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"I'd Grab at Anything. And I'd Forget." Domestic Violence Victim Testimony After Davis v. Washington, 41 J. Marshall L. Rev. 937 (2008)

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"I'D GRAB AT ANYTHING. AND I'D FORGET."

DOMESTIC VIOLENCE VICTIM TESTIMONY AFTER *DAVIS V. WASHINGTON*

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Some folks whispered, some folks talked
But everybody looked the other way
And when time ran out there was no one about
On Independence Day . . .[1]

I. INTRODUCTION

A. "Ask Me"[2]

Ask Me. Ask Me. Ask Me. Here goes . . . . Pushes me, drops me into the corner. Hair rips. A sharper pain. His shoe into my arm, like a cut with a knife . . . . I curl up. My back screams. I don't think, I don't look. I gather the pain . . . . [But] [d]o I actually remember that? Is that exactly how it happened? Did my hair

* J.D. Candidate, May 2008. The author wishes to thank Professor Susan L. Brody, Peter Isaac, and the 2007-2008 Editorial Board of *The John Marshall Law Review* for their invaluable assistance in the writing of this Comment. She is also grateful to the victim advocates at the Davidson County District Attorney's Office in Nashville, Tennessee for originally inspiring her to write this piece. The author would like to recognize her parents, Douglas and Pamela Barth, for teaching her how to see the world through another's eyes. She dedicates this Comment to Matthew James Hofheimer, the editor who first challenged her to write with conviction.

1. MARTINA MCBRIDE, *Independence Day*, *on* MARTINA MCBRIDE GREATEST HITS (RCA Records 2001).

2. RODDY DOYLE, THE WOMAN WHO WALKED INTO DOORS, 175, 186 (Penguin Books 1996). This Comment utilizes portions of this novel (as section titles or examples) to highlight the nature of domestic violence victim storytelling. All of these excerpts are presented from the perspective of Paula Spencer, the novel's protagonist and a victim of domestic violence. Although admittedly disjointed and inconsistent, victim statements shed light on the day-to-day experience of living in a home infected with violence. Because it is only in the past thirty years that domestic violence has begun to be recognized, these quotes stress the importance of asking victims about their experiences in order to hear their answers. As this Comment will suggest, the law, too, must listen to victim stories in order to combat domestic violence.

> *rip* . . . . When did it happen? What date? What day? I don't know . . . . I'm messing around here. Making things up; a story . . . . Hair *rips*. Why don't I just say He pulled my hair[?]
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> [Now] I have memories that I can touch . . . . I'm haunted all day and all night. I have mistakes that stab me before I think of them. He hit me, he thumped me, he raped me, it happened.[3]

Paula Spencer's story[4] mirrors the way in which many domestic violence prosecutions unfold.[5] Although Paula has memories of the abuse, once she is asked to relay those memories to others, she begins to question her own accuracy.[6] She "loved him," she "provoked him," she "was stupid," she "needed him."[7] Once social workers, advocates, police, or prosecutors enter the scene; these are the phrases that we hear from domestic violence victims.[8] In the excerpt, Paula did not call the police, she did not tell a friend or an advocate. Instead, she privately reflects on the abuse that she endured for seventeen years.[9]

What if Paula called 911 and then claimed she was "making things up?"[10] Could the transcript of that call be used in a trial against Charlo, her husband?[11] If a neighbor heard her scream and the police arrived to find Paula's clothing slashed, could the police admit this evidence at trial to convict Charlo?[12] Would it matter, if Paula "loved him"[13] too much to testify against him, that

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3. *Id.* at 175, 183-85. Doyle's novel follows Paula Spencer through her abusive relationship with her husband. Ironically, police kill Paula's husband while pursuing him for an unrelated crime. *Id.*

4. DOYLE, *supra* note 2. Paula Spencer is the novel's protagonist. *Id.*

5. *See generally* Amanda Dekki, Note, *Punishment or Rehabilitation? The Case for State-Mandated Guidelines for Batterer Intervention Programs in Domestic Violence Cases,* 18 ST. JOHN'S J. LEGAL COMMENT. 549, 552-65 (2004) (outlining the components of community responses to domestic violence and advocating the use of Batterer Intervention Programs to rehabilitate batterers).

6. DOYLE, *supra* note 2, at 184.

7. *Id.* at 177.

8. *See* Connecticut v. Borelli, 629 A.2d 1105, 1113 (Conn. 1993) (finding expert testimony on Battered Women's Syndrome admissible). In this case, the witness, Stark, was introduced to help explain why the victim recanted on the stand. *Id.* Stark testified that battered women commonly fail to report their problems or delay reporting them to the authorities or others, that even though these women have suffered extraordinary harm, they minimize or even deny the harm that they have suffered, and there is the "paradoxical situation . . . where a woman will come in on one occasion and present a very clear and concise picture of danger that she's in, either explaining it to her health provider or to a police officer, and then a week later completely change her story." *Id.*

9. DOYLE, *supra* note 2.

10. *Id.* at 184.

11. *Id.* Charlo is the name of Paula's abusive husband in Doyle's novel. *Id.*

12. *Id.*

13. *Id.*

the years of abuse happened at all?[14]

B. One Answer

First, this Comment will identify the frequency with which incidents of domestic violence occur in the United States and how these incidents have been treated by the criminal justice system to date.[15] Second, it will trace the evolution of mandatory and evidence-based prosecutions and the importance of hearsay evidence in domestic violence cases. Third, it will explore the pertinent psychological effects on female victims of intimate violence and how this bears upon victims' experiences in court. Fourth, it will analyze the Supreme Court's recent decision in *Davis v. Washington*[16] and its forthcoming impact on domestic violence prosecutions. Last, it will suggest how the *Davis* decision will impact the way prosecutors and police approach domestic violence cases and what state legislative measures should be taken in the wake of *Davis* to ensure that the voices of victims are heard.

II. BACKGROUND

A. The Origins of Domestic Violence: "It Happened"[17]

In the landmark decision *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[18] Justice Sandra Day O'Connor spoke of the pervasiveness of domestic violence:

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14. *Id.* at 183.

15. The author recognizes that domestic violence is a problem that affects families and is often perpetuated from parents to children: boys, who are hit by their mothers, go on to abuse their own wives. The question then becomes, should the man be punished for a behavior he learned from a parent? *See* LINDA G. MILLS, INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE 1-10 (Princeton Univ. Press 2003) (discussing the deeply engrained nature of family violence). Even though there are incidents where men are the victims of domestic abuse, the author chooses to focus on male-to-female violence. As a result, the victim will always be, to use the traditional term, a battered woman. To illustrate the overwhelming prevalence of male-to-female violence: in 1994, thirty-seven percent of women injured by violence and treated in an emergency room were injured by an intimate partner, while less than five percent of men injured by violence and treated in an emergency room were injured by an intimate partner. DEP'T OF JUSTICE SPECIAL REPORT: VIOLENCE-RELATED INJURIES TREATED IN HOSPITAL EMERGENCY ROOM DEPARTMENTS, NCJ-178247, 5 (1997).

16. 547 U.S. 813 (2006).

17. DOYLE, *supra* note 2, at 184.

18. 505 U.S. 833 (1992). *Casey* held that the spousal notification portion of the Pennsylvania abortion statute was invalid because it required a woman to notify her husband of her intention to abort the fetus before exercising her freedom of choice to do so. *Id.* at 898. The Court related spousal and family violence data to show that the spousal notification requirement was a substantial obstacle to battered women obtaining an abortion. *Id.* at 893-94.

> Studies reveal that family violence occurs in two million families in the United States. This figure, however, is a conservative one that substantially understates (because battering is not usually reported until it reaches life-threatening proportions) the actual number of families affected . . . . In fact, researchers estimate that one of every two women will be battered at some time in their life . . . .[19]

Between 1996 and 2001, 1,551,143 incidents of family violence were reported in the United States.[20] Of these incidents, the most prevalent relationship context was boyfriend/girlfriend.[21] The spousal relationship context was a close second.[22] As these findings indicate, domestic violence truly is an epidemic.

During the 1970s, mainstream feminists recognized this fact[23] and began to reform institutional responses to domestic violence.[24] However, it was not until after the Simpson-Goldman murders in 1994 that most states instituted mandatory arrest and no-drop prosecution policies.[25] Advocates of these measures believed that

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19. *Id.* at 888. The opinion goes on to say that "women of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered." *Id.* at 889. Further, "[b]attering husbands often threaten their wives . . . with further abuse if she tells an outsider of the violence and [her husband] tells her that nobody will believe her." *Id.* at 889-90. "A battered woman, therefore, is highly unlikely to disclose the violence . . . for fear of retaliation by the abuser." *Id.* "Even when confronted directly by . . . helping professionals, battered women often will not admit to the battering because they have not admitted to themselves that they are battered." *Id.* at 890.

20. National Criminal Justice Reference Service, http://www.ncjrs.gov/spotlight/family_violence/facts.html (last visited Feb. 25, 2008). This fact sheet reports the findings of a 2004 family violence study conducted by the Federal Bureau of Investigation's Uniform Crime Reporting (UCR) Program. *Id.* Local, county, and state law enforcement agencies report incidents from twenty-two crime categories to the UCR. *Id.* The data is representative of twenty percent of the United States population and sixteen percent of the total crime statistics collected by the UCR program. *Id.* It is important to note that this study only accounts for *reported* incidents of family violence between 1996 and 2001. *See Casey*, 505 U.S. at 888 (finding that most incidents of domestic violence are not reported until they are life-threatening).

21. National Criminal Justice Reference Service, *supra* note 20. 29.6 percent of the total violent incidents reported was between boyfriends and girlfriends. *Id.*

22. *Id.* 24.4 percent of the violent incidents in 1996 to 2001 were between husbands and wives. *Id.*

23. MILLS, *supra* note 15, at 34-36.

24. *Id.* at 34.

25. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 238-43 (2005). "With the death of Nicole Brown, politicians raced to the state house to invoke domestic violence laws, jumping on the 'zero tolerance' bandwagon." *Id.* at 238. Mandatory arrest requires that police officers arrest a suspect if he or she has reason to believe that an assault has occurred, regardless of the victim's consent or objection. MILLS, *supra* note 15, at 36. Currently, the federal government encourages mandatory arrest and

they would force professionals to treat intimate violent crimes the same way as stranger crimes, thereby ensuring that batterers were punished by the criminal justice system.[26]

Mandatory arrest and prosecution policies succeeded in bringing attention to the Battered Women's Movement and characterizing intimate violence as a crime under the law.[27]

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prosecution by providing federal funds to jurisdictions that adopt such policies. *Id.* at 37. Similarly, no-drop policies encourage prosecutors to pursue domestic violence cases regardless of the victim's wishes. *Id.* at 40. Other no-drop policies are more flexible and take the battered woman's wishes into account when deciding whether to go forward with criminal charges. *Id.*

26. *Id.* at 35. *See generally* Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes, in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 161, 162-75 (E.S. Buzawa & C.G. Buzawa, eds., 1992) (describing no-drop policies as emphasizing the fact that prosecutors control decision-making about the case by precluding victims from dropping charges). Prosecutors, as part of the executive branch of government, are allowed discretion with regard to how laws should be implemented. *Id.* at 162. Traditionally, prosecutors assumed that domestic violence is trivial, and because women often do not follow through with the charges in domestic violence cases, they waste prosecutorial resources. *Id.* at 162-63. Mandatory prosecution policies allow for prosecutorial discretion, while preventing victims from dropping the case. *Id.* at 168. Proponents of no-drop policies argue that they force prosecutors to take domestic violence cases seriously and acknowledge that domestic violence is a crime against society. *Id.* In contrast, opponents of no-drop policies argue that victims should have the right to decide whether they want intervention from the criminal justice system. *Id.* Two examples serve to illustrate the mandatory prosecution controversy: Duluth, Georgia initiated a "case-by-case" approach to encouraging prosecution as opposed to a "hard no-drop policy," and after several years found that the abuser was intimidating the victim, while a study in Indianapolis found that where the victim "initiated the prosecution, recidivism decreased when victims had control over whether to drop charges and decided not to drop charges." *Id.*

27. *See* Miccio, *supra* note 25, at 238-43 (discussing the ways in which mandatory prosecutions succeeded). "They criminaliz[ed] conduct that the justice system and society previously had sanctioned." *Id.* at 240; *see also* CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 564-65 (Foundation Press 2001) (providing a list of behaviors by abusers that fit into the confines of traditional crimes). Dalton and Schneider list assault, assault and battery, assault and battery on an officer, assault and battery with a dangerous weapon, attempt to commit a crime, breaking and entering, criminal trespass, disorderly conduct, disturbing the peace, willful and malicious destruction of property, harassing phone calls, violation of a restraining order, and intimidation of a witness. *Id.* Kidnapping, attempted homicide and homicide, rape and sexual assault, and stalking should also be added. *Id.* Rape and sexual assault are problematic criminal categories for married persons because many victims do not realize that they have the "right to refuse sex with an intimate partner" and the law is "slow and reluctant" to recognize that the "marriage license is not a license to rape." *Id.*; *see also* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 50 (1992) (tracing the development of spousal abuse). In 1970, when feminists began reformation of domestic violence practices, American law did not recognize marital rape as a crime. *Id.*

Despite these strides, however, the continuing efficacy of mandatory arrest and prosecution is questionable.[28] While mandatory arrest laws increase the number of domestic violence cases filed, prosecutors continue to find it difficult to successfully prosecute domestic violence cases because victims recant, request that charges be dropped, or refuse to testify against their abusers.[29]

B. Evidence-Based Prosecutions: "[T]he burn on my hand? The missing hair? The teeth?"[30]

To avoid problems with victim testimony, prosecutors of domestic violence cases often employ practices known as evidence-based or victimless prosecutions.[31] Prosecutors build their cases on physical evidence such as photographs of injuries and through witness statements to the police, medical personnel, or social workers.[32] Calls made to 911 and victim statements play an important role in victimless prosecutions.[33] Many times the victim is the only witness and her out-of-court statements, if admitted as hearsay exceptions, are necessary to prove essential elements of the crime.[34]

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28. *See* National Criminal Justice Reference Service, *supra* note 20 (reporting a remarkable number of violent family situations between 1996 and 2001); *see also* MILLS, *supra* note 15, at 35 (finding that mainstream feminists were too zealous in their reformation policies and thought they could change the discriminatory attitudes of police officers and prosecutors by forcefully changing their policies); DALTON AND SCHNEIDER, *supra* note 27, at 621 (acknowledging the tension between proponents and opponents of no-drop prosecution policies). If prosecutorial discretion is left to the victim, batterers become more aggressive. Casey G. Gwinn & Sergeant Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and Prosecutor*, 20 W. ST. U. L. REV. 297, 310-11 (1993). This is because, "[b]y definition, most batterers have the power in violent relationships." *Id.* at 310. "When the system demanded that the victim act in the role of prosecutor, in reality the batterer was being given control of the criminal case." *Id.* "Once prosecutors . . . stop asking victims whether they want to press charges, they quickly find that victims stop asking to press charges or drop charges." *Id.* Still, victim advocates argue that some victims have "good reason to fear" the consequences of pursuing prosecution. DALTON AND SCHNEIDER, *supra* note 27, at 622. These same advocates fear that no-drop policies coerce victims into cooperation, rather than encouraging them to seek help from the criminal justice system. *Id.*

29. Geetanjli Malhotra, Note, *Resolving the Ambiguity Behind the Bright-Line Rule: The Effect of* Crawford v. Washington *on the Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions*, 2006 U. ILL. L. REV. 205, 213 (2006).

30. DOYLE, *supra* note 2, at 164.

31. MILLS, *supra* note 15, at 40. Because domestic violence victims often recant, prosecutors treat such cases similarly to homicides, "as though no victim was available to testify." *Id.*

32. Malhotra, *supra* note 29, at 214.

33. *Id.*

34. *Id.* "The evidence-based approach is a powerful weapon for prosecutors

When a prosecutor offers a victim's accusatory statement into evidence, hearsay rules are implicated.[35] A statement such as, "he (the defendant) is the one who hit me," is hearsay because it is offered to prove the truth of the matter asserted: the defendant committed a battery upon the victim.[36] However, if the victim's previous, out-of-court accusatory statement falls under a legitimate hearsay exception, then that statement may be admissible against the defendant.[37]

Additionally, the Sixth Amendment provides a criminal defendant with the right "to be confronted with the witnesses against him."[38] If the victim refuses to testify against her abuser at trial, her accusatory statement cannot be cross-examined and the use of that statement violates the defendant's Constitutional right to confront his accuser.[39]

Ohio v. Roberts[40] was the first Supreme Court case to define the boundaries of admissibility for an out- of-court statement where the out-of-court declarant is unavailable.[41] *Roberts* found that where a witness is unavailable for cross-examination at the present proceeding, her statement is admissible only if it "bears adequate 'indicia of reliability.'"[42] The controversial decision in *Crawford v. Washington*[43] rejected the *Roberts* framework and found that admitting statements deemed reliable by a judge is fundamentally at odds with the right of Confrontation.[44] The *Crawford* Court left "for another day any effort to spell out a

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fighting the domestic-abuse battle because it allows prosecutors to take legal action against the abuser without relying on the victim's cooperation." *Id.* at 214-15.

35. *See* Michael D. Cicchini & Vincent Rust, *Confrontation After* Crawford v. Washington*: Defining "Testimonial"*, 10 LEWIS & CLARK L. REV. 531, 532 (2006) (suggesting that the Court define testimonial evidence to include all accusatory hearsay).

36. *Id.*

37. The statement could be admitted as a "present sense impression," FED. R. EVID. 803(1), or as an "excited utterance," FED. R. EVID. 803(2).

38. U.S. CONST. amend. VI.

39. *See* Cicchini & Rust, *supra* note 35, at 532 (providing where the state calls a police officer to testify that the victim told him, "the defendant is the person who attacked me," the statement is not only hearsay (because it is offered for the truth of the matter asserted: the accused is the attacker), but should be inadmissible under the Confrontation Clause as an accusatory statement).

40. 448 U.S. 56 (1980).

41. *See id.* at 65. (finding that the Sixth Amendment operates to restrict the range of admissible hearsay when a witness is shown to be unavailable).

42. *Id.* "Reliability 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." *Id.*

43. 541 U.S. 36 (2004).

44. *Id.* at 60. The Court overruled *Ohio v. Roberts*. *Id.* at 75.

comprehensive definition of 'testimonial,'" (beyond noting that testimonial statements are made with an eye toward future prosecution) and left in its wake a great burden on evidence-based prosecutions.[45] With the recent Supreme Court decision *Davis v. Washington*,[46] the day to define testimonial has come.[47]

C. "Making things up": Recanting a Story of Violence[48]

Before turning to the *Davis* decision and its impact on domestic violence prosecutions, it is important to understand the abusive dynamic that often prevents women from testifying against their batterers.[49] Indeed, as many as one in five victims do not want their batterer arrested.[50] Even so, battered women report that abusers exert great control over their everyday activities.[51] This control manifests itself in rule-making.[52] A batterer might forbid, for example, his wife from writing checks from their joint checking account.[53] A violation of this "rule" results in a beating.[54] The wife knows that if she writes the check in violation of his wishes, she will be punished with physical violence. As a result, she obeys his rule. A process of self-censorship develops.[55] The victim, as a woman, has been socialized to believe that making relationships work is part of her

45. *Id.*

46. 547 U.S. 813.

47. *Id.* at 817. *Davis* determines which statements made in the course of police interrogations are testimonial. *Id.* The Court found that statements are nontestimonial when made "under circumstances objectively indicating that the primary purpose of the investigation is to enable police assistance to meet an ongoing emergency." *Id.* at 822. Statements are testimonial when there is no "ongoing emergency" and the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*

48. DOYLE, *supra* note 2, at 184.

49. Not all women respond to battering in the same way. *See, e.g.*, Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women's Syndrome,* 21 HOFSTRA L. REV. 1191, 1194-96, 1198-1201, 1216-27, 1231-32 (1993) (suggesting that the "psychological realities of battered women are not limited to one particular 'profile'"). However, the most prevalent dynamics of the battering relationship are helpful to a discussion of victims' reluctance to testify.

50. Eve S. Buzawa & Carl G. Buzawa, *The Scientific Evidence is Not Conclusive: Arrest is No Panacea, in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE, 337, 348 (R.G. Gelles & D.R. Loseke, eds., 1993).

