THE PRICE OF SILENCE: THE PROSECUTION OF DOMESTIC VIOLENCE CASES IN LIGHT OF *CRAWFORD V. WASHINGTON*

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I. INTRODUCTION

A woman calls 911 and says, "Please. I need an ambulance. My husband just attacked me and I'm eight months pregnant. He hit me in the stomach and I'm bleeding. I think I'm losing the baby." The home is located outside a small town. When the police and ambulance arrive after some time, the wife is unconscious at the bottom of a staircase and the woman's husband is there, claiming to have just arrived home to find his wife in this condition.

The wife has bruises all over her body and the baby is lost, but shortly after being admitted to the hospital and regaining consciousness, she flees and is nowhere to be found. There are no witnesses, and the husband insists the wife fell down the stairs. The husband has no prior domestic violence convictions, but the wife's medical history reveals a number of other "accidental injuries." The wife has no friends and has not spoken to her family since the couple married two years ago. Her coworkers can testify that they suspected the husband was abusive. They can also testify that the wife was not allowed to drive, spend money, or attend social events.

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Prior to the Supreme Court's March 2004 decision in *Crawford v. Washington*,[1] the wife's 911 call would likely have been admitted in court under a hearsay exception and used to secure the husband's conviction. But following *Crawford*, if the wife could not be brought into court, the statement would be inadmissible. Given that there is no evidence besides the 911 call that directly implicates the husband as the cause of the wife's injuries, prosecutors would be unlikely even to file a case against the husband, let alone convict him.

Crawford v. Washington is a landmark decision that will undoubtedly change the way in which many criminal cases are prosecuted, if they are prosecuted at all.[2] In fact, many prosecutors and defense attorneys agree that the *Crawford* decision will come into play in one way or another in nearly every criminal trial.[3] In *Crawford*, the Court held that admitting "testimonial"[4] out-of-court statements against a criminal defendant violates the defendant's rights under the Confrontation Clause of the Sixth Amendment,[5] unless either (1) the declarant is available to testify and be cross-examined at trial, or (2) the defendant had a previous opportunity to cross-examine the declarant and the declarant is now unavailable.[6] In a unanimous decision by the Court, with a majority opinion written by Justice Antonin Scalia,[7] the *Crawford* decision restricts judges from admitting hearsay statements that once fell into statutorily recognized hearsay exceptions.[8] Judges now have to decide, without much guidance

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

2. *See id.*

3. *See* Wendy N. Davis, *Hearsay, Gone Tomorrow?*, A.B.A. J., Sept. 2004, at 22, 22.

4. The *Crawford* Court left a lot of uncertainty regarding what qualifies as "testimonial." For further discussion of the definition of "testimonial out-of-court statements," see *infra* Part III.A.

5. The Confrontation Clause specifies,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

6. *Crawford*, 541 U.S. at 68–69.

7. Although the Supreme Court's holding was unanimous, Justice Scalia's opinion was joined by only six other members of the Court. Chief Justice Rehnquist filed an opinion, in which Justice O'Connor joined, concurring in the judgment that the evidence was inadmissible, but dissenting from the Court's decision to overrule *Ohio v. Roberts*, 448 U.S. 56 (1980), and establish a new Confrontation Clause theory and analysis. *Crawford*, 541 U.S. at 69–76.

8. *Crawford*, 541 U.S. at 58. At the end of a lengthy footnote, the Court's opinion discretely limits Confrontation Clause protection to statements that are hearsay. *Id.* at 59 n.9 ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). Hearsay is defined by the Federal Rules of Evidence as "a statement, other than one made

from the Court, whether the evidence is testimonial.[9] Under *Crawford*, testimonial statements cannot be admitted against the defendant when there is no opportunity to cross-examine the declarant, regardless of whether the court deems the statements to be reliable.[10]

While *Crawford* will have an effect on nearly all criminal trials, domestic violence prosecution will likely experience the most dramatic impact from the decision.[11] In domestic violence cases, often the only witnesses are the alleged victims themselves, who are frequently unavailable to testify at trial, and thus, are often not subject to cross-examination.[12] Alleged victims of domestic violence may be unavailable for a number of reasons. Most tragically, the victim may be deceased, sometimes as a result of the alleged acts of the criminal defendant. In other circumstances, the witness may have disappeared, may be incompetent or emotionally unavailable, or may simply refuse to testify. Many prosecutors and domestic violence advocates believe that domestic violence victims disappear or refuse to testify as a result of intimidation by their batterers or out of fear of future violence.[13] The frequent struggle to procure witnesses willing to testify against criminal defendants makes the prosecution of domestic violence cases remarkably different from, and particularly in light

by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

9. *Crawford*, 541 U.S. at 68–69.

10. *Id. Crawford* directly overrules *Ohio v. Roberts* in this regard. *Id.*

11. *See generally* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005) (arguing that, despite its impact on domestic violence, the *Crawford* decision was correct and just, and proposing a number of legislative reforms to facilitate the effective prosecution of domestic violence cases in light of the Supreme Court's interpretation of constitutional law in *Crawford*). In comparison, this Note discusses the ways in which the *Crawford* decision itself should be interpreted and reformed, and also suggests changes for law enforcement, domestic violence prosecutors, domestic violence advocates, and state and federal lawmakers.

12. *See* Phillip Carrizosa, *Conflicts, Paradoxes Impede Cases of Domestic Violence*, S.F. DAILY J., May 10, 2004, at 15 ("Because of the unique dynamics of domestic violence cases, victims are often reluctant to cooperate with the prosecution of their batterers. Many times, victims recant their complaints to police and some even end up testifying on behalf of their batterers."); Onell R. Soto, *Experts Call Wife's Denial of Domestic Abuse Typical*, SAN DIEGO UNION TRIB., July 28, 2002, at N1, *available at* 2002 WLNR 11185229 (quoting one California Superior Court Judge who exclusively hears domestic violence cases, Judge David Ryan, referring to recanting victims as "the norm"); Interview with Pamela K. Booth, Head Deputy, L.A. County Dist. Attorney's Office, Family Violence Div., in L.A., Cal. (Dec. 29, 2004) [hereinafter Booth] (discussing how domestic violence victims usually recant or refuse to cooperate and that this trend is particularly problematic for domestic violence cases because they are often heavily dependent on the victim's testimony).

13. *See* Davis, *supra* note 3, at 22; Interview with Gail J. Pincus, Dir., Domestic Abuse Ctr., in L.A., Cal. (Dec. 31, 2004) [hereinafter Pincus].

of the *Crawford* decision, much more difficult than the prosecution of other types of crimes.[14]

Although a very recent decision, *Crawford* has already begun to significantly affect the prosecution of domestic violence cases, causing widespread confusion and uncertainty for a number of reasons. First, the Court failed to explain what types of statements are testimonial, so it is unclear under what circumstances the *Crawford* decision applies.[15] Second, the Court left ambiguous the definitions of "unavailable" and "opportunity to cross."[16] Third, although the Court implied that a defendant's Confrontation Clause rights can be forfeited if the defendant's own wrongdoing caused the witness to be unavailable to testify, it is unclear what action constitutes a "forfeiture by wrongdoing" and what standard should apply to that analysis.[17] Finally, of particular importance to domestic violence cases, which frequently rely heavily on expert testimony regarding battered women's syndrome or domestic violence victims' tendency to recant their testimony or refuse to testify,[18] is the fact that the Court was unclear as to whether experts can continue to rely on out-of-court statements that would now be barred by the Confrontation Clause if offered against the defendant directly.[19]

While prosecutors scramble to find ways around *Crawford*'s restrictions in order to successfully prosecute perpetrators of domestic violence and uphold the convictions of the perpetrators they have already prosecuted,[20] lower courts struggle to make sense of the Court's ruling and decipher their own interpretations of the decision's many ambiguities. The

14. *See* Davis, *supra* note 3, at 22; Pincus, *supra* note 13; *infra* Part IV.A.

15. *Crawford*, 541 U.S. at 68–69 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"). *See also infra* Part III.A; *Crawford*, 541 U.S. at 57, 58–59.

16. *See infra* Part III.B–C.

17. *Crawford*, 541 U.S. at 62.

18. *See* Carrizosa, *supra* note 12, at 1, 5 (discussing the use of expert testimony in domestic violence prosecutions).

19. *See infra* Part III.E. Currently, the Federal Rules of Evidence permit reliance on such out-of-court statements. Federal Rule of Evidence 703 states:

> The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. *If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.* Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

FED. R. EVID. 703 (emphasis added).

20. *See* Leonard Post, *Prosecutors Feel Broad Wake of "*Crawford*"; Child Abuse Cases, 911 Calls Affected*, NAT'L L.J., Dec. 13, 2004, at 1.

system may not be adapting fast enough, however, as some jurisdictions are dismissing as many as a dozen domestic violence cases a day as a result of the *Crawford* decision and the alleged victim-witness's refusal to testify.[21] Some judges are simply throwing out cases that rely on even exceptionally trustworthy out-of-court statements, statements that certainly would have been permitted by the Confrontation Clause prior to *Crawford*.[22] And defense attorneys are doing their part to make it tougher to prosecute domestic violence cases in light of *Crawford*. The National Association of Criminal Defense Lawyers encourages defense attorneys to raise a *Crawford* objection along with every hearsay objection and to make sure they get the words "Confrontation Clause" on the record to preserve the issue for appeal.[23] As a result of legal confusion and decreased prosecution, the real-world impact of *Crawford* may be to reverse the last decade's progress in the area of domestic violence prosecution and prevention, and reverse the overall national decline in domestic violence incidences.[24]

This Note argues that while the Supreme Court's goal of protecting the rights of the criminally accused under the Confrontation Clause is just, the framework the Court created is unworkable and problematic for the prosecution of domestic violence cases. Part II describes the Court's goals in deciding *Crawford* and the state of Confrontation Clause law after *Crawford*. Part III analyzes the ambiguities and uncertainties the Court left unresolved in the *Crawford* opinion and argues that post-*Crawford* confusion undermines the goals the Court articulated in deciding *Crawford*. Part IV discusses the unique difficulties inherent in domestic violence prosecution and enumerates the ways in which the *Crawford* decision exacerbates those difficulties. Finally, Part V suggests ways in which the negative implications of *Crawford* can be mitigated and proposes legal reforms that would satisfy the Court's goals in deciding *Crawford*, while limiting the decision's negative implications on the prosecution of domestic violence cases.

21. *See* Davis, *supra* note 3, at 22, 24 ("In Dallas, for example, as many as a dozen cases a day are being dismissed because the women aren't coming to court to testify.").

22. *See, e.g.*, People v. Cortes, 781 N.Y.S.2d 401, 416 (Sup. Ct. 2004) (excluding a 911 call as testimonial); State v. Powers, 99 P.3d 1262, 1265 (Wash. Ct. App. 2004) (excluding a 911 call reporting domestic violence as testimonial). *See* Post, *supra* note 20, at 1.

23. *See* Davis, *supra* note 3, at 24.

24. *See* Nathan Max, *Domestic Violence on Decline*, PRESS-ENTERPRISE (Riverside, Cal.), Dec. 21, 2004, at A1. It is outside the scope of this Note to question the legitimacy of such statistics.

II. CONFRONTATION CLAUSE LAW AFTER *CRAWFORD*

The Sixth Amendment's Confrontation Clause assures a criminal defendant the right "to be confronted with the witnesses against him."[25] According to Justice Scalia's opinion in *Crawford*, however, this constitutional text alone does not provide enough guidance to determine what the amendment actually requires.[26] Instead, Justice Scalia determined through analysis of the historical background of the Confrontation Clause,[27] that it has two goals, which must be adhered to in modern jurisprudence: (1) to prevent a method of criminal procedure that allows ex parte examinations of witnesses to be used as evidence against the accused,[28] and (2) to categorically require that before testimonial out-of-court statements can be offered against the defendant at trial, it must be shown that the declarant is unavailable and that the defendant had a prior opportunity to cross-examine the declarant. Scalia also concludes that courts should not have leeway to develop open-ended exceptions to the opportunity-for-cross requirement.[29] Consequently, the Court holds that the constitutionally required procedural method for determining whether the witness's statement is reliable is to provide a criminal defendant with an opportunity to cross-examine the witnesses against him. Thus, absent an opportunity to cross-examine a declarant, the requisite reliability determination cannot be made, and the court must exclude any testimonial out-of-court statements made by that declarant.[30]

Crawford explicitly overruled, at least to some extent, the Court's previous interpretation of the Confrontation Clause in *Ohio v. Roberts*.[31] The *Roberts* decision interpreted the Confrontation Clause as providing criminal defendants with a substantive due process right to be presented with reliable evidence against them, rather than as providing a procedural

25. U.S. CONST. amend. VI. For an informative history of case law leading up to the *Crawford* decision, see Thomas J. Reed, Crawford v. Washington *and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185 (2004).

26. *See* Crawford v. Washington, 541 U.S. 36, 42 (2004).

27. *Id.*

28. *Id.* at 50.

29. *Id.* at 53–54.

30. *Id.* at 68–69.

31. *Id.* The Court's opinion criticizes the *Roberts* test as "vindicat[ing] the Framers' wisdom in rejecting a general reliability exception"; being "so unpredictable that it fails to provide meaningful protection from even core confrontation violations"; allowing a jury to hear evidence that is "untested by the adversary process, based on a mere judicial determination of reliability"; and "replac[ing] the constitutionally prescribed method of assessing reliability with a wholly foreign one." *Id.* at 62–63. In sum, the Court finds that the *Roberts* test's "unpardonable vice" is having a "demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.* at 63.

right to cross-examination.[32] *Roberts* developed a framework under which courts could determine whether a statement was reliable and, thus, whether it complied with the requirements of the Sixth Amendment.[33] *Roberts* required that admissible hearsay statements must either fall under one of the "firmly rooted" hearsay exceptions or involve surrounding facts that provide "particularized guarantees of trustworthiness."[34] *Crawford* overruled the *Roberts* test for determining the reliability (and, subsequently, the admissibility) of testimonial statements, as *Crawford* holds that the only constitutionally acceptable method for determining the reliability of testimonial statements is cross-examination.[35] As Justice Scalia wrote, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[36] Further, the *Crawford* opinion criticizes the *Roberts* test as being unpredictable and possessing the "demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[37]

Because of the distinction made in *Crawford* between testimonial and nontestimonial out-of-court statements, three plausible interpretations of the continuing validity of *Roberts* exist. First, *Roberts* may be overruled altogether, leaving *Crawford* as the governing law for all Confrontation Clause issues. If this is the case, once a court makes the determination that a statement is nontestimonial, no further analysis is required. If the nontestimonial statement complies with the court's other rules of evidence, the statement is admissible, regardless of whether the defendant has had an

32. Ohio v. Roberts, 448 U.S. 56, 63–64 (1980).

33. *Crawford*, 541 U.S. at 62; *Roberts*, 448 U.S. at 66.

34. *Roberts*, 448 U.S. at 66. Firmly rooted hearsay exceptions for purposes of the *Roberts* analysis likely include the following: statements made by coconspirators, FED. R. EVID. 801(d)(2)(E); present sense impressions, FED. R. EVID. 803(1); excited utterances, FED. R. EVID. 803(2); statements describing the declarant's then-existing mental or emotional conditions, FED. R. EVID. 803(3); statements made for purposes of medical diagnosis or treatment, FED. R. EVID. 803(4); past recollection recorded, FED. R. EVID. 803(5); business and public records, FED. R. EVID. 803(6), FED. R. EVID. 803(8); and statements made under belief of impending death ("dying declarations"), FED. R. EVID. 804(b)(2). *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 367–68 (5th ed. 2004). Some nonfirmly rooted hearsay exceptions likely include declarations against interest, FED. R. EVID. 804(b)(3), and statements that fall in the catchall provision, FED. R. EVID. 807. *See* MUELLER & KIRKPATRICK, *supra*.

35. *Crawford*, 541 U.S. at 68–69. *See also* Decision of Interest, *911 Call Is Admissible as Trial Evidence if It Meets "Excited Utterance" or Other Hearsay Exceptions*, N.Y. L.J., Apr. 23, 2004, at 20 [hereinafter *911 Call*] (discussing a New York case holding that a 911 call was not testimonial, so the normal hearsay rules for admissibility applied).

