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Comments: In Light of Crawford v. Washington and the Difficult Nature of Domestic Violence Prosecutions, Maryland Should Adopt Legislation Making Admissible Prior Acts of Domestic Violence in Domestic Violence Prosecutions

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IN LIGHT OF *CRAWFORD V. WASHINGTON* AND THE DIFFICULT NATURE OF DOMESTIC VIOLENCE PROSECUTIONS, MARYLAND SHOULD ADOPT LEGISLATION MAKING ADMISSIBLE PRIOR ACTS OF DOMESTIC VIOLENCE IN DOMESTIC VIOLENCE PROSECUTIONS.

I. INTRODUCTION

Veronica Williams's story is all too familiar. Veronica's "picture-perfect" marriage to Cleaven Williams was shattered on a Friday night in January 2005 when Cleaven slapped, choked, and kicked Veronica in an upstairs bedroom.[1] As she pleaded with him to stop, he pistol whipped her with a .45-caliber handgun and fired a shot at her feet, just missing her.[2] Veronica was able to escape the house and went to the police, but provided a false name and a false story claiming she had just been robbed.[3]

Cleaven fled to the home of a female acquaintance.[4] While staying there he punched holes in the wall, threw pictures, and attempted to rape her; she refused to press charges.[5] While Cleaven fled, Veronica left town to visit relatives in another state.[6] Cleaven tracked her down and brought her back to Maryland assuring her that everything would change.[7]

Nothing did change. The physical and emotional abuse continued.[8] Veronica did not want to leave for fear that her children would live without a father.[9] Finally, Veronica worked up the courage to tell Cleaven she was leaving again; in retaliation, Cleaven cut off all of her hair.[10]

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1. Melissa Harris, *No Safe Place: In Danger at Home, Let down by the Law, a Woman Fleeing Brutality Loses Her Life*, THE BALT. SUN, Dec. 14, 2008, at 18.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

The story of Veronica Williams ended on the sidewalk outside the Baltimore City District Court, where she was filing a protective order against Cleaven.[11] Cleaven followed Veronica to the courthouse, darted across traffic, and stabbed her multiple times.[12] Several days later, Veronica died with her children by her side as doctors removed her from a ventilator.[13] Doctors discovered something else, a three-to-six-week-old fetus with a faint heartbeat.[14]

Although Veronica had pressed charges against Cleaven,[15] the shooting incident, along with any 911 calls or statements made to police and social workers, would have been inadmissible at any subsequent trial for domestic violence, hindering a proper prosecution.[16] This Comment attempts to address the problems of domestic violence prosecutions and provide a recommendation to prevent an outcome similar to Veronica Williams's.

The pervasiveness of domestic violence throughout the United States is staggering. According to the United States Department of Justice (USDOJ), approximately 1.3 million women are physically assaulted by an intimate partner annually.[17] The prevalence of domestic violence in Maryland is no less daunting. According to the 2007 Maryland Uniform Crime Report (UCR), compiled by the Maryland State Police, there were a total of 19,391 domestic crimes reported throughout the state in 2007.[18]

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *See infra* Part III.C.2.
17. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN at iv, 26 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf. Although domestic violence can and does affect men and those in homosexual relationships, the primary victims are women in heterosexual relationships. *See* MARYLAND STATE POLICE, CRIME IN MARYLAND 2007 UNIFORM CRIME REPORT 52, 57 (2007). Therefore, throughout this Comment, the victim will be referred to as a woman in a heterosexual relationship.
18. MARYLAND STATE POLICE, *supra* note 17, at 53. The 2007 level slightly decreased from the 2006 level of 21,965. *Id.* Baltimore County averaged the highest number of domestic violence incidents over a five-year period followed by Baltimore City, Prince George's County, and then Montgomery County. *Id.* at 60. During the five-year period, an average of 20,864 incidents were reported throughout the state. *Id.*

Although the UCR provides useful data, the UCR only provides statistics on reported domestic violence incidents to local police departments. *See id.* at 53. Therefore, unreported incidents of domestic violence remain unclear. *See id.*

The prosecution of domestic violence cases is difficult for varying reasons, including a victim's lack of cooperation or lack of physical evidence.[19] Prior to 2004, prosecutors routinely relied on victim statements, admitted at trial through a hearsay exception, to supplement the lack of physical evidence, the lack of victim cooperation, or both.[20] Following the 2004 decision of the Supreme Court of the United States, *Crawford v. Washington*,[21] the customary tools of introducing hearsay statements in a domestic violence prosecution through a hearsay exception has become limited.[22] *Crawford* holds that hearsay statements deemed "testimonial" violate the Sixth Amendment and cannot be admitted at trial.[23] In the context of domestic violence cases, *Crawford* and its progeny have severely limited the prosecution's ability to admit a victim's hearsay statements because they routinely fall under the Supreme Court's definition of testimonial.[24]

Moreover, current evidence law in Maryland prohibits the introduction of a defendant's past acts of domestic violence.[25] This prohibition affects domestic violence prosecutions because domestic violence is a highly recidivistic crime; prosecutors would like to use past acts of domestic violence to show that the defendant committed the same crime before and therefore is more likely to have committed the current charge.[26] The *Crawford* decision and subsequent cases, paired with Maryland evidence law banning a defendant's prior acts of domestic violence admission into evidence, limits the tools available to prosecutors in already difficult domestic violence prosecutions, tipping the balance at trial heavily in favor of the defendant.

Part II of this Comment briefly defines domestic violence and describes the difficulties faced in prosecuting domestic violence cases and the hearsay tools that are commonly used to combat those difficulties.[27]

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19. *See infra* Part II.B.
20. *See infra* Part II.B.
21. 541 U.S. 36 (2004).
22. *See infra* Part III.C.
23. *Crawford*, 541 U.S. at 68.
24. *Infra* Part III.C.2.
25. MD. R. 5-404.
26. *Infra* Part III.D.1.
27. *Infra* Part II.

Part III details the admissibility of hearsay in domestic violence prosecutions under *Crawford* and its progeny.[28] Next, Part III describes the current Maryland law on admitting past acts of domestic violence in a case for a current domestic violence charge.[29] Part III concludes by highlighting California Evidence Code section 1109 and similar statutes from other states that make admissible a defendant's past acts of domestic violence in a current charge for domestic violence.[30]

Part IV argues that in light of the *Crawford* decision, coupled with current evidence law banning a defendant's past acts of domestic violence and the difficult nature of domestic violence prosecutions, the balance at trial has tipped heavily in the defendant's favor and is obscuring the search for the truth.[31] Therefore, Part IV also argues that Maryland should adopt a statute similar to section 1109.[32] The recidivistic nature of domestic violence and past acts' predictability of future acts of domestic violence support the inference that prior acts of domestic violence infer guilt on the current charge.[33] In addition, Part IV analyzes the positive aspects of section 1109 and the proposal, including their ability to protect the defendant's rights.[34] By adopting such a proposal, the prosecution will have a tool to bring the balance at trial back to equilibrium. The overall goal of this Comment is to shed light on the problems of domestic violence prosecutions and encourage the Maryland General Assembly to take action.

II. THE PROBLEMS OF DOMESTIC VIOLENCE PROSECUTIONS

A. Domestic Violence Definition

Domestic violence is prevalent nationwide as well as throughout Maryland.[35] The question remains, what exactly is domestic violence? Domestic violence does not have one specific definition; various states and the federal government provide their own definitions. Under Maryland law, a victim of domestic violence is defined as "an individual who has received deliberate, severe, and

28. *Infra* Part III.A–C.
29. *Infra* Part III.D.1.
30. *Infra* Part III.D.2.a–b.
31. *Infra* Part IV.
32. *Infra* Part IV.
33. *Infra* Part IV.
34. *Infra* Part IV.
35. *See supra* text accompanying notes 17–18.

demonstrable physical injury, or is in fear of imminent deliberate, severe, and demonstrable physical injury from a current or former spouse, or a current or former cohabitant."[36] From another perspective, the USDOJ defines domestic violence as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."[37] Although the definitions differ, the ultimate goal is to identify the same type of victim.

B. Difficulties Prosecuting Domestic Violence

Domestic violence is a serious problem with grave ramifications. Domestic violence can cause the victim psychological distress, resulting in problems with future relationships and future victimization.[38] Allowed to continue, domestic violence can impact children physically and increase the likelihood that the child who witnessed domestic violence will become abused in the future.[39] Ultimately and tragically, domestic violence can end with spousal murder.[40]

Many argue that prosecutions, by placing the abuser in jail or counseling, are necessary to decrease the prevalence of domestic

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36. MD. CODE ANN., FAM. LAW § 4-513 (LexisNexis 2006).

37. USDOJ: Office on Violence Against Women, About Domestic Violence, http://www.ovw.usdoj.gov/domviolence.htm (last visited Mar. 3, 2010). The U.S. Department of Justice describes five different sub-categories of domestic violence. *Id.* First, physical abuse, which involves hitting but can also involve forced drug use or the denial of medical care. *Id.* Second, sexual abuse, which involves coercion in sexual contact or behavior such as marital rape. *Id.* Third, emotional abuse, which involves the weakening of an individual's self-worth through acts including constant criticism. *Id.* Fourth, economic abuse, which involves financial dependency by controlling all financial aspects of a person. *Id.* Finally, psychological abuse, which is fear through intimidation by threatening harm to the individual, her children, or her family and friends. *Id.*

38. *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1221, 1224–25 (1993).

39. Tonya McCormick, Note and Comment, *Convicting Domestic Violence Abusers When the Victim Remains Silent*, 13 BYU J. PUB. L. 427, 429–30 (1999).

40. Callie Marie Rennison, *Intimate Partner Violence, 1993–2001*, Bureau of Justice Statistics Crime Data Brief (U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Wash., D.C.), Feb. 2003, at 1–2, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf. In 2000, throughout the United States, 1247 women were killed by an intimate partner. *Id.* This figure accounts for 33.5% of murders of all women in 2000. *Id.* In Maryland, thirty of the domestic violence incidents resulted in homicide. MARYLAND STATE POLICE, *supra* note 17, at 61.

violence and, in turn, its effects as described above.[41] However, convictions can be hard to obtain.[42] A primary reason for this difficulty is that victims of domestic violence, after initially cooperating with the police, sometimes refuse to cooperate—testifying on behalf of the batterer, requesting a dismissal of the charges, refusing to testify, recanting, or generally refusing to assist the prosecution.[43] Some evidence suggests that eighty to ninety percent of domestic violence victims will recant at some point.[44]

The victim's lack of cooperation can be traced to the significant control that the batterer exerts over the victim. One theory describing the control in an abusive relationship is the "cycle of violence."[45] The cycle of violence, initially described by Lenore Walker in 1979, consists of three stages: the tension-building phase, the acute battering phase, and the tranquil-loving phase often referred to as the honeymoon phase.[46] The tension-building phase involves minor abusive incidents.[47] Although the victim tries to please the abuser, the incidents evolve into the acute-battering phase where the most violent attacks occur, ending only at the desire of the abuser.[48] Finally, in the honeymoon phase, the batterer will express regret for

41. J. Alex Little, *Balancing Accountability and Victim Autonomy at the International Criminal Court*, 38 GEO. J. INT'L L. 363, 382 (2007).

