Victimless Prosecution of Domestic Violence in the wake Of *Crawford V. Washington*

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Introduction

Domestic violence is unquestionably a massive social problem in American society. The United States Department of Justice has described domestic violence as the most common but least reported crime in America.[1] Because of the complex interpersonal relationships between victims and offenders, domestic violence cases include the unique phenomenon of victims who are unwilling to cooperate in the prosecution of offenders. In the past, when a victim refused to cooperate the prosecution would either not bring charges or request that pending charges be dismissed. Prosecuting attorneys then began pursuing criminal charges even if the victims were unwilling to testify. This paper will discuss the practice of "victimless prosecution" and the impact of *Crawford v. Washington* (2004) where the U.S. Supreme Court ruled that the admission of certain statements by victims into evidence violates the 6th Amendment Confrontation Clause unless the defendant has the opportunity to cross-examine the victim.

Domestic Violence History

Evidence suggesting domestic violence dates back 130,000 years to the Neanderthals.[2] As recent as 1824, the Supreme Court justified domestic violence in the

1 Julie E. Tomz and Daniel McGillis, *Serving crime victims and witnesses, 2nd. ed.* (Washington, DC: U.S. Department of Justice, 1997).

2 James Shreeve, The Neanderthal enigma: Solving the mystery of modern human origins, (New York: Morrow, 1995).

3 *Bradley v. State*, 1 Miss. 156 (1824)

4 April Howard and Susan Lewis, "Herstory of domestic violence: A timeline of the battered women's movement," Minnesota Center Against Violence and Abuse website, 1999,

http://www.mincava.umn.edu/documents/herstory/herstory.html (2 February 2005).

5 Robert C. Davis and Barbara Smith, "Domestic violence reforms: Empty promises or fulfilled expectations?" *Crime and Delinquency* 41, no. 4 (1995 October): 541-552.

case of *Bradley v. State*, where the court ruled that a husband was allowed to "use salutary restraints in every case of a wife's misbehavior, without being subjected to vexatious prosecutions resulting in mutual discredit and shame of all parties concerned (p. 156)."[3] It was not until 1882 when Maryland became the first state to outlaw wife beating. When finally criminalized, a charge of domestic assault carried a punishment of 40 lashes or a year in jail.[4]

In the 1970's, almost 90 years after the first law making domestic assault a crime, grass roots political pressure increased to employ harsher domestic violence laws such as stricter arrest policies.[5] Arrest policy reform would eventually develop into policies that would require police to respond to family violence in an aggressive manner.[6] Despite many laws which had been enacted to protect victims of domestic violence and police having made greater reforms in responding to domestic violence than any other part of the criminal justice system, by the 1990's the number of arrests for domestic assault offenses continued to escalate and domestic violence remained a serious issue.[7]

However, the U.S. Department of Justice, reported that the rate of violence against females by intimates fell 49% from 1993 to 2001, and violence against males by intimates fell 42% for the same period. Also, the number of females killed by intimates fell 22% from 1976 to 2000. These figures could be read to suggest that systemic changes in the way the criminal justice system views domestic violence has had a positive impact on this serious social problem. But even this decreased level of violence is unacceptably

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6. Margaret E. Martin, "Policy promise: community policing and domestic violence victim satisfaction," *Policing* 20, no. 3 (1997): 519.

7 Allison Klein, "Two domestic violence bills likely to pass," *Washington Post on the Web*, 24 March 2005, <http://www.washingtonpost.com/wp-dyn/articles/A58895-2005Mar23.html> (3 September 2005).

high. In 2001, nearly 600,000 women were victims of domestic violence and in 2000 there were 1,247 women killed by intimate partners.[8]

Impact upon Families and Communities

Domestic violence not only affects those abused, but witnesses, family members, co-workers, friends, and the community at large. Children who witness domestic violence are victims themselves and growing up amidst violence predisposes them to a multitude of social and physical problems.[9] Constant exposure to violence in the home and abusive role models teaches these children that violence is a normal way of life and places them at risk of becoming society's next generation of victims and abusers.[10]

It may be perplexing to outside observers, who wonder why a woman would stay with a man who beats her. Despite repeated assaults, which can include trips to the emergency room, serious physical injury, alienation from family and friends, deteriorating self-esteem, children who live in fear, repeated calls for police protection, and threats of death, many women remain with the men who abuse them.[11] The paralyzing affect of fear from the abuser is but one element that keeps the victim silent. Another element is the "love-dependence" relationship developed in which the victim denies the violent part of the aggressor's behavior and gets attached to the perceived

8 Callie M. Rennison, "Intimate Partner Violence, 1993-2001." (U.S. Department of Justice, National Institute of Justice, NCJ 197838, 2003.)

9 William M. McGuigan, "The Effects of Intimate Partner Violence on Children," *Family Relations,* 53 no. 4, (2004): 417.

10 Richard Gelles and Murray A. Straus, Intimate violence: The causes and consequences of abuse in the American family, (Newbury Park, CA: Sage, 1988).

11 Nancy Faulkner, "Domestic Violence: Why women stay," [Electronic Version], (2003). <http://www.prevent-abuse-now.com/domviol.htm#Safety> (9 September 2005)

12 Dee Graham and Edna Rawlings, "Bonding with abusive dating partners: Dynamic of Stockholm Syndrome in dating violence," in Dating violence: Women in danger, B. Levy (ed.), (Seattle, WA: Seal Press, 1991), 121-122.

positive side of the abuser, ignoring their own needs and turning hypervigilant to those of the abuser.[12]

Somewhat similar to the concept of the "love-dependence" phenomenon is Domestic Stockholm Syndrome. According to Brayton, Perkins, and Dunham (2003), in Domestic Stockholm Syndrome, the victim has no outside support and relies completely on her abuser.[13] Domestic Stockholm syndrome is defined as "an interpersonal bond of protection built between a woman victim and her aggressor, within a traumatic and stimulus restricted environment." Domestic Stockholm syndrome originated from criminologist and psychologist Nils Bejerot's term Stockholm syndrome. Bejerot assisted police during the response to a robbery of Kreditbanken at Norrmalmstorg, Stockholm in 1973. During this robbery, bank employees were held hostage for six days during which time they became emotionally attached to their victimizers, and even defended them after they were released. Actions of domestic violence victims are often similar to those of the hostages in the Stockholm bank robbery.[14]

In cases of domestic violence, victims are sometimes fearful and anxious about criminal justice proceedings. Battered women are also concerned about their safety and are uncertain about their future if their abusive partners are charged or convicted.[15] Still others are motivated by their economic situation. These victims fear a loss of income if the abuser goes to prison, and in many instances the abuser is the only provider.[16]

13 Tara T. Brayton, Deane Perkins, and Katherine Dunham. "The need for intervention: The effectiveness of current programs designed to deter family violence," (M.A. thesis, Vermont College of The Union Institute, 2003).

