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## Articles

### Reconceptualizing Confrontation After *Davis*

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On June 19, 2006, in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana* (hereafter simply *Davis*), the Supreme Court clarified the constitutional requirements for confrontation of accusers.<sup>1</sup> The Court considered the admissibility of excited utterances by accusers in two prosecutions of alleged domestic violence. The Court ruled that the Confrontation Clause generally bars a hearsay statement elicited by police unless the declarant appears at trial. The Court carved out an exception for an excited utterance during an ongoing emergency.<sup>2</sup> But the Court made clear that when the emergency ends—for example, when police arrive and secure the scene—a hearsay statement to police cannot surmount the Confrontation Clause unless the declarant appears for cross-examination.<sup>3</sup>

This ruling portends ominously for future prosecutions of domestic violence. A high proportion of battered women refuse to testify against their assailants.<sup>4</sup> The majority in *Davis* acknowledged that the Court's ruling could provide a "windfall" for batterers in such cases.<sup>5</sup> The Appellate Chief of the Manhattan District Attorney's Office predicted that, as a result of the *Davis* ruling, "[t]he inability to use the excited utterances to responding police officers will effectively end many prosecutions" of domestic violence.<sup>6</sup> A recent article in the *L.A. Times* put it simply: "The Supreme Court made it harder Monday to prosecute cases of domestic violence . . . ."<sup>7</sup>

The fallout from *Davis* became evident quickly. On June 30, 2006, in *State v. Mechling*,<sup>8</sup> the West Virginia Supreme Court cited *Davis* in overturning a conviction for domestic assault.<sup>9</sup> The evidence at trial showed that the defendant had battered his girlfriend while she was pushing a baby carriage.<sup>10</sup> The police arrived and took a statement from the injured woman.<sup>11</sup> She identified the defendant as her assailant.<sup>12</sup> When the accuser did not appear at trial, the prosecution offered her hearsay statement as an excited utterance.<sup>13</sup> The trial court admitted the statement, but the West Virginia Supreme Court reversed, heeding the mandate of *Davis*.<sup>14</sup> The West Virginia Supreme Court reached this result apprehensively, "painfully aware" that the

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1. 126 S. Ct. 2266 (2006).

2. *Id.* at 2273. For further discussion of *Davis*, see *infra* subpart I(B).

3. *Davis*, 126 S. Ct. at 2273–74, 2277.

4. See *infra* subpart I(C).

5. 126 S. Ct. at 2279–80.

6. David L. Hudson, Jr., *Supreme Court Confronts 'Testimonial Statements'*, A.B.A. J. EREPORT, June 23, 2006, available at WL 5 No. 25 A.B.A.J. E-Report 2 (quoting Mark Dwyer).

7. David G. Savage, *High Court Limits Domestic Abuse Crime Reports as Trial Testimony*, L.A. TIMES, June 20, 2006, at A8.

8. 633 S.E.2d 311 (W. Va. 2006).

9. *Id.* at 323.

10. *Id.* at 315.

11. *Id.*

12. *Id.*

13. *Id.* at 314–15.

14. *Id.* at 323.

reticence of domestic violence victims will compound their victimization after *Davis*.<sup>15</sup>

Curiously, prosecutors and victims' advocates were not the only ones complaining about the *Davis* ruling. Defense attorneys made a startling discovery when they read the *Davis* opinion closely. The *Davis* majority indicated in dicta that the Confrontation Clause does not apply *at all* to a huge category of hearsay statements—those deemed “nontestimonial.”<sup>16</sup> This term includes statements made by a declarant who did not foresee the later use of his statement in a criminal prosecution.<sup>17</sup> A statement made to an audience other than police or court personnel is likely to be nontestimonial.<sup>18</sup> Even those statements made to police while an emergency is ongoing fall under the rubric of “nontestimonial.”<sup>19</sup>

Defense attorneys realized that *Davis* had significantly reduced defendants' right to confront declarants of nontestimonial hearsay. Prior to *Davis*, most courts had held that the Sixth Amendment requires at least minimal attention to the reliability of nontestimonial hearsay offered against the accused.<sup>20</sup> *Davis* dispensed with any constitutional regulation of nontestimonial hearsay.<sup>21</sup> *Davis* invited prosecutors to rely more heavily on unusual hearsay exceptions such as the “catch-all exception” in Rule 807 of the Federal Rules of Evidence, which prior case law had disfavored.<sup>22</sup>

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15. *Id.* at 324 (“We reach our decision in this case with some hesitation. This Court is painfully aware that domestic violence cases inherently present a combination of circumstances that obstruct, yet simultaneously intensify the need for, successful criminal prosecutions: low victim cooperation and high same-victim recidivism.”). It is important to emphasize that the facts of the *Mechling* case are somewhat unclear, and it is difficult to ascertain how—if at all—the defendant battered the accuser. These facts must await resolution on remand.

16. 126 S. Ct. at 2274–76 (concluding that the Confrontation Clause applies solely to testimonial hearsay).

17. *Crawford v. Washington*, 541 U.S. 36, 50–53 (2004) (explaining the distinction between testimonial and nontestimonial hearsay). For further discussion of the term “testimonial,” see *infra* subpart I(A).

18. See *Crawford*, 541 U.S. at 51 (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”).

19. *Davis*, 126 S. Ct. at 2273.

20. Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L. REV. 2409, 2446 (2005) (noting that, in the pre-*Davis* era, lower courts continued to apply the *Roberts* test to nontestimonial hearsay); Rorry Kinnally, *A Bad Case of Indigestion: Internalizing Changes in the Right to Confrontation After Crawford v. Washington Both Nationally and in Wisconsin*, 89 MARQ. L. REV. 625, 636–37 (2006) (observing that in the era preceding *Davis*, “lower courts have assumed that the *Roberts* analysis still applies to non-testimonial hearsay”); Daniel E. Monnat & Paig A. Nichols, *The Kid Gloves Are Off: Child Hearsay After Crawford v. Washington*, CHAMPION, Jan.–Feb. 2006, at 18, 22 (commenting in advance of *Davis* that, “until the United States Supreme Court says otherwise, nontestimonial statements are still subject to the Sixth Amendment rule contained in *Roberts*”).

21. 126 S. Ct. at 2274–76.

22. See, e.g., *Miller v. State*, 98 P.3d 738 (Okla. Crim. App. 2004) (applying *Roberts* and finding error in the trial court's admission of nontestimonial hearsay offered under the residual hearsay exception and the exception for statements against penal interest); see also *Idaho v. Wright*,

So the *Davis* ruling accomplished a rare feat: it caused consternation among both prosecutors and defense attorneys. Commentators on all sides expressed their disappointment that the Court had not devised a comprehensive, easily administrable set of rules for the confrontation of accusers.<sup>23</sup> Some argued that *Davis* created a lamentable asymmetry in confrontation law: the right to confront declarants of testimonial hearsay was now too strong, while the right to confront declarants of nontestimonial hearsay was now too weak.<sup>24</sup> Some criticized the Court for paying more attention to the history of the Confrontation Clause<sup>25</sup> than to the exigencies of modern law enforcement.<sup>26</sup>

The *Davis* ruling seems more sensible, however, when viewed as a first step toward a new regime for the regulation of hearsay—a regime in which legislation plays a significant role. The Supreme Court has set the boundaries for confrontation law by clarifying the mandates of the Confrontation Clause.<sup>27</sup> But the Court has not purported to fill the field. To the contrary,

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497 U.S. 805, 818, 826–27 (1990) (invoking *Roberts* to find error in the trial court's use of the catch-all exception to admit a statement by an alleged victim of child abuse to the doctor); Robert M. Pitler, *Introduction to Symposium, Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1, 4 n.11 (2005) (discussing *Wright*).

23. Examples of such criticism appear in the Michigan Law Review's online symposium analyzing *Davis*. *An Online Symposium on the Confrontation Clause*, 105 MICH. L. REV. FIRST IMPRESSIONS (2006), [http://students.law.umich.edu/mlr/first\\_impressions.htm](http://students.law.umich.edu/mlr/first_impressions.htm). Even Professor Richard Friedman, the attorney for the successful petitioner in *Hammon* that was part of the consolidated *Davis* ruling, expressed his dismay with the Court's ruling. Posting of Amy Howe to SCOTUSblog, <http://www.scotusblog.com/movabletype/archives/2006/06/18-week> (June 19, 2006, 12:44 EST) (quoting Professor Friedman as saying: "Well, for a guy who just won his first Supreme Court case 8-1, I'm feeling pretty grumpy. . . . I'm very unhappy about the result in *Davis*").

24. See Tom Lininger, *Davis and Hammon: A Step Forward, or a Step Back?*, 105 MICH. L. REV. FIRST IMPRESSIONS 28, 29–30 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/lininger.pdf>; see also Posting of Karl Blanke to SCOTUSblog, <http://www.scotusblog.com/movabletype/archives/2006/06/25-week/> (June 26, 2006, 11:39 EST) (quoting Mark Dwyer, Chief of Appeals and Counsel to the District Attorney in New York City, arguing that defendants' right to confront declarants of testimonial hearsay is too strong).

25. See *Davis*, 126 S. Ct. at 2274–76 (analyzing early American cases and "the English cases that were the progenitors of the Confrontation Clause"); *Crawford v. Washington*, 541 U.S. 36, 47–50 (2004) (surveying English legal history that pre-dated the U.S. Constitution, as well as early American legal history).

26. See, e.g., Anthony J. Franze & Jacob E. Smiles, *Still "Left in the Dark": The Confrontation Clause and Child Abuse Cases After Davis v. Washington*, 105 MICH. L. REV. FIRST IMPRESSIONS 33, 35–37 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/franze.pdf> (looking at the Court's historical analysis before determining that most practical questions for child abuse cases have been left undetermined); see also Myrna Raeder, *Remember the Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 311 (2005) ("A purely historic approach to confrontation ignores the significant societal changes that have resulted in the criminalization of domestic violence and child abuse.").

27. See, e.g., *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (holding that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence"); *Lee v. Illinois*, 476 U.S. 530, 543–46 (1986) (holding that the admission of a codefendant's confession violates the defendant's Sixth Amendment

the Court has made clear that states are free to regulate confrontation law in the interstices.<sup>28</sup> To put it differently, the Court has left to the states the task of “fine tuning” confrontation law.

This Article will recommend that states promptly seize the opportunity to legislate confrontation policy. State legislation, of course, cannot deviate from the Supreme Court’s constitutional interpretation. In no event could a state provide fewer confrontation rights than the U.S. Constitution. At most, states can establish a more graduated calibration of confrontation law within the parameters set by Sixth Amendment jurisprudence. State legislation can also address ancillary issues. For example, states can equip police and prosecutors to investigate crimes and present evidence at trial in a manner that respects confrontation rights without compromising effective law enforcement.

Part I of this Article will explore the evolution of the Supreme Court’s confrontation jurisprudence and will consider the implications of this jurisprudence for particular categories of prosecutions. Part II will analyze the arguments for and against a legislative role in confrontation policy, taking account of extraconstitutional norms that could inform such policy. Part III will present legislative proposals that states should adopt in the wake of *Davis*. Among other reforms, Part III will urge an expansion of statutory hearsay law to allow the introduction of statements by absent declarants, especially victims of violence, whose unavailability is excusable as a constitutional matter. Part III will also advocate a limited statutory right of confrontation for defendants against whom the government offers nontestimonial hearsay.

Statutory reforms are not a perfect solution. They will not eliminate all the confusion or solve all the problems arising in the aftermath of *Davis*. But a legislative approach will allow states to fashion a confrontation policy that is more nuanced—more responsive to modern circumstances—than the Supreme Court’s history-centered interpretation of confrontation law. As Justice Oliver Wendell Holmes once observed, “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”<sup>29</sup>

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confrontation rights based on the content of the confession and the specific circumstances under which it was made).

28. In *Crawford*, the Court commented that, with respect to nontestimonial hearsay, “it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” 541 U.S. at 68. The latter approach is precisely what the Court adopted two years later in *Davis*. 126 S. Ct. at 2274–77. Professor Daniel J. Capra, the Reporter to the Judicial Conference Advisory Committee on the Federal Rules of Evidence, has noted that *Crawford* “invites rulemakers to provide the necessary protections for nontestimonial hearsay.” Capra, *supra* note 20, at 2445.

29. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

## I. The Supreme Court's Confrontation Jurisprudence

To understand the significance of the Supreme Court's latest ruling on the Confrontation Clause, it is useful to survey the evolution of confrontation law over the last three decades. In few areas of the law has the Court so vehemently repudiated its own precedent.

### A. *From Roberts to Crawford*

The modern era of confrontation jurisprudence began with the Supreme Court's 1980 ruling in *Ohio v. Roberts*.<sup>30</sup> There, the Court considered whether the trial court properly allowed the prosecution to introduce a transcript of witness testimony.<sup>31</sup> The Court held that the Confrontation Clause requires an overlay of constitutional regulation in addition to the strictures of statutory hearsay law.<sup>32</sup> The Court developed a two-prong test to satisfy the constitutional requirements. First, the hearsay in question must bear sufficient indicia of reliability.<sup>33</sup> Second, the government must show that the declarant is unavailable, or else the government must produce the declarant for cross-examination at trial.<sup>34</sup> The Court made clear in *Roberts* that confrontation is a means to an end: ensuring the trustworthiness of the evidence considered by the jury.<sup>35</sup>

*Roberts* and its progeny permitted a number of "shortcuts" through which the prosecution could meet the requirements of the Confrontation Clause.<sup>36</sup> For example, the prosecution could establish reliability for purposes of *Roberts* simply by showing that the evidence in question fit within a firmly rooted hearsay exception.<sup>37</sup> The unavailability requirement also disappeared when the prosecution invoked a firmly rooted exception; the *Roberts* Court saw only instrumental value in cross-examination, so confrontation seemed superfluous when a time-honored hearsay exception necessarily admitted only reliable evidence.<sup>38</sup> With such reasoning, *Roberts* and its

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30. 448 U.S. 56 (1980).

31. *Id.* at 60–62.

32. *See id.* at 62–72 (describing the interpretation of the Confrontation Clause through case law and finding that Ohio's hearsay rules comply with the purpose of the Clause).

33. *Id.* at 65–66.

34. *Id.*

35. *Id.* at 63–65.

36. *See* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 756–60 (2005) (discussing the weakening of the constitutional confrontation requirements during the *Roberts* era).

37. *Id.* at 757; *e.g.*, *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (dispensing with reliability analysis for co-conspirator statements on the ground that the rule admitting co-conspirator statements is "firmly . . . rooted").

38. *E.g.*, *United States v. Inadi*, 475 U.S. 387, 399–400 (1986) (declining to require unavailability as a predicate for the admission of co-conspirator statements); *see also* *White v. Illinois*, 502 U.S. 346, 355–57 (1992) (applying the same holding for hearsay statements made while receiving medical treatment).

progeny subordinated the Confrontation Clause to statutory hearsay law in the vast majority of prosecutions.<sup>39</sup>

*Roberts* occasionally required a more thorough analysis. For the few hearsay exceptions that were not firmly rooted—such as the catch-all exception in Rule 807, the exception for statements against interest under Rule 804(b)(3), and new hearsay exceptions under state law—*Roberts* required the proponent to show “particularized guarantees of trustworthiness.”<sup>40</sup> The determination of reliability depended heavily on the discretion of the trial judge. Different judges imputed different significance to the same facts. But judges did occasionally exclude hearsay statements on constitutional grounds—even statements that met the requirements of statutory hearsay exceptions.<sup>41</sup>

The Court began to undermine *Roberts* in 2004. In *Crawford v. Washington*, the Court considered the admissibility of a hearsay statement by a witness whom the police had interrogated while investigating a suspected crime.<sup>42</sup> The declarant arguably subjected herself to criminal liability by making the statement, although the police were focusing on an apparent crime committed by the declarant’s husband.<sup>43</sup> The declarant did not testify at trial.<sup>44</sup> The prosecution offered the statement under Washington’s exception for statements against interest.<sup>45</sup> The trial court admitted the statement, but the Supreme Court reversed, holding that the Confrontation Clause barred the evidence.<sup>46</sup>

The *Crawford* Court formulated a new test for confrontation. The Court criticized the *Roberts* ruling for relying on vague notions of reliability that were susceptible to inconsistent interpretations.<sup>47</sup> The *Crawford* Court stressed a new criterion: the “testimonial” character of the hearsay statement. A statement would be “testimonial” if made in a formal setting or in other circumstances under which the later prosecutorial use of the statement was foreseeable.<sup>48</sup> The Court did not offer a precise definition of the term “testimonial,” leaving that task “for another day.”<sup>49</sup>

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39. Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 199–211 (2004).

40. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

41. E.g., Idaho v. Wright, 497 U.S. 805, 817–18 (1990) (finding that the catch-all hearsay exception is not firmly rooted and holding that the trial court erred in allowing the prosecution to introduce evidence that lacked particularized guarantees of trustworthiness under this exception); see also Lilly v. Virginia, 527 U.S. 116, 131–35 (1999) (applying the same holding to declarations against interest).

42. 541 U.S. 36 (2004).

43. *Id.* at 38–42.

44. *Id.* at 40.

45. *Id.*

46. *Id.* at 68–69.

47. *Id.* at 62–63.

48. *Id.* at 51–54, 68.

49. *Id.* at 68.

The Court held in *Crawford* that testimonial hearsay requires nothing short of true confrontation—i.e., an opportunity to cross-examine the declarant. The Court could not abide *Roberts*' rationalization for denying confrontation when the evidence appeared plainly reliable: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."<sup>50</sup>

The *Crawford* Court indicated that when the prosecution offers testimonial hearsay, the prosecution only has three options for satisfying the Confrontation Clause: (1) produce the declarant for cross-examination;<sup>51</sup> (2) prove that the accused has forfeited his right of confrontation by wrongfully procuring the absence of the declarant;<sup>52</sup> or (3) offer the evidence pursuant to the hearsay exception for dying declarations, which prosecutors had used to admit testimonial hearsay back in 1791 when the Framers drafted the Sixth Amendment.<sup>53</sup>

The *Crawford* Court strongly criticized the *Roberts* ruling, but the *Crawford* opinion did not explicitly overturn *Roberts* as a test for the admission of nontestimonial hearsay. The Court in *Crawford* found that the hearsay at issue was testimonial, so the Court did not spend a great deal of time prescribing procedures for the review of nontestimonial hearsay. In fact, after the *Crawford* ruling, most lower courts continued to apply the *Roberts* test to nontestimonial hearsay.<sup>54</sup>

In sum, the transition from *Roberts* to *Crawford* was a monumental one. The Court gave the accused a much stronger right to confront declarants of testimonial hearsay. The difficulty lay in distinguishing testimonial from nontestimonial hearsay. The Court did not eliminate the ambiguity that plagued the "reliability" test under *Roberts*; if anything, the Court simply shifted the ambiguity from the term "reliability" to the term "testimonial."<sup>55</sup> As to nontestimonial hearsay, the Court allowed the *Roberts* test to remain intact, although the vituperative rebuke in *Crawford* suggested that the future of the *Roberts* test was uncertain.

#### B. From *Crawford* to *Davis*

The aftermath of *Crawford* saw much hand-wringing over the definition of the term "testimonial." Because that term served as the "on-off" switch for the Confrontation Clause, advocates debated its meaning in hundreds of

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50. *Id.* at 62.

51. *Id.* at 59.

52. *Id.*

53. *Id.* at 56 n.6.

54. See *supra* note 20 and accompanying text.

55. See *Crawford*, 541 U.S. at 60–68 (disparaging the "amorphous notions of 'reliability'" but failing to provide a comprehensive definition of "testimonial").

published opinions over the next two years.<sup>56</sup> Lower courts diverged in their approach to two types of hearsay statements in particular: statements by alleged victims in phone calls to 911 centers and statements to responding officers.<sup>57</sup>

In order to clarify the application of *Crawford* to these categories of evidence, the Supreme Court granted certiorari in *Davis v. Washington* and *Hammon v. Indiana*. The former case involved a hearsay statement uttered by an excited caller who was reporting an alleged incident of domestic violence to a 911 operator.<sup>58</sup> The latter case involved another excited utterance, this time by an alleged victim of domestic violence to police responding to her residence after her 911 call.<sup>59</sup> The Supreme Court reviewed the two cases at once and issued a single opinion in the consolidated case (referred to herein simply as *Davis*).

The *Davis* ruling sought to create a temporal boundary between testimonial and nontestimonial statements to law enforcement officers.

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal proceedings.<sup>60</sup>

Applying the new test to the facts at hand, the Court held that the 911 call by the alleged victim in *Washington* was not testimonial because she was seeking help during the pendency of an emergency.<sup>61</sup> She was describing events as they were happening. The 911 operator who questioned her was seeking to provide emergency assistance, not to investigate a crime. A portion of the 911 call continued after the emergency subsided and that portion deserved classification as “testimonial,” though the admission of that portion was harmless error.<sup>62</sup>

By contrast, the declarant in *Indiana* spoke with officers who had secured the scene by the time they interrogated her, so her statement was testimonial.<sup>63</sup> The defendant had left the scene. The arrival of police en-

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56. On July 27, 2006, the following WESTLAW search yielded over 2,000 federal and state opinions: (Crawford /3 Washington) & testimonial.

57. Lininger, *supra* note 36, at 773–80.

58. *Davis v. Washington*, 126 S. Ct. 2266, 2270–72 (2006). The Court assumed, without deciding, that “[i]f 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers.” *Id.* at 2274 n.2.

59. *Id.* at 2273.

60. *Id.* at 2273–74.

61. *Id.* at 2276–78.

62. *Id.* at 2277–78.