42. Tragically, prosecutions for domestic violence have come too late for many victims. Among those incarcerated for spousal abuse in state prisons, fifty percent are there for spousal murder. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 3 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs.pdf.

43. Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 768 (2005); Jennifer Gentile Long, *Prosecuting Intimate Partner Sexual Assault*, 10 CONNECTIONS 22, 24–25 (2008). This differs from assaults where the victim does not know the perpetrator and is more willing to cooperate. Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367 (1996).

44. *See, e.g.*, Lininger, *supra* note 43, at 768; 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) ("The head of the Family Violence Division of the Los Angeles District Attorney's Office estimates that ninety percent of domestic violence victims recant."); De Sanctis, *supra* note 43, at 367 ("[V]ictims of domestic violence are uncooperative in approximately eighty to ninety percent of cases.").

45. LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 95–104 (Springer Publ'g Co. 1984).

46. *Id.* at 95; *see* McCormick, *supra* note 39, at 431; Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 508 (2008).

47. Rachmilovitz, *supra* note 46, at 508.

48. *Id.*

his behavior, often swearing it will not happen again.[49] The victim will believe that her abuser will revert to the man that he was when she first started the relationship.[50] However, this phase will eventually yield to the tension-building phase, repeating the cycle over again.[51] The cycle of violence is one theory that explains the recidivism in domestic violence.[52] Prosecution most likely occurs after the battering incident in the acute-battering phase;[53] by the time the prosecution is underway, the victim will have progressed to the honeymoon phase where she forgives the abuser and will be less willing to cooperate with prosecutors.[54]

Although Walker's theory is helpful in understanding domestic violence relationships, the cookie-cutter description has often been criticized as an inaccurate description of every abusive relationship.[55] Other scholars have theorized that innate in every domestic violence relationship is "coercive control."[56] That is, throughout the relationship there is "an ongoing strategy of intimidation, isolation and control that extends to all areas of [the victim's] life, including access to food, money, help, protection, friendships, family and children; work; transportation; control over her own sexuality; and the minutiae of every day life."[57] The high level of control in the relationship leads the victim to have less autonomy and independence, leading to a diminished ability to seek help or assist in a prosecution.[58]

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49. McCormick, *supra* note 39, at 431.
50. *Id.*
51. Rachmilovitz, *supra* note 46, at 508.
52. *Id.*
53. *See* Pamela Vartabedian, Comment, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence*, 47 SANTA CLARA L. REV. 157, 159–60 (2007).
54. *See id.* at 160.
55. *See, e.g.*, Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN'S L.J. 65, 75 (2008); Megan G. Thompson, Comment, *Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard*, 86 OR. L. REV. 599, 615 (2007).
56. *See* Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2, 8–10 (2007). This theory was first articulated by Susan Schechter and built upon by Evan Stark. *Id.*
57. *Id.* at 10. A helpful visual tool to explain the control in a domestic violence relationship is the power and control wheel. *See id.* at 9. The Domestic Abuse Intervention Project in Duluth, Minnesota developed the power and control wheel, and domestic violence experts routinely use it. *Id.* at 19 n.39.
58. *See id.* at 10.

Aside from control, a victim's refusal to cooperate with the prosecution may also stem from the fear of retaliation by the batterer.[59] Studies have shown that the most dangerous time for a victim is when she attempts to break free from a violent relationship and seek prosecution.[60]

Other factors also cause a victim to recant or refuse to testify, further hindering domestic violence prosecutions. The victim may have an economic dependence on her abuser and fear that she would be unable to independently provide for herself or her children.[61] Additional factors include: continued emotional attachment; reluctance to break up families, including fear that children will be placed into state custody; religious and cultural views; "'learned helplessness'" based on repeated abuse; and, a genuine belief that things have gotten better, specifically during the honeymoon phase of the cycle of abuse.[62] In Maryland, the law even allows a spousal victim of domestic violence a one-time refusal to testify.[63] Lastly, in the most extreme cases, victim cooperation is absent because the domestic violence assault resulted in the victim's death.[64]

It is difficult to prosecute domestic violence without victim cooperation. Domestic violence cases often leave scant physical evidence (i.e. physical evidence, such as bruises or scratches, have not materialized or a delay in reporting the domestic abuse causes physical evidence to dissipate) that, even when present, can be interpreted in many different ways.[65] When physical evidence of abuse is lacking, prosecutors rely heavily on hearsay statements to explain what occurred.[66] Hearsay is used to "'connect the dots'" when the victim does not testify.[67] For example, a victim's statement to a responding police officer that the abuser "'kicked [me] in the leg'" and "'grabbed [me] around the neck'" would be used to describe, in lieu of a testifying victim, what occurred.[68] Without the

59. *See* Lininger, *supra* note 43, at 769 (noting a study which found that thirty percent of batterers assault their victims during the predisposition phase of prosecution).

60. *Id.*

61. *Id.* This fear may be more of a reality; fifty percent of battered women drop below the poverty line after leaving their abusers. *Id.* Also, a study has found that in forty-two percent of cases, batterers threatened to reduce economic support in retaliation for continued assistance with the prosecution. *Id.* at 769–70.

62. *Id.* at 770.

63. MD. CODE ANN., CTS. & JUD. PROC. § 9-106(a)(2)(iii) (LexisNexis 2006).

64. *See supra* note 40 and accompanying text.

65. Lininger, *supra* note 43, at 771.

66. *See id.* at 771–72.

67. *Id.* at 771.

68. *See* State v. Lucas, 407 Md. 307, 309, 965 A.2d 75, 77 (2009).

hearsay statements "[t]he quantum of proof . . . may be so low that the absence of hearsay necessitates dismissal."[69]

For many years, hearsay statements by a victim who refused to cooperate with the prosecution had been admissible at trial through various exceptions.[70] However, the Supreme Court's decision in *Crawford v. Washington*[71] has limited the admissibility of hearsay statements in prosecutions for domestic violence.[72]

III. THE CURRENT LAW: *CRAWFORD*, HEARSAY EXCEPTIONS, AND THE PROPENSITY RULE

A. Hearsay and Hearsay Exceptions

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[73] The declarant is the person making the statement.[74] Generally, a hearsay statement is inadmissible at trial.[75] The hearsay rule is intended to prevent a statement's admission into evidence where the cross-examiner has not had an opportunity to cross-examine the declarant and expose weaknesses in the statement, such as defects in perception, memory, and sincerity, as well as defects in transmission of the statement.[76] There are, however, numerous exceptions and exemptions to the

69. Lininger, *supra* note 43, at 771. The use of hearsay in a domestic violence trial also has other benefits. It abates the motivation for an abuser to intimidate the victim while waiting for trial. *Id.* If live testimony were used, the victim would be subject to constant intimidation to change her testimony and cause a dismissal. *Id.* at 771–72. Also, by not testifying, the victim gets a reprieve from reliving the trauma of the incident upon prosecution and defense questioning. *Id.*

70. *See infra* Part III.B.

71. 541 U.S. 36 (2004).

72. *See infra* Part III.C.1.

73. MD. R. 5-801(c). A "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." *Id.* 5-801(a).

74. *Id.* 5-801(b).

75. *Id.* 5-802. If a statement is not used for its truth then it is admissible under the hearsay rule. *See* GRAHAM C. LILLY, PRINCIPLES OF EVIDENCE 150 (Thomson West 4th ed. 2006). For example, a statement by a driver that a car had defective brakes can be used to show that the driver knew the car had defective brakes, but not for the purpose of proving that the car did indeed have defective brakes. *See id.*

76. LILLY, *supra* note 75, at 140, 142.

hearsay rule,[77] some of which, as discussedd below, are relevant to the admission of a domestic violence victim's hearsay statement.

*B. Pre-*Crawford*: Hearsay Statements in Domestic Violence Prosecutions*

Prior to *Crawford*, prosecutors would generally rely on five types of hearsay statements: 911 calls, statements made to responding officers or paramedics, formal statements given to police after their initial response, statements made to individuals other than the police (i.e. social workers, friends, or doctors), and dying declarations.[78] These hearsay statements would generally be admitted under the excited utterance hearsay exception or the dying declaration exception in homicide prosecutions.[79]

In cases prior to *Crawford*,[80] excited utterances and dying declarations were commonly admitted against defendants

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77. *See id.* at 166–268. Some exceptions require unavailability of the declarant, while others do not. *Compare* MD. R. 5-804(b) (providing that the exceptions contained therein are applicable only when the declarant is unavailable to testify), *with* MD. R. 5-803 (providing that under certain circumstances, a statement will not be excluded even though the declarant is unavailable to testify). Maryland Rule 5-804(a) defines "unavailability."

78. Carol A. Chase, *Is* Crawford *a "Get Out of Jail Free" Card for Batterers and Abusers? An Argument for a Narrow Definition of "Testimonial,"* 84 OR. L. REV. 1093, 1113–14 (2005).

79. *See* Lininger, *supra* note 43, at 776. Maryland Rule 5-803(b)(2) codifies the excited utterance exception and makes admissible "[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." MD. R. 5-803(b)(2). Underlying the excited utterance exception in a domestic violence case is the theory that the circumstances of an assault on the victim would produce enough excitement to still the victim's ability to reflect and fabricate. FED. R. EVID. 803 advisory committee's note.

Maryland Rule 5-804(b)(2) codifies the dying declaration exception and makes admissible "a statement made by a declarant, while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death." MD. R. 5-804(b)(2). Unlike the Federal Rules of Evidence, in Maryland, the dying declaration exception applies not only in a homicide or civil action, but also in an "attempted homicide [and] assault with intent to commit a homicide." MD. R. 5-804(b)(2); *see also* FED. R. EVID. 804(b)(2) (providing that the dying declaration exception applies "[i]n a prosecution for homicide or in a civil action").

