A CALL FOR CHANGE: THE DETRIMENTAL IMPACTS OF *CRAWFORD v. WASHINGTON* ON DOMESTIC VIOLENCE AND RAPE PROSECUTIONS

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Abstract: In 2004, the U.S. Supreme Court held in *Crawford v. Washington* that testimonial hearsay is inadmissible at trial unless the declarant is available for cross-examination. Courts have subsequently struggled to define "testimonial hearsay," but have often vaguely defined it as an out-of-court statement made for the primary purpose of establishing past events for use in future prosecution. Although *Crawford* intended to protect a defendant's Sixth Amendment right to confrontation, in doing so, it overlooked the holding's detrimental effects on two particular types of victims: domestic violence and rape victims. Under *Crawford*, domestic violence and rape victims' out-of-court statements are likely to be considered testimonial because the sensitive and personal nature of these incidents often results in substantial deliberation prior to any declaration, as opposed to the impromptu declarations made during so-called ongoing emergencies. In turn, these statements are likely viewed as made for future prosecution. Moreover, domestic violence and rape victims have especially compelling and uniquely fragile psychological reasons to be unavailable for cross-examination, including being at risk at for re-traumatization. Yet, despite these reasons, *Crawford* still places pressure on these victims to be cross-examined in front of their perpetrators because testimonial hearsay evidence is often determinative in these types of trials, and thus an unavailable victim would lead to an increased likelihood of the perpetrator escaping conviction. This sensitivity and consequential unreliability surrounding the admissibility of testimonial hearsay upon which domestic violence and rape cases rely also disincentives prosecutors from pursuing these cases, further exacerbating the unlikelihood of conviction. To alleviate the detrimental impacts that *Crawford* has on both victims and trials, this Article suggests that *Crawford*'s essential terminology must be narrowly defined, exceptions to the ruling must be expanded upon, and victims must be adequately safeguarded.

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INTRODUCTION

The U.S. Supreme Court's 2004 decision in *Crawford v. Washington* has significantly impacted domestic violence and rape victims throughout the United States in a variety of negative ways.[1] By interpreting the Confrontation Clause of the Sixth Amendment to the U.S. Constitution to mean that testimonial out-of-court statements are inadmissible at trial unless the declarant is available for cross-examination, *Crawford* effectively prevents admissibility of statements made to first-responders by domestic violence and rape victims who become afraid to face their attackers at trial or are coerced into succumbing to their abusive relationships. In creating this barrier to admission of such crucial evidence, *Crawford* not only presents defendants with an advantage considering the inherent fear their domestic violence and rape victims have of confronting them, but it also disincentives prosecutors from pursuing these cases in the first place, thereby increasing the likelihood that perpetrators of domestic violence and rape will go free. Consequently, not only are domestic violence and rape victims harmed by the psychological consequences of the crimes committed against them, such as fear, depression, and coercion, but *Crawford* also further punishes victims by allowing the psychological nature of rape and domestic violence to disadvantage them in the judicial system. At the same time, their attackers are going free and are able to subsequently harm them again and attack new victims. Ultimately, *Crawford* places the responsibility of conviction, or lack thereof, on the shoulders of the victim, and thereby further exacerbates the psychological consequences of domestic violence and rape. To alleviate the detrimental effects that the *Crawford* framework has created for domestic violence and rape victims and trials, the definition of testimonial must be narrowed, the ongoing emergency exception to *Crawford* must be broadened, all states must codify the forfeiture by wrongdoing exception, and existing statutes providing protection for victims testifying at trial must be reformed.[2]

This Article proceeds in four primary parts. Part I examines the status of the law surrounding hearsay leading up to the *Crawford* holding and subsequently discusses *Crawford* in depth. It also analyzes the resultant consequences of the *Crawford* holding, including the consolidated holdings of *Davis v. Washington* and *Hammon v. Indiana*, which attempt to define

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[1] *See* 541 U.S. 36, 68 (2004).

[2] *See* Joan S. Meier, Davis/Hammon, *Domestic Violence, and the Supreme Court: The Case for Cautious Optimism*, 105 MICH. L. REV. FIRST IMPRESSIONS 22, 25–26 (2006), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1112&context=mlr_fi [https://perma.cc/W3YQ-MTR4]. Joan Meier is the co-author of the only amicus brief filed in *Davis v. Washington*, which expands upon the *Crawford* holding. *See* Davis v. Washington, 547 U.S. 813, 822, 823, 826–28, 829–30 (2006) (attempting to define a testimonial statement post-*Crawford*).

Crawford's key element of testimonial. Other consequences examined include the reassessment of the significance placed on the reliability of hearsay statements, the application of *Crawford* in relation to the forfeiture by wrongdoing exception, and the criticism of the inconsistent jurisprudence following *Crawford* and its inconclusive standards.

Part II posits that in effect, *Crawford*'s intent is undermined in domestic violence cases. This is particularly due to the circumstances presented by such cases, including their defining attributes of cyclicality and control, as well as the psychological pain and lack of judicial justice that *Crawford* can force upon domestic violence victims. In contrast, Part III presents the often-overlooked application and impact of *Crawford* on rape cases. It expresses the need to distinguish the application of *Crawford* to domestic violence cases from its application to the unique context of rape cases by delineating various ways in which rape cases differ from domestic violence cases and scrutinizing why these divergent cases call for a separate analysis.

Part IV addresses various proposed solutions to the problems presented by *Crawford*'s application to domestic violence and rape cases. It suggests that the definition of testimonial should be restricted in the domestic violence and rape contexts to allow for a narrower, objective application rather than a broad, discretionary case-by-case application. Other solutions include expanding the definition of ongoing emergency to include statements made within twenty-four hours after an incident of domestic violence or rape, codifying the forfeiture by wrongdoing doctrine to ensure its consistent and continuous implementation by courts, and finally, improving safeguards for domestic violence and rape victims both before and during trial.

I. THE SUPREME COURT'S DECISION IN *CRAWFORD V. WASHINGTON*

A. Hearsay Statements Prior to Crawford

The Federal Rules of Evidence define hearsay as a statement, verbal or non-verbal, that "the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement."[3] In its most basic form, hearsay is a previously made out-of-court statement being introduced as evidence to prove the truth of the statement. Although hearsay is generally inadmissible in court, the Federal Rules of Evidence include many exceptions to this convention

[3] FED. R. EVID. 801(a)–(c) (defining declarant as "the person who made the statement"). The Federal Rule of Evidence defining hearsay, Rule 801(d), "properly carries a strong presumption of legitimacy [because] it was proposed by a distinguished Advisory Committee, was enacted by Congress after a nearly two-year review, has been adopted by thirty-four states, and has been the law for over thirty-five years." Sam Stonefield, *Rule 801(d)'s Oxymoronic "Not Hearsay" Classification: The Untold Backstory and a Suggested Amendment*, 2011 FED. CTS. L. REV. 1, 5 (2011).

that render certain hearsay statements admissible.[4] These exceptions are derived from common law and are typically premised on trustworthiness and reliability.[5] Under these hearsay exceptions, out-of-court statements can be admissible at trial even when the declarant is not present.[6]

In contrast, the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, which guarantees the accused the right to confront those who make statements against him or her, requires the availability of declarants at trial for their out-of-court statements to be admitted.[7] Since the enactment of the Sixth Amendment, courts have elaborated upon what qualifies as an adequate cross-examination. Cross-examination is satisfied when a willing witness is questioned under oath on a stand.[8] It is also well established that a declarant's testimony made in a preliminary hearing is admissible at a current trial even if the declarant is no longer available.[9] This is because the declarant's presence at the preliminary hearing adequately provides a defendant with an opportunity to cross-examine the declarant.[10] Historically, the Sixth Amendment's objectives are to ensure consistency of declarants' statements and to allow a face-to-face encounter between the accuser and the accused, which shall assist jurors in judging the credibility of declarants and the accusatory or incriminatory claim(s) a declarant has made against the defendant.[11]

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[4] *See, e.g.*, FED. R. EVID. 803–804.

[5] *See id.*

[6] *Id.*

[7] U.S. CONST. amend. VI (guaranteeing a criminal defendant the right to confront those who make claims and allegations that are adverse to the defendant's interests); Crawford v. Washington, 541 U.S. 36, 68 (2004) (holding the Sixth Amendment's confrontation right requires defendant's accuser(s) be available for cross-examination at trial unless some other exception applies).

[8] United States v. Owens, 484 U.S. 554, 560 (1988).

[9] *See Crawford*, 541 U.S. at 58–59 (holding cross-examination at a preliminary hearing, or a hearing prior to trial to determine sufficiency of evidence, satisfies the Confrontation Clause because it still serves the purpose of allowing the defendant to face his or her accuser(s) and call into question the declarant's credibility); *see also* Mattox v. United States, 156 U.S. 237, 242–43 (1895) (*ex parte* affidavits and depositions do not qualify as cross-examinations).

[10] *See* Melissa Moody, *A Blow to Domestic Violence Victims: Applying the "Testimonial Statements" Test in* Crawford v. Washington, 11 WM. & MARY J. WOMEN & L. 387, 391–92 (2005). Some states have gone further and held that even if the declarant is available to testify at trial but claims to not remember his or her original testimony from the preliminary hearing, then the testimony from the preliminary hearing is admissible at trial and does not violate the defendant's right to confrontation. *See* People v. Stewart, No. 246334, 2004 WL 1778525, at *2–4 (Mich. Ct. App. Aug. 10, 2004). Other cases have gone as far as holding that even if a transcript of the declarant's testimony at the preliminary hearing is not available, then eyewitness testimony of the declarant's testimony at the preliminary hearing is constitutionally admissible at trial. *See* People v. Ali Al-Timimi, No. 245211, 2004 WL 1254271, at *2–6 (Mich. Ct. App. June 8, 2004) (holding even the examining magistrate could testify at trial regarding personal observations of the witness's testimony at the preliminary hearing where no preliminary hearing transcript was available).

[11] *Mattox*, 156 U.S. at 242–43.

These objectives are deemed satisfied through cross-examination, whether performed at trial or at a preliminary hearing.

There is an apparent tension between the intersection of hearsay and the Sixth Amendment. Although the Federal Rules of Evidence can admit hearsay regardless of a declarant's availability, the U.S. Constitution's Confrontation Clause prohibits admission of hearsay without the availability of the declarant.[12] Thus, a particular conflict arises when the hearsay declarant is unavailable because the court is presumably left without evidence that is pertinent to the trial.

The U.S. Supreme Court addressed this issue in 1980 in *Ohio v. Roberts*, where a transcript of an unavailable witness's previously-provided testimony was admitted at trial in lieu of the witnesses being present to testify.[13] The Court held that an out-of-court statement made by a declarant who is unavailable to testify in court is still admissible if there are either indications of reliability, meaning the hearsay statement falls under a firmly-rooted hearsay exception, or if the circumstances under which the statement was made bear indications that the statement is honest or trustworthy.[14] When calling for classification under a firmly-rooted hearsay exception, the Court essentially stated that in order for an unavailable declarant's hearsay statement to be admissible at trial, it must squarely fit within a traditional and established hearsay exception that is uniformly applied by courts.[15] Additionally, when calling for hearsay statements to have guarantees of trustworthiness, the Court explained that the context in which a statement was made could not have allowed for dishonesty or pretense.[16]

Overall, the *Roberts* holding proved compatible with the Federal Rules of Evidence regarding hearsay because both protected the admissibility of certain out-of-court statements.[17] The decision, however, faced criticism, particularly from U.S. Supreme Court Justice Antonin Scalia who viewed the *Roberts* test as far too lenient and one that favored prosecutors.[18] Justice

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[12] *Compare* U.S. CONST. amend. VI (requiring defendant be allowed to confront declarant testifying against the defendant), *with* FED. R. EVID. 803–804 (admitting hearsay at trial regardless of declarant's presence).

[13] 448 U.S. 56, 58–60 (1980).

[14] FED. R. EVID. 801(a) (hearsay statements can be verbal or non-verbal); *Roberts*, 448 U.S. at 66–67 (explaining the purpose of the Confrontation Clause is to allow the defendant to "test adverse evidence").

[15] *See Roberts*, 448 U.S. at 63–66 (holding examples of firmly-rooted hearsay exceptions include excited utterances under Federal Rule of Evidence 803(1), present sense impressions under Federal Rule of Evidence 803(2), and statements made for a medical diagnosis under Federal Rule of Evidence 803(4)).

[16] *Id.* at 66.

[17] FED. R. EVID. 801–803; *Roberts*, 448 U.S. at 66.

[18] *See* Crawford v. Washington, 541 U.S. 36, 61–63 (2004) (arguing the *Roberts* reliability test was far too "amorphous" and diluted the Sixth Amendment's historical intent of specifically

Scalia advocated for returning to the Sixth Amendment's original and historical intent of focusing on pure cross-examination as the means to achieve confrontation; he did not consider the reliability of hearsay as a fair or sufficient substitute for cross-examination, and therefore believed the admissibility of hearsay without the availability of the declarant would entirely circumvent the Confrontation Clause.[19] According to Scalia, although reliability is an underlying goal of the Confrontation Clause, it must not also be used as the means of achieving that very goal.[20] Scalia claimed that admitting hearsay of a declarant who is unavailable for cross-examination would create a broad and discretionary loophole through which defendants' Sixth Amendment rights would be bypassed. As a result, defendants would be deprived of the opportunity to face their accusers, which, in turn, would diminish assurance of reliability.[21]

B. *Overview of* Crawford

More than two decades later, in 2004 Justice Scalia overruled *Roberts* in *Crawford v. Washington*. Since then, *Crawford* has been the authoritative framework courts use to interpret and apply the Confrontation Clause of the Sixth Amendment and the Federal Rules of Evidence relating to hearsay statements made by an unavailable declarant.[22] In *Crawford*, the defendant, Mr. Crawford, was charged with assault and attempted murder after stabbing a man who allegedly tried to rape his wife.[23] At trial, the prosecution attempted to present tape-recorded statements made by Mr. Crawford's wife that implicated Mr. Crawford in the assault and attempted murder.[24] After applying the criteria established in *Roberts*, the trial court permitted the prosecution to present such evidence despite the fact that Mrs. Crawford was unavailable as a witness due to the marital privilege.[25] The trial court reasoned that because Mrs. Crawford made the implicating statements during a lawful and aptly-timed police interrogation, particularly because she

placing importance on cross-examination as the means to satisfy a defendant's right to confrontation).

[19] *See id.* at 61.

[20] *See id.*

[21] *See id.* at 62.

[22] *See id.* at 44–45 (explaining the trial of Sir Walter Raleigh who was ultimately beheaded after being denied his request to confront his co-conspirator whose statements led to Raleigh's conviction as the historical impetus for the Confrontation Clause). *Crawford* has "ushered in a sea [of] change in confrontation jurisprudence, casting doubt on standard operating procedures in thousands of criminal courtrooms every day." Meier, *supra* note 2, at 22.

[23] 541 U.S. at 38.

[24] *Id.* at 39–40.

[25] *Id.* at 40–41 (explaining in Washington state, a spouse can only testify against his or her defendant spouse if there is consent or if the spouse is the plaintiff).

was read her Miranda rights and spoke after being given time to regain composure, the statement did not fall under any hearsay exception.[26] Thus, the trial court admitted the wife's statements based on trustworthiness.[27]

On appeal, the Washington Court of Appeals reversed *Crawford*'s conviction on the grounds that the wife's statements were unreliable and should have been inadmissible.[28] In making this determination, the Washington Court of Appeals applied a nine-factor test of trustworthiness and found that the wife's statements were not trustworthy for reasons such as inconsistency with previous statements, poor questioning methods, and memory recall issues.[29] Upon further appeal, however, the Washington Supreme Court then reinstated the conviction based on reasoning reflecting that of the trial court—that although the wife's statements did not fall under a hearsay exception, they were indeed trustworthy.[30]

Justice Scalia writing for the majority, the U.S. Supreme Court reversed *Crawford* and remanded the case, holding that admitting Mrs. Crawford's statements was a violation of Mr. Crawford's Sixth Amendment right to confront his accuser.[31] In delivering the opinion of the Court, Justice Scalia was highly critical of *Roberts* and its focus on reliability for being not only lenient and malleable, but also misguided.[32] He specifically argued that complications arise when prosecutors are given discretion to make the subjective determination of whether the highly idiosyncratic circumstances surrounding a crime represent a context in which statements spoken can be deemed reliable or trustworthy. Justice Scalia emphasized that reliability of witness statements should not be used as a tool to determine whether the Confrontation Clause is satisfied but rather, the Confrontation Clause should be used as tool to determine whether witness statements are relia-

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[26] *Id.*

[27] *See id.*

[28] State v. Crawford, No. 25307-1-II, 2001 WL 850119, at *1, 4–6 (Wash. App. July 30, 2001), *rev'd*, 54 P.3d 656 (Wash. 2002), *rev'd*, 541 U.S. 36 (2004).

[29] *See id.* at *4–6 (applying a nine-factor asking: 1) whether the declarant had an apparent motive to lie; 2) whether the declarant's general character suggests trustworthiness; 3) whether more than one person heard the statement; 4) whether the declarant made the statement spontaneously; 5) whether the timing of the statement and the relationship between the declarant and the witness suggests trustworthiness; 6) whether the declarant's statement contained express assertions of past facts; 7) whether cross-examination could help to demonstrate the declarant's lack of knowledge; 8) whether there is a possibility that the declarant's recollection was faulty because the event was remote; and, 9) whether the circumstances surrounding the statement suggest that the declarant misrepresented the defendant's involvement).

[30] *Crawford*, 54 P.3d at 658.

[31] 541 U.S. at 68–69.

[32] *See id.* at 65–67.

ble.[33] The Confrontation Clause, according to Justice Scalia, was enacted to prevent use of "*ex parte* examinations as evidence against the accused."[34]

Justice Scalia advocated that more weight should be given to the Confrontation Clause's objective of providing defendants with a fair and just opportunity to face their accusers, as guaranteed by the Constitution, rather than admitting hearsay via the Federal Rules of Evidence, as *Roberts* did. Justice Scalia emphasized the importance of narrowing the circumstances under which hearsay is admissible through the Sixth Amendment, as well as the importance of protecting the constitutional right to confront one's accuser. Thus, Justice Scalia's criticism of *Roberts* chipped away at the increased prosecutorial power that *Roberts* allowed for and instead, through *Crawford*, he empowered the accused with the opportunity he believed rightfully belongs to defendants per the Sixth Amendment.

The *Crawford* Court redefined the application of the Confrontation Clause by holding that, rather than depending on the reliability of the out-of-court statement at issue, the Confrontation Clause first requires an analysis of whether a hearsay statement is testimonial in nature before determining that a defendant's right to confrontation is in jeopardy.[35] Under a *Crawford* examination, an out-of-court statement is considered testimonial if it was "made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial" or was made "with an eye toward trial."[36] The Court declined to adopt a precise or comprehensive formulation of what is considered testimonial, but did articulate that, at a minimum, testimonial statements include those made "at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations."[37] If an out-of-court statement is deemed testimonial, then its admission violates the Confrontation Clause unless the declarant testifies at trial or, if the declarant is unavailable, the defendant had a prior opportunity to cross-examine the declarant.[38] In contrast, if the hearsay statement is considered non-testimonial, the Court noted it would be more accepting of

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[33] *See id.*

[34] *Id.* at 50.

[35] *Id.* at 59, 61, 68 (clarifying that the Confrontation Clause is satisfied by cross-examination, and thus the terms "confront" and "cross-examine" are essentially synonymous and both are what signify the "availability" as referenced in the holding).

[36] *Id.* at 51–52, 56 n.7; *see* Davis v. Washington, 547 U.S. 813, 822 (2006) (describing "eye-toward-trial" statements as ones that detail past events, including those that accuse or implicate a perpetrator, and primarily aim to gather evidence for prosecution).

[37] 541 U.S. at 68. The Court acknowledged that it left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* The Court further recognized this open definition would create uncertainty in lower courts, but stated this uncertainty was preferable to the status quo. *Id.*

[38] *Id.*

discretionary standards to determine admissibility, such as those used in *Roberts*.[39]

Ultimately, *Crawford* set precedent that caused great confusion surrounding those statements that fall within a hearsay exception but violate the Confrontation Clause due to their testimonial features. Consequently, courts lack consistent guidelines as to when to admit hearsay statements of an unavailable declarant. As a result of this inconsistency and uncertainty, courts are likely hesitant to admit such statements, which are oftentimes crucial or incriminating pieces of evidence at trial. Consequently, *Crawford* has created a greater difficulty in obtaining convictions in cases where declarants are unavailable for cross-examination.

C. Testimonial and Non-Testimonial Statements Under Crawford

Following the *Crawford* Court's decision that provided little guidance on how to delineate the difference between testimonial and non-testimonial hearsay statements, numerous Supreme Court cases have since attempted to draw the distinction.[40] Two of these cases, *Davis v. Washington* and *Hammon v. Indiana*, were decided just two years after *Crawford* in 2006.[41] *Davis* and *Hammon* are factually quite similar—both involved a victim of domestic violence making statements about her attacker to law enforcement personnel.[42] The key distinction between these cases is that in *Davis*, the declarant's statements were made to a 911 operator as the emergency was occurring.[43] In the telephone call, the victim was describing her attacker and seeking immediate help in fear of her safety.[44] In contrast, in *Hammon*, the declarant's statements were made once the attack had ceased.[45] The victim

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[39] *See id.*

[40] *See* Ohio v. Clark, 135 S. Ct. 2173, 2183 (2015) (finding that statements made by a child in response to a teacher questioning the child about possible abuse were non-testimonial because the primary purpose of the conversation was to protect the child from abuse by identifying the abuser, not to gather evidence for prosecution); Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011) (holding the report of a laboratory analyst was testimonial hearsay, and thus the analyst must be available for cross-examination at trial in order to satisfy the Confrontation Clause); Michigan v. Bryant, 562 U.S. 344, 383–95 (2011) (holding a dying declarant's statements made to a police officer were non-testimonial because they fell under the ongoing emergency exception of hearsay rules, and thus were admissible in court despite the unavailability of the declarant); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 305, 324 (2009) (holding laboratory reports deeming the substance at hand as cocaine were testimonial affidavits, and thus required the availability of a witness at trial for cross-examination); *Davis*, 547 U.S. at 822 (holding that declarant's statements to emergency responders were non-testimonial because declarant was seeking emergency assistance).

[41] *Davis*, 547 U.S. at 822. On certiorari, the Court consolidated these two cases.

[42] *Id.* at 817–21.

[43] *Id.* at 817–18.

[44] *See id.*

[45] *Id.* at 819–20.

spoke with police and provided an affidavit after the domestic violence incident had occurred and after the victim had been separated from her attacker.[46]

In *Davis* and *Hammon*, the Court held that whether a statement is considered testimonial, and therefore subject to the Confrontation Clause, depends on the "primary purpose" behind the statement.[47] The Court defined a testimonial statement as one where the primary purpose of the interrogation is to establish or prove past events with an "eye toward trial," meaning the statement was made for the purpose of gathering evidence and would be potentially relevant to a later criminal prosecution.[48] This would include statements made regarding a *past* emergency, such as statements made during a formal police interrogation.[49] Such statements that fall under the definition of testimonial call for the declarant to be available for cross-examination at trial.[50] In contrast, if the declarant makes a statement during the course of an ongoing emergency, meaning the declarant describes events as they are occurring for the purpose of seeking help due to fear for his or her safety, the statement is reactive and could not have been made with an "eye toward trial."[51] Therefore, that type of statement is non-testimonial and is admissible at trial notwithstanding the unavailability of the declarant.[52]

In *Davis* and *Hammon*, the Court applied the aforementioned test and ultimately reached entirely different results despite the similar factual histories of these cases.[53] In *Davis*, the Court held that the declarant's statements were non-testimonial because they were made during an ongoing emergency for the purpose of seeking help, not for the purpose of gathering evidence.[54] In *Hammon*, the Court found the statements to be testimonial because they were made after the danger had passed, and thus were more closely associated with gathering evidence for trial rather than for seeking emergency assistance.[55] The *Hammon* declarant was merely "telling a story about the past" that provided evidence that could be used in a prosecution.[56]

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[46] *Id.*
[47] *Id.* at 822.
[48] *Id.*
[49] *Id.*; Crawford v. Washington, 541 U.S. 36, 52 (2004).
[50] *Davis*, 547 U.S. at 822.
[51] *See id.* at 822–23, 828.
[52] *Id.* at 822; *Crawford*, 541 U.S. at 52.
[53] *See Davis*, 547 U.S. at 826–28, 829–30.
[54] *Id.* at 828.
[55] *Id.* at 830 (holding statements in *Hammon* to be testimonial despite police questioning occurring at scene of attack and certain formalities, such as *Miranda* warnings and interrogation recording).
[56] *Id.* at 831.

