

Domestic Violence, Child Abuse, and Trustworthiness Exceptions After *Crawford*

by Myrna S. Raeder

C*rawford's* fallout is being felt throughout the criminal justice system, but it has had a unique impact on domestic violence, child abuse, and elder abuse cases where absent victims and witnesses had become commonplace. For 25 years, *Ohio v. Roberts*, 448 U.S. 56 (1980), permitted the admission of trustworthy hearsay of unavailable declarants. Under *Roberts*, Confrontation Clause challenges could be won simply by showing that the out-of-court statement of the absent witness fit a “firmly rooted” hearsay exception or demonstrated “particularized guarantees of trustworthiness.” The opportunity for previous cross-examination did not matter.

As a result, prosecutors in domestic violence cases realized that they did not need to rely on the testimony of victims, typically female, many who refused to cooperate and often recanted their allegations at trial. Instead, they developed an approach known somewhat misleadingly as “evidence-based” or “victimless” prosecutions. In such cases, the government would introduce the woman’s cries for help made on 911 calls, or police officers would testify to her excited utterances at the scene and show pictures of her bruises, while health care providers would also testify to her statements as well as introduce her medical records. California and Oregon even adopted specific domestic violence hearsay exceptions to permit other trustworthy statements, and a bare majority of states turned to their version of Federal Rule of Evidence 807, known informally as the residual or catchall exception, to admit trustworthy hearsay ranging from diaries to previous threats. This evidence was presented together with prior acts of domestic violence offered under state versions of Rule 404(b) or domestic violence exceptions. On occasion, an expert on Battered Woman’s Syndrome would explain why the woman stayed with the batterer or had recanted her accusatory statements, thereby rehabilitating the credibility of the victim who had testified or whose hearsay had been impeached by her prior inconsistent statements.

Legislators also became emboldened by *Roberts* to enact specific child hearsay elder abuse exceptions based on trustworthiness to increase the likelihood of convictions

in cases where witnesses could not testify due to incompetency or trauma. As with domestic violence complainants, even when they testified, they were subject to stinging credibility attacks, based on their recantations or other inconsistencies in their testimony, their faulty memories, and/or charges that they were manipulated by their families, caregivers, or law enforcement. In addition, federal and state general catchall exceptions covered all manner of their ad hoc statements considered trustworthy.

Although the rationale for adopting such exceptions has been undermined by *Crawford*, because very few are written in such a way as to render them unconstitutional in all circumstances, their application in a particular case will depend on whether the specific hearsay is “testimonial,” and, if so, whether or not the declarant testifies at or prior to trial, unless the right to confrontation has been forfeited. Even if *Crawford* is not violated, the question remains whether any reliability test applies before the hearsay can be admitted. Most cases appear to apply the *Roberts* progeny to nontestimonial hearsay. (See, e.g., *United States v. McClain*, 377 F.3d 219 (2d Cir. 2004); *Evans v. Luebbers*, 371 F.3d 438 (8th Cir. 2004); *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004); *State v. Rivera*, 268 Conn. 351, 844 A.2d 191 (2004); *Demons v. State*, 277 Ga. 724, 595 S.E.2d 76 (2004); *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004).) Thus, catchalls and other ad hoc exceptions are scrutinized for particularized indicia of trustworthiness. (See, e.g., *People v. Garrison*, 2004 WL 2278287 (Colo. App. 2004).)

Pre-*Crawford*, particularly in domestic violence cases, the witness lite/hearsay heavy approach appeared to result in a discernable increase in convictions, helped along by the creation of domestic violence courts in urban areas to which prosecutors were specifically assigned. (See generally Phyllis Goldfarb, *Intimacy and Injury: How Law Has Changed for Battered Women*, in *THE HANDBOOK OF WOMEN, PSYCHOLOGY, AND THE LAW* (Andrea Barnes, ed. 2005).) In contrast, post-*Crawford*, prosecutors have had to return to square one to determine whether they can win an individual case if the witness does not testify, as well

as how to combat the inevitable credibility attack if she does. In the wake of *Crawford*, a number of cases were reversed where testimonial hearsay had been introduced. News reports indicated nearly 50 percent of domestic violence cases were being dropped in some jurisdictions. Coupled with estimates that up to 80 percent of victims are noncooperative, it is no surprise that a recent survey of prosecutors found that they are having significant difficulties winning domestic violence cases after *Crawford*. (See generally Tom Lininger, *Prosecuting Batterers after Crawford*, 91 VA. L. REV. 102 (May 2005).)

Undoubtedly, the nascent movement to increase elder abuse prosecution has also been impacted. For example, a California exception admitting a videotaped hearsay statement made by an unavailable elderly or dependent adult to a law enforcement official was held unconstitutional in *People v. Pirwani*, 14 Cal. Rptr. 3d 673 (Cal. App. 6 Dist. 2004). Delaware, Oregon, and Illinois have also enacted elder abuse exceptions, but they apply more broadly than California's, so do not appear to be unconstitutional in all circumstances. However, unavailability due to death or other inability to testify is a significant issue for this population. Although a number of child abuse convictions and a few child hearsay exceptions have fallen by the wayside after *Crawford*, the growing consensus is that *Crawford* will not dramatically lower the number of such cases taken to trial because the reality is that few prosecutors are willing to try such cases in the absence of the child. In other words, in many cases the testimonial hearsay is introduced in addition to, not in lieu of, the child's testimony.

What does *Crawford* require?

Crawford was the judicial equivalent of a double whammy. First, it destroyed the existing *Roberts* framework for analyzing Confrontation Clause challenges, and, second, it failed to provide explicit instructions as to what to substitute in its place. The *Crawford* standard is deceptively simple: Introduction of an out-of-court "testimonial" statement made by a person who does not testify at trial violates the defendant's right to confrontation in the absence of a prior opportunity for cross-examination, unless the defendant's conduct has forfeited this claim. However, the Court provided no clear definition as to what is "testimonial," left

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open whether nontestimonial hearsay is still governed by *Roberts* or can be freely introduced, and did not develop the doctrine of forfeiture. Undoubtedly, the vagueness was required in order to obtain a majority. Justice Scalia's opinion promises something for everyone, with examples that can be cited in favor of a narrow or broad interpretation of testimonial depending on the litigant's perspective.