51. Karla Fischer, Neil Vidmar, & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2126 (1993).

52. *Id.* at 2127.

53. *Id.* at 2129.

54. *Id.*

55. *Id.*

female role.[56] She feels responsible for the failure of her relationship with the batterer, evidenced by his "punishment": the abuse.[57] She learns to censor herself so that the relationship may succeed.[58]

This process of "rule-making" and subsequent censorship results in the victim's constant fear of future violence.[59] The batterer maintains control over the victim through the use of "extensive humiliation, ridicule, criticism . . . financial abuse; and societal isolation."[60] A fear of violence coupled with social isolation prevents women from testifying to the truth of their situation.[61] They are more fearful of the abusive consequences they might receive from the batterer for unveiling the abuse than they are of the consequences of keeping the abuse a secret.[62] The victim's need to self-censor may occur through the complete refusal to involve the police, a refusal to testify against the abuser in a criminal proceeding, or the recanting of a prior incident of abuse reported to the police.[63]

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56. *Id.*

57. *Id.*

58. *Id.* "Succeed" refers to the woman's misguided belief that if she obeys the batterer's wishes, the relationship will continue without violence. *See, e.g.*, WALKER, THE BATTERED WOMAN, *infra* note 65, at 55-70 (describing the tension-building phase of the cycle of violence).

59. Fischer, Vidmar, & Ellis, *supra* note 51, at 2132.

60. *Id.*

61. *See generally* Angela Browne, *Courtship and Early Marriage: From Affection to Assault, in* WHEN BATTERED WOMEN KILL, 38-48, 52-53 (MacMillan Free Press 1987) (discussing the beginnings of an abusive relationship). Browne describes isolation as "[n]eed for a constant knowledge of the woman's whereabouts, combined with a preference for not letting the woman interact with people other than themselves." *Id.* at 43. Browne goes on to say that this led to "severe restrictions of the woman's activities . . . especially once a commitment [between the woman and the abuser] had been established." *Id.*

62. *See* Buzawa & Buzawa, *supra* note 50, at 350 (finding that "[a] woman's experience may tell her that an arrest is ineffective and violence increases when the offender is freed").

63. *See Borelli*, 629 A.2d at 1113 (describing Stark's expert testimony that battered women stay in a relationship with an abuser, fail to report the abuse, and deny or minimize the harm they've experienced); *see also* Fischer, Vidmar, & Ellis, *supra* note 51, at 2141 (noticing that battered women feel a great deal of shame and embarrassment, particularly when their injuries are visible to others). It is normal for abused women to remain inside their homes until "their bruises and other injuries fade away." *Id.* at 1239. Minimization, much like denial, allows the victim to escape from the pain the violence in her life. *Id.* Similarly, in accordance with the cycle of violence, women choose to focus on the times during the relationship when there was not any violence and hope that it will not occur again in the future. *See infra* II.D, note 64 and accompanying text (describing the manner in which batterers control their victims and the cycle of violence).

D. The Cycle of Violence: "Waiting for the fist, waiting for the smile."[64]

Domestic abuse involves a "cycle of violence."[65] Lenore Walker, one of the first female psychologists to analyze the dynamics of battering relationships, breaks the cycle of violence into three phases: the tension-building phase, the acute battering incident, and the tranquil, loving (non-violent) phase.[66] During the tension-building phase, minor battering incidents occur and the woman's main goal is to placate the batterer and keep the violence from escalating.[67] At some point the tension builds to the point where it erupts in a violent incident.[68]

The acute battering incident is different from the tension-building phase in its intensity.[69] The physical violence and damage that can occur during this phase leads the victim to realize that she has no control over the batterer.[70] Many women do not seek help during or even directly after an acute battering incident because they feel like they have lost control over the relationship.[71]

Last is the tranquil, loving phase. During this phase, the batterer seeks forgiveness and the victim may join the batterer in an illusion of bliss: she convinces herself that it will not happen

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64. DOYLE, *supra* note 2, at 176.

65. LENORE WALKER, *The Cycle of Violence*, *in* TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS, 42-45 (HarperCollins 1989). *See generally* LENORE WALKER, THE BATTERED WOMAN, 55-70 (Harper & Row 1979) (discussing the phases of the cycle of violence).

66. WALKER, TERRIFYING LOVE, *supra* note 65, at 42-45.

67. *Id.* Minor battering incidents include slaps, pinches, verbal abuse, and psychological warfare. *Id.* The woman's attempts to calm the batterer range from "a show of kind, nurturing behavior to simply staying out of his way." *Id.* Her desire to placate the batterer is "a double-edged sword" because her behavior "legitimizes his belief that he had the right to abuse her in the first place." *Id.*

68. *Id.* The psychological tension of the first phase builds to the point where the woman emotionally withdraws and the batterer, angry at her withdrawal, becomes more abusive. *Id.*

69. *Id.* The acute battering incident is characterized by "rampage, injury, brutality, and sometimes death." *Id.* The victim sees the incident as unpredictable, but also knows that it is inevitable. *Id.* *See* WALKER, THE BATTERED WOMAN, *supra* note 65, at 59-60 ("[L]ack of control and its major destructiveness distinguish the acute battering incident from the minor battering incidents in phase one."). *Id.* at 59.

70. *Id.* Resistance will only make the attack worse for the victim. *Id.* Often, during the attack itself, the victim distances herself from the pain and does not recognize what is happening. *Id.*

71. *Id.; see also* MILLS, *supra* note 15, at 60 (suggesting that the "leaving and staying" of victims in abusive relationships reflects not indecision, but a complex set of "factors"). Women tend to have stronger relational bonds than men, and, as a result, are more likely to remain in dangerous abusive relationships. *Id.*

again.[72]

III. ANALYSIS

A. *"Too Scared to Expect It": A Typical Domestic Violence Case*[73]

A typical domestic violence prosecution often involves multiple uses of hearsay and hearsay exceptions.[74] The perpetrator's identity, his actions, and the victim's injuries may all be obtained from the victim's phone call to 911, her statements to police, photographs of her injuries, and other physical evidence.[75] An entire case may be composed of hearsay evidence.[76] Because domestic violence often involves repeat offenders, perpetrators and victims are increasingly aware of law enforcement's use of hearsay.[77]

In some cases, this creates a "race" to call 911 by which the perpetrator places the call first and actually secures the arrest of the victim, knowing his call will be used as evidence at trial.[78]

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72. MILLS, *supra* note 15, at 60. Many battered women feel responsible for their abuser; they envision themselves as the one link their batterer has to the "normal world." *Id.* This is the phase where the woman is most psychologically victimized. *Id.* "Underneath the grim cycle of tension, violence, and forgiveness that make their love truly terrifying each partner may believe that death is preferable to separation. Neither one may truly feel that he or she is an independent individual, capable of functioning without the other." WALKER, TERRIFYING LOVE, *supra* note 65, at 42-45. *See also* Michelle Weldon, I CLOSED MY EYES: REVELATIONS OF A BATTERED WOMAN 118 (Hazelden 1999) (detailing one woman's reflections on her abusive relationship).

> For our entire relationship I had been recklessly positive and forgiving, seeking solutions, trying to work around him, trying to offer better answers . . . . But even looking at him couldn't change who he really was. He was the only component in my life that I couldn't make better, that I couldn't change.

Id.

73. DOYLE, *supra* note 2, at 196.

74. *See* Alistair Y. Raymond, Case Note, *Calling* Crawford: *Minnesota Declares a 911 Call Non-Testimonial in State v. Wright*, 58 ME. L. REV. 249, 252-53 (explaining the role of hearsay in criminal prosecutions).

75. *Id.* at 263. In light of public awareness of domestic violence, uncooperative victims still make these crimes "among the most difficult to prosecute" with hearsay evidence as a necessity. *Id.* In cases of domestic violence, prosecutors turn to the hearsay exceptions present sense impression, excited utterance (to admit the victim's 911 calls or statements to police), or statements for purposes of medical diagnosis or treatment (to establish the victim's injuries). FED. R. EVID. 803(1)(2)(4).

76. Raymond, *supra* note 74 at 263-64.

77. *Id.*

78. *Id.*; *see also* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1196-97 (2002)(describing the race to the phone phenomenon).

> The person first to call and complain is more likely to get to stay home,

This results in recurring and alternating arrests of batterer and victim to the point where the identity of the real victim becomes unclear.[79] Problems like this "race" demonstrate the way in which batterers can manipulate the criminal justice system to their own advantage.[80]

The antidote to these practices was once found in evidence-based prosecutions, a technique which *Crawford* and *Davis* have subsequently limited.[81] This section will examine *Crawford* and *Davis* in depth and the ways in which their fact-specific results work to the detriment of domestic violence prosecutions.

B. "He'd shot her so she couldn't say anything": The Trap of Unavailability[82]

Hearsay policy stands for the proposition that a witness's out-of-court statements are less reliable than statements made by a witness in court, under oath, in the presence of a jury, and subject to cross-examination.[83] The purpose of any trial is to expose the truth, and cross-examination is the vehicle by which weaknesses in a witness's testimony are exposed to the factfinder.[84]

The Confrontation Clause of the Sixth Amendment, although often coupled with hearsay principles, has its own underlying policies.[85] The Confrontation Clause "is based upon a fundamental

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> while the other person is the one charged and taken into custody . . . . [I]t reflects merely a race to the phone by abusers who have been through the system and know that they will be in a much better position if they are the first to call; batterers, skilled at controlling their victims, are also likely to manipulate the law enforcement and evidence gathering system to which 911 is the threshold.

Id.

79. Friedman & McCormack, *supra* note 78 at 1196-97.

80. *Id.*

81. *See* discussion *supra* Part II.B (emphasizing the importance of evidence-based prosecutions in punishing domestic violence offenders).

82. DOYLE, *supra* note 2, at 158.

83. *Id.* at 251-52. The fact that the in-court witness/declarant (as opposed to the out-of-court declarant) is under oath has been equated to a ceremonial and religious symbol: it "induces a special obligation [on the part of the witness] to speak the truth." Carl C. Wheaton, *What is Hearsay?* 46 IOWA L. REV. 210, 219-22 (1961). Additionally, the lack of opportunity to observe the in-court witness/declarant's demeanor has been advanced to justify the hearsay rule. *Id.* If the jury or factfinder cannot observe the witness/declarant, they cannot assess his credibility. *Id.* Another argument for the hearsay rule is based on the Confrontation Clause. *Id.* However, confrontation may be waived if the defendant had a prior opportunity to cross-examine the out-of-court declarant. *Id.* Therefore, "most writers, both judicial and nonjudicial, feel that . . . lack of opportunity for cross-examination is the basic reason for rejecting hearsay." *Id.*

84. *See* Raymond, *supra* note 74, at 251-53 (describing the policies behind the hearsay rule).

