
AVOIDING CONFRONTATION

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*This Article takes seriously Justice Scalia's aside in *Giles v. California* and examines whether there should be a separate confrontation doctrine for domestic violence cases. The history of confrontation is explored, starting with one of its predecessors, the judicial duel. Dueling served as a judicial factfinder for centuries and developed a complex series of regulations that focused not only on accuracy but also on the status of the participants. As the doctrine of confrontation developed, it retained some of the substantive status-oriented elements of dueling. An analysis of major cases from the common law and the Supreme Court tracks these developments and uncovers these elements. Modern confrontation doctrine is shown to embody non-adjudicatory elements concerned with status and social power.*

These elements imagine a series of relationships between accuser and accused that do not adequately address the concerns reflected in domestic violence situations. This helps explain why recent confrontation clause decisions have presented such a serious challenge to effective prosecution of these crimes.

Although most scholars addressing these concerns contend that the Court misinterpreted the Confrontation Clause, this Article argues that the Court may very well be right. Indeed, confrontation doctrine may pose a problem that cannot be reconciled through traditional means. This Article concludes by proposing a legislative solution, whereby Congress could return to States the ability to successfully adjudicate domestic violence cases in state courts.

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*“The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it.”*¹

I. INTRODUCTION

The Supreme Court has substantially altered the role of the Confrontation Clause in a series of three recent rulings.² The prosecution of domestic violence cases has been most strongly impacted by these cases.³ Initial reactions to this shift have been strong.⁴ Many scholars agree with the claim that the Court caused a “sudden shift in the constitutional fault lines underlying the statutory framework of the states’ evidence codes.”⁵ Following these rulings, scholars and practitioners have addressed new challenges in order to successfully prosecute domestic violence cases.⁶

One solution proposed after *Crawford v. Washington*⁷ was a call for strong enforcement of the forfeiture doctrine to ensure that domestic violence prosecutions

1. *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988).

2. See generally *Giles v. California*, 554 U.S. 353 (2008); *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004). See *infra* Part II.B for a discussion of these cases and the modern development of the Confrontation Clause.

3. See *infra* Part III.C for a discussion of the impact of recent Confrontation Clause jurisprudence on domestic violence cases.

4. See, e.g., Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, 1326 (2010) (arguing that Supreme Court ignored “prolific witness tampering” in domestic violence cases, “render[ing] the *Crawford*, *Davis*, and *Giles* trilogy an unworkable albatross for truth-seeking courts”); Donald A. Dripps, *Controlling the Damage Done by Crawford v. Washington: Three Constructive Proposals*, 7 OHIO ST. J. CRIM. L. 521, 535 (2010) (criticizing *Crawford* for making it “significantly more difficult to convict the guilty, without improving the chances of vindicating the innocent”).

5. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 750 (2005).

6. See, e.g., Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L. REV. 2409, 2418 (2005) (noting Chief Justice Rehnquist’s criticism that *Crawford* provides little guidance to modern prosecutors); Dripps, *supra* note 4, at 521 (proposing three legislative strategies to combat the damage caused by *Crawford*); Whitney Baugh, Note, *Why the Sky Didn’t Fall: Using Judicial Creativity to Circumvent Crawford v. Washington*, 38 LOY. L.A. L. REV. 1835, 1837 (2005) (observing that “the new standard enunciated in *Crawford* has already begun to materially alter the presentation of hearsay evidence in criminal trials”).

7. 541 U.S. 36 (2004).

could succeed.⁸ In *Giles v. California*,⁹ these hopes were largely dashed as the Supreme Court restricted the application of forfeiture, largely preventing the solution these advocates promoted.¹⁰ Understandably, these same scholars have strongly decried that ruling and continue to search for a way to effectively prosecute domestic violence cases.¹¹

Perhaps anticipating many of these concerns, Justice Scalia directly raised a question in *Giles*: “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?”¹² Perhaps we need to take this question more seriously than it was intended.

This Article does not try to poke holes in the Court’s interpretation of the Confrontation Clause hoping to find some remaining ability to effectively prosecute domestic violence. Instead, it addresses a difficult question: Whether a commitment to ending domestic violence is irreconcilable with the Sixth Amendment’s Confrontation Clause.

We perpetuate many myths about our constitutional jurisprudence. Questioning the Confrontation Clause directly challenges at least three tenets of this Constitutional mythology. The first myth is the belief that American legal history, especially the Court’s canonical mid-twentieth century cases, reflects a progressive march towards the realization of liberties for all.¹³ The second is that the incorporation of the Bill of

8. See, e.g., Lininger, *supra* note 5, at 806–12 (2005) (encouraging a liberal application of the forfeiture doctrine in domestic violence cases); 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, 542 (2007) (“Until this problem is addressed, prosecutors should utilize the doctrine of forfeiture by wrongdoing to circumvent the Confrontation Clause altogether.”); Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 33–56 (2006) (emphasizing the importance of the revitalized forfeiture rule in the domestic violence context). *But see* Kimberly D. Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 B.Y.U. L. REV. 1, 28–43 (arguing that women’s interests might not be advanced by victimless prosecution); James F. Flanagan, *Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing: Davis v. Washington and the Necessity of the Defendant’s Intent to Intimidate the Witness*, 15 J.L. & POL’Y 863, 873–74 (2007) (effectively predicting *Giles* by arguing that forfeiture requires that a defendant intended to silence a witness and warning against a strong forfeiture doctrine).

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

10. See *infra* Part III.C for a discussion of the restriction of forfeiture.

11. See Tom Lininger, *The Sound of Silence: Holding Batters Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 905–09 (2009) (proposing a new hearsay exception for federal and state evidence codes to better prosecute in a post-*Giles* environment); Deborah Tuerkheimer, *Forfeiture after Giles: The Relevance of “Domestic Violence Context”*, 13 LEWIS & CLARK L. REV. 711, 721–30 (2009) (suggesting a path for lower courts to apply *Giles*); Ellen Liang Yee, *Forfeiture of the Confrontation Right in Giles: Justice Scalia’s Faint-Hearted Fidelity to the Common Law*, 100 J. CRIM. L. & CRIMINOLOGY 1495, 1547–48 (2010) (criticizing Justice Scalia’s methodology and holdings in the *Crawford* trilogy).

12. *Giles*, 554 U.S. at 376.

13. This narrative has come under extreme scrutiny within the past few decades as a new generation of scholars has criticized the heroic narrative of the Court. Much of the focus has been on the actual impact of *Brown v. Board of Education*, 347 U.S. 483 (1954), especially as compared to the popular vision of the case. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed., 2008) (observing that legislative and executive branch actions led to integration in conjunction with *Brown*); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law*, 105 COLUM. L. REV. 1436 (2005) (discussing

Rights against the states was an unqualified victory for individual liberties and civil rights.¹⁴ The final myth is the belief that adherence to the Constitution and judicial reasoning provides sufficient tools for the fair administration of justice.¹⁵

Quite simply, the Confrontation Clause is not a neutral principle of law, nor does it necessarily advance significant principles of justice in all circumstances. Indeed, it reflects centuries of sociopolitical forces that have shaped how we adduce the trustworthiness of an individual, the legal doctrines regarding how we adjudicate facts, and the kinds of relationships we believe exist between defendants and witnesses. Our views on confrontation reflect a gendered understanding of crime that includes a number of implicit androcentric assumptions. This claim goes deeper than the surface observation that confrontation itself is a traditionally masculine response to adversity.¹⁶

The modern practice of witness confrontation is inextricably tied into historic concepts of dueling, status, and honor—concepts that present significant obstacles to the administration of justice under certain circumstances. Confrontation doctrine does not represent evidence-based or logical concerns about factfinding. Instead, confrontation is an example of “preservation through transformation,” a way that historical values about class, gender, and status have survived into the present by burrowing themselves under a veneer of neutrality.¹⁷

The treatment of domestic violence, as long as it has been a legally cognizable claim, has been a secondary concern for the American judicial system and is almost exclusively litigated in state courts.¹⁸ As such, the application of the Confrontation

the critical tradition that states “that law is unlikely, alone, to directly produce significant change” in race relations); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 97–98 (1994) (noting that *Brown* unified the South in resisting integration); Gerald N. Rosenberg, *Brown is Dead! Long Live Brown!: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161, 163–65 (1994) (arguing that civil rights movement could have occurred independently of *Brown*).

14. Perhaps the most heroic version of this narrative is the incorporation of the Sixth Amendment right to counsel in *Gideon v. Wainwright*, 372 U.S. 335 (1963), as told in ANTHONY LEWIS, *GIDEON’S TRUMPET* (1964). This makes the central focus of this Article even more shocking at first blush.

15. This belief gives rise to the phrase, “The Constitution is not a suicide pact.” This phrase has appeared a number of times in court decisions, including this often cited formulation: “[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). See also RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 8 (2006) (using the familiar phrase in discussion of the Constitution and terrorism).

16. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 38 (1982) (contrasting a young boy’s view of “a world of dangerous confrontation and explosive connection” with a young girl’s understanding of “a world of care and protection”). Indeed, much of the language we use regarding confrontations is notably gendered, such as the expression “face me like a man.” Although this line of analysis does not directly implicate the main focus of this Article, it dovetails with the conclusions. A book length treatment of this and many related themes can be found in ROBIN WEST, *CARING FOR JUSTICE* (1997).

17. The concept of “preservation through transformation” was first described by Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

18. See *McCarty v. McCarty*, 453 U.S. 210, 220 (1981) (“This Court repeatedly has recognized that ‘[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.’” (alteration and omission in original) (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979))). Reva Siegel has argued that the invocation of federalism in the domestic violence context is itself an instance of preservation through transformation, specifically that federalism maintains a

Clause in state courts has hamstrung the effect of administration of justice in domestic violence cases. Given these circumstances, this Article asks a novel question: Should we partially unincorporate the Sixth Amendment's Confrontation Clause?¹⁹

Unincorporation is such a foreign concept that it ought to inspire incredulity and confusion. This Article argues that the Sixth Amendment was written when the law did not conceive of domestic violence as a serious crime.²⁰ Further, the Confrontation Clause reflects a gendered perspective on crime that makes it inapt to apply in domestic violence cases.²¹ The central goal of this Article is not to fundamentally undermine the Confrontation Clause itself. Rather, the goal of this Article is to suggest that the Confrontation Clause doctrine cannot coexist with effective domestic violence prosecution.²²

Part II of this Article traces both the development of our Confrontation Clause jurisprudence and the legal recognition of domestic violence. Part III explores the Supreme Court's recent treatment of the Confrontation Clause. Part IV discusses the gendered assumptions underlying the confrontation doctrine and how this makes it particularly inapposite for domestic violence prosecutions. Part V advances the idea of partial unincorporation as a potential solution to the tension between domestic violence and the Confrontation Clause.

II. A BRIEF HISTORY: THE CONFRONTATION CLAUSE AND DOMESTIC VIOLENCE

The Court's recent Confrontation Clause rulings all included a significant historical treatment.²³ Writing for the majorities in these cases, Justice Scalia began his

status quo that keeps women in a subordinate status position relative to men. *Cf.* Siegel, *supra* note 17, at 2196–97 (recounting the federalism-based controversy surrounding the Violence Against Women Act).

19. The focus of this Article is on unincorporating the Confrontation Clause in those situations where it is most inappropriate given the analysis that follows. Whether these concerns would apply in other contexts, such as gang violence, prostitution, or terrorism, is bracketed for now. Such an analysis would require a similar analysis of the difficulties facing witnesses in those trials and whether these concerns are deepened by the shortcomings of confrontation doctrine. Although I suspect that there are gendered elements in the kinds of intimidation posed by criminal gangs towards potential witnesses, I am hesitant to extend the analysis beyond this observation. The Author would like to thank Nancy Leong, Greg Klass, and Robin West for their insights on this point.

20. The same is true for the Fourteenth Amendment, for purposes of incorporation. See *infra* note 123 for a discussion of the view of domestic violence at the time of passage of the Fourteenth Amendment.

21. This Article does not address whether the Confrontation Clause is broken in other ways. The Confrontation Clause has been used in a number of settings. See, e.g., *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009) (right to examine forensic experts whose reports have been introduced into evidence); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (holding that Confrontation Clause does not provide right to access confidential records); *Kentucky v. Stincer*, 482 U.S. 730, 744 (1987) (denying right of a defendant to be present at a witness competency hearing); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (holding that “the right of cross-examination” is “implicit in the constitutional right of confrontation”).

22. The Author suspects that other scholars feel this way, but, given the plain language of the Sixth Amendment, do not believe it possible to reject the Confrontation Clause. See, e.g., Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 275 (2006) (“In no event could a state provide fewer confrontation rights than the U.S. Constitution.”).