Given the equivocal guidelines regarding how to determine one's primary purpose, *Crawford*, *Hammon*, and *Davis* left unclear whether statements made to non-law enforcement personnel are testimonial in nature, but most courts have held they are not.[57] Despite this nearly uniform agreement, it is still an open question. Currently, however, because statements made to non-law enforcement personnel do not necessarily or consistently fit squarely within *Crawford*, *Davis*, and *Hammon*'s requirement that non-testimonial statements are not made with the primary purpose of establishing past events with an "eye toward trial," statements made to non-law enforcement personnel are subject to a discretionary, case-by-case *Roberts*-like analysis that evaluates whether they are admissible for purposes of the Confrontation Clause.[58] Consequently, because *Roberts* affords more leniency than *Crawford* for determining what constitutes admissible hearsay, as Justice Scalia recognizes, it is more likely that such statements will be admitted at trial.[59] Therefore, hearsay statements made to someone such as a family member, friend, neighbor, social worker, or medical personnel are left "relatively unconstrained by *Crawford* and *Davis*."[60]As a result, courts generally hold that that statements obtained by non-law enforcement personnel are non-testimonial because such persons are not seeking information for judicially investigative purposes or with an "eye toward trial."[61]

However, even with this general application of how to consider statements made to non-law enforcement personnel, *Davis* and *Hammon* never clarify whose intent controls when the statement is made—the declarant or the listener.[62] Although some, including Justice Scalia, state that focusing on the declarant's intent when speaking is too subjective, and thus the focus should instead be placed on the purpose of the listener or the government when applying the primary purpose test, others claim that not considering the

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[57] *Id.* at 822; *Crawford*, 541 U.S. at 60–68; Rankins v. Commonwealth, 237 S.W.3d 128, 131 n.6 (Ky. 2007) (recognizing that neither *Crawford* nor *Davis* limit testimonial evidence to statements gathered by law enforcement).

[58] *Davis*, 547 U.S. at 834 (Thomas, J., dissenting) (arguing the primary purpose test introduced in *Davis* and *Hammon* is just as discretionary and unreliable as the *Roberts* test); Ohio v. Roberts, 448 U.S. 56, 77 (1980).

[59] *Crawford*, 541 U.S. at 53–54 (explaining how *Roberts* provides more prosecutorial power due to the flexibility it grants prosecutors in terms of claiming reliability).

[60] *See* Meier, *supra* note 2, at 25.

[61] *See, e.g.*, State v. Her, 750 N.W.2d 258, 265 (Minn. 2008) (holding that, in a domestic violence murder case, the State did not prove the victim's statements were non-testimonial because it did not prove that the primary purpose of these statements was to address an ongoing emergency).

[62] *See* Andrew Dylan, *Working Through the Confrontation Clause After* Davis v. Washington, 76 FORDHAM L. REV. 1905, 1918–21 (2007) (citing Robert P. Mosteller, Davis v. Washington *and* Hammon v. Indiana*: Beating Expectations*, 105 MICH. L. REV. FIRST IMPRESSIONS 6, 9 (2006), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1115&context=mlr_fi [https://perma.cc/62VL-2SA7]).

declarant's purpose leaves room for government manipulation.[63] These differing interpretations following *Davis* and *Hammon* leave unsettled whose intent or purpose controls—the declarant or the government listener—when analyzing whether a statement is made with the primary purpose of gathering evidence for subsequent prosecution.[64]

D. Crawford*'s Effect on Hearsay Exceptions*

Prior to *Crawford*, the *Roberts* reliability test governed the admissibility of hearsay for unavailable declarants.[65] Under *Roberts*, a statement of an unavailable declarant was admissible at trial if it fell under one of the "firmly-rooted hearsay exception[s]," ones that existed at common law, even if the declarant is unavailable at trial.[66] One example of such an exception is a present sense impression, which is "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it," regardless of the availability of the declarant.[67] Another firmly-rooted hearsay exception is an excited utterance, which is a statement made while the declarant was experiencing an event that led to stress or excitement.[68] A third example is a statement that describes the declarant's "then-existing mental, emotional, or physical condition."[69] Finally, a statement "made for medical diagnosis or treatment" also qualifies as a firmly-rooted hearsay exception.[70] According to *Roberts*, hearsay statements that fall within these afore-

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[63] *See id.*

[64] *See id.*

[65] Crawford v. Washington, 541 U.S. 36, 60 (2004); Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[66] FED. R. EVID. 803 (delineating exceptions to the hearsay rule that would allow admissibility of out-of-court statements); *Crawford*, 541 U.S. at 60 (citing *Roberts*, 448 U.S. at 66).

[67] FED. R. EVID. 803(1). The following statement is an example of a present sense impression if the declarant makes the statement while witnessing the event: "The man in the hat is running fast away from the police." *See id.*

[68] *Id.* at 803(2) (defining an "excited utterance" as "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused"). The following statement is an example of an excited utterance if the declarant makes the statement while someone else is pointing a gun at the declarant: "He's pointing a gun at me!" *See id.*

[69] *Id.* at 803(3) (defining a "then-existing mental, emotional, or physical condition" hearsay exception as "a statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will"). The following statement is an example of a statement relating to the declarant's then-existing mental, emotional, or physical condition if the declarant makes the statement while his or her vision is going blurry: "My vision is going blurry." *See id.*

[70] *Id.* at 803(4) (defining a "medical diagnosis or treatment" hearsay exception as "a statement that: (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause"). The following statement is an example of a statement made for medical diagnosis or

mentioned exceptions are admissible at trial, regardless of the availability of the declarant, because these statements bear "adequate 'indicia of reliability.'"[71] This is because statements falling under these exceptions are made in a context in which the declarant would not have the opportunity, incentive, need, or forethought to fabricate.[72]

The *Crawford* Court ultimately found, however, that the discretion *Roberts* left to judges in determining the reliability of hearsay did not meet the intent of the Confrontation Clause.[73] After *Crawford*, even if a statement falls under one of the aforementioned hearsay exceptions, the statement is not necessarily admissible at trial; under *Crawford*, the key for admissibility of an out-of-court statement is that it must be categorized as non-testimonial.[74] *Crawford* therefore implied that reliability alone is insufficient to determine the admissibility of hearsay. Instead, for the sake of protecting the Confrontation Clause, *Crawford* sets a higher bar that prosecutors must meet for hearsay to be admitted when the declarant is unavailable by requiring a classification of "non-testimonial," rather than merely requiring the discretionary classification of reliable.[75] In practice, for example, most courts hold that even if a declarant's statement is deemed an excited

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treatment if the declarant is speaking to his or her physician while being treated for an overdose: "I took drugs with my friends." *See id.*

[71] 448 U.S. at 66.

[72] *See* Carol A. Chase, *Is* Crawford *a "Get Out of Jail Free" Card for Batterers and Abusers? An Argument for a Narrow Definition of "Testimonial,"* 84 OR. L. REV. 1093, 1106–13 (2005) (discussing how hearsay exceptions are premised upon reliability because these contexts denote trustworthiness). A present sense impression is recognized as a hearsay exception because "the contemporaneity of the statement and the event" makes it unlikely that the declarant had time to develop the intent to fabricate. *Id.* Similarly, excited utterances preoccupy the brain so that there is no capacity to intentionally fabricate. *Id.* Medical diagnosis and treatment statements are also deemed reliable because declarants in those situations have a strong incentive to tell the truth. *Id.* Statements made by victims during 911 telephone calls, to medical personnel, or to first responders whom the victim talks to shortly after the event occurred would be admissible at trial even if the victim is unavailable for cross-examination because those statements fall under one of these exceptions. John M. Leventhal & Liberty Aldrich, *The Admission of Evidence in Domestic Violence Cases After* Crawford v. Washington*: A National Survey*, 11 BERKELEY J. CRIM. L. 77 (2006) (citing United States v. James, 164 F. Supp. 2d 718 (D. Md. 2001); United States v. Haner, 49 M.J. 72 (C.A.A.F. 1998); People v. Coleman, 791 N.Y.S.2d 112 (App. Div. 2005)). Many different situations qualify as a context in which the declarant would not want, need, or think to fabricate his or her statement(s). *See, e.g.*, *James*, 164 F. Supp. 2d at 727–29 (admitting statements made to police officer by victim of domestic abuse as excited utterance); *Haner*, 49 M.J. at 76–77 (admitting statements made by domestic violence victim to doctor via medical treatment hearsay exception); *Coleman*, 791 N.Y.S.2d at 113 (admitting recording of 911 telephone call made by a distraught person as either an excited utterance or present sense impression).

[73] Crawford v. Washington, 541 U.S. 36, 61 (2004) ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . .").

[74] *Id.* at 68.

[75] *Id.* at 50–52, 63, 68.

utterance, if that utterance is made in response to the police interrogation, rather than made during an ongoing emergency, it will not be admissible at trial if the declarant becomes unavailable.[76] This is because responses to formal or official police interrogations are generally considered testimonial.[77]

Although *Crawford* does discredit *Roberts* for its breadth in admitting an unavailable declarant's hearsay at trial, this is not to say that *Roberts* and *Crawford* are completely incongruent in what hearsay they deem admissible. For instance, 911 telephone calls and "excited utterances" made to responding police officers could still be classified as ongoing emergencies, thereby rendering them non-testimonial statements and admissible under both *Roberts* and *Crawford*.[78] This is because such statements often are not made for an interrogatory purpose but rather for the purpose of seeking immediate aid.[79] Similarly, the medical records of declarants can be admissible at trial even if the declarants themselves are not available, so long as the medical record consists of statements made "for the purposes of medical diagnosis or treatment," thereby rendering the statements non-testimonial.[80] In the situations where hearsay is considered non-testimonial, *Crawford* grants the flexibility and discretion to admit hearsay under the traditional hearsay exceptions rooted in reliability, which is quite reminiscent of the *Roberts* test.[81]

E. Crawford *and the Forfeiture by Wrongdoing Doctrine*

Despite criticizing *Roberts* for being too lenient and broad because it does not consider the testimonial aspect of an unavailable declarant's statement, *Crawford* still appreciated that the right to confrontation is not absolute. The *Crawford* Court recognized how a defendant's confrontation right can be extinguished through the forfeiture by wrongdoing doctrine.[82] Even if a hearsay statement is classified as testimonial and the declarant is unavailable for cross-examination, the statement may still be admissible pursu-

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[76] Leventhal & Aldrich, *supra* note 72, at 87.

[77] Davis v. Washington, 547 U.S. 813, 828–29 (2006).

[78] Leventhal & Aldrich, *supra* note 72, at 87–88.

[79] *Id.*

[80] *Id.* at 84, 92 (citing State v. Vaught, 682 N.W.2d 284 (Neb. 2004)); *see, e.g.*, People v. Sisavath, 13 Cal. Rptr. 3d 753, 757 (Ct. App. 2004) (holding that an unavailable sexual assault victim's medical statements were not made for the purpose of seeking medical diagnosis or treatment because they were made to a police officer as opposed to a doctor or a nurse and were thus inadmissible at trial); Snowden v. State, 846 A.2d 36, 47 (Md. Ct. Spec. App. 2004) (holding statements made to a social worker were not made for the purpose of seeking medical diagnosis or treatment).

[81] Crawford v. Washington, 541 U.S. 56, 68 (2004) ("Where nontestimonial hearsay is at issue"—for example, in business records or statements made in furtherance of a conspiracy—"the States [have] flexibility in their development of hearsay law . . . .").

[82] *Id.* at 62.

ant to the forfeiture by wrongdoing doctrine.[83] Under this doctrine, if a defendant's own wrongdoing causes the declarant to be unavailable for cross-examination, that defendant forfeits his or her right to confrontation and the unavailable declarant's hearsay statement, even if testimonial, is admissible at trial.[84] Examples of a "wrongdoing" committed by the defendant include coercing, killing, harming, bribing, or threatening the declarant in such a way that would make availability impossible or unappealing.[85] The Supreme Court's recognition of the forfeiture by wrongdoing exception to the Confrontation Clause provides prosecutors with an avenue to admit hearsay that could otherwise be inadmissible under *Crawford*.[86] The Court's reasoning behind the forfeiture by wrongdoing exception to *Crawford* is an equitable one: a person should not benefit from engaging in a wrongful act.[87] In other words, without the forfeiture by wrongdoing exception, defendants could otherwise have an unfair advantage in the courtroom by preventing incriminating or crucial evidence from being admitted at trial by personally rendering the declarant unavailable.

In 2008 in *Giles v. California*, a lethal domestic violence case, the Supreme Court limited the applicability of the forfeiture by wrongdoing doctrine by holding that, in order for the exception to apply, the prosecutor must prove that the defendant *intentionally* procured the declarant's unavailability to testify.[88] The *Giles* majority specified that in cases of domestic

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[83] *Id.*

[84] FED. R. EVID. 804(b)(6) (codifying the forfeiture by wrongdoing doctrine); Davis v. Washington, 547 U.S. 813, 833 (2006) (reiterating *Crawford*'s acceptance of the forfeiture by wrongdoing doctrine); *Crawford*, 541 U.S. at 62 ("the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds").

[85] *See* James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for Forfeiture by Wrongdoing*, 14 WM. & MARY BILL RIGHTS. J. 1193, 1220 (2006) (explaining that post-*Crawford*, some courts, such as People v. Moore, 117 P.3d 1 (Colo. Ct. App. 2005), did not require the defendant to have intentionally prevented declarant's availability for the forfeiture by wrongdoing hearsay exception to apply). *Contra* Giles v. California, 554 U.S. 353, 359–65, 368 (2008) (holding forfeiture by wrongdoing hearsay exception did not apply to defendant who murdered girlfriend because he did not murder her for the purpose of preventing her from testifying against him).

[86] *See* Flanagan, *supra* note 85, at 1214 (explaining in most state and federal courts, the prosecution must prove by a preponderance of the evidence that declarant's absence was procured by wrongdoing of the defendant for exception to be applicable); *see also* United States v. Stewart, 485 F.3d 666, 672 (2d Cir. 2007) (holding the forfeiture by wrongdoing doctrine makes an unavailable witness's hearsay admissible at trial, even if the defendant was trying to procure the unavailability for a different trial); People v. Jones, 714 N.W.2d 362, 367–68 (Mich. Ct. App. 2006) (holding the right guaranteed by the Confrontation Clause is no longer applicable to a defendant who procures a declarant's unavailability through an act of wrongdoing).

[87] *Crawford*, 541 U.S. at 62; United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982).

[88] 554 U.S. at 357, 368, 377 (vacating and remanding decision of California Supreme Court admitting murder victim's testimonial hearsay under the forfeiture by wrongdoing exception to *Crawford* because defendant did not murder the victim with intent or purpose of making her unavailable for trial).

violence, a demonstrated history or pattern of abuse or control by the defendant over the declarant is "highly relevant to [the] inquiry" of intent.[89] The concurring opinion in *Giles* pushed further, stating that such evidence is sufficient to infer intent.[90] This is because manipulation and control—conscious and intentional acts—necessarily accompany relationships of domestic violence.[91] Because the *Giles* holding allows testimonial hearsay of an unavailable declarant to be admitted at trial if the unavailability was intentionally and wrongfully caused by the defendant, the holding thereby offers a potential avenue of relief from the added pressure placed on prosecutors by *Crawford*'s more stringent requirement of availability.

F. The Primary Critique of Crawford

Since *Crawford* was decided in 2004, it has been heavily criticized, particularly for the confusion it has created amongst lower courts. The primary critique of *Crawford* is that it produces inconsistent jurisprudence due to its lack of precise language defining whether a statement is testimonial—the essential and decisive determination in the application of *Crawford*.[92] This shortfall leaves courts susceptible to "judicial manipulation" and ultimately leads to discrepancy amongst court holdings.[93] Even in light of *Davis*' primary purpose analysis for determining what constitutes an ongoing emergency and accordingly, what is considered non-testimonial, critics claim that there are no objective and definitive guidelines underlying the *Davis* test.[94] Thus, as a result, the *Davis* test similarly confuses lower courts.[95] Indeed, because of *Crawford* and *Davis*' failure to define crucial terminology, there has already been great variation in the factors lower courts look to when interpreting what kinds of statements are testimonial, and therefore

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[89] *Id.* at 377.

[90] *See Id.* at 379–80 (Souter, J., concurring in part) (explaining intent to procure declarant's unavailability can be inferred in a domestic violence case because isolation and silencing through physical, verbal, psychological, and/or emotional abuse and control define such relationships).

[91] *See id.*

[92] Deborah Ahrens & John Mitchell, *Don't Blame* Crawford *or* Bryant*: The Confrontation Clause Mess Is All* Davis*' Fault*, 39 RUTGERS L. REC. 104, 107–12 (2012) (discussing the "mess" and inconsistency of Confrontation Clause jurisprudence).

[93] *Id.* at 107.

[94] *See* Davis v. Washington, 547 U.S. 813, 839–42 (2006) (Thomas, J., dissenting) (discussing the subjectivity of the *Davis* test); Ahrens & Mitchell, *supra* note 92, at 107.

[95] *See* Ahrens & Mitchell, *supra* note 92, at 109–13; *see also* State v. Rodriguez, 722 N.W.2d 136, 141 (Wis. Ct. App. 2006) (discussing that *Davis* has led to inconsistent definitions of "ongoing emergency"); Leventhal & Aldrich, *supra* note 72, at 85–86 (noting many questions remain unresolved after *Davis*); Meier, *supra* note 2, at 26 (discussing the confusion and varying interpretations of testimonial following the *Davis* decision).

inadmissible pursuant to *Crawford*.[96] Because those factors change in nearly every opinion, courts across the nation have been inconsistent in their jurisprudence, thereby setting the stage for an unpredictable future in *Crawford*-based rulings.

In 2011, the U.S. Supreme Court again attempted to clarify the distinction between testimonial and non-testimonial out-of-court statements in *Michigan v. Bryant.*[97] This case is particularly relevant because it focuses on defining testimonial specifically in the context of an ongoing emergency, the context most often present in rape and domestic violence cases.[98] In *Bryant*, police arrived at the scene of a shooting where the victim, prior to her death, responded to police questioning regarding the identification and location of his shooter.[99] The Supreme Court applied *Davis*' primary purpose test to determine the testimonial or non-testimonial nature of the hearsay statement.[100] In doing so, the *Bryant* court analyzed the intent, circumstances, and safety of both the declarant and the interrogators.[101] In its analysis, the court made various subjective determinations, such as whether the statement occurred in a public area, whether the interrogation was informal

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[96] Deborah Tuerkheimer, *Forfeiture After* Giles*: The Relevance of "Domestic Violence Context,"* 13 LEWIS & CLARK L. REV. 711, 711–15, 728 (2009) ("Lower courts have struggled with the new 'ongoing emergency' test."); *see Rodriguez*, 722 N.W.2d at 141 (finding despite victim being separated from her attacker and questioned at her home, statements were not testimonial because attacker was hiding under the couch with a weapon). *Compare* United States v. Arnold, 486 F.3d 177, 179–80 (6th Cir. 2007) (finding a victim's statements describing a gun to the first responder to be non-testimonial because the primary purpose of her statements was to respond the police questions being asked in order to manage the ongoing emergency), *and* State v. Pugh, 225 P.3d 892, 895–96 (Wash. 2009) (finding entire 911 telephone call was non-testimonial because it passed a four-part test analyzing: 1) when the events being described occurred; 2) whether there was an ongoing emergency; 3) whether the statements were immediately necessary to resolve the current ongoing emergency; and 4) the formality of the interrogation), *with* Rankins v. Commonwealth, 237 S.W.3d 128, 128 (Ky. 2007) (finding statements made to first responder were testimonial although made mere minutes after emergency ended), *and* State v. Camarena, 176 P.3d 380, 386–88 (Or. 2008) (finding at least part of 911 telephone call was testimonial because its purpose was to identify the defendant for trial).

[97] 562 U.S. 344, 352 (2011).

[98] *See id.* at 359; *see also* Chase, *supra* note 72, at 1106–15 (discussing how the attributes of assault cases necessarily signify the attributes that create a context for an ongoing emergency); Leventhal & Aldrich, *supra* note 72, at 85–88 (discussing the responsiveness required by government officials in domestic violence cases); Meier, *supra* note 2, at 26 (discussing the interaction of *Crawford v. Washington*, 541 U.S. 56 (2004), and domestic violence contexts). *Bryant* applies a broad scope as to what qualifies as an ongoing emergency. *See* 562 U.S. at 359. This expansive view patently allows rape and domestic violence cases, which by definition involve an injury, whether psychological, physical, or emotional, to fall under the definition of ongoing emergency not only because an injury is involved, but also because by definition, these cases require urgency to diffuse the harm caused.

[99] *See Bryan*t, 562 U.S. at 359; Ahrens & Mitchell, *supra* note 92, at 104, 108 (citing *Bryant*, 562 U.S. at 349–50).

[100] *Bryant*, 562 U.S. at 366–69.

[101] *Id.*

rather than a formal interview, whether the dangerous weapon was still at large, whether there was an ongoing threat to public safety, and whether the statement was reliable.[102] In applying these factors, the Court held that the police interrogation was an informal line of questioning that occurred in a public area, there was a dangerous weapon still at large that created an ongoing threat to public safety, and the victim's statements were reliable because they were not only excited utterances, but they were also made during an ongoing emergency, which has the "effect of focusing an individual's attention on responding to the emergency."[103] *Bryant*'s multi-factor analysis reintroduces consideration of reliability for purposes of determining whether a statement is testimonial specifically in the context of an ongoing emergency, as is the case with domestic violence and rape cases. With this analysis, the Court found the victim's statements to be non-testimonial in nature, and thereby admissible at trial.[104]

In attempting to delineate the factors to consider when evaluating whether a statement is testimonial, *Bryant* created even more space for judicial discretion under a *Crawford* determination. The Court urged that the totality of the circumstances be considered in this type of analysis because it did not believe a blanket rule or an exhaustive list of factors could definitively evaluate the testimonial or non-testimonial nature of a statement in all cases.[105] The *Bryant* Court emphasized the importance of leaving room for broad discretion in stating, "[c]ourts making a 'primary purpose' assessment should not be unjustifiably restrained from consulting all relevant [evidence]," but rather, should use a highly context-dependent inquiry.[106] Ultimately, although it attempted to delineate new factors with which to analyze a *Crawford* situation, the *Bryant* Court chose to remain consistent with prior holdings in promoting inconsistency. *Bryant* furthered the lack of a coherent principled basis for determining what constitutes a testimonial statement in the context of an emergency, such as a rape or domestic violence, and in doing so, validated precedent that allows for subjectivity and discrepancy amongst court rulings.[107]

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[102] *Id.* at 369, 371–77 (holding factors, such as formality of questioning, timing of the statements, and condition of the declarant, can be considered when determining whether statements were made during an ongoing emergency).

[103] *Id.* at 362.

[104] *Id.* at 377–78.

[105] *See id.* at 369–70.

[106] *Id.* at 369–71, 374–75; Ahrens & Mitchell, *supra* note 92, at 108 n.30 (citing *Bryant*, 562 U.S. at 369–71).