36. *Crawford*, 541 U.S. at 62.

37. *Id.* at 63.

opportunity to cross-examine the declarant.[38] Second, *Roberts* could have been overruled only with regard to its reliability analysis applying to testimonial statements, and it may remain the applicable analysis for the admissibility of nontestimonial statements.[39] Under this interpretation, courts would analyze testimonial statements with the *Crawford* framework and nontestimonial statements with the *Roberts* framework.[40] Third, the *Roberts* test may remain the valid method of determining whether the admission of an out-of-court statement complies with the defendant's due process rights, but not a defendant's Confrontation Clause rights. If this is the case, in order to be admissible, the Constitution would require that the statement meet both the *Roberts* due process test (the statement must be reliable) and the *Crawford* Confrontation Clause test (the declarant must be unavailable and the defendant must have had a prior opportunity to cross-examine the declarant). The second and third interpretations are not mutually exclusive.[41]

38. Because it is unclear whether the Court entirely overruled *Roberts*, lower courts likely remain bound to follow the *Roberts* test, at least for examining the reliability of nontestimonial statements. *See* Agostini v. Felton, 521 U.S. 203, 237 (1997) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (internal citation omitted)). *Accord* State v. Rivera, 844 A.2d 191, 202 (Conn. 2004) (applying the *Roberts* test to statements found to be nontestimonial); State v. Blackstock, 598 S.E.2d 412, 422–23 (N.C. Ct. App. 2004) (holding that the *Roberts* test barred nontestimonial statements regardless of *Crawford*).

39. *See* Richard D. Friedman, Non-Testimonial Statements, The Confrontation Blog, Jan. 24, 2005, http://confrontationright.blogspot.com/2005_01_01_confrontationright_archive.html (arguing that "the law of the Confrontation Clause would be improved if the Court were to make it clear that the Clause has no application to non-testimonial statements" and that "[a]s a matter of principle, this is the right outcome").

40. *Id*. As Richard Friedman argues, using the *Roberts* analysis for nontestimonial statements provides no protection to defendants and

> [i]t is highly unlikely that a court would hold that (1) a given statement is non-testimonial for *Crawford* purposes, (2) it satisfies the rule against hearsay, either because it (a) fits within an exception or (b) is supported by sufficient guarantees of trustworthiness to warrant admissibility, and yet (3) it is barred by the *Roberts* test because it is unreliable, neither (a) fitting within a 'firmly rooted' hearsay exception nor (b) supported by sufficient guarantees of trustworthiness that are of a form satisfactory for constitutional purposes.

Id.

41. It could be that the Constitution requires all out-of-court statements to be reliable in order to comply with the requirements of due process, but that the Constitution specifies cross-examination as the method by which the reliability of testimonial statements should be tested for purposes of the Confrontation Clause. In other words, nontestimonial statements still have to meet the *Roberts* test because those statements also have to be reliable. The third explanation separates the substantive and procedural rights of defendants.

The *Crawford* opinion leaves unclear which of the above interpretations may be correct.[42] The interpretation adopted can make a considerable difference in how difficult it will be to prosecute a criminal defendant. The validity of the *Roberts* test after *Crawford* determines the number of hurdles prosecutors need to clear in order to get out-of-court statements admitted into evidence. If *Roberts* is entirely overruled, the only hurdle is getting out-of-court statements to be classified as nontestimonial. But if *Roberts* remains the analysis for nontestimonial statements, or for due process analysis, then in addition to finding that the statement is nontestimonial under *Crawford*, the prosecution must meet the *Roberts* test of reliability. In domestic violence prosecutions, where victims are more likely to be unavailable than in other criminal trials, and the prosecution's case is more often dependent on out-of-court statements,[43] these evidentiary barriers can determine whether a case is even filed, much less whether it will result in conviction.

III. THE REMAINING AMBIGUITIES AND UNCERTAINTIES AFTER *CRAWFORD*

Justice Scalia's opinion in *Crawford* clearly states, "where testimonial evidence is at issue, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity to cross-examine."[44] While a seemingly straightforward approach, grounded in history, it is now very unclear what the Confrontation Clause requires. In fact, Chief Justice Rehnquist's concurrence criticizes the majority opinion on this very point, arguing that "the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers . . . now, not months or years from now," because the "[r]ules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark."[45] The decision left uncertain, among other things, what is testimonial, what is unavailable, what is an opportunity to cross-examine, what is the standard for forfeiture by wrongdoing and when does it apply, and whether

42. *Crawford*, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.").

43. *See supra* notes 12–13 and accompanying text.

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

45. *Id*. at 75–76 (Rehnquist, C.J., concurring).

Crawford applies to out-of-court statements relied on by expert witnesses in forming their opinions.[46]

A. WHAT IS "TESTIMONIAL"?

Perhaps the most obvious unknown after *Crawford* is the definition of "testimonial." The Court's opinion plainly acknowledges the ambiguity by admitting that it "leave[s] for another day any effort to spell out a comprehensive definition of 'testimonial.'"[47] The Court did, however, provide at least some indication as to what it considers testimonial: "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[48] And although the Court's opinion did not expressly adopt a test for making the distinction between testimonial and nontestimonial statements, the opinion cited at least three possibilities: (1) "'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'";[49] (2) "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'";[50] and (3) "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[51] The range of out-of-court statements that qualify as testimonial varies greatly depending on which definition the Court intended.[52]

46. *See* Neil P. Cohen & Donald F. Paine, Crawford v. Washington*: Confrontation Revolution*, 40 TENN. B.J. 22 (2004) (discussing many of *Crawford*'s ambiguities).

47. *Crawford*, 541 U.S. at 68. Justice Scalia does, however, mention one possible exception to the ban on testimonial out-of-court statements when the declarant is unavailable for cross-examination: the dying declaration. In a lengthy footnote he explains, "[The Court] need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*." *Id*. at 56 n.6. Thus, the validity of this "exception" remains unclear, as well.

48. *Id.* at 68.

49. *Id.* at 51 (quoting Brief for the Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410)).

50. *Id.* at 52 (quoting White v. Illinois, 502 U.S. 346, 356 (1992) (Thomas & Scalia, JJ., concurring)).

51. *Id*. (quoting Brief for Nat'l Ass'n of Criminal Defense Lawyers, et al. as Amici Curiae Supporting Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02-9410)).

52. *See 911 Call*, *supra* note 35, at 20 (discussing the *Moscat* holding in light of *Crawford*). The effect each different definition of "testimonial" has on the outcome of cases is easily seen in the area of 911 calls. *Compare* People v. Cortes, 781 N.Y.S.2d 401 (Sup. Ct. 2004) (excluding a 911 call as testimonial), State v. Powers, 99 P.3d 1262 (Wash. Ct. App. 2004) (excluding a 911 call reporting

Scholars and courts across the country disagree as to what the definition of "testimonial" should be.[53] The basis of the debate turns on whose perspective should matter for purposes of determining whether the statement is testimonial: the declarant's, the listener's, or the objective observer's. While all three approaches have appeared in California case law,[54] the perspective of the listener is perhaps the most relevant to domestic violence prosecutions, because it pertains to the intent of police officers when talking to victims. For example, in *People v. Kilday*, the court analyzed three separate statements made by a victim-declarant to police officers to determine whether the statements were testimonial.[55] The court held that the declarant's first statement to the police officers was not

domestic violence as testimonial), *and* Richard D. Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. PA. L. REV. 1171, 1240–42 (2002) (arguing that a call to report a crime should be testimonial, particularly when the operator questions the declarant), *with* People v. Corella, 18 Cal. Rptr. 3d 770, 775–76 (Ct. App. 2004) (holding that statements made during 911 call were nontestimonial), People v. Caudillo, 19 Cal. Rptr. 3d 574, 590 (Ct. App. 2004) (holding that statements made during a 911 call placed shortly after a criminal incident were nontestimonial), *superseded by grant of review*, 104 P.3d 97 (Cal. 2005), State v. Wright, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004) (holding that 911 calls made shortly after a criminal act or during the "stress of the event" are nontestimonial), *and* People v. Moscat, 777 N.Y.S.2d 875, 879–80 (Crim. Ct. 2004) (finding that 911 calls made for the purpose of seeking help are nontestimonial).

53. *See* Laurie L. Levenson, "Crawford" *Forces Re-evaluation of Hearsay Evidence*, L.A. DAILY J., July 6, 2004, at 7. *See also* Friedman, *supra* note 39 (arguing for a much broader interpretation of "testimonial"); Richard D. Friedman, Essay, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1039 (1998) (arguing for a definition of "testimonial" that incorporates statements made by declarants, where the declarants understand that such statements may be available for use at a trial); Andrew King-Ries, Crawford v. Washington*: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 321–37 (2005) (arguing for a narrow definition of "testimonial" that allows for continued prosecution of domestic violence cases, when the victim is unavailable to testify, by permitting more 911 calls, dying declarations, and statements to responding officers); Paul Shechtman, "Crawford" *and the Meaning of Testimonial*, N.Y. L.J., June 23, 2004, at 4 (discussing Richard Friedman and Akhil Reed Amar's positions on the definition of "testimonial").

54. In *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Ct. App. 2004), a California court adopted the objective observer approach and found that statements made by an unavailable child witness at a neutral interview location for the purpose of assisting in making a case against the defendant were testimonial because "an objective observer would reasonably expect the statement to be available for use in a prosecution." *Id.* at 758. In *People v. Cervantes*, 12 Cal. Rptr. 3d 774, 777 (Ct. App. 2004), the court made its determination based on the declarant's motives in making a statement to a neighbor and family friend while seeking medical attention. The court held that the statement was nontestimonial because a reasonable person in the declarant's position would not expect such a statement to be available for use at trial. *Id.* at 782–83. In *People v. Cage*, 15 Cal. Rptr. 3d 846 (Ct. App. 2004), *superseded by grant of review*, 99 P.3d 2 (Cal. 2004), the court's decision turned on the motives of the person eliciting the statement from the declarant, the "listener." The court held that one statement made to a police officer while the officer was "still trying to determine whether a crime had been committed and, if so, by whom" was nontestimonial, while another statement "made during a classic station-house interview" was testimonial. *Id.* at 854–56.

55. People v. Kilday, 20 Cal. Rptr. 3d 161, 171–73 (Ct. App. 2004), *superseded by grant of review*, 105 P.3d 114 (Cal. 2005). *See also Cage*, 15 Cal. Rptr. 3d at 854–56.

testimonial because the officers "were still principally in the process of accomplishing the preliminary tasks of securing and assessing the scene,"[56] but found the second two statements were testimonial because the officers were "acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution."[57]

Ambiguity about the definition of "testimonial" leaves the admissibility of many types of statements that domestic violence prosecutors regularly relied on prior to *Crawford* unknown.[58] While it is clear from the *Crawford* opinion that police interrogations and prior testimony at preliminary hearings, before a grand jury, or at a former trial are testimonial,[59] uncertainty still remains regarding the categorization of child hearsay statements not given to police or government personnel,[60] statements made to officers responding to a crime,[61] 911 calls,[62] and statements made to medical personnel.[63]

56. *Kilday*, 20 Cal. Rptr. 3d at 173–74.

57. *Id*. at 170.

58. *See* Jeffrey L. Fisher, Partner, Davis Wright Tremaine, *Crawford v. Washington*: Reframing the Right to Confrontation (Jan. 25, 2005), http://www.dwt.com/pdfs/01-05_CrawfordOutline.pdf. Jeffrey Fisher successfully argued *Crawford* to the Supreme Court.

59. Crawford v. Washington, 541 U.S. 36, 66–67 (2004).

60. *Compare* People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 (Ct. App. 2004) (holding that statements made by a child in a neutral interview location were testimonial because the interview was taken after prosecution was initiated, attended by the prosecutor, and conducted by someone trained in forensic interviewing), People v. Warner, 14 Cal. Rptr. 3d 419, 429 (Ct. App. 2004) (holding that statements made by a child to a child interviewer were testimonial), People v. Vigil, 104 P.3d 258, 265 (Colo. Ct. App. 2004) (holding that statements made by a child to a physician who regularly testified for the prosecution in child abuse cases were testimonial, but that statements made to the child's father and family friend were not testimonial), *In re* T.T., 815 N.E.2d 789, 800–01 (Ill. App. Ct. 2004) (holding that statements made by a child to a social worker and an examining physician were testimonial), *and* State v. Mack, 101 P.3d 349, 352 (Or. 2004) (holding that statements of a child made to a social worker during an interview requested by the police were testimonial), *with Crawford*, 541 U.S. at 58 n.8 (discussing White v. Illinois, 502 U.S. 346 (1992), and referencing the child's statements to investigating officers as testimonial, but not referencing the statements made to the child's parent and others as testimonial), *and In re* Rolandis G., 817 N.E.2d 183, 189 (Ill. App. Ct. 2004) (holding that statements made by a child to his mother were not testimonial because there was no indication that he was a victim of a crime or that the mother was trying to elicit evidence from the child for prosecution).

61. In California alone there is a plethora of conflicting case law. *Compare Sisavath*, 13 Cal. Rptr. 3d at 753 (holding that statements made to responding officer by alleged victim-declarant were testimonial), *with* People v. Corella, 18 Cal. Rptr. 3d 770 (Ct. App. 2004) (holding that statements made to responding officers were not testimonial), *and Kilday*, 20 Cal. Rptr. 3d at 161 (holding that a statement made to responding officer by alleged victim-declarant was not testimonial when the officer was performing an information-gathering function, but that later statements made to officers were testimonial when the officers were performing an investigative function), *superseded by grant of review*, 105 P.3d 114 (Cal. 2005).

62. *See supra* note 52.

63. *Compare Vigil*, 104 P.3d at 265 (holding that statements made to a doctor as part of a child abuse investigation were testimonial), *and In re T.T.*, 815 N.E.2d at 800–01, 803 (holding that

B. WHAT IS "UNAVAILABILITY"?

Although the *Crawford* opinion does not explicitly change the state of the law regarding unavailability, it may change the law in practice. *Crawford* bars all testimonial statements when a witness is unavailable for cross-examination at trial, unless the defendant had a prior opportunity to cross-examine the declarant.[64] Even if the defendant had an opportunity to cross-examine the declarant at a previous hearing, however, the out-of-court statement is still barred by the Confrontation Clause unless the prosecution proves the unavailability of the declarant.[65] This makes the definition of "unavailability," and how it is proven, very important,[66] particularly to prosecutors of domestic violence cases, in which witnesses often fail to testify at trial.

1. When Is a Witness Considered Unavailable?

Witnesses may be unavailable for a number of reasons. Under any standard, the law classifies a witness as unavailable if the witness is physically unavailable because the witness is deceased, too ill, or too infirm, or if the government proves it is unable to locate the witness.[67] From there, however, the law is not as clear and it often varies from state to state. A witness can sometimes be considered unavailable because of a claim of privilege,[68] as Sylvia Crawford was unavailable because she claimed marital privilege in *Crawford*.[69] But *Crawford* itself may make

statements made to a doctor regarding the declarant's physical condition were not testimonial, but statements identifying the perpetrator were testimonial), *with* People v. Cage, 15 Cal. Rptr. 3d 846, 854–56 (Ct. App. 2004) (holding that statements made to a doctor identifying the perpetrator were not testimonial because there was no indication of government involvement in the doctor's examination), *superseded by grant of review*, 99 P.3d 2 (Cal. 2004), *and* State v. Vaught, 682 N.W.2d 284, 291 (Neb. 2004) (same).

64. *Crawford*, 541 U.S. at 57.

65. *Id.* ("Even where the defendant had such an opportunity [to cross-examine the declarant], we excluded the testimony where the government had not established the unavailability of the witness."). *See* John F. Yetter, *Wrestling with* Crawford v. Washington *and the New Constitutional Law of Confrontation*, 78 FLA. B.J. 26, 26 n.7 (2004). *But cf.* People v. Martin, No. A100213, 2004 WL 605440 (Cal. Ct. App. Mar. 29, 2004) (holding that the Confrontation Clause places no restraints on the use of a video tape of a child's prior testimony when the child is available for cross-examination at trial).

66. *See* Fisher, *supra* note 58.

67. *See, e.g.*, FED. R. EVID. 804(a); CAL. EVID. CODE § 240 (West 1995).

