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Reconsidering Spousal Privileges after *Crawford*

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I. Introduction

The Supreme Court's decision *Crawford v. Washington*¹ has revitalized the Confrontation Clause in criminal proceedings by restricting the government's use of hearsay evidence where the out-of-court declarant does not testify at trial. It has led increasingly to circumstances where criminal defendants are able to exclude out-of-court statements which would previously have been admitted under firmly rooted exceptions to the hearsay rules.² This sudden shift in the relationship between state evidentiary rules and the Sixth Amendment's Confrontation Clause has led to confusion and uncertainty for prosecutors, defense counsel, and judges. While the fallout from *Crawford* has been dramatic, it has been felt most acutely in area of domestic violence prosecutions, due to the frequent unwillingness of such victims to testify against batterers with whom they share an intimate relationship.³

To date, *Crawford* has generated calls in the academic community for increasing preliminary examinations of victims in domestic violence cases so that hearsay will be admissible at trial should the witness later become unavailable to testify;⁴ for dedicating judicial and prosecutorial resources to specialized domestic violence courts so that these types of cases may be tried more expeditiously—before the victim is coerced or induced to recant;⁵ and, for improving the provision of witness protection services prior to trial.⁶ Surprisingly, little academic attention has been paid to the root *cause* of witness unavailability in domestic violence cases; that is, state spousal privilege statutes. In this article, I will argue that state legislatures should reconsider their spousal privilege rules—many of which are poorly conceived, confusing, and outdated—and should reform these statutes in light of *Crawford* to add an express exception for criminal cases alleging domestic violence.

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¹ 541 U.S. 36 (2004).

² Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 755 (2005).

³ Myrna Raeder, *Remember the Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 312 (2005). "*Crawford* has disrupted domestic violence prosecutions to a degree not seen in any other area." Robert P. Mosteller, *Encouraging and Insuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 607 (2005).

⁴ Lininger, *supra* note 2, at 789; Mosteller, *supra* note 3, at 609–10.

⁵ Raeder, *supra* note 3, at 315.

⁶ Lininger, *supra* note 2, at 814.

In Part I of this article I analyze the *Crawford* decision and the Supreme Court’s “new” Confrontation Clause analysis, including the Court’s recent post-*Crawford* decisions in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*.⁷ In Part II, I assess the pervasive and adverse impact *Crawford* has had on state domestic violence prosecutions. Part III of the article explores the historical purposes and policies underlying the marital privileges, including both testimonial disqualification rules and privileges for confidential communications. In Part IV of the article, I survey marital privilege statutes throughout the fifty United States, pinpointing doctrinal weaknesses and current areas of confusion nationwide. In the final section I propose reforms that would decrease the incidence of witness unavailability in domestic violence cases, thereby empowering law enforcement to more effectively combat this highly pernicious form of crime.

II. *Crawford*: Shifting the Constitutional Landscape

In *Crawford v. Washington*,⁸ the Supreme Court considered whether the prosecution’s use at a criminal trial of a witness’ tape recorded statement to the police violated the defendant’s Sixth Amendment right to “be confronted with” the witnesses against him.⁹ Defendant Michael Crawford was charged with first degree assault and attempted murder for allegedly stabbing the victim with a knife.¹⁰ The alleged motive was that the defendant believed the victim had previously sexually assaulted Crawford’s wife.¹¹ Both Crawford and his wife were arrested following the fracas, and both gave statements upon questioning by police and following Miranda warnings. Mrs. Crawford’s recorded statement implicated her husband, because it cast doubt on Mr. Crawford’s claim that the victim possessed a weapon and that Crawford was acting in self defense.¹² Mrs. Crawford’s statement also implicated herself as an accomplice, because she acknowledged informing her husband about the sexual assault and leading her husband to the victim’s apartment. Mrs. Crawford was excused from testifying at trial on the ground of the state marital privilege.¹³ The trial court admitted Mrs. Crawford’s tape recorded statement to the police under the state of Washington’s hearsay exception for declarations against interest.¹⁴

Writing for the majority, Justice Scalia ruled that the defendant’s Sixth Amendment rights were violated by the admission of this tape recording.¹⁵ Engaging in a lengthy historical analysis of the Confrontation Clause, Justice Scalia noted that “the

⁷ 126 S.Ct. 2266, __U.S. __ (2006).

⁸ 541 U.S. 36 (2004).

⁹ *Id.* at 54–56. The Sixth Amendment was incorporated and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965).

¹⁰ *Crawford*, 541 U.S. at 40.

¹¹ *Id.* at 38.

¹² *Id.* at 39.

¹³ *Id.* at 40.

¹⁴ *Id.* at 40 (citing WASH. R. EVID. 804(b)(3)).

¹⁵ *Crawford*, 541 U.S. at 68–69.

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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 [by magistrates] as evidence against the accused.”¹⁶ The Confrontation Clause reflects the Framers’ “acute” concern in 1791 about a particular type of out-of-court statement; that is, one that “bear(s) testimony,”¹⁷ such as where a witness was examined “in private by judicial officers” in the continental civil law tradition.¹⁸ According to Justice Scalia, “testimony” is “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.”¹⁹ The Court concluded that except where the Confrontation Clause right has been forfeited by the defendant,²⁰ out-of-court statements that are “testimonial” in nature may not be admitted in criminal cases over defendant’s objection unless 1) the declarant is deemed unavailable to testify at trial, and 2) the defendant has some prior opportunity to cross examine the declarant.²¹

The Court in *Crawford* was unable or unwilling to agree on a precise formulation of a “testimonial” statement, most likely due to the practical difficulty of obtaining a majority of justices to support any single definition.²² Justice Scalia discussed three possible definitions: 1) the functional equivalent of *ex parte* testimony; that is, “material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially;”²³ 2) “extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;”²⁴ and 3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”²⁵ The Court declined to settle on one comprehensive definition of testimonial

¹⁶ *Id.* at 43.

¹⁷ *Id.* at 36, 50.

¹⁸ *Id.* at 43.

¹⁹ *Id.* at 51.

²⁰ The Supreme Court in *Crawford* recognized the doctrine that a party who procures the non-attendance of a witness at trial cannot raise a constitutional objection to his inability to confront that witness. *Id.* at 62 (“[T]he rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds.”) (citing *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879)). The Court in *Davis* expanded on this dicta somewhat by citing with approval decisions by state and federal courts that impose the burden on the government to prove forfeiture by a preponderance of evidence, and that allow for the admissibility of hearsay evidence in such preliminary proceedings. *Davis v. Washington*, 126 S.Ct. 2266, 2280 (2006). While a claim of forfeiture by wrongdoing might be raised with increasing frequency in domestic violence cases after *Crawford* where the government has evidence that the defendant affirmatively intimidated the victim to get her to recant or refuse to cooperate, the subject of forfeiture is beyond the scope of this article. See generally Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 213, 253 (2005). It is ironic, however, that the Court in *Davis* cited the hearsay exception for “Forfeiture by Wrongdoing” under Fed. R. Evid. 804(b)(6) as evidence that such an exception should be recognized in Confrontation Clause cases, 126 S.Ct. at 2280, when the Court in *Crawford* had explicitly decoupled hearsay rules from Sixth Amendment protections on the ground that these two doctrines serve different purposes. *Crawford*, 541 U.S. at 62–64.

²¹ *Davis*, 126 S.Ct. at 1365.

²² See Raeder, *supra* note 3, at 320.

²³ *Crawford*, 541 U.S. at 51–52 (citing Brief for Petitioner at 23).

²⁴ *Id.* (citing *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

²⁵ *Id.* (citing Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae at 3).

hearsay,²⁶ instead ruling that Mrs. Crawford's tape recorded, post-arrest statement to the police fell within the common core of all three tests proposed by the court.²⁷ The Court stated that at a minimum the term applies "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."²⁸ The Court similarly declined to define "police interrogations," the product of which was construed to be within even the narrowest definition of testimonial.²⁹

Crawford transformed overnight the landscape of criminal practice. Under the court's earlier Confrontation Clause analysis of *Ohio v. Roberts*,³⁰ the hearsay rule and the Confrontation Clause were considered closely aligned and intended to protect the same value: that is, the reliability of the statement. So long as hearsay met a firmly rooted exception to the hearsay rule or harbored particular guarantees of trustworthiness, its admission in a criminal case did not offend constitutional protections for the accused.³¹ After *Crawford*, however, hearsay and confrontation rights have been decoupled.³² Where hearsay is considered "testimonial" it may not be admitted at trial *even if* it meets an established and long-standing hearsay exception or is otherwise reliable,³³ unless the declarant is unavailable and the defendant previously had an opportunity to cross examine him.³⁴ According to Justice Scalia, the Confrontation

²⁶ The Court cited works by Akil Amar and Richard Friedman, two constitutional scholars who have long advocated that a testimonial approach is more consistent with the historical purposes of the Confrontation Clause. *Id.* at 61. These scholars have taken radically different approaches to the question of how the term testimonial should be defined. See Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L. J. 1045, 1045 (1998) (arguing that testimony should be construed in a narrow sense, encompassing "those witnesses who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like."); Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1240-01 (2002) (urging a broader definition that would include any statement "made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime").

²⁷ *Crawford*, 541 U.S. at 68.

²⁸ *Id.* at 68.

²⁹ *Id.* at 52. "[Mrs. Crawford's] recorded statement, knowingly given in response to structured police questioning, qualifies [as a "police interrogation"] under any conceivable definition." *Id.* at 54n.4. In *Crawford*, the Court cited *Rhode Island v. Innis*, 446 U.S. 291, 292 (1980), in support of a colloquial rather than formalistic approach to defining interrogation. *Id.* In *Innis*, the Court stated that interrogation for the purposes of *Miranda* extends "not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 292.

³⁰ 448 U.S. 56 (1980).

³¹ *Id.* at 66.

³² See *id.* at 66 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.").

³³ The one possible exception to this new rule is dying declarations, which Justice Scalia recognized were admitted at common law even prior to the enactment of the Sixth Amendment. *Crawford*, 541 U.S. at 56 n.6 ("Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are If this exception must be accepted on historical grounds, it is *sui generis*." (internal citations omitted)).

³⁴ Although not entirely clear from the Court's opinion in *Crawford*, it does not even appear that the cross examination must have covered the same subject matter referenced in the hearsay statement. Cf. *People v. Sharp*, 825 N.E.2d 706, 713 (Ill. App. 2005) (admitting prior statement even though defense counsel stayed

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Clause was designed to guarantee the procedural protection of cross examination, and not the substantive reliability of the statement.³⁵ Where testimonial hearsay is at issue,³⁶ the Court concluded that no assurances of reliability can substitute for the defendant's "bedrock" right to confront his accuser.³⁷

Commentators, practitioners, and even Justice Rehnquist in his *Crawford* concurrence³⁸ lamented the many important questions left unanswered by the Supreme Court. The three most notable areas of confusion are: 1) what definition of "testimonial" lower courts should follow; 2) what constitutes a police "interrogation," response to which the Court considered to be within even the narrowest definition of testimonial hearsay; and 3) when is a witness considered "unavailable" within the meaning of *Crawford*, such that the government may be permitted to introduce hearsay if the witness had previously been cross-examined by the defendant.³⁹

With dramatic implications for domestic violence prosecutions, the Court also left unresolved the critical issue of whether and when excited utterances will be considered testimonial for purposes of the Confrontation Clause. *Crawford* involved testimony

away from subject matter on cross examination at trial of child victim, where child was unable to recount abuse).

³⁵ *Id.* at 61 ("[The Confrontation Clause] commands, not that [evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.]")

³⁶ Where the state seeks to admit non-testimonial hearsay against the defendant in a criminal case, the Court in *Crawford* left open the possibility that the Confrontation Clause provides no protections whatsoever. An example of non-testimonial hearsay is a casual, off hand overheard remark, such as an excited utterance or a present sense impression made by the declarant to another civilian, which may be admitted under state and federal evidentiary hearsay exceptions. *See id.* at 51 ("Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."). Thus, the Supreme Court in *Crawford* did not expressly overrule *Roberts* as applied to nontestimonial hearsay; however, this was likely a tactic designed to avoid an issue not presented that may have put the majority at risk of losing votes. Justice Rehnquist stated in his concurring opinion that the Court in *Crawford* had "of course overrule[d]" *Ohio v. Roberts*. *Id.* at 75. In *Davis* the Court put this issue to rest by ruling definitively that *Ohio v. Roberts* has no continued vitality with respect to nontestimonial hearsay, and that the Confrontation Clause poses no bar to its admission. "We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay." *Davis v. Washington*, 126 S.Ct. 2266, 2274. "The answer to [this] question was suggested in *Crawford*, even if not explicitly held . . . A limitation [directed at 'bearing testimony'] so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter." *Id.*

³⁷ *Crawford*, 541 U.S. at 42.

³⁸ *Id.* at 69–70.

³⁹ While the *Crawford* court declined to define "unavailability," it cited *Barber v. Page*, for the proposition that even where the defendant had an adequate opportunity to cross examine a witness at a preliminary hearing, the trial judge must nevertheless exclude this prior testimony where the government has not established the unavailability of the witness at trial. 390 U.S. 719 (1968). In *Barber*, the prosecutor had not made any attempt to file a detainer seeking the transfer of a federal prisoner in order to have him testify in a state armed robbery trial. *Id.* Instead, the government simply introduced a copy of the prisoner's testimony at a preliminary hearing. According to the *Barber* Court, "a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Id.* at 725. What constitutes a "good faith effort" to secure the attendance of the witness for purposes of Confrontation Clause analysis will have to be decided by future cases. *Cf.* FED. R. EVID. 804 (a)(5).

admitted under a state exception for declarations against interest. The exception for excited utterances was not directly at issue in the case. However, the majority in *Crawford* stated that the Court's new Sixth Amendment analysis "cast doubt"⁴⁰ on its prior holding in *White v. Illinois*.⁴¹ In *White*, the Court had ruled that an excited utterance made by a four-year-old child to an investigating police officer in her home shortly after an alleged sexual attack were admissible in a state prosecution notwithstanding the Confrontation Clause because the statement came within a firmly rooted exception to the hearsay rule.⁴² According to Justice Scalia in *Crawford*, the *White* decision was "arguably in tension" with the new rule requiring prior opportunity to cross examine testimonial statements.⁴³ Clearly, the Court believed that some excited utterances would be considered testimonial within the new *Crawford* framework, but it declined to elaborate on which forms of such utterances must be excluded and which will be admissible when the declarant does not testify.

