

# *Crawford v. Washington:* The End of Victimless Prosecution?

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## I. INTRODUCTION

Domestic violence offenses are difficult to prosecute because the batterer's actions often make the victim unavailable to testify. Since the mid-1990s, prosecutors have pursued "victimless" prosecutions<sup>1</sup> to combat the problem.<sup>2</sup> Victimless prosecutions seek to introduce reliable evidence without the victim's in-court testimony, often to maintain the victim's safety or to avoid re-victimizing the victim.<sup>3</sup> The victimless prosecution is based largely on the admission of hearsay statements that a victim makes to 911 operators, police officers, doctors, nurses, paramedics, and social workers.<sup>4</sup> Victimless prosecution has been a highly successful tool in society's efforts to eradicate domestic violence and it is made possible by using the unavailable victim's admissible hearsay statements. In its most recent term, the United States Supreme Court decided *Crawford v. Washington*<sup>5</sup> and held

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1. "Victimless" prosecution describes a prosecution in which the domestic violence victim never testifies in the prosecution's case. The term is misleading in that there is a victim to the offense; she simply does not physically appear in court, so the prosecution is "victimless." Some prosecutors refer to victimless prosecutions as "evidence-based" in an effort to recognize that an actual person has been victimized and that prosecution is appropriate because it is supported by the evidence. The term "evidence-based" prosecution can be criticized as meaningless, since all prosecutions must by necessity be based on evidence. This article will use "victimless" rather than "evidence-based" to highlight the central issue in *Crawford* surrounding unavailable victims.

2. See *infra* text accompanying notes 22–63.

3. See *infra* text accompanying notes 26–42.

4. Generally, these statements fall into three categories: excited utterances, FED. R. EVID. 803(2), present sense impressions, *id.* 803(3), and statements to medical personnel, *id.* 803(4). See *infra* text accompanying notes 38–55. Prior to *Crawford*, the above hearsay statements were potentially admissible even when the domestic violence victim did not testify. See *infra* text accompanying notes 43–73.

5. 124 S. Ct. 1354 (2004).

that the Confrontation Clause of the Sixth Amendment bars admission of certain hearsay statements of unavailable witnesses.<sup>6</sup> With its decision in *Crawford*, the Supreme Court placed the future of victimless domestic violence prosecutions in doubt.<sup>7</sup>

This article will explore the *Crawford* decision in the context of victimless prosecutions. Part II will discuss current trends in victimless domestic violence prosecution and the power and control dynamics of domestic violence relationships, including how these dynamics relate to, and create the need for, victimless prosecutions. Part III will discuss the *Crawford* decision. Part IV will explore possible interpretations of *Crawford* within the context of victimless domestic violence prosecutions. Part V will explain why courts should interpret *Crawford* in a way that allows prosecutors to continue to prosecute batterers without a participating victim.

## II. DOMESTIC VIOLENCE AND THE VICTIMLESS PROSECUTION

*Near midnight, Stephanie dials 911. She reports to the 911 operator that her husband, Frank, punched her in the face, dragged her by the hair, and threw her down the stairs. Stephanie is crying and screaming. At times, her speech is unintelligible. The operator asks her where Frank is and whether he has any knives or guns. Stephanie is not sure; she thinks he has left the apartment. In response to questions, Stephanie describes Frank as six feet tall with black hair and a medium build. She gives the operator Frank's last name and his birth date. Stephanie begs the operator to tell the officers to hurry. She says that Frank told her that he would kill her if she called the police. As the operator assures Stephanie that the police are on the way, Stephanie screams that Frank has a knife. Sounds of a scuffle are heard; Stephanie screams, "You cut me. You cut me."*

*Officer Johnson is the first to arrive. He finds Stephanie lying in a fetal position on a bed. He sees that she is bleeding from a severe laceration on her forearm. Stephanie, shaking and crying, tells Officer Johnson that Frank tried to kill her. Officer Johnson secures the scene and locates a bloody knife on the kitchen counter. Frank is not there. Officer Johnson photographs the cut on Stephanie's arm and the blood on her sheets. He places the knife and several photographs of Stephanie and Frank into evidence.*

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6. *Id.* at 1370.

7. *Id.* at 1374 (Rehnquist, C.J., concurring):

I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.

*Stephanie is transported to the hospital emergency room. There, she tells Doctor Jones that Frank cut her and threw her down the stairs. Dr. Jones sutures the laceration on Stephanie's arm and orders blood tests.*

*Robin, a hospital social worker, visits Stephanie. Stephanie tells Robin that Frank is her husband of seven years and that he regularly beats her and forces her to have sexual intercourse. Frank suspected that she was seeing another man and confronted her. Stephanie reports that Frank did not believe her denials and started to beat her. According to Stephanie, Frank asserted that he would never go back to jail with her alive.*

*Several days later, Detective Smith meets with Stephanie and takes additional photographs of Stephanie's injuries. These photographs document severe bruising to Stephanie's back, legs, and face. Detective Smith also discovers that Frank had been convicted of an assault against Stephanie. In the prior case, Stephanie called 911 and was treated by a doctor for broken bones in her wrist and index finger. Stephanie testified at the earlier trial, and Frank was sentenced to six months in jail with credit for time served.*

*Prior to Frank's current trial, Stephanie informs the prosecution that she will not testify. Stephanie indicates that Frank threatened to kill her if she sent him back to jail. She also states that Frank was the sole provider for her household, so she cannot afford to have him in jail. The prosecution is unable to subpoena Stephanie or secure her presence for an interview with the defense.<sup>8</sup>*

#### *A. Domestic Violence Dynamics and Criminal Prosecutions*

Millions of American women are the victims of domestic violence each year; in fact, domestic violence is the leading cause of injury to women.<sup>9</sup> Nearly half of all American women will experience a violent domestic relationship in their lifetimes.<sup>10</sup>

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8. The story of Stephanie is a construct, drawn from my experience prosecuting domestic violence cases at the King County Prosecutor's Office in Seattle, Washington. Although a construct, Stephanie's story reflects a typical domestic violence case. See, e.g., *People v. Hendrickson*, 586 N.W.2d 906 (Mich. 1998); *Humphrey v. State*, No. A-6543, 1999 WL 46541, at \*1 (Alaska Ct. App. Feb. 3, 1999).

9. Joan Zorza, *Women Battering: High Costs and the State of the Law*, in NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 11, 15 (2001) (nearly four million American women are victims of domestic violence each year); Benjamin Z. Rice, *A Voice from People v. Simpson: Reconsidering the Propensity Rule in Spousal Homicide Cases*, 29 LOY. L.A. L. REV. 939, 939-40 (1996) ("Violence is now the leading cause of injuries to women ages 15 through 44 years.") (citing Antonio C. Novello, *From the Surgeon General, U.S. Public Health Service: A Medical Response to Domestic Violence*, 267 JAMA 3132, 3132 (1992)).

10. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 3 (1991).

The battering relationship is not about conflict between two people; rather, it is about one person exercising power and control over the other.<sup>11</sup> Battering is a pattern of verbal and physical abuse, but the batterer's behavior can take many forms.<sup>12</sup> Common manifestations of that behavior include imposing economic or financial restrictions, enforcing physical and emotional isolation, repeatedly invading the victim's privacy, supervising the victim's behavior, terminating support from family or friends, threatening violence toward the victim, threatening suicide, getting the victim addicted to drugs or alcohol, and physically or sexually assaulting the victim.<sup>13</sup> The purpose of the abusive behavior is to subjugate the victim and establish the batterer's superiority.<sup>14</sup>

Historically, the domestic violence victim's refusal to testify precluded prosecution.<sup>15</sup> Jurisdictions relied exclusively on the victim to determine whether to proceed with a domestic violence prosecution.<sup>16</sup> While the

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11. Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome by and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 793 (1996). Raeder explains as follows:

Most commentators appear to agree that coercion, control, and domination are at the heart of domestic violence. While violence is instrumental in maintaining control, it is not the actual goal. Thus, emotional and financial coercion, as well as destruction of property, all mix together with physical battering to maintain the male's domination of his mate.

*Id.* See also Daniel Jay Sonkin & William Fazio, *Domestic Violence Expert Testimony in the Prosecution of Male Batterers*, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 218, 222–223 (Daniel Jay Sonkin ed., 1987); Anne L. Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases*, in DOMESTIC VIOLENCE MANUAL FOR JUDGES 2-5 to 2-6 (Helen Halpert et. al. eds., 1997).

12. Ganley, *supra* note 11, at 2-5 to 2-6; Angela Browne, *Violence in Marriage: Until Death Do Us Part*, in VIOLENCE BETWEEN INTIMATE PARTNERS: PATTERNS, CAUSES AND EFFECTS 50, 52 (Albert P. Cardarelli ed., 1977).

13. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1206 (1993). See also Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 975, 983 (1995).

14. NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 35, 43, 61, 148 (1998).

15. See Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 90 n.6 (1997) (noting that the Texas legislature has said that “[v]ictims of domestic violence are often the only witnesses to the violence. Because of this, when a victim chooses not to testify in a criminal proceeding, he or she may unintentionally weaken the case against the perpetrator, and the case may be dismissed due to lack of evidence.”); see also David M. Gersten, *General Practice: Evidentiary Trends in Domestic Violence*, FLA. B.J., July/August 1998, at 65 (explaining that the refusal of a domestic violence victim to testify destroys the prosecution's case if there is no tangible evidence); cf. Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67, 73 (1998) (“[H]istorically, law enforcement officials have used the lack of victim cooperation as an excuse for their lax response to domestic violence.”).

16. See Morley H. Swingle, et al., *Unhappy Families: Prosecuting and Defending Domestic Violence Cases*, 58 J. MO. B. 220, 220 (2002) (“In the past, most prosecutors routinely dismissed domestic assault cases upon the victim's request. Some jurisdictions still do.”).

charging decision has always remained with the State, the perception that the victim presses charges reflected reality.<sup>17</sup> Many jurisdictions required the domestic violence victim to swear out a complaint after the incident, assuring the prosecution that the victim was willing to participate.<sup>18</sup> When the victim refused to appear for trial, prosecutors' offices traditionally dismissed the case.<sup>19</sup> This remains the status quo in a surprising number of jurisdictions in America.<sup>20</sup>

In any type of criminal case, a victim's refusal to participate in the trial creates credibility concerns and undermines the integrity of the prosecution. At a minimum, these situations require the prosecution to reassess the validity of the case and the decision to proceed. In an effort to achieve a just result and to decide whether to go forward with the prosecution, the prosecutor will consider the need for the victim's testimony, the possible reasons for the refusal, the reliability of possible recantations, the recantations in connection with all the other evidence in the case, and the victim's desires. Often, an assessment of these factors weighs in favor of dismissing the charges because the victim's refusal to testify poses insurmountable proof problems or reflects reasons to question the validity of the initial reports. This assessment is particularly difficult in domestic violence prosecutions because the batterer should not, through manipulation of the victim by threats of further abuse, have de facto control over the State's case.<sup>21</sup>

### *B. Victimless Prosecutions*

In recent years, scholars have increased prosecutors' awareness of the battering power and control dynamic, demonstrating that the batterer's co-

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17. Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?* 63 FORDHAM L. REV. 853, 857 (1994) ("In many jurisdictions, prosecutors routinely drop domestic violence cases because the victim requests it, refuses to testify, recants, or fails to appear in court."); James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1163-1164 (1995) ("Prosecutors are hesitant to charge abusers, or they may bring a lesser charge than the offense mandates. Additionally, prosecutors often are eager to forego prosecution when the victim displays any unwillingness to proceed.").

18. Jo Lynn Southard, *Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 8 PACE INT'L L. REV. 1, 66-67 (1996).

19. Truss, *supra* note 17, at 1163-64.

20. There is some evidence suggesting that a growing number of prosecutors' offices are responding to domestic violence cases. See Peter R. Dworkin, *Confronting your Abuser in Oregon: A New Domestic Violence Hearsay Exception*, 37 WILLAMETTE L. REV. 299, 299 (2001); Brooks Holland, *Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide, or Just a Crack*, 8 CARDOZO WOMEN'S L.J. 171, 175 (2002).

21. See Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 310 (1993) (concluding that "abusers would become more violent and aggressive toward the victim when they learned that she controlled the outcome of the criminal prosecution.").

ercion can result in the victim refusing to testify.<sup>22</sup> Supporting research casts doubt on the victim's autonomy in refusing to testify.<sup>23</sup> In addition, the research challenges the prosecution's unwillingness to proceed without the victim.<sup>24</sup> In several jurisdictions, prosecutors' offices have responded to this greater recognition of the battering dynamic with victimless domestic violence prosecutions.<sup>25</sup> Prior to the development of victimless prosecutions of domestic violence cases, the State would not have been able to hold Frank accountable for his assault on Stephanie if she chose not to testify.

The validity of a victimless prosecution is based on three premises. First, domestic violence is a societal harm.<sup>26</sup> Second, the victim's initial description of a violent incident is often the most accurate.<sup>27</sup> Third, the State should give credence to initial reports where those reports are consistent

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22. See Christopher Shu-Bin Woo, *Familial Violence and the American Criminal Justice System*, 20 HAW. L. REV. 375, 383 (1998); Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?* 7 WM. & MARY J. WOMEN & L. 383, 394 (2001) ("The defendant often attempts to exert his control over the victim through threats and by pressuring the victim not to cooperate with prosecution."); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1315–21 (1993) (showing that the woman's reactions to the battering, including her testimony or lack thereof, is derived from the controlling aspects of the relationship); 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, 4 (2002) (citing studies indicating eighty percent of domestic violence victims refuse to participate in prosecutions because "[b]atterers put hydraulic pressures on domestic violence victims . . ."). Beloof and Shapiro also argue that the problem of "secondary harm" inflicted on victims as a result of mandatory no-drop policies is paradoxical because "an individual victim's choice not to prosecute, to lie on the stand, or to no-show might not be a 'free' choice." This implies that the choice might be dictated by the batterer. *Id.* at 35–36; see also Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1885 (1996). Beloof & Shapiro, *supra*, at 1 ("Batterers pressure domestic violence victims to recant, which typically results in failure of victims to appear, or alternatively, in testimony at trial that is less reliable than the victim's initial report of abuse.").

23. The battering dynamic is also often responsible for a domestic violence victim recanting her initial reports to the police. Beloof & Shapiro, *supra* note 22, at 1. Victimless prosecutions can also be effective in the recantation scenario. See Hanna, *supra* note 22, at 1851–52. However, even if the victim is recanting, as long as she testifies in the prosecution's case-in-chief and is subject to cross-examination, the *Crawford* decision will not apply. *Crawford*, 124 S. Ct. at 1369 n.9. For this reason, this article will focus on the "pure" *Crawford* issue of the completely absent victim.

24. Cochran, *supra* note 15, at 100 (arguing that when the State allows the victim to decide whether to prosecute, "the batterer quickly learns that he can control the decision to prosecute . . ."); Woo, *supra* note 22, at 383–88; Hanna, *supra* note 22, at 1883–1900; Meier, *supra* note 22, at 1305–22; Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 608, 615–21 (2000).

25. Hanna, *supra* note 22, at 1860–65; Allison Frankel, *Domestic Disaster*, AM LAW., June 1996, at 63–64.

26. Hanna, *supra* note 22, at 1865.

27. Beloof & Shapiro, *supra* note 22, at 1.

with other evidence, regardless of whether the victim is willing to participate in the prosecution.<sup>28</sup>

First, domestic violence harms society even though incidents of domestic violence arise only among partners and families. While the behavior occurs within a personal relationship, the harm extends beyond the victim and dramatically affects communities.<sup>29</sup> Each year, domestic violence is responsible for billions of dollars in property damage and loss, medical costs, mental healthcare costs, police and fire protection services, and victims' services.<sup>30</sup> Another societal harm arises when a child is raised in a violent home because that child is more likely to commit criminal acts as an adult.<sup>31</sup>

A second reason for allowing victimless prosecutions is that several observations suggest that the victim's initial reports are the most accurate. First, the initial reports tend to be more consistent with all the other evidence than do recantations or later refusals to testify.<sup>32</sup> Most refusals or recantations minimize the defendant's involvement or exaggerate the victim's share of the blame.<sup>33</sup> The majority of these later versions of domestic violence incidents are not consistent with the other physical evidence in a case.<sup>34</sup> Second, many victims articulate to police officers and prosecutors that their abuser threatened increased violence if the victim exposed the bat-

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28. See, e.g., Hanna, *supra* note 22, at 1874–75 (describing a case where, despite the fact that the prosecutor had sufficient evidence to go forward without the victim's testimony, a well-meaning judge dismissed the case against the victim's husband because of the victim's statement that she wished to avoid state intervention).

29. *Id.* at 1889 (“[S]ome researchers have found that violent offenders in the family are more likely to assault nonfamily”); see also Cochran, *supra* note 15, at 95–96 (“[P]rosecutors should concentrate on domestic violence because ignoring the problem leads to future crime, causes great harm to victims and their children, increases juvenile delinquency, and places great stress on police departments, medical personnel, and mental health providers.”) (citations omitted).

30. Cochran, *supra* note 15, at 95 n.40 (citing Roberta L. Valente, *Domestic Violence and the Law, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK* 1-1, 1-1 to 3-3 (Deborah M. Goelman et al. eds., 1996)).

31. Meier, *supra* note 22, at 1308 (“[S]tudies consistently show what common sense dictates: that living in homes where domestic violence takes place is profoundly traumatic and destructive for children, and that men who beat their female partners are more likely to abuse their children, both violently and sexually.”). See also Cochran, *supra* note 15, at 95 n.38:

Juveniles who witness violence in the home are 24% more likely to commit sexual assault crimes, 74% more likely to commit crimes against the person (including assault, robbery, and theft), 50% more likely to abuse alcohol and drugs, and have a 7% higher likelihood of committing suicide than children who have not witnessed domestic violence.