85. *See id.* at 253-56 (providing a brief history of the Confrontation Clause);

principle . . . that a witness's testimony should be given in front of the adverse party."[86] The original intent behind the Confrontation Clause was to prevent the use of depositions or ex parte affidavits in lieu of cross-examination.[87] Such practices denied the jury the opportunity to assess the credibility and believability of the witnesses against the accused.[88]

The Court in *Roberts*[89] merged the Confrontation Clause with hearsay rules.[90] Statements bore sufficient "indicia of reliability" under the first prong of the *Roberts* test if they fell within a "firmly rooted hearsay exception."[91] The theory was that if an out-of-court statement fell within a hearsay exception, then there was no need for cross-examination.[92] *Crawford* overruled *Roberts* and re-drew the line between confrontation and hearsay rules.[93] Under

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see also Kenneth Graham, Commentary, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209, 209-11 (2005) (critiquing the history of the Confrontation Clause as provided by Justice Scalia in the *Crawford* majority opinion).

86. Raymond, *supra* note 74, at 253.

> The conventional history of the right of Confrontation, as embraced by the Crawford majority, goes something like this: the right of confrontation was created by common law judges seeking to preserve the English tradition of liberty in cases of Tudor oppression of the aristocracy; our ancestors brought this common law right with them when they came to the New World and deployed it against imperial persecution in inquisitorial courts. When drafting the Bill of Rights, James Madison wrote this common law right to cross-examine witnesses into the Sixth Amendment as a separate right of 'confrontation.'

Graham, *supra* note 85, at 209.

87. Raymond, *supra* note 74, at 253. The most famous example of a trial by ex parte examination is the trial of Sir Walter Raleigh where Raleigh prayed the court to bring him face to face with his accusers. Graham, *supra* note 85, at 212.

88. *See* Raymond, *supra* note 74, at 254 (finding that the primary purpose of the Confrontation Clause is that the witnesses against the accused are assessed by the jury in the same way the accused is judged); *see also* Mattox v. United States, 156 U.S. 237, 240 (1895) (*Mattox* is one of the first cases to deal with the right of confrontation and held that the defendant [a murderer] should not go free simply because "death has closed the mouth of that witness"). Although standing for the proposition that the defendant must stand in court and face his accuser, *Mattox* also paved the way for the Confrontation Clause to yield to public policy and the necessities of the case. *Id.*

89. 448 U.S. 56 (1980).

90. *See* Raymond, *supra* note 74, at 255-56 (finding that *Roberts* merged, and *Crawford* later severed the Confrontation Clause from hearsay).

91. *Id.* at 255. The *Roberts* Court noted that competing interests may sometimes warrant dispensing with the confrontation requirements. *Id.* The adequate "indicia of reliability" test demanded that not only must the hearsay statements be necessary, they must either 1) fall within a firmly rooted hearsay exception, or 2) show "particularized guarantees of trustworthiness." *Id.*; *Roberts*, 448 U.S. at 65-66.

92. Raymond, *supra* note 74, at 255.

93. *Crawford*, 541 U.S. 36 (2004).

Crawford, out-of-court statements must independently satisfy both a hearsay exception and the demands of the Confrontation Clause.[94]

C. "Memories are made of this": Pre- and Post-Crawford Historical Perspectives[95]

In theory, Justice Scalia's majority opinion in *Crawford* uses history to rejuvenate the defendant's right to confrontation.[96] In practice, his opinion delivers a blow to domestic violence prosecutions.[97] The *Crawford* rule insists on cross-examination as the only tool sufficient to satisfy the Confrontation Clause of the Sixth Amendment.[98] As a result, if an out-of-court statement is deemed testimonial in nature, and the witness is not available to testify at trial, the defendant must have had a prior opportunity for cross-examination.[99]

The Court defines testimony as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[100] Testimonial statements, then, consist of "affidavits . . . prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that an out-of-court declarant would reasonably expect to be used prosecutorially."[101] Under the *Crawford* formulation, statements taken by police officers are testimonial under the narrowest standard because they resemble the English examinations the Confrontation Clause sought to eliminate.[102] The *Crawford* Court declined the opportunity to

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94. *See id.* at 65-66 (rejecting and overruling *Roberts*).

95. DOYLE, *supra* note 2, at 198.

96. *See* Raymond, *supra* note 74, at 256-61 (describing *Crawford*'s effect as a "complete paradigm shift" in the Supreme Court's view of the Confrontation Clause).

97. *See* Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid*, Prosecutor, Nov. - Dec. 2004, at 14 (applying "common sense" and damage control to prosecutors' interpretations of *Crawford*).

98. *Crawford*, 541 U.S. at 65. In *Crawford*, the defendant, Michael Crawford, was charged with assault and attempted murder. *Id.* at 40. At trial, the prosecutor attempted to introduce evidence of Sylvia Crawford's out-of-court statement to police as evidence that Michael's attack on the victim was not self-defense. *Id.* Sylvia did not testify at trial because she asserted Washington's marital privilege. *Id.* The trial court allowed Sylvia's statement under the *Roberts* standard and the Washington Supreme Court agreed, finding her statement to be reliable. *Id.* at 40-42. The Supreme Court reversed the trial court decision. *Id.* at 68-69.

99. *Id.* at 59. "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted)." *Id.*

100. *Id.* at 51.

101. *Id.* at 52.

102. *Id.* *See* Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witness*, 39 U. RICH. L. REV. 511, 547-55 (2005)

"spell out a comprehensive definition of testimonial."[103]

In the wake of *Crawford*, prosecuting domestic violence cases became even more difficult.[104] Statements to law enforcement officers, once admitted in the victim's absence if deemed reliable under the *Roberts* standard, were refused.[105] The use of taped 911 calls from victims also became problematic because although many calls were requests for immediate police intervention, some had "testimonial" qualities.[106]

Post-*Crawford*, many scholars suggested that the doctrine of forfeiture by wrongdoing could circumvent the *Crawford* problem in domestic violence cases.[107] However, even where the defendant has threatened or even re-assaulted the victim to prevent her from testifying, establishing wrongdoing is nearly impossible.[108] "Victims who fear participating in a prosecution are unlikely to inform prosecutors about new episodes of abuse and even less likely to appear for a forfeiture hearing. Thus, where proof of the

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("seeking a categorical solution" to the treatment of police interrogations as testimony). *But see* Graham, *supra* note 85, at 219 (finding that the right of confrontation is an American innovation, not an English importation and to "confront" and accuser meant the holistic right to a fair trial, not just the right to cross-examination).

103. *Crawford*, 541 U.S. at 68. Scalia recognizes that the court's refusal to articulate a comprehensive definition will cause interim uncertainty, but stated "it can hardly be worse than the status quo [under *Roberts*]." *Id.; see* Mosteller, *supra* note 102, at 532-47 (providing case examples of testimonial and nontestimonial statements).

104. Krischer, *supra* note 97, at 14.

105. *See generally* Sweta Patel, *Comment: The Right to Submit 'Testimony' Via 911 Emergency after* Crawford v. Washington, 46 SANTA CLARA L. REV. 707, 714 (analyzing which statements may be testimonial under the *Crawford* Confrontation Clause formulation). *See also* Malhotra, *supra* note 29, at 221 (finding that 911 calls are not per se testimonial).

106. Raymond, *supra* note 74, at 264. *See also* Mosteller, *supra* note 102, at 608 (describing *Crawford*'s destructive effect on domestic violence prosecutions); David Jaros, *Essay: The Lessons of* People v. Moscat*: Confronting Judicial Bias in Domestic Violence Cases Interpreting* Crawford v. Washington, 42 AM. CRIM. L. REV. 995, 995-98 (2005) (describing the confusion that followed *Crawford* and its interpretation); Brief for the National Network to End Domestic Violence Indiana and Washington Coalitions Against Domestic Violence, Legal Momentum, et al. as Amici Curiae Supporting Respondents, Davis v. Washington, 547 U.S. 813 (2006) (Nos. 05-5224, 05-5705) 2006 WL 284229.

> [6]3% of respondents reported that the Crawford decision significantly impeded prosecutions of domestic violence; 76% indicated that after Crawford, their offices were more likely to drop domestic violence charges when victims recant or refuse to cooperate; and 65% reported that victims of domestic violence are now less safe in their jurisdictions than during the era preceding the Crawford decision.

Id. at 17.

107. *See, e.g.*, Krischer, *supra* note 97, at 14 (suggesting that forfeiture is a long-term solution to the *Crawford* problem).

108. Brief as Amici Curiae Supporting Respondents, *supra* note 106, at 23.

defendant's wrongdoing depends solely on the victim's in-court testimony, the testimony will be unavailable and a forfeiture argument will fail."[109]

D. Testimonial v. Nontestimonial Statements: "I had to say something definite, I had to let him know."[110]

Davis v. Washington was the Court's opportunity to define testimonial statements in domestic violence cases.[111] On certiorari, the Court combined the cases of *Davis v. Washington* and *Hammon v. Indiana* in its decision.[112]

In *Davis*, Michelle McCottry called 911.[113] The conversation revealed that McCottry had just been assaulted by Davis, her former boyfriend, who had come to her house to "get his stuff."[114] The operator explained that the police would first check the area for Davis, then find Michelle and speak with her.[115] When the police arrived within four minutes of the 911 call, they observed Michelle McCottry in a "frantic" state.[116] She had "fresh injuries on her forearm and face" and she was "gather[ing] her belongings and her children so they could leave the residence."[117]

Adrian Davis was charged with felony violation of a domestic no-contact order and at trial, the State's only witnesses were the police officers who responded to Michelle's 911 call.[118] Although Michelle initially cooperated with the prosecutor's office, the State was unable to locate her at the time of trial.[119] The trial court

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109. *Id.* at 22-23. "Moreover, proof of interference in the domestic violence context can be quite subtle. 'Battered women . . . may perceive danger and imminence differently from men . . . . A subtle gesture or a new method of abuse, insignificant to another person, may create a reasonable fear in a battered woman.'" People v. Romero, 13 Cal. Rptr. 2d 332, 338 (Cal. Ct. App. 1992).