Two cases consolidated by the Court and decided at the end of the 2005-2006 term clarified this latter issue—but only somewhat.⁴⁴ In *Hammon v. Indiana*,⁴⁵ the Court reversed the defendant's conviction for domestic battery where the victim was subpoenaed to testify but failed to appear at trial. The prosecutor offered in evidence through a police witness both the victim's hearsay statement to police officer upon arriving at the scene and a signed battery affidavit that the victim completed shortly after the incident.⁴⁶ The trial court admitted these statements under a state hearsay exception for excited utterances, notwithstanding the defendant's objection on Confrontation Clause grounds.⁴⁷ The Supreme Court ruled that these statements were the product of a police "interrogation" and thus fell within the core class of testimonial hearsay described in *Crawford*. The Court believed that the victim's oral and written statements to the police officer at the scene were testimonial because there was no emergency in progress when the police arrived at the scene; the alleged fracas was over, the victim stated that she was "fine," and both parties were separated with a view toward determining how potentially past criminal acts had progressed.⁴⁸ The Court viewed this conversation as similar to the interrogation of the alleged co-venturer in *Crawford*, even though it lacked the formality of a stationhouse setting and Miranda warnings.⁴⁹

⁴⁰ *Crawford*, 541 U.S. at 61.

⁴¹ 502 U.S. 346 (1992).

⁴² *Id.* at 350. The trial court in *White* admitted these statements under the state "spontaneous declaration exception," defined in Illinois as "[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." *Id.* (citing *People v. White*, 555 N.E.2d 1241, 1246 (Ill. App. 1990)).

⁴³ *Id.* at 58 n.8.

⁴⁴ *Davis v. Washington*, 126 S.Ct. 2266 (2006).

⁴⁵ *Id.*

⁴⁶ *Id.* at 2272.

⁴⁷ *Id.* While the trial court admitted the victim's oral statement to the police as an excited utterance and her affidavit as a present sense impression, the Indiana Supreme Court ruled that only the first hearsay exception applied to these out of court statements. *Hammon v. State*, 829 N.E.2d 444, 449 (Ind. 2005), *rev'd*, 126 S.Ct. 2266 (2006).

⁴⁸ *Davis*, 126 S.Ct. at 2278–79.

⁴⁹ *Id.* at 2278.

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In the consolidated case of *Davis v. Washington*, the Court affirmed the defendant's conviction for felony violation of a domestic no-contact order, where the victim did not testify at trial and the prosecution instead introduced the victim's tape recorded telephone call to a 911 dispatcher identifying her attacker and asking for help.⁵⁰ The trial court, over the defendant's Confrontation Clause objection, admitted this 911 tape as an excited utterance.⁵¹ The Supreme Court ruled that this conversation was not a police "interrogation" because it was taken primarily for the purpose of meeting an ongoing emergency which was in progress, rather than to gather evidence of a past act.⁵² The Court in *Davis* recognized that "[o]fficers called to investigate [domestic violence disputes] need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.' Such exigencies may often mean that 'initial inquires' produce nontestimonial statements."⁵³

The Court in *Davis* once again refused to adopt a precise definition of "testimonial." It did, however, clarify when police questioning rises to the level of an "interrogation" such that civilian responses will be considered testimonial even within the narrowest possible definition of that latter term. The Court adopted the following test:

[Statements made in response to police questioning] are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁵⁴

The Court instructed lower courts to look for the "primary purpose" of the police officer's inquiry, and to make this determination *objectively* based on the apparent purpose served by the questioning rather than by inquiring into the subjective intent of either the speaker or the listener.⁵⁵ Justice Thomas, concurring in the result in *Davis* and dissenting in *Hammon*, criticized Scalia's "primary purpose" test as unworkable and unpredictable. "In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence."⁵⁶ Thomas would have preferred that the Court adhere to the narrow test of testimonial which he had first proposed in *White*, limiting application of the Confrontation Clause to "formalized testimonial materials" such as "affidavits, depositions, prior testimony, or confessions."⁵⁷

⁵⁰ *Id.* at 2271.

⁵¹ *State v. Davis*, 111 P.3d 844, 847 (Wash. 2005), *rev'd* 126 S. Ct. 2266 (2006).

⁵² *Davis v. Washington*, 126 S.Ct. 2266, 2276–77 ("Although one might call 911 to provide a narrative report of a crime absent any imminent danger, [the victim's] call was plainly a call for help against bona fide physical threat. . . . She simply was not acting as a witness; she was not testifying.")

⁵³ *Id.* at 2279 (citing *Hibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 186 (2004)).

⁵⁴ *Id.* at 2273.

⁵⁵ *Id.* at 2277–2278n.5.

⁵⁶ *Id.* at 2283.

⁵⁷ *White v. Illinois*, 502 U.S. 346, 365 (Thomas, J., concurring).

While it is clear from *Davis* that not all excited utterances made by victims to 911 dispatchers or to police officers responding to the scene of a crime will be considered “testimonial,” some certainly will be. “Calls for help”⁵⁸ during 911 calls and “initial inquiries”⁵⁹ when police respond to the scene will not be considered testimonial where there is an ongoing medical or public safety emergency and the police are trying to render aid or impose order. According to the Court, when the police are responding to an emergency and they ask preliminary questions to ascertain whether the victim, other civilians, or the police themselves are in danger; they are not obtaining information for the purpose of making a case against a suspect, and therefore the ensuing statements are non-testimonial.⁶⁰ But responses to further questioning by the same police officer after the cause and circumstances of the emergency have been clarified may be considered testimonial. The Court in *Davis* clearly noted that some victim statements may contain both non-testimonial portions and testimonial portions; that is, initial segments of a statements may be considered non-testimonial because primarily evoked for the purpose of securing help in an emergency situation, but as the conversation continues the focus of the inquiry may shift from providing medical assistance to gathering evidence of a past criminal act.⁶¹ Where the victim is unavailable to testify at trial, to protect the defendant’s rights under the Confrontation Clause such mixed statements must be redacted and only the non-testimonial portion of the excited utterance may be admitted.⁶²

III. Impact of *Crawford* on Domestic Violence Prosecutions

Findings by the U.S. Surgeon General reveal that battery by intimates (spouses or lovers) is the single largest cause of physical injury to women in the United States.⁶³ The Center for Disease Control and Prevention (CDC) estimates approximately two million injuries and 1,300 deaths can be attributed to intimate partner violence in the United States each year.⁶⁴ Roughly one out of every three women in this country will be victims of domestic violence during their lifetimes.⁶⁵ It is not an overstatement to suggest that our country is fighting a national epidemic of this form of abuse.⁶⁶

⁵⁸ *Davis*, 126 S.Ct. at 2276.

⁵⁹ *Id.* at 2279.

⁶⁰ *Id.* at 2277.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L & CRIMINOLOGY, 46, 46 (1992).

⁶⁴ John C. Nelson, Ronald B. Adrine, Elaine Alpert, Sara Buel & Corrine Graffunder, *Domestic Violence in the Adult Years*, 33 J. L. MED. & ETHICS 28, 29 (2005).

⁶⁵ KAREN SCOTT COLLINS, CATHY SCHOEN, SUSAN JOSEPH, LISA DUCHON, ELISABETH SIMANTOV & MICHELE YELLOWITZ, HEALTH CONCERNS ACROSS A WOMAN’S LIFESPAN: THE COMMONWEALTH FUND 1998 SURVEY OF WOMEN’S HEALTH 15 (May, 1999), available at http://www.cmf.org/usr_doc/Healthconcerns__surveyreport.pdf.

⁶⁶ Percival, *supra* note 20, at 234.

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Over eighty percent of domestic violence victims are noncooperative with law enforcement following their initial allegations of abuse.⁶⁷ Justice Scalia in *Davis* recognized that “[t]his particular type of crime is notoriously susceptible to intimidation or coercion of the victim to insure that she does not testify at trial.”⁶⁸ An “all too familiar” scenario in domestic violence prosecutions is that the victim calls the police, the police show up at the marital home where the victim reports a battery, the alleged perpetrator is arrested, and thereafter the victim fails to show up for trial, or appears and recants.⁶⁹ Experts have identified four psychological factors that contribute to the uniquely high incidence of noncooperation by domestic violence victims compared to other types of prosecutions: 1) the victim fears retaliation from her⁷⁰ abuser; 2) the victim fears that children of the relationship will be taken away from her or otherwise adversely effected by criminal proceedings; 3) the victim is economically dependent on her abuser and is concerned about the family’s ability to support itself should the abuser be incarcerated; and, 4) repeated cycles of abuse and reconciliation over time have caused the victim to internalize feelings of low self esteem, learned helplessness, and even personal responsibility for her own abuse.⁷¹

In light of these obstacles, prosecutors have developed several strategies over the last decade to combat domestic violence. These strategies include “no drop” policies and so called “evidence based” prosecution models.⁷² A “no-drop” policy—first developed in American jurisdictions during the late 1980’s and early 1990’s—denies the victim of domestic violence the option of freely withdrawing a complaint once formal charges have been filed.⁷³ Under a “hard” no-drop policy, the district attorney’s office will subpoena the victim to court if necessary, and request a bench warrant for her arrest if she fails to appear.⁷⁴ Far more common and realistic are so-called “soft” no-drop policies, where prosecutors look to a variety of factors (including but not limited to the victim’s wishes) in deciding whether to proceed with the case.⁷⁵ Such other factors may include the seriousness of the battery, the defendant’s prior criminal record, the level of lethality of

⁶⁷ Myrna Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, CRIMINAL JUSTICE MAGAZINE, Summer 2005, at 25.

⁶⁸ *Davis v. Washington*, 126 S. Ct. 2266, 2279–80 (2006).

⁶⁹ *Hammon v. State*, 829 N.E. 2d 444, 448 (Ind. 2005), *rev’d* 126 S.Ct. 2266 (2006).

⁷⁰ In this article I will refer to the domestic violence victim with the female pronoun and the alleged batterer with the male pronoun, in order to accurately reflect the most common demographics of this crime in our society. Studies show that over ninety percent of domestic violence victims are women. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1854 (1996).

⁷¹ See Lininger, *supra* note 2, at 769–71 (collecting authorities); see also LENORE WALKER, *THE BATTERED WOMAN* 42–70 (1979).

⁷² Percival, *supra* note 20, at 243.

⁷³ See Hanna, *supra* note 70, at 1861–63; Angela Corsilles, *No-drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORD. L. REV. 853, 856 (1994).

⁷⁴ Proponents of “hard” no-drop strategies argue that where the defense lawyer knows that the prosecution is able and willing to go forward with the case notwithstanding the victim’s wishes, many domestic violence cases will result in plea bargains, thus ultimately sparing the victim the trauma of testifying notwithstanding the apparent threat of forcing her to do so. Hanna, *supra* note 70, at 1867.

⁷⁵ “Even under a no-drop policy, a prosecutor will often dismiss a case involving a reluctant victim out of concern and respect for her.” *Id.* at 1873.

the defendant's future predicted behavior, the exposure of children to the violence, and the availability of evidence other than the victim's testimony to prove the case.⁷⁶ In these "soft" no-drop jurisdictions, prosecutors generally follow a presumption that the case will be prosecuted, but this presumption may be rebutted in situations where testifying will pose a serious risk of physical or emotional danger to the victim.⁷⁷

A second strategy used in conjunction with no-drop policies is to develop methods to prove domestic violence charges without the victim's cooperation should it be necessary to do so. The term "evidence based prosecutions" refers to trial methods in domestic violence cases that do not rely on live testimony by the victim.⁷⁸ To prove the charges, prosecutors typically rely on tapes of the victim's 911 call, photographs of the victim's injuries taken at the scene, and the police officer's first response testimony describing the physical condition of the home and any admissions made by the defendant.⁷⁹ When necessary, an expert on Battered Women's Syndrome will be called to explain to the victim's absence; that is, to offer a psychological explanation of why a victim may recant or refuse to cooperate in the prosecution of her abuser.⁸⁰ Key to the success of such "evidence based" prosecutions is the in-court testimony of police dispatchers, responding officers, or ambulance attendants repeating what the victim said to them immediately after the incident regarding the source and nature of her injuries.⁸¹

Domestic violence crimes are unique in that they typically carried out in the privacy of the home; often there are no witnesses available to prove the crime other than the victim herself.⁸² "[T]hese cases are more likely than others to rely on hearsay statements by accusers who may recant or refuse to cooperate with the prosecution at the time of trial."⁸³ The "workhorses" of domestic violence prosecutions under an evidence-based prosecution model are excited utterances and statements for the purpose of medical diagnosis or treatment.⁸⁴ Prosecutors frequently rely on statements to first responders not only to compensate for subsequently uncooperative victims, but also because these statements tend to be more accurate descriptions of what happened than later equivocations or recantations. Studies show that initial statements to police at the scene

⁷⁶ *Id.* at 1898, 1901–09. It is considered critical to the success of either type of no-drop policy that the government provide counseling and support to domestic violence victims, so that they feel empowered to go forward with the trial if their testimony is needed. *Id.* at 1861–64.

⁷⁷ *See id.* at 1863–64.

⁷⁸ Lininger, *supra* note 2, at 752 n. 24.

⁷⁹ Raeder, *supra* note 67, at 24; Jessica Dayton, *The Silencing of a Woman's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L.J. 281, 293 (2003).

⁸⁰ *See* Lininger, *supra* note 2, at 812.

⁸¹ Andrew King-Ries, Crawford v. Washington: *The End of Victimless Prosecutions*, 28 SEATTLE U.L. REV. 301, 310 (2004–2005). *See generally* FED. R. EVID. 803(3) & 803(4).

⁸² Sherrie Bourg Carter & Bruce M. Lyons, *The Potential Impact of Crawford v. Washington on Child Abuse, Elderly Abuse, and Domestic Violence Litigation*, CHAMPION, Sept–Oct. 2004 at 21; *see* Malinda L. Seymore, *Against the Peace and Dignity of the State: Spousal Violence and Spousal Privilege*, 2 TEXAS WESLEYAN L. REV. 239, 257 (1995). The same could certainly be said of child sexual abuse cases, but the impact of *Crawford* on these types of prosecutions is beyond the scope of this article.

⁸³ Lininger, *supra* note 2, at 768.

⁸⁴ Raeder, *supra* note 3, at 332.

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tend to be more consistent with the overall evidence (physical injuries and disruption at the scene) than later recantations.⁸⁵

The current practice of going forward with criminal charges in domestic violence cases over the objection of the original complainant has its critics. Some feminist scholars have argued that a woman's desire not to proceed to trial in domestic violence cases should be honored, not only out of respect for the woman's autonomy but also due to concerns that forcing testimony will further traumatize the victim and/or erode her sense of self esteem and control.⁸⁶ The two most common feminist critiques of "no-drop" policies are that 1) they are paternalistic; that is, they suggest that the state knows what is best for women; and 2) they revictimize women by subjecting them to further coercion at the hands of the state.⁸⁷ Pro-prosecution advocates and other feminist scholars have advanced several convincing counterarguments to this critique. First, aggressive prosecution strategies may actually protect the physical safety of the immediate victim. Where the state retains the option to proceed with the case notwithstanding the victim's wishes, it *decreases* the incentive of the batterer to threaten, intimidate or harm the witness.⁸⁸ Studies show that if victim does not cooperate and there is a dismissal, she is more likely to be beaten again by the same batterer.⁸⁹ Second, proceeding with the prosecution over the victim's objections may protect other women who might enter into future relationships with the defendant. Third, the "autonomy" argument of some feminists fails because it is well documented that domestic violence victims frequently make choices *against* their best interests due to fear and intimidation.⁹⁰ When a domestic violence victim informs a prosecutor that she does not want to go forward with pending charges against her abuser, this is not really a "free" choice at all—respecting the woman's desire to dismiss the case is the equivalent of respecting the batterer's option to coerce his prey.⁹¹

Perhaps most importantly, domestic violence is a public rather than an individual problem.⁹² The criminal justice system has been put in place for the community's benefit, not to vindicate the interests of individual citizens.⁹³ Domestic violence causes billions of dollars of in property damage and loss each year (including medical costs,

⁸⁵ Hanna, *supra* note 70, at 1902; King-Ries, *supra* note 81, at 327.

