LET THE TRUTH BE TOLD: PROPOSED HEARSAY EXCEPTIONS TO ADMIT DOMESTIC VIOLENCE VICTIMS' OUT OF COURT STATEMENTS AS SUBSTANTIVE EVIDENCE

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I. INTRODUCTION AND BACKGROUND

The hearsay rule that excludes the reliable initial report of abuse by the domestic violence victim mocks the truth-finding process because victims' false recantations or failure to appear at trial (hereinafter "no-show") are the norm in domestic violence cases. Batterers pressure domestic violence victims to recant, which typically results in the failure of victims to appear or, alternatively, in testimony at trial that is less reliable than the victim's initial report of the abuse. When a domestic violence victim fails to appear for trial because of a batterer's coercion, fear of the batterer, or the potentially drastic consequences of leaving the batterer, the hearsay rule promotes the failure of the criminal case by excluding the initial report of abuse. As the hearsay rule excludes out of court statements of abuse, recantation or no-show by the victim results in no charge, dismissal, or acquittal.

In most jurisdictions, the hearsay rule prohibits the use of domestic violence victims' initial report of abuse as substantive evidence. Reform efforts within the criminal justice system designed to address the epidemic of domestic violence have failed to address hearsay problems[1] and instead

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[1] In the wake of the O.J. Simpson trial, there has been some discussion of modifying hearsay rules to allow prior incidents of domestic violence into evidence. *See, e.g.*, Linell A. Letendre, Note, Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence, 75 Wash. L. Rev. 973 (2000); Neal A. Hudders, Note, The Problem of Using Hearsay In Domestic Violence Cases: Is a New Exception the Answer? 49 Duke L.J. 1041 (2000); Sara J. Lee, Comment, The Search for Truth: Admitting Evidence of Prior Abuse in Domestic Violence Cases, 20 U. Haw. L. Rev. 221 (1998); Lisa Marie DeSanctis, Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence, 8 Yale J.L. & Feminism 359 (1996); Lisa A. Linsky, Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach, 16 Pace L. Rev. 73 (1995). California has passed a hearsay rule exception to address this concern. *See* Cal. Evid. Code §1370 (West Supp. 1999). While

have focused on adoption of other informal and formal policy initiatives.[2] This article argues that given that victims recant or fail to appear at trial in the majority of domestic violence cases, existing exceptions to the hearsay rule are inadequate to achieve truth-finding in these cases. The article proposes and analyses the constitutionality of two hearsay exceptions that provide solutions to the problem of the inadmissibility of the victim's initial report. The proposed exceptions would greatly enhance truth-finding.

The two proposed hearsay exceptions focus on the admissibility of unsworn prior inconsistent statements made by domestic violence victims. The first proposal is designed to address the problem of recantation. It alters the definition of hearsay to allow a domestic violence victim's unsworn out of court statements to be used as substantive evidence, not just for impeachment, when the victim is available for cross-examination at trial. A minority of state jurisdictions admit unsworn prior inconsistent statements as substantive evidence in all criminal cases. The exception targets the remaining majority of jurisdictions, including federal and most state courts, and argues that these jurisdictions should not continue to deny the admissibility of prior inconsistent statements of domestic violence victims in domestic violence cases.

The second proposed modification to the hearsay rule addresses the problem of domestic violence victim no-show at trial. This new hearsay exception provides criteria for admissibility when the victim is not present at trial. The exception allows a judge to consider criteria of reliability in determining whether a domestic violence victim's report, made within twenty-four hours of the incident, is admissible. If reliable, the statement can be admitted whether or not the victim shows up for trial.

Next, the article addresses the special issues of "unavailability," "victim memory loss," and "sufficiency of evidence to convict" within the context of the proposed amendments. Finally, the proposed hearsay exceptions are discussed in the context of the ongoing debate about the wisdom of mandatory prosecution procedures in domestic violence cases.

II. HOW THE HEARSAY RULE DEFEATS TRUTH-FINDING IN DOMESTIC VIOLENCE CASES.

Evidence rule changes have been aggressively pursued to aid in truth determination in other types of crimes against women and children.

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this is undoubtedly a subject worth addressing, it is not the hearsay problem that impacts the greatest number of domestic violence cases.

[2] Policy changes include mandatory arrest, no-drop policies (i.e., refusal to dismiss the case at the request of the victim), deferred sentencing programs and uniform probation conditions for offenders. Virtually all of these policy efforts to intervene in battering relationships are readily thwarted by hearsay rule limits, with the exception of mandatory arrest of the batterer.

Examples include rape shield laws and accommodations for child testimony in child sexual assault cases. Surprisingly, in the context of a feminist law movement accustomed to altering rules of evidence to achieve truth-finding, there has been no similar effort to address the problem of the hearsay rule in domestic violence cases.

Many batterers continue to prevent the truth from being told in the courtroom by instilling fear in their victims. The legal system provides the coerced victim ample opportunity to prevent the introduction of reliable evidence. When a victim recants or fails to appear at trial, the victim's words or actions combine with the hearsay rule to exclude the victim's reliable out of court statements. In turn, exclusion results in inadequate or a lack of substantive evidence with which to prove the offense. Since the hearsay rule excludes reliable prior statements of the abuse, victim recantation and no-show at trial results in failure to charge, dismissal, or acquittal in cases of domestic violence.

Non-cooperation by recantation or failure to appear at trial is an epidemic in domestic violence cases. Persons qualified to give expert testimony at trial on domestic violence, including psychologists,[3] counselors,[4] police detectives,[5] directors of battered women's shelters,[6] and victim advocates,[7] consistently testify that, in their experience, it is commonplace for domestic violence victims to recant or minimize initial reports of abuse. The head of the Family Violence Division of the Los Angeles District Attorney's Office estimates that ninety percent of domestic violence victims recant.[8] A psychologist specializing in the treatment of

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[3] *See, e.g.*, People v. Gomez, 85 Cal. Rptr. 2d 101, 105 (Cal. Ct. App. 1999) (psychologist testified that "about 80 percent of the time a woman who has been sexually assaulted by a boyfriend or husband or lover will recant, change or minimize the story."); People v. Lafferty, 9 P.3d 1132, 1134 (Colo. Ct. App. 1999), *cert. denied* (Oct. 10, 2000) (psychologist testified that the significance of the passage of time is that over time a victim may recant); Odom v. State, 711 N.E.2d 71, 72 (Ind. Ct. App. 1999) (psychologist testified that it is not unusual for a domestic violence victim to recant).

[4] *See, e.g.*, People v. Acosta, 84 Cal. Rptr. 2d 370, 374 (Cal. Ct. App. 1999) (finding that abused victims often recant accusations made against their partners).

[5] *See, e.g.*, State v. Perry, No. 58607, 1991 WL 97404, at *3 (Ohio Ct. App. June 6, 1991) (police detective testified that it is not unusual for domestic violence victims to recant).

[6] *See, e.g.*, State v. Clark, 926 P.2d 194, 204 (Haw. Ct. App. 1996) (executive director of crisis shelter testified that domestic violence victims "often" recant accusations of abuse).

[7] *See, e.g.*, State v. Butler, No. 17564-2-III, 1999 WL 643368, at *2 (Wash. Ct. App. Aug. 24, 1999) (advocate testified that it is common for domestic violence victims to recant); State v. Griffin, 564 N.W.2d 370, 374 (Iowa 1997) (advocate testified that it is common for domestic violence victims to refuse to testify against the batterer).

[8] Videotape: Social Advocacy and Domestic Violence (UCLA School of Law 1996) (on file with Harvard Law School Library) (a class presentation given by Donna Wills, Head Deputy, Family Violence Division, Los Angeles County District Attorney).

battered women has estimated the non-cooperation rate to be eighty percent.[9] Similarly, one judge reports that in as many as eighty percent of domestic violence prosecutions the victim refuses to cooperate at trial.[10] Increasingly, courts have taken judicial notice of the unreliability of the domestic violence victim's recantations.[11] Thus, recantation is the norm rather than the exception, in domestic violence cases. This is hardly surprising. Batterers put hydraulic pressures on domestic violence victims to recant, drop the case, or fail to appear at trial.

The reasons that victims do not cooperate are closely related to the victim's need for physical and emotional survival and the safety of her children. "Many domestic violence professionals are becoming convinced...that the primary reason women stay with the batterer is out of *fear*."[12] Victims have good reason to be afraid. Many women stay in battering relationships because when they have tried to leave they have been beaten.[13] Leaving a batterer is a very risky undertaking. Victims have reason to fear financial ruin.[14] The leading cause of homelessness among women and children is domestic violence. Studies reveal that domestic violence has led to the circumstances of between thirty-five and fifty percent of all homeless women and children.[15] In addition to the toll

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[9] Gomez, 85 Cal Rptr. 2d. at 103.

[10] David M. Gersten, Evidentiary Trends in Domestic Violence, 72 Fla. B.J. 65, 65 n.3 (1998).

[11] However, judicial notice of the phenomenon of recantation in domestic violence cases does not render the unsworn prior inconsistent statement admissible for substantive purposes. "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so." 9 John H. Wigmore, Wigmore on Evidence § 2567(a) (3d ed. 1940). For cases in which courts have recognized the particular unreliability of domestic violence recantations, where no proof was presented on the point, see, *e.g.*, State v. Allender, No. 7464, 1988 WL 94027, at *8 (Ohio Ct. App. Sept. 6, 1988) (Milligan J., dissenting) ("the plain fact is that in many, many domestic disputes the 'kiss and forgive' syndrome appears to the frustration of both law enforcement attempting to perform its legal responsibilities and the ultimate health and safety of the participants. There is a sense in which an experienced police officer is never surprised when a domestic violence victim recants or waters down his [sic] story."); Lakewood v. Pfeifer, 583 N.E.2d 1133, 1137 (Lakewood Ohio Mun. Ct. 1991) ("It is not uncommon for the complaining witness to attempt to have the case dismissed or recant the previous statement that was the basis of the criminal charge."); State v. West, 667 A.2d 540, 543 (Vt. 1995) (stating that recantation is common).

[12] Margi Laird McCue, Domestic Violence 113-14 (1995).

[13] *See id.* at 115.

[14] *See id.* at 82. Many battered women have no access to checking accounts (thirty-four percent) or charge cards (fifty-one percent). *Id.*

[15] *See id.* at 106-07.

homelessness takes on women and children, it "places an enormous financial and physical strain on our social services system."[16]

While it is *possible* in a particular case that the recantation is true and the initial report is not, hearsay rules and exceptions are founded upon generalities. Thus, the prohibition against the use of prior inconsistent statements as substantive evidence is premised on the notion that in the majority of all categories of cases a statement under oath is more reliable than an unsworn prior inconsistent statement. A nuanced alternative is, nevertheless, appropriate in domestic violence cases because the reliability of initial statements in most domestic violence cases justifies the admission of the victims' out of court statements in all domestic violence cases. Admissibility is justified because, generalizing over all domestic violence cases, the prior inconsistent statement is likely to be more reliable than the statement under oath in a majority of cases. Of course, the jury remains free to determine which version of events, the prior inconsistent statement or the testimony under oath, is true.

