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GENDER-CONSCIOUS CONFRONTATION: THE ACCUSER-OBLIGATION APPROACH REVISITED

*Michael El-Zein**

ABSTRACT

The Supreme Court's recent Confrontation Clause decisions have had a dramatic effect on domestic violence prosecution throughout the United States, sparking debate about possible solutions to an increasingly difficult trial process for prosecutors and the survivors they represent. In this Note, I revisit and reinterpret the suggestion by Professor Sherman J. Clark in his article, An Accuser-Obligation Approach to the Confrontation Clause,[1] *that we should view the Confrontation Clause primarily as an obligation of the accuser rather than a right of the accused. Specifically, I reevaluate Clark's proposition using a gendered lens, ultimately suggesting a novel solution to the problem of the "victimless" domestic violence prosecution that would extend beyond the domestic violence context. An approach that views the Confrontation Clause as an accuser's obligation, and focuses on the values of honor, courage, and respect, while simultaneously taking a gender-conscious approach in defining those values, will produce a body of jurisprudence that can satisfy the courts, academics, and advocates alike.*

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

INTRODUCTION

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[2]

In 2004, the Supreme Court dramatically changed its interpretation of the Confrontation Clause. For years, courts had been using hearsay doctrine

2. U.S. CONST. amend. VI.

as a proxy to determine whether the Confrontation Clause had been satisfied. Courts routinely collapsed any constitutional analysis of potential Confrontation Clause issues with an evidentiary analysis of hearsay rules, essentially rendering the Confrontation Clause superfluous.[3] The Court's decision in *Crawford v. Washington* finally gave the Confrontation Clause teeth.[4] The Court articulated a new test to determine whether or not a statement was admissible, decoupling it from any hearsay analysis. Now "testimonial statements [would] only be admitted against a criminal defendant when the declarant [was] unavailable and the defendant had a previous opportunity for cross-examination."[5]

This shift was incredibly problematic for domestic violence prosecutions, many of which involve victims who are either unable or unwilling to testify at trial.[6] Under the *Crawford* analysis, key pieces of evidence in the state's case on which prosecutors previously relied were now excluded to uphold the defendant's Confrontation Clause right, making it much more difficult to secure convictions.[7] Following *Crawford*, advocates and scholars began suggesting unique solutions to avoid these new Confrontation Clause issues, enabling prosecutors to secure domestic violence convictions in cases where the victim declines to testify.[8] Subsequent research shows that the lower courts have found their own inventive solutions to the problem, en-

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3. *See* Clark, *supra* note 1, at 1259–60.

4. *See* Crawford v. Washington, 541 U.S. 36 (2004).

5. Eleanor Simon, *Confrontation and Domestic Violence Post*-Davis*: Is There and Should There Be a Doctrinal Exception?*, 17 MICH. J. GENDER & L. 175, 179 (2011); *Crawford*, 541 U.S. at 68.

6. Simon, *supra* note 5, at 185.

> [O]ften the only witnesses to [domestic violence] will be the victim and the defendant. The high likelihood both that victims will refuse to cooperate and that there will be no other witnesses often requires prosecutors to rely primarily on hearsay evidence. This type of hearsay evidence generally consists of 911 emergency calls, verbal statements given by the victim to the police upon their arrival at the scene, and written statements given by the victim, such as affidavits or civil restraining orders. Under the formally obsolete Roberts framework, these types of out-of-court statements were routinely admitted without the presence of the declarant in court, thus enabling domestic violence prosecutions to proceed. Under the new Crawford framework, however, if these statements are deemed testimonial (and the victim has in fact chosen not to testify), then their admission would be barred as a violation of the defendant's Sixth Amendment right.

Id. (footnotes omitted).

7. *Id.*

8. *See infra* Part IV.

suring that these "victimless"[9] domestic violence prosecutions still have a chance of success.[10]

In this Note, I revisit the work of Professor Sherman J. Clark, who in 2003 proposed that we look at the Confrontation Clause "not solely as a right enjoyed by criminal defendants, but also, even primarily, as an obligation imposed upon would-be witnesses."[11] An essential first step toward reaching a more satisfying solution to the problem of "victimless" domestic violence prosecutions is to refocus the Confrontation Clause as an obligation imposed on the accuser. The accuser-obligation approach forces us to consider what we as a society deem acceptable.[12] Clark understandably emphasizes the confrontation aspect of the Clause,[13] but necessary to his approach is an evaluation of the concepts of honor, courage, and respect.[14] Though his focus on the social values reflected in the Confrontation Clause is appropriately placed, Clark fails to account for his own masculine conception of those values. I present a novel solution to the problem by drawing on feminist theory and viewing Clark's work through a gendered lens,

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9. For convenience, I use the term "victimless" prosecutions throughout this Note. I am not doing so because I think "victimless" is the best way to describe these cases. It is, however, a part of the discourse, and the most common nomenclature used to refer to prosecutions that proceed without the testimony of the victim. For a further discussion on the problematic aspects of the term, see *infra* note 89 and accompanying text.

10. *See infra* Part IV.E.

11. Clark, *supra* note 1, at 1261.

12. I use the terms "we" and "us" throughout this Note to refer to American people generally, and the dominant cultural norms to which they subscribe. America is an incredibly diverse country with a wide range of cultural influences. Consequently, many people do not subscribe to all, or in some cases any, of the interpretations of the values discussed in this Note. I am not claiming that "we" refers to each and every member of our society.

13. Clark, *supra* note 1, at 1270.

> I have argued elsewhere that the criminal trial jury can be understood in part as an institution through which each of us in turn are forced to face, to confront, the difficult and troubling thing we do when we judge another. Here my point is that we might expect that those who would ask us to take that step—who would claim to provide the grounds for our judgment—should be willing to do the same.

Id. (emphasis added).

14. *See, e.g.*, *id.* at 1271 ("[I]t is manifestly not problematic to act as nobly as we are able, in the belief that those occasions of *honorable* behavior, however rare, say something important about who we really are." (emphasis added)); *id.* at 1259 ("[T]he Confrontation Clause, on this reading, focuses on whether [the testimony] is worthy of *respect*." (emphasis added)); *id.* at 1281 ("At some level, the traumatized child victim differs only in degree from the adult witness who lacks the *courage* to confront those he or she would accuse." (emphasis added)).

reaching a new understanding of the Confrontation Clause that can be applied outside of the domestic violence context.

A gender-conscious accuser-obligation approach challenges masculine conceptions of honor, courage, and respect—values that are reflected in, and shaped by, the Clause. It will produce better outcomes not only in "victimless" domestic violence cases but in *all* cases. The accuser-obligation approach recognizes the power of the law to "both reflect and constitute community identity and self-perception,"[15] helping to shape the very fabric of society.[16] This approach, coupled with a gender-conscious understanding of our own values that accounts for both masculine and feminine perspectives,[17] will produce a coherent body of jurisprudence which can be effectively and consistently applied by the lower courts while simultaneously allowing the values reflected in the Clause to better serve as societal ideals.

Part I of this Note provides a history of both the ancient roots of the Confrontation Clause and its modern interpretation. Part II highlights the prevalence of domestic violence in the United States. Part III details the issues surrounding domestic violence prosecutions since *Crawford* and responses from within the criminal justice system. Some of the solutions previously proposed to address the issues highlighted in Part III are presented in greater detail in Part IV. Part V then reinterprets the accuser-obligation approach using a gendered lens. Finally, Part VI highlights how the gender-conscious accuser-obligation approach provides a novel solution to the problems raised in Part III that, unlike those presented in Part IV, will produce better outcomes not only in "victimless" domestic violence cases, but in *all* cases.

I. The History of the Confrontation Clause

A. Ancient and Common Law Origins

The origins of the Confrontation Clause can be traced back to well before the founding of the United States and the ratification of the Sixth Amendment.[18] As the Supreme Court and scholars have noted, the right to

15. *Id.* at 1259

16. *See also* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20, 58–59 (1988) (noting that legal decisions make "statement[s] about the kind of world we live in and want to live in.").

17. When I use the terms masculine and feminine, I am referring to the culturally dominant forms of masculinity and femininity at any given time, also known as hegemonic masculinity and femininity. For a further explanation of hegemony, see *infra* Part V.C.

18. *See, e.g.*, Crawford v. Washington, 561 U.S. 36, 43 ("The right to confront one's accusers is a concept that dates back to Roman times.").

confrontation has ancient roots.[19] A detailed discussion on the long history of the Confrontation Clause is, however, beyond the scope of this Note.[20] Relevant to this discussion is the fact that masculine voices often dominated the legal discourse in the ancient systems in which the right developed.[21]

More directly relevant is the common law origin of the right to confrontation, most often attributed to the trial of Sir Walter Raleigh in England in 1603.[22] During Sir Walter Raleigh's trial for treason, the evidence against him was drawn from the out-of-court statements of a supposed accomplice.[23] Sir Raleigh demanded much less than defendants do today, requesting, as was common at the time, that the accuser merely be present in court.[24] Much to his surprise, the request was denied.[25] As a response to the

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19. *See, e.g.*, *Crawford*, 561 U.S. at 43; Frank R. Herrmann, S.J. & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481 (1994).

20. For an in-depth discussion regarding the ancient origins of the Confrontation Clause and its acknowledgement by the Supreme Court, see Herrmann & Speer, *supra* note 19, at 483–84:

> The principle of confrontation, in the sense of the right of defendants to have accusing witnesses produced before them, developed along three main lines, each originating in Roman law. First, legislation of the Emperor Justinian in the year 539 provided the normative foundation of the right of witness confrontation. This norm derived from preexisting practice and was based on the heightened necessity for accurate fact-finding in criminal cases. Second, Pope Gregory I emphasized the guarantee of fundamentally fair procedures to an accused person when he applied Justinian's legislation in the year 603. Finally, the great pseudoisidorean forgeries of the mid-ninth century initiated a third line of development by creating a powerful defense tool to ward off unfair accusations and unreliable testimony.

Id.

21. *See, e.g.*, RICHARD A. BAUMAN, WOMEN AND POLITICS IN ANCIENT ROME 1–2 (Taylor & Francis eds., 2003) ("Although enjoying considerable social mobility under the influence of Etruscan and Hellenistic ideas, and gradually achieving a large measure of independence under private law, women were at a permanent disadvantage in the public sector. They were rigorously excluded from all official participation in public affairs . . . .").

22. *See, e.g.*, Herrmann & Speer, *supra* note 19, at 481–82 ("When Sir Walter Raleigh demanded to meet the witness against him 'face-to-face' at his trial for treason in 1603, the English court rejected his request as having no foundation in the common law. Conventional wisdom marks Raleigh's rejected demand as the starting point of the history of the Sixth Amendment's Confrontation Clause . . . .").

