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# Complex Relationships: Public Policy and Law Solutions to Rebalance the Confrontation Clause, Evidence-Based Intimate-Partner Violence Prosecution, and Public and Private Violence After the Resurrection of Roberts

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**Complex Relationships: Public Policy and Law Solutions to  
Rebalance the Confrontation Clause, Evidence-Based Intimate-  
Partner Violence Prosecution, and Public and Private Violence  
After the Resurrection of *Roberts***

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A thesis submitted in partial fulfillment of the requirements for the Degree of Bachelor of Arts  
with Honors in Public Policy and Law

TRINITY COLLEGE

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## Table of Contents

<b>Acknowledgements</b> .....	4
<b>Abstract</b> .....	5
<b>Chapter 1: Introduction and Purpose</b> .....	6
Dynamics and Differences of Intimate-Partner Violence .....	7
Evidence-Based Prosecution .....	12
Evidence-Based Prosecution and <i>Ohio v. Roberts</i> .....	13
<i>Crawford v. Washington</i> and the New Framework.....	16
Ambiguities in Interpretation .....	20
Immediate Consequences of <i>Crawford</i> .....	21
Post- <i>Crawford</i> Concerns.....	24
Purpose of Thesis .....	27
<b>Chapter 2: Cases and Consequences</b> .....	28
<i>Davis v. Washington</i> Fact Pattern .....	29
<i>Hammon v. Indiana</i> Fact Pattern.....	30
Comparison of Temporal Reasoning in <i>Davis</i> and <i>Hammon</i> .....	31
Comparison of Formality Between <i>Davis</i> and <i>Hammon</i> .....	34
Testimony Erroneously Made the Product of a Relationship .....	37
The Diminished Scope of Testimonial Core Classes .....	39
<i>Michigan v. Bryant</i> Fact Pattern.....	42
The Expansion of the Ongoing Emergency Doctrine .....	44
Emergencies— A Product of Uncertainty.....	47
Consequences for Evidence-Based Prosecution and the Hierarchy of Public and Private Violence .....	49
<i>Ohio v. Clark</i> Fact Pattern and Implications .....	54
Resurrecting <i>Roberts</i> .....	59
<b>Chapter 3: Rectifying the Resurrection of <i>Roberts</i></b> .....	62
Function Versus Purpose.....	62
A New Testimonial Test .....	63
<b>Figure 1: Flowchart for Two-Part Testimonial Test for Statements Made to Law         Enforcement Officers</b> .....	65
The Need for and Application of a New, Two-Part Test .....	72

<b>Chapter Four: Policy Solutions to the Post-<i>Crawford</i> Crisis</b> .....	74
The Need for Community Collaboration .....	74
The Target Abuser Call Program—An Example of Community Cooperation.....	76
Prior Opportunities for Cross-Examination .....	83
Investigative Procedures of Intimate-Partner Violence .....	85
Implementing <i>Giles v. California</i> .....	88
<b>Chapter Five: Summary and Conclusions</b> .....	97
<b>Bibliography</b> .....	100

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### **Abstract**

Following the Supreme Court's 2004 decision in *Crawford v. Washington*, tensions between the Sixth Amendment Confrontation Clause and evidence-based prosecution of intimate-partner violence increased. In consequence, the Court forged a path of Constitutional jurisprudence which has weakened the power of the Confrontation Clause, reverted to a disguised reliability test reminiscent of *Ohio v. Roberts*, and diminished the rights of the accused. Simultaneously, these rulings have created a hierarchy where the severity of private, domestic violence is regarded as a lower level of emergency than public violence. Consequently, the Supreme Court's primary purpose test for testimonial statements should be replaced with a two-part test which analyzes both the purpose and function of out-of-court statements, and evidence-based prosecutions should be supported by policy solutions adopted at local and state levels.

## Chapter 1: Introduction and Purpose

A woman calls 911 and reports that her husband had beat her. She relays her address to the dispatcher. The dispatcher asks for the name of the caller and the woman identifies herself as Maria. The dispatcher then asks if Maria's husband is still present and Maria informs the operator that he left the house, drunk. The dispatcher asks Maria what had happened. Maria identifies her husband by name, Mike, and informs the dispatcher that her husband came home drunk and became angry with her—this had happened before. Maria explains that the fight escalated, she had been hit and pushed and received a serious head wound when she fell backward and slammed her head on the corner of the kitchen table. It was after this that her husband stormed out. The 911 operator asks if an ambulance was needed and Maria answers affirmatively. The dispatcher assures her that help is on the way and proceeds to ask Maria to describe Mike, the suspect. Maria tells the dispatcher the height, weight, race, and distinguishing characteristics of her husband, including a description of his clothing. The dispatcher asks how long-ago Maria's husband left the house and where Maria believes he may have gone. Maria responds that it had been no more than five minutes; she had regained enough composure after her fall to be able to make the phone call. Maria was not sure where he may have gone. The dispatcher asks whether weapons were involved in the events Maria was describing, and Maria answers that Mike owned a gun and had threatened to use it before, but he had not specifically threatened her with it this time. She was not sure whether it was in its case or with him. Finally, the dispatcher asks Maria whether police had been at her address before, and if so, how many times and when the most recent time was. Maria answers that the police had been to her home

twice before, the most recent being approximately three weeks earlier. The dispatcher stays on the line with Maria until the police arrive at the scene.<sup>1</sup>

When the police and ambulance arrive at Maria's home, Maria is examined by EMTs. Maria's injuries, the disorderly kitchen scene, and the corner of the dining room table where small droplets of blood can be seen are photographed. EMTs ask Maria how she received her injuries and she describes being pushed down and hitting her head on the table and how she expected that bruises on her forearms were the result of being forcibly grabbed by her husband. The responding police secure the scene, ask Maria a series of questions similar to those asked during the 911 call, and commence a search for Maria's husband after they receive a name identification and a description. The police find Mike and arrest him for domestic battery. Once the charges had been filed, a prosecutor contacts Maria to prepare testimony for Mike's trial. Maria refuses to cooperate.

### **Dynamics and Differences of Intimate-Partner Violence**

Intimate-partner violence is a tragic and pervasive issue that affects more than 10 million men and women in the United States per year.<sup>2</sup> The Center for Disease Control has adopted the term "intimate-partner violence" in lieu of domestic violence in order to recognize that violence between intimate partners is not limited to the home or to legal conceptions of family.<sup>3</sup> Maria's

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<sup>1</sup> "Handling a Domestic Violence Call In-Service Training for Police Dispatchers." *Police Resources*, 2003. [www.njpdresources.org/dom-violence/dv-dispatcher-stud.pdf](http://www.njpdresources.org/dom-violence/dv-dispatcher-stud.pdf).

The prior source was used to guide the creation of the hypothetical Maria and Mike scenario. The resource guide served as an example of dispatcher questions to be asked during a response to a domestic violence call. The source provided guidance for my choosing of questions for the scenario.

\*\* Intimate-partner violence is not limited to male-on-female violence. This violence impacts people of all sexes and impacts same-sex couples, as well. I recognize that IPV is nuanced and encompasses many diverse forms of relationships, however the language of this project will default to pronouns which suggest male-on-female violence. This choice was made not to suggest limitations on the scope of victims and relationships which IPV affects, but rather to allow for linguistic clarity and reflect the language used in the majority of sources I utilized.

<sup>2</sup> NCADV, *National Coalition Against Domestic Violence*, 2018. <https://ncadv.org/statistics>.

<sup>3</sup> National Domestic Violence Prosecution Best Practices Guide: White Paper, *National District Attorneys Association, Women Prosecutors Section*, Alexandria, VA: March 16, 2017. p6.



story, although an anecdotal fictional scenario, is not unlike many intimate-partner violence cases that come before courts. Maria had experienced prior abuse, violence escalated, the police become involved on multiple occasions, and before any prosecution begins, the woman recants or refuses to cooperate with prosecutors. The dynamics of intimate-partner violence differ from other crimes because the intimate relationship and shared life between the perpetrator and the victim creates a knot of complications that must be untangled or cut before the criminal justice system can operate effectively. Unlike other crime victims, battered women often cohabit with their abusers, they may share children, feel emotionally attached, or depend on their abuser for financial support. Leaving an abusive partner, or choosing to involve oneself in a prosecution process against a batterer whether leaving or not, requires victims to decide whether moving forward with any action will make them safer and be beneficial, and whether they are capable of successfully embarking on the leaving process.<sup>4</sup> Intimate-partner violence affects people of all social and economic classes, people from every level of education, and people from every corner of the world.<sup>5</sup> Consequently, the determination of benefits and the feasibility of leaving requires a nuanced array of religious, cultural, economic, familial, and safety factors to be considered by every victim. As many as fifty percent of all homeless women became homeless as a consequence of leaving an abusive intimate partner.<sup>6</sup> Intimate-partner violence and leaving such situations are often indicative of resulting poverty.<sup>7</sup> Victims must consider the realities of more difficult financial circumstances, the dynamics of single parenting or possibilities of losing

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<sup>4</sup> Michael P. Johnson and Kathleen J. Ferraro, "Research on Domestic Violence in the 1990s: Making Distinctions," *Journal of Marriage and the Family* 62(4);(2000): 948–63.

<sup>5</sup> Rakovec-Fesler, Zlatka, "Domestic Violence and Abuse in Intimate Relationship from Public Health Perspective," *Health Psychology Research*, no. 2(3) (November 2014). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4768593/>.

<sup>6</sup> American Civil Liberties Union, "Domestic Violence and Homelessness," *American Civil Liberties Union: Women's Rights Project*, p.2-4.

<sup>7</sup> Johnson and Ferraro.

custody of children, and whether they will have access to bank accounts, assets, or a place to go to receive assistance.<sup>8</sup> Intimate-partner violence victims with immigrant or refugee status must consider whether leaving or involving law enforcement will complicate their status; the fear of an abuser may be lesser than the fear of deportation.<sup>9</sup> Leaving can be the most dangerous point in time for a battered woman. Abuse does not often end when the relationship does. Once a victim leaves, the perpetrator often continues measures of harassment, stalks the victim, violates restraining orders, or continues physical harm.<sup>10</sup> One study demonstrated that seventy percent of intimate partner violence injuries were inflicted after the relationship had ended.<sup>11</sup> The decision to leave is not simply a departure from a person—it is a departure from a lifestyle that the victim may feel is safer than a lifestyle of homelessness, economic struggle, and loneliness.

In addition to the material consequences of leaving, victims of intimate-partner violence are trapped within a dynamic of power and control which creates emotional and psychological consequences that victims must weigh against the benefits of leaving. Intimate partner violence is accompanied by psychological effects on victims including posttraumatic stress disorder, depression, and a lacking sense of self-esteem.<sup>12</sup> One study discovered that 63.8 percent of women victimized by intimate partners suffered from posttraumatic stress disorder.<sup>13</sup> Often intimate-partner violence cases which are brought before courts are examples of “intimate terrorism” where an intimate partner practices general control over the victim.<sup>14</sup> This form of violence often escalates, is often one-sided, and is more likely to result in serious injuries than

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<sup>8</sup> “Why Do Victims Stay?” accessed November 15, 2018, <https://ncadv.org/why-do-victims-stay>.

<sup>9</sup> Johnson and Ferraro.

<sup>10</sup> Rakovec-Fesler, Zlatka.

<sup>11</sup> *Ibid.*

<sup>12</sup> Johnson and Ferraro.

<sup>13</sup> Rakovec-Fesler, Zlatka.

<sup>14</sup> Johnson and Ferraro.

defensive or mutual violence.<sup>15</sup> The effects of this form of violence affect other aspects of victims' lives. The negative psychological effects harm both physical and mental health and result in victims more consistently missing work and becoming two-thirds as likely to be unable to hold employment for more than thirty hours per week for more than six months than non-battered women.<sup>16</sup>

Studies of abuse demonstrate that there are four stages which are cycled through that reinforce dynamics of power and control. The first stage is identifiable by the steady building of tension where the abuser becomes angry and the victim becomes increasingly more uneasy and apologetic in order to diffuse tension.<sup>17</sup> During the second stage the abuser acts out and engages in behaviors which harm the victim.<sup>18</sup> The third stage is identifiable as the "honeymoon phase" where the abuser apologizes and asks for forgiveness; the abuser makes promises and tries to shift blame to the victim or "gaslight" her about the severity of the abuse.<sup>19</sup> Finally, during the fourth stage the relationship will be calm; the abuser may give gifts and act on promises and the victim may believe that the abuser has changed and the abuse is over.<sup>20</sup> It is this cycle which creates complications in securing the testimony of victim-witnesses and contributes to the privatization of this crime. Victims are less likely to involve law enforcement when they do not consider their abuse to be criminal acts; the honeymoon phase and calm stage of the cycle of abuse create feelings where victims feel as though their relationship and the harm they endure is

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Rakovec-Fesler, Zlatka.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

normal.<sup>21</sup> Abusers make additional efforts to minimize the conceptions that the victim has about the severity of the abuse they face.

In a study of jailhouse calls that abusers made to their intimate-partner victims the researchers discovered that abusers were utilizing minimization tactics, appeals to sympathy, and requests for recantation more than overt threats to coerce victims into backing out of prosecutions.<sup>22</sup> A five-step process was identified within these phone calls. First, the victim is determined and strong and the abuser works to wear away these feelings of confidence.<sup>23</sup> Second, the abuser makes an effort to convince the victim that she is overreacting and asks the victim whether she thinks that the abuser “deserves” the charges, the treatment in jail, or other repercussions; he minimizes the severity of the attack while inflating the severity of his punishment.<sup>24</sup> The abuser often manages to frame the situation in a manner where *he* is the victim and elicits sympathy and care from the woman he abused—the situation flips and the battered woman is put in a place where her partner is seemingly in trouble and she must be the one to “save him.”<sup>25</sup> Third, the abuser bonds with the victim and the couple takes on an “us against the world” mentality.<sup>26</sup> Fourth, the abuser asks the victim to remove herself from the prosecution and recant, and fifth, the recantation plan and story are created.<sup>27</sup> In most criminal prosecutions outside of the intimate-partner violence sphere there is not the same complexity of interaction between victim and perpetrator. If the victim is to be involved in a prosecution, the

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<sup>21</sup> “Reasons for Reporting and Not Reporting Domestic Violence to the Police - FELSON - 2002 - Criminology - Wiley Online Library,” accessed November 16, 2018, <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1745-9125.2002.tb00968.x>.

<sup>22</sup> “Jailhouse Phone Calls Reveal Why Domestic Violence Victims Recant -- ScienceDaily,” accessed November 15, 2018, <https://www.sciencedaily.com/releases/2011/08/110815101535.htm>.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

prosecutorial system must often break the deep emotional, social, and economic bonds which exist between the batterer and the battered—this is no easy task.

America's adversarial legal system is set up as an awkward structure for intimate partner violence cases to exist within because the system expects that there is an adverse relationship between a victim and a perpetrator; however, intimate partner violence cases are not so black and white.<sup>28</sup> This grey area of determining whether or not a batterer is an adversary contributes to high rates of uncooperative or recanting victims. In nearly eighty percent of all intimate-partner violence cases the woman recants or refuses to cooperate.<sup>29</sup> Consequently, the courts face complications when working to prosecute batterers when there are non-cooperative witnesses.

### **Evidence-Based Prosecution**

In response to the problem of recanting victims, many jurisdictions have adopted “victimless” or “evidence-based” prosecution policies as a means of better responding to intimate-partner violence (IPV). Duluth, Minnesota, San Diego, California, Los Angeles, California, and Nashville, Tennessee were the trailblazing cities for these policies and Duluth was the birthplace of a model used to understand the intricacies of intimate-partner violence which describes IPV as a manifestation of power and control. These policies are characterized by the prosecution of an alleged batterer without calling the victim to testify. Compulsory means of securing victim testimony such as subpoenas are not used to secure the victim's presence and threats of jail-time and other legal consequences are not employed to encourage the victim to be available for trial. These policies allowed for the prosecution of an alleged batterer to continue without the direct and voluntary involvement of the victim. The goals of intimate-partner violence laws are to punish offenders, prevent future offenders, and empower and assist

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<sup>28</sup> Jones, Ann. *Next Time, She'll Be Dead: Battering & How to Stop It*. Boston, MA: Beacon Press, 2000.

<sup>29</sup> National Domestic Violence Prosecution Best Practices Guide.

victims.<sup>30</sup> Evidence-based prosecution approaches these goals by leading to higher conviction rates and allowing victims to focus on personal needs and safety rather than upcoming trials, but do, quite literally, remove the voice of the victim from the trial. Evidence-based prosecutions utilize 911 call recordings, photos of the crime scene and victim, physical evidence such as ripped clothing, medical evaluation forms, expert testimony, statements of the accused, and even police body-camera footage to build a case against the defendant.<sup>31</sup> The victim, however, will not be called to the witness stand to tell her story or be cross-examined. Maria's example case would be a good candidate for an evidence-based prosecution. However, statements that Maria made out of court may violate the United States Constitution's Sixth Amendment guarantee for the accused to confront the witnesses against him. This creates a significant tension between the Confrontation Clause and the successful prosecutions of batterers with evidence-based prosecution. If Maria does not appear in court but her statements that identified Mike as her abuser and connected his violent actions to her injuries are entered in to evidence, then Mike's rights of confrontation may have been swept under the rug for the sake of bringing intimate-partner violence out in the open.

### **Evidence-Based Prosecution and *Ohio v. Roberts***

Evidence-based prosecution policies were working well under the framework of *Ohio v. Roberts* (1980) which dictated the boundaries of the Confrontation Clause until 2004. *Roberts* allowed for hearsay statements to be admitted when a declarant is absent from trial and unavailable for cross-examination if the hearsay statements bore "adequate indicia of reliability...inferred without more in a case where the evidence falls within a firmly rooted

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<sup>30</sup> Buzawa, Eva S., and Carl G. Buzawa. *Domestic Violence: the Criminal Justice Response*. Thousand Oaks, Calif: Sage Publications, 2003.

<sup>31</sup> Klein, Andrew R., and Jessica L. Klein. *Abetting Batterers: What Police, Prosecutors and Courts Aren't Doing to Protect America's Women*. Lanham, MD: Rowman & Littlefield, 2016.

hearsay exception” or where there are “particularized guarantees of trustworthiness.”<sup>32</sup> This meant that statements made by domestic abuse victims to dispatchers during 911 calls and statements made to the police and medical examiners were generally admissible under state and federal rules of evidence. These rules carve out exceptions to hearsay. According to Federal Rules of Evidence rule 801, hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted.”<sup>33</sup> Hearsay statements are generally objectionable and inadmissible in court unless the statement falls under a hearsay exception under rule 803 of the Federal Rules of Evidence. These exceptions allow for, among other things, “excited utterances” and “statements for the purposes of medical diagnosis or treatment” to be admitted in court. Consequently, under the rule of *Roberts*, statements made during 911 calls were generally considered to fall under the excited utterance exception, statements about injury were generally admitted as statements for purposes of medical diagnosis or treatment, and statements made to responding police officers were categorized as reliable in a variety of different ways. In the case of Maria and Mike, most all of Maria’s statements would have been admissible under *Roberts*. Excited utterances are statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”<sup>34</sup> Maria’s statements to the 911 dispatcher and to the police who responded were on the topic of the startling event of abuse, and testifying officers would need to say no more than “the victim seemed stressed” or describe that the victim was trembling or her voice was shaking to establish the stress of the situation and qualify a

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<sup>32</sup> *Ohio v. Roberts*. 448 U.S. 56, 66 (1980).

<sup>33</sup> Fed. Rules Evid. 801(c).