Some domestic violence prosecutions also use the present sense impression exception, which makes admissible "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MD. R. 5-803(b)(1).

80. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56 (1980).

notwithstanding the Sixth Amendment right to confrontation,[81] as long as there was "adequate 'indicia of reliability'" and a firmly-rooted hearsay exception.[82] "Suffice to say, if a hearsay statement was admissible under the rules of evidence, it almost always satisfied the Sixth Amendment right to confrontation."[83]

C. Crawford *and the Change to Domestic Violence Prosecutions' Use of Hearsay*

1. The *Crawford* Decision

In 2004, the Supreme Court reexamined the Confrontation Clause in *Crawford v. Washington*.[84] In an opinion written by Justice Antonin Scalia, the Court expressly overruled *Ohio v. Roberts*[85] and created a holding that would have lasting effects on the introduction of hearsay statements at trial for all types of prosecutions, including domestic violence prosecutions.[86]

Michael Crawford was charged with assault and attempted murder for trying to stab a man who allegedly raped his wife.[87] Crawford claimed self-defense, stating that the victim reached for a weapon first.[88] However, in a taped interrogation, Crawford's wife gave a different account in which she stated that the victim did not have a weapon in his hand.[89] At trial, Crawford's wife refused to testify,

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81. *See, e.g.*, Byron L. Warnken, *"Forfeiture by Wrongdoing" After* Crawford v. Washington*: Maryland's Approach Best Preserves the Right to Confrontation*, 37 U. BALT. L. REV. 203, 205–07 (2008); Tracey L. Perrick, Comment, Crawford v. Washington*: Redefining Sixth Amendment Jurisprudence; The Impact Across the United States and in Maryland*, 35 U. BALT. L. REV. 133, 135–36 (2005).

The Confrontation Clause of the Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. One of the benefits of the Sixth Amendment, which is similar to the reasoning of the hearsay rule, is that it requires a face-to-face confrontation allowing cross-examination to expose discrepancies in a witness' testimony. *See* Maryland v. Craig, 497 U.S. 836, 845–46 (1990). In domestic violence cases where hearsay statements are used in lieu of or in addition to the victim's statement, defendants can argue that they are deprived of a chance to cross-examine and confront the victim and expose flaws in their testimony.

82. *Roberts*, 448 U.S. at 65–66.

83. Warnken, *supra* note 81, at 205.

84. 541 U.S. 36, 42 (2004).

85. *See id.* at 75 (Rehnquist, C.J., concurring).

86. *See* Perrick, *supra* note 81, at 143.

87. *Crawford*, 541 U.S. at 38–40.

88. *See id.* at 38–39.

89. *Id.* at 39–40.

claiming marital privilege.[90] The prosecution proffered her taped interrogation into evidence in lieu of her live testimony.[91] Crawford argued that his Sixth Amendment right to confrontation was violated because he was unable to confront his wife.[92] However, the trial court admitted the testimony under the *Roberts* standard, finding that it was reliable.[93] The Supreme Court granted certiorari to determine whether the statement violated the Confrontation Clause.[94]

Justice Scalia seized the opportunity to build on his dissent in *Maryland v. Craig*[95] and change the landscape of Sixth Amendment right to confrontation cases.[96] In *Crawford*, the Court abandoned the *Roberts* test.[97] First, the Court examined English law[98] to discern the Framers' intent when contemplating the Sixth Amendment.[99] The Court determined that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[100] The Court stated that the focus of the Sixth Amendment is to allow the defendant to confront a witness whose words "bear testimony."[101]

Thus, the Court held that testimonial statements are inadmissible when the witness is unavailable and there was no prior opportunity for the defendant to cross-examine the declarant.[102] The Court's holding effectively rejected the *Roberts* test of "adequate indicia of

90. *Id.* at 40.

91. *See id.* The hearsay exception that the prosecution used was "statement against penal interest." *Id.* (citing WASH. R. EVID. 804(b)(3)).

92. *Id.*

93. *Id.* ("The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy: [Crawford's wife] was not shifting blame but rather corroborating her husband's story that he acted in self-defense or 'justified reprisal'; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a 'neutral' law enforcement officer.").

94. *Id.* at 42.

95. 497 U.S. 836 (1990) (holding that on a case-by-case basis and a finding of necessity to protect a child witness, a child witness may testify through a closed circuit television and will not violate the Sixth Amendment).

96. *See id.* at 860–70 (Scalia, J., dissenting); Warnken, *supra* note 81, at 208–09.

97. *See Crawford*, 541 U.S. at 60–64.

98. *See* Perrick, *supra* note 81, at 136–41 (discussing the English law the Court used to interpret the Sixth Amendment).

99. *See Crawford*, 541 U.S. at 43–47.

100. *Id.* at 50.

101. *Id.* at 51 (quoting N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). The Court described testimony as a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.*

102. *Id.* at 68.

reliability."[103] The Court reasoned that allowing a judge to subjectively determine what is reliable takes away the primary virtue of the Sixth Amendment, which is to allow the jury to determine the reliability of the statement through cross-examination.[104] The Court explained the failing of the *Roberts* test: "The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[105] That is, testimonial statements from a witness who the defendant has not had an opportunity to cross-examine.

The Court put off defining the exact boundaries of which statements are testimonial, "leav[ing] for another day any effort to spell out a comprehensive definition of 'testimonial.'"[106] However, having found that Crawford's wife's statements to the police were testimonial, it can be inferred that testimonial statements to police are a category of statements that are inadmissible at trial when the witness is unavailable for cross-examination.[107] The Court also stated that, at minimum, the Sixth Amendment "applies . . . to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[108] Subsequent cases have defined and shaped the definition of testimonial and have had a primary effect on domestic violence cases, where testimonial statements are often introduced at trial to take the place of a witness who is unavailable.[109]

2. The *Crawford* Decision and its Progeny's Effect on Domestic Violence Hearsay Tools

The *Crawford* decision and its new standard significantly affects the types of hearsay statements prosecutors use to introduce evidence in domestic violence prosecutions.[110]

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103. *See id.* at 60–65.

104. *See id.* at 62.

105. *Id.* at 63.

106. *Id.* at 68.

107. *Id.* at 52, 68. The Court drew the comparison that statements made to the police in the course of interrogations are similar to examinations by justices of the peace in England—statements that the Framers wished to exclude by implementing the Sixth Amendment. *See id.* at 52–53.

108. *Id.* at 68.

109. *See infra* Part III.C.2.

110. *See supra* Part III.B. *Crawford* only has a bearing on domestic violence prosecutions when the victim refuses to testify. *See* Perrick, *supra* note 81, at 144. If the victim

a. 911 calls

As previously discussed, 911 calls are a primary tool prosecutors use in domestic violence cases where the victim is unavailable.[111] The leading case to determine whether a 911 call is testimonial under *Crawford* is *Davis v. Washington*.[112] In *Davis*, Justice Scalia took the opportunity to elaborate on the definition of "testimonial."[113] Michelle McCottry, the victim of an alleged domestic assault at the hands of Davis, phoned 911.[114] After an initial hang-up and a call-back by the 911 operator, McCottry sought assistance from the police.[115] After it was clear that Davis had vacated the scene, the operator continued to ask McCottry questions about the incident.[116] At trial, McCottry did not testify and was thus considered "unavailable."[117] The prosecution sought to introduce a recording of the 911 call over Davis's objection on the grounds that it violated his right to confrontation.[118]

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testifies at trial, she has made herself available for cross-examination and thus no Confrontation Clause issue exists. *See id.*

111. *See supra* Part III.B.

112. 547 U.S. 813 (2006).

113. *See id.* at 817.

114. *Id.*

115. *Id.* at 817–18. The relevant conversation between the 911 operator and Michelle McCottry was as follows:

> . . . .
> 911 Operator: What's going on?
> Complainant: He's here jumpin' [sic] on me again.
> . . . .
> 911 Operator: Okay. Has he been drinking?
> Complainant: No.
> 911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?
> Complainant: I'm on the line.
> 911 Operator: Listen to me carefully. Do you know his last name?
> Complainant: It's Davis.
> 911 Operator: Davis? Okay, what's his first name?
> Complainant: Adrian.
> . . . .
> 911 Operator: Okay. What's his middle initial?
> Complainant: Martell. He's runnin' [sic] now.

Id. at 817–18.

116. *Id.* at 818.

117. *Id.* at 819.

118. *Id.*

The Court had to decide whether the 911 call was considered testimonial under *Crawford*.[119] The Court compared McCottry's statements to the interrogation in *Crawford*.[120] It noted that statements such as McCottry's, made when it is clear that there is an ongoing emergency, are not testimonial.[121] The Court reasoned that statements made when the witness is seeking help are not the same as statements made when a witness is testifying;[122] therefore, the protections that *Crawford* and the Sixth Amendment provide are not applicable.[123]

The Court described the type of statement that can be classified as an ongoing emergency:

> McCottry's call was plainly a call for help against bona fide physical threat . . . . [T]he nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past.[124]

The Court also noted the differences between the calm, station-house interview in *Crawford* versus McCottry's "frantic" answers in an unsafe environment.[125] The Court did note, however, that in some circumstances, statements made during an ongoing emergency could evolve into testimonial statements—a conversation that begins as an inquiry into whether emergency assistance is needed can "'evolve into testimonial statements' once that purpose has been achieved."[126] For example, in *Davis*, McCottry's responses to the operator's "battery of [subsequent' questions" posed after the operator obtained the information needed to address the ongoing emergency, "were testimonial, not unlike the 'structured police questioning' that occurred in *Crawford*."[127]

What does this mean for domestic violence prosecutions? After *Davis*, if a prosecutor wants to admit into evidence a recording of a 911 call when the witness is not available for cross-examination, the

119. *Id.* at 823.
120. *Id.* at 827.
121. *Id.* at 828.
122. *Id.* ("No 'witness' goes into court to proclaim an emergency and seek help.").
123. *See id.*
124. *Id.* at 827.
125. *Id.*
126. *Id.* at 828 (citation omitted).
127. *Id.* at 828–29.

statement must have been made when an ongoing emergency was present.[128] If the statement becomes a narrative and is more akin to the victim "testifying" rather than seeking help, the statement cannot be admitted into evidence.[129] While many portions of 911 calls can still be readily admitted into evidence under *Davis*, many recordings are excluded if a judge finds that the emergency had ended.[130]

b. Statements to responding or investigating officers

Prior to *Davis* and its companion case *Hammon v. Indiana*,[131] there was an open question as to whether statements made to officers responding to a domestic disturbance or statements made to an investigating officer who had returned to conduct an investigation were testimonial.[132]