⁸⁶ See Linda G. Mills, *Killing Her Softly, Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 569–570 (1999) (citing authorities).

⁸⁷ See Hanna, *supra* note 70, at 1855.

⁸⁸ *Id.* at 1892; see FINAL REPORT OF THE GENDER BIAS TASK FORCE OF TEXAS 70–71 (1994) (reflecting a growing awareness that leaving the decision with the battered spouse about whether or not to go through with charges opens her up to threats from her abuser and gives the abuser a wedge to use against her).

⁸⁹ Hanna, *supra* note 70, at 1895.

⁹⁰ King-Ries, *supra* note 81, at 325; see Seymore, *supra* note 82, at 247 (1995).

⁹¹ For a feminist critique of the adverse testimonial privilege, see Malinda L. Seymore, *Isn't It A Crime: Feminist Perspectives On Spousal Immunity And Spousal Violence*, 90 N.W.U. L. REV. 1032, 1073 (1996) (arguing that refusal of the state to intervene in private matters does not expand victim autonomy, it simply substitutes private power of the typically male batterer for the public power of government).

⁹² Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L. J. 173, 174 (1997).

⁹³ WILLIAM F. McDONALD, THE ROLE OF THE VICTIM IN AMERICA IN ASSESSING THE CRIMINAL 295, 295–296 (Randy E. Barnett & John Hagel, III eds. 1977).

healthcare, police and fire protection services, and victim services).⁹⁴ Batterers pose a threat not only to their partners but also to their children and their communities.⁹⁵ Police officers put their lives at risk by responding to a victim's call for help;⁹⁶ having invoked the resources of society, domestic violence victims have forfeited the right to exercise a veto over how society decides to respond to the threat once it has been exposed.⁹⁷ Mandating prosecution when the state decides that it is in the public interest treats domestic violence victims like victims of other crimes—including victims of rape, gang-related activities, and whistleblowers in corporate fraud cases. These victims too face internal and external pressure to drop criminal charges, but the state does not reflexively accede to their wishes.⁹⁸

In this ongoing philosophical debate about whether to honor the wishes of domestic violence victims, perhaps “the numbers” provide us with the best guidance.⁹⁹ Aggressive prosecution strategies in the last decade have been successful in stemming the rising tide of intimate partner abuse.¹⁰⁰ Between 1994 and 2003, some studies estimate that the reported incidence of domestic violence has fallen by as much as fifty percent.¹⁰¹ For example, after the City of San Diego adopted a “no-drop” prosecution strategy, the number of annual domestic violence-related homicides in the City of San Diego fell from a high of thirty to a low of seven.¹⁰²

Most commentators agree that prior to *Crawford* our society was making important inroads against domestic violence through aggressive prosecution strategies

⁹⁴ Roberta L. Valente, *Domestic Violence and the Law* in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK, 1-1 to 3-3 (Deborah M. Goelman ed. 1996). According to one commentator, emergency room visits, hospitalizations, and private physician appointments attributable to domestic violence in this country cost \$100,000,000 annually. Raoul Felder, *Should Victims be Force to Testify Against Their Will? Yes: It's Time to Declare War on Spouse Abuse*, 82-MAY A.B.A. J. 76, 76 (1996). In 1995, the total cost of intimate partner violence—including estimates of lost earnings and lost productivity—exceeded \$5.8 billion. National Center for Injury Prevention and Control, *Costs of Intimate Partner Violence Against Women in the United States* 32 (March 2003), available at, http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf.

⁹⁵ Hanna, *supra* note 70, at 1889. The empirical evidence demonstrates that “children who grow up in a violent family are more likely to engage in acts of violence in their own relationships.” *Id.* at 1895.

⁹⁶ Between 1995 and 2004, sixty police officers in this country were killed responding to calls alleging family quarrels. FEDERAL BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED T.20 (2004), available at, <http://www.fbi.gov/ucr/killed/2004/openpage.htm>

⁹⁷ Debra Saunders, *Battered, But Still Responsible*, S. F. CHRON., April 5, 2001 (arguing that battered women have civic responsibilities once they invoke the resources of the police and the courts); see 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2192 (McNaughten ed. 1961) [hereinafter WIGMORE ON EVIDENCE] (“He who will live by society must let society live by him, when it requires to.”).

⁹⁸ See Hanna, *supra* note 70, at 1891.

⁹⁹ *Id.* at 1857, 1885–1889 (arguing that societal benefits gained through aggressive criminal justice response to domestic violence far outweighs short term costs to victim autonomy).

¹⁰⁰ Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 95 (1997).

¹⁰¹ Nathan Max, *Domestic Violence on Decline*, RIVERSIDE PRESS-ENTERPRISE, December 21, 2004, at A1. See CALLIE MARIE RENNISON, U.S. DEPT. OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993–2001 2 (NCJ 197838), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>.

¹⁰² Mark Hansen, *New Strategies in Battering Cases*, 81-AUG A.B.A. J. 14, 14 (1995).

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and public education.¹⁰³ But *Crawford* threatens to eliminate or reverse these hard-fought gains. As one commentator has dramatically noted, the Supreme Court's new Confrontation Clause analysis has brought the practice of trials without victims to "an abrupt halt."¹⁰⁴ Professor Lininger surveyed sixty prosecutors' offices in the states of Washington, Oregon, and California six months following the *Crawford* decision; sixty-three percent of the offices responding indicated that *Crawford* had significantly impeded domestic violence prosecutions in their jurisdictions, and seventy-six percent indicated that they are now more likely to drop domestic violence charges when the victim recants or refuses to cooperate.¹⁰⁵ These jurisdictions are not unique. In Dallas County, close to fifty percent of the domestic violence cases set for trial were dropped in the summer following the Supreme Court's *Crawford* decision.¹⁰⁶

This trend is not likely to improve after *Davis*. Only those portions of a 911 recording in which the questioner is "determining the need for emergency assistance" will be admissible where the victim does not testify at trial.¹⁰⁷ With respect to excited utterances made to police officers at the scene of an alleged attack, some will be admissible and some will not, depending on whether the emergency has subsided and what the trial court determines to be the "primary purpose" of the interrogation.¹⁰⁸ Statements made by the victim to nurses, ambulance attendants, and doctors for the purposes of medical treatment that would otherwise be admissible under Fed. R. Evid. 803(b)(4) or a state analogue¹⁰⁹ may no longer be admitted where the questioning is

¹⁰³ King-Ries, *supra* note 81, at 328.

¹⁰⁴ Raeder, *supra* note 3, at 330.

¹⁰⁵ Lininger, *supra* note 2, at 750.

¹⁰⁶ Robert Tharp, *Domestic Violence Cases Face New Test: Ruling That Suspects Can Confront Accusers Scares Some Victims From Court*, DALLAS MORNING NEWS, July 6, 2004 at 1A.

¹⁰⁷ *Davis v. Washington*, 126 S.Ct. 2266, 2277 (2006) (calling for redaction of that portion of the tape where the operator is questioning the caller for the primary purpose of gathering evidence).

¹⁰⁸ *Id.* at 2279 (noting that "initial inquiries" designed to respond to an ongoing "exigency" or "threatening situation" will produce nontestimonial statements, but where the immediate danger has passed any questioning to establish historical events will be considered testimonial.). See also *supra* notes 58-62, and accompanying text. But see *id.* at 2281 (Thomas, J., concurring in part and dissenting in part) (taking position that distinguishing between primary purpose of emergency response and gathering evidence is "an exercise in fiction." "[T]he fact that the officer in Hammon was investigating Mr. Hammon's past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife.") *Id.* at 2284. Adding to this confusion as to how to apply the "primary purpose" test is certain scattered language in *Davis* majority opinion focusing on the declarant's point of view. See *id.* at 2276 (characterizing 911 call as "plainly a call for help" rather than a "narrative report of a crime absent any imminent danger."). One post *Davis* appellate decision has relied on the above language to conclude that the trial court's focus in assessing the admissibility of the statement should be on the declarant's primary purpose, considered objectively, rather than on the primary purpose of the police in making the inquiry. *State v. Mechling*, 633 S.E.2d 311, 322 (W.Va. 2006).

¹⁰⁹ Many jurisdictions treat statements to medical personnel about source of injury (spouse or partner) as within the Fed. R. Evid. 803(4) hearsay exception because reasonably pertinent to the treatment to be provided. See *U.S. v. Joe*, 8 F.3d 1488, 1494 (10th Cir. 1993); *State v. Stahl*, 2005 WL 602687 (Ohio App. 2005); *State v. Moses*, 119 P.3d 906, 911 (Wash. App. 2005); *State v. Vaught*, 682 N.W.2d 284 (Neb. 2004); *Fleming v. State*, 819 S.W.2d 237 (Tex. App. 1991).. The "attacker's identity can determine a release date and location, the need for other services, and even the course of treatment, such as counseling." King-Ries *supra* note 81, at 312. In the domestic violence field, "[a] patient's history is 85% of his or her diagnosis." Nelson, *supra* note 64, at 29. See also FED. R. EVID. 803(4) advisory committee's note

considered a “police interrogation,” either because the medical professional is working with law enforcement authorities as part of a multi-jurisdictional task force, or because the medical professional has a statutory duty to report domestic violence to law enforcement authorities under state law.¹¹⁰ Even where the medical professional is acting in a private capacity and therefore not conducting a “police interrogation” within the narrowest class of “testimonial” hearsay recognized by the Supreme Court to date, the conversation may satisfy one of the broader possible definitions of testimony alluded to by the Court in *Crawford*.¹¹¹

In short, “evidence based” prosecutions are in jeopardy after *Crawford* and *Davis*. The Court’s originalist approach to the Confrontation Clause puts a premium on securing the actual attendance of domestic violence victims at trial. “While not every statement of an absent domestic violence victim will be excluded, enough will be to require a reassessment of current practices.”¹¹²

One common reason victims are “unavailable” for cross examination at trial is that they assert a marital privilege and are excused from testifying.¹¹³ Indeed, that is what happened in the *Crawford* case, eventually giving rise to the Court’s new “testimonial” approach to the Sixth Amendment. Mrs. Crawford was excused from testifying against her husband under the Washington state marital privilege law, and instead of live testimony the state relied on her recorded interview with the police.¹¹⁴ Since *Crawford* was decided in 2004, numerous state court convictions for domestic violence have been reversed on appeal where the victim refused to testify at trial in reliance on a state marital privilege, and the government proceeded with a prosecution based on the victim’s out of court hearsay statements.¹¹⁵

(explaining that the hearsay exception “also extends to statements as to causation” if reasonably pertinent to treatment).

¹¹⁰ See *State v. Hooper*, ___ P.3d ___, 2006 WL 2328233, *4 (Id. 2006)(collecting cases in which courts have held a victim’s statements to medical personnel were testimonial because she was “act[ing] in concert with or at the behest of the police.”); *In re T.T.*, 351 Ill. App. 3d 976, 993 (2004) (holding that victim’s statements to treating physician identifying the defendant as the perpetrator “implicate[s] the core concerns protected by the confrontation clause.[.]” but admitted statements “regarding the nature of the alleged attack, the physical exam, and complaints of pain or injury.”); see also Mosteller, *supra* note 3, at 518, 602. Some jurisdictions have developed task forces to coordinate the efforts of emergency medical personnel, battered women’s advocates, police, and the district attorney’s office. See Cochran, *supra* note 100, at 102. See also *Davis*, 126 S. Ct. at 2274n.2 (assuming that civilian 911 dispatchers are acting as “agents” of law enforcement even if they are not police officers themselves).

¹¹¹ *Crawford v. Washington*, 541 U.S. 36, 52 (citing two other tests beyond narrowest formulation of testimonial: 1) whether an “objective witness” would reasonably believe that the statement would be available for use at a later trial, and 2) whether the declarant herself ‘would reasonably expect [the statement] to be used prosecutorially.’).

¹¹² Raeder, *supra* note 3, at 330–31.

¹¹³ See *United States v. Owens*, 484 U.S. 554, 562 (1988) (successful assertion of a privilege renders a witness unavailable for cross examination under the Confrontation Clause). See also FED. R. EVID. 804(a) (defining unavailability to include excusal on the ground of privilege).

¹¹⁴ *Crawford*, 541 U.S. at 37 (citing WASH. REV. CODE § 5.60.060(1) (1994)).

¹¹⁵ See, e.g., *Miller v. State*, 615 S.E.2d 843 (Ga. Ct. App. 2005) (overturning husband’s convictions for terroristic threats and obstructing a person making an emergency phone call); *State v. Powers*, 99 P.3d 1262 (Wash. Ct. App. 2004) (overturning conviction for violating a domestic protection order because victim’s 911 call telling operator the defendant had come to her home was testimonial); *Commonwealth v. Foley*,

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Consider the following example from a real life drama that recently unfolded in Boston, Massachusetts.¹¹⁶ Former Linebacker Ted Johnson of the New England Patriots—winner of three Super Bowl rings—lived with his wife Jacqueline Johnson and their three children in Weston, Massachusetts. Police were called to their home on Sunday, July 16, 2006 after receiving a report of a domestic disturbance. Responding officers found Mrs. Johnson sitting on a stone wall along the driveway of their three story house visibly upset. Jacqueline Johnson reported that she and her husband had an argument, and that the strapping and muscular Ted Johnson turned violent, grabbing her wrist, twisting it behind her back, and pushing her head repeatedly against a bookcase in their study. Upon interviewing Ted Johnson, the police were told a different story. Johnson claimed that he tried to take some medication away from his wife for which she did not have a prescription, at which point she became violent, punching him in the upper body and head. According to Ted Johnson, only then did he grab her wrist and push her into the bookcase in order to defend himself. Both parties were arrested and charged with assault and battery. Following arraignment, a family lawyer issued a statement that the entire incident had been a “misunderstanding” and that the Johnsons had each signed an affidavit agreeing not to testify against each other in the criminal case. In Massachusetts, they have that right. The state marital privilege statute allows a witness to refuse to testify against their spouse when the latter is a defendant in a criminal proceeding, with no applicable exception for crimes allegedly committed by one spouse against another.¹¹⁷ Before *Crawford*, the Johnson prosecution—if the government decided to proceed with this case at all—would have had to rely on excited utterances made to the police immediately after the event. After *Crawford*, this prosecution will be all but impossible.