110. DOYLE, *supra* note 2, at 173.

111. 547 U.S. 813.

112. State v. Davis, 154 Wash. 2d 291 (Wash. 2005); Hammon v. State, 829 N.E.2d 444 (Ind. 2005).

113. *Davis*, 547 U.S. at 817. When the operator answered, the connection terminated before anyone spoke and the operator reversed the call. *Id.*

114. *Id.* at 817-18. The relevant portion of the call was as follows:

Complainant: Hello.
911 Operator: What's going on?
Complainant: He's here jumpin' on me again. . .
911 Operator: Are there any weapons?
Complainant: No. He's usin' his fists. . .
911 Operator: Listen to me carefully. Do you know his last name?
Complainant: It's Davis.

Id.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Davis*, 154 Wash. 2d at 296.

admitted the 911 call as an excited utterance hearsay exception over Davis's Confrontation Clause objections.[120] Davis was convicted.[121]

In *Hammon*, police responded to reports of a domestic disturbance at the home of Hershel and Amy Hammon.[122] When they arrived, they found Amy Hammon "alone on the front porch," "somewhat frightened."[123] She told police that "nothing was the matter" and gave them permission to enter her house.[124] Once inside, police observed a broken heating unit with shards of glass strewn around the still-lit unit.[125] Hershel admitted to police that he and Amy had been in an argument, but said that it never became physical and "everything was fine now."[126] One of the officers remained with Hershel while the other went to the living room to ask Amy again what had happened.[127] Hershel tried to intervene in Amy's conversation with the police and became angry when police forced him to stay separated from his wife.[128] Amy filled out a battery affidavit.[129]

Hershel was charged with domestic battery in violation of his probation.[130] Although the state subpoenaed Amy, she did not appear at Hershel's bench trial.[131] The trial court admitted Amy's affidavit as a present sense impression, and her statements to police officers as excited utterances, both exceptions to the hearsay rule.[132] Hershel Hammon was found guilty and the Indiana Supreme Court affirmed his conviction.[133]

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120. *Id.*; *see also* FED. R. EVID. 803(1). The Washington Supreme Court affirmed, "concluding that the portion of the 911 conversation in which McCottry identified Davis was not testimonial, and that if other portions of the conversation were testimonial, admitting them was harmless beyond a reasonable doubt." *Davis*, 547 U.S. at 817.

121. *Id.*

122. *Hammon*, 829 N.E.2d at 446.

123. *Id.*

124. *Id.* at 447.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Davis*, 547 U.S. at 819-20.

129. *Id.* The pertinent part of the affidavit stated: "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone . . . ." *Id.*

130. *Hammon*, 829 N.E.2d at 447.

131. *Id.*

132. *Davis*, 547 U.S. at 820; FED. R. EVID. 803 (1) & (2).

133. *Id.* The Indiana Supreme Court affirmed the conviction, validated the admission of Amy's statements to police as excited utterances and found that even though the battery affidavit was testimonial, it was harmless beyond reasonable doubt. *Id.*

E. Questioning the Clarity of An Ongoing Emergency: "His smile meant lots of things."[134]

In its opinion, the Court referred to the *Crawford* formulations of testimonial statements.[135] The police interrogation in *Crawford* qualified under any definition of testimonial, but the statements in *Davis* could not be characterized so easily.[136] *Davis* took *Crawford*'s testimonial/nontestimonial distinction to the next level by characterizing nontestimonial statements as those statements "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[137] Statements are testimonial when there is no "ongoing emergency, and . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[138]

With regard to Michelle McCottry's 911 call, the *Davis* Court found that her out-of-court statements were nontestimonial because she was facing an ongoing emergency.[139] "McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe."[140] Because McCottry was in fear for her life and in need of police assistance, the primary purpose of her call was not to provide testimony.[141]

Unlike Michelle McCottry's 911 call, the Court deemed Amy Hammon's statements to police officers testimonial.[142] Indeed, the Court likens the police investigation in Amy Hammon's case[143] to

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134. DOYLE, *supra* note 2, at 196.
135. *Davis*, 547 U.S. at 822.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 827. "Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against a bona fide physical threat." *Id.*
140. *Id.*; *see also* State v. Wright, 726 N.W.2d 464, 475 (Minn. 2007) (holding, in light of *Davis*, that both the initial portion of a 911 call reporting an emergency, and the later portion where caller asked for assurances that help was coming, were non-testimonial). *But see People v. Cortes*, 781 N.Y.S.2d 401, 407 (App. Div. 2004) (holding that a 911 call from a witness to a crime is testimonial because individuals call 911 to report crimes with the knowledge that they, the perpetrator, will be prosecuted).
141. 547 U.S. at 828. Just because this portion of McCottry's call was nontestimonial, does not mean that the call could not have evolved into testimonial statements once the call's purpose of securing emergency assistance was achieved. *Id.*
142. *Id.* at 830.
143. *Hammon*, 829 N.E.2d at 446-48.

the investigation of Sylvia Crawford.[144] Because Amy Hammon was not facing an ongoing emergency, the statements she made to police were testimonial in nature and her absence in court violated the Confrontation Clause.[145] By having Amy sign a battery affidavit and answer questions about what happened (not what *is happening*), the officers investigated possible past criminal conduct.[146] The Supreme Court reversed Hershel Hammon's conviction.[147]

In its opinion, the Supreme Court never addresses the domestic violence context in which both of these cases arose. In fact, the Court only refers to the character of the offenses, crimes of "domestic violence," once in its opinion.[148] Ironically, however, the Court, as it did in *Crawford*, engages in a lengthy discussion about the historical meaning of the words "witness" and "testimonial" and the meaning of the Confrontation Clause as it was understood during the Framer's generation.[149]

F. Ongoing Emergencies in the Domestic Violence Context: "Everything was fragile and hysterically important"[150]

Justice Thomas, dissenting in *Davis*, criticized the testimonial/nontestimonial distinction as being "neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause."[151] Thomas points out that a law enforcement officer always responds to a crime scene with the dual purposes of assessing the emergency in progress and preparing for a later criminal prosecution.[152]

The *Davis* distinction requires that courts divine the purpose of any police investigation producing out-of-court statements.[153] It

144. *Davis*, 547 U.S. at 829-32. Although the *Crawford* interrogation was admittedly more formal, the primary purpose was the same in both cases: to provide the truth about past criminal conduct. *Id.* Sylvia Crawford was interrogated at the police station separately from her husband Michael Crawford; Amy Hammon was interviewed in the living room while Hershel Hammon was secured to the kitchen. *Id.* Both took place after the events in question were over and both attempted to re-create those events. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 834.

148. *Id.* at 831.

149. *Id.* at 821-22.

150. DOYLE, *supra* note 2, at 196.

151. *Davis*, 547 U.S. at 842 (Thomas, J., concurring in judgment in part and dissenting in part); *see also* Brief as Amici Curiae Supporting Respondents, *supra* note 106, at 29 (arguing that prosecutorial abuse and trial by affidavit is not a concern in domestic violence cases because the state has historically ignored domestic violence cases).

152. *Davis*, 547 U.S. at 839-41.

153. *Id.*; *see also* Mosteller, *supra* note 102, at 553-54 (recognizing difficulty with police interrogations deemed testimonial per se because an officer may

is impossible to know whether, once police left Amy Hammon's house, Hershel's violence would have resumed and escalated.[154] In this instance, what the Court characterized as "past conduct" transforms into an ongoing emergency.[155]

The standards *Davis* announced force courts to decide the admissibility of out-of-court statements on a case-by-case, fact-specific basis.[156] Although 911 calls may be less offensive to the Confrontation Clause, they too may contain testimonial elements that must be redacted before they can be offered into evidence.[157] The question becomes, if an ongoing emergency is the standard, how does one really know that Michelle McCottry was in a worse position than Amy Hammon?[158] The facts show that Amy was still married to her abuser and, more significantly, she resided with him.[159] Intuitively, Amy was more likely to suffer another incident of abuse.[160]

What constitutes "an ongoing emergency" for the *Davis* Court is very different from what constitutes an ongoing emergency for a domestic violence victim. What the Court defines as "an ongoing emergency" is really an ongoing occurrence. But given the cyclical nature of domestic violence, victims are in a constant state of emergency.[161] In fact, the next acute battering incident may occur at any time.[162] Add to this the fact that many batterers use the nontestimonial nature of 911 calls to their advantage and benefit

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not recognize the significance of a statement at the time it is made); Ariana J. Torchin, Note, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under* Crawford v. Washington, 94 GEO. L. J. 581, 593 (2006) (describing the circuit split between courts on whether statements produced during a preliminary police investigation are testimonial); Hiibel v. Sixth Jud. Dist. Ct., 542 U.S. 177, 186 (2004) (finding that initial police inquiries in domestic disputes often produce nontestimonial statements). During domestic disputes, "officers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Id.*

154. 547 U.S. at 41.

155. *Id.*

156. *See id.* at 829-30 (differentiating *Hammon* from *Davis*).

157. *See id.* at 828 (finding that a call originating from the need for immediate assistance can "evolve into testimonial statements").

158. *See id.* at 819 (explaining that Amy was "frightened" and there were "flames coming out of the . . . partial glass front of the heater").

159. *Id.*

160. *See id.* at 820 (noting that Hershel became angry when police officers separated him from Amy). The domestic disturbance call was to the home of Amy and Hershel Hammon. *Id.* at 819.

161. *See supra* Part II.D (describing the cycle of violence in abusive relationships); *see also* Brief as Amici Curiae Supporting Respondents, *supra* note 106, at 4 (describing domestic abuse as "a pattern of terror, domination and control").

