CONTENTS

SYMPOSIUM

MEANINGFUL RECIPROCITY—IN HONOR OF CLARE DALTON
Preface by Martha Minow, J.D. 297

Leigh Goodmark, J.D. 301

LITIGATING DISCRIMINATION: LESSONS FROM THE FRONT LINES
Deborah L. Rhode, J.D. 325

THE DEVELOPMENT OF DOMESTIC VIOLENCE AS A LEGAL FIELD: HONORING CLARE DALTON
Elizabeth M. Schneider, J.D. & Cheryl Hanna, J.D. 343

THE FEMINIST ACADEMIC’S CHALLENGE TO LEGAL EDUCATION: CREATING SITES FOR CHANGE
Ann Shalleck, J.D. 361

SYMPOSIUM

CONFRONTATION IN CHILDREN’S CASES: THE DIMENSIONS OF LIMITED COVERAGE
Robert P. Mosteller, J.D. 393

THE SKY IS STILL NOT FALLING
Richard D. Friedman, J.D. 427

CONFRONTATION, EXPERTS, AND RULE 703
Paul C. Giannelli, J.D. 443

THE CONFRONTATION CLAUSE AND EXPERT TESTIMONY: RECENT DEVELOPMENTS IN THE SUPREME COURT AND THE NEW YORK STATE COURT OF APPEALS
Andrew C. Fine, J.D. 457

CONFRONTATION CLAUSE CURIOSITIES: WHEN LOGIC AND PROPORTION HAVE FALLEN SLOPPY DEAD
Randolph N. Jonakait, J.D. 485

CONFRONTATION AND KABUKI
David Alan Sklansky, J.D. 501
CRAWFORD & BEYOND: HOW FAR HAVE WE TRAVELED FROM ROBERTS AFTER ALL?
Brooks Holland, J.D. 517

Notes and Comments

SPORTING CHANCE: LITIGATING SEXISM OUT OF THE OLYMPIC INTERSEX POLICY
Samantha Glazer 545

PROTECTING TENANTS AT FORECLOSURE BY FUNDING NEEDED REPAIRS
Steven T. Hasty 581

Failing to realize Nicholson’s vision: How New York’s child welfare system continues to punish battered mothers
Jame Perrone 641

PADILLA V. KENTUCKY: BENDING OVER BACKWARD FOR FAIRNESS IN NONCITIZEN CRIMINAL PROCEEDINGS
Alison Syré 677
PREFACE: MEANINGFUL RECIPROCITY—
IN HONOR OF CLARE DALTON

Martha Minow*

Among the many wonders of Clare Dalton is her brilliant performance in a one-person dramatic show as Virginia Woolf. So it seems fitting to turn to Woolf in thinking about how to introduce this tribute volume marking the close of Dalton’s career as a legal academic and start of her new career. Woolf once wrote: “It is no use trying to sum people up.” It is no use, then, to try to capture Professor Dalton solely by way of listing her many accomplishments: her creation of the landmark and vital Domestic Violence Institute at Northeastern Law School; her incisive, elegant writing; her passionate teaching at several law schools; or the awards from Radcliffe, the Massachusetts Women’s Political Caucus, Massachusetts Women’s Bar Association, and recognition as Feminist of the Year by the Feminist Majority Foundation. As marvelous as all of these are, naming them does not evoke her vividness, grace, or sense of fun. Woolf, thank goodness, has some other insights of use.

Consider: “The older one grows the more one likes indecency.” This quotation prompts me to remember when

---

* Dean and Jeremiah Smith, Jr. Professor, Harvard Law School. Thanks to Elizabeth Schneider and Joe Singer for their help with this preface.


2 VIRGINIA WOOLF, JACOB’S ROOM 18 (Melvin House Publishing 2011) (1922).

3 VIRGINIA WOOLF, THE STRING QUARTET, in MONDAY OR TUESDAY 31,
Clare and I worked to create a course we taught together. We called it *Family Law and History*. I think we resisted something as tidy as *History of Family Law* because we wanted to signal an inquiry that would spill out of the dress of doctrine. Yes, we thought, we can teach and talk about histories of divorce, marriage, and child custody. I suggested histories of struggles over birth control. Clare said, “Let’s start with the history of birth.” So we did. I am confident that no Harvard Law School classroom had previously been home to searching discussions of a right to vaginal delivery after Caesarian section and the role of the forceps in struggles between midwives and physicians. It was memorable!

Virginia Woolf also once said, “I read the book of Job last night, I don’t think God comes out well in it.” This reminds me of Clare’s gift for puncturing pieties and also for looking behind the “given”: showing we each have free will, can expect more, and hold others to account. This is what Clare has done in scholarship, teaching, and advocacy. In the still-remarkable article, *An Essay in the Deconstruction of Contract Doctrine*, Clare questioned common assumptions about power and knowledge and identified faulty patterns of thought and argument that yield inconsistencies and produce rules that fail to support flourishing human relationships.

Indeed, Clare invited readers to regard law as stories we tell about ourselves, authority, and our relationships—and to reimagine the stories we want to construct about who we wish to be. That, of course, is what Clare did when she held Harvard University to account and negotiated a settlement that funded the Domestic Violence Institute at Northeastern. This is simply one demonstration of her gift of metamorphosis and her ability to convert trauma into hope—just as she uses the points of needles to relieve pain. Clare has braided the strands of her life as a theorist, activist, mother, and friend on a journey into service and justice, healing and care, voice and touch.


In “To the Lighthouse,” Virginia Woolf writes:
What is the meaning of life? That was all—a simple question; one that tended to close in on one with years.
The great revelation had never come. The great revelation perhaps never did come. Instead there were little daily miracles, illuminations, matches struck unexpectedly in the dark; here was one.\(^6\)

Clare’s grace, integrity, insight, and clarity are gifts, and the essays that follow examine and honor her personal and professional contributions as a scholar, teacher, and activist.
Clare once closed an article by quoting Ayi Kwei Armah: Our way, the way, is not a random path . . . . It is a way that aims at preserving knowledge of who we are, knowledge of the best way we have found to relate each to each, each to all, ourselves to other peoples, all to our surroundings. If our individual lives have a worthwhile aim, that aim should be a purpose inseparable from the way. Our way is reciprocity. The way is wholeness.\(^7\)

It is a pleasure to salute Clare Dalton’s commitment to living a worthwhile life in meaningful relationships of reciprocity. Although I suspect the tributes gathered here may embarrass her, they offer a path that can inspire those yet to come.

---


Leigh Goodmark*

After the Massachusetts Commission Against Discrimination found probable cause to believe that Harvard University had discriminated against her by denying her tenure, Clare Dalton could have done any number of things. What Professor Dalton ultimately chose to do, however, was to start a law school clinic to meet the legal needs of women subjected to abuse. The settlement Professor Dalton negotiated required that Harvard fund Northeastern University School of Law’s Domestic Violence Institute (“DVI”), which she directed until 2005. The DVI educates law students about domestic violence and gives them the opportunity to learn from and about women subjected to abuse through various clinical components. The DVI’s programs include a partnership with the Boston Medical Center, through which first

* Associate Professor, Director of Clinical Education, and Co-Director, Center on Applied Feminism, University of Baltimore School of Law. My thanks to Professor Lois Kanter and Northeastern University School of Law for inviting me to participate in this event honoring Clare Dalton and giving me the opportunity to think about Professor Dalton’s contributions in light of clinical pedagogy, and to Professors Zanita Fenton, Cheryl Hanna, and Elizabeth Schneider for helping me to develop those views as we planned our panel. Professor Margaret E. Johnson, as always, provided me with a wonderful sounding board for testing these ideas, and Peggy Chu provided essential research support. Thanks to the editors of the Brooklyn Journal of Law and Policy for their input on this piece; their work and their thoughts improved it significantly. Most importantly, thanks to the clinic students who have left our clinic and devoted themselves to practice on behalf of women subjected to abuse—you are the change I see in the world.
year students interview women seeking help in the emergency room, and the Domestic Violence Clinic, which focuses on protective order advocacy in the Massachusetts District Courts. The DVI also provides students with litigation opportunities in the Massachusetts Probate and Family Courts. At the time Professor Dalton created the DVI, domestic violence clinics were relatively rare. They are much more common now, thanks to efforts by the American Bar Association’s Commission on Domestic Violence and others to promote the need to teach domestic violence in law school curricula.

Like many domestic violence clinical programs, the DVI embraces a set of philosophical and pedagogical principles for teaching students to work with women subjected to abuse. Those principles include working collaboratively with clients subjected to abuse, client-empowering advocacy, maximizing options for women subjected to abuse, and looking beyond the legal system to redress woman abuse. These values, which are essential elements of what is taught in domestic violence clinics throughout the country, are at odds with much of mainstream domestic violence law and policy, which stresses the importance of state intervention, prioritizes the legal response to domestic violence, and focuses on separation of women from their abusive partners. Moreover, the legal system established to effectuate that law and policy further widens the gap between the principles domestic violence clinics strive to teach students and the reality of the system’s treatment of women subjected to abuse. Clinics teach a model of client-centered, collaborative lawyering intended to help clients generate

1 See generally Lois H. Kanter, V. Pualani Enos & Clare Dalton, Northeastern’s Domestic Violence Institute: The Law School Clinic as an Integral Partner in a Coordinated Community Response to Domestic Violence, 47 Loy. L. Rev. 359 (2001) (discussing the Institute’s guiding goals and community context and describing the program’s various academic, clinical, internship, and fellowship offerings).

2 See generally DEBORAH GOELMAN & ROBERTA VALENTE, ABA Comm’n on Domestic Violence, When Will They Ever Learn?: Educating to End Domestic Violence: A Law School Report (1997) (reporting recommendations from a two-day meeting of experts on how law schools can better prepare lawyers to serve the needs of women subjected to abuse).

3 Kanter, Enos & Dalton, supra note 1, at 365.
and decide among a wide range of options based on their own needs, goals, and interests. The legal system, however, offers women subjected to abuse a narrow range of options based on assumptions about who those women are and how they should react to their abuse. Clinics teach client empowerment; the legal system deprives women of autonomy and dictates women’s choices. Clinical programs urge students to look beyond the law to meet their clients’ needs. In contrast, the mainstream legal response to domestic violence is premised overwhelmingly on legal intervention.

This disconnect between the goals of domestic violence clinics and the realities of domestic violence practice has implications for the ways in which law students understand domestic violence and experience lawyering on behalf of women subjected to abuse. While some students might be motivated to change the system based on their experiences, others will almost certainly internalize the system’s view of women subjected to abuse and the appropriateness of state intervention into women’s lives. The gap between what we teach and what students will see in the world should give domestic violence clinicians pause. It should also cause us to question what we teach students about the realities of the legal system’s response to domestic violence and how we have contributed to the development of that response. Given the role that feminists, clinicians, and feminist clinicians played in the development of domestic violence law and policy, we need to think carefully about whether endorsing the current legal regime undermines our pedagogical and client service goals.

This essay is an attempt to begin that process. It begins by articulating the goals of domestic violence clinics, as explained in the clinical literature, highlighting the important role that client-centered lawyering plays in domestic violence clinics. The essay then juxtaposes the values that students are taught in domestic violence clinics against the realities of practicing domestic violence law as most attorneys experience it, arguing that domestic violence law and policy is at odds with much of what students in domestic violence clinics are taught. The essay concludes by considering how students might react to this “clinical cognitive dissonance” when they go out into the world to represent women subjected to abuse.
I. THE VALUES-DRIVEN GOALS OF DOMESTIC VIOLENCE CLINICS

While variation from clinic to clinic certainly exists, many domestic violence clinics have embraced a common set of values and goals and a pedagogy designed to further them. Believing that women subjected to abuse should formulate and control any response to their abuse, domestic violence clinics teach students to practice client-centered, collaborative lawyering; to empower their clients; to maximize client options; and to look beyond the law to assist women subjected to abuse.

A. Client-Centered Lawyering

Like many clinics, the DVI stresses lawyering that is “client-centered” and “client-empowering.”\(^4\) The theory of client-centered lawyering—first introduced by law professors David Binder and Paul Bergman in their groundbreaking book, *Lawyers as Counselors: A Client-Centered Approach*\(^5\)—rests on a number of core principles. Client-centered lawyers believe that clients are the “autonomous ‘owners’ of their problems” and that clients are better placed to assess both the non-legal consequences of potential solutions to problems and the level of risk they are willing to accept.\(^6\) Moreover, the theory holds that clients want to, and are able to, participate in the counseling process and to make important decisions about their lives. That collaboration between lawyers and clients, in turn, will lead to better results.\(^7\) To actualize these principles, client-centered lawyers must explore both legal and non-legal consequences of potential solutions and engage clients in developing those solutions. Client-centered lawyers encourage clients to make key decisions, advising clients based on the clients’ own values and acknowledging and recognizing the


\(^5\) *Lawyers as Counselors* is now in its second edition, and has added authors Susan C. Price and Paul R. Tremblay. **DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH** (2d ed. 2004).

\(^6\) *Id.* at 4.

\(^7\) *Id.* at 4–8.
importance of clients’ feelings in the counseling process. Clinicians working with women subjected to abuse have refined the concept of client-centered lawyering to respond specifically to the context of an abusive relationship. As in other contexts, client-centered lawyers work collaboratively with clients to develop, weigh, and select legal and/or non-legal options that best meet their clients’ goals, whatever those goals might be. DVI faculty have described client-centered lawyering as “focused on identifying and assessing experiences, risks, values, judgments, capacities and limitations from the client’s perspective.” Working with women subjected to abuse adds an additional layer of complexity to the client-centered lawyering relationship. Women subjected to abuse are assumed to want immediate separation from their partners. This normative assumption sometimes conflicts, however, with women’s desires to continue their relationships, albeit without the abuse. These assumptions also overlook the reality that women subjected to abuse must sometimes tolerate continued relationships with their partners in order to maintain their safety, economic security, housing, child care, or other

8 Id. at 9–11.
9 See Sue Bryant & Maria Arias, Case Study: A Battered Women’s Rights Clinic; Designing A Clinical Program Which Encourages A Problem Solving Vision of Lawyering, 42 WASH. U. J. URB. & CONTEMP. L. 207, 212–15 (1992) (describing the Battered Women’s Rights Clinic of the City University of New York, where students conducted a needs assessment of the service area and developed an intake and referral system tailored to those needs); Enos & Kanter, supra note 4, at 107–21 (discussing the training that student participants in the Boston Medical Center Domestic Violence Project receive on client-centered lawyering); Ann Shalleck, Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused, 64 TENN. L. REV. 1019, 1033 (1997) (arguing that the lawyer should create an opportunity for the client to explore multiple legal possibilities in order to positively affect her changing concepts of her life and herself).
10 See Enos & Kanter, supra note 4. A number of clinics representing women subjected to abuse, including the clinics at the DVI, University of Baltimore, The Catholic University of America, the Washington College of Law, American University, City University of New York, and Georgetown Law Center, teach students the principles of client-centered lawyering. See Mithra Merryman, A Survey of Domestic Violence Programs in Legal Education, 28 NEW ENGL. L. REV. 383 (1993).
11 Enos & Kanter, supra note 4, at 84–85.
material needs. Client-centered lawyers working with women subject to abuse must generate options and counsel clients subjected to abuse with an awareness of these norms, but without allowing them to color the lawyers’ contribution to the collaboration. Moreover, more than many clients, the goals of women subjected to abuse may change quickly and often, in response to variations in their relationships. \(^{12}\) Law professor Ann Shalleck explains that the client-centered lawyer representing a woman subjected to abuse “needs to see his or her role not as furthering a stable goal of the client, but as creating an opportunity for a client to explore multiple possibilities, as well as her own changing desires to further any of them.” \(^{13}\) Such representation must be

non-judgmental . . . If the woman can experience a space within which she can examine multiple possibilities and shift among them freely without fear of being judged as unstable or indecisive, she is then better able to figure out, within the contours of that relationship, what she thinks is best for her to do. \(^{14}\)

Client-centered lawyering recognizes that both the lawyer and client have knowledge and skills to bring to the table as they generate and consider options. \(^{15}\) Lawyers have legal knowledge; clients have, among other things, life knowledge. This is particularly true of women subjected to abuse: “the client is the best, and often the only, person to provide the critical information on the danger posed by the batterer, his likely response to a particular course of action, and the implications for her and her children.” \(^{16}\) Moreover, client-centered lawyering recognizes that in the end, the client will have to live with the consequences of any decision she might make, which will have financial, social and emotional ramifications for her, her partner, and her children. Given their importance, “these are not decisions that can be made

\(^{12}\) Shalleck, supra note 9, at 1032–33.
\(^{13}\) Id. at 1033.
\(^{14}\) Id. at 1034.
\(^{15}\) BINDER ET AL., supra note 5, at 282–85.
\(^{16}\) Kanter, Enos & Dalton, supra note 1, at 366.
by an outsider, no matter how well-intentioned.”

Listening is an essential component of client-centered lawyering, and one that the DVI, like most domestic violence clinics, teaches its students explicitly. The DVI’s credo is “less lawyering and more listening.” The DVI’s approach to women seeking services at Boston Medical Center shifts the interviewing focus from talking to listening, from asking a list of questions to initiating and facilitating a discussion relating to intimate partner violence with a patient purely for the purpose of learning about her experiences, interests, and perspectives. [Its] goal is to impress upon the students that it is through listening and being responsive to a client in a less directive way that more accurate and relevant information relating to the problem and potential solutions is gained.

Client-centered lawyering enables a woman subjected to abuse to analyze her full panoply of options prior to making a decision about how to address the abuse in her relationship. That decision, when made, may be informed by legal information and expertise offered by the lawyer, but will be the client’s alone. Client-centered lawyering gives student attorneys the tools to avoid “the most dangerous and unhelpful thing an advocate can do” when working with a woman subjected to abuse—“give a victim of domestic violence advice and instruction about how to best ensure her safety and that of her children.” The approach embraces the

---

17 Id.
19 Enos & Kanter, supra note 4, at 91.
20 Binder, Bergman, Price and Tremblay acknowledge that there may be times when a client asks what the lawyer would do if in the client’s position. They believe that a client-centered lawyer can answer that question because it “satisf[ies] clients’ legitimate requests for relevant information.” BINDER ET AL., supra note 5, at 369. They caution, though, that lawyers should give clients not only their opinions, but also the attitudes and values underlying those opinions, so that clients can compare the values and attitudes underlying the attorney’s opinion with their own. Id.
21 Enos & Kanter, supra note 4, at 96; see also GOELMAN & VALENTE, supra note 2, at I-1, 71.
idea that women subjected to abuse are the experts on their own lives, with the strongest ability to predict the impact of the decisions they make in terms of their safety and well being.  

B. Empowerment and Autonomy

“[A]ttorneys do not save—they empower,”23 was the first lesson that law student Jennifer Howard learned during her time as a student attorney in Catholic University’s Families and the Law Clinic, although the lesson didn’t immediately take. Howard describes her struggle to understand why her clients didn’t seem as concerned—even obsessed—with their cases as she was, explaining that only later was she able to balance her empathy for her client with her professional role. Describing her interactions with a client, Howard notes:

Early in my relationship with Ellen, I lacked a necessary level of objectivity and as a result felt as thought it was indeed my job to ‘save’ her. I think that finally, in my second semester of representing battered women, I have achieved the necessary balance. I say this because I no longer feel it is my job to save my clients—I truly believe my role is to empower them to save themselves.24

Putting aside the question of whether women subjected to abuse need to be saved, Jennifer Howard’s experience is similar to that of many students who enter domestic violence clinics. Law students often find representing a woman subjected to abuse to be a stress-inducing, daunting task. They are terrified by the enormity of the stakes involved—the immediate safety of women and their children as well as their long-term physical and economic security—and have limited practical legal experience when they


24 Id. at 189.
begin their time in clinic. In addition to experiencing fear and frustration, student lawyers struggle to understand why the legal action that they are so diligently pursuing might not be the client’s first priority. Given all of these variables, it is not surprising that students sometimes come to believe that they must save their clients.

Clinics, however, teach students to empower, not save. Empowerment has been a central tenet of the battered women’s movement since its inception, and is no less important in domestic violence clinical education. The DVI defines empowering a client as

- an effort by her advocate, reaffirmed in every stage of the relationship between them, to ensure that the client has the information, capacity, and opportunity to articulate her needs, determine what course of action will best meet those needs, and obtain from others the resources and cooperation necessary to keep herself and her children safe.

- Definitions of empowerment frequently incorporate the ideas of controlling one’s environment; self-determination; and identifying, evaluating, and making choices. These characterizations of empowerment link the concept to another central value of domestic violence clinical education, client-centered lawyering.

The decision about how to present themselves to others is a particularly important aspect of self-determination for women subjected to abuse. Stereotypes of women subjected to abuse as meek, weak, passive, powerless, and without control pervade the public sphere and the legal system. But some women subjected to


26 Enos & Kanter, *supra* note 4, at 94; see also Kanter, Enos & Dalton, *supra* note 1, at 366.

27 See, e.g., Bryant & Arias, *supra* note 9, at 216–17, 220.


29 Id. at 77.
abuse reject being characterized in this way. Women who self-identify as strong and resilient may not see themselves as victims and may be unwilling or unable to present themselves as such. Law students frequently come to domestic violence clinics with internalized stereotypical images of women subjected to abuse, and as a result, have difficulty reconciling these stereotypes with the experiences of the women they represent. The divergence of stereotype and reality “can encourage students to distrust clients’ own accounts of their experiences and interpret their clients’ understandings of their experiences through the filter of the dominant stereotypes,” which can “impede students in listening to and hearing, let alone respecting, women’s own interpretations of their experiences of intimate violence.” Clinics encourage students to explore how these stereotypes color their interactions with clients. Students are asked to examine the disconnect between the stereotypes and their clients as they actually are and as they wish to be seen. Students then must learn to support and actualize their clients’ decisions about how they are to be portrayed in interactions with system actors; other sources of assistance; and their partners, families, and community networks.

It is particularly important for women subjected to abuse to have empowering relationships with lawyers. These relationships counterbalance the controlling behavior and deprivation of power that women subjected to abuse may experience with their partners. As the DVI faculty explain,

30 Bell Hooks, Feminist Theory: From Margin to Center 46 (2d ed. 2000).
31 See Goodmark, When is a Battered Woman Not a Battered Woman?, supra note 28, at 103, 106.
32 See, e.g., Enos & Kanter, supra note 4, at 98. We regularly have this conversation with students enrolled in our clinic, most recently after our students saw what they considered “atypical victims” during a court observation this fall. Conversations about the stereotypical victim regularly happen when our students begin representing clients in domestic violence cases and find that those clients do not present or behave in the ways that our students expect.
33 Shalleck, supra note 9, at 1041–42.
34 See Leigh Goodmark, Law is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women, 23 St. Louis U. Pub. L. Rev. 7, 24–25 (2004) [hereinafter Goodmark, Law is the Answer?].
one cannot underestimate the psychological harm to a victim when service providers fail to encourage her to make her own decisions or undermine her efforts to do so . . . . To the extent that service providers replicate the disempowering behavior of the perpetrator, they are reinforcing the victim’s powerlessness and further disabling her in her struggle to prevent her abuse.35

Respect for client autonomy is paramount in the clinical setting, especially when the client makes a choice with which the student attorney (or supervising attorney) disagrees or feels uncomfortable.36 Such choices give students a chance to surface assumptions and judgments they make about women subjected to abuse and consider how those assumptions and judgments color their client counseling. Moreover, such choices help student attorneys to understand that domestic violence is not a monolith—women subjected to abuse experience that abuse very differently.

C. Maximizing Options

Once students recognize the diversity of experiences among women subjected to abuse, they also begin to see that maximizing these women’s available options is an essential component of their role as attorneys. Students frequently come to clinics with the sense that they are limited to legal solutions to address domestic violence, which “prevents most students from recognizing solutions available through non-legal services or informal or formal networks unrelated to service institutions.”37 Moreover,

35 Kanter, Enos & Dalton, supra note 1, at 366.
36 See Tricia P. Martland, From Classroom to Courtroom: The Legal Advocacy Clinic as a Collaborative Effort to Address Domestic Violence Issues in the Community, 3 FAM. & INTIMATE PARTNER VIOLENCE Q. 101, 103 (2010).
37 Enos & Kanter, supra note 4, at 87; see also Merryman, supra note 10, at 400–01 (quoting CUNY clinical law professor Susan Bryant). In fact, the DVI stopped offering its Domestic Violence Education and Training program to first year law students in 2000 in part out of concern that the course focused too much on legal proceedings and

failed to convey our conviction that domestic violence is a complex social problem that must be addressed by community-based, multidisciplinary advocacy—not solely, or even primarily, through
students working with women subjected to abuse frequently assume that separation from their partners is or should be the goal of the women with whom they are working.\textsuperscript{38}

Domestic violence clinics often teach student attorneys about the concept of intersectionality.\textsuperscript{39} Looking at a woman’s experiences through the lens of intersectionality enables students to see how a woman’s placement at the center of one or more identities—race, class, sexual orientation, geographic location (urban, suburban or rural), disability status, religion, immigration status—affects her experience of abuse. A woman’s various identities may make her more or less able or willing to separate from her partner, use formal legal and social service delivery systems, or take other actions that the student attorney might assume would benefit her.\textsuperscript{40} “For example,” writes law professor Susan Bryant and former professor (now Judge) Maria Arias, “if a student represents an orthodox Jewish woman on public assistance, the student must ask how being orthodox Jewish, being a woman,

legal representation and resolution. We were concerned that these messages must be conveyed early in law students’ careers, before their approach to client advocacy mirrors the more traditional relations of a lawyer to a client and a court.

Kanter, Enos & Dalton, supra note 1, at 384. The DVI’s Boston Medical Center project, by contrast, gives students the opportunity to learn from the stories of women who are not, for the most part, actively seeking legal assistance or intervention for abuse, and who may or may not have tried to use the legal system to make themselves safer from abuse in the past. These women can teach us about strategies for coping with violence that do not involve legal action, and about why women choose or do not choose to take legal action.

\textit{Id.} at 387.


\textsuperscript{39} Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1262 (1991); see also Bryant & Arias, supra note 9, at 216.

\textsuperscript{40} See Crenshaw, supra note 39, at 1262; see also Bryant & Arias, supra note 9, at 216; Goldfarb, supra note 38, at 1542–44.
being battered, and being on public assistance affect this woman’s options, both from her perspective and the student’s.”

Domestic violence clinics stress the importance of exploring a broad range of options with clients. Examining the role that the legal system can play in an individual client’s case is a part of that exploration, but only one part. Students are taught to consider not only the usual options offered women subjected to abuse—separation, as facilitated by legal remedies including protective orders, criminal prosecution, or divorce, and social services like shelter—but also other remedies that might better meet the needs of their individual clients in their individual contexts. As Professor Dalton explained to the Boston Globe, students must “take off their legal hats” and help clients to think through the negative consequences of invoking the legal system. Such consequences might include a partner’s deportation, the loss of a partner’s economic or parenting support, and the loss of family or community support as a result of seeking assistance. Students must also explore whether and how they can help clients secure the other kinds of services, like child care, housing, education, job training, drug treatment, or transportation, which might best meet their clients’ goals.

Clinics also help students to recognize that separation may not be the safest or best option for every client. Clinics encourage students, in response to the oft-heard question “Why didn’t she leave?”, to respond “What makes you think that would have made her safer?” Domestic violence clinics challenge students to recognize that turning to the legal system is only one option, and may be a problematic or even dangerous option, for their clients. The goal of client representation “is not just to direct her toward what she might file in court, but towards examining what is going on in her life and what she might need to make the whole situation

41 Bryant & Arias, supra note 9, at 216.
42 Kanter, Enos & Dalton, supra note 1, at 366.
43 Enos & Kanter, supra note 4, at 84.
44 Kirtz, supra note 18, at B8.
45 Id.
47 See Merryman, supra note 10, at 402.
Accepting the limitations of the law can be difficult for students who come to clinics motivated to use the legal system to improve the lives of women subjected to abuse. Most students enter clinics believing that “their role will consist solely of pursuing legal solutions through applying their knowledge of the law and legal systems to the client’s legal problems.”

Embedded in that orientation is the assumption that the law will provide solutions. Students’ resistance to the idea that law is an imperfect remedy grows from their need to protect “their ideas of law, and the conception that law will fix things, and that law is not a tool of oppression.”

But, as Bryant and Arias note, “One of the challenges of any public interest clinical program is to help students practice in a particular area of law, while at the same time, be able to criticize it . . . A critical perspective is especially necessary when representing battered women . . . .” Domestic violence clinics help law students see that invoking the power of the state is but one option for women subjected to abuse, and that, in order to address abuse, lawyers for women subjected to abuse must think beyond the legal system about what their clients really need.

Ann Shalleck has written that, ideally, a legal practice for women subjected to abuse promotes awareness of the multiple visions of the client that are operating throughout her experience in the legal system . . . attends to the consequences of any vision that is unselfconsciously or self-consciously adopted by lawyer and client . . . enables a client to convey, in the forums she chooses and to the extent she wishes, the vision of herself that she decides, after consultation with her lawyer, to project . . . recognizes that the interaction between lawyer and client plays a part in shaping the client’s understanding.

---

48 Id. at 401 (quoting clinical law professor Ann Shalleck).
49 Enos & Kanter, supra note 4, at 86.
50 Merryman, supra note 10, at 408; see also Bryant & Arias, supra note 9, at 222. As law professor Martha Mahoney argues, “[I]t is very hard to shake these ideas without discouraging student optimism about using the law as a means of bringing about social change.” Merryman, supra note 10, at 408.
51 Bryant & Arias, supra note 9, at 210.
of her needs and her experience . . . enables the client to make informed decisions about the multiple consequences of the visions of herself conveyed through the legal proceeding; . . . and assists a client in understanding the possibilities that she has within her situation to make changes that are meaningful to her and in taking those actions that she decides are desirable.52

Domestic violence clinics—using the principles and techniques of client-centered, collaborative lawyering intended to maximize client empowerment and autonomy and the options available to clients—prepare students for the kind of practice Shalleck envisions.

II. THE REALITIES OF DOMESTIC VIOLENCE PRACTICE

Domestic violence clinics teach students a host of important values and skills that are essential for representing women subjected to abuse. But by stressing client centeredness and empowerment, domestic violence clinics prepare law students for a practice on behalf of women subjected to abuse that is fundamentally at odds with the realities of the legal system’s response to domestic violence. The system of law and policy erected over the last forty years to address domestic violence—which students confront when they represent women subjected to abuse through domestic violence clinics—is anything but client-centered. The system stereotypes women subjected to abuse, making judgments about what they need without considering the needs, goals, and priorities of the individual women seeking assistance from the system.53 The legal system substitutes the judgment of its actors for that of women subjected to abuse, causing many women to perceive the system as disempowering.54 The disproportionate reliance on a legal response to domestic violence constrains women’s options and steers women towards predetermined interventions.55 The system that women subjected to

52 Shalleck, supra note 9, at 1062–63.
53 GOODMARK, A TROUBLED MARRIAGE, supra note 38, at 139–41.
54 Id. at 152–53.
55 Id. at 153–54.
abuse—and the student attorneys who represent them—experience simply does not reflect the values taught in domestic violence clinics.

A. System-Centered Lawyering

The legal system does not share client-centered lawyering’s focus on the importance of individuality. Instead, the legal system operates using a set of stereotypes that color how judges hear the narratives of women subjected to abuse and, therefore, the relief that is available through the legal system. Trained to look for a cycle of violence\(^\text{56}\) in any relationship where claims of domestic violence are made, and schooled in the paradigmatic victim of Battered Woman Syndrome,\(^\text{57}\) judges expect to hear women subjected to abuse tell stories about their passivity, their submission, and their inability to break free of the cycle of violence.\(^\text{58}\) Women who fail to conform to these stereotypes or to tell the types of narratives that legal system actors are conditioned to hear may find it difficult to secure relief through the legal system.\(^\text{59}\) Rather than attempting to elicit the details of each woman’s individual story of abuse, the legal system looks for a stock narrative, and in the absence of that stock narrative, withholds its benefits.\(^\text{60}\)

In a system in which individual stories are less important than conforming to a stock narrative, listening is devalued. Police, lawyers, and judges listen, but often only for those details that will satisfy their internal checklists. Physical violence—check. Threats to kill accompanied with past physical abuse or the presence of a

\(^{56}\) See generally Lenore E. Walker, The Battered Woman 55–70 (1979) (describing the three phases of the cycle of violence: the tension-building stage, the acute battering incident, and the exhibition of kindness and contrite loving behavior).

\(^{57}\) See generally id. at 3–15 (providing an overview of Battered Women Syndrome).

\(^{58}\) Goodmark, When Is a Battered Woman Not a Battered Woman?, supra note 28, at 91–92.

\(^{59}\) Id. at 81–82.

Clinical Cognitive Dissonance

weapon—check. Fear of their partners—check. But concern about a child’s safety, anger at being assaulted, subtle threats whose malevolence is unclear without an understanding of the broader context of the relationship—these are signs to legal system actors that the story isn’t worth hearing.\(^6^1\) Overburdened police officers, prosecutors seeing witnesses for the first time minutes before a trial, and judges facing ever-increasing dockets simply do not or cannot take the time to tease out the details of a story of abuse that is convoluted, non-linear, or in another language. Too often, legal system actors fail to listen to the stories that require closest attention, because those stories fail to conform to legal system expectations about abuse.\(^6^2\)

Even where the system does entertain a story and intercedes, it offers only a constrained set of options and deprives women of choices about how to use those options. The legal system is premised on the belief that women subjected to abuse should want—and do want—to separate from their abusers. Accordingly, the relief the legal system provides is largely centered around separation, using—among other tools—protective orders, arrest, prosecution, and divorce. What such an orientation ignores, of


\(^{62}\) In 2008, against the backdrop of a hotly contested custody hearing, Dr. Amy Castillo sought a protective order against her estranged husband, Mark Castillo, who had threatened her life and her children’s lives. He first told her that he would kill her and the children, but then threatened “actually worse than that would be [killing] the children and not [his wife] so that [she] would have to live without them.” Editorial, The Castillo Case: Maryland’s Legislature and Judiciary Must Face the Tragedy of Three Murdered Children, WASH. POST (Apr. 3, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/04/02/AR2008040203055_pf.html. Judge Joseph A. Dugan denied Dr. Castillo’s request for a protective order. Shortly thereafter, Mark Castillo drowned his three children in the bathtub of a Baltimore, Maryland hotel. Id. Like many mothers who seek protective orders, Castillo may have faced skepticism about the veracity of her claims given the existence of a custody case; judges seem to believe that domestic violence claims made in the context of custody or divorce actions are inherently less credible. Deborah M. Weissman, Gender-Based Violence as Judicial Anomaly: Between “The Truly National and the Truly Local,” 42 B.C. L. REV. 1081, 1122 (2001).
course, is that separation does not necessarily provide safety for women subjected to abuse and that not all women want to separate from their abusers, for myriad reasons. The research on separation assault confirms what women subjected to abuse have long known; that separation can make a woman less safe, rather than more, and that abuse frequently continues long after a woman has separated from her abuser, and often takes on new forms or finds new targets (abuse of children as secondary victims, for example). 63

Moreover, as noted above, women remain in abusive relationships for a variety of reasons, some created by external constraints—economic instability, lack of community support upon separation, concern about children—and others that women actively choose, such as maintaining their relationships with their partners. 64 A separation-based system is responsive to neither of those concerns, providing little assistance to women who either cannot separate or do not want to separate from their partners. Women who choose not to separate from their abusers invite suspicion and condemnation, as if by choosing not to separate, for whatever reason, they are asking to be abused, reviving myths of the masochism of women subjected to abuse. 65

Moreover, some of the tools that the system uses to enforce separation—arrest and prosecution—are beyond the control of women subjected to abuse, which allows the state to intervene in relationships without the woman’s desire or consent. 66 Mandatory arrest policies—which require police to make an arrest any time they have probable cause to believe that domestic violence has occurred—and no drop prosecution policies—which mandate that


64 See, e.g., Goodmark, Autonomy Feminism, supra note 25, at 38 (“[T]he economic resources their partners provide might be more important than a cessation of the battering at a particular point in time.”).

65 Goodmark, A Troubled Marriage, supra note 38, at 96–100.

66 As Kanter, Enos & Dalton write, “Law enforcement, traditionally operating in a masculine, hierarchical and authoritarian fashion, may want the client to provide information but reserve to itself the right to assess the situation and its implications, and decide upon a ‘proper’ course of action.” Kanter, Enos & Dalton, supra note 1, at 367.
prosecutors pursue any domestic violence case in which they have sufficient evidence to proceed—compel state actors to pursue criminal interventions regardless of an individual woman’s desire to do so. In their most stringent iterations, no drop prosecution policies might even require prosecutors to subpoena unwilling women to testify or request their incarceration pending their testimony, a position prosecutors have defended as upholding the state’s responsibility to vigorously enforce the law, regardless of the relationships between the parties, in order to reinforce the message that domestic violence is unacceptable. As clinic students adapt to their role as lawyers who partner with clients, they and their clients confront a system that regularly decides how best to address the abuse the client is experiencing, substituting this judgment for the client’s own. This is the polar opposite of client-centered lawyering.

B. Disempowerment

The legal system can be profoundly disempowering for women subjected to abuse. It listens poorly, presupposes women’s goals, and prevents women from making choices about how to address the abuse in their lives. Domestic violence clinics may empower their clients, but the legal system is dedicated to “saving” them, and, as Jennifer Howard realized in her first semester as a student attorney, the difference between those orientations has profound implications for women subjected to abuse.

These differences between how we teach students in domestic violence clinics and the realities they and their clients face when using that system would matter less if there were viable alternatives other than the legal system for women subjected to abuse. But the disproportionate funding and attention the legal system has received has both created a societal expectation that the legal system is where women should turn when dealing with abuse and stunted other avenues of response. The legal system is now the primary mode of response to domestic violence in the United

---

States, for better or for worse. When clinic students look for other ways to address domestic violence with their clients, they do so in the context of a societal response to domestic violence based largely on legal system intervention. Millions of dollars go towards funding police, prosecutors, courts, and civil legal assistance at the expense of other services women subjected to abuse might need and that might be more useful than state intervention. Moreover, some non-legal services are only available if women subjected to abuse are willing to engage with the legal system—which is too high a price for some women to pay for access to counseling, financial support, and government services. In some communities, the legal response is the only avenue of relief available to women subjected to abuse; in others, engaging the legal response is a precondition to the availability of other services. Even without hard and fast requirements that women engage with the state, the expectation certainly exists in most communities that the legal system is best placed to intervene in cases of domestic violence, and that women who choose not to use that system are not serious about ending their abuse.

III. Teaching Client-Centered Students in a System-

69 GOODMARK, A TROUBLED MARRIAGE, supra note 38, at 18–22.

70 Id.

71 Through the Violence Against Women Act, the federal government has poured millions of dollars into police, prosecution, and courts. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902–55. Funding for shelters and other services has not been as generous. As a result, the National Network to End Domestic Violence reported that on one day in 2010, 9,541 requests to domestic violence programs for services went unmet; 5,686 (60%) of those requests were for shelter or transitional housing. NATIONAL NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC VIOLENCE COUNTS 2010: A 24-HOUR CENSUS OF DOMESTIC VIOLENCE SHELTERS AND SERVICES (2011), available at http://nnedv.org/docs/Census/DVCounts2010/DVCounts10_Report_Color.pdf.

72 A battered immigrant woman cannot apply for a U Visa, for example, without providing assistance to law enforcement. Crime victim compensation fund monies may be unavailable to women who choose not to engage the legal system. Statutes intended to protect women subjected to abuse who experience employment or housing discrimination may require that those women seek protective orders in order to invoke those provisions. GOODMARK, A TROUBLED MARRIAGE, supra note 38, at 101–04.
FOCUSED WORLD

Law students enrolled in domestic violence clinics see the contradictions between the theories and methods they are taught in clinics and the realities of domestic violence practice. Students bring “images of the ideal lawyer” with them into the clinic—lawyering that uses “directive, hierarchical, and individualistic methods of advocacy that limit the interest and responsibility of the lawyer to client problems that can be solved exclusively through available legal mechanisms.”73 Despite the best efforts of faculty in domestic violence clinics, the beliefs that students already have about lawyering are reinforced by students’ observation of other legal practitioners and of systems that encourage and reward hierarchical practices through which court personnel, lawyers and judges control interactions and outcomes for clients. This traditional model of lawyering not only separates legal professionals from other non-legal service providers, but also assumes that the legal system knows and will provide what the victim needs, rather than work collaboratively with her to define her needs and fashion appropriate remedies.74

Moreover, helping students see the need for system change can be difficult, according to law professors Naomi Cahn and Joan Meier, “because most of legal education focuses on learning how to work within the existing system.”75 Essentially, domestic

73 Enos & Kanter, supra note 4, at 85–86. A lawyer from a prominent family law practice was invited to my clinic to model a client counseling session. His presentation followed my discussion of client-centered lawyering with my students. After he finished a very traditional, directive session in which he neither inquired about the client’s goals nor attempted to engage the client in problem solving, but instead told the client his options and strongly recommended the one he thought best, one of my students raised his hand and said, “Was this a demonstration of how not to do client-centered lawyering?” The student recognized the disconnect between what we teach and how many lawyers practice—how the student subsequently resolved that tension in his own practice, I do not know.

74 Id. at 86.

violence clinical professors often find themselves attempting to persuade students that everything they believe they know about lawyering and the legal system is wrong, and that they must re-learn how to lawyer to be effective advocates for women subjected to abuse—not an easy paradigm shift for students to accept.

The disconnect between the skills domestic violence clinics teach and how domestic violence legal systems operate has the potential to influence how students learn and use what they have learned in domestic violence clinics in their lawyering careers. Domestic violence clinicians hope to motivate students to devote themselves to changing the system, making it more responsive to the clinicians’ vision of practice for women subjected to abuse. This certainly happens; seeing students who espouse the values of client-centered lawyering, empowerment, and maximization of options begin a legal practice on behalf of women subjected to abuse is among the most rewarding aspects of clinical teaching, and allows the instructor to see the ripple effect of sending students out into the world to do good work.

But the reality is that most students will not take the difficult position of challenging the status quo they encounter within the legal system. Perhaps the easiest, and most troubling, route for new lawyers to take once they leave the clinical setting and enter practice is to reject what they have been taught and to accept that the stereotypes of women subjected to abuse in the legal system are accurate and that the legal system knows best when it comes to addressing domestic violence. The new lawyer is freed from having to challenge existing institutional structures and the received wisdom of those who operate the legal system, enabling them to take the path of least resistance, to “go along to get along” within a system that rewards such behavior. Others might acknowledge the value of what they have learned in their domestic violence clinic, but nonetheless spurn the clinic’s values in order to work with the system as it is. These lawyers might recognize that systemic change is slow, difficult, and often quite frustrating and, as a result, reject the clinic’s teaching that “responsibility for changing that system rests with all of us.”

As professor Abbe Smith has written in the context of criminal defense clinic students

---

76 Id.
becoming prosecutors, “I have seen the role consume the person.” The context within which lawyers practice shapes their beliefs and their actions; that students might conform to the expectations of what Smith calls “time and place” is hardly surprising. Students more committed to the values they have been taught might fight to have the system change to accommodate the needs of women subjected to abuse as they understand those needs, but find that the system does not change despite their best efforts. Some of these students may become so disillusioned by the inability of the system to serve women subjected to abuse that they avoid the system altogether. Each of these responses is a very real, albeit very disappointing, possibility.

IV. Conclusion

The legal system’s response to domestic violence is flawed in a number of ways, and there are many reasons to work for change—most importantly, to better serve women subjected to abuse. But another reason for working to change the current system is to bring the system in line with the principles, values and goals that many of us have for practice with women subjected to abuse—the same principles, values and goals that are taught in domestic violence clinics every day. Eliminating the cognitive dissonance that students experience when the realities of the system are juxtaposed against what they have learned in clinic can only benefit the women that we hope to serve.

---


78 Professor Smith’s comment centers more on the societal context within which prosecutors practice, but is, I believe, equally applicable to the context of the courthouse and the larger system that domestic violence attorneys must negotiate. Id. at 396.
LITIGATING DISCRIMINATION: LESSONS FROM THE FRONT LINES

Deborah L. Rhode*

I got to know Clare Dalton in 1985, the year that the Harvard Law School faculty failed to grant her tenure. I was visiting at Harvard, and this was my first exposure to a sex discrimination claim at close range. It was a profoundly unsettling experience. What did it say about the future for feminists in legal education if this could happen to someone as talented and deserving as Clare at a place like Harvard?

If there was anything redeeming about the experience, it was the opportunity to see someone survive a discrimination case with her dignity, commitments, and reputation intact. This essay seeks to account for that rare experience. What was typical about the challenges that her litigation posed, and distinctive about the way that she addressed them? Her case, together with similar discrimination claims, holds broader lessons about the capacities and constraints of law in pursuit of social justice.

I. EVIDENTIARY HURDLES IN EMPLOYMENT DISCRIMINATION CASES

Employment discrimination cases are, as research demonstrates, “exceedingly difficult to win.”¹ They are also

* Ernest W. McFarland Professor of Law, Director of the Center on the Legal Profession, Stanford University. The research assistance of Laurel Schroeder and the comments of Clare Dalton are gratefully acknowledged.

difficult to settle on terms that adequately compensate for the costs of complaining. Fewer than a fifth of sex and race discrimination claims filed with the federal Equal Opportunity Commission result in outcomes favorable to the complainant.\textsuperscript{2} Settlements in these cases are generally modest, and only two percent of complaints result in victory at trial.\textsuperscript{3} About forty percent of trial wins are only temporary; they are reversed on appeal.\textsuperscript{4} Lawsuits of the kind Clare Dalton brought, alleging discrimination against lawyers or law professors, almost never produce a final judgment for the complainant.\textsuperscript{5}

Plaintiffs in upper-level employment positions face multiple obstacles. Part of the problem is the mismatch between legal


\textsuperscript{3} Kotkin, supra note 1, at 144 (noting mean recovery of $54,651); Nielsen, Nelson & Lancaster, supra note 1, at 187.

\textsuperscript{4} Clermont & Schwab, \textit{Employment Discrimination Plaintiffs}, supra note 1, at 111.

definitions of discrimination and the social patterns that produce it. The most common way for professionals to establish a claim is to prove that they were treated differently on the basis of a prohibited characteristic, such as race, ethnicity, or sex. If an employer offers a non-discriminatory reason for the treatment, the plaintiff bears the burden of proving that it is an obvious pretext. In cases involving mixed motives, if an employer can establish that non-discriminatory reasons would have produced the same outcome, then a plaintiff can only recover injunctive relief and attorney’s fees. In effect, the law forces a choice between two overly simplistic accounts of workplace decision making. The basis for an employer’s decision must be judged either biased, or unbiased; its justifications sincere, or fabricated. Yet in life rather than law, legitimate concerns and group prejudices are often intertwined, and bias operates at unconscious levels throughout the evaluation process rather than simply at conscious levels at the time a decision is made. Most of what produces different outcomes in upper-level employment contexts is not a function of demonstrably discriminatory treatment. Rather, these outcomes reflect interactions shaped by unconscious assumptions and organizational practices that “cannot be traced to the sexism [or racism of an identifiable] bad actor.”

So, too, the subjectivity of standards and lack of transparency in upper-level employment decisions generally makes it difficult for individuals to know or to prove that they have been subject to bias. Unless and until they assume the costs

---


of suing, they may have little idea of whether they have a suit worth bringing. Not all differential treatment leaves a paper trail, and colleagues with corroborating evidence are often reluctant to expose it for fear of jeopardizing their own positions.10 Plaintiffs like Dalton who are denied promotion seldom know until after discovery how closely their files resemble those of successful candidates.

Ann Hopkins, an accountant who successfully sued Price Waterhouse, had no specific proof that sexist comments had been made about her or any other woman at the firm at the time she filed her complaint.11 Although she had received advice that she should “walk more femininely, talk more femininely, dress more femininely, wear makeup and jewelry, [and have her] hair styled,” she had viewed these suggestions as “nonsense” rather than evidence of bias.12 In fact, the record ultimately revealed ample evidence of sexist stereotyping. Female accountants were faulted for being “curt,” “brusque,” or “women’s libber[s],” or for acting like “one of the boys.”13 Hopkins herself was characterized as someone who “overcompensated for being a woman” by acting “macho” and “overbearing” and needed “a course at charm school.”14 Yet several male accountants who achieved partnership had been similarly described—as “abrasive,” “overbearing,” and “cocky.”15 No one suggested charm school for them.

---

13 Hopkins, 618 F. Supp. at 1117.
14 HOPKINS, supra note 11, at 235.
15 Hopkins, 618 F. Supp. at 1115, 1117.
So, too, Nancy Ezold, the associate who sued the Philadelphia firm of Wolf, Block, Schorr & Solis-Cohen for discrimination after being denied a partnership, learned only after discovery how her performance evaluations stacked up against those of male colleagues who were promoted. She had been characterized as too “assertive,” too preoccupied with “women’s issues” and too lacking in analytic ability. Yet, some of the male associates who became partners had been described as “not real smart,” “overly confrontational,” “very lazy,” and “more sizzle than steak.”

Even when plaintiffs can produce evidence of sex-based stereotypes and double standards, courts sometimes discount its significance. “Stray remarks” in the workplace are insufficient to establish liability if a defendant can demonstrate some legitimate reason for the unfavorable treatment. In one unsuccessful tenure case decided the same year as Dalton’s denial, a female professor introduced comments describing herself as too feminine: “unassuming, unaggressive, unassertive, and not highly motivated for vigorous interpersonal competition.” Yet both the lower and appellate courts dismissed such comments as related not to gender but simply to “the effect of her personality on graduate students . . . .” Nancy Ezold similarly lost her case on appeal despite evidence of a double standard. The court found that comments about her reflected concern over her abilities, rather than an “obvious or manifest” pretext on the part of the firm.

The outcome of Ezold’s case is similar to that in one of the nation’s only reported race discrimination trials involving a law firm promotion decision. Larry Mungin was a lateral hire to the

---

18 Heim v. Utah, 8 F.3d 1541, 1546 (10th Cir. 1993); see also Ezold, 983 F.2d at 544–46; Deborah L. Rhode, What’s Sex Got to Do With It?: Diversity in the Legal Profession, in LEGAL ETHICS: LAW STORIES 233, 241 (Deborah L. Rhode & David J. Luban eds., 2006).
20 Id. at 94.
21 Ezold, 983 F.2d at 534; see also Rhode, supra note 18, at 243.
District of Columbia branch office of Katten Muchin & Zavis. A black graduate of Harvard College and Harvard Law School, with six years experience in bankruptcy law, Mungin fell through the cracks of the firm’s mentoring and business development efforts. A two-and-a-half-million dollar jury verdict in his favor was reversed on appeal by judges who saw him as a victim not of racial bias but merely “business as usual mismanagement.” Problems of proof are compounded in contexts like tenure evaluations, where ostensibly “objective” evaluations are obtained through a process that may be anything but objective. In a politically charged atmosphere, such as the one at Harvard Law School during the 1980s when Clare Dalton sought tenure, assessments of scholarly merit are likely to depend on who is doing the assessing.

Nancy Gertner, Dalton’s lawyer, highlighted an obvious flaw in Dalton’s tenure evaluation. The panel of outside reviewers that Harvard President Derek Bok appointed to consider the case consisted of no one “even conversant with Critical Legal Studies,” the approach that Dalton’s scholarship reflected. A second problem was that the standard that President Bok asked the reviewers to apply was not the one applicable at Harvard at the time, but the one that they would use to assess the qualifications of someone at any leading law school. Yet, as Dalton later noted, it was hardly an even playing field when the five male candidates up for tenure were “judged by an internal standard and the sole female candidate by a ‘universal’ standard.”

Given these evidentiary hurdles, it should come as no surprise that individuals who perceive themselves as subject to employment discrimination seldom file formal complaints.

---

22 Wilkins, supra note 5, at 1927, 1933.
24 Email from Clare Dalton to author (Sept. 28, 2010) (on file with author).
25 Id.
26 See William L.F. Felstiner et al., The Emergence and Transformation
Their reluctance is reinforced by the personal costs of adversarial processes.

II. THE PERSONAL PRICE OF LEGAL PROCEEDINGS

The costs of a discrimination case can be substantial, both in financial and psychological terms. Ann Hopkins’ legal fees for her seven-year suit against Price Waterhouse totaled over $800,000 in today’s dollars.\(^{27}\) Even if a plaintiff finds an attorney to take the case on a contingent fee basis, the out-of-pocket litigation expenses can be steep; Nancy Ezold estimated hers at over $150,000 in today’s dollars.\(^{28}\) Plaintiffs also put their professional lives on trial, and the profiles that emerge are seldom entirely flattering. In listening to defense witnesses, Hopkins “felt as if [her] personality were being dissected like a diseased frog in the biology lab.”\(^{29}\) In some cases, complainants’ foibles become fodder for the national press. The lead plaintiff who sued Sullivan and Cromwell in one of the nation’s first law firm sex discrimination cases had her “mediocre law school grades” aired in the Wall Street Journal.\(^{30}\) A gay associate who sued the same firm three decades later found himself described in New York Magazine as a “sarmy,” “paranoid kid with a persecution complex.”\(^{31}\) In Ezold’s case, a Wolf Block senior

---


\(^{29}\) Hopen, supra note 11, at 197.


partner told the *American Lawyer* that she was like the proverbial "ugly girl. Everybody says she has a great personality. It turns out that [Nancy] didn’t even have a great personality."³²

Even favorable press accounts often deliver backhanded compliments that would make any potential litigant think twice. A *Boston Globe* profile of Clare Dalton noted: “She doesn’t sound like some crazed feminist spouting anti-male sexual, political or legal jargon that would allow her to be dubbed a strident female.”³³ More of the same appeared in a *New York Times* portrait of Shannon Faulkner, the woman who sued for admission to the Citadel, South Carolina’s all-male military academy. Faulkner was not a “cantankerous man hater, lesbian, or ugly duckling out to find a mate.”³⁴

Although many potential plaintiffs are drawn to litigation as a way of demonstrating their capabilities and restoring their reputations, the result is often the opposite. Complaining about bias risks making individuals seem too “aggressive,” “confrontational,” or “oversensitive”; they may be typecast as a “troublemaker,” “bitch,” or an “angry black.”³⁵ Advice from


colleagues is generally to “let bygones be bygones,” “let it lie,” “[d]on’t make waves, just move on.” Those who ignore that advice frequently experience informal retaliation and blacklisting; “professional suicide” is a common description. As one plaintiff’s attorney put it, a “mid or high level attorney who decide[s] to sue in connection with a cutback or firing may never eat lunch in [this] town again.”

Reported cases bear this out. Hopkins found herself “a pariah in the Big Eight” accounting firms. Lawrence Mungin had a similar experience. As he testified at trial, other firms “may admire me, but they won’t hire me. I am a whistleblower . . . . I am persona non grata. My career is dead. That is what I think. That is what I found. That is what I know.” Darlene Jespersion, a bartender who unsuccessfully sued Harrah’s Casino for gender discrimination in its grooming code, failed to find another job. As her attorney noted, for anyone in the entertainment industry, “Reno is a small town.”

Shannon Faulkner paid a still higher price for her challenge to the exclusion of women from the Citadel. While her suit was pending, she attended the school as a day student, and experienced constant intimidation, vilification, and isolation. She


36 For the advice, see Kolker, supra note 31; and EPNER, supra note 35, at 21. For negative consequences following complaints about compensation, see WILLIAMS & RICHARDSON, supra note 35, at 38.


39 HOPKINS, supra note 11, at 166.

40 BARRETT, supra note 38, at 154.

was not permitted to sleep in the barracks, eat in the mess hall, work on the newspaper, or play in the marching band. She received multiple death threats, her family’s house was vandalized, and her sex life was the subject of frequent speculation in school publications. “Die Shannon” greeted her from a Charleston billboard; “Go Home” and “Save the Males” appeared on campus signs and banners.

III. WINNERS AND LOSERS

So what might make litigating discrimination claims worth these risks? What constitutes winning and what might predict it? Empirical research on employment discrimination generally uses money as the metric of a “favorable” outcome. But qualitative studies of dispute resolution techniques make clear the need for more sophisticated measures of success. Complainants’ satisfaction is not always determined by monetary compensation. Nor are their interests the only concern in assessing the societal contributions of legal proceedings.

Although we lack systematic data on broader measures of winning and losing in the discrimination context, the case studies that are available suggest two key questions to consider. To

---

42 Manegold, supra note 34.
43 CATHERINE S. MANEGOLD, IN GLORY’S SHADOW: SHANNON FAULKNER, THE CITADEL, AND A CHANGING AMERICA 21, 182 (2000); Manegold, supra note 34.
44 MANEGOLD, supra note 43, at 21, 206.
what extent did the plaintiffs get what they wanted? And were they able to use the experience to improve their lives, their institutions, or the opportunities for other potential victims of discrimination? Although many factors that affect a judgment are beyond the control of complainants, and indeed may have little to do with the objective “merits” of a claim, litigants have more influence over the meaning of the experience than they often realize.  

Individuals bring discrimination cases for multiple reasons, but most plaintiffs share one overriding interest: the desire for vindication. Complainants generally see themselves as victims of injustice for which the law should provide some remedy. Clare Dalton reported a sense of anger; she believed her work was “tenure-worthy” and that the process had been tainted by political and gender bias. 47 Nancy Ezold similarly felt that she had been “as good or better as many of the men the firm promoted.” 48 Ezold also believed that other women at the firm were subject to the same injustice and she wanted to do something to “improve their situation.” 49 Lawrence Mungin felt doubly burned at Katten Muchen. He had defined himself largely in terms of professional success. The law firm crushed that self image by making him feel like a failure. Worse, he had walked away feeling foolish that for his whole life, he had “gone the extra mile to show people . . . that I wasn’t one of those blacks, one of the dangerous ones, the bad ones. Or one of the complainers, the ones demanding special treatment . . . . I wanted to

46 For example, the rating that EEOC experts give to a claim does not predict outcome. More important factors include whether the party has legal representation and whether the claim is part of a class action. Nielsen, Nelson & Lancaster, supra note 1, at 191–92. Other obvious factors that affect trial outcomes include the abilities of counsel, the resources of the parties, and the sympathies of judges and jurors.
47 Bernstein, supra note 23 (quoting Dalton on tenure-worthy work); Alice Dembner, MCAD Leans on Harvard in Gender Bias Case, Bos. GLOBE, July 28, 1993, at M13 (quoting Dalton on bias); Doten, supra note 33 (quoting Dalton on anger).
48 Rhode, supra note 18, at 242 (quoting Ezold).
49 Id.
show that I was like white people . . . one of the good blacks.” But that hadn’t been enough.\textsuperscript{50}

Shannon Faulkner was also driven by anger after the Citadel rescinded her admission upon learning that she was female. Her brother was then thriving as a naval recruit. It seemed unjust to deny her similar chances for a military career.\textsuperscript{51} Although she had not been sure that she wanted to attend the school, and later, she struggled with the decision whether to file a lawsuit, once the Citadel made clear its intention to fight her access, Faulkner’s resolve stiffened and she felt she could not “back out[.].” “This [was] what I’ve been working for.”\textsuperscript{52}

Money, of course, often plays a role in a plaintiff’s decision to sue. For Hopkins it was the driving force. In describing her reaction when Price Waterhouse denied her partnership, she recalled: “For the first time since I graduated from college, I was unemployed and scared to death at the prospect of running out of money.”\textsuperscript{53} Lawrence Mungin was also anxious for a recovery that would make up some of the difference between his law firm salary and his income from temporary contract work.

For most of these plaintiffs, as with employment discrimination complainants generally, legal outcomes fell far short of their original goals, and it is difficult to identify factors that might have guaranteed better results. The most systematic research to date finds that the factors most correlated with favorable monetary awards are having a lawyer, and being part of a class action or other collective mobilization effort.\textsuperscript{54} Notably, the merits of a claim, even when assessed by disinterested Equal Employment Opportunity Commission (“EEOC”) experts, are not accurate predictors of financial success.\textsuperscript{55}

Nor is winning in that sense an accurate gauge of the broader personal and social impact of litigation. Of the cases discussed here, only Hopkins got full compensation for her

\textsuperscript{50} Barrett, supra note 38, at 5–6 (quoting Mungin).
\textsuperscript{51} Manegold, supra note 34.
\textsuperscript{52} Id. (quoting Faulkner); see Manegold, supra note 43, at 160.
\textsuperscript{53} Hopkins, supra note 11, at 165.
\textsuperscript{54} Nielsen, Nelson & Lancaster, supra note 1, at 192.
\textsuperscript{55} See id.
financial losses. But oddly enough, the experience seemed to do little to equip or inspire her to advance gender equity outside the context of her own case. For Hopkins, the personal was simply personal, not political. Her autobiography recounts no efforts to level the playing field at Price Waterhouse once she was reinstated. Nor does it suggest a full appreciation of the sexual stereotypes that her lawsuit was challenging. With no sense of irony, she recounts friends’ characterizations of opposing counsel at the Supreme Court argument. The lawyer was “dowdy”; she wore an “awful black suit and no jewelry,” and could have benefited from makeup.  

This from a woman whose discrimination case was built on similar criticisms of her own cosmetic deficits.

By contrast, Nancy Ezold was a loser financially. Not only did she fail to recover her losses in compensation and career opportunities, she also had to pay her opponents’ appellate expenses as well as her own out of pocket costs. But she turned the outcome into something “positive” by using it to launch a new career. The publicity that the case generated put her in touch with women who had similar stories, and she developed a profitable practice in sex discrimination litigation. The litigation also served as a “wake up call” to the profession in general, and Wolf Block in particular. At the time Ezold sued, only one of the firm’s fifty-five litigation partners was female. That quickly changed, although some of the women who benefited from the firm’s efforts to refurbish its reputation paid a price in credibility: the label “Ezold partner” was hard to shake. Yet in assessing that legacy, the question is always “compared to what?” No one wants to be perceived as getting a job solely because she is a woman, but it is still better than not getting a job for that reason.

---

56 HOPKINS, supra note 11, at 294; see also Estlund, supra note 12, at 82 (commenting on the irony of these characterizations).
57 See Rhode, supra note 18, at 253.
58 Id. (quoting Ezold).
59 Id.
60 Id.
61 Id.
62 See RHODE, supra note 8, at 169 (quoting Barbara Babcock).
Lawrence Mungin’s story also had mixed results. Financially, there was no happy ending. And although he “never wanted publicity,” Mungin got plenty.63 In the book that his Harvard roommate, Paul Barrett, wrote about the case, Mungin seemed to have lost in a deeper sense as well. He had spent much of his career attempting to be seen as “not merely, not primarily, black.”64 He had resisted being involved with racial issues at the firm or mentoring other lawyers of color because he “didn’t want to be typecast as an African-American big brother . . . .”65 Yet “by suing his employer, Mungin . . . ensured that everyone would see him primarily in terms of race.”66 Mungin himself, however, viewed the experience in a more positive light. “I feel I have won,” he told a National Law Journal reporter after the book came out.67 Although still “very, very angry” with Barrett for his “violation of trust,” Mungin felt that the book accomplished something by “hit[ting] [Katten Muchen] where it hurts.”68 The publication also forced him to “see the world as it really is,” and to face up to his own “worst fears” about how much race mattered.69 Yet, when asked whether he hoped for a “broader victory” from his lawsuit, “one that could help other minorities as they follow similar career paths,” Mungin responded, “I never felt I had to carry that burden.”70 Apparently, nothing about the litigation experience increased his willingness to assume that responsibility.

Shannon Faulkner also got a discomforting look at the “world as it really is,” and the limits of law in addressing it. Her victory in the Supreme Court did not bring victory in the world outside it. The Justices could command her admission but not her acceptance at the Citadel. After five days of life as a full-time cadet with federal marshal protection, physical and

---

63 Coyle, supra note 35, at A14 (quoting Mungin).
64 BARRETT, supra note 38, at 282.
65 Id. at 43.
66 Id. at 283.
68 Id.
69 Id. at A14–15.
70 Id. at A15.
psychological stress forced her withdrawal. Despite the humiliation of a nationally televised exit, surrounded by jeering jubilant cadets, Faulkner expressed no regrets. As she told reporters later, she had opened the door for other women who are at the Citadel now and “that’s my prize . . . [T]hey have that choice.”

Ironically enough, Faulkner’s unsuccessful but well-publicized efforts to withstand harassment may have done more to advance the cause of gender equity than her graduation would have accomplished. By exposing virulent sexism to public view, her case galvanized forces for change, both within and outside the military. The Louts of Discipline, a Time story on Faulkner’s departure, chronicled her abusive treatment and made clear that while she may not have needed the Citadel, “the Citadel surely need[ed] her” or others like her. On the fifteenth anniversary of Faulkner’s Citadel challenge, an ABC news segment summed it up: “in losing her own battle, she won the war for so many others.”

The outcome of Clare Dalton’s suit against Harvard Law School was similar to that of most discrimination plaintiffs in that it ended short of total victory. But what makes her story uniquely inspiring is the way that she turned difficult circumstances to the service of broader goals. From the outset, the deck was stacked against winning, either by conventional definitions or even by her own standards. What she wanted most, she told reporters at the time, was “an apology.” And that, she and her lawyer came to realize, she would never get. Even if she had won a judgment from the Massachusetts Commission Against Discrimination, and even if that judgment was affirmed in court, Harvard would never acknowledge that

---


72 See MANEGOLD, supra note 43, at 289.


75 Doten, supra note 33 (quoting Dalton).
its processes had been anything but meritocratic. As the university’s (female) lawyer stated on the eve of the Commission hearing: “Our position is that she was treated fairly . . . . There was no discrimination on the basis of gender or any other grounds.”

What, then, was the best that could have come from a prolonged legal battle? Although Dalton might have obtained a significant monetary judgment, that would not have changed the quality of her life. She was not in financial need. She held another position with adequate pay, as did her husband. She might have been reinstated at Harvard, but what would her experience there have been like if she obtained the position by humiliating colleagues in courtroom proceedings? The institution was already known as the “Beirut of legal education.”

A highly publicized discrimination suit, destined to drag on for years, might simply have made matters worse, and delayed Dalton’s efforts to do something more productive with her talents and commitments.

To her enormous credit, she identified an alternative resolution that Harvard could accept. The University agreed to contribute a quarter of a million dollars to create a joint Northeastern-Harvard Institute on Domestic Violence that Dalton would direct. In commenting on the settlement, she stated,

It is fitting that if Harvard [is] going to pay a price for gender discrimination, it should . . . help women who are the most egregious victims . . . . In addition, this gives me the professional opportunities that mean the most to me at this time in my career.

Harvard’s attorney applauded the agreement, not only because it ended a divisive and expensive battle, but also because it did so “in a way that everyone feels is going to do something good for

---

76 Dembner, supra note 47, at M13 (quoting Harvard attorney Ann Taylor).
77 Id. (quoting the National Law Journal’s description of Harvard Law School’s reputation).
79 Id. (quoting Dalton).
the community . . . . Clare [deserves] a lot of credit for coming up with the idea and being willing to accept it.”

Not only did Dalton accept the settlement, she embraced it in ways that left no one feeling that this was some second-best outcome. “I belong at Northeastern in ways I never did at Harvard,” she told the press. “I don’t want to sound Pollyanna-ish, but . . . I like myself better than the person I would have been at Harvard. I’ve learned so much about how our culture works, the pervasiveness of discrimination, and what it takes to [overcome it].” Unlike other discrimination litigants who became “accidental feminists” when their own cases demanded it, Dalton was a committed advocate for women before her litigation and an even stronger one in its wake. At a panel sponsored by the Society for Alternative Law Teaching, Dalton concluded her remarks with her own definition of success:

it is important to hang on to the idea that winning isn’t everything. Waging the fight for as long as you can, knowing when to stop, and coming out of it personally intact, ready for the next venture, whatever that may be—that, it seems to me, is what it means to make a success of experience of discrimination.

The legacy of Dalton’s “next venture” in violence work at Northeastern speaks for itself. The example she provides for employment discrimination complainants should do so as well.

How often could other litigants accomplish what Dalton did? Clearly in some cases, no such settlement is possible. The kind of compromise that the Citadel was prepared to offer was clearly inadequate: an alternative program at another school with nothing like its own reputation and resources. But it is conceivable that some defendants in discrimination cases might

---

80 Id. (quoting Joan A. Lukey, an attorney for Hale and Dorr, the law firm that represented Harvard in the suit).
81 Id. (quoting Dalton).
82 Doten, supra note 33, at 36 (quoting Dalton).
83 See Juju Chang et al., supra note 71 (describing Shannon Faulkner).
accept results that do not acknowledge wrongdoing, but that serve the community, assist complainants, and prevent embarrassing public disclosures. Wolf Block partners, for example, were opposed to settling Ezold’s claim because of concerns about reputation. The firm was founded in response to anti-Semitism, and the partners “accused of discrimination . . . had spent much of their careers fighting against it.” Yet the Ezold litigation also took a considerable reputational toll. Public disclosures of demeaning comments about both male and female lawyers seriously damaged internal relations as well as external recruiting efforts. In reflecting on the firm’s decision not to settle the case, one firm leader concluded: “This may have been a case that wasn’t worth winning.” At the very least, it was a case that might have benefited from more creative problem solving.

It may be asking a lot from both sides in discrimination cases to set aside their desires for total vindication. But as the preceding overview suggests, there are many other ways to define winning. Plaintiffs can use their legal leverage in multiple ways: to make law, to make money, to make a point, to make change, and to remake themselves. Clare Dalton’s case somehow managed to do all of the above, and I am grateful for this opportunity to celebrate that unique and lasting achievement.

---

85 Rhode, supra note 18, at 242 (quoting Arlin Adams, lawyer for Wolf Block on appeal).
86 Id. at 247–48.
87 Id. at 245 (quoting Robert Segal).
THE DEVELOPMENT OF DOMESTIC VIOLENCE AS A LEGAL FIELD: HONORING CLARE DALTON

Elizabeth M. Schneider* and Cheryl Hanna**

This essay honors Clare Dalton’s important work in feminist legal theory and women’s rights. It examines Clare’s work on gender, law, and domestic violence, especially her work on the original Dalton and Schneider casebook on domestic violence, Battered Women and the Law;¹ and the evolution of this casebook as critical to the development of domestic violence as a legal field. Liz Schneider and Cheryl Hanna, co-authors with Clare Dalton on the second edition of this casebook, are from two different generations of women in legal practice and the legal academy, and were originally teacher and student. In the first Part of this essay, Liz Schneider offers a brief history of the Dalton and Schneider casebook and explores the

* Rose L. Hoffer Professor of Law, Brooklyn Law School. This essay is based on presentations at the conference Challenging Boundaries in Legal Education, A Symposium Honoring Clare Dalton’s Contributions as a Scholar and Advocate, held at Northeastern Law School on November 5, 2010.
** Professor of Law, Vermont Law School.
development of domestic violence as a field in American law. In the second Part, Cheryl Hanna examines issues presented by the second edition of the casebook and their implications for legal conceptions of domestic violence. In the third Part, the authors write jointly to draw some conclusions about the casebook and the evolution of domestic violence as a distinct field of law.

I.

In 1970, I entered New York University Law School in order to do legal work in the field of women’s rights. I graduated in 1973, and in 1974, while a staff attorney at the Center for Constitutional Rights, I started teaching Women and the Law with Rhonda Copelon at Brooklyn Law School. I then began teaching Women and the Law along with other courses when I joined the full-time faculty at Brooklyn Law School in 1983, and subsequently taught this course at Harvard Law School from 1989–2002, mostly in the Winter Term.

I began to do legal work relating to domestic violence in the 1970s. In the spring of 1991, while I was a visiting professor at Harvard Law School for the year, I taught my first course on Battered Women and the Law at the invitation of the law school. This course was proposed by many of my Women and the Law students who wanted a special course on domestic violence. Martha Minow, now Dean of Harvard Law School (and then a member of the faculty), was especially enthusiastic about my teaching the course. It was not my first time teaching about these issues, since my Women and the Law courses had included sections on domestic violence and battered women who kill, as well as rape and sexual harassment, but they did not focus exclusively on domestic violence.

One of the people with whom I spoke about this course was Clare Dalton, who was already teaching at Northeastern Law

---

2 In the first two Parts, each author writes individually and so uses the pronoun “I.” In Part III, the authors refer to themselves as “we.”

3 For further discussion of this history, see Elizabeth M. Schneider, Battered Women and Feminist Lawmaking 3–10 (2000).
School. Clare, Martha Minow, Mary Joe Frug, and I had become good friends through joint work as part of a loose network of feminist legal scholars—the “Fem-Crits”—in the 1980s, and all of us were concerned with legal issues surrounding domestic violence.\(^4\) Clare had not only founded the Domestic Violence Institute at Northeastern with the money that she had received from her settlement with Harvard from her gender discrimination lawsuit,\(^5\) but she had been teaching about issues of domestic violence in an innovative “bridge” program involving first-year courses at Northeastern. She generously shared with me some of the materials that she had used for that program and I included them in my course materials. Clare visited one of my classes at Harvard and we spent time talking about it afterward, imagining that there might be a day when such courses and clinics would be common at many law schools and a casebook would be available.