68. *See, e.g.*, *Crawford*, 541 U.S. at 39–40 (assuming that the marital privilege establishes unavailability); Lilly v. Virginia, 527 U.S. 116, 124 (1999) (plurality opinion) (assuming that the Fifth Amendment establishes unavailability); United States v. Wilmore, 381 F.3d 868, 872–73 (9th Cir. 2004) (holding that a witness was unavailable when at trial she invoked her Fifth Amendment rights as to her prior grand jury testimony, and holding that the defendant did not have an opportunity to cross-examine her on that testimony).

69. *Crawford*, 541 U.S. at 39–40.

privilege claims more difficult, simply by placing much more importance on a finding of unavailability.[70] Witnesses may also be deemed unavailable because they are determined by the court to be incompetent to testify.[71] This is most common with young children, but may also be the case for mentally ill witnesses, or for witnesses who claim to have no memory of the events at issue.[72] In light of *Crawford*, however, some prosecutors may try to expand the unavailability-due-to-incompetence doctrine, contending that the doctrine should apply when extreme mental or emotional distress prevented a witness from coming to court.

2. The Prosecutor's Burden of Proving Unavailability

Prior to *Crawford*, the Supreme Court clarified that the prosecution bears the burden of proving a declarant's unavailability as well as a good faith effort on the part of the government to locate and produce the witness.[73] Exactly what "a good faith effort" means, however, is also unclear.[74] Of course, the government, when necessary, has to issue subpoenas, take reasonable steps to find a witness, and reasonably secure a witness once found.[75] The additional measures prosecutors may have to take to secure witnesses are unknown. For example, do prosecutors have to provide transportation for witnesses to the courthouse? Do they have to pay for parking? Do they have to use body attachments to subpoenas? Do they have to jail witnesses who they fear will not show? Do they have to threaten to take away the witness's children or, if the witnesses are undocumented, report them to authorities if they refuse to cooperate? Although prosecutors already feel the pressure to do whatever they can to

70. *See, e.g.*, People v. Seijas, 9 Cal. Rptr. 3d 826, 829–30 (Ct. App. 2004) (holding that a declarant who claimed to be unavailable based on asserting his Fifth Amendment privilege against self-incrimination for "lying to the police" was not unavailable because lying to the police is not a crime in California and because the District Attorney had assured the witness he would not be prosecuted, but refused to grant the witness immunity), *superseded by grant of review*, 90 P.3d 116 (Cal. 2004).

71. *See, e.g.*, Idaho v. Wright, 497 U.S. 805, 816 (1990) (assuming that incompetence satisfies the unavailability requirement); State v. C.J., 63 P.3d 765, 770–72 (Wash. 2003) (holding that incompetence satisfies the unavailability requirement).

72. *See* Reed, *supra* note 25, at 198.

73. Barber v. Page, 390 U.S. 719, 724–25 (1968).

74. *See id*.

75. *See id.* at 719 (holding that the State had failed to make a good faith effort to procure the witness's attendance at trial); Motes v. United States, 178 U.S. 458, 470–71 (1900) (holding that government negligence allowed the witness to escape from jail prior to the trial); People v. Chokr, No. G033014, 2004 WL 1932644, at *2 (Cal. Ct. App. Aug. 31, 2004) (holding that the State had failed to make an adequate effort to procure a witness's attendance at trial where the State knew the witness had disappeared, but neither searched for the witness until the day before the trial nor issued a subpoena); People v. Sandoval, 105 Cal. Rptr. 2d 504 (Ct. App. 2001) (holding that the State had failed to make an adequate effort to procure a witness's attendance at trial because it had not exhausted the legal means by which it could get the witness back from Mexico).

get their witnesses to come to court[76]—even, perhaps at a cost to the witness's own safety—*Crawford* may require that they do so. And what if a witness simply refuses to come to court to testify despite a good faith effort on behalf of the prosecution and an order to testify? Does this mean the witness is unavailable? The fact that these questions remain unanswered only adds to the post-*Crawford* confusion.

C. WHAT IS "OPPORTUNITY TO CROSS-EXAMINE"?

Although *Crawford* does not outwardly change the existing law in this area, like unavailability, it makes the law much more important than it was under the *Roberts* test and may change the law in practice. *Crawford* bans testimonial out-of-court statements when the witness is unavailable and the defendant (1) does not have an opportunity to cross-examine the witness at trial, and (2) did not have an opportunity to cross-examine the witness prior to trial.[77] Given that Confrontation Clause rights cannot be invoked unless the defendant is denied opportunities for cross-examination both at trial and prior to trial, the standards for each are individually significant.

1. The Opportunity to Cross-examine a Witness at Trial

As to a defendant's opportunity to cross-examine the witness at trial, case law prior to *Crawford* suggests that all that is required is that the declarant of the out-of-court statement appears at trial.[78] Seemingly in accord, the *Crawford* opinion states, "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."[79] Similarly, under pre-*Crawford* case law, even when witnesses took the stand and had no recollection (or claimed to have no recollection) of their prior testimony, the Confrontation Clause did not bar the witnesses' out-of-court statements.[80] Also prior to *Crawford*, courts held that when witnesses took

76. *See infra* Part IV.C.

77. Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

78. *See, e.g.*, United States v. Owens, 484 U.S. 554, 560 (1988) (holding that the defendant's Confrontation Clause rights were not violated by admitting a declarant's out-of-court statements when the declarant appeared at trial, even though the declarant had suffered a head injury and had an impaired memory after making the statements); California v. Green, 399 U.S. 149, 188 (1970) (holding that the defendant's Confrontation Clause rights were not violated by admitting a declarant's out-of-court statements, even though the declarant claimed memory loss when testifying at trial).

79. *Crawford*, 541 U.S. at 59 n.9.

80. *See supra* note 78.

the stand and recanted their prior testimonial statements, those statements still were admissible.[81]

Nonetheless, some of the language in *Crawford* indicates that mere presence at trial may be insufficient to meet the opportunity-for-cross requirement. *Crawford* states that "[t]he Clause does not bar admission of a statement so long as the declarant is present at trial *to defend or explain it*."[82] What if a declarant takes the stand and remains silent, without a privilege claim, refusing to answer any questions?[83] In this scenario, the declarant has not explained the prior statement. Thus, it is now unclear whether a witness's simple presence at trial, without an explanation of earlier statements, is enough to satisfy the Confrontation Clause.[84]

2. The Opportunity to Cross-examine the Witness Prior to Trial

As to a prior opportunity to cross-examine the declarant, case law prior to *Crawford* required that the defendant was represented by counsel at the prior opportunity,[85] the defendant's counsel had an adequate opportunity to cross-examine the witness on the prior occasion,[86] and the defendant had substantially the same motive for cross-examining the witness on the prior occasion as the defendant has now.[87] After *Crawford*,

81. *See* Cooley v. State, 849 A.2d 1026, 1030–32 (Md. Ct. Spec. App. 2004) (holding that the defendant's Confrontation Clause rights were not violated by admitting a declarant's out-of-court statements where the declarant took the stand at trial and recanted the statements).

82. *Crawford*, 541 U.S. at 59 n.9 (emphasis added).

83. This only applies to situations in which the witness does not have a privilege claim. When there is a valid privilege claim, case law suggests that the defendant would not have had an opportunity to cross-examine the witness. *See* Douglas v. Alabama, 380 U.S. 415, 420–23 (1965) (holding that a witness who invoked his right against self-incrimination was not available for cross-examination and that admission of his prior testimonial statements was in violation of the defendant's Confrontation Clause rights); People v. Price, 15 Cal. Rptr. 3d 229, 233, 239–40 (Ct. App. 2004) (assuming that a witness who invoked her right against self-incrimination was unavailable and allowing the prior testimonial statement because the defendant had an opportunity to cross-examine the witness at a prior hearing).

84. The Supreme Court has never decided whether appearance alone is enough, but after *Crawford* it may have to do so. For a good discussion on the topic of the cross-examination requirement of *Crawford*, see Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 578–85 (2005).

85. *See* California v. Green, 399 U.S. 149, 165–68 (1970) (holding that the defendant had adequate opportunity to cross-examine the declarant at a preliminary hearing, in which the defendant was represented by counsel); Pointer v. Texas, 380 U.S. 400, 406–08 (1965) (holding that the defendant did not have an adequate opportunity to cross-examine the declarant at a preliminary hearing, in which the defendant was not represented by counsel).

86. *See* People v. Fry, 92 P.3d 970, 978 (Colo. 2004) (holding that all defendants have inadequate opportunities to cross-examine declarants at all preliminary hearings because Colorado state law requires such hearings to be truncated).

87. *See* Mancusi v. Stubbs, 408 U.S. 204, 213–16 (1972) (holding that the defendant had a prior opportunity to cross-examine the declarant because the cross-examination was done at a prior trial for

however, if a defendant simply had a prior opportunity to cross-examine the declarant, then the defendant's Confrontation Clause rights have been satisfied as to that witness. In effect, *Crawford* pressures prosecutors to compel witnesses—particularly those witnesses least likely to continue cooperating with the prosecution—to testify at the first available opportunity, so that if the witness becomes unavailable for trial, the prosecutor can argue that the defendant had a prior opportunity to cross-examine the witness. This tactic inevitably raises a number of questions that *Crawford* left unanswered:[88] What kind of information do attorneys need to possess to be able to "adequately" cross-examine a witness? Exactly how much cross-examination is adequate, particularly if the judge limited the defense attorney's questioning?[89] Do cross-examinations conducted at limited-purpose preliminary hearings and during discovery proceedings suffice to satisfy a defendant's Confrontation Clause rights? And will defendants have a claim of ineffective assistance of counsel if their attorneys waive an opportunity to cross-examine a witness and that witness later becomes unavailable?[90] The fact that these questions remain unanswered only adds to the post-*Crawford* confusion.

D. FORFEITURE BY WRONGDOING

Although the forfeiture by wrongdoing doctrine is perhaps the most important Confrontation Clause issue relating to domestic violence prosecution, the *Crawford* opinion only briefly references it, adopting the rule that defendants who wrongfully prevent witnesses from being able to testify at trial waive their rights under the Confrontation Clause with

the same charges); Kirby v. United States, 174 U.S. 47, 54–57 (1899) (holding that the defendant had no prior opportunity to cross-examine the declarant because the cross-examination was done at a prior trial in which the defendant was not a party).

88. *See* Fisher, *supra* note 58 (discussing many of the post-*Crawford* ambiguities regarding a defendant's prior opportunity to cross-examine the declarant).

89. *See* United States v. Wilmore, 381 F.3d 868, 873 (9th Cir. 2004) (holding that the district court judge's limitation of questioning by defense counsel on cross-examination during the grand jury proceeding made for an inadequate opportunity for cross-examination and effectively made the witness unavailable as to that testimony).

90. Some courts have held that testimonial out-of-court statements are admissible when the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant, but chose not to do so. *See* Clark v. Indiana, 808 N.E.2d 1183, 1190 (Ind. 2004) (holding that admission of testimony was not in error because the defendant had a prior opportunity to cross-examine the declarant, even though the defendant chose not to cross-examine); Liggins v. Graves, No. 4:01-CV-40166, 2004 WL 729111, at *7 (S.D. Iowa Mar. 24, 2004) (holding that the defendant had waived his Confrontation Clause rights at trial because he chose not to cross-examine an unavailable declarant at a deposition prior to trial).

respect to those witnesses' prior out-of-court statements.[91] As Justice Scalia writes, "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds."[92]

But forfeiture, too, remains unclear after *Crawford* because the Court failed to outline the applicable standard. One ambiguity exists as to whether a finding of forfeiture requires a showing of the defendant's intent to prevent the witness from testifying. The definition of forfeiture by wrongdoing in the Federal Rules of Evidence explicitly requires such intent.[93] In contrast, the case cited in *Crawford* for this point, *Reynolds v. United States*, makes no reference to intent.[94] Lower courts have split on the issue,[95] with some courts taking a very expansive view of the forfeiture by wrongdoing doctrine.[96] While it is unclear what standard the *Crawford*

91. Crawford v. Washington, 541 U.S. 36, 61–62 (2004) (citing Reynolds v. United States, 98 U.S. 145, 158–59 (1878)). *See* Fisher, *supra* note 58.

92. *Crawford*, 541 U.S. at 62 (citing *Reynolds*, 98 U.S. at 158–59).

93. FED. R. EVID. 804(b)(6). The Federal Rules of Evidence define forfeiture by wrongdoing as arising when a party has "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." *Id.*

94. As the Court stated in *Reynolds*,

> The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.

Reynolds, 98 U.S. at 159. *Accord* United States v. Dhinsa, 243 F.3d 635, 651 (2d Cir. 2001) (holding that the defendant's misconduct waived his confrontation rights and listing "threats, actual violence, or murder" as examples of qualifying misconduct).

95. The California Court of Appeal has held that

> [f]orfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.

People v. Giles, 19 Cal. Rptr. 3d 843, 848 (Ct. App. 2004), *superseded by grant of review*, 102 P.3d 930 (Cal. 2004). *Compare id.*, *and* People v. Moore, No. 01CA1760, 2004 WL 1690247, at *3–4 (Colo. Ct. App. July 29, 2004) (holding that the defendant had waived his Confrontation Clause rights because he had killed the victim, without requiring a showing that the defendant intended to prevent the witness from testifying), *with* United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996) (holding that when a defendant causes a potential witness's unavailability "by a wrongful act . . . undertaken with the intention of preventing the potential witness from testifying at a future trial, then the defendant waives his right to object on confrontation grounds to the admission of the unavailable declarant's out-of-court statements at trial."), People v. Weidert, 705 P.2d 380, 385–87 (Cal. 1985) (requiring a showing of an intention to kill the witness to prevent the witness from testifying), *and* Francis v. Duncan, No. 03 Civ. 4959(DC), 2004 WL 1878796, at *17 (S.D.N.Y. Aug. 23, 2004) (requiring a showing of an intention to prevent the witness from testifying).

96. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 271–72 (2d Cir. 1982) (holding that the defendant's knowledge of a plot to kill the witness and failure to alert the authorities constituted

court intended to incorporate, the difference for domestic violence prosecutors is crucial. An intent requirement would severely limit the application of the doctrine by making the exception only available under very rare and difficult-to-prove circumstances. Without the intent requirement, forfeiture could be an important tool for domestic violence prosecutors facing Confrontation Clause barriers.[97]

Another important ambiguity regarding the forfeiture by wrongdoing doctrine after *Crawford* is whether courts can make a finding of forfeiture based on the same criminal acts for which the defendant is currently on trial. The argument against allowing judges to do so is that it usurps the function of the jury and can lead to a guilty conviction based on a judicial finding that the defendant is guilty—a practice commonly referred to as bootstrapping.[98] One post-*Crawford* California case rejected that argument, citing the evidence rules that permit courts to admit coconspirators' statements to prove the existence of a conspiracy[99] and stating that "[a] court is not precluded from determining the preliminary facts necessary for an evidentiary ruling merely because they coincide with an ultimate issue in the case."[100] An opposite holding barring the practice of bootstrapping could be particularly problematic in domestic violence prosecutions, particularly those in which the defendant is charged with having killed the declarant. In light of the post-*Crawford* importance of confrontation, it is unclear how the Court would rule in such a case.

sufficient wrongdoing to be a waiver of his right to confrontation); Steele v. Taylor, 684 F.2d 1193, 1201–02 (6th Cir. 1982) (holding that a defendant in a domestic violence case who prevented a witness from testifying by exploiting his intimate relationship with her waived his right to confrontation); People v. White, 772 N.Y.S.2d 309, 310 (N.Y. App. Div. 2004) (holding that a defendant had forfeited his Confrontation Clause rights through his own wrongdoing, even when the declarant was willing to testify, explaining that a witness who is so fearful that the witness refuses to testify or will testify falsely is just as unavailable as a witness who is deceased); People v. Santiago, No. 51034U, slip. op. at 31–33 (N.Y. Sup. Ct. Apr. 7, 2003) (finding that the defendant's long history of domestic abuse against the declarant caused the declarant to recant her testimony and make herself unavailable to testify and constituted a forfeiture by wrongdoing).