[107] *See* Ahrens & Mitchell, *supra* note 92, at 108; *see also* Leventhal & Aldrich, *supra* note 72, at 85–86 (noting many questions remain unresolved after *Davis v. Washington*, 547 U.S. 813 (2006)); Meier, *supra* note 2, at 26.

Similar to *Roberts*, *Bryant* also takes a compromising approach to the Confrontation Clause in that it affords courts the discretion to make a case-by-case determination regarding whether a hearsay statement is testimonial based on subjective factors.[108] Taking note of this, Justice Scalia's dissent in *Bryant* argues that the Court's decision undermines the Confrontation Clause by reinserting reliability into a *Crawford* assessment.[109] Justice Scalia's criticism echoes that of many scholars and judges, including Supreme Court Justice Thomas.[110] These opponents claim that the *Bryant* ruling returns courts to the initial problem posed by the "reliability" test in *Roberts*—that the right to confrontation is again easily "manipulable" by courts' subjective determinations.[111] Opponents also criticize *Bryant*'s reliance on discretionary factors by arguing that the factors can be easily manipulated due to their dependence on the subjective perception of the declarant's audience, the police on the scene, and the presiding judge at trial.[112] This claim mirrors Justice Thomas' criticism of the primary purpose discussed back in the *Davis* opinion.[113] When concurring in part and dissenting in part in the *Davis* opinion, Justice Thomas argued that the intentions of first responders are subjective, and that courts should not take it upon themselves to "guess" what those intentions were at the time the declarant's statement was made.[114] In their criticisms, Justices Scalia and Thomas and various scholars warn that *Bryant* curtails defendants' confrontation rights and advantages prosecutorial power.

Lower courts' inability to consistently interpret Supreme Court decisions on the Confrontation Clause and inability to apply a coherent principle as to what constitutes a testimonial statement is further complicated by the difficulty in assessing law enforcement's primary duty at a certain time.[115] When responding to a dispatch call, law enforcement personnel themselves are uncertain of which of their many purposes they are serving; they arrive bear-

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[108] *See* Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure:* Crawford*'s Birth Did Not Require that* Roberts *Had to Die*, 15 J.L. & POL'Y 685, 695–96 (2007).

[109] *Bryant*, 562 U.S. at 388 (Scalia, J., dissenting) (claiming that the *Bryant* holding has "distort[ed] our Confrontation Clause jurisprudence and leaves it in [] shambles").

[110] *Davis*, 547 U.S. at 839–42 (2006) (Thomas, J., concurring in part and dissenting in part); Marc Chase McAllister, *Evading Confrontation: From One Amorphous Standard to Another*, 35 SEATTLE U. L. REV. 473, 479 (2012) (claiming that "*Bryant*, the Court's most recent decision in this area, has fully revived the flaws of *Roberts*").

[111] *See* McAllister, *supra* note 110, at 491 (discussing the malleability of the factors used in the *Bryant* analysis).

[112] *See id.*

[113] 547 U.S. at 834–42.

[114] *Id.* (disagreeing with the majority that the declarant in *Hammon* was out of danger despite her saying she was "fine").

[115] Meier, *supra* note 2, at 25; *see* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. L. REV. 261, 270 (2011).

ing a vast range of responsibilities, most of which they assume simultaneously, including securing a scene, ensuring safety, investigating the crime and assessing the likelihood of prosecution.[116] Given this array of purposes law enforcement can be serving at any one time, the process of delineating a "primary" purpose becomes convoluted. Additionally, some critics claim that in evaluating an emergency, courts should not focus solely on the declarant's emergency, but should also take into consideration the level of the emergency, meaning the sense of urgency with which law enforcement personnel conduct their information-gathering practices for the purpose of securing safety and serving justice.[117] These critics reason that such an analysis will help shed light on the "ongoing" aspect of an ongoing emergency, because a greater sense of urgency is indicative of a presently occurring sense of danger.[118] Developing a consistent and objective test that adequately evaluates the full context of an emergency, however, has proven to be a difficult task for courts given the range of law enforcement personnel's overlapping responsibilities and the many actors at play.

Although *Crawford* by itself does not reassert reliability when implementing the Confrontation Clause, *Bryant*'s analysis and application of *Crawford* does indeed consider reliability in the context of ongoing emergencies.[119] Therefore, in evaluating a hearsay statement made during an ongoing emergency, as in domestic violence and rape cases, then through *Bryant*'s understanding of *Crawford*, a court can once again consider reliability as an element in determining admissibility.[120] This ultimately generates yet another complex phenomenon. Following *Bryant*, prosecutors neither have consistent jurisprudence to rely on for arguing hearsay to be considered non-testimonial, nor do they have the same extent of flexibility that was once bestowed upon them by *Roberts*' broad and sole requirement of reliability. In effect, *Crawford* strengthens a defendant's confrontation right while at the same time sacrifices the admissibility of potentially incriminating statements, but *Bryant* only compounds the problem because in delineating its testimonial factors, it leaves courts with too much discretion to provide any guarantees for unavailable declarants. Inevitably, *Crawford* and its progeny make the prosecution of defendants much more difficult when declarants are unavailable for cross-examination.

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[116] Meier, *supra* note 2, at 25.

[117] *See, e.g.*, Ahrens & Mitchell, *supra* note 92, at 109–10 (citing Josephine Ross, Crawford*'s Short-Lived Revolution: How* Davis v. Washington *Reins in* Crawford*'s Reach*, 83 N.D. L. REV. 387, 406 (2007)).

[118] *See id.*

[119] *See* Michigan v. Bryant, 562 U.S. 344, 369 (2011) (majority opinion).

[120] *See id.*

The subjective tests delineated in post-*Crawford* decisions, including *Bryant*, pose an especially significant danger in the context of domestic violence and rape cases where these victims are frequently unavailable to testify at trial.[121] This is because domestic violence and rape victims are driven to recant, drop charges, or simply choose not to appear, whether it be out of fear of facing their abuser, the economic consequences of breaking relations with their abuser, divulging personal information in a public courtroom, or out of rekindled affection for the abuser.[122] When this occurs and the victim is unwilling to cooperate, prosecutors are left to rely on hearsay and its questionable admissibility under the unstable device of *Crawford* and its application in *Bryant*. Given how discretionary the *Bryant* application is, prosecutors in domestic violence and rape cases are posed with an unpredictable trial where their most crucial piece of evidence may not be admitted simply based on a subjective decision by the court.

Furthermore, the victims in these cases are particularly vulnerable. Domestic violence cases, like most rape cases, are delicate in nature in that the victim and the assailant have a personal relationship, thereby making it difficult for the victim to be available for cross-examination by the defense.[123] The domestic violence and rape victims have already suffered physically, emotionally, and psychologically, but now bear a difficult burden to seek justice for their suffering. If the victim is unavailable for cross-examination, it is highly unlikely that his or her statements will be admissible in court given the difficulty *Crawford* and its progeny place on prosecuting with an unavailable declarant, and therefore highly unlikely that the attacker will be convicted. Ultimately, these victims are forced to choose between testifying and confronting their attacker or facing the probability that their attacker may not be incarcerated. These victims are essentially revictimized regardless of the choice they make because *Crawford* asks them to either re-live their trauma in a public trial or be responsible for making prosecution of their attacker much more difficult. If, as a result of the victim declarant's unavailability and the consequential inadmissibility of crucial evidence, the victim's attacker escapes conviction and attacks again, then

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[121] *See id.* at 371–77; *see also* Chase, *supra* note 72, at 1093, 1095 (discussing the implications of *Crawford v. Washington*, 541 U.S. 56 (2004), particularly in domestic violence and other abuse cases because victims in such cases frequently become unavailable).

[122] Chase, *supra* note 72, at 1112–13; Geetanjli Malhotra, Note, *Resolving the Ambiguity Behind the Bright Line Rule: The Effect of* Crawford v. Washington *on the Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions*, 2006 U. ILL. L. REV. 205, 213–14 (explaining that despite prosecutor, not domestic violence victim, deciding whether the case proceeds or is dropped, recanting and fear still create problems for prosecutors).

[123] Chase, *supra* note 72, at 1118; *see* Meier, *supra* note 2, at 23; Jane K. Stoever, *Transforming Domestic Violence Representation*, 101 KY. L.J. 483, 488 (2012–2013) (citing LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 95–97 (1984)).

the victim is even further traumatized because *Crawford* places the weight of that guilt on their shoulders.

II. *CRAWFORD*'S APPLICATION TO THE UNIQUE CONTEXT OF DOMESTIC VIOLENCE CASES

As a result of *Crawford v. Washington*, cases in which prosecutors rely primarily on hearsay or on forensic evidence, which is a form of hearsay in the sense that it requires the presence of the person who conducted the forensic analysis at trial, rather than on the live testimony of a victim or witness, have become increasingly difficult.[124] Not surprisingly, this is due to the requirement that hearsay statements qualify as non-testimonial and inconsistent jurisprudence surrounding that determination. These obstacles prevent evidence-based or victimless prosecutions from admitting what is often the defining and most crucial piece of evidence against the defendant: the unavailable victim's testimonial hearsay.[125] Consequently, defendants in such cases are often not convicted due to insufficient substantial evidence. Domestic violence cases are frequently victimless, and are particularly subject to *Crawford*'s downfalls for the following reasons: the high probability that the domestic violence victim will be unavailable at trial, the intent of the Confrontation Clause as applied to domestic violence cases, and the impact of *Crawford* on domestic violence prosecutions.

A. The Unavailability of Domestic Violence Victims

Domestic violence victims are frequently unavailable for cross-examination, which poses difficulties for prosecutors at trial in attempting to convict attackers. Victims of domestic violence are particularly susceptible to recanting their testimonial hearsay or becoming unavailable for cross-examination for two reasons: (1) the abuser exercises control over the victim by using intimidation, coercion (including economic coercion), psychological pain, or physical violence to scare or guilt the victim from appearing at a trial proceeding, or (2) the volatile and cyclical nature of a domestic violence relationship makes it possible that the victim has succumbed to the honeymoon phase of the cycle of violence, which involves feelings of love, self-blame, and forgiveness, and thus regrets ever having made any impli-

[124] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 305, 320–21 (2009) (defining "forensic evidence" as evidence procured through use of a scientific discipline in which extraction of the evidence is conducted by techniques and methodologies that have garnered approval and acceptance by the scientific community); Tuerkheimer, *supra* note 96, at 711–15, 730 (categorizing cases that rely on hearsay as "victimless" or "evidence-based" prosecutions).

[125] Tuerkheimer, *supra* note 96, at 730.

cating statements.[126] As a result, eighty to ninety percent of domestic violence victims recant or refuse to cooperate with prosecution.[127]

Because domestic violence victims are so frequently reluctant or uncooperative and fail to provide live testimony, prosecutors are forced to proceed with victimless or evidence-based prosecutions. In turn, the admissibility of statements made by unavailable victims becomes crucial in the outcome of the case.[128] Without the live testimony of the victim, prosecutors are left with the victim's hearsay as the most significant evidence in obtaining a conviction against the defendant. Reliance on hearsay evidence is common in domestic violence cases due to the high volume of victims in those cases who are unavailable for cross-examination. Such reliance, however, is tenuous at best given the subjective and discretionary application of *Crawford*.[129] In other words, because domestic violence cases often turn on the admissibility of hearsay statements, these cases become "particularly susceptible to the negative consequences" of *Crawford*.[130]

Because victims of domestic violence are often unavailable for cross-examination due to the power and control exerted over them by their abuser and the cyclical nature of domestic violence, courts are tasked with characterizing victims' hearsay statements as testimonial or not pursuant to the unpredictable line of precedent set forth by *Crawford*.[131] In turn, prosecutors run a high risk of not being able to admit crucial evidence at trial. Do-

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[126] Stoever, *supra* note 123, at 506–07 (defining the honeymoon phase as the phase after an incident of abuse in a relationship, where the perpetrator of the abuse offers means of reconciliation in an effort to convince the victim that the abuse will no longer occur); *see* Meier, *supra* note 2, at 25–26; *see also* Malhotra, *supra* note 122, at 212–14 (discussing the cyclical nature of domestic violence relationships and the type of psychological and emotional manipulation that necessarily accompanies them).

[127] Meier, *supra* note 2, at 25.

[128] *See* Andrew King-Ries¸ Crawford v. Washington*: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 318 (2005).

[129] *See id.*; *see also* Chase, *supra* note 72, at 1114–22 (discussing difficulty of predicting court's determination of whether domestic violence victim's hearsay is considered testimonial because of conflicting precedent, even for seemingly clear situations); Malhotra, *supra* note 122, at 212–14 (discussing how, because of the emotional and psychological manipulation in abusive relationships, prosecutors often have to rely on evidence that is more subjective than live witness testimony).

[130] Robert P. Mosteller, Crawford*'s Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411, 426 (2005) (arguing the context of domestic violence cases makes it likely that statements made by the victim will be considered testimonial).

[131] *See* Malhotra, *supra* note 122, at 212–14 (discussing the concept of "learned helplessness" and how it often takes domestic violence victims multiple attempts before they can escape their abusive relationships, thus recantation, fear to be available to face their abuser at trial, and refusal to cooperate with prosecution are all normal and expected behaviors of these victims); *see also* Chase, *supra* note 72, at 1114–22 (discussing forms of hearsay evidence and how courts have varied in classifying hearsay as testimonial or not testimonial post-*Crawford v. Washington*, 541 U.S. 56, 68 (2004)).

mestic violence cases require a *Crawford* analysis due to the nature of the statements that victims make. For example, domestic violence victims commonly make instinctive emergency telephone calls to law enforcement personnel in hopes of being saved from the violence they are experiencing.[132] Then, over the telephone or in-person to whomever responds, the victim makes a statement implicating his or her abuser in the violence.[133] Such a statement will typically satisfy a hearsay exception as a present sense impression, excited utterance, or statement made to medical personnel.[134] However, a court must then analyze whether the statement is testimonial in nature in the likely event that the victim later recants his or her testimonial statement or becomes unavailable.[135] Given the inconsistency in what qualifies as testimonial under *Crawford* and its progeny, the statement could be inadmissible.[136] Subsequently, if neither the live testimony nor the hearsay statement of the victim is available at trial, prosecutors are left with few options for presenting strong and incriminating evidence.

B. The Intent of the Confrontation Clause and the Sixth Amendment As Applied to Domestic Violence Cases

The intent of the Confrontation Clause at the time of its enactment in 1791 is particularly troubling today. The Confrontation Clause's historical background conveys that its original intent is inappropriate in the context of domestic violence prosecutions due to its underlying assumptions about men and women in society.[137] The Confrontation Clause was enacted at a time in which society was accepting, and even encouraging, of domestic violence in an effort to uphold the authoritative position of men and perpetuate the status of women as subordinate.[138] In fact, some of the early supporters of the Confrontation Clause overtly endorsed domestic violence as a

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[132] *See, e.g.*, United States v. James, 164 F. Supp. 2d 718, 727–29 (D. Md. 2001) (holding a woman's 911 telephone call after she had just been pushed and slapped by her husband was admissible as an excited utterance); State v. McCombs, 2000 WL 1836338, at *1–3 (Ohio Ct. App. Dec. 14, 2000) (holding statements made by victim of domestic violence to 911 operator, neighbor, and responding patrolman could be admitted at trial as excited utterances because her statements were reactive and not a product of reflective thinking).

[133] *See James*, 164 F. Supp. at 727–29; *McCombs*, 2000 WL 1836338 at *1–3.

[134] *See* FED. R. EVID. 803(1–3).

[135] *See id.*; *Crawford*, 541 U.S. at 54–68.

[136] *See* Leventhal & Aldrich, *supra* note 72, at 85–86; Meier, *supra* note 2, at 26.

[137] Moody, *supra* note 10, at 389 n.15 (citing Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will It Work This Time?*, 31 PEPP. L. REV. 709, 715–16 (2004)).

[138] *Id.* ("By intentionally limiting the understanding of the meaning of the Confrontation Clause to a time when women were treated as chattel and men abused their wives with impunity, constitutional law jurisprudence will, perhaps unwittingly, prevent a shift toward successful prosecution of this conduct.").

way to ensure that men could take any measure, including violent ones, against their wives without impunity to maintain their patriarchal role.[139]

Although society has since progressed beyond this male-dominated regime, in effect the Confrontation Clause unfortunately operates in a way that does subordinate domestic violence victims, who are most often women, by leaving them with very little protection. At its core, the Confrontation Clause was intended to protect defendants who are not able to confront their accusers face-to-face.[140] Although it is important that the Sixth Amendment to the U.S. Constitution recognizes a defendant's confrontation right, it is also important to recognize the conundrum that in domestic violence cases, it is often the defendant who actually prevents his or her accuser from being available at trial.[141] There are a myriad of reasons why a domestic violence victim chooses to be unavailable at trial, including being afraid to re-face past abuse, being too intimidated to testify at trial, experiencing overt threats from the defendant, fearing the economic hardship that could accompany breaking ties with the abuser, being vulnerable to questioning on highly personal and sensitive topics, or feeling too guilty to testify against the defendant.[142] Regardless of the particular reason, they all render the declarant unavailable.[143]

This dynamic turns "the original paradigm for which the Confrontation Clause was designed . . . on its head" because the Clause's fundamental objective is to protect a defendant from being convicted based on the words of someone who isn't even present at the defendant's trial.[144] However, in its effort to protect defendants, the Confrontation Clause, exacerbated by the hearsay rules of evidence, creates a loophole through which defendants can essentially increase their own likelihood of success at trial by manipulating the Sixth Amendment in a way whereby the defendant's right to confront trumps the victim-declarant's psychological considerations. Ultimately, the defendant is the element constant among the many reasons why a domestic violence victim does not testify at trial, yet it is the victim and the prosecution who likely lose because of the victim's unavailability. Therefore, in domestic

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[139] *See id.*

[140] *See* Meier, *supra* note 2, at 23; *see also* Mattox v. United States, 156 U.S. 237, 242–43 (1895) (discussing how the founders intended for the Sixth Amendment to afford defendants the right to face their accuser, to question the reliability of their accuser's memory, and to allow the jury to witness the accuser's demeanor for purposes of assessing credibility because without these opportunities, the defendant faces the risk of being convicted without ever having the chance to address more than words).

[141] Meier, *supra* note 2, at 23.

[142] *See id.*; *see also* Malhotra, *supra* note 122, at 210–16 (discussing the various reasons why victims in abuse cases are so frequently unavailable to testify at trial).

[143] *See* Meier, *supra* note 2, at 23; *see also* Chase, *supra* note 72, at 1113 (discussing why abuse victims are frequently unavailable to testify at trial).

[144] Meier, *supra* note 2, at 23.

violence cases, it is not the defendant's right to confrontation that needs protection, especially because that right is safeguarded in many ways, including by the Sixth Amendment and hearsay rules.[145] Instead, it is the prosecution's right to present material evidence by a victim-declarant who has valid psychological reasons for being unavailable that needs protection.[146]

C. Crawford*'s Barrier to Successful Domestic Violence Prosecutions*

The *Crawford* ruling not only presents potential problems for domestic violence victims during trial by requiring a victim to confront his or her attacker, but it can also prevent domestic violence cases from ever reaching trial altogether. The frequent unavailability of domestic violence victims, in conjunction with the inconsistent line of precedent on defining testimonial hearsay statements following *Crawford*, threatens and deters prosecutors from moving forward in domestic violence cases.[147]

Most prosecutors believe that the *Crawford* decision has "significantly impeded prosecutions of domestic violence" cases by discouraging prosecutors from pursuing cases where the victim is unavailable because of the difficulty in admitting the out-of-court statements that victims make, the essential evidence, at trial.[148] This difficulty is foreseeable and known to many prosecutors given how often, albeit inconsistently, hearsay in domestic violence cases is considered testimonial, and thus is not admissible at trial per *Crawford*.[149] As a result, prosecutors pursue charges against a defendant for a case they believe is destined to fail, but often subsequently drop those charges. In fact, seventy-six percent of prosecutors surveyed in California, Oregon, and Washington stated that they would drop a case if the victim recanted or was uncooperative in testifying.[150] This is because when prosecutors foresee the unlikelihood of success without an available

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[145] *See id.*

[146] *Id.*

[147] Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1365, 1419 (2005) (surveying sixty prosecutors' offices in California, Oregon, and Washington and finding that domestic violence prosecutions had decreased post-*Crawford v. Washington*, 541 U.S. 56, 68 (2004)).

[148] Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases*: *Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 854–55, 857 (1994) ("In many jurisdictions, prosecutors routinely drop domestic violence cases because the victim requests it, refuses to testify, recants, or fails to appear in court."); Lininger, *supra* note 147, at 1363–64 n.60 (finding sixty-three percent of prosecutors among those surveyed in California, Oregon, and Washington stated that *Crawford* has impeded prosecutions of domestic violence).

[149] *See* Davis v. Washington, 547 U.S. 813, 822 (2006) (defining testimonial statements as those made for the primary purpose of investigating past events); *see also* Chase, *supra* note 72, at 1114–22 (discussing how frequently abuse victims choose to not testify at trial and therefore courts must evaluate whether their out-of-court statements, likely the primary evidence, are testimonial in nature).

[150] Lininger, *supra* note 147, at 1366 n.72, 1419.

victim-declarant, it becomes precarious for them to rely on a crucial piece of evidence that has a foreseeable chance of being inadmissible given inconsistent, and oftentimes conflicting, jurisprudence.[151]

Crawford not only disincentives prosecutors from pursuing domestic violence cases when the victim is unwilling to testify, but it also disincentives police officers from moving forward with these types of cases, too.[152] This is particularly significant because before a prosecutor even has the opportunity to decide whether to pursue a domestic violence case, police officers first determine whether there is probable cause for an arrest warrant and document their findings in a report directed to the prosecutor's office.[153] Subsequently, the prosecutor's office analyzes the report and makes a determination on whether to proceed in pressing charges against the accused based on the likelihood of success at trial.[154] Under *Crawford*, if the police determine that the victim is unwilling to cooperate or be available for cross-examination, it is unlikely that police will refer the case to the prosecutor's office because they believe it will not succeed at trial without the testimonial hearsay as admissible evidence.[155]

Despite the high volume of domestic violence incidents reported—up to fifty percent of calls to police and up to twenty to fifty percent of criminal dockets involve domestic violence cases—police officers and prosecutors are still reluctant to go forth with such cases after *Crawford* due to their unlikelihood of success.[156] Although victims of domestic violence have a right to seek justice against their perpetrators for both legal and psychological reasons, perpetrators are frequently not charged, let alone convicted, and

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[151] *Crawford*, 541 U.S. at 62–68; Chase, *supra* note 72, at 1114–22. Indeed, according to the same survey, before *Crawford* fifty-four percent of prosecutors relied on testimonial hearsay in more than fifty percent of domestic violence prosecutions. Lininger, *supra* note 147, at 1365, 1419. Following *Crawford*, only thirty-two percent were able to rely on the same evidence. *Id.* at 1365–66 (examining how even defendants are aware of the difficulty *Crawford* creates for prosecutors). As a result, fifty-nine percent of defendants are less likely to plead guilty as part of a plea agreement after the *Crawford* holding because they believe *Crawford* gives them a better chance at trial. *Id.* at 1419.

[152] *See* Brett E. Applegate, Comment, *Prior (False?) Accusations: Reforming Rape Shield to Reflect the Dynamics of Sexual Assault*, 17 LEWIS & CLARK L. REV. 899, 919 (2013).

[153] *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 443 n.312 (1992) (citing MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(A) (AM. BAR ASS'N 1980); ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.9 (AM. BAR ASS'N 2d ed. Supp. 1986); NAT'L PROSECUTION STANDARDS § 9.4(A) (NAT'L DIST. ATTORNEY'S ASS'N 1977)) (explaining before instituting criminal charges, a prosecutor must find probable cause or sufficient evidence that would support a conviction of the accused crime); Applegate, *supra* note 152, at 919.