Prosecutors can argue that testimonial statements should be viewed narrowly to affect the fewest cases by pointing to the following formulations noted by Justice Scalia: 1) "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," 541 U.S. at 51, quoting Brief for Petitioner 23; and 2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," 541 U.S. at 52, citing *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

Conversely, defense counsel can cite the following broad definition also mentioned by Justice Scalia, which would affect the greatest number of cases: "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." (541 U.S. at 52, quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae*.) Justice Scalia also recognized that "[i]nvolvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace. In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." (*Id.* at 53.) Moreover, *Crawford* indicates that interrogation was being used in its colloquial sense, and that while various definitions of interrogation might be offered, the declarant's "recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." (*Id.*, n.4, 53.) Similarly, "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." (*Id.* at 52.)

Even under the narrowest definition, some statements made to private individuals are likely to be considered testimonial. The statement would be testimonial, for example, if a person is acting as an agent or proxy for the government, which might occur in mandatory reporting contexts in child abuse or domestic violence cases, or where a child welfare agency joins with the prosecution to investigate child abuse cases. Some may view *Idaho v.*

Wright, 497 U.S. 805, 820-24 (1990), as such a case. (See Margaret Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 603-04 (1992).) In *Wright*, a doctor who was selected by law enforcement, arguably to develop testimony in the criminal case, questioned a child who was believed to be sexually abused. The child did not testify, and her hearsay was admitted under a state catchall exception. Professor Berger has pointed out that the solicitor general admitted that the questioning in *Wright* was by an agent of the prosecution in his amicus brief in *White v. Illinois*. (Brief for the United States as Amicus Curiae Supporting Respondent at 28 n.18.)

This interpretation of *Wright* will likely be argued by prosecutors for the proposition that a *Roberts* reliability analysis is not required for nontestimonial hearsay. In other words, because *Wright's* holding, reversing the defendant's conviction as a violation of the Confrontation Clause, was not specifically overruled by *Crawford*, the defense can point to *Wright* as a case where the introduction of nontestimonial hearsay (the child's statement to a doctor) resulted in a reversal. Because *Wright's* holding is still valid, the decision must have rested on a finding of unreliability under *Roberts*. However, if *Wright* is recharacterized as involving testimonial hearsay, the rationale for its holding that hearsay introduced under ad hoc exceptions must be subject to a separate reliability review could be rejected without having to overrule the case. While such an approach would expand the range of testimonial statements, particularly in child hearsay cases, it would leave the prosecution free to argue that no reliability review is required for any nontestimonial hearsay, regardless of whether such hearsay is admitted under an ad hoc or firmly rooted exception.

I have long argued that all nontraditional hearsay should be subject to a reliability check, regardless of which exception it was admitted under. In other words, expansive interpretations of firmly rooted exceptions, such as excited utterances, should not obtain an automatic pass, even under a *Roberts* analysis. (See *White's Effect on the Right to Confront One's Accuser*, 7 CRIM. JUST. 2 (Winter, 1993); *Hot Topics in Confrontation Clause Cases and Creating a More Workable Confrontation Clause Framework Without Starting Over*, 21 QUINNIPIAC L. REV. 1013 (2003).) However, like Professor Taslitz, I agree that, post-*Crawford*, such an approach appears to be grounded in due process concerns, rather than the Confrontation Clause. (See Andrew Taslitz article on page 38.)

Post-*Crawford* issues in domestic violence cases

Domestic violence cases will not fade away. Their numbers are simply too large to be ignored, even recog-

nizing that substantial decreases in such violence has occurred in the recent past. Nearly 590,000 nonfatal acts of violence were estimated to have been committed against women in 2001, and approximately 1,250 women were killed by an intimate partner in 2000. (See Callie Marie Rennison, "Intimate Partner Violence, 1993-2001" (BJS Crime Data brief, February 2003).) According to the 2000 National Violence Against Women Survey, 25 percent of women and 8 percent of men are subject to violence by an intimate during their lifetimes. Thus, the post-*Crawford* challenge is how long it will take courts to develop a framework for analyzing the testimonial status of the most frequently used types of hearsay to give some predictability to lawyers trying these types of cases in the absence of the complainant. It is disappointing that the Supreme Court has not yet taken a case in which it could clarify these issues. One year after *Crawford* uniformity is nowhere to be found, although some trends are emerging.

Excited utterances

The bulk of hearsay in domestic violence cases is offered as excited utterances. Several general categories exist and have been treated somewhat differently: 1) statements made in person to police officers arriving at the scene; 2) statements made in person to police officers as a result of questioning either at the scene or later; 3) statements made in 911 calls; and 4) statements made to private individuals.

Statements to police officers

Some cases have favored automatic categorization of excited utterances as nontestimonial, arguing that it is a contradiction to consider excited utterances to be testimonial. This approach, which ignores the context in which statement was made, was first suggested in *People v. Moscat*, 3 Misc. 3d 739, 777 N.Y.S.2d 875 (2004), an early post-*Crawford* 911 case that has become influential. *Hammon v. State*, 809 N.E.2d 945, 952-53 (Ind. Ct. App. 2004), clearly expresses this reasoning:

[T]he very concept of an "excited utterance" is such that it is difficult to perceive how such a statement could ever be "testimonial." The underlying rationale of the excited utterance exception is that such a declaration from one who has recently suffered an overpowering experience is likely to be truthful. To be admissible, an excited utterance must be unrehearsed and made while still under the stress of excitement from the starting event. The heart of the inquiry is whether the declarants had the time for reflection and deliberation. An unrehearsed statement made without time for reflection or deliberation, as required to be

an excited utterance, is not “testimonial” in that such a statement, by definition, has not been made in contemplation of its use in a future trial. (internal quotations and citations omitted).