162. *See supra* Part III.C (pointing to the problem with relying on the doctrine of forfeiture by wrongdoing).

from the fact that forfeiture by wrongdoing is almost impossible to prove when the victim is unavailable to testify.[163] To put it into the words of the *Davis* Court, for a domestic violence victim, each and every day is an ongoing emergency.[164]

III. PROPOSAL

A. The Unintended Consequences of the Davis Decision: "You get up, you stagger to the doors, the doors shut."[165]

Domestic violence is unlike any other crime.[166] In part, this is because both parties—batterer and victim—know how to manipulate the system.[167] Domestic violence is a cycle, which by definition implicates the same parties involved in similar altercations more than once.[168] This is important to remember when considering *Davis*'s impact on domestic violence prosecutions.[169]

First, *Davis*'s holding will intensify the race to the phone that already permeates domestic violence cases.[170] Although *Davis* did not declare 911 calls nontestimonial per se, both batterers and victims can understand that whoever calls 911 first will remain at

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163. *See supra* Part III.A (discussing the "race" to the phone).

164. *See* 547 U.S. at 822; *see also* Wisconsin v. Rodriguez, 722 N.W.2d 136, 141 (Wis. Ct. App. 2006) (discussing a post-*Davis* case where police were speaking to the victim outside the house while the defendant was hiding inside under her couch clutching a knife). The Wisconsin Court of Appeals found that:

> Officers Sterling and Kurtz did not go to the LaMoore [victim] house looking for evidence with which to prosecute Rodriguez [defendant], and, after they arrived their focus was not on building a case against him but, rather, trying to ensure the safety of Ms. LaMoore and her daughter, and other members of the community.

Id. at 148. Here, the Wisconsin Court of Appeals found that, although police questioned the victim at her home, she was still in the midst of an "ongoing emergency" under *Davis*. *Id.*

165. DOYLE, *supra* note 2, at 109.

166. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 768-71 (2005) (distinguishing domestic violence as problematic due to the fact that victims recant, are uncooperative with law enforcement, and often do not show up to court proceedings).

167. *See* discussion *infra* Part III.A (discussing batterer and victim knowledge of the importance of the initial phone call to 911) and Friedman & McCormack, *supra* note 78 and accompanying text, at 1196-97 (describing the phenomenon of "dial-in testimony").

168. *See* discussion *supra* Part II.D (describing the cycle of violence).

169. *See, e.g.*, *Rodriguez*, 722 N.W. at 139.

170. *See* discussion *infra* Part III.A (discussing batterer and victim knowledge of the importance of the initial phone call to 911) and Friedman & McCormack, *supra* note 78 and accompanying text, at 1196-97 (describing the phenomenon of "dial-in testimony").

home.[171] A transcript of his or her call may be admitted in a subsequent criminal proceeding where the caller (here, the "victim") fails to appear.[172] By giving 911 calls a nontestimonial status, the Court, albeit respecting the Confrontation Clause and requirements of *Crawford*, effectuates yet another way for batterers to control their victims. If the batterer reaches for the dial first, the true victim may be arrested.

Second, before *Crawford* and *Davis*, encouraging a victim to testify against her abuser was already nearly impossible.[173] Ironically, the *Davis* distinction between a nontestimonial 911 call and a testimonial police interrogation compounds this problem.[174] If a victim believes that a 911 tape can easily take her place in court, why would she anger her lover and risk damaging her relationship by testifying against him?[175] Simply put, she would not.[176]

The best scenario for the prosecutor is one in which the victim testifies in open court against her abuser.[177] However, this goal is unrealistic, especially when the victim has much to lose by testifying against a man she loves, fears, and with whom she probably shares a life.[178] If victims know that calling 911 (as opposed to speaking with police at the scene) relieves them of a painful day in court, then surely they will choose the former.[179]

Third, as Justice Thomas points out in *Davis*, the Court's

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171. *See* Friedman & McCormack, *supra* note 78 and accompanying text, at 1196-97 (presenting the reality of batterer knowledge about the domestic violence prosecution process).

172. *See id.* at 1195 (finding that with increased awareness of domestic violence, "[v]ictims are reminded that their complaints will be taken seriously and that protective and punitive action to assist them will follow . . .").

173. *See* 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, 1 (2002) (addressing the problem of victim recantation).

174. *See The Supreme Court, 2005 Term Leading Cases*, 120 HARV. L. REV. 213, 217 (2006) (analyzing Davis's possible effects, including the "perverse" incentive for officers to elicit as much information as possible, thus delaying resolution of the underlying emergency).

175. *See id.* at 216-21 (describing the problems in the subtext of the *Davis* decision).

176. *See id.* at 217 (requesting that Court create rules to facilitate victim testimony and ensure that the *Davis* holding does not further impede such testimony).

177. Interview with Benjamin Ford, Assistant District Attorney, Nashville District Attorney's Office, in Nashville, Tenn. (Nov. 13, 2006) (describing the best case scenario for prosecutors).

178. *See* Beloof & Shapiro, *supra* note 174, at 1 (providing reasons why victims fail to appear in court or recant their accusations).

179. *See* Brief as Amici Curiae Supporting Respondents, *supra* note 106, at 16 (suggesting that "[t]he rights accorded to defendants under the Confrontation Clause were intended as a 'shield' to protect the defendant from potential prosecutorial abuses," not as a sword "wielded" against victims).

decision leaves the door open for police abuse.[180]

> By holding that the Confrontation Clause applies only to a particular subset of police interrogation techniques, the Court created the obvious risk that police officers will mold their techniques to elicit statements defined as nontestimonial . . . . 911 operators, for instance, might be instructed to press callers for information about their assailants during the emergency rather than guide them to safety . . . .[181]

Police and emergency personnel perform a dual role in our society.[182] They provide immediate, official assistance in ending a dangerous situation *and* they collect information to help with the investigation and prosecution.[183] These two roles are interconnected, difficult to separate, and often at odds.[184] Under *Davis*, police must not ask questions that may produce even a single testimonial statement.[185] Further, they must keep the victim worked up—"excited"—so that the victim's statements may come in under an excited utterance exception to hearsay.[186] Not only are the above practices abuses of police discretion, but they also compromise the victim's physical and emotional safety.[187]

Last, the *Davis* rule focuses on "the primary purpose of the interrogation."[188] However, the Court does not advise *whose* purpose should be examined: the police officer's or the victim's.[189] One scholar suggests that because the *Crawford* rule was designed to prevent government indiscretions, the *Davis* ruling refers to the purpose of the police officer.[190] However, as seen in *Crawford*, the

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180. *Davis*, 541 U.S. at 834 (Thomas, J., concurring). "Today, a mere two years after the Court decided *Crawford*, it adopts an equally unpredictable test, under which district courts are charged with divining the 'primary purpose' of police interrogations." *Id.*

181. *Leading Cases*, *supra* note 175, at 217.

182. Malhotra, *supra* note 29, at 217.

183. *Id.*

184. *See Hiibel*, 542 U.S. at 190-91 (holding that preliminary determinations made at the scene of domestic violence incidents are nontestimonial in nature, but can convert to a form of testimonial questioning).

185. *See Leading Cases*, *supra* note 175, at 217 (describing possible police abuses under the *Davis* framework designed to elicit statements defined as nontestimonial).

186. *See* FED. R. EVID. 803(2); *see also Leading Cases*, *supra* note 175, at 217 (outlining the potential for police abuse of the excited utterance exception by prolonging a startling event).

187. *See Leading Cases*, *supra* note 175, at 217 (noting the problem with allowing police officers to tailor their questioning of domestic violence victims in an effort to avoid producing testimonial statements).

188. *Davis*, 547 U.S. at 822.

189. *Id.*; *see also Leading Cases*, *supra* note 175, at 218 (pointing out that the Court leaves open the "crucial question" of whose purpose is important in the *Davis* analysis). The article observes, "[a] purpose cannot merely exist; someone must have one." *Id.*

190. *See Leading Cases*, *supra* note 175, at 219. (finding the Court's

testimonial formulation addresses "pretrial statements that out-of-court declarants would reasonably expect to be used prosecutorially."[191] Further, in *Davis*, Justice Scalia notes that "any reasonable listener" would recognize the fact that Michelle McCottry "was facing an ongoing emergency."[192] Both interpretations of primary purpose of the interrogation, from the viewpoint of the police officer or the victim, are plausible, leaving the ambiguity unresolved.[193]

B. The Culture of Victimhood in Davis's Context: "I know the paths and the bumps. I know what goes on."[194]

Suppose that *Davis*'s "primary purpose" refers to the victim's state of mind when obtaining assistance from law enforcement officers.[195] Taking into account the psychological aspects of domestic violence, a domestic violence victim's out-of-court statement to emergency personnel or police officers would likely not be made in anticipation of criminal prosecution.[196]

Victims of domestic violence are more likely to recant statements made to police or refuse to cooperate than any other crime victim.[197] Eighty to eighty-five percent of battered women will recant at least once during each criminal case.[198] Moreover, even if victims cooperate with the police initially, fear of the effects on their relationship with the batterer, concern about loss of economic resources, custody of their children, or the fear of more violence will weigh heavily on the victim within a matter of days.[199]

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interpretation of the rule focused on the perspective of the police officer, because that interpretation best addresses both semantic and policy concerns).

191. *Crawford*, 541 U.S. at 51 (quoting White v. Illinois, 502 U.S. 346, 365 (1992)).

192. *Davis*, 547 U.S. at 827.

193. *See id.* at 830 (finding that with regard to Hershel Hammon, Scalia uses the phrase "he was not seeking" (meaning the officer) and with regard to Michelle McCottry, Scalia says "any reasonable listener" would recognize that "she" (meaning McCottry) "was facing an ongoing emergency").

194. DOYLE, *supra* note 2, at 110.

195. *See Leading Cases*, *supra* note 175, at 218-19 (noting Justice Scalia's discussion of both the victim's and the officer's state of mind in *Davis*).

196. *Davis*, 547 U.S. at 828.

197. Lininger, *supra* note 167, at 768.

198. *Id.*

199. *Id.* "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'." *Id.* at 770 (citing *People v. Thompson*, 812 N.E.2d 516, 520 (Ill. App. Ct. 2004)). "Other factors that may lead victims to recant or refuse to cooperate include continued emotional attachment to batterers, reluctance to break up families, religious and cultural views of relationships . . . 'learned helplessness' based on repeated abuse, and a genuine belief that no crime has occurred." *Id.*

Further, the cyclical nature of domestic violence necessitates the victim's reconciliation with her batterer.[200] Truly, because the victim convinces herself that the violence will not happen again, she will never have one eye toward prosecution.[201] Victims call 911 in order to receive temporary relief from the situation, but absent an immediate threat of an acute battering incident, victims will not risk testifying and breaking their batterer's rules.[202]

C. Domestic Violence Through a Feminist Lens: "There were days when I didn't exist; he saw through me and walked around me"[203]

The batterer-victim relationship can be viewed as a microcosm of a larger power struggle at work within the criminal justice system. From a feminist perspective, domestic violence is one area that reveals the imbalance of power between men and women in American society.[204] Looking broadly at the nature of criminal and evidentiary laws (and considering that men were the architects of most of these laws), the legal standards that govern crimes against women are undeniably masculine.