Battered Women and the Law was not the first law school course on domestic violence (although it was one of the first), but the interest and enthusiasm it generated reflected an enormous wave of student interest in legal work on domestic violence.\(^6\) Since first teaching the course at Harvard in 1991, I taught it again at Harvard in 2002; have taught it regularly at Brooklyn Law School; at Columbia Law School in 2000; and at Florida State University Law School several times as an intensive, week-long “mini-course.” These experiences have been hugely energizing. Now, in 2012, many law schools around the country have courses or clinical programs that focus on problems of intimate violence, and a great number have student-run advocacy programs, which provide students the opportunity to assist in cases.


\(^6\) The first course was taught by Nancy Lemon at Boalt Hall Law School.
After word got out that I was teaching Battered Women and the Law, many law teachers around the country asked for my course materials. After duplicating thousands of pages, and sending them to many people, Clare and I began to talk about co-authoring a casebook. There was one casebook that had already been published, written by longtime domestic violence activist Nancy Lemon, who had taught a course at Boalt Hall Law School, but it was primarily geared towards legal practice.\(^7\) Clare and I wanted to write a casebook that involved both theory and practice, and tied them together—a casebook that was broadly interdisciplinary and placed domestic violence within a wider framework of gender equality. We also wanted to document the development of the field in the women’s movement of the 1970s, and the efforts that had led to the explosion of legal work on domestic violence. We were incredibly lucky to have the support of Foundation Press, and the book was published in 2001. The publication of casebooks plays an important role in legitimizing a new and innovative field in legal education as a serious subject. This casebook, and the work of so many other activists, teachers, and scholars whose work is included in it, has helped to build and establish domestic violence law as a distinct and important field of legal study.

I want to note several aspects of the casebook that represented our joint vision, but reflected Clare’s special concerns. The casebook included considerable discussion of the psychological dimensions of violence, and the ways in which aspects of the legal system might affect women who had experienced violence. The book also examined the “secondary trauma” that is often experienced by those who have worked with them, whether as lawyers or shelter workers, or in any advocacy capacity.\(^8\) We included many social science materials

---

8. Perhaps this focus reflected Clare’s longstanding interests in healing that she has now moved to full-time. See Bella English, Life Points: For Legal Scholar Clare Dalton, a Sharp Turn from Academia to Acupuncture Was a Natural Fit, Bos. Globe (May 24, 2011), http://articles.boston.com/2011-05-24/lifestyle/29580304_1_thin-needles-healing-hands-domestic-
and did not just focus on cases and legal doctrine. Clare selected some important literary excerpts, which powerfully explored issues of intimate violence, and emphasized the use of stories. Throughout the book, we highlighted tensions around the role of law and the limits of law.\(^9\) We were jointly responsible for the larger vision, but Clare did much of the work to make our ideas concrete.

There is now a significant literature that documents the serious problem of gender bias in the law school curriculum, and specific courses that focus on issues of gender and violence against women are widely recognized as crucial to contemporary legal education. Yet there is still a need for “mainstream” courses, including first-year courses, to expand to include issues concerning violence against women. Discussion of violence against women must also be integrated into a wide range of upper-class courses in the law school curriculum.

Programs on domestic violence and legal education that have been held at the Annual Meeting of the Association of American Law Schools (AALS) and at other professional development conferences have discussed the breadth of potential curricular options.\(^{10}\) In 1997, the American Bar Association (ABA) Commission on Domestic Violence published a report, *When Will They Ever Learn? Educating to End Domestic Violence*, which surveys the range of programs in law schools around the country and underscores the importance of these programs. Over the last two decades, the ABA Commission has also sponsored a series of regional conferences around the country to encourage curricular development in law schools concerning violence against women.\(^{11}\)

\(^9\) In this sense, some of these themes reflected Clare’s early work in post-modernism and a skepticism about the limits of law. See sources cited supra note 4.


Every first-year law school course could integrate issues of violence against women. In civil procedure, a course that I teach, the issue of the effectiveness of injunctive relief available for battered women—such as restraining orders—poses important questions, as does the “domestic relations” exception to federal subject-matter jurisdiction and the Violence Against Women Act. In torts, there are important issues relating to state responsibility, negligence, failure to provide police protection and enforce orders of protection, and battered women and self-defense. The historic legitimacy of domestic violence flows from concepts of “husband and wife as one” and coverture that should be explored in property. At AALS Annual Meeting programs, ABA Commission meetings, or forums at particular law schools, teachers and scholars of domestic violence have described efforts to integrate these issues into first-year courses. In addition, segments on violence against women fit easily into upper-class courses on family law, evidence, civil rights, racial discrimination, health law, alternative dispute resolution, remedies, law and poverty, international human rights, advanced courses in criminal justice, and more “obvious” courses such as gender discrimination or feminist theory, and mediation courses.

Domestic violence is also a natural topic for the development of clinical courses. There was a clinical component to my first course on Battered Women and the Law at Harvard, and that was just a beginning. Now, in 2012, many law schools around the country in addition to Northeastern have developed full in-house clinical programs, in which students represent battered women in a variety of settings. These clinical opportunities are key to further evolution and growth of domestic violence law.


13 This clinical component was taught in 1991 by Sarah Buel, a recent Harvard Law School graduate, former student, and formerly battered woman. Sarah now directs the domestic violence clinic at Arizona State Law School and has been a leading activist and scholar in this field. Faculty Profile of Sarah Buel, SANDRA O’CONNOR SCH. L., http://apps.law.asu.edu/Apps/faculty/faculty.aspx?individual_id=69160 (last visited Mar. 12, 2012).
Most important, integrating domestic violence into all aspects of the law school curriculum has the potential to foster greater opportunities for legal representation for battered women, as no state provides for free legal representation in any civil matter.\textsuperscript{14} Classroom and clinical courses that address legal issues affecting battered women can increase access to justice and legal representation, not only providing direct service, but also introducing law students to these issues. Many younger lawyers who now provide legal assistance for victims of domestic violence, whether in their full-time work or as part of pro bono projects with law firms, were, as law students, involved in battered women’s projects, courses, or clinics. Many younger judges and legislators have had those experiences as well.

Many of the students who have been in the many courses that I have taught have made important contributions to legal reform for battered women. Cheryl Hanna was one of the students in the very first class of Battered Women and the Law, and when Clare and I thought of additional co-authors for the second edition of our casebook, we immediately thought of Cheryl. There are several other students in that first class who are now law professors, and who teach and write on domestic violence.\textsuperscript{15} There are many other students from all of the classes that Clare, Cheryl, and I (and many others in the field) have now taught who have made important contributions through lawyering, advocacy, teaching, and scholarship.\textsuperscript{16} Many of these students are now carrying on the legacy, teaching the same course or related courses at law schools across the country, reaching a new generation of law students. Expanding legal educational opportunities for students in this field has made it

\textsuperscript{14} Although, the Civil Gideon movement’s call for state-funded legal representation in civil matters is a promising development. See generally Laura K. Abel, \textit{A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright}, 15 TEMP. POL. & CIV. RTS. L. REV. 527 (2006).

\textsuperscript{15} For example, Jennifer Collins, now Professor of Law at Wake Forest University Law School, has written widely in this field. See, e.g., \textsc{Jennifer Collins, Dan Markel \\& Ethan Leib, Privilege or Punish: Criminal Justice and the Challenge of Family Ties} (2009).

possible to develop more committed, sensitive, thoughtful, and effective lawyers to assist battered women in the future. In this way, creative legal advocacy, or what I have called “feminist lawmaking on battering,” will continue to grow and be enriched by new perspectives.

II.

In the past quarter-century, there has been an explosion in scholarship concerning domestic violence, law reform, and services available to those who have been victims of abuse by their intimate partners. The intentional intergenerational mentoring by Clare Dalton, Liz Schneider, and so many other founders of the field to foster the next generation of lawyers and professors who focus on domestic violence law and scholarship has played an important role. Of course, mentoring relationships can take many forms, from informal conversations between a student and a teacher, to more formal settings. But these relationships, whatever their form, provide professional development opportunities for each new generation.

Two aspects of intergenerational mentoring have been key: the establishment of law school clinics, such as the Northeastern Domestic Violence Institute, which was founded and funded by Clare,17 and the institutionalization of academic courses, facilitated in large measure by the development of course materials, including publication of the casebook, *Battered Women and the Law*. These developments have had two profound effects on the law and social change. First, they have established domestic violence as a relevant and legitimate field of intellectual inquiry and practice, both within classrooms and in clinical settings. Domestic violence was once relegated to an occasional mention in criminal law, or presented as an unexamined dynamic in legal services divorce cases, often with stereotypical or biased references. Now domestic violence law

The Development of Domestic Violence as a Legal Field

has become a distinct course that integrates diverse fields of study, such as constitutional and employment law, and a field of practice that extends far beyond the family law courtroom. This has provided opportunities for learning and doing, and created laboratories for the development of new ideas and the implementation of new strategies. Today, domestic violence courses and clinics have become the training ground for soon-to-be lawyers to hone their professional skills and establish their professional agendas. And it was in these settings that the legislation and litigation that are the hallmarks of the movement to combat violence against women first began to take root.

I have had firsthand experience with how influential the early domestic violence courses were in fostering the movement because I was a student in Liz Schneider’s course, Battered Women and the Law, at Harvard Law School in 1991. Of all the courses I took in law school, this one had the most profound effect on my professional development. Battered Women and the Law documented human suffering inflicted not just by abusive individuals, but also by state indifference. Thus, for the first time in law school, I understood what it meant to be disempowered, both as a person and as a citizen. Like the rest of the students in the class, I was required to undertake a significant research project. My project examined how welfare regulations required recipients to identify the father of their children without exception for victims of domestic violence, thereby inadvertently placing victims at risk of retaliatory violence. My fellow students and I learned how to be creative lawyers through these projects by not simply mastering material, but by re-imagining new directions for law and public policy to respond to violence against women. Professor Schneider encouraged this through both scholarship and practice. Her teaching was a kind of activism, and class members became legal activists along with her; many students went on to publish their research papers and pursue careers in the field.

Second, and perhaps most important, courses and clinics have established opportunities for students and teachers to develop relationships with each other. These interpersonal relationships have blossomed into networks that have fed the
field. Domestic violence law has become a self-sustaining field because of the work of many, not just a few, individuals. I suspect that if we were to map a “family tree” of domestic violence practitioners, teachers, and scholars, we would find many connections to Clare Dalton, Liz Schneider, and the many people who participated in the Northeastern conference honoring Clare in 2010, which sparked the movement. Many of these “first generation” leaders have understood that they do not control the field, but rather have been stewards for the next generation.

So what has this next generation of domestic violence scholarship yielded? Once Judith Greenberg and I joined Clare and Liz as editors on the second edition of the casebook, I had the unique opportunity to examine the field not just from my own plot of scholarship, but from a broader perspective. As a group, we could see the development of the field as a whole, and seek to identify those areas that needed attention or changing.

One of the challenges that we faced was whether to change the title of the casebook. The original title, *Battered Women and the Law*, reflected both the feminist and the activist origins of the book. The term “battered women” grew from the early shelter movement, which was an integral part of the women’s rights movement, and it shed light on violence perpetrated by men against women as both a real phenomenon that was largely unrecognized, and was a metaphor for the legal status of women in the United States. But by the mid 2000s, the term “battered women” had come to represent a particular legal and social characterization of abused women, and was often associated with controversial, problematic, and largely inaccurate legal assumptions, embodied in notions such as “battered women’s syndrome.” Furthermore, by the mid 2000s, there was a growing understanding of battering in same-sex relationships and

---

that, in some instances, women were the ones who were abusive.

By this time, the term “domestic violence” had proliferated not just in the law, but also in numerous other disciplines, such as psychology, criminal justice, medicine, and beyond. Replacing “battered women” with “domestic violence” reflected the terminology used by colleagues in other disciplines and invited a more nuanced and complex analysis. “Domestic violence” had become widespread in common parlance and was the term people would Google most frequently when they were looking for research or searching for help.  

Yet it was this dimension of mainstreaming that made the title change somewhat bittersweet. There had been a subtle shift from the feminist origins of the field. The field was no longer dominated by those who saw ending private violence against women as part of a larger social and political agenda to ensure women’s equality with men. Others entering the field saw violence against women as caused by either individual challenges or a breakdown in family relationships, largely disconnected from women’s rights more generally. And so, while the title change was driven by both practicality and acceptance of the changing nature of domestic violence law, it was also a somewhat sobering decision because it signaled that, for both better and for worse, the field had changed.

The second struggle we faced was accounting for the dimensions of battering and intersections with race, ethnicity, class, religious affiliation, age, sexual orientation, disability, and immigration status. By the mid 2000s, there had been a proliferation of legal scholarship critiquing the early development of the field as being primarily about white middle-class women and their experiences. It was argued that early

---

19 While there is no specific research available, a search of the term “Domestic Violence” yielded 136,000,000 sources, as compared to 16,900,000 for the term “Battered Woman.” Comparison of Search Results, GOOGLE, http://google.com (search “Domestic Violence”; then execute separate search for “Battered Women” for comparison) (last visited Feb. 8, 2012).
scholars had ignored much social specificity such as race, ethnicity, or class, and had been responsible for the development of laws that often failed to provide the relief and remedies which well-meaning advocates and lawmakers had intended. The paradigmatic victim was not Farrah Fawcett in the *Burning Bed*, or Julia Roberts in *Sleeping with the Enemy*. She, or perhaps he, had many more dimensions, many more barriers, and many more life experiences than what had been described in early works.

Yet in our attempts to capture the complexities of women’s lives and to alert readers to the need for legal remedies that take these complexities into account, we often felt that our over-inclusiveness minimized any individual dimension. As we read much of the emerging scholarship challenging the unidimensionality of domestic violence work, we were struck that each piece echoed common themes across life experiences, in particular: the reluctance to seek outside intervention due to shame, concerns over the potential loss of community or children, a lack of financial resources, and the internalization of a patriarchal culture. Victims’ experiences were unique and uniform at once, different, and yet the same. Therefore, we struggled, and continue to struggle, with how to present this dilemma in the casebook, unessentializing victims of abuse while presenting the experiences that are common or universal.

Part of this struggle has personal as well as intellectual implications for students, who often look for aspects of their own experiences in the stories told in the cases and the articles in the casebook. For many students, a course on domestic violence and the law can be a deeply personal and transforming experience in which they can associate their own journeys as members of a particular gender, class, and background, with broader institutionalized structures and norms that govern intimate relationships. Students of domestic violence law often begin to question their own personal relationships, or those of their families and friends. This area of legal study raises issues that are inevitably close to home, like the kind of consciousness-raising prevalent during the second wave of feminism, when women were encouraged to see the political as personal.
Students often want to see themselves in stories they read in law school because it validates their own place in legal scholarship and the profession. In this light, leaving out certain narratives runs the risk that some students may feel marginalized. Thus, to avoid minimizing or trivializing differences due to over-inclusion of every possible dimension of domestic violence, we attempted to weave difference deliberately throughout the book rather than relegate any particular aspect to its own chapter, and to highlight commonalities when appropriate. It has been a difficult line to walk, and I suspect that we have performed with equal measures of awkwardness and grace.

The third challenge we faced concerned the role of the state in domestic violence legal work. Historically, there has been a debate among domestic violence law reformers and activists about whether states should have affirmative duties to protect citizens from privately-inflicted violence, and the state’s role in balancing victim autonomy and decision making with the broader dictates of a civilized society—but these debates had intensified by the time we were writing.\(^{20}\) These debates are not confined to the United States, but take place within international communities as well.\(^{21}\) And as co-authors, we engaged in them ourselves. The challenge for us was how to present and make space for differing points of view. Overall, those who work in this field but differ on issues have largely acted respectfully. But


no issue has had more potential to divide the community of domestic violence scholars and activists than the questions of if, how, and in what contexts the state should intervene into private relationships. To this end, we have intentionally attempted to present a wide range of views on this question. We hope that our students will closely examine and vigorously debate these issues and reach their own conclusions about how to best balance the need for the state to undertake affirmative steps to stop violence and the rights of individuals to determine their own destiny and define their own autonomy.

Finally, and most significantly for the development of the field, we included a chapter on domestic violence, sexual autonomy, and reproductive freedom. In this chapter, we explore the impact of intimate partner violence on the ability of women, in particular, to control their sexual lives—from rape, forced intercourse, and birth control sabotage, to questions of abortion policy and battering during pregnancy. Before the publication of the second edition of the casebook, there had been no comprehensive and sustained legal analysis of how battering affected what is arguably the most central aspect of women’s autonomy in all of its interrelated aspects. Through the development of this chapter, we strengthened the theme that was already manifest in other parts of the book—that domestic violence was fundamentally an assault on women’s autonomy, personhood, and full citizenship. In the third edition, we plan to expand this chapter to include a broader discussion of the impact of battering on a woman’s physical health, including the effect of ill health on her ability to access the legal system. This chapter provides important examples of the ways in which intimate violence affects all aspects of women’s lives, which is a central theme of the book.

As we plan the third edition, we are struck by how many new cases and areas of law there are to explore, and the richness and depth of new scholarship. The number of cases involving domestic violence before the United States Supreme Court has increased, signifying the sophistication of the field, and these cases often have presented complex questions
reflecting how federal judges understand domestic violence. We also see common concerns and growing connections with our colleagues in other emerging fields of study, such as international human rights law, sexual orientation and gender identity law, and even animal law. We have to address the challenges that modern technologies have presented for victims, and the possibility that these technologies can provide more effective remedies and relief. Issues like cyber-abuse and electronic monitoring, for example, raise many questions and


possibilities and require heightened attention. Finally, we would be remiss not to expand both international and comparative perspectives on domestic violence. While we struggle here in the United States to strike the appropriate balance between affirmative state duties and victim autonomy, that struggle is not ours alone. Understanding how ending domestic violence is part of a global struggle to end violence and discrimination against women and girls is both re-energizing and humbling.

III.

As we jointly reflect upon Clare Dalton’s work in the evolution of the casebook and the development of the field of domestic violence law, it is important to ask what differences these developments have made on the ground, in the lives of real people. Clare’s work, and the work of so many others, has had a considerable impact in raising awareness, and in restructuring our understanding of domestic violence from a private family matter to a public and social problem rooted in gender discrimination. We continue to see a proliferation of law reform and litigation in many courts and legislatures. While not all cases or legislative battles have turned out favorably from the point of view of domestic violence advocacy communities and there is often a diverse range of perspectives within these communities, the increased debate evinces a growing understanding and sophistication on the part of both advocates and scholars, many of whom started their careers in law school clinics and courses a generation earlier.

We also see increasing connections to broader struggles to end discrimination, such as global issues of human rights. Work on domestic violence has helped inform and enrich other fields, and has been central to recognizing male violence against women as a human rights issue. Domestic violence is no longer an isolated field, but an integral part of the human rights movement internationally.27

27 See SCHNEIDER, supra note 3 (discussing the United Nations Secretary-General’s Report on Global Violence); see also Jessica Lenahan (Gonzales) v. United States, Inter-Am. Comm’n on H.R., Report No. 80/11
But beyond this increased awareness and scholarship that has led to law reform, the question remains whether all of these efforts have really reduced gendered violence. While the empirical data suggests that rates of domestic violence have remained relatively steady in the last quarter century, we cannot deny the enormous importance that this field has had on the lives of those who seek recognition, remedy, and relief. Every one of us who reads this essay has a story to tell of someone whose life was made safer or more meaningful because of domestic violence law reform. The complexity of reforms may have made some lives difficult or complicated, but, overall, the efforts of this movement have offered many people opportunities to live more safely than would have been possible a generation ago. While we still face many challenges to reduce violence against women, we should take this opportunity to not only celebrate Clare’s contribution to domestic violence legal work, but to the growth of the field of domestic violence law.

THE FEMINIST ACADEMIC’S CHALLENGE TO LEGAL EDUCATION:
CREATING SITES FOR CHANGE

Ann Shalleck*

While a few pioneering women legal academics inhabited law schools and throughout the 20th century sporadically challenged the pervasive male domination of legal education, legal feminism did not begin to flourish in law schools until the 1980s. Drawing on broader feminist efforts to transform academia, feminist law teachers, students, and activists began questioning not only the content of the material included in the curriculum that dominated legal education, but also the nature of scholarly inquiry and analysis, the assumptions underlying pedagogical methods, the gendered components of the culture that dominated legal education, and the daily practices that characterized law schools, both in and out of the classroom. From these initial efforts to bring the second wave of feminism into law schools and legal thought, legal feminists generated vast and enduring change. For more than thirty years, Clare Dalton contributed to creating a vibrant movement that has sustained succeeding waves of innovative and diverse forms of feminist legal thought and pedagogy. These early feminist academics, such as Clare, challenged prevailing ideas, pervasive norms, and entrenched structures of power. Often greeted with hostility, their efforts needed strength, flexibility, and creativity. Clare

* Professor of Law and Carrington Shields Scholar, American University, Washington College of Law. This essay is based on the presentations I and others made at Challenging Boundaries in Legal Education, A Symposium Honoring Clare Dalton’s Contributions as a Scholar and Advocate held at Northeastern University School of Law on November 5, 2010. Many thanks to Anna-Kristina Fox and Brittany Ericksen who provided expert research assistance and valuable insight.
worked with others to develop multiple sites within legal academia—in scholarship, in teaching, and in curricular design—where legal academic feminism could flourish. She built upon and expanded understanding of the gendered nature of law, deployed forms of critical legal analysis that illuminated the dynamics of gender within the structures of legal thought, brought issues that implicated the operation of gender in society and law into the classroom, and implemented an innovative model of clinical education that enabled students to act as lawyers in ways that engaged the experiences of women and sought to accomplish change.

Clare appeared as an explicitly feminist legal academic early in this development. When I started the Women and the Law Program at American University, Washington College of Law in 1984, Clare already appeared to me and to other feminist academics as an established and respected scholar.\(^1\) With so few women and far fewer feminist professors in this period of rapid change, when the span of each generation was remarkably short, we beheld Clare as a senior colleague (although only an Assistant Professor) who revealed vistas that we had only incompletely imagined. She identified herself, however, not as the exceptional woman forging her own distinctive path, but as a friend akin to us, someone with the courage and confidence to help us all be stronger in our commitment to and better in our ability to bring feminist insight and practice to law. Her work, in its brilliance and originality and its urge to reach across disciplines and find new ways of understanding gender, was our work—a project that could undergird and foster our own nascent efforts. It could help in our resistance to demands and impulses to replicate dominant models for achieving success within existing academic terms. With our collective strength,

\(^1\) This essay proceeds, as do others in this volume, from an explicitly situated perspective. Some of us have taken the opportunity presented by this symposium to reflect upon the history of feminism in legal academia, a history we were active in creating, through reflection upon Clare Dalton’s contribution to that history. Therefore, in important respects, this essay contains certain characteristics of memoir as I (and others) interrogate how our experiences as participants in these developments influenced the history of legal education and the history of feminist change.
determination, and expansive vision, we felt through Clare the possibility and excitement of transformation. This essay chronicles Clare’s contributions to the creation of a feminism that was able to challenge and reconstitute the legal academy. Part I describes how her ground-breaking approach to contract theory encouraged others to apply different kinds of feminist critiques to fundamental assumptions underlying legal doctrine, expanding the range of feminist critiques of law beyond many of the initial efforts that often focused on questions regarding the legal concept and meaning of equality. Part II recounts Clare’s attempts to reform law teaching and the law school curriculum. While scholarship was a mark of legitimacy for the legal academic, in the curriculum and teaching practices, feminist academics had to learn how to have their new legal understandings take root and gain acceptance in the daily life and institutional structures of the academy, particularly as transmitted to students. Through the Women’s Rights and the Law School Curriculum workshop, Clare and other colleagues helped to fashion the beginnings of a first-year curriculum that recognized and even embraced feminist perspectives, including initiatives such as teaching torts with the recognition of domestic violence as a fundamental violation of the obligations in relationships among people. Part III discusses Clare’s efforts to create institutions within law schools that united feminist theory and practice. In the founding of the Northeastern University School of Law’s Domestic Violence Institute, Clare moved from integrating feminist thought into traditional modes of legal pedagogy to transforming that pedagogy.

I. BRINGING FEMINISM TO THE CENTER: DECONSTRUCTING CONTRACT DOCTRINE

During the early 1980s, Clare’s scholarship took on nothing

---

2 Katherine T. Bartlett & Deborah Rhode, Gender and Law: Theory, Doctrine, Commentary 1–3 (5th ed. 2010) (explaining that gender equality analysis focuses on the premise that individuals should be treated alike and generates challenges to law based on sex-based classifications). Formal equality constitutes only one of many feminist legal theories.
less than a critique of the basic assumptions underlying contract doctrine, using critical methodologies still largely unfamiliar to the legal academy. Her article, *An Essay in the Deconstruction of Contract Doctrine*, remains a classic to this day, bringing together methods from different critical traditions in philosophy, political thought, and literary analysis and drawing on feminist thought across disciplines. Just as she seeks in these traditions new ways to understand the operation of law and the activity of legal scholarship, her work reflects her purpose to understand women as they appear in law and whose lives law shapes. She explores how women are situated differently in relation to the materials of the law and to authority in interpretation of law. The treatment of women in law is at the center of her concerns. In describing her own goal in engaging in the deconstruction of doctrine, Clare declares, “my own first commitment is to assess how women are viewed and treated in legal contexts.”

To fully appreciate Clare’s contribution, we must situate her project within the context of the feminism that was beginning to establish itself within the legal academy and understand those efforts in light of the powerful resistance that a feminist presence and feminist legal thought encountered. While academic feminism was growing rapidly in some disciplines throughout the 1970s, law schools remained largely impervious or hostile to bringing feminist critical thinking to bear on legal thought and analysis. The intellectual breadth and sophistication of Clare’s scholarship reflected and furthered a broad feminist determination to open up intellectual terrain that could create space for understanding the relationship of law to gender. Concomitantly, her intellectual pursuits remained bound up with her aspiration to make feminist thought central to legal thought. She situated herself and her writing within the commitments of feminism.

In her stunningly ambitious project, *An Essay in the
Deconstruction of Contract Doctrine, Clare elucidates the relationships among seemingly discrete intellectual frameworks for analyzing legal doctrine and legal thought, all of which she maintained directly and indirectly contributed to the development of feminist legal thought. She analyzes and critiques contract law by identifying three central recurring themes—the distinctions between the public and the private, subjective and objective understanding, and form and substance—that she argues drive selected doctrines across the field of contract law. The distinction between the public and the private becomes her frame for exploring the structure and development of the concepts of implied-in-law and quasi-contracts, as well as the doctrines of duress and unconscionability. The dichotomous understanding of subjective and objective viewpoints guides her analysis of contract formation, parol evidence, and mistake; in each of those areas doctrinal devices operate to favor objective over subjective interpretations of contracts. The wavering formulations of purported explanations of differences between form and substance propel her analysis of consideration and reliance. As form devolves into substance, doctrines that concern whether something has value and how that value is understood resurface questions of the objectivity of value and the uneasy distinction between the public and the private.

In her analysis of these three thematic dichotomies, Clare brings to bear critical methods and insights that highlight underlying structures of law. Most explicitly, her title announces her use of the methods of deconstruction in legal analysis.

---

7 In these discrete areas of contract law doctrines, Clare identifies ways that the dominant conception of contract law as private is subverted by submerged concerns for the public that appear clearly in justifications for these seeming “deviations” from the law’s concern for private bargains. Dalton, supra note 3, at 1001.

8 These devices are seen as a way to disguise how the existence of an objective way to understand what happens in a bargain is a threat to contract law’s claim that it is private, not public. Id. at 1001–02.

9 Thus, as in the other areas, arguments about and within these intricate doctrinal formulations serve to displace questions about the public nature of seemingly private contract law and the instability of an objective realm of interpretation in ways that disguise fundamental questions. Id. at 1002.

10 J.M. Balkin, Deconstructive Practice and Legal Theory, 96 Yale L.J.
Two aspects of deconstructive techniques appear in her work as most powerful. First, Clare draws upon analyses of the “role of conceptual duality” and its hierarchies of inclusion and power in critiquing contract doctrine. She identifies how legal doctrine attempts both to frame and resolve dualities (such as public/private, objective/subjective, and form/substance) in particular legal contexts, by favoring one pole of the duality over the other. The constructed dualities create forms of legal argumentation that, while seeming to generate determinate answers, actually disguise underlying problems of power and knowledge. This process submerges contradictions and inconsistencies in the creation of the duality in an attempt both to achieve stability for law and to disguise how the privileging of one pole can generate benefits for some at the expense of others. Second, the creation of the duality involves circularity. Clare shows that while each pole relies on the other for its meaning and each is unrecognizable without the other, law attempts through its doctrines to separate the opposing concepts from each other. The law treats one concept as fundamental or foundational and the other as secondary or supplemental to the first. Arguments within intricate doctrinal formulations serve to displace, and therefore to disguise, questions about the very nature of the duality, its hierarchical structure, and the questions it presents.

743 (1987) (identifying methodological techniques and philosophical ideas from deconstruction that can illuminate how legal doctrines are formed and influenced by ideological thinking).

11 Dalton, supra note 3, at 1007. Dalton analyzes how the “hierarchal relationship between the poles” of a duality produces a disfavored pole. While Dalton draws most explicitly on the work of Derrida and deconstructive methodologies within post-structuralism, a related strand of feminist thought goes back to Simone de Beauvoir. In the introduction to The Second Sex, de Beauvoir identifies her analysis of women’s situation as rooted in the operation of the duality of masculine and feminine: “[N]o group ever sets itself up as the One without at once setting up the Other over against itself . . . . The Other is posed as such by the One in defining himself as the One. But if the Other is not to regain the status of being the One, he must be submissive enough to accept this alien point of view. Whence comes this submission in the case of woman?” Simone de Beauvoir, The Second Sex, at xvii–xviii (H. M. Parshley trans. 1952) (1949).

12 Dalton, supra note 3, at 1000–01, 1007–08. For example, in creating
Clare also draws upon other critical traditions in her analysis of three dichotomies that recur in contract law. She argues that liberal legalism—which posits abstract universal legal subjects who can freely interact with others without state interference, except that which protects them from the overreaching of others—also disguises what is at stake in the dichotomies between public and private, subjective and objective understanding, and form and substance. By constructing contract doctrines that assume the abstract universal legal subject in the creation of the lines that demarcate the boundaries between the poles of each duality, contract law disguises the structures of power that underlie the lives of the actual people implicated in each particular doctrinal formulation. In exploring her three thematic dualities, Clare shows how the doctrines reflect liberal legalism’s vision of the relationship of the individual to others and to the state, while also presenting forms of argumentation that legitimate underlying structures of power that allocate benefits within society. By revealing the underlying understandings of individuals, assumptions about their relationships to each other and to the state, and the forms of power disguised within doctrinal formulations and analysis, Clare provides academics and advocates with “a most sophisticated sense both of the array of available argument and of the limits of legal discourse.”

While other schools of legal critique, most notably legal realism, had long assaulted the orthodoxy of classical legal thought, none embraced the insights of the second wave of

---

a duality between the public and the private, and in valuing the private over the public in contract law, doctrines seek to make the private the norm and the public the deviation from, or the supplement to, the private. If questions about the actual public nature of seemingly private contract law become questions about the precise contours of specific doctrines such as unconscionability, then doctrinal formulations maintain the stability of the idea that contracts are private and disguise how fundamental questions of fairness are marginal to the interpretation of contracts.

13 Id. at 1007.
14 Id. at 1009.
feminist thought that emerged and matured outside law.\textsuperscript{15} Clare, however, integrates multiple forms of emergent feminist thought with other critical traditions. Her thematic analysis of the dichotomies of contract doctrines and her challenge to the abstract legal subjects who appear in the resulting doctrinal formulations present a feminist approach to confronting any area of legal doctrine. In critiquing “liberal political theory and legal liberalism,”\textsuperscript{16} Clare demonstrates how liberal legal thought posits a universal (rather than particular) and abstract (as opposed to contextualized) vision of individuals and relationships and, thereby, evades the conversation about “how we should conceive relationships between people” and “how we should understand and police the boundary between self and other.”\textsuperscript{17} Her critique, which reflects the feminist discomfort with the abstract, isolated individual as the central figure in liberal legal thought,\textsuperscript{18} calls for careful and sustained attention in each doctrinal area to the “concrete aspects of social life.”\textsuperscript{19} Further, Clare highlights how the abstraction disguises “how a legal order . . . can still operate to exclude important constituencies from the benefits available within the society.”\textsuperscript{20} This exclusion makes the experiences of women, however situated, invisible or indistinguishable from those of men even when social reality makes the differences in experiences critical to understanding how law does and could operate. Abstract doctrines, when applied in particular legal and social contexts, distort understanding of women’s participation in society or work to exclude them from crucial spheres of life.


\textsuperscript{16} Dalton, \textit{supra} note 3, at 1005–06.

\textsuperscript{17} \textit{Id.} at 1006.

\textsuperscript{18} For example, while many legal feminists criticized law for treating individuals differently based on their gender, other feminists questioned the limits of an equality analysis that could not reach structural inequalities between men and women. Debates about formal equality versus substantive equality and multiple efforts to transcend the debate dominated much feminist legal theory of this period. See Dalton, \textit{supra} note 6.

\textsuperscript{19} Dalton, \textit{supra} note 3, at 1001–03.

\textsuperscript{20} \textit{Id.} at 1007.
In the task of deconstruction, Clare also makes feminist insight central.\textsuperscript{21} The themes she chooses for organizing her process of deconstructing contract doctrine permeated the resurgent second wave of feminism thought within which Clare wrote. Two paradigmatic examples from different disciplines illustrate how Clare’s study of contract law reflected developments altering vast fields of inquiry and drew upon methods of analysis and themes that appear in the path-breaking work of others. In philosophy, Simone de Beauvoir’s pioneering work, \textit{The Second Sex}, analyzed women’s experience through the hierarchal duality of man/woman.\textsuperscript{22} In history, feminist historians explored the development of separate spheres ideology in the nineteenth century, revealing ways of thinking and structures relationships that marked off the public from the private and treated women’s feelings as distinct from men’s knowledge.\textsuperscript{23} Clare’s thematic choices reflect the feminist consciousness of the time and contributed to its expansion into legal academia.

In addition, the article brings a distinctive technique to the methodology of deconstruction: while her deconstructive methods draw upon the work of Derrida, her accounts of binaries within law take the form of stories.\textsuperscript{24} This mode of analysis reflects the emergent feminist focus on storytelling that crossed disciplinary boundaries. Clare describes her scholarly deconstructive project as reshaping the telling of law’s stories. She begins her article with an invocation of this project: “[I]law,

\textsuperscript{21} Id. at 1009 n.23 (“[W]hen it comes to looking behind and beyond doctrine to ask what is perpetrated through it, my own first commitment is to assess how women are viewed and treated in legal context.”).

\textsuperscript{22} DE BEAUVOR, \textit{supra} note 11.

\textsuperscript{23} For an example of such work, see generally CAROL SMITH-ROSENBERG, \textit{DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA} (1984).

\textsuperscript{24} In explaining how Derrida’s metaphysical concerns can be translated into law, Jack Balkin credits Dalton with developing the metaphor of storytelling to explain how binaries work in law: “Law tells a story about what people are and should be.” Balkin, \textit{supra} note 10, at 762. The binaries of public and private, objective and subjective, and form and substance appear not just as doctrinal rules but as stories about how law works to explain and order people’s behavior and relationships.
like every other cultural institution, is a place where we tell one another stories about our relationships with ourselves, one another, and authority.” 25 In pursuing this project of deconstructing contract law, she demonstrates how analyzing stories within and about legal discourse can “expose the way law shapes all stories into particular patterns of telling, favors certain stories and disfavors others, or even makes it impossible to tell certain kinds of stories.” 26 In order to build feminism into the legal academy in a way that could be deep and integral, she shows how feminists can reveal hidden or displaced stories and tell new stories as ways of challenging those that dominate. For example, in telling how doctrines implicate the stories of relationships and not just discrete, atomized individuals, feminists can resuscitate buried accounts and construct new narratives that expose unrealized aspects or consequences of a particular doctrinal formulation. Through telling and retelling, critique and re-interpretation of law’s stories, and the revelation of stories hidden behind the stylized process of storytelling in legal discourse, Clare and other feminist legal academics sought to reshape through scholarship the meaning and experience of law. Further, recognizing that “those who dominate the legal forum only incompletely dictate the range of legitimate stories,” Clare takes from feminism the imperative of finding and creating “room for those who speak in a different voice and who can use that voice to critique the dominant one.” 27

To pull all these feminist strands together, Clare concludes with analysis of the doctrines implicated in the enforcement of cohabitation agreements between unmarried people. Using the understanding developed in the article of the doctrines of express and implied contract, manifestation and intent, and consideration and reliance, she shows how courts achieve a supposed resolution of arguments about how to treat these agreements. Her methodology applied in this setting of a particular kind of relationship reveals how, in the doctrinal treatment of

26 *Id.*
27 *Id.* at 999 n.3.
cohabitation agreements, the creation and structuring of the dichotomies of public and private, objective and subjective understanding, and form and substance serve to displace underlying issues about the actual relationships, the interactions of unmarried people who enter cohabitation agreement, and the stance of the state toward those agreements and those people. To escape from “the stranglehold” of these doctrinal arguments “on our thinking about concrete contractual issues,” Clare “bring[s] to life the underlying issues of power and knowledge that lie buried in the doctrine by focusing on the images of women and of human relationship that the doctrine presupposes.” Clare constructs intellectual paths to generate analysis and debate about “commitments and concerns central to our society” that are pervasive in doctrine but that doctrinal discourse keeps at a “stylized distance.” In “decoding the doctrinal formulations,” she fosters understanding about the real stakes for real people. She aims to present possibilities not just for critique of those particular doctrines, but for reimagining how law might be recast.

It is clear in retrospect that feminist legal scholarship across many different theoretical orientations and in many different areas of substantive law has grappled with these concerns—regarding the connection between self and others, the distribution and operation of power, and the exclusion of women from or their marginalization in aspects of social life—that Clare articulated at a moment when feminist thought was transforming the academy generally, yet only beginning to challenge entrenched ways of analyzing law. It is also apparent that

---

28 Id. at 1095 (“By ordering the ways in which we perceive disputes, these [doctrinal] arguments blind us to some aspects of what the disputes are actually about. By helping us categorize, they encourage us to simplify in a way that denies the complexity, and ambiguity, of human relationships. By offering us the false hope of definitive resolution, they allow us to escape the pain, and promise, of continual reassessment and accommodation.”).

29 Id. at 1003.

30 Id.

31 Id. at 1009.

32 The textbooks on feminist legal theory, many of which have gone through multiple editions, provide an entry point into this now vast
Clare’s identification of these questions as central to feminist legal thought—although they differed from the more readily available issues concerning equality—generated and sustained further innovative inquiry. This work has extended feminist legal critique in ways seemingly remote from particular contract doctrines or discrete areas of law and expanded feminist legal analysis to create new ways to explore the interplay of law with the operation of gender. With Clare’s innovative work on contract doctrine, we were all better able to confront the weight of authority that appeared arrayed to resist challenges. With her concepts, approaches, and analysis, we proceeded with her as an ally in our minds and in our hearts.

This iconic article coupled with Clare’s other scholarship did not secure tenure for her at Harvard, just as extraordinary achievement has often failed to bring rewards “that would in all probability have fallen to the lot of equally determined and qualified men”; however, it achieved a different sort of success in feminist terms. It played a central role in securing for feminism a powerful and explicit presence in legal scholarship.

33 Much early feminist legal thought, influenced by distinguished advocates, approached law as the site of inequality and the site for remedying that inequality. Justice Ruth Bader Ginsburg’s now renowned work as a lawyer litigating the pioneering cases challenging sex-based classifications as part of the ACLU’s Women’s Rights Project and as a law teacher is only the most widely known and influential example of this strand of early feminist thought. Other early feminist legal advocates and academics, along with Clare, developed other feminist approaches. See Dalton, supra note 6.

34 As feminists grappled with dilemmas around the treatment of pregnancy in anti-discrimination law and generated new approaches in feminist thought in the equality debates, feminist legal academics have found ways to continue to create new forms of analysis for critiquing how gender differences in caring for others and in household responsibilities can contribute to exclusion from social and political life or to economic vulnerability. See, e.g., Martha Albertson Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies (1995).


fostered new forms of feminist legal analysis, prompted recognition and respect that have endured the continually changing scholarly landscape, and became a source for critical legal thought up to the present. Feminists across disciplines have drawn upon it, traditional legal scholars have had to

37 A quick citation check on Lexis reveals 370 citation references across legal fields, not to mention citations in many secondary sources and reprints in various collections. In 1996, it was listed as a most cited law review article of recent years. Fred R. Shapiro, The Most-Cited Law Review Articles Revisited, 71 CHI.-KENT L. REV. 751, 774 tbl.2 (1996).

38 See, e.g., Susanne Baer, A Different Approach to Jurisprudence? Feminisms in German Legal Science, Legal Cultures, and the Ambivalence of Law, 3 CARDozo WOMEN'S L.J. 251, 282–83 n.135 (1996); Katharine T. Bartlett, Feminist Legal Methods, 103 HARv. L. REV. 829, 835 n.18 (1990) [hereinafter Bartlett, Feminist Legal Methods]; Katharine T. Bartlett, Gender Law, 1 DUKE J. GENDER L. & POL'y 1, 13 n.64, 14 n.71 (1994); Dan L. Burk, Feminism and Dualism in Intellectual Property, 15 AM. U. J. GENDER SOC. POL'y & L. 183, 184 n.4 (2007); Phyllis Goldfarb, A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education, 75 MINN. L. REV. 1599, 1624 n.95 (1991) [hereinafter Theory-Practice Spiral]; Beverly Horsburgh, Decent and Indecent Proposals in the Law: Reflections on Opening the Contracts Discourse to Include Outsiders, 1 WM. & MARY J. WOMEN & L. 57 (1994) (arguing that the contracts curriculum disadvantages law students by its insistence on total objectivity and a separateness from the culture in which it is situated and applying Dalton’s analysis to understanding how a partial or subjective view gets presented as universal); Christine A. Littleton, Reconstructing Sexual Equality, 75 CALIF. L. REV. 1279, 1283 n.24, 1322 n.225 (1987); Ramona L. Paetzold, Commentary: Feminism and Business Law: The Essential Interconnection, 31 AM. BUS. L.J. 699, 713 n.51 (1994) (applying Dalton’s analysis to a feminist critique of commercial law, arguing that her analysis of the public/private duality is helpful in deconstructing various doctrines and the analysis of the objective/subjective duality reveals how questions of power dynamics get obscured); Kellye Y. Testy, An Unlikely Resurrection, 90 NW. U. L. REV. 219 (1995) (applying Dalton’s analysis of contract law to lesbian legal theory, arguing that lesbians should seek to use contract rather than be used by it, by confronting the ambivalence and dualities).
acknowledge it—
even if critical of it—and scholars from other
critical traditions have relied on it.40

II. TELLING STORIES IN CLASS: FEMINISM IN THE LAW SCHOOL CURRICULUM

Clare’s work and the work of feminist legal academics
transformed not only legal scholarship, although that
transformation was necessary for feminism to survive and
flourish in the legal academy. Were academic legal feminism
confined to legal scholarship, however important scholarship

39 See, e.g., Donald F. Brosnan, Serious But Not Critical, 60 S. Cal. L.
Rev. 259 (1987) (criticizing Dalton’s use of deconstruction as inconclusive
and as failing to provide guidance on how to construct rules that better
organize private obligations); Joel R. Cornwell, Legal Writing as a Kind of
Philosophy, 48 Mercer L. Rev. 1091 (1997) (applying Dalton’s analysis to
the legal writing curriculum in arguing that the standard models of legal
writing promote a disjunction between writing and thought); Chad
McCacken, Hegel and the Autonomy of Contract Law, 77 Tex. L. Rev.
719, 749 (1999) (in arguing for the autonomy of contract law, discusses
Dalton’s description of the tension between objective and subjective theories
of contract law in relationship to the dialectic between individual and
community in Hegel); Sky Pettey, Power and Knowledge in Agreements to
Arbitrate Statutory Employment Rights, 14 Ohio St. J. on Disp. Resol. 927
(1999) (using the treatment of power and knowledge in Dalton’s dichotomies
to analyze the arbitrariness of courts’ preferences for arbitration clauses);
Legal Education Has Been Short-Changing Feminism, 43 U. Rich. L. Rev.
1185 (2009) (extending Dalton’s analysis of quasi-contract to the concepts of
agency and trust as reflective of the ways equity’s private fiduciary
relationships can address power and knowledge imbalances); Kenneth L.
L.J. 429 (1997) (applying Dalton’s methodology to the notion of mistake
in contract doctrine and emphasizing the role of binaries in the development of
mutual mistake).

40 See, e.g., Mark Kelman, A Guide to Critical Legal Studies 25,
104–06 (1987); Balkin, supra note 10; Robert Batey, Alienation by Contract
in Paris Trout, 35 S. Tex. L. Rev. 289 (1994) (using questions posed by
Dalton regarding the relationship between self and other to analyze the
potential for alienation in the individualist bias of most modern conceptions
of contract law that tends to overemphasize the threat posed by others and
undervalue the promise of solidarity with them).
may be to educational institutions, it would have been little more than a bump in intellectual history. For feminism to alter the legal academy and thereby reshape understanding in the legal profession and in society, new understandings of law could not remain cabined in the realm of scholarly production; scholarly work had to be instantiated as curricular change.

Having embraced the task of reframing the narratives of law in her own scholarly writing, Clare enthusiastically joined the feminist effort to reconstitute the storytelling that pervades legal education. Through an engaged legal education, feminist academics could pass on to their students an understanding of how law’s stories relate to the lives of women and to the core concerns of all people, concerns that demand the inclusion of women. Feminist thought had to be incorporated into the law school curriculum—not just as separate “women and the law” courses, but as part of the full range of law’s stories as they emerge in different courses throughout the curriculum.41 In 1984, the Women and the Law Program at American University, Washington College of Law set out to build connections among feminists and others critical of dominant forms of legal education who often worked in isolation at their institutions. They sought to facilitate change in what was taught in classrooms and how it was taught, and, at deeper structural levels, to influence the structure and content of the curriculum.42

41 Dalton, supra note 36.


43 The seeds of this current symposium honoring Clare Dalton were sown at the 1985 program. Feminist academics that preceded me and participated in this symposium were essential to conceptualizing and creating the workshop on Women’s Rights and the Law School Curriculum, most notably Elizabeth Schneider. Conversations with Liz helped produce this project, and
In 1985, the Women and the Law Program instituted an annual workshop called *Women’s Rights and the Law School Curriculum*, coordinated with the annual meetings of the Association of American Law Schools, designed to create a regularized yet distinctive feminist presence broadly accessible to interested faculty. The program continued for the remainder of the century. Clare was an enthusiastic and committed participant from the beginning. The first workshop “focused on those courses devoted primarily to examining the legal status of

Liz, already with significant experience in creating feminist change in practice and in legal academia, guided me into the existing academic feminist network. See Elizabeth M. Schneider & Cheryl Hanna, *The Development of Domestic Violence as a Legal Field: Honoring Clare Dalton*, 20 J.L. & Pol’y 343 (2012). At the 1985 workshop, my own academic work intersected with that of Clare, whom this symposium honors. Other academics from the 1985 program are participants in this symposium.

Shalleck, supra note 42, at 98–99. The relationship to the AALS Annual Meetings changed over time as the format and structure of those meetings changed. For example, in the early years, the Women and the Law Program could be considered to be an allied organization and its workshop was treated as part of the programming done by those organizations. In 1986, the workshop presented by the Women and the Law Program was actually one of the AALS’s Mini-Workshops. Later, with changes in the format of the annual meetings, the Women and the Law Program’s annual workshops could not have these official or quasi-official designations, but, to facilitate participation, coordination of the workshops with the official meeting activities continued.

Around this time, the AALS Annual Meeting had expanded in scope, including extended programming involving full-day workshops at the beginning of the meeting. It became increasingly difficult for those attending the meeting to participate in supplementary programming as the annual meeting itself became more extensive. In addition, as more women entered law teaching, the AALS Section on Women in Legal Education became increasingly active in developing its own programming on gender and the law. A specialized focus on feminism within the law school curriculum remains important as resistance to feminist theory and to a curriculum that fully incorporates theoretical, doctrinal, and clinical feminist teaching remains. Particularly as legal education goes through critical changes, sustaining efforts to retain feminist thought and practice as part of legal education takes on new meaning. However, the particular institutional structure for creating a setting for these discussions must be different.
women”—partly because feminists had first claimed a presence in legal academia through demands, primarily by women students, for these courses and partly because these courses served as a base for many feminists within academia. By 1985, such women and the law courses had already served many purposes, among them operating as outposts for feminist thinking within the curriculum. From this starting point, the Women and the Law Program, with the second workshop the following year, began in earnest to expand feminist thinking into all aspects of law and law teaching and, therefore, into all parts of the curriculum.

Moving from specialized courses often on the margins to the core of legal education, the second workshop concentrated on the first-year curriculum. As the announcement for the second workshop declared, “[i]ssues affecting women permeate the law but are often invisible in the law school curriculum outside of specialized courses in women and the law.” It then marked as an historical phenomenon the efforts of those “who have begun to integrate this work into many courses throughout the curriculum.”

The first-year curriculum, in the content of its courses and its methods of instruction, worked to signal what mattered to the development of students’ understanding of law and their ways of thinking about it. “Because the first year curriculum is basic to shaping a shared understanding throughout the legal profession of what the law is and how it operates, the program will focus on attempts to include issues about women in

47 See Dalton, supra note 6, at 3–5.
48 Id.
49 The yearly workshop served not only as a space to share and develop ideas and to learn from others engaged in similar efforts, but also as a site for creating change. The number of women law teachers, while growing quickly during a period of expansion of legal education, remained relatively small, and feminists were a far smaller group. Situating feminist thinking in the curriculum, whether in specialized courses or embedded in other courses, was a contested enterprise.
50 Program Announcement, supra note 46.
51 Id.
three standard first year courses: property, contracts, and torts.”52

This early effort at addressing the exclusion of any explicit examination of the operation of gender at this formative point in students’ education involved asking basic questions and creating a broad dialogue among participants: Why did an exploration of gender matter in legal study? How did such inquiries affect students’ understanding of these areas of law? What goals did feminist law teachers seek to achieve in making change? What change was possible within the constraints of a standard first-year curriculum? What methods were available? What challenges did people face? What risks did they invite? This workshop created a space for framing and facing these basic questions and began an ongoing endeavor to explore how feminist thought could affect the approach to the most basic of law school’s material.

In light of Clare’s scholarly work, this workshop precisely suited her knowledge and her commitments. Along with Deborah Rhode and Patricia Williams, Clare led the discussion on contracts. In a letter following the workshop, she described the meaning of the workshop for her:

For myself, it was nothing short of thrilling to sit down with a group of people teaching in the contracts field, and compare notes and exchange suggestions about how to enrich our courses through a more concrete recognition of the women who are our students, and the women’s issues that for one reason and another have been left out of the traditional curriculum.53

Consistent with her conviction that focusing on women illuminates questions regarding the most deeply embedded assumptions in law and the most basic ways of framing doctrinal questions, Clare was particularly drawn to how this project can “provide many more points of access to central questions about the role law plays in our society.”54 Clare also cautioned: “[n]ow the question will be whether we can collectively sustain our

52 Id.
53 Id.
54 Id.
commitment to the project and move forward.”\textsuperscript{55} The Women and the Law Program provided the “supporting and steering function”\textsuperscript{56} that aggregated the work of individuals into a collective project so that feminist law professors could achieve more than discrete and idiosyncratic victories. With this 1986 workshop, the Women and the Law Program took a critical, albeit initial, step of “bringing us into touch with each other.”\textsuperscript{57}

To incorporate feminist ideals into the first-year curriculum, feminist academics needed to develop teaching materials that at least acknowledged, even if they did not fully embrace, the emergence of feminist approaches to and insights about legal thought. While a textbook with women’s names on the cover did not guarantee feminist perspectives, the near exclusion of women from authorship of the central materials shaping the story of the law that first-year students encountered revealed the daunting project of challenging legal education that feminists faced. At that time, with rare exceptions,\textsuperscript{58} major casebooks in first-year subjects did not include women authors. The three fields of contracts, torts, and property on which the workshop focused had no women authors. In addition, whoever the authors, no texts included explicitly feminist perspectives nor offered the feminist critiques emerging in the literature of law journals. Feminist academics knew that if in first-year classrooms only feminist law professors told counter-stories of the law that contained women’s experiences, ones that operated as narratives of resistance to the text, they and their accounts would be discounted as partial, biased, marginal—or at best subsidiary.

Just as feminists had to publish their legal theories in law reviews, they also needed to appear in the authoritative material of the texts presented to students as embodying the corpus of the law, particularly the texts of first-year courses, which appeared as the most fundamental. The narrative of law told through the

\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} See, e.g., \textsc{Barbara Allen Babcock \& Paul D. Carrington}, \textsc{Civil Procedure: Cases and Comments on the Process of Adjudication} (2d ed. 1977).
text needed to encompass feminist thought. Only with concerted effort would this domain, just as that of scholarly writing, allow entry to subversive accounts. Just as the academy viewed Clare’s scholarship with suspicion, feminists who challenged the standard presentation of material in the first year risked skeptical responses from colleagues and students. Clare and other feminists promoted exchange and experimentation that could produce different materials. Over time these efforts could yield fully developed texts. Clare saw that the Women and the Law Program could help feminist academics “develop materials for our own and others’ use” and explore when and how they might “supplement a traditional casebook,” or, at some later time, “provide a complete substitute.”

While the first-year curriculum continued as a focus of the Women and the Law Program through its annual workshops, the program also pursued other entry points into the law school curriculum, identifying those that at this point in history appeared amenable to change. While the established curriculum’s weight and solidity were formidable, women students were flooding into law schools after years of exclusion. Many of these students had the capacity and motivation “to exert some political muscle on behalf of other women, if they will,” and they had at their disposal the “growing body of empirical research into gender issues, and the growing body of formal and informal feminist and gender theory.” These factors aligned to create the potential “that professional cultures themselves will begin to change in ways responsive to women’s perspectives and experiences.” But these developments created only the possibility of change. The Women and the Law Program worked consistently with feminist legal academics to identify and foster strategies for creating a

---

59 Letter from Clare Dalton, Professor of Law, Northeastern University School of Law, to author (Feb. 10, 1986) (on file with author).
60 Dalton, supra note 36, at 1355 (citing Miriam Slater & Penina Migdal Glazer, Prescriptions for Professional Survival, DAEDALUS, Fall 1987, at 119, 132).
61 Id.
62 Id.
63 Id.
different curriculum. As Clare stated, “[w]omen too solitary to count on the support of other women, women too nervous about their vulnerabilities as women to take the risk involved in identifying politically with other women, will find it difficult to provide that guidance.” As the workshops continued to explore multiple facets of feminist work in the curriculum, participants found support and guidance in this collective project.

After Harvard denied Clare tenure and she won a significant settlement in her sex-discrimination lawsuit, she moved to Northeastern where she expanded and broadened her efforts to transform the law school curriculum. She continued to integrate these efforts into the collective work of the Women and the Law Program. In 1992, at the sixth annual workshop on Women’s Rights and the Law School Curriculum, Teaching about the Battering of Women: Women’s Experiences, Legal Responses and the Educational Project, Clare discussed two broad efforts among colleagues to change first-year stories of law that appeared in the curriculum: designing a torts class around domestic violence issues and using domestic violence to teach various subjects. As in her previous work, she looked to experiences shared among many women, the experiences of domestic violence, as part of the material for the new stories in the first year. Clare and her colleagues grounded both projects to change the traditional narratives of the first year in the dynamics of relationships that affected the lives of many women in many ways.

The choice of this topic related to Clare’s work on founding and shaping the Domestic Violence Institute at Northeastern.

---

64 Id.
67 Other presenters were Elizabeth Schneider and Margaret Mahoney. Id.
68 As part of the settlement of her sex discrimination lawsuit against Harvard, at the center of which was her article, Clare obtained Harvard’s funding for the Domestic Violence Institute. Alice Dembner, Harvard Law Ends Bias Suit by Agreeing on Institute, BOS. GLOBE, Sept. 22, 1993,
Addressing domestic violence throughout the different subjects of the first year and within various doctrinal formulations exposed how discrete legal categories inadequately contain the multiple aspects of people’s experience and relationships—a project fundamental to all Clare’s work. Clare and her colleagues proceeded with complementary strategies: the first made the social reality of domestic violence central to the exploration of several doctrinal categories throughout all the sections of the basic torts class; the second used domestic violence as a topic for analysis across different subjects—criminal law, torts, and contract law, for example—that routinely compartmentalize people’s experiences and students’ understanding of how law works in discrete neat packages.

In the first project, the redesign of the torts course reflected how feminist principles can begin to transform the culture of legal education. In shaping the course, Clare and her colleagues did not want to make domestic violence merely an interesting, even gripping, example of a doctrinal point; feminists in law schools had long criticized the exploitation in texts and in classroom hypotheticals of scenarios in which women suffer profound harm. To avoid treating domestic violence as just a random, convenient topic or sensationalizing violence against women, the torts faculty adopted several approaches. First, in the torts class, discussion of domestic violence recurred within three doctrinal areas: the no-duty rule in negligence, self-defense rules in intentional torts, and immunity rules within the context of governmental action and within the family. Faculty connected the exploration in each doctrinal area to the others, showing how themes, such as the public/private distinction, appeared across doctrines and were used to justify doctrinal resolutions. Second, exploration of the issues implicated in situations of domestic violence went beyond doctrinal or policy debates. Classes explored the social contexts within which domestic violence occurs and the different meanings it has, the systemic issues that affect the legal treatment of domestic violence, and the work of advocates in devising legal strategies to address both systemic failures and harm to individuals. Third, professors presented

(Metro), at 11.
issues of battering not only through legal texts, but also with materials that could make social contexts meaningful in understanding the interaction of the legal world and the social world.69

With this careful structure in place, Clare and her colleagues also developed teaching methods that reflected the messages they sought to convey. For example, they made the interactions among the students in the class central to the teaching mission and the teaching design. Knowing that “many students in the room . . . had violence touch their lives,” faculty “design[ed] experiences at the beginning of the year that alert[ed] students to the issues that [would] arise in class.”70 In addition, they anticipated and planned ways to structure classroom discussions that acknowledged “the presence and the power of the anger evoked” in the discussions, while including discussion of the harm to men as well as women when battering occurs.71 To include students’ experiences and feelings in the pedagogy of the class was to acknowledge how lawyers are connected to the law they practice and students are connected to the material they learn. People in cases are not abstract legal subjects, and lawyers are not abstract legal advocates. As Clare sought to displace the autonomous, objective legal subject at the center of liberal legal thought, she and her colleagues devised ways to reconstruct the law school classroom with students and their experiences central to the educational inquiry.

In the second project, all professors in first-year courses collaborated to devote a day to domestic violence, demonstrating that issues of domestic violence transcend subject matter, with

---

69 Social science literature about domestic violence, descriptions of how courts treat different kinds of cases involving domestic violence, and personal narratives of attempts to use the legal system in situations involving battering are examples of the types of materials that provided critical context for considering and assessing how legal doctrine frames and resolves complex aspects of social life.


71 Id.
each subject area limited in its capacity to address the complex social reality of partner abuse. This project, like Clare’s work on contract doctrine, critiqued how legal structures constrict fundamental questions of self-definition and of relationships, but situated that analysis within a particular, pervasive, deeply troubling part of the social world and placed it at the center of inquiry in the first-year curriculum. The faculty devised small group exercises that enabled students to participate in activities through which they could, at least in the constrained and artificially limited setting of a simulation, experience aspects of the real-world meaning and consequences of the legal stories about domestic violence.

The power of Clare’s account at the 1992 workshop came only partially from the particular initiatives she described. Rather, the workshop wove together her experiments in change with the compelling stories of other feminist academics working to create new forms of legal education through sustained, contextualized treatment of this one aspect of women’s experience. The multiple accounts of disrupting the standard format of law school classes expanded the imaginations of law teachers about manageable, effective ways to bring feminist thought and teaching into the curriculum and increased confidence and desire to undertake similar experiments. Perhaps the greatest tribute to Clare’s work at the site of law school teaching and curriculum is that pedagogical practices such as hers and those of the other feminist academics who joined in the annual workshops on Women’s Rights and the Law School curriculum now seem normal, regular parts of an expanded vision of legal education. Specialized courses abound, even if not evenly distributed across law schools. Many upper-level offerings and clinical courses routinely give serious attention

---

72 See Dalton, supra note 3, at 999–1000.
73 Women and the Law Project’s Discussion Group, supra note 70.
74 Examples of these teaching innovations have been presented at Professional Development Programs of the AALS.
75 For example, Women and the Law, Sex-Based Discrimination, Feminist Jurisprudence, Battered Women and the Law, and Reproductive Rights appear with some frequency across legal education.
76 For example, courses at many schools in employment, education,
to gender, and courses examining a range of critical theories include feminist analyses. At the same time, feminism has not swept away dominant structures and forms of thought from legal education. These remain, but less firmly in place and more susceptible to critique and reconstruction than when Clare entered legal academia more than thirty years ago.

III. CREATING THE NORTHEASTERN DOMESTIC VIOLENCE INSTITUTE

Clare’s move to Northeastern and the monetary settlement she obtained in her claim against Harvard afforded her another opportunity to transform law and legal education through feminist thought and action. Supported partially by the Harvard funds, Clare worked with others, most notably Lois Kanter, to establish the Northeastern Domestic Violence Institute. The Institute was a feminist clinical program at the intersection of immigration, civil rights, human rights, criminal law, and family law address issues involving analysis of gender.

For example, specialized clinics in women and the law, domestic violence, and sex discrimination appear regularly among a law school’s clinical offerings. Clinics addressing lawyering across many spheres of law and practice—whether through specialized focus on areas such as immigration, human rights, tax, intellectual property, or disability rights or through general approaches to lawyering, such as civil practice, community lawyering, or community economic development—often give substantial attention to questions of law and practice that pose issues related to gender, race, inequality, and multiple forms of exclusion. See generally Margaret Johnson, An Experiment in Integrating Critical Theory and Clinical Education, 13 AM. U. J. GENDER SOC. POL’Y & L. 161 (2005).

For example, courses in critical race theory or sexuality and law routinely explore how gender operates in conjunction with other structures of exclusion, discrimination, and subordination.


law school and the community. Through advocacy, education, research in the community, and representation of women in violent relationships, the Institute provided legal education in which learning and understanding of law proceeded from students’ immersion in and reflection on the social world of women who experienced abuse and the legal institutions and practices established to address that abuse. Through the educational structures of the Institute, students could learn to identify the implicit and explicit images of women in violent relationships, compare those images to their clients’ experiences and understandings, and challenge the ways that the law and the legal system operate to cast women in violent intimate relationships as victims lacking in knowledge and judgment about their lives. They could engage in forms of legal practice that made options for acting beyond the limited possibilities enshrined in the legal process available to their clients. As with all that Clare did, the power of the Institute’s approach came from its engagement with others in a collective effort to transform law, legal institutions, and lawyering through feminist thought and action.

As Clare was developing the Institute at Northeastern, clinical faculty—like feminist faculty—were challenging traditional visions of law, as well as forms and methods of legal education. Concepts and approaches shaped by these two overlapping groups of faculty drew on similar themes. The Domestic Violence Institute belonged to both projects. Proceeding from the early work of Clare and those in clinical education, the pedagogical structures and practices of such

---


clinics now aim to generate understanding of how law, lawyering, and legal institutions can both create possibilities for remedying harms to women who experience abuse, and also constrain how law and society address the experiences of domestic violence. In the educational activities of the Institute, as in other domestic violence clinics, students’ understanding of law grows from relationships with women struggling with the ambiguities in and complexity of their relationships with others. As advocates for these women, students learned to incorporate into client representation the possibilities of using law to help women address violence in their relationships, while recognizing its many problematic and harmful dimensions. In their representation and their other work in the community, students encounter the distortions and limits of law in individual cases and in systemic practices. They see how law can force a woman into leaving an intimate partner, even if that action poses dangers she understands better than others. They also learn how law can require a woman to cooperate in seeking incarceration for a partner, even if jail harms all members of her family, or can fail to secure the most basic forms of immediate help with jobs or income at a time of grave danger. With this understanding of law, students learn to expand their vision of the work of the lawyer to include engagement with institutions in the community that can be resources for individual women and can be important in creating systemic change.

83 See Goodmark, supra note 79, for an analysis of how feminist thought and practice about domestic violence are reflected in this form of legal education. See Schneider & Hanna, supra note 43, for a discussion of the evolution of feminist approaches to violence against women since Clare and others established the Institute.

84 Clinical academics analogously have structured legal pedagogy to highlight the relationship of individual and community. See generally, e.g., Sameer Asher, Law Clinics and Collective Mobilization, 14 CLINICAL L. REV. 455 (2008); Susan Bennett, Little Engines That Could: Community Clients, Their Lawyers, and Training in the Arts of Democracy, 2002 WIS. L. REV. 469; Juliet Brodie, Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics, 15 CLINICAL L. REV. 333 (2009); Susan Bryant & Maria Arias, A Battered Women’s Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering that Empowers Clients and Community, 42 WASH. U. J.
Clare made the Institute her central priority at the moment of transition not just from Harvard to Northeastern, but from institutional rejection to approval, and from a focus on doctrinal formulations to law in the context of the world of legal practice and social life. In her development, she expressed the central commitments that had guided her work since she wrote about contract doctrine: “how we should conceive relationships between people, how we should understand and police the boundary between self and other.”\(^85\) She wrote about how the “inherent indeterminacy”\(^86\) of law and legal argumentation can reveal these issues but cannot resolve them, and how we need to “reflect directly on the concrete aspects of social life that create the disputes and shape their resolution.”\(^87\) At all the critical sites within the legal academy, she integrated these commitments into her work.

As a feminist legal academic, Clare experienced the importance of connection to other feminists and to feminism. She understood the different aspects of her work—as a scholar, a teacher, and a designer of curriculum—to be part of the task of feminist transformation of legal understanding, legal practice, and legal education. In the realm of legal scholarship, her writing helped to enrich the legal inquiry of feminist academics and to make the scholarly enterprise more inclusive of and accessible to all women. With each use of her work by others, her writing validated the importance of the development of feminist thought to all legal thought. But the very success of her article on contract doctrine exhibited the reality that individual achievement on its own will not bring about change. Merit alone could not secure tenure in a world of structural discrimination. However, the fruits of her battle against that discrimination through her litigation against Harvard secured the funding for a

\(^85\) Dalton, supra note 3, at 1006.

\(^86\) Id. at 1007.

\(^87\) Id. at 1003.
Domestic Violence Institute based on feminist understanding, constructed with other feminists and supported by an institution in which feminism could flourish. Her own life thus reflected her analysis of the lives of other women who had sought professional fulfillment in worlds within which women were subordinate.\textsuperscript{88} Clare wrote that women needed to remain cognizant of “the professional commitment to meritocracy as containing a substantial element of window-dressing.”\textsuperscript{89} She therefore cautioned that women should not accept the invitation to reinterpret experiences of prejudice and discrimination as experiences of personal inadequacy. They should not imagine that superperformance will be an amulet against such experiences. They should not accept the argument that women “choose” subordinate professional roles . . . without attention to the way these “choices” are culturally constrained.\textsuperscript{90}

In the multiplicity of its meanings, Clare’s contract article reminds us that even today, more than twenty-five years after its publication, feminist legal thought has an ambiguous and unstable place in the legal academy, simultaneously honored and marginalized, always in need of grounding in feminist support and action. Just as Clare urged, feminist legal academics continue to engage in collective effort not just to inhabit but to transform legal thought and legal education. Absent this grounding, Clare warned that women will be “stopped short of their full potential.”\textsuperscript{91} When they can “locate the problem firmly outside themselves,” however, and can feel “comfortable working politically with other women and sympathetic men, to combat the forces arrayed against them,” they will not have to bear the “personal cost” of the “denial of some of the realities of their lives.”\textsuperscript{92} With her guidance, feminist academics continue to build on the legacy that Clare explicitly and munificently bequeathed to them. They work in virtually every area of law both to continue

\textsuperscript{88} Dalton, supra note 36.  
\textsuperscript{89} Id. at 1354.  
\textsuperscript{90} Id. at 1353–54.  
\textsuperscript{91} Id. at 1354.  
\textsuperscript{92} Id.
to elaborate the meaning of feminist legal theory in all its
diversity\textsuperscript{93} and to bring insights from feminist analysis to realms
of legal education still resistant to feminist questions.\textsuperscript{94}

CONCLUSION

As we honor Clare’s work with this symposium on
Challenging Boundaries in Legal Education, we see the
trajectory of feminists and feminism in the legal academy. We
identify the moments when Clare, always along with others,
created new visions of law and legal education and new
practices to make those visions real. Feminist academics, along
with those from other critical traditions,\textsuperscript{95} have brought about
something of a renewal of legal education. While partial,
tentative, and fraught with contradictions, the multiple changes
in legal education and broad discussion of the exciting
possibilities\textsuperscript{96} emerged in their current form largely because of
the efforts of committed academics—feminists prominent among
them—to remake the entire culture of legal education. This
transformation creates not just possibilities for richer and more

\textsuperscript{93}See, e.g., Baer, supra note 38, at 252 (discussing feminist approaches
to German jurisprudence); Bartlett, Feminist Legal Methods, supra note 38,
at 829 (identifying and critically examining feminist practical reasoning and
consciousness-raising and describing the concept of positionality); Burk,
supra note 38, at 185 (arguing that the feminist theory of oppositional pairs
may show how intellectual property law contributes to determining and
maintaining a pervasive set of power relationships in society); Littleton,
supra note 38, at 1285 (describing the feminist legal scholars’ reaction to the
civil rights movement and sexual equality); Paetzold, supra note 38, at 713–
14 (applying feminist ideas to business law).

\textsuperscript{94}See Judith G. Greenberg, Martha L. Minow & Dorothy E.
Roberts, Mary Jo Frug’s Women and the Law (3d ed. 2004); see also
sources cited supra note 38.

\textsuperscript{95}Critical legal studies and clinical theorists have been the most
prominent, although her work also intersects with that of law and society and
critical race theory.

\textsuperscript{96}The vibrancy of both the critiques of legal education and the
possibilities for change are captured most recently and prominently in
William M. Sullivan et al., The Carnegie Found. for the
Advancement of Teaching, Educating Lawyers: Preparation for the
engaged educational experiences, but also for a legal profession and a society that can deploy law better to address “commitments and concerns central to our society.”

97 Dalton, supra note 3, at 1009.
CONFRONTATION IN CHILDREN’S CASES:
THE DIMENSIONS OF LIMITED COVERAGE

Robert P. Mosteller*

I. INTRODUCTION

Application of the rules of evidence in cases involving children is often different than in those involving adults. The central reason for the variation is not difficult to understand. Children have limited capacities, and in providing evidence generally and presenting evidence in the courtroom, they face special challenges. In multiple minor ways, courts simply have no alternative other than making some adjustments. Frequently, judges will entertain more significant accommodations, as well, to avoid the loss of valuable evidence or minimize the trauma of testimony. In child sexual abuse cases, the revolting nature of the crimes puts its own emotional pressure on courts to admit the child’s evidence.

Hearsay is particularly important in many cases in which children are victims because of the need to supplement the incomplete versions of events provided by children as witnesses in the stressful environment of trials. Initial statements regarding the events are often needed to convict because the crimes are committed in private with no outside witnesses and frequently no definitive physical or scientific evidence of either the crime or the identity of the perpetrator.

Given these background facts, it would hardly be surprising if application of Crawford v. Washington and its new testimonial

* J. Dickson Phillips Distinguished Professor of Law and Associate Dean for Academic Affairs, University of North Carolina School of Law. I would like to thank participants at the symposium for their helpful comments and Eric Roehrig for his excellent work as research assistant on this project.
statement approach to confrontation doctrine was more nuanced, complicated, and uncertain in cases involving children. Although the doctrine’s application is undeniably different, it is generally not less certain. The lines in most cases involving children are just as clear as in adult cases—perhaps even clearer for some commonly encountered situations.

However, the general uncertainty and flexibility brought into the confrontation analysis by the United States Supreme Court’s decision in *Michigan v. Bryant*, with its elaborate multifactor test to determine whether the questioning relates to an ongoing emergency, will likely have a significant effect in children’s cases. The complicated *Bryant* test effectively gives lower courts a large measure of discretion in resolving the testimonial concept’s application by making the determination dependent upon numerous elements of the case, potentially going beyond the emergency issue that was the immediate focus of *Bryant*.