(See also *Fowler v. State*, 809 N.E.2d 960, 962 (Ind. Ct. App. 2004); *State v. Anderson*, 2005 WL 171441 (Tenn. Crim. App. 2005); *People v. Spade*, 2005 WL 240867 (Cal. App. 1 Dist. 2005) (unpublished); *State v. Cannaday*, 2005 WL 736583 (Ohio App. 10 Dist. 2005), expands this view even further, finding *Crawford* does not apply to “common-law exceptions to the hearsay rule, such as excited utterances.”)

In contrast, other courts prefer a case-by-case approach to excited utterances, which appears doctrinally to be the better reasoned approach. For example, *Com. v. Gray*, 867 A. 2d 560 (Pa. Super. Ct. 2005), specifically held that excited utterances could not be excluded automatically from confrontation review. *Gray* relies on *Lopez v. State*, 888 So. 2d 693 (Fla. Dist. Ct. App. 2004), which held that a statement does not lose its character as testimonial merely because the declarant was excited at the time it was made. *Lopez* also noted that while excited utterances are likely to be reliable, “under *Crawford*, reliability has no bearing on whether a statement was testimonial. Some testimonial statements are reliable and others are not.” *Lopez* reasoned “a startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect. In this situation, the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made.” Similarly, *Stancil v. United States*, 866 A.2d 799 (D.C. 2005), also refused to “automatically” exclude all excited utterances from the class of testimonial statements following the rationale in *Lopez*.

It should be noted that applying a case-by-case approach does not necessarily dictate how the court will rule in an individual case, raising the same unpredictability problems that Justice Scalia branded as the reason why *Roberts* failed to protect core Confrontation Clause values. For example, *Gray* held that volunteered statements made to obtain assistance are not testimonial. Similarly, *Stancil* rejected a broad view that any statements to police were testimonial, saying “it is unlikely that the Court intended the term to embrace contacts with the police that do not amount to interrogations.” However, *Stancil* attempted to chart a middle course that treats as testimonial “a declarant’s knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial pro-

ceedings.” Thus, under *Stancil*, police responding to emergency calls, securing the scene, and preliminary questioning to determine what happened is viewed as nontestimonial in contrast to structured questioning of victims or witnesses to a crime after the emergency has passed. Similarly, *People v. King*, 2005 WL 170727 (Colo. App. 2005), recently opined that almost all cases have concluded initial statements volunteered by excited declarants are not testimonial.

In contrast, there are mixed findings as to the status of field investigations. (Compare *Stancil*, *Lopez*, and *Moody v. State*, 594 S.E.2d 350 (Ga. 2004) (interrogation included the field investigation of witnesses by police shortly after the commission of a crime in a case where a jealous boyfriend kills the woman he has sexual relationship with) and *Pitts v. State*, 2005 WL 127049 (Ga. App. 2005) (statements made to deputies after they arrested defendant at scene were testimonial) with *Davis v. State*, 2005 WL 183141 (Tex. App. Fort Worth 2005) (unpublished) (nontestimonial where wife voluntarily made 911 call after discovering the body and voluntarily informed police officer who came to interview her of the statements that her common law husband made to her), *People v. Compton*, 2005 WL 236841 (Cal. App. 2 Dist 2005) (unpublished) (statements to officer at crime scene and hospital nontestimonial) and *People v. Mackey*, 785 N.Y.S.2d 870 (N.Y. Crim. Ct. 2004) (preliminary field investigations lacks the requisite formality to constitute a police interrogation).)

Any approach that requires discerning the intent of the declarant is likely to prove difficult to administer or result in the categorical exclusion of excited utterances. For example, *Fowler* concluded that the classification of a statement as an excited utterance supports the conclusion that the statement is nontestimonial in nature because it was made under the stress of the event, not with intent or knowledge that the statement might later be used at trial. However, given that in many states, excited utterances are interpreted expansively, as *Stancil* indicates, mere excitement does not predict the declarant’s state of mind. Moreover, since the declarant will always be absent at trial, it will be difficult to assess his or her subjective intent, unless we have other witnesses or the declarant’s own statements at a later time. If we were to view his or her subjective intent from the perspective of an objective declarant in those circumstances, we would still need the context, or the result would likely be to consider such statements as nontestimonial, when in fact some of them bear witness against the accused.

Lack of formality

Sometimes, lack of formality is also mentioned as why such statements are not testimonial. For example, *People*

v. *Corella*, 122 Cal. App. 4th 461 (Cal. App. 2 Dist. 2004), reasoned that *Crawford* only applied to police interrogations made as part of “a relatively formal investigation where a trial is contemplated.” *People v. Compton*, 2005 WL 236841 (Cal. App. 2 Dist. 2005) (unpublished), noted that the victim had just been shot, and the police were trying to learn the circumstances of the shooting. “No suspect was under arrest, and the police had not yet determined whether a crime had been committed. The interviews with Shufford were not recorded, and there was no ‘structured police questioning.’” In contrast, *Stancil*, *supra*, rejected a formality requirement, relying on *Crawford*’s discussion that suggested interrogation included any questioning in a structured environment, meaning that an excited utterance made to an officer at the scene could be testimonial.

A few courts seem to suggest formality is a requirement, rather than an indicator, but this would appear foreclosed under any but the narrowest *Crawford* definitions. (See, e.g., *People v. Cage*, 15 Cal. Rptr. 3d 846, 856-57 (Cal. Ct. App. 2004), *review granted*, 99 P.3d 2 (Cal. Oct. 13, 2004).) *Cage* held a 15-year-old child’s statement to a police officer at a hospital was not testimonial because:

We cannot believe that the framers would have seen a “striking resemblance”

between Deputy Mullin’s interview with John at the hospital and a justice of the peace’s pretrial examination. There was no particular formality to the proceedings. Deputy Mullin was still trying to determine whether a crime had been committed and, if so, by whom. No suspect was under arrest; no trial was contemplated. Deputy Mullin did not summon John to a courtroom or a station house; he sought him out, at a neutral, public place. There was no “structured questioning,” just an open-ended invitation for John to tell his story. The interview was not recorded. There is no evidence that Deputy Mullin even so much as recorded it later in a police report. Police questioning is not necessarily police interrogation. When people refer to a “police interrogation,” however colloquially, they have in mind something far more formal and focused.