97. Richard Friedman criticizes Andrew King-Ries's commentary on *Crawford* for not adequately addressing the use of the forfeiture by wrongdoing doctrine in the prosecution of domestic violence cases. He suggests that batterers who intimidate victim-witnesses from testifying should have their Confrontation Clause rights waived. *See* Friedman, *supra* note 39; King-Ries, *supra* note 53.

98. *See* Kenneth Ofgang, *C.A. Allows Admission of Murder Victim's Hearsay Statement*, METRO. NEWS ENTERPRISE (L.A., Cal.), Oct. 26, 2004, at 1, *available at* http://www.metnews.com/articles/2004/gile102604.htm.

99. *See* FED. R. EVID. 801(d)(2)(E) (amended 1997) (adopting the rule from *Bourjaily v. United States*, 483 U.S. 171 (1987), that a court may consider the contents of a coconspirator's statement in determining whether there was a conspiracy in which the declarant was involved, but that the contents of the statement alone do not suffice to establish a conspiracy).

100. *Giles*, 19 Cal. Rptr. 3d at 848–49.

E. *CRAWFORD* AND EXPERT TESTIMONY

Under the Federal Rules of Evidence, state statutes, and the common law, experts have traditionally been permitted to rely on out-of-court statements in forming their opinions.[101] Furthermore, the law allows expert witnesses to disclose to the jury the basis of their opinions, including otherwise inadmissible evidence, if the probative value of such information in assisting the jury to evaluate the expert's opinion substantially outweighs the unfair prejudice to the defendant.[102] While *Crawford* does not explicitly change the current law regarding expert testimony, some scholars advocate that it should,[103] and some courts are finding that it does.[104] Although the *Crawford* opinion limits its holding to statements offered for the truth of the matter asserted,[105] those skeptical of prosecutorial use of expert testimony argue that it is often used as a "backdoor" approach to allowing the jury to hear otherwise inadmissible evidence.[106] The Federal Rules of Evidence and pre-*Crawford* case law, however, emphasize that allowing experts to discuss the basis of their opinions is not an exception to the hearsay rule and that judges can instruct juries to consider the out-of-court statements only for the purpose of evaluating the expert's conclusions.[107]

101. *See, e.g.*, FED. R. EVID. 701; CAL. EVID. CODE § 801 (West 1995). For a discussion of the common law, see Ross Andrew Oliver, Note, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After* Crawford v. Washington, 55 HASTINGS L.J. 1539 (2004) (arguing that courts should prohibit experts from testifying as to opinions that rely on testimonial out-of-court statements, to the extent that such opinion testimony informs the jury of the content of the hearsay, unless the requirements of *Crawford* have been met).

102. *See* FED. R. EVID. 703.

103. *Compare* Ronald L. Carlson, Essay, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 584–86 (1986) (arguing that the admission of unreliable hearsay violates the hearsay rules and the defendant's Confrontation Clause rights), *with* Paul R. Rice, Essay, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 584 (1987) (arguing that the federal rules provide appropriate precautions for the admission of out-of-court statements by experts and that it does not violate the hearsay rules or a defendant's Confrontation Clause rights to admit such statements).

104. *See* Post, *supra* note 20, at 1 (excluding the prosecution's expert witness's testimony because the witness relied on the testimonial out-of-court statements of a deceased declarant in forming his opinion, based on a claim that admitting the testimony would violate the defendant's Confrontation Clause rights).

105. Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004).

106. *See* Carlson, *supra* note 103, at 592–93 (arguing that the party offering the expert testimony can use the testimony as a sort of "backdoor exception to the hearsay rule" to get the jury to hear untrustworthy evidence).

107. *See* FED. R. EVID. 703 advisory committee's note. This is true for the use of all out-of-court statements that are not offered for the truth of the matter asserted, and thus, are not hearsay. Opponents of the admissibility of such expert testimony argue that juries are unable to limit the use of such evidence only to evaluating the expert's testimony and will inevitably consider the statements for the truth of what they assert. Oliver, *supra* note 101, at 1540, 1552.

In light of these arguments and the *Crawford* ruling, it is unclear how the Supreme Court would rule on the admissibility of expert testimony based on testimonial out-of-court statements. A holding that confrontation rights apply to statements not offered for the truth of the matter asserted would not only greatly expand the scope of the *Crawford* decision, but would also dramatically impact the prosecution of domestic violence cases, which often depend on expert testimony regarding battered women's syndrome.[108] In effect, the prosecution would no longer be able to have an expert explain to judges and juries the psychology of the domestic violence victim and why victims decide to recant earlier testimony, remain silent, or refuse to cooperate with the prosecution.

F. CONFUSION AND THE GOALS OF *CRAWFORD*

Crawford confirms that a criminal defendant's constitutional rights under the Confrontation Clause cannot be abrogated by a categorical or judicial determination of reliability.[109] Rather, the Constitution requires cross-examination as the procedural method for determining the reliability of testimonial hearsay statements.[110] Ideally, *Crawford* will serve as a reminder of a criminal defendant's constitutional rights, prevent "trial by hearsay," and prevent prosecutions where the only evidence against a criminal defendant is the testimony of government officials.[111] While *Crawford*'s goals are just, the rampant confusion the decision engendered has created an unworkable Confrontation Clause framework. In an effort to protect the rights of the criminally accused, the *Crawford* decision has forced the pendulum to swing too far. The inadvertent results of *Crawford* are most dramatically evident in the prosecution of domestic violence cases. The *Crawford* ruling has caused an astounding number of domestic violence cases to be dropped,[112] and has disrupted the established "victimless prosecution" methods by which law enforcement, prosecutors,

108. *See* Carrizosa, *supra* note 12, at 1 (discussing the use of expert testimony in domestic violence prosecutions).

109. *See Crawford*, 541 U.S. at 53–54. *See also* Maryland v. Craig, 497 U.S. 836, 860–70 (1990) (Scalia, J., dissenting) (arguing that the use of a one-way closed circuit television for a six-year-old's testimony in a sexual abuse case violated the defendant's Confrontation Clause rights). For a good discussion of the Court's goals in deciding *Crawford* and the decision's resulting ambiguities, see Leading Cases, *Sixth Amendment—Witness Confrontation*, 118 HARV. L. REV. 316–24 (2004).

110. *Crawford*, 541 U.S. at 54–55.

111. *Id.* at 49–50.

112. *See* Davis, *supra* note 3, at 22, 24 (noting that a dozen cases a day are being dismissed in Dallas); Lininger, *supra* note 11, at 749–50 (noting that "within days—even hours—of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past").

and domestic violence advocates attempt to combat the domestic violence epidemic,[113] without providing prosecutors with any alternative methods of prosecution.[114] The *Crawford* opinion criticizes the *Roberts* test as being unpredictable and admitting the very testimonial out-of-court statements that the Confrontation Clause was intended to prevent.[115] Yet, because of all the uncertainties the *Crawford* decision left unresolved, *Crawford* may be even more riddled with "unpardonable vices" than the *Roberts* analysis it replaced.[116]

IV. THE CONSEQUENCES OF *CRAWFORD* FOR THE PROSECUTION OF DOMESTIC VIOLENCE CASES

Domestic violence prosecution is different than the prosecution of other crimes. It has taken decades for jurisdictions to learn how to effectively prosecute perpetrators, and many are still unable to do so. In the last decade, however, there have been signs of success. Between 1994 and 2003, reports of domestic violence incidences declined by more than fifty percent.[117] But *Crawford* jeopardizes continued success in the prosecution and prevention of domestic violence. The legal community is both confused and uncertain about the state of the law. The confusion causes an array of problems that makes successful prosecution of domestic violence even more difficult. First, some prosecutors, desperate to continue prosecuting domestic violence perpetrators, resort to extreme measures to get victims to come to court to testify.[118] Second, the *Crawford* holding endangers victims' safety by shifting the decision of whether to prosecute from the government to victims, and requiring victims to choose between the frightening consequences of participating in the prosecution of the batterer and letting the batterer go free. Third, by banning even very trustworthy hearsay, *Crawford* leads to some cases getting dismissed for lack of admissible evidence, even when the dismissal seems unjust. Fourth, because the decision places such an emphasis on the need for the victim to testify, *Crawford* pressures prosecutors to put victims on the stand at the

113. *See* Steve Silverman, *Panel Looks at Effects of Abuse*, PANTAGRAPH (Bloomington, Ill.), Nov. 18, 1999, at A6 (quoting emergency room physician Kathryn Bohn as saying that domestic violence accounts for "more injuries than rapes, muggings, and auto accidents combined" and referring to domestic violence as a "public health epidemic").

114. *See* King-Ries, *supra* note 53, at 318–20.

115. *Crawford*, 541 U.S. at 63.

116. *Id.*

117. *See* Max, *supra* note 24.

118. Booth, *supra* note 12 (detailing the interviewee's statements that since *Crawford*, she has heard of prosecutors in other jurisdictions threatening or arresting victims to get them to testify, although she strongly disagrees with such practices).

first available opportunity, often before they are adequately prepared to do so, thereby "showing their cards" to defense counsel at an early stage. Finally, *Crawford* jeopardizes the use of expert testimony and provides a disincentive to inform victims about their rights.

A. WHY DOMESTIC VIOLENCE PROSECUTION IS DIFFERENT

Every year millions of women in the United States are victims of domestic violence; in fact, domestic violence is the leading cause of injury to women.[119] Compounding the seriousness of the problem, domestic violence is widely regarded as one of the most difficult types of crimes to investigate and prosecute.[120] Because physical abuse typically occurs inside the home, rather than in public, the victim and the victim's children are often the only witnesses to the crime.[121] Consequently, the prosecution's case typically relies heavily on the victim testifying.[122] But getting victims to testify can be a monumental challenge. Most jurisdictions report that in the overwhelming majority of domestic violence cases, victims recant the testimony that was given to law enforcement immediately following the violent event, and many victims refuse to continue cooperating with the prosecution.[123] Some jurisdictions report withdrawal rates as high as ninety-six percent.[124] Unfortunately, the

119. King-Ries, *supra* note 53, at 303.

120. *See* Dillard v. Roe, 244 F.3d 758, 764 (9th Cir. 2001) (quoting a prosecutor's closing argument as explaining, "[D]omestic violence is a very difficult crime to prosecute . . . one of the reasons being that it's very common for victims to recant, to blame themselves, and to say that nothing happened, and to not want to prosecute."); Jack Leonard, *Orange County Deputies to Use Video During Family Disturbance Calls*, L.A. TIMES, May 31, 2000, at B4 (discussing how domestic violence is "widely regarded as one of the most difficult crimes to investigate and prosecute").

121. *See* Sherrie Bourg Carter & Bruce M. Lyons, *The Potential Impact of* Crawford v. Washington *on Child Abuse, Elderly Abuse and Domestic Violence Litigation*, CHAMPION, Sept.–Oct. 2004, at 21, 21, *available at* Westlaw, 28-OCT CHAMPION-21 ("[O]ftentimes the only witnesses in these cases are the alleged victims and the professionals who interview and/or treat them after the alleged crime.").

122. *See* David J. Molton, *Protecting Domestic Violence Victims in Bail Determinations*, N.Y. L.J., Jul. 2, 2004, at 4 (stating that "[t]ypically, the domestic violence victim is also the principal witness for the state," and arguing for reforming bail factors to include prior acts of violence or threats of violence against family members or intimates).

123. *See* Mary E. Asmus, Tineke Ritmeester & Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 139 & n.108 (1991) (reporting that as few as four percent of domestic violence victims were actively willing to testify against their batterers in the City Attorney's Office in Duluth, Minnesota); Alex Roth, *Jailing the Victim: Courts Force Battered Women to Testify*, DAILY NEWS OF L.A., June 8, 1998, at N1 (quoting Deputy City Attorney Lara Bloomquist as saying that more than two-thirds of women who file domestic violence complaints recant or vanish by the time of the trial).

124. Asmus et al., *supra* note 123, at 139 & n.108.

victim's failure to cooperate or testify often leads to dismissal of the case.[125]

Domestic violence experts recognize a number of reasons why victims so frequently recant testimony or refuse to cooperate. In domestic violence cases, unlike most crimes, the victim and the defendant are or were involved in an intimate relationship.[126] The victim may still care for the batterer[127] and feel obligated to try to protect the batterer from prosecution.[128] The victim and the batterer may have children in common, as domestic violence often begins or intensifies when the victim becomes pregnant.[129] Victims of domestic violence are often financially dependent on the batterer, and emotionally and physically isolated from their family and friends.[130] It is also common for victims to feel dependent on their batterers to maintain their immigration status.[131]

Psychologists have found that domestic violence relationships typically follow a three phase cycle: tension-building, acute battering, and loving contrition.[132] In the first phase, the violence slowly escalates while the victim attempts to be compliant and calming.[133] During the second phase, there is a brief period of severe battering, normally lasting no longer than twenty-four hours, in which the violence continues until the victim gets away or the batterer is too exhausted to continue.[134] In the last phase, the batterer begs the victim for forgiveness, promising to change and

125. *See* Neal A. Hudders, Note, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?*, 49 DUKE L.J. 1041, 1047 (2000); Sara Langenberg, *Battered Spouses Can Expect to See Counselor at the Door*, SARASOTA HERALD-TRIB., Oct. 10, 1996, at 1B.

126. *See* Roberta Pennington, *Domestic Violence Tough to Report, Prosecute*, SHEBOYGAN PRESS, Oct., 31, 2004, at 1, *available at* 2004 WLNR 15055442 ("What makes [domestic violence] so enigmatic and difficult, after all, is the fact that the parties involved often share a bond—living together, being married, having a child together.").

127. *See* Langenberg, *supra* note 125, at 1B.

128. *See* Susan Estrich, *Abuse Policy Creates Its Own Problem*, DENVER POST, Sept. 10, 1999, at B11 (explaining that most wives, even battered wives, do not want their husbands to go to jail).

129. *See* Shari Roan, *A Dirty Secret: Society Would Like to Think that Expectant Moms are Cherished. But Pregnancy May Start—Or Increase—Domestic Violence*, L.A. TIMES, Dec. 5, 1995, at E1.

130. *See* King-Ries, *supra* note 53, at 304; Hudders, *supra* note 125, at 1048.

131. *See* Leslye E. Orloff, Deeana Jang & Catherine F. Klein, *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313, 314 (1995).

132. LENORE E. WALKER, THE BATTERED WOMAN 55 (1979). *See also* DONALD G. DUTTON, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES 125 (1995) (discussing Walker's three-phase cycle and its psychological underpinnings).

133. WALKER, *supra* note 132, at 56–59.

134. *Id.* at 59–61.

discontinue the abuse.[135] Then the cycle repeats, escalating in violence each time around.[136]

The cycle of abuse makes it difficult for victims to leave the situation and seek help from authorities. A psychological condition called "traumatic bonding," in which victims form strong emotional ties to their batterers as a result of the cycle of abuse, adds to the difficulty victims have in breaking out of the cycle.[137] The final phase of the cycle makes it particularly difficult for victims suffering from traumatic bonding to leave their batterers.[138] In fact, it takes domestic violence victims an average of seven attempts at leaving before they successfully flea a battering relationship.[139] Victims may also suffer from clinical depression,[140] blaming themselves for the abuse, and learned helplessness, all of which seriously impair the victim's problem-solving skills.[141] In addition, the victim may be fearful or distrusting of the criminal justice system,[142] and the batterer may be intimidating or threatening the victim to prevent the victim from cooperating with law enforcement.[143] All of these factors contribute to the unique difficulty of domestic violence prosecution.

B. THE CONSEQUENCES OF CONFUSION IN THE LEGAL COMMUNITY

The legal community is justifiably confused and uncertain as to the state of the law after *Crawford*.[144] As Justice Rehnquist's concurrence predicted,[145] in light of the remaining uncertainties and ambiguities in the *Crawford* decision, domestic violence prosecutors, defense attorneys, and advocates cannot predict how particular cases will be decided—even judges are unsure how they should be decided. Others in the legal community simply do not understand the Court's holding in *Crawford* or

135. *Id.* at 65–69.

136. *Id.* at 69.

137. *See* DUTTON, *supra* note 132, at 106–12.