63. *Id.* at 2278–79.

sured her safety. The police who interrogated her sought to investigate a past crime rather than to respond to an ongoing emergency.<sup>64</sup>

The *Davis* ruling is doctrinally straightforward, but its reasoning represents a conspicuous departure from the *Crawford* ruling. The *Crawford* Court had focused on the mindset of the declarant: Did she give her statement under circumstances in which she could foresee the later prosecutorial use of her words?<sup>65</sup> The *Davis* opinion shifted the focus from the declarant's state of mind to the officers' purpose in questioning the declarant.<sup>66</sup> This shift is theoretically inconsistent, and it is also problematic as a practical matter. For example, if an officer questions a clear-headed declarant while an emergency is pending and the declarant contemplates the prosecutorial use of her statement, the statement may nonetheless fall outside the definition of "testimonial" under *Davis*. On the other hand, if a declarant subjectively believes that she is still in grave danger but the facts do not support this conclusion as an objective matter, a court might classify her statement as testimonial under *Davis* even though she lacks the state of mind that *Crawford* would have required.

Assessing the pendency of an emergency is surely a difficult matter. How long after the arrival of police does an emergency abate? In a call to the 911 center, what questions and comments are so clearly unrelated to an emergency that the call becomes testimonial? To what extent can police manipulate the test by creating an exaggerated sense of emergency? The *Davis* test has not escaped the ambiguity that plagued the tests in *Roberts* and *Crawford*. One might argue that the locus of the ambiguity has simply shifted over time, from the term "reliable" (in *Roberts*) to the term "testimonial" (in *Crawford*) to the term "emergency" (in *Davis*).

The *Davis* ruling included dicta that rankled defense attorneys. Whereas *Crawford* called into question the reasoning of *Roberts*, *Davis* sounded the death knell. The *Davis* Court indicated plainly that the protections of the Confrontation Clause are limited to testimonial hearsay. Not only does the definition of testimonial hearsay lie at the "core" of the Sixth Amendment, but this term also marks out the "perimeter" of the constitutional protection.<sup>67</sup>

*Davis* evinced a growing schizophrenia in the Supreme Court's confrontation jurisprudence. The right of the accused to confront declarants of testimonial hearsay is becoming clearer, while the right to confront declarants of nontestimonial hearsay has perished entirely.

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64. *Id.* at 2279.

65. *Crawford v. Washington*, 541 U.S. 36, 65–69 (2004).

66. 126 S. Ct. at 2273.

67. *Id.* at 2274.

### C. Implications for Prosecutions of Domestic Violence

The Supreme Court's recent interpretations of the Confrontation Clause have hindered many categories of prosecutions,<sup>68</sup> but none more significantly than prosecutions of domestic violence.<sup>69</sup> The reason for this disparate effect is that victims of domestic violence are more likely than other crime victims to recant or decline to testify altogether. Approximately eighty percent of accusers in domestic violence cases refuse to cooperate with the government at some point in the prosecution.<sup>70</sup> Their reluctance may result from a number of circumstances: economic dependence on the batterer, fear of reprisals, depression, lack of confidence in the criminal justice system, and enduring affection for the defendant, among other factors.<sup>71</sup>

Prior to *Crawford* and *Davis*, prosecutors of domestic abuse did not depend heavily on live testimony by accusers.<sup>72</sup> The hearsay exception for

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68. It is no exaggeration to say that prosecutors and defense attorneys must ponder the Supreme Court's new confrontation jurisprudence in every single criminal case after *Crawford*, and the new rules constrain prosecutorial strategies that had been successful in the pre-*Crawford* world. Jeanine Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 213, 213–15 (2005).

69. See *id.* at 215 (arguing that “domestic violence prosecution will likely experience the most dramatic impact” from the Supreme Court's stricter enforcement of the Confrontation Clause); Wendy N. Davis, *Hearsay, Gone Tomorrow?: Domestic Violence Cases at Issue as Judges Consider Which Evidence to Allow*, A.B.A. J., Sept. 2004, at 22, 22, 24; Savage, *supra* note 7 (examining the potential for the *Davis* ruling to impede domestic violence cases throughout the country); David Feige, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution*, SLATE, Mar. 12, 2004, <http://www.slate.com/id/2097041>.

70. *People v. Brown*, 94 P.3d 574, 576 (Cal. 2004); accord Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3 (2002) (citing figure that 90% of domestic violence victims do not cooperate with prosecutors); Lisa Marie DeSancitis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367 (1996) (noting that victims' noncooperation rate in domestic prosecutions is between 80% and 90%).

71. Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 474 (2003) (citing studies indicating that 40% of accusers in domestic violence prosecutions suffer from post-traumatic stress disorder and 80% suffer from clinically diagnosable depression); Lininger, *supra* note 36, at 769–70 (listing reasons why battered women recant or refuse to cooperate after initially complaining to police).

72. Prosecutors and victims' advocates used the terms “victimless” or “evidence-based” to refer to prosecutions that relied entirely on evidence other than in-court testimony by the alleged victims. E.g., Geetanji Malhotra, *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, 214 (2006) (describing prosecutors' proceeding in domestic abuse cases without a victim's testimony); see also Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 301–02 (2005) (referring to victimless prosecutions as necessary due to domestic violence victims' frequent unavailability to testify); Adam M. Krischer, *“Though Justice May Be Blind, It Is Not Stupid”*: Applying Common Sense to *Crawford* in Domestic Violence Cases, THE PROSECUTOR, Nov.–Dec. 2004, at 14, 14 (discussing evidence-based prosecution in domestic violence situations).

excited utterances<sup>73</sup> often allowed the admission of the accusers' initial statements to officers who responded at the scene of the alleged crime.<sup>74</sup> Because the exception for excited utterances was firmly rooted, the Confrontation Clause generally presented no obstacle for prosecutors in these cases.<sup>75</sup> The exception for excited utterances was the single most important evidentiary rule for prosecutors in domestic violence cases during the era preceding *Crawford*.<sup>76</sup>

The Supreme Court's ruling in *Crawford* constrained prosecutors' reliance on excited utterances.<sup>77</sup> Defense attorneys argued that accusers who discussed domestic violence with police could reasonably foresee the prosecutorial use of their statements. This argument prevailed in a number of cases.<sup>78</sup> An empirical study found that in California, Oregon, and Washington, a majority of prosecutors' offices reported greater difficulty

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73. This exception appears in Rule 803(2) of the Federal Rules of Evidence and in a corresponding provision in most states' evidence codes. The federal version of the rule creates a hearsay exception for "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FED. R. EVID. 803(2); see David F. Binder, HEARSAY HANDBOOK § 9.2 (2005) (noting that all states have some version of the excited utterance exception and most follow the federal model).

74. Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, CRIM. JUST., Summer 2005, at 24, 24; see King-Ries, *supra* note 72, at 309 ("[A] large number of jurisdictions use the excited utterance exception to conduct effective victimless domestic violence prosecutions.").

75. See *White v. Illinois*, 502 U.S. 346, 355 n.8 (1992) (dispensing with the unavailability test in *Roberts* for the firmly rooted exception in Rule 803); Donna D. Bloom, "Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive *Crawford v. Washington*, 36 ST. MARY'S L.J. 717, 735 (2005) (analyzing admission of excited utterances prior to 2004 and arguing that the prosecution had "carte blanche" to admit these statements under then-existing confrontation jurisprudence). See generally *supra* subpart I(A).

76. See Bloom, *supra* note 75, at 732 (explaining the crucial role that excited utterances play in prosecutions of domestic violence); Carole 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, 1094 (2005) (noting that hearsay offered by prosecutors pursuant to the firmly rooted hearsay exception prior to *Crawford* was easily admissible notwithstanding the Confrontation Clause); see also Celeste E. Byrom, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After Crawford v. Washington*, 24 REV. LITIG. 409, 412-16 (2005) (discussing the importance of the excited utterance exception in domestic violence prosecutions); Amy Karan & David M. Gersten, *Domestic Violence Hearsay Exceptions in the Wake of Crawford v. Washington*, JUV. & FAM. JUST. TODAY, Summer 2004, at 20, 20-22 (noting that admission of hearsay evidence in domestic violence cases was commonplace before *Crawford*).

77. King-Ries, *supra* note 72, at 318-19 (discussing how the chronic nature of domestic violence makes it likely that an accuser will have had prior interaction with authorities and thus creates an awareness that statements could be used in prosecution of the attacker); Kinnally, *supra* note 20, at 642 (noting that prosecutors' reliance on excited utterances became more difficult after *Crawford*).

78. A list of such cases appears in an outline prepared by Jeffrey L. Fisher, the petitioner's counsel in *Crawford*. Jeffrey L. Fisher, *Crawford v. Washington: Reframing the Right to Confrontation*, <http://www.dwt.com/lawdir/publications/CrawfordOutline.pdf>.

relying on excited utterances in domestic violence cases subsequent to the Supreme Court's ruling in *Crawford*.<sup>79</sup>

Even after *Crawford*, many courts found a way to admit excited utterances as nontestimonial. Indeed, it appeared that many judges and prosecutors simply refused to accept the implications of *Crawford*.<sup>80</sup> Classifying excited utterances as nontestimonial was the easiest way to avoid *Crawford*'s consequences. Some courts held that excited utterances were necessarily nontestimonial because the declarants were too distraught to contemplate the later prosecutorial use of their statements.<sup>81</sup> Some courts deemed excited utterances nontestimonial if elicited by officers during their first interaction with witnesses at the scene of the alleged crime—whether or not an emergency was pending—on the theory that the officers' initial questioning was not the sort of "formal interrogation" that would put victims on notice of a future prosecution.<sup>82</sup>

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79. Lininger, *supra* note 36, at 820–22. This survey involved prosecutors' offices in counties that include 90% of the population in the three Western coastal states. The survey found that 87% of respondents reported greater difficulty introducing hearsay statements elicited by police from victims of domestic violence at the scene of the alleged crime, and 52% reported greater difficulty specifically when they have characterized such statements as excited utterances. *Id.* at 821–22.

80. Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 270 (2005) ("Since *Crawford*, many courts have continued operating essentially as they did before. Indeed, I believe that some courts and prosecutors who are actively engaged in domestic violence cases, determined to maintain the practice [of freely admitting excited utterances by alleged victims], have adopted a 'draw the wagons' approach.").

81. Jerome C. Latimer, *Confrontation After Crawford: The Decision's Impact on How Hearsay Is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 327, 402–03 (2006); Monnat & Nichols, *supra* note 20, at 21 (noting that after *Crawford*, "[m]any jurisdictions have held that the excited nature of such statements renders them nontestimonial, and the fact of government involvement is insufficient to conclude otherwise"); e.g., *United States v. Brown*, 322 F. Supp. 2d 101, 105 n.4 (D. Mass. 2004); *Anderson v. State*, 111 P.3d 350, 353–54 (Alaska Ct. App. 2005), *vacated*, 126 S. Ct. 2983 (2006); *People v. Isaac*, No. 23398/02, 2004 WL 1389219, at \*4 (N.Y. Dist. Ct. June 16, 2004); *State v. Forrest*, 596 S.E.2d 22, 26–29 (N.C. Ct. App. 2004), *aff'd*, 611 S.E.2d 833 (N.C. 2005), *vacated*, 126 S. Ct. 2977 (2006); *State v. Banks*, No. 03AP-1286, 2004 WL 2809070, at \*3 (Ohio Ct. App. Dec. 7, 2004), *appeal denied*, 825 N.E.2d 624 (Ohio 2005), *appeal denied*, 830 N.E.2d 348 (Ohio 2005); *State v. Quintero*, No. M2003-02311-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 383, at \*30–33 (Tenn. Crim. App. Jan. 25, 2005), *appeal denied*, 2005 Tenn. LEXIS 840 (Tenn. Oct. 10, 2005), *cert. denied*, 126 S. Ct. 2979 (2006); *Smith v. State*, No. 2-05-300-CR, 2006 WL 1653356, at \*5 (Tex. App.—Fort Worth June 15, 2006, no pet.); *Rivera v. State*, No. 04-03-00830-CR, 2004 WL 3015165, at \*1–2 (Tex. App.—San Antonio Dec. 30, 2004, no pet.); *State v. Ohlson*, 125 P.3d 990, 994–95 (Wash. Ct. App. 2005), *review granted*, 143 P.3d 828 (Wash. 2006).

82. *See People v. Ford*, No. A104115, 2004 WL 2538477, at \*7 (Cal. Ct. App. Nov. 10, 2004) (explaining that because statements made in response to police questioning were "not the product of structured questioning" they were not testimonial); *People v. Newberry*, No. E035199, 2004 WL 2335232, at \*3 (Cal. Ct. App. Oct. 18, 2004) (illustrating that statements made in response to unstructured questioning were not testimonial), *vacated*, No. E035199, 2004 WL 2810257 (Cal. Ct. App. Dec. 8, 2004); *People v. Magdaleno*, No. B169360, 2004 WL 2181412, at \*9 (Cal. Ct. App. Sept. 29, 2004) (showing that a victim's plea for help and a description of her physical condition were not testimonial when both were made to police officers at the crime scene); *People v. King*, 121 P.3d 234, 238 (Colo. Ct. App. 2005) (noting that although several hours passed between the time the incident occurred and the time the officer elicited statements, such statements were not testimonial because the victim was still under pain and distress resulting from the incident), *cert.*

The *Davis* ruling ended these courts' indulgent treatment of excited utterances.<sup>83</sup> *Davis* necessitated the reversal of several convictions in domestic violence cases, many of which had occurred after *Crawford* or had survived intermediate appellate review in the post-*Crawford* era.<sup>84</sup> *Davis* tightened the standards for admitting excited utterances by shifting the focus from the accuser's state of mind to the pendency of an emergency.<sup>85</sup> This shift decreased the importance of "excitement" in confrontation jurisprudence. After *Davis*, it is far less likely that courts will admit an accuser's excited utterances to police after the alleged assailant left the scene. *Davis* has therefore increased the importance of live testimony by accusers, and unless prosecutors are able to secure the cooperation of accusers or devise alternative strategies for offering hearsay, a decline in convictions will likely result.<sup>86</sup>

In addition to hindering prosecutions, the Supreme Court's recent confrontation jurisprudence poses other risks for battered women. First, the heightened importance of live testimony by accusers may tempt defendants

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*denied*, No. 05SC179, 2005 WL 3073374 (Colo. Oct. 17, 2005); *Commonwealth v. Foley*, 833 N.E.2d 130, 133 (Mass. 2005) (explaining that because the purpose of police questioning was related to "law enforcement's community caretaking function, not prosecution of a crime," statements made in response to such questioning were not testimonial), *cert. denied*, 126 S. Ct. 2980 (2006); *State v. Warsame*, 701 N.W.2d 305, 311 (Minn. Ct. App. 2005) (holding that statements are not "testimonial simply because they were given in response to some questioning" by an officer), *vacated*, 126 S. Ct. 2983 (2006); *People v. Nieves-Andino*, 815 N.Y.S.2d 577, 578 (App. Div. 2006) ("Whether a particular excited utterance is 'testimonial' . . . depends upon the circumstances, with the 'particular nature of the police inquiry' being a critical factor." (citation omitted)), *appeal granted*, 2006 N.Y. LEXIS 3365 (N.Y. Sept. 14, 2006); *People v. Bradley*, 799 N.Y.S.2d 472, 476-77 (App. Div. 2005) (explaining that a police officer's question of "[w]hat happened?" did not constitute an interrogation and the response to such a question was therefore not testimonial), *appeal granted*, 843 N.E.2d 1160 (N.Y. 2005); *People v. Mackey*, 785 N.Y.S.2d 870, 873-74 (Crim. Ct. 2004) (stating that because questioning by an officer "lacked the requisite formality to constitute a police interrogation," statements made in response to the questioning were not testimonial); *Spencer v. State*, 162 S.W.3d 877, 882 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) ("Responses to preliminary questions by police at the scene of a crime while police are assessing and securing the scene are not testimonial."); *Gonzalez v. State*, 155 S.W.3d 603, 609 n.4 (Tex. App.—San Antonio 2004, pet. granted) (stating that "[a]n unstructured interaction between an officer and witness shortly after a distressing event has occurred" does not constitute an investigation and statements made during such an interaction are therefore not testimonial).

83. See *supra* subpart I(B).

84. See, e.g., *Thomas v. California*, 126 S. Ct. 2983, 2983 (2006) (vacating a California appellate court's ruling upholding a conviction for domestic violence based largely on the accuser's excited utterance pursuant to *Davis*); *Warsame v. Minnesota*, 126 S. Ct. 2983, 2983 (2006) (vacating a Minnesota appellate court's similar ruling in a domestic violence case); *State v. Mechling*, 633 S.E.2d 311, 314 (W. Va. 2006) (reversing the lower court's post-*Crawford* ruling admitting excited utterances by an alleged victim of domestic violence).

85. The key question under *Davis* is whether the statements at issue "[were] made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006). Statements made within this temporal window will likely be nontestimonial, while statements made outside this window will likely be testimonial. *Id.* at 2273-74. For a more thorough discussion of the *Davis* holding, see *supra* subpart I(B).

86. *Savage*, *supra* note 7; *Hudson*, *supra* note 6.

to intimidate or even kill their victims before trial because the unavailability of the victim may foreclose any possibility of prosecution.<sup>87</sup> Second, the new temporal test in *Davis* creates a perverse incentive for 911 operators and responding officers to prolong the “emergency” phase of an investigation, as hearsay statements elicited after the resolution of the emergency will likely be inadmissible. Third, the new confrontation rules have led some prosecutors to jail accusers on material witness warrants pending trial of the alleged assailants.<sup>88</sup> The ordeal of a prosecution in the era of a rejuvenated Confrontation Clause may deter some victims of domestic violence from filing complaints in the first place.<sup>89</sup>

#### D. Implications for Nontestimonial Hearsay

At the same time that the Supreme Court has fortified the right of the accused to confront declarants of testimonial hearsay, the Court has virtually extinguished constitutional confrontation rights with respect to nontestimonial hearsay. The *Crawford* ruling had chided the *Roberts* framework, implying that *Roberts* was inadequate in any context, but left *Roberts* intact as the primary authority for evaluating nontestimonial hearsay.<sup>90</sup> In *Davis*, the Court renounced *Roberts* more emphatically. The Court declared that the Sixth Amendment simply has no application outside the scope of testimonial hearsay.<sup>91</sup> This language in *Davis* was arguably dicta, but its unequivocal tone made clear the Court’s resolve to discard *Roberts* altogether.

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87. Where prosecutors can prove that the defendant wrongfully procured the unavailability of the declarant, this misconduct may forfeit the defendant’s confrontation rights. See *infra* subpart III(A). The problem is that many defendants will intimidate their victims so effectively that the government may lack the evidence necessary to establish forfeiture.

88. See Lininger, *supra* note 36, at 787 (discussing the regrettable practice of jailing victims, one respondent to a recent survey of district attorneys’ offices noted, “[u]nfortunately, some of the victims have had to remain in custody until the trial, which is a terrible message we are sending to the victim, her children, the defendant and society” (emphasis added) (internal quotation marks omitted)); Percival, *supra* note 68, at 241 (discussing harm to the accuser when prosecutor jails her to assure her attendance at the trial of the alleged batterer).

89. See Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1366 (2005) (arguing that hardships created by the Supreme Court’s new confrontation jurisprudence discourage some victims from reporting crimes); Percival, *supra* note 68, at 241 (“Victims, particularly those already familiar with the criminal justice system, will begin to distrust prosecutors and the system and will be less likely to report future crime. Fear of prosecutors taking extreme measures could cause domestic violence advocates and shelters to advise victims against coming forward.”); Robert Tharp, *Domestic Violence Cases Face New Test: Ruling That Suspects Can Confront Accusers Scares Some Victims from Court*, DALLAS MORNING NEWS, July 6, 2004, at A1 (reporting that the Supreme Court’s new confrontation jurisprudence has limited the willingness of victims to come forward).

90. See Lininger, *supra* note 36, at 766–67 (noting that among approximately 500 published federal and state opinions applying *Crawford* between March 8, 2004, and December 31, 2004, nearly one-third of the courts reaching the merits distinguished *Crawford* on the ground that the statement in question was not testimonial and that many of these courts simply applied the *Roberts* test as if *Crawford* had never been decided). See generally *supra* note 20 and accompanying text.

91. *Davis v. Washington*, 126 S. Ct. 2266, 2274–75 (2006).

Lower courts seemed somewhat incredulous when they interpreted the *Davis* Court's discussion of nontestimonial hearsay. A few lower courts even continued to apply *Roberts* after *Davis*,<sup>92</sup> just as they had in the wake of *Crawford*. But the prevailing view is that *Davis* completely overturned *Roberts* as a test for confrontation in any context.<sup>93</sup> One federal appellate court that had initially posited the survival of *Roberts* after *Davis* was careful to correct its error a few weeks later.<sup>94</sup>

Is the passing of *Roberts* lamentable? Perhaps the *Roberts* test was so perfunctory that its demise was entirely inconsequential. This characterization of *Roberts* may be accurate with respect to hearsay offered pursuant to the so-called firmly rooted hearsay exceptions.<sup>95</sup> But *Roberts* had provided genuine protection for the accused when the prosecution offered nontestimonial hearsay under one of the few hearsay exceptions that the Court did not deem firmly rooted,<sup>96</sup> such as the exception for declarations against interest (Rule 804(b)(3)),<sup>97</sup> the catch-all hearsay exception (Rule 807),<sup>98</sup> or the many

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92. See, e.g., *State v. Blue*, 717 N.W.2d 558, 565 (N.D. 2006) (concluding that “[t]he reliability and trustworthiness factors are still to be used for nontestimonial statements”); *State v. Rodriguez*, No. 2005AP1265-CR, 2006 WL 2088161, at \*10 (Wis. Ct. App. July 28, 2006) (applying the *Roberts* framework to nontestimonial excited utterance in domestic violence case); see also *Middleton v. Roper*, 455 F.3d 838, 857 n.6 (8th Cir. 2006) (suggesting that it is open to debate whether the *Roberts* test “remains good law when applying the Confrontation Clause to nontestimonial hearsay” (quoting *Ferguson v. Roper*, 400 F.3d 635, 639–40 (8th Cir. 2005), cert. denied, 126 S. Ct. 1028 (2006))).