For example, evidentiary rules in rape cases often reflect male, not female, notions of consent and self-defense.[205] In effect, many incidents considered rape by a reasonable woman are overlooked as normal by a system that recognizes and accepts coercive male sexual behavior.[206]

As a further illustration, in the context of domestic violence

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200. *See* WALKER, TERRIFYING LOVE, *supra* note 65, at 42-45 (laying out the stages of a battering relationship).

201. *See* MILLS, *supra* note 15, at 60. *See also supra* note 72 and accompanying text (discussing the way in which victims feel responsible for leaving or betraying the trust of their abuser); *see also* WELDON, *supra* note 72, at 127 (detailing the author's anxiety before obtaining an emergency order of protection against her husband/batterer). "For three nights before I went to domestic violence court, he slept in our house, eating dinner in the kitchen . . . . I couldn't hear him[;] . . . [it was] [a]s if I were deaf." *Id.*

202. *See* WALKER, THE BATTERED WOMAN, *supra* note 65 at 59-60 (discussing the "acute battering incident" stage of domestic violence relationship); *see also supra* notes 66-71 and accompanying text (providing a timeline for the cycle of domestic abuse).

203. DOYLE, supra note 2, at 178.

204. *See* Katharine T. Bartlett, *Essay: Gender Law*, 1 DUKE J. GENDER L. & POL'Y, 1, 6 (1994) (setting forth the feminist legal theory of nonsubordination or dominance, whereby a rule, practice, or social construct operates to further the subordination of women).

205. *Id.* at 9; *see also* Kit Kinports, Special Issue: Feminism and the Criminal Law, *Rape and Force: The Forgotten Mens Rea*, 4 BUFF. CRIM. L. REV. 755, 791-92 (2001) (finding irony in the fact that the injury of rape stems from the meaning of the unwanted act to its female victim, while the criminal standard is composed of the meaning of the act to the male assailant); Patricia Hughes, *From a Woman's Point of View*, 42 U. NEW BRUNSWICK L. J. 341, 343 (1993) (criticizing the defining of rape from a strictly male point of view).

206. Kinports, *supra* note 206, at 790-91.

homicide, the law attempts to affix male responses to a mostly female problem. Because men generally react immediately to provocation, facts that allow for a small "cooling off period" between the domestic violence (characterized as provocation) and a female response are admitted as relevant.[207] Meanwhile, evidence of the infliction of years of physical and mental abuse on a woman before she responds is excluded as irrelevant.[208] In this vein, Battered Women's Syndrome has never been accepted as a defense to homicide, while acting in self-defense is an acceptable response to provocation.[209] In response, feminist legal scholars argue that self-defense should be rethought to consider "why abused women who strike back at their abusers may stay with their batterers well beyond the point of conventional 'reason,' and why they may act to protect themselves at a time when they do not appear to be immediately threatened."[210] Where laws are based solely on masculine standards, the criminal justice system is inherently unequal.

Specifically in the evidentiary context, it is often argued that the hearsay rule is one of universal and equal application.[211] However, as feminist scholar Catherine MacKinnon points out, "[w]hen it [the law] is most ruthlessly neutral, it is most male; when it is most sex blind, it is most blind to the sex of the standard being applied."[212] The hearsay rule presupposes that excluding less reliable communications will affect men and women equally. But, as research and experience suggests, men and women communicate differently.[213]

In her selection, *Gender Bias in the Hearsay Rule*, Fiona Raitt, a feminist scholar focusing on evidence, argues that the hearsay rule works against women's interests by virtue of the different communication patterns between men and women, and the language of professional discourse used in the courtroom.[214] Hearsay law, as it has developed in our legal system, ignores the

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207. DEBORAH L. RHODE & KATHARINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 516 n.1 (4th ed. 2006).

208. *Id.* at 521 n.3.

209. *See, e.g., State v. Norman*, 378 S.E.2d 8 (N.C. 1989) (declining to expand self-defense beyond "the limits of immediacy and necessity"). "It has even been suggested that the relaxed requirements of self-defense found in what is often called 'the battered woman's defense' could be extended in *principle to any type of case* in which a defendant testified that he or she subjectively believed that killing was necessary and proportionate to any perceived threat . . . ." *Id. at 16.*

210. Bartlett, *supra* note 205, at 9 n.38.

211. Fiona E. Raitt, *Gender Bias in the Hearsay Rule*, FEMINIST PERSPECTIVES ON EVIDENCE 59, 63 (Mary Childs & Louise Ellison eds., 2000).

212. Catherine MacKinnon, TOWARD A FEMINIST THEORY OF THE STATE, 1, 248 n.3 (Harvard Univ. Press 1989).

213. Raitt, *supra* note 212, at 63.

214. *Id.*

importance that women accord their conversations with others. These conversations often take place on a face-to-face basis and individuals are carefully selected to receive the shared information.[215] However, because this information is viewed by the law as "second-hand," its potential significance is completely disregarded. Further, as has often been the case in rape and domestic violence cases alike, the rigid language of lawyers is at odds with patterns of female communication that values intimacy and context.[216] Successful advocacy demands that the lawyer "control" the witness and act "dominant," especially during cross-examination, in order to be the victor in the American adversarial system.[217]

Exposing the dominance and recognizing the uphill battle that domestic violence prosecutions face is an important first step. However, until laws are made with female experience in mind, proactive steps must be taken to address the reality of domestic violence cases.

D. *The Failure of Davis for Domestic Violence Victims: "That was the blackest time, the five minutes after I felt the cold and recognized it."*[218]

Domestic violence prosecutions cannot be treated like other criminal prosecutions.[219] Victims recant, refuse to cooperate; lie.[220] As a result, prosecutors must rely on hearsay statements, photographs, and the testimony of others to arrive at "the truth."[221] Add to the equation the fact that domestic violence was not even recognized as a crime until just thirty years ago.[222]

Despite these considerations, Justice Scalia used an interpretation of the history of the Confrontation Clause, not a realistic look at the criminal justice system as applied to domestic violence cases, to reach the *Crawford* and *Davis* decisions.[223] His historical formulation leads to this result: confrontation demands

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215. *Id.* at 63, 65.

216. *Id.* at 68.

217. *Id.* at 69-70.

218. DOYLE, *supra* note 2, at 110.

219. *See* Raymond, *supra* note 74, at 263-64 (detailing the role of hearsay in victimless prosecution for domestic violence).

220. *See id.* (characterizing the difficulty that domestic violence victims pose to the criminal court process).

221. *See id.* (discussing the nature of victimless prosecutions).

222. *See* Dekki, *supra* note 5, at 553; Jeanne Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 12-13 (2006) (describing the history associated with domestic violence). Historically, wife beating was even "overtly approved and reserved as a right of the man of the house" as a form of chastisement. *Id.*

223. *Crawford*, 541 U.S. at 42-52; *see also supra* note 86 and accompanying text (providing a summary of Justice Scalia's *Crawford* Confrontation Clause history).

nothing less than cross-examination any time a testimonial out-of-court statement is offered for the truth of the matter asserted, regardless of the charge against the defendant or the criminal context.[224] Yet "the English common law has never recognized a right to Confrontation."[225] Further, the Founders viewed the Sixth Amendment "holistically" in that they did not see it as demanding merely confrontation, but the more general and expansive right to a fair trial.[226] In what could be seen as *Davis's* greatest failure, the Court never acknowledges that Michelle McCottry and Amy Hammon are victims of intimate violence. The Court refuses to consider the distinct nature of domestic violence crimes and, in doing so, places two equally endangered victims in very different legal positions.

A single interpretation of Confrontation Clause history cannot be used to demand confrontation in all cases.[227] In cases of domestic violence, the mere presence of the defendant in the courtroom puts the victim in a state of severe emotional distress.[228] One victim describes her reaction to confronting her abuser: "it still makes me throw-up when I have to face him. I break out in a horrible, drenching cold sweat. . . . I often have to seek medical attention afterwards for migraines."[229] In most cases, confrontation and cross-examination is perhaps the most efficient way to reach the truth.[230] However, where placing the victim on the stand is emotionally and physically damaging, it is not the best method, nor is it the only method.[231]

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224. *See Crawford*, 541 U.S. at 61-62 (interpreting what the Framers would have wanted with regard to testimonial statements).

225. Graham, *supra* note 85, at 209.

226. *Id.* at 210; *see also* Brief as Amici Curiae Supporting Respondents, *supra* note 106, at 28-29 (arguing that a narrow interpretation of the Confrontation Clause is consistent with the Framers' intent). "A narrow definition of 'interrogation,' limited to the 'colloquial' understanding of a coercive, formal, and structured environment is fully consistent with the original intent of the Clause." *Id.*

227. *See* Graham, *supra* note 85, at 209 (characterizing the movie version of Justice Scalia's historical rhetoric as "Sir Walter Raleigh Came Over on the Mayflower and Other Stories My Evidence Teacher Taught Me"). "Justice Scalia's majority opinion tells a version of the history of the Confrontation Clause that would do Hollywood proud. But unless they wish to operate on the same level of 'truth' as 'reality TV,' lawyers should know better." *Id.*

228. *See* Brief as Amici Curiae Supporting Respondents, *supra* note 106, at app. 65a (discussing the woman's state of mind when confronting her abuser).

229. *Id.* The victim's anonymous letter goes on to say, "[n]o victim should have to face their antagonist. Fear—not the abuse itself—is the major part . . . that keeps a victim in their helpless position." *Id.*

230. *See* Wheaton, *supra* note 83, at 219-22 (discussing the rationale for the hearsay rule); *see also supra* note 83 and accompanying text (concluding that the most accepted rationale for excluding hearsay is the inability to cross-examine the declarant).