911 calls

Numerous cases have held that 911 calls are nontestimonial because they are victim initiated, and the inten-

tion of the citizen is to be rescued. The call is viewed as part of the incident in progress, providing the declarant with no time for contemplation: *People v. Moscat*, 3 Misc. 3d 739, 777 N.Y.S.2d 875 (2004), probably the most influential 911 case, characterized such calls as “the electronically augmented equivalent of a loud cry for help. The Confrontation Clause was not directed at such a cry.” *Fowler v. State*, 809 N.E.2d 960 (Ind. Ct. App. 2004) (*transfer granted* Dec. 9, 2004), noted that *Crawford* limited to police “interrogation,” not all police questioning, and concluded that the victim’s statement was nontestimonial because it was not given in a formal setting, was not given during any type of pretrial hearing or deposition, was not contained within a formalized document, and questioning at the scene did not qualify as a classic police interrogation. In *Pitts v. State*, 2005 WL 127049 (Ga. App. 2005), the statements were viewed as not made for the purpose of establishing or proving a fact regarding some past event, but for the purpose of preventing or stopping a crime as it was actually occurring. The caller was requesting that police come to her home to remove Pitts, who she said had broken into her house. Similarly, *State v. Wright*, 686 N.W.2d 295, 302 (Minn. App. 2004), *review granted* (Minn. Nov. 23, 2004), held statements made during a 911 call were not tes-

timonial because the caller wants protection from an immediate danger. (See also Andrew J. King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?* 28 SEATTLE U. L. REV. 301 (2005), arguing for broad admission of 911 calls and preliminary statements to the police.)

In contrast, *People v. Cortes*, 781 N.Y.S.2d 401 (S. Ct. Bronx Co. N.Y. 2004), concluded that 911 calls are testimonial, based on a number of factors: the police prepare the public to use 911 to report crimes; information is given on what to report, operators use protocols for obtaining information, and calls are recorded and preserved. In other words, regardless of what the caller believes, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding. (*Id.* at 414.) The technology even permits the operator to see the telephone number if a land line is used. Judge Bamberger conducted a thorough historical review to bolster her conclusions. Ironically, this case has not received the same degree of attention as has *Moscat*. Many 911 decisions do not mention or try to distinguish it, possibly viewing it based on a unique

Preliminary questioning is viewed as nontestimonial.

911 system or New York constitutional law. However, the federal constitutional analysis has general application, and most of the significant features of 911 systems nationwide have substantial similarity. While *Cortes* concerned a witness to a crime, rather than a victim, that should not be the controlling factor in determining the admissibility of a 911 call. (See also *State v. Powers*, 99 P.3d 1262 (Wash. App. Div. 2 2004), finding a call testimonial where its purpose was to report a crime, and was not a call for help.) Ironically, *Wright, supra*, argued that “there is a cloak of anonymity surrounding 911 calls that encourages citizens to make emergency calls and not fear repercussion” as favoring its nontestimonial status, but this rationale can easily be turned around to argue that this would liken the use of calls at trial to anonymous accusers in a Star Chamber proceeding. For a review of all cases involving police officers and 911 calls, see *State v. Davis*, 2005 WL 708598 (S.C. App. 2005).

Ultimately, my view is that the prosecutorial aspects of 911 calls are such that only the initial cry for help should be considered nontestimonial. In other words, because 911 calls have a dual purpose—obtaining help and initiating a criminal investigation of the crime—the calls must be parsed depending on their function. Therefore, the identity of the perpetrator or any information obtained as a result of questioning by the 911 operator would be viewed as testimonial, while information about the nature of the injury would not. This type of approach has been used in other hearsay contexts, most analogously in declarations against penal interest, where *Williamson v. United States*, 512 U.S. 594 (1994), requires each statement in a narrative to be viewed separately to determine whether it is dis-serving or self-serving. *People v. West*, 823 N.E.2d 82 (Ill. App.1 Dist. 2005), comes close to this approach, holding a rape victim’s statements to a 911 dispatcher concerning the nature of the alleged attack, the victim’s medical needs, and her age and location were not testimonial, but her statements to the dispatcher that described her vehicle, the direction in which her assailants fled, and the items of personal property they took were testimonial.

Statements to private individuals

Whether introduced in domestic violence or other types of cases, the decisions are virtually unanimous in hold that statements made to private individuals are not testimonial. (See generally *Davis*, summarizing the case law.) The

only wrinkle appears to be in child abuse cases, which will be discussed below.

Statements for medical diagnosis

This category of hearsay is relied upon heavily in both domestic violence and child abuse cases. The key issue is whether identifying the perpetrator is testimonial. *West* also took a nuanced approach to this issue, finding statements made to doctors regarding the nature of the alleged attack, and the cause of her symptoms and pain nontestimonial, but rejecting as testimonial, statements of fault or identity, because they implicate the core concerns protected by the Confrontation Clause. In contrast, other cases view all statements within Rule 803(4) as not testimonial. Indeed, the complainant’s use of a specialized health care facility designed to provide expert care to victims of violent sexual assault, where she gave a statement identifying the perpetrator, did not render the nurse’s testimony testimonial in *State v. Stahl*, 2005 WL 602687 (Ohio App. 9 Dist. 2005).

To the extent that the doctor has a reporting duty in domestic violence cases, which occurs in a few jurisdictions, the argument can be made that any statement is testimonial, either because the doctor is an agent of the police

or because an objective witness would view the statements as available for prosecution. In addition, if a doctor adopts the protocols suggested to aid health care providers to “help victims” by selecting what to record and implicitly what to ask, and how to record the statements, it is also arguable that the resulting recording of victims’ statements becomes testimonial. (See, e.g., Nancy E. Issac and V. Pualani Enos, *Documenting Domestic Violence: How Health Care Providers Can Help Victims* (National Institute of Justice Research in Brief, Sept. 2001).)