In *Hammon*, the Court examined the admissibility of statements made to police in a non-emergency situation.[133] Police responded to a domestic violence call.[134] Upon arrival, the officers separated the husband, Hershel Hammon, and his wife, Amy Hammon.[135] An officer asked Amy what had happened and Amy stated that she was not in any immediate danger.[136] Still, the officer had Amy fill out an affidavit describing the domestic assault.[137] At trial, Amy was subpoenaed but did not appear.[138] Hammon objected to the use of the affidavit, admitted through the "present sense impression" hearsay exception.[139] Hammon also objected to testimony admitted through the "excited utterance" exception from an officer indicating that Amy stated that Hammon was irate.[140] Nevertheless, the trial court admitted the evidence over Hammon's objection.[141]

The Supreme Court held that the affidavit and Amy's statements to the officer were testimonial.[142] The Court reasoned that there was no

128. *See id.* at 828.
129. *See id.*
130. *See id.*
131. 547 U.S. 813 (2006).
132. *See id.* at 817.
133. *Id.* at 829.
134. *Id.* at 819.
135. *Id.* at 819–20.
136. *Id.* at 830.
137. *Id.* at 820.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *See id.* at 829–30.

emergency; in fact, Amy had informed the officer that "there was no immediate threat to her person."[143] The Court stated:

> When the officer questioned Amy . . . and elicited the challenged statements, he was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.' Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, precisely what the officer *should* have done.[144]

Hammon is an example of when an ongoing emergency has dissipated and a once non-testimonial environment quickly turned testimonial.[145] Therefore, the Supreme Court held that when a responding officer arrives, if there is no ongoing emergency, the statements made to the responding officer are testimonial.[146] This further means that any statement made to an officer who is investigating a crime rather than responding to a call for help will be held inadmissible.[147] Post *Crawford*, *Davis*, and *Hammon*, it is clear that there is greater difficulty introducing domestic violence victims' hearsay statements made to responding and investigating police officers.[148]

c. *Statements made to persons other than police officers*

The Supreme Court has yet to decide whether a domestic violence victim's statements to social workers, medical personnel, friends, or relatives are testimonial. However, the Court of Appeals of

143. *Id.*
144. *Id.* at 830.
145. *Id.* at 828–29.
146. *Id.* at 822.
147. The Court of Appeals of Maryland, in the recent decision *State v. Lucas*, 407 Md. 307, 965 A.2d 75 (2009), addressed a factual scenario that closely paralleled *Hammon*. Where two police officers had separated the abuser and victim in a domestic violence incident, the responding officer's questions of "'What happened?'" and "'Where [did you get] the marks?'" were held not to be enabling the police to meet an ongoing emergency because any threat was already under control and the primary purpose was to "prove past events . . . relevant to later criminal prosecution"; therefore, the victim's statements to the police were testimonial. *Id.* at 326, 965 A.2d at 87.
148. Lininger, *supra* note 43, at 776. "[A] survey of West Coast prosecutors found that since the Crawford ruling, [eighty-seven] percent of respondents have encountered greater difficulty in introducing victims' hearsay statements elicited by investigation officers at the scene of the alleged domestic abuse." *Id.*

Maryland confronted the issue in *State v. Snowden*.[149] In *Snowden*, the State sought to admit statements made by child abuse victims to a social worker through the "tender years" statute, which allows social workers to testify in place of child abuse victims.[150] The defendant objected to the admission of the social worker's testimony, claiming that it violated his Sixth Amendment right to confrontation.[151]

The Court of Appeals of Maryland held that the crux of the question is whether the victim's statements to the social worker were part of a formal interrogation.[152] Courts differ on defining an interrogation; some courts will look to the intent of the parties involved in the conversation, placing emphasis on whether there was intent to gather evidence.[153] Other courts examine factors such as formality, an adversarial relationship, who initiated the conversation, and passive listening to determine if a statement to a responding officer is testimonial.[154] In *Snowden*, the Court of Appeals of Maryland provided its own definition of what constitutes an interrogation:

> No matter what other motives exist, if a statement is made under such circumstances that would lead an objective person to believe that statements made in response to government interrogation later would be used at trial, the admission of those statements must be conditioned upon *Crawford*'s requirements of unavailability and a prior opportunity to cross-examine.[155]

The court held the statements in *Snowden* to be testimonial because the children were brought to the social worker for the express purpose of developing testimony for trial and were interviewed in order to develop their testimony for trial.[156] The court also stated that "an ordinary person in the position of any of the declarants would have anticipated the sense that [their] statements to the sexual abuse

149. 385 Md. 64, 867 A.2d 314 (2005).
150. *Id.* at 73, 867 A.2d at 319.
151. *Id.*
152. *See id.* at 82–83, 867 A.2d at 324–25.
153. *See, e.g.*, United States v. Saner, 313 F. Supp. 2d 896, 901–02 (S.D. Ind. 2004); State v. Bell, 603 S.E.2d 93, 116 (N.C. 2004).
154. *See* Perrick, *supra* note 81, at 140–48.
155. *Snowden*, 385 Md. at 92, 867 A.2d at 330.
156. *Id.* at 84–85, 867 A.2d at 325–26.

investigator potentially would have been used to 'prosecute' [the defendant]."[157]

The *Snowden* decision means that, in Maryland, a domestic violence victim's statements to a social worker will be inadmissible if police bring the victim to a social worker, or the victim objectively believes that the questions asked by the social worker would be used at trial against the alleged abuser.[158]

As for medical personnel, the *Snowden* court noted in dicta that some courts have found victim statements to medical physicians to be non-testimonial.[159] The court suggested that if the child abuse victims had been brought to the social worker for medical or psychological treatment, the outcome may have been different.[160] The key to determining whether a statement to medical personnel is investigatory in nature or non-testimonial is whether the victim is seeking medical assistance or whether the goal of the conversation is to investigate past events.[161] In domestic violence prosecutions, this means that a victim's statements made to doctors are most likely admissible when the statements were made to obtain a medical

157. *Id.* at 84–85, 867 A.2d at 325–26. It should be noted that *Snowden* was decided before *Hammon* and *Davis*. It is the author's opinion that, if taking the case now, the Court of Appeals of Maryland may approach the analysis differently, holding instead that when the social worker spoke with the child, there was no ongoing emergency and therefore the statements were testimonial.

158. *See id.* at 92, 867 A.2d at 330. Because of Maryland's statutory law, which requires police officers to refer domestic violence victims to social workers, Maryland social workers have substantial contact with domestic violence victims and therefore the admissibility of statements made to social workers is highly relevant. MD. CODE ANN., FAM. LAW § 4-503(1) (LexisNexis 2006).

159. *Snowden*, 385 Md. at 91, 867 A.2d at 330 (citing State v. Vaught, 682 N.W.2d 284, 291–92 (Neb. 2004)).

160. *See id.*

161. *Compare* State v. Kirby, 908 A.2d 506 (Conn. 2006) (holding that a kidnapping victim's statements to a volunteer emergency medical technician were non-testimonial because the statements did not identify her assailant and were pertinent to the medical technician's treatment of the victim), *and Snowden*, 385 Md. 64, 867 A.2d 314 (holding that a victim's statements to a social worker were testimonial because the victims were not brought to the social worker for medical or psychological purposes), *and* State v. Stahl, 855 N.E.2d 834 (Ohio 2006) (holding that statements made to a nurse at a hospital working for a rape victim unit were not testimonial because the primary purpose of the statements were for medical diagnosis; the fact that the rape unit collects evidence for prosecutions was immaterial because the primary purpose was medical treatment), *with* Medina v. State, 143 P.3d 471 (Nev. 2006) (holding that a rape victim's statement to a sexual assault nurse was testimonial because the nurse was a police operative who gathered evidence for the prosecution).

diagnosis or if the victim's statements were in response to a doctor's inquiry of how the patient was injured.[162]

As for statements made to private individuals, such as friends or relatives who are not agents of the government, *Crawford* normally would not apply; the goal of *Crawford* is to prevent government involvement in the creation of testimony.[163] For example, the statement of "'daddy beat me'" made by a child to his mother would be non-testimonial.[164] However, a victim's statements made to a private individual can be testimonial if the victim makes the statement to the private individual with the goal of prosecution in mind.[165]

d. Dying Declarations

As previously discussed, the dying declarations hearsay exception may be used to admit a domestic abuse victim's statement in a homicide prosecution, and in Maryland, for certain other crimes as well.[166] The Supreme Court in *Crawford* briefly discussed this hearsay exception. The Court noted that "[a]lthough many dying declarations may not be testimonial, there is authority for admitting even those that clearly are."[167] The Court continued by stating, "[w]e need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this

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162. Perrick, *supra* note 81, at 147. For example, a statement made to a doctor would be testimonial if the medical personnel was an operative of the police. *See Medina*, 143 P.3d at 476.

163. Chase, *supra* note 78, at 1120.

164. State v. Buda, 912 A.2d 735, 745 (N.J. 2006); *see also Medina*, 143 P.3d 471 (holding that a victim's statements to a neighbor regarding rape were not testimonial in nature); Patano v. State, 138 P.3d 477 (Nev. 2006) (holding that statements to a father about a sexual assault were not testimonial). One court has pointed out that it is open for interpretation as to whether statements made to private individuals are testimonial. State v. Mechling, 633 S.E.2d 311, 324 n.10 (W. Va. 2006). In *Mechling*, where a domestic violence victim made statements to a neighbor that the defendant had beat her, the court noted that the *Davis* decision relied on cases where statements made to private individuals would have been testimonial. *Id.* The court also noted that in *Davis*, the Supreme Court warned readers not to infer that statements lacking any interrogation are automatically non-testimonial. *Id.*

165. State v. Shafer, 128 P.3d 87, 93 & n.8 (Wash. 2006). *See* Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 260 (2005) ("If the declarant anticipates that the statement, or the information asserted in it, will be conveyed to the authorities and used in prosecution, then it is testimonial, whether it is made directly to the authorities or not.").

166. *See supra* Part III.B.

167. Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004).

exception must be accepted on historical grounds, it is *sui generis*."[168] Therefore, *Crawford* has impacted dying declarations the least among the exceptions.[169]

e. Forfeiture by wrongdoing

Because *Crawford* has limited the ways in which prosecutors can introduce statements of domestic violence victims, prosecutors have increasingly relied on the forfeiture by wrongdoing exception that the *Crawford* Court acknowledged.[170] The forfeiture by wrongdoing exception allows "the prosecution [to] admit out-of-court statements, despite the unavailability of the witness, if the defendant's wrongful conduct procured the witness's unavailability through intimidation, coercion, and/or violence."[171]

In *Giles v. California*,[172] the Supreme Court addressed whether the forfeiture by wrongdoing exception survives *Crawford*. In *Giles*, the defendant shot and killed his ex-girlfriend.[173] At trial, Giles claimed self-defense.[174] To rebut the defense, the prosecution sought to introduce statements that the victim had made to a police officer responding to a domestic disturbance call three weeks earlier.[175] In those statements, the victim said that the two had argued, Giles had assaulted her, and he "threatened to kill her."[176] Over Giles's objection that his Sixth Amendment right to confrontation was violated, the trial court admitted the statements under a California provision that permits the introduction of out-of-court statements describing the threat of actual or physical injury of a declarant when the declarant is unavailable.[177]

The Court held that when a declarant is unavailable because of the defendant's actions or acquiescence, the forfeiture by wrongdoing exception to the Confrontation Clause applies only when there was intent on the part of the defendant to procure the declarant's unavailability.[178] The Court explained that "intent" exists "'if the

168. *Id.*
169. Chase, *supra* note 78, at 1122.
170. Warnken, *supra* note 81, at 229.
171. *Id.* at 218.
172. 128 S. Ct. 2678 (2008).
173. *Id.* at 2681.
174. *Id.*
175. *Id.* at 2681–82.
176. *Id.* at 2682.
177. *See* CAL. EVID. CODE § 1370 (West 2009); *Giles*, 128 S. Ct. at 2682.
178. *Giles*, 128 S. Ct. at 2687–88.

defendant has in mind the particular purpose of making the witness unavailable.'"[179]

The Court addressed the decision's effect on domestic violence cases, but refused to carve out a separate forfeiture by wrongdoing exception for domestic violence victims.[180] The Court did state, however, that when an abusive relationship terminates in murder, evidence of the intent to isolate the victim to hinder reporting of domestic abuse would make a victim's prior statements admissible under the forfeiture by wrongdoing exception.[181] The Court also stated that earlier abuse, intended to dissuade the victim from seeking outside help, would be relevant to a finding that the abuser procured the unavailability of the victim.[182]

The Court only discussed instances where the victim is unavailable due to murder.[183] The Court did not address how *Giles* impacts cases when victims are unavailable to testify because they are entrapped in the cycle of violence. Presumably, the prosecution would need to show that during the entire cycle of violence the abuser intended to abuse the victim for the purpose of preventing her testimony.[184] But what evidence would be used to prove that fact? Prosecutors would have evidentiary problems, especially without the cooperation of the victim, proving that the intent of the abuser was to keep the victim from testifying or seeking help from authorities.[185] The dissent in *Giles* discussed these evidentiary problems:

> Consider H who assaults W, knows she has complained to the police, and then murders her. H *knows* that W will be unable to testify against him at any future trial. But who knows whether H's knowledge played a major role, a middling role, a minor role, or no role at all, in H's decision to kill W? Who knows precisely what passed through H's mind at the critical moment?[186]

Therefore, forfeiture by wrongdoing, a long-standing prosecutorial tool in domestic violence cases, has become increasingly more difficult to use in light of *Giles*.

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179. *Id.* at 2687.
180. *Id.* at 2693.
181. *Id.*
182. *Id.*
183. *Id.*
184. *See id.* at 2687.
185. *See id.* at 2699 (Breyer, J., dissenting).
186. *Id.*

3. Prosecuting Domestic Violence Under *Crawford* and its Progeny

As the prior discussion reveals, introducing a domestic violence victim's out-of-court statements when the victim is unavailable has become increasingly challenging post-*Crawford.* The primary prosecutorial tools, including 911 calls, statements made to police officers, statements made to social workers, and statements made to medical personnel are difficult to admit into evidence. With the forfeiture by wrongdoing exception requiring proof of intent that the abuse was committed for the specific purpose of causing the victim not to testify, the admission of hearsay statements in domestic violence prosecutions has become severely inhibited.[187] As the next section explains, evidence law in Maryland, and most states, offers no relief to the challenges of domestic violence prosecutions in light of *Crawford.*

D. Other Crimes, Wrongs, or Past Acts in Domestic Violence Prosecutions

Another method to prosecute domestic violence where the victim is unwilling or unable to testify is to introduce evidence of a defendant's past acts of domestic violence. The theory is that past acts of domestic violence are predictive of future conduct and that if a batterer assaulted the victim previously, he has the propensity to have assaulted the victim in the current case.[188] Also, past acts of domestic violence can help explain the controlling nature of a domestic abuse relationship and why a victim does not cooperate or refuses to testify.[189] However, current Maryland law, as well as federal law and

187. *See* Lindsay Hoopes, Note, *The Right to a Fair Trial and the Confrontation Clause: Overruling* Crawford *to Rebalance the U.S. Criminal Justice Equilibrium*, 32 HASTINGS INT'L & COMP. L. REV. 305, 341 (2009) (footnotes omitted).

> [A] survey of 64 district attorney's offices in the United States indicated that [seventy-six] percent of offices were more likely to dismiss domestic violence cases post *Crawford.* For instance, in 2005 in Dallas County, Texas, judges dismissed 'up to a dozen' domestic violence cases per day for problems related to *Crawford.*

Id.

188. *See* Andrea M. Kovach, Note, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at Its Past, Present, and Future*, 2003 U. ILL. L. REV. 1115, 1119 (2003).

189. *See id.* at 1138–41.

most other state law, does not permit the admission into evidence of a defendant's past acts of domestic violence under these theories.[190]

1. Current Maryland Law and the Propensity Rule

The propensity rule excludes evidence offered to prove that a person acted in accordance with a prior bad act.[191] The rationale for the propensity rule is that past acts have "little probative value as circumstantial evidence of how a person acted on one occasion;" that is, people sometimes act out of character.[192] The rule is also in place because allowing such evidence could cause the fact finder to place an undue amount of weight on the prior act, thus hindering a fair trial.[193]

Maryland has codified the propensity rule in Maryland Rule 5-404.[194] Subsection (b) sets forth the propensity rule that prohibits evidence of prior crimes, wrongs, or acts to show conformity with those acts.[195] The rule states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[196] However, the exception to subsection (b) provides that such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident."[197]

What does this mean in domestic violence prosecutions? In domestic violence prosecutions, prosecutors may argue that propensity evidence is relevant to show intent, common plan or scheme, and identity.[198] However, admission of a defendant's prior

190. *See* MD. R. 5-404; FED. R. EVID. 404; *see also* 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE T-1, T-9, T-34 to -40 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2009) (illustrating the differences between the Federal Rule and various corresponding state rules).

191. LYNN MCLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL, § 404:1(c)(i) (2d ed. 2001), *available at* Westlaw MDEV-STFED § 404:1.

192. *Id.* § 404:1(c)(ii).

193. *Id.*

194. *See* MD. R. 5-404.

195. *Id.*

196. *Id.* The Maryland Rule is based on Federal Rule of Evidence 404. *Id.*; *see also* FED. R. EVID. 404.

197. MD. R. 5-404.

198. *See* Kovach, *supra* note 188, at 1128. Maryland requires a three-step analysis to admit a past act under one of these exceptions. Hurst v. State, 400 Md. 397, 408, 929 A.2d 157, 162 (2007) (citing State v. Faulkner, 314 Md. 630, 634–35, 552 A.2d 896, 898 (1989)).

acts usually falls short of the requirements for admission under these exceptions.[199] For instance, in an admission under a theory of intent or accident in a domestic violence case, the defendant will admit the act occurred, but assert an accident or self-defense.[200] The prosecution, in turn, will argue the past acts should be admitted to prove the defendant's culpable intent. In Maryland, to admit past acts through the intent exception, the prior act must be nearly identical to the charged act.[201] However, the similarity is analyzed by looking at the specific acts, such as kicking, hitting, pushing, or choking.[202] The similarity is not measured through a broader concept such as the intent to control a person.[203] Because domestic violence incidents tend to be dissimilar in their facts, it is unlikely that a defendant's prior act of domestic violence will be admitted under this theory.[204]

The theory of identity is triggered in domestic violence cases when the victim recants and states that it was someone else that beat her.[205] In Maryland, to admit prior acts under the identity theory, there must be a "distinctive modus operandi" between the current and prior

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> First, the court must decide whether the evidence falls within an exception to Rule 5-404(b). Second, the court must decide 'whether the accused's involvement in the other crimes is established by clear and convincing evidence.' Finally, the court must balance the necessity for, and the probative value of, the other crimes evidence against any undue prejudice likely to result from its admission.

Id. (citations omitted).

199. *See* Kovach, *supra* note 188, at 1128–29.

200. De Sanctis, *supra* note 43, at 376.

201. *See* Harris v. State, 324 Md. 490, 503, 597 A.2d 956, 963 (1991) (holding that the prior act was not admissible when it was "not closely linked in point of time or by [the] circumstances").

202. Kovach, *supra* note 188, at 1129–30.

203. *Id.*

204. De Sanctis, *supra* note 43, at 376.

> For example, it is unlikely that the act of killing a former girlfriend's pet would be sufficiently similar to slapping a current girlfriend, or stalking an ex-wife. Even though they are conceptually similar—violent acts committed upon an intimate partner for the purpose of maintaining power, dominance, and control—they are factually *dissimilar* and therefore likely to be held inadmissible.

Id.

205. *Id.* at 378.

acts.[206] Yet, as previously described, domestic violence acts share conceptual similarities but not factual similarities.[207] For example, while a batterer may, on one occasion, choke a victim, and then on a subsequent occasion, verbally assault the victim, neither are similar enough to be classified as a modus operandi.