23. *Crawford v. Washington*, 541 U.S. 36, 42–55 (2004) (tracing the evolution of “[t]he right to confront one’s accusers” beginning in Roman times, detailing its implementation in English common law, and briefly examining American jurisprudence); *Davis v. Washington*, 547 U.S. 813, 823–29 (2006) (documenting

treatment with the famous trial of Walter Raleigh.²⁴ Although some might disagree with Scalia's application of this method,²⁵ the method itself also leaves something to be desired. Justice Scalia may get the outline of the doctrine correct, but he fails to discuss the social meaning with which the doctrine is imbued.²⁶ Understanding confrontation in this manner is analogous to understanding a symphony by only reading the sheet music: something vital is lost. Although Justice Scalia may be ultimately correct regarding the Confrontation Clause, he may have arrived at this conclusion through a narrow understanding of history.²⁷

What Justice Scalia misses can be found in a seminal Confrontation Clause case. In *Mattox v. United States*,²⁸ the Supreme Court declared that the primary objective of the Confrontation Clause was to give the defendant:

an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.²⁹

This explanation reflects many of the concerns about the accuracy of hearsay testimony. It also carries with it something else—an understanding of confrontation that is not exclusively concerned with accurate factfinding. Indeed, the language itself demonstrates a concern about a witness's worthiness, an inquiry that reflects an interest in status.

This interest in a witness's status is not an accident and, to truly understand our modern confrontation doctrine, we need to look beyond Walter Raleigh and look at confrontation's predecessor, the judicial duel.³⁰ The judicial duel developed in a manner that included both fact-finding concerns and a residual social content that reflected and deepened preexisting social stratifications. Once dueling was no longer employed as an adjudicatory mechanism, the practice of dueling changed. Slowly, the substantive social factors of the duel overcame the procedural concerns of adjudication. The duel became an element of a nonjudicial system concerned primarily with the distribution of social status. At the same time, these substantive social elements remained present in the developing doctrine of confrontation, the process that replaced judicial combat as adjudicative factfinder. These non-adjudicatory elements were not

modern Confrontation Clause jurisprudence including *Davis*); *Giles v. California*, 554 U.S. 353, 357–64 (2008) (examining the historical origins of forfeiture by wrongdoing).

24. THE TRIAL OF SIR WALTER RALEIGH, KNT. AT WINCHESTER, FOR HIGH TREASON (1603), reprinted in 2 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 1 (1816).

25. See *infra* note 96 and accompanying text for a discussion of the criticism of Scalia's methodology.

26. This phrasing comes in part from Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 949 (1995).

27. See Frank R. Hermann, *The Uses of History in Crawford v. Washington*, 2 INT'L COMMENTARY ON EVID., No. 1, Art. 5, at 16, 21 (2004) (arguing that Justice Scalia selectively uses history and did not happily tolerate historical ambiguity).

28. 156 U.S. 237 (1895).

29. *Mattox*, 156 U.S. at 242–43.

30. There are important lessons to be learned by studying the trial by ordeal and trial by oath as well, some of which are discussed below. These are equally fascinating topics and their legacy certainly has had some impact on modern evidentiary procedure.

static. As the status-focused duel continued to develop, so too did the non-adjudicatory elements of confrontation, often in parallel. Tracing this interchange will help us identify what lies beneath the formal rhetoric of confrontation.

A. *The Rise and Fall of Dueling as Judicial Factfinding*

As Justice Scalia notes in *Crawford*, “[t]he right to confront one’s accusers is a concept that dates back to Roman times.”³¹ Indeed, a number of scholars have traced the development of the confrontation right back that far, although none argue that it has been continually practiced since then. A common origin is often traced to the Roman Governor Festus.³² There is ample evidence showing Roman law required witnesses to be examined in the presence of the defendant.³³ These rules would be advanced by a number of prominent jurists, including Hadrian and Justinian.³⁴ The fall of the Roman Empire in the West led to a significant change in judicial trials and these practices fell out of use.³⁵ Confrontation was replaced with a new series of fact-finding mechanisms: ordeals, oaths, and judicial duels.³⁶ These practices are ignored in Justice Scalia’s historical analyses and Scalia incorrectly presents a history of Confrontation as an uninterrupted practice.³⁷

Some scholars ascribe the origins of the judicial duel³⁸ to King Gunobad of Burgundy in 501,³⁹ whereas others point to mid-seventh century Lombardy.⁴⁰ The purpose of these duels was not to extract vengeance or to defend one’s honor but rather the impartial discovery of truth and the fair administration of justice.⁴¹ Two combatants

31. *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (citing *Coy v. Washington*, 487 U.S. 1012, 1015 (1988); Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT’L L. 481 (1994)).

32. *Coy*, 487 U.S. at 1015–16 (quoting *Acts* 25:16) (reciting that Governor Festus told Paul that “[i]t is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges”); Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384 (1959) (quoting *Acts* 25:16) (same).

33. See Herrmann & Speer, *supra* note 31, at 484–90.

34. Frank R. Herrmann, *The Establishment of a Rule Against Hearsay in Romano-Canonical Procedure*, 36 VA. J. INT’L L. 1, 13–21 (1995).

35. Herrmann & Speer, *supra* note 31, at 499.

36. *Id.* There were attempts to keep alive the Roman judicial traditions. One of the most fascinating is the Pseudoisidorean Forgeries of the ninth century. These documents consist of a set of forged legal texts that lent support to a series of significant procedural practices, including the belief that accusers and witnesses must appear before the defendant. For more on these forgeries, see *id.* at 503–11.

37. The Court itself invoked the concept of trial by battle immediately after the Civil War. For more on this history, see Cynthia Nicoletti, *The American Civil War as a Trial by Battle*, 28 LAW & HIST. REV. 71, 72 (2010) (citing *Texas v. White*, 74 U.S. (1 Wall.) 700 (1869); *The Prize Cases*, 67 U.S. (2 Black) 635 (1862)) (discussing how the “Court invoked trial by battle” in the context of “the constitutionality of secession”).

38. The terms judicial duel, trial by combat, and judicial battle are used interchangeably throughout this Article and are all descriptions of the same practice.

39. Edward L. Rubin, *Trial by Battle. Trial by Argument*, 56 ARK. L. REV. 261, 264–65 (2003) (citing FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 39 (2d ed. 1959)).

40. BEN C. TRUMAN, *THE FIELD OF HONOR: BEING A COMPLETE AND COMPREHENSIVE HISTORY OF DUELLING IN ALL COUNTRIES* 9 (1884).

41. HENRY CHARLES LEA, *THE DUEL AND THE OATH* 104 (1878).

would engage in a physical contest according to heavily specialized rules in order to settle a legal dispute.⁴² The practice of trial by battle supplanted the interrogation of witnesses and became a common practice throughout western and central Europe.⁴³ The rationale behind the duel was that God would grant victory to the party telling the truth and thus it served as a reflection of divine truth-ascertainment.⁴⁴

Contemporary scholars turned to the Bible for justification, noting that dueling was as old as Cain and Abel, and arguing that the story of David and Goliath was proof that God approved of the practice.⁴⁵ Other scholars looked to the Greeks, specifically to the Homeric account of the duel between Menelaus and Paris in *The Iliad*.⁴⁶ Whatever its historic precedents, the practice of dueling had one obvious advantage for its adoption: it favored the powerful, and, as a result, the powerful encouraged its spread.⁴⁷

In an era before the introduction of gunpowder, these duels did not resemble the stylized undertakings a modern reader might have in mind involving pistols at dawn.⁴⁸ In England the combatants usually fought on foot, with clubs.⁴⁹ On the Continent, the nobility fought on horseback with the standard accompaniments of lance, shield, and armor, although commoners fought on foot as in England.⁵⁰ Death was rarely the result of these proceedings and they often concluded with one party surrendering, thereby vindicating the opposing side.⁵¹

The fact-finding purpose of the duel allowed an individual to challenge not only one's accusers but the witnesses of a trial as well.⁵² Whenever a litigant or defendant believed that a witness was being dishonest (or perhaps found the testimony to be particularly damaging), he could challenge the witness to a duel—the outcome determining whose version of the truth would be admitted in court. In some locations, it was even possible to challenge one's own witnesses.⁵³ When things were looking particularly bad, individuals could challenge the court itself and receive a forcible

42. See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES *337–41 (describing rules of trial by battle in England).

43. Rubin, *supra* note 39, at 264–65.

44. *Id.* at 265.

45. LEA, *supra* note 41, at 107.

46. *Id.* at 108.

47. *Id.* at 119 (“The elasticity, in fact, with which the duel lent itself to the advantage of the turbulent and unscrupulous had no little influence in extending its sphere of action.”). Rubin argues that the fall of the Roman Empire weakened state structures that prevented private violence and that successor states chose to recognize these battles as official as one mechanism of controlling them. Rubin, *supra* note 39, at 265 (citing BARON MONTESQUIEU (CHARLES LOUIS DE SECONDAT), THE SPIRIT OF THE LAWS 548–53 (Anne Cohler et al. trans., 1989)).

48. For a popular treatment of the history of this form of dueling, see generally BARBARA HOLLAND, GENTLEMEN’S BLOOD: A HISTORY OF DUELING FROM SWORDS AT DAWN TO PISTOLS AT DUSK (2003).

49. Rubin, *supra* note 39, at 263.

50. *Id.*

51. *Id.* at 264 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 340 (1979)).

52. LEA, *supra* note 41, at 119–20 (“The duel was a method of determining questions of perjury, and there was nothing to prevent a suitor, who saw his case going adversely, from accusing an inconvenient witness of false swearing and demanding the ‘campus’ to prove it—a proceeding which adjourned the main case, and likewise decided its result.”).

53. *Id.* at 121.

reversal of judgment.⁵⁴ The duel thus contained both an adjudicatory and fact-finding role.⁵⁵

The duel was not limited to members of a specific social class, it was pervasive throughout society.⁵⁶ Duels drew a large crowd and became a popular form of entertainment for spectators.⁵⁷ Indeed, it is possible that crowds came to expect this form of adjudication, finding trials to lack the badges of truthfulness when there was no duel. The regularity of these processes presented a problem to repeat litigants and witnesses. To accommodate this concern, judicial duels were often fought by hired professionals who represented the parties as “champions.”⁵⁸ This did not impact the theory of divine revelation, nor did it challenge dueling’s centrality to factfinding; rather, it formalized the process and led to some standardization of the proceedings.⁵⁹

Although the duel was pervasive throughout society, it was not a neutral institution that treated all equally. In many locations, differences in rank allowed a superior to decline the challenge of an inferior.⁶⁰ Many groups of citizens were forbidden from participating in duels, such as children, the aged, or the disabled.⁶¹ The practice of being able to appoint a champion on one’s behalf allowed for these disadvantaged individuals to have recourse in some locations.⁶² People of varying social statuses had different rights to participate in duels, with some locations having detailed rules regulating who could challenge whom and whether a challenge could be declined.⁶³ For example, a Jew could not decline the challenge of the duel by a Christian and also could not challenge a Christian to a duel.⁶⁴

One of the most remarkable regulations regarded the ability of women to duel. Some locations forbid the practice altogether. Others made specific accommodations that resulted in a process that must rank high on any list of bizarre judicial practices. In order to ensure a fair fight between a man and a woman, and thus best establish the facts of the case, the man was placed up to his navel in a pit three feet wide.⁶⁵ The man had his left hand tied behind his back while the woman was able to use all of her

54. *Id.* at 123.

55. In this sense, dueling was not just a replacement of a jury trial but of cross-examination and confrontation as well.

56. *Id.* at 135 (“It is not to be supposed, however, from these instances that the duel was an aristocratic institution, reserved for nobles and affairs of state. It was an integral part of the ordinary law, both civil and criminal, employed habitually for the decision of the most every-day affairs.”).

57. See HOLLAND, *supra* note 48, at 11–12 (describing duels as “a traditional feature of public entertainment by the twelfth century”).

58. Rubin, *supra* note 39, at 267–68.

59. LEA, *supra* note 41, at 127 (“[The duel] was so skillfully interwoven throughout the whole system of jurisprudence that no one could feel secure that he might not, at any moment, as plaintiff, defendant, or witness, be called upon to protect his estate or his life either by his own right hand or by the club of some professional and possibly treacherous bravo.”).

60. *Id.* at 141.

61. Cf. Rubin, *supra* note 39, at 266–67 (explaining that women and other disadvantaged persons would often be allowed to nominate a champion to fight on their behalf).

62. *Id.*

63. LEA, *supra* note 41, at 149.

64. *Id.* at 151.

65. *Id.* at 153.

limbs.⁶⁶ The man was given only a club, whereas “his fair opponent had the free use of her limbs and was furnished with a stone as large as the fist, or weighting from one to five pounds, fastened in a piece of stuff.”⁶⁷ In at least one jurisdiction, this procedure was limited only to accusations of rape.⁶⁸ These regulations reflect an interest in sex roles and the ability of women to participate in formal evidentiary practices—specifically their inability to participate as equals. Two fifteenth century depictions of such a battle can give us insight into the mechanics of this practice.

66. *Id.*

67. *Id.*

68. *Id.*



A facsimile of a fifteenth-century manuscript from the GERICHTLICHE ZWEIKAMPF (1873), reprinted in LEA, *supra* note 41, at 154.



Another depiction of a judicial duel between a man and a woman, Hans Thalhofer, *Alte Armatur Und Ringkunst* 169 (Bavaria 1459) (unpublished manuscript) (on file at Det Kongelige Bibliotek, Copenhagen), available at http://www.kb.dk/da/nb/materialer/haandskrifter/HA/e-mss/thalhofer/thott-2_290.html.