93. See generally *An Online Symposium on the Confrontation Clause*, 105 MICH. L. REV. FIRST IMPRESSIONS I (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/ConfrontationClause.htm>.

94. Over a two-week period in July 2006, a succession of Seventh Circuit panels reached diametrically opposite conclusions about the continued viability of *Roberts* after *Davis*. In *United States v. Thomas*, the Seventh Circuit seemed to conclude that *Roberts* survived *Davis*. 453 F.3d 838, 844 (7th Cir. 2006) (“Where a hearsay statement is found to be nontestimonial, we continue to evaluate the declaration under *Ohio v. Roberts*.” (citation omitted)). The *Thomas* ruling itself seemed equivocal on this point, determining that “[b]ecause the tape-recording of the call is nontestimonial, it does not implicate Thomas’s right to confrontation”—a conclusion that seems at odds with the *Thomas* court’s assessment of *Roberts*’s enduring vitality. *Id.* In any event, the Seventh Circuit completely discarded *Roberts* twelve days later. *United States v. Tolliver*, 454 F.3d 660, 665 n.2 (7th Cir. 2006) (indicating that although *Crawford* had not clearly resolved the status of nontestimonial hearsay under the Confrontation Clause, “the Supreme Court’s recent decision on the matter, *Davis v. Washington*, appears to have resolved the issue, holding that nontestimonial hearsay is not subject to the Confrontation Clause”). Perplexingly, Judge Richard Posner sat on both panels.

95. *Davis*, 126 S. Ct. at 2274–75.

96. E.g., *Miller v. State*, 98 P.3d 738, 744–45 (Okla. Crim. App. 2004) (applying *Roberts* and finding error in the trial court’s admission of nontestimonial hearsay offered under the residual hearsay exception and the exception for statements against penal interest); see also *Idaho v. Wright*, 497 U.S. 805, 818–27 (1990) (invoking *Roberts* to find error in the trial court’s use of the catch-all exception to admit a statement by an alleged victim of child abuse to a doctor).

97. FED. R. EVID. 804(b)(3). This rule provides that when a declarant is unavailable for one of the reasons set forth in Rule 804(a), the court may admit:

A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a

new state hearsay exceptions that are not firmly rooted simply because of their novelty. The end of *Roberts* likely means that the Sixth Amendment will no longer exert a restraining influence on prosecutorial use of such exceptions.

Consider a few examples. In a prosecution of Jennifer Johnson for financial fraud, if a third party spoke to a neighbor and made a statement that harmed the declarant's pecuniary interest while also implicating Johnson, the statement may very well be admissible under Rule 804(b)(3) without any overlay of constitutional regulation.<sup>99</sup> In a prosecution of Bill Smith for possession of a firearm after a felony conviction, if the prosecution offered a hearsay statement by a deceased gun dealer to a friend indicating the dealer had sold Smith a firearm, that statement may very well be admissible under Rule 807 without any second guessing under the Confrontation Clause.<sup>100</sup> Prosecutors have been hesitant to use Rule 804(b)(3) and Rule 807 in the two years after *Crawford*, but *Davis* may persuade prosecutors to throw that caution to the wind.

The importance of the growing rift between constitutional regulation of testimonial and nontestimonial hearsay will only grow in the aftermath of *Davis*. Indeed, the new temporal test in *Davis* has provided plain guidance for police officers and prosecutors who seek classification of their evidence as nontestimonial. The likely result is that a higher proportion of hearsay elicited by police will fall on the "nontestimonial" side of the line drawn by *Davis*. As the Supreme Court itself has acknowledged, officers are accustomed to adapting their techniques in order to exploit opportunities and avoid

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reasonable person in the declarant's position would not have made the statement unless believing it to be true.

*Id.*

98. FED. R. EVID. 807. This rule provides that:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

*Id.*

99. Capra, *supra* note 20, at 2417, 2441–50 (arguing that, due to uncertainty surrounding constitutional regulation of nontestimonial hearsay, the best approach would be to tighten the language of Rule 804(b)(3) rather than rely heavily on the Confrontation Clause to protect the rights of accusers).

100. The language of Rule 807 itself seems to allude to the requirements of both the reliability and unavailability prongs in the *Roberts* test. See FED. R. EVID. 807; *supra* text accompanying notes 97–98. But there can be little doubt that *Roberts* and its progeny imposed a higher level of regulation than did Rule 807 itself. See, e.g., *Wright*, 497 U.S. at 817–27 (relying on *Roberts* to reverse the trial court's admission of evidence offered against the accused under the state version of Rule 807).

pitfalls created by constitutional jurisprudence.<sup>101</sup> Officers could not so easily deduce how to satisfy *Crawford*, in part because *Crawford* did not create a bright line test and in part because *Crawford* placed greater emphasis on the mindset of the declarant than on the conduct of police. The clarity of the new rule in *Davis* is admirable, but this case also provides a “how to” manual for officers seeking to avoid the strictures of the Confrontation Clause.

## II. Reconceptualizing Confrontation as a Policy Issue

The previous Part has shown that the Supreme Court now construes the Confrontation Clause as an all-or-nothing proposition. If hearsay is testimonial, the accused has strong constitutional confrontation rights. If hearsay is nontestimonial, the Sixth Amendment has no application. Such a stark dichotomy may accurately reflect the Framers’ understanding of then-existing law, but originalist constitutional interpretation does not necessarily make good policy for the twenty-first century.<sup>102</sup> This Part will consider whether legislatures should strive for a more graduated calibration of confrontation rights within the framework established by *Davis* and *Crawford*.

### A. *The Need for Legislation to Fine Tune Confrontation Law*

The Supreme Court has made clear its intent that state legislatures should play a role in confrontation policy. The Court has hardly filled the field. One would not characterize the Court’s jurisprudence as a comprehensive approach to confrontation. More accurately, the Court has responded passively to particular fact patterns that wend their way before the Court, and the *Davis* ruling showed that the Court does not wish to take a more proactive, wider-ranging approach.<sup>103</sup>

Nor does the Court seem to feel an obligation to translate its confrontation jurisprudence into easily administrable rules. In the seminal *Crawford* ruling, the Court never purported to devise a bright-line rule akin to the *Miranda* rule,<sup>104</sup> the *Doyle* rule,<sup>105</sup> or the *Bruton* rule.<sup>106</sup> Instead, the

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101. See, e.g., *Missouri v. Scibert*, 542 U.S. 600, 616 (2004) (recognizing a police strategy to “undermine the *Miranda* warnings”).

102. For an interesting discussion of the originalist approach in *Crawford*, see Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1516–18 (2006). See also Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 189–93 (2005) (characterizing *Crawford* as an example of “successful” originalist and formalistic constitutional interpretation).

103. See *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006) (“Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases . . . as follows . . .”).

104. *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966) (excluding statements resulting from custodial interrogations unless the police first warn the individual before any questioning begins that he has “the right to remain silent,” that anything the individual “says can be used against him in a court of law,” that the individual has the right to have an attorney present, and that if the

*Crawford* Court left “for another day” the formulation of precise guidelines for trial courts.<sup>107</sup> Former Chief Justice Rehnquist lambasted his colleagues for abdicating their responsibility to devise a workable framework of confrontation law.<sup>108</sup> The *Davis* ruling began to address some of Chief Justice Rehnquist’s concerns, but the scope of *Davis* is narrow, and the Court does not seem inclined imminently to clarify all the implications of *Crawford*. Rather, the Court seems to expect that the states will take some initiative in implementing the *Crawford* ruling.<sup>109</sup>

How should state legislatures respond? The dynamism in constitutional confrontation law presents both opportunities and challenges for statutory confrontation law. In areas where constitutional confrontation law is strong—for example, the regulation of testimonial hearsay—statutory hearsay law has more room to maneuver. No longer must statutory hearsay law serve as a backstop for a weak Confrontation Clause. Professor Richard Friedman, perhaps the leading expert on testimonial hearsay and a strong advocate of defendant’s rights, has indicated that he welcomes an expansion of statutory hearsay law so long as the Confrontation Clause is robust.<sup>110</sup>

On the other hand, in contexts where the Confrontation Clause is weak, statutory hearsay provides the only protection for defendants.<sup>111</sup> After the Supreme Court has determined that the Sixth Amendment affords the accused no right to confront declarants of nontestimonial hearsay, defense attorneys must look elsewhere for authority to support at least some modicum of confrontation. The Due Process Clause is one possibility, but due process jurisprudence is amorphous and underdeveloped in these

individual “cannot afford an attorney one will be appointed for him prior to any questioning if he so desires”).

105. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (prohibiting the prosecution from referring to a defendant’s silence after *Miranda* warnings).

106. *Bruton v. United States*, 391 U.S. 123, 126 (1968) (barring post-arrest statement to police by a nontestifying codefendant).

107. *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

108. *Id.* at 75–76 (Rehnquist, J., concurring in the judgment).

109. *See id.* at 68 (majority opinion) (“[I]t is wholly consistent with the Framers’ design to afford the states flexibility in their development of hearsay law . . .”); *supra* text accompanying note 28.

110. Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506, 512 & n.118 (1997) (noting the ill effects of “linking the confrontation right to hearsay doctrine” and arguing that “[t]he use of hearsay law to reflect a confrontation right that should be articulated separately will tend to result in hearsay law that is too stringent in excluding hearsay”); Confrontation Blog, <http://confrontationright.blogspot.com/> (Feb. 21, 2005, 16:33 CDT) (arguing that “hearsay law—as opposed to confrontation law—should generally become far less exclusionary and less rigid”).

111. Capra, *supra* note 20, at 2445 (arguing that “[t]he need to protect the accused from unreliable hearsay has not gone away” as a result of the Supreme Court’s new confrontation jurisprudence and instead that the “need has simply shifted away from the Constitution and more toward rulemaking”).

circumstances.<sup>112</sup> In the few contexts where due process supplies the authority for confrontation—for example, revocation and sentencing hearings—the variation among courts interpreting the requirements of due process is striking indeed.<sup>113</sup> The best approach, in the absence of regulation under the Confrontation Clause, would be for statutes to supply a minimal level of confrontation rights vis-à-vis declarants of nontestimonial hearsay.

At the present time, the states' statutory hearsay law does not mesh well with constitutional confrontation law. Most states have modeled their evidence codes after the original version of the Federal Rules of Evidence, drafted in the early 1970s. Most states have not even kept their statutes up to date by incorporating the amendments to the Federal Rules in the mid-1990s.<sup>114</sup> To the extent that states have innovated their own hearsay rules, some of these rules have sought to memorialize then-existing constitutional requirements, which are now out of date.<sup>115</sup> *Crawford* and *Davis* have effected a seismic shift that has shaken the foundations of statutory hearsay law, and the evidence codes are now misaligned with the constitutional terrain. A retrofit is necessary to update the codes.

Could the legislatures simply pass the buck to state courts? Ultimately, in the absence of clear guidance from the U.S. Supreme Court or the legislative branch, state appellate courts would bear the responsibility of spelling out the precise requirements of confrontation law. But this result would be unfortunate. Except in those states that have empowered the judiciary to make evidentiary rules, state appellate courts could only proceed on an ad hoc, reactive basis. Confrontation law would develop slowly. Chances are slim that the courts could develop a comprehensive, internally consistent set of rules, in part because different panels of judges would be rendering decisions at different times. And of course, every litigator knows the serendipity of judge-made law: good facts make good law, and bad facts make bad law.<sup>116</sup> Some judges may simply resist a rule-making function on ideological grounds.<sup>117</sup>

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112. See *id.* at 2423 n.70 (“[U]nreliable hearsay could be excluded under the Due Process Clause, but that is a very soft constraint in the context of admissibility of evidence.”); Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723, 726 n.10 (1992) (arguing that “if a hearsay statement did not fit within the confrontation protection,” the assertion could still be evaluated under the Due Process Clause, although its standards are general and flexible).

113. See *infra* subpart III(C).

114. See *infra* subpart III(C).

115. For example, the special hearsay exception that Oregon innovated in 1999 for domestic violence cases incorporated a multi-factor test to assess reliability pursuant to *Roberts*. OR. REV. STAT. § 40.460(26) (2005).

116. See, e.g., Daniel R. Cahoy, *Changing the Rules in the Middle of the Game: How the Prospective Application of Judicial Decisions Related to Intellectual Property Can Promote Economic Efficiency*, 41 AM. BUS. L.J. 1, 39 n.166 (2003) (“[I]n the same way that ‘bad facts make bad law,’ one can argue that good facts make good law . . . .”); Thomas Saunders, *Settling Without “Settling”: School Finance Litigation and Governance Reform in Maryland*, 27 YALE L. & POL’Y

To be sure, one can conceive of arguments against state legislatures' involvement in formulating confrontation policy. Federal confrontation jurisprudence could continue to evolve, and perhaps it could pull the rug out from under the states' statutory regime once again. The process of legislating confrontation could become highly politicized. But state courts are similarly vulnerable to changes in federal confrontation jurisprudence. And the concern about the politicization of statutory law does not necessarily favor judge-made law, because most state judges are elected.<sup>118</sup>

Assuming that state legislatures have a role to play in confrontation policy, another question arises: what considerations should inform that policy? Of course, state legislatures must abide by constitutional law. But state legislatures may also consider a wider range of norms, as discussed in more detail below.

#### *B. Extraconstitutional Norms Guiding Confrontation Policy*

While constitutional law supplies the boundaries for legislative policy, the Constitution has left interstitial opportunities for policymaking that takes account of "extraconstitutional norms." This term refers to the constellation of considerations extrinsic to the constitutional text, but relevant to assessing the philosophical and policy implications of various alternative courses permitted by the Constitution. While scholars may disagree about the propriety of considering extraconstitutional norms in interpreting the Constitution,<sup>119</sup> this debate should not constrain the imagination of legislators, to whom the separation of powers doctrine has delegated the task of extraconstitutional policymaking. So long as legislators comply with the Constitution, they are

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REV. 571, 613 (2004) (explaining that the old adage "good facts make good law" means that a lawyer should use the best case with the best facts for a case of first impression).

117. See Alfred M. Mamlet, *Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits*, 33 EMORY L.J. 685, 701 (1984) (suggesting that a judge who takes part in "making a public policy choice not required by the Constitution" has overstepped the proper boundary between the judiciary and the legislative branch).

118. Bill Brooks, *Judicial Independence Subject of Town Hall Meeting*, RES GESTAE, Dec. 2005, at 12, 12 (reporting that at local and state levels, "most judges are elected").

119. See, e.g., JOHN ELY, *DEMOCRACY AND DISTRUST* 1-72 (1980) (discussing the "long-standing dispute" between those who believe "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution" and those who hold the "contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document"); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705-10 (1975) (rejecting a purely interpretivist approach to judicial review and arguing that the "broad textual provisions [of the Constitution should be] seen as sources of legitimacy for judicial development and explication of basic shared national values" and are "sufficiently unspccific to permit the judiciary to elucidate the development and change in the content of [basic] rights over time").

free to embrace norms and policy rationales outside the scope of the Constitution.<sup>120</sup>

There are myriad extraconstitutional considerations bearing on policy in the area of criminal procedure, and space does not permit an exhaustive list in this Article. The following subsections will examine three considerations in particular: deontological norms, teleological norms, and Rawlsian theory.

*1. Deontological Norms.*—Immanuel Kant ascribed paramount importance to individual moral autonomy.<sup>121</sup> A person acts autonomously when his action expresses his own will. According to Kant, the distinctive dignity of human beings derives from their ability to act autonomously.<sup>122</sup> Kantian autonomy is not completely without boundaries. A person must exercise his autonomy in a manner that abides by moral law, and that, in particular, does not deny others their legitimate exercise of autonomy.<sup>123</sup> Applying Kantian principles to political philosophy, government should enact laws and policies that maximize individual autonomy and that respect the inherent dignity of all people. The antithesis of Kantian deontology is a utilitarian construct whereby the state treats an individual as a means to another end, rather than as an end in and of himself.<sup>124</sup>

Admittedly, few legislators thumb through Kant's writings on their lunch breaks. But Kant's deontological theory (packaged in different forms) turns up again and again in policy discussions about matters ranging from "death with dignity" to medical marijuana to compulsory military service.<sup>125</sup>

120. See Margaret Paris, *Trust, Lies & Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 8 (1996) (urging that, in regulating admissibility of confessions, local communities should prescribe rules setting a higher standard of voluntariness than required under the Fifth Amendment); David Schuman, *Taking Law Seriously: Communitarian Search and Seizure*, 27 AM. CRIM. L. REV. 583, 603 (1990) (applying the same argument with respect to the Fourth Amendment).

121. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 58 (Allen W. Wood trans., Yale Univ. Press 2002) (1785) [hereinafter KANT, *GROUNDWORK*] (describing "[a]utonomy of the will as the supreme principle of morality"); see also IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 30 (Mary J. Gregor trans., Cambridge Univ. Press 1997) (1788) ("Autonomy of the will is the sole principle of all moral laws and of duties in keeping with them . . .").

122. See KANT, *GROUNDWORK*, *supra* note 121, at 54 ("Autonomy is thus the ground of the dignity of human nature and of every rational nature.").

123. See *id.* at 40–42 (applying the principle that humanity must always be an end unto itself to highlight the importance of respecting the autonomy of other human beings as key to recognizing them as rational beings).

124. For an interesting collection of critiques, see KANT'S *GROUNDWORK OF THE METAPHYSICS OF MORALS: CRITICAL ESSAYS* (Paul Guyer ed. 1998). See also THOMAS HILL, *DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY* (1992).

125. See, e.g., Rebecca Dresser, *Precommitment: A Misguided Strategy for Securing Death with Dignity*, 81 TEXAS L. REV. 1823, 1827 (2003) (criticizing advance directives, such as an expressed wish to "die with dignity," that assign a high value to personal autonomy, including autonomy over future treatment); Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEXAS L. REV. 1481, 1514 n.143 (1990) (noting the Alaska Supreme Court's attempt to legalize adult marijuana use and possession based on personal autonomy considerations and Alaska's status as the "home of people who prize their

In the context of criminal procedure, Kantian concerns about the primacy of individual autonomy permeate our present rights-based regime.<sup>126</sup>

Does the confrontation of hearsay declarants advance deontological values? Scholars have argued that courts must permit vigorous, unfettered cross-examination in order to respect the autonomy of the accused.<sup>127</sup> As a general matter, the accused should be able to adduce evidence through whatever means he chooses. He should be able to confront percipient witnesses directly, not through some intermediary such as a police officer who filters the hearsay declarant's statements. The state should not require the accused to forego confrontation simply because such a policy would be expedient in prosecutions of domestic violence.<sup>128</sup>

On the other hand, Kantian deontology does not permit the accused to mistreat a witness in order to gain a tactical advantage.<sup>129</sup> Such instrumentalism, whether practiced by the state or by the accused, is anathema to Kantian philosophy. For example, if the accused has engaged in some sort of misconduct that procured the absence of a key witness, then deontological theory would abide forfeiture of the defendant's confrontation rights.<sup>130</sup> In these circumstances, it is the defendant's own agency, not some instrumentalist concern about facilitating convictions, which deprives the defendant of confrontation.<sup>131</sup>

individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own individual life styles"); Burt Neuborne, *Is Money Different?*, 77 TEXAS L. REV. 1609, 1615 (1999) (discussing the argument that imposing a legal duty to vote would be a constitutionally impermissible violation of political autonomy while certain other forms of legal compulsion, including compulsory military service, are generally accepted by society).

126. See William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 439 (1995) (noting that concerns about respect for individual autonomy underlie many modern rules protecting the rights of individuals).

127. See Timothy Terrell, *Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the "Metaphysics" of Legal Ethics*, 49 EMORY L.J. 87, 112–13 (2000) (suggesting that when a lawyer vigorously cross-examines a witness, even a truthful witness, the lawyer shows respect for the dignity of the lawyer's client); R. George Wright, *Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character*, 83 KY. L.J. 801, 825 (1994–1995) (arguing that Kantian concerns about protecting human dignity and autonomy support a strong adversarial system, including vigorous cross-examination, so long as attorneys do not abuse witnesses).

128. Since the *Davis* ruling, courts have explicitly subordinated concerns of expediency. *E.g.*, *State v. Mechling*, 633 S.E.2d 311, 325 (W. Va. 2006) (refusing to sacrifice confrontation "upon the altar of expediency to achieve a conviction in a domestic violence case"); see also *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006) (insisting on confrontation despite "the effect of allowing the guilty to go free").

129. Wright, *supra* note 127, at 825.

130. For a further discussion of forfeiture of confrontation rights, see *infra* subpart III(A).

131. *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879) ("The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the accused's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts."); *Mechling*, 633 S.E.2d at 325 (noting that while the state may not sacrifice confrontation in the name of expediency, "those protections may be sacrificed by the accused through a time-tested equitable doctrine: forfeiture").

Deontological theory does not focus solely on the moral obligations and rights of the accused. The accuser also has an important claim to moral autonomy. This analysis is complicated. Accusers in domestic violence cases frequently wish to drop charges after initially complaining to police.<sup>132</sup> Some commentators believe that the appropriate response by the government is to honor the accuser's wishes, rather than to override her autonomy with a "no-drop policy."<sup>133</sup> The opposing view is that vacillating accusers are not exercising moral autonomy, but rather are submitting to a pattern of abuse and intimidation that has undermined their self-determination; according to this view, a no-drop policy is necessary to vindicate the accuser's autonomy.<sup>134</sup> This debate is a fascinating one, and it lies outside the scope of the present Article. Suffice it to say for present purposes that respect for the moral autonomy of accusers would support a policy favoring the accuser's attendance at court, so that she can share her story and give input of whatever sort the court will allow, unless the accuser is unavailable or under duress. A policy that freely substitutes hearsay for live testimony by the accuser, irrespective of her willingness and availability to testify, does not comport with Kantian deontology.<sup>135</sup>

In sum, deontological theory guides confrontation policy in a number of important ways. First, the confrontation advances deontological values by respecting the moral autonomy of the accused to present evidence in the manner he sees fit, even in contexts where the Sixth Amendment does not apply. Second, the defendant's deontological claim to cross-examination is not absolute: a defendant who tries to coerce the accuser pending trial—sub-

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132. See *supra* notes 70–71 and accompanying text.

