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CRAWFORD'S TRIANGLE: DOMESTIC VIOLENCE AND THE RIGHT OF CONFRONTATION*

DEBORAH TUERKHEIMER**

This Article examines an issue of great importance to the future of domestic violence prosecution: when does the admission of out-of-court statements by an "absent accuser" violate a defendant's right of confrontation? Given the Supreme Court's recent decision in Davis v. Washington, which promulgated an analysis inherently incompatible with the realities of battering, my critique anticipates the prospective factual determinations confronting lower courts and suggests that an evolution in judicial reasoning is warranted. Even assuming the occurrence of this proposed paradigm shift, however, there will be hearsay in victimless prosecutions that would have been admissible before Crawford v. Washington but will now be properly excluded. Given this reality, forfeiture is the next frontier of domestic violence prosecution. Accordingly, I devote considerable attention to the question of how to import forfeiture principles to the domestic violence context. Battering—a course of conduct that is ongoing, patterned, and characterized by control—is qualitatively different from violence against strangers. I argue that judicial reliance on precedent and analogy is therefore inadequate to construct a doctrinal framework applicable to domestic violence cases. This Article provides a roadmap for the necessary reconceptualization of forfeiture.

I conclude by contemplating the implications of what I characterize as a relational approach to confrontation. I posit that the Confrontation Clause is fundamentally concerned with the triangular relationship among accused, accuser, and the state. Asking the relational question reveals a set of previously

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unexamined assumptions about this triangle. By exposing—and, in the domestic violence realm, contesting—the conventional alignment of the triangle, a relational approach transforms how we think about the meaning of confrontation.

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INTRODUCTION

In criminal justice circles it has become widely accepted that prosecutors may, and often do, pursue domestic violence charges against a defendant despite a victim’s unwillingness to cooperate with law enforcement efforts.¹ Notwithstanding considerable scholarly controversy,² it is fair to say that prosecutors have remained willing and able to convict batterers without the testimony of victims.³ This

1. See *infra* notes 91–96 and accompanying text (discussing common reasons for victim reluctance to cooperate with the prosecution).

2. See, e.g., Cathleen A. Booth, *No-Drop Policies: Effective Legislation or Protectionist Attitude?*, 30 U. TOL. L. REV. 621 (1999) (analyzing the drawbacks of no-drop policies in relation to civil protection orders); Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853 (1994) (discussing no-drop prosecution policies and their role in combating domestic violence in the face of nonparticipating victims); Cheryl Hanna, *No Right To Choose*, 109 HARV. L. REV. 1849 (1996) (defending the need for mandated participation of domestic violence victims to address impediments associated with victimless prosecutions).

3. Prosecutors’ offices have with increasing frequency developed policies and training protocols regarding so-called “victimless” or “evidence-based” prosecution. See, e.g., WIS. DEP’T OF JUSTICE, MODEL DOMESTIC VIOLENCE POLICIES AND PROCEDURES (2002), available at <http://www.doj.state.wi.us/cvs/documents/DAR/ModelDVPolicies.pdf> (stating that “the decision to prosecute is based on evidence, not on the cooperation of the victim”); Prosecutor’s Protocol for Domestic Violence, Livingston County, New York, District Attorney’s Office (on file with the North Carolina Law Review) (establishing procedures and protocol for “Recanting or Non-Appearing Victims”); Domestic Violence Protocol, San Diego County, California, District Attorney’s Office (on file with author).

reality may be changing, however, as a result of the Supreme Court's 2004 decision in *Crawford v. Washington*⁴ and its more recent pronouncement in *Davis v. Washington*.⁵

Crawford held that the Confrontation Clause generally requires the exclusion of out-of-court statements against a criminal defendant, provided those statements are deemed "testimonial."⁶ Hearsay previously admissible as a matter of evidence law⁷ must now accordingly be subjected to a separate, distinct, and rigorous constitutional analysis. Quite suddenly, the evidence most commonly relied upon in "evidence-based" domestic violence prosecutions⁸ may be excluded based on the defendant's right of confrontation. And indeed thousands of cases raising challenges of this sort have already been decided in *Crawford*'s wake.⁹

("Charges may be filed without victim participation if there is deemed to be sufficient independent corroboration of the crime to prove the charges . . .").

I use "victimless" and "evidence-based" prosecution synonymously to refer to prosecution of "domestic violence" in the absence of a victim's testimony. Each term, however, has its limitations and requires a word of caution: "victimless prosecution" has a tendency to obscure the fact that someone was *in fact* victimized by the battering conduct at issue in the case—she simply is not present at the trial to testify to the abuse; "evidence-based" prosecution is also problematic, as it may incorrectly suggest that the testimony of a victim is something other than evidence.

4. 541 U.S. 36 (2004).

5. 126 S. Ct. 2266 (2006).

6. *Crawford*, 541 U.S. at 68. Provided the declarant is deemed "unavailable" to testify at trial, testimonial statements may be admissible if the defendant was given an opportunity to cross-examine the declarant when the statement was made. *Id.*; see also *infra* note 307 (discussing unavailability). In the domestic violence context, victims' out-of-court statements are rarely cross-examined. But see Tom Lininger, *Prosecuting Batters After Crawford*, 91 VA. L. REV. 747, 784–97 (2005) (proposing creation of new opportunities for pretrial cross-examination); Robert P. Mosteller, *Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411, 415–16 (2005) (suggesting the need for early confrontation opportunities).

7. As a general rule, hearsay is not admissible unless it qualifies as one of a number of enumerated exceptions. See FED. R. EVID. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"); FED. R. EVID. 802 (general rule of exclusion); FED. R. EVID. 803, 804 (delineating exceptions to the rule against hearsay).

8. See Lininger, *supra* note 6, at 771 (discussing the reasons why hearsay is often the "linchpin" of domestic violence prosecutions).

9. Between March and December of 2004 alone, approximately 500 opinions treating *Crawford* were issued. Lininger, *supra* note 6, at 766–67; see also Robert M. Pitler, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1, 14 (2005) ("Almost overnight, *Crawford* spawned an entire cottage industry, including several hundred reported cases . . ."). The published case law does not, however, fully capture the impact of *Crawford* on domestic violence prosecution. For instance, prosecutors are now dismissing larger numbers of cases where victims are uncooperative or unavailable. See Lininger, *supra* note 6, app. 1 at 820 (reporting that seventy-six percent of prosecutors responding to survey of sixty offices reported a higher

As commentators have uniformly observed, the decision transformed the constitutional landscape.¹⁰ But despite considerable scholarly discourse,¹¹ there is significant disagreement regarding whether the Court's interpretation of the Confrontation Clause is correct¹²—and even how the holding should be understood.¹³ We do know that the “reliability” approach,¹⁴ which for decades governed the admissibility of out-of-court statements against a criminal defendant, has been largely, if not entirely, dismantled.¹⁵ Far less settled is what doctrinal changes the Court intended to effectuate with its new testimonial approach to the confrontation right.

dismissal rate post-*Crawford*). Domestic violence defendants are also more likely after *Crawford* to take their cases to trial. *See id.* (reporting that fifty-nine percent of prosecutors surveyed indicated that defendants are less likely to plead guilty after *Crawford*). Wholly unmeasurable are the increased pressures to which battered women are now being subjected in light of the new obstacles in the path of victimless prosecution. *Cf. Hanna, supra* note 2, at 1865 (“Pro-prosecution advocates argue that aggressive policies take the burden off the victim by removing her as the ‘plaintiff.’ They contend that the batterer has less incentive to try to control or intimidate his victim once he realizes that she no longer controls the process.”).

10. *See, e.g.,* Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 2, 5 (2004) (“In *Crawford v. Washington* . . . the U.S. Supreme Court radically transformed its doctrine governing the Confrontation Clause . . .”); Lininger, *supra* note 6, at 748 (characterizing the impact of *Crawford* as “dramatic”); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 511 (2005) (asserting that *Crawford* “radically changed Confrontation Clause doctrine”).

11. *See, e.g.,* Friedman, *supra* note 10; Miguel A. Mendez, *Crawford v. Washington: A Critique*, 57 STAN. L. REV. 569 (2004); Mosteller, *supra* note 10. For a helpful collection of scholarship on the opinion and its meaning, also see BROOKLYN LAW REVIEW’s symposium issue entitled, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1 (2005).

12. *See* Pitler, *supra* note 9, at 12–14 (highlighting the differences in opinion over the decision in *Crawford*). *Compare, e.g.,* Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 107 (2005) (arguing that *Crawford* was wrongly decided), with Roger C. Park, *Purpose as a Guide to the Interpretation of the Confrontation Clause*, 71 BROOK. L. REV. 297, 297 (2005) (stating that he “applaud[s] the change from *Ohio v. Roberts* to *Crawford v. Washington*”).

13. *See* Tom Lininger, *Yes, Virginia, There Is a Confrontation Clause*, 71 BROOK. L. REV. 401, 402 (2005) (“The lack of concrete guidance in *Crawford* has led to inconsistent rulings by the lower courts . . . [N]o one is certain what *Crawford* really means.”).

14. *See* *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Under *Roberts*, any out-of-court statement offered for its truth against a criminal defendant raised a Confrontation Clause issue. However, provided that a statement was considered “reliable”—either because it fell within a “firmly rooted hearsay exception” or was supported by “particularized guarantees of trustworthiness”—it could be admitted without running afoul of the Constitution. *Id.*

15. Whether the *Roberts* framework continues to control the admissibility of nontestimonial statements is debatable. *See infra* note 105.

In this Article, I take no position on whether *Crawford* was rightly decided or how its dictates should be implemented, important though these inquiries are. Rather, without challenging either its mode of constitutional interpretation or its fidelity to originalist intent, I adopt the Court's holding in *Crawford* as the starting point for my discussion. My interest lies in exploring the ways in which courts and scholars are, in the face of significant doctrinal indeterminacy,¹⁶ reasoning about domestic violence and, further, how this reasoning could be improved. My contention is that notions of domestic violence underlying contemporary Confrontation Clause jurisprudence are flawed. Because judges are misunderstanding the dynamics of battering, the wrong questions are being asked when *Crawford* is applied to cases involving intimates.

Battering is fundamentally different from violence between non-intimates.¹⁷ As a consequence, default to analogy is inadequate to the task of defining the confrontation right in domestic violence cases. This inadequacy is compounded by a judicial inclination toward "looking backwards"¹⁸ in time to locate the meaning of confrontation. When the Sixth Amendment was passed, of course, wife battering was

16. In the aftermath of *Crawford*, commentators were in general agreement that the Court had failed to articulate a workable definition of "testimonial." See, e.g., Friedman, *supra* note 10, at 8 ("The most significant question that arises . . . is how far the category of 'testimonial' statements extends."); Brooks Holland, *Testimonial Statements Under Crawford: What Makes Testimony . . . Testimonial?*, 71 BROOK. L. REV. 281 (2005) ("The majority in *Crawford* . . . left the precise meaning of 'testimonial' statements 'for another day,' casting a shadow of uncertainty over a major component of criminal practice." (citations omitted)); Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 36 (2005) ("Justice Scalia did not provide a complete definition of a testimonial statement."). Moreover, the Court's recent effort in *Davis* to clarify the meaning of "testimonial" raised as many questions as it purported to answer. As I will argue, the opinion is sufficiently fact-bound and insufficiently reasoned so as to leave the lower courts in a continuing state of confusion. See *infra* notes 148–99 and accompanying text (discussing and critiquing *Davis*).

17. Violence between non-intimates is paradigmatic criminal conduct, in contrast to domestic violence, which, in important respects, lies outside the bounds of traditional criminal law structures. For a more thorough analysis of the features that define "paradigmatic" crime, see Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call To Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 971–74 (2004). Although child abuse and elder abuse share many of the dynamics distinguishing battering from paradigmatic criminal conduct, and much of the discussion that follows applies to violence in intimate relationships generally, I focus here on adult partner abuse and the law's response to it.

18. Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 313 (2005) (discussing the "historic approach to confrontation").

lawful,¹⁹ suggesting the need for an approach that is something other than “purely historic.”²⁰ The framework of *Crawford* thus presents a formidable conceptual challenge: to somehow extrapolate from the treason trial of Sir Walter Raleigh²¹—which the Court has characterized as “a paradigmatic confrontation violation”²²—a confrontation right with meaning in the context of domestic violence prosecution. In short, if Raleigh’s accuser, Lord Cobham, is the “paradigmatic” absent accuser, and women who were battered at the time of the amendment’s passage could not even *be* accusers, how should we make sense of victimless domestic violence prosecution and the right of confrontation?

Part I tells a story of the absent accuser that differs in important ways from the tale of Lord Cobham. I present a domestic violence case fairly described as typical, in order to answer the question of why a prosecutor would pursue charges without a cooperative victim. By showing how one defendant’s battering conduct over a period of

19. “Ambivalence surrounding criminalization efforts has enduring roots in the Anglo-American common law, which until the late nineteenth century ‘structured marriage to give a husband superiority over his wife in most aspects of the relationship.’ This structurally sanctioned superiority encompassed the husband’s right to ‘command his wife’s obedience, and subject her to corporal punishment or “chastisement” if she defied his authority.’ Integral to the law’s construction of the marital relationship was its defense of hierarchy, of which physical abuse was but one component.” Tuerkheimer, *supra* note 17, at 969 (quoting Reva B. Siegel, “*The Rule of Love*: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2122, 2123 (1996)).

20. Raeder, *supra* note 18, at 312.

21. In 1603, Sir Walter Raleigh was tried for treason for conspiring to overthrow King James I of England. *Crawford v. United States*, 541 U.S. 36, 44 (2004). As recounted by the *Crawford* Court:

Lord Cobham, Raleigh’s alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh’s trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: “Cobham is absolutely in the King’s mercy; to excuse me cannot avail him; by accusing me he may hope for favour.” Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that “[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face” The judges refused, and, despite Raleigh’s protestations that he was being tried “by the Spanish Inquisition,” the jury convicted, and Raleigh was sentenced to death.

Id. (citations omitted). For a thorough account of Sir Walter Raleigh’s trial, see 2 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 1–60 (1809).

22. *Crawford*, 541 U.S. at 50–52 (stating that the Confrontation Clause “was directed [at] . . . notorious treason cases like Raleigh’s; Raleigh’s trial has long been thought a paradigmatic confrontation violation.”). Justice Scalia’s reliance on Sir Walter Raleigh’s trial, and other treason cases notorious at the time of the framing, to support his view of the confrontation right has been criticized as “flawed” and “oversimplified.” Davies, *supra* note 12, at 121–22.

years impacted his victim's willingness to testify for the prosecution, this Part begins to demonstrate why courts must view abuse in context when making the factual determinations required by *Crawford* and *Davis*.

In the discussion that follows, I examine cases and commentary treating the right of confrontation in victimless domestic violence prosecutions. My objective in doing so is to expose the assumptions underlying application of *Crawford* to the battering context: put simply, courts and scholars are failing to acknowledge the ongoing course of conduct that characterizes domestic violence.²³ A full appreciation of the dynamics of abuse and attention to the context of relationship that embeds victim and defendant results in what I will call a "relational approach" to Confrontation Clause analysis.²⁴ I move on in Parts II and III to develop this approach in the two broad doctrinal contexts that will continue to arise most frequently in this post-*Crawford* era.

In Part II, I explore how courts apply the definition of "testimonial" to battering cases. In contrast to previous scholarship in this area, my interest lies not in evaluating the relative merits of various formulations of the term,²⁵ but, rather, in critiquing unexamined assumptions that inform judicial analyses regardless of the precise legal language employed.²⁶ In evaluating whether a hearsay statement is testimonial, courts have adopted a theoretical framework that posits a binary relationship between "crying for help" and "providing information" for investigatory purposes.²⁷ The Supreme Court's recent holding in *Davis* is a striking—and, for obvious reasons, most influential—instance of this dichotomization.

Despite apparent judicial certainty to the contrary, in the domestic violence realm, the dichotomy is false.²⁸ By this contention, I mean to suggest more than that officers and victims have "mixed motives" that are often difficult to discern.²⁹ Rather, from the

23. See *infra* notes 98–101 and accompanying text.

24. See *infra* Conclusion.

25. See *infra* notes 123–27 and accompanying text (describing differing formulations of the term "testimonial").

26. After *Davis*, lower courts are, of course, bound to apply the standard dictated by the Court to the extent the holding can be understood. Given the definitional indeterminacy still remaining, however, I suspect that there will be considerable variation in judicial implementation of *Davis*'s "test." See *infra* notes 149–200 and accompanying text (critiquing *Davis*).

27. See *infra* notes 121–31 and accompanying text.

28. See *infra* notes 133–39 and accompanying text.

29. See, e.g., *Davis v. Washington*, 126 S. Ct. 2266, 2283 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part) ("In many, if not most, cases where police

perspective of battered women, the meaning of “exigency”—a construct deeply embedded in the now-reigning definition of testimonial³⁰—is distinct from that experienced by victims of other types of crime. Abuse victims are faced with a threat that is ongoing. In order for the exigency confronting her to be resolved, a battered woman must often provide information regarding past violence; she does so in order to prevent imminent violence. That is, the two functions conceived by courts as distinct (and binary) are not only practically inseverable but conceptually so as well. By failing to account for this reality, the dominant judicial approach has resulted, and will continue to result in, the classification as “testimonial” of many statements by domestic violence victims that are, in fact, cries for help in response to immediate danger. Part II argues that decontextualized determinations of “exigency”—and continued adherence to an inapt dualism—will inevitably skew judicial treatment of Confrontation Clause challenges.

Even enlightened analysis of the definitional question, however, will lead to the exclusion of out-of-court statements that, while admissible in victimless prosecutions before *Crawford*, will now be properly categorized as testimonial.³¹ Given this reality, new attention must be given to the rule of forfeiture by misconduct, which precludes a defendant from asserting confrontation rights where he is responsible for procuring the trial absence of a witness.³² As advancement of forfeiture arguments in domestic violence cases becomes increasingly commonplace,³³ the doctrine—as yet undeveloped in the battering realm—must evolve.

Part III provides a conceptual roadmap for this doctrinal transformation. I suggest that, as courts begin formulating a forfeiture framework applicable to domestic violence cases, reliance

respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence. Assigning one of these two ‘largely unverifiable motives’ primacy requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible.”) (internal citation omitted); *see infra* notes 130–36 and accompanying text.

30. *See infra* notes 152–57 and accompanying text.

31. Justice Scalia’s unhelpful observation that “testimonial statements are what they are” aside, *Davis*, 126 S. Ct. at 2279 n.6, it is undoubtedly true that certain statements by domestic violence victims are testimonial pursuant to fair application of the *Crawford* framework.

32. *See infra* notes 204–10 and accompanying text.

33. The *Davis* Court’s recent reiteration of the principle of forfeiture and its dictum discussing evidentiary standards applicable to forfeiture hearings, *see Davis*, 126 S. Ct. at 2280, will further accelerate the development of law in this area.

on precedent and analogy will inevitably subvert the rule's equitable rationale.³⁴ This Part reveals that the influence of batterers over victims departs in important ways from the traditional witness tampering paradigm: in most abusive relationships, "tampering" conduct is inexorably bound up in the violent exercise of power that is itself criminal.³⁵ Abuse occurring prior to or during the crime for which the defendant is being tried often functions to undermine a victim's willingness to cooperate with prosecutorial efforts; classic forfeiture analysis is insufficiently contextualized to contemplate these dynamics.³⁶ I argue that judicial forfeiture determinations must take account of the characteristics that distinguish domestic violence from other types of criminal tampering.³⁷ Without accounting for the patterned, ongoing nature of abuse, courts cannot correctly interpret the meaning of forfeiture. Thus, fidelity to the theoretical underpinnings of the doctrine demands new consideration of its applicability to victimless domestic violence prosecutions.³⁸

Finally, I conclude by offering a theory of how the previous discussion might help to conceptualize the meaning of the confrontation right.³⁹ *Crawford* undermined the notion that ensuring evidence "reliability" is the exclusive function of the right of confrontation; yet the opinion erected no new theoretical underpinning. In the face of this void, the need to articulate a normative vision of confrontation has never been more compelling. I suggest that when the realities of domestic violence are attended to, a new paradigm for Confrontation Clause jurisprudence—one that is, in essence, relational—can be discerned.⁴⁰

Adopting a relational approach to confrontation allows *Crawford* to be fairly applied to domestic violence prosecutions.⁴¹ More broadly, asking the relational question reveals the operation of a set of previously unexamined assumptions regarding the triangle of

34. See *infra* Part III.

35. See *infra* notes 294–305 and accompanying text.

36. *Id.*

37. See *infra* notes 305–07 and accompanying text.

38. See *infra* Part III.C. I also consider how courts might analyze the issue of witness "unavailability" for purposes of allowing the prosecution to invoke the forfeiture doctrine. See *infra* notes 313–14 and accompanying text.