A number of significant changes led to the downfall of the judicial duel. Developments in Roman law, maintained and promoted by the Church, continued to present a counterpart to the doctrines of ordeal, oath, and duel.⁶⁹ In addition to Church-based hostility, royalty began to see duels as undermining the order the kings were trying to establish.⁷⁰ By the thirteenth century, trial by battle fell into disfavor in England.⁷¹ Judicial combat was not officially abolished until 1819, when Parliament eradicated it as a legitimate form of proof.⁷²

The modern doctrine of confrontation did not immediately come into being to replace judicial combat. Nor did dueling disappear altogether—instead it transformed itself into a mechanism for settling matters outside the legal system.⁷³ The duel became primarily focused with honor and social standing, and the elements of the ritual grew to reflect these concerns.⁷⁴ This form of dueling took a particularly strong hold in the antebellum South.⁷⁵ It is from here that we get many of our present-day concepts of what constitutes a duel: a heavily formalized mechanism by which individuals challenged each other to defend their honor on the battlefield.⁷⁶ Once freed from its adjudicatory purpose, the duel became primarily interested in status, and the politics of challenging and declining duels helped define the social structure of the societies that used the practice.⁷⁷

During the period that it served as an adjudicatory mechanism, dueling retained an additional residuum that internalized extant social dynamics. The regulations determining who could duel whom and under which conditions reflected privilege and power differentials and helped structure these relations in its own way, reinforcing existing distinctions. As an adjudicatory institution, the judicial duel embodied important non-adjudicatory elements. As dueling morphed into a practice used to

69. See Herrmann & Speer, *supra* note 31, at 511–22.

70. Rubin, *supra* note 39, at 268.

71. Pollitt, *supra* note 32, at 386.

72. Nicoletti, *supra* note 37, at 78 (citing *Ashford v. Thornton*, 106 Eng. Rep. 149 (1818)).

73. See Rubin, *supra* note 39, at 269–70 (describing the transition of judicial combat into dueling as an instrument of chivalry).

74. See MARKKU PELTONEN, *THE DUEL IN EARLY MODERN ENGLAND: CIVILITY, POLITENESS, AND HONOUR* 18 (2003) (describing the role of honor and chivalry in the perpetuation of the duel). The duel itself would, of course, also change over time. See DICK STEWARD, *DUELS AND THE ROOTS OF VIOLENCE IN MISSOURI* 133–48 (2000) (exploring a variety of justifications provided for dueling in the social, cultural, and political development of Missouri, including honor, courage, paternalism, protagonism, and retribution).

75. See Kenneth S. Greenberg, *The Nose, the Lie, and the Duel in the Antebellum South*, 95 AM. HIST. REV. 57, 57 (1990) (describing dueling as a “ritual that embodied many values at the core of antebellum Southern white male culture”); C. A. Harwell Wells, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805, 1821 (2001) (describing dueling as “one element of a well-understood ritual, the ‘affair of honor’”).

76. Martha Minow even argues that this exchange “supported a sense of agency and power” for participants. See Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1429 (1993).

77. For a particularly biting view of this practice and how it relates to jury trials and modern evidentiary practices, see MARK TWAIN, *THE TRAGEDY OF PUDD’NHEAD WILSON* (1893). This transition and preservation was not limited to Europe or the antebellum South. See generally David S. Parker, *Law, Honor, and Impunity in Spanish America: The Debate over Dueling, 1870–1920*, 19 LAW & HIST. REV. 311 (2001) (describing the role of dueling in Spanish America).

defend one's honor, these sociopolitical elements of dueling would migrate and become embedded within the practice of confrontation. Examining the history of confrontation doctrine, we will find traces of these non-adjudicatory elements.

B. The Modern Development of the Confrontation Clause

It took many centuries for the common law to develop from the trial by battle to the modern jury trial, and the path was not always a linear one.⁷⁸ Scholars and courts who try to trace this history, including Justice Scalia, almost always begin their focus on the trial of Sir Walter Raleigh.⁷⁹ The facts of this 1603 trial are well known: one of the major pieces of evidence against Raleigh was a letter written by Lord Cobham that accused Raleigh of planning to overthrow the King.⁸⁰ This letter was introduced into evidence even though Cobham himself did not testify.⁸¹ Raleigh insisted that the prosecution produce Cobham for cross-examination, claiming that a failure to do so would mean that he was being tried by the Spanish Inquisition.⁸² This fear of a continental system of inquisitorial factfinding remains with us today (elements of which are reflected in the pejorative term "inquisitorial").⁸³ The impact of this case on the common law is hard to overstate, as it is almost universally invoked in discussions of the Confrontation Clause (and hearsay law in general).⁸⁴

At the time that Raleigh was convicted he had no right to counsel as an accused felon⁸⁵ and defendants were barred from testifying on their own behalf in court.⁸⁶ A married woman could not have found herself in Raleigh's position; by law, a husband

78. Rubin, *supra* note 39, at 271–77.

79. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 44 (2004) (Scalia, J.).

80. GEORGE FISHER, EVIDENCE 360–61 (2d ed. 2008).

81. *Id.*

82. *Id.* at 361. The reference to the Inquisition is a reference to a trial by ordeal, a related doctrine similar to the doctrines of oath and judicial battle discussed above. Interestingly enough, Raleigh was being accused of conspiring with Spain to commit regicide. *Id.* at 360–61. Later in his life, during a 1616 expedition to Guiana, Raleigh engaged in an unauthorized attack on a Spanish settlement. *Id.* at 639. This action so enraged the Spanish Ambassador and King James I that Raleigh's death sentence was reinstated. *Id.*

83. The Author suspects that part of the American fear of a non-adversarial, inquisitorial system is less focused on accuracy in factfinding and is wrapped up in a cultural belief about individualism, specifically about the right of an individual to confront his accusers and the state in a stylized manner. A comparative examination of these beliefs across different common law and civil law traditions could be the subject of another, related essay. It is also possible that the causality is reversed, and that an Anglo view of the primacy of the individual has its roots in these traditions, or that these are dynamic interchanges without directional causality. For a fascinating approach to this question, see David Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009).

84. See *Crawford*, 541 U.S. at 44 ("One of Raleigh's trial judges later lamented that 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'" (internal quotation mark omitted) (quoting D. JARDINE, CRIMINAL TRIALS 520 (1832))).

85. FISHER, *supra* note 80, at 360.

86. JEFFREY GILBERT, THE LAW OF EVIDENCE 94 (London, Henry Lintot 1756) ("That the Plaintiff or Defendant can't be a Witness in this own Cause, for these are the Persons that have a most immediate Interest" (minor script edits made)). Furthermore, neither infidels nor the excommunicated could testify, but a special exception was made for Jews. *Id.* at 103. For a further discussion of the laws related to defendants testifying on their own behalf, as discussed in Gilbert, see George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 977–81 (2000).

acquired the rights to his wife's person, the proceeds of her labor, and was obligated to represent her within the judicial system.⁸⁷ The common-law doctrine of marital unity subsumed a wife's legal identity under her husband.⁸⁸ Furthermore, women were often barred from testifying themselves, on the theory that like Eve, they could not be trusted.⁸⁹ Whatever right that Raleigh was denied was not one that would have been status or sex neutral.

Furthermore, it is unclear that the concern was mainly about factual accuracy, as opposed to Raleigh's honor. Raleigh had no counsel and would not have had the ability to counter Cobham's testimony with his own.⁹⁰ The ability to cross-examine would give Raleigh a chance to challenge Cobham's story—but much of the language used in the case and by Raleigh himself focuses on the injury inflicted upon him by not letting Raleigh summon Cobham to face him “like a man.”

The standard tour through confrontation history takes us next to 1666 and *Lord Morley's Case*,⁹¹ which would end up playing a major role in *Giles*. Lord Morly shot his opponent in a duel and the deceased made declarations to the coroner before dying.⁹² This case presented an early opportunity for judges to consider whether or not the introduction of a dying declaration would violate the right to confront witnesses.⁹³ These two cases have quite a bit in common, especially the fact that the defendants in each were nobility. Raleigh and Cobham were potential co-conspirators, and Morly and his victim were duel opponents, which, given the nature of the dual in mid-seventeenth-century England, meant that they were social equals. Furthermore, just as Walter Raleigh's case involved the famous jurist Edmund Coke, Matthew Hale was one of the judges in *Lord Morley's Case*.⁹⁴

Lord Morley's Case represented the rise of an exception to the principle of confrontation, allowing for testimony to be entered when a declarant was unavailable. It is also seen as the seminal ruling that established the forfeiture doctrine.⁹⁵ One reaction to the recent series of Confrontation Clause cases is to insist that Scalia misread this and other cases; Tom Lininger notes that Scalia questionably looked to dictionaries published over 100 years after *Lord Morley's Case* and willfully

87. Siegel, *supra* note 17, at 2122.

88. See 1 BLACKSTONE, *supra* note 51, at 442 (“By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing” (minor script edits made)).

89. Sally Frank, *Eve Was Right to Eat the “Apple”*: The Importance of Narrative in the Art of Lawyering, 8 YALE J.L. & FEMINISM 79, 80 (1996).

90. See FISHER, *supra* note 80, at 360 (indicating defendant had no right to counsel because he was charged with treason).

91. 6 Cobbett's St. Tr. 769, 770–71 (H. L. 1666).

92. Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 498 (2007). Kry claims that Morly's name acquired an ‘e’ at some point in the recordation process and the case is therefore known as *Morley* while his name is actually Morly.

93. *Id.*

94. *Id.* at 499.

95. Lininger, *supra* note 11, at 878.

misinterpreted the word “or” to stretch the case to fit his agenda.⁹⁶ Bracketing these concerns, it is worth asking what role the duel played.

One possible interpretation of the case is that Hale and the other judges were willing to allow the testimony of the victim because Morly already had the chance to confront his victim through the mechanism of the duel. The judges may have believed that the duel satisfied at least some of the interests that a courtroom confrontation would serve. As in *Raleigh*, the absence of an attorney for the accused raises interesting questions about whether the judges were truly concerned with accuracy, or if there was something far more personal involved with the right to confront.

Conceivably, the greatest significance of these cases for modern American jurisprudence is the impact they had on the intent of the Founders at the time the Sixth Amendment was ratified. Although the colonists inherited much of the common law tradition, laws in America developed in a different cultural context that may have viewed dueling differently. Dueling was somewhat rare in the British North American colonies, with only a handful of incidents between 1620 and 1760.⁹⁷ Yet the practice grew in popularity as the Revolution neared.⁹⁸ Indeed, dueling became a part of the British response to the Boston Tea Party.

Parliament sought to punish the Colonists by passing “a [b]ill for the improved administration of justice in the province of Massachusetts Bay.”⁹⁹ One of the original aspects of this bill was a revocation of the traditional practice of the “appeal of death,” one of the remnants of the judicial duel.¹⁰⁰ This judicial procedure applied to individuals who had been acquitted of murder charge.¹⁰¹ Despite acquittal in court, the accused potentially faced a second adjudication.¹⁰² The appeal of death allowed the family of the deceased to prosecute the accused, with the matter being settled by a duel.¹⁰³ When this traditional practice was to be denied to the Colonists as a form of punishment, many members of Parliament balked at the suggestion.¹⁰⁴ Among those opposed to the idea was Edmund Burke. Ultimately, the plan to ban the appeal of death failed and the colonists retained their “right” to duel in certain circumstances.

96. See *id.* (critiquing Scalia’s “selective originalism” in his analysis of *Lord Morley’s Case*). Thomas Davies has also criticized the accuracy of Scalia’s reading of history. See Thomas Y. Davies, *Not “The Framers’ Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL’Y 349–53 (2007); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005).

97. Wells, *supra* note 75, at 1814.

98. See *id.* at 1815–16 (describing the changes in colonial society that contributed to the increased use of dueling in 1760s North America). The duel would become even more popular, especially in the South, after the Revolution. See *id.*

99. LEA, *supra* note 41, at 245.

100. *Id.* As discussed *supra*, judicial duels were not formally abolished in England until 1818 and some related traditions such as this one remained. See generally Nicoletti, *supra* note 37.

101. LEA, *supra* note 41, at 245.

102. *Id.*

103. *Id.*

104. *Id.* (“The denial of this ancestral right aroused the indignation of the liberal party in the House of Commons, and the point was warmly contested.”).

By the time the Bill of Rights was ratified in 1791, it is possible that the colonists had developed a different understanding of adversariness and confrontation than the British common law tradition they had inherited and which had continued to play a role in American justice up until the Revolution. To see one of the clearest expressions of contemporary attitudes, it is possible to look at the very first time that the Confrontation Clause was interpreted by a Supreme Court Justice—the 1807 trial of Aaron Burr for treason, where Justice Marshall presided.¹⁰⁵ Although Burr had just completed a five year term as Thomas Jefferson’s Vice-President, he was also widely known for what has become the most famous duel in American history: the one where he mortally wounded Alexander Hamilton just three years prior.

In his opinion, Justice Marshall closely intertwines two elements when speaking of the importance of the Confrontation Clause: the need for accurate information and the inherent rights of the accused.¹⁰⁶ The Founders closely associated confrontation with a sense of fairness independent of the need for accuracy. Furthermore, although Burr was a famous duelist, he had not previously faced off against the witness in this case, and Marshall found no exception to the Confrontation Clause.

