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Melissa Moody

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A BLOW TO DOMESTIC VIOLENCE VICTIMS: APPLYING THE "TESTIMONIAL STATEMENTS" TEST IN CRAWFORD V. WASHINGTON

MELISSA MOODY*

I. INTRODUCTION

The Supreme Court struck a fatal blow to 'victimless' domestic violence prosecutions1 with its recent decision in Crawford v. Washington.2 In Crawford, the Court held that the Confrontation Clause of the Sixth Amendment requires witnesses to appear in court.3 Specifically, the Court held that in order for an unavailable witness's testimony to be admissible, the defendant must have had a prior opportunity for cross-examination.4 This holding, which overruled precedent set twenty-four years earlier in Ohio v. Roberts,5 was framed against the history of ex parte abuses that were made famous by Sir Walter Raleigh's trial for treason.6 Unfortunately, Sir Walter Raleigh's story has little to do with the stories of domestic violence victims and ex parte abusers. The lack of guidance from the Court regarding the proper application of its 'new and improved' Sixth Amendment jurisprudence has resulted in a disturbing number of inconsistent holdings throughout the United States.7 More disturbing than the sheer number of inconsistencies, however, is the fact that the Court's academically

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* The opinions expressed in this article are solely those of the author and do not represent those of the Idaho Office of the Attorney General. The author would like to thank Steven Clymer for sharing his passion and vast knowledge of the criminal law. His lessons continue to inspire.

1. 'Victimless' prosecutions rely on evidence from sources other than victim testimony when, as is often the case, the domestic violence victim is unable or unwilling to testify. For a discussion of this type of evidence-based prosecution, see Cory Adams, Deterring Domestic Violence: Prospects for Heightened Success in the "Victimless" Prosecution of Domestic Violence Cases, 11 J. CONTEMP. LEGAL ISSUES 51 (2000).
3. Id. at 1374.
4. Id.
5. 448 U.S. 56 (1980). Roberts held that the test for admitting hearsay evidence was whether the hearsay evidence was reliable. Id. at 57. Reliability turned on whether the hearsay evidence "fell within a firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." Id.
6. Crawford, 124 S. Ct. at 1360-63. Justice Scalia's opinion described the seventeenth century political trial of Sir Walter Raleigh at some length. Id. at 1360-63. Raleigh was falsely convicted of treason without being afforded the opportunity to confront his accuser. Id. Unlike the domestic batterer of today who tries every trick in the book to prevent his significant other from testifying, Raleigh actually urged the court to have his accusers appear before him at trial. Id.
7. See infra Part II.
appealing interpretation of the Sixth Amendment right to confrontation has significantly eroded offender accountability in domestic violence prosecutions.

Part II of this article briefly summarizes the facts, holding, and rationale behind the Supreme Court's momentous about-face in Sixth Amendment jurisprudence. Part III details numerous inconsistencies in state court interpretations of Crawford's intentionally-oblique mandate. Part IV discusses how the Crawford holding binds the hands of prosecutors, as well as legislators, in taking action to end domestic violence. Finally, Part V seeks solutions, arguing that "testimonial" statements should never include excited utterances or statements to medical treatment providers.

II. THE COURT'S DECISION IN CRAWFORD V. WASHINGTON

Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. Sylvia gave the police a statement that implicated Crawford, but Crawford later invoked the marital privilege, successfully preventing her from testifying at trial. The Court allowed the prosecution's admission of evidence in the form of an audiotape of Sylvia's statement to the police, and the jury convicted Crawford of assault. The Washington Court of Appeals reversed, concluding that Sylvia's statement was not sufficiently trustworthy to warrant admission. The Washington Supreme Court reinstated Crawford's conviction, unanimously concluding that Sylvia's statement was reliable and admissible. The United States Supreme Court reversed the Washington Supreme Court and remanded the case, holding that the admission of Sylvia's statement violated Crawford's Sixth Amendment right
to confront his accuser.\textsuperscript{14} Before arriving at this conclusion, the Court turned to the historical background of the Confrontation Clause to understand its meaning,\textsuperscript{15} noting that "[t]he Constitution's text does not alone resolve this case."\textsuperscript{16} Writing for the Court, Justice Scalia discussed the history of civil law examination and \textit{ex parte} abuses, including Sir Walter Raleigh's infamous trial for treason.\textsuperscript{17}

According to Justice Scalia, the history of the Confrontation Clause supports two inferences about the meaning of the Sixth Amendment: "[f]irst, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of \textit{ex parte} examinations as evidence against the accused,"\textsuperscript{18} and second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."\textsuperscript{19} Simply because these limitations on hearsay admissibility existed at the time the Constitution was written, a time when domestic violence was

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  \item \textsuperscript{14} \textit{Crawford}, 124 S. Ct. at 1374. Significantly, the Court did not address whether Crawford waived his right to confrontation by invoking the marital privilege to prevent his wife from testifying. In a footnote, Justice Scalia wrote:

  The [Washington] court rejected the State's argument that guarantees of trustworthiness were unnecessary since petitioner waived his confrontation rights by invoking the marital privilege. It reasoned that "forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice" (quoting State v. Crawford, 54 P.3d, at 660) . . . The State has not challenged this holding here. The State also has not challenged the Court of Appeals' conclusion (not reached by the State Supreme Court) that the confrontation violation, if it occurred, was not harmless. We express no opinion on these matters.