39. See *infra* notes 345–65 and accompanying text.

40. See *infra* Conclusion. My use of the word relational in this context is not derived from the scholarly tradition of relational feminism. Rather, it is a way of characterizing an approach to understanding the Confrontation Clause that views the alignment of relationships between accuser, accused, and state as central to its descriptive and normative aspirations.

41. See *infra* notes 340–44 and accompanying text.

relationships relevant to the Confrontation Clause context—relationships between accuser, state, and accused.⁴² By exposing—and, in the domestic violence realm, contesting⁴³—the conventional alignment of this triad, which I call “Crawford’s Triangle,” a relational approach has the potential to transform how we think about the value of confrontation in domestic violence prosecutions and beyond.⁴⁴

I. DOMESTIC VIOLENCE AND THE “ABSENT ACCUSER”

Angela first contacted the police regarding her relationship with Victor Santiago in January 1996.⁴⁵ According to her written complaint, for about a week Victor (whom she referred to as her “ex-boyfriend”) had been harassing Angela,⁴⁶ banging on her apartment door, threatening her, and hitting her in the face.⁴⁷

A few months later, police were again summoned to Angela’s apartment.⁴⁸ When they arrived, the officers heard her screaming for help and Victor yelling, “I’m going to fucking kill you.”⁴⁹ After observing Victor on top of Angela, who was lying on the floor, police broke down the door to gain access to the apartment.⁵⁰ Four officers were needed to pry Victor off of Angela, and he continued kicking and spitting even after he was separated from her.⁵¹ Angela, who was “crying and disheveled,” explained to police what had happened. The two had begun arguing on the first floor of the building. Victor then dragged Angela by the hair up four flights of stairs to her apartment

42. See *infra* notes 345–48 and accompanying text.

43. See *infra* notes 349–55 and accompanying text.

44. See *infra* notes 356–65 and accompanying text.

45. *People v. Santiago*, No. 2725-02, 2003 WL 21507176 (N.Y. Sup. Ct. Apr. 7, 2003). Before trial, the prosecution moved for an order allowing the use of various out-of-court statements made by Angela. As characterized by the court, “[t]he People’s theory [of admissibility] is that the defendant’s longstanding pattern of physical and emotional abuse toward Angela R. effectively forced her to become unavailable as a witness for the People at trial.” *Id.* at *1. The court held a pretrial hearing on the issue of whether the defendant forfeited his right to challenge the introduction of Angela’s statements. *Id.* at *1–2. The facts that follow are contained in the written opinion granting the prosecution motion. See *infra* notes 327–38 and accompanying text (discussing the judge’s decision).

46. Angela’s last name is omitted in the published opinion “to spare her further embarrassment.” *Santiago*, 2003 WL 21507176, at *1 n.1.

47. *Id.* at *5.

48. *Id.* While not entirely clear from the opinion, it seems likely that the police were called to the scene by one of Angela’s neighbors.

49. *Id.*

50. *Id.*

51. *Id.*

and once inside, began hitting her in the face and choking her. All the while, Victor prevented Angela from escaping.⁵²

Angela was taken by police to the hospital where, according to medical records, she acknowledged ongoing domestic violence by Victor, but refused to give information regarding her injuries and stated she was “ok” and “want[ed] to go home.”⁵³ The defendant was arrested for the incident.⁵⁴ Initially, Angela cooperated with the prosecution, but when the case was scheduled for trial, she “refused to go forward,” resulting in dismissal of the charges.⁵⁵

In December 1996, Angela again filed a report of domestic violence with the local precinct.⁵⁶ According to Angela’s account, when she asked Victor (whom she then referred to as her “common-law husband”) to turn down his loud music at three a.m., he set a towel on fire, “came over to the bed [and] said he’ll burn me and the apt. I grab [sic] the towel and put it off.”⁵⁷ The officer who took the report noted that Angela “‘had visible burns on her left hand and was visibly shaken and fearsome that common-law husband had returned.’”⁵⁸ The defendant was arrested for the incident, but the case was dismissed when Angela refused to cooperate with the prosecution.⁵⁹

Around this time, the domestic violence counselor at the local police precinct began keeping a log documenting her efforts to assist Angela.⁶⁰ The counselor’s log indicates that in July 1997, Angela stated that she had no further contact with Victor.⁶¹ However, in June 2000, Angela filed yet another report with the police (this time describing her relationship with Victor as having a “child in common”), stating, “‘[we] been having promble [sic]. I have been asking him to please leave and to just stay away,’ ” and that morning he hit her “‘all over [her] face and neck.’ ”⁶² The domestic violence counselor’s log indicates that Angela did not appear for her scheduled follow-up interview.⁶³ A few months later, Angela explained that “all

52. *Id.*

53. *Id.*

54. *Id.* at *6.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at *7. The police kept a list called “High Propensity for Recurrence of Domestic Violence,” which included Angela and Victor. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

is well” and that she and Victor were “counseling each other.”⁶⁴ In September, however, Angela reached out to the domestic violence counselor, admitting that Victor was continuing to abuse her and that she was “scare[d] to do something because he has threatened her if she seeks help.”⁶⁵ Over the next four months, the domestic violence log indicates multiple contacts with Angela: she variously cancelled appointments, accepted referrals for safety planning, petitioned for a family court order of protection despite her expressed fear of Victor’s reaction to its service, and subsequently dropped her petition.⁶⁶

In the spring of 2001, Victor was once again arrested, this time, for throwing a bowl at Angela with such force that she required emergency medical attention to her arm.⁶⁷ When Angela did not appear for trial,⁶⁸ despite having been served with a subpoena, the case was dismissed.⁶⁹

About a year later, in May 2002, Angela left a tearful message for the prosecutor who had handled the previous case.⁷⁰ In the message, she “requested information about how to contact a woman who had helped her in the past but whose number she no longer had because the defendant had taken all of her papers.”⁷¹ Angela added that the defendant had again “put his hands on me—he just ‘went off’ this morning and he’s been doing this for a couple of days and I don’t call the cops because I don’t have the Order of Protection in my hand.”⁷² After filing a report with the police, Angela met with the prosecutor and recounted multiple incidents of recent abuse, each of

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at *8.

68. The case was first scheduled to be tried in December 2001. At that time, Angela, while expressing her reluctance to testify, was convinced that “because of the on-going nature of the abuse, it would be best if she did testify against the defendant.” *Id.* at *8. The case was adjourned for trial to early 2002 because no courts or judges were available. *Id.*; see also Lininger, *supra* note 6, at 815–16 (recognizing that the loss of a victim’s testimony is a frequent consequence of trial delay, and proposing the creation of special “domestic violence courts” with lighter dockets and the amendment of “speedy trial” legislation to mandate “substantial showing of urgency” before the adjournment of domestic violence cases).

69. *Santiago*, 2003 WL 21507176, at *8. At this point, the case had been transferred to a new assistant district attorney. The previous assistant had prosecuted all former cases involving Victor and Angela in conformance with the general practice of the Manhattan District Attorney’s Office with respect to domestic violence cases. *Id.* Since 1996, Angela had apparently been in touch with the previous assistant “approximately once a year either calling for help or to make a new complaint against the defendant.” *Id.*

70. *Id.* at *9.

71. *Id.*

72. *Id.*

which violated an outstanding family court order of protection.⁷³ Angela “expressed reluctance” to testify in front of the grand jury, explaining that “she was ashamed to tell her story in front of other people, she didn’t want them to judge her, and she was concerned that the defendant would be there.”⁷⁴ Ultimately she was convinced to testify and—after she “froze” at the door to the grand jury—Angela was able to describe Victor’s most recent physical abuse.⁷⁵ The grand jury indicted Victor for multiple counts of criminal contempt.⁷⁶

Shortly after Victor’s arrest, Angela began expressing her desire to “drop all the charges.”⁷⁷ She left repeated messages for the prosecutor, explaining that “things are very hard for me as a single parent right now . . . and . . . I cannot work full time because I have no one to take care of [my daughter].”⁷⁸ She indicated that the assistant had “protected . . . and help[ed]” her when it was needed, but added that Victor “doesn’t deserve jail time, so, he went into himself to think, he already has.”⁷⁹ Angela also suggested that the two had not been in contact since his arrest⁸⁰ and reiterated her wish that charges be dismissed.⁸¹

I tell the story of Angela and Victor—or what we know of it from the relatively few times Angela reached out to law enforcement to protect her from an ongoing pattern of systemic abuse⁸²—with a

73. *Id.* At this meeting, Angela also indicated that sometime in the previous four months the defendant had actually been arrested for violating the order of protection. *Id.* This case (which was assigned to a different assistant) had been dismissed due to Angela’s failure to cooperate with the prosecution. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* The top count, or most serious charge, contained in the indictment was aggravated criminal contempt, which makes it a felony to intentionally or recklessly cause physical injury to a person in violation of a duly served order of protection. N.Y. PENAL LAW § 215.52 (McKinney 2002). Victor was also indicted for two counts of criminal contempt in the first degree, which prohibits a defendant from engaging in a defined course of conduct violative of a duly served order of protection. *Id.* § 215.51.

77. *Santiago*, 2003 WL 21507176, at *10.

78. *Id.*

79. *Id.*

80. *Id.* This contention, frequently articulated by battered women to prosecutors in support of requests to “drop charges,” is highly unlikely. Angela made similar assertions that were rejected as incredible by the judge later called upon to determine whether Victor had forfeited his constitutional right to challenge the admissibility of Angela’s out-of-court statements. *Id.* at *2.

81. *Id.*

82. According to the Justice Department, women who are victims of domestic abuse report the violence to law enforcement only fifty-five percent of the time; this number is even lower when the victim is not physically injured. BUREAU OF JUSTICE STATISTICS,

purpose, and the details here matter. To glimpse this relationship—and the frustrated involvement of police and prosecutors over *six years*—is to begin to understand what those who work with battered women experience as a matter of course, and those who do not often fail to appreciate: the general inadequacy of the criminal justice system to protect victims of domestic violence and hold batterers accountable. The story of Angela and Victor is tragic, not only because it tells of torture, but because it is typical.⁸³

As Angela's ambivalent relationship with the criminal justice system and its actors reveals, a batterer's conduct often causes the expressed interests of victims and law enforcement to diverge.⁸⁴ A battered woman⁸⁵ may manifest her reluctance to cooperate with

U.S. DEPT OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 5 (1995), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/femvied.pdf>; *see also* Am. Bar Ass'n, Comm'n on Domestic Violence, Domestic Violence Facts and Statistics, <http://www.abanet.org/domviol/stats.html> (last visited Aug. 26, 2006) ("Only about one-seventh of all domestic assaults come to the attention of the police." (citing FLA. GOVERNOR'S TASK FORCE ON DOMESTIC AND SEXUAL VIOLENCE, FLORIDA MORTALITY REVIEW PROJECT 3 (1997))).

83. *See* Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions To Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3 (2002) (citing the estimate of the head of the Los Angeles District Attorney's Office Family Violence Division that 90% of domestic violence victims recant); Lininger, *supra* note 6, at 768 ("[R]ecent evidence suggests that 80 to 85 percent of battered women will recant at some point . . .").

84. I do not mean to deny that factors other than the dynamics of abuse may contribute to a victim's hesitation to cooperate with law enforcement efforts; indeed, the relationship between these factors and the battering itself is often synergistic. *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) ("Women of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile. There is also a more generalized community ethic against public intervention, the product of a desire to create a private world free from the diverse assaults on the public lives of racially subordinated people.").

85. In the vast majority of cases, women are the victims of domestic violence and men the perpetrators. Approximately eighty-five to ninety percent of heterosexual partner violence reported to law enforcement is perpetrated by men. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, INTIMATE PARTNER VIOLENCE 2 (2000), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf>; PHYSICAL ASSAULTS BY HUSBANDS: A MAJOR SOCIAL PROBLEM, CURRENT CONTROVERSIES ON FAMILY VIOLENCE 89-90 (R.J. Gelles & D.R. Loeske eds., 1993). I therefore use the female pronoun when referring to victims of intimate partner violence and the male pronoun when referring to its perpetrators. It should also be noted that the terminology used to describe victims of battering "raises critical questions of definitions and strategy." ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 61 (2000); *see* Tuerkheimer, *supra* note 17, at 960 n.5 ("[U]se [of] the terms 'battered woman' and 'victim' . . . emphasize the basic proposition that women are indeed harmed by battering.").

prosecutorial efforts in any number of ways:⁸⁶ she may recant her allegations,⁸⁷ refuse to testify,⁸⁸ effectively disappear,⁸⁹ or simply articulate her desire not to “press charges.”⁹⁰ The true reasons for her reluctance may or may not be revealed. Domestic violence prosecutors⁹¹ hear from victims that they fear greater violence if they cooperated;⁹² that they still love the batterer⁹³ and do not want him to

86. While commentators generally refer simply to the “reluctant victim,” it is helpful to disaggregate the ways in which she may evidence her reluctance—particularly because the impact on the prosecution varies tremendously depending on which path of noncooperation a victim takes.

87. As one expert witness for the prosecution testified in a case involving a recanting victim:

Domestic violence victims, after describing the violence to the police, often later repudiate their description. There is typically “anywhere between 24 and 48 hours where victims will be truthful about what occurred because they’re still angry, they’re still scared.” But “after they have had time to think about it . . . it is not uncommon for them to change their mind.” About 80 to 85 percent of victims “actually recant at some point in the process.” Some victims will say they lied to the police; almost all will attempt to minimize their experience.

People v. Brown, 94 P.3d 574, 576 (Cal. 2004) (quoting testimony of Jeri Darr, Program Manager of the Antelope Valley Domestic Violence Council). A recanting domestic violence victim may be called by either the prosecution (who would treat her as a hostile witness and proceed to cross-examine her testimony) or the defense.

88. *See, e.g., People v. Kilday*, 20 Cal. Rptr. 3d 161, 164–66 (Cal. Ct. App. 2004) (the victim refused to testify because the defendant threatened her with physical harm), *review granted*, 105 P.3d 114 (Cal. 2005). A victim who refuses to testify despite having been served with a subpoena may be prosecuted for contempt. *See, e.g., John Riley, Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, NAT’L L.J., Aug. 22, 1983, at 4 (discussing a case in Anchorage, Alaska in which a victim was jailed for failing to testify); *infra* note 314 (citing the use of material witness orders to arrest domestic violence victims).

89. *See, e.g., Heard v. Commonwealth*, No. 2002-CA-002494-MR, 2004 WL 1367163, at *2 (Ky. Ct. App. June 18, 2004) (noting that the domestic violence victim disappeared and did not respond to multiple subpoenas to testify at the trial of her abuser); *State v. Davis*, 64 P.3d 661, 666 (Wash. Ct. App. 2003), *aff’d*, 111 P.3d 844 (Wash. 2005).

90. Prosecutors may, of course, attempt to persuade a reluctant victim to cooperate; this effort is greatly enhanced by the provision of social services and support specifically addressed to the needs of battered women. In the event that a victim remains uncooperative, prosecutors have limited options available: they may subpoena her to testify (and hope for compliance), determine to move forward without her testimony where an evidence-based prosecution is viable, or dismiss the charges. *See Hanna, supra* note 2, at 1853–54; *supra* note 3 (discussing prosecutorial policies addressing the uncooperative victim).

91. For five years I prosecuted domestic violence cases in the New York County District Attorney’s Office. During my last year in the office, in my capacity as domestic violence supervisor, I assembled a more complete picture of the hundreds of domestic violence cases handled every month by the office.

92. Sadly, this concern is often well founded. At least one study shows that, while police involvement may help to reduce violence in the short term, it can increase violence

suffer; that they need his financial support;⁹⁴ and that they want their children to have a father in the home.⁹⁵ Many other factors may contribute to a victim's hesitation to participate in the prosecution of

in the long term. DO ARRESTS AND RESTRAINING ORDERS WORK? 43-49 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

93. In evaluating the expression of love for their abusers that battered women often articulate to prosecutors, it is helpful to understand the "cycle of violence" that characterizes many battering relationships. It "consists of a tension-building phase, followed by acute battering of the victim, and finally by a contrite phase where the batterer's use of promises and gifts increases the battered woman's hope that violence has occurred for the last time." Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (1993). As Mary Ann Dutton explains, "[s]ome batterers are genuinely remorseful and experience guilt and negative self-image as a result of their violent behavior, whereas others may use promises and gifts in a more overt act of manipulation." *Id.* at 1208 n.89. In either scenario, a pending prosecution inevitably intensifies the effects of the "contrition" phase of the abusive cycle.

Even apart from this dynamic, however, a battered woman's love for her abuser should not be abstracted from the complexity of human relationships. As Sarah Buel has insightfully noted:

A victim may say she still loves the perpetrator, although she definitely wants the violence to stop. Most people will be in an abusive relationship at some point in their lives, be it with a boss or family member who mistreats them. However, most do not immediately leave the job or stop loving the family member when treated badly; they tend to try harder to please the abuser, whether because they need or love the job or the person, or hope that renewed effort and loyalty will result in cessation of the abuse. Since many batterers are charismatic and charming during the courtship stage, victims fall in love and may have difficulty in immediately altering their feelings with the first sign of a problem.

Sarah Buel, *Fifty Obstacles to Leaving, A.K.A. Why Abuse Victims Stay*, COLO. LAW., Oct. 1999, at 19, 22.

94. This problem is particularly acute when the victim is also a mother. See Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 680-81 (2006) ("[S]ingle mothers tend to live at or below the poverty line, and welfare reform has only served to worsen their plight. Faced with the prospect of living without sufficient food or shelter for themselves and their child or children, it is not surprising that many women 'choose' to remain in a relationship with a man who can help to provide these subsistence items—even if the cost of the exchange is continued violence." (citations omitted)).

95. The prospect of raising children alone is daunting for many reasons. Many domestic violence victims "believe it is in the children's best interest to have both parents in the home, particularly if the abuser does not physically assault the children." Buel, *supra* note 93, at 20. The explicit promotion of marriage and family and the denigration of childrearing "outside of marriage" have resulted in the "demonization of single mothers" in public discourse. Tuerkheimer, *supra* note 94, at 682. Battered mothers contemplating cooperation with prosecutorial efforts must "confront not only adverse material consequences, but a societal message that many have internalized: children raised in households headed by single mothers are damaged emotionally, developmentally, and financially." *Id.* at 683.

her abuser.⁹⁶ What can be said of virtually every consideration militating against cooperation, however, is that each is rooted in the continuing relationship between the woman and the defendant. The victim's decisionmaking with regard to prosecution simply cannot be evaluated without reference to the context in which she remains embedded.

Despite the criminal law's preoccupation with physical injury,⁹⁷ victims of domestic violence experience a spectrum of violence defined by both physical and nonphysical manifestations of power and control.⁹⁸ As psychologist Mary Ann Dutton explains:

Abusive behavior does not occur as a series of discrete events. Although a set of discrete abusive incidents can typically be identified within an abusive relationship, an understanding of the dynamic of power and control within an intimate relationship goes beyond these discrete incidents. To negate the impact of the time period between discrete episodes of serious violence—a time period during which the woman may never know when the next incident will occur, and may continue to live with ongoing psychological abuses—is to fail to recognize what some battered women experience as a continuing “state of siege.”⁹⁹

This “state of siege” is often experienced by victims as the most painful aspect of battering,¹⁰⁰ and it is enduring: the intervention of law enforcement rarely puts a final end to the power that a batterer maintains over his victim; rather, it can provide her with a temporary reprieve from the physical violence.¹⁰¹

96. See, e.g., *State v. Davis*, 64 P.3d 661, 666 (Wash. Ct. App. 2003) (noting that the defendant threatened the complainant that her children would be removed from her custody if she testified), *aff'd*, 111 P.3d 844 (Wash. 2005). See generally Buel, *supra* note 93.