133. See, e.g., Feige, *supra* note 69 ("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."); Wendy McElroy, *Supreme Court Ruling May Impact Domestic Violence Cases*, IFEMINISTS.COM, Mar. 31, 2004, <http://www.wendymcelroy.com/ifeminists/2004/0331.html> (hailing the Supreme Court's recent confrontation jurisprudence as "affirm[ing] the power of victims of domestic violence to exercise control over their own cases—specifically over whether or not to pursue charges"); see also Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1854–68 (1996) (discussing the difficulty of strengthening prosecution of domestic violence while respecting the survivors' autonomy); Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 977 (1998) (explaining the concern among many feminists that a paternalistic approach that "refuse[s] deference to [the victim's] own assessment of the promises and perils of proceeding with prosecution" deprives the victim of her own agency).

134. See Shazia Choudhry & Jonathan Herring, *Righting Domestic Violence*, 20 INT'L J.L. POL. & FAM. 95, 101–03 (2006) (suggesting that intervention in families experiencing domestic violence honors and strengthens the moral autonomy of victims, even where victims decline to cooperate with the government); see also MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 140–66 (2003) (offering a nuanced feminist perspective on moral autonomy).

135. See *Beach v. State*, 816 N.E.2d 57, 60 (Ind. Ct. App. 2004) (expressing concern that in a domestic violence case the government chose to offer hearsay statements of an accuser without any explanation as to why the government did not present live testimony).

verting her autonomy by treating her as a means to his own ends—should forfeit any right to confront that witness. Finally, to the extent that the law places a greater premium on live testimony by accusers, the law accords them greater respect and gives them greater influence over the outcome of prosecutions.

2. *Teleological Norms.*—Teleology differs greatly from deontology. Teleology places the highest emphasis on ends, not means.<sup>136</sup> One subset of teleology is utilitarianism. Jeremy Bentham, the first modern proponent of utilitarianism, judged the merit of a proposed action by assessing the extent to which it would advance aggregate societal utility.<sup>137</sup> In pure Benthamite utilitarianism, a policy proposal that caused significant hardship for a small minority, but brought a small increment of utility to a large majority, would be salutary.

Confrontation has value in a teleological paradigm for a number of reasons. To begin with, confrontation furthers the goal of truth-seeking.<sup>138</sup> Cross-examination is the “greatest legal engine ever invented for the discovery of truth.”<sup>139</sup> The personal presence of the declarant at trial allows the jury to evaluate his or her demeanor.<sup>140</sup> Of course, the trial witness must take the oath, while the out-of-court declarant has no such obligation.<sup>141</sup>

Another teleological argument in favor of confrontation is that defendants fare better in rehabilitation when the criminal justice system has accorded them respect at trial. This phenomenon is particularly important in cases of family violence.<sup>142</sup> As a general matter, procedural fairness en-

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136. See Robert G. Olson, *Teleological Ethics*, in 8 THE ENCYCLOPEDIA OF PHILOSOPHY 88, 88 (Paul Edwards ed., 1967) (“The common feature of all teleological theories of ethics is the subordination of the concept of duty, right conduct, or moral obligation to the concept of the good or the humanly desirable.”).

137. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11–13 (J.H. Burns & H.L.A. Hart eds., 1996) (1789).

138. The Supreme Court has stressed that the imperative of truth-seeking takes precedence over the priority of zealous advocacy for the accused. *Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (opining that defense tactics should be “limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth”). Subsequent decisions such as *Crawford*, however, have cast doubt on the notion that deontological concerns are subordinate to truth-seeking. See *Crawford v. Washington*, 541 U.S. 36, 62, 67–68 (2004) (stating that judicial assurance that evidence is reliable is not sufficient to circumvent the constitutional right of the accused to confront his accuser because the Framers, in drafting the Confrontation Clause, understood that a judge may not always safeguard the rights of the accused); *supra* text accompanying notes 48–50.

139. *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940)).

140. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 108 (5th ed. 2004) (explaining that jurors’ observation of a witness’s demeanor is regarded as an important safeguard that helps to ensure reliability of evidence).

141. See *id.* at 109 (noting that an oath is regarded as helpful to ensure reliability).

142. In domestic violence cases, the failure of judges and prosecutors to respect defendants’ rights in court actually increases the likelihood of recidivism by these defendants. Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L.

hances the legitimacy of the legal system, helping to achieve the utilitarian goals of fostering social cohesion and securing compliance with the courts' orders.<sup>143</sup> Of course, one should not overstate the importance of this consideration, but it deserves inclusion in a list of teleological benefits deriving from treating defendants fairly at trial.

There are a number of teleological arguments that would militate in favor of *reducing* confrontation rights. For example, strict confrontation rules may hinder effective law enforcement.<sup>144</sup> Some commentators believe that onerous cross-examination at trial may discourage victims from reporting certain categories of crime.<sup>145</sup> Rigorous confrontation requirements may necessitate dismissals of cases in which the alleged victims refuse to cooperate with the government after initially filing complaints. Further, the increasing necessity for live testimony heightens the risk that defendants will attack or threaten crucial witnesses in the hope of dissuading them from testifying at trial.<sup>146</sup> The Supreme Court itself has recognized utilitarian concerns in modifying confrontation requirements for child abuse prosecutions, allowing accusers to testify via closed-circuit television.<sup>147</sup>

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REV. 1843, 1881–84 (2002). In addition, accusers' perception of unfairness to defendants may discourage future reporting by victims of domestic violence and sexual assault. *Id.* at 1846.

143. *Id.* at 1874–81.

144. Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 459 (2006) (arguing that the Supreme Court's stricter enforcement of the Confrontation Clause has made convictions "harder to obtain" in domestic violence cases).

145. Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 936–37 (2001) (listing studies supporting the proposition that victims' reluctance to report rape goes up when cross-examination at trial is more difficult); Thomas R. Baker, *Cross-Examination of Witnesses in College Student Disciplinary Hearings: A New York Case Rekindles an Old Controversy*, 142 EDUC. L. REP. (West) 11, 23, 29 (2000) (discussing possible effects of permitting cross-examination of date rape victims in college disciplinary hearings, including discouraging victims from filing disciplinary complaints). Among women who declined to report violent crimes committed against them by intimates (defined as current and former spouses and boyfriends), the percentage citing privacy concerns has grown considerably in recent years. A 1998 report indicated that 15.4% of nonreporting victims cited privacy concerns as the reason for their reluctance to file complaints against their assailants. A follow-up report in June 2005 indicated that 33.8% of nonreporting victims cited privacy concerns as their reason for not filing complaints against assailants who were boyfriends or girlfriends; 25.1% of nonreporting victims cited privacy concerns as their reason for not reporting violent crimes committed against them by spouses. Compare BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 19 (1998), available at [www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf) (setting forth data for the years 1992 through 1996), with BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS, INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 26 (2005) [hereinafter BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf> (setting forth data for the years 1998 through 2002).

146. See *infra* subpart III(A) (explaining that defendants are beginning to realize that intimidated witnesses may refuse to cooperate during trial, resulting in dismissal or acquittal).

147. *Maryland v. Craig*, 497 U.S. 836, 853 (1990) (concluding that the state's interest in the "physical and psychological well-being" of child accusers is so important that it outweighs the defendant's interest in conventional confrontation).

One last shortcoming of confrontation, at least from a purely utilitarian standpoint, is that it prolongs trials and requires more judicial resources than would a criminal justice system that relies heavily on hearsay. Not only do trials take longer, but defendants are more likely to go to trial in the post-*Crawford* era.<sup>148</sup> Further, trials must be delayed when litigants have been unable to secure the attendance of crucial witnesses whose testimony cannot be replaced with hearsay statements. Surely judicial economy does not deserve the same weight as procedural fairness and public safety, but judicial economy is one priority that legislatures consider in formulating criminal justice policy.<sup>149</sup>

The foregoing analysis has shown that confrontation brings both benefits and drawbacks in the utilitarian calculus. These advantages and disadvantages do not necessarily align with the testimonial–nontestimonial distinction. Accordingly, legislatures may wish to supplement constitutional confrontation law in order to customize the requirements in certain settings where legislatures have discretion to regulate within constitutional boundaries. An all-or-nothing approach to confrontation simply does not make sense as a policy matter.

3. *Rawlsian Theory*.—Of course, the consequentialist analysis set forth above could yield egregious results if policymakers simply gave equal weight to all measures of utility. Pure utilitarianism would abide feeding ten people to the lions if 100,000 spectators derived a total utility exceeding the suffering of the victims. The philosopher John Rawls addressed this problem by offering a normative theory according greater weight to the welfare of the worst-off segment of society.<sup>150</sup> In other words, the gauge of justice is not the extent to which aggregate social utility will advance. A better indication, according to Rawls, is the benefit or detriment to the lowest stratum.<sup>151</sup>

Applying Rawlsian theory to confrontation policy, legislatures should give less weight to issues of judicial economy or consumption of societal resources and more weight to considerations such as the protection of battered women. Research has shown that while domestic violence pervades all strata of society, it is particularly severe among the lowest income

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148. See Lininger, *supra* note 36, at app. 1 (stating that 59% of those surveyed felt that defendants in domestic violence cases were less likely to plead guilty after *Crawford*).

149. This paragraph should not be construed as an endorsement of the position that a curtailment of confrontation rights is desirable to achieve judicial economy. Rather, this observation is simply one item in a list of utilitarian concerns that state legislatures might possibly consider (correctly or incorrectly) in judging how far to extend confrontation rights (e.g., in misdemeanor trials, revocation hearings, administrative hearings, etc.).

150. See JOHN RAWLS, *A THEORY OF JUSTICE* 65 (rev. ed. 1999) (presenting the “Difference Principle,” whereby any proposal that might result in unequal distribution of resources or benefits must be judged according to whether it would “improve[] the expectations of the least advantaged members of society”).

151. See *id.* (explaining that the interests “of those less fortunate” have absolute priority in Rawlsian normative theory).

brackets.<sup>152</sup> Without intervention by the criminal justice system, battering can result in a “cycle of violence” that entraps poor mothers and their children for generations to come.<sup>153</sup> From a policy standpoint—at least in the interstices where constitutional law allows consideration of other norms—Rawlsian theory insists that the plight of battered women deserves greater emphasis than such concerns as the efficient administration of justice.

To be sure, Rawlsian theory does not simply favor the accuser. Defendants accused of domestic violence are often destitute. Lacking resources to hire an attorney, the defendants generally represent themselves in misdemeanor prosecutions of alleged domestic violence.<sup>154</sup> The reality of pro se indigent defense necessitates a Rawlsian concern for simplicity and predictability in confrontation law—a concern that, in turn, favors reliance on statutes as well as case law in articulating confrontation policy. Rawlsian theory also requires that courts accord substantive fairness to accused batterers, and this concern does not disappear when hearsay falls on the “nontestimonial” side of the *Crawford–Davis* taxonomy.

Rawlsian theory has sometimes drawn criticism. A few commentators have protested the premise that the poor deserve preferential treatment; this prioritization seems to reward lack of effort.<sup>155</sup> Critics have also complained that special benefits for the poor may create perverse incentives that will discourage industry.<sup>156</sup> Such criticisms naively presume that economic status is always a function of volition rather than fate, endowment, or luck. In any event, these criticisms have less cogency outside the context of redistributive

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152. See ELEANOR LYON, NAT’L ELEC. NETWORK ON VIOLENCE AGAINST WOMEN, WELFARE AND DOMESTIC VIOLENCE AGAINST WOMEN: LESSONS FROM RESEARCH 1 (2002), available at [http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR\\_Welfare2.pdf](http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_Welfare2.pdf) (“[P]oor women experience violence by their partners at higher rates, partly because they have fewer options.”); see also BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE, *supra* note 145, at 39 tbl.5.10 (presenting recent data concerning incidence of domestic violence and demographic characteristics of victims); Barbara Gault & Annisah Um’rani, *The Outcomes of Welfare Reform for Women*, POVERTY & RACE (Poverty & Race Research Action Council, Wash., D.C.), July–Aug. 2000, at 1, 1, available at <http://www.prrac.org/newsletters/julaug2000.pdf> (noting that low income and minority women have an elevated exposure to sex-based inequalities such as physical abuse). Of course, the point here is not to suggest that some battered women deserve justice more than others, or to make judgments about different segments of society, but to focus attention on categories of survivors that domestic violence policy has not served adequately. See generally Adele M. Morrison, *Changing the Domestic Violence (Dis)course: Moving From White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061 (2006).

153. See Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 HARV. WOMEN’S L.J. 205, 205 (1997) (stating that children who witness domestic violence are more likely to promote or accept domestic violence in future relationships).

154. Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 585–92 (2003) (noting that a substantial number of defendants in misdemeanor domestic violence cases proceed pro se).

155. In his latest book, Ronald Dworkin criticizes Rawls on this point. RONALD DWORKIN, *JUSTICE IN ROBES* 253 (2006). Dworkin however holds Rawls in high esteem, indicating that “we are only just beginning to grasp how much we have to learn from that man.” *Id.* at 261.

156. *Id.* at 253.

taxation, which is the primary focus of critics who oppose Rawls. There can be little doubt that the criminal justice system seems more onerous to low-income people, in part because they are often unable to afford legal representation. The principle of equal justice requires greater attention to the plight of the most vulnerable.

In sum, Rawlsian theory guides confrontation policy by ordering priorities within the teleological framework. The most important consideration is to help those who need help the most. Confrontation policy should alleviate the suffering of battered women and children, a group that includes a disproportionately high number of low-income people. Confrontation policy should be straightforward, so that indigent defendants can understand their rights when they proceed without a lawyer. Confrontation policy should not disregard altogether the importance of judicial economy, lawyers' convenience, or the efficient use of societal resources, but these considerations must rank lower than the priority of according fair treatment to the worst-off segment of society.

### III. Five Statutes That Every State Needs After *Davis*

The previous Part has examined a number of philosophical and policy-based rationales for fine tuning confrontation rights within the parameters set by the Supreme Court's confrontation jurisprudence. This Part will offer specific proposals.<sup>157</sup> First, all states need a comprehensive forfeiture statute that complements, but does not simply mirror, the constitutional forfeiture doctrine recognized in *Crawford* and *Davis*. Second, states should provide a minimum level of confrontation rights for defendants against whom the government offers nontestimonial hearsay. Third, states should revise their rules for the use of hearsay in revocation hearings. Fourth, Rule 804 (setting forth hearsay exceptions for statements by unavailable declarants) should be revamped in order to exploit all the "chinks in the armor" of the Confrontation Clause. Finally, all states should develop protocols for law enforcement officers who interact with victims of domestic violence. Each of these proposals will be discussed in turn below.

#### A. *Comprehensive Forfeiture Statute*

Batterers sometimes use threats, violence, or both to dissuade accusers from testifying at trial. A defendant who wrongfully procures the absence of the complainant must forfeit his confrontation rights. No matter which of the above-listed perspectives one adopts—deontological, teleological, or Rawlsian—the deliberate coercion of a witness is intolerable. A deontological theorist recognizes that the defendant foregoes any claim to moral autonomy when he deliberately subverts the autonomy of another.<sup>158</sup>

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157. For each proposal, a draft statute appears in the Appendix to this Article.

158. See *supra* notes 127–35 and accompanying text.

The teleological policymaker recognizes that prosecutions will be ineffectual if batterers can escape with impunity whenever they bully their victims not to testify.<sup>159</sup> The Rawlsian theorist sees that poor accusers are most vulnerable to intimidation.<sup>160</sup> Indeed, it is hard to imagine any philosophical perspective that would countenance the assertion of confrontation rights by a defendant who himself has wrongfully caused the unavailability of a witness.

In both *Crawford* and *Davis*, the Supreme Court recognized the doctrine of forfeiture of wrongdoing as an exception to the Confrontation Clause. The *Crawford* Court indicated that “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds,” even if the hearsay at issue is plainly testimonial.<sup>161</sup> The *Davis* Court discussed forfeiture in more detail, declaring that “when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.”<sup>162</sup> According to the *Davis* Court, “[O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”<sup>163</sup> After vacating one of the cases reviewed in *Davis*, the Court suggested that the prosecution explore the applicability of forfeiture doctrine on remand.<sup>164</sup> Rarely has the Court so explicitly recommended an advocacy strategy to a party against whom the Court ruled.

It is difficult to overstate the practical importance of forfeiture law in the aftermath of *Crawford* and *Davis*. These decisions have made the accuser’s participation crucial for a prosecution to succeed.<sup>165</sup> Defendants are coming to realize that the accusers’ refusal to cooperate may result in dismissal or acquittal. This realization may tempt defendants to intimidate accusers, hoping to cause their absence at trial.<sup>166</sup> Ironically, the Supreme

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159. See *supra* notes 144–47 and accompanying text.

160. See *supra* notes 152–54 and accompanying text.

161. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

162. *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006).

163. *Id.*

164. *Id.*

165. For instance, on June 30, 2006, the Supreme Court vacated the judgments in seven lower court rulings regarding testimonial hearsay and the unavailability of key witnesses in light of the *Davis* decision. See *Anderson v. Alaska*, 126 S. Ct. 2983 (2006); *Lewis v. North Carolina*, 126 S. Ct. 2983 (2006); *Thomas v. California*, 126 S. Ct. 2983 (2006); *Billingslea v. United States*, 126 S. Ct. 2980 (2006); *Wright v. Minnesota*, 126 S. Ct. 2979 (2006); *Forrest v. North Carolina*, 126 S. Ct. 2977 (2006); *Castellanos v. California*, 126 S. Ct. 2965 (2006).

166. See *Davis*, 126 S. Ct. at 2279–80 (“This particular type of crime [domestic violence] is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.”); *State v. Mechling*, 633 S.E.2d 311, 324 (W. Va. 2006) (collecting various studies and articles indicating that threats or retaliation against accusers by defendants in domestic violence cases may occur in over half of these cases); Krischer, *supra* note 72, at 15 (reporting the high incidence of witness coercion in prosecutions of domestic violence); see also King-Ries, *supra* note 144, at 442–43 (noting that “[m]any defendants charged with crimes of domestic violence engage in wrongdoing designed to make it impossible for their victims to testify against them” and arguing that this challenge has exacerbated the difficulty of “victimless” prosecutions after *Crawford*).

Court's insistence on greater confrontation in court may actually lead to more out-of-court confrontation that discourages declarants from appearing at trial. Strict enforcement of the forfeiture doctrine will help to ensure that trials can proceed even when defendants scare away accusers. In turn, these laws will help to protect accusers from harassment pending trial if defendants realize that their wrongdoing cannot subvert the prosecution.

Given the paucity of forfeiture statutes at the present time,<sup>167</sup> a question naturally arises: why would states need to codify forfeiture law instead of simply relying on case law interpreting the constitutional forfeiture doctrine?<sup>168</sup> A comprehensive forfeiture statute serves a number of important functions. To begin with, the statute puts judges and attorneys on notice that forfeiture law is potentially applicable in a wide range of cases.<sup>169</sup> Further, the statute standardizes procedures for proving and contesting proof of

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167. This doctrine appears in Federal Rule of Evidence 804(b)(6), added to the Federal Rules in 1997, and in fourteen state analogs. *E.g.*, CAL. EVID. CODE § 1350 (West 1995); HAW. REV. STAT. ANN. § 626-1, R. 804(a) (LexisNexis 2002); 725 ILL. COMP. STAT. ANN. 5/115-10.2(d) (West 2002); 42 PA. CONS. STAT. ANN. § 804(a) (West 2005); S.D. CODIFIED LAWS § 19-16-29 (2006); DEL. UNIF. R. EVID. 804(b)(6); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); OHIO R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6). The supreme courts of Kentucky and Vermont added analogs of Federal Rule of Evidence 804(b)(6) to those states' evidence codes within a few months after the *Crawford* decision. *See* KY. R. EVID. 804(b)(5); VT. R. EVID. 804(b)(6). In the summer of 2005, the Oregon legislature passed a unique forfeiture statute that now appears in OR. REV. STAT. § 40.465(f) & (g) (2005). A new forfeiture statute took effect in Maryland in October 2005 and is now codified at MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (LexisNexis 2005). A similar measure is now under consideration in the Washington House Judiciary Committee. *See* H.R. 1508, 59th Leg., Reg. Sess. (Wash. 2005), available at <http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bills/House%20Bills/1508.pdf>.

168. The seminal case that addressed forfeiture by wrongdoing is *Reynolds v. United States*, 98 U.S. 145, 158–59 (1878) (ruling that a defendant who wrongfully procures the unavailability of a hearsay declarant cannot be heard to protest the admission of the absent declarant's hearsay statements). Even in states without forfeiture statutes, courts have acknowledged forfeiture principles. *E.g.*, *State v. Valencia*, 924 P.2d 497, 502 (Ariz. Ct. App. 1996); *People v. Moore*, 117 P.3d 1, 4 (Colo. Ct. App. 2004); *State v. Hallum*, 606 N.W.2d 351, 354–59 (Iowa 2000) (en banc); *State v. Meeks*, 88 P.3d 789, 791 (Kan. 2004); *State v. Magouirk*, 539 So. 2d 50, 65–66 (La. Ct. App. 1988), *opinion withdrawn in part on reh'g*, 561 So. 2d 801 (La. Ct. App. 1990); *State v. Fields*, 679 N.W.2d 341, 347 (Minn. 2004); *State v. Turner*, No. A04-1799, 2005 WL 2850315, at \*2–3 (Minn. Ct. App. Nov. 1, 2005); *State v. Sheppard*, 484 A.2d 1330, 1345–48 (N.J. Super. Ct. Law Div. 1984); *People v. Geraci*, 649 N.E.2d 817, 821–23 (N.Y. 1995); *Gonzalez v. State*, 195 S.W.3d 114, 117–26 (Tex. Crim. App. 2006), *cert. denied*, No. 06-6706, 2006 WL 2736595 (U.S. Nov. 6, 2006); *State v. Ards*, No. 2005AP2806-CR, 2006 WL 1911681, at \*1 (Wis. Ct. App. July 13, 2006).