  Id. at 1359 n.1.
  
  \item \textsuperscript{15} \textit{Id.} at 1359. It should be apparent that "turn[ing] to the historical background of the Clause to understand its meaning", \textit{id.}, necessarily prevents consideration of domestic violence prosecutions in the context of the Confrontation Clause. At the time the United States Constitution was penned, it was more than acceptable for men to physically abuse their spouses. See Prentice L. White, \textit{Stopping the Chronic Batterer Through Legislation: Will It Work this Time?}, 31 PEPP. L. REV. 709, 715-16 (2004). In fact, one of the first authorities cited by the Supreme Court on its historical \textit{tour de force} was Blackstone, a legal scholar who endorsed and codified "domestic chastisement." White, \textit{supra} at 715. Domestic chastisement has been described as the husband's power of correction to modify his wife's behavior as necessary to uphold the patriarchal family structure. \textit{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.

  \item \textsuperscript{16} \textit{Crawford}, 124 S. Ct. at 1359.
  \item \textsuperscript{17} \textit{Id.} at 1359-63.
  \item \textsuperscript{18} \textit{Id.} at 1363.
  \item \textsuperscript{19} \textit{Id.} at 1365.
\end{itemize}
tolerated by the criminal law and encouraged by social mores, the Court concluded neatly that "[t]he Sixth Amendment therefore incorporates those limitations." The effect of this decision is that for an unavailable witness's hearsay testimony to be admissible at trial, the defendant must have had a prior opportunity to cross-examine the witness regarding the statement.

While the Court acknowledged some exceptions to the general exclusion of hearsay evidence, it only recognized exceptions existing in 1791, at the time of the adoption of the Sixth Amendment. Examples of such exceptions include "business records or statements in furtherance of a conspiracy." A dying declaration is also admissible, despite the defendant having been denied a prior opportunity for cross-examination. The Court emphasized its overarching concern that the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse — a fact borne out time and again throughout a history with which the Framers were keenly familiar."

Chief Justice Rehnquist and Justice O'Connor disagreed with the Court's holding in a dissent framed as a concurrence, wherein the two Justices reached the same result as the majority. In reaching the same result, however, Justices Rehnquist and O'Connor were less eager to overrule twenty-four years of precedent. Chief Justice Rehnquist wrote:

20. See supra note 15 and accompanying text.
22. Id. at 1369.
23. See id. at 1367.
24. Id.
25. Id. at 1367 n.6.
26. Id. at 1367 n.7. Unfortunately, the Court seemed more attuned to the unique abuses of yesterday than the actual current abuse of the criminal justice system by domestic batterers. Consider the perspective of a public defender:

Scalia either ignores or forgets the sad daily truth of local domestic violence courtrooms: that ideologically driven judicial decision-making is alive and well even in run of the mill assault cases. Whether he knew it or not, Scalia has, in essence, radically shifted the balance of power from prosecutors to reluctant complainants, giving alleged victims more control over the cases of their own victimization and greater freedom from the paternalistic philosophy of prosecution that the Roberts rule enabled. So from now on, when the complainant in a domestic violence case insists she's not coming to court and just wants to drop the charges, I'll just smile as Judge Kiesel says, "Case dismissed."

I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case. 28

Chief Justice Rehnquist's words have come to haunt both federal and state prosecutions, for his predicted "mantle of uncertainty" has materialized more ominously as a 'gag order on justice.' 29

III. THE INCONSISTENT APPLICATION OF CRAWFORD'S HOLDING PRODUCES UNDESIRABLE RESULTS

The Crawford Court abandoned the 'reliability' test for admitting hearsay statements, commenting that "[l]iability is an amorphous, if not entirely subjective, concept." 30 The Court replaced the 'reliability' test with an even more amorphous and subjective test, the "testimonial statements' test. 31 Worried that "judges, like other government officers, could not always be trusted to safeguard the rights of the people," the Court dutifully followed in the footsteps of those who "were loath to leave too much discretion in judicial hands." 32 With its decision in Crawford, the Supreme Court has guaranteed that virtually no discretion will be left in judicial hands, including the discretion to exercise common sense. Courts that no longer have this necessary discretion are struggling mightily to exercise what little evidentiary discretion they do have with respect to the Confrontation Clause of the Sixth Amendment.

While this article focuses on the problems in interpreting the phrase "testimonial statements" in a domestic violence context, it is worth noting that courts are attempting, again with inconsistent results, to interpret other ambiguous phrases from the Crawford holding. For example, courts do not agree on a single definition of "opportunity for prior cross-examination." 33 Most state courts

28. Id.
29. Id. For one example of the many unreported prosecutions that will never be brought because of Crawford's holding, see Patrick Walters, Prosecutors Drop Assault Charges Against Former Boxing Champ Frazier, THE SAN DIEGO UNION-TRIBUNE, Apr. 20, 2004, available at http://www.signonsandiego.com/sports/20040420-1735-frazier-arrest.html (describing how prosecutors had to drop assault charges because the victim refused to testify).
30. Crawford, 124 S. Ct. at 1371.
31. Id. at 1374.
32. Id. at 1373.
33. See cases cited infra note 34.
have held that probable cause or preliminary hearings provide a satisfactory opportunity for the defendant to cross-examine his accuser, and testimony given at these hearings will be admissible at trial if the witness later becomes unavailable.\textsuperscript{34} Conversely, the Supreme Court of Colorado has held that a probable-cause hearing will not satisfy the Sixth Amendment guarantee of the right to confront one's accuser under the \textit{Crawford} holding.\textsuperscript{35}