32. Belooof & Shapiro, *supra* note 22, at 1, 3–4.

33. Hanna, *supra* note 22, at 1900.

34. *Id.* at 1902 (discussing the importance of police documentation at the scene of a domestic violence incident: “[S]tories that the victim or the defendant later give to explain away the violence often contradict the detailed descriptions that the officer gathers.”).

terer's conduct.<sup>35</sup> These same victims often disclose to police details about their relationship with the batterer that are consistent with the dynamics of power and control.<sup>36</sup> The ultimate refusal to testify is consistent with those earlier articulated patterns of power and control.<sup>37</sup>

Finally, the notion that the State should give credence to initial reports, where those reports are consistent with other evidence, supports victimless prosecution. Recognizing that the impact of domestic violence extends beyond a particular intimate relationship, and that the battering dynamic may be behind a victim's recantation or refusal to testify, the State must pursue victimless prosecution when the victim's initial reports are consistent with the other evidence. The victim's refusal to testify or participate in the State's prosecution does not change the fact that the victim and the community have suffered an injury that needs redress.

### *C. Hearsay Exceptions and Victimless Prosecutions*

Victimless prosecution allows a prosecutor to introduce the victim's credible statements without the victim's testimony in court<sup>38</sup> by calling upon evidence rules governing excited utterances, present sense impressions, and statements to medical personnel.<sup>39</sup> These rules are subsections of Rule 803 of the Federal Rules of Evidence, which delineates exceptions to the traditional ban on hearsay evidence.<sup>40</sup> Statements falling within the exception are admitted into evidence based on the assumption that they are credible<sup>41</sup> regardless of who testifies in court about the statements.<sup>42</sup>

Rule 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

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35. Kirsch, *supra* note 22, at 393–95. My experience in prosecuting domestic violence cases includes many similar reports by police officers who have responded to domestic violence incidents.

36. See, e.g., Beloof & Shapiro, *supra* note 22, at 4–5.

37. See *supra* notes 22–25 and accompanying text.

38. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PENN. L. REV. 1171, 1190 (2002).

39. *Id.*; Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 139–41 (1991) (discussing present sense impression).

40. The Federal Rules of Evidence govern the admissibility of hearsay evidence. See FED. R. EVID. 801–807. Rule 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 802 bars the admission of hearsay "except as provided by these rules or other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

41. Leonard Birdsong, *The Exclusion of Hearsay Through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of the Codification of the Concept into Federal Rule 804(b)(6)*, 80 NEB. L. REV. 891, 893–94 (2001).

42. There are twenty-three categories of hearsay evidence that are admissible whether or not the declarant testifies. FED. R. EVID. 803.



excitement caused by the event or condition.”<sup>43</sup> Courts generally require the satisfaction of two conditions prior to admitting a hearsay statement under the excited utterance exception: First, the proponent of the statement must demonstrate that the declarant was under the stress of the event when making the statement; second, the proponent must demonstrate that there was no opportunity for the declarant to reflect on the statement before making it.<sup>44</sup> As the Advisory Committee Notes to the Federal Rules of Evidence indicate, “the theory of [excited utterances] is simply that circumstances may produce a condition of excitement which temporarily stills the capacity for reflection and produces utterances free of conscious fabrication.”<sup>45</sup> A large majority of states have adopted the excited utterance exception to the hearsay rule.<sup>46</sup> In addition, a large number of jurisdictions use the excited utterance exception to conduct effective victimless domestic violence prosecutions.<sup>47</sup>

The present sense impression exception is built upon the same foundational assumptions as the excited utterance exception.<sup>48</sup> Rule 803(1) defines a present sense impression as “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”<sup>49</sup> A present sense impression is an exception to the hearsay rule because the requirement that the statement be made at, or near, the time of the event largely eliminates possibility of memory loss or fabrication.<sup>50</sup> Although used less frequently than other exceptions, the present sense impression exception is still an important tool in domestic violence prosecutions.<sup>51</sup>

Another exception to the hearsay rule that is commonly used in domestic violence cases is the exception for statements made to medical per-

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43. *Id.* 803(2).

44. See 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT THE COMMON LAW § 1750, at 202 (James H. Chadbourne ed. 1976) (“There must be some *occurrence, startling enough* to produce this nervous excitement and render the utterance spontaneous and unreflecting.”) (emphasis in original) (“The utterance must have been *before there has been time to continue and misrepresent*; i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance.”) (emphasis in original); see also Holland, *supra* note 20, at 180–89.

45. ERIC D. GREEN ET AL., FEDERAL RULES OF EVIDENCE 202 (2003 ed.) (citing FED. R. EVID. 803 advisory committee’s note). For a history of the excited utterance rule, see Friedman & McCormack, *supra* note 38, at 1209–24.

46. Friedman & McCormack, *supra* note 38, at 1222.

47. Cochran, *supra* note 15, at 107–08.

48. Green, *supra* note 45, at 201–02 (“In considerable measure [present sense impressions and excited utterances] overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.”) (citing FED. R. EVID. 803 advisory committee’s note).

49. FED. R. EVID. 803(1).

50. Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 907–08 (2001).

51. Asmus, *supra* note 39, at 139.

sonnel.<sup>52</sup> The exception for statements to medical personnel finds its origins in common law hearsay exceptions and was codified in Rule 803(4). Statements made to medical personnel are admissible if they are “made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source therefore insofar as reasonably pertinent to diagnosis or treatment.”<sup>53</sup> The theoretical basis for this exception to the hearsay rule is the assumption that a person has a strong self-interest in accurately reporting information to a doctor for diagnosis and treatment.<sup>54</sup> The medical statements exception includes statements made to paramedics, ambulance drivers, nurses, hospital social workers, and doctors.<sup>55</sup>

In the past several years, the focus on these evidence rules has changed the way police investigate and document a domestic violence incident. Today, police in many jurisdictions begin their investigations with the assumption that the victim will not be present at trial.<sup>56</sup> As a result, officers take greater care to document the demeanor of the victim at the scene and to record her exclamations,<sup>57</sup> with an eye toward the admission of the victim’s excited utterances in court.<sup>58</sup> In addition, officers now routinely photograph victims’ injuries at the scene, and detectives often revisit the victim to secure additional photographs of developing injuries.<sup>59</sup> For victims receiving medical attention, officers also attempt to secure consent for the release of medical records<sup>60</sup> in an attempt to admit evidence of injuries and statements made to medical personnel at a subsequent trial.<sup>61</sup> Finally, the investigation of domestic violence incidents routinely involves preserving the recorded 911 calls that summoned police and medical aid<sup>62</sup> in order to admit the vic-

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52. See *infra* note 55 and sources cited therein.

53. FED. R. EVID. 803(4).

54. John J. Capowski, *An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception*, 33 GA. L. REV. 353, 360, 364–365 (1999).

55. See *id.* at 357, 361; Tracy A. Bateman, Annotation, *Admissibility of Statements Made for the Purposes of Medical Diagnosis or Treatment as Hearsay Exception Under Rule 803(4) of the Uniform Rules of Evidence*, 38 A.L.R. 5th 433 §§ 26–29 (1996).

56. Friedman & McCormack, *supra* note 38, at 1187.

57. *Id.*

58. *Id.*

59. Hanna, *supra* note 22, at 1902. The emphasis on photographs at the scene resulted partially from the involvement of the Polaroid Company, which provided law enforcement with Polaroid cameras to document domestic violence injuries. See Cochran, *supra* note 15, at 104 n.113. See also Polaroid.com, *Family Violence Programs @ Polaroid.com*, available at [http://www.polaroid.com/global/printer\\_friendly.jsp?PRODUCT%3C%3Eprd\\_id=845524441760328&FOLDER%3C%3Efolder\\_id=282574488338439&bmUID=1098499088843&bmLocale=en\\_US&PRDREG=null](http://www.polaroid.com/global/printer_friendly.jsp?PRODUCT%3C%3Eprd_id=845524441760328&FOLDER%3C%3Efolder_id=282574488338439&bmUID=1098499088843&bmLocale=en_US&PRDREG=null) (last visited November 15, 2004).

60. Hanna, *supra* note 22, at 1903 (discussing the importance of medical records for prosecutions).

61. See generally Bateman, *supra* note 55, for a discussion of domestic violence cases using the hearsay exception for statements to medical personnel.

62. Hanna, *supra* note 22, at 1903.

tim's recorded statements as excited utterances and present sense impressions at trial.<sup>63</sup> As a result of these increased law enforcement efforts and hearsay exceptions, it is possible to prosecute batterers for felony assault without the testimony of the victim.