169. In several cases over the last few years, advocates and trial judges overlooked opportunities to invoke the doctrine of forfeiture by wrongdoing. For example, in *People v. Kilday*, the prosecution failed to raise a forfeiture argument until the case reached the appellate level, and the court disallowed this argument. No. A099095, 2004 WL 1470795, at \*6 n.8 (Cal. Ct. App. June 30, 2004), *vacated*, 20 Cal. Rptr. 3d 161 (Cal. Ct. App. 2005), *review granted and opinion superseded*, 105 P.3d 114 (Cal. 2005). Perhaps if California had a broader forfeiture statute such as the one recommended herein, the prosecution in *Kilday* would have recognized the opportunity to raise the argument in a timely manner. *Kilday*, 2004 WL 1470795, at \*6 n.8; *see also Davis*, 126 S. Ct. at 2280 (remanding the *Hammon* case to state court and suggesting that the parties examine potential applicability of forfeiture doctrine); *Mechling*, 633 S.E.2d at 326 (remanding with a suggestion to consider forfeiture).

forfeiture. Perhaps most important, a statutory forfeiture provision aligns the hearsay exceptions with the contours of the constitutional forfeiture doctrine. When offering hearsay against the accused, the prosecution needs to accomplish two separate tasks: finding a statutory hearsay exception and demonstrating compliance with the Confrontation Clause. A comprehensive forfeiture statute would help to ensure that statutory law is no more restrictive than constitutional law in the area of forfeiture. The present misalignment of constitutional and statutory law presents the risk that prosecutors might succeed in proving forfeiture as a constitutional matter, only to find that no statutory hearsay exception accommodates the hearsay in question.<sup>170</sup>

Legislatures seeking to codify the doctrine of forfeiture face a number of challenges. First, they need to decide whether to extend the statutory forfeiture provision only to cases in which the wrongdoer subjectively intends to cause the unavailability of the declarant at trial,<sup>171</sup> or to cases in which the wrongdoer incidentally causes unavailability without specifically intending to do so.<sup>172</sup> The latter approach is preferable from both a practical and theoretical standpoint. Practically, it is difficult to prove a predominant motive to procure the absence of a declarant.<sup>173</sup> Theoretically, a perpetrator

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170. See FED. R. EVID. 802 (indicating that “[h]earsay is not admissible except as provided by these rules”); MUELLER & KIRKPATRICK, *supra* note 140, at 359–95 (explaining that, when offering hearsay against the accused, the prosecution must deal separately with the strictures of statutory hearsay law and the constitutional confrontation requirements).

171. The requirement of subjective intent appears in Federal Rule of Evidence 804(b)(6), and some courts have required such intent when considering whether to apply the constitutional doctrine of forfeiture. *E.g.*, *State v. Romero*, 133 P.3d 842, 849–58 (N.M. Ct. App. 2006) (finding that the Constitution requires proving subjective intent in order to apply forfeiture), *cert. granted*, 134 P.3d 120 (N.M. 2006). For strong arguments in favor of the specific intent requirement, see Joan Comparet-Cassani, *Crawford and the Forfeiture by Wrongdoing Exception*, 42 SAN DIEGO L. REV. 1185, 1200–07 (2005), which argues that a California court’s application of the forfeiture exception without requiring subjective intent was inconsistent with the exception’s equitable nature, the Constitution, the Federal Rules of Evidence, and federal jurisprudence, and James Flanagan, *Confrontation, Equity, and the Misnamed Exception for “Forfeiture” by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193, 1196 (2006), which argues that the forfeiture exception should be labeled “waiver by wrongdoing” and require subjective intent.

172. A number of courts have applied the constitutional doctrine of forfeiture even in the absence of proof that the defendant specifically intended to procure the absence of the declarant as a trial witness. In almost all of these cases, the defendant killed the declarant. *E.g.*, *United States v. Garcia-Meza*, 403 F.3d 364, 369–71 (6th Cir. 2005) (holding that hearsay evidence of the defendant’s prior assault against his wife did not violate the defendant’s Sixth Amendment right to confront witnesses, where defendant admitted that he killed his wife, thereby procuring her unavailability to testify); *State v. Meeks*, 88 P.3d 789, 792–95 (Kan. 2004) (holding that by killing the victim and thereby procuring the absence of the victim as a witness, the murder defendant forfeited his right of confrontation and waived any hearsay objections to the witness’s prior statements).

173. Inferring such intent from conduct is highly speculative. Batterers may sometimes threaten reprisals if their victims cooperate with the government, but the reticence of victims may make this evidence unavailable by the time of trial. Protocols for investigating officers would help to ensure that they inquire about witness tampering when the officers first encounter the accusers. See *infra* subpart III(E).

of intentional violence should not reap any “profit” from his wrongdoing, whether he specifically intended to silence witnesses or not. The best legislative strategy would be to devise a hearsay exception that covers both intentional procurement of unavailability and other wrongful conduct that incidentally, but foreseeably, results in the unavailability of the declarant. A draft of such a provision appears in the Appendix to this Article.<sup>174</sup>

Second, the forfeiture statute needs to address the issue of causation. The statute should insist that the wrongdoing by the opponent must have proximately caused the unavailability of the witness. This qualification is especially important for wrongdoing by an opponent who did not specifically intend to make the witness unavailable. The dual requirements of foreseeability and proximate cause have proven workable in tort law.<sup>175</sup> These requirements will allow the trial court, in an appropriate case, to determine that prolonged domestic violence effected a forfeiture by overbearing the victim’s will to cooperate with the government,<sup>176</sup> but these requirements will not amount to a per se rule finding forfeiture in every domestic violence case.<sup>177</sup> A looser standard for causation would unfairly compromise confrontation rights.<sup>178</sup>

Third, legislatures need to specify the procedure through which proponents can demonstrate forfeiture and the quantum of proof necessary to support a finding of forfeiture. The best approach would be to require proof at a hearing outside the presence of the jury in which the judge may consider all available information—whether or not admissible as evidence at trial—except for privileged information. The proffered hearsay statement should be cognizable as at least partial proof of forfeiture, regardless of concerns about “bootstrapping” the admissibility of evidence by reference to the evidence itself. These procedures may be unpopular with some commentators,<sup>179</sup> but

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174. See *infra* Appendix.

175. See generally D.E. Buckner, Annotation, *Comment Note—Foreseeability as an Element of Negligence and Proximate Cause*, 100 A.L.R.2d 942, 974–79 (1965) (summarizing the approach states have taken in using foreseeability and proximate cause to negligence actions).

176. See, e.g., *People v. Santiago*, No. 2725-02, 2003 WL 21507176, at \*15–16 (N.Y. Sup. Ct. Apr. 7, 2003) (holding that a defendant forfeited his confrontation rights where he had caused a witness’s reticence through relentless, long-term violence). Deborah Tuerkheimer has thoroughly analyzed the *Santiago* ruling and has explained the value of a nuanced, contextualized approach to forfeiture in domestic violence cases. Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1 (2006).

177. Cf. Krischer, *supra* note 72, at 14 (suggesting that the forfeiture argument is potentially applicable in every domestic violence case).

178. In *People v. Melchor*, 841 N.E.2d 420 (Ill. App. Ct. 2005), *appeal granted*, 850 N.E.2d 811 (Ill. 2006), the defendant jumped bail and avoided prosecution for ten years. During that period, a key witness for the government died. The court held that the defendant’s conduct did not proximately cause the unavailability of the declarant, so it would be unfair to deny the defendant his confrontation rights on a theory of forfeiture by wrongdoing. *Id.* at 436.

179. See, e.g., Joshua Deahl, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford*, 104 MICH. L. REV. 599, 620 (2005) (expressing concerns about bootstrapping and suggesting that “in making a predicate finding of forfeiture, a court should place minimal reliance on the unopposed testimonial evidence at issue”); Flanagan, *supra* note 171, 1237 (“A different

they comport with longstanding procedures for screening hearsay in other contexts.<sup>180</sup> The standard of proof in such hearings should be a mere preponderance of the evidence, as is required in all settings where the judge makes a preliminary factual finding in ruling upon the admissibility of evidence.<sup>181</sup> Some courts have required a higher quantum of proof, such as clear and convincing evidence,<sup>182</sup> but that approach is out of step with prevailing practice, and it neglects the Supreme Court's general disfavor for the clear and convincing test in adjudicating the admissibility of evidence.<sup>183</sup> The various procedures for proof of forfeiture by wrongdoing should appear in a separate substructure within the new forfeiture statute. Draft language in the Appendix of this Article offers one example of such a provision.<sup>184</sup>

Fourth, legislatures need to clarify the scope of the evidence that becomes admissible upon a finding of forfeiture. Only reliable evidence should be admissible. Right now the constitutional forfeiture doctrine and the most common version of Rule 804(b)(6) do not police the reliability of evidence admitted after a finding of forfeiture.<sup>185</sup> State legislatures should

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problem of circularity, or 'bootstrapping,' comes when the hearsay itself may be considered in determining its admissibility."); *see also* Adam Sleeter, *Injecting Fairness into the Doctrine of Forfeiture by Wrongdoing*, 83 WASH. U. L.Q. 1367, 1377 (2005) (noting that bootstrapping is often "a contentious issue").

180. FED. R. EVID. 104(a) ("Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."); FED. R. EVID. 801(d)(2) (allowing consideration of a proffered statement itself in judging whether to classify the statement as agent admission or co-conspirator admission); *Bourjaily v. United States*, 483 U.S. 171, 176-77 (1987) (holding that proffered evidence can be part of the basis for concluding that a proponent has met requirements of co-conspirator admission rule); *see Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006) (noting the state practice of considering a hearsay statement itself when judging whether grounds for forfeiture exist).

181. *See Davis*, 126 S. Ct. at 2280 (observing that federal and state courts generally apply a "preponderance of the evidence" standard in evaluating claims of forfeiture).

182. The following decisions applied a clear and convincing evidence standard in judging whether the defendant had committed wrongdoing sufficient to effect a forfeiture. *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir. 1982); *People v. Geraci*, 649 N.E.2d 817, 821 (N.Y. 1995). The new forfeiture statute in Maryland also requires proof by clear and convincing evidence. MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (LexisNexis 2005).

183. *E.g.*, *Huddleston v. United States*, 485 U.S. 681, 685 (1988) (abandoning the clear and convincing test as the standard of proof in judging whether the proponent has proven the occurrence of prior bad acts under Rule 404(b)); *see Davis*, 126 S. Ct. at 2280 (noting, with apparent approval, that most courts only require a preponderance of the evidence to prove forfeiture).

184. *See infra* Appendix.

185. *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (noting that the rule of forfeiture by wrongdoing "does not purport to be an alternative means of determining reliability"); *see* FED. R. EVID. 804(b)(6) (omitting any requirement of reliability); James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459, 519-25 (2003) (criticizing the lack of a reliability requirement in the context of statutory forfeiture); John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 840 (1996) (observing that "courts applying the confrontation waiver rule admit hearsay statements not on the basis of reliability, but because of defendant misconduct").

rectify this dereliction by importing into the forfeiture statute the same predicate that appears at the start of Rule 807: “A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule . . . .”<sup>186</sup> In addition, when the government uses the forfeiture statute to offer hearsay against the accused, the statute should only admit evidence relating to the victimization of the declarant by the accused. The prosecution should not be able to offer evidence from the declarant concerning any subject under the sun. The mere fact of intimidation does not make the declarant a reliable source on every conceivable subject. The equitable rationale for forfeiture erodes when the statement at issue does not relate to misconduct by the opponent vis-à-vis the declarant.<sup>187</sup>

Finally, legislatures need to create cohesion among the various forfeiture provisions in the hearsay rules. Presently, the jumble of forfeiture language in Rule 804 is confusing and asymmetrical. A sentence at the end of Rule 804(a) precludes a wrongdoer from offering hearsay by the absent declarant, but this provision lacks its own subpoint, and the disqualification also omits any reference to Rule 803—the most desirable set of hearsay exceptions. Legislatures should move all the forfeiture language in both Rule 804(a) and 804(b)(6) to a single freestanding forfeiture rule.<sup>188</sup> Consolidation of the forfeiture language would make it easier to locate and would eliminate the odd gap that now appears between Rule 804(b)(4) and 804(b)(6). Such reorganization has a recent precedent in 1997, when Congress moved all the “catch-all” exceptions to a new Rule 807.<sup>189</sup> In its new location, the freestanding forfeiture rule would be in a better position to prohibit wrongdoers from offering any hearsay, whether under Rule 803 or 804. The theme of the new forfeiture statute would be straightforward: any party with unclean hands cannot benefit from the hearsay rules.

In sum, the forfeiture statute proposed herein would not only meet constitutional requirements but would also address deontological, teleological, and Rawlsian concerns. The statute would vindicate the autonomy of the coerced accuser but would not forsake the autonomy of the accused; to the contrary, the statute would simply hold the accused accountable for his own voluntary acts. The statute would recognize the teleological imperative of prosecuting the most dangerous batterers—those who try to scare their victims away from court. The statute would give a measure of

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186. FED. R. EVID. 807.

187. A comparison to the dying declaration exception is instructive. That exception only allows the admission of a statement concerning the cause and circumstances of the declarant's death—for which the opponent of the evidence is generally responsible—and bars statements on unrelated subjects. FED. R. EVID. 804(b)(2).

188. The draft statute in the Appendix to this Article has designated that new provision as Rule 808. See *infra* Appendix.

189. See FED. R. EVID. 807 advisory committee's note (describing the history of this rule in the 1990s).

protection to a class of victims who are among the most vulnerable in the criminal justice system. By facilitating the enforcement of forfeiture doctrine, the statute would ensure that the Confrontation Clause plays its intended role as a shield, not a sword.

*B. Minimum Confrontation Requirements for Nontestimonial Hearsay*

As noted previously, the policy reasons for confrontation do not disappear when hearsay is nontestimonial. A rule that allows the accused to confront declarants of nontestimonial hearsay has value in a deontological paradigm because such a rule respects the Kantian right of the accused to present evidence through the means he sees fit. Confrontation has teleological value because cross-examination is the “greatest legal engine ever invented for the discovery of truth.”<sup>190</sup> Moreover, Rawlsian theory dictates that confrontation law should be uniform, predictable, and understandable to all defendants, especially those who cannot afford counsel to help them discern the complex distinction between testimonial and nontestimonial hearsay.<sup>191</sup> For all these reasons, state legislatures should enact laws that establish a minimum level of confrontation rights in all criminal prosecutions, whether the government’s hearsay is testimonial or not.

The U.S. Constitution will not provide the impetus for such legislation. The Supreme Court signaled in *Davis* that the Confrontation Clause only applies to testimonial hearsay.<sup>192</sup> The Court indicated that nontestimonial hearsay will not even be subject to the *Roberts* test.<sup>193</sup> The *Davis* Court spoke much more emphatically on this point than did the *Crawford* Court.<sup>194</sup> In a sense, *Davis* was a zero-sum game for defendants: *Davis* solidified the Sixth Amendment’s protection with respect to testimonial hearsay, but *Davis* dispensed entirely with that protection in the context of nontestimonial hearsay.<sup>195</sup>

190. *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940)).

191. RAWLS, *supra* note 150, at 208–09.

192. *Davis v. Washington*, 126 S. Ct. 2266, 2274–76 (2006).

193. *Id.*

194. *Compare Crawford v. Washington*, 541 U.S. 36, 53 (2004) (“[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object . . .”), with *Davis*, 126 S. Ct. at 2274 (“‘The text of the Confrontation Clause reflects this focus [on testimonial hearsay].’ . . . A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter.” (alteration in original) (citations omitted)).

195. During the period between *Crawford* and *Davis*, most lower courts had continued to apply *Roberts* to nontestimonial hearsay offered against the accused. More than a year after the *Crawford* ruling, the Wisconsin Supreme Court reviewed the published opinions by lower courts considering nontestimonial hearsay. The Wisconsin Supreme Court found that only one of these opinions had declined to apply the *Roberts* test to nontestimonial hearsay. *State v. Manuel*, 697 N.W.2d 811, 826 n.15 (Wis. 2005); see *Capra*, *supra* note 20; *Kinnally*, *supra* note 20; *Monnat & Nichols*, *supra* note 20. After *Davis*, lower courts seemed reluctant to let go of the *Roberts* test. In the first few weeks

There is a possibility that defense attorneys may be able to invoke the Due Process Clause as authority for some modicum of confrontation rights in cases involving nontestimonial hearsay. But reliance on the Due Process Clause is far from ideal. Little case law to date has inferred a right to confrontation from the Due Process Clause.<sup>196</sup> Because confrontation jurisprudence under the Due Process Clause remains inchoate, defendants will find difficulty relying on this jurisprudence in the near term. The case law will evolve slowly and serendipitously, depending largely on the facts presented to state supreme courts. The likelihood of a comprehensive, cohesive approach to confrontation is bleak if the Due Process Clause serves as the sole source of authority. The due process protection with respect to confrontation is amorphous and is susceptible to varying interpretations by courts.<sup>197</sup>

The best solution would be a partial revival of *Roberts* through legislation. The reliability test in *Roberts* is dead on arrival,<sup>198</sup> so legislatures should not waste time trying to resuscitate that patient.<sup>199</sup> But the unavailability test in *Roberts* can be saved.<sup>200</sup> Legislatures should enact a new hearsay rule<sup>201</sup> that prohibits prosecutors from offering hearsay under either Rule 803 or 804 unless prosecutors produce the declarant for cross-examination or demonstrate that the declarant is unavailable. The new rule would not necessitate that prosecutors prove declarants are unavailable within the meaning of Rule 804(a)<sup>202</sup> (although facts satisfying Rule 804(a)

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following the *Davis* decision, a few lower courts suggested that *Roberts* might have survived *Davis*. See *supra* notes 92–94 and accompanying text.

196. This paucity is likely attributable to the lack of necessity since the Sixth Amendment appeared to govern all categories of hearsay until recently. To the extent that courts have relied on the Due Process Clause as a source of authority for confrontation rights, they have generally done so in contexts other than trials, such as sentencing hearings, revocation hearings, or administrative proceedings.

197. For example, courts have looked to the Due Process Clause to supply the confrontation rules for revocation hearings because the Sixth Amendment clearly does not apply in that setting. Confrontation rights in revocation hearings vary widely as a result. See *infra* subpart III(C).

198. It would be very difficult to rely on the reliability prong of the *Roberts* test after the Supreme Court has lambasted the inconsistency of this test. *Davis*, 126 S. Ct. at 2275 n.4 (noting that *Crawford* overruled the *Roberts* reliability test); *Crawford*, 541 U.S. at 63 (“Reliability is an amorphous, if not entirely subjective, concept.”).

199. A preferable strategy for legislative regulation of reliability would be to ensure that all hearsay exceptions include some language assuring the reliability of the statements that they admit. Those exceptions which currently lack such language (e.g., Federal Rule of Evidence 804(b)(6)) should be amended promptly now that the Sixth Amendment no longer polices reliability. For further discussion of the proposal to include a reliability predicate in Rule 804(b)(6), see *supra* subpart III(A).

200. The unavailability prong in *Roberts* had required that the government either call the declarant as a witness or show why the declarant was unavailable. See *supra* subpart I(A).

201. A draft of the new rule appears as Rule of Evidence 809 in the Appendix to this Article. See *infra* Appendix.

202. Federal Rule of Evidence 804(a) and its state counterparts require that, in order for the proponent to introduce hearsay evidence pursuant to subsection (b), the declarant must be unavailable for one of the following reasons: (1) invocation of a valid privilege; (2) persistent

would surely be sufficient under the new rule). Rather, the prosecution would simply need to show some reason why the declarant will not be testifying, or the prosecution would need to bring that declarant to court for cross-examination. The unavailability requirement would not disappear, as in the post-*Roberts* era, when the prosecution offered hearsay pursuant to a firmly rooted hearsay exception.<sup>203</sup> The new rule would simply establish a preference for live testimony, irrespective of the hearsay exception invoked by the government, unless the government could give a reason for the unavailability of the declarant.

This new rule would avoid the unfairness of prosecutorial reliance on hearsay when declarants could easily come to court. A post-*Crawford* decision by the Indiana Court of Appeals provides a glaring example of such unfairness. In *Beach v. State*, the prosecution offered an excited utterance by an alleged victim of domestic violence.<sup>204</sup> The prosecution did not make any effort to produce the declarant, nor did the prosecution even suggest why the declarant would not testify.<sup>205</sup> It appeared that the prosecution could have questioned the declarant in court, but simply chose not to for tactical reasons. The appellate court was outraged, recognizing that the prosecution's tactics violated the spirit—if not the letter—of the Supreme Court's decision in *Crawford*. The *Beach* court gave the prosecution this stern admonition: “the State would be well-advised to avoid the tactic of introducing hearsay statements without calling the declarant to testify in cases where the declarant is in fact available to testify.”<sup>206</sup> But the *Beach* court did not reverse the trial court's admission of the prosecution's evidence. The evidence at issue was nontestimonial.<sup>207</sup> The prosecution had offered this evidence under Rule 803(2), which lacks an unavailability predicate.<sup>208</sup> The hearsay exception at issue was firmly rooted, so the then-existing *Roberts* test did not necessitate any showing of unavailability. In sum, the Indiana Court of Appeals saw the manifest unfairness of denying confrontation in this circumstance, but felt the court powerless to vindicate the defendant's confrontation rights. The rule proposed here would help trial courts to police the sort of gamesmanship that occurred in *Beach*.