<sup>34</sup> Fed. Rules Evid. 803(2).

statement as an excited utterance.<sup>35</sup> Under the rule of *Ohio v. Roberts* statements which identified abusers, described crimes, and established integral facts of criminal cases were being admitted into evidence without cross-examination despite the Sixth Amendment guarantee that “in all criminal prosecutions, the accused shall enjoy the right to... be confronted with the witnesses against him.”<sup>36</sup>

In 2004 the United States Supreme Court issued a landmark opinion, *Crawford v. Washington*. This decision tackled the issue of statements being offered to prove cases without being subject to cross examination. This case overturned *Ohio v. Roberts* and created a new framework that dictated the admissibility of hearsay statements in court. Prior to the *Crawford* decision the Sixth Amendment coupled with *Ohio v. Roberts* generally had more bark than bite and allowed for a “heads I win, tails you lose” system that was unforgiving to criminal defendants in all criminal cases.<sup>37</sup> *Crawford* turned this around but impeded the progress of evidence-based prosecutions and catalyzed a lineage of further Supreme Court decisions that wrestled with the Confrontation Clause and unavailable witnesses. Each subsequent decision has changed the landscape of evidence-based prosecution, but none has ironed out all the wrinkles of the system. Today, *Crawford* dictates the rules for legal proceedings without victim involvement, but subsequent cases have dulled its effect in protecting the Sixth Amendment. Both evidence-based prosecution and the Confrontation Clause play important roles in protecting individuals and it is imperative that each of these values be allowed to function symbiotically with one another.

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<sup>35</sup> King-Ries, Andrew, “Crawford v. Washington: The End of Victimless Prosecution?,” *Seattle U. L. Rev.*, (January 1, 2005) p.301.

<sup>36</sup> United States Constitution. The Sixth Amendment.

<sup>37</sup> Stras, David, Orin Kerr, Rachel Barkow, Stephanos Bibas, and Paul J. Larkin Jr., “Justice Scalia and the Criminal Law,” *U. Cin. L. Rev.* 743(86); (2018).



### ***Crawford v. Washington and the New Framework***

*Crawford v. Washington* was granted certiorari by the United States Supreme Court in 2004 and was decided unanimously in favor of the petitioner, Michael Crawford. Justice Antonin Scalia delivered the opinion of the Court and Justice Rehnquist authored a concurring opinion. Michael Crawford had been charged with assault and attempted murder; although this case resulted in serious consequences for domestic violence cases, it was not itself a domestic violence case. In 1999, Sylvia Crawford informed her husband, Michael Crawford, that a man by the name of Kenneth Lee had tried to rape her.<sup>38</sup> In response, Michael and Sylvia went to Lee's apartment and Michael stabbed him. Michael Crawford was arrested the same night and both Sylvia and Michael were interrogated by the police at the police station.<sup>39</sup> Michael told the police that a fight had ensued after Sylvia disclosed that Lee had attempted to rape her, and Michael had stabbed Kenneth Lee in the torso. Sylvia's interrogation was recorded and her story matched Michael's at nearly every point save whether Lee had pulled a weapon on Michael before or after Michael attacked.<sup>40</sup> Michael Crawford claimed self-defense and asserted marital privilege for his trial, and consequently Sylvia Crawford was barred from testifying in-person and deemed legally unavailable.<sup>41</sup> However, Washington's marital privilege law allows for admissible *hearsay* statements by the accused's spouse to be admitted, and the prosecution played the recording of Sylvia's interrogation for the jury.<sup>42</sup> The Washington State Supreme Court decided that the statements were reliable because they interlocked with Michael's account of the stabbing.<sup>43</sup> During her interrogation Sylvia Crawford told the police that she had helped facilitate a planned

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<sup>38</sup> *Crawford v. Washington* at 36.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Crawford v. Washington* at 37.

<sup>41</sup> *Crawford v. Washington* at 38.

<sup>42</sup> *Crawford v. Washington*. at 36.

<sup>43</sup> *Crawford v. Washington* at 39.

attack and her account of whether Lee had pulled a weapon undermined Michael's self-defense claim.<sup>44</sup> Sylvia's statements helped convict Michael of both assault and attempted murder despite never having been subject to cross-examination. Michael Crawford appealed and cited a violation of his Sixth Amendment rights to confrontation. The United States Supreme Court heard the case and issued an opinion which would overturn *Roberts* and change the relationship between hearsay rules and the Sixth Amendment.

The United States Supreme Court overturned the decision of the Washington State Supreme Court and determined that the use of Sylvia Crawford's unfronted statements violated Michael Crawford's Sixth Amendment right to confrontation. The Court began narrating its decision by turning to the historical background of the Confrontation Clause. Justice Scalia wrote that the right to confrontation can be traced back to Roman times but was bolstered under English Common Law.<sup>45</sup> In 1603 Sir Walter Raleigh was charged with treason, and during his trial an alleged accomplice's letter which discussed Raleigh's involvement in the crime was read to the jury. Raleigh asserted that the alleged accomplice was not writing for truth but writing in self-interest and called for the alleged accomplice to be brought to the stand to testify in person. The presiding judge denied the request—Raleigh was convicted and sentenced to death.<sup>46</sup> In response to this trial, the English law was reformed to require confrontation "face to face."<sup>47</sup> This historic trial marks the origin of fears about trial by affidavit.<sup>48</sup> In 1791 the Sixth Amendment was ratified, and the rule of cross-examination secured in Common Law in 1693 was being abided by in American legal systems.<sup>49</sup> Additionally, many early United States state court

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<sup>44</sup> *Crawford v. Washington* at 37.

<sup>45</sup> *Crawford v. Washington* at 41.

<sup>46</sup> *Crawford v. Washington* at 43.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Crawford v. Washington* at 45.

decisions reflected utmost adherence to the protection of the right to confrontation.<sup>50</sup> Justice Scalia concluded that this history demonstrated that *ex parte*, (from the party, one-sided) examinations were to be prevented by confrontation and that the law of evidence should not supersede the rule of the United States Constitution and should apply to *all testimony*, both in- and out-of-court made by “witnesses”.<sup>51</sup> Justice Scalia looked to the dictionary definitions of “witnesses” and “testimony” to clarify his opinion about where the Confrontation Clause applies:

It applies to “witnesses” against the accused—in other words, those who “bear testimony” ... “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>52</sup>

Scalia’s decision clarified that any statements made by “witnesses” and considered to be “testimonial,” whether made in- or out-of-court, must satisfy the Confrontation Clause before becoming admissible in court. The Court chose not to define what makes a statement testimonial save identifying a few core classes:

Various formulations of this core class of “testimonial” statements exist “*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... extrajudicial statements... contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions... 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.”<sup>53</sup>

The result of this definition is a stricter, but ambiguous understanding of the Sixth Amendment. The “primary object” of the Sixth Amendment’s Confrontation Clause is testimonial hearsay— hearsay that is testimonial must have been subject to an opportunity for cross-examination while nontestimonial hearsay is governed by the Rules of Evidence.<sup>54</sup>

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Crawford v. Washington* at 49.

<sup>52</sup> *Crawford v. Washington* at 50.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Crawford v. Washington* at 52.

*Crawford v. Washington* also set the requirement that in order for testimonial hearsay to be admitted, the declarant-witness must either be present for trial to testify, or unavailable to testify and have been previously subject to cross-examination.<sup>55</sup> The Court asserted that the *Roberts*' doctrine was incapable of protecting the original values of the Confrontation Clause because it was simultaneously too broad and too narrow.<sup>56</sup> The ruling did not distinguish admissibility requirements between *ex parte* testimony and other hearsay, and allowed for statements to be admitted under ambiguous requirements of reliability. The Confrontation Clause was intended to be a *procedure* which guarantees reliability, not a tool to use only when there are suspicions that evidence may be unreliable.<sup>57</sup> "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."<sup>58</sup>

*Crawford* warns of the dangers of leaving too much power up to individual judicial discretion. Malleable rules can easily be manipulated, and even when the manipulation is utilized to secure a positive end, the underlying dangerous effects can undermine rights. Standards should be solid and understandable to ensure uniformity and fairness across judicial jurisdictions—the same "meaningful protection" of Sixth Amendment rights could not be guaranteed under the unpredictable framework of *Roberts*.<sup>59</sup> The *Crawford* decision overturned *Roberts*, though not retroactively and not clearly. Although the *Crawford* opinion expresses concern over ambiguities and loose ends of the *Roberts* ruling, the opinion left ambiguous and

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<sup>55</sup> *Crawford v. Washington* at 53.

<sup>56</sup> *Crawford v. Washington* at 60.

<sup>57</sup> *Crawford v. Washington* at 61.

<sup>58</sup> *Crawford v. Washington* at 62.

<sup>59</sup> *Ibid.*

loose the integral definition of “testimonial statements” and chose to “leave for another day any effort to spell out a comprehensive definition.”<sup>60</sup>

### **Ambiguities in Interpretation**

Following the issuance of the *Crawford* decision, judicial jurisdictions were left waiting for the day that a clearer definition would be handed down from the Supreme Court. This definitional ambiguity left prosecutors utilizing evidence-based prosecution strategies for domestic violence cases with questions about how to go forward with their procedures without violating the new *Crawford* framework and further, the Sixth Amendment. Prosecutors struggled to successfully bring forward intimate-partner violence cases without the involvement of the victim. The Administrative Office of the Courts for Washington State followed domestic violence conviction rates from 1999 to 2010 and discovered that beginning in 2004 there was a dramatic decrease in the number of successful convictions.<sup>61</sup> Sixty prosecutor’s offices located in California, Oregon, and Washington were surveyed following the *Crawford* decision. Sixty-three percent of the responding offices asserted that *Crawford* “significantly impeded prosecutions of domestic violence;” seventy-six percent reported that they were more likely to drop charges for domestic violence altogether if the victim’s participation could not be secured.<sup>62</sup> More than half of the surveyed prosecutor’s offices were counting on the use of testimonial hearsay in more than fifty percent of their domestic violence cases; following the *Crawford* decision, this number dropped to thirty-two percent, and that percentage required a broad interpretation of the decision.<sup>63</sup> The roadblock that *Crawford* put in place extended to inhibit law enforcement, as

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<sup>60</sup> *Crawford v. Washington* at 68.

<sup>61</sup> National District Attorney’s Association. Women Prosecutors Section. *National Domestic Violence Prosecution Best Practices Guide*. March 16, 2017. p.7.

<sup>62</sup> Lininger, Tom. “Prosecuting Batterers After Crawford” *Va. L. Rev.* 747 91(3); (2005). p.750.

<sup>63</sup> *Ibid.*

well. The lackluster prosecution success across the board created a lack of incentive for law enforcement to target aggressors of intimate-partner violence.<sup>64</sup> Most alarmingly, in the same survey of prosecutor's offices, sixty-five percent of the surveyed offices believed that their jurisdictions were less safe for victims of intimate-partner violence than before.<sup>65</sup> It is here that the conflict between *Crawford's* effects and the successful protection of victims of intimate-partner violence is most clearly understood— if *Crawford* and the Sixth Amendment operated at full force then either evidence-based prosecution must fall by the wayside and intimate-partner violence could be hidden behind closed doors, or evidence-based prosecution could be practiced but a small exception would have to be cut from the understanding of the Confrontation Clause. *Crawford* created an ambiguous test that could either be followed at the risk of sacrificing evidence-based prosecution and reprivatizing intimate-partner abuse or manipulated in order to present a case without victim testimony.

### **Immediate Consequences of *Crawford***

In response, Judges in different jurisdictions across the country interpreted *Crawford* in very different ways and developed a variety of different tests to determine whether statements were testimonial. The different jurisdictional decisions demonstrate a lack of clarity surrounding how far Sixth Amendment protections extend and a lack of consistency, even among decisions made within the same state. For example, in Texas's Court of Appeals Twelfth District the court applied the "primary purpose test" to classify statements as testimonial and applied *Roberts*

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<sup>64</sup> Percival, Jeanine. "The Price of Silence: The Prosecution of Domestic Violence Cases in Light of *Crawford v. Washington*," 79 *S. Cal. L. Rev.* 213; (2005). p.238.

<sup>65</sup> Lininger, Tom. p.750.

when the court ruled statements nontestimonial.<sup>66</sup> *Spencer v. State*<sup>67</sup> from Texas’s Fourteenth District Appellate Court and *Moore v. State* from the Sixth District each used a combination of a “formality test” and the “primary purpose test” to determine whether a statement was testimonial.<sup>68</sup> However, at the Court of Criminal Appeals of Texas the court opted for an entirely new test to pass down to the district courts. *Wall v. State* from the Court of Criminal Appeals adopted the “reasonable expectation” test to identify testimonial statements.<sup>69</sup> In California, in the Sixth Appellate District, the case *People v. Caudillo*<sup>70</sup> adopted a compound test of “primary purpose” and a “core class” test while the Second Appellate District adopted a bright-line rule that spontaneous statements are not hearsay and wove the “formality” test through the *People v. Corella* opinion.<sup>71</sup> In New York, a criminal court in Bronx County ruled in *People v. Moscat* that 911 calls are per se not testimonial under the “primary purpose test.”<sup>72</sup> However, the Supreme Court of New York turned the *Moscat* reasoning upside-down and determined that 911 calls are

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<sup>66</sup> *Kenneth Lamar Key, Appellant v. The State of Texas, Appellee*, 173 S.W.3d 72, 2005 Tex. App. LEXIS 1573. <https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FKR-VDY0-0039-445R-00000-00&context=1516831>.

<sup>67</sup> *Randall Bruce Spencer, Appellant v. The State of Texas, Appellee*, 162 S.W.3d 877, 2005 Tex. App. LEXIS 3162. <https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4G24-4YH0-0039-4065-00000-00&context=1516831>.

<sup>68</sup> *Tavares Latra Moore, Appellant v. The State of Texas, Appellee*, 169 S.W.3d 467, 2005 Tex. App. LEXIS 5777. <https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GR4-JOV0-0039-4280-00000-00&context=1516831>.

<sup>69</sup> *Roger Morgan Wall, Appellant v. The State of Texas, Appellee*, 184 S.W.3d 730, 2006 Tex. Crim. App. LEXIS 16 <https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4J2N-DS10-0039-43F5-00000-00&context=1516831>.

<sup>70</sup> *The People, Plaintiff and Respondent, v. John Mose Caudillo, Defendant and Appellant.*, 122 Cal. App. 4th 1417, 19 Cal. Rptr. 3d 574, 2004 Cal. App. LEXIS 1691.

<https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DGW-25X0-0039-40BN-00000-00&context=1516831>.

<sup>71</sup> *The People, Plaintiff and Respondent, v. Miguel Angel Corella, Jr., Defendant and Appellant.*, 122 Cal. App. 4th 461, 18 Cal. Rptr. 3d 770, 2004 Cal. App. LEXIS 1552, 2004 Cal. Daily Op. Service 8533, 2004 Daily Journal DAR 11645. <https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DBC-NCH0-0039-4285-00000-00&context=1516831>.

<sup>72</sup> *The People of the State of New York, Plaintiff, v. Octivio Moscat, Defendant.*, 3 Misc. 3d 739, 777 N.Y.S.2d 875, 2004 N.Y. Misc. LEXIS 231. <https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4C29-MOD0-0039-407F-00000-00&context=1516831>.

actually per se testimonial due to their formality and the “reasonable expectation test.”<sup>73</sup> An appellate court in Ohio ruled that *Crawford* is only applicable to hearsay statements that do not fall under Common Law hearsay exceptions.<sup>74</sup> In Massachusetts, the State Supreme Court determined in *Commonwealth v. Gonsalves* that statements made to police during the course of an investigation are per se testimonial unless the police are involved in “caretaking or stabilizing a volatile situation.”<sup>75</sup> The Sixth Circuit of the United States Court of Appeals decided that a “statement made knowingly to authorities describing criminal activity is almost always testimonial” as a general premise for the reasonable expectation test.<sup>76</sup> The vast differences in court rulings across the nation, and even between jurisdictions within the same states demonstrate that *Crawford*’s promise of “interim uncertainty” held true. In general, court decisions can be characterized by having used one, or a combination of, four kinds of tests: “formality,” “reasonable expectation,” “primary purpose,” and bright-line rules. Although there are a few jurisdictions which produced outliers to these categories, these four provide the framework for understanding the ambiguity following *Crawford* as well as the framework for potential steps at settling the uncertainty.

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<sup>73</sup> *The People of the State of New York, Plaintiff, v. Eugenio Cortes, Defendant.*, 4 Misc. 3d 575, 781 N.Y.S.2d 401, 2004 N.Y. Misc. LEXIS 663. <https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CK8-J940-0039-4010-00000-00&context=1516831>.

<sup>74</sup> *State of Ohio, Plaintiff-Appellee, v. Torrel E. Cannaday, Defendant-Appellant.*, 2005-Ohio-1513, 2005 Ohio App. LEXIS 1494. <https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FVC-XGCO-0039-4110-00000-00&context=1516831>.

<sup>75</sup> *Commonwealth vs. John D. Gonsalves.*, 429 Mass. 658, 711 N.E.2d 108, 1999 Mass. LEXIS 381. <https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WSK-M1Y0-0039-4058-00000-00&context=1516831>.

<sup>76</sup> *United States of America, Plaintiff-Appellee, v. Joseph Arnold, Defendant-Appellant.*, 486 F.3d 177, 2007 U.S. App. LEXIS 11616, 2007 FED App. 0181P (6th Cir.), 73 Fed. R. Evid. Serv. (Callaghan) 583. <https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NS3-80R0-0038-X1FB-00000-00&context=1516831>.



### **Post-*Crawford* Concerns**

Even fourteen years after the *Crawford* decision, and many years after subsequent court rulings made to clarify the ambiguous requirements of *Crawford*, these tests are being applied in different manners across the country. The formality test measures whether the circumstances of when the statement was made were formal enough to indicate that the statement was more than a casual statement to a friend, but rather more similar to depositions taken by magistrates under the Common Law.<sup>77</sup> Under this test, statements made to law enforcement officers in response to structured questioning, in secured or official areas, or recorded statements that are preserved in an official capacity are often encapsulated under the definition of testimonial. The reasonable expectation test, sometimes referred to as the “objective observer test” measures whether an observer (or the declarant) would reasonably expect from the circumstances surrounding their statement, that their statement will be used for either prosecutorial purposes or to aid in an investigation.<sup>78</sup> The primary purpose test, which was later articulated in the Supreme Court case *Davis v. Washington* (2006) classifies statements as testimonial if the primary purpose is to “prove past facts potentially relevant to later criminal prosecution” and 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.”<sup>79</sup> The main difference between the primary purpose test and the reasonable expectation test is the point of view. The primary purpose test hinges on whether the police are eliciting statements with prosecution in mind, and the reasonable expectation test determines whether a statement is testimonial based on the mindset of the declarant-witness. Finally, bright-line tests qualify specific kinds of statements or statements made in particular settings as either per se testimonial or per se nontestimonial.

*Crawford*'s ambiguous decision left the door open for diverse tests to be used which led to unpredictable results. The decision allowed courts a great amount of latitude within which to build their Sixth Amendment framework and left a multitude of questions unanswered. How do evidence-based prosecutions go forward following *Crawford*, if at all? How do courts manage hearsay after the Sixth Amendment has been satisfied? Is *Roberts* overturned in its entirety or do indicia of reliability serve as an acceptable basis of admittance for hearsay if *Crawford* is satisfied? What should courts make of statements to advocates, medical examiners, or off-duty police officers? Which test best protects the integrity of the Sixth Amendment but also does not re-privatize domestic violence, sexual assault cases, and child abuse cases where the victim may become unavailable? Lower courts attempted to answer some of these unanswered questions within the wide scope of directional latitude they were granted by the *Crawford* decision. However, this wide scope created dangers for the integrity of the courts, the protection of the Sixth Amendment, and the efficacy of evidence-based prosecution. Justice Scalia warned of this danger within the *Crawford* decision:

[The Framers] knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people... They were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts*' providing any meaningful protection in those circumstances.<sup>80</sup>

Justice Scalia warned about affording judges too much latitude for discretionary power, putting too much faith in open-ended tests, and for implementing manipulable standards and cautioned

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<sup>77</sup> *Crawford v. Washington* at 52.

<sup>78</sup> Cleary, Gordon P., and John A. Tarantino. *Trial Evidence Foundations*. Costa Mesa, CA: James Pub., 2015.

<sup>79</sup> *Davis v. Washington*, 547 U.S. 813, 819 (2006).