[154] *See* Applegate, *supra* note 152, at 919 (explaining that if the police have evidentiary concerns about the case, they will not invest significant resources in it).

[155] *See id.*

[156] *See* Meier, *supra* note 2, at 23.

are therefore free to continue their violence.[157] Ultimately, the barrier created by *Crawford* and the resulting reluctance of police officers and prosecutors to pursue domestic violence cases leave many victims continually victimized and allow many abusers to continue to abuse not only their current victims, but also new victims.[158] In contrast, if a perpetrator of domestic violence discovers that police officers and prosecutors intend to pursue their case, then they are more likely to stop the abuse against their victims, more likely to plead guilty to the charge, and less likely to abuse future victims.[159]

A prosecutor proceeding with a domestic violence case in which the victim is unavailable has two hopes for a substantial chance of success at trial under *Crawford*: (1) the victim's statement will not be considered testimonial, and thus it can be admissible via a hearsay exception or withstand *Ohio v. Roberts*' reliability test, or (2) the forfeiture by wrongdoing exception will be applicable and render the statement admissible.[160] Beyond these two avenues for potentially admitting hearsay statements in the domestic violence context, a prosecutor's probability of success at trial significantly decreases because the valuable testimonial hearsay evidence would not be admissible under *Crawford*.[161] If there is no forensic evidence, the hearsay is not just valuable, but it is critical for a conviction because any other type of evidence would be circumstantial at best, which is far weaker evidence than the very direct evidence of concrete statements made by the victim-declarant because it relies on inference.[162]

Although each of the two possible aforementioned methods for admitting an unavailable declarant's hearsay at trial are beneficial in theory, both are often unattainable for several reasons. Despite the fact that a determination regarding whether hearsay is testimonial is made on a case-by-case basis, courts frequently find domestic violence victims' out-of-court statements are testimonial statements made during an ongoing emergency.[163] The circumstances that often surround cases of domestic violence, including control through threats or acts of violence, often prevent the victim from making a call to police during an actual incident of violence for fear of further violence from his or her attacker.[164] Instead, the victim must wait until the abuser is no longer present to have a private telephone conversation. As

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[157] *See id.*; *see also* Corsilles, *supra* note 148, at 874 (discussing how perpetrators of abuse are often not convicted or incarcerated).

[158] *See* Meier, *supra* note 2, at 23; Applegate, *supra* note 152, at 919.

[159] *See* Meier, *supra* note 2, at 23; Applegate, *supra* note 152, at 919.

[160] Davis v. Washington, 547 U.S. 813, 822 (2006); Crawford v. Washington, 541 U.S. 36, 62–68 (2004); Ohio v. Roberts, 448 U.S. 56, 77 (1980).

[161] *See* Meier, *supra* note 2, at 23.

[162] *See* FED. R. EVID. 401.

[163] Leventhal & Aldrich, *supra* note 72, at 87; *see Davis*, 547 U.S. at 822.

[164] *See* Leventhal & Aldrich, *supra* note 72, at 87.

a result of this phenomenon, law enforcement officers who respond to domestic violence calls are often doing so for the purpose of investigating the events that have already occurred, not ones that are presently occurring.[165] Unlike the out-of-court statements involved in *Davis v. Washington* and *Michigan v. Bryant*, under a *Crawford* analysis, these particular facts are akin to those in *Hammon v. Indiana*, and thereby render the victim's statements testimonial because they were gathered for the purpose of potential future use at trial, not for responding to an emergency or a threat to public safety.[166]

Furthermore, courts often conclude that the presence of a law enforcement officer primarily serves an investigative purpose. Even in cases where officers must physically restrain the defendant from harming the victim-declarant, courts have still deemed the declarant's statements testimonial in nature rather than falling under the ongoing emergency exception.[167] Judicial failure to recognize that a law enforcement officer seeks information also for the purpose of protection and failure to expand the current stringent view on what constitutes an ongoing emergency is detrimental to the prosecution of domestic violence cases where the victim is unavailable.[168] This is because victimless prosecutions rely on evidence in place of live testimony.[169] The critical evidence relied upon to prosecute these crimes, however, is often not admissible at trial. Many victims' statements are deemed testimonial despite an obvious primary need for protection rather than investigation and despite the fact that a domestic violence relationship, by definition, is in and of itself an ongoing emergency for the entire duration that the relationship is in existence.[170]

Relying on the forfeiture by wrongdoing exception is also problematic for prosecutors because in order to apply the doctrine, a prosecutor must prove, by a preponderance of evidence, that the defendant intentionally procured a declarant's unavailability, which is not an easy task.[171] Although the

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[165] *See id.*

[166] *See id.*

[167] Davis v. Washington, 547 U.S. 813, 819–32 (Thomas, J., dissenting) (citing Hammon v. State, 829 N.E.2d 444 (Ind. 2005)) (explaining regardless of the victim claiming she was "fine," the danger in a domestic violence relationship is consistent and continuous).

[168] *See id.*; Tuerkheimer, *supra* note 96, at 730.

[169] *See Davis*, 547 U.S. at 819–32 (citing *Hammon*, 829 N.E.2d 444).

[170] *See id.*; MATTHEW BREIDING ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES—2010, at 1–7 (2010) (defining a domestic violence relationship to be dangerous even during the seemingly calm phases of its cycle).

[171] Giles v. California, 554 U.S. 353, 367–68 (2008); *see Preponderance of the Evidence*, WEST'S ENCYCLOPEDIA OF AM. LAW (2d ed. 2008) (defining preponderance of evidence as meaning there is "just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true"); Flanagan, *supra* note 85, at 1215 (noting that preponderance of the evidence standard is applicable in most state and federal courts).

Giles v. California court stated that a pattern of abuse could be sufficient in proving the intentional procurement of the declarant's unavailability, the court failed to consider that in reality, the abuse in domestic violence relationships is often well-hidden by long-lasting periods of the honeymoon phase.[172] The honeymoon phase occurs after an incident of abuse in which the abuser attempts to reconcile with the victim through various means, such as gifts or apologies, in an effort to convince the victim that the abuse will not happen again.[173] These periods of reconciliation and "peace" are themselves a means of control and manipulation; they instill a sense of false hope in the victim that their abuser may actually change, thereby making the victim reluctant to testify against their abuser.[174] By failing to recognize that these seemingly peaceful phases are part of the pattern of abuse and manipulation that allows abusers to control their victims, courts have been reluctant to admit the testimonial out-of-court statements made by unavailable domestic violence victims despite the *Giles* holding. Evidently, *Crawford* has generated serious impediments to prosecuting these sensitive, deplorable crimes.

III. *CRAWFORD*'S APPLICATION TO RAPE CASES

Although many scholarly articles discuss *Crawford v. Washington*'s interaction with domestic violence cases, *Crawford*'s interaction with rape cases has received little scholarly documentation. This is because neither *Crawford* nor its progeny draw a distinction between these two types of cases. Perhaps this is because domestic violence and rape are both similarly defined as acts of violence and, as a result, courts do not feel compelled to evaluate rape independently when it can fall under the umbrella of domestic violence.[175] In reality, *Crawford*'s identical treatment of rape and domestic violence is flawed because rape cases face their own, distinctive set of issues, and thereby require their own distinct analysis. The inherent differences between rape cases and domestic violence cases highlight the importance of assessing rape in the context of *Crawford* separately from domestic violence. Unfortunately, however, the essential role of hearsay in both domes-

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[172] *Giles*, 554 U.S. at 377; *see* Stoever, *supra* note 123, at 506.

[173] *See* Stoever, *supra* note 123, at 506.

[174] *Id.* (discussing how perpetrators of domestic violence maintain control over their victims during the honeymoon phase by making false promises of remorse and change).

[175] *See* KATHLEEN C. BASILE & LINDA E. SALTZMAN, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, SEXUAL VIOLENCE SURVEILLANCE: UNIFORM DEFINITIONS AND RECOMMENDED DATA ELEMENTS VERSION 1.0, at 9–10 (2002) (defining rape as variety of non-consensual acts including, but not limited to, husband forcing his wife to engage in unwanted sexual acts or a stranger attacking and sexually assaulting a woman). *See generally* BREIDING ET AL., *supra* note 170 (defining intimate partner violence to include sexual violence); SHIRLEY KOHSIN WANG & ELIZABETH ROWLEY, THE WORLD HEALTH ORG., RAPE: HOW WOMEN, THE COMMUNITY AND THE HEALTH SECTOR RESPOND (2007) (explaining rape involves sexual violence).

tic violence and rape cases means that the ultimate resulting detriment of *Crawford* in both types of cases is the same: the increased difficulty in obtaining a conviction due to the inadmissibility of probative evidence.

A. Distinguishing Rape from Domestic Violence

Rape can be distinguished from domestic violence in three primary ways: (1) through varying definitions, (2) through varying judicial processes, and (3) through varying psychological components. Although rape *can* be defined as falling under the umbrella of domestic violence, it does not always. Perpetrators of domestic violence are always intimate partners or family members, but perpetrators of rape do not have to be; they can be strangers or mere acquaintances.[176] Additionally, although domestic violence is defined as involving an ongoing or cyclical relationship, the occurrence of a single incident is sufficient to constitute rape.[177] Furthermore, some of the defining attributes that accompany domestic violence do not accompany rape, and vice versa.[178] For instance, there is an aspect of vulnerability and mistrust that a rape victim feels as a result of sexual violence that may not necessarily, at least to the same extent, develop from domestic violence.[179] Evidently, rape can be its own distinct form of violence, separate and apart from instances of domestic violence.

In addition to these definitional differences, there are also differences in the judicial process as applied to rape and domestic violence cases. One difference is that the justice system is more distrusting of rape victims' accusations than they are of domestic violence victims' accusations.[180] This distrust is a historical one, dating back to times of slavery where "white women 'were often pressured by white men to falsely accuse black men of rape['].'"[181] Additionally, even in modern day, "high-profile stories of false rape accusations" garner greater attention and "capture [the public's] collective imagination" more so than the more frequent truthful rape accusations,

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[176] *See* BASILE & SALTZMAN, *supra* note 175, at 10; BREIDING ET AL., *supra* note 170, at 1.

[177] *See* Stoever, *supra* note 123, at 486–87 (discussing the cyclical nature of the abuse in domestic violence relationships as a defining characteristic).

[178] BASILE & SALTZMAN, *supra* note 175, at 9–10 (defining rape as single or multiple acts of sexual violence by one or more persons); Stoever, *supra* note 123, at 506–07 (discussing the psychological difficulties that necessarily and uniquely accompany domestic violence, such as manipulation, control, and the entire psychological concept behind the honeymoon phase).

[179] *See* Stoever, *supra* note 123, at 506; *see also* BASILE & SALTZMAN, *supra* note 175, at 12 (discussing the psychological consequences of sexual assault); WANG & ROWLEY, *supra* note 175, at 18–28 (discussing the responses of women to sexual violence).

[180] *See* Applegate, *supra* note 152, at 900–10.

[181] *Id.* at 902 (quoting ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 260 (6th ed. 2007)).

which reinforces the belief that women falsely accuse men of rape.[182] A sense of distrust of rape victims also stems from the fact that their demeanor often parallels the demeanor of a witness who lacks credibility.[183] This is because their hesitation and reluctance to cooperate with police and prosecutors is perceived as being caused by fear of getting caught in a lie when, in reality, it is caused by fear of judgment, facing their perpetrators, and confronting their psychological damage.[184]

Courts also apply another layer of evidence rules to rape cases that are not applicable to domestic violence cases.[185] As discussed further below, these rules of evidence, known as rape shield laws, provide rape victims with an additional set of concerns when it comes to being available for cross-examination.[186] Despite these significant differences between rape and domestic violence, there is a shortage of literature distinguishing *Crawford*'s application to domestic violence versus rape.[187] To gain insight into how the judicial system commonly treats domestic violence cases, victims of domestic violence are at least able to turn to precedent set forth by *Crawford* and subsequent holdings. In contrast, rape victims face more uncertainty due to the shortage of precedent as applicable to and literature written about these types of cases, and are often left to draw inferences from domestic violence cases.

Finally, perhaps the most significant distinction between domestic violence and rape cases are the psychological differences that accompany these two cases. Although *Crawford* poses a similar threat to the prosecution of rape as it does to the prosecution of domestic violence, it does so in a different way. Both types of prosecution involve victim-declarants who have

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[182] *See id.*

[183] *See id.* at 905–06.

[184] *See id.* Moreover, "studies show that traumatic experiences, such as rape, may [even] cause a victim to forget some or all of the experience, and this traumatic forgetting can occur even after the victim initially remembered, and even described, the event." *Id.* at 905 (citing Jennifer J. Freyd, *What Juries Don't Know: Dissemination of Research on Victim Response Is Essential for Justice*, TRAUMA PSYCHOL. NEWSL. 15, 15, 16 (2008)).

[185] FED. R. EVID. 412.

[186] *See id.*

[187] *See* Lininger, *supra* note 147, at 1365, 1419. Many journal articles and amicus briefs discuss *Crawford v. Washington*'s, 541 U.S. 56, 68 (2004), application to domestic violence cases. *See, e.g.*, Brief of the Domestic Violence Legal Empowerment & Appeals Project (DV LEAP), California Partner to End Domestic Violence, Legal Momentum, et al. as Amici Curiae Supporting Respondent, Giles v. California, 554 U.S. 353 (2008) (No. 07-6053); Brief of Amici Curiae The National Network to End Domestic Violence, Indiana & Washington Coalitions Against Domestic Violence, Legal Momentum, et al. in Support of Respondents, Davis v. Washington, 547 U.S. 813 (2006) (Nos. 05-5224 and 05-5705); King-Ries¸ *supra* note 128, at 318; Leventhal & Aldrich, *supra* note 72; Meier, *supra* note 2, at 25–26; Moody, *supra* note 10, at 392 n.34. However, no amicus briefs and only one journal article have discussed *Crawford*'s application to rape cases. *See* Lininger, *supra* note 147, at 1365, 1419.

valid reasons to be unavailable at trial, which, under *Crawford*, hinders the admissibility of their crucial hearsay evidence. The valid reasons that domestic violence and rape victims have for being unavailable at trial, however, can differ. Because rape victims can experience psychological effects distinct from those experienced by domestic violence victims, they have different incentives for being unwilling to cooperate with prosecution and unavailable for cross-examination.[188]

One such psychological difference between rape victims and domestic violence victims involves the impact of the abuse on the victim's trust. The repetitiveness of the cycle of violence and the victim's willingness to remain with the abuser are indicative of relentless trust, hope, and belief that the abuser will change for the better.[189] In contrast, the most common and defining attribute of rape victims is their loss of trust in not only their abusers, but also in people as a whole.[190] This loss of trust can easily translate to the judicial system through victims' projection and thereby motivate rape victims to be uncooperative with prosecutors.[191]

Another psychological difference between victims of rape and victims of domestic violence involves their sense of control. Though not necessarily always true, domestic violence victims may feel that they are in control of whether to stay in their relationships and may feel that they have the power to change their abusers.[192] On the other hand, rape victims' sense of power and control is completely replaced by vulnerability because the act of rape entails being stripped of any consent or authorization over one's body.[193] This leads to a heightened sense of weakness and insecurity in rape victims, which is likely to prevent victims from being available for cross-examination.[194] A public trial can make a rape victim feel further exposed and vulnerable, and the victim's weakened self-assurance is likely to make him or her believe that any chance of success in the judicial system is futile.[195] Had the rape victim provided any testimonial hearsay statements regarding the rape and the attacker, this lack of cooperation triggers *Crawford* and can seriously impede a successful prosecution.[196]

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[188] *See* BREIDING ET AL., *supra* note 170, at 18; *see also* BASILE & SALTZMAN, *supra* note 175, at 12 (discussing the psychological consequences of sexual assault).

[189] *See* Stoever, *supra* note 123, at 506–07.

[190] *See* Applegate, *supra* note 152, at 905–06.

[191] *See id.*

[192] *See* BREIDING ET AL., *supra* note 170, at 13–17; Stoever, *supra* note 123, at 506–07.

[193] *See* BASILE & SALTZMAN, *supra* note 175, at 9–10; WANG & ROWLEY, *supra* note 175, at 18–28 (discussing the symptoms of rape trauma syndrome, such as depression, suicidal thoughts, anxiety, and disassociation); Applegate, *supra* note 152, at 905 (citing ANN WOLBERT BURGESS & LYNDA LYTLE HOLMSTROM, RAPE: CRISIS AND RECOVERY 35–39 (1979)).

[194] WANG & ROWLEY, *supra* note 175, at 18–28, 44–45.

[195] *Id.* at 19–21, 44–45.

[196] *See* Crawford v. Washington, 541 U.S. 36, 68 (2004).

Moreover, although victims of domestic violence are sometimes unaware that they are in an abusive relationship and are psychologically in denial of the violence they are experiencing, rape victims are more often than not aware that they have been raped and commonly are not in denial of the rape.[197] Even if rape victims do deny the occurrence of their rape, this denial is generally shorter in duration than that of domestic violence victims due to the lack of the cyclical nature of the violence, which serves to perpetuate feelings of denial.[198] As a result, rape victims are more likely than domestic violence victims to seek counseling prior to trial because they overcome their denial more quickly than do victims of domestic violence and are able to realize what they have been subjected to.[199]

Although counseling is a positive and healthy step for any victim of violence, it may deter rape victims from participating at trial. This is because rape victims may fear defense counsel gaining access to and exposing their counseling records in order to highlight embarrassing facts about the victim for the purpose of shedding doubt on their credibility and appeal.[200] Again, this lack of cooperation triggers *Crawford* and likely deems inadmissible any testimonial hearsay made by the victim-declarant that could have been used in convicting the rapist, thereby causing the rapist to avoid incarceration and the victim to forego finding justice—a detriment to the victim's psychological and emotional recovery.[201] This outcome of *Crawford* affords the rapist the opportunity to victimize others and, in doing so, exacerbates the guilt felt by the original victim who chose to be unavailable at trial and consequently contributed to the rapist's increased likelihood of freedom.

Despite these differences, both rape victims and domestic violence victims alike feel the immense psychological pain of inner-conflict surrounding prosecution. They both face the burden of deciding whether to confront their perpetrator at trial, and are subsequently overcome with guilt knowing that they have increased the likelihood that their perpetrator will not be convicted and will be free to victimize someone else.[202] Domestic violence and rape victims feel enormous pressure knowing that this decision, upon which the

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[197] *See* WANG & ROWLEY, *supra* note 175, at 18–21; Stoever, *supra* 123, at 506–07.

[198] *See* WANG & ROWLEY, *supra* note 175, at 18–21 (discussing how the cyclicality that necessarily accompanies domestic violence causes victims to justify, excuse, and deny wrongdoing by their abusers); Stoever, *supra* 123, at 510; Applegate, *supra* note 152, at 905 (discussing how rape victims may experience shock immediately following their rape, but there is no perpetual or cyclical component that is part of the definition of rape).

[199] *See* WANG & ROWLEY, *supra* note 175, at 41–45.

[200] FED. R. EVID. 803(4) (allowing admissibility of statements at trial that were made for the purpose of seeking medical diagnosis or treatment thus permitting defense counsel to gain access to and expose rape victims' counseling records); Lininger, *supra* note 147, at 1373–74.

[201] *See* 541 U.S. at 60–68.

[202] *See id.*

ultimate outcome of the trial and justice rests, is entirely in their hands. By placing this sort of responsibility on victims, *Crawford* perpetuates not only the psychological affliction or trauma these victims are already suffering, but also enables many rapists and perpetrators of domestic violence.

B. Crawford *Specifically in the Context of Rape*

Given the definitional, judicial, and psychological differences between rape and domestic violence, it necessarily follows that the application and subsequent effects of *Crawford* are often different between the two, thereby calling for a discussion of *Crawford* specifically in the context of rape. For example, one such difference between domestic violence and rape is that, because perpetrators of rape can be strangers or mere acquaintances, rape victims often have a strong, distinct incentive in being unavailable for cross-examination—never seeing their attacker again.[203] Conversely, this factor does not similarly disincentive many domestic violence victims to cooperate with prosecution in the same way; these victims know their attackers, and thus may reason that they will have to face them eventually, so to avoid doing so at trial would prolong the inevitable.[204] Additionally, because rape is defined as an act of *sexual* violence, whereas domestic violence does not necessarily always include a sexual component, rape victims understand that if they do testify at trial, they will be cross-examined regarding sexual acts.[205] Rape victims are often intimidated by the potential shame and embarrassment they might face during cross-examination in front of a courtroom full of strangers, and can be deterred from testifying altogether.[206]

Furthermore, in rape cases, it is even more difficult than in domestic violence cases to demonstrate that there was an ongoing emergency at the time the victim made out-of-court statements that are crucial to the defendant's conviction. This is because in rape cases, there is often no relationship between the victim and the perpetrator, but rather, just a single incident of sexual violence.[207] A court is not likely to consider a rape victim's statements post-rape to a police officer discussing the events and the perpetrator as having been made during an ongoing emergency because rapists often flee the crime scene or are unknown to the victim.[208] As a result, the victim's hearsay statements are likely testimonial in nature, and thus will not

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[203] *See* BASILE & SALTZMAN, *supra* note 175, at 9–10, 12; WANG & ROWLEY, *supra* note 175, at 18–28; *see also* Applegate, *supra* note 152, at 905 (citing BURGESS & HOLMSTROM, *supra* note 193, at 35–39) (explaining rape victims try to erase their assaults from their memories).

[204] *See* Meier, *supra* note 2, at 23; Stoever, *supra* note 123, at 506–07.

[205] *See* Lininger, *supra* note 147, at 1373–74.

[206] *See* WANG & ROWLEY, *supra* note 175, at 18–28; Lininger, *supra* note 147, at 1373–74.

[207] *See* BASILE & SALTZMAN, *supra* note 175, at 10.

[208] *See id.*

be admissible in court. In contrast, a domestic violence victim's statements post-abuse to a police officer discussing the events and the perpetrator are more likely to be considered as made during an ongoing emergency because domestic violence constitutes an ongoing relationship by definition.[209] Thus, *Crawford* can be particularly detrimental to the prosecution of rape cases because it is distinctively difficult to qualify hearsay statements made by rape victims as non-testimonial. As a result, critical hearsay evidence that prosecutors rely on in rape cases will more often than not be deemed inadmissible, and therefore a conviction becomes unlikely.[210]

C. Crawford *and the Judicial System's Disbelief of Rape Victims*

Like domestic violence victims who fear cooperating with prosecution and being available at trial, rape victims also fear trial for many reasons, but particularly due to the fear of being judged as liars by the judicial system.[211] There is a national, "widespread perception" amongst the public that rape victims lie about their assaults.[212] As a component of the public, oftentimes the judicial system, which includes police officers, judges, jurors, and prosecutors, adopts this perception and in doing so, discourages both rape victims from cooperating with prosecution and prosecutors from proceeding with rape cases.[213]

The primary reasoning behind this perception that rape victims lie about their abuse is threefold. First, in nearly all jurisdictions nationwide, if a victim makes an accusation of rape but then later recants that accusation, evidence of this retraction is admissible at trial regardless of the reason behind it.[214] In admitting this evidence, courts, regardless of the proof or lack thereof, generally presume that whenever a rape victim recants, he or she

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[209] Stoever, *supra* note 123, at 506–07.

[210] Davis v. Washington, 547 U.S. 813, 822 (2006); Crawford v. Washington, 541 U.S. 36, 60–68 (2004).

[211] *See* Jason M. Price, Note, *Constitutional Law—Sex, Lies, and Rape Shield Statutes: The Constitutionality of Interpreting Rape Shield Statutes to Exclude Evidence Relating to the Victim's Motive to Fabricate*, 18 W. NEW ENG. L. REV. 541, 545–58 (1996) (discussing rape victims and fabrications of sexual assaults); Applegate, *supra* note 152, at 900–15.