Ad hoc hearsay exceptions

California and Oregon have ad hoc hearsay exceptions directed towards domestic violence victims. For example, California Evidence Code § 1370 provides an exception for statements that narrate, describe, or explain the infliction or threat of physical injury upon the declarant, which were made at or near the time of the incident by a declarant who is unavailable at trial. Although it reaches beyond domestic violence, the section was enacted as a reaction to the *O.J. Simpson* case, and has been applied

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primarily in the domestic violence context. Oregon's statute permits statements made up to 24 hours after the incident. (Or. 803(26).) Both require the statement be made to specific categories of individuals, such as law enforcement or other governmental or medical personnel, unless in writing. To the extent that a statute has no application, other than to create a testimonial statement, it will not survive a constitutional challenge. However, Oregon's exception also applies to statements made by testifying declarants, and both apply to written or trustworthy statements that are arguably nontestimonial. Thus, *People v. Compton*, 2005 WL 236841 (Cal. App. 2 Dist. 2005) (unpublished), held that section 1370 is not unconstitutional since it is not invalid under every construction post-*Crawford*. Reversals have occurred in several section 1370 domestic violence cases involving statements to police. (See, e.g., *People v. Pantoja*, 122 Cal. App. 4th 1, 18 Cal. Rptr. 3d 492 (Cal. App. 1 Dist. 2004); *People v. Zarazua*, 2004 WL 837914 (Cal. App. 6 Dist. 2004) (unpublished).)

In addition, the typical Rule 807 catchall would also apply in a number of domestic violence settings, and has been used to admit diary entries. Determining what is testimonial when the statement is not made in a law enforcement context will be key. For example, many women's advocates tell domestic violence victims

to keep a diary so that if anything happens, their voices will be heard. While even in a reliability framework, some of these diaries were questioned as being self-serving if child custody or alimony was a consideration, such knowledge could also be argued as making the diary testimonial admissible only if a forfeiture rationale applies.

After *Crawford*, ad hoc hearsay exceptions for recorded victim statements to police will still provide necessary evidence to convict when the domestic violence complainant testifies, particularly if she recants. For the confrontation analysis, it does not matter that the victim recants at trial, or what exception the hearsay is admitted under, so long as she testifies and is subject to cross-examination, since confrontation is satisfied if the jury is able "to assess her demeanor as she attempted to deny or explain away the prior statements." (*People v. Martinez*, 2005 WL 78550 (Cal. App. 3 Dist 2005).)

Prior ability to cross-examine unavailable declarants

Crawford permits testimonial statements of unavailable declarants, if the defendant had a "prior opportunity

for cross-examination." The traditional ways of satisfying this standard are through testimony at a prior trial or preliminary hearing in the same case. In Florida, where defendants can take either a discovery or a preservation of testimony deposition, conflict has arisen about whether the discovery deposition satisfies confrontation in the absence of the declarant at trial. Compare *Lopez*, 888 So. 2d at 701, finding a confrontation violation, with *Blanton v. State*, 880 So. 2d 798, 801 (Fla. 5th DCA 2004), finding no violation where the defendant did not introduce the discovery deposition at all at trial, and could have requested a deposition to perpetuate testimony. It should come as no surprise that the charges in these cases related to domestic violence and child abuse. There has been some discussion about a statutory amendment in Florida to satisfy *Crawford*. Similarly, *People v. Fry*, 92 P.3d 970 (Colo. 2004) held that because preliminary hearings in Colorado do not present an adequate opportunity for cross-examination, such tes-

timony violated *Crawford* when introduced at trial. In contrast, other courts have viewed cross-examination at a probable cause hearing as sufficient. (See, e.g., *People v. Hernandez*, 2005 WL 562807 (Mich. App. 2005); *State v. Crocker*, 852 A.2d 762 (Conn. App. 2004).) *Blanton* might also be read to shift the burden to the defendant to call

the declarant. However, most courts appear to be rejecting this approach. (See, e.g., *State v. Cox*, 876 So. 2d 932 (La. Ct. App. 2004).)

Even when full cross-examination has occurred pre-trial, this has not ensured admission in the absence of the declarant. *State v. Hale*, 2005 WL 147123 (Wis. 2005) found a Confrontation Clause violation when evidence was admitted as prior testimony that was cross-examined by a codefendant at a separate trial. In other words, this very defendant must cross-examine the declarant. While this result appears harsh, it accords with the limitation that prior testimony is limited to cases in which the defendant has previously cross-examined the witness. Recently, the catchall has expanded the introduction of prior testimony beyond its historic confines. As a matter of constitutional dimension, if states can expand their hearsay exceptions, it appears highly ritualistic to argue that the testimony should be lost when a person with the same motive and opportunity as the defendant was the cross-examiner.

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diary entries.

Waiver of confrontation

Post-*Crawford*, it appears that defendants can still waive their right to confrontation by not raising the issue at trial, by opening the door, or as a result of trial strategy. Similarly, the doctrine of harmless error has not been affected by *Crawford*. In domestic violence cases, opening the door is often significant to introduce statements of a decedent that demonstrate her state of mind. Such statements are otherwise typically inadmissible because her state of mind is not relevant to any issue at trial. (See generally Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. LAW REV. 1463, 1506-11 (1996).) However, when the defense claims the decedent committed suicide, or her death was accidental or a result of self-defense, it opens the door to the declarant's state of mind. A few post-*Crawford* cases have applied this doctrine to testimonial statements. (See, e.g., *Le v. State*, 2005 WL 487443 (Miss. 2005); *People v. McMillian*, 2004 WL 979701 (Mich. App. 2004).) *People v. Ko*, 789 N.Y.S.2d 43, 45 (N.Y.A.D. 1 Dep't 2005), applied this doctrine in a domestic homicide setting, noting that "[a] contrary holding would allow a defendant to mislead the jury by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context."