<sup>80</sup> *Crawford v. Washington* at 67.

that *Roberts* was a danger and not a tool for constitutional protection. Justice Scalia is famous for being an originalist and was a staunch advocate for minimizing the amount of discretionary power that judges had, in general.<sup>81</sup> However, *Crawford's* lack of a concise definition of testimonial and what the Sixth Amendment presides over allowed for the *Crawford* progeny to expand and twist the *Crawford* ruling. The effect that *Crawford* had on the efficacy of evidence-based prosecution may have been, and could still be, shaping the interpretations of the Sixth Amendment Confrontation Clause.<sup>82</sup> *Crawford* has been worked to the point that at the present-day juncture, statements that the Framers and Justice Scalia may have anticipated the Sixth Amendment to cover are not in fact protected by the Confrontation Clause, and the current Sixth Amendment protections are circling back to the same feeble protections offered under the *Roberts* framework.

Further, the *Crawford v. Washington* decision puts prosecutors of intimate-partner violence in a difficult position. In order to go forward with evidence-based prosecution they must either potentially abuse the Sixth Amendment's right to confrontation or pressure victims to testify earlier or more aggressively than is ideal.<sup>83</sup> The victims of intimate-partner violence are similarly put between a rock and a hard place—either choose to participate and face potential consequences of retribution and threats, or face the consequences of letting the perpetrator go free when the charges are dropped due to a lack of evidence consequential of choosing not to participate.<sup>84</sup>

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<sup>81</sup> Stras, David, Orin Kerr, Rachel Barkow, Stephanos Bibas, and Paul J. Larkin Jr. p.744.

<sup>82</sup> Jaros, David. "The Lessons of *People v. Moscat*: Confronting Judicial Bias in Domestic Violence Cases Interpreting *Crawford v. Washington*." *American Criminal Law Review* 42(3). p.1108.

<sup>83</sup> Percival, Jeanine. p.235.

<sup>84</sup> *Ibid.*

## Purpose of Thesis

This thesis will consider how to restore the function of *Crawford* in a way which does not re-privatize domestic violence. The story of Maria and Mike will serve as a scenario to apply to multiple forthcoming examples to in order to clarify points and allow for abstract concepts to be applied more concretely. This thesis will consider the implications of *Crawford* and its progeny and suggest multiple policies and definitions which should be adopted in order to settle the “interim uncertainty” which has remained pervasive since *Crawford* in 2004.<sup>85</sup>

The subsequent chapters of this thesis will argue that the *Crawford* lineage of cases has weakened the effects of the *Crawford* decision in a manner that warns of a judicial overstep. I will consider how it is imperative that courts not enter a vicious cycle where the strength of the Sixth Amendment right to confrontation ebbs and flows with further Supreme Court decisions, but simultaneously argue that protecting evidence-based prosecution is essential to protecting victims of intimate-partner violence in Chapter Three. The answer to the *Crawford* cycle of constitutional crisis which conflicts with evidence-based prosecution is not simply further judicial decisions, but rather a commitment to clear definitions and jurisdictional commitments to policy solutions. This thesis will clearly lay out the subsequent decisions which contributed to the weakening of *Crawford* and provide suggestions for policy solutions that require efforts from the courts, law enforcement, community support systems, and prosecutors in order to provide equal protection to both the Amendment and the accused as well as victims of intimate partner violence.

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<sup>85</sup> *Crawford v. Washington* at 68 footnote 10.

## Chapter 2: Cases and Consequences

*Crawford v. Washington* left the relationship between the Sixth Amendment Confrontation Clause and out-of-court statements in a haze of “interim uncertainty” until 2006 when the Supreme Court decided two cases in a combined opinion known as *Davis v. Washington*.<sup>86</sup> *Davis* combined two fact patterns, and the ultimate holding rendered the primary purpose test the law of the land for determining which statements are testimonial, and therefore subject to the Confrontation Clause, and which are not. Justice Scalia wrote the opinion and elaborated the rule as:

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.<sup>87</sup>

A corresponding footnote in the majority opinion notes that the *Davis* fact patterns were only expansive enough to allow the Court to decide on the issue of testimonial statements as they relate to police interrogations and where the role of police and responsibility of interrogation can extend to 911 operators.<sup>88</sup> Thus, this holding does not comment on the testimonial nature of statements made to non-law enforcement officers or off-duty officers, nor does it dictate a rule on statements made to officers without provocation or questioning from an officer. The fact patterns of these two cases are significant for comparison and contrast to subsequent decisions in the *Crawford* progeny and make a difference in the workability of the primary purpose test that the facts ultimately led to.

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<sup>86</sup> *Crawford v. Washington* at 69 footnote 10.

<sup>87</sup> *Davis v. Washington* at 820.

<sup>88</sup> *Davis v. Washington* at 820 footnote 1.

***Davis v. Washington* Fact Pattern**

In *Davis v. Washington*, Michelle McCottry made a 911 call which disconnected, and led to a return call from the operator.<sup>89</sup> The operator established through questioning that McCottry had called because she was being abused in her home by her ex-boyfriend.<sup>90</sup> The operator asked if there were weapons used or alcohol involved, and McCottry reported “He’s usin’ his fists,” and the alleged abuser had not been drinking.<sup>91</sup> It was at this point that the 911 operator informed McCottry that help was on the way and she was to stay on the line and listen while additional questions were asked.<sup>92</sup> The 911 operator gathered the full name of the alleged abuser, Adrian Martell Davis, and then McCottry informed the operator that Davis was running and leaving in a car.<sup>93</sup> The operator told McCottry to “Stop talking and answer my questions,” and proceeded to accumulate information about Davis, including his birthday, reason for being present at the house, and additional information about the assault.<sup>94</sup> The police arrived at the scene approximately four minutes after the call and observed McCottry as “shaken” and “frantic.”<sup>95</sup>

McCottry did not testify in the subsequent trial against Adrian Davis, but her recorded statements made during the 911 call were played to the jury; with those statements, the two testifying officers were able to connect McCottry’s injuries to her account of the attack.<sup>96</sup> Davis was convicted and the Supreme Court of Washington determined that the portion of the call which identified Davis was not testimonial.<sup>97</sup>

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<sup>89</sup> *Davis v. Washington* at 813.

<sup>90</sup> *Davis v. Washington* at 814.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Davis v. Washington* at 815.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

***Hammon v. Indiana* Fact Pattern**

*Hammon v. Indiana* is also a case of intimate-partner violence, but the facts are quite different. The victim, Amy Hammon, did not reach out to the police, herself, but rather police responded to her and her husband, Hershel Hammon, after receiving a report of a domestic disturbance.<sup>98</sup> When the police arrived, Amy was on her porch and perceived as “somewhat frightened,” though she informed the police that nothing was wrong and gave permission to go inside of her home.<sup>99</sup> The police observed a broken heating unit and shattered glass in the living room and found Hershel Hammon in the kitchen.<sup>100</sup> One officer asked Amy to explain what had happened; meanwhile, Hershel made multiple attempts to interrupt and interject this conversation.<sup>101</sup> Amy told police that she had been shoved and hit, furniture was broken, her van was made unusable, and her daughter was attacked.<sup>102</sup> She signed a battery affidavit including this information.<sup>103</sup>

Amy did not appear for Hershel’s trial, but the questioning officer narrated her statements and provided authentication for the battery affidavit.<sup>104</sup> Both Amy’s hearsay statements and the affidavit were admitted as “excited utterances” and a “present sense impression,” respectively, despite objections regarding the Sixth Amendment.<sup>105</sup> The affidavit was determined to be testimonial due to its use as a preservative of potential evidence, but its admission was ruled to be harmless beyond a reasonable doubt.<sup>106</sup>

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<sup>98</sup> *Davis v. Washington* at 816.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> *Davis v. Washington* at 817.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Davis v. Washington* at 818.

### **Comparison of Temporal Reasoning in *Davis* and *Hammon***

The key differences in these two cases lie within the timeline and the formality of the events; however, it is not these differences that necessarily underlie the reasoning for the differing determinations regarding the testimonial nature of the victims' statements. The circumstances of each intimate-partner attack are important to note because they demonstrate inconsistencies within these decisions and future decisions pertaining to the Sixth Amendment which come before the court. Namely, during the phone call with the 911 operator, Michelle McCottry specifically states that the perpetrator was leaving. It is not entirely clear from the decision precisely when the ongoing emergency ends and the ensuing questioning becomes an interrogation that produced testimonial statements, but it seems as though when the threat was separated from the threatened the words that McCottry spoke were no longer the narration of events as they took place, but rather a recantation of past events and statements which would serve as the functional equivalent of testimony elicited in court. The operator asked McCottry specific questions about Davis including his birthday and reasons for being present at the home. Knowledge of an alleged abuser's birthday cannot be integral to resolving an emergency; the information goes to further proving the identity of an alleged perpetrator to allow for easier searches of records, but it does not serve the purpose of stopping an attack and resolving an emergency. Further, the operator asked for the reason why Davis was present at the home<sup>107</sup>. This question and its consequent answer provide information about the means which made a crime possible or the motive for the ensuing attack, but they do little to provide a remedy to the abuse which had just ensued. This narration of past events, the narration of why Davis was in the home in the first place, resembles the kind of story which, if she had chosen to be involved with

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<sup>107</sup> *Davis v. Washington* at 816.



the prosecution, Michelle McCottry would have taken the stand to repeat during a trial against Davis. However, one of the cited reasons why McCottry's phone call and a few of her statements to the arriving police officers were admitted as nontestimonial excited utterances and present sense impressions was because she had been narrating events as they were occurring.<sup>108</sup> However, following Davis's departure from the home, this is less convincing.

In the case of Amy and Hershel Hammon, the statements of Amy Hammon were ruled testimonial because when the officers arrived, the statements that she gave to officers were those which narrated past events and the previous emergency was no longer unfolding. This creates an interesting tension between the reasoning of *Hammon* and the reasoning of *Davis*. In *Hammon*, the alleged abuser was still present at the home and was actively trying to insert himself into situations with his victim, despite police action to stop him. The situation was no longer an emergency despite the perpetrator and the victim still being in proximity to one another and the perpetrator exhibiting aggressive tendencies. On the other hand, McCottry was ruled to have been facing an ongoing emergency even when the alleged abuser had fled the scene and separated himself from his victim. The distance did not resolve the emergency. The temporal differences of these two fact patterns, however, may justify the decisions regarding emergencies—McCottry's phone call spanned from during, or just after the attack to only minutes after the attack while Hammon's discussions with officers may have taken place any span of time after the attack had commenced. However, because of the factual differences regarding the presence of the threat tell a different story—McCottry's threat had departed while Hammon was left for a span of time alone, with her attacker present. The decisions defining an ongoing emergency in these cases demonstrate that defining "emergency" is a temporal decision

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<sup>108</sup> *Davis v. Washington* at 825.

in relation to the freshness of the crime instead of a decision based on whether the threatening subject has been separated from the threatened subject.

Consider the Mike and Maria hypothetical in comparison to *Davis* and Michelle McCottry's statements. Maria was calling 911 to report that her husband *had* beaten her and that he had already left the home, but no more than five minutes ago. She notes that an ambulance is necessary to tend to her head wound. She also notes that Mike owns a gun, had threatened her with it in the past, and she does not know if he has it with him or not. Maria is certainly relaying information about a past crime to an arm of the police in response to structured questioning. Her words, which incriminate her husband Mike, connect him to physical evidence and injury, and ultimately lead to his arrest certainly serve as an out-of-court alternative to in-court testimony. Now consider Michelle McCottry's statements. She relays Davis's name and connects him to the crime by identifying his weapon (his fists) and describing that "he's here jumpin' on me *again*" (emphasis added).<sup>109</sup> These statements by McCottry were ruled to be nontestimonial because they were made during the course of an ongoing emergency considering that Davis was still present at the home while McCottry was responding. What if in the hypothetical Maria had specifically said, "He was here jumpin' on me again," and responded to "Are there any weapons?" with "No. He was usin' his fists."? These words would be identical to the nontestimonial statements made by Michelle McCottry save the tense of these statements. The statements would have been in the past tense but describing events that happened no more than five minutes ago. This comparison demonstrates that the difference between what is considered nontestimonial and what is likely considered testimonial lies in the tense of the statement and not in the accusatory function of the statements. Whether in past or present tense, each of these statements serve the

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<sup>109</sup> *Davis v. Washington* at 814.

purpose of accusing another person of a crime in response to formalized, structured questioning by agents of the police. Whether past or present tense, each of these statements are declarations or affirmations “made for the purpose of establishing or proving some fact.”<sup>110</sup> The fact that *Davis* is able to separate testimonial statements from the declarant and the function of proving fact and make them into affirmations conditional on time and relationship to an emergency separates *Davis* from the initial force of *Crawford*. This test should not discriminate against statements based on the tense the declarant uses nor entirely invalidate victim statements because they were not safe enough or able to call for help until the dangerous situation had calmed.

### **Comparison of Formality Between *Davis* and *Hammon***

The formality of the two modes of questioning also played a role in contrasting the two cases but did not necessarily find its way into defining the parameters of testimonial. In *Davis* the questioning took place over a 911 phone call. The call was determined to be informal and therefore less likely to be testimonial; however, many jurisdictions and 911 training programs have a specific and structured script for 911 operators to stick to while gathering information to dispatch officers. For example, consider these instructions for responding to calls reporting domestic violence from a 911 dispatch officer student manual created by the New Jersey Division of Criminal Justice:<sup>111</sup>

During a call for assistance, the dispatcher should ask the following questions:

1. Where is the emergency? What address? What apartment number?
2. Who am I speaking to?
3. What has happened?

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<sup>110</sup> *Crawford v. Washington* at 50.

<sup>111</sup> “Handling a Domestic Violence Call: In-Service Training for Police Dispatchers.”

4. Has anyone been injured? If yes, is an ambulance needed?
5. Are you the victim? If no, are you a witness?
6. Is the suspect present? What is his/her name? Please describe the suspect. If the suspect is not present, where does the caller believe the suspect is.
7. Are weapons involved? If yes, what kind?
8. Is the suspect under the influence of drugs or alcohol? If yes, what substance?
9. Are children present? If yes, how many? How old?
10. Are other people present? If yes, how many?
11. Have the police been to this address before? If yes, how many times? When was the last time?
12. Does the victim have a current restraining order?
13. A telephone number where the caller can be called back.

A comparison of the order, text, and purpose of these questions to the questions used by the 911 operator in the Mike and Maria hypothetical which were based off a different training manual demonstrate that the general organization and structure of these calls are nearly identical across different jurisdictions. There is rhythm and reason to each question and the question that follows which makes the operation of the calls and the ensuing response more streamlined. With this in mind, consider the definition of “formality” from the Merriam Webster Dictionary: “compliance with formal or conventional rules; an established form or procedure that is required or conventional.”<sup>112</sup> The congruence of the form between different jurisdictions demonstrates that this procedure is both established and conventional, which would qualify 911 calls as formalized interrogations. However, the approach that the *Davis v. Washington* decision takes frames 911

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<sup>112</sup> Merriam Webster’s Dictionary, s.v. “Formality,” accessed February 9, 2019, <https://www.merriam-webster.com/dictionary/formality>.

calls as often the opposite because the caller, in this case McCottry, was answering questions over the phone and in a chaotic setting.<sup>113</sup> This take on the interrogation's formality is problematic because it shifts the role of the integral viewpoint away from the interrogator and to the person answering questions—this is the opposite of the integral viewpoint in the primary purpose test—and makes this structured questioning nontestimonial because the respondent is not constrained by formality. This conflicts with the Court's *Crawford* holding which made interrogations by law enforcement a core class, and particularly at odds with Justice Scalia's footnote four:

We use the term “interrogation” in its colloquial, rather than any technical legal, sense (citation omitted) ... Just as various definitions of “testimonial” exist, one can imagine various definitions of “interrogation,” and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to *structured police questioning*, qualifies under any conceivable definition (emphasis added).<sup>114</sup>

The Supreme Court determined in *Davis* that the 911 operator questioning McCottry was an act of the police.<sup>115</sup> If “under any conceivable definition” knowingly given responses to *structured police questioning* are testimonial, then McCottry's knowingly given statements made in response to structured questioning by a police agent should have been considered testimonial. However, the Court notably made a viewpoint shift which saved the case. In *Crawford*, interrogations were made to be such by the structure and function of the questions and the officer asking such questions; no mention was made of an additional qualification for the respondent to be of a particular demeanor or cognizant of a formality level. In *Davis*, the Court justified their addendum to the once clear core class by inserting “and of course even when interrogation exists

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<sup>113</sup> *Davis v. Washington* at 824.

<sup>114</sup> *Crawford v. Washington* at 54.

<sup>115</sup> *Davis v. Washington* at 820.

it is in the final analysis the declarant's statements, not the interrogators questions, that the Confrontation Clause requires us to evaluate."<sup>116</sup>

The problem with this viewpoint shift is not that it considers the perspective and demeanor of the respondent, but that it is inconsistent with the remainder of the *Davis* decision, is a form of cherry-picking rules to achieve a desired result, and distorts the core class that had been clearly laid out in *Crawford*. The determination of a statement's testimonial nature should either be based upon an analysis of the questioner's viewpoint, the declarant's viewpoint, specifically defined as a joint-test, or a different test altogether—but what the Court should not do is flip-flop which viewpoint is scrutinized to avoid coming to an unattractive conclusion, namely that 911 calls are structured police questioning and per se testimonial. I do not argue that 911 calls *should* be per se testimonial, but rather I make this point to show that *if* formality hints at a testimonial nature, and structured questioning by police officers or agents is per se testimonial, *then* the formalized, structured nature of 911 calls should be testimonial under *this* definition—but they are not. This points at an inconsistency which was created to make cases workable for the prosecution, which is not a fair reason for a decision.

### **Testimony Erroneously Made the Product of a Relationship**

The *Davis* decision further differs from *Crawford* and creates difficulties for the workability of the primary purpose testimonial test because it makes testimonial statements the products of a relationship instead of inherent members of core classes and products of witnesses. In *Crawford* the active voice belongs to the declarant, and it is the declarant who has the power to turn a statement into one that is either testimonial or nontestimonial. For example, “an accuser who makes a formal statement to government officers bears testimony in a sense that a person

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<sup>116</sup> *Davis v. Washington* at 819-820 footnote 1.

who makes a casual remark to an acquaintance does not.”<sup>117</sup> The difference between these two kinds of statements (casual remarks and testimony) is not their relationship, or lack thereof, to an emergency, nor differences in the primary purposes of the police officers’ questions. Rather, the difference between these two kinds of statements regards the level of solemnity of the speaker and the speaker’s function. To bear testimony or witness against someone requires no relationship other than an active speaker and a present listener. Taking such action to formulate such a statement does not require particular external environmental factors nor a specific type of listener, but only the active choice by a declarant to voice or write a statement which has the effect of establishing or proving some fact. A “formal statement to government officers” can be made inside or outside the constraints of an ongoing emergency, and *Crawford* pays no mind to the subsequent actions of the law enforcement officer when making the assertion that this formal statement would be testimonial. The declarant should bear the power to create a testimonial statement, not situational factors—if the speaker makes a “solemn declaration or affirmation made for the purpose of establishing or proving some fact,” then the statement made was testimonial. *Davis*, on the other hand, distorts this clear understanding by switching the point of view and the creative power to the law enforcement officer and the circumstances surrounding each statement. When statements made during police interrogations are surrounded by circumstances that suggest an emergency must be attended to by police and the statements would be helpful in reaching a resolution to that emergency, then the circumstances and the necessity of the police to respond to the emergency override the creative power of the declarant. The declarant is removed from the active role of creating testimony based on the subject and inherent accusatory value of her statement and put in the passive role of having testimony, or

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<sup>117</sup> *Crawford v. Washington* at 50.

nontestimonial statements elicited from her. Consequently, testimonial statements become a product of their environment rather than an inherent form of speech like imperative, declarative, interrogatory, and exclamatory statements. Some scholars, including Justice Scalia, himself, held the belief that it was too subjective to make a determination about the intent of the declarant while they made a statement and that this subjectivity required the testimonial test to concentrate on the purpose of the second-party, whether a listener or a law enforcement agent.<sup>118</sup> It can be derived from *Davis* that nearly identical statements made under different circumstances can be classified differently as long as the relationship to an emergency or the intent of the listener can be argued as different. This is neither workable, nor does it protect from the abuses that the Sixth Amendment Confrontation Clause was implemented to protect against.

