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Andrew King-Ries

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I. Introduction

In the thirty years since the adoption of the Federal Rules of Evidence, American society has become much more aware of the domestic violence epidemic. The numbers are truly staggering: intimate partner violence accounts for twenty percent of crimes against women; one out of every ten violent victimizations is the result of family violence; 1.5 million women are abused annually by their partners; one in five women has experienced an attempted or completed rape; and marital rape accounts for twenty-five percent of all rapes, affecting over 75,000 women each year.[1] Some studies announce results that are arguably more chilling, such as those showing that homicide is the second leading cause of death among pregnant women.[2]

Despite these statistics, prosecution of domestic violence remains problematic. Largely due to pressure from defendants, victims overwhelmingly refuse to testify or recant their initial statements implicating the defendant.[3] Victims report a host of

* Assistant Professor, Montana University School of Law; B.A., Brown University, 1988; J.D., Washington University in St. Louis, 1993. I owe many thanks to Kristin King-Ries for her wonderful editing assistance and encouragement, to Michelle Bryan Mudd for her comments on earlier drafts, and to Jason Johns for his outstanding research assistance.

1. Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford's *Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 325-26 (2005); DOMESTIC VIOLENCE FACTS (Nat'l Coalition Against Domestic Violence ed., 2005), *available at* http://www.ncadv.org/files/DV_Facts.pdf.

2. DOMESTIC VIOLENCE FACTS, *supra* note 1.

3. Douglas E. Beloof & Joel Shapiro, *Let the Truth be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3 (2002); Celeste E. Byrom, Note, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After* Crawford v. Washington, 24 REV. LITIG. 409, 410 (2005) ("victims of domestic violence are nine times more likely than victims of non-domestic

reasons for refusing to participate in the prosecution or for recanting their testimony, including physical or sexual assaults prior to trial, fear of retaliation once the batterer is released from incarceration, financial hardships caused by the abuser, and harm or threatened harm to the victim's family or children.[4] Although the impetus creating uncooperative victims is often unique, the result is too often the same: the defendant's violence toward the victim undermines the criminal justice system's effort at accountability.

In response to defendants' efforts to avoid accountability, prosecutors created a new legal species: victimless prosecutions. Proceeding without the victim's in-court testimony, prosecutors relied on hearsay exceptions to admit the victim's statements to 911, police, and medical personnel.[5] Having found a point of convergence between the Court's Confrontation Clause decisions and current hearsay rules, prosecutors were able to pursue victimless prosecutions and the jury was allowed to consider the victim's initial statements to 911 operators, police officers, and doctors about the violent incident as substantive evidence of the crime.[6]

In 2004, the United States Supreme Court's decision in *Crawford v. Washington*[7] dramatically hobbled the prosecution of domestic violence offenses. In *Crawford*, the Court severed the link between confrontation and hearsay and shifted the Confrontation Clause analysis from satisfaction of hearsay rules to cross-examination for "testimonial" statements. Underlying this transformation was the Court's recognition that cross-examination is the sole constitutionally relevant determinant of reliability. The post-*Crawford* world offers few opportunities for victimless prosecutions.[8] Consequently, some jurisdictions have reported dismissing over seventy percent of

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assault to request that their cases be dropped, and estimates of the attrition rate of victim-initiated cases reach as high as eighty percent.").

4. Beloof & Shapiro, *supra* note 3, at 4; Byrom, *supra* note 3, at 410.

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

6. *Id.*

7. 541 U.S. 36 (2004).

8. *See* Davis v. Washington, 126 S. Ct. 2266, 2277 (2006) (determining that some 911 calls are not testimonial). In this limited context, as the facts of *Davis* demonstrate, a victimless prosecution built on the 911 call is still possible.

their domestic violence cases.[9] Largely, the Court's Confrontation Clause shift from hearsay rules to testimonial statements means that domestic violence prosecutions will only proceed when the victim testifies and is subjected to cross-examination.

The *Crawford* decision also exposes an additional obstacle to domestic violence prosecutions that is neither necessary nor constitutionally mandated: even when the prosecution complies with *Crawford*'s command and the victim testifies in court, current hearsay rules needlessly prevent the jury from fully considering the victim's testimony. Federal and state rules of evidence largely prevent the jury from considering the victim's prior inconsistent statements about the incident as substantive evidence of the crime. By the time of trial, over eighty percent of domestic violence victims recant their initial statements describing the defendant's violent conduct, primarily due to pressure from the defendant.[10] In the post-*Crawford* world, the combination of the Confrontation Clause and the rules of evidence require the victim to testify. However, in most cases, the jury is precluded from considering her initial statements about the violence, except possibly for impeachment purposes.

The domestic violence prosecutor, therefore, is in the worst of both worlds, because in the vast majority of cases he is unable to present to the jury the victim's first statements about the defendant's violent conduct. The prosecution cannot proceed without the victim, but even when she does testify, her most relevant statements are not admissible. The batterer, on the other hand, gains a double benefit from his violence toward the victim. When the victim refuses to testify, the Confrontation Clause compels dismissal, and when the victim recants the initial statements, the rules of evidence shield the defendant from the victim's most damaging testimony.

I propose that the solution to this unnecessary obstacle to domestic violence prosecutions and to this undeserved benefit to the defendant is to allow the jury to consider prior inconsistent

9. Tom Lininger, *Prosecuting Batterers after* Crawford, 91 VA. L. REV. 747, 750 (2005).

10. *Id.* at 768-69 (discussing research indicating that between eighty and ninety percent of domestic violence victims recant or refuse to participate in the prosecution and stating that "[t]he reasons why victims refuse to cooperate with the prosecution are manifold, but chief among them is the risk of reprisals by the batterers.").

statements of a testifying witness as substantive evidence of the charged crime. Such an amendment is well-founded for numerous reasons.

First, it is completely consistent with *Crawford* and with the Confrontation Clause. *Crawford* held that a witness's prior statement implicating the defendant may be testimonial and that the Sixth Amendment requires the witness to be in court, subject to cross-examination.[11] Significantly, the *Crawford* Court did not impose *any* other admissibility requirements on testimonial statements. With that in mind, current Federal Rule of Evidence 801(d)(1)(A),[12] which imposes a requirement that the prior statement be made under oath, seems to contradict *Crawford*. In addition, the *Crawford* Court recognized that cross-examination is the only constitutionally relevant reliability determinant.[13] As a result, by requiring an oath, Rule 801(d)(1)(A) imposes a separate and unnecessary reliability aspect.

Additionally, allowing substantive use of prior inconsistent statements recognizes the intent behind the rule as originally proposed: preventing witness intimidation.[14] In 1972, the Supreme Court proposed allowing the substantive use of prior inconsistent statements of witnesses who testified in court and were subject to cross-examination.[15] Largely due to the impact of Watergate, Congress rejected the Supreme Court's rule. Restoring the Supreme Court's proposed rule is even more relevant today in light of *Crawford*'s new limitations and the witness intimidation that is rampant in domestic violence cases.[16]

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11. *Crawford*, 541 U.S. at 52, 68.

12. FED. R. EVID. 801(d)(1)(A).

13. *Crawford*, 541 U.S. at 68-69.

14. *Rules of Evidence: Hearings on H.R. 5463 Before the S. Comm. on the Judiciary*, 93d Cong. 50-51 (1974) [hereinafter *Senate Hearings*] (testimony of Prof. Edward W. Clear, Reporter, Advisory Comm. on Rules of Evidence), *reprinted in* 4 JAMES F. BAILEY, III & OSCAR M. TRELLES, II, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS (1980).

15. Rules of Evidence for United States Courts and Magistrates, 34 L. Ed. 2d 5, 88 (1972) (Proposed Official Draft), *reprinted in* A.L.I. & A.B.A., COURSE OF STUDY: PRACTICE UNDER THE NEW FEDERAL RULES OF EVIDENCE 505, 598 (1975).

16. The Court has recognized the importance of addressing witness intimidation in domestic violence cases, relying primarily on the doctrine of forfeiture by wrongdoing. *See Crawford*, 541 U.S. at 62 (citing Reynolds v. United States, 98

Section II of this article discusses the *Crawford* decision. Since much has already been written about *Crawford*, Section II will only briefly discuss the Court's separation of the hearsay rules from the Confrontation Clause. This section will focus on the *Crawford* decision from the perspective of the relationship between the Confrontation Clause and the admissibility of prior inconsistent statements. Section III examines the history of the rule precluding substantive use of prior inconsistent statements, including a brief look at the common law's treatment of such statements. This section emphasizes the convoluted history of the adoption of Rule 801(d)(1)(A)—which is primarily the current state of the law—and also explores some of the states that follow the minority position with regard to admissibility of prior inconsistent statements.

Section IV discusses the dynamics of domestic violence relationships and the need to address witness intimidation. This section also briefly addresses forfeiture by wrongdoing, specifically how the same concerns underlie both forfeiture by wrongdoing and admission of prior inconsistent statements as substantive evidence. Section V addresses the arguments for and against the adoption of a rule allowing the use of prior inconsistent statements as substantive evidence. In this section, I argue that this amendment to the rules of evidence is consistent with the Supreme Court's Confrontation Clause jurisprudence and is critical to society's efforts to combat domestic violence.

U.S. 145, 158-59 (1879)) (noting that a defendant has a constitutional right to confront the witnesses against him, but he cannot assert that right if he procured a witness' absence); *see also* Davis v. Washington, 126 S. Ct. 2266 (2006). While the Court has recognized the importance of forfeiture by wrongdoing as a counter to the defendant's ability to use the Confrontation Clause as a sword, the forfeiture by wrongdoing doctrine addresses only a small portion of the witness intimidation present in domestic violence cases and, more importantly, has no deterrent effect when the victim recants in court. However, the same rationale supports both forfeiture by wrongdoing and the admission of prior inconsistent statements as substantive evidence. Amending the evidence rule, therefore, is critical to preventing the defendant from gaining the benefit of his violence and will fill the gap left by the forfeiture by wrongdoing doctrine. For a complete discussion of this point, see *infra* text accompanying notes 160-65.