#### *D. A Typical Victimless Prosecution*

Prosecuting Frank for felony assault with a deadly weapon requires the prosecution to prove the elements of the crime beyond a reasonable doubt: first, the prosecution must prove that Frank intentionally assaulted Stephanie with a deadly weapon; second, that the assault with that weapon resulted in substantial bodily injury to Stephanie.<sup>64</sup> To meet its burden, the prosecutor will have to prove the victim's identity, the degree of injury the victim suffered, the presence of a weapon, the defendant's mental state, and the identity of the defendant.<sup>65</sup> Without Stephanie's in-court testimony to establish the critical elements of both Stephanie's and Frank's identities, the prosecutor must make use of the excited utterance, present sense impression, and statements to medical personnel hearsay exceptions.

Using these exceptions, the prosecution will likely be able to establish Stephanie's identity.<sup>66</sup> First, the early portion of Stephanie's 911 call constituted an excited utterance because Stephanie was under the stress of the startling incident and related information pertaining to that incident when she identified herself to the 911 operator.<sup>67</sup> Her statements are likely reliable because, as the incident had just occurred and continued to unfold while Stephanie was on the telephone, she had no opportunity to reflect or fabricate.<sup>68</sup> Furthermore, Stephanie's excited utterances are consistent with the other evidence in the case: Stephanie identified herself to the hospital and to her treating physician, and a forensic scientist can establish that the blood on the knife matched Stephanie's blood drawn at the hospital.

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63. Friedman & McCormack, *supra* note 38, at 1178.

64. See, e.g., WASH. REV. CODE § 9A.36.021 (2004).

65. The defendant's mental state can be established circumstantially from all the evidence introduced at trial. This is similar to prosecutions in which the victim testifies, and the element is not contingent upon the testimony of the victim or a hearsay exception. Similarly, establishing the knife as a deadly weapon is not contingent on the testimony of the victim or a hearsay exception and can be established through the responding officer. The prosecutor can also establish that Stephanie received substantial bodily harm through the testimony of the officer and the physician. The responding officer can establish that he observed the injury to Stephanie and transported her to the hospital. He can also authenticate the photographs of Stephanie's arm. The treating physician can establish that Stephanie's injuries meet the definition of substantial bodily injury. For these reasons, the discussion will focus on the elements contingent upon the testimony of the victim or hearsay exceptions.

66. The success of the prosecution will depend upon the prosecutor's ability to establish the necessary foundational requirements for the hearsay exceptions. For the purposes of this discussion, it will be assumed that these foundations can be satisfied at pretrial hearings.

67. See *State v. Wright*, 686 N.W.2d 295 (Minn. Ct. App. 2004).

68. *Id.* at 302; see also *Soto v. Commonwealth*, 139 S.W.3d 827, 860–61 (Ky. 2004).

Hearsay exceptions will also help establish the identity of the attacker. As discussed above, portions of the 911 tape are excited utterances. In one of the excited utterances, Stephanie identified Frank. The latter portion of the 911 call is both an excited utterance and a present sense impression<sup>69</sup> where Stephanie described what was happening, and the recording captured sounds of an altercation and Stephanie stating that she had been cut. The exceptions apply because, on the tape, Stephanie was clearly upset and described an event as it was occurring.<sup>70</sup> Again, her opportunity to fabricate was reduced sufficiently to satisfy the hearsay exception,<sup>71</sup> and therefore her statements that Frank was coming toward her with a knife and then cut her should be admissible.

Other statements identifying the assailant are admissible as hearsay exceptions. Stephanie's statement identifying Frank to the responding officer could qualify as an excited utterance because, when the officer found Stephanie lying on the bed, she was crying and shaking under the stress of the incident.<sup>72</sup> Frank's identity is also contained twice in the medical records, once when Stephanie told her doctor that Frank beat and stabbed her, and again when Stephanie told the hospital social worker that Frank was her husband of seven years. These statements are admissible under the statements to medical personnel exception because the identity of the assailant is critical to the medical treatment Stephanie received from her providers; the attacker's identity can determine a release date and location, the need for other services, and even the course of treatment, particularly the prevention of future injury.<sup>73</sup> Combining this information with the photographs of Stephanie and Frank taken from the scene by the responding officer and booking photographs from Frank's prior conviction involving Stephanie, the prosecutor should be able to establish beyond a reasonable doubt that Frank and the assailant are the same individual.

A commitment to victimless prosecution allows the State to hold defendants like Frank accountable for their violent conduct. Focus on the hearsay exceptions for excited utterances, present sense impressions, and statements to medical personnel guides the police investigation of the domestic violence incident and the prosecution's presentation of the evidence. The State is then able to address the individual and societal harm resulting from the violence, even in situations where the batterer attempts to circumvent the criminal justice system by absenting the victim from the justice

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69. See *State v. Briscoeray*, 95 Wn. App. 176, 974 P.2d 912 (Wash. Ct. App. 1999); *People v. Hendrickson*, 586 N.W.2d 906 (Mich. 1998).

70. See *Hendrickson*, 586 N.W.2d at 909.

71. See *id.*, 586 N.W.2d at 915 (Brickley, J., concurring).

72. See *Fowler v. State*, 809 N.E.2d 960, 962 (Ind. Ct. App. 2004).

73. See *State v. Sims*, 77 Wash. App. 236, 239, 890 P.2d 521, 523 (1995); *United States v. Joe*, 8 F.3d 1488, 1494 (10th Cir. 1993); see generally Bateman, *supra* note 55, at §§ 312–37.

process. Given the societal epidemic that is domestic violence, the State's efforts to creatively respond through victimless prosecutions are both laudable and necessary.

### III. *CRAWFORD V. WASHINGTON*

The Supreme Court's decision in *Crawford v. Washington* dramatically changed the landscape for the admission of out-of-court statements in all kinds of criminal cases. Prior to *Crawford*, admission of out-of-court statements hinged on satisfying the tests established in *Ohio v. Roberts*.<sup>74</sup> In *Roberts*, the Court held that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability by falling either within a "firmly rooted hearsay exception" or bearing "particularized guarantees of trustworthiness."<sup>75</sup> The *Crawford* decision overturned *Roberts* and established a rule that the Confrontation Clause of the Sixth Amendment requires that the defendant have an opportunity to cross-examine out-of-court testimonial statements prior to admission.<sup>76</sup> Although the Court conceded that it could have reached the same decision in *Crawford* under *Roberts*, the Court nevertheless determined that its prior jurisprudence "reveal[ed] a fundamental failure on [the Court's] part to interpret the Constitution in a way that secures its intended constraint on judicial discretion."<sup>77</sup>

In *Crawford*, the defendant and his wife, Sylvia, went to the apartment of Kenneth Lee to confront Lee about his alleged attempted rape of Sylvia.<sup>78</sup> At the apartment, the defendant got into an altercation with Lee.<sup>79</sup> Lee received a stab wound to his torso, and the defendant's hand was cut.<sup>80</sup> The police arrested the defendant later that night and interrogated him.<sup>81</sup> The police also interrogated Sylvia after Mirandizing her and tape-recording her subsequent statement.<sup>82</sup>

The defendant was charged with assault.<sup>83</sup> At trial, the prosecution sought to rebut the defendant's claim of self-defense with testimony from Sylvia, but Sylvia was unavailable to testify because the defendant asserted his marital privilege.<sup>84</sup> Barred from her in-court testimony, the State sought

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74. 448 U.S. 56 (1980).

75. *Id.* at 66.

76. *Crawford*, 124 S. Ct. at 1369–70.

77. *Id.* at 1373.

78. *Id.* at 1357.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1357–58.

84. In Washington, the marital privilege prevents a husband or wife from testifying for or against his or her spouse without the spouse's consent. WASH. REV. CODE § 5.60.060(1) (2004). The defendant

to introduce the tape-recording of Sylvia's statement.<sup>85</sup> The State argued that Sylvia's statement constituted an admissible statement against interest<sup>86</sup> because she implicated herself in the assault by admitting that she led the defendant to Lee's apartment.<sup>87</sup> Applying the rule from *Roberts*, the trial court found that the tape-recorded statement at issue in *Crawford* did not fit within a firmly rooted hearsay exception and admitted the statement on the alternate ground that the statement contained "particularized guarantees of trustworthiness."<sup>88</sup> The jury convicted the defendant of assault.<sup>89</sup>

The case went through several stages of appeal. The Washington State Court of Appeals reversed the defendant's conviction, finding that the trial court erred in admitting Sylvia's statement because the statement did not contain particularized guarantees of trustworthiness.<sup>90</sup> The Washington Supreme Court reversed the court of appeals and reinstated the conviction.<sup>91</sup> The court found that, because Sylvia's statement was "interlocking" with the defendant's confession, her statement was reliable and admissible under *Roberts*.<sup>92</sup>

The United States Supreme Court elected not to determine whether the Washington Supreme Court misapplied the *Roberts* test regarding particular guarantees of trustworthiness;<sup>93</sup> rather, the Court reconsidered whether the *Roberts* test was consistent with the Confrontation Clause of the Sixth Amendment.<sup>94</sup> After reviewing the history of the Confrontation Clause and Supreme Court precedent interpreting that clause, the Court determined that *Roberts* needed to be overturned.<sup>95</sup>

According to *Crawford*, the historical background of the Confrontation Clause "support[s] two inferences about the meaning of the Sixth Amendment."<sup>96</sup> The first inference is that the Confrontation Clause was primarily directed at the use of testimonial statements as evidence against the accused,<sup>97</sup> and the second inference is that the Clause does not allow

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refused to waive the privilege and thus prevented Sylvia from testifying. See *Crawford*, 124 S. Ct. at 1357.