### **The Diminished Scope of Testimonial Core Classes**

*Crawford* laid out that the core classes which were named in Chapter One “all share a common nucleus *and then* define the Clause’s coverage at various levels of abstraction around it” (emphasis added).<sup>119</sup> These core classes include “statements taken by police officers in the course of interrogations” and make no mention of an additional condition for an absence of an emergency-in-progress or for the primary motivation of the interrogator to be to collect evidence for an impending prosecution.<sup>120</sup> Rather, the decision calls for statements made in the course of police interrogation to be a core upon which *additional* protections are built. Adding conditionals where statements made in the course of police interrogation are testimonial *only if* made when there are no circumstances that indicate an ongoing emergency or *only if* the responses are

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<sup>118</sup> Rouhanian, Anoosha. “A Call for Change: The Detrimental Impacts of *Crawford v. Washington* on Domestic Violence and Rape Prosecutions,” *Boston College Journal of Law & Social Justice*, 37(1); (2017). p.11.

<sup>119</sup> *Crawford v. Washington* at 51.

<sup>120</sup> *Ibid.*



proving *past* fact chip away at the nucleus of this protection rather than garner additional protections outside of the core.<sup>121</sup>

The core classes of testimonial statements set forth in the *Crawford* decision have nothing to do with whether there is an ongoing emergency nor take in to any consideration the primary purpose of the police. Rather, these core classes establish that certain kinds of materials and statements inherently have the purpose of proving some fact and serve as the functional equivalent of a witness at trial.<sup>122</sup> The purpose and function of these core classes is derived from either the expectation of the declarant, a level of formality, and the substance of the statements which make them inculpatory. The Framers were likely unconcerned with whether declarants had made statements used as *ex parte* evidence under conditions indicating an ongoing emergency, or whether they were *ex parte* regardless of exterior conditions. *Ex parte* testimony was subject to the Confrontation Clause. In the cases that Justice Scalia cites as early state decisions regarding the Sixth Amendment and the right to confrontation, the North Carolina Supreme Court held that “[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.”<sup>123</sup> The South Carolina high court found it an “indispensable condition” that “prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examinations.”<sup>124</sup> Neither of these holdings include an addendum that cuts out an exception if the evidence was created during an ongoing emergency.

It is important to consider that establishing or proving some fact during an emergency, whether past or present, can be one of the most important times to do so. Officers responding to

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<sup>121</sup> *Davis v. Washington* at 819.

<sup>122</sup> *Crawford v. Washington* at 50.

<sup>123</sup> *Crawford v. Washington* at 48.

<sup>124</sup> *Ibid.*

emergencies often must take statements to be fact in order to best respond to an emergency at hand. If a declarant states that John Doe ran toward the city center with a gun, then that statement will likely be taken as fact for the purpose of apprehending John Doe for a crime that includes a firearm. The emergency situation *requires* that facts be established. This creates a dual purpose for statements made during emergencies. They may be made for the purpose of establishing or proving some fact, but that very establishment of fact may aid law enforcement in both the resolution of an emergency, but also in the subsequent apprehension and conviction of a culprit of a crime. The reason that statements of a testimonial nature, considering that they prove or establish fact, aid in resolving emergencies should not alone be enough to inherently disqualify those statements from the broader definition of testimonial. Cutting statements with a testimonial purpose out of the testimonial definition because they are made during an ongoing emergency creates perverse incentives to maintain a perception of an emergency state whether it exists or not.<sup>125</sup>

Inconsistencies and distortion plague the *Crawford* progeny beginning with *Davis*, continuing in *Michigan v. Bryant* in 2011, and further affecting *Ohio v. Clark* in 2015. Analysis reveals that viewpoint shifts, expansions of definitions, and minimizations of core classes occur in these cases in a manner that severely damages a criminal defendant's right to confrontation in all cases, but simultaneously discriminates against victims in domestic violence cases. The purpose of *Crawford* was to reestablish order to the system governing the admittance of out-of-court statements and to reinvigorate the right to confrontation which the Sixth Amendment guarantees in *all* criminal proceedings. Those protections have been worn down through the lineage of cases following *Crawford* and consequently, criminal defendants face a system in

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<sup>125</sup> *Hammon v. Indiana* Oral Argument, *United States Supreme Court*, 20 Mar. 2006.

which out-of-court statements offered to prove facts about their behavior or a crime are being admitted as evidence without any opportunity for the credibility or reliability of the evidence to be tested through cross examination.

### ***Michigan v. Bryant* Fact Pattern**

In 2011 the United States Supreme Court handed down another decision which shaped the jurisprudence covering the Confrontation Clause's effects on out-of-court hearsay statements being used as evidence in criminal trials. *Michigan v. Bryant* was decided by a 6-2 vote and the opinion was authored by Justice Sotomayor. Both Justice Scalia and Justice Ginsburg dissented, and Justice Elena Kagan was not involved in deciding the matter.<sup>126</sup> In *Michigan v. Bryant*, the victim, Anthony Covington, was shot through the porch door at the home of a man he believed to be Richard Perry Bryant.<sup>127</sup> Twenty-five minutes after the shooting, police were dispatched and arrived at a gas station where Covington was found, lying in the parking lot, with a gunshot wound in his abdomen.<sup>128</sup> Upon arrival, the police asked Covington "what had happened, who had shot him, and where the shooting had occurred."<sup>129</sup> Covington responded by narrating the story that he had been shot by "Rick" at approximately three in the morning, that he had been speaking with "Rick" from the porch and through the back door of Bryant's home, but when he turned to leave, he had been shot through the door.<sup>130</sup> He then drove to the gas station where he had been found. Additional officers subsequently arrived at the scene, and each one asked Covington the same, or similar questions. In all, five separate officers received consistent stories from Anthony Covington about the crime that had taken place nearly a half hour ago.<sup>131</sup> Between

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<sup>126</sup> *Michigan v. Bryant*. 562 U.S. 344, 375 (2011).

<sup>127</sup> *Michigan v. Bryant* at 345.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Michigan v. Bryant* at 379. Justice Scalia's dissenting opinion.

five and ten minutes later, emergency medical services approached the scene and moved Covington to a hospital where he died from his injuries.<sup>132</sup> Consequently, *Michigan v. Bryant* was a case that tackled the Sixth Amendment from a non-domestic dispute lens and the witness was unavailable not due to fear or noncooperation, but rather because he was deceased at the time of Richard Bryant's trial.

The prosecution in the *Bryant* case brought the five officers who responded to the scene to the stand to recount the statements that Covington made to them and narrate how his statements led to their subsequent actions. They visited Bryant's home, discovered blood, a bullet, and a bullet hole in the door, as well as personal belongings and identification of Covington on the porch.<sup>133</sup> Bryant and his lawyers took issue with the prosecution using the officers as vessels for relaying out-of-court statements made by Covington and argued on appeal that the admittance of Covington's responses to the questions of what happened, who shot him, and where he was shot were a violation of Bryant's Sixth Amendment right to confront the witnesses against him because the statements were testimonial, pursuant to the decisions in *Crawford v. Washington* and *Davis v. Washington*. The case worked its way to the United States Supreme Court where the Court considered "whether the Confrontation Clause barred the admission at trial of Covington's statements to the police."<sup>134</sup> The Court held that "the circumstances of the interaction between Covington and the police objectively indicate that the "primary purpose of the interrogation" was "to enable police assistance to meet an ongoing emergency."<sup>135</sup> To reach this conclusion, the Court assessed a multitude of situational factors and adopted a mode of thinking which resembled that of *Roberts* in a startling way.

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<sup>132</sup> *Michigan v. Bryant* at 345.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Michigan v. Bryant* at 354

<sup>135</sup> *Michigan v. Bryant* at 344.

## The Expansion of the Ongoing Emergency Doctrine

The Court concluded that the only statements of concern to the Sixth Amendment are those made with the “primary purpose of creating an out-of-court substitute for trial testimony.”<sup>136</sup> Thus, any other purpose for the creation of evidence, including but not limited to the purposes of resolving an ongoing emergency, would be nontestimonial and admissible in court without confrontation. These purposes allude to hearsay law which was a cornerstone of the *Roberts* logic of reliability. Statements made for the primary purpose of a medical diagnosis or treatment are not made for trial, but for treatment.<sup>137</sup> Other documents may be made for the purposes of a business records, or for the purposes of furthering a conspiracy. These are all not proffered for the purposes of serving as out-of-court substitutes for testimony, and therefore the Court majority argues that these are inherently reliable, and therefore admissible, without confrontation.<sup>138</sup> The Court further expands this primary purpose test by loosely coupling the ongoing emergency doctrine with the rationale for indoctrinating the hearsay exception for excited utterances. Namely, when one is distracted by an ongoing emergency, their focus shifts away from the purpose of proving past events and consequently their desire to fabricate a story for prosecution is squashed by the desire to project reliable information helpful to ending an emergency.<sup>139</sup> This rationale mirrors the argument for the excited utterance exception—circumstances of stress, shock, or feelings of excitement eradicate the chances of the declarant having been in a clear enough mindset to fabricate falsities.<sup>140</sup> Some scholars argue that excited utterances, whether made during an ongoing emergency or not, are never made with a reasonable

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<sup>136</sup> *Michigan v. Bryant* at 355.

<sup>137</sup> King-Ries, Andrew. p 318.

<sup>138</sup> *Michigan v. Bryant* at 358 footnote 9.

<sup>139</sup> *Michigan v. Bryant* at 357.

<sup>140</sup> *Michigan v. Bryant* at 358.

idea that the statement will be used for a prosecutorial purpose.<sup>141</sup> These statements as initial reports are frequently the most reliable and consistent with other physical and circumstantial evidence.<sup>142</sup> This rationale supporting the admissibility of unconfrosted statements made by witnesses during an ongoing emergency stands on the premise that if the circumstances surrounding a statement indicate that the statement is reliable, then the statement is admissible without violating the Confrontation Clause. This rationale supports the success of evidence-based prosecution because trusting initial reports and admitting excited utterances as nontestimonial hearsay broadens the amount of prosecutorial evidence.<sup>143</sup> However, admitting statements for reliability and to guarantee a result favorable for the prosecution is the same premise which *Roberts* stood on, and the same premise which was undermined by *Crawford* in 2004. *Bryant* returns to the Confrontation Clause to a substantive guarantee instead of a procedural one as promised in *Crawford*.<sup>144</sup>

The Court utilized another viewpoint shift in the *Bryant* decision, making it clear that it is the viewpoint of a *reasonable participant* in the same circumstances that matters when determining the existence of an ongoing emergency.<sup>145</sup> Would a reasonable person in the declarant's position, knowing all of the relevant facts and circumstances which the declarant did, objectively believe that there was an ongoing emergency, and thus believe that their statements would be used to address that emergency, and not used for a future prosecution? This is the question put before the courts when determining whether statements are testimonial. However, the Court adds that the *actual* existence of an emergency is of little consequence—if a reasonable

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<sup>141</sup> King-Ries, Andrew. p.319.

<sup>142</sup> King-Ries, Andrew. p.307

<sup>143</sup> King-Ries, Andrew. p.308-309.

<sup>144</sup> *Crawford v. Washington* at 61.

<sup>145</sup> *Michigan v. Bryant* at 356.

person in the declarant's position would be under the impression that there *was* an emergency, then their mindset would be affected in the same way as if there *actually were* an emergency, and thus, the Court argues, their statements would be reliable and nontestimonial.<sup>146</sup> The Court argues that the existence of a medical emergency would be considered by a reasonable participant making a conclusion about the existence of an emergency, along with the type of weapon being used, the formality of the questioning, and the setting of the interrogation i.e. public or private.<sup>147</sup> Ultimately, the Court declared its decision an establishment of an objective analysis, but what was actually established presents itself as a multi-faceted consideration that has so many moving parts that can easily be manipulated by the prosecution to resemble an emergency and circumnavigate *Crawford* and the Sixth Amendment. This totality of the circumstances test is unworkable. The result of *Michigan v. Bryant* was not a final settlement of the interim uncertainty caused by *Crawford*, but rather an effective return to the uncertainties of *Roberts* where multi-part balancing tests rule in an unpredictable way.

The steps that the Court took to reach this holding were complicated, and thus the resulting precedent that the case set is complicated, unpredictable, and *dangerous* for both criminal defendants and victims of domestic violence. It creates “an expansive exception to the Confrontation Clause for violent crimes” and in the same vein effectively exempts victims of domestic violence from benefitting from this exception.<sup>148</sup>

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<sup>146</sup> *Michigan v. Bryant* at 357 footnote 8.

<sup>147</sup> *Michigan v. Bryant* at 360-363.

<sup>148</sup> *Michigan v. Bryant* at 387 Justice Scalia dissent.

## **Emergencies— A Product of Uncertainty**

The *Bryant* decision is distinguished from *Davis* as “a nondomestic, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim.”<sup>149</sup> From these facts, the Court concluded that the “ongoing emergency” was a potential threat which extended to both the police and members of the greater public. Thus, the ongoing emergency which the entire decision rests upon is one of hypothetical future danger made possible by the “nondomestic” nature and setting in a “public location.” Upon arrival, the responding officers were unaware of Covington’s identity, unsure of whether the shooting had taken place at the gas station or elsewhere, and further uncertain of whether the assailant was indeed a continuing threat to either Covington, the police, or the general public.<sup>150</sup> According to the majority opinion, these uncertainties are the making of an emergency because, until the key facts about the scope of the situation at hand are established, the primary purpose of the investigators’ questioning is assumed to be to resolve any emergency that *could* be happening. Ultimately, the conclusion could be drawn that any situation where a victim has been injured and the reason for that injury is unknown to the responding law enforcement is an emergency until sufficient facts are established to show otherwise. What constitutes sufficient facts is, however, unclear because five separate officers interrogated Covington, and each of those officers was ruled to have been responding to an ongoing emergency. Evidently sufficient information to resolve an ongoing emergency is a blurry, but high bar. The opinion uses the fact that Covington did not make clear through his statements whether the emergency threat was individual to him or to the public as evidence that it was fair

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<sup>149</sup> *Michigan v. Bryant* at 355.

<sup>150</sup> *Michigan v. Bryant* at 368.



for the police to assume that the threat was more broad.<sup>151</sup> However, if the primary purpose or objective of the police was to resolve an ongoing emergency, it seems the quickest way to resolve such a situation is to determine whether such a situation exists. Hence, rather than asking questions of a dying man that elicited responses that would have paralleled “a routine direct examination,” the officers should have asked questions that would have gotten directly to the heart of the issue—is Bryant a threat to others? Was this an isolated incident? Etc.<sup>152</sup> Although the decision claims that “none of this suggests that an emergency is ongoing in every place or even just surrounding the victim for the entire time that the perpetrator of a violent crime is on the loose,” the decision’s evidence in support of this is unclear.<sup>153</sup> The Court argues that interrogations may gradually transform from a response to an emergency to the eliciting of testimonial statements.

This evolution may occur if, for example, a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute. It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or, as in *Davis*, flees with little prospect of posing a threat to the public.<sup>154</sup>

Though this list is likely not all-encompassing, the transformation from a nontestimonial interrogation to a testimonial interrogation is contingent on a limited number of factors which suggest that an “ongoing emergency” is to be interpreted broadly. Police can either remain ignorant to the scope of a situation to extend an emergency and gather statements with a function identical to those which would be offered in court, or the emergency could extend as long as a potentially armed perpetrator is a potential threat to the public. The Court creates an exception with such latitude that conditions can be manipulated into an emergency simply when there are

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<sup>151</sup> *Michigan v. Bryant* at 369.

<sup>152</sup> *Michigan v. Bryant* at 384 Justice Scalia dissent.

<sup>153</sup> *Michigan v. Bryant* at 363.

<sup>154</sup> *Michigan v. Bryant* at 360.

uncertainties about the potential scope of a situation and its danger, and this emergency can be extended by remaining ignorant to clarifying facts. This is not the way that the Confrontation Clause was intended to function. Consequentially, criminal defendants face a serious injustice in court when statements with the function of proving past fact pertinent to a crime are not subject to cross-examination but are entered into evidence because they were made during an ongoing emergency and construed to have been used to resolve that ongoing emergency. Criminal defendants suffer from this functional resurrection of *Roberts*.<sup>155</sup>

### **Consequences for Evidence-Based Prosecution and the Hierarchy of Public and Private Violence**

The *Bryant* decision's framework has an inadvertently adverse effect on the efficacy of evidence-based prosecution and thus victims of intimate-partner violence. Consider again the Court's language distinguishing *Bryant* from *Davis*. *Bryant* was "a *nondomestic* dispute" in which the victim was in a "*public* location" and the potential threat encompassed "responding police and the *public* at large."<sup>156</sup> Later the opinion further distinguishes by noting:

*Davis* and *Hammon* involved domestic violence, a known and identified perpetrator, and, in *Hammon*, a neutralized threat. Because *Davis* and *Hammon* were domestic violence cases, we focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat to *them*.<sup>157</sup>

Distinguishing the severity of emergencies based on the relationship of the victim and the perpetrator creates a system where intimate-partner violence is viewed as a lower-risk emergency than crimes committed by strangers. This diminishes the realities of the severity that intimate-partner violence can reach and disregards the patterns of re-abuse that accompany so many intimate-partner violence cases. Female victims of intimate-partner violence between the ages of

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<sup>155</sup> *Michigan v. Bryant* at 392. Justice Scalia dissent (2011).

<sup>156</sup> *Michigan v. Bryant* at 355. Emphasis added.

<sup>157</sup> *Michigan v. Bryant* at 359.

18 and 24 were re-abused by the same perpetrator in 77% of cases.<sup>158</sup> That statistic jumps to 81% of females when the age considered is between 35 and 49.<sup>159</sup> If the Court was considering the potential continued threat to the victim at hand, then victims of domestic violence may likely be facing more of a potential threat than victims of violent crime by strangers or known offenders who are not intimately related to the victim. A declarant who is not narrating dangerous events as they happen to a law enforcement officer is not necessarily out of danger.<sup>160</sup>

The *chance* of continued danger to the public, the police, and Anthony Covington was enough to transform multiple statements made by Covington to police officers in to nontestimonial statements. However, the *likelihood* of re-abuse in cases of intimate-partner violence is insufficient to constitute an ongoing emergency. Even Michelle McCottry noted that Davis had been “jumpin’ on me *again*” noting that this was a behavior that had occurred before.<sup>161</sup> The Court also considered the potential threat to additional members of the public in the *Bryant* case. However, this was not taken in to consideration when assessing the domestic violence cases which came before the Court. Intimate-partner violence is not always confined to one victim. “A study of intimate partner homicides found 20% of victims were family members or friends of the abused partner, neighbors, persons who intervened, law enforcement responders, or bystanders.”<sup>162</sup> In addition, the threat can often extend to children; between 30 and 60 percent of intimate-partner abusers also are abusive toward children in the home.<sup>163</sup> Intimate partner violence is not confined to one potential victim. Rather, it both threatens the safety of others and

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<sup>158</sup> “Get the Facts and Figures,” The National Domestic Violence Hotline, n.d., <https://www.thehotline.org/resources/statistics/>.

<sup>159</sup> *Ibid.*

<sup>160</sup> Rouhanian, Anoosha. p.51.

<sup>161</sup> *Davis v. Washington* at 814.

<sup>162</sup> Smith, S., Fowler, K. & Niolon, P. “Intimate partner homicide and corollary victims in 16 states: National violent death reporting system, 2003-2009.” *American Journal of Public Health*, 104(3); (2014): 461-466. doi: 10.2105/AJPH.2013.301582.

<sup>163</sup> “Get the Facts and Figures.”

often includes re-abuse. Consequentially, the Court's consideration of whether there was a continued potential threat to either Michelle McCottry or Amy Hammon may not have considered all the nuances of intimate-partner violence and the special form of emergency which it presents. This approach unfairly creates a bias against victims of intimate-partner violence because the future potential danger to them is not given the same weight as hypothetical danger to police or the greater public as in *Bryant*. The Court noted that separating Amy and Hershel Hammon in to different rooms was enough to end an emergency, yet the separation between Covington and his attacker both in location and temporally was apparently insufficient.<sup>164</sup> This comparison demonstrates a minimization of the complexities and dangers of domestic violence and a hierarchy between public and private violence where private violence is a lower tier danger. The Court went so far as to say that an evolution from testimonial to nontestimonial may happen if "what appeared to be a public threat is actually a private dispute."<sup>165</sup> This language has the effect of creating a test where public violent crimes can nearly always be ruled an ongoing emergency for the purposes of the Confrontation Clause, while "private disputes" are never enough of an emergency to be ruled an ongoing emergency.