Where the law of confrontation goes from here, in general and in children’s cases, is hardly settled. As it now stands, the doctrine applies clearly only to a limited number of situations, regardless of whether the declarant is a child or an adult. In the large remainder of cases, lower courts make decisions regarding a potentially testimonial statement using a heavily fact-dependent and largely discretionary form of analysis that is likely to result in admission of apparently important and reliable, but un-confronted, hearsay. We are moving toward a Confrontation Clause where *Crawford* is uniformly applied to a very modest number of cases and where, for a sizeable group of other cases, its application is unpredictable. This same pattern is found in

---


3. In *Bryant*, statements of a seriously injured man to police officers about the identity of the person who shot him and the circumstances of the shooting, although removed in time and space from the offense, were ruled nontestimonial because the police inquiry related to resolving the existence of an ongoing emergency. *Id.* at 1150.
cases involving children. As the dimensions of the Crawford system were initially being defined, courts and commentators complained primarily of the unpredictability of Confrontation Clause law. Another two major questions should be added now: whether the lines drawn by the testimonial doctrine make sense, and, more significantly, whether the resulting system has been worth the effort.

In Part II, I describe the somewhat uncertain future of the Crawford doctrine. As the doctrine is applied to hearsay of different types and in varying situations, its support among members of the Supreme Court has declined. In Part III, I demonstrate the clarity of application of the testimonial statement doctrine to most types of statements made by children. By bringing trial court discretion into play, Bryant has the potential to limit the application of the doctrine in the one area where protection has been clear. Part IV highlights the difficulty of reaching clear results for statements produced for multiple purposes. Part V examines a number of discrete issues involving principally the elicitation of testimony from children who testify, bemoaning the limited efforts to help facilitate and expand confrontation as an alternative to exclusion of the testimony or broadly denying defendants the right to confront child witnesses.

II. THE UNCERTAIN STATUS OF CRAWFORD AS CONSENSUS ERODES IN THE SUPREME COURT

As the Crawford approach loses commitment within the Court, it is possible, although unlikely, that the testimonial statement doctrine could be greatly limited or wiped off the books. While the present Court is unlikely to do an about-face and reverse Crawford, the voting pattern shows declining support. The near consensus that existed in the Crawford

---

4 Although a few features of the analysis might resemble the old Roberts system, the new multi-factored analysis is directed to the definitional question of whether the statement is testimonial, whereas the old system focused upon the substantive issue of trustworthiness. See id. at 1162 (“In determining whether a declarant’s statements are testimonial, courts should look to all of the relevant circumstances.”).
decision—which commanded a 7-2 majority—and Davis v. Washington—which was virtually unanimous—is a relic of the past.

On the one hand, Justice Scalia remains enthusiastically on board as architect and author of Crawford, Davis, California v. Giles, and Melendez-Diaz v. Massachusetts. Among the justices on the Court, Justice Ginsburg has been his most consistent supporter, apparently driven by her liberal views rather than Justice Scalia’s originalism. The remaining seven justices, however, are not consistent supporters of Crawford.

Changes in the Court’s membership played a minor role in reducing support for the Crawford approach. When the more liberal Justices Stevens and Souter were replaced by the more moderate Justices Sotomayor and Kagan, whatever impact the right to confrontation might have had on criminal procedure was reduced. Justice Breyer’s conversion from a contributing member of the group of Justices and scholars who created the new Confrontation Clause doctrine that became Crawford, to a full-fledged opponent, played a more major role. During oral argument in Giles, Breyer and Scalia had a telling exchange in which Breyer announced his impending exit from the Crawford enterprise:

5 Chief Justice Rehnquist and Justice O’Connor agreed with the result, but they would have retained Roberts. See Crawford, 541 U.S. at 75–76 (Rehnquist, C.J., joined by O’Connor, J., concurring).

6 Davis v. Washington, 547 U.S. 813 (2006). Davis was unanimous but for Justice Thomas’ concurrence, which related to the lack of formality of the statement, which was not at issue in the case.

7 Scalia has described Crawford as his favorite opinion. See Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court 317 (2007).


10 On the other hand, Justice Stevens’ sensitivity to domestic abuse may have also have produced his dissenting vote in Giles. See Giles, 554 U.S. at 404 (Breyer, J., dissenting) (noting that the Court’s requiring subjective intent to silence the witness as a predicate for forfeiture by wrongdoing would disproportionately impact domestic violence prosecutions).

Justice Breyer: I joined *Crawford*, and Justice Scalia would like to kick me off the boat, which I’m rapidly leaving in any event, but the . . . .

Justice Scalia: You jumped off in *Crawford*, I thought.\(^{12}\)

Justice Breyer’s vigorous dissent in *Giles* confirmed his departure.\(^{13}\) Concerns about the impact of *Crawford* on domestic violence prosecutions are likely at the heart of his shift in position.\(^{14}\) Justice Breyer is now a solid vote for a much different approach than the current *Crawford*-based doctrine offers, and potentially even for starting over.\(^{15}\)

Chief Justice Roberts supported the *Crawford* enterprise initially, joining the *Davis* and *Giles* opinions, but he turned away in *Melendez-Diaz* and *Bullcoming v. New Mexico*, joining the dissent in both opinions,\(^{16}\) and he joined Justice Sotomayor’s limiting opinion in *Bryant*. Justice Alito has had a similar voting pattern to Chief Justice Roberts, although his earlier support was even more limited.\(^{17}\) Three Justices, Roberts, Alito, and Breyer, constitute a solid group in opposition to *Crawford*’s approach, and Justice Kennedy, who authored a spirited dissent in *Bullcoming*\(^{18}\) appears to be part of that oppositional group.\(^{19}\)

\(^{12}\) Transcript of Oral Argument at 13, *Giles*, 554 U.S. 353 (No. 07-6053) [hereinafter *Giles* Transcript]. In the *Bryant* argument, Justice Breyer stated: “I joined *Crawford*, but I have to admit to you I have had many second thoughts when I’ve seen how far it has extended . . . .” Transcript of Oral Argument at 35, *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (No. 09-150) [hereinafter *Bryant* Transcript].

\(^{13}\) See *Giles*, 554 U.S. at 381–404 (Breyer, J., dissenting).

\(^{14}\) See id. at 404 (noting the particular impact on domestic violence cases of the Court’s rule requiring intent to silence the witness for a forfeiture by wrongdoing).

\(^{15}\) In the *Giles* argument, Justice Breyer expressed a strong opposition to *Crawford*’s approach: “[m]aybe we have to assume an intent to allow the contours of the Confrontation Clause to evolve as the law of evidence itself evolves.” *Giles* Transcript, *supra* note 12, at 34–35.


\(^{17}\) See *infra* notes 23–24 (describing Justice Alito’s strict view of the formality requirement for testimonial statements).

\(^{18}\) Chief Justice Roberts and Justices Alito and Breyer joined Kennedy’s
Justice Thomas shares Justice Scalia’s commitment to the originalist jurisprudence on which the testimonial concept and the *Crawford* opinion are based, but he supports a much narrower definition of “testimonial” that requires strict formality of the statement. In Justice Thomas’s view, the statement must be memorialized in written or recorded form to be testimonial, a requirement that would significantly limit the application of the testimonial concept. Indeed, Justice Thomas takes the position that, except where statements are informally taken to evade confrontation, if the statement is not in written form or its modern equivalent (such as recorded interrogation in *Crawford*), it is not testimonial. Justice Alito has joined Justice Thomas’s apparent repudiation of the *Crawford* doctrine in his dissent in *Bullcoming*.

19 Although questioning in an oral argument is often poor evidence for a justice’s position, Kennedy’s questioning in the most recent confrontation case, *Williams v. Illinois*, 131 S. Ct. 3090 (2011), suggests a more supportive position regarding the *Crawford* approach to expert evidence than his recent dissents in *Bullcoming* and *Melendez-Diaz* would suggest. See Transcript of Oral Argument at 22, *Williams*, 131 S. Ct. 3090 (No. 10-8505) (apparently supporting the defendant’s position in noting that if the expert’s statement was not used for its truth it would be irrelevant). The other Justices—Roberts, Alito, and Breyer—showed no signs of uncertainty in their opposition during that oral argument. See generally id.


21 See *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment) (“[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”).

22 In *Giles v. California*, 554 U.S. 353 (2008), Justice Thomas concurred in the judgment because the parties had not contested the testimonial quality of the statement. Nevertheless, he expressed his commitment to the fundamental requirement of formality of the statement, expressing his position as follows:

I write separately to note that I adhere to my view that statements like those made by the victim in this case do not implicate the Confrontation Clause. The contested evidence is indistinguishable from the statements made during police questioning in response to the report of domestic violence in *Hammon v. Indiana*, decided with
strict formality position. Thus, despite their approval of the holding in *Crawford*, Justices Thomas and Alito have expressed opposition to treating oral statements to the police as testimonial. Their position is contrary to the outcomes in *Hammon v. Indiana* and *Giles*, which both involved such oral statements. As a result, a majority of the Court now opposes finding ordinary witness statements to the police testimonial, eliminating the right of confrontation for a substantial category of the statements that lower courts routinely find within *Crawford’s* testimonial definition.

*Davis v. Washington.* There, as here, the police questioning was not “a formalized dialogue”; it was not “sufficiently formal to resemble the Marian examinations” because “the statements were neither Mirandized nor custodial, nor accompanied by any similar indicia of formality”; and “there is no suggestion that the prosecution attempted to offer [Ms. Avie’s] hearsay evidence at trial in order to evade confrontation.” *Id.* at 377–78 (Thomas, J., concurring) (citations omitted) (quoting *Davis v. Washington*, 547 U.S. 813, 840 (2006) (Thomas, J., concurring in the judgment and dissenting in part)).

In his *Giles* concurrence, Justice Alito wrote “separately to make clear that, like Justice Thomas, [he was] not convinced that the out-of-court statement at issue [there] fell within the Confrontation Clause in the first place.” *Id.* at 378 (Alito, J., concurring).

In addition to a written statement by the victim, *Hammon* involved the police officer’s testimony regarding what she orally told him. *See Davis*, 547 U.S. at 820. Given the position Justice Alito took in *Giles* to associate himself with Justice Thomas’ view, it is somewhat inexplicable that he joined the *Davis* opinion rather than joining Justice Thomas’ concurring opinion. *See id.* at 840 (Thomas, J., concurring) (noting the oral statement given to the police in *Hammon* lacked sufficient formality to be considered testimonial).

In *Giles*, Justices Thomas and Alito joined the opinion because the state had not contested the testimonial character of the statement to police. *Giles*, 554 U.S. at 377 (Thomas, J., concurring); *Id.* at 377 (Alito, J., concurring).

These two justices diverge, however, in their view of the propriety of treating forensic certificates as testimonial, Justice Thomas supporting that treatment and Justice Alito opposing it. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530, 2543 (2009) (Justice Thomas joining Justice Scalia’s opinion and Justice Alito joining Justice Kennedy’s dissent); *see also Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709, 2723 (2011) (Justice Thomas joining Justice Ginsburg’s majority except as to two parts and Justice

---

23

24

25

26
Let’s imagine that the Court considers in its next term an oral statement to a police officer by a victim, and the prosecution challenges the testimonial quality of the oral statement on grounds that included its lack of formality. Were it not for stare decisis, the Court would presumably find the statement not testimonial by a vote of 5 to 4. Justice Thomas would join the four who dissented in Melendez-Diaz and Bullcoming—Roberts, Breyer, Kennedy, and Alito—to form a five-justice majority that would find the statement outside the testimonial definition. The newly reshaped doctrine would bar only the formally testimonial statements endorsed by Justice Thomas in his White concurrence, which include formal written statements, forensic certificates, and other formal testimonial documents of the type covered by Melendez-Diaz, as well as recorded interrogations at the stationhouse of the type involved in the Crawford case.27 However, assuming a commitment to stare decisis is sufficient to preserve the Hammon and Giles results, there appears to be a sustainable majority for Crawford’s basic testimonial statement approach, albeit with a limited reach.

Justice Sotomayor provides the swing vote to shape the testimonial doctrine. Her opinion in Bryant effectively narrowed the scope of testimonial statements by expanding the meaning of ongoing emergency and enlarging the factors, including hearsay exceptions, relevant to a testimonial determination. She supported the Melendez-Diaz concept, but she suggested limitations on that aspect of the doctrine through her concurring opinion in Bullcoming.28

Alito joining Justice Kennedy’s dissent).

27 It is a substantial question whether that retrenchment would cause the Court to overrule the Crawford doctrine and start over, or maintain the dramatically restricted doctrine going forward.

28 Bullcoming, 131 S. Ct. at 2720–23 (Sotomayor, J., concurring). Certiorari was granted a few days later to resolve the issue identified in her concurring opinion of whether testimonial documents are covered by the Confrontation Clause when used for the traditional non-hearsay purpose of supporting the opinion of a testifying expert. See People v. Williams, 939 N.E.2d 268 (Ill. 2010), cert. granted, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505).
III. RESULTS IN CHILDREN’S CASES

I will not restate here why I find analysis that focuses on the compromised intent or expectation of the child because of developmental limitations to be practically unhelpful,29 or why I conclude there is no reason to create a general exception for treating children as witnesses covered by the Confrontation Clause.30 Where the declarant is a child, Davis effectively shifts

30 At this symposium, Professor Richard Friedman continued to argue for developing a general exception to treating young children as witness even when they make clearly accusatory statements to law enforcement officials because he contends their statements are qualitatively different from those made by adults and outside the definition of testimonial utterances. His proposal would eliminate all protections against these accusatory statements under the Confrontation Clause. He develops his generalized argument from the aberrational case of State v. Webb, 779 P.2d 1108 (Utah 1989). See Richard D. Friedman & Stephen J. Ceci, The Child Quasi-Witness (Nov. 11, 2011) (unpublished manuscript) (on file with the Journal of Law and Policy); see also Richard D. Friedman, Grappling with the Meaning of “Testimonial,” 71 BROOK. L. REV. 241, 272 (2005). Webb involved virtually incomprehensible words uttered by an eighteen-month child, 779 P.2d at 1108–09, which the state court ultimately held were insufficient as a matter of state law to support a guilty verdict. Id. at 1115.

As I have set out in an earlier article, when one reads the vast range of cases, particularly criminal cases, that involve the words of children presented through their hearsay statement, one finds these statements to be comprehensible assertions of functioning human beings with purposeful communicative abilities. They are not, I contend, mere pieces of evidence that are distinct in kind from the statements of adults. See Mosteller, supra note 29, at 975–76. Professor Friedman’s proposal, which unfortunately is not carefully cabined to the aberrational case, is ill-conceived and destructive of the limited confrontation rights defendants enjoy under the testimonial approach. His contention that the destruction of Confrontation Clause protections in this area would be offset by the creation of a right of examination of the child by a defendant-selected expert under the Due Process Clause is unfortunately highly unlikely under existing doctrine or as a matter of legislative grace in a world of constrained resources. Moreover, he provides no theory for a necessary link between his proposed destruction of Confrontation Clause coverage for children’s statements and creation of this new right. If there is a right of expert examination of children, it should
the court’s analysis of whether a statement is testimonial from the declarant’s purpose in giving a statement to the purpose of the questioner. Although Justice Scalia, citing Professor Richard Friedman’s work, contends that “[t]he declarant’s intent is what counts,” the Supreme Court in Bryant stated that “Davis requires a combined inquiry that accounts for both the declarant and the interrogator.” In my view, courts analyze the intent of the questioner in children’s cases because that perspective has some potential to give the inquiry an objective base and avoid easy manipulation of outcomes.

A. Statements to Police

In cases involving child declarants, statements to police are generally treated as testimonial because children are typically not already have been recognized, particularly in the myriad of situations where the right of confrontation is not presently protected. Finally, courts can embrace his destruction of the Confrontation Clause right under his argument that such children’s statements are not testimonial even for accusatory statements made by children to government investigators without providing any compensating protection, and I fear that if they do anything with his proposal, this one-way denial of confrontation protection will be the result.

Michigan v. Bryant, 131 S. Ct. 1143, 1168 (Scalia, J., dissenting) (citing Richard D. Friedman, Grappling with the Meaning of “Testimonial,” 71 BROOK. L. REV. 241, 259 (2005)).

Id. at 1160 (majority opinion).

In an earlier article, I elaborated on my analysis as follows:

In situations where the statement would be clearly testimonial if judged from the questioner’s perspective, courts generally reject limiting the testimonial concept based on either the subjective and limited child’s perspective or the similar result achieved by an objective approach considering the age and circumstances of the child. I suggest that [they] do so because they find outcomes based on those perspectives so unpalatable. The statement may be highly accusatorial and would have been clearly testimonial if it had been made by an adult, and the adult who is receiving the statement may fully appreciate its use. The courts seem most troubled that this analysis would permit the statement to be used despite extraordinary clear purpose by the government questioner, given the Supreme Court’s focus on the dangers of governmental manipulation.

Mosteller, supra note 29, at 980 (citations omitted).
accessible to the police until after an ongoing emergency has concluded. However, Bryant may alter that result at the margins and potentially work more substantial changes in outcomes through its invitation to lower courts to apply an open-textured, multifactored analysis.

In an earlier article, I wrote:

Unlike in domestic violence cases, the police do not generally encounter a child still in an emergency situation, nor does the child call an agent of the police, such as a 911 operator. Rather, in cases involving children, the police are summoned by parents or other adults after these private parties have secured the child’s immediate safety and often after they have determined that a crime has occurred. Perhaps also the uniformity of the response has resulted because Justice Scalia indicated that a mistake had likely been made in White regarding the statement of the child to the police.34

The cases treat statements to the police as nontestimonial in the unusual situation where the police encounter the child in an undefined situation or a clear emergency.35 The Bryant decision

---

34 See id. at 949–50. In Wright v. State, 673 S.E.2d 249, 253 (Ga. 2009), the Georgia Supreme Court found that statements made by a child, who was three or four at the time of the statement, were testimonial when made in response to an officer’s question regarding “what happened.” Wright, 673 S.E.2d at 253. The child’s mother had a bruise on her face. This conclusion was reached without extended analysis apparently because it was straightforward in the absence of evidence presented regarding an ongoing emergency. Id.

35 In Commonwealth v. Patterson, 946 N.E.2d 130, 134 (Mass. App. Ct. 2011), the Massachusetts Appeals Court ruled nontestimonial the statements of a five-year-old child as the officers walked into what the court described as a “volatile and unstable scene of domestic disturbance.” The child stated: “He pushed Mommy into the wall. He had a gun.” Id. at 132. The statement was made spontaneously, without police questioning. The court concluded that there was nothing to indicate that it was made for any purpose other than securing aid.

Lagunas v. State, 187 S.W.3d 503 (Tex. Ct. App. 2005), which was decided before the Davis decision, presents a fact pattern resembling an ordinary criminal case more than the typical child sexual abuse case. The child’s mother had been kidnapped from her home where a four-year-old
is unlikely to change the outcome in the typical situation, since no ongoing emergency will exist at the time the police have their first conversation with the child. However, Bryant will certainly add some flexibility for courts to find initial statements by a child to law enforcement officers to be nontestimonial by expanding the definition of an ongoing emergency to include those where the potential dangers to the child or the child’s condition, for example, have not been fully clarified.

Questioning by law enforcement may serve many nontestimonial purposes. Bryant recognized that the existence or nature of the declarant’s injuries might be relevant to the primary purpose inquiry enunciated in Davis.36 The police may also want to learn the identity of the perpetrator to determine whether he remains a threat to other children or to the victim herself. If they are uncertain of the accuracy of information provided by adults caring for or having access to the child, the police may also want to confirm with the child the identity of the perpetrator.

In most situations, those issues will be clearly resolved before the officers gain their first access to the child. In other cases, where a known perpetrator “flee[s] with little prospect of posing a threat to the public,” as occurred in both Illinois v. White37 and Davis, there is a diminished likelihood that an emergency continues. Nevertheless, after Bryant, arguments that a declaration by a child is nontestimonial will be quite plausible in a number of standard situations, such as where the perpetrator

child remained. A police officer returned to the home after the mother escaped, where he found the child. The officer asked the child “what happened to her mommy. And she stated that ‘A bad man had killed her and took her away.’” Id. at 508. The court concluded that the initial question was not testimonial because the officer’s questions were motivated by concerns for the safety and welfare of the child. The child’s response “amounted to a small child’s expressions of fear.” Id. at 519. The officer also asked follow-up questions, which might be treated as testimonial, as the Supreme Court in Davis treated the victim’s statements after the defendant had left the premises. See Davis, 547 U.S. at 828.

36 See Bryant, 131 S. Ct. at 1159.

37 Illinois v. White, 502 U.S. 346, 349 (1992) (describing the babysitter being awakened by the child’s screams and seeing the defendant first leave the child’s room and then the house).
remains unidentified, may be a member of the household, or may potentially have continuing access to the child or other children. Indeed, before Bryant, in response to arguments of this type, courts found these statements to be nontestimonial because the period of the emergency was extended, and social workers were seen as questioning the child to meet their responsibility for her safety and welfare. After Bryant’s general expansion of the scope of emergencies and the types of concerns viewed as included in police questioning directed to resolving those emergencies, arguments of this sort will likely have more persuasive power if made regarding police inquiries of the child.

Justice Scalia’s dissent in Bryant may have overstated the impact of the case on the Crawford testimonial doctrine. However, the opinion’s one clear impact is the signal it sends to lower courts, particularly trial courts, that the line between testimonial and nontestimonial statements is not clear. This is the case even when the statement was made to law enforcement officers regarding past criminal events, and the testimonial quality of the statement is subject to a fact-dependent and uncertain analysis. My sense is that in the wake of the Davis opinion, courts have consistently ruled that statements by

In Commonwealth v. Allshouse, 985 A.2d 847, 857–58 (Pa. 2009), cert. granted, vacated, 131 S. Ct. 1597 (2011), the Pennsylvania Supreme Court ruled that questioning by a county caseworker a week after an assault was nontestimonial because it was for the purpose of ensuring children’s safety given unresolved issues about who was the person responsible for the assault. On remand from the United States Supreme Court after Bryant, the Pennsylvania Supreme Court affirmed the result on largely the same grounds, albeit slightly broader grounds invited by Bryant. See Allshouse, 36 A.3d at 176–82 (Pa. 2012). Similarly, in State v. Buda, 949 A.2d 761, 778–80 (N.J. 2008), the New Jersey Supreme Court found that questioning by a member of a special response team from the Division of Youth and Family Services was not testimonial because it was for the purpose of determining how to protect a injured child from the source of his injuries, which appeared to be the adults charged with his care. See generally Christopher C. Kendall, Note & Comment, Ongoing Emergency in Incest Cases: Forensic Interviewing Post Davis, 10 Whittier J. Child & Fam. Advoc. 157, 170–80 (2010) (arguing that in cases of incest the gathering of data to determine the identity of the perpetrator and to protect the child from continued victimization should be treated as nontestimonial because its purpose is to meet an ongoing emergency).
children to law enforcement officers are testimonial, despite disliking the outcome, because they conclude that there are no credible alternative interpretations. This consistency in treating such statements as testimonial is in contrast to the early decisions after *Crawford* when a number of courts latched onto widely varying arguments in an apparent attempt to avoid finding the statements excluded under the Confrontation Clause. Whatever else results from *Bryant*, it provides judges with multiple additional grounds on which to justify admission when they are concerned about the consequences of excluding hearsay statements to the police, even those previously clearly testimonial statements made by children in relatively settled situations. Consistency will predictably diminish with regard to the admissibility of children’s statements to the police.

**B. Statements to Family Members and Friends**

Statements to parents, family members, and friends are uniformly considered not testimonial. This result was solidified after *Davis* established that the primary purpose of the questioner was relevant. Courts freely assume that private individuals generally, and family members in particular, ask questions of the child for the primary purpose of ensuring the health and welfare of the child rather than prosecuting the

---

39 See, e.g., State v. Forrest, 596 S.E.2d 22, 27–29 (N.C. Ct. App. 2004), aff’d, 611 S.E.2d 833 (N.C. 2005) (ruling statement by victim to police officer not testimonial because not sufficiently formal in that it was spontaneous and made in the field), cert. granted, vacated, 548 U.S. 923 (2006) (remanding “for further consideration in light of *Davis*”).

40 See *Bryant*, 131 S. Ct. at 1175–76 (Scalia, J., dissenting) (listing the many types of factors to be considered by the trial court under the Court’s newly established open-ended and amorphous definition of an ongoing emergency).

41 The implications of *Bryant* are likely to be felt in other areas as well. Statements to multidisciplinary teams, discussed later, see infra Part IV, which are frequently videotaped and introduced at trial, are not testimonial if made primarily for a medical purpose and if made during an ongoing emergency, both of which may be broadly construed after *Bryant*. They are testimonial if made for a clearly forensic purpose, and clarity may be difficult to find in *Bryant’s* wake.
perpetrator, even though both purposes are logically of concern.\footnote{In \textit{State v. Ahmed}, 782 N.W.2d 253, 259 (Minn. Ct. App. 2010), the Minnesota Court of Appeals concluded that a statement made to the child’s grandmother outside an interview room was not testimonial. Its result was justified under both a far-reaching approach that the statement was nontestimonial because not made to a government official and a traditional approach regarding the purpose of the questioning. \textit{Id.} Utilizing the traditional interpretation, it recognized that the child was expressing pain to a close relative from whom he expected help and comfort, albeit a statement made just outside the room where a formal interview by governmental officials was to occur. \textit{Id.} Similarly, in \textit{State v. Hopkins}, 154 P.3d 250, 256 (Wash. Ct. App. 2007), the Washington Court of Appeals ruled that a child’s statement made to her family members was not testimonial because the questioners were not contemplating prosecution of a criminal case but rather were concerned about her physical well-being and future safety.}

Some lower courts have identified a more fundamental dichotomy, which the Supreme Court has certainly not rejected: statements to private individuals are categorically not testimonial,\footnote{In \textit{Ahmed}, the Minnesota Court of Appeals stated that “[s]tatements made to nongovernmental questioners, who are ‘not acting in concert with or as an agent of the government’ are considered nontestimonial.” \textit{Ahmed}, 782 N.W.2d at 259 (quoting \textit{State v. Scacchetti}, 711 N.W.2d 508, 514–15 (Minn. 2006)). Similarly, in \textit{State v. Coder}, 968 A.2d 1175 (N.J. 2009), the New Jersey Supreme Court stated the inference negatively: “neither mother acted ‘predominantly as an agent/proxy or an operative for law enforcement in the collection of evidence of past crimes for use in a later criminal prosecution, circumstances that may well render the hearsay statements thereby procured testimonial under \textit{Crawford}.’” \textit{Id.} at 1186 (quoting \textit{Buda}, 949 A.2d at 779–80).}

except in the rare situation where they were made purposefully to avoid the making of what would be considered a testimonial statement.\footnote{The Supreme Court of Tennessee in \textit{State v. Franklin}, 308 S.W.3d 799, 816 (Tenn. 2010), entertained making a ruling that statements made to private parties are \textit{per se} not testimonial. However, following the lead of the Supreme Court of Kansas in \textit{State v. Brown}, 173 P.3d 612, 633 (Kan. 2007), it chose to avoid resting its result exclusively on that ground and instead applied a multi-factored analysis. \textit{Franklin}, 308 S.W.3d at 818.} In \textit{Michigan v. Bryant},

Justice
Sotomayor noted that the Court in *Davis* had “explicitly reserved the question of ‘whether and when statements made to someone other than law enforcement personnel are “testimonial.”’” She remarked that Justice Scalia in his dissent had supported one of his arguments with *King v. Brasier*, a Framing-era English case involving a statement made by a child to her mother, a private citizen, just after the child had been sexually assaulted. However, Justice Scalia responded that he “remain[ed] agnostic about whether and when statements to nonstate actors are testimonial.”

The citation of *Brasier* has implications for several major issues of confrontation interpretation. As I have noted earlier, *Brasier* is a difficult case to analyze from an originalist point of view because at the time the Sixth Amendment was framed, the published version of the opinion discussed the competency of a young child to testify, without addressing hearsay and confrontation. However, Scalia quotes from a version of the case published some decades later. In this later version, the facts had been revised to indicate that the case involved a hearsay accusation by the child presented in court by her mother and another witness, which the English court ruled could not be received. If accepted as part of the originalist foundational understanding of excluded hearsay at the time of the Constitution’s framing, *Brasier* would alter current confrontation outcomes substantially. The statement of the child to her mother...

“Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of ex parte statements as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process.” *Davis v. Washington*, 547 U.S. 813, 838 (2006) (Thomas, J., dissenting).

45 *Bryant*, 131 S. Ct. 1143.

46 *See id.* at 1155 n.3.


48 *Bryant*, 131 S. Ct. at 1169 n.1 (Scalia, J., dissenting).

49 *See Mosteller*, *supra* note 29, at 927–29.

and another private individual in Brasier are similar to those generally ruled nontestimonial by modern courts, but in Brasier, the statements were seen as equivalent to testimony. Brasier’s existence and citation are unlikely to have such a profound effect as to alter all these outcomes. I suspect that the broader interpretation will be ignored.  

Indeed, the Court may well treat as nontestimonial all statements to private parties. Shortly after Crawford was decided, a few courts took that position. In State v. Geno, for example, the Michigan Court of Appeals ruled that a statement made by a child to the executive director of the local Children’s Assessment Center was nontestimonial, relying heavily on the fact that the person receiving the information was a private individual. This change or clarification of confrontation law would have a substantial effect. Many, likely most, individuals who receive accusatory statements from children are private individuals, and many organizations that conduct interviews of children are private nonprofit agencies and private organizations, such as hospitals.

The New Jersey Supreme Court’s opinion in State v. Buda goes a bit further and considers statements nontestimonial if made even to government investigators when they are not enforcing the criminal law. This more subtle distinction was made in a case involving questioning by an employee of the Office of Child Abuse Control at the Division of Youth and Family Services (“DYFS”): the court ruled that the statements were not testimonial because the questions were asked for a protective purpose. In the discussion of the work done by the interviewer, the court stated that the investigative role of the interviewer was civil in nature—as opposed to the criminal purpose of law enforcement—despite the fact that these civil and criminal systems were both operating against a defendant. The court concluded that “our inquiry is informed by the explicit recognition that a DYFS worker acting in a proper civil role

---

51 See Mosteller, supra note 29, at 931–32.
53 Id. at 692.
does not trigger considerations that are unique to criminal trials, including the Confrontation Clause.” Conceivably, the Supreme Court could rule that only criminal investigations conducted by law enforcement agents and those working in explicit cooperation with them are even potentially testimonial. While this would have little impact in most traditional criminal prosecutions, it would potentially change many of the current standard responses in children’s cases and sexual assault cases where governmental employees at social service agencies are frequently involved in interviews.

C. Statements to Doctors

In Bryant, the Court stated:
When, as in Davis, the primary purpose of an interrogation is to respond to an “ongoing emergency,” its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.56

More specifically, the Court stated in Giles that “statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules.”57 Thus, when doctors receive statements in the course of treatment, those statements are nontestimonial. In People v. Duhs,58 a doctor treated a three-year-old child in the emergency room for second- and third-degree burns to his feet. During the course of the examination,

55 Id. at 779.
the doctor asked the child how he had been injured to properly administer treatment. The New York Court of Appeals stated that it is of no moment that the pediatrician may have had a secondary motive for her inquiry, namely, to fulfill her ethical and legal duty, as a mandatory reporter of child abuse, to investigate whether the child was potentially a victim of abuse. Her first and paramount duty was to render medical assistance to an injured child. 59

In an earlier article, I suggested that a broad reading should be given to medical purpose, which would usually include the identity of the perpetrator when statements are elicited during the initial medical exam or exams. 60 This appears to be the pattern in the lower courts, and with the liberalizing impact of Bryant, one would assume at least such a broad interpretation would continue. However, simply citing the term “medical purpose” should not be a talisman. For example, an examination by a psychologist rather than a medical doctor secured weeks after an injury at the behest of law enforcement or a social service agency should have no presumption of nontestimonial status. 61 Similarly, after the treatment inquiry has been completed, later interviews by medical personnel gathering evidence for prosecutions should be considered testimonial even though it is secured by medical personnel. 62

59 Id. at 620; see also, e.g., People v. Cage, 155 P.3d 205, 218–22 (Cal. 2007) (ruling that response to question “what happened” from emergency room physician treating the victim for a laceration to his face and neck was nontestimonial and finding that reporting requirement for abuse does not transform doctors into investigative agents); State v. Cannon, 254 S.W.3d 287 (Tenn. 2008) (making a similar nontestimonial ruling for statements made by a rape victim to a nurse in the emergency room).


61 See Commonwealth v. Allshouse, 985 A.2d 847, 858–59 (Pa. 2009), cert. granted, vacated, 131 S. Ct. 1597 (2011) (not reaching the issue with regard to a psychologist interview two weeks after injury because it would have been harmless in any case).

62 See Cannon, 254 S.W.3d at 305 (ruling that statements to sexual
D. Statements to Social Workers

Social workers for departments of social services generally have responsibilities that overlap with law enforcement duties, and statutes frequently require coordination between the two groups. Whether statements secured by social workers investigating potential abuse are testimonial depends on whether the statements are secured for the purpose of ensuring the child’s safety and well-being, or collecting information about past events for prosecutorial purposes. The degree of coordination with, and involvement by, the police can be critical. However, because it demonstrates the existence of an ongoing emergency, the most important factor, where it exists, is a genuine and immediate need to assess the circumstances for the purpose of protecting the child, which renders the statement nontestimonial under the rationale of Davis.

In Bobadilla v. Carlson, the Court of Appeals for the Eighth Circuit found an interview testimonial despite arguments by the government that the purpose was the welfare of the child, relying heavily on the lack of an ongoing emergency and the absence of an immediate need for protective action. The interview took place five days after the abuse, which was seen by the court as strong evidence that the purpose was to confirm past allegations of abuse rather than to assess immediate threats to the child’s health and welfare. A similar result was reached

assault nurse examiner subsequent to treatment in the emergency room were testimonial).

63 See, e.g., MINN. STAT. § 626.556(3)(f) (2011); see also Bobadilla v. Carlson, 575 F.3d 785, 792–93 (8th Cir. 2009).
66 Bobadilla, 575 F.3d at 791.
67 See id. at 791; see also Styron, 34 So. 3d at 732 (noting that the interview did not occur until four days after the report of molestation). Time must be evaluated relative to the information about the nature of the threat to the child’s safety. In Commonwealth v. Allshouse, 985 A.2d 847, 858 (Pa. 2009), although a week had passed from the time of the abuse, the statement was ruled nontestimonial because the interview occurred only a day after the social worker received information that the threat to the child was from a
in *State v. Hopkins*, involving statements made by a child when a social worker visited the child for a second time after the child had made new disclosures regarding abuse.\(^{68}\) There, the court found that, although the second interview could be construed as protecting the child, it was far removed from the initial emergency and produced incriminating statements, and therefore was testimonial.\(^{69}\) By contrast, in *State v. Buda*,\(^{70}\) concern for the child’s safety was ongoing at the time of the interview since the social worker had reason to conclude the battered child needed protection from the adults charged with her basic care.\(^{71}\)

IV. MULTIPURPOSE STATEMENTS

As the Court’s opinion in *Davis* concluded, a single statement—there, a call to a 911 operator—can have multiple purposes.\(^{72}\) In child sexual abuse cases, many statements can have multiple purposes, including statements made to sexual assault nurses. I will concentrate on a specialized form of the multipurpose statement. In child abuse cases, many jurisdictions have developed procedures for videotaped interviews that serve the purposes of multiple organizations. The recorded statement produced for these multiple parties is designed to reduce the number of times a child must be interviewed. Determining how to treat these interviews, and specifically the issue of their primary purpose, presents a challenge. The interview procedures create a record that serves very effectively as evidence at trial. It also has the potential nontestimonial purposes of protecting the child from future harm and facilitating treatment.

Although the treatment of such an interview depends on the specific facts of the particular case, a large number of courts

---


\(^{69}\) *Id.* at 256–58.


\(^{71}\) *Id.* at 778–80.

\(^{72}\) *See Davis v. Washington*, 547 U.S. 813, 828 (2006) (stating that a conversation that begins as an interrogation to determine the need for emergency assistance can evolve into testimonial statements once the initial purpose has been achieved).
have found these statements to be testimonial, determining that there was no ongoing emergency and the primary purpose was to prove past facts for prosecution.\textsuperscript{73} However, the decisions of two state supreme courts that use differing modes of assessment for the primary purpose analysis illustrate the uncertainty of outcomes that is likely only to be exacerbated by the \textit{Bryant} decision.

In \textit{In re S.P.},\textsuperscript{74} the Supreme Court of Oregon concluded that an interview conducted by CARES Northwest, a child abuse assessment center, was testimonial. It recognized the evaluation served a dual purpose for the child, referred to as N.

N’s statements were necessary to provide an accurate diagnosis of whether N had been abused, but they were also necessary to develop and preserve evidence of the alleged abuse for later presentation in juvenile court. The two purposes “are concurrent and coequal; both are ‘primary’ in the sense that neither takes precedence over the other.”\textsuperscript{75}

The \textit{S.P.} court resolved the dual purpose by concluding that this agency, which acts as a proxy for the police, conducts the type of ex parte examinations that trigger Confrontation Clause protection. The court, therefore, concluded that statements by the child describing the abuse and identifying the perpetrator were testimonial.\textsuperscript{76}

\textsuperscript{73} See, e.g., State v. Contreras, 979 So. 2d 896, 905 (Fla. 2008) (“[T]he primary, if not the sole, purpose of the [Child Protection Team] interview was to investigate whether the crime of child sexual abuse had occurred, and to establish facts potentially relevant to a later criminal prosecution.”); \textit{In re Rolandis G.}, 902 N.E.2d 600, 613 (Ill. 2008) (“Furthermore, since there is no indication that the primary purpose of the interview was for treatment and because [the child] was no longer in any danger from the respondent, it must be concluded that the main purpose of the interview was to gather information about past events for potential future prosecution.”).

\textsuperscript{74} \textit{In re S.P.}, 215 P.3d 847 (Or. 2009).

\textsuperscript{75} \textit{Id.} at 864 (quoting State \textit{ex rel.} Juvenile Dep’t of Multnomah Cnty. v. S.P., 178 P.3d 318, 330 (Or. Ct. App. 2008)).

\textsuperscript{76} \textit{Id.} at 865. In \textit{State v. Moreno-Garcia}, 260 P.3d 522, 527 (Or. Ct. App. 2011), the Oregon Court of Appeals stated that “[a]lthough we agree with the state that CARES’s functions are diagnostic and forensic, the forensic aspect is pervasive.”
In State v. Arnold, the Supreme Court of Ohio examined an interview by an employee of a Child Advocacy Center (“CAC”). The court considered the objectives of the interview to be neither exclusively for purposes of medical diagnosis or treatment, nor solely for forensic investigation. The court took the view that neither police officers nor medical personnel in the multidisciplinary team became agents of the other and that the single interviewer acted as an agent of each team. The court ruled that statements made for medical diagnosis and treatment were nontestimonial. It ruled that other statements that served primarily a forensic or investigative purpose were testimonial. The court directed the lower courts to sort these statements out within the interview rather than treating them under a single category.

The Supreme Court’s decision in Bryant may be read by courts to provide flexibility to make just this type of rule. However, Bryant did not suggest that emergencies continue forever, and it did not give license to courts to ignore the fact that an interview had only forensic purposes. Bryant will, nevertheless, push the dividing line at the margin in the direction of a nontestimonial determination.

77 State v. Arnold, 933 N.E.2d 775 (Ohio 2010).
78 Id. at 782–83.
79 Id. at 785–86. Albeit supposedly applicable only to hearsay analysis and not Confrontation Clause treatment, the Supreme Court of New Mexico pulled back from a categorical approach that excluded “medically pertinent statements just because they were made to a [sexual assault nurse examiner] when those same statements would be admissible if made to a doctor or to a nurse in the emergency room.” State v. Mendez, 242 P.3d 328, 339 (N.M. 2010). Instead, it directed the courts to consider the substance and circumstances surrounding each individual statement, determining in each instance the purpose for which each was made. Id. at 339. Mendez overruled in part State v. Ortega, 175 P.3d 929 (N.M. 2007). See Kimberly Y. Chin, Note, “Minute and Separate”: Considering the Admissibility of Videotaped Forensic Interviews in Child Sexual Abuse Cases After Crawford and Davis, 30 B.C. THIRD WORLD L.J. 67, 99 (2010) (arguing for an approach that examines the videotaped interview closely and excludes only the specific portions that are testimonial).
80 In State v. Cannon, 254 S.W.3d 287, 304–05 (Tenn. 2008), the Tennessee Supreme Court held that the statements made by the victim to the
By contrast, the decision in S.P. has the very different effect of correcting what I see as a fundamental error in the effective burden of showing that a statement should enjoy Confrontation Clause protection. Most lower courts understood the *Davis* opinion to require that the defense show that the primary purpose of the interrogation was to create a testimonial statement. In essence, *S.P.* stands for the proposition that a statement is testimonial if one of the purposes of the interrogation was to create a testimonial statement. That allocation of the burden is the appropriate one in enforcing this constitutional right. The defendant should have a constitutional right to confront statements which were made with a substantial or significant purpose of creating a testimonial statement, or where that purpose was a clear motivating factor. Nothing about the structure or effect of the fundamental confrontation right suggests that it should be applied with reluctance, or indicates that a heavy burden should be placed on the defendant in claiming its application. However, even before the negative impact on Confrontation Clause protection that I anticipate from the *Bryant* decision, the cases did not recognize the importance of allocating the burden to the prosecution to show investigation of a crime was not a significant purpose, nor a trend to follow the path of *S.P.*

---

nurse in the emergency room were not testimonial but those made to the sexual assault nurse examiner were testimonial. It stated: “We caution, however, that our conclusion in this case should not be interpreted as a blanket rule characterizing as testimonial all the portions of all out-of-court statements given by sexual assault victims to sexual assault nurse examiners.” *Id.* at 305. It suggested that in other cases, the interview may move from nontestimonial to testimonial, and trial courts should redact some portions of the interview rather than exclude it all. *Id.* Use of the latter approach that admits much of these interviews is likely to increase after *Bryant*.

81 The analysis that I suggest should be followed is similar to that illustrated by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). There in the employment discrimination context, the Court determined that discrimination had been shown if the plaintiff showed that it was a “motivating factor” or “substantial factor” in the adverse employment action rather than the sole factor that was required under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).
V. OTHER ISSUES

Courts in children’s cases have continued to make some progress in addressing a range of issues raised in eliciting statements outside of court, and in presenting children’s testimony when they appear at trial and are cross-examined. However, courts have largely failed to provide ways to facilitate meaningful confrontation in particularly challenging circumstances.

A. Application of Melendez-Diaz Concepts in Children’s Cases

Under Crawford’s testimonial doctrine, when a witness takes the stand and repeats an out-of-court statement that she has heard, the Confrontation Clause is implicated only if the statement being repeated by this “ear witness” was testimonial in nature. Thus, if a doctor takes the stand and repeats a child’s statement made to secure medical treatment, or if a grandmother takes the stand and repeats her granddaughter’s statements about sexual abuse elicited out of concern for the child’s welfare, no constitutional violation has occurred. The nontestimonial nature of the declarant’s statement means that it is exempt from scrutiny under the confrontation doctrine.

However, the “ear witness” must testify. If instead, the child’s statements are presented through a document prepared by the “ear witness” with an expectation that it would be used as a record of past events for potential use in a criminal prosecution, then the Confrontation Clause is violated. This is not because the nature of the declarant’s original statement was testimonial, but because the repetition of that statement occurs in the form of a testimonial statement from the nontestifying “ear witness.”

In Vega v. State, the Supreme Court of Nevada ruled that the Confrontation Clause was violated when the content of a report of a sexual abuse examination by a nurse at a county child advocacy center was introduced through a doctor. The

---

83 Id. at 637–38.
court focused on whether an objective witness would reasonably have believed that the nurse’s statement would be available for use at a later trial.\textsuperscript{84} In \textit{Green v. State},\textsuperscript{85} the Maryland Court of Special Appeals found the report of a sexual assault forensic examiner (“SAFE”) to be testimonial using the same reasoning.\textsuperscript{86}

This issue is similar to, but distinct from, the analysis used when determining the primary purpose of the interrogation. In \textit{Melendez-Diaz}, Justice Scalia noted that “[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.”\textsuperscript{87}

Justice Scalia is not describing an emergency purpose for the initial statement, but is resting the decision on the fact that the document reciting that statement was created for a nontestimonial purpose. The appropriate inquiry is whether the document was prepared with an understanding that it would be available for use at a later trial. In this inquiry, the intent of the declarant is irrelevant, because the testimonial act is that of the recorder in writing down the statement to be presented in court, not of the declarant in making the initial statement. Multiple-purpose statements that are videotaped do not present this issue because the words of the initial declarant are mechanically reproduced in court. However, when it is memorialized through the potentially selective and inaccurate words of the interviewer, the same interview should be treated as testimonial if the person creating the written document understood that its purpose was to constitute evidence.

\textsuperscript{84} Id. at 638 (applying \textit{Crawford} and \textit{Melendez-Diaz}, rather than the primary purpose test under \textit{Davis}).


\textsuperscript{86} Id. at 950–56.

\textsuperscript{87} \textit{Melendez-Diaz}, 129 S. Ct. 2527, 2539–41 (2009). He also observed that medical reports created for treatment purposes would not be testimonial. \textit{Id.} at 2533 n.2.
B. Requirement of the Prosecution Calling the Witness
Rather than Mere Availability to Satisfy Confronting the Witness

In *Crawford*, the Supreme Court stated: “we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”

In *Melendez-Diaz*, the Court made clear that the defendant’s ability to call the witness for cross-examination is not sufficient to satisfy the Confrontation Clause. The Court stated that

the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.

These principles should require that children be called to the stand by the prosecution before their statements may be introduced under this “present confrontation” exception to *Crawford*. I encourage use of this procedure in preference to loss of evidence to the prosecution and denial of confrontation to the defendant. To some readers, the insistence that children be called and, as discussed in the next section, questioned by the prosecution on direct about the crime and be subject to cross-examination by the defense, may appear to be insensitive and to subject the victim to further victimization. Sensitivity is appropriate. However, prosecutors and researchers frequently find that children can be enabled to testify by carefully working with the child to familiarize her with the court proceedings.

---


89 *Melendez-Diaz*, 129 S. Ct. at 2540 (“[The witness] was subpoenaed, but she did not appear at . . . trial.” (quoting *Davis v. Washington*, 547 U.S. 813, 820 (2006))).

90 See Robert P. Mosteller, *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 592 (2005); see also Eileen A.
In *State v. Caper*, the Louisiana Court of Appeals applied these principles. It held that the defendant’s confrontation rights were violated where recorded testimonial statements of two children were presented but the children did not testify, “[a]lthough they were present at the courthouse and were available to be called as witnesses.”

C. The Meaning of “Subject to Cross-Examination” for Compliance with Confrontation Through Current Cross-Examination

“Subject to cross-examination” requires the presence of the child on the stand in a situation where he or she can be asked questions, but it does require more than merely placing a child on the stand. I have argued previously for a requirement of “minimal capacity” for a witness, which most often presents an issue for very young children:

To be sure, simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns. If, for example, a child is so young that she cannot be cross-examined at all . . . the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause.” Confrontation theory, the Due Process Clause, or the competency concept must provide some constitutional floor, albeit certainly at a very low level, as to minimal testimonial adequacy. To date,

---

Scallen, *Coping with Crawford: Confrontation of Children and Other Challenging Witnesses*, 35 WM. MITCHELL L. REV. 1558, 1575–76 (2009) (citing sources that most children are able to testify if prepared and supported in the process and that the outcome of the prosecution may have as much impact on the child’s well being as whether the child testifies).


92 *Id.* at 607, 617. In *State ex rel. D.G.*, 40 So. 3d 409, 411 (La. Ct. App. 2010), another panel of the Louisiana Court of Appeals ruled, after the Supreme Court reversed and remanded *D.G. v. Louisiana*, 130 S. Ct. 1729 (2010), in light of *Melendez-Diaz*, that in a juvenile case where there is no jury, the prosecution making the child witness available is sufficient. The result appears plainly wrong.
courts have gone no further than *Spotted War Bonnet* in recognizing that a limit must exist, but not yet attempting a concrete definition.\(^{93}\)

In addition, two other types of relatively bright line rules should apply to how the testimony is elicited. First, the prosecution must make an effort to elicit the accusation of abuse from the child. Asking about innocuous details is not sufficient without asking about the criminal actions of the perpetrator. On the other hand, the child need not acknowledge the criminal activity, and can even deny it. However, the child must be asked about it. Such a question gives the witness an opportunity to make her accusation in the presence of the defendant and provides the jury a basis for evaluation, regardless of the answer given by the child to the prosecutor’s question regarding the alleged criminal activity.\(^{94}\)

In addition, I contend the participation of the child in cross-examination is required, absent defense complicity in silencing the witness’ responses.

If the child ceases answering questions before cross-examination, she is clearly not available for cross-examination because none was possible. However, if a child of minimal ability answers some cross-examination questions, she should be treated as available for cross-examination if the questions answered give the jury a sufficient basis to evaluate her testimony.\(^{95}\)

A number of cases found limited responses by young witnesses minimally sufficient. Two cases from the Illinois Appeals Court are representative. In *People v. Bryant*,\(^{96}\) the seven-year-old victim described sex acts committed by the defendant under one count, but did not describe any conduct

\(^{93}\) Mosteller, *supra* note 90, at 596 (quoting United States v. Spotted War Bonnet, 933 F.2d 1471, 1474 (8th Cir. 1991)). In *Cookson v. Schwartz*, 556 F.3d 647, 652 (7th Cir. 2009), the Seventh Circuit characterized *Spotted War Bonnet* as dealing with “witnesses who are ‘too young’ or ‘too frightened’ to be cross-examined.”

\(^{94}\) *See* Mosteller, *supra* note 90, at 585.

\(^{95}\) Mosteller, *supra* note 29, at 991.

satisfying the charge in another count. The court nevertheless found the child subject to cross-examination about the second count because she answered defense counsel’s questions on cross-examination.\(^{97}\) Similarly, in *People v. Major-Fisk*,\(^ {98}\) the court found a child subject to cross-examination where the child testified on direct examination that the defendant made the child sit on his hand—which could be seen as related to the conduct charged although without facts necessary to constitute a crime—and then answered all the questions posed on cross-examination by defense counsel.\(^ {99}\)

By contrast, the requisites of confrontation and availability for cross-examination were satisfied in *People v. Learn*,\(^ {100}\) but the Illinois Appeals Court held the child’s testimony inadequate. The child gave only general answers to the prosecutor’s questions, but the prosecution generally attempted to elicit the accusation. The child admitted knowing the defendant, but when asked about going to the police station and whether she had been asked some questions there, she put her head down and began to cry. After a short recess, the prosecution asked whether the child felt better, to which the child responded that she did not know. The prosecution then asked no further questions.\(^ {101}\) The trial court imposed no limitations on cross-examination,\(^ {102}\) and the child answered all the questions asked by the defense on cross-examination, although defense counsel did not broach the subject of the crime with her.\(^ {103}\) The requisites were satisfied because the prosecution attempted to elicit the accusation from the child and the child responded to defense questions on cross-examination, which the defense apparently chose to limit to innocuous matters.

\(^{97}\) *Id.* at 400.


\(^{99}\) *Id.* at 336; *see also*, e.g., *Bush v. State*, 193 P.3d 203, 212 (Wyo. 2008) (ruling that failure of memory by child does not affect the determination that the child was subject to cross-examination under the Confrontation Clause).

\(^{100}\) *People v. Learn*, 819 N.E.2d 1042 (Ill. App. Ct. 2009).

\(^{101}\) *Id.* at 1048–49.

\(^{102}\) *Id.* at 1050.

\(^{103}\) *Id.* at 1057 (Hudson, J., dissenting).
These minimal requirements for availability for cross-examination will be challenging to apply, for example, when determining when a child who is predominantly unresponsive has responded sufficiently on cross-examination. Realistically, little is required beyond the presence of a minimally competent child on the stand, along with both an effort by the prosecution to secure an accusation and an opportunity for the defense to ask questions of a child who is minimally responsive.\(^{104}\)

The logistics of when to introduce the prior statement of the child, relative to the child’s testimony, present challenges in assuring the defense an opportunity to cross-examine the child regarding the out-of-court statement. *Myer v. State\(^{105}\)* dealt with the important issue of the timing of cross-examination: the Maryland Court of Appeals concluded that, when a statement is admitted after the child’s testimony, the defense must be permitted to recall the child for cross-examination.\(^{106}\)

**D. Alternative Methods of Achieving Confrontation**

Efforts should be made to encourage confrontation rather than to focus on excluding testimony.\(^{107}\) Any change to current doctrine that reduces confrontation is arguably problematic. However, when the only available options are the exclusion of evidence or a ruling that the defendant’s confrontation rights

---

\(^{104}\) This is only modestly different from the concept of the “The ‘Warm Breathing Body’ Rule” suggested by Professor Eileen Scallen. *See* Scallen, *supra* note 90, at 1575–81.


\(^{106}\) *Id.* at 626–29; *cf.* Hernandez v. Schuetzle, No. 1:07-cv-056, 2009 WL 395781, at *28 (D.N.D. Feb. 17, 2009) (indicating skepticism of the state’s argument that the burden of calling a child witness could be placed generally on the defendant, but recognizing that there might be an argument for a different result where the child appears and testifies about the acts related to the charged conduct, and the burden-shifting relates only to hearsay statements regarding uncharged bad act evidence); *State v. Hill*, 715 S.E.2d 368, 375 (S.C. Ct. App. 2011) (finding no error when the child’s recorded statement was introduced after she had completed her examination, given that the defense was not prohibited from recalling her to examine the child regarding the statement).

\(^{107}\) *See* Mosteller, *supra* note 90, at 519.
either did not exist or were not violated, some compromise regarding the degree of confrontation required may be the best course. This is particularly true in cases involving abhorrent crimes and sympathetic victims, which put great pressure on the courts to admit incriminating hearsay that is apparently reliable despite a lack of confrontation. Unfortunately, only modest efforts have been made to secure more testimony and confrontation through the creation of alternative procedures, such as having hearings prior to trial where witnesses can testify and face confrontation.

The Nevada Supreme Court has ruled that the preliminary hearing under the state’s criminal procedure guaranteed to defendants an adequate opportunity for cross-examination. It permits examination into credibility and does not limit the scope of cross-examination to only matters of probable cause. Moreover, the state permits discovery before the preliminary hearing.\(^{108}\) On the other hand, the Florida Supreme Court ruled that its discovery deposition procedure was inadequate to constitute prior confrontation. It reasoned that the procedure “was not designed as an opportunity to engage in adversarial testing of the evidence against the defendant” but instead “to learn what the testimony will be,” and that the defendant could not conduct an adequate cross-examination during a deposition when he learns for the first time of the information. Moreover, the deposition could not serve as “the functional substitute for in-court confrontation” because it was admissible only for the purpose of impeachment and the defendant was not entitled to be present.\(^{109}\)

Like Nevada, states should develop alternative procedures to allow the defendant to have an opportunity to challenge witnesses’ testimony before trial or in alternative procedural settings. However, Texas has gone too far in authorizing the receipt of recorded testimony with only the opportunity for cross-


\(^{109}\) Blanton v. State, 978 So. 2d 149, 155 (Fla. 2008); see also State v. Lopez, 974 So. 2d 340, 347–50 (Fla. 2008) (citing State v. Basiliere, 353 So. 2d 820, 824–25 (Fla. 1977)) (reaching the same conclusion and setting out the analysis summarized in Blanton).
examination through written interrogatories. The lack of the opportunity for the jury to observe how questions are asked, and how the child gives the answers, is a central failing of this alternative procedure. Nevertheless, the state’s effort to provide somewhat limited confrontation if, in fact, full confrontation is not feasible is commendable.

VI. CONCLUSION

Confrontation Clause results in cases involving child declarants under the Crawford testimonial model have been reasonably stable and consistent over the past few years. Courts have found statements to police officers testimonial in almost all cases. In a substantial number of cases, courts concluded that where social workers or forensic interviewers conducted recorded interviews with an investigative purpose, the statements secured were testimonial. Relatively few cases found such interviews to be responding to an ongoing emergency. However, statements by children in the vast bulk of other circumstances were generally found to be nontestimonial.

The apparent clarity of the Supreme Court’s directive can account, at least in part, for the relatively consistent findings that statements were testimonial in the two situations described above. Davis appeared to draw a clear line with respect to timing and purpose, and courts acted as if they had no real alternative. Unfortunately, the Bryant decision will likely inject substantially more discretion—and therefore uncertainty—into the analysis of these two classes of statements, with the result that many of them will now be found nontestimonial.

Crawford has provided some protection to defendants from government-generated hearsay of the most dangerous accusatorial type. When statements are made to the police or their clear surrogates, the protection is substantial. Relatively

110 See Coronado v. State, 310 S.W.3d 156, 162–65 (Tex. Ct. App. 2010). The procedure is only used where the child is found unavailable, but the existence of the alternative procedure presents a far too inviting incentive for the prosecution to develop evidence of trauma if the child testifies and far too easy an avenue for avoiding real confrontation for the judge.
little else receives any protection under the Confrontation Clause. I am not convinced that the system that has resulted from Crawford, where the vast bulk of even accusatorial statements made to others are freed from confrontation, is rational under confrontation policy or consistent with history. It is unclear whether Crawford’s impact on children’s cases was worth the substantial upheaval in trial courts reflected in the mass of litigation it engendered. If Bryant has the effect that I anticipate of expanding trial court discretion to find even statements to government investigators exempt from confrontation protection, that impact will be even more modest and the current predictability of results will diminish.

For those who hold a defendant’s right to confront witnesses in high regard, the Crawford effort was likely still justified because it requires confrontation or exclusion for the particularly problematic category of statements made by alleged accomplices during police interrogation, and, at least prior to Bryant, strictly regulated most statements by witnesses to the police about past events. However, the doctrine’s dimensions are far less substantial, protective, and beneficial than could reasonably have been anticipated when it was first decided. The Crawford approach is an improvement on Ohio v. Roberts,111 but its development has been disappointing, and the evolving doctrine shows limited promise.

---

THE SKY IS STILL NOT FALLING

Richard D. Friedman*

*Crawford v. Washington*\(^1\) dramatically transformed the law governing the Confrontation Clause of the Sixth Amendment to the Constitution, and much for the better. Under the old regime associated with *Ohio v. Roberts*,\(^2\) the Clause was little more than a constitutionalization of the modern law of hearsay, incorporating its multiple particular oddities and also a general principle that the law poses no obstacle to admission of an out-of-court statement that is deemed by the courts to be reliable. This doctrine bore no relation to the text or history of the Confrontation Clause. It reflected no principle worthy of respect—and in part as a result, it was highly manipulable. *Crawford*, by contrast, articulated a simple and robust principle that is apparent on the face of the Clause and in its history, and is a central element of our system of criminal adjudication: A witness against an accused must (unless the accused waives or forfeits the right) give her testimony in the presence of the accused, subject to cross-examination. Ordinarily, she must do so at trial. If she is unavailable to testify then, however, the accused’s confrontation right will be satisfied if she gave her testimony on some prior occasion at which he had the opportunity to be confronted by her and cross-examine her.

*Crawford*, by razing the old structure of Confrontation Clause doctrine, left many open questions. Chief among these was the standard for determining whether an out-of-court statement that is later offered against an accused should be deemed to be testimonial—that is, whether the person who made

---

* Alene and Allan F. Smith Professor of Law, University of Michigan Law School.

the statement should be deemed to have been acting as a witness and so within the scope of the Confrontation Clause. I had no doubt that there would be decades of litigation, including numerous Supreme Court cases, before the new framework was completely filled in. But it appeared to me that the basic principle of Crawford was so obviously correct, so fundamental to our system, so easy to state and to understand, and so far superior to what had prevailed before, that prosecutors and judges as well as those on the defense side would quickly come to accept it.

Silly me. In the eight years since Crawford, many prosecutors have attempted at every turn to limit its holding. Lower courts have often used strained reasoning to reach results that undercut Crawford’s holding. And before the Supreme Court, most of the states, and sometimes the United States as well, have joined in, trying to scare the justices into believing that they will create enormous practical problems if they do not cut back on Crawford.

Cases since Crawford have mainly fallen into two categories. One involves accusations of crime, made by the apparent victim shortly after the incident. In Michigan v. Bryant, a majority of the Court adopted an unfortunately constricted view of the word “testimonial” in this context. That decision was a consequence of the Court having failed to adopt a robust view of when an accused forfeits the confrontation right. How the Court will deal

---

4 In Bryant, Anthony Covington, suffering from severe gunshot wounds, told the police that Bryant had shot him half an hour before and several blocks away, Id. at 1150. There was no indication that Covington realized death was close, but he died several hours later. Id. In my view, the statement should clearly have been deemed testimonial. Covington did not make the statement in order to get medical help or stop a crime spree, but to finger the man who he claimed had shot him. But a holding that Covington’s statement could not be admitted at a trial of Bryant seems singularly unappealing. Id. at 1167. Before Giles v. California, 554 U.S. 353 (2008), a court might have held that Bryant forfeited the confrontation right by engaging in serious, intentional misconduct that foreseeably rendered Covington unavailable to appear as a witness at trial. But Giles foreclosed a decision along those lines. In that case, the Court held that an accused does not forfeit the confrontation right unless he engaged in the misconduct for the purpose of rendering the witness unavailable. Giles, 554 U.S. at 368. As a
with this situation—one mistake made in an attempt to compensate for another—is a perplexing and important question. This Essay, though, concentrates on the other principal category of post-
_Crawford_ cases, involving forensic laboratory reports. In this context, the Supreme Court has, thus far at least, come to what I believe is the proper result, recognizing that such reports, prepared for use in investigation and prosecution of crime, are testimonial for purposes of the Confrontation Clause. But in the most significant cases, the Court has reached this result over the strenuous dissent of four justices, and over the objections of most of the states.

**Melendez-Diaz v. Massachusetts**

The key case was _Melendez-Diaz v. Massachusetts_, \(^5\) which held that, at least as a general matter, forensic laboratory reports are testimonial for purposes of the Confrontation Clause. I regarded that basic holding as quite obvious—it was, as Justice Scalia’s opinion for the majority said, a “rather straightforward application” of _Crawford_. But four justices, led by Justice Kennedy, dissented, and they, together with Massachusetts and its supporting amici (including the United States, thirty-five states, the District of Columbia, the National District Attorneys Association, and numerous local prosecutors), raised a flurry of arguments in opposition. This gave Justice Scalia a chance to clear away a good deal of underbrush, as one by one—quite correctly—he set these arguments aside.

- A lab report is ordinarily not accusatory. That does not matter—the Confrontation Clause is not limited to accusatory statements. Such a limitation would eviscerate the right, because in many cases there is no witness who can testify that she observed the accused committing a crime.

An analyst who prepares a lab report is not an “ordinary” or “conventional” witness. The dissent raised several points in support of this rather odd assertion. The analyst writing the report was reporting near-contemporaneous observations. Not really true, responded Justice Scalia—the report was completed almost a week after performance of the tests—and immaterial in any event: A witness can testify about contemporaneous observances. The analyst who completed the report did not observe the crime itself or “any human action related to it.” But again, so what? No one would deny, I suppose, that an observer who testifies to the state of the crime scene after the fact is a witness for Confrontation Clause purposes. She is reporting on information that may help the trier of fact determine whether a crime was committed and, if so, how. But the same is true of the lab analyst who testifies that a given substance contains cocaine. Finally, according to the dissent, the lab analyst is not testifying in response to police interrogation. That assertion is dubious at best: The lab analyst was responding to a police request. But the broader response is yet again, so what? The confrontation right is independent of, and much older than, the institutions of a police force or a public prosecutor. It is a right that the accused has with respect to the witness, and if the witness makes her statement on her own initiative that does not nullify the right.

The lab report was, Massachusetts contended, a product of neutral, scientific testing, rather than an historical account subject to distortion. Once more, Justice Scalia challenged both the truth and the materiality of the premise. Lab testing, while usually accurate, is far from foolproof. Nor can agents of the government properly be called neutral in a criminal prosecution. But beyond that, Crawford forbids a court from trying to exempt species of evidence from the confrontation right on the ground that they are reliable and so cross-examination is unlikely to be productive.

Massachusetts contended that the lab reports were akin to business records and so exempt from the Confrontation Clause. True, forensic lab reports are produced routinely—but to say that this is sufficient to guarantee admissibility
would only mean that the confrontation rights of the accused are routinely violated. Forensic laboratory reports are routinely produced for use in prosecution, and that is what makes them testimonial. Statements genuinely falling within the hearsay exception for business records are not prepared for litigation purposes. But beyond that, a statement cannot be exempted from the Confrontation Clause on the ground—part of the rejected Roberts doctrine—that it fits within a well-recognized hearsay exception. True, Crawford suggested that business records are typically not testimonial statements. But that was merely an empirical observation: If a statement satisfies the requirements for the hearsay exception, it will probably also be properly characterized as non-testimonial. That is not at all the same thing as saying that qualification as a business record means that the statement is not testimonial.

- Melendez-Diaz could have subpoenaed the lab analysts and made them his own witnesses. But, as the Court emphasized, that turns criminal procedure on its head. It is the prosecution’s job, not the defense’s, to produce the witnesses against the accused. The difference is not merely one of formality; it is far better for the defense if the prosecution produces its witness live and then the defense decides whether and how to cross-examine, than if the prosecution presents the testimony in written form and the defense can examine the witness only by calling her to the stand as part of his case.

- The practical burden on the courts of requiring lab analysts to testify, asserted those on the state side, would be intolerable. Once again, Justice Scalia challenged both the accuracy and the materiality of the premise. “[W]e may not disregard [the Confrontation Clause] at our convenience,” he wrote. Besides, he doubted the “dire predictions” of disaster: “Perhaps the best indication that the sky will not fall [as a result of the decision] is that it has not done so already.” That is, Melendez-Diaz had no impact on those states that

---

already complied with the constitutional rule it required, and those states had not been led to ruin.

The majority opinion in *Melendez-Diaz* was quite wonderful. Point by point, it swept aside potential obstructions to the confrontation right that should never have been erected. But I confess that I found it disappointing in two respects. One was that the opinion secured only five votes—and the four dissenters seemed so ready to undercut *Crawford* severely, largely because of misguided concern that the practical consequences of the decision would be intolerable.

The other respect was perhaps less to my credit. At the time, I had a petition for *certiorari* pending in *Briscoe v. Virginia*. The petition contended that Virginia did not satisfy the Confrontation Clause in providing that a lab certificate could be admissible but the accused could present the analyst as his own witness. The *Melendez-Diaz* decision, it appeared clear, had just resolved this issue in our favor—great news for my clients, but apparently precluding my hopes of arguing the issue in the Supreme Court. I, like most observers, expected that the Court would, as a matter of course, remand *Briscoe* to the Virginia Supreme Court for reconsideration in light of *Melendez-Diaz*. It was startling, therefore, when four days later the Court instead simply granted *certiorari*. There was widespread speculation that the four dissenters had decided to take *Briscoe* in hopes of undercutting *Melendez-Diaz*. The speculation gained credence from the fact that Justice David Souter, a member of the majority, had announced his retirement and his prospective successor, Sonia Sotomayor, was a former prosecutor. Once again, state-side amici—including the United States, a majority of the states, and the District of Columbia—raised the catastrophic consequences that would occur if the defendant’s position prevailed. But at the argument, it became quite clear that Justice Sotomayor was not about to undermine a seven-month-old precedent. Two weeks later, the Court did what

---

7 During oral argument in *Briscoe*, Justice Scalia lent additional force to the speculation, suggesting that the Court had taken the case for no reason other than to consider overruling *Melendez-Diaz*. Transcript of Oral Argument at 58, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191).
observers had expected it to do in the first place, remanding the case for proceedings consistent with *Melendez-Diaz*.  

But, of course, the matter did not rest there. Nine months later, the Court granted *certiorari* in *Bullcoming v. New Mexico*. The Court’s makeup had shifted again—Justice Kagan had replaced Justice Stevens, a member of the *Melendez-Diaz* majority. In *Bullcoming*, unlike *Melendez-Diaz* and *Briscoe*, the prosecution had presented a live witness from the laboratory, rather than simply the report. But the witness was not the analyst who had performed the test and prepared the report, for he had been placed on unpaid administrative leave. I thought this case was extremely easy—after all, in his *Melendez-Diaz* dissent, Justice Kennedy noted that the Court had made clear that it “will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . . .” Perhaps for that reason, the United States did not appear as amicus in support of the state. But thirty-three states did, as well as organizations of prosecutors and medical examiners, and once again they focused on the practical consequences that would follow if the author of the report had to testify live. Nevertheless, I hoped that some or all of the *Melendez-Diaz* dissenters would acknowledge that the Court had decided that forensic lab reports are testimonial statements, and that it obviously followed that a surrogate witness could not testify as to the contents of a lab report stating events and results that the surrogates had not observed. In the end, Justice Kagan stayed with the majority, which once again—this time in an opinion by Justice Ginsburg—treated the case as virtually a foregone conclusion. But the bloc of four dissenters remained intact. Once again, Justice Kennedy took the lead, and this time some of his language seemed to indicate that he was ready to throw out the entire *Crawford* framework and return to something like that of *Roberts*.

---

8 *Briscoe*, 130 S. Ct. at 1316.
9 *Melendez-Diaz*, 129 S. Ct. at 2546 (Kennedy, J., dissenting).
Five days after the *Bullcoming* decision, the Court took one more case involving forensic lab reports. *Williams v. Illinois* is the first in the line that involves DNA testing, one of the most complex types of forensic testing. It is also different from the prior cases in two respects. First, an in-court witness used the report in question, by a Cellmark lab, in part to formulate her opinion that the DNA profile indicated on that report—taken from a vaginal swab of the victim of a sexual assault—matched that of the accused. Second, the Cellmark report was never formally introduced into evidence. I do not believe that either of these facts should make a difference. The Cellmark report transmitted information that was important to link the accused to the crime; the in-court expert’s opinion that the two profiles matched would be worthless for the case if the Cellmark report were inaccurate. And the essential substance of the Cellmark report was conveyed to the trier of fact. *Williams* is pending as I write this. I worry that if the state prevails, the Court will have opened a broad path for manipulation around the Confrontation Clause—not only in the context of forensic lab reports, but generally. Any person whom a state is willing to designate as an expert may be allowed to testify to her conclusions, and in doing so she may convey to the trier of fact the substance of testimonial statements on which she relied.

In *Williams*, the United States has returned as an amicus favoring the state—as have forty-two other states, the District of Columbia, Guam, and various prosecution-related agencies and associations. This Essay focuses on the brief submitted by the New York County District Attorney’s Office and the New York City Office of the Chief Medical Examiner—what I will call the New York brief—because it makes the most detailed and aggressive assertions of impractical consequences that would follow from a holding for *Williams*. Indeed, it appears to me
that the brief is in large part an attempt to scare the Supreme Court into thinking that if Williams wins this case, prosecution use of DNA and some other types of forensic evidence will become unfeasible. That is simply not true.  

The New York brief builds on the fact that DNA testing involves several different stages. It suggests that if Williams prevails, a prosecutor wishing to present DNA evidence would have to bring to court one witness for each stage. But that is not so. At the outset, bear in mind that the Confrontation Clause requires the presence at trial only of those persons who make testimonial statements that are in some way conveyed to the trier of fact. I use this phrasing because the Clause may be invoked even if the prosecutor does not formally introduce the statement. Consider the stages of DNA testing as described in the New York brief:

(a) **Examination**: A technician “examines the sample and takes cuttings for DNA extraction.” There is no testimonial statement—or any statement at all—in this process; examining and cutting do not constitute a statement.

(b) **Extraction**: A technician adds reagents to the sample. Again, the process does not involve a statement.

(c) **Quantitation**: A technician measures the amount of DNA. Presumably this technician reports that amount. But even assuming for purposes of argument that this report is a testimonial statement, there is no need for it to be presented to the trier of fact. The witness who reports on the profile found in the later part of the process does not have to convey it to the trier of fact, or even rely in her own testimony on the results of this stage. We know from the fact that, by hypothesis, a DNA profile was ultimately found that there was enough DNA to perform

---


the analysis. Put another way: The quantitation stage is a screen, used to determine whether the process should continue; once the process does continue, neither subsequent analysts nor the trier of fact need rely on the results of this stage.

(d) Amplification: A technician copies specific portions of the DNA to raise them to sufficient levels for testing. Once more, performance of this test is not a statement, let alone a testimonial statement.

(e) Electrophoresis: Here, at last, we have the performance of the test that yields the numbers and graph from which a DNA profile may be deduced. The printout of the machinery used to perform the test is not in itself a testimonial statement. But presumably the printout bears identifying information that was entered by a human, and (assuming the test was clearly performed for forensic purposes) that should be a testimonial statement. If, as in Williams, an analyst at the lab deduces the profile of interest and prepares a report presenting that profile, that report is a testimonial statement, and thus provides the essential information that the prosecution needs.¹³

Even assuming Williams wins and some labs continue to adhere to the procedure described by the New York brief, the Confrontation Clause would, at least presumptively, say nothing about most of the technicians involved in that procedure. As a check on this, try this thought experiment: Assume for the moment that Williams wins his case. Would the signatories to the New York brief contend in subsequent cases that all the technicians in the procedure they have described have to testify for DNA test results to be admissible? Not very likely.