In light of *Crawford*, states should be reconsidering their state marital privilege statutes to determine whether they truly are in accord with the public interest. After all, one glimmer of hope for prosecutors in the *Crawford* opinion is that hearsay statements may be admitted at trial so long as the declarant testifies and is subject to cross examination; it does not matter whether the victim affirms or disavows the prior statement, or even if she recants the allegation of abuse entirely.¹¹⁸ Physical presence and testimony at trial—coupled with the option of the defendant to cross examine—are all that are necessary to satisfy the demands of the Confrontation Clause. Domestic violence prosecutions can thus still be successful with uncooperative witnesses (even those who profess a complete lack of memory of the incident)¹¹⁹ so long as no valid privilege stands as a lawful impediment to their being called as a witness.

833 N.E.2d 130 (Mass. 2005) (overturning husband’s conviction of assault and battery by means of a dangerous weapon).

¹¹⁶ Ari Bloomekatz, *Ex Patriot Player, Wife Arrested After Scrap*, BOSTON GLOBE, July 22, 2006 at B1.

¹¹⁷ MASS. GEN. LAWS ch. 233, § 20.

¹¹⁸ *Crawford*, 541 U.S. at 59–60n.9 (“When the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements”) (citing *California v. Green*, 399 U.S. 149, 162 (1970)).

¹¹⁹ See *Owens*, 484 U.S. at 561–63.

IV. Origins and Purposes of the Marital Privileges

Evidentiary privileges contravene the general principle that “the public...has a right to every man’s evidence.”¹²⁰ Because they tend to impede the accurate ascertainment of the truth, privileges are strictly construed and recognized only where necessary to protect interests superior to the truth seeking function of the courts.¹²¹

The recognition of evidentiary privileges in the United States followed English common law. Testimonial privileges first began to appear in England in the sixteenth century, when the practice of deciding cases based on the jurors’ personal knowledge of events gave way to the more modern practice of presenting factual testimony to the jury via lay witnesses.¹²² Reliance on fact witnesses led to a universal duty to testify when summonsed to appear,¹²³ which in turn led to judicially recognized exceptions to this general civic responsibility.¹²⁴

In the United States, the so-called “marital”¹²⁵ privileges vary from jurisdiction to jurisdiction, and are predominantly statutory in nature.¹²⁶ In general, there are two different types of marital privilege: the option of a witness to refuse to testify against their spouse when that party is a defendant in a criminal case (for reasons discussed below, this privilege is often referred to as the marital or spousal “disqualification”); and, the right of either spouse in a civil or criminal case to refuse to reveal confidential communications between them.¹²⁷ While these two privileges often overlap, they are

¹²⁰ Trammel v. United States, 445 U.S. 40, 45 (1980) (internal citations omitted).

¹²¹ David W. Louisell & Byron M. Crippin, Jr., *Evidentiary Privileges*, 40 MINN. L. REV. 413, 414 (1956). “[T]hese exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” United States v. Nixon, 418 U.S. 683, 710 (1974).

¹²² *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1455 (1985) [hereinafter *Privileged Communications*].

¹²³ English law provided courts with the power to compel testimony in 1562. See 5 Eliz. 1, c. 9, § 12 (1562) (Eng.).

¹²⁴ *Privileged Communications*, supra note 122, at 1455.

¹²⁵ For ease of reference in this article, I will refer to the spousal relationship as a lawful union between a man and a woman. In states that allow marriage or civil unions between homosexual couples, the pertinent state marital privilege may apply to those relationships as well. See VT. ST. ANN. Tit. 15 § 1204(e)(15) (applying state law of privilege to civil unions); Goodrich v. Department of Public Health, 798 N.E.2d 941, 955–56 (Mass. 2003) (ruling that limiting the benefits and protections of civil marriage to opposite sex couples violates the state constitution, and including in this discussion “evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations.”) No federal court has yet applied the federal common law of marital privilege to homosexual couples. See Elizabeth Kimberly Penfil, *In Light of Reason and Experience: Should Federal Evidence Law Protect Confidential Communications Between Same-Sex Partners?*, 88 MARQ. L. REV. 815, 831 (2005).

¹²⁶ STONE AND TAYLOR, TESTIMONIAL PRIVILEGES § 5.01 at 5-2.

¹²⁷ JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE MANUAL, § 18.05.

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doctrinally distinct and protect different interests.¹²⁸ In discussing the genesis and contours of the marital privileges I will refer to the first privilege as the “adverse testimonial privilege” and the second privilege as the “confidential communications privilege.”

The privilege against adverse spousal testimony is generally considered to be a vestige of a long-abandoned common law rule that completely disqualified one spouse from testifying either *for* or *against* their marital partner in either a civil or criminal proceeding.¹²⁹ Writing in 1628, Lord Coke stated that a “wife cannot be produced either against or for her husband.”¹³⁰ The disqualification sprang from two canons of medieval jurisprudence—a party is not allowed to testify on his own behalf due to his interest in the proceedings, and a husband and wife were recognized as one legal entity.¹³¹ Over time, the rule evolved from a rule of total incompetence,¹³² to a disqualification in criminal cases only,¹³³ to a rule giving the defendant the right to prohibit only *adverse* testimony in criminal case, but allowing the defendant to call his spouse to testify on his behalf,¹³⁴ to a privilege in criminal cases held by the witness spouse only.¹³⁵ The parties must be married at the time of the criminal trial in order for

¹²⁸ *Privileged Communications*, *supra* note 122, at 1564. The two privileges overlap when a witness currently married to the defendant is called to testify against him at a criminal trial as to confidential communications between the two of them during the marriage. Either privilege may then be relied upon as grounds for refusing to testify. There is no overlap, however, when a divorced spouse is called at a criminal trial to testify against her husband as to conversations which occurred during the marriage. In that situation, only the confidential communication privilege and not the adverse testimonial privilege would apply. There is also no overlap when a spouse is called to testify to conversations with a criminal defendant that pre-dated the marriage. In that situation, only the adverse testimonial privilege, and not the confidential communication, privilege would apply.

¹²⁹ *Trammel v. United States*, 445 U.S. 40, 44 (1980).

¹³⁰ 1 SIR EDWARD COKE, A COMMENTARIE UPON LITTLETON 6b (1628).

¹³¹ *Trammel*, 445 U.S. at 44. Dean Wigmore disputed this traditional view, arguing that the adverse testimony privilege developed independently from the spousal disqualification rule. Wigmore believed the adverse testimonial privilege originated from the sixteenth century social acceptance of the husband as head of the household, and the corresponding legal doctrine that a wife or servant who harmed the head of the household could be punished for petit treason. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2227 at 211–213. (J. McNaughton rev. ed. 1961).

¹³² See *Bent v. Allot*, 22 Engl. Rep. 50 (1579–1580).

¹³³ Lord Brougham’s Act in England (Evidence Act of 1851) repealed the rule of incompetence and made both party and spouse competent and callable witnesses, except in criminal cases. *Shelton v. Tyler*, L.R. 1939 at 626. See generally MUELLER & KIRKPATRICK, EVIDENCE § 5.31 at 558 (1999).

¹³⁴ *Funk v. United States*, 290 US 371, 376 (1933) (recognizing that the modern trend is to enlarge the domain of competency and leave credibility to jurors). “A refusal to permit the wife upon the ground of interest to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity.” *Id.* at 381; see Note, *Competency of One Spouse to Testify Against The Other in Criminal Cases Where The Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359, 370 (1952).

¹³⁵ *Trammel*, 445 U.S. at 53. Although in federal court today the witness spouse alone holds the adverse testimonial privilege, as will be discussed in the next section some states continue to vest the adverse testimonial privilege in the hands of the defendant. See, e.g., WASH. REV. CODE § 5.60.060. Other states place this privilege in the hands of both spouses (in effect allowing the witness spouse to decline to testify even if the party spouse subpoenas them, and allowing the party spouse to prevent the witness from testifying if subpoenaed by the government). See, e.g., W.VA. CODE ANN. §57-3-3.

the witness to invoke the adverse testimonial privilege.¹³⁶ Where applicable, the witness spouse may refuse to testify both as to facts observed and as to matters communicated to her by the defendant spouse.¹³⁷

In contrast, the confidential communication privilege protects private conversations between husband and wife. This marital privilege may be one of the oldest testimonial privileges recognized at English common law, predated only by the attorney client privilege.¹³⁸ The typical prerequisites to the application of the confidential communication privilege are that 1) there was a communication (that is, words or utterances intended to convey a message);¹³⁹ 2) between two persons who were married at the time of the communication;¹⁴⁰ and 3) the communication was intended to be kept confidential (that is, not made in the presence of a third party or intended to be communicated to a third party).¹⁴¹ Both spouses typically hold the privilege, and thus either may object to testimony revealing a private communication.¹⁴² The confidential communication privilege typically applies in both criminal and civil proceedings, and one spouse need not be a party to the proceeding for the privilege to be invoked.¹⁴³

The two primary justifications for evidentiary privileges are utilitarian and humanistic.¹⁴⁴ A utilitarian justification for privileges recognizes that sometimes

¹³⁶ GLEN WEISSEBERGER, FEDERAL RULES OF EVIDENCE § 501.6, at 216 (1999). See *United States v. Porter*, 986 F.2d 1014, 1019 (6th Cir. 1993) (citing authorities). Where the witness and defendant marry for the sole purpose of disqualifying the spouse as a witness, the courts can pierce the privilege if they find the marriage a sham. *Lutwak v. United States*, 344 U.S. 604, 614-15 (1953). But see *State v. Gianakos*, 644 N.W.2d 409, 417 (requiring a strong showing to conclude that that marriage is so empty as to render purpose of the privilege valueless).

¹³⁷ *Privileged Communications*, *supra* note 122, at 1563.

¹³⁸ H. BATHURST, THE THEORY OF EVIDENCE 99–100 (London 1671). But see *Shelton v. Tyler*, L.R. 1939 at 633 (reviewing English legal history and suggesting that no common law privilege for confidential communications existed independent of the marital disqualification prior to statutory enactments).

¹³⁹ *Privileged Communications*, *supra* note 122, at 1572.

¹⁴⁰ The confidential communication privilege survives the termination of the marriage; so long as the speakers were legally wed at the time of the communication, the privilege may be asserted to bar revelation of the contents of the communication even if the speakers are divorced at the time of the judicial proceeding. MCCORMICK ON EVIDENCE § 85 at 308 (John William Strong ed., 4th ed. 1992).

¹⁴¹ WEINSTEIN & BERGER, *supra* note 127, § 18.05(3)(b). See C. WRIGHT & K GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5586–87 (1973); *Privileged Communications*, *supra* note 122, at 1573. See generally *State v. Parent*, 836 So.2d 494, 504 (La. Ct. App. 2003); *State v. Holmes*, 412 S.E.2d 660, 665 (N.C. 1992).

¹⁴² WEISSEBERGER, *supra* note 136, at 219; *Privileged Communications*, *supra* note 122, at 1571. Some jurisdictions suggest that only the party making the communication holds the privilege, but that the party receiving the communications is authorized to assert it on the other's behalf in the absence of evidence to the contrary. See TEX. R. CRIM. EVID. § 504(1)(c). Cf. *United States v. Figueroa-Paz*, 408 F.2d 1055, 1057 (9th Cir. 1972) (holding that the speaker-spouse waives the privilege if she fails to object to the testimony as to her communication). In these latter jurisdictions the party making the communication may force the recipient spouse to testify about the communication if the sender/speaker so desires.

¹⁴³ *Shelton v. Tyler*, L.R. 1939 (Chancery) at 627. See 8 WIGMORE ON EVIDENCE § 2334 at 648.

¹⁴⁴ Penfil, *supra* note 125, at 818. In addition to utilitarian and humanistic rationales, scholars have advanced both “power” and “image” theories of privilege. A power theory suggests that whatever citizens or professional organizations command the most power and social prestige are likely to have their communications privileged by legislators or the judiciary. See WRIGHT & GRAHAM, *supra* note 141, §5422, at 673–79. An image theorist argues that society recognizes particular communications and

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witnesses should be excused from testifying in order to promote or preserve relationships which society values above the truth finding functions of its courts.¹⁴⁵ Utilitarian theorists justify privileges as a way of promoting the public good; that is, a privilege will be recognized where the social benefits to be achieved from excusing the witness exceed the social costs of losing the testimony. When privacy is valued not for its own sake but for its beneficial effects—such as promoting free speech or successful interpersonal relationships—it becomes a utilitarian rather than a purely humanistic justification.¹⁴⁶ Supporters of a utilitarian rationale for testimonial privileges include John Henry Wigmore¹⁴⁷ and, more recently, Thomas Krattenmaker.¹⁴⁸

The traditional utilitarian justification for a marital adverse testimonial privilege is that forcing one spouse to testify against another in a criminal case would lead to one of two unacceptable results: it could potentially cause a break up of the marriage if the witness spouse testified truthfully and inculpated her husband, or it could promote perjury.¹⁴⁹ Lord Coke, speaking of the adverse spousal testimony privilege in the early seventeenth century, reasoned that forcing a witness to testify against their accused spouse would "be a cause of implacable discord and dissension" in the marriage.¹⁵⁰ Lord Hardwicke similarly explained that this privilege was necessary to "preserve the peace of families."¹⁵¹

A utilitarian argument in support of a marital confidential communication privilege is that individuals would be inhibited from confiding in their spouses unless private conversations were shielded from disclosure in court. That is, denying a privilege for confidential communications between husbands and wives would chill

relationships as privileged because it would be embarrassing or demeaning for the state to compel testimony in certain circumstances, leading to disrespect of the government. See Amanda H. Frost, *Updating the Marital Privileges, a Witness Centered Rationale*, 14 WISC. WOMEN'S L. J. 1, 20 (1999) ("Widespread acts of perjury and contempt threaten the accuracy of verdicts and public confidence in the legal system."); *Privileged Communications*, *supra* note 122, at 1499.

¹⁴⁵ *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citing *Elkins v. United States*, 364 U.S. 206, 234 (1960)). "Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice or availability of evidence relevant to the administration of justice." MCCORMICK ON EVIDENCE § 72, at 101.

¹⁴⁶ *Privileged Communications*, *supra* note 122, at 1583.

¹⁴⁷ Wigmore posited four threshold conditions for the application of an evidentiary privilege:

- 1) the communication must have originated in confidence;
- 2) the confidence must be essential to the relationship in question;
- 3) the relationship must be one worth fostering; and
- 4) the injury to society from disclosure of the communication must be greater than the benefit to society and the truth finding function achieved by disclosure.