The 'forfeiture by wrongdoing' doctrine provides another source of inconsistent post-\textit{Crawford} caselaw. Some courts have admitted the hearsay statements of a murder victim, holding

\begin{itemize}
\item \textit{E.g.}, United States v. Avants, 367 F.3d 433 (5th Cir. 2004) (holding that witness testimony from a prior preliminary hearing held decades earlier was properly admitted at trial); People v. Ochoa, 18 Cal. Rptr. 3d 365 (Cal. Ct. App. 2004) (holding that a rape victim's preliminary hearing testimony, in which she recanted statements made to police at the scene of the crime, was admissible at trial when she became unavailable by invoking her rights under the Fifth Amendment, and its admission did not violate the defendant's right to confrontation because he had an adequate opportunity to cross-examine her at the preliminary hearing); People v. Cloud, No. 0042386, 2004 WL 1895022 (Cal. Ct. App. Aug. 25, 2004) (holding that the trial court did not err in admitting preliminary hearing testimony of a witness who disappeared on the day of trial); People v. Flippin, No. A099086, 2004 WL 1879998 (Cal. Ct. App. Aug. 24, 2004) (finding that it was not error to admit the preliminary hearing testimony of an unavailable witness); People v. Sharpe, No. B169924 2004 WL 1771481 (Cal. Ct. App. Aug. 9, 2004) (affirming that the preliminary hearing testimony of an unavailable witness was properly admitted at trial, despite the fact that the defendant's preliminary hearing attorney was not the trial attorney); People v. Price, 15 Cal. Rptr. 3d 229 (Cal. Ct. App. 2004) (holding that a domestic violence victim's preliminary hearing testimony was admissible at trial where she testified at trial but claimed not to remember any of the statements made to the officers); People v. Lewis, No. B165379, 2004 WL 928191 (Cal. Ct. App. Apr. 30, 2004) (deciding that it was not error to admit preliminary hearing testimony of a witness where the state established due diligence in its attempts to locate the witness); People v. Martin, No. B161573, 2004 WL 882062 (Cal. Ct. App. Apr. 26, 2004) (holding that it was not error to admit the preliminary hearing testimony of an unavailable witness); State v. Crocker, 852 A.2d 762 (Conn. Ct. App. 2004) (finding that preliminary hearing testimony was adequate to satisfy the defendant's right to confrontation); State v. Young, 87 P.3d 308 (Kan. 2004); People v. Stewart, No. 246334, 2004 WL 1778525 (Mich. Ct. App. Aug. 10, 2004) (indicating that eyewitness testimony from a preliminary hearing was admissible where a witness refused to testify, despite some suggestion that the witness's preliminary hearing testimony might have been perjurious); People v. Tinchcr, No. 246891, 2004 WL 1460687 (Mich. Ct. App. June 29, 2004) (holding that the admission of preliminary hearing testimony satisfied the Confrontation Clause, where witness could not testify because of a high-risk pregnancy); People v. Ali Al-Timimi, No. 245211, 2004 WL 1254271 (Mich. Ct. App. June 8, 2004) (holding that observers of the preliminary hearing, including the examining magistrate, could properly testify at trial regarding their personal observations of the witness's testimony at the preliminary hearing, where no preliminary hearing transcript was available); State v. Rossbach, No. 245262, 2004 WL 1178424 (Mich. Ct. App. May 27, 2004) (deciding that an unavailable witness's statement from the preliminary hearing was properly introduced at trial because the defendant had a prior opportunity for cross-examination); Primeaux v. State, 88 P.3d 893 (Okla. Crim. 2004).

\item People v. Fry, 92 P.3d 970 (Colo. 2004) (holding that preliminary hearing testimony is not admissible at trial under the Confrontation Clause because the opportunity for cross-examination is limited to the issue of probable cause and for that reason is insufficient).
\end{itemize}
that the defendant forfeited his right to confront his accuser by doing wrong. Other courts, however, have interpreted the doctrine less broadly, requiring an additional link between the defendant and the cause of action before recognizing a waiver. In these cases, an additional link may be required to admit even non-testimonial hearsay statements. Crawford has also produced caselaw fallout best categorized as ‘decisions that make no sense whatsoever.’

The greatest confusion has resulted in the area that is the subject of this paper: the meaning of the phrase “testimonial statements.” In attempts to apply the testimonial statements test, courts are excluding evidence that should be admitted. Further,

36. E.g., State v. Meeks, 88 P.3d 789, 794 (Kan. 2004) (holding simply, “a waiver of the right to confrontation based upon the procurement of the absence of the witness also constitutes a waiver of any hearsay objections to prior statements of the absent witness”); Francis v. Duncan, No. 03 Civ. 4959 (DC), 2004 WL 1878796 *17 (S.D.N.Y. Aug. 23, 2004) (finding, “[t]he waiver by misconduct rule prevents a defendant from asserting his confrontation rights to reap the benefits of his own misconduct by precluding former testimony from being admitted against him”).