138. WALKER, *supra* note 132, at 69.

139. Steve Lipsher, *Wife Stayed Despite Violence Pattern Typical in Abuse Cases, Authorities Say*, DENVER POST, Oct. 22, 2000, at B1.

140. WALKER, *supra* note 132, at 50.

141. *Id.* at 45–48.

142. *See* Hudders, *supra* note 125, at 1047.

143. *See id*.

144. *See supra* Part III. *See also* Post, *supra* note 20, at 1 (quoting one frustrated prosecutor asking, "'How on earth can you tell whether someone is anticipating whether [the out-of-court statement] is going to be used in court?'"); Levenson, *supra* note 53, at 7 (stating that hundreds of cases nationwide are interpreting *Crawford*'s effect on various hearsay rules, and that the ambiguous definition of "testimonial" "has resulted in some very interesting rulings in the California courts").

145. Crawford v. Washington, 541 U.S. 36, 69–76 (2004) (Rehnquist, C.J., concurring).

how it is related to the evidence rules. Not only is the *Crawford* decision itself favorable to defendants,[146] but also, confusion and uncertainty exacerbate *Crawford*'s negative impact on domestic violence prosecution.

1. *Crawford*'s Effect on the Decision to Prosecute

Amidst the confusion over what *Crawford* requires, the prosecution of both misdemeanor and felony domestic violence cases in which the victim is unable or unwilling to testify (the overwhelming majority of domestic violence cases), has become much more difficult.[147] Misdemeanor prosecutions are most significantly affected because there is often little physical evidence,[148] and thus, the cases are more dependent on the victim's out-of-court statements.[149] But felonies are also affected, even those in which the victim is unavailable because the victim is deceased. Additionally, felony convictions are more likely to be appealed and overturned by reviewing courts,[150] so prosecutors, who have large case loads and tight budget constraints, must be conservative with the cases they choose to prosecute.

When prosecutors do not know what evidence will be admissible, and thus, how strong their cases are, they are less likely to vigorously prosecute those cases. Prosecutors' uncertainty as to whether they will be able to admit evidence of a victim's out-of-court statements pressures prosecutors to plea-bargain, down-charge, and sometimes, not file cases at all. Moreover, as the defense knows that prosecutors are uncertain about their cases, their bargaining power increases. As a result, batterers are more likely to get shorter jail sentences or receive sentences only requiring

146. Matthew T. Mangino, *Protecting Victims of Abuse; Confrontation Right May Jeopardize Safety of Children, Domestic Violence Victims*, 27 PA. L. WEEKLY 8 (2004) (quoting the *New York Times* as referring to *Crawford* as "highly favorable to criminal defendants" and arguing that *Crawford* will make the prosecution of domestic violence, child abuse, and sexual assault much more difficult).

147. *See supra* notes 126, 146.

148. Many batterers, sometimes called "sophisticated batterers," consciously abuse their victims so as to not leave visible marks. *See* Casey Gwinn, San Diego City Attorney, The Nuts and Bolts: Investigation and Prosecution of Family Violence (Oct. 18, 2002), http://familyjusticecenter.org/dwnlds/TennesseeProsecution_101702.pdf.

149. *See* Post, *supra* note 20, at 1 ("In felony cases, there is usually plenty of other evidence, such as medical reports, visible injuries and witnesses . . . . In misdemeanors, though, that kind of evidence is often lacking and there is a greater need for hearsay."); Roth, *supra* note 123, at N1 ("A woman's presence is often important in misdemeanor cases where police don't have any independent proof of injury.").

150. JOHN SCALIA, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: FEDERAL CRIMINAL APPEALS, 1999 WITH TRENDS 1985–99, at 6 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fca99.pdf.

completion of batterer's intervention programs, which have been shown to be less successful than jail sentences at preventing recidivism.[151]

Some critics worry that the challenges *Crawford* created will be the last straw in an area of law that was already so difficult to prosecute, resulting in prosecutors making domestic violence prosecution even less of a priority.[152] Compounding the problem, when prosecution success rates decrease, law enforcement officers lose their motivation to target domestic violence ardently, as it becomes more and more evident that their efforts do not translate into more batterers being prosecuted.[153] This is particularly true because of the high rate of recidivism among batterers.[154]

2. Ambiguity as to Formulating Legal Arguments

Confusion over what the correct legal standards are prevents prosecutors from crafting the arguments they need to win their cases. When the prosecution is unclear about what elements need to be proven to win, successful prosecutions of domestic violence cases will inevitably decline. Judicial confusion leads to lower success rates as well. Many judges are too focused on *Crawford*'s testimonial versus nontestimonial distinction to

151. *See* Kalyani Robbins, Note, *No-drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 215–16 (1999) (referencing a National Institute of Justice study that found the advice/mediation approach left victims twice as likely to be reabused than did arrest of the batterer); American Bar Association Commission on Domestic Violence, http://www.abanet.org/domviol/stats.html (last visited Dec. 28, 2005) [hereinafter Commission on Domestic Violence] (citing the American Psychological Association's findings that short term batterers intervention programs helped prevent immediate physical abuse in some cases, but that these programs were ineffective at stopping abuse over time, and noting that some batterers actually became more sophisticated in their abuse and intimidation after attending the programs).

152. *See* Pincus, *supra* note 13 ("My opinion is that *Crawford* is going to become more of an excuse for agencies that didn't pursue the cases vigorously anyway . . . because the cases are just too hard to prosecute.").

153. *See* Robbins, *supra* note 151, at 233 (arguing that if prosecutors drop cases when domestic violence victims recant or refuse to cooperate, police may justify failures to arrest batterers as a waste of time and resources); Pincus, *supra* note 13 (explaining that "it is a cycle, when prosecutors start backing off, then cops start backing off [and] [i]t rolls back everything"); Interview with Don Wynn, Police Officer, Instructor, Training Div., L.A. Police Dep't., in L.A., Cal. (Nov. 17, 2004) [hereinafter Wynn] (discussing how law enforcement officers get discouraged when they do not see their work in the field ("the fruits of their labor") resulting in convictions in court, and how they get frustrated by going to the same houses time and time again).

154. *See* Steve Jackson, *A Quick Ride on a Fast Track; For Offenders Arrested in Jefferson County, Speed Is of the Essence*, DENVER WESTWORD, June 11, 1998, *available at* http://www.westword.com/issues/1998-06-11/news/feature7.html (citing recidivism rates as high as fifty percent in Jefferson County, Colorado); Commission on Domestic Violence, *supra* note 151 (citing a Bureau of Justice Statistics report finding recidivism rates for reported domestic violence crimes as high as thirty-two percent, and citing an American Medical Association Diagnostic and Treatment Guidelines on Domestic Violence report finding that forty-seven percent of men who abuse their wives do so at least three times per year).

recognize the legitimacy of arguments regarding forfeiture by wrongdoing as an exception to a defendant's confrontation rights.[155] Even when judges are willing to consider the argument, the forfeiture by wrongdoing standard is not any clearer to judges than it is to prosecutors.[156] Regardless, many judges, not wanting to get overturned, may be making very conservative decisions until the *Crawford* law is clearer.[157]

3. Confusion as to the Interaction of *Crawford* and the Evidence Rules

Success rates are also lowered because some prosecutors and judges are confused as to what the Court held in *Crawford* and as to how the decision relates to the evidence rules. In certain instances, prosecutors drop cases when the victim recants because the prosecutors believe that the *Crawford* opinion will be an absolute bar to the admission of the victim's out-of-court testimonial statements at trial.[158] Although *Crawford* left the meaning of "unavailable" ambiguous,[159] if the victim is willing to take the stand at all, even to recant, the defense would have only a weak argument that the victim is "unavailable," despite being able to cite *Crawford*'s pro-defendant language. Additionally, likely because forfeiture by wrongdoing is only briefly mentioned in the *Crawford* opinion,[160] many prosecutors do not even know when to argue forfeiture as an exception to a defendant's confrontation rights, regardless of the standard. Finally, many prosecutors and judges fail to understand that *Crawford* only applies to statements that are hearsay, regardless of whether the statement is testimonial.[161] Thus, statements that are verbal acts or objects, offered to show the effect on the listener or reader, offered to show circumstantial evidence of state of mind, or offered to impeach cannot be barred by *Crawford* because they are not offered for the truth of the matter asserted.[162]

155. *See* Booth, *supra* note 12 (explaining that judges are less comfortable with a forfeiture by wrongdoing argument than they are with an argument that a statement is nontestimonial, often requiring a showing that a statement is nontestimonial in addition to a showing of forfeiture by wrongdoing).

156. *See supra* Part III.D. For example, in felony homicide cases, in order to make a forfeiture by wrongdoing argument, does the prosecution have to prove that the defendant killed the victim with the intent to prevent the victim from testifying in court before the court will admit the victim's out-of-court testimonial statements? Can prosecutors inform the judge as to why the victim refuses to come to court, or is this inadmissible hearsay?

157. *See* Post, *supra* note 20, at 1 (quoting Deirdre Bialo-Padin, Chief of the District Attorney's Domestic Violence Bureau in Brooklyn, New York, as stating that after *Crawford*, "'[s]ome judges are being very conservative'" in domestic violence cases).

158. Pincus, *supra* note 13.

159. *See supra* Part III.B.

160. Crawford v. Washington, 541 U.S. 36, 62 (2004) (citing Reynolds v. United States, 98 U.S. 145, 158–59 (1879)).

161. *Id.* at 59 n.9. *See supra* note 8 and accompanying text.

162. *See* FED. R. EVID. 801(c); *supra* note 8 and accompanying text.

C. GETTING VICTIMS TO TESTIFY AFTER *CRAWFORD*

By excluding all testimonial hearsay statements when the defendant does not have an opportunity to cross-examine the declarant,[163] *Crawford* forces prosecutors with cases dependent on a victim's out-of-court statements either to get the victim to testify in court and be subject to cross-examination or to lose the case. Consequently, some prosecutors resort to extreme measures to get victims into court. For example, some prosecutors threaten to: take the victim's children away;[164] prosecute the victim for child endangerment, neglect, or disturbing the peace;[165] drop the case entirely; or not prosecute future domestic violence incidences, if the victim refuses to testify. In the most extreme cases, prosecutors threaten to or do, in fact, jail the victim prior to testifying, to ensure the victim's presence in court on the day of the trial.[166] While informing the victim of the possible consequences of testifying or not testifying is appropriate, and perhaps ethically required, threatening the victim with disciplinary action if the victim does not cooperate is inappropriate and probably amounts to prosecutorial misconduct.

A number of negative consequences results from prosecutors taking extreme measures to get victims to testify. Victims, particularly those already familiar with the criminal justice system, will begin to distrust prosecutors and the system and will be less likely to report future crime. Fear of prosecutors taking extreme measures could cause domestic violence advocates and shelters to advise victims against coming forward.[167] If prosecutors carry out their threats or jail the victim, their actions could seriously harm the victim in a future or ongoing dependency or family court proceeding. In addition, the measures likely would lead to increased prosecutorial misconduct charges and undermine the government's credibility with judges. Finally, by changing the risks the victim has to balance in deciding whether or not to testify, these measures could jeopardize a victim's safety in situations in which it would have been in the victim's and the victim's children's best interests not to testify.[168]

163. *Crawford*, 541 U.S. 68–69.

164. The prosecutor can threaten to take the victim's children away by calling child protective services to report the noncooperation to the victim's social worker or by contacting an attorney in an open dependency court proceeding. *See* Roth, *supra* note 123. In some circumstances, prosecutors can threaten to charge a victim with assault and battery if the victim defended against an attack.

165. *See id.*

166. *See* Roth, *supra* note 123.

167. Pincus, *supra* note 13.

168. *See infra* Part IV.D.

D. ENDANGERING THE VICTIM'S SAFETY

The renewed importance on victim testimony in domestic violence cases after *Crawford* will endanger the safety of many victim-witnesses, and perhaps their children. Most obviously, because many cases will be dismissed when the victim disappears or refuses to testify, more batterers will be free to return to the homes of their victims and continue the abuse. Additionally, although many victims of domestic violence find testifying in court against their batterers liberating and empowering,[169] others are psychologically traumatized and revictimized by the experience.[170]

In most cases of domestic violence, a victim faces repercussions from the batterer as a result of participating in the batterer's prosecution, particularly if the batterer goes free, receives a short sentence, or is only ordered to attend a short treatment program.[171] In some cases, the victim may be placed in an unreasonable amount of danger by testifying, even if the case is successful, either because the batterer will severely punish the victim when the batterer is released from prison[172] or because the batterer has connections outside of prison.[173] And given that many domestic violence cases are less likely to be prosecuted or to be successful without the victim's testimony, after *Crawford*, many victims are left with no safe option. In most cases, however, it is still in the victim's best interest to testify because of the likelihood that the batterer will receive jail time and the chance that the separation will break the cycle of violence.

The most severe danger to victims that *Crawford* created is in returning the responsibility for whether or not a case is prosecuted to the

169. Pincus, *supra* note 13.

170. Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 415–17 (2001) (documenting prosecutors' accounts of domestic violence victims who have been revictimized by having to testify against their batterers).

171. *See* Sherri M. Owens, *Domestic Violence Cases Fuel Dispute*, ORLANDO SENTINEL, Nov. 26, 2004, at B1 (quoting a domestic violence advocate as explaining that victims fear retaliation from their batterers for cooperating with the prosecution and that victims fear that if the batterer gets a lesser charge, "[the batterer] will be released and they will be more seriously injured than they would have been otherwise").

172. *See* Denice Wolf Markham, *When Abused Women Don't Prosecute*, CHI. TRIB., Dec. 28, 1998, at 16N (arguing that the victim's safety concerns should be taken into account when deciding whether a victim should testify).

173. For example, the batterer may have connections to family or friends, or to members of a gang with which the batterer is associated. *See* Robbins, *supra* note 151, at 205 (noting cases in which the victim's life may be placed in jeopardy because of the prosecution, and arguing that in these cases it may not be wise to have the victim testify).

victim.[174] Prior to *Crawford*, many jurisdictions developed tools for combating domestic violence that made governments solely responsible for prosecution and removed responsibility from the victims, in order to allow victims to better protect themselves from retaliation.[175] These tools included "no-drop" policies that prohibit victims from withdrawing a complaint once formal charges have been filed[176] and "victimless prosecution" techniques that attempt to prosecute cases regardless of whether the victim will testify.[177] With these techniques, the batterer cannot blame the victim for the government's decision to prosecute because the victim has no control over the prosecution. The victim could even show support for the defendant by taking the stand to recant. *Crawford* undermines these tools by making a victim's in-court testimony far more crucial for prosecution than it was previously. Knowing that the victim's testimony is necessary for successful prosecution, the batterer is more likely to blame and punish the victim for the prosecution going forward, even if the victim ultimately recants on the stand.

E. EXCLUDING RELIABLE HEARSAY

Prior to *Crawford*, *Roberts* provided that when a declarant of an out-of-court statement was unavailable, the statement could still be admissible if it bore adequate "indicia of reliability."[178] Reliability could be determined in two ways: (1) by proving that the statement fell within a firmly rooted hearsay exception, or (2) by proving surrounding facts that demonstrated particularized guarantees of trustworthiness.[179] The *Crawford* decision, however, holds that cross-examination is the

174. *See* Sandy Banks, *When Victims Refuse to Prosecute*, L.A. TIMES, Jan. 11, 2000, at E1 (quoting a Los Angeles Deputy City Attorney, Grace Kim Lee, before *Crawford*, as saying that domestic violence cases used to rest entirely on the victim deciding whether to file charges, provide evidence, and testify in court—thus, a reluctant witness meant no case—but that prosecutors now were going forward and prosecuting cases without the cooperation of the victim); Stephen Hunt, *Wife Spares Ex-deputy an Abuse Trial*, SALT LAKE TRIB., July 14, 1998, at B1 (explaining that a Utah law that allows judges to dismiss domestic violence charges at the victim's request endangers the lives of domestic violence victims and returns the responsibility of prosecuting defendants to the victim, thereby negating years of progress in domestic violence policy). *Crawford*, of course, dramatically hampers the victimless prosecution techniques and no-drop policy strategy, once again making cases dependent on victim cooperation.

175. *See* Robbins, *supra* note 151, at 217–18.

176. *See* Robbins, *supra* note 151, at 215–17; Hudders, *supra* note 125, at 1041.