II. *Crawford v. Washington*

In the spring of 2004, the Supreme Court decided *Crawford v. Washington*,[17] fundamentally changing the analysis of both hearsay and the Confrontation Clause. First, the Court separated the analysis of whether the Confrontation Clause is satisfied from the determination of whether particular hearsay rule exceptions are met.[18] Since its 1980 decision in *Ohio v. Roberts*, the Court had largely equated Confrontation Clause analysis with hearsay exception analysis.[19] In *Crawford*, the Court overturned *Ohio v. Roberts* and the *Roberts* test for satisfaction of the Confrontation Clause—whether the hearsay statement met a "firmly rooted hearsay exception" or bore other "particular guarantees of trustworthiness."[20] The Court replaced the *Roberts* test with a rule stating that the Confrontation Clause requires that the defendant have an opportunity to cross-examine any testimonial statements.[21]

Underlying the Court's decision to overturn *Roberts* was the Court's conclusion that *Roberts* created a non-constitutionally mandated "reliability" determination.[22] The Court found that cross-examination is the only reliability determinant constitutionally mandated by the Confrontation Clause.[23]As the Court stated, the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[24] In support of this proposition, the Court drew upon a statement by Matthew Hale claiming that cross-examination "beats and bolts out the Truth much better."[25]

Second, the Court divided the universe of hearsay statements into those that are testimonial and those that are nontestimonial, stating that the Sixth Amendment Confrontation

17. 541 U.S. 36 (2004).
18. *Id.* at 68.
19. Ohio v. Roberts, 448 U.S. 56, 66 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004).
20. *Crawford*, 541 U.S. at 60-68 (citing *Roberts*, 448 U.S. at 66).
21. *Id.* at 68.
22. *Id.* at 62.
23. *Id.* at 67-68.
24. *Id.* at 61.
25. *Id.* at 62 (quoting MATTHEW HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (1713)).

Clause demands that the defendant have an opportunity to cross-examine the declarant of any testimonial hearsay.[26] The Court appeared to exempt nontestimonial hearsay (or testimonial statements not offered for their truth) from the Confrontation Clause altogether, leaving the development of nontestimonial hearsay rules to the states.[27] In its most recent *Crawford* progeny case, *Davis v. Washington*, the Court seemed to reiterate this point: "It is the testimonial character of the statement that separates it from other hearsay that, *while subject to traditional limitations upon hearsay evidence*, is not subject to the Confrontation Clause."[28]

While the Court did not define testimonial, the Court clearly did not limit testimonial statements to those that were made under oath. The Court stated: "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive."[29]

The *Crawford* decision has prompted extensive discussion as courts and commentators struggle with the changes the Court made in Confrontation Clause law.[30] Most of this discussion has centered on the propriety of the changes and the definition of what constitutes a testimonial statement.[31] These two questions are beyond the scope of this article. Rather, this arti-

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26. *Id.* at 68.

27. *Id.*

28. 126 S. Ct. 2266, 2273 (2006) (emphasis added).

29. *Crawford*, 541 U.S. at 52.

30. For instance, simply typing (Crawford & "testimonial statement!") into Westlaw's ALLCASES database receives 1375 hits. *See also* Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331, 1353 (2006); Rorry Kinnally, Comment, *A Bad Case of Indigestion: Internalizing Changes in the Right to Confrontation After* Crawford v. Washington *Both Nationally and in Wisconsin*, 89 MARQ. L. REV. 625 (2006); Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 500 (2006); Kimberly McKelvey, Note, State v. Carter*: Rejecting* Crawford v. Washington*'s Third Formulation as a Per Se Definition of Testimonial*, 67 MONT. L. REV. 121 (2006).

31. *See* Susanne C. Walther, *Pipe-Dreams of Truth and Fairness: Is* Crawford v. Washington *a Breakthrough for Sixth Amendment Confrontation Rights?*, 9 BUFF. CRIM. L. REV. 453 (2006); Alistair Y. Raymond, Note, *Calling* Crawford*: Minnesota Declares a 911 Call Non-Testimonial in* State v. Wright, 58 ME. L. REV. 249 (2006); Kinnally, *supra* note 30; McKelvey, *supra* note 30.

cle addresses the specific issue that flows from a determination that a domestic violence victim's description of a violent incident is testimonial. It is necessary, therefore, to examine what *Crawford* says about the use of prior statements of a witness that fall within the testimonial category.

After *Crawford*, it is clear the Court severed the congruence between hearsay and confrontation and elevated the Confrontation Clause above the hearsay rules.[32] However, the Court did not spell out the role of the hearsay rules, if any, when the Confrontation Clause analysis deems a statement to be testimonial.[33] In footnote nine, the *Crawford* Court indicated that the Confrontation Clause—once satisfied through the witness appearing and being subject to cross-examination—posed no additional obstacle to the use of the statement:

> Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. It is therefore irrelevant that the reliability of some out-of-court statements cannot be replicated, even if the declarant testifies to the same matters in court. The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.[34]

In this footnote, the majority is responding to then-Chief Justice Rehnquist's dissent, which argues that the common law had always recognized exceptions to the Confrontation Clause.[35] Rehnquist argued that those recognized exceptions to the Confrontation Clause served the public interest in the truth and in an effective and efficient criminal justice system.[36] Within this footnote, however, it is possible to see the Court suggesting a more far-reaching conclusion regarding testimonial statements: while making clear that the Confrontation Clause poses no additional obstacles on the use of the prior testimonial statement, the Court also seems to suggest there

32. *See supra* text accompanying notes 17-25.

33. *Crawford*, 541 U.S. at 68 (noting that the Court will "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

34. *Id.* at 59 n.9 (citations omitted).

35. *Id.* at 73-74 (Rehnquist, C.J., dissenting).

36. *Id.* at 74-76.

would be no hearsay bar to the use of the prior testimonial statement.

Immediately after stating that the Confrontation Clause does not restrict the use of prior testimonial statements, the Court cited to its 1970 decision in *California v. Green*. In that case, a witness's trial testimony differed significantly from statements he gave the police and from testimony he gave at the preliminary hearing.[37] Under the California Evidence Code in effect in 1967, prior inconsistent statements were admissible as substantive evidence.[38] When the defendant's trial testimony differed from his earlier statements, the prosecution read to the jury the defendant's statements to the police and his testimony at the preliminary hearing.[39] The California Supreme Court held that the Sixth Amendment precluded the substantive use of prior inconsistent statements as evidence of the charged crime when those statements had not been subject to cross-examination at the time they were made.[40] The United States Supreme Court disagreed with the California Supreme Court and reversed.[41]

The *Green* Court considered the issue before it to be whether the Confrontation Clause prohibits a state from enacting an evidentiary rule permitting the substantive use of prior inconsistent statements.[42] In framing this issue, the Supreme Court identified two established views in the common law.[43] First, the Court identified the "orthodox view," which held that prior inconsistent statements were inadmissible for substantive purposes, although they could be admissible for impeachment purposes.[44] The Court identified three concerns underlying the orthodox position: "the statement may not have been made under oath; the declarant may not have been subjected to cross-examination when he made the statement; and the jury cannot

37. California v. Green, 399 U.S. 149, 151-52 (1970).

38. CAL. EVID. CODE § 1235 (West 2006). This particular section of California's Evidence Code has gone essentially unchanged since first becoming operative in 1967.

39. *Green*, 399 U.S. at 152.

40. *Id.* at 153.

41. *Id.*

42. *Id.* at 155.

43. *Id.* at 154-55.

44. *Id.* at 164.

observe the declarant's demeanor at the time he made the statement."[45] The Court next identified the "minority view," which allowed substantive use of prior inconsistent statements of a declarant testifying at trial.[46] According to the proponents of the minority position, the

> usual dangers of hearsay are largely nonexistent where the witness testifies at trial. 'The whole purpose of the Hearsay rule had been already satisfied [because] the witness is present and subject to cross-examination [and] there is ample opportunity to test him as to the basis for his former statement.'[47]

The *Green* Court also considered the history of the Confrontation Clause.[48] In a section of the opinion that sounds remarkably similar to *Crawford*, Justice White indicated that the Confrontation Clause was included in the Constitution in response to the abuses present in Sir Walter Raleigh's case.[49] The Court found that the history of the Confrontation Clause did not preclude the substantive use of prior inconsistent statements when the declarant testifies and is subject to cross-examination.[50]

The Court compared the purposes behind confrontation with the dangers of admitting hearsay evidence.[51] According to the Court:

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth;' (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[52]

While recognizing that the prior statements of the witness may not have been under oath or subject to cross-examination at the

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45. *Id.*
46. *Id.* at 154-55.
47. *Id.* at 155 (quoting 3 JOHN HENRY WIGMORE, EVIDENCE § 1018 (3d ed. 1940)).
48. *Id.* at 156.
49. *Id.* at 157 n.10.
50. *Id.* at 164.
51. *Id.* at 162-64.
52. *Id.* at 158.

time of the making, the Court held that when the witness testifies in court and is subject to cross-examination, the statement "regains most of the lost protections" and the Confrontation Clause is satisfied.[53]

While the Court stated that it was not deciding which of the two positions was "sounder" as a matter of law,[54] in reaching its decision, it rejected the arguments in favor of the "orthodox" view.[55] First, the Court found that because the current statement is under oath, it overcomes concerns about the prior statement being unsworn.[56] According to the Court, the witness must still declare under oath and under threat of the penalty of perjury that the prior statement was true or false.[57]

