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ARTICLE

MAKING THE CRUCIAL CONNECTION: A PROPOSED THREAT HEARSAY EXCEPTION

DONNA MEREDITH MATTHEWS

To the man or woman on the street, the relevance and probative value of such evidence is both obvious and compelling, especially those statements made just days before the homicide. It seems only just and right that a crime victim's own words be heard, especially in the court where the facts and circumstances of her demise are to be presented. However, the laws and appellate court decisions that must be applied by the trial court hold otherwise.

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1. Judge Lance A. Ito in The People of the State of California v. Orenthal James Simpson, explaining an evidentiary ruling denying admission of Nicole Brown Simpson's statements. Ito went on to say, "In factual situations distressingly similar to the assumed facts of this case, the California Supreme Court has given clear guidance to the trial court. The courts in People v. Arcega (1982) 32 C.3d 503, and People v. Ireland (1969) 70 C.2d 522, have clearly held that it is reversible error to admit the hearsay statements by a homicide victim expressing fear of the defendant, even when made on the very day of the homicide. (See also People v. Ruiz (1988) 44 C.3d 589, 607-610) The Evidence Code Section 1250 exception argued by prosecution on the theory of 'learned helplessness' is not supported by the offer of proof and the defense has not raised any issue concerning Brown Simpson's acts of conduct preceding the homicide. State v. Simpson, 1995 WL 21788, at *3 (Cal. Super. Doc., Jan. 18, 1995).
This striking statement from Judge Ito in *State v. Simpson* highlights a persistent flaw in the rules of evidence. That is, a victim's statements to friends, family, counselor, or battered women's shelter are frequently inadmissible in court, unless they fit into one of the existing hearsay exceptions. In the *Simpson* case ruling, the victim's "words" that were not "heard" included statements by Nicole Brown Simpson that she was deathly afraid of O.J. Simpson, that he had threatened her, and that he had said if he couldn't have her, no one could.2 Nicole's "testimony" against her ex-husband was excluded, barred by the hearsay rules. When a trial judge feels impelled to explain and apologize for evidence rulings, it signals that something is seriously awry. Furthermore, it signals that the rules should be changed to reconcile evidentiary decisions with what seems "only just and right."

A victim of domestic violence who is ultimately murdered cannot speak for herself2 because she is dead, killed in part because the law is seemingly helpless to intervene on her behalf. Almost invariably, a victim of domestic homicide4 endures years of hidden violence and terror, within the private sphere of the home, before she is killed.5 Typically, when she finally realizes that she *must* leave and finds the strength to do so, the abuser cannot tolerate her escape from control, so he kills her.6 Because his threats and assaults have predominant-

2. *Id.* at 25.
3. I use "she" for the victim and "he" for the perpetrator because the great majority of domestic violence is perpetrated by a man against a woman. This is not meant to devalue the significance of violence within same sex domestic relationships nor of the rare cases in which a woman abuses her male domestic partner. Both of these situations should be deemed included within the gendered terms "she" and "he."
4. I use the term "domestic homicide" because, much of the time, these murders occur after the woman has left the marital or pseudo-marital relationship, and because these homicides belong on the continuum of what is commonly termed "domestic violence." Some courts have carved out specific exceptions to admit statements by the victim regarding threats, fear, and sometimes abuse in what they call "marital homicide" cases, which some of these courts have explicitly held to apply to live-in relationships. See *e.g.*, *State v. Young*, 852 P.2d 510 (Kan. 1993). However, the term "domestic homicide" seems more accurate and intrinsically inclusive of live-in relationships, so I use it here.
ly occurred in secret, she has no witnesses: Her only witness is herself, and she is dead.

Often, the words the domestic homicide victim has spoken to others cannot be heard in the trial of her accused murderer. Courts admit certain statements by victims when they fit into existing categorical exceptions to the hearsay rule. However, when they do admit threat hearsay, many courts appear to contort the rules in order to do so, and which statements they find admissible varies significantly from state to state.\(^7\) Further, most threat hearsay comes in under the state-of-mind exception to the hearsay rule, which does not admit the statements as substantive evidence and subjects them to limiting instructions.\(^8\) Many courts apply the hearsay rules more categorically and simply bar the victim’s declarations as inadmissible hearsay or character evidence.\(^9\)

In any event, the murdered woman can no longer speak for herself, and without her statement a killer may go free or be convicted of a lesser offense. Yet, if she had been almost-fatally attacked, but had not seen her attacker, the threats would be admissible if offered by the victim against him at trial.\(^10\) The effect of this evidentiary loophole is reminiscent of the cynical adage that if you hit someone with your car, back up to make sure they’re dead (to avoid the extensive pain and suffering damages). At a minimum, absent admission of the victim’s statements as substantive evidence, the common pat-

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\(^7\) See discussion of cases, Part II, infra.
\(^8\) Under Fed. R. Evid. 803(3), and its state counterparts, statements of the declarant concerning his or her present mental attitudes and intentions or physical condition are admissible; however the rule expressly excludes “a statement of memory or belief to prove the fact remembered or believed.” Fed. R. Evid. 803(3).
\(^10\) Statements by the party constitute admissions by a party-opponent and are not hearsay when offered against him. Fed. R. Evid. 801(d)(2).
tern of domestic violence escalating from abuse to death threats and then homicide will never be properly accounted for in the legal paradigm. To correct this situation, I argue that the rules of evidence be amended to create an exception for the "victim's own words" to be heard.

This article discusses how courts admit and exclude threat hearsay in the domestic homicide context and suggests an approach for admission of such evidence. After analyzing the current evidentiary status of the victim's statements regarding threats in homicide cases in which an apparently abusive spouse/partner is accused, I argue for adoption of a new hearsay exception that permits systematic admission of victims' statements concerning threats and violence by the accused. The victim can no longer speak for herself because she has been killed, often because the law is apparently helpless to intervene on her behalf, even when asked. Consequently, the legal system must change to admit her words, even if it is too late to save her. While such statements would not, and should not, suffice to convict someone of homicide, they may well provide the critical piece of cumulative evidence that convinces a jury that the accused is guilty beyond a reasonable doubt.

Part I provides an overview of domestic violence and why the victim's statements should be accorded special status in domestic homicide cases. This part describes the pattern of domestic violence that escalates into serious threats and finally death, particularly when the victim tries to escape. As a recent, well-known example, I examine the treatment of threat hearsay in State v. Simpson. Finally, this part discusses related hearsay challenges and what commentators have proposed to allow their admission despite the hearsay rule.

Part II surveys the ways courts admit or exclude threat hearsay under the current rules of evidence and then examines

11. In reviewing available cases that involve rulings on threat hearsay, the overwhelming impression is how uncannily similar are the fact patterns. Although individual circumstances vary, these cases uniformly involve a pattern of prior domestic violence, an attempt to leave the abusive relationship or otherwise escape the partner's control, overt or covert threats by the partner, and then a brutal homicide. See, e.g., cases discussed infra Part II, and accompanying notes.
the limitations inherent in the inconsistent and restrictive application of the existing hearsay exceptions. Each exception courts apply in this context is analyzed and then explicated by discussion of domestic homicide cases in which that exception is used to admit or exclude hearsay threat evidence. The particular focus is on those situations where threats were made in secret and subsequently disclosed to apparently trustworthy witnesses prior to institution of any legal proceedings against the defendant. The central question is whether, and to what extent, the existing rules achieve the purpose of the hearsay rules and of justice in the domestic homicide context.

Part III recommends that the Federal Rules of Evidence be amended to provide a hearsay exception for statements by domestic homicide victims regarding threats and violence by the accused. This part briefly reviews various broad critiques and proposals for reform of the hearsay rules and analyzes each in terms of how it might affect admission of threat evidence. I conclude that, while some of these proposals might lead to admission of threat hearsay, it is unlikely that such sweeping reforms will be adopted or that, if adopted, they would provide the necessary recognition of the validity of the victim's words. Instead, I propose a specific hearsay exception for statements by homicide victims concerning fear of or threats by the accused, limited to situations in which prior incidents of abuse or threats can be demonstrated.

I. SILENCING THE VICTIM – WHAT'S WRONG WITH EXCLUDING FUTURE THREAT EVIDENCE

Studies of domestic homicides find a clear pattern of abuse escalating into death threats and finally murder—particularly when the victim finally attempts to leave or in fact leaves her abuser.\footnote{13. See, e.g., ANNE JONES, NEXT TIME, SHE'LL BE DEAD 87–96 (1994).} Martha Mahoney calls this “separation assault,” pointing out that more than half of domestic homicides are committed after the victim left the relationship, “when the batterer's quest for control becomes lethal.”\footnote{14. Mahoney, supra note 6, at 79.} Before she was killed, the victim may have told others that her—usually estranged or former—partner threatened to kill her, or that she
was afraid that he would kill her. Yet her statements to others about what her abuser said or did are hearsay, and therefore inadmissible unless they fit one of the categorical exceptions to the hearsay rule.

Even though the victim, if alive, could give direct testimony about those threats because they would qualify as admissions of a party opponent, others cannot testify about what she claims that he said or did. Thus, unless someone witnesses the partner’s threats or the victim’s statements fit into an existing hearsay exception, the victim is truly silenced by her abuser because her words cannot be introduced in court. Exclusion of this evidence creates a vital gap in the case against the abuser, because, absent the threat evidence, juries often do not make the crucial connection between domestic violence and domestic homicide.

In contrast, a number of commentators argue that the experience of the victim should be given special status. This special status should be accorded because common myths about domestic abuse seriously affect jury perceptions in abuse-homicide cases. Further, the victim is in fact the best witness against the perpetrator but he has “procured” her absence from testifying. More broadly, the victim should be given particular credence because the continuing isolation of and violence against women in the domestic sphere constitutes a serious societal problem that must be addressed on various fronts. Through its failure to take domestic violence seriously, including exclusion of a domestic homicide victim’s crucial

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15. A statement is not hearsay if it is offered against a party and is the party’s own statement in either an individual or a representative capacity or a statement of which the party has manifested an adoption or belief in its truth. FED. R. EVID. 801(d)(2).
17. See note 47 infra, and accompanying text.
18. Mahoney, supra note 5, at 58 n.273; Mahoney supra note 6, at 74–79.
testimony, the legal system implicitly condones the behavior of men who batter and kill "their women" and fails to give these women the protection of the law.