23. *Id.* at 545.

24. *Id.*

25. Ellen Liang Yee, *Confronting the "Ongoing Emergency": A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729, 745 (2008).

"gross procedural abuses"[26] suffered by Sir Raleigh, the common law finally named the right of confrontation, a right which had been present in western culture for ages.[27]

B. Modern Confrontation Clause Jurisprudence

1. The *Roberts* Era

The seminal case addressing the Confrontation Clause prior to *Crawford* was *Ohio v. Roberts*.[28] In *Roberts*, the Court set forth a two-part test that bound Confrontation Clause doctrine to the rules against hearsay. First, prosecutors had to prove that the witness was unavailable to testify. Once this was established, the prosecution then had to show that the statement was marked by an "indicia of reliability."[29] In order to demonstrate such reliability, the prosecutor needed merely to point to a "firmly rooted hearsay exception," or, should no such exception exist, show that the statement had a "particularized guarantee[ ] of trustworthiness."[30] This test left the Confrontation Clause without teeth, as the Court would subsequently find only two hearsay exceptions to lack firm roots: the residual hearsay exception and the exception for an accomplice's custodial confession.[31]

Though the *Roberts* analysis drew its fair share of criticism from academics and judges,[32] the Court allowed it to reign for over twenty years. One particularly vocal critic who eventually influenced the Court was Professor Richard Friedman, an expert on both evidence and U.S. Supreme Court history. As early as 1997, he noted the "virtually superfluous role that

26. Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 873 (1988).
27. *See* Herrmann & Speer, *supra* note 19, at 482.
28. Ohio v. Roberts, 448 U.S. 56 (1980).
29. *Roberts*, 448 U.S. at 65–66.
30. *Roberts*, 448 U.S. at 65–66.
31. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 758 (2005). The residual hearsay exception was found to lack firm roots because its exclusive purpose is to cover unusual hearsay that falls outside the scope of the traditional exceptions. Idaho v. Wright, 497 U.S. 805, 817 (1990). An accomplice's custodial confessions were considered to be inherently unreliable given the incentive one has in betraying a fellow accused and the government's involvement in their production, thus raising core hearsay concerns. Lilly v. Virginia, 527 U.S. 116, 131–34 (1999).
32. *See, e.g.*, Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998); *Lilly*, 527 U.S. at 140–43 (Breyer, J., concurring); John L. Ross, *Confrontation and Residual Hearsay: A Critical Examination, and a Proposal for Military Courts*, 118 MIL. L. REV. 31, 60–62 (1987); William S. Pitman, Note, Baker v. Morris *and the Right? to Confrontation*, 14 HASTINGS CONST. L.Q. 839 (1987).

the Confrontation Clause had come to play."[33] It had become "simply a formality" because the courts routinely considered it satisfied if an exception to the hearsay requirement could be cited.[34] The *Crawford* Court cited Friedman when the *Roberts* analysis was finally laid to rest and the Confrontation Clause began to play a more important role in criminal prosecutions.[35]

2. *Crawford* and the Focus on Testimonial Statements

In 2004, the Supreme Court abandoned the two-part *Roberts* test, declaring that the Sixth Amendment primarily concerned "testimonial" statements.[36] With *Crawford*, the Court established a new rule: "[T]estimonial statements may only be admitted against a criminal defendant when the declarant is unavailable and the defendant had a previous opportunity for cross-examination."[37] According to Justice Scalia's majority opinion in *Crawford*, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[38]

Though the majority felt the outcomes of the Court's prior decisions had "remained faithful to the Framers' understanding"[39] of the Confrontation Clause, they were willing to admit their rationales had not.[40] The Court acknowledged two ways in which the *Roberts* test had "depart[ed] from [ ] historical principles:"

> First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that do consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.[41]

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33. Lininger, *supra* note 31, at 759–60 (citing Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 509–10 (1997)).
34. *Id.* at 760.
35. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004).
36. *Crawford*, 541 U.S. at 53.
37. Simon, *supra* note 5.
38. *Crawford*, 541 U.S. at 53–54.
39. *Crawford*, 541 U.S. at 59.
40. *Crawford*, 541 U.S. at 60.
41. *Crawford*, 541 U.S. at 60.

While critics of the *Roberts* analysis were surely pleased to see its end, the *Crawford* opinion left a pressing question—what statements *are* testimonial?[42]

3. Defining Testimonial post-*Crawford*

The Supreme Court having "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial,'"[43] lower courts faced, as anticipated,[44] a level of uncertainty that resulted in unpredictable judgments. The Court addressed the Confrontation Clause two years later in *Davis v. Washington*.[45] *Davis* was a consolidation of two cases involving domestic violence: *Davis v. Washington*[46] and *Hammon v. State*.[47] Both centered on statements made to law enforcement personnel. The victim in *Davis* spoke to a 911 operator while involved in a domestic disturbance,[48] while the victim in *Hammon* spoke directly with law enforcement personnel who were responding to a domestic disturbance complaint.[49]According to the *Davis* majority:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[50]

While still refusing to "produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial,"[51] the majority deemed the statements in *Davis* to be nontestimonial and therefore admissi-

42. *See, e.g.*, Jeanine Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of* Crawford v. Washington, 79 S. CAL. L. REV. 213, 216 (2005) ("[T]he Court failed to explain what types of statements are testimonial, so it is unclear under what circumstances the *Crawford* decision applies.").
43. *Crawford*, 541 U.S. at 68.
44. *See Crawford*, 541 U.S. at 68 n.10.
45. Davis v. Washington, 547 U.S. 813 (2006).
46. State v. Davis, 111 P.3d 844 (Wash. 2005).
47. Hammon v. State, 829 N.E.2d 444 (Ind. 2005).
48. *Davis*, 547 U.S. at 817.
49. *Davis*, 547 U.S. at 819.
50. *Davis*, 547 U.S. at 822.
51. *Davis*, 547 U.S. at 822.

ble, while the statements in *Hammon* were considered testimonial and therefore inadmissible.[52] The Court "thus created the 'primary purpose' and 'ongoing emergency' test" by which the lower courts were to classify statements made to law enforcement.[53]

Two years after *Davis*, the Court made another landmark Confrontation Clause decision. In *Giles v. California*,[54] the Court considered out-of-court testimonial statements made by a victim of domestic violence against the defendant, her abuser. Following her death at his hands, these statements were admitted under the doctrine of forfeiture by wrongdoing.[55] *Crawford* admitted the possibility that exceptions to the testimonial rule could be incorporated into the Confrontation Clause.[56] The question before the Court in *Giles* was whether forfeiture by wrongdoing was one such exception.[57] Though the majority recognized that both a dying declaration and a forfeiture by wrongdoing exception were established when the Confrontation Clause was adopted,[58] it disagreed with the California Supreme Court finding forfeiture when the defendant had not intended to prevent the witness from testifying at trial.[59] Instead, looking to common law cases and treatises from the time of the founding, the Court determined that the forfeiture by wrongdoing exception applied only to cases in which "the defendant had *intended* to prevent the witness from testifying."[60] Finding the defendant lacking the requisite intent, the Court vacated the decision.[61]

The Court again addressed the Confrontation Clause in 2011, though not in a domestic violence context. In *Michigan v. Bryant*,[62] the Court addressed the statements of a man who was found with a fatal gunshot wound in the abdomen.[63] Police officers responding to the scene asked the victim

52. Simon, *supra* note 5, at 181–82.
53. *Id.* at 181.
54. Giles v. California, 554 U.S. 353 (2008).
55. *Giles*, 554 U.S. at 356–57, 359. Forfeiture by wrongdoing "permit[s] the introduction of statements of a witness who was detained or kept away by the means or procurement of the defendant." *Id.* at 359 (citations omitted) (internal quotation marks omitted).
56. Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004) ("We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.").
57. *Giles*, 554 U.S. at 358.
58. *Giles*, 554 U.S. at 358–59. Dying declarations are made by a speaker "who [is] both on the brink of death and aware that [he is] dying." *Id.* at 358 (citations omitted).
59. *Giles*, 554 U.S. at 358–68.
60. *Giles*, 554 U.S. at 361 (emphasis added).
61. *Giles*, 554 U.S. at 377.
62. Bryant v. Michigan, 131 S. Ct. 1143 (2011).
63. *Bryant*, 131 S. Ct. at 1150.

who had shot him, where it had happened, and when it had happened.[64] The Court determined that the questions asked and the responses given were primarily concerned with meeting an ongoing emergency, and were therefore admissible under the Confrontation Clause.[65] The Court emphasized the context-dependent nature of the analysis in determining whether there was an ongoing emergency for the purposes of admissibility.[66] In *Bryant*, the Court determined that the nature and content of the police officers' questions were necessary to assess the situation. As the questions' primary purpose was to allow the officers to meet an ongoing emergency, the statements were not testimonial and admissible under *Davis*.[67]

Post-*Bryant*, the lower courts must ask a series of questions to determine whether admitting a statement will violate a defendant's right under the Confrontation Clause. First, the court must ask whether the statement is testimonial.[68] To make this determination, the court must consider the primary purpose of the statement and whether it was made during an ongoing emergency.[69] When asking these questions, the court must account for the context-dependent nature of the analysis.[70] If a statement is found to be testimonial, the court must then determine whether the statement will still be admissible because the witness is unavailable and the defendant had a prior opportunity for cross-examination.[71] Finally, the court must examine whether the statement may be admitted under an established exception to the Clause, asking whether it was a dying declaration or the defendant's actions have resulted in forfeiture by wrongdoing.[72]

II. Domestic Violence in America

To truly understand how problematic modern Confrontation Clause jurisprudence has been for domestic violence prosecutions, it is important to realize how pervasive domestic violence is in America. This Part provides a sense of scope and serves as a brief introduction to the issue for those unfamiliar with the subject.[73]

64. *Bryant*, 131 S. Ct. at 1165–66.
65. *Bryant*, 131 S. Ct. at 1165–67.
66. *Bryant*, 131 S. Ct. at 1148 ("[T]he Michigan Supreme Court failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry.").
67. *Bryant*, 131 S. Ct. at 1166–67.
68. Crawford v. Washington, 541 U.S. 36, 53–54 (2004).
69. Davis v. Washington, 547 U.S. 813 (2006).
70. *Bryant*, 131 S. Ct. at 1158.
71. *Crawford*, 541 U.S. at 54.
72. Giles v. California, 554 U.S. 353, 358–59 (2008).
73. Many advocacy groups provide resources on domestic violence. For a list of additional resources on domestic violence in America, see *Domestic Violence, Dating Vio-*

Studies show that each year, over seven million men[74] and women in the United States are subjected to domestic violence.[75] According to the Center for Disease Control and Prevention, nearly 30 percent of women and 10 percent of men have experienced rape, physical violence, stalking, or some combination of the above at the hands of an intimate partner.[76] Domestic violence "accounts for 20 percent of all non-fatal crime experienced by women in this country"[77] and resulted in a recorded 1,638 deaths in 2007.[78] Often victims "are continually abused by the same perpetrator."[79] It is important to note that because many survivors experience repeated incidents of violence, "the number of intimate partner victimizations exceeds the number of intimate partner victims annually."[80] Furthermore,

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lence, Sexual Assault, and Stalking Resources, NAT'L TASKFORCE TO END SEXUAL & DOMESTIC VIOLENCE AGAINST WOMEN, http://4vawa.org/dvnational-state-and-local-resources/ (last visited Apr. 14, 2014).