85. *Crawford*, 124 S. Ct. at 1358.

86. See WASH. R. EVID. 804(b)(3) (2004).

87. *Crawford*, 124 S. Ct. at 1358.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1358–59.

93. *Id.* at 1373.

94. *Id.* at 1357. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

95. *Crawford*, 124 S. Ct. at 1373.

96. *Id.* at 1363.

97. *Id.*

courts to develop “open-ended exceptions” to the Constitutional confrontation requirement.<sup>98</sup>

The fact that the Confrontation Clause was primarily directed at testimonial statements as evidence compels the conclusion that the commands of the Confrontation Clause control the admission of out-of-court statements.<sup>99</sup> The rules of evidence are of secondary importance and only regulate the admission of out-of-court statements once the Confrontation Clause has been satisfied.<sup>100</sup> Recognizing that not all hearsay statements “implicate[] the Sixth Amendment’s core concerns,”<sup>101</sup> the Court suggested that the “primary” concern of the Confrontation Clause was “testimonial hearsay.”<sup>102</sup> The Court did not define “testimonial” for purposes of Confrontation Clause analysis, except to quote the definition of “testimony” from an 1828 dictionary.<sup>103</sup> The parties, the amici, and case law all suggested several variations of the meaning of “testimonial.”<sup>104</sup>

The petitioner asked the Court to adopt a definition of “testimonial” that limited testimonial statements to “*ex parte* in-court testimony or its functional equivalent.”<sup>105</sup> Falling within this definition are “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.”<sup>106</sup> This test proposes a definition that hinges on the declarant’s subjective understanding of the way that a statement might be used.

The National Association of Criminal Defense Lawyers urged the Court to adopt a definition of “testimonial” statements that would include “statements . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use

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98. *Id.* at 1374

99. *Id.* at 1364.

100. *Id.*

101. *Id.*

102. *Id.* at 1365. The Court refused to say that the Confrontation Clause applies only to testimonial statements. The Court did, however, strongly suggest that position.

103. *Id.* at 1364 (“[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”) (alterations in original).

104. *Id.*

105. *Id.* (citing Brief for Petitioner at 23, *Crawford v. Washington*, 124 S. Ct. 1354 (2004) (No. 02-9410)). The United States, as amicus, also asked the Court to adopt this standard. Brief of Amici Curiae United States at 17, *Crawford* (No. 02-9410). The United States, however, argued against a categorical ban on all testimonial statements, suggesting instead that situations exist that justify the admission of testimonial statements without prior cross-examination if they are particularly reliable. *Id.* at 21–22. In addition, the United States did not propose that the definition of testimonial statements also include those that the declarant believes will be used in trials.

106. Brief of Amici Curiae United States at 21–22, *Crawford* (No. 02-9410).

at a later trial.”<sup>107</sup> This test would be an objective standard that would examine the belief of some reasonable person as a witness.

The Court also considered a possible definition for testimonial statements suggested by case law. Specifically, the Court cited to Justice Thomas’s concurrence in *White v. Illinois*, which defined “testimonial” statements as “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”<sup>108</sup>

The Court did not endorse any of these three potential definitions. In fact, the Court refused to define the term “testimonial” at all. It instead determined that a more precise definition of “testimonial” was not necessary in this case because Sylvia’s statement was the product of a police interrogation, and police interrogations satisfy any definition of “testimonial.”<sup>109</sup> While the Court stated that it was “leav[ing] for another day any effort to spell out a comprehensive definition of ‘testimonial,’” the Court did state that, at a minimum, “testimonial” applies to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and also to statements made during police interrogations.<sup>110</sup>

The second inference the Court found from the historical record was that the Confrontation Clause did not “suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.”<sup>111</sup> The Court found that the prior opportunity to cross-examine testimonial statements was not a means of establishing a statement’s reliability; rather, prior cross-examination was “dispositive” of the Confrontation Clause issue.<sup>112</sup> The Court relied on the United States’ amicus brief to reach its decision and acknowledged that the common law recognized several exceptions to the hearsay rule<sup>113</sup> at the time the Sixth Amendment was framed in 1791.<sup>114</sup> The Court distinguished these exceptions by construing them as largely “cover[ing] statements that by their nature were not testimonial.”<sup>115</sup> Again,

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107. *Id.* (citing Brief for National Association of Criminal Defense Attorneys at 3, *Crawford* (No. 02-9410)).

108. *Id.* (citing *White v. Illinois*, 502 U.S. 346, 365 (1992)).

109. *Id.* at 1374.

110. *Id.*

111. *Id.* at 1365.

112. *Id.* at 1366–67.

113. Brief of Amici Curiae United States at 13 n.5, *Crawford* (No. 02-9410) (discussing recognized exceptions for co-conspirator declarations, dying declarations, regularly kept records, declarations against interest by deceased persons, statements of fact against penal interest, pedigree and family history evidence, reputation evidence, and past recollection recorded).

114. *Crawford*, 124 S. Ct. at 1367.

115. *Id.* The Court recognized that dying declarations did not always fit within the nontestimonial category. The Court, however, concluded that it did not need to determine whether “testimonial” dying declarations were an exception to the Confrontation Clause requirement of prior cross-examination before admission of testimonial out-of-court statements. *Id.* at 1367 n.6.



while the Court did not draw a bright-line rule that the Confrontation Clause applies only to testimonial statements, the language and the reasoning of the Court strongly suggest just such a bright-line rule.

After concluding that the historical commands of the Confrontation Clause require a prior opportunity for cross-examination when the proffered statement is testimonial, the Court found only one case, *White v. Illinois*,<sup>116</sup> that was inconsistent with the Framers' intent.<sup>117</sup> In *White*, the Court affirmed the admission of statements a child victim made to an investigating officer even though the victim did not testify at trial.<sup>118</sup> The *White* Court found that the statements were spontaneous declarations and admissible pursuant to *Roberts*' firmly rooted hearsay exception.<sup>119</sup> The Court also determined that the victim's unavailability at trial did not violate the Confrontation Clause.<sup>120</sup> The *Crawford* Court distinguished *White* by finding that *White* never reached the issue of whether spontaneous declarations were testimonial.<sup>121</sup> While the majority cited an English case recognizing a hearsay exception for spontaneous declarations,<sup>122</sup> the Court stated that "it is questionable whether testimonial statements would ever have been admissible on that ground in 1791."<sup>123</sup>

Finally, the *Crawford* Court considered the two-part test from *Roberts*: The admission of hearsay statements must fall within a firmly rooted hearsay exception or bear particularized guarantees of trustworthiness. The Court concluded that the *Roberts* test is in conflict with the historical understanding of the Confrontation Clause.<sup>124</sup> The Court reasoned that the *Roberts* test was both too broad, because it failed to distinguish between testimonial and nontestimonial statements, and too narrow, because it allowed the admission of testimonial statements on a mere showing of reliability.<sup>125</sup> Construing the Confrontation Clause as a rule of procedure, the Court held that the *Roberts* test was in fatal conflict with the Sixth Amendment because that amendment established the sole procedure for determining the reliability of testimonial statements in criminal trials: confrontation by cross-examination.<sup>126</sup>

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116. 502 U.S. 346 (1992).

117. *Crawford*, 124 S. Ct. at 1368 n.8.

118. *White*, 502 U.S. at 349–51, 358.

119. *Id.* at 354–57.

120. *Id.* at 357.

121. The Court also later suggests, although it does not decide, that *White v. Illinois* is still good law. *Crawford*, 124 S. Ct. at 1368 n.8.

122. *Id.* at 1368 n.8 (citing *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694)).

123. *Id.* at 1368 n.8.

124. *Id.* at 1369.

125. *Id.*

126. *Id.* at 1370.

The Court left the question of how to deal with nontestimonial hearsay to the states: “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”<sup>127</sup>

#### IV. VICTIMLESS DOMESTIC VIOLENCE PROSECUTION UNDER *CRAWFORD*

In creating its new rule that the Confrontation Clause requires that the defense have an opportunity to cross-examine testimonial statements prior to admission, the Court left numerous questions unresolved. Those questions include whether the Confrontation Clause requirement only applies to testimonial statements, and what constitutes a testimonial statement. The resolution of these questions poses potentially serious problems to victimless domestic violence prosecutions. Analyzing Stephanie’s case in light of *Crawford* makes clear the potential impact *Crawford* may have on victimless domestic violence prosecution. Analysis also highlights that the extent of *Crawford*’s harm to victimless prosecution turns on the critical questions left unanswered in *Crawford*. Because a victimless prosecution of Stephanie’s case relies on the excited utterance, present sense impression, and statements to medical personnel hearsay exceptions, the prosecutor’s ability to proceed in Stephanie’s absence will depend wholly upon whether courts deem these hearsay exceptions nontestimonial statements beyond the reach of the Confrontation Clause.

