearsay exceptions for testimonial hearsay in criminal trials, provided that the new statutes guarantee compliance with *Crawford*.

The Supreme Court's pronouncement that all testimonial hearsay will be subject to cross-examination has eliminated one of the

[232] In *Bruton v. United States*, the Supreme Court announced a rule barring the admission of hearsay statements by one nontestifying defendant if the statements implicate another defendant in the same trial. 391 U.S. 123 (1968).

[233] *Crawford*, 124 S. Ct. 1354 (2004); Lilly v. Virginia, 527 U.S. 116 (1999).

concerns that hindered the development of hearsay law. The drafters of the Federal Rules of Evidence took a cautious approach to certain categories of hearsay precisely because the drafters worried about the availability of the declarant for cross-examination.[234] For example, the Rules' drafters balked at including a hearsay exception for prior recorded statements by an absent declarant,[235] but the Rules allow the use of these statements when the declarant takes the stand and is available for cross-examination.[236] The Rules' drafters were very wary about out-of-court statements to police by accusers identifying their assailants,[237] but the Rules liberally admit such statements when the declarant appears in court for cross-examination.[238]

There is a certain symmetry in expanding statutory hearsay exceptions after the Supreme Court's fortification of the Confrontation Clause. Strong confrontation rights counterbalance expansive hearsay exceptions. This balancing effect has been evident at the state level. Oregon innovated the nation's most aggressive hearsay exceptions for domestic violence prosecutions,[239] and concomitantly Oregon enforced its confrontation clause more strictly than most other states, even before *Crawford*.[240] Idaho, by contrast, has the nation's weakest confrontation law,[241] and Idaho has never adopted a single statute that liberalizes the admission of hearsay in domestic violence cases.[242] Because confrontation law checks statutory hearsay law, it is natural that they should grow in proportion to one another.

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[234] Friedman, supra note 37, at 512 (1997).

[235] See 120 Cong. Rec. 2387 (1974).

[236] Fed. R. Evid. 803(5).

[237] Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Fed. Crim. Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. on Proposed Rules of Evidence (1973).

[238] Fed. R. Evid. 801(d)(1)(C).

[239] E.g., Or. Rev. Stat. § 40.460, Rule 803(26) (2004) (exception for cases involving domestic violence); Or. Rev. Stat. § 40.460, Rule 803(18) (2004) (exception for cases involving child abuse and elder abuse).

[240] See State v. Moore, 49 P.3d 785, 789 (Or. 2002) (declining to follow *Inadi* and *White* in dispensing with unavailability requirement for "firmly rooted" hearsay exceptions).

[241] Idaho does not even have a confrontation clause. D. Craig Lewis, Idaho Trial Handbook § 19:2:10 (2004).

[242] Idaho Rules of Evidence 803 and 804 lack any specific provisions for domestic violence cases.

Notions of "balance" are antithetical to Justice Scalia's analysis in *Crawford*, because of course the Court's duty is to protect cross-examination for its intrinsic worth as a constitutional right, rather than its utilitarian value as a counterweight to statutory law. In the legislative realm, however, policy concerns—and an awareness of *Crawford*'s safety net—are undeniably appropriate considerations that guide the reform of statutory hearsay law. If *Crawford* has taught us anything, it is to compartmentalize the analyses of confrontation and reliability. At least with respect to testimonial hearsay, *Crawford* relegates to legislatures the question of whether certain categories of out-of-court statements are sufficiently reliable to merit an exception from the ban on hearsay. In other words, *Crawford* clarified that the legislature should handle the policy issues in hearsay law, and the courts should set the constitutional parameters. Against that backdrop, it is appropriate to consider policy-driven proposals for reforms of statutory hearsay law that would facilitate effective prosecutions of domestic violence after *Crawford*.

1. Victims' Statements Within 24 Hours of Abuse

All states would benefit from adopting a version of Oregon Evidence Code 803(26), which admits a hearsay statement by a victim of domestic abuse to police or other official personnel within 24 hours of the incident, as long as sufficient indicia of reliability are present. In an abundance of caution, legislatures in other states should limit the application of this new exception to statements by declarants who either (1) are presently available for cross-examination, or (2) are presently unavailable, but whom the defendant once had an opportunity to cross-examine.[243] So modified,

[243] The following language could serve as a boilerplate for states other than Oregon:

> (a) In a criminal trial, [the rule prohibiting hearsay] shall not apply to a statement that purports to narrate, describe, report or explain an incident of domestic violence, if the statement was made by a victim of the domestic violence within 24 hours after the incident occurred, and the following additional requirements are satisfied:
>
> (A) The declarant is presently available for cross-examination, or, if the declarant is unavailable, the accused had a prior opportunity to cross-examine the declarant regarding the statement;
>
> (B) The statement was recorded, either electronically or in writing, or was made to a law enforcement officer, corrections officer, youth corrections offi-

the statute would always comply with *Crawford*; indeed, the statute could not possibly admit a hearsay statement that *Crawford* would exclude.

When Oregon first passed this hearsay exception in 1999, opponents' primary concern was the lack of opportunity for cross-examination if the declarant did not testify.[244] Even the author of the present Article recommended against importing this rule to the Federal Rules of Evidence, in part due to concerns about defendants' confrontation rights.[245] However, with an overlay of confrontation requirements, the exception becomes nearly as innocuous as an FRE 801(d)(1) exception (requiring, as a condition for admissibility, the declarant's availability for cross-examination).

The justification for the 24-hour exception rests on the traditional criteria of necessity and reliability.[246] Hearsay statements by victims of domestic violence within 24 hours of the incident in many cases provide the only candid account of what happened. The proposed hearsay exception would admit only reliable evidence because the statute requires the trial court to find sufficient indicia of reliability, emphasizing such considerations as the decla-

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cer, parole and probation officer, emergency medical technician or firefighter; and

(C) The statement has sufficient indicia of reliability.

(b) In determining whether a statement has sufficient indicia of reliability under paragraph (a) of this subsection, the court shall consider all circumstances surrounding the statement. The court may consider, but is not limited to, the following factors in determining whether a statement has sufficient indicia of reliability:

(A) The personal knowledge of the declarant.

(B) Whether the statement is corroborated by evidence other than statements that are subject to admission only pursuant to this subsection.

(C) The timing of the statement.

(D) Whether the statement was elicited by leading questions.

(E) Subsequent statements by the declarant. Recantation by a declarant is not sufficient reason for denying admission of a statement under this subsection in the absence of other factors indicating unreliability.