97. See Tuerkheimer, *supra* note 17, at 971–73.

98. As Elizabeth Schneider has noted, an accurate description of battering is “premised on an understanding of coercive behavior and of power and control—including a continuum of sexual and verbal abuse, threats, economic coercion, stalking, and social isolation—rather than ‘number of hits.’” ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 65 (2000).

99. Dutton, *supra* note 93, at 1208 (quoting Sue Osthoff, Director, National Clearinghouse for the Defense of Battered Women).

100. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2123–24 (1993). For a fuller discussion of the dynamics of battering, see Tuerkheimer, *supra* note 17, at 962–69.

101. Studies have found that, on average, it takes a woman eight years from the time she first endeavors to leave her abuser, and seven attempts, before she finally separates from him. A. Horton & B. Johnson, *Profile and Strategies of Women Who Have Ended the Abuse*, 74 FAM. IN SOC'Y: J. CONTEMP. HUM. SERVS. 481, 481–92 (1993); Mayumi Waddy,

We see, then, why victimless prosecution is an issue whose importance to those concerned about domestic violence can hardly be overstated.¹⁰² Law enforcement can (and should) continue to improve its treatment of domestic violence victims;¹⁰³ the law can (and should) evolve to more accurately define the harm of battering,¹⁰⁴ but a true understanding of what battering entails exposes the intractable nature of the problem. The uncooperative complainant inheres in the dynamics of abuse; she is not going away.

II. HEARING A "CRY FOR HELP" AFTER *CRAWFORD*

After *Crawford*, the classification of a hearsay statement as "testimonial" subjects it to a new constitutional scrutiny that is qualitatively more rigorous than that given to statements deemed nontestimonial.¹⁰⁵ It is worthwhile to consider the extent to which

DVRO: Just a Piece of Paper, 11 J. CONTEMP. LEGAL ISSUES 81, 83 (2000). Moreover, "[a]t the moment of separation or attempted separation—for many women, the first encounter with the authority of law—the batterer's quest for control often becomes most acutely violent and potentially lethal." Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5–6 (1991) (defining the concept of "separation assault" to mean the "assault on a woman's body and volition that seeks to block her from leaving, retaliate for her departure, or forcibly end the separation"). Women who separate from their husbands are three times more likely to be further abused by those spouses than divorced women and twenty-five times more likely to be victimized by spouses than married women who are still living with their spouses. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *supra* note 82, at 4.

102. Other scholars have addressed the theoretical and policy implications of victimless domestic violence prosecution, *see, e.g.*, Hanna, *supra* note 2, as well as the evidentiary challenges that most often arise in these cases, *see, e.g.*, Belooof & Shapiro, *supra* note 83; Brooks Holland, *Using Excited Utterances To Prosecute Domestic Violence in New York: The Door Opens Wide, or Just a Crack*, 8 CARDOZO WOMEN'S L.J. 171 (2002); Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67 (1998).

103. *See, e.g.*, Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 125 (1991); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System*, 11 YALE J.L. & FEMINISM 3, 13–16 (1999).

104. *See* Tuerkheimer, *supra* note 17, at 1019–23.

105. The central holding of *Crawford* is that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004); *see also* Richard D. Friedman, *Grappling with the Meaning of Testimonial*, 71 BROOK. L. REV. 241, 241 (2005) (stating that the Confrontation Clause "poses little if any obstacle" to admission of nontestimonial hearsay).

Crawford left unresolved the extent to which the *Roberts* reliability approach to confrontation continues to govern the admissibility of nontestimonial hearsay. *See, e.g.*, Mosteller, *supra* note 10, at 515; Raeder, *supra* note 18, at 320–35. After *Davis*, it seems more likely that the Confrontation Clause applies only to testimonial statements and that *Roberts* has been effectively overruled. *See Davis v. Washington*, 126 S. Ct. 2266, 2274

victimless domestic violence prosecutions that would have been viable before *Crawford*¹⁰⁶ are now doomed.¹⁰⁷ This of course depends on whether courts classify as “testimonial” out-of-court statements that otherwise would be admissible pursuant to applicable evidentiary rules,¹⁰⁸ a matter of considerable complexity.

As the *Crawford* majority readily conceded, the opinion made no “effort to spell out a comprehensive definition” of the term,¹⁰⁹ leaving lower courts to discern its meaning from the Court’s “cryptic clues.”¹¹⁰

(2006) (noting that testimonial hearsay “mark[s] out not merely the [the Confrontation Clause’s] core, but its perimeter”). The less than definitive nature of the Court’s proclamation, however, has led to early divergence in lower court treatment of *Roberts*’s continued vitality. Compare *United States v. Thomas*, 453 F.3d 838, 844 n.2 (7th Cir. 2006) with *United States v. Tolliver*, 454 F.3d 660, 665 n.2 (7th Cir. 2006) (noting that “nontestimonial hearsay is not subject to the confrontation clause” according to that court’s interpretation of *Davis*).

106. Even before the Court announced its testimonial approach to the Confrontation Clause, many cases with uncooperative victims could not go forward. Indeed, in the absence of sufficient evidence to prove the defendant’s guilt beyond a reasonable doubt, prosecutors must drop charges. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3.9 (1993) (“A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”).

107. For purposes of the discussion in Part II, I am deferring consideration of the forfeiture by misconduct exception to *Crawford*’s requirement of witness unavailability and an opportunity for cross-examination. See *infra* Part III.

108. With rare exception, victimless prosecutions are based in part on the admission of hearsay pursuant to an exception to the rule against hearsay. See *supra* note 102 (referencing evidence commonly used in victimless prosecutions). In the domestic violence context, most post-*Crawford* challenges to hearsay are directed at statements to 911 operators or police officers who respond to the crime scene—statements previously admissible as excited utterances or present sense impressions. See Raeder, *supra* note 18, at 332; *infra* note 150 (noting hearsay exceptions invoked in *Davis* and its consolidated companion case, *Hammon v. Indiana*).

109. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). The Court left “for another day” the articulation of a definition of testimonial, provoking Chief Justice Rehnquist, who was joined by Justice O’Connor, to object that

the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists, is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

Id. at 75–76 (Rehnquist, C.J., dissenting) (citation omitted). The Court in *Davis v. Washington* recently elaborated further on its definition of testimonial. See *infra* notes 151–52 and accompanying text (discussing the definition of testimonial).

110. Holland, *supra* note 16, at 282. According to the *Crawford* Court,

[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law

In *Crawford*'s wake, courts have applied a range of definitions to decide the threshold question,¹¹¹ often confronting similar factual scenarios yet reaching divergent conclusions about the testimonial nature of the challenged statements, and engaging in reasoning as varied as the tests ostensibly framing the inquiry.¹¹² A survey of the post-*Crawford* case law reflects, to be generous, a state of confusion.¹¹³

In *Davis v. Washington*¹¹⁴ and its consolidated companion case, *Hammon v. Indiana*, the Court purported to clarify the applicable legal standard for classifying hearsay.¹¹⁵ As we shall see, notwithstanding its seemingly unequivocal definitional language,¹¹⁶ the opinion provides little in way of guidance to lower courts or predictability for litigants.¹¹⁷ Because *Davis* leaves intact significant doctrinal indeterminacy, it is crucial to examine how, as a categorical matter, amorphous legal tests governing what is "testimonial" are

right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

The *Crawford* Court articulated three, oft-cited "formulations" of what it called the "core class of 'testimonial' statements":

[E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[;] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[;] and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51–52 (citations and internal quotation marks omitted). By way of further explanation, the Court added that "[t]hese formulations all share a common nucleus and they define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing." *Id.*

111. See Holland, *supra* note 16, at 282 (noting the "diversity of judicial decisions interpreting" the meaning of "testimonial").

112. See *infra* notes 123–35 and accompanying text (articulating various definitional tests).

113. In the period between *Crawford* and *Davis*, scholarly discourse focused largely on the relative merits of the various definitions of "testimonial" floating in the judicial ether. See, e.g., Friedman, *supra* note 105; Mosteller, *supra* note 10.

114. 126 S. Ct. 2266 (2006).

115. *Id.* at 2273–74.

116. *Id.*

117. Given the uniform dissatisfaction expressed by blogging commentators across the ideological spectrum in the immediate aftermath of *Davis*, all manner of critique of the opinion is surely forthcoming. See, e.g., Posting of Amy Howe to SCOTUSblog, <http://www.scotusblog.com/movabletype/archives/2006/06/18-week/> (Jun. 24, 2006, 18:22 EST).

judicially mapped onto the realities of battering. Given the Court's adoption of a definition that is striking for its malleability, the critique that follows anticipates the prospective factual determinations confronting lower courts.¹¹⁸ By identifying how misunderstandings of the dynamics of abuse inform analysis of the definitional question,¹¹⁹ I mean to suggest that, however *Davis* is interpreted, a shift in judicial thinking about the relevant facts is warranted.¹²⁰

The conceptual tension that underlies this area of law derives from an uncritical acceptance of what one court expressly termed "[t]he dichotomy between a plea for help and testimonial statements."¹²¹ Prior to *Davis*, regardless of how the definitional question was precisely framed, this dichotomy was embedded in most judicial inquiry into the testimonial nature of a statement.¹²² Whether courts were examining the declarant's level of excitement,¹²³ her intended use of the statement,¹²⁴ her anticipated use of the statement or a "reasonable person's" anticipated use of the statement,¹²⁵ the

118. In a sense, reconstructing reality is what *Crawford* and *Davis* require of lower courts. By definition, the doctrinal issues raised by Confrontation Clause challenges are triggered only when the prosecution has determined to try the defendant without the testimony of the victim. With rare exceptions, courts deciding whether a statement is testimonial in nature (or, for that matter, whether the defendant forfeited his Confrontation Clause rights) do not have the benefit of truthful testimony from a domestic violence victim. See *supra* notes 82–90 and accompanying text (suggesting various ways that victims manifest reluctance to cooperate with prosecution). Engaged in what might be characterized as an inherently speculative inquiry, judges are called upon to make factual determinations which are, to a great extent, dependent on their life experiences, perspectives, and background knowledge with respect to battering. See Tuerkheimer, *supra* note 17, at 974 n.79 (noting the importance of a judicial "decisionmaker's particular worldview, itself deeply embedded in a social context" and citing similar feminist critiques of evidence law).

119. For a discussion of the *Davis* Court's failure to account for these dynamics, see *infra* notes 157–96 and accompanying text.

120. To be clear, I am not arguing that hearsay statements by domestic violence victims cannot be testimonial, see *infra* note 201 and accompanying text, but, rather, that taking into account the dynamics of battering will improve judicial reasoning about confrontation in domestic violence cases.

121. *State v. Powers*, 99 P.3d 1262, 1265 (Wash. Ct. App. 2004).

122. See *infra* notes 123–37.

123. See, e.g., *State v. Barnes*, 854 A.2d 208, 211–12 (Me. 2004); *State v. Forrest*, 164 N.C. App. 272, 281, 596 S.E.2d 22, 28 (2004), *discretionary review denied*, 359 N.C. 193, 607 S.E.2d 653 (2004); *In re Key*, No. PD-0495-05, 2005 Tex. Crim. App. LEXIS 999 (Tex. Crim. App. June 29, 2005), *reh'g denied*, No. 12-04-30-CR, 2005 Tex. App. LEXIS 9023 (Tex. App. June 29, 2005).

124. See, e.g., *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *rev'd*, 126 S. Ct. 2266 (2006); *State v. Davis*, 111 P.3d 844 (Wash. 2005) (en banc), *aff'd*, 126 S. Ct. 2266 (2006).

125. See, e.g., *People v. Cortes*, 781 N.Y.S.2d 401, 414 (N.Y. Sup. Ct. 2004); *Powers*, 99 P.3d at 1265.

degree of “formality” associated with the making of the statement,¹²⁶ or even the perspective of the questioner,¹²⁷ the issue of exigency impacted the analysis.

In an important article pre-dating *Crawford*,¹²⁸ Richard Friedman and Bridget McCormack describe the operative theoretical construct¹²⁹ as follows:

Now consider statements made in 911 calls and to responding police officers. A reasonable person knows she is speaking to officialdom—either police officers or agents whose regular employment calls on them to pass information on to law enforcement, from whom it may go to the prosecutorial authorities. The caller’s statements may therefore serve either or both of two primary objectives—to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous, situation, and to provide information to aid investigation and possible prosecution related to that situation. In occasional cases, the first objective may dominate—the statement is little more than a cry for help—and such statements may be considered nontestimonial The more the statement narrates events, rather than merely asking for help, the more likely it is to be considered testimonial.¹³⁰

Friedman and McCormack acknowledge that a speaker may have a dual purpose in making a statement: she may need “to gain immediate official assistance in ending or relieving an exigent,

126. See, e.g., *People v. Jimenez*, No. B164534, 2004 WL 1832719, at *11 (Cal. Ct. App. Aug. 17, 2004); *Barnes*, 854 A.2d at 211–12.

127. See, e.g., *Mungo v. Duncan*, 393 F.3d 327, 332 (2d Cir. 2004), *cert denied sub nom. Mungo v. Greene*, 544 U.S. 1002 (2005); *Stancil v. United States*, 866 A.2d 799, 814–15 (D.C. 2005), *reh’g en banc granted*, 878 A.2d 1186 (D.C. 2005); *People v. Kilday*, 20 Cal. Rptr. 3d 161, 169–70 (Cal. Ct. App. 2004).

128. The “testimonial” approach to confrontation that was advocated by Richard Friedman for many years was essentially adopted by the Court in *Crawford*.

129. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171 (2002). The authors do not limit their discussion to the domestic violence context, although much of their attention is directed specifically at the problem referred to as “dial-in testimony” by domestic violence victims, *see id.* at 1180–1200, most of whom, according to Friedman and McCormack, “know what they are doing” when they call 911:

They know that by making the call they are practically ensuring that the other person will be arrested, and that a criminal prosecution will probably follow. We also believe that in most cases they understand that the prosecutor may attempt to use the statements they make to the 911 operator or to the police officer who follows up on the call. In short, these 911 callers realize they are creating evidence for the prosecution as they call.

Id. at 1199.

130. *Id.* at 1242.

perhaps dangerous situation”—which the authors consider “little more than a cry for help”—and, at the same time, she may intend “to provide information, to aid investigation and possible prosecution related to that situation.”¹³¹ And yet, even accepting the possibility that the two motives may coexist, the functions are articulated here—and similarly understood by lower courts applying *Crawford* and, more recently, by the *Davis* Court—as binary. Put differently, if the declarant is “providing information to aid investigation,” the exigency confronting her must necessarily have been “end[ed] or reliev[ed],” and she thus cannot possibly be “cry[ing] for help.”¹³²

In the domestic violence context, this dichotomy is false. Often, a battered woman’s safety depends entirely on the intervention of law enforcement: she needs police protection because, without assistance, the violence will continue.¹³³ To posit a clean divide between the crime and the exigency it creates, and the crime’s aftermath, is to import a model of crime characterized by discrete instances of one-time, episodic violence.

As we have seen, this conventional paradigm is incompatible with the realities of battering.¹³⁴ A domestic violence victim’s safety may be wholly contingent on her communication with police, her “narration of events” linked inexorably to resolving—however temporarily—the danger posed by her batterer.¹³⁵ Unlike victims of discrete crimes, a battered woman may “cry for help” because it is the only possible way for her to experience a moment of safety, however brief.

The “cry for help” may sound, then, much like a narration of events because it is: a victim is describing battering that will, in all likelihood, continue in the absence of some action by law

131. *Id.*

132. Friedman & McCormack, *supra* note 129, at 1242.

133. From the perspective of many domestic violence victims, a batterer’s abusive course of conduct is ongoing, notwithstanding interruption by contact with the criminal justice system. *See infra* notes 136–38.

134. *See infra* notes 136–39. For cases that effectively illustrate the ongoing nature of battering, *see, e.g.*, *State v. Davis*, 111 P.3d 844, 846–47 (Wash. 2005), *aff’d*, 126 S. Ct. 2266 (2006); *People v. Walker*, 697 N.W.2d 159, 161 (Mich. Ct. App. 2005), *leave to appeal granted*, 697 N.W.2d 527 (2005); *State v. Bradley*, 799 N.Y.S.2d 472, 474–75 (N.Y. App. Div. 2005), *leave to appeal granted*, 843 N.E.2d 1160 (2005); *People v. Adams*, 16 Cal. Rptr. 3d 237, 238–41 (Cal. Ct. App. 2004), *depublished by* 19 Cal. Reprtr. 3d 824 (Cal. 2004); *People v. Mackey*, 785 N.Y.S.2d 870, 871 (N.Y. Crim. Ct. 2004); *People v. Kilday*, No. A099095, 2004 Cal. App. LEXIS 6289, at *4–9 (Cal. Ct. App. June 30, 2004).

135. *See, e.g.*, *State v. Wright*, 701 N.W.2d 802, 806 (Minn. 2005) (en banc), *vacated* 126 S. Ct. 2979 (2006).

enforcement.¹³⁶ From her perspective, if she does not describe the crime to police, it is simply not “over,” nor is she safe.¹³⁷ And even when she does recount the incident, assuming the police are able to make an arrest, of course, there is every reason to believe that—after a respite—the battering will continue.¹³⁸ The domestic violence victim’s exigency extends beyond what might appear to an outside observer, or even to the “reasonable person” unfamiliar with the culture of the particular battering relationship,¹³⁹ to be the “end” of

136. The ongoing pattern of physical and nonphysical conduct that characterizes battering is often escalated by the victim’s attempt to increase her control over her life. In my prosecutorial experience, I found this to be especially true of acts triggering the intervention of law enforcement. See Waddy, *supra* note 101, at 84; cf. Brief for National Network To End Domestic Violence et al. as Amici Curiae Supporting Respondents at 7, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (Nos. 05-5224 & 05-5705) (“Pursuing prosecution, thus, is not only an assertion of autonomy, it directly defies the abuser’s control, exposing the victim to considerable risk of violence.”). By asserting that violence will likely continue absent some action on the part of law enforcement, I do not mean to suggest that arrest will, in all or even most cases, bring about a permanent cessation of violence. See *infra* note 138 (acknowledging uncertainty regarding the deterrent effects of arrest in domestic violence cases). Rather, arrest provides battered women a reprieve, however temporary, that is of value for a variety of reasons.

137. See, e.g., Brief for National Network To End Domestic Violence, *supra* note 136, at 25 n.20 (“It is not uncommon for domestic abusers to threaten their victims that they will kill them if they call the police.” (citing the Director of the Milwaukee County District Attorney’s Office)).

138. Domestic violence victims are rarely (if ever) able to predict with certainty the impact of a particular call for help on future abuse. Indeed there is considerable controversy regarding the deterrent effects of arrest in battering relationships. See, e.g., Eve S. Buzawa & Carl G. Buzawa, *The Scientific Evidence Is Not Conclusive: Arrest Is No Panacea*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 337, 337–56 (Richard J. Gelles & Donileen R. Loseke eds., 1993); Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 963 (1994); see also SCHNEIDER, *supra* note 98, at 184–88 (discussing the broader implications of mandatory arrest and no-drop prosecution policies).

Accepting as a phenomenological matter that a constant danger characterizes the lives of many battered women does not mean that the period of exigency relevant to Confrontation Clause analysis should be considered to extend indefinitely. As is true of most difficult criminal law questions, lines must be drawn. See Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 274 (2002) (“[T]here are many line-drawing dilemmas throughout the criminal law.”).

139. See Fischer, *supra* note 100, at 971–73. Even if an “objective witness” or “reasonable person” analysis requires judicial consideration of “an objective witness in the same category of persons as the actual witness,”—a notion rejected by some courts, see, e.g., *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 n.3 (Cal. Ct. App. 2004)—in the domestic violence realm, either formulation may be problematic. Compare *id.* (evaluating based upon an “objective observer”), with *State v. Scacchetti*, 690 N.W.2d 393, 396 (Minn. App. 2005), *discretionary review granted*, No. A03-301, 2005 Minn. LEXIS 165 (Minn. Mar. 29, 2005), *aff’d en banc*, 711 N.W.2d 508 (Minn. 2006) (evaluating based upon a “reasonable child of [the victim’s] age”). After *Davis*, the way in which these issues are framed may have shifted: the focus of inquiry would now seem to be on the “circumstances objectively indicating . . . the primary purpose of the interrogation,” although “it is in the final analysis

the criminal incident. The exigency the victim experiences requires a narration of past events in order to resolve the immediate danger they precipitated. In short, the meaning of “exigency” to a victim of domestic violence is different than it is to victims of other types of crime. This reality fatally undermines judicial reasoning predicated on the “crying for help” versus “providing information to law enforcement” rubric.