177. *See* King-Ries, *supra* note 53, at 301.

178. Ohio v. Roberts, 448 U.S. 56, 65–66 (1980). *See supra* Part II.

179. *Roberts*, 448 U.S. at 66.

constitutionally prescribed method for determining reliability.[180] In effect, this means that testimonial hearsay statements that are not subject to cross-examination, no matter how trustworthy they appear, are not reliable and are barred by the Confrontation Clause.

Thus, testimonial statements relating present sense impressions[181] or excited utterances,[182] statements describing then-existing mental or emotional conditions,[183] statements made for the purpose of medical diagnosis or treatment,[184] and statements qualifying as past recollections recorded[185] no longer automatically pass constitutional muster.[186] Moreover, the Court in *Crawford* recognizes that there will be situations in which the surrounding circumstances of a testimonial out-of-court statement indicate particular guarantees of trustworthiness, but where the Confrontation Clause will prohibit admissibility of the statement due to a lack of cross-examination.[187]

Many results of this new rule simply seem unjust, as what was once considered very reliable hearsay is now excluded.[188] The most egregious examples are those in which the defendant is on trial for murder and the out-of-court statements are the victim's. In the sensationalized O.J. Simpson trial of the 1990s, for example, Judge Lance Ito ruled that statements made by Nicole Brown Simpson in her diary and to friends and relatives describing a history of abuse by O.J. Simpson were inadmissible hearsay.[189] Although Judge Ito stated that "the relevance and probative value of such evidence is both obvious and compelling, especially those statements made just days before the homicide," there was no hearsay

180. Crawford v. Washington, 541 U.S. 36, 68–69 (2004). Some may argue that this was in dicta and that all *Crawford* holds is that the Confrontation Clause procedurally requires cross-examination, regardless of whether cross-examination was conducted for the purpose of determining reliability. That debate is outside the scope of this Note.

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

182. *Id.* 803(2).

183. *Id.* 803(3).

184. *Id.* 803(4).

185. *Id.* 803(5).

186. For a list of "firmly rooted" hearsay exceptions, see *supra* note 34. The only previously "firmly rooted" hearsay exceptions that *Crawford* permits without cross-examination are dying declarations, Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004), and business and public records. *Id.* at 73, 76 (Rehnquist, C.J., concurring). *See supra* note 47.

187. *Crawford*, 541 U.S. at 61–62.

188. *Id.* at 61.

189. *See* Hudders, *supra* note 125, at 1051–52.

exception in the evidence rules permitting him to admit the statements.[190] In response, and shortly after the case was decided, the California legislature enacted a new hearsay exception that permits judges to admit hearsay statements that explain the threat or infliction of physical injury upon the declarant.[191] Regardless of this new rule, however, if the statements are deemed testimonial under *Crawford* and the prosecution cannot prove forfeiture by wrongdoing, the statements would now be barred by the Confrontation Clause because the defendant does not have an opportunity to cross-examine the declarant.[192]

Consider the hypothetical 911 call described in Part I, in which the only evidence that the husband was the cause of the wife's severe injuries is her 911 call, and the woman has since disappeared. Under the *Roberts* analysis, to determine the admissibility of the 911 call against the husband, the court would consider whether the wife's statement to the 911 operator fell under a firmly rooted hearsay exception or whether the surrounding facts demonstrate particularized guarantees of trustworthiness.[193] The statement likely would be admissible using the *Roberts* test as an excited utterance[194] or a present sense impression,[195] or even because the surrounding circumstances demonstrate particularized guarantees of trustworthiness.

After *Crawford*, however, if the wife's statement in the 911 call was found to be testimonial,[196] the statement would be inadmissible unless the defendant had an opportunity to cross-examine her.[197] As the prosecution has no way of locating the wife and cross-examination is not possible, the statement would be barred.[198] Given that there is no evidence besides the 911 call that directly implicates the husband as the cause of the wife's injuries, under current law, the case would likely not even be filed, much less successfully prosecuted.

190. Ruling on Defendant's *In Limine* Motion to Exclude Evidence of Domestic Discord at 5, People v. Simpson, No. BA097211 (Cal. Super. Ct. Jan. 18, 1995), 1995 WL 21768; Hudders, *supra* note 125, at 1052.

191. CAL. EVID. CODE § 1370 (West Supp. 2005) (effective Sept. 4, 1996). *See* Hudders, *supra* note 125, at 1067–68.

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

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

194. FED. R. EVID. 803(2).

195. *Id.* 803(1).

196. *See supra* Part III.A; *supra* note 52.

197. *Crawford*, 541 U.S. at 68–69.

198. *Id.*

F. FORCING A CHANGE IN STRATEGY

By making cross-examination a procedural right of the defendant's, *Crawford* forces domestic violence prosecutors to have victims testify and be subject to cross-examination at the first available opportunity, usually at a preliminary hearing. The majority of domestic violence victims eventually discontinue cooperating with the prosecution by refusing to testify at trial or recanting their stories.[199] Moreover, the longer it has been since the crime occurred, the less likely a domestic violence victim is to participate in the batterer's prosecution.[200] When cases are dependent on testimonial out-of-court statements of the victim, domestic violence prosecutors, in effect, have no choice but to put a victim on the stand at the first available opportunity, for fear that the victim will later disappear or refuse to testify at trial. Forcing this change in strategy will undermine many prosecutors' cases by requiring that prosecutors examine witnesses before having enough information to adequately do so. It also requires prosecutors to show their cards to defense counsel by presenting their evidence early on, diminishing their leverage at the time of plea bargaining and at trial, and allowing defense attorneys time to prepare responses.[201]

G. JEOPARDIZING THE USE OF EXPERT TESTIMONY

The *Crawford* opinion may be understood to mean that experts can no longer rely on a victim's out-of-court testimonial statements in forming their opinions, or that experts can no longer relay the basis of their opinions to the jury.[202] Such a change in expert testimony may have the most significant negative impact of all of *Crawford*'s effects on the prosecution of domestic violence cases.[203] Successful domestic violence prosecutions

199. *See supra* notes 123–24 and accompanying text.

200. *See* Langenberg, *supra* note 125 (explaining that it is important for domestic violence counselors to contact victims right away because it will increase the likelihood that the victim will cooperate with the prosecution); Jeffrey R. Sipe, *Is Prosecution Best Defense Against Domestic Violence?*, INSIGHT ON THE NEWS, Dec. 2, 1996, at 40 ("The longer the case is pending, the more likely it is that the victim will drop charges.").

201. Because all *Crawford* requires is an *opportunity* to cross-examine, to be fair, defense attorneys, too, may have to show their cards to prosecutors by actually cross-examining the witness at the first opportunity. The decision is not as forced, however, as defense attorneys could later argue that they did not have an adequate opportunity to cross-examine the witness or that the witness is not unavailable. *See supra* Part III.B; *supra* notes 89–90.

202. *See* Oliver, *supra* note 101, at 1540, 1552.

203. *See supra* Part III.E. *See also* Post, *supra* note 20 (discussing both an unpublished Kings County, New York case, *People v. Diaz*, 777 N.Y.S.2d 856 (Sup. Ct. 2004), in which a judge refused, on *Crawford* grounds, to allow expert testimony that relied on testimonial out-of-court statements of the deceased victim, and an unpublished federal case, *Howard v. Walker*, No. 98-CV-6427Fe, 2004 U.S.

often depend on the use of expert testimony, allowed by state law,[204] to help judges and juries understand why victims of domestic violence stay with their batterers, refuse to testify, or recant.[205] In particular, experts on battered women's syndrome[206] have become an important tool for prosecutors in convicting batterers.[207] Usually, experts interview victims to determine whether the victim's situation involves battered women's syndrome. Thus, the expert's testimony is inherently based, at least in part, on the victim's out-of-court statements. As with many other in-court determinations, it is within the judge's discretion to allow the victim's out-of-court statements to be admitted into evidence for the nonhearsay purpose of aiding the jury in evaluating the expert's conclusions.[208] Revealing the statements can also help the jury understand battered women's syndrome so that jurors can decide whether it has affected the victim in the particular case. If courts disallow experts from discussing the basis of their opinions, the effects could be detrimental to domestic violence prosecutions.

H. KEEPING VICTIMS IN THE DARK ABOUT THEIR RIGHTS

Depending on what definition of "testimonial" is ultimately adopted,[209] *Crawford* could discourage prosecutors and domestic violence advocates from giving victims information regarding their legal rights. If the definition of "testimonial" is based on the declarant's motives in communicating the statement, surely what declarants know about their legal rights will be considered in deciding whether statements are

Dist. LEXIS 14425 (W.D.N.Y. July 28, 2004), *rev'd* 406 F.3d 114 (2d Cir. 2005), in which a judge allowed the testimony of an expert who had relied on testimonial out-of-court statements, but who would have reached the same conclusion without the statements).

204. *See, e.g.*, CAL. EVID. CODE § 1107 (West 1995 & Supp. 2005).

205. *See, e.g.*, People v. Williams, 93 Cal. Rptr. 2d 356 (Ct. App. 2000); People v. Gomez, 85 Cal. Rptr. 2d 101 (Ct. App. 1999). *See also* Jonathan Bandler, *White Plains*, J. NEWS (Westchester County, N.Y.), Jan. 7, 2004, at 3B (discussing a New York case in which a judge gave a batterer a twenty-two years-to-life prison sentence, despite a statement by the victim recanting her testimony regarding abuse, after the judge heard the testimony of a domestic violence expert who said it was common for battered women to deny or recant abuse when facing their attackers in court).

206. The California Supreme Court noted that battered women's syndrome has been defined as "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." People v. Humphrey, 921 P.2d 1, 7 (Cal. 2004).

207. *See supra* Part III.E.

208. FED. R. EVID. 703 ("Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.").

209. *See supra* Part III.A.

testimonial. If they are aware that they are incriminating their batterers and making statements that could be used in court to convict their abusers, the statements are more likely to be found testimonial than if they are unaware of the consequences of their statements. In essence, the more declarants know, the more likely their out-of-court statements are to be found testimonial, and the more likely they are to be barred by the Confrontation Clause.[210] Thus, if the declarant's intent is used to define what is testimonial, there is a particularly strong incentive not to inform domestic violence victims about their legal rights.

V. MITIGATING *CRAWFORD*'S NEGATIVE IMPLICATIONS ON THE PROSECUTION OF DOMESTIC VIOLENCE

Even in the aftermath of *Crawford*, continuing the downward trend in nationwide domestic violence incidences[211] and successfully prosecuting domestic violence is still possible, if certain crucial changes are made. A combination of clarification by the Supreme Court, and legal reforms and institutional changes made by law enforcement, prosecutors, and domestic violence advocates will go a long way toward mitigating *Crawford*'s detrimental effect on domestic violence prosecution. This can be done without undermining *Crawford*'s goals or denying criminal defendants their constitutional rights.

A. CLARIFYING *CRAWFORD*

Successfully prosecuting domestic violence cases and decreasing the overall number of domestic violence incidences depends on how *Crawford*'s ambiguities are clarified and interpreted. In the wake of *Crawford*, the Supreme Court should clarify the following: the continuing validity of *Ohio v. Roberts*; the definitions of "testimonial," "unavailable," and "opportunity to cross-examine"; the standard for forfeiture by wrongdoing; and the status of expert testimony.

210. *See* King-Ries, *supra* note 53, at 324–25 (arguing against Richard Friedman and Bridget McCormack's definition of "testimonial," which is based on a reasonable declarant's motivations in making the statement, calling the definition "cynical and simplistic," and stating that "[o]n their terms, no domestic violence victim could ever have a truly excited utterance because she holds prior knowledge of the ability to use the statement in investigation or prosecution"). *See* Friedman & McCormack, *supra* note 52, at 1240–42.

211. *See* Max, *supra* note 24 (describing the downward trend in California).

1. The Continuing Validity of *Roberts*

Ohio v. Roberts should still be good law for the purpose of determining the admissibility of nontestimonial statements and the general reliability of out-of-court statements.[212] *Crawford* should not mean that criminal defendants no longer have a right to have only reliable evidence presented against them. To ensure that defendants' rights are respected, *Crawford* should complement the requirements of *Roberts*, not replace them.

Moreover, *Roberts* should remain the test for guaranteeing a criminal defendant's due process rights. Although this would mean that domestic violence prosecutors, and prosecutors in general, would face additional barriers to the admissibility of evidence, prosecutors would know what those barriers are and would be able to prepare for them. The constitutional requirements should be complemented by legislation that allows reliable hearsay to be admitted in domestic violence and child abuse cases, such as California's hearsay exception for statements that "purport[] to narrate, describe, or explain the infliction or threat of physical injury upon the declarant."[213] These measures would safeguard a defendant's right to a fair trial, while better enabling the government to prosecute domestic violence perpetrators using reliable evidence.

2. The Definition of "Testimonial"

The Supreme Court should clearly define what statements qualify as testimonial and are thus subject to *Crawford*'s requirements. To satisfy *Crawford*'s two main goals,[214] there should be a two-step analysis to determine whether a statement is testimonial: a testimonial statement should be either (1) "ex parte in-court testimony or its functional equivalent,"[215] or (2) a statement that an individual declarant made with the purpose that the statement be available for use at a trial for the same crime about which the statement was made. The first stage of the analysis is a categorical, objective determination. Ex parte in-court testimony or its

212. Ohio v. Roberts, 448 U.S. 56 (1980). *See supra* Part II.

213. CAL. EVID. CODE § 1370 (West Supp. 2005).

214. *See supra* Parts II, III.A. The two goals of *Crawford* are (1) to prevent a method of criminal procedure that allowed ex parte examinations of witnesses to be used as evidence against the accused, and (2) to categorically require that if the declarant is unavailable, the defendant has an opportunity to cross-examine the declarant before the testimonial out-of-court statements can be offered against the defendant at trial. Crawford v. Washington, 541 U.S. 36, 49–53 (2004).

215. *Crawford*, 541 U.S. at 36, 51 (citing Brief for the Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410)).

functional equivalent should include affidavits, custodial examinations, depositions, prior in-court testimony that the defendant was unable to cross-examine, confessions, and the like.[216] The second stage of analysis is a subjective, individual analysis that requires the court to examine the declarant's motive in making the statement. The two-stage analysis serves to protect a defendant against violations of Confrontation Clause rights by both the government, when preparing cases against the defendant, and the declarant, when making statements that are designed to serve as potential evidence against the defendant.

The second stage of the analysis is a much narrower definition of "testimonial" than many scholars have proposed.[217] By taking the point of view of the individual, the declarant is not presumed to have the motivation that a "reasonable person" in the declarant's position might have had.[218] Only the declarant's actual motives in making the statement are considered through this fact-based analysis. Limiting testimonial statements to those made with the purpose that the statements be available for use at trial prevents a testimonial classification when the declarant was motivated by something other than a desire to aid in prosecuting the defendant. For example, statements made for the purpose of getting help from police or receiving medical attention would generally be nontestimonial and would be admissible if found to be reliable according to the hearsay rules. Allowing such reliable statements would limit the unjust outcomes caused by *Crawford*.[219]

The "for that crime" requirement also narrows the definition of "testimonial." Statements made regarding conduct for which the defendant is not charged are not considered testimonial in the instant case. This includes out-of-court statements regarding prior uncharged misconduct. These statements are admitted as circumstantial evidence, rather than direct evidence of the defendant having committed the crime and as such, the statements do not have as strong an evidentiary effect as direct evidence would have. Thus, defense attorneys can more easily argue their insignificance to the jury. This evidence serves a purpose other than to prove directly that the defendant committed the charged crime.

The statements of domestic violence victim-witnesses who call 911 or seek police protection should be considered nontestimonial under any

216. *Id*. at 51–52 (citing Brief for the Petitioner, *supra* note 215, at 23, and White v. Illinois, 502 U.S. 346, 356 (1992) (Thomas & Scalia, JJ., concurring)).

217. *See supra* Part III.A and note 53.

218. *See supra* Part III.A.