39. E.g., People v. Martin, 2004 WL 882062 (Cal. Ct. App. 2 Dist. April 26, 2004) (citing the Crawford holding, but seemingly relying on the old Roberts test, admitting the statement in question on the ground that it was “spontaneous,” a category of hearsay among the “firmly rooted” hearsay exceptions, and therefore admissible); United States v. Taylor, 328 F. Supp. 2d 915 (N.D.Ind. 2004) (analyzing the statement’s admissibility under the framework of Roberts, Lilly, and Crawford, applying the Roberts test, and ultimately determining that the statement was admissible because it contained “particularized guarantees of trustworthiness,” without addressing whether the statement was testimonial); State v. Midgett, 680 N.W.2d 288 (S.D. 2004) (remarking that it would be counsel’s burden to argue whether the victim’s statements to law enforcement were admissible despite the victim’s appearance and testimony at trial). One wonders what argument the appellate court in Midgett felt was necessary on this subject. The Crawford opinion reiterated that the Sixth Amendment’s right to confrontation is only implicated when the witness does not appear at trial: “Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” Crawford, 124 S. Ct. at 1369 n.9.

40. Crawford, 124 S. Ct. at 1374.

41. E.g., In re J.K.W., Child, No. A03-1650, 2004 WL 1488850 (Minn. Ct. App. July 6, 2004) (holding that statements made by one co-conspirator to another, which were recorded during a telephone conversation, were testimonial and inadmissible because a police officer encouraged the recording of the conversation for the purpose of incriminating J.K.W.); People v. Cortes, 781 N.Y.S.2d 401 (Supp. 2004) (prohibiting the admission of the recording of a call to 911, where the caller described a shooting happening at the time of the call, because the call was the product of “interrogation”); United States v. Mikos, No. 02 CR 137-1, 2004 WL 1631675 (N.D.Ill. July 16, 2004) (holding that, where defendant made phone calls to a
when courts stubbornly insist on admitting hearsay evidence that they believe should be admitted despite Crawford's exclusion of testimonial evidence, they must creatively circumvent the Crawford test with inventive evidentiary rulings.\textsuperscript{42}

Nowhere has the application of the testimonial statements test been more painfully inconsistent than in the area of domestic violence. An unreported case from Kentucky provides a good example of the problems that arise in this context.\textsuperscript{43} Marquis Heard was convicted of first-degree criminal trespass and second-degree criminal assault for knocking a door off of its hinges, hitting the victim, Angel, in the head with the butt of a handgun, and leaving with the child that belonged to him and the victim. When Angel's grandmother found her later that same evening, Angel was in a hysterical state, crying and shouting incoherently.

Angel told a police officer "that Heard had kicked the door down and that he had hit her in the head with a gun because she would not let go of her infant child."\textsuperscript{44} Angel told the emergency room physician "that the cuts were the result of being struck with a pistol."\textsuperscript{45}

Angel did not appear at either of the two trials.\textsuperscript{46} After Heard was convicted, he argued "that the trial court violated his Sixth Amendment right to confront and to cross-examine his accuser witness to convince her to lie in her testimony and the witness refused and was subsequently shot, the government was first required to prove, by preponderance of the evidence, that the defendant murdered the witness before the government could introduce evidence of the phone calls); Hendricks, 2004 WL 1125143 at *2 (excluding wiretap evidence in the case of the murder of a confidential informant because the government was unable to establish a "conclusive link" between the defendant and the murder, where murder occurred after informant's identity was revealed to defendants during discovery).

\textsuperscript{42} E.g., Blanton v. State, 880 So.2d 798 (Fla. App. 5 Dist 2004) (holding that the defendant's constitutional right of confrontation was not denied by the admission of the unavailable child victim's statement to police because the defendant had had the opportunity to depose the victim, but did not); State v. Meeks, 88 P.3d 789 (Kan. 2004) (holding that the defendant forfeited his right to confront his victim by killing him); People v. Landers, No. 235918 2004 WL 1089500 at *2 n.3 (Mich. Ct. App. May 13, 2004) (finding, in a footnote, that Crawford did not bar the admission of a transcript from a grand jury proceeding against one other than the defendant because, "[t]he defendant was not denied his Sixth Amendment guarantee to be confronted with the witnesses against him"); Francis v. Duncan, 2004 WL 1878795 (S.D.N.Y. Aug. 23, 2004) (holding that it was not error to admit a witness's prior statements when she would not testify at trial because of threatening telephone calls she received from the defendant).


\textsuperscript{44} Id.

\textsuperscript{45} Id.

\textsuperscript{46} Id. at *2.
by permitting the Commonwealth to introduce the out-of-court statements made by Angel on the evening of the incident through the testimony of [her grandmother, the police officer, and the doctor]."47 The appellate court held that the trial court properly admitted the victim's statements to her grandmother and treating physician, based upon the "firmly rooted" hearsay exception discussed in White v. Illinois.48 However, it also held that the trial court erred in admitting the victim's statements to the police officer.49 In support of its holding, the court specifically discussed the mandate from Crawford, concluding that, "Crawford dictates that the admission of [the victim's] statements to Officer Gilbert implicating Heard as her attacker should not have been admitted under any exception to the hearsay rule."50

The appellate court's conclusion that the victim's statements to the officer could not be admitted as excited utterances, despite the trial court's correct finding that the victim was under the stress of the event when she made these statements to the officer, produces an internally inconsistent result.51 One wonders what result would have occurred had a neighbor, who happened to be an off-duty police officer, stopped by and asked the victim what happened. Would the victim's statements to her neighbor have been excluded as the result of "police interrogation?" Would the result have been different if the police officer had responded to the scene, but not posed a single question? Indeed, the appellate court's ruling encourages police inaction. The Heard holding plainly illustrates the internally inconsistent results that arise when courts attempt to interpret the term "testimonial statement" put forth in Crawford.