Forfeiture in domestic violence cases

Crawford specifically referenced *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879) for the proposition that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability." (541 U.S. at 61.) Some prosecutors are already arguing that domestic violence cases by their nature involve forfeiture when the victim does not testify. They claim that invariably the defendant either actually threatens the complainant or, given the circumstances of the relationship, she is afraid that her testimony will cause further violence. While forfeiture is likely to be a factor in a number of domestic violence cases, and prosecutors are correct to worry that the testimonial approach gives defendant more incentive to keep women from testifying, forfeiture cannot be assumed without specific evidence linking the defendant to the witness's failure to testify in cases where the victim is alive, since there are so many potential causes for her absence at trial.

It is unclear how broadly *Reynolds* will be interpreted, since the actual case involved both witness tampering and a declarant who had been previously cross-examined. Several courts have applied the doctrine to admit state-

ments of murdered victims, where witness tampering is not involved. (See *People v. Taylor*, 2005 WL 715973 (Cal. App. 1 Dist. 2005) (unpublished) (summarizing case law).) For example, in *United States v. Garcia-Meza*, 2005 WL 756563 (6th Cir. 2005), where the defendant was charged with stabbing his wife to death, the Court specifically noted that the federal forfeiture hearsay exception's requirement that the defendant intended to prevent the witness from testifying did not control the constitutional analysis of forfeiture. It should be noted that in most domestic violence murder cases the doctrine is being used constitutionally to overcome the testimonial bar rather than to provide a hearsay exception, since forfeiture hearsay exceptions are generally limited to witness tampering. In other words, some other exception, such as excited utterance or a catchall ensures the reliability of the statement. For example, in *People v. Moore*, 2004 WL 1690247 (Colo. App. 2004), a domestic violence homicide case, the decedent's statement was admitted as an excited utterance to a police officer. The court found that the victim's unavailability to testify was because of her death and that her death was the result of defendant's action, forfeiting his right to claim a confrontation violation. The California Supreme Court has granted review to determine whether a defendant forfeited his Confrontation Clause claim regarding admission of the victim's prior statements concerning an incident of domestic violence because defendant killed the victim, thus rendering her unavailable to testify at trial, and whether the doctrine applies where the alleged "wrongdoing" is the same as the offense for which defendant was on trial. (*People v. Giles*, 102 P.3d 930 (Cal. 2004).) The statement in *Giles* was admitted under EC § 1370, a trustworthiness exception enacted in the wake of the *O.J. Simpson* case.

Undoubtedly, in cases involving battered rather than dead victims, prosecutors will need to expend resources to obtain evidence of forfeiture, such as sending out an advocate or officer to talk to the woman or talking to neighbors who may have information. Adam Krischer has provided a number of ways to obtain evidence to support forfeiture. ("*Though Justice May Be Blind, It Is Not Stupid*": *Applying Common Sense to Crawford v. Washington in Domestic Violence Cases*, 38 PROSECUTOR 14 (Dec. 2004).) He suggests subpoenaing phone records from jail, obtaining voice mail messages, e-mail, or Caller ID logs indicating large numbers of calls. However, it is unlikely that such resources would be available in misdemeanor cases, although valuable in felonies, not only to show forfeiture, but also to explain why a testifying complainant recants at trial. For example, *People v. Martinez*, 23 Cal. Rptr. 3d 508, 513 (Cal. App. 3 Dist. 2005), noted the admission of a tape and transcript of the victim's conver-

sation with the defendant and her son-in-law during a jail visit after the preliminary hearing in which her son-in-law said the two of them would have to “get a story going and . . . make sure it sounds right.”

Hammon v. State, 809 N.E.2d 945 (Ind. App. 2004) recognized the difficulty of providing evidence of forfeiture. It questioned the definition of “wrongdoing” by a defendant, asking if another battery was required, or whether psychological pressure on a victim not to cooperate is enough, and, if so, how is such pressure to be measured? It would seem that psychological pressure should be sufficient, since that is how the defendant maintains control of the battered woman and is a recognized feature of the cycle of violence and the Battered Woman’s Syndrome. (See generally Myrna S. Raeder, *The Double Edged Sword: The Admissibility of Battered Woman Syndrome Evidence By and Against Batterers in Domestic Violence Related Cases*, 67 U. COLO. L. REV. 789 (1996).) Such pressures often result in a victim’s lack of cooperation. Thus, in determining forfeiture, evidence that a woman suffers from post-traumatic stress disorder should be considered a significant factor. Previous history should also be factored into the analysis, including prior charges of abuse and any previous recantations by the declarant.

The forfeiture decision is a preliminary fact question for the judge, so unless state practice requires admissible evidence, the court can consider hearsay in its determination. Because forfeiture can have a significant impact at trial, a few states require clear and convincing evidence for the preliminary showing. However, the preponderance standard appears to be currently favored in federal constitutional analysis. (See, e.g., *Lego v. Twomey*, 404 U.S. 477, 488-89 (1972).)

Child abuse cases

Child abuse cases are often difficult for prosecutors to win because the abuse takes place in secret, there is typically no physical evidence of abuse in molestation cases not involving penetration, and even rape may not provide physical evidence because the crime is often reported well after it occurred, and children heal quickly. The fact that children disclose in stages also increases the likelihood of inconsistencies in the child’s testimony. In addition, questioning by a family member, doctor, psychologist, or police officer may be perceived as leading, producing unreliable answers. Like domestic violence victims, children often recant. Thus, the testimony of young children is viewed more skeptically by jurors than that of adults, because of concerns over suggestibility, manipulation, coaching, or confusing fact with fantasy.

Even though many children testify, a number do not because prosecutors, parents, and some psychologists

believe that requiring a child to testify revictimizes the child and inflicts additional trauma that may result in slowing the child’s recovery. Moreover, some children are found to be unavailable either because they are so young that they are not competent due to an inability to discern truth from falsity, or because they cannot communicate with the jury.