Finally, introducing a defendant's past acts of domestic violence through the common plan or scheme exception may seem like the most viable option. For example, a prosecutor would attempt to admit a defendant's past acts of domestic violence under a theory that there is a common plan to control the victim.[208] In Maryland, to show common plan or scheme, there must be evidence that the defendant conceived all the crimes as one grand plan to reach an ultimate goal.[209] The fact that the two acts are similar in time and nature do not automatically make it a common plan to reach an ultimate goal.[210] Although it may seem that an abuser has a common plan to control the victim, domestic violence is unlike a case where multiple robberies were planned together for the ultimate objective of obtaining enough money to purchase drugs.[211] Although domestic violence-related beatings may be similar, that is not enough to prove an ultimate goal needed to suffice admission under the common plan exception.[212] From the above, it is clear that "non-propensity theories often 'do not reflect the realities of domestic violence.'"[213]

206. *See* MCLAIN, *supra* note 191, § 404:11. *See, e.g.*, State v. Faulkner, 314 Md. 630, 634, 552 A.2d 896, 898 (1989); McKnight v. State, 280 Md. 604, 613, 375 A.2d 551, 556 (1977).

207. De Sanctis, *supra* note 43, at 376; Kovach, *supra* note 188, at 1130.

208. *See* Kovach, *supra* note 188, at 1124–30.

209. *See* Tichnell v. State, 287 Md. 695, 712, 415 A.2d 830, 839 (1980) ("[The] exception permits the admission of evidence of other crimes when the several offenses are so connected or blended in point of time or circumstances that they form one transaction, and cannot be fully shown or explained without proving the others."); MCLAIN, *supra* note 191, § 404:9.

210. MCLAIN, *supra* note 191, § 404:9; *see also* Behrel v. State, 151 Md. App. 64, 123–24, 823 A.2d 696, 730 (Ct. Spec. App. 2003).

211. *See* State v. Jones, 284 Md. 232, 244, 395 A.2d 1182, 1188 (1979); *see also* MCLAIN, *supra* note 191, § 404:9.

212. *Cf.* Reidnauer v. State, 133 Md. App. 311, 323–24, 755 A.2d 553, 559–60 (Ct. Spec. App. 2000) (arguing that while two rapes may be similar, one still needs to demonstrate a common goal).

213. Kovach, *supra* note 188, at 1129 (quoting Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 773, 819 (1997)).

2. A Countercurrent to the Norm: California Evidence Code Section 1109 and Similar Statutes

a. California Evidence Code Section 1109

In 1996, the California Legislature enacted California Evidence Code section 1109, partly in response to the fury over the exclusion of prior acts of domestic violence in the O.J. Simpson case where the prosecution attempted, but was denied, the admission of past domestic violence acts O.J. Simpson committed against his wife Nicole Brown Simpson, to prove a course of conduct that culminated in murder.[214] Section 1109 permits the introduction of prior acts of domestic violence that the propensity rule would otherwise exclude.[215] Through case law and the application of section 1109,

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214. Vartabedian, *supra* note 53, at 168. The enacted legislation came to be known as the "Nicole Brown Simpson Law." *Id.* To see a full analysis on the prosecution's theory of attempting to admit prior acts of domestic abuse in the Simpson case, see Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence:* Simpson *and Beyond,* 69 S. CAL. L. REV. 1463 (1996).

215. *See* CAL. EVID. CODE § 1109 (West 2009). The relevant portion of the statute reads:

> (a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.
>
> . . . .
>
> (b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054.7 of the Penal Code.
>
> . . . .
>
> (e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice."

§ 1109.

The first proposal for the statute was made by Lisa Marie De Sanctis, a Deputy District Attorney in the Ventura County District Attorney's Office. De Sanctis, *supra* note 43, at 361. Ms. De Sanctis recognized the problem inherent in domestic violence prosecutions and modeled a proposal similar to Federal Rules of Evidence 413, 414, and 415. *Id.* California's propensity rule is codified at CAL. EVID. CODE § 1101 (West 2009).

uncharged[216] prior acts of domestic violence committed against the same victim[217] or different victims are admissible.[218]

b. Similar acts from other states

A few other states have introduced rules similar to section 1109 with varying degrees of admissibility for prior acts. Colorado, for example, allows evidence of prior domestic violence between the defendant and other victims.[219] The statute states that the General Assembly of Colorado recognizes the cyclical nature of domestic violence and the "pattern[] of abuse."[220] Colorado courts have recognized that the legislature intended that trial courts would allow prior acts into evidence, specifically through common plan[221] or intent,[222] as opposed to prior acts normally excluded under these two theories.[223] The past act must be proven by a preponderance of the evidence,[224] and a limiting instruction must be given to the jury advising them not to punish the defendant for the past acts but to use such evidence only to show propensity for committing the current charge.[225]

Minnesota has a statute that provides, "[e]vidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice."[226] Although it may seem that most prior acts of domestic violence would be unfairly prejudicial under the statute, it has been "interpreted not as permitting propensity evidence, but rather as

216. Kovach, *supra* note 188, at 1133 (citing People v. Hoover, 92 Cal. Rptr. 2d 208, 212 (Ct. App. 2000)); Vartabedian, *supra* note 53, at 168–69. The reason charged acts are not allowed relates back to the legislative intent: "This provision allows the admission of evidence of past acts of domestic violence, not convictions." SENATE COMMITTEE ON CRIMINAL PROCEDURE, BILL ANALYSIS, 1995–1996 Sess., at 8 (Ca. 1996), *available at* http://www.leginfo.ca.gov/pub/95-96/bill/sen/sb_1851-1900/sb_1876_cfa_960408_110911_sen_comm.html.

217. People v. Hoover, 92 Cal. Rptr. 2d 208, 212 (Ct. App. 2000).

218. People v. Brown, 92 Cal. Rptr. 2d 433, 437–39 (Ct. App. 2000).

219. COLO. REV. STAT. ANN. § 18-6-801.5(2) (West 2004).

220. *Id.* § 18-6-801.5(1).

221. People v. Gross, 39 P.3d 1279, 1282 (Colo. App. 2001).

222. People v. Ramirez, 18 P.3d 822, 828 (Colo. App. 2000).

223. *See supra* Part III.D.1.

224. People v. Moore, 117 P.3d 1, 3 (Colo. App. 2004).

225. *See* COLO. REV. STAT. ANN. § 18-6-801.5(5).

226. MINN. STAT. ANN. § 634.20 (West 2009). The court only needs to find that the probative value outweighs the prejudicial effect to admit the prior act; no standard such as clear and convincing evidence needs to be met. State v. McCoy, 682 N.W.2d 153, 159 (Minn. 2004).

allowing evidence of the history of the victim and defendant's relationship."[227] Evidence of prior acts under this statute would include "evidence of domestic abuse, violation of an order for protection . . . [and] violation of a harassment restraining order."[228]

Lastly, the Alaska Legislature allows "evidence of other crimes involving domestic violence by the defendant against the same or another person" to be admitted in a prosecution involving domestic violence or interfering with a report of a crime involving domestic violence.[229]

IV. PROPOSAL: IN THE WAKE OF *CRAWFORD*, MARYLAND SHOULD ADOPT A STATUTE SIMILAR TO SECTION 1109 TO HELP QUELL THE DIFFICULTIES OF PROSECUTING DOMESTIC VIOLENCE

Prior to *Crawford*, it was understandable that Maryland did not have a law similar to section 1109. However, the interplay between *Crawford* and Maryland Rule 5-404(b) necessitates a reevaluation of current Maryland evidence law. Before *Crawford*, past acts of domestic violence would have been helpful, but not essential, to a prosecution.[230] Even without the victim's cooperation or testimony, prosecutors could rely on victims' hearsay statements to paint a picture of the domestic abuse.[231] However, the Court's decision in *Crawford* severely limits the use of victims' hearsay statements in domestic violence prosecutions.[232] Lacking the ability to rely on hearsay statements, prosecutors are left with few tools to use in domestic violence prosecutions when the victim is unavailable or refuses to cooperate. Without the ability to introduce a defendant's past acts of domestic violence, prosecutors are unable to tell the full story of the abusive relationship or use their value as a predictor of future domestic violence to convict the defendant, causing many domestic violence prosecutions to be dismissed.[233] Because of the unique nature of domestic violence and domestic violence

227. Kovach, *supra* note 188, at 1147.

228. MINN. STAT. ANN. § 634.20.

229. ALASKA R. EVID. 404(b)(4); Kovach, *supra* note 188, at 1141. The Alaska statute differs from the Minnesota statute in that Minnesota does not allow evidence of past domestic violence against a different victim, while Alaska is similar to California in allowing evidence of prior domestic abuse against a different victim.

230. *See supra* text accompanying notes 64–71.

231. *See supra* text accompanying notes 64–69.

232. *See supra* Part III.C.

233. *See supra* Part III.C.3.

prosecutions where the victim routinely is not cooperative (especially in Maryland with the "one free slap" rule),[234] the *Crawford* decision, its progeny, and Maryland Rule 5-404(b), the balance has tipped sharply in favor of the defendant/batterer in domestic violence prosecutions and away from the search for truth. In light of *Crawford*, it is time to provide the prosecution and the victim another tool in domestic violence prosecutions.

A. Proposal

A statute similar to section 1109, and other statutes previously discussed, would provide such a tool while still protecting a defendant's rights. A proper Maryland statute should allow for the admission of a defendant's uncharged[235] prior acts of domestic abuse against the current victim only in a prosecution for domestic violence. Evidence, including pictures or testimony, such as that from a witness or police officer, would be used to prove the prior acts of domestic violence in the current prosecution.[236] The statute should state that prior acts include, but are not limited to, evidence of prior domestic abuse and violation of any type of protective order.[237]

The statute should also provide for a limitation that allows only the admission of past acts that occurred in the last ten years. Furthermore, the statute should specifically state that the past acts must be proven by a preponderance of the evidence, or if a higher standard is desired, clear and convincing evidence. Moreover, notice must be given to the defendant that the prior acts will be used, describing the testimony and evidence that will be used to prove the past acts.

In addition, the statute should provide a jury instruction that will inform the jury that prior acts alone cannot meet the prosecution's burden of proving the elements of the charged offense; therefore,

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234. MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (LexisNexis 2006).

235. Although prior charged conduct is just as relevant to elaborate on the control in the relationship, its inclusion would greatly impact a defendant's rights because, when the conviction would be introduced at trial, a jury might automatically infer guilt of the current charge based on a prior conviction causing the defendant to be punished again for an already convicted charge. *See* MCLAIN, *supra* note 191, § 404:1(c)(ii).

236. *See* Vartabedian, *supra* note 53, at 181. For example, a neighbor may testify that she heard yelling and loud noises coming from the house. A police officer may testify that he responded to the house for a domestic violence call.

As will be discussed below, all evidentiary and constitutional procedures would be followed when proving a past act of domestic violence. *See infra* Part IV.A.3.c.