These attempts at interpretation have led to inconsistent results in domestic violence cases across the country. While Indiana and North Carolina admit the testimony of police officers regarding a victim's statements at the scene under the "excited utterance" exception to hearsay,52 California has more strictly interpreted the

47. Id.
48. Id. at *3 (citing White v. Illinois, 502 U.S. 346 (1992)).
49. Id. at *4.
50. Id.
51. Id. The jurors were permitted to hear the statements that the victim made to her grandmother and her doctor; however, the jurors were not permitted to hear the statements that the victim made to the police officer, although these statements were identical. Id. at *4-6.
52. See e.g., Fowler v. State, 809 N.E.2d 960 (Ind. Ct. App. 2004) (ruling that statements made by a domestic violence victim to an officer at the scene were not testimonial and were properly admitted as excited utterances); Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004) (holding that where an officer responded to a domestic disturbance call and the victim reported what the defendant had done to her, the victim's statements were properly admitted
term “testimonial statement” in domestic violence cases. For the most part, California courts have ruled that a victim’s statements to police officers at the scene of the crime are not admissible as excited utterances. These rulings, misinterpreting the Supreme Court’s holding in Crawford, eviscerate efforts to bring ‘victimless’ domestic violence cases to trial.

People v. Kilday illustrates this problematic trend in California courts. In that case, Kilday’s girlfriend, Patricia, told the police “that Kilday had cut her with a shard of glass, burned her legs, and injured her shoulder and head.” Patricia “had visible physical injuries and was upset, frightened, and [was] initially unwilling to speak” to the police officers. Patricia’s first words to the police were, “I deserve this.” During the trial, the jury heard a

as non-testimonial excited utterances); see also Beach v. State, 816 N.E.2d 57 (Ind. Ct. App. 2004) (holding that any error in the admission of the domestic violence victim’s statements to police officers at the scene was harmless, without deciding whether the statements were testimonial); State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004) (ruling that statements, made by a victim of assault and kidnapping, to police officers right after the incident were not testimonial because they were excited utterances); cf. State v. Barnes, 854 A.2d 208 (Me. 2004) (holding that prior statements made by the victim at the police station to report an assault by her son were properly admitted at her son’s murder trial as non-testimonial statements because they were excited utterances).

53. See, e.g., People v. Lugo, No. E033252, 2004 WL 2092018 (Cal. Ct. App. Sept. 20, 2004) (holding that a domestic violence victim’s statements to a police officer who arrived on the scene in response to a 911 call were testimonial); People v. Adams, 16 Cal. Rptr. 3d 237 (Cal. Ct. App. 2004) (holding that victim’s statements given to police officers at a convenience store were testimonial); People v. Kilday, No. A099095, 2004 WL 1470795 (Cal. Ct. App. June 30, 2004) (holding that statements made by the victim of domestic violence to the police at the scene were testimonial regardless of the informality of the questioning); see also People v. Zarazua, No. H025472, 2004 WL 837914 (Cal. Ct. App. Apr. 20, 2004) (holding that the statements of the victim of rape and domestic battery, who appeared at the police station with injuries at 4:30 a.m., were testimonial).

54. Of course, inconsistent rulings have resulted within California’s own appellate courts. In a confused holding, the Fourth District Court of Appeals upheld the admission of the statements of a domestic violence victim who was stabbed by her significant other. People v. Jiles, 18 Cal. Rptr. 3d 780 (Cal. Ct. App. 2004). The victim’s statements identifying her assailant, made approximately one hour before she died, were admitted by the trial court under the “spontaneous statement” hearsay exception. Id. at 795-96. In what seems a transparent attempt to reach the right result, the appellate court upheld the admission of the testimony, but was unclear as to the basis for its holding. Id. It may have upheld the admission as a spontaneous statement exception to hearsay, or as a dying declaration, or even on the basis of the “forfeiture by wrongdoing” doctrine, which it also mentioned briefly. Id. The court stated that, “[r]egardless of whether under Crawford a spontaneous declaration may be inadmissible in the absence of an opportunity to cross-examine, under the circumstances in the instant case, [the victim’s] statement was admissible.” Id. at 795. In the case of a gang-related shooting, the Sixth District Court of Appeals held that a 911 call was admissible because the statements to dispatch were not testimonial. People v. Caudillo, 19 Cal. Rptr. 3d 574 (Cal. Ct. App. 2004).