*People v. Ruiz*¹⁴⁰ represents a common mode of judicial analysis. Decided in the period between *Crawford* and *Davis*, the case provides a helpful illustration of the distortion that results from conceptually differentiating actually intertwined functions. In *Ruiz*, the defendant’s conviction for “ex-felon possessing a firearm” was reversed based on the trial court’s admission of an on-scene statement to a responding police officer.¹⁴¹ The victim, G. Sanchez, informed the officer that her boyfriend had just threatened her with a gun during an argument.¹⁴² She indicated that the defendant had “become angry, grabbed her by the arm”¹⁴³ and hair, “pulled a black handgun from his waistband and had said, ‘if you call the cops, I’m going to kill you in front of them’”¹⁴⁴ Conceding that the police officer’s “function was partially to rescue” Sanchez, the court concluded that “the complained-of conduct,” to wit, brandishing a weapon during an argument, “was illegal and so dangerous that Sanchez reasonably was aware that her complaint to the officers would lead to [Ruiz’s] arrest and prosecution.”¹⁴⁵

According to the *Ruiz* court, and others whose opinions rest on similarly faulty conceptual foundations,¹⁴⁶ the more egregious the

the declarant’s statements, not the interrogator’s questions” that remain at the heart of the Confrontation Clause. *Davis*, 126 S. Ct. at 2274 n.1.

140. No. B169642, 2004 WL 2383676 (Cal. Ct. App. Oct. 26, 2004).

141. The victim did not testify at trial and her “unavailab[ility],” *id.* at *1, was not challenged by the defense. *Id.* at *2–3.

142. A gun was subsequently recovered from the defendant’s car approximately ten minutes after the officers arrived at the scene. *Id.* at *1.

143. The responding police officer “observed bruises on Sanchez’s arm.” *Id.* at *3.

144. *Id.*

145. *Id.* at *9.

146. See, e.g., *State v. Powers*, 99 P.3d 1262 (Wash. 2004). In *Powers*, a woman named “T.P. called 911 to report that [Jeffrey] Powers had been in her home in violation of a no-contact order” issued on her behalf. *Id.* at 1263. At the time, Powers had been convicted of two previous no-contact violations, *id.*, suggesting that T.P. was the victim of a pattern of abusive conduct at the time she called 911 in this case. The appellate court reversed the defendant’s conviction, concluding that the 911 tape of the call was testimonial and, therefore, that its admission violated the defendant’s confrontation right. *Id.* at 1266–67. This conclusion was based on the court’s characterization of the 911 call: “the content of T.P.’s call is to report a crime . . . but *nowhere is it a call for help.*” *Id.* at 1265 (emphasis

incident, the less the likelihood that a victim is providing information to police in order to get help.¹⁴⁷ This approach thus results in the exclusion of those statements that reveal most powerfully how the two functions—"crying for help" and "providing information"—are, in domestic violence cases, intertwined. From Sanchez's perspective, it seems quite reasonable to believe that had she not given an account to the police officer who responded to the scene, the police would have taken no action to protect her and, as a result, Ruiz would have resumed his assault on her. Sanchez's fear and her immediate need for physical protection, however, are not understood by the court to bear on her motive for providing information to police. When a victim is in need of police action to confront the danger presented by her batterer—a danger that, given the continuing nature of the violence, is no less "exigent" simply because one prosecutable crime has already occurred¹⁴⁸—the narrative of events necessary to trigger law enforcement assistance is classified as testimonial hearsay.

Rather than reject the reasoning that relies on these inapt constructs, the Supreme Court recently reified it in *Davis*.¹⁴⁹ At issue in the case (and in the consolidated case of *Hammon v. Indiana*) was the admissibility of various out-of-court statements made by victims of domestic violence to law enforcement officers during, or immediately after, an incident of acute physical violence: in *Davis*, Michelle McCrotty spoke with a 911 operator about the crime; in *Hammon*, Amy Hammon relayed information to a responding police

added). Despite the known history of the defendant's repeated violations of orders to stay away from T.P.—and in seeming contradiction to references in the tape transcript stating that T.P. sounded "distressed" and that she and a child were crying during the call, *id.* at 1265 n.4, the court concluded that the call was actually not "a request for help": "[i]nstead, the records shows that T.P. called 911 to report Powers' violation of the existing protective order and described Powers to assist in his apprehension and prosecution, rather than to protect herself or her child from his return." *Id.* at 1266. The court thus concluded that the defendant's confrontation right required exclusion of T.P.'s statement, *id.*, as other courts have done in similar situations, *see, e.g.*, *People v. Adams*, 16 Cal. Rptr. 3d 237, 243 (Cal App. 2004), *depublished by* 19 Cal. Rptr. 3d 824 (Cal. 2004); *People v. Kilday*, No. A099095, 2004 Cal. App. LEXIS 6290, at *22–24 (Cal. Ct. App. June 30, 2004); *People v. Victors*, 819 N.E.2d 311, 321 (Ill. App. Ct. 2004), *appeal denied*, 830 N.E.2d 8 (2005).

147. Thus, somewhat perversely, a victim's report of conduct that is, in the *Ruiz* court's view, particularly "dangerous" is more likely to be deemed testimonial (and, thus, inadmissible) should the victim ultimately choose not to cooperate with prosecutors because, let us suppose, she is particularly concerned about what her particularly dangerous batterer will do to her.

148. *See supra* notes 98–101 and accompanying text; *supra* notes 133–39 and accompanying text. Indeed, given the escalating nature of domestic violence, when one crime has just occurred, a victim's circumstances may be even more "exigent."

149. *Davis v. Washington*, 126 S. Ct. 2266, 2276–78 (2004).

officer at the scene. In each case, trial proceeded without the testimony of the victim, the out-of-court statements were admitted pursuant to a hearsay exception,¹⁵⁰ and the defendants were convicted.¹⁵¹

According to Justice Scalia, writing for the majority, a statement is nontestimonial if uttered “in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”¹⁵² Conversely, if the “primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution”—i.e., if there is “no such ongoing emergency”—a resulting statement is testimonial.¹⁵³

Adopting this binary standard, the Court affirmed in *Davis*, holding that the “primary purpose” of the 911 call “was to enable police assistance to meet an ongoing emergency,”¹⁵⁴ but it reversed in *Hammon*, classifying the challenged statements to responding police as “part of an investigation into possibly criminal past conduct.”¹⁵⁵ By totemically incanting the language of crisis—“ongoing emergency,” “imminent danger,” “call for help against bona fide physical threat,” “present emergency,” “frantic answers,” “environment that was not . . . safe”—the Court purports to differentiate Michelle McCrotty’s words from Amy Hammon’s and to justify its definition of the latter as testimonial.¹⁵⁶ Because “Amy’s statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation,”¹⁵⁷ their admission at trial constituted a violation of the defendant’s Confrontation Clause rights.¹⁵⁸

150. The statements in both cases were admitted as excited utterances. *State v. Davis*, 111 P.3d 844, 847 (Wash. 2005) (en banc), *aff’d*, 126 S. Ct. 2266 (2006); *Hammon v. State*, 829 N.E.2d 444, 448 (2005), *rev’d*, 126 S. Ct. 2266 (2006); *see also supra* note 108 (characterizing “excited utterance” and “present sense impression” as the most commonly invoked hearsay exceptions in victimless domestic violence prosecutions).

151. *Davis* was convicted of felony violation of a domestic no-contact order, *Davis*, 126 S. Ct. at 2271, and *Hammon* of domestic battery and probation violation, *id.* at 2273.

152. *Id.* at 2273. Somewhat surprisingly, the Court seems to have adopted a test that focuses on the police officer’s primary purpose in conducting the “interrogation,” as opposed to examining the declarant’s motivation for speaking to the officer. *See supra* notes 123–27 and accompanying text (describing pre-*Davis* interpretations of testimonial statements formulated by lower courts). I leave to others the task of exploring this turn.

153. *Id.*

154. *Id.* at 2277.

155. *Id.* at 2278.

156. *Id.* at 2276–78.

157. *Id.*

158. The Court, however, left open the possibility of a forfeiture finding on remand. *See id.* at 2280 (“We have determined that, absent a finding of forfeiture by wrongdoing,

Passage of an “event” thus becomes one proxy for the resolution of exigency. Yet tensions within the opinion regarding what counts as an “event” are left unresolved by the majority’s unwillingness to concede that the concept is subject to interpretation. The Court leaps to an analysis premised on whether the “event” is past or present—without pausing to consider *what* must have passed for a statement to be considered testimonial. In this way, the Court’s employment of a seemingly neutral term (“event”) functions to conceal its outcome-determining effect. The assumption that “events” have either happened or “are actually happening” obscures the utter subjectivity of this determination, begging the question of what qualifies as an “event.”¹⁵⁹

If “event” were defined in this context as narrowly as possible—i.e., as the infliction of physical injury—it might be possible to identify when an event had concluded. While a number of passages in the opinion suggest that the Court is flirting with adopting this constricted view (by references to “past criminal events” and the like¹⁶⁰), it ultimately concludes, as it must, that “event” should be defined more broadly, at the very least, to encompass “a threatening situation”¹⁶¹ or “ongoing emergency.”¹⁶² After all, Davis had already left the home moments before McCrotty described the assault to the 911 operator.¹⁶³ Yet somehow, the Court is able to view her as “speaking about events as they were actually happening.”¹⁶⁴

An expansive understanding of what constitutes an “event”—and not the crabbed, episodic notion that the Court seems at times to embrace—is particularly warranted in the battering context. The ongoing pattern of physical and nonphysical conduct that is domestic violence is often escalated by the victim’s attempt to increase her control over her life; this is especially true of acts triggering the intervention of law enforcement.¹⁶⁵ Accordingly, a meaningful

the Sixth Amendment operates to exclude Amy Hammon’s affidavit. The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.”).

159. *Id.* at 2276.

160. *Id.* at 2278.

161. *Id.* at 2279.

162. *Id.* at 2273.

163. *Id.* at 2271; *Davis v. Washington*, 111 P.3d 844, 846 (Wash. 2005), *aff’d*, 126 S. Ct. 2266 (2006).

164. *Davis*, 126 S. Ct. at 2276.

165. *Cf.* Brief for National Network To End Domestic Violence et al., *supra* note 136 (“Pursuing prosecution, thus, is not only an assertion of autonomy, it directly defies the abuser’s control, exposing the victim to considerable risk of violence.”).

definition of event must extend beyond the infliction of physical injury.

Beyond the ambiguity surrounding the device of “event,” *Davis* rests on the fallacy that exigency can be discerned without reference to context.¹⁶⁶ Certainly Michelle McCrotty is more readily analogized to victims of paradigmatic crime:¹⁶⁷ her attacker had just recently fled,¹⁶⁸ while Amy Hammon’s was still in the house during the police

166. Justice Thomas, concurring in the judgment in *Davis* and dissenting in *Hammon*, implicitly incorporates this critique insofar as his opinion contemplates the dynamics of domestic violence. Consider the following passage:

The fact that the officer in *Hammon* was investigating Mr. Hammon’s past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action. It is hardly remarkable that Hammon did not act abusively towards his wife in the presence of the officers . . . and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as “past conduct” back into an “ongoing emergency.”

Davis, 126 S. Ct. at 2284–85 (Thomas, J., concurring in part and dissenting in part).

167. Apropos of this observation, the Court’s reference to the 1779 English case of *King v. Brasier* is curious. *See id.* at 2277. By suggesting that a young rape victim’s “screams for aid as she was being chased by her assailant” would properly be deemed nontestimonial, the Court seems willing to consider the possibility that safety—as opposed to crime currently in progress—is the operative construct. *See id.* What eludes the Court is the extent to which the dynamics of domestic violence raise safety concerns that are distinct from those presented by paradigmatic crime. (While nonmarital rape arguably departs in certain respects from a conventional crime paradigm, *chase* by an assailant, regardless of the crime, is more likely experienced by a victim of paradigmatic crime—i.e., someone whose attacker is not an intimate.) A domestic violence victim may, in effect, be screaming for aid as she is being functionally chased by her assailant, yet, provided the physical assault has ended, the Court would presumably characterize the statement as one that described past events and is, therefore, testimonial.

168. In dicta that is both confusing and troubling, Justice Scalia suggests that “after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises) It could readily be maintained that, from that point on, McCrotty’s statements were testimonial.” *Id.* at 2277. From the complete transcript of the 911 call at issue, it seems that after “beating [her] up,” Davis “ran out the door.” Joint Appendix, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (No. 05-5224), 2005 WL 3617525, at *10, *12. The Court rightly views this time—after the infliction of physical injury but before Davis has driven away—as characterized by sufficient exigency to qualify the statements made during this period as nontestimonial; there was, of course, no reason for McCrotty (or the 911 operator) to believe that Davis would not return to continue his attack. And yet, Justice Scalia perceives that once Davis has gotten in the car and is driving up the “dead-end” of a dead-end street, *id.* at *10, the “emergency appears to have ended.” *Davis*, 126 S. Ct. at 2277. That this moment (the turning of the ignition? the movement of the car?) becomes the instant at which the exigency confronting Michelle McCrotty vanishes seems to defy reality—particularly if one imagines how events would likely have unfolded had police not responded to her need for protection. Although this scenario is counterfactual,

investigation. But this, of course, does not mean that exigency can be experienced only as it was by Michelle. Amy's story is not unlike those of countless battered women unable to communicate with law enforcement "about events as they [are] actually happening."¹⁶⁹ Yet the Court's inability (or unwillingness) to contemplate her perspective allows it to proclaim with certainty: "It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct."¹⁷⁰ As "[t]here was no emergency in progress"¹⁷¹ (apparently because the responding officer "heard no arguments or crashing and saw no one throw or break anything"¹⁷²) and "there was no immediate threat"¹⁷³ once officers arrived, it is clear to the Court that "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime."¹⁷⁴ And thus is Amy Hammon "cast . . . in the unlikely role of a witness."¹⁷⁵

Consider an alternative formulation of these same facts and their legal significance.¹⁷⁶ Police respond promptly¹⁷⁷ to a "reported

it is only so in hindsight: at the time of the communication at issue—which is, after all, the relevant occasion for purposes of determining whether a statement is sufficiently like testimony to require exclusion—it seems fair to say that, absent police aid, there was *still* every reason for McCrotty (and the 911 operator) to believe that Davis would return to continue his attack.

169. *Davis*, 126 S. Ct. at 2276. Hershel Hammon apparently broke the telephone during his attack on his wife. *Id.* at 2272. For obvious reasons, it is quite common for batterers to destroy or disable the telephone during episodes of acute physical violence. Even if a phone is in working order during an attack, it should come as no surprise that victims are rarely able to make a call to 911 in the midst of a beating.

170. *Id.* at 2278.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 2277. This language comes from the portion of the opinion in which the Court, rejecting *Davis*'s Confrontation Clause challenge, dismisses the argument that Michelle McCrotty's statement was testimonial. The Court correctly observes that McCrotty's "*ex parte* communication" was not "aligned" with "[its] courtroom [analogue]," concluding that "[n]o 'witness' goes into court to proclaim an emergency and seek help." *Id.*

176. This recitation of the facts is culled from the opinions of the Indiana Court of Appeals and the U.S. Supreme Court. *Davis*, 126 S. Ct. at 2270–74; *Hammon v. State*, 809 N.E.2d 945, 948–49 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (Ind. 2005), *rev'd*, 126 S. Ct. 2266 (2006).

177. According to the Indiana Court of Appeals, "it is reasonable to infer that Officer Mooney responded promptly to the dispatch after receiving it and he arrived in a timely manner." *Hammon*, 809 N.E.2d at 949. While the factual record was not well developed on this point (the officer "did not testify as to the precise amount of time that passed between his receipt of the domestic disturbance dispatch and the time that he arrived at the residence," *id.*), it is unlikely that a more precise account of the timeline would have

domestic disturbance”¹⁷⁸ and find a “timid”¹⁷⁹ and “frightened”¹⁸⁰ woman, and a man who admits to arguing with his wife¹⁸¹ but claims—despite a living room in a state of “disarray”¹⁸² with “broken objects littering the . . . floor”¹⁸³ and shards of glass in front of a shattered gas heating unit with “flames coming out of the . . . partial glass front”¹⁸⁴—that it “never became physical.”¹⁸⁵ After police separate the two, the woman tells police that her husband had thrown her into the shattered glass and punched her in the chest and that she is in pain.¹⁸⁶ Despite the efforts of police to keep the man away, he makes “several attempts” to enter the room where the woman is speaking to an officer about the episode, becoming “angry” when the officer “insist[s] that [he] stay separated” from his wife so that police can investigate the situation.¹⁸⁷

Might a “reasonable listener”¹⁸⁸ with insight into the nature of domestic violence conclude that Amy was not describing events that were “past” in any meaningful sense of the word?¹⁸⁹ Rather, she was

changed the outcome in *Davis*. Nonetheless, lower courts implementing the holding will now carefully scrutinize the timing of law enforcement’s response.

178. *Davis*, 126 S. Ct. at 2272. The Court’s disparate treatment of the 911 call and the on-scene statements suggests that, somewhat ironically, a battered woman whose abuser has disabled her mode of phoning the police, *see supra* note 169, is *less* likely to be perceived as confronting an “ongoing danger” when she ultimately communicates with law enforcement. If her “cry for help” is not telephonic because the batterer has more effectively preempted it, the cry may well go unheard. *Davis*, 126 S. Ct. at 2279. I say this notwithstanding a seemingly important concession by the Court—that “[o]fficers called to investigate [domestic disputes] . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim,” which “may often mean that ‘initial inquiries’ produce nontestimonial statements,” *id.* (quoting *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt County*, 542 U.S. 177, 186 (2004))—because of the way in which the Court applies this principle to the facts of *Hammon*. *See id.* (“But in cases like this one, where Amy’s statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were ‘initial inquiries’ is immaterial.”).

179. *Hammon*, 809 N.E.2d at 949.

180. *Id.*

181. *Davis*, 126 S. Ct. at 2272.

182. *Hammon*, 809 N.E.2d at 948.

183. *Id.* at 949.

184. *Davis*, 126 S. Ct. at 2272.

185. *Id.*

186. *Hammon*, 809 N.E.2d at 948.

187. *Davis*, 126 S. Ct. at 2272. According to the testimony of the responding police officer, when her husband approached, Amy became quiet and seemed afraid. *Hammon*, 809 N.E.2d at 948.

188. *Davis*, 126 S. Ct. at 2276.

189. *See supra* notes 158–65 and accompanying text (critiquing the Court’s employment of “event” as an objectively ascertained phenomenon).

very much “facing an ongoing emergency.”¹⁹⁰ The threat to her absent some sort of police action in response to her husband’s recent criminal conduct was “bona fide.”¹⁹¹ And police needed information “to be able to resolve the present emergency.”¹⁹² Finally, Amy’s answers were “provided . . . in an environment that was not tranquil, or even . . . safe.”¹⁹³ (These are, of course, the factors delineated by the Court in defense of its designation of Michelle McCrotty’s 911 call as nontestimonial.) Yet the Court *easily*¹⁹⁴ classifies Amy Hammon’s statements as testimonial: unlike Michelle McCrotty, and like Sylvia Crawford,¹⁹⁵ she was “telling a story about the past,”¹⁹⁶ not “seeking aid.”¹⁹⁷

The portion of *Davis* treating *Hammon* may well be criticized for its application of the Court’s newly articulated definition to the facts. But the important point is that Amy Hammon could not “seek aid” without “telling a story about the past.” (After all, police could do nothing to protect her from her husband were Amy simply to have requested assistance because she feared him.) My contention, therefore, is that the Court’s test is inherently flawed.¹⁹⁸ By equating the past commission of crime (i.e., by propounding the primacy of tense¹⁹⁹) with the resolution of exigency, the Court wholly discounts the realities of battering.²⁰⁰

190. *Davis*, 126 S. Ct. at 2276.