As a result, whether or not the child testifies, child abuse cases like domestic violence cases rely heavily on excited utterances, and exceptions for medical diagnosis and treatment. However, even given expansive interpretations of those exceptions when a child is the declarant, virtually every state has a child hearsay exception, or uses a catchall to permit hearsay that would otherwise be barred. Twenty states allow such exceptions regardless of whether the child witness is or is not available to testify; four states allow the exceptions only if the child is available to testify; and eight states allow the exceptions only if the child is unavailable to testify. (Task Force on Child Witnesses, American Bar Association Criminal Justice Section, “The Child Witness in Legal Cases” (2002).) A few states have also adopted exceptions that require the videotaping of child interviews typically by law enforcement, psychologists, social workers, or others employed by the local child services agency. This approach is designed to show juries that the child has not been misled by suggestive questioning techniques, when the child does not testify.

Impact of mandatory reporting obligations

Regardless of which exception the hearsay is admitted under, after *Crawford*, if a child does not testify, the deciding factor for confrontation analysis is whether the statement is considered testimonial. This is complicated by a factor not as prevalent in domestic violence cases, the existence of mandatory reporting of child abuse in all 50 states. Most states specify which professionals are required to report, and many have increased the list of mandatory reporters to include nurses, dentists, social workers, school personnel, child care providers, law enforcement officers, clergymen, and even pharmacists, firefighters, and paramedics. Approximately 18 states require any person who suspects abuse to report it to the proper authorities. (See generally National Clearinghouse on Child Abuse and Neglect Information, “Current Trends in Child Maltreatment Reporting Laws” 1 (Sept. 2002), available at <http://www.calib.com/nccanch/pubs/issue/process.pdf>.)

To date, many courts have not focused on the impact of mandatory reporting, which arguably makes any reporter a government proxy, virtually excluding all hearsay of children who do not testify. For example, *State v. Vaught*, 682

N.W.2d 284 (Neb. 2004) makes no reference to the reporting requirement of a physician who testified the child said that “defendant put his finger in her pee-pee,” in its decision rejecting a Confrontation Clause challenge. Similarly, in *People v. Cage*, 15 Cal. Rptr. 3d 846, 856-57 (Cal. Ct. App. 2004), review granted, 99 P.3d 2 (Cal. Oct. 13, 2004), a case where an older child suffered a substantial cut in a dispute with his mother, the court found statements made to doctor were nontestimonial. Using an objective reasonable person test as to whether a reasonable person would have expected his statements to the doctor to be used prosecutorially, *Cage* found the possibility that someone would pass information to police was not enough, completely ignoring the fact that in many jurisdictions the doctor has an obligation to report physical as well as sexual abuse of children. Indeed, the Department of Justice’s Law Enforcement Guide suggests that to encourage reluctant physicians to get involved in cases of abuse, they should be reminded that “all 50 States and the District of Columbia have enacted legislation regarding immunity from civil or criminal liability for persons who, in good faith, make or participate in making a report of child abuse or neglect.” (*Law Enforcement Response to Child Abuse* 8 (U.S. Dep’t of Justice, 2d printing 2001).

In contrast, *People v. Vigil*, 104 P.3d 258 (Colo. App. 2004), held that a child’s statements to a physician were testimonial where the physician questioned the child and was a member of a child protection team and a frequent prosecution witness in child abuse cases. However, the court recognized that the doctor could testify regarding his observations and physical findings. While I would expect the defense bar to argue that statements to all mandatory reporters are testimonial, an absolute ban on all statements made to medical personnel is troubling. *In re T.T.*, 815 N.E.2d 789 (Ill. App. 2004), suggests a middle road, in which statements are not testimonial so long as they did not accuse or identify the perpetrator of the assault. Thus, the child’s explanation of how she was penetrated, the pain, and the offender’s use of a lubricant were admissible in assessing how the doctor reached her opinion that the child was sexually abused and was in accord with the statutory hearsay exception for statements, made by a patient with a selfish interest in treatment, for the purpose of medical diagnosis and treatment. In reaching this conclusion, the court focused on the crucial “witnesses against” phrase of the Confrontation Clause.

Child abuse cases rest heavily on excited utterances.

Must children understand how statements will be used?

Courts appear not to focus on whether the child understands how a statement will be used in determining whether it is testimonial. For example, *State v. Snowden*, 867 A.2d 314 (Md. 2005), imposed an objective person test, rejecting use of an objective child to insulate “statements by a young child made in an environment and under circumstances in which the investigators clearly contemplated use of the statements at a later trial,” calling such an approach “an exception that we are not prepared to recognize.” (See also *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 n.3 (Cal. App. 2004) (rejecting the notion that “an ‘objective witness’ should be taken to mean an objective witness in the same category of persons as the actual witness—here, an objective four-year-old”).)

To whom is the statement made?

While most cases consider disclosures to close family members as nontestimonial, under the objective observer approach a few courts have barred such statements as testimonial. For example, *In re E.H.*, 2005 WL 195376 (Ill. App. 1 Dist. 2005), found complaints to the children’s grandmother were testimonial because they were the impetus for filing the petition against E.H. and were accusatory statements offered at trial.

Ironically, *Crawford* appears to undo the multidisciplinary team approach to child abuse. A majority of states have legislation concerning joint investigation and cooperation between law enforcement and social services and authorizing multidisciplinary teams. Such teams have been instrumental in improving the skills of interviewers and reducing the number of interviews. Professor Myers, who has written extensively about child abuse, indicates that reducing interviews ensures that vulnerable children are not put under additional stress and lowers the likelihood that unnecessarily suggestive questions will be asked. (John E.B. Myers et al. *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3 (1996).) Post-*Crawford* these best practices are clearly testimonial when the child does not testify. “When DCFS works at the behest of and in tandem with the State’s Attorney with the intent and purpose of assisting in the prosecutorial effort of an alleged sexual assault on a child, DCFS functions as an agent of the prosecution.”

(*In re T.T.*, *supra*; see also *In re Rolandis G.*, 352 Ill. App. 3d 776 (Ill. App. 2d Dist. 2004); *State v. Snowden*, *supra*; but see *People v. Geno*, 683 N.W.2d 687 (Mich. Ct. App. 2004).)