An abuse victim is silenced in part because a shroud of secrecy and misunderstanding still surrounds domestic violence, and because the dualistic personality traits common to many batterers create a false public image of the relationship. In general, batterers who ultimately kill display an obsessive need to control all aspects of the marriage, including what outsiders observe, and they will make "extraordinary efforts" to prevent the domestic partner from leaving. Many batterers characteristically have dual or contradictory personality traits, which are often manifested in being charming and personable to others, yet cruel and violent to their domestic partners. Dr. Lenore Walker, a nationally recognized expert on domestic violence, estimates that only 20 percent of batterers are violent outside the private, domestic context, so the violence remains obscured or invisible to outside observers. Thus, the violence is largely sequestered from public view and subsequently disregarded by the legal system.

The sharp distinction between the public and private demeanor of the batterer makes a victim of domestic violence the best judge of the abuser's violent potential. Because the violence is largely hidden from public view, the victim is the primary, often only, witness to the violence. Further, the abuser's victim is most able to assess his dangerousness, because she has a heightened sensitivity to how and when the violence might occur. Although the abuse victim's perception is not infallible, "the instrumental nature of his violence makes her, the
target, the closest observer.\textsuperscript{27} That is, the victim has a great-
er necessity to measure her abuser's violent potential than any
outside observer could have. In essence, the victim holds
unique and compelling evidence, so the legal system should
give special credence to her perception. Thus, courts should
consider a victim's statements regarding death threats by and
fear of the accused as some of the most relevant and probative
evidence available in a prosecution for her murder.

A. A CASE IN POINT: \textit{THE STATE OF CALIFORNIA V. ORENTHAL
JAMES SIMPSON}

A few days after the not-guilty verdict in \textit{State v.
Simpson},\textsuperscript{28} a woman juror asserted her belief that the prose-
cution had wasted a huge amount of time in the case by bela-
broring the domestic abuse evidence—that this was about mur-
der, not domestic abuse.\textsuperscript{29} She simply could not make the con-
nection. Might her, and the other jurors', view have changed if
the prosecution had been allowed to present its evidence of
Nicole Brown Simpson's call to a women's shelter only four
days before her murder, in which she expressed her fear of
O.J.\textsuperscript{30} Of Nicole's statements to friends and family that she
knew O.J. would kill her, and that he would get away with it?\textsuperscript{31}
Of Nicole's counseling sessions in which she disclosed her
fear of O.J. and that he had threatened to kill her?\textsuperscript{32} Of
Nicole's statement that O.J. had told her, "If I can't have you,
no one can"?\textsuperscript{33}

That threat and fear evidence was excluded, as was much

\textsuperscript{27} \textit{Id}.
\textsuperscript{29} NATIONAL PUBLIC RADIO, \textit{Morning Edition}, October 17, 1995.
on In Limine Motion to Exclude Evidence of Domestic Discord). \textit{See also}, Laurie L.
Levenson, \textit{Abuse By Any Other Name: The Admissibility of Domestic Violence Evi-
dence in The Simpson Case}, 1995 WL 5632 (O.J. Comm., Jan. 9, 1995); Susan B.
16, 1995).
\textsuperscript{31} State v. Simpson, 1995 WL 21768, at *3.
\textsuperscript{32} \textit{Id}.
\textsuperscript{33} \textit{Id}. 
other evidence of recurring violent and abusive incidents in the relationship. The court did admit some "prior acts" evidence regarding Simpson's "prior assaults upon Nicole Brown Simpson . . . as to the issues of motive, intent, plan and identi­ty,"34 as well as statements regarding Nicole's fear of Simpson that fit into the excited utterance exception.35 The court admitted other abuse evidence "to establish a pattern of con­duct . . . indicating an escalating course of conduct indicative of the motive, planning, intent and identity of the assailant in the homicide of Nicole Brown Simpson and Ronald Goldman."36 Nicole's statements to friends and family, to her counselor, and to staff at a women's shelter appear to be con­sistent with demonstrating such "an escalating course of con­duct." Nonetheless, the court held that they did not fit an ex­isting hearsay exception so were inadmissible in the trial for her murder.37

While admission of Nicole's statements might not have affected the outcome of the Simpson case—with its rogue police officer and tainted investigation, its rich and famous defendant with a $10 million legal defense fund, and its highly charged political and racial atmosphere—it is possible that the jurors may have been able to make the connection between the pat­tern of domestic violence and domestic homicide. At a mini­mum, perhaps the Simpson juror quoted above would not have so glibly disregarded the cumulative evidence of violence, abuse, extreme jealousy, and stalking, and how that evidence supported conviction of a "heroic" man like O.J. Simpson for brutally slashing his ex-wife and her male friend when she finally escaped his control. And perhaps the viewing public would begin to make the connection as well and to take domes­tic violence more seriously.

34. Id. at *1–2.
35. For example, the recording of Nicole Brown Simpson's 911 call made while O.J. Simpson was breaking in her door and screaming was admitted under the excited utterance and present sense impression exceptions; the entire tape was admitted, including Brown Simpson's expressions of fear. Id.
37. Id.
B. THE CYCLE OF VIOLENCE

Only recently has American society begun to treat private violence against women as a matter of public concern. The effect of domestic violence on women, both psychologically and physically, remains inadequately addressed in society and in law. The escalating pattern of domestic abuse is not well understood by most people. Somehow, domestic violence is still generally viewed as anomalous behavior that is best handled in private, within the family, and which was likely provoked by the victim herself. Yet battering is the main cause of injury to women, more than injuries from auto accidents, rapes, and muggings combined. Further, extensive studies have found that one-third to one-half of all female homicide victims are killed by a domestic partner, often after she decides to leave the relationship.

Research and anecdotal evidence indicates that domestic abusers exist throughout all levels of society and that they cannot be easily spotted by outsiders. That is, "[b]attering occurs in all social groupings . . . cross[ing] all racial, ethnic, socioeconomic, religious, age and geographic boundaries." In

38. See, e.g., Steffani J. Saitow, Battered Woman Syndrome: Does the "Reasonable Battered Woman" Exist?, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 329 (1993); Frager Griffith, supra note 16.
39. Id.
40. Jane O'Reilly, Wife Beating: The Silent Crime, TIME, September 5, 1983. See also Belluck, supra note 6 ("More women in New York City are killed by their husbands or boyfriends than in robberies, disputes, sexual assaults, drug violence, random attacks or any other crime... where the relationship between the murderer and victim is known."). Further, the New York City study found that the number of domestic homicides increased during the time period studied, while total crime and murders of women decreased. Id.
42. NANCY HUTCHINGS, THE VIOLENT FAMILY: VICTIMIZATION OF WOMEN, CHILDREN AND ELDERS 73 (1988); But see Belluck, supra note 6 (study of women killed in New York City between 1990 and 1994 found that two-thirds of domestic homicides were in the poorest areas of the city and three-quarters of the victims
fact, "[b]ecause domestic violence is so widespread, it is unlikely that there is one 'personality type' which is characteristic of all violent men. Nevertheless, it is still possible to identify some common factors."43 These factors include insecurity and extreme jealousy; an excessive need to control the partner and to prevent her from leaving; and a dual or contradictory personality characterized by an ability to be charming to others yet cruel to his partner.44

Although such evidence would be inadmissible “profile” evidence if introduced in court to show that the accused acted in accordance with that profile (or failed to do so),45 discussion of it here helps us to understand the pattern of violence. Further, such evidence may be useful in establishing a foundation for admitting threat hearsay and could potentially be used in educating jurors about domestic violence and homicide.

The legal system has done little to acknowledge the connection between battering and domestic homicide. This marginalization of domestic violence both leads to a failure of people—including jurors—to understand the effects and patterns of domestic violence and results in continuing isolation and legal disregard of the victims.46 Understanding the association between domestic violence and domestic homicide is not about predicting that a particular individual will murder his wife, or even that a particular abusive spouse did in fact kill his wife. Rather, discerning the pattern of escalating, often secret, violence may show motive, planning, intent, or identity of the assailant, as some courts already recognize.47 Acknowledging that this pattern of violence may well have culminated

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were African American or Hispanic).

43. HOFELLER, supra note 20, at 83.
44. Id. at 83–87. See also Frager Griffith, supra note 16.
in homicide may also provide a basis for admitting the victim’s statements about threats and intimidation by her partner. This then may help to free the victims—both living and dead—from silence and isolation within the violent relationship.

There are a few analogous contexts in which justice seems to call for specific adaptations of the hearsay rules: where a witness has been made unavailable to testify by the accused, and where the victim of child sexual abuse is the only witness. I discuss these below, to illustrate some of the underlying moral grounds for admission of threat hearsay and to consider proposals for hearsay exceptions that may be applicable in the threat hearsay context as well.

C. ANALOGY TO PROCUREMENT OF WITNESS UNAVAILABILITY — WAIVER BY MISCONDUCT

Many courts contend with a related hearsay problem, that of how to admit testimony when the defendant has procured a witness’s unavailability. Courts admit hearsay against a party, including a criminal defendant, who is found to have wrongfully caused the unavailability of the hearsay declarant, under the residual hearsay exception. Courts apply the hearsay rule more expansively when they determine that the defendant has made the witness unavailable, generally hold-

48. See Paul T. Markland, The Admission of Hearsay Evidence Where Defendant Misconduct Causes the Unavailability of a Prosecution Witness, 43 Am. U. L. Rev. 995 (1994), for an overview of these cases and the arguments in favor of admitting the witness's testimony.

49. See, e.g., Steele v. Taylor, 684 F.2d 1193, 1201–02 (6th Cir. 1982), cert. denied 460 U.S. 1053 (1983), rehearing denied 461 U.S. 940 (1983). See generally Mueller & Kirkpatrick, supra note 9 at § 8.66. Under the residual or “catchall” hearsay exception, a statement not specifically covered by any of the categorical exceptions to the hearsay rule but having equivalent circumstantial guarantees of trustworthiness is admissible if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. Fed. R. Evid. 803(24).

50. Michael H. Graham, Handbook of Federal Evidence § 802 n.4 (3d ed.)
ing that by doing so the defendant has waived the right to raise hearsay objections to admission of that witness's out-of-court statements or to assert violation of the Confrontation Clause of the Sixth Amendment.\textsuperscript{51} This common-law waiver requires a preliminary finding—generally by a preponderance of the evidence, although some courts have held it to a clear and convincing standard—that the defendant did in fact procure the unavailability of the witness, after commencement of the proceedings.\textsuperscript{52} In part, underlying these rulings is the belief that disclosure of relevant information at a trial is of paramount interest.\textsuperscript{53} Thus, any significant interference with that interest, except by exercising a legal right to object, is a wrongful act.