Second, the Court rejected the argument that "belated" cross-examination was constitutionally insufficient to satisfy the Confrontation Clause.[58] Rather than undermining the defendant's confrontation rights, the Court indicated that the defendant's ability to cross-examine the declarant is improved when the witness recants.[59]

> The defendant's task in cross-examination is, of course, no longer identical to the task that he would have faced if the witness had not changed his story and hence had to be examined as a "'hostile'" witness giving evidence for the prosecution. This difference, however, far from lessening, may actually enhance the defendant's ability to attack the prior statement. For the witness, favorable to the defendant, should be more than willing to give the usual suggested explanations for the inaccuracy of his prior statement, such as faulty perception or undue haste in recounting the event. Under such circumstances, the defendant is not likely to be hampered in effectively attacking the prior statement, solely because his attack comes later in time.[60]

Third, the Court rejected the notion that the jury is unable to assess the demeanor of the declarant at the time he makes

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53. *Id.*
54. *Id.* at 155.
55. *Id.* at 159-62.
56. *Id.* at 158-59.
57. *Id.*
58. *Id.* at 159.
59. *Id.* at 160.
60. *Id.*

his earlier statement.[61] The Court found that the jury is able to sufficiently assess the demeanor and credibility of the declarant because the declarant is confronted with both statements in front of the jury,[62] and that the jury's ability to assess the declarant's demeanor is constitutionally sufficient even though some relevant demeanor evidence had been "forever lost."[63]

In holding that the Confrontation Clause does not preclude the substantive use of prior inconsistent statements—even those prior statements that are unsworn and not cross-examined[64]—the Court appeared to take a pragmatic view of the Confrontation Clause:

> [T]he question as we see it must be not whether one can somehow imagine the jury in a "'better position,'" but whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. On that issue, neither evidence nor reason convinces us that contemporaneous cross-examination before the ultimate trier of fact is so much more effective than subsequent examination that it must be made the touchstone of the Confrontation Clause.[65]

Finally, the *Green* Court addressed a potential anomaly that could result had it reached a contrary conclusion as to the Confrontation Clause, namely that the prosecution might be better off if the witness were unavailable and did not testify at the trial.[66] In its 1895 decision in *Mattox v. United States*, the Court held that the admission of testimony, given at an earlier trial by a witness who later died, did not violate the Confrontation Clause.[67] In addressing this issue, the *Green* Court stated:

> It may be that the rules of evidence applicable in state or federal courts would restrict resort to prior sworn testimony where the declarant is present at the trial. But as a constitutional matter, it is untenable to construe the Confrontation Clause to permit the use of prior testimony to prove the State's case where the declarant never appears, but to bar that testimony where the declarant

61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 164.
65. *Id.* at 160-61.
66. *Id.* at 167 n.16.
67. 156 U.S. 237, 244 (1895).

> is present at the trial, exposed to the defendant and the trier of fact, and subject to cross-examination.[68]

Therefore, in *California v. Green*, the Court made it clear that the Confrontation Clause posed no obstacle to the admission of prior inconsistent statements—unsworn and not cross-examined at the time of the making—as substantive evidence as long as the declarant testifies in court and the defendant has the opportunity to cross-examine the declarant.[69] The Court recognized, however, that the rules of evidence might work to restrict the admission of those statements, even when the Confrontation Clause would not.[70]

In citing with approval to *California v. Green*, the *Crawford* Court clearly had the foregoing discussion in mind.[71] Thus, it is well-established that both before the birth of *Roberts* and after its demise, the Confrontation Clause does not prevent a state or federal government from adopting an evidentiary rule allowing prior inconsistent statements to be considered as substantive evidence. The Federal Rules of Evidence, and most state codes, however, do exactly the opposite and adhere to the orthodox rule. It is necessary, therefore, to consider the history surrounding the adoption of the orthodox rule in the Federal Rules of Evidence, as embodied in the codification of Federal Rule of Evidence 801(d)(1)(A).

III. The History of Federal Rule 801(d)(1)(A)

More than thirty years ago, the Supreme Court approved an evidentiary rule that allowed for substantive use of prior inconsistent statements when the declarant testified in court and was subject to cross-examination.[72] The Court's rule, however, did not survive the legislative process; rather, the version adopted by Congress limited substantive use of prior inconsistent statements to those given under oath in formal proceed-

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68. *Green*, 399 U.S. at 166-67.

69. *Id.* at 164.

70. *Id.* at 166-67.

71. Crawford v. Washington, 541 U.S. 36, 57 (2004).

72. Rules of Evidence for United States Courts and Magistrates, 34 L. Ed. 2d 5, 88 (1972) (Proposed Official Draft), *reprinted in* A.L.I. & A.B.A., *supra* note 15, at 505, 598.

ings.[73] While subject to much scholarly criticism, Federal Rule of Evidence 801(d)(1)(A) has remained the rule for three decades and the majority position in most states.[74]

A. *From the Common Law to Codification*

At the common law, prior inconsistent statements of witnesses were considered hearsay,[75] which precluded admission of out-of-court statements of declarants offered to prove the truth of the matter asserted.[76] As out-of-court hearsay statements, prior inconsistent statements were not admissible as substantive evidence of the charged crime. However, the common law did permit the limited use of prior inconsistent statements for impeachment purposes only because the statement was not being considered for its truth.[77]

In 1961, Chief Justice Earl Warren appointed an advisory committee to "study the advisability and feasibility of uniform rules of evidence" for use in Federal courts."[78] After the Committee recommended the promulgation of uniform federal rules of evidence, an Advisory Committee on Rules of Evidence was created and charged with developing rules of evidence for adoption and promulgation by the Supreme Court.[79] The Advisory Committee was comprised of judges, lawyers, and professors,[80] and in 1969, after four years of work, the Committee issued a preliminary draft of uniform federal rules of evidence.[81] In that preliminary draft, the Advisory Committee proposed a major change in the common law dealing with prior inconsistent state-

73. H.R. 5463, 93d Cong. (1974).

74. Stanley A. Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C. L. REV. 1, 7 (1986). For criticisms of Rule 801(d)(1)(A), see Jennifer L. Hilliard, Note, *Substantive Admissibility of a Non-Party Witness' Prior Inconsistent Statements: Pennsylvania Adopts the Modern View*, 32 VILL. L. REV. 471 (1987); Richard D. Friedman, *Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket*, 1995 SUP. CT. REV. 277, 299 (1996).

75. 30B MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 7011 (2006).

76. Goldman, *supra* note 74, at 5-6.

77. *Id.*

78. S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7051.

79. *Id.* at 7052.

80. *Id.*

81. *Id.*

ments, rejecting the common law restrictions and proposing instead the following definition of hearsay:

> (c) Hearsay. "Hearsay" is a statement, offered in evidence to prove the truth of the matter asserted, unless . . .
> (2) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony . . . .[82]

In its comments, the Advisory Committee noted "[c]onsiderable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay."[83] The Advisory Committee identified the arguments in favor of the common law treatment of prior inconsistent statements as the absence of the oath, of cross-examination, and of the opportunity to assess the demeanor of the declarant while making the statement.[84] However, the Advisory Committee found these arguments unpersuasive, relying extensively on the comments of a California Law Revision Commission that considered substantive use of prior inconsistent statements:

> Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. *In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation.* The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. *Moreover, Section 1235 will provide a party with desirable protection against the "'turncoat'" witness*

82. Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 331 (1969) (discussing Rule 8-01(c)(2)).

83. *Id.* at 335.

84. *Id.*

> *who changes his story on the stand and deprives the party calling him of evidence essential to his case.*[85]

In 1972, the Supreme Court of the United States approved the Advisory Committee's version of Rule 801(d)(1)(A).[86]

After the Supreme Court promulgated the Federal Rules of Evidence, Congress reacted immediately and passed legislation delaying the effective date of the Federal Rules until "expressly approved by Congress."[87] The new Supreme Court rules prompted dramatic speeches from members of Congress. For instance, Representative Podell of New York stated:

> The effects of these new rules upon our system of justice could be disastrous. Rules of evidence determine whether a case is won or lost . . . . These rules will replace the common law evidentiary rules which are currently employed by our courts, rules which were developed over a period of centuries of application and constant refinement. The far-reaching consequences of these rules make it incumbent upon us to subject them to a detailed, searching inquiry. We cannot allow them to go into effect without first determining what the consequences of them will be on our courts and on our people.[88]

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85. *Id.* at 337 (quoting CAL. EVID. CODE § 1235 (West 2006) (Law Review Commission Comments)) (emphasis added).

86. Michael H. Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*, 75 MICH. L. REV. 1565, 1565 (1977) (citing Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 184 (1972)).

87. S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7052. Congress expressed concern over the Supreme Court's authority to adopt rules for the federal courts which are under Congressional jurisdiction. Congress reacted strongly to this perceived violation of separation of powers. Another major concern that prompted Congressional action was the Supreme Court's changes to the laws of privilege. For many on Congress, the Supreme Court's proposed privilege rule undermined state sovereignty and raised serious federalism concerns. *Id.* at 7053. As Rep. Bertram L. Podell testified:

> Mr. Chairman, I suggest that Congress alone has the right to set rules of evidence or to delegate that authority by specific acts of Congress. Congress first asserted its authority to prescribe the law to be followed by the Federal courts in the Rules of Decision Act of 1789. I do not believe that this attempt to usurp that power should go unchallenged.

Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Fed. Criminal Laws of the H. Comm. on the Judiciary, 93d Cong. 5-6 (1973) [hereinafter *House Hearings*] (testimony of Rep. Podell, given on February 7, 1973), *reprinted in* BAILEY & TRELLES, *supra* note 14.

88. *House Hearings*, *supra* note 87, at 5-6 (testimony of Rep. Podell).

