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## A RELATIONAL APPROACH TO THE RIGHT OF CONFRONTATION AND ITS LOSS

*Deborah Tuerkheimer\**

### INTRODUCTION

Battering is fundamentally different from violence between non-intimates.<sup>1</sup> Domestic violence is widely understood—outside the law—as an ongoing pattern of conduct defined by both physical and non-physical manifestations of power.<sup>2</sup> Yet, by tacit

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\* Associate Professor of Law, University of Maine School of Law; A.B., Harvard College, 1992; J.D., Yale Law School, 1996. This Article condenses and updates the ideas first expressed in Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REVIEW 1 (2006). I am grateful to Laurence Busching, Richard Friedman, Brooks Holland, Tom Lininger, Lois Lupica, Joan Meier, Robert Pitler, Myrna Raeder, Frank Tuerkheimer, Jennifer Wriggins, and Melvyn Zarr for their helpful comments on earlier incarnations of this piece, and to Judith Lewis for her invaluable research assistance.

<sup>1</sup> Violence between non-intimates is paradigmatic criminal conduct and lies in contrast to domestic violence, which, in important respects, lies outside the bounds of traditional criminal law structures. For a discussion of the features that define “paradigmatic” crime, see Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 971-74 (2004) [hereinafter *Remediating the Harm of Battering*]. Although child abuse and elder abuse share many of the dynamics distinguishing battering from conventional crime, and much of the discussion which follows applies to violence in intimate relationships generally, I focus here on adult partner abuse and the law’s response to it.

<sup>2</sup> Psychologist Mary Ann Dutton has elaborated on the dynamics of domestic violence as follows:

default to analogy and precedent, our legal system equates domestic violence with paradigmatic non-domestic violence,<sup>3</sup> resulting in an odd disconnect between the law and life outside of it.

This observation is particularly true in the Sixth Amendment context, where notions of domestic violence underlying contemporary Confrontation Clause jurisprudence are sufficiently inaccurate as to fatally undermine the coherence of both doctrine and theory.<sup>4</sup> As scholars, practitioners, and courts struggle to discern the meaning of the Supreme Court's recent pronouncement in *Davis v. Washington*,<sup>5</sup> my critique focuses on

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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 on-going psychological abuse—is to fail to recognize what some battered woman experience as a continuing “state of siege.”

Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (2003) (quoting Sue Osthoff, Director, National Clearinghouse for the Defense of Battered Women). For a more thorough discussion of the nature of battering, see Tuerkheimer, *Remedying the Harm of Battering*, *supra* note 1, at 962-69.

<sup>3</sup> See *supra* note 1 (explaining term).

<sup>4</sup> The jurisprudence is incoherent insofar as its defining construct 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, battering prosecutions will most often present the need for trial without the testimony of a victim. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768 (2005) (“[R]ecent evidence suggests that 80 to 85 percent of battered women will recant at some point.”). See also Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REVIEW 1, 14-18 (2006) [hereinafter *Crawford's Triangle*] (discussing causes and manifestations of victim non-cooperation). If a framework for Confrontation Clause challenges fails in these cases, in my view it cannot be seen as adequate.

<sup>5</sup> 126 S. Ct. 2266 (2006).

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the underlying conceptual framework as inherently flawed.

The Court has promulgated an invalid test for “testimonial statements” by incorporating a model of discrete, episodic violence that is incompatible with the ongoing nature of abuse. In essence, the Court has defined the term in a manner that does not and cannot measure what it purports to in domestic violence cases.

In the discussion which follows, I examine cases and commentary treating the right of confrontation in victimless domestic violence prosecutions.<sup>6</sup> My objective in doing so is to expose the assumptions underlying the application of *Crawford v. Washington*<sup>7</sup> to the battering sphere. This Article argues that the Court has failed to acknowledge the continuing course of conduct that characterizes domestic violence.

A full appreciation of the dynamics of domestic abuse and attention to the context of the relationship that embeds victim and defendant results in what this Article will refer to as a “relational approach” to Confrontation Clause analysis.<sup>8</sup> This Article develops the relational approach by analyzing the two doctrinal questions that will continue to arise most frequently in the post-*Crawford* era: (1) when is a statement testimonial, and (2) when has a defendant forfeited his right of confrontation?

Part I critiques the *Davis* Court’s definition of “testimonial”

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<sup>6</sup> Many domestic violence victims become reluctant or unwilling to assist with prosecutorial efforts after a batterer’s arrest, creating the need for prosecution without reliance on a victim’s testimony, or so-called “victimless prosecution.” Tuerkheimer, *Crawford’s Triangle*, *supra* note 4, at 2 n.3. I use this term advisedly, as it tends to obscure the fact that someone was indeed victimized by the conduct at issue in the case, notwithstanding her absence from the trial. It seems to me that “victim absent” would be a preferable way of describing prosecutions now referred to as “victimless.” Nevertheless, to adhere to convention and avoid unnecessary confusion, I will continue to use the accepted term.

<sup>7</sup> 541 U.S. 36 (2004).

<sup>8</sup> My use of the word relational in this context is not derived from the scholarly tradition of relational feminism. Rather, it is 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. *See infra* Part V.

for its complete inattention to the dynamics of battering. This Part argues that decontextualized determinations of exigency—and continued adherence to an inapt dualism—will inevitably skew the disposition of Confrontation Clause challenges. In evaluating whether a hearsay statement is testimonial, the Court has adopted a theoretical framework that posits a binary relationship between “crying for help” and “providing information” for investigatory purposes.<sup>9</sup>

However, in the domestic violence realm, the dichotomy is false. By this contention, I mean to suggest more than that officers and victims have “mixed motives” that are often difficult to discern.<sup>10</sup> Rather, from the perspective of battered women, the meaning of “exigency”—a construct deeply embedded in the now-reigning definition of testimonial—is distinct from that experienced by victims of other types of crimes.<sup>11</sup> In order for the exigency confronting a battered woman to be resolved, she must often provide information regarding past violence; she does so in order to prevent imminent violence. Thus, the two functions conceived of by courts (“crying for help” and “providing information”) as distinct, and indeed binary, are not only practically inseverable, but are 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 examines the lower courts’ treatment of the testimonial question in *Davis*’ immediate aftermath in order to

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<sup>9</sup> See *Davis*, 126 S. at 2279.

<sup>10</sup> *Id.* at 2283 (Thomas, J., concurring in the judgment in part and dissenting in part) (“In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence. Assigning one of these two ‘largely unverifiable motives,’ primacy correct word here? requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible.”) (internal citation omitted).