However, Oregon has implemented a hearsay law which allows for statements made by victims of domestic violence within twenty-four hours of an attack to be considered to have been made in the course of an ongoing emergency and are admissible as long as they bear sufficient indicia of reliability.<sup>166</sup> This law is overcorrects in its response to *Crawford*. Whether no domestic dispute, or all domestic disputes are considered ongoing emergencies, the ongoing

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<sup>164</sup> *Michigan v. Bryant* at 360.

<sup>165</sup> *Michigan v. Bryant* at 361.

<sup>166</sup> Oregon Evid. Code Rule 803 (26); Rouhanian, Anoosha. p.53.

emergency doctrine on its own is incompatible with a fair application of the Confrontation Clause to cases of ongoing abuse, and lower courts have struggled to apply the doctrine fairly.<sup>167</sup>

Though not specifically written out, the *Bryant* decision adds another relational requirement to the understanding of the ongoing emergency doctrine. It has the impact of asking lower courts to consider the relationship between the alleged perpetrator and the victim, and if the victim and the perpetrator are intimately related, then the scope of the emergency is smaller. An interesting hypothetical to consider: if Covington had been lying in the same spot at the gas station with the same fatal wounds, had been asked the same questions about what happened, who shot, and where, but had answered that it was “Rick,” his husband, who had shot him through the door of his home about twenty minutes before he had driven to the gas station, would the opinion have been the same? The only substantive factual difference in this hypothetical would be the relationship between the victim and the shooter. Suddenly, there is “a narrower zone of potential victims than cases involving threats to public safety” which undermines a great deal of the Court’s argument for Covington’s statements being offered to resolve an ongoing emergency.<sup>168</sup> The primary purpose test should not place so much weight on the relationship between the accused and the victim—this creates drastic differences in the amount of protection of confrontation rights between those accused of domestic violence and those accused of public violence, and also between victims of public crime and victims of intimate-partner crime. In the 1980s, a series of equal protection cases surrounding law enforcement’s abysmal response to domestic violence emerged in America’s courts. Plaintiffs claimed that law enforcement treating victims of domestic violence differently than victims of other violent crime is discriminatory

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<sup>167</sup> Tuerkheimer, Deborah. ‘Forfeiture after Giles: The Relevance of Domestic Violence Context,’ *Lewis & Clark L. Rev.* 711(13); (2009). p.715.

<sup>168</sup> *Michigan v. Bryant* at 359-360.

against women, and that police should be aware of this negative impact.<sup>169</sup> They further argued that there is no “important or compelling public interest” in different treatment.<sup>170</sup> The female plaintiffs did not win their cases; however, these equal protection cases demonstrate that discrepancies between treatment of victims of intimate-partner violence and victims of other violent crime by law enforcement and the court system do raise legitimate questions of whether an unequal playing field for victims is justified by “important or compelling public interest.”

Clearly, the ruling in *Davis* regarding McCottry’s statements made during the 911 call were rendered nontestimonial and thus the bar of ongoing emergency is not a catchall block on statements made regarding private disputes, but the Court noted that the question before the Court only required them to assess the testimonial nature of McCottry’s first few responses during the call. Therefore, they did not assess whether the ongoing emergency did continue after *Davis* left the home, and no outer bound of an ongoing emergency was defined by *Davis*.<sup>171</sup> However, considering that the phone call established that *Davis* had no weapons, the police could establish that this was a private dispute, and that the police arrived quickly to aid her, if *Davis* were decided after *Bryant* and followed its rationale, I would anticipate that statements after *Davis*’s departure would likely be testimonial.

The hierarchy of emergency which minimizes intimate-partner violence has a major adverse effect on evidence-based prosecution. Evidence-based prosecution is a specific tool utilized to manage the prosecution of private disputes when the relationship between the victim and the perpetrator deters the victim from participating and thus are unavailable. *Bryant* created a major disadvantage for prosecutors attempting to offer an evidence-based prosecution. Evidence-

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<sup>169</sup> Jones, Ann. p.61-62.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Michigan v. Bryant* at 359.

based prosecutors likely have statements made by an unavailable witness that have not been subject to the opportunity for cross-examination. Therefore, they either need to subject the statements to that opportunity or prove that the statements were made for the primary purpose of something other than offering facts for a potential prosecution. The ongoing emergency exception would be a popular choice for an alternative purpose—however, *Bryant* makes that exception much smaller for domestic violence cases than for public violence, and thus evidence-based prosecutors must fight an uphill battle harder than prosecutors of public crimes, or hope for a judge who is willing to grant a major expansion of *Crawford* and *Davis* doctrine. Yet, activist judges are not the proper solution, either.

I argue that the proper solution is a rebalancing of the Sixth Amendment and *Crawford* that does not reprivatize domestic violence, does not over-expand the exceptions to the Sixth Amendment, nor infringe upon the rights of the accused. Rather, the solution has two parts. The first part is to implement a new test that *shrinks* the ongoing emergency exception to equalize private violence with public violence. The second part is the implementation of community-based support structures and other policy solutions within jurisdictions. These policies will aid in improving the efficacy of prosecuting intimate-partner violence by helping victims gain resources necessary to garner their participation and invigorate forfeiture doctrine for evidence-based prosecutions that must occur because the victim did not participate. My solution would settle the ambiguity and uncertainty that first manifested in blurry tests of “indicia of reliability,” evolved into ambiguous conceptions of “testimonial,” and now exist as broad ideas of “emergency.”<sup>172</sup>

### ***Ohio v. Clark* Fact Pattern and Implications**

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<sup>172</sup> Hardaway, Robert. Domestic Violence and the Confrontation Clause: The Case for a Prompt Post-Arrest Confrontation Hearing,” *Cardozo Journal of Law and Gender* 22(1); (2015). p.11.

In 2015, the Supreme Court handed down another ruling which would shape the landscape of Confrontation Clause jurisprudence. *Ohio v. Clark*'s fact pattern tells a story of child abuse and answers whether statements made by a three-year-old to his preschool teacher, a mandatory reporter, about who was responsible for injuring him were testimonial and hence subject to confrontation. A three-year-old boy, whom the court identified as L.P., arrived at preschool and one of his teachers noticed that one of his eyes looked bloodshot.<sup>173</sup> The teacher asked the child "what happened," and he was first non-responsive, but then told her that he had fallen.<sup>174</sup> She noticed that L.P. had red marks covering his face and asked the child, "who did this?" and "what happened to you?"<sup>175</sup> L.P. responded "something like Dee, Dee," and told his teacher that "Dee is big."<sup>176</sup> It was concluded that "Dee" was a reference to Darius Clark, L.P.'s mother's boyfriend who was left to care for L.P. and his younger sister while their mother was away.<sup>177</sup> L.P.'s teacher, as a mandatory reporter, alerted the proper authorities about suspected child abuse. At the end of the school day, Darius Clark arrived at the school to take L.P. home, denied that he was to blame for the abuse, and left with L.P.<sup>178</sup> The following day, L.P. and his younger sister were taken to the hospital by a social worker; a physician found further injuries and signs of abuse.<sup>179</sup> Consequentially, Clark was indicted for felonious assault, child endangerment, and domestic violence.<sup>180</sup> Ohio law prevented L.P. from testifying—his young age made him incompetent.<sup>181</sup> In lieu of L.P.'s live testimony, the prosecution offered L.P.'s statements to his teachers at trial under state hearsay law that admitted "reliable hearsay by child

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<sup>173</sup> *Ohio v. Clark*. 576 U.S. 135, 136 (2015).

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ohio v. Clark* at 135.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ohio v. Clark* at 136-137.



abuse victims” considering his statements “bore sufficient guarantees of trustworthiness.”<sup>182</sup> Clark objected to the admission of L.P.’s statements, arguing that they violated his rights to Confrontation; the trial court disagreed and Clark appealed his conviction.<sup>183</sup> The Supreme Court ruled that L.P.’s statements were nontestimonial because the situation was an ongoing emergency considering that L.P. faced the potential danger that he could be released back to his abuser at the end of the school day.<sup>184</sup> Therefore, the primary purpose of the teacher’s questioning was to respond to this emergency and protect L.P.<sup>185</sup> Additionally, the statements were nontestimonial because the dialogue “was informal and spontaneous.”<sup>186</sup> The conversation between L.P. and his teachers occurred in the preschool lunch room, and only occurred because the teacher noticed injuries and needed to respond to that emergency.<sup>187</sup> Lastly, these statements were rendered nontestimonial because L.P.’s young age precluded him from understanding the criminal justice system well-enough to have the primary purpose of providing a statement with a prosecutorial purpose.<sup>188</sup>

The fact pattern of this case differs from the previous cases which shaped the jurisprudence of the Confrontation Clause considering that the statements were not made to investigating or responding police officers, but rather to a teacher who was a mandatory reporter. A second key difference is that the statements were made by a three-year-old child whose age rendered his statements to be regarded quite differently than those of an adult who would better comprehend the situation. However, despite these differences which do make comparison to

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<sup>182</sup> *Ohio v. Clark* at 137.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ohio v. Clark* at 142.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ohio v. Clark* at 143.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

cases of domestic violence difficult, it is important to discuss this case to better understand the direction that the Court is taking when determining questions about the Confrontation Clause, and question what this direction means for evidence-based prosecution and criminal defendants, both.

First, this case could be read to extend the ongoing emergency doctrine to include the potential for repeat abuse as a component of an ongoing emergency inquiry. If this were the case, then evidence-based prosecution of intimate partner violence would be able to go forward with far fewer issues than they did in the initial time period post- *Crawford*. However, as a result, the rights of criminal defendants would be severely damaged, and the Confrontation Clause would lose strength. Justice Alito, the author of the opinion, wrote:

[The teachers] rightly became worried that the 3-year-old was the victim of serious violence. Because the teachers needed to know whether it was safe to release L.P. to his guardian at the end of the day... The teachers' questions were meant to identify the abuser in order to protect the victim from future attacks.<sup>189</sup>

Although not explicit, these words hint at an expansion of the ongoing emergency doctrine to include repeat abuse, and future attacks. Could Maria's statements referring to past abuse be rendered nontestimonial because the 911 operator's primary purpose in asking whether attacks on Maria had happened before was to assess Maria's safety level and protect her from future attacks? One could follow the line of reasoning in *Clark* and reasonably come to that conclusion. However, this would demonstrate a major separation from both *Davis* and *Bryant's* decisions which all but excluded the possibility of repeat abuse as a contributor to an ongoing emergency.

*Clark* does, however, mimic *Bryant* because the rationale behind the decision over-expands the exceptions to the Confrontation Clause. I would agree with the Court that L.P.'s age made him incapable of producing statements with the primary purpose of providing evidence for

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<sup>189</sup> *Ohio v. Clark* at 142.

trial. If he is legally incompetent to testify in court, then he is likely incompetent to produce testimony outside of the courtroom. However, this begs the question of whether L.P.'s delicate age was a necessary or a sufficient condition to render his statements nontestimonial. If his age was necessary to render his statements nontestimonial, then questions posed to older students by mandatory reporters could still be testimonial if they have the primary purpose of proving some past fact relevant to a future prosecution. However, if L.P.'s age was a sufficient condition, as the opinion hints at by stating that "statements by very young children will rarely, if ever, implicate the Confrontation Clause," then it is difficult to discern how much of an effect this decision has on Confrontation Clause jurisprudence outside the scope of child declarants.<sup>190</sup>

Despite hinting at L.P.'s age being a necessary condition, the opinion further elaborates reasons for finding his statements nontestimonial. In *Clark*, Justice Alito identifies the primary purpose of the teachers questions as having been "meant to identify the abuser in order to protect the victim from future attacks."<sup>191</sup> This purpose, worded in this way, nearly exactly replicates a purpose of offering testimony at trial. At trial, on direct examination, a witness would identify an abuser or perpetrator of another crime to aid in sentencing and protect the victim or future potential victims from future attacks. This fine line between a nontestimonial primary purpose and the purposes of testimony signals trouble for the continuing strength of the Confrontation Clause. This path is a slippery slope that begins with determining that statements offered to help end an ongoing emergency are nontestimonial and could potentially end with a Confrontation Clause exception that encompasses any statement that helps to catch a criminal and fight crime by providing facts relevant to that crime disguised as a "primary purpose of ending an ongoing emergency."

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<sup>190</sup> *Ohio v. Clark* at 144.

<sup>191</sup> *Ohio v. Clark* at 142.

## Resurrecting *Roberts*

*Ohio v. Roberts* was struck down by the Supreme Court because its relationship with the Confrontation Clause was unworkable. The case left out-of-court statements to be handled by hearsay law instead of the Sixth Amendment and had a nullifying effect on criminal defendants' rights to confrontation. *Crawford v. Washington* was handed down as the new rule for delineating which out-of-court statements were in violation of the Confrontation Clause when admitted without an opportunity for cross-examination, and which were not. This case created a major roadblock for prosecutors relying on out-of-court statements made by unavailable witnesses. Two years following *Crawford*, the Court readdressed the Confrontation Clause and testimonial statements and implemented the primary purpose test which allowed for statements made for the purposes of resolving an ongoing emergency to be rendered nontestimonial and thus subject to the Rules of Evidence on hearsay instead of to the Confrontation Clause. *Michigan v. Bryant* expanded that rule by naming a situation where a perpetrator was unknown in identity, location, and potential for future threat, and a victim was relaying statements while suffering from a mortal injury as an ongoing emergency for the sake of the *Crawford* and *Davis* rulings. Finally, *Ohio v. Roberts* opened the possibility that ongoing emergency doctrine could encompass situations where future abuse to the same victim. This lineage of cases has excluded so many statements from being subject to the effects of *Crawford* and the Confrontation Clause that "a suspicious mind (or even one that is merely not naïve) might regard this distortion as the first step in an attempt to smuggle longstanding hearsay exceptions back in to the Confrontation Clause—in other words, an attempt to return to *Ohio v. Roberts*."<sup>192</sup>

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<sup>192</sup> *Ohio v. Clark* at 150 Justice Scalia Concurring in Judgement.

Resurrecting *Roberts* through the gradual restoration of its vitality through a number of Supreme Court cases is not the direction that the Court should be heading. There must be a reexamination of the problem that *Crawford* was initially intended to solve. *Crawford* sought to reinvigorate the strength of the Sixth Amendment right of criminal defendants to confront the witnesses against them in all criminal prosecutions. The decision determined that holding a sufficient “indicia of reliability” or falling under “deeply rooted hearsay exceptions” were not valid reasons to exempt out-of-court statements that served as *ex parte* evidence from the Confrontation Clause as a substitute for live testimony. Considering this, the workings of judicial systems fifteen years after the *Crawford* decision should still have the same effect of excluding statements which have not been subject to cross-examinations yet are a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>193</sup> The over-expanded ongoing emergency doctrine has distorted this function and moved Confrontation Clause jurisprudence to a point where excited utterances are often only subject to the Rules of Evidence because the “startling event or condition” that the rule requires to be occurring and causing stress and excitement to be felt by the declarant may be construed to be synonymous with “ongoing emergency.”<sup>194</sup> This virtually returns excited utterances to a point where they are admissible around the Confrontation Clause because they are a deeply rooted hearsay exception which bears indicia of reliability—the backbone of *Roberts*. In addition, *Crawford*’s original function has been further distorted by the very text of *Ohio v. Clark*. A reason which L.P.’s statements are rendered nontestimonial by the trial court is because the Ohio Rule of Evidence 807 “allows the admission of reliable hearsay by child abuse victims, the court ruled that L.P.’s statements to his

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<sup>193</sup> *Crawford v. Washington* at 50.

<sup>194</sup> Fed. Rules Evid. 803(2).

teachers bore sufficient guarantees of trustworthiness to be admitted as evidence.”<sup>195</sup> Admitting statements solely because they bear indicia of reliability or guarantees of trustworthiness was the exact thing *Crawford* made unacceptable, yet this rationale was being applied in Ohio trial courts in 2013. This logic demonstrates the reality that the ghost of *Roberts* is haunting the effectiveness of *Crawford*'s impact.

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<sup>195</sup> *Ohio v. Clark* at 137.

### Chapter 3: Rectifying the Resurrection of *Roberts*

#### Function Versus Purpose

*Crawford* sought to block the admission of statements that were used in lieu of in-court testimony for the same purposes as in-court testimony by requiring that statements of a testimonial nature be subject to cross-examination. The right to confrontation is a procedural guarantee; *Crawford* makes this clear.<sup>196</sup> This means that the test applied in sorting testimonial statements from nontestimonial statements should keep out those with a *function* identical to the function of in-court testimony. Statements made out-of-court during an investigation which replicate the function of proving some fact pertinent to a criminal prosecution should be subject to cross-examination. The primary purpose test has blurred the lines between *purpose* and *function*. The Confrontation Clause should have power over out-of-court statements with a testimonial *function* because this is a less subjective test than the primary purpose test. Although purpose and function are often understood as synonyms, their definitions distinguish them enough to make a major difference when considered from a legal standpoint. According to the Merriam Webster dictionary, a “purpose” is “something set up as an object or end to be attained; Intention”<sup>197</sup>. The MacMillan dictionary defines it as “the goal that someone wants to achieve, or that something is intended to achieve.”<sup>198</sup> The words *intent*, *wants*, and *set up*, each insinuate that purpose is dependent on an actor’s desires and motivations. A primary purpose test thus requires courts to evaluate the mindsets of declarants and the police in a subjective manner. This is made clear by the aforementioned cases where the primary purposes of the interrogators and

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<sup>196</sup> *Crawford v. Washington* at 61.

<sup>197</sup> *Merriam Webster’s Dictionary*, s.v. “Purpose,” accessed March 11, 2019, <https://www.merriam-webster.com/dictionary/purpose>.

<sup>198</sup> *MacMillan Dictionary*, s.v. “Purpose,” accessed March 11, 2019, <https://www.macmillandictionary.com/us/dictionary/american/purpose>.

declarants are assessed. Under this test alone, two identical “solemn declaration(s) or affirmation(s) made for the purpose of establishing or proving some fact” against the accused may be classified differently from one another as long as the declarant’s *primary* purpose can be assumed to be different things—one statement for the sake of aiding a prosecution and the other for the sake of ending an ongoing emergency. Identical statements may have different purposes, but the same function. Merriam Webster defines function as “the action for which a person or thing is specifically fitted or used or for which a thing exists.”<sup>199</sup> This definition is more objective—is the action for which the statement is specifically fitted or used an action which establishes or proves some fact? Is the statement specifically fitted for a replication of in-court testimony? This assessment requires no speculation into mindset, but rather questions only the content of the statement. Is the statement the functional equivalent of in-court testimony? Would the statement, if said during a direct-examination, be right in place? The Confrontation Clause should cover statements that are the functional equivalent of in-court testimony instead of only covering statements which have the same purpose of in-court testimony. The oral argument in the *Crawford* case suggests that statements functionally equivalent to in-court testimony should be barred.<sup>200</sup> This better guarantees that the right to confrontation remains a procedural instead of a substantive guarantee.

### **A New Testimonial Test**

To cease a resurrection of *Roberts* and restore order and vigor to the Sixth Amendment in *all* criminal prosecutions, and to even the playing field for victims of intimate-partner violence, I would suggest the implementation of a clear, two-part test that replaces the “totality of the

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<sup>199</sup> Merriam Webster’s Dictionary, s.v. “Function,” accessed March 11, 2019, <https://www.merriam-webster.com/dictionary/function>.

<sup>200</sup> *Crawford v. Washington* Oral Argument, *United States Supreme Court*, 10 Nov. 2003.



