

Prosecuting Domestic Violence After *Crawford*. Why a Categorical Approach to the Forfeiture Doctrine Threatens Female Autonomy

MICHAEL VARGAS*

INTRODUCTION

Prosecutors face a unique dilemma in domestic violence cases after *Crawford v. Washington*.¹ Post-*Crawford*, the Confrontation Clause requires any statement deemed “testimonial” to be subject to cross-examination in order to be admitted against the defendant, no matter how reliable or fundamental the evidence is to the prosecutor’s case.² Application of the Confrontation Clause is especially salient in domestic violence cases because successful prosecution of alleged abusers often hinges on the admission of “testimonial” out-of-court statements and sworn affidavits made by a victim of abuse against her spouse.³ Introduction of these accusations of domestic violence into evidence is further complicated by the fact that a victim of domestic abuse is often reluctant to cooperate with prosecutors by testifying against her spouse, therefore denying the defendant any meaningful opportunity for cross-examination.⁴ As a result, the Confrontation Clause often precludes admittance of these probative victim statements. If prosecutors wish to somehow introduce this evidence at trial, they must seek an alternative means of doing so.

Absent an opportunity for cross-examination, “testimonial” evidence can only be admitted against the defendant in one of two ways: (1) if the statement in question was a dying declaration made by the victim when her death was imminent; or (2) if the defendant has forfeited his right to confrontation by his own wrongdoing.⁵ Dying declarations do not play a significant role in domestic

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1. 541 U.S. 36 (2004).

2. *Id.* at 68 (“Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”); *contra* *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

3. See Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 281–82 (2006) (noting that prior to *Crawford*, prosecutors did not depend heavily on live testimony because the excited utterance hearsay exception allowed admission of the statements of accusers to law enforcement taken at the scene of the crime; these statements, if not taken to try to defuse an emergency, would likely qualify as testimonial under *Davis*).

4. Rebecca McKinstry, “An Exercise in Fiction”: *The Sixth Amendment Confrontation Clause, Forfeiture by Wrongdoing, and Domestic Violence in Davis v. Washington*, 30 HARV. J.L. & GENDER 531, 531 (2007). Although I recognize that domestic violence can be initiated by either the male or female spouse, for the sake of clarity in reading and writing this Note, I will use male pronouns to refer to the abusive spouse and female pronouns to refer to the victim spouse.

5. Tim Donaldson & Karen Olson, “Classic Abusive Relationships” and the Inference of Witness

violence prosecutions even if the victim dies because the statements sought to be introduced are usually provided to law enforcement when the victim's death is not imminent.⁶ The forfeiture-by-wrongdoing doctrine, therefore, has become the primary tool for prosecutors attempting to introduce "testimonial" evidence at trial when a domestic violence victim refuses to testify against her spouse.

Not surprisingly, domestic violence prosecutors have argued for a broad application of the forfeiture doctrine that extends even to cases in which the victim is still alive and has voluntarily decided not to testify against her spouse.⁷ Their rationale for doing so is as follows: a broad application of the forfeiture doctrine is necessary, even if the victim voluntarily decides not to testify against her spouse about prior accusations of abuse, because victims of domestic violence are being pressured or coerced by the defendant into not testifying for fear of violent reprisal.⁸

It may be surprising, though, that this prosecutorial tactic could be backed by Supreme Court precedent. In *Giles v. California*,⁹ the Supreme Court clarified that the defendant must have specifically intended to prevent a witness from testifying in order to forfeit his right of confrontation.¹⁰ However, the Court also addressed in dictum the possible application of the forfeiture doctrine in cases of domestic violence where the crime results in the victim's death.¹¹ Justice Scalia, writing for the majority, noted that evidence of prior domestic abuse could be relevant to the intent inquiry of the forfeiture doctrine because acts of domestic violence are often intended to dissuade a victim from obtaining any outside assistance.¹² But Justice Souter, in his concurrence, went one step further. Souter noted that an abusive relationship is *per se* sufficient to presume the defendant's specific intent to prevent the victim from testifying because an abusive relationship is meant to isolate the victim from any cooperation with law enforcement.¹³

This Note argues that in domestic violence cases where the victim is still alive, the forfeiture doctrine should be concerned solely with the specific intent of the defendant, as emphasized by the Supreme Court majority in *Giles*, in lieu of any categorical alternative. Scalia's case-by-case approach is underinclusive;

Tampering in Family Violence Cases After Giles v. California, 36 LINCOLN L. REV. 45, 45–46 (2009) (citing *Crawford*, 541 U.S. at 52).

6. See FED. R. EVID. 804(b)(2).

7. See Adam M. Krischer, "Though Justice May Be Blind, It is Not Stupid": Applying Common Sense to *Crawford v. Washington* in Domestic Violence Cases, 1 THE VOICE 1, 6 (Nov. 2004), available at <http://www.ndaa-apri.org/pdf/the-voice-vol-1-issue-1.pdf> ("Prosecutors must educate their judges that the domestic violence itself may have procured the victim's unavailability.").

8. See *id.* at 3 ("As most . . . domestic violence prosecutors have known for decades, a domestic violence abuser does not necessarily stop the abuse when the criminal justice system intervenes. Instead, many abusers become more abusive to reassert control over the victim.").

9. 554 U.S. 353 (2008).

10. See *id.* at 367.

11. *Id.* at 376–77.

12. *Id.*

13. *Id.* at 380 (Souter, J., concurring in part) (noting "the absence from the early material of any reason to doubt that the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process").

in some cases, the inference of the defendant's specific intent to prevent a victim from testifying, as ascertained by direct or circumstantial evidence, might be so strong as to require a (rebuttable) presumption of forfeiture. But Souter's categorical approach, while a valuable prospective tool for prosecutors, is overinclusive; in trying to enhance the voice of domestic violence victims, the law actually silences victims who do not wish to testify against their spouses by speaking for them.

Instead, specific intent should remain a primary guiding marker in the forfeiture inquiry for domestic violence crimes as it is in criminal law generally. Courts should focus on the specific intent of the defendant through the analysis of direct or circumstantial evidence because it is only in those cases where such evidence exists that the victim is actually being coerced into not testifying. That is, only in cases where there is such evidence has the defendant clearly manifested his intent to deprive the domestic violence victim of an opportunity to obtain outside assistance. Therefore, only those cases merit an override of the victim's autonomy and voice as to her decision to offer any testimonial evidence. By not focusing on the specific intent of the defendant, the state will inevitably silence the voices of those that are already voiceless in the criminal justice system: victims of domestic abuse.¹⁴ Instead of being able to shape their own destinies, victims of domestic violence have to rely on the state's blanket assertion that, in order for women to attain an even footing with their male counterparts, introducing prior accusations against their explicit wishes is both in their own best interest and in the best interest of society generally.