<sup>11</sup> For a more extended analysis of this proposition, see Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. (forthcoming 2007).

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illustrate defects in the Court's framework for classifying testimonial hearsay. It must be conceded, however, that even a properly contextualized analysis of the definitional question 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. New attention must therefore be given to the rule of forfeiture by misconduct, which precludes a defendant from asserting confrontation rights where he is responsible for procuring the witness' absence from trial. As the advancement of forfeiture arguments in domestic violence cases becomes increasingly commonplace,<sup>12</sup> the doctrine—as yet, undeveloped in the battering realm—must evolve.

Part III argues that judicial forfeiture determinations should take into account the characteristics that distinguish domestic violence from other types of criminal tampering. This Part provides a conceptual roadmap for this doctrinal transformation suggesting that as courts begin to formulate a forfeiture framework applicable to domestic violence cases, reliance on precedent and analogy inevitably will subvert the rule's equitable rationale. 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. Without acknowledging the patterned nature of domestic abuse, courts cannot correctly interpret the meaning of forfeiture. Thus, fidelity to the theoretical underpinnings of the doctrine demands new consideration of how it applies to victimless domestic violence prosecutions.

Finally, Part IV offers a theory of how the preceding discussion might help to conceptualize the meaning of the confrontation right. While undermining the notion that ensuring evidence “reliability” is the exclusive function of the right of confrontation, *Crawford* erected no new governing theoretical framework. In the face of this void, the need to articulate a

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<sup>12</sup> The *Davis* Court's recent reiteration of the principle of forfeiture and its *dictum* discussing evidentiary standards applicable to forfeiture hearings will further accelerate the development of law in this area. See *Davis*, 126 S. Ct. at 2279-80.

normative vision of confrontation has never been more compelling. This Part suggests 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. Adopting a relational approach to confrontation has the potential to transform how we think about the value of confrontation in domestic violence prosecutions and beyond.

### I. DAVIS AND THE FALSE PRIMACY OF PAST “EVENTS”

The conceptual tension that underlies the definition of testimonial hearsay derives from an uncritical acceptance of what one court expressly termed “the dichotomy between a plea of help and testimonial statements.”<sup>13</sup> In the domestic violence context this dichotomy is false. Often, a battered woman’s safety depends entirely on the intervention of law enforcement: she

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<sup>13</sup> State v. Powers, 99 P.3d 1262, 1265 (Wash. 2004). In an important article pre-dating *Crawford*, Richard Friedman and Bridget McCormack describe the operative theoretical construct 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.

Richard D. Friedman & Bridge McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1241-42 (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” of domestic violence victims. *Id.* at 1180-1200.

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needs police protection because without assistance the violence will continue. Put differently, 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.<sup>14</sup> Unlike victims of episodic 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 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 enforcement.<sup>15</sup> From her perspective, if she does not describe the crime to the police, it is simply not "over," nor is she safe.<sup>16</sup> And even when she does recount the incident, assuming

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<sup>14</sup> See, e.g., *People v. Mackey*, 785 N.Y.S.2d 870 (N.Y. Crim. Ct. 2004); *State v. Wright*, 701 N.W.2d 802 (Minn. 2005), *judgment vacated*, 126 S. Ct. 2979 (2006).

<sup>15</sup> The ongoing pattern of physical and non-physical conduct that characterizes battering is often escalated by a victim's attempt to increase her control over her life. In my experience prosecuting and supervising domestic violence cases in the New York County District Attorney's Office, I found this to be especially true of acts triggering the intervention of law enforcement. See Martha M. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-6 (1991) ("[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."). Cf. Brief of Amici Curiae National Network to End Domestic Violence et al. in Support of Respondent at 7, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (Nos. 05-5224 and 05-5705), 2006 U.S. S. Ct. Briefs LEXIS 198, at \*19 ("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 imply that an arrest will, in all or even most cases, bring about a permanent cessation of violence. See *infra* note 17 (acknowledging uncertainty regarding deterrent effects of arrest in domestic violence cases). Rather, arrest provides battered women with a reprieve, however temporary, that is of value for a variety of reasons.

<sup>16</sup> See, e.g., Brief of Amici Curiae National Network to End Domestic Violence, *supra* note 15, at 48 n.20 ("It is not uncommon for domestic abusers to threaten their victims that they will kill them if they call the



the police are able to make an arrest, there is every reason to believe that—after a respite—the battering will continue.<sup>17</sup> 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 this particular battering relationship<sup>18</sup>—to be the “end” of the criminal incident. The exigency she experiences requires a narration of past events in order to resolve the immediate danger they precipitated. This reality fatally undermines judicial reasoning predicated on the “crying for help” versus “providing information to law enforcement” rubric.

Rather than reject this reasoning, the Supreme Court recently reified it in *Davis*.<sup>19</sup> According to Justice Scalia, writing for the

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police . . . .”) (citing Director of Milwaukee County District Attorney's Office Domestic Violence Unit).

<sup>17</sup> Domestic violence victims are rarely (if ever) able to predict with certainty the impact of law enforcement involvement on future abuse. *See generally* note 15. Indeed, there is considerable controversy regarding the deterrent effects of arrest in battering relationships. *See, e.g.*, Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929 (1994); Eve Buzawa & Carl Zuawa, *Arrest is No Panacea*, CURRENT CONTROVERSIES ON FAMILY VIOLENCE 337 (Gelles & Loseke eds., 1993). *See also* ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 184-88 (2000) (discussing 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 as a practical matter that the period of exigency relevant to the 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) (remarking that “[t]here are many line-drawing dilemmas throughout the criminal law”). Ideally, these lines are drawn in a manner that corresponds to underlying empirical realities.

<sup>18</sup> After *Davis*, the focus of judicial inquiry now would seem to be on the “circumstances objectively indicating . . . the primary purpose of the interrogation,” although “it is in the final analysis the declarant's statements, not the interrogator's questions” that remain at the heart of the Confrontation Clause. 126 S. Ct. at 2273-74.

<sup>19</sup> *See generally id.*

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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.”<sup>20</sup> Conversely, if the “primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution”—i.e., there is “no ongoing emergency”—a resulting statement is testimonial.<sup>21</sup> Where 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 occurred<sup>22</sup>—the narrative of events necessary to trigger law enforcement assistance is classified as testimonial hearsay.

In this manner, the passage of an “event” essentially becomes one proxy for the resolution of exigency. Yet tensions within the opinion regarding what counts as an “event” are left

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<sup>20</sup> *Id.* at 2273.