Other Supreme Court Confrontation Clause cases share many of these features: male defendants convicted of capital crimes (such as the treasons and murders already seen) demanding the right to face other men who serve as their social peers, with the Court emphasizing both the truth-seeking aspect of Confrontation, as well as additional and often undifferentiated concerns of “rightness” that require confrontation. The seminal case of *Mattox v. United States*¹⁰⁷ fits this description perfectly. Mattox was convicted of the murder of John Mullen in what was then Indian Territory.¹⁰⁸ That case was overturned and remanded for a new trial, by which point two of the witnesses who testified at his first trial were dead.¹⁰⁹ The Court allowed their testimony to be introduced into the second trial, noting that the Confrontation Clause was satisfied so long as the testimony produced had been subjected to cross-examination at the first trial.¹¹⁰ The ruling produced a dissent, which noted that the defendant had been unable to impeach the credibility of the deceased witnesses in his new trial, which undermined the ability of the jury to accurately assess their testimony.¹¹¹

This problem did not concern the majority, which stated “[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had

105. Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 228 (2005) (citing *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694)) (“*Crawford* also completely ignored the first interpretation of confrontation by a Supreme Court Justice. Chief Justice John Marshall presided at the 1807 trial of Aaron Burr.”).

106. *Burr*, 25 F. Cas. at 193 (“The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, has been generally deemed all essential to the correct administration of justice. . . . I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered.”).

107. 156 U.S. 237 (1895).

108. *Id.* at 239.

109. *Id.* at 240.

110. *Id.* at 240, 250.

111. *Id.* at 251 (Shiras, J., dissenting).

of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.”¹¹² There is again a shared focus between getting the truth and the defendant’s right to *subject a witness* to some form of ordeal at a point leading up to or including the trial. As in *Lord Morley’s Case*, because the defendant had already encountered the witness in a duel-like setting, the Justices were willing to waive Confrontation Clause protections. The use of the word “ordeal” is also telling, if inadvertent, related as it is to the historic adjudicatory mechanism of trials by ordeal and trials by judicial battle.

These issues can again be seen in *Pointer v. Texas*,¹¹³ the case that incorporated the Confrontation Clause against the States. Pointer was accused of the armed robbery of Kenneth Phillips. Phillips testified at a preliminary hearing before Pointer was indicted.¹¹⁴ Pointer and a co-arrestee were present. The co-defendant did attempt to cross-examine Phillips, but Pointer did not.¹¹⁵ By the time of trial, Phillips had moved from the state with no intention to return.¹¹⁶ As a result, the transcript of his hearing testimony was introduced at trial, and, at that point, Pointer was unable to cross-examine him.¹¹⁷ As such, the jury was able to assess the trustworthiness of the witness and Phillips was compelled to tell the truth by being put under oath. Furthermore, Pointer did confront Phillips in the sense that both were present in the courtroom at the time of the cross-examination.

Yet the Court found that the Sixth Amendment was violated because Pointer, despite not being represented by counsel, was unable to cross-examine Phillips.¹¹⁸ This parallel to *Raleigh* is striking, considering the same Court had only recently decided *Gideon*. The Court’s concern in *Pointer* reflects some of the same motivating elements throughout all of these cases: that confrontation is about more than accuracy. Interestingly, Pointer had already confronted Phillips once: when he robbed him. Unlike *Morley’s Case*,¹¹⁹ however, this was not a formalized duel, but a chance encounter where only one party attacked the other. The uneven power dynamic of this confrontation (as opposed to the relationships between the accused in the witnesses in *Raleigh*, *Mattox*, and *Burr*), where the victim of a violent crime is testifying against his attacker, foreshadows some of the concerns that are addressed later.

These cases show that from the earliest development of the common law right to confront, through the founding era, up to the time the Fourteenth Amendment was passed,¹²⁰ this right was seen through a particular cultural lens that was concerned with

112. *Id.* at 244 (majority opinion).

113. 380 U.S. 400 (1965).

114. *Pointer*, 380 U.S. at 401.

115. *Id.*

116. *Id.*

117. *Id.* Pointer’s trial came before *Gideon v. Wainwright*, 372 U.S. 335 (1963), meaning that he did not have counsel at the time, although the Supreme Court decided *Pointer* after deciding *Gideon*. The Court chose not to decide the issue on these grounds, instead choosing to incorporate the Confrontation Clause. *Pointer*, 380 U.S. at 403.

118. *Id.* at 407–08.

119. See *supra* notes 91–96 and accompanying text for a discussion of *Lord Morley’s Case*.

120. Conceivably an originalist would be more concerned with the view of confrontation when the Fourteenth Amendment was passed rather than that of the Framers of the Sixth Amendment. See Lininger,

more than accuracy. One way to understand this additional concern is that the development of confrontation doctrine reflected a cultural belief in the right to defend one's honor when accused of wrongdoing. Extending this analysis, it appears that this right is the inheritor of the status-oriented elements that had long been a part of confrontation's antecedents: judicial duels.

We should expect to see this tendency invoked mostly in cases reflecting serious accusations made by social peers; the kind of charges that might have otherwise led to a duel. Furthermore, just as men were the only duelists and dueling regulations had a preoccupation with issues of sex, we should expect this notion of honor to be deeply gendered.¹²¹ Indeed this non-adjudicatory residuum reflects historical power dynamics and may continue to perpetuate these issues after power roles have shifted in society. As time passes and women develop the right to testify, to serve as both plaintiffs and defendants, and eventually to have their own lived experience reflected (in part) by the law, we should expect there to be conflict between the rhetoric of a supposedly neutral judicial procedure and the reality of the underlying status-oriented substance.

C. *The Development of Domestic Violence Law*

Although the law has long been concerned with confrontation, domestic violence is a relatively young body of law. The Massachusetts Bay Colony had a law prohibiting abuse of one's wife as early as 1641, but actual prosecution or penalty for domestic violence has been extremely rare throughout history.¹²² Indeed, at the time the Sixth Amendment was written, the common law protected a husband's right to "chastise" his wife, a privilege that remained at the time the Fourteenth Amendment was written.¹²³ A paradigmatic view of the status of domestic violence law at this time can be seen in the North Carolina Supreme Court's 1864 case *State v. Black*.¹²⁴ In this case, a husband was being prosecuted for assaulting his wife, a conviction that the state supreme court overturned.¹²⁵ In typical language, the court wrote: "A husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the

supra note 11, at 877 ("After all, the framers of the Fourteenth Amendment, not the framers of the Sixth Amendment, imposed the confrontation requirement on the states. Why should the seventeenth-century common law control the interpretation of a constitutional amendment passed in the following century?"). Indeed, legal scholars and historians frequently invoked the analogy of judicial battle immediately after the Civil War and at the time of the drafting of the Fourteenth Amendment. *See generally* Nicoletti, *supra* note 37. The traditional practice of judicial duels and the antebellum practice of dueling certainly could have affected the drafters of the Fourteenth Amendment.

121. *See infra* Part III for a discussion of Justice Scalia's views on gendered confrontation clause issues.

122. *See* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1494 (2008).

123. *See* Siegel, *supra* note 17, at 2122–29 (describing the right of chastisement and early social movements that attempted to challenge it).

124. 60 N.C. (1 Win.) 262 (1864), *overruled by* *State v. Oliver* 70 N.C. 60 (1874). *See also* Jennifer Thompson, *Who's Afraid of Judicial Activism? Reconceptualizing a Traditional Paradigm in the Context of Specialized Domestic Violence Court Programs*, 56 ME. L. REV. 407, 414–20 (2004) (discussing *Black* in the context of the historical development of domestic violence adjudication in the United States).

125. *Black*, 60 N.C. at 268.

law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself.”¹²⁶

This vision of a legally tolerated amount of violence within the family began to erode in the 1870s, as state legislatures and courts began to hold men responsible for the assault of their wives.¹²⁷ In both *Fulgham v. State*¹²⁸ and *Commonwealth v. McAfee*,¹²⁹ state supreme courts found husbands liable for the respective beating and murdering of their wives.¹³⁰ For the first time ever, men were held equally responsible for violence against their wives as they would be for the same crimes against a stranger, although prosecutions were few and far between. Domestic violence was often seen as a “private” matter with which the courts would not interfere.¹³¹ Indeed, until the 1970s, prosecutions were rare and only those from disfavored racial groups were likely to be held accountable for domestic violence.¹³²

Feminist agitation from the 1970s onward led to new laws and an increased attention to the problem of domestic violence.¹³³ As public sentiment moved away from tacit toleration of the problem, states began adopting various methods to improve prosecution, such as controversial no-drop/mandatory arrest, which prohibited battered women from dropping charges against their batterers once the police intervened.¹³⁴ These efforts also led to the Violence Against Women Act, which attempted to partially federalize the prosecution of domestic violence, an effort halted by the Supreme Court’s ruling in *United States v. Morrison*.¹³⁵

126. *Id.* at 267.

127. Siegel, *supra* note 17, at 2129–30; *see also* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 14–17 (2000) (tracing historical changes in attitudes towards domestic violence during this time period); Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1853 (2002) (describing state courts’ change in approach to domestic violence in late nineteenth century).

128. 46 Ala. 143 (1871).

129. 108 Mass. 458 (1871).

130. *Fulgham*, 46 Ala. at 148; *McAfee*, 108 Mass. at 461.

131. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 93 (1987); *cf.* Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1105 n.172 (1994) (stating that the private family sphere “has always been subject to public regulation”); Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 152–68 (2000) (criticizing the language in *Morrison* that implies the Fourteenth Amendment only affects state, not private, action); Siegel, *supra* note 17, at 2144–45 (discussing the evolution in how private relationships are viewed). *But see* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1869–77 (1996) (defending privacy from MacKinnon’s critiques).

132. Goldfarb, *supra* note 122, at 1494 n.37.

133. *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 11 (1999); Steven Shulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2158–70 (1995).

134. Shulhofer, *supra* note 133, at 2158–70; *see also* Hanna, *supra* note 131, at 1857–59 (discussing the evolution of law enforcement’s response to incidents of domestic violence); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 265 (2005) (explaining the “seismic cultural change” opponents of domestic violence hoped to achieve through the implementation of laws against domestic violence).

135. 529 U.S. 528 (2000); *see also* MacKinnon, *supra* note 131, at 136 (criticizing the *Morrison* decision for limiting the federal government’s ability to protect rights “that states have inadequately protected”).

Instead of focusing on the efficacy of various legislative efforts, it is important for the purposes of this Article to look at the evidentiary challenges facing the prosecution of domestic violence. Victims of domestic violence are more likely “to recant or refuse to cooperate” with the prosecution than the victims of any other crime.¹³⁶ There are often a number of different reasons for this reaction: A victim may fear greater violence if she cooperates, she may still love her batterer, she may have a religious or cultural belief that prevents her from leaving her husband, she may be financially dependent on her batterer, or she may think it is best for her children if her batterer does not go to jail.¹³⁷ There is a unique reluctance to testify by witnesses within the domestic violence context.¹³⁸ Further, as acts of domestic violence often occur at home, victims are frequently the only witnesses to the crime.

When domestic violence finally started being taken seriously in the 1970s, it encountered a judicial system that had developed a confrontation doctrine that was particularly ill suited to this problem. Although extremely disfavored in other contexts, hearsay has proven to be centrally important to prosecutors in domestic violence cases.¹³⁹ Hearsay doctrines developed to address relations between accused and accuser that were completely unlike the relationship between a batterer and his victim. Furthermore, these norms are now seen to be neutral and equally applicable to all bodies of law, even if the experiences of battered women were not even a consideration when these policies were created.¹⁴⁰ These problems were only exacerbated by the Court’s recent changes to Confrontation doctrine.

III. FROM *COY* TO *GILES*: JUSTICE SCALIA’S APPROACH TO CONFRONTATION

Authors divide the Court’s treatment of the Confrontation Clause and hearsay into three chronological periods: the *Mattox* Era, the *Roberts* Era, and the *Crawford* Era.¹⁴¹ These periods describe different ways that the Court has reconciled the Confrontation Clause with the admissibility of hearsay under various exceptions. During the *Mattox* Era, the Court took an ad hoc approach to determining whether certain types of evidence were “testimonial” in nature and thus inadmissible without confrontation.¹⁴²

136. Lininger, *supra* note 5, at 768.

137. These explanations with corresponding footnotes are summarized in Tuerkheimer, *supra* note 8, at 15–16. Some have focused on asking these questions and understanding the psychology of battered women. See generally LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 55–70 (1979); Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993). This Article does not address these issues.

138. Certainly this is true of other relational crimes, such as child abuse. Again, that is beyond the scope of this Article, although a separate focus might lead to more differentiation in another work.

139. Lininger, *supra* note 5, at 771–72.

140. This is one of feminism’s fundamental criticisms of criminal law. See Catharine MacKinnon, *Law in the Everyday Life of Women*, in *WOMEN’S LIVES, MEN’S LAWS* 34 (2005) (“Burdens of proof and evidentiary standards as well as substantive law tacitly presuppose the male experience as normative and credible and relevant.”).

141. This tripartite division can be seen in FISHER, *supra* note 80, at 567–73. The cases referenced are *Mattox v. United States*, 156 U.S. 237 (1895); *Ohio v. Roberts*, 448 U.S. 56 (1980); and *Crawford v. Washington*, 541 U.S. 36 (2004).

142. See, e.g., *Mattox*, 156 U.S. at 244 (examining existent case law and relevant circumstances rather than general principles to determine if guarantee of confrontation had been denied).

