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DOMESTIC VIOLENCE CASES AFTER DAVIS: IS THE GLASS HALF EMPTY OR HALF FULL?

*Myrna S. Raeder**

INTRODUCTION

The revolution wrought by the 2004 Supreme Court decision in *Crawford v. Washington*¹ had its most dramatic impact on domestic violence cases. *Crawford* prohibited courtroom use of “testimonial” statements by unavailable witnesses who were not previously subjected to cross-examination, unless the defendant forfeited the right to confrontation by causing the witness’ absence.² Since the vast majority of victims of domestic violence do not cooperate with the prosecution,³ and statements made to the police in such circumstances are arguably testimonial, *Crawford* spelled disaster in cases where victims did not testify.

Numerous reasons have been offered for why these women initially call the police and then subsequently refuse to testify in court.⁴ While women want to stop the violence, and calling upon the police may be the most likely way to ensure this result, other

* Myrna Raeder is a Professor at Southwestern University School of Law. These comments update parts of her article *Remember the Ladies and Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311 (2005) [hereinafter *Remember the Ladies*], in light of *Davis v. Washington*, 126 S. Ct. 2266 (2006).

¹ 541 U.S. 36 (2004).

² *Id.* at 62, 68.

³ *Remember the Ladies*, *supra* note *, at 328-30; *State v. Mechling*, 633 S.E.2d 311, 324-25 (W. Va. 2006).

⁴ *Remember the Ladies*, *supra* note *, at 364; *Mechling*, 633 S.E.2d at 324-25.

complex motivations are also at play.⁵ For example, their batterers are often the fathers of their children, who they love and hope will reform. In misdemeanor cases, where the punishment is not likely to be lengthy, some women view a conviction as jeopardizing their batterer's ability to hold a job and support the family. Other, more sinister reasons for their nonappearance include threats or physical violence aimed at preventing their testimony and Post Traumatic Stress Disorder (PTSD) caused by their repeated abuse.

In an earlier era, prosecutions would end when women refused to cooperate, but in recent years, zero tolerance for domestic violence has gained wide community support.⁶ This resulted in no-drop policies by prosecutorial agencies, and so-called victimless prosecutions in which a woman's excited pleas for help on 911 calls, and to police at crime scenes, were admitted along with testimony by police officers and medical personnel concerning any bruises or other indications of violence.⁷ Statements by the absent victims satisfied the pre-*Crawford* reliability based approach to the Confrontation Clause adopted by *Ohio v. Roberts*.⁸

In contrast, after the first wave of dismissals and reversals caused by *Crawford*, victim's advocates worried that the testimonial approach would return us to the days when domestic violence was considered a private concern, not a public outrage. Instead, *Crawford's* failure to define what is testimonial led to two years of judges reading tea leaves, and reaching contrary outcomes.⁹ To the relief of prosecutors, a number of courts began to admit victims' excited utterances made in 911 calls and to the police in the field, finding them to be "nontestimonial." These courts reasoned that such statements were simply cries for help, not police interrogation, or they were too informal to resemble the *ex parte* affidavits or prior testimony that had been

⁵ See generally *Remember the Ladies*, *supra* note *, at 325-30.

⁶ *Id.* at 327-28, 368.

⁷ *Id.* at 328.

⁸ See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

⁹ *Remember the Ladies*, *supra* note *, at 333-47.

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traditionally excluded by the Confrontation Clause.¹⁰

In *Davis v. Washington*¹¹ the Court has finally addressed these issues, and rendered a split decision that satisfies neither the prosecution nor the defense. *Davis* combined two separate domestic violence cases, in which neither of the female victims appeared at trial. The decision unanimously affirmed the admission of a 911 call in *Davis*,¹² but with only one dissent,¹³ rejected the admission of statements in *Hammon*¹⁴ made by the defendant's wife who spoke excitedly to an officer in person at the scene. To reach these results, *Davis* adopted a "primary purpose" test for determining whether a statement is testimonial, which provides that when the circumstances objectively indicate that 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, a statement is testimonial.¹⁵

The defense will be pleased that *Davis* held that volunteered statements were products of interrogation and employed an objective evaluation of motivation for determining if a statement is testimonial, which arguably favors a broader view of confrontation. However, treating dual purpose statements as nontestimonial in the absence of a primary motivation to create testimony clearly favors the government, because it denies the defendant the ability to cross-examine declarants who make such statements. For example, defendants will not be able to cross-examine absent complainants who made damning statements against them whenever the primary motivation of the interrogation was to obtain assistance during an ongoing emergency.

Conversely, prosecutors will be pleased that the new test focuses on the *primary* purpose of the interrogation, rather than requiring that police assistance to meet an ongoing emergency be

¹⁰ *Id.* at 333-36.

¹¹ 126 S. Ct. 2266 (2006).

¹² *Id.* at 2280 (*affirming* State v. Davis, 111 P.3d 844 (Wash. 2005)).

¹³ *See id.* at 2280-81.

¹⁴ *Id.* (*reversing* Hammon v. State, 829 N.E.2d 444 (Ind. 2005)).

¹⁵ *Id.* at 2273-74.

the sole motivation. However, prosecutors may be concerned about the apparent focus on the police officer's motivation,¹⁶ not merely the motivation of the absent witness. Moreover, *Davis* did not create a separate category for domestic violence cases, which means that testimonial statements are still barred unless a victim testifies, or there is specific evidence that the defendant caused the victim's absence from trial.¹⁷

Judges will likely find that *Davis*' bright line is illusory and hard to apply. Indeed, Justice Thomas called the test unworkable,¹⁸ and it appears no more predictable than the reliability standard that *Crawford* abandoned.¹⁹ Moreover, Justice Scalia, who authored both *Crawford* and *Davis*, recognized that the nature of the statement may change once the exigency is over, requiring courts to carefully redact statements.²⁰ At a minimum, *Davis* settled that the identity of an assailant who is battering a victim as she calls 911 is admissible.²¹ It also should ensure that the admission of any statement in response to police questioning after the threat has ended, such as when the assailant flees or has been separated from the victim, is problematic when the victim does not appear at trial, and no evidence of forfeiture exists.²²

After *Davis*, prosecutors will continue to dismiss or lose cases where the testimonial statements are key, unless they take the drastic step of arresting victims who ignore their subpoenas, a step that punishes victims for the crimes of their abusers. Moreover, given the testimonial approach, it makes sense to reevaluate how domestic violence felonies and misdemeanors are being litigated across America.²³ In a world of limited prosecutorial resources, decisions may need to be made about

¹⁶ *Id.*

¹⁷ *Id.* at 2279-80.

¹⁸ *Id.* at 2285 (Thomas, J., concurring in part and dissenting in part).

¹⁹ *See Crawford*, 541 U.S. at 63-64 (discussing the subjectivity of the reliability test).

²⁰ *See id.* at 2277-78.

²¹ *Id.* at 2277.

²² *See id.* at 2279. *See infra* Part IV.

²³ *See Remember the Ladies*, *supra* note *, at 367-73.

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identifying which cases to vigorously pursue in the criminal justice system, and which to refer to quasi-criminal diversionary programs.