In Part I of this Note, I present an overview of the current state of Confrontation Clause jurisprudence, including a discussion of the forfeiture doctrine. In Part II of this Note, I explain the reasons why prosecutors believe that a categorical approach to forfeiture is a necessary tool for successful domestic violence prosecution. In Part III, I argue that such a broad approach to the forfeiture doctrine relies upon a flawed premise that a victim of domestic violence would always want to testify against her spouse unless she was being coerced not to testify. I note that there are both policy and practical reasons suggesting that such an approach would not automatically vindicate women's rights but could actually significantly impair them. In Part IV of this Note, I compare the forfeiture doctrine in domestic violence cases to the diffusion of the adverse testimony privilege from an outright prohibition to the current autonomy-based approach. I will argue that such an approach reasonably applies to the forfeiture doctrine as well, given that both doctrines involve the

14. Several articles have already been written as to whether a broad forfeiture right could disintegrate the categorical protection of the Confrontation Clause. This Note, for the most part, will not focus on this issue beyond the general fact that a broad application threatens the emanating principles and protections behind the *Crawford* decision in the context of domestic violence. This Note will focus instead on the effect that a broad application has on female autonomy and that this is enough to sway the application of the clause to a focus on specific intent rather than an approach based on a certain category of crimes (in this case, domestic violence). For further information relating to a concern about the disintegration of *Crawford* through a broad application of the forfeiture doctrine, see Rebecca Sims Talbott, *What Remains of the "Forfeited" Right to Confrontation? Restoring Sixth Amendment Values to the Forfeiture-By-Wrongdoing Rule in Light of Crawford v. Washington and Giles v. California*, 85 N.Y.U. L. REV. 1291 (2010); and James F. Flanagan, *In Defense of Giles—A Response to Professor Lininger*, 87 TEX. L. REV. 67, 76–77 (2009).

exclusion of potentially probative evidence. Finally, in Part V of this article, I operationalize my theory and argue that a focus on the specific intent of the defendant is the preferable approach, should the Court wish to vindicate the victim's autonomy and voice while preventing further gender inequality.

I. AN OVERVIEW OF THE FORFEITURE DOCTRINE

A. The Confrontation Clause

The Confrontation Clause of the Sixth Amendment of the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."¹⁵ The Confrontation Clause protects the defendant from potential federal abuse in several key ways. For one, the Confrontation Clause codifies the Framers' foundational belief in the importance of cross-examination.¹⁶ This belief is thought to have emanated from the common law response to the trial of Sir Walter Raleigh, who was found guilty of treason after various hearsay statements were introduced against him.¹⁷ Throughout the proceeding, Raleigh pleaded with the presiding judges to allow him to confront Lord Cobham, an accusatory witness, in order to expose Cobham's accusations as a lie.¹⁸

The Confrontation Clause can therefore be interpreted as a response to the shortcomings of Raleigh's trial in several ways.¹⁹ First, the Confrontation Clause ensures the reliability of evidence at trial by allowing the defendant to extract the truth of the matter through cross-examination.²⁰ Second, the right of confrontation ensures the appearance of procedural fairness and respect for the accused by providing a mechanism through which the defendant can physically face his accuser.²¹ Third, the Confrontation Clause prevents government abuse by preventing trials by affidavit and potential witness misinterpretation by the jury.²² However, some ambiguity remained as to the scope of the Confrontation Clause in determining what specific type of evidence was subject to cross-examination. This question was initially answered in *Ohio v. Roberts*.²³

In *Roberts*, the Supreme Court clarified that in order to introduce non-confronted hearsay evidence, the prosecution must satisfy a two-pronged test.

15. U.S. CONST. amend. VI.

16. Daniel Shaviro, *The Confrontation Clause Today in Light of Its Common Law Background*, 26 VAL. U. L. REV. 337, 341 (1991).

17. *Id.*; see also David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1646-47 (2009).

18. Sklansky, *supra* note 17, at 1647. Raleigh, in his trial, famously pleaded, "[Let] my accuser come face to face, and be deposed. Were the case but for a small copyhold, you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life!" William O. Douglas, *A Challenge to the Bar*, 28 NOTRE DAME LAW. 497, 499 (1953).

19. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) ("The basic purpose of the Confrontation Clause was to 'target[t]' the sort of 'abuses' exemplified at the notorious treason trial of Sir Walter Raleigh.").

20. See Talbott, *supra* note 14, at 1296 (noting that the reliability of evidence is "widely considered the most 'central concern' of the Clause").

21. *Maryland v. Craig*, 497 U.S. 836, 847 (1990).

22. *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring in result).

23. 448 U.S. 56 (1980).

First, the prosecution must demonstrate the unavailability of the declarant whose statement the prosecution seeks to introduce.²⁴ Then, the prosecution must prove that the statement itself bears adequate “indicia of reliability” to “comport[] with the ‘substance of constitutional protection.’”²⁵ If both prongs are met, then the hearsay evidence can be admitted at trial without being subject to the defendant’s confrontation. However, this rationale was subsequently reversed in *Crawford v. Washington*,²⁶ which now delineates the scope of the Confrontation Clause.

Under *Crawford*, only non-testimonial hearsay evidence can be admitted at trial without being subject to confrontation.²⁷ *Crawford* supplanted the previous “reliability of the evidence” inquiry central to the *Roberts* decision by focusing instead on the history of the Confrontation Clause. Examination of the clause’s legislative history provided two key inferences: (1) the Framers were primarily concerned with the evils associated with the introduction of *ex parte* examinations and other forms of testimonial evidence; and (2) the Framers would never have allowed admission of such testimonial evidence unless the declarant was unavailable at trial and there was a suitable prior opportunity for cross-examination.²⁸ The Court added that *Roberts*’ reliability concern placed too much focus on the interpretation of an “amorphous concept,” thereby allocating too much discretion in the hands of judges.²⁹ Instead, the only way to safeguard the accused from government abuse is for the accused to have a broad categorical protection in his right to confrontation in lieu of a malleable balancing test. Questions remained, however, as to how to apply *Crawford*’s new criterion for the admission of non-confronted hearsay because the definition of “testimonial” was “le[ft] for another day.”³⁰

Two years later, the Supreme Court shed some light on the definition of “testimonial” in *Davis v. Washington*.³¹ *Davis* clarified that statements made to government officials when not attempting to defuse an emergency situation are tantamount to statements taken to mount a law enforcement investigation.³² These statements are therefore “testimonial” and must be subject to cross-examination by the defendant if the statements are to be introduced at trial.³³ In

24. *Id.* at 65.

25. *Id.* at 66.

26. 541 U.S. 36 (2004).

27. See *id.* at 68 (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”).

28. *Id.* at 50–55.

29. *Id.* at 61.

30. *Id.* at 68.

31. 547 U.S. 813 (2006).

32. *Id.* at 822.

33. See generally *id.* at 828. The *Davis* case was consolidated with *Hammon v. Indiana*, another domestic violence case in which introduction of probative statements depended on whether it was deemed “testimonial” or not. The *Davis* case concerned a 911 call in which the victim of a domestic disturbance relayed to the 911 operator that the defendant was in the process of hitting her with his fists. The court determined that this statement was not testimonial because the purpose of the statement made to the 911 operator was to defuse an ongoing emergency. This determination was

determining whether statements elicited from the witness by law enforcement qualify as “testimonial” under this logic, lower courts are to apply a “primary purpose test.”³⁴ That is, lower courts must determine whether the primary purpose in obtaining the statement is to either defuse an emergency situation or to mount a law enforcement investigation.³⁵ But even though the Supreme Court provided the lower courts with some guidance as to how to determine whether evidence qualifies as “testimonial,” it still remained unclear how expansive the scope of an emergency might be and whose primary purpose is determinative in assessing whether the given statement is “testimonial,” that of the declarant or that of the law enforcement official.