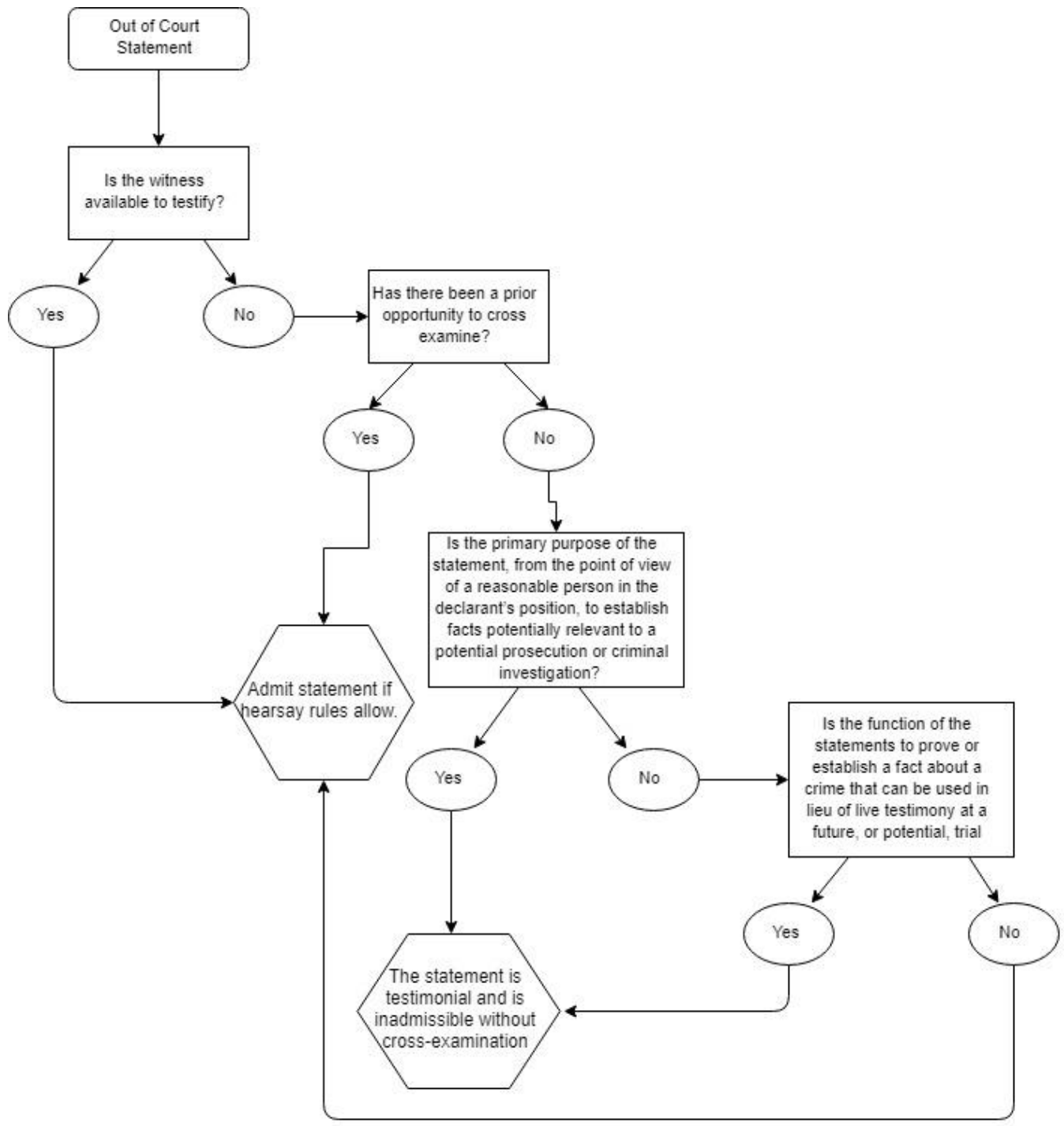
circumstances” system offered in *Bryant*. This test would not even the playing field by expanding the exceptions to the Confrontation Clause for victims of intimate-partner violence to match the gaping exception offered to general victims of anonymous violent crime, but rather scale *back* the exceptions to become more equitable. Solutions to the problems faced by evidence-based prosecution should not be solved by growing constitutional exceptions nor a reincarnation of *Roberts*, but rather by policy solutions, which will be addressed in this chapter.

The two-part test I suggest does include a primary purpose test, but adds a simple, objective, second portion to bar statements which would filter through the primary purpose test despite their testimonial nature. I propose that first, as precedent suggests, the primary purpose of a statement be assessed. Is the primary purpose of the statement, from the point of view of a reasonable person in the declarant’s position, to establish facts potentially relevant to a potential prosecution or criminal investigation? If yes, then the statement is testimonial and should be subject to the Confrontation Clause without any need to consult the second part of the test. This falls in line with *Davis*. If the answer to the primary purpose portion is no, then the court should consider whether the function of the statements is to prove or establish a fact about a crime that could be used in lieu of live testimony at a future, or potential trial. If yes, then the statements are testimonial and should be covered by the Confrontation Clause. If no, then the statement should be admitted if state or federal hearsay rules of evidence allow. The scope of this test is limited to statements made to law enforcement officers and individuals actively working as arms of law enforcement, like the 911 operator in *Davis*. The Supreme Court has continually refused to draw a line on where testimonial statements fall when statements are made to non-law enforcement officers. *Ohio v. Clark* failed to do so as well because of the added consideration of L.P.’s

delicate age. Consequently I, too, will resist to offer a test to determine the testimonial nature of statements made to non-law enforcement officers.

**Figure 1: Flowchart for Two-Part Testimonial Test for Statements Made to Law**

**Enforcement Officers**



This new test would allow statements which are clearly not being offered for the purposes of creating evidence for use in a future prosecution to be admitted but would make statements inadmissible which serve as a functional equivalent of testimony. Sylvia Crawford's statements, those regarding her husband's assault of a man who allegedly attempted to rape her and given during a recorded interrogation at the police station, would still be testimonial—their primary purpose was to offer evidence for a prosecution and would not even implicate the second part of the test. Michelle McCottry's statements during her 911 call up to the point where the operator says, "Okay, sweetie. I've got help started. Stay on the line with me, okay?" would be nontestimonial because it is clear that McCottry's primary purpose was to call for help.<sup>201</sup> Usually, victim initiated statements which call for help hold a primary purpose of seeking help, not to incriminate.<sup>202</sup> The function of her statements prior to that point do not serve the function of pointed incrimination of Davis, either. She simply states why she needs help and where she is. In this context, these statements have the function of being specifically fitted for providing the operator with the proper information to provide start help. "No "witness" goes into court to proclaim an emergency and seek help."<sup>203</sup> However, the function of declaring such an emergency and seeking help was achieved when the operator told Michelle that help was on the way. Following those statements which called for help, McCottry named the assailant, provided a narrative of why Davis was at the home, and informed the operator of information such as Davis's birthday.<sup>204</sup> These statements serve as the functional equivalent of live testimony by establishing facts relevant to a prosecution. They fail the second portion of the test and are therefore testimonial. Regarding the statements made by Anthony Covington in *Michigan v.*

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<sup>201</sup> *Davis v. Washington* at 814.

<sup>202</sup> King-Ries, Andrew. p.322.

<sup>203</sup> *Davis v. Washington* at 825.

<sup>204</sup> *Ibid.*

*Bryant*, I agree with Justice Scalia’s dissent that “from Covington’s perspective, his statements had little value except to ensure the arrest and eventual prosecution of Richard Bryant. He knew the “threatening situation,” (citation omitted) had ended six blocks away and 25 minutes earlier when he fled from Bryant’s back porch.”<sup>205</sup> I would argue that Covington’s statements would fail to pass the first part of the test and are thus testimonial, but the Court majority disagreed. Under my test, Covington’s statements would be subject to the second part of the testimonial test and would fail and be labelled testimonial. “Covington recounted in detail how a past criminal event began and progressed,” and therefore his statements had the functional equivalent of testimony.<sup>206</sup> The action for which Covington’s statements were specifically fitted was to prove facts relevant to a criminal prosecution.<sup>207</sup>

This test would drastically minimize the need for convoluted considerations of the scope of emergencies. Consider a situation where the scope of an emergency is blurred. There was disagreement from both Justice Scalia and my point of view about whether the *Michigan v. Bryant* fact pattern constituted an emergency. Therefore, *Bryant* would serve as a good example for demonstrating how this test minimizes the need for lengthy arguments over what the boundaries of an emergency are. If you apply my test from the point of view that the situation *was* an emergency, then the function test is applied, and Covington’s statements are considered testimonial because they are particularly suited for in-court testimony. If you say that the *Bryant* situation *was not* an emergency and the primary purpose *was* to offer facts for criminal investigation and prosecution, then the statements are rendered testimonial. Both considerations about the scope of emergency reach the same result, and consequentially courts would no longer

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<sup>205</sup> *Michigan v. Bryant* at 383 Justice Scalia’s dissent.

<sup>206</sup> *Michigan v. Bryant* at 384 Justice Scalia’s dissent.

<sup>207</sup> *Merriam Webster’s Dictionary*, s.v. “Function.”

have to spend time defining emergency with multi-factor and unpredictable tests. My test resolves this.

Though the test I have offered only applies to statements made to law enforcement officers and to individuals operating as arms of law enforcement, the test can shed some light on the fate of statements made to friends and medical examiners, even if not expressly used. Statements made to friends would most always be nontestimonial because their primary purpose would not be to prove fact for a potential criminal prosecution, but to confide in a friend or seek help from a friend. The statements would pass the first prong of the test and likely pass the second because statements made to friends do not function with the same solemnity as testimonial statements. Statements made while giving testimony in court function as incriminating statements given by a declarant to individuals involved in the criminal justice system. Statements made to friends, while they may function as damning statements, do not hold the same function of *incrimination* and are therefore less naturally suited to the function of in-court testimony. Justice Scalia alludes to this in *Crawford* with, “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”<sup>208</sup> Statements made during medical examinations would most always be nontestimonial because their primary purpose would not be to prove past facts for a potential criminal prosecution, but to provide context to an injury in order to seek proper treatment. Further, their function differs from testimonial statements. Statements to medical examiners are well-fitted within examination rooms where there is privacy and function not as incriminating statements to replace testimony—one would talk to a doctor about their injuries and conditions different than they would to a judge, jury, and courtroom. However, the narration

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<sup>208</sup> *Crawford v. Washington* at 50.

of how an injury was incurred if a medical examiner was referred to examine a victim by law enforcement following a crime could yield a different result. That would render a situation where the medical examiner may be operating as an arm of law enforcement and therefore subject to the scope of my proposed test. This argument is not intended to parse out that situation.

The first portion of this test that maintains the primary purpose test should be considered from the point of view of the declarant, as perceived by a reasonable person in the declarant's position instead of from the interrogator's point of view. It is the declarant who would take the stand and understand that they are giving testimony when giving statements in a courtroom. In the same manner, it should be the declarant whose mindset and primary purpose are considered to understand whether the declarant-witness would understand that they, though out of court, are acting as a witness. Additionally, cross-examination is required to assess the reliability of the mindset of the witness, not the mindset and reliability of the questioning officer. A primary purpose test which solely focuses on the motives of the declarant helps the court to understand *why* statements are made, and thus whether they are understood as solemn declarations proving some fact.<sup>209</sup> Therefore, it is most in line with the Confrontation Clause to assess the testimonial nature of a statement of the declarant from the point of view of a reasonable person in their shoes. This test should not be subject to the viewpoint flip-flopping previously employed to obtain favorable results. In addition, I assess the first question of the test from the point of view of a reasonable person in the declarant's shoes because the reasonable person point of view also allows for statements to be considered from a fresh set of eyes. Prior interactions with the criminal justice system are common in cases of intimate-partner violence, and these prior interactions may cause a person to be more aware that their statements are being used for a

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<sup>209</sup> Percival, Jeanine. p.249.

prosecutorial purpose and not to resolve an ongoing emergency<sup>210</sup> A reasonable person in the declarant's position allows for a neutral, unprejudiced point of view to be considered and makes the test less subjective than if the viewpoint of the *actual* declarant were considered.<sup>211</sup> The second part of this test ensures that it is not only the intent of a reasonable person that determines the testimonial nature of a statement, but guarantees that statements, regardless of intent, are encompassed by Sixth Amendment protections.

This proposed test shrinks the ongoing emergency doctrine in a manner that levels the playing field between victims of violent crime by nondomestic offenders and victims of domestic violence. The test would not allow for statements to be rendered nontestimonial only because the offender posed a hypothetical threat to the public. Statements made by victims of intimate-partner violence and by victims of nondomestic crime would be treated in an identical manner because the assessment of the function of statements is less manipulable than assessments of the purpose of statements. Justice Scalia wrote in his dissent of *Bryant* that:

If the dastardly police trick a declarant into giving an incriminating statement against a sympathetic defendant, a court can focus on the police's intent and declare the statement testimonial. If the defendant "deserves" to go to jail, then a court can focus on whatever perspective is necessary to declare damning hearsay nontestimonial. And when all else fails, a court can mix-and-match perspectives to reach its desired outcome.<sup>212</sup>

The combination of the primary purpose and primary function test strips away the nonsense of the "totality of the circumstances" approach. The first prong, primary purpose, can immediately stamp statements made with a prosecutorial purpose with a "testimonial" stamp, but the second prong, the function test both checks and balances the primary purpose test. It adds an objective test to assess statements as statements with or without testimonial function instead of as

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<sup>210</sup> King-Ries, Andrew. p.320.

<sup>211</sup>Friedman, Richard D. "Crawford, Davis, and Way Beyond," *University of Michigan Law School Scholarship Repository*, (2007). p.558.

<sup>212</sup> *Michigan v. Bryant* at 382 Justice Scalia's dissent.

statements which can be shaped to circumvent or directly violate the Confrontation Clause depending on the “fairest” outcome.<sup>213</sup> A designation of a purpose to a statement a great deal of time after a statement was made welcomes manipulation to make the statement more favorable to admissibility.<sup>214</sup> In addition, this discretion allows for discrimination against victims. When a victim of intimate-partner violence recants or does not fit the bill of what courts and juries expect a victim to be, then the victim’s statements may be viewed under a different lens. Female victims of intimate-partner violence have argued that discretion and discrimination go hand-in-hand.<sup>215</sup> The difficulties that *Crawford* posed for prosecutors of evidence-based prosecution is likely to affect the way that the courts interpret the Sixth Amendment’s coverage, and having a manipulable test encourages this.<sup>216</sup> Assessing the function of statements allows for identical assertions in different environments to be treated in the same way. For example, if Maria, Michelle McCottry, and Anthony Covington all responded to a question asking for a physical description of their assailant by answering that their attacker was a Caucasian male, approximately six-foot tall and 250 pounds, bald, and wearing a red hoodie, then these identical statements would yield the same testimonial result. Even if Maria and Michelle identified this person as their husband or boyfriend and Covington identified him as “Rick” the statements serve the same function whether the threat extends to one victim, or future potential victims. This description does not go to resolving an ongoing emergency and has the function of proving a fact relevant to a criminal prosecution. A descriptive statement such as this would be testimonial without a subjective assessment of to whom a potential threat extends that has a discriminatory effect on victims of intimate-partner violence.

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<sup>213</sup> *Ibid.*

<sup>214</sup> Friedman, Richard D. p.559.

<sup>215</sup> Jones, Ann. p.68.

<sup>216</sup> Jaros, David. p.1108.



## **The Need for and Application of a New, Two-Part Test**

The primary purpose test combined with a totality of the circumstances assessment made for an unpredictable, manipulable, and often discriminatory system of sorting testimonial statements from nontestimonial statements. By the time that *Ohio v. Clark* was decided by the United States Supreme Court in 2015, the exceptions to the Confrontation Clause had become over-extended to a point which nearly nullified *Crawford* and resurrected *Roberts*. To restore strength to the Confrontation Clause and *Crawford* and create a system which does not violate the rights of criminal defendants nor disadvantage prosecutions of intimate-partner violence, a new two-part test should be adopted. First, courts should consider the primary purpose of a statement from the point of view of the declarant. If the primary purpose of the statement is to aid in a prosecution, it is testimonial. If it is not, courts should assess whether the statement has a testimonial function. If it does, it is testimonial. Nontestimonial statements are left subject to evidentiary rules on hearsay. This test equalizes victims of violent crime and removes the hierarchy that delegitimizes intimate-partner crime. However, it is undeniable that this new test would not ease the struggles of bringing forward a case by means of evidence-based prosecution when victims of intimate-partner violence refuse to participate in the prosecutorial process. Chapter Two has demonstrated that the current tests of the admissibility of out-of-court statements are unworkable and has presented a solution that does not over-extend exceptions to allow for evidence-based prosecution to successfully proceed. The solution to the tension between the Confrontation Clause and evidence-based prosecution is in the legislature, not the courts. Chapter Four will discuss how community-based support systems, investigative standards, and the forfeiture doctrine can help to promote the success of evidence-based prosecution without compromising the Confrontation Clause and equip victims with the

resources and support they need to be encouraged to take part in prosecution, circumnavigating the need for evidence-based prosecution altogether.

## **Chapter Four: Policy Solutions to the Post-*Crawford* Crisis**

A widened definition of testimonial statements would have negative consequences for evidence-based prosecution of intimate-partner violence (IPV). Without victim involvement, most statements gathered through 911 calls and initial police interrogations would not be subject to cross-examination, and thus, unless the statement were made for a purpose other than to produce evidence pertinent to a future trial and did not have a function identical to in-court testimony, most statements made by non-cooperative victims would be inadmissible. Consequentially, for the prosecution of domestic violence cases to be successful under my proposed test, several policy solutions should be implemented within criminal justice jurisdictions. These policy solutions would improve the process of managing intimate-partner violence cases and hence increase victim willingness to participate in the prosecution, making evidence-based prosecution less necessary and conflicts with the Confrontation Clause more infrequent. However, no policy solution will be sufficient to allow or encourage every victim of intimate-partner violence to be a willing prosecutorial participant, so I will discuss the use of the forfeiture doctrine in cases where a victim's participation cannot be secured.

### **The Need for Community Collaboration**

Chapter One discussed several factors which deter victims from participating in prosecution. If the obstacles that victims face which prevent them from participating in prosecution could be more easily overcome, then victim-survivors could be more willing to participate, and the number of evidence-based prosecutions which may have conflicts with the Confrontation Clause may decrease. Victim needs may be best addressed through a criminal justice partnership with community organizations that can aid victims in meeting the needs they

have outside of the criminal justice system.<sup>217</sup> The success rate of intimate-partner violence response may be understood in terms of victim satisfaction with the services and aid made available to victims by law enforcement including information about restraining orders or providing transportation to or information about shelter services rather than simply measured by arrest rates.<sup>218</sup> Victims of intimate-partner violence cite a lack of information about the criminal justice system and about additional services available to them as one of the largest contributing factors to their unwillingness to participate in the prosecution process.<sup>219</sup> Consequently, a criminal justice partnership with community organizations which provide services and a program which prioritizes transparency, options, and victim empowerment could improve victim satisfaction and encourage court participation. Studies dating as far back as 1977 demonstrate that victim-assistance programs increase victim participation—such programs in LA and Santa Barbara helped domestic violence non-cooperation rates to be lower than ten percent.<sup>220</sup> In addition, victims are more willing to participate if time is spent counseling the victim about their options and their risk.<sup>221</sup> Responding police officers are not as well equipped to do this as victim advocates specifically trained on intimate-partner violence, and thus a criminal justice pairing with community services can best address the nuances of IPV. Critics of community-criminal justice conjunctions argue that these partnerships cause intimate-partner violence to become a subject of social work instead of treated as the violent crime that it is.<sup>222</sup> However, these

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<sup>217</sup> Visher, Christy A., Adele Harrell, Lisa Newmark Jennifer Yahner, "Reducing Intimate Partner Violence: An Evaluation of a Comprehensive Justice System-Community Collaboration," *Criminology and Public Policy*. 7(4); (2008). p.520.

<sup>218</sup> Buzawa, Eva S., and Carl G. Buzawa. p. 7.

<sup>219</sup> Hartley, Carolyn C. and Lisa Frohmann, "Cook County Target Abuser Call (TAC): An Evaluation of a Specialized Domestic Violence Court, Revised Final Report. Nov. 19, 2003. p7-8;117

<sup>220</sup> Jones, Ann. p.143.

<sup>221</sup> Han, Erin L. "Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases," *Boston College Third World Law Journal*, 1(23); (2003); 159-192.