The remainder of this Article will briefly explore *Davis*' impact on the following topics in the context of domestic violence litigation: (1) assessing whether a statement made to law enforcement personnel is testimonial; (2) assessing whether a statement made to someone other than law enforcement personnel is testimonial; (3) difficulties with the *Crawford/Davis* approach; (4) establishing forfeiture and other procedural issues; and (5) suggestions for prosecutors in light of *Davis*. In addition to critiquing *Davis* and identifying trends in the appellate case-law, criteria will be suggested to help determine whether or not a statement is testimonial, and when forfeiture is appropriate.

I. ASSESSING WHETHER A STATEMENT MADE TO LAW ENFORCEMENT PERSONNEL IS TESTIMONIAL

Crawford established the testimonial framework, but gave little guidance as to how to interpret it in the domestic violence context, where the statements are not made by suspects in custody, but by victims frantically seeking help. As a result, many courts found such statements far removed from the governmental abuse that seemed at the root of *Crawford*'s concerns.²⁴ In contrast, *Davis* presented two typical domestic violence fact patterns that populate one-third of the criminal calendars in urban jurisdictions,²⁵ and overwhelmingly rely upon complainants who are uncooperative.²⁶ *Davis* addressed 911 calls as well as field investigations, but its holding was generalized, focusing more on the context in which the statements were made than their method of transmission. The *Davis* test is deceptively

²⁴ *Id.* at 333-47.

²⁵ See MATTHEW R. DUROSE, ET AL., BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE STATISTICS 45 (June 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs05.pdf> (stating that approximately one third of felony assault charges in 11 large counties during a one-month period involved family violence).

²⁶ See *Remember the Ladies*, *supra* note *, at 330.

simple:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.²⁷

While this standard still is capable of wide variation in interpretation, at least a few things are set. First, 911 calls can be testimonial, regardless of who employs the operator. Second, 911 calls and preliminary field investigations can generate testimonial statements despite their lack of formality. Whether Justice Thomas will be proven correct in his view that the standard is unworkable²⁸ will depend on how the Supreme Court refines it in light of likely conflicts among lower courts in defining ongoing emergencies. However, in its current version, the standard is little more than a tautology: a statement is not testimonial when needed to resolve an ongoing emergency, and testimonial when not needed to resolve it. The Court gives few concrete suggestions about how to identify an ongoing emergency or determine if the statement helps to resolve it, other than Justice Scalia's reference to the instinctive ability of officers to distinguish between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence.²⁹ In the same vein, *Davis* cavalierly pronounces "testimonial statements are what they are."³⁰ In other words, paraphrasing Justice Stewart's *bon mot* concerning pornography,³¹ we will know whether statements

²⁷ *Davis*, 126 S. Ct. at 2273-74.

²⁸ *Id.* at 2285 (Thomas, J., concurring in part and dissenting in part).

²⁹ *Id.* at 2277.

³⁰ *Id.* at 2279 n.6.

³¹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

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help resolve an ongoing emergency when we hear them.

The absence of any reference to medical emergencies, despite such mention in pre-*Davis* cases,³² would seem to indicate a narrow view of nontestimonial statements made to police officers. Yet, while statements made well after the incident should be fairly easy to discern, some courts are already viewing emergencies expansively. This is understandable since the transcript of the 911 tape in *Davis* indicates that the defendant left shortly after the start of the call, but the Court did not indicate when the call morphed into being testimonial, claiming that the only question it certified related to the defendant's identity, which occurred at the beginning of the call.³³

Davis emphasized that the caller was speaking in the present tense, and that the operator needed information to determine what danger the officers would face in resolving the dispute.³⁴ This was contrasted to the field investigation in *Hammon* where the victim denied any problem and was separated from the defendant when she admitted her husband assaulted her.³⁵ Since *Davis* indicated that information "needed to address the exigency of the moment"³⁶ was not testimonial, concern has been voiced that officers and operators will tailor their questions to obtain evidence rather than to resolve the emergency in order to ensure admissibility at trial.³⁷ It seems hypertechnical that admission of a statement might rest on whether the questioner asks what is happening, rather than what happened, but *Davis* leaves open the possibility of such a result.

Courts have recognized that the *Davis* analysis is "flexible and inherently fact based, and the existence or lack of government interrogation does not necessarily determine whether

³² See, e.g., *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 557 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006).

³³ 126 S. Ct. at 2277.

³⁴ *Id.* at 2276.

³⁵ *Id.* at 2278.

³⁶ *Id.* at 2277.

³⁷ *The Supreme Court—2005 Term Leading Cases*, 120 HARV. L. REV. 125, 217 (2006) [hereinafter *Leading Cases*].

a statement is testimonial.”³⁸ Several decisions have attempted to distill a multifactor test from *Davis* and some focus on statements to police. For example, a statement is not testimonial if: (1) the victim spoke about the events as they were actually happening; (2) the victim faced a bona fide physical threat; (3) the questions and answers viewed objectively were necessary to resolve the present emergency, rather than simply learn what previously happened; (4) there was a significant difference in the formality of questioning between frantic answers given in a potentially unsafe environment by phone when compared to the calm station house questioning in *Crawford*.³⁹ Other decisions speak more generally: a statement is testimonial if (1) it would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; (2) the circumstances objectively indicate that a statement taken during interrogation by a law enforcement officer was made when there was no ongoing emergency, and the primary purpose was to prove past events rather than to enable police assistance to meet an ongoing emergency; and (3) the focus of analysis was more on the witness’ statement, and less upon any interrogator’s questions.⁴⁰ However, such tests do not necessarily foretell the outcome of a specific case.

In the *Crawford* and Beyond symposium, Professor Kirst ably attempted to predict the future of Confrontation Clause analysis by divining the results of the post-*Davis* certiorari dispositions.⁴¹ Several themes emerged, including the defendant’s presence or absence from the scene of the incident, and whether or not he was under police control.⁴² However, it is unclear that these will ultimately provide the bright lines that could make an ongoing emergency test easy to apply. Already

³⁸ *State v. Mechling*, 633 S.E.2d 311, 321 (W. Va. 2006).

³⁹ *State v. Camarena*, 145 P.3d 267, 273-74 (Or. App. 2006); *see also* *Harkins v. State*, 143 P.3d 706, 714 (Nev. 2006) (four-part test for 911 calls).

⁴⁰ *Mechling*, 633 S.E.2d at 321-22.

⁴¹ Roger W. Kirst, *Confrontation Rules After Davis v. Washington*, 15 J.L. & POL’Y 635 (2007).

⁴² *Id.*

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the pre-*Davis* tendency to find all 911 calls by distraught victims to be nontestimonial has reappeared in the post-*Davis* cases.

For example, *People v. Walker*⁴³ held that a 911 call was a call for help, even though it was made by a neighbor to whom the victim fled seeking help after she escaped from her home by jumping from a second-story balcony while the defendant slept.⁴⁴ The victim told her neighbor that she could not return home, which indicated that the specific incident was over. Indeed, the defendant claimed that the victim had waited two hours after the beating to ensure the defendant was asleep before fleeing.⁴⁵ Thus, *Walker* seems to take a more global view that the emergency is resolved only when the defendant is captured.