In this context, courts traditionally limit admissible hearsay to prior grand jury testimony, although some courts have extended the admission to other statements. Commentators argue that complete waiver should operate to admit all such statements.\textsuperscript{54} In line with this approach, the Rules Advisory Committee recently proposed a "waiver by misconduct" rule,

\textsuperscript{51} See Markland, supra note 48, at 997.

\textsuperscript{52} Compare United States v. Thevis, 665 F.2d 616 (5th Cir. 1982), rehearing denied 671 F.2d 1379 (5th Cir. 1982), cert. denied 456 U.S. 1008 (1982) (applying the clear and convincing standard), with United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982), on remand 561 F.Supp. 1114 (E.D.N.Y. 1983), affd 722 F.2d 13 (2d Cir. 1983), cert. denied 467 U.S. 1204 (1984) ("We see no reason to impose upon the government more than the usual burden of proof by a preponderance of the evidence where waiver by misconduct is concerned.").

\textsuperscript{53} GRAHAM, supra note 50, at § 802.

\textsuperscript{54} United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982) (defendant's involvement in murder of witness precluded assertion of confrontation rights); State v. Olson, 291 N.W.2d 203, 207 (Minn. 1980) (waiver where witness feared retribution and therefore did not testify after receiving threats from defendant); United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976) (defendant's procurement of witness's absence from trial by threats constituted waiver of confrontation rights), cert. denied, 431 U.S. 914 (1977). Paul Markland argues that "the most equitable response to the problem of defendant-procured witness unavailability is the complete abrogation of the defendant's ability to object on confrontation or hearsay grounds to the admission of any of that witness' [sic] out-of-court statements, including unworn, ex parte, and extrajudicial declarations." Markland, supra note 48 at 998. See also Kenneth Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 CRIM. L. BULL. 99, 139 (1972) (arguing that a defendant who is found responsible for murdering a witness should be prevented from using the confrontation clause to block that witness's statements in court).
Proposed Fed. R. Evid. 804(b)(6). Under the proposed rule, "[a] statement offered against a party who has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is not inadmissible as hearsay. The proposed rule potentially reaches quite broadly: it is not limited to prior grand jury testimony, so in theory any prior statements would be admissible under the new rule if the conditions are met.

Under the Federal Rules of Evidence, a prior grand jury statement by a witness made unavailable by the wrongful conduct of a party is admissible against that party if that statement would have been admissible if the witness had testified. This testimony of a witness unavailable at trial is usually admitted under the residual exception. The rule derives both from the public policy of protecting the integrity of the adversary process and from the equitable doctrine of "clean hands." A controlling principle of hearsay exclusion is the preference of the law for live testimony, which is designed to protect everyone. However, the contravening policy in this context argues that a defendant cannot hide behind that preference after creating the situation that precludes its use.

Although not directly parallel, domestic homicides implicate a similar public policy and equitable analysis. The accused allegedly killed the only witness to his threats and violence, who is also the only witness to the homicide. Thus, it seems only fair that the killer not be shielded from the victim's statements after procuring her silence. However, in domestic homicide cases, the trial is itself about whether the accused killed the hearsay declarant, so the procurement of witness unavailability question merges with the central issue at trial. This conflation of the issues argues for a separate rule for threat hearsay, with an independent determination of reliability or

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55. FED. R. EVID. 804(b)(6) (Proposed Rule 1996). According to the Committee Notes, the test for determining waiver will be by a preponderance of the evidence. FED. R. EVID. 804(b)(6) advisory committee's note (Proposed Rule 1996).
56. MUELLER & KIRKPATRICK, supra note 9, at § 8.66.
57. Id.
58. GRAHAM, supra note 50.
59. See MUELLER & KIRKPATRICK, supra note 9, at § 8.3.
60. GRAHAM, supra note 50.
Procurement of witness unavailability cases normally concern admissibility of prior testimony under oath, which presumably carries substantial indicia of reliability, and an equitable judgment of waiver by misconduct. While domestic homicide threat hearsay does not involve prior testimony, the waiver argument arguably still applies. A victim of domestic violence and threats would generally have as little or less incentive to lie than would a witness to a crime, and the court can analyze the circumstances of the victim’s declaration for trustworthiness.

If threat hearsay were subject to the same standard as in procurement cases, a preliminary determination would have to be made as to whether the accused procured the absence of the victim/witness. As this determination would probably be only by a preponderance of the evidence, much of this kind of hearsay would be admitted. However, such safeguards may not be necessary because, unlike in procurement cases, threat and abuse hearsay does not directly indict the accused for the crime, but rather provides one part of cumulative evidence linking the accused to the crime. Nonetheless, such a preliminary finding may be necessary to ensure that a threat hearsay exception survives a constitutional challenge.

D. ANALOGY TO CHILD HEARSAY STATEMENTS IN SEX ABUSE PROSECUTIONS

A related problem arises when courts consider whether and how to admit hearsay from child victims alleging sexual abuse. In that context, the child is “unavailable” as a witness

61. See discussion in Part IIIB, infra.
62. In a Westlaw search of cases involving a victim’s statements concerning threats by or fear of the accused, none included any prior testimony by the victim.
63. Often, witnesses made unavailable by the accused had agreed to provide testimony in exchange for leniency. See, e.g., Markland, supra note 48, at 996–97.
64. Threat hearsay could conceivably fall within Proposed FED. R. EVID. 804(b)(6), although some problems arise from the conflation of the issue at trial and the preliminary determination that the accused procured the unavailability of the witness.
65. See cases cited supra note 52; FED. R. EVID. 804(b)(6) advisory committee’s note (Proposed Rule 1996).
because of her "tender years"; that is, the child may be emotionally unable to testify in court after disclosing the circumstances of abuse to a parent, doctor, counselor, or officer of the court. Yet, because the child victim is the crucial, and frequently only, witness who can link the accused with the crime, a number of states have enacted statutes or modified their evidence rules so that such testimony may be admitted. Typically, such statutes admit a child's out-of-court hearsay statement if sufficient indicia of reliability are indicated by the content and circumstances of the declaration.

The child abuse hearsay problem differs from threat hearsay in a domestic homicide in two significant ways. First, the child is only functionally unavailable, so the debate often focuses on the Sixth Amendment confrontation clause – unavailability requirement issues. The confrontation clause gives the accused the right "to be confronted with the witnesses against him," so prosecutors must make a good faith effort to produce available witnesses instead of simply offering their prior statements. Witnesses can be psychologically unavailable; in the child victim context this has resulted in extensive use of videotaped and remote testimony and admission of prior statements that fit an existing exception. In contrast to the child sex abuse victim, the victim of a domestic homicide is invariably dead, and thus clearly unavailable, so the dispute focuses more explicitly on whether the victim's statements fit into an existing hearsay exception and on their reliability.

Second, the child witness's testimony, if admitted, directly implicates the accused and often constitutes the only direct evidence for the prosecution. Such testimony raises signifi-
significant confrontation clause issues because of its centrality to the prosecution's case. In contrast, while future threat hearsay may provide a crucial link in the prosecution's case against the accused, it does not assert that "he killed me" but rather that "he threatened to kill me" or "[at the time of this statement] I believe he is going to kill me." Such hearsay would not in itself, if believed, be sufficient evidence for a homicide conviction. Unlike in child sex abuse cases, this indirect evidence serves more to explicate the nature of the violence in the relationship, to educate the factfinder, and to provide incremental evidence of motive or identity.

Nonetheless, existing and proposed child hearsay statutes and rules could serve as a partial model for a threat hearsay exception given the relative similarity of issues. In a typical example, the Washington model child sex abuse hearsay statute provides in part:

(A) A statement made by a child, under the protected age in the statute for which the defendant is being charged, describing any act of sexual contact on or with the child, is admissible in evidence in a criminal proceeding if:
(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide particularized guarantees of trustworthiness;
(2) The statement was made immediately after the offense or the court finds the delay consistent with truth;
(3) The statement was not made in preparation

not involve penetration or other physically discernible evidence, the abuse almost always occurs in secret, and the child does not immediately disclose what happened because of intimidation. See, e.g., Weinstein, supra note 67; Robert G. Marks, Note, Should We Believe The People Who Believe The Children?: The Need for A New Sexual Abuse Tender Years Hearsay Exception Statute, 32 HARV. J. ON LEGIS. 207 (1995).

74. Under one theory explaining the operation of the confrontation clause, hearsay is constitutionally admissible if it pertains to a peripheral issue or if it involves circumstantial or corroborative evidence, but not if it is "direct and critical evidence going to the heart of the prosecutor's case," which is consistent with the underlying principles of why the constitution gives this protection to a criminal accused. MUELLER & KIRKPATRICK supra note 9, at § 8.75, citing Dutton v. Evans, 400 U.S. 74 (1970).
These standards for determining trustworthiness may be transferable to the domestic homicide-threat hearsay context.

In both child sex abuse and domestic homicide cases, the victim has unique information about the accused, evidence that may be essential to a conviction. Just as for child sex abuse victims, courts should accord special treatment to statements by victims of domestic homicide. In both cases, the victims can provide vital, unique testimony unavailable from any other source. The constitutional rights of the accused can still be protected, if "the circumstances of the statement provide particularized guarantees of trustworthiness" in the narrow context of domestic homicide or child sexual abuse.