Recently, in *Michigan v. Bryant*, the Supreme Court elaborated on the scope of what qualifies as an emergency response, noting that the scope can be quite broad.³⁶ *Bryant* involved statements made by a victim who was shot and later discovered by law enforcement in a gas station parking lot.³⁷ After police questioning at the gas station, the victim identified the shooter and told police that he recognized the shooter’s voice before being shot.³⁸ The Court clarified that these statements, identifying the shooter, qualified as “nontestimonial” because (1) the police officers were attempting to defuse an ongoing emergency, given that the defendant carried a gun and presented a threat to the public at large; and (2) the victim had no viable reason to fabricate the statements.³⁹ When someone is severely injured at the scene of a crime, the Court noted, there can be little doubt that the statements being made are reliable because the witness would have little reason to fabricate any evidence.⁴⁰

In *Bryant*, the Supreme Court again emphasized the reliability of the statements in question in determining whether the Confrontation Clause applies in lieu of the broad categorical safeguard of *Crawford*. Use of such broad reliability language in *Bryant* likely means that fewer statements will be deemed testimonial in the future, thereby relegating the utility of the forfeiture doctrine to a secondary tool for prosecutors seeking to admit probative evidence.⁴¹ What

contrasted with the *Hammon* case, in which the victim’s statement was taken by an officer at the scene of the crime after both the victim and the accused were already separated, and after the accused no longer posed any further threat to the victim. The court reasoned that this statement was testimonial because the police officer at the scene took the statements with the primary purpose of assembling “replies for use in his ‘investigat[ion].’” *Id.* at 830.

34. *Id.* at 822.

35. *Id.*

36. *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

37. *Id.* at 1150.

38. *Id.*

39. *Id.* at 1166–67.

40. *See id.* at 1157 (“Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.”).

41. This is because the scope of an emergency seems to be much more expansive than previously believed, given that the shooter was no longer present and given that the harm had already occurred in the past. Rather, the officers explicitly noted that their purpose in being at the gas station and in asking the victim questions was simply to apprehend the suspect. *Id.* at 1151. So, it is quite possible that statements that would otherwise be deemed “testimonial” under *Crawford* and *Davis* are now likely to be deemed “nontestimonial” after *Bryant*. These nontestimonial statements under *Bryant*

is clear is that the scope of the Confrontation Clause is still in flux and that the forfeiture doctrine presents a salient, albeit perhaps secondary, solution to the introduction of testimonial evidence under *Crawford*.

B. The Forfeiture Doctrine

Most important for the purpose of this Note is the Court's discussion in *Giles v. California* as to when a defendant has forfeited his right to confrontation, even if the evidence sought to be admitted against him undoubtedly qualifies as "testimonial."⁴² In 2002, Dwayne Giles killed Brenda Avie, shooting her six times.⁴³ Giles alleged that the shooting was in self-defense.⁴⁴ Three weeks before this incident, Avie provided several statements to law enforcement about an alleged domestic altercation.⁴⁵ Specifically, Avie alleged that Giles, her boyfriend at the time, had repeatedly punched her in the hand and face, choked her, and threatened to stab her with a knife.⁴⁶ At trial, the California prosecutor attempted to introduce these statements to rebut Giles' affirmative defense,⁴⁷ even though, under *Crawford*, these statements were plainly testimonial.⁴⁸

According to California law at the time, statements describing the infliction or threat of physical violence were admissible in open court when the declarant is both unavailable and when the prior statements are deemed particularly trustworthy.⁴⁹ The underlying rationale for the admission of these statements is that the doctrine of forfeiture applies as an equitable principle to ensure that a defendant does not benefit from his own wrongdoing by procuring witness unavailability through the threat of violence.⁵⁰ In other words, the law establishes that the defendant should be precluded from raising a Confrontation Clause-based defense since he seemingly procured the witness's absence himself.⁵¹ Both the California Court of Appeals and the California Supreme Court found this to be a proper application of the doctrine of forfeiture and concluded that the statements were admissible against Giles in court because: (1) Giles caused Avie's unavailability by murdering her; and (2) there was no reason to suspect Avie's statements to law enforcement three weeks prior to the crime's

might very well include prior accusations of domestic violence since the defendant is still at large and likely still living with his spouse.

42. *Giles v. California*, 554 U.S. 353 (2008).

43. *Id.* at 356.

44. *Id.*

45. *Id.*

46. *Id.* at 356–57.

47. *Id.* at 356.

48. See *Crawford v. Washington*, 541 U.S. 36, 52 (2004) ("Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.").

49. CAL. EVID. CODE, § 1370 (West Supp. 2008). Note that this law is very similar to the Supreme Court's formulation in *Ohio v. Roberts*, overturned in *Crawford v. Washington*.

50. *Giles*, 554 U.S. at 357.

51. See, e.g., GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 141 (1756), available at http://books.google.com/books?id=6MwDAAAAQAAJ&printsec=frontcover&source=gbs_ge_summary_1&cad=0#v=onepage&q&f=false (noting a defendant "shall never be admitted to shelter himself by such evil Practices on the Witness, that being to give him Advantage of his own Wrong").

commission were not trustworthy.⁵²

The Supreme Court reversed the lower courts, noting that in order for the defendant to forfeit his right of confrontation, the defendant must have wrongfully procured the unavailability of the witness with the specific intent to prevent the victim from testifying.⁵³ Unlike the California statute in question, the defendant's knowledge that performing a certain intimidating act *could* prevent a witness from testifying does not suffice for the admission of hearsay evidence.⁵⁴ Justice Scalia, writing for the majority, clarified that while the doctrine of forfeiture may be equitable in nature, it was primarily intended to target defendants who attempt to "bribe, intimidate, or kill any witnesses against him"⁵⁵ It was therefore not aimed at ensuring that any defendant who wrongfully caused the absence of a victim from the witness stand be deprived of an opportunity for cross examination without any inquiry into his *mens rea*. A contrary reading would be dangerous for two reasons. First, this approach would require a prior judicial determination that the defendant is guilty of the act in question for which the defendant is at trial before the issue ever reaches the jury.⁵⁶ Second, a judicial determination of what is "fair" amounts to "a thinly veiled invitation to overrule *Crawford*" by returning to the reliability concern in *Roberts*.⁵⁷ This is because *Crawford* specifically mandated a broad categorical guarantee in lieu of a judicial determination on the application of the amorphous concept of "reliability."⁵⁸

The Court also addressed, in dictum, the role that the forfeiture doctrine might specifically play in domestic violence cases. The majority opinion plainly asserts that the forfeiture doctrine always requires an inquiry into the specific intent of the defendant, even if such an inquiry would be detrimental to the conviction of potential domestic abusers.⁵⁹ There cannot be a unique Confrontation Clause approach to domestic violence crimes, according to the majority, which renders the defendant's *mens rea* irrelevant due to concerns about fundamental fairness.⁶⁰ That is not to say, however, that the domestic violence context plays no role in determining whether the defendant has forfeited his right to confrontation: "Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions."⁶¹ So, if the victim dies, previous evidence of abuse or threats of

52. *Giles*, 554 U.S. at 357.

53. *Id.* at 367–68.

54. *See id.* at 367 ("Forfeiture by wrongdoing' . . . applies only when the defendant 'engaged or acquiesced in wrongdoing that was intended to, and *did*, procure the unavailability of the declarant as a witness.'") (emphasis added).

55. *Id.* at 374.

56. *See id.* at 365 (noting that such a rationale "does not sit well with the right to trial by jury").

57. *Id.* at 374.

58. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

59. *See Giles*, 554 U.S. at 376.

60. *Id.* ("Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women?").