In an average criminal proceeding that does not involve domestic violence, it makes sense to construe statements falling within the excited utterance, present sense impression, and statements-to-medical-personnel hearsay exceptions as nontestimonial statements. This is because, to qualify as an excited utterance, for example, the declarant must make the statement while under the influence of a startling event, the statement must relate to the startling event, and the declarant must not have had an opportunity to reflect upon the events or fabricate the story.<sup>128</sup> In many cases, these three requirements will place the excited utterance outside even the broadest definition of a testimonial statement because the spontaneous statement, made by a victim without a chance to reflect, indicates that the victim has no understanding that the prosecutor will use the statement at a later trial. Similarly, statements to medical personnel will likely be nontestimonial. To qualify under the exception for statements to medical personnel, the indi-

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127. *Id.* at 1374.

128. See *supra* notes 43–47 and accompanying text.

vidual must make the statement to medical personnel for the purpose of receiving medical treatment.<sup>129</sup> The individual seeking medical assistance is doing just that, without intent to provide potential evidence for use at a later trial. Finally, present sense impressions are contingent upon the declarant making the statement while describing an event that is presently occurring.<sup>130</sup> This temporal requirement places the statement beyond the causal control of the declarant. With all three of these hearsay exceptions, the declarant makes the statements for purposes unconnected to the production of incriminating evidence, and therefore the statements would likely qualify as nontestimonial under any definition of "testimonial" discussed in *Crawford*.

In the domestic violence context, however, it may not be possible to make this same statement with confidence. Studies demonstrate that domestic violence is a pattern of behavior repeated over time.<sup>131</sup> Most victims are assaulted seven times before they involve the police,<sup>132</sup> and they are not able to fully extricate themselves from the violent relationship until the fifth attempt.<sup>133</sup> Domestic violence victims such as Stephanie often have repeated contact with law enforcement and the criminal justice system.<sup>134</sup> In Stephanie's case, she had firsthand experience and knowledge that her statements to the 911 operator, the police, and doctors could be used in court because she had seen them used there before. The impact of Stephanie's firsthand experience can produce disparate results under the three definitions of "testimonial" discussed in *Crawford*. Under the definition of "testimonial" provided by the *Crawford* petitioner, Stephanie's statements would likely be subject to the cross-examination requirements of the Confrontation Clause. Applying the definition proposed by the National Association of Criminal Defense Attorneys in their amicus brief, however, the statements may or may not be subject to the Confrontation Clause. And a judge applying the definition in the *White* case would likely find that the comments satisfy the Confrontation Clause without cross-examination ever taking place.

Under the subjective definition of "testimonial" proposed by the petitioner in *Crawford*, Stephanie's personal experience would render "testimonial" her excited utterances to the 911 operator, the police, and her state-

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129. See *supra* notes 52–55 and accompanying text.

130. See *supra* notes 48–51 and accompanying text.

131. Friedman & McCormack, *supra* note 38, at 1196 & n.91 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES 2 (1994)).

132. *Id.* at 1192 n.77.

133. ELAINE WEISS, SURVIVING DOMESTIC VIOLENCE: VOICES OF WOMEN WHO BROKE FREE 41 (2000) ("Statistics indicate that, on average, battered women return to their batterers five times before they leave for good.").

134. Twenty percent of domestic violence victims report three or more similar assaults within that six-month period. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES 2 (1994).

ments to medical personnel.<sup>135</sup> Stephanie's prior experience with the criminal justice system would give her a reasonable expectation that her statements could be used at trial. Because the statements are likely testimonial under this definition, *Crawford* would require that Frank have a prior opportunity to cross-examine Stephanie before her testimony is admitted in any sort of trial.<sup>136</sup> The result is that cases like Stephanie's would not be prosecutable without the victim's in-court testimony.

The result under the definition of "testimonial" proposed by the National Association of Criminal Defense Attorneys—whether an objective witness reasonably believes that the statement may be used at trial—depends on the characteristics the reasonable witness is deemed to have. If the average domestic violence victim serves as the standard, the statements will likely be subjected to the cross-examination requirements of the Confrontation Clause because of the repetitive nature of domestic violence and often repeated contact with the criminal justice system. If the objective witness is determined to be a reasonable person without experience in domestic violence—and therefore without experience with the criminal justice system—the 911 call, the statements to the police, and the statements to medical personnel might be admissible as nontestimonial statements.

Unlike the other two definitions of "testimonial," all three hearsay exceptions should avoid invoking the Confrontation Clause under the "testimonial" definition in Justice Thomas's opinion in *White*. Justice Thomas proposed that the meaning of "testimonial" is limited to "formalized testimonial statements" such as affidavits, depositions, prior testimony, or confessions. Stephanie's statements are likely not "formalized testimonial statements" because, while they may be "formalized," they are preserved for purposes largely unconnected to the production of evidence for use at a later trial.

The ability of prosecutors to continue employing victimless prosecutions, therefore, is dependent upon which definition of "testimonial" the United States Supreme Court determines is appropriate.

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135. This is the position taken by Friedman & McCormack as to any domestic violence victim calling 911. See Friedman & McCormack, *supra* note 38, at 1242.

136. See *Crawford*, 124 S. Ct. at 1364. It might be possible in some situations to depose the victim prior to trial. This procedure would provide the defendant an opportunity to cross-examine the victim, and it appears to satisfy the commands of *Crawford*. Two difficulties exist with this alternative. First, the most likely time to secure a victim's participation in a deposition is during the first few days after the traumatic incident. It seems practically impossible to get the defense ready to do a deposition that quickly after the incident because that would require production of discovery and time to conduct a defense investigation. Second, the presence of the defendant poses practical and safety concerns.

V. *CRAWFORD* SHOULD BE INTERPRETED TO PRESERVE VICTIMLESS  
DOMESTIC VIOLENCE PROSECUTIONS

The Supreme Court should adopt a definition of “testimonial” that does not include excited utterances, present sense impressions, or statements to medical personnel. Three arguments support this position. First, the very nature of these statements in the domestic violence context establishes that they are not testimonial statements, particularly under the narrowest definition of “testimonial” proposed in *Crawford*. Second, the historical record supports the premise that these three hearsay exceptions should not be subjected to the cross-examination requirements of the Confrontation Clause. Third, sound policy arguments support excluding these three hearsay exceptions from a definition of “testimonial,” including the policy that the defendant should not profit from his own wrongdoing and the policy that the Court should not eliminate the tools needed to prosecute otherwise unprosecutable offenses.

Excited utterances, present sense impressions, and statements to medical personnel are not testimonial statements in a domestic violence context, particularly under the Court’s narrow definition of testimonial. The *Crawford* Court clearly set the rule that the Confrontation Clause bars admission of testimonial statements absent prior cross-examination and recognized that much hearsay is not testimonial evidence and does not implicate the Sixth Amendment. The primary question in determining if a statement is testimonial is whether the statement bears “resemblance to the civil-law abuses the Confrontation Clause targeted.”<sup>137</sup> Thus, further discussion of what constitutes “testimonial” must be consistent with the primary concern of the Court: preventing civil-law abuses.

While the Supreme Court did not fully elucidate the perimeters, the *Crawford* decision did establish a minimum definition of “testimonial.” According to the Court, any definition of “testimonial” necessarily includes those statements taken by police officers in the course of interrogations.<sup>138</sup> The Court indicated that it was not using “interrogation” in a technical sense, but that interrogation was satisfied in *Crawford* because the declarant made the statement knowingly in response to “structured police questioning.”<sup>139</sup> While the Court did not define “structured police questioning,” the harm at the heart of the Court’s concern about the Confrontation Clause is the abuse of government agents in using ex parte statements against the accused.<sup>140</sup> A structured police questioning seems to contain three aspects. First, the questioner is a government agent who has an investigative or

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137. *Crawford*, 124 S. Ct. at 1364.

138. *Id.*

139. *Id.* at 1365 n.4.

140. *See id.* at 1364.

prosecutorial function: a police officer, prosecutor,<sup>141</sup> or similar government official.<sup>142</sup> Second, the questioning occurs at the initiation of the police or prosecutor.<sup>143</sup> Third, the questioning is designed to produce incriminating evidence.<sup>144</sup> At a minimum, therefore, the Confrontation Clause appears to apply to statements knowingly made to police in response to police-initiated questions seeking incriminating information.

In the domestic violence context, excited utterances, present sense impressions, and statements to medical personnel would fall outside *Crawford*'s minimum definition of "testimonial." Statements to medical personnel are the easiest cases: The victim makes the statement to a doctor, nurse, or social worker, and not to a police officer or prosecutor.<sup>145</sup> Although these individuals are investigating, their investigation is medical, not criminal, in nature.<sup>146</sup> Additionally, the questioning is at the initiation of the person seeking medical assistance rather than at the initiation of law enforcement personnel.<sup>147</sup> The patient who is also a domestic violence victim can hardly be accused of exploiting a system over which she has no control.