II. THE RULES OF EVIDENCE AND FUTURE THREAT HEARSAY

Published opinions constitute the basis for analysis of how courts rule on evidentiary questions. Yet, written opinions reveal only a fraction of all evidence rulings, and thus of hearsay rulings. Because state courts try most criminal cases

75. WASH. REV. CODE § 9A.44.120 (1991), quoted in Marks, supra note 73, at 213 n.25 (1995).
77. The O.J. Simpson trial was unique in that each evidence ruling was immediately available electronically, closely scrutinized by the press and legal pundits, and hotly debated on prime time and during coffee breaks.
78. See generally, Eleanor Swift, The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?, 76 MINN. L. REV. 473 (1992). In discussing the statistical basis for her analysis of the judicial treatment of hearsay and her predictions of the consequences of liberalization or abolition of the hearsay rule, Swift points out that,

[extensive data about the behavior of trial judges toward hearsay is not available. There simply is no record of most day-to-day rulings on evidence questions. Those rulings that are recorded in pre-trial orders and in trial transcripts are not easily accessible. Hotly contested evidence rulings can be questioned on appeal, but many rulings are not contested and many cases are not appealed . . . The inaccessibility of trial court actions regarding hearsay is a frustrating fact of life." Id. at 474.]
and state trial court opinions are not published, the only evidentiary rulings we see are those challenged on appeal. A further narrowing results from the fact that in criminal cases only the defendant may appeal evidentiary rulings—with certain narrow exceptions the prosecution cannot appeal adverse rulings or the final decision in a case—so only the rulings adverse to the defendant are appealed. Nonetheless, judicial opinions indicate which hearsay issues are disputed, how courts treat the issues presented, and how trial judges will tend to rule in the future. In a limited survey of general hearsay rulings, one commentator found that courts exclude a substantial amount of hearsay at the trial level, so it never reaches public view. She also found that appeals courts usually affirm the evidentiary rulings of the lower courts, giving great deference to the trial court rulings on review. In contrast, my review of hearsay rulings in domestic homicide cases indicates that appellate courts quite frequently find admission of threat hearsay erroneous (although usually harmless error). But, without making a direct statistical comparison between hearsay rulings in domestic homicide and other cases, it is impossible to tell whether the statistical pattern in fact differs in the domestic homicide context.

In a search for rulings excluding or admitting future threat hearsay, I found that the overwhelming majority of the cases involved killings of an estranged or former partner, referred to here as "domestic homicide." In the domestic homi-
cide context courts admit certain threat hearsay under the existing exceptions to the hearsay rule, which are modeled after those in Federal Rules of Evidence. However, admission of such hearsay varies substantially from state to state, and among courts within a state. Even in the states with the most expansive interpretations of the hearsay rules, certain kinds of threats are excluded altogether, admitted subject to limiting instructions, or admitted but then held erroneous on appeal. Among these cases, courts most often admit threat hearsay under rules similar to Fed. R. Evid. 803(3), which provides that such evidence may be admitted if the victim's state of mind is at issue, but only for a limited purpose. The other exceptions that have been held to apply include the excited utterance, present sense impression, medical diagnosis, and residual or "catchall" exceptions.

A. HEARSAY UNDER THE EXISTING RULES OF EVIDENCE

Under the hearsay rule, out-of-court statements "offered in evidence to prove the matter asserted" are inadmissible in court unless the original declarant testifies or the declaration fits into one of the categorical exceptions to the rule. The hearsay doctrine arises from the belief that out-of-court statements are intrinsically inferior proof. This perception is usually explained in terms of the risks involved with admitting hearsay—of misperception, faulty memory, insincerity, and narrative ambiguity—and the preference for cross-examination at trial.

Numerous exceptions have long coexisted with the hearsay

violence, victim's declarations to friends or professionals regarding fear and threats, victim's decision to leave the relationship, culminating in a brutal murder. Then, despite substantial other evidence indicative of guilt, the defendant appeals admission of even a fraction of the threat hearsay.

84. Standard bases for finding the victim's state of mind at issue include defendant's claim of accident, self-defense, lack of motive, or, sometimes, simply that the relationship was peaceful and loving. This evidence is admitted for the limited purpose of considering the victim's state of mind, but not for the truth of the matter remembered or believed. Fed. R. Evid. 803(3). See Part IIE, infra, for a discussion of domestic homicide cases applying this exception.

85. See MUELLER & KIRKPATRICK, supra note 9, at § 8.1.

86. Id. at § 8.2.

87. Id.
rule. Courts have developed these categorical exceptions because of the perception that certain statements are inherently reliable despite the absence of direct testimony and because the need for certain evidence outweighs the risks.\(^{88}\) The necessity for threat evidence is critical in the domestic homicide context. With the declarant dead—likely at the hands of the accused—when her statements have a unique evidentiary value, the necessity for that evidence justifies admission despite the basic hearsay exclusionary rule and the reliability risks. The categorical hearsay exceptions are not derived from abstract analysis but rather have developed on a more pragmatic, *ad hoc* basis; their purpose is "merely to sanction certain situations as a sufficient guarantee of trustworthiness," not to permanently define those situations that justify a specific exception.\(^{89}\)

**B. Admissibility of Statements by Victim Concerning Threats by the Accused**

Courts admit future threat hearsay evidence under some of the existing exceptions, including those based on Rules 803(1)–(4) and Rule 804(b)(5). The majority of such threats are admitted under Rule 803(3), the "state of mind," and Rule 804(b)(5), the residual "catchall," exceptions.\(^{90}\) However, the rules are applied inconsistently from state to state.\(^{91}\) While a few courts have crafted interpretations that regularly admit threat hearsay in domestic homicide cases under the state-of-mind exception,\(^{92}\) this "gloss" on the rules of evidence is not authorized by the plain language of any hearsay exception, and such admissions are generally for a limited purpose.

As is discussed in Parts IIC–G below, many other courts have applied an unduly restrictive interpretation and reversed convictions for impermissible admission of hearsay despite seemingly overwhelming evidence of the defendant's guilt. And, throughout the cases, many statements by victims concerning

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88. See Fed. R. Evid. 803 & 804 advisory committee's note.
89. 5 Wigmore, Evidence in Trials at Common Law (J. Chadbourne, 1974).
90. See discussion in Part IID–E, infra.
91. *Id.*
92. See cases cited Part IIE1, infra.
threats by and fear of the accused are barred as inadmissible hearsay or subject to limiting instructions, or found inadmissible but harmless on appeal.93

C. TREATMENT OF THREAT EVIDENCE AS A PRESENT SENSE IMPRESSION — FED. R. EVID. 803(1)

Admission of threat hearsay under the present sense impression exception is unusual because the victim rarely describes the threat event while it is occurring, or "immediately thereafter," as is required by Rule 803(1). To meet this exception, a statement must describe or explain an event or condition made "while the declarant was perceiving the event or condition, or immediately thereafter."94 That is, the proponent must show that the event, the declarant's perception of the event, and the declarant's statement were contemporaneous, and the statement must pertain to the declarant's observation of the event. Because she is almost always alone with her abuser when the threat is made, the victim is almost never able to describe the threat contemporaneously.

Commonwealth v. Coleman95 was the only domestic homicide case found in which the present sense impression exception was used to admit threat and abuse hearsay. The threat evidence was necessary to controvert Coleman's claim that the victim "had precipitated his action by an unprovoked attack upon him with a letter opener" and thus that the killing was voluntary manslaughter, not second-degree murder.96 The court held that testimony by the victim's mother that "Diane telephoned . . . saying that Coleman would not let her leave the apartment, that he would hang up the phone and that he was going to kill her" was admissible "under a variant of the res gestae exception to the hearsay rule" (present sense impression).97 In the majority's opinion, this was warranted by the immediacy and ongoing character of the events, because ten minutes later the phone connection was broken at the

93. See Parts IIC–E, infra.
94. FED. R. EVID. 803(1).
95. 326 A.2d 387 (Pa. 1974).
96. Id. at 388.
97. Id. at 389.
victim's end, and because only twenty minutes later police found Diane in the apartment, dead of multiple stab wounds. In contrast, the concurrence argued that the majority opinion was an impermissible extension of the present sense impression exception and that the evidence should instead have been admitted as an excited utterance.

Utility of the present sense impression rule is obviously limited in the domestic homicide-threat hearsay context. The contemporaneity requirements are unlikely to be met in most domestic violence cases because almost invariably the abuser threatens in private and isolates the victim from others; most commonly, the victim discloses the threat after the fact, precluding use of this exception. In addition, statements admissible under this rule are limited to a description of an event or condition, which would generally not encompass statements of belief or cumulative fear by the victim.

D. TREATMENT OF THREAT EVIDENCE AS AN EXCITED UTTERANCE – FED. R. EVID. 803(2)

Under Rule 803(2), the excited utterance exception, 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” is admissible. Although certain statements regarding threats by and victims’ fear of the accused are admitted under this exception, the time and emotional stress limitations reduces the utility of this exception in the threat hearsay context. In general, courts hold that the time between the stressful event and the declaration must be quite short, and that the declarant still be under significant stress of the recent event when she makes the statement. Since such threats and abuse profoundly intimidate and often virtually imprison the victim, only rarely does she immediately escape the abuser and disclose her terror.

98. Id.
99. Id. at 391 (Pomeroy, J. concurring).
100. MUELLER & KIRKPATRICK, supra note 9, at § 8.35.
101. See, e.g., JONES, supra note 13; WALKER, THE BATTERED WOMAN, supra note 5, at 185-250.
In a fairly straightforward ruling, the court in *State v. Woodward* admitted as an excited utterance the victim's statement to neighbors that her husband planned to kill her. Minutes after her estranged husband arrived at her house, fought with her father, and took her children, the victim ran over to her neighbors' house and made the statement while curled up on the couch in fetal position and sobbing. However, other similar threats disclosed by the victim were not admissible because they did not fit any of the hearsay exceptions, despite the consistent pattern of threats and abuse in the relationship. Similarly, in *State v. Anderson*, the victim's statement, made 30 minutes after incident, that her husband had threatened to kill her was admissible as an excited utterance.

However, in *Commonwealth v. Myers*, testimony by the victim's neighbor that a few months before her murder "she was terribly beat up, her face and eye were all terribly bruised, and her tooth was chipped, and she told me that her husband beat her up" and that she was fearful and crying the whole weekend, was inadmissible. This evidence was not admissible under either the excited utterance or state of mind exceptions, although the victim was killed by multiple stab wounds shortly thereafter, and the accused claimed that *she* had attacked *him* and he had acted in self-defense, which would normally place the victim's state of mind at issue.