Roberts represented the Court's attempt to create a formal rule regarding the admissibility of hearsay, one that introduced the famous "indicia of reliability" test rejected in *Crawford*.¹⁴³ Two specific cases from the *Roberts* Era address the need for a face-to-face confrontation, and lay the groundwork for the changes made in *Crawford*.

A. *Avert Your Eyes: Coy v. Iowa and Maryland v. Craig*

*Coy v. Iowa*¹⁴⁴ is the first case where Justice Scalia authored an opinion regarding the Confrontation Clause.¹⁴⁵ *Coy* focused on the trial of a man accused of sexually assaulting two thirteen-year-old girls while they were camping in his neighbor's backyard.¹⁴⁶ Iowa law allowed for a large screen to be placed in the court that prevented the girls from seeing the defendant while they testified.¹⁴⁷ The defendant could still see the witnesses, and both the judge and the jury could see the witnesses throughout their testimony; only the witnesses had their vision obscured.¹⁴⁸

The Court ruled that this arrangement violated the Confrontation Clause. In his opinion, Justice Scalia stated that the Confrontation Clause contained a right to a face-to-face confrontation, considering it to serve a similar purpose to the right to cross-examine.¹⁴⁹ The reasoning was simple: "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"¹⁵⁰

Although the Confrontation Clause guaranteed a right to a face-to-face confrontation without an intermediating screen, there was one limitation: it did not guarantee eye contact.¹⁵¹ Further, the Court rejected a claim that the right to a face-to-face confrontation should be balanced against the State's interest in protecting the victims of sexual abuse.¹⁵² Specifically, the Court noted that there had not been an individualized finding that these witnesses needed special protection—instead the state

143. *Roberts*, 448 U.S. at 66 ("In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'").

144. 487 U.S. 1012 (1988).

145. *Coy*, 487 U.S. at 1014–22.

146. *Id.* at 1014.

147. *Id.* at 1014–15.

148. *Id.* at 1015.

149. *Id.* at 1019–20 ("Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss—the right to cross-examine the accuser . . .").

150. *Id.* at 1019.

151. *Id.* ("The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.").

152. *Id.* at 1020–21. The Court did not *consider* whether the victims of sexual abuse might have a Fourteenth Amendment interest in being protected from the violence of cross-examination—or that such an interest could have been balanced against the Sixth Amendment right. Robin West has argued that the original meaning of the Equal Protection Clause was that "no state may deny to any citizen the protection of its criminal and civil law against private violence and private violation." ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 23 (1994). See *infra* Part III.C for this Article's conceptualization of a face-to-face confrontation under certain circumstances as a private harm. Conceivably, a court could consider a balancing test that addressed these concerns. The Author would like to thank Robin West for suggesting this line of analysis.

had created a legislative presumption of trauma.¹⁵³ Justice O'Connor wrote separately to emphasize that the right to a face-to-face confrontation was not absolute but "may give way in an appropriate case to other competing interests."¹⁵⁴

The Court returned to this issue in *Maryland v. Craig*¹⁵⁵ and directly addressed when these interests might trump the right to a face-to-face confrontation.¹⁵⁶ This case focused on the trial of a woman accused of raping a six-year-old.¹⁵⁷ During the trial, the state invoked a procedural law that allowed the victim to testify via a one-way closed circuit camera.¹⁵⁸ Under this procedure, the child witness, prosecutor, and defense counsel went to another room while the defendant, judge, and jury remained in the courtroom to watch the proceedings.¹⁵⁹ The child was under oath and subject to cross-examination. Although the defendant could observe the proceedings on the television, the witness could not see the defendant at all.¹⁶⁰ Prior to using this system, the trial court had made an individualized finding that "the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress."¹⁶¹

In determining whether this practice violated the Confrontation Clause, Justice O'Connor looked to the clause's purpose: "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."¹⁶² Justice O'Connor weakened the holdings in *Coy* and *Craig*, stating that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial."¹⁶³ The majority found there to be a compelling state policy that justified the dispensation of this right and upheld the law.¹⁶⁴

Justice Scalia dissented, joined by three other justices.¹⁶⁵ Scalia found the text of the Sixth Amendment to be "clear" and reiterated his position from *Coy v. Iowa*.¹⁶⁶ After criticizing the majority's reasoning, Scalia declared: "For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. . . . We are not free to conduct a cost-benefit analysis of clear and explicit constitutional

153. *Coy*, 487 U.S. at 1021.

154. *Id.* at 1022 (O'Connor, J., concurring).

155. 497 U.S. 836 (1990).

156. *Craig*, 497 U.S. at 852–57.

157. *Id.* at 840. The sex of the perpetrator does not undermine the analysis for the purpose of this Article, as the crime itself remains hierarchical and gendered in nature.

158. *Id.*

159. *Id.* at 841.

160. *Id.* at 841–42.

161. *Id.* at 842.

162. *Id.* at 845.

163. *Id.* at 849 (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

164. It is worth noting that the public policy asserted was the "interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator." *Id.* at 852. See *supra* note 152 for a discussion of a potential Fourteenth Amendment interest in being protected from the violence of cross-examination, which is distinct from the public policy asserted in *Craig*.

165. *Id.* at 860 (Scalia, J., dissenting).

166. *Id.* at 861–62.

guarantees, and then to adjust their meaning to comport with our findings.”¹⁶⁷ Disdainful of the prevailing confrontation doctrine, Justice Scalia’s views would ultimately become law.¹⁶⁸

B. Redefining Confrontation: Crawford and Davis

Justice Scalia’s vision of the Confrontation Clause eventually replaced the *Roberts* test, beginning with *Crawford v. Washington*.¹⁶⁹ Crawford was tried for stabbing a man who allegedly tried to rape his wife.¹⁷⁰ The defendant claimed the stabbing was in self-defense—his wife believed otherwise.¹⁷¹ Washington’s marital privilege law prohibited Crawford’s wife from testifying; instead the prosecution played a recording of Crawford’s wife’s prior statement for the jury.¹⁷²

Writing for the majority, Justice Scalia began with a history of the Confrontation Clause before arriving at two conclusions.¹⁷³ First, the Confrontation Clause was primarily focused on criminal prosecutions and the use of ex-parte witnesses and therefore applied to out-of-court statements.¹⁷⁴ Second, out-of-court testimony could only be admitted if the witness was unable to testify and the defendant had a prior opportunity for cross-examination.¹⁷⁵ Courts would no longer look to indicia of reliability in determining the admissibility of testimonial evidence from an unavailable witness.

Scholars immediately reacted to this realignment of confrontation doctrine with many harsh criticisms directed at the ruling.¹⁷⁶ Many scholars agreed that the *Roberts*

167. *Id.* at 870.

168. There are some who believe that *Maryland v. Craig* may still be good law. See Myrna S. Raeder, *Comments on Child Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1015–19 (2007) (arguing that *Maryland v. Craig* may survive in a post-*Crawford* and *Davis* world). The Author is skeptical, given Scalia’s role in shaping the Confrontation Clause doctrine in recent years and the similarity of his dissent in *Maryland v. Craig* to his future holdings.

169. 541 U.S. 36 (2004). There were other cases between *Maryland v. Craig* and *Crawford* that discussed related issues. See, e.g., *White v. Illinois*, 502 U.S. 346, 355–57 (1992) (discussing the admissibility of a four-year-old’s statements of her sexual abuse to various third parties). Justice Scalia did not file an opinion in this case or the others that analyzed the Confrontation Clause.

170. *Crawford*, 541 U.S. at 38.

171. *Id.* at 39–40. From the beginning this was a heavily gendered case revolving around a husband’s belief that an assault upon his wife was an assault upon him—thus raising the specter of “self-defense.” A deeper analysis of the language used throughout this case is beyond the scope of this Article but there is something fascinating under the surface.

172. *Id.* Washington’s marital privilege law did not extend to a spouse’s out-of-court statements, which were admissible under a hearsay exception. *State v. Burden*, 841 P.2d 758, 761 (1992). This itself is a curious artifact of gendered presumptions about a spouse’s interests, and it does not necessarily make sense in domestic violence situations. For more on this point, see R. Michael Cassidy, *Reconsidering Spousal Privileges After Crawford*, 33 AM. J. CRIM. L. 339 (2006).

173. *Crawford*, 541 U.S. at 42–50.

174. *Id.* at 50.

175. *Id.* at 53–54.

176. See, e.g., Frank Herrmann, *The Uses of History in Crawford v. Washington*, in 2 INT’L COMMENTARY ON EVID., No. 1, Art. 5 at 19–19 (2004); Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 37–39 (2005) (criticizing Justice Scalia for reading the Confrontation Clause out of context from the other elements of the Sixth Amendment); Thomas J.

doctrine was not strongly grounded in the text of the Sixth Amendment but believed it to have been a good balance that served an important purpose.¹⁷⁷ Others expressed concern about the impact this would have in domestic violence prosecutions and the impact that the new confrontation doctrine would have on state-level hearsay rules.¹⁷⁸ Still others worried about how to determine whether evidence was testimonial or not.¹⁷⁹

These concerns only deepened as the Court continued remaking confrontation doctrine in *Davis v. Washington*.¹⁸⁰ This case explored whether a call made to 911 during a domestic violence attack was “testimonial” and thus subject to the Confrontation Clause.¹⁸¹ Once again writing for the majority, Justice Scalia determined that statements made to the police during an ongoing investigation that are intended to produce immediate assistance were nontestimonial.¹⁸² Those statements made to the police once the matter was no longer immediate were testimonial and thus subject to the Confrontation Clause.¹⁸³

Although *Davis* clarified the meaning of “testimonial” evidence, scholars remained critical of the new direction of the Court.¹⁸⁴ Some scholars turned to one of the hearsay exceptions, forfeiture by wrongdoing, with the hope of continuing to prosecute domestic violence effectively.¹⁸⁵ This doctrine is codified in the Federal Rules of Evidence and allows into evidence “[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”¹⁸⁶ It was hoped that this exception could be used in domestic violence cases where an abusive spouse made his victim unavailable to testify through unlawful means.

Reed, Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule, 56 S.C. L. REV. 185, 223 (2004) (listing the “host of unanswered questions” that Crawford left in its wake).

177. Lininger, *supra* note 5, at 751–53 (summarizing opposition to Crawford).

178. See Tuerkheimer, *supra* note 8, at 18–33 (“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.” (footnote omitted)).

179. See Richard D. Friedman, *Grappling with the Meaning of “Testimonial”*, 71 BROOK. L. REV. 241, 242–43 (2005) (agreeing with the Court’s rejection of the Roberts doctrine but expressing concern about the future of confrontation doctrine without clear guidelines).

180. 547 U.S. 813 (2006).

181. *Davis*, 547 U.S. at 817. The companion case, *Hammon v. Indiana*, also focused on a domestic violence situation. *Id.* at 819–20.

182. *Id.* at 822.

183. *Id.*

184. See, e.g., Bailey, *supra* note 8, at 26–27 (criticizing the court for failing to discuss how evidence will be produced in domestic violence trials); Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them”*, 82 IND. L.J. 917, 919 (2007) (criticizing the Court for failing to clarify the definition of “testimonial” in *Davis*, and expressing concern about the impact in domestic violence prosecutions).

185. See Lininger, *supra* note 5, at 807 (“All states should codify the doctrine of forfeiture by wrongdoing, which provides that a party who has wrongfully procured the unavailability of a declarant may not invoke the hearsay rules to bar the admission of that declarant’s out-of-court statement.”).

186. FED. R. EVID. 804(b)(6).

C. *Giles and the Forfeiture by Wrongdoing Exception*

In *Giles v. California*,¹⁸⁷ a divided Court produced five opinions that undermined the ability of forfeiture by wrongdoing to assist in domestic violence prosecutions. The majority opinion ruled that in order to invoke forfeiture by wrongdoing and admit the testimony of an absent witness, a court would need an individualized “showing that the defendant intended to prevent a witness from testifying.”¹⁸⁸

In *Giles*, the witness in question was the defendant’s ex-girlfriend, who was unable to testify because Giles had shot her to death.¹⁸⁹ The testimony in question was a statement she gave to the police three weeks earlier, when the officers were responding to a domestic violence incident.¹⁹⁰ Justice Scalia again examined the history of the Confrontation Clause and came to the conclusion that a direct showing of intent to silence was necessary to invoke the forfeiture doctrine.¹⁹¹ Justice Souter, joined by Justice Ginsburg, came to the same conclusion without a historical analysis, focusing instead on a perceived danger of circular reasoning and question-begging.¹⁹² Both Justice Scalia and Justice Souter acknowledged that domestic violence is a serious offense that often involves isolating a woman from resources, including law enforcement, but required a specific finding of such an intent for forfeiture to be invoked.¹⁹³ Justice Breyer dissented, and came to a conclusion opposite of Justice Scalia’s, based on his own reading of the historical record.¹⁹⁴

In response to Justice Breyer’s dissent, Justice Scalia asked a provocative question: “Is the suggestion that we should have one Confrontation Clause (the one the

187. 554 U.S. 353 (2008).

188. *Giles*, 554 U.S. at 361.

189. *Id.* at 356.

190. *Id.* at 357 (“According to [the victim], when she broke free and fell to the floor, Giles punched her in the face and head, and after she broke free again, he opened a folding knife, held it about three feet away from her, and threatened to kill her if he found her cheating on him.”).

191. *Id.* at 359–61.