237. Including the violation of a protective order as a prior act is important because such a violation continues to show the extreme control that the batterer exerts over the victim.

prior acts should only be used to elaborate on the controlling nature of the relationship and that prior acts are predictive, but not an ultimate indicator, of guilt for the current charge.[238] Of course, the prior act will be balanced to determine if its prejudicial effect substantially outweighs its probative value as required by Maryland Rule 5-403.[239]

1. Why Such a Rule Works: Prior Acts of Domestic Violence Are Extremely Probative in Proving that the Defendant Committed the Charged Crime and Explaining the Controlling Nature of an Abusive Relationship

One of the main reasons that such an evidentiary rule will work is because domestic violence is a recidivistic crime, making prior acts of domestic violence "'[t]he best predictor of future violence.'"[240] Studies show that once violence occurs in a relationship, it reoccurs sixty-three percent of the time.[241] Therefore, a past act is highly predictive of guilt on the current charge. Although other crimes such as robbery, burglary, larceny, and motor vehicle theft are recidivistic crimes as well,[242] a statute that permits past acts to be admitted in those cases is not needed. These crimes do not require an explanation of the extreme level of control as in an abusive relationship.[243] For example, if a victim is not testifying in a larceny prosecution, a defendant's prior act of larceny is not likely to explain the victim's absence; whereas, in a domestic violence case, a defendant's prior acts of abuse can explain the controlling nature of the relationship and provide an explanation for why the victim is not cooperating or testifying.

238. *See* People v. James, 96 Cal. Rptr. 2d 823, 830–31 (Ct. App. 2000).

239. MD. R. 5-403.

240. Kelly A. Zinna & Michael Gelles, *Domestic Violence and Stalking*, MD. B.J., Sept.-Oct. 2003, at 54–55.

241. Steven R. Morrison, *Creating Sex Offender Registries: The Religious Right and the Failure to Protect Society's Vulnerable*, 35 AM. J. CRIM. L. 23, 72 (2007). "Nearly a third of female victims of nonlethal intimate violence were victimized at least twice during the previous 6 months." LAWRENCE A. GREENFIELD ET AL., U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 15 (1998), *available at* http://bjs data.ojp.usdoj.gov/content/pub/pdf/vi.pdf.

242. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 at 1 (2002), *available at* http://www.bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.htm.

243. *See* Kuennen, *supra* note 56, at 10.

Allowing past acts that are predictive of a certain crime into evidence is not a novel idea. Congress has taken notice of the predictive nature of other, certain recidivistic crimes.[244] The Federal Rules of Evidence 413–415 make admissible past acts of sexual abuse and child molestation in a prosecution of sexual abuse or child molestation.[245] The Court of Appeals of Maryland has also recognized that in sexual assault cases against the same victim, prior sexual assaults against the current victim are probative and admissible.[246]

In Maryland, the courts and the General Assembly have already pointed to the predictive accuracy of past acts of domestic violence. Accordingly, an adoption of the proposal would not be anomalous. For example, the Court of Appeals of Maryland, in *Coburn v. Coburn*,[247] held that past acts of domestic violence can be used in a final protective order hearing. The court stated that "[t]he fact that there is a history of prior abusive acts implies that there is a stronger **likelihood** of future abuse."[248] The current statute that governs protective orders specifies that the petitioner of the order should include prior acts of domestic violence.[249] In addition, the statute that governs child custody allows a court to consider past acts of domestic violence.[250]

In a brief to the Court of Special Appeals of Maryland, for a case on appeal because prior acts of domestic violence were admitted for a current charge of domestic violence, the State argued that the court should extend the exception for sexual assaults, mentioned above, to domestic violence cases.[251] Although this is commendable and

244. *See* Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 11 (2008).

245. *See* FED. R. EVID. 413–415; Vartabedian, *supra* note 53, at 180–81. To see a discussion on Federal Rules of Evidence 413–415, see Vartabedian, *supra* note 53, at 161–64. Maryland does not have an equivalent to Federal Rules of Evidence 413–415. *See* MCLAIN, *supra* note 191, § 413:1.

246. Acuna v. State, 332 Md. 65, 75, 629 A.2d 1233, 1238 (1993); Vogel v. State, 315 Md. 458, 466, 554 A.2d 1231, 1234 (1989).

247. 342 Md. 244, 674 A.2d 951 (1996).

248. *Id.* at 258, 674 A.2d at 958. The court did address prior acts in Rule 5-404(b). The court stated that Rule 5-404(b) was inapplicable in this case because the facts at hand related to a protective order proceeding and not a criminal proceeding. *Id.* at 260, 674 A.2d at 959. However, nowhere did the court address the value of the predictive nature of a defendant's prior acts of domestic abuse in relation to guilt on a criminal charge of domestic violence.

249. *See* MD. CODE ANN., FAM. LAW § 4-504 (LexisNexis 2009).

250. *See* MD. CODE ANN., FAM. LAW § 9-101.1 (LexisNexis 2006).

251. Brief and Appendix of Appellee at 14, Howard v. Maryland, No. 2914 (Md. Ct. Spec. App. 2008), 2008 WL 5023427.

recognizes the Office of the Attorney General's belief that a defendant's past acts of domestic violence are predictive of guilt on a current charge, a statute as described above would be the proper method to enact change because it would give precise guidelines to protect the defendant's rights versus a change of the rule through case law which may not be as specific and fail to provide proper safeguards.

2. Positive Aspects of the Proposal and Section 1109

a. The admission of prior acts helps the jury evaluate the victim's credibility

When a victim happens to testify in a domestic violence prosecution, the jurors may find it difficult to believe the victim.[252] They may blame the victim for not leaving the relationship and may not understand the intricacies of the relationship.[253] When the victim does not testify there is also juror bias; it is hard to understand why a person would not testify after being abused.[254] The jury may also feel that the current charged crime was an isolated event or an accident.[255] Therefore, the jury is less likely to believe the accusation against the defendant.[256]

Section 1109 and the proposal would allow the victim's testimony or the state's accusation of domestic violence to be corroborated and prove the truth of the charged crime.[257] Also, when a victim does not testify but the defendant does, admitting past acts of domestic violence limits the ability of the defendant to deny or fabricate testimony.[258] The goal of a trial is to keep the "focus [on] the truth-seeking process," and section 1109 and the proposal accomplish this

252. *See* Vartabedian, *supra* note 53, at 181.
253. *Id.*
254. *See id.*
255. *See* Kovach, *supra* note 188, at 1152.
256. It is still possible to have an expert testify as to the intricacies of the relationship and why the victim is not present. Although this scenario is plausible, the cost of an expert for each domestic violence prosecution where the victim does not testify is not economically sound. Also, it is possible that the jury will disregard the expert. *See* JENNIFER G. LONG, NAT'L DISTRICT ATTORNEY'S ASS'N, INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS 18–19, 22, 34 (National District Attorneys Association: American Prosecutors Research Institute 2007), *available at* http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf.
257. Vartabedian, *supra* note 53, at 182.
258. *Id.*

by allowing the jury to obtain an unbiased perspective of the victim.[259]

b. Judicial efficiency will not be decreased

Opponents argue that allowing past acts of domestic violence may create "mini trials" because the defendant would be able to deny the prior acts.[260] However, there are aspects of section 1109 and the proposal that counteract this argument. Currently, the admission of any prior acts of domestic violence rests on a judicial determination of relevance and then admission through a narrow exception.[261] Section 1109 and the proposal make prior acts automatically relevant and eliminate any judicial inquiry into a finding of relevance or a finding of admission through a narrow exception.[262] If there are numerous past acts, a judge may be able to limit all those admissions on the grounds of waste of time, a rule that is found in the Maryland Rules of Evidence.[263]

Also at the trial level, judicial efficiency is increased because defendants are more willing to enter into plea bargains or seek treatment, reducing court costs. Having an abuser realize that past acts can be used against him could trigger accountability and treatment, thus breaking the cycle of abuse and reducing the number of domestic violence incidents in the future.[264]

At the appellate level, any decrease in judicial efficiency will be negligible. Although the courts may have to conduct a review on whether the prejudicial effect substantially outweighed the probative value of the prior act of domestic violence, those courts no longer need to evaluate trial courts' admission of prior acts of domestic violence for relevance or under an exception.[265]

Therefore, although a similar statute to section 1109 may decrease judicial efficiency in certain areas, it will, in turn, increase efficiency

259. *See* Kovach, *supra* note 188, at 1143.

260. De Sanctis, *supra* note 43, at 392.

261. Linell A. Letendre, Notes & Comments, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973, 1002 (2000).

262. *See id.* Judges and lawyers will no longer need to spend time determining, for example, if a prior act is so similar to the charged act that it could be admitted. *See* De Sanctis, *supra* note 43, at 394.

263. MD. R. 5-403; *see also* De Sanctis, *supra* note 43, at 393 (noting the time and effort required by attorneys and judges to admit numerous prior acts of domestic violence).

264. Vartabedian, *supra* note 53, at 182–83.

265. Letendre, *supra* note 261, at 1002.

in other areas, nullifying any dramatic decrease in judicial efficiency on the whole.

c. It works

There have been numerous positive effects with regard to domestic violence prosecutions in those jurisdictions that have implemented section 1109 or a similar statute.[266] For example, California prosecutors have noted that "section 1109 has proved invaluable in convicting recidivist batterers."[267] Alaska prosecutors also report a strengthened ability to prosecute domestic violence cases because of the legislation enacted.[268] One reason the statutes are so effective is because allowing past acts is a powerful tool to explain the victim's behavior and it prevents juries from blaming the victim.[269] As one prosecutor described it, "the defendant sounds 'incredibly foolish' when arguing that the victim attacked him or fabricated the story when the prosecution is able to call prior domestic violence victims as witnesses to support the instant victim."[270]

The statutes have also increased reporting of domestic violence. When victims knew that a conviction was more likely, or that reporting a domestic violence incident could be used later at a trial, reporting and, in turn, intervention of batterers by domestic violence professionals occurred more often.[271]

3. Defendant's Rights are Protected

Opponents of section 1109 and the proposal argue that such statutes greatly prejudice the defendant's rights at trial.[272] However, section 1109 and the proposal provide safeguards that are designed to protect the defendant.

a. Written protections in the statute and proposal ensure defendant's rights

Disclosing testimony and evidence that will be used to prove the past acts of domestic violence of the defendant[273] enables the

266. *See* Kovach, *supra* note 188, at 1138, 1143.
267. *Id.* at 1138.
268. *Id.* at 1143.
269. *Id.*
270. *See id.* at 1138.
271. Vartabedian, *supra* note 53, at 182–83.
272. *See id.* at 166.
273. *See* CAL. EVID. CODE § 1109(b) (West 2009).

defendant to prepare a proper defense and counter the accusations of the past acts. Requiring the past acts of domestic violence to have occurred within the past ten years[274] allows the defendant to reform his conduct without having a prior act of domestic violence haunt him, thus providing another way section 1109 and the proposal protect the defendant's rights.