[212] *See* Lininger, *supra* note 147, at 1360 (discussing how rape victims' distrust of judges and jurors exacerbates victims' "plight at trial"); Philip N.S. Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L. J. 128, 128–58 (2006) (analyzing data and literature throughout the United States and other countries finding that police determinations that no rape occurred are frequently based on subjective personal judgments grounded in undue skepticism and cynicism of rape complainants); Applegate, *supra* note 152, at 900–15.

[213] *See* Lininger, *supra* note 147, at 1360.

[214] *See* Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 709–14 (2003).

does so because the accusation was false.[215] In reality, a rape victim may recant for any number of reasons other than because they were lying about the rape itself.[216] In fact, many rape victims recant their accusations because when they initially inform others of their rape, the first reactions they receive are skepticism, often from close friends or family members.[217] The rape victims reason that if people with whom they have a close relationship doubt their story, so will a judge or jury, thus they often choose to recant rather than face more skepticism. Another reason rape victims might recant is because they fear confronting their attackers, whether directly or indirectly, through legal proceedings.[218] Instead, the victims opt to eliminate any form of involvement with the perpetrator. Finally, rape victims commonly retract their accusations due to societal pressures; victims can feel pressure from family, friends, or even law enforcement to recant and not pursue prosecution due to any number of factors, such as the time, money, and resources involved in a rape trial.[219] Although rape victims have well-founded rationales for retracting their statements, their recantation is perceived with distinct undue cynicism and is given more weight than the accusation itself.

Second, even without a recantation, courts commonly inaccurately deem an accusation as false because truthful rape victims often exhibit so-called typical red-flag behavior of someone who is lying about their rape.[220] According to The National Center for Prosecution of Violence Against Women, such behavior includes omitting, exaggerating, or fabricating parts of their accounts.[221] Additionally, rape victims are typically not hysterical, as a courtroom might expect them to be, when interviewed by doctors, nurses, police, prosecutors, and the like.[222] There are explanations for this behavior that do not include lying, such rape trauma syndrome or post-traumatic stress disorder.[223] The symptoms associated with these conditions,

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[215] *See id.*; *see also, e.g.*, Peeples v. State, 681 So. 2d 236, 238–39 (Ala. 1995) (finding a victim recanting an accusation necessarily means the accusation was false); State v. Oliveira, 576 A.2d 111, 113 (R.I. 1990) (noting that Rhode Island requires the prior recanted accusation was false in order for it to be admissible at trial).

[216] *See* Lininger, *supra* note 214, at 709–13; *see also* Applegate, *supra* note 152, at 900–15; Price, *supra* note 211, at 550–52.

[217] Applegate, *supra* note 152, at 900–15; Price, *supra* note 211, at 550–52.

[218] Applegate, *supra* note 152, at 900–15; Price, *supra* note 211, at 550–52.

[219] Applegate, *supra* note 152, at 900–15; Price, *supra* note 211, at 550–52.

[220] Applegate, *supra* note 152, at 900–15 (discussing how recantation, even if for reasons of fear, and inconsistent and/or incomplete testimony indicates untrustworthy character).

[221] Kimberly A. Lonsway et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 3 NAT'L CTR. FOR PROSECUTION OF VIOLENCE AGAINST WOMEN 1, 5 (2009).

[222] *Id.*; Applegate, *supra* note 152, at 900–15.

[223] Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 981 (1974) (defining rape trauma syndrome as occurring in the weeks following an assault and causing fear, embarrassment, anger, memory lapses, etc.); Lonsway et al., *supra*

including depression, disassociation and anxiety, may lead to impaired memory issues or a calm demeanor, which courts can mistake as lying.[224] The stress and trauma that accompany rape have profound effects on the victim's psyche, and because each victim copes with trauma and stress differently, it is inaccurate for members of the judicial system to assume that because a victim is not acting how one would "presume" a rape victim should act, he or she must be lying. Furthermore, emotional components are not the only factors that affect memory.[225] The accuracy of a rape victim's memory can also be impaired by factors such as whether there was a weapon present during the crime, the age of the victim, the race of the perpetrator and the victim, and the method of questioning conducted by police, among others.[226] Courts and jurors often do not recognize these valid explanations for the rape victim's lying demeanor or red-flag behavior, and instead still mistakenly commonly correlate the behavior with deceit. Knowing this, prosecutors are reluctant to investigate and pursue these cases.[227]

Finally, some conservative members of the judicial process place significant weight on a rape victim's past sexual conduct.[228] They mistakenly believe that because a victim may have acted in a certain sexual way in the past, then that is necessarily indicative of his or her actions in the case at hand.[229] For example, if a rape victim has a promiscuous past, those involved in the judicial process commonly assume that the rape victim consented to the actions that occurred during the rape.[230] Similarly, if a rape victim had willingly engaged in sexual conduct with the perpetrator in the past, some assume that the conduct that occurred in the alleged rape was

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note 221; Julie Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 HARV. WOMEN'S L.J. 59, 93 n.167 (1987) (explaining the effects of trauma may cause a victim to give inconsistent accounts from interview to interview because she may be in a state of shock and thus incapable of giving a full account of the sexual assault at a particular time); Applegate, *supra* note 152, at 905 (citing KARMEN, *supra* note 181) (defining post-traumatic stress disorder as a psychological occurrence that causes victims to re-experience their traumatizing attacks "over and over again in daydreams, flashbacks, or nightmares").

[224] Applegate, *supra* note 152, at 900–15.

[225] Sheena M. Lorenza, *Factors Affecting the Accuracy of Eyewitness Identification*, 6 THE REV.: J. UNDERGRADUATE STUDENT RES. 45, 45–49 (2003).

[226] *Id.*

[227] Lonsway et al., *supra* note 221; Applegate, *supra* note 152, at 905.

[228] Lininger, *supra* note 147, at 1360 (explaining existence of a perception that a woman with an "extensive sexual history [is] unlikely to have withheld consent on the night of the charged offense").

[229] *Id.*

[230] *See id.* (discussing how if the victim has a prior sexual history of any kind, not necessarily an extensive one, the jury is more likely to perceive the victim as someone who consented to the current sexual encounter in question).

also willing.[231] When a rape victim claims that a sexual encounter that was once consensual later became nonconsensual, skepticism surrounding the change of mindset arises.

In sum, *Crawford*'s application to rape cases poses the risk of re-victimizing rape victims by forcing upon them the pressure of being available at trial for cross-examination, which would mean being publicly questioned on a matter that is delicate in nature and already painful to merely discuss, let alone be interrogated about.[232] *Crawford* further poses this risk because rape victims are not only probed about this highly sensitive topic, but, given the lens of skepticism that rape is so often perceived through, *Crawford* also asks rape victims to take the stand and be questioned on their credibility regarding this personal and uncomfortable topic.[233] This significant deterrent rape victims face from going to trial is a result of courts failing to appreciate that prior recantations, discrepancies in a story, a lying demeanor, or past sexual behavior do not necessarily indicate a false accusation of rape. As a result, courts have allowed for the widespread belief that far more false accusations of rape occur than they actually do.[234] Finally, *Crawford* also leaves rape victims feeling alone in their legal battles because it deters prosecutors from moving forward with rape cases due to the difficulties it imposes on prosecuting these crimes.[235] Given the significant chance of re-victimization and the complications prosecutors face as a result of *Crawford*'s application to rape cases, it is apparent why a rape victim would be reluctant to be available at trial, which likely renders any of the victim's testimonial hearsay that may have been used to convict the rapist inadmissible.[236]

D. Rape Shield Laws and Crawford

Even if a rape victim chooses to bear the consequences of being available at trial, exceptions or loopholes to certain rules of evidence can operate to further victimize and shame rape victims. Simply being aware of these repercussions can further disincentive rape victims from being available at trial, thereby requiring prosecutors to face *Crawford*'s admissibility hurdles. Rape shield laws are an example of evidence rules that contain exceptions

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[231] *Id.*

[232] *See* Applegate, *supra* note 152, at 900–15; *see also* Price, *supra* note 211, at 541.

[233] *See* Applegate, *supra* note 152, at 900–15; *see also* Price, *supra* note 211, at 541.

[234] Applegate, *supra* note 152, at 900–15; *see* Rumney, *supra* note 212, at 128–58 (discussing how the judicial system's belief that complaints of rape are false is often unfounded and/or not based on legal standards yet this belief frequently continues to influence police and prosecutorial decision-making); *see also* Lininger, *supra* note 214, at 709–14; Price, *supra* note 211, at 541.

[235] *See* Applegate, *supra* note 152, at 900–15; *see also* Price, *supra* note 211, at 541.

[236] Crawford v. Washington, 541 U.S. 36, 60–68 (2004).

harmful to rape victims and the successful prosecution of rape crimes. Rape shield laws, adopted by the federal and all state governments, are intended to protect a rape victim's privacy interest by deeming inadmissible evidence offered to prove that a rape victim engaged in other sexual behavior or to prove a rape victim's sexual predisposition.[237]

Knowing such evidence will not be exposed in court, rape victims often find comfort in rape shield laws and feel empowered to seek justice against their abusers.[238] However, there are exceptions to the protections offered by rape shield laws which, if met, can expose the rape victim to a level of vulnerability and embarrassment that oftentimes amounts to re-victimization, which in turn makes the recovery process more lengthy and strenuous for the victim.[239] This discourages rape victims from testifying, which triggers *Crawford*'s requirement that admissible hearsay be non-testimonial.[240] In the likely event that *Crawford* bars the admissibility of the victim's hearsay in court by deeming it testimonial, then the likelihood of a successful conviction decreases significantly.

To determine whether evidence regarding a rape victim's prior sexual conduct will be admissible at trial, a court will hold a pre-trial *in camera* hearing to assess whether the evidence falls under any of the exceptions to the federal rape shield law, Federal Rule of Evidence 412.[241] Such evidence is admissible under the exceptions if: (1) it is offered to prove that a person other than the accused "was the source of semen, injury, or other physical evidence;" (2) it is offered to "prove consent" between the victim and the defendant; or (3) "exclusion [of the evidence] would violate the defendant's constitutional rights."[242]

Unfortunately for a rape victim, it is not difficult for one of these exceptions to be met and thereby allow evidence of the victim's prior sexual

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[237] FED. R. EVID. 412(b); NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, RAPE SHIELD CHART (2010), http://www.ndaa.org/pdf/Rape%20Sheild%20Chart%20_Updated%202010_.pdf [https://perma.cc/6J8T-RYX4]; Applegate, *supra* note 152, at 910–11 n.68 (citing NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, RAPE SHIELD STATUTES AS OF MARCH 2011 (2011), http://www.ndaa.org/pdf/NCPCA%20Rape%20Shield%202011.pdf [https://perma.cc/P99M-LJNH]) (defining sexual predisposition as a victim's past sexual behavior and actions being indicative of their character or mindset when it comes to current or future sexual tendencies).

[238] *See* Price, *supra* note 211, at 541.

[239] FED. R. EVID. 412; Price, *supra* note 211, at 563 (citing Lara English Simmons, Note, Michigan v. Lucas*: Failing to Define the State Interest in Rape Shield Legislation*, 70 N.C. L. REV. 1592, 1604 (1992)) ("The privacy interest advanced by rape shield statutes is necessary to protect the victim from suffering a second rape on the witness stand during trial.").

[240] 541 U.S. at 60–68.

[241] Applegate, *supra* note 152, at 910–11 (citing Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 718 (1995)).

[242] FED. R. EVID. 412(b); Applegate, *supra* note 152, at 910–11. These three exceptions apply to criminal cases. FED. R. EVID. 412(b).

conduct to enter the courtroom. For instance, modern forensic science technologies have significantly advanced to the point to easily identify sources of "semen, injury, or physical evidence."[243] With the use of such technology at hand to defend their accusation, defendants are likely to call into question the source of physical evidence. Additionally, the heightened importance the government places on constitutional rights, such as due process, makes it likely that a court will lean in favor of protecting a defendant if his or her constitutional right is even at risk of being breached.[244]

Finally, various ethical codes allow for lawyers to break the confidentiality of attorney-client communications in certain circumstances, such as when they believe, even mistakenly, that disclosure is necessary to prevent knowingly helping the client commit a crime, like perjury, or fraud that may result in substantial injury to another.[245] For instance, if a victim is explaining to his or her lawyer that a preexisting consensual sexual relationship existed with the rapist, even just minutes before, a lawyer may misconstrue that to mean that the victim consented to the current sexual encounter in question.[246] With this mistaken belief regarding rape's key element of consent, the lawyer may break confidentiality to avoid being compliant in perjury or to avoid incarcerating a potentially innocent person, because doing so can be considered substantially injurious to the opposing party.[247] Knowing that this chance of breach in confidentiality exists, rape victims recognize that there is potential for private information, which may inaccurately reflect on their consent, or lack thereof, to enter the courtroom.

If a victim's sexual history is admissible in court by way of an exception to a rape shield law, he or she risks exposure of intimate details at trial, and also faces a potentially intrusive, humiliating, and callous cross-examination

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[243] FED. R. EVID. 412(b); *see* Lininger, *supra* note 147, at 1374–75, 1390–92 (discussing how forensic science abilities, amendments to confidentiality laws, and misreading of constitutional rights can circumvent rape shield laws, and thus "have a strong potential to embarrass the victim and inflame the prejudice of the jury in the very manner that the original authors of the rape shield laws sought to prevent").

[244] *See* Lininger, *supra* note 147, at 1390–92.

[245] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016) (explaining a lawyer can break a client's confidentiality if not doing so is "reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services"); Lininger, *supra* note 147 at 1374–75 (discussing how lawyers can break the confidentiality of attorney-client communications if they believe that their clients may be committing a crime or fraud that may result in substantial injury).

[246] *What Consent Looks Like*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/articles/what-is-consent [https://perma.cc/BXU5-3G55] (discussing how a victim can withdraw consent at any time, even during a sexual act, thus, even if a victim has given consent previously, it does not necessarily mean they have continued their consent).

[247] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6; Lininger, *supra* note 147, at 1374–75, 1390–92; *see also, e.g.*, United States v. Long, 857 F.2d 436, 445 (8th Cir. 1988) (holding attorney may disclose client confidences if client expresses clear intent to commit perjury).

by a defense counsel that is well aware that *Crawford* requires the victim's live testimony for the prosecution to have any likelihood at success.[248] This awareness motivates defense counsel to make "cross-examination extremely unpleasant for the victim in hopes that she will lose interest in the case."[249] For instance, if a rape victim had a prior sexual relationship with the defendant, and evidence of the sexual history meets an exception to the applicable rape shield law, he or she may be reluctant to testify at trial knowing that defense counsel will pursue an embarrassing or shameful line of questioning against the victim by emphasizing that prior sexual relationship.[250] Such tactics utilized by defense counsel in the cross-examination of rape victims often include questioning that probes into how many people a victim has had a sexual encounter with, the feelings and sexual encounters, if any, the victim had with the defendant prior to the alleged rape, intimate details of the rape itself, such as whether there was mutual flirtation beforehand, and sometimes even obscure, irrelevant details such as personal hobbies.[251]

Furthermore, because court documents are often made public, a victim's private life can also be exposed outside of the courtroom, particularly through the media.[252] Rape victims are already scrutinized due to the skepticism surrounding their claims, but are often left feeling further exposed and vulnerable when their sexual histories are made public.[253] This is exactly what happened in 2004 in *People v. Bryant* after the media obtained records detailing the alleged rape victim's prior sexual conduct.[254] After facing judgment and humiliation both inside and outside of the courtroom, the alleged rape victim felt too victimized to continue to participate with the prosecution and dropped

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[248] Lininger, *supra* note 147, at 1366.

[249] *Id.*

[250] Richard I. Haddad, *Shield or Sieve?* People v. Bryant *and the Rape Shield Law in High Profile Cases*, 39 COLUM. J.L. & SOC. PROBS. 185, 190 n.25 (2005) (quoting People v. Bryant, 94 P.3d 624, 629–30 (Colo. 2004)) (noting many rape victims claim that they are significantly deterred or dissuaded from cooperating with prosecution because "'involvement with the criminal justice system [can be] as bad as the sexual assault itself'"); Lininger, *supra* note 147, at 1362 (explaining defense attorneys rely on "harsh cross-examination of accusers . . . [as] the best—and perhaps the only—means of exonerating the accused"). Only a small portion of the rapes that are reported lead to convictions because rape victims are afraid of having their sexual histories publicly disclosed during trial should one of the rape shield law exceptions be satisfied. Haddad, *supra*.

[251] *See* Haddad, *supra* note 250, at 186–190 (discussing how rape victims' private lives are often exposed in the courtroom to the psychological detriment of the victims); Lininger, *supra* note 147, at 1390–92 (discussing the sense of vulnerability that results from being sexually assaulted and how that is often felt in the line of questioning).

[252] *See* Haddad, *supra* note 250, at 185–95 (discussing the importance of keeping the sexual histories of rape victims private in the courtroom and approaching the questioning of victims' private lives with sensitivity).

[253] *See* Applegate, *supra* note 152, at 900–01; *see also* Lininger, *supra* note 147, at 1360 (discussing the vulnerability and distrust felt by victims of sexual assault).

[254] Haddad, *supra* note 250, at 185–95 (citing *Bryant*, 94 P.3d at 629–30).

the charges against the defendant.[255] Although the presiding judge issued an order prohibiting the publication of the alleged victim's name and the trial footage never showed her face, the media was able to obtain and broadcast her name, telephone number, photograph, home address, and email address.[256] Like the alleged victim in *Bryant*, many victims refuse to proceed with trial for fear of exposing their private, intimate lives.[257] When a victim refuses to cooperate with prosecution and is not available for cross-examination, understandably because the loopholes in rape shield laws create the strong possibility of being humiliated, violated or re-victimized, *Crawford* is triggered and the prosecutor likely must forego using the victim's testimonial statements as evidence—evidence that a conviction often hinges upon.[258]

Rape victims commonly perceive the benefits of being available at trial as outweighed by the negative consequences. Evidently, being available at trial advantages rape victims' cases and significantly assists the prosecution and conviction of defendants because courts need not address a testimonial classification issue if victims are present at trial.[259] On the other hand, being available at trial does not necessarily guarantee a conviction. It does, however, almost always guarantee an array of negative consequences: the victims must face their rapists once again, they must defend their trustworthiness that has been newly shattered by a system that is often disbelieving, they must relinquish control to the justice system much as they relinquished, albeit unwillingly, control to their rapists, they may face potential backlash from skeptical strangers who criticize their sexual history, and they will risk the discomfort that accompanies having their past sexual histories

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[255] *See id.* These particular records were admitted into evidence in *Bryant* because the defense had successfully argued that because the victim had sexual relations with another man near the time of the alleged rape, evidence of her sexual history fell under an exception to Colorado's rape shield law. *See id.* at 191–95 (citing COLO. REV. STAT. § 18-3-407(1), (2) (2005)). This particular exception allowed admission of such evidence for the purpose of demonstrating whether someone other than the accused was the source of the physical evidence found on the victim. *See* COLO. REV. STAT. § 18-3-407(1), (2); Haddad, *supra* note 250, at 191–95. In this case, the judge admitted evidence of the victim's sexual history from the seventy-two hours preceding her medical examination because it would satisfy the purpose of this rape shield law exception. *See* COLO. REV. STAT. § 18-3-407(1), (2); Haddad, *supra* note 250, at 191–95.

[256] Lininger, *supra* note 147, at 1356 ("Media coverage of rape trials has grown, while the media's forbearance on matters of accusers' privacy has waned."); Moira McDonough, Note, *Internet Disclosures of a Rape Accuser's Identity (Focus on the Kobe Bryant Case*), 3 VA. SPORTS & ENT. L.J. 284, 285–86 (2004).

[257] Lininger, *supra* note 147, at 1383 (discussing a 2005 U.S. Bureau of Justice Statistics report); McDonough, *supra* note 256, at 285–86, 292–93.

[258] Davis v. Washington, 547 U.S. 813, 822 (2006); Crawford v. Washington, 541 U.S. 36, 68 (2004); *see* BASILE & SALTZMAN, *supra* note 175, at 10 (considering rape is a single incident, it does not have an ongoing attribute to render it an ongoing emergency); BREIDING ET AL., *supra* note 170, at 1–2; WANG & ROWLEY, *supra* note 175, at 18–28.

[259] *Crawford*, 541 U.S. at 68.

exposed during cross-examination if a rape shield law exception applies. It is apparent that rape victims have many legitimate and substantiated concerns that discourage them from being available for cross-examination. These disincentives, coupled with *Crawford*'s impediments, significantly interfere with the successful prosecution of rape cases, and as a result, many rapists are ultimately able escape conviction and incarceration.

IV. PROPOSED SOLUTIONS FOR MINIMIZING THE DISADVANTAGES *CRAWFORD* PLACES ON VICTIMS IN DOMESTIC VIOLENCE AND RAPE CASES

Crawford v. Washington reflects a grave threat to domestic violence and rape cases and victims across the nation. Although there has been a shortfall of effective safeguards put into place for these types of cases and victims, *Crawford* is not beyond remedy. Its current detrimental effect of decreasing the likelihood of convictions in domestic violence and rape prosecutions with an unavailable declarant can, at the very least, be minimized. This, however, will require substantive changes, which can fall under the umbrella of either modifying interpretations of key terminology in *Crawford* or providing an overall shift in focus to affording victims equal protection, rather than a primary focus on the defendant's Sixth Amendment constitutional right to confrontation.

Although the fundamental component of *Crawford* is whether hearsay is testimonial, the *Crawford* holding itself lacked a comprehensive definition of this categorization, and even subsequent cases, such as *Davis v. Washington* and *Hammon v. Indiana*, defined the term in a way that leaves room for discrepancy amongst courts.[260] By merely stating that proclamations made during an ongoing emergency are the antithesis of testimonial statements, *Davis* and *Hammon* afford courts the discretion to decide what constitutes an ongoing emergency.[261] Because an emergency is a highly subjective determination made after considering many factors and contextual components, the amount of discretion, and therefore inconsistency and discrepancy amongst courts, is abundant.[262] To create more comprehensive guidelines and consistent precedent on which prosecutors and victims can rely, the term testimonial must be modified and codified to delineate an inclusive list of factors that courts must consider, such as whether the hearsay

[260] *Id.* at 60–68; *see Davis*, 547 U.S. at 822; King-Ries¸ *supra* note 128, 318–24.
[261] *See* King-Ries, *supra* note 128, at 318–24.
[262] *See id.*

statement was an excited utterance, present sense impression, or a statement made to medical personnel.[263]

Furthermore, *Crawford* is also flawed because it mistakenly assumes that the defendant necessarily wants the ability to confront his or her accuser. This assumption overlooks the fact that defendants who are aware of how *Crawford* can operate, to render essential hearsay evidence against them inadmissible if there is no opportunity for confrontation, have an incentive to procure the unavailability of their accuser.[264] Although *Giles v. California* discusses the application of the forfeiture by wrongdoing doctrine in the domestic violence context, the *Giles* precedent alone is insufficient in that it does not discuss the application of the forfeiture by wrongdoing doctrine specifically in the context of rape, nor did it result in consistent and common application in domestic violence cases.[265] By primarily focusing on the defendant's right to confrontation, *Crawford* fails to appreciate that defendants are taking advantage of that emphasis in order to secure evidentiary benefits at the expense of victims. Accordingly, this translates into the second modification needed: the shift in focus to victims.

By shifting the holding in *Crawford* to increase the focus on the rights of victims, so that, at minimum, their rights are weighed equally with the defendants' rights, courts can incentivize victims to be available at trial. An increased focus on the rights of victims would encourage their availability at trial by offering various safeguards, such as reducing the time between investigation and trial, requiring tamer cross-examination of victims, and allowing psychological support at trial for victims, thereby helping victims feel more secure and confident in the courtroom and minimizing the psychological pain they experience during the prosecution process. Ultimately, if the shift in focus is successful and does empower victims to be available at trial, *Crawford*'s holding would be inapplicable.