191. *Id.*

192. *Id.*

193. *Id.* at 2277.

194. *Id.* at 2278 (“Determining the testimonial or nontestimonial character of the statements that were the product of the interrogation in *Hammon* is a much easier task.”).

195. Sylvia Crawford was the declarant whose statements to police—“made and recorded while she was in police custody, after having been given Miranda warnings as a possible suspect”—were deemed testimonial in *Crawford*. *Id.*

196. *Id.* at 2279.

197. *Id.*

198. The test is inherently flawed insofar as it cannot be applied meaningfully in the domestic violence realm, though it may indeed be compatible with paradigmatic crime. The irony is that, as a categorical matter, it is battering prosecutions that (apart from homicide cases) will most often present the need for trial without the testimony of a victim. See *supra* notes 84–104 and accompanying text. If a framework for Confrontation Clause challenges fails in these cases, it surely cannot be viewed as coherent. See *infra* Conclusion.

199. See, e.g., *Davis*, 126 S. Ct. at 2279 (“McCrotty’s present-tense statements showed immediacy; Amy’s narrative of past events was delivered at some remove in time from the danger she described.”); *supra* notes 158–65 and accompanying text (critiquing ambiguity surrounding the Court’s use of “event”).

200. One way of addressing the problem I am identifying here would be to define domestic violence more accurately in the criminal code, that is, to criminalize the ongoing, patterned exercise of power and control that is battering. I have proposed such a statute and explained at length the limitations of the current criminal law’s incident-based

After *Davis*, it seems probable that the “ongoing emergency” framework will continue to undermine reasoned judicial analysis of the threshold definitional question. Even were courts to adopt the contextualized approach that I have suggested is appropriate,²⁰¹ however, there is undoubtedly hearsay which will be properly defined as testimonial.²⁰² It may be that the discrepancy between what an evidentiary code requires²⁰³ and what the testimonial approach to confrontation demands has grown wider, particularly in the realm of domestic violence prosecution. Because some theoretical divergence is inevitable—and because, as a practical matter, the wholesale judicial rejection of familiar templates seems unlikely—the next frontier for the victimless prosecution of domestic violence is forfeiture.

III. FORFEITURE BY MISCONDUCT—THE NEXT FRONTIER

A criminal defendant whose wrongdoing²⁰⁴ has procured the absence of his victim at trial²⁰⁵ is deemed to have forfeited his right of confrontation.²⁰⁶ This rule—expressly “approved” by the Court in

physical injury-focused response to domestic violence. See generally Tuerkheimer, *supra* note 17, at 1019–30; *supra* Part II.

201. Contextualizing the testimonial inquiry in the manner I have suggested is consistent with an approach to the confrontation right that I will describe as “relational.” See *infra* Conclusion.

202. See *supra* note 120.

203. When considering the scope of this discrepancy, it is worth noting the recent expansions of hearsay exceptions often used in victimless prosecution. For instance, “California and Oregon have ad hoc hearsay exceptions directed towards domestic violence victims” that allow certain statements of a declarant describing “the infliction or threat of physical injury” against her, provided the statement was “made at or near the time of the incident.” Raeder, *supra* note 18, at 353; see also CAL. EVID. CODE § 1370(a)(1), (3) (West Supp. 2006); OR. REV. STAT. § 40.460(26)(a) (2005).

204. “Wrongful conduct obviously includes the use of force and threats, but it has also been held to include persuasion and control by a defendant, the wrongful nondisclosure of information, and a defendant’s direction to a witness to exercise the fifth amendment privilege.” *Steele v. Taylor*, 684 F.2d 1193, 1201 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053 (1983). For further discussion of defining wrongdoing in the domestic violence context, see *infra* notes 278–307.

205. See *infra* note 314 (discussing unavailability analysis meaningfully applied to domestic violence cases).

206. “Some courts speak of the defendant as having waived the confrontation right, but this is inaccurate: It is not necessarily so that an accused who has acted in the ways described here has knowingly, intelligently, and deliberately relinquished the right.” Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 506 n.2 (1997). But see James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for “Forfeiture” by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193 (2006).

both *Crawford*²⁰⁷ and, more recently, *Davis*²⁰⁸—“extinguishes confrontation claims on essentially equitable grounds,”²⁰⁹ precluding an accused from “complain[ing] about the consequences of his own conduct.”²¹⁰ A judicial finding of forfeiture results in the admission at trial of out-of-court statements that would otherwise be excluded pursuant to the Confrontation Clause.

Crawford’s testimonial approach to hearsay—and, more generally, its “restoration” of Confrontation Clause protection²¹¹—instantly creates the prospect of a newly robust forfeiture doctrine²¹² as well as providing an impetus for its reenvisioning.²¹³ Before *Crawford*, the linkage of Confrontation Clause analysis to the evidentiary rules²¹⁴ meant that constitutional forfeiture had a

207. *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (citing *Reynolds v. United States*, 98 U.S. 145 (1878)). The Court’s acceptance of the rule of forfeiture by wrongdoing, and state court forfeiture decisions following *Crawford*, are not without their critics. See, e.g., Flanagan, *supra* note 206. Flanagan argues that a defendant’s loss of confrontation rights should be understood as “based on a waiver or implied waiver rationale” (as opposed to forfeiture) and posits that an “essentially unrestrained forfeiture theory” is in tension with equitable norms. *Id.* at 1196, 1199.

208. See *supra* note 33 (noting *Davis*’s reiteration of the vitality of forfeiture doctrine).

209. *Crawford*, 541 U.S. at 62.

210. See Friedman, *supra* note 206, at 516–18 (“The proper basis for this principle is not, as some courts have suggested it is, the broad dictum that no one should profit by his own wrong. As an ideal, that is probably true, but in some cases exclusion of the evidence on confrontation grounds will not be *necessary* to guarantee that the accused does not profit by his own wrong, and in some cases such exclusion will not be *sufficient* to guarantee that result” *Id.* at 516.

A more satisfying explanation may be that the accused should not be heard to complain about the consequences of his own conduct. Thus, the accused ought not be able to cause exclusion of the secondary evidence on the ground that he has been unable to confront and examine the declarant when his own conduct accounts for that inability.

Id. at 517–18.

211. Friedman, *supra* note 10, at 5.

212. As Myrna Raeder observes, “*Crawford* virtually invited prosecutors to raise claims of forfeiture when facing Confrontation Clause challenges.” Raeder, *supra* note 18, at 361; see *supra* note 33 (predicting that *Davis*’s imprimatur on forfeiture doctrine will have dramatic impact on this area of law).

213. In contrast to the abundance of cases treating the testimonial question, see, e.g., *supra* notes 122–27, post-*Crawford* forfeiture case law is still remarkably undeveloped. In my view, the discrepancy is reflective of the practical challenge of recalibrating understandings of the bench and prosecutorial bar with respect to how constitutional forfeiture applies to domestic violence cases. It also suggests that this is a uniquely opportune moment for considered reflection on how best to effect forfeiture’s normative potential in a new jurisprudential era. See *infra* Part III.C (explaining why “forfeiture must be conceptualized anew”).

214. See *infra* notes 221–24 and accompanying text (summarizing the pre-*Crawford* regime):

relatively insignificant doctrinal identity of its own.²¹⁵ Despite the Court's early recognition of a constitutional forfeiture doctrine,²¹⁶ not until the latter half of the twentieth century did modern courts begin systematically using forfeiture theory to address the problem of witness intimidation.²¹⁷ In response to rising concern about the loss of testimony in organized crime and drug prosecutions, courts began admitting out-of-court statements of missing witnesses.²¹⁸ Applying the residual hearsay exception to address the evidentiary objection,²¹⁹ courts held that witness intimidation constituted a forfeiture of the constitutional right of confrontation.²²⁰

In 1997, the principle of forfeiture by misconduct was codified in an evidentiary rule.²²¹ Much of the recent case law treating forfeiture

215. See *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006) ("The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the 'reliability' of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence."). Writing in 2003, one commentator observed that "[a]lthough witness intimidation is a significant problem, the exception has been an important issue in only about seventy-five reported federal and state cases." James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 *DRAKE L. REV.* 459, 543 (2003).

216. *Reynolds v. United States*, 98 U.S. 145 (1878). In *Reynolds*, the defendant, who was being retried for bigamy, refused to reveal to law enforcement the whereabouts of his second wife, who had testified at his first trial. *Id.* at 159–60. The Court held that the admission of the absent witness's former trial testimony was proper, concluding that the defendant had forfeited his right of confrontation. *Id.* at 160. The Court reasoned:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.

Id. at 158.

217. Flanagan, *supra* note 215, at 465–68. James Flanagan suggests that *Reynolds* had "little impact on the Supreme Court's Sixth Amendment jurisprudence," noting that before *Crawford*, the Court cited *Reynolds* in only seven cases involving a defendant's loss of Confrontation Clause rights. *Id.* at 465.

218. *Id.* at 466.

219. *Id.* at 467. The residual exception, which was originally found in *FED. R. EVID.* 803(24) and 804(b)(25), is now codified at *FED. R. EVID.* 807. The forfeiture by wrongdoing exception to the rule against hearsay was not codified in the Federal Rules of Evidence until 1997. See *supra* note 217 and accompanying text.

220. Flanagan, *supra* note 215, at 466–69. In James Flanagan's view, the Confrontation Clause jurisprudence that he summarizes is properly understood as applying waiver theory. See *supra* notes 215, 217 (elaborating on Flanagan's position).

221. "A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is admissible as an exception to the rule against hearsay. *FED. R. EVID.* 804(b)(6). This exception was added to the Federal Rules of Evidence in 1997; only a few states to date have specifically amended their codes to include the provision. Lininger,

accordingly focused on whether this “forfeiture by wrongdoing” hearsay exception was satisfied.²²² If the evidentiary exception applied, any remaining challenge to an out-of-court statement on Confrontation Clause grounds was, until *Crawford*, framed by the “reliability” inquiry.²²³ As articulated by James Flanagan:

Although the exception has been promulgated as a rule of evidence, it will affect Confrontation Clause claims because the Supreme Court has linked hearsay rules and the Confrontation Clause, and has generally found that exceptions to the rule against hearsay also satisfy the Confrontation Clause. Now that Rule 804(b)(6) defines the conditions for the forfeiture of the hearsay objection, those same conditions will inevitably apply to the constitutional objections as well.²²⁴

Crawford’s transformation of the Confrontation Clause has fundamentally altered this terrain.²²⁵ As a consequence of the Court’s unequivocal decoupling²²⁶ of the constitutional right from the

supra note 6, at 807. Nonetheless, rule 804(b)(6) may still “affect the states as they develop their own versions of the Rule,” and can potentially be “influential in states without an evidence code.” Flanagan, *supra* note 215 at 500 n.268.

222. See, e.g., *State v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001) (affirming the defendant’s conviction and holding that the unavailable declarant’s statements were admissible under FED. R. EVID. 804(b)(6) due to the defendant’s wrongdoing in murdering the declarant); *United States v. Johnson*, 219 F.3d 349 (4th Cir. 2000) (same); *United States v. Emery*, 186 F.3d 921 (8th Cir. 1999) (same); see also *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000) (holding that one defendant’s wrongdoing in murdering a witness renders that declarant’s statements admissible against all defendants, pursuant to rule 804(b)(6)).

223. Although a Confrontation Clause challenge to testimonial hearsay no longer necessitates a judicial finding of reliability, a defendant’s due process rights may still be implicated by the admission of unreliable out-of-court statements—even those to which the defendant forfeited his right to object on Confrontation Clause grounds. See, e.g., *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 n.21 (Mass. 2005) (“There may be some statements so lacking in reliability that their admission would raise due process concerns.”); cf. Raeder, *supra* note 18, at 362 (observing that in most domestic violence murder cases, forfeiture arguments are constitutional, rather than evidentiary; “since forfeiture hearsay exceptions are generally limited to witness tampering . . . some other exception, such as an excited utterance or a catch-all ensures the reliability of the statement”).

224. Flanagan, *supra* note 215, at 500–01.

225. See Joshua Deahl, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford*, 104 MICH. L. REV. 599, 606 (2005) (“Given the new approach to the Confrontation Clause, overlooking the emerging importance of forfeiture could be a serious mistake.”). Because the problem of the absent witness is endemic to domestic violence prosecutions, see *supra* notes 92–96 and accompanying text (explaining common reasons for domestic violence victim’s lack of cooperation with prosecution), a vitalized forfeiture doctrine is likely to have the greatest impact in this type of case.

226. Raeder, *supra* note 18, at 363.

evidentiary code,²²⁷ constitutional forfeiture must be given its own doctrinal space.²²⁸ Indeed, the dramatically changed approach to the Confrontation Clause means that forfeiture, too, must be conceptualized anew.²²⁹

The need for this reexamination of forfeiture occasioned by *Crawford*'s "radical transformation"²³⁰ is, in my view, particularly critical in the domestic violence context. As I will show, the traditional forfeiture paradigm, firmly entrenched in legal culture, does not map onto the realities of battering.²³¹ Without an appreciation of how domestic violence is different from other types of crime, judicial decisionmaking—which tends to default to reason by way of precedent and analogy²³²—will invariably fall short.²³³ Defining the contours of a constitutional forfeiture doctrine with meaning in the domestic violence realm therefore requires an evolution in judicial reasoning.

A. Evidentiary Forfeiture and the Problem of Specific Intent

Cases treating evidentiary forfeiture are of limited utility to courts faced with constitutional forfeiture in domestic violence cases. Precedent fails because Federal Rule of Evidence 804(b)(6)'s requirement that the defendant have "intent to procure" the unavailability of the victim²³⁴ would exclude the misconduct that often causes the trial absence of battered women.²³⁵ Before elaborating on

227. When considering the introduction of hearsay statements against a criminal defendant in a post-*Crawford* era, it is important to bear in mind that, while evidentiary admissibility does not dictate constitutionality, neither does constitutional acceptability resolve evidentiary issues. For a thoughtful proposal to expand admissible hearsay to facilitate victimless domestic violence prosecution after *Crawford*, see Lininger, *supra* note 6, at 797–811. For purposes of this Article, I take no position on the merits of hearsay reform and assume the continued applicability of the evidentiary framework in place before *Crawford*, a framework that, it should be emphasized, allowed some—but certainly not all—domestic violence prosecutions to go forward in the absence of a cooperative victim. See *supra* note 108 (discussing hearsay exceptions commonly utilized in victimless domestic violence prosecutions).

228. See Raeder, *supra* note 18, at 363 ("In my view, we need to separate the forfeiture hearsay exception from the constitutional forfeiture doctrine.").

229. See *infra* Part III.C.

230. Friedman, *supra* note 10, at 6.

231. See *infra* Part III.B.

232. Cf. Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1314 (1991) ("Legal method traditionally proceeds by analogy and distinction.").

233. By "fall short," I mean that in victimless domestic violence prosecutions, the equitable promise of forfeiture will remain largely unfulfilled. See *supra* notes 208–09 and accompanying text (noting the normative underpinnings of forfeiture doctrine).

234. See Flanagan, *supra* note 206, at 485.

235. See *infra* notes 239–62 and accompanying text (discussing *Ivy*).

this claim, it should be emphasized that judicial interpretation of the evidentiary rule need not—and should not—be slavishly imported to the constitutional context.

As the Sixth Circuit (in a case not involving domestic violence) has recognized:

There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits his right to confront the witnesses where, in producing the witness's unavailability, he intended to prevent the witness from testifying. Though the Federal Rules of Evidence may contain such a requirement, the right secured by the Sixth Amendment does not depend on, in the words of the Supreme Court, "the vagaries of the Rules of Evidence." The Supreme Court's recent affirmation of the "essentially equitable grounds" for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive.²³⁶

This observation is especially compelling in the battering context, where a "specific intent"²³⁷ requirement is most problematic.²³⁸

The court's reasoning in *State v. Ivy*²³⁹ reveals the incongruity of conditioning forfeiture on a showing that a domestic violence defendant intended by his conduct to procure a victim's trial absence. David Ivy was convicted of the murder of LaKisha Thomas, whom he had been dating for almost a year.²⁴⁰ Over the course of their relationship, Ivy engaged in a course of conduct characterized by the violent exercise of control.²⁴¹ According to one witness, Thomas

236. *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (citations omitted).

237. "Specific intent" refers to a "special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." WAYNE R. LAFAVE, *CRIMINAL LAW* § 5.2(e) (4th ed. 2003). In the evidentiary forfeiture context, the defendant must have specifically intended to procure the victim's unavailability.

238. In some domestic violence cases, of course, the defendant does act in a manner that would satisfy the legal requirement of intent to procure a victim's trial absence. *See, e.g., State v. Wright*, 701 N.W.2d 802, 807 (Minn. 2005) (finding that defendant who menaced his girlfriend with a gun made calls from jail threatening that "if she doesn't do what he wants someone will come over to her house and do something to her"). Even in domestic violence cases in which a "specific intent" requirement could similarly be established, other issues tend to undermine the traditional "witness tampering" paradigm. *See infra* notes 300–04 and accompanying text.

239. No. W2003-00786-CCA-R3-DD, 2004 WL 3021146 (Tenn. Crim. App. 2004 Dec. 30, 2004).

240. *Id.* at *1–2.

241. Testimony regarding what the court refers to as "instances of conflict in David Ivy and Lakisha Thomas' relationship" included the following: one witness observed the

often indicated that “she was ready to leave” the defendant, “but she was scared.”²⁴²

Two days before he killed her, Ivy assaulted Thomas with a pistol.²⁴³ When police responded to the scene, Thomas had visible injuries consistent with her description of events.²⁴⁴ She told police that Ivy had “said that he wasn’t going back to jail” and “that he would come back and kill her.”²⁴⁵ In the days immediately preceding her murder, Thomas repeatedly expressed her fear of the defendant: she told her cousin that Ivy had threatened that “if I put the police in his business he was going to fuck me up”; according to an employee at a store to which the defendant followed her, Thomas “was shaking real bad and crying and saying, ‘I know he’s going to kill me. I know he’s going to get me.’”²⁴⁶ This same employee overheard Ivy tell Thomas that “it wasn’t over,” and that “[h]e was going to get her.”²⁴⁷

Two days later, Ivy shot and killed Thomas from less than two feet away while she was sitting in a parked car.²⁴⁸ According to one witness, before firing, he “smiled and remarked, ‘oh, bitch, you want me dead, huh?’”²⁴⁹

At trial, the prosecution moved to admit various out-of-court statements made by Thomas pursuant to the State’s forfeiture-by-wrongdoing hearsay exception.²⁵⁰ In contrast to many victimless

defendant pull a hair plug out of Thomas’s head; another witness “confirmed . . . [the defendant’s] physical abuse of Ms. Thomas . . . [and] further stated that Ms. Thomas would comment that [the defendant] ‘had her on 23 and 1. She could only come out an hour a day. That was to take her kids to school and pick them up from school.’” *Id.* at *4. A police officer testified that, a month before the murder, he responded to a disturbance at Thomas’s apartment and was informed that the defendant “had forced his way into her apartment and was moving the belongings out of her apartment” and that he had “stated that he was going to kill her.” *Id.* Thomas indicated that the defendant “was stalking her and was constantly making threats to her to harm her and he was upset because she ended their relationship.” *Id.*

242. *Id.*

243. *Id.* at *1–2.

244. *Id.* at *2.

245. *Id.* at *1.

246. *Id.* at *3.

247. *Id.*

248. *Id.* at *3, *6.

249. *Id.* at *3.