The fact that the victim, rather than the state, initiates the questioning makes excited utterances and present sense impressions in domestic violence situations nontestimonial statements: The primary purpose of the statement is to summon aid and not to incriminate.<sup>148</sup> The victim literally calls out to the state for assistance, and the state does not initiate the contact

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141. One district court has interpreted *Crawford* and found that a statement taken by a prosecutor and paralegal was testimonial. *United States v. Saner*, 313 F. Supp. 2d 896, 902 (S.D. Ind. 2004).

142. *Crawford*, 124 S. Ct. at 1364–1365.

143. The North Carolina Court of Appeals has construed *Crawford* and ruled that a woman's excited utterance to a police officer was not testimonial because the victim's statement was initiated by the victim, without prompting by police questions. *State v. Forrest*, 596 S.E.2d 22, 27 (N.C. Ct. App. 2004). See *People v. Moscat*, 777 N.Y.S.2d 875, 880 (App. Div. 2004) (holding that part of the reason a 911 call is not testimonial is because the victim initiates the call).

144. The Colorado Court of Appeals found that, under *Crawford*, a police interview with a child abuse victim was a testimonial statement because it was initiated and conducted by police. *People v. Vigil*, No. 02CA0833, 2004 Colo. App. LEXIS 1024, at \*5–6 (Colo. Ct. App. June 17, 2004).

145. A California Court of Appeals has ruled that a victim's statement to her doctor was not testimonial after *Crawford*. *People v. Hunter*, No. 163182, 2004 WL 1282842, at \*1 (Cal. Ct. App. June 9, 2004). The fact that a person might visit the emergency room of a public hospital should not change this analysis. While doctors in state hospitals are state agents, they do not serve as prosecutors.

146. See *Heard v. State*, No. 2002-CA-002494-MR, 2004 WL 1367163, at \*1 (Ky. Ct. App. June 18, 2004) (holding that the victim's statements to the doctor were properly admitted).

147. See *State v. Vaught*, 682 N.W.2d 284, 289–90 (Neb. Ct. App. 2004) (a child's statement to a doctor was not testimonial because the victim's family brought her to the emergency room to seek treatment, and there was no indication that the purpose of the visit was to formulate evidence for trial); *State v. Castilla*, No. 51679-5-I, slip op. at 4 (Wash. Ct. App. Apr. 19, 2004) (statements to a nurse were not testimonial because the statements were not "elicited by a government official and were not given with an eye toward trial.").

148. See *Moscat*, 777 N.Y.S.2d at 879–80 (a 911 phone call is not testimonial because it is initiated by the victim, who desires to be rescued, and the 911 call is part of the actual criminal incident rather than part of the prosecution that follows).

to produce incriminating information.<sup>149</sup> The fact that the state incidentally collects incriminating evidence should not convert a statement made for the purposes of receiving assistance into a testimonial statement.<sup>150</sup> If that were the case, the Supreme Court's testimonial discussion would have been significantly different: The Court would have focused not on whether the statement was testimonial, but rather on whether it was incriminating.

In a recent pre-*Crawford* article,<sup>151</sup> commentators Richard Friedman and Bridget McCormack argue that the use of 911 calls as evidence, particularly in domestic violence cases, violates the Confrontation Clause. The authors propose a definition of "testimonial" similar to the definition proffered by petitioners in *Crawford*: A statement is testimonial if a reasonable person knows the statement will be used in the investigation or prosecution of a crime.<sup>152</sup> Friedman and McCormack assert that victims and batterers engage in a "race" to the telephone, and the authors argue that this supports the notion that 911 callers are conscious that their call will be used as evidence.<sup>153</sup> In their view, the domestic violence victim's 911 call is testimonial because the victim is aware that 911 calls may be used in court.<sup>154</sup> Friedman and McCormack argue that these 911 calls should not be admissible without cross-examination.<sup>155</sup> The authors correctly identify the difficulty that domestic violence cases pose in the debate over what constitutes a testimonial statement: Domestic violence victims often have experience with the criminal justice system and specific knowledge that their statements to 911, officers, and doctors may be admissible.<sup>156</sup> The authors' position that 911 calls should not be admissible is less convincing.

Arguments supporting the position that 911 calls should never be admissible in domestic violence cases distort the legal context. Authors taking this position often give the impression that every 911 call is necessarily ad-

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149. See *Hammon v. State*, 809 N.E.2d 945, 950, 952 (Ind. Ct. App. 2004) (ruling that the victim's tale of her batterer's assault was a valid excited utterance and not testimonial because the statement was not in response to police interrogation, but informal questioning).

150. In fact, courts in New York and Indiana have acknowledged that the very nature of an excited utterance precludes it from being testimonial. See *People v. Isaac*, No. 23398/02, 2004 WL 1389219, at \*4 (N.Y. Dist. Ct. June 16, 2004) (stating that 911 calls are not equivalent to testimonial statements, "not because they fall within a hearsay exception, but because the characteristics which bring them within this particular hearsay exception negate the characteristics which would be required to make them 'testimonial.'"); see also *Fowler v. State*, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004) (explaining that, although a victim gives a statement to a police officer, the fact that the statement was an excited utterance "place[s] it outside the realm of testimonial statements."); see also *Hammon*, 809 N.E.2d at 952.

151. See generally Friedman & McCormack, *supra* note 38.

152. *Id.* at 1240-41.

153. *Id.* at 1193-94.

154. *Id.* at 1240-44.

155. *Id.* at 1242-43.

156. *Id.* at 1196.

missible.<sup>157</sup> For example, Friedman and McCormack's use of the term "dial-in testimony" suggests that there is a direct line from the 911 operator to courtroom.<sup>158</sup> In reality, several layers of discretion stand between a 911 caller and admission of that 911 call into evidence at trial: The police, the prosecutor, and the judge must all make decisions regarding the 911 call. Most importantly, the court must determine that the call constitutes an excited utterance or present sense impression.<sup>159</sup> The issue, therefore, is not whether the evidence is a 911 call, but whether the particular call constitutes an excited utterance.

Friedman and McCormack's article also largely ignores the domestic violence context. They build their case against 911 calls by highlighting the "race to the phone."<sup>160</sup> The use of the phrase "race to the phone" distorts the reality of the situation. A race calls to mind a competition between equals with similar objectives, which misconstrues the intent of the victim and divorces the situation from the dynamics of power and control within the relationship.<sup>161</sup> The authors' case studies seem to actually support the opposite conclusion, that the batterer and the victim often have different agendas: The batterer seeks to achieve an advantage within a mandatory arrest framework, and the victim seeks assistance.<sup>162</sup> Friedman and McCormack's discussion is disconnected from the critical issue of whether the statement is an excited utterance or a present sense impression.<sup>163</sup>

Finally, Friedman and McCormack's definition of "testimonial" seems, at turns, cynical and simplistic. On their terms, no domestic violence victim could ever have a truly excited utterance because she holds prior knowledge of the ability to use a statement in investigation or prosecution.<sup>164</sup> It is cynical to suggest that this knowledge so permeates an individual's consciousness that she is unable to make a reliable, spontaneous statement. One would also have to extend this assumption of knowledge to defense attorneys, prosecutors, practicing attorneys with an understanding of the rules of evidence, police officers, domestic violence advocates, and judges, because they too have prior knowledge that their 911 statements may be used in a future prosecution. In the context of domestic violence, the

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157. See e.g., *id.* at 1198 n.98 ("But the prosecutor could have proved the case against the wife with his 911 call and follow-up statements to the police."). This statement leaves out the entire discussion of whether the statements would even meet the hearsay exceptions.

158. *Id.* at 1171 ("[N]ow a new way is developing for witnesses for the prosecution to testify: Call 911.").

159. The trial court controls the admission of evidence.

160. Friedman & McCormack, *supra* note 38, at 1197.

161. Many states have recognized the reality of the situation and criminalized efforts to interfere with a 911 call. See, e.g., WASH. REV. CODE § 9A.36.150(1)(b) (2004).

162. See Friedman & McCormack, *supra* note 38, at 1197–98 n.97.

163. See *supra* note 150.

164. Friedman & McCormack, *supra* note 38, at 1242.



authors' arguments are simplistic. Given the well-documented fact that victims often work against their supposed self-interest,<sup>165</sup> it is unlikely that the primary reason victims call for help is to generate incriminating evidence rather than to stop the current violence.