219. *See supra* Part IV.E.

definition of "testimonial."[220] Domestic violence victims who call 911 or seek police protection are motivated by an urgent need for help and safety, not a desire to have their batterers arrested and prosecuted. The fact that the overwhelming majority of domestic violence victims refuse to cooperate with the prosecution shortly after their batterers are arrested evidences this assertion.[221] Asserting that victims' 911 calls are motivated by a purpose other than protecting themselves and their children is a disingenuous legal fiction. Any proposed definition that results in an opposite outcome must be reexamined.

3. The Definition of "Unavailable"

The Supreme Court should clarify what a determination of "unavailability" requires after *Crawford*.[222] If the test for the unavailability of a healthy, absent witness requires that prosecutors have to prove a good faith effort to secure the witness's attendance, the Court should define what qualifies as a good faith effort.[223] In creating such a definition, the Court must balance a defendant's Sixth Amendment rights with a victim's Fourth and Fifth Amendment rights.[224] Thus, the requirements for securing witnesses' attendance should not force prosecutors to resort to any means possible to get their witnesses to come to court, such as threatening them or jailing them.[225] The results of such a rule would be to further endanger domestic violence victims and discourage reporting domestic violence.

220. *See supra* note 52.

221. *See supra* notes 120–22 and accompanying text.

222. *See supra* Part III.B. It is useful to note that the unavailability standard is only implicated in practice when the declarant's prior statements were cross-examined by the defendant. This is because *Crawford* holds that testimonial statements that were not subject to prior cross-examination (and are not subject to cross-examination at trial) are inadmissible, regardless of the declarant's unavailability.

223. Barber v. Page, 390 U.S. 719, 724–25 (1968).

224. The Fourth Amendment mandates,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Fifth Amendment states,

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

225. The constitutional implications of requiring prosecutors to utilize any means at their disposal to secure witness attendance raises significant questions in light of available federal and state witness-detention statutes. *See* 18 U.S.C. § 3144 (2000); CAL. PENAL CODE § 1332 (West 2004). *Compare In re*

Judges should be able to make a finding of unavailability for domestic violence victims much like they do for child witnesses and the mentally incompetent. This could be accomplished by revising the language of Federal Rule of Evidence 804(a)(4) to include the witness's continuing health and safety in the court's consideration of the witness's unavailability.[226] Separate from establishing a forfeiture by wrongdoing claim, it should be within judicial discretion to determine if, in a particular case, the potential for extreme mental or emotional distress to the victim caused by testifying warrants a finding of unavailability. As in cases of severe child abuse, this can be shown through the use of expert testimony. To ensure *Crawford*'s goals are met, if witnesses simply refuse to appear, despite a court order, and are unwilling to explain their absence to the judge, the court should not make a finding of unavailability.

4. The "Opportunity to Cross-examine" Requirement

The Supreme Court should clarify what "opportunity to cross-examine" means after *Crawford*.[227] Primarily, the Court should resolve the confusion that the *Crawford* opinion's ambiguous "defend or explain" language[228] created. The Court should clarify that as long as a witness takes the stand, the defendant has an opportunity to cross-examine the witness, regardless of whether the witness remains silent or recants earlier statements. The significance of a witness's testimony is for attorneys to argue and for the jury to determine. Moreover, if the defendant had any prior opportunity to cross-examine the witness regarding the out-of-court statement, this should satisfy the requirement. Again, to ensure *Crawford*'s goals are met, judges in domestic violence cases should be aware of the significant possibility that the victim-declarant will be unavailable for cross-examination at a later time and thus should allow defense attorneys the time and leeway to adequately cross-examine the witness when the witness is available.[229] And, in accord with pre-*Crawford* case law, a

Francisco M., 103 Cal. Rptr. 2d 794 (Ct. App. 2001) (allowing juvenile witnesses to be incarcerated for several months to guarantee their attendance as witnesses at trial), *with In re* Jesus B., 142 Cal. Rptr. 197 (Ct. App. 1977) (holding that the State's prolonged detention of a juvenile witness was unconstitutional).

226. *Cf.* Maryland v. Craig, 497 U.S. 836, 854–55 (1990) (holding that, upon a showing of likely psychological trauma to a child resulting from testifying in court in a child abuse trial, the child could testify via one-way closed-circuit television, despite the face-to-face requirement of the Confrontation Clause).

227. *See supra* Part III.C.

228. Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004).

229. If jurisdictions switch to fast-track domestic violence prosecutions, this requirement becomes almost inapplicable to domestic violence cases, as the first opportunity to cross-examine would likely

defendant should only be found to have had a prior opportunity to cross-examine the declarant when the defendant was represented by counsel, the defendant's counsel had an adequate opportunity to cross-examine the witness on the prior occasion, and the defendant had substantially the same motive for cross-examining the witness on the prior occasion as the defendant has now.[230]

5. The Applicable Standard for Establishing Forfeiture by Wrongdoing

As the most significant post-*Crawford* ambiguity for the prosecution of domestic violence cases, the Supreme Court should clarify the forfeiture by wrongdoing exception to a defendant's Confrontation Clause rights.[231] The standard for forfeiture by wrongdoing should not require a showing of the defendant's intent to prevent a witness from testifying.[232] The equitable theory behind the forfeiture by wrongdoing exception is that people should not benefit from their own wrongdoings.[233] Regardless of their intent in doing so, people who, through their own wrongful acts, prevent witnesses from testifying should not be permitted to benefit from that wrongdoing. When considering forfeiture claims, judges should be able to consider the same criminal acts for which the defendant is currently on trial, just as they do for evidentiary rulings.[234]

6. Expert Reliance on Testimonial Out-of-court Statements

The Supreme Court should clarify that *Crawford* does not prevent experts from relying on testimonial out-of-court statements when forming their opinions, nor does it prevent experts from revealing the basis of their conclusions to the jury after a judicial finding that the statements are more probative than prejudicial.[235] These statements are simply not offered for

be the only one. For homicides and other felony crimes that often involve preliminary hearings, however, this should be the rule.

230. *See supra* notes 85–87; *supra* Part III.C.

231. *See supra* Part III.D.

232. The forfeiture by wrongdoing requirement in the evidence rules also should not require a showing of intent. FED. R. EVID. 804(a)(5) ("A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence due to the procurement or wrongdoing of the proponent of the statement *for the purpose of preventing the witness from attending or testifying.*" (emphasis added)).

233. Reynolds v. United States, 98 U.S. 145, 158–59 (1878).

234. FED. R. EVID. 801(d)(2)(E). Judges regularly make the preliminary factual determinations necessary for evidentiary rulings, even when those determinations coincide with the determinations necessary to find a defendant guilty of the crime for which the defendant is on trial. For example, judges may admit a coconspirator's statement based in part on the content of that same statement. *Id.*

235. FED. R. EVID. 703. *See supra* Part III.E.

the truth of the matter asserted and, as *Crawford* indicates, a defendant's Confrontation Clause rights bar only testimonial *hearsay* statements.[236] Thus, revealing the basis of an expert's opinion is no more of a backdoor approach to getting inadmissible hearsay into evidence than any other rule that permits admitting of out-of-court statements not offered for the truth of the matter asserted.[237]

Expanding the *Crawford* holding to include statements not offered for the truth of the matter asserted dramatically undermines the use of expert testimony and jeopardizes the use of an enormous amount of other evidence. As discussed in Part IV.G, many of today's domestic violence cases depend on expert testimony. Juries also need experts to be allowed to reveal the basis of their opinions in order to weigh the validity of the expert's conclusions. The judge's evaluation of whether a statement is too prejudicial to be admitted should be sufficient to protect the defendant's interests.[238] We should trust the jury trial process to fairly evaluate the evidence presented against a defendant because, like confrontation, it is the constitutionally prescribed method for doing so.

B. REFORMS FOR LAW ENFORCEMENT

As an important aspect of continuing to successfully prosecute domestic violence after *Crawford*, law enforcement has to work closely with domestic violence advocates and prosecutors to build cases that will ultimately lead to the conviction of batterers. Proper training of law enforcement officers is critically important. Specifically, they should be trained about domestic violence so they can better understand the nature and severity of the problem, the psychology and motivations of both the batterer and the victim, and the evidence prosecutors need to successfully try domestic violence cases.

1. Steps that Should Be Taken when the Crime Occurs

Police officers responding at the scene of the crime should know how to speak with a victim to get the information they need to assess the situation without interrogating the victim. They should know how to properly document those conversations to increase the likelihood that

236. Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004). *See supra* note 8.

237. *See* Carlson, *supra* note 103, at 592–93 (arguing that the party offering the expert testimony can use the testimony as a "back door exception to the hearsay rule" to get the jury to hear untrustworthy evidence). *See supra* Part III.E; *supra* notes 103–06 and accompanying text.

238. *See* FED. R. EVID. 703.

prosecutors will be able to use victims' out-of-court statements. By keeping the conversation focused on addressing the victim's immediate safety concerns, the statements are less likely to be considered testimonial under either a definition that looks to the motivations of law enforcement in eliciting the statement or one that looks to the motivations of the victim in making the statement.[239] Police officers at the scene should also understand hearsay and know the exceptions to the hearsay rule, so that they can describe in their reports the surrounding circumstances that indicate those exceptions. This will help increase the likelihood a statement will get into evidence once the requirements of *Crawford* have been met.[240]

As domestic violence victims' out-of-court statements often come from their initial 911 calls for help, properly training 911 dispatchers in light of *Crawford* is also vital. Dispatchers, like officers on the scene, should limit their questioning to assessing the risk of the situation and getting the victim safe, in order to avoid the victim's statements being classified as testimonial.[241]

For both police officers responding to the scene and 911 dispatchers, there should be a very clear divide between ensuring victims' safety and gathering evidence for future prosecution of the batterer. Perhaps there should even be separate lines of questioning,[242] police officers with

239. *See* People v. Newland, 775 N.Y.S.2d 308, 309 (App. Div. 2004) (finding that a brief, informal comment to an officer conducting an investigation that was not made in response to structured police questioning should not be considered testimonial); State v. Forrest, 596 S.E.2d 22, 27 (N.C. Ct. App. 2004) (holding that remarks initiated by a witness to police immediately after a rescue were nontestimonial), *aff'd*, 611 S.E.2d 833 (N.C. 2005); *supra* Part III.A. Furthermore, as one scholar remarked,

> [A]s to statements made to police at the scene of an incident, courts in New York and throughout the country have held that responses to police officers during a preliminary field investigation are not barred as 'testimonial' statements under *Crawford* if the statements and the circumstances in which the statements were made lack the requisite formality to constitute a police interrogation.

Decision of Interest, *Witness' Statements to Police in Patrol Van Are Not Testimonial Under "*Crawford*"*, N.Y. L.J., Dec. 10, 2004, at 19. *But cf.* Moody v. State, 594 S.E.2d 350, 354 (Ga. 2004) (concluding that statements of a deceased victim made to a police officer during an investigation of a separate incident involving defendant two years prior were testimonial, and finding that admission of these statements was error).

240. For example, officers can document the tone of voice of the declarant, the surrounding circumstances, and the time the statement was made, to help prosecutors make an excited utterance argument under Federal Rule of Evidence 803(2). Wynn, *supra* note 153 (explaining how the Los Angeles Police Department trains its officers to make notations indicating excited utterances, then existing physical or mental states, and information relating to other hearsay exceptions in their police reports when victims make statements). *See also* Gwinn, *supra* note 148, at 28–30.

241. *See supra* Part III.A; *supra* note 52.

242. For example, there could be one line of questioning designed to assess and address the victim's safety considerations and another line of questioning designed to gather information and

separate responsibilities,[243] or separate phases of police response.[244] And, to increase the effectiveness of evidence-gathering at the scene of the crime, jurisdictions should continue to train law enforcement in victimless prosecution techniques, gathering evidence to prosecute cases regardless of whether the victim will testify at trial. For example, some jurisdictions have had success giving video cameras to law enforcement to take on domestic violence calls so they can show judges and juries the severity of the injuries and the look and feel of the scene of the crime, regardless of whether the victim testifies.[245]

Finally, domestic violence advocates should accompany law enforcement to the scene of the crime itself or make contact with victims as soon as possible thereafter.[246] This will ensure that support of the victim starts immediately and will increase the likelihood that the victim will cooperate with the prosecution and testify at trial. Domestic violence advocates can assist law enforcement in addressing the victim's immediate safety, and can also help address the victim's concerns regarding housing, food, money, children, the criminal justice system, and immigration status, among other obstacles that may otherwise prevent the victim from attempting to break the cycle of violence and cooperate with prosecution.

2. Institutional Changes to Postincident Response

There are a number of institutional changes that law enforcement should make in order to better address domestic violence in light of

evidence for prosecution. Depending on the definition of "testimonial" adopted by the court, responses to the first line of questioning likely would be nontestimonial, while responses to the second line of questioning likely would be testimonial. *See supra* Part III.A.

243. For example, one officer could work to secure the safety of the situation, while another officer gathers evidence. Depending on the definition adopted by the court, statements made to the first officer likely would be nontestimonial and statements made to the second likely would be testimonial. *See supra* Part III.A.

244. For example, phase one of the law enforcement response would be assessing the situation and securing the victim's safety, and phase two would be gathering evidence for prosecution. Depending on the definition of "testimonial" adopted by the court, statements made during phase one likely would be nontestimonial, and statements made during phase two likely would be testimonial. *See supra* Part III.A.

245. *See, e.g.*, Leonard, *supra* note 120 (quoting the Sheriff of Orange County, California, as saying that the cameras "will provide clearer pictures of injuries and capture other evidence, such as a victim's pleas for help" and that the footage "should prove especially useful in cases where victims caught in a tangle of dependency, guilt, and love often retract earlier statements to police and refuse to testify against their attackers").

246. *See, e.g.*, Langenberg, *supra* note 125 (reporting on the success of a program in Manatee County, Florida, in which domestic violence counselors follow up on domestic violence reports by going the following day to the locations where domestic violence was reported, to help victims leave their batterers and cooperate with prosecuting them).

Crawford. Detectives investigating domestic violence cases should follow up with victims quickly. Because victims are most likely to cooperate when the violent incident is most recent, detectives will often have only a small window of opportunity to get the information they need from the victim. Not only will early contact help to provide prosecutors with more evidence, but also, it will increase the likelihood that the victim will testify.

Law enforcement should also recognize that oftentimes their jobs will not end when the batterer is in custody. They should continue evidence-gathering efforts beyond the arrest of the batterer to help the prosecution prove forfeiture by wrongdoing claims and explain why victims are unavailable. Such efforts would include recording threatening phone calls from the batterer or the batterer's friends or family, documenting when batterers stalk and harass their victims or their victims' families, and verifying violations of restraining orders.[247]

Finally, there should be separate interviews of victims conducted by social workers, psychiatrists, and medical doctors that are done for assessment and treatment purposes rather than for evidence-gathering purposes.[248] The interviews should also be conducted at the recommendation of domestic violence advocates, not law enforcement, and should not be conducted in law enforcement offices. This will decrease the likelihood that the out-of-court statements made during those interviews will be considered testimonial at trial.[249]

C. SUGGESTIONS FOR DOMESTIC VIOLENCE PROSECUTORS

Domestic violence prosecutors could implement several changes that would dramatically improve the chances of continued success with domestic violence prosecution after *Crawford*. Three important focus areas

247. *See, e.g.*, Owens, *supra* note 171 (citing one case in Lake County, Florida, in which a prosecutor is planning to use tape recordings of threatening phone calls made to the victim by the batterer while the batterer was still being held in custody as evidence that the victim is refusing to testify because of the defendant's wrongful act).

248. *See* Victor I. Vieth, *Keeping the Balance True: Admitting Child Hearsay in the Wake of* Crawford v. Washington, UPDATE (Am. Prosecutors Res. Inst., Alexandria, Va.), 2004, http://www.ndaa-apri.org/publications/newsletters/update_volume_16_number_12_2004.html (arguing that "forensic interviews," if done as part of a multidisciplinary response to the possibility of abuse, "*are not primarily for the purpose of criminal litigation*," but rather for the purpose of treatment; therefore, such interviews should not be seen as producing testimonial statements under *Crawford*). *See also* Post, *supra* note 20, at 1 (quoting one deputy county prosecutor as saying that *Crawford* gravely jeopardizes multidisciplinary interviews, and recommending that prosecutors and law enforcement discontinue their participation in such interviews, leaving the interviews to social workers, child psychiatrists, and medical doctors).