Similarly, post-*Crawford*, videotaped interviews by forensic teams have generally been found to be testimonial. (See, e.g., *Vigil*, *supra*; *People in Interest of R.A.S.*, 2004 WL 1351383 (Colo. App. 2004).) *United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005), specifically noted that because the statements may also have “a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.” Professor Mosteller has discussed the possibility that videotaped interviews will fall into disuse since that will not provide an avenue for admission of the child’s statement. (See Robert P. Mosteller, *Crawford v. Washington: Encouraging & Securing the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511 (2005).) I am more hopeful about their continued use. First, because such statutes typically apply to children who testify as well as to those who do not, a prosecutor will still have incentive to bolster the credibility of the child by showing the interview was nonsuggestive. Second, empirical evidence indicates that in actual trials, jurors rated the videotaped interview as important for their believing the child victim/witness at trial. (See, e.g., John E. B. Myers et al., *Jurors’ Perception of Hearsay in Child Sexual Abuse Cases*, 5 PSYCHOL. PUB. POL’Y & L. 388, 409 (1999).)

Appearance for cross-examination at trial

One issue that is significant in cases with young children is whether their appearance at trial is sufficient to defeat any *Crawford* challenge. *United States v. Owens*, 484 U.S. 554 (1988), which rejected a confrontation challenge for declarants who testify, is not affected by *Crawford*. While *Owens* requires an opportunity for effective cross-examination, it is unclear what this means in the context of child witnesses. However, *United States v. Spotted War Bonnet*, 933 F.2d 1471, 1474 (8th Cir. 1991), indicated that if a child is so young that she cannot be cross-examined at all, or if she is “simply too young and too frightened to be subjected to a thorough direct or cross-examination, the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause.” Post-*Crawford*, this is even more critical. *State v. Carothers*, 692 N.W.2d 544 (S.D. 2005), found a confrontation claim to be premature where the defendant argued that the four-year-old child would be unable to remember and testify at the time of trial as to the statements she gave to a social worker, to law enforcement, and to her mother, but this only defers the inevitable

challenge. Moreover, at least seven states currently provide for victims of child abuse to testify without any finding of competency, specifically to allow very young children to be observed by the jury.

Indeed, this type of challenge has already been raised with older children, with varying results. For example, *State v. McClanahan*, 120 Wash. App. 1065 (Wash. Ct. App. 2004), held that a second grader subject to substantial cross-examination did not pose a confrontation problem. Similarly, in *People v. Harless*, 22 Cal. Rptr. 3d 625 (Cal. App. 6 Dist. 2004), although a child’s memory at the time of trial was somewhat selective, her partial failure of recollection did not prevent her from explaining her prior statements, or preclude the jury from assessing her demeanor and determining whether her prior statements or her trial testimony was more credible. Accordingly, the court held that defendant had the opportunity for effective cross-examination. *People v. Sharp*, 2005 WL 583755 (Ill. App. 4 Dist. 2005), demonstrates how a seemingly wise defense strategy can backfire. The defense decided to forgo cross-examination about specifics of the alleged abuse after the child failed to respond on direct to the details of the abuse. Because the child answered all of the questions the defense posed on cross-examination, the court held that her statements were governed by *Owens*, rather than *Crawford*. *Sharp* left open what legal consequences would ensue if she had answered some, but not all, of those questions.

A few decisions have found confrontation violations concerning the admission of hearsay despite the child’s testimony at trial. *In re T.T.*, *supra*, considered a child to be unavailable to testify after she froze on the stand when asked to recount the alleged incidents of abuse. The victim responded to general questions from the prosecutor about her family and school, and explained how she came to be at the alleged perpetrator’s house on the dates of the alleged assaults, but when questions became more specific regarding the assaults she stopped answering questions, even after a recess was taken so that her mother could console her. In *People v. Couturier*, 2005 WL 323680 (Mich. App. 2005), limiting the cross-examination of a child witness testifying at trial about notes that she wrote after the alleged abuse telling the defendant that she loved and missed him was found to violate the Confrontation Clause where there was no corroborating physical evidence or witness testimony, making the trial a credibility contest. Although the evolving case law is not necessarily consistent, it is clear that all such findings are highly fact-specific.

The intersection of *Craig* and *Crawford*

To the extent that a child is afraid to testify in the presence of the defendant, prosecutors will continue to rely on

Maryland v. Craig, 497 U.S. 836, 852 (1990). So far, there has been no direct judicial attack on *Craig* even though *Crawford* clearly has a vision of the Confrontation Clause that rejects the type of balancing approach that *Craig* applied. However, *Craig* requires that the child must be traumatized, not by the courtroom generally, but by the presences of the defendant. For example, in *Bordeaux*, testimony via closed circuit television violated the Confrontation Clause because the decision was based in part on the child's fear of the jury, rather than of testifying in the presence of the defendant. The court noted that "'confrontation' via a two-way closed circuit television is not constitutionally equivalent to a face-to face confrontation." (400 F.3d at 554.)

Forfeiture in child abuse cases

While forfeiture can also play a role in child abuse cases, often the child is pressured by the parent who is not the defendant, typically the mother, since the abuse may result in her having to make a choice of remaining with her male intimate and having the child removed from the home, or leaving him to retain custody of her child.

Because the penalties for child abuse are so great, on occasion the family refuses to believe the child. Similarly, children who are old enough to understand the consequences of the complaint may decide at some point that they would rather live at home than be placed in foster care. Another forfeiture issue arises due to the fact that many abusers tell the child to keep their relationship a secret, and some threaten the child to prevent disclosure. If the child's unwillingness to testify results from those original threats, they should be admissible to demonstrate forfeiture even though the tampering was prior to disclosure. However, if the child is otherwise incompetent, there is no link to any witness tampering at trial.

Conclusion

Crawford is like the elephant in the room—counsel can't tiptoe around it, making believe it is not there. Yet, until the Court gives more direction as to *Crawford*'s contours, the case law will continue to produce inconsistent results that are reminiscent of another elephant story, the one in which three blind men touched the creature in different places and found that their descriptions had little in common.■