Now, I have included the “at least presumptively” qualification in the last paragraph because I have not yet said anything about chain of custody. So long as a witness speaks only about what she knows from personal knowledge, chain of custody is not a confrontation problem per se. Melendez-Diaz makes clear that, as an initial matter, it is up to the prosecution to decide what witness’s statements it wishes to present to

¹³ Friedman, supra note 11.
establish the chain of custody.\textsuperscript{14} If the gaps in the chain are too great, there may be insufficient proof, and at some point that could be a due process violation. It may be, depending on what procedures the laboratory used to tag the sample and maintain identification throughout the procedure, that to prevent such a violation, the prosecution would have to present one or more additional witnesses. But reasonable inferences can bridge even some substantial gaps. I do not believe the sample needs to have been sitting still during those gaps; technicians may have performed procedures on it other than letting it change naturally over time.

Consider also that, given the sensitivity of modern methods of DNA testing, in most cases if the prosecution would have difficulty bringing to court the lab witnesses necessary to prove the results of a given test, it can simply ask for the sample to be retested. This could be done perhaps by a single witness who can easily come to court. Note, for example, that only one technician from the Illinois State Police lab did the test on the blood sample taken from Williams. Retesting would not be necessary in the vast majority of cases, because so few cases go to trial, but the availability of this option reduces the overall burden on the state enormously.

The Illinois test in Williams serves as a reminder that the Sixth Amendment does not incorporate the Cellmark protocol. Much of the New York brief seems to suggest that Confrontation Clause jurisprudence must take as given procedures such as those used by Cellmark in Williams and described by the brief. But other labs, like the one in Illinois, use different procedures. For example, the Michigan State Police lab rarely involves more than three people in a given DNA test.\textsuperscript{15} Is such vertical integration less efficient than an assembly-line procedure? Perhaps. But the standard for constitutionality cannot be the procedure that would be optimal when the constitutional rights of the accused are disregarded.

\textsuperscript{14} See Melendez-Diaz, 129 S. Ct. at 2532 n.1.

\textsuperscript{15} Interview with John Collins, Director, Mich. State Police Lab. (Jan. 2011).
THE PRACTICAL CONCERNS OF LIVE TESTIMONY

I do not mean to suggest—and I do not believe—that it is inappropriate for the Supreme Court, in considering the bounds of the Confrontation Clause, to pay some attention to the practical consequences of its decision. Crawford has compelled the Court to build a new structure, and I think it is fitting for the Court to subject its tentative conclusions to a reality check. If the result of its doctrines were to be a practical disaster, the Court should think again; “the Constitution . . . is not a suicide pact.” But disaster avoidance does not require optimal efficiency. And the fact is that states that—like my own state of Michigan—use more integrated procedures do not suffer unduly on that account.

Indeed, in conjunction with Bullcoming, I supervised a study of Michigan cases to determine how many lab witnesses actually testify at trials. In rape cases in which DNA evidence was presented, we found that an average of 1.24 lab witnesses testified per trial. This strikes me as a very tolerable number, given that DNA is a particularly complex form of laboratory evidence. In drug cases, we found an average of .46 live lab witnesses per trial, and about .55 live lab witnesses per test presented. No more than one witness testified live with respect to a given test. In driving-under-the-influence cases, an average of about .55 lab witnesses per trial, and about .67 per test presented, testified live.

19 There were 71 live lab witnesses in 154 trials. Id. In 116 of the cases lab results were presented, accounting for at least 128 tests—meaning that an average of .55 lab witnesses per test testified at trial. Id.
20 There were 55 trials, in 41 of which lab results were presented, and a total of 30 lab witnesses testified live. Id. There was a total of at least 45 lab tests, meaning an average of .67 lab witnesses per test testified live at trial. Id.
This means that—despite the fears expressed by the Melendez-Diaz dissenters—many Michigan defendants stipulate to the admissibility of forensic lab evidence without the need for the prosecution to bring in live testimony. Why is that so? The plus side of demanding confrontation may appear minimal. Experience may compel counsel to recognize that the lab reports will not be excluded; the prosecution will ensure that any necessary lab witnesses appear. Also, in some cases, the defense does not see much likelihood of any worthwhile gains from cross-examination. The negative side of demanding confrontation may appear substantial. For example, the defense’s chance of reaching an acceptable plea bargain may be substantially impaired if counsel is perceived as game-playing in hopes of imposing costs on the prosecution. The defense may regard a live, perhaps very credible, prosecution witness as far worse than introduction of a piece of paper or reading of a stipulation.

States that are concerned about cost can use other mechanisms as well. Melendez-Diaz expressly approved simple notice-and-demand statutes, under which a prosecutor may give advance notice of intent to introduce lab evidence, and the accused then

---

21 Some of the following discussion is drawn from my article, Richard D. Friedman, Potential Responses to the Melendez-Diaz Line of Cases, 90 Crim. L. Rep. (BNA) 396 (Dec. 21, 2011).

22 It sometimes happens that defense counsel will demand that the lab witness appear, believing that doing so is cost-free, and then stipulate to admissibility of the report when the witness does appear. But this type of game playing does not appear to be an insuperable problem, in part for the reason stated in the text. A prosecutor concerned about it can further limit its effect by announcing a policy—or simply informing counsel in the given case—that if the accused demands that the witness appear live, and the witness does in fact appear at trial prepared to testify, the prosecution will then not stipulate to admissibility of a lab report but instead will insist that the witness testify live. By hypothesis, the accused prefers admission of the report to live testimony of the witness. Accordingly, such a policy might make the accused hesitant to make the demand, especially where it appears very probable that the witness would indeed appear if required to do so.

23 In his Melendez-Diaz dissent, Justice Kennedy argued that it would be unprofessional for counsel to waive a client’s rights for fear of incurring judicial displeasure. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2556 (2009) (Kennedy, J., dissenting). I am putting aside the possibility that counsel would act in that way.
waives objections to introduction of the lab report if he does not make a timely demand for live testimony. 24 These statutes are valid because, if the defense makes the demand, it is the prosecution that (a) bears the risk that the witness does not appear at trial, and (b) presents the witness’s live testimony as part of its case. Indeed, in some contexts, a demand-only statute should also be held constitutional. Under such a statute, the prosecution does not have to give the accused notice of intent to offer a lab report in prosecuting one of a prescribed list of crimes, such as those involving drug possession. The use of such reports in prosecutions of this type is so common that the accused is deemed to be on notice from the fact that he is being prosecuted. As under a notice-and-demand statute, if the accused wishes a live witness to testify, he must make a timely demand, and if he does, the prosecution must either present the live witness or forgo use of the evidence. So long as (1) the statute is sufficiently clear as to the consequences of failure to make a demand, and (2) the crime is one for which use of a forensic lab report would not be surprising, this type of statute should not be constitutionally troublesome. Moreover, in my view, the legislature could validly add to either a notice-and-demand or a demand-only statute a requirement that the accused assert that he is not making the demand simply to impose costs on the prosecution.

States might also ease the burden by adopting two procedures for taking testimony of lab witnesses. 25 First, at least on consent of the accused, they might—as Michigan has begun to do 26—take an analyst’s testimony by televideo. Such a procedure offers great efficiency, for the analyst could testify from a studio adjoining her laboratory. Whether use of such a procedure would be allowed over the objection of the accused is doubtful. 27 But, given that the accused often willingly does

24 See id. at 2541 (majority opinion).
25 Other techniques states may adopt, such as videotaping autopsies and ensuring that a second examiner is present, are discussed in Friedman, supra note 21.
26 State Police Receives Innovation Award, MICH. ST. POLICE (Dec. 9, 2008), http://www.michigan.gov/msp/0,4643,7-123-1586_1710-204770,00.html.
27 For a brief analysis, see Friedman, supra note 21.
without live testimony altogether, there is good reason to suppose that he would often be willing to consent to testimony by video transmission, so long as the quality of the transmission is good enough to allow an opportunity for cross-examination that is not significantly impaired.

Second, states may take depositions for the purpose of preserving testimony. Ideally, the deposition should be video-recorded. If the witness is then unavailable to testify at trial, the deposition may be admitted. Given that the accused has had an opportunity to be confronted with the witness at the deposition, courts should be rather lenient in declaring witnesses unavailable, either because of their distance from the courthouse or because of lack of memory of a test performed long before.

The laws of most states are extremely restrictive concerning the circumstances when depositions may be taken. But those laws can be changed, and they should be, because depositions offer several advantages. A deposition may be scheduled to suit the convenience of the witness and of the parties; the witness need not wait through unpredictable trial proceedings to give her testimony. Indeed, a lab witness can feasibly schedule several depositions in one day, minimizing travel time—an important consideration if the witness’s lab is some distance from the courthouse. A deposition may also be held close to the time when the test was performed, meaning that the witness will be testifying with a memory that is fresher than at the time of trial. A deposition also ensures against the possibility that the lab analyst will be dead or otherwise unable to appear at trial.

Of course, if a deposition is held too early, it might be wasteful, because the case probably would plead out before trial (though the scheduling of the deposition might accelerate negotiations). Also, early on, the defense might not know enough about the case to conduct cross-examination adequately. With respect to many types of lab reports, however, this will not usually be a serious problem; defense counsel does not need to know much about the case to know that it hurts the accused if the prosecution can prove that a substance allegedly found in his possession is high-quality cocaine. An accused should be allowed to argue that in the particular circumstances of the case the deposition was too early to satisfy his confrontation right—
but, though occasionally such arguments are meritorious, courts should generally approach them with considerable skepticism.

Even putting aside such relatively innovative responses as remote testimony and greatly expanded use of depositions, the bottom line remains: States that have conscientiously protected the accused’s confrontation rights—allowing him to demand that a lab witness must testify subject to confrontation if she has made a testimonial statement that is conveyed to the trier of fact—have not found the burden intolerable. There is no reason to suppose that the other states would find adherence to the Melendez-Diaz line so much more difficult if they tried it. Instead of putting their energy into trying to undercut the Melendez-Diaz doctrine, attorneys general, local prosecutors, and other prosecution-related government agencies should do what they can to make the doctrine work effectively. Some good prosecutors have taken this approach virtually from the beginning. I hope many more now join them.

28 In a recent case not involving a lab witness, the Illinois Supreme Court held that a prior opportunity for cross-examination was inadequate in the circumstances because defense counsel lacked sufficient information. People v. Torres, No. 111302, 2012 WL 312119, at *14 (Ill. Feb. 2, 2012).


Many of you may expect me to get up here today and say that, “the sky is falling, this is horrible, this is horrible, we cannot do justice.” Well, I’m here to say quite the opposite . . . . [B]ased upon the efforts that have been made since the Melendez-Diaz decision, I can say that I think it’s going to work out, and I think especially . . . when it comes to drug cases, I’m quite confident that our state and hopefully all states in the country are going to be able to deal with Melendez-Diaz in an efficient, appropriate and just way, to hold those accountable but also to afford the constitutional rights to all defendants.

Id. Suffolk County includes the city of Boston, where Melendez-Diaz itself arose.
And then came *Crawford v. Washington*—the blockbuster decision that jettisoned twenty-five years of Confrontation Clause jurisprudence. Under *Crawford*, the critical inquiry governing admissibility of a hearsay statement became whether it is “testimonial” and not whether it is reliable. Following the basic principle articulated in *Crawford*, the holding five years later in *Melendez-Diaz v. Massachusetts* became a foregone conclusion: a crime laboratory report is simply an expert’s affidavit, and thus clearly testimonial. Even the outcome of *Bullcoming v. New Mexico*, where a surrogate expert introduced a lab report, could be considered inevitable—at least to Justice Scalia and the dwindling number of his colleagues who share his view of testimonial statements. However, *Crawford* now seems endangered, as the Court confronts yet another case involving expert testimony: *Williams v. Illinois*.
This essay starts with some thoughts about Federal Evidence Rules 703 and 705 and then makes a few observations about the constitutional issue. My thesis is that any Confrontation Clause jurisprudence involving these rules must appreciate their weaknesses. In particular, the Court has failed to appreciate the relationship between pretrial discovery and meaningful confrontation at trial. My concerns are practical, not doctrinal.

I. RULE 703’S RATIONALE

An expert’s opinion is, of course, only as good as the basis on which it rests. If the jury rejects the basis, it should also reject the opinion on which it is based. The pre-Rules common law limited the bases of expert testimony to (1) personal knowledge of the expert or (2) assumed facts—typically presented to the expert in the form of a hypothetical question—if those assumed facts were supported by the record (known as the “record-facts requirement”). Although the hypothetical question had long been criticized, it had several distinct advantages. It informed the jury of the basis of an expert’s opinion prior to the giving of the opinion. In addition, the record-facts requirement ensured that the basis could be tested by cross-examination when the evidence concerning those facts was introduced at trial.

A. The Reliability Rationale

Rule 703, along with Rule 705, made the hypothetical


Both rules were recently amended. In December 2011, the “restyled” Federal Rules of Evidence became effective. No substantive change was intended. Daniel J. Capra, Preface to WEINSTEIN’S FEDERAL EVIDENCE: RESTYLED FEDERAL RULES OF EVIDENCE, at 1–2 (2d ed. 2011).


See PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE §5.05[b], at 309 (4th ed. 2007) (“[T]he hypothetical question has been criticized as a cumbersome and unwieldy device which often precludes the expert from fully explaining her opinion to the jury.”).
question optional, but more importantly, these rules made it possible for an expert to base an opinion on out-of-court statements if it was typical for experts in the field to reasonably rely upon such statements. Thus, an expert opinion could be based on hearsay (nonrecord facts). The drafters offered a reliability rationale to support Rule 703—i.e., experts relied on nonrecord facts in their everyday practice and would not do so if the information was untrustworthy. The advisory committee provided an example most commonly associated with civil practice: a physician who makes life and death decisions based on X-rays, hospital records, blood tests, and other medical documents.9 Nevertheless, from its inception, Rule 703 was “controversial,”10 and a 2000 amendment made admissibility of hearsay more difficult.11

B. The Discovery Rationale

In addition to the reliability rationale, there was another, perhaps less appreciated, justification for Rules 703 and 705:

9 FED. R. EVID. 703 advisory committee’s note (1975):
In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

10 See ABA SECTION OF LITIGATION, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 176 (2d ed. 1991) (“Rule 703 was a controversial rule when enacted, and it remains controversial.”).

11 Inadmissibility of the hearsay basis became the default position. The rule now reads: “But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.” FED. R. EVID. 703.
comprehensive pretrial discovery. According to the drafters, Rule 705 assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. . . . Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Thus, informed of the basis of an expert’s opinion through discovery, an opposing party has the opportunity to challenge it. The combination of these two rationales—reliability and extensive pretrial discovery—made the enactment of Rules 703 and 705 an attractive reform in civil cases. Simplified trials coupled with extensive discovery ensured basic fairness.

Discovery in criminal cases, however, is not comprehensive. Indeed, it is meager, at best. Only a few states authorize pretrial discovery depositions of witnesses, much less experts. Interrogatories are unheard of. Although expert reports are discoverable in criminal litigation, these reports, as the Supreme Court reminded us in Melendez-Diaz, often are woefully inadequate. According to the Court, the laboratory report in that case contained only the bare-bones statement that ‘[t]he substance was found to contain: Cocaine.’ At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed.

---

12 Fed. R. Evid. 705 advisory committee’s note (1975).
13 See Giannelli & Imwinkelried, supra note 8, ch. 3 (discovery). In contrast, most jurisdictions have deposition procedures for the preservation of testimony if the witness might be unavailable for trial. Thus, depositions are used to preserve the testimony of a party’s own witnesses, not uncover the testimony of adverse witnesses.
The National Academy of Sciences’ recent report on forensic science makes the same point.\(^{15}\)

A rule justified (at least in part) on the basis of extensive pretrial discovery is extremely troublesome, to say the least, if that discovery is not provided. Meaningful “confrontation” of an in-court expert without adequate discovery is often an insurmountable task.\(^{16}\)

Furthermore, the bare-bones lab reports in criminal cases are a product of the adversary system, not science. The *Journal of Forensic Sciences*, the official publication of the American Academy of Forensic Sciences, published a symposium on the ethical responsibilities of forensic scientists in 1989. One Article discussed a number of unacceptable laboratory reporting practices, including (1) “preparation of reports containing minimal information in order not to give the ‘other side’ ammunition for cross-examination,” (2) “reporting of findings without an interpretation on the assumption that if an interpretation is required it can be provided from the witness box,” and (3) “[o]mitting some significant point from a report to

---

\(^{15}\) See NAT’L RESEARCH COUNCIL, NAT’L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 21 (2009).

\(^{16}\) See FED. R. CRIM. P. 16 advisory committee’s note (“It is difficult to test expert testimony at trial without advance notice and preparation.”); see also Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791, 798–99 (1991) (discussing the inadequate discovery of expert evidence in criminal cases).
trap an unsuspecting cross-examiner.”17 In other words, the reports are intended to make the trial confrontation of the expert more difficult.

As an example, imagine that a forensic pathologist testifies that a person died as a result of carbon monoxide poisoning.18 This opinion is based partly on an autopsy, which revealed a cherry-red skin color that is indicative of carbon monoxide poisoning, and the absence of any other cause of death. This personal knowledge is supplemented by two other sources of information. The first is the report of a toxicologist, which revealed the presence of quantifiable amounts of carbon monoxide in tissue samples taken from the decedent’s organs during the autopsy. The second is a police report regarding the scene where the body was found, which revealed that a gas stove was on and the windows were shut when the police entered the decedent’s apartment.

In a life insurance case involving a death benefit, Rules 703 and 705 would permit the pathologist to testify that the cause of death was carbon monoxide poisoning, without first disclosing the bases of her opinion.19 Neither the toxicologist (another expert) nor the first police responder (lay witness) would be required to testify.20 In contrast, the common law required both to testify at some point in the trial in order for the hypothetical question to be valid.

Under the discovery rules in civil litigation, the opposing party would be entitled to a comprehensive expert report,21

---

18 This example is based on State v. David, 22 S.E.2d 633 (N.C. 1942).
19 On direct examination, the pathologist may be asked to provide the basis of her opinion because it would be more persuasive (not because of any evidence rule).
20 As a practical matter, the police officer would probably be called as a witness because his testimony is needed independently of the expert’s opinion.
21 The rule requires that the report must contain:
   (i) a complete statement of all opinions the witness will express and
which might spur that party to retain its own expert. In addition, the opposing attorney could depose all three participants—the pathologist, the toxicologist, and the police officer. Interrogatories would probably precede these depositions. In contrast, in a criminal case, say for murder, most of this discovery is simply not authorized. As noted above, testing the reliability of the expert’s opinion is extremely difficult without pretrial discovery.

Now recall the hearsay problem inherent in Rule 703. The 2000 amendment to Rule 703 makes non-disclosure of the hearsay basis of an expert’s opinion the default position. This provides some protection, but the opposing party (i.e., the accused) is still disadvantaged. The only means of attacking the pathologist’s opinion may require disclosure of the hearsay basis on cross-examination, which the cross-examiner may not know ahead of time because of inadequate discovery. Moreover, disclosure may carry a high price: it might inform the jury that another expert (the toxicologist) supports the pathologist’s opinion regarding the cause of death. An instruction telling the jury to limit its consideration of this information to a non-hearsay purpose would most likely be ineffective. The jury

---

The basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness’s qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.


22 Professor Mnookin has rejected the argument that the bases can be offered for a non-hearsay purpose:

The problem with this argument is that notwithstanding its frequent invocation by courts, it makes almost no sense. To be sure, the jury might have better grounds for evaluating the expert’s testimony if it hears about the data upon which the expert relied for her conclusion. But part of a rational evaluation of the expert will thus entail an evaluation of her sources—which will inevitably involve a judgment about the likelihood that the sources themselves are valid and worthy of reliance. In other words, to decide how
would probably not understand, much less adhere to, such an instruction in this context.  

In sum, Rules 703 and 705 are problematic as evidence rules in criminal cases without even considering Confrontation Clause issues.

II. Rule 703’s “Reasonable Reliance” Requirement

Rule 703 provides: “If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.” What is considered “reasonable reliance” varies from field to field. For example, an arson investigator’s opinion on the origin and cause of a fire may be based in part on statements of eyewitnesses. In contrast, a psychiatrist who testifies in an insanity case may base her opinion in part on the post-crime statements of the defendant’s family and friends. Accordingly, the “reasonable reliance” requirement requires close scrutiny.

much to credit the expert’s sources, the jury should, logically, first assess the odds that they are reliable. And what is this but a judgment about the likely truth of their contents? Using the information for the permissible purpose of evaluating the expert thus necessarily requires a preliminary determination about the information’s truth. The permitted purpose is therefore neither separate nor separable from an evaluation of the truth of the statement’s contents.

Mnookin, supra note 7, at 816.

23 See Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.” (citation omitted)); Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962) (“[I]f you throw a skunk into the jury box, you can’t instruct the jury not to smell it.”).

24 See United States v. Lundy, 809 F.2d 392, 395–96 (7th Cir. 1987) (“[H]earsay and third-party observations that are of a type normally relied upon by an expert in the field are properly utilized by such an expert in developing an expert opinion. . . . [The expert] presented uncontroverted evidence that interviews with many witnesses to a fire are a standard investigatory technique in cause and origin inquiries.” (citing Fed. R. Evid. 703; United States v. Lawson, 653 F.2d 299, 301–03 (7th Cir. 1981))).

25 These witnesses may provide important information about the accused’s conduct leading up to the crime.
A. Supervising Toxicologist

A pre-Crawford case, Reardon v. Manson, illustrates the kinds of problems that the “reasonable reliance” requirement raises. In that case, a toxicologist, Dr. Reading, testified about the identity of a seized substance (marijuana) based on tests performed by a chemist working under his supervision. The Second Circuit upheld the practice: “Expert reliance upon the output of others does not necessarily violate the confrontation clause where the expert is available for questioning concerning the nature and reasonableness of his reliance.”

Reardon raises numerous issues. First, the term “under the supervision” is troublesome. In 1983, Saks and Duizend published a study on the use of scientific evidence. Part of their investigation involved case studies of different forensic techniques. The drug case in their study is the Reardon prosecution. They comment:

In this case, the laboratory in question had three doctorate-level toxicologists and 22 or 24 less-credentialed chemists. The volume of tests performed (about 20,000 annually) left the toxicologist an average of only a few minutes per day to attend to any given test. Is this adequate involvement to justify testifying to the findings?

In other words, the toxicologist was “supervising” fifty cases

---

26 Reardon v. Manson, 806 F.2d 39 (2d Cir. 1986). The case had a long legal history before it was heard by the Second Circuit. The Connecticut Supreme Court upheld the conviction on appeal. State v. Reardon, 376 A.2d 65, 67, 69 (Conn. 1977). On habeas review, the Federal District Court for the District of Connecticut ruled that the defendant’s right to confrontation had been violated. Reardon v. Manson, 491 F. Supp. 982, 988–89 (D. Conn. 1980). The Second Circuit Court of Appeals remanded on procedural grounds. Reardon v. Manson, 644 F.2d 122, 127 (2d Cir. 1981). On remand, the district court once again found a confrontation violation, Reardon v. Manson, 617 F. Supp. 932 (D. Conn. 1985), and then the Second Circuit reversed on the merits, Reardon v. Manson, 806 F.2d 39 (2d Cir. 1986).

27 Reardon, 806 F.2d at 42.

a day. As the federal district court noted, “[I]t strains credulity to assert that Dr. Reading could personally ‘supervise’ some 50 of these tests daily.”

Here, the line between a supervising expert and a surrogate witness, as in *Bullcoming*, is blurred, if not erased.

An understanding of the laboratory procedures demonstrates how this blurring occurred. According to the toxicologist, his laboratory used three different tests to identify marijuana: (1) a microscopic test to determine the presence of cystolithic hairs that are characteristic of marijuana, (2) a chemical color test, and (3) thin layer chromatography (TLC).

Dr. Reading admitted, however, that his opinion was not based on the first test; he “never personally examined the substance under the microscope.” He further testified that the TLC and color tests were sufficient to identify marijuana. In other words, Dr. Reading claimed that a microscopic test required by his laboratory’s protocol, that he presumably directed his subordinate to perform, was unnecessary!

Dr. Reading also explained that the TLC and color tests “were conducted out of his immediate presence by laboratory chemists under his supervision and on oral or hand-written

---

29 *Reardon*, 617 F. Supp. at 936.

30 “The briefs and the opinions focused on the laboratory procedures, both technical and administrative, without real evidence of the workloads and methods, and reached various differing conclusions about the directness of the supervising toxicologist’s observations under the given circumstances.” *Saks & Van Duizend*, supra note 28, at 49.

31 See Bruce Stein et al., *An Evaluation of Drug Testing Procedures Used by Forensic Laboratories and the Qualifications of Their Analysts*, 1973 Wis. L. REV. 727, 771 (“Cystolith hairs are small hairs on the leaves resembling ‘bear claws.’ . . . The major difficulty with this test is that many plants have cystolith hairs. . . . In the subclass dicotyledon, . . . 600 species . . . contained cystolith hairs.”).

32 State v. Reardon, 376 A.2d 65, 66 (Conn. 1977) (“Dr. Reading testified at length . . . as to the manner in which drug identifications were conducted in the state toxicological laboratory in this and other similar cases. A microscopic test, a thin-layer chromatography test and a chemical test were conducted.”).

Confrontation, Experts, and Rule 703

reports from [the] chemists.”34 Therefore, he lacked personal knowledge about issues such as the chain of custody and adherence to proper procedures during the time the subordinate had possession of the evidence.35 Notably, these closely resemble the practices condemned in Bullcoming.

Second, the procedure sanctioned in Reardon misleads a jury into believing that a well-trained toxicologist with a Ph.D. has performed the tests personally, when that is not the case. The district court noted that substitution of the toxicologist for the chemist had become “routine” in Connecticut. According to that court,

it is likely that the State was hoping to take strategic advantage of their absence. By not producing the actual chemists, the State effectively screened these less-experienced witnesses from the rigors of cross-examination. Moreover, in their place, the State substituted a witness with great experience both on the witness stand and in the practice of forensic medicine, whose testimony . . . was buttressed by his doctorate degree.36

This practice may be more misleading than it first appears. The Second Circuit refers to the subordinates as “chemists,”37 which one might assume is someone with a bachelor’s degree in chemistry. But this is not necessarily true. The district court pointed out that the “record is absolutely devoid of any evidence as to the qualifications of the chemists who actually performed the tests.”38 A more accurate description may be the one used by Saks and Duizend, who referred to them as “technician[s].”39

Finally, discovery is once again a problem. The Second Circuit justified its Reardon holding in part on the defendant’s

34 Id.
35 “As to other tests where he himself observed the results of the experiments, he still was required to assume that the substances tested were in fact the substances in question, that the tests had been performed correctly, and that the appropriate standards had been used.” Id. at 985.
36 Id. at 987.
37 Reardon, 806 F.2d 39, 41 (2d Cir. 1986).
38 Reardon, 617 F. Supp. 932, 935 (D. Conn. 1985).
39 SAKS & VAN DUIZEND, supra note 28, at 49.
pretrial access to the underlying data, asserting that in-court confrontation of a supervising expert is sufficient “where the defendants have access to the same sources of information through subpoena or otherwise.” The “otherwise” presumably refers to discovery but, as discussed above, such discovery often does not exist.

In sum, the “supervision” cases should not all be treated alike. *Reardon* seems only a step (and a very short one, at that) away from what the Court found unacceptable in *Bullcoming*.

**B. DNA Cases**

Even DNA cases are not all the same. In the typical case only one laboratory is involved. However, *Williams* is not the typical DNA case. The crime scene analysis was farmed out to a private DNA lab, Cellmark. Although Sandra Lambatos, a state DNA analyst, testified that she made an independent assessment of the Cellmark report, she also testified that she was not familiar with Cellmark’s protocols and that Cellmark had different matching rules than her lab. Moreover, Lambatos was incapable of answering important questions about the Cellmark laboratory. Among these questions were those about personnel and procedures. According to DNA Advisory Board requirements, each DNA analyst must undergo proficiency testing—how did the Cellmark expert perform on these proficiency tests? Each laboratory must undergo audits and

---

40 *Reardon*, 806 F.2d at 42.

41 The DNA Identification Act of 1994 required proficiency testing and the creation of a DNA Advisory Board to set standards. 42 U.S.C. § 14131 (2006); see also DNA ADVISORY BD., QUALITY ASSURANCE STANDARDS FOR FORENSIC DNA TESTING LABORATORIES 13.1 (1999) [hereinafter DAB STANDARD], available at http://www.cstl.nist.gov/strbase/dabqas.htm (“Examiners and other personnel designated by the technical manager or leader who are actively engaged in DNA analysis shall undergo, at regular intervals of not to exceed 180 days, external proficiency testing in accordance with the standards. Such external testing shall be an open proficiency testing program.”).

42 DAB STANDARD 15.1 (“The laboratory shall conduct audits annually in accordance with the standards outlined herein.”); *Id.* at 15.2 (“Once every two years, a second agency shall participate in the annual audit.”).
keep a corrective action file—what kind of problems had Cellmark experienced, as recorded in the corrective action file? If confrontation is going to be meaningful, the defense must have the opportunity to confront a witness who knows the answers to critical questions, such as those left unanswered in *Williams*. It also needs access to such information before trial.

III. NOTICE-AND-DEMAND STATUTES

One final point deserves mention. The adequacy of pretrial discovery has an impact on a related *Crawford* expert issue. In *Melendez-Diaz*, the Court seemed to approve one type of notice-and-demand statute." Such statutes permit the admission of a laboratory report if the defense is notified that the prosecution intends to introduce the report and the defense fails to demand the presence of the analyst as a witness." In other words, failure to demand the analyst’s presence constitutes a waiver of the right of confrontation. Defense counsel, however, cannot intelligently waive the presence of the analyst unless she understands the basis of the analysis. In short, waiving a client’s right of confrontation without knowing far more about the

---

43 *Id.* at 14.1 (requiring corrective action procedures “whenever proficiency-testing discrepancies and/or analytical errors are detected”).

44 *Melendez-Diaz* v. Massachusetts, 129 S. Ct. 2527, 2534 n.3 (2009) (“The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.”); *Id.* at 2541 n.12 (“It suffices to say that what we have referred to as the ‘simplest form [of] notice-and-demand statutes,’ is constitutional; that such provisions are in place in a number of States; and that in those States, and in other States that require confrontation without notice-and-demand, there is no indication that the dire consequences predicted by the dissent have materialized.” (citation omitted)).

45 The Court has yet to directly consider notice-and-demand statutes. In *Briscoe* v. *Virginia*, 130 S. Ct. 1316 (2010) (per curiam), the Court vacated the judgment of the Supreme Court of Virginia and “remand[ed] the case for further proceedings not inconsistent with the opinion in *Melendez-Diaz*.” Although that statute gave the accused the “right to call” the forensic analyst “as a witness,” it did not require the Commonwealth to call the analyst in its case-in-chief. *See* Cypress v. Commonwealth, 699 S.E.2d 206, 208 (Va. 2010). On remand, the Virginia Supreme Court held the statute unconstitutional. *Id.* at 211–13.
analysis than is typically provided in criminal discovery would be ineffective assistance of counsel.

CONCLUSION

In Pennsylvania v. Ritchie, a 1987 decision, a plurality of the Supreme Court took the position that the right of confrontation is a trial right and “does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.” It seems likely, given this holding, that the Supreme Court may continue to fail to account for the inadequacy of pretrial discovery in its Confrontation Clause jurisprudence. The Court should revisit this issue. The provision of adequate discovery is critical to meaningful trial confrontation.

---

47 Id. at 52–53. In a concurring opinion, Justice Blackmun, who cast the deciding vote, disagreed with the plurality: “In my view, there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness.” Id. at 61–62 (Blackmun, J., concurring in part and concurring in the judgment). In dissent, Justices Brennan and Marshall agreed:

The creation of a significant impediment to the conduct of cross-examination thus undercuts the protections of the Confrontation Clause, even if that impediment is not erected at the trial itself. In this case, the foreclosure of access to prior statements of the testifying victim deprived the defendant of material crucial to the conduct of cross-examination.

Id. at 71 (Brennan, J., dissenting). Justices Stevens and Scalia dissented on procedural grounds. Id. at 72–78 (Stevens, J., dissenting); see also United States v. Bagley, 473 U.S. 667, 674–78 (1985) (rejecting the Court of Appeals’ right of confrontation approach in favor of a due process analysis).
THE CONFRONTATION CLAUSE
AND EXPERT TESTIMONY:
RECENT DEVELOPMENTS IN THE
SUPREME COURT AND THE NEW YORK
STATE COURT OF APPEALS

Andrew C. Fine*

INTRODUCTION

*Crawford v. Washington* promised an entirely new approach to the Confrontation Clause. Under the regime of *Ohio v. Roberts*, the scope of the Clause was essentially coterminous with the rule against hearsay. A nontestifying declarant’s out-of-court statements, including her written reports, were generally admissible in New York because of the state’s expansive view of the exceptions to the hearsay rule. *Crawford*, however, overruled *Roberts* and seemed to signal transformative change, because it explicitly severed the link between the Clause and the scope of the prohibition against hearsay. The decisive inquiry became whether an out-of-court hearsay statement is testimonial in character, rather than whether it is reliable. If a statement is testimonial, and is offered for its truth, its introduction is prohibited in the absence of an opportunity to cross-examine the declarant, regardless of its evidentiary admissibility.

In deciding to abandon the *Roberts* approach, Justice Scalia’s opinion in *Crawford* condemned the *Roberts* Court’s willingness to “leave the Sixth Amendment’s protection to the vagaries of

* Director, New York Court of Appeals Litigation, The Legal Aid Society, Criminal Appeals Bureau.
2 U.S. CONST. amend. VI.
the rules of evidence,” and to “allow[] a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability.” “Dispensing with confrontation because testimony is obviously reliable,” the opinion declares, “is akin to dispensing with jury trial because a defendant is obviously guilty.” Accordingly, a hearsay statement’s reliability, as measured by whether a judge concludes that it fits under a hearsay exception or believes that it is otherwise “trustworthy,” has become irrelevant under the Confrontation Clause. If the declarant does not testify and the statement is testimonial within the meaning of the Clause, its admission violates the Clause, regardless of its reliability. Out-of-court statements from a nontestifying declarant that are not offered for their truth, however, do not run afoul of the Clause.

In Crawford’s aftermath, important questions have arisen regarding its applicability to an expert’s “basis” testimony that either incorporates or relies upon out-of-court statements by nontestifying declarants. In addition, courts have addressed the constitutional admissibility of lab reports based on tests conducted by nontestifying analysts, and whether the Confrontation Clause problem can be finessed by offering the reports through the testimony of experts who were not involved in the testing process. This piece will address the manner in which the New York State court of appeals has grappled with Crawford and its progeny in the area of expert testimony and lab reports.

Since Crawford, New York’s high court has, unlike most appellate courts, recognized the hearsay character of an expert’s “basis” testimony that incorporates the statements of nontestifying declarants. If those statements are testimonial in character, their introduction through the expert violates the Confrontation Clause. However, the court of appeals has simply refused to recognize that the Supreme Court’s post-Crawford

---

4 541 U.S. at 61.
5 Id. at 62.
6 Id.
7 Id. at 59.
decision in *Melendez-Diaz v. Massachusetts*, subsequently reinforced by *Bullcoming v. New Mexico*, squarely held that the introduction of laboratory reports prepared by nontestifying declarants, and any expert testimony based on them, is prohibited by the Clause. Supreme Court precedent contradicts the court of appeals’ rulings upholding the admission of such evidence.

I. EXPERT “BASIS” TESTIMONY RELYING ON STATEMENTS MADE BY NONTESTIFYING DECLARANTS: *PEOPLE V. GOLDSTEIN*  

Prior to *Crawford*, most courts viewed an expert witness’ “basis” testimony as nonhearsay. In such jurisdictions, the documents, lab reports, or other information upon which the expert relied were ostensibly not being offered for their truth, but rather only to assist the jury in evaluating the validity of the expert’s opinion. The federal courts that have followed this approach have relied on Federal Rule of Evidence 703, which allows an expert to base an opinion on “facts or data in the case that the expert has been made aware of or personally observed,” and further declares that such facts “need not be admissible for the opinion to be admitted.” Moreover, even if such facts “would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury,” if their probative value “substantially outweighs their prejudicial effect.”

Since the federal approach is premised on the view that “basis” testimony is not hearsay, such testimony seemed to be immune from *Crawford* scrutiny when offered in cases tried in federal courts, and in states with similar evidentiary rules. Indeed, that is how most federal courts have treated this subject since *Crawford*, and a number of state courts have relied on

---

11 *E.g.*, United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993); Boone v. Moore, 980 F.2d 539, 542 (8th Cir. 1992); *People v. Nieves*, 739 N.E.2d 1277, 1284 (Ill. 2000).
12 *See, e.g.*, United States v. Augustin, 661 F.3d 1105, 1128–29 (11th Cir. 2011); United States v. Pablo, 625 F.3d 1285, 1292 (10th Cir. 2010).
similar provisions in their evidence codes to reach the same result.

However, New York has no evidence code or written rules, and the New York court of appeals—unlike most jurisdictions—has long considered an expert witness' “basis” testimony to be a form of hearsay that could run afoul of the Confrontation Clause. In People v. Sugden, the court recognized that the Clause is potentially implicated when a prosecution expert "base[s] his opinion on material not in evidence," and in People v. Stone, the court acknowledged the "legally hearsay" character of expert testimony reliant upon out-of-court statements. But, anticipating the rationale that the Supreme Court would thereafter adopt in Ohio v. Roberts, the court, in essence, created a reliability-based hearsay exception. The court stated that a prosecution expert "may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion." Post-Crawford, the Sugden/Stone approach retains validity as an evidentiary matter, but the hearsay exception set forth in those decisions can no longer justify the introduction of such expert testimony by the prosecution without calling the declarant, if the statements on which it is based are testimonial in character.

The New York court of appeals recognized this in People v. Goldstein. In that case, which involved an insanity defense, a private psychiatrist hired by the prosecution relied on her out-of-court interviews with nontestifying witnesses regarding the defendant’s alleged prior conduct to support her opinion that Goldstein was not insane, and recited the contents of those interviews before the jury.

The court of appeals rejected defendant’s evidentiary challenge to the professional reliability of the interviews under

---

But cf. United States v. Mejia, 545 F.3d 179, 197–99 (2d Cir. 2008) (finding it improper to permit expert police officer to communicate out-of-court testimonial statements of nontestifying confidential informants and cooperating witnesses directly to the jury as the basis for his expert opinion).


15 Id.

16 Sugden, 323 N.E.2d at 173.
The Confrontation Clause and Expert Testimony

However, it ruled that the contents of the interviews constituted testimonial hearsay and hence were inadmissible under the Confrontation Clause as interpreted by Crawford. The prosecution argued that their psychiatrist’s recitation of the contents of her interviews with nontestifying declarants was not hearsay because it was admitted merely to assist the jury in evaluating the psychiatrist’s opinion. In dismissing this claim, the court declared, “[w]e do not see how the jury could use the statements of the [nontestifying] interviewees to evaluate [the prosecution psychiatrist’s] opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution’s goal was to buttress [the psychiatrist’s] opinion, the prosecution obviously wanted and expected the jury to take the statements as true.” Accordingly, the statements “were offered for their truth, and are hearsay.”

The Goldstein court then ruled that the hearsay statements relied on by the psychiatrist were testimonial as well, and therefore that their introduction in the declarants’ absence violated the Confrontation Clause under Crawford. It reasoned that the interviewees had to have known that the prosecution had retained

---

17 Even though it approved the admission of the expert’s reliance on the civilians’ statements as an evidentiary matter, the Goldstein Court was troubled by the notion that an expert may “repeat to the jury all the hearsay information on which [her opinion] was based.” People v. Goldstein, 843 N.E.2d 727, 731 (N.Y. 2005). It recognized that “it can be argued that there should be at least some limit on the right of the proponent of an expert’s opinion to put before the factfinder all the information, not otherwise admissible, on which the opinion is based. Otherwise, a party might effectively nullify the hearsay rule by making that party’s expert a ‘conduit for hearsay.’” Id. (quoting Hutchinson v. Groskin, 927 F.2d 722, 725 (2d Cir. 1991)).

18 Id. at 732.

19 Id. at 733; accord People v. Dungo, 98 Cal. Rptr. 3d 702, 711–14 (Ct. App. 2009), review granted, 220 P.3d 240 (Cal. Dec. 2, 2009); see People v. Archuleta, 134 Cal. Rptr. 3d 727, 731 (Ct. App. 2011); People v. Hill, 120 Cal. Rptr. 3d 251, 270–79 (Ct. App. 2011). The Supreme Court may well resolve the expert basis hearsay issue for Sixth Amendment purposes in Williams v. Illinois, 939 N.E.2d 268 (Ill. 2010), cert. granted, 131 S. Ct. 3090 (argued Dec. 6, 2011) (No. 10-8505).
the psychiatrist to testify against Goldstein. Accordingly, “all of them should reasonably have expected their statements ‘to be used prosecutorially’ or ‘to be available for use at a later trial.’”20

The admissibility of the expert’s opinion itself was not at issue in Goldstein, but since the opinion was based in part on the inadmissible statements made to the psychiatrist, it was dependent on testimonial hearsay and hence suffered from the same constitutional defect. The expert’s opinion could not be fairly evaluated in the absence of an opportunity for cross-examination of the declarants who provided the necessary foundation.21 Nor would the problem be solved by not revealing on the stand the testimonial hearsay on which the expert relied. Camouflaging the sources of the opinion puts the cross-examiner “in an untenable position: expose the inadmissible hearsay or forego effective cross-examination.”22

In view of the court of appeals’ prior treatment of expert “basis” testimony as hearsay, the outcome in Goldstein was not surprising, though it represents a minority view nationally. But it is difficult to deny its underlying logic: if acceptance of an expert’s opinion is dependent on another person’s statement, the opinion is worthless unless the statement is true.23

20 Goldstein, 843 N.E.2d at 733 (quoting Crawford v. Washington, 541 U.S. 36, 51–52 (2004)). The court further held that the statements were sufficiently “formal” to qualify as testimonial, noting that Crawford itself did not require strict formality, and found a statement to be testimonial that “was unsworn and used colloquial phrasing.” Id. It also determined that although the psychiatrist was not a “government officer . . . . the Confrontation Clause would offer too little protection if it could be avoided by assigning the job of interviewing witnesses to an independent contractor rather than an employee.” Id. at 733–34.


23 See Mnookin, supra note 22.
II. NEW YORK’S INITIAL POST-CRAWFORD TREATMENT OF SCIENTIFIC REPORTS ADMITTED IN THE ANALYST’S ABSENCE: PEOPLE V. RAWLINS, PEOPLE V. MEEKINS, AND PEOPLE V. FREYCINET

The next cases before the court of appeals regarding the applicability of Crawford to expert testimony about scientific procedures were People v. Rawlins and People v. Meekins (decided jointly). In Rawlins, a police detective, who did not testify, examined latent fingerprints that had been lifted from two burglary sites. The detective’s report, introduced at trial in the detective’s absence over the defendant’s Confrontation Clause objection, concluded that those prints matched the defendant’s right thumbprint. By a vote of six to one, the court held in Rawlins that the fingerprint comparison report constituted testimonial hearsay under Crawford, and thus its admission at trial in the absence of the specialist’s testimony violated Rawlins’ Confrontation Clause rights. In Meekins, however, the court unanimously upheld the introduction of a DNA testing report through the testimony of experts who did not participate in the testing, even though the experts who conducted the tests were not called to the stand. The report, based on tests conducted by a private laboratory at the behest of police, did not include a comparison of that DNA with the defendant’s. The majority opinion discussed the circumstances under which business records prepared by or at the behest of law enforcement should be deemed to constitute testimonial hearsay under Crawford.

Ultimately, the court concluded that the most critical issue is whether a law enforcement “business record” directly accuses

---

25 Id. at 1033. A second detective who also offered this report testified to his independent assessment of the sets of prints, concluding that they matched the defendant’s prints. A third detective testified to the match as well, as a defense witness. Relying on their testimony, the court of appeals held that the erroneous introduction of the report by the nontestifying detective, in violation of the Confrontation Clause, constituted harmless error. Id. at 1022–24, 1033–34.
26 Id. at 1034–36.
the defendant of a crime. Thus, the court stated, “[O]ur task in each case must be to evaluate whether a statement is properly viewed as a surrogate for accusatory in-court testimony.”27 Such reports, the court suggested, will likely be viewed as testimonial, but even more clearly, the court indicated that few others would be. Adopting a pinched view of Crawford, the court rejected as “too broad” a test that depends on the declarant’s reasonable expectation that a statement will be used prosecutorially.28 It determined that the result in Davis v. Washington,29 allowing the introduction of a nontestifying domestic-violence complainant’s accusations against her former boyfriend in a 911 call, would have been different had this standard been determinative, since the complainant could well have expected her statements to be used against Davis at trial.30

The court also considered the proper practice for lab reports that memorialize results of scientific tests, relying heavily on the “insights” and “reasoning” underlying three pro-prosecution state high court decisions, State v. Crager,31 People v. Geier,32 and Commonwealth v. Verde,33 which it found to be “instructive.”34 The court adopted the Massachusetts supreme judicial court’s reasoning in Verde that the drug-test certificates at issue did not “concern the exercise of fallible human judgment,” but “merely [recorded, contemporaneously, the procedures taken and] state[d] the results of a well-recognized scientific test determining the composition and quantity of the substance.”35 Such “contemporaneous recordation of scientific

27 Id. at 1029.
28 Id.
30 Rawlins, 884 N.E.2d at 1029.
32 People v. Geier, 161 P.3d 104 (Cal. 2007).
34 Rawlins, 884 N.E.2d at 1030–32.
35 Id. at 1031 (alterations in original) (internal quotation marks omitted) (quoting Verde, 827 N.E.2d at 705).
protocol,” the court reasoned, “must be undertaken independent of any possible use at trial, for the independent purpose of ensuring that the test was properly administered.”

Discussing the Ohio supreme court’s decision in Crager, which involved a DNA report, the court of appeals noted that the technicians “could have reasonably expected that the . . . reports would be used in a later prosecution,” but that the Ohio court determined that any concern that the reports could be “prejudicial is allayed . . . because such notes ‘represented the contemporaneous recordation’ of the . . . results ‘as [they were] actually performing those tasks’ pursuant to industry protocols.” Accordingly, “police or prosecutorial involvement in a case like Crager becomes a nonissue, and the focus shifts to declarant.”

Adapting the “primary purpose” test used by Davis v. Washington to evaluate whether statements made in response to police interrogation are testimonial, the court of appeals concluded that a technician’s motivation and purpose are to “simply record[], contemporaneously, the administration of scientific protocol to reveal what is hidden from the naked eye”; the technician “ordinarily has no subjective interest in the test’s outcome.” The court also cited, with approval, the Ohio court’s reasoning that the lab, although its mission was to “aid law enforcement,” was “not itself an ‘arm’ of law enforcement in the sense that . . . [its] purpose [was] to obtain incriminating results.”

Judge Jones’ opinion for the court approvingly noted that in Geier, another DNA case, the California supreme court had similarly relied upon the “contemporaneous recordation” rationale; the DNA analysis, the court of appeals reasoned, was based on observations similar to those of a Davis-style declarant.

---

36 Id.
37 Id. at 1030–31 (quoting State v. Crager, 116 Ohio St. 3d 369, 2007-Ohio-6840, 879 N.E.2d 745, cert. granted, vacated mem., 129 S. Ct. 2856 (June 29, 2009) (No. 07-10191)).
38 Id. at 1031.
40 Rawlins, 884 N.E.2d at 1031.
41 Id. at 1030 (quoting Crager, 879 N.E.2d at 753).
who is reporting an emergency.\textsuperscript{42} “[T]he . . . raw data were not ‘accusatory’ ( . . . in a Sixth Amendment sense) and the analyst did not ‘bear witness’ against defendant.”\textsuperscript{43} Rather, she generated the report “for the purpose of adhering to ‘standardized scientific protocol.’”\textsuperscript{44}

Though the courts emphasized the “objectivity of the scientific procedures at issue” in these three cases, none of the reports that were held admissible were “directly accusatory, in the sense that they explicitly linked the defendants to the crimes.”\textsuperscript{45} The court of appeals viewed this to be critical. It was “particularly noticeable in \textit{Geier}” that although the laboratory analysis was conducted by nontestifying technicians, “the comparison to defendant’s DNA was made by a testifying witness.”\textsuperscript{46} Though this distinction “is not an infallible touchstone,” the court wrote, “[i]n close cases, . . . the directness with which a particular statement points to the defendant as the offender is a factor to be considered.”\textsuperscript{47} However, the court also said that “statements can often be testimonial where their tendency to inculpate the defendant is only indirect.”\textsuperscript{48}

Summarizing its overall approach, the court stated that “[t]he question of testimoniality requires consideration of multiple factors, not all of equal import in every case.”\textsuperscript{49} Two of these, however, “play an especially important role in this determination: first, whether the statement was prepared in a manner resembling ex parte examination and second, whether the statement accuses the defendant of criminal wrongdoing.”\textsuperscript{50} These “interrelated touchstones” are informed by “the purpose of making or generating the statement, and the declarant’s motive for doing so . . . .”\textsuperscript{51}

\textsuperscript{42} \textit{Id.} at 1032.
\textsuperscript{43} \textit{Id.} (quoting People v. Geier, 161 P.3d 104, 140 (Cal. 2007)).
\textsuperscript{44} \textit{Id.} (quoting \textit{Geier}, 161 P.3d at 140).
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 1033.
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
Applying these principles to Rawlins, the court concluded that the fingerprint reports at issue were testimonial because their maker, “a police detective, prepared his reports solely for prosecutorial purposes and, most importantly, because they were accusatory and offered to establish defendant’s identity.”\(^{52}\) Comparing latent prints recovered from a crime scene with fingerprints from a known individual “fit the classic definition of ‘a weaker substitute for live testimony’ at trial.”\(^{53}\) The technician was “‘testifying’ through his reports that, in his opinion, defendant is the same person who committed the burglaries,” and his only purpose was “to ultimately apprehend a perpetrator . . . .”\(^{54}\) Rebutting the argument that the report was business related, rather than an effort “to nail down the truth about past criminal events,” the court noted that “it was the business of [the police technician] to establish (if possible) who committed the crime.”\(^{55}\) Though his conclusions could have exculpated Rawlins, the direct involvement of this law enforcement officer “‘presents unique potential’ for abuse.”\(^{56}\)

The court ruled in Meekins, however, that the DNA reports at issue were nontestimonial.\(^{57}\) That the testers “did not determine whether the data [they] collected matched [defendant] or any other suspect” was critical to this outcome.\(^{58}\) The DNA test results, “standing alone,” without any “‘comparisons of the results’ to any known DNA profiles,” “shed no light on the guilt of the accused in the absence of an expert’s opinion that the results genetically match a known sample.”\(^{59}\) Only the Medical Examiner’s office determined a match with defendant, and defendant did not challenge the “Medical Examiner’s role.”\(^{60}\) The testing procedures were “neither discretionary nor based on opinion,” and the testers “only contemporaneously recorded the

\(^{52}\) Id.

\(^{53}\) Id. (quoting Davis v. Washington, 547 U.S. 813, 828 (2006)).

\(^{54}\) Id.

\(^{55}\) Id. at 1033 n.14.

\(^{56}\) Id. (quoting Crawford v. Washington, 541 U.S. 36, 57 n.6 (2004)).

\(^{57}\) Id. at 1034.

\(^{58}\) Id. at 1035.

\(^{59}\) Id.

\(^{60}\) Id.
procedures employed and ‘state[d] the results of a well-recognized scientific test.’” Thus, the report “is not the kind of ex parte testimony the Confrontation Clause was designed to protect against.” Though the technicians “knew or had every reason to know . . . that their findings could generate results that could later be used at trial,” law enforcement’s involvement was nevertheless “inconsequential” because it could not have influenced the outcome of the tests. Moreover, the prosecution called a supervising witness from the lab who, though not involved in the tests at issue, was available for cross-examination regarding whether the lab’s testing protocol was followed.

Finally, “the documents . . . were not directly accusatory; none of them compared the DNA profile they generated to defendant’s.” In this regard, the court noted that the document prepared by the Division of Criminal Justice Services notifying the Medical Examiner’s office that there was a DNA match was not a business record, and, because it “comes close to a direct accusation that defendant committed the crime, . . . is less clearly nontestimonial hearsay than the other documents at issue.” But “any error” in admitting that document was harmless.

In People v. Freycinet, the court addressed a defendant’s Confrontation Clause challenge to the introduction of an autopsy report, in the absence of testimony from the doctor who performed the autopsy and prepared the report. The report was “redacted to eliminate [the doctor’s] opinions as to the cause and manner of the victim’s death.” Another doctor in the medical examiner’s office, who did not participate in the autopsy,

---

61 Id. (alteration in original) (quoting Commonwealth v. Verde, 827 N.E.2d 701, 705 (2005)).
62 Id.
63 Id.
64 Id.
65 Id.
66 Id. at 1035–36.
67 Id. at 1036.
69 Id. at 844.
testified to her opinions based on the facts in the absent pathologist’s report. The court applied the rationale of *Meekins* to unanimously reject the defendant’s claim.

First, the court noted its prior holding in *People v. Washington*. In *Washington*, the court held that autopsy reports, prepared by physicians associated with the office of New York City’s Medical Examiner, were not discoverable under state law; that the Medical Examiner’s office is “not a law enforcement agency”; and that the duties of the office are “independent of and not subject to the control of the office of the prosecutor.” The report was “very largely a contemporaneous, objective account of observable facts.” Though the doctor’s finding characterizing the victim’s injury as a “stab wound” was the product of an exercise of professional judgment, its significance to the case “derives almost entirely from [the absent doctor’s] precise recording of his observations and measurements as they occurred.” Thus, it was “hard to imagine” that the report, as redacted, “could have been significantly affected by a pro-law-enforcement bias.” The opinion ends by relying on the report not “directly link[ing] the defendant to the crime,” since it was concerned with “what

---

71 Freycinet, 892 N.E.2d at 846. The court of appeals’ focus in Freycinet on whether the medical examiner’s office is an arm of the prosecution, and its approving reference in Rawlins to the Crager court’s focus on the DNA lab not being an “arm of law enforcement,” are difficult to reconcile with the court’s treatment of a similar Crawford-related issue in Goldstein. In Goldstein, the prosecution hired a private psychiatrist to rebut defendant’s insanity defense. The Court held that the psychiatrist’s recitation of out-of-court statements by nontestifying declarants, which she relied on in support of her opinion, violated Goldstein’s Confrontation Clause rights. People v. Goldstein, 843 N.E.2d 727 (N.Y. 2005). In rejecting the prosecution’s reliance on the psychiatrist not being a “government officer,” the court reasoned that “[t]he Confrontation Clause would offer too little protection if it could be avoided by assigning the job of interviewing witnesses to an independent contractor rather than an employee.” Id. at 733–34; see also sources cited supra note 21.
72 Freycinet, 892 N.E.2d at 846.
73 Id.
74 Id.
happened to the victim, not with who killed her.”

Thus, “[the absent doctor] was not defendant’s ‘accuser’ in any but the most attenuated sense.”

III. THE NEW YORK COURT OF APPEALS’ REFUSAL TO FOLLOW MELENEZ-DIAZ V. MASSACHUSETTS

The Supreme Court repudiated every essential aspect of the New York court of appeals’ approach to this issue in Melendez-Diaz v. Massachusetts. Police searched a car in which Luis Melendez-Diaz was riding. They found a plastic bag containing nineteen smaller bags hidden in the partition between the front and back seats, and ultimately charged Melendez-Diaz with selling cocaine. The only proof that the bags recovered by police contained cocaine consisted of three sworn “certificates of analysis” showing the results of forensic testing performed on the seized substances. Neither the analyst nor any other expert was called to testify. Without detailing the nature of the testing, the certificates merely reported the weight of the bags and asserted that they contained cocaine. The certificates were sworn to by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, which is not a law enforcement agency. This practice of admitting a sworn “certificate of analysis” was authorized by statute, and the certificate constituted “prima facie evidence of the composition, quality, and the net weight” of the substance. Melendez-Diaz’s Confrontation Clause objection was overruled.

On appeal, the Massachusetts appeals court rejected the defendant’s Confrontation Clause claim, on the authority of the Massachusetts supreme judicial court’s decision in

75 Id.
76 Id.
78 Id. at 2530.
79 Id. at 2531.
80 Id.
81 Id.
82 Id. at 2552 (Kennedy, J., dissenting).
83 Id. at 2531 (majority opinion).
Commonwealth v. Verde, which had held such certificates to be nontestimonial, and that the makers of such certificates are accordingly not subject to confrontation. The Supreme Court reversed, holding, by a vote of five to four, that the certificates were testimonial and inadmissible under the Confrontation Clause, since the defendant had been given no opportunity to cross-examine the nontestifying analysts. Justice Scalia wrote the Court’s opinion, joined by Justices Stevens, Souter, Ginsburg, and Thomas. Justice Thomas joined in the opinion but also filed a concurrence, adhering to his previously announced view that “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” He concluded that the sworn certificates at issue in Melendez-Diaz were clearly affidavits, and thus “fall within the core class of testimonial statements’ governed by the Confrontation Clause.

Justice Scalia’s opinion begins by quoting the three potential formulations of “testimonial” statements set forth in Crawford. He noted that these categories “mention[] affidavits twice,” and then continues,

The documents at issue here, while denominated by

---

84 Id. (citing Commonwealth v. Melendez-Diaz, No. 05-P-1213, 2007 WL 2189152, at *4 n.3 (Mass. App. Ct. July 31, 2007)).
85 Id. at 2543 (Thomas, J., concurring).
86 Id. (quoting White v. Illinois, 502 U.S. 346, 365 (1992)).
87 Id. at 2531 (majority opinion).

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

88 Id. at 2532.
Massachusetts law “certificates,” are quite plainly affidavits: “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” They are incontrovertibly a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”

The majority concluded that the certificates were testimonial because (1) they qualified as affidavits, (2) they contained “the precise testimony the analysts would be expected to provide if called at trial,” and (3) they were “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” (quoting from the broadest formulation of “testimonial” in Crawford).

Perhaps most significantly as one considers New York practice, the Supreme Court explicitly rejected the major premise of Meekins/Freycinet: that whether a statement is “accusatory” in that it directly implicates the defendant in wrongdoing is vital to a resolution of its testimonial status. Instead, relying on the language of the Clause, the Court determined that the relevant issue is whether the statement relates to facts necessary for a conviction.

---

89 Id. (quoting BLACK’S LAW DICTIONARY 62 (8th ed. 2004)).
90 Id. (quoting Crawford, 541 U.S. at 51).
91 Id. at 2531–32.
92 Respondent first argues that the analysts are not subject to confrontation because they are not ‘accusatory’ witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband . . . This finds no support in the text of the Sixth Amendment or in our case law.

The Sixth Amendment guarantees a defendant the right ‘to be confronted with the witnesses against him.’ To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony against petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine. The contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause confirms this analysis. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses ‘against him,’ the Compulsory Process Clause guarantees a defendant the right to call witnesses ‘in
Regarding “business records” and “public records,” the Court made it clear that when such records are prepared for litigation purposes, they did not qualify under the “business records” exception as it had originally been recognized under the common law. The opinion specifically notes that “the results of a coroner’s inquest”—i.e., an autopsy report—were not exempt from confrontation under early American common law. Of course, this suggests strongly that autopsy reports are testimonial and hence inadmissible without the testimony of the examining pathologist—a view that had been almost uniformly rejected by lower courts after Crawford.

Relatively, Melendez-Diaz roundly rejects the notion that reporting the results of a forensic test is somehow less testimonial because such testing is “neutral” and “scientific,” in contrast with “testimony recounting historical events, which is ‘prone to distortion or manipulation . . . .’” The Court explained that “[t]his argument is little more than an invitation to return to our overruled decision in Roberts,” which focused on a statement’s reliability rather than its testimonial character.

The Supreme Court majority peremptorily rejected the dissent’s view that its opinion “sweeps away an accepted rule governing the admission of scientific evidence” that “has been established for at least 90 years,” pointing out that nearly all of those decisions either relied on, or were decided under the same

his favor.” U.S. Const., amend. VI. The text of the Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution must produce the former; the defendant may call the latter. Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

Id. at 2533–34 (footnote omitted).

93 Id. at 2538–40.
94 Id. at 2538.
96 Melendez-Diaz, 129 S. Ct. at 2536.
97 Id.
98 Id. at 2543 (Kennedy, J., dissenting).
standard as, *Ohio v. Roberts*, which was overruled by *Crawford*.99

It also seems clear that under *Melendez-Diaz*, a forensic lab report prepared for prosecution need not have been generated by a law enforcement official or agency in order to qualify as testimonial. Although the reports at issue were not prepared by a law enforcement agency,100 the Court emphasized that the report was prepared “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,”101 not the identity of the analyst’s employer. The dissenters, in contrast, would not require confrontation of declarants who could not qualify as “adversarial government officials responsible for investigating and prosecuting crime.”102

In addition, the Court, in dicta, took issue with the notion that “‘neutral scientific testing’ is as neutral or as reliable” as the prosecution suggested.103 The opinion cites studies critical of police laboratory techniques, refers to “documented cases of fraud and error involving the use of forensic evidence,” and points out that “[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.”104 It notes reliability problems that have been uncovered regarding “common forensic tests such as latent fingerprint analysis, pattern/impression analysis, and toolmark and firearms

---

99 *Id.* at 2533 (majority opinion).

100 See *id.* at 2531; *id.* at 2552 (Kennedy, J., dissenting). Justice Kennedy noted that “[t]here is no indication that the analysts here—who work for the State Laboratory Institute, a division of the Massachusetts Department of Public Health—were adversarial to petitioner. Nor is there any evidence that adversarial officials played a role in formulating the analysts’ certificates.” *Id.*

101 *Id.* at 2532 (majority opinion) (quoting *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004)).

102 *Id.* at 2552 (Kennedy, J., dissenting) (quoting Carolyn Zabrycki, *Toward a Definition of “Testimonial”: How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 CALIF. L. REV. 1093, 1118 (2008)).

103 *Id.* at 2536 (majority opinion) (emphasis added).

104 *Id.* at 2537.
analysis.”\textsuperscript{105} And it further declares that there may be no viable alternative to cross-examination as a means of challenging autopsies and breathalyzer test results.\textsuperscript{106} This, of course, strongly suggests that such reports are testimonial. In \textit{Melendez-Diaz}, moreover, the certificates merely contained the test result (cocaine was found), but not what tests were performed or “whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed.”\textsuperscript{107}

Finally, the Court declined to “relax the requirements of the Confrontation Clause to accommodate the ‘necessities of trial and the adversary process’:"

It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.\textsuperscript{108}

The Court also disputed the premise that this requirement will be onerous, concluding that most defendants who go to trial will not insist on producing the analyst, particularly in drug cases, and that “there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst’s appearance at trial.”\textsuperscript{109} \textit{Melendez-Diaz} rejected virtually all of the arguments that were relied upon by the court of appeals in \textit{Meekins} and \textit{Freycinet} to justify its viewpoint that many types of forensic lab reports and other scientific reports, including ones generated in anticipation of prosecution, are nontestimonial. Indeed, the

\textsuperscript{105} Id. at 2538. Though these types of police and scientific reports were discussed in dicta, they likely reflect the Court’s viewpoint that all of these documents are testimonial, as long as they contain evidence relevant to proving an element of a crime and are made in anticipation of prosecutorial use.

\textsuperscript{106} Id. at 2536 & n.5.

\textsuperscript{107} Id. at 2537.

\textsuperscript{108} Id. at 2540.

\textsuperscript{109} Id. at 2540–42.
Supreme Court has rejected, either directly or indirectly, all three of the out-of-state decisions relied on so heavily by the court of appeals. Commonwealth v. Verde provided the basis for the Massachusetts intermediate appellate court’s now-reversed disposition of the Melendez-Diaz case itself.110 In Barba v. California,111 the Supreme Court vacated an unpublished California intermediate appellate court decision directly applying People v. Geier to an identical DNA fact pattern, and remanded for reconsideration in light of Melendez-Diaz.112 The Supreme Court similarly vacated and remanded the Ohio supreme court’s decision in State v. Crager.113

The centerpiece of the court of appeals’ analysis in Meekins and Freycinet is its premise that perhaps the most critical determinant of a statement’s “testimoniality” is whether it is “accusatory,” in that it directly implicates the defendant in wrongdoing. In Melendez-Diaz, the Supreme Court held such reasoning to be antithetical to the very language of the Confrontation Clause, which guarantees an accused’s right to be confronted with the witnesses “against” him.114 Any witness who

114 Melendez-Diaz, 129 S. Ct. at 2534; see also Paul Shechtman, Not Many Fireworks During a Workmanlike Term, N.Y. L.J., Aug. 31, 2009, at S12–S13 (“The analysis in Melendez-Diaz calls into question the thoughtful opinions of the Court of Appeals in Freycinet and Rawlins . . . [which] relied principally on the fact that the analysts whose forensic reports were received into evidence were not ‘accusatory’ witnesses. But in Melendez-Diaz, Justice Antonin Scalia rejected the notion that the Confrontation Clause distinguishes between accusatory and nonaccusatory witnesses.”).
provides facts helpful to the prosecution in proving an element of the crime, the Court ruled, is a witness “against” him under the Clause.\footnote{See supra p. 472 and note 92.}

Moreover, in flatly rejecting the viewpoint that an analyst is somehow immunized from confrontation because she is making “near-contemporaneous observations,”\footnote{Melendez-Diaz, 129 S. Ct. at 2535.} the Supreme Court nullified another major underpinning of the analytical foundation of \textit{Meekins} and \textit{Freycinet}. In both decisions, the court of appeals relied on the virtually contemporaneous observations of the technicians, both in its discussion of the out-of-state authority it deemed persuasive,\footnote{\textit{E.g.}, People v. Rawlins, 884 N.E.2d 1019, 1030–31 (N.Y. 2008) (stating that the DNA report in \textit{Crager} “‘represented the contemporaneous recordation’ of the . . . results ‘as [they were] actually performing those tasks’ pursuant to industry protocols.” (alteration in original) (quoting State v. Crager, 116 Ohio St. 3d 369, 2007-Ohio-6840, 879 N.E.2d 745, 756)).} and in its analysis of the facts of the cases before it.\footnote{\textit{E.g.}, \textit{Id.} at 1035 (stating that the technicians “only contemporaneously recorded the procedures employed”); \textit{see also} People v. Freycinet, 892 N.E.2d 843, 846 (N.Y. 2008) (stating that the autopsy report was “very largely a contemporaneous, objective account of observable facts”).}

Nevertheless, in \textit{People v. Brown},\footnote{People v. Brown, 918 N.E.2d 927 (N.Y. 2009).} the court of appeals, after \textit{Melendez-Diaz}, reaffirmed the holding and analysis in \textit{Meekins}, and held that a DNA report processed by a laboratory working as a subcontractor to the medical examiner’s office was not testimonial. Given the rationale of \textit{Melendez-Diaz}, the decision of the court of appeals to confirm the analysis of \textit{Meekins} in the \textit{Brown} case is baffling, and analytically insupportable. Indeed, the opinion simply ignores the most pertinent aspects of the analysis in \textit{Melendez-Diaz}, which are incompatible with \textit{Meekins}.

In \textit{Brown}, as in \textit{Meekins}, the prosecution was permitted to introduce a DNA report containing the results of a genetic test of a male specimen taken from the victim’s rape kit, performed by a laboratory (Bode) that acted as a subcontractor for the New York City Medical Examiner’s office. No analyst from Bode
was called to testify. The only expert called was a forensic biologist/criminalist from the Medical Examiner’s office, who compared the genetic profile of male DNA found in the rape kit analyzed by Bode with a specimen of the defendant’s DNA, and determined there to be a match.

The court of appeals rejected the defendant’s Confrontation Clause challenge to the introduction of the rape kit DNA testing report. Melendez-Diaz notwithstanding, the court restated the Meekins analytical framework as asserting the governing standard, and applied it to hold that the report was not testimonial and hence that its admission did not violate the Clause. In so doing, it relied upon the nonaccusatory nature of the report, its conclusion that the report was not testimonial because it “consisted of merely machine-generated graphs, charts and numerical data,” and its view that, since the tests were conducted before the defendant was a suspect and neither the laboratory nor the Medical Examiner’s office is a law enforcement entity, “any pro-law-enforcement benefit to manipulating the results” was thereby eliminated. Each of these rationales is flatly rejected by Melendez-Diaz. The court of appeals made a limited attempt to distinguish Melendez-Diaz by pointing out that, unlike in that case, the prosecution in Brown called an expert who made the determination that the defendant’s DNA matched the male DNA recovered from the rape kit that was analyzed by the lab; the court noted that she could have been cross-examined regarding the results of her comparison and about her knowledge of the lab’s procedures. As this Article will discuss, the Supreme Court soon specifically repudiated the latter distinction.

Thus, one wonders whether the results of any of the court of appeals’ decisions on this subject can be reconciled with Melendez-Diaz. Certainly, the result in Rawlins was not

---

120 Id. at 931–32.
121 Id. at 931.
122 Id. at 932.
123 Id. at 931.
124 See infra pp. 125–26 (discussing Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)).
affected. The fingerprint comparison report was a formal police report that was prepared for litigation. Indeed, in *Melendez-Diaz*, the Supreme Court specifically called attention to the value of confrontation regarding “latent fingerprint analysis.”

But *Meekins* and *Brown* are analytically irreconcilable with *Melendez-Diaz*.

Although the DNA test results in *Meekins* did not report a match, the Supreme Court held in *Melendez-Diaz* that whether a document is accusatory or nonaccusatory is utterly irrelevant to its testimonial character. The *Meekins* court’s rejection of the significance of the declarant’s reasonable expectation of prosecutorial use is no longer valid; the Supreme Court relied heavily on that standard in *Melendez-Diaz*. Similarly, the court of appeals in *Brown*, as in *Meekins*, relied on the DNA report’s near-contemporaneous nature, its scientific validity, and its generation by a non-law-enforcement agency in holding the report to be nontestimonial, but *Melendez-Diaz* rejected each of these justifications for admission. Under the Supreme Court’s reasoning in *Melendez-Diaz*, such a document would be testimonial since it was generated at the behest of law enforcement, prepared in anticipation of a criminal prosecution, and offered to assist in proving an essential element of the charged crime. The post-*Melendez-Diaz* court of appeals’ decision in *Brown* simply ignores all of this.

Based on *Melendez-Diaz* alone, one would think that *Freycinet* would have a short shelf life as well. As in *Meekins*, the *Freycinet* court found it critical that the report in question (here, an autopsy report) did not directly link the defendant to the crime, and hence that the pathologist “was not defendant’s ‘accuser’ in any but the most attenuated sense.”

As noted, whether a document is “accusatory” in nature is no longer relevant, as long as the document is offered to prove facts helpful to the prosecution, which the report in *Freycinet* was. Similarly, the court’s reliance on the report being “very largely a contemporaneous, objective account of observable facts,”

---

127 *Id.*
and its having been prepared by a declarant who was employed by a non-law-enforcement agency, is incompatible with *Melendez-Diaz*. Moreover, as discussed above, the *Melendez-Diaz* Court referred specifically to autopsy reports, in a manner strongly suggesting that they are to be considered testimonial. Under the now-applicable Supreme Court standard, the autopsy report in *Freycinet* should be considered testimonial, since it fulfilled an obvious testimonial purpose and was prepared with the reasonable expectation of prosecutorial use.

IV. THE INADEQUACY OF THE OPPORTUNITY TO CROSS-EXAMINE AN EXPERT WHOSE TESTIMONY RELIES ON A NONTESTIFYING ANALYST’S REPORT: BULLCOMING V. NEW MEXICO

In *Melendez-Diaz*, the forensic report held by the Supreme Court to be testimonial was admitted without accompanying expert testimony. In *Brown, Meekins*, and *Freycinet*, by contrast, the prosecution offered the reports through the testimony of experts who examined them and were familiar with the labs’ procedures, but did not call any analyst who participated in the testing. Thus, the question becomes whether this matters. Logically, the answer should be no; the cross-examiner will remain unable to ask questions that test either the professional background or the techniques and procedures utilized by the person who performed the analysis. One commentator has observed that under these circumstances, “[t]he expert witness is not meaningfully subject to cross-examination, because the basis of his opinion cannot be tested according to the constitutionally prescribed procedure for assessing testimonial hearsay: cross-examination of the hearsay declarant.”