61. *Id.* at 377.

abuse could be highly relevant in determining the defendant's *mens rea* at the time of the crime.⁶²

In his concurrence, Justice Souter, joined by Justice Ginsburg, agreed with the majority's formulation of the forfeiture doctrine but argued that the majority adopted the wrong approach as to the role that evidence of past abuse or threats of abuse plays in the forfeiture inquiry.⁶³ Like the majority, Souter argued that the intent requirement for the forfeiture doctrine can be satisfied by an inference that the accuser sought to prevent the victim from testifying and that he intended to "thwart the judicial process" in doing so.⁶⁴ Souter differentiated himself from Scalia, however, by stating that in the "classic abusive relationship," the element of intent would be satisfied more often than not because abusive relationships, by their very nature, are "meant to isolate the victim from outside help."⁶⁵ If this fundamental premise is correct, Souter argued, there is no reason to think that, prior to the commission of the act in question, the abusive defendant "abandoned the dynamics of [the abusive relationship]."⁶⁶ That is, unlike Scalia's formulation in which evidence of an abusive relationship is one of several factors that can be used to infer the defendant's specific intent, an abusive relationship, according to Souter, constitutes *per se* forfeiture without any further inquiry needed into the defendant's *mens rea*.⁶⁷

Writing for the dissent, Justice Breyer also seemingly endorsed Souter's view, "recogniz[ing] that 'domestic violence' cases are 'notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.'"⁶⁸ Therefore, it is acceptable to presume purpose "based on no more than evidence of a history of domestic violence."⁶⁹

Albeit dictum, such persuasive reasoning has allowed prosecutors to argue for a broad application of the forfeiture doctrine in all domestic violence cases, even where the victim is still alive but refuses to cooperate. Their reason for proffering such a broad application of the forfeiture doctrine is as follows.

II. A BROAD FORFEITURE APPLICATION IN LIVING VICTIM CASES

In 1994, the Violence Against Women Act⁷⁰ (VAWA) put a national spotlight on the state's general inability to protect victims of domestic violence.⁷¹ Traditionally, the state restricted the crime of domestic violence to the private sphere, insisting that domestic interference was outside of the state's police

62. *Id.*

63. *Id.* at 379–80 (Souter, J., concurring).

64. *Id.* at 380 (Souter, J., concurring).

65. *Id.*

66. *See id.* ("If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger.")

67. *See id.*

68. *Id.* at 406 (Breyer, J., dissenting) (quoting *Davis v. Washington*, 547 U.S. 813, 832–33 (2006)).

69. *Id.*

70. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

71. G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN'S L.J. 133, 157 (2008).

power.⁷² But by labeling domestic violence as a private act, the state relinquished any obligation to assist those subject to systematic abuse. This systematic violence, some argue, has perpetuated gender inequities because the abuser attains a position of power over his abused.⁷³ VAWA sought to remedy this abuse and gender inequality by providing increased federal funding for the investigation and prosecution of domestic violence crimes. However, the resulting media attention relating to the passage of VAWA also seemingly placed considerable pressure on prosecutors to secure convictions of alleged domestic abusers.⁷⁴

Prosecutors responded to this national spotlight on domestic violence in several ways. First, as a public policy measure, states accorded the same level of intervention to the crime of domestic violence as they would accord to any other crime under the Fourteenth Amendment's Equal Protection Clause.⁷⁵ Second, in order to institute these measures, several states, including New York, adopted no-drop policies that force state prosecutors to press charges whenever an alleged instance of domestic violence is reported to the State Attorney's Office by law enforcement, regardless of whether or not the victim wants to press charges.⁷⁶ Third, if the victim refused to assist the government in the prosecution of her spouse by making herself unavailable,⁷⁷ prosecutors would still attempt to proffer past accusations of domestic violence at trial by arguing that introduction of these statements was both necessary and reliable under the *Roberts* regime.⁷⁸

With the subsequent change in Supreme Court case law, many prosecutors came to believe that *Crawford* posed a large hurdle to domestic violence convictions.⁷⁹ In cases of domestic violence, often the lone two witnesses, or at least the most important two witnesses, are the abusive spouse and the victim spouse.⁸⁰ The abusive spouse is unlikely to testify because he can assert his Fifth Amendment privilege.⁸¹ This means the victim spouse often holds the key to the

72. *Id.*

73. See generally Sarah F. Russell, *Covering Women and Violence: Media Treatment of VAWA's Civil Rights Remedy*, 9 MICH. J. GENDER & L. 327(2003).

74. See generally *id.*

75. See Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 231 (2003); U.S. CONST. amend. XIV.

76. See Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1226 (2001).

77. The victim in a domestic violence prosecution can make herself unavailable in various ways. For example, the victim can make herself unavailable by contempt of court, by privilege, or by failure to appear. See Brian J. Hurley, *Confrontation and the Unavailable Witness: Searching for a Standard*, 18 VAL. U. L. REV. 193, 194-95 (1983); Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach but not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/griffin.pdf>.

78. See, e.g., *Davis v. Washington*, 547 U.S. 813 (2006).

79. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 750 ("In a survey of over 60 prosecutors' offices in California, Oregon, and Washington, 63 percent of respondents reported the *Crawford* decision has significantly impeded prosecutions of domestic violence.").

80. See JOHN E. B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES, VOLUME 1 849 (2005).

81. See U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . .").

successful prosecution of the accused. In *Giles*, Scalia correctly pointed out that statements concerning the abuse made to friends and neighbors, as well as to physicians in the course of treatment, would still be admissible post-*Crawford* should these statements satisfy state hearsay rules.⁸² But oftentimes the sole evidence in these cases, or at least the most probative evidence in these private altercations, will be in the form of statements or affidavits made to law enforcement by the victim concerning prior instances of abuse, which undoubtedly qualify as “testimonial” under *Crawford*.⁸³ Therefore, there are only two ways to introduce such powerful probative evidence in the domestic violence context post-*Crawford*: (1) subject the evidence to cross-examination; or (2) argue that the defendant has forfeited his right to confrontation due to his own wrongdoing.

The first option is not very promising. Historically, spouses were disqualified from testifying against their spouses in court.⁸⁴ While there is now only a privilege where there was once a general prohibition,⁸⁵ an abused spouse is still generally reluctant to testify against the defendant spouse. Various empirical studies suggest that victims of domestic violence are more likely to recant prior statements or to refuse to testify than are victims of any other crime.⁸⁶ About eighty percent of accusers in domestic violence prosecutions refuse to cooperate with the government at some point in the case.⁸⁷ Their reasons for this reluctance vary. Testifying is an inherently stressful event and testifying against one’s spouse can be even more stressful.⁸⁸ It certainly does not help the prosecution either that victims can easily avoid testifying by asserting the adverse testimony privilege, which allows the victim to choose to what degree, if any, she wishes to testify against her spouse.⁸⁹ Even in states like New York where such a marital testimonial privilege does not exist, the victim spouse may elect to make herself unavailable by placing herself in contempt in lieu of testifying. So, if the prosecution is to introduce these probative statements, the most likely means of doing so is by virtue of the forfeiture doctrine.

There certainly are valid policy reasons to believe that a broad forfeiture application is necessary to secure the conviction of domestic abusers. About one

82. *Giles v. California*, 554 U.S. 353, 376 (2008); see also FED. R. EVID. 803(4) (noting that “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms” are not excluded by the hearsay rule).

83. *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004).

84. Myrna S. Raeder, *Thoughts About Giles and Forfeiture in Domestic Violence Cases*, 75 BROOK. L. REV. 1329, 1333 (2010).

85. *Trammel v. United States*, 445 U.S. 40, 53 (1980).

86. See Lininger, *supra* note 79, at 751, 768–69 (“Recent evidence suggests that 80 to 85 percent of battered women will recant at some point.”); see also 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) (estimating that ninety percent of domestic violence victims recant).

87. Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367 (1996); Lininger, *supra* note 79, at 751.