192. *Id.* at 379 (Souter, J., concurring) (“If the victim’s prior statement were admissible solely because the defendant kept the witness out of court by committing homicide, admissibility of the victim’s statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence; evidence that the defendant killed would come in because the defendant probably killed.”).

193. *Id.* at 376 (majority opinion) (“Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State’s arsenal.”). Justice Souter makes almost an identical point: “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.” *Id.* at 380 (Souter, J., concurring). Given that Justices Souter and Ginsburg believe that domestic violence almost always manifests the intent to silence a victim, it is remarkable that they did not think to make a per se rule for this context, or even a rebuttable presumption. Instead, by signing onto a subjective intent policy, the two Justices make it extremely difficult to prosecute the problem as Souter describes it. See *supra* Part III.A for a discussion of the parallel distinction made in *Maryland v. Craig* and *Coy v. Iowa* regarding individualized assessment versus legislative pronouncement.

194. *Giles*, 554 U.S. at 406 (Breyer, J., dissenting). The last sentence of Justice Breyer’s dissent implies that he would have agreed with Justice Souter had he proposed a per se assumption that the intent-to-silence exists in the domestic violence context.

Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women?”¹⁹⁵ Although Scalia was being facetious, the answer may very well be yes. It appears that we need a special understanding of the Confrontation Clause to address domestic violence.¹⁹⁶

D. An Unasked Question

An extremely important question was not addressed by any of the five opinions: What kind of crime, other than domestic violence, would ever fail the test set out in *Giles*? In other words, what kind of situation would ever exist where a defendant would make a witness unavailable for some reason other than intent-to-silence? For such a situation to occur, the witness and the defendant would have a preexisting relationship that causes the defendant to bear a significant amount of enmity towards the witness independent of the accusations to be made a trial. Such a defendant would need to take drastic actions, such as imprisonment, impairment, or murder, such that the witness would be unable to testify. These actions could not be motivated by a desire to avoid a guilty sentence, but would have to be motivated by a non-adjudicatory factor. Finally, the witness would have had to have made a recorded testimonial statement prior to these actions regarding a separate case against the defendant.

There are a few instances when we might expect a defendant to lash out at a potential witness, such as mob informants and whistleblowers. Both types of witnesses may have made statements either to the police or to a grand jury. Yet any retaliatory action against these witnesses will be focused on the fact that they gave any testimony. Conceivably, these witnesses were regular employees/gang members before the testimony, and any anger towards these witnesses comes from feelings of betrayal. Still, if these witnesses disappear, it is to prevent this testimony from ever getting out.¹⁹⁷ Conceivably, a prosecutor would be able to show that the defendant had the subjective intent of preventing that witness from ever testifying, and the *Giles* test would be met.

Although it might be easy to meet this standard in other circumstances, *Giles* will certainly present a serious hurdle in domestic violence prosecutions. Sadly, it is a common situation for a woman to be killed after separating from her boyfriend or husband—having made a sworn affidavit in order to obtain an order of protection.¹⁹⁸ Indeed, the period immediately after separation is the most dangerous time for a

195. *Id.* at 376 (majority opinion).

196. See *infra* Part V for a discussion of how the Confrontation Clause now undermines domestic violence prosecutions.

197. Of course, a defendant could argue that any murder was not directed at preventing a witness from testifying but was intended to send a message to future whistleblowers. Furthermore, it is conceivable that a mob member could be suspected of being a “snitch” without his superiors having specific knowledge that the individual had spoken to the police. Perhaps these circumstances would also be examples where someone was killed without the direct intent of silencing specific testimony—although these are still arguably instances where a prosecutor could show specific intent to silence.

198. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 113–14 (1987) (explaining that fear of retaliation deters women from leaving and is justified because many women are “followed and harassed for months or even years, and . . . have been killed” by the abusive partner).

battered woman and the most common time for a domestic violence homicide.¹⁹⁹ The only other crime (barring a law school hypothetical)²⁰⁰ where a defendant might murder a witness for non-adjudicatory purposes would be stalking, a crime that is so deeply gendered that it could be included in the domestic violence context, even when the parties might not fit into such a category.²⁰¹ Although some batterers may kill their partners to avoid a trial, many kill for other reasons. In these cases *Giles* may present a serious challenge to effective prosecution by barring the admission of important testimonial evidence given by the victim before she was killed.²⁰²

From this vantage point, *Giles* creates a standard that precludes only domestic violence cases—yet these are the cases where the need for such an exception to the Confrontation Clause is the most important. All other criminals who prohibit witnesses from testifying are denied the protections of the Confrontation Clause. Yet batterers who kill their victims out of the same anger that led them to batter can find refuge.

Although some theorists are shocked by this series of cases and how they impact domestic violence prosecutions, a close study of the development of the Confrontation Clause might reveal that this outcome could have been predicted.²⁰³ Looking closely at the Confrontation Clause we find that it is inherently at odds with a legal regime that effectively prosecutes domestic violence.

IV. THE ANDROCENTRIC BIAS OF THE CONFRONTATION CLAUSE

Up until this point, this Article has advanced a descriptive argument about the contexts in which the Confrontation Clause doctrine was developed. As discussed above, the Confrontation Clause contains a subsumed belief that evidence is best established by a ritualistic showdown of sorts, where social equals face off against each other.²⁰⁴ Considering that women's perspectives and realities were not considered during the period of these developments, it comes as no surprise that the law did not

199. See *id.* at 115 (describing the point of separation as “one of the most dangerous times for partners in a violent relationship”).

200. It is possible to imagine such an example: Suppose a defendant was driving home from work and accidentally struck a pedestrian who just happened to be a witness who had testified that morning in front of a grand jury. Should that testimony be admissible? It is unclear that there is any value in making such a hypothetical, however, when it comes to dealing with substantive law. The ability to imagine a fanciful example cannot change the fact that only one crime consistently resembles the situation described. One might even wonder if the act of creating fanciful counter examples is in itself inherently regressive, as it serves mostly to prevent progressive social change by prioritizing the interests of hypothetical and unlikely individuals instead of the needs of real people who are currently oppressed by the status quo.

201. See Susan E. Bernstein, Note, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARDOZO L. REV. 525, 528 n.18 (1993) (“[N]early 80% of the nation’s stalkers are men”) (citing Scott Bowles, *Stalked by Strangers, Women Seek Protection*, GANNETT NEWS SERVICE, Apr. 27, 1992.). See *supra* note 19 for an example of where this analysis could conceivably be extended to other crimes.

202. Silencing a victim also includes threats and intimidation and should not be limited to just murder. See *infra* Part V.A for an explanation of how a testifying witness can be silenced in the domestic violence context.

203. See *supra* Part II for a discussion on the brief history of the Confrontation Clause.

204. See *supra* Part II.B for a discussion on the history and development of the Confrontation Clause.

evolve in a manner that would reflect their interests.²⁰⁵ This Part presents a normative argument to compliment the descriptive argument: that underlying this view of the Confrontation Clause is a set of assumptions about relationships between criminals and witnesses that is particularly androcentric and, further, makes it inapposite for the prosecution of domestic violence.

This is not necessarily a new criticism. Feminist legal theorists have often argued that our criminal law is focused on the types of crimes that disproportionately affect men and is less attuned to criminal acts that disproportionately affect women.²⁰⁶ One prominent example of this debate is the “imminent danger” requirement for the claim of self-defense.²⁰⁷ What at first seems like a neutral principle of law, that there must be an imminent danger present in order to justify the use of lethal force in self-defense, presupposes a situation where violence is discrete as opposed to continuous.²⁰⁸ The imminence requirement assumes singular violent acts, such as an assault in a dark alleyway, as opposed to a series of violent acts, which collectively may seriously endanger a victim in the long term and where escalation may be extremely likely but unpredictable. The former set of crimes describes acts of violence that largely affect men and occur in public settings, whereas the latter describe acts of violence that largely affect women and occur in private.²⁰⁹

This claim alone is not enough to demonstrate that the Confrontation Clause is irreconcilable with a sensible policy towards domestic violence. Certainly the Founders, let alone Hale and Coke, could not have foreseen the crime of airplane hijacking, given the technological capabilities of the time. It is safe to argue, then, that airplane hijacking was not considered during the development of the Confrontation Clause. The existence of new problems alone is not a sufficient enough counterargument, especially when fundamental principles of justice are at stake.

This Part goes one step further and distinguishes the case of domestic violence from other unanticipated developments. The Confrontation Clause is not merely

205. See *supra* notes 87–89 and accompanying text for a discussion of women’s limited access to the legal system.

206. See, e.g., Shulhofer, *supra* note 133, at 2151 (stating that “across a wide range of issues, the feminist position has its basis in a simple fact that cannot be considered debatable: criminal law is, from top to bottom, preoccupied with male concerns and male perspectives”).

207. See, e.g., *Ha v. State*, 892 P.2d 184, 190–91 (Alaska Ct. App. 1995) (discussing the meaning and applicability of “imminent” danger).

208. See Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 392–97 (1993) (using the example of one woman’s constant exposure to violence to illustrate different understandings of “imminence”).

209. Of course, men may also be the victims of hierarchical, relational violence. See *State v. Schroeder*, 261 N.W.2d 759, 760 (Neb. 1978) (explaining scenario where male inmate stabbed his sleeping cellmate after the deceased threatened to sell cellmate to another prisoner as sex slave). Much like battered women who kill their husbands in their sleep, Schroeder was unable to plead self-defense because the imminent harm he faced was dissimilar to the types of harms imagined by the doctrine. It is worth noting, however, that Schroeder was being treated “as a woman” by the deceased and the other prisoner. *Id.* at 761. See also *Ha*, 892 P.2d at 191 (“However, ‘inevitable’ harm is not the same as ‘imminent’ harm.”). For a criticism of the gendered concerns underlying the imminence requirement, see generally Rosen, *supra* note 208.

ignorant of domestic violence, but its doctrines are based on a series of assumptions that make it incapable of addressing domestic violence.²¹⁰

A. *Taking Hierarchy Seriously*

In the domestic violence context, the witness has been abused by the accused in a manner that makes testimony difficult.²¹¹ The two are not social equals but are hierarchically related, where the abuser dominates the abused.²¹² In a system of hierarchy and sustained, relational violence, when the abuser attacks the abused, there is no shortage of opportunities for confrontation. Indeed, each instance of abuse is more than violence, it is a disciplinary attempt to control the abused and make her conform her behavior to the abuser's will.²¹³ The violence of the abuser becomes the reality of the abused. To demand confrontation is to provide another opportunity for the abuser to impose this logic/language of violence upon his victim.²¹⁴

The confrontation doctrine does not assume these barriers to testimony and largely presumes a relationship of equals between the witness and the defendant, not one of hierarchical inequality. The Confrontation Clause carries with it no exception for intimidation or retribution, which are classic markers of hierarchical relationships that prevent the subordinated from speaking out against her oppressor. In short, the Confrontation Clause anticipates a narcissistic injury that requires mediation.²¹⁵ Domestic violence represents a different kind of injury, an offense to the status of the powerful that necessitates an increase in violence towards the accuser to reestablish hierarchical order. For a subordinated individual to confront her abuser is often to invite more violence, not a resolution.²¹⁶

210. Conversely, unlike domestic violence cases, there is nothing obviously inherent to the crime of hijacking that causes difficulty within current confrontation doctrine, despite technological innovation.

211. Of course, this is not the case with false claims of abuse, where the accuser has not suffered from these concerns. False claims of abuse are addressed below.

212. Much of this description of hierarchy is derived from the works of Catharine MacKinnon's. *See, e.g.,* CATHARINE MACKINNON, *SEX EQUALITY* 2–49 (2d ed. 2007).

213. There is extensive literature on the role of control within domestic violence. *See, e.g.,* JAMES TEDESCHI & RICHARD FELSON, *VIOLENCE, AGGRESSION, AND COERCIVE ACTIONS* 203 (1994); Richard Felson & Steven Messner, *The Control Motive in Intimate Partner Violence*, 63 *SOC. PSYCHOL. Q.* 86, 86 (2000) (stating that violence is used to influence a target's behavior); Deborah Tuerkheimer, *Control Killings*, 87 *TEXAS L. REV.* 117, 119–20 (2009) (responding to Lininger's *Sound of Silence* and discussing how the patterned nature of power and control should impact Confrontation Clause application).

214. Furthermore, many victims of abuse consider trials to be a second assault, as the judicial system treats them in a similar manner as their abuser: as someone whose behavior needs to be molded and controlled in a very specific way according to a foreign logic. *Cf.* Tuerkheimer, *supra* note 8, at 13–14 (describing how the criminal justice system does not adequately protect domestic abuse victims and common victim reactions).

215. *See* Daniel D. Polsby & Don B. Kates, Jr., *American Homicide Exceptionalism*, 69 *U. COLO. L. REV.* 969, 979 (1998) (discussing how various cultural elements help “dictate how young men will answer narcissistic injuries and territorial affronts”).

216. Perhaps this explanation, more than any individual reason, explains why domestic violence prosecutions demonstrate such a markedly different rate of testifying than any other crime. *See* BROWNE, *supra* note 198, at 113–14 (describing women's fear of retaliatory action by their abuser); Tuerkheimer, *supra* note 8, at 14 n.83 (citing Lininger, *supra* note 5, at 768) (stating that eighty to eighty-five percent of battered women recant their statements).