The hearsay rule limits the substantive use of out of court statements because "at the heart of the hearsay doctrine is the conviction that out of court statements are generally an inferior kind of proof."[17] "Inferiority" comes from the hearsay risks of misperception, faulty memory, risk of insincerity, and narrative ambiguity.[18] Three cherished procedural safeguards typically operate to aid in truth-finding and in ensuring the impeachment of inferior statements: cross-examination, oath and witness demeanor. Ironically, the hearsay rule, as applied to the out of court statements of domestic violence victims, defeats the value of reliability. The hearsay rule is self-defeating because its application results in the admission of unreliable recantations and exclusion of reliable initial reports. Thus, the value of reliability (that is the legitimate basis of the hearsay rule) is suppressed.

Adjustments should be made to the hearsay rule to take into account the dominant phenomenon of recantation and no-show in domestic violence cases. Exceptions to the hearsay rule are created when "some special reason appears to suppose [statements] are trustworthy or reliable, or [when statements] should be admitted on account of some special need."[19] The phenomenon of recantation and failure to appear by domestic violence victims presents a case of special need for admissibility. Initial reports of abuse made by domestic violence victims are typically more reliable than the victim's testimony under oath, because the passage of time

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[16] *Id.*

[17] Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 8.2, at 783 (2d ed. 1999).

[18] *See id.* at 783-86 (because hearsay rules should promote reliability).

[19] *Id.* at 785.

after the victim's initial report allows the hydraulic pressures of domestic violence to bear down upon the victim, resulting in recantation and no-show at trial. While out of court statements are generally considered an *inferior* kind of proof, in cases of domestic violence the victim's out of court statements are typically a *superior* form of proof. Hearsay exceptions should allow the use of the initial report as substantive evidence because hearsay rules were created to promote reliability.

Continued exclusion of prior statements by victims in domestic violence cases means placing wishful thinking ahead of reality. This is because it is highly probable that a domestic violence victim's initial disclosure, not allowed into evidence, is more reliable than the victim's recantation made under oath. The pressures brought to bear on a victim of domestic violence make it highly probable that a recanting domestic violence victim will be lying under oath. The oath, as a tool for assuring reliability, cannot adequately compete with the pressures the batterer uses on the domestic violence victim. Clinging to the requirement of the oath as predicate for admissibility of the domestic violence victim's initial report requires naively blinding oneself to the greater forces at work upon the victim. The sanctions of the batterer are simply surer, swifter, more devastating, and more real than speculative court sanctions for perjury or contempt. Given this reality, excluding unsworn prior inconsistent statements of domestic violence victims from use as substantive evidence creates a high probability that the truth will never be presented to the jury.

Hearsay rules were created long before the development of a sophisticated understanding of domestic violence, and well before it was understood that recantation is the rule rather than the exception in domestic violence cases. In light of this new understanding, hearsay rule exceptions are needed to accommodate truth-finding. Unfortunately, the existing hearsay exceptions are inadequate for assuring the admissibility of the crime victim's initial report of abuse.

III. THE INADEQUACY OF TRUTH-FINDING: EXISTING HEARSAY EXCEPTIONS IN DOMESTIC VIOLENCE CASES

The hearsay exceptions relevant to domestic violence are those based on the spontaneous declaration rationale, such as "excited utterances," "present sense impressions," "past recollection recorded," or statements of "state of mind." Each of these exceptions, however, is narrowly defined, and the prior statement may not satisfy the criteria of any single exception. Due to batterer coercion, an additional avenue of admissibility, constructive waiver by the defendant of the hearsay rule and confrontation clause, will rarely be available.

A. The Inadequacy of the Excited Utterance Exception

In jurisdictions where prior inconsistent statements are not admissible as substantive evidence, prosecutors may attempt to admit the statements pursuant to the "excited utterance exception."[20] The excited utterance hearsay exception will admit a statement that relates to a startling event or condition if made while the declarant was under the stress of excitement caused by the event or condition. It is well-established in evidence law that such an occurrence "stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response . . ."[21] To admit a statement under this exception, the proponent of the evidence must establish: 1) that the declarant was subjected to a startling event or condition; and 2) that the declarant was in a state of excitement when the statement was made. With regard to a domestic assault, this second finding may be difficult to make. Although a violent assault is undoubtedly a stressful and startling event, the victim may respond instead by withdrawing, becoming sullen, or going into shock, as opposed to conveying "excitement." In such an instance, failure of the declarant to be excited presents an arbitrary barrier to admissibility.

B. The Inadequacy of the Present Sense Impression Exception

To satisfy the federal hearsay exception of present sense impression and be admitted into evidence, the statement must have been made "while the declarant was perceiving the event or condition, or immediately thereafter."[22] This requirement places significant limits on the utility of the present sense impression exception as a vehicle to admit a domestic violence victim's prior inconsistent statement. This exception has a strict time limit defined as a time period nearly contemporaneous between the events described and the making of the statement.

Most domestic assaults do not occur in public, therefore the defendant (who is shielded by the Fifth Amendment privilege), is the only witness to hear the victim's statements during or immediately after the event.[23] Therefore, the exception is only rarely available as a tool to admit

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[20] The federal rules provide: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Fed. R. Evid. 803(2).

[21] 6 John H. Wigmore, Wigmore on Evidence § 1747 (James H. Chadbourn rev. 1976).

[22] The federal rules provide: "Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." Fed. R. Evid. 803(1).

[23] *See* Donna M. Mathews, Making the Crucial Connection: A Proposed Threat Hearsay Exception, 27 Golden Gate U. L. Rev. 117, 138 (1997).

evidence of a domestic violence assault.[24] In those rare instances in which the present sense impression exception applies, it is further limited to the description of events. Thus, admissibility of other relevant facts, such as a description of the nature of injuries to the victim, is problematic.

C. The Inadequacy of the State of Mind Exception

Much like the problems with the present sense impression exception, the state of mind exception imposes severe time and content limitations for admissibility.[25] The most significant limitation on admissibility is that evidence admitted under this exception is only relevant to show the state of mind of the declarant. The exception cannot be used as substantive proof of the events surrounding the declarant's state of mind. For example, assume the admission into evidence of a statement of a domestic violence victim that, "I was afraid because the defendant had burst through the door holding a knife." The statement is properly admitted under the state of mind exception only to prove that the victim was fearful, and not as proof that the defendant burst through the door brandishing a knife. As a result, when the domestic violence victim recants, there is no substantive evidence of the assault available to the trier of fact.

D. The Inadequacy of the Past Recollection Recorded Exception

The past recollection recorded exception to the hearsay rule is based on notions of necessity and trustworthiness.[26] A prerequisite to use of the exception is an insufficient present memory to testify "fully and accurately." Once this is established, the party offering the recorded recollection must use the writing to try to refresh the witness' memory. It is only when there is a substantial inability to recollect that the statement may be considered as proof. Another requirement is that the recorded statement represents the firsthand knowledge of the witness while the matter was

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[24] *See id.*

[25] The federal rules provide: "Then existing mental, emotional or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Fed. R. Evid. 803(3).

[26] The federal rules provide: "Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." Fed. R. Evid. 803(5).

fresh in the witness' memory. The witness must make a live endorsement by testifying in court that the writing reflects their firsthand knowledge. Finally, the statement must have been made or adopted by the witness.

There are several problems with using the past recollection recorded exception to provide substantive evidence of domestic violence. The main problem is that the "forgetful" domestic violence victim must make a live endorsement of the statement in the trial. The failure to endorse the statement is fatal to the statement's admissibility as substantive evidence. For a victim who is recanting because of a loss of memory, an endorsement of a statement inculpating the alleged batterer is unlikely to occur. Thus, the past recollection recorded exception is of little benefit because control over the admissibility of the prior inculpating statement is left in the hands of the domestic violence victim, who is susceptible to batterer coercion.

E. The Inadequacy of the Batterer's Constructive Waiver of Hearsay Rules Confrontation Rights

If a defendant is responsible for the unavailability of a witness, the defendant constructively waives the right to hearsay rule protection and the right of confrontation. The result is that prior statements of the witness can be admitted.[27] If proof is made to the trial court that the domestic violence defendant played a role in the making the victim unavailable, or in coercing a recantation from the victim, the prior inconsistent statement would be admissible. However, domestic violence victims, for the same reasons they recant, typically will not volunteer evidence of this nature. Thus, absent evidence of threats or coercion of the victim presented by other witnesses, prior inconsistent statements of the victim will not be admissible by constructive waiver of hearsay rule and confrontation rights.

For all the foregoing reasons, existing hearsay exceptions are inadequate to assure the admissibility of victims' prior reports of violence. The hearsay rule still stands in the way of truth-finding in domestic violence cases. Additional exceptions are needed to assure that reliable evidence essential to truth-finding is admitted.

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[27] *See, e.g.*, U.S. v. Cherry, 217 F.3d 811 (10th Cir. 2000); U.S. v. Emery, 186 F.3d 921 (8th Cir. 1999); U.S. v. Houlihan, 92 F.3d 1271 (1st Cir. 1996); U.S. v Aguiar, 975 F.2d 45 (2d Cir. 1992).

IV. THE TWO PROPOSED HEARSAY EXCEPTIONS

A. The First Exception: Admission as Substantive Evidence of Unsworn Prior Inconsistent Statements of Domestic Violence Victims Available for Cross-Examination

The roadblock to intervention in violent relationships created by the hearsay rule should be removed, to the extent constitutionally permissible. Fortunately, the hearsay rule roadblock can be moved aside while complying with constitutional commands. The first exception, proposed below, is designed to address the problem of recantation, by allowing the prior statement of the domestic violence victim in as substantive evidence when she is available for cross-examination. The second exception, proposed below, is designed to address the problem of victim no-show or recantation by admitting the prior statement if certain criteria to ensure reliability are met, whether the victim is available for cross-examination or not.

1. The Exception or Exemption

The first proposed modification to the hearsay rule is to allow the unsworn prior inconsistent statements of a domestic violence victim to be admissible as substantive evidence if the victim is available for cross-examination. The strict limitation on admissibility is that only a statement made by a domestic violence victim is admissible.[28] The proposal can be accomplished in two different ways. First, the statements could be admissible as a non-hearsay exemption. Using the federal rule as context, the admissibility of statements stated as a non-hearsay exemption is:

> **Proposed Fed. R. Evid. 801(d)(1) Prior Statement by Witness.** [A statement is not hearsay if] The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ...(D) made by a domestic violence victim, is inconsistent with the victim's testimony, and during the testimony the victim is given an opportunity to explain or deny the statement or at the time the statement is offered in evidence the victim has not been excused from giving further testimony and can be recalled for the purpose of explaining or denying the statement.

[28] This is not the only context in which a victim is identified prior to conviction. The identification of a victim for purposes of evidentiary and other procedural rules is commonplace. *See* Douglas E. Beloof, Victims In Criminal Procedure 41-43 (1998).

Second, instead of being drafted as *non-hearsay*, the proposal can be constructed as an *exception* to the hearsay rule:

> **Proposed Fed. R. Evid. 803 Hearsay Exceptions; Availability of Declarant Immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (24) a prior unsworn statement of a domestic violence victim inconsistent with the victim's testimony, where during the testimony the victim was given an opportunity to explain or deny the statement or at the time the statement is offered in evidence the victim has not been excused from giving further testimony and can be recalled for the purpose of explaining or denying the statement.