88. See Flanagan, *supra* note 14, at 76.

89. See *Trammel*, 445 U.S. at 53 (1980) (concluding that the witness-spouse may neither be compelled to, nor foreclosed from, testifying).

in five victims of domestic violence is repeatedly battered.⁹⁰ It is additionally estimated that up to ninety percent of battered women never report this abuse.⁹¹ Of those incidents that are reported to police, nearly half of the victims allege that their spouses threatened them with physical violence should they assist the prosecution.⁹² Should the victims decide to leave their partners during their spouses' prosecution, studies suggest that this departure period is the most dangerous period for victims of abuse.⁹³ During this period, married, female victims of domestic violence are four times more likely to report being raped, assaulted, or stalked.⁹⁴ Further, it cannot be doubted that violence can be used as a method of control in abusive relationships to dissuade victims from obtaining outside help. Due to this likelihood of coercion in abusive relationships by means of violence, there is no doubt that forfeiture must play a key role in domestic violence prosecutions, even in living victim cases. The difficulty lies in determining the scope of that role.

Under Justice Souter's formulation in *Giles*, forfeiture applies as long as the relationship in question qualifies as a "classic abusive relationship."⁹⁵ But it is unclear exactly what a "classic abusive relationship" is and how broad this designation might be. As a result, Souter's formulation could seemingly extend to all domestic violence prosecutions, including those in which the victim is alive but unavailable (whether through privilege, contempt, or physical unavailability). If the trial court finds as a matter of fact that the defendant and the victim were involved in a "classic abusive relationship," then it will be presumed that the defendant procured the unavailability of the victim. Thus, a defendant could forfeit his right to confrontation in a domestic violence case simply because a living spouse has refused to testify against him. It is further unclear whether this presumption would be rebuttable.⁹⁶

However, this formulation is questionable because it hinges on a flawed premise: that a victim of domestic abuse would always want to testify against her spouse absent the defendant's coercion. Such a fundamental premise is not accurate in its blanket application to all domestic violence cases for various reasons. First, it is unclear as a matter of policy whether the forced introduction of past accusations of abuse really vindicates the autonomy of women. It is quite possible that this policy does the exact opposite.⁹⁷ Second, there are various practical reasons why a victim of abuse might not want to testify against her spouse absent any abuse or coercion, including economic and familial concerns. If there is no probative evidence to suggest that she is being coerced into not

90. Alana Dunnigan, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. Rev. 1031, 1038-40 (2003).

91. *Id.*

92. Krischer, *supra* note 7, at 3.

93. PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NAT'L VIOLENCE AGAINST WOMEN SURVEY 37 (2000).

94. *Id.* In addition, male victims of domestic violence are three times as likely to report being raped, assaulted, or stalked during this period. *Id.*

95. *Giles v. California*, 554 U.S. 353, 380 (2008) (Souter, J., concurring).

96. Given that Justice Souter claimed that such a finding would constitute *per se* forfeiture instead of a strong presumption of forfeiture.

97. See *infra* Section III.

testifying, the victim's decision should be respected. Rather, the focus should turn to any legislative alternatives that would allow the victim to safely flee from an abusive spouse of her own volition.

If prosecution of domestic violence was meant to cure the systematic violence against women that perpetuates gender inequality, a categorical approach to forfeiture in these cases actually threatens gender equality in a reciprocal fashion. A categorical approach allows the state to assert power over the "victimized" by silencing her wants and needs without any specific consideration as to whether her decision was actually coerced. The many reasons why a broad application of forfeiture threatens female voice and autonomy are discussed below.

III. WHY AN OVERBROAD APPROACH THREATENS FEMALE AUTONOMY

Criminal law is a sanction for actions committed against the state, not for actions committed against a particular individual. For that reason, the victim's consent is not traditionally required for the prosecution of the defendant. That is not to say, however, that the victim's consent does not play a key role in the prosecutor's determination as to whether the state will press charges or not. Without the victim's consent, prosecution of the accused can be extremely challenging since the victim is often a key witness.⁹⁸ So, if the victim does not want to press charges, oftentimes the prosecutor will abide by those wishes and drop the case given the difficulty that the victim's lack of cooperation has on proving the elements of a crime beyond a reasonable doubt. Yet, under no-drop policies for domestic violence prosecutions, which many jurisdictions have adopted, a prosecutor cannot drop the case even if the victim does not wish to proceed. Instead, prosecutors are forced to try the case and introduce whatever probative evidence can be admitted, even if the evidence is admitted without the victim's consent.

For the most part, states have not adopted different prosecutorial policies regarding the admission of non-confronted victim testimony for cases in which the victim has died and for cases in which the victim is still alive. In domestic violence cases where the victim has died, the state obviously has a heightened responsibility to prosecute the accused. In these cases, the state can easily imply the victim's willingness to press charges against her spouse given the fact that she was murdered and thereby silenced. However, living victim domestic violence cases are different in one key way from cases in which the victim has died – living victims still have a voice. But the prosecutorial tactic applied to these wholly different cases is wholly the same: the state presumes the victim's willingness to assist the prosecution because she is viewed as irreversibly victimized.

Feminist thought is concerned with how oppressive power structures affect female autonomy and voice.⁹⁹ One such oppressive power structure is the state,

98. MYERS, *supra* note 80, at 849.

99. Mallika Kaur Sarkaria, *Lessons from Punjab's "Missing Girls": Toward a Global Feminist Perspective on "Choice" in Abortion*, 97 CALIF. L. REV. 905, 906 (2009).

traditionally assumed to be patriarchal.¹⁰⁰ One way to overcome the state's patriarchal stranglehold is to endorse a normative approach that promotes freedom of choice for women in all aspects of their lives.¹⁰¹ The recognition that a victim of abuse may still be psychologically able to control the prosecution of her accused in accordance with her long-term best interests aligns with this normative approach.

By allowing prosecutors to pursue cases without any input from victims, a categorical approach to abusive relationships denies exactly that which many feminists suggest is necessary for gender equality: choice and an opportunity to voice one's wishes. As such, a broad application of forfeiture inevitably disempowers women in the following way: women will either be forced to testify against their spouses indirectly through the admission of non-confronted prior accusations, or they will be socially castigated for remaining in an abusive relationship that they cannot control.¹⁰² This is due to the fact that a broad application of forfeiture presumes that the abused has been victimized to the point that she is weak, helpless, and unable to make informed, voluntary decisions.¹⁰³ A broad application presumes that the only way to prevent this coercion is for the state to intervene and silence the victim's overt wishes by asserting that violence and coercion have overridden individual agency. In other words, for a prosecutor to respect the wishes of a victim not to press charges, the victim must instruct the prosecutor to drop the charges with informed consent. But the state presumes that a victim of domestic violence can never provide informed consent because the consent is believed to have been compelled by fear, coercion, or involuntariness.

There are seemingly two main reasons why prosecutors and policymakers assume that domestic violence victims do not have the adequate agency to function as atomistic individuals. The first reason is due to dangerous, overbroad generalizations that manifest themselves into overt prosecutorial policies. The second reason is due to a failure to recognize the various practical and often safety-related reasons why a victim might not want to testify against her spouse even absent coercion.

A. Policy Reasons

One dangerous overgeneralization that manifests itself into a broad forfeiture application is the widely held belief that all battered women behave within the confines of the battered woman's syndrome. The battered woman's syndrome rose to prominence in criminal law cases in the 1970s as an attempted

100. R.W. Connell, *The State, Gender, and Sexual Politics: Theory and Appraisal*, 19 THEORY & SOC'Y 507, 508 (1990) (noting that "[r]ecent theoretical writing contains a remarkable series of sketches of a theory of the patriarchal state . . .").

101. Sarkaria, *supra* note 99, at 936.

102. Chiu, *supra* note 76, at 1225 (noting that battered women usually end up either being denied a voice by the system, or being blamed for their abuse).