Although *Walker* briefly mentioned questions about whether the couple's child was present, it gave no indication of where the child was, or that any violence had been threatened to the child.⁴⁶ Ironically, the opinion did not discuss whether the neighbor could have testified to what the victim had initially said, although it held that the neighbor's written narrative of the victim's statement given to the police when they arrived, was testimonial.⁴⁷ The conviction was reversed because the details supplied by the later oral and written information provided to the police were found to be testimonial, but the 911 holding should not be considered surplusage. In other words, it suggests a pattern that is likely to be repeated in evaluating other 911 calls, such as *State v. Wright*, in which the Minnesota Supreme Court⁴⁸ found that the latter part of a 911 call, after the victim's sister was told the defendant was in custody, was nontestimonial because the goal was to reassure her and her sister that the defendant had really been apprehended, not to create testimony.⁴⁹

⁴³ No. 250006, 2006 WL 3365521 (Mich. App. Nov. 21, 2006).

⁴⁴ *Id.* at *1.

⁴⁵ See facts discussed in *People v. Walker*, 697 N.W.2d 159, 161-62 (Mich. App. 2005).

⁴⁶ *Walker*, 2006 WL 3365521.

⁴⁷ *Id.* at *4.

⁴⁸ No. Ao3-1197, 2007 WL 177690 (Minn. Jan. 25, 2007).

⁴⁹ *Id.* at *9-10.

Similarly, it is unclear whether the focus on assessing the emergency will result in every initial statement of a 911 call being deemed nontestimonial. Justice Scalia separated the investigatory collection of *ex parte* testimonial statements by the police from their attempted use at trial in violation of the Confrontation Clause.⁵⁰ Recognizing the distinction between trial and investigatory use of 911 calls appears to permit a more cautious approach to evaluating their admissibility, encouraging judges to evaluate the tenor of the entire statement. Looking only at the investigatory function could arguably justify admitting the first sentence of every conversation, because the caller always has to explain the nature of the incident in order for the operator to determine how to resolve the perceived emergency. Calling a statement nontestimonial until the operator can figure out whether the danger is past or present would effectively deny the right of cross-examination based on the sentence structure and speech pattern of the caller, hardly a principled distinction for separating Sixth Amendment wheat from chaff.

Yet this is already what some courts are doing. For example, in *State v Camarena*,⁵¹ the victim called 911, hung up, and when the operator called her back to ask if there was a problem, she answered, "Yeah, my boyfriend hit me but then he left."⁵² Before providing details she also specified he had departed by car.⁵³ Evaluating the totality of the circumstances, *Camarena* held that the victim's initial response as well as her response concerning the nature of the injuries were not testimonial because they occurred immediately after the assault, the defendant could have returned, it was likely that the victim was seeking assistance against a possible renewal of the attack, and the level of formality of the interrogation was unlike that in *Crawford* and *Hammon*.⁵⁴ Thus, Justice Scalia appears unduly

⁵⁰ 126 S. Ct. at 2279 n.6.

⁵¹ 145 P.3d 267 (Or. Ct. App. 2006).

⁵² *Id.* at 269.

⁵³ *Id.*

⁵⁴ *Id.* at 275.

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optimistic that ongoing emergencies are easy to spot.

Indeed, I would not be surprised if pressure emerges to change the typical 911 script to better fit with *Davis* by specifically asking as the first question whether the caller is presently in danger. The second question would be what is the nature of the ongoing emergency, before more identifying details are requested. As a practical matter, most emergency systems will display the address of the caller even without an inquiry. *Davis* also expressed concern that the police need to know the identity of the assailant in order to assess the threat to their own safety and danger to the potential victim.⁵⁵ However, this information can be revealed by asking if the individual is known to have access to a weapon or currently appears to be on drugs, as opposed to asking the identity of the defendant or specific details of the defendant's conduct. If the defendant is armed and the incident is still in progress, *Davis* suggests that his identity is needed to end the emergency,⁵⁶ but in other circumstances identity appears only necessary to decide whom to prosecute. Given that the 911 system is considered a proxy for police involvement, we should expect the defense to challenge the order and content of questions that appear designed to produce nontestimonial statements despite Justice Scalia's belief that emergencies are immutable and not affected by police conduct.⁵⁷

For example, in *Vinson v. Texas*,⁵⁸ the victim's identification of her boyfriend as her assailant to an officer at the scene was held to be nontestimonial, in part because the officer said he didn't feel safe until backup arrived, in a situation where the defendant entered the room and yelled at the victim who was recently and badly injured.⁵⁹ One would assume that the officer

⁵⁵ 126 S. Ct. at 2279.

⁵⁶ See, e.g., *Lile v. State*, No. 79A02-0601-CR-31, 2006 WL 3306004, at *3 (Ind. App. Nov. 15, 2006) (affirming admission of 911 call made after defendant killed first victim, where caller was hiding under bed before defendant dragged her out and forced her into car).

⁵⁷ *Davis*, 126 S. Ct. at 2279 n.6.

⁵⁸ *Vinson v. State*, Nos. 01-05-00784-CR, 01-05-00785-CR, 2006 WL 2291000 (Tex. App. 1st, Aug. 10, 2006).

⁵⁹ *Id.* at *8-10.

could have controlled or separated the defendant, placing him in the squad car until he finished assessing the situation. Distinguishing the facts in *Hammon* because the assailant was not present during the interview seems fairly disingenuous, given that Hammon also tried to intervene and was separated from his wife.⁶⁰

Even reading certiorari dispositions concerning field investigations indicates that the dividing line between testimonial and nontestimonial statements is not as obvious as *Davis* would suggest. For example, pre-*Davis*, in *State v. Hembertt*,⁶¹ the Nebraska Supreme Court upheld the admission of a detailed statement made by a woman to police responding to a 911 call. The victim volunteered such an amount of detail that the officers stopped her to locate the assailant. The emergency was not considered to be over until the defendant was found inside. However, were the details of the assault necessary to resolve the emergency? The Supreme Court denied certiorari, upholding the conviction,⁶² although numerous other cases were vacated. While one can never know the reason for a denial, *Hembertt* sends a message that admission of detail is not fatal to a conviction, whether because it is not error or harmless error, and encourages courts to find statements to be nontestimonial whenever the defendant remains in the home, even though the victim is outside and no longer in danger.

Defining the scope of the emergency also proved difficult in *State v. Warsame*,⁶³ which held that statements made to two officers were nontestimonial, although the victim's first words revealed, "My boyfriend just beat me up."⁶⁴ The court reasoned that the woman's sister who was in the fleeing vehicle with the defendant might be in danger, although the victim did not claim she was kidnapped.⁶⁵ It was also unclear what happened to another sister who was at the house where the victim had been

⁶⁰ *Davis*, 126 S. Ct. at 2278.

⁶¹ 696 N.W.2d 473, 479 (Neb. 2005).

⁶² *Hembertt v. Nebraska*, 126 S. Ct. 2977 (2006).

⁶³ 723 N.W.2d 637 (Minn. App. 2006).

⁶⁴ *Id.* at 642.

⁶⁵ *Id.* at 641-42.