The argument against the substantive use of prior inconsistent statements by witnesses available for cross-examination at trial centers on the lack of reliability of a prior statement which is not made under oath. Also, the prior statement is recalled from memory, rather than a trial transcript, thus the recounting of the statement might be inaccurate. On the other hand, advocates in favor of admitting *all* prior inconsistent statements of *all* witnesses in *all* cases argue that the witness is present in court and subject to cross-examination, so any dangers accompanying the use of the statement as substantive evidence are sufficiently mitigated. A growing number of states have adopted the view that prior inconsistent statements are always admissible as substantive evidence.[29] Other states allow prior inconsistent statements to be used as substantive evidence for any purpose only when the statements meet certain criteria.[30] However, other states exclude the use of unsworn prior inconsistent statements for any substantive evidence purpose.[31] Finally, the Federal Rules of Evidence and a majority

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[29] *See* Alaska R. Rev. 801(d)(1)(A)(i)-(ii); Ariz. Stat. Rev. R. 801(d)(1)(i)-(iii); Cal. Evid. Code § 1235 (West 1966); Colo. Stat. Rev. Rule 801(d)(1)(A); Del. R. Rev. Rule 801(d)(1)(A); Kan. Stat. §60-460(a); Ky. Stat. Rev. Rule 801A(1); Mont. R.Rev. Rule 613; Nev. Stat. § 51.035(1)(a); R.I. R. Rev. Rule 801(d)(1)(A)-(C); S.C. R. Rev. Rule 801(d)(1)(A); Utah R. Rev. Rule 801(d)(1)(A); Wis. Stat. § 908.01(4)(a)(1); Gibbons v. State, 286 S.E.2d 717 (Ga. 1982), *cited with approval in* Holiday v. State, 534 S.E.2d 411 (Ga. 2000).

[30] *See* Conn. R. Rev. § 8-5; Haw. Stat. § 626-1, R. 613(b)(1)-(2); Ill. Stat. Ch. 725 § 5/115-10.1 (written or electronic recording); N.J. Stat. Rev. N.J. R. Evid. 803(a)(1)(A)-(B) (where offered by party other than proponent of the evidence; proponent may offer if recorded, in writing and signed, or under oath); Md. R. Rev. Rule 5-802.1(a)(1) (written and signed by declarant or recorded in substantially verbatim fashion by electronic recording or stenographic means); Mo. Stat. § 491.074 (for certain criminal offenses); N.M. R. Rev. Rule 11-801(D)(1)(a) (where witness under oath); Pa. Stat. Rev. Rule 803.1(1) (signed written statement, recording or under oath); State v. Whelan, 513 A.2d 86 (Conn. 1986) (signed statement only).

[31] *See* Ala. R. Rev. Rule 801(d)(1)(A); Ark. R. Rev. Rule 801(d)(1) (criminal cases only); Ind. Stat. Rev. Rule 801(d)(1)(A); La. C. E. Art. 801(D)(1)(a); Me. R. Rev. Rule 801(d)(1)(A); Mass. Stat. 233 § 23; Miss. R. Rev. Rule 801(d)(1)(A); Neb. Stat. §27-

of state evidence codes disallow the use of prior inconsistent statements as substantive evidence unless used for purposes of identification only.[32]

The proposed hearsay exception differs from the broad prior inconsistent statement exception that exists in a minority of jurisdictions, because these jurisdictions allow the prior inconsistent statements of *all* witnesses to be admitted as substantive evidence in *all* cases. The proposed exception admits only a domestic violence victim's prior statement, and only in a domestic violence case. The proposed exception is directly limited by its rationale: that in domestic violence cases, victim recantations are the norm, and recantations are typically more unreliable than the initial report of abuse. The proposed limited hearsay exception is needed in cases of domestic violence in the jurisdictions that do not have a general hearsay exception which allows the substantive use of all prior inconsistent statements. This hearsay exception is needed because in domestic violence cases, unlike every other class of cases: recantation is the norm; the unique dynamics of domestic violence render the prior statement the most reliable statement available, and; there is typically insufficient reliable proof before the trier of fact without the prior statement.

2. The Constitutionality of the First Proposed Exception

The use of an unsworn prior inconsistent statement as substantive evidence is constitutional if the domestic violence victim is present at trial and subject to cross-examination. In California v. Green, the United States Supreme Court reviewed the constitutionality of a provision of the California Evidence Code which allowed for the admissibility of the prior inconsistent statements of all witnesses who were present at trial and subject to cross-examination.[33] The Court held that the Confrontation

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801(4)(a)(i); N.J. Stat. Rev. Rule 63(1)(a); N.Y.C.P.L.R. Rule 4514; N.C. Stat. Evid. § 8C-1, Rule 801(c); Okla. Stat. T.12 § 2801(4)(a)(1); Va. Stat. § 8.01-403.

[32] *See* Fed. R. Evid. 801(d)(1)(A), (C) (allowing use for prior identification only); Fla. Stat. § 90.801(1), (2)(a), (c); Idaho R. Rev. Rule 801(d)(1)(A), (C); Iowa R. Rev. Rule 801(d)(1)(A), (C); Mich. R. Rev. M.R.E. 801(d)(1)(A), (C); Minn. Stat. Rev. Rule 801(d)(1)(A) (for identification after court examination of reliability and statement made while perceiving event or immediately thereafter); N.H. R. Rev. Rule 801(d)(1)(A), (C); N.D. R. Rev. Rule 801(d)(1)(i), (iii) (criminal cases only); Ohio Stat. Rev. Rule 801(D)(1)(a), (c) (only after showing of reliability); Or. R. Rev. Rule 801(4)(a)(A), (C); S.D. Evid. Code 801(d)(1), (3); Tenn. R. Rev. Rule 803(1.1); Tex. R. Rev. Rule 801(e)(1)(A), (C); Vt. R. Rev. Rule 801(d)(1)(A), (C); Wash. R. Rev. E.R. 801(d)(1)(i), (iii); W. Va. R. Rev. Rule 801(d)(1)(A), (C);Wyo. R. Rev. Rule 801(d)(1)(A), (C); State v Newcomb, 663 A.2d 613 (N.H. 1995).

[33] *See* California v. Green, 399 U.S. 149 (1970). Section 1235 provided that "evidence of a statement of a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Cal. Evid. Code § 1235 (West 1966). Section 770 required that the witness be given an opportunity to explain or deny the prior statement at some point in the trial. *See* Green, 399 U.S. at 150 n. 76 (citing Cal. Evid. Code § 770).

Clause[34] does not require excluding from evidence prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question and who is fully available for cross-examination.[35] The Court viewed California's choice to admit prior inconsistent statements as a "considered choice by the California legislature between two opposing positions concerning the extent to which witnesses' prior statements may be introduced at trial without violating hearsay rules of evidence."[36] In Green, the Court pointed out that most evidence scholars support the admissibility of prior inconsistent statements if the witness is subject to cross-examination.[37] The California approach is constitutional because most of the hearsay dangers are largely non-existent where the witness testifies at trial and is present for cross-examination.

B. The Second Exception: Admission as Substantive Evidence of Prior Statements of Abuse, Availability of Domestic Violence Victim Immaterial

1. The Exception

The authors, and others, have successfully pursued the adoption of the second proposed hearsay exception in the State of Oregon.[38] It is designed primarily to address the problem of domestic violence victim no-show at trial and, secondarily, recantation. The exception admits prior statements of a domestic violence victim only after the trial judge has screened the statements for sufficient indicia of reliability. If reliable, the statements come in as evidence whether or not the victim is present at trial. Cast in the structure of the Federal Rules of Evidence the proposal is:

The Supreme Court affirmed the continued constitutionality of the California approach in U.S. v. Owens, 484 U.S. 554, 559 (1993), *aff'g* Green, 399 U.S. 149.

[34] The Sixth Amendment of the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

[35] *See* Green, 399 U.S. at 154-55.

[36] *Id.* at 154.

[37] *See id.* at 155 n.6 and accompanying text (listing Wigmore, McCormick, Maguire, and Morgan as proponents of the admissibility of unsworn prior inconsistent statements when the declarant is subject to cross-examination).

[38] Or. Rev. Stat. § 40.460(26). For work on passage of this exception, the authors thank Linda Beloof, Gina McClard, Dale Penn, and the Oregon Department of Justice.

> **Proposed Fed. R. Evid. 803(24) The following are not excluded by the hearsay rule, even though the declarant is available as a witness:** (a) A statement that purports to narrate, describe, report or explain an incident of domestic violence, as defined by [insert federal or state definition of domestic violence here], made by a victim of the domestic violence within twenty-four hours after the incident occurred, if the statement:
>
> > (A) Was recorded, either electronically or in writing, or was made to a peace officer [as defined by federal or state statute], corrections officer, youth corrections officer, parole and probation officer, emergency medical technician or firefighter; and
> >
> > (B) Has sufficient indicia of reliability.
>
> (b) In determining whether a statement has sufficient indicia of reliability under paragraph (a) of this subsection, the court shall consider all circumstances surrounding the statement. The court may consider, but is not limited to, the following factors in determining whether a statement has sufficient indicia of reliability:
>
> > (A) The personal knowledge of the declarant.
> >
> > (B) Whether the statement is corroborated by evidence other than the statements that are subject to admission only through this subsection.
> >
> > (C) The timing of the statement.
> >
> > (D) Whether the statement was elicited by leading questions.
> >
> > (E) Subsequent statements made by the declarant. Recantation by a declarant is not sufficient reason for denying admission of a statement under this subsection in the absence of other factors indicating unreliability.

The requirements of this hearsay exception ensure reliability. Further, the threshold requirements of the exception must be met before a judge admits the statement. First, the statement must be made by a victim

of domestic violence, a class of witnesses likely to recant. In addition to the limitation of the exception to statements of domestic violence victims, any statement made after twenty-four hours is automatically excluded from the exception.[39] This threshold requirement exists because courts have used the twenty-four hour window as a benchmark of reliability in various contexts.[40] Another threshold requirement is that the statement must be recorded electronically or made in writing or must be made to a limited category of state officials or medical personnel. An electronic recording or writing made by the witness at the time of, or shortly after the incident, is considered reliable by a number of jurisdictions.[41] A statement made to state officials or emergency medical personnel is more likely to be reliable. This category of persons is more likely to accurately convey the content of the victim's statement at trial because, in the context of domestic violence, they are disinterested witnesses. The text of the domestic violence hearsay exception sets out a number of factors that "[t]he court may consider, but is not limited to...in determining whether a statement has sufficient indicia of reliability."[42] The enumerated factors of reliability are not exclusive and the court may rely on other factors in assessing reliability. However, recantation is not a sufficient reason for a finding of unreliability (and therefore inadmissibility) for the obvious reason that the exception itself is necessitated by and predicated upon the prevalence of false recantation in domestic violence cases.[43]

2. The Constitutionality of the Second Proposed Exception

a. Victim Available for Cross-Examination

As with the first proposed exception, under the second proposed exception, when the victim is available for cross-examination, the admissibility of the prior inconsistent statement of the victim is plainly

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[39] Of course, if an abuser prevented the victim from reporting the abuse within twenty-four hours, the period would be twenty-four hours after the victim became able to report the domestic violence incident. This comports with the logic of the constructive waiver of Confrontation Clause rights discussed, *supra*, note 34, and accompanying text. The defendant should not be able to circumvent the hearsay exception by improper behavior. Furthermore, there is likely to be an ongoing domestic violence crime if the victim's freedom is constrained to the degree that he or she cannot report the crime.