8 WIGMORE ON EVIDENCE § 2396. Wigmore believed that utilitarian reasoning supported a privilege for confidential communications between spouses, but not an adverse testimonial privilege. According to Wigmore, marital harmony depends on a variety of subtle factors, and the dissension possibly caused by one spouse testifying against another is "only a casual and minor one, not to be exaggerated into the foundation of so important a rule." *Id.* § 2228 at 216.

¹⁴⁸ Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L. J. 61, 86–88 (1973-74).

¹⁴⁹ See *Clements v. Marston*, 52 N.H. 31, 36 (1872). See generally Note, *supra* note 134, at 359.

¹⁵⁰ COKE, *supra* note 130, § 6b.

¹⁵¹ *Barker v. Dixie*, 95 Eng. Rep. 171 (K.B. 1736).

private spousal conversation, which in turn would lead to less productive and successful marital relationships.¹⁵² In the early nineteenth century English case of *Doker v. Hasler*, the court stated that “the happiness of the marriage state requires that the confidence between a man and wife should be kept ever inviolable.”¹⁵³

Commentators have noted the lack of any empirical evidence to support traditional utilitarian arguments about the social efficacy of the marital privileges.¹⁵⁴ For example, with regard to the confidential communication privilege some commentators have argued that it is based on “debatable behavioral assumptions,” because few couples are aware of the law of evidence and are likely to take judicial considerations into account in deciding whether to communicate with one another.¹⁵⁵ Nonetheless, the rationale for evidentiary privileges most frequently cited by the United States Supreme Court in the twentieth century is the utilitarian justification.¹⁵⁶

A humanistic strand also continues to pervade much of the discussion in support of the marital privileges.¹⁵⁷ Such a rationale for privileges suggests that it is fundamentally indecent for the law to intrude upon certain intimate relationships.¹⁵⁸ Early English cases relied on humanistic rationales in creating testimonial privileges,

¹⁵² 1 MCCORMICK ON EVIDENCE § 86 at 309 (noting that some argue that confidential communication privilege is justified in order to “encourage marital confidences” and thus “promote harmony between husband and wife”). *See also* *Woffle v. United States*, 291 U.S. 7, 14 (1934) (in recognizing marital confidential communication privilege under federal law “in light of reason and experience,” Supreme Court stated that “[t]he basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails”).

¹⁵³ 171 E.R. 992 (Ry. & Moo 1824).

¹⁵⁴ MCCORMICK ON EVIDENCE § 86 at 309. *See* Robert Weisberg and Michael Wald, *Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform*, 18 FAM. L.Q. 143, 183 (1984). Spouses confide in each other because they love and trust one another, not because the law protects the privacy of their communications. MCCORMICK ON EVIDENCE, § 86 at 201; *see* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 682 (1929) (“As far as the writers are aware...marital harmony among lawyers who know about privileged communications is not vastly superior to that of that of other professional groups”). *Cf. In re Grand Jury*, 103 F.3d 1140 (3d Cir. 1997) (in refusing to recognize a parent-child privilege, the Third Circuit noted lack of any evidence that confidential communications are essential to a successful parent-child relationship). “Even assuming *arguendo* that children and their parents generally are aware of whether or not their communications are protected from disclosure, it is not certain that the existence of a privilege enters into whatever thought processes are performed by children in deciding whether or not to confide in their parents.” *Id.*

¹⁵⁵ *Privileged Communications*, *supra* note 122, at 1579.

¹⁵⁶ “Our cases make clear that an asserted privilege must also ‘serve public ends.’” *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). *See also* *Trammel v. United States*, 445 U.S. 40, 50 (1980) (stating privileges will be accepted “only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.”) (quoting *Elkins v. United States*, 364 U.S. 206 234 (1960)).

¹⁵⁷ *See, e.g.,* Frost, *supra* note 144, at 5 (arguing that marital privileges do not *shape* conduct of spouses, but rather *respond* to loyalty that they harbor for each other—even if that loyalty is misplaced).

¹⁵⁸ *See, e.g.,* RICHARD M. GULA, S.S., *ETHICS IN PASTORAL MINISTRY* 120–121 (Paulist Press 1996) (discussing ethical foundations for clergy duty of confidentiality). *Cf.* Charles Black, *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L. J. 45 (1975).

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acknowledging that "privileges reflected the legal system's respect for human dignity."¹⁵⁹ Under a humanistic rationale, evidentiary privileges embody the fundamental regard in which society holds individual rights, especially privacy and autonomy.¹⁶⁰ Charles Wright and Kenneth Graham illustrate the core concerns of the humanistic view when they observe that "[t]he question of privilege is not really 'what are the empirical results of permitting this witness to remain silent?'; it is 'what kind of people are we who empower courts in our name to compel parents, friends, and lovers to become informants on those who have trusted in them?'"¹⁶¹ Among the modern supporters of a humanistic view of privileges are David Louisell¹⁶² and Edward Imwinkelried.¹⁶³

Under a humanistic view of the marital privileges, it is simply morally wrong—if not cruel—to require a spouse to testify against her partner in a criminal case, because it forces one spouse to be an instrumentality of their beloved's demise.¹⁶⁴ Using contempt powers to compel testimony from a reluctant spouse constitutes "blatant governmental intrusion into private relationships."¹⁶⁵ With regards to the privilege for confidential communications, a humanistic rationale suggests that couples have a right to confidentiality in their private conversations, and such intimate discourse should be beyond the reach of the government.¹⁶⁶ Several commentators¹⁶⁷ and at least one federal court¹⁶⁸ have suggested that the government may not invade marital confidences without offending the couple's right to privacy under substantive due process guarantees.

English common law recognized certain exceptions to both of the marital privileges, and these exceptions grew largely out of the doctrine of necessity.¹⁶⁹ In fact,

¹⁵⁹ See EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* §§ 2.3, 5.3.3 (2002) (citing authorities).

¹⁶⁰ See Krattenmaker, *supra* note 148, at 92.

¹⁶¹ WRIGHT & GRAHAM, *supra* note 141, § 5422.1 (Supp. 2002)

¹⁶² See David W. Louisell, *Confidentiality Conformity and Confusion: Privileges in Federal Court Today*, 31 TULANE L. REV. 101, 110–113 (1956-57).

¹⁶³ See IMWINKELRIED *supra* note 159, §§ 2.3, 5.3.3.

¹⁶⁴ The Advisory Committee on the Federal Rules of Evidence recognized in 1969 that one justification for the adverse testimonial privilege is the social "repugnancy" of requiring a person to condemn or be condemned by their marital partner. 46 F.R.D. 161, 264 (March, 1969).

¹⁶⁵ *Privileged Communications*, *supra* note 122, at 1584.

¹⁶⁶ MCCORMICK ON EVIDENCE § 86 at 310 (1992) ("Probably the policy of encouraging confidences is not the primary reason in creating the privilege....It is a matter of emotion and sentiment. All of us have a feeling of indelicacy and want of decorum in prying into the secrets of husband and wife.")

¹⁶⁷ Mark Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as they Affect Marital Privileges*, 61 CALIF. L. REV. 1353, 1370–71 (1973); Note, *Pillow Talk, Grimribbers and Connubial Bliss: The Marital Communications Privilege*, 56 IND. L. J. 121, 139–142 (1980).

¹⁶⁸ *United States v. Neal*, 532 F. Supp. 942, 945–46 (D. Colo. 1982), *aff'd*, 743 F.2d 1441 (10th Cir. 1984).

¹⁶⁹ 8 WIGMORE ON EVIDENCE § 2239, at 242. In addition to cases involving crime by one spouse upon another, Wright and Graham identified fifteen other common exceptions to the marital privileges. See Wright and Graham, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* §5591 (1989)(action for divorce; action for alienation of affections; action for abandonment or nonsupport; custody disputes; personal injury actions between the spouses; prosecutions for adultery, polygamy, and bigamy; will contests, communications in aid of a crime or fraud; prosecutions for sex crimes; where evidence is needed by a criminal defendant to prove his innocence; and where another statute makes the marital privilege inapplicable). While some commentators frequently justify such exceptions on the basis of necessity,

one of the earliest exceptions recognized to the spousal disqualification rule was for crimes committed by the defendant against the person of the wife, such as battery or rape.¹⁷⁰ This exception was considered vital because otherwise the husband would be immune from prosecution for crimes committed within the household in situations where the spouse could provide the only source of eyewitness testimony. Even after the adverse testimonial privilege morphed and the election was determined to rest in the witness spouse rather than in the accused, many jurisdictions continued to recognize an exception for crimes by one spouse on another.¹⁷¹ The reasoning underlying this exception was that the public policy of having spouses punished for crimes committed in the household outweighs any state or personal interest in preserving what by all objective accounts is an apparently failing marriage.¹⁷²

The development of the law of marital privileges in federal courts tracked fairly closely to these common law origins, with some notable exceptions. In 1965 Chief Justice Warren appointed an Advisory Committee to study and make proposals on uniform federal rules of evidence.¹⁷³ When the Advisory Committee drafted Proposed Rule 505, it recommended limiting the privilege for adverse testimony to criminal cases.¹⁷⁴ The Committee also vested the adverse testimonial privilege in hands of the criminal defendant, consistent with the Supreme Court's earlier decision in *Hawkins v United States*.¹⁷⁵ The Committee recognized both utilitarian and humanistic reasons for recognizing an adverse testimonial privilege; that is, the prevention of marital dissension, and the social repugnancy of forcing one spouse to testify against another in circumstances that could lead to imprisonment.¹⁷⁶ Notably, however, the Committee declined to recommend any marital confidential communications privilege for the federal courts, citing exclusively utilitarian concerns.¹⁷⁷ The Committee believed that marriage is not primarily a verbal relationship, and therefore declining to recognize a confidential communication privilege would not have as great an impact on the institution of marriage as it would on professional relationships.¹⁷⁸ This decision of the drafters to recommend abandonment of the marital confidential communication privilege prompted public

another way to look at this is to say that theoretical basis for protecting the information—preserving marital harmony— does not exist in most of these situations. *Id.*

¹⁷⁰ See *Rex. v. Azire*, 93 Eng. Rep. 746 (KB 1725) (assault); Lord Audley's case, 123 Eng. Rep. 1140 (1631) (rape). See generally 1 BLACKSTONE COMMENTARIES 443 (Wayne Morrison ed. 2001).

¹⁷¹ Lininger, *supra* note 2, at 363.

¹⁷² “[I]f the promotion of marital peace, and the apprehension of marital dissension, are the ultimate ground of the privilege, it is an overgenerous assumption that the wife who has been beaten, poisoned, or deserted is still on such terms of delicate good feeling with her spouse that her testimony must not be enforced lest the iridescent halo of peace be dispelled by the breath of disparaging testimony.” 8 WIGMORE ON EVIDENCE § 2239 p. 243.

¹⁷³ Paul F. Rothstein, *The Proposed Amendments to The Federal Rules of Evidence*, 62 GEO. L.J. 125, 125 (1973).

¹⁷⁴ 46 F.R.D. 161, 263 (1969).

¹⁷⁵ 358 U.S. 74 (1958).

¹⁷⁶ *Id.* at 264 (citing 8 WIGMORE ON EVIDENCE § 2229).

¹⁷⁷ 46 F.R.D. at 264–65 (“[N]or can it be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware.”)

¹⁷⁸ “The other communications privileges, by way of contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege.” 46 F.R.D. at 265.

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outry, and was an important factor leading to congressional rejection of the Advisory Committee's proposed rules.¹⁷⁹

In 1980 the Supreme Court interpreted the federal common law of marital privileges under Fed. R. Evid. 501¹⁸⁰ very differently than the Advisory Committee had recommended only nine years earlier.¹⁸¹ The Court in *Trammel v. United States* affirmed the existence of an adverse testimonial privilege under federal law.¹⁸² However, the Supreme Court placed the adverse testimonial privilege in the hands of the witness spouse, rather than in the hands of the criminal defendant, overruling *Hawkins v. United States*.¹⁸³

The contemporary justification for affording an accused such a privilege is unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve.¹⁸⁴

Equally notably, the Court in dicta recognized the continued vitality of a common law privilege for a confidential communications, notwithstanding the Advisory Committee's conclusion that this latter privilege lacked any justification under traditional utilitarian

¹⁷⁹ MUELLER & KIRKPATRICK, *supra* note 133, § 5.32 at 561.

¹⁸⁰ Congress enacted the Federal Rules of Evidence in 1975 after several years of study and debate. H.R. REP. NO. 93-650, at 3-4 (1973). Rule 501 does not contain a specific list of privileges to be applied in the federal courts. Instead, Rule 501 dictates the evolution and application of privileges “in the light of reason and experience.” FED. R. EVID. 501. This common law privilege formula adopted by Congress in Rule 501 eschewed the nine specific enumerated privileges—including a marital adverse testimonial privilege—recommended by the Advisory Committee and approved by the Supreme Court. *See* PROPOSED RULE EVID. 505, 56 F.R.D. 183, 369 (1971).

¹⁸¹ *See* FINAL REPORT ON ADVISORY COMMITTEE ON FEDERAL RULES OF EVIDENCE, 51 F.R.D. 315, 370 (1971).

¹⁸² 445 U.S. 40 (1980).

¹⁸³ 358 U.S. 74 (1958). The defendant in *Hawkins* was charged with a violation of the Mann Act; that is, transporting a woman across interstate lines for immoral purposes. *Id.* at 74. The prosecution called the defendant's wife as a witness against him, and she testified voluntarily. The Supreme Court interpreted *Funk* to apply only to testimony beneficial to accused; in that situation, there was no incompetence bar. But *Funk* had left open to “further scrutiny” the question of adverse testimony. *Id.* at 76. According to the Court in *Hawkins* the policy justification for the rule prohibiting favorable testimony has eroded, but the justification for adverse testimony has not. It is “difficult to see how family harmony is less disturbed by a wife's voluntary testimony against her husband than by her compelled testimony.” *Id.* at 78. The Court felt that not all marital flare ups are permanent. *Id.* at 77. The “[l]aw should not force or encourage testimony which might alienate husband or wife, or further inflame existing domestic differences.” *Id.* at 79 (emphasis added).

¹⁸⁴ *Id.* at 53. While the Court in *Trammel* employed utilitarian reasoning in recognizing both marital privileges, *id.* at 50, it did not employ the test formulated by Wigmore. WIGMORE ON EVIDENCE, *supra* note 147. Wigmore argued that in deciding whether privileges were justified, courts should look to the wider societal effects of that legal recognition, not to the individual effects on the relationship before the court. *Id.* (factor (4)). The Court in *Trammel*, however, seemed more concerned about whether there was anything left to protect in the particular marital relationship before the court, rather than marital relationships generally. 445 U.S. at 52. Using this broader utilitarian reasoning, the *Trammel* approach suggests that injury to the parties is one “cost” the court should take into consideration in undertaking a cost-benefit analysis.

rationales.¹⁸⁵ Against the recommendation of the Advisory Committee, both privileges are now recognized in federal courts under FRE 501.