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beaten.⁶⁶ In deciding where to draw the line, the court concluded that the ongoing emergency “need not be limited to the complainant’s predicament or the location where she is questioned by police.”⁶⁷ Thus, the complainant’s entire narrative was considered nontestimonial.⁶⁸

Another questionable result in a domestic violence case was reached in *State v. Rodriguez*,⁶⁹ which held that statements to an officer on two separate occasions were nontestimonial cries for help, although on both occasions the statements were made outside of the presence of the defendant.⁷⁰ Indeed, the same result would have been justified by a forfeiture analysis, given the victim’s statements about being threatened by the defendant and his family, and that the police couldn’t protect her or her child. Only the statement that the defendant was inside the home underneath the couch with a knife⁷¹ appears arguably nontestimonial.

Yet even this points out the difficulty with the standard. As previously mentioned, many judges understandably view the emergency as ongoing until the defendant is apprehended for purposes of determining whether statements are testimonial, despite the fact that the victim is out of harm’s way. Thus, the confrontation right seems dictated by the fortuity of whether the defendant is still at home, rather than has fled. Some courts go further, suggesting the emergency is not over if he could return. Such results appear totally out of keeping with the Supreme Court’s narrow view of context in assessing whether an emergency existed in *Hammon*, and quite different from the nontestimonial statement of a victim running out of an apartment screaming, “that’s him, that’s him. He’s the one that just hit me.”⁷² In that case, the officers acted as Justice Scalia

⁶⁶ *See id.*

⁶⁷ *Id.* at 641.

⁶⁸ *State v. Warsame*, 723 N.W.2d 637, 643 (Minn. App. 2006).

⁶⁹ 722 N.W.2d 136 (Wis. Ct. App. 2006).

⁷⁰ *Id.* at 140-41.

⁷¹ *Id.* at 141.

⁷² *State v. McKenzie*, No. 87610, 2006 WL 3095671 (Ohio Ct. App., Nov. 2, 2006).

envisioned, securing the defendant in the police car before asking the victim for details, which were deemed testimonial.⁷³

II. ASSESSING WHETHER A STATEMENT MADE TO SOMEONE OTHER THAN LAW ENFORCEMENT PERSONNEL IS TESTIMONIAL

Whether *Crawford* and *Davis* leave a gaping hole in Confrontation Clause protection by which statements made to people having no relationship to law enforcement can march in without any regulation is unresolved. Outside of the child abuse context, cases generally reject protection for statements made to private individuals.⁷⁴ Several domestic violence cases have found such statements to be nontestimonial.⁷⁵ However, *Davis* specifically left open whether statements made to someone other than law enforcement personnel are testimonial.⁷⁶ Realistically, when a victim cries out for help to those around her such as neighbors, relatives, friends, acquaintances, or strangers on the street, the question will focus on what assistance the victim hopes to receive. Only when it appears that the cry is to obtain police aid for a completed criminal act will the calls likely be considered testimonial.⁷⁷ In many cases, the confidant is not the person who calls the police, suggesting that the statement is not testimonial.⁷⁸ This should help the prosecution, although it has

⁷³ *Id.* at *5.

⁷⁴ Compare *Compan v. People*, 121 P.3d 876 (Colo. 2005) (finding that domestic violence victim's statements to friend not testimonial) with *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779) (holding that the admission of a young rape victim's statements to her mother was error; cited with approval in *Davis*). See also *Idaho v. Wright*, 497 U.S. 805, 817-18 (1990) (excluding child's statements to private pediatrician as violating Confrontation Clause; holding implicitly approved in *Crawford*, 541 U.S. at 58-59).

⁷⁵ See, e.g., *Lile v. State*, 2006 WL 3306004, at *1-3 (finding voice message to daughter as she saw defendant return with shotgun was nontestimonial).

⁷⁶ *Davis*, 126 S. Ct. 2266, 2274 n.1.

⁷⁷ See *State v. Mechling*, 633 S.E.2d 311, 323-24 (W. Va. 2006) (remanding to determine if statements of domestic violence victim to neighbor who called 911 were testimonial).

⁷⁸ See, e.g., *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 561-62

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troubling implications about the devaluation of cross-examination and live witnesses whenever the police are not involved. It also suggests inclusion of testimonial statements at trial may be viewed as harmless error when they duplicate admissible information. However, some courts appear to reject harmless error when the additional information provides persuasive details.⁷⁹

Another frequent source of testimony in domestic violence cases comes from medical personnel and records. Again, the question arises as to whether both the victim's statements and the doctor's diagnosis can be admitted if the declarant is absent from trial. Some courts determine whether the examination and questioning was for a "diagnostic purpose" and whether the "statement was the by-product of substantive medical activity."⁸⁰ Most decisions concerning medical statements occur in child abuse cases.⁸¹ However, a few domestic violence and rape cases appear to find such statements nontestimonial when the physician has no role in investigating the assault,⁸² or when the statements describe the rape and resulting injuries but do not identify the defendant.⁸³

Questions are also raised when victims are subjected to sexual assaults and are then sent to a forensic unit for evaluation, which would appear to implicate testimonial concerns. Even here, some courts consider statements made to forensic nurses or to medical personnel in forensic units to be nontestimonial, despite their likely use for purposes of

(Mass. 2005).

⁷⁹ See, e.g., *State v. Wright*, 2007 WL 177690, at *11-13 (Minn. Jan. 25, 2007).

⁸⁰ *State v. Kirby*, 908 A.2d 506, 527 (Conn. 2006), quoting *In re T.T.*, 815 N.E.2d 789, 803 (Ill. App. Ct. 2004) (child abuse case).

⁸¹ See Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay and Confrontation*, 82 IND. L.J. (forthcoming 2007).

⁸² See, e.g., *State v. Moses*, 119 P.3d 906, 912 (Wash. Ct. App. 2005).

⁸³ See, e.g., *State v. Slater*, 908 A.2d 1097, 1106-07 (Conn. App. Ct. 2006).

prosecution.⁸⁴ In discussing medical records, *Clark v. State*⁸⁵ found that it could not properly evaluate if the statements were testimonial because it was not clear who made them and whether they were volunteered or elicited for purposes of medical diagnosis. Thus, more detailed record keeping may be necessary to determine admissibility.

III. DIFFICULTIES WITH THE *CRAWFORD/DAVIS* APPROACH

A major problem with *Davis*' focus on ongoing emergencies is that it ignores a question that is key to any sound Confrontation Clause analysis: whether cross-examination would serve an important function at trial. Instead, claiming historical justification, which has been challenged both by then-Chief Justice Rehnquist in *Crawford*,⁸⁶ and by the historian Thomas Davies,⁸⁷ *Davis* asks why the statement was made, as if sincerity alone was at the heart of the right to confrontation. Even Justice Scalia softened his rigidly originalist *Crawford* analysis when he stated in *Davis*, "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction."⁸⁸ In the *Crawford* and Beyond symposium, Professor Tuerkheimer correctly critiques *Davis* as being out of sync with the realities of domestic violence, which she suggests would be better served by a relational approach that

⁸⁴ See, e.g., *State v. Stahl*, 855 N.E.2d 834, 836-37 (Ohio 2006) (holding rape victim's statements to nurse practitioner at forensic unit were nontestimonial); see generally, Allie Phillips, *HealthCare Providers' Roles After Crawford, Davis & Hammon*, 40 PROSECUTOR 18 (Oct. 2006) (discussing forensic nurse case law and suggesting ways to ensure statements are considered to be nontestimonial).