See Or. Rev. Stat. § 40.460, Rule 803(18) (2004).

[244] E.g., Laird Kirkpatrick, Oregon Evidence § 803.28 (2003); Peter R. Dworkin, Confronting Your Abuser in Oregon: A New Domestic Violence Hearsay Exception, 37 Willamette L. Rev. 299 (2001).

[245] Tom Lininger, Evidentiary Issues in Federal Prosecutions of Domestic Violence, 36 Ind. L. Rev. 687, 715–16 (2003).

[246] 5 Wigmore, supra note 38, §§ 1421–22 (establishing necessity and reliability as principles underlying hearsay exceptions).

rant's personal knowledge, the temporal proximity of the statement to the alleged abuse, the existence of any corroboration, and the degree to which the statement was elicited by leading questions. Considered as a category, the statements subject to the 24-hour rule are the most reliable statements by a domestic violence victim; victims' statements generally grow less reliable as trial draws nearer.

Indeed, the safeguards in the 24-hour exception provide a much stronger assurance of reliability than do many hearsay rules presently included in the Federal Rules of Evidence. It is instructive to compare the proposed 24-hour rule with FRE 801(d)(1)(B) (admitting prior consistent statements) and FRE 801(d)(1)(C) (admitting prior statements of identification). All three of these provisions require that the declarant must be available at trial. But FRE 801(d)(1)(B) and FRE 801(d)(1)(C) require little else, while the 24-hour rule imposes several extra requirements assessing the trustworthiness of the speaker and the surrounding circumstances.

One benefit of the 24-hour rule is the clear guidance that it would provide to law enforcement officers. In jurisdictions adopting this rule, police agencies would devise protocols ensuring that officers would promptly interview the victim and then inform her as soon as possible of the court date on which she would appear for cross-examination (at a preliminary hearing or special hearing for cross examination).[247] So long as the officers interviewed the victim within 24 hours of the incident, the officers would not need to fret about the highly subjective assessments of demeanor and affect that are necessary to sustain admission of hearsay under the excited utterance rule. Indeed, police would no longer face the perverse pressure to maintain a high level of anxiety in the victim so that her statements would more likely qualify as excited utterances. Police now could urge the victim to calm down before they interviewed her. Permitting her to regain some composure could improve the reliability of the evidence, and could minimize the trauma of the interview. The investigation of a domestic violence case could focus more on the victim's needs than on the peculiar exigencies of the evidentiary rules.

[247] See proposals set forth supra in Section III.A.

Another benefit of the 24-hour exception for domestic violence cases is that it would help to preserve the doctrinal integrity of the excited utterance rule. Stretched almost to the breaking point in the past two decades, the rule should now return to its originally intended shape as Justice Scalia insists on tighter temporal proximity for excited utterances.[248] Prosecutors' expedient misuse of the excited utterance rule in domestic violence cases has blown this rule out of proportion, so that it now applies to statements made several minutes after the startling event. Rulings that liberally admit "excited" statements by domestic violence victims become inappropriate precedent for civil cases and criminal cases not involving domestic violence.

It is time to acknowledge that the rationale for admitting a victim's statement to responding officers is not the hysteria of the declarant, but the need for a timely account of the crime before the pressure to recant overwhelms the victim.[249] A hearsay exception that admits statements by victims within 24 hours of the abuse, while guaranteeing defendants an opportunity to cross-examine the declarants, would enable effective prosecutions while respecting the boundaries set by *Crawford*.[250]

2. Victims' Inconsistent Statements in Sworn Affidavits

Federal Rule of Evidence 801(d)(1)(A) and its state analogs should be amended to allow the substantive use of inconsistent prior statements in sworn affidavits by victims of domestic violence. In other words, the government should be able to confront a

[248] See *Crawford*, 124 S. Ct. at 1368 n.8.

[249] For a feminist critique of overreliance on the excited utterance exception in rape cases, see Aviva Orenstein, "My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 Cal. L. Rev. 159 (1997). Orenstein proposes creating a special hearsay exception for victims of rape and sexual assault. Id. at 215–23. See also Raeder, supra note 38, at 1512–17 (justifying a domestic violence hearsay exception based in part upon inadequacy of existing hearsay exceptions such as the exception for excited utterances).

[250] By contrast to the proposal advocated in this Section, California's hearsay exception for a statement narrating an incident of domestic violence, Cal. Evid. Code § 1370 (West 1995), is an awkward fit with *Crawford*. Section 1370 could conceivably apply to both testimonial and nontestimonial hearsay, but this statute requires as a predicate that the declarant must be *unavailable* to testify at trial. Thus this statute is of little value to prosecutors with respect to testimonial hearsay, and it could admit a large amount of nontestimonial hearsay without any guarantee of cross-examination.

recanting victim with the sworn statements she made in a prior affidavit concerning the abuse at issue, and the government should be able to offer these prior statements for their truth. Presently in most jurisdictions, only a limited list of prior inconsistent statements may be offered for their truth under Rule 801(d)(1)A). These include testimony at trial, testimony in a hearing, testimony before a grand jury, and testimony in a deposition.[251] A sworn affidavit by a domestic violence victim deserves inclusion on this list. Like the enumerated categories of prior testimony, the affidavit is given under oath, and misstatements are punishable as perjury. If prior sworn affidavits could be offered for their truth whenever the affiants testified inconsistently at trial, the prosecution of domestic violence would be a far less speculative venture, and abusers would have less reason to believe that they could extricate themselves by suborning their victims' perjury.

Admission of such affidavits under FRE 801(d)(1)(A) would not violate *Crawford*. Consistent with all the provisions of FRE 801(d)(1), the new provision would only apply if the declarants were in court and presently available for cross-examination. *Crawford* permits the admission of testimonial hearsay as long as the declarant is available for cross-examination at trial.[252]

The seminal case allowing substantive impeachment with a sworn affidavit is *State v. Smith*.[253] There, a badly injured woman contacted police and filled out an affidavit to initiate a prosecution of her abuser. After completing the affidavit, the victim encountered the defendant again. He chased her and stole her car keys. By the time of trial, the victim changed her story, evidently in response to pressure by the defendant. She testified at trial that a person other than the defendant had caused her injuries. The prosecution responded by introducing the victim's affidavit. The prosecution argued that the statements in the affidavit were true, and that the victim's testimony at the trial was false. The Supreme Court of Washington upheld the defendant's conviction, concluding that a sworn affidavit is analogous to prior testimony, and may

[251] Binder, supra note 34, § 39:2.