[40] *See, e.g.*, Smith v. State, 460 S.E.2d 114, 117 (Ga. Ct. App. 1995); Barton v. State, 962 S.W.2d 132, 138 (Tex. Ct. App. 1997); Autrey v. State, No. 05-96-01545-CR, 1998 WL 337864, at *5 (Tex. Ct. App. June 26, 1988).

[41] *See supra*, note 30 (listing jurisdictions in which written and recorded prior inconsistent statements are deemed reliable).

[42] Or. Rev. Stat. § 40.460(26).

[43] *See id.*

constitutional because cross-examination and witness demeanor during cross-examination provide sufficient safeguards of reliability. The opportunity to cross-examine the victim about the prior inconsistent statement eliminates Confrontation Clause obstacles. Due to the additional restrictions on admissibility, the second proposed exception admits statements that are, as a threshold matter, more likely to be reliable than statements admitted under the (constitutionally permitted) first proposed exception when the victim is available for cross-examination.

b. Victim Unavailable for Cross-Examination

When a victim is unavailable for cross-examination, the constitutional analysis of the propriety of admitting a prior statement as substantive evidence begins with an inquiry into whether the exception is "firmly rooted." In Ohio v. Roberts, the Court confessed that it "has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all ... hearsay exceptions.'"[44] In 1999, in Lilly v. Virginia, the Court stated that in order to satisfy the Confrontation Clause, uncross-examined hearsay must meet one of two alternatives: "(1) 'the evidence falls within a firmly rooted hearsay exception' or (2) [is not firmly rooted but] it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability."[45] A statement offered under a firmly rooted exception is presumptively reliable.[46] The opposing party can rebut this inference of reliability by showing that the statement lacks adequate circumstantial indicia of reliability.[47]

In two recent Confrontation Clause cases, White v. Illinois[48] and Lilly v. Virginia, the Court moved closer to providing a functional definition of "firmly rooted." In White, the Court deemed firmly rooted "such out-of-court declarations ... made in contexts that provide substantial guarantees of their trustworthiness. But those same factors that contribute to the statements' reliability cannot be recaptured even by later in-court testimony."[49] In Lilly, the Court declared, "[w]e now describe a hearsay

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[44] Ohio v. Roberts, 448 U.S. 56, 65 (1980) (quoting Green, 399 U.S. at 162).

[45] Lilly v. Virginia, 527 U.S. 116, 124-25 (1999) (quoting Roberts, 448 U.S. at 66).

[46] *See* Roberts, 448 U.S. at 66 ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.").

[47] *See* Idaho v. Wright, 497 U.S. 805, 821 (1990).

[48] White v. Illinois, 502 U.S. 346 (1992).

[49] White, 502 U.S. at 355-56. In White, the Supreme Court concluded that the Confrontation Clause is satisfied where hearsay evidence possesses "adequate indicia of reliability." *Id.* The previous interpretation of the Confrontation Clause involved a two-part test set forth in Ohio v. Roberts requiring a showing of unavailability and adequate "indicia of reliability." 448 U.S. at 66. Reliability was inferred if it was a firmly rooted exception.

exception as 'firmly rooted' if, in light of 'longstanding judicial and legislative experience,' it 'rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the 'substance of the constitutional protection.'"[50] "Context" is the central focus in determining whether an exception fits the doctrine. Exceptions that have been deemed firmly rooted have been those in which the reliability of the statement derives from: 1) an out-of-court context, that 2) cannot be recaptured in the courtroom.[51] Other factors that may be considered include the length of time the exception has been recognized and how widely accepted the exception is among states.[52]

i. The Second Proposed Modification as "Firmly Rooted" Exception

The firmly rooted nature of the second proposed exception is established by the Court's rationale, that "context" is the primary factor for determining whether a hearsay exception is firmly rooted. A statement satisfying the exception's threshold prerequisites for admissibility possesses "adequate indicia of reliability" derived from context. The primary contextual factors of the proposed hearsay exception are the occurrence of an assault, the timing of the statement, and reporting of the assault to persons responsible for responding to the report. These are identical contextual factors to those that have historically been admitted under the "hue and cry" doctrine, as well as other exceptions, including the spontaneous declaration category of hearsay exceptions (such as excited utterance) and the *res gestae* principle.

The Court has cited the ancient "hue and cry" doctrine, which authorized the admission of statements reporting violent assaults. "The

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See id. at 66. Subsequent to Ohio v. Roberts, the United States v. Inadi decision eliminated the unavailability prong of the test for most types of hearsay. Inadi, 475 U.S. 387 (1986).

[50] Lilly, 527 U.S. at 162 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895) (alterations in original)).

[51] The Court has declared some exceptions to be firmly rooted. Spontaneous declarations and statements for medical diagnosis. White, 502 U.S. 346. Statements by co-conspirators made during the course of the conspiracy. Inadi, 475 U.S. 387. There are other exceptions that the Court has refused to regard as firmly rooted. Residual exceptions. Wright, 497 U.S. at 817. Statements by a co-defendant. Lee v. Illinois, 476 U.S. 530 (1986). Finally, declarations against penal interests, which the Court called "too large a class for meaningful Confrontation Clause analysis." Lilly, 527 U.S. at 117 (quoting Lee, 476 U.S. at 544 n.44).

[52] Lilly, 527 U.S. 116. For another view supporting the constitutionality of this hearsay exception see Peter Dworkin, Confronting Your Abuser in Oregon: A New Domestic Violence Hearsay Exception, 37 Willamette L. Rev. 299 (2001) ("In many scenarios of application that arise statements admitted will satisfy the requirements of both the United States and Oregon Constitutions.").

citizen's duty to 'raise the "hue and cry" and report felonies to the authorities' was an established tenet of Anglo-Saxon law at least as early as the 13th century."[53] The hue and cry doctrine existed at common law and developed from an ancient process for reporting crimes and apprehending perpetrators.[54] Under early English common law, in order for a criminal charge to lie, a prosecutor had to demonstrate that the victim had alerted the neighborhood by raising a hue and cry.[55] All the neighbors were required (under penalty of liability), to set out in search of the felon.[56] At trial, the fact of the complaint and all the details were admissible.[57]

As hearsay doctrine emerged, it supplanted hue and cry. By the late seventeenth century, courts began to move away from hue and cry requirement and towards the hearsay rule, but statements reporting violent assaults continued to be received into evidence. Admissibility was based either upon the early common law exceptions to the hearsay rule or as *res gestae*.[58] In some jurisdictions, the admissible evidence came to be limited only to the fact of the report, but not the details of the crime. However, many jurisdictions continued to allow the admissibility of details of the report through a recognized hearsay exception or under *res gestae*.[59]

As Wigmore observed, as far back as the earliest applications of the hearsay rule, courts allowed certain statements to be admitted as exceptions

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[53] Roberts, 445 U.S. at 557 (citation omitted).

[54] *See* Black's Law Dictionary 583 (1st ed. 1891).

[55] *See* New Jersey v. Hill, 578 A.2d 370, 374 (1990) ("Trial courts required full details of the victim's complaint as a necessary element of the prosecutions case in those instances of violence."); *see also* Paula J. Clifford, Fresh Complaint Testimony in Massachusetts-Friend or Foe, 2 Suffolk J. Trial & App. Advoc. 161, 168 (1997) ("To prove his case, a prosecutor had to show that the alleged victim made a complaint.").

[56] *See* Bouvier's Law Dictionary 966 (Rawle's rev. 1897) ("The constable ... is to call upon the parishioners to assist him in the pursuit in his precinct; and to give notice to the next constable, who will do the same as the first, etc. If the county will not answer the bodies of the offenders the whole hundred will be answerable for the robberies there committed, etc."); *see also* Hill, 578 A.2d at 374 ("Victims of violent crimes were expected to cry out immediately and alert their neighbors that they had been violently assaulted. The neighbors would then initiate a collective search for the aggressor.").

[57] *See* Wigmore, *supra* note 21, §§1747, 1760, at 196-98; Hill, 578 A.2d at 375 ("Because the details of 'hue and cry' were admissible as evidence of the rape, testimony concerning hue and cry was substantive evidence against the accused."); Clifford, *supra* note 55, at 169; *see also* Deborah Brandon, Going to Extremes: The Doctrine of Prompt Complaint and Louisiana Code of Evidence Art. 801(d)(1), 39 Loy. L.Rev. 151 (1993).

[58] *See* Wigmore, *supra* note 21, §§1747 at 196-98, 1760; *see also* Clifford, *supra* note 55, at 168-69. *Res gestae* is the historical hearsay exception which "includes those circumstances which are the automatic and undesigned incidents of a particular litigated act . . . [In] operation it renders acts and declarations which constitute a part of the things . . . said admissible in evidence." Black's Law Dictionary 1469 (4th ed. 1957).

[59] *See* Wigmore, *supra* note 21, §§1747, 1760, at 196-98.

to the general ban.[60] "The hearsay rule is not a rule without exceptions; there never was a time when it was without exceptions."[61] For example, one of the earliest justifications for ensuring the reliability of out of court statements is the spontaneous declaration rationale.[62] This rationale was important for admitting statements in early assault cases, including crimes of domestic violence. The United States Supreme Court has recognized the ancient precedent of admitting hearsay statements that report acts of what would now be called domestic violence. The Court has cited the 1694 domestic violence case Thompson v. Trevanion,[63] in which the domestic violence victim's statement was admitted as substantive evidence, as authority that the spontaneous declaration category of exceptions are firmly rooted. The case involved an "assault and battery" upon a wife where the judge admitted what the wife had said "immediate upon the hurt received, and before she had time to devise or contrive anything for her own advantage."[64]

The proposed hearsay exception satisfies the second aspect of "context" because a statement that is admissible under the domestic violence exception is made under circumstances that cannot be recaptured by in-court testimony. By the time testimony is given, the victim will likely have been subjected to threats or coercion by the assailant. Due to the pressure on the victim to recant, testimony given on the witness stand months later by the domestic violence victim will not have the same evidentiary value, and cannot substitute for the out of court statement.

The second proposed hearsay exception is firmly rooted because it satisfies the modern "context" test, resembles hue and cry requirements, and fits within the rubric of *res gestae* principles. Although it is much more narrowly drawn, the second proposed exception is analogous to the ancient hue and cry doctrine because both fill the same functional purpose. The functional purpose of each is (1) to achieve the reporting of violent crime; (2) to the appropriate authorities; (3) shortly after the crime was committed; (4) to initiate criminal prosecution and to provide evidence for admission at trial.[65]

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[60] Wigmore, *supra* note 21, § 1397, at 158.

[61] Wigmore, *supra* note 21, § 1426, at 256-67.

[62] *See* Wigmore, *supra* note 21, §1746, at 195.