Conversely, Senator Hruska considered the rules "landmark legislation in the improvement in the Federal judicial process . . . . [These rules are] designed to assist in reaching the objectives in every trial—truth and justice."[89]

To better understand the feverish zeal pulsing through Congress's consideration of the Federal Rules of Evidence, it is important to view the moment in its historical context: Vietnam, the Pentagon Papers, and Watergate. As Congress examined the Federal Rules, the country was in the middle of a national crisis over federal officials, sworn to uphold the laws and the Constitution, who were actively involved in both violating the law and making false statements regarding their activities. On February 7, 1973, the same day the House heard testimony on the Federal Rules, the Senate unanimously voted to create the Select Committee on Presidential Campaign Activities to investigate Watergate and possible White House involvement.[90] Representative Elizabeth Holtzman introduced the House hearings with the following remarks:

> I think also, in view of the nationwide discussions of the newspaperman's privilege and Government secrets, it is extremely important that we scrutinize the rules—which concern both these subjects—with the greatest care. The Congress has been the subject of a great deal of criticism in terms of its failing to respond to many of the critical issues of our times. I think there is imperative need for us to give the utmost attention to the review of these rules.[91]

Throughout the entire time Congress considered the Federal Rules of Evidence and prior inconsistent statements, it was also consumed on an unprecedented level with the Watergate scandal. For instance, from May 17, 1973, to August 7, 1973, and September 24, 1973, to February 6, 1974, the Senate held daily televised hearings on Watergate.[92] On July 7, 1973, Presi-

89. 120 CONG. REC. S19905-06 (1974), *reprinted in* A.L.I. & A.B.A., *supra* note 15, at 393-94.

90. Watergate Chronology, http://www.watergate.info/chronology/1973.shtml (last visited July 25, 2006) [hereinafter Watergate Chronology 1973]; *House Hearings*, *supra* note 87.

91. *House Hearings*, *supra* note 87, at 5 (testimony of Rep. Holtzman).

92. *See generally Watergate: Chronology of a Crisis*, CONG. Q. (1975); The Museum of Broadcast Communications, Watergate, http://www.museum.tv/archives/etv/W/htmlW/watergate/watergate.htm (last visited July 25, 2006).

dent Nixon refused to testify before the Senate Committee and refused, on grounds of executive privilege, to provide the Committee with requested documents.[93] Shortly thereafter, the nation learned how President Nixon secretly taped all of his conversations in the White House.[94] President Nixon initially refused to release any of the tapes of those conversations,[95] but later agreed to release redacted tapes without providing the Senate with the redacted portions.[96] On February 6, 1974, the House authorized the House Judiciary Committee to investigate whether sufficient evidence supported grounds for impeachment of President Nixon.[97] In May 1974, the House began impeachment hearings which resulted in the return of three articles of impeachment on July 27, 1974.[98] To avoid impeachment, President Nixon resigned on August 8, 1974.[99]

The Supreme Court's changes to the common law of prior inconsistent statements failed to survive Congressional scrutiny.[100] The House held six days of hearings on the rules of evidence generally and prior inconsistent statements specifically.[101] In addition, the House sought extensive input from the bench and bar across the country.[102] United States District Court Judge Henry J. Friendly submitted both oral and

93. Watergate Chronology 1973, *supra* note 90; J. Allan Cobb, *Evidentiary Issues Concerning Online "Sting" Operations: A Hypothetical-Based Analysis Regarding Authentication, Identification, and Admissibility of Online Conversations—A Novel Test for the Application of Old Rules to New Crimes*, 39 BRANDEIS L. J. 785 (2001).

94. Watergate Chronology 1973, *supra* note 90. Alexander P. Butterfield alleged that President Nixon taped all conversations occurring in the White House starting in 1971, and on July 13, 1973, Butterfield informed the Senate of the White House's audio taping system. *Id.*

95. *Id.* (discussing how Nixon refused the Senate's request on July 25, 1973).

96. Watergate Chronology 1973, *supra* note 90. *See also* Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389, 390 (1996).

97. Watergate Chronology, http://www.watergate.info/chronology/1974.shtml (last visited July 25, 2006).

98. *Id.*

99. *Id.*

100. For details on the battles within Congress, see Graham, *supra* note 86.

101. *House Hearings*, *supra* note 87 (noting that the dates of the hearings were Feb. 7, 8, 22, 28 and March 9, 15, 1973).

102. 120 CONG. REC. S19906 (1974), *reprinted in* A.L.I. & A.B.A., *supra* note 15, at 394.

written testimony against the Supreme Court's rule. In his written statement, Judge Friendly criticized Rule 801(d)(1):

> This makes cross-examination a farce. The rule goes far beyond any decided case dealing with federal crimes or any consideration of sound policy . . . . While it may be constitutional under *California v. Green*, 399 U.S. 149 (1970), it is basically inconsistent with the spirit of the Supreme Court's effort to put real meaning into the confrontation clause of the Sixth Amendment.[103]

The House passed a version of a prior inconsistent statements rule limiting their substantive use to those statements made under oath, subject to cross-examination, at a formal hearing. The House bill (H.R. 5463) read: "(A) inconsistent with his testimony and was given under oath subject to cross-examination, and subject to the penalty of perjury at a trial or hearing or in a deposition . . . ."[104]

Four concerns underscored the House's modifications. First, the House was concerned about possible disputes over whether the prior statement had ever been made.[105] The House, therefore, sought to limit the substantive use of prior statements to those situations when the dispute was eliminated, namely by establishing a requirement that the statements have been made in a formal setting, such as a trial.[106] Presumably, the fact that the statement would have been preserved on a record would eliminate arguments as to the fact of the prior statement.

In his oral testimony before the House, Judge Friendly emphasized this concern:

> What it means is—and this is the setting in which we see it rising, and particularly in criminal trials—a defendant calls a witness who says the defendant was not at the place, did not do the things of which he is being accused. The Government then puts on an agent who testifies to a statement, even an oral statement, by this witness to the contrary. And under this rule the agent's statement, which is controverted by the witness—there is no

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103. *House Hearings*, *supra* note 87, at 264 (written statement of Henry J. Friendly, Chief Judge, United States Court of Appeals for the Second Circuit, given on February 22, 1973).

104. 120 CONG. REC. H559 (1974) (reading of the Clerk), *reprinted in* A.L.I. & A.B.A., *supra* note 15, at 425.

105. H.R. REP. NO. 93-650, at 13 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075.

106. Graham, *supra* note 86, at 1577.

> proof except the agent's own testimony that it had ever been made—is used as affirmative evidence against the defendant. That really revolts me. I was responsible for some modification of the old rule that a prior inconsistent statement could be used only for impeachment of a witness on the stand, but we limited it very carefully to testimony in a previous trial or before a grand jury. I find this rule absolutely indefensible.[107]

In light of the historical context, it is not surprising that the House debate over the substantive use of prior inconsistent statements reflected concern over whether the prior statement had ever actually been made.

Second, the House expressed concerns over the reliability of the prior inconsistent statements.[108] To this end, the House imposed additional limitations, requiring a prior statement be made under oath and subject to cross-examination at the time it was made.[109]

Third, the House expressed a general concern that substantive use of prior inconsistent statements could create a situation where a criminal defendant was convicted solely on the basis of a prior inconsistent statement, "even though the statement was disputed by the witness' own testimony and no certain evidence existed establishing that the witness had accurately recounted the information in the statement and, more fundamentally, that the statement had ever been made."[110]

The following exchange between Representative Dennis and Axel Kleiboemer, a member of the staff of the Deputy Attorney General, is telling:

> Mr. Dennis. But you wind up with the rather unusual situation that at least in theory in a criminal trial, you could arrive at a conviction solely on a prior statement made out of court and not subject to cross-examination which was diametrically opposed to every word of testimony taken under oath before the jury. Isn't that right?

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107. *House Hearings*, *supra* note 87, at 252 (testimony of Henry J. Friendly, Chief Judge, United States Court of Appeals for the Second Circuit, given on February 22, 1973).

108. Graham, *supra* note 86, at 1566.

109. *See id.* (discussing how Congress placed further restrictions on the prior inconsistent statement rule initially proposed by the Advisory Committee).

110. *Id.* at 1577.

> Mr. Kleiboemer. That is absolutely correct. But I might mention that under the present state of the law, we can formulate hypothetical cases which permit that also. Take, for instance, dying declarations—
> Mr. Dennis. It does for a dying declaration which is a time-honored exception. But you are not telling me that the present state of the law in general permits any such results . . . . Maybe it is right, but it is certainly not common or usual.
> Mr. Kleiboemer. I cannot disagree that this is a change from the majority rule. I think the majority of jurisdictions do not have the rule. But it appears to me upon review of the authorities—and I believe the second circuit has a similar rule and the experience in California, Kentucky, and Wisconsin . . . that there is merit and wisdom to this particular provision. Chief Judge Friendly recommended a similar rule in *United States v. De Sisto*, 329 F.2d 929 (1964).[111]

Finally, the House acknowledged the importance of addressing witness intimidation.[112] While the Supreme Court rule highlighted this as an important and positive aspect of its proposed rule, House members opposed to the Supreme Court rule often shifted the debate from witness intimidation by criminal defendants to the danger of government misconduct and fabrication of evidence.[113] For example, during one debate, Representatives Mayne and Wiggins argued in favor of the Supreme Court rule.[114] Representative Mayne discussed cases in which defendants avoided conviction when witnesses, under pressure, recanted their testimony and left the prosecution without recourse.[115] Representative Mayne argued that the Supreme Court rule was a "sound proposal . . . that responds to the needs of law enforcement and reacts to recent developments in the law."[116]

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111. *House Hearings*, *supra* note 87, at 270 (discussion between Rep. Dennis and Mr. Kleiboemer).