250. Tennessee Rule of Evidence 804(b)(6) provides: “A statement offered against a party that has engaged in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness” constitutes an exception to the rule against hearsay. In *Ivy*, the State did not rely on other hearsay exceptions (although at least certain statements would presumably qualify as excited utterances), *Ivy*, 2004 WL 3021146, at *15, and, therefore, the court’s forfeiture analysis is framed by the evidentiary, rather than constitutional, law. See *supra* note 223.

domestic violence prosecutions,²⁵¹ there could be no dispute that the act allegedly committed by the defendant²⁵²—i.e., murder—constitutes misconduct, or that it caused the victim’s absence.²⁵³ Rather, the appellate court focused on what it viewed as a lack of proof on the “motive” issue, concluding that the prosecution did not show that Ivy acted with the requisite intent to procure Thomas’s unavailability.²⁵⁴

In determining that the trial court erred in its finding of forfeiture,²⁵⁵ the appellate court noted that no evidence was presented that the defendant was aware that a warrant had issued for his arrest for assault; thus, according to the court, “any finding that [the defendant] murdered the victim to prevent her from testifying against him . . . is at best speculative.”²⁵⁶ The court seemed to take into account the dynamics of battering (clearly characteristic of the relationship between Ivy and Thomas), but—in a cruelly ironic twist—did so to support its contention that Ivy’s threats to kill Thomas could *not* be considered proof that her murder was intended, at least in part,²⁵⁷ to prevent her from testifying against him.²⁵⁸ The court reasoned:

As much as the proof indicated that [the defendant’s] intent was to prevent Ms. Thomas from testifying against him, *e.g.*,

251. See *infra* notes 278–305 and accompanying text.

252. The trial court held an evidentiary hearing at which the applicable standard of proof was preponderance of the evidence. *Ivy*, 2004 WL 3021146, at *13–14.

253. Notwithstanding this observation, it is worthwhile to imagine how a court would analyze the forfeiture question if the more likely scenario had come to pass: that is, had Thomas not been murdered, but, rather, had she become uncooperative in the prosecution of Ivy for assaulting her with a pistol and been deemed unavailable at trial. See *supra* note 92 and accompanying text (discussing a domestic violence victim’s “choice” not to prosecute).

254. *Ivy*, 2004 WL 3021146, at *14.

255. In light of the testimony of two eyewitnesses to Thomas’s murder, the court found the trial court’s error in admitting the out-of-court statements harmless. *Id.* at *15.

256. *Id.* at *14.

257. Even courts requiring that the defendant intended to procure the victim’s trial absence for a finding of forfeiture recognize that it need not be his sole purpose in acting. See, e.g., *United States v. Dhinsa*, 243 F.3d 635, 654 (2d Cir. 2001) (“The government need not, however, show that the defendant’s sole motivation was to procure the defendant’s absence; rather, it need only show that the defendant ‘was motivated *in part* by a desire to silence the witness.’” (quoting *United States v. Houlihan*, 92 F.3d 1271, 1282 (1st Cir. 1996))).

258. Again, the court was not addressing whether Ivy’s conduct in the absence of a murder might constitute forfeiture, which is—at least in the *constitutional* forfeiture context—a question potentially raised by the facts of countless domestic violence prosecutions. See *infra* notes 278–305 and accompanying text (discussing paradigmatic domestic violence “tampering”).

“he wasn’t going back to jail” and “he told me if I put the police in his business he was going to fuck me up,” there was also evidence that Ms. Thomas had endured [Ivy’s] abusive behavior throughout the existence of their relationship. To conclude that the murder was committed for the purpose of preventing Ms. Thomas from testifying at *potential* future proceedings would expand the Rule beyond the scope of its intended purpose.²⁵⁹

This passage suggests that the applicable forfeiture definition is fundamentally incompatible with the realities of domestic violence. Specifically, Ivy’s analysis of “specific intent” shows why case law treating evidentiary forfeiture is not helpful²⁶⁰ in formulating a constitutional forfeiture doctrine with meaning in the battering context.²⁶¹ The problem of specific intent is sufficiently fundamental in the domestic violence realm to render evidentiary forfeiture inapposite to a relevant constitutional framework.²⁶²

B. Constitutional Forfeiture and the Limits of the Witness Tampering Paradigm

If case law interpreting Federal Rule of Evidence 804(b)(6) is not a useful source of guidance in applying constitutional forfeiture doctrine to the domestic violence realm, courts may be naturally inclined—or perhaps institutionally predisposed—to rely on traditional witness tampering cases²⁶³ for their precedential value.²⁶⁴ I argue that it would be a mistake to do so. Given the ways in which battering is qualitatively different from paradigmatic “witness

259. Ivy, 2004 WL 3021146, at *14.

260. Nor, again, is the case law governing evidentiary forfeiture controlling. See *supra* note 235 and accompanying text.

261. See *supra* Part III.A (noting limited value of precedent).

262. See *State v. Romero*, 133 P.3d 842 (N.M. Ct. App. 2006), *cert. granted*, 134 P.3d 120 (N.M. 2006). In *Romero*, which involved a prosecution for the murder of the defendant’s former wife, the appellate court noted its disagreement with state supreme court precedent holding that proof of Confrontation Clause forfeiture requires the showing of a specific intent to procure the witness’s absence. The intermediate court remarked, “[W]e suspect that our Supreme Court may not have fully considered the pros and cons of imposing the intent to silence requirement in all cases involving forfeiture by wrongdoing.” *Id.* at 854. The New Mexico Supreme Court has granted certiorari to review the decision and specifically to revisit the boundaries of constitutional forfeiture. *State v. Romero*, 113 P.3d 346 (N.M. 2005); E-mail from Joel Jacobsen, Assistant Attorney Gen., State of N.M., to Deborah Tuerkheimer, Assoc. Professor of Law, Univ. of Me. Sch. of Law (June 29, 2006, 14:31:00 EST) (on file with the North Carolina Law Review).

263. See *supra* notes 217–20 (placing judicial treatment of “typical witness intimidation” cases in historical perspective).

264. See *infra* note 304 and accompanying text (citing cases conforming to classic paradigm).

tampering” conduct,²⁶⁵ meaningful forfeiture inquiry demands an understanding of the context in which a domestic violence victim “chooses”²⁶⁶ not to cooperate with prosecutorial efforts.

To illustrate the failure of this analogy,²⁶⁷ I first consider how forfeiture doctrine applies quite easily to the types of conduct typically associated with witness tampering in non-intimate relationships.²⁶⁸ In the classic forfeiture scenario, a person charged with a crime wrongfully procures the unavailability of a witness who would have testified to the accused’s involvement in the underlying (charged) crime. At trial, the defendant may not assert confrontation rights to bar the introduction of prior statements made by the unavailable witness with respect to the charged crime.²⁶⁹ For instance, where a defendant awaiting trial on murder charges makes threatening calls from jail to a witness to the murder, the defendant may be deemed to have forfeited his confrontation rights by intimidating the witness into silence.²⁷⁰ Accordingly, prior statements by the now-unavailable witness may be admitted at the defendant’s murder trial.²⁷¹

One distinguishing feature of this forfeiture template is that the “tampering misconduct” is clearly distinct from the behavior

265. *See id.*

266. For compelling insight into tensions surrounding the construction of “choice” in the domestic violence context, see generally Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 59, 59 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (exploring the “challenge of analyzing structures of oppression while including an account of the resistance, struggles, and achievements of the oppressed”).

267. *See supra* note 232 and accompanying text (noting limited value of analogy).

268. In light of my argument, it is somewhat ironic that the seminal forfeiture case, *Reynolds v. United States*, 98 U.S. 145 (1878), involved an accused and an absent witness who were married. *See supra* note 216 (describing the facts of *Reynolds*). The Court’s recognition that Reynolds’s *influence* over his wife caused her unavailability accurately suggests that, in the domestic realm, what is needed to procure a witness’s absence may be different than what would be required in other contexts. *See id.* *Reynolds* factually diverges from many domestic violence cases, however, in that the defendant’s conduct was deliberately targeted at the testimony of his wife in an upcoming trial. *See supra* note 238. Moreover, other than the Court’s finding that Reynolds “kept [the witness] away,” *Reynolds*, 98 U.S. at 151–52, specifically so that she could not be served with a subpoena for trial, there is no evidence that Reynolds was engaged in an abusive course of conduct.

269. For a more thorough discussion of “[t]he classic Case for Forfeiture,” see Deahl, *supra* note 225, at 608–09 (noting that “[w]hile the Supreme Court has not made much use of the [forfeiture] doctrine, every Circuit to address the issue has recognized this application of forfeiture”); Flanagan, *supra* note 215, at 466–72. For cases illustrating this archetype, see *infra* note 303 and accompanying text.

270. *State v. Fields*, 679 N.W.2d 341, 347 (Minn. 2004).

271. *Id.*

constituting the charged crime.²⁷² By contrast, in cases involving what has been termed “reflexive forfeiture,” the defendant is charged with the very same conduct that caused the unavailability of a witness.²⁷³ To illustrate the point: assume that a defendant who kills a key witness in a pending narcotics prosecution is subsequently tried for the murder of the witness-turned-victim. In deciding Confrontation Clause challenges when the defendant tampers with a witness to a prior crime and is later prosecuted for this tampering activity, courts

272. In this type of case, courts have generally not required proof of the defendant’s underlying motive in procuring the absence of the witness. Deahl, *supra* note 225, at 609 (explaining that no court confronting classic forfeiture facts has required a showing that the defendant’s conduct was specifically intended to prevent the witness from testifying). To place any importance on this motive, a court would have to effectively say, “You would not be able to object to the admission of this testimony had you killed [the victim] to keep her from testifying, but since you killed her only to get revenge, your objection is allowed and [the victim’s] testimony is precluded notwithstanding the fact that you killed her.” *Id.* A court clinging to this distinction could not be viewed as one concerned with equity, but, instead, as prioritizing a contrived formal limitation.

273. Richard Friedman describes and defends the “reflexive forfeiture” principle as follows:

Suppose that the conduct that rendered the declarant-victim unavailable, rather than occurring at some time after the crime charged, *was* the crime charged In such a case, for the court to conclude that the accused committed the act rendering the declarant-victim unavailable, the court must also conclude that the defendant committed the criminal act charged, because those two acts are the same I do not believe, however, that this identity presents a reason not to apply the forfeiture principle. The identity should not distract us from the importance of deciding the evidentiary predicate. If the predicate is true, then . . . the defendant’s inability to confront the declarant is attributable to his own misconduct. And if that is true, the defendant should not be able to keep the declarant’s statement out of evidence by a claim of the confrontation right. A court should not decline to decide the predicate question, for evidentiary purposes, simply because the same question must also be decided in making the bottom-line determination of guilt.

Friedman, *supra* note 206, at 521–22.

The California Supreme Court is currently considering the application of “reflexive forfeiture” in a case involving statements by a murder victim regarding abuse by the defendant. *People v. Giles*, 19 Cal. Rptr. 3d 843, 847 (Cal. Ct. App. 2004), *review granted*, 102 P.3d 930 (Cal. 2004). The court certified the following questions:

Did defendant forfeit his Confrontation Clause claim regarding admission of the victim’s prior statements concerning an incident of domestic violence . . . under the doctrine of “forfeiture by wrongdoing” because defendant killed the victim, thus rendering her unavailable to testify at trial? Does the doctrine apply where the alleged “wrongdoing” is the same as the offense for which defendant was on trial?

102 P.3d at 930.

have generally applied the principle of forfeiture to allow in evidence the prior statements of the absent witness.²⁷⁴

In important ways, the factual predicates onto which forfeiture doctrine has traditionally been grafted²⁷⁵ differ from those typically presented by domestic violence cases. At least one court has acknowledged the tension between the standard forfeiture framework and prosecutions involving battering, noting that “[a]pplication of the ‘wrongdoing’ exception to the Confrontation Clause undoubtedly will be difficult in many domestic violence cases where a victim does not cooperate with the prosecution.”²⁷⁶ Put differently, application of forfeiture doctrine to violence between intimates entails a collision of paradigms: paradigmatic witness tampering—which, again, provides the template for traditional forfeiture inquiry²⁷⁷—and paradigmatic battering are too factually disparate to be yoked by a single, undifferentiating legal doctrine.

The ongoing course of conduct that characterizes abusive relationships²⁷⁸ undermines classic forfeiture analysis for a number of reasons. In most battering relationships, there is no clear conceptual divide between a defendant’s “prior crime” and his “tampering conduct.”²⁷⁹ A domestic violence victim’s noncooperation is typically

274. See, e.g., *United States v. Dhinsa*, 243 F.3d 635, 651 (2d Cir. 2001); *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999); *United States v. Houlihan*, 887 F. Supp. 352, 357–58 (D. Mass. 1995); see also Deahl, *supra* note 225, at 609–11 (offering a fuller discussion of this narrow application of “reflexive forfeiture”).

275. Cf. Tuerkheimer, *supra* note 17, at 969–71 (summarizing evolution of the criminal justice response to domestic violence and suggesting the importance of a historical perspective for understanding current structural deficiencies).

276. *Hammon v. State*, 809 N.E.2d 945, 951 n.3 (Ind. Ct. App. 2004), *aff’d*, 829 N.E.2d 444 (2005), *rev’d*, 126 S. Ct. 2266 (2006).

277. See *supra* notes 217–20 and accompanying text.

278. See *supra* notes 98–101 and accompanying text.

279. Even outside the domestic violence context, forfeiture arguments are occasionally raised in cases where the defendant is charged with a crime that causes the unavailability of a victim who did not witness separate criminal activity. See, e.g., *State v. Meeks*, 88 P.3d 789, 792–93 (Kan. 2004). This application—which, according to one commentator, has emerged only post-*Crawford*—is receiving mixed treatment by lower courts. Flanagan, *supra* note 206, at 483–84; see also Deahl, *supra* note 225, at 611–13, nn.69–70 (surveying post-*Crawford* cases involving the “broader application of reflexive forfeiture”). Forfeiture analysis based on this type of factual predicate—involving no “prior crime” to which the victim was witness and no “tampering conduct” apart from the charged conduct—will likely arise in the non-domestic context relatively infrequently and almost always where the defendant is charged with homicide and the victim made statements admissible under the evidentiary rules. Because battering involves dynamics that are fundamentally different from those presented by this type of case, see *supra* notes 280–305, judicial analysis of the forfeiture question under these circumstances is of limited analogical value for purposes of this discussion.

caused—either in whole or in part²⁸⁰—by abuse that occurred prior to the arrest for the latest incident.²⁸¹ In some cases, the charged crime is itself largely responsible for the victim's unavailability.²⁸² Indeed, it is often impossible to isolate the “tampering conduct” from the crime itself,²⁸³ because the nature of the relationship between a batterer and his victim frequently renders superfluous acts aimed specifically at procuring trial absence.²⁸⁴

The case of *Heard v. Commonwealth*²⁸⁵ illustrates this proposition. Marquis Heard was convicted of assault and trespass for an incident involving Andreal (Angel) Saunders, the mother of his child.²⁸⁶ The prosecution proved that Marquis came to the home of Angel's grandmother (whom Angel was visiting), “knocked the door off its hinges . . . then assaulted Angel by hitting her in the head with the butt of a handgun; he left the premises with their child.”²⁸⁷ Before leaving, “Heard pointed the gun at [Angel] and told her that the only reason he did not shoot her was that the gun was broken.”²⁸⁸ Police and emergency workers responded to the scene, where Angel was bleeding from multiple head wounds.²⁸⁹ Shortly thereafter, the defendant telephoned Angel's grandmother and threatened “that he would kill Angel and himself if they reported the incident to the police.”²⁹⁰ Eight months later, Angel failed to appear for trial despite

280. See *infra* notes 285–307 and accompanying text (discussing importance of contextualizing misconduct).

281. See *infra* notes 298–300 and accompanying text.

282. See *infra* notes 285–97.

283. The discussion that follows tends to support the proposition that existing criminal law definitions of domestic violence fail to capture the full spectrum of battering conduct. See generally Tuerkheimer, *supra* note 17 (critiquing adequacy of substantive criminal law's response to domestic violence).

284. While it is often impossible to identify a “tampering” behavior that is distinct from an abusive course of conduct (even as a theoretical matter), this is not always the case. Many batterers engage in efforts *specifically targeted* at procuring the unavailability of the victim at trial—for instance, threatening to kill her if she cooperates with prosecutorial efforts. See, e.g., *State v. Wright*, 701 N.W.2d 802, 807 (Minn. 2005) (involving a defendant who menaced his girlfriend with a gun and made calls from jail threatening that “if she doesn't do what he wants someone will come over to her house and do something to her”); *supra* note 237 (explaining the specific intent requirement in the evidentiary context). Even when a batterer behaves in ways that correspond more closely to traditional understandings of “tampering,” however, his actions are contextualized by a relationship characterized by the violent exercise of power. See Fischer, *supra* note 100, at 2120–26.

285. No. 2002-CA-002494-MR, 2004 WL 1367163 (Ky. Ct. App. June 18, 2004).

286. *Id.* at *1.

287. *Id.*

288. *Id.*

289. *Id.*

290. The paramedic at the scene was listening to this telephone conversation and overheard the defendant's threat. *Id.* In fact, “Heard made no fewer than three threats to

having been served with two subpoenas.²⁹¹ The trial was postponed for a month and a warrant issued for her arrest.²⁹² When Angel did not appear for trial on the rescheduled date, the prosecution elected to proceed without her.²⁹³

While the facts of *Heard* were not developed to support a forfeiture argument,²⁹⁴ certain observations about the relationship between Marquis and Angel—and the reasonable implications that flow from them—are suggestive of limitations of traditional forfeiture analysis in the battering context. We see that there is no neat sequential divide between previous criminal conduct, charged criminal conduct, and tampering conduct; the ongoing *course of conduct* that began long before Marquis broke down the door to the home where Angel was visiting did not suddenly end when law enforcement appeared at the crime scene.

Similarly, it is impossible to isolate with precision which act “caused” the unavailability of Angel at trial.²⁹⁵ The charged conduct itself—Marquis assaulting Angel with a handgun and informing her that he would have shot her had the gun not been “broken”—was a probable contributor to Angel’s unwillingness to cooperate with prosecutorial efforts. The threats conveyed to her grandmother

kill Angel during the brief telephone conversation”; one, in particular, was frighteningly vivid: “Next level, lock-up, will kill Angel.” *Id.* at *6.

291. *Id.* at *2.

292. *Id.*; see *infra* note 314 (discussing the unavailability analysis in the domestic violence context).

293. *Heard*, 2004 WL 1367163, at *2. The trial court admitted into evidence statements made by Angel on the evening of the incident describing the assault to her grandmother, to a responding police officer, and to the doctor at the hospital where she was taken for treatment. *Id.* The jury convicted, and the defendant appealed based in part on a claim that his confrontation rights were violated by the introduction of Angel’s out-of-court statements. *Id.* The Kentucky Court of Appeals held, pursuant to *Crawford*, that statements made to the responding officer were testimonial in nature and should not have been admitted, but that the error was harmless. *Id.* The court did not address whether the defendant forfeited his Confrontation Clause rights, presumably because the argument was not advanced by the prosecution. *Id.*

294. Reasoned speculation about the factual predicate for a forfeiture argument is inherently challenging in this context, given that appellate recitations of facts are necessarily limited to the issues developed at trial and, as I am suggesting, the applicability of forfeiture principles to the typical battering case may require an evolution in judicial thinking. Nevertheless, it is possible to surmise how forfeiture might apply to some cases based on the court’s discussion of related factual issues.

295. The doctrinal focus on identifying a particular act of misconduct that can be said to have caused the victim’s unavailability is likely related to a judicial preoccupation with the defendant’s intent. See *supra* Part III.A (critiquing the application of the specific intent requirement in the domestic violence context).

presumably played a role²⁹⁶ but so, in all likelihood, did myriad other controlling behaviors—some meaningful only or especially to Angel, perhaps not appearing controlling at all to the outside observer—occurring throughout the relationship between Angel and Marquis.²⁹⁷ Without an appreciation of the importance of context, and a sense of the patterned nature of battering, the judicial forfeiture inquiries will be unduly restrictive.

In many battering relationships, abuse occurring prior to the crime for which the defendant is being tried causes the victim's noncooperation. Threats to harm, or kill, a woman if she ever calls the police or testifies for the prosecution are used as a mechanism of control.²⁹⁸ These threats may be explicit or implicit, they are often leveled against the victim's children and other family members, and they are no less real or powerful than the classic witness tamperer's call from jail²⁹⁹ by virtue of having been announced prior to the crime for which the batterer happens to be standing trial. We see, then, that the conventional notion that someone who witnesses a crime *later* becomes subject to a defendant's efforts to prevent her testimony is often inapt in the domestic violence context; the chronology that comports with reality is not nearly so linear.³⁰⁰

In some cases, of course, the defendant engages in misconduct occurring after the charged crime in a manner that causes the victim's unavailability.³⁰¹ Here, too, the difficulty of importing the "tampering" construct to the domestic violence context—where the significance of a particular act is deeply embedded in a relationship³⁰²—becomes readily apparent.³⁰³ In marked contrast to

296. In my practice experience, threats made to family members are a common tactic employed by batterers to prevent victims from cooperating with prosecutors, particularly where post-arrest, pre-trial communication with the victim directly is impossible or unfeasible.