[252] 124 S. Ct. at 1369 n.9 ("[W]e reiterate 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.").

[253] 651 P.2d 207 (Wash. 1982) (en banc).

be used substantively under Washington's version of Rule 801(d)(1)(A).[254]

The results of the present Article's survey suggest that adoption of the *Smith* rule throughout the nation could mitigate the impact of the *Crawford* decision on prosecutions of domestic violence. Prior to *Crawford*, each of the three states surveyed—California, Oregon, and Washington—had taken a different approach to impeachment with prior inconsistent statements. California had allowed substantive impeachment with any prior inconsistent statement.[255] Oregon had adopted the majority rule, whereby most prior inconsistent statements could not be offered for their truth.[256] Washington had followed *Smith* and had allowed substantive impeachment with inconsistent statements in sworn affidavits. In the aftermath of *Crawford*, 89 percent of respondents in Oregon found that Crawford significantly impeded prosecutions of domestic violence cases. Among the remaining respondents in California and Washington, only 51 percent found that *Crawford* significantly impeded prosecutions of domestic violence.[257] In other words, the strict impeachment rules in Oregon correlated with greater difficulty after *Crawford*, while the more permissive impeachment rules in California and Washington correlated with less difficulty after *Crawford*.[258] Many respondents in California and Washington indicated that they dealt with recanting witnesses by calling them in the government's case-in-chief, impeaching them, and arguing that their prior inconsistent statements were truthful.

If wider use of prior inconsistent statements would help to ameliorate the burdens created by *Crawford*, where should states draw the line? Should they allow substantive use of all prior inconsistent statements, as in California, or should they only expand Rule 801(d)(1)(A) to include sworn affidavits, as in Washington? The more prudent alternative would be to emulate the *Smith* rule in Washington. Affidavits are very similar to the categories of prior

[254] Id. at 210–11.

[255] Cal. Evid. Code § 1235 (West 1995).

[256] Or. R. Evid. 801(4)(a)(A) (2003) (virtually identical to Fed. R. Evid. 801(d)(1)(A)).

[257] App. 1, questions 1 & 3.

[258] Of course, it is always risky to infer causation from correlation. A more precise study would be helpful to assess how much of the disparity in *Crawford*'s impact is attributable to differences in the states' impeachment rules.

statements presently admissible under most states' versions of Rule 801(d)(1)(A). The reliability of affidavits is comparable to that of grand jury testimony, which is generally admissible under Rule 801(d)(1)(A). Both grand jury testimony and affidavits are given under oath, and false statements in either the grand jury or in an affidavit could be prosecuted as perjury.[259] Because grand jury testimony and affidavits occupy approximately the same position on the spectrum of reliability, they should be treated consistently under Rule 801(d)(1)(A). Extending Rule 801(d)(1)(A) to cover unsworn statements would be a more radical measure, providing less assurance of the prior statement's reliability, and defying the intent of the Rule's drafters in Congress.[260]

If FRE 801(d)(1)(A) were broadened to cover affidavits, is there a risk that juries would rely too heavily on these affidavits in judging defendants' guilt or innocence? Some jurisdictions have addressed this risk by establishing a rule that recanted statements cannot serve as the sole basis for proving an element of the charged offense.[261] Of course, the jury will naturally be suspicious of a case that relies too much on recanted statements; therefore wise prosecutors will buttress their proof with other corroboration such as physical evidence from the crime scene and testimony of other witnesses.

The liberalized admission of prior inconsistent statements will not solve all the problems created by *Crawford*, but this reform would make some progress. Evidence admissible under Rule

[259] Cross-examination, however, is not available in either a grand jury hearing or in the preparation of an affidavit.

[260] In framing Fed. R. Evid. 801(d)(1)(A), Congress considered and rejected the California approach. Christopher B. Mueller & Laird C. Kirkpatrick, Federal Rules of Evidence 188 (2004).

[261] In the leading case prohibiting reliance on recanted statements as sole proof of an element of an offense, the Sixth Circuit expressed its concern that "the central element of the crime with which the defendant was charged was established entirely through the use of out-of-court statements, made at a time when the defendant had no opportunity to cross-examine the witness as to the accuracy of their accusations." United States v. Orrico, 599 F.2d 113, 118–19 (6th Cir. 1979); see also Brower v. State, 728 P.2d 645, 648 (Alaska Ct. App. 1986); State v. Moore, 485 So. 2d 1279, 1280–82 (Fla. 1986); State v. Allien, 366 So. 2d 1308, 1312 (La. 1978); State v. Pierce, 906 S.W.2d 729, 735 (Mo. Ct. App. 1995); State v. Giant, 37 P.3d 49, 59 (Mont. 2001); State v. Mancine, 590 A.2d 1107, 1116–18 (N.J. 1991); State v. Ramsey, 782 P.2d 480, 484 (Utah 1989). But see People v Cuevas, 906 P.2d 1290, 1302 (Cal. Ct. App. 1995) (rejecting corroboration rule).

801(d)(1)(A) is sure to withstand *Crawford*'s requirements, and this evidence can help to fill the gap left by other categories of evidence that *Crawford* has excluded.

3. Statements by Coerced or Intimidated Victims

All states should codify the doctrine of forfeiture by wrongdoing, which provides that a party who has wrongfully procured the unavailability of a declarant may not invoke the hearsay rules to bar the admission of that declarant's out-of-court statement. The best way for states to incorporate this concept into their evidence codes is simply to adopt FRE 804(b)(6). This rule admits "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the witness."

To date, only nine states have codified the rule in one form or another.[262] The omission of this provision from most states' evidence codes is conspicuous, given that 44 states have modeled their hearsay rules after the Federal Rules of Evidence.[263] The Federal Rules did not add FRE 804(b)(6) until 1997, and most states had already copied the federal blueprint before that time. States that lack a version of FRE 804(b)(6) have not necessarily rejected the concept; they just have not considered whether to adopt it. Legislatures in Oregon, Maryland, and Washington are now considering proposals to add a version of FRE 804(b)(6) to their state evidence codes.[264]

The universal adoption of FRE 804(b)(6) would diminish the detrimental effect of *Crawford* on prosecutions of domestic vio-

[262] Cal. Evid. Code § 1350 (West 1995); Del. R. Evid. 804(b)(6); Haw. R. Evid. 804(b)(7); Mich. R. Evid. 804(b)(6); N.D. R. Evid. 804(b)(6); Pa. R. Evid. 804(b)(6); S.D. R. Evid. 804(b)(6); Tenn. R. Evid. 804(b)(6). Illinois's statute limits application of this rule to domestic violence cases. 725 Ill. Comp. Stat. Ann 5/115-10.2a (West 2004).