112. H.R. REP. NO. 93-650, at 13 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075.

113. *See* STAFF OF SPECIAL SUBCOMM. ON REFORM OF FED. CRIM. LAWS OF H. COMM. ON THE JUDICIARY, 93d CONG., H.R. 5463, at 26 (1973), *reprinted in* BAILEY & TRELLES, *supra* note 14.

114. 120 CONG. REC. H560-61 (1974) (statements of Reps. Mayne and Wiggins), *reprinted in* A.L.I. & A.B.A., *supra* note 15, at 426-27.

115. *Id.* at H561 (statement of Rep. Mayne), *reprinted in* A.L.I. & A.B.A., *supra* note 15, at 427.

116. *Id.*

Thereafter, Representative Wiggins identified the Supreme Court rule as an "extremely meritorious amendment which deals with a very practical problem in criminal cases."[117] Representative Wiggins also set out the realities of many narcotics cases: a witness recants his grand jury testimony after being "exposed to the realities of the street" and being "told if he testifies as he testified before the grand jury that he and his family are in serious jeopardy."[118] In support of substantive use of prior inconsistent statements, Representative Wiggins stated, "[i]t provides an answer to an important practical problem confronting prosecutors in narcotics cases and in organized crime cases. It would be unwise in my opinion to deny them this important tool . . . ."[119]

In response to Representatives Mayne and Wiggins' arguments, Representative Dennis cleverly shifted the issue of witness intimidation to official misconduct: "Maybe he changed his story, not because the defense threatened him, but because the cops beat him up the first time. That has happened, too . . . ."[120]

On February 6, 1974, the same day that the House began investigating the impeachment of President Nixon, the House passed the bill restricting substantive use of prior inconsistent statements.[121] Nine months later, the Senate rejected the House version of a prior inconsistent statement rule and voted instead to adopt the Supreme Court's promulgated rule.[122]

With respect to the prior inconsistent statement rule and witness intimidation, the Senate heard testimony characterizing the issue as one of defendants undermining the criminal justice system, in addition to testimony characterizing the issue

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117. *Id.* (statement of Rep. Wiggins).

118. *Id.*

119. *Id.*

120. 120 CONG. REC. H562 (1974) (statement of Rep. Dennis), *reprinted in* A.L.I. & A.B.A., *supra* note 15, at 428.

121. Watergate Chronology 1973, *supra* note 90; 120 CONG. REC. H570 (1974), *reprinted in* A.L.I. & A.B.A., *supra* note 15, at 436.

122. 120 CONG. REC. S19916 (1974), *reprinted in* A.L.I. & A.B.A., *supra* note 15, at 404. Interestingly, after the extensive review by the House, the House recommended changes in nearly fifty percent of the rules proposed by the Supreme Court. *Id.* The Senate modified only twelve of the sixty-two rules proposed by the House and of the twelve, the Senate reinstated six versions of the Supreme Court rules. *Id.* The rule dealing with prior inconsistent statements was one of the six rules that the Senate sought to reinstate. *Id.*

as one of government misconduct. Herbert Semmel, representative for the Washington Counsel of Lawyers, argued to the Senate in favor of the House bill:

> The problems of inaccurate repetition, ambiguity and incompleteness of out-of-court statements may be found in both written and oral statements, although the problem is more acute in oral statements. But written statements are also subject to distortion. We are all familiar with the way a skilled investigator, be he a lawyer, police officer, insurance claim agent, or private detective, can listen to a potential witness and then prepare a statement for signature by the witness which reflects the interest of the investigator's client or agency. Adverse details are omitted; subtle changes of emphasis are made. It is regrettable but true that some lawyers will distort the truth to win a case and that some police officers will do the same to 'solve' a crime, particularly one which has aroused the public interest or caused public controversy. Or the police officer may be seeking to put away a 'dangerous criminal' who the officer "knows" is guilty but against whom evidence is lacking . . . .
>
> It has sometimes been urged that use of prior statements is needed to protect against coercion of prosecution witnesses in criminal trials, particularly those involving defendants allegedly connected with organized crime. The suggested solution, the indiscriminate use of extra-judicial statements, far exceeds the scope of any such problem, if indeed the problem is a real one.[123]

The Senate also heard from Professor Edward W. Cleary, who was concerned the restrictions in the House rule would "for all practical purposes virtually . . . destroy the utility of the rule as a solution for the problems it was designed to meet, such as fading memories, bribery, intimidation, and other influences which cause witnesses to change their stories."[124] The Senate also considered the testimony of United States Attorney H. M. Ray, who argued that "by admitting prior statements as affirmative proof, the law can prevent those miscarriages of justice that occur when witnesses are intimidated or otherwise improperly influenced, or are motivated by malice or spite, to repudiate their initial statements under circumstances enabling the jury

123. *Senate Hearings*, supra note 14, at 302-03 (statement of Herbert Semmell), *reprinted in* BAILEY & TRELLES, *supra* note 14.

124. *Id.* at 51 (testimony of Prof. Edward W. Cleary, given on June 4, 1974).

to discern the falsity of that repudiation."[125] As opposed to the House, the Senate tended to find more persuasive the concerns about the government's ability to respond to defendants manipulating the criminal justice system.

The Senate found the lack of an oath and contemporaneous cross-examination to be remediable when the declarant testifies under oath and is subject to cross-examination at the later trial.[126] In addition, the Senate labeled the House's cross-examination requirement as too broad, in that it precluded the use of prior grand jury testimony.[127] Finally, the Senate found that Supreme Court rule had "positive advantages,"[128] stating, "[t]he prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play. A realistic method is provided for dealing with the turncoat witness who changes his story on the stand."[129]

Since the Senate and House could not agree, the matter was sent to a Conference Committee, which molded the version of Rule 801(d)(1)(A) ultimately adopted by Congress. This version reads:

> (d) Statements which are not hearsay. A statement is not hearsay if
>
> . . .
>
> (1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .[130]

The final version of Rule 801(d)(1)(A) is essentially that desired by the House, excepting the inclusion of "other proceedings" which admits testimony before a grand jury. As the Note accompanying the Conference bill stated:

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125. *Id.* at 109 (statement of H.M. Ray, United States Attorney, given on June 5, 1974).

126. S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7062.

127. *Id.*

128. *Id.*

129. *Id.*

130. Federal Rules of Evidence, H.R. 5463, 93d Cong. (1975) (discussing Rule 801(d)(1)(A)).

> The Senate amendment drops the requirement that the prior statement be given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition.
>
> The Conference adopts the Senate amendment with an amendment, so that the rule now requires that the prior inconsistent statement be given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.[131]

As one commentator expressed: "Enacted rule 801(d)(1)(A) limits substantive admissibility to those prior inconsistent statements for which there is (1) almost absolute certainty that the statement was made and (2) additional assurances of reliability and truthfulness because of the requirement that the prior statement must have been given in a formal proceeding."[132]

The Conference Committee's compromise regarding prior testimony before the grand jury highlights that Congressional concern over government fabrication of evidence rose to the fore. Testimony given to the grand jury is under oath in a formal proceeding, and all grand jury testimony is preserved on record. However, defense counsel is absent from the grand jury and no witness's testimony is subjected to contemporaneous cross-examination.

In conference, the House was willing to jettison its requirement of cross-examination in favor of allowing the government the utility of prior grand jury testimony.[133] This demonstrates that the House's—and ultimately Congress's—primary concern was not ensuring cross-examination. Rather, Congress was primarily interested in limiting substantive use of prior inconsistent statements to those situations when the existence of the initial statement is not in dispute. Viewed in light of the backdrop of Watergate, elevating the issue of whether a statement was made over the issue of cross-examination reflects the triumph of those representatives fearful of government misconduct, and the loss of those seeking to protect the justice system from the effects of witness intimidation. In other words, the

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131. JOINT EXPLANATORY STATEMENT OF THE COMM. OF CONFERENCE, H.R. REP. NO. 93-1597, at 10 (1974), *reprinted in* BAILEY & TRELLES, *supra* note 14.

132. Graham, *supra* note 86, at 1578-79.

133. *See* H.R. REP. NO. 93-1597 (1974), *reprinted in* BAILEY & TRELLES, *supra* note 14.

Conference "compromise" reflects that preventing witness intimidation took a back seat to preventing governmental misuse of evidence.

By imposing unnecessary reliability requirements, the final version of Federal Rule of Evidence 801(d)(1)(A) largely adheres to the common law position that prior inconsistent statements are only admissible for the purpose of impeaching the witness's current testimony. If a number of factors are not met, then a prior inconsistent statement is limited to impeachment.[134] Deviating only slightly from the orthodox common law position, the federal rule allows substantive use of the prior inconsistent statement in the limited situation when the prior statement was made under oath at a formal hearing[135] and subject to cross-examination at the time it was made.

B. *State Practice with Prior Inconsistent Statements*

Prior to the promulgation of the Federal Rules of Evidence, the vast majority of states adhered to the common law rule rejecting substantive admissibility of prior inconsistent statements. At that time, only six states—New Jersey, California, Utah, Nevada, New Mexico, and Wisconsin—departed from the common law and allowed for the substantive use of prior inconsistent statements.[136]

Since Congress adopted Rule 801(d)(1)(A), the vast majority—forty-one—of the states allow some substantive use of prior inconsistent statements.[137] Fourteen states have adopted evidence rules identical to Federal Rule 801(d)(1)(A).[138] In a complete reversal, now at least seven states and the District of Columbia follow the orthodox rule and allow no substantive use of prior inconsistent statements. The remaining states allow some substantive use of prior inconsistent statements, but place reliability requirements on the statements above and beyond testifying under oath at the trial and being subject to cross-ex-

134. *See* Graham, *supra* note 86, at 1568.

135. The federal rule also allows for the use of prior grand jury testimony which, while under oath, is not subject to cross-examination.