<sup>222</sup> Buzawa, Eva S., and Carl G. Buzawa. p.7.

partnerships do not require the response to intimate-partner violence to be labeled as either “social work” or “crime response,” but allow for the unique conditions and complications of IPV to be understood and addressed. The National Crime Victim Survey uncovered that only one out of four survey respondents who were victims of domestic violence received services from victim-assistance programs; the police are often contacted in lieu of help hotlines.<sup>223</sup> Intimate-partner violence assistance and resource organizations and the criminal justice system each have similar goals of protecting victims from violence. This goal could better be achieved if access to the criminal justice system and victim-assistance worked in partnership so that a call to the police could be a conduit to additional services when necessary.

### **The Target Abuser Call Program—An Example of Community Cooperation**

The Chicago Target Abuser Call (TAC) program is an example of such a community-criminal justice partnership which has increased victim participation in domestic violence cases and should serve as a model for intimate-partner violence response programs which jurisdictions across the country should adopt. This program is funded through the Violence Against Women Act’s (VAWA) STOP (Services, Training, Officers, Prosecutors) grant<sup>224</sup> and additional grant money from the United States Department of Justice.<sup>225</sup> The program utilizes a vertical prosecution program which employs prosecutors who are specifically trained for TAC prosecution and partners this domestic violence court with TAC investigators, independent domestic violence advocates, victim-witness specialists, connecting victims with civil attorneys

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<sup>223</sup> Klein, Andrew R., and Jessica L. Klein. p.7.

<sup>224</sup> VAWA expired at the end of 2018 while this thesis was in-progress and its reauthorization has become a topic of great debate in Congress. As of April 4, 2019, the VAWA reauthorization bill has passed the United States House of Representatives and will soon be debated and voted on by the United States Senate. In order to be reauthorized for 2019 and years to come, an affirmative vote from the Senate and approval by President Trump is required. I support the merits of the Chicago TAC program as a policy solution, but while VAWA remains in limbo at the federal level, so may funding for such programs.

<sup>225</sup> Hartley, Carolyn C. and Lisa Frohmann. p.2-3.

when appropriate.<sup>226</sup> Cases are labeled as high-risk based on evaluations of prior criminal domestic violence history, the severity of injury, presence of weapons or threats of their use, and evidence of prior threats to kill or harm the victim or his/her family.<sup>227</sup> Once a case has been “screened in” to the TAC program, an investigative team contacts the victim, calculates her level of safety, collects evidence and photos, inquires about additional witnesses, and provides the victim with both a subpoena and written materials about the criminal and civil legal systems, as well as the TAC program which she will be involved with.<sup>228</sup> Next, a victim-witness specialist places a call to the victim to respond to any questions she may have regarding her options and the materials she was provided by investigators.<sup>229</sup> When the victim arrives on the initial court date, this specialist will cover court procedure, speak to the victim about her goals for the process, and aid the victim in filling out an order of protection, if the victim wishes.<sup>230</sup> In addition, on the first court date, each member of the TAC team, from the prosecutor to the independent advocate, will speak to the victim about the role they play and the support they can provide.<sup>231</sup> The independent advocate (from the Chicago Hull House) confidentially interviews the victim to speak about her concerns and address needs regarding housing or shelter, her job, her children, or counseling through referrals and making contacts.<sup>232</sup> TAC advocates made referrals in 84% of cases—this is a jump of 50 percentage points in comparison to the number of service referrals made to victims participating with the general domestic violence court.<sup>233</sup> Studies show that greater amounts of tangible support and resources such as childcare,

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<sup>226</sup> *Ibid.*

<sup>227</sup> Hartley, Carolyn C. and Lisa Frohmann. p.13.

<sup>228</sup> Hartley, Carolyn C. and Lisa Frohmann. p.16.

<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid.*

<sup>233</sup> Hartley, Carolyn C. and Lisa Frohmann. p.101

transportation, and economic resources aid in increasing the chances that a victim will be involved in the prosecutorial process.<sup>234</sup> Referrals made by the TAC advocates help to give victims access to these tangible support sources. In addition to receiving support from advocates, a TAC attorney on the civil side of the law will meet with the victim if she desires or needs services pertaining to child custody or civil orders of protection.<sup>235</sup> Finally, the criminal prosecutor will speak to the victim about her options for criminal legal remedy, conduct further investigation, and prepare the victim for trial.<sup>236</sup> Because the TAC program employs a vertical approach to prosecution, this attorney will be involved in the victim's case at every stage and will subsequently possess greater knowledge about the facts and details regarding each individual case; this continued support and stability builds trust between the victim and the legal system.<sup>237</sup> Each of the members of this TAC team is then included in regular team consultations where the desires and needs of the victim are prioritized.<sup>238</sup>

These procedures were specifically implemented to address some of the primary reasons that victim-survivors cite for their disinclination to engage with the criminal justice system. Interviews with victim-survivors of intimate-partner violence show that the confusing criminal justice process and lack of clarity regarding the differences between the civil and criminal systems deterred participation, and that victims received insufficient follow-up and contact from the court system which distorted their understanding of the role they were to play.<sup>239</sup> The continuity of contact between the victim and members of the TAC team allows for confusion to be decreased while familiarity with the system to be increased. TAC women reported that the

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<sup>234</sup> Hartley, Carolyn C. and Lisa Frohmann. p.9.

<sup>235</sup> Hartley, Carolyn C. and Lisa Frohmann. p.16.

<sup>236</sup> *Ibid.*

<sup>237</sup> Hartley, Carolyn C. and Lisa Frohmann. p.15.

<sup>238</sup> Hartley, Carolyn C. and Lisa Frohmann. p.17.

<sup>239</sup> Hartley, Carolyn C. and Lisa Frohmann. p.7-8.

involvement of supporters in the TAC system alleviated many of their fears, helped them become more familiar with the criminal justice system and process, and encouraged them to continue their involvement in the prosecutorial process.<sup>240</sup> These women reported that the TAC relationships increased their commitment to the prosecution and this commitment was empowering.<sup>241</sup> In short, the more that the concerns about a lack of information and clarity were addressed by the TAC team, the more satisfied women were with the prosecutorial process and the more enthusiastic they were to participate.<sup>242</sup>

The satisfaction levels of victim-survivors who were screened in to the TAC program were compared with those of victim-survivors whose cases were addressed in the general domestic violence court. Overall, TAC participants were more satisfied with the contacts they had with those involved in the process than the victims who were involved with the general court.<sup>243</sup> The highest satisfaction levels reported by TAC participants were with the court advocate and with the victim-witness specialist.<sup>244</sup> The TAC women expressed that their questions were better answered, that they believed the TAC team prioritized their needs and desires, and that they felt they had control within the process; all of these response rates were more positive than those of the victims in the general court.<sup>245</sup> In addition, many more TAC participants than general court participants reported that they were inclined to come to court because they believed that they would be protected; this is likely attributed to the greater amount of support and resources they received prior to the court date.<sup>246</sup> More than 75% of responding

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<sup>240</sup> Hartley, Carolyn C. and Lisa Frohmann. p.123.

<sup>241</sup> Hartley, Carolyn C. and Lisa Frohmann. p.126, 131-132.

<sup>242</sup> Hartley, Carolyn C. and Lisa Frohmann. p.140.

<sup>243</sup> Hartley, Carolyn C. and Lisa Frohmann. p.69.

<sup>244</sup> *Ibid.*

<sup>245</sup> Hartley, Carolyn C. and Lisa Frohmann. p.73-75; 104.

<sup>246</sup> Hartley, Carolyn C. and Lisa Frohmann. p.139.



participants reported that their participation in the TAC program decreased the amount of abuse they experienced.<sup>247</sup>

The TAC program allows for the victims with the highest need to have easier access to services and support so that they can better make informed decisions based on the safety of themselves and their families with less concern for tangible, material needs. TAC would help guarantee that victims at the highest risk be provided with the services they need to empower and support them in the criminal justice system and in life in general. When requests for support services for victims of IPV go unmet, 60% of victims will return to their abuser while 27% become homeless.<sup>248</sup> A community TAC program would put high-risk victims in constant contact with advocates who can prioritize and address the needs of victims at high-risk and encourage them to engage with the criminal justice system.

The TAC program is not only successful in increasing communication, transparency, and access to resources. The program boasts a 90% conviction rate of offenders, with victims appearing in court 75% of the time—this is in comparison to a 20-30% conviction rate and a 25% appearance rate in general domestic violence courts.<sup>249</sup> A victim appearance rate in three-quarters of TAC cases is striking and demonstrates that increased efforts to facilitate participation, fulfill the needs of victims outside of the court system, and clarify the process make a difference in attrition rates.<sup>250</sup> Greater attrition rates translate to fewer Confrontation Clause conflicts.

The use of a TAC program in every case of intimate-partner violence is unfortunately impractical considering the additional time these cases require and the insufficient availability of

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<sup>247</sup> Hartley, Carolyn C. and Lisa Frohmann. p.104.

<sup>248</sup> Klein, Andrew R., and Jessica L. Klein. p.6.

<sup>249</sup> Hartley, Carolyn C. and Lisa Frohmann. p.14.

<sup>250</sup> Hartley, Carolyn C. and Lisa Frohmann. p.6.

funds and resources to support such a large need. However, this problem can best be minimized by screening into TAC the victims with the greatest chances of re-abuse or intimate-partner homicide and incorporating the vertical prosecution structure into the model used for all other IPV cases. Cases should be screened in to TAC utilizing the ODARA (Ontario Domestic Assault Risk Assessment) test. This test can be quickly administered by responding officers on the scene of an intimate-partner assault. The questionnaire includes thirteen “yes” or “no” questions; every question answered with a “yes” receives a score of 1 and “no” receives a zero.<sup>251</sup> When the questionnaire is complete, the total score is tallied and is compared to a table which predicts the recidivism rate of cases with such scores.<sup>252</sup> For example, scoring a 5 on the ODARA scale would signal a 53% chance of recidivism while a score of 7 or higher suggests a 73% recidivism rate.<sup>253</sup> An analysis of the ODARA test and similar IPV recidivism prediction tests revealed that the ODARA was most accurate at predicting future violence; it correctly distinguished recidivists from nonrecidivists nearly 70% of the time.<sup>254</sup> The questionnaire was developed through careful analysis of criminal justice databases of IPV and utilized the same database to measure re-assault and common factors within those cases.<sup>255</sup> This test asks questions which address the strongest indicators of re-assault including whether the victim had been confined or restrained from escape, whether the assailant had ever threatened to harm or kill the victim or her family, whether the victim is worried about future assault, whether the victim and assailant have children

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<sup>251</sup> “Ontario Domestic Assault Risk Assessment,” Wayport Centre for Mental Health, 2017.

<https://www.nj.gov/lps/dcj/agguide/directives/ODARA-Scoring-Form.pdf>.

<sup>252</sup> *Ibid.*

<sup>253</sup> *Ibid.*

<sup>254</sup> Lauria, Ilana, Troy E. McEwan, Stefan Luebbbers, Melanie Simmons, and James R. P. Ogloff. “Evaluating the Ontario Domestic Assault Risk Assessment in an Australian Frontline Police Setting.” *Criminal Justice and Behavior* 44(12); (December 2017): 1545–58. p1547-1552. doi:10.1177/0093854817738280.

<sup>255</sup> Campbell, Jacquelin C., “Assessing Dangerousness in Domestic Violence Cases: History, Challenges, and Opportunities,” *Vollmer Award Address* 4(4): 653–672. p.658.

together (2 children or more scores a 1), whether the victim has a child with someone other than the assailant, whether the victim has ever been assaulted during a pregnancy, whether the perpetrator abuses substances, whether the victim faces barriers to support including lack of transportation or childcare responsibilities, whether the perpetrator is violent to non-domestic individuals, whether the perpetrator has prior records of domestic or non-domestic assault in police reports or on criminal records, whether the assailant has been previously sentenced to custodial time for more than thirty days, and whether the assailant has ever violated a conditional release.<sup>256</sup> Other risk assessments include questions regarding the presence of or access to weapons and whether the assailant had ever used or threatened to use such weapons.<sup>257</sup> In addition, more recent studies have suggested replacing the question pertaining to abuse while pregnant with a question that asks whether the assailant had ever tried or succeeded in strangling the victim to increase accuracy and sort nonrecidivists from recidivists.<sup>258</sup>

Responding officers should complete the ODARA form with victims during their response to the scene, and if the total score is 5 or above, the victim should be included in a TAC program when resources allow. Approximately 20% of cases result in a score of 5 or above; when resources do not allow for this number of cases to utilize the TAC system, priority should be given to cases which score 7 or above which make up approximately 6% of IPV cases.<sup>259</sup> This test will aid responding officers in assessing the current and future severity of the situation so that the most tumultuous of situations can receive a proper response and the situations which are

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<sup>256</sup> "Ontario Domestic Assault Risk Assessment."

<sup>257</sup> Messing, Jill Theresa, Jacquelyn Campbell, Janet Sullivan Wilson, Sheryll Brown, Beverly Patchell, "The Lethality screen: The Predictive Validity of an Intimate Partner Violence Risk Assessment for Use by First Responders," *Journal of Interpersonal Violence*, 32(2); (2017):205-226. p..211.

<sup>258</sup> Messing, Jill Theresa, Jacqueline Campbell, Carolyn Snider, "Validation and Adaptation of the Danger Assessment-5: A Brief Intimate Partner Violence Risk Assessment," *Journal of Advanced Nursing*, (2017) doi: 101111/jan.13459.

<sup>259</sup> "Ontario Domestic Assault Risk Assessment."

unlikely to escalate into future abuse can be addressed in a manner which will not aggressively disrupt the lives of those involved with the full force of the criminal justice system.<sup>260</sup> In all cases which are not screened in to TAC, a vertical prosecution style should be used to promote continuity and trust between the victim and prosecutor, and a victim witness specialist should meet with the victim on her court date. Chicago TAC implemented this structure to manage TAC overflow.<sup>261</sup> In addition, all victim-survivors whose ODARA scores suggest that they are at a higher risk for future violence, a 4 or above, should be provided an opportunity to call an advocate when police respond to an incident to be notified about safety planning information and options and receive information about her specific risk factors.<sup>262</sup> Employing a vertical prosecution system and providing opportunities to connect with prosecutors, victim-witness specialists, and advocates mimics the strengths of the TAC program without requiring the extensive use of resources. The use of ODARA to sort cases in and out of the TAC program allows for cases with high probability of recidivism to be addressed by the prosecutorial system with the greatest fervor and for cases with fewer indications of severity and chance for recurring abuse to be managed in a way which supports the victim but is realistic in terms of resources.

### **Prior Opportunities for Cross-Examination**

Criminal justice jurisdictions could further circumnavigate *Crawford* and Confrontation Clause issues through policy measures by providing more avenues for prior opportunities for cross-examinations of witnesses. Cross-examined statements are admissible regardless of whether the declarant is cooperating at the time of trial. Therefore, testimony given during pretrial hearings subject to cross-examination and depositions taken with an opportunity for

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<sup>260</sup> Campbell, Jacquelin C. p.655.

<sup>261</sup> Hartley, Carolyn C. and Lisa Frohmann. p.17.

<sup>262</sup> Messing, Jill Theresa, Jacquelyn Campbell, Janet Sullivan Wilson, Sheryll Brown, Beverly Patchell. p.208.

cross-examination could be sufficient to satisfy the requirements of *Crawford* and the Sixth Amendment for the statements contained within the pretrial transcript or deposition. Many states have held that opportunities for cross-examination at probable cause or preliminary hearings are acceptable for the purposes of *Crawford*; the Supreme Court of Colorado, however, has held that probable cause hearings are not sufficient.<sup>263</sup>

States including Arizona and Utah have adopted non-waivable preliminary hearings to allow for an early opportunity for cross-examination.<sup>264</sup> In Oregon, a bill is pending which would allow for the prosecution to call for a hearing to cross-examine a victim if the prosecution is concerned about the victim making herself unavailable.<sup>265</sup> The greater the amount of time between a criminal-abuse incident and the subsequent trial, the greater the chances are that a victim decides to recant or quit cooperating with prosecutors.<sup>266</sup> Earlier opportunities for cross-examination can diminish the probability of running into a Confrontation Clause issue, minimize the opportunity for witnesses to be threatened or coerced by batterers, and reduce the need for victims to be subpoenaed and subsequently held until required to give testimony.<sup>267</sup>

In an article titled *Domestic Violence and the Confrontation Clause: The Case for a Prompt Post-Arrest Confrontation Hearing*, author Robert Hardaway suggests that immediately following an arrest for intimate-partner abuse, both the alleged assailant and the victim should be taken to a specialized courtroom where an immediate cross-examination hearing would be held.<sup>268</sup> A magistrate on-call would preside while a defense-attorney on-call would represent the

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<sup>263</sup> Moody, Melissa, 'A Blow to Domestic Violence Victims: Applying the "Testimonial Statements Test" in *Crawford v. Washington*.' *William and Mary Journal of Race, Gender and Social Justice* 11(3); (2005).

<sup>264</sup> Lininger, Tom. p.788.

<sup>265</sup> Lininger, Tom. p.791.

<sup>266</sup> Lininger, Tom. p.785.

<sup>267</sup> *Ibid.*

<sup>268</sup> Hardaway, Robert. p.22-23.

accused.<sup>269</sup> The prosecutor's office would be notified, the defendant would be interviewed, and the victim would appear, make a sworn statement, and be subject to open-ended cross-examination.<sup>270</sup> The implementation of such a policy would require a great deal of resources, time, and commitment; however, it would be a speedy solution to potential Confrontation Clause conflicts.

Finally, though some states do not allow for victim-witnesses to be deposed during the pretrial period in criminal cases, studies have shown that victims of intimate-partner violence find the deposition process to cause less trauma than testifying live.<sup>271</sup> The deposition process allows for breaks when necessary and allows for the deponent to be exposed to cross-examination without the pomp-and-circumstance of trial.<sup>272</sup> Though depositions should not be exclusively used in lieu of live testimony, the process could be a means of including the victim's story in trial, even when they become unavailable, without violating the Confrontation Clause.

### **Investigative Procedures of Intimate-Partner Violence**

In cases where, despite increased support from the community and the justice system, the victim chooses not to participate, the problems facing evidence-based prosecution can be further improved upon by the adoption of further procedural tactics for law-enforcement officers to use. Investigations of intimate-partner abuse should be thorough enough to best allow a prosecutor to go forward with an evidence-based prosecution without the victim. Arkansas adopted a law (Arkansas Law Section 12-12-108) which requires that investigative law-enforcement agencies investigate in a manner that would allow a prosecutor with probable cause to obtain a guilty

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<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

<sup>271</sup> Lininger, Tom. p.796.

<sup>272</sup> *Ibid.*

verdict despite a lack of victim testimony.<sup>273</sup> To do so, investigators should properly collect statements from victims, witnesses, and the offender, obtain medical records, take photos and collect physical evidence from the scene.<sup>274</sup> This can be expanded upon utilizing an example from Maricopa County, Arizona. The county attorney's office worked with healthcare forensic nurse examiners and law enforcement to give victims of intimate-partner violence comprehensive medical forensic exams; these exams utilized high-definition photos and DNA collection which helped provide striking evidence of abuse even when victims did not participate in prosecution.<sup>275</sup> These medical exams made strangulation cases easier to prove and helped to raise the rate of successful prosecution for strangulation in the county from just 14% to 61.5%.<sup>276</sup> These specialized medical examinations, made possible by community partnerships, ensure that specific signs of abuse are recognized and documented. A study published in the *Journal of the American Medical Association* uncovered that doctors often fail to recognize signs of abuse in middle-class patients because of difficulties recognizing abuse and violent behavior in those who have similar identities or social positions to themselves.<sup>277</sup> Partnerships which promote more specialized and specific examinations ensure that more thorough and specific evidence of intimate-partner violence is collected. Cases which can be built upon physical evidence instead of victim testimony will have fewer Confrontation Clause issues.

A stronger focus on collecting evidence in a thorough manner could greatly improve the success of intimate-partner violence prosecution. A study of police in Rhode Island uncovered that police collected physical evidence in fewer than 10% of intimate-partner abuse cases and

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<sup>273</sup> Klein, Andrew R., and Jessica L. Klein. p.100.