[263] Binder, supra note 34, at v.

[264] See Hearing notice, Or. Interim Judiciary Comm., June 9, 2004 (copy on file with the Virginia Law Review Association); Hearing notice, Wash. House Judiciary Comm., Sept. 21, 2004 (copy on file with the Virginia Law Review Association); Fox Butterfield, Guns and Jeers Used by Gangs to Buy Silence, N.Y. Times, Jan. 16, 2005, at A1, available at 2005 WLNR 595287; Editorial, Conspiracy of Silence, Balt. Sun, Feb. 16, 2004, at 18A, available at 2004 WL 68773202; Editorial, Protecting Witnesses, Balt. Sun, July 14, 2004, at 14A, available at 2004 WL 84123923.

lence. To begin with, it is clear that the doctrine of forfeiture by wrongdoing survives *Crawford*. Justice Scalia's opinion in *Crawford* underscored the continuing vitality of this doctrine.[265] Justice Scalia noted that this rule did not rest, as *Roberts* did, on misguided presumptions about the reliability of evidence, but instead the forfeiture rule "extinguished confrontation claims on essentially equitable grounds."[266] In the aftermath of *Crawford*, a number of courts have applied the doctrine of forfeiture to admit hearsay statements when the accused has wrongfully procured the absence of the declarant.[267]

Coercion and intimidation are commonplace in domestic violence cases. *Crawford* has compounded the problem by heightening the importance of the victim's live testimony, thereby increasing the likelihood that the abuser will threaten the victim before trial in the hope of derailing the prosecution. A jurisdiction that lacks a version of FRE 804(b)(6) tempts abusers to silence their victims with threats of continued abuse. If batterers enjoy impunity when they scare their victims away from testifying in court, violence against family members and intimate partners could increase dramatically.

The doctrine of forfeiture by wrongdoing would help to prevent abusers from manipulating witnesses. Police interviewing a victim of domestic violence should inquire whether the abuser has threatened to retaliate against the victim for cooperating with law enforcement. If so, this record of tampering may provide an "insurance policy" that would guarantee admission of the victim's hearsay statements even if the defendant succeeds in procuring the victim's absence. Some authority suggests that the charged offense itself may provide the factual basis for a finding of forfeiture by wrongdoing; other courts are reluctant to permit such "bootstrapping" by the prosecution.[268] Details of the ongoing intimidation

[265] 124 S. Ct. at 1370.

[266] Id.

[267] See, e.g., People v. Jiles, 18 Cal. Rptr. 3d 790, 796 (Ct. App. 2004); People v. Baca, No. E032929, 2004 WL 2750083, at *12 (Cal. Ct. App. Dec. 2, 2004); Gonzalez v. State, No. 04-03-00819-CR, 2004 WL 2873811, at *5 (Tex. App. Dec. 15, 2004).

[268] The law professor amici in *Crawford* specifically approved "bootstrapping" as a means of proving forfeiture by wrongdoing. Their brief indicated that a defendant's wrongdoing could forfeit his confrontation rights "even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness

may be hard to elicit from a battered woman. However, the standard of proof for a threshold evidentiary issue is merely a preponderance of the evidence, and the judge, not the jury, must resolve these issues.[269] The strict enforcement of FRE 804(b)(6), and strong admonitions by trial courts about the rule, will likely discourage defendants from further mistreating victims while awaiting trial.

Is a new hearsay exception necessary for prosecutors to invoke the doctrine of forfeiture by wrongdoing? Some states have recognized the doctrine in their case law but not in their statutory law. Federal circuit courts applied this doctrine repeatedly before the appearance of FRE 804(b)(6) in 1997.[270] Prosecutors in states without a statutory analog of FRE 804(b)(6) should not give up hope of using this doctrine. Indeed, Minnesota prosecutors employed the doctrine successfully two months after *Crawford*, even though

unavailable." Brief of Amici Curiae Law Professors *Crawford* (No. 02-9410), available at 2003 WL 21754958, at *24 n.16 (July 24, 2003); see also Friedman, supra note 37. The post-*Crawford* decisions have generally applied the doctrine of forfeiture by wrongdoing to cases in which the charged offense is the basis for forfeiture of confrontation rights—even when the prosecution has not proven that the defendant committed the charged offense for the purpose of preventing the victim's trial testimony. See, e.g., People v. Jiles, 18 Cal. Rptr. 3d 790, 796 (Ct. App. 2004); People v. Giles, 19 Cal. Rptr. 3d 842, 849–50 (Ct. App. 2004); People v. Baca, No. E032929, 2004 WL 2750083, at *12 n.6 (Cal. Ct. App. Dec. 2, 2004); State v. Meeks, 88 P.3d 789, 793–94 (Kan. 2004); Gonzalez v. State, No. 04-03-00819-CR, 2004 WL 2873811, at *5 (Tex. App. Dec. 15, 2004); But see United States v. Mikos, No. 02 CR 137-1, 2004 WL 1631675, at *5 (N.D. Ill. 2004) ("Allowing otherwise inadmissible evidence to prove a defendant's guilt in a capital case based upon a judge's pretrial conclusion that the defendant is in fact guilty of that very crime appears to us to be a slippery slope.").

[269] Fed. R. Evid. 104(a). Most courts have applied this standard when judging whether the proponent has made the predicate showing to invoke the doctrine of forfeiture by wrongdoing. See, e.g., United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002); United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001); United States v. Ochoa, 229 F.3d 631, 639 (7th Cir. 2000); United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996); United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982); Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1980); United States v. Rivera, 292 F. Supp. 2d 827, 831 (E.D. Va. 2003); United States v. Melendez, No. CRIM. 96-0023, 1998 WL 737994, at *2 (D.P.R. Oct. 15, 1998); People v. Baca, No. E032929, 2004 WL 2750083, at *11 (Cal. Ct. App. Dec. 2, 2004); State v. Henry, 820 A.2d 1076, 1087 (Conn. App. Ct. 2003); State v. Meeks, 88 P.3d 789, 794 (Kan. 2004). Some courts have required clear and convincing proof. See, e.g., People v. Giles, 19 Cal. Rptr. 3d 842, 849 (Ct. App. 2004).

[270] According to the advisory committee's note to Rule 804(b)(6), "[e]very circuit that has resolved the question has recognized the principle of forfeiture by misconduct." Fed. R. Evid. 804 advisory committee's note (listing cases).