136. S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7062.

137. Hilliard, *supra* note 74, at 489.

138. *Id.* at 492.

amination.[139] Interestingly, one-third of all states rejected Federal Rule 801(d)(1)(A) and have adopted evidence rules similar to the original Supreme Court rule. These seventeen states permit substantive use of prior inconsistent statements when the declarant testifies at trial and is subject to cross-examination.[140] Thus, the majority of jurisdictions refuse to allow substantive use of prior inconsistent statements.

IV. The Domestic Violence Dynamic and Its Impact on Prosecutions

In the same thirty years since Congress enacted the Federal Rules of Evidence, American society has seen increased awareness of the epidemic of domestic violence and greater government intervention to eliminate the problem. Studies show that twenty percent of American women have been physically assaulted by a domestic partner.[141] The leading cause of injury to American women every year is domestic violence,[142] the leading indicator of child abuse is domestic violence, and the greatest risk factor for children becoming violent adults is the presence of domestic violence in their homes.[143] In addition to the human costs, domestic violence costs American businesses billions of dollars a year.[144]

Increased understanding of the problem has spawned greater prosecutorial efforts to hold batterers accountable. Domestic violence, however, poses many challenges to prosecution, the most important of which is the very nature of the abusive

139. The following jurisdictions still adhere to the orthodox rule: Alabama (Cloud v. Moon, 273 So. 2d 196, 200 (Ala. 1973)); District of Columbia (Turner v. United States, 443 A.2d 542, 549 (D.C. 1982)); Louisiana (State v. Kimble, 375 So. 2d 76, 79 (La. 1979)); Maryland (Smith v. Branscome, 248 A.2d 455, 462 (Md. 1968)); New York (People v. Ramirez, 380 N.Y.S.2d 80, 81 (App. Div. 1976)); North Carolina (State v. Erby, 289 S.E.2d 86, 88 (N.C. Ct. App.1982)); Rhode Island (State v. Roddy, 401 A.2d 23, 25 (R.I. 1979)); Tennessee (Martin v. State, 584 S.W.2d 830, 833 (Tenn. Crim. App. 1979), *overruled by* State v. Rickman, 876 S.W.2d 824 (Tenn. 1994)); Virginia (VA. CODE ANN. § 8.01-403 (2006)).

140. Hilliard, *supra* note 74, at 491.

141. Andrea M. Kovach, Note, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at Its Past, Present, and Future*, 2003 U. ILL. L. REV. 1115, 1116 (2003).

142. Beloof & Shapiro, *supra* note 3, at 34.

143. *Id.*

144. *Id.*

relationship. Domestic violence relationships are largely built on a power and control dynamic in which the batterer uses a variety of tactics to subjugate the victim and establish his superiority.[145] Some of these tactics might include physically and sexually assaulting the victim, restricting or limiting the victim's access to financial resources, physically and emotionally isolating the victim, harming or threatening to harm the victim's children or family, or depriving or interrupting the victim's sleep patterns.[146]

As a result of this dynamic, the victim feels incredible pressure not to alert authorities about the nature of the relationship or to seek help to end the relationship. Unfortunately, only about one-half of the violence that women experience is ever reported to the police.[147] Even when police respond to a violent incident and a prosecution is generated, studies indicate that eighty to eighty-five percent of domestic violence victims refuse to testify for the prosecution or recant their earlier statements to the police about the violent incident for which the defendant is charged.[148] Victims report that their refusal to testify stems from fear of additional violence, concern over present or prior threats not to disclose to police or prosecutors, economic coercion, and anxiety about the safety of their children or family members.[149] After reviewing the research on recantation, one commentator concluded that "recantation is the norm rather than the exception, in domestic violence cases. This is hardly surprising. Batterers put hydraulic pressures on domestic violence victims to recant, drop the case, or fail to appear at trial."[150] By exerting pressure on the victim, the defendant

145. *See id.* at 4.

146. *See* Byrom, *supra* note 3, at 410.

147. Kovach, *supra* note 141, at 1116.

148. Lininger, *supra* note 9, at 768-69; Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse*, *in* WOMAN BATTERING: POLICY RESPONSES 102 (Michael Steinman ed., 1991) ("Many victims who become witnesses in criminal cases against their abusers are subject to threats, retaliation, and intimidation to coerce their noncooperation with prosecutors."); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367 (1996) (stating that victims do not cooperate with the prosecution in eighty to ninety percent of domestic violence cases).

149. De Sanctis, *supra* note 148, at 368-69.

150. Beloof & Shapiro, *supra* note 3, at 4.

seeks to destroy the prosecution's case and to avoid accountability for his violent conduct.

When the defendant successfully pressures the victim to recant her initial report, the State's case is founded primarily on Rule 801(d)(1)(A). Recantation thus converts the initial report into a prior inconsistent statement, thereby eliminating the substantive utility of the statement and restricting its use to impeachment purposes:

> Many batterers continue to prevent the truth from being told in the courtroom by instilling fear in their victims. The legal system provides the coerced victim ample opportunity to prevent the introduction of reliable evidence. When a victim recants or fails to appear at trial, the victim's words or actions combine with the hearsay rule to exclude the victim's reliable out of court statements. In turn, exclusion results in inadequate or a lack of substantive evidence with which to prove the offense. Since the hearsay rule excludes reliable prior statements of the abuse, victim recantation and no-show at trial results in failure to charge, dismissal, or acquittal in cases of domestic violence.[151]

In addition to studies documenting recantation rates and reasons behind those recantations, experts also report that recantations are less credible than the initial reports of violence.[152] Prosecutors' offices appreciated the credibility of a victim's initial statements, as well as the mounting forces causing victims to recant, and thus developed new strategies for prosecuting domestic violence.[153] In the past ten to fifteen years, prosecutors have attempted to respond to the defendant's efforts to undermine the criminal justice system with a strategy called "victimless prosecutions."

In a victimless prosecution, the government would proceed to trial without the victim testifying in court.[154] These types of trials were made possible by the evidence rules governing excited utterances, present sense impressions, and statements to

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151. *Id.* at 3.

152. Mark S. Brodin, *Behavioral Science Evidence in the Age of* Daubert*: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 920 (2005) ("victims usually tell the truth about their abuse within 48 hours of the incident, but then often recant or minimize it later on.").

153. *See* Friedman & McCormack, *supra* note 5, at 1190.

154. *Id.*

medical personnel.[155] Even when these initial statements were inconsistent with the victim's recantation at trial, the jury was allowed to consider them as substantive evidence of the charged crime because the statements were admitted through hearsay exceptions. In this way, the State largely avoided the rule against substantive use of prior inconsistent statements, and Rule 801(d)(1)(A) was mostly an afterthought. Therefore, use of these hearsay exceptions allowed the government to address the individual and the societal harm resulting from domestic violence even in situations when the batterer attempted to circumvent the criminal justice system by pressuring the victim to change her testimony.

Prosecutors built their victimless domestic violence cases on the hearsay exceptions because of *Ohio v. Roberts*, which ruled that use of these exceptions did not violate the defendant's confrontation rights.[156] However, after the Supreme Court's decisions in *Crawford v. Washington*[157] and *Davis v. Washington*,[158] it is clear that the future for victimless prosecutions is now very limited.[159] Because those cases essentially held that victimless prosecutions, as they existed, conflicted with the Confrontation Clause, prosecutors' creative responses to defendants' efforts to undermine the criminal justice system are now largely foreclosed. Post-*Crawford*, prosecution of domestic violence cases will only proceed when the victim appears in court and is subject to cross-examination.

In the current post-*Crawford* world, the State has lost the ability to avoid Rule 801(d)(1)(A). As a result, the jury will again be precluded from considering the recanting victim's initial statements as substantive evidence of the charged crime,

155. *Id. See also* Brooks Holland, *Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide, or Just a Crack?*, 8 CARDOZO WOMEN'S L.J. 171, 171 (2002); Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 139-41 (1991) (discussing present sense impression).

156. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (citing Mattox v. United States, 156 U.S. 237, 244 (1895)).

157. 541 U.S. 36 (2004).

158. 126 S. Ct. 2266, 2273 (2006).

159. *See Davis*, 126 S. Ct. at 2277 (allowing for limited use of 911 calls as nontestimonial statements).

and the defendant, yet again, has the ability to "prevent the truth from being told."

Although *Crawford* and *Davis* have dramatically impacted the State's ability to combat domestic violence and witness intimidation, the Court did recognize the reality of witness intimidation in domestic violence cases. As the Court stated in *Davis*:

> This particular type of crime [domestic violence] is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free . . . . But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.[160]

The Court also acknowledged a constitutional remedy for when the defendant's violence is responsible for the victim not testifying: forfeiture by wrongdoing.[161] When the defendant's actions cause a witness not to testify, the defendant forfeits his right to confront the absent witness.[162] The State may admit, as substantive evidence, the absent witness's prior statements.[163] Although seldom used, the Court recognized that forfeiture by wrongdoing is an exception to the Confrontation Clause:

> The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine [forfeiture by wrongdoing] less necessary, because prosecutors could show the "reliability" of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence. *Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings.[164]

Importantly, the Court has recognized the conundrum in which its Confrontation Clause change has placed the State.

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160. *Id.* at 2279-80.
161. *Id.* at 2280.
162. *Id.*
163. *Id.*
164. *Id.*

The State now has less ability to prosecute the defendant and to counter the defendant's intimidation and coercion of the victim. Yet, the Court's remedy of forfeiture by wrongdoing is only available when the defendant's actions prevent the victim from testifying at all.[165] When the victim appears in court but recants her testimony, forfeiture by wrongdoing is unavailable, leaving the defendant's intimidation and coercion to go unchecked.