[63] 90 Eng. Rep. 179 (K.B. 1694).

[64] *Id.* at 179.

[65] The argument that the second hearsay exception proposal is not firmly rooted because it addresses domestic violence is unpersuasive. The historical "hue and cry" foundations of the second proposed modification are not made any less firmly rooted because, to ensure reliability, the admissibility is restricted to statements of domestic violence victims. To see it otherwise misinterprets the more restrictive criteria of admissibility in the second proposed exception, (e.g., domestic violence victim statements in domestic violence cases), as instead a foundational basis of the exception. It would be

ii. The Second Proposed Exception not as a "Firmly Rooted" Exception

The possibility that an appellate court would hold that the exception is not firmly rooted cannot be foreclosed. If courts narrowly defined the exception by its "domestic violence" focus, a court could disregard historical support and conclude that the exception has not been in existence long enough and does not have a history in the courts. Furthermore, a court might conclude that a twenty-four hour reporting period is too long to fall under historical standards.[66] If the second proposed exception is not firmly rooted, it is still constitutional as a non-firmly rooted exception.

Where a statement is offered under a hearsay exception that is not firmly rooted, the Supreme Court has stated that the statement is "presumptively unreliable," but the proponent may rebut the presumption "by a 'showing of particularized guarantees of trustworthiness'" based on the totality of the circumstances surrounding the making of the statement.[67] The Supreme Court in Idaho v. Wright, ruled that reliability must be "drawn from the totality of circumstances that surround the making of the statement."[68] Accordingly, the second proposed domestic violence hearsay exception directs that "the court shall consider all circumstances surrounding the statement" to discern the statement's reliability.[69]

By requiring the trial judge to specifically determine whether a statement offered under the domestic violence hearsay exception has "particularized guarantees of trustworthiness," out of court statements admitted under the exception satisfy both constitutional and hearsay concerns. Thus, constitutional issues will arise only in those particular cases where a court admits a statement that does not possess particularized guarantees of trustworthiness.

A judge finds indicia of reliability within the context surrounding the making of the statement. For example, the proposed statute requires the statement to have been recorded electronically or in writing, or made to a police or other state officer. Police officers are trained to accurately record

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peculiar to eliminate the firmly rooted status of an exception because *additional criteria to ensure the reliability of the statement were added* to the historical exception. While there is some point at which modifications to hue and cry would end its firmly rooted nature, this is not the case in the proposed exception.

[66] The time period in the proposed exception could be shortened by further legislative refinement to fall within "hue and cry" should a court determine twenty-four hours is too long to fall within the firmly rooted category

[67] Lee v. Illinois, 476 U.S. 530, 543 (1986); *see also* Idaho v. Wright, 497 U.S. 805, 818-19 (1990).

[68] Wright, 497 U.S. at 819-20.

[69] Or. Rev. Stat. § 40.460 (26)(b).

and preserve evidentiary statements, and will provide better contextual information than the average lay witness. If the statement was recorded, there is little doubt regarding the reliability in recollecting the words of the statement. In addition, the recording, whether electronic or written, will provide the court with some contextual evidence as to the demeanor of the declarant. Also, the domestic violence hearsay exception requires that the statement be made within twenty-four hours after the incident of violence occurred. Finally, the statement will have been made by a domestic violence victim about an incident of domestic violence. This is significant because the initial out of court statement of a domestic violence victim in a domestic violence case is likely to be the most reliable statement obtainable, whether or not the victim is available for cross-examination. In the exception, the threshold requirements for admissibility are designed to give the judge adequate evidence to make a determination that the statement bears particularized guarantees of trustworthiness which warrant its admission into evidence and ensure that contextual information will be available to the court.[70]

Only intrinsic corroboration of the statement is constitutionally permitted because extrinsic corroborating facts cannot be used under Wright.[71] In various decisions, the Court has recognized a number of factors that relate to reliability, including: spontaneity, voluntariness, repetition, the knowledge and mental state of the declarant, whether the statement was made in response to leading questions, whether the statement was made anonymously, the existence or lack of a motive to fabricate, and whether the terminology used would be expected of such a declarant.[72] However, the Court has never attempted to set out a comprehensive list of factors to be considered in determining reliability, and, in fact, has stated that, "courts have considerable leeway in their consideration of appropriate factors."[73] Nor has the Court specifically identified, or found it wise to

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[70] Before appellate courts affirm that the presence of threshold requirements of the exception are tantamount to "particularized guarantees of trustworthiness," a proponent of the evidence would be wise to supplement the record, where possible, with other indicia of reliability.

[71] Extrinsic corroboration is evidence extrinsic to the statement and the immediate context in which it was made, such as physical injuries, etc. Intrinsic corroboration is evidence provided in the immediate attendant circumstances and the actual context in which the statement was made. The limitation imposed by Wright prohibiting corroborating evidence extrinsic to the context, does not foreclose the admissibility of the domestic violence victim's statement under the second proposed exception. *See* Wright, 497 U.S. at 805.

[72] *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 851 (1990); Wright, 497 U.S. at 821-22; Lee, 476 U.S. at 532-546.

[73] Idaho v. Wright, 497 U.S. 805, 821-22 (1990) (the Court, after citing a number of factors that properly relate to reliability, states: "These factors are, of course, not exclusive.").

identify, the quantity or quality of intrinsic corroboration needed for admissibility. Rather, the constitutional sufficiency of intrinsic corroboration of statements offered under a non-firmly rooted exception must be assessed in the "totality of circumstances." In keeping with the Court's view, while some criteria are explicitly set forth in the proposed hearsay exception, the proposed exception explicitly allows a court to consider any other relevant criteria not specifically enumerated. If the exception is not firmly-rooted, the constitutionality of the admission of a statement will be determined on a case by case basis by weighing intrinsic evidence of reliability.

V. SPECIAL ISSUES RAISED BY THE PROPOSED EXCEPTIONS

A. Addressing the Problem of Recantation by "Memory Loss"

One way domestic violence victims try to assist the defendant is to claim no memory of the prior statement of the assault. The troublesome question is whether the present testimony of memory lapse by the victim renders the prior statement an "inconsistent statement,"[74] and thus admissible into evidence. Professors Mueller and Kirkpatrick are skeptical that the failure of witnesses to recall is typically a genuine lapse of memory:

> At least in theory, both a claimed lack of memory and a prior positive statement might be true and correct—what was known may be forgotten, and the difference need not suggest that the witnesses lied or erred either time. But common sense rebels at the thought that such changes in knowledge or memory reflect only the vagaries of human understanding, and common experience suggests that changes of this sort may reflect a change of view or uncertainty or mistake. After all claiming not to know is a familiar way to keep distance and avoid involvement, controversy, mask confusion, insecurity, or uncertainty.[75]

While it is probable that most lapsed memory is feigned, it is even more probable in domestic violence cases because recantation is the norm rather than the exception. In light of the improbability of genuine memory loss in most cases where it is claimed, one federal approach, followed by some states, has been to find that the prior statement is inconsistent if the loss of memory claim is false or feigned.[76] If the court makes a finding that the memory lapse is false or feigned then the earlier statement becomes a

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[74] *See* Mueller & Kirkpatrick, *supra* note 17, at 590 nn.10-11 (citing federal cases).

[75] *Id.* at 590.

[76] *See, e.g.*, People v. Perez, 98 Cal. Rptr. 2d 522 (Cal. Ct. App. 2000) (witness's deliberate forgetfulness is an implied denial of prior statements which creates inconsistency); State v. Soto, 773 A.2d 739, 750 (N.J. Super. Ct. App. Div. 2001).

prior inconsistent statement and is admissible. Some commentators have criticized hinging admissibility on a judicial finding that the witness is feigning or falsifying memory loss and urge that it is an unnecessary barrier to the admissibility of prior inconsistent statements.[77] The criticism is that the court unwisely invades the province of the jury in engaging in such a finding so it is better to let the statement in as a prior inconsistent statement without a judicial inquiry into the reliability of the lapsed memory claim.[78] Other federal courts have done just that and have admitted the statement without any inquiry into whether the memory was feigned or false.[79] Also, some other state courts which have ruled on the issue in the domestic violence context have admitted the prior inconsistent statement without requiring a finding of false or feigned memory.[80]

In terms of ultimate admissibility, it is perhaps inconsequential whether or not a jurisdiction requires a finding of whether the domestic violence victim's memory loss is feigned. Courts have recognized that recantation is commonplace in domestic violence cases.[81] While it is theoretically possible that a domestic violence victim's recantation is true and the original report untrue, the practical reality of domestic violence is that a truthful recantation by a domestic violence victim is rare. Modern trial courts are likely to find the recantation unbelievable because the courts are familiar with the dynamics of domestic violence. It is also probable that these courts will find that a domestic violence victim's lapse of memory is feigned.

Because it may be difficult or impossible, as a practical matter, to cross-examine a witness on a prior statement of which the witness presently claims no recall, it may raise the possibility that there will be an inadequate opportunity to confront the witness under the confrontation clause. However, it is clear that the use of the prior inconsistent statement when a witness claims loss of memory is permissible under the Confrontation Clause.[82] Likewise, most states ruling on the issue have found no violation

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[77] *See* United States v. Tory, 52 F.3d 207, 210 (9th Cir. 1995), *quoted in* Mueller & Kirkpatrick, *supra* note 17, § 6.40, at 590 ("[T]o require a false or feigned lack of memory as a condition seems unworkable: if the judge must already assess credibility in deciding to admit a prior positive statement, he is playing a role normally reserved for the jury, and the question is one that cannot be answered with any confidence. It seems better not to impose this condition on the use of prior statements and sometimes courts make no mention of it.").

[78] *See* Mueller & Kirkpatrick, *supra* note 17, § 6.40, at 590 (citing cases that omit the requirement of a finding of feigned memory).

[79] *See id.*

[80] *See, e.g.*, State v. King, 883 P.2d 1024, 1030-33 (Ariz. 1994); Bullock v. State, 543 A.2d 858 (Md. 1988).

[81] *See supra* note 11 and accompanying text.

[82] *See, e.g.*, United States v. Owens, 484 U.S. 554, 559 (1988) (finding that adequate opportunity to probe memory loss satisfies confrontation clause when witness had

of state constitutional confrontation clauses.[83] At least one state has followed the two dissenting justices in Owens, and found that an absence of memory means the witness is unable to be effectively confronted and that the state constitutional confrontation clause is violated.[84] This minority of courts should establish a feigned memory procedure unique to domestic violence cases. First, because domestic violence victims will probably recant, these cases represent a class of cases different than other cases. In no other class of cases is recantation, including recantation by memory loss, commonplace and even expected. Second, to apply an inflexible rule to domestic violence cases is to doom the possibility of a truthful outcome. Domestic violence victims will find out from their abuser, typically based on information provided to the accused by his attorney, the significance the evidence code possesses in relation to the case. It seems peculiar to enforce the defendant's right to confront a victim with "memory loss" by excluding a prior inculpating statement made by the victim, while, at the same time being fully aware that the victim has feigned loss of memory to shelter the defendant from criminal liability.