14 Brayton, "The need for intervention," 2003.

15 Tomz, 1997; Harvey Wallace, *Family violence: Legal, medical, and social perspectives* (3rd ed.), (Boston: Allyn and Bacon, 2002).

16 David M. Gersten, "Evidentiary trends in domestic violence," *The Florida Bar Journal* 72 no. 65. [On-line], (1998), http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/d1a19eebaf75020285256adb005d61f5?OpenDocument (30 August

These financial concerns may keep many female victims in abusive relationships. Women and children in this country suffer substantial economic loss upon separation and divorce.[17] Studies indicate that the standard of living for divorced women after divorce falls between 30% and 73%, while that of divorcing men increase by 42% in the same time frame. Many women who establish households independent of battering husbands or partners find themselves in poverty. The number of female-headed households living below the poverty line has nearly doubled since 1970. The most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him.[18] As will be discussed later, this financial dependence of the victim upon the offender may influence domestic assault victims to withhold cooperation from the prosecution of the offender.

Victims Rights Movement

In the early 1960's, crime began a steady rise in the United States, reaching its peak in 1981. By the early 1970's, the effect on American life was evident. In response, the victims' rights movement began on multiple fronts. In the last 20 years, the victims' rights movement has emerged as a powerful source of social, legal, and political change. Numerous milestones mark the progress of the victims' rights movement.[19] In 1972, volunteers founded the first three victim assistance programs, all of which still exist

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2005); Lenore Weitzman, *The divorce* revolution: The unexpected social and economic consequences for women and children in America, (New York: The Free Press, 1985).

17 June S. Berlinger, "Why don't you just leave him?" *Nursing,* 98, (1998): 35-39; T. Henninger, *The American family,* (Harrisburg, PA: The Women's Center, 1986 March); Weitzman, 1985; Pat Evans, "Gender, poverty and women's caring," in C. Baines, P. Evans and S. Neysmith ed., *Women's caring: Feminist perspectives on social welfare, second edition,* (Toronto: Oxford University Press, 1998), 49-50.

18 Edward W. Gondolf, *Battered women as survivors: An alternative to treating learned helplessness,* (MA: Lexington Books, 1988); Lewis Okun, *Woman Abuse: Facts replacing myths,* (Albany: State University of New York Press, 1986).

19 Marlene Young, "History of the Victim's Movement," In Ochberg (ed) *Victims of violence,* (New York: Harper and Row, 1986): 311.

19 Marlene Young, "History of the Victim's Movement", In Ochberg (ed) *Victims of violence,* (New York: Harper and Row, 1986): 311.

today: the Aid for Victims of Crime in St. Louis, Missouri; the Bay Area Women Against Rape in San Francisco, California; and the Rape Crisis Center in Washington, DC. The first shelter for battered women was established in Denver, Colorado in 1974. In 1975, the Law Enforcement Assistance Administration called together leading victim activists to discuss methods of increasing victims' rights. The major result of this meeting was the founding of the National Organization for Victim Assistance [NOVA].[20]

Between 1977 and 1981, it appeared that many of the gains of the victims' movement might be lost when Federal funding began to diminish due to lack of congressional support.[21] In 1978, domestic violence programs created their own national organization, the National Coalition Against Domestic Violence [NCADV], to pursue their specific agendas.[22] On the legislative front, crime victim advocates pressed for reforms, and state legislators enacted laws that increasingly supported victims. In 1977, Oregon passed the first law mandating arrest in domestic violence cases.[23]

Between 1982 and 1986, as the revitalized victims' movement learned to better access the news media, public awareness of victims' issues increased. In 1984, with this awareness came one of the most important events in the victims' movement to date: the passage of the Victims of Crime Act [VOCA]. The Office for Victim's of Crime [OVC]

20 USDOJ, 2005

21 Arthur Lurigio, Wesley Skogan, and Robert Davis, Victims of crime: Problems, policies, and programs, (Newbury Park: Sage Publishing Co., 1990); Young, "History," 311.

22 Young, "History," 311; USDOJ, 2005.

23 Andrea D. Lyon, "Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan," Michigan Journal of Gender & Law 5, (1999): 253; USDOJ, 2005.

24 USDOJ, 2005

was also born out of the 1984 VOCA.[24] The OVC was designated as responsible for administering VOCA, including distribution of VOCA funds to states for existing victim programs. Changes at the federal level led to legislative changes at state levels: Victims' Bills of Rights, proposals for training and education, and expansion of existing victim-witness programs.[25]

From 1987 to the present, the legislative agenda for victim's rights proponents has continued to expand. During this time, political efforts have been more organized and they have presented a clear and cohesive agenda. Successful results of this agenda have included the VOCA reauthorization in 1988,[26] along with the passage in 1994 of a comprehensive package of federal victims' rights legislation as part of the Violent Crime Control and Law Enforcement Act signed President Clinton. This act included the Violence Against Women Act (VAWA), which authorized more than $1 billion in funding for programs to combat violence against women and enhanced VOCA funding provisions.[27] The VAWA has been one most important pieces of legislation promoting women's rights issues.

Women's Rights Issues

Everyday in the United States, thousands of women experience gender-based violence. Stalking, sexual harassment, sexual violence, and domestic violence are examples of human rights violations affecting women at alarming rates in this country. Gender-based violence is a violation of women's human rights and a form of

25 Arthur Lurigio, Wesley Skogan, and Robert Davis, *Victims of crime: Problems, policies, and programs*, (Newbury Park: Sage Publishing Co., 1990); USDOJ, 2005.

26 Lurigio, "Victims," 1990.

27 USDOJ, 2005.

28 Elizabeth Schneider, *Battered women and feminist lawmaking*, (New Haven, CT: Yale University Press, 2000).

discrimination that prevents women from participating fully in society and fulfilling their potential as human beings. Women's human rights are compromised not only by abusers, but also by those who are responsible for protection or providing services to women.[28]

Throughout history, women's movements have focused on American family values, traditional male/female roles, sexism in bureaucracy (including the criminal justice system), and economic discrepancies between men and women. This is the most important precursor of the victims' movement. The definition and discussion of male/female roles have not been the same since it began. The victimization of women and the bureaucratic facilitation of this violence in all areas of society were clarified and politicized. The women's movement stated that the other fifty percent of society should have equal political and economic opportunity and power. A direct result of the increasing power of women was the formation of rape crisis centers and domestic violence shelters in the early 1970's.[29]

The recognition of violence against women as a human rights violation, and the implementation of legal and policy measures to further enforce this recognition, have been pivotal goals of the women's rights movements. Over the past 20 years, sexual assault and domestic violence organizations have produced very effective awareness campaigns and have provided services to women who previously had nowhere to turn for help. The public and policy makers are beginning to understand the prevalence and damaging effects of gender-based violence. Recognition of domestic violence as a violation of women's human rights is critical to the efforts of combating the epidemic.