<sup>21</sup> *Id.* Adopting this binary standard, the Court affirmed the state court ruling in *Davis*, holding that the “primary purpose” of the 911 call “was to enable police assistance to meet an ongoing emergency”; but it reversed the state court holding in *Hammon*, classifying the challenged statements to the responding police officers as “part of an investigation into possibly criminal past conduct.” *Id.* at 2278. 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 purported to differentiate Michelle McCrotty’s words from Amy Hammon’s and to justify its definition of the latter as testimonial. *Id.* at 2276-78. Since “Amy’s statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation,” *id.* at 2279, their admission at trial constituted a violation of the defendant’s Confrontation Clause rights.

<sup>22</sup> Indeed, given the escalating nature of domestic violence, where one crime has just occurred, a victim’s circumstances may be even more “exigent.” See Mahoney, *supra* note 15, at 5-6 (“[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.”) *Cf.* Brief of Amici Curiae National Network to End Domestic Violence, *supra* note 15, at \*19 (“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”).

unresolved by the majority's unwillingness to concede that the concept is subject to interpretation. The Court leaps to an analysis premised on tense—that is, 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.”

If “event” were defined as narrowly as possible—i.e., as the infliction of physical injury—it might be possible to identify when an event had terminated. 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 like), it ultimately concludes—as it must—that “event” must be defined more broadly, at the very least, to encompass “a threatening situation” or “ongoing emergency.” After all, Davis already had left the home moments before McCrotty, the victim, described the assault to the 911 operator.<sup>23</sup> Yet somehow, the Court is able to view her as “speaking about events as they were actually happen[ing].”<sup>24</sup>

Beyond the ambiguity surrounding the device of “event,” *Davis* rests on the fallacy that exigency can be discerned without reference to context.<sup>25</sup> The Court's treatment of *Hammon v.*

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<sup>23</sup> See *Davis*, 126 S. Ct. at 2271 (2006); *State v. Davis*, 111 P.3d 844, 846 (Wash. 2005).

<sup>24</sup> *Davis*, 126 S. Ct. at 2276.

<sup>25</sup> In contrast, the opinion of Justice Thomas, concurring in the judgment in *Davis* and dissenting in *Hammon*, expressly contemplates the dynamics of domestic violence. Consider the following passage:

[T]he fact that the officer in *Hammon* was investigating Mr. Hammon's past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, 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

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*Indiana*, the consolidated companion case to *Davis*, is instructive in this regard.<sup>26</sup> *Hammon* involved the admissibility of a statement made by Amy Hammon to a police officer responding to the crime scene. The statement relayed information regarding an assault by the victim's husband. By purporting to differentiate Michelle McCrotty's words from those of Amy Hammon,<sup>27</sup> the Court justified its definition of the latter as testimonial and the former as non-testimonial. In some respects, this result is not surprising. After all, Michelle McCrotty is more readily analogized to victims of paradigmatic crime:<sup>28</sup> Her attacker had just recently fled, while Amy Hammon's was still in the house during the police investigation. But this does not mean that exigency can only be experienced as it was by Michelle McCrotty. Amy Hammon's story is not unlike those of countless battered women unable to communicate with law enforcement "about events as they [are] actually happening."<sup>29</sup> Yet the

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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."

*Id.* at 2284-85.

<sup>26</sup> *Hammon v. State*, 829 N.E.2d 444, *rev'd*, 126 S. Ct. 2266 (2006).

<sup>27</sup> *Davis*, 126 S. Ct. at 2278-79.

<sup>28</sup> 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 the current infliction of a crime—is the relevant construct. 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. 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 which described past events and was, therefore, testimonial.

<sup>29</sup> *Id.* 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.

Court's inability (or unwillingness) to contemplate her perspective allowed 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."<sup>30</sup> As "there was no emergency in progress"<sup>31</sup> (apparently because the responding officer "heard no arguments or crashing and saw no one throw or break anything"<sup>32</sup>) and "there was no immediate threat"<sup>33</sup> once the officers arrived, it was clear to the Court that "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime."<sup>34</sup> And thus, Amy Hammon was "cast . . . in the unlikely role of a witness."<sup>35</sup>

The portion of *Davis* treating *Hammon* may well be criticized for its application of the Court's newly articulated definition of testimonial to the facts. But Amy Hammon *could not* "seek aid" without "telling a story about the past." (After all, the 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 defective.<sup>36</sup> By equating the past commission of a crime with the resolution of exigency—in essence, by propounding the primacy of tense<sup>37</sup>—the Court negates the

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<sup>30</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2278 (2006).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See id.* at 2277. This language comes from the portion of the opinion where the Court, rejecting *Davis*' Confrontation Clause challenge, dismisses the argument that Michelle McCrotty's statement was testimonial. *Id.* The Court correctly observes that McCrotty's "ex parte communication" was not "aligned" with "[its] courtroom analogues," concluding that "[n]o 'witness' goes into court to proclaim an emergency and seek help." *Id.*

<sup>36</sup> *See supra* note 4.

<sup>37</sup> *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."). *See also supra* notes 23-24 and accompanying text (critiquing ambiguity surrounding Court's use of "event").

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realities of battering.<sup>38</sup>

The definition of testimonial embodies assumptions about the nature of crime that are false in the battering realm. Incorporating a model of discrete, episodic physical violence that is incompatible with ongoing, multi-dimensional abuse, the Court formulates a standard for classifying testimonial hearsay that cannot be truly mapped onto domestic violence cases. Faced with the task of implementing a meaningless construct, judges are left with only unattractive options. They may grapple with the messy truth of ongoing emergencies—thereby confronting the inherent unworkability of the standard announced by *Davis*, and the inevitably *ad hoc* nature of decisions purporting to implement it. Alternatively, they may ignore the contextualized nature of ongoing emergencies, thereby maintaining the illusion of a rule by law (not judges), but at the cost of jurisprudential integrity.

## II. AFTER *DAVIS*

It is still too early to predict judicial reaction to the new regime. Nevertheless, cases decided in the immediate wake of *Davis* suggest lower court resistance to the Court's tacit equation of battering with other types of crime.<sup>39</sup> The decisions treating

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<sup>38</sup> 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 physical injury-focused response to domestic violence. See generally, Tuerkheimer, *Remedying the Harm of Battering*, *supra* note 1; Deborah Tuerkheimer, *Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later*, 75 GEO. WASH. L. REV (forthcoming 2007) (manuscript at 16-17, on file with author) (discussing relationship between Court's recent 6th Amendment jurisprudence and proposed substantive criminal law reform).