This, then, is a fundamental problem with the Confrontation Clause as it is applied to domestic violence. Underlying the doctrine is the presupposition of a relationship where there is no imbalance of power. In the domestic violence context this is often not the case, as one party has subjugated the other.²¹⁷ Confrontation insists upon an in-court confrontation, which allows the batterer to further terrorize his victim while ignoring the ways that this might undermine her ability to testify.²¹⁸ It plays directly into the control mechanism, by giving the batterer one final way to dictate how his victim must behave, where she must go, and what language she must use. Finally, it discounts the lived experience of those who do not testify by assuming that an adversarial system is the only way that the truth can be told, without questioning why some witnesses choose not to testify.

B. Could the Confrontation Clause Be Otherwise Defended?

There is an immediate instinct among some modern practitioners and scholars to defend the basic principle of confrontation.²¹⁹ As the Court has mentioned, it seems fundamental to our notion of a fair trial. This instinct comes less from any evidence-based demonstration of efficacy or accuracy but instead from longstanding tradition to which we have become accustomed. Indeed this conception comes not only from experiences with the judicial system but from popular representations of trials. Confrontation provides authors with an opportunity for dramatic tension and, as a result, it is commonplace for scenic moments in multiple forms of media. These representations have certainly shaped our expectations and opinions on what a fair trial would look like.

Although there may be a Burkean instinct to preserve this notion,²²⁰ it is also worth trying to find independent grounds upon which to defend the practice. It is important to separate out the practice of cross-examination from the principle of confrontation. We could still believe that cross-examination serves an important fact-finding function by giving the defendant a specific mechanism to challenge the key

217. See Felson & Messner, *supra* note 213, at 86 (describing how violence influences a target's behavior); Tuerkheimer, *supra* note 8, at 17 (describing the control and power in domestic violence and its impact in law enforcement).

218. See Epstein, *supra* note 133, at 17 (stating that the criminal justice system can perpetuate the kinds of power and control dynamics that exist in the battering relationship); Tuerkheimer, *supra* note 8, at 17–18 (describing the enduring effect of the “state of siege” on the abused and how it affects the ability to testify).

219. This could be the result of many sociological pressures among attorneys and legal academics. Seeing how the Confrontation Clause is in the Bill of Rights, it is unlikely to go anywhere. It makes more sense to defend the principle while arguing for different implementations. Another reason could focus on the tendency of legal scholars to see the Constitution as the origin of all our substantive liberties and believe deeply in all of its tenets. Long gone are the days when activists such as William Lloyd Garrison would burn copies of the Constitution. For a longer discussion on pressures facing attorneys who deal with similar issues, see Mark Eggerman, *Rules for Radical Lawyers: Advancing the Abortion Rights of Inmates*, 21 COLUM. J. GENDER & L. 46, 52 (2011) (outlining the strategies employed by radical lawyers).

220. For background on Burkean ideals, see Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 353 (2006).

witnesses against him.²²¹ The challenge is to preserve the defendant's right to bring a witness before him, without any intermediation (as in *Coy*) during the trial. After all, cross-examination could take place in any number of ways precluded by confrontation doctrine.

There are some authors who argue the Confrontation Clause plays an important purpose in modern jurisprudence, independent of its historical development. These scholars often turn to deontological conceptions of individual rights.²²² Some argue that the right to aggressively cross-examine a witness respects the autonomy of the accused.²²³ The same could be said about the weak form of confrontation: that the right to have one's accuser brought in for a face-to-face confrontation during the trial respects the accused's autonomy. This form of argumentation often lacks an awareness of gender dynamics or hierarchical power imbalances, especially given the harms that such a confrontation can cause a victim.²²⁴ What does it say about autonomy if intentionally causing pain to one weaker than you enhances your autonomy?²²⁵

Even granting this argument, the issue of forfeiture makes things particularly untenable. It is hard to imagine a Kantian argument that would support a right to mistreat a witness outside of the courtroom in order to gain a strategic advantage during the trial.²²⁶ Forfeiture would reflect a belief that a defendant's direct actions can cost him some of his autonomy rights. By the same logic, in the domestic violence context, we could strip a defendant of his confrontation right because of his own previous actions: a history of abuse which has caused the victim to be unwilling to confront him in court. The defendant may challenge that such a history exists; indeed that is likely the subject of the case.

This presents a difficulty when dealing with false claims of abuse. Given a presumption of innocence, it would be difficult to strip the defendant of his deontological right without an affirmative showing of guilt. Granting this deference causes us to circle back to the problem presented by *Giles*.²²⁷ Default autonomy rights that require an individualized showing of intent before stripping the confrontation protection will make it difficult to prosecute domestic violence for all the reasons

221. For the purposes of this Article, I accept this claim. A more radical argument may look to see whether it would be desirable to jettison cross-examination in certain circumstances or move towards an inquisitorial and non-adversarial form of fact-finding in domestic violence cases.

222. See, e.g., William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 439 (1995) (discussing the role of "privacy, autonomy, and the ability of individuals to keep information to themselves" underlying many modern criminal procedural rules).

223. See R. George Wright, *Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character*, 83 KY. L. J. 801, 825 (1995) ("[T]he value of protecting human dignity or autonomy counts generally in favor of some sort of adversary system . . ."); Timothy P. Terrell, *Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the "Metaethics" of Legal Ethics*, 49 EMORY L.J. 87, 113-14 (2000) (wondering if an aggressive cross-examination of a witness may advance the dignity of the client, even if it does not advance the client's interests).

224. See *supra* Part IV for a discussion of such problems with respect to domestic violence cases.

225. This would also seem to imply that the autonomy interest is itself a reflection of the perspective of the abuser and not the abused.

226. See Lininger, *supra* note 22, at 293 (explaining that Kantian deontology does not permit the mistreatment of a witness for strategic gains).

227. See *supra* Parts III.C-D for a discussion of the problems *Giles* presents.

discussed above. It would seem, therefore, that any deontological arguments in favor of confrontation fail in the domestic violence context, or at least they may be internally coherent but fundamentally undermine domestic violence prosecutions in the same way our current doctrine does.

There could also be teleological or utilitarian arguments for the Confrontation Clause as a general background rule. Such an argument would weigh the harms described above with other gains, perhaps looking at confrontation's advantage in reducing wrongful convictions in other areas. Social science research casts doubt on the ability of juries to accurately assess truth-telling, even given a face-to-face showdown.²²⁸ Still, assuming that there is some utilitarian benefit, this argument would acknowledge that it would be utility maximizing to waive confrontation in cases where it interferes with generating optimal outcomes, so long as the search costs and rate of false-positives remain lower than the cost of not waiving.²²⁹ In this case, the Confrontation Clause would transform from a constitutionally guaranteed right to a rebuttable presumption given narrowly tailored exceptions. One might suggest that this is exactly what the common law attempted to do with doctrines such as forfeiture by wrongdoing. It might be possible to conceptualize the confrontation doctrine away from an individual right and create adequate independent grounds to maintain the practice. Sherman Clark proposed that we reframe the Confrontation Clause as an accuser's obligation and not a defendant's right.²³⁰ It would seem that this formulation perpetuates the same problem described above. Given the social content of confrontation, burdening the witness within a hierarchical relationship is not functionally different than giving the right to the perpetrator. A compulsion to appear within this framework remains problematic no matter how the process is structured.

Finally, an important note must be made about the development of the Confrontation Clause with respect to evidence-based practices. There is a disturbing lack of concern about empirically demonstrating that the Confrontation Clause actually does what its proponents claim. The Court feels comfortable with statements such as: "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former context, even if the lie is told, it will often be told less convincingly."²³¹ Yet no evidence is given to support this claim. Indeed, the privileged constitutional position of the Confrontation Clause has precluded the need for any serious social science research to examine these hypotheses. It would be somewhat

228. See WALTER MISCHER, *PERSONALITY AND ASSESSMENT 2* (1968) (examining the developments in theory, research, and personality assessment relevant to complex human behavior); Gerald R. Miller & Judee K. Burgoon, *Factors Affecting Assessments of Witness Credibility*, in *THE PSYCHOLOGY OF THE COURTROOM* 169, 187–88, (Norbert L. Kerr et al. eds., 1982) (applying various sociology studies of nonverbal communication to illustrate how difficult it is to perceive truthfulness even from an in-person encounter).

229. This also would require an assumption that individuals would know that they faced higher burdens in these cases and would structure their behavior in ways outside the courtroom in a utility maximizing way. In the case of domestic violence, it certainly seems uncontroversial to argue that a fear of increased prosecution would lead to reduced battering, which would maximize social utility.

230. Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1261 (2003).

231. *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988). See *supra* Part II.A for a discussion of a brief history of the Confrontation Clause.

straightforward to develop tests to determine whether or not juries were more able to determine the veracity of a witness when the defendant was present.²³² Perhaps the data would show that some aspects of these claims are true in some predictable and determinable circumstances—better procedures could conceivably be developed around these lines.

A perfect example exists in the facts of *Coy v. Iowa*.²³³ The Court provided no evidence for any of the behavior claims made regarding the ability of a jury to ascertain the truth. It may be the case that allowing victims of trauma to choose to testify behind a screen could increase the likelihood of a jury correctly ascertaining the truth. Studies could be constructed to create the type of evidence-based policies that would best allow for the administration of justice in situations like these. Courts will never need to turn to any such evidence so long as the Sixth Amendment is clear and there is no need for a rational basis to defend these practices.²³⁴

V. MOVING BEYOND *GILES*

The Confrontation Clause was never intended to regulate accusations of domestic violence; it contains markers of a historical process that mediated conflicts between social equals, not between the dominating and the subordinated. By ignoring the substantive elements underlying the rhetoric of the confrontation doctrine, the *Crawford* trilogy has seriously undermined domestic violence prosecutions. These problems mirror other recent Supreme Court rulings limiting the prosecution of domestic violence, most prominently *United States v. Morrison*²³⁵ and *Castle Rock v. Gonzales*.²³⁶ With *Giles*, one of the last remaining exceptions to the Confrontation Clause that allowed for some effective prosecution of domestic violence was narrowed.²³⁷

There are three potential options for advocates to take in order to continue to prosecute domestic violence effectively in light of *Giles*: (1) expand the narrowed forfeiture by wrongdoing doctrine in order to prosecute batterers whenever possible, (2) amend the Constitution, or (3) partially unincorporate the Confrontation Clause.²³⁸ Although supportive in principle, I am skeptical of the likelihood of the second

232. See *supra* note 228 and accompanying text for a discussion of social scientists' theories on jurors' ability to witness truthfulness.

233. 487 U.S. at 1014–15.

234. Of course, even the Court may not be particularly interested in this type of evidence-based practice. See Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 894–96 (2009) (illustrating the Court's "naïve realism" in the context of a case involving a motor vehicle injury caused by a police officer during a high-speed chase).

235. 529 U.S. 598 (2000).

236. 545 U.S. 748 (2005). Some believe that these cases reflect a deeply troubling fact about Justice Scalia. See G. Kristian Miccio, *Giles v. California: Is Justice Scalia Hostile to Battered Women?*, 87 TEXAS L. REV. 93, 99 (2009) (arguing Justice Scalia is sexist and misogynistic).

237. See Lininger, *supra* note 11, at 897–98 (highlighting the difficulties after *Giles* in preventing defendants from escaping the forfeiture rule).

238. The move to unincorporate the Confrontation Clause is at odds with traditional activist goals of increased federalization of domestic violence as reflected in VAWA. MACKINNON, *supra* note 131, at 103–105, 135.

approach succeeding. The extraordinary difficulty of an Article V amendment makes it unlikely that a small modification to the Sixth Amendment would warrant the political capital needed to successfully pass, bracketing obvious questions of popularity.

A. Successfully Prosecuting Domestic Violence After Giles

The first option is certainly what most advocates promote. Justice Souter's concurrence effectively calls for prosecutors to explicitly find that defendants intended to silence their victims in order to invoke the doctrine and thus introduce the hearsay testimony.²³⁹ Of course, given the dynamics of domestic violence, it might have been useful for there to have been a rebuttable presumption of intent-to-silence whenever there is an absent victim in a domestic violence case. This is especially important in nonlethal cases. *Giles* takes the easier case of lethal domestic violence, where there is an obvious causation as to why the victim is not testifying.²⁴⁰ Yet in the case of nonlethal domestic violence, where threats and intimidation keep victims off the stand, it can be extremely hard for a prosecutor to show that there was a clear intent to silence.²⁴¹ Although Justices Souter and Ginsburg may have been concerned about question-begging, the opinion with which they concurred requires prosecutors to establish that the defendant subjectively intended to silence the witness.²⁴² This standard sets the bar too high for the prosecution to succeed in domestic violence cases.²⁴³

One suggestion has been to revise state and federal hearsay laws to invoke a broader hearsay exception for forfeiture.²⁴⁴ Proponents believe that "*Giles* has left interstices in which states are free to legislate."²⁴⁵ Such areas include hearsay by the accused himself, hearsay in civil cases, or the introduction of nontestimonial hearsay, as permitted in *Davis*.²⁴⁶ All of these are good ideas and should be vigorously supported. Yet, given the opinions in *Coy* and *Craig*, the Court has shown a strong preference for individual adjudications of intent, as opposed to legislative declarations. This argument is not likely to succeed given the current composition of the Court.