29 Andrew Karmen, *Crime victims: An introduction to victimology*, (Pacific Grove, CA: Brook/Cole Publishing Co., 1990).

States are obligated under law to take effective steps to protect women from violence and hold batterers accountable and to guarantee women the equal protection of the law.[30]

Response of Law Enforcement and Courts

In addition to the increased awareness of domestic violence, during the past decade, there have been significant changes in the criminal justice system's response to domestic violence.[31] Police intervention can be viewed as an emergency measure intended to stop violence, restore peace, and if necessary arrest a person who has violated the law. Historically in police culture, domestic situations were not viewed as 'real' police work; it was neither glamorous nor rewarding.[32] Bronfman, Butzer, and Stipak (1996) asserted that for the police officer the domestic violence incident was at best a nuisance and at worst a very dangerous situation to be avoided, if possible.[33]

Today, community policing is currently the dominant paradigm of police practice. The change in attitude of the law enforcement community toward domestic violence has been slow and is most often recognized in those officers who work under the philosophy of community policing. The latest evolution has brought about a view, by many, of police as cooperative, responsive, and a respectful community partner.[34]

Because police are usually the first responders to the scene and are often looked upon as the leaders in providing a model response for others, the importance of training

30 Schneider, *Battered women*, 2000.

31 Carl Buzawa and Eve Buzawa, Domestic violence: The criminal justice response,

2nd ed. (Thousand Oaks, CA: Sage Publications, 1996); Sandra Clark, Martha R. Burt, Margaret M. Schulte, and Karen Maguire, *Coordinated community responses to domestic violence in six communities: Beyond the justice system*, (Washington, DC: The Urban Institute, 1996); Emerson Dobash and Russell P. Dobash, *Women, violence, and social change*, (New York, NY: Routledge, 1992); James Ptacek, *Battered women in the courtroom: The power of judicial responses*, (Boston: Northeastern University Press, 1999).

32 Murray A. Straus, *Behind closed doors: Violence in the American family*, (New York: Bantam Dell Publishing Group, 1980); Edna Erez, "Intimacy, violence, and the police," *Human Relations* 39 no. 3, (1986): 265-281.

33 Lois Martin Bronfman, David Butzer, and Brian Stipak, "The Role of Police In Combating Domestic Violence in the United States: A Case Study of the Domestic Violence Reduction Unit, Portland Police bureau," *Policing in Central and Eastern Europe: Comparing Firsthand Knowledge with Experience from the West*, (Slovenia: College of Police and Security Studies, 1996).

34 Margaret E. Martin, "Policy promise: community policing and domestic violence victim satisfaction," *Policing* 20 no. 3, (1997): 519.

law enforcement officers to respond effectively and safely to domestic incidents cannot be overemphasized.[35] Since the police can and should be expected to offer relief to those seeking help, all officers must be trained in emergency procedures so that they can provide immediate assistance.[36]

Effective domestic violence training requires a substantial training investment. Police officers need to understand their departments' intervention strategies, the legal requirements of their actions, and the policies and procedures of their department. Without proper training, everyone will continue to suffer because of confusion and lack of proper direction from the hierarchy of their department. Police policies and procedures must be clear and concise and police intervention must be consistent and uniform to be successful. Every officer of the department must be held to the same standard and expectation of behavior regardless of rank or place in the agency hierarchy.[37]

Although most of the attention has been placed on law enforcement's response to domestic violence,[38] the criminal courts have received attention regarding the increase in processing of domestic violence cases over the past decade.[39] Between 1989 and 1998, for example, domestic relations cases in state courts across the United States grew by 178%. In response to the growing awareness of domestic violence as a serious social problem and rising caseloads, judicial systems have been searching for innovative

35 Richard L. Davis, Domestic Violence: Facts and Fallacies, (Westport, CT: Praeger Publishers, 1998).

36 Bronfman, "The role of police," 1996.

37 Bronfman, "The role of police," 1996; Davis, *Domestic violence,* 1998; Martin, "Policy promise," 519.

38 Lawrence Sherman, "The variable effects of arrest on criminal careers: The Milwaukee Domestic Violence Experiment," *Journal of Criminal Law & Criminology* 83 no. 1, (1992): 137.

39 Margaret E. Bell and Lisa A. Goodman, "Supporting battered women involved with the court system," *Violence Against Women* 7, (2001): 1377-1404.

40 Brian J. Ostrom and Nicole B. Kauder, Examining the work of state courts, 1998: *A national perspective from the court statistics project,* (Williamsburg, VA: National Center for State Courts, 1999).

methods to deal with domestic violence cases.[40] While courts must intervene for the protection of the victim and to hold the abuser accountable for his actions, the court cannot yield its role as the arbiter of justice and become an advocate for either side. As will be discussed herein, the court must balance the protection of victims against the rights of the accused. In addition to meting out punishment for those convicted of wrongdoing, the court cannot abdicate its function as a fact-finding body. It is in this capacity that the court must adhere to Constitutional principles, including the Sixth Amendment right of the accused to confront witnesses.

The Phenomenon of Lack of Cooperation of Victims of Domestic Violence

Battered women enter the justice system unaware of the realities of the modern criminal justice process. They are often unprepared for the number of court appearances, the lack of input they have about plea negotiations and sentencing, and the amount of protection the defendant receives for his constitutional rights. Victims who expect that the process will be predictable and straightforward are often left feeling dissatisfied with the justice system.[41] In some instances, it is this dissatisfaction with the system and lack of support that compel victims to request dismissal of charges. As discussed above, many victims are motivated by financial concerns to stay with an accused batterer. Still others may be coerced by the accused into cessation of the prosecution. As a result, many states have amended domestic violence laws to allow the charging of the assailant by the prosecutor even if the victim will not cooperate.[42]

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41 Deborah P. Kelly, "Have victim reforms gone too far or not far enough?" *Criminal Justice* 6 no. 2, (1991).