74. Throughout this Note, I speak primarily about female survivors of domestic violence. It is important to recognize that men can also be, and are, subjected to domestic violence. It is also true that women can, and do, commit acts of violence. I do not mean to dismiss the very real abuse that men have suffered, or to mask the fact that women subject others to domestic violence. However, because domestic violence disproportionately affects women, and men represent the majority of abusers, I will speak primarily about the paradigmatic case in which the abuser is male and the survivor is female. DIV. OF VIOLENCE PREVENTION, CTRS. FOR DISEASE CONTROL & PREVENTION, NISVS: AN OVERVIEW OF 2010 SUMMARY REPORT FINDINGS 1 (2011), *available at* http://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_overview_insert_final-a.pdf; MICHELE C. BLACK ET AL., DIV. OF VIOLENCE PREVENTION, CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT EXECUTIVE SUMMARY 3 (2011), *available at* http://www.cdc.gov/violenceprevention/pdf/nisvs_executive_summary-a.pdf.

75. Michelle Byers, *What Are the Odds: Applying the Doctrine of Chances to Domestic-Violence Prosecutions in Massachusetts*, 46 NEW ENG. L. REV. 551, 552 (2012) (citing DIV. OF VIOLENCE PREVENTION, CTRS. FOR DISEASE CONTROL & PREVENTION, UNDERSTANDING INTIMATE PARTNER VIOLENCE: FACT SHEET 2011 (2011)).

76. DIV. OF VIOLENCE PREVENTION, CTRS. FOR DISEASE CONTROL & PREVENTION, UNDERSTANDING INTIMATE PARTNER VIOLENCE: FACT SHEET 2012 1 (2012) [hereinafter INTIMATE PARTNER VIOLENCE FACT SHEET 2012], *available at* http://www.cdc.gov/violenceprevention/pdf/ipv_factsheet-a.pdf.

77. Simon, *supra* note 5, at 175 (citing Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 867 (2009)).

78. INTIMATE PARTNER VIOLENCE FACT SHEET 2012, *supra* note 76.

79. Byers, *supra* note 75 (citing PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 39 (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/181867.pdf).

80. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE

"[a]ccording to the Bureau of Justice [S]tatistics' report, between 1993 and 1998, only half of the victims of domestic violence reported the crime committed against them to the police."[81] It is widely recognized today that "[m]ost domestic violence incidents are never reported."[82] Reasons cited for failing to report these crimes include: belief that it was a private matter, belief that it was a minor crime unworthy of reporting, belief that the police would not investigate the crime if reported, a fear of reprisal by the perpetrator if the crime was reported, and a desire to protect the offender from possible repercussions of reporting the crime.[83]

III. Domestic Violence Prosecution Post-*Crawford*

Domestic violence is a longstanding issue, yet effective prosecution of abusers remains a weakness of the United States criminal justice system.[84] This stems largely from the decision that many survivors make either not to report the crime,[85] or, once they have reported it, to refuse to participate in the trial process.[86] Given the Court's strengthening of the Confrontation Clause beginning with *Crawford*, prosecutors have found it increasingly difficult to secure convictions absent a cooperating witness.[87] Domestic violence survivors may refuse to cooperate for any number of reasons, not the least of which is the increased risk of danger in which survivors find themselves should they leave an abuser during the trial process.[88] These cases, in which there is no witness to testify at trial, are often referred to as "victimless" or "evidence-based" prosecutions.[89]

Against Women Survey iii (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

81. Andrew Fisk, *Prosecution of Domestic Violence Cases: The Practical Effects of the Ruling in* Davis v. Washington, *126 S. Ct. 2266 (2006)*, 32 S. Ill. U. L.J. 251, 263 (2007) (citing Callie Marie Rennison & Sarah Welchans, Bureau of Justice Statistics, Dept. of Justice, Intimate Partner Violence 1 (2000)).
82. *Domestic Violence: Statistics and Facts*, Safe Horizon, http://www.safehorizon.org/index/what-we-do-2/domestic-violence—abuse-53/domestic-violence-statistics—facts-195.html (last visited Apr. 14, 2014).
83. Fisk, *supra* note 81, at 263–64 (citing Callie Marie Rennison & Sarah Welchans, Bureau of Justice Statistics, Dept. of Justice, Intimate Partner Violence 7 tbl.8 (2000)).
84. Simon, *supra* note 5, at 183–86.
85. *See id.*; Fisk, *supra* note 81; *Domestic Violence: Statistics and Facts*, *supra* note 82.
86. Simon, *supra* note 5, at 183–86.
87. *Id.*
88. Michael Vargas, *Prosecuting Domestic Violence After* Giles*: Why A Categorical Approach to the Forfeiture Doctrine Threatens Female Autonomy*, 20 Duke J. Gender L. & Pol'y 173, 184 (citing Tjaden & Thoennes, *supra* note 80, at 37).
89. As noted by Deborah Tuerkheimer, both terms have limitations: "victimless prosecution tends to obscure the fact that someone was in fact victimized by the battering

A. The Trouble with "Victimless" Prosecutions

In many domestic violence cases, the only witnesses to the crime are the perpetrator and the victim.[90] However, domestic violence survivors "are more likely to recant prior statements or to refuse to testify than are victims of any other crime," and roughly "eighty percent of accusers in domestic violence prosecutions refuse to cooperate with the government at some point in the case."[91] Many prosecutors are therefore forced to proceed with "victimless prosecutions," without the survivor's cooperation or live testimony, instead relying on the survivor's previous statements.[92]

Those unfamiliar with domestic violence may find it difficult to understand why survivors refuse to assist prosecutors, particularly when the cited reason for refusal is love or something similarly abstract.[93] However, one reason that is easy for everyone to understand is survivors' very real fear of additional violence. Survivors are frequently threatened with further abuse should they assist the prosecution, and studies suggest that leaving the abuser in response to these threats places them in great danger.[94] Married female victims are "four times more likely to report being raped, assaulted, or stalked" should they assist,[95] and a woman's "highest risk for murder is when she attempts to leave or shortly after."[96] But fear of additional violence is not the only reason a survivor may refuse to cooperate. Other factors include: economic dependence on the abuser, emotional attachment to the abuser, desire to keep families together, concern for children's wellbeing, fear that the state will remove the survivor's children from the home, religious views of relationships, fear that the batterer or the survivor will be deported, learned helplessness based on repeated abuse, a genuine belief that

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conduct at issue in the case; evidence-based prosecution may incorrectly suggest that the testimony of a victim is something other than evidence." Deborah Tuerkheimer, *Forfeiture After* Giles*: The Relevance of "Domestic Violence Context"*, 13 LEWIS & CLARK L. REV. 711, 712 n.4 (2009). Tuerkheimer instead proposes the phrase "victim absent" prosecution to describe this situation, *id.*, but like her I will use the conventional phrase in order to avoid confusion.

90. Simon, *supra* note 5, at 185 (citing Michael Baxter, *The Impact of* Davis v. Washington *on Domestic Violence Prosecutions*, 29 WOMEN'S RTS. L. REP. 213, 215 (2008)).

91. Vargas, *supra* note 88, at 183 (citations omitted).

92. Simon, *supra* note 5, at 185 (citing Baxter, *supra* note 90).

93. *See, e.g.*, Fisk, *supra* note 81, at 251 ("The prosecution usually lacks an eye-witness in domestic violence crimes because love blinds the victim and usually she or he refuses to testify.").

94. Vargas, *supra* note 88 (citing TJADEN & THOENNES, *supra* note 80, at 37).

95. *Id.*

96. Aviva Orenstein, *Sex, Threats, and Absent Victims: The Lessons of* Regina v. Bedingfield *for Modern Confrontation and Domestic Violence Cases*, 79 FORDHAM L. REV. 115, 145 (2010) (citations omitted).

no crime has occurred, cognitive and physical limitations of the survivor, the perceived availability of social support, and the ethnicity and culture of the survivor.[97]

Given the myriad reasons why a survivor may choose not to assist the prosecution, "many state legislatures . . . fashioned special hearsay exceptions for cases involving domestic violence, and courts . . . liberally admit hearsay statements by domestic violence victims."[98] Much like murder trials, in which the victim is always unable to testify, these "victimless" or "evidence-based prosecutions" rely on circumstantial evidence and hearsay in order to secure a conviction.[99] *Crawford* immediately cast doubt on the admissibility of much of that evidence, resulting in the dismissal of many cases.[100] As noted by Deborah Tuerkheimer, "[w]hen the Court decided *Crawford* . . . the immediate impact on the prosecution of domestic violence was profound."[101] The Court's post-*Crawford* decisions have not made such prosecutions easier, as lower courts continue to struggle in applying the ongoing-emergency test set forth in *Davis*.[102]

B. Frustration from Within: Responses of Those in the Criminal Justice System

The lack of successful prosecutions and repeated exposure to reluctant survivors has taken a toll on those within the criminal justice system. This is due in part to the way our criminal justice system typically deals with domestic violence, equating it with "paradigmatic non-domestic violence,"[103] as "discrete"[104] and "episodic,"[105] when it is in fact "an ongoing pattern of

97. *See, e.g.*, Fisk, *supra* note 81, at 264; Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1236–40 (1993); Lininger, *supra* note 31, at 770.

98. Lininger, *supra* note 31, at 751 (citation omitted).

99. Fisk, *supra* note 81, at 265.

100. *Id.* at 265–66. For the results of surveys taken by prosecutors regarding the immediate impact of *Crawford* in three different states, see Lininger, *supra* note 31, app. 1 at 820–22.

101. Tuerkheimer, *supra* note 89, at 714–15 (citation omitted).

102. This is perhaps best demonstrated by the work of Eleanor Simon, who took a sample of eighty-two state cases in 2011 in order to determine how the lower courts were dealing with Confrontation Clause issues in domestic violence cases. Simon, *supra* note 5, at 176 ("[S]tate court judges take a relatively expansive but unpredictable approach to the *Davis* framework, allowing many testimonial statements while excluding others, with little consistency."); *see also* Tuerkheimer, *supra* note 89, at 715–16.

103. Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and Its Loss*, 15 J.L. & POL'Y 725, 726–27 (2007) (citations omitted).

104. *Id.* at 727.

105. *Id.*

conduct defined by both physical and non-physical manifestations of power."[106] By treating one specific act of domestic violence like any other isolated crime of violence—for example, a battery of one stranger by another—the episodic and cyclical nature of the violence is often overlooked, as is its function as a part of a greater system of control.[107] As a result, both prosecutors and judges have expressed frustration with survivors and the trial process.[108]

However, the Supreme Court's recent ruling in *United States v. Castleman*[109] provides hope that a more nuanced understanding of domestic violence may become the norm in the American judiciary. In *Castleman*, the Court had to determine whether the defendant's "misdemeanor offense of having intentionally or knowingly caused bodily injury to the mother of his child"[110] qualified as a "misdemeanor crime of domestic violence"[111] for purposes of a federal law preventing those convicted of such crimes from possessing firearms.[112] At issue was the meaning of the phrase "the use . . . of physical force" in the federal statute that defined misdemeanor crimes of domestic violence.[113] The Supreme Court granted certiorari in order to resolve a circuit split over what degree of force was necessary to trigger the federal law, whether it included crimes involving any use of force or only those involving violent force.[114]

Recognizing that the common law meaning of force included offensive touching,[115] the Court held that Congress intended to incorporate that meaning into the definition of a "misdemeanor crime of domestic vio-

106. *Id.* at 725.

107. *Id.* at 725 n.2 (quoting Dutton, *supra* note 97, at 1208).

108. *See, e.g.*, Njeri Mathis Rutledge, *Turning A Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 161 (2009) (citing Jennifer L. Hartman & Joanne Belknap, *Beyond the Gatekeepers: Court Professionals' Self-Reported Attitudes About & Experiences with Misdemeanor Domestic Violence Cases*, 30 CRIM. JUST. & BEHAV. 349, 363 (2003)); Emily J. Sack, *From the Right of Chastisement to the Criminalization of Domestic Violence: A Study in Resistance to Effective Policy Reform*, 32 T. JEFFERSON L. REV. 31, 57 (2009) (citing JENNIFER L. WHITE, CTR. FOR EDUC. ON VIOLENCE AGAINST WOMEN, REPORT: A ROUNDTABLE ON THE IMPACT OF *Crawford* on Prosecution of Domestic Violence 7 (2008), *available at* http://www.ovw.usdoj.gov/docs/crawford-08-roundtable-final-rpt.pdf).

109. United States v. Castleman, 572 U.S. __ (2014).

110. *Castleman*, 572 U.S. __, __(2014) (slip op., at 1) (internal quotations and citations omitted).

111. *Castleman*, 572 U.S. __, __(2014) (slip op., at 1) (internal quotations and citations omitted).

112. *Castleman*, 572 U.S. __, __(2014) (slip op., at 2–3).

113. *Castleman*, 572 U.S. __, __(2014) (slip op., at 3).

114. *Castleman*, 572 U.S. __, __(2014) (slip op., at 4).

115. *Castleman*, 572 U.S. __, __(2014) (slip op., at 4).

lence."[116] The opinion is exciting because it recognizes that domestic violence "is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic content."[117] The Court highlighted how acts that might not normally be thought of as especially violent, such as squeezing an arm and causing a bruise, easily qualify as domestic violence "when the accumulation of such acts over time can subject one intimate partner to the other's control."[118]

While *Castleman* represents a great victory for domestic violence advocates, and should result in fewer domestic violence victims losing their lives, it is unclear whether it will have any effect on Confrontation Clause jurisprudence. *Castleman* is a case of statutory interpretation, and the only potential Constitutional issue relevant to the case was a challenge under the Second Amendment, a challenge that was not taken up by the Court.[119] Moreover, the Court noted that its interpretation would not even extend to all statutory uses of the term domestic violence.[120]

Justice Scalia also wrote a separate concurrence to reject the Court's definition of domestic violence, a definition which he felt "ignore[d] . . . authorities" and instead embraced the "unconventional" views of private organizations and the Department of Justice's Office on Violence Against Women.[121] He felt such a move was a distortion of the law, one that would "impoverish the language" and force Congress to "come up with a new word . . . to denote actual domestic *violence*."[122]

Only time will tell if the *Castleman* majority's more comprehensive understanding of domestic violence will impact the Court's Confrontation Clause jurisprudence. If it does, it may lead to better outcomes in the persistently difficult realm of domestic violence prosecutions. Even prior to *Crawford*, prosecutors and other court professionals had expressed frustration with domestic violence prosecutions. According to a study funded by the National Institute of Justice, over 30 percent of court professionals felt domestic violence survivors actually undermined the prosecutor's case, and

116. *Castleman*, 572 U.S. __, __(2014) (slip op., at 4–5).

117. *Castleman*, 572 U.S. __, __(2014) (slip op., at 7). The Court went on to note that domestic violence "encompasses a range of force broader than that which constitutes 'violence' *simpliciter*." *Id.* at 6 n.4.

118. *Castleman*, 572 U.S. __, __(2014) (slip op., at 8).

119. *Castleman*, 572 U.S. __, __(2014) (slip op., at 15); *see also Castleman*, 572 U.S. __, __(2014) (Scalia, J. concurring) (slip op., at 11) ("This is a straightforward statutory-interpretation case that the parties and the Court have needlessly complicated.").

120. *Castleman*, 572 U.S. __, __(2014) (slip op., at 6 n. 4).

121. *Castleman*, 572 U.S. __, __(2014) (Scalia, J. concurring) (slip op., at 8–9).

122. *Castleman*, 572 U.S. __, __(2014) (Scalia, J. concurring) (slip op., at 10) (emphasis in original).

over 50 percent believed that survivors would only testify if subpoenaed.[123] Additionally, a 1995 study of prosecutors showed that most believed domestic violence survivors did not cooperate fully with the prosecution.[124] *Crawford* served only to increase these frustrations.

In 2005 Tom Lininger published an in-depth article focused on the effects of *Crawford* in which he reported the results of a survey of sixty-four prosecutor's offices conducted in 2004 and 2005.[125] His report shows just how immediate and powerful of an impact the decision had:

> In the first year after *Crawford*, prosecutors reported that they were dismissing a higher number of domestic violence cases than in the preceding years. This Article's survey . . . found that 76 percent of the offices were more likely to dismiss domestic violence charges when the victim was unavailable or refused to cooperate. In Dallas County, Texas, judges [were] dismissing up to a dozen domestic violence cases per day because of evidentiary problems related to Crawford. A public defender in the Bronx put it this way: "When the complainant in a domestic violence case insists she's not coming and just wants to drop the charges, I'll just smile as the judge says, 'Case dismissed.'"[126]

According to the same study, 65 percent of those surveyed felt *Crawford* "had undermined the safety of battered women."[127]

Others within the criminal justice system affirmed Lininger's findings.[128] Legal professionals recognized that *Crawford* had "a widespread chilling effect on judges, prosecutors, and law enforcement,"[129] affecting all aspects of the criminal justice system's response to domestic violence. Law enforcement officers, believing an effective investigation would inevitably lead to "testimonial" statements from the survivor,[130] began bringing charges less frequently when they "determine[d] that a victim [was] unlikely

123. Rutledge, *supra* note 108 (citation omitted).

124. Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 869 (2009) (citing Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 176, 190 (Eve S. Buzawa & Carl G. Buzawa eds., 1996)).

125. Lininger, *supra* note 31.

126. *Id.* at 772–73 (citations omitted).

127. *Id.* at 821.

128. *See, e.g.*, Sack, *supra* note 108 (citing WHITE, *supra* note 108, at 13).

129. *Id.*

130. *Id.* at 57–58.

to testify."[131] Even when law enforcement officers brought charges that were subsequently pursued by the prosecutors' office, some judges began to dismiss cases without a cooperating survivor under the assumption that there could not possibly be enough admissible evidence to warrant a conviction.[132]

Though the response of law enforcement officers and judges is alarming, the response of prosecutors is perhaps most troubling. Budget and time constraints force prosecutors to be selective about which cases they pursue.[133] Unsure of their ability to obtain a conviction absent live, in-court testimony, prosecutors became reluctant to try domestic violence cases without a cooperating survivor, or with a survivor they deemed unreliable.[134] Even in jurisdictions that had "no drop" policies in place requiring prosecutors to bring charges in all domestic violence cases,[135] *Crawford* still posed problems. Prosecutors are less likely to vigorously prosecute a case they are not confident they will win,[136] and with *Crawford* and the Court's subsequent Confrontation Clause cases casting doubt on the admissibility of survivors' out-of-court statements, prosecutors felt pressured to offer defendants plea bargains or reduce the charges.[137] The decrease in successful prosecutions absent a testifying survivor further chilled law enforcement's motivation to investigate and bring domestic violence charges in those instances.[138]

IV. The Search for a Solution

Academics and advocates proposed a number of different solutions to address the prosecutorial difficulties in domestic violence cases post-*Crawford*. This Part highlights some of those, from the most common to the more radical. All of these solutions are limited in their effectiveness because they are bound by the logic laid out in *Crawford*. Most of them search for alternative answers to the questions courts must ask under *Crawford* and its progeny—a task which has proven difficult. Using Clark's accuser-obligation model, which shifts our understanding of the Confrontation Clause

131. *Id.* at 57.

132. *Id.*

133. Percival, *supra* note 42, at 238.

134. Sack, *supra* note 108 (citing White, *supra* note 108, at 13).

135. Simon, *supra* note 5, at 184.

136. *See* Percival, *supra* note 42, at 238.

137. *Id.*

138. *See id.* at 239 ("[W]hen prosecution success rates decrease, law enforcement officers lose their motivation to target domestic violence ardently, as it becomes more and more evident that their efforts do not translate into more batterers being prosecuted."); Sack, *supra* note 108, at 57–58 (citing White, *supra* note 108, at 13).

from a right of the accused to an obligation of the accuser, we are able to ask a completely different set of questions regarding the admissibility of evidence. This allows us to avoid many of the issues raised by the solutions discussed below.