<sup>39</sup> As of November 17, 2006, approximately 140 lower court decisions have cited *Davis*, although a number of these citations simply reflect remand orders, rather than treatment of *Davis* on the merits. (This figure also does not include grant, vacate and remand orders issued by the United States Supreme Court.) About a quarter of these cases involve prosecutions for

on-scene statements to responding police officers mostly have determined that the hearsay is non-testimonial.<sup>40</sup> These cases are more significant for what their application of *Davis* reveals about the test itself, and the ways in which courts may attempt to navigate its failings, than for their outcomes.

The case of *Vinson v. State*<sup>41</sup> is illustrative of what might be seen as a judicial inclination to apply *Davis*' test in a manner that more adequately accounts for the dynamics of battering than does the *Davis* opinion itself.<sup>42</sup> In *Vinson*, the police responded

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domestic violence. *See, e.g.*, *State v. Ly*, No. A05-1106, 2006 Minn. App. Unpub. LEXIS 853 (Minn. Ct. App. Aug. 8, 2006), *State v. Mancini*, No. A05-1910, 2006 Minn. App. Unpub. LEXIS 859 (Minn. Ct. App. Aug. 8, 2006), *State v. Vinson*, Nos. 01-05-00784-CR and 01-05-00785-CR, 2006 Tex. App. LEXIS 7036 (Tex. App. Aug. 10, 2006), *State v. Rodriguez*, 722 N.W.2d 136 (Wisc. Ct. App. 2006).

<sup>40</sup> *See, e.g.*, *State v. Ly*, No. A05-1106, 2006 Minn. App. Unpub. LEXIS 853 (Minn. Ct. App. Aug. 8, 2006), *State v. Mancini*, No. A05-1910, 2006 Minn. App. Unpub. LEXIS 859 (Minn. Ct. App. Aug. 8, 2006), *State v. Vinson*, Nos. 01-05-00784-CR and 01-05-00785-CR, 2006 Tex. App. LEXIS 7036 (Tex. App. Aug. 10, 2006), *State v. Rodriguez*, 722 N.W.2d 136 (Wisc. Ct. App. 2006). Interestingly, the designation of 911 calls has arisen with less frequency. *But see* *Jackson v. State*, 931 So. 2d 1062, 1063 (Fla. Dist. Ct. App. 2006) (classifying with little analysis statement as non-testimonial since it "described events as they were actually happening"); *Santacruz v. State*, No. 14-05-00227-CR, 2006 Tex. App. LEXIS 7789, at \*8 (Tex. App. Aug. 31, 2006) (holding some portions of call deemed testimonial, because "there was apparently less, if any, threat of imminent danger while the call was being placed" from victim's mother's house after victim was able to leave crime scene).

<sup>41</sup> No. 01-05-00784-CR, No. 01-05-00785-CR, 2006 Tex. App. LEXIS 7036, at \*1 (Tex. App. Aug. 10, 2006).

<sup>42</sup> *See also Mancini*, 2006 Minn. App. Unpub. LEXIS 859, at \*14 ("based on [the domestic violence victim's] emotional state and the informal nature of the conversation with the officer, we conclude that a reasonable, objective witness would not contemplate that the statements to the responding officer would be used in a later trial"); *Ly*, 2006 Minn. App. Unpub. LEXIS 853, at \*\*9-10 (finding statements concededly similar to those defined as testimonial in *Davis* deemed non-testimonial because they were given shortly after the police found domestic violence victim bleeding, because officers "were still attempting to determine who was involved," and because she "was not cooperating with police").

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to the scene “within 10 to 15 minutes” of a 911 hang-up call and were told by the victim, who appeared to have recent injuries, that she had been assaulted by her boyfriend.<sup>43</sup> Soon after, the defendant entered the room, where he remained during the course of much of the ensuing conversation between the police and the victim.<sup>44</sup> All of the victim’s statements were deemed non-testimonial.<sup>45</sup>

With respect to the victim’s initial description of the incident, the *Vinson* court, noting the victim’s “bloodied appearance,” and that “the deputy knew that, only minutes before, a woman in that same apartment had been yelling for police assistance while a man denied that any problem existed,” concluded that “the deputy’s asking only what had happened was tantamount to his having asked whether an emergency existed or whether [the victim] needed assistance.”<sup>46</sup> Citing *Davis*, the court emphasized that “[t]he Confrontation Clause does not prohibit questioning when, as here, its purpose, viewed objectively, is to ascertain if there is an ongoing emergency.”<sup>47</sup>

In classifying the deputy’s subsequent questioning of the complainant (“the extent and formality of which is not revealed”), the court viewed the defendant’s sweaty, shirtless, and “very excited” appearance, as well as his interaction with the injured victim (i.e., his “implicit order” that she “answer in a certain way so that he would not be taken to jail”) as an “indicat[ion] that the ‘elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn . . . what had happened in the past.’”<sup>48</sup> Thus, in *Vinson*,

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<sup>43</sup> *Vinson*, 2006 Tex. App. LEXIS 7036, at \*3.

<sup>44</sup> The record was “somewhat unclear as to exactly when appellant was removed from the apartment,” but the court interprets the evidence to suggest that the defendant was present when all of the challenged statements were made. *Id.*, at \*6 n.3. For the possible significance of this observation, see *infra* note 50 and accompanying text (discussing perpetrator presence as possibly evolving proxy for emergency).

<sup>45</sup> *Id.*, at \*\*22-24.

<sup>46</sup> *Id.*, at \*23.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at \*24 (citing *Davis v. Washington*, 126 S. Ct. 2266, 2276 (2006))



the court was able to find an outlet for the pressure created by a doctrinal framework incompatible with the facts presented by a typical battering case.

The opinion in *State v. Rodriguez*<sup>49</sup> similarly reflects what may be a willingness on the part of the lower courts to adapt *Davis* to the realities of domestic violence.<sup>50</sup> At issue in *Rodriguez* were statements made by a domestic violence victim to the police when officers first responded to the scene and on the day following that initial interaction. In finding the statements describing the past assault to be non-testimonial, the court emphasized that the victim was not “motivated by anything other than [a] desire to get help and secure safety,” and that her “trauma” belied the notion that she had a “conscious expectation” that her words would later be used against the defendant.<sup>51</sup> Statements made to the police the following day were also deemed nontestimonial, since the defendant—who, *unknownst to police*, was present at the scene at the time of the questioning—“was . . . still a severe threat to [the victim’s] safety.”<sup>52</sup>

Again, it is too soon to forecast with certainty whether, and how, lower courts will make workable a framework that cannot be meaningfully applied to the facts presented by a typical domestic violence case.<sup>53</sup> That said, consider the possibility that a perpetrator’s presence at the crime scene at the time the

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(emphasis in original). Testimony by the deputy that “the scene did not feel safe until after appellant had been secured and back-up had arrived” also impacted the court’s determination. *Id.* at \*29.