*Anderson* and *Myers* demonstrate the inconsistent manner in which courts apply the excited utterance exception in do-

103. *Id.* at 234.
104. *Id.* at 239. The victim's statements about her fear of the accused were admissible as made to a physician in course of treatment. Her statement to her counselor that "David [the accused] is going to kill me" was not covered by hearsay exception because it was a "statement of memory or belief," although the court found it to be harmless error. *Id.*
105. 723 P.2d 464, 468 (Wash. App. 1986). The victim's subsequent description of the same incident in a family counseling session was admissible as an adoptive admission, because Anderson nodded when the counselor asked if her description was true. *Id.*
107. *Id.* at 165 (reversible error).
108. *Id.* at 162. Investigators determined that the few superficial stab wounds he had sustained were self-inflicted. *Id.*
mestic homicide cases. Further, many victims of domestic violence do not communicate their fear and tell of the threats against them during a highly emotional state; right after the attack, they are just trying to survive and forestall further injury.\textsuperscript{109} Often, victims of domestic violence are so isolated that they cannot tell anyone about the violence; it is only later, when they escape the control of the abuser and the immediate danger, that they can talk about it.\textsuperscript{110} By then, the excited utterance exception no longer applies, even though the victim arguably has greater perspective on the events and less motive to fabricate. This exception fails to address the long-term pattern of intimidation in an abusive relationship and how difficult it often is for victims to reveal their situation to others, so it does not reach the majority of such disclosures.

E. TREATMENT OF THREAT EVIDENCE UNDER THE STATE OF MIND EXCEPTION – FED. R. EVID. 803(3)

Under Rule 803(3) "[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)" may be admitted.\textsuperscript{111} This exception also admits certain statements to prove the declarant's subsequent conduct,\textsuperscript{112} but this broader use rarely applies in threat hearsay cases. Although it is the most commonly used to admit threat hearsay, this exception contains three crucial limitations for the domestic homicide context: (1) the victim's state of mind must be at issue;\textsuperscript{113} (2) this exception excludes "a statement of memory or belief to prove the fact remembered or believed" so backward-looking statements about threats are not admissible as substantive evidence;\textsuperscript{114} and (3) even if admitted, the statement is subject to limiting instructions to the jury.\textsuperscript{115}

\textsuperscript{109} See Part IB, supra.
\textsuperscript{110} See, e.g., HOFELLER, supra note 20, at 94–95.
\textsuperscript{111} FED. R. EVID. 803(3).
\textsuperscript{112} MUELLER & KIRKPATRICK, supra note 9, at § 8.36.
\textsuperscript{113} See Part IIE1, infra.
\textsuperscript{114} See Part IIE2, infra.
\textsuperscript{115} See Part IIE3, infra.
1. Admissible if Victim's State of Mind at Issue

When the victim's state of mind is "at issue" most courts admit expressions of fear—and sometimes threats if intertwined with the expression of fear—by a victim/declarant under Rule 803(3). However, the "at issue" limitation precludes admission of many statements from domestic homicide victims, when a court construes "at issue" narrowly or when, as in the Simpson case, the accused simply claims he was not the perpetrator. Courts generally find the victim's state of mind to be at issue where the defendant claims that the death was accidental or provoked, or when he claims that the relationship was peaceful and happy; evidence of abuse, fear, and threats may then be admitted in rebuttal.116

The Washington Supreme Court applied a typical analysis in State v. Parr,117 saying:

... if there is no defense which brings into issue the state of mind of the deceased, evidence of fears or other emotions is ordinarily not relevant. But where a defense such as that of accident or self-defense is interposed..., courts have generally allowed the admission of evidence of the victim's fears, as probative of the question whether that person would have been likely to do the acts claimed by the defendant.118

However, while the court in Parr found the victim's statements of fear admissible under the state of mind exception,

116. See, e.g., State v. Porter, 587 A.2d 188 (Del. Supr. 1990) (statement by victim about death threats admissible in homicide prosecution if meet standard requirements of then-existing state of mind exception and if admitted in rebuttal to evidence of accident, self-defense, suicide, or extreme emotional distress); State v. Finch, 29 Cal. Rptr. 420 (Cal. App. 1963) (victim's statements of fear of her husband and threats made by him, admissible under state of mind exception where he claimed that he was attempting to disarm her); State v. Atchley, 346 P.2d 764 (Cal. 1959), cert. dismissed 366 U.S. 207 (1961) (letter that victim wrote to a judge two days before her death, saying her husband had threatened her and she feared him, where defendant claimed she had threatened him, admissible under state of mind exception).
117. 606 P.2d 263 (Wash. 1980).
118. Id. at 269.
related statements by the victim about threats and other abusive conduct by the accused were not, even though they were arguably probative of intent.119

Courts regularly admit statements of fear to rebut claims of accident.120 For example, in State v. Crawford, the victim’s statement of fear was admissible, even though it included a statement of her belief about her husband’s intent, to show the nature of their relationship and the effect of his behavior on her state of mind.121 This testimony included statements by the victim saying that she feared the defendant, that he had threatened to kill her, that he had physically abused her, and that he had been stalking her.122 Although admissible, the statements were subject to standard limiting instructions, which told the jury to consider it only with respect to the victim’s state of mind, not as evidence of the facts asserted.123

The question of consent also places the victim’s state of mind at issue. In People v. Ortiz, the victim’s statements that she was afraid of the accused, and that he had attempted to rape her and had repeatedly “bothered” her were admissible under the state-of-mind exception.124 The victim’s state of mind was at issue because the accused claimed that he and the victim had engaged in consensual intercourse the morning she was killed.125 Similarly, in State v. Faucette, the victim’s statements to her son and her sister regarding threats and other comments made by her estranged husband were admissible under the state of mind exception to show that she did not want the accused to visit her home, and to prove that he en-

119. Id. 
120. State v. Crawford, 472 S.E.2d 920 (N.C. 1996). See also State v. Magruder, 765 P.2d 716 (Mont. Supr. 1988) (testimony of the victim’s daughter about a telephone call from the accused to victim a few hours before her death and the victim’s emotions afterward admissible under state of mind exception where defendant claimed accident). But see Hunt v. State, 429 So.2d 811 (Fla. App. 1983) (testimony about victim’s fear of defendant inadmissible, where defendant claimed the victim had been accidentally shot).
121. Crawford, 472 S.E.2d at 927.
122. Id. at 926.
123. Id.
124. 44 Cal. Rptr. 2d 914, 925 (Cal. App. 1995).
125. Id.
Some courts interpret the state-of-mind exception more expansively. For example, the court in *Brenk v. State* allowed a friend of the victim “to testify that Lou Alice Brenk was crying and when he asked her ‘Lou, what’s the matter, Honey?’ she had said to him ‘[h]e’s going to kill me, Dink.’” The defendant claimed neither accident nor self-defense, and did not claim that the relationship was happy or peaceful. Thus, the victim’s state of mind was not at issue under traditional analysis. Yet, with virtually no explanation as to why the victim's state of mind was at issue, the trial court allowed this statement to show Lou Alice’s fear, and the state Supreme Court did not find an abuse of discretion.

The Delaware Superior Court seemed to stretch the state-of-mind exception in *Re v. State*. There the court found admissible the victim’s statement that the accused had threatened to kill her and then said “that he would just act like he was crazy and get off.” The court asserted that this was not offered to prove that the accused would kill her, or that he would fake insanity, but rather to rebut Re’s claim that he killed the victim due to extreme emotional distress. That is, the victim’s expression of fear contradicted the accused's argument that she incited stress in him, leading him to kill her.

In a more expansive approach, the Oklahoma court in *Duvall v. State* did not require a specific claim by the accused to place the victim's state of mind—and thus the threats and her fear—at issue. There, the victim’s statements that she was afraid of her husband because he “told her if she left him

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127. 847 S.W.2d 1 (Ark. 1993). Although the court calls this exception “present sense impression” it in fact quotes a rule worded exactly like 803(3), the state-of-mind exception. *Id.* at 12.
128. *Id.* at 12–13.
129. *Id.*
131. *Id.* at 430.
132. *Id.*
133. *Id.*
that he would kill her” were admissible under the state-of-
mind exception as relevant to show the victim’s fear of the
accused. In Oklahoma courts, hearsay testimony showing
ill feeling, threats or similar conduct by one spouse toward
another are generally considered relevant in “marital homic-
cide” cases. Nonetheless, as always for the state-of-mind
exception, the jury was given limiting instructions on how to
consider the victim’s statements in its deliberations.

Using a similar exception, the military court in U.S. v.
Elmore admitted threat hearsay to rebut the accused’s claim of
relatively harmonious marriage. While no body had been
found, other forensic evidence strongly indicated that the
defendant’s wife had been stabbed to death and then dumped
in the sea. There was also substantial hearsay evidence of
prior domestic violence, jealousy, and threats by the defen-
dant. In that case, the court found sufficient circumstantial
evidence combined with the threat hearsay to support a convic-
tion.

In contrast, Georgia and a number of other states do not
find threat and fear hearsay relevant as such in a domestic
homicide. In Dover v. State, the Georgia court held the victim’s
conduct was not at issue in a domestic homicide case. Thus,
the victim’s statements to several people that she moved
out of the house and met with a divorce attorney because of
her husband’s violence and threats were not admissible, al-
though other evidence indicated a history of abuse.

135. Id. at 626.
136. Id. (citing a line of Oklahoma cases asserting relevance in this context).
This special category for marital homicide is promising. See discussion in Part IV, infra.
137. Id. at 626. In fact, in this case the court gave severe instructions, telling
the jury that “[a]t this point, you are instructed to disregard all statements of the
decedent, as they are not relevant to any of the issues you will be called upon to
decide.” Id.
139. Id. at 391.
140. Id. at 388–89.
141. Id. at 394.
142. 296 S.E.2d 710, 713 (Ga. 1982).
143. Id.
Taking a different approach, other courts bifurcate the question of admissibility of threat evidence, finding a domestic homicide exception for the relevance determination but then applying standard hearsay analysis to the statement itself. For example, the Texas court of appeals finds “prior threats and altercations between the victim and the accused . . . admissible to show relevant facts and circumstances surrounding the killing and to show the relationship existing between the two parties” in a domestic homicide or manslaughter prosecution. However, this exception “does not extend the rules of evidence to admit hearsay testimony that would otherwise inadmissible.” Thus, while allowing a greater scope for the relevance determination, these courts do not admit threat hearsay unless it fits an existing hearsay exception under the traditional analysis.