The United States Supreme Court adopted this reasoning, with reservations expressed in a concurring opinion by Justice Sotomayor, in *Bullcoming v. New Mexico*. In *Bullcoming*, a certified lab report of a test performed on the defendant’s blood

---

128 Seaman, *supra* note 21, at 880.
129 *Bullcoming*, 131 S. Ct. 2713–16; *id.* at 2719 (Sotomayor, J., concurring).
alcohol level by an independent state agency was admitted, as a business record, through a supervisor from the lab who had not observed or performed the test. The state court held that

[although the blood alcohol report was testimonial, . . . its admission did not violate the Confrontation Clause, because the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph machine and, therefore, the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant’s right to confrontation.]^{130}

A closely divided Supreme Court reversed. Justice Ginsburg wrote the opinion, and Justices Scalia, Thomas, Kagan, and Sotomayor joined for the most part. Justice Sotomayor also wrote a concurrence primarily in order to stress the principal opinion’s “limited reach.”^{131} The Bullcoming Court held that the in-court testimony of a supervisor who lacked any connection to the test was an entirely inadequate substitute for testimony from the analyst: “surrogate testimony of that order does not meet the constitutional requirement. The accused’s right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.”^{132} The supervisor’s testimony “could not convey what [the analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst’s part.”^{133} In short, the Confrontation Clause “does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.”^{134}

^{131} Bullcoming, 131 S. Ct. at 2719 (Sotomayor, J., concurring).
^{132} Id. at 2710 (majority opinion).
^{133} Id. at 2715.
^{134} Id. at 2716.
In so holding, the Supreme Court upended the only basis upon which the court of appeals distinguished *Brown* from *Melendez-Diaz*: the presence in *Brown* of an opportunity to cross-examine a surrogate expert not involved in the testing. The Supreme Court has authoritatively discredited the entire analysis of *Meekins* and *Brown*.

The *Bullcoming* Court determined with little difficulty that the lab report was testimonial under *Melendez-Diaz*. As in that decision, the report’s evidentiary purpose rendered it testimonial, trumping the state’s reliance on its allegedly non-“adversarial” nature. 135 Although, unlike in *Melendez-Diaz*, the report was not sworn, it was sufficiently “formalized,” since the analyst signed a certificate concerning the result of the analysis. 136 In addition, relying on *Crawford*, the *Bullcoming* Court ruled that the report’s “comparative reliability . . . does not overcome the Sixth Amendment bar.” 137

The latter pronouncement was somewhat surprising, coming as it did just four months after the Court’s decision in *Michigan v. Bryant*. 138 In a opinion by Justice Sotomayor, the Court determined in *Bryant* that an identification of the defendant by a shooting victim to police on the street a short time after the shooting was nontestimonial. The Court based its determination on its view that the “primary purpose” of the interaction between the victim and the police officer was “to enable police assistance to meet an ongoing emergency,” rather than “to create a record for trial.” 139 The *Bryant* Court relied, in part, on its conclusion that the victim’s statement was reliable, and likely fell within the “excited utterance” exception to the rule against hearsay. 140 Diverging sharply from *Crawford*, the Court opined that a statement’s reliability, and whether it qualified under a settled exception to the rule against hearsay, were significant factors militating against its testimonial quality. 141

---

135 Id. at 2717.
136 Id.
137 Id. at 2715.
139 Id. at 1150, 1155.
140 Id. at 1155.
141 Id. at 1157.
The opinion of the Court in *Bullcoming* seemingly signifies that the *Bryant* decision’s focus on reliability was not the precursor to a full-scale retreat from *Crawford* as some had believed, at least regarding the testimonial status of laboratory reports. Justice Sotomayor, the author of *Bryant*, stressed in her *Bullcoming* concurrence that *Bryant* “deemed reliability, as reflected in the hearsay rules, to be ‘relevant,’ not ‘essential.’”\(^{142}\) However, her opinion also pointed out recurring fact patterns in lab report cases that she viewed as left open by *Bullcoming*: (1) cases in which there is an alternate purpose, or alternate primary purpose, for the report; (2) cases in which the testifying witness has some connection to the test at issue; (3) cases in which an expert is asked for her independent opinion about underlying testimonial reports that were *not* themselves admitted into evidence; and (4) cases in which the state introduces only “machine-generated results.”\(^{143}\) The Supreme Court should shortly address the third of these fact patterns in *Williams v. Illinois*.\(^{144}\)

The New York court of appeals has not addressed a Confrontation Clause lab report issue since *Bullcoming*. Given the court’s manifest failure to apply controlling Supreme Court precedent in the post-*Melendez-Diaz* case of *People v. Brown*, it is impossible to predict what it will do in such a case, though an essential element of *Brown*, the supposedly critical in-court presence of a surrogate expert, has now been declared irrelevant by the Supreme Court. It is noteworthy that in *People v. Morrison*,\(^{145}\) decided after *Bullcoming*, the Fourth Department held that the defendant’s Confrontation Clause rights had been violated by the introduction of a certified DNA report prepared

---

\(^{142}\) *Bullcoming*, 131 S. Ct. at 2720 n.1 (Sotomayor, J., concurring) (quoting *Bryant*, 131 S. Ct. at 1155–56).

\(^{143}\) *Id.* at 2721–23.

\(^{144}\) *Williams v. Illinois*, No. 10-8505 (U.S. argued Dec. 6, 2011); see *People v. Williams*, 939 N.E.2d 268 (Ill. 2011), *cert. granted*, 131 S. Ct. 3090 (2011). In *Williams*, an expert testified in court, despite the fact that he was not involved in conducting the DNA testing. The report itself was not admitted, but a critical part of its substance was made known to the jury. *See Williams*, 939 N.E.2d at 271–72.

by an analyst who did not testify, where the prosecution did call another analyst who read the report and determined that the lab had followed proper procedure. The court cited Bullcoming, but did not discuss it, instead choosing to factually distinguish Brown.\(^\text{146}\)

**CONCLUSION**

Following its important recognition of the testimonial-hearsay character of expert “basis” testimony in Goldstein, the court of appeals has taken an insupportably restrictive view of Crawford in subsequent decisions involving the admission of scientific test reports in the absence of an opportunity to cross-examine the lab analyst. Melendez-Diaz and Bullcoming have discredited the court of appeals’ decisions in Meekins and Freycinet, although those cases were defensible at the time they were decided. The court’s refusal to reconsider Meekins in Brown, decided after Melendez-Diaz, is astonishing, and the court has already missed an opportunity to rectify that mistake after Bullcoming by denying permission to appeal in People v. Hall,\(^\text{147}\) in which the Appellate Division recently reaffirmed the validity of Freycinet.\(^\text{148}\) Of course, intervening developments at the Supreme Court, particularly the forthcoming decision in Williams v. Illinois, could be dispositive as well. The court of appeals has shown no signs of considering an independent state constitutional approach in this area. Unfortunately, its unanimous rejection of the defendant’s Confrontation Cause claim in Brown provides no assurance that it will follow binding Supreme Court Sixth Amendment authority either.

\(^{146}\) *Id.* The Appellate Division determined that the Confrontation Clause violation was harmless error. *Id.* at 237.


\(^{148}\) *Id.* at 428. Following Bullcoming, two circuits and one state high court have recognized that autopsy reports are testimonial in character. United States v. Ignasiak, Nos. 09-10596, 09-16005, 10-11074, 2012 WL 149314, at *9–12 (11th Cir. Jan. 19, 2012); United States v. Moore, 651 F.3d 30, 69–74 (D.C. Cir. 2011); People v. Lewis, 806 N.W.2d 295 (Mich. 2011).
CONFRONTATION CLAUSE CURIOSITIES:
WHEN LOGIC AND PROPORTION HAVE
FALLEN SLOPPY DEAD

Randolph N. Jonakait*

I. THE TRIAL RIGHTS OF ENGLISHMEN

This symposium title’s use of “curioser” reminded me that I had put aside a draft labeled “The Curious Notion that the Sixth Amendment Constitutionalized the Trial Rights of Englishmen.” I was referring to Justice Scalia’s opinion in the confrontation case of Giles v. California, which stated:

It is not the role of the courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts’ views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen.¹

This interpretive fundament is similar to what Scalia said for the Court in Crawford v. Washington: the Confrontation Clause “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”² The Giles assertion, however, differs from the earlier statement: it does not confine itself to the Confrontation Clause but gives a principle for all the Sixth Amendment guarantees. And Scalia seems to be indicating some sort of interpretive shift, for the “trial rights of Englishmen” is not synonymous with the common law. But if there is a shift,

* Professor, New York Law School.
what does it mean? Giles gave no explanation for the change, and I realized that I could only speculate about the significance, if any, of the newer formulation. Curious, I mused, and my thoughts, apparently like those of Robert Pitler, who organized this symposium, turned to Lewis Carroll’s Alice. I, being of a certain age, however, also thought of the Alice mediated through the Jefferson Airplane. Grace Slick seemed to be speaking to me. If I wanted to know the significance of the differences in the assertions in Crawford and Giles, I could only “Go ask [Scalia], when he’s ten feet tall.”

The curious might have further questions, such as what is the constitutional source of Scalia’s Giles pronouncement? It was unadorned with references or citations. That nakedness is not surprising for, as far as I have been able to ascertain, no one in the framing era said that the Sixth Amendment was meant to guarantee the trial rights of Englishmen or the common law. The Giles’ statement is in the curious position of being, charitably, a self-evident proposition or, less charitably, a bare assertion.

The notion that the Sixth Amendment seeks fairness through the specific means of the trial rights of Englishmen is also curious, if not mystifying, since it is simply flat out wrong. At the time of the drafting of the Bill of Rights, England permitted

3 The lyrics to the Jefferson Airplane song White Rabbit can be found at various places online. See, e.g., White Rabbit, LYRICSDOMAIN, http://www.lyricsdomain.com/10/jefferson_airplane/white_rabbit.html (last visited Feb. 21, 2012).

4 Id.

5 See Roger W. Kirst, Does Crawford Provide a Stable Foundation for Confrontation Doctrine, 71 BROOK. L. REV. 35, 83 (2005) (“English common law may be more accessible or more well-defined than American common law, but Justice Scalia’s survey of the historical record did not provide any evidence that the original meaning was tied to English common law. There is no mention of English common law in the statements from the ratification debates quoted by Justice Scalia.”); see also Robert N. Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 IND. L. REV. 711, 735–38 (1976) (“[I]t is remarkable that there was so little debate [about the Sixth Amendment.] . . . [T]he historical background of the Bill of Rights leaves unclear the intent of the Framers of the [F]ifth and [S]ixth amendments.”).
counsel for misdemeanors and by statute in treason cases. For ordinary felonies, however, an accused could have counsel for issues of law—and perhaps at the indulgence of the court, lawyers could cross-examine witnesses—but such defendants were prohibited from having the full assistance of counsel.\(^6\)

Americans of the framing era saw this limitation as inhumane and cruel, and the Sixth Amendment’s grant of a full right of counsel to all those charged with crimes was a conscious rejection of English law. For example, James Wilson, a drafter of the Constitution and an original Supreme Court Justice, criticized the English law: “The practice in England is admitted to be a hard one, and not to be very consonant to the rest of the humane treatment of prisoners by the English law.”\(^7\) In contrast, he wrote, “It is enacted by a law of the United States that persons indicted for crimes shall be allowed to make their full defense by counsel learned in the law.”\(^8\)

Zephaniah Swift, who later served as Chief Justice of the Connecticut Supreme Court, was even harsher in his assessment of the English law and Connecticut’s rejection of it. In his treatise published in 1796, he wrote:

We have never admitted that cruel and illiberal principle of the common law of England, that when a man is on trial for his life, he shall be refused counsel, and denied those means of defence, which are allowed, when the most trifling pittance of property is in question. The flimsy pretence, that the court are to be counsel for the prisoner will only heighten our indignation at the practice; for it is apparent to the least consideration, that a court can never furnish a person accused of the crime with the advice, and assistance necessary to make his defence. . . . One cannot read without horror and astonishment, the abominable maxims of law, which


\(^8\) Id.
deprive persons accused, and on trial for crimes, of the assistance of counsel . . . . It seems by the ancient practice, that whenever a person was accused of a crime, every expedient was adopted to convict him, and every privilege denied him, to prove his innocence. . . . The legislature has become so thoroughly convinced of the impropriety and injustice of shackling and restricting a prisoner with respect to his defence, that they have abolished all those odious laws, and every person when he is accused of a crime, is entitled to every possible privilege in make his defence, and manifesting his innocence, by the instrumentality of counsel . . . .

Swift, writing a few years after the Sixth Amendment’s ratification, saw the American right to counsel as an important rejection of what were then the limited trial rights of Englishmen. It is clear that the Sixth Amendment rejected that then-existing English law. Even so, Scalia, in Giles, asserts that the Sixth Amendment sought fairness through the trial rights of Englishmen. How could the Supreme Court Justices be so clearly wrong? We seem to be in Alice’s world, where following the rabbit leads down the rabbit hole of someone’s imagination. And how is one to understand this imaginary history? Grace Slick’s voice returns, “Call [Scalia], when he was just small.”

II. THE MYTH OF RALEIGH’S TRIAL

Those going down the confrontation rabbit hole tend to spy Sir Walter Raleigh. His trial, even if not the wellspring of the confrontation right, is seen as emblematic of the kind of proceedings the Confrontation Clause was meant to prohibit. Justice Scalia stated what many believe when he said that “Raleigh’s infamous 17th-century treason trial . . . remains the canonical example of a Confrontation Clause violation. . . .”

---

But as Professor David Alan Sklansky points out, for Raleigh’s case to guide us today, “[w]e need to decide precisely what was wrong with it. . . .” At this point, however, the vision becomes obscured, perhaps by the smoke from the tobacco that the sometime-historian Bob Newhart suggests Raleigh brought back to Europe. The haze prevents answers to some basic questions: “Was confrontation so important because Cobham had provided key evidence against Raleigh, because Cobham was in Crown custody, because Cobham reportedly had retracted his incriminating statements,” or some combination of these procedures?

Such questions are based on the presupposition that the trial was seen as unfair because of the way that the prosecution presented evidence. But surely there are other reasons why the trial could be perceived as unjust: perhaps it was because Raleigh was without a defense advocate, apparently could not call witnesses of his own, and could not call Cobham. Maybe it was unjust because Raleigh did not have notice of the charges or the evidence before the trial, there was no neutral magistrate, the trial was not public, or because the trial, and the time it took place, were filled with religious intolerance. Later generations could have found various reasons for why Raleigh’s trial was unjust, and the evidence we now call hearsay was just one of many interrelated reasons.

Of course, these more modern answers to the question of why Raleigh’s trial was historically seen as unjust are not really the point. Instead, we should want to know what the framers and adopters of the Constitution thought the answers were. This we do not know. We do not know if the question was even posed. Indeed, nothing has been presented that people of the framing era, whether actually involved with crafting our Constitution or not, gave Raleigh’s trial any thought at all. Even if we accept the unsupported supposition that Raleigh’s trial was

13 Sklansky, *supra* note 11, at 1690.
seen in the framing era as a canonical example of an unfair trial, we do not know why.

III. THE IMPORTANCE OF THE CHOSEN MYTH

Perhaps we all need a myth to lean on, but the one we choose can matter. Somehow the notion that the Confrontation Clause was meant to prevent trials like Raleigh’s leads to the conclusion that the Clause’s prime concern is with the use of ex parte depositions from absent witnesses. If, however, the Salem witch trials had been picked as exemplars of the unfairness that the Sixth Amendment sought to prevent, the focus would be different. Certainly, in some ways, the Salem trials are a better choice than Raleigh’s trial. While we do not have any indication that Raleigh’s trial got any real consideration from Americans, we do know that the Salem trials had widespread notoriety.

The witch trials were quickly, widely, and consistently perceived as unjust. In print, correspondence, and no doubt in public and private discourse, colonial Americans pondered the mistakes. No colonial trials were examined more. The consensus concluded that injustices were committed, even though existing law and procedures had been followed. Something, then, had to be wrong with the law and procedures, and consequently pressures for change and reform emerged from these trials.  

If these trials formed part of the Sixth Amendment’s origin myth, as they well could, then the focus of the Confrontation Clause doctrine would be different from that adopted by the Court, since the flaws at Salem did not come from the lack of face-to-face confrontation. Face-to-face confrontation was not only granted, it was crucial to many of the proceedings. The secret generation of evidence by the state did not occur. The proceedings, including the preliminary examinations, were very public. Ex parte depositions were not used. The trials relied heavily on evidence adduced at preliminary examinations, but both the accused and the

---

accuser were present at them. If those examinations can be labeled depositions, they were not ex parte.\textsuperscript{15}

Analysis of the Salem trials continued at least into the mid-eighteenth century. In 1750 Thomas Hutchinson, who later would be governor of Massachusetts, published documents from the witch trials along with a commentary. He concluded that the trials were unfair even though the accusers faced the accused in open court and even though the trials were not based on depositions. The proceedings were “absurd and dangerous,” at least in part because “[i]nstead of suspecting and shifting the witnesses, and suffering them to be cross-examined, the authority, to say no more, were imprudent in making use of leading questions, and thereby putting words into their mouths for suffering others to do it.”\textsuperscript{16}

IV. THE CURIOUS LIMITATION ON THE CONFRONTATION RIGHT

The Court’s choice of myth has led to the conclusion that the Confrontation Clause’s purpose was to prevent ex parte depositions and, therefore, courts must prevent the modern equivalents of such evidence. The result has been, as the next section discusses, the Court’s increasingly Mad-Hatterish discussion of what is “testimonial” hearsay. But even if the Court has selected the correct myth and correctly pronounced the Confrontation Clause’s purpose, the Court has made an analytic leap by concluding that the constitutional right operates only when un-cross-examined testimonial evidence is presented. Perhaps the Framers did want to prevent ex parte depositions, but that does not necessarily mean that their selected method—the confrontation right—only applies when the equivalent of an ex parte deposition occurs. It is possible that the Framers were adopting a right like other Sixth Amendment provisions that prevent specific abuses by giving an affirmative right that applies generally and is not limited to the animating harm.

\begin{flushright}  
\textsuperscript{15} \textit{Id.} at 128–29.  
\end{flushright}
For example, the jury trial provision of the Sixth Amendment was created, according to the Supreme Court, to prevent government oppression. “Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”¹⁷ If this right were interpreted as confrontation is, the Court would give standards for determining the presence of a corrupt or overzealous prosecutor or a compliant, biased, or eccentric judge and limit jury trials to these situations. The Sixth Amendment jury trial right acts as a check on such judges and prosecutors, but the guarantee applies generally and even in the established absence of an abusive prosecutor or judge in the particular trial.

Even if the Confrontation Clause’s birth was prompted by a specific abuse, its text, like that of the jury guarantee, is not expressly limited to restraining a particular pernicious practice. Just as the jury right operates generally and protects an accused even if the right’s animating harm is not present, the confrontation right, even if opposition to ex parte depositions gave a reason for its birth, could grant an accused rights even when the concern regarding ex parte depositions is irrelevant. Surely, it ought to be at least considered curious that the Court has not explained why the Confrontation Clause should operate differently, or in a more limited manner, from other Sixth Amendment rights.

V. CONFRONTATION’S IDIOSYNCRATIC TERMS

Of course, for those most truly affected by the Confrontation Clause—the lawyers seeking to admit or exclude evidence, the judges who must decide if the evidence is admissible, and the defendants whose lives will be irrevocably changed by the decisions—the important point is not how the Court got where it is, but whether some specific hearsay is “testimonial.”

The formal definition seems clear. Justice Sotomayor,
writing for the Court in *Michigan v. Bryant*, relied on the definition in *Davis v. Washington*¹⁸ that statements “are testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”¹⁹ Justices Scalia and Ginsburg dissented and Justice Kagan did not participate in *Bryant*, but Scalia and Kagan both joined in the portion of Ginsburg’s opinion in *Bullcoming v. New Mexico* that stated, “To rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.’”²⁰ Justice Thomas, too, may agree with this definition, but he is the outlier because he maintains that the confrontation right only applies when testimonial evidence is somehow “formal.”²¹

While the Court may have a consensus on the definition of “testimonial,” the Court’s fractured decisions reveal that the Justices differ on how the term applies. This is hardly unexpected. The term “testimonial hearsay” does not appear in the Constitution. It is not a term used in the framing era, nor can it be found in English common law. It is not a term used in Raleigh’s trial. In fact, it was not used in the eighteenth, nineteenth, or twentieth centuries. It is a new term, first coined in the Court’s decision in *Crawford v. Washington*²² in 2004, without a history of interpretation, and it should not be surprising that this ahistorical, atextual term is malleable.

Indeed, many of the terms used in the present

---

²⁰ Bullcoming v. New Mexico, 131 S. Ct. 2705, 2714 n.6 (2011) (quoting *Davis*, 547 U.S. at 822).
²¹ See Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring) (“I continue to adhere to my position that ‘the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’” (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring))).
Confrontation Clause doctrine have idiosyncratic meanings.\textsuperscript{23} This includes, for example, Scalia’s dissenting statement in Bryant that “[r]eliability tells us nothing about whether a statement is testimonial. Testimonial and nontestimonial statements alike come in varying degrees of reliability.”\textsuperscript{24} Scalia then offers an illustration. “An eyewitness’s statements to the police after a fender-bender, for example, are both reliable and testimonial. Statements to the police from one driver attempting to blame the other would be similarly testimonial but rarely reliable.”\textsuperscript{25}

Even if Justice Scalia is correct that “reliability” should not be part of the testimonial analysis, his use of the term “reliability” is distinctive. Surely if the eyewitness or that driver testified in court consistently with what was told the officer, the jury, after considering other evidence and hearing cross-examination, might correctly rely on either the driver or the eyewitness, or both. The driver that Scalia deems rarely reliable may be giving an absolutely accurate rendition of what happened. Just because she was involved in the accident does not mean she was not telling the truth. And, of course, other evidence and cross-examination may reveal the eyewitness’s statement—which Scalia presumed reliable—to be inaccurate. A “reliable statement,” as Scalia conceives of it here, is not one that ultimately can be relied upon, but one made by a person who does not have an obvious motive to shade the truth. But a witness’s motives, credibility, and bias are elements that are traditionally adduced by the finder of fact at a trial. Thus, reliability, Scalia suggests, can be determined without the information that only a trial can produce.

Scalia’s use of “eyewitness,” however, may seem even more curious. He posits that the eyewitness’s statements are testimonial because, apparently, the eyewitness’s assertions had the primary purpose of proving past events potentially relevant


\textsuperscript{24} Bryant, 131 S. Ct. at 1175.

\textsuperscript{25} Id.
Confrontation Clause Curiosities

to a criminal case. As the Court has come to define the term, this eyewitness would be a “witness against” the accused if his statements were offered by the prosecution. Consistent with the Confrontation Clause, such hearsay could be admitted only if the accused had the opportunity to cross-examine the eyewitness. But if that eyewitness had made the very same statement to a non-law enforcement official, such as a spouse or a bystander, apparently the statement would be nontestimonial. Since the eyewitness has not made a testimonial statement, the eyewitness does not bear testimony, and the Confrontation Clause would not bar introduction of such statements. The very same words that could not be admitted when said to the police, except under cross-examination, now could be. Why? Because under confrontation terminology, the “eyewitness” is no longer a “witness.” In this curious world that a Lewis Carroll might appreciate, words have lost their normal English meanings.

This result, again, suggests that the Confrontation Clause is interpreted differently from its companion rights. The Sixth Amendment does not merely restrain the government. Instead, it acts as a check on official power by granting affirmative rights to an accused:

> [T]he Sixth Amendment is not a collection of negatives. Instead, the provision grants positive guarantees to the accused. The controlling question is not what did the government do, but what did the defendant get. Did he get a jury? Did he get an attorney? Did he get notice? Did he get the chance to produce witnesses? and so on.

The Confrontation Clause operates differently. It is not viewed from the accused’s perspective. While the accused could benefit similarly from cross-examination of an out-of-court declarant whether a statement is made to a bystander or a police officer, he only gets the constitutional protection, apparently, if law enforcement was involved. Present interpretation, in effect, focuses on governmental actions or the declarant’s intentions, not on what right the accused was actually afforded. Returning to a comparison of the right to a jury trial, this shift in focus is

---

26 Jonakait, supra note 14, at 617–18.
akin to concluding that as long as the state did not do something to deny an accused a jury trial, his Sixth Amendment right was not violated, instead of asking, Did the accused get a jury trial?

VI. IS BULGER A RALEIGH?

The Confrontation Clause’s present interpretation is based on the curious use and reinvention of history. It ignores the methods used to interpret other Sixth Amendment provisions, and employs terms with idiosyncratic meanings, for which the Justices cannot agree on an application. But since the Court gives fealty to the proposition that trials like Sir Walter’s were meant to be forbidden, surely the search for and exclusion of testimonial hearsay prevents Raleigh-like trials. But does it, really?

The Ohio Court of Appeals recently affirmed the conviction of Deon Bulger for the possession of a weapon. In a drug buy-and-bust operation, Cleveland Detective Luther Roddy drove a person, identified in the appellate opinion as “the confidential reliable informant (‘CRI’),”27 to a buy site. Roddy parked his undercover car nearby. Another detective observed from a second vehicle. The officers saw the CRI approach a person later identified as Byron Turner in a residential driveway. The CRI quickly backed away from Turner and returned to Roddy’s car. Roddy asked, “Did you get anything?” The CRI responded that he had not and continued, “he pulled a gun on me and told me to get the f____ out of there, so I came right back to you.”28 Roddy radioed for back up. A responding officer saw “Turner quickly take a dark object from his waistband and hand it to”29 the defendant Bulger, who went into the house owned by Turner’s uncle.

A few minutes later, the police found Bulger in the living room, apparently feigning sleep with his heart “beating really,

---

28 Id. ¶ 21.
29 Id. ¶ 6.
really fast.”\textsuperscript{30} In the basement under the furnace, the police found a fully loaded, .9 millimeter gun. According to the testimony, the gun “was the size, shape, and color of the object the detectives had seen Turner display in his waistband.”\textsuperscript{31} Turner’s grandmother indicated that Turner lived with her in a nearby house, and the police found .9 millimeter bullets in Turner’s bedroom.

The CRI did not testify, but for convenience’s sake, let’s give him a name, perhaps Larry Cobham. The appellate opinion does not explain Cobham’s absence. As far as we know, he was available but, as a matter of strategy, the prosecution did not call him.

Cobham’s statement about seeing Turner with a gun was admitted over a hearsay objection as a present sense impression. Surely, as the appellate court found, this was a correct ruling since Detective Roddy made clear that only moments elapsed between the time when Cobham perceived Turner and when he reported to the officer that Turner had a gun.

The appellate court also ruled that the admission of Cobham’s statement did not violate the Confrontation Clause because it was not testimonial. Under present interpretations of that right, that also seems correct. Whether the statement “[h]e pulled a gun on me” is considered objectively from Cobham’s viewpoint, from the viewpoint of both the police and Cobham’s perspective simultaneously, or from the totality of the circumstances, the detective’s question and Cobham’s response did not have the primary purpose to prove past events relevant to a later criminal prosecution. This was not evidence collection. The statement was “not procured with a primary purpose of creating an out-of-court substitute for trial testimony.”\textsuperscript{32} The Ohio court correctly stated, “The CRI could not have expected his statement to be used as evidence at trial. . . .”\textsuperscript{33} Instead, this was important information about a police operation in its midst that would affect its next actions.

\textsuperscript{31} Id.
\textsuperscript{32} Bulger, 2011 WL 5550255, ¶ 22.
\textsuperscript{33} Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011).
State v. Bulger is a minor case that correctly applies present doctrines and seems of little significance. On the other hand, perhaps it ought to make us wonder whether Raleigh’s trial has truly been banished.

The CRI’s hearsay statement seems to have been essential to Bulger’s conviction. Police officers did testify that they saw Turner take an object from his waistband that bore a resemblance to the recovered weapon and hand it to Bulger. The police, however, did not state that they saw Turner pass a gun to Bulger. The gun was not discovered in Bulger’s immediate possession, but on a different floor from where he was found in a house that was not his residence and he did not own. No one testified that Bulger hid the gun or that he was familiar with the place where it was secreted. The bullets that matched the gun were not found where Bulger lived. Only if the trier of fact concluded that Turner handed Bulger a gun could it be rationally concluded beyond a reasonable doubt that Bulger had possessed the recovered weapon. No in-court testimony established that, but the “confidential reliable informant’s” out-of-court assertion, if believed, did. Although this hearsay is not testimonial, and under present doctrine can be presented without cross-examination, it surely provided an effective substitute for trial testimony. In other words, Bulger was seemingly convicted because of the unconfronted words of an anonymous police informant.

Does this make Bulger’s case like Raleigh’s? Certainly differences can be found. If Raleigh’s case was unfair because the government sought to get hearsay from Cobham for later use at trial, or Cobham gave it for that purpose, then Bulger differs significantly from Raleigh’s trial. On the other hand, the two cases share the essential similarity of unconfronted out-of-court statements by government informants acting as effective, essential substitutes for trial testimony when no reason was given for the lack of in-court testimony. And on some level, Bulger’s case is more disturbing than Raleigh’s, since the hearsay against Bulger came from an anonymous informant.

Sir Walter’s lament may very well have application in Bulger. Raleigh stated that “Cobham is absolutely in the King’s mercy; to excuse me cannot avail him, by accusing me he may
hope for favour. It is you, then Mr. Attorney, that should press his testimony, and I ought to fear his producing, if all that be true which you have alleged.” The confidential reliable informant may not have been as absolutely in the mercy of the government as Cobham was, but anyone with even superficial knowledge of our criminal justice system should not be surprised if an anonymous police informer sought favors from governmental power. He may have been “working off” his own arrest or getting paid. Like Cobham, his circumstances suggested that he would naturally incriminate the accused. Even so, like Cobham he was not called as a “witness,” and surely part of the reason for that is the prosecution expected to use his out-of-court statements without any right of confrontation.

Any assumption that because the Confrontation Clause would prevent Raleigh’s trial, it would also prevent convictions based on the unconfronted words of anonymous police informants appears to be wrong. We can go further. If an undercover police officer reported to his partner in Bulger that a target had pulled a gun, the result should be the same. The hearsay of that undercover would not be “testimonial” and could be presented without confrontation. Furthermore, if two officers are in a patrol car on routine patrol, and one reports that a pedestrian they passed had pulled a gun and commands the driver to pull over, the police officer’s hearsay report should be admissible without showing that the officer was unavailable, as non-testimonial, without any cross-examination. Although the undercover and the patrol officer may have been “eyewitnesses” to events important for a criminal prosecution, they are not “witnesses against” the accused.

Curious, to say the least.

CONCLUSION

Confrontation Clause interpretations have contained many curiosities. Opinions have made historically inaccurate assertions. Raleigh’s trial has become a central myth with little basis for its selection and with little thought given to the myth’s meaning. Without explanation, the Clause has been interpreted differently from companion Sixth Amendment rights.
Interpretive terms have taken on unusual meanings, and trials like Raleigh’s may still be occurring. Perhaps it is really best to leave the various curiosities to the legal commentators of the Jefferson Airplane.

When logic and proportion
Have fallen sloppy dead
And the White Knight is talking backwards
And the Red Queen’s “off with her head!”
Remember what the dormouse said:
“Feed your head, Feed your head
Feed your head”

---

34 See White Rabbit, supra note 3.
CONFRONTATION AND KABUKI

David Alan Sklansky*

There is an old Jewish joke about a man who takes his mother to a fancy restaurant and later asks her what she thought of the meal. “It was fine,” she says, “what there was of it.” “Were the portions too skimpy?” the son asks. “Oh,” his mother responds, “there was plenty . . . such as it was.”

Reading the Supreme Court’s recent decision interpreting and applying the Confrontation Clause can make you feel a little like the son in that story. You begin to wonder what parts of the argument deserve to be taken seriously. But the ambiguity isn’t about quantity versus quality. It has to do with the significance of original intent.

Beginning with Crawford v. Washington,¹ the Supreme Court’s confrontation jurisprudence has been famously and quite explicitly originalist. The Court has insisted that the Confrontation Clause should be interpreted as it was originally understood—no matter how inconvenient or unjust the results may now seem. At the same time, the Court has suggested in its jurisprudence that the result dictated by an originalist reading of the Confrontation Clause is not, actually, inconvenient or unjust. Mirabile dictu, the originalist reading always turns out to be the best reading on policy grounds as well—the reading, that is to say, that best promotes what might be thought to be the underlying purposes of the Confrontation Clause while also taking account of considerations of administrability and practicality. There is no hard choice, the Court continues to rediscover, between originalism and pragmatism.

All of this raises questions about how sincere and how

---

* Yosef Osheawich Professor of Law, University of California, Berkeley, School of Law.

meaningful it is when the Court appeals to history in its confrontation decisions. Originalism lacks cash value if it never leads the Court to results it would otherwise avoid: “[i]f originalism never requires judges to reach results that they would not reach using some other theory, it does no independent work.” The extended discussions of common-law precedents in the confrontation cases begin to look like rhetorical kabuki, a bit of stylized theater to dress up what are really, at bottom, arguments about something else entirely.

Were it only so. If debates about original meaning were just ceremonial, they would do little damage. They would be irrelevant to the main event, disconnected, like a cartoon before the feature film. But the rhetorical kabuki in confrontation cases is more complicated—more like the Jewish mother’s complaints about the restaurant. It involves shifting repeatedly between two modes of discourse—one pragmatic and one historical—in a way that avoids the need for either set of arguments to bear the full weight of the Court’s conclusions.

To get a feel for the rhetorical back-and-forth, it is helpful to compare the oral arguments in the Court’s recent confrontation cases with the opinions later released in these cases. I will do that in the first part of this essay. (Focusing on oral argument is a little artificial, of course. What about the briefs? But bear with me. I will get to them later.) The pattern in the oral arguments and the decisions is complicated: sometimes the argument focused on policy and the opinions on history; sometimes the opposite; sometimes both focused on history; and sometimes both seemed more concerned with policy. The second part of the essay will briefly discuss the implications of the rhetorical and methodological shifts discussed in the first part. There are advantages, of course, to eclecticism, and well-known reasons not to obsess about consistency. Sometimes what looks like an unwillingness to be pinned down is really a sophisticated and advantageous dialectic. But not always.

---

I.

When *Crawford* was argued before the Justices, common law hardly came up at all. The Court pressed the lawyers on the nature and implications of their positions: what precedents would need to be reconsidered if their arguments were accepted, and what future cases might come out differently? Crawford’s counsel referred fleetingly to the trial of Sir Walter Raleigh.\(^3\) The Deputy Solicitor General appearing for the United States as amicus curiae was also asked about Raleigh, but only in passing, as the basis for a hypothetical designed to test how far the government would go in tying admissibility under the Confrontation Clause to reliability.\(^4\) Counsel for the State of Washington, toward the beginning of his argument, made halting reference to “the history surrounding the Confrontation Clause and how we got to have the right to confrontation,” but the Court did not pursue the matter.\(^5\) Virtually all of the Court’s questions focused on practicalities: how different tests would operate in practice, what it would mean to depart from or to adhere to the framework for confrontation analysis set forth in *Ohio v. Roberts*\(^6\)—the framework that the petitioner in *Crawford* had asked the Court to reconsider, and that the Court ultimately abandoned.

The Court did so in an opinion that paid far more attention

---

\(^3\) Transcript of Oral Argument at 17, 56, *Crawford*, 541 U.S. 36 (No. 02-9410).

\(^4\) *Id.* at 28. Counsel for the United States responded to the inquiry by saying he “doub[ed] seriously that . . . Sir Walter Raleigh’s case would come out differently under our approach.” *Id.* He meant, presumably, that the approach the United States was urging the Court to adopt—limiting the Confrontation Clause to “testimonial statements and their functional equivalent,” *id.* at 23—would condemn the outcome in Raleigh’s case, just like the Court’s traditional approach. He didn’t really mean that Raleigh’s case would come out the same way it in fact came out, with Raleigh convicted and sentenced to death based on an out-of-court statement provided by his alleged co-conspirator. But it is a sign of how little history mattered during the oral argument of *Crawford* that no one on the Court bothered to clarify this.

\(^5\) *Id.* at 37–38.

\(^6\) *Ohio v. Roberts*, 448 U.S. 56 (1980).
to history and to common-law cases than had been paid at oral argument. The common-law background of the Confrontation Clause was, in fact, the principal subject of Justice Scalia’s opinion for the Court in Crawford: he spent considerably more pages discussing that history than he spent on the Court’s own precedents or on how the Roberts test had operated in practice. Justice Scalia did suggest that Roberts had worked badly: the results it produced were unpredictable and inconsistent. What was worst about those results, though, is that they diverged from the common-law holdings that Justice Scalia suggested the Confrontation Clause was intended to codify.7 The oral argument in Crawford was intensely practical in its focus; the Court’s opinion in Crawford was pointedly historical and originalist.

Two years after deciding Crawford, the Court returned to the Confrontation Clause in a pair of cases consolidated for oral argument and decision, Davis v. Washington and Hammon v. Indiana.8 The lawyers took their cues from Crawford, and common law received a fair bit of attention in the oral arguments of these two cases. Counsel for Davis discussed the treatment of “hue and cry” reports in the seventeenth century.9 The Solicitor General’s office, appearing again as amicus curiae, said that a 911 call—the evidence at issue in Davis—differed from a Marian examination.10 Both Justice Breyer and Justice Scalia asked the Deputy Solicitor General about a set of seventeenth-century “hue and cry” cases relied upon by Davis. These cases suggested that reports of ongoing crimes to law enforcement officers were not admissible.11 Justice Scalia invoked Raleigh’s case when questioning counsel for the State of Washington.12 The lawyer for Washington, in turn, tried to focus the Court on whether introducing evidence from a 911 call “resemble[d] . . . inquisitorial abuses.”13 Counsel for Hammon

---

7 See Crawford, 541 U.S. at 54 n.5, 63–65.
9 Transcript of Oral Argument at 6, 56–58, Davis, 547 U.S. 813 (No. 05-5224).
10 Id. at 43.
11 Id. at 49–50.
12 Id. at 29.
13 Id. at 31–32.
discussed Old Bailey cases and the limited development of hearsay law in the eighteenth century. Counsel for Indiana dealt at length with Raleigh’s case, examinations by Marian magistrates, and the light these abuses shed on what “the Founders were concerned about”; his point was that questioning by police officers at the scene of a domestic disturbance—the context of the statements at issue in Hammon—differed from the kinds of things the Confrontation Clause was intended to prohibit. On the other hand, counsel for the United States, appearing as amicus curiae in Hammon, did not mention history or common law. His entire argument, and all of the questions the Court put to him, concerned the workability of a definition of “testimonial” that excluded statements obtained “in response to police questions that are reasonably necessary to determine whether an emergency exists.” This was the focus of the rebuttal argument by Hammon’s lawyer, too, but he couched it in terms of keeping “the confrontation right . . . robust, as the Framers intended.” All in all, history and common law played a much larger role in the Davis and Hammon arguments than they had when Crawford was argued before the Court. In fact, Indiana’s Solicitor General told the Court that the “important lesson from Crawford” was that in interpreting the Confrontation Clause the question should be “[w]hat does history tell us the Founders were concerned about?”

The Court pushed back. Justice Scalia, who wrote the Court’s opinions in Crawford, Davis, and Hammon, cautioned at oral argument against “overread[ing] Crawford” by concluding “that the only thing the Confrontation Clause was directed at was the kind of abuse that . . . occurred in the case of Sir Walter

15 Id. at 20.
16 Id. at 31–34, 36–39, 44–48.
17 Id. at 48–59.
18 Id. at 61; see also id. at 62–63 (suggesting that the questioning in Hammon “resembled inquisitorial practices . . . in a key respect” and that the interpretation of the Confrontation Clause should take into account “the system of private prosecution” in place when the Bill of Rights was adopted).
19 Id. at 31.
It would be “the worst sort of formality,” Justice Scalia suggested, to make admissibility of a statement hinge on how closely it resembled the evidence produced in a Marian examination. And the Court pushed back when deciding these cases, too. Justice Thomas reasoned that neither a 911 call nor police questioning at the scene of a domestic disturbance sufficiently resembled a Marian examination to be barred by the Confrontation Clause: there was no “formalized dialog,” there were no Miranda warnings, the declarants were not in custody, there were no other “indicia of formality,” and there was “no suggestion that the prosecution attempted to offer the . . . hearsay evidence at trial in order to evade confrontation.” But Justice Thomas wrote for himself and in partial dissent. Justice Scalia’s opinion for the majority cited some eighteenth-century (and nineteenth-century) cases, but mostly in support of the notion that the Confrontation Clause applied only to “testimonial” statements, and not for aid in determining what a testimonial statement was—or whether, in particular, a 911 call or police questioning at the scene of a domestic disturbance counted as testimonial. On those questions, the Court relied mostly on arguments about what kind of rule would be sensible and would fit well with the basic idea that a statement was “testimonial” if it was a “substitute for live testimony.” Responding to Justice Thomas, Justice Scalia reasoned that “[i]t imports sufficient formality . . . that lies to [police] officers are criminal offenses.” But that argument was plainly makeshift. The real point was that, in Justice Scalia’s words, “[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”

Giles v. California, argued to the Court two years after

---

20 Transcript of Oral Argument, supra note 9, at 32–33.
21 Transcript of Oral Argument, supra note 14, at 35.
22 Davis, 547 U.S. at 840 (Thomas, J., concurring in the judgment in part and dissenting in part).
23 See id. at 824–25 & n.3 (majority opinion).
24 Id. at 830.
25 Id. at 830 n.5.
26 Id.
Davis and Hammon, also concerned statements made to police officers responding to a call about domestic violence. Giles was charged with murdering his former girlfriend, who had told the police three weeks earlier that Giles had attacked her and threatened to kill her. The question was whether the Confrontation Clause barred the introduction of the out-of-court statements even if the judge concluded that, as the indictment charged, the declarant’s unavailability was due to the defendant’s wrongdoing. Everyone agreed that there was an equitable forfeiture exception to the confrontation requirement, but the defendant claimed that it should be limited to cases where the wrongdoing was aimed at preventing the declarant from testifying in court. Oral argument in Giles focused heavily on common-law history: the question that received the most attention was whether pre-1791 common-law courts would have admitted out-of-court accusations on the ground that the defendant had procured the accuser’s absence, even though there was no proof that the defendant had been motivated by a desire to prevent the accuser from testifying.28 Counsel for Giles—and Justice Scalia—repeatedly claimed that there were no common-law cases directly supporting that proposition,29 and counsel for the State of California did not disagree; his claim was simply that the logic of the common law suggested these accusations would apply even when no intent to prevent testimony was shown.30

If the parties in Giles concurred that the resolution of the case should turn on eighteenth-century understandings, not everyone else was convinced. Professor Richard Friedman, who had argued for the defendant in Hammon, filed an amicus brief supporting the State of California in Giles; he wanted the Court to interpret the confrontation right in a way “that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly

29 See id. at 8, 20, 25, 33.
30 See, e.g., id. at 34–35, 38–40.
hamper prosecution of crime.”

At oral argument in Giles, moreover, Justice Breyer tried to get California’s lawyer to argue that “maybe we shouldn’t follow completely the common law” as it existed in 1791: “maybe we have to assume an intent to allow the Confrontation Clause to evolve as the law of evidence itself evolves.”

But even California’s lawyer would not go that far; the most he would suggest is that the Court should “take account . . . of situations that the common law might not have faced or might not have recognized as representing a problem of relevant evidence to a crime.”

The decision in Giles was as originalist as the argument. The Court reaffirmed what it had said in Crawford—that the Confrontation Clause should be read “as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding”—and, for once, was willing to start and end with common law . . . almost. Toward the end of his opinion for the Court, Justice Scalia suggested there would be an uncomfortable element of bootstrapping in admitting an out-of-court accusation against a murder defendant by the defendant’s alleged victim on the ground that the judge believed the defendant was guilty of murdering the victim. But this was something of a digression, intended to cast doubt on the suggestion that a broad rule of forfeiture would make more sense than a narrower rule tied to a purpose behind the defendant’s alleged wrongdoing.

The vast bulk of Justice Scalia’s opinion was devoted to an inquiry into the bounds of the forfeiture exception at common law before the Confrontation Clause was adopted. He was openly scornful, in fact, of the suggestion that the Court could recognize new exceptions to the confrontation requirement based on the underlying objective of the right. He lost his majority on this point. Justice Souter and

---

31 Brief of Richard D. Friedman as Amicus Curiae Supporting Respondent at 2, Giles, 554 U.S. 353 (No. 07-6053).
32 Transcript of Oral Argument, Giles, supra note 28, at 34–35.
33 Id. at 35.
35 Id. at 374.
36 See id.
Justice Ginsburg joined all but that part of Justice Scalia’s opinion, and Justice Souter wrote a short concurring opinion, joined by Justice Ginsburg, that put more weight on the undesirability of a broader rule of forfeiture.\textsuperscript{37}

Moreover, Justice Breyer, joined by Justice Stevens and Justice Kennedy, argued in dissent in \textit{Giles} that practicalities weighed heavily against the rule adopted by the Court. The dissenters thought that the right to confrontation should be forfeited whenever the witness’s unavailability was due to the defendant’s misconduct, regardless of what the defendant’s purpose had been in killing the witness or otherwise making her unavailable. The dissenters argued that the most “conclusive” justifications for their position included considerations of policy and the “basic purposes and objectives” of the confrontation right.\textsuperscript{38} Nonetheless, even the dissenters felt compelled to argue at length about how the forfeiture question would be resolved under “17th-, 18th-, and 19th-century law of evidence.”\textsuperscript{39} And two of the justices in the majority signaled an inclination to take originalism even further than Justice Scalia. Justice Thomas wrote separately to reiterate the view he had expressed in \textit{Davis}, that the Confrontation Clause applied only to statements made in a context “sufficiently formal to resemble the Marian examinations.”\textsuperscript{40} Justice Alito said that he, too, was “not convinced that the out-of-court statement at issue [in \textit{Giles}] fell within the Confrontation Clause in the first place”; but he joined the majority’s analysis because the State of California had conceded that question.\textsuperscript{41} On the whole, therefore, the opinions in \textit{Giles} were highly originalist, just as the argument in that case had been.

The Court returned to the Confrontation Clause the following year in \textit{Melendez-Diaz v. Massachusetts}.\textsuperscript{42} The question was whether prosecutors could introduce a sworn certificate of examination from a state forensic chemist who did not testify

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{37} Id. at 379–80 (Souter, J., concurring in part).
\item \textsuperscript{38} Id. at 384, 403 (Breyer, J., dissenting).
\item \textsuperscript{39} Id. at 390.
\item \textsuperscript{40} Id. at 378 (Thomas, J., concurring) (quoting Davis v. Washington, 547 U.S. 813, 840 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part)).
\item \textsuperscript{41} Id. at 378 (Alito, J., concurring).
\item \textsuperscript{42} Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
\end{itemize}
\end{footnotesize}
and was not subject to cross-examination; the Court concluded this practice was unconstitutional. Unlike the oral argument in *Giles*, the oral argument in *Melendez-Diaz* was highly focused on present-day concerns. History took a back seat. Justice Breyer, who had dissented in *Giles*, made plain at the *Melendez-Diaz* oral argument that he was less interested in “what happened in the year 1084” than in “what’s a workable rule.”

Justice Scalia, in contrast, said that he was “interested in the history,” because the point of *Crawford* was “that the content of the Confrontation Clause is not what we would like it to be, but what it historically was when it was enshrined in the Constitution.” But none of the other Justices seemed terribly interested in history at the oral argument; the bulk of the questioning—including most of Justice Scalia’s questions—focused on practicalities: how a rule could be formulated, what incentives it would create for lawyers and their clients, and how burdensome it would be for the government. Counsel for the defendant—Professor Jeffrey Fisher, who had also represented the defendants in *Crawford* and in *Davis*—made no effort to steer the discussion back to history and common law. The Attorney General of Massachusetts began her argument for the State by asserting that the certificates at issue were “official records” of “independently verifiable facts” and therefore would have been “admissible at common law.” A few minutes later Justice Souter and then Justice Scalia pressed her on that claim, but only briefly. The questioning quickly returned to questions of administrability, feasibility, the nature of scientific testing, and the underlying purposes of the confrontation right. This also was the predominant focus of the questioning of the United States Assistant Solicitor General, appearing as amicus curiae.

The Court split 5-4 in *Melendez-Diaz*. Justice Scalia wrote for the majority, striking down the Massachusetts practice of

---

44 Id. at 23.
45 Id. at 29.
46 Id. at 33–34.
47 Id. at 48–58.
allowing prosecutors to rely on sworn certificates of analysis from chemists who never appeared in court or were subject to cross-examination. Justice Kennedy, joined by Chief Justice Roberts, Justice Alito, and Justice Breyer, wrote a sharp dissent, complaining that confrontation doctrine was becoming “formalistic,” “wooden,” and “pointless.” Both opinions appealed to pre-1791 common law but spent more time debating whether it made sense to distinguish scientific analysts from what Justice Kennedy called “ordinary,” “conventional” witnesses, who have “personal knowledge of some aspect of the defendant’s guilt.” The dissent argued that extending the confrontation right to scientific analysts gave defendants a “windfall . . . unjustified by any demonstrated deficiency in trials” and would cause widespread disruption of forensic investigations and criminal prosecutions. Justice Kennedy contended that framing-era common law supported exempting lab analysts from the Confrontation Clause. He analogized forensic scientists to copyists, whose affidavits that their copies were true and accurate “were accepted without hesitation” by common-law courts, even when the affidavits were prepared specifically for use in a criminal prosecution. But this was a relatively small part of his argument. Most of his argument had to do with what kind of rule made most sense on grounds of policy, balancing the defendant’s legitimate interests against the burdens placed on courts, prosecutors, and analysts.

Perhaps as a consequence, Justice Scalia devoted much of his majority opinion in Melendez-Diaz to arguing that giving defendants a right to confront forensic analysts in court would be neither disruptive nor prohibitively expensive, and that the confrontation would help defendants protect themselves against fraudulent, misleading, or mistaken laboratory results. He also spent time arguing about common-law precedents, maintaining that the closest analogs to forensic lab reports at common law were not copyists’ affidavits but “a clerk’s certificate attesting to

---

48 Melendez-Diaz, 129 S. Ct. at 2544, 2547 (Kennedy, J., dissenting).
49 Id. at 2543.
50 Id. at 2549–50.
51 Id. at 2552–53.
the fact that the clerk had searched for a particular relevant record and failed to find it”—certificates that Justice Scalia said were admissible only if the clerk was “subject to confrontation.” But the points on which Justice Scalia placed most emphasis in *Melendez-Diaz*—the points with which he began his opinion for the Court and the points to which he returned at the end of the opinion—had to do with what Justice Scalia took to be the basic logic of *Crawford*, that statements prepared as substitutes for testimony cannot be admitted against a criminal defendant without an opportunity for confrontation.

The Court’s most recent confrontation cases are *Michigan v. Bryant* and *Bullcoming v. New Mexico*, each of which was argued and decided in the October 2010 term. The question in *Bryant* was whether *Crawford* and *Davis* allowed the introduction in a homicide trial of statements the victim made after he was shot to police officers who responded to the scene (the Court answered yes); the question in *Bullcoming* was whether *Melendez-Diaz* permitted the prosecution to introduce a forensic report based on machine-generated lab results if the analyst who prepared the report did not appear in court, but another analyst from the laboratory did (the Court said no). Aside from scattered references to the prosecution of Sir Walter Raleigh when *Bryant* was argued before the Court, common law played little role in the oral argument of either of these cases. Professor Jeffrey Fisher, representing *Bullcoming*, started his oral argument by appealing to the “text, purpose, and history of the Confrontation Clause,” but then spent virtually all of his time arguing how the purposes of the confrontation guarantee could best be furthered and a workable and administrable doctrinal line drawn. This was the focus of the argument in *Bryant* as well, notwithstanding the references to Raleigh’s case.

---

52 *Id.* at 2539 (majority opinion).
53 See *id.* at 2531–32, 2542.
Common law was a minor theme of the opinions in these cases, too. Perhaps this was because these were the first significant confrontation cases the Court has decided since *Crawford* in which Justice Scalia did not write for the Court. Justice Sotomayor wrote the majority opinion in *Bryant*, and Justice Scalia was in dissent. Justice Scalia was part of the majority in *Bullcoming*, but Justice Ginsburg wrote the Court’s opinion. Even Justice Scalia’s dissenting opinion in *Bryant*, though, focused more on the purposes of the confrontation guarantee, and the administrability of the line drawn by the Court, than on the intricacies of pre-1791 common law. This was also the focus of Justice Ginsburg’s majority opinion in *Bullcoming*, which Justice Scalia joined.

Justice Ginsburg wrote a short, separate dissent in *Bryant*. She agreed with Justice Scalia that the victim’s statements in that case were “testimonial” and therefore the Court was wrong to find them admissible without confrontation. Justice Ginsburg also drew attention, though, to the fact that pre-1791 common law allowed certain “dying declarations” to be admitted against homicide defendants, notwithstanding the absence of confrontation. That issue had not been preserved by the prosecutors in *Bryant*, but Justice Ginsburg suggested that in a case where the issue had been preserved, the Court should consider whether the Confrontation Clause incorporated the “dying declaration” exception and what its contours were. Nonetheless, for Justice Ginsburg as for the rest of the Court, the major concerns in *Bryant* and *Bullcoming* seemed to be doctrinal and pragmatic, not historical.

II.

*Crawford* was argued looking forwards and decided looking backwards. *Davis* and *Hammon* were argued looking backwards and decided looking forwards. *Giles* was argued looking

---

58 *Bryant*, 131 S. Ct. at 1177 (Ginsburg, J., dissenting). The Court had suggested in *Giles*, and in *Crawford* itself, that the “dying declaration” exception might indeed be incorporated into the constitutional guarantee of confrontation. See *Giles* v. California, 554 U.S. 353, 358, 362 (2008); *Crawford* v. Washington, 541 U.S. 36, 56 n.6 (2004).
backwards and decided looking backwards. *Melendez-Diaz* was argued looking forwards, mainly, and decided looking forwards, mainly. So were *Bryant* and *Bullcoming*, only more so. Sometimes the advocates focus on common law, sometimes on concerns of practicality, administrability, and fundamental purposes. The same goes for the Court. Sometimes the lawyers are on the same page as the Justices, sometimes not.

All of this might be thought unremarkable. Everyone knows that judging is an eclectic enterprise, combining attention to prior decisions and drafters’ intentions with assessments of workability, social costs and benefits, and underlying rationales. It is to be expected that certain of these considerations will receive greater emphasis at one time, other considerations at another time.

Besides, it oversimplifies matters to look only at oral arguments. Each of the Court’s recent confrontation cases was briefed not just by the parties but by amici, and the briefs reliably argued from a range of perspectives. In each of these cases, some briefs gave close attention to history and common law, others raised arguments about the underlying purpose of confrontation, and still others focused on concerns of practicality and administrability. Most of the briefs, of course, were themselves eclectic in the kinds of arguments they raised.

So one way to understand the nature of the argumentation in the confrontation cases is this: lots of different kinds of arguments were made in each case, some backward-looking and some forward-looking. Inevitably, certain arguments wound up getting a disproportionate amount of attention at oral argument. There is a limited amount of time for oral argument, and the entire range of considerations raised in the briefs cannot be canvassed. So the questioning winds up focusing on arguments that, for one reason or another, strike one or more Justices as particularly strong, particularly weak, particularly confusing, or particularly interesting. Those may or may not wind up being the points on which the Court leans most heavily when deciding the case. But just because a consideration gets less emphasis at oral argument, or in the Court’s written decision, does not mean the Court is neglecting it. There is a dialectic in these cases, as in all cases the Court decides: a back-and-forth consideration of,
say, history on the one hand and policy on the other. There is nothing nefarious or troubling about the fact that different kinds of arguments seem more compelling, or more worthy of discussion, in different cases or at different times.

In fact, the process can be advantageous: policy considerations and appeals to history can operate as useful checks on each other. That is one way to read the progression from *Crawford* to *Davis*: the Court confronted what *Crawford*’s originalism would look like if taken to an extreme, and (except for Justice Thomas) refused to go that far. Instead, a majority of the Court, led by Justice Scalia, seemed to decide in *Davis* that the Confrontation Clause needed to be read with enough flexibility to keep it relevant.

But much, if not most, of the methodological back-and-forth in the recent confrontation cases has operated less helpfully. It has taken the form of a kind of rhetorical kabuki, making the Court’s reasoning harder to pin down, harder to argue with, harder—in a word—to confront. The Court claims that it is bound by the original understanding of the Confrontation Clause, that the clause was originally understood to codify eighteenth-century common law, and that therefore the Court must follow the rules of eighteenth-century common law, no matter how inconvenient or unjust those rules may now seem. That way of framing the issues suggests that inquiries into fairness and practicality are irrelevant, except perhaps as evidence about what eighteenth-century common law is likely to have required. But the Court repeatedly acts as though fairness and practicality matter in their own right. Indeed, the Court often acts—especially at oral argument—as though fairness and practicality are what matter most. Sometimes common law trumps considerations of policy, but sometimes it seems to be the other way around.

It is possible, of course, that the Court has consistently taken account of both original intent and present-day practicalities when interpreting the Confrontation Clause. Perhaps the Court has tried, in each of its recent confrontation cases, to read the Sixth Amendment in a way that strikes a kind of equilibrium between historical fidelity and its own assessment of the dictates of fairness and practicality. There might not be anything wrong
with that. Lots of people think that the Court should, and maybe even must, approach the Constitution in this way: balancing different methodologies against each other, sacrificing purity for a rough, incompletely theorized kind of common sense. Other people, including at times some members of the Court, are skeptical of that kind of multi-factored analysis, finding it too manipulable and indeterminate.

But that debate can be put to one side. Regardless of whether it makes sense for the Court to try to balance originalism and pragmatism on a case-by-case basis, there is little to be said for making the attempt and not admitting it. If you say that history matters, but that fairness and accuracy matter, too, and that both kinds of considerations will be taken into account, then you can no longer dismiss considerations of either kind as ultimately beside the point. You can be held responsible, too, for the particular way in which you combine considerations of history with considerations of present-day practicalities. And you commit yourself to defending your interpretative methods in all of their particulars: your reliance on history (to whatever degree you rely on it, and in whatever manner), the weight you put on considerations of justice, fairness, and practicality, and the way in which you combine these disparate considerations and—crucially—resolve any conflicts between them. If, on the other hand, you insist at times that what really matters is history, and you act at other times as though what really matters is present-day practicality, then you brush aside arguments about history by talking about fairness and what makes sense, and you belittle arguments about fairness and what makes sense by retreating to history. The food was fine, what there was of it; there was plenty, such as it was.
CRAWFORD & BEYOND: HOW FAR HAVE WE TRAVELED FROM ROBERTS AFTER ALL?

Brooks Holland*

I. INTRODUCTION

We have ridden the Crawford confrontation train for almost eight years. In Crawford, the U.S. Supreme Court overruled Ohio v. Roberts, and “discarded the reliability framework that had governed the admissibility of hearsay statements under the Confrontation Clause for more than twenty years.” In place of Roberts’ reliability framework, under which judges decided which hearsay evidence to admit without cross-examination, Crawford gave us a rule excluding “testimonial” hearsay at trial.

* Assistant Professor and Gonzaga Law Foundation Scholar, Gonzaga University School of Law. In addition to teaching law, the author represents clients in criminal appeals before the U.S. Court of Appeals for the Ninth Circuit, and previously served as a public defender in the Bronx and Manhattan. Laurel Yecny, a law student at Gonzaga, provided excellent research assistance for this paper. Many thanks to the editors at the Journal of Law and Policy for excellent editing.

I boarded this Crawford train an enthusiastic passenger,\(^5\) believing that Crawford promised real change in confrontation law to constrain trends such as “evidence-based” prosecutions—where prosecutors proved cases largely through hearsay evidence without producing the declarant.\(^6\) We just needed to ride the Crawford train for a few more stops to learn precisely what evidence would qualify as “testimonial.”\(^7\) In Michigan v. Bryant,\(^8\) however, the Supreme Court returned to a multi-factor judicial test for deciding whether cross-examination of a non-testifying declarant is needed, a test that resurrected the relevance of “reliability.”\(^9\) Bryant thus put the brakes on the Crawford train, and maybe even started its return to the Roberts station.\(^10\)

Following the Bryant decision, Brooklyn Law School hosted

\(\text{Crawford, 541 U.S. at 53–54 (introducing and explaining the concept of \text{“testimonial" evidence under the Confrontation Clause, and holding that the confrontation right renders testimonial evidence inadmissible at trial absent an opportunity to cross-examine).}}\)\(^5\)

\(\text{See generally Testimonial Statements, supra note 3, at 281–95 (embracing Crawford’s basic \text{“testimonial" framework for confrontation analysis).}}\)\(^5\)

\(\text{See McClure v. Rehg, No. 4:07CV1686 FRB, 2007 WL 3352389, at *1 n.1 (E.D. Mo. 2007) (defining evidence-based prosecutions); Richard Friedman & Bridget McCormack, Dial-in Testimony, 150 U. Pa. L. Rev. 1171, 1176–77 (2002) (exploring the growing trend of prosecutors introducing witness statements to 911 and the police without calling the witness at trial, particularly in domestic violence cases); Brooks Holland, Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide, or Just a Crack?, 8 CARDOZO WOMEN’S L.J. 171, 175–79 (2002) (reviewing trend of prosecutors using hearsay to prosecute cases without producing the victim to testify).}}\)\(^6\)

\(\text{See Crawford, 541 U.S. at 68 (“We leave for another day any effort to spell out a comprehensive definition of \text{‘testimonial.’”}); see also Joelle Anne Moreno, Finding Nino: Justice Scalia’s Confrontation Clause Legacy from Its (Glorious) Beginnings to Its (Bitter) End, 44 AKRON L. REV. 1211, 1212–13 (2011) (“[B]oth in and after Crawford, the Court has repeatedly refused to provide clear or consistent criteria distinguishing testimonial statements from the infinite range of out-of-court statements made by victims and witnesses during criminal investigations.”).}}\)\(^7\)

\(\text{Michigan v. Bryant, 131 S. Ct. 1143 (2011).}}\)\(^8\)

\(\text{See infra notes 34–49 and accompanying text.}}\)\(^9\)

\(\text{See infra notes 50–57 and accompanying text.}}\)\(^10\)
its most recent “Crawford and Beyond” symposium.\textsuperscript{11} The learned presentations at this symposium prompted me to reflect on the point of Crawford, and where Crawford perhaps should have taken us. In the end, this reflection has made me more sympathetic to Chief Justice William Rehnquist’s caution in Crawford:

[T]housands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what . . . is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.\textsuperscript{12}

\textit{Crawford} did spawn years of doctrinal uncertainty, an uncertainty that persists to date.\textsuperscript{13} These were good years for law professors,\textsuperscript{14} but difficult ones for lawyers and judges. If this protracted uncertainty was necessary to bring criminal practice into harmony with an important constitutional principle, lawyers and judges needed to tough it out. But, if this uncertainty merely


\textsuperscript{12}\textit{Crawford}, 541 U.S. at 75–76 (Rehnquist, C.J., concurring).

\textsuperscript{13} See Jeffery Fisher, \textit{What Happened—and What is Happening—to the Confrontation Clause}, 15 J.L. & POL’Y 587, 589 (2007) (“We have entered a brave new world of confrontation jurisprudence in which virtually no judges have experience applying even its basic governing principles.”); Moreno, supra note 7, at 1212, 1213 (noting that \textit{Crawford} “generated a flurry of activity in the federal and state courts,” and “[w]ithout clear guidance, the lower courts have generated confused and inconsistent confrontation decisions”). As of January 18, 2012, Westlaw Keycite lists 10,416 court decisions citing to \textit{Crawford}—an average of more than 2,000 judicial citations a year since \textit{Crawford} was decided in March of 2004. By contrast, Westlaw Keycite lists 2,759 judicial citations to \textit{Roberts} from 1980 to March 2004, before \textit{Crawford} was decided.

\textsuperscript{14} As of January 18, 2012, Westlaw Keycite lists 1,346 law review citations to \textit{Crawford}. Westlaw Keycite lists 678 law review citations to \textit{Roberts} between 1980 and March 2004.
resulted from the Supreme Court’s experimentation with different confrontation theories, only to return the law close to where it began, the real world of law may have benefitted from a bit more respect for stare decisis.

This Essay will examine where this Crawford project took us, where it should have taken us instead, and whether the trip was worthwhile. Part II of this paper traces how the Crawford-Davis-Bryant trajectory of decisions regarding “testimonial” evidence effectively returns us to Roberts—or perhaps to an even more narrow conception of confrontation rights than under Roberts. Part III outlines how confrontation rights could have been understood consistent with our modern adversary system of criminal adjudication, and where I believed the Crawford train was destined when it departed eight years ago. Part IV concludes that if the Supreme Court was not prepared to deliver confrontation law to an important and new constitutional principle through Crawford’s wholesale revision of existing doctrine, the Court should have heeded Chief Justice Rehnquist’s call for restraint.

II. TESTIMONIAL EVIDENCE: A TURN BACK TO ROBERTS

The Sixth Amendment provides that “in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The Supreme Court has interpreted the Confrontation Clause to include a right to face-to-face confrontation with accusers as sworn witnesses before the trier of fact, and a right to cross-examine those witnesses. Roberts, however, held that this right could be satisfied when the prosecution introduced hearsay evidence from a non-testifying declarant, so long as the evidence proved sufficiently reliable. The prosecution could demonstrate this reliability by showing that the evidence either fell within a “firmly-rooted” hearsay exception or contained judicially-determined guarantees of trustworthiness.

---

15 U.S. CONST. amend. VI.
Crawford rejected Roberts’ “amorphous, if not entirely subjective” 18 reliability framework for confrontation. In the Crawford Court’s view, “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because the defendant is obviously guilty.” 19 Thus, the Court concluded, the prosecution may not introduce testimonial evidence against a defendant without producing the declarant for cross-examination, “unless the declarant [is] unavailable and the defendant[] had a prior opportunity [for cross-examination].” 20

The question became what evidence the Court would count as testimonial, and therefore subject to Crawford’s rule of exclusion. Relying on historical reference points, Crawford included testimony given at a preliminary hearing, before a grand jury, and during a former trial, as well as statements given during a precinct police interrogation. 21 The Court “[left] for another day,” however, the task of “spell[ing] out a comprehensive definition of ‘testimonial.’” 22

The Court next undertook this task in Davis v. Washington. 23 Davis involved two separate domestic violence cases. Prior to Crawford, prosecutors frequently employed excited utterances and other hearsay evidence to prove domestic violence cases without producing the victim-declarant. 24 In Davis, the victim called 911 and said that Davis had assaulted her and fled the location. 25 In a companion case, Hammon v. Indiana, the police responded to the victim’s home following a domestic disturbance

---

19 Id. at 62.
20 See id. at 68 (“Where testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination.”); see also Fisher, supra note 13, at 587–88 (explaining that Crawford “prohibits the prosecution from introducing out-of-court ‘testimonial’ statements unless the declarants are unavailable and defendants had a prior opportunity to cross examine them”).
21 See Crawford, 541 U.S. at 68.
22 Id.
24 See id. at 817, 819; see also Friedman & McCormack, supra note 6, at 1180–81 (commenting in 2002 on the admissibility of 911 calls in domestic violence cases, two years before the Crawford decision).
25 See Davis, 547 U.S. at 817–19.
report. The police separated the victim and Hammon, and the victim told the police that Hammon had assaulted her. The victims did not testify at trial, and the defendants argued that the victims’ out-of-court statements were “testimonial” under *Crawford*, thus precluding their admission absent cross-examination.

In resolving the confrontation challenges to these two instances of hearsay evidence, the Court split the outcome: the declarant’s statement to 911 in *Davis* was ruled non-testimonial, but the victim’s statement to the responding officers in *Hammon* was deemed testimonial. Thus, under *Crawford*, no confrontation was required at all in *Davis*—the State was free to prove Davis’ guilt through the 911 record without cross-examination of the declarant or any other confrontation requirement. In *Hammon*, however, cross-examination was mandated, or else the declarant’s statement had to be excluded from trial.

This critical constitutional line was demarcated by a new confrontation test that the Court articulated to refine *Crawford*’s incomplete definition of testimonial evidence:

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 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.

This test and its application in *Davis* left several questions unresolved about the definition of “testimonial” evidence. But

---

26 See *id* at 819–21.
27 See *id*.
28 See *id* at 818–19, 821.
29 See *id* at 828–29.
30 See *id* at 830–31.
31 *Id*. at 822.
32 These questions included what distinguishes an “ongoing emergency”
*Davis* did appear to answer one question: analysis of whether hearsay evidence is “testimonial” under the Confrontation Clause is completely removed from the lawyers, witnesses, and arguments in the courtroom where that hearsay evidence is being offered.33 Instead, the Court divined whether the declarants’ statements proved testimonial in *Davis* and *Hammon* by looking solely to the “primary purpose” of the exchange between the declarant and the police at the time and place of those statements, many months before the trial.

*Bryant* reaffirmed this pre-trial focal point of the *Crawford* confrontation framework. In *Bryant*, the police encountered the declarant lying in the street after being shot.34 The police asked the declarant “what had happened, who had shot him, and where the shooting had occurred.”35 The declarant answered that “Rick” shot him.36 The declarant also gave a time, location, and brief description of the shooting.37 The declarant died later that

from an investigation of past events, and whose perspective bears on the “primary purpose” of the investigation: the declarant’s, the police officer’s, or both. See generally, e.g., Fisher, supra note 13, at 617–18 (questioning predictability of *Davis*’ objective test for assessing the primary purpose of an interrogation); Richard Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & Pol’y 553, 561–63 (2007) (arguing that *Davis* should be understood to analyze evidence from the perspective of the declarant, not the police or a combination of parties to a conversation); Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and Its Loss*, 15 J.L. & Pol’y 725, 728–35 (2007) (questioning how *Davis*’ “binary” emergency-past events framework will apply accurately in domestic violence cases).

33 The Court in *Crawford* did limit its confrontation rule to hearsay evidence offered at trial for the truth of the matter asserted. See *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004). But the Court made clear that hearsay evidence and testimonial evidence should be defined separately. See *id.* at 51.


35 See *Bryant*, 131 S. Ct. at 1150 (internal quotation marks omitted).

36 *Id.*

37 *Id.*
morning. At Bryant’s subsequent murder trial, the court admitted the declarant’s statements to the police into evidence as excited utterances.

On appeal, Bryant argued that admission of the declarant’s statements identifying the shooter violated Crawford because he could not cross-examine the declarant at trial. The Supreme Court disagreed, finding the declarant’s statements non-testimonial. In the process, the Court used this case as an opportunity to “provide additional clarification of what Davis meant by ‘the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.’”

As in Davis, the Court in Bryant looked solely to the time and place of the exchange between the declarant and the police to determine whether the declarant’s statements were testimonial. The Court sought in this exchange objective proof of either a crime investigation, which would require confrontation later at trial, or an emergency, in which case the purpose of the questioning “is not to create a record for trial and thus is not within the scope of the Clause.” The Court employed a multi-factor judicial test to identify the objective primary purpose of the exchange. This test considers the statements, actions, and perspectives of both the police and the declarant when the pre-trial statement was procured. Moreover, “standard rules of hearsay, designed to identify some statements as reliable, will be relevant.” In particular, the Court analogized the newly-minted

---

38 See id.
39 See id. at 1150–51 & n.1.
40 See id. at 1150–51.
41 Id. at 1156.
42 Id. at 1155.
43 Commentators have extracted anywhere from eight to a dozen potential factors to be considered under the Bryant test. See Michael D. Cicchini, Dead Again: The Latest Demise of the Confrontation Clause, 80 FORDHAM L. REV. 1301, 1309–10 (2011) (identifying, for example, the formality of the interrogation producing the declarant’s statement, whether a weapon was used during the alleged crime, the medical condition of the declarant, as well as other factors); Graham, supra note 34, at 28; Moreno, supra note 7, at 1245.
44 See Bryant, 131 S. Ct. at 1160–61.
45 Id. at 1155.
emergency-investigation distinction in confrontation law to the “logic . . . justifying the excited utterance exception in hearsay law,” because “[a]n ongoing emergency has a similar effect of focusing an individual’s attention on responding to the emergency,” rather than on fabricating evidence. Thus, “the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.”