<sup>49</sup> 722 N.W.2d 136 (Wis. App. Ct 2006).

<sup>50</sup> Given the relatively small sample size of written opinions involving domestic violence and treating *Davis* to date, my assessment of how the lower courts may be negotiating its defects is necessarily tentative.

<sup>51</sup> *Rodriguez*, 722 N.W.2d at 148.

<sup>52</sup> *Id.* After the police left the scene the previous day, the defendant returned home and attempted to stab the victim and her child. *See id.* at 141.

<sup>53</sup> Without specifically identifying the fundamental incoherence of the *Davis* test, one court has observed that “within the context of the fact patterns before the Court, the *Davis* Court crafted some diffuse guidelines which, because of the Court’s circumlocution, we must now attempt to distill into practical rules.” *State v. Mechling*, 633 S.E.2d 311, 319 (W. Va. 2006).

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challenged statements are made might generally become accepted as a proxy for an “ongoing emergency,” and the perpetrator’s absence from the scene viewed as presumptive evidence that a crisis has been resolved.<sup>54</sup> Under this rubric, the ongoing nature of battering would, to an extent, be acknowledged and employed to somewhat mitigate *Davis*’ shortcomings.

It should be emphasized that any such mitigation would be partial: a batterer’s departure from a crime scene (often in response to a victim’s call to police) hardly means that the danger of imminent harm to the victim has dissipated; absent arrest, in many cases, the threat remains real. And yet, lower court recognition that “ongoing emergencies” in domestic violence cases encompass situations in which—notwithstanding police presence—a batterer is still on the scene when the victim recounts what occurred would represent a significant departure from the Supreme Court’s limited understanding of the dynamics of domestic abuse.

If courts manipulate *Davis* to allow for a more empirically-based classification of hearsay as testimonial/nontestimonial, perhaps the ultimate impact of the decision may be largely conceptual. But it would be premature to reach this conclusion. Indeed, the Court’s orders granting certiorari, vacating the judgment, and remanding cases for further proceedings in *Davis*’ immediate aftermath do not bode well for judicial reasoning

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<sup>54</sup> Compare, e.g., *State v. Vinson*, Nos. 01-05-00784-CR and 01-05-00785-CR, 2006 Tex. App. LEXIS 7036, at \*27 (Tex. App. Aug. 10, 2006) (mentioning specifically perpetrator’s presence and behavior as indicating an “ongoing and dangerous situation”), with *Mechling*, 633 S.E.2d at 323 (noting that “the defendant had clearly departed the scene” when the victim was questioned, and concluding that the officers’ questioning of the victim “was part of an investigation into possibly criminal past conduct”). See also *Commonwealth v. Gonsalves*, 883 N.E.2d 549, 561 (Mass. 2005), cert. denied, 126 S. Ct. 2982 (2006) (“[B]y the time the officers arrived, although the complainant remained upset, the situation had diffused. The testifying officer stated that he was informed the assailant was no longer present. Nothing in the record indicates that his questioning of the complainant was designed to secure the scene.”).

predicated on an accurate perception of battering.<sup>55</sup> (The domestic violence cases that fall into this category resulted in the classification of on-scene statements as nontestimonial and effectively undermined the notion that an emergency is over when the beating ends.<sup>56</sup>) While many lower courts will continue to embrace the false dualisms upon which *Davis* was erected, in all likelihood, an uneasy judicial equilibrium will be reached; one which reflects but somewhat moderates the core defects of *Davis*.

Regardless of how the contortions manifest themselves, the “ongoing emergency” framework will continue to distort analysis of the threshold definitional question. Moreover, even if courts were to adopt the contextualized approach that I have suggested, there undoubtedly will be hearsay that is properly defined as testimonial.<sup>57</sup> Since some theoretical divergence is

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<sup>55</sup> This type of order is issued only when “intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

<sup>56</sup> *See, e.g.*, *People v. Thomas*, No. A104336, 2005 WL 2093065, at \*5 (Cal. App. 1st Dist. Aug. 31, 2005) (finding that victim made statements “shortly after the incident, while she was crying and frightened, and described the beating and the circumstances that immediately led up to it;” officer “was responding to a report of a crime and trying to find out what had happened and who was responsible”); *State v. Warsame*, 701 N.W.2d 305, 312 (Minn. Ct. App. 2005) (holding that victim, who was “on her way to the police station near her house when she encountered [police] . . . explained that all of the phone lines at her house had been cut;” because “[h]er assailant was still at large, and she was injured,” it was “evident” to the court that “she was seeking police protection and assistance”); *State v. Wright*, 701 N.W.2d 802, 814 (Minn. 2005) (mentioning that victim was “primarily concerned” about the defendant’s “ability to harm [her] in the future, and not with the criminal penalties that he might face for his actions that night.”).

<sup>57</sup> It may be that the discrepancy between what an evidentiary code requires and what the testimonial approach to confrontation demands has grown wider, particularly in the realm of domestic violence prosecution. When considering the scope of this discrepancy, it is worth noting the recent expansions of hearsay exceptions often used in victimless prosecution. For

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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. EVOLVING FORFEITURE

A criminal defendant whose wrongdoing<sup>58</sup> has procured the absence of his victim at trial<sup>59</sup> is deemed to have forfeited his right to confrontation.<sup>60</sup> This rule—expressly “approved” by the Court in both *Crawford*<sup>61</sup> and, more recently in *Davis*<sup>62</sup>—

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instance, California and Oregon have “ad hoc hearsay exceptions directed toward domestic violence victims” that allow certain statements of a declarant describing the infliction of physical injury or threat of physical injury against her provided the statement was made close in time to the incident. Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK L. REV. 311, 353 (2005). See also CAL. EVID. CODE. §1370(a)(1) & (3) (West 2001); OR. REV. STAT. §40.460(26)(a)(2002).

<sup>58</sup> “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). See *infra* notes 73-80 and accompanying text for further discussion of defining wrongdoing in the domestic violence context.

<sup>59</sup> See *infra* note 91 (discussing unavailability analysis meaningfully applied to domestic violence cases).

<sup>60</sup> “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 as knowingly, intelligently, and deliberately relinquished the right.” Richard D. Friedman, *Confrontation and the Definition of Chutzpah*, 31 ISR. L. REV. 506 (1997) [hereinafter *Confrontation*].