2. Not Admissible as Statement of Memory or Belief

An additional problem in using the state-of-mind exception to admit threat hearsay involves the explicit preclusion under Rule 803(3) of “a statement of memory or belief to prove the fact remembered or believed.” Because of this limitation, courts often exclude the victim’s statements as impermissible statements of memory or belief, and, if admitted, they are

144. Other courts explicitly state that evidence concerning the marital relationship may be relevant and admissible for specific purposes in the domestic homicide context. See, e.g., Commonwealth v. Ulatoski, 371 A.2d 186, 190–91 (1977) (citations omitted). (“admissible to prove ill will, motive, or malice, and that such evidence can include instances in which the defendant threatened, quarreled with, or physically abused the victim . . . [but] like any other evidence, it is subject to the general evidentiary rules governing competency and relevancy”); State v. Hulsing, 825 P.2d 1027 (Colo. App. 1991) (in homicide cases involving marital partners, circumstances showing discord, jealousy, prior assaults, threats in the relationship are relevant to show motive and malice under Fed. R. Evid. 404(b), but even though relevant, victim’s statements must also be admissible under a hearsay exception).


146. Id. (citations omitted). See also State v. Hulsing, 825 P.2d 1027 (Colo. App. 1991) (in homicide cases involving marital partners, circumstances showing discord, jealousy, prior assaults, threats in the relationship are relevant to show motive and malice under Fed. R. Evid. 404(b), but even though relevant, the victim’s statements must also be admissible under a hearsay exception).

147. FED. R. EVID. 803(3).
subject to limiting instructions.

As the court put it in *State v. Woodward*: 148

In this case, [Dr.] Chaffee testified that Debbie stated that David was going to kill her. He testified that she was calm when she said it, so it was not an excited utterance. Likewise, this was not a present sense impression or a statement of then-existing mental, emotional, or physical condition. It was a 'statement of memory or belief' and, as such, was inadmissible. 149

Although the appellate court found admission of this statement “harmless beyond a reasonable doubt,” 150 the guidance to lower courts clearly precludes them from admitting similar testimony in the future.

The Tenth Circuit in *United States v. Joe* 151 made a similar ruling under almost identical circumstances. Ruling on the admissibility of the victim's statements to her doctor regarding rape and threats by her estranged husband, the court said:

With respect to the threat statement, Rule 803(3) therefore would extend to Ms. Joe's statement that she was 'afraid sometimes.' We disagree with the district court's ruling, however, because Ms. Joe's statement to Dr. Smoker, though indicating her state of mind, also included an assertion of why she was afraid (i.e., because she thought her husband might kill her). This portion of Ms. Joe's statement is clearly a 'statement of memory or belief' expressly excluded by the Rule 803(3) exception. 152

Similarly, a Texas court held in *Navarro v. State* that the victim's statements to her mother were not admissible under

149. Id. at 239.
150. The court applied this heightened standard of review because Woodward had invoked the Sixth Amendment confrontation clause in challenging admission of this evidence. Id.
151. 8 F.3d 1488 (10th Cir. 1993). This criminal case was in federal court because it involved a Native American defendant.
152. Id. at 1492–93.
the state of mind exception. In the court's view, the victim's statements that the accused had "put a gun to her head and threatened to kill her" and that he had said he would kill her if she continued to see her parents had no relevance in the case except to prove the truth of the matter asserted. Thus, "the statements were merely statements of memory to prove the fact remembered and therefore were not admissible under rule 803(3)."

The Federal Rules Advisory Committee stated that:

[t]he exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.

Therefore, arguing for a simple broadening of the state of mind exception to remove this limitation would subvert the underlying intent of the rule, and such a change might result in "the virtual destruction of the hearsay rule." In contrast, creating a new rule that admits "statements of memory or belief" in the narrow context of domestic homicides would not.

3. Admission Subject to Limiting Instructions

Even when admitted under the state-of-mind exception, threat hearsay is subject to limiting instructions to the jury. The court typically instructs the jury to consider the statements only with respect to the state of mind of the victim, not as evidence of the truth of the facts stated. Some courts have developed a more restrictive rule in which "a victim's extra-judicial declarations of fear of the defendant are admissi-

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154. Id.
155. Id. (citations omitted).
156. FED. R. EVID. 803(3) advisory committee's note, citing Shepard v. United States, 290 U.S. 96 (1933).
157. Id.
158. See generally MUELLER & KIRKPATRICK, supra note 9, at §§ 1.14, 1.16.
ble under the state of mind exception to the hearsay rule with a limiting instruction only if there is a manifest need for such evidence, i.e., if it is relevant to a material issue in the case.\textsuperscript{159} In what it characterizes as a standard limiting instruction,\textsuperscript{160} the court in \textit{Duvall v. State} seems to craft an even more restrictive instruction regarding threat hearsay: the judge instructed the jury to completely disregard the victim's statements after they had previously been admitted.\textsuperscript{161}

There is serious doubt about whether juries pay meaningful attention to limiting instructions and whether they even begin to make the fine distinctions called for. But, to the extent that juries do understand and follow limiting instructions, the victim's unique evidence concerning the abuser is excluded from their determinations. Even where the jury instruction does not affect the outcome of the case, limiting use of the victim's words implies a disregard of their importance and validity.

\textbf{\textsc{F. Treatment of Threat Hearsay Under the Medical Diagnosis Exception – \textsc{Fed. R. Evid} 803(4)}}

Threat hearsay rarely comes in under the medical diagnosis exception. This seems logical because such statements, to be admissible, must be "reasonably pertinent to diagnosis or treatment."\textsuperscript{162} Since fear may be relevant to depression or stress-related illness, courts admit a victim's statements that

\begin{itemize}
\item 160. This instruction is much more severe than a typical limiting instruction, indicating that perhaps the judge changed his mind after admitting the hearsay. See \textit{State v. Crawford}, 472 S.E.2d at 926, and \textit{State v. Solovano}, 726 P.2d at 52, for more standard instructions in the threat hearsay context.
\item 161. 825 P.2d 621, 626 (Ok. Crim. App. 1991). The court said:
You were instructed during the trial that you could consider the statements only as they might relate to the decedent's state of mind. At this point, you are instructed to disregard all statements of the decedent, as they are not relevant to any of the issues you will be called upon to decide. \textit{Id.}
\item 162. \textsc{Fed. R. Evid.} 803(4).
\end{itemize}
she was afraid of the accused. However, threats are usually excluded as not pertinent. My search found only two domestic homicide cases in which courts admitted such hearsay under this exception.

In *State v. Woodward*, the court admitted various statements by the victim about threats by and her fear of the accused. The victim's statements that she had been abused by her husband and she was deathly afraid of him were admissible as made to physician in course of treatment, as necessary information in treating the victim's situational depression. However, her statement that she was afraid because "David is going to kill me" was inadmissible, although harmless error, because it was not pertinent to the diagnosis.

In contrast, in *State v. Moen*, the Oregon Supreme Court held admissible a victim's complete statement to her physician describing abusive conduct by the accused and her fear that he might kill her. In this case, the statement was considered pertinent information explaining the victim's severe nervousness and depression. Here the victim was the mother-in-law of the accused, not his wife, but the circumstances were similar to those in domestic homicides, in that the violence followed the typical pattern.

G. TREATMENT OF THREAT EVIDENCE UNDER THE CATCHALL EXCEPTION – FED. R. EVID. 804(B)(5)

The residual, or catchall, exception provides that a statement having equivalent circumstantial guarantees of trustworthiness [is admissible], if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence proponent can

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164. Id.
165. Id.
167. Id. at 120.
A number of courts have admitted threat hearsay in domestic homicides under the catchall exception; certain exemplars are discussed infra.

The North Carolina Supreme Court recently took a promising approach in *State v. Baker*, in which it admitted the victim's statements under what it called the "exception for unavailable declarant," which was the state equivalent of the catchall. The court focused on the victim's personal knowledge of underlying events, her motivation to speak the truth to the witness, whether she ever recanted her statement, the nature and character of statement, and the relationship between the parties. Here, the court found that the declarant was likely to be honest in statements made to a close friend, and that the victim's statement to the police regarding ill will between the accused and the victim, the victim's fear of him, and his prior attacks on the victim were likely to possess requisite guarantees of trustworthiness.

In a similar vein, the Georgia court in *Hawkins v. State* admitted the victim's statements under the catchall exception, finding sufficient reliability and relevance. Three days before she was killed by four shotgun blasts at close range, the victim made a report to the police in which she said that her husband had threatened to shoot her. The court held that this statement was relevant to show the accused's intent and course of conduct. In affirming the decision of the trial court, the supreme court emphasized "that the evidence was excepted from the hearsay rule by necessity, the declarant being unavailable because of her death . . . and the

168. FED. R. EVID. 804(b)(5).
169. 451 S.E.2d 574, 592 (N.C. 1994) (citing the state equivalent of FED. R. EVID. 804(b)(5)).
170. Id.
171. Id. at 593.
172. 448 S.E.2d 214 (Ga. 1994).
173. Id. at 215.
174. Id.
statement being replete with indicia of reliability."\(^{175}\)

Similarly, in *State v. Faucette* the court found statements made by the victim to her attorney admissible under the catch-all exception.\(^{176}\) The court admitted the evidence with reasoning similar to that used in the state-of-mind cases; it was considered relevant to rebut the contention that the accused went to the victim’s home to talk with the victim and see his son, not with intent to murder her.\(^{177}\) In the catchall exception analysis, the court found these statements to be the most probative evidence available regarding domestic problems between the accused and victim.\(^{178}\) Further, the attorney-client relationship provided a sufficient guaranty of trustworthiness.\(^{179}\)

In contrast, the Iowa court in *State v. Williams*\(^{180}\) held inadmissible testimony that was arguably more reliable and probative than the cases cited *supra*. In *Williams*, the victim’s domestic relations attorney testified about a conversation *on the morning of the murder* in which the victim told him that “the defendant, on the previous day, had threatened to throw her through a plate glass window and use the broken glass to cut her head off.”\(^{181}\) In the court’s view, “[t]he only discernible purpose of this testimony was to establish the threat was made. That, of course, depends on the truth of the matters asserted by [the victim].”\(^{182}\) Despite seemingly overwhelming evidence against the accused and despite his claim of “accident/struggle,” the court did not find the threat hearsay admissible under the residual or any other hearsay exception.\(^{183}\) The court went further, holding the admission of this evidence to be reversible error, despite substantial evidence indicating the defendant’s guilt, including forensic evidence showing that

\(^{175}\) Id. (citations omitted).
\(^{176}\) 392 S.E.2d 71, 75 (N.C. 1990).
\(^{177}\) Id.
\(^{178}\) Id. at 76.
\(^{179}\) Id.
\(^{180}\) 427 N.W.2d 469 (Iowa 1988).
\(^{181}\) Id. at 471.
\(^{182}\) Id. I argue that such testimony should be admitted for the truth of the matter asserted. That is why a new hearsay exception is required.
\(^{183}\) See Part III, *supra*, for discussion of cases in which such evidence was admitted under the state-of-mind exception, although subject to limiting instructions.
the victim was shot while lying on the bed rather than while standing beside it and the testimony of two witnesses that he had threatened to kill the victim only hours before she died.\textsuperscript{184}

These catchall cases illustrate how much courts vary in their treatment of threat hearsay in the domestic homicide context. In general, the courts appear to disagree about the meaning of the catchall exceptions and fail to use them as intended, in part because of the ambiguity of the rules and the limitations inherent in the hearsay doctrine.\textsuperscript{185}

While the catchall exception would seem flexible enough to admit statements made to family, friends, or professionals about domestic abuse, threats, and intimidation, it does not appear to be generally used in this context. Unlike in the child sex abuse and witness procurement contexts, this exception is not used extensively to admit threat hearsay and does not seem to be undergoing any substantial development in threat hearsay–domestic homicide cases. Instead, this judicial modification and extension of the hearsay rule seems to be occurring primarily within the more restrictive state-of-mind exception.\textsuperscript{186} Nonetheless, a framework for determining constitutional reliability can be derived from the judicially developed approaches to admission of threat hearsay under the catchall exception.