297. See *infra* notes 301–05 and accompanying text.

298. See Lininger, *supra* note 6, at 769 ("The reasons why victims refuse to cooperate with the prosecution are manifold, but chief among them is the risk of reprisals by the batterers. One study found that batterers threaten retaliatory violence in as many as half of all cases, and 30 percent of batterers actually assault their victims again during the predisposition phase of prosecution." (citing Randall Fritzier & Lenore Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 CT. REV. 28, 33 (2000))).

299. See *infra* note 304.

300. See *supra* notes 279–99.

301. Here, the question of what "misconduct" qualifies as a forfeiture of confrontation rights is put in starkest relief, though the inquiry is relevant regardless of *when* the (mis)conduct which caused the victim's absence occurred in relation to the charged crime.

302. See *infra* note 305 (explaining the significance of relationship to understanding the act's meaning).

303. This tension relates to a concern articulated by the Hammon Court:

the archetypical tampering case, in which courts have little trouble seeing the likely effect of a murder defendant's call from jail threatening to kill a witness if she testifies,³⁰⁴ the meaning that a domestic violence victim ascribes to her accuser's conduct can rarely be understood or evaluated without reference to the abusive relationship.³⁰⁵

Deviations from the standard tampering/forfeiture model represent a formidable conceptual challenge for courts faced with interpreting the meaning of forfeiture in the domestic violence context. Unless the dynamics of abuse are taken into account, the forfeiture principle cannot be faithfully applied to the domestic violence realm.³⁰⁶ Insight into the nature of battering is thus essential for the equitable underpinnings of forfeiture³⁰⁷ to be realized.

The question will probably also frequently arise as to what amounts to "wrongdoing" by a defendant in such a scenario, i.e., will only physical "wrongdoing" (another battery) by a defendant suffice, or can psychological pressure on a victim not to cooperate be enough, and if so, how is such pressure to be measured?

Hammon v. State, 809 N.E.2d 945, 951 n.3 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (2005), *rev'd*, 126 S. Ct. 2266 (2006).

304. See, e.g., State v. Fields, 679 N.W.2d 341, 345 (Minn. 2004). For other cases involving post-indictment tampering conduct against a non-intimate, in conformity with the classic paradigm, see United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (illustrating that a defendant's verbal and written threats to a witness caused unavailability); United States v. Potamitis, 739 F.2d 784, 788 (2d Cir. 1984) (illustrating that a defendant's threats to witness caused unavailability); Rice v. Marshall, 709 F.2d 1100, 1101-02 (6th Cir. 1983) (illustrating that a threatening visit from the defendant's "investigators" caused a witness's unavailability); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979) (illustrating that a defendant's threat caused witness unavailability); United States v. Carlson, 547 F.2d 1346, 1352-53 (8th Cir. 1976) (same); People v. Straker, 662 N.Y.S.2d 166, 167-68 (N.Y. Sup. Ct. 1997) (same); State v. Magouirk, 561 So. 2d 801, 804 (La. Ct. App. 1990) (same).

305. "[R]elationship provides the terrain on which a batterer's system of domination is enacted; relationship is essential to grasping the full measure of harm inflicted by the abuser and suffered by the victim; relationship connects and organizes what might otherwise appear to be random acts." Tuerkheimer, *supra* note 17, at 973-74; see Fischer et al., *supra* note 100, at 2120 ("In battering relationships . . . cultural components become an extension of the pattern of domination itself A gesture that seems innocent to an observer is instantly transformed into a threatening symbol to the victim of abuse. It is a threat that carries weight because similar threats with their corresponding consequences have been carried out before, perhaps many times.").

306. A separate but related concern is that traditional applications of forfeiture have become so firmly embedded in our legal culture that prosecutors are not raising forfeiture arguments in cases in which the facts warrant it. This prosecutorial failure of imagination both impedes the development of judicial understandings of domestic violence and is enabled by it. Cf. Tuerkheimer, *supra* note 17, at 1012-13 (discussing the application of stalking statutes to battering conduct that occurs over time, and noting that, while there

C. Forfeiture Reconceived

I have posited that in many, if not most, cases of victimless domestic violence prosecution, a batterer's conduct *over time* has caused the victim's unavailability.³⁰⁸ Accepting the truth of this proposition, it does not answer the question of how judges are to determine whether a particular defendant has forfeited his constitutional rights.³⁰⁹ Importantly, "forfeiture cannot be assumed without specific evidence linking a defendant to a complainant's failure to testify at trial."³¹⁰ The procedures for evaluating whether the defendant forfeited his Confrontation Clause rights vary from jurisdiction to jurisdiction,³¹¹ but courts typically require an

are no legal impediments to this type of prosecution, "it does not comport with social understandings" and has yet to become standard practice).

307. See *supra* notes 209–10 and accompanying text.

308. *Crawford* did not change the law governing unavailability. See Friedman, *supra* note 10, at 8 ("In applying the unavailability requirement to prior testimony under the *Roberts* regime, the Court developed a body of case law concerning when the prosecution has adequately proven unavailability, and for better or worse that case law, including part of *Roberts* itself, is left untouched."). "Unavailability" for purposes of constitutional forfeiture analysis generally requires the prosecutor to show "reasonable efforts in good faith" to secure the witness's presence. See, e.g., *People v. Dement*, 661 P.2d 675, 681 (Colo. 1983) ("Unavailability 'in the constitutional sense' is established by the prosecution when good faith, reasonable efforts have been made to produce the witness without success."); cf. *State v. Nix*, No. C-030696, 2004 WL 2315035, at *6 (Ohio Ct. App. Oct. 15, 2004) (explaining that in the evidentiary forfeiture context, sworn hearing testimony to this effect required for judicial finding of unavailability).

309. Cf. Raeder, *supra* note 18, at 361 ("Some prosecutors are already arguing that domestic violence cases *by their nature* involve forfeiture when the victim does not testify. They claim defendants *invariably* either actually threatened complainants or, given the circumstances of their relationships, such women are afraid that their testimony will cause further violence." (emphasis added)). Apropos of a concern that domestic violence victims' statements will be categorically immune from Confrontation Clause challenge, I wholeheartedly agree with Tom Lininger's observation that "not every [domestic violence] assault carries with it the threat of reprisals if the victim cooperates with law enforcement. If courts were to presume such tampering in every domestic violence case, the forfeiture exception would swallow the rule of confrontation." Lininger, *supra* note 13, at 407.

310. Raeder, *supra* note 18, at 361. By "specific evidence," I am contemplating proof of how the particular defendant on trial, by his battering conduct, caused the victim's unavailability. See *supra* notes 278–305 and accompanying text (discussing ways in which battering conduct may result in a victim's trial absence). In my view, this requisite linkage largely alleviates fears that forfeiture will be too radically expanded. For various expressions of this concern, see, e.g., Lininger, *supra* note 13, at 407 ("support[ing] the forfeiture doctrine as a general matter, but [worrying] that it will become too expansive" after *Crawford*); Flanagan, *supra* note 215 at 546 (noting the risk of "remov[ing] confrontation in an entire class of criminal prosecutions"); Raeder, *supra* note 18, at 355, 364 (suggesting a limiting principle that, while "witness tampering rationale" should be inapplicable in cases where a domestic violence victim is alleged to have been killed by the defendant, it should be required in cases where the declarant is still alive).

311. See Flanagan, *supra* note 215, at 488–92.

evidentiary hearing³¹² at which the prosecution has the burden of proving³¹³ that the defendant's misconduct caused the trial unavailability³¹⁴ of the witness.

312. *Id.* at 488. In the constitutional context, the requirement of an evidentiary hearing on the forfeiture issue seems particularly warranted. See *infra* notes 322–26 and accompanying text (discussing the evidentiary hearing in *People v. Santiago*, No. 2725-02, 2003 WL 21507176 (N.Y. Sup. Ct. Apr. 7, 2003)); see also Adam M. Krischer, “*Though Justice May Be Blind, It Is Not Stupid*”: Applying Common Sense to Crawford in Domestic Violence Cases, PROSECUTOR, Nov.–Dec. 2004, at 14 (describing various ways of proving a batterer’s responsibility for procuring victim unavailability, including prison phone records, jailhouse phone recordings, voicemail messages, e-mail, eyewitnesses to threats, and expert testimony on the effects of battering). In my prosecutorial experience, many victims are, at some point in the process, quite candid about their reasons for wishing charges to be “dropped”; their hearsay statements should be admissible at a forfeiture hearing. Even so, as litigation strategies shift in the wake of *Davis*, the prosecutorial resources which will be expended to prove forfeiture should not be underestimated. See Raeder, *supra* note 18, at 365 (discussing the costs associated with proving forfeiture, and questioning “whether such resources would be available for misdemeanors, which encompass a large percentage of the domestic violence caseload”).

313. “The forfeiture decision is a preliminary fact question for the judge, so unless state practice requires admissible evidence, the court can consider hearsay in its determination. Because forfeiture can have a significant impact at trial, a few states require clear and convincing evidence for the preliminary showing.” Raeder, *supra* note 18, at 365. Most courts, however, have applied the preponderance of evidence standard when determining whether the prosecution has met its burden of persuasion. See Lininger, *supra* note 13, at 407 (citing courts applying the preponderance of evidence standard). In *Davis*, while declining to adopt a “position on the standards necessary to demonstrate” forfeiture, Justice Scalia noted that courts making evidentiary forfeiture rulings pursuant to Federal Rule of Evidence 804(b)(6) have generally required of the prosecution proof by a preponderance of the evidence and allowed inadmissible hearsay to be considered at the hearing stage. *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006).

314. See *supra* notes 203–05 and accompanying text. Without purporting to resolve the issue, it is worth observing that what “reasonableness” requires in the domestic violence context may be distinct. In this vein, consider the case of *Fowler v. State*, 809 N.E.2d 960 (Ind. 2004), which concluded that a victim’s out-of-court statement was not testimonial and, therefore, that its admission did not violate the Confrontation Clause. *Id.* at 964. In dicta (because its holding on the testimonial question obviated a need to reach the forfeiture issue), the *Fowler* court noted that prior to trial, a police officer had “threatened [a domestic violence victim] with a charge of filing a false police report if she refused to testify against [the defendant].” *Id.* at 965. After suggesting that domestic violence victims “might choose to recant or not cooperate” for a variety of reasons, the court opined: “A domestic violence victim should not be placed in the situation of being intimidated not only by the aggressor, but also by the State and its representatives.” *Id.*

The “reasonableness” of prosecutorial efforts calibrated to context may be partly dependent on whether the dynamics of battering warrant any degree of deference to a victim’s expression of noncooperation. Must a prosecutor subpoena a victim for trial in order to satisfy the “unavailability” prong of forfeiture analysis? If a victim fails to appear in response to a subpoena, must she be arrested and brought to court? Should a subpoenaed victim be arrested in anticipation of her testimony? These questions are not simply academic: after *Crawford*, prosecutors are increasingly relying on material witness warrants to ensure the availability of victims at trial. See Lininger, *supra* note 6, at 787 (“Unfortunately, some of the victims have had to remain in custody until the trial which is

It may well be that, if forfeiture is rightly conceptualized, domestic violence prosecutors will frequently be able to prove to a judge's satisfaction that the defendant's misconduct procured the victim's unavailability.³¹⁵ This would suggest, however, not that the principle of forfeiture is being incorrectly applied³¹⁶ but, rather, that the law is properly accounting for the realities of the uncooperative domestic violence victim.

For a forfeiture analysis that reflects judicial understanding of these dynamics, we return to the case of Victor Santiago.³¹⁷ Because the prosecution sought to try Santiago without the testimony of Angela,³¹⁸ the court granted the prosecutor's motion for a pre-trial evidentiary hearing³¹⁹ to determine whether the prosecution had proven³²⁰ that the defendant "procured the victim's unavailability

a TERRIBLE message we are sending to the victim, her children, the defendant and society." (emphasis added)).

Crawford and its progeny present domestic violence prosecutors with a difficult dilemma: in order to successfully advance a forfeiture argument, extreme measures to procure the victim's trial attendance may be required. See *supra* notes 79–95 and accompanying text (discussing reasons for and manifestations of victim noncooperation). As judicial understandings of forfeiture in the battering realm evolve, it is reasonable to expect that the law regarding witness unavailability will concomitantly develop in a manner that accounts for the particularities of domestic violence. See *infra* Conclusion (identifying the default alignment of a triangular relationship between the accuser, accused, and state in domestic violence cases). In the meantime, depending on how "unavailability" is interpreted, resort to forfeiture arguments will often be, from the prosecutorial perspective, an unattractive alternative; judicial resolution of the testimonial inquiry (which, of course, does not require any showing of victim unavailability) thus remains critical. Cf. *People v. Baca*, No. E032929, 2004 WL 2750083, at *10 (Cal. Ct. App. Dec. 2, 2004) (deciding case on forfeiture grounds, rather than addressing whether "testimonial" definition was properly applied by the lower court).

315. See *supra* note 284 (discussing the frequency of "tampering" in domestic violence cases).

316. See *supra* note 310 (describing the skepticism of commentators).

317. See *supra* notes 45–81 and accompanying text. With the sole exception of *Santiago*, I have found no written opinion in a domestic violence case that conceptualizes forfeiture in the manner that I am advocating.

318. The prosecution sought to introduce various out-of-court statements made by Angela describing the events in question. *People v. Santiago*, No. 2725-02, 2003 WL 21507176, at *1 (N.Y. Sup. Ct. Apr. 7, 2003); see also *supra* notes 70–75 and accompanying text.

319. "The People's papers demonstrated a distinct possibility that the defendant engaged in witness tampering," mandating what is known in New York as a Sirois hearing. *Id.* at *1; see *In re Holtzman v. Hellenbrand*, 92 A.2d 405 (N.Y. Sup. Ct. 1983); *supra* note 312 and accompanying text (arguing that an evidentiary hearing and individualized determination should be required).

320. In New York, the prosecution bears the burden of proof by clear and convincing evidence. See, e.g., *People v. Geraci*, 649 N.E.2d 817, 822 (N.Y. 1995); see *supra* note 312 (noting jurisdictional variance in the burden of proof).

through violence, threats, or chicanery.”³²¹ After hearing testimony from Angela,³²² the police domestic violence counselor,³²³ one of the responding police officers, the assistant district attorney with whom Angela had discussed her reluctance to testify,³²⁴ an expert on domestic violence, and Santiago himself,³²⁵ the court concluded that Santiago’s misconduct had caused Angela’s absence; accordingly, Santiago forfeited his right to object to the introduction of her out-of-court statements.³²⁶

Accepting that the defendant’s “longstanding pattern of physical and emotional abuse toward Angela R. effectively forced her to become unavailable as a witness for the People at trial,”³²⁷ the court’s opinion—the only one of its kind³²⁸—is instructive less for its result than for its reasoning about domestic violence. The *Santiago* court expressly repudiated the defendant’s efforts to analogize to the traditional tampering paradigm.³²⁹ Rejecting the notion that misconduct can only cause a victim’s unavailability if it takes place *after* the occurrence of the charged crime,³³⁰ the court observed that

321. *Santiago*, 2003 WL 21507176, at *1.

322. For a summary of Angela’s hearing testimony, see *id.* at *9. This case is somewhat unusual in that the prosecution was able to call Angela as a witness at the forfeiture hearing. Often, a victim can neither be located nor her presence secured for this type of hearing, requiring prosecutors alleging forfeiture to prove it using other types of evidence. See *supra* note 311 (discussing types of evidence admissible at a forfeiture hearing).

323. See *supra* notes 60–66 and accompanying text.

324. *Id.*

325. *Santiago*, 2003 WL 21507176, at *2.

326. Pursuant to the governing legal framework, the court did not disaggregate analysis of potential constitutional and evidentiary challenges. The law in New York precludes a defendant whose “violence, threats, or chicanery” causes a witness’s unavailability “from asserting either ‘the constitutional right of confrontation or the evidentiary rules against the admission of hearsay in order to prevent the admission of the witness’s out-of-court declarations.’ ” *People v. Cotto*, 92 N.Y.2d 68, 69 (N.Y. 1998) (quoting *People v. Geraci*, 85 N.Y.2d 359, 366 (N.Y. 1995)).

327. *Santiago*, 2003 WL 21507176, at *1. The court, recognizing the “frequency with which battered women seek to withdraw as witnesses,” noted that “if the witness’s earlier statements become admissible according to the [applicable legal] standards, considerable public benefit can be anticipated.” *Id.* at *2.

328. See *supra* note 316 (noting that *Santiago* was exceptional for its forfeiture conceptualization).

329. *Santiago*, 2003 WL 21507176, at *14. It is interesting to see that the defendant explicitly invoked the traditional model in order to contrast it with his own conduct: “The defendant argues that this distinguishes this case from others in which a witness’s prior statements were properly admitted because the defendant’s misconduct, committed between the inception of the case and the date of trial, was found sufficiently threatening to have caused the witness’s unavailability.” *Id.*

330. *Id.* (articulating, and rejecting, defendant’s argument that Angela’s “current reluctance to testify is not as a result of any misconduct committed by him *since the inception of this case*” and that the facts before the court are distinguishable “from others

domestic violence is sufficiently distinct from prototypical witness tampering so as to justify a broader view of the relevant time frame.³³¹

Further, the opinion acknowledges that a domestic violence defendant's conduct must be viewed in context in order to evaluate its significance to the forfeiture inquiry. Since battering is deeply embedded in a relationship, and it occurs over time, the court's forfeiture analysis contemplates a "pattern of behavior [that] causes the victim of domestic abuse to succumb to the offender's importuning in ways that others might not."³³² In short, determining whether Santiago caused Angela's unavailability demanded a judicial inquiry that was more temporally encompassing, more expansive in its definition of "misconduct," and more attentive to the relational as compared to the traditional forfeiture analysis.³³³

in which a witness's prior statements were properly admitted because the defendant's misconduct, *committed between the inception of the case and the date of trial*, was found sufficiently threatening to have caused the witness's unavailability" (emphasis added)).

331. *Id.* at *15 ("I do not believe that the cases admitting prior testimony of an unavailable witness should be read to hold that prior evidence given by an unavailable witness is admissible only when the defendant's misconduct causing the unavailability occurs between the defendant's arrest and the date of trial. While that may occur in the usual case, domestic violence matters are of such a different character as to justify a broader application of the rule.").

332. *Id.* The court explained:

[T]he defendant's pattern of behavior causes the victim of domestic abuse to succumb to the offender's importuning in ways that others might not. Thus, attempts to become unavailable as a prosecuting witness cannot be viewed as we might see voluntary withdrawal in a case where the complainant and the defendant are strangers to one another. Nor, can such withdrawal be viewed as having been made without the misconduct of the defendant when it is attempted during the honeymoon phase of a cycle of violence filled, as it is here, with a mix of fear, false hope, a sense of guilt and weakness of will all resulting from the defendant['s] prior behavior.

Id.

333. The court elaborated on how battering dynamics undermine traditional forfeiture analysis as follows:

[D]omestic violence cases are different because of the complainant's desire for a stable relationship and the exploitation of that desire by the defendant. The hallmark of such cases is the hope for a brighter future with the abuser held by the complainant who is weakened by past abuse and seduced by untrustworthy gestures of love but, whose expectations are eventually met with repeated abuse to the perverse satisfaction of the abuser. In other kinds of cases there has been little, if any, intimate interaction between the parties and generally there is no expectation of a future relationship. As I have noted, in the vast majority of cases victims pursue their complaints seeking retribution and safety from the process provided by the police and courts. Such complainants, although sometimes apprehensive, follow through because they have the strength, the will and the need to do so. Victims of domestic violence do not have the will to follow through . . .