With particular significance for domestic violence cases, the Supreme Court in *Trammel* suggested in dicta that federal law might support an exception to *both* the adverse testimonial privilege and the confidential communication privilege for “cases in which one spouse commits a crime against the other.”¹⁸⁶ The Advisory Committee had recommended an exception to the adverse testimonial privilege for crimes against the spouse or a child of marriage, to prevent the “grave injustice” that would otherwise occur.¹⁸⁷ It had not recommended such an exception to the confidential communication privilege, because the Advisory Committee had suggested eliminating that latter privilege entirely. However, with a brief citation to Wigmore the Court in *Trammel* suggested, without deciding, that “similar exceptions” should be recognized to both privileges.¹⁸⁸

V. State Spousal Privilege Statutes and the Need for Reform

The marital privileges are for the most part defined by the legislatures of our respective states.¹⁸⁹ Jurisdictions differ on what types of proceedings the privileges can be exercised in, which spouse (or both) controls the privilege, and whether the court can look behind the marriage to assess the strength, vitality, and bona fides of the

¹⁸⁵ *Trammel*, 445 U.S. at 51–53 n.5 (citing *Blau v. United States*, 340 U.S. 332, 333 (1951) (recognizing husband’s privilege to refuse to reveal communications from wife in grand jury proceeding)); *Wolfe v. United States*, 292 U.S. 7, 14 (1934) (recognizing marital confidential communications privilege under federal common law, but ruling that husband’s communications to wife through stenographer did not qualify).

¹⁸⁶ *Trammel*, 445 U.S. at 46n.7. Although the Court cited its earlier precedent in *Wyatt v. United States*, *Wyatt* was actually a case involving only the privilege against adverse testimony. 362 U.S. 525 (1960). The defendant was charged with transporting a woman for the purposes of prostitution in violation of the Mann Act. *Id.* at 525. The alleged prostitute married the defendant prior to his trial. *Id.* at 526. The Supreme Court ruled that the government may call a wife to testify against husband in a Mann Act prosecution, notwithstanding the both husband’s and wife’s objection, where the wife is the victim of the alleged misconduct. *Id.* at 530. The Court recognized that English common law admitted of an exception to adverse testimonial privilege for crimes against the wife. *Id.* at 526. The “[b]asic purpose of the exception is to prevent the husband from abusing the wife with impunity” *Id.* at 533n. 1 (Warren, C.J., dissenting). Although the adverse testimonial privilege at that time was considered held by both the witness and the defendant, and therefore both must waive, *id.* at 529, the Court held that where the testimony comes within a recognized exception to the privilege neither can exercise it.

¹⁸⁷ 46 F.R.D. 161, 265 (1969) (citing *Wyatt*, 362 U.S. 525).

¹⁸⁸ 445 U.S. at 46 n.7. *See also* *Stein v. Bowman*, 38 U.S. 209, 221 (1839) (suggesting that exception for “violence upon [wife’s] person” applies both to disqualification and to privilege for confidential communications. *Compare* Model Code of Evidence 216 (1942) with Uniform Rule of Evidence 28(2) (1974) (both uniform rules of evidence recognize exception to confidential communication privilege and adverse testimonial privilege for crimes against person or property of the other spouse, or crimes against person or property of third person during the course of a crime against the spouse).

¹⁸⁹ *See* Proposed Rules of Evidence for the United States District Courts, 46 F.R.D. 161, 263 (1969). The early nineteenth century saw the growth in the idea that legislation would “demystify, simplify, and make more predictive” a judicial process that for the first two centuries had been controlled by common law. *Privileged Communications*, *supra* note 122, at 1458. This trend led to codification of evidence law. *Id.* at 1460.

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relationship.¹⁹⁰ Jurisdictions also differ widely in the terminology use to describe the two marital privileges—frequently invoking terms such as incompetence, immunity, and disqualification—which generates substantial confusion.¹⁹¹ Although multi-state comparisons run the risk of oversimplification, some generalizations are possible.

Thirty one states and the District of Columbia recognize the adverse testimonial privilege.¹⁹² Nineteen states have abandoned this privilege entirely, proceeding under the belief that the confidential communications privilege adequately protects marital privacy.¹⁹³ Of the states that still recognize the adverse testimonial privilege, most apply it to criminal cases only, although several states apply this privilege to both criminal and civil cases.¹⁹⁴ In the vast majority of states the witness spouse holds the adverse testimonial privilege, consistent with *Trammel v. United States*.¹⁹⁵ However, four states still follow the pre-*Trammel* rule that the defendant holds the adverse testimonial

¹⁹⁰ Frost, *supra* note 144, at 15.

¹⁹¹ See, e.g., Glover v. State, 836 N.E.2d 414, 419-20 (Ind. 2005) (using “spousal incompetence” when discussing the adverse testimonial privilege and “disqualification” when discussing the confidential communication privilege); State v. Christian, 841 A.2d 1158, 1172-73 (Conn. 2004) (stating the confidential communication privilege is a grant of immunity given to communications between husband and wife); Beck v. State, 587 S.E.2d 316, 319 (Ga. App. 2003) (referring to the adverse testimonial privilege as “spousal immunity”); Commonwealth v. Walker, 780 N.E.2d 26, 32 (Mass. 2002) (holding that the confidential communication privilege is a rule of disqualification and is not a privilege at all).

¹⁹² See ALA. CODE § 12-21-227 (LexisNexis 2005); AK. R. EVID. 505(a); ARIZ. REV. STAT. ANN. § 13-4062 (Supp. 2005); CAL. EVID. CODE § 970 (West 1995); COLO. REV. STAT. § 13-90-107 (2004); CONN. GEN. STAT. ANN. § 54-84A (2005); D.C. CODE ANN. § 14-306 (LEXISNEXIS 2001); GA. CODE ANN. § 24-9-23 (1995); HAW. REV. STAT. § 626-1 (SUPP. 2005); IDAHO CODE ANN. § 19-3002 (2004); KY. R. EVID. 504; LA. CODE EVID. ANN. art. 505 (2006); MD. CODE ANN., CRTS. & JUD. PROC. § 9-106 (2002); MASS. GEN. LAWS ANN. CH. 233, § 20 (2000); MICH. COMP. LAWS ANN. § 600.2162 (WEST SUPP. 2006); MINN. STAT. ANN. § 595.02 (WEST 2000); MISS. CODE ANN. § 13-1-5 (2002); MO. ANN. STAT. § 546.260 (2002); NEB. REV. STAT. § 27-505 (1995); NEV. REV. STAT. 49.295 (SUPP. 2005); N.J. STAT. ANN. § 2A:84A-17 (WEST 1994); N.C. GEN. STAT. § 8-57 (2005); OHIO REV. CODE ANN. § 2945.42 (WEST 1997); OR. REV. STAT. § 40.255 (2005); 42 PA. CONS. STAT. § 5913 (2000); R.I. GEN. LAWS § 12-17-10 (2003); TEX. R. EVID. 504(B); UTAH CODE ANN. § 78-24-8 (2002); VA. CODE ANN. § 19.2-271.2 (SUPP. 2006); WASH. REV. CODE ANN. § 5.60.060 (1) (SUPP. 2006); W. VA. CODE ANN. § 57-3-3 (2005); WYO. STAT. ANN. § 1-12-104 (2005).

¹⁹³ ARK. R. EVID. 504; DEL. R. EVID. 504; FLA. STAT. § 90.504 (1999); 725 ILL. COMP. STAT. 5/115-16 (2002); IND. CODE ANN. § 34-46-3-1 (1998); IOWA CODE § 622.9 (1999); KAN. STAT. ANN. § 60-423 (2005); ME. REV. STAT. ANN. tit. 15, § 1315 (1999); MONT. CODE ANN. § 46-16-212 (2005); N.H. R. EVID. 504; N.M. STAT. ANN. § 38-6-6 (1998); N.Y. C.P.L.R. LAW § 4502 (McKinney 1992); N.D. R. EVID. 504; OKLA. STAT. ANN. tit. 12, § 2504 (Supp. 2006); S.C. CODE ANN. § 19-11-30 (Supp. 2005); S.D. CODIFIED LAWS § 19-13-13 (2004); TENN. CODE ANN. § 24-1-201 (2000); VT. STAT. ANN. tit. 12, § 1605 (2002); WIS. STAT. ANN. § 905.05 (2000). See Seymore, *supra* note 91, at 1053.

¹⁹⁴ AK. R. EVID. 505(A); Ariz. Rev. Stat. § 12-2231 to -2232; CAL. EVID. CODE § 970; COLO. REV. STAT. § 13-90-107; D.C. CODE ANN. § 14-306; Idaho Code § 9-203; KY. R. EVID. 504; MICH. COMP. LAWS ANN. § 600.2162; MINN. STAT. ANN. § 595.02; MISS. CODE ANN. § 13-1-5; NEB. REV. STAT. § 27-505; NEV. REV. STAT. 49.295; WASH. REV. CODE ANN. § 5.60.060 (1); WYO. STAT. ANN. § 1-12-104.

¹⁹⁵ Pamela A. Haun, *The Marital Privilege in the Twenty-First Century*, 32 U. MEM. L. REV. 137, 158 (2001). See ALA. CODE § 12-21-227; AK. R. EVID. 505(a); CAL. EVID. CODE § 970; CONN. GEN. STAT. ANN. § 54-84a; D.C. CODE ANN. § 14-306; GA. CODE ANN. § 24-9-23; HAW. REV. STAT § 626-1; IDAHO CODE ANN. § 19-3002; LA. CODE EVID. ANN. art. 505; MD. CODE ANN., CRTS. & JUD. PROC. § 9-106; MASS. GEN. LAWS ANN. CH. 233, § 20; MO. ANN. STAT. § 546.260; NEV. REV. STAT. 49.295; N.J. STAT. ANN. § 2A:84A-17; N.C. GEN. STAT. § 8-57; OHIO REV. CODE ANN. § 2945.42; OR. REV. STAT. § 40.255; 42 PA. CONS. STAT. § 5913; R.I. GEN. LAWS § 12-17-10; TEX. R. EVID. 504(B); UTAH CODE ANN. § 78-24-8.

privilege,¹⁹⁶ including the state of Washington whose decision in *Crawford* gave rise to the Supreme Court's landmark Confrontation Clause ruling. In five other states both spouses hold the adverse testimonial privilege; in these states, if the witness, wants to testify against her spouse the defendant may prevent her from doing so, but if the defendant does not object to the testimony the witness may still refuse.¹⁹⁷

All fifty states and the District of Columbia recognize a privilege for confidential communications between spouses.¹⁹⁸ In most states this privilege applies in both criminal and civil proceedings, although four states limit its application to criminal cases.¹⁹⁹ The greatest area of divergence with respect to the confidential communication privilege is in who holds the privilege. The most common approach is to provide that both parties to the communication may assert the privilege.²⁰⁰ Where both spouses hold the privilege, disclosure by one spouse does not constitute a waiver of the privilege and the testifying spouse can continue to refuse to testify about the communication even if the other party calls the spouse as a witness. Some states provide that the privilege rests only with the party to the criminal or civil proceeding,²⁰¹ non-party witnesses may not

¹⁹⁶ ARIZ. REV. STAT. ANN. § 13-4062; COLO. REV. STAT. § 13-90-107; MINN. STAT. ANN. § 595.02; WASH. REV. CODE ANN. § 5.60.060(1).

¹⁹⁷ KY. R. EVID. 504; MISS. CODE ANN. § 13-1-5; NEB. REV. STAT. § 27-505; W. VA. CODE ANN. § 57-3-3; WYO. STAT. ANN. § 1-12-104. *See* Enberg v. Meyer, 820 P.2d 70, 83 (Wyo. 2001) (although statute was phrased in terms of incompetence, court interpreted privilege to rest in hands of both spouses). In Michigan the witness spouse holds the adverse testimonial privilege in criminal cases, but the party spouse holds the privilege in civil cases. *See* MICH. COMP. L. ANN. § 600-2162.

¹⁹⁸ ALA. R. EVID. 504; AK. R. EVID. 505(b); ARIZ. REV. STAT. ANN. § 13-4062; ARK. R. EVID. 504; CAL. EVID. CODE § 980; COLO. REV. STAT. § 13-90-107; DEL. R. EVID. 504; D.C. CODE ANN. § 14-306; FLA. STAT. § 90.504; GA. CODE ANN. § 24-9-21; HAW. R. EVID. 505; IDAHO CODE ANN. § 9-203; 725 ILL. COMP. STAT. 5/115-16; IND. CODE ANN. § 34-46-3-1; IOWA CODE § 622.9; KAN. STAT. ANN. § 60-423; KY. R. EVID. 504; LA. CODE EVID. ANN. art. 504; ME. REV. STAT. ANN. TIT. 15, § 1315; MD. CODE ANN., CRTS. & JUD. PROC. § 9-105; MASS. GEN. LAWS ANN. CH. 233, § 20; MICH. COMP. LAWS ANN. § 600.2162; MINN. STAT. ANN. § 595.02; MISS. R. EVID. 504; MO. ANN. STAT. § 546.260; MONT. CODE ANN. § 46-16-212; NEB. REV. STAT. § 27-505; NEV. REV. STAT. § 49.295; N.H. R. EVID. 504; N.J. STAT. ANN. § 2A:84A-22; N.M. STAT. ANN. § 38-6-6; N.Y. C.P.L.R. LAW § 4502; N.C. GEN. STAT. § 8-57(C); N.D. R. EVID. 504; OHIO REV. CODE ANN. § 2317.02(D) (PARTIALLY SUPERSEDED BY OHIO R. EVID. 601); OKLA. STAT. ANN. TIT. 12 § 2504; OR. REV. STAT. § 40.255; 42 PA. CONS. STAT. § 5914; S.C. CODE ANN. § 19-11-30; S.D. CODIFIED LAWS § 19-13-13; TENN. CODE ANN. § 24-1-201; TEX. R. EVID. 504(A); UTAH CODE ANN. § 78-24-8; VT. STAT. ANN. TIT. 12, § 1605; VA. CODE ANN. § 8.01-398 (civil cases only); WASH. REV. CODE ANN. § 5.60.060; W. VA. CODE ANN. § 57-3-4; WIS. STAT. ANN. § 905.05; WYO. STAT. ANN. § 1-12-104.

Connecticut and Rhode Island continue to follow a common law privilege for confidential communications, notwithstanding that no privilege is expressly set forth by statute. *See* State v. Christian, 841 A.2d 1158, 1173 (Conn. 2004); State v. DeSlovers, 100 A. 64, 72 (R.I. 1917).

¹⁹⁹ ARK. R. EVID. 504; N.D. R. EVID. 504; OKLA. STAT. ANN. TIT. 12 § 2504; S.D. CODIFIED LAWS § 19-13-13.