\textbf{H. LIMITS OF THE EXISTING HEARSAY EXCEPTIONS PREVENT THE VICTIM’S WORDS FROM BEING HEARD}

It could be said that many courts have contorted and stretched the existing hearsay exceptions in order to admit threat hearsay in domestic homicide cases. Although we might agree with the particular ruling or the result in a case, adaptation or revision of the rules of evidence should not be left to the discretion of individual trial judges. Not only does judicial

\textsuperscript{184} 427 N.W.2d at 470.
\textsuperscript{186} See discussion Part 1IE, supra.
modification of the rules probably exceed their authority, it fails to provide sufficient guidance to counsel and other judges. And it fails to give notice to abusers that hidden threats will not remain hidden if the victim is silenced. 187

A specific hearsay exception, derived in part from the more expansive readings of the existing exceptions, would provide greater clarity and certainty to litigants and courts; it would also explicitly assert a public policy against domestic violence. In order to systematically admit this sometimes crucial evidence within the domestic homicide context, the federal and state rules of evidence should be revised to include a new exception. Thus, all the threat hearsay statements of the victim would be admissible under one rule, rather than admitted under an array of exceptions or precluded in a piecemeal fashion as occurs now.

III. CRITIQUES OF THE HEARSAY RULES AND PROPOSALS FOR REFORM

Many commentators advocate abolition or substantial revision of the existing hearsay rules and exceptions. 188 These

187. While it is dubious that abusers know or think about hearsay rules, the concept of notice is basic to our jurisprudence, and systematic approaches to evidence potentially filter into the general social consciousness.

188. See, e.g., Edward R. Becker & Aviva Orenstein, The Federal Rules of Evidence after Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, The Need for an Advisory Committee on the Rules of Evidence, and Suggestions forSelective Revision of the Rules, 60 GEO. WASH. L. REV. 857 (1992) (an Advisory Committee on the Rules of Evidence should be created to systematically overhaul the rules, including the residual hearsay exceptions); Michael L. Seigel, Rationalizing Hear­say: A Proposal for a Best Evidence Hearsay Rule, 72 B.U. L. REV. 893 (1992) (the existing rules are irrational and undermine respect for the legal system; proposing a rule that incorporates the preference for in-court testimony, but allows admission of hearsay "that, by its very nature . . . is sometimes the best evidence of its assertive content"); Eleanor Swift, A Foundation Fact Approach to Hearsay, 75 CALIF. L. REV. 1339 (1987) (hearsay analysis should focus on the foundation witness to provide evidence about the circumstances surrounding the declaration rather than specific, fact-laden exceptions); Paul J. Brysh, Comment, Abolish the Rule Against Hearsay, 35 U. PITI'. L. REV. 609, 621-28 (1974) (the expected error from admitting hearsay is low, so should be admitted unless the jury will assign it at least twice its real weight). See generally Christopher B. Mueller, Post-Modern Hearsay Reform: The Importance of Complexity, 76 MINN. L. REV. 367 (1992), for an incisive review of the leading critiques of the hearsay rules and proposals for change, and a proposal for reform of his own.
proposals tend to focus on establishing a simple overarching framework for admission of hearsay and eliminating the many exceptions. However, other evidence experts oppose “over-simplifying” the hearsay rules and persuasively argue that complexity and detail is needed for predictability and consistency.189

Although some of these proposals point out fruitful directions for hearsay treatment, creating a specific exception for threat hearsay in domestic homicide cases seems more viable. While courts might admit future threat evidence under these broad proposed rule changes, it is unlikely that such comprehensive revisions will be enacted. A specific, new exception is also more workable in that it would clearly instruct courts on the priority of this evidence and greatly reduce the opportunity of variable application. Further, legislative and judicial recognition that these victims words should be heard may be a factor in stemming domestic violence and domestic homicide.

Commentators have argued for promulgation of new hearsay exceptions for statements by child sexual abuse victims190 and for statements of witnesses whose unavailability has been procured by the accused.191 These also may serve as useful models for analysis and creation of a future threat exception,

189. Mueller, supra note 188.

First, lawyers have to prepare for trial and know what they are up against . . . Second, it is not clear that judges will perform better without rules to apply . . . Trial judges may need rules of some sort to deal wisely with hearsay. It is one thing for Judge Weinstein, who is both a scholar and an extraordinary jurist, to claim judges work better without rules, and quite another to suppose most judges can do so. Rules also invite a second look by appellate courts, which probably contributes to the development of sound doctrine and corrects some mistakes . . . Finally, even discretionary rules will produce doctrinal complexity unless they grant judges essentially complete discretion. Id. at 397 (citations omitted).


and so are discussed in Part IIIB, infra.

A. COMPREHENSIVE REFORM PROPOSALS

1. The "Best Evidence" Rule

One interesting, broad proposal calls for replacing the existing hearsay rules by a "best evidence" hearsay standard in which there is a general rule of preference for in-court testimony, but all hearsay is admitted when the declarant is unavailable.192 In this proposal, "[h]earsay is the 'best evidence' when the declarant is physically unavailable, as by reason of death. . . ."193 According to this theory, in many cases the party offering "hearsay evidence is driven by necessity, not a desire to gain an unfair tactical advantage,"194 so the system should not operate to block hearsay as such, particularly when no probative alternative evidence is available. In this view, "a rule of automatic exclusion merely shifts the disadvantage to the proponent, and does so to the detriment of the fact-finding process."195 The search for truth could thus be better served by establishing different criteria for admission/exclusion of hearsay evidence. Because hearsay may inherently be "the best evidence of its assertive content,"196 it should be admitted even when less preferred testimony can be given by available declarants.

Although the best evidence rule may well encompass future threat hearsay, its generality and ambiguity make it unlikely that admission of future threats in domestic homicide cases would survive a constitutional challenge. Some crucial issues remain unresolved under this approach. Threat hearsay potentially raises confrontation clause issues that remain unresolved in the proposed rule. Given the nature of this evidence and the protections guaranteed to criminal defendants, simply admitting all hearsay by unavailable declarants, requiring

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192. Seigel, supra note 188, at 896. "Hearsay is admissible if it is the best evidence available to the offering party from a particular declarant source, or if the best evidence has been or will be presented to the trier of fact." Id. at 929.
193. Id. at 933.
194. Id.
195. Id.
196. Id. at 896.
corroborative evidence, and then providing various limiting instructions to the jury may not meet the constitutional test for non-firmly rooted hearsay exceptions. Rather than directly addressing the fundamental problem, and according special status to victim's statements, this approach treats all hearsay by unavailable declarants as essentially equal. Further, the validity and sufficiency of threat evidence may be limited in this approach because in criminal cases it would be necessary to corroborate hearsay before it could support a conviction. It is not clear what would constitute adequate corroboration under this proposal, although support by other testimonial or circumstantial evidence may be enough. In any case, adoption of such a broad rule would probably not lead to the necessary changes in how the legal system handles domestic violence and homicide.

2. Foundation Fact Approach

In an approach that has been characterized as "[o]ne of the most striking and original proposals on hearsay reform," Eleanor Swift argues that hearsay should be admissible after a showing of "foundation facts" that would enable a jury to evaluate the hearsay intelligently. According to Swift, the current hearsay doctrine errs in excluding relevant information that would help the trier of fact. As she puts it, the "foundation fact approach admits hearsay when the proponent produces foundation facts about the circumstances surrounding a statement that allow the trier of fact to assess the reliability of the statement for itself." Essentially, the foundation witness testifies as to the circumstances in which the declarant's statement was made and positively identifies the declarant.

The foundation fact approach obligates the pro-

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197. Seigel, supra note 188, at 942.
198. Mueller, supra note 188, at 402.
199. Swift, supra note 188, at 1355.
200. Id. at 1390.
201. Id. at 1391.
ponent of hearsay to produce a foundation witness knowledgeable about the circumstances affecting the declarant's process of perceiving, remembering, and making a statement about a relevant event. This witness serves as the source of information for the trier's evaluation and is subject to cross-examination by the opponent.\textsuperscript{202}

Swift cites cases in which "a declarant's description of her husband's or boyfriend's threat is offered in the prosecution of the husband/boyfriend for the declarant's subsequent murder" as examples of how the "adjusted foundation" would affect hearsay rulings.\textsuperscript{203} In the two cases she cites, both involved testimony that the victim had described "a telephone conversation with defendant . . . in which she told [him] she intended to get an annulment and he replied he would kill her if she left him."\textsuperscript{204} In one case, this evidence was admitted as a present sense impression, and in the other it was not, because too much time had elapsed.\textsuperscript{205} According to Swift, under the foundation fact approach both statements would be admissible, because "[i]n both cases, the declarants describe the context in which they perceived and remembered the threat . . . The foundation witness in each case could testify about the circumstances at the time each declarant made her statement. Moreover, in each case, the foundation witness . . . could have qualified as an identification witness."\textsuperscript{206}

This proposed comprehensive revision of hearsay might well result in inclusion of much threat evidence, as Professor Swift's examples indicate. However, even she acknowledges that the likelihood of such a "radical" proposal being adopted is unlikely.\textsuperscript{207} Within the narrow framework of a new categorical exception, these principles may provide guidance in developing a workable exception that admits threat hearsay without violating the constitutional rights of the defendant.