Minnesota does not have any equivalent to FRE 804(b)(6) in its evidence code.[271]

Nonetheless, universal codification of FRE 804(b)(6) would be useful to ensure that prosecutors do not overlook an opportunity to apply this doctrine. One recent case illustrated the need for codification of Rule 804(b)(6) in California. In *People v. Kilday*, the prosecution relied heavily on hearsay statements that a victim of domestic abuse had made to police.[272] She recanted before trial, in part because the defendant had threatened to harm her if she cooperated with the government.[273] When the government sought admission of the victim's hearsay statements during trial, the government neglected to mention the doctrine of forfeiture by wrongdoing. The government finally realized the potential applicability of this doctrine by the time the government filed its supplemental appellate brief, but the appellate court found that the argument was too late to be considered.[274] The appellate court vacated Kilday's conviction. Perhaps if California had adopted FRE 804(b)(6), instead of a much narrower forfeiture provision,[275] the California Evidence Code would have alerted prosecutors to raise the forfeiture argument during the *Kilday* trial.

Another reason to codify the doctrine of forfeiture by wrongdoing is that the rule could serve as both a statutory hearsay exception and an exception to the constitutional confrontation requirement. In states without an analog to FRE 804(b)(6), the courts have sometimes required the prosecution to cite an existing statu-

[271] State v. Fields, 679 N.W.2d 341 (Minn. 2004). The Minnesota Supreme Court upheld the trial court's admission of hearsay evidence under the doctrine of forfeiture by wrongdoing. The defendant, charged with murder, had called a prospective witness and threatened reprisals if the witness testified against the defendant. The witness refused to cooperate at trial, and the trial court admitted grand jury testimony by the witness in lieu of his live trial testimony. The defendant cited *Crawford* to claim that the trial court's ruling had violated his rights under the Confrontation Clause. The Minnesota Supreme Court determined that the defendant had forfeited his confrontation rights by wrongfully procuring the unavailability of the witness. Id. at 346–47.

[272] 20 Cal. Rptr. 3d 161 (Ct. App. 2004).

[273] Id. at 166–67.

[274] Id. at 163–64. But see Gonzalez v. State, No. 04-03-00819-CR, 2004 WL 2873811, at *5 n.5 (Tex. App. Dec. 15, 2004) (finding forfeiture by wrongdoing even though neither party raised this argument below).

[275] See Cal. Evid. Code § 1350 (West 1995).

tory hearsay exception in addition to the forfeiture doctrine.[276] As noted by one appellate court in a jurisdiction lacking a version of FRE 804(b)(6), "forfeiture by wrongdoing does not automatically render hearsay statements by an absent witness admissible. Prior statements by an unavailable witness must still fall within a recognized hearsay exception."[277] Such dual requirements might allow a defendant to profit from wrongfully silencing a victim. A defendant who procures the absence of a declarant should face accountability for all the declarant's hearsay statements, not just those fitting within the conventional hearsay exceptions.

Confrontation rights should be a shield, not a sword. The defendant should not be able to frighten away witnesses against him, and then protest their absence when the prosecution seeks to introduce their out-of-court statements. Adoption of FRE 804(b)(6) will help to end such gamesmanship, and will impose a sanction for batterers' continuing abuse of victims.[278]

C. Other Proposals

In addition to the foregoing proposals that would increase opportunities for cross-examination and widen the scope of statutory hearsay exceptions, a number of other proposals deserve consideration in the aftermath of *Crawford*.

[276] In *People v. Pantoja*, 18 Cal. Rptr. 3d 492 (Ct. App. 2004), the defendant appealed his conviction for murdering his girlfriend. The trial court had admitted the victim's statements in an application for a restraining order. The government argued on appeal that the defendant had forfeited his confrontation rights by killing the declarant. The appellate court did not reach this argument because the government had not invoked a valid statutory hearsay exception that would support admission of the affidavit. Id. at 400 & n.2. See also People v. Giles, 19 Cal. Rptr. 3d 842, 850 (Ct. App. 2004) (noting that the government needed a statutory hearsay exception in addition to the doctrine of forfeiture by wrongdoing).

[277] Id.

[278] To be sure, prosecutors must not become carried away with the notion that forfeiture by wrongdoing can circumvent the Confrontation Clause in every domestic violence prosecution. See, e.g., Krischer, supra note 26, at 14 ("[D]omestic violence almost always involves forfeiture."). The forfeiture doctrine should be reserved for cases in which the wrongdoer acted with the specific intent of making the declarant unavailable as a trial witness. Some of the post-*Crawford* decisions applying the forfeiture doctrine have presumed wrongful intent without an adequate factual basis. See Tom Lininger, Yes, Virginia, There is a Confrontation Clause, __ Brook. L. Rev. (forthcoming Sept. 2005).

1. Expert Testimony on Effects of Domestic Violence

All states should adopt a rule similar to California Evidence Code Section 1107, which allows expert testimony

> regarding battered women's syndrome, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.[279]

The phrase "intimate partner battering and its effects" replaced the term "battered women's syndrome" in an amendment that took effect January 1, 2005.[280]

Expert testimony can in some cases help the trier of fact to understand why a victim of domestic violence may testify reluctantly or inconsistently with her prior statements.[281] Expert witnesses can explain the unique pressures brought to bear on battered women. Knowledge of those pressures helps jurors to put the victims' vacillation in context.[282] This insight is particularly important after *Crawford*: By putting more victims in the witness chair, *Crawford* will expose juries to recanted and inconsistent statements in a much higher percentage of cases than ever before, and this spectacle may thwart convictions unless experts can explain the complex psychological effects of battering.

The prototype for such expert testimony was Lenore Walker's original theory of Battered Women's Syndrome.[283] Walker's re-

[279] Cal. Evid. Code § 1107(a) (West Supp. 2005).

[280] This new phrasing reflects concerns in the advocates' community that the term "Battered Women's Syndrome" might be construed to refer to only a subset of the research on the effects of battering—in particular, the work of Lenore Walker—which might not address the full breadth of circumstances faced by battered women. See sources cited infra note 283.

[281] E.g., People v. Zarazua, No. H025472, 2004 WL 837914, at *5 (Cal. Ct. App. April 20, 2004); accord People v. Morgan, 58 Cal. Rptr. 2d 772, 774 (Ct. App. 1996).

[282] For an excellent discussion of the value (and possible misuse) of expert testimony relating to Battered Women's Syndrome, see, 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 (1997); Raeder, supra note 38.