249. *See supra* Part III.A.

are to better train prosecutors to understand the unique nature of domestic violence prosecution, to make changes to the method of prosecuting domestic violence cases, and to ensure that victims are safe and comfortable with testifying.

1. Training Prosecutors to Understand the Unique Nature of Domestic Violence Prosecution

Domestic violence prosecutors should be zealously prosecuting domestic violence cases. Prosecutors, like law enforcement officers, should have training in domestic violence patterns, so that they can understand the nature and severity of the problem and the psychology and motivations of both the batterer and the victim. They should know why victims recant, feel like they are unable to testify, or refuse to come to court. This will help prosecutors explain victims' actions to judges and juries.[250] It may also help to establish the victims' unavailability or forfeiture by wrongdoing claims. Because domestic violence victims are often not available to testify, domestic violence prosecutors, in particular, should be thoroughly trained in the status of Confrontation Clause law after *Crawford* and the legal arguments that are available to get around it.[251] They also should be familiar with the hearsay rules of evidence so they can better argue for the admission of nontestimonial out-of-court statements.

2. Changes in the Method of Prosecuting Domestic Violence Cases

Prosecutors should modify the methods they use to prosecute domestic violence. They should more actively prosecute violations of restraining orders and protective orders.[252] This would send a message to batterers that their actions will not be tolerated, show victims that law enforcement is

250. In addition, better understanding domestic violence victims will help combat prosecutors' feelings of frustration and discouragement, which have become a big problem in domestic violence prosecution. Prosecutors' difficulty in convicting batterers, which is due in large part to victims' reluctance to cooperate, leads to high turnover and undertrained staff. *See* Booth, *supra* note 12; Wynn, *supra* note 153.

251. For example, prosecutors should be aware of the possibility of arguing that a victim's statement is nontestimonial or that the forfeiture by wrongdoing doctrine applies. *See supra* Parts III.A, III.D.

252. *See* Hector Castro, *"Black Hole" Exists in Justice System, Law on Protection Orders Is Not Being Enforced, Say King County Prosecutors*, SEATTLE POST-INTELLIGENCER, Mar. 16, 2004, at B4 (reporting that prosecutions for violating protection orders are rare events nationwide); Richard Espinoza & Linda Man, *Court Orders Not Enough to Protect Some From Domestic Abusers*, KANSAS CITY STAR, Apr. 28, 2004, at D6 (discussing how protection orders are notoriously unhelpful in preventing abusers who are bent on attacking victims, and proposing legislation that would require bonds to be revoked and defendants to be sent back to prison for violating protective orders).

supportive of their efforts to leave, and likely could be used to establish a forfeiture by wrongdoing claim in a future case. Prosecutors should make it clear to batterers that the government, not the victim, is to blame for their being prosecuted. Sending this message could help relieve the victim from retaliation by the batterer. For cases that have already been prosecuted in which batterers have received sentences including intervention programs, prosecutors should schedule status conferences to ensure completion and encourage compliance. Moreover, prosecutors should stop prosecuting domestic violence crimes as lesser offenses, such as disorderly conduct, that carry only small penalties or fines. Such prosecutions only serve to make batterers retaliate against victims for reporting the crime, without the benefit of protecting the victim from the batterer through jail time or treatment programs.[253] This puts the victim in danger and makes it less likely the victim will contact law enforcement in the future.

Other steps prosecutors can take to increase their likelihood of successfully prosecuting domestic violence cases after *Crawford* include implementing fast-track domestic violence prosecution programs, in which domestic violence cases are given priority and prosecuted as quickly as possible.[254] By limiting the amount of time the batterer has to contact the victim after the crime has been committed and before the trial takes place, these programs help keep the victim safe and make it more likely that the victim will testify.[255] Fast-track programs capitalize on the fact that batterers are most remorseful and most likely to recognize that they have a

253. *See* Robbins, *supra* note 151, at 211 (arguing that many domestic violence prosecutors "undercharge cases of domestic abuse by filing as misdemeanors crimes which actually constitute felonies"); Pennington, *supra* note 126 (reporting that in Sheboygan County, Wisconsin, many domestic violence cases are prosecuted as disorderly conduct, carrying a lesser penalty, because these charges are easier to prove, and that one woman's batterer received only a $200 ticket when she reported the crime).

254. *See, e.g.*, Susan Drumheller, *Bonner County Women Can Fight Back . . . Legally*, SPOKANE SPOKESMAN REV. (Bonner County, Idaho), Dec. 26, 2000, at A1 (reporting an increase in prosecutorial success rates that resulted from making domestic violence cases a priority, moving on the cases immediately, and getting perpetrators to plead guilty); Jackson, *supra* note 154 (noting that in Jefferson County, Colorado, many cases are resolved within twenty-four hours, and most within a few weeks; and citing that one goal of the Fast Track program is to keep the victim safe and get the victim to testify, but another is getting batterers to plead guilty in the brief period after the violent attack when they are most remorseful).

255. *See* Jackson, *supra* note 154.

problem immediately after a violent episode,[256] during which time batterers more readily plea bargain and agree to tougher sentences.[257]

3. Ensuring the Victim Is Safe and Comfortable with Testifying

Victims of domestic violence should be introduced to domestic violence advocates and support groups at the first available opportunity. Domestic violence advocates can address the reasons a particular victim is reluctant or refusing to cooperate with prosecution. The more support a victim receives, the more likely it is the victim will testify. The victim also should be notified when the batterer is bonded out of jail or released from prison.[258] Prosecutors and domestic violence advocates should work with the victim to help ensure the victim's safety at all times throughout the prosecution, including following the batterer's release. This will help victims trust prosecutors and the criminal justice system and may make them more likely to testify.

Prosecutors should better prepare victims to testify by helping them understand the legal procedure and attempting to make a court appearance less intimidating. Like much of the general public, many domestic violence victims' only knowledge of the criminal justice system comes from highly dramatized and disheartening television shows. Television portrayals can make a court appearance seem terrifying, even if the victim's batterer is not going to be there. Prosecutors can alleviate many intimidating aspects of testifying that have little or nothing to do with the batterer, in order to make it more likely that the victim will appear.

The prosecution should work closely with the domestic violence advocate to decide what the best strategies are for getting the victim to testify or whether, for safety reasons, the victim should testify at all. A victim may need transportation to court, clothes to wear in court, a chaperone to protect the victim from the batterer's family or friends while in the building, or any number of other supportive services. Informing the

256. *See id.* (explaining that "the majority of domestic-violence offenders go through a period of remorse following an attack that advocates call 'hearts and flowers' [during which batterers] are most receptive to acknowledging that they have a problem and that they might benefit from court-ordered counseling," and noting that the Jefferson County, Colorado, Fast Track program has taken advantage of this period of batterer remorse to secure twice as many guilty pleas as other jurisdictions in the state).

257. *Id.*

258. For example, in Los Angeles County, California, the Sheriff's Department provides the Victim Information and Notification Everyday service as a free and anonymous way for victims to monitor the incarceration status of their batterers and to be notified by telephone when their batters are released from prison. *See* VINE Fact Sheet, http://www.appriss.com/sitedocs/CA%20Los%2Angeles%20fact%20sheet.pdf (last visited Dec. 27, 2005).

victim of all of the consequences of deciding whether to cooperate can help victims see the larger picture and think about their long-term interests. In some circumstances, it may benefit the victim for the prosecutor to use a body attachment to a subpoena to compel a victim's testimony. Body attachments make victims safer by enabling victims to tell their batterers that they had no choice but to cooperate or face arrest.[259] Prosecutors should also continue to employ "victimless prosecution" techniques and no-drop policies to help remove the responsibility, and the blame, for prosecuting the batterer from the victim.

D. SUGGESTIONS FOR DOMESTIC VIOLENCE ADVOCATES

If the role of domestic violence advocates in addressing domestic violence is expanded, they can make a significant contribution both to the successful prosecution of domestic violence cases after *Crawford*, and to decreasing the prevalence of domestic violence. Advocates should play a key role in getting victims to testify by working with victims to address their reasons for not testifying. They should earn the victim's trust, help the victim prepare for court, attend court with the victim,[260] work consistently to ensure the victim's safety, and understand the criminal justice system and the prosecutorial process, in order to explain it to the victim.[261] Advocates should help victims document contact they have with the batterer or the batterer's friends and family. They should also encourage victims to communicate their concerns and fears about testifying to judges, in order to help establish unavailability and forfeiture by wrongdoing.[262]

Advocates themselves may need to testify as to why a victim they are working with refuses to testify or cooperate when there is evidence of the batterer attempting to prevent the victim from testifying. Because *Crawford* bars only the testimony of declarants who are unavailable for cross-examination, advocates should support any manner in which victims choose to tell their stories, even if they choose to recant.[263] Advocates should inform victims of the consequences of both testifying and not testifying, and should help victims decide on a course of action appropriate

259. Booth, *supra* note 12.

260. Advocates may be able to sit with victims for moral support while they testify in court and should be available to do so. For example, California law permits advocates to sit with the victim, or sit between the victim and the defendant, while the victim is testifying in court.

261. *See* Pincus, *supra* note 13.

262. *Id.*

263. *Id.* For a discussion of the confusion surrounding the opportunity to cross-examine the declarant, see *supra* Part III.C.

for their situation.[264] Lastly, domestic violence advocates should offer options for victims besides prosecution[265]—such as education, support groups, immigration services, shelters, and poverty assistance[266]—so that victims have fewer reasons to stay with their batterers.

E. OTHER LEGAL REFORMS

Numerous legal reforms should be implemented that would increase the success rates of domestic violence prosecutions and aid in ensuring a continued decrease in nationwide domestic violence incidences, despite *Crawford*.[267] First, separate courts should be set up to hear domestic violence cases, with judges who are familiar with the unique characteristics of the crime.[268] Such a system would lead to judges being more familiar with victims' characteristic behaviors and better understanding the unique difficulties of prosecuting domestic violence cases. It would also serve to foster more consistent treatment of offenders both within a case and between cases. Perhaps most importantly, it would help ensure that the judges hearing domestic violence cases are comfortable with the applicable legal standards and use consistent definitions of concepts like "testimonial" and "unavailable" in their decisions. More consistency would increase predictability and better enable prosecutors to bring successful cases. Furthermore, when sentencing domestic violence perpetrators, judges should keep in mind that empirical data indicates that short-term counseling programs are ineffective and may even further endanger the victim.[269] Accordingly, long-term and very intensive counseling programs

264. Pincus, *supra* note 13.

265. *See* Estrich, *supra* note 128 (criticizing the limited remedies the criminal justice system provides to victims, which often leave victims with a choice between prosecution or nothing); Joyce Shelby, *Abuse Figures Mislead Panel*, DAILY NEWS (N.Y.), Apr. 29, 2004, at 3 (quoting New York University School of Social Work Professor Linda Mills as stating that in order to effectively decrease domestic violence incidences, victims need to have more options besides prosecution, and that such options should involve family, clergy, law enforcement, and social services agencies).

266. *See* JODY RAPHAEL & RICHARD M. TOLMAN, TRAPPED BY POVERTY, TRAPPED BY ABUSE: NEW EVIDENCE DOCUMENTING THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND WELFARE 22 (1997), *available at* http://www.ssw.umich.edu/trapped/pubs_trapped.pdf (citing numerous methods by which batterers prevent their victims from being self-sustaining).

267. For a good discussion of other possible legal reforms that may assist in the prosecution of domestic violence cases after *Crawford*, see Linigner, *supra* note 11, at 783–819.

268. *See, e.g.*, Robyn Bradley Litchfield, *Special Report: An Abuse of Trust*, MONTGOMERY ADVERTISER, Apr. 23, 2003, at A1 (crediting the consolidation of domestic violence cases into one court, in Montgomery County, Alabama, with attaining more consistent sentencing of batterers, tougher treatment of repeat offenders, and better services for victims).

269. *See supra* note 154.

should be used for first time offenders, when jail sentences are inappropriate.

Additionally, legislatures should change the law so that bail considerations include prior acts of violence or threats of violence against family members or intimates.[270] A bail determination that recognizes the high recidivism rates among batterers and the heightened risk of danger to domestic violence victims who attempt to leave their batterers will lead to increased bail denials, which, in turn, will give victims an opportunity to get to safety before the batterer is released. This also provides prosecutors and domestic violence advocates an opportunity to support the victim in leaving the batterer before the third phase of the cycle of abuse, gather evidence for forfeiture by wrongdoing claims when the batterer tries to prevent the victim's cooperation, and secure the victim's testimony.

Legislatures should also enact laws that account for victims' need to defend themselves from their batterers. For instance, laws should not require a victim to be arrested for taking defensive measures at the scene of the crime if the victim was not the dominant aggressor.[271] Conversely, laws should require a batterer to be arrested anytime a law enforcement officer sees evidence of domestic violence when responding to the scene of a crime.[272] Finally, and most importantly, in light of *Crawford*, legislatures should enact hearsay exceptions for domestic violence cases, including reliability requirements that specifically apply to nontestimonial statements.[273] This will help make the evidence admissible once the

270. *See* Molton, *supra* note 122, at 4 (discussing a proposed New York State Assembly bill that changes New York's Criminal Procedure Law to recognize a higher level of danger to the victim-witness in domestic violence situations, and which proposes that, in cases where the defendant is charged with domestic violence, bail factors would include threats of violence or prior acts of violence against family member or intimates, including prior convictions or restraining order violations).

271. *See* Steve Jackson, *A Shock to the System*, DENVER WESTWORD, June 11, 1998, *available at* http:/www.westword.com/issues/1998-06-11/news/feature4.html (quoting domestic violence prosecutors and advocates as saying that when victims who are defending themselves against their batterers get arrested themselves, they often plead guilty to take the rap for their batterers, they become less likely to report the crime in the future, and their batterers threaten to call the police on the victims during future attacks).

272. *See, e.g.*, *Breaking the Grip of Fear*, BUFFALO NEWS, Aug. 1, 2004, at A1 (citing one reason for increased arrests and prosecution of domestic violence in Buffalo, New York: a law that requires police officers responding to the scene of the crime to make an arrest if they see evidence of domestic violence).

273. The California Evidence Code's hearsay exception is an example of this type of law, passed prior to *Crawford* in the wake of the O.J. Simpson trial. CAL. EVID. CODE § 1370(a) (West Supp. 2005) (effective Sept. 4, 1996). Section 1370(a) states,

> Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. (2) The declarant is unavailable

requirements of *Crawford* have been met. If these changes are implemented, the progress that has been made in addressing domestic violence should be able to continue, rather than recede.

VI. CONCLUSION

Although the Supreme Court's goals in deciding *Crawford* were laudable, the Court ultimately created an unworkable Confrontation Clause framework that is riddled with uncertainty and undermines its own objectives. *Crawford*'s aftermath of confusion is particularly problematic for the prosecution of domestic violence cases and should be resolved as soon as possible. Simply resolving *Crawford*'s ambiguities will mitigate many of the negative implications of the *Crawford* decision on the prosecution of domestic violence cases. In addition, courts should seek to define *Crawford*'s requirements in ways that do not force prosecutors to take extreme measures to get victims to testify, further endanger victims' safety, exclude even very reliable hearsay, or provide an incentive to keep victims in the dark about their rights. Finally, the Supreme Court should reaffirm that *Crawford* supports the current doctrine regarding the use of expert testimony.

While courts should work quickly to clarify and interpret *Crawford*'s many ambiguities, law enforcement, prosecutors, domestic violence advocates, and legislators should all work just as quickly to implement changes that could mitigate *Crawford*'s negative implications on the prosecution of domestic violence cases. Through legal reforms and institutional changes, it remains possible to continue the accomplishments of the last decade in decreasing domestic violence incidences[274] and successfully prosecute domestic violence perpetrators, even in light of *Crawford v. Washington.*

> as a witness pursuant to Section 240. (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section. (4) The statement was made under circumstances that would indicate its trustworthiness. (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

Id. Laws passed after *Crawford* should specify that they apply to nontestimonial hearsay, however. *See also* Post, *supra* note 20, at 1 (quoting one deputy county prosecutor as saying that state legislatures should be working right now to adopt laws that define hearsay exceptions for nontestimonial statements for use in child abuse and domestic violence cases).

274. Max, *supra* note 24.