42 S. Schmitt, "Combating domestic violence: Prosecution can proceed with or without the victim's participation," 1997, April, Law *and Order Magazine*, 10 February 2005. http://www.lawandordermag.com/

Victimless Prosecution

The practice of victimless prosecution developed in response to the fact that victims of domestic violence are often reluctant or unwilling to cooperate with the prosecution of the accused batterer. Prosecution of cases without the cooperation and testimony of the victim is also known as "evidence-based prosecution." This type of prosecution is called evidence-based because it relies upon physical evidence and testimony of third parties to support the charges against the defendant. Victimless prosecution typically works in conjunction with "no-drop" policies whereby prosecutors refuse to dismiss domestic violence cases at the request of the victim.[43]

As discussed above, there are several techniques employed in "victimless" prosecution. These techniques include creation of specialized subject matter courts and prosecution units for the purpose of expediting the legal process, and correspondingly reducing the opportunities for offenders to exert pressure on victims to abandon prosecution, and reducing other pressures on victims caused by the often-lengthy court process.[44]

Police officers may be given specialized training in the investigation of domestic violence cases. The officers may be trained to assume that the case will be tried without the in-court testimony of the victim. Investigators must collect physical evidence including photographs of injuries and damaged property, bloody clothing, furniture or other tangible physical evidence. In this regard, the investigators treat domestic violence cases in a fashion very similar to the manner in which a homicide is investigated. In the

43 David Jaros, "The lessons of *People v. Moscat*: Confronting judicial bias in domestic violence cases interpreting *Crawford v. Washington*," *American Criminal Law Review* 44, (2005): 995-1000.

44 Davis, Barbara E. Smith, and Caitlin R. Rabbitt, "Increasing Convictions in Domestic Violence Cases: A Field Test in Milwaukee," *The Justice System Journal* 22, no. 1, (2001): 61.

homicide case, investigators know the victim will not testify, and in the domestic violence case, investigators assume the victim will not testify.[45]

Hearsay Evidence

Acts of domestic violence often occur behind closed doors with no witnesses other than the victim and the offender. If the victim does not wish to cooperate, the prosecution begins at a substantial disadvantage. Prosecuting attorneys have developed techniques for filling in the evidentiary holes created by uncooperative victims. Among the most important elements of a victimless prosecution are statements made to police officers by victims and offenders at the scene of the incident. The introduction of the statements of victims into evidence for consideration by the court has not been without question. The 6th Amendment gives persons accused of criminal conduct the right to confront witnesses against them. In addition, the rules governing the admission of evidence in state and federal courts include a prohibition against the introduction of hearsay evidence. Rule 801 of the Federal Rules of Evidence defines hearsay evidence as a statement made by a declarant outside of court, and the statement is offered for the purpose of proving the truth of the matter asserted in the statement. Thus, the statement to a police officer by the victim of a domestic assault describing the attack would arguably constitute inadmissible hearsay evidence.[46]

As with most rules, the prohibition against hearsay has exceptions. In the prosecution of domestic violence cases without the in-court testimony of the victim, prosecuting attorneys have relied heavily upon three of these hearsay exceptions. Specifically, the exceptions are: excited utterances under Rule 803(2); present sense

45 Louise Ellison, "Prosecuting domestic violence without victim participation," *Modern Law Review* 65, (2002): 834-858.

46 Andrew King-Reis, "*Crawford v. Washington:* The End of Victimless Prosecution?" 28 *Seattle University Law Review* 28, (2005): 301-328.

impressions under Rule 803(3); and statements made to medical personnel under Rule 803(4). These three exceptions to the prohibition against hearsay evidence have been extremely important in victimless prosecution of domestic violence cases.[47]

Excited utterances are statements made by a person while the person is under the stress and excitement of a traumatic experience. These statements are exceptions to the hearsay rule because statements are made under such circumstances as to be deemed trustworthy. A person who is functioning under stress and excitement is believed to be less capable of fabrication of false statements for the purpose of gaining some advantage.[48] Victims may often make excited utterances to police officers who are called to the scene of a domestic dispute.

Present sense impressions are statements which the declarant makes to another person while the declarant is observing the event, or immediately thereafter. It is suggested that present sense impression statements are credible because the person has no time for fabrication or memory failure.[49] The person describes the action as they are witnessing it, much like a sports announcer calling the play-by-play account of a sporting event.

Statements made for the purpose of obtaining medical treatment are also commonly used as evidence in domestic violence cases. These statements are believed to be trustworthy because the declarant has a vested interest in providing accurate information to medical care providers.[50] Providing inaccurate information to medical first

47 Celeste E. Byrom, "The use of the excited utterance hearsay exception in the prosecution of domestic violence cases after *Crawford v. Washington*," *The Review of Litigation* 24, no. 2, (2005): 409-429; King-Reis, 2005: 301-328; Alissa P. Worden, *Violence against women: Synthesis of research for judges*, (U.S. Department of Justice, National Institute of Justice, NCJ 199911, 2000).

48 King-Reis, "Crawford v. Washington," 310.

49 Id.

50 Id.

responders, nurses and physicians could result in additional harm to a victim. Accordingly, these statements have been an important exception to the hearsay rule in cases involving domestic violence against reluctant witnesses. In the domestic violence context, a victim may seek medical attention following an attack and describe to medical personnel how and by whom the injuries were inflicted. This statement may then be offered into evidence at any trial of the related charges.

In all hearsay exceptions, the person who made the proffered statement must be unavailable to testify at trial. In trials of domestic violence, an unwilling victim may satisfy the unavailability requirement.

Hearsay and Confrontation of Witnesses

These hearsay exceptions have operated in the shadow of the 6th Amendment, which guarantees the right of the accused to confront witnesses against him. When hearsay evidence is offered the accused is denied the opportunity to confront the witness. The purpose of the Confrontation Clause was to provide the accused with an opportunity to test the reliability of the proffered evidence. The exceptions to the hearsay rule developed because of the supposed reliability of the evidence. As noted above, these exceptions to the hearsay rule were integral to victimless prosecution of domestic violence cases. The Constitutional guarantee of the right to confront witnesses has run headlong into these hearsay exceptions with the case of *Crawford v. Washington* (2004).[51]

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

Crawford v. Washington

In 2004, the U.S. Supreme Court delivered its "bombshell opinion" in the case of *Crawford v. Washington*.[52] *Crawford* addressed the problem of the use of excited utterance evidence in light of the Confrontation Clause of the 6th Amendment to the United States Constitution. Michael Crawford was convicted of assault and attempted murder of Kenneth Lee, who Crawford believed had raped his wife. Crawford and his wife were both interrogated by police. Each gave two statements, with the second statement of each being tape-recorded. Mrs. Crawford's statement was consistent with her husband's statement, except as to the issue of self-defense. Crawford claimed that he acted in self-defense, while Mrs. Crawford's statement tended to undermine that defense. Mrs. Crawford did not testify at her husband's trial because of the marital privilege in Washington law. The prosecution offered the tape-recorded statement of Mrs. Crawford, which described the attack, and contradicted her husband's claim of self-defense.