103. *See id.* Chiu argues that some policies in the criminal justice system "consider battered women to be weak and helpless." *Id.* She claims that one of these policies is a no-drop system. *Id.* at 1230-32. I argue that another such policy is a potential categorical approach to the doctrine of forfeiture-by-wrongdoing.

self-defense justification for the murder of an abusive spouse committed by the abused spouse.¹⁰⁴ The battered woman's syndrome contains two distinct elements: (1) "a cycle of violence"; and (2) "learned helplessness."¹⁰⁵ The "cycle of violence" element of the battered woman's syndrome consists of three phases that determine the behavior of the battered spouse.¹⁰⁶ First, there is a period of initial tension that consists of verbal abuse and minor psychological abuse.¹⁰⁷ In this period, the woman will try to calm her abuser down or will be abnormally kind to the abuser to appease him and to prevent any violent escalation.¹⁰⁸ Second, there is a period of battering where women are subjected to the most dangerous period of physical abuse.¹⁰⁹ A woman's behavior during this period is solely concerned with protecting herself from further violence, recognizing that any resistance will only make the violence worse.¹¹⁰ The third phase, known as the "honeymoon phase,"¹¹¹ involves a period of reconciliation whereupon the batterer apologizes for his behavior and claims that he will never employ such violence again.¹¹² Here, the woman remains in the relationship believing that her spouse has changed his violent ways or hopeful that she can be a catalyst for future change.¹¹³ Prosecutors likely would allege that battered women are in this final phase when the state decides to intervene since the domestic violence incident in question would have only recently occurred.

But it is considerably overbroad and dangerous to assume that all battered women act within the confines of the battered woman's syndrome, especially if this means that the victims of abuse are going to be deprived of their voice and their ability to choose what is in their best interests. Many academics documenting battered women have noted that victims of domestic abuse do not consider themselves to be within the confines of the battered woman's syndrome because they do not consider themselves to be "exclusively victimized."¹¹⁴ There should indeed be some legitimate concern that a victim might be in denial when refusing to testify against her spouse. However, a proper solution to this concern should not consist of a jurisprudential doctrine that inhibits both her autonomy and her voice by applying a blanket assertion of coercion that characterizes the abused spouse as irreversibly "victimized" simply because she has been abused in the past. Rather, there should be an analogous concern that an overemphasis

104. Melanie Frager Griffith, *Battered Woman Syndrome: A Tool for Batterers?*, 64 *FORDHAM L. REV.* 141, 143 (1995) ("Since its inception in the late 1970s, the battered woman syndrome has benefited victims of domestic violence—most prominently, those women who are on trial for killing their batterers and who plead self-defense.").

105. *Id.* at 165.

106. LENORE E. WALKER, *THE BATTERED WOMAN* 55 (1979).

107. *Id.* at 56.

108. *Id.*

109. *Id.* at 59.

110. LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 44 (1989).

111. Mira Mihajlovich, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 *IND. L. J.* 1253, 1259 (1987).

112. *TERRIFYING LOVE*, *supra* note 110, at 44–45.

113. *Id.* at 45.

114. Chiu, *supra* note 76, at 1247–48.

on victimization could become a self-fulfilling prophecy by “discouraging people who are victimized from developing their own strengths or working to resist the limitations they encounter.”¹¹⁵ This is especially true if there are practical reasons why it might not be in the abused spouse’s immediate best interest to testify against her spouse even absent coercion.

B. Practical Concerns

There is a misinformed belief that victims of domestic violence have no justifiable reason for making themselves unavailable at trial outside of the fear of violent reprisal by their abusive spouse. In fact, there are legitimate, informed reasons why a victim of domestic violence might refuse to testify and might make herself unavailable at trial for the sake of her immediate best interest. First, when a battered woman calls for emergency assistance, it cannot be automatically concluded that she wants the police to get involved. Often, those calling for help solely desire medical assistance.¹¹⁶ Second, victims of domestic violence might not want to testify against their spouses because of economically-motivated concerns. Poor women are significantly more likely than more affluent women to experience domestic violence. Women whose household adjusted gross income (AGI) is less than \$7,500 per year are over four times more likely to be abused than their more affluent counterparts with household AGIs over \$75,000 per year.¹¹⁷ Abused women also might not want to participate in any legal proceedings against their spouses for fear that their children will be placed in protective custody because they permitted an abusive relationship to occur.¹¹⁸ Third, unique circumstances may preclude any desire for state intervention.¹¹⁹ For example, undocumented immigrants might not want law enforcement involvement for fear of deportation resulting from the government’s investigation into the domestic dispute.¹²⁰

A victim of domestic abuse might also refuse to participate in legal proceedings against her spouse because of a desire to preserve her marriage, often for religious reasons. Various critics are skeptical about the authenticity of the preservation of marriage justification for many compelling reasons.¹²¹ However, the Supreme Court has recognized that the preservation of marriage is

115. Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1429 (1993). Minow warns that continuing to label the victim as “victimized” can “suppress the strengths and capacities of people who are victims. Victim talk can have a kind of self-fulfilling quality.” *Id.*

116. See Chiu, *supra* note 76, at 1230.

117. LAWRENCE A. GREENFIELD ET AL., BUREAU OF JUSTICE STATISTICS, VIOLENCE BY INMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 14 (1998), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/vi.pdf>.

118. See, e.g., Karen Houppert, *Victimizing the Victims*, THE VILLAGE VOICE, June 15, 1999, at 42, available at <http://www.villagevoice.com/issues/9923/houppert.php> (noting that battered women are being charged with “failure to protect” and risk losing custody of their children for allowing them to be exposed to domestic violence).

119. Deidre Ewing, Note, *Prosecuting Batterers in the Wake of Davis and Hammon*, 35 AM. J. CRIM. L. 91, 96 (2007).

120. *Id.*

121. See, e.g., Amanda H. Frost, *Updating the Marital Privileges: A Witness-Centered Rationale*, 14 WIS. WOMEN’S L.J. 1, 21–24 (1999).

a legitimate enough interest to allow a testifying spouse to assert a privilege which would exclude potentially probative evidence at trial.¹²² It is unclear then why the preservation of marriage would not be a legitimate enough interest for an abused spouse to voluntarily make herself unavailable at trial as well.

A categorical application of the forfeiture doctrine presents a very similar threat to the institution of marriage as would the complete eradication of the adverse testimony privilege.¹²³ By not allowing the victim to decide whether she should indirectly testify against her spouse without any further inquiry into the extent of the abuse and the specific intent of the defendant, we limit her autonomy and her voice. Rather than taking such a broad approach, the forfeiture doctrine should mirror the evolution of the adverse testimony privilege, laid out in the next section, to one that involves at least some measure of autonomy, while recognizing the large possibility of spousal coercion. Allowing a similar measure of autonomy in the forfeiture doctrine as that found in the adverse testimony privilege will at the very least promote legal consistency and a mutual recognition of the importance of a testifying spouse's right to shape her own destiny.

IV. THE ADVERSE TESTIMONY PRIVILEGE AND SPOUSAL AUTONOMY

There are currently two evidentiary privileges related to marriage: the confidential communications privilege and the adverse testimony privilege. The former protects private marital communications from being divulged in court, while the latter protects spouses from being compelled to incriminate one another.¹²⁴ The confidential communications privilege is similar to the attorney-client privilege in that it only protects against the disclosure of communication made in confidence during the course of marriage. The adverse testimony privilege, on the other hand, protects all sorts of incriminating disclosures, whether pertaining to confidential communications or not, made before or during the course of a lawful marriage.