In domestic violence cases, states which have interpreted their respective confrontation clauses more strictly than the Federal Constitution should allow a trial judge to make a finding about whether a domestic violence victim's memory loss is feigned. If it is feigned, the state confrontation clause should be satisfied, because the feigning is done to protect the defendant, ironically, the very person complaining about the inability to confront.[85]

B. Confronting the Problem of the Unavailability Requirement

In both United States v. Inadi and Idaho v. Wright, the United States Supreme Court abandoned the unavailability requirement as a prerequisite to admissibility.[86] The Court in Wright noted that hearsay

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no recall of prior identification); United States v. McHorse, 179 F.3d 889, 900 (10th Cir. 1999); United States v. Keeter, 130 F.3d 297, 302 (7th Cir. 1997) (Confrontation Clause not violated when witness feigned amnesia at trial because defense could examine about credibility, as prior inconsistent statement had been made under oath).

[83] *See, e.g.*, London v. State, 549 S.E.2d 394, 397 (Ga. 2001); State v. Jenkins, 23 P.3d 201, 205 Mont. 2000).

[84] *See* State v. Canady, 911 P.2d 104 (Haw. 1996) (denying admissibility of prior inconsistent statement when domestic violence victim claimed no memory).

[85] One comment uses a similar argument in support of the idea that feigned memory loss should not solve Confrontation Clause problems where someone other than the defendant is responsible for promoting the feigned memory loss testimony. *See* David Greenwald, Comment, The Forgetful Witness, 60 U. Chi. L. Rev. 167, 180 (1993).

[86] *See* Idaho v. Wright, 497 U.S. 805 (1990); Inadi v. United States, 475 U.S. 387 (1986).

statements either firmly rooted or not firmly rooted must meet admissibility standards that are "so trustworthy that adversarial testing would add little to [their] reliability."[87] The judge need not make a finding as to the witness's unavailability, because the statement will have been made under circumstances that cannot be "replicated by courtroom testimony,"[88] such that "the test of cross-examination is of marginal utility"[89] and therefore is not required. A witness must either be produced or shown to be unavailable only "when the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial."[90] The Supreme Court has quoted with approval Wigmore's famous phrase that cross-examination is the "greatest legal engine ever invented for the discovery of truth."[91] This viewpoint has increasingly been reflected in the Court's hearsay and Confrontation Clause opinions.[92] The Supreme Court has adopted Wigmore's belief that certain types of hearsay have "circumstantial guarantees of trustworthiness," and do not need to be subjected to cross-examination.[93] For example, in Idaho v. Wright, the Court cited Wigmore explaining that "if the declarant's truthfulness is so clear from the surrounding circumstances that cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement."[94]

Certain types of hearsay need not be subjected to cross-examination because some statements derive their reliability from their context. The Court explained this in White: "We note first that the evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations ... is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness."[95] In such an instance, cross-examination would add little to the trier of fact's understanding of the evidence. When a declarant is reacting to a startling event, for example, there is no need to ask at trial: "Why did you make that statement?" or "What were you thinking?" The statements themselves are more valuable evidence than testimony given months later when the events are not as fresh

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[87] Wright, 497 U.S. at 821.

[88] White v. Illinois, 502 U.S. 346, 356 (1992).

[89] Wright, 497 U.S. at 820.

[90] Inadi, 475 U.S. at 393.

[91] 5 Wigmore, *supra* note 21, §1367, *quoted in* California v. Green, 399 U.S. 149, 158 (1970).

[92] *See, e.g.*, White, 502 U.S. at 356; Ohio v. Roberts, 448 U.S. 56, 63 (1980); *see also* Robert P. Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 713 (1993).

[93] Idaho v. Wright, 497 U.S. 805, 812 (1990) (quoting Idaho R. Evid. 803(24)).

[94] Wright, 497 U.S. at 820.

[95] White v. Illinois, 502 U.S. 346, 355 (1992).

in the declarant's mind, and after there has been an opportunity for the witness's memory or comments to be influenced by others, or for a motive to fabricate to develop.

Another important reason that cross-examination does not add value to this type of hearsay is that in-court testimony cannot substitute for the contextual circumstances that made the statement significant.[96] The Court applies this reasoning to excited utterances: "A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom."[97] In such instances where statements derive their significance from an out-of-court context, "adversarial testing would add little to their reliability."[98]

Despite United States Supreme Court holdings, some state courts continue to require a showing of unavailability. For example, the prosecution may be required to demonstrate a significant effort to locate the victim before declaring the victim unavailable. A showing of unavailability should not be required in domestic violence cases. It is backwards to require a showing of unavailability when the domestic violence victim is typically unavailable to assist the batterer's defense and frustrate the truth-finding process. Ironically, if a showing of unavailability is not required, a defendant is more likely to secure the victim's attendance at trial rather than encourage no-show. When coercing a victim to no-show becomes an ineffective means of avoiding the admissibility of reliable evidence at trial, the coercion of the victim to recant at trial is the defendant's remaining option. Thus, eliminating the unavailability requirement in domestic violence cases has the added benefit of increasing the likelihood that victims attend trial, which in turn, eliminates the unavailability problem.

Furthermore, state court retention of the unavailability requirement in domestic violence cases poses another problem: it may be unrealistic of courts to expect that adequate police resources can be committed to the legwork necessary to meeting the standard of unavailability.[99] Because of the high volume of domestic violence cases, the fact that most are misdemeanors, and the fact that there are a disproportionate rate of victims in these cases hiding from the criminal process, adequate resources may not be readily available to establish unavailability.

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[96] *See* Inadi v. United States, 475 U.S. 387, 395 (1986) (applying logic to statements of co-conspirators).

[97] White, 502 U.S. at 356

[98] Wright, 497 U.S. at 821.

[99] *See* Fed. R. Evid. 804(a) (stating requirements of witness unavailability for application of hearsay exception).

Like the hearsay rule itself, unavailability requirements have been imposed with no regard for the uniqueness of domestic violence cases. In light of the modern understanding of domestic violence, some accommodation to the unavailability requirement should be fashioned by the few state courts still requiring it. For example, if added precautions are needed, a requirement of general corroboration of the statement in order to convict is far preferable to unavailability requirements.[100]

C. Corroborating the Statement Sufficiently to Convict

Once a prior statement is determined to be reliable for use as substantive evidence, there are two approaches to the use of unsworn prior inconsistent statements to convict. The two approaches are: (1) to allow a conviction to be based entirely upon the prior statement or (2) to require corroborating evidence of the statement before the statement can be a sufficient basis of conviction. The issue of whether the statement alone is sufficient to convict may arise under either of the proposed exceptions.[101]

A majority of the twenty-two states that allow the use of prior inconsistent statements as substantive evidence do not require the statements be corroborated in order for them to be the basis of conviction.[102] In these states, there are no significant legal hurdles to the use of a domestic violence victim's out of court statements as a sufficient basis for conviction.

A minority of the twenty-two states that allow unsworn prior inconsistent statements as substantive evidence[103] have also required

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[100] *See infra* Part V.C (discussing general corroboration requirements).

[101] *See* Stanley A. Goldman, Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict, 65 N.C. L. Rev. 1 (1986). Goldman argues that a prior inconsistent statement that is recanted ought not to be a sufficient basis for conviction. But Goldman's point was made in the context of cases generally, and does not take into account the remarkable and unique circumstances of domestic violence recantation. It is not the point of this article to confront his general thesis but to point out that his thesis has little merit in the domestic violence context. However, in domestic violence cases the prior inconsistent statement is the reliable statement and is not rendered unreliable by a subsequent recantation. It is the recantation itself that is inherently unreliable. Since Goldman's focus is the general case, he does not address other issues involved in domestic violence such as the fact that the recantation is for the benefit of the party seeking to render the conviction insufficient. An illustrative example of a court painting domestic violence victim memory "lapses" with Goldman's too broad a brush can be found in State v. Tomas. 933 P.2d 90 (Haw. Ct. App. 1991).

[102] *See* People v. Chavies, 593 N.W.2d 655, 659-61 (Mich. Ct. App. 1999) (citing cases). For state cases not requiring corroboration, see People v. Cuevas, 906 P.2d 1290, 1302 (Cal. 1995); Montoya v. People, 740 P.2d 992, 996-98 (Colo. 1987); Acosta. v. State, 417 A.2d 373, 376-378 (Del. 1980); Weeks v. State, 370 S.E.2d 344 (Ga. Ct. App. 1988); Tomas, 933 P.2d at 91(domestic violence case); People v. Morrow, 708 N.E.2d 430, 436 (Ill. Ct. App. 1999) (holding that if a judge finds a prior inconsistent statement is reliable, no finding of corroboration is necessary); Nance v. State, 629 A.2d 633 (Md. 1993).

[103] *See* statutes cited *supra* notes 29-30.

corroboration of a prior inconsistent statement before it can be considered a sufficient basis for a conviction. The judicial choice between allowing *general* or *specific* extrinsic corroboration makes a big difference in the effectiveness of the proposed domestic violence hearsay exceptions as truth-finding tools.

Most jurisdictions that require corroboration have a *general* extrinsic corroboration requirement.[104] For example, in the Missouri case State v. Archuleta,[105] the victim told the officer about the assault and identified the defendant as the perpetrator. At trial, the victim stated she did not recall the events. At the scene, the victim had a bloody nose and swollen eyes and the Missouri court found this sufficient foundation for the admission of the victim's prior inconsistent statements.[106] In Vermont, the court held that in a domestic violence case the requirement of "corroborative evidence need not tack down each and every fact and allegation."[107] General corroboration factors cited by the court included the short time between the assault and the statement, as well as the victim's physical and emotional state. The Vermont court found it significant that "recantation is common in cases of domestic abuse because victims fear retaliation from the batterer."[108] A Montana court found that, among other corroborative facts, the victim's hysterical appearance, the fact that she was out on the street at 11:00 P.M. with no coat or socks, and had cuts, bruises, and scrapes on her body, could be considered corroboration of her prior inconsistent statement concerning the assault.[109] A New Mexico court, faced with identification of the domestic violence perpetrator only through the victim's prior inconsistent statements, found sufficient *general* extrinsic corroboration in the facts that defendant lived with the victim, no other person bore an unfavorable relationship to the victim that would result in a severe beating, defendant produced no evidence impeaching the prior inconsistent statements and no evidence of defendant's good character was presented.[110] These courts have all appropriately applied a general

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[104] States with case law that requires only general corroboration of prior inconsistent statements to convict: Alaska. Hamilton v. State, No. A-6859, 1999 WL 7165000 (Alaska Ct. App., Sept. 15, 1999); Montana. State v. Stringer, 897 P.2d 1063 (Mont. 1995); New Jersey. State v. Mancine, 590 A.2d 1107 (N.J. 1991); New Mexico. State v. Maestas, 584 P.2d 182 (N.M. Ct. App. 1978) (domestic violence); South Dakota. State v. Owl, 316 N.W.2d 801 (S.D. 1982); Utah. State v. Ramsey, 782 P.2d 480 (Utah 1989); Vermont. State v. West, 667 A.2d 540 (Vt. 1995) (evidence sufficient for conviction in prior inconsistent statement admitted under excited utterance exception).

[105] 955 S.W.2d 12 (Mo. Ct. App. 1997).

[106] *See id.*

[107] West, 667 A.2d at 543 (quoting Mancine, 590 A.2d at 1119).