One commentator recently complained that after Bryant, the Confrontation Clause is “dead again.” Bryant certainly returns confrontation law to a malleable judicial test that invites judges to decide whether out-of-court statements inspire sufficient confidence to dispense with cross-examination at trial. Nor does the Court’s recent confrontation jurisprudence hint at impending limits to the pro-admission trajectory that Bryant sets. The six-Justice Bryant majority included the four vocal dissenters from two recent confrontation decisions that did apply Crawford’s rule

---

46 Id. at 1157.
47 Id.
48 See id. (citing Idaho v. Wright, 497 U.S. 805, 820 (1990)).
49 Id. at 1157.
50 Cicchini, supra note 43, at 1302–04 (“[T]he Confrontation Clause, for all practical purposes, died in 1980 with the Court’s decision in Ohio v. Roberts,” and following Davis and Bryant, “[t]he Confrontation Clause is dead again.”).
51 Cf. Graham, supra note 34, at 1, 29–30 (arguing that Bryant “effectively overruled Crawford and pushed confrontation doctrine back in the direction of Roberts,” and the “majority’s analysis of the exception for excited utterances demonstrates the lengths they will go to aid prosecutors”); Marc Chase McAllister, Evading Confrontation: From One Amorphous Standard to Another, 35 Seattle U. L. Rev. 473, 492–93 (2011) (observing that Bryant’s totality-of-circumstances test “is strikingly reminiscent of the discredited Roberts framework” and “makes case results unpredictable and provides easy means for courts to dispense with actual confrontation” (citations omitted)); Moreno, supra note 7, at 1218 (“Bryant will lead to the admission of more prosecutor-sponsored statements that defendants cannot exclude from witnesses whom defendants cannot confront,” and “will almost inevitably exacerbate the problem of erratic and inconsistent decisions.”); Jason Widdison, Comment, Michigan v. Bryant, The Ghost of Roberts and the Return of Reliability, 47 Gonz. L. Rev. 219, 230 (2011) (contending that Bryant undermined Crawford “by reintroducing reliability to the Court’s Sixth Amendment analysis”).
of exclusion: Melendez-Diaz v. Massachusetts, and Bullcoming v. New Mexico. Those dissents evince that, to these Justices, confrontation is a flexible right that ensures “a fair trial with reliable evidence.” Thus, in these Justices’ view, Melendez-Diaz and Bullcoming improperly “treated the reliability of evidence as a reason to exclude it.” Four Justices consequently appear committed to the core principle of Roberts: judges may dispense with a defendant’s right to confrontation on a finding that a non-testifying declarant likely did not fabricate a pre-trial statement. Justice Clarence Thomas, by comparison, consistently has supported a very narrow definition of testimonial evidence, including only formal, solemnized pre-trial statements. In total, therefore, five current Justices could vote for broad admission of hearsay evidence without cross-examination at trial. Regardless of how aggressively Bryant’s author, Justice Sonia Sotomayor, will push her primary purpose test, evidence-based prosecutions easily may become prevalent again.

If anyone doubts the elasticity built into Bryant, one need

---

54 Bullcoming, 131 S. Ct. at 2725 (Kennedy, J., dissenting) (emphasis added).
55 Id.
57 Justice Sotomayor joined the Court subsequent to the Davis decision. She concurred separately in Bullcoming, listing several nuanced “factual scenarios” not presented by the expert report admitted in Bullcoming. See Bullcoming, 131 S. Ct. at 2721–23 (Sotomayor, J., concurring). Whether she will switch sides from Bullcoming according to one of these factual scenarios may be revealed this term in Williams v. Illinois. Williams v. Illinois, 939 N.E.2d 268 (Ill. 2010), cert. granted, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8337). Justice Elena Kagan recused herself in Bryant, and she joined the Bullcoming opinion only in part. Justice Kagan thus may not have voted yet in a manner that fully reveals her views on confrontation.
only consider the decision in United States v. Solorio. Solorio was charged with selling drugs to a confidential informant during an undercover “buy bust” operation. During the informant’s purchase of drugs, two undercover DEA agents observed the interactions between the informant and Solorio, and radioed their observations to the arrest team. The arrest team agents did not observe these events. At trial, the Government did not call the two officers who personally observed the informant and Solorio interact. Instead, “for reasons not explained in the record,” the Government called arrest team agents to testify to the radioed surveillance observations of the non-testifying agents. The trial court admitted these hearsay statements as a present sense impression.

On appeal to the United States Court of Appeals for the Ninth Circuit, Solorio argued that these statements were testimonial and therefore inadmissible under Crawford, absent cross-examination. Invoking Bryant, the Ninth Circuit disagreed. The court accepted the Government’s argument that the non-testifying agents “communicated their observations to the other agents to ensure the success and safety of the operation, by assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly.” Thus, the court observed, “objectively assessed, the ‘primary purpose’ of the agents’ statements was assuring that the arrest effort both succeeded and did not escalate into a dangerous situation, not ‘to create a record for trial.’” The court accordingly held that “the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination,” because “the

59 Id. at *1–2.
60 Id. at *1–2, 4–5.
61 Id. at *4–5.
62 Id. at *7.
63 Id. at *4–5.
64 Id. at *4. The trial court did not rule on a confrontation objection to this evidence. See id. at *4 n.6.
65 Id. at *7.
66 Id. at *8 (quoting Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011)).
prospect of fabrication’ in statements” given for this purpose is presumably “‘significantly diminished.’”67

The Solorio decision’s underlying rationale was not limited by unique case-specific facts, and instead relied on facts common to most undercover operations. Undercover operations of every kind present risks of danger or failure. Through this decision, therefore, Bryant appears to have gifted prosecutors with a fairly broad template for trying undercover operations without subjecting key witnesses to cross-examination. Defendants instead will confront only the recipients of hearsay statements about alleged criminal activity, so long as those statements, in the trial judge’s opinion, objectively were made “to ensure the success and safety of the operation.”68

Crawford thus has followed a round-trip trajectory since its departure in 2004. From an early promise of robust protection of confrontation rights at trial, Crawford has circled back to an easily-narrowed conception of confrontation, authorizing judges to decide when cross-examination—or any other confrontation priority—must be preserved. Indeed, Crawford may conceive of confrontation even more narrowly than Roberts did, because outside of testimonial evidence, Crawford attaches no confrontation interests to hearsay evidence.69 Roberts, by contrast, extended confrontation interests to hearsay evidence broadly.70 As a result, if Roberts did “kill” confrontation thirty years ago, confrontation post-Bryant may be “dead again”—or even more dead.71

67 Id. (quoting Bryant, 131 S. Ct. at 1157).
68 Id. at *7.
69 See Crawford v. Washington, 541 U.S. 36, 68 (2004); David Alan Sklansky, Hearsay’s Last Hurrah, in THE SUPREME COURT REVIEW, 2009, at 1, 5 (Dennis J. Hutchinson et al. eds., 2010) (“[T]he Court has made clear that the introduction of nontestimonial statements raises no constitutional concerns, no matter how the statements are treated under the hearsay rule.”); Jeffrey Bellin, The Incredible Shrinking Confrontation Clause 1, 3, 5 (S. Methodist Univ. Sch. of Law, Research Paper No. 84, 2012), available at http://ssrn.com/abstract=1956748 (noting that the constriction of testimonial evidence following Davis and Bryant excludes a wide range of hearsay evidence from confrontation protection).
70 See Bellin, supra note 69, at 9 (“Roberts treated testimonial and nontestimonial statements identically.”).
71 Cicchini, supra note 43, at 1302–04.
III. WHERE CRAWFORD COULD HAVE TAKEN CONFRONTATION: A TRIAL RIGHT IN AN ADVERSARY PROCESS

One commentator has pinned this trajectory of confrontation law on an “ill-advised attempt by Justice Scalia to fashion the confrontation clause in a manner only he, if anyone, is willing to accept as fundamentally sound and consistent in history, logic, and practice.”  Yet Justice Scalia persuaded a majority of the Court to join his confrontation project, even if that train now has derailed. On reflection, however, that train was destined to derail, because Crawford’s framework inevitably encouraged judges to narrow confrontation rights to avoid Crawford’s harsh exclusionary rule. If the Confrontation Clause ultimately must permit discretionary judicial decision making, better that discretion apply to how to enforce that right, not to the definition of the right itself. By treating confrontation more accurately as a trial right in an adversary process, the Court could have realized this balance from Crawford.

Crawford observed that the Confrontation Clause “applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’” The Court explained further that “‘[t]estimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’” If, however, “testimonial” evidence is the lynchpin for whether a declarant is a “witness” to be confronted, the Court has not adequately explained why it looks solely to the time and place of a pre-trial statement to determine whether it proves “testimonial,” and does not consider the trial purpose for which the prosecuting lawyer offers that evidence as the more accurate measure of the statement’s purpose.

I assume that the Court’s focus on out-of-court facts in

---

73 Justice Scalia made quite clear in his Bryant dissent that the Court has mutated, if not destroyed, his original confrontation project. See Bryant, 131 S. Ct. at 1168 (Scalia, J., dissenting) (“Today’s opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles.”).
74 See infra notes 100–01 and accompanying text.
76 Id.
defining testimonial evidence results from Crawford’s heavy historical emphasis on the founding era, when criminal trials did not involve institutionalized prosecution and defense bars marshaling and challenging evidence in an adversary system. Focus on the primary purpose of evidence when it was gathered during an investigation might be more meaningful in a “civil-law mode of criminal procedure.” But in the 21st century criminal justice system, a trial lawyer’s purpose in admitting evidence defines the precise nature of that evidence. Therefore, it makes marginal sense to judge whether a hearsay declarant has borne witness against a defendant at trial by inspecting solely the procurement of the declarant’s statement by the police, months or years prior to the trial.

The Court in Davis acknowledged that criminal procedure institutions and practices have changed since the founding era, and that these changes should inform how courts evaluate

---

77 See id. at 42–50.
78 Id. at 50; cf. Thomas Davies, Not the “Framers’ Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause, 15 J.L. & Pol’Y 349, 355, 365–68 (2007) (criticizing the Crawford opinion’s reliance on originalist methodology because it “fail[s] to grasp—or admit—the degree to which legal doctrine and legal institutions have changed since the framing”).
79 See, e.g., Fed. R. Evid. 404 (barring introduction of evidence of a character trait or prior act in order to prove propensity, but permitting introduction of that same evidence if offered to prove, for example, motive or modus operandi); Fed. R. Evid. 407 (barring introduction of subsequent remedial measures to prove, inter alia, negligence, but permitting it for other purposes, such as impeachment); Fed. R. Evid. 801 (barring the admission of out-of-court statements if offered for the truth of the matter asserted, but permitting their introduction for other purposes, such as their effect on the listener).
80 Cf. Testimonial Statements, supra note 3, at 284 (questioning the “view [of confrontation that] focuses on the circumstances surrounding an out-of-court statement instead of the trial at which it is offered, which for confrontation purposes may be asking the wrong question”). Professor Josephine Ross has advocated a comparable position. See Josephine Ross, After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness, 97 J. Crim. L. & Criminology 147, 196–209 (2006).
whether evidence is testimonial. Yet the Court erred when it asserted that, as a result of those changes, we “no longer have examining Marian magistrates,” but “we do have, as our 18th-century forebears did not, examining police officers.” In our modern criminal justice system, we have investigating police officers prior to trial; at trial, where confrontation applies, we have “examining” prosecuting lawyers.

Confrontation law should reflect this reality, where the intent of prosecuting lawyers, not of declarants and the police, defines the nature of trial evidence. An old evidence law cliché illustrates this distinction. A lawyer presents a plate of spaghetti to a witness. The spaghetti is not offered to prove something about that plate of spaghetti. Rather, the spaghetti is offered to refresh the witness’ memory of some fact, or to test whether the witness can recognize spaghetti. The law thus does not evaluate when, where, why, and by whom that spaghetti was prepared in deciding whether the spaghetti may be offered, because the lawyer is not attempting to prove a fact about that particular plate of spaghetti—it is simply an object to trigger memory, or to test perception. If, however, the lawyer at trial offers that same plate of spaghetti as the plate of spaghetti at issue in the case, the law will condition the spaghetti’s admissibility on a showing of authenticity and chain of custody. The point is, how lawyers marshal and use evidence at trial determines what the evidence is in that trial—whether that same plate of spaghetti is just a physical object to awaken memory, a plate of spaghetti to test perception, or the plate of spaghetti subject to litigation at trial. The “objective primary purpose” with which the spaghetti originally was prepared cannot alone define the purpose for which the trial lawyer has offered the spaghetti as trial evidence.

---

81 See Davis v. Washington, 547 U.S. 813, 830 n.5 (2006) (“Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”).
82 Id.
83 Id.
Similarly, when a court considers whether a hearsay statement supplies testimonial evidence, the objective primary purpose of that statement when it was made reveals little about whether the declarant has borne witness at the later trial when it is introduced. Imagine a witness who testified before a grand jury, all with the clear objective purpose of establishing facts for a future trial. This sounds like a good case for testimonial evidence under Crawford. But the prosecutor at trial offers that grand jury testimony only to show that this witness testified before a grand jury, not to prove any facts asserted by that testimony. The grand jury testimony should not constitute “testimonial” evidence as used in this trial, regardless of its primary purpose when created, because the lawyer offering it did not attempt to prove any fact from those statements.

By contrast, consider a person who comments casually about a fact to a friend at a party. Under Crawford itself, let alone Davis and Bryant, this statement seems a weak candidate for testimonial evidence—and properly so if we are asking solely whether the person “testified” at the time and place of the casual comment to the friend. But if the prosecutor offers this statement at trial to prove the fact expressed in this statement, the prosecutor has employed the statements as testimonial evidence at trial. Regardless of the primary purpose of the statement when made, at trial the prosecutor has offered it to prove this fact as true and accurate according to the declarant.

The Court has acknowledged this important investigation-trial dichotomy in confrontation analysis, recognizing that

---

86 See id. at 51 (testimony involves “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact” (internal quotation marks omitted)).
87 See id. (“An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”).
88 See id.
confrontation is a trial right and not a right against police abuses during investigation.\textsuperscript{89} An exigency can alter whether a search proves reasonable, because Fourth Amendment rights arise at the time of the search.\textsuperscript{90} Whether a pre-trial statement addresses an emergency or anything else, however, does not determine how a prosecuting lawyer has employed that evidence at a later trial, consistent with the \textit{trial} right of confrontation. Yet the Court still fixates on the interaction between the police and the declarant in deciding whether that evidence is testimonial at the later trial. And for some reason, the existence of an emergency when a statement is made predetermines that the prosecution cannot employ it as testimonial evidence at trial. The Constitution locks evidence into testimonial or non-testimonial form months or years before the trial even begins.

\textit{Crawford} thus inexplicably authorizes declarants and the police, not the trial lawyers, to dictate whether evidence at trial operates as testimony. A single word from an important passage in \textit{Bryant} reveals this failure in confrontation analysis, but a simple revision can resolve it. In \textit{Bryant}, the Court held that confrontation rights extend to statements “\textit{procured} with a primary purpose of creating an out-of-court substitute for trial testimony.”\textsuperscript{91} I would embrace this statement if it instead extended confrontation rights to statements “[\textit{introduced at trial}] with a primary purpose of creating an out-of-court substitute for trial testimony.” Whatever history may say about 16th- and 17th-century criminal procedure abuses, in my experience this modified statement from \textit{Bryant} more accurately reflects how lawyers and judges define evidence in criminal trials today. The Constitution should not defy the reality of how contemporary criminal cases are tried.\textsuperscript{92}

\textsuperscript{89} See \textit{Davis v. Washington}, 547 U.S. 813, 832 n.6 (2006) (“The Confrontation Clause in no way governs police conduct, because it is the \textit{trial} use of, not the investigatory \textit{collection} of, \textit{ex parte} testimonial statements which offends that provision.”).

\textsuperscript{90} See generally \textit{Minnesota v. Olson}, 495 U.S. 91, 100 (1990).

\textsuperscript{91} Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011) (emphasis added).

\textsuperscript{92} Cf. \textit{Graham}, \textit{supra} note 34, at 30–31 (criticizing \textit{Bryant} for ignoring the investigation-trial dichotomy in confrontation analysis); \textit{Ross}, \textit{supra} note 80, at 196–201 (proposing that “[t]estimonial’ should mean statements that
When I advanced this vision of testimonial evidence at the recent *Crawford and Beyond* symposium, a participant inquired whether I meant to define all hearsay evidence as testimonial and thus subject to *Crawford*’s rule of exclusion. To me, this question implicates two considerations.

First, my understanding of testimonial evidence may track closely to the definition of hearsay. But I do not perceive this relationship as a flaw. Like confrontation doctrine, the hearsay rule also concerns itself with the opportunity to cross-examine. And the intent of the examining lawyer at trial largely guides the court in judging whether evidence constitutes hearsay, not the “objective purpose” of the declarant and interrogator in creating the evidence. Perhaps the Confrontation Clause could best be understood as the inverse of the confrontation view, embraced in *Roberts* and rejected in *Crawford*, that “[the Confrontation Clause’s] application to out-of-court statements introduced at function as testimony during the trial,” not statements that function as testimony at the time and place of evidence production). Indeed, as the Supreme Court has acknowledged, the Confrontation Clause is not concerned with whether a defendant had any opportunity to cross-examine the declarant when the out-of-court statement was made, only when the evidence is offered at trial. See *California v. Green*, 399 U.S. 149, 159 (1970) (“[T]he inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial.”). Whether that evidence necessitates confrontation thus should be defined by its use at trial, where the right to cross-examine exists.

93 See *Crawford*, 541 U.S. at 51 (“[N]ot all hearsay implicates the Sixth Amendment’s core concerns.”).

94 See generally *United States v. Owens*, 789 F.2d 750, 756 (9th Cir. 1986), overruled on other grounds, 484 U.S. 554 (1988) (“The reliability concerns of the rule against hearsay have been satisfied when ‘the witness . . . is subject to cross-examination.’” (quoting *United States v. Fiore*, 443 F.2d 112, 115 (2d Cir. 1971))).

95 See *United States v. Linwood*, 142 F.3d 418, 425 (7th Cir. 1997) (“[W]hether a statement is hearsay . . . will most often hinge on the purpose for which it is offered.”). For an examination of prosecution arguments for offering trial evidence “not for the truth of the matter asserted,” see Jeffrey L. Fisher, *The Truth About the “Not for the Truth” Exception to Crawford*, CHAMPION, Feb. 2008, at 18.
trial depends upon ‘the law of Evidence for the time being.’” Instead, the Confrontation Clause simply could constrain the State from legislating or adjudicating policy exceptions to trial cross-examination of a hearsay declarant in criminal cases. Some commentators have argued that *Crawford* should have subjected more hearsay to confrontation limitations. This approach even may have a stronger historical basis than *Crawford*’s focus on “testimonial” evidence.

More than tracking hearsay law, however, my suggested approach may bring testimonial evidence under the Sixth Amendment closer to the meaning and role of testimonial evidence under the Fifth Amendment Self-Incrimination Clause, an assertion that the prosecuting lawyer has introduced to prove a fact against the accused at the trial itself. But regardless of

---

96 *Crawford*, 541 U.S. at 50–51.
98 See *Davies*, supra note 78, at 352, 434 (explaining that, contrary to *Crawford*’s historical position, “the framing-era sources indicate that the confrontation right itself prohibited the use of hearsay statements as evidence of the defendant’s guilt,” and “[a]dmitting unsworn, ‘nontestimonial’ hearsay was not part of ‘the Framers’ design’”).
99 See U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself.”).
100 See *Doe* v. United States, 487 U.S. 201, 210 (1988) (“[T]o be testimonial, an accused communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.”); *Chavez* v. Martinez, 538 U.S. 760, 766–67 (2003) (“Martinez was never made to be a ‘witness’ against himself in violation of the Fifth Amendment’s Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case.” (emphasis added)); cf. Pennsylvania v. Muniz, 496 U.S. 582, 590–91 (1990) (finding defendant’s response to police questions non-testimonial, because the prosecutor introduced this evidence to show defendant’s physically slurred speech, not to prove defendant’s knowledge, thoughts, or beliefs); Michael J. Zydney Mannheimer, Toward a Unified Theory of Testimonial Evidence under the Fifth and Sixth Amendments, 80 TEMP. L. REV. 1135, 1135 (2007) (examining definitional differences of “testimonial” between the Fifth Amendment’s Self-Incrimination Clause and
whether confrontation law defines testimonial evidence separately from hearsay evidence, as Crawford and Davis indicated it should.\textsuperscript{101} Confrontation rights should turn on the prosecuting lawyer’s purpose for that evidence at trial, not the objective purpose for which that evidence was procured during the investigation.\textsuperscript{102}

Second, concern about a broad definition of testimonial evidence that tracks hearsay law, I suspect, reacts to Crawford’s rule of exclusion, which can transform confrontation rights into a perceived “windfall” for defendants.\textsuperscript{103} Professor Robert Mosteller presciently predicted the response to this perception following Crawford:

\textit{Crawford} places a bold “stop sign” in the way of the admission of statements in this core area when confrontation is not provided. Given the damaging impact on prosecutions—a “stop sign” for the statement if it is testimonial—tremendous pressure will be placed on courts to narrow the definition [of testimonial evidence].\textsuperscript{104}

the Sixth Amendment’s Confrontation Clause, and advancing a unified theory of testimonial evidence).

Of course, under the Fifth Amendment, courts do analyze the circumstances surrounding how the police procured a suspect’s statement in determining its admissibility. See Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (defining interrogation to include “any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect”). But this analysis does not address whether the suspect’s statement is testimonial. Rather, unlike the Confrontation Clause, the Fifth Amendment also concerns itself with whether the police obtained a statement through coercive pretrial interrogation, necessitating analysis of these pretrial circumstances in addition to whether the statement constitutes testimonial evidence in its use at trial.

\textsuperscript{101} See Davis v. Washington, 547 U.S. 813, 821 (2006); Crawford, 541 U.S. at 51.

\textsuperscript{102} Cf. Cicchini, supra note 43, at 1320–21 (“The inquiry should not be on the facts and circumstances of how a hearsay statement was allegedly made . . . . Nor should it be on how a hearsay statement was allegedly collected . . . . [T]he proper inquiry to determine whether a statement is testimonial involves the statement’s use at trial.”); Ross, supra note 80, at 196–201.

\textsuperscript{103} See Davis, 547 U.S. at 833.

\textsuperscript{104} Mosteller, supra note 97, at 516.
As I indicated at the Crawford and Beyond symposium, I am not sold on Crawford’s absolute rule of exclusion not only for the practical reason suggested by Professor Mosteller, but also in my understanding of trial confrontation generally.

In my experience trying criminal cases, the confrontation right is not best understood as a “stop sign” against a narrow class of evidence. Rather, confrontation is part of an adversary process designed to ensure a fair trial.\(^{(105)}\) In this process, the prosecution carries the burden of proof beyond a reasonable doubt, but both sides are represented by competent counsel before a judicial officer and unbiased jury. From this process-focused view should flow a broadly-defined trial right connected to a realistic set of confrontation priorities, not an exclusionary rule that eliminates only a very narrow range of evidence.

Crawford hitched confrontation’s wagon to an exclusionary rule without clearly defining the right itself. A narrowed confrontation right inevitably followed. Many defendants now are left with no exclusionary rule or any other confrontation interest to assert when hearsay is admitted from a non-testifying declarant, because only a limited class of testimonial evidence implicates confrontation rights.\(^{(106)}\) Instead of placing a constitutional “stop sign” before testimonial evidence, Crawford should have been understood to introduce a series of important confrontation priorities—priorities that frame confrontation less as a rule of evidence admissibility and more as a critical ingredient to a fair adversarial trial.

The first priority is that the prosecution should produce for

---

\(^{(105)}\) Cf. Testimonial Statements, supra note 3, at 285 (defining “testimony” in light of its role in a process of criminal adjudication).

\(^{(106)}\) See Crawford, 541 U.S. at 68; Sklansky, supra note 69, at 1, 5 (“[T]he Court has made clear that the introduction of nontestimonial statements raises no constitutional concerns, no matter how the statements are treated under the hearsay rule.”); cf. Tom Lininger, Reconceptualizing Confrontation after Davis, 85 Tex. L. Rev. 271, 288–325 (2006) (reconceptualizing confrontation as a policy issue, and proposing legislative reforms to protect confrontation interests excluded from Crawford and Davis); Bellin, supra note 69, at 1, 3, 5 (noting that the constriction of testimonial evidence following Davis and Bryant excludes a wide range of hearsay evidence from confrontation protection, and advocating that confrontation rights extend to limit the use of non-testimonial hearsay).
cross-examine any available witness whose pre-trial statement is being offered “for the purpose of establishing or proving some fact” against the defendant. Availability is key. The prosecution should not be able to choose, by stratagem or lack of diligence, whether a defendant cross-examines the sources of testimonial evidence. This prosecutorial practice, in my experience, supplied the most widespread confrontation problems under Roberts, and now perhaps under Crawford and Bryant. A confrontation rule that constrains this practice would do a lot more to ensure fair criminal trials today than would a historically pure vision of 17th-century abuses.

If a prosecution can show true unavailability of a declarant, however, the prosecution has not elected to deprive the defendant of cross-examination. Unavailability begins to implicate legitimate concerns for both necessity and equity in an adversary process. Crawford thus identifies the next confrontation priority: where cross-examination at trial is not possible, the prosecution should give the defendant a pre-trial opportunity to examine the declarant. Rarely will this pre-trial

---

107 Crawford, 541 U.S. at 51.
109 See, e.g., Testimonial Statements, supra note 3. I do not mean to suggest that prosecutors never have good reasons for proceeding in this manner. In many domestic violence cases, for example, prosecutors face challenges in producing the victim for trial, challenges that may reflect the defendant’s misconduct. See generally Lisa Marie De Sanctis, Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence, 8 YALE J.L. & FEMINISM 359, 367–74 (1996) (exploring difficulties in prosecution); Thomas L. Kirsch, Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?, 7 WM. & MARY J. WOMEN & L. 383, 392–98 (2001) (reviewing challenges). I am arguing only that the prosecution should not be able to choose whether a defendant confronts a prosecution witness at trial, a choice I have witnessed prosecutors make in numerous cases.
110 For an example of unavailability, see Hardy v. Cross, 132 S. Ct. 490, 495 (2011).
111 See Crawford, 541 U.S. at 68. For insightful questions and comments about prior opportunities to cross-examine under Crawford, see Richard Friedman, Opportunity for Cross-Examination at Preliminary Proceedings, CONFRONTATION BLOG (Aug. 29, 2007), http://confrontationright.blogspot.
cross-examination, such as cross-examination at a preliminary hearing,\(^{112}\) substitute fully for defense counsel’s trial examination.\(^{113}\) Yet even \textit{Crawford} accepts this practical compromise, rather than the exclusion of evidence, to maintain a fair adversary process.\(^{114}\)

Working beyond cross-examination as the sole measure of confrontation, \textit{Crawford} recognizes another confrontation priority: if the prosecution could not afford a defendant any opportunity for cross-examination, even prior to trial, the defendant cannot complain about the loss of cross-examination in cases where the defendant wrongfully caused the declarant’s unavailability.\(^{115}\) The Court has drawn this “forfeiture” exception to confrontation from history, but the Court also has noted that it is grounded in necessity and equity.\(^{116}\) Surely, a defendant cannot purposefully absent a witness from trial and complain about an unfair adversary process.\(^{117}\)

At this point, if the defendant could not cross-examine the declarant and did not make the declarant unavailable, \textit{Crawford} would prioritize the exclusion of testimonial evidence. This evidentiary “stop sign,” however, understandably may have prompted members of the Court to curb the confrontation right itself by defining testimonial evidence narrowly.\(^{118}\) \textit{Crawford} offered no substantial reasons for the law to stop here in


\(^{113}\) Cf. \textit{Blanton v. State}, 978 So. 2d 149, 154–56 (Fla. 2008) (holding that a “discovery deposition” does not constitute a prior opportunity for cross-examination under \textit{Crawford}).

\(^{114}\) See \textit{Crawford}, 541 U.S. at 68.


\(^{117}\) Cf. \textit{id.} at 380 (Souter, J., concurring in part) (indicating that confrontation forfeiture should be triggered by an intent “to thwart the judicial process,” or to “isolate the victim from outside help, including the aid of law enforcement and the judicial process”).

\(^{118}\) See \textit{Mosteller, supra} note 97, at 516.
considering practical confrontation priorities consistent with an adversary process.\footnote{Cf. Crawford, 541 U.S. at 72–75 (Rehnquist, C.J., concurring) (reviewing historical record and concluding, “I am not convinced that the Confrontation Clause categorically requires exclusion of testimonial statements”); cf. Maryland v. Craig, 497 U.S. 836, 849–50 (1990) (holding that face-to-face confrontation is a preferred but not indispensible part of trial confrontation, and thus modified confrontation procedures can be employed when necessary, equitable, and fair); Coy v. Iowa, 487 U.S. 1012, 1022–25 (1988) (O’Connor, J., concurring) (accepting face-to-face confrontation as a confrontation priority, but recognizing that necessity and equity can justify alternative procedures that do not deny the defendant the opportunity to test the evidence in an adversary process).} For example, if the defendant did not absent the unavailable declarant, one fairly might ask whether the prosecution had any opportunity to supply even pre-trial examination of the declarant. If the prosecution sat on its hands pending trial, or chose to deny the defense pre-trial access to the declarant through discovery limitations, the prosecution will have lost its claim to necessity and equity for introducing the now-unavailable declarant’s statement at trial. But on the other hand, the prosecution’s demonstrated inability to offer even pre-trial examination of an unavailable declarant should be a relevant consideration to a fair adversary process. Dying declarations certainly could qualify for this consideration,\footnote{I always have found “necessity and equity” as the most persuasive argument for admitting a dying declaration over a confrontation objection—the prosecution simply has no ability to produce this witness for anyone to examine, including the prosecution itself, at any time. The argument that a dying declaration uniquely should be admissible over a confrontation objection solely because of its greater antiquity than other hearsay exceptions, cf. Giles, 554 U.S. at 358 (identifying historical bases for testimonial dying declarations), too categorically and arbitrarily preferences the old over the new in the development of the law.} as could victims or witnesses who evade the prosecution’s diligent efforts to locate them.

In this circumstance, before excluding the testimonial evidence altogether, a court could prioritize exploring whether a fair adversary process still could be preserved without cross-examination of the unavailable declarant. For example, the court could order the prosecution to produce witnesses with detailed personal knowledge of the unavailable declarant and how the
statement was made; condition admission on robust pre-trial discovery or deposition to enhance defense preparedness for this evidence; relax the evidentiary foundations for relevant impeachment of the non-testifying declarant or rebuttal of the declarant’s statement; instruct the jury and permit defense argument on the risks of this kind of evidence; or hold a pre-trial hearing to evaluate whether the evidence presents any unique risks of unreliability that cannot be confronted fairly without the declarant on the witness stand for cross-examination.

This approach recognizes that, in carrying the burden of proof, prosecuting lawyers determine whether trial evidence is testimonial by how they employ it against the defendant at trial. The defendant, however, also is represented by diligent trial counsel in an adversary process. In necessary and equitable circumstances, competent defense counsel properly may be expected to confront prosecution testimony with more than just the tool of cross-examination if the law treats confrontation as a part of a fair adversary process and not just a rule of evidence admissibility.

By embracing some flexibility in how confrontation rights are enforced, I do not mean to minimize the centrality of cross-examination to this right. Crawford properly ranks cross-examination at trial as the highest confrontation priority.

121 See Bullcoming v. New Mexico, 131 S. Ct. 2705, 2723 (2011) (Kennedy, J., dissenting) (emphasizing that while the prosecution did not produce the declarant of the testimonial report, “a knowledgeable representative of the laboratory was present to testify and to explain the lab’s processes and the details of the report”).

122 See Fred O. Smith, Jr., Crawford’s Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause, 60 STAN. L. REV. 1497, 1524–26 (2008).

123 See id. at 1528. Courts already instruct juries in this manner with other types of potentially problematic or unreliable evidence, such as cooperating witness testimony, interested witness testimony, missing testimony from an uncalled and knowledgeable witness, and identification evidence. Rather than exclude this evidence altogether, the law trusts that a well-informed jury in an adversary system can weigh the evidence appropriately. See Perry v. New Hampshire, 132 S. Ct. 716, 728 (2012).

124 Cf. Smith, Jr., supra note 122, at 1528.
Moreover, my approach severely would restrict the prosecution’s ability to proceed without producing an available declarant, and it further would acknowledge that defendants retain confrontation interests even when the prosecution has a strong case for proceeding without an unavailable declarant. But the point of the confrontation right is an opportunity to test the prosecution’s evidence as an adversary. Confrontation should not be an all-or-nothing evidence admissibility rule that, while reflecting some views of history, ignores how criminal cases can be tried—and how judges are likely to decide confrontation cases when given an all-or-nothing choice. By imposing an all-or-nothing choice, Crawford’s commitment to a binary confrontation framework seems to assure less confrontation, not more: Crawford incentivizes a narrow view of the testimonial evidence subject to exclusion, and permits a broad universe of non-testimonial evidence that legislatures and courts are free to admit at trial without any concern for confrontation priorities.

I recognize that my suggested vision for confrontation rights may invite some of the vices of Roberts. But Crawford is doing no better, and perhaps even worse, at reducing judicial discretion and decision making uncertainty. Whatever the vices of my proposed approach to confrontation, it at least offers the competing virtue of honestly acknowledging real-world equity in solving confrontation problems in an adversary system. Judges already are acknowledging these concerns, just under the guise of Crawford’s testimonial evidence framework. Judges by necessity are narrowing the definition of the right, rather than exploring practical ways to prioritize that right’s enforcement. I would rather see this judicial discretion exercised in how confrontation is enforced, not in whether that right exists.

IV. CONCLUSION

If my assessment of the trajectory of confrontation law is accurate, one has to ask what the contribution of Crawford has been to constitutional criminal procedure. No doubt, Roberts had become a fairly empty confrontation framework that needed some meaningful constitutional discipline imposed on it. Yet the Supreme Court needs to be cautious about disrupting prevalent
rules of criminal trial procedure without some clear sense of where that constitutional project is going, and a judicial commitment to get there. That commitment apparently did not exist for Crawford.

Chief Justice Rehnquist thus raised an important question in Crawford: In the world of criminal practice, does a shot at perfection justify an extended and uncertain journey, perhaps to no better a place, or even to someplace worse? I do not know an overarching answer to this question. But in retrospect, Chief Justice Rehnquist made a pretty good case for a more modest effort to refine confrontation doctrine in Crawford—perhaps such as bundling a more robust unavailability requirement into Roberts. An effort of this sort may not have promised confrontation perfection, even from the beginning. But it would have improved Roberts, avoided years of uncertainty in how criminal cases are to be tried, and in the end, may have proved about as good as where Crawford appears to have delivered us.

---

SPORTING CHANCE: LITIGATING SEXISM OUT OF THE OLYMPIC INTERSEX POLICY

Samantha Glazer*

INTRODUCTION

On April 5, 2011, the International Olympic Committee (“IOC”), the “supreme authority of the Olympic [m]ovement,”¹ released a statement on the need to promulgate a clear set of rules governing the inclusion of intersex² athletes in time for the 2012 Summer Olympic Games in London.³ The IOC’s Executive Board (“EB”) met for two days in London to discuss the issue of the eligibility of female athletes with hyperandrogenism,⁴ a condition where a woman possesses elevated androgen levels—typically involving increased amounts of testosterone.⁵ The resulting principles, a product of two separate meetings in 2010

* J.D., Brooklyn Law School 2013, B.A., Wake Forest University, 2010. I would like to thank my mother for her constant support and thoughtful critiques during the process of writing this Note. Special thanks to Karen Schneiderman for her help in selecting such an engaging subject and to the entire staff of the Journal of Law and Policy for their tireless edits and assistance.

² “Intersex refers to the atypical appearance of the external genitalia at birth where they differ from the usual development of either sex and create difficulty in sex assignment.” Robert Ritchie et al., Intersex and the Olympic Games, 101 J. ROYAL SOC. MED. 395, 395 (2008). For a more complete discussion of intersex, see infra Part I.B.
⁴ Id.
of the IOC Medical Commission and International Association of Athletic Federations ("IAAF")\(^6\) and adopted by the IAAF, constitute the most recent attempt to regulate intersex athlete participation in the Games.\(^7\) The IOC’s guidelines may be clear cut, but they have a discriminatory effect on female athletes.

The IAAF first introduced a means for determining an athlete’s sex in 1966.\(^8\) Since then, there have been several iterations of sex tests developed by the IOC and IAAF.\(^9\) Scholars have noted that traditionally, sex testing within the realm of the Olympics has been justified on two grounds: (1) “sex exists in a binary” and (2) “fairness in sport requires a strict separation of the sexes.”\(^10\) These premises, however, reflect a flawed understanding of sex and competitive advantage, respectively.\(^11\) While “sex verification supposes that every athlete can be assigned to one of two sex categories,” scientifically, “[s]ex cannot be distilled to a single determinable factor” that conclusively indicates man or woman.\(^12\) Moreover, though the notion of fairness in sport is well intentioned, sex verification is an incomplete remedy for equality in competition because factors aside from sex contribute to an athlete’s competitive advantage.\(^13\) Despite its faulty logic, sex testing continues to be a focus of

---


\(^7\) IOC Addresses Eligibility of Female Athletes with Hyperandrogenism, supra note 3.

\(^8\) Anna Peterson, But She Doesn’t Run Like a Girl . . .: The Ethic of Fair Play and the Flexibility of the Binary Conception of Sex, 19 TUL. J. INT’L & COMP. L. 315, 320 (2010).

\(^9\) See infra Part II.B.


\(^11\) See generally id.

\(^12\) Id. at 37–38.

\(^13\) Id. at 38.
sports governing bodies.\textsuperscript{14} As the tradition of sex testing persists, it is critical to recognize that its effects remain predominantly an issue for female athletes.\textsuperscript{15} Even the IOC’s most recent guidelines reflect an understanding that female, not male, athletes will be held to arbitrary standards of acceptable androgen levels.\textsuperscript{16}

This Note asserts that the IOC’s guiding principles for regulating the inclusion of female athletes with hyperandrogenism result in discriminatory policies against women. In Part I, this Note discusses the terms “sex,” “gender,” and “intersex.” Part II will explain the internal governance structure of the Olympic movement, including the relationship between the IOC and IAAF, as well as detail the various forms of sex testing used throughout history in sporting events by both organizations. Part II will also describe the recent sex testing guidelines developed by the IOC and IAAF. After outlining the history of sex testing in sports and identifying the current sex verification policy at issue in this Note, Part III will transition to a discussion of two separate sex discrimination suits brought by female athletes against Olympic governing bodies.\textsuperscript{17}

In light of the case law discussed in Part III, Part IV will assess the viability of a sex discrimination suit as a response to the IOC and IAAF’s inequitable policy on hyperandrogenism. Ultimately, this Note maintains that the current IOC and IAAF policy on hyperandrogenism facially discriminates against women and that litigation represents a viable vehicle for female athletes to voice their opposition.


\textsuperscript{16} Id.

I. INTERSEXUALITY AND THE SEX-GENDER DISTINCTION

A. Sex and Gender: What’s the Difference?

Though colloquially the terms “sex” and “gender” are used interchangeably, this Note assumes a distinction between them, as is common practice in scholarly work examining the participation of intersex or transgender athletes in sports.18 Sex is a biological determination at birth19 and is generally defined according to one’s genitals, gonads, chromosomes, and hormones.20 While “[s]ex is about what your body includes[,] ‘[g]ender[,]’ by contrast is about who you are.”21 Gender is dictated by self-perceptions about one’s identity22 and is understood by scholars as a “social construct.”23 Gender is related to sex in that it “refers to the social, cultural, or attitudinal qualities that are typically associated with a particular sex.”24 Simply, sex is a biological designation and gender is a personal and/or societal designation.25

While one’s sex determines whether one is male or female, gender is determinative of masculinity or femininity.26 Though

---

19 Cooper, supra note 18, at 236; see also Patel, supra note 18.
21 Dreger, supra note 18, at 22.
22 Id.
23 Cooper, supra note 18, at 237.
24 Id.
25 Id. at 236–37.
26 Adair, supra note 18, at 124; Patel, supra note 18. Justice Scalia, in a dissenting opinion, discussed distinctions between sex and gender, noting that, “[t]he word ‘gender’ has acquired the new and useful connotation of
for many people being biologically male is linked to masculinity or being biologically female is linked to femininity, some individuals view themselves as masculine while simultaneously possessing biologically female characteristics or as feminine while possessing male characteristics. Recognizing the potential for and existence of masculine females and feminine males, the terms “sex” and “gender” will be used throughout this Note to refer to distinct concepts.

cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male.” J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

See Dreger, supra note 18. In her article, The Five Sexes, Revisited, Anne Fausto-Sterling, a Brown University professor and biologist, argues that there are at least five sexes that should be recognized as “points in a multidimensional space.” Anne Fausto-Sterling, The Five Sexes, Revisited, 40 SCIENCES 18, 23 (2000) (explaining her theory on variation in sex); see also Haley K. Olsen-Acre, The Use of Drug Testing to Police Sex and Gender in the Olympic Games, 13 MICH. J. GENDER & L. 207, 214 (2007) (discussing Anne Fausto-Sterling’s work). In addition to “male” and “female,” Fausto-Sterling proposes the recognition of ‘herms’ (named after true hermaphrodites, people born with both a testis and an ovary); ‘merms’ (male pseudohermaphrodites, who are born with testes and some aspect of female genitalia); and ‘ferms’ (female pseudohermaphrodites, who have ovaries combined with some aspect of male genitalia).” Fausto-Sterling, supra, at 19.
B. Defining Intersexuality

Individuals whose sex and gender identities do not align are collectively referred to as intersexuals. There are a “myriad of conditions” that comprise intersexuality, which the International Intersex Consensus Conference has termed Disorder(s) of Sex Development (“DSD”). Intersexuality is, perhaps surprisingly, “a relatively common occurrence . . . it is estimated that approximately 1 in 2000 children are born with ambiguous genitalia.” Current scientific standards deem any child with an “adequate” penis to be male. “An ‘adequate’ penis is defined as ‘a penis capable of vaginal penetration and urination while standing.’” This classification presents an overly simplistic view of sex and highlights society’s general understanding of sex as binary. From birth, individuals

---

29 In addition to appreciating the difference between “sex” and “gender,” it is critical to realize another distinction, intersex from transsexual. While legal commentary on sex testing in sports frequently discusses the treatment of both transsexual and intersex individuals, these terms refer to different scientific and biological conditions. Transsexualism references “[t]he desire to change anatomic sexual characteristics to conform physically with one’s perception of oneself as a member of the opposite sex, coupled with a desire to live full-time in the role of the opposite sex.” STEDMAN’S MEDICAL DICTIONARY 415,630 (27th ed. 2000). Intersexuals, meanwhile, are “people who, as individuals, are born with genetic, hormonal and physical features that may be thought to be typical of both male and female at once.” What is Intersex?, ORGANISATION INTERSEX INT’L USA, http://oiiusa.org/what_is_intersex (last visited Feb. 17, 2012). This note will focus on policies governing the inclusion of intersex athletes.

31 Ritchie et al., supra note 2.
32 Id.
33 Peterson, supra note 8, at 319.
35 Id.
36 Adair, supra note 18, at 124. “In a world that tends to classify a person with either a male sex and gender or a female sex and gender, intersexuality can present problems immediately at birth.” Id.
are classified as either male or female. Rejecting this “either/or” designation, Anne Fausto-Sterling argues that sex exists on a spectrum, or as points in space. Sex is more fully defined by the following eight factors:

1. Genetic or chromosomal sex—XY or XX;
2. Gonadal sex (reproductive sex glands)—testes or ovaries;
3. Internal morphologic sex (determined after three months gestation)—semenal vesicles/prostrate [sic] or vagina/uterus/fallopian tubes;
4. External morphologic sex (genitalia)—penis/scrotum or clitoris/labia;
5. Hormonal sex—androgens or estrogens
6. Phenotypic sex (secondary sexual features)—facial and chest hair or breasts
7. Assigned sex and gender rearing; and
8. Sexual identity.

These factors frequently align so that one is either male or female; however, for intersex persons, determining sex on these indicators is decidedly less clear-cut.

Although by no means exhaustive, the following are common forms of intersexuality:

1. Klinefelter Syndrome: Men with Klinefelter syndrome have an extra sex chromosome, such that their chromosomal makeups are XXY, instead of the typical XY. The syndrome is characterized by hypogonadism (small testes, azoospermia, oligospermia), gynecomastia in late puberty, psychosocial problems, hyalinization and

---

37 Id.
38 Olsen-Acre, supra note 28.
39 See supra note 28.
40 Cooper, supra note 18, at 238; see also Buzuvis, supra note 10, at 37–38 (“Sex cannot be distilled to a single, determinable factor. Many biological and social factors—including chromosomes, hormones, genitals, gender identity and gender expression—contribute to our interpretation of whether an individual is male or female.”)
41 Cooper, supra note 18, at 238.
fibrosis of the seminiferous tubules, and elevated urinary gonadotropin levels.”

2. **Turner Syndrome**: Individuals with this condition have one X chromosome but are missing one sex chromosome. Their genitalia, though female, is underdeveloped.

3. **Swyer Syndrome**: This condition is also known as pure gonadal dysgenesis. These individuals have an XY chromosomal makeup typical of males; however, they have a female genital appearance.

4. **Persistent Mullerian Duct Syndrome**: This is a “rare form of male pseudo-hermaphroditism characterized by the presence of Mullerian duct structures in an otherwise phenotypically, as well as genotypically, normal man.”

5. **Hermaphroditism**: True hermaphrodites typically have ambiguous external genitalia.

6. **Androgen Insensitivity Syndrome (“AIS”)**: This is the most common form of male pseudohermaphroditism and is also known as testicular feminization. Though individuals with AIS are chromosomally and gonadally male, they lack an androgen receptor necessary to interact with the production of androgens, or male hormones.

7. **5-Alpha Reductase Deficiency**: This condition is a form of male pseudohermaphroditism in which an individual appears to be externally female when young.

---


47 Id. at 27–28.
but after puberty becomes more male in appearance.\textsuperscript{48}

8. Congenital Adrenal Hyperplasia: This condition is a form of female pseudohermaphroditism whereby an individual’s external organs develop in a typical male fashion yet the individual’s internal organs develop like a female.\textsuperscript{49}

While there are a variety of ways in which one can be intersexed, intersexed individuals do not necessarily consider themselves to be intersexual but often view themselves as either men or women.\textsuperscript{50} Within the realm of sports, Alice Dreger\textsuperscript{51} notes that “[i]n practice, athletes show up with genders—as men or as women—and sex becomes an issue only if . . . an athlete competing as a woman is suspected of being ‘really’ male . . . .”\textsuperscript{52} Here, Dreger references the tradition of sex testing in the Olympics and the IOC’s standing to evaluate those “suspected” of being a sex distinct from the one he/she represents himself/herself to be.\textsuperscript{53} Through sex testing, the IOC thus can challenge an individual’s understanding of his or her sex.\textsuperscript{54} Given the IOC’s power to interfere with both how an individual perceives himself or herself, as well as an individual’s ability to compete in the Olympics, it is therefore critical that the IOC promulgates unbiased policies towards intersexed individuals.

\textsuperscript{48} Id. at 40.
\textsuperscript{49} Id. at 27.
\textsuperscript{50} Peterson, supra note 8, at 319.
\textsuperscript{51} Alice Dreger is a Professor of Clinical Medical Humanities and Bioethics at the Feinberg School of Medicine at Northwestern University. About Me, ALICE DOMURAT DREGER, http://www.alicedreger.com/about.html (last visited Feb. 17, 2012).
\textsuperscript{52} Dreger, supra note 18, at 22.
\textsuperscript{53} Id.
\textsuperscript{54} See id.
II. THE OLYMPIC MOVEMENT: STRUCTURE AND SEX TESTING POLICIES

A. Organization of the Olympics

The Olympic Movement is comprised of the IOC, International Federations, and National Olympic Committees.\textsuperscript{55} Within the IOC, there is a consultative Congress; a Session that issues final decisions; the EB, which oversees the ongoing of the IOC; and a President, who makes decisions when there is disagreement in the Session.\textsuperscript{56} The Olympic Charter outlines various duties of the IOC, most notably calling upon the organization to “act against any form of discrimination affecting the Olympic Movement; [t]o encourage and support the promotion of women in sport at all levels and in all structures with a view to implementing the principle of equality of men and women . . . [and] [t]o encourage and support the development of sport for all.”\textsuperscript{57}

Functionally, the IOC coordinates the efforts of National Olympic Committees (“NOCs”), International Sports Federations\textsuperscript{58} (“IFs”), Organising Committees for the Olympics Games (“OCOGs”), and athletes.\textsuperscript{59} In overseeing IFs, the IOC recognizes their ability to administer specific sports around the world.\textsuperscript{60} Additionally, IFs oversee developments and organize competitions in specific sports.\textsuperscript{61}

\begin{footnotesize}
\textsuperscript{55} Cooper, \textit{supra} note 18, at 245.
\textsuperscript{56} Id.
\textsuperscript{57} The IOC: The Organisation, \textit{supra} note 1.
\textsuperscript{58} The IAAF, which worked with the IOC to develop a policy on hyperandrogenic women in Olympic competitions, is an IF. \textit{International Sports Federations, OLYMPIC.ORG}, http://www.olympic.org/content/The-IOC/Governance/International-Federations/ (last visited Feb. 17, 2012); \textit{International Association of Athletics Federations, OLYMPIC.ORG}, http://www.olympic.org/iaaf-athletics-road (last visited Feb. 17, 2012); IOC Addresses Eligibility of Female Athletes with Hyperandrogenism, \textit{supra} note 3.
\textsuperscript{59} The IOC: The Organisation, \textit{supra} note 1.
\textsuperscript{60} International Sports Federations, \textit{supra} note 58.
\textsuperscript{61} Id.
\end{footnotesize}
IOC policies assist IFs in the governance of their respective sports.  

Notably, the IOC has a distinct legal process for handling disputes that arise in connection with athletes at the Olympic Games. The IOC’s Olympic Charter mandates that parties arbitrate any dispute arising from the Olympic Games in accordance with the Code of Sports-Related Arbitration. In 1984, the IOC established the Court of Arbitration for Sport (“CAS”) and funded it to ensure that typical expenses associated with litigating in court would not burden athletes and other litigants. In this way, the IOC assures there is a forum for “increased disputes in international sports . . . .”

B. Historical Overview of Sex Testing

Both the IAAF, the IF that regulates track and field events, and the IOC, which oversees IFs like the IAAF, have a substantial history of monitoring the sex of athletes at worldwide athletics events and the Olympics. In its original form, sex

---

63 Cooper, supra note 18, at 245.
65 Cooper, supra note 18, at 245–46.
66 Id. at 246.
testing was aimed at ensuring that men did not disguise themselves and compete in women’s events to gain a competitive advantage.\textsuperscript{68} Despite this purported interest in maintaining a strict divide between men’s and women’s competitions, sex testing has never uncovered a case of an athlete disguising his or her sex.\textsuperscript{69} On the other hand, such testing has exposed female athletes with various forms of sex disorders often previously unknown to the competitors themselves.\textsuperscript{70}

The 1936 Olympics in Berlin marks the first instance of gender controversy in the Games.\textsuperscript{71} Stella Walsh and Helen Stephens, two female sprinters from the United States, were suspected of being men because of their masculine appearances.\textsuperscript{72} Walsh was even given the nickname “Stella the Fella” by the press.\textsuperscript{73} Following the 100-meter sprint, where Stephens beat Walsh by 0.2 seconds, Walsh accused Stephens of being a man.\textsuperscript{74} Upon Walsh’s death in 1980, it was revealed via an autopsy that Walsh had atypical sex chromosomes and ambiguous genitalia.\textsuperscript{75} Additionally, the 1936 Olympics marks the only known instance of a male masquerading as a female for competitive purposes.\textsuperscript{76} Hermann Ratjen, an Olympic high jumper, bound his genitals in order to participate in the women’s competition.\textsuperscript{77} Interestingly, Ratjen placed fourth behind three women.\textsuperscript{78}

The purported impetus behind the introduction of formal sex testing in international athletic organizations was the string of

\textsuperscript{68} Adair, supra note 18, at 132 (“Predicated on the belief that men and women should compete separately, administrators of athletic competitions historically sought to prevent people from infiltrating the other sex’s division in order to gain a competitive advantage.”).

\textsuperscript{69} Ritchie et al., supra note 2, at 398.

\textsuperscript{70} Id.

\textsuperscript{71} Peterson, supra note 8, at 320.

\textsuperscript{72} Id.

\textsuperscript{73} Id.

\textsuperscript{74} Id.

\textsuperscript{75} Id.

\textsuperscript{76} Olsen-Acre, supra note 28, at 212.

\textsuperscript{77} Id.

\textsuperscript{78} Id.
eight other female competitors between 1932 and 1968 who were accused of being men.\textsuperscript{79} In 1966, the IAAF required all female participants at the European Track and Field Championships to pass a “femininity” test to be eligible for competition.\textsuperscript{80} The test consisted of a physical inspection of an athlete’s genitalia.\textsuperscript{81} In 1967, however, the IAAF introduced a new form of sex testing—the chromatin analysis.\textsuperscript{82} The chromatin method involves a “buccal smear,” or a cheek swab, taken from athletes to test for the presence of the Barr body, which is found only in females.\textsuperscript{83} In light of the IAAF’s developments, in 1968 the IOC instituted the chromatin testing at the Mexico City Summer Olympic Games.\textsuperscript{84} The IOC reasoned that such testing was less invasive than physical inspections; nevertheless, the use of chromosomes to determine sex is still flawed given the numerous chromosome combinations discussed in Part I Section B of this Note.\textsuperscript{85}

Ewa Klobukowska, an Olympian and co-world record holder for the 100-meter sprint, was the first athlete disqualified as a result of sex testing.\textsuperscript{86} In 1967, Klobukowska failed her chromatin analysis at the European Cup Track and Field events in Kiev and consequently was permanently disqualified from future events and stripped of her records.\textsuperscript{87} The IOC even went so far as to rescind her medals from the 1960 Olympics.\textsuperscript{88} Klobukowska not only suffered embarrassment within the IAAF but also endured derision from the popular media.\textsuperscript{89} After

\textsuperscript{79} Peterson, \textit{supra} note 8, at 320.
\textsuperscript{80} \textit{Id}.
\textsuperscript{81} \textit{Id} at 321.
\textsuperscript{82} \textit{Id}.
\textsuperscript{83} Ritchie et al., \textit{supra} note 2, at 397.
\textsuperscript{84} Peterson, \textit{supra} note 8, at 321.
\textsuperscript{85} \textit{Id}.
\textsuperscript{87} Peterson, \textit{supra} note 8, at 322.
\textsuperscript{88} \textit{Id}.
\textsuperscript{89} \textit{Id}. 
Klobukowska was essentially turned into a public spectacle following the sex test failure, the IOC and IAAF recommended that athletes similarly situated should withdraw from competitions, citing a warm-up injury, to avoid the media frenzy.  

In 1992, yet another form of sex testing was introduced at the Albertville Winter Olympics—the test involved a “polymerase chain reaction (PCR) determination of the absence or presence of DNA sequences from the testes-determining gene located on the Y chromosome.” This test, however, was flawed since at least one of the DNA sequences used in the PCR was not restricted to males. Moreover, both the buccal smear test and the PCR test are inadequate because they “do not consider hormonal levels, physical appearance . . . or any other of the many factors that can be said to contribute to a person’s sex . . . .”

The 1996 Atlanta Games evidenced a shift in the IOC’s policy on the participation of intersex athletes. Though the IOC tested over 3,000 women at the Atlanta Games and eight women failed the test, it did not disqualify nor require the withdrawal of any athletes from competition. Some scholars have speculated that the case of Maria Jose Martinez Patino, a Spanish hurdler, changed the IOC’s outlook towards intersex athletes. After Patino was ruled ineligible to compete at the 1985 University Games in Japan, she was diagnosed with AIS. Though the

---

90 Id.
92 Id.
93 Olsen-Acre, supra note 28, at 217 (“Because the buccal smear and polymerase chain reaction tests identify only chromosomal sex, they can declare athletes to be a sex that the athletes themselves have never identified as.”).
94 Peterson, supra note 8, at 322.
95 Id.
96 Id.
98 Cole, supra note 86, at 138. See supra Part I.B. for a further
Spanish Athletic Federation removed her name from record books, Patino vigilantly fought to reassume her status as a woman in athletics. 99 “Armed with the knowledge that because of her androgen insensitivity she was unable to respond to testosterone and was ‘unquestionably female and chromosomally XY,’ Patino managed to be reinstated by the IAAF.” 100 In 1991, the IAAF discontinued its use of the chromatin analysis, 101 returning to an earlier method where doctors observed athletes’ genitals during a routine physical examination. 102 The IOC, however, continued to utilize chromosome testing until 1999. 103

Though the IOC moved away from compulsory sex testing, 104 to this day it retains the right to test athletes on an individual basis who are suspected of being a biological sex that differs from his or her gender. 105 After the 2006 Asia Games, Santhi Soundarajan, an Indian runner, was stripped of her silver medal for failing her sex test. 106 Following the sex test, Soundarajan was diagnosed with AIS. 107 Rumors soon circulated that Soundarajan attempted to commit suicide after discovering the results of the sex test. 108 No longer a competitor herself, Soundarajan now coaches hopeful athletes at a sports academy explanation of androgen insensitivity syndrome.

---

99 Peterson, supra note 8, at 323.
100 Id.
102 Lemonick, supra note 97.
103 Peterson, supra note 8, at 323.
104 This decision of the IOC was supported by Yale physician and professor Myron Genel “who stated that the tests are difficult to perform, have the potential for error, and are discriminatory towards women.” Larson, supra note 101, at 233.
105 Peterson, supra note 8, at 323.
106 Buzuvis, supra note 10, at 36.
107 Nilanjana Bhowmick & Jyoti Thottam, Gender and Athletics: India’s Own Caster Semenya, TIME (Sept. 1, 2009), http://www.time.com/time/world/article/0,8599,1919562,00.html. See supra Part I.B for an explanation of AIS.
108 Id.
for underprivileged children. Soundarajan continues to consider herself a woman; in fact, her birth certificate indicates that she is female. Soundarajan's painful and public experience further highlights the problematic nature of the use of sex testing in determining eligibility for competition, particularly for intersex individuals.

The most recent controversy over an athlete's sex is the case of Caster Semenya. In 2009, at the Track and Field World Championship, Caster Semenya, a South African athlete, beat the defending world champion in the 800-meter competition by 2.45 seconds. Rumors that Semenya was not, in fact, a woman quickly eclipsed the excitement surrounding her impressive performance. Semenya's fellow competitors openly doubted her eligibility for women's competitions given her masculine appearance and record-shattering performance. In response to public rumblings over Semenya's questionable womanhood, the IAAF asked that Semenya submit to sex testing to confirm her eligibility for competition in the women's division. The results from Semenya's sex test were never publicly released.

---

109 Id.
111 Peterson, supra note 8, at 315.
112 Id.
114 Peterson, supra note 8, at 315.
115 Epstein, supra note 113.
116 Peterson, supra note 8, at 316. In September 2009, the Australian Daily Telegraph reported that the results of the sex test revealed that Semenya had female external genitalia but internal testes. Mike Hurst, Caster Semenya Has Male Sex Organs and No Womb or Ovaries, DAILY TELEGRAPH (Sept. 11, 2009), http://www.dailytelegraph.com.au/sport/semenya-has-no-womb-or-ovaries/story-e6frexni-1225771672245. The IAAF never confirmed these reports, instead declaring that they were not official IAAF statements. Peterson, supra note 8, at 316. Despite this, the results reprinted in the Australian Daily Telegraph were reprinted in several other publications. Id.; see also Hurst, supra.
keeping with the IAAF’s policy on privacy rights of athletes.\textsuperscript{117} While Semenya was permitted to keep her prize money, gold medal, and World Champion title, her ability to compete in future events in the women’s division remained uncertain.\textsuperscript{118} Moreover, Semenya herself struggled to recover from harsh public skepticism about her sex, and she reportedly went “into hiding due to the distress and embarrassment generated by the controversy.”\textsuperscript{119} Semenya’s story illustrates the delicate balance the IOC must strike in achieving fairness in the Games as well as the serious consequences sex testing practices may have on the reputations and livelihoods of individual athletes.

\textbf{C. Current Sex Verification Policy}

While the IOC has yet to release a finalized policy that will dictate the eligibility of intersexual athletes for the 2012 Olympic Games in London, in April of 2011 it did release a series of principles that will likely dictate the formulation of such a policy.\textsuperscript{120} The principles are guided in large part by the conclusions of two different conferences convened in 2010.\textsuperscript{121} The January 2010 meeting, organized by both the IOC Medical Commission and the IAAF, sought to address the scientific implications of female athletes with hyperandrogenism competing on the Olympic level.\textsuperscript{122} The meeting was arguably

\textsuperscript{117} Peterson, \textit{supra} note 8, at 316.
\textsuperscript{118} Id. Later, the IAAF decided that Semenya would be eligible to compete in future events. Buzuvis, \textit{supra} note 10, at 36.
\textsuperscript{119} Buzuvis, \textit{supra} note 10, at 36.
\textsuperscript{120} Kohli, \textit{supra} note 15. The principles were released following a two-day meeting of the EB to discuss the issue of female athletes with hyperandrogenism. The IOC stated that it would formalize rules based on the principles at its next meeting in July 2011 in Durban, South Africa. Roy Kessel, \textit{IOC to Adopt Gender Guidelines}, FROM BENCH: OFFBEAT SPORTS L. BLOG (Apr. 5, 2011), http://www.fromthebench.us/2011/04/05/ioc-to-adopt-gender-guidelines/.
\textsuperscript{122} IOC Addresses Eligibility of Female Athletes with Hyperandrogenism, \textit{supra} note 3.
prompted by the controversy over Semenya’s sex at the 2009 World Championships in Berlin. Following Semenya’s stellar performance, some athletes questioned the fairness of her ability to compete as a woman in light of her masculine features.

While conference members generally agreed that they should promulgate specific rules addressing female athletes with hyperandrogenism, they gave no indication that they had decided the substance of those rules. They did, however, reach two general conclusions: (1) “in order to protect the health of the athlete, sports authorities should have the responsibility to make sure that any case of female hyperandrogenism that arises under their jurisdiction receives adequate medical follow-up” and (2) “rules need to be put in place to regulate the participation of athletes with hyperandrogenism in competitions for women.”

Furthering this concern for athlete health, conference members advised that the IOC create “medical ‘centers of excellence’ . . . to diagnose sex-development disorders.” The IOC Medical Commission Chairman Arne Ljungqvist justified the creation of such centers on the grounds that not every country with Olympic athletes would have the requisite resources to identify and treat intersex athletes. Constructing “strategically located centers” would allow athletes to be tested by qualified experts in an efficient and expedient manner, Ljungqvist explained. Another idea discussed at the conference involved requiring all athletes to undergo a medical examination prior to competition.

---

123 Kolata, supra note 121. For further discussion of the controversy over Caster Semenya’s sex, see supra Part II.B.
124 Kolata, supra note 121.
125 Id.
126 IOC Addresses Eligibility of Female Athletes with Hyperandrogenism, supra note 3 (emphasis added).
127 Kolata, supra note 121.
129 Id.
130 Id. Italy is among several countries that have already instituted such policies for their athletes. Id.
The IOC Medical Commission organized a second conference in October 2010 to further discuss the treatment of athletes with hyperandrogenism.\textsuperscript{131} The conference consisted of scientists, sports administrators, sports lawyers, human rights experts, female athletes, experts in medical and sports ethics, and a representative from Organisation Intersex International.\textsuperscript{132} The conference further emphasized the need for clear-cut rules that would “respect the essence of the male/female classification and also guarantee the fairness and integrity of female competitions for all female athletes.”\textsuperscript{133}

Drawing upon the conclusions reached by these two panels, the IOC Medical Commission recommended a set of principles to assist in the development of rules governing the participation of intersex athletes.\textsuperscript{134} The principles are as follows:

1. A female recognised in law should be eligible to compete in female competitions provided that she has androgen levels below the male range (as shown by the serum concentration of testosterone) or, if within the male range, she has androgen resistance such that she derives no competitive advantage from such levels.

2. An evaluation with respect to eligibility should be made on an anonymous basis by a panel of independent international experts in the field of hyperandrogenism that would in each case issue a recommendation on eligibility for the sport concerned. In each case, the sport would decide on an athlete’s eligibility taking into consideration the panel’s recommendation. Should an athlete be considered ineligible to compete, she would be notified of the reasons why, and informed of the conditions she would be required to meet should she wish to become eligible again.

\textsuperscript{131} IOC Addresses Eligibility of Female Athletes with Hyperandrogenism, supra note 3.
\textsuperscript{132} Id. The Organisation Intersex International representative was Hida Viloria. See infra Part IV.C for a discussion on her views on intersex athletes.
\textsuperscript{133} IOC Addresses Eligibility of Female Athletes with Hyperandrogenism, supra note 3.
\textsuperscript{134} Id.
(3) If an athlete refuses to comply with any aspect of the eligibility determination process, while that is her right as an individual, she will not be eligible to participate as a competitor in the chosen sport.

(4) The investigation of a particular case should be conducted under strict confidentiality. Although rare, some women develop male-like body characteristics due to an overproduction of male sex hormones, so-called “androgens.” The androgenic effects on the human body explain why men perform better than women in most sports and are, in fact, the very reason for the distinction between male and female in competition in most sports. Consequently, women with hyperandrogenism generally perform better in sport than other women.\textsuperscript{135}

Ljungqvist noted that an athlete would only be investigated if she herself sought out medical officials for an evaluation, if she displayed male characteristics during drug testing, or if she had abnormal hormone levels.\textsuperscript{136} At the same time, Ljungqvist stressed that an athlete would not be subject to testing due to accusations of other athletes that the individual was not a woman.\textsuperscript{137}

Once the rules are finalized, the EB of the IOC noted that it would encourage IFs to adopt similar rules for use in their competitions, “duly adapted to meet the specificities of the sport concerned.”\textsuperscript{138} In April 2011, the IAAF adopted rules that closely mirror the principles outlined by the IOC Medical Commission, becoming the first international sports federation to do so.\textsuperscript{139} The rules were approved by the IAAF at its meeting in Daegu, South Korea—the host of the 2011 world championships—and went into effect May 1, 2011.\textsuperscript{140}

\textsuperscript{135} Id.
\textsuperscript{136} Kessel, \textit{supra} note 120.
\textsuperscript{137} Id.
\textsuperscript{138} IOC Addresses Eligibility of Female Athletes with Hyperandrogenism, \textit{supra} note 3.
\textsuperscript{140} Id.
III. *Martin* and *Sagen*: The Legacy of Sex Discrimination Lawsuits against Olympic Policies

If formally adopted by the IOC prior to the 2012 Summer Olympics in London, this policy on hyperandrogenism will likely preclude some female athletes from participation. Female athletes with androgen levels within the “male range” whose bodies do not have an androgen resistance will be considered ineligible for competition in women’s events.\footnote{141} Such a policy is discriminatory on its face because it is silent on the issue of what constitutes an acceptable level of androgen for men competing in men’s events.\footnote{142} For instance, the intersex condition Diplo (XYY) causes men to produce higher levels of testosterone than other men, yet the IOC policy does not disqualify men with Diplo from competitions.\footnote{143}

Recognizing this inequity, female competitors must find appropriate methods to challenge this biased policy, such as using litigation to attack the discrimination. This Part discusses two lawsuits that female athletes have brought against the IOC, and/or relevant organizing committees in host countries, alleging sex discrimination in the administration of the Games; namely, *Martin v. International Olympics Committee* and *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*.\footnote{144} Though the groups of women in both cases were ultimately unsuccessful in their suits, those

\footnote{141}{IOC Addresses Eligibility of Female Athletes with Hyperandrogenism, supra note 3.}


\footnote{143}{Id.}

\footnote{144}{Though Jennifer Ann Cleary argues in her Note that these two cases illustrate the inability of litigation to address gender discrimination in the Olympics, this Note maintains that the cases serve as useful vehicles for shaping a gender discrimination claim in regards to the androgen policy and that such a claim is in fact stronger than those in *Martin* and *Sagen*. See Jennifer Ann Cleary, *A Need to Realign the Modern Games with the Modern Times: The International Olympic Committee’s Commitment to Fairness, Equality, and Sex Discrimination*, 61 CASE. W. RES. L. REV. 1285 (2011).}
cases are distinguishable from a hypothetical case challenging the latest intersex policy. The cases provide important insight into how women can assert successful claims that the hyperandrogenism policy is discriminatory on the basis of sex.

A. Martin v. International Olympics Committee

In *Martin v. International Olympics Committee*, women runners argued that a decision, and the rule used to implement it, was discriminatory. *Martin* illustrates the potential pitfalls female plaintiffs may encounter when they bring a sex discrimination claim against various Olympics bodies in U.S. courts. In particular, if the challenged rule is deemed gender-neutral, the claim is less likely to succeed.

On August 15, 1983, a group of women runners filed a complaint against the IOC, United States Olympic Committee ("USOC"), Athletic Congress of the United States ("TAC") and Los Angeles Olympic Organizing Committee ("LAOOC") alleging that the defendants discriminated in the administration of the 1984 Los Angeles Olympic Games by failing to include the 5,000 meter and 10,000 meter women’s track races. The plaintiffs sought declaratory and injunctive relief and requested a writ of mandate from the court directing the defendants to institute women’s 5,000 meter and 10,000 meter track races. The plaintiffs argued, inter alia, that the defendants had violated their right to the equal protection of law under the Fifth Amendment.

145 Though the complaint was originally filed by the plaintiffs in Los Angeles Superior Court, it was later removed by the defendants to the United States District Court for the Central District of California. Martin v. Int’l Olympics Comm., 740 F.2d 670, 673 (9th Cir. 1984).


147 *Id.* at *4–5.

148 The Fifth Amendment to the United States Constitution applies only to the federal government. Corrigan v. Buckley, 271 U.S. 323, 330 (1926). It states, in relevant part, that a person shall not “be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. “[T]he Fifth Amendment does not explicitly contain an ‘equal protection’ requirement. However, the Due Process Clause of the Fifth Amendment has been held to contain an equal protection requirement which prohibits the United States
Fourteenth Amendments to the United States ("U.S.") Constitution. The court ultimately determined that the plaintiffs failed to show a fair chance of success on the merits regarding their federal constitutional claims. Though the plaintiffs argued that the court should apply the test for sex discrimination utilized by the United States Supreme Court in Craig v. Boren—classifications based on gender "must serve important governmental objectives" and be "substantially related" to those objectives—the court declined to apply that test because it found that Rule 32 was gender-neutral. Rule 32 of the 1970 Olympic Charter governs the addition of events to the Olympic Program. Under the rule, "a men’s sport may be added to the Olympic Program if it is widely practiced in at least forty

from invidiously discriminating between groups or individuals." Martin, 1984 U.S. Dist. LEXIS 24941, at *22 (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

149 The Fourteenth Amendment to the United States Constitution applies only to states. Martin, 1984 U.S. Dist. LEXIS 24941, at *22. It states, in relevant part, that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Here, the court found that the LAOOC, though a private entity, could be considered to have engaged in state action. Martin, 1984 U.S. Dist. LEXIS 24941, at *24. The court relied upon a state action test announced in Burton v. Wilmington Parking Authority, noting that the LAOOC was in a "position of interdependence" with the state of California. Id. (citing Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)).


154 Id. at *4, 10–11.
countries on three continents,” for the Summer Olympics, “and at least twenty-five countries on two continents” for the Winter Olympics. For women’s events, the sport must be “widely practiced in twenty-five countries and two continents” for the Summer Olympics and “twenty countries and two continents” for the Winter Olympics.

The plaintiffs then argued that the rule had a disproportionate impact on women; however, the court noted that a “disproportionate impact must be traceable to an invidiously discriminatory purpose.” The court found no invidiously discriminatory purpose behind Rule 32 because, statistically, the number of female competitors in the Games has almost tripled since 1948; forty-eight women’s events have been added to the Games since 1949; “no new opportunities intended only for male competitors have been added as exceptions to normal rules and procedures”; and the plaintiffs produced no “statements made by persons involved in the decision,” which would illustrate a discriminatory purpose. Thus, the court rejected the plaintiffs’ contention that the rule was discriminatory on the basis of gender.

---

155 Id.
156 Id.
157 Id. at *28 (citing Washington v. Davis, 426 U.S. 229, 238–44 (1976); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 260 (1979)). In Feeney, the court applied a twofold test to determine if a facially neutral statute was invidiously discriminatory: (1) “[A] court must ascertain whether the statutory classification is indeed neutral in the sense that it is not gender based;” (2) If it is neutral, “whether the adverse effect reflects invidious gender-based discrimination.” Feeney, 442 U.S. at 274. In Arlington Heights, the court listed several factors that would evidence a discriminatory purpose: (1) the decision’s historical background; (2) “the impact of the official action”; (3) events leading up to the official action; and (4) the “administrative history of the decision.” Arlington Heights, 429 U.S. at 266–68.
159 Id. at *34.
160 Id. at *40.
161 Id. at *41.
162 Id.
After the district court denied the plaintiffs’ requested injunctive relief, the plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit noted that though “the women runners made a strong showing that the early history of the modern Olympic Games was marred by blatant discrimination against women . . . women’s participation in the Olympics had increased markedly during the past thirty-six years.”

The plaintiffs challenged the decision of the district judge on several grounds; specifically, they argued that the district judge had incorrectly concluded that Rule 32 was facially gender-neutral and that the district judge should have shifted the burden of proof to the defendants after they presented ample evidence of historical discrimination in the Olympic Games.

Addressing these arguments in turn, the Ninth Circuit rejected the plaintiffs’ argument that the Rule was not facially neutral because “[R]ule 32 undeniably applies to both men and women athletes as it established criteria for adding all new events to the Olympic program.” In response to the plaintiffs’ second argument, the Ninth Circuit noted that a historical background of discrimination in the Olympics “is insufficient alone to create a presumption of purposeful discrimination or to shift the burden of showing discriminatory intent behind this facially neutral regulation.” Thus, under its “very limited” scope of review, the court found that the district judge had applied a proper legal analysis and affirmed the decision. Acknowledging its restricted ability to review the district court’s decision, the Ninth Circuit noted that its review on appeal “may provide little guidance as to the appropriate disposition [of the case] on the

163 Martin v. Int’l Olympics Comm., 740 F.2d 670, 673 (9th Cir. 1984).
164 Id.
165 Id. at 678.
166 Id. at 679.
167 Id. at 678–79.
168 Id. at 679.
169 The Ninth Circuit reviewed the opinion of the district court for abuse of discretion, or a “clear error of judgment.” Id. (citing Sports Form, Inc. v. United Press Int’l, Inc., 686 F.2d 750, 752 (9th Cir. 1982)).
170 Id.
This disclaimer evidences the possibility for a different outcome had the Ninth Circuit possessed a broader scope of review.

B. Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games

Years after the plaintiffs in Martin charged that the absence of the women’s 5,000 meter and 10,000 meter track event was discriminatory, in 2008 a group of female ski jumpers brought suit in the Supreme Court of British Columbia, making similar claims about the exclusion of women’s ski jumping from the Olympic Program. Sagen evidences the difficulty with naming defendants in gender discrimination suits concerning the Olympics. Courts are wary of applying national law to international organizations yet are reticent to hold national committees entirely responsible for the implementation of policies guided by those international organizations. The women here claimed that the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games (“VANOC”) had violated the Canadian Charter of Rights and Freedoms. They argued that VANOC’s decision to hold men’s ski jumping events and not women’s ski jumping events violated Section 15(1) of the Canadian Charter, which prohibits discrimination on the basis of sex and other protected classes.

In analyzing the claim of the female ski jumpers, the court outlined three issues: (1) does the Canadian Charter apply to VANOC, (2) if so, did VANOC breach Section 15 by failing to host women’s ski jumping, and (3) is an infringement under

---

171 Id. (citing Sports Form, Inc., 686 F.2d at 753).
173 Cleary, supra note 172, at 1297 (“The Canadian Charter is Canada’s Bill of Rights and comprises the first part of the Canadian Constitution.”).
174 Id.
Section 15 negated by Section 1 of the Canadian Charter? In response to the first issue, the court found that, though VANOC is a “private entity,” the Canadian Charter applied to VANOC because it engaged in a “government activity” by “planning, organizing, financing, and staging the 2010 Games.”

In addressing the second issue, the court utilized a two-part test to ascertain whether there was discrimination under § 15(1) of the Canadian Charter: “(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?” Interestingly, the court looked to Martin to evaluate sex discrimination. The court critiqued the Martin court’s determination that Rule 32 was gender-neutral, noting that

[the majority in Martin did not go beyond formal distinctions to consider adverse effects [of] discrimination, in particular, whether the application of rules neutral on their face result in the unequal treatment of women who compete in events that are already included in the Olympics for men but not for women.] Thus, the court rejected Martin’s narrower outlook on sex discrimination and found, using its two-pronged test, that (1) the female ski jumpers were being “treated less favourably” as compared to male ski jumpers and (2) “the Olympic Charter Rules that grandfather men’s ski jumping, while requiring women’s ski jumping events to meet the criteria for inclusion of new events” was discriminatory.

Despite its finding of discrimination, the court noted that the plaintiffs’ suit was not brought against the IOC, who

176 Sagen, 98 B.C.L.R. 4th 109, at para. 9.
177 Id. at para. 11.
178 Id. at para. 63.
179 Id. at para. 65.
180 Id. at para. 68.
181 Id. at para. 83.
182 Id.
183 Id. at para. 75.
184 Id. at para. 103.
promulgated the rules, but rather brought against VANOC, the organization that implemented the rules.\textsuperscript{185} The court explained that the IOC was not a party to the suit because it was not subject to the Canadian Charter as a Swiss organization.\textsuperscript{186} Though the plaintiffs attempted to argue that VANOC’s \textit{implementation} of IOC policy was discriminatory, the court noted that VANOC had no authority to select which events would be staged at the Olympics.\textsuperscript{187} Rather, the IOC and IFs have authority over Olympic events.\textsuperscript{188} Ultimately, the court found that since “VANOC did not make the decision to exclude women’s ski jumping from the 2010 Games[,]” VANOC did not violate the Canadian Charter.\textsuperscript{189}

IV. HYPOTHETICAL SEX DISCRIMINATION SUIT CHALLENGING INTERSEX POLICY

Though the plaintiffs in both \textit{Martin} and \textit{Sagen} were ultimately unsuccessful in their lawsuits charging discriminatory practices at the Olympics, both cases could inform the formulation of a potential lawsuit brought by female athletes challenging the IOC and IAAF policy on hyperandrogenism. Even though the cases are from different countries, the Honourable Madam Justice Fenlon’s analysis in \textit{Sagen} engages with the \textit{Martin} court’s reasoning, which evidences a willingness

\textsuperscript{185} \textit{Id.} at para. 104.
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Id.} at para. 115.
\textsuperscript{188} \textit{Id.} at paras. 116–17.
\textsuperscript{189} \textit{Id.} at para. 121. Though the court ultimately ruled that VANOC had not violated § 15 of the Canadian Charter, Honourable Madam Justice Fenton, in writing the opinion, included strong language expressing her regret that the female skiers would not be able to compete: “I acknowledge that there is something distasteful about a Canadian governmental activity subject to the \textit{Charter} being delivered in a way that puts into effect a discriminatory decision made by others . . . .” \textit{Id.} at para. 124. Though the plaintiffs appealed the Honourable Madam Justice Fenlon’s decision, the British Columbia Court of Appeal dismissed the case, citing reasoning similar to that of the lower court. \textit{Sagen} v. Vancouver Org. Comm. for the 2010 Olympic and Paralympic Winter Games [2010], 98 B.C.L.R. 4th 141, para. 68 (Can. B.C.).
of courts to look beyond their jurisdictions when evaluating sex discrimination claims against an international player such as the IOC. More broadly, U.S., Canadian, and British law “fall within the scope of a single, common legal tradition” characterized by legal borrowing. “Legal borrowing” implies a willingness among these countries to, explicitly or implicitly, share jurisprudence. While Vincent-Joël Proulx analyzes “legal borrowing” within the framework of trademark law, the concept has the potential for other applications, particularly when the body of law is susceptible to an international exchange and involves international players.

This section outlines the structure of a potential lawsuit and assesses its likelihood of success. After first addressing the proper venue and parties for such a case, this section then turns to the claim itself and considers what an argument of sex discrimination should look like. Ultimately, this Note concludes that a sex discrimination suit against the IOC/IAAF hyperandrogenism policy would be more successful than either Martin or Sagen because of the ability to hold the London Organising Committee of the Olympic Games (“LOCOG”) directly responsible for supporting a facially discriminatory policy.

A. Where: British Law on Sex Discrimination

Assuming arguendo that the IOC were to finalize its policy on hyperandrogenism prior to the 2012 Summer Olympics in London—which is likely, as it was adopted by the IAAF—a sex discrimination suit would necessarily be brought in Britain.

---

190 Sagen, 98 B.C.L.R. 4th 109, at para. 83.
192 Id.
193 Id. at 511–12.
194 Kessel, supra note 139.
195 Int’l Council of Arbitration for Sport [ICAC] & Court of Arbitration for Sport [CAS], Statutes of the Bodies Working for the Settlement of Sports-
Recall that in *Martin*, the plaintiffs brought suit in state court in California, charging that the absence of certain women’s events at the Los Angeles Olympics was discriminatory. Later, the plaintiffs in *Sagen* litigated their claim concerning the Vancouver Olympics in the Supreme Court of British Columbia. Additionally, the Court of Arbitration for Sport would not have jurisdiction over this suit because there is not a “specific agreement” between the female athletes and the London Organising Committee of the Olympic Games. Despite the outcomes of both *Martin* and *Sagen*, plaintiffs seeking to challenge the implementation of the intersex policy at the London Games would be advised to bring suit in England, the country in which the Games will be staged, to ensure proper venue over the LOCOG.

A claim against various Olympic entities in Britain would most likely be brought under that country’s new Equality Act, passed in 2010. The law was aimed at synthesizing nine major pieces legislation into a single, cohesive “legal framework” guaranteeing equality. Despite the unification under the

---

202 *Id.*
Equality Act, the relevant sex discrimination law is still contained within the text of the Sex Discrimination Act ("SDA") of 1975. The SDA prohibits both direct and indirect discrimination on the basis of sex in the realm of "goods, facilities and services." Notably, there is an exception for sports, as the SDA permits separation of the sexes within sports "where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man . . . .” Moreover, the Equality Act states that “[s]ex discrimination is lawful in certain circumstances when selecting participants for sports and other events of a competitive nature where activities are confined to competitors of one sex.” The language of the SDA, and other laws encompassed within the Equality Act, suggests that British law tolerates separate events for different sexes based on physical differences between men and women; however, a lawsuit challenging the IOC and IAAF policy on hyperandrogenism would not object to the existence of separate men’s and women’s divisions in Olympic competition, but rather how the Olympic bodies would regulate who counts as a woman. Simply, the discrimination here is the arbitrary definition of woman and the consequences of excluding from competition athletes who consider themselves women.

204 Id. ("Indirect sex discrimination occurs when a condition or requirement is applied equally to both women and men but, in fact, significantly fewer members of one sex would be able to comply with it and is not justifiable on objective grounds unrelated to sex.")
205 Id.
206 Id.
B. Who: Determining Defendants in a Sex Discrimination Suit

Once deciding where to litigate their claim, hypothetical plaintiffs would then identify the relevant defendants. Recall that in *Martin*, the plaintiffs sued the IOC in addition to U.S. Olympic governing bodies.\(^{208}\) In *Sagen*, however, the plaintiffs did not join the IOC as a defendant.\(^{209}\) Jennifer Anne Cleary, in her Note *A Need to Align the Modern Games with Modern Times: the International Olympic Committee’s Commitment to Fairness, Equality, and Sex Discrimination*, suggests that the plaintiffs in *Sagen* did not join the IOC because of the outcome of *Martin* and “the history of deference to the IOC’s decisions.”\(^{210}\) Admittedly, in both *Martin* and *Sagen* the courts may have been reticent to demand that an international organization alter the Olympic program.\(^{211}\)

Respect for the IOC’s authority, on the other hand, did not control the outcome of those cases. Although they joined the IOC as defendants, the plaintiffs in *Martin* were unsuccessful because the court found that Rule 32 was not discriminatory on its face.\(^{212}\) The plaintiffs in *Sagen* lost because they did not bring suit against the IOC, which was responsible for determining the Olympic program.\(^{213}\) The *Sagen* plaintiffs, who brought their claim in the Supreme Court of British Columbia, did not join the IOC because it was not subject to the Canadian Charter.\(^{214}\) Thus, the plaintiffs in *Sagen* were out of luck—they could not sue the IOC because of lack of jurisdiction, but could not assert a successful claim against VANOC because it did not control the


\(^{209}\) *Id.*

\(^{210}\) *Id.*

\(^{211}\) *Id.*

\(^{212}\) *Martin v. Int’l Olympics Comm.*, 740 F.2d 670, 678–79 (9th Cir. 1984).


\(^{214}\) *Id.*
The Honourable Madam Justice Fenlon, however, left open the possibility that there exist “exceptions to the general principle” that VANOC could not be held responsible for the discriminatory policy because it did not create it. A sex discrimination suit against the hyperandrogenism policy should fall within the exception noted by the Honourable Madam Justice Fenlon. Just as the court in Sagen looked to Martin to influence its decision, the hypothetical court here should incorporate analyses from Sagen and Martin into its own decision. Here, the plaintiffs’ success hinges on whether they are able to show that the implementing entity—in this case LOCOG—is so supportive of the discriminatory policy that it should itself be held accountable for it. In Sagen, it was important to the Honourable Madam Justice Fenlon’s decision that VANOC had expressed its support for the female athletes; she wrote that VANOC “remains ready and willing to host [a women’s ski jumping] event should the IOC change its decision.” It was difficult to hold VANOC responsible for enforcing the IOC’s discriminatory decision when VANOC had clearly demonstrated its backing of the female ski jumpers. Here, however, more support exists for the hyperandrogenism policy than for the female athletes. Not only has the IAAF adopted the policy but LOCOG has essentially ratified it by recognizing that the final IOC policy on hyperandrogenism will govern at the 2012 Olympic Games. As LOCOG supports the IOC policy on hyperandrogenism, or at least does not outwardly object to it as VANOC did in Sagen, the hypothetical plaintiffs here would have a stronger case against LOCOG than the plaintiffs in Sagen had against VANOC. Thus, the Sagen dilemma of lack of jurisdiction over the IOC is avoided since the local organizing committee itself can be named as a defendant.

215 Id. at para. 121.
216 Id. at para. 124.
217 Id.
218 Id.
219 Kessel, supra note 139.
C. What: The Sex Discrimination Claim

The IOC and IAAF policy on hyperandrogenism is facially discriminatory because the policy only regulates androgen levels in women, not men. The principles put forth by the IOC explicitly require “female[s]” in “female competitions” to have “androgen levels below the male range,” but the policy is silent on what the threshold for the male range is, or if there is an androgen limit for males in male competitions. In this vein, Hida Viloria, the Human Rights Spokesperson for the Organisation Intersex International, argues that “many athletes have conditions that give them physical advantages, and . . . seeking to remove the advantages of only women with hyperandrogenism is discriminatory.” Viloria cites to the “intersex variation Diplo,” which causes men to produce higher levels of testosterone, and points out, “no one is insisting that [men with Diplo] lower their testosterone levels to the ‘normal’ male level.”

Furthermore, the hyperandrogenism policy is overly simplistic because it assumes there exists a “normal” level of androgens in females. Dr. Eric Vilain, a professor of human genetics, pediatrics and urology at the University of California Los Angeles’ David Geffen School of Medicine and participant

221 Kohli, supra note 15.
222 IOC Addresses Eligibility of Female Athletes with Hyperandrogenism, supra note 3.
224 Viloria, supra note 142.
225 Id.
226 The hormones in question are not naturally exclusive to men. Women and men naturally make androgens—sometimes called strength-building hormones—including testosterone. Yet despite the fact that testosterone belongs to women, too, the I.O.C. and the I.A.A.F. are basically saying it is really a manly thing: “You can have functional testosterone, but if you make too much, you’re out of the game because you’re not a real woman.”

in the January 2010 IOC panel on hyperandrogenism, noted that “there is a tremendous variation in hormone levels even in typical females, which makes determining a baseline virtually impossible.”Additionally, Alice Dreger argues that female athletes are “likely to have naturally high levels of androgens. That is probably part of why [they] succeed[] athletically.” Thus, the IOC’s hyperandrogenism policy is not only discriminatory because it focuses solely on women, but it also rests on flawed logic because it incorrectly assumes that science is capable of quantifying a “normal” level of androgens in women.

The IOC and IAAF policy unfairly targets women with hyperandrogenism on the basis of maintaining a level playing field for other female athletes; however, this rationale is defective because it does not account for the failure of these organizations to regulate other factors that affect athletes’ competitive advantages. For instance, Alice Dreger points out that men tend to be taller than women; however, no sporting body attempts to bar from competition women who are a “male-typical height . . . .” Indeed, “sports are inherently unequal regardless of genetics . . . and any potential athletic advantages one might have because of a DSD are no different from other naturally occurring physical advantage like being taller or having more balance.” Furthermore, it is unclear whether increased androgens actually translate into a competitive advantage.

227 Meg Handley, The IOC Grapples with Olympic Sex Testing, TIME (Feb. 11, 2010), http://www.time.com/time/printout/0,8816,1963333,00.html. Joe Leigh Simpson, an associate dean at Florida International’s medical school, characterized the attempt to discern normal androgen levels for men and women as “absurd.” Epstein, supra note 113.


229 Dreger, Redefining the Sexes in Unequal Terms, supra note 226. Instead, Alice Dreger believes, “[W]hat is really being leveled here is the bodies of female athletes.” Id.

230 Dreger, Where’s the Rulebook for Sex Verification, supra note 228.

231 Handley, supra note 227.

232 Id. “[S]ome sex differentiations are purely biological variations and do not equate to physical superiority. Furthermore, it has never been proven
Clearly, the IOC and IAAF’s purported interest in maintaining a level playing field through the strict separation of sexes fails to justify the implementation of an arbitrary hyperandrogenism policy that unfairly discriminates against women.

CONCLUSION

The IOC and IAAF policy on hyperandrogenism plainly conflicts with the sentiment of equality of the sexes within the Olympic Charter. While a sex discrimination suit against LOCOG is not the only means to challenge the hyperandrogenism policy, it represents an effective avenue for addressing the inequity presented by the regulation of androgen levels in women. Certainly, a lawsuit involving female athletes and Olympic organizing bodies would draw international media attention and highlight the unfair practice of sex testing. Female athletes looking to dispute the policy’s implementation at the Summer Olympic Games in London would likely have more success than the plaintiffs in Martin and Sagen because of the importance placed on sex equality in British law, the ability to hold LOCOG responsible for the policy, and the recognition that the policy represents outright discrimination against women.

The IOC and IAAF’s efforts to ensure a level playing field in international sports competitions have effectively undercut much of the progress made in the realm of women’s sports. By insisting that female athletes possess androgen levels below the “male” level, these organizations have oversimplified what it means to be a woman. Furthermore, the imposition of an artificial definition of woman upon athletes precludes from competition certain athletes that have always considered themselves to be female.

that those whose biological sex is difficult to ascertain have attributes superior to the genetically female.” Larson, supra note 101, at 232.
PROTECTING TENANTS AT FORECLOSURE
BY FUNDING NEEDED REPAIRS

Steven T. Hasty*

I. INTRODUCTION

In 2008, the investment group Milbank Real Estate Services effectively abandoned\(^1\) ten apartment towers it owned in the Bronx and defaulted on its $35 million mortgage loan.\(^2\) By all accounts, the buildings were in serious disrepair: the roofs leaked, rats and roaches infested the apartments, and several units were fire-damaged.\(^3\) Some of the 548 units were uninhabitable and vacant, but most had tenants living in them.\(^4\) After Milbank stopped paying the mortgage, the mortgagee (a

---

* J.D. Candidate, Brooklyn Law School, 2013; B.A., New York University, 2007. Many thanks to Ian Davie of Legal Services N.Y.C.–Bronx and Shira Galinsky of South Brooklyn Legal Services for providing helpful background, to Professor Jessica Attie for her insightful comments, and to the editorial staff of the *Journal of Law and Policy* for their input and suggestions.

\(^1\) See generally *Hearing on Intros. 494, 500, & 501 Before the Comm. on Hous. & Bldgs. of the N.Y.C. Council*, 2011 Leg., 2011 Sess. 164–65 (N.Y. Apr. 14, 2011) [hereinafter *Hearings*] (testimony of Elizabeth M. Lynch, MFY Legal Servs.) (“It is a fact that some owners abandon their property once a foreclosure action is commenced. . . . [But] homeowners . . . in one- to four-family houses, rarely abandon their homes.”).


\(^3\) Id. at 3–4. There were 4,300 housing code violations on record at the time the tenants filed their motion seeking payment from the mortgagee to cover repairs; 756 were classified as “immediately hazardous.” *Id.* at 3; Transcript of Oral Argument at 11–12, *Milbank*, No. 380454/09 [hereinafter *Milbank Transcript*].

\(^4\) *Milbank Transcript*, *supra* note 3, at 11–12.
mortgage-backed securities trust)\textsuperscript{5} began a foreclosure action and asked the court to appoint a receiver to take control of the properties.\textsuperscript{6} Although the securities trust had advanced some funds for taxes and water bills, the court-appointed receiver had only a very modest rental income from the properties and could not afford to make repairs.\textsuperscript{7} As the foreclosure case dragged on, some of the tenants began to withhold rent because of poor housing conditions.\textsuperscript{8}

In April 2010, the tenants moved the foreclosure court for an order compelling the plaintiff mortgagee to provide enough funds to enable the receiver to make repairs.\textsuperscript{9} The tenants estimated that it would cost $17–25 million to rehabilitate the buildings,\textsuperscript{10} but the defendant Milbank was unwilling (or unable) to pay for even emergency repairs.\textsuperscript{11} Relying on ten-year-old

\begin{footnotes}
5 The parties are described in detail infra at notes 157–62 and in the accompanying text.
\textsuperscript{6} Milbank Tenants’ Memorandum of Law, supra note 2, at 4–5. Receivership is discussed in greater detail below in Part II.
\textsuperscript{7} Milbank Transcript, supra note 3, at 12, 18.
\textsuperscript{8} Id. at 12; Amended Affidavit of Cicciu at para. 12, Milbank, No. 380454/09 (N.Y. Sup. Ct. Bronx Cnty. Mar. 17, 2009) (“[M]uch of this arrearage may not be collectible because many tenants are invoking the defense of breach of the warranty of habitability.”).
\textsuperscript{9} Milbank Tenants’ Memorandum of Law, supra note 2, at 1. The tenants were named as “‘John Doe’ Nos. 1–25” in the foreclosure action. Milbank Transcript, supra note 3, at 16.
\textsuperscript{10} Milbank Transcript, supra note 3, at 7.
\textsuperscript{11} See Milbank Tenants’ Memorandum of Law, supra note 2, at 5. Some of the entities that held title to Milbank’s properties have entered bankruptcy. Dakota Smith, Downtown’s Roosevelt Lofts Files for Chapter 11 Bankruptcy, CURBED LA (Apr. 14, 2009), http://la.curbed.com/archives/2009/04/downtowns_roosevelt_lofts_files_for_chapter_11_bankruptcy.php. According to its press release, however, “[t]here is no direct legal relationship between Roosevelt Lofts, LLC and Milbank Real Estate Services, Inc. Milbank is thus not affected by Roosevelt’s Chapter 11 filing, and continues to operate its various business operations and real estate ventures without interruption or oversight by the Bankruptcy Court.” Id. Milbank’s website has remained static and unchanged since 2008, and its status is unknown. See What’s New, MILBANK, http://www.milbankre.com/whatsnew.php (last visited May 10, 2012) (listing press releases, the newest of which is dated October 2008).
\end{footnotes}
appellate court dicta and employing a four-factor equitable test, the court ordered the mortgagee to advance $2.5 million to the receiver during the foreclosure action to cover the cost of correcting the immediately hazardous conditions in Milbank’s buildings. While this outcome was an important victory for Milbank’s Bronx tenants, it is unfortunately not the norm. During the gap period between an owner’s default and a judgment of foreclosure, tenants too often face uninhabitable conditions that go long uncorrected.

Among the victims of the current mortgage foreclosure crisis, tenants of buildings in foreclosure are often innocent, harmed, and overlooked. A nonresident investor-owner may

---


13 The court examined (1) the degree of necessity of the expenses, (2) whether a benefit would accrue to the party who requested that a receiver be appointed, (3) whether the foreclosing mortgage lender was aware that the building’s income would be insufficient to pay the receiver’s expenses when it asked that one be appointed, and (4) whether the funds would be judicially expended. Milbank Transcript, supra note 3, at 10, 12–13, 18–19.

14 Milbank, No. 380454/09 (granting motion “for reasons stated on the record”); Milbank Transcript, supra note 3, at 20.


17 Armin Bazikyan, Renters: The Innocent Victims of the Foreclosure Mortgage Crisis, 39 Sw. L. Rev. 339, 344 (2009) (“The plight of the renter has become a silent problem.”); Vicki Been & Allegra Glashausser, Tenants: Innocent Victims of the Nation’s Foreclosure Crisis, 2 ALB. GOV’T L. REV. 1, 3 (2009) (“[R]enters are often completely unaware that their landlords are in default until utilities are shut off or an eviction notice appears on their door.”); Tony S. Guo, Tenants at Foreclosure: Mitigating Harm to Innocent Victims of the Foreclosure Crisis, 4 DEPAUL J. FOR SOC. JUST. 215 (2011); Danilo Pelletiere & Keith Wardrip, Renters and the Housing Credit Crisis, POVERTY & RACE (Poverty & Race Research Action Council, Wash., D.C.),
endure a lengthy foreclosure proceeding and suffer a serious financial setback, but the resident-tenants of a property in foreclosure must literally live with the consequences—from leaks and recurrent mold to broken appliances and lack of heat and hot water. Although the primary threat to tenants at foreclosure is eviction by usual means, they also face the threat of constructive eviction because of uninhabitable conditions.

The owner of a multiple dwelling in foreclosure typically has inadequate funds to make repairs required by the applicable housing code and the implied warranty of habitability (the basic guarantee that a rented residence will be livable), leaving tenants especially vulnerable.

Further, a judicial foreclosure action may take years to resolve, and the presence of a court-appointed receiver may
introduce additional complexity—such as requiring court approval of, or the lender’s consent to, larger expenses.\textsuperscript{25} Usually, a temporary receiver has only the income from current rents to pay for upkeep.\textsuperscript{26} When a building needs a new roof or boiler, for example, such a major expenditure may be impossible without financial assistance from the owner or lender.\textsuperscript{27}

Tenants should not have to bear these costs by enduring falling plaster, peeling paint, recurrent mold, and inadequate heat and hot water, nor should tenants be constructively evicted by housing conditions so unlivable that they are the equivalent of a sheriff or city marshal executing a warrant of eviction. Where an owner has resources and is subject to a court’s jurisdiction, the tenants can often hold the owner directly accountable.\textsuperscript{28} But where an owner has filed for bankruptcy or has abandoned a failing investment property, the foreclosing lender should step in to pay for needed repairs.\textsuperscript{29} Further, fairness may require the lender to pay where the owner’s default was inevitable because the lender recklessly made an oversized loan, incentivizing the owner to pressure low-income tenants to leave by withholding


\textsuperscript{26} Andrew L. Herz et al., What to Expect When a Receiver Takes over a Troubled Property (With Mortgage Foreclosure Receiver’s Checklist), PRAC. REAL EST. LAW., Sept. 2011, at 33, 35; see also infra Part II.

\textsuperscript{27} See Rasmussen, supra note 22.

\textsuperscript{28} Rasmussen, supra note 16.

\textsuperscript{29} Id. (“[M]any landlords in foreclosure simply won’t show up; a default judgment does little to get repairs completed.”); see also Tess Vigeland, They Walked Away, and They’re Glad They Did, N.Y. TIMES (Nov. 9, 2011), http://www.nytimes.com/2011/11/09/your-money/life-goes-on-some-find-after-leaving-an-underwater-mortgage.html (describing process of mortgagors avoiding legal proceedings through careful timing).
Some states and local governments have passed laws requiring foreclosing mortgage lenders to pay for postjudgment upkeep. But for innocent renters who must cope with poor housing conditions during the foreclosure action—from the mortgagor’s default until judgment—these laws leave substantial gaps, often spanning years.

This Note argues that courts should extend application of Milbank’s equitable rule to hold foreclosing lenders accountable for interim repairs, out of fairness to innocent tenants who face constructive eviction during a foreclosure. Part II provides background on judicial mortgage foreclosure actions and the role of temporary receivers. Part III surveys the remedies currently available for tenants and demonstrates why these measures inadequately protect tenants by leaving a gap period—between default and judgment—during which no one is held responsible for substandard housing conditions. Part IV examines the Milbank case and the grounds for holding lenders financially responsible for interim repairs. Part V argues that courts should apply Milbank’s equitable test to determine whether the mortgage lender in a foreclosure action should bear the cost of remediating serious housing code and warranty of habitability violations during the pendency of the action, where other financial sources are inadequate. Extending the rule complements existing law requiring postjudgment upkeep, helps prevent neighborhood blight, and places the burden of repairing abandoned apartment buildings on the party best able to bear the cost.

Recognizing that the application of a powerful yet manipulable equitable rule may be somewhat uneven, Part VI recommends that state legislatures establish a duty on the part of foreclosure plaintiffs to pay for needed repairs to multiple

---

30 See infra Part III.
32 See City Council Amicus Brief, supra note 19, at 8; Rasmussen, supra note 22.
dwellings. Additionally, states might require foreclosure plaintiffs to post a compliance bond to cover the anticipated cost of needed repairs. As of this writing, the New York City Council is considering adopting similar legislation, yet if the effort is successful, the local laws face possible preemption challenges. Meanwhile, at the state level, reform faces significant practical and political hurdles. Finally, while this Note focuses on New York law, the argument for the extension of an equitable rule may have wider implications for many U.S. jurisdictions with judicial foreclosure processes.

II. TENANTS AT FORECLOSURE AND THE ROLE OF THE RECEIVER

Thirty-six states permit both judicial and nonjudicial foreclosures; the other fourteen, New York among them, require a judicial process. In New York, the entire process can take years. A foreclosure action usually begins when the borrower (the mortgagor) fails to make payments under the associated promissory note. Then, the lender (the mortgagee) may file an action to foreclose on the mortgaged property. Many actions settle, but if the action proceeds to judgment, the mortgagee will

---


34 Alvin L. Arnold, Real Estate Investor’s Deskbook § 11:32 (3d ed. 2011) (describing reasons some mortgagees seek a deed in lieu of foreclosure, one of them being to avoid the delay and expense of a judicial foreclosure proceeding); Herz et al., supra note 26, at 34.


36 Paths of a Foreclosure, supra note 35.
typically request that the court appoint a referee to sell the property to the highest bidder, in order to satisfy the mortgage debt.\(^\text{37}\)

In New York, a judgment of foreclosure severs a tenancy, provided the tenant was made a party to the foreclosure action,\(^\text{38}\) (though Part III describes some important exceptions to this). Tenants are often named as John or Jane Does in the foreclosure action and are subject to the orders of the foreclosure court.\(^\text{39}\) During the foreclosure action, however, the tenancy continues, and the same lease terms and rent remain in effect.\(^\text{40}\) For a bank holding the mortgage note on a multiple dwelling, often an investment property, it is problematic for the property to languish and rents go uncollected.\(^\text{41}\) A receiver solves this problem, acting as a temporary caretaker, taking in the building’s income and maintaining its condition, both for the lender as well as the current occupants.\(^\text{42}\) In New York, foreclosure plaintiffs often seek receivers for apartment buildings with six units or more.\(^\text{43}\)

\(^{37}\) Id.

\(^{38}\) 6820 Ridge Realty LLC v. Goldman, 701 N.Y.S.2d 69 (App. Div. 1999) (holding that where tenant was not joined in foreclosure action, new owner’s remedy was eviction proceeding, not writ of assistance). Other states do not require that tenants be made parties to the foreclosure action. WITHOUT JUST CAUSE, supra note 33, at 8.


\(^{40}\) Ifantides v. Mikeway Enter., Inc., N.Y. L.J., Nov. 27, 1991, at 25 ("[A]bsent fraud or collusive action in anticipation of foreclosure or receivership, pending a judgment of foreclosure and sale the receiver may not collect a higher rent from a tenant than is stipulated in a lease."). Renewal leases entered into during the foreclosure action may change the amount of rent or other terms of the tenancy. Herz et al., supra note 26, at 37–38.

\(^{41}\) See Herz et al., supra note 26, at 33–34.

\(^{42}\) Id.

\(^{43}\) See Holmes v. Gravenhorst, 188 N.E. 285, 286 (N.Y. 1933) ("Where . . . the mortgagor is not in possession during the foreclosure of [the] mortgage . . . and the premises are occupied by tenants . . . a receiver may be appointed in a proper case to take possession of the premises, collect the rents, and apply them to the payment of the carrying charges on the property.")
A temporary receiver is an officer of the court, and one may be appointed at the request of the parties to the action, typically the mortgagee-plaintiff.\textsuperscript{44} Even though the mortgage agreement may provide for a receiver, courts “exercise extreme caution in appointing receivers . . . because such appointment [generally] results in the taking and withholding of possession of property from a party without an adjudication on the merits.”\textsuperscript{45} Appointing a receiver effectively terminates the mortgagor’s right to collect rents but not its ownership of the property.\textsuperscript{46} Technically, the owner holds title until the final judgment of foreclosure, even though a court’s order appointing the receiver may require the owner to surrender possession.\textsuperscript{47}

State law makes clear that the receiver has only those powers conferred by the appointing order.\textsuperscript{48} The receiver’s presence “is intended to protect the lender from the risk that the borrower will mismanage the property or misappropriate revenue . . . [and] to assure that the property does not deteriorate under the control of a distracted and penniless borrower.”\textsuperscript{49} Appointing a receiver also allows the lender to insulate itself from liability that could result were it deemed a “mortgagee-in-possession.”\textsuperscript{50}

\textsuperscript{44} Herz et al., supra note 26, at 34 (“Any well-drafted mortgage usually states that the holder of the mortgage can have a receiver appointed if the lender starts a foreclosure action.”).


\textsuperscript{47} See, e.g., Nat’l Bank of N.Y.C. v. 296 5th Ave. Grp., No. 29057/09 (N.Y. Sup. Ct. Kings Cnty. Sept. 9, 2010) (“All persons now or hereafter in possession of said premises or any part thereof and not holding such possession under valid and existing leases or tenancies do forthwith surrender such possession to said Receiver, subject to emergency laws, if any.”).

\textsuperscript{48} N.Y. C.P.L.R. 6401(b) (McKinney 2010); Daro Indus., Inc. v. RAS Enters., 380 N.E.2d 160, 161 (N.Y. 1978).

\textsuperscript{49} Herz et al., supra note 26, at 33–34.

\textsuperscript{50} N.Y. GEN. OBLIG. LAW § 9-101 (McKinney 2010) (“A receiver of
“mortgagee-in-possession” will not equate the mortgagee’s rights and duties with those of an owner. But a receiver’s rights, duties, and powers are even more limited in scope, allowing the mortgagee to limit its potential liability and to insulate itself from most direct claims.

For its necessary expenses, the receiver has priority over other creditors when the property is sold. A receiver’s necessary expenses, including the cost of complying with legal duties like the warranty of habitability, “constitute a first charge or lien against the receivership property and funds . . . [with] priority over preexisting liens of mortgagees,” including the plaintiff-mortgagee’s lien. Thus, even when the sale price yields less than the amount of the loan, the receiver’s necessary interim expenses will usually be covered. Additionally, upon judgment, the receiver may apply for reimbursement from the mortgagee for necessary expenses incurred during the action. Thus, the receiver can be made whole even without a sale: if the lender takes title to the property and keeps it on its books as real estate owned, the receiver may seek reimbursement of necessary expenditures directly from the foreclosing mortgagee.

In New York, a receiver is considered an owner for rents and profits appointed in an action to foreclose a mortgage upon real property shall be liable, in his official capacity, for injury to person or property sustained by reason of conditions on the premises, in a case where an owner would have been liable.”); Mortimer v. E. Side Sav. Bank, 295 N.Y.S. 695, 699 (App. Div. 1937) (finding mortgagee-in-possession liable as owner); Herz et al., supra note 26, at 34.


Herz et al., supra note 26, at 38.


Id.


purposes of complying with the New York Multiple Dwelling Law and New York City Housing Maintenance Code.\(^{59}\) Once appointed, the “receiver is charged with the responsibility to ‘preserve and protect the property for the benefit of all persons interested in the estate.’”\(^{60}\) State law further directs courts in New York City to include in their appointing orders that the receiver will give priority to remediing housing code violations.\(^{61}\)

Ordinarily, the receivership’s expenditures are limited to the money it takes in from the property.\(^{62}\) In many cases, this will not be sufficient to pay for anything beyond basic taxes, fees, and charges (e.g., for water and heating oil).\(^{63}\) When there is a


\(^{61}\) N.Y. REAL PROP. ACTS. LAW § 1325(3) (McKinney 2009) (“In a city with a population of one million or more persons an order appointing a receiver to receive the rents and profits of a multiple dwelling shall provide that the receiver . . . expend rents and income and profits as described in subdivision two of this section, except that a priority shall be given to the correction of immediately hazardous and hazardous violations of housing maintenance laws within the time set by orders of any municipal department, or, if not practicable, seek a postponement of the time for compliance.”); see also Memorandum of the City of New York, in 1983 N.Y. LEGIS. ANN. 303 (“[T]enants . . . many times face dangerous health and safety situations. This bill would afford court appointed receivers with proper guidance during the mortgage foreclosure period.”).

\(^{62}\) Herz et al., supra note 26, at 35. The receiver may also enter into lease agreements for the premises and take out necessary loans, subject to court approval. Id. at 37–38.

\(^{63}\) See, e.g., City Council Amicus Brief, supra note 19, at 14.
deficit, the receiver will look to the foreclosing mortgagee, who is probably the receiver’s only source of additional funds. State law permits the mortgagee to advance funds to the receiver of a multiple dwelling in order to correct violations, but it does not explicitly require it to do so. Mortgagees typically attempt to recoup these advances as part of the ultimate recovery from the mortgagor. Where the need goes beyond the building’s income and any advances, this statutory scheme falls short of meeting the receiver’s obligations to innocent tenants.

III. CURRENT LAW INADEQUATELY PROTECTS THE INNOCENT VICTIMS OF FORECLOSURE

The United States faces an unprecedented crisis in the rate of defaults on mortgages. By the end of the current crisis, between 8 and 13 million homes will have been foreclosed on, according to some predictions. Millions more borrowers are “underwater,” owing more on their mortgages than their real estate is worth, and are in danger of foreclosure if they fall

---

64 Herz et al., supra note 26, at 35.
65 N.Y. MULT. DWELL. LAW § 4(7) (McKinney 2001) (“[A] multiple dwelling . . . [is] . . . a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of each other.”).
66 MULT. DWELL. § 302-b(1) (“[W]here a receiver has been appointed in foreclosure proceedings instituted by a mortgagee with respect to any multiple dwelling, such mortgagee may advance to such receiver funds necessary for the operation of such multiple dwelling and for the making of repairs therein necessary to remove conditions constituting violations of this chapter.” (emphasis added)).
67 Herz et al., supra note 26, at 35 (“Most mortgage documents do allow the lender to spend money to protect its collateral, and then recover those expenses from the borrower as part of the borrower’s secured obligation.”).
68 But see Litho Fund Equities, Inc. v. Alley Spring Apartments Corp., 462 N.Y.S.2d 907, 909 (App. Div. 1983) (holding that the court may consider “whether there [a]re special circumstances that make it equitable to impose additional receivership expenses on [the mortgagee] even though the expenses exceed the rent collected”).
69 Vicki Been et al., Decoding the Foreclosure Crisis: Causes, Responses, and Consequences, 30 J. POL’Y ANALYSIS & MGMT. 388, 388 (2011).
behind on payments. As recently as August 2011, the number of new mortgage foreclosure filings jumped significantly, and as of March 2012, observers are noting a troubling new trend in foreclosure activity. Nor is the crisis limited to places like Florida, California, Texas, and Arizona, where the bursting housing bubble left neighborhoods dotted with empty “McMansions” and dying lawns. New York City, despite having a relatively stable housing supply, suffered a massive price bubble and has seen a rapid increase in foreclosure filings. And it is not just homeowners who are suffering: experts estimate that more than 20% of the properties in foreclosure nationwide are rentals.

---


73 See June Fletcher, The McMansion Glut, WALL ST. J. (June 16, 2006), http://online.wsj.com/article_email/SB115042445578782114-lMyQiAxMDE2NTEwNjQxMjY0Wj.html (“McMansions . . . [are] . . . oversized homes—characterized by sprawling layouts on small lots, and built in cookie-cutter style by big developers.”).

74 See Edward L. Glaeser et al., Housing Supply and Housing Bubbles 28 (Harvard Inst. of Econ. Research Discussion, Paper No. 2158, 2008) (“[M]arkets with highly elastic supply sides are much less likely to have ‘bubbles.’”).

75 Hearings, supra note 1, at 5 (statement of Erik Martin Dilan, Chairperson, Comm. on Hous. & Bldgs. of N.Y.C. Council) (“According to a report published last month by the New York State Co[m]p[le]t[er’s] Office, between the years 2006 and 2009, the number of foreclosure filings within the City of New York rose approximately 32%, to 22,866.”).

76 Aleatra P. Williams, Real Estate Market Meltdown, Foreclosures and Tenants’ Rights, 43 IND. L. REV. 1185, 1185 n.1 (2010) (citing JOINT CTR.
and in New York City, more than half the families affected by foreclosures are renters.\textsuperscript{77}

Tenants of buildings in foreclosure face special challenges. In addition to evictions without cause, foreclosures often lead to a substantial increase in housing code or warranty of habitability violations.\textsuperscript{78} Absentee owners may simply abscond with tenants’ rent payments without investing in any building upkeep.\textsuperscript{79} The problem is especially acute in low-income neighborhoods and communities of color.\textsuperscript{80}

Predatory lending has exacerbated the problem of troubled mortgages\textsuperscript{81} and has caused many properties to go underwater.\textsuperscript{82}

\textsuperscript{77} Danilo Pelletiere, Nat’l Low Income Hous. Coal., Renters in Foreclosure: Defining the Problem, Identifying the Solutions 2 (2009), \textit{available at} http://www.nlinc.org/doc/renters-in-foreclosure.pdf (“In New York City, the Furman Center conservatively estimated that if an owner lived on-site in every multi-unit building and none of the single-family residences in foreclosures were rentals, 50% of the nearly 30,000 families affected by foreclosure were renters.”) (citing Press Release, Furman Ctr. for Real Estate & Urban Policy, New Analysis of NYC Foreclosure Data Reveals 15,000 Renter Households Living in Buildings that Entered Foreclosure in 2007 (Apr. 14, 2008), \textit{available at} http://furmancenter.org/files/FurmanRelease_RentersInForeclosure_7_14_2008.pdf).

\textsuperscript{78} Vicki Been et al., Furman Ctr. for Real Estate & Urban Policy, State of New York City’s Housing & Neighborhoods 2010, at 5–6 [hereinafter \textit{State of N.Y.C. Housing Report}] (“The analysis finds that buildings receive an average of 21 percent more violations during the specific quarter in which a \textit{lis pendens} is filed, and 15 percent more violations during the two quarters prior to the \textit{lis pendens} issuance and the two quarters after, compared to what the building received in other periods.”).


During the latest real estate boom, investors bought up properties in New York and other cities with low rent rolls, hoping to evict tenants paying below-market rents, remove apartments from rent regulation, and re-rent units at market rate. Many such plans were based on unrealistic expectations.

84 State law allows an owner to remove a vacant apartment from rent stabilization by spending forty times the difference between the legal regulated monthly rent and $2,500 (but the owner must spend sixty times the difference in rent in a building with more than 35 apartments). Fact Sheet #12 – Rent Increases for Individual Apartment Improvements (IAI), N.Y. STATE HOMES & CMTY. RENEWAL, http://nysdhcr.gov/Rent/FactSheets/orafac12.htm (last updated July 31, 2011); see also Fact Sheet #36 – High-Rent Vacancy Deregulation and High-Rent High-Income Deregulation, N.Y. STATE HOMES & CMTY. RENEWAL, http://nysdhcr.gov/Rent/FactSheets/orafac36.htm (last updated July 2011).
85 ASS’N FOR NEIGHBORHOOD & HOUS. DEV., Predatory Equity: Evolution of a Crisis 4 (Nov. 2009), available at http://www.anhd.org/resources/Predatory_Equity-Evolution_of_a_Crisis_Report.pdf (finding that predatory equity loans “could place up to 100,000 apartments at risk”); see also Milbank Tenants’ Memorandum of Law, supra note 2, at 2 (“The predatory equity model leads inevitably to widespread defaults that undermine the financial system while causing displacement of low income families.”).
Regulated apartments have not become vacant as often, nor have rents increased as much, as owners had hoped.\textsuperscript{87} Much of the financing made available to real estate investors who bought rental buildings now appears inappropriately outsized because lenders did not account for realistic rental income, costs of repairs, heating oil or gas, and other necessary expenses on top of the debt service payments, while at the same time, real estate prices and equity have collapsed.\textsuperscript{88} Consequently, some owners have purposefully withheld repairs to coerce tenants to vacate their apartments, in order to improve their bottom line.\textsuperscript{89}

Repairs are of less concern, however, if tenants also face eviction proceedings because of the foreclosure, but they are crucial for long-term tenants with an interest in staying put.\textsuperscript{90} In New York City, many tenants are entitled to renewal leases under the Rent Stabilization Code,\textsuperscript{91} or continued tenancy under the Rent Control Law,\textsuperscript{92} the benefits of which they may no longer have if forced to move.\textsuperscript{93} Outside New York City, similar

\textsuperscript{87} City Council Amicus Brief, supra note 19, at 15.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 10 (describing rationale behind Tenant Harassment Act); E-mail from Shira Galinsky, Staff Att’y, S. Brooklyn Legal Servs., to author (Oct. 20, 2011, 02:15 PM EST) (on file with author) (“[W]ithholding repairs is a very popular method of enhancing turnover.” (quoting Posting of Jonathan Levy, Deputy Dir., Hous. Unit, Legal Servs. N.Y.C.–Bronx, Jlevy@bx.ls-nyc.org, to N.Y.C. Hous. Discussion, HousingNYC@wnylc.net (Sept. 15, 2011, 2:29 P.M.))).
\textsuperscript{90} But see Minjak Co. v. Randolph, 528 N.Y.S.2d 554 (App. Div. 1988) (holding that abandonment due to uninhabitable conditions may absolve the tenant from paying rent).
\textsuperscript{92} See id. § 2104.1 (provision of the Rent Control Law prohibiting eviction).
\textsuperscript{93} Raun J. Rasmussen, Defending Rent-Controlled Tenants Against Eviction, N.Y. L.J., Dec. 8, 1992, at 3 (“Unfortunately for tenants in New York City, many banks fail to investigate the rent regulatory status of the tenants who occupy the building upon which they have foreclosed, and bring meritless motions for writs of assistance. Tenants are confused by the legal papers, confused by the forum, and unable to get legal assistance if they are low income. They therefore fail to appear, fail to assert valid defenses, and end up evicted and homeless.”); Rasmussen, supra note 16.
laws apply in a handful of jurisdictions. In other states, such as Massachusetts, and in thirteen jurisdictions in California, tenants at foreclosure are protected from eviction without good cause—at least until the property is transferred to a new owner. In addition, current federal law allows all tenants of one-to-four family buildings to continue their valid leases during and after a foreclosure sale, up to the end of the lease term. Federal law also allows recipients of federal Section 8 Housing Choice vouchers, which subsidize private rentals for eligible individuals, to remain in their apartments after a judgment of foreclosure and sale.

It would thwart these laws’ purpose if uninhabitable conditions were to lead to constructive evictions. Affordable housing in expensive urban markets like New York City is also threatened if housing conditions deteriorate to the point where constructive evictions lead to tenants leaving, allowing the owners to remove apartments from rent regulation. Legislators at every level of government have enacted protections for paying tenants who, by no fault of their own, risk becoming homeless because of a foreclosure. As the following sections will demonstrate, however, those responses have not adequately

---

95 Compare MASS. GEN. LAWS ch. 186A, § 2 (2012) (“[A] foreclosing owner shall not evict a tenant except for just cause or unless a binding purchase and sale agreement has been executed for a bona fide third party to purchase the housing accommodation from a foreclosing owner.”), with An Act Requiring Tenant Protections in Foreclosed Properties, S.B. 1609, 186th Gen. Ct. (Mass. 2009) (proposing further, postsale tenant protections).
99 See infra Part V.B.1.
addressed the crucial gap period between an owner’s default and the moment title passes to a new owner.

A. Federal Statutory Response

Recognizing the plight of tenants at foreclosure, Congress passed the Protecting Tenants at Foreclosure Act of 2009 (PTFA).\textsuperscript{100} The PTFA applies to one-to-four family dwellings and provides that, in the case of a foreclosure, any new owner takes title subject to the tenants’ bona fide leasehold interests; but if the lease expires, or if the new owner intends to occupy the premises as a primary residence, then the tenant is entitled to ninety days notice before any eviction.\textsuperscript{101} The PTFA further protects tenants in any size building who receive federal Section 8 Housing Choice Voucher subsidies.\textsuperscript{102} Although the PTFA adds important protections against immediate eviction, it does not address the plight of tenants facing uninhabitable conditions during and after the foreclosure process, which may take years to unfold.\textsuperscript{103} Moreover, the PTFA sunsets in 2014.\textsuperscript{104} Because the PTFA only applies to buildings “designed principally for the occupancy of from one to four families,” it would have only applied to Milbank’s tenants who received Section 8 vouchers, and not to the buildings generally.\textsuperscript{105} The PTFA is an important

\textsuperscript{100} § 701–04, 123 Stat. at 1660–62.

\textsuperscript{101} \textit{Id.} The PTFA applies to foreclosures of “federally-related mortgage loans,” a wide category that includes any loan for a one-to-four family dwelling made by a bank whose deposits are insured by FDIC. 12 U.S.C. § 2602 (2006).

\textsuperscript{102} § 701–04, 123 Stat. at 1660–62.


\textsuperscript{104} § 701–04, 123 Stat. 1632.

step, but it is a temporary measure that does not address habitable conditions for tenants at foreclosure.

**B. State Statutory Responses**

Similarly, New York law provides additional protections but still leaves substantial gaps. In 2009, Governor David Paterson signed into law Senate Bill S66007, which revised New York Real Property Actions and Proceedings Law (RPAPL) section 1307 to require plaintiffs in foreclosure actions (usually mortgage lenders) who obtain judgments of foreclosure to maintain the foreclosed properties during the period between judgment and sale.\(^\text{107}\)

Unfortunately, however, the statute is silent with respect to the crucial period from the mortgagor’s default to judgment, when the building may be in the hands of a court-appointed receiver.\(^\text{108}\) This period could span several years. The bill as written purports to “relieve[] the plaintiff [i.e., the mortgagee] of the responsibility to maintain the property for the period that a receiver of such property is serving,” but it also purports to not “diminish any obligations of the mortgagor or receiver to maintain the property prior to the closing of the title and [to] not diminish or reduce the rights of the parties under existing law against the mortgagor of the property for failure to maintain


\(^{108}\) See REAL PROP. ACTS. LAW § 1307.
such property." Uncertainty about the ability of mortgagees to enter and control the premises during the foreclosure proceeding, when the mortgagor technically retains ownership, would perhaps explain why the legislature declined to extend these obligations to mortgagees during the foreclosure action. In a multiple dwelling foreclosure, however, courts often appoint a receiver, who steps into the shoes of the owner and assumes the duty to maintain the building, but who often lacks the funds to do so.

Not only does it neglect to address this significant gap in time during which tenants are particularly vulnerable, but RPAPL section 1307 also fails to achieve its stated goals. If its purpose is to protect tenants during foreclosure, but the mortgagor cannot afford to make payments on its mortgage, it is likely that the mortgagor cannot afford to pay for upkeep needed to protect those tenants. Many tenants may be constructively evicted long before a judgment is entered. Moreover, if a building deteriorates during the foreclosure action, it may cost the mortgagee more to fulfill its duties under RPAPL section 1307—maintaining the property from judgment to sale—than it would have if the mortgagee had begun making repairs as soon as a receiver stepped in. Finally, there is evidence that foreclosing banks are simply ignoring section 1307’s mandate.

---

109 S.B. 7V § 6, 232 Leg., Spec. Sess. (N.Y. 2009); see also infra Part V.

110 See Hearings, supra note 1, 80–81 (testimony of Michael P. Smith, President & C.E.O., N.Y. Bankers Ass’n).

111 See supra Part II.

112 See D.C. DEP’T OF CONSUMER & REGULATORY AFFAIRS, No. 680931, STUDY GUIDE FOR PROPERTY MANAGERS EXAMINATION 16 (2011), available at http://www.asisvcs.com/publications/pdf/680931.pdf (“Often, by ‘investing’ in preventive maintenance, the owner will save money by avoiding costly emergency repairs.”). For example, reroofing an apartment building to halt leaks may be expensive, but it may be much less expensive to take this preventive step than to wait until the building also requires extensive mold remediation resulting from water leaks. See Bill Boles, Missteps with Mold, HOME ENERGY, July/Aug. 2002, at 38, 40, available at http://www.bestofbuildingscience.com/pdf/Missteps%20with%20Mold%20HEM_19-4_p38-41.pdf.

113 Beekman, supra note 107.
Another, older New York law contemplates a possible community-based approach to abandonment. Article 7A of the RPAPL “provides for the appointment by housing court judges of private administrators to manage residential buildings that have been ‘effectively abandoned’ by their owners, and in which conditions are ‘dangerous to life, health, or safety’ of tenants.” A third or more of a building’s tenants can petition for an administrator. The process can be contentious, lengthy, and time-consuming, however, and it can be difficult for tenants to agree on strategy and to find competent people willing to serve as administrators. As a result, Article 7A–administered buildings remain relatively rare.

Outside New York, similar statutes offer some protection for tenants at foreclosure. Massachusetts law is particularly tenant friendly: new owners who obtain title in a foreclosure sale may not evict existing tenants without just cause. Other states have yet to enact “just cause” measures, but are making limited progress on other fronts. In Texas, for example, although its state laws are even less protective of tenants at foreclosure than the PTFA, the legislature recently passed two measures aimed at helping renters of properties in foreclosure:

1. Texas Justice Courts may now issue orders restoring utility services to renters,


115 Id.

116 For example, the proceeding may first be adjourned several times to allow the owner to attempt to remedy the conditions. See In re Dep’t of Hous. & Pres. Dev., N.Y. L.J., Oct. 1, 1992, at 21.

117 Rasmussen, supra note 22.

118 See KopPELL & Park, supra note 114 (finding 123 buildings under 7A administration as of 2003).

119 Without Just Cause, supra note 33, at 8.

120 See supra note 95 and accompanying text.

121 Without Just Cause, supra note 33, at 8.

a frequent issue for tenants at foreclosure, and (2) courts may also order repairs costing up to $10,000.\textsuperscript{123} It is unclear, however, whether repair orders would be enforceable against anyone but the owner, such as the mortgagee. Like New York, other states have sidestepped the messy issue of who is responsible for repairs during the foreclosure proceeding and have done little to protect innocent tenants from constructive eviction.

\textit{C. Local Administrative Responses}

Direct government intervention may also protect tenants from hazardous code violations.\textsuperscript{124} Where an absent or negligent owner fails to correct serious violations of the Housing Maintenance Code, the New York City Department of Housing Preservation and Development (HPD) may step in to make repairs and restore essential services.\textsuperscript{125} The agency then bills the owner or places a tax lien on the property to recoup the amounts expended.\textsuperscript{126} Additionally, New York City’s Safe Housing Act\textsuperscript{127} created an Alternative Enforcement Program to target the city’s worst 200 buildings with more focused efforts.\textsuperscript{128} But only the most serious cases receive agency attention, government action may be long in coming, and the remedial measures may be merely a stopgap.\textsuperscript{129} Moreover, the expense of HPD’s emergency

\textsuperscript{123} \textit{Id.} at 40.


\textsuperscript{125} Rasmussen, \textit{supra} note 16 (“Tenants can get help with some emergencies, such as cascading water leaks and empty boilers, from [HPD].”).

\textsuperscript{126} \textit{N.Y.C. CHARTER \\ & ADMIN. CODE ANN.} §§ 27-2125, 27-2128 (N.Y. Legal Publishing Corp. 1993); City Council Amicus Brief, \textit{supra} note 19, at 7.

\textsuperscript{127} \textit{N.Y.C., N.Y., LOCAL LAW No. 29, Int. No. 561-A} (2007); City Council Amicus Brief, \textit{supra} note 19, at 8.

\textsuperscript{128} City Council Amicus Brief, \textit{supra} note 19, at 8–9.

\textsuperscript{129} Rasmussen, \textit{supra} note 16 (“[F]or conditions that the city considers
repairs are an unnecessary burden on the city budget where a lender has filed a foreclosure action to recover its security for a mortgage loan and sought a receiver to protect the value of that security. These remedies fill a necessary role, but they should be a last resort.

D. Private Ordering

When faced with uninhabitable conditions, tenants may also employ self-help. For example, tenants may band together or solicit charity in order to pay heating bills when an owner fails to supply heat in the dead of winter. Two principal problems with this approach are the inability of poor tenants to pay for self-help, and the uncertain recoupment of expenses, especially where the owner has “walked away” from the property.

Increasingly, community-based organizations are getting involved, sometimes to purchase distressed properties in order to turn them into permanent affordable housing. Although

---

less dangerous, e.g., broken windows, leaky ceilings, mold or rat infestation, tenants may have no recourse but self help.”).

See City Council Amicus Brief, supra note 19, at 7–8 (noting burden). Many of the same cities that face foreclosure crises also face budget shortfalls and have precious few staff devoted to maintaining the quality of private property for renters. See Roger Lowenstein, Broke Town U.S.A., N.Y. TIMES (Mar. 3, 2011), http://www.nytimes.com/2011/03/06/magazine/06Muni-t.html (describing cuts to local government services).

Fourth Fed. Sav. Bank v. 32-22 Owners Corp., 653 N.Y.S.2d 588, 589 (App. Div. 1997) (“The tenants . . . claimed to have expended more than $50,000 of their own money in repairs to the building . . . .”); Missionary Sisters of the Sacred Heart v. Meer, 517 N.Y.S.2d 504, 508 (App. Div. 1987) (“[A] tenant may take it upon himself to incur an expense for a repair or service which the landlord is obligated to provide, and he may sue to recover the cost . . . .”).

See Rasmussen, supra note 22.

See id.

advocates are cautiously optimistic that this mechanism will gain traction and spread, it is still relatively rare. Moreover, the process may simply take too long to make this an appropriate remedy for urgently needed repairs.

Finally, tenants in these situations have a cause of action against the current owners, which they may bring before the foreclosure court or in a separate action. In New York City, state law allows a special part of the Housing Court to hear petitions (called “HP actions”) by tenants against owners who fail to comply with the Housing Maintenance Code. Initiating an HP action in Housing Court is fairly simple: claimants fill out a preprinted form and pay a small fee. In contrast, in a foreclosure action involving a receiver, tenants cannot sue the


136 Madar et al., supra note 134, at 6, 12, 21, 22, 34 (noting delay, as well as organizational and financial hurdles to closing deals). But see id. at 32 (documenting one case where length of time property remained abandoned was shorter than through the regular foreclosure process).

137 Rasmussen, supra note 22.


receiver without leave of the appointing court. Thus, they are forced to make a motion in State Supreme Court, which might entail hiring an attorney familiar with both landlord-tenant and foreclosure law. This is a far more complicated task than beginning an HP action. Additionally, the New York City Tenant Harassment Law makes it illegal for landlords to intentionally harass tenants, which includes disrupting essential services or neglecting to make repairs. But the owner who can no longer keep up with his or her mortgage payments may not even show up when sued, and the tenant plaintiff may be left with a useless judgment, unable to collect. In either case, a lawsuit (or the threat of one) would probably result in a negotiated settlement, but would likely only protect the tenants if that threat were credible. In sum, currently available remedies are inadequate for tenants of buildings in foreclosure who urgently need repairs.

IV. HOUSING ADVOCATES IN NEW YORK CITY EXTEND AN EQUITABLE REMEDY

Tenant advocates have attempted to use existing statutory and case law to protect the vulnerable, but sometimes advocates must

---


141 See Milbank Transcript, supra note 3, at 4 (“Mr. Del Valle [counsel for the receiver]: . . . he [a contractor] had brought a motion down there [in Civil Court] asking for permission [to sue the receiver], but the Court said you have to come up to the Supreme Court. He didn’t understand. It’s a pro se litigant, your Honor.”).


144 City Council Amicus Brief, supra note 19, at 10.

145 Rasmussen, supra note 16 (“[M]any landlords in foreclosure simply won’t show up; a default judgment does little to get repairs completed.”); Rasmussen, supra note 22.
push the envelope. In 1996, before the enactment of RPAPL section 1307, a New York trial court ordered a foreclosing bank to make repairs to a long-neglected property.\footnote{Dep’t of Hous. Pres. & Dev. v. Greenpoint Sav. Bank, 646 N.Y.S.2d 601, 604 (Civ. Ct. 1995); see also Rasmussen, supra note 22. N.Y. REAL PROP. ACTS. LAW § 1307 (McKinney 2009).} The bank had already won a judgment, but it had allowed twenty-nine months to elapse before requesting a sale.\footnote{Greenpoint Sav. Bank, 646 N.Y.S.2d at 691.} Meanwhile, the tenants suffered without heat or hot water and with other dangerous conditions.\footnote{Id. at 604.} Significantly, the bank had become the legal owner of the premises, and therefore compelling it to maintain the premises was novel but relatively straightforward.\footnote{Id.} State law now codifies such a duty, but it would take twelve years after this action for the legislature to pass this provision into law.\footnote{REAL PROP. ACTS. § 1307.} Even after RPAPL section 1307’s enactment, tenants still often face poor housing conditions during and after foreclosure proceedings.\footnote{See Beekman, supra note 107 (suggesting banks are ignoring section 1307’s mandate); Shahani, supra note 107.} This is illustrative of a broader problem: statutory and court-made law have not brought relief for tenants in certain circumstances. Faced with few viable options, tenant advocates have turned to making equitable arguments before foreclosure courts.\footnote{See, e.g., Nat’l Bank of N.Y.C. v. 296 5th Ave. Grp., No. 29057/09 (N.Y. Sup. Ct. Kings Cnty. Dec. 20, 2011) (granting motion similar to that in Milbank); N.Y. Cmty. Bank v. 1255 Longfellow LLC, No. 306660/10 (N.Y. Sup. Ct. Bronx Cnty. Aug. 12, 2010) (filing with similar motion pending).} This Part summarizes the facts in \textit{Milbank} and the equitable rule that the court applied.

\textbf{A. The Facts of Milbank}

As foreclosure filings have increased during the financial crisis and overwhelmed court dockets, for some tenants, the gap period that RPAPL section 1307 leaves open has become...
interminable. In a recent case in New York Supreme Court for Bronx County, a mortgagee sought to foreclose on ten large apartment buildings.\textsuperscript{153} With some 4,300 housing code violations, the buildings were in terrible shape.\textsuperscript{154} A quarter of the 548 units were vacant and uninhabitable, but the rest had tenants, who suffered through conditions ranging from intermittent heat and hot water to leaks and mold.\textsuperscript{155} On the tenants’ motion, the Supreme Court ordered the mortgagor to advance $2.5 million to the receiver, enough to correct the immediately hazardous conditions.\textsuperscript{156}

In November 2006, Los Angeles–based Milbank Real Estate Services began investing in its Bronx portfolio, financing the purchase of ten apartment buildings with a $35 million loan from Deutsche Bank.\textsuperscript{157} The bank repackaged the mortgage into a $3 billion mortgage-backed securities trust named “COMM-2006-C8,” (“the Comm trust”) which, in turn, was sold to investors.\textsuperscript{158} When Milbank’s investment soured, it stopped paying its mortgage, and the Comm trust began a foreclosure action, creating a special-purpose limited-liability company to serve as plaintiff.\textsuperscript{159} It named as defendants the Milbank group’s five LLCs, in which Milbank had placed title to the Bronx properties, two personal guarantors, several NYC agencies that might have had liens on the properties, and twenty-five John

\begin{footnotes}
\item[154] Milbank Transcript, supra note 3, at 11.
\item[155] Id. at 12.
\item[156] Milbank, No. 380454/09 (granting motion “for reasons stated on the record”); Milbank Transcript, supra note 3, at 20.
\item[157] Milbank Tenants’ Memorandum of Law, supra note 2, at 1; Affidavit of Whitney Wheeler in Opposition to Order to Show Cause at paras. 7–14, Milbank, No. 380454/09 [hereinafter Wheeler Affidavit].
\item[158] Milbank Tenants’ Memorandum of Law, supra note 2, at 1; Wheeler Affidavit, supra note 157, at paras. 7–14. For background on mortgage securitization, see GEORGE LEFCOE, REAL ESTATE TRANSACTIONS, FINANCE AND DEVELOPMENT 177–80 (6th ed. 2009).
\item[159] Milbank Tenants’ Memorandum of Law, supra note 2, at 1.
\item[160] Supplemental Affidavit of Whitney Wheeler in Opposition to Order to Show Cause at para. 3, Milbank, No. 380454/09 [hereinafter Wheeler Supplemental Affidavit].
\end{footnotes}
Does. The plaintiff sought a receiver, and the court appointed Consolato Cicciu (“the receiver”) in March 2009.

The receiver complained that he did not have anywhere near the funds he needed to comply with the appointment order, which required him to maintain the premises and to correct “hazardous and immediately hazardous violations” of the Housing Maintenance Code. Though the Comm trust opposed the tenants’ motion, it admitted that “the status quo is untenable.” The trust pointed out that it had already advanced over $1 million to the receiver for repairs, as the law permitted but did not require it to do. The receiver, however, reported that he used the money to pay current water and heating oil bills, and that none of it was spent to correct violations. The tenants stressed that the equities favored an order requiring the lender to advance additional funds to correct hazardous conditions.

---

161 Wheeler Affidavit, supra note 157, at paras. 7–14. The plaintiff had moved to dismiss against the John Doe defendants, and claimed the tenants lacked standing to bring their motion, but the court had reserved decision on the motion to dismiss against the John Doe defendants and declined to dismiss the tenants’ motion for lack of standing. Milbank Transcript, supra note 3, at 14, 16.

162 Amended Affidavit of Cicciu, supra note 8, at para. 2.


164 Amended Affidavit of Cicciu, supra note 8, at paras. 8–16.

165 Milbank Transcript, supra note 3, at 19.

166 Plaintiff’s Memorandum of Law in Opposition to Non-Party Tenants’ Application for an Order Directing the Court-Appointed Receiver to Cure All Code Violations and to Compel Plaintiff to Advance the Funds Necessary to Do So at 2, Milbank, No. 380454/09 (N.Y. Sup. Ct. Bronx Cnty. Mar. 17, 2009) [hereinafter Brief of Comm 2006-C8] (describing advancing funds to the receiver pursuant to N.Y. MULT. DWELL. LAW § 302-b(1) (McKinney 2001)).

167 Amended Affidavit of Cicciu, supra note 8, at paras. 14–15.

168 Tenant-Defendants’ Brief in Reply to Plaintiff’s Opposition and in Further Support of Tenant-Defendants’ Order to Show Cause at 8–12, Milbank, No. 380454/09 [hereinafter Reply Brief of Tenant-Defendants].
In granting the tenants’ motion, the Milbank court relied on its equitable power, as well as on state law (RPAPL section 1325) providing that a receiver’s priority is to correct housing code violations. That a foreclosure court should fashion an equitable remedy is not all that surprising—traditionally, foreclosures were actions at equity, and today, foreclosure courts still have the power to create a suitable remedy that does substantial justice among the parties before them, even without a statute or precedent to guide them. As far as ordering a mortgagee to advance funds to a receiver, one court expressed its equitable function as follows: “[t]he plaintiff may not be heard to object when called upon to meet an ordinary obligation necessarily and obviously incidental to the relief which he himself sought, obtained and from which he reaped benefits.” Following these guideposts, the Milbank court held that the statutory postjudgment recoupment procedure was not an exclusive remedy, and that an equitable remedy could exist alongside the statutory one, even before a judgment.

169 Milbank Transcript, supra note 3, at 19 (“[It] seems to me the equity’s here . . . .”); N.Y. REAL PROP. ACTS. LAW § 1325(3)(b) (McKinney 2009); see also Memorandum of the City of New York, supra note 61.

170 Graf v. Hope Bldg. Corp., 171 N.E. 884, 886 (N.Y. 1930) (Cardozo, J., dissenting) (“There is no undeviating principle that equity shall enforce the covenants of a mortgage, unmoved by an appeal ad misericordiam [to pity], however urgent or affecting. The development of the jurisdiction of the chancery is lined with historic monuments that point another course.”).


B. The Milbank Court’s Application of a Four-Factor Equitable Test

The tenants urged the court to employ a four-factor balancing test, drawn from several appellate and lower court decisions, to examine (1) the degree of necessity of the expenses; (2) whether there would be a benefit to the party that requested a receiver be appointed; (3) whether the foreclosing mortgage lender was aware that the building income would be insufficient to pay the receiver’s expenses when it asked that one be appointed; and (4) whether the funds would be judiciously expended. That the properties were overleveraged and “underwater” may also have contributed to the court’s analysis. The tenants argued that, at some level, it was the mortgage lender’s fault for having initially made an overly risky loan. At oral argument, the court heard details on each factor of the test. While the court’s reasoning and application are not always laid bare in the transcript, the record contains enough facts to support its conclusion, which the court memorialized in a one-page short form order.

1. Necessity of Expenses

First, the court had to determine that the money the tenants asked the Comm trust to advance was actually needed. In Milbank, the repairs were surely necessary. With more than 4,300 violations, 756 of them immediately hazardous “C” violations (the most serious category established by the City Department of Housing Preservation and Development), the

175 Reply Brief of Tenant-Defendants, supra note 168, at 1–4.
176 Id.
178 HPD Online Glossary, supra note 163 ("The law establishes three
ten buildings were literally falling apart.\textsuperscript{179} The roofs were leaking, and mold was growing.\textsuperscript{180} Despite boiler repairs that the plaintiff claimed were completed, the buildings had a history of lacking heat even after repairs were supposedly done.\textsuperscript{181} The court heard argument on September 29, just days before New York City’s “heat season” typically begins on October 1.\textsuperscript{182}

The Comm trust had already advanced more than $1 million to the receiver, which the trust claimed was spent repairing or replacing boilers and elevators and fixing gas leaks.\textsuperscript{183} But the receiver stated that these funds were only enough to pay water and fuel bills, along with the buildings’ insurance premiums and real estate taxes.\textsuperscript{184} The Comm trust also argued that the court should not interfere with the status quo because a sale was imminent, and that the fact that the city agency charged with correcting serious violations had decided to take no action suggested that the repairs could await this sale.\textsuperscript{185} But the court was more convinced by the fact that the case had already languished for eighteen months on the court’s calendar.\textsuperscript{186} In rejecting plaintiff’s counsel’s suggestion that

\begin{itemize}
  \item \textsuperscript{179} See Milbank Transcript, \textit{supra} note 3, at 10–11.
  \item \textsuperscript{180} \textit{Id.} at 7 (“Mr. Levy [tenants’ counsel]: . . . something [on] the order of five million dollars would make it possible for the receiver to repair the roof so [that] when they go in and correct the mold in somebody’s bathroom it doesn’t just leak the next time it rains and the mold reoccurs.”).
  \item \textsuperscript{181} Reply Brief of Tenant-Defendants, \textit{supra} note 168, at 7.
  \item \textsuperscript{183} Brief of Comm 2006-C8, \textit{supra} note 166, at 2–3.
  \item \textsuperscript{184} Amended Affidavit of Cicciu, \textit{supra} note 8, at paras. 14–16.
  \item \textsuperscript{185} Milbank Transcript, \textit{supra} note 3, at 15 (“Mr. Tross [plaintiff’s counsel]: . . . . If the properties are in such disrepair, and I’m not saying they’re not, they are in disrepair, but if the City felt that something urgently needed to be done they could take over these buildings and manage the buildings themselves. They have not seen fit to do it and, quite frankly, the reason for that is we’ve met with the City counsel, we’ve met with HPD. They know exactly what we’re working on and they are confident that what we’re working on is the correct solution here . . . .”).
  \item \textsuperscript{186} \textit{Id.} at 17 (“The Court: . . . . [Y]ou’re suggesting [that the sale] is going to happen within the week, but I heard that two weeks ago, that it was
\end{itemize}
the repairs were not urgently needed, the court implicitly found that they were necessary.

2. Benefit to the Mortgagee

The tenants also argued that the equities weighed in their favor because improving the Milbank properties would actually inure to the benefit of the plaintiff. They argued—and plaintiff did not dispute—that in particular, improvements would arrest the deterioration of the mortgagee’s security. Indeed, many of the units in Milbank’s buildings were uninhabitable and generated no income. Repairing the properties to a rentable state would likely begin to show returns quite rapidly. In addition to preserving the value of its collateral, the Comm trust would also benefit from avoiding fines or penalties assessed against the property for failure to correct violations. On the other hand, making extensive repairs may have been out-of-sync with Milbank’s investment strategy. Some of the units were fire-damaged, and perhaps Milbank may have wanted to tear down one of the buildings and rebuild instead of repairing the fire-damaged units (in which case repairing those units would have gone to happen within two weeks, and before that I heard that again and again and again.”).

187 Id. at 10; see also Idan Holding Corp. v. 244 Water Realty Corp., 154 N.Y.S.2d 396, 397 (Sup. Ct. 1956) (“[T]he preservation of the property inures to the benefit of the plaintiff whether he subsequently becomes the purchaser at the foreclosure sale or whether he preserves it merely because he may receive full value therefore when the sale is held.”).

188 Amended Affidavit of Cicciu, supra note 8, at para. 10 (“[T]he vacancy rate, which was 10%, upon my initial appointment, is now approaching 25%.”).

189 See Jemrock Realty Co. v. Krugman, 899 N.Y.S.2d 161, 163 (App. Div. 2010), appeal dismissed, 936 N.E.2d 913 (finding owner had met burden of showing it was entitled to a rent increase for a rent-regulated apartment); see also supra note 84 (describing method for removing apartments from rent regulation). While deregulating an apartment would certainly help increase the building’s profitability, it is less likely to occur in The Bronx than in Manhattan, and at bottom, any rent is better than no rent.

been a waste of time and money), but the Comm trust offered no such rationale. In the end, the court was more “concerned about the condition of the apartments where there are people living” and did not inquire at length into whether the $2.5 million payment would benefit the Comm trust.