<sup>274</sup> *Ibid.*

<sup>275</sup> Klein, Andrew R., and Jessica L. Klein. p.64.

<sup>276</sup> Klein, Andrew R., and Jessica L. Klein. p.74.

<sup>277</sup> Buzawa, Eva S., and Carl G. Buzawa. p.24.

conducted interviews with further witnesses in fewer than 25% of cases.<sup>278</sup> A study of police in Ohio revealed that prosecutors were provided with tapes of 911 calls, medical records, and testimony from eyewitnesses in less than 10% of cases, and prosecutors in North Carolina only received photos of injuries to victims in approximately 15% of cases.<sup>279</sup> This shocking lack of information given to prosecutors is not a result of a lack of physical evidence or additional witnesses, but a lack of continuity in the criminal justice system. A study of IPV cases in large urban areas showed that third-parties witnessed or were aware of incidents in approximately half of the cases, physical evidence was available in 68%, and victim statements were taken and preserved in over half of the cases.<sup>280</sup> This demonstrates that in a great deal of cases more evidence is available, but simply needs to be collected thoroughly and passed along. The statewide adoption of laws similar to Arkansas Law Section 12-12-108 would improve the process of evidence collection and criminal justice continuity.

Misdemeanor simple assault cases will reap the fewest benefits from procedures which promote and facilitate the collection of physical evidence and proof of harm to a victim. Misdemeanor cases often have less physical evidence than more severe instances of intimate-partner violence.<sup>281</sup> Without observable injury in simple assault cases, there is little left to photograph or physically show to prove a case beyond a reasonable doubt.<sup>282</sup> Even so, greater investigatory thoroughness would have a positive impact on many intimate-partner abuse cases and allow for a greater number of cases to be tried successfully when the victim chooses not to

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<sup>278</sup> Klein, Andrew R., and Jessica L. Klein. p.131.

<sup>279</sup> *Ibid.*

<sup>280</sup> *Ibid.*

<sup>281</sup> Percival, Jeanine. p.238.

<sup>282</sup> Klein, Andrew R., and Jessica L. Klein. p. xi.



cooperate and the prosecutor faces Confrontation Clause obstacles to trying a case with out-of-court statements.

### **Implementing *Giles v. California***

In 2008, the United States Supreme Court handed down a decision in the case *Giles v. California*. In this case, the petitioner, Dwayne Giles, had been convicted of murder after shooting his ex-girlfriend, Brenda Avie.<sup>283</sup> The prosecution offered statements made weeks earlier by the victim to the police when the police responded to a domestic violence call.<sup>284</sup> Avie described to the officers how she and Giles had been involved in a fight. She had been lifted from the ground and choked, punched, and threatened with a knife.<sup>285</sup> She further told the officers that Giles had made threats to kill her if she was discovered to be cheating on him.<sup>286</sup> These statements were admitted under a California hearsay exception for “statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify at trial and the prior statements are deemed trustworthy.”<sup>287</sup> The prosecution offered these statements at trial to prove that Giles had forfeited his rights to confront these statements (but not his rights to object to them on hearsay grounds) because, by murdering the declarant, he had secured the unavailability of the witness.<sup>288</sup> The Supreme Court reviewed the question of “whether a defendant forfeits his Sixth Amendment rights to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial.”<sup>289</sup> Ultimately, the majority opinion authored by Justice Scalia concluded that the

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<sup>283</sup> *Giles v. California*. 544 U.S. 353, 353 (2008).

<sup>284</sup> *Giles v. California* at 354.

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

<sup>287</sup> *Ibid.*

<sup>288</sup> *Giles v. California* at 362.

<sup>289</sup> *Giles v. California* at 353.

forfeiture by wrongdoing exception to the Sixth Amendment right to confrontation was in use at the time of the founding and therefore a legitimate exception, but it was only applicable when the actions by the defendant were *designed* to make the witness unavailable to testify against the defendant.<sup>290</sup> The opinion ultimately concluded that Giles' actions were not taken to procure Avie's unavailability for his murder trial, so the forfeiture doctrine did not apply in the *Giles* case but is a valid consideration for many cases, including intimate-partner violence cases. The opinion concluded with a caveat for the domestic-violence context:

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.<sup>291</sup>

This paragraph signals that the forfeiture doctrine is an exceptionally important tool for promoting the success of evidence-based prosecution. Intimate-partner violence situations give criminal defendants a special relationship with their victim-witness which can make coercive behavior and threats of violence to deter the victim from testifying especially persuasive.

All fifty states have adopted some form codification of the forfeiture by wrongdoing doctrine into state rules of evidence. The Federal Rules of Evidence include a forfeiture provision under Rule 804(b)(6). The rule allows that any “statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant’s unavailability as a witness, and did so intending that result” be admitted as evidence.<sup>292</sup> Of course, this is only

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<sup>290</sup> *Giles v. California* at 357.

<sup>291</sup> *Giles v. California* at 375

<sup>292</sup> Fed. Rules Evid. 804(6).

applicable if a judge has first determined that the defendant *had* taken specific actions *designed* to ensure the unavailability of the victim-witness and had therefore forfeited Confrontation Clause objections to the admittance of statements by that witness. This hearsay rule is positive considering that the shift from a *Roberts* framework to a *Crawford* framework made threats to the victim which resulted in victim noncooperation beneficial and worthwhile for the defendant.<sup>293</sup> Under *Roberts*, the defendant could still be convicted using out-of-court statements, while under *Crawford*, without a codified forfeiture exception, securing the victim's unavailability could secure a dropped case. A *Crawford* framework coupled with a codified forfeiture doctrine allows for the right to Confrontation to be better protected than it was when *Roberts* was the law of the land but ensures that criminal defendants do not benefit from securing the unavailability of victim-witnesses through threats, coercion, or bribes.

A successful case proving forfeiture by wrongdoing could be one of the most effective means of securing a conviction in evidence-based prosecution. If it can be proven that the defendant purposefully took actions to dissuade the victim-witness from being available for live testimony, then unfronted statements made by the unavailable victim-witness could be used in trial to build a successful intimate-partner violence case. First, forfeiture is primarily a preliminary issue determined by a judge prior to trial.<sup>294</sup> Consequently, the judge can determine forfeiture by hearing statements which would otherwise be inadmissible *without* forfeiture having been confirmed.<sup>295</sup> Because forfeiture is a preliminary matter, it should be proven to a judge at a pretrial hearing when otherwise inadmissible evidence can be utilized under rule 104(a) in the Federal Rules of Evidence. This rule requires that “the court must decide any

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<sup>293</sup> Hutton, Chris, “Sir Walter Raleigh Revived: The Supreme Court Revamps Two Decades of Confrontation Abuse Precedent in *Crawford v. Washington*,” *50 S.D.L Rev* 41; (2005). p.54.

<sup>294</sup> Fed. Rules Evid. 104(a).

<sup>295</sup> Friedman, Richard D. p.578-579.

preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.”<sup>296</sup> This means that the judge can hear evidence such as jailhouse calls and 911 calls which *are* hearsay to determine forfeiture. If this otherwise inadmissible evidence proves a forfeiture case, then the same evidence will be subject to rules of evidence. For example, if a 911 call is used to prove forfeiture to a judge then the same phone call could still be rendered inadmissible if does not meet the specific requirement of the forfeiture hearsay exception, namely it is a testimonial statement but not necessarily a statement *against* the defendant. Statements like this would only be admissible if they met the requirements of another hearsay exception. The judge would also have the authority to make statements inadmissible under rule 403 of the Rules of Evidence if the statement is rendered to be more prejudicial than it is probative.<sup>297</sup> Even if the judge examines evidence for a forfeiture ruling and believes it credible for a ruling affirmative of forfeiture, the judge may still render it inadmissible for trial under another evidentiary rule. An affirmative forfeiture ruling would not make all evidence immediately admissible, but it removes the Confrontation Clause obstacle, so evidence is only subject to the Rules of Evidence. If this evidence does not prove forfeiture, then the testimonial evidence is inadmissible if the declarant is unavailable. The procedure for determining forfeiture does not employ circular reasoning because first, a judge determines the preliminary matter of forfeiture while a jury determines guilt. Second, the standard of proof for a preliminary matter on

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<sup>296</sup> Fed. Rules Evid. 104(a).

<sup>297</sup> Markman, Isley. “The Admission of Hearsay Testimony under the Doctrine of Forfeiture-by-Wrongdoing in Domestic Violence Cases: Advice for Prosecutors and Courts,” *American University Criminal Law Brief* 6(2); (2010). p.16.

forfeiture, a preponderance of the evidence, is lower than the “beyond a reasonable doubt” standard of proof for guilt.

Despite *Giles* being a lethal case, forfeiture is not limited to lethal cases. The Supreme Court said that forfeiture applies when “the defendant engaged in *conduct* designed to prevent the witness from testifying.”<sup>298</sup> This conduct is not limited to murder and is in fact “need not consist of a criminal act.”<sup>299</sup> Considering this, the expanse of forfeiture extends over non-lethal domestic violence cases when it can be proved by a preponderance of the evidence—a standard much lower than that for criminal convictions—that the defendant engaged in wrongdoing, criminal or not, which caused the declarant-witness to become unavailable for trial.<sup>300</sup> Courts have historically held that forfeiture applies even when the misconduct is not murder or the acquisition of one’s murder in cases like *United States v. Aguiar*, *United States v. Potamitis*, and numerous others.<sup>301</sup> *Giles* only specifically addressed situations where actions culminate in murder, but did not close the door on forfeiture for non-lethal cases and the Rules of Evidence make clear that murder is not a prerequisite for forfeiture.

Regardless of whether the case of intimate-partner violence is lethal, there are numerous sources of evidence and procedures which can be used to build a strong case of forfeiture. Calls from jail with statements made by the victim-witness, which unless forfeiture is proven, could be ruled inadmissible at trial could be played to the judge to prove that the defendant was coercive and made threats to the victim-witness and also show the reaction of the victim-witness to these tactics. Seventy-five percent of the time, victim-witness women cease to be cooperative after

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<sup>298</sup> *Giles* at 368. emphasis added.

<sup>299</sup> “Rule 804. Hearsay Exceptions; Declarant Unavailable.” Legal Information Institute at Cornell Law School. [https://www.law.cornell.edu/rules/fre/rule\\_804](https://www.law.cornell.edu/rules/fre/rule_804).

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.*

speaking with the abusive defendant in intimate-partner violence cases.<sup>302</sup> One survey demonstrated that ninety percent of jurisdictions which were surveyed released a majority of the defendants in domestic violence cases while awaiting trial, which gives defendants a larger opportunity to contact and dissuade the victim-witness from cooperating.<sup>303</sup> A study from Milwaukee discovered that more than half of defendants in intimate-partner violence cases contacted their victims prior to the trial date and made efforts to convince the victim to recant, change their story, or cease cooperation.<sup>304</sup> Evidence of these such conversations or actions should be sought after and used to prove forfeiture. This requires support of, and contact with, the victim-witness for as long as possible.

Responding police officers could ask questions which would supplement a forfeiture claim. Questions about whether the accused had ever threatened the witness if she called the police or cooperated with authorities should be asked.<sup>305</sup> Further, questions such as, “How frequently and seriously does your partner intimidate you?” “Have you ever made it known to your partner that you wanted to leave?” and “If so, how did your partner react?” would help to draw out a narrative about intimidation and threatening responses that plant fear in the victim-witness.<sup>306</sup> Written evidence such as texts, posts on social media, and voicemail recordings could also potentially be used to show a pattern of manipulation or isolation.<sup>307</sup> Any evidence preemptively gathered to demonstrate trauma and fear experienced by the victim that could potentially later be connected to actions taken by the defendant with, among other motivations, a

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<sup>302</sup> Weisberg, D. Kelly. “Domestic Violence: Legal and Social Reality”. *New York: Wolters Kluwer Law & Business*, (2012). p.248.

<sup>303</sup> Lininger, Tom. p.814.

<sup>304</sup> *Ibid.*

<sup>305</sup> Lininger, Tom. p.807.

<sup>306</sup> Ratnayake, A. Ann. “The Confrontation Clause After Ohio v. Clark: The Path to Reinvigorating Evidence-Based Prosecution in Intimate Partner Violence Cases,” *The George Washington Law Review Arguendo*, 84(18); (2016). p.34.

<sup>307</sup> *Ibid.*

motivation to prevent the victim from testifying against the defendant would be relevant to a case of forfeiture. This type of evidence should be collected and could be used to secure a ruling of forfeiture by wrongdoing and serve to aid in successful evidence-based prosecution.

Corroborating evidence helps to paint a bigger picture of abuse which can protect *both* victims and criminal defendants. For example, corroborating evidence collected by investigators helps to build a stronger case for forfeiture and allows for a story to be told about the infliction of trauma and the buildup of fear within a victim which are relevant to questions of forfeiture to aid in prosecution. Additionally, corroborating evidence helps to mitigate fears of false-positives in intimate-partner violence cases. This evidence in conjunction with testimonial accusations of harm and abuse helps shed light on the reliability of such accusations. Forfeiture is an important determination with the power to suspend the rights of the accused. Therefore, it is imperative that forfeiture cases not be built solely upon accusations that could be false-positives. Investigators need to make every effort to secure corroborating evidence, and the cases that prosecutors make for forfeiture should be robust enough to best mitigate the chance for false positives. The solution to concerns about falsely positive accusations should not be a suspension of the use of forfeiture, but rather a respect for the integrity and importance of forfeiture. Judges making determinations about forfeiture should consider and weigh the evidence and ensure that if there is a preponderance of evidence suggesting that the defendant has forfeited their rights, that there is sufficient evidence suggesting that the ruling is not based upon a false positive. Corroborating evidence supplied through thorough investigation is therefore imperative.

In a case from New York, *People v. Byrd*, prosecutors had proven forfeiture by wrongdoing at an evidentiary hearing using expert testimony to describe non-violent actions

characteristic of abuse as they relate to Battered Women's Syndrome.<sup>308</sup> The expert witness testimony proved that the victim suffered from the trauma of Battered Women's Syndrome.<sup>309</sup> The expert witness further elaborated on the effects of the "honeymoon" stage of abuse where apologies and promises made through calls and visits can be made for the purpose of convincing the victim to not cooperate with prosecutors.<sup>310</sup> Forfeiture was proven in the *Byrd* case. The timeline of such actions is important because the phone calls and visits in *Byrd* were made after charges for abuse had been made so the promises and actions within the honeymoon phase were designed with the specific intent to persuade the victim's unavailability in a different sense than had the "honeymoon" phase taken place absent of criminal charges.<sup>311</sup> Battered Women's Syndrome and past experiences of coercion and control are only sufficient to prove that the defendant may have engaged in wrongful acts which caused trauma. The additional component of specific acts taken *designed* to procure unavailability for trial would be necessary following police intervention and charges. Past evidence is therefore a necessary, but not sufficient condition for forfeiture. In this way, less serious efforts to intimidate victims, alone, would be insufficient to suspend confrontation rules, but these efforts, when criminal charges are pending or on the table, coupled with additional evidence would be enough for a forfeiture ruling. Consequently, forfeiture is possible without specific threats of murder, but proving forfeiture can be an uphill battle dependent on temporal considerations of when specific threats and coercive "honeymoon" behaviors are employed by the defendant.

The forfeiture doctrine would be inapplicable when the victim-witness refuses to testify for reasons not resulting from specifically designed deterrent conduct by the defendant. The

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<sup>308</sup> Markman, Isley. p.14.

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*



forfeiture doctrine would not cover cases where victims become non-cooperative due to a desire to drop the case because of financial concerns, concerns for children, or other legitimate reasons separate from the defendant's wrongdoing. Proving wrongdoing requires continuity and temporal proof of wrongful action by the defendant specifically designed to secure the unavailability of the witness. Therefore, if a victim-witness decides to drop the case and there is no evidence or suggestion that wrongful actions were taken by the defendant in response to criminal justice intervention, then the case for forfeiture would be lacking the intent requirement made clear in *Giles*. Actions and intent must be proved to a judge by a preponderance of the evidence. In cases where victim non-cooperation is the result of a factor other than wrongdoing intended to secure unavailability, there will likely be too little evidence of such action and intent to constitute a preponderance. In cases such as this, the criminal justice system may not be the proper avenue for help at that particular time, and referrals for services and support from community support systems may be more beneficial than a life-disrupting prosecution process.

## Chapter Five: Summary and Conclusions

The relationship between intimate-partners who experience violence is complicated, and consequently the history and practice surrounding the prosecution of such cases of violence is complicated. For many years, *Ohio v. Roberts* dictated the procedure for prosecuting cases, including IPV cases, in which victims or other witnesses were unavailable. Under this framework, statements made by unavailable witnesses were being admitted without cross-examination regardless of their testimonial nature and despite the confrontation guarantee afforded by the Constitution's Sixth Amendment. In 2004, *Crawford v. Washington* was handed down by the United States Supreme Court and mandated that testimonial hearsay statements are inadmissible when the witness is unavailable for trial and there is no opportunity for the statements to be subject to the procedural guarantee of cross-examination. This decision initially served as a major barrier for prosecutors working with evidence-based prosecution of intimate-partner violence. However, subsequent Supreme Court decisions including *Davis v. Washington* and *Michigan v. Bryant* have weakened the effects of *Crawford* and done so in a way which dichotomizes "public" and "private" violence and places public violence on a heightened level of urgency and concern. Under the present system, *Roberts* has been figuratively resurrected, the Sixth Amendment right to confrontation does not operate with full force, and victims of intimate-partner violence and evidence-based prosecution of IPV are subject to different treatment than the victims and prosecution of public crimes. In order to restore the vigor of the Sixth Amendment, rectify the resurrection of *Roberts*, and create a fair path forward for IPV victims and evidence-based prosecution, a new two-part testimonial test which assesses the purpose and function of statements should be adopted in courts, and policy initiatives should be adopted to aid and protect IPV victims. Steps must be taken at every level to ensure that both the rights of

the accused and the rights of victims to be heard and be safe are protected. The adoption of programs, such as TAC and vertical prosecution, would help to promote victim involvement and their voice while minimizing Sixth Amendment issues. Further, jurisdictions should make efforts to facilitate early opportunities for cross-examination of victim-witnesses. Where, still, the availability of victim-witnesses cannot be secured nor prior cross-examination opportunities be managed, evidence-based prosecution should robustly go forward when the safety of victims and society is dependent on prosecution. In order to do so without overwhelming Sixth Amendment obstacles, law enforcement investigators should be required to collect physical and spoken evidence in such a way that would best support an evidence-based prosecution. Finally, evidence should be collected and used to prove forfeiture by wrongdoing pursuant to the Supreme Court's 2008 ruling in *Giles v. California*. In doing so, criminal defendants cannot perpetuate the cycle of abuse by benefiting from coercing, threatening, or further harming victim-witnesses.

The story of confrontation clause jurisprudence from *Roberts* to present is one of a tug-of-war between a strengthened Sixth Amendment and strengthened prosecutions. While *Roberts* ruled, unavailable witnesses were not detrimental to a successful prosecution. While *Crawford* controlled the courts, prosecutors with hearsay statements made by unavailable witnesses struggled to move forward with prosecution, and in response *Davis*, *Bryant*, and *Clark* gradually dulled the force of *Crawford* and returned to a system which resembles the *Roberts*, diminished Sixth Amendment, framework. I proposed a new two-part test to pull the rope back toward the center between the Sixth Amendment and strengthened prosecution. However, the solution to the confrontation clause conflict does not fall solely to the judicial system. Rather, the solution is a marriage of public policy and law. My proposed two-part testimonial test would settle the testimonial issue for the courts and the implementation of public policy initiatives would settle

further difficulties for evidence-based prosecution and best support victims of intimate-partner violence. The resurrection of Roberts can be rectified, but doing so requires a healthy, intimate relationship between public policy and law.

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Federal Rules of Evidence 104(a).

(a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

Federal Rules of Evidence 801(c).

(c) **Hearsay.** “Hearsay” means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Federal Rules of Evidence 803(2).

(2) **Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

Federal Rules of Evidence 804(6).

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness and did so intending that result.

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