<sup>61</sup> *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., James P. Flanagan, *Confrontation, Equity, and the Misnamed Exception for “Forfeiture” by Wrongdoing*, 14 WM. & MARY BILL OF RTS. J. 1193 (2006).

<sup>62</sup> See *supra* note 12 (noting *Davis*’ reiteration of the vitality of the

”extinguishes confrontation claims on essentially equitable grounds,”<sup>63</sup> precluding an accused from “complain[ing] about the consequences of his own conduct.”<sup>64</sup> 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 the Confrontation Clause protection<sup>65</sup>—instantly creates the prospect of a newly robust forfeiture doctrine,<sup>66</sup> and provides an impetus for its re-envisioning.<sup>67</sup> As a consequence of the Court’s unequivocal

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forfeiture doctrine).

<sup>63</sup> *Crawford*, 541 U.S. at 62.

<sup>64</sup> See Friedman, *Confrontation*, *supra* note 60, at 516. Richard Friedman has stated:

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 . . . . A more satisfying explanation may be that the accused that 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.*

<sup>65</sup> See Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 5 (2004).

<sup>66</sup> As Myrna Raeder observes, “*Crawford* virtually invited prosecutors to raise claims of forfeiture when facing Confrontation Clause challenges.” Raeder, *supra* note 57, at 361.

<sup>67</sup> In contrast to the abundance of cases treating the testimonial question, 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

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“decoupling”<sup>68</sup> of the constitutional right from the evidentiary code,<sup>69</sup> constitutional forfeiture must be given its own doctrinal space.<sup>70</sup> Indeed, the dramatically changed approach to the

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best to effect forfeiture’s normative potential in a new jurisprudential era.

<sup>68</sup> Raeder, *supra* note 57, at 363.

<sup>69</sup> 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.

<sup>70</sup> See Raeder, *supra* note 57, at 363 (“In my view, we need to separate the forfeiture hearsay exception from the constitutional forfeiture doctrine.”). Since *Davis* was decided, a number of courts have reiterated that constitutional forfeiture—unlike its evidentiary counterpart (codified at FED. R. EVID. 804(b)(6))—does not require specific intent to procure a witness’ trial absence. See, e.g., *State v. Jensen*, No. 2004AP2481-CR, 2007 WL 543053, at \*12-14 (Wis. 2007) (rejecting argument that specific intent requirement applies to constitutional forfeiture by wrongdoing doctrine); *People v. Giles*, 2007 Cal. LEXIS 1913, at \*32 (Cal. 2007) (“[F]orfeiture principles can and should logically and equitably be extended to . . . cases in which an intent-to-silence element is missing.”). See also *State v. Brooks*, No. W2004-02834-CCA-R3-CD, 2006 Tenn. Crim. App. LEXIS 668, at \*26 (Aug. 31, 2006) (“[U]nlike the forfeiture by wrongdoing exception to the hearsay rule, a defendant’s intent is irrelevant with respect to the forfeiture by wrongdoing exception to the Confrontation Clause”); *Mechling*, 633 S.E.2d 311, *infra* note 53. Cf. *People v. McClain*, No. 6302/02, 2006 N.Y. Misc. LEXIS 2013, at \*12 (N.Y. Sup. Ct. May 10, 2006) (holding that the rule of forfeiture “simply provides that by killing another, a defendant forfeits his or her right to raise a confrontation clause challenge”); *People v. Jackson*, Crim. No. B183306, 2006 Cal. App. Unpub. LEXIS 7544, at \*13 (Cal. Ct. App. Aug. 28, 2006) (“Because [the victim’s] unavailability was caused by [the defendant’s] intentional criminal act, [the defendant] cannot be heard to complain that he was deprived of the opportunity to confront and cross-examine him.”). See also *State v. Romero*, 133 P.3d 842 (N.M. Ct. App.), *cert. granted*, 146 P.3d 809 (N.M. 2006). In *Romero*, a prosecution for murder of the defendant’s former wife, the appellate court noted its disagreement with the state Supreme Court precedent holding that proof of Confrontation Clause forfeiture requires a showing of a specific intent to procure the witness’ absence. The intermediate court remarked, “we 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. See *State v. Romero*, 113 P.3d 346 (N.M. 2005); E-

Confrontation Clause means that the forfeiture doctrine also must be conceptualized anew.

The need for this reexamination of forfeiture occasioned by *Crawford* is particularly critical in domestic violence cases, where the ongoing course of conduct which characterizes abusive relationships undermines both evidentiary<sup>71</sup> and classic constitutional forfeiture analysis.<sup>72</sup> Without an appreciation of how battering is different from other types of crime, judicial decision-making—which tends to default to reason by way of precedent and analogy<sup>73</sup>—will invariably fall short.<sup>74</sup> Thus, defining the contours of a constitutional forfeiture doctrine with meaning in the domestic violence realm requires an evolution in judicial reasoning.

Courts may be beginning to recognize this imperative. For instance, in *State v. Mechling*,<sup>75</sup> the West Virginia Supreme Court, in remanding a domestic violence conviction for a determination on forfeiture grounds, noted that “[a]n accused’s coercion or intimidation of a victim of domestic violence so as to trigger forfeiture can take many forms,” including pre-charge conduct, conduct not specifically directed at procuring trial absence, and conduct which can only be understood when viewed in context.<sup>76</sup> Predicated on an understanding of the nature of battering and the ways in which it is distinct from other types of crime, the *Mechling* court’s observations may be

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mail from Joel Jacobsen, Assistant Attorney General, New Mexico Attorney General’s Office, to Deborah Tuerkheimer, Associate Professor of Law, University of Maine School of Law (June 29, 2006, 14:31:00 EST) (on file with author).

<sup>71</sup> See *Crawford’s Triangle*, *supra* note 4, at Part III.A.

<sup>72</sup> See *Crawford’s Triangle*, *supra* note 4, at Part III.B.

<sup>73</sup> Cf. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1314 (1991) (noting that “legal method traditionally proceeds by analogy and distinction”).

<sup>74</sup> By “falling short,” I mean that in victimless domestic violence prosecutions, the equitable promise of forfeiture will remain largely unfulfilled. See *supra* notes 63-64 and accompanying text (noting normative underpinnings of forfeiture doctrine).

<sup>75</sup> See generally *Mechling*, 633 S.E.2d at 311.

<sup>76</sup> *Id.* at 326.

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viewed as an effort to begin to develop a forfeiture doctrine grounded in reality.