⁸⁵ No. A-8890, 2006 WL 2578642 (Alaska App. Sept. 6, 2006).

⁸⁶ 541 U.S. at 69-74 (concurring in judgment).

⁸⁷ See generally Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005); Thomas Y. Davies, *Not "The Framers' Design": How the Framing Era Ban against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J. L. & POL'Y 349 (2007).

⁸⁸ 126 S. Ct. at 2278 n.5.

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acknowledges the context of the battering relationship.⁸⁹ However, in my view the testimonial approach cannot easily accommodate that shift doctrinally. Unfortunately, this approach, which is rooted in a timeframe when women were still subject to the common law rule of thumb which permitted a husband to beat his wife with a rod “no thicker than his thumb,”⁹⁰ is not likely to produce a result favorable to domestic violence victims.⁹¹ Therefore, while I agree with Professor Tuerkheimer about the importance of forfeiture, I would also rethink the domestic violence litigation framework, targeting criminal justice resources to obtain more pretrial cross-examination, and encourage women to testify, even if they recant their accusations.⁹²

The testimonial approach ignores the classic role of cross-examination in exposing mistake, and in the case of modern expansive interpretations of excited utterances, highlighting the possibility of fabrication. It also downplays the function of cross-examination and face-to-face confrontation as to nontestimonial hearsay. This is particularly troubling given that the world of the founding fathers had very little hearsay in contrast to the liberal creation of modern hearsay exceptions by federal and state governments. The fact that most of today’s hearsay could not be admitted in 1791 seems not to be factored into the current Confrontation Clause analysis, even though the newly minted and expansively interpreted hearsay exceptions are surely a product of the same government that the founders distrusted enough to adopt the Confrontation Clause.

The practical difficulty in modern Confrontation Clause analysis is how to harmonize the right of confrontation with modern trial practices that thrive on hearsay. The reliability approach of *Roberts* and its progeny totally denigrated the right of cross-examination and live testimony. Yet *Crawford* and

⁸⁹ See generally Deborah Tuerkheimer, *A Relational Approach to Confrontation and Its Loss*, 15 J. L. & POL’Y 725 (2007).

⁹⁰ See *State v. Burtzloff*, 493 N.W.2d 1, 13 (S.D. 1992) (discussing history of domestic violence).

⁹¹ *Remember the Ladies*, *supra* note *, at 312.

⁹² *Id.* at 367-73.

Davis have substituted an approach that is almost arbitrary in its result, with the potential of unfairly harming both the prosecution and the defense. Confrontation is absolutely required for statements labeled “testimonial,” regardless of the absence of any fault by the prosecution in failing to secure cross-examination, even when such statements are both reliable and the only evidence on the disputed issue. For example, it does not matter that the unavailable victim died unexpectedly in an unrelated accident, even though the victim was the only eyewitness to the crime and the other evidence is inconclusive as to the defendant’s guilt. Yet confrontation is denied for all other statements, even when cross-examination is critical, with at best a reliability check for statements that are admitted via hearsay exceptions that are not firmly rooted.⁹³ Thus, the focus is not on the impact of the statement to the defense and the criticality of cross-examination, but on the abstract notion of whether the statement is defined as testimonial.

In contrast, an accusatory approach to defining what is testimonial, as had been suggested by Professor Mosteller,⁹⁴

⁹³ See *Remember the Ladies*, *supra* note *, at 323-25 (arguing that nontestimonial hearsay should be reviewed for reliability, whether under *Idaho v. Wright*, 497 U.S. 805, 817-18 (1990), or under a due process rationale). While *Davis* asserts that testimonial statements define the perimeter, not simply the core of the right to Confrontation, 126 S. Ct. at 2274, this dicta is not necessary to its holding, since an excited utterance would not require any additional reliability analysis under the *Roberts*’ progeny. Moreover, *Crawford* did not challenge the holding in *Wright*, excluding unreliable hearsay of a child to a private doctor, which would appear to be an incorrect result unless the statement was testimonial. Post-*Davis* cases are split as to whether nontestimonial hearsay must be reliable. See generally James J. Duane, *The Cryptographic Coroner’s Report On Ohio v. Roberts*, 21 CRIM. JUST. 37 (Fall, 2005). However, in *Whorton v. Bocktin*, 127 S.Ct. 1173, 1183 (2007), Justice Alito unequivocally states that under *Crawford*, “the Confrontation Clause has no application to such [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability.”

⁹⁴ See generally Robert P. Mosteller, “Testimonial” and the Formalistic Definition—The Case for an “Accusatorial” Fix, 20 CRIM. JUST. 14 (Summer, 2005); Robert P. Mosteller, *Crawford’s Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK.

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appears closer to satisfying concerns about the need for cross-examination, as well as promoting the fairness values associated with requiring witnesses to appear at trial and face the accused when testifying. *Davis*' concentration on discerning primary intent in situations that clearly manifest equally strong ties to the dual goals of obtaining help and assisting the prosecution will simply create a new set of crazy quilt results that will no doubt be as unpredictable, and in some cases as unfair, as those produced by *Roberts*.

Moreover, to the extent that the objective test results in ignoring an improper subjective motivation of an officer to create testimony to be used at trial, it could result in decisions that are viewed as unjust. In other words, the objective test adopted by *Whren v. United States*⁹⁵ and its progeny in the Fourth Amendment context has provoked an outcry because it could allow a car stop when probable cause exists, despite the decision of an officer to stop the defendant for an improper purpose, such as racial profiling.⁹⁶ Similarly, some fear that an objective Sixth Amendment standard could also mask potential prosecutorial misconduct. Given the ambiguous references in *Crawford* and *Davis* about whether interrogation should be viewed from the officer's perspective even if the declarant is unaware of the improper motivation, one would hope that while the declarant's intent should typically control the confrontation analysis, that improper police motivation would also result in a statement being deemed testimonial. It has been suggested that the Court should exclude evidence if it is found that police officers systematically attempt to evade the Confrontation Clause.⁹⁷ This would be in accord with *Missouri v. Seibert*, which excluded a confession obtained by a technique that "by any objective measure reveal[ed] a police strategy adapted to

L. REV. 411 (2005) (arguing that the most important feature is the core concern of whether certain witnesses were making criminal accusations against the defendant. Beyond that, a rigid formula should not be imposed).

⁹⁵ 517 U.S. 806 (1996).

⁹⁶ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, Stevens, Ginsburg, and Breyer, JJ., dissenting).

⁹⁷ *Leading Cases*, *supra* note 37, at 220.

undermine the *Miranda* warnings.”⁹⁸

IV. ESTABLISHING FORFEITURE AND OTHER PROCEDURAL ISSUES

Davis reiterated *Crawford*'s suggestion that forfeiture could result in admitting testimonial statements that were otherwise banned by the Confrontation Clause, on equitable grounds.⁹⁹ While *Davis* refused to treat domestic violence differently from other cases in the testimonial analysis, it recognized that “[t]his particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.”¹⁰⁰ Such offending conduct was described as “undermin[ing] the judicial process by procuring or coercing silence from witnesses and victims.”¹⁰¹ Moreover, the defendant was said to “have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.”¹⁰² However, no guidance was given about the specific evidence needed to demonstrate forfeiture and whether intent to intimidate a witness is necessary.