[283] Walker, supra note 119; Lenore Walker, The Battered Woman Syndrome (1984). The California Supreme Court recently summarized Walker's theory in People v. Brown, 94 P.3d 574, 578 (Cal. 2004) ("Walker relied on the psychological concept of

search focused on women who suffer repeated episodes of violence. Some courts have recently held that expert testimony on the effects of battering may be valuable even in cases that do not present a pattern of repeated abuse.[284] After all, the defendant should not get "one free episode" of abuse before Section 1107 is applicable.[285]

The recent decision in *People v. Price* exemplified the value of expert testimony in a case involving a recanting or reluctant witness.[286] As may prove typical in many post-*Crawford* cases, the government questioned the accuser three times about the abuse: in an interview by police shortly after the incident; in a preliminary hearing; and in a truncated direct examination at trial. The accuser gave wildly varying statements. An expert on domestic violence helped to explain how the trauma of battering may affect the psychology of victims, and may lead to seemingly irrational behavior such as recanting prior accusations. After hearing this expert testimony, the jury convicted the defendant of inflicting corporal injury on a spouse, even though two of the accuser's three statements had been favorable to the defendant.[287]

In another post-*Crawford* case, *State v. Plantin*, the government presented expert testimony on battered women's syndrome to explain why the alleged victim had recanted after initially accusing the defendant in a statement to police one week after the incident.[288] The appellate court found that "the expert testimony was appropriate because it could help the jury understand behavior that might otherwise undermine the complainant's credibility."[289]

The lack of cross-examination in the pre-*Crawford* era diminished the need for testimony on the psychological effects of battering. The jury commonly heard only the hearsay version of the events in question, and there were fewer inconsistencies for jurors

'learned helplessness,' under which an animal, or person, repeatedly unable to protect itself against injury, eventually learns that resistance is useless and becomes passive and despondent.").

[284] Id. at 581, 583; *Zarazua*, 2004 WL 837914, at *4–6.

[285] People v. Williams, 93 Cal. Rptr. 2d 356, 363 (Ct. App. 2000); accord *Zarazua*, 2004 WL 837914, at *5.

[286] 15 Cal. Rptr. 3d 229 (Ct. App. 2004).

[287] Id. at 235–37.

[288] 682 N.W.2d. 653 (Minn. Ct. App. 2004).

[289] Id. at 661 (citing State v. Grecinger, 569 N.W.2d 189, 196 (Minn. 1997)).

to digest. Now the jury may often hear two or three different accounts by the victim—her story to police at the scene of the crime, her story at the preliminary hearing, and her testimony at trial—and jurors' understanding of victims' psychology is more important than ever.

2. Improved Protection of Victims Pending Trial

States must take steps to prevent abusers from harassing victims during the period between the initial complaint and the trial. These steps are necessary to avert the loss of victims' testimony, and, more importantly, to prevent victims from suffering further abuse.

The survey of prosecutors' offices in California, Oregon, and Washington found that pretrial release of defendants in domestic violence cases may compound the pressure on victims to recant or avoid testifying. Respondents reported that in 90 percent of the jurisdictions surveyed, courts release the majority of domestic violence defendants at some point pending trial.[290] The same percentage of respondents believed that the pretrial release of defendants is a factor that leads victims to recant or refuse to cooperate by the time of trial.[291]

According to one study that involved interviews of domestic violence victims in Milwaukee, 55 percent of defendants made contact with victims before trial and attempted to influence their testimony or dissuade them from testifying.[292] The defendants' tactics ranged from entreaties to threats to physical abuse.[293]

When a court agrees to release a defendant before trial, the court typically imposes conditions of release, and these conditions may include a requirement that the defendant avoid the victim. The defendant may also be subject to a civil restraining order requiring him to avoid contact with the victim. Yet these measures are often ineffectual. Defendants who are inclined to intimidate their accusers are unlikely to be daunted by such court orders—especially where the only witnesses to violations are the accusers themselves. If a witness can be coerced or enticed not to testify at

[290] App. 1, question 15.
[291] App. 1, question 16.
[292] Davis, Smith & Rabbitt, supra note 106, at 61, 69.
[293] Id. at 62.

trial, then presumably the same coercion and suasion would prevent her from reporting violations of pretrial orders.

Greater pretrial detention of accused batterers is necessary to protect the safety of victims and to prevent witness tampering. To be sure, the criminal justice system is not indifferent to these problems at the present time. Courts already take account of victims' safety in deciding whether to detain defendants pending trial. However, in many jurisdictions, limited funding for jails has led to the release of defendants who would otherwise qualify for detention. Some jails use "matrix" systems that rate inmates on a scale of dangerousness, and fill the available bed space with the most dangerous inmates in the jail at that time. Such a system can lead to the release of domestic abusers if the other inmates in the same jail are deemed even more dangerous. In Oregon, for example, budget pressures led to the release of a defendant in a domestic violence case who murdered the accuser during a break at a hearing.[294] Legislatures must appropriate sufficient funding for the detention of defendants posing a danger to the community.

In addition to detaining more defendants pending trial, courts and legislatures should consider other measures to improve protection of victims. Electronic monitoring of defendants on pretrial release is expensive, but it provides a reliable means of tracking their whereabouts and may deter them from returning to the victims' residences. Courts should also order counseling for defendants even before trial, if warranted by the circumstances. Relocation of victims to shelters or hotels at the government's expense is another option that deserves more attention in domestic violence cases. Finally, legislatures should provide adequate funding for victims' advocates (commonly affiliated with district attorneys' offices) who give support to victims, inform them of resources for their protection, and monitor the defendants' compliance with pretrial orders.

3. Prompt Disposition of Cases

As *Crawford* greatly increases the importance of a victim's testimony at trial, it is vital to ensure that the trial begin promptly after the alleged offense. A victim's motivation to testify decreases

[294] Failed by the System, supra note 109.

with time,[295] while the opportunities for witness tampering increase. Because domestic violence prosecutions do not rest on physical evidence or other immutable proof, justice delayed may be justice denied.