A. Expansion of the Forfeiture Doctrine

Forfeiture by wrongdoing refers to the common law exception to the confrontation right that, "when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth amendment does not require courts to acquiesce."[139] The Court in *Crawford* recognized this historical exception as "extinguish[ing] confrontation claims on essentially equitable grounds . . . ."[140] Expansion of the doctrine of forfeiture by wrongdoing in domestic violence prosecutions was perhaps the most frequently suggested solution post-*Crawford*.[141] The argument for its expansion was premised on courts both recognizing and accounting for the fact that individual acts of domestic violence are typically part of a system of abuse and control,[142] and that ultimately "a batterer's conduct over time . . . cause[s] the victim's unavailability."[143] In many battering relationships, "[a]buse occurring prior to or during the crime for which the defendant is being tried often functions to undermine a victim's willingness to cooperate with prosecutorial efforts."[144] Therefore, defendants in domestic violence cases would satisfy the test for forfeiture by wrongdoing in most cases, even if the prosecution failed to show specific misconduct occurring after the events of the charged crime.[145]

In *Davis*, the Court hinted that such a nuanced understanding of forfeiture in the domestic violence context might in fact be appropriate.[146] The Court recognized domestic violence as the "type of crime" which is "notori-

139. Davis v. Washington, 547 U.S. 813, 833 (2006).

140. Crawford v. Washington, 541 U.S. 36, 62 (2004).

141. *See, e.g.*, 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 (2007); Tuerkheimer, *supra* note 89; Monica Vozakis, *Constitutional Law-The Confrontation Clause and the New "Primary Purpose Test" in Domestic Violence Cases;* Davis v. Washington*, 126 S. Ct. 2266 (2006)*, 7 WYO. L. REV. 605 (2007); 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 (2010).

142. *See* Tuerkheimer, *supra* note 103, at 725 n.2 (citing Dutton, *supra* note 97, at 1208).

143. Deborah Tuerkheimer, Crawford*'s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 49 (2006).

144. *Id.* at 47.

145. *Id.* at 52–56.

146. Davis v. Washington, 547 U.S. 813, 833 (2006).

ously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial."[147] Though the Court recognized this aspect of domestic violence and acknowledged that the Sixth amendment did not require courts to permit defendants to silence their victims, it cautioned that it "may not . . . vitiate constitutional guarantees [even] when they have the effect of allowing the guilty to go free."[148] This dictum was seen as "signaling an inclination to embrace a robust forfeiture doctrine."[149] Advocates encouraged prosecutors to "utilize the doctrine of forfeiture by wrongdoing to circumvent the Confrontation Clause altogether," leaving them "better able to successfully prosecute abusers without the assistance of victims in the courtroom."[150]

Two years later, *Giles* seemed to restrict application of the forfeiture doctrine in domestic violence cases by requiring a finding that the defendant specifically intended to prevent the witness from testifying at trial.[151] This requirement appears to generally foreclose an expanded application of the forfeiture doctrine that would account for past behavior of the defendant and the recurring nature of domestic violence.[152] Nonetheless, some advocates have found hope in the Court's acknowledgment of a "domestic-violence context,"[153] and continue to argue for expansion of the forfeiture doctrine.[154] The basis for this line of advocacy is that the lower courts can view *Giles* as an opportunity to begin a new line of "jurisprudence informed by the realities of battering."[155] Under this line of reasoning, *Giles* is simply another opportunity to expand the use of forfeiture as a means of successfully prosecuting a "victimless" case. This line of advocacy may enjoy renewed vigor given the Court's ruling in *United States v. Castleman*.[156] However, as discussed in Part III.B, the extent to which that opinion will

147. *Davis*, 547 U.S. at 832–33.
148. *Davis*, 547 U.S. at 833.
149. Tuerkheimer, *supra* note 89, at 716.
150. McKinstry, *supra* note 141, at 542.
151. Giles v. California, 554 U.S. 353, 361 (2008).
152. Mark Egerman, *Avoiding Confrontation*, 84 TEMP. L. REV. 863 (2012).
153. *Giles*, 554 U.S. at 377 ("The domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. ").
154. *See, e.g.*, Lininger, *supra* note 124, at 867; Tuerkheimer, *supra* note 89; Yee, *supra* note 141.
155. Tuerkheimer, *supra* note 89, at 731.
156. *Castleman*, 572 U.S. __, __(2014).

impact future Confrontation Clause jurisprudence, indeed whether it will even be extended to this context, remains to be seen. While this solution remains theoretically possible, it seems overly optimistic, requiring an expansive understanding of the doctrine which runs counter to the Court's clear intent in *Giles* to limit its application.[157]

B. A Doctrinal Exception

Eleanor Simon suggests the Court create a doctrinal, common law exception to the right of confrontation for domestic violence cases separate from forfeiture.[158] Although Simon recognizes the Court has shown no interest in doing so,[159] she highlights multiple benefits in creating such a bright-line exception. Most importantly, she writes, it would "enable courts to function with more consistency," allowing prosecutors to "more fully and reliably assess the strengths and weaknesses of their cases."[160] Additionally, it would send "a clear and powerful message about the unacceptability of both domestic violence and of intimidating victims in advance of trial."[161] In order in invoke such an exception, the prosecution would have to prove to the judge that the domestic violence survivor was in fact in a "classic abusive relationship."[162]

This solution's strength lies in its simplicity—adoption of such a rule would eliminate much of the confusion courts face in determining whether statements are in fact admissible in a "victimless" domestic violence prosecution. However, its adoption remains utterly improbable. Simon admits that the Court "affirmatively believes there should *not* be a doctrinal domestic violence exception to confrontation."[163] In *Crawford*,[164] *Davis*,[165] and again in *Giles*,[166] the Court rejected such an approach. Absent a complete reinterpretation of our understanding of the Confrontation Clause, the Court has little reason to abandon its stated hostility to this solution and adopt a doctrinal exception.[167] As long as we interpret the Confrontation

157. Lininger, *supra* note 124, at 857.
158. *See* Simon, *supra* note 5.
159. *Id.* at 200.
160. *Id.* at 204–05.
161. *Id.* at 205.
162. *Id.*
163. *Id.* at 200–01 (emphasis added).
164. Crawford v. Washington, 541 U.S. 36, 62 (2004) (noting that the "Clause's ultimate goal is to ensure reliability of evidence" and that "it is a procedural rather than a substantive guarantee").
165. Davis v. Washington, 547 U.S. 813, 833 (2006).
166. Giles v. California, 554 U.S. 353, 375–77 (2008).
167. Simon argues that this exception can be created within the Court's current Confrontation Clause framework by categorically characterizing "any statements made by a

Clause as being primarily concerned with the constitutional right of the accused, rather than with an obligation on the accuser, the Court's recent precedent makes such a move highly unlikely.

C. Legislative Solutions

While many advocates feel the best approach would be a liberal application of the forfeiture doctrine by the lower courts, others argue that immediate legislative action is necessary.[168] Tom Lininger was a leading proponent of this solution. He has since gone on to argue for an expansion of the forfeiture doctrine as a better way "to facilitate the effective prosecution of domestic violence cases,"[169] but his legislative suggestions are still worth considering. His work suggests a number of state legislative reforms in response to *Crawford*.[170] His proposals fall into three broad categories: expanding the opportunities for pretrial cross-examination of hearsay declarants; broadening the scope of admissible hearsay in certain circumstances; and enacting various measures to protect battered women before trial and to open additional avenues of recourse for survivors outside of traditional prosecutions.[171]

Lininger's first suggestion focuses on the fact that *Crawford* never explicitly stated cross-examination must take place at trial.[172] Because survivors of domestic violence have shown a greater tendency to withdraw from the prosecutorial process the longer it drags on, Lininger argues that early access to cross-examination is crucial,[173] and he suggests creating a number of new opportunities for "pretrial confrontation."[174] Lininger views his second category as a natural counterbalance to *Crawford*'s strengthening of the Confrontation Clause, claiming that "[s]trong confrontation rights counter-

victim in an abusive relationship . . . [as] non-testimonial." Simon, *supra* note 5, at 205. However, in doing so the Court would effectively be removing all domestic violence cases from the basic Confrontation Clause analysis set forth in *Crawford*, which declared the Confrontation Clause as primarily concerned with testimonial statements. *Crawford*, 541 U.S. at 53. A categorical exclusion of all statements in the domestic violence context, preventing the courts from determining whether any particular statement is in fact testimonial, fits only superficially within the *Crawford* framework. In fact, Tom Lininger, writing in response to *Crawford*, claimed that to label most statements by victims to police as nontestimonal would be "intellectually dishonest" and "[un]true to the Supreme Court's interpretation of the Confrontation Clause." Lininger, *supra* note 31, at 819.

168. *See, e.g.*, Vozakis, *supra* note 141, at 632–33.
169. Lininger, *supra* note 124, at 857–58.
170. Lininger, *supra* note 31, at 783–818.
171. *Id.*
172. *Id.* at 784.
173. *Id.* at 786–87.
174. *Id.* at 787.

balance expansive hearsay exceptions."[175] He believes that "because confrontation law checks statutory hearsay law . . . they should grow in proportion to one another,"[176] and that states should therefore be liberal in expanding the scope of admissible hearsay in light of *Crawford*'s strengthening of the Clause.[177] The third category includes ideas such as legislation to ensure prompt disposition of domestic violence cases, which would ensure survivors remained motivated to testify,[178] thus avoiding "victimless" prosecutions all together.

While these suggestions show promise, they were never intended to be a complete solution to the problems created by *Crawford*. Lininger himself recognizes that "there can be no 'legislative fix' for the Supreme Court's interpretation of Constitutional law."[179] The proposed changes are meant to alter state court procedures to "better fit the contours of the *Crawford* rule," focusing on expanding the scope of admissible hearsay in domestic violence prosecutions,[180] "maximizing constitutionally permissible opportunities to admit reliable out-of-court statements by battered women."[181]

D. Unincorporation

Mark Egerman rejects the viability of the expansion of the forfeiture doctrine post-*Giles*, proposing a more radical solution—a partial unincorporation of the Confrontation Clause.[182] Egerman claims that "the Confrontation Clause doctrine cannot coexist with effective domestic violence prosecution,"[183] largely due to "the gendered assumptions underlying the confrontation doctrine."[184]

Incorporation is "[t]he process of applying the provisions of the Bill of Rights to the states by interpreting the 14th Amendment's Due Process Clause as encompassing those provisions."[185] While not all amendments have been incorporated, "[n]o amendment has ever been unincorporated."[186] Unincorporation would mean the Sixth Amendment would no longer be applied against the states in any context.[187] As this has never been

175. *Id.* at 799.
176. *Id.*
177. *Id.* at 798.
178. *Id.* at 815–16.
179. *Id.* at 753.
180. *Id.* at 753–54.
181. *Id.* at 819.
182. Egerman, *supra* note 152, at 897–99.
183. *Id.* at 867.
184. *Id.*
185. BLACK'S LAW DICTIONARY 834 (9th ed. 2009).
186. Egerman, *supra* note 152, at 898.
187. *Id.* at 898.

done before, Egerman himself recognizes it is a "foreign concept that . . . ought to inspire incredulity and confusion."[188] Given the current state of affairs, however, he argues that a radical approach is necessary.