[108] West, 667 A.2d at 543.

[109] *See* Stringer, 897 P.2d at 1072.

[110] *See* State v. Maestas, 584 P.2d 182, 192 (N.M. Ct. App. 1978).

corroboration requirement to establish the sufficiency of out of court statements of a domestic violence victim to convict.

On the other hand, a *specific* corroboration requirement would spell disaster for truth finding in domestic violence cases. An example of how requiring the use of specific extrinsic fact corroboration for each element of the crime could potentially undo any benefit of the proposed hearsay exceptions is found in the Ohio case State v. Attaway.[111] While Ohio does not allow the use of prior inconsistent statements generally, it does recognize an excited utterance exception upon which case law has overlaid a specific extrinsic fact corroboration requirement. In Attaway, police responded to a 911 call and found the victim and defendant together.[112] The domestic violence victim informed the police that the defendant had punched, kicked, stomped, and choked her.[113] The victim had a swollen bloody lip and scratches on her neck, was crying and was obviously intoxicated.[114] The officer observed that Attaway had scratches on his neck and a minor lip injury. It was uncontested that the defendant and victim resided in the same house.[115] At trial the victim recanted, saying that she had instead been in a fight with a woman on the street and not, as she originally reported, the defendant. Not surprisingly, the trial court believed the original report to the police by the victim and convicted the defendant.[116] The appellate court reversed the conviction.[117] Ohio's application of a *specific* extrinsic corroboration requirement in Attaway was made with no discussion of the unique reality of domestic violence recantation. The Ohio court painted over the unique picture of domestic violence cases with the broad brush of cases generally, stating:

> . . . [f]or the trial court to have found Attaway guilty in the present case, it must necessarily have placed more credence in the statements [the victim] made to the arresting officer than it did in her testimony at trial under oath. Such a determination assumes that statements made contemporaneous with the event, while still under its stress, carry a more substantial guarantee of trustworthiness than testimony given after the fact, subsequent to a period of cooling off in which one has had an opportunity to fabricate....We note that the record is bereft of any extrinsic corroborating evidence from which to conclude that [the

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[111] 676 N.E.2d 600 (Ohio Ct. App. 1996).

[112] *See id.* at 601

[113] *See id.*

[114] *See id.*

[115] *See id.*

[116] *See id.* at 601.

[117] *See id.* at 602.

> victim's] statement to the arresting officer was more credible than her recantation under oath.[118]

The Attaway opinion demonstrates a lack of understanding of the dynamics of domestic violence, much less any significance it might have to an evidentiary ruling. This victim, like eighty to ninety percent of domestic violence victims, recanted her initial report to the police. As a practical matter, the Attaway *specific* extrinsic corroboration requirement severely limits, if not altogether destroys, the practical import of the proposed hearsay modifications advocated in this article and, for that matter, *any* pre-existing hearsay exceptions, such as the firmly rooted excited utterance exception used in the Attaway case.

Absent a full and complete confession by the defendant, or the improbable independent eyewitness, it is difficult to imagine a fact scenario under the Attaway ruling in which a coerced victim could not completely eliminate the possibility of a conviction by simply recanting. In Attaway, the police officer responded to the call. The officer found the defendant and victim present at the scene. Both victim and defendant had been recently injured. Despite the fact that the trier of fact (the trial court judge) determined that the initial statement, and *not* the recantation, was reliable, the Ohio appellate court ruled implicitly that a domestic violence victim's initial statement to police, admitted under the excited utterance exception was *less reliable as a matter of law* than one made under oath absent specific extrinsic corroboration.[119]

Hopefully, Attaway does not represent the beginning of a giant step backwards in the effort to achieve truth finding in domestic violence cases. If testimony under oath is, *as a matter of law*, more reliable than a statement falling into the firmly rooted excited utterance exception (unless there are *specific* extrinsic facts to corroborate each element of the crime), then there will rarely be sufficient evidence to convict a batterer. The reality of batterer coercion in domestic violence cases should be reason enough to require only *general* extrinsic corroboration in cases of prior inconsistent statements of domestic violence victims, rather than corroboration of each element of the crime. The general requirement that some fact or facts in the statement be supported by corroborating evidence should render the statement reliable enough to be a sufficient basis for conviction.

In fairness to the Ohio court, the Attaway opinion also demonstrates the need for the two proposed hearsay exceptions. Attaway

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[118] *Id.* at 601-02.

[119] The only other conclusion possible is that the appellate court gave itself power to review the facts in a criminal case *de novo*. This alternative conclusion would represent a revolutionary expansion of appellate authority in criminal appeals, and therefore is an unlikely explanation for the decision.

reveals that, because of the low threshold of reliability needed for the admissibility of statements under existing firmly rooted hearsay exceptions (e.g., a state of excitement), courts may be tempted to impose a higher standard of corroboration to satisfy a "sufficiency of evidence to convict" requirement. The Attaway court was struggling with a problem that does not exist within the proposed hearsay exceptions. In the proposed exceptions, "excitement" is not a central criterion for admissibility. The Attaway court noted that "an excited utterance can just as easily lead to the contradictory conclusion that a startling event enhances the possibility for misstatement or mis-perception."[120] Absent the court's discomfort with the criterion of "excitement" as the main indicia of reliability, the court would be free to abandon *specific* corroboration requirements and embrace *general* corroboration requirements under the heightened criteria of reliability in the proposed hearsay exceptions. Unlike the excited utterance exception, both of the proposed hearsay exceptions provide a court with the opportunity to admit the prior statement by the victim without relying upon the criterion of excitement, and with better criteria and procedures available to ensure reliability. The first exception requires cross-examination of the victim about the prior inconsistent statement to ensure reliability. The second exception sets threshold criteria of reliability and, beyond that, allows a court to examine other criteria of reliability. With the presence of much more substantial procedures and criteria for establishing reliability in the proposed exceptions, there is much less need for an overly stringent test of sufficiency of proof to convict. As a result, general extrinsic corroboration should satisfy appellate courts as sufficient corroborative proof to convict.

VI. A FINAL PROBLEM: RECONCILING THE HEARSAY EXCEPTIONS IN THE DEBATE OVER MANDATORY PROSECUTION PROCEDURES IN DOMESTIC VIOLENCE CASES

This section surveys the conflict over whether mandatory domestic violence prosecution procedures are wise, and identifies the hearsay rule as the wrong context within which to make public policy decisions about mandatory prosecution in domestic violence cases. Recently, the problem of a domestic violence victim's failure to appear at trial (hereinafter "no-show") has led to heated debate about whether domestic violence victims should be compelled by arrest to appear and testify. This has spurred an ongoing debate about the wisdom of any and all mandatory prosecution procedures in domestic violence cases. This debate takes place in the context of the reality of gender subordination.

Cheryl Hanna's thesis is that domestic violence must be prosecuted as a matter of public interest. On the other hand, Linda Mills argues that

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[120] State v. Attaway, 676 N.E.2d 600, 602 (Ohio Ct. App. 1996).

mandatory prosecution procedures are destructive to the uncooperative domestic violence victim.[121] Reviewing the scholarship of Hanna and other supporters of mandatory procedures, Elizabeth Schneider has identified four core arguments in favor of mandatory prosecution of domestic violence cases.[122] First, the decision to prosecute is properly a state decision, because the state represents the people not the victim, and because the public wrong of domestic violence, which concerns "public safety and the protection of children," should not be ignored.[123] Second, mandatory prosecution removes the decision from the victim and thus removes the coercion of the batterer upon the victim to end the case.[124] Third, mandated procedures are justified by the "effect they have on the batterer."[125] Finally, that domestic violence is not a private matter, but an issue of public concern.[126] Reviewing Mills' scholarship, among others, Schneider also identifies the central criticisms of mandatory prosecution procedures. In deciding what is "best" for victims by imposing mandatory prosecution practices, the empowerment of "choice" is removed from the victim and the autonomy of the victim is violated.[127] Mandatory prosecution procedures can also increase the potential for harm to the victim's dignity by increasing the likelihood that the batterer will retaliate against the victim, or that the victim will realign his or her loyalty with the batterer.[128]

Empirically, the case is strong for mandated domestic violence procedures because of the adverse impact of domestic violence on public interests and the interests of children. The sheer volume of domestic violence crime is shocking.[129] Statistics from varied sources reveal the

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[121] *Compare* Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 Harv. L. Rev. 1849 (1996) *with* Linda G. Mills, Killing Her Softly: Intimate Abuse and the Violence of State Intervention, 113 Harv. L. Rev. 550 (2000).

[122] *See* Elizabeth Schneider, Battered Women and Feminist Lawmaking 185 (2000). Professor Schneider has urged that we should be concerned about efforts to de-contextualize battering from the larger framework of gender subordination. That battering occurs as a method of gender subordination is accepted in this article as a premise. Thus, this article is not cast as a debate as to the existence of a cultural framework of gender subordination. Importantly, neither Hanna nor Mills challenge this premise in arriving at their polarized conclusions on appropriate criminal procedures in the domestic violence context.

[123] *Id.* at 185.

[124] *See id.*

[125] *Id.* at 185-86.

[126] *See id.* at 186.

[127] *See id.*

[128] *See id.* at 187.

[129] The Federal Bureau of Justice Statistics [hereinafter BJS] reports that on average each year, "women experienced over 572,000 violent victimizations committed by

enormity and scope of the domestic violence epidemic. Domestic violence imposes a staggering financial burden on society. The economic cost of battering relationships to employers is between five and ten billion dollars per year.[130] Also, substantial health care resources are devoted to domestic violence. The Surgeon General reports that violence against women is the leading cause of injury to American women.[131] Other medical studies reveal similarly dramatic statistics.[132] Domestic violence impacts children and the social service agencies which serve them. The impact of domestic violence on children is substantial. The most identifiable risk factor for child abuse is domestic violence.[133] Other studies also document the tragedy

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an intimate." Lawrence A. Greenfield et al., Bureau of Justice Statistics Factbook: Violence by Intimates 2 (1998). An article in the Journal of the American Medical Association estimates that between 1.8 and 4 million women are victimized by domestic violence every year. *See* Antonia C. Novello et al., From the Surgeon General, U.S. Public Health Service, JAMA, June 17, 1992, at 267-23. BJS reports that one in five females who had reported abuse was the victim of three or more assaults in the preceding six months. *See* Greenfield et al., *supra,* at 2. Domestic violence accounts for twenty-seven percent of all victimizations of women. Many judges and lawyers familiar with domestic violence have emphasized that intervening in domestic violence is a critical task for the legal system. *See* National Council of State and Juvenile Judges, Family Violence: A Model State Code (1994) ("Domestic and family violence must be reduced and prevented. When it occurs we must intervene effectively. Our best hope to do so requires strong public policy against domestic and family violence and begins with appropriate legislation to that end."); *see also* Howard Davidson, The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association 2 (1994) ("The time has come for the entire legal profession to scrutinize and respond to this problem [of domestic violence]. The law must protect children who live in violent home environments. The law must work to save lives, to protect abused parents and their children by removing violent abusers, and to protect victim parents from continued exposure to domestic violence.").