56. Id.
tape recording of Patricia’s interview with the police, and the
detective testified regarding Patricia’s statements. Patricia did
not testify.58

The trial court admitted Patricia’s statements pursuant to a
state evidence rule, California “Evidence Code section 1370, which
sets forth a limited exception to the general rule of inadmissibility
of hearsay.”59 It interpreted the statute as follows:

Under section 1370, a victim’s statement made to law
enforcement personnel, or a recorded statement, which “purports
to narrate, describe, or explain the infliction or threat of
physical injury upon the declarant,” made at or near the time
of the injury or threat, is admissible notwithstanding the
hearsay rule if the victim is an “unavailable . . . witness” and
if the statement “was made under circumstances that would
indicate its trustworthiness.”60

The appellate court reversed the trial court with respect to the
admission of each of Patricia’s statements.61 Discussing the holding
in Crawford, the appellate court set out to determine whether
Patricia’s statements to police officers and Patricia’s statements
made on audiotape constituted “testimonial statements.”62 The
appellate court concluded that “both categories of statements [were]
testimonial.”63

In reaching this conclusion, the appellate court relied upon the
language in Crawford, quoting the Supreme Court opinion no fewer
than six times.64 The California court reasoned that statements
obtained during police interrogations are testimonial not because
an interrogation is formal, structured, or recorded, but because
police interrogations serve an investigative (and potentially

57. Id. at *2, 4. The tape-recorded interview included Patricia’s account of four prior
incidents of abuse by Kilday, including an incident, when he cut her with a piece of glass and
when he held her down and burned her with a hot clothing iron. Id. at *2-3.
58. Id. at *2.
59. Id. at *4. Not surprisingly, the history behind the enactment of this rule of evidence
involves domestic violence. After the application of the hearsay rule to exclude the diary of
Nicole Simpson in O.J. Simpson’s murder trial, public outcry demanded that this new
evidentiary exception be enacted, virtually tailored to domestic violence prosecution. See
Glenn A. Fait, Victims’ Rights Reform — Where Do We Go From Here? More Than A Modest
61. Id.
62. Id. at *6.
63. Id. (emphasis added).
64. Id.
prosecutorial) function. According to this reasoning, no statement a domestic violence victim makes to a police officer will ever be admissible, because the court assumes that police officers always serve an investigative function. This narrow categorization of the police officer's function completely ignores the role of the police officer as a hero and protector. It is incorrect to assume that police officers always serve as investigators in times of trouble.

In comparing domestic violence cases from various states, it becomes apparent that the Supreme Court's refusal to articulate a definition of "testimonial statements" has resulted in irreconcilable evidentiary rulings.

IV. PROSECUTORS AND LEGISLATORS AT A STANDSTILL

Before the Crawford decision, several states had taken progressive steps to address the unique aspects of prosecuting domestic violence cases. Alaska and Colorado had both allowed for admission of evidence of prior domestic violence incidents in domestic violence prosecutions. Knowing that domestic violence victims often recant, Illinois, California, and Oregon had allowed a victim's initial statement to police to be admissible at trial.

65. Id.
67. Cf. People v. Moscat, 777 N.Y.S.2d 875, 879 (N.Y. Crim. Ct. 2004). A 911 call is typically initiated not by the police, but by the victim of a crime. It is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather, the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril.
68. There are significant problems associated with cases in which prosecutors attempt to hold abusers accountable despite recanting and reluctant witnesses. [B]ecause complainants in domestic violence cases often do not appear for trial, prosecutors have in recent years increasingly tried to fashion "victimless" prosecutions. In such a case, the government tries to prove the defendant's guilt without testimony from the complainant through other evidence. Often prosecutors attempt to prove such cases in important part by offering certain out-of-court statements made by the complainant; they ask that such statements be admitted in evidence pursuant to various exceptions to the hearsay rule.
69. In 1997, Alaska added a section to its rules of evidence specifically to permit the introduction of "evidence of other crimes involving domestic violence by the defendant." ALASKA R. REV. RULE 404(b)(3) (West 2004). In 1994, Colorado provided for the same type of evidence to be introduced, albeit via statute. COLO. REV. STAT. ANN. § 18-6-801.5 (West 2003).
70. In 2003, by public act, Illinois added a specific statute entitled "Admissibility of prior statements in domestic violence prosecutions when the witness is unavailable to testify." 725 ILL. COMP. STAT. 5/115-10.2a (2004). In 1996, California added a section to its evidence code,
While the admission of 'other acts' evidence appears, for the most part, outside the scope of the Crawford holding, the admission of domestic violence victims' out-of-court statements falls squarely within Crawford's prohibitions. It is doubtful that the attempts of states to accommodate reality will survive the Supreme Court's decree that reality is not the concern of legal scholars.

Justice Scalia could not have been clearer in dismissing the "run-of-the-mill" realities of 2004 in favor of the Framers' weightier concerns. He wrote:

By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's — great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear.

According to Scalia, when the interests of hundreds of thousands of "run-of-the-mill" domestic violence victims are pitted against the rare victim of a false treason charge, it is the latter's rights that the Constitution safeguards, and the former whom states are virtually powerless to protect. Prosecutors cannot go forward with 'victimless' prosecutions, and legislators cannot ameliorate the Court's ignorance or indifference, through reparative legislation. Under Crawford, when the defendant has not had an opportunity for prior cross-examination, the admission of the domestic violence victims' statements will be overturned on appeal entitled "Threat of infliction of injury," that was specifically tailored to address recanting victims of domestic violence and admit certain types of reliable hearsay. CAL. EVID. CODE § 1370 (West 2004). Oregon had a separate hearsay exception for "[a] statement that purports to narrate, describe, report or explain an incident of domestic violence . . . made by a victim of the domestic violence within 24 hours after the incident occurred," if the statement satisfied certain listed criteria. OR. REV. STAT. § 40.460(26)(a) (2003).