²⁰⁰ ALA. R. EVID. 504; DEL. R. EVID. 504; FLA. STAT. § 90.504; GA. CODE ANN. § 24-9-21; HAW. R. EVID. 505; LA. CODE EVID. ANN. art. 504; MINN. STAT. ANN. § 595.02; MISS. R. EVID. 504; N.M. STAT. ANN. § 38-6-6; N.Y. C.P.L.R. LAW § 4502; N.D. R. EVID. 504; OR. REV. STAT. § 40.255; 42 PA. CONS. STAT. § 5914; TENN. CODE ANN. § 24-1-201; TEX. R. EVID. 504(A); UTAH CODE ANN. § 78-24-8; VT. STAT. ANN. TIT. 12, § 1605; VA. CODE ANN. § 8.01-398; WASH. REV. CODE ANN. § 5.60.060; W. VA. CODE ANN. § 57-3-4.

²⁰¹ AK. R. EVID. 505(b); ARIZ. REV. STAT. ANN. § 13-4062; ARK. R. EVID. 504; COLO. REV. STAT. § 13-90-107; IDAHO CODE ANN. § 9-203 (); ME. REV. STAT. ANN. TIT. 15, § 1315; MICH. COMP. LAWS ANN. §

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assert the confidential communication privilege, unless the statute expressly provides that a witness spouse is “presumed” to have authority to assert the privilege on behalf of the party spouse absent evidence to the contrary.²⁰² Kansas takes the position that only the communicating spouse can assert the privilege; the recipient of the communication cannot assert the privilege where the spouse communicating the information desires that it be revealed.²⁰³ Finally, a small number of states including Massachusetts protect confidential communications through a rule of complete incompetence or disqualification; the judge may not allow a witness to reveal a private marital communication in court, even if *both* spouses desire that it be disclosed.²⁰⁴

Of these two common marital privileges, the adverse testimonial privilege is the one most commonly raised in domestic violence prosecutions. Where the alleged batterer and victim are married at the time of trial, the victim might be allowed to assert the adverse testimonial privilege and refuse to testify against her accuser at the criminal proceeding—even as to facts occurring prior to the marriage. The premise is that forcing one spouse to give factual testimony against the other in a criminal case would put an unconscionable strain on the marriage. The result is that victims who reconcile with their abusers, or are threatened or intimidated into not testifying, can sometimes invoke the adverse testimonial privilege and effectively block the prosecution.

By now most have enacted exceptions to their adverse testimonial privileges for crimes committed by one spouse against another, consistent with the English common law rule.²⁰⁵ In these states, the victim/witness has no right to refuse to testify against her

600.2162; NEV. REV. STAT. § 49.295; OKLA. STAT. ANN. TIT. 12 § 2504; S.D. CODIFIED LAWS § 19-13-13; WIS. STAT. ANN. § 905.05.

²⁰² See, e.g., S.D. CODIFIED LAWS § 19-13-13; WIS. STAT. ANN. § 905.05.

²⁰³ KAN. STAT. ANN. § 60-428. McCormick argued that this privilege should be held by the communicating spouse. MCCORMICK, *supra* note 140, § 72 at 299. Most state and federal courts have rejected such a “communicant” centered approach to the marital confidential communications privilege, recognizing that most if not all conversations are two-sided. See *United States v. Montgomery*, 384 F.3d 1050, 1057 (9th Cir. 2004) (citing authorities). See also *Wolfe v. United States*, 291 U.S. 7, 16 (1934) (Supreme Court assumed without deciding that absent involvement of stenographer, where husband wrote letter to his wife the wife could assert the privilege and refuse to reveal the letter).

²⁰⁴ D.C. CODE ANN. § 14-306; 725 ILL. COMP. STAT. 5/115-16; IND. CODE. ANN. § 34-46-3-1; IOWA CODE § 622.9; MD. CODE ANN., CRTS. & JUD. PROC. § 9-105; MASS. GEN. LAWS ANN. CH. 233, § 20; MO. ANN. STAT. § 546.260; NEB. REV. STAT § 27-505; N.H. R. EVID. 504; N.C. GEN. STAT. § 8-57(C); WYO. STAT. ANN. § 1-12-104.

²⁰⁵ See discussion, *supra* note 170 and accompanying text. See also AK. R. EVID. 505(a); ARIZ. REV. STAT. ANN. § 13-4062; CAL. EVID. CODE § 970; COLO. REV. STAT. § 13-90-107; CONN. GEN. STAT. ANN. § 54-84A; HAW. REV. STAT § 626-1; IDAHO CODE ANN. § 19-3002; KY. R. EVID. 504; MD. CODE ANN., CRTS. & JUD. PROC. § 9-106; MICH. COMP. LAWS ANN. § 600.2162; MINN. STAT. ANN. § 595.02; NEB. REV. STAT. § 27-505; NEV. REV. STAT. 49.295; N.J. STAT. ANN. § 2A:84A -17; N.C. GEN. STAT. § 8-57; OHIO REV. CODE ANN. § 2945.42; OR. REV. STAT. § 40.255; 42 PA. CONS. STAT. § 5913; TEX. R. EVID. 504(B); VA. CODE ANN. § 19.2-271.2; WASH. REV. CODE ANN. § 5.60.060 (1); W. VA. CODE ANN. § 57-3-3; WYO. STAT. ANN. § 1-12-104. In Louisiana, Mississippi, and Utah, although the pertinent adverse testimonial privilege did not contain an express spousal crime exception, the courts created one by judicial decision. See *State v. Taylor*, 642 So.2d 160, 166 (La. 1994); *Stubbs v. State*, 441 So. 2d 1386 (Miss. 1983); *State v. Benson*, 712 P.2d 252 (Ut. 1985). In Louisiana a court may compel a spouse’s testimony in criminal case where the defendant is charged with a crime against the spouse and where there is evidence that the privilege is being exercised because of fear, threats or coercion. *Taylor*, 642 So.2d at 166.

husband in a domestic violence prosecution.²⁰⁶ Where the spousal crime exception applies, the adverse testimonial privilege is simply inapplicable. If the defendant holds the adverse testimonial privilege, he may not prevent the victim from testifying, and if the victim holds the privilege, she may not refuse to testify. Remarkably, however, four states and the District of Columbia still do not recognize any spousal crime exception to the marital adverse testimonial privilege.²⁰⁷ In Alabama, the District of Columbia, Georgia, Massachusetts, and Missouri domestic violence cases will be increasingly difficult to prove after *Crawford* unless there are third party witnesses to the battery.

Each of these five jurisdictions should immediately consider amending their adverse testimonial privilege statutes to include a spousal crimes exception. The purposes behind the adverse testimonial privilege—to preserve marital harmony and to prevent government intrusion on intimate relationships—is simply incompatible with situations where one spouse is charged with a crime against the other. There is very little left of marital harmony worth protecting under a utilitarian rationale.²⁰⁸ If one of the purposes of the adverse testimonial privilege is to respect societal norms of loyalty, the value of that loyalty should be dependent on the value of its object.²⁰⁹ As a society we should be prepared to make a strong statement that marital loyalty is no longer deserving of protection when one spouse physically abuses his partner. In terms of the humanistic rationale, while a civilized society may generally not wish to force a spouse to be an instrument of their partner’s demise, in circumstances where the witness has sought and benefited from the resources of police and the courts, society can reasonably expect her to follow through with testimony. Simply put, it is no more morally repugnant to force a witness to testify against a rapist when he is the husband of the victim than when he is a total stranger.²¹⁰ The law should treat these two situations similarly, and in both situations vest discretion for the prosecution in the state.

²⁰⁶ Many states have also enacted child abuse exceptions to their marital adverse testimony privileges, providing that a spouse witness may not refuse to testify in any criminal proceeding alleging that their marital partner abused a child of the relationship. See Milton C. Regan Jr., *Spousal Privilege and the Meaning of Marriage*, 81 VA. L. REV. 2045, 2052 (1995) (citing jurisdictions). The application of the marital privileges to criminal charges of child abuse is beyond the scope of this article.

²⁰⁷ ALA. CODE § 12-21-227; D.C. CODE ANN. § 14-306; GA. CODE ANN. § 24-9-23; MASS. GEN. LAWS ANN. CH. 233, § 20; MO. ANN. STAT. § 546.260.

²⁰⁸ *Trammel v. United States*, 445 U.S. 40, 52 n.12 (1980). “It is difficult to reconcile lofty ideals of marital harmony and privacy with the dysfunctional and violent relationships depicted in many of the cases in which the privileges are raised.” Frost, *supra* note 144, at 3. Moreover, in instrumental terms placing the option of whether or not to testify in the witness’s hands is probably more likely to lead to a strain on the marriage than when the option of whether to proceed rests with the government, because in the former situation the defendant’s “blame for the testimony is directed at the spouse, with certain disruption of the marriage.” Debbie S. Holmes, *Marital Privileges in the Criminal Context: The Need for a Victim Spouse Exception in the Texas Rule of Criminal Evidence 504*, 28 HOUSTON L. REV. 1095, 1109. Creating an exception to the marital privilege for domestic violence cases and transferring the power back to the prosecutor may free women from pressure, and thus protect them from further threat of physical harm.

²⁰⁹ See generally Regan, *supra* note 206, at 2114. Because the adverse testimonial privilege operates most commonly to preclude wives from testifying against their husbands, we “must confront the issue of whether the privilege serves to reinforce a traditional ethic of self-sacrifice for women within marriage.” *Id.* at 2051.

²¹⁰ “Those jurisdictions that refuse to give the prosecution the right to compel testimony in domestic violence cases the way they can in every other crime send an obvious message: When a man beats his wife

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Although less typical, the confidential communications privilege can also be a barrier to truth finding in domestic violence cases. Consider a situation where the defendant says to his spouse while he is beating her “I will never let you leave me. I would sooner kill you first.” In states which recognize the confidential communication privilege, even if victim wanted to testify against her batterer as to the facts of the abuse she may be prevented by the court from repeating these statements on the witness stand upon timely objection of the accused because both spouses generally hold this privilege.²¹¹ Or imagine a case where a beating occurs and the defendant calls the victim up on the telephone days or weeks after the incident, begging for forgiveness and promising never to harm the victim again. In some states the confidential communications privilege may prevent the victim from repeating this private conversation on the witness stand, notwithstanding that it contains an express admission of the accused.²¹²

While most states recognize a spousal crime exception for the confidential communications privilege, several do not. Georgia, New Hampshire, North Carolina, South Carolina, and West Virginia have confidential communications privileges with no spousal crimes exception.²¹³ In these five states, a witness may not be allowed to testify to a private conversation with their spouse/defendant, even if those conversations occur in the context of and/or promote a spousal battery (threats, entreaties, subsequent admissions of remorse, promises of improved behavior, etc.). This omission is particularly problematic, because in most states the defendant communicant is one holder of this privilege and may prevent his wife from testifying about the private conversation even if the wife wishes to reveal it. It is difficult to justify such a glaring omission on public policy grounds. Requiring a domestic violence victim to narrate the facts of abuse but preventing her from testifying about conversations with her abuser makes little sense when such conversations relate to the very facts which public policy dictates must be disclosed. The five states cited above should rethink the breadth of their marital confidential communication privileges and join the mainstream by enacting an express spousal crimes exception.

Many states exclude oral threats made by one spouse against another from the confidential communications privilege, treating such threats essentially as verbal acts rather than private conversations.²¹⁴ But such a judicial narrowing of the confidential

it is not a crime that offends the state—it is simply a private matter between the two of them.” Seymore, *supra* note 91, at 1036.

²¹¹ See *Commonwealth ex rel Platt v. Platt*, 404 A.2d 410 (Pa. Super. 1979) (wife not allowed to testify to substance of husband’s threats); *Sherry v. Moore*, 163 N.E.2d 906, 907 (1928) (statement by husband to wife that he “wished she were dead” was properly excluded under disqualification for confidential communications).

²¹² See *State v. Enriquez*, 609 A.2d 343, 344 (Md. Ct. Sp. App. 1992).

²¹³ GA. CODE ANN. § 24-9-21; N.H. R. EVID. 504; N.C. GEN. STAT. § 8-57(C); S.C. CODE ANN. § 19-11-30; W. VA. CODE ANN. § 57-3-4.

²¹⁴ See, e.g., *State v. Parent*, 836 So.2d 494, 504 (La. App. 2002) (holding threats are not confidential communications); *State v. Bryant*, 564 N.E.2d 709, 710-11 (Ohio App. 1988) (per curiam) (holding that the defendant could not assert privilege to preclude his wife’s testimony in kidnapping prosecution based on charge that he had taken his wife hostage against her will and threatened her life, even though kidnapping

communications privilege does not assure that *non*-threatening statements made by the defendant during or after an incident of domestic violence will be admitted in those states that have not enacted a spousal crimes exception. For example, statements by the defendant after his arrest begging his spouse for forgiveness, seeking reconciliation, or encouraging her not to press criminal charges are uniquely probative of guilt and helpful to the jury in understanding a cycle of abuse; however, they may not be admissible in states which have not enacted an express exception to the confidential communication privilege for cases alleging an inter-spousal crime.

Recognizing that there is little public interest in protecting such conversations, three states have by judicial decision interpreted a spousal crime exception into their confidential communication statute even though one was not expressly approved by the legislature.²¹⁵ For example, the New York Court of Appeals has held that the state confidential communication privilege does not apply if the communication is not “prompted by the affection, confidence and loyalty of the marital relationship.”²¹⁶ This New York decision was clearly results oriented. While some courts may find statements made by the defendant during or subsequent to domestic abuse to be outside the privilege because not conducive to marital harmony, a more principled basis for allowing testimony about such statements is that, although they may have been intended to be kept confidential when made, the public interest in disclosing them outweighs the couple’s interests in keeping them secret. This latter rationale involves a balancing of interests more appropriately undertaken by state legislatures in enacting spousal crimes exceptions to their privilege laws than for the courts in construing statutes otherwise clear on their face.²¹⁷

Even in states that have enacted spousal crime exceptions to both forms of the marital privilege, some of these exceptions are worded so narrowly that they do not allow for effective prosecution of domestic violence cases in a post *Crawford* world. The early common law exception to the marital privileges for crimes against the spouse applied only to crimes of violence against the person, such as assault, rape, and attempted

was not specifically listed as the exception under spousal privilege statute, since threats and acts of defendant were not "confidential communications" within purpose of statute); *Harris v. State*, 376 A.2d 1144 (Md. App. 1977) (holding that threats made by defendant while forcing his wife to reveal to him the location of the residence of the victim, with whom the wife had been carrying on a relationship, were not within the scope of the confidential communication privilege); *Commonwealth v. Gillis*, 263 N.E.2d 437, 439-440 (Mass. 1970) (threat by defendant that he would kill wife properly admissible).