While unincorporation would require "merely a court ruling,"[189] Egerman operates under the assumption that the Court is unwilling to effectuate such a change. He suggests Congress could reach the same result through jurisdiction stripping, via legislation "denying federal courts the ability to review Confrontation Clause challenges arising from state trials of domestic violence,"[190] or direct unincorporation "using its Fourteenth Amendment Section Five Powers."[191] Although he acknowledges the jurisdiction stripping approach is unlikely to "survive judicial scrutiny,"[192] he remains confident that direct unincorporation is permissible under Congress's Fourteenth Amendment Section Five powers.[193] This reliance on the legislature to take unprecedented action is the solution's greatest weakness, particularly at a time when legislative inaction is the order of the day.[194] Egerman's approach highlights just how desperate advocates are for a solution, and how little faith they have in the Court to provide one in the wake of its recent Confrontation Clause jurisprudence.

E. Reaching for Reform: Questionable Rulings of the Lower Courts

Perhaps the most interesting response to *Crawford* and the subsequent Confrontation Clause cases has come from the lower courts themselves. In 2012, Eleanor Simon analyzed state appellate and high court decisions in post-*Davis* domestic violence cases.[195] Specifically, she looked "to those cases decided that examined or discussed the Confrontation Clause issue, not just mentioning or citing *Crawford* or *Davis*."[196] The findings showed

188. *Id.* at 867.

189. *Id.* at 899.

190. *Id.* at 900.

191. *Id.* at 901. Under this approach Congress would "issue a finding . . . 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." *Id.* It would then use its Section Five powers to "unincorporated the Confrontation Clause in domestic violence cases, allowing states to interpret the Sixth Amendment according to their own constitutions and their own jurisprudence." *Id.* at 901–02

192. *Id.* at 900.

193. *Id.* at 901.

194. Frank James, *Lawmakers In Name Only? Congress Reaches Productivity Lows*, NPR (Dec. 3, 2013, 6:28 PM), http://www.npr.org/blogs/itsallpolitics/2013/12/03/248565341/lawmakers-in-name-only-congress-reaches-productivity-lows ("Congress is headed for a record low in productivity . . . .").

195. Simon, *supra* note 5.

196. *Id.* at 187.

both an expansion of the *Davis* framework and a lack of predictability.[197] Lower courts often considered statements that were "objectively testimonial under *Davis*"[198] as non-testimonial, or found their admission to be harmless error on appeal.[199] For example, in all cases she analyzed, Simon found that "911 call statements were uniformly classified as non-testimonial, despite . . . variances from the *Davis* situation and despite the arguable end of the immediate emergency."[200] Simon sees this as possible evidence of the de facto creation of an exception to the Confrontation Clause requirement in domestic violence cases,[201] although the lack of consistency from court to court makes such a de facto exception ineffective.

Another explanation for this behavior is that the lower courts are trying to comply with *Davis* as best they can, but "the impreciseness of the . . . opinion means inevitable disagreements among reasonable judges on what constitutes testimonial evidence."[202] In the alternative, Simon asserts that the inconsistency is in fact the result of "judges consciously engag[ing] in a broad reading of *Davis*."[203] Regardless of their reasons, it is important to note that the lower courts are actively searching for ways to carry forward successful "victimless" prosecutions in the wake of *Crawford* and the Court's subsequent Confrontation Clause cases. Simon's work clarifies that it is not only advocates and scholars pushing for change; members of the judiciary are also searching for a solution.

V. Reinterpreting the Accuser-Obligation Approach

Before the Supreme Court radically altered Confrontation Clause jurisprudence with *Crawford*, Professor Sherman Clark published an article entitled *An Accuser-Obligation Approach to the Confrontation Clause*.[204] In it, he argues that "the Confrontation Clause of the Sixth Amendment ought to be re-understood as primarily an accuser's obligation rather than primarily as a defendant's right."[205] Were the Court to adopt this understanding of the Confrontation Clause, with its emphasis on the accuser, the lower courts could obtain more desirable and meaningful outcomes in the majority of cases. This is particularly true for "victimless" domestic violence pros-

197. *Id.* at 188.
198. *Id.*
199. *Id.*
200. *Id.* at 190.
201. *Id.* at 198.
202. *Id.*
203. *Id.*
204. Clark, *supra* note 1.
205. *Id.* at 1258.

ecutions, which, as shown above, have become increasingly difficult post-*Crawford*.

While Clark's work provides a compelling understanding of the Confrontation Clause, he, like the Founders before him, approaches the topic from a masculine point of view.[206] His conceptions of courage, honor, and respect place great value on face-to-face conflict.[207] In doing so, he overlooks subtler, non-confrontational acts that may also be deemed honorable, worthy of our respect, and indicative of courage. In my analysis of Clark's work through a gendered lens, I challenge those unspoken masculine assumptions. This is a necessary step if the accuser obligation is to be effectively implemented. Central to Clark's work is the idea that the law can "both reflect and constitute community identity and self-perception,"[208] helping to shape the very fabric of society.[209] Viewing Clark's work through a gendered lens yields an imperative question: if the confrontation requirement truly is "aspirational—a notion of who we want to understand ourselves to be,"[210] shouldn't that vision take into account both masculine and feminine perspectives?

A. Confrontation as an Accuser's Obligation

Clark argues that "the Confrontation Clause of the Sixth Amendment ought to be re-understood as primarily an accuser's obligation rather than as primarily a defendant's right."[211] This is premised on the belief that laws

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206. *See* Egerman, *supra* note 152, at 890–91.

> [T]he 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. 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 evolve in a manner that would reflect their interests. . . . [U]nderlying 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.

Id.

207. *See infra* Part V.C. I recognize that an essential aspect of the United States legal system is its adversarial nature. However, a shift away from conceptions of honor, courage, and respect, all of which emphasize and value conflict between two individuals, would not seriously undermine the adversarial system. Prosecutors would occupy an adversarial role vis-à-vis the defendant regardless of whether the gender-conscious accuser-obligation approach is adopted.

208. Clark, *supra* note 1, at 1259.

209. *See also* Aleinikoff, *supra* note 16.

210. *Clark*, supra note 1, at 1263.

211. *Id.* at 1258.

can "both reflect and constitute community identity and self-perception."[212] Because the law possesses this unique property, the Confrontation Clause can be understood to reflect our society's belief and desire that those who accuse a fellow citizen will be willing to "look [the defendant] in the eye and literally stand behind [the] accusation."[213] The Confrontation Clause is therefore an artifact of aspiration, "a notion of who we want to understand ourselves to be,"[214] or at least who we wanted to understand ourselves to be when it was written.

Clark draws on a variety of sources to support this aspirational reading of the Clause, citing examples of honor, courage, and respect, which both predate and reflect the values embodied in it.[215] He cites two prominent American icons as examples of this emblematic reading: the "straight-talking Abraham Lincoln and [the] straight-shooting John Wayne."[216] While those specific examples are unprecedented in the legal context, the Court has articulated a similar idea. In *Coy v. Iowa*, Justice Scalia opined, "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' "[217] In an effort to explain that mysterious element of our nature, Justice Scalia went on to "cit[e] not just previous Supreme Court opinions but also *The Bible*, Shakespeare, and Dwight D. Eisenhower."[218] Scholars have subsequently recognized that the notion that face-to-face confrontation is essential to a fair trial stems largely from its longstanding place in our legal tradition, rather than from an evidence-backed demonstration of its truthfulness.[219]

Clark spends time unpacking Eisenhower's quote in *Coy*, with particular emphasis on the following language: "[In] this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow."[220] He argues that "[t]he very language smacks of disdain for the whispering back-stabber," with the aforementioned back-stabber in this case being the accuser who is unwilling to confront the defendant in court.[221] Clark also places emphasis on Biblical language from both the Old and the New Testament. From the Old Testament he cites Deuteronomy 17:7: "The hands of the witnesses shall be first upon him to put him to

212. *Id.* at 1259; *see also* Aleinikoff, *supra* note 16.
213. Clark, *supra* note 1, at 1261.
214. *Id.* at 1263.
215. *See infra* Part V.C.
216. Clark, *supra* note 1, at 1263.
217. Coy v. Iowa, 487 U.S. 1012, 1018 (1988).
218. Clark, *supra* note 1, at 1264.
219. *See, e.g.*, Egerman, *supra* note 152, at 893.
220. Clark, *supra* note 1, at 1265 (quoting *Coy*, 487 U.S. at 1017–18).
221. *Id.* at 1266.

death, and afterward the hands of all the people."[222] This language again places primary emphasis on the accuser, demanding that they come forward and confront the accused.

B. Looking through a Gendered Lens: A Feminist Tool

A gendered or gender lens is a critical thinking technique that can be employed to uncover the assumptions lying behind an aspect of society or a specific body of work.[223] Gender scholars and queer theorists use the technique for unpacking social assumptions and determining what perspectives may be left out of the conversation.[224] Specifically, utilizing a gendered lens highlights the ways society's construction of gender influences the object under study,[225] allowing for reinterpretation of the object in light of another gender's experience. UNESCO describes gendered lenses in a way that is particularly helpful here:

> Think of a gender[ed] lens as putting on spectacles. Out of one lens of the spectacles, you see the participation, needs and realities of women. Out of the other lens, you see the participation, needs and realities of men. Your sight or vision is the combination of what each eye sees.[226]

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222. *Id.* at 1267–68. For a detailed history and explanation of the practice of judicial dueling, see Egerman, *supra* note 152, at 869–76.

223. *See, e.g.*, Thelma McCormack, *Review: The Gender Lens Series*, 27 CONTEMP. SOC. 143, 143 (1998) (reviewing the Gender Lens series, the broad objectives of which "are to make gender visible in our ordinary everyday experience and to relate this new awareness to larger, and more familiar, systems of inequality"); Barbara A. Cleary & Mary C. Whittemore, *Gender Studies Enriches Students' Lives*, 88 ENG. J. 86, 87 (1999); Barbara J. Riseman & Myra Marx Ferree, *Making Gender Visible*, 60 AM. SOC. REV. 775, 777 (1995); Fiona Mackay et al., *New Institutionalism Through a Gender Lens: Towards a Feminist Institution?*, 31 INT'L POL. SCI. REV. 573, 580 (2010); Sanjay Nagral, *Teaching Surgery: Through a Gender Lens*, 40 ECON. & POL. WKLY. 1835, 1835 (2005); Kalyani Menon-Sen & K. Seeta Prabhu, *The Budget: A Quick Look Through a 'Gender Lens'*, 36 ECON. & POL. WKLY. 1164, 1165 (2004).