A second reason to interpret *Crawford* to preserve victimless prosecutions is that the historical record supports the proposition that testimonial statements should not include excited utterances, present sense impressions, and statements to medical personnel. The *Crawford* Court recognized that exceptions to the hearsay rules,<sup>166</sup> including a precursor to the exception for excited utterances and present sense impressions, existed before the Framers wrote the Confrontation Clause.<sup>167</sup> Since these exceptions existed at the framing of the Sixth Amendment, the Framers likely did not intend these to fall within the ambit of the Confrontation Clause. As Wigmore explained, "[t]here were a number of well-established [exceptions] at the time of the earliest constitutions, and others might be expected to be developed in the future."<sup>168</sup> The *Crawford* Court read the historical record as treating the statements covered by these exceptions as nontestimonial.<sup>169</sup>

Finally, sound social and legal policy supports limiting *Crawford* in the domestic violence context. The Court's decision in *Crawford* established a rule of procedure that requires testimonial statements to be subjected to cross-examination prior to admission.<sup>170</sup> If the Court construes statements to medical personnel, present sense impressions on 911 tapes, and excited utterances in the domestic violence context to be testimonial statements, the defendant will profit from his own misdeeds because the domestic violence victim is generally absent from trial due to the defendant's action or threatened action.<sup>171</sup> The defendant, therefore, can profit by

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165. See Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 20–21 (2004). From one perspective, the fact that victims remain in violent relationships, recant their testimony, or refuse to testify when the State is prosecuting can be seen as the victims working against their self-interest.

166. *Crawford*, 124 S. Ct. at 1367.

167. *Id.* at 1368 n.8.

168. 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 101 (2d ed. 1923). While the *Crawford* Court cited to Wigmore, the decision itself might call into question the continued validity of section 1397. Some scholars blame Wigmore (and specifically section 1397) for the idea that the right of cross-examination was merely an evidentiary rule, essentially equivalent to the hearsay rule. Since *Crawford* severs the ties between the right to confrontation and the rules of evidence, Wigmore's view of the Confrontation Clause may no longer be trustworthy. For more discussion of Wigmore and the Confrontation Clause see Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 572 (1992).

169. *Crawford* 124 S. Ct. at 1367.

170. *Id.* at 1370, 1374.

171. See Corsilles, *supra* note 17, at 870–71 n.127 ("Although not all batterers engage in escalated violence during the pendency of prosecution, as many as half threaten retaliatory violence, and at least

the Confrontation Clause when he creates the situation in which the rule would apply to his case in the first instance.<sup>172</sup> This profit actually creates a perverse incentive for the batterer to exert pressure to absent the victim, and the application of the Confrontation Clause to domestic violence situations reinforces the very same domestic violence dynamics that the State attempts to challenge through the prosecution.<sup>173</sup>

Additionally, it is bad policy to remove a potent avenue to address the ills of domestic violence. Construing excited utterances, present sense impressions, and statements to medical personnel as testimonial statements eliminates the hearsay exceptions most at issue in domestic violence cases. Victimless domestic violence prosecutions allow the State to proceed when the defendant has been so successful in his battering that the victim is unable to assist the State.<sup>174</sup> Unlike the difficulties with child sexual assault prosecutions that are dependent on highly suggestible victims,<sup>175</sup> no research indicates that domestic violence victims fail to provide accurate and reliable information to 911 operators or treating doctors, or that spontaneous

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30% of batterers may inflict further assaults during the *predisposition* phase of prosecution.”) (emphasis added).

172. One example of how a broad definition of “testimonial” helps a batterer elude conviction is found in the recent case of *People v. Kilday*, No. A099095, 2004 WL 1470795, at \*1 (Cal. Ct. App. June 30, 2004). In *Kilday*, two police officers responded to a domestic violence call. At the scene, the victim was visibly upset and frightened. As an initial investigation, the police officers questioned the victim about what happened. The victim told the officers that the defendant cut her with glass, burned her legs, and hurt her shoulder and head. In ruling that these statements to the investigative officers were testimonial, the California appellate court held that even if statements are not in response to a police interrogation, the statements are testimonial because they are part of a police investigation aimed at obtaining testimonial evidence. The victim in this case did not testify at trial, likely because of her fear of the defendant. *Id.* at \*6 n.8. With the court adopting a liberal definition of “testimonial” and the victim unavailable to testify at trial, the statements that the victim made to the police after the incident were excluded, and the prosecution was left with little or no case against the batterer.

173. In *Crawford*, the Supreme Court recognized an exception to the Confrontation Clause that might be applicable in this context, namely forfeiture by wrongdoing. *Crawford*, 124 S. Ct. at 1370. For detailed discussions of this exception, see James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 *DRAKE L. REV.* 459 (2003); Birdsong, *supra* note 41; Joan Comparet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus a Defendant's Right of Confrontation: The Waiver Doctrine After Alvarado*, 39 *SAN DIEGO L. REV.* 1165 (2002).

174. See Cochran, *supra* note 15, at 90, 102–04 (explaining that a committee in the Texas House of Representatives concluded that the unequal power structures in violent marriages precluded many victims from testifying about the abuse. This unequal power structure and loss of the victim's testimony necessitates using the excited utterance, photographs of the crime scene, and statements made for medical purposes for the prosecution to proceed with charges.) (citing House Comm. on Criminal Jurisprudence, Bill Analysis, H.B. 25, 74th Leg., (Tex. 1995)).

175. Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 *ARIZ. L. REV.* 927, 933 (1993) (“Social science evidence of children's suggestibility indicates that persistent pretrial interrogation of child witnesses can impair the search for truth in litigation. Indeed, the case can be made that the pretrial process not only refines, but actually manufactures children's accusations, however unwittingly.”).

statements stemming from the violent incident are unreliable.<sup>176</sup> On the contrary, research and experience strongly suggest that abused women are more credible when they are speaking to 911 or to their doctors as well as during the stress of the violent incident than they are later,<sup>177</sup> when they have time to reflect on the dangerousness of their situations<sup>178</sup> and the additional risk of harm to themselves that would result from participation in the prosecution.<sup>179</sup> Rather than rewarding battering behavior, the Court should carefully construe the definition of "testimonial" to preserve the ability of prosecutors to combat the evils of domestic violence.

## V. CONCLUSION

The victimless domestic violence prosecution is a creative, resourceful, and effective response to the patterns established by the defendant who then batters his partner. Use of the hearsay exceptions grew out of the in-

176. See Belooﬀ & Shapiro, *supra* note 22, at 1.

177. *Id.* at 19–21.

By the time testimony is given, the victim will likely have been subject to threats or coercion by the assailant. Due to the pressure on the victim to recant, testimony given on the witness stand months later by the domestic violence victim will not have the same evidentiary value, and cannot substitute for the out of court statement. . . . [T]he initial out of court statement of a domestic violence victim in a domestic violence case is likely to be the most reliable statement obtainable[.]

*Id.*; see also Hanna, *supra* note 22, at 1901.

178. One author describes several reasons why a cooperative victim may become uncooperative: Most domestic violence victims have been frequently threatened by the batterer and understand that police departments are often not equipped to protect them against a truly obsessed defendant. If the victim has children, she may fear that her cooperation in the prosecution may result in the loss of her children through kidnapping, violence, or a custody battle. The victim may also fear that the defendant will carry out his threats to harm or kill her family members, friends and/or pets.

Victims of domestic violence may refuse to cooperate in their batterer's prosecution for economic reasons. "When a battered woman leaves her abuser, there is a 50% chance that her standard of living will drop below the poverty line." [And] it is a myth to think that being "cut off" is the only form of economic harm a batterer can impose on his victim. For example, a batterer will often harass a victim at her place of work, until her employer terminates her from her position. He may refuse to pay his portion of child support. He may make false reports of fraud to the Welfare Department to create obstacles to her lawful receipt of public assistance. He may destroy her property, including her home and car. He may harass and annoy her neighbors, until her landlord terminates her rental agreement. He may threaten the children's caregiver, until the caregiver refuses to care for the children. Victims of domestic violence often experience these economic threats and harms and know that there is rarely any practical legal recourse. Thus, a victim's decision not to cooperate in her batterer's prosecution may simply be a rational economic choice.

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, 368–69 (1996) (internal footnotes omitted); see also Belooﬀ & Shapiro, *supra* note 22.

179. See Corsilles, *supra* note 17; Raeder, *supra* note 11, at 794 (noting that the expert on domestic violence in the O.J. Simpson murder trial, Dr. Dutton, estimated that the risk of spousal homicide increases by a factor of six on separation).

ability to prosecute serious offenses due to the victim's unavailability and society's increased recognition of the domestic violence battering dynamic, including the defendant's role in the victim's refusal to testify. Without the hearsay exception tools, prosecutors' offices across the country will be powerless to address a significant portion of domestic violence crimes; without these tools, domestic violence will return to a private realm beyond the reach of the state. Using victimless prosecutions, society has made inroads against domestic violence. Eliminating the ability to proceed without the victim will reverse these societal gains. Batterers will quickly realize the state's inability to proceed in millions of crimes against women, even when women actively seek the assistance of law enforcement. Courts, therefore, must construe *Crawford* in such a way that adopts a narrow definition of "testimonial" that does not preclude the use of excited utterances, present sense impressions, and statements to medical personnel in domestic violence cases. In this way, the strength of victimless prosecutions will be preserved.