²¹⁵ *Iowa v. Klindt*, 389 N.W.2d 670, 676 (Iowa 1986) (overruled on other grounds) (holding in case involving prosecution for crime committed against defendant’s spouse, the communication privilege is inapplicable); *People v. Mills*, 804 N.E.2d 392 (N.Y. 2003) (holding that “[c]ommunication or threats made during the course of physical abuse are not entitled to be cloaked in the privilege because the maker of the statement is not ‘relying upon any confidential relationship to preserve the secrecy of his acts and words.’”); *Commonwealth v. McBorrow*, 779 A.2d 509 (Pa. Super. 2001) (communication not privileged “if it is not imbued with an aura of a sharing disclosure precipitated largely due to the closeness spouses share.”).

²¹⁶ *Mills*, 804 N.E. 2d at 276.

²¹⁷ *See, e.g., Gillis*, 263 N.E.2d at 439-44 (holding that words preceding episode of abuse by eight days-- where wife informed husband that she wanted a divorce and husband responded that he would “kill her” -- were “not reasonably to be regarded as [a] ‘conversation’” within the statutory disqualification).

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murder.²¹⁸ A significant number of states still limit the spousal crime exception to crimes of violence.²¹⁹ Gradually the common law exception was expanded in some states to include crimes against both the person and the property of the spouse, which may be broad enough to include crimes such as arson or burglary but which may not encompass crimes such as violation of a restraining order or disturbing the peace.²²⁰ Narrowly worded spousal crimes exceptions reflect an uninformed view of what constitutes intimate partner abuse. Many instances of domestic abuse involve disturbing the peace, disorderly conduct, threats, stalking, forgery or unlawful possession of a firearm.²²¹ To avoid dismissal of these cases due to an assertion of privilege by the victim, manipulative and controlling criminal behavior not rising to level of a battery or a property crime should be included in the spousal crime exception.²²² The most workable formulations currently utilized by some states are to exempt from application of the marital privileges evidence of any crime “committed by one spouse against the other”²²³ or, even broader yet, any crime “growing out of a personal injury or wrong” to the other spouse.²²⁴ Such language provides prosecutors the appropriate leeway to craft appropriate charges in

²¹⁸ Seymore, *supra* note 91, at 1051. *See* Chamberlain v. State, 348 P.2d 280, 283 (Wy. 1960).

²¹⁹ *See, e.g.*, CONN. GEN. STAT. ANN. § 54-84a (“personal violence from the other”); IDAHO CODE ANN. § 19-3002 (“in cases of criminal violence upon one by the other”); MD. CODE ANN., CRTS. & JUD. PROC. § 9-106 (assault on other); 42 PA. CONS. STAT. § 5913 (bodily injury or violence caused or threatened); R.I. GEN. LAWS § 12-17-10.1 (limits exception to crimes of “assault, sexual assault, or abuse”). *Cf.* N.C. GEN. STAT. § 8-57 (limits exception to assault and trespass charges).

²²⁰ *See, e.g.*, AK. R. EVID. 505(a); KY. R. EVID. 504; NEB. REV. STAT. § 27-505; NEV. REV. STAT. 49.295; OR. REV. STAT. § 40.255. *See also* State v. Thornton, 119 Wash. 2d 578, 580 (1992) (discussing development of exception).

²²¹ *See* Seymore, *supra* note 82, at 270.

²²² *See* Renee L. Rold, *All States Should Adopt Spousal Privilege Exception Statutes*, 55 J. MO. B. 249, 251 (1999). For examples of domestic abuse allegations not considered to come within the pertinent state spousal crime exception, *see* Jackson v. State, 603 So.2d 670 (Fla. App. 1992) (holding marital privilege applied to wife's testimony that husband, who was charged with murder, called her from jail in attempt to get wife to change trial testimony and threatened to do bodily harm to wife, even though threatening witness is crime, since husband was not charged with that crime); Creech v. Commonwealth, 410 S.E.2d 650 (Va. 1991) (holding that spousal privilege was violated by defendant's wife's testimony that defendant had threatened to “torch” her property when she told him she was leaving him, where defendant was not charged for any offense against his wife, but was indicted and tried solely for arson of his house); Ohio City of Huron v. Bass No. E-90-29, 1991 WL 137009 (Ohio Ct. App. 1991) (disorderly conduct not a crime against the spouse); State v. Vaughan 118 S.W.2d 1186 (Mo. Ct. App. 1909) (disturbing the peace not included within spousal crime exception).

²²³ *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4062; CAL. EVID. CODE § 970; HAW. REV. STAT § 626-1; MINN. STAT. ANN. § 595.02; N.J. STAT. ANN. § 2A:84A-17; TEX. R. EVID. 504(B); WASH. REV. CODE ANN. § 5.60.060 (1); W. VA. CODE ANN. § 57-3-3; WYO. STAT. ANN. § 1-12-104. *See also* Chamberlain, 348 P.2d at 284 (exception worded as “crime committed by one against the other” was broad enough to include statutory rape of daughter, because that crime “caused a special wrong to the wife and has particularly and directly affected her in a manner other than that suffered by the public in general”). *Cf.* State v. Jansen, 108 P.3d 92, 93 (Or. 2005) (exception phrased as “offense or attempted offense against the person or property of the other spouse” broad enough to include crime of interference with making a report, based on allegations that defendant prevented his wife from making a 911 call during domestic dispute).

²²⁴ MICH. COMP. LAWS ANN. § 600.2162; *See* People v. Pohl, 507 N.W.2d 819 (Mich. 1993) (holding wife could testify against husband in prosecution for breaking and entering when husband's action interfered with wife's right of peaceful habitation, and was part of pattern of hostile behavior, such that it could constitute “personal wrong or injury” against wife within an exception to testimonial privilege statute for actions growing out of personal wrong or injury done by one to other spouse).

domestic violence cases based on the evidence and the probationary status of the accused, without concern that the available proof will be unnecessarily constrained by the charges selected.²²⁵ It also eliminates potential ambiguity and judicial discretion where the defendant is charged with multiple counts, only some of which allege violent crimes.²²⁶

Some may argue that spousal crimes exceptions to the marital privileges are unworkable and counterproductive. That is, forcing a victim to testify against her spouse will seldom yield any fruitful (and truthful) results, because the witness may simply lie or profess a lack of memory to the events in question.²²⁷ But prosecutors have the tools necessary to handle such situations when they occur, and use of these tools in many circumstances is preferable to dismissal of the case entirely. For example, the prosecutor can have the witness declared hostile and examine her as if on cross examination;²²⁸ the prosecutor can structure the examination in a way that highlights the witness's emotional and economic dependence on the defendant in order to make the case for psychological manipulation; and the prosecutor may be allowed to introduce expert testimony of battered women's syndrome to explain the sudden change of heart.²²⁹ Prosecutors can also impeach the victim with inconsistent statements made to others (sworn affidavits provided to police or casual oral statements made to friends and relatives).²³⁰ But most importantly, so long as the victim testifies at trial, contemporaneous oral statements made by the victim to police officers at the scene are admissible for substantive purposes to prove the abuse so long as they satisfy an exception to the state hearsay rule—whether or

²²⁵ For example, a prosecutor may choose to charge a misdemeanor count of disturbing the peace or violation of a restraining order if he or she feels that a felony charge of assault and battery is unnecessary to secure the custody and control of the defendant or to reflect the gravity of the offense.

²²⁶ A related question is whether a spouse should be compellable to testify in a case growing out of harm directed at her, but charging injury to a third party victim. *See, e.g.,* *Young v. State*, 603 SW 2d 851, 852 (Tex. Crim. App. 1980)(husband's act of driving into car containing wife and two others did not fit within the spousal crimes exception because the indictment did not allege injury to her); *Jenkins v. Commonwealth*, 250 S.E.2d 763, 765 (Va. 1979)(spousal crime exception did not apply, and wife could refuse to testify, where husband allegedly shot at wife but missed, killing third person). *Cf. Michigan v. Love*, 391 N.W. 2d 738, 754 (Mich. 1986)(wife could not be compelled to testify against husband in second degree murder case involving shooting of wife's lover, where defendant allegedly pistol whipped both wife and lover, shot lover, and then kidnapped wife, ruling that the assault on the wife grew out of the primary assault on the lover, rather than *visa versa*), *limited by* *People v. Warren*, 615 N.W. 2d 691, 696 (Mich. 2000)(declining to find temporal sequence relevant in determining whether attack on third party and attack on spouse grow out of same transaction). California and several other states have addressed this problem by including in their spousal crime exception "crimes against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse." *See* Cal Evid. Code 972(e)(2). *See also* Model Code of Evidence 216 (1942) and Uniform Rule of Evidence 28(2)(1974)(recommending similar language). Stone and Taylor suggest that the spousal crimes exception should apply even if the testimony concerns a crime against another, so long as that crime is part of same criminal transaction as the crime against the spouse. STONE AND TAYLOR, *supra* note 126 § 5.06 at 5-10.

²²⁷ Many domestic violence victims who choose (or are forced) to testify recant once they take the witness stand and face their alleged batterers. *See* Raeder, *supra* note 3, at 351.

²²⁸ *See* FED. R. EVID. 611(c).

²²⁹ *Commonwealth v. Goetzendanner*, 42 Mass. App. Ct. 637 (1997). *See* Lininger, *supra* note 2, at 812.

²³⁰ Cross examination with such prior inconsistent statements generally will not be considered to violate the hearsay bar because these statements are not offered for the truth of the matter asserted. *See* FED. R. EVID. 801(c).

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not they are considered “testimonial” under *Crawford*.²³¹ If the witness is on the stand testifying and recants or equivocates, the prosecutor can admit excited utterances made to responding officers at or near the time of the event, even if they are testimonial in nature.²³²

Still others may bristle at the unsettling possibility of jailing a battered woman for refusing to testify against her alleged abuser.²³³ After all, if the prosecutor has the legal right to force a victim to testify, the judicial sanction that might be invoked to give effect to this right is jailing a witness for contempt of court.²³⁴ Concerns about re-traumatizing domestic violence victims through contempt proceedings are legitimate,²³⁵ if not overstated.²³⁶ Two states have addressed this problem with novel adjustments to their statutes. For example, in California judges are only allowed to sentence a victim to up to 72 hours of battering counseling or up to 72 hours of community service for the first finding of contempt in a domestic violence prosecution.²³⁷ Only if the victim refuses to satisfy this condition, or again refuses to testify at the same proceeding after completing the program, may she be jailed her for contempt of court. In Maryland, a married victim in a domestic assault proceeding is required to take the stand and refuse to testify in front of the jury. For the first such refusal, the judge may excuse her from testifying on the grounds of the adverse testimonial privilege.²³⁸ But if the victim is called to testify at a second criminal proceeding against the same spouse, the spousal crime exception kicks in and the witness has no privilege not to testify.²³⁹ This novel “two strikes” approach to the spousal crimes exception--like California’s contempt statute--essentially assures that the witness will not be jailed upon her first refusal to testify. Each of these creative approaches are attempting to send the message that while society may condemn the witness’s choice not to testify, we are not going to punish this choice too severely because we sympathize with the substantial pressures that may lead to it.

Enactment of broad spousal crimes exceptions to the marital privileges does not mean that prosecutors will always force a victim to testify over her objections. The true value of these exceptions is not in the *exercise* of the power to compel (which might be

²³¹ “When the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” *Crawford v. Washington*, 541 U.S. 36, 59-60 n. 9 (citing *California v. Green*, 399 U.S. 149, 162 (1970)).

²³² Raeder, *supra* note 67, at 31. See *People v. Martinez*, 2005 WL 78550 (Cal. App. 2005).

²³³ Seymore, *supra* note 91, at 1072.

²³⁴ See *Ohio v. Karnes*, 1981 WL 5749 (Ohio App. 1981) (domestic violence victim properly jailed for contempt).

²³⁵ See Seymore, *supra* note 91, at 1072. Where the witness is the primary caregiver of children, the invocation of contempt sanctions may pose serious issues for child custody and protection.

²³⁶ A study of “no-drop” policies in San Diego found that in a five year period only eight arrest warrants were issued for domestic violence victims and only two witnesses were jailed overnight for contempt, out of roughly 400-500 domestic violence cases prosecuted monthly. Rold, *supra* note 222, at 251. A Texas Committee on domestic violence found no correlation between states with spousal violence exception to the adverse spousal testimonial privileges and the incidence of contempt charges or jailing of victims.

Seymore, *supra* note 82, at 258.

²³⁷ See CAL. CODE CIV. PRO. 1219(c).

²³⁸ MD. CODE CTS. & JUD. PRO. 9-106 (a).

²³⁹ *Id.*

used only in situations of last resort) but in the *ability* to do so. Prudent prosecutors will decide whether to compel a victim's testimony in domestic violence cases only after analyzing the factual nuances and circumstances of each particular case, taking into account not only the victim's wishes, but also the level of risk to the victim and her family, the danger to the public, the victim's mental and emotional stability, and the defendant's prior criminal record.²⁴⁰ The legal capacity to compel testimony in domestic violence prosecutions may in fact encourage more guilty pleas, a result which would end up being in the best interests of both the victim and the public.²⁴¹

VI. Conclusion

If the marital privileges were an impediment to domestic violence prosecutions in several states prior to the *Crawford* decision, they are now a major and often insurmountable obstacle. Sometimes a change in one area of the law brings to light a need for reform in related areas as well. State legislatures must wake up and give careful scrutiny to the wording and breadth of their marital privilege statutes, many of which are antiquated and poorly drafted. In a post-*Crawford* world, all domestic violence victims should be compellable to testify about the circumstances of their alleged abuse. Enacting domestic violence exceptions to both forms of the marital privilege will render more victims available to testify—a result that not only ensures defendants an opportunity to confront their accusers, but one that is also consonant with the interests of public safety.

Establishing the nature and scope of family privileges should not be a simplistic process that automatically favors certain intimate relationships over other societal values.²⁴² There are competing interests at stake—respect for and preservation of marriage on the one side, and needs of law enforcement and protection of public safety on the other. While policymakers may disagree on where precisely these lines should be drawn, most would likely concur that batterers should not be allowed to escape punishment for their conduct through disingenuous reliance on statutes designed primarily to promote marital peace. Domestic violence is a crime of control and manipulation.²⁴³ The amendments proposed in this article would remove any incentive that a defendant may have to blame and/or coerce the testifying spouse, and would place the responsibility for domestic violence prosecutions squarely with the state, where it belongs.

²⁴⁰ Hanna, *supra* note 70, at 1908–09. See King-Ries, *supra* note 81, at 305.

²⁴¹ See Seymore, *supra* note 91, at 1083. In most cases the defendants will agree to plead guilty because they know that with the victim's testimony the state will be able to proceed, and will likely win. Seymore, *supra* note 82, at 252 (quoting study in Houston that fifty percent of domestic violence cases were dismissed before a spousal crime exception to the marital privilege was enacted, but seventy percent of these cases were disposed thereafter).

²⁴² In re Grand Jury Subpoena, 849 N.E.2d 797, 805 (2006) (interpreting state adverse testimonial privilege statute to not apply to grand jury proceedings).

²⁴³ Nelson *et al.*, *supra* note 64, at 29.