The adverse testimony privilege has a long common law history. What is now a privilege was once a general prohibition on one's ability to testify against his or her spouse.¹²⁵ There were various justifications for this *per se* prohibition. First, medieval canons of jurisprudence focused on the notion of a unity in marriage, therefore allowing the accused spouse to prohibit the testifying spouse from taking the stand against him because it was akin to self-incrimination.¹²⁶ In

122. *Trammel v. United States*, 445 U.S. 40, 53 (1980).

123. I admit that there might be very compelling reasons to actually do away with the marital privilege completely but that is not the crux of my argument. My only concern is that if Supreme Court jurisprudence recognizes that the desire to preserve one's marriage is a compelling justification important enough to protect with a common law evidentiary privilege, then there should be some consistency by allowing a similar rationale to apply to the forfeiture doctrine. For a very compelling argument as to why complete eradication of the adverse testimonial privilege might make for good policy, *see generally* Frost, *supra* note 121.

124. *Trammel*, 445 U.S. at 44–46.

125. Frost, *supra* note 121, at 8.

126. *See Trammel*, 445 U.S. at 44 (noting that, in medieval jurisprudence, the husband and wife were considered one).

1933, this blanket rule of spousal disqualification was abolished.¹²⁷ Later, proponents of the adverse testimony privilege began to focus on the sanctity of marriage and concluded that the incrimination of one spouse by another would inevitably destroy the marital union.¹²⁸ Thus, what had been an automatic disqualification evolved into a spousal privilege. But there still remained some discrepancy as to who retained the privilege – the defendant or the testifying spouse.

In *United States v. Trammel*, the Supreme Court clarified that the testifying spouse retains the adverse testimony privilege.¹²⁹ In other words, the testifying spouse has the opportunity to decide whether or not she wants to testify against her spouse. The Court's decision to mitigate such a broad-sweeping privilege was motivated by three core concerns. First, there was a clear concern about the heightened possibility of injustice caused by the exclusion of probative evidence that would result if the defendant spouse held the privilege.¹³⁰ Second, the allegedly important interests related to the sanctity of marriage that had previously required such a broad-sweeping marital privilege were no longer compelling. The Court suggested that the preservation of marriage remains a strong justification for the existence of a spousal privilege, but reasoned that if the testifying spouse is willing to testify against the defendant spouse then there is little marriage worth saving.¹³¹ Finally, the Court noted that there should be some semblance of judicial recognition of female autonomy: "Nowhere in the common-law world – indeed in any modern society – is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being."¹³²

In *Trammel*, the Supreme Court was noticeably cynical about the need for an adverse testimony privilege, given the existence of the marital communications privilege. However, the fact that the Court did not attenuate the privilege at all is quite suggestive of important underlying considerations. In not striking down the adverse testimony privilege, the Court recognized that the decision to preserve one's marriage justifies the exclusion of potentially probative evidence. Further, the Court maintained that the testifying spouse should be allowed to choose for herself whether she will risk the potential dissolution of her marriage by testifying against her spouse. If this is the case for an evidentiary privilege, it is unclear why the same rationale should not also extend to the forfeiture doctrine. A categorical approach to forfeiture undermines the very autonomy concerns deemed compelling in *Trammel*, while dealing with evidence of similarly probative force. If that is the case, then it is quite clear that another approach should be applied instead to obtain consistency in the law of evidence.

127. See *Funk v. United States*, 290 U.S. 371, 380–81 (1933).

128. See *id.* at 381 ("It has been said that to admit such testimony is against public policy because it would endanger the harmony and confidences of marital relations . . .").

129. 445 U.S. at 53.

130. *Id.* at 51–52.

131. *Id.* at 52.

132. *Id.*

V. A CONTEXTUAL APPROACH TO FORFEITURE IN LIVING VICTIM CASES

The Supreme Court's formulation of the forfeiture doctrine in *Giles* provides an approach that is already sufficiently clear for trial courts to apply and allows for some consideration of victim autonomy without needing to resort to any categorical alternatives. Under *Giles*, a defendant has forfeited his right to confrontation when he has procured the witness's unavailability with the specific intent to prevent the witness from testifying.¹³³ This approach is what I label a "contextual approach" or an "intent-based approach," as opposed to a "categorical approach."

A contextual approach to forfeiture in cases of domestic violence is straightforward: in order to determine whether the defendant has forfeited his right to confrontation by his own wrongdoing, the lower court must review the contextual details of the abusive relationship, along with several other factors, to determine whether there is enough evidence to infer the defendant's specific intent to procure the witness's unavailability.¹³⁴

In contrast, a categorical approach applies a certain exception to the general rule for a specific category of cases.¹³⁵ In the present context, the category would be defined as cases of domestic violence where the victim and the defendant are involved in a "classic abusive relationship."¹³⁶ Under a categorical approach, a lower court factual finding of a "classic abusive relationship" would automatically presume forfeiture.¹³⁷

Although very persuasive arguments exist, there is no immediate reason to deviate from a contextual approach to a categorical approach simply because the crime involves domestic violence. Specific intent matters just as much in the domestic violence context as it does in criminal law generally. The *Giles* majority rightfully focuses on the specific intent of the defendant in its analysis of the forfeiture doctrine because only where such specific intent is present are victims actually being coerced into not testifying. As noted in *Giles*, the forfeiture doctrine has always been concerned with this kind of witness tampering and coercion.¹³⁸ If the victim of domestic abuse has in any way been coerced, such coercion will become manifestly evident, or at least circumstantially evident, after an inquiry into the defendant's state of mind, as would be the case with any other crime. Such a circumstantial inquiry will undoubtedly involve an in-depth examination into the nature of the abusive relationship. Should such an examination reveal a strong likelihood of coercion to prevent spousal testimony, then forfeiture should be presumed. Absent such a finding, forfeiture should be

133. *Giles v. California*, 554 U.S. 353, 367 (2008).

134. *See, e.g., id.* at 367–68.

135. For a recent application of a categorical approach by the Supreme Court, *see Graham v. Florida*, 130 S. Ct. 2011 (2010), where the Court applied a categorical approach to juvenile sentencing by not permitting a juvenile offender to be sentenced to life in prison without some meaningful opportunity to release. The approach is considered "categorical" because it implicates a specific type of sentence (life in prison) to a specific class of offenders (juveniles).

136. *See, e.g., Giles*, 554 U.S. at 380 (Souter, J., concurring).

137. It is unclear whether this presumption is rebuttable. Given that Justice Souter states that such a finding is *per se* forfeiture, I assume that it is not.

138. *Giles*, 554 U.S. at 374.

avoided. Only in the former case, where a defendant has the requisite specific intent to prevent his spouse from testifying, does fundamental fairness require an override of the victim's autonomy and voice regarding whether to offer incriminating evidence against her spouse or not.

There is no need to drastically overhaul *Giles's* formulation, because a contextual approach is neither at odds with Justice Scalia's formulation, nor is it completely at odds with Justice Souter's approach. A contextual approach tries to reconcile both views by recognizing that domestic violence can certainly be coercive but that the victim should still be able to retain some degree of autonomy in shaping her own destiny.