224. *See, e.g.*, *id.*; *see also* Sue Lafky et al., *Looking Through Gendered Lenses: Female Stereotyping in Advertisements and Gender Role Expectations*, 73 JOURNALISM & MASS COMM. Q. 379, 380 (1996) ("[L]enses of gender influence the ways individuals socially construct reality and produce (and reproduce) gender traits. Because these lenses of gender are embedded in social, political, and economic institutions . . . they help to shape gender-based inequalities . . . .") (citations omitted) (internal quotation marks omitted).

225. *See id.*

226. UNITED NATIONS EDUC. SCIENTIFIC & CULTURAL ORG. (UNESCO), GENDER IN EDUCATION NETWORK IN ASIA (GENIA): A TOOLKIT FOR PROMOTING GENDER EQUALITY IN EDUCATION 19 (2006), *available at* http://unesco.org.pk/education/life/nfer_library/Reports/4-109.pdf.

Employing a gendered lens thus highlights the ways Clark's formulation of the accuser-obligation approach reflects and incorporates his own masculine lens. The accuser-obligation approach can subsequently be altered to incorporate a feminine perspective, which, as I argue in this Note, provides a new understanding of the Confrontation Clause that will produce better outcomes in all cases.

C. The Accuser Obligation through a Gendered Lens

Clark's masculine lens is best reflected in his conceptions of honor, courage, and respect. Consequently, in this Note, I focus specifically on his arguments that utilize those terms either directly or indirectly. Clark's understanding of confrontation unites all three ideas; he views the accuser's act of confronting the accused as courageous, worthy of our respect, and honorable.[227] Once one recognizes that Clark defines these three key concepts using a masculine lens,[228] they can be reinterpreted using a feminine lens. The result is a gender-conscious conception of each of these values, providing a better understanding of the aspirations embodied in the Confrontation Clause. This reinterpretation of the accuser-obligation approach provides a novel solution to the problem of "victimless" domestic violence prosecutions post-*Crawford* that is applicable to all cases.

In this Note, I use the term masculine lens to mean one that represents hegemonic masculinity. Hegemonic masculinity is, as implied by its modifier, not synonymous with all forms of masculinity. Rather, it is "that form of masculinity that is considered culturally to be most dominant at any given time. . . ."[229] Of course, hegemonic masculinity excludes femininity in addition to leaving out alternative forms of masculinity. If we are truly to accept the Confrontation Clause as a reflection of ourselves, or at least "a notion of who we want to understand ourselves to be,"[230] we must include in that notion the experience of our entire population, both men and women. Such a step is both informative and necessary, especially in the context of the criminal justice system, which has historically "been run by men, against men, and for the benefit of men."[231] While this masculine predisposition is "not . . . much different from the rest of society,"[232] the

227. *See infra* Part V.C.1–3.

228. It is arguable that such a lens was almost unavoidable because "the Confrontation Clause reflects a gendered perspective on crime." Egerman, *supra* note 152, at 867.

229. Tony Coles, *Negotiating the Field of Masculinity: The Production and Reproduction of Multiple Dominant Masculinities*, 12 MEN & MASCULINITIES 30, 41 (2009).

230. Clark, *supra* note 1, at 1263.

231. Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2157 (1995).

232. *Id.*

system's focus on "male concerns and male perspectives"[233] is more exaggerated than that seen in other aspects of society less dominated by men.[234] Taking a gender-conscious approach is the only way we can truly understand the Confrontation Clause as an obligation applicable to all would-be accusers; we must account for the fact that not every accuser identifies as a man.

I do not mean to accuse Clark of rampant sexism. In many ways, his work reflects a systemic problem within our legal system—it is based on foundations laid by men at a time when women had little to no voice in public affairs.[235] As noted by Catherine MacKinnon, "[women] had no voice in writing the U.S. Constitution. When, one hundred years and a civil war later, an equality provision was added in 1868, it was without any expectation that the legal status of the sexes would be affected."[236] MacKinnon is just one of many to highlight this historical bias,[237] so it comes as little surprise that Clark, albeit unintentionally, took an androcentric[238] approach in his article.

1. Honor

"Honor" appears eight times in Clark's article.[239] It is first discussed through what it is not: It is "inconsistent with a sneaking attempt to get a

233. *Id.* at 2151.

234. *See id.* at 2157.

235. *See* CATHERINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 103 (2007).

236. *Id.*; *see also* Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 174 (2000) ("Nothing in the design of the system exposes the gender bias built into the history and tradition of the Constitution's structure and doctrines. Nothing requires that women's interests as such be given any consideration at all.").

237. *See, e.g.*, Egerman, *supra* note 152, at 866 ("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 fact finding. 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." (citations omitted)); Schulhofer, *supra* note 231 ("The criminal justice system fits almost perfectly Lincoln's conception of a government of the people, by the people, and for the people. It fits perfectly, if you are willing to equate 'the people' with the male half of the population. Criminal law is—and has been for centuries—a system of rules conceived and enforced by men, for men, and against men.").

238. Androcentric is defined as "dominated by or emphasizing masculine interests or a masculine point of view." *Androcentric Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/androcentric (last visited Apr. 14, 2014).

239. Clark, *supra* note 1, at 1263, 1269–71, 1273–74, 1286.

fellow citizen sent to jail without ever looking him in the eye."[240] Inherent in this definition of honor is the concept of confrontation. Clark contrasts this eye-to-eye interaction with "stab[bing] a man in the back."[241] His focus on confrontation reflects a masculine conception of self "defined through separation,"[242] a conception that consequently "views aggression as endemic in human relationships."[243] This stands in contrast to a feminine conception of self, one based on an "ethic of care" that often informs women's lives and "rests on a premise of nonviolence—that no one should be hurt"[244] The masculine conception demands conflict, and prioritizes violence over peacefulness.[245] Violence and aggression are thus frequently regarded as masculine,[246] and "many members of the privileged group [i.e. men] use violence to sustain their dominance."[247] Clark next discusses honor in relation to respect, describing whispering as unworthy of respect and consequently dishonorable.[248] Again this places an emphasis on confrontation; it requires the accuser to speak loudly and directly at the accused, to draw attention to themselves and initiate conflict.

Implicit in this argument are two premises: (1) direct confrontation is the only way to achieve honor, and (2) a conception of honor can and should be incorporated into criminal procedure through the Confrontation

240. *Id.* at 1263.

241. *Id.*

242. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 8 (1993) ("Since masculinity is defined through separation while femininity is defined through attachment, male gender identity is threatened by intimacy . . . males tend to have difficulty with relationships. . . .").

243. *Id.* at 45.

244. *Id.* at 173–74.

245. *See, e.g.*, Egerman *supra* note 152, at 866 (citation omitted) ("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.").

246. *See, e.g.*, R. W. Connell, *The Social Organization of Masculinity*, *in* FEMINIST THEORY READER: LOCAL AND GLOBAL PERSPECTIVES 232 (Carole R. McCann & Seung-kyung Kim eds., 2d ed. 2010) ("That is to say, an unmasculine person would behave differently: being peaceable rather than violent, conciliatory rather than dominating . . . ."); Coles, *supra* note 229, at 40 ("[M]en have tried to defend their position of dominance by falling on essentialist arguments . . . i.e., that men are genetically predisposed to masculine behavior such as aggression . . . and risk taking."); *Gender and Gender-Identity: What is Feminine? What is Masculine?*, PLANNED PARENTHOOD, http://www.plannedparenthood.org/health-topics/sexual-orientation-gender/gender-gender-identity-26530.htm (last visited Apr. 14, 2014) ("Words commonly used to describe masculinity: independent, non-emotional, aggressive, tough-skinned, competitive, clumsy, experienced, strong, active, self-confident, hard, sexually aggressive, [and] rebellious.").

247. Connell, *supra* note 246, at 241.

248. Clark, *supra* note 1, at 1269.

Clause. Though Clark's second premise is correct, his first is flawed by, and representative of, his masculine lens. To create an accuser-obligation approach that better reflects the entirety of society, it is necessary to incorporate a definition of honor that allows for more than just direct confrontation. Instead, the accuser-obligation approach should account for a feminine perspective, incorporating a conception of honor that is achievable through less aggressive means.

We can and should conceive of honor in ways that do not involve aggressive behavior.[249] It is reasonable to posit a theory of honor that celebrates non-confrontational actions. This does not require us to suddenly consider backstabbing to be honorable. An alternative conception of honor could place value on speaking up where an individual is not subsequently required to "stab" anyone, be it in the chest or the back. We can and should choose to recognize the act of a domestic violence survivor reaching out for help as honorable. If a survivor contacts the police, even if that survivor later chooses to use more "subtle acts of resistance" and refuses to testify at trial,[250] we should recognize the initial act as honorable, setting aside any subsequent refusal to participate in the trial process. This would not offend the Confrontation Clause, understood as serving in part to prohibit the use of dishonorable statements in court, because the honor requirement will have already been satisfied.

2. Courage

Another key concept in Clark's work is the notion of courage. Clark suggests that one basis for excusing children's inability or unwillingness to testify under the accuser-obligation approach is that "we might not be willing to demand that our children demonstrate the same fortitude [or courage] we require of our fellow adults."[251] This exception highlights Clark's conception of courage in the negative, by describing when it is not present. If he would excuse children from delivering live testimony due to a lack of courage, then confronting someone directly and engaging in the combative process that is a trial system must be emblematic of courage under his accuser-obligation approach.

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249. I am not alone in the belief that the Confrontation Clause can stand for more than one set of values, more than one conception of such an important concept as honor. *See, e.g.*, Orenstein, *supra* note 96, at 154 ("[T]he Confrontation Clause can encompass multiple values and interests . . . .").

250. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 247 (2005).

251. Clark, *supra* note 1, at 1281.

We need not say that one can only display courage by engaging in a combative process; instead, we can choose to recognize courage displayed outside of battle. Survivors of domestic violence routinely display courage while navigating "homes . . . marked by terror."[252] Merely persevering in such an environment should be recognized as courageous. While it is true that these displays of courage go unwitnessed, insisting upon an in-court confrontation only "allows the batterer to further terrorize his victim while ignoring the ways that this might undermine [the victim's] ability to testify."[253] An act need not be witnessed to be courageous, and we should recognize courage outside of confrontational situations like that of delivering live, in-court testimony. Under this approach, the survivor who makes statements to the police and engages in "subtle acts of resistance,"[254] can fulfill her obligations as an accuser under the Confrontation Clause, and courts could allow the testimony even in her absence. This would not offend Clark's conception of Confrontation Clause, serving in part to reinforce our conception of courage, because the accuser is acting courageously.