For judges to apply the principle of forfeiture faithfully to domestic violence cases requires acknowledgment that, as a general proposition,<sup>77</sup> abuse victims are absent from trials for reasons different from those that tend to cause other types of witnesses to become unavailable. The divergence of battering from a stranger violence template challenges existing conceptions of forfeiture in two fundamental ways. First, in many battering relationships, abuse occurring *prior to* the crime for which the defendant is being tried causes the victim's non-cooperation. Second, what causes a victim to absent herself from trial may not be readily identified as "misconduct." Put differently, forfeiture in domestic violence cases raises questions of chronology and of how to discern a defendant's misconduct. After elaborating on each inquiry, I will address how forfeiture in domestic violence cases might be proven.

*A. The Problem of Time*

Often, a domestic violence victim's absence from trial is caused by conduct on the part of the defendant that has occurred prior to, or even during, the commission of the crime with which he is charged.<sup>78</sup> Threats to harm, or even kill a woman if she ever calls the police or testifies for the prosecution, are used as mechanisms of control by countless batterers.<sup>79</sup> These threats

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<sup>77</sup> Asserting that an accurate understanding of the dynamics of battering should shape the contours of the forfeiture doctrine is perfectly consistent with a commitment to a requirement that, in each particular case, an individualized forfeiture determination must be made. *See infra* note 86 and accompanying text.

<sup>78</sup> This dynamic is one of a number of reasons that a requirement that the defendant specifically intend to procure a witness's absence from trial is particularly inapt in the domestic violence context. *See supra* note 66 and accompanying text (discussing judicial refusal to import this evidentiary construct to constitutional realm).

<sup>79</sup> *See* Lininger, *supra* note 4, 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



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 jail by virtue of having been announced prior to the crime for which the batterer happens to be standing trial. Indeed, it is often impossible to isolate the "tampering conduct" from the crime itself,<sup>80</sup> since the nature of the relationship between a batterer and his victim often renders superfluous acts aimed specifically at procuring trial absence.<sup>81</sup>

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.

### B. *The Problem of "What Counts"*

In some cases, of course, the defendant engages in misconduct occurring after the charged crime in a manner that

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retaliatory violence in as many as half of all cases. . . ." (citing Randall Fritzier & Lenore Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 FAM. CT. REV. 28, 33 (2000), available at <http://aja.ncsc.dni.us/courtrv/review.html>)).

<sup>80</sup> 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, *Remedying the Harm of Battering*, *supra* note 1.

<sup>81</sup> See *supra* note 2 and accompanying text. 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) (mentioning defendant who menaced girlfriend with 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 when a batterer behaves in ways that correspond more closely to traditional understandings of "tampering," however, his actions are embedded in a relationship characterized by the violent exercise of power.

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causes the victim's unavailability.<sup>82</sup> Yet 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 relationship—becomes readily apparent.

In marked contrast to the archetypical tampering case, where courts have little trouble seeing the likely effect of a murder defendant's call from jail threatening to kill a witness if she testifies, the meaning ascribed by a domestic violence victim to conduct by her abuser can rarely be understood or evaluated without reference to the abusive relationship.<sup>83</sup>

This tension relates to a concern articulated by the lower court in *Hammon*:

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?<sup>84</sup>

This question cannot be answered in the abstract, and the fact-dependent nature of the inquiry can hardly be overstated.

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<sup>82</sup> Here, the question of what "misconduct" constitutes a forfeiture of confrontation rights is put in starkest relief, although the inquiry is relevant regardless of *when* the (mis)conduct which caused the victim's absence occurred in relation to the charged crime.

<sup>83</sup> "[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, *Remedying the Harm of Battering*, *supra* note 1, at 973-74. See Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU. L. REV. 2117, 2120 (1993) ("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.").

<sup>84</sup> *Hammon v. State*, 809 N.E.2d 945, 951 n.3 (Ind. App. 2004), *vacated*, 829 N.E.2d 444 (2005).

With regard to the reasoning process itself (as opposed to its outcome), however, it may be said that without an appreciation of the importance of context, and a sense of the patterned nature of battering, judicial forfeiture decisions will be unduly restrictive. Unless the dynamics of abuse are taken into account, the principle of forfeiture cannot be faithfully applied to domestic violence cases. Insight into the nature of battering is thus essential for the equitable underpinnings of the rule to be realized.

### C. Proving Forfeiture

Accepting that in many, if not most, victimless domestic violence prosecutions a batterer's conduct *over time* has caused the victim's unavailability does not answer the question of how judges are to determine whether a particular defendant has forfeited his constitutional rights.<sup>85</sup> One fundamental requirement is an evidentiary hearing at which the prosecution has the burden of proving that the defendant's misconduct caused the victim's unavailability.<sup>86</sup> In my prosecutorial experience, many victims

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<sup>85</sup> Cf. Raeder, *supra* note 57, at 361 ("Some prosecutors are already arguing that domestic violence cases *by their very 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, Tom Lininger has aptly observed 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." Tom Lininger, *Yes, Virginia, There is a Confrontation Clause*, 71 BROOK. L. REV. 401, 407 (2005).

<sup>86</sup> Importantly, "forfeiture cannot be assumed without specific evidence linking a defendant to a complainant's failure to testify at trial." Raeder, *supra* note 57, at 361. "Specific evidence," in my view, contemplates proof of how the particular defendant on trial, by his battering conduct, caused the victim's unavailability. This requisite linkage should go some way to alleviating fears that forfeiture will be too radically expanded by a categorical domestic violence exception to the default requirement of confrontation.

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are, at some point in the process, quite candid about their reasons for wishing charges to be “dropped”; their hearsay statements are generally admissible at a forfeiture hearing.<sup>87</sup> Other evidence might include orders of protection, family court petitions and transcripts, prior police reports, and expert testimony on the effects of battering.<sup>88</sup>

In many victimless prosecutions, provided an accurate judicial conception of what may constitute forfeiture, the burden of proving that the defendant’s misconduct procured the complainant’s trial absence will be satisfied.<sup>89</sup> Yet *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.<sup>90</sup> As understandings of forfeiture in the battering realm evolve, the law regarding witness unavailability may concomitantly develop in a manner that accounts for the particularities of domestic violence.<sup>91</sup> But in the meantime, in

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<sup>87</sup> FED. R. EVID. 104(a) (in making a determination regarding questions of admissibility, the court “is not bound by the rules of evidence except those with respect to privileges.”).

<sup>88</sup> See Adam M. Krischer, “*Though Justice May be Blind, It Is Not Stupid*”: Applying Common Sense to *Crawford* in Domestic Violence Cases, 38 PROSECUTOR 14, 15 (2004) (describing various other ways of proving a batterer’s responsibility for procuring victim unavailability, including prison phone records, jailhouse phone recordings, voicemail messages, e-mail, and eyewitnesses to threats).