71. See Crawford, 124 S. Ct. at 1373-74.
72. Id.
and deemed unconstitutional as a violation of the defendant's Sixth Amendment right to confront his accuser.\textsuperscript{74}

V. THE SMALLEST OF STEPS: RECOGNIZING THAT STATEMENTS TO MEDICAL PERSONNEL AND EXCITED UTTERANCES ARE NEVER TESTIMONIAL

The impact of excluding statements to medical personnel is especially severe for prosecutors when the victim refuses to testify. Apart from the victim's statements to the physician, there may be no evidence to establish causation or the identity of the abuser. Further, if a pretrial motion to admit the victim's statement to an emergency room physician is denied, the prosecutor may not be able to appeal the decision.\textsuperscript{75}

Statements made for the purpose of medical treatment or diagnosis should be categorically admissible on the grounds that such statements are never testimonial. Testimonial statements are those in which the government is involved "with an eye toward trial."\textsuperscript{76} Physicians treating those in pain are "not performing any function remotely resembling that of a Tudor, Stuart, or Hanoverian justice of the peace."\textsuperscript{77} Testimonial statements are statements that possess a certain degree of formality.\textsuperscript{78} Statements made to a medical provider, such as a paramedic, nurse, or physician, do not possess this requisite formality. In order to effectively treat the patient's medical condition, the doctor must encourage the patient to share private and sometimes even embarrassing information. Formality would reduce the willingness of a patient to speak candidly; thus, these types of conversations must be kept informal. Further, testimonial statements have an underlying purpose of establishing or proving some fact.\textsuperscript{79} Medical

\textsuperscript{74} See Crawford, 124 S. Ct. at 1366.

\textsuperscript{75} For example, Idaho would not permit such an appeal. See Idaho Appellate Rule 11 for a list of dispositions from which one may appeal, which does not include an evidentiary ruling by the court that certain hearsay statements are inadmissible at trial. IDAHO APPELLATE RULE 11 (2001).

\textsuperscript{76} Crawford, 124 S. Ct. at 1367 n.7.

\textsuperscript{77} People v. Cage, 15 Cal. Rptr. 3d 846, 854 (Cal. Ct. App. July 15, 2004) (holding that a victim's statement to an emergency room physician was not testimonial); see also State v. Castilla, 87 P.3d 1211 (Wash. Ct. App. 2004) (unpublished portion) (upholding the admission of the victim's statements to a sexual assault examination nurse because "these statements were not testimonial in nature — they were not elicited by a government official and were not given with an eye toward trial").

\textsuperscript{78} See Crawford, 124 S. Ct. at 1364 (stating that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not").

\textsuperscript{79} See id. at 1364 (defining testimony as "[a] solemn declaration or affirmation made for
patients do not wish to establish or prove any facts. Patients answer questions and provide information for the sole purpose of facilitating their medical care.

In State v. Vaught, the Nebraska Supreme Court directly addressed the medical statements exception to the exclusion of hearsay after Crawford. The court permitted the physician to repeat the four-year-old victim's statements at trial, over objection by the defense counsel. On appeal, the Nebraska Supreme Court upheld the admission of this testimony, concluding that it was not testimonial in nature. The court relied on the fact that the victim’s identification of the perpetrator was a statement made for the purpose of medical diagnosis or treatment. The court wrote, “[i]n the present case, the victim was taken to the hospital by her family to be examined and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, was to obtain medical treatment.” The court left open the possibility that a different ruling might result under a different set of facts.

To date, courts have been more consistent in admitting “statement[s] for the purpose of medical diagnosis or treatment” post-Crawford than any other type of statement. Courts tend to exclude the statements of child sexual assault victims as “testimonial” only when the children made the incriminating statement to specially trained social workers or police officers, and not nurses or doctors. Perhaps this very ‘police officer

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80. 682 N.W.2d 284 (Neb. 2004).
81. See id.
82. See id. at 293.
83. See id. at 291.
84. Id. at 291.
85. See id.
problem’ has contributed to the cause of the confusion concerning the excited utterances exception. As previously mentioned, large discrepancies have resulted from the courts’ attempts to categorize statements as “excited utterances” made to police officers. Some courts have held that excited utterances to police officers are admissible. Other courts have ruled that such statements are testimonial, and therefore inadmissible. A better approach would be to recognize that excited utterances should always be deemed non-testimonial. The Supreme Court’s Crawford decision leaves room for such an interpretation.

Hinting at what kinds of statements might be considered “testimonial,” Justice Scalia wrote, “This focus also suggests that statements despite the fact that the interview was conducted in a relaxed atmosphere with open-ended questions); Snowden v. State, 846 A.2d 36 (Md. Ct. Spec. App. 2004) (holding that the statements of a victim of child abuse to a social worker who used non-leading questions were testimonial and their admission violated the defendant’s right to confrontation).

89. Cf. Wall v. State, 143 S.W.3d 846 (Tex. App. 2004) (holding that a statement given by the victim of an aggravated assault in which she identified her attacker to the police was testimonial even though it was given to the police at the hospital).