In sum, proposed solutions to *Crawford*'s damaging consequences in domestic violence and rape cases with unavailable declarants fall under the categories of either re-defining testimonial or shifting the focus to the victim. To adequately modify the key element of testimonial, its definition must be restricted and the definition of ongoing emergency must be expanded to include more hearsay statements made by unavailable declarants.[266] To appropriately shift the focus to victims and afford them the pro-

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[263] *See* Chase, *supra* note 72, at 1108; Leventhal & Aldrich, *supra* note 72, at 86–87, 92–93; King-Ries, *supra* note 128, at 318–24.

[264] Giles v. California, 554 U.S. 353, 376–77 (2008); *Crawford*, 541 U.S. at 60–68.

[265] *See* Leventhal & Aldrich, *supra* note 72, at 98; Tuerkheimer, *supra* note 96, at 718–20 (discussing the inconsistency in the application of the forfeiture by wrongdoing doctrine in cases of intimate violence despite its particular importance in such cases).

[266] *See* Leventhal & Aldrich, *supra* note 72, at 98; Tuerkheimer, *supra* note 96, at 718–20.

tection equal to what is afforded to defendants under *Crawford*, more emphasis and advocacy should be placed on the forfeiture by wronging exception, and the protections of victims before and during trial should be improved.[267] These proposed solutions will effectively mitigate *Crawford*'s effect of creating difficulty in obtaining convictions in domestic violence and rape cases with an unavailable declarant.

A. Restricting the Definition of Testimonial in the Contexts of Domestic Violence and Rape

Under *Crawford*, if a hearsay statement made by an unavailable declarant qualifies as testimonial, it is inadmissible at trial unless the declarant testifies in court or the defendant had a prior opportunity to cross-examine the declarant.[268] Several cases post-*Crawford* attempted to clarify this testimonial inquiry, including *Davis* and *Hammon*, which define a testimonial statement as one made for the purpose of gathering evidence with an "eye toward trial," as opposed to statements made for the purpose of assisting in an ongoing emergency.[269] This definition of testimonial is particularly relevant in domestic violence and rape cases because the circumstances surrounding such cases make the discussion of an ongoing emergency particularly pertinent.[270] Unfortunately, many of the hearsay statements made in these types of cases are frequently and inconsistently not categorized as made during an ongoing emergency, and the victims' crucial incriminating words are deemed inadmissible.[271] In an effort to provide consistency and predictability in the determination of whether a statement is testimonial, state and federal rules of evidence should codify a statute that would uniformly deem the hearsay exceptions of excited utterances, present sense impressions, and statements made to medical personnel as testimonial and thereby admissible at trial regardless of the declarant's availability. This codification of the definition would help avoid affording too much leverage to defendants in domestic violence and rape cases and too little chance of success to victims.

Although most courts have consistently held that excited utterances and present sense impressions made to non-law enforcement personnel are non-testimonial, courts have been less consistent in regard to excited utter-

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[267] *See* Leventhal & Aldrich, *supra* note 72, at 98; Tuerkheimer, *supra* note 96, at 711–20.

[268] 541 U.S. at 60–68.

[269] Davis v. Washington, 547 U.S. 813, 822 (2006).

[270] *See* King-Ries, *supra* note 128, at 318–24.

[271] *See id.* at 319–22 (discussing the lack of consistency when courts classify statements falling under the hearsay exceptions of excited utterances, present sense impressions, and statements made to medical personnel as testimonial, especially in certain contexts, such as domestic violence).

ances and present sense impressions made to law enforcement personnel.[272] In these latter situations, the court will apply a case-by-case analysis to determine the purpose of the statement and assess whether it was made with a prosecutorial purpose or for the purpose of receiving aid in an emergency.[273] Similarly, the admissibility of statements made to medical personnel are typically also analyzed on a case-by-case basis after a determination of whether the statement was made with an "eye toward trial" or for the purpose of receiving medical diagnosis or treatment after an emergency.[274] Rather than applying a case-by-case analysis, courts should consistently deem out-of-court statements that fall under one of these three exceptions as non-testimonial, and thus admissible under *Crawford* regardless of the availability of the victim-declarant or whether the statement was made to law enforcement. This way, prosecutors can avoid the impediments caused by the inconsistent line of jurisprudence following *Crawford* that potentially prevents crucial hearsay from being admitted at trial when there is an unavailable declarant, even if it falls under one of the aforementioned exceptions. Subsequently, this would allow for the appropriately increased conviction of

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[272] *See* Chase, *supra* note 72, at 1108 ("the law governing the admissibility of hearsay can permit the admission of evidence that the courts of one jurisdiction find reliable even though the courts of another jurisdiction would not admit the same evidence, finding it too unreliable").

[273] Leventhal & Aldrich, *supra* note 72, at 86–87, 92–93 nn.132–36 (citing State v. Vaught, 682 N.W.2d 284 (Neb. 2004) (holding a child sexual abuse victim's statements to a doctor were non-testimonial because their purpose was to seek urgent care); People v. Coleman, 791 N.Y.S.2d 112 (App. Div. 2005) (finding that the motivation of a 911 telephone call to police was to seek emergency help)); *see, e.g.*, United States v. Brun, 416 F.3d 703, 707–08 (8th Cir. 2005) (holding that a declarant's excited utterances made to police officer were non-testimonial because the officer's questioning and overall interaction with the declarant was informal and "unstructured"); United States v. Summers, 414 F.3d 1287, 1302–03 (10th Cir. 2005) (holding that a declarant's statements to law enforcement were testimonial despite the absence of *Miranda* warnings, formal interrogation, and government involvement in eliciting the statements); United States v. Luciano, 414 F.3d 174, 179–80 (1st Cir. 2005) (holding that a fourteen-year-old boy's statements when he flagged down an officer immediately after the crime qualified as excited utterances and were non-testimonial); Drayton v. United States, 877 A.2d 145, 150–51 (D.C. 2005) (holding that the excited utterances made to law enforcement were testimonial because at the time the statements were made, the police were already aware that they were gathering facts for a future prosecution).

[274] *See* King-Ries, *supra* note 128, at 319–22 (discussing how the same sentence falling under an excited utterance, present sense impression, or statement made to medical personnel hearsay exception can be interpreted either as non-testimonial or testimonial depending on the court's line of reasoning); *see also* People v. Cage, 15 Cal. Rptr. 3d 846, 854–55 (Ct. App. 2004) (holding that a victim's statement to a doctor identifying his perpetrator as a family member and thus someone he may need rescue from was not testimonial because it was made for the purpose of seeking help); *In re* T.T., 815 N.E.2d 789, 800–05 (Ill. App. Ct. 2004) (finding that a child domestic violence victim's statements to a doctor describing his attack were not testimonial, but the statements identifying the attacker were); Leventhal & Aldrich, *supra* note 72, at 86–87, 92–93 n.134 (citing State v. Stahl, No. 22261, 2005 WL 602687, at *1–6 (Ohio Ct. App. Mar. 16, 2005) (holding statements to a nurse were non-testimonial because the victim had already given testimonial statements to the police, and thus the nurse's role was simply to provide care)).

defendants and for victims of rape and domestic violence to find recourse without facing the trauma and stress that accompanies cross-examination.[275]

To most effectively resolve *Crawford*'s adverse impacts in the domestic violence and rape contexts, courts must interpret certain hearsay statements, ones evidently not made with an "eye toward trial," as non-testimonial. According to the Federal Rules of Evidence, the following are several hearsay exceptions: an excited utterance, which is a statement "relating to a startling event or condition, made while under the stress or excitement that it caused;" a present sense impression, which is a statement "describing or explaining an event or condition, made while or immediately after the declarant perceived it;" and a statement to medical personnel, which is a statement "made for—and is reasonably pertinent to—medical diagnosis or treatment and describes medical history, past or present symptoms or sensations, their inception or their general cause."[276]

Currently, some courts hold that these statements are testimonial in nature simply if they are made to law enforcement personnel.[277] In actuality, if a statement falls under any of these categories, it should automatically be designated as non-testimonial, regardless of who the statement is made to, because statements of this nature are inherently not made with an "eye toward trial."[278] This is because all three of these exceptions occur in a context in which the declarant would not have either the time or mental capacity to fabricate, or, in the case of statements made to medical personnel, would have a strong interest *not* to fabricate.[279] Thus, these statements should uniformly and consistently be deemed non-testimonial, regardless if they are made to law enforcement personnel or not, and should therefore be admissible at trial.[280] If courts were able to appreciate the nature of these statements and consistently held that they are not testimonial, this would prevent *Crawford* from asking victims of domestic violence and rape to sacrifice their mental and emotional well-being for the sake of obtaining a conviction at trial. Success at trial could then be possible without their live testimony because the crucial evidence they provided beforehand would be admissible.[281]

This presumption that the aforementioned hearsay exceptions are always non-testimonial is particularly strong in the context of domestic vio-

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[275] *See, e.g.*, FED. R. EVID. 803–804.

[276] FED. R. EVID. 803–804; Crawford v. Washington, 541 U.S. 36, 51–52 (2004); Chase, *supra* note 72, at 1106–13; *see also supra* notes 67, 68, 70 and accompanying text.

[277] Chase, *supra* note 72, at 1116–19.

[278] *See* FED. R. EVID. 803–804; *Crawford*, 541 U.S. at 51–52.

[279] *See* Chase, *supra* note 72, at 1106–13.

[280] *See* FED. R. EVID. 803–804; *Crawford*, 541 U.S. at 51–52.

[281] *See* FED. R. EVID. 803–804; *Crawford*, 541 U.S. at 51–52.

lence and rape cases because of the circumstances surrounding domestic violence and rape. For example, because domestic violence and rape cases are highly emotional, it is likely that statements made during or immediately after the occurrence of such events will be considered excited utterances.[282] For instance, in the context of rape, a victim may exclaim, "he violated me!" and in cases of domestic violence, a victim may exclaim, "he's going to kill me if he finds out I left!" In both situations, the emotional stakes are high and the victims' statements are triggered by a startling and stressful event. When a domestic violence or rape victim makes an excited utterance to law enforcement or non-law enforcement personnel, he or she is not thinking about assisting prosecution, but is rather overcome with stress or fear.[283] Thus, based on the underlying premise of the excited utterance exception that the victim is too startled to fabricate, it should be presumed that the domestic violence or rape victim is too startled to make statements with an "eye toward trial."[284]

Similarly, a present sense impression is an instantaneous statement in which the declarant is describing what he or she perceives at the moment, and is therefore thinking about his or her existing impression, not the prospect of prosecution.[285] In domestic violence and rape cases, these victims, regardless of whether they are speaking to law enforcement or non-law enforcement, are describing their physical attacks as they are happening. For instance, in rape cases, the victim may call 911 and say, "I was just raped and my rapist is still in my house, looking for a weapon." In domestic violence cases, the victim may say, "I can hear my husband loading his gun while saying he's going to kill me." Both statements involve present sense impressions, and should therefore be deemed testimonial, regardless of whether they were made to law enforcement, because the victim is describing a crime that is currently occurring. Again, the underlying principle be-

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[282] Leventhal & Aldrich, *supra* note 72, at 81–82 (citing various domestic violence cases in which hearsay of an unavailable declarant was admitted through the excited utterance hearsay exception, including: United States v. James, 164 F. Supp. 2d 718, 727–29 (D. Md. 2001) (holding a woman's 911 telephone call after she had just been pushed and slapped by her husband was admissible as an excited utterance); Werley v. State, 814 So. 2d 1159 (Fla. Dist. Ct. App. 2002) (holding a 911 telephone call by a woman an hour after she was beaten by her husband was admissible at trial through the excited utterance hearsay exception); State v. McCombs, 2000 WL 1836338, at *1–3 (Ohio Ct. App. Dec. 14, 2000) (holding statements made by victim of domestic violence to 911 operator, neighbor, and responding patrolman could be admitted at trial as excited utterances because her statements were reactive and not a product of reflective thinking)).

[283] Leventhal & Aldrich, *supra* note 72, at 81–82.

[284] Michigan v. Bryant, 562 U.S. 344, 362 n.9 (2011) (explaining statements that fall under the hearsay exceptions of excited utterances, present sense impressions, and statements made for medical diagnosis or treatment "are, by their nature, made for a purpose other than use in a prosecution").

[285] *See* FED. R. EVID. 803–804; *Crawford*, 541 U.S. at 51–52.

hind the present sense impression hearsay exception is that these statements are reliable and trustworthy because declarants do not have the time to fabricate. If that is the case, then it can be safely presumed that declarants in domestic violence and rape cases also do not have the time to fabricate statements with the foresight of prosecution in mind.[286]

Furthermore, even after a rape or domestic violence crime occurs, many victims face long-lasting psychological effects that cause them relive the attacks.[287] This is because, in addition to the actual physical violence that accompanies these attacks, the victims, like anyone suffering from post-traumatic stress, are then trapped in their own psychological torment both through vivid and distressful flashbacks and memories that occur after the attack, which can restore a victim's frame of mind to the state it was in during the attack.[288] Therefore, domestic violence and rape victims are susceptible to re-excitement for purposes of excited utterances, and to re-visualization or re-hearing for purposes of present sense impressions.[289] The same logic and reasoning that makes initial excited utterances and present sense impressions reliable—that these statements are reactive and involve no time to deliberate a fabrication—also applies to excited utterances and present sense impressions made during a flashback of domestic violence or rape, meaning they should be admissible at trial.[290] If courts appreciated that victims make non-testimonial present-sense impressions to law enforcement and non-law enforcement personnel both during and after their attacks, more essential and incriminatory hearsay could be admitted at trial without having to force emotionally and psychologically vulnerable victims to be available for cross-examination.

Finally, because medical personnel are not trained or associated with the legal process, statements made to them by domestic violence and rape victims are likewise made for a non-prosecutorial, non-testimonial purpose—to seek medical attention.[291] Moreover, because both domestic violence and rape victims often experience feelings of vulnerability after their attacks, these statements are often made for psychological, in addition to physical, assistance.[292] Courts must recognize that statements made in such a state are not made with

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[286] *See Bryant*, 562 U.S. at 362 n.9; Chase, *supra* note 72, at 1106–13.

[287] Applegate, *supra* note 152, at 905.

[288] *See id.*; *see also* BASILE & SALTZMAN, *supra* note 175, at 10; BREIDING ET AL., *supra* note 170, at 1 (defining intimate partner violence to include sexual violence); WANG & ROWLEY, *supra* note 175, at 18–28.

[289] *See* WANG & ROWLEY, *supra* note 175, at 20–22; *see also* Applegate, *supra* note 152, at 905 (discussing the psychological effects of abuse).

[290] *See* BASILE & SALTZMAN, *supra* note 175, at 10; WANG & ROWLEY, *supra* note 175, at 18–28; Applegate, *supra* note 152, at 900–15; Leventhal & Aldrich, *supra* note 72, at 80–83.

[291] *See* FED. R. EVID. 803–804; Crawford v. Washington, 541 U.S. 36, 51–52 (2004).

[292] *See* Applegate, *supra* note 152, at 905.

an "eye toward trial," and should always interpret these statements in the rape and domestic violence context as non-testimonial.[293]

Proponents of Sixth Amendment rights need not be concerned that allowing these hearsay exceptions to stand under *Crawford* will impinge a defendant's constitutional right to confrontation.[294] Because this proposal is limited to these three particular hearsay exceptions, it would have a narrow application; therefore many other hearsay statements may still be deemed testimonial and inadmissible under *Crawford*. For example, the hearsay exceptions of the declarant's statement of personal or family history or a statement of the declarant's then existing mental, emotional, or physical condition will still be subject to be scrutiny under *Crawford*.[295] In other words, although the hearsay exceptions of excited utterances, present sense impressions, and statements made for medical diagnosis or treatment can be presumed non-testimonial, all other hearsay exceptions still must endure *Crawford*'s case-by-case analysis of whether the statement is classified as non-testimonial or having been made during an ongoing emergency.[296]

Furthermore, courts have always held that the fairness for both parties in a criminal proceeding must be balanced.[297] Although Sixth Amendment proponents are correct in arguing that a defendant's right to confrontation must not be arbitrarily circumvented, they must also recognize that such a right is not absolute.[298] This means that in order to "maintain the integrity of the judicial process," courts must balance the defendant's constitutional rights with rights that protect victims, such as the aforementioned hearsay exceptions.[299] In other words, because *Crawford* strengthens and further solidifies the defendant's right to confrontation, it is equally fair to the victims, and in the interest of judicial integrity, that courts proportionally counterbalance *Crawford* by uniformly interpreting excited utterances, present sense impressions, and statements made for the purpose of medical diagnosis to withstand the burden that *Crawford* places on victims.[300]

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[293] *See* Chase, *supra* note 72, at 1112–22.

[294] U.S. CONST. amend. VI; *see* Mattox v. United States, 156 U.S. 237, 242–43 (1895) (discussing importance of allowing defendants' constitutional right to face accusers and question accusations brought against defendant as well as convey to a jury of their peers the demeanor and dynamic between the accused and the accuser).

[295] *See* FED. R. EVID. 803–804; *Crawford*, 541 U.S. at 51–52.

[296] *See* FED. R. EVID. 803–804; *Crawford*, 541 U.S. at 51–52.

[297] Meier, *supra* note 2, at 23.

[298] *Id.*

[299] Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 799 (2005) ("Strong confrontation rights counterbalance expansive hearsay exceptions."); Meier, *supra* note 2, at 23.

[300] *See* Meier, *supra* note 2, at 23.

B. Expanding the Concept of Ongoing Emergency

The definition of an ongoing emergency is essential to the application of *Crawford* because a statement made in the course of an ongoing emergency is not considered testimonial, and thus is not barred from admissibility at trial under *Crawford*.[301] This concept is particularly relevant to domestic violence and rape cases because the circumstances of such incidents are characterized by their urgency and sense of crisis.[302] Despite this importance, what constitutes an ongoing emergency was never explicitly defined in *Crawford* or subsequent cases.[303] As a result, lower courts have struggled to apply the ongoing emergency test consistently and objectively.[304] *Davis* and *Hammon* attempted to clarify what constitutes an ongoing emergency, but ultimately caused further confusion for lower courts by evaluating factually similar cases yet reaching opposite conclusions.[305]

Davis and *Hammon* both involved excited utterances made by a victim of domestic violence.[306] The victim's statements in *Davis* were considered made during an ongoing emergency, therefore not testimonial, and were admissible in court regardless of the unavailability of the victim-declarant, but the victim's statements in *Hammon* were not.[307] In 2006, the U.S. Supreme Court distinguished these two cases in holding that in *Davis*, the victim was describing the events over the telephone to a 911 operator as they were occurring in an effort to obtain immediate help, whereas in *Hammon*, the victim detailed the accounts of the domestic violence attack to the police once they arrived on the scene after the attack had already occurred.[308] This emphasis on the lapse of time between when the crime occurred and when the statement was made, however, is not an accurate or comprehensive assessment of an ongoing emergency. Simply because a declarant is not visually witnessing the danger she fears while speaking to law enforcement does not mean the declarant is no longer in danger. Moreover, the fact that a

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[301] Michigan v. Bryant, 562 U.S. 344, 378 (2011); Davis v. Washington, 547 U.S. 813, 822 (2006); *Crawford*, 541 U.S. at 68; Tuerkheimer, *supra* note 96, at 715.

[302] BREIDING ET AL., *supra* note 170, at 1–2; WANG & ROWLEY, *supra* note 175, at 18–20. Rape cases are characterized by their emotional intensity, volatility, and frantic reactiveness. *See* BREIDING ET AL., *supra* note 170, at 1–2; *see also, e.g.*, Stoever, *supra* note 123, at 488.

[303] *Bryant*, 562 U.S. at 378; *Davis*, 547 U.S. at 822; *Crawford*, 541 U.S. at 68; Tuerkheimer, *supra* note 96, at 715.

[304] *Bryant*, 562 U.S. at 356–71; *Davis*, 547 U.S. at 822; *Crawford*, 541 U.S. at 60–68; Tuerkheimer, *supra* note 96, at 715.

[305] *Davis*, 547 U.S. 813 at 822; Ahrens & Mitchell, *supra* note 92, at 107–12.

[306] *Davis*, 547 U.S. 813 at 822.

[307] *Id.* at 828 (citing Hammon v. State, 829 N.E.2d 444 (Ind. 2005)) (finding statement made during a 911 telephone call was non-testimonial because it was made for the purpose of assisting law enforcement solve an ongoing emergency, whereas statement made to the responding officer was testimonial because the crime had already passed); *Crawford*, 541 U.S. at 68.

[308] *Davis*, 547 U.S. 813 at 830–32 (citing *Hammon*, 829 N.E.2d 444).

single attack is over does not mean all attacks are over; because domestic violence involves an ongoing relationship and "[m]ost rape victims know their assailants," it is not improbable that such attacks can occur again.[309]

This was particularly true in *Hammon*, where the husband shoved his wife into broken glass, hit her on the chest, threw her to the floor, destroyed multiple items around the house, prevented the wife from leaving the house by breaking their car, and even attacked their daughter.[310] Furthermore, the police had to actively keep the husband separated from his wife. The husband in *Hammon* made several attempts to interject in his wife's conversation with the police and became irritable when the officers prevented him from getting near her.[311] Despite these apparent signs of anger and violence that the husband displayed both during the initial attack and when law enforcement arrived, the court classified the wife's statements to the police as ones that were not made during an ongoing emergency.[312] The Court made this determination only because at the time the police were present and questioned the victim, the husband was not attacking the victim due to police intervention.[313] This reasoning disregards the fact that the husband had displayed an ongoing and repetitive pattern of violence toward his wife and would likely attack again.[314]

As evidenced by *Davis*, *Hammon*, and many subsequent cases, there is inconsistency amongst how courts interpret an ongoing emergency.[315] Codification of a definition of an ongoing emergency would unify how courts treat this concept, particularly in the domestic violence context. In 2004, as a response and counterbalance to the strengthened Confrontation Clause, Oregon codified a rule of evidence that recognizes that domestic violence cases are, by definition, always an ongoing emergency because in such situations, just because a single attack has ended does not necessarily mean the

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[309] THE WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 1 (2014), http://www.sapr.mil/public/docs/research/201401_WhiteHouse_CouncilonWomenandGirls_RapeandSexualAssault.pdf [https://perma.cc/VJ47-7KWJ]; *Perpetrators of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/statistics/perpetrators-sexual-violence [https://perma.cc/B8PT-UWR3] ("[seven] out of [ten] rapes are committed by someone known to the victim").

[310] *Davis*, 547 U.S. at 828 (citing *Hammon*, 829 N.E.2d 444).

[311] *Id.* at 819–20.

[312] *Id.* at 830–32.

[313] *Id.* at 832.

[314] *See* Meier, *supra* note 2, at 23; Stoever, *supra* note 123, at 506; Malhotra, *supra* note 122, at 212–14.