Crawford objected to the admission of the tape-recorded statement, claiming that it violated his 6th Amendment right to confront witnesses against him. The prosecution contended that the statement was within an exception to the hearsay rule and should be allowed. The exception was Rule 804(b)(3) of the Washington Rules of Evidence, which allows statements that are against the penal interest of the declarant. The state argued that since Mrs. Crawford took her husband to the victim's residence, she was implicated in the crime. Accordingly, when she made the statement to the officers that negated self-defense by her husband, she was making a statement that exposed her to criminal liability. The state's position was that such statements are trustworthy and admissible as an exception to

52 *U.S. v. Bailey and Gilmer*, 2005 U.S. Dist. LEXIS 28070, N.D. Ill.

the hearsay rule. Persons would not make statements implicating themselves in a crime unless the statements were true.

The U.S. Supreme Court ruled that in spite of any state law permitting the evidence, the 6th Amendment gives Crawford the right to confront witnesses against him. The court discussed the right to confront witnesses as one that dates back to the Roman Empire. The purpose of the 6th Amendment Confrontation Clause was to protect against the European style civil law practices that allowed examination of witnesses by interrogatories or private judicial questioning. England had previously permitted accusers to give evidence through affidavits. The court used the trial of Sir Walter Raleigh for illustration. Raleigh was charged with treason and the principle evidence against him was the statement by his alleged co-conspirator, Lord Cobham, which was read at Raleigh's trial. Raleigh denied the allegation and demanded that Cobham face him in court for cross-examination. Raleigh's demand to face his accuser was denied and Raleigh was convicted. This practice was later abolished so as to require witnesses to confront the accused in person in court.[53] The right to confrontation of accusers was thereafter rooted in American jurisprudence by inclusion in the 6th Amendment.

The *Crawford* decision stated that the only permissible exceptions to the Confrontation Clause are those exceptions that existed in common law at the time of the ratification of the 6th Amendment in 1791. The common law in 1791 limited admissibility of a witness prior statement to situations where the witness was not available at trial and the defendant had prior opportunity to cross-examine the witness regarding the statement. The Washington marital privilege effectively rendered Mrs.

53 Crawford v. Washington, 44.

Crawford unavailable to testify at trial. However, the defendant clearly had no opportunity to cross-examine her statement to police investigators.

Crawford overruled its recent interpretation of the Confrontation Clause in *Ohio v. Roberts,* (1980),[54] which had allowed the hearsay statement of an unavailable witness if the statement fell within a "firmly rooted hearsay exception" or was imbued with "particularized guarantees of trustworthiness" (p. 66). The court held that *Roberts* had departed from the intent and meaning of the Confrontation Clause. The *Roberts* method of permitting evidence because of its reliability is insufficient. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." (p .62)

In its discussion of common law exceptions to the Confrontation Clause, the court noted that at common law, "to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made 'immediately upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.'"[55]

Crawford limited the right of confrontation to "testimonial" statements. Unfortunately, the court did not clearly define "testimonial."

We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever 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

54 *Ohio v. Roberts*, 448 U.S. 56, (1980).

55 *Thompson v. Trevanion,* Skin. 402, 90 Eng.Rep. 179 (K.B. 1694).

56 Crawford v. Washington, 68.

interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."[56]

The decision specifically did not limit testimonial evidence to statements made in the courtroom. Statements made to police officers by Mrs. Crawford were testimonial in nature. These statements in question were made pursuant to police interrogation of Mrs. Crawford, with the second statement being tape-recorded. The court held that testimonial statements are not admissible unless the defendant had the opportunity to confront the witness when the statement was made. The Court did not define which statements are testimonial and which are not. However, the court did state that statements given in response to police interrogation were testimonial in nature and subject to the Confrontation Clause.[57]

While *Crawford* did not involve a domestic violence case, and did not involve the above described hearsay exceptions generally used in domestic violence cases (excited utterances, present sense impressions, statements related to medical diagnosis or treatment), the case does have significant implications for prosecution of domestic violence cases when the victim does not wish to testify.

Impact of *Crawford*

What impact does *Crawford* have on victimless or evidence-based prosecutions of domestic violence cases? It has been suggested that *Crawford* would "... upset an entire methodology for the treatment of domestic violence cases".[58] One particularly scathing commentary states that *Crawford* "struck a fatal blow to 'victimless' domestic violence

57 *Id.*

58 Jaros, "The lessons," 998.

prosecutions",[59] and "even encourages men to kill their wives and girlfriends to escape retribution".[60] While *Crawford* certainly places limits on the practice of victimless or evidence based prosecutions, this doomsday prediction does not appear to be justified. For *Crawford* to apply the statement must be "testimonial" in nature.

It has been urged that the post-*Crawford* interpretation of "testimonial" statements should be narrowly drawn so as to allow the use of excited utterances, statements regarding present sense impressions, and medical statements. "In this way, the strength of victimless prosecutions will be preserved".[61] A number of lower courts have addressed the scope of the Confrontation Clause in light of *Crawford.*

Preliminary Hearings

The preliminary hearing must be considered from two perspectives: the statement used as evidence at a preliminary hearing; and the statement from a preliminary hearing used as evidence at a trial. *Crawford* has been interpreted as recognizing an evidentiary right that applies only to trials, and not applicable to grand jury proceedings or preliminary hearings.[62] Accordingly, the excited utterances of a victim can be used for a judicial finding of probable cause for a criminal charge to proceed. Of course, if the statement were found by the court to be testimonial, it would not be admissible at a trial on the merits.

A statement elicited at a preliminary hearing may be admitted at a trial under certain circumstances. A U.S. District Court has ruled that when a defendant had adequate opportunity to cross-examine a witness during a preliminary hearing, the use of

59 Melissa Moody, "A blow to domestic violence victims: Applying 'testimonial statements' test in *Crawford v. Washington*," *William and Mary Journal of Women and Law* 11, (2005): 387.

60 Moody, "A blow," 404.

61 King-Reis, *"Crawford,"* 328.

62 *U.S. v. Thompson*, 2005 U.S. Dist. LEXIS 27763, (ED, MD).

a transcript of the testimony of the then unavailable witness at the sentencing hearing did not violate the Confrontation Clause.[63] This interpretation may be important in situations where the victim initially cooperates with the prosecution but withdraws support later in the proceedings.

In states where the preliminary hearing is adversarial in nature and permits cross-examination of government witnesses by the defense, prosecutors may consider offering the testimony of the victim. Under *Lewis*, if the victim wavered in her willingness to cooperate at a trial on the merits, the transcript of the victim's preliminary hearing testimony could be offered at trial. In states where the preliminary hearing is more informal and non-adversarial in nature, this practice will not solve the confrontation requirement. In *People v. Fry*, (2004),[64] the Supreme Court of Colorado held that the limited scope of the preliminary hearing to the issue of probable cause also limited the scope of the allowed cross-examination of the victim. Accordingly, this limited cross-examination did not satisfy Sixth Amendment Confrontation Clause requirements.