231. *See* Brief as Amici Curiae Supporting Respondents, *supra* note 106, at

E. Recognizing the Need for State-Drawn Remedies: "There aren't many real walls, it's open-plan, all partitions."[232]

In light of this discussion, *Crawford* and *Davis* damage domestic violence prosecutions where hearsay evidence is often essential and confrontation impracticable.[233] Perhaps the Court should have retained the *Roberts* test for sole use in cases of domestic violence.[234] Despite his attack on *Roberts* in *Crawford*, Justice Scalia admits, in dicta, that states may still use *Roberts* in conjunction with *Crawford* to determine the reliability of hearsay statements.[235] In any event, the Court rejected *Roberts*, leaving domestic violence victims in jeopardy and prosecutors in need of a remedy.[236]

Although legal scholars have suggested that forfeiture may be the answer to the difficulties *Crawford* and *Davis* create, this doctrine is insufficient.[237] In order for forfeiture to take effect, the prosecutor must prove, by a preponderance of the evidence, that the defendant wrongfully procured the victim's absence in court.[238] If the victim is not present in court due to her fear of the defendant, she cannot testify to any bad acts that deterred her cooperation with the prosecution.[239]

App. B, Part III, p. 63a – 81a (collecting stories of abuse by domestic violence victims, recounting the trauma of testifying).

232. DOYLE, *supra* note 2, at 107.

233. *See* Beloof & Shapiro, supra note 174, at 3-4 (describing how domestic violence is incompatible with the truth-finding function of American courts).

234. *See Roberts*, 448 U.S. at 66 (describing the test for a hearsay statement's adequate "indicia of reliability"). The statement must "fall within a firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Id.*

235. *Crawford*, 541 U.S. at 68.

236. *See generally* Beloof & Shapiro, *supra* note 174, at 5-20; Karleen F. Murphy, *Note: A Hearsay Exception for Physical Abuse*, 27 GOLDEN GATE U. L. REV. 497 (1997); Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases In Light of* Crawford v. Washington, 79 S. CAL. L. REV. 213, 263-64 (2005); Neal A. Hudders, Note, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?* 49 DUKE L.J. 1041, 1071-74 (2000) (all proposing hearsay exceptions to be instituted in domestic violence cases).

237. *See* Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 444 (2006) (proposing that forfeiture can overcome *Crawford*'s negative impact). The article suggests that the state establish forfeiture by either "specific evidence of threats . . . or the existence of a battering relationship built on power and control dynamics." *Id.*

238. *Id.* The state must establish defendant's wrongdoing by a preponderance of the evidence. *Id.*

239. *Contra id.* (claiming that reporting the forfeiture to authorities may be enough). *Compare id. with* Brief as Amici Curiae Supporting Respondents,

Instead, state legislatures should adopt evidentiary hearsay rules that will specifically address the problems presented by domestic violence cases.[240] An instructive concept to examine is the hearsay "gang exception" created by the state of California.[241] This exception "make[s] admissible into court sworn statements of witnesses that have died by any manner other than natural causes."[242] This rule targets the problem that exists in gang-related prosecutions: key witnesses are killed before the case can go to trial.[243]

Although domestic violence and gang violence can be distinguished, they both evade prosecution and punishment.[244] In each case, victims are silenced.[245] And in each case, hearsay evidence may be the only avenue for discerning some truth about the criminal act.[246]

California took its hearsay exception for gang violence one step closer to domestic violence by creating a hearsay exception for physical violence.[247] The California law provides that "evidence of a statement by a declarant is not made inadmissible by the

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supra note 106, at 23-23 (observing that a forfeiture argument will fail if the victim will not appear at the forfeiture hearing).

240. See Andrew King-Reis, *An Argument for Original Intent: Restoring Rule 801(d)(1)(A) to Protect Domestic Violence Victims in a Post-*Crawford *World*, 27 PACE L. REV. 199, 231-32 (2007), for a discussion of Federal Rule of Evidence 801(d)(1)(a) and its possible applicability to the domestic violence context. Professor King-Reis suggests that prior inconsistent statements of domestic violence victims (given to the police or prosecutors) should be expanded and used as substantive evidence at trial. *Id.* King-Reis suggests that prior inconsistent statements as substantive evidence will allow the jury to fully consider the victim's testimony. *Id.* This suggestion, however, frames domestic violence as a federal issue. *Id.* at 213-20. This Comment proposes that states construct a new, domestic violence-specific hearsay exception, rather than utilize an already-existing federal hearsay exception in the local domestic violence context. *Compare id.* at 213-20 (describing the creation and federal applicability of Federal Rule of Evidence 801(d)(1)(a)), *with infra* notes 245-61 and accompanying text (suggesting that states should adopt hearsay exceptions like those in Oregon and California that create a separate domestic violence hearsay exception under Federal Rule of Evidence 803).

241. Erin Stepno, *Review of Selected 1997 California Legislation: Gang-Related Hearsay Exception*, 29 MCGEORGE L. REV. 605, 607 (1998).

242. CAL. EVID. CODE § 1231(e) (2006).

243. *See* Stepno, *supra* note 242, at 607 (finding that the California hearsay rule eliminates any "incentive a gang member would have to kill a witness").

244. *Compare id.* (discussing the California hearsay exception as it applies to the gang epidemic), *with* Lininger, *supra* note 166, at 768-72 (discussing the importance of hearsay in domestic violence prosecutions).

245. *Compare* Stepno, *supra* note 242, at 607 (discussing the death of key witnesses in gang prosecutions), *with* Lininger, *supra* note 167, at 769-71 (pointing to "violent abusers" and "silent accusers").

246. *Compare* Stepno, *supra* note 242, at 607 (intending to use hearsay to make gang prosecutions easier) *with* Lininger, *supra* note 167, at 771-72 (emphasizing the importance of hearsay in domestic violence prosecutions).

247. CAL. EVID. CODE § 1370 (2006).

hearsay rule if . . . the statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant."[248]

Perhaps most instructive is an Oregon evidentiary statute that carves out a hearsay exception for statements of domestic violence victims.[249] In the aftermath of *Crawford* and *Davis*, such an exception may be the best way for states to avoid *Davis*'s ongoing emergency problem.[250] By instituting statutes similar to the Oregon model, states will ensure that victim statements that are deemed reliable under standards similar to those of *Roberts*, are admitted at trial.[251]

The Oregon statute provides that "[a] statement that purports to narrate, describe, report or explain an incident of domestic violence . . . made by a victim of the domestic violence within 24 hours after the incident occurred" is an exception to the hearsay rule even if the declarant is unavailable as a witness.[252] This exception confronts the problem of prosecuting domestic violence cases head-on. Other states should follow suit to ensure that batterers will be held accountable for their criminal conduct.[253]

Domestic violence victims will typically recant the accusations against their batterer.[254] This deems victim statements made in close proximity to the incident more truthful than even those statements that the victim might make at trial.[255] In increasing numbers of domestic violence cases, prosecutors put on

248. *Id.*

249. OR. REV. STAT. § 40.460 (26)(a) (2006).

250. *See Rodriguez*, 722 N.W.2d at 143-46 (showing the inconsistent application of the *Davis* ongoing emergency terminology).

251. *See* § 40.460 (26)(b) (providing *Roberts*-like reliability factors).

252. *Id.* The victim statement taken within twenty-four hours of the incident must have been recorded by a peace officer, emergency personnel or firefighter, and must have "sufficient indicia of reliability." *Id.* The statute then lists several factors to be used in determining reliability. *Id.* The Oregon statute categorizes its hearsay exception under Federal Rule 803. *Id.*; FED. R. EVID. 803. However, states following the Oregon model may wish to consider the victim unavailable under Rule 804(a), and then add their hearsay exception to the list of federal exceptions already provided in 804(b). FED. R. EVID. 804(a), (b). This will bar any *Crawford* problem because when the witness is deemed unavailable under an 804(a) analysis, she need not be produced for cross-examination. *See* FED. R. EVID. 804(a) (deeming a witness unavailable because of privilege, refusal to testify, a lack of memory, mental illness or infirmity, or absence from the hearing with no foreseeable procurement by the proponent of the evidence).

253. OR. REV. STAT. § 40.460 (26); *see also* Lininger, *supra* note 167, at 771-87 (setting forth the legislation needed to combat domestic violence).

254. *See* Malhotra, *supra* note 29, at 213 (describing the problem of recantation).

255. *See* OR. REV. STAT. § 40.460 (26) (2006) (recognizing that statements made within 24 hours of the incident are the most reliable).

psychologists as expert witnesses to explain victim recantation.[256] The Oregon statute dispenses with this practice by ensuring that the most accurate statements are admitted into evidence.[257] Other state legislatures must move quickly to adopt analogous statutes to ensure that accurate victim statements, essential to successful domestic violence prosecutions, are admitted at trial.

IV. CONCLUSION: "HE WAS SPEAKING ON MY BEHALF, FOR US BOTH."[258]

Oregon's evidentiary scheme specifically addresses the problems this discussion predicts will result from the *Davis* decision.[259] Amy Hammon's affidavit, deemed by *Davis* to be tantamount to a formalized police interrogation, now can only be admissible under a statutory scheme like Oregon's.[260] For states to allow only nontestimonial statements like those made by Michelle McCottry during an ongoing emergency is to ignore the nature of domestic violence and the unique needs of its victims.[261]

When life is an ongoing emergency, how should the police know if time has run out for an Amy Hammon?[262] How do they know if it is a true emergency this time — if it is essential that they be there? And if they are too afraid to ask her questions and to use her answers, well then perhaps time has run out for each and every Amy Hammon, for the millions of American women whose voices will never be heard without a hearsay exception.[263]

256. *See Borelli*, 629 A.2d at 1113 (admitting expert testimony on Battered Women's Syndrome).

257. *See* § 40.460 (providing more stringent reliability factors than *Roberts*).

258. DOYLE, *supra* note 2, at 198.

259. *See* discussion *supra* III.B (discussing the impact of the *Davis* decision).

260. *See Davis*, 547 U.S. at 819-20 (describing Amy Hammon's statements to police).

261. *See id.* at 818 (describing Michelle McCottry's statements to police).

262. *See* discussion *supra* II.F (describing the lives of domestic violence victims as ongoing emergencies); *see* McBride, *supra* note 1 (singing that "when time ran out, there was no one about").

263. *See generally* McBride, *supra* note 1.