In the proposal, the requirement that the past act of domestic violence be proven by a preponderance of the evidence (or in the alternative, by clear and convincing evidence) protects the defendant's rights because the prosecution will have to substantiate their claims of past acts of domestic violence, thus limiting the admission of false claims into evidence.[275] The requirement of a jury instruction would also protect the defendant's rights by ensuring that the jury only uses the evidence of prior acts for limited purposes.[276]

Having prior acts admissible as long as the prejudicial effect does not substantially outweigh the probative value also protects the defendant's right by excluding the extreme past act where a judge determines that a jury would be unable to properly use the past act.[277]

The requirement in the proposal that only past acts of domestic violence against the current victim be admitted into evidence is another safeguard in place to safeguard the defendant's rights. Although others have argued that past domestic violence against any prior victim is predictive of a current domestic violence charge,[278] allowing a past act of domestic violence against only the current victim in the case better explains how the past act predicts the probability that the defendant committed the current charge and better elaborates on the controlling environment of the current relationship. A past act of domestic violence committed against a different victim would not have the same predictive or explanatory value and would unduly burden the defendant.[279]

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274. *Id.* § 1109(e). Section 1109 allows the admission of ten-year-old prior acts of domestic violence that are in the interest of justice. *Id.*

275. *See* People v. Moore, 117 P.3d 1, 3 (Colo. App. 2004).

276. *See supra* Part III.D.2.b.

277. *See* CAL. EVID. CODE § 1352 (West 2009); *id.* § 1109(a)(1); MD. R. 5-403. However, California courts rarely find that a prejudicial effect outweighs the probative value of evidence of prior acts. *See, e.g.*, People v. Dallas, 81 Cal. Rptr. 3d 521 (Ct. App. 2008); People v. Williams, 70 Cal. Rptr. 3d 845 (Ct. App. 2008); People v. Morton, 70 Cal. Rptr. 3d 827 (Ct. App. 2008); People v. Cabrera, 61 Cal. Rptr. 3d 373 (Ct. App. 2007).

278. *See* Letendre, *supra* note 261, at 977.

279. *See* GREENFIELD ET AL., *supra* note 241, at 15 ("Nearly a third of female victims of nonlethal intimate violence were victimized at least twice during the previous six months."). *Cf.* State v. Lough, 853 P.2d 920, 925 (Wash. Ct. App. 1993), *aff'd*, 889

b. The problem of false claims

Opponents of section 1109 also argue that in the event of a false claim, either in the current charge or a claim of a past act of domestic violence, the defendant's rights will be infringed.[280] For example, if the victim fabricates the current charge, then a legitimate past act of domestic violence could be used to his detriment at trial. However, the pioneer of section 1109, Marie De Sanctis, responds with her anti-coincidence argument.[281] She states that it is very unlikely that one man would twice be the victim of a false accusation of domestic violence.[282] Therefore, either the prior incident or the current accusation is valid. Second, a man falsely accused of domestic violence would probably not have a history of domestic violence as so few domestic violence incidents are ever reported.[283] Therefore, the innocent defendant falsely accused of domestic violence would rarely or never have a past domestic violence incident haunt him and would be unaffected by section 1109 or the proposal.

c. Constitutional protections on equal protection and due process grounds

Defendants that have challenged the admission of prior acts evidence have argued that the statutes are unconstitutional on equal protection and due process grounds.[284] However, states such as California and Alaska, rejected challenges to such statutes on constitutional grounds.[285]

In *People v. Jennings*,[286] the California Court of Appeal upheld section 1109 against an equal protection challenge.[287] The defendant

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P.2d 487 (Wash. 1999) ("Such [prior acts] evidence is generally inadmissible because it could lead a jury to determine that a defendant committed the crime with which he or she is charged simply because he or she committed a similar crime in the past.").

280. *See* De Sanctis, *supra* note 43, at 390–92 (outlining critics' arguments that defendants are falsely accused because of pressure by law enforcement, that women exaggerate or imagine abusive incidents after finding out about prior acts of domestic violence, and that juries do not effectively weigh inflammatory evidence).

281. *Id.* at 390–92.

282. *Id.*

283. *Id.* at 391.

284. *See, e.g.*, People v. Jennings, 97 Cal. Rptr. 2d 727 (Ct. App. 2000); People v. Hoover, 92 Cal. Rptr. 2d 208 (Ct. App. 2000); People v. Johnson, 91 Cal. Rptr. 2d 596 (Ct. App. 2000); People v. Poplar, 83 Cal. Rptr. 2d 320 (Ct. App. 1999); *see also* Fuzzard v. State, 13 P.3d 1163 (Alaska Ct. App. 2000).

285. *See supra* note 284.

286. 97 Cal. Rptr. 2d 727.

287. *Id.* at 734.

argued that treating those accused of domestic violence differently from those accused of other crimes violated the Equal Protection Clause.[288] The court reasoned that defining a class in legislation is permissible as long as the distinctions have some relevance to the purpose of defining the classes.[289] The court concluded that the distinction of domestic violence defendants is relevant to the legislative purpose of easing the difficulty of domestic violence prosecutions for which the distinction was made.[290]

In *People v. Johnson*,[291] the California Court of Appeal for the Third District held section 1109 valid against a due process challenge.[292] The court found that section 1109 is analogous to California Evidence Code section 1108, which allows the admission of prior sex offenses in a sex offense case.[293] The court then pointed to the case *People v. Falsetta*,[294] where the court upheld section 1108 against a due process challenge. In *Falsetta*, the California Supreme Court concluded that section 1108 does not violate due process because it has adequate defendant safeguards similar to those in section 1109.[295] Although it cannot be definitively stated that the Maryland appellate courts will follow the same reasoning as the California courts or that Maryland courts will hold the Maryland Constitution to the same protective standard as that of California or the U.S. Constitution, it can be inferred that a proposal similar to section 1109 is on sound constitutional grounds with respect to equal protection and due process.

d. Constitutional protections under the Confrontation Clause

Section 1109 and the proposal are still subject to the protections of the Confrontation Clause and *Crawford*, further protecting the defendant's rights. Any evidence or testimony a prosecutor uses to prove a past act of domestic violence must survive an analysis under *Crawford* and its progeny, otherwise it will be inadmissible.[296] For

288. *Id.*

289. *Id.* at 735 (referencing Estelle v. Dorrough, 420 U.S. 534, 538–39 (1975)).

290. *Id.*

291. 91 Cal. Rptr. 2d 596.

292. *Id.* at 597.

293. *Id.* at 600; CAL. EVID. CODE § 1108 (West 2009).

294. 986 P.2d 182 (Cal. 1999).

295. *Id.* at 188. *Compare* § 1108 (providing certain safeguards to the defendant, including disclosure of the evidence to the defendant), *with* § 1109 (providing the same safeguards to the defendant, in addition to a ten-year limitation for admitting evidence of prior acts).

296. Melissa Moody, *A Blow to Domestic Violence Victims: Applying the "Testimonial Statements" Test in* Crawford v. Washington, 11 WM. & MARY J. WOMEN & L. 387,

example, the victim's testimonial statements made in *Giles*, ultimately held inadmissible, were originally admitted through section 1109.[297]

The fact that evidence admitted under section 1109 or the proposal are subject to *Crawford* and its progeny may make it seem that the difficulties of proving a domestic violence claim under *Crawford* and its progeny would resurface. However, the benefits of a statute similar to section 1109 are not neutralized. Because the standard of proof in the proposal is a preponderance of the evidence (or, in the alternative, clear and convincing evidence) less evidence is needed to prove the prior act. This means that proof of a prior act of domestic violence can be established without aid of testimonial statements by the defendant and proven instead through non-testimonial evidence such as witness statements, photographs, and testimony from police officers responding to an ongoing emergency, etc.[298] Therefore, *Crawford*'s effect on section 1109 and a similar statute would not be significant while still preserving the defendant's rights under the Sixth Amendment.

V. CONCLUSION

Domestic violence creates a unique type of prosecution where physical evidence may be lacking and the victim often recants, refuses to cooperate, or is murdered.[299] While hearsay exceptions prior to *Crawford* offered a solution, post *Crawford* prosecutorial tools such as 911 calls, statements made to doctors or social workers, and the forfeiture by wrongdoing exception have become more difficult to use.[300] *Crawford*, along with the propensity rule, has created a scenario where domestic violence prosecutions have become arduous. Difficult prosecutions may mean an increase in the already daunting domestic violence statistics. Those like Veronica Williams will not have justice served.

The proposal for a statute similar to section 1109 allows juries to consider past acts to show a disposition for guilt on the current charge of domestic violence and provide context of the controlling nature of

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399 (2005). *See, e.g.*, People v. Moran, No. B204002, 2009 WL 162293, at *1 (Cal. Ct. App. 2009); People v. Suniga, No. F052710, 2008 WL 3090622, at *13 (Cal. Ct. App. 2008); People v. Younger, No. A110031, 2007 WL 1848976, at *9 (Cal. Ct. App. 2007).

297. *See* People v. Giles, No. B166937, 2009 WL 457832, at *2 (Cal. Ct. App. 2009).

298. *See supra* Part III.C.2.

299. *See supra* Part II.B.

300. *See supra* Part III.C.2.

the abusive relationship.[301] Enacting such a statute would provide a solution to the obstacles prosecutors face in domestic violence cases post-*Crawford* while still safeguarding a defendant's rights in a manner consistent with the Constitution.

This proposal is not a novel idea. Other states joined California even before *Crawford* became a hindrance to domestic violence cases.[302] Maryland courts and the legislature have indicated a belief that a past act of domestic violence has predictive value for a future act of domestic violence.[303] The next logical step, in the wake of *Crawford* and its progeny, is to adopt a statute similar to the proposal described. A victim of domestic violence will again have some protection when she cannot testify or refuses to testify. The search for truth would again be in harmony with a defendant's rights in domestic violence prosecutions.

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301. *See supra* Part IV.A.1.
302. *See supra* Part III.D.2.b.
303. *See supra* Part IV.A.1.