V. Restoring Original Intent—A Call for a New Rule Allowing Substantive Use of Prior Inconsistent Statements

Since Congress enacted the Federal Rules, the majority of jurisdictions have limited substantive use of prior inconsistent statements.[166] Consequently, in federal courts and in two-thirds of all state courts, a domestic violence prosecutor faces a considerable obstacle in Rule 801(d)(1)(A). This rule prevents the jury from considering all of the relevant evidence of the charged crime and allows the defendant to undermine the criminal justice system by intimidating the victim into changing her story.

As originally conceived, Rule 801(d)(1)(A) sought to protect the criminal justice system from the corrupting influence of witness intimidation.[167] Congress grafted oath and formality requirements onto the original rule approved by the Supreme Court,[168] yet critics contend that Congressional concern about reliability was overblown and that the rule as adopted does lit-

165. In addition, forfeiture by wrongdoing in the domestic violence context is difficult to establish. For an additional discussion of forfeiture by wrongdoing in the domestic violence context, see Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441 (2006).

166. *See, e.g.*, Hilliard, *supra* note 74, at 489.

167. *See Senate Hearings*, *supra* note 14, at 50-51 (testimony of Prof. Edward W. Cleary, Reporter, Advisory Committee on Rules of Evidence, given on June 4, 1974). "Their effect [the House amendments] is for all practical purposes virtually to destroy the utility of the rule as a solution for the problems it was designed to meet, such as fading memories, bribery, intimidation, and other influences which cause witnesses to change their stories." *Id.* at 51.

168. *See* S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7062.

tle to address witness intimidation.[169] The import of this criticism, until now, has largely been ignored, primarily due to prosecutors' past abilities to circumnavigate the rule through victimless prosecutions.[170] The impact of the rule governing prior inconsistent statements was limited to those cases in which the State was unable to proceed under another hearsay exception. In those cases, Rule 801(d)(1)(A) would limit the State to impeachment of a recanting victim, and without substantive evidence, the State would rarely be able to establish a prima facie case.

In domestic violence prosecutions, however, the Supreme Court's *Crawford* decision has largely closed those other hearsay exception avenues to admit prior inconsistent statements for substance evidence. Particularly in the domestic violence context, the shortcomings of the current prior inconsistent statement rule are no longer blunted. Without those hearsay exceptions, the State is not able to proceed because the jury has no substantive evidence of the charged crime. Rather than preventing witness tampering and assisting the criminal justice system, Rule 801(d)(1)(A)'s procedural safeguards assist the domestic violence defendant and protect the witness intimidation rampant in domestic violence prosecutions.

The Supreme Court's *Crawford* decision to enhance the defendant's confrontation rights makes it critical that Congress amend Rule 801(d)(1)(A). The rule should be restored to the original Supreme Court rule which allowed for substantive use of prior inconsistent statements when the witness is subject to cross-examination. This modification will allow prosecutors to pursue domestic violence prosecutions that fully ensure the defendant's confrontation rights while also preventing the defendant from exploiting the hearsay rule to undermine the criminal justice system through witness intimidation.

Merely restoring the original Supreme Court rule does not address the concerns of Congress.[171] To address these concerns,

169. *See supra* note 167 and accompanying text.

170. *See generally* Friedman & McCormack, *supra* note 5.

171. The House focused on arguments surrounding the unreliability of prior inconsistent statements rather than accepting the Advisory Committee's rationale for withdrawal from the common law. In particular, the House worried about convictions resting on prior statements that were, in fact, a total fabrication. *See* Graham, *supra* note 86, at 1576.

it is essential that two additional safeguards be attached to the original Supreme Court rule. First, the fact of the prior statement itself must be established. However, the reliability requirements imposed by Congress—an oath and formal proceeding—are too restrictive. Instead, the State should also be able to establish the existence of the prior statement when the witness acknowledges making the earlier statement or the State demonstrates pre-trial that the witness made the earlier statement. If the prior inconsistent statement is admitted for substantive evidence, a second limitation is needed to fully respond to Congressional concerns: the prior inconsistent statement may not be the only evidence that supports the conviction. In other words, the statement must be corroborated by other evidence establishing the defendant's guilt. With these two additional limitations, substantive use of prior inconsistent statements will fulfill its original purpose—addressing witness intimidation—and satisfy Congressional concern over governmental misconduct and fabrication of evidence.

A. *Dangers of Allowing Substantive Use of Prior Inconsistent Statements in Domestic Violence Prosecutions*

Domestic violence victims tend to behave in a recognizable and predictable fashion. At the scene and shortly thereafter, the victim willingly provides police with statements explaining how the defendant caused her injuries. At trial, the victim changes her story and testifies that the defendant was not culpable for her injuries. The reality that an enormous percentage of domestic violence victims recant their initial reports about the violence creates two unique and challenging problems for substantive use of those earlier statements.[172]

First, the victim has provided two different versions of the same event and, by definition, the victim is not credible. The State, however, will argue the jury should disregard the later recantation and find the initial statements credible. Typically, there is good reason for the jury to follow the prosecution's suggestion. Since over eighty percent of domestic violence victims recant, the odds exist that a jury will find credible a prior inconsistent statement and subsequently use that statement to find

172. *See supra* notes 148-50 and accompanying text.

the defendant guilty. The odds also exist, particularly when substantive use of prior inconsistent statements is permitted, that a defendant might be convicted when the prior inconsistent statement is the only substantive evidence of the crime.

Allowing a conviction based solely on the prior statement of a witness, who at some point is not credible, is problematic. The days are long past when juries were instructed to view the complaining witness in rape cases with distrust. The criminal justice system is comfortable with convictions solely based on the testimony of victims. However, the recanting domestic violence victim—because her testimony has changed—is different. To maintain society's perception of fairness in jury verdicts, and thus in the criminal justice system itself, a jury must not be allowed to convict based solely on a prior inconsistent statement.

More importantly, the typical pattern of the recanting domestic violence victim creates an opportunity for government misconduct. The government can exploit the domestic violence dynamic and fabricate evidence implicating the defendant. For example, it is not uncommon for police officers to respond repeatedly to the same address for domestic violence incidents. After a subsequent call in which the victim refuses to detail how the defendant caused her injuries, the officer could arrest the defendant and then craft a "victim" statement implicating the defendant. At trial, the victim would testify that the defendant did not cause her injuries, and the State could admit the officer's fabricated statement as substantive evidence of the defendant's crime.

This hypothetical raises the very concern Congress had over government fabrication of evidence, albeit in a more problematic context. Congress looked at narcotics cases and organized crime.[173] Those cases clearly present the possibility of witness intimidation. Domestic violence, however, presents not mere possibility but well documented fact of witness intimidation and victim recantation. The jury would not be surprised to hear the domestic violence victim testify at trial that the defendant did not cause her injuries. In fact, the dynamic of the re-

173. 120 CONG. REC. H561 (1974) (statement of Rep. Wiggins), *reprinted in* A.L.I. & A.B.A., *supra* note 15, at 427.

canting domestic violence victim is so well established that the jury will, perversely, discount the testimony of a victim who testifies consistently with the story she told the police. The jury, therefore, will have a harder time ferreting out governmental misconduct and fabrication of evidence in the domestic violence context.

B. *Arguments in Favor of a Modified Supreme Court Rule*

While the Court stated that society cannot "vitiate constitutional guarantees when they have the effect of allowing the guilty to go free,"[174] the Court has acknowledged that, once the Confrontation Clause is met, society is free to craft its own evidentiary rules. Thus, the impact of an evidentiary rule on society's ability to effectively enforce its criminal laws is a significant factor in assessing the continued validity of the rule. Currently, Rule 801(d)(1)(A) has an excessively detrimental impact on effective domestic violence prosecutions. Modifying the rule to allow substantive use of prior inconsistent statements, however, does not "vitiate" a defendant's constitutional rights. Rather, the modified rule will enhance the defendant's confrontation rights and allow society to attack the domestic violence epidemic.

Three reasons support modifying the rule. First, the modification is consistent with the Supreme Court's decision in *Crawford*. Second, the modified rule more appropriately balances the interests in preventing witness intimidation and protecting against government fabrication of evidence. Third, substantive use of prior inconsistent statements will dramatically assist society's efforts against domestic violence. The modified rule will also address the two dangers of substantive use of prior inconsistent statements in domestic violence prosecutions, thereby guaranteeing that defendant's rights are protected and society's interest in fair and impartial criminal justice is preserved.

174. Davis v. Washington, 126 S. Ct. 2266, 2280 (2006).

1. The Modified Rule is Consistent with the *Crawford* Decision

Amending Rule 801(d)(1)(A) to allow substantive use of prior inconsistent statements is consistent with *Crawford*'s mandates. Recall that the *Crawford* Court revitalized a defendant's confrontation rights, ensuring the defendant a right to cross-examine the maker of statements that implicate the defendant in criminal conduct.[175] Also, in reaffirming *California v. Green*, the *Crawford* Court breathed life into two principles: substantive use of prior inconsistent statements is consistent with enhanced Sixth Amendment protection, and cross-examination, as opposed to an oath or formal proceeding, is the sole determinant of reliability. Thus, under *Crawford* and other Supreme Court precedent, a defendant's Confrontation Clause rights are satisfied by the opportunity to cross-examine the witness at trial.[176] In fact, the Court went so far as to say that all other reliability determinants are irrelevant.[177]

The original Supreme Court rule allowing substantive use of prior inconsistent statements is consistent with *Crawford* and *Green* because cross-examination is the only factor it uses to determine the reliability of the statement. Conversely, the current version of Rule 801(d)(1)(A) is inconsistent with *Crawford* because it imposes two additional reliability requirements, mandating that the prior statement be made under oath at a formal hearing.[178] In other words, the current rule determines that only those statements made under oath and in a formal hearing are reliable enough to be subjected to cross-examination and employed by the jury. This is directly in conflict with *Crawford*'s commitment to cross-examination as the sole constitutional reliability determinant. *Crawford* specifically found that the presence of the oath and the initiation of formal proceedings are not essential to determining which statements must be subject to cross-examination.[179]

In addition, the current rule is internally inconsistent in its commitment to cross-examination. In Congress, the Senate ad-

175. Crawford v. Washington, 541 U.S. 36, 59 (2004).
176. *Id.* at 59 n.9; California v. Green, 399 U.S. 149, 164 (1970).
177. *Crawford*, 541 U.S. at 54.
178. FED. R. EVID. 801(d)(1)(A).
179. *Crawford*, 541 U.S. at 59 n.9.

vocated adoption of the Supreme Court rule, and the House supported a rule that imposed a contemporaneous cross-examination requirement on the prior statement.[180] However, in the final version of the bill that emerged from the Conference Committee, the contemporaneous cross-examination requirement was eliminated by a compromise which opened the door to substantive use of prior grand jury testimony.[181] The current Rule 801(d)(1)(A), therefore, partially recognizes that *subsequent* cross-examination of a prior statement is sufficient, at least insofar as prior grand jury testimony is concerned. In a grand jury context, the current rule finds that later cross-examination at trial provides the defendant adequate confrontation. Yet in all other contexts, the current rule provides that cross-examination at trial is *not* sufficient to provide adequate confrontation. Again, this flies in the face of *Crawford*. The original Supreme Court rule suffers from none of these failings. It places its sole emphasis on cross-examination and treats all statements equally with respect to that one requirement.