I stand by my earlier views of forfeiture, that intent should not be required in cases where the defendant has murdered the victim.¹⁰³ Despite the fact that historically, forfeiture was limited to witness-tampering cases,¹⁰⁴ after *Crawford* most courts have applied the doctrine to admit statements of murdered domestic violence victims, where witness tampering is not involved.¹⁰⁵ For example, in *United States v. Garcia-Meza*,¹⁰⁶ the Court

⁹⁸ *Missouri v. Seibert*, 542 U.S. 600, 616 (2004).

⁹⁹ 126 S. Ct. at 2280.

¹⁰⁰ *Id.* at 2279-80.

¹⁰¹ *Id.* at 2280.

¹⁰² *Id.*

¹⁰³ *Remember the Ladies*, *supra note* *, at 363-64.

¹⁰⁴ See generally James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for “Forfeiture by Wrongdoing,”* 14 WM. & MARY BILL RTS. J. 1193 (2006) (arguing that intent has always been required).

¹⁰⁵ See, e.g., *Gonzalez v. State*, 195 S.W.3d 114 (Tex. 2006) (discussing caselaw, but not resolving issue of whether intent is necessary).

¹⁰⁶ 403 F.3d 364, 370 (6th Cir. 2005). *Accord* *State v. Brooks*, No.

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specifically noted that the federal forfeiture hearsay exception's requirement that the defendant intended to prevent the witness from testifying did not control the constitutional analysis of forfeiture. In other words, constitutional forfeiture is not restricted by the statutory requirements of Federal Rule of Evidence 804(b)(6). *Mattox v. United States*¹⁰⁷ rejected a Confrontation Clause challenge to the admission of the prior testimony of two witnesses in a murder trial who had died before the retrial.¹⁰⁸ Rereading *Mattox* reinforces my belief that, as is often expressed in other contexts, the Constitution is not a suicide pact. In discussing the relationship of death to confrontation, *Mattox* noted that such rules of law, "however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."¹⁰⁹ My only hesitation about abandoning intent is Justice Scalia's brief mention in *Davis* that forfeiture was codified by Federal Rule of Evidence 804(b)(6), since that would appear to equate the rule with the constitutional doctrine.

This dicta, however, was general and did not address interpreting forfeiture in domestic violence cases when the victim's death is often accomplished in ways that are aimed at frustrating prosecution. Previous violence and threats instill fear in the victims who downplay their risk of continuing danger, and their murders are often accomplished at home without witnesses. These victim's statements are best analogized to the dying declarations of individuals whose deaths are witnessed.¹¹⁰ After *Davis*, courts have continued to approve of the use of forfeiture in murders implicating domestic violence without requiring any intent to prohibit her from testifying at trial.¹¹¹

W2004-02834-CCA-R3-CD, 2006 WL 2523991, at *8 (Tenn. Crim. App. Aug. 31, 2006).

¹⁰⁷ *Mattox v. United States*, 156 U.S. 237 (1895).

¹⁰⁸ *Id.* at 240.

¹⁰⁹ *Id.* at 243.

¹¹⁰ See *Remember the Ladies*, *supra* note *, at 363-64.

¹¹¹ See *People v. Giles*, 152 P.3d 433 (Cal. 2007) (finding forfeiture where defendant claimed self defense in killing former girlfriend and her statements concerned an unrelated claim of domestic violence); *State v.*

State v. Romero,¹¹² a pre-*Davis* decision that was bound by jurisdictional case law that required intent for establishing forfeiture, discussed what it characterized as compelling reasons as to why a showing of intent to procure silence should not be required in cases where the defendant has killed the witness.¹¹³ Citing cases that applied forfeiture without a showing of intent, *Romero* noted two reasons to reject intent: (1) cases confused forfeiture with waiver, and (2) forfeiture is equitable, and does not hinge on the defendant's motive.¹¹⁴ While I question whether totally unreliable hearsay should come in by forfeiture, practically, the evidence being admitted in domestic violence homicides comes in via what *Roberts* would have called firmly rooted exceptions such as excited utterances, or ad hoc trustworthiness exceptions that would meet any constitutionally based reliability test. In other words, they are not being admitted via the forfeiture exception.

Most domestic violence forfeiture cases will relate to live victims who do not appear. In such cases, I agree that the traditional definition of forfeiture that requires intent to procure the absence or silence of the witness should be followed. Unfortunately, it is often difficult to identify the cause for the victim's nonappearance at trial. As *State v. Mechling* noted, some victims fear retaliation, which can include threats not only to the victim, but also to the victim's children.¹¹⁵

Indeed, some women fear that the batterers will claim custody of their child or cause the victim to come under scrutiny of the child welfare system. The suggestion of some prosecutors that forfeiture should be presumed when a domestic violence victim is absent from trial has not gained any judicial support. I disagree that battering relationships can by themselves establish

Brooks, 2006 WL 2523991, at *8 (finding forfeiture where defendant beat his girlfriend to death). *Cf.* *State v. Jensen*, 727 N.W.2d 518, 533-34 (Wis. 2007) (finding forfeiture where wife was murdered by husband, but no evidence existed of prior domestic violence).

¹¹² 133 P.3d 842 (N.M. Ct. App. 2006).

¹¹³ *Id.* at 852.

¹¹⁴ *Id.*; *accord, Giles*, 152 P.3d 433.

¹¹⁵ *State v. Mechling*, 633 S.E.2d 311, 324, n.11 (W. Va. 2006)

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forfeiture¹¹⁶ because I believe that individualized evidence is required. I am also uncomfortable with applying a presumption of forfeiture for unavailable domestic violence victims, since the burden of proof should be on the prosecutor, rather than on the defendant, because it is difficult to prove a negative. In other words, requiring the defendant to show there were reasons other than coercion for the victim's absence may be more difficult than requiring the prosecution to establish evidence of intimidation. However, I recognize that if the presumption only affects the burden of production, and not the burden of persuasion, the defendant could rebut it by any evidence of another reason the complainant did not appear.

Even decisions such as *Mechling*¹¹⁷ that appear receptive to forfeiture require fact-based evidence of forfeiture in the specific case. However, the specific pattern of abuse in each case should be considered in the forfeiture analysis because it provides the context for understanding the pressure that is brought to bear by the defendant on the victim in the case. Thus, previous history should be factored into the analysis, including prior charges of abuse, and any previous recantations by the declarant. Similarly, evidence of further abuse after the incident should be considered as conduct aimed at procuring absence or lack of cooperation even when no direct threat can be demonstrated.¹¹⁸ Moreover, PTSD should be considered a significant factor in deciding forfeiture, since the victim's hypersensitive responses can be traced to the defendant's initial conduct. As *Mechling* pointed out, decisions concerning forfeiture are most difficult when the batterer's actions, such as threats about her never calling the police, precede the current domestic charge.¹¹⁹

Davis suggested, without deciding, that forfeiture would be decided by a preponderance of the evidence standard,¹²⁰ but did not discuss any distinction between the showing necessary for a

¹¹⁶ See, e.g., Andrew King Ries, *Forfeiture by Wrongdoing*, 39 CREIGHTON L. REV. 441, 458 (2006).