Several strategies are possible to reduce delay in bringing domestic violence cases to trial. One alternative is to create "domestic violence courts" with lighter dockets and specialized expertise. For example, the establishment of domestic violence courts in Milwaukee reduced case processing time by 50 percent.[296] Interviews of victims indicated that pretrial intimidation by defendants declined considerably. The conviction rate in domestic violence cases increased by 25 percent.[297]

Another option might be to amend the federal and state "speedy trial" legislation to ensure that courts require a substantial showing of urgency before granting a continuance of a domestic violence prosecution. Such an amendment would be consistent with the purpose of this legislation, which is to protect not only the rights of criminal defendants, but also the rights of crime victims and the public.[298]

4. Alternative Criminal Charges Not Requiring Victims' Testimony

There is no escaping the conclusion that prosecutions of domestic battery will be much more difficult after *Crawford*. To address this development, state legislatures should diversify the charges that prosecutors can bring against batterers. In particular, legislatures should equip prosecutors to bring two categories of charges that do not depend heavily on witness testimony: possession of firearms by domestic abusers, and criminal contempt for violation of restraining orders.

The former charge is particularly promising. Congress has prohibited the possession of firearms by any person against whom a

[295] Robert C. Davis & Barbara E. Smith, Crimes Between Acquaintances: The Response of the Criminal Courts, 6 Victimology 175, 176 (1981).

[296] Davis, Smith & Rabbitt, supra note 106, at 66.

[297] Id. at 66–70.

[298] See House Judiciary Comm. Rep. supporting the Speedy Trial Act,H.R. Rep. No. 93-1508, at 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7408; see also United States v. Lloyd, 125 F.3d 1263, 1268 (9th Cir. 1997) (citing H.R. Rep. No. 93-1508).

restraining order is pending in a domestic violence case.[299] Congress has also outlawed gun possession by any person previously convicted of a domestic violence offense (whether that offense was a felony or a misdemeanor).[300] There are tens of thousands of Americans who violate these statutes every day,[301] but federal prosecutors charge fewer than 100 violators per year[302] due to limitations on federal law enforcement resources.

The states should take a more aggressive role in prosecuting firearms offenses related to domestic violence—both because this proposal is intrinsically a good idea,[303] and because such prosecutions could absorb some of the slack created by *Crawford*'s restrictions on domestic assault prosecutions. Most state legislatures have not yet adopted the gun ban for domestic abusers.[304] The states are in a much better position than the federal government to enforce this gun ban. As a general matter, over 95 percent of all crimes are prosecuted in state court. Moreover, state-level investigations are the most likely avenue for discovering violations of the gun ban for domestic abusers.

From an evidentiary standpoint, these gun prosecutions are very straightforward. They rarely require live testimony or hearsay statements by victims of domestic violence.[305] In fact, the government need only prove a few elements to prevail in such a prosecution: (1) the defendant's possession of a firearm; (2) his status as a "prohibited person" (for example, a person against whom a restraining order is pending, or a person who has previously been

[299] 18 U.S.C. § 922(g)(8) (2000).

[300] Id. § 922(g)(9).

[301] See United States v. Wilson, 159 F.3d 280, 294 (7th Cir. 1998) (Posner, J., dissenting) (estimating that possibly 40,000 Americans are violating § 922(g)(8)).

[302] Tom Lininger, A Better Way to Disarm Batterers, 54 Hastings L. Rev. 525, 530–31 (2003).

[303] As a general matter, the involvement of a firearm increases the likelihood that an episode of domestic violence will cause the death of the victim. One study of family and intimate assaults in Atlanta found that these assaults were 12 times more likely to result in death if a firearm was present. According to a 1997 study that analyzed homicide cases in which women were killed by intimate acquaintances, such murders were 14.6 times more likely to occur in a household with a history of domestic violence, and 7.2 times more likely to occur in a household where firearms were present. Lininger, supra note 302, at 528–29.

[304] Lininger, supra note 302, at 570.

[305] Tom Lininger, Evidentiary Issues in Federal Prosecutions of Violence Against Women, 36 Ind. L. Rev. 687, 713 (2003).

convicted of a domestic violence misdemeanor); and, in federal court, (3) the movement of the firearm in interstate commerce (generally a perfunctory requirement).[306] The defendant's possession of a firearm can usually be proven by an officer's testimony about seizing the gun from the defendant's residence, his car, or his person. Due to the ease with which such cases may be proven, the conviction rate is 98 to 99 percent in federal court.[307]

In addition to facilitating state-level enforcement of the gun ban for domestic abusers, legislatures should enact laws and appropriate adequate funding to enable more criminal prosecutions for violation of restraining orders. At present, only a fraction of respondents who violate restraining orders are prosecuted for criminal contempt. A number of limitations have hampered these prosecutions: lack of uniform evidentiary rules; confusion as to the egregiousness of the violation required to establish contempt; shortage of police dedicated to investigating such offenses; and perplexing due process requirements arising from the hybrid civil-criminal nature of contempt proceedings. Legislatures could eliminate many of these impediments by establishing a standardized code that would apply to all prosecutions for violation of restraining orders, and by providing enough funding for local police and prosecutors to enforce the code. Because the testimony of battered women is rarely necessary to show a violation of a restraining order—the defendant's physical presence in proximity to the petitioner is generally proven by the testimony of responding officers—these prosecutions could help replace some of the assault prosecutions foreclosed by *Crawford*.[308]

CONCLUSION

There are two general ways to salvage domestic violence prosecutions after *Crawford*. One is to engage in the intellectually dis-

[306] 18 U.S.C. § 922(g) (2000).

[307] Lininger, supra note 305, at 714.

[308] In some of the post-*Crawford* appellate decisions, prosecutors appear to have missed opportunities to file charges for violation of restraining orders when the proof of these violations was plain. For example, in *Pitts v. State*, No. A04A1621, 2005 WL 127049 (Ga. Ct. App. Jan. 24, 2005), the victim claimed in a 911 call that there was some sort of an order banning the batterer from the county, but the prosecution charged battery and related offenses rather than violation of the order.

honest exercise of labeling most statements by victims to police as "nontestimonial," so that *Crawford* would have no application to these statements. Such an approach might seem expedient, but it would not be true to the Supreme Court's interpretation of the Confrontation Clause.[309]

Another alternative would be to acknowledge that a high proportion of the statements by domestic violence victims to police are, in fact, testimonial, and that reforms are necessary to facilitate admission of victims' out-of-court statements while guaranteeing the cross-examination required by *Crawford*.

This Article has taken the latter course. The Article offered proposals that would provide pretrial opportunities for cross-examination, so that the victim's hearsay could be offered even if she were not available to testify at trial. The Article also proposed to expand the scope of admissible hearsay, emphasizing avenues of admissibility that would not offend the *Crawford* rule. Finally, the Article argued that legislatures could do more to protect victims while prosecutions are pending, and that legislatures could equip prosecutors to bring charges other than traditional assault cases in order to diminish reliance on victims' testimony.