[315] *See* Michigan v. Bryant, 562 U.S. 344, 356–71 (2011); United States v. Arnold, 486 F.3d 177, 179–80 (6th Cir. 2007); Rankins v. Commonwealth, 237 S.W.3d 128, 128 (Ky. 2007); State v. Camarena, 176 P.3d 380, 386–88 (Or. 2008); State v. Pugh, 225 P.3d 892, 892 (Wash. 2009); Wisconsin v. Rodriguez, 2006 WI App 163, 295 Wis. 2d 801, 722 N.W.2d 136, 141 (2006); *see also* Tuerkheimer, *supra* note 96, at 715 ("Since *Davis*, lower courts have struggled with the new 'ongoing emergency' test.").

emergency has ended.[316] Oregon Evidence Code Rule 803(26) admits at trial any hearsay statement made to a government official within twenty-four hours of a domestic violence attack, regardless of whether the statement is testimonial, so long as it bears "sufficient indicia of reliability," much like the *Ohio v. Roberts* test.[317] Oregon's reversion to *Roberts* affords prosecutors more discretion and flexibility in admitting hearsay. This movement was made to counterbalance the strengthened Confrontation Clause in an effort to provide safeguards for domestic violence cases because they are particularly susceptible to the downfalls of *Crawford*.[318] Although Oregon limits this rule to the domestic violence context, this Article proposes that federal and state evidence rules should codify the twenty-four hour rule as applicable to both domestic violence and rape cases, particularly because of the similarities in the psychological effects that domestic violence and rape victims experience.[319]

The twenty-four-hour rule is appropriate because it still adequately safeguards a defendant's confrontation right by setting a succinct time limit on admissible hearsay statements in the domestic violence and rape contexts that necessarily indicates reliability.[320] Statements made by domestic violence victims, and likely by rape victims, are most reliable within twenty-four hours of an incident.[321] After that period, cooperation diminishes, influences of coercion increase, and memories fade.[322] Thus, if testimonial statements made after twenty-four hours are not sufficiently reliable to warrant admissibility, the defendant need not worry about the deprivation of his or her confrontation right. Under the twenty-four-hour rule, a defendant's right to confront the accuser and the rights that protect victims are sufficiently balanced.

Furthermore, the twenty-four-hour rule is constructive for law enforcement personnel, people who are often viewed by the courts as serving an investigative purpose when speaking with victims. Under the rule, police

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[316] Lininger, *supra* note 299, at 799–800 (citing OR. REV. STAT. § 40.460(26)); *see* State v. William, 43 P.3d 1182, 1185–87 (Or. Ct. App. 2005) (holding that an unavailable domestic violence victim's hearsay was admissible under § 40.460(26) because the totality of the circumstances indicated reliability of her statements); *see also* CAL. EVID. CODE § 1370 (also allowing special consideration for hearsay in domestic violence cases).

[317] Ohio v. Roberts, 448 U.S. 56, 68 (1980) (explaining hearsay testimony is reliable if it falls under a firmly-rooted hearsay exception or if it appears trustworthy); Lininger, *supra* note 299, at 799–800 (citing OR. REV. STAT. § 40.460(26)).

[318] *See* Lininger, *supra* note 299, at 799–800.

[319] *See* Lininger, *supra* note 299, at 799–800; Meier, *supra* note 2, at 22–25; Applegate, *supra* note 152, at 905.

[320] *See* Lininger, *supra* note 299, at 800–03 (responding to those who argue domestic violence and rape cases call for perpetual ongoing emergencies).

[321] *See id.*

[322] *Id.*

officers responding to a domestic violence or rape attack within twenty-four hours need not focus on whether they are ascertaining an emergency for purposes of trial, but rather can safely assume that anything falling within this time period satisfies *Crawford*.[323] Thus, police officers could focus on aiding the situation in the best way possible, and not on formalities that would foster a testimonial statement.[324] Likewise, courts would no longer have to evaluate whether a law enforcement officer is responding to an emergency or gathering evidence during this time, a distinction that can create a serious barrier to admissibility.

The twenty-four-hour rule is also appropriate as a policy matter because perpetrators of domestic violence and rape often embody dangerous, sometimes unapparent, attributes that necessitate time to subside or become less threatening.[325] In other words, anger, and even a propensity for violence, can linger within the perpetrator and resurface after a police officer leaves the victim, which can develop into a continuation of the first attack or a second attack. This is indicative of an ongoing emergency even when a police officer hears the victim's statements after the initial attack has passed, and supports the inclusion of the twenty-four-hour rule in state and federal evidence rules to allow for greater admissibility of victim statements.

Nonetheless, the twenty-four-hour rule will certainly be accompanied by criticism. Although proponents of the Sixth Amendment might argue that the rule will circumvent the right to confrontation by admitting more hearsay statements at trial and ultimately convicting more defendants who never had the opportunity to face their accusers, such fears can be alleviated. This is because the twenty-four-hour rule will narrowly apply to victims of domestic violence or rape, not to third parties or police officers.[326] The rule shall apply only in circumstances where the victim is still at risk, not if a third party is at risk nor if a police officer simply forgets to elicit a statement from the victim. With this limitation, the twenty-four-hour rule creates a narrow exception to *Crawford* for the specific circumstances of rape and domestic violence given their sensitive contexts and particularly high susceptibility to *Crawford*, rather than creating a broad or sweeping exception to the Confrontation Clause.

Some Sixth Amendment proponents argue that a twenty-four-hour rule is unnecessary because police officers already initially approach their investigations under the presumption that there is an ongoing emergency, mean-

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[323] *Id.*

[324] *Id.*

[325] *See* BASILE & SALTZMAN, *supra* note 175, at 10; BREIDING ET AL., *supra* note 170, at 1–2.

[326] *See* Ahrens & Mitchell, *supra* note 92, 110–11 (arguing that if the ongoing emergency exception belonged to police officers, they would be incentivized to manipulate "investigative methods that might permit them to circumvent confrontation concerns").

ing that the safety of the victim, rather than, say, the formality of questioning, is a priority.[327] Critics claim that, by calling for a blanket definition of when an ongoing emergency occurs, the twenty-four hour rule not only discredits police officers, who already approach their job duties under the presumption of a need for urgency and safety, but it also takes away flexibility from police officers' ability to asses varying situations and respond accordingly. For instance, one argument is that the twenty-four-hour rule's blanket application to an explicit and set time frame leaves no room for accommodation. This is because even if it is blatantly obvious there is no ongoing emergency or the emergency has ended, the rule would not permit police officers to begin their formal line of questioning and conduct their investigative business in an efficient and timely manner until those twenty-four hours have passed.[328] These fears, however, are unfounded. The twenty-four-hour rule will provide guidelines to aid in eliminating potential manipulation of the judicial process by inserting a rigid time frame that objectively constitutes an ongoing emergency, thereby eliminating any subjective considerations or manipulations, such as intentional or unintentional biased maneuvering by the police.[329] Thus, the twenty-four-hour rule does not impinge on Confrontation Clause rights by creating new exceptions, but merely elaborates on what constitutes an ongoing emergency, a subcategory of a non-testimonial situation, and limits that situation to certain contexts.

For the reasons set forth above, Congress and state legislatures should follow Oregon's path and incorporate the twenty-four-hour rule into their evidence rules, slightly modifying it to apply to both domestic violence and rape contexts. By implementing a twenty-four-hour rule, it will be easier for prosecutors to admit domestic violence and rape victims' statements at trial under *Crawford* despite unavailability. This will not only preserve the defendant's confrontation rights by limiting the statements to the period in which they are reliable, but it will also help protect victims from further harm by allowing police officers to focus their attention on how to best

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[327] *See* Tom Lininger, Davis *and* Hammon*: A Step Forward, or a Step Back?*, 105 MICH. L. REV. FIRST IMPRESSIONS 28, 29 (2006), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1111&context=mlr_fi [https://perma.cc/XK6Y-TJVK]. Oftentimes law enforcement can actively acknowledge or act in a manner in which an emergency situation can be inferred by employing behavior such as informal questioning and breaking with standard operating procedures, and by putting the victim's safety first and foremost, even if that may mean disbanding with certain formalities. *See id.*

[328] *See* Lininger, *supra* note 299, at 800–02.

[329] *See id.* Due to ambiguity left by *Davis v. Washington*, 547 U.S. 813 (2006), police officers are left to their own discretion when deciding how to approach a situation, a decision which will ultimately influence the court in determining if there was an ongoing emergency at hand. *See* Lininger, *supra* note 327, at 29. However, with clear rules, court officers will have rigid guidelines to use when determining emergency situations, thereby leaving less room for discretion. *See* Lininger, *supra* note 299, at 802.

serve the needs of victims and by increasing the conviction of perpetrators, even without the participation of victims at trial.[330]

C. Codification of the Forfeiture by Wrongdoing Doctrine

Crawford seems to limit all hearsay statements with its testimonial analysis, even if such statements meet a hearsay exception. The forfeiture by wrongdoing doctrine, however, escapes *Crawford*'s reach.[331] According to this doctrine, a statement that would normally be inadmissible under hearsay rules or *Crawford* is entirely admissible under the forfeiture by wrongdoing doctrine if the defendant intentionally procures the witness's unavailability through wrongful acts.[332] Thus, a defendant's Confrontation Clause rights are extinguished through forfeiture.[333] For the reasons discussed below, to ensure consistent application of the forfeiture by wrongdoing doctrine to domestic violence and rape cases, and in turn remedy *Crawford*'s prejudicial impacts on these types of cases, state legislatures should codify the doctrine.

In *Giles*, the Supreme Court held that requisite intent can be inferred in cases of domestic violence because such cases are often characterized by threat, intimidation, or manipulation against the victim, or other "wrongdoings" intended to control the victim in various ways, including procuring their availability or lack thereof.[334] The forfeiture by wrongdoing doctrine proves to be essential in prosecuting domestic violence cases in that it provides an avenue of relief for victim-declarants who previously made essential hearsay statements that would be beneficial to the prosecution of their attacker, but are unavailable for cross-examination due to the wrongdoing of their attacker.[335] The *Giles* precedent allows for a special application of the doctrine by recognizing how the psychological components of domestic violence, such as manipulation and control, enable a valid inference that if a domestic violence victim is unavailable, it is likely due to the pattern of the abusive relationship.[336]

Although rape is not defined in the same manner that domestic violence is, the forfeiture by wrongdoing doctrine should also apply to the rape context. From a policy perspective, this doctrine applies to domestic vio-

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[330] *See* Crawford v. Washington, 541 U.S. 36, 65 (2004); Lininger, *supra* note 299, at 800–03.

[331] FED. R. EVID. 804(b)(6); *Davis*, 547 U.S. at 833; *Crawford*, 541 U.S. at 62.

[332] *See Crawford*, 541 U.S. at 62; Flanagan, *supra* note 85, at 1211 (citing FED. R. EVID. 804(b)(6) Advisory Committee Note; United States v. Ochoa, 229 F.3d 631, 639, 639 n.3 (7th Cir. 2000)) ("Wrongdoing may, but need not be, illegal conduct.").

[333] *See* Giles v. California, 554 U.S. 353, 366 (2008).

[334] *Id.* at 377.

[335] *See id.*

[336] *Id.* at 377; *id.* at 380 (Souter, J., concurring).

lence cases because those cases involve an ongoing relationship characterized by a history and pattern of threats or attempts to control or isolate the victim.[337] These wrongdoings against the victim are intended to manipulate the victim, procure the victim's availability in various situations and ways, and are a part of what defines a domestic violence relationship itself, thereby making the forfeiture by wrongdoing doctrine highly relevant and applicable to these cases.[338] Unlike domestic violence, rape is not traditionally defined by this cyclical relationship; however, the context of rape shares other similar defining characteristics with domestic violence that renders the forfeiture by wrongdoing doctrine relevant and applicable.[339]

For instance, although rape victims may not have relationships with their attackers based on past or ongoing threatening patterns, rape victims are often threatened and coerced by their attackers.[340] Furthermore, as in domestic violence contexts, the attackers, rapists, cause the severe psychological trauma that their victims face.[341] Courts should realize that this amounts to intentional infliction, and that such psychological trauma, including feelings of weakness, vulnerability, and mistrust, oftentimes procures rape victims' absence from court.[342] Despite the fact that the forfeiture by wrongdoing doctrine has significant potential to support victimless or evidence-based prosecutions, like domestic violence and rape cases where the victim is unavailable and *Crawford* applies, courts have rarely invoked the doctrine in these contexts.[343]

To ensure the application of the forfeiture by wrongdoing doctrine to rape and domestic violence cases, states should codify the doctrine to allow admission of testimonial hearsay statements made by victims who would otherwise be unable to obtain justice against their perpetrators as a result of *Crawford* and their unavailability at the hands of their attackers.[344] When the forfeiture by wrongdoing doctrine has been applied at the federal level, vic-

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[337] *Id.* at 377 (majority opinion); *see* Leventhal & Aldrich, *supra* note 72, at 98; Stoever, *supra* note 123, at 506–07; Tuerkheimer, *supra* note 96, at 719.

[338] *See Giles*, 554 U.S. at 377; Leventhal & Aldrich, *supra* note 72, at 98; Stoever, *supra* note 123, at 506–07; Tuerkheimer, *supra* note 96, at 719.

[339] *See Giles*, 554 U.S. at 377; BASILE & SALTZMAN, *supra* note 175, at 1–2, 9–11 (explaining characteristics of rape incidents).

[340] *See* WANG & ROWLEY, *supra* note 175, at 7–8 (discussing attributes of rape which call for the application of the forfeiture by wrongdoing doctrine).

[341] WANG & ROWLEY, *supra* note 175, at 18–20.

[342] *See id.* at 18–28; *see also* Applegate, *supra* note 152, at 905–06 (explaining survivors' mental challenges post-rape).

[343] *See* Leventhal & Aldrich, *supra* note 72, at 98 ("Although relatively few courts have relied on [the forfeiture by wrongdoing doctrine] exception in admitting domestic violence testimony, forfeiture may now become an important tool in admitting testimonial evidence in domestic violence cases.").

[344] Lininger, *supra* note 299, at 807; *see* FED. R. EVID. 804(b)(6).

tims have been able to find recourse from the conundrum caused by *Crawford*'s application, specifically in cases of domestic violence and rape.[345] It is particularly easy for defendants to increase their own likelihood of success at trial by procuring the absence of their victim in those cases because they are characterized by intimidation, vulnerability, sensitivity, intimacy, and manipulation.[346] Thus, the defendant may not have to do anything more than the crime already committed in order to procure the victim's unavailability because the crime itself already set the groundwork for the victim-declarant to be under the intimidation, fear, or manipulation of the defendant.[347] That alone can procure the unavailability of the already vulnerable and sensitive victim.[348] By codifying the forfeiture by wrongdoing doctrine, however, states could grant victims the same relief that federal courts do when they apply the doctrine to cases of domestic violence and rape.[349] Under the forfeiture by wrongdoing doctrine, domestic violence and rape victims would no longer feel the pressure of the case resting entirely on their shoulders because a conviction would no longer hinge on their availability at trial. Hearsay statements made by a domestic violence or rape victim would be admissible so long as there is proof that the defendant intentionally procured their unavailability, and, as discussed above, this is commonly the case in these contexts.[350]

To codify the forfeiture by wrongdoing doctrine and ensure its consistent and continuous application to domestic violence and rape cases, advocacy groups and individuals should lobby state legislatures to adopt Federal Rule of Evidence 804(b)(6), the federal codification of the forfeiture by

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[345] Giles v. California, 554 U.S. 353, 377 (2008); Crawford v. Washington, 541 U.S. 36, 62 (2004); *see* Carlson v. Attorney Gen. 791 F.3d 1003 (9th Cir. 2015) (holding the forfeiture by wrongdoing doctrine applicable where the petitioner wrongfully procured the absence of his wife and son); United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (finding the forfeiture by wrongdoing doctrine must exist to prevent defendants from benefiting from their "wrongful prevention of future testimony from a witness or potential witness"); United States v. White, 116 F.3d 903, 911–12 (D.C. Cir. 1997) (stating that a defendant cannot silence a witness "through the use of threats, violence or murder" and if he or she does so, that witness's statements must be admissible even in the witness's absence through the forfeiture by wrongdoing doctrine); United States v. Houlihan, 92 F.3d 1271, 1279–80 (1st Cir. 1996) (applying the forfeiture by wrongdoing exception in order to avoid witness and court suffering by wrongdoing of the defendant); Reynolds v. United States, 98 U.S. 145, 158–59 (1878) (holding that a criminal defendant waives his right to confrontation if his or her own misconduct procured the witness's absence); United States v. Johnson, 354 F.Supp.2d 939, 964 (N.D. Iowa 2005) (holding that there was sufficient evidence that the defendant caused the unavailability of the witnesses).

[346] *See* WANG & ROWLEY, *supra* note 175, at 18–22; Lininger, *supra* note 299, at 808.

[347] *See* Lininger, *supra* note 299, at 808.

[348] *See id.*

[349] *See Giles*, 554 U.S. at 377; Lininger, *supra* note 299, at 807–11; *see also* cases cited *supra* note 345.

[350] *Giles*, 554 U.S. at 367–68, 377; Flanagan, *supra* 85, at 1215.

wrongdoing doctrine.[351] Rule 804(b)(6) provides that an unavailable declarant's hearsay is admissible at trial when the defendant intentionally or "wrongfully cause[d] the declarant's unavailability," thereby waiving the defendant's right to confrontation.[352] It would be relatively easy for states to adopt 804(b)(6) because it is a straightforward and comprehensive declaration of the forfeiture by wrongdoing doctrine and because most states have already modeled their evidence rules after the Federal Rules of Evidence.[353] Currently, only a minority of states have adopted and codified the doctrine in their rules of evidence.[354] Some other states have applied the doctrine as a common law or equitable principle, but others have failed to do so, perhaps because those states find codification unnecessary due to existing case law.[355] Despite this overwhelming lack of a statutory foundation for the doctrine, however, no state court has ever explicitly rejected the forfeiture by wrongdoing doctrine when confronted by it.[356] Nonetheless, it would be

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[351] FED. R. EVID. 804(b)(6) (explaining this hearsay exception is "[a] statement offered against a party that wrongfully causes—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result"); *see also* Lininger, *supra* note 299, at 807–11 (discussing why all states should codify the forfeiture by wrongdoing doctrine).

[352] FED. R. EVID. 804(b)(6).

[353] Leonard Birdsong, *The Exclusion of Hearsay Through Forfeiture by Wrongdoing—Old Wine In a New Bottle—Solving the Mystery of Codification of the Concept into Federal Rule 804(b)(6)*, 80 NEB. L. REV. 891, 895 (2001) (citing 6 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, tbl. t-1 (2d ed. 2000)); Lininger, *supra* note 299, at 807–09.

[354] *See Giles*, 554 U.S. at 365–71, 367 n.2 ("Seven of the twelve States that recognize wrongdoing as grounds for forfeiting objection to out-of-court statements duplicate the language of the federal forfeiture provision that requires purpose."); Birdsong, *supra* note 353, at 918–19 (explaining that some even thought federal codification was unnecessary given the significant case law that would have led to the same conclusion and application of the forfeiture by wrongdoing doctrine); Lininger, *supra* note 299, at 807 (citing CAL. EVID. CODE § 1350; DEL. R. EVID. 804(b)(6); HAW. REV. STAT. § 626-1, Rule 804; MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); PA. R. EVID. 804(b)(6); S.D. CODIFIED LAWS § 19-19-804(b)(6); TENN. R. EVID. 804(b)(6)).

[355] *See* Birdsong, *supra* note 353, at 891–915 (citing Weinstein & Berger, *supra* note 353); *see, e.g.*, United States v. Dhinsa, 243 F.3d 635, 652 (2d Cir. 2001) (citing United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982)) (justifying forfeiture by wrongdoing doctrine on equitable grounds by stating that a person cannot take advantage of his or her own wrongdoing); People v. Geraci, 649 N.E.2d 817, 821 (N.Y. 1995) ("[l]ike all of the other courts that have adopted and applied the rule, we conclude that out-of-court statements, including Grand Jury testimony, may be admitted as direct evidence where the witness is unavailable to testify at trial and the proof establishes that the witness's unavailability was procured by misconduct on the part of the defendant"); *see also, e.g.*, State v. Byrd, 967 A.2d 285, 295–300 (N.J. 2009) (determining "the appropriate means by which to make the forfeiture-by-wrongdoing doctrine a part of [New Jersey's] Rules of Evidence").

[356] Birdsong, *supra* note 353, at 895–96 (discussing how although codification may not be necessary because states always apply the policy behind the forfeiture by wrongdoing doctrine, it is still beneficial for states to codify it in order to make its application more reliable, effective, and certain); Lininger, *supra* note 299, at 807–11 (discussing the implicit injustice and immorality of allowing a defendant to secure his or her own benefit by manipulating the Confrontation Clause to his or her advantage and procuring the unavailability of the declarant).

beneficial for all states to codify the doctrine to ensure its consistent application and that the doctrine is not overlooked. Codification will be a "reliable and effective means of insuring that there will be a prophylactic rule" against procuring the declarant's unavailability through a wrongdoing.[357] This is especially vital in domestic violence and rape cases given the high likelihood of victims whose unavailability has been procured by defendants as a result of the severe psychological components, such as control, vulnerability, and manipulation, that accompany these contexts.[358]

In addition to codifying the forfeiture by wrongdoing doctrine, state courts, in applying the doctrine, should expressly recognize that wrongdoing and intentional procurement includes subjecting the victim to the honeymoon phase, a phenomenon present in domestic violence and likely rape, too.[359] The honeymoon phase itself is a form of abuse as it is part of the cycle of violence involved in domestic abuse cases. Perpetrators use the honeymoon phase as a tool to manipulate their victims from escaping abuse by creating false pretenses of change and improvement.[360] Courts should recognize that the honeymoon phase allows a defendant to procure a declarant's unavailability to testify, not only through violent intimidation, but also by misleading the declarant to believe that things will change for the better, that the defendant loves the victim, or that the violence was a deserved punishment.[361]

Moreover, although the honeymoon phase does not exist in rape cases per se, a variation of this type of manipulation can exist.[362] For example, rapists who are in a position of authority over rape victims, as is oftentimes the case with incest and child sexual assault, can manipulate their victims into believing that what they are doing is normal and out of love.[363] Although *Giles* did acknowledge that the forfeiture by wrongdoing doctrine includes patterns of abuse, threats, coercion or control, the holding did not explicitly discuss how coercion can include the honeymoon phase, or false and manipulative promises of love, normalcy and change.[364] Furthermore,

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[357] Birdsong, *supra* note 353, at 919 (citing United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)).

[358] *See* Lininger, *supra* note 299, at 810; Meier, *supra* note 2, at 23.

[359] *See* Stoever, *supra* note 123, at 506–07 (describing the honeymoon phase as the final phase of the cyclical nature of domestic violence, before the cycle repeats itself, characterized by expressions of remorse, love, and promises of change by the perpetrator).

[360] *See* Giles v. California, 554 U.S. 353, 380 (2008) (Souter, J., concurring); Stoever, *supra* note 123, at 506–07.

[361] *See* Stoever, *supra* note 123, at 506–07.

[362] *See* BREIDING ET AL., *supra* note 170, at 1–2; WANG & ROWLEY, *supra* note 175, at 18–20.

[363] *See* BREIDING ET AL., *supra* note 170, at 1–2; WANG & ROWLEY, *supra* note 175, at 18–20; Stoever, *supra* note 123, at 506–07.

[364] *See Giles*, 554 U.S. at 377 (majority opinion); Stoever, *supra* note 123, at 506–07.

the holding did not expand beyond the context of domestic violence.[365] Courts must realize this expansion of what constitutes wrongdoing under the doctrine, thereby setting a consistent precedent for future domestic violence and rape cases.

Opponents might argue that such codification and expansion of the forfeiture by wrongdoing doctrine risks creating too many holes in a defendant's Sixth Amendment right to confrontation.[366] For instance, as one of the primary supporters of the Confrontation Clause, Justice Scalia would likely appreciate this criticism as he emphasized in *Crawford* that the purpose and intent behind the Sixth Amendment should not be subject to vague evidence rules that can be manipulated.[367] Furthermore, other critics of the forfeiture by wrongdoing doctrine argue that, unlike in the Federal Rules of Evidence, nowhere in the Sixth Amendment is there a mention of intent or motive; rather, the defendant's right to confrontation is absolute.[368] In other words, the application of the forfeiture by wrongdoing doctrine under the Federal Rules of Evidence would undermine the Constitution. Despite these criticisms, the forfeiture by wrongdoing doctrine does not in fact conflict with the Confrontation Clause; it only places control of the right to confrontation in the very hands of the person it belongs to—the defendant. A defendant must take an affirmative action to strip himself of his Sixth Amendment right.[369] Otherwise, the right presumptively stands.[370] By placing the defendant in control of his or her own constitutional right, the forfeiture by wrongdoing doctrine conforms to the historical intent and purpose behind constitutional rights, such as incentivizing moral conduct.[371]

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[365] *Giles*, 554 U.S. at 377.