<sup>89</sup> 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 57, at 364-65 (discussing 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”).

<sup>90</sup> Again, a judicial determination that a defendant forfeited his right of confrontation requires a finding of witness unavailability. See *supra* note 59 and accompanying text.

<sup>91</sup> Without purporting to resolve the issue, it is worth observing that what “reasonableness” requires in the domestic violence context may be distinct. More specifically, the “reasonableness” of prosecutorial efforts to secure the trial participation of a domestic violence victim may be partly dependent on whether the dynamics of battering warrant any degree of

many victimless prosecutions, these necessary measures to procure a victim's presence at trial will be undertaken—often reluctantly, and often unsuccessfully—forcing judges to apply an equitable doctrine to conduct that is in essence different from crimes that occupy a more historically privileged, less equivocal place in our criminal justice system.<sup>92</sup>

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.<sup>93</sup> 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.

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deference to the victim's expression of non-cooperation. 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? Must 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, *Prosecuting Batterers After Crawford*, *supra* note 4, at 1365 n. 70. Whether the "unavailability" component of the Confrontation Clause analysis should be analyzed differently in domestic violence cases is a question with which courts and commentators will likely grapple for some time.

<sup>92</sup> See *supra* note 1; Tuerkheimer, *Remedying the Harm of Battering*, *supra* note 1, at 969-71.

<sup>93</sup> For a forfeiture analysis that reflects judicial awareness of these dynamics, see *People v. Santiago*, No. 2725-02, 2003 WL 21507176 (N.Y. Sup. Ct. April 7, 2003). With the sole exception of *Santiago* (which was decided before *Crawford*), I have found no written opinion in a domestic violence case that conceptualizes forfeiture in the manner that I am advocating.

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## IV. A RELATIONAL APPROACH TO THE CONFRONTATION RIGHT AND ITS LOSS

The approach to confrontation that this Article has described may best be characterized as “relational.”<sup>94</sup> 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 domestic abuse challenges conventional notions of exigency derived from and related to paradigmatic crime between strangers. Consideration of the relational question 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. A relational view of forfeiture requires contemplation of the connection between the defendant and victim when determining whether the defendant’s misconduct caused the victim’s unavailability at trial. Attending to the context of the relationship essential to battering thus impacts how the confrontation right is operationalized, a matter of great import to the future prosecution of domestic violence.

More broadly, a relational approach also may influence how we view the meaning of the confrontation right. By synthesizing my critiques of the “testimonial” inquiry and of the 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 is largely dependent on the configuration of relationships between the accuser, state, and accused—a variable scarcely noticed by courts or commentators. 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.

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<sup>94</sup> See *supra* note 8 (qualifying use of “relational”).

We can see how integral this default arrangement is to the “paradigmatic Confrontation Clause violation” suffered by Sir Walter Raleigh.<sup>95</sup> In the case against Raleigh, the relationship between the 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 produced . . . .”<sup>96</sup>

In prosecutions for paradigmatic crime, the relational triangle may be generally characterized in this manner: the accuser is “in the house hard by;” or aligned with the state against the accused. In the victimless domestic violence realm, however, the same cannot be said. Indeed, quite the opposite is true: in most cases where the prosecution is proceeding without a victim,<sup>97</sup> 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”<sup>98</sup> may be

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<sup>95</sup> Crawford v. Washington, 541 U.S. 36, 52 (2004) (noting that the Confrontation Clause “was directed [at] . . . notorious treason cases like Raleigh’s;” “Raleigh’s trial has long been thought a paradigmatic confrontation violation.”).

<sup>96</sup> DAVID JARDINE, CRIMINAL TRIALS 427 (1832). In the alternative: JOHN GEORGE PHILLIMORE, THE HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 157-58 (1850).

<sup>97</sup> In the vast majority of victimless prosecutions, it is the preferences of domestic violence victims, as opposed to the strategic maneuvering of prosecutors, that drive this aspect of prosecutorial decision-making. See *supra* note 4 (noting high percentage of uncooperative domestic violence victims).

<sup>98</sup> See Davis v. Washington, 126 S. Ct. 2266, 2274 (2006). Cf. Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 UNIV. RICH. L. REV. 511, 514 n. 18 (2005). Robert Mosteller observes:

Somewhat inexplicably, in my judgment, one aspect that [Crawford’s] historical treatment and preliminary definition leaves out is my particular focus on accusers and accusatory statements, as opposed to testimonial statements. I believe there

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different when the witness is a victim of domestic 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* majority<sup>99</sup>—the providing 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.<sup>100</sup>

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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. (citation omitted) 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.

*Id.*

<sup>99</sup> See *Crawford*, 541 U.S. at 51 (“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.”).

<sup>100</sup> 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



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. Classifying this type of hearsay as nontestimonial reflects awareness that a domestic violence victim has not permanently shifted her allegiance from the defendant by asking for police protection and, 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. The contextualized judicial determination that I have urged 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.<sup>101</sup> While theoretical perspectives on the value of the right are varied,<sup>102</sup> I contend that the identification of a relational triangle has implications across the conceptual spectrum, enhancing our understanding of how best to advance whatever the chosen norm. Across

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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."

Richard D. Friedman, *Grappling with the Meaning of Testimonial*, 71 BROOK. L. REV. 241, 259 (2005).

<sup>101</sup> See *Crawford*, 546 U.S. at 61.

<sup>102</sup> See Tuerkheimer, *Crawford's Triangle*, *supra* note 4, at 59-61 (summarizing various normative perspectives on the right of confrontation, including the individual dignity theory, the "accuser/obligation" approach, the limited government model, and a utilitarian "truth seeking" understanding of the right.).

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theoretical orientations, a relational perspective speaks to what implementation of the confrontation right requires.<sup>103</sup>

#### CONCLUSION

The departure of domestic violence from a traditional crime archetype shows that a particular vision of relationships has, until now, animated our sense of what the Constitution requires. Toward the end of discerning whether confrontation furthers its intended normative purpose, a relational inquiry reveals that the meaning of “absent accuser” is distinct in the battering context. Similarly, a relational approach to forfeiture contemplates whether, by his battering behavior, a defendant has reconfigured the conventional alignment of the accused-accuser-state triad. By exposing a conceptual triangle that frames Confrontation Clause challenges, the relational insight thus advances our understanding of the confrontation right and how its promise may best be realized.

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<sup>103</sup> For application of this argument to competing visions of the function of confrontation, see *id.*