The original Supreme Court rule is also consistent with *Crawford* and *Davis* in another way: it recognizes the negative impact of witness intimidation on the search for truth. In *Crawford* and *Davis*, the Supreme Court recognized that witness intimidation in domestic violence cases is a problem that potentially undermines the criminal justice system.[182] The Court articulated concern that the defendant could exploit his confrontation rights. For instance, through violence or intimidation, a defendant could prevent a witness from appearing in court and testifying. When the witness is subsequently absent from trial, the defendant could assert his confrontation rights to preclude the admission of the unavailable witness's inculpatory statements. Since the inclupatory statements are most likely testimonial, the Confrontation Clause would prevent their admission without the defendant having an opportunity to cross-examine the witness. The *Davis* Court emphasized that the de-

180. *See* S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7062.

181. JOINT EXPLANATORY STATEMENT OF THE COMM. OF CONFERENCE, H.R. REP. NO. 93-1597, at 10 (1974), *reprinted in* BAILEY & TRELLES, *supra* note 14.

182. *Crawford*, 541 U.S. at 50-51; Davis v. Washington, 126 S. Ct. 2266, 2280 (2006).

fendant should not be permitted to exploit the Confrontation Clause to sanction his witness intimidation.[183] To eliminate this incentive, the Court reaffirmed its commitment to forfeiture by wrongdoing as an exception to the Confrontation Clause.[184]

In a similar fashion, current Rule 801(d)(1)(A) creates an incentive for the defendant to engage in witness intimidation. If a witness succumbs to pressure from the defendant and changes her testimony, Rule 801(d)(1)(A) excludes the inculpatory statement, unless it was made under oath at a prior hearing. Since the most damaging statements in domestic violence cases are those made to police, 911, and medical personnel within the first forty-eight hours of the incident, it is unlikely that these statements will satisfy the additional requirements of the rule.[185] The rule, therefore, shields the defendant from the victim's most damaging testimony. Essentially, the current rule gives the defendant incentive to force the victim to recant, thus sanctioning the defendant's efforts in undermining the criminal justice system.

The original Supreme Court rule allowing substantive use of prior inconsistent statements, on the other hand, was specifically drafted to remedy witness intimidation.[186] Since the Supreme Court rule makes prior statements available to the jury as substantive evidence, the defendant is denied the benefit of having pressured the victim to change her story. Moreover, both forfeiture by wrongdoing and substantive use of prior inconsistent statements have the same rationale: preventing a defendant from exploiting an evidentiary bar to influence a criminal prosecution. Therefore, the original Supreme Court rule, therefore, is consistent with *Crawford* and *Davis*, while the current rule works to the opposite effect.

2. The Modified Rule Addresses Congress's Concerns

As originally conceived, the Supreme Court's prior inconsistent statement rule was designed to combat witness intimidation. During the Congressional debates, however, that concern

183. *Davis*, 126 S. Ct. at 2280.
184. *Id.*
185. *See* Brodin, *supra* note 152, at 930.
186. *See supra* note 167 and accompanying text.

shifted to one of government fabrication of evidence[187]—an obvious result of the unique historical context, *i.e.*, Watergate, that consumed Congress concurrently with its consideration of the Federal Rules of Evidence. Due to this historical convergence, Congress placed too much emphasis on combating government fabrication and lost sight of witness intimidation. The proposed modified Supreme Court rule adequately addresses both concerns.

As discussed in Section III, there is a high degree of congruence between Watergate and Congress's adoption of the Federal Rules of Evidence. This is, perhaps, not surprising because Watergate was largely an evidentiary conflict. However, this intersection in history had unfortunate and deleterious effects upon future domestic violence prosecutions. Rather than focusing the Congressional hearings on the evidentiary concerns of both the Advisory Committee and Supreme Court, the House immersed itself in the politics of the day, turning Rule 801(d)(1)(A)'s focus from witness intimidation to government fabrication. This changeover is not reducible to singular propositions, yet the murmurs of Watergate are distinctly evident in the transcripts of the House hearings.

In the face of this power struggle, and in the face of repeated evidence of government wrongdoing—including secrecy and lies—it is not surprising that Congress exhibited heightened sensitivity to issues of governmental misconduct and fabrication of evidence. Repeatedly, the debate in Congress returned to the concern that the government might misuse proposed Rule 801(d)(1)(A) by fabricating evidence of a prior statement to attack a witness's testimony denying the defendant's culpability. For instance, during one debate, Representative Dennis stated that the witness may have "changed his story, not because the defense threatened him, but because the cops beat him up the first time."[188] Similar sentiments were expressed during the Senate debates.[189]

Congress grafted the oath and formal hearing requirements onto the Supreme Court's prior inconsistent statement rule,

187. Graham, *supra* note 86, at 1576.

188. 120 CONG. REC. H562 (1974) (statement of Rep. Dennis), *reprinted in* A.L.I. & A.B.A., *supra* note 15, at 428.

189. *See supra* note 123 and accompanying text.

manifesting sensitivity to the issue of government fabrication of evidence. These requirements were designed to eliminate any dispute over the actual existence of the prior inconsistent statement. To this end, these requirements are extremely effective because, essentially, the prior statement must have been on the record in some way: deposition, hearing, trial, or grand jury testimony.

While the historical context of Watergate correctly led Congress to appreciate the potential for governmental abuse with prior inconsistent statements, the historical context also led Congress to overwrite its solution to the problem. For instance, Rule 801(d)(1)(A) does not take into account the situation where the witness freely admits giving a prior statement to a government official. If that prior statement was not made under oath at a formal hearing, it would not be admissible, even though the witness acknowledges the actual existence of the statement. When the witness is present and acknowledges the prior statement, the dispute over the existence of that statement is eliminated. In that context, it makes little sense to keep the statement from the jury's consideration, particularly when the declarant can explain the reasons behind the content of the earlier statement at trial. Current Rule 801(d)(1)(A) excludes these acknowledged statements from the jury. The modified rule would not.

In a similar fashion, independent corroboration of the existence of the prior statement can be established outside of a formal hearing. For instance, a witness might make a statement to police in the presence of an uninvolved third party, or the witness might call 911 and her prior statement might be recorded. In those situations, even if the witness were to deny making the prior statement, the State could convincingly establish that the statement was, in fact, made. Again, the current rule prevents the jury from considering these prior statements as substantive evidence, even if corroborated. The modified rule would provide the State the opportunity to convince a judge pre-trial of the existence of the prior statement.

In addition to over-drafting the solution, Congressional concern over government fabrication of evidence caused Congress to underemphasize the issue of witness intimidation. Essentially, the current rule cripples the prosecution's ability to

address witness intimidation by creating a perverse incentive for defendant's to coerce victims to change their stories. The modified Supreme Court rule would create the opposite effect, eliminating the secondary benefit to the defendant. The modified rule helps preserve the integrity of the criminal justice system. As importantly, it balances both of Congress's concerns: preventing witness intimidation and prohibiting government fabrication of evidence.

VI. Conclusion

Prosecution of domestic violence is extremely difficult, largely due to the fact that defendants are successfully pressuring victims to refuse to testify or to recant their testimony at trial. With its decision in *Crawford*, the Supreme Court eliminated the ability of prosecutors to use hearsay exceptions to place the domestic violence victim's statements before the jury for their substantive consideration. The Supreme Court also closed this avenue to combat defendants' efforts to avoid liability through coercive pressure on victims. Therefore, the Court's change in the Confrontation Clause law limits the prosecution's arsenal for combating witness intimidation and, at the same time, places an unwieldy Rule 801(d)(1)(A) squarely into play.

Unfortunately, the current rule is ineffective in assisting domestic violence prosecutions and preventing witness intimidation. When the defendant's pressure results in recantation, rather than refusal to testify, the Court's forfeiture by wrongdoing remedy to witness intimidation is not available. In this situation, the prosecution is left with a faulty witness and no prior statement. The defendant, on the other hand, is the double beneficiary of the *Crawford* decision: he has an enhanced right to confront the victim and Rule 801(d)(1)(A) prevents redress of his intimidation of the victim.

The modified rule, however, is able to properly align the positive benefits of the *Crawford* decision by ensuring the defendant's full confrontation rights and eliminating the incentive to intimidate witnesses. In this way, allowing substantive use of prior inconsistent statements is vital to society's efforts to hold batterers accountable for the violence they inflict on their victims.