\textsuperscript{202} Id. at 1392.
\textsuperscript{203} Id. at 1402 n.206.
\textsuperscript{204} Swift, \textit{supra} note 188, at 1402, quoting People v. Green, 609 P.2d 468, 480 (1980).
\textsuperscript{205} Id. at 1402.
\textsuperscript{206} Id.
\textsuperscript{207} Id. at 1428.
B. PROPOSED THREAT EXCEPTION TO THE HEARSAY RULE

In general, courts have used the residual hearsay exceptions to expand hearsay exceptions in particular areas.\(^{208}\) Evolution of the catchall exceptions to admit previously excluded hearsay tends to argue for formulating a new categorical exception. That is, "[o]nce it becomes evident that the residual exception is being used repeatedly to cover a certain type of hearsay, such as out-of-court statements of child victims of sexual assault, an Advisory Committee should consider either creating a new exception, or labeling the evidence as inadmissible hearsay."\(^{209}\) In part, this is because "the stare decisis effect of the residual exception is limited to the facts of individual cases"\(^{210}\) and "clarity and certainty in the Rules [of Evidence] is critically important . . . Careful revision will not undermine, but, rather, enhance the certainty of the Rules, given the current state of confusion surrounding many of them."\(^{211}\)

Although courts do use the exception in the context of threat hearsay in domestic homicide cases, it is not "used repeatedly" as in the child sex abuse and procurement of witness unavailability cases.\(^{212}\) Courts more commonly seem to be modifying the state-of-mind exception to admit previously inadmissible threat and fear hearsay in domestic homicide cases.\(^{213}\) Thus, the same argument may apply. That is, the Advisory Committee should create a new exception in order to reestablish clarity and certainty in the Rules and reduce confusion in this area.

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208. See generally Becker & Orenstein, supra note 188.
209. Id. at 909.
211. Id.
212. See discussion in Parts IC–D, supra.
213. See discussion in Part IIG, supra.
1. Constitutional Limitations

Any new hearsay exception is by definition not "firmly rooted" in the law, so it must meet certain constitutional requirements in a criminal case. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."\textsuperscript{214} Although this does not bar admission of all hearsay in criminal prosecutions, it does add additional constraints. The U.S. Supreme Court has held that, when a declarant is unavailable, unless the hearsay statement fits into a "firmly rooted" exception it must provide certain "particularized guarantees of trustworthiness."\textsuperscript{215}

The Court has not specified exactly what constitutes such particularized guarantees. However, external corroborating evidence is not sufficient; the trustworthiness must be somehow intrinsic to the statement itself.\textsuperscript{216} Thus, to provide a "particularized guarantee" in domestic homicide cases, threat hearsay could be admitted subject to a preliminary determination that a pattern of threats and violence existed in the relationship, and that the circumstances and content of the victim's statement support an inference that she was telling the truth.

2. Proposed Rule 804(b)(7)\textsuperscript{217}

A hearsay exception that would admit threat and abuse statements by a domestic homicide victim could take many forms. One reasonable approach was presented to the California Assembly, in the form of a bill to amend the California Evidence code by creating a new exception to the hearsay rule,\textsuperscript{218} which was substantially modified before enact-

\textsuperscript{214} U.S. CONST. amend. VI.
\textsuperscript{215} Ohio v. Roberts, 448 U.S. 56, 66 (1980).
\textsuperscript{216} Id.
\textsuperscript{217} Proposed Rule 804(b)(6) has been promulgated and distributed for comment by the Rules Advisory Committee, so the rule proposed here would be Rule 804(b)(7).
\textsuperscript{218} The bill, AB 2068, proposed the following rule:
1360. Evidence of a statement by a declarant is not made
1997] PROPOSED THREAT HEARSAY EXCEPTION 161

... I propose an exception similar to the California rule, with certain modifications, as follows:

804(b)(7). A statement by a declarant is not made inadmissible by the hearsay rule if the following conditions are met:
(A) The declarant is deceased and was the

inadmissible by the hearsay rule if all the following conditions are met:
(a) The statement purports to narrate, describe, or explain an act, condition, or event purportedly perceived by the declarant.
(b) The act, condition, or event referred to in subdivision (a) is the infliction or threat of physical harm upon the declarant against whom the statement is offered.
(c) The party against whom the statement is offered has been held civilly liable for, or has been convicted of or has entered a plea of no contest to any crime based upon, any incident of infliction or threat of infliction of physical harm upon the declarant.

219. As enacted, the rule states as follows:
(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:
(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
(2) The declarant is unavailable as a witness pursuant to Section 240.
(3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.
(4) The statement was made under circumstances that would indicate its trustworthiness.
(5) The statement was made in writing, was electronically recorded, or made to a law enforcement official.
(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:
(1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

CALIF. EVID. CODE § 1370 (West Supp. 1997).
spouse or domestic partner or former spouse or
domestic partner of the person against whom
the statement is offered.
(B) The statement narrates, describes, or ex­
plains an act, condition, event or series of events
perceived by the declarant, or the statement
purports to express the declarant's belief con­
cerning an act, condition, event or series of
events.
(C) The act, condition, or event or series of
events referred to in subdivision (B) is the inflic­
tion or threat of physical harm upon the declar­
ant by the party against whom the statement is
offered.
(D) The party against whom the statement is
offered has been held civilly liable for, or has
been convicted of or has entered a plea of no
contest to any crime based upon, infliction or
threat of infliction of physical harm upon the
declarant, or the court determines, in a hearing
conducted outside the presence of the jury, that
the party against whom the statement is offered
has inflicted or threatened to inflict physical
harm upon the declarant within five years prior
to the hearing.
(E) The court finds, in a hearing conducted out­
side the presence of the jury, that the time,
content, and circumstances of the statement
provide particularized guarantees of trustworthi­
ness. In making this determination, the court
will consider (1) declarant's personal knowledge
of the underlying events and motivation to
speak the truth, (2) whether the declarant re­
canted the statement before death, the nature
and character of the statement, (3) the rela­
tionship between declarant and the party against
whom the statement is offered, and (4) the rela­
tionship between declarant and the testifying
witness.

Under this proposed rule, the domestic homicide victim's
out-of-court statements will be generally admissible against
the accused spouse or domestic partner. Unlike the California
proposed and enacted rules, Subdivision A specifically limits
the exception to statements of the victim in a domestic homi-
Subdivision B would allow a victim’s statements concerning incidents of threats and violence to be admitted. Unlike the California proposed and enacted rules, this rule would additionally permit admission of the victim’s statements of fear and belief that her partner is going to kill her, even absent explicit threats by the accused, based on her perception of the overall pattern of abuse and threat in the relationship.

The California proposed rule conditioned admissibility on prior civil liability or a criminal conviction or plea based on infliction or threat of physical harm on the declarant. The California rule as enacted does not require a prior conviction or plea, but requires that the statement be recorded or made to a law enforcement officer at or near the time of the infliction or threat of physical harm.

Both of these requirements unnecessarily restrict utility of the exception. In the majority of cases involving declarations by domestic homicide victims, there has been no prior legal determination of threatening or abusive incidents. Rarely do the victims write down, record, or report the threat or injury to law enforcement personnel. She tells her doctor, her lawyer, her mother, her sister, her best friend. Cumulative evidence by various witnesses can reliably establish the pattern of threats and violence in the relationship. This pattern can presumably be extrapolated to the many hearsay rulings never recorded on appeal. Because of these discrepancies, the rule I

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220. Both the proposed and enacted California rules reach beyond the marital homicide context to situations in which prior threat or infliction of harm to the declarant can be shown. For example, under the proposed rule, if a parent or child has been abused and later killed, their words also would be admissible under the proposed rule. Certain non-domestic homicides would also meet the requirements of this exception. Under the enacted rule, the statements of any decedent who had been subjected to threats or violence and who meets the other requirements would be admissible; this raises other questions about the constitutional “indicia of reliability.”

221. See note 211, supra.


223. See, e.g., Part IB and cases discussed in Part II, supra.

224. The no-contest plea by O.J. Simpson in the prior attack on Nicole Brown Simpson was unusual. Most incidents of domestic violence are never reported, and those that do rarely get to court.
propose broadens the condition in Subdivision D to let the court make a preliminary determination that harm or threats of harm were inflicted on the declarant by the accused, but limits the permissible time frame. Thus, my proposed rule would admit statements by the many domestic violence victims who do not pursue complaints against their abusers prior to being killed and who do not record the threats, yet still provide reasonable protections for the accused.

Creating a new exception for threat hearsay raises confrontation clause issues that must be addressed by a determination that the statement bears adequate "indicia of reliability." The reliability requirement can be met where the statement either falls within a firmly rooted hearsay exception or is supported by a showing of "particularized guarantees of trustworthiness," shown by a totality of the circumstances surrounding the declaration, which would indicate that the declarant is particularly worthy of belief and that "adversarial testing would add little to its reliability."227

The relatively narrow application of this exception as well as the inquiry into indicia of reliability required by Subdivision E would address the confrontation clause issues. I have argued here that the victim of domestic violence has unique knowledge about the abuser's potential for violence that should be accorded special status as the "best evidence" available and as necessary information for the trier of fact. If accepted, this status in itself should provide the basis for a showing of constitutional reliability. Further, a number of courts have applied tests similar to that set out in Subdivision E to verify the trustworthiness of such statements in domestic homicide cases under the catchall hearsay exception, and these admissions have survived constitutional challenge.228

226. Id.
228. See discussion in Part IIG, supra.
IV. CONCLUSION

Currently, courts apply the hearsay rule inconsistently in domestic homicide cases. Some courts seem to stretch the exceptions past permissible bounds, while others apply the hearsay rule and its exceptions strictly, finding no applicable exceptions for the victim's statements about her abuser. Courts admit threat, fear, and abuse hearsay under a patchwork of exceptions, while they exclude vital portions of the victim's words. Courts of appeal regularly hold such hearsay to have been erroneously admitted. These cases cry out for a new approach, one that recognizes the unique situation facing victims of domestic violence and homicide. Proposed Rule 804(b)(7) offers a possibility for change, one that will allow the victims' words finally to be heard.