3. Respect

The Confrontation Clause also focuses on whether the accuser and the testimony in question are "worthy of respect."[255] Throughout his article, Clark claims that people who "hide from those they accuse" are not worthy of our respect.[256] He thereby makes conflict an essential component of respect, just as he did with his conception of honor. Clark further argues that respect should be a necessary prerequisite for having a statement "heard in court,"[257] as those who are "unworthy of respect"[258] should not be considered at trial. Consequently, Clark seems to suggest that an individual who is unwilling to engage in conflict is incapable of serving as an aspirational figure, and should be silenced and barred from participation in the criminal justice system.

We need not accept the proposition that respect can only be gained through conflict. Such an assumption is particularly damaging if we accept Clark's implicit suggestion that respect is a prerequisite for simply gaining a voice within the criminal justice system. Instead, we should embrace a concept of respect that is earned in ways other than direct conflict. For example, we should deem someone worthy of our respect if they seek assistance in a

252. Miccio, *supra* note 250.
253. Egerman, *supra* note 152, at 893 (citations omitted).
254. Miccio, *supra* note 250.
255. Clark, *supra* note 1, at 1259.
256. *Id.* at 1265.
257. *Id.* at 1278.
258. *Id.* at 1279.

desperate situation, such as domestic violence.[259] Similarly, we should deem putting oneself in harm's way in an attempt to mitigate damage to others, something we frequently see survivors of domestic violence do,[260] as worthy of our respect. Consequently, in the majority of "victimless" domestic violence cases the Confrontation Clause, working in part to ensure that accusers are in fact worthy of our respect, would not be offended by allowing a survivor's testimony at trial, even in her absence.

VI. The Gender-Conscious Accuser Obligation: A More Satisfying Solution

This Note only scratches the surface of how our conceptions of masculinity and femininity shape and influence our perspectives and understanding of society and its values, and the subsequent impact those perspectives and values have in shaping our legal system. The accuser-obligation model can be reinterpreted to include gender-conscious conceptions of honor, courage, and respect. To effectively implement the gender-conscious accuser-obligation approach in a way that reflects and constitutes our community identity, we must have a comprehensive understanding of our societal values. Formulating the gender-conscious accuser-obligation approach is not only an interesting exercise in feminist theory; it also provides a more satisfying solution for the problems currently plaguing "victimless" domestic violence prosecutions. Using the gender-conscious accuser-obligation approach would produce the outcome advocates and courts desire, allowing more evidence to be admitted absent the accusers' in-court testimony. It would greatly relieve the burdens faced in most "victimless" domestic violence prosecutions, while simultaneously reflecting a version of ourselves that we do in fact "want to understand ourselves to be."[261]

At the core of the accuser-obligation model lies a simple contention—the law has power to "both reflect and constitute community identity and self-perception,"[262] helping to shape the very fabric of society. Further, the focus of the Confrontation Clause's reflective and constitutive powers should lie on the accuser, rather than the accused.[263] Under the Court's current jurisprudence, the Confrontation Clause is doing very little to positively constitute our identity. Take for example the case of *Giles*.[264] Dwayne

259. For a brief overview on the scope and severity of domestic violence in America see *supra* Part II.

260. *See* Dutton, *supra* note 97, at 1234.

261. Clark, *supra* note 1, at 1263.

262. *Id.* at 1259.

263. *Id.* at 1266.

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

Giles was convicted of murder for shooting Brenda Avie outside her grandmother's home. Less than a month before the shooting, Avie had spoken to police about the domestic violence she claimed to have suffered at Giles's hands.[265] The Supreme Court vacated the conviction, taking issue with the lower court's formulation of the forfeiture by wrongdoing exception.[266] As Chief Justice Roberts noted at oral argument, the accused actually received a great benefit for causing the accuser's death under the Court's interpretation of the rule,[267] sending the perverse message to the potentially accused that it is better to kill than simply injure a potential accuser. Such a message can hardly be deemed "aspirational."[268]

Applying the gender-conscious accuser-obligation approach to the facts of *Giles* produces a very different result. Shifting the focus from the accused, we ask whether the accuser, in making her accusations, was behaving in a way that was honorable, courageous, and worthy of our respect. I argue that a domestic violence survivor speaking out about her abuse under any circumstances is honorable, but at the very least, we should be able to accept that a survivor speaking to police about a threat to her life is not dishonorable. It follows that Avie was acting honorably when speaking with police about the abuse she suffered at Giles's hands. Likewise, we can conceive of such an action as courageous given the very real risk of violence that survivors face,[269] particularly when cooperating with law enforcement.[270] A survivor such as Avie who speaks out is therefore a paragon of courage. Finally, we consider whether her actions were worthy of our respect. Avie was a survivor seeking assistance; surely her actions were worthy of our respect.

In summary, Avie, in providing her statements to the police, was acting honorably, courageously, and in a manner worthy of our respect. Under the gender-conscious accuser-obligation approach, her statements consequently raise no Confrontation Clause issues. This completely avoids any discussion of the doctrine of forfeiture by wrongdoing, and would allow the verdict of the lower court to stand.

I recognize that adoption of the gender-conscious accuser-obligation approach would be a radical step for this Court, and is unlikely to occur in the near future. However, it does provide a novel solution to the problem of "victimless" domestic violence prosecutions, an issue that has yet to be re-

265. *Giles*, 554 U.S. at 356–57.

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

267. Lininger, *supra* note 124, at 864 (citing Transcript of Oral Argument at 18, *Giles*, 554 U.S. 353 (No. 07-6053)).

268. Clark, *supra* note 1, at 1263.

269. *See supra* Part II.

270. Vargas, *supra* note 88 (citing TJADEN & THOENNES, *supra* note 80, at 37).

solved. As shown by the lower courts' questionable rulings in these cases,[271] such a solution is necessary. It is not only about putting more abusers behind bars; a coherent understanding of the Confrontation Clause will avoid future acts of "intellectual[ ] dishonest[y]"[272] on the part of state judges. As such, it is a solution that reaches beyond the domestic violence context. The gender-conscious accuser-obligation approach better reflects and utilizes the law's constitutive powers, providing a better understanding of who we "want to understand ourselves to be."[273] That understanding is valuable regardless of the substance matter of the case. This Note does not intentionally exclude hypothetical examples of the gender-conscious accuser-obligation approach in other contexts; they are simply beyond its scope. The approach would be beneficial in any context, as it is always better to account for both masculine and feminine perspectives when constructing the cultural ideals to which we subscribe.

This versatility is perhaps the approach's greatest strength. Unlike an expansion of the forfeiture doctrine,[274] it is not primarily concerned with, or limited to, the domestic violence context.[275] Further, the Court has signaled a desire to limit the application of the forfeiture doctrine,[276] whereas the gender-conscious accuser-obligation approach, while radical, currently faces no open hostility. A doctrinal exception for domestic violence[277] is limited by the same specificity, in that it too is focused only on the domestic violence context. More so than in regards to the forfeiture doctrine, the Court has shown no interest in creating such a categorical exception.[278] Though such an exception would allow the courts to "function with more consistency,"[279] so too would the gender-conscious accuser-obligation approach. And unlike a categorical exception, the gender-conscious accuser-obligation approach is applicable outside the domestic violence context. While it is a more radical solution than those discussed above, it is more moderate than partial unincorporation.[280] The gender-conscious accuser-obligation approach asks the Court to shift its understanding of the principles underlying the Confrontation Clause, but this is not unprecedented, as *Crawford* itself

271. *See supra* Part IV.E.
272. Lininger, *supra* note 31, at 818–19.
273. Clark, *supra* note 1, at 1263.
274. *See supra* Part IV.A.
275. For arguments in favor of approaches designed specifically to protect domestic violence victims, see, for example, Lininger, *supra* note 124; Tuerkheimer, *supra* note 89; Yee, *supra* note 141.
276. Lininger, *supra* note 124, at 857.
277. *See supra* Part IV.B.
278. Simon, *supra* note 5, at 200.
279. *Id.* at 204–05.
280. *See supra* Part IV.D.

was a monumental shift in Confrontation Clause jurisprudence.[281] Finally, unlike proposed legislative solutions,[282] the gender-conscious accuser-obligation approach is a complete solution which the Court itself can implement.

Conclusion

As it is currently understood, the Confrontation Clause "is inherently at odds with a legal regime that effectively prosecutes domestic violence."[283] By continuing to uphold a doctrine that undermines effective prosecution of an entire subset of crime, "public trust in the system is destroyed."[284] The gender-conscious accuser-obligation approach provides a solution to the Confrontation Clause problem that should satisfy academics, advocates, prosecutors, and judges alike. With so many groups seeking change, and with such a widespread and serious issue at stake, it is crucial that we understand the Confrontation Clause in a way that produces better outcomes. Those outcomes should not be limited to the domestic violence context—instead, we should utilize the potential of the Confrontation Clause to "both reflect and constitute community identity and self-perception,"[285] providing a clearer vision of "who we want to understand ourselves to be."[286]

While such an interpretation of the Clause is a radical approach unlikely to be adopted by the Court, it effectively grapples with the world in which we live. Domestic violence remains prevalent in America even as prosecutors try in earnest to effectively prosecute batterers. While this Note focuses on domestic violence as a reason for adopting a revised accuser-obligation approach, the doctrine itself would not be limited to domestic violence cases. The accuser-obligation approach is an effective way to understand the Confrontation Clause in all cases. The law's reflective and constitutive powers are applicable in all contexts, and consequently, a gender-conscious understanding of the Confrontation Clause that focuses on the accuser is valuable in all cases.

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281. *See supra* Part I.B.

282. *See supra* Part IV.C.

283. Egerman, *supra* note 152, at 890.

284. Yee, *supra* note 25, at 784. It is also important to note that some advocates have argued that women's autonomy is undermined by states that continue to pursue convictions even when a victim chooses not to cooperate. *See, e.g.*, Miccio, *supra* note 250; Vargas, *supra* note 88. While I recognize those concerns, I believe it is important to remember that "[t]he government, not the victim, is the plaintiff in prosecutions of domestic violence. The state has a duty to seek punishment of batterers, irrespective of whether the victims are willing to cooperate in prosecuting their assailants." Lininger, *supra* note 124, at 783.

285. Clark, *supra* note 1, at 1259.

286. *Id.*; *see also* Aleinikoff, *supra* note 16.

We deserve an understanding of the Confrontation Clause that takes into account the lived experiences and perspectives of both men and women, an understanding that can serve as an inspiration to all of us. Moreover, we deserve an interpretation of the Confrontation Clause that will produce a coherent body of jurisprudence that can be effectively applied by the lower courts. The gender-conscious accuser-obligation approach gives us just that. ♣