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refusal to testify despite a court order to do so; (3) death or serious illness; (4) loss of memory concerning the topic in question; or (5) inability of the hearsay proponent to hail the declarant into court despite good-faith efforts. Rule 804(b)(6) supplements this list to include unavailability wrongfully procured by the opponent.

203. As noted previously, the progeny of *Roberts* had found that the unavailability predicate was unnecessary to enforce when the prosecution offered hearsay pursuant to a firmly rooted hearsay exception. See *supra* subpart 1(A).

204. 816 N.E.2d 57, 58 (Ind. Ct. App. 2004).

205. *Id.* at 60.

206. *Id.*

207. *Id.* The court also determined that, even if the evidence were somehow testimonial, its admission was harmless. *Id.* at 60–61.

208. *Id.* at 59.

Critics may perhaps argue that the new rule would hinder prosecutions of domestic violence. To be sure, a high proportion of accusers in domestic violence cases refuse to testify at trial, no matter what the hearsay statutes require.<sup>209</sup> But the reluctance of accusers would not necessarily impede prosecutorial use of their hearsay statements under the new rule. Prosecutors would simply need to inform the judge that the declarants declined to appear in court, for reasons that might include, but are not necessarily limited to, the grounds set forth in Rule 804(a). Having made that showing, the prosecution would be free to offer hearsay in lieu of live testimony. A number of states have enforced the unavailability prong of *Roberts* rigorously in the last few decades<sup>210</sup>—more rigorously than the Supreme Court, in fact—and the experience of these states does not support the conclusion that the unavailability predicate constrains prosecutions of domestic violence.<sup>211</sup> After all, the unavailability requirement proposed here is not a rule of *exclusion*, but rather a rule of *preference*.

Legislatures must be careful not to create a regime that obligates prosecutors to incarcerate accusers in order to guarantee their attendance at trial. Such a rule would be abusive of accusers, and would perhaps discourage the filing of complaints in the first place.<sup>212</sup> One prosecutor who has jailed accusers pending trial made this comment in response to a survey: “Unfortunately, some of the victims have had to remain in custody until the trial, which is a terrible message we are sending to the victim, her children, the defendant and society.”<sup>213</sup> The rule proposed in the Appendix addresses this concern by including a final sentence making clear that “[i]n no event

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209. See Percival, *supra* note 68, at 215 (discussing the difficulty of procuring witnesses in domestic violence cases); Feige, *supra* note 69 (explaining that “domestic violence cases, more often than any others, go to trial with unwilling or unavailable witnesses”).

210. See, e.g., *State v. McGriff*, 871 P.2d 782, 790 (Haw. 1994) (holding that the state constitution imposes an unavailability requirement); *State v. Lopez*, 926 P.2d 784, 789 (N.M. Ct. App. 1996) (same); *State v. Moore*, 49 P.3d 785, 792 (Or. 2002) (same); see also *State v. Branch*, 865 A.2d 673, 692–93 (N.J. 2005) (declining to require the declarant’s testimony or unavailability as a condition of admissibility, but stating that “the issue deserves careful study,” and submitting the matter “to the Supreme Court Committee on the Rules of Evidence to consider whether a rule change would be advisable”).

211. For a state-by-state comparison of domestic violence statistics and laws relating to domestic violence, see the website of the Domestic Violence and Sexual Assault Data Resource Center, <http://www.jrsa.org/dvsa-dre/state-info.shtml>. The author of this Article serves as chair of the Oregon Criminal Justice Commission and is aware through this position that Oregon has ranked among the states with the most effective responses to domestic violence, even after the Oregon Supreme Court required that prosecutors in Oregon must meet the unavailability requirement of *Roberts* in all prosecutions. *Moore*, 49 P.3d at 792.

212. See Percival, *supra* note 68, at 251 (arguing that “the requirements for securing witnesses’ attendance should not force prosecutors to resort to any means possible to get their witnesses to come to court, such as threatening them or jailing them”); *id.* at 251 n.225 (“The constitutional implications of requiring prosecutors to utilize any means at their disposal to secure witness attendance raises significant questions in light of available federal and state witness-detention statutes.”).

213. Lininger, *supra* note 36, at 787 (reprinting one respondent’s comment in a survey of West Coast prosecutors handling domestic violence cases).

shall this rule be construed to require the incarceration of a witness pending trial.”<sup>214</sup>

In sum, the proposed rule would fill a gap created by *Davis*. The proposed rule would establish an intermediate level of confrontation law applicable to nontestimonial hearsay. Where possible, confrontation would be required, but where impossible, confrontation would be excused. This approach would accord deontological respect to both the accused (for whom confrontation would provide empowerment) and the accuser (who would have greater autonomy to determine the extent of her involvement). The “rule of preference” would also serve teleological goals: it would not only acknowledge the value of cross-examination to the truth-seeking process, but also preserve the viability of prosecutions in which confrontation is impossible. The rule would address Rawlsian concerns about the welfare of the indigent because the rule would make confrontation law more uniform, more predictable, and more comprehensible to defendants who cannot afford attorneys.

### C. *New Rules for Revocation Hearings*

The *Davis* ruling underscores the need for reform of rules governing the admission of evidence in hearings on prosecutors’ motions to revoke probation, parole, or supervised release. The present rules for these hearings are inconsistent, and in many states these rules grant more confrontation rights than dictated by the Constitution or by wise public policy.<sup>215</sup>

Many convicted batterers commit additional assaults while on release status. Because batterers typically receive sentences of probation,<sup>216</sup> they have an opportunity to return to their victims and resume their abuse.<sup>217</sup> Data published by the U.S. Bureau of Justice Statistics in August 2006 indicate that 36% of all violent felons in the 75 largest counties had an “active criminal justice status” at the time of their most recent offense.<sup>218</sup> In the particular

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214. See *infra* Appendix.

215. See *infra* notes 225–27 and accompanying text.

216. Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613, 641 (2004–2005) (“Incarceration for domestic violence is rare . . . .”); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1508 (1998) (noting reluctance of judges to impose incarceration when sentencing batterers); Molly J. Walker Wilson, *An Evolutionary Perspective on Male Domestic Violence: Practical and Policy Implications*, 32 AM. J. CRIM. L. 291, 320 (2005) (“[J]udges often sentence abusive men not to a jail term, but, instead, to probation . . . .”).

217. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL’Y REV. 125, 141 (2004) (discussing the high rate of recidivism among batterers who have been to court already); Julie Momjian, *Fighting the Domestic Violence Battle*, 28 PAC. L.J. 847, 859 n.93 (1997) (noting the danger of recidivism among domestic violence offenders on parole) (citing CAL. SEN. RULES COMM., ANALYSIS OF AB 2647, at 5 (Aug. 27, 1996)).

218. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, VIOLENT FELONS IN LARGE URBAN COUNTIES 1 (2006), available at <http://www.ojp.gov/bjs/pub/pdf/vfluc.pdf> (“Thirty-six percent of violent felons had an active criminal justice status at the time of their arrest. This

context of family violence, the data show that 38% of offenders are on some sort of release status when they commit their latest offense.<sup>219</sup>

A revocation hearing not only serves to enforce the original conditions of release—a purpose that is important for its own sake—but also can function as a surrogate for an independent prosecution of the latest crime. Prosecutors who learn of new domestic violence by a probationer or parolee have three options: (1) revocation of release status for the prior offense and imposition of the incarceration that the judge had forgone in that case; (2) prosecution of an entirely new case, in which the defendant will have the full confrontation rights accorded by the Sixth Amendment; or both 1 and 2. *Davis* has made the second option increasingly difficult when accusers recant or refuse to testify.<sup>220</sup> In the post-*Davis* world, revocation hearings may sometimes provide the only means for holding recidivist batterers accountable.<sup>221</sup>

The increasing importance of revocation hearings after *Davis* necessitates a review of the evidentiary rules for such hearings. Do the present rules mesh well with constitutional requirements? Have states provided the right level of confrontation rights in these hearings, or have states provided too little or too much confrontation?

Presently a number of states provide far more confrontation rights in revocation hearings than required by the Constitution. The Sixth Amendment plainly does not apply in such hearings.<sup>222</sup> The Due Process

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included 18% on probation, 12% on release pending disposition of a prior case, and 7% on parole.”).

219. BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE, *supra* note 145, at 47 tbl.6.6 (analyzing data from eleven large counties and concluding that, at the time of most recent arrest for family assault, 38.3% of defendants had a “criminal justice status,” including 27.9% who were on probation and 4.4% who were on parole).

220. *See supra* subpart I(C).

221. *E.g.*, *Davis v. Brown*, 311 F. Supp. 2d 110, 113–16 (D.D.C. 2004) (mem.) (holding in a post-*Crawford* domestic violence case that a parole revocation withstood review but a new prosecution based on the same conduct did not); *see Jackson v. State*, 931 So. 2d 1062 (Fla. Dist. Ct. App. 2006) (upholding admission of testimonial hearsay without confrontation in revocation hearing, but noting that this evidence would not be admissible in a separate criminal prosecution).

222. Most federal appellate courts have held that the *Crawford* ruling, and the Sixth Amendment in general, do not apply to hearings in which the government seeks revocation of supervised release (the federal equivalent of probation and parole). *E.g.*, *Ash v. Reilly*, 431 F.3d 826, 830 (D.C. Cir. 2005); *United States v. Rondeau*, 430 F.3d 44, 47–48 (1st Cir. 2005); *United States v. Hall*, 419 F.3d 980, 985–86 (9th Cir. 2005); *United States v. Kirby*, 418 F.3d 621, 627–28 (6th Cir. 2005); *United States v. Aspinall*, 389 F.3d 332, 342–43 (2d Cir. 2004); *United States v. Martin*, 382 F.3d 840, 844 n.4 (8th Cir. 2004). A few federal courts have posited that Sixth Amendment rights do arise in revocation hearings, but the circuit courts in these jurisdictions have subsequently adopted the majority position. *E.g.*, *Ash v. Reilly*, 354 F. Supp. 2d 1, 8–9 (D.D.C. 2004), *rev'd*, 431 F.3d 826 (D.C. Cir. 2005); *see also United States v. Jarvis*, 94 Fed. App'x 501, 502 (9th Cir. 2000); *United States v. Comito*, 177 F.3d 1166, 1171–73 (9th Cir. 1999). Most state courts addressing the question have concluded that the Sixth Amendment is inapplicable to hearings in which the prosecution moves for revocation of parole or probation. *E.g.*, *People v. Johnson*, 18 Cal. Rptr. 3d 230, 231–32 (Cal. Ct. App. 2004); *People v. Turley*, 109 P.3d 1025, 1025–26 (Colo. Ct. App. 2004); *State v. Rose*, No. 31966, 2006 WL 1459803, at \*4 (Idaho Ct. App. May 30, 2006),

Clause provides some minimal protections that fall far short of the confrontation rights discussed in *Crawford* and *Davis*.<sup>223</sup> Yet even without a constitutional mandate, many states impose strict limits on the use of hearsay in revocation hearings.<sup>224</sup> Some state courts do not allow the prosecution to rely solely on hearsay as the basis for revocation.<sup>225</sup> Some courts have mistakenly concluded that the Sixth Amendment applies in these hearings.<sup>226</sup>

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*petition for review filed* (June 20, 2006); *Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1248 (Mass. 2006); *State v. Abd-Rahmaan*, 111 P.3d 1157, 1160–61 (Wash. 2005).

223. According to the Supreme Court, the due process rights enshrined in the Fourteenth Amendment entitle the probationer to written notice of the claimed violation, disclosure of the evidence against him or her, the opportunity to be heard in person and present witnesses and evidence, the opportunity to confront adverse witnesses (unless the hearing officer specifically finds that there is good cause for not allowing confrontation), a “neutral and detached” hearing body, and a written statement of the evidence relied on and the reasons for revoking probation. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

224. States that attempt to place restrictions on the use of hearsay in revocation hearings do so to provide the “right to confront and cross-examine adverse witnesses” from *Morrissey*. See, e.g., *Nash v. State*, 931 So. 2d 785, 788 (Ala. Crim. App. 2005) (explaining that “hearsay evidence may not form the sole basis for revoking an individual’s probation”) (citing *Mallette v. State*, 572 So. 2d 1316, 1317 (Ala. Crim. App. 1990)); *Ex Parte Carnona*, 185 S.W.3d 492, 495 (Tex. Crim. App. 2006) (noting that “the final revocation of probation must be preceded by a hearing, where the probationer is entitled to . . . disclosure of the evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence” to a neutral hearing body, and a written statement by the fact finder as to the evidence relied on and the reasons for revoking probation).

225. See, e.g., *Hill v. State*, 350 So. 2d 716, 718 (Ala. Crim. App. 1977) (reversing revocation based solely on hearsay); *Warren v. State*, 924 So. 2d 979, 981 (Fla. Dist. Ct. App. 2006) (“[P]robation may not be revoked solely on the basis of hearsay.”); *People v. Lewis*, 329 N.E.2d 390, 393 (Ill. App. Ct. 1975) (“Even when it is received without objection and thus considered competent, hearsay evidence falls short of the proof necessary to deprive a man of his liberty.”); *State v. Allen*, No. COA05-497, 2006 WL 91586, at \*2 (N.C. Ct. App. Jan. 17, 2006) (“[P]robation may not be revoked solely on the basis of hearsay evidence.”); *State v. Ohly*, 853 N.E.2d 675, 682 (Ohio Ct. App. 2006) (“The introduction of hearsay evidence into a probation-revocation hearing is reversible error when that evidence is the only evidence presented and is crucial to a determination of a probation violation.”); *State v. Brown*, 600 S.E.2d 561, 565 (W. Va. 2004) (holding that the circuit court erred in relying entirely on hearsay to resolve the most critical issue in the revocation hearing); *State ex rel. Hampton v. Schwartz*, No. 01-0639, 2001 WL 1609156, at \*3 (Wis. Ct. App. Dec. 18, 2001) (“[E]videntiary rules . . . cannot be relaxed to the point where a parole violation may be proved entirely by unsubstantiated hearsay testimony.”); *Anderson v. State*, 43 P.3d 108, 120 (Wyo. 2002) (“[P]robation revocation may not be based solely on the use of hearsay evidence” (citation omitted)). The U.S. Constitution does not require this restrictive approach. *Morrissey*, 408 U.S. at 489 (setting forth no requirements concerning the centrality of hearsay in revocation proceedings and allowing prosecution to introduce hearsay without confrontation where necessary in the interest of justice); see, e.g., *State v. Graham*, 30 P.3d 310, 313 (Kan. 2001) (indicating that reliable hearsay can be the sole basis for revocation); *Commonwealth v. Negrón*, 808 N.E.2d 294, 300 (Mass. 2004) (same).

226. See, e.g., *Thompson v. Maryland*, 846 A.2d 477, 481 (Md. Ct. Spec. App. 2004) (recognizing “a defendant’s right to confront witnesses and accusers during a probation revocation hearing pursuant to the Sixth Amendment of the U.S. Constitution”); *State v. Johnson*, 899 A.2d 478, 481 (R.I. 2006) (holding that a defendant in a revocation hearing “retains the right to confront and cross-examine the witnesses against [him or her] in accordance with the Sixth Amendment to the United States Constitution” (alteration in original) (internal quotation marks omitted) (quoting *State v. Russo*, 701 A.2d 1023, 1024 (R.I. 1997) (mem.))).

The most extreme approach is to prohibit the prosecution from offering *any* hearsay when petitioning to revoke parole or probation.<sup>227</sup>

State legislatures should amend their codes of criminal procedure to end the inconsistent and unduly restrictive treatment of hearsay in revocation hearings. All states should adopt statutes admitting hearsay in revocation hearings to the full extent permitted by the federal and state constitutions. In the interest of fairness, these statutes should require notice to the defendant in advance of the hearing, so that the defendant can prepare to meet the government's hearsay evidence and perhaps subpoena the declarants himself. Draft statutory language appears in the Appendix of this Article.<sup>228</sup>

The liberalization of hearsay rules in revocation hearings would better address the exigencies of prosecuting domestic violence.<sup>229</sup> Where states require greater confrontation in revocation hearings than the Constitution demands, this requirement will thwart a significant proportion of revocations based on allegations of domestic violence, both because of the victims' reluctance to testify and the government's inability to invest the same resources in revocation proceedings as in new prosecutions. When states admit hearsay in revocation hearings as freely as the Constitution allows, these hearings can take up some of the slack resulting from the tighter confrontation requirements in criminal trials.<sup>230</sup> The revocation hearings provide an alternative avenue for criminal prosecution that is less traumatic for victims, whose testimony is not vital in the hearings.<sup>231</sup>

This proposal primarily addresses utilitarian concerns, but it does not subvert deontological and libertarian norms. Simply put, a defendant in a revocation hearing does not have the same standing as a defendant in an ordinary criminal prosecution. The defendant who faces revocation has already

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227. See, e.g., *Wolcott v. Georgia*, 604 S.E.2d 478, 482 (Ga. 2004) (“[I]n this jurisdiction hearsay evidence is inadmissible in a probation revocation proceeding.”).

228. See *infra* Appendix.

229. One of the problems with domestic violence crimes is that prosecutors frequently undercharge, prosecuting felony crimes as misdemeanors instead. Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1664 (reporting that domestic violence cases are “frequently undercharged . . . regardless of the seriousness of the victim’s injuries”); see also Epstein, *supra* note 142, at 1857 (citing empirical research indicating that domestic violence cases are “notoriously undercharged”).

230. See, e.g., *Davis v. Brown*, 311 F. Supp. 2d 110, 113–16 (D.D.C. 2004) (reversing a prosecution that relied on testimonial hearsay, but upholding the postponement of parole status based on the same evidence); *Jackson v. State*, 931 So. 2d 1062, 1063 (Fla. Dist. Ct. App. 2006) (holding that a written statement by an alleged victim to police could be considered as a basis for revocation of probation, but this testimonial hearsay would not be admissible in a fresh prosecution alleging the same conduct).

231. See Pamela Posch, *The Negative Effects of Expert Testimony on the Battered Women’s Syndrome*, 6 AM. U. J. GENDER & L. 485, 502 n.106 (1998) (noting that parole revocation hearings provide an alternative to a new prosecution in some cases and indicating that revocation hearings are sometimes easier for victims because live testimony is not necessary).

been adjudicated guilty of the prior offense.<sup>232</sup> During the pendency of his release status, this defendant owes his freedom to the judge's discretionary forbearance. Such a defendant hardly deserves the same confrontation rights extended to a defendant who is not on probation or parole.

The *Davis* case itself illustrates the value of the proposal advocated here. One of the petitioners in the *Davis* case, Herschel Hammon, was on probation at the time he committed the conduct at issue in that prosecution.<sup>233</sup> Indeed, Hammon was serving a sentence of probation due to a prior conviction for domestic violence.<sup>234</sup> The Indiana prosecutors decided to pursue both a criminal prosecution and a revocation of probation. Because Indiana statutes confer greater confrontation rights in revocation hearings than does the federal constitution,<sup>235</sup> Herschel Hammon's revocation proved just as vulnerable to appellate reversal as his conviction for the new offense. By contrast, in states with less rigorous requirements for prosecutorial use of hearsay in revocation hearings, revocations based on testimonial hearsay can withstand appellate review even when convictions for new offenses cannot.<sup>236</sup> If Indiana had adopted the statute proposed in this Article, Hammon would likely have gone to prison based on revocation of his probation, regardless of whether his wife's hearsay statements to police were testimonial or not.

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232. For example, the Supreme Judicial Court of Massachusetts had no trouble distinguishing a revocation hearing from a trial.

The probation revocation proceeding is not a new criminal prosecution. The Commonwealth has already met its burden of proving beyond a reasonable doubt the person's guilt on the underlying crime. The probationer escaped total loss of liberty only as a result of the trial judge's exercise of discretion. It follows that, at a revocation proceeding, a probationer need not be provided with the full panoply of constitutional protections applicable at a criminal trial. The finding of a violation is not by a jury but by a judge, and is based only on a preponderance of the evidence, not proof beyond a reasonable doubt.

*Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1246 (Mass. 2006) (internal citations and quotation marks omitted).

233. *Davis v. Washington*, 126 S. Ct. 2266, 2272 (2006).

234. These details appear in *Professor Friedman 'Confronts' the U.S. Supreme Court*, U. MICH. LAW QUADRANGLE NOTES, Winter-Spring 2006, available at <http://www.law.umich.edu/newsandinfo/LQN/winterspring2006/friedmanCourt.pdf>.

235. IND. CODE ANN. § 35-38-2-3(e) (West 2004) (establishing that at a revocation hearing, the respondent "is entitled to confrontation, cross-examination, and representation by counsel"); see, e.g., *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999) (holding that probationers are entitled to confront adverse witnesses at revocation hearings); *Baxter v. State*, 774 N.E.2d 1037, 1043 (Ind. Ct. App. 2002) (determining that trial court should not have admitted hearsay in revocation hearing). The Indiana rule does not allow the judge to dispense with cross-examination when necessary to serve the interests of justice. Cf. FED. R. CRIM. P. 32.1(b)(2)(C) (providing that a defendant in a revocation hearing should have "an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear" (emphasis added)); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (holding that courts do not violate the Constitution when they deny the defendant an opportunity to confront adverse witnesses if the courts find that there is good cause for not allowing confrontation or that the hearsay evidence is reliable).