[130] Harris Meyer, The Billion-Dollar Epidemic, Am. Med. News, Jan. 6, 1992, at 7.

[131] *See* Novello, *supra*, note 129.

[132] Domestic violence accounts for seventeen percent of women's visits to emergency rooms. BJS, Pub. No. NCJ-1569212, Violence Related Injuries Treated in Hospital Emergency Departments 5 (1997). In a study in a metropolitan emergency department, twenty-eight percent of women presenting for domestic violence were hospitalized, thirteen percent required major medical treatment, and forty percent had previously required medical care for domestic abuse. McCue, *supra* note 12, at 80. A study randomly reviewing approximately 3,600 medical records revealed that forty percent of women's injuries resulted from intentional assault by an intimate. *See id.* at 81 (citing study). One study reports that thirty-two percent of domestic violence victims seeking treatment suffered fractures, eleven percent lacerations and nine percent had been beaten to unconsciousness. *Id.* at 80 (citing study). The author of a comprehensive work on domestic violence writes that, "[p]regnancy is no protection from abuse and may even incite batterers to greater violence." *Id.* at 83. Between twenty-five and fifty percent of abusive husbands batter pregnant wives. *Id.* Domestic violence assaults result more frequently in medical care (twenty-seven percent versus fourteen percent) and in hospitalization (fifteen percent versus eight percent) than stranger assaults. *See* Meyer, *supra,* note 130, at 4.

[133] McCue, *supra* note 12, at 103 (citing studies).

heaped upon children by domestic violence.[134] Substantial resources of the criminal justice system must be committed when the state fails to intervene and the violence is allowed to escalate.[135]

By looking away from the statistics and focusing instead on the secondary harm[136] subset of psychological harm to domestic violence victims, Professor Mills makes the case that mandated prosecution procedures are not justified. Mills argues that forcing a victim to participate in the criminal process can result in psychological trauma.[137]

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[134] In seventy percent of the homes where the woman is battered, children are victims of abuse or neglect. *See id.* Children in violent homes most commonly suffer "depression, anxiety, suicidal tendencies, phobias, withdrawal and overt psychoses." *Id.* A recent American Bar Association [hereinafter ABA] report investigated and reported on the impact of domestic violence on children. The ABA reported that 3.3 to 10 million children witness domestic violence annually. ABA, The Impact of Domestic Violence on Children, 1-2 (1994) (citation omitted). About eighty-seven percent of children in homes with domestic violence witness the abuse. *Id.* (cite omitted). In a study, from a sample of 146 children, all sons over fourteen attempted to intervene and stop violence towards their mothers. Sixty-two percent were injured in the process. McCue, *supra* note 12, at 103 (citing study).

[135] In one study of over fifty domestic violence homicides, over fifty percent had police response to the home five or more times before the homicide occurred. The murder of intimates accounted for fifteen percent of the 22,540 murders nationwide in 1992. *See* Greenfield et al., *supra* note 129, at 1. Seven percent of prison inmates are incarcerated for violence against intimates. *Id.* at 7. Left unchecked, domestic violence can lead not only to murder, but also to rape. Sexual assault is often an integral component of domestic violence. Forty percent of battered women are forced into sex by their intimate partner, and half of all rapes of women over thirty are by intimate partners. McCue, *supra* note 12, at 83 (citing studies). Two independent studies reached the same result that one in every seven women who had ever been married said they were raped by a husband or ex-husband. *Id.* at 82 (citing studies).

[136] "Secondary harm," the basis of victim participation laws, is conceptually much broader than "psychological harm." As the laws of participation have emerged, the basis of these laws has not been narrowly circumscribed to the resolution of psychological trauma. *See* Douglas E. Beloof, The Third Model of Criminal Process: The Victim Participation Model, 99 Utah L. Rev. 289, 297-98 ("The resolution of psychological trauma has not emerged as the main measure of victim participation [or non-participation], but is only one part of according victims fairness, dignity and respect.").

[137] Identifying eight criteria adapted from work on the psychological treatment of children, Professor Mills identifies how state actors inflict psychological harm by mandatory prosecution procedures. *See* Mills, *supra* note 121, at 586-609. First, the state process *rejects* the victim when the police fail to identify the "primary aggressor," and police and prosecutors routinely discount or ignore the opinion of the battered woman. *Id.* at 587-89. Second, victims are *degraded* when they subpoena the victim to testify against her will and publicly question the truth of her testimony. *Id.* at 589-90. Third, victims are terrorized by compelling the "battered woman to choose between the terrifying anger and the state's equally terrifying threats." *Id.* at 591. Fourth, the victim is *isolated* by making state compensation funds for therapy and medical expenses contingent on cooperation with the authorities. *Id.* at 591-92. Fifth, there is *mis-socialization* when a woman is, among other things, forced to commit perjury. *Id.* at 592-93. Sixth, victims are *exploited* when they are used as individuals in a social battle against all batterers. Seventh, the state actor's *emotional*

Mills is correct that the criminal process can harm individual domestic violence victims. It hardly enhances the victim's dignity or autonomy to arrest him or her regardless of (or perhaps because of) the victim's fear or 'helplessness.' That criminal processes can inflict secondary harm and actually injure individual victims of crime is not controversial. Secondary harm "comes from governmental processes and governmental actors within those processes."[138] The concept of secondary harm is the basis for victims' civil rights of participation in the criminal process.[139] The fact that the victim suffered the primary harm of the crime, and may suffer secondary harm from the criminal process has resulted in victims obtaining many due process-like rights in the criminal system.[140] Among others, these rights include the right to consult with prosecutors about the charge or plea bargain, the right to attend the trial, and the right to allocute at sentencing.[141] Thirty-one states granting crime victims rights of participation explicitly base these rights on the concepts of "dignity," "fairness," and "respect."[142] Denying the victim participation rights inflicts secondary harm upon the victim because it injures the dignity of the victim, is disrespectful to the victim and is unfair to the victim.[143] Forcing the victim to participate is no different. "Implicit in victim participation laws is the idea that denying the individual victim the choice whether to participate or not participate in the criminal process is unfair to the victim, disrespectful of the victim, and a great affront to the victim's dignity."[144]

The fact that the individual battered woman knows what is best to preserve her individual survival and dignity, and that this is manifested in recantation and no-show, is not disputed here. Also, not disputed is the assertion that the framework of gender subordination and violence provides context to the individual crime victim's knowledge. The framework of gender subordination means that an individual victim's choice not to prosecute, to lie on the stand, or to no-show might not be a "free" choice. Arguably, many victims do not exercise a truly "free" choice when they

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unresponsiveness fails to respond to emotional needs of the victim "in healthy ways that support recovery." *Id.* at 593. Finally, the threat of *close confinement* comes with a subpoena and may prohibit the victim from taking necessary steps of self protection. *Id.* Mills' rationales against mandatory prosecution procedures each fit within the Victim Participation Model value of the primacy of the individual victim.

[138] Beloof, *supra* note 136, at 294.

[139] *Id.* at 294-95.

[140] *Id.*

[141] Douglas E. Beloof, Victims in Criminal Procedure, *passim* (1998).

[142] Beloof, *supra*, note 136, app. A at 328-30.

[143] *Id.* at 294-98.

[144] *See id.* at 297-98.

recant, fail to appear for trial, or ask that the case be dropped.[145] The paradox, that a victim can make rational choices about preserving her dignity on a micro level, while not actually having a completely free choice on a macro level to preserve her dignity, is presently unresolvable.[146]

In any event, the conflict over mandatory prosecution procedure does not belong in a debate over how to maximize the introduction of reliable evidence leading to truth-finding within hearsay rules. The modification of hearsay rules to provide more reliable evidence should be divorced from the issue of whether mandatory prosecution (including mandatory arrest of the victim to secure testimony) is a good decision as a policy matter. In domestic violence cases, the removal of hearsay rule restrictions is more likely to result in truth-finding at trial. Hearsay rules should reflect the best ways of discerning reliable evidence. To continue to allow a hearsay rule, which denies reliable evidence to the fact-finder for the purpose of providing a procedural mechanism to defeat mandatory prosecution, is to use the wrong tool for the job, and corrupts the function of the hearsay rule. A policy decision giving the crime victim the choice of whether to prosecute is not primarily a debate about the admissibility of reliable evidence, but about whether the primacy of the individual crime victim trumps the efficient suppression of domestic violence. Other decisions about whether to prosecute batterers against the will of the victims, are policy decisions within the scope of prosecutorial discretion, or ultimately, within the authority of legislatures to limit prosecutorial

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[145] Maureen C. McHugh, Irene Hanson Frieze & Angela Browne, Research on Battered Women and Their Assailants *in* Florence L. Denmark & Michelle A Paludi, Psychology of Women: A Handbook of Issues and Theories, 513 (1993) (surveying psychological theories of the pathology of batterers and victims of domestic violence).

[146] This split in opinion, about whether there should be mandatory prosecution procedures, is familiar as a conflict between the Crime Control Model value of efficient suppression of domestic violence crime and the Victim Participation Model value of the primacy of the individual domestic violence victim. The first and second models are the Crime Control Model, representing protection of society embodied in the value of efficient suppression of crime, and the Due Process Model, representing the value of the primacy of the individual defendant. The third model, the Victim Participation Model, represents the value of the primacy of the individual victim. Professor Hanna's recommendation, that domestic violence victims be compelled to testify even if arrest is necessary to ensure testimony, fits in the Crime Control Model value of efficient suppression of (domestic violence) crime. The three model theory deals with the paradox in a particular way. The individual victim operating at a micro level of dignity (saving her life, health, and children) is placed within the value of the primacy of the individual victim (or the Victim Participation Model). The value of primacy of the individual victim assumes the victim has free will and should be able to exercise autonomy to make decisions, at least on a micro level. The other half of the paradox, that the framework of gender subordination means the victim has no true "free will," is placed in the Crime Control Model. Such placement is appropriate where society decides what is best for an entire category of victims. The placement of each of the two truths in the paradox within the three model framework allows both to be respected as a meaningful and competing truth.

discretion. Any battle over the wisdom of a victim's veto over prosecution should be waged in those forums. A victim's veto over mandatory prosecution should be placed in an appropriate procedural context removed from the hearsay rules in order to avoid corruption of the hearsay rule function of truth-finding.

VII. CONCLUSION

Hearsay rules are the wrong context in which to implement policy choices about mandatory prosecution forged within competing values of efficient suppression of crime and the primacy of the individual victim. If legislatures desire to remove the discretion of the public prosecutor and grant the domestic violence victim a veto power over the decision to prosecute, they should do so as a rule of criminal procedure, and not by perpetuating a hearsay status quo that suppresses truth-finding. Even among pro- and anti- mandatory prosecution factions, there should be a consensus that initial reports by domestic violence victims should be admissible.

Hearsay rules should be altered to let the truth be told in domestic violence cases. Hearsay rules were passed in a time when domestic violence cases were not well understood. Within the conventions of hearsay, truth-finding is the primary value. In light of the phenomenon of mass recantation and no-show unique to domestic violence victims, the truth-finding value is promoted by hearsay rules that admit the initial disclosure of abuse as substantive evidence. The hearsay exceptions proposed in this article are within constitutional limits and resolve constraints on truth-finding in domestic violence cases.