¹¹⁷ 633 S.E.2d at 324-26.

¹¹⁸ See, e.g., *id.* at 325.

¹¹⁹ *Id.*

¹²⁰ 126 S. Ct. at 2280.

decision made pursuant to a federal evidentiary rule as opposed to a constitutional mandate. Indeed, the Court ignored state decisions requiring a clear and convincing evidence standard. However, since the voluntariness of confessions and *Miranda* violations are determined by a preponderance,¹²¹ it is difficult to argue that forfeiture requires a higher standard, whether in a hearsay exception or for constitutional purposes. The only constitutional right that currently appears to impose a clear and convincing evidence standard is found in the nearly 40-year old decision of *United States v. Wade*, which permitted the government to establish by clear and convincing evidence that a constitutionally defective in-court identification was based upon observations of the suspect apart from the lineup identification held without counsel.¹²² *Davis* also indicated that hearsay evidence, including the unavailable witness' out-of-court statements, may be considered at any forfeiture hearing,¹²³ but left open whether such statements alone can establish forfeiture, or whether additional evidence is required.

Interestingly, *Mechling* discounts prosecution claims that domestic violence convictions can never be obtained without the use of the victim's statements because convictions are routinely obtained in murder cases without such statements.¹²⁴ However, this ignores the reality that the government allocates more resources to murder prosecutions than to domestic violence cases, particularly misdemeanors. Generally, prosecutors will be forced to expend more resources to obtain evidence of forfeiture. This could require sending an advocate or officer to talk to the complainant or to neighbors who may have information. Adam Krischer has provided a number of valuable suggestions about obtaining evidence to support forfeiture.¹²⁵

¹²¹ *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Lego v. Twomey*, 404 U.S. 477, 488-89 (1972).

¹²² 388 U.S. 218 (1967).

¹²³ 126 S. Ct. at 2280.

¹²⁴ 633 S.E.2d at 325, n.13.

¹²⁵ Adam Krischer, *Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to Crawford v. Washington in Domestic Violence Cases*, 38 PROSECUTOR 14, 15 (Dec. 2004).

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For example, phone records subpoenaed from jail may reveal tapes or explain a recantation at trial. Voicemail messages, e-mail, or caller ID logs indicating large numbers of calls may also be useful.¹²⁶ However, in a world of limited prosecutorial resources, proving forfeiture in misdemeanor cases, which encompass a large percentage of the current domestic violence caseload, will likely be difficult, reinforcing my view that we must rethink domestic violence prosecutions.

Other procedural issues also come into play. For example, *Davis* recognized that some of the 911 statements may have been testimonial, but suggested that *in limine* hearings could be used to redact or exclude the testimonial portions of the statements.¹²⁷ In this context, some attempts at parsing statements may result in a determination that admission of the redacted statement would be misleading, supporting exclusion for undue prejudice. *State v. Kirby*,¹²⁸ a case where the victim was kidnapped by a friend of her husband, recognized that:

some isolated portions of the telephone call, specifically when the complainant described to Gomes the injuries and chest pains that affected her at the time of the conversation, are not testimonial in nature and, therefore, would not by themselves be barred under *Crawford*. We conclude, however, that the telephone recording remains inadmissible in its entirety because the recording is so heavily dominated by testimonial statements that redacting them in accordance with the procedure directed in *Davis v. Washington* . . . would leave the nontestimonial portions of the conversation without any meaningful context.¹²⁹

Thus, attorneys must focus not only on whether statements

¹²⁶ See, e.g., *State v. Jens*, 724 N.W.2d 702 (Table), No. 2005AP2144, 2006 WL 3007498, at ¶ 27 (Wis. App. Oct 24, 2006) (dealing with audiotapes of telephone conversations where defendant discussed ways for victim to avoid subpoena forfeited right to complain about her not testifying).

¹²⁷ 126 S. Ct. at 2277-78.

¹²⁸ 908 A.2d 506 (Conn. 2006).

¹²⁹ *Id.* at 523 n.18.

are testimonial, but also on whether they can be effectively excised from otherwise admissible nontestimonial narratives.

V. SUGGESTIONS FOR PROSECUTORS IN LIGHT OF *DAVIS*

Obviously, the shift in Confrontation Clause analysis makes the testimony of the victim at trial or preliminary hearing critical. Thus, the continued support of victim's advocates and coordinators remains a key component to successful prosecution, and given the cost to the system and to victims' autonomy, these criminal justice resources should be allocated to risky offenders and felonies, with diversion being the route for less serious cases, or those with significant evidentiary problems.¹³⁰ Moreover, while the vast majority of domestic violence complainants have suffered psychological injuries beyond the incident in question, it would be unrealistic to assume that everyone who complains about a particular incident is telling the truth.

Anecdotally, the most common causes of lying or exaggeration relate to anger over male infidelity or child custody disputes. Thus, prosecutors must use their independent judgment in evaluating whether the victim is being entirely forthcoming about the entire nature of the incident as well as whether the refusal to cooperate is because a lying complainant has had a change of heart. In other words, the need for confrontation is not eliminated simply because the case relates to domestic violence, even if most allegations are likely true and many domestic violence victims do not call the police, let alone testify.¹³¹

It is well known that even when the complainant is a true victim of domestic violence, it is likely that she will recant when

¹³⁰ See *Remember the Ladies*, *supra* note *, at 367-73; see also Paul C. Friday, et al., *Evaluating the Impact of a Specialized Domestic Violence Police Unit* (Oct. 2006), <http://www.ncjrs.gov/pdffiles1/nij/grants/215916.pdf> (discussing targeting of more serious domestic violence offenders) (last visited on March 25, 2007).

¹³¹ See, e.g., *State v. Mechling*, 633 S.E.2d 311, 324 (W. Va. 2006).

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she testifies at trial.¹³² While prior inconsistent statements are typically admitted to impeach her credibility, it is their substantive use that is necessary for successful domestic violence prosecutions. Only a minority of states permit the substantive use of all prior inconsistent statements of witnesses.¹³³ Therefore, prosecutors should support efforts to enact such an exception, which in conjunction with expert testimony and the introduction of the defendant's prior bad acts, will increase the probability of conviction. Typically, there will be enough circumstantial evidence to meet any challenge based on the sufficiency of evidence when the prior inconsistent statement provides a key element. In this regard, some states apply a totality of the circumstances approach to reviewing the evidence for sufficiency to uphold verdicts even where the inconsistent statement provides the only evidence of identity of the defendant.¹³⁴ In jurisdictions where prior inconsistent statements must be given under oath in a proceeding to be used substantively, prosecutors should have the victim testify at a preliminary hearing, even if they typically indict defendants or are permitted to use hearsay at preliminary hearings.