Statements to Civilians

The U.S. District Court for the District of Columbia held that statements made to civilians are not testimonial statements pursuant to *Crawford*.[65] Similarly, statements made to friends and acquaintances of declarant who does not appear to testify are not testimonial and not subject to the Confrontation Clause.[66] The statements in *Bodkins* were about the murder of the victim and the reasons for the murder. The statements were informal and not with any expectation that they would be used in a trial of any kind.

63 *Lewis v. Woodford*, U.S. Dist., LEXIS 23686 (ED. CA.), (2005).

64 *People v. Fry*, 92 P. 3d. 970 (Colo. 2004).

65 *U.S. v. Wilson*, 2005 U.S. Dist. LEXIS 18910 (D.C.D.C.)

66 *U.S. v. Bodkins and Plunkett*, 2005 U.S. Dist LEXIS 16419 (W.D. Va.).

Accordingly, the statements are not testimonial under *Crawford*.[67] Since the statements are not testimonial, then the *Roberts* test of determining whether the statement falls within a firmly rooted hearsay exception and its trustworthiness must be applied.

Statements to Medical Personnel

Similar to statements to civilians, are statements made to medical personnel for the purposes of diagnosis and treatment. These statements are not "structured police questioning" within the meaning of *Crawford*. If non-testimonial, then the statements must be analyzed under the *Roberts* test. Medical statements fall within an established hearsay exception and should be found to possess sufficient indicia of reliability. The Minnesota Supreme Court held that statements to a physician by a three-year old child were not testimonial. The purpose of the statement was to aid in rendering a medical diagnosis. The circumstances would not lead the child to reasonably expect the statements would be used in a trial.[68]

The line of demarcation between testimonial and non-testimonial statements is sometimes clear and sometimes quite blurry. As noted above, statements made to a physician for the purpose of diagnosis and treatment is clearly non-testimonial. Statements made in response to formal police interrogation are testimonial. How do we define statements related to treatment, but given to persons who function in an investigative capacity, such as persons employed by child protective agencies? A Maryland court held that statements by eight and ten-year old children to an employee of the state child protective services agency were testimonial. The court concluded that the

67 Crawford, 53.

68 *State v. Scacchetti*, 690 N.W. 2d 393 (Minn. 2005).

children were aware that the agency was questioning them because of a police investigation of their allegations of abuse.[69]

The New York Court of Appeals recently ruled that a forensic psychiatrist could not testify as to the statements made by third parties about a criminal defendant. The court distinguished between permitting an expert witness to use the same hearsay statements in formulating an opinion as to the defendant's mental condition and repeating the statements to a jury.[70] The expert was a forensic psychiatrist hired by the prosecution to rebut the defense of insanity.

Goldstein was convicted of second-degree murder for pushing a woman off of a subway platform into the path of a train. Goldstein did not know the victim and had no motive for the killing. The defendant relied upon defense of insanity. The case hinged upon testimony of competing experts for the defense and the prosecution. The prosecution expert, Dr. Hegerty, was a forensic psychiatrist. Forensic psychiatry differs from clinical psychiatry in that a clinical psychiatrist primarily relies on statements of subject, while a forensic psychiatrist may consider statements of third persons.

Dr. Hegerty was allowed to testify as to her opinion of Goldstein's condition. This opinion was, based, in part, upon statements made by six persons interviewed by Hegerty. Dr. Hegerty was allowed to tell the jury the content of the statements by these interviewees. These statements were offered for the truth of the matters asserted in the statements. One witness told Hegerty that he was a witness to a previous attack by Goldstein on another person. In that incident, Goldstein immediately after the attack told bystanders that he was sick and schizophrenic and that he had just been released from the

69 *State v. Snowden*, 867 A.2d 314 (Md. 2005).

70 *People v. Goldstein*, 1 No. 155. 2005 NY Int. 156.

hospital. This was very similar to the facts of this case where Goldstein immediately told witnesses that he was psychotic and should be taken to the hospital.

Dr. Hegerty also testified about statements by another person regarding an incident two weeks before the event. In that incident she was present when another young woman, who was a stripper, sexually "teased" Goldstein. The woman also told Dr. Hegerty that the victim bore a strong resemblance to the teasing stripper. Dr. Hegerty suggested to the jury that Goldstein identified the victim with a woman who had recently caused him sexual frustration.

The statements were hearsay because they were offered to prove that the matters asserted were true. In addition, the statements were testimonial because the declarant was "bearing testimony" as described in *Crawford*. The statements were not made to police officers, but Hegerty was an expert hired by the state to form an opinion and testify in court as to that opinion. The interviewees were all giving responses to questions by a state agent who was preparing for trial testimony. These were not casual remarks. Statements such as these to an expert preparing testimony for trial are just as "formal" as are statements made in depositions. The defense had no opportunity to cross-examine these declarants. This violates the Confrontation Clause.

Statements such as those in *Goldstein* are much more in the nature of police questioning than statements given to medical personnel for the purpose of diagnosis and treatment. These statements were obtained for the purpose of diagnosis, but there was no treatment intended. The sole purpose of the statements was to collect evidence for trial. The statements could just have easily been taken by police officers.

Statements to Police

As noted above, *Crawford* held that the scope of testimonial statements will always include statements made in response to police interrogation. This does not mean that all statements to police are testimonial. Some early post-*Crawford* cases made a distinction between statements made in response to police questioning and statements volunteered to police when the victim initiates the encounter. In *Leavitt v. Arave* (2004),[71] the 9th Circuit found that a statement made by a victim to police was not testimonial because the victim was seeking the aid and assistance of the police. There, a person called the police to report a prowler and named the defendant as the person they suspected. This was held not to be interrogation under *Crawford*.

However, it was suggested by the 6th Circuit Court of Appeals that almost any statement to police that describes criminal conduct is testimonial in nature because a reasonable person would expect the statement to be used in future criminal proceedings.[72] In *U.S. v. Bordeaux* (2005)[73] the 8th Circuit Court of Appeals held that statements to a "forensic interviewer" were testimonial in nature and prohibited by *Crawford*.

The Supreme Court has subsequently ruled in two cases addressing different unanswered questions raised by *Crawford.* In *Davis v. Washington*,[74] the court considered the question of 911 calls, and in *Hammon v. Indiana*[75] the court reviewed the issue of

71 *Leavitt v. Arave*, 383 F.3d 809, 830 (9th Cir. 2004).

72 *U.S. v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2005).

73 *U.S. v. Bordeaux*, 400 F.3d. 548, 556 (8th Cir. 2005).