236. See *supra* note 230.

#### D. Revitalization of Rule 804

As noted previously, the Supreme Court's new confrontation jurisprudence liberates legislatures to widen the statutory hearsay exceptions,<sup>237</sup> because the overlay of stricter constitutional regulation addresses many of the concerns that had led to restrictive statutory language in the 1970s.<sup>238</sup> An additional impetus for reforming the statutory hearsay exceptions is the decline of the excited utterance exception, which had previously served as the primary vehicle for the admission of hearsay in domestic violence prosecutions.<sup>239</sup> State legislatures dissatisfied with *Crawford* or *Davis* cannot "fix" constitutional law, but they can revise statutory hearsay exceptions to exploit all the opportunities for admitting new categories of hearsay that meet constitutional requirements.

Legislatures considering a liberalization of hearsay rules should focus their attention on Rule 804. This rule is more faithful to the spirit of *Crawford* and *Davis* than is Rule 803. Rule 804 requires, as a predicate, that the proponent show the unavailability of the declarant.<sup>240</sup> Rule 803 requires no such showing.<sup>241</sup> Rule 804 reflects a preference for live testimony, while Rule 803 allows the proponent to admit hearsay even when live testimony is available.<sup>242</sup> If legislatures appreciate the deontological and teleological arguments for confrontation, they will favor Rule 804 over Rule 803.

Several reforms of Rule 804 are advisable. Chief among them is the expansion of Rule 804(b)(2), the exception that admits "dying declarations."<sup>243</sup> Dicta in *Crawford* indicated that dying declarations lie beyond the scope of the Confrontation Clause because courts routinely admitted testimonial dying declarations in the years preceding the adoption of

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237. See *supra* notes 109–10 and accompanying text.

238. Friedman, *supra* note 110, at 512 (suggesting that uncertainty about the enforcement of constitutional confrontation rights led the drafters of the Federal Rules of Evidence to take a restrictive approach to statutory hearsay law); see also 2 MCCORMICK ON EVIDENCE § 245, at 94–96, § 251, at 117–20 (John W. Strong ed., 5th ed. 1999) (indicating that the overriding objective of hearsay law is to provide an opportunity for cross-examination of the declarant at some point).

239. See *supra* subpart I(C).

240. FED. R. EVID. 804.

241. FED. R. EVID. 803.

242. For example, in *Beach v. State*, the appellate court noted that the prosecution in a domestic violence case had offered an excited utterance pursuant under Rule 803 without any effort to demonstrate that the declarant was unavailable. 816 N.E.2d 57, 60 (Ind. Ct. App. 2004). While the appellate court did not need to pass on this issue because any error in admitting the evidence was harmless, it noted that the practice seemed incongruous with the spirit of *Crawford*. *Id.* ("[T]he State would be well-advised to avoid the tactic of introducing hearsay statements without calling the declarant to testify in cases where the declarant is in fact available to testify.").

243. This rule provides that, when the proponent has shown the unavailability of the declarant within the meaning of Rule 804(a), the proponent may introduce a statement, made by a declarant while believing that the declarant's death was imminent, that concerns the cause or circumstances of what the declarant believed to be impending death. Other language in Rule 804(b)(2) limits the exception to "a prosecution for homicide or in a civil action or proceeding."

the Constitution.<sup>244</sup> While the Sixth Amendment presents no obstacle to the admission of dying declarations,<sup>245</sup> the present language of Rule 804(b)(2) renders this exception virtually useless in prosecutions of domestic violence and many other crimes. The current version of the rule only applies in civil cases and homicide prosecutions, not prosecutions for other categories of crimes.<sup>246</sup>

A preferable rule would allow the use of the dying declaration exception in all categories of prosecutions. This revision could be accomplished simply by deleting from Rule 804(b)(2) the prefatory words, “In a prosecution for homicide or in a civil action or proceeding . . . .”<sup>247</sup> A model version of the revised dying declaration exception appears in the Appendix of this Article.<sup>248</sup>

Strong policy arguments favor the extension of the dying declaration exception to all criminal prosecutions. The rationale for trusting the reliability of dying declarations should apply equally to all categories of prosecutions. According to this rationale, declarants feel a special obligation to tell the truth when they find themselves on the verge of death.<sup>249</sup> Whether death actually ensues is of no import, even in a homicide prosecution or civil

244. *Crawford v. Washington*, 541 U.S. 36, 55 n.6 (2004) (stating that dying declarations are the one exception to the historical rule excluding testimonial hearsay unless confrontation is possible, because “[a]lthough many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.” (citations omitted)).

245. See Raeder, *supra* note 26, at 351 (“*Crawford* appears to give an automatic pass to dying declarations . . . . This view has been almost universally adopted by the courts that have reached the question.” (citations omitted)). Since the Supreme Court’s ruling in *Crawford*, nearly every court considering the question has concluded that dying declarations are beyond the reach of the Confrontation Clause, even when the declarant knowingly spoke with police. *E.g.*, *People v. Monterroso*, 101 P.3d 956, 972 (Cal. 2004), *cert. denied*, 126 S. Ct. 61 (2005); *People v. Mayo*, 44 Cal. Rptr. 3d 497, 513 (Cal. Ct. App. 2006); *People v. Gilmore*, 828 N.E.2d 293, 301–03 (Ill. App. Ct. 2005), *appeal denied*, 839 N.E.2d 1030 (Ill. 2005); *Wallace v. State*, 836 N.E.2d 985, 992–96 (Ind. Ct. App. 2005), *transfer denied*, 2006 Ind. LEXIS 39 (Ind. Jan. 11, 2006); *State v. Young*, 710 N.W.2d 272, 283–84 (Minn. 2006); *State v. Martin*, 695 N.W.2d 578, 584–86 (Minn. 2005) (en banc). *But see, e.g.*, *United States v. Jordan*, No. CRIM. 04-CR-229-B, 2005 WL 513501, at \*3 (D. Colo. Mar. 3, 2005) (mem.) (holding that dying declarations should not be treated differently than other testimonial statements).

246. FED. R. EVID. 804(b)(2).

247. *Id.*

248. See *infra* Appendix.

249. See *Idaho v. Wright*, 497 U.S. 805, 820 (1990) (quoting *Queen v. Osman*, 15 Cox. Crim. Cas. 1, 3 (Eng. N. Wales Cir. 1881) (Lush L.J.)) (“[N]o person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips.”). In modern times, courts have recognized that even nonreligious declarants feel a compunction to speak honestly on the verge of their death. See *State v. Weir*, 569 So. 2d 897, 901 (Fla. Dist. Ct. App. 1990) (noting that the “religious justification for the exception has long lost judicial recognition”); *People v. Calahan*, 356 N.E.2d 942, 945 (Ill. App. Ct. 1976) (“At the moment wherein the deceased realizes his own death is imminent there can no longer be any temporal self-serving purpose to be furthered regardless of the speaker’s personal religious beliefs.”).

case.<sup>250</sup> The reliability of the evidence surely does not depend on the prosecutor's charging decision, but rather on the declarant's genuine belief that the end is near.<sup>251</sup> Other evidentiary rules, such as the exception for co-conspirator statements, avoid staking too much on the prosecutor's charging decision, in part because charging practices vary widely and in part because the charging decision has little to do with the circumstantial guarantees of reliability.<sup>252</sup>

The case for expanding the dying declaration exception is particularly strong in the context of domestic violence.<sup>253</sup> Prosecutors notoriously undercharge domestic violence cases even when the defendant's conduct was potentially fatal, so an evidentiary rule that depends on aggressive charging decisions is of little value in domestic violence prosecutions.<sup>254</sup> The high incidence of fatality and severe injury in domestic violence cases<sup>255</sup> makes the dying declaration exception a natural fit for this category of crime. Many

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250. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.71, at 1038 (2d ed. 1999) (indicating that "the exception requires only belief in imminent death," whether or not the speaker actually dies); e.g., *United Servs. Auto. Ass'n v. Wharton*, 237 F. Supp. 255, 257–60 (W.D.N.C. 1965) (admitting statement as dying declaration even though declarant survived what at the time seemed likely to be a fatal car crash).

251. To be sure, some critics have challenged the assumption that dying people are more likely to tell the truth. Michael J. Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 MO. L. REV. 285, 300–07 (2006) (disputing the premises of the dying declaration exception). Whatever the merit of such criticism, it is clear that the reliability of dying declarations does not vary in different categories of prosecutions. If the dying declaration is worth keeping for any type of case, it should be available in all categories of cases.

252. MUELLER & KIRKPATRICK, *supra* note 250, § 8.33, at 898 ("The requirement that the party against whom a co-conspirator statement is offered be a member of a conspiracy does not mean he must be charged with conspiring. The exception operates even if no conspiracy charges are brought . . .").

253. Raeder, *supra* note 26, at 350–52 (noting that dying declarations are presently underutilized, but are potentially useful in domestic violence prosecutions).

254. Epstein, *supra* note 142, at 1857 (citing empirical research indicating that domestic violence cases are "notoriously undercharged"); Sack, *supra* note 229, at 1664 (reporting that domestic violence cases are "frequently undercharged . . . regardless of the seriousness of the victim's injuries").

255. *United States v. Morrison*, 529 U.S. 598, 632 (2000) (Souter, J., dissenting) (noting that thousands of women die each year as a result of domestic violence); Jennifer Rios, *What's the Hold-up? Making the Case for Lifetime Orders of Protection in New York State*, 12 CARDOZO J.L. & GENDER 709, 709, 713 (2006) ("Domestic violence takes the lives of many mothers, wives, sisters, aunts, and friends every year . . . . Between 1976 and 1996, approximately one third of all women who were homicide victims in the United States were killed by current or former intimate partners."); Women's Rural Advocacy Programs, Statistics About Domestic Abuse, <http://www.letswrap.com/dvinfo/stats.htm> (indicating that every day in the U.S., "4 women are murdered by boyfriends or husbands," and that a woman is more likely to be killed by a male partner than by any other type of assailant); see BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE, *supra* note 145, at 8 (analyzing data from eleven large counties and concluding that "[n]early a quarter of the murders committed from 1998 to 2002 were against a family member"). Indeed, some police departments treat every episode of domestic violence as a potential homicide. Michelle Madden Dempsey, *What Counts as Domestic Violence? A Conceptual Analysis*, 12 WM. & MARY J. WOMEN & L. 301, 321 n.73 (2006) (citing the example where Michigan police specializing in domestic violence refer to themselves as the "Homicide Prevention Task Force").

victims of domestic violence may reasonably believe that their death is imminent, and their statements in these circumstances deserve the same treatment as statements by declarants in homicide prosecutions.

A broader dying declaration exception would help to offset the decreasing utility of the excited utterance exception.<sup>256</sup> In the wake of *Davis*, some excited utterances may be testimonial because the declarant speaks after police arrive or the assailant flees, but a portion of these statements might still be admissible if they qualify as dying declarations,<sup>257</sup> which are automatically exempt from the Confrontation Clause.<sup>258</sup> The revised dying declaration exception could also reach evidence that does not meet the statutory requirements for excited utterances. For example, some declarants who are resigned to accept their imminent death may have a calm state of mind when they speak, or perhaps they may speak outside the time limits prescribed in the rule for excited utterances.<sup>259</sup>

One tragedy in Milwaukee exemplifies the value of a broader exception for dying declarations. The defendant in that case beat his girlfriend “so savagely with an iron that it broke.”<sup>260</sup> He then “scooped up the pieces, stuffed them into a sweat shirt and resumed the pounding, eventually setting aside the broken iron and choking her into unconsciousness.”<sup>261</sup> Police arrived and secured the scene. The officers noted that the victim’s face was covered in blood, some of her teeth were missing, her nose was fractured, and her jaw was broken in multiple places. Her condition was so dire that police believed

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256. Polelle, *supra* note 251, at 297 (speculating, disapprovingly, that prosecutors may attempt to use the dying declaration exception to introduce testimonial hearsay statements formerly offered under the excited utterance exception).

257. See, e.g., *Holland v. Commonwealth*, 192 S.W.3d 433, 438 n.3 (Ky. Ct. App. 2005) (holding that a victim’s statements at the hospital concerning his wife setting him on fire were admissible as dying declarations under Rule 804 but not under a Rule 803 exception), *review denied*, 2006 Ky. LEXIS 152 (Ky. June 7, 2006); *People v. Siler*, 429 N.W.2d 865, 867–68 (Mich. Ct. App. 1988) (holding that the trial court properly applied the dying declaration exception to the victim’s statement in a 911 call that the defendant had stabbed him, even though the defendant no longer appeared to be a threat at the time of the call).

258. *Crawford v. Washington*, 541 U.S. 36, 55 n.6 (2004). Presumably the language in *Crawford* exempting dying declarations from the Confrontation Clause would apply equally to a new statute that extends the excited utterance doctrine to all prosecutions. The argument for reliability is the same under the new exception as it was in the eighteenth century: no declarant wants to go to his or her death with a lie on his or her lips. Significantly, in some of the states with evidence codes that admit dying declarations in all categories of prosecutions, appellate courts have cited *Crawford* in holding that evidence admitted under these statutes is exempt from the Confrontation Clause. E.g., *People v. Monterroso*, 101 P.3d 956, 971–72 (Cal. 2004) (upholding admission of dying declaration to police officer), *cert. denied*, 126 S. Ct. 61 (2005); *Wallace v. State*, 836 N.E.2d 985, 992–96 (Ind. Ct. App. 2005) (upholding admission of dying declaration to emergency medical technician).

259. E.g., *Monterroso*, 101 P.3d at 971–72 (upholding the admission of a dying declaration to a police officer eleven days after a shooting).

260. David Doege, *Man Gets Prison for Beating Girlfriend: Detectives Didn’t Expect Woman to Survive Her Injuries*, MILWAUKEE J. SENTINEL, Feb. 27, 2001, available at 2001 WLNR 2943216.

261. *Id.*

“they’d better get a dying declaration.”<sup>262</sup> She identified the defendant as her assailant, but she insisted that she did not want to prosecute. If this case proceeded to trial in the post-*Davis* era, her statements to police would not be admissible as excited utterances, because police had resolved the emergency before she spoke to them. However, her statements are nonetheless admissible after *Davis* in jurisdictions such as Wisconsin that allow dying declarations in all categories of prosecutions, and the Confrontation Clause poses no impediment for such statements.<sup>263</sup>

The foregoing analysis has focused on teleological grounds for extending the dying declaration exception. Would an expanded exception raise a deontological concern about excessive instrumentalism?<sup>264</sup> The proposal here is reconcilable with deontological philosophy because the defendant’s agency is the very reason for his loss of confrontation rights. Just as in the case of forfeiture by wrongdoing, the defendant who has caused the declarant to fear imminent death has no standing to protest his inability to confront that declarant.<sup>265</sup> He voluntarily chose a course of conduct for which he must bear the consequences.<sup>266</sup>

Other reforms of Rule 804 are desirable as well. For example, the language in Rule 804(b)(4), which allows hearsay statements concerning the death of family members, should be expanded to include statements concerning family members’ serious bodily injuries. A draft of the proposed new rule appears in the Appendix to this Article.<sup>267</sup> The amended language would help with the prosecution of domestic violence cases because relatives of victims frequently make statements to neighbors or other relatives concerning the domestic violence they have observed.<sup>268</sup> If the percipient witnesses become reluctant to testify, their hearsay statements to others may be available as an alternative. The proposal to expand Rule 804(b)(4) makes

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262. *Id.*

263. WIS. STAT. ANN. § 908.045(3) (West 2000) (admitting dying declarations in civil cases and all categories of prosecutions); *Crawford*, 541 U.S. at 55 n.6 (indicating that dying declarations are not subject to the Confrontation Clause).

264. *See supra* section 11(B)(1).

265. The dying declaration exception only applies to statements concerning the cause or circumstances of the declarant’s apparently impending death, so it is highly likely that such statements will implicate the person who caused the declarant’s condition rather than some blameless third party. FED. R. EVID. 804(b)(2).

266. *See People v. Jiles*, 18 Cal. Rptr. 3d 790, 795 (Cal. Ct. App. 2004) (determining that testimonial dying declaration survives confrontation analysis for equitable, as well as historical reasons, and invoking forfeiture theory to allow declarant’s dying declaration in trial of her husband), *superseded*, 103 P.3d 270 (Cal. 2004).

267. *See infra* Appendix.

268. A substantial proportion of domestic violence occurs in the presence of relatives, especially children. *E.g.*, Alan Tompkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 LAW & PSYCHOL. REV. 137, 139 (1994) (“Estimates of the numbers of children who witness their mothers being physically battered—and even sometimes sexually assaulted—each year are somewhere in the 3 million range.”).

sense because it is consistent with the policy judgments underlying that rule: family members have expertise concerning their family history.<sup>269</sup> The amendment proposed here would not be onerous for defendants because they would be able to confront declarants of testimonial hearsay, and the exception would only be applicable when the prosecution could prove the unavailability of the declarant. Indeed, defendants might use this new rule themselves as a means of proving alternative causes for the injuries at issue in a prosecution.

Another amendment that would improve Rule 804 would be the inclusion of an exception for statements of recent perception. This exception actually won approval by the Supreme Court in the early 1970s, but Congress declined to incorporate the exception in the Federal Rules of Evidence.<sup>270</sup> A version of the rule appears in the Appendix to this Article (it differs from the 1970s proposal only in that it uses gender-neutral language); the exception allows “[a] statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant’s recollection was clear.”<sup>271</sup> The few states that have adopted this rule<sup>272</sup> have found it useful in a wide range of cases, including prosecutions of violent crime.<sup>273</sup> The exception seems particularly well-suited for the Supreme Court’s new confrontation jurisprudence because the rule explicitly bars statements when

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269. MUELLER & KIRKPATRICK, *supra* note 250, § 8.77, at 1059–60 (claiming that family members are likely to have accurate information about close relatives sufficient to make trustworthy statements about them); *see also* Cox v. Brice, 159 F. 378, 382 (5th Cir. 1908) (admitting as evidence declarations of the plaintiff’s family attesting to his identity and stating that “[w]here the time or place of residence or death is introduced for the purpose of identifying the person in question as a member of a particular family, it is admissible . . .” (quoting Byers Bros. v. Wallace, 87 Tex. 503, 511, 28 S.W. 1056, 1059 (1894))).

270. H.R. REP. NO. 93-650, at 6 (1973), *as reprinted in* 1974 U.S.C.A.N. 7075, 7079–80.

271. *See infra* Appendix.

272. KAN. STAT. ANN. § 60-460(d)(3) (2005); WIS. STAT. ANN. § 908.045(2) (West 2000); HAW. R. EVID. 804(b)(5); WYO. R. EVID. 804(b)(5) (limiting the exception only to civil proceedings); *see* R.I. R. EVID. 804(c) (allowing “good faith” statements in criminal prosecutions when declarants are unavailable).

273. Two recent cases show the utility of such an exception even in the aftermath of *Crawford* and *Davis*. *See* State v. Feliciano, 901 A.2d 631, 631–35 (R.I. 2006) (upholding the admission of a victim’s hearsay statement to a friend regarding the crime under Rhode Island’s unique Rule 804 exception for good-faith statements and holding that the trial court’s ruling withstood *Crawford* because the statement in question was not testimonial); State v. Manuel, 697 N.W.2d 811, 816–29 (Wis. 2005) (upholding the admission of statements by an eyewitness to his girlfriend under the exception for statements of recent perception, because the statements fit within the exception and were not “testimonial” under the meaning of *Crawford*); *see also* Kenneth Kraus, *The Recent Perception Exception to the Hearsay Rule: A Justifiable Track Record*, 1985 WIS. L. REV. 1525, 1543–44 (generally praising the exception).

the declarant was contemplating litigation or when the declarant was responding to investigators.<sup>274</sup>

Finally, Rule 804(a) should be amended to include a new ground for unavailability. The present version of the rule allows the proponent to resort to hearsay only when the declarant is unavailable due to invocation of a privilege, defiance of a court order to testify, medical infirmity, lack of memory, or absence from court despite the proponent's good-faith efforts to secure the declarant's attendance.<sup>275</sup> This list should include another type of unavailability that is common in prosecutions of domestic violence: recanting.<sup>276</sup> When an accuser or any other witness renounces a prior statement, the declarant is, in effect, "unavailable" with respect to the first statement. That declarant's prior statement should be admissible if it falls within any of the exceptions set forth in Rule 804(b). There is little harm in admitting such a statement, because the declarant is available for cross-examination, and the inconsistency provides ample ammunition for impeachment.<sup>277</sup>

The proposals listed above would enlarge statutory hearsay exceptions without overstepping the boundaries set forth in *Crawford* and *Davis*. Rule 804's predicate of unavailability would continue to ensure that proponents do not resort to hearsay as a facile substitute for live testimony. Hearsay would remain what both the Constitution and good public policy dictate that it should be: a disfavored alternative.

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274. The likelihood this exception could admit testimonial hearsay is extremely slim. By excluding the statements of declarants who contemplate litigation, the rule seems to align well with *Crawford's* classification of hearsay as testimonial when declarants reasonably foresee the prosecutorial use of their statements. By excluding statements elicited through investigative questioning, the rule seems to align with the *Davis* rule that bars statements in response to police questioning about past crimes. See *supra* subparts I(A)-(B).

275. FED. R. EVID. 804(a).

276. The term "recanting" refers to testimony that renounces or diverges widely from a prior statement. A very high percentage of accusers in domestic violence cases recant by the time of trial. The California Supreme Court recently cited expert testimony that "[a]bout 80 to 85 percent of victims 'actually recant at some point'" in prosecutions of domestic violence. *People v. Brown*, 94 P.3d 574, 576 (Cal. 2004) (quoting Jeri Darr, Program Manager of the Antelope Valley Domestic Violence Council); accord *DeSancitis, supra* note 70, at 367 (noting that victims' noncooperation rate in domestic prosecutions is between 80% to 90%); see also *Beloof & Shapiro, supra* note 70, at 3 (citing that the senior prosecutor handling family violence cases for the Los Angeles District Attorney's office estimates that 90% of domestic violence victims do not cooperate with prosecutors).