90. See, e.g., Leavitt v. Arave, 371 F.3d 663 (9th Cir. June 14, 2004) (holding that statements from the victim’s frantic call to dispatch on the night before the murder were not testimonial); Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004) (holding that statements in response to a domestic disturbance call were properly admitted as non-testimonial excited utterances); Fowler v. State, 809 N.E.2d 860 (Ind. Ct. App. 2004) (holding that statements to officer at scene were properly admitted as excited utterances); Heard v. Commonwealth, No. 2002-CA-002494-MR, 2004 WL 1367163 (Ky. Ct. App. June 18, 2004) (holding that the victim’s statements at the scene to her grandmother and a medical professional were not testimonial, but that the statement to an officer was testimonial because it involved police interrogation); State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004) (holding that a victim’s statements to police officers right after the incident were not testimonial, as they were excited utterances); Cassidy v. State, 1619 S.W.3d 712 (Tex. Ct. App. 2004) (holding that victim’s statements to a police officer at the hospital through an interpreter approximately one hour after the assault were not testimonial in nature).

91. People v. Adams, 16 Cal. Rptr. 3d 237 (Cal. App. 3d July 22, 2004) (finding that victim’s statements to police officers at a convenience store that her boyfriend kneed her in the stomach and lacerated her with glass were testimonial); People v. Kilday, 2004 WL 1470795 (Cal. App. June 30, 2004) (finding that statements made by victim of domestic violence to the police at the scene of the domestic violence are testimonial regardless of the informality of the questioning); People v. Lugo, 2004 WL 2092018 (Cal. App. 4th Sept. 2004) (finding that domestic violence victim’s statements to police officer who arrived on scene in response to 911 call were testimonial).

92. In discussing the “spontaneous declaration” exception, Justice Scalia wrote: It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made “immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive anything for her own advantage.” Crawford, 124 S. Ct. at 1368 n.8 (citing Thompson v. Trevanian, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694)). This requirement comports with states’ attempts to legislate the admission of domestic violence victims’ statements made to officers at the scene of the crime.
not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. 93

An excited utterance is similar to an off-hand or overheard remark and does not implicate the Sixth Amendment's core concerns. In a certain sense, there is no more off-hand remark than one that is made under the excitement of a stressful event. For the purposes of Sixth Amendment analysis, a statement made by a bleeding victim identifying her assailant is inherently trustworthy, regardless of who overhears it. It does not matter if her cries of distress are heard by a family member, a neighbor, or a police officer. As Heard demonstrates, attempting to categorize statements based on the listener produces nonsensical results. 94 The speaker, under the excitement of a stressful event, does not alter her statement depending on who might be listening, or, indeed, whether anyone is listening at all.

An excited utterance, by its very nature, bears no resemblance to the civil law abuses that the Confrontation Clause targeted. 95 In domestic violence cases, many victims attempt to retract the incriminating excited utterances they made to dispatch personnel or in the presence of the police — not because the statements are false, but precisely because they are true.

If we can learn from the Framers' experiences, surely we can learn from our own. The contrast between a defendant accused of treason, begging to confront his accuser, and a defendant accused of domestic battery, hoping he has successfully intimidated his accuser into failing to appear in court so that the charges will be dropped, makes painfully apparent how the Crawford decision has failed to offer protection to victims of domestic violence. The Supreme Court should affirmatively acknowledge that excited utterances are never testimonial, and necessarily do not implicate the core concerns of the Confrontation Clause. Such recognition would be a step back in the right direction.

VI. CONCLUSION

There is something appealing about viewing the Sixth Amendment's Confrontation Clause in a historical vacuum, as the

93. Crawford, 124 S. Ct. at 1364.
95. See Crawford, 124 S. Ct. at 1364.
Supreme Court did in *Crawford*. Always requiring an accuser to appear seems the most obvious interpretation; indeed, it is so obvious as to be irrefutable. Unfortunately, as with many perfect theories, this conceptual framework breaks down in modern day criminal law practice. While the Framers did not consider the problem of recanting victims of domestic violence, modern state courts routinely face this problem.

In attempting to apply the Supreme Court’s obscure new Sixth Amendment jurisprudence to their daily criminal trial dockets, courts have produced inconsistent and contradictory holdings, with no unified approach in sight. The most troubling aspect of this Confrontation Clause ‘free-for-all’ is the effect that this confusion has on prosecution of domestic violence cases. Due to the Court’s intentionally obtuse holding, many domestic violence cases will never be prosecuted.

In the current legal environment, prosecutors do not know what evidence will be admissible in domestic violence cases. Trial courts may rule that conversations recorded during 911 telephone calls are testimonial, and may exclude them. Courts may also exclude a victim’s statements to a police officer, a paramedic, or even the victim’s own child. In gambling on pre-trial motions, prosecutors know that the cards are stacked against them. Of the cases that are filed, many will be dismissed prior to trial because of erroneous rulings excluding critical evidence.

Statements for the purpose of medical diagnosis and excited utterances should never be deemed “testimonial.” Until the United States Supreme Court provides some clarity regarding what types of evidence are testimonial, trial courts and appellate courts will continue to make inconsistent rulings that provide little discernable precedent for future cases. Indeed, in a worst-case scenario, the Supreme Court’s latest interpretation of the Sixth Amendment actually encourages men to kill their wives and girlfriends to escape retribution. The Court’s recent interpretation of the Sixth Amendment may render prosecutors and legislators powerless to stop domestic violence.