B. Partial Unincorporation

Instead of struggling to expand hearsay laws as broadly as possible, it is worth considering whether the Confrontation Clause could be partially unincorporated as it

239. *Giles v. California*, 554 U.S. 353, 379 (2008) (Souter, J., concurring) ("If the victim's prior statement were admissible solely because the defendant kept the witness out of court by committing homicide, admissibility of the victim's statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence; evidence that the defendant killed would come in because the defendant probably killed.").

240. *See id.* at 383 (Breyer, J., dissenting) ("[M]urder . . . leads to the witness' absence . . .").

241. *See* Tuerkheimer, *supra* note 11, at 726–28 (explaining the differences between lethal and nonlethal domestic violence in terms of the difficulty prosecutors have in proving witness intimidation by the defense).

242. *Giles*, 554 U.S. at 379 (Souter, J., concurring).

243. *See* Lininger, *supra* note 11, at 897–98 (highlighting the difficulties after *Giles* in preventing defendants from escaping the forfeiture rule).

244. *Id.* at 902–07.

245. *Id.* at 905.

246. *Id.* at 892–93.

applies to victims in domestic violence cases.²⁴⁷ No amendment has ever been unincorporated, although not all have been incorporated. As such, this proposal seems extreme.²⁴⁸ This Article has argued that the historical development of the confrontation doctrine focused on crimes strongly unlike domestic violence and that the doctrine is ill suited to address domestic violence. Given that domestic violence and related crimes are only tried in state courts, these concerns could be addressed by not applying the Sixth Amendment against states in all contexts. In effect, unincorporation is one way to reverse *Morrison*: if the Constitution prohibits the federalization of domestic violence, then it is time to remove constitutional shackles prohibiting states from effectively addressing the problem.

Given the very complex problems involved with effectively prosecuting domestic violence, it might be wise to allow states to modify their fact-finding procedures in these areas in order to address these concerns. States would still be required to honor the Confrontation Clause in other contexts. Confrontation rights would only be unincorporated in domestic violence cases with respect to a face-to-face meeting and only as to alleged victims.²⁴⁹

This move would allow for expanded policy space wherein states could experiment with various solutions, such as specialized domestic violence courts that allowed for in camera testimony by victims,²⁵⁰ or a per se presumption of forfeiture by wrongdoing for a nontestifying victim in the domestic violence context,²⁵¹ or directions to balance the Sixth Amendment against witnesses' Fourteenth Amendment rights to be safe from violence.²⁵² This flexibility would allow states to work seriously to address this complicated issue and to tailor solutions that would allow for the introduction of testimonial evidence obtained by officers or individuals at shelters even when a battered woman is unable to testify.

This is not to say that the ability to use this evidence means that it is a good idea to do so. Many of the criticisms of no-drop policies apply here as well—it might be terribly damaging for women to have testimony introduced when they wished to recant.²⁵³ Furthermore, many of the concerns of women who choose not to testify, such

247. As mentioned above, there may be other situations where this move would be supported by a similar analysis. An historical example could be the experience of African American witnesses in Jim Crow era courts—although there the hierarchical relationship is not identical to that of domestic violence. Another potential place to look would be the testimony of prostitutes or victims of trafficking, people whose experience could also mirror the analysis here. These questions are left open for further research.

248. Furthermore, it runs counter to many analyses of the likely future of hearsay law and the Confrontation Clause. David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 3–5.

249. This is a minimalist case given the argument presented in this Article. One could argue that the scope should be extended to include other crimes or other witnesses, or apply to other practices beyond a face-to-face confrontation.

250. For a history of specialized domestic violence courts, see Thompson, *supra* note 124, at 427–30.

251. See *Giles v. California*, 554 U.S. 353, 405–06 (2008) (Breyer, J., dissenting) (cautioning that an evidentiary requirement requiring proof of purpose rather than intent or knowledge may permit the perpetrator of the violence to avoid conviction).

252. See *supra* note 152 for a discussion of the theory that sexual abuse victims might have a Fourteenth Amendment interest in protection from cross-examination.

253. See Bailey, *supra* note 8, at 3–4 (challenging the use of victimless testimony); Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 977

as reduced income for themselves and their children, or shunning from the community, still apply.²⁵⁴ Absent increased counseling and support, these problems will continue to place victims of domestic violence in an unwinnable position. These are serious challenges; innovative and effective policies must be implemented in order to address them. If we want to disallow prosecution without consenting victims, then we should do so because it is a superior way to combat a problem, not because the Sixth Amendment says so.

Finally, there is a real concern that beginning this process of unincorporation could lead to deeply problematic results. Such a move could potentially “open a can of worms” and result in the Court stripping defendants of important rights in other areas. This is why the narrowest case is argued, and only after a careful examination of showing why the doctrine is incommensurate with a substantial interest in justice.

C. *A Legislative Fix*

Incorporation is purely judge-made law—the Constitution does not directly apply the Confrontation Clause against the states. If we believe the Court has the power to interpret the Fifth and Fourteenth Amendments to allow for incorporation and reverse incorporation, there is no reason why the Court lacks the power to rule for unincorporation. Unincorporation would require no legislative effort or constitutional amendment, but merely a court ruling. At the same time, there is no reason to think that federal courts, let alone the Supreme Court, would be interested in such a policy oriented move. State legislatures themselves are unlikely to take affirmative steps in creating new policies without clear guidance that their programs will not be struck down in federal court. Absent sua sponte action from the Court, it is worth considering whether there is a legislative solution that involves congressional lawmaking.

As odd as unincorporation may be, it may seem equally bizarre to think that Congress has the power to determine whether specific elements of the Bill of Rights can be applied to the states. Our instincts on this matter are shaped by what Robin West refers to as a “Missing Critical Jurisprudence.”²⁵⁵ Reliance on judicial review has diverted legislators from substantive grappling with interpretation of constitutional meaning.²⁵⁶ Adjudicated constitutionalism has resulted in an interpretation of the Sixth and Fourteenth Amendments that prevent effective prosecution of domestic violence.

(1998) (explaining that “no-drop policies deprive or constrict the victim’s choices and refuse deference to her own assessment of the promises and perils of proceeding with prosecution”). See also Hannah, *supra* note 131, at 1869–77.

254. See Lininger, *supra* note 11, at 869 (stating that many victims are reluctant to report domestic violence due to fear of reprisals and other considerations); Tuerkheimer, *supra* note 8, at 13 (listing the variety of reasons women do not leave abusive relationships).

255. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1398 (2009).

256. Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in THE CONSTITUTION IN 2020, at 86 (Jack Balkin & Reva Siegel eds., 2009).

Yet scholarly approaches to political or popular constitutionalism could have provided a different outcome.²⁵⁷

It is not too late to address this problem through legislative means. Over a decade after *Morrison*, Congress could choose to take up the issue of domestic violence again. Serious discussion about federalism and the role of judges could enrich political culture and address our missing legislative jurisprudence. There are two paths by which Congress could address this issue: indirectly through jurisdiction stripping or by directly unincorporating the Confrontation Clause through Section Five of the Fourteenth Amendment.

1. Jurisdiction Stripping

One way to unincorporate the Confrontation Clause would be for Congress to pass legislation denying federal courts the ability to review Confrontation Clause challenges arising from state trials of domestic violence. States wishing to create specialized trial procedures for domestic violence trials could then pass corresponding legislation that prevented state judges from entertaining Sixth Amendment claims in these contexts.

There are some advantages to an indirect approach. Careful tailoring could allow other due process claims to be heard in federal court, ensuring that this project protects criminal defendants in other contexts. Furthermore, by stripping the judicial system of jurisdiction, state and federal legislators would be forced to seriously engage in legislative constitutional reasoning, debating in the ways anticipated by popular constitutional advocates.

It is unlikely that such a proposal would survive judicial scrutiny. There is a long and rich scholarly tradition regarding the constitutionality of jurisdiction stripping.²⁵⁸ In recent decades, Congress has enacted a number of bills restricting jurisdiction in federal courts.²⁵⁹

257. For more on popular constitutionalism, see generally LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

258. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1362–63 (1953); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 21–22 (1981); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 132 (1981).

259. See Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CAL. L. REV. 1193, 1193–95 n.5 (2007). Alexander's extensive research highlights a multiplicity of statutes that in some way or another restructure federal court jurisdiction, including the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915 (1998), the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996), the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), the Real ID Act of 2005, Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, Div. B, § 106, 119 Stat. 231 (2005) (codified at 8 U.S.C. § 1252), the Detainee Treatment Act of 2005 (DTA) Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified at 10 U.S.C. § 801), and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

Part of the scholarly debate has focused on whether Congress can preclude all judicial review in federal court.²⁶⁰ Some of these issues may have been addressed in *Boumediene v. Bush*,²⁶¹ when the Court struck down a jurisdiction-stripping statute as unconstitutional, the first such decision since 1871.²⁶² In part, the Court asserted the fundamental premise, traced to *Marbury v. Madison*,²⁶³ that the role of the judiciary is to “say what the law is.”²⁶⁴ The Court also rejected the idea that Congress can completely deny habeas relief in all courts.²⁶⁵

Even if Congress were able to strip judicial review of Confrontation Clause arguments from federal courts, it remains unclear whether it could do so if the same were true in state courts. Academics who believe that Congress can completely preclude judicial review often see states courts as functioning as the primary guarantors of individual rights.²⁶⁶ Stripping jurisdiction from both would be seen as extremely unpalatable.

2. Direct Unincorporation

Although the indirect approach is unlikely to succeed, Congress could still directly unincorporate the Confrontation Clause by using its Fourteenth Amendment Section Five powers. The text of Section Five is straightforward: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”²⁶⁷ Given this clear language, Congress could attempt to pass legislation altering the enforcement of an incorporated right. As the Court incorporated the Confrontation Clause against the states via the Fourteenth Amendment, the same Fourteenth Amendment vests power in Congress to enforce it.

The legislation would be straightforward. Congress would repeat many of the claims advanced by domestic violence prosecutors and scholars discussed in this Article, noting the difficulty posed by the Confrontation Clause. Next, the legislation would repeat the history of confrontation discussed earlier, noting the non-adjudicatory role that confrontation plays. The bill would then issue a finding of Congress that the fundamental Fourteenth Amendment principles of due process and equal protection are not advanced by the incorporation of the Confrontation Clause in all cases. Using its

260. See *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (explaining that “[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1426–27 (1987) (offering a neo-federalist perspective on state sovereignty); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2038–39 (2007) (describing how limits on statutory jurisdiction present difficult constitutional questions).

261. 553 U.S. 723 (2008).

262. Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1053 (2010) (citing Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 1).

263. 5 U.S. 137 (1803).

264. *Boumediene*, 553 U.S. at 765 (quoting *Marbury*, 5 U.S. at 177) (internal quotation mark omitted).

265. *Id.* at 779–87.

266. See Hart, *supra* note 258, at 1401 (noting that the Constitution makes the state courts “the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones”).

267. U.S. CONST. amend. XIV, § 5.

Section Five powers, Congress would then unincorporate the Confrontation Clause in domestic violence cases, allowing states to interpret the Sixth Amendment according to their own constitutions and their own jurisprudence. Clear language could be included to allow collateral attacks on state laws that otherwise violate due process or Sixth Amendment principles, independent of the Confrontation Clause.

In many ways, this would be *United States v. Morrison*²⁶⁸ in reverse. In *Morrison*, the Court ruled that Congress lacks the authority under the Equal Protection Clause to create a federal civil rights remedy for gender-based violence.²⁶⁹ Again, the Court ruled that it was the final expositor of the Constitution.²⁷⁰ Yet the structure of the Fourteenth Amendment is clear: Congress has the tools to enforce incorporation.

In response, using Section Five powers to move in the opposite direction on the central issue of federalism will certainly seem unexpected. Yet, something must be done. The same rhetoric challenged by this Article applies here: the Constitution is not a suicide pact.²⁷¹ If Congress lacks the ability to federalize domestic violence, then certainly it must be able to effectively equip states to address the problem.

VI. CONCLUSION

The Confrontation Clause was not designed to apply in the domestic violence context and allowing it to prevent innovative solutions creates an inexcusable dead hand problem. Common law jurists and the Founders never conceived of cases like these; the doctrines they implemented were not designed with this crime in mind. Incorporating those views against the states should not be seen as a progressive victory of the 1960s. The text of the Sixth Amendment is clear, and while reasonable minds may differ about the historical exceptions to the doctrine, it is a losing battle to try to stretch the Sixth Amendment to do what it never was intended to. Confrontation doctrine continues to contain outdated and misguided views about dueling and status, and its continued application in domestic violence cases deepens and furthers the ability for an abuser to terrorize his victim.

Unincorporation seems extreme because we assume that the Bill of Rights advances the rights of individuals in ways that should bind states as well as the federal government. The Confrontation Clause does not always do so. It secures a certain form of liberty for a certain type of defendant. Defendants in nonhierarchical cases would continue to enjoy that right. Yet, confrontation after *Giles* actively hinders important principles of justice, and expanded policy space must be created for states to address this problem. For that to happen, Congress should seriously consider partially unincorporating the Confrontation Clause.

268. 529 U.S. 598 (2000).

269. *Id.* at 623–24.

270. *Id.* at 616–17 n.7 (“No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.”).

271. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).