[366] Lininger, *supra* note 299, at 758–59 (discussing how many academics and judges call for strict and rigorous enforcement of the Sixth Amendment).

[367] *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("[W]e do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"); Lininger, *supra* note 299, at 758–59.

[368] United States v. Garcia-Meza, 403 F.3d 364, 370–71 (6th Cir. 2005) (discussing how a defendant's intentions to procure unavailability should not impact the right granted to a defendant by the Sixth Amendment because that right does not depend on the Federal Rules of Evidence).

[369] Isley Markman, *The Admission of Hearsay Testimony Under the Doctrine of Forfeiture-by-Wrongdoing in Domestic Violence Cases: Advice for Prosecutors and Courts*, 6 CRIM. L. BRIEF 9, 15 (2011).

[370] *See id.*

[371] *See id.*

D. Improving Safeguards for Domestic Violence and Rape Victims Before and During Trial

1. Reducing Time Between Investigation and Trial Through Rape Kit Analysis

One way to ameliorate the negative consequences of *Crawford*'s application to rape cases, in particular, is to provide safeguards for victims before and during trial so that they are confident in their decision to be available for cross-examination. This type of support would allow for the admissibility of their statements, whether testimonial or not, and increase the likelihood of conviction.[372] One potential safeguard is to simply reduce the time between the attack and the first opportunity for cross-examination.[373] As time passes, victims often become increasingly less cooperative with prosecution.[374] Reduced time between the attack and cross-examination allows for less opportunity for the victim's fear of testifying at trial to heighten, and less opportunity for the defendant to threaten or coerce the victim from testifying.[375]Although courts cannot necessarily choose to hear a case quickly or sooner than others, there is a way for police and lab technicians to help expedite the path toward trial and how quickly rape cases get on court dockets—by decreasing the rape kit backlog.[376]

The conviction of rapists relies heavily on DNA evidence gathered from a rape kit.[377] A rape kit, also known as a sexual assault kit, is a package of items that is utilized to collect evidence, including DNA evidence, from a rape victim's "body, clothes, and other personal belongings."[378] If a

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[372] *See Crawford*, 541 U.S. at 47, 51–62.

[373] *See* Mosteller, *supra* note 130, at 415 (providing examples of reducing the time between an attack and the first opportunity for cross-examination through the use of a preliminary hearing).

[374] *Id.*

[375] *See id.*

[376] *See* MARK NELSON ET AL., U.S. DEP'T OF JUSTICE, MAKING SENSE OF DNA BACKLOGS, 2012—MYTHS VS. REALITY 1–7 (2013), https://www.ncjrs.gov/pdffiles1/nij/243347.pdf [https://perma.cc/VZH3-5AP4] (explaining conditions leading to backlog of DNA testing); NANCY RITTER, U.S. DEP'T OF JUSTICE, THE ROAD AHEAD: UNANALYZED EVIDENCE IN SEXUAL ASSAULT CASES 3–13 (2011), https://www.ncjrs.gov/pdffiles1/nij/233279.pdf [https://perma.cc/6N43-UT5Y] (analyzing how to improve the DNA backlog and get cases to trial). By making it onto a court docket, a rape case would be on the court's radar even if not yet in the courtroom. *See Addressing the Rape Kit Backlog*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/articles/addressing-rape-kit-backlog [https://perma.cc/P3EG-XCWT].

[377] RITTER, *supra* note 376, at 1 ("the repercussions [of the backlog] are affecting every stakeholder in the nation's criminal justice system: the police and crime laboratories; the courts; victim service agencies; policymakers at the federal, state and local levels; and, most significantly, the victims"). *See generally* NELSON ET AL., *supra* note 376 (discussing the importance of eliminating the rape kit backlog because it is crucial to obtaining convictions against perpetrators of sexual violence).

[378] RITTER, *supra* note 376, at 1; *What Is a Rape Kit?*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/articles/rape-kit [https://perma.cc/X282-L4YS].

prosecutor sees that a rape kit has been used at the crime scene and DNA evidence has been analyzed to identify the defendant, he or she is more likely to file a complaint and pursue the case through to trial.[379] This encourages rape victims to cooperate with prosecution by increasing their confidence in success of their case and that they will not be scrutinized because they have hard forensic evidence to support their recitation of the facts.[380] Thus, not only can rape kits help expedite rape cases, but they can also render *Crawford* entirely moot by encouraging the availability of rape victims for cross-examination.

Although many rape victims bravely choose to go to the hospital and undergo intrusive rape kit procedures in the event that they should choose to seek justice against and accuse their attacker, many of these rape kits remain in labs or police evidence rooms entirely untested.[381] This means that DNA evidence of their attacker is collected but never analyzed, and the attacker remains unidentified.[382] The U.S. Department of Justice estimates there are one hundred thousand rape kits nationwide that have not yet been tested, and the media reports an even higher number of four hundred thousand.[383] This backlog significantly hinders the speed in which rape prosecutions occur because so many rape prosecutions rely on DNA evidence, especially ones where the rapist is an unidentified stranger.[384]

The Debbie Smith Reauthorization Act (the "Act"), which amends the Debbie Smith Act of 2004 and secures funding for the Debbie Smith DNA Backlog Grant Program through 2019, is a promising solution to the rape kit backlog.[385] The program allocates grants to states and municipalities to help reduce and eventually eliminate the national DNA backlog by identifying the reason or source behind backlogs in states.[386] The grant program strives to provide training and education in the investigation of rape kits and

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[379] *See* RITTER, *supra* note 376, at 1.

[380] *See The Importance of DNA in Sexual Assault Cases*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/articles/importance-dna-sexual-assault-cases [https://perma.cc/MTX6-5PBY].

[381] *See* RITTER, *supra* note 376, at 1.

[382] *See id.*

[383] NELSON ET AL., *supra* note 376, at 2; *Outrage over Nationwide Rape Kit Backlog*, CNN (May 28, 2013, 11:12 PM), http://ac360.blogs.cnn.com/2013/05/28/outrage-over-nationwide-rape-kit-backlog/ [https://perma.cc/6ZEF-K4EN]; *see Addressing the Rape Kit Backlog*, *supra* note 376.

[384] *See What Is a Rape Kit?*, *supra* note 378.

[385] Debbie Smith DNA Backlog Grant Program, 42 U.S.C. § 14135 (2014); Debbie Smith Reauthorization Act, Pub. L. No. 113-182, 128 Stat. 1918; *see What Is a Rape Kit?*, *supra* note 378.

[386] 42 U.S.C. § 14135.

bring more transparency and accountability to the legal process of DNA analysis for victims.[387]

Although funding under the grant program will continue through 2019, lobbying is needed to ensure that the Act will be continually reauthorized until there is sufficient funding to completely eliminate the backlog.[388] By eliminating the rape kit backlog, the Act will encourage rape victims to be available for cross-examination by increasing the instances in which the time between the rape and the trial is minimized. It will also provide forensic evidence to support the verbal claims made by the victim, thereby decreasing, if not extinguishing, any doubt the court or public may have in the victim's allegations.[389] Eliminating the rape kit backlog will also balance the inadmissibility of crucial testimonial hearsay with the admissibility of crucial DNA evidence; even if a victim still chooses to be unavailable for cross-examination in spite of a rape kit, any damage to the prosecutor's case done by the victim's absence can still be reversed by the admissibility of the rape kit as evidence, which will provide strong forensic support to the prosecution.[390]

2. Requiring Tamer Cross-Examination of Domestic Violence and Rape Victims During Trial

A secondary approach to mitigating *Crawford*'s detrimental effects on domestic violence and rape cases is to relax the guidelines for cross-examination. Because both domestic violence and rape victims choose to avoid availability at trial primarily due to the fear of facing their attacker or re-victimization during harsh and embarrassing cross-examination, guidelines for more sensitive cross-examination can encourage more availability of victim-declarants at trial.[391] If more victims were available at trial, this

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[387] *Id.*

[388] *See id.* Lobbyists for the original federal bill include the Rape, Abuse & Incest National Network (RAINN), the nation's largest anti-sexual assault network. Debbie Smith Reauthorization Act of 2014, H.R. 4323, 113th Cong. (2014); *About RAINN*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/about-rainn [https://perma.cc/K3JQ-C5L9].

[389] *See* Applegate, *supra* note 152, at 905–06; *The Importance of DNA in Sexual Assault Cases*, *supra* note 380.

[390] *See* Crawford v. Washington, 541 U.S. 36, 61 (2004); *The Importance of DNA in Sexual Assault Cases*, *supra* note 380.

[391] *See* Meier, *supra* note 2, at 23 (explaining fear felt by victims during prosecution of abusers); Stoever, *supra* note 123, at 488 (describing specific strategies attorneys representing victims use); Tuerkheimer, *supra* note 96, at 713–16 (describing changes in domestic violence prosecutions and confusion among courts after *Crawford*); Applegate, *supra* note 152, at 905 (explaining physical and psychological effects of rape on victims' accounts of their abuse to law enforcement); *see also* Giles v. California, 554 U.S. 353, 376–78 (2008) (explaining domestic violence is unique as compared to other crimes because it can involve "intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering

would ultimately eliminate potential problems that can arise from a defendant's right to confrontation. Such guidelines can prevent defense counsel from employing excessively cruel and callous cross-examination tactics that can make domestic violence and rape victims feel more fearful, vulnerable, and alone than they already feel on the stand.[392]

Federal Rule of Evidence 611(a) would benefit victims of domestic violence and rape if states codified the rule, or a version of it, and uniformly applied it in all jurisdictions. Currently, not all state jurisdictions have adopted the rule.[393] Rule 611(a) requires a court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment."[394] In other words, Rule 611(a), if invoked by prosecutors, can set boundaries for cross-examination and restrain defense counsel from causing domestic violence and rape victims any further stress or hardship. This rule can provide comfort to victims of domestic violence and rape because their attorneys can object when the opposing party's counsel is interrogating the victim in a grating, cruel, or severe manner that makes the victim uncomfortable.[395] In doing so, the victim's attorney can protect the victim from further discomfort that he or she would otherwise feel during a harsh and embarrassing cross-examination.[396] By utilizing this rule consistently and more frequently through codification in all jurisdictions, prosecutors can ensure that victim-declarants will be more likely to cooperate with prosecution and be available for cross-examination, thereby preventing *Crawford* from banning the testimonial hearsay evidence that can convict their attackers.[397]

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her prior statements admissible under the forfeiture doctrine"); Leventhal & Aldrich, *supra* note 72, at 98 (detailing interpersonal and economic factors affecting victims' abilities to testify against abusers).

[392] *See* Meier, *supra* note 2, at 23; Stoever, *supra* note 123, at 488.

[393] Lininger, *supra* note 147, at 1387–88 (citing 6 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, T-46 to T-50 (Joseph M. McLaughlin ed., 2d ed. 1997) (noting that as of today, twelve jurisdictions have not adopted Federal Rule of Evidence 611(a)).

[394] FED. R. EVID. 611(a).

[395] *See id.*

[396] *See id.*; *see also* Leventhal & Aldrich, *supra* note 72, at 98 (detailing interpersonal and economic factors affecting victims' abilities to testify against abusers); Meier, *supra* note 2, at 23 (explaining fear felt by victims during prosecution of abusers); Stoever, *supra* note 123, at 488 (describing specific strategies attorneys utilize when representing these sensitive victims); Tuerkheimer, *supra* note 96, at 713–16 (describing changes in domestic violence prosecutions and confusion among courts after *Crawford v. Washington*, 541 U.S. 36 (2004)).

[397] *See* Leventhal & Aldrich, *supra* note 72, at 98; Meier, *supra* note 2, at 23; *see also* Tuerkheimer, *supra* note 96, at 713–16 (describing upheaval in domestic violence prosecutions post-*Crawford*); Applegate, *supra* note 152, at 905 (explaining physical and psychological effects of rape on victims' accounts of their abuse to law enforcement).

Despite the aforementioned benefits of Rule 611(a), there are impediments to its ultimate success.[398] Unfortunately, not all jurisdictions have adopted Rule 611(a) or a version of it.[399] This lack of uniformity and consistency in jurisdictions across the nation deprives victims of the assurance of protection during cross-examination that Rule 611(a) is intended to provide. Additionally, many critics claim that there is a lack of guidance and consistency in the application of Rule 611(a) because it does not define what constitutes "harassment or undue embarrassment," leaving that subjective determination up to the courts.[400] Without a definition or guidance, critics warn that prosecutors are able to apply the rule too broadly because determinations of what constitutes harassment and embarrassment can be subjective, thereby preventing effective cross-examination and hindering necessary components of the trial and adversarial process.[401] In other words, prosecutors may object to cross-examination too frequently under Rule 611(a) and disrupt the judicial process in doing so. On the other hand, proponents of the rule claim that in practice the discretion or subjectivity granted to prosecutors by the rule does not impede effective cross-examination because thus far, prosecutors have not exploited Rule 611(a) and have instead applied it selectively.[402]

Finally, many scholars have argued that Rule 611(a) is a difficult standard to meet.[403] Not just any improper cross-examination tactic can be challenged by a prosecutor under the rule but, rather, there must be "strong evidence" of embarrassment or harassment.[404] Some courts go as far as requiring apparent physical signs of embarrassment or harassment, such as crying, before they invoke Rule 611(a), at which point the emotional pain the victim faces may be irreparable.[405] Critics argue that this high standard renders the rule unnecessary because judges are likely to stop the cross-examination before it escalates to that level.[406]

For these reasons, Rule 611(a) might not be the most efficient tool for supporting and protecting domestic violence and rape victims during cross-examination. However, because Rule 611(a) can help a victim feel more confident and safe in deciding to cooperate with prosecution and be available for cross-examination, it is essential that states adopt, and prosecutors

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[398] *See* Lininger, *supra* note 147, at 1387–88.

[399] *Id.* at 1387 n.199 (citing Weinstein & Berger, *supra* note 393).

[400] *Id.* at 1387–88.

[401] *See id.* (explaining commentators have argued that Federal Rule of Evidence 611(a) "sets a very high standard for improper cross-examination").

[402] *See id.*

[403] *See id.*

[404] *Id.*

[405] *Id.*

[406] *Id.*

invoke, this rule. To encourage courts to enforce these rules and create consistent precedent, all jurisdictions should adopt and appropriately apply a form of Rule 611(a). Doing so would provide support and protection to domestic violence and rape victims at trial, thereby preventing *Crawford* from hindering the prosecution.[407]

3. Allowing Emotional or Psychological Support for Domestic Violence and Rape Victims During Trial

Facing trial after domestic violence or rape is especially difficult for victims given the highly emotional and psychological components of these attacks.[408] These types of attacks often create long-lasting impacts on victims, such as feelings of insecurity, vulnerability, and loneliness.[409] Being put on the stand to testify in front of a courtroom full of people and their attacker can undoubtedly exacerbate these feelings. A domestic violence or rape victim assumes the obvious fear that accompanies having to face his or her attacker, someone who has already forced the victim to endure immense physical and psychological pain. Additionally, a victim in court must confront those present in the courtroom who are either unsure whether to believe the victim or are adamantly against believing the victim. Furthermore, discussing the event of an attack can cause the victim to relive the incident and the feelings that came with it, making it more painful and difficult to testify in a courtroom.[410]

To help alleviate the trauma of discussing and being questioned about these attacks and facing their attackers, it would be beneficial for domestic violence and rape victims to have a support person—someone who the victim looks to as a source of strength, consolation, comfort, and understanding—present in the courtroom. This type of person can be essential for these victims because in a time of weakness and vulnerability that stems from inner beliefs, memories, and feelings, victims often turn to external sources as means of strength and encouragement.[411]

Some states have adopted statutes that allow rape and domestic violence victims to bring someone with them to trial, such as a family member, friend, counselor, or court-appointed advocate, who will provide emotional or psychological support during the trial.[412] Such persons allow rape and

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[407] *See id.*

[408] *See* WANG & ROWLEY, *supra* note 175, at 18–28.

[409] *See id.*

[410] *See id.* at 45.

[411] *Id.* at 18–28.

[412] Lininger, *supra* note 147, at 1392–93 n.219 (citing CAL. PENAL CODE § 868.5 (2005)) (highlighting § 868.5 as example of state statute permitting support person by side of testifying witness so long as support person does not interfere with testimony and only provides emotional

domestic violence victims to feel more comfortable testifying at trial and being cross-examined. Simply being able to see the face of someone who has supported the victim throughout the psychological hardships of their attack provides victims with a source of strength and comfort while on the witness stand.[413] In fact, it is not even necessary for the person to speak or contribute in any way other than merely being present; this alone can help alleviate a victim's anxiety, stress, depression, and trauma when it comes to cross-examination because the victim recognizes that the very purpose of the person's presence in that courtroom is comfort and support for the victim. Additionally, by indicating to the courtroom that the victim is not alone, a support person may hinder any attempts by the attacker to intimidate the victim while he or she is testifying.[414]

Critics suggest that although states that have adopted these support-person rules also require that the person does not interfere with the judicial proceedings in any manner other than to be present for the victim, there may still be undue prejudice at a trial due to the presence of a support person. This is because the mere presence of the support person may inevitably shed the victim in a vulnerable light.[415] In doing so, the judge or jury may sympathize more with the victim, causing them to grant a more favorable ruling than they otherwise would have. Albeit a valid concern, the role of a support person is highly discreet; the rules regarding support persons prohibit them from stopping what they believe to be an improper examination.[416] For example, California's application of its support-person rule requires that, "if the presence of the support person interferes in any way with the testimony of the witness, the judge may remove the support person from court."[417] Rather, a support person can only be physically present as a focal point of strength for the victim who is being cross-examined about a highly sensitive event. Furthermore, most rules regarding support persons prohibit

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support). Other states have also codified support-person statutes, including Colorado, which allows at trial "any person whose regular or volunteer duties include the support of an alleged victim of physical or sexual abuse or assault," Michigan, which allows a victim of sexual assault or child abuse who is testifying at trial to have a support person nearby during his or her testimony, and Washington, which similarly allows a victim of sexual violence to have a support person at his or her judicial proceeding. *Id.* at 1392 n.221 (citing COLO. REV. STAT. § 16-10-401 (2004); MICH. COMP. LAWS § 600.2163a(4) (2016); WASH. REV. CODE § 7.69.030(10) (2005)).

[413] Lininger, *supra* note 147, at 1392–93.

[414] *Id.* (arguing that support persons at trial make a victim feel more secure and less intimidated by his or her perpetrator because the perpetrator sees power in numbers). For instance, if the victim did not have anyone at trial other than an attorney, then the perpetrator may presume that the victim is alone and abandoned, and therefore weaker and less resilient to intimidation—a seemingly easy target to manipulate. *See id.*

[415] *Id.*

[416] *Id.*

[417] *Id.* at 1392 n.220 (citing PENAL § 868.5).

advocacy by the support person on behalf of the victim in *any* manner but support.[418]

Another potential criticism of these support-person rules is that a support person for the victim at trial can serve as a detriment to the defendant.[419] Critics believe that the support person's presence can create a bias that the defendant is a threatening person. On the other hand, it may also be a detriment to the victim because having a support person present in the courtroom could make the victim appear weak and therefore susceptible to harm. For this reason, not all victims may want a support person present at trial because they view their legal battle as part of their journey to recovery from their attack, and a part of that journey may be going about it as independently as possible.[420] This potential problem could be resolved by codifying support-person rules in a way to ensure that the presence of a support person can be guaranteed at the behest of the victim.[421] This is especially important because rape victims often feel as though their power of choice has been taken away from them.[422] States that have not yet adopted a support-person rule and states that have should be lobbied to codify and amend this rule, respectively, to allow for the presence of support persons at trial.[423] Doing so will encourage many rape and domestic violence victims to be available for cross-examination, thereby alleviating the destructive impacts that *Crawford* otherwise has on cases where the victim-declarant is unavailable at trial.

CONCLUSION

Evidently, *Crawford v. Washington* and its progeny can be a significant detriment to the prosecution of rape and domestic violence cases by keeping testimonial hearsay—evidence that is often essential for a conviction—out of trial when victims of such cases are unavailable for cross-examination. Subsequently, perpetrators of these crimes are going free, leaving a trail of more victims in their path, and leaving their own victims who chose not to confront them to feel responsible and guilty—feelings that victims already

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[418] Lininger, *supra* note 147, at 1393 n.223 (citing Commonwealth v. Harris, 567 N.E.2d 899, 905 (Mass. 1991) (despite finding no reversible error, "the Supreme Judicial Court of Massachusetts expressed consternation that a victim's advocate held the hand of the decedent's mother during a murder trial")).

[419] *Id.* at 1392–94.

[420] *See* WANG & ROWLEY, *supra* note 175, at 44–45; Lininger, *supra* note 147, at 1392–94.

[421] Lininger, *supra* note 147, at 1392–93.

[422] *See generally* WANG & ROWLEY, *supra* note 175 (discussing the psychological effects of sexual violence and the importance of empowering victims with the ability to make their own decisions in seeking recourse).

[423] *See* Lininger, *supra* note 147, at 1392 n.221 (explaining that a total of fourteen states have enacted statutes permitting support persons in the courtroom).

suffering from the psychological harm caused by domestic violence and rape should not have to endure.

Crawford creates this effect in cases of domestic violence and rape more detrimentally than in others due to the unique psychological components surrounding these cases—components which cannot be ignored as they are the inevitable painful effects the victims of these cases endure. For instance, even when initially determining whether *Crawford*'s application is even appropriate in a domestic violence or rape case, courts fail to recognize the psychological components of these cases. Because *Crawford* only applies to testimonial hearsay, courts must carefully consider the unique psychological circumstances that may make a statement testimonial in a domestic violence or rape case, but not in another type of case. Yet, courts commonly, though incorrectly and inconsistently, consider domestic violence and rape victims' statements testimonial despite the fact that these cases are characterized by lasting psychological effects, whether through the cyclical and manipulative nature of domestic violence or the vivid post-traumatic flashbacks of rapes, that create an ongoing state of emergency long after a 911 telephone call is placed.

Additionally, domestic violence and rape victims are particularly susceptible to becoming unavailable for cross-examination for psychological reasons such as being manipulated by their relationship with their attacker, being afraid to face their attacker, or being violated and biasedly distrusted by the harshness and invasiveness of court proceedings. As a result of this increase in likelihood of unavailability of domestic violence and rape victims in conjunction with the fact that *Crawford* calls for victims' availability to admit crucial hearsay evidence in spite of the unique psychological components inducing their unavailability, prosecutors are reluctant to pursue these cases. In turn, perpetrators of domestic violence and rape are not convicted or often even tried, and their victims are left not only to fear another attack on themselves, but also to fear an attack on others that will leave them bearing that weight of responsibility and guilt on their shoulders.

To help ameliorate the destructive impacts of *Crawford* on domestic violence and rape cases, state legislatures, and, in some cases, Congress, must be lobbied to adopt the following remedies: (1) restrict the definition of testimonial to never include excited utterances, present sense impressions, and statements made to medical personnel; (2) expand the definition of ongoing emergency to include up to twenty-four hours after a rape or a domestic violence attack; (3) codify the forfeiture by wrongdoing doctrine; and (4) improve safeguards for victims before and during trial, including reducing the time between investigation and cross-examination, enforcing more sensitive cross-examination practices, and permitting emotional or psychological support systems at trial for victims of rape and domestic vio-

lence. As a result of the violent crimes committed against them, rape and domestic violence victims continue to suffer psychologically and emotionally. It is the job of the criminal justice system to not add to that pain and suffering, but to instead recognize and protect the sensitive nature of these cases and these victims. If adopted, the proposed changes articulated in this Article could ultimately help "many domestic violence [and rape] cases to be swept out from under the strictures of *Crawford* . . . ."[424]

[424] Meier, *supra* note 2, at 27.