277. The rules that presently govern prior inconsistent statements are perplexing and subject to abuse. Federal Rule of Evidence 801(c) excludes from the definition of hearsay any prior inconsistent statements offered for impeachment rather than for the truth of the matter asserted. Federal Rule of Evidence 801(d)(1)(A) excludes from the definition of hearsay prior inconsistent statements offered for their truth, so long as the declarants uttered these statements while under oath in court, in a grand jury proceeding, or in a deposition. Proponents of prior inconsistent statements uttered out of court have sought to introduce these statements for the nonsubstantive purpose of impeachment, recognizing that jurors will consider the statements for whatever purpose the jurors consider appropriate.

### *E. Protocols for Law Enforcement Personnel*

The Supreme Court's new confrontation jurisprudence has focused attention on the manner in which 911 operators, police, and probation officers interact with victims and perpetrators of domestic violence.<sup>278</sup> Careful training will be necessary to ensure that these personnel conform their conduct to the requirements of the Sixth Amendment while still protecting public safety and collecting sufficient evidence to hold offenders accountable in court. Legislatures and executive agencies that appropriate money for local law enforcement should consider granting this money on the condition that the recipients comply with new protocols harmonizing the recipients' practices with the requirements of *Davis* and *Crawford*.<sup>279</sup> A draft statute setting forth examples of such protocols appears in the Appendix to this Article.<sup>280</sup>

Protocols for 911 operators are essential. After *Davis*, 911 operators may feel pressure to structure their interaction with callers in a way that preserves significant portions of the conversations for evidentiary use. For example, by delaying questions that could elicit an answer indicating the emergency is over,<sup>281</sup> the operator would maximize the nontestimonial portion of the conversation. Such a delay, however, could conflict with the goal of promptly responding to emergencies. The protocols for 911 operators

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278. See *Davis v. Washington*, 126 S. Ct. 2266, 2276–77 (2006) (discussing the implications of the manner in which law enforcement officers interacted with victims of domestic violence).

279. Through the Violence Against Women Act, the federal government appropriates millions of dollars for state and local programs to assist victims of domestic violence. Epstein, *supra* note 142, at 1848 (citing Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000) (codified as amended at 42 U.S.C. §§ 13701, 3789p, 3796gg-2)); see also Raeder, *supra* note 26, at 327 (describing myriad programs supported by VAWA grants). States also issue grants to local police agencies for 911 centers and for other purposes. Because local law enforcement agencies depend on state and federal assistance, the grantors have leverage to require compliance with protocols. See Amanda Dekki, Note, *Punishment or Rehabilitation? The Case for State-Mandated Guidelines for Batterer Intervention Programs in Domestic Violence Cases*, 18 ST. JOHN'S J. LEGAL COMMENT. 549, 558 & nn.30–31 (2004) (explaining the value of protocols for all agencies within the criminal justice system when dealing with victims of domestic violence and noting that a state grant to agencies working in conjunction would help streamline the statewide response to domestic violence cases).

280. See *infra* Appendix.

281. A 911 operator risks ending the nontestimonial portion of the conversation by asking a question such as, "Is the man who hit you still in your apartment?" If the caller says that the assailant has left, a court is likely to find that there is no "ongoing emergency" from that point forward (unless there is a risk that the batterer will return). Of course, the exigencies of responding to an emergency dictate that the 911 operator should ask such questions at an early stage of the conversation, but the goal of preserving evidence for prosecution of the defendant would dictate postponement of such questions in order to enlarge the nontestimonial portion of the conversation. Many—probably most—911 operators will instinctively subordinate the objective of gathering evidence to the objective of emergency response, but it would be naïve to assume that 911 operators do not contemplate the evidentiary implications of their questioning in these calls. See Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1171–72 (2002) (describing the increasing importance of and developing public awareness of recordings of 911 calls as testimony).

should make clear that their paramount duty is to ensure the safety of the callers and all other people known to be in peril, and operators should conduct their questioning to serve that purpose rather than to investigate crimes for possible prosecution. It would be unfortunate indeed if *Davis* created perverse incentives for operators and thereby jeopardized the safety of battered women.

Operators' protocols should also include guidelines for situations in which assailants appear to be interfering with 911 calls. The operators should be prepared to ask callers questions that elicit coded responses. "If he's standing next to you right now, answer 'fine.'" "If he's threatening to harm you right now, answer 'no problem.'" Because *Davis* has clarified that prosecutors may rely on 911 calls—at least up until the point when the emergency dissipates—the incentive for batterers to interfere with 911 calls has grown.<sup>282</sup> Such conduct is illegal in many states.<sup>283</sup> The protocols for 911 operators should direct them to report to police and prosecutors any evidence of a third party's interference with an emergency call.

A few additional protocols are necessary for 911 centers. In communities with a substantial Spanish-speaking population, each 911 center needs full-time staffing with operators who speak Spanish fluently. Every 911 center needs the capacity to receive calls for assistance via email and text messaging as well as via phone; victims of domestic violence may need to use these alternate means in order to avoid arousing suspicion by their batterers or in order to seek help when batterers have denied them access to the phone. Each 911 center should have equipment that pinpoints the location from which any cell phone call originates within the jurisdiction. Finally, 911 centers should record every call that they receive and retain these recordings for five years. The potential evidentiary value of the recorded calls is great, and even if they appear to be testimonial at first blush, wrongdoing by defendants at a later time may result in a forfeiture that allows admission of testimonial calls.<sup>284</sup>

Responding officers need protocols too. Like 911 operators, responding police officers must recognize the paramount priority of securing the scene and protecting the safety of all people in peril. If officers' first priority were to secure nontestimonial statements, officers might opt to delay resolution of

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282. See *Davis*, 126 S. Ct. at 2279–80 ("This particular type of crime [domestic violence] is notoriously susceptible to intimidation or coercion of the victim . . ."); see also Krischer, *supra* note 72, at 15–16 (reporting the high incidence of witness coercion in prosecutions of domestic violence).

283. See ALASKA STAT. § 11.56.745 (2004) (criminalizing interfering with a report of a crime involving domestic violence); GA. CODE ANN. § 16-10-24.3 (Supp. 2006) (criminalizing obstructing or hindering persons making emergency telephone calls); HAW. REV. STAT. ANN. § 710-1010.5 (LexisNexis 2003) (criminalizing interference with reporting an emergency or crime); WASH. REV. CODE ANN. § 9A.36.150(1)(b) (West 2000) (criminalizing interfering with a victim of or a witness to a domestic violence crime calling 911, obtaining medical assistance, or making any report to a law enforcement official).

284. See *supra* subpart III(A).

an emergency or postpone a protective sweep of the area, reasoning that these measures will demarcate the boundary between the “emergency” and “non-emergency” phases. Such a dilatory strategy might indeed help with the collection of nontestimonial statements, but it would endanger the safety of both the complainants and the officers. Confrontation law should not distract officers from their first priority—protecting public safety.

Another important new procedure for responding officers is to bring a video camera with which to record their initial entry and interaction with all people found at the scene. If patrol cars all carried detachable video cameras mounted on their dashboards,<sup>285</sup> it would be easy for officers to comply with this requirement. Of course, the requirement should not apply in situations where the safety of officers or victims requires that all available officers must handle tasks other than videotaping. One study in Modesto, California, found that such videotaping resulted in a demonstrable improvement of officers’ responses to domestic violence calls.<sup>286</sup> The videotape would provide a clear record of the statements at the scene, the condition of the people at the scene, the extent of any injuries, and the pendency or resolution of any emergency at the time the officers questioned the witnesses. Videotaping would help with the objective application of the *Davis* test and would reduce courts’ dependence on officers’ subjective (and perhaps exaggerated) assessments of whether emergencies continued at the time the officers questioned witnesses.<sup>287</sup> The preservation of the complainants’ statements on videotape would limit the incentive for witness tampering because such harassment could not eliminate the complainants’ evidence; in fact, if tampering occurred, the government would easily be able to present the tape to the jury. Because the protocols would mandate videotapes in every response to a domestic violence complaint, the use of video cameras would not necessarily transform every witness’s comment to testimonial hearsay. To the contrary, the *Davis* Court made clear that such facile indicators of “formality” are not controlling in the taxonomy of testimonial hearsay.<sup>288</sup>

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285. A number of vendors sell these cameras to police departments. See, e.g., PowerCam In/Out Car Video Camera Allen’s Law ESP, <http://72.14.209.104/search?q=cache:rvlQM6lVq0cJ:www.allenslaw.com/powercam> (listing specifications for and explaining the benefits to law enforcement officers of a “dash mountable camera”).

286. See *id.* (“The Modesto Police Department in California has dramatically increased its successful prosecution rate of domestic violence cases using video cameras instead of still photographs. DV calls have dropped 40% freeing officers to concentrate on other matters.”); see also Modesto Police Department, <http://www.modestopolice.com/info/innovations.asp> (crediting portable video evidence for an increase of successful spousal abuse prosecutions from 4% to 54% in Modesto).

287. The Supreme Court insisted that officers should not be able to manipulate application of the *Davis* test through their characterization of circumstances at the time they questioned witnesses. “Their saying that an emergency exists cannot make it be so. . . . [P]olice conduct [cannot] govern the Confrontation Clause; testimonial statements are what they are.” *Davis*, 126 S. Ct. at 2279 n.6.

288. *Id.* at 2278 (indicating that the classification of hearsay as testimonial or nontestimonial should not depend on the vague criterion of “formality”).

The protocols for responding officers should include other requirements as well. The protocols should direct officers to inquire about particular matters during their questioning of complainants (after resolution of any emergency). Mindful of the forfeiture doctrine, officers should always ask complainants whether the alleged assailants have ever made threats or offered enticements to prevent the complainants from cooperating with the police. The responding officers should also search for evidence of crimes that can be proven in “victimless prosecutions,” such as the possession of a firearm during a period of disability,<sup>289</sup> or the violation of a restraining order that requires the defendant to maintain a certain distance from the victim. Proof of such crimes typically does not require complainants’ testimony,<sup>290</sup> so officers will make prosecutions more secure by collecting evidence of these crimes.

New protocols are also necessary for parole and probation officers. These officers have extensive contact with batterers and their victims. Not only must these officers supervise convicted batterers who are at risk of recidivism,<sup>291</sup> but these officers must also present evidence in revocation hearings or new prosecutions. In this hybrid role, the officers should be mindful that their first priority is to protect the safety of all those in peril and their secondary function is to collect evidence. In addition, probation and parole officers should employ supervision strategies that reduce the need for testimony by battered women in any subsequent prosecutions. To the maximum extent possible, probation and parole agencies should make use of bilateral electronic monitoring to enforce probationers’ and parolees’ compliance with civil protection orders or conditions of release requiring a minimum distance from victims of domestic abuse. The most effective means of bilateral electronic monitoring is to affix transmitter bracelets on the ankles of both the batterer and the victim, allowing remote monitoring to determine if the two ever come closer than the minimum distance. Such a measure not only enhances safety, but also reduces the need for live testi-

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289. For example, 18 U.S.C. § 922 prohibits the possession of firearms by a person who is under indictment, who is subject to a domestic violence restraining order, or who is a convicted felon or domestic violence misdemeanor. 18 U.S.C. § 922(g), (n) (2000).

290. For example, violation of a restraining order can be proven by officers’ own testimony that they found the defendant in the same residence as the complainant. Violation of the gun statutes can be proven with evidence that the defendant either carried firearms or had firearms in his car or residence. See Russell Donaldson, Annotation, *What Constitutes Actual or Constructive Possession of Unregistered or Otherwise Prohibited Firearm in Violation of 26 USCS § 5861*, 133 A.L.R. FED. 347 (1996) (explaining doctrine of constructive possession). Neither of these strategies would necessitate testimony by complainants.

291. See Elena Salzman, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 348 (1994) (“The vast majority of batterers have prior criminal records and exhibit all of the typical attributes of high risk, chronic offenders. The National Council of Family and Juvenile Court Judges recommends that probation offices give batterers on probation the maximum supervision possible and monitor them intensely.” (footnotes omitted)).

mony by battered women if prosecutions are necessary for violations of restraining orders.<sup>292</sup>

The foregoing protocols would enable effective law enforcement while respecting the Supreme Court's new rulings on the Confrontation Clause. The protocols would achieve both teleological and deontological objectives: law enforcement agents would improve the safety of battered women but would also provide suspects with more tools to defend themselves (such as videotapes of initial questioning by police). The protocols would address Rawlsian concerns by requiring officers to attend carefully to the concerns of victims who may lack the resources to vindicate their rights if left to their own devices.

#### IV. Conclusion

The Supreme Court's vision of constitutional confrontation law has become increasingly strabismic. Testimonial hearsay has attracted the Court's attention, but the Court cannot seem to discern a constitutional role in the regulation of nontestimonial hearsay.

Originalist constitutional interpretation does not necessarily make good policy. As Michael Polelle has written, "the Framers most likely did not expect the evidentiary principles of 1791 to become frozen relics."<sup>293</sup> Even the *Davis* Court opined that, "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction."<sup>294</sup>

The present misalignment of constitutional law, statutory law, and police practices will pose a very real danger for battered women and for a category of defendants who will lack meaningful confrontation rights at trial. States should not wait for fate to bring about the alignment of the constitution, the code, and the constabulary. The time has come to legislate confrontation policy. Every state should pass laws updating hearsay rules and police practices to complement the Supreme Court's new confrontation jurisprudence.

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292. Preliminary studies have demonstrated the usefulness of bilateral electronic monitoring in domestic violence cases. *E.g.*, Edna Erez & Peter R. Ibarra, *Electronic Monitoring of Domestic Violence Cases—A Study of Two Bilateral Programs*, 68 FED. PROBATION 15 (2004) (discussing the efficacy of monitoring devices and the impact of monitoring on victims of domestic abuse). This research predates *Crawford*. Surely the stricter requirements for confrontation of hearsay declarants have only increased the desirability of an electronic monitoring program that reduces the need to rely on live testimony by reluctant victims.

293. Polelle, *supra* note 251, at 298.

294. *Davis v. Washington*, 126 S. Ct. 2266, 2278 n.5 (2006).

Appendix: Proposed Statutory Language<sup>295</sup>

## Rule 804. Hearsay Exceptions; Declarant Unavailable

## (a) Definition of unavailability.

“Unavailability as a witness” includes situations in which the declarant—

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so, *or recants the prior statement*; or
- (3) testifies to a lack of memory of the subject matter of the declarant’s statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

~~A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.~~

[This language has been moved to new Rule 808.]

## (b) Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (2) Statement under belief of impending death. ~~In a prosecution for homicide or in a civil action or proceeding,~~ A statement made by a declarant while believing that the declarant’s death was

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295. Plain text indicates the language of an existing rule. Italics indicate new language. Strikethroughs indicate deletions. Bracketed language is editorial commentary.

imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

- (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
- (4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters *with respect to another person*, and ~~death also, of another person, also the death of or substantial bodily injury to another person~~, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
- (5) *Statement of recent perception.* A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear. [Note that there has been no text in Rule 804(b)(5) since 1997, when the residual hearsay exception was moved from Rule 804(b)(5) to Rule 807.]
- ~~(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. [Transferred to new Rule 808.]~~

*Rule 808. Forfeiture by Wrongdoing*

*(a) Wrongdoing by proponent.* No party may invoke Rule 803, 804, or 807 to offer the hearsay statement of a declarant whose absence that party has wrongfully procured through conduct intended to prevent the witness from testifying, or through conduct that foreseeably could have caused, and did proximately cause, the unavailability of the declarant as a witness.

*Nothing in this rule shall prevent a party from offering a declarant's hearsay statement that is admissible under Rule 806 if an opposing party has first introduced a hearsay statement by that declarant.*

*(b) Wrongdoing by opponent. A statement not specifically covered by Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if (1) the statement is offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did procure, the unavailability of the declarant as a witness, or (2) the statement is offered against a party that has engaged in wrongdoing that foreseeably could cause, and did in fact proximately cause, the unavailability of the declarant as a witness. When the government offers hearsay against the accused under this provision, the hearsay must relate to the victimization of the declarant by the accused.*

*(c) Manner of proof. Except with respect to evidence that is separately admissible, evidence offered to establish forfeiture shall be heard outside the presence of the jury. Proof of forfeiture may consist, in whole or in part, of the same proof that the proponent offers in order to establish one or more criminal offenses, civil claims, or affirmative defenses at issue in the trial itself. In determining whether wrongdoing has occurred within the meaning of Rule 808(a) or (b), the court may consider all available information except privileged matters, and the court shall employ the same standard of proof as set forth in Rule 104(a).*

*Rule 809. Rule of Preference for Live Testimony in Criminal Prosecutions.*

*Except as provided in Rule 806 and Rule 808(b), the prosecution may not offer against the accused a hearsay statement, or an agent's statement under Rule 801(d)(2)(C) or (D), unless the prosecution makes the declarant available for cross-examination, or unless the prosecution establishes that the declarant is unavailable. For purposes of this rule, the term "unavailable" includes, but is not limited to, the grounds for unavailability set forth in Rule 804(a). In no event shall this rule be construed to require the incarceration of a witness pending trial.*

*Sec. \_\_\_\_: Protocols for Law Enforcement, Probation and Parole Officers.*

*All agencies that receive grants or other funds from [this agency, legislative body, etc.] shall file annual reports with [specify office] indicating the recipient's compliance with the following protocols, or the recipient's progress toward compliance:*

*(a) Protocols for 911 operators. All 911 operators and other personnel at 911 centers shall receive training concerning the following expectations and procedures.*

*(1) The first priority of 911 operators is to facilitate a prompt and appropriate response to an emergency and to secure the physical*

*safety of all people known to be in peril. No 911 operator may subordinate the imperative of emergency response to some other goal such as the collection of evidence for use in a criminal prosecution. In particular, a 911 operator may not postpone questioning about the continued presence of an alleged assailant, or the pendency or resolution of an emergency, in an attempt to preserve the nontestimonial character of statements made by the caller.*

- (2) *A 911 operator must constantly remain vigilant for any indication that a third party is interfering with a caller's effort to report an emergency. A 911 operator should devise a special question or questions to which a caller can respond with a coded, apparently innocuous answer that signals intimidation and/or interference by a third party. Upon detecting any such intimidation or interference, a 911 operator shall make a prompt written report to the appropriate prosecuting authority.*
- (3) *In any community in which over 10% of the population speaks a particular language other than English, every 911 center shall employ at all times an operator capable of conversing fluently in that language.*
- (4) *All 911 centers shall utilize technology capable of pinpointing the location from which any cellular phone call originated within the territorial jurisdiction of that center.*
- (5) *Recognizing that some victims who suffer violence at the hands of intimate partners may need to report emergencies in a manner that does not arouse suspicion, all 911 centers shall develop the capacity to receive requests for emergency assistance via electronic mail and text messaging.*
- (6) *Every call to a 911 center shall be recorded, and every recording shall be retained for at least five years, along with notations indicating the date and phone number of origin for each call.*
  - (b) *Protocols for responding officers. All law enforcement officers whose duties include responding to scenes of domestic violence shall receive training concerning the following expectations and procedures.*
    - (1) *The first priority of responding officers is to secure the physical safety of all people known to be in peril. No responding officer shall prolong the resolution of an emergency in order to collect evidence that may be usable in a criminal prosecution.*
    - (2) *Squad cars shall be equipped with detachable dash-mounted video cameras. Unless practically impossible or unsafe in a particular instance, responding officers shall use video cameras to record all their entries into residences and their interactions with witnesses and suspects.*

- (3) *In the course of questioning apparent victims of violent crime after securing the scene, officers shall inquire whether the alleged assailants have threatened reprisals in the event of cooperation with law enforcement, or whether the alleged assailants have offered enticements for victims to refuse cooperation with law enforcement. Officers shall also search carefully for evidence of crimes or violations that may be prosecuted without the testimony of victims, including violations of restraining orders and possession of firearms (either direct or constructive) during a period of disability. Among other disabilities, officers shall consider disabilities due to the pendency of a domestic violence restraining order or a prior misdemeanor conviction for domestic violence.*
- (4) *When one or more persons at the scene of an apparent crime appears to be a victim of domestic violence, responding officers must provide to all such victims information about shelters, financial assistance, and restraining orders.*
- (5) *When one or more persons at the scene of an apparent crime appears to be a perpetrator of domestic violence, responding officers shall serve upon all such persons written notice indicating that efforts to procure the unavailability of a witness may be prosecuted as a separate offense.*

*(c) Protocols for probation and parole officers. All probation and parole officers whose duties include the supervision of domestic violence offenders shall receive training concerning the following expectations and procedures.*

- (1) *In interacting with apparent victims of domestic violence, the officers' first priority must be to secure the physical safety of all people known to be in peril. No officer shall prolong the resolution of an emergency in order to collect evidence that may be usable in a criminal prosecution.*
- (2) *To the maximum extent possible, probation and parole agencies shall make use of bilateral electronic monitoring to enforce probationers' and parolees' compliance with civil protection orders or conditions of release requiring a minimum distance from victims of domestic abuse. The preferred means of implementing bilateral electronic monitoring shall be to equip both parties with ankle bracelets or other similar devices that enable law enforcement officers at a remote location to assess, at any given time, the precise location of the parties and the distance between them.*

*Sec. \_\_\_\_: Admissibility of Hearsay at Revocation Hearings.*

*In a hearing on the government's petition for revocation of probation, parole, or supervised release of any sort, hearsay will be admissible to the same extent permitted by the federal and state constitutions. Upon request, defendant shall be entitled to notice of the government's contemplated hearsay evidence. The government shall provide this notice one week prior to the hearing, except upon a showing of good cause. The notice shall list each hearsay declarant and the general nature of the out-of-court statement by that declarant that the government intends to present.*