For the sake of clarity, it might be best to arrange abusive relationships along a spectrum from most coercive to least coercive. At the most coercive end of the spectrum are cases in which there is a dead victim linked to very probative evidence of systematic abuse and various recantations of prior allegations of abuse. The presumption of forfeiture is the strongest in these cases because the victim has already been denied her voice and because there is strong direct or circumstantial evidence to suggest that the defendant has engaged in severely coercive behavior. This evidence should manifest itself into a strong presumption that the defendant had the requisite intent to prevent the victim from testifying. As a result, this situation is one more likely to warrant a Souter-like presumption of forfeiture.¹³⁹

Conversely, on the least coercive end of the spectrum are cases in which there is a live recanting victim with little evidence of continuous systematic abuse. This situation is more likely to warrant a Scalia-like approach, where what little evidence of abuse there is becomes one of many factors to consider in determining the defendant's specific intent. However, as noted in *Giles*, the determinative factor as to whether to apply the doctrine of forfeiture is always whether the defendant had the requisite specific intent to prevent the victim from testifying.¹⁴⁰ Any presumption otherwise *must be* rebuttable in order for the defendant's *mens rea* to remain as the core concern of the forfeiture inquiry.

Obviously, the determination of specific intent becomes much more muddled in the middle of the spectrum. These complex forfeiture cases, with live recanting victims in which there is probative evidence of abuse, are the cases which would be most severely affected by a categorical approach in terms of overriding the victim's explicit wishes. In these cases, due to a concern for victim autonomy, equitable determination of forfeiture should again remain squarely focused on the specific intent of the defendant. The defendant has the confrontation privilege under the Sixth Amendment and, therefore, only the defendant's intended actions to forfeit this privilege should eradicate his right to confrontation.

Scalia's approach is valuable in these intermediate cases, as his view recognizes that continuous accusations of abuse, or threats of abuse, suggest that

139. Although notably not a *per se* presumption under my formulation.

140. *Giles*, 554 U.S. at 361 ("The manner in which the rule was applied makes plain that unfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying.") (emphasis added).

the defendant intended to coerce the victim from testifying.¹⁴¹ Given the incredible statistics related to victim recantation,¹⁴² such coercive tendencies cannot be denied. For Scalia, evidence of abuse or threats of abuse is one of several factors used in determining whether the defendant had the requisite specific intent.¹⁴³ But Scalia's approach does not go far enough.

Scalia admits that "[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help" and, therefore, can be suggestive of conduct designed to prevent victim testimony.¹⁴⁴ Although Scalia clearly recognizes that abusive relationships can be coercive and can isolate the victim, he does not seem to recognize the fact that this abuse or coercion should be the *most* important factor in determining whether the defendant had the requisite specific intent, especially given the lack of otherwise probative evidence in these cases. Where the degree of violence is severe and where there are continuous accusations of domestic violence to law enforcement met with violent spousal retribution, a very strong, but rebuttable, presumption should be applied. This approach is closer to Souter's suggested approach in *Giles*.

Making evidence of abuse and threats of abuse the two most important factors in determining the defendant's specific intent strikes a suitable compromise for those concerned with autonomy and for those justifiably concerned with possible witness intimidation by domestic abusers. And, since the defendant's specific intent can be so hard to prove, especially in the middle of the spectrum cases, this compromise appeases any fear that *Crawford* will give offenders a greater incentive to threaten, coerce, or kill their victims as a means of ensuring dismissal.¹⁴⁵ Meanwhile, this sliding scale analysis ensures that female autonomy remains intact and that fundamental constitutional protections will not be further eroded.

But this does not mean that evidence of abuse or threats of abuse should be the *sole* determinative factor in deciphering the defendant's specific intent either. Such a position would be tantamount to Souter's approach in *Giles*, which, unlike Scalia's approach, is *overinclusive*. In addition to evidence of abuse, a trial court judge might also want to consider the gravity, longevity, and type of abuse, as well as the extent to which the abuse seems coercive or intended to shield the victim from obtaining any outside assistance. Other factors to consider may include: (1) whether there is any recanted testimony; (2) the reasons given by the victim for recanting her testimony; (3) the reasons given by the victim in attempting to procure state involvement in the first place; and (4) potential safety concerns in allowing the victim to remain in the abusive relationship. In weighing these various factors, trial courts will be able to recognize the inherently coercive element of intimate partner violence without undermining the victim's choice and the defendant's constitutional protections.

Unless such additional factors are considered, Souter's broad-sweeping

141. *Id.* at 377.

142. *See supra* Section III.

143. *Giles*, 554 U.S. at 377.

144. *Id.*

145. Brief for California Partnership to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 34–35, *Giles v. California*, 554 U.S. 353 (2008) (No. 07-6053), 2008 WL 859396.

approach risks considerably eroding the autonomy and voice of a recanting victim in deciding whether or not she wants to testify against her spouse. Souter's approach also overlooks the various policy and practical reasons why abused women might want to remain in a potentially abusive relationship in the short term.¹⁴⁶ Moreover, a categorical formulation presupposes that the state is acting in the best interest of the victim in requiring immediate intervention even though the period of criminal prosecution is the period most likely to culminate in the victim's death or in serious injury.

It should be noted that state intervention can and should still play a fundamental role in these intermediate cases where the evidence of continuous abuse is not substantial enough to presume forfeiture. However, such state intervention is better directed at a legislative forum than a judicial one. Other salient methods exist that can be used to obtain probative evidence that do not threaten the autonomy or voice of domestic abuse victims by allowing for higher rates of voluntary compliance. For example, in lieu of the forced introduction of recanted statements, the legislature could pool state resources into counseling, witness protection, and other methods of safety planning in order to secure voluntary victim assistance.¹⁴⁷ Some jurisdictions have already attempted to obtain cooperation in this way and have had considerable success. For example, the Family Justice Center, a community group that houses 25 domestic violence service agencies, was recently established in San Diego to combat domestic violence and foster cooperation between public and private entities that provide services to victims of domestic violence.¹⁴⁸ This agency was highly successful in obtaining voluntary victim cooperation with both prosecutors and law enforcement.¹⁴⁹ After the agency's first three years of existence, the San Diego District Attorney's Office reported that nearly seventy percent of victims agreed to testify at trial compared to having nearly seventy percent of victims refuse to do so a few years prior.¹⁵⁰ Such optimistic results suggest that female autonomy and spousal safety may be better preserved in tandem through legislative action than through a judicially crafted remedy.

CONCLUSION

This Note is concerned with the application of the forfeiture doctrine in cases of domestic violence and the effect it can have on a victim's autonomy, voice, and inevitably on gender disparity generally. In order to ensure that female autonomy and gender equality is not further destabilized, the specific intent of the defendant should remain the guiding marker for the application of the forfeiture doctrine in cases of domestic violence as in criminal law generally. Only in cases where the defendant shows clear intent to prevent the victim from testifying based upon significant direct or circumstantial evidence is the victim

146. See *supra* Section III.

147. See Ewing, *supra* note 119, at 97–99 (noting several legislative assistance programs for victims of domestic violence).

148. See CASEY GWINN & GAEL STRACK, HOPE FOR HURTING FAMILIES: CREATING FAMILY JUSTICE CENTERS ACROSS AMERICA 55–59 (2006).

149. *Id.* at 108–09.

150. *Id.* at 109.

actually being coerced into not testifying. It is only these cases that merit an override of the victim's wishes and the defendant's constitutional protections. This is especially true if victims have legitimate reasons to not testify against their spouses that reasonably align with their immediate best interests.

In order to infer the defendant's specific intent, a judge should certainly consider the contextual details of the abusive relationship, as abusive relationships are inherently coercive. But this consideration alone should not be *per se* determinative. Depriving a victim of her autonomy could lead to severe physical, social and economic ramifications. Moreover, such deprivation could also threaten female gender equality by not allowing women to decide what is in their best interests as individuals and as a class. The threat of coercion in domestic violence relationships is real, but any forced state intervention may be better directed at legislative action rather than an irrebuttable judicial presumption.