Equation of the parameters of forfeiture in battering cases with forfeiture in other types of prosecutions is expressly disavowed:

[I]n other kinds of cases we have often taken for granted that a complainant's desire to withdraw from the prosecution was based on the simple unwillingness to get involved in the process, or give up the time it takes to follow through on the complaint, or because of the witness's unsubstantiated fears of reprisal from some unspecified source. We have frequently not looked beyond those excuses in such cases where no proof was immediately available that a particular and recent act of misconduct by the defendant had brought about the witness's unavailability However, I do not believe domestic violence cases are of the same character as other kinds of cases³³⁴

By forsaking the narrow analytic lens of standard forfeiture inquiry, the court's decision responds to the challenge of evolving a forfeiture doctrine with meaning for a category of crime that does not comport with the traditional paradigm.³³⁵

The court's conclusion that "domestic violence matters are of such a different character as to justify a broader application of the rule" is, of course, not without qualification,³³⁶ the opinion is

This is so not only because of the psychological damage done by repeated abuse but, also because there lurks in the mind of such complainants the fear of physical retaliation to themselves and their children at the hands of an offender whose past behavior toward the complainant makes it highly probable that such abuse will occur again.

Id.

334. *Id.* at *14.

335. Recall that the court heard testimony from an expert on battering and its effects. *Id.* at *2. It is also apparent that the court was well aware of the "frequency with which battered women seek to withdraw as witnesses" and that the court's novel application of forfeiture "may affect the prosecution of similar cases involving domestic violence." *Id.*

336. *Id.* at *14. The court observes that "the evidentiary consequences would be different in this case if the complainant's choice not to go forward were premised exclusively on feelings of love and loyalty to the defendant." *Id.* at *16. In *Santiago*, however,

the violent domestic history of these two people, and defendant's recent persistent importuning of the complainant to withdraw from this prosecution, have made clear that Angela R.'s choice with respect to continuing this prosecution was not made without fear of the defendant Indeed, abuse of the complainant by the defendant is the recurrent theme in the relationship between these two parties.

Id.

The *Santiago* court rightly recognized that love and loyalty are frequent *sequilae* of abuse and, as suggested by the relationship between Angela and Victor, often indications that the batterer has been particularly successful in his efforts to control the victim. *Id.* By way of contrast, if a victim's unwillingness to cooperate with the

appropriately limited by the constructs of misconduct and causation that have always framed forfeiture analysis.³³⁷ Indeed, the court's reasoning may be viewed as an endeavor to fairly import the principle of forfeiture into a context that fundamentally departs from the crime template with which it historically has been linked. *Santiago's* interpretation of forfeiture thus constitutes a reassessment that remains true to its normative foundations.³³⁸

Battering is in essence different from crimes that occupy a more historically privileged, less equivocal place in our criminal justice

prosecution is "premised *exclusively* on feelings of love and loyalty to the defendant," *id.* (emphasis added)—i.e., if her emotional connection to the defendant was not caused and is not maintained by a pattern of domination and abuse—the defendant's *misconduct* would not be responsible for procuring the unavailability of his victim. Under these circumstances, a prosecutor's forfeiture argument would fail. While I do not pretend that courts will easily engage in these types of fact-bound determinations, or that the effects of complicating factors such as a victim's economic dependence on her batterer are easily assessed, practical challenges should not overwhelm a desire for conceptual coherence in this area of law. Indeed, criminal remediation of domestic violence cases often requires inquiry easily dismissed as messy or overly intimate. See Tuerkheimer, *supra* note 17, at 1027–28 (critiquing the notion that "legal entanglement in the messy imbroglio of intimacy is dangerous and ultimately doomed").

337. To wit:

The credible evidence at this hearing makes very clear that Angela R.'s current attitude toward testifying is a classic example of a battered woman's reaction to what has been described as the honeymoon phase of the abusive relationship. Angela R. is frightened that separation will leave her isolated and without help in caring for her child and her home. The evidence shows that in the past she has feared, and she continues to fear, that the defendant's violent behavior will be directed toward her again and conceivably toward her child.

....

[T]he violent domestic history of these two people, and defendant's recent persistent importuning of the complainant to withdraw from this prosecution, have made clear that Angela R.'s choice with respect to continuing this prosecution was not made without fear of the defendant Thus, in my view, there is clear and convincing evidence that the defendant's misconduct procured the complainant's unavailability as a witness in this prosecution and, as a fitting consequence, the People should be allowed to present evidence of the complainant's prior statements and Grand Jury testimony regarding this incident to the trial jury.

Santiago, 2003 WL 21507176, at *13, 16.

338. See *id.* at *16 ("In this case the conclusion is inescapable that this abused complainant seeks to make herself unavailable as a witness because of the pattern of misconduct directed toward her by the defendant The complainant's decision not to cooperate with this prosecution is, without a doubt, strongly, if not totally influenced by the long history of domestic abuse that appears to affect all the decisions made by the complainant with respect to this defendant.").

system.³³⁹ A meaningful rule of forfeiture contemplates these distinguishing features and acknowledges their incompatibility with the traditional forfeiture framework, contesting law's systemic inattention to relationship. Application of forfeiture principles to domestic violence thus requires no radical reworking of doctrinal foundations. Rather, the potential for a reasoned forfeiture analysis lies in enhanced judicial understanding of the underlying facts and a willingness to accept the obsolescence of conventional witness tampering paradigms.

CONCLUSION: A RELATIONAL APPROACH TO THE CONFRONTATION RIGHT

The approach to confrontation that I have proposed may be described as “relational.”³⁴⁰ As a method of analyzing what the right of confrontation entails, the relational question is critical in prosecutions involving domestic violence. When engaging in the threshold “testimonial” inquiry, taking into account the dynamics of abuse challenges conventional notions of exigency derived from and related to paradigmatic crime between strangers.³⁴¹ Consideration of the relational yields a similar reconfiguration of doctrinal parameters in the forfeiture area, where precedent and analogy are inadequate to the task of implementing the equitable principles underlying the rule.³⁴² A relational view of forfeiture requires contemplation of the connection between defendant and victim when determining whether his misconduct caused her trial unavailability.³⁴³ Attending to the context of relationship essential to battering, I have argued, thus impacts how the confrontation right is operationalized—a matter of great import to the future prosecution of domestic violence.³⁴⁴

More broadly, a relational approach may also influence how we view the meaning of the confrontation right. By synthesizing my critique of the “testimonial” inquiry and of forfeiture doctrine, an understanding of the right that is itself relational in nature emerges. In conclusion, I offer an outline of the normative implications of this argument.

The meaning of confrontation, I want to argue here, is largely dependent on the configuration of relationships between accuser,

339. See Tuerkheimer, *supra* note 17, at 969–71; *supra* note 17.

340. See *supra* note 40 (qualifying the use of “relational”).

341. See *supra* Part II.

342. See *supra* Part III.A–B.

343. See *id.*

344. See *supra* Part I.

state, and accused—a variable scarcely noticed by courts or commentators.³⁴⁵ Theories of confrontation do not remark on this triangle (accused/accuser/state), which implicitly frames the conceptual analysis. Rather, Confrontation Clause jurisprudence and scholarship tend to presume particular alliances: accuser with state, against accused.

We can see how integral this default arrangement is to the “paradigmatic Confrontation Clause violation” suffered by Sir Walter Raleigh.³⁴⁶ In the case against Raleigh, the relationship between state and accuser was such that the prosecution could very well have produced Lord Cobham, the quintessential accuser, to testify. Tacitly invoking this alliance, Raleigh argued:

[I]t is strange to see how you press me still with my Lord Cobham, and yet will not produce him He is in the house hard by, and may soon be brought hither; let him be produced³⁴⁷

In prosecutions for paradigmatic crime,³⁴⁸ the relational triangle may be generally characterized in this manner: the accuser is “in the house hard by”; the accused stands alone. In the victimless domestic violence realm, however, the same cannot be said. Indeed, quite the opposite is true: in most cases in which the prosecution is proceeding without a victim,³⁴⁹ allegiances underlying the relational triad are essentially inverted; the accuser is metaphorically, and often physically, in the house with the accused.

This inversion has real consequences for the functioning of the confrontation right. Fundamentally, what it means to be an “accuser”³⁵⁰ may be different when the witness is a victim of domestic

345. Indeed, I have found no judicial or scholarly treatment that frames the issue in this manner.

346. See *supra* notes 21–22 and accompanying text (discussing Sir Walter Raleigh’s case).

347. JOHN GEORGE PHILLIMORE, *THE HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE* 157–58 (1850).

348. See *supra* note 17.

349. While in some cases prosecutors may proceed to trial without a victim simply because she “would be an unhelpful witness or would be subjected to a difficult cross-examination,” Friedman & McCormack, *supra* note 129, at 1178, in the vast majority of victimless prosecutions, it is the preferences of domestic violence victims that drive this aspect of prosecutorial decisionmaking. See *supra* note 87 (noting high percentage of uncooperative domestic violence victims); *supra* notes 91–96 and accompanying text (discussing reasons for victim noncooperation).

350. See *Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006); cf. Mosteller, *supra* note 10, at 514 n.18 (“Somewhat inexplicably, in my judgment, one aspect that [Crawford’s] historical treatment and preliminary definition leaves out is my particular focus on

violence, as inquiry into the “testimonial” nature of a statement shows. Consistent with the conventional model of crime—which also seems to resonate with the *Crawford* majority³⁵¹—provision of information regarding past criminal conduct to law enforcement transforms a victim/witness into an accuser. By participating in an effort to apprehend (and, therefore, prosecute) the perpetrator, she has allied herself with the state, thus triggering attendant obligations under the Confrontation Clause.³⁵²

In most domestic violence cases, as we have seen, no such alliance inheres in a victim’s invocation of the law enforcement apparatus. Viewed narrowly, a battered woman who recounts a criminal incident to police may be considered an “accuser” but her actions have a different meaning when seen in context.³⁵³ Classifying this type of hearsay as nontestimonial reflects an awareness that a domestic violence victim has not permanently shifted her allegiance from defendant to state simply by asking for police protection and,

accusers and accusatory statements, as opposed to testimonial statements. I believe there should be a role for the concept of ‘accusatory’ hearsay in the analysis because it better describes the core concern of the Confrontation Clause than does the testimonial concept. On the other hand, I recognize that the decisional moment has been reached and that, despite my arguments, the concept of testimonial statements, rather than accusatory hearsay or accusatory statements, has been the dominant paradigm. Moreover, if testimonial is defined using the amicus definition in *Crawford* and, appropriately interpreted, it will include most accusatory hearsay. Thus, I focus on testimonial statements. Nevertheless, I believe the concept of accusatory statements is quite useful in helping to identify those statements that should be identified as testimonial.”)

351. See *Crawford v. Washington*, 546 U.S. 36, 51 (2004) (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.”); see also *Davis*, 126 S. Ct. at 2274 (quoting same language).

352. In support of his position that the conduct of the declarant, as opposed to the participation of a government agent, renders a statement testimonial, Richard Friedman has made the following helpful observation:

If . . . the source of the information is a human who does understand its likely use, we can say that she was playing a conscious, knowing role in the criminal justice system, providing information with the anticipation that it would be used in prosecution—and that certainly sounds a lot like testifying. Furthermore, without such understanding on the part of the declarant, the situation lacks the moral component allowing the judicial system to say in effect, “You have provided information with the knowledge that it may help convict a person. If that is to happen, our system imposes upon you the obligation of taking an oath, saying what you have to say in the presence of the accused, and answering questions put to you on his behalf.”

Friedman, *supra* note 105, at 259.

353. See *supra* Part II.

accordingly, that she is not an “accuser” in the Confrontation Clause sense of the word.

A similar theoretical claim may be articulated with respect to a reconceived forfeiture doctrine.³⁵⁴ The contextualized judicial determination that I have urged³⁵⁵ asks whether the alliances underlying the conventional relational triad have been inverted and, if so, whether the defendant’s battering behavior is causal in the shift. If so, he may not assert a Confrontation Clause challenge; the default mandate of state production of the “accuser” makes little sense where the accused’s own misbehavior is responsible for perverting the paradigmatic relational structure.

Crawford teaches that confrontation has a function beyond ensuring the reliability of evidence.³⁵⁶ While theoretical perspectives on the value of the right are varied,³⁵⁷ I contend that the identification of a relational triangle has implications across the conceptual spectrum,³⁵⁸ enhancing our understanding of how best to advance *whatever* the chosen norm.

To test the power of this observation, consider the idea that confrontation has a noninstrumental “dignity value,”³⁵⁹ a notion that, in my view, is compelling. From this perspective, the constitutional requirement of confrontation speaks to the respect afforded the accused by both the state and the accuser. As Toni Massaro has explained, “the appropriate question under the individual dignity

354. See *supra* Part III.

355. See *supra* Part III.C.

356. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004). While *Crawford* emphasized that cross-examination is the touchstone of Confrontation Clause analysis, asserting that a particular procedure is required to effectuate a right seems to me an inadequate explanation of its meaning. Cf. Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1261 (2003). Characterizing Richard Friedman’s argument that “reliability is not the *raison d’être* for the clause . . . [and that] the confrontation right, like the oath, is one of the fundamental conditions governing the giving of testimony,” *id.* at 1261 (citing Friedman & McCormack, *supra* note 129, at 1200), Sherman Clark suggests:

He has it exactly right I think, as far as he goes, but we need to go farther. Why should we see confrontation as a “fundamental condition” other than to insure the reliability of testimony? Why, other than “to advance ‘the accuracy of the truth-determining process in criminal trials,’ ” might we want to consider this requirement so important?

Id. at 1261. In my view, the Confrontation Clause may certainly tend to promote the reliability of admissible evidence without this being its exclusive normative function.

357. See *infra* notes 359–65 and accompanying text.

358. See *id.*

359. Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 908 (1988).

approach is . . . when will admission of an out-of-court statement deny the defendant his or her individual dignity?"³⁶⁰ This inquiry, as I have suggested, is largely dependent on the configuration of relationships between accuser, state, and accused.³⁶¹

As a general proposition,³⁶² confrontation advances a dignitary value because confrontation is how respect for the accused is properly demonstrated: the state presents the accuser; the accuser testifies in the presence of the accused. Note how the paradigmatic relational triangle is embedded in this understanding of what respect requires. In the victimless domestic violence realm, a reshaped triad of allegiances alters the meaning of the conventional procedural mandate—prosecution produces an accuser to be cross-examined by the accused. If confrontation has a dignitary value, then, what the right requires cannot be grasped without examination of the relational.

A similar relational analysis may be applied to competing visions of the Confrontation Clause, including an "accuser/obligation"

360. *Id.* Massaro adds:

The confrontation guarantee cannot be explained solely by the claim that face-to-face encounters may enhance the reliability of the witness's testimony The confrontation guarantee reflects a belief that criminal trials of human beings should look human to do "justice," and should treat the defendant—even an alleged child molester—as an equal, dignified participant in the proceedings against him. These qualities are compromised when government prosecutors use affidavits, depositions, videotaped testimony, one-way mirrors, or closed-circuit television testimony to prove their central accusations against the criminal defendant, no matter how "accurate" those accusations may be. Procedure that is based on these forms of evidence no longer is an even contest in which the defendant plays an active, equal, and dignified role.

Id. at 902–03.

In application, Massaro's approach would focus on the availability of a hearsay declarant; the government would be obligated to produce a declarant unless she were "genuinely unavailable," in which case her testimony would not be excluded on Confrontation Clause grounds. *Id.* at 910–13.

The dignity value of the confrontation guarantee, as it has been defined herein, is preserved when the government exhausts all feasible alternatives of the use of out-of-court accusations, and explains to the court why the accuser is not available for cross-examination by the accused [W]hen a face-to-face encounter is impossible, due to death of the accuser or other circumstances not attributable to the government, then the out-of-court accusation nevertheless can be admitted without offending the individual dignity value of the confrontation guarantee.

Id. at 913, 917.

361. *See supra* notes 345–49 and accompanying text.

362. My use of "general proposition" here refers to cases not involving domestic violence.

approach;³⁶³ a “prosecutorial restraint” or limited government model;³⁶⁴ and even a utilitarian “truth-seeking” understanding of the right.³⁶⁵ Across theoretical orientations, a relational perspective speaks to what implementation of the confrontation right requires.

363. See Clark, *supra* note 356, at 1258. According to Clark:

[T]he Confrontation Clause of the Sixth Amendment ought to be re-understood as primarily an accuser’s obligation rather than primarily as a defendant’s right. We demand that those who would perform this potentially dangerous, morally weighty, and symbolically loaded act—the act of accusation—be willing to do so face to face. We impose this requirement not only because out-of-court accusations are unreliable, though they may often be, but also in response to a deep, if inchoate, feeling that it is somehow beneath us—inconsistent with our sense of who we want to be as a community—to allow witnesses against criminal defendants to “hide behind the shadow” when making an accusation. On this interpretation, requiring confrontation is a way of reminding ourselves that we are, or least want to see ourselves as, the kind of people who decline to countenance or abet what we see as the cowardly and ignoble practice of hidden accusation.

Id. (footnote omitted).

In this regard, the relational question points to an important truth: to understand the meaning of failure to confront one’s accuser—behavior that Sherman identifies as “cowardly and ignoble,” *id.*—the failure must be viewed in context. It may be generally true that, for victims of paradigmatic crime, shirking one’s moral obligation to perform the “symbolically loaded” act of accusation is worthy of condemnation. See *id.* In contrast, for victims of domestic violence, declining to testify against one’s abuser in court is typical; I have suggested that it is also understandable, justifiable and, often, fully rational. See *supra* notes 91–96 (discussing the reasons for a domestic violence victim’s reluctance to cooperate with the prosecution). Accordingly, quite apart from doctrinal niceties, the moral significance of allowing prior statements of battered women into evidence may require a distinct analysis. See Eileen Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623, 641–45 (1992) (generally describing the dimensions of confrontation as evidentiary, procedural, and societal, and discussing the “moral responsibility of witnesses as accusers”); cf. Clark, *supra* note 356, at 1275 (“If our reason for requiring confrontation is meaning-based rather than merely formal or solely consequentialist, we need to acknowledge that the unavailability of a witness might, under some circumstances at least, alter our perception of what it means to make use of a prior out-of-court statement.”).

364. See, e.g., Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992). Margaret Berger has expressed a view of the Confrontation Clause that “restrain[s] the power of the government vis-à-vis the individual.” *Id.* at 561.

[V]iewing the right to confrontation as part of a package of rights concerned with protection of the people against government oppression promises significant values and restores a valuable purpose to the clause. In criminal prosecutions, the ability of the accused and the public to monitor, curb, and expose prosecutorial abuse remains of utmost importance.

Id. at 562–63 (footnote omitted). For reasons that should by now be obvious, I believe that where the relational triangle implicitly underlying this vision is inverted, the dictates of this “limited government” norm are correspondingly impacted.

365. To the extent that a default constitutional requirement of cross-examination incorporates an inherent skepticism toward the truth of hearsay (as compared to in-court

In sum, toward the end of discerning whether confrontation furthers its intended normative purpose, a relational inquiry shows that the meaning of “absent accuser” is distinct in the battering context. The departure of domestic violence from a traditional crime archetype reveals that a particular vision of relationships has, until now, animated our sense of what the Constitution requires. By exposing a conceptual triangle that frames Confrontation Clause challenges, the relational insight advances our understanding of the confrontation right and how its promise is best realized.

testimony), it is worth noting, as a categorical matter—though certainly not as a universal proposition—that when statements of domestic violence victims are inconsistent, those made closer in time to the incident tend to be more reliable than those made at trial. *See* Lininger, *supra* note 6, at 802 (stating that, “considered as a category,” statements of domestic violence victims “generally grow less reliable as trial draws nearer”); Beloof & Shapiro, *supra* note 83, at 19–21 (“[T]he initial out of court statement of a domestic violence victim in a domestic violence case is likely to be the most reliable statement obtainable.”).

Moreover, approaches to confrontation predicated on the truth-seeking value of a trial often invoke a vision of cross-examination that replicates, to the extent allowed by civilized notions, an “altercation” between accuser and accused. *See, e.g.*, Brief for Professors Clark et al. as Amici Curiae Supporting Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2003) (No. 02-9410) (quoting sixteenth century commentator Thomas Smith’s description of the English criminal trial). Confrontation theories that conjure, in essence, a duel between victim/witness and defendant—a duel that results in the truthful participant emerging victorious—are, of course, undermined when the accuser and accused are allied against the state.