In addition, because of the likelihood the victim will refuse to testify, evidence of witness intimidation should always be sought to support an argument of forfeiture. However, even if the complainant testifies and recants, intimidation evidence should be admissible as going to the bias of the witness. Such evidence should survive a prejudice challenge since, as in *United States v. Abel*,¹³⁵ its probative value is extremely high in that it explains the reason for the change of testimony in a way that jurors can understand, as opposed to the less intuitive explanation by experts as to why women do not readily leave their batterers.

¹³² See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768-69 (2005).

¹³³ See CLIFFORD S. FISHMAN, 4 JONES ON EVIDENCE §§ 26.5-26.7 (7th ed. 2000 & Supp. 2004); *Remember the Ladies*, *supra* note *, at 351-52.

¹³⁴ See, e.g., *People v. Cuervas*, 906 P.2d 1290, 1304 (Cal. 1995) (using a substantial evidence test).

¹³⁵ 469 U.S. 45 (1984).

A few prosecutors I have talked to over the years believe that because women will virtually always downplay their abuser's conduct, it is better not to ask the woman for her version of the facts before trial, and instead simply let the woman testify. The explanation for why she has recanted her initial statement to the police is offered via expert testimony, other evidence and jury argument. While this approach might be considered controversial, those who use it believe that complainants are more likely to testify when they can retain their dignity and do not feel doubly battered by the system. As a result, focusing on the other evidence of abuse is felt to produce more convictions than arguing with the victim. In a post-*Davis* world, any approach that encourages women to testify should be considered.

Only if cross-examination at the preliminary hearing is limited will such testimony present a *Crawford/Davis* problem when introduced at trial because of the absence of the witness.¹³⁶ Indeed, where statutory limits on preliminary hearing testimony exist, even if prosecutors are loath to urge expansion of testimony at all preliminary hearings, they could in select cases indicate to the judge that they will not object to full cross-examination, providing the opportunity necessary to meet a later challenge if the witness does not appear at trial. While a statute that only permits full examination in domestic violence, but not other cases, might be questionable, creating a statutory exception that allows full cross-examination for any case in which the victim is uncooperative should pass constitutional muster. All such cases, whether domestic violence or otherwise, would warrant preservation of cross-examined testimony as quickly as possible after the incident. In this regard, the statute could include a presumption that full cross-examination of domestic violence victims should be permitted in light of the empirical evidence of their non-cooperation.

Finally, as Professor Lininger and I have argued, more use

¹³⁶ *Remember the Ladies*, *supra* note *, at 355-58 (discussing the difference between limited and full cross-examination at preliminary hearings); *Cf.*, *Howard v. State*, 853 N.E.2d 461, 468-70 (Ind. 2006) (discovery deposition satisfied *Crawford*).

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should be made of federal prosecutions for gun possession.¹³⁷ Large numbers of individuals are prohibited from owning a weapon because they have been convicted of a qualifying domestic violence misdemeanor or are subject to a qualifying protective order.¹³⁸ The federal penalties for violating these statutes are typically greater than sentences for domestic violence assaults.¹³⁹ Moreover, such prosecutions typically do not require the domestic violence victim to testify, because they focus on the prohibited possession of the weapon in light of the qualifying offense or protective order.¹⁴⁰ Currently relatively few federal domestic violence weapons related charges are prosecuted, given the large number of individuals who run afoul of such bans.¹⁴¹ Joint efforts by state and federal prosecutors are needed to target dangerous domestic violence offenders who would otherwise escape conviction due to witness non-cooperation. In addition, many states do not criminalize weapon possession by domestic violence offenders. Enacting such laws pose a way to ensure that domestic violence offenders do not escape conviction.

When convicting a defendant in the absence of the victim appears problematic, it may be possible to forgo a new criminal case if he has previously committed other crimes, whether domestic violence related or not. The key is whether he is still subject to probation, parole or supervised release, since his conduct will also violate the conditions of his release. Such violations are easier to prove because they are typically established by a preponderance of the evidence,¹⁴² rather than by the more exacting beyond a reasonable doubt standard. More importantly, revocations are not subject to evaluation under the

¹³⁷ Myrna S. Raeder, *Domestic Violence in Federal Court: Abused Women as Victims, Survivors and Offenders*, 19 FED. SENTENCING RPTR. 91, 94 (Dec. 2006); *see generally* Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525 (2003).

¹³⁸ Raeder, *supra* note * at 92.

¹³⁹ *Id.* at 92-93.

¹⁴⁰ *Id.* at 95.

¹⁴¹ *Id.* at 92-93.

¹⁴² *See, e.g.*, *Hammon v. State*, 829 N.E.2d 444, 447 (Ind. 2005).

Confrontation Clause, which is considered a trial right.¹⁴³ Therefore, cross-examination can be denied for good cause,¹⁴⁴ which would likely be established by the unavailability of the declarant. In other words, hearsay is usually acceptable evidence, unless so unreliable as to raise due process concerns. Given *Roberts'* endorsement of the reliability of firmly rooted hearsay exceptions, the excited utterances that are the bread and butter of domestic violence prosecutions would undoubtedly meet any due process reliability test. Ironically, according to the recital of the facts in *Davis*, Hammon was also found guilty of violating his probation.¹⁴⁵ However, neither the Indiana Supreme Court nor the United States Supreme Court discussed whether his sentence was longer than permitted solely for the violation of probation, even though Hammon's one-year sentence for the new battery was suspended for all but 20 days, and he was ordered to complete a drug and alcohol evaluation and counseling program.¹⁴⁶ Of course, unless the defendant has previously been convicted of a felony, any potential sentence will not reflect the seriousness of many domestic violence crimes, though revocations have the benefit of imposing swift and predictable incarceration.

CONCLUSION

Crawford left many unanswered questions about how to define testimonial statements in domestic violence cases, where victims typically make frantic 911 calls or greet police officers with frightened pleas for help when they arrive at the scene. Since most domestic violence victims do not cooperate with the prosecution, the two years after *Crawford* produced conflicting

¹⁴³ See, e.g., *Crawford*, 541 U.S. at 59; *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (Powell, J.).

¹⁴⁴ *Black v. Romano*, 471 U.S. 606, 612 (1985) (holding that probationer is entitled under due process to cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation).

¹⁴⁵ 126 S. Ct. at 2272-73.

¹⁴⁶ *Hammon*, 829 N.E.2d at 447.

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decisions about the admissibility of their excited utterances and doomed many domestic violence prosecutions. In *Davis*, the Court addressed the two most common domestic violence scenarios, 911 calls and field investigations. Unfortunately, *Davis*' bright line for evaluating testimonial statements is likely to prove illusory given the vagueness of its definition of ongoing emergencies. In addition, courts must grapple with whether intent is necessary to justify forfeiture. Nobody scored a knockout punch in *Davis*: prosecutors must assume that most statements of unavailable declarants made after the incident to police are inadmissible, regardless of how excited the declarant is; defense counsel must assume that most 911 calls will be admitted, and may increasingly find that nontestimonial statements are no longer tested for reliability; domestic violence victims must assume that the context of their abuse will be ignored in evaluating whether they face an ongoing emergency; and judges must continue to read tea leaves until the Supreme Court's inevitable next foray into Confrontation Clause jurisprudence.