74 Jaros, "The lessons," 2005.

75 No. 05-5224, decided June 19, 2006.

76 No. 05-5705, decided June 19, 2006.

77 Davis v. Washington, Hammon v. Indiana, 2006 U.S. LEXIS 4886.

78 Friedman & McCormack, "Dial-in testimony," 2002.

79 *People v. Moscat*, 777 N.Y.S.2d 875 (NY Crim. Ct. 2004).

whether statements made to a police investigator following a domestic violence call are testimonial in nature. These cases were decided together on June 19, 2006.[76]

911 Calls

Before *Davis*, some commentators suggested that 911 calls by victims should always be considered testimonial.[77] This is particularly true in cases where victims are familiar with the system and know that the 911 calls will be used in court.[78] The New York case of *People v. Moscat* (2004)[79] addressed the issue of 911 calls. *Moscat* was decided a few weeks after *Crawford* and held that the statements in the 911 call were not testimonial and were not inadmissible under *Crawford*. The presiding judge ruled that the 911 call was a plea for help initiated by the victim and was admissible evidence. This decision was made without oral argument or briefs by counsel, and without either party or the judge having heard the tape. When the tape was ultimately produced, it was learned that a neighbor of the victim made the call several hours after the incident.[80] *Moscat* appears to involve a judge who was reaching for an opportunity to make a ruling that would limit the potential scope of *Crawford* by finding that 911 calls are per se excited utterances. This is a case where bad facts were utilized by a seemingly biased judge to force a pre-determined outcome.

In *Davis v. Washington*, a 911 operator had communications with the purported victim of a domestic assault. The victim told the operator that her boyfriend, Adrian Davis, had attacked her and that he ran out the door and was leaving with another

80 Jaros, "The lessons," 2005.

81 Id.

person.[81] The operator advised the victim that police officers were on the way to see if Davis was in the vicinity and then would speak with her. Police arrived within four minutes and observed that the victim was upset and showed physical evidence of "fresh injuries on her forearm and her face."[82] Davis was charged with violation of an order of protection. The victim did not appear to testify at trial. The trial judge admitted the recording of the 911 call, during which the victim identified Davis as her attacker. The officers testified as to the fact of her apparently recent injuries.[83]

The question before the court in *Davis* was whether the statements of the victim to the 911 operator were testimonial and thus, inadmissible under *Crawford*. The court distinguished between statements that are made in relation to investigation of past events and those related to an emergency situation. The court stated:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[84]

The court observed that 911 calls are made to "describe current circumstances requiring police assistance."[85] The call to a 911 operator is not a police interrogation as contemplated by *Crawford*. The court recognized that this scenario is distinguished from

82 *Davis v. Washington*, 2006 U.S. LEXIS 4886, p. 7-9.

83 *Id.*, p. 9.

84 Id.

85 *Davis v. Washington*, 2006 U.S. LEXIS 4886, p. 16.

86 Id., 23.

that in *Crawford*, where the questioning took place at a police station, after providing *Miranda* warnings to the witness, and was focused upon a completed crime.[86] This situation is clearly dissimilar from that of a 911 dispatcher seeking to learn the nature and scope of a possible domestic assault. It was noted that the emergency nature of 911 calls may be limited to the initial statements by the caller, and that later statements could go beyond the scope of this exception to the confrontation clause, and "evolve into testimonial statements."[87] Further, the court recognized the possibility that "one *might* call 911 to provide a narrative report of a crime absent any imminent danger...."[88] Here, the court considered the circumstances of the interrogation in order to determine whether "its primary purpose was to enable police assistance to meet an ongoing emergency."[89]

In *Hammon*, police responded to a domestic disturbance call and found the victim, Amy Hammon, alone on the porch, and apparently frightened of her husband who was inside. The officers went inside and questioned Mr. Hammon who denied anything other than an argument. The officers observed physical evidence of a disturbance, including a broken gas heater. Ms. Hammon came in, whereupon the officers separated the couple and interviewed them separately. Ms. Hammon completed an affidavit which alleged that her husband broke the furnace, broke lamps and the telephone, shoved and hit her, disabled her vehicle and attacked her daughter.[90]

As in *Davis*, Ms. Hammon did not appear to testify at the trial of her husband. The trial judge admitted the affidavit and the officers' testimony as to her statements at

87 Id., 26.

88 Id., 23.

89 Id., 24.

90 *Hammon v. Indiana*, 2006 U.S. 4886, p. 10-11.

the scene. The trial judge held the affidavit was a present sense impression and that the victim's statements were excited utterances.[91] The Supreme Court found that the context of the interrogation in *Hammon* was similar to that of *Crawford* and was focused upon possible past criminal acts. The officers were presented with no present danger of any sort, but were merely seeking to ascertain what had already occurred. As in *Davis*, the court wisely refused to establish any blanket rule regarding the testimonial nature of statements taken in this situation. In *Davis*, the court found that the initial inquiries of the investigating officer were not testimonial, and were thus in violation of the confrontation clause and inadmissible.

Exceptions to Confrontation Clause

Statements made by victims in response to questions by police officers will usually be testimonial. This will prevent the usage of statements made by victims to police investigators immediately following an incident of domestic violence. The structured forms and checklists utilized by special domestic violence investigation units described above[92] will still be quite useful, but the victim's responses to questions will not by-pass the confrontation requirement as an excited utterance unless the interrogator is seeking to protect a victim from an emergency and presently dangerous situation.

The Supreme Court, in *Crawford*, did indicate that some limited form of the present excited utterance exception might survive 6th Amendment scrutiny. The court cited an English case (*Thompson v. Trevanian*, 1694) for the existence of a common law spontaneous declaration exception to the confrontation requirement. [93] *Thompson* held the statement must be made contemporaneously with the injury. Many statements made by a

91 Id., 12

92 Ellison, "Prosecuting," 2002.

93 *Thompson v. Trevanion*, Skin. 402, 90 Eng.Rep. 179 (K.B. 1694).

victim to a 911 operator during an attack will fit this narrow exception. The holding in *Davis* is consistent with that part of *Crawford*. The victim in *Davis* described an assault by her former boyfriend who had just run from the house after inflicting physical injuries upon her.[94]

With regard to the situation where the victim does not wish to cooperate because of fear of reprisal by the offender,[95] another exception to the Confrontation Clause may be the equitable principle that persons cannot profit from their own wrongdoing. *Crawford* pointed out there is an exception to the confrontation requirement where the defendant is responsible for the unavailability of the witness. This is in keeping with the equitable principle that a person cannot profit from her own wrongdoing. This principle was discussed in *U.S. v. Mayhew* (2005),[96] a U.S. District Court case.