There is no question that, even under the proposals suggested in this Article, the implementation of the *Crawford* rule will work a hardship on battered women. Legislative proposals cannot undo a landmark interpretation of constitutional law. At best, legislatures can ameliorate the impact of *Crawford* by maximizing constitutionally permissible opportunities to admit reliable out-of-court statements by battered women.

[309] People v. Cortes, 781 N.Y.S.2d 401, 414 (Sup. Ct. 2004).

APPENDIX 1: SURVEY RESULTS[310]

1. HAS THE CRAWFORD DECISION SIGNIFICANTLY IMPEDED PROSECUTIONS OF DOMESTIC VIOLENCE IN YOUR OFFICE?

63% answered yes (61% in California, 89% in Oregon, and 41% in Washington).

2. ARE PROSECUTORS IN YOUR JURISDICTION MORE LIKELY TO CALL VICTIMS AS WITNESSES IN DOMESTIC VIOLENCE PROSECUTIONS AFTER CRAWFORD?

80% answered yes (83% in California, 88% in Oregon, and 71% in Washington).

3. AFTER CRAWFORD, IS YOUR OFFICE MORE LIKELY TO DISMISS DOMESTIC VIOLENCE CHARGES WHEN THE VICTIM IS UNAVAILABLE OR REFUSES TO COOPERATE?

76% answered yes (80% in California, 79% in Oregon, and 68% in Washington).

4. ARE DEFENDANTS IN DOMESTIC VIOLENCE CASES LESS LIKELY TO PLEAD GUILTY AFTER CRAWFORD?

59% answered yes (48% in California, 84% in Oregon, and 48% in Washington).

[310] This survey was conducted from October 2004 to January 2005 at the University of Oregon School of Law. The survey included responses from 23 counties in California (which collectively included 88% of California's population), 19 counties in Oregon (which collectively included 94% of Oregon's population), and 22 counties in Washington (which collectively included 96% of Washington's population). The counties involved in the survey ranged in size from several million residents to fewer than 10,000 residents. In each county, the survey was presented to the supervisor of domestic violence prosecutions, or in the absence of such a supervisor, the survey was presented to the elected prosecuting attorney or to an attorney with substantial involvement in the prosecution of domestic violence. The survey was conducted by phone and by email. Respondents were informed that their answers would not be attributed to individual offices, and that only the aggregate data would be public. Respondents had the option of answering "yes," "no," or "not applicable" in response to each question. Responses of "not applicable" were excluded from the percentage tallies. Records of all respondents' answers are on file with the author.

5. ARE BATTERED WOMEN LESS SAFE IN YOUR JURISDICTION AFTER CRAWFORD?

65% answered yes (59% in California, 82% in Oregon, and 57% in Washington).

6. PRIOR TO CRAWFORD, DID YOUR OFFICE RELY ON TESTIMONIAL HEARSAY IN MORE THAN HALF OF DOMESTIC VIOLENCE PROSECUTIONS?

54% answered yes (43% in California, 89% in Oregon, and 36% in Washington).

7. PRIOR TO CRAWFORD, DID VICTIMS TESTIFY IN THE MAJORITY OF DOMESTIC VIOLENCE TRIALS?

83% answered yes (87% in California, 76% in Oregon, and 85% in Washington).

8. DOES YOUR OFFICE RELY ON TESTIMONIAL HEARSAY IN MORE THAN HALF OF ALL DOMESTIC VIOLENCE PROSECUTIONS AFTER CRAWFORD?

32% answered yes (17% in California, 67% in Oregon, and 18% in Washington).

9. IN YOUR JURISDICTION, IS IT MORE DIFFICULT TO INTRODUCE 911 CALLS INTO EVIDENCE AFTER CRAWFORD?

56% answered yes (43% in California, 69% in Oregon, and 58% in Washington).

10. DO YOU BELIEVE THAT 911 CALLS SHOULD GENERALLY BE ADMISSIBLE IN DOMESTIC VIOLENCE PROSECUTIONS AFTER CRAWFORD?

95% answered yes (96% in California, 100% in Oregon, and 90% in Washington).

11. IN YOUR JURISDICTION, IS IT MORE DIFFICULT TO INTRODUCE HEARSAY STATEMENTS ELICITED BY POLICE FROM VICTIMS OF DOMESTIC VIOLENCE AT THE SCENE OF THE ALLEGED CRIME?

87% answered yes (83% in California, 95% in Oregon, and 84% in Washington).

12. IN PARTICULAR, IS IT MORE DIFFICULT AFTER CRAWFORD TO INTRODUCE SUCH STATEMENTS WHEN YOU HAVE CHARACTERIZED THEM AS EXCITED UTTERANCES?

52% answered yes (59% in California, 56% in Oregon, and 41% in Washington).

13. WHEN SUBPOENAED AS A WITNESS IN A DOMESTIC VIOLENCE TRIAL, IS A VICTIM LIKELY TO BE COOPERATIVE WITH THE PROSECUTION?

9% answered yes (5% in California, 0% in Oregon, and 20% in Washington).

14. ARE THE MAJORITY OF DOMESTIC VIOLENCE CHARGES MISDEMEANORS IN YOUR JURISDICTION?

82% answered yes (77% in California, 79% in Oregon, and 90% in Washington).

15. IN YOUR JURISDICTION, ARE THE MAJORITY OF DOMESTIC VIOLENCE DEFENDANTS OUT OF CUSTODY FOR AT LEAST A PORTION OF THE PERIOD BETWEEN THE INITIAL APPEARANCE AND THE TRIAL?

90% answered yes (86% in California, 100% in Oregon, and 86% in Washington).

16. IN YOUR JURISDICTION, IS PRETRIAL RELEASE OF DEFENDANTS A FACTOR THAT LEADS VICTIMS TO RECANT OR REFUSE TO COOPERATE BY THE TIME OF TRIAL?

90% answered yes (82% in California, 94% in Oregon, and 95% in Washington).

17. WOULD THE SAFETY OF DOMESTIC VIOLENCE VICTIMS BE ENHANCED IF PRETRIAL DETENTION OF DEFENDANTS WERE MORE COMMON?

92% answered yes (86% in California, 95% in Oregon, and 95% in Washington).

18. DOES PRETRIAL CROSS-EXAMINATION OF VICTIMS TAKE PLACE IN MORE THAN HALF OF DOMESTIC VIOLENCE CASES IN YOUR JURISDICTION AT THE PRESENT TIME?

29% answered yes (43% in California, 16% in Oregon, and 25% in Washington).