The defendant Mayhew had killed his wife and kidnapped his daughter. Upon being apprehended by police, the defendant mortally shot his daughter and shot himself. While his daughter was being transported to the hospital by ambulance, police investigators interviewed her. The interview was taped. The court rejected the applicability of the dying declaration exception to the confrontation requirement. In so ruling, the court noted the lack of validity of the dying declaration exception, but did accept the forfeiture of the right to confront a witness when the defendant's conduct causes the unavailability of the witness. This equitable exception to the 6th Amendment confrontation clause was further discussed in *Davis* and *Hammon*, reaffirming that a

94 Davis v. Washington (2006).

95 Davis, Robert C., Barbara E. Smith, and Caitlin R. Rabbitt. "Increasing Convictions in Domestic Violence Cases: A Field Test in Milwaukee." *The Justice System Journal* 22, no. 1, (2001): 61-72.

96 *U.S. v. Mayhew*, 380 F.Supp.2d 961; 2005 U.S. Dist. LEXIS 15935 (S.D. Ohio 2005).

97 Davis v. Washington, Hammon v. Indiana, 2006 U.S. LEXIS 4886, 33.

defendant who causes "...the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."[97]

As observed above, victims often do not wish to proceed with the prosecution of the offender in domestic violence cases.[98] The fact that victims do not wish to proceed may often result from fear of reprisal by the offender.[99] If the prosecution can prove that the unavailability of the victim is because of her fear of the defendant, then the court should rule that the defendant has forfeited his right of confrontation. This proof could be developed from other family members, friends or neighbors.

Victimless Prosecutions after *Crawford*

While referring to *Crawford* as a "bombshell opinion,"[100] may not be inaccurate, the case has not eliminated all tools utilized by prosecutors in victimless prosecution of domestic violence cases. As discussed above, the phenomenon of recalcitrant victims means that prosecuting attorneys of many domestic violence cases will not have the benefit of a willing victim with which to provide evidence to the court. The literature supports the position that many of these "victimless" cases should proceed if there is any other evidence to submit to the court.[101] Can they realistically proceed after *Crawford*? The answer is, in many cases, "yes."

While refusing to fully delimit the scope of what is "testimonial," *Crawford* held that "structured police questioning" would always be subject to the confrontation

98 Davis, "Increasing convictions," 2001; Ellison, "Prosecuting," 2002; King-Reis, "*Crawford*," 2005; Richard B. Felson, Steven F. Messner, Anthony W. Hoskins, and

Glenn Deane, "Reasons for reporting and not reporting domestic violence to the police," *Criminology* 40 no. 3, (2002): 617-648; Jaros, "The lessons," 2005.

99 Davis, "Increasing convictions," 2001.

100 *U.S. v. Bailey and Gilmer*, 2005 U.S. Dist. LEXIS 28070, N.D. Ill.

101 Kelly, "Have victim reforms," 1991; Schmitt, "Combating," 1997; Jaros,"The lessons," 2005.

requirement.[102] The lower court decisions discussing the unanswered questions of *Crawford* leave a great deal of non-testimonial reliable hearsay that can be admitted in domestic violence cases. Statements to medical personnel should still be admissible because those statements are not made to police officers or agents. In addition, *Crawford* does not impact the admissibility of physical evidence. Thorough police investigation will still result in the collection of physical evidence of domestic abuse. Photographs of injuries and property damage at the scene of a domestic altercation can be very powerful evidence. Again, by no means does *Crawford* eliminate all hearsay statements of victims. *Crawford* simply reins in the use of unchallenged statements of complainants.

As to some pressing questions, help has arrived. The U. S. Supreme Court granted certiorari in *Washington v. Davis* (2005),[103] and in *Hammon v. Indiana* (2005), which involved crime scene statements by a victim to police officers.[104] The court held that statements made during 911 calls are not testimonial if the statements are made in a context, which objectively indicate, "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[105] The court also held that statements to police officers investigating a possible offense that is not ongoing and poses no present threat to the witness are testimonial and are inadmissible under the 6th Amendment confrontation clause.[106] Accordingly, statements in 911 calls that relate to an ongoing emergency may be used in cases where the victim does not participate in the trial without violating the defendant's right of confrontation. The court must make a determination of the objective nature of the statement for the purpose of finding whether the statement is

102 Crawford, 53.

103 *Washington v. Davis*, 154 Wn.2d 291, 111 P.3d 844 (Wash. 2005), cert. Granted 126 S.Ct. 547, 2005 U.S. LEXIS 7859 (October 31, 2005).

104 *Hammon v. Indiana*, 829 N.E.2d 444 (Ind. 2005), *cert. granted*, 126 S.Ct. 552 (U.S. Oct. 31, 2005) (No. 05-5705).

105 *Washington v. Davis*, 2006 U.S. LEXIS 4886, 16.

106 *Hammon v. Indiana*, 2006 U.S. LEXIS 4886, 28.

testimonial. This ruling will permit reliable evidence that can be used in deciding problematic domestic violence cases while still protecting the constitutional right of the accused to confront witnesses.

Conclusion

The social and psychological dynamics that are at play in relationships between current and former spouses and lovers often produce volatile behavior. These same dynamics also produce situations where the victim of a domestic assault may not wish to participate in a formal prosecution of the abuser. As discussed above, this lack of cooperation of the victim may result from a number of factors, none of which makes the offender any less blameworthy. As a result, prosecutors developed techniques whereby domestic violence cases could proceed without the in-court testimony of the victim. Victimless prosecutions included the use of physical evidence and a liberal application of the exceptions to the hearsay rule and the confrontation clause.

The Confrontation Clause was made a part of our Constitution because of abuses inherent in the consideration of affidavits and *ex parte* communications and statements of complainants. The framers of the Constitution recognized the potential injustice that can result from the use of unquestioned evidence in criminal trials. While the law can and should be an agent for social change, the principal of the rule of law dictates that the law must be limited by the boundaries of the Constitution. One of these Constitutional boundaries is the right of the accused to confront witnesses against him. The Constitution and the Confrontation Clause is not suspended because the crime involves a victim and offender who are in a domestic relationship.

The alarmists have cried that *Crawford* spells the end of victimless prosecutions and eliminates virtually all advances made by society and the law in preventing domestic violence. *Crawford* did no such thing. It simply limits the unconstitutionally broad use of hearsay exceptions. The courts will do their job of adjudicating disputes and trying allegations of criminal conduct within the confines of the Constitution. It is possible that there will be some increase in the dismissal rate of domestic violence cases where the victim is unwilling to cooperate. Future studies should address this issue and determine the actual impact of this restriction on previously used hearsay evidence. However, the remaining practices and techniques that have developed in "evidence-based" prosecutions should dampen the impact of *Crawford*. With the non-testimonial statements that are not subject to the Confrontation Clause, including many statements in 911 calls, statements for medical treatment, and statements to civilians, along with better use of physical evidence, victimless prosecutions will continue to be an effective tool in the adjudication of complaints of domestic violence.

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