3. Foreseeable Deficit

The court did, however, consider the fairness of imposing a new cost on a mortgagee in a foreclosure action when it might not have foreseen the new cost arising. The idea is to avoid undue surprise by holding a party liable for hidden defects when it has only a bare financial interest in the building. This part of the test examines only what the plaintiff (even if it is not the original lender) knew at the time it sought the receiver. Finally, it focuses on the receivership and considers the futility of appointing a caretaker for a property who is unable to take care of it. The conditions of the Milbank properties had been so poor for so long that the plaintiff should have known that the receivership would suffer a deficit if the receiver attempted to comply with his statutory duties by bringing the buildings up to code. Thus, the Milbank court did not find foreseeability much of a hurdle in directing the payment.

192 Milbank Transcript, supra note 3, at 12.
193 Id. at 12–13 (“The Court: Are you consenting to the tenants’ application? Mr. Tross [plaintiff’s counsel]: No, your Honor. The Court: Why not? You asked for the receiver. You knew the buildings weren’t in great shape.”).
194 But see LEFCOE, supra note 158, at 107 (“Buyers of commercial property take physical inspections seriously . . . [M]ost institutional lenders . . . can look to professional ‘due diligence’ service providers.”).
195 See infra Part V.B.2.
196 See Herz et al., supra note 26, at 33–34.
197 Amended Affidavit of Cicciu, supra note 8, at para. 16 (“It is abundantly clear to all that the Buildings[‘] problems cannot be addressed via the current rent roll.”).
198 Milbank Transcript, supra note 3, at 12–13, 18–19.
4. Judicious Expense

Spending money to fulfill a duty under law, remediating immediately hazardous conditions, repairing fire damage, stopping cascading leaks, and supplying heat and hot water to poor Bronx tenants are, this Note argues, the definition of “judicious.”¹⁹⁹ International law as well as many scholars and advocates recognize decent, quality housing as a human right.²⁰⁰ In many ways, New York State and New York City law echo this sentiment, such as by requiring receivers to prioritize remediating violations of the Housing Maintenance Code.²⁰¹

Not only should the money be spent on justifiable ends, but the amount should also be reasonable with respect to the need. The tenants estimated that this work would cost about $5 million.²⁰² The plaintiff argued that the law did not require it to pay anything.²⁰³ Splitting the difference, the Milbank court directed the plaintiff to advance $2.5 million to the receiver, leaving open the possibility of directing the plaintiff to advance more funds later.²⁰⁴ In the end, $2.5 million will go a long way, if not to correct all the serious, open violations, then at least to

²⁰⁰ Chester Hartman, The Case for a Right to Housing, in A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 177, 179, 187–88 n.8 (Rachel G. Bratt et al. eds., 2006) (citing various sources of international law containing right-to-housing provisions).
²⁰¹ N.Y. REAL PROP. ACTS. LAW § 1325(3)(b) (McKinney 2009) (“[P]riority shall be given to the correction of immediately hazardous and hazardous violations of housing maintenance laws.”).
²⁰² Milbank Transcript, supra note 3, at 7.
²⁰³ Id. at 13.
²⁰⁴ Id. at 20. The plaintiff obtained a stay from the Appellate Division, but the stay was later vacated on the tenants’ motion. The parties have since settled, and a new purchaser has agreed to make all the needed repairs. E-mail from Ian Davie, Staff Att’y, Legal Servs. N.Y.C.–Bronx, to author (Sept. 6, 2011) (on file with author) (explaining that among the settlement terms, the Comm trust agreed to “pay heat/hot water through the winter, fix a crumbling retaining wall, fix an elevator . . . and perfect . . . [its] appeal by a certain date,” while a deal was “hashed out . . . with the new buyer/landlord . . . [giving the] tenants some protection.”).
correct the most serious violations—or, as happened here, to force a settlement.

V. FORECLOSURE COURTS SHOULD EXTEND EQUITABLE REMEDIES FOR TENANTS

*Milbank* was correctly decided, and New York foreclosure courts should apply its reasoning to hold foreclosing mortgagees accountable for conditions that threaten tenants’ safety or well-being. In order to protect tenants of apartment buildings in foreclosure, particularly those that are not owner-occupied, courts should require the foreclosing mortgagee to bear the unmet cost of needed repairs during the foreclosure action. Precedent and equity provide a legal framework to support this rule, and public policy concerns grounded in efficiency and common-sense fairness undergird it.

A. Legal Framework for Holding a Foreclosing Mortgage Lender Liable

Though somewhat novel, there is a sound legal basis to hold the foreclosing mortgagee accountable under an equity rule, especially where a receiver is appointed. A receiver in a foreclosure action stands in the shoes of the owner, and has a “legal duty to maintain the property in good repair and is liable for damages for the failure to meet that duty.” Because the receiver is a court-appointed officer, the court can order it to comply with legal duties. State law provides for postjudgment recoupment

---


from the mortgagee for the receiver’s necessary expenditures, but it is, by its terms, not an exclusive remedy. But imposing liability on a foreclosing mortgagee who is not yet an owner is doctrinally problematic. Because the warranty of habitability and other duties apply only to an “owner,” the more difficult case is one in which the mortgagee has not yet won a judgment in a foreclosure action, and is, therefore, not the legal owner. However, laws requiring postjudgment advances and permitting prejudgment advances from mortgagee to receiver suggest that the state legislature did not intend that receivers should bear maintenance costs alone. Appointed receivers may have a legal duty to correct Housing Maintenance Code violations, but there is no expectation that they use their own personal funds to do so.

Courts have begun to recognize that they can craft equitable rules to bridge this problematic statutory gap. In Fourth Federal Savings Bank v. 32-22 Owners Corp., the Appellate Division reasoned (in dicta) that a court might order the mortgagee to make an advance to the receiver when the order appointing the receiver contemplated further expenses beyond the receiver’s available funds, thus requiring court approval. Tracking the language of the statute, there the appointing order also “required the receiver to ‘make repairs necessary to the preservation of the property’ and to give priority to ‘the correction of immediately hazardous and hazardous violations of housing maintenance laws.’” In light of this, the court could “order the person who

---

211 C.P.L.R. 8004(b) (prejudgment); MULT. DWELL. § 302-b(1) (postjudgment).
212 Herz et al., supra note 26, at 38.
214 Id. at 589 (quoting the appointing order, tracking the language of
applied for the receiver—in this case, plaintiff bank—to pay for necessary expenditures in cases where the receiver lacks the funds to do so.”215 The court reasoned that, “if such necessary repairs were funded by rents paid by the tenants . . . [it] would lead to the inequitable result of compelling tenants to advance funds for housing which they are not receiving.”216 Breach of the warranty of habitability, after all, is a defense to an eviction proceeding for nonpayment of rent, and state law recognizes that tenants need not pay (full) rent for apartments that are fire-damaged, unheated, or lacking other essentials.217 *Fourth Federal* merely recognizes that this principle ought not change in the event the owner faces foreclosure. Therefore, courts should require prejudgment advances where the circumstances call for it, and where equity supports it.218

**B. Weighing the Equities in Multiple Dwellings in Foreclosure**

Considering all the circumstances includes considering the mortgagee’s position as well as that of innocent tenants. Keeping the building in good repair is necessarily and obviously incidental to the mortgagee’s purpose, and often benefits its bottom-line.219 The rational profit-maximizing mortgagee must wish to preserve the value of the mortgaged property—the collateral for its loan—during the foreclosure action,220 because it usually ends up selling the building to recoup unpaid amounts due from the mortgagor.221 In the event of a sale, a building in

---

215 *Fourth Fed. Sav. Bank*, 653 N.Y.S.2d at 590 (citing C.P.L.R. 8004(b)).

216 *Id.*


219 See *supra* Part IV.B.2.


221 N.Y. *REAL PROP. ACTS. LAW* § 1354 (McKinney 2009). Perhaps, if
better condition commands a higher price. Additionally, a mortgagee who retains the property would benefit from its better condition by being able to command higher rents. Tenant advocates have pointed out, and this Note also urges, that there are other, less obvious equitable considerations to balance: the circumstances surrounding the building’s financial condition when the loan was originated, who the plaintiff is, the availability of funds, and broader effects such as blight. Taken together, it is often unfair to impose the cost of repairs during a gap period (or the cost of suffering without repairs) on innocent tenants rather than on foreclosing mortgagees.

1. Holding Reckless Lenders Accountable

As described above in Part III, predatory equity has wreaked havoc on affordable housing and has worked to pull apart diverse, urban neighborhoods by giving owners perverse incentives to push out tenants paying below-market rents. Although owners may face direct liability for harassing tenants, there is also support for finding mortgagees liable at equity when the lender’s participation in such a plan was reckless or there is a settlement, the mortgagor retains the building for at least some time, during which the mortgagee benefits from the mortgagor’s continued payments on the mortgage note. AM. SECURITIZATION FORUM, STATEMENT OF PRINCIPLES, RECOMMENDATIONS AND GUIDELINES FOR THE MODIFICATION OF SECURITIZED SUBPRIME RESIDENTIAL MORTGAGE LOANS 1 (2007), available at http://www.americansecuritization.com/uploadedFiles/ASF%20Subprime%20Loan%20Modification%20Principles_060107.pdf (“The modification provisions that govern loans that are in default or reasonably foreseeable default typically also require that the modifications be in the best interests of the securityholders or not materially adverse to the interests of the securityholders.”).

222 Idan Holding Corp. v. 244 Water Realty Corp., 154 N.Y.S.2d 396 (Sup. Ct. 1956) (“[T]he preservation of the property inures to the benefit of the plaintiff whether he subsequently becomes the purchaser at the foreclosure sale or whether he preserves it merely because he may receive full value therefore when the sale is held.”); Robert M. Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 S. CAL. L. REV. 843, 845 (1980).

Protecting Tenants at Foreclosure

In the run-up to the 2008 market collapse, many banks turned a blind eye to the foreseeable harm their actions posed to third parties. Although many individual loan officers probably did not consider the effect that lax underwriting and oversize loans would have on long-term tenants of properties being purchased, large institutions should have been aware of troubling trends. Their customers, especially purchasers of distressed properties, generally view remaining tenants as a costly nuisance. But prearranging tenant harassment and coercion through unsustainable financing is another story. Putting tenants’ feet to the fire by withholding services or repairs is illegal. Investors who state their intent to

---

224 City Council Amicus Brief, supra note 19, at 15 (“[A] bank’s decision to offer [a] disproportionately high level of funding—i.e., ‘overleveraging’ the property—often contributes to the owner’s default, the physical deterioration of the building and the receiver’s inability to fund maintenance and repairs from the rent rolls.”). But see LEFCOE, supra note 158, at 193 (“[T]he concept of suitability has little current support in the case law . . . . [L]enders do not even owe borrowers the duty of care to avoid negligence in the lending process.”).

225 Michael Lewis, It’s the Economy, Dummkopf!, VANITY FAIR (Sept. 2011), http://www.vanityfair.com/business/features/2011/09/europe-201109 (“[T]raders may have sunk their firms by turning a blind eye to the risks in the subprime-bond market, but they made a fortune . . . and have for the most part never been called to account.”).

226 City Council Amicus Brief, supra note 19, at 15.

227 Bruce J. Bergman, So Your Client Wants to Buy at a Foreclosure Sale: Pitfalls and Possibilities, N.Y. ST. B. J., Sept. 2003, at 43, 45 (“[I]n a perfect world, the defaulting borrower, or his tenants, would quietly depart the foreclosed premises after the foreclosure sale and before the closing.”).

228 N.Y.C. CHARTER & ADMIN. CODE ANN. §§ 27-2004(a)(48), 27-2005(d) (N.Y. Legal Publishing Corp. 1993 & Supp. 2011); N.Y. REAL PROP. LAW § 235-d (McKinney 2006) (“[I]t shall be unlawful . . . for any landlord . . . to engage in . . . interruption or discontinuance or willful failure to restore services . . . if such conduct is intended to cause the tenant . . . to vacate.”); see also N.Y. PENAL LAW § 241.05 (McKinney 2008) (“An owner is guilty of harassment of a rent regulated tenant when with intent to cause a rent regulated tenant to vacate a housing accommodation, such owner . . . intentionally . . . [or r]ecklessly causes physical injury to such tenant or to a third person. Harassment of a rent regulated tenant is a class E felony.”).
"improve[ the] tenant base" of affordable housing by aggressively pursuing turnover should have raised red flags to lenders.\textsuperscript{229} There is also ample evidence that, aided by stubborn residential segregation and redlining, the current foreclosure crisis has disproportionately affected minority homeowners.\textsuperscript{231} Banks should also be held to account for the effects of similar discrimination against renters in communities of color.

Legislatures have consistently adopted tenant-protectionist views in response to the threat of predatory equity,\textsuperscript{232} and courts should follow suit. Despite there being no clear statutory authority, a court may use its equitable power to order the lender to pay for repairs where the lender’s negligence or recklessness in making a loan based on unrealistic expectations of high turnover resulted in improper pressure on the mortgagor to harass or coerce tenants into leaving by withholding repairs or services.\textsuperscript{233} That many banks received credit on their Community

\textsuperscript{229} Milbank Tenants’ Memorandum of Law, supra note 2, at 1 (quoting \textit{Portfolio}, \textit{MILBANK}, http://www.milbankre.com/portfolio.php (last visited Feb. 20, 2012) (“Milbank identified [its Bronx] assets as having added value for its investors and that revitalization would occur by infusing the capital necessary to improve the condition of the buildings, as well as aggressively pursuing the collection of past-due rents—allowing for an improved tenant base.”)).

\textsuperscript{230} See \textit{ASS’N FOR NEIGHBORHOOD & HOUS. DEV.}, supra note 85, at 22–25.

\textsuperscript{231} City Council Amicus Brief, supra note 19, at 4; Steil, supra note 80, at 76–86; Dunn, supra note 80. But see EDWARD L. GLAESER & JACOB VIGDOR, MANHATTAN INST. FOR POLICY RESEARCH, \textsc{The End of the Segregated Century} 3–7 (2012) (arguing that U.S. cities are today more racially integrated than at any time since 1910). Plaintiffs have sued banks such as Wells Fargo (the trustee in \textit{Milbank}) for discriminatory lending practices. Steil, supra note 80, at 85 n.73 (describing suit alleging bank targeted African-Americans for subprime loans by classifying applicants by race in the bank’s internal mortgage application software).

\textsuperscript{232} See, e.g., City Council Amicus Brief, supra note 19, at 10 (describing rationale behind the Tenant Harassment Act, \textsc{N.Y.C. CHARTER & ADMIN. CODE ANN. §§ 27-2004(a)(48), 27-2005(d}) (N.Y. Legal Publishing Corp. 1993)).

\textsuperscript{233} Katherine M. Lehe, Comment, \textit{Cracks in the Foundation of Federal Law: Ameliorating the Ongoing Mortgage Foreclosure Crisis Through Broader Predatory Lending Relief and Deterrence}, 98 CALIF. L. REV. 2049,
Reinvestment Act exams for making these oversized loans in low- and moderate-income census tracts makes an accounting all the more compelling. When a court has no other tool to adequately address wrongful conduct, it may use its equitable powers to reach a fair result.

2. When the Plaintiff Isn’t the Original Lender

The “reckless lender” argument is somewhat less persuasive where the mortgage note has been bought and sold several times, and the plaintiff in the foreclosure action did not originate the loan. Indeed, the Uniform Commercial Code, which governs the sale of promissory notes associated with mortgages, insulates a “holder in due course” from preexisting property claims, unless the purchaser had actual knowledge of the prior claim. At first blush, the “holder in due course” doctrine


236 N.Y. U.C.C. LAW §§ 9-109(a)(3), 9-109 cmt. 7 (McKinney 2002) (“The security interest in the promissory note is covered by this Article even though the note is secured by a real-property mortgage.”). Article 9 “does not determine the circumstances under which and the extent to which a person who is obligated on a negotiable instrument is disabled from asserting claims and defenses. Rather, Article 3 must be consulted. See, e.g., Sections 3-305, 3-306.” § 9-403 cmt. 2. New York’s U.C.C. Article 3, Section 3-304(7) provides that “to constitute notice of a claim or defense, the purchaser must have knowledge of the claim or defense or knowledge of such facts that his action in taking an instrument amounts to bad faith.” N.Y. U.C.C. LAW § 3-304(7) (McKinney 2001). The subsequent purchaser of a mortgage note, as a “holder in due course,” takes it free and clear of claims to the note, unless it has actual notice of the claims. In re AppOnline.com, Inc., 285
would seem to absolve many subsequent holders of mortgage notes, including investment trusts holding mortgage-backed securities, from preexisting claims relating to the mortgage, such as claims that the loan originator engaged in predatory lending. But neither Article 3, which contains the “holder in due course” bar, nor Article 9, which governs the sale of promissory notes, speaks to claims by third parties, unrelated to ownership of the note, and arising after the interest in the mortgage and note changes hands. Breaches of the warranty of habitability and violations of the Housing Maintenance Code are often continuous, ongoing breaches and violations. Thus, a mortgagee’s “holder in due course” status should not bar this kind of relief. Still, without something more, the equities may not favor liability for a seemingly blameless successor mortgagee before it obtains a judgment of foreclosure.


Lehe, supra note 233, at 2066 (“[M]any borrowers who seek to challenge their mortgage loans as predatory find that the ‘holder in due course’ doctrine bars suit against the assignee who currently holds the mortgage note, and assignment of the mortgage precludes them from bringing suit against the mortgage originator.”).

See U.C.C. §§ 3-304(7), 9-403; see also Kurt Eggert, Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine, 35 CREIGHTON L. REV. 503, 607–35 (2002) (recommending eliminating the holder in due course doctrine for all noncommercial loans).


The *Milbank* decision sheds light on this thorny issue. The court, relying on *Fourth Federal*, only considered whether the party who sought the receiver was aware of the receiver’s likely deficit. It did not ask whether the Comm trust knew about the buildings’ finances when it acquired the mortgage note.\(^{241}\) Given this appellate authority, a New York foreclosure court deciding a similar claim need not quibble about the precise identity of the plaintiff.\(^{242}\) It might be more difficult to impose liability on the trust as opposed to the original lender, but this did not prevent the *Milbank* court from doing so.\(^{243}\) The trust became liable when it asked the foreclosure court to appoint a receiver yet failed to investigate and disclose the precarious financial situation the receiver would inherit.\(^{244}\) However, the court is still likely to look for some other reason to support finding the subsequent purchaser of a mortgage note liable for damages that are several steps removed from its own actions.

In some ways, the plaintiff can nearly always be linked back to the original lender. In *Milbank*, the plaintiff was not the original lender—the original mortgage lender was Deutsche Bank.\(^{245}\) Deutsche Bank repackaged the mortgage note into a huge mortgage-backed securities trust, which it sold to investors.\(^{246}\) While there was a lack of one-to-one identity, the demand for mortgages to back such securities was a driving

\(^{241}\) *Milbank* Transcript, *supra* note 3, at 18.


\(^{243}\) *Milbank*, No. 380454/09 (N.Y. Sup. Ct. Bronx Cnty. Sept. 29, 2010) (granting motion “for reasons stated on the record”); *Milbank* Transcript, *supra* note 3, at 18–19. Although the plaintiff in *Milbank* argued it should not be liable because it created a special-purpose L.L.C., which took title to the mortgage note, the L.L.C. was a wholly owned subsidiary of the Comm trust, a subterfuge the *Milbank* court easily saw past. Reply Brief of Tenant-Defendants, *supra* note 168, at 2. Even though the trust was owned by investors who were not parties to the action, the trust itself was nevertheless held liable. *Id.*

\(^{244}\) Reply Brief of Tenant-Defendants, *supra* note 168, at 2. *But see LEFCOE, supra* note 158, at 178–79 (describing difficulty of due diligence for mortgage-backed securities investors and tendency to freeloard).

\(^{245}\) *Milbank* Tenants’ Memorandum of Law, *supra* note 2, at 1.

\(^{246}\) *Id.*
force behind banks’ making loans with lax underwriting.\textsuperscript{247} In this way, the beneficiaries of the Comm trust played a role in causing the outsized loan to be made (though granted, someone else may have bought the securities if they had not).\textsuperscript{248} In this way, a link, however attenuated, can be drawn from the loan originator to the plaintiff in the foreclosure action.

Aside from identity, this also raises questions of what duties a mortgage investor (or trustee) owes to third parties when it acquires or forecloses on a mortgage.\textsuperscript{249} The scope of inquiry required at first seems potentially huge—the ten Bronx apartment buildings in \textit{Milbank} were only a small piece of a multibillion-dollar investment vehicle.\textsuperscript{250} But a mortgage-backed securities holder like the Comm trust need not scrutinize the books of every single mortgagor it forecloses on for likely deficits from spending money on repairs—most of its mortgages are likely for single-family homes for which no receiver is likely to be sought.\textsuperscript{251} If, however, the property is an occupied multiple dwelling and the mortgagee seeks a receiver, courts have found that equity calls for an inquiry.\textsuperscript{252} The basic premise—that

\textsuperscript{247} See Been et al., \textit{supra} note 69, at 390 (“The ability of mortgage originators to remove mortgages from their books through securitization may have also weakened originators’ incentives to carefully screen potential loans and borrowers, as they retained little exposure to the risk of the originated loans.”); Demyanyk & Van Hemert, \textit{supra} note 82, at 1872 (“[L]enders were to some extent aware of high [loan-to-value] ratios being increasingly associated with risky borrowers.”); Maddaloni & Peydró, \textit{supra} note 82, at 2124.

\textsuperscript{248} But see Nelson D. Schwartz & Shaila Dewan, \textit{Political Push Moves a Deal On Mortgages Inches Closer}, \textit{N.Y.Times} (Jan. 24, 2012), http://www.nytimes.com/2012/01/24/business/a-deal-on-foreclosures-inches-closer.html (“Senator Sherrod Brown of Ohio said the settlement [between lenders, federal officials, and state attorneys general] as reported—its details were not fully known—was too small and would allow banks to pass on the cost of the settlement to ‘middle-class Americans’ whose pension funds held soured mortgage securities.”).

\textsuperscript{249} See LECFCE, \textit{supra} note 158, at 178–79.

\textsuperscript{250} \textit{Milbank Tenants’ Memorandum of Law}, \textit{supra} note 2, at 1.

\textsuperscript{251} See \textit{infra} Part V.C.2.

\textsuperscript{252} \textit{Land v. Esrig}, 43 N.Y.S.2d 623, 626 (Sup. Ct. 1943) (“The plaintiff may not be heard to object when called upon to meet an ordinary obligation necessarily and obviously incidental to the relief which he himself sought,
tenants should not have to pay for housing they do not receive—is the same regardless of who holds the mortgage and note. While imposing costs on a mortgagee who did not make a reckless loan is less than ideal, it would be inequitable to allow innocent tenants to continue to suffer because of a mortgagor’s failure, and a receiver’s inability, to comply with the Housing Maintenance Code and warranty of habitability.

3. Other Equitable Concerns

Costs to the parties to the foreclosure action should not be the court’s only concern. Blight has worsened during the subprime-lending crisis, and the Milbank rule helps prevent neglected buildings from depressing neighboring property values. Abandoned properties also pose risks to neighbors, since they are magnets for squatters, fires, and crime. Requiring the foreclosure plaintiff to pay for upkeep during the proceeding is a perfect complement to state laws that aim to fight blight by requiring foreclosing lenders to maintain

obtained and from which he reaped benefits.”). A duty of inquiry might also be considered a quid pro quo for the limited liability a mortgagee enjoys with a receiver in place. See supra text accompanying notes 49–52.


254 City Council Amicus Brief, supra note 19, at 14–17; see Part V.D infra (discussing implications).


properties after obtaining a judgment, and is even more effective at nipping the problem in the bud.

Not only does this rule allow the lender to prevent the value of its collateral from further deteriorating and creating blight, but it also places the cost of upkeep on the party best able to bear it. Anticipating these costs, lenders can spread them among mortgagors by setting slightly higher interest rates on mortgage loans or charging small fees, which efficiently places the cost where it should be—on mortgagors, as a kind of insurance. While lenders may no doubt pass added costs on to mortgage consumers—and owners, in turn, to renters—the overall effect will be negligible.

Finally, applying the Milbank equitable rule avoids relying on undesirable, resource-intensive, and often-unavailable

---

258 See, e.g., N.Y. REAL PROP. ACTS. LAW § 1307 (McKinney 2009).
262 See infra Part V.D (discussing implications).
government intervention to make costly emergency repairs—at the expense of taxpayers—in exchange for a tax lien on the property. Intervention, while sometimes available where an owner has abandoned the property, is even less desirable where a receiver controls the premises. This is because the lender requested the receiver in order to protect its security and is concerned about the condition of the building (if only for its resale value), and because the lender must pay the receiver’s expenses upon judgment and usually has the assets to do so.

4. Which Repairs Should Be Covered by the Rule?

If the foreclosure court orders the mortgagee to pay for repairs, it is an open question how serious a code violation must be to trigger the lender’s contribution. Broken locks threaten the safety of the tenants, and cascading water leaks have long been considered by New York City agencies to be a serious condition meriting intervention, but it is less clear that a leaky radiator pipe in only one apartment should deserve the same attention. Painted-over peepholes are also a threat to tenants’ security, but not clearly as serious as a broken front door lock. Courts must decide whether a duty to abate an infestation of rats or mice also extends to roaches and bedbugs. The N.Y.C. Department of Housing Preservation and Development (HPD) uses a letter grading system that, while flawed, offers a handy proxy for which items should be the lender’s financial responsibility and which should await a new owner.

---

263 See supra Part III.C.
264 See supra Part II.
267 Indeed, the definitions of B and C violations track the language of the state statute requiring receivers to prioritize correction of dangerous violations, reflecting a judgment of the legislature that some repairs are more
The letter grading system uses grades of A, B, or C, with C violations being the most serious.\textsuperscript{268} State law provides that the receiver shall give priority to the correction of “immediately hazardous and hazardous violations” of the code, which correspond to class “B” and “C” violations.\textsuperscript{269} Not all violations (especially “A” violations) constitute a breach of the warranty of habitability.\textsuperscript{270} Funds spent to correct “B” and “C” violations are therefore most likely to be judicious expenditures, and this should be a reliable cutoff for receivers and lenders when measuring compliance with their legal duties.

C. Applications of the Milbank Rule

While HPD’s violations definitions provide a bright-line rule, the Milbank rule itself does not, and the rule’s applications are not always so clear-cut. The trial court in \textit{Milbank} extended an equity rule contemplated by the appellate court in \textit{Fourth Federal}, without any certain appellate authority.\textsuperscript{271} At least one other trial court, in \textit{National Bank v. 5th Avenue Group}, has followed suit.\textsuperscript{272} In late 2009, the owner of a small apartment

\textsuperscript{268} \textit{HPD Online Glossary}, supra note 163 (“The law establishes three classes of violations which are: ‘A’, non-hazardous; ‘B’, hazardous; or ‘C’, immediately hazardous.”).

\textsuperscript{269} \textit{Id.}

\textsuperscript{270} Park W. Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1294 (N.Y. 1979) (“Housing codes do not provide a complete delineation of the landlord’s obligation, but rather serve as a starting point in that determination by establishing minimal standards that all housing must meet.” (citing Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 844 n.16 (Mass. 1973))). New York also requires HPD to promulgate a list of which violations are “rent-impairing,” or serve as the basis for rent abatement or a defense to a suit for the nonpayment of rent. N.Y. MULT. DWELL. LAW § 302-a (McKinney 2001).

\textsuperscript{271} \textit{Milbank Transcript}, supra note 3, at 18–19 (“[E]ven though there’s no authority before and it’s not been done before perhaps except in that one case you cite . . . .”).

building in Brooklyn stopped paying its mortgage, and the bank began to foreclose on the building.\textsuperscript{273} Intermittent heat and hot water, roof leaks, and an unsecured front door plagued the six tenants, many of whom were elderly or disabled.\textsuperscript{274} One year later, the court appointed a receiver to collect rents and maintain the property, but the receiver could not spend more than $2,000 at a time without the bank’s consent.\textsuperscript{275} The receiver hired workers to fix the roof, but the leaks continued.\textsuperscript{276} In May 2011, the tenants asked the foreclosure court for relief.\textsuperscript{277} By September, their motion still pending, the building’s front door remained unsecured, its locks broken.\textsuperscript{278} Worse, the property seemed doomed from the start: its income was not nearly enough to service the $1.85 million mortgage.\textsuperscript{279} In December 2011, the court granted the tenants’ motion in full, directing the plaintiff mortgagee to advance funds to the receiver to cover the cost of emergency repairs, reasoning that, “it would be equitable for plaintiff to be required to advance funds to the Receiver where rental income is insufficient for the Receiver to fulfill his

\textsuperscript{273} Opfer, \textit{supra} note 265.

\textsuperscript{274} \textit{Id.}

\textsuperscript{275} \textit{Id.}

\textsuperscript{276} \textit{Id.}

\textsuperscript{277} \textit{Id.}

\textsuperscript{278} \textit{Id.} (“‘That’s always been a problem. They fix it and then all of a sudden it’s damaged again,’ said Raymond Jimenez, a retired butcher who has lived in his fourth floor apartment for 48 years.”).

duty to repair and maintain the premises."\textsuperscript{280} Nor, as the court explained, was this designed to be a windfall to the tenants or the receiver: “assuming the building is not ‘overleveraged,’ . . . plaintiff will be made whole upon the sale of the property.”\textsuperscript{281} While trial courts seem to be receptive to extending the Milbank rule, the following examples demonstrate that, in some situations, application of the rule is not so straightforward.

1. Bedbugs

Whether the lender should pay for extermination of an apartment building with six units where the tenants complain of a building-wide bedbug\textsuperscript{282} infestation will depend on the degree of the necessity of the expenditures. Bedbugs are currently classified as a “B” violation of the Housing Maintenance Code;\textsuperscript{283} therefore, the lender could be found responsible for paying for the extermination, since it is the receiver’s duty to correct “hazardous” conditions.\textsuperscript{284} But there could also be a hidden causal factor if one of the tenants brought the bedbugs in, in which case it is less clear that the mortgagee should be responsible. Although exterminating bedbugs might have little impact on the building’s long-term value, an infestation impacts the habitability of the units for the current tenants and affects the building’s current income if units cannot be rented. Provided the “judicious expense” prong of the Milbank test is met, an equitable remedy seems appropriate.

2. Single-Family Rental Homes

Unlike in a multiple dwelling, a tenant of a one-family home in foreclosure faces an uphill battle to benefit from Milbank,

\textsuperscript{281} Id.
\textsuperscript{284} N.Y. REAL PROP. ACTS. LAW § 1325 (McKinney 2009).
because it would require extending the law with no clear precedent (since the case law discussed so far deals only with multiple dwellings). Tenants of single-family homes are protected by the warranty of habitability, a foreclosing mortgagee must maintain the premises after judgment, and there is still a gap period between default and judgment. But the principal problem is that receivers are rarely sought for single-family homes, and thus there is no statutory support (RPAPL section 1325) for an equitable determination. The mortgagee does risk becoming directly liable as a “mortgagee in possession” if it takes steps to repair the property or collect rent without a receiver in place, but mortgagees understandably steer clear of these liabilities. While the tenant might not be able to obtain immediate relief against the bankrupt owner in a separate action, that avenue is available. In the end, the amounts involved are likely smaller than in a multiple dwelling, making self-help more feasible. The tenant can then sue the owner and wait in line along with the owner’s other creditors, or attempt to further extend the Milbank rule.

3. Where No Receiver Is Appointed

In buildings with fewer than six units, the mortgagee plaintiff often forgoes seeking a receiver. Arguably, the Fourth

---

287 REAL PROP. ACTS. § 1307.
288 See Rasmussen, supra note 16.
290 See supra Part III.D.
291 See supra Part III.D.
292 See supra Part III.D.
293 Rasmussen, supra note 16 (“Receivers . . . are not usually appointed to care for the small buildings that are the subject of the vast majority of foreclosure actions now.”).
Federal equitable inquiry is irrelevant in a case where there is no receiver, the mortgagor is still in possession, or where the mortgagee comes into possession. While legislatures increasingly pass laws to protect tenants at foreclosure, at the same time there is a desire to avoid fees and costs to small owners who actually live in their buildings. Moreover, the tenants of a small building may find it less likely for a live-in owner to skip town (or skimp on repairs) and easier to compel the owner to make repairs in an HP action.

4. Affordable Loans and Not-for-Profit Lenders

While Milbank held a mortgagee accountable for a loan that should possibly never have been made, its application to a lender who made an affordable loan or to a not-for-profit lender is more problematic because no “predatory equity” angle is present and the lender likely has fewer assets at its disposal. Milbank’s four-part equitable test does not necessarily speak to this one way or the other. The court’s analysis focused on whether the foreclosing mortgage lender had been aware that the building’s income would be insufficient to pay the receiver’s expenses when it asked that the court appoint a receiver. Application of the test would still result in a mortgagee’s responsibility to pay for repairs, even though it made an affordable loan, if the receiver’s anticipated expenses were more than the anticipated income when the plaintiff sought to have a receiver appointed. Nonprofits may have less capital to finance interim upkeep, but they would still be liable for postjudgment upkeep under the statute, which does not exempt them.

294 Hearings, supra note 1, at 164–65 (testimony of Elizabeth M. Lynch, MFY Legal Servs.); E-mail from Brad Lander, N.Y.C. Councilmember, to author (Nov. 13, 2011, 8:51 AM EST) (on file with author).
295 In an HP action, the tenant sues the owner and the Department of Housing Preservation and Development seeking repairs to correct outstanding violations. See supra Part III.D.
297 Id.
298 See N.Y. REAL PROP. ACTS. LAW § 1307 (McKinney 2009).
Alternatively, if the law were to require the lender to post a compliance bond, it may not bear such a heavy financial burden. In sum, despite its difficult application, the Milbank rule is workable and malleable enough to make it a viable option for tenants who have difficulty seeking repairs from owners in foreclosure.

D. Implications of Extending Milbank

There are a few problematic implications of extending the Milbank rule, such as increased costs to borrowers, disincentives for foreclosure plaintiffs to seek receivers, and the propriety of extending a liability rule in response to a crisis, since conditions that currently justify reform may no longer exist in the future. Taken together, however, the positive outcomes that would result from wider application of the Milbank rule significantly outweigh these consequences.

Banks may assert that the rule will decrease mortgage lending, or make it more costly to lend to people at the margins. But Milbank was an exceptional case in that most buildings in foreclosure will not require millions of dollars in additional funds to correct hazardous conditions. Banks have shown that they can survive new regulatory requirements that have significantly hurt their bottom line. For example, the cost of compliance with new interchange fees for debit card purchases will run into the billions, yet banks are finding small-bore ways of recouping these losses. In the context of mortgage lending, where fees are already substantial and rising, the net effect on consumers of a small market-wide increase due

300 See ex infra Part VI.
300 See, e.g., Williamson & Hitt, supra note 260.
301 See Nat’l Bank of N.Y.C. v. 296 5th Ave. Grp., No. 29057/09 (N.Y. Sup. Ct. Kings Cnty. Dec. 20, 2011) (ordering plaintiff to advance funds to receiver for repairs estimated to cost $65,150); City Council Amicus Brief, supra note 19, at 7 (“In fiscal year 2011, HPD budgeted over $29 million for emergency repairs [citywide].”).
302 See Bank of America plans $5 debit card fee, supra note 260; Dash, supra note 260.
to the *Milbank* rule is probably minimal. From a public policy perspective, spreading the cost of remediating poor housing conditions across all mortgage borrowers is desirable because it more effectively and more efficiently minimizes the risk of harm to more people. In addition, slightly increasing the costs of borrowing may deliver better incentives to consumers deciding whether to rent or buy. Federal housing policy has placed too strong an emphasis on homeownership, and many people who were able to qualify for loans in 2006 would have been better off renting instead. At bottom, however, extending *Milbank* will probably increase costs to borrowers, but not by any appreciable amount.

---


rule may increase rents for tenants; but, again, the overall effect is probably negligible.\textsuperscript{308}

Aside from mere cost, the plaintiff in \textit{Milbank} argued that extending liability to it would mean that foreclosure plaintiffs would no longer be willing to seek receivers.\textsuperscript{309} But mortgagees will still desire to have the limitation on liability that comes with the appointment of a receiver, which is unavailable to them as mortgagees-in-possession.\textsuperscript{310} Because of the favorable limitations on liability, applying \textit{Milbank} more broadly is unlikely to affect the decision whether or not to seek the appointment of a receiver.\textsuperscript{311} Mortgagees will still need to protect their security from deterioration in order to recoup as much as possible from the foreclosure sale. If the building needs repair, this is practically impossible to accomplish without either having a receiver or becoming a mortgagee-in-possession.\textsuperscript{312} Diverting a building’s rental income from the owner and investing it back into the building also makes sound business sense because it maximizes the value of the loan’s collateral.\textsuperscript{313} This suggests that mortgagees would still seek receivers just as often.

\textsuperscript{308} See Paula Beck, \textit{Fighting Section 8 Discrimination: The Fair Housing Act’s New Frontier}, 31 \textit{Harv. C.R.-C.L. L. Rev.} 155, 180 (1996) (explaining how landlords might react to an influx of subsidized tenants by spreading the cost across their subsidized and unsubsidized holdings). Costs of financing are only one component of what the N.Y.C. Rent Guidelines Board considers when deciding on a schedule of increases for rent-stabilized apartments. \textit{Process by Which the Rent Guidelines Board Determines the Guidelines}, N.Y.C. RENT GUIDELINES BD., http://www.housingnyc.com/html/guidelines/guidelines.html (last visited Feb. 20, 2012) (“These include: the economic condition of the residential real estate industry in N.Y.C. including such factors as the prevailing and projected (i) real estate taxes and sewer and water rates, (ii) gross operating maintenance costs (including insurance rates, governmental fees, cost of fuel and labor costs), (iii) costs and availability of financing (including effective rates of interest), [and] (iv) over-all supply of housing accommodations and over-all vacancy rates.”).

\textsuperscript{309} Wheeler Affidavit, \textit{supra} note 157, at para. 4.


\textsuperscript{311} Herz et al., \textit{supra} note 26, at 38.


\textsuperscript{313} Herz et al., \textit{supra} note 26, at 38.
Even if mortgagees are able to bear or distribute the additional costs, and still seek receivers, extending a rule of law during a financial crisis raises concerns about the rule’s applicability after the crisis. Although the current situation seems unprecedented, dangers to tenants at foreclosure are a cyclical, recurring problem. The warranty of habitability and housing code also do not typically change from boom to bust—the duty that foreclosing lenders owe to tenants should remain constant as well. Those tenants who pay rent are innocent victims of a foreclosure, crisis or not.

In sum, New York courts should extend Milbank to apply more broadly where the receivership suffers a foreseeable deficit, the expenses are necessary and judicious, and there will be some benefit to the mortgagee. In addition, some courts may insist on some level of culpability by the current mortgagee if it is not the original lender. Extension of the rule will help protect innocent renters who, by no fault of their own, suffer adverse consequences from their landlords’ defaults.

VI. STATUTORY REMEDIES FOR TENANTS IN FORECLOSURE ACTIONS SHOULD ALSO BE EXPANDED

Extending the Milbank rule is a vital part of a robust judicial response to the foreclosure crisis, but legislatures also have a role to play. Because the options available to tenants in such situations (including the equitable remedy in Milbank) are few, narrow, and uncertain, state legislatures should adopt laws

314 See supra Part III.
315 Rasmussen, supra note 22.
316 See Been & Glashauser, supra note 17, at 3.
317 In other states, tenant advocates and foreclosure courts should consider whether equitable relief is available where the equitable factors from Milbank are present. If, for instance, a Massachusetts building in foreclosure is afflicted with a substantial Sanitary Code violation, under what circumstances may the tenant compel the out-of-possession mortgagee to pay for repairs before a judgment is entered? See MASS. GEN. LAWS ch. 111, § 127A (2002); Berman & Sons, Inc. v. Jefferson, 396 N.E.2d 981, 982–84 (Mass. 1979). After all, the tenant is entitled to stay absent good cause for eviction. See supra Part III. This entitlement would serve little purpose if the tenant were constructively evicted.
formalizing a duty on the part of foreclosing mortgagees to maintain the premises during the foreclosure action. This would, importantly, close any loophole a lender might exploit by declining to seek the appointment of a receiver it would otherwise seek, or by starting the foreclosure action through a mortgage servicer who is not technically the mortgagee.\textsuperscript{319} Codifying a legal duty would make it straightforward for tenants to seek needed repairs in an action against the mortgagee, and it would allow courts to skip the messy and searching inquiry into whether the lender knew the receiver’s income would be inadequate.\textsuperscript{321} Tenants caught in gap situations would be able to seek relief without extensive motion practice.\textsuperscript{322} Ideally, a legal duty on the books would be prophylactic and simply cause foreclosing mortgagees to begin to fund necessary repairs as soon as a receiver is appointed.\textsuperscript{323} But realistically, reform at the state level may be far off.

In addition to the duty requirement, state legislatures should create compliance-bond-posting requirements for mortgagees who seek to foreclose on multiple dwellings. Such laws would require the mortgagee to post a bond to cover anticipated costs associated with compliance with the applicable housing code and warranty of habitability at the start of the foreclosure action.\textsuperscript{324}

\textsuperscript{318} Brief of Comm 2006-C8, supra note 166, at 7.
\textsuperscript{319} \textit{Hearings, supra} note 1, at 164–65 (testimony of Elizabeth M. Lynch, MFY Legal Servs.). If the mortgage servicer is not an assignee, the mortgagee may also be a necessary party to the foreclosure action. \textit{See} J.V. Dempsey, \textit{Mortgagee or Liensholder as a Proper or Necessary Party to Suit in Respect of Contract for Sale of Mortgaged Property}, 164 A.L.R. 1044 (2011).
\textsuperscript{320} For example, the statute might authorize New York City tenants to bring an HP action against the lender in Housing Court. \textit{See} supra Part III.D.
\textsuperscript{321} \textit{See supra} Part IV.B.3. A legal duty enacted at the state level would obviate the need for \textit{Milbank}’s four-factor equitable test in order to compel a prejudgment advance from the mortgagee to the receiver.
\textsuperscript{322} \textit{Cf. supra} Part III.D (describing the non-availability of relief in Housing Court against a receiver in particular and against the owner in foreclosure generally).
\textsuperscript{323} Brief of Comm 2006-C8, supra note 166, at 2–3 (describing funds already advanced to receiver).
Importantly, this would lessen the burden on mortgagees, especially smaller ones, and help stabilize costs.

There are currently two proposals before the New York City Council to enact local laws further strengthening protections for tenants at foreclosure. Intro 0494-2011 would require mortgagees who seek foreclosure to secure and maintain a compliance bond, which would be used to cover the cost of compliance with the Housing Maintenance Code. Intro 0500-2011 would establish a duty requiring a foreclosing mortgagee to maintain the property during the pendency of the foreclosure action. Yet unresolved is whether any city law affecting foreclosures or nationally chartered banks will, as the bill opponents claim, be preempted by state or federal law. Both bills have been laid over in committee after a hearing, and one of the bills’ sponsors reports that the committee is working to address the preemption issues and to add a carve-out for smaller, owner-occupied multiple dwellings.


326 Intro. 500, 2011 Leg., 2011 Sess. (N.Y.C. Council 2011), http://legistar.council.nyc.gov/ViewReport.ashx?M=R&N=Text&GID=61&ID=1079568&GUID=0487EFD-D-CBF5-4F0-E-B66-E-4E6-A9DFD2A47&Title=Legislation+Text (amending the N.Y.C. ADMIN. CODE tit. 27 by adding § 27-2109.1). While a notification requirement is a great start, it does not directly address the plight of tenants facing poor housing conditions, especially if one considers that HPD may already know about most problem buildings because of the number of tenant complaints and violations.

327 Intro. 494.

328 See Cuomo v. Clearing House Ass’n, L.L.C., 129 S. Ct. 2710, 2721 (2009) (holding that state regulatory agency could not enforce regulation with respect to nationally-chartered banks); Hearings, supra note 1, at 85 (testimony of Michael P. Smith).

329 Intro. 494; Intro. 500.

330 E-mail from Brad Lander, supra note 294; Hearings, supra note 1, at
Even if the mayor signs these measures into law, worrisome concerns remain about state- or federal-law preemption of a local law affecting the foreclosure process or regulating nationally chartered banks.\textsuperscript{331} Passing new tenant protections at the state level would alleviate any concern about state-law preemption.\textsuperscript{332} Likewise, passing bank regulation at the federal level could mollify any concern about federal-law preemption.\textsuperscript{333} But these are much more daunting challenges than attempts to pass local legislation.\textsuperscript{334} Even though it is unlikely to pass at the state or federal level, advocates should continue to push for positive reform, since current statutory schemes are inadequate to protect tenants,\textsuperscript{335} and an equitable remedy against a lender will only aid those who can show that the mortgagee was aware of a likely deficit when it asked for the receiver.\textsuperscript{336} A statutory solution would contribute greatly to protecting tenants.

VII. CONCLUSION

Extending \textit{Milbank} will help protect tenants of multiple dwellings during the gap period between a mortgagor’s initial default and a final judgment awarding possession to the

\begin{itemize}
  \item \textsuperscript{165} (testimony of Elizabeth M. Lynch) (“In our experience, homeowners . . . in one- to four-family houses, rarely abandon their houses. They usually maintain the property and try to work with the bank to get a modification.”).
  \item \textsuperscript{331} Stoffer v. Dep’t of Pub. Safety of Huntington, 907 N.Y.S.2d 38, 45 (App. Div. 2010) (“Where the Legislature has not expressly forbidden local governments from superseding state law, a local government may nevertheless be prohibited from enacting superseding legislation, pursuant to the doctrine of preemption, where the State has evidenced an intent to occupy the field.”); see also Cuomo, 129 S. Ct. at 2721; Hearings, supra note 1, at 85 (testimony of Michael P. Smith).
  \item \textsuperscript{332} See Stoffer, 907 N.Y.S.2d at 45.
  \item \textsuperscript{333} See Cuomo, 129 S. Ct. at 2721.
  \item \textsuperscript{334} Michael Powell & Nicholas Confessore, \textit{Dysfunction Displaces Work in Distracted Albany}, N.Y. TIMES (Mar. 6, 2010), http://www.nytimes.com/2010/03/06/nyregion/06albany.html (“The State Senate can’t get 32 votes to agree that today is Thursday.”) (quoting Daniel J. O’Donnell, Assemblyman, N.Y.C.) (internal quotation marks omitted)).
  \item \textsuperscript{335} See supra Part III.
  \item \textsuperscript{336} See supra Part V.
\end{itemize}
mortgagee, especially in the increasingly common scenario when the owner “walks away.” By providing a source of funding for necessary repairs, the four-factor equitable test helps reinforce existing eviction-protection measures for tenants and serves as a backstop against constructive eviction, blight, and the loss of affordable housing through predatory equity. Finally, though proponents face several challenges, codifying a duty or a compliance-bond requirement will also go a long way toward realizing Milbank’s potential to solve this persistent problem.  

I. INTRODUCTION

In June 2010, Child Protective Services (“CPS”) initiated child neglect proceedings against an anonymous mother and father. The proceedings were ostensibly based on two allegations: that the father had abused the mother in the presence of their three children, and that neither parent was ensuring the children’s regular school attendance. CPS obtained a court order directing that the children be placed in the temporary custody of their grandmother, and the court issued a temporary order of protection against the father. In August 2010, the

* J.D. Candidate, Brooklyn Law School, 2013; B.A., Pace University, 2008. I would like to thank Professor Cynthia Godsoe, Rebeccah Golubock Watson, William Denker, and the entire staff of the Brooklyn Law School Journal of Law and Policy for their invaluable editorial assistance. I would also like to thank Desmond Rozario, and my parents, Marisa and James Perrone, for their continuous support and encouragement.

1 In re. David G., 909 N.Y.S.2d 891, 894 (Fam. Ct. 2010). The opinion refers to the local child protective agency as New York City Children’s Services, which is more commonly known as the Administration for Children’s Services (“ACS”). However, since this Note also examines child neglect cases outside of New York City, for the sake of consistency I will use the term CPS to refer to all child protective services agencies in New York State.

2 Id.

3 Id.
mother requested a Family Court Act section 1028 hearing\(^4\) for the return of her son, David.\(^5\) The court ordered that David be immediately returned to his mother’s custody on the condition that she was to cooperate with CPS supervision, enter a domestic violence shelter, enforce an order of protection against the father, and participate in domestic violence counseling.\(^6\)

In compliance with the court’s mandate, the mother moved into a domestic violence shelter with David.\(^7\) Unfortunately, David’s father violated the order of protection by following them to the shelter, and they were forced to leave.\(^8\) During the tumultuous week that followed, the mother violated the court’s order by missing one counseling session and by not informing CPS that she had left the shelter.\(^9\) Indifferent to the circumstances surrounding the mother’s brief lapse in compliance, CPS placed David in foster care, this time without a court order.\(^10\)

The next day, the court held a Family Court Act section 1027 hearing\(^11\) to determine whether David was in “imminent risk” of danger such as to warrant removal.\(^12\) CPS argued that David was at risk because “of the possibility that the mother might decide to return to the father.”\(^13\) Yet, CPS did not offer any concrete evidence to support this allegation.\(^14\) CPS even admitted that before being forced to leave the shelter, the mother

---

\(^4\) See N.Y. JUD. CT. ACTS LAW § 1028(a) (McKinney 2009) (“Upon the application of the parent . . . the court shall hold a hearing to determine whether the child should be returned . . . .”).

\(^5\) David G., 909 N.Y.S.2d at 894.

\(^6\) Id. at 894–95.

\(^7\) Id. at 895.

\(^8\) Id.

\(^9\) Id.

\(^10\) Id.

\(^11\) See N.Y. JUD. CT. ACTS LAW § 1027(b)(i) (McKinney 2009) (stating that for CPS to remove a child without a court order, such removal must be “necessary to avoid imminent risk to the child’s life or health”).

\(^12\) David G., 909 N.Y.S.2d at 895–96.

\(^13\) Id.

\(^14\) Id. at 896.
had been in total compliance with the court’s command.\textsuperscript{15} Nevertheless, a CPS caseworker testified that the mother’s breach cast doubt on her credibility and demonstrated that she could not be trusted to obey court orders.\textsuperscript{16}

The court ultimately concluded that CPS had not met its burden of proof and had contravened the basic precepts of \textit{Nicholson v. Scoppetta} by removing David from his mother’s care.\textsuperscript{17} In \textit{Nicholson}, the Court of Appeals of New York held that victims of domestic violence cannot be found guilty of neglect solely because their children have witnessed their mothers’ abuse.\textsuperscript{18} While the \textit{David G.} court immediately returned David to his mother, it did not dismiss the neglect proceeding.\textsuperscript{19} Moreover, David was only paroled to his mother on the condition that she was to cooperate with CPS supervision and referrals for domestic violence services while the neglect case was ongoing.\textsuperscript{20}

The case of \textit{David G.} is troublesome for a number of reasons. First, CPS’s primary basis for depriving the mother of custody appears to be her children’s exposure to the abuse she

\begin{footnotes}
\footnotetext{15}{Id.}
\footnotetext{16}{Id.}
\footnotetext{17}{Id. at 901; see also Nicholson v. Scoppetta, 820 N.E.2d 840, 853 (N.Y. 2004) (“[E]mergency removal is appropriate where the danger is so immediate, so urgent that the child’s life or safety will be at risk before an ex parte order can be obtained. The standard obviously is a stringent one.”); see also infra Part III (discussing the impact of Nicholson on child neglect proceedings against battered mothers in New York).}
\footnotetext{18}{Nicholson, 820 N.E.2d at 844. Throughout this Note, I refer to domestic violence victims as women and batterers as men for the sake of consistency and to reflect the fact that the overwhelming majority of domestic violence victims are indeed women. \textit{See Domestic Violence Facts, NAT’L COAL. AGAINST DOMESTIC VIOLENCE} (July 2007), http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf (stating that 85\% of domestic violence victims are women); \textit{Intimate Partner Violence in the U.S.}, \textit{BUREAU OF JUSTICE STATISTICS}, http://bjs.ojp.usdoj.gov/content/intimate/victims.cfm (last modified Apr. 4, 2012) (stating that between 1976 and 2005, intimate partners committed 30\% of homicides against females versus 5\% of males).}
\footnotetext{19}{\textit{David G.}, 909 N.Y.S.2d at 901.}
\footnotetext{20}{Id.}
\end{footnotes}
suffered at the hands of their father. While CPS also accused the mother of failing to ensure that her children regularly attended school, the court opinion does not articulate any support for that allegation. Furthermore, the mother is only ordered to comply with domestic violence services. Second, the father’s violation of the order of protection was the impetus behind CPS placing David in foster care, despite the mother’s best efforts to keep her and David safe. The caseworker who testified focused narrowly on the mother’s lapse in compliance, and did not consider that the mother fled the domestic violence shelter—which she had entered at the court’s direction—in order to avoid further abuse. Finally, it is unclear on what grounds the family court kept the neglect proceeding open, because it did not elaborate on its additional reasons for suspecting her of neglect, as required by Nicholson. Thus, despite having admonished CPS for violating Nicholson by removing David, the court seemingly continued the neglect case against the mother primarily because she was a victim of domestic violence.

This Note argues that CPS agencies in New York contradict the policy goals of Nicholson when they remove children from their nonviolent parents chiefly due to the children’s exposure to domestic violence, despite the presence of other, usually minor charges. In addition, this Note contends that, under Nicholson, family courts should dismiss these neglect proceedings if they cannot articulate a separate, credible ground for suspecting the mother of neglect. Part II of this Note describes the path of a CPS case in New York, exploring the various ways it can travel through the family court system. Part III discusses the landmark Nicholson case and why charging battered mothers with neglect is problematic. It also considers the role class and gender may play in the child welfare system and analyzes the current flaws

---

21 *Id.* at 894.
22 *See id.*
23 *Id.* at 901.
24 *Id.* at 895.
25 *Id.* at 896.
26 *See David G.*, 909 N.Y.S.2d. 891.
27 *See id.*
in CPS practice. Part IV examines court decisions post-
_Nicholson_ which suggest that its vision has yet to be realized and
argues that in order to more effectively further the goals of
_Nicholson_, family courts must clearly delineate their
consideration of the _Nicholson_ factors in neglect proceedings
against battered mothers. Finally, Part V proposes holistic
solutions for change that will require the cooperation of CPS and
New York family courts, as well as increased community
support for families affected by domestic violence.

II. THE PATH OF CHILD ABUSE OR NEGLECT CASES IN
NEW YORK STATE

CPS cases begin when someone calls a report of suspected
child abuse or neglect to a hotline operated by the New York
State Central Register of Child Abuse or Maltreatment
(“SCR”). If the SCR finds sufficient cause to suspect abuse or
neglect, they will send the report to the local child protection
agency. Next, a caseworker will have twenty-four hours to
initiate and sixty days to complete an investigation to determine
the accuracy of the report. During the investigation, the
caseworker will assess the condition of the child’s home and
interview the child’s parents and any other person with
potentially vital information concerning the child’s well-being.
At the end of the investigation the caseworker will either declare
the report to be “unfounded” or “indicated” (i.e. accurate).

---

28 N.Y. Soc. Serv. Law §§ 422(1), 422-a (McKinney 2010); N.Y.
Comp. Codes R. & Regs. tit. 18, § 432 (2012); see also
INMOTION & BROOKLYN BAR ASS’N VOLUNTEER LAWYERS PROJECT, ABUSE AND NEGLECT
CASES IN NEW YORK STATE 5 (2002) [hereinafter ABUSE AND NEGLECT
CASES], available at http://www.inmotiononline.org/assets/pdfs/TheBasics
Series_English/Abuse_and_Neglect.pdf.

29 Soc. Serv. §§ 415, 422.2(b); Comp. Codes R. & Regs. tit. 18, §
432.2(b)(2); see also ABUSE AND NEGLECT CASES, supra note 28, at 5.

30 Comp. Codes R. & Regs. tit. 18, §§ 432.2(b)(3), 432.3(k); see also
ABUSE AND NEGLECT CASES, supra note 28, at 6.

31 Comp. Codes R. & Regs. tit. 18, §§ 432.2(b)(3), 432.3(k); see also
ABUSE AND NEGLECT CASES, supra note 28, at 6.

32 Comp. Codes R. & Regs. tit. 18, § 432.2(b)(3)(iv); see also ABUSE
AND NEGLECT CASES, supra note 28, at 6.
When a report is indicated, CPS may bring child protective proceedings against the parents by filing a petition under Article 10 of the Family Court Act.\(^{33}\) CPS may either commence such proceedings while the investigation is pending, or if the report is deemed indicated, after the investigation is complete.\(^{34}\) Shortly thereafter, the court must hold a preliminary hearing to evaluate whether the child’s interests should be protected while the final order of disposition is pending.\(^{35}\) CPS has the burden of proving that removal is necessary “to avoid imminent risk to the child’s life or health.”\(^{36}\) The court must consider whether CPS made reasonable efforts to prevent the need for removal and whether removing the offending parent from the child’s home via an order of protection would lessen the risk to the child.\(^{37}\)

There are other avenues available to CPS and the family courts if there is not enough time to file a petition and hold a preliminary hearing.\(^{38}\) For instance, the court may issue an order of removal at an expedited preliminary hearing.\(^{39}\) However, if CPS determines that the child is in such immediate danger that there is not enough time for the expedited preliminary hearing, it may remove a child from its parents without a court order.\(^{40}\) When CPS conducts an emergency removal without a court order, the child’s parents may apply for a Family Court Act section 1028 hearing to secure their child’s return.\(^{41}\) This hearing


\(^{34}\) See Jud. Ct. Acts § 1032(a); Soc. Serv. §§ 397(2)(b), 424(11); see also, e.g., Nicholson v. Williams, 203 F. Supp. 2d 153, 167 (E.D.N.Y. 2002).

\(^{35}\) Jud. Ct. Acts § 1027(a); see also, e.g., Nicholson, 203 F. Supp. 2d at 167.

\(^{36}\) Jud. Ct. Acts § 1027(b)(i); see also, e.g., Nicholson, 203 F. Supp. 2d at 167.

\(^{37}\) Jud. Ct. Acts § 1027(b); see also, e.g., Nicholson, 203 F. Supp. 2d at 167.


\(^{41}\) Jud. Ct. Acts § 1028; see also, e.g., Nicholson, 203 F. Supp. 2d at
must take place within three days of the parents’ application. At this hearing, the court may decide to “parole” the child to his or her parents while the proceeding continues. The child is then released into the temporary custody of his or her parents, although usually with broad oversight by CPS.

After the preliminary issues have been resolved, the next step in the court proceedings is the fact-finding stage. This is generally a long and arduous process. Nicholas Scoppetta, the previous Commissioner of New York City’s Administration for Children’s Services has stated, “Once you are in the Family Court, you are in it very often for many months before you can get to the substance of the case . . . .” Therefore, child protective caseworkers play a crucial gate-keeping role in ensuring that the only cases entering the family court system are the ones that belong there.

III. NICHOLSON’S ATTEMPT TO DECOUPLE DOMESTIC VIOLENCE AND NEGLECT

New York State’s definition of neglect has undergone a significant evolution in recent years. Section 1012 of the Family Court Act defines a neglected child as one “whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care.” For years, courts could find battered mothers to be neglectful based on their perceived failure to protect their children from exposure to domestic violence. In fact, CPS could remove children from

168.

42 JUD. CT. ACTS § 1028; see also, e.g., Nicholson, 203 F. Supp. 2d at 168.
44 Id.
45 Id.
46 Id.
47 Id.
49 See The “Failure to Protect” Working Grp., Charging Battered Mothers with “Failure to Protect”: Still Blaming the Victim, 27 FORDHAM
their mother’s custody in cases where the only allegation was that the mother herself had been abused.\textsuperscript{50}

The landmark \textit{Nicholson} decision dramatically changed the definition of neglect in New York by holding that battered mothers could not be found neglectful solely because their children were exposed to domestic violence.\textsuperscript{51} The \textit{Nicholson} court determined that removing children from their nonviolent parents unfairly punishes battered mothers\textsuperscript{52} and, when it comes to the child’s welfare, may in fact do more harm than good.\textsuperscript{53} This decision was an important first step for New York in moving away from a child welfare system that often blamed victims for their abuse instead of holding batterers accountable.

In order to comply with \textit{Nicholson}, local CPS agencies must prove by a preponderance of the evidence that the child’s “physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired” and that this is “clearly attributable” to the mother’s failure to exercise a “minimum degree of care” toward the child.\textsuperscript{54} The court emphasized that the statute merely required a “‘baseline minimal degree of care’—not maximum, not best, not ideal—and the failure must be actual, not threatened.”\textsuperscript{55} It is important to note that this “minimal degree of care” is a very low bar.\textsuperscript{56} Furthermore, in determining whether a parent has met this nominal standard of care, courts must objectively consider


\textsuperscript{51} Nicholson v. Scoppetta, 820 N.E.2d 840, 853 (N.Y. 2004) (“Plainly, more is required for a showing of neglect under New York law than the fact that a child was exposed to domestic abuse against the caretaker.”).


\textsuperscript{53} Id. at 204.

\textsuperscript{54} Nicholson, 820 N.E.2d at 845–46.

\textsuperscript{55} Id. at 846 (citing \textit{In re Hofbauer}, 393 N.E.2d 1009 (N.Y. 1979)).

\textsuperscript{56} Id.
whether “a reasonable and prudent parent would have so acted, or failed to act, under the circumstances then and there existing.”

When judging whether a battered mother has acted reasonably under the circumstances, courts must consider the risks attendant to leaving, if the batterer has threatened to kill her if she does; risks attendant to staying and suffering continued abuse; risks attendant to seeking assistance through government channels, potentially increasing the danger to herself and her children; risks attendant to criminal prosecution against the abuser; and risks attendant to relocation.

Furthermore, the determination of whether a battered mother has failed to exercise the requisite basic level of care “is necessarily dependent on facts such as the severity and frequency of the violence, and the resources and options available to her.”

Additionally, each case must be individually assessed to determine “whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. [The court] must balance that risk against the harm removal might bring . . . .” In addition, the court must evaluate whether the need for removal could be eradicated by offering the mother and child preventive services. Thus, after Nicholson, CPS caseworkers may no longer charge battered mothers with neglect solely because their child was exposed to domestic violence.

\[57\] Id. (citing In re Jessica YY., 685 N.Y.S.2d 489, 491 (App. Div. 1999)).

\[58\] Id.

\[59\] Id. (citing In re Melissa U., 538 N.Y.S.2d 958 (App. Div. 1989)).

\[60\] Id. at 852.

\[61\] Id.

\[62\] Id. at 844. However, the court cautioned that a battered mother could still properly be charged with neglect where “a preponderance of the evidence establishes that the children were actually or imminently harmed by reason of her failure to exercise even minimal care in providing them with proper oversight.” Id. at 847. The court offers several examples where additional factors are present other than the children’s mere exposure to the domestic violence. Id.
A. Charging Battered Mothers with Neglect is Problematic

An overview of the complexities underlying domestic violence is helpful to understanding the importance of Nicholson’s vision that battered mothers should not be blamed for the abuse they have endured. Various theories have been propounded to explain the psychological effects of domestic violence on battered women. The New York State Office for the Prevention of Domestic Violence (“OPDV”) defines domestic violence as a pattern of verbal, psychological, and/or physical abuse by one person in order to control the other person in an intimate relationship. Abuse, therefore, need not be physical in order to have an impact.

Before the inception of the Battered Women’s Movement in the late 1960s and early 1970s, domestic violence was considered a private family matter and therefore “noncriminal.” Police officers responding to domestic violence calls would often “tell the husband to ‘cool off’ by ‘taking a walk around the block.’” The Battered Women’s Movement shed light on the severity of domestic violence and developed community resources to assist battered women. Today, the Manhattan District Attorney’s Office describes domestic violence as “a public health crisis that affects us all.” In 2010, New York City police responded to 249,440 domestic violence

---

63 See generally Nicholson, 820 N.E.2d 840.
66 See id.
68 Id.
69 Id. at 1666.
incidents, which translates to about 680 incidents per day. Moreover, New York State’s OPDV estimates that intimate partner violence accounts for 3% of all violence against males and 23% of all violence against females in the United States.

Dr. Lenore Walker, a clinical and forensic psychologist, developed the “Cycle Theory of Violence” in an effort to explain the complex interpersonal dynamics of an abusive relationship. According to this theory, a recurring battering cycle is composed of three phases. The first phase is characterized by “a gradual escalation of tension” through the batterer’s verbal or physical abuse of his partner. During this phase, the woman learns to walk on eggshells to avoid angering her abuser. She tries her best to pacify him, but her inability to predict his responses leads to the creation of “learned helplessness.” Dr. Walker defines “learned helplessness” as “having lost the ability to predict that what you do will make a particular outcome occur,” and argues that because such coping behavior is learned, it can also be unlearned. The second phase occurs after the batterer has created such an atmosphere of tension that an explosion of physical violence is inescapable without intervention. Finally, in the third phase, the batterer may express remorse for his physical violence and promise to never do it again. He may be loving and attentive, reminding

---

74 Id. at 126.
75 Id.
76 Id.
77 Id.
78 Id. at 116.
79 Id. at 126–27.
80 Id. at 127.
the woman of why she fell in love with him.\textsuperscript{81} Even if the batterer does not express any remorse, the absence of violence and tension alone may reinforce the battered woman’s belief that her partner’s violent behavior was an aberration.\textsuperscript{82}

The theory of “traumatic bonding,” developed by sociologists Donald Dutton and Susan Painter, provides additional insight into the dynamics of an abusive relationship.\textsuperscript{83} It refers to “the development and course of strong emotional ties between two persons where one person intermittently harasses, beats, threatens, abuses or intimidates the other.”\textsuperscript{84} According to traumatic bonding theory, abusive relationships are characterized by a mutually dependent power imbalance and intermittent abusive episodes.\textsuperscript{85} The woman views the first violent incident as an aberration; she does not believe her partner will hurt her again.\textsuperscript{86} As the abuse become more frequent and severe, the woman comes to believe that it is her fault and that it is within her power to prevent it from happening again.\textsuperscript{87} By the time the woman realizes that she cannot control the abuse, the relationship’s power imbalance has intensified; she feels dependent on her batterer, and her batterer in turn needs her to maintain his sense of dominance.\textsuperscript{88}

Furthermore, many actions taken by a battered mother may be the result of rational, reasoned choices as to what will best protect her and her children.\textsuperscript{89} For example, an abused woman

\begin{itemize}
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{Id.} at 126.
\item \textsuperscript{84} \textit{Id.} at 146–47.
\item \textsuperscript{85} \textit{Id.} at 147–48.
\item \textsuperscript{86} \textit{Id.} at 151.
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{89} Amy R. Melner, \textit{Rights of Abused Mothers vs. Best Interest of Abused Children: Courts’ Termination of Battered Women’s Parental Rights Due to Failure to Protect Their Children From Abuse}, \textit{7 S. CAL. REV. L. & WOMEN’S STUD.} 299, 309 (1998).
\end{itemize}
may reasonably believe that she will be in more danger if she leaves the relationship than if she stays.\textsuperscript{90} Indeed, this is often accurate, as a battered woman is at a higher risk of severe or fatal injury after leaving her abuser.\textsuperscript{91} In addition, lack of financial resources, social support, an inadequate number of domestic violence shelters, and fear of losing her children may cause a battered woman to rationally decide that it will be better for her and her children if she stays in the relationship.\textsuperscript{92}

Moreover, in order to properly ascertain the impact domestic violence has on a battered woman, the abuse should be viewed as an ongoing, continuous event.\textsuperscript{93} Even when there is a lull in the physical violence, an abused woman lives with the fear and certainty that such violence could erupt at any moment.\textsuperscript{94} Her fear is derived not just from the immediate threat her batterer is presenting, but also from what she knows he is capable of.\textsuperscript{95}

While courts and caseworkers may assume that the psychological manifestations of abuse are fundamental to the character of battered mothers, such symptoms generally disappear after the abusive relationship is over.\textsuperscript{96} While some battered women may continue to enter into violent relationships, the reality is that many do not.\textsuperscript{97} In fact, Dr. Walker’s research into the behavior of domestic violence victims discovered that when beginning new relationships, “[battered women] were extremely careful not to choose another violent [man].”\textsuperscript{98}

While she is in the grip of an abusive relationship, however, a battered woman may feel as though she cannot escape.\textsuperscript{99} This psychological response should be attributed to “the nature of the relationship, not the nature of the woman.”\textsuperscript{100} Behavior that may

\textsuperscript{90} \textit{Id.} at 309–10.
\textsuperscript{91} \textit{Stark, Coercive Control, supra} note 64, at 115.
\textsuperscript{92} \textit{Melner, supra} note 89, at 308–15.
\textsuperscript{93} \textit{Id.} at 305.
\textsuperscript{94} \textit{See id.}
\textsuperscript{95} \textit{See id.}
\textsuperscript{96} \textit{Id.} at 309.
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.} (quoting \textit{Lenore E. Walker, The Battered Woman} 28 (1979)).
\textsuperscript{99} \textit{Id.} at 308.
\textsuperscript{100} \textit{Id.}
seem irrational to an outsider could instead be “a terrified human being’s normal response to an abnormal and dangerous situation.”\textsuperscript{101} A batterer creates a “generalized feeling of powerlessness” in his victim.\textsuperscript{102} He may force her to choose between her own safety and the safety of her children, or threaten to hurt her if she reports his violence to the authorities.\textsuperscript{103} Thus, courts should not assume that the actions a battered woman takes while she is in an abusive relationship are evidence of her true character.\textsuperscript{104}

In addition, it is important to view domestic violence within the broader framework of societal gender inequality.\textsuperscript{105} Narrowly focusing on the individual correlates of intimate partner violence ignores the fact that partner abuse does not occur in a vacuum; rather, it is “a chosen behavior occurring in a larger structural context.”\textsuperscript{106} Susan Schechter, a leading feminist scholar, argues that domestic violence should be viewed as a collective problem caused by women’s oppression, rather than as one of individual victimization.\textsuperscript{107} Similarly, Dr. Stark, a nationally recognized expert on domestic violence and an expert witness for the plaintiffs in \textit{Nicholson}, argues that while trauma theory is helpful to explain why many battered women fail to effectively utilize support services, it is also dangerous because it shifts the focus from the batterer’s actions to the victim’s response, which may reinforce the stereotype that victims of domestic violence are at least partially to blame for their abuse.\textsuperscript{108}

\textsuperscript{101} Id. (quoting \textsc{Lenore E. Walker}, \textsc{Terrifying Love: Why Battered Women Kill and How Society Responds} 180 (1990)).
\textsuperscript{104} See generally id. at 713–16.
\textsuperscript{105} \textsc{Larry L. Tifft}, \textsc{Battering of Women: The Failure of Intervention and the Case for Prevention} 16 (1993).
\textsuperscript{106} Id. at 13.
\textsuperscript{107} See \textsc{Susan Schechter}, \textsc{Women and Male Violence} 252 (1982).
\textsuperscript{108} Stark, \textsc{Coercive Control}, \textit{supra} note 64, at 116–17.
This shift in accountability is amplified by the fact that child protective workers are often encouraged, and indeed may find it easier, to deal with the nonviolent parent. Professor Leigh Goodmark, of the University of Baltimore School of Law, suggests that “this reluctance may stem from fear of the perpetrator, the difficulty of tracking the perpetrator down, lack of appropriate services to offer batterers, or the absence of a familial relationship between the perpetrator and the child.” However, basing a neglect charge against a battered woman on her abusive partner’s actions only furthers the power imbalance of the relationship; the court sends her the message that she is a “bad mother” and that she is at least partly to blame for what has transpired. Yet, in families affected by domestic violence, both mother and child are victims at the offender’s hands. Therefore, it is imperative that CPS and family courts do not punish battered mothers for being abused. Family courts in particular must take care to ensure that CPS has an alternative basis for any neglect charges it may bring against battered women.

B. Role of Class and Gender in the System’s Treatment of Battered Mothers

Some suggest that there are two separate child welfare systems: one for families that are poor, and one for families that are not. Whereas the custody battles of upper-class families are


110 Id. at 620.

111 See Justine A. Dunlap, Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect, 50 LOY. L. REV. 565, 588 (2004) (“The system and the batterer have the same refrain towards the mother: it—whatever ‘it’ is—is her fault.”).

112 See Stark, Good People, supra note 103, at 715–16.

largely dealt with in private divorce actions, the problems of low-income families are usually relegated to public child protective agencies, such as CPS. 114 This is illustrated by the disparity in treatment of private custody and visitation disputes in Supreme Court, where access is largely limited to families who can afford private counsel, and actions brought in family courts, which are overwhelmingly against or on behalf of low-income persons. 115 The stark contrast between the legal system’s treatment of affluent and indigent children has existed in America since the inception of the child welfare movement, and continues today. 116

Domestic violence cases that would ordinarily result in a report of neglect if handled by CPS may not have the same result when they arise in the context of a private civil action. For instance, in J.R v. N.R., a father filed a petition in Richmond County Supreme Court seeking visitation with his seventeen-year-old daughter, Nicole. 117 The mother alleged that she had been physically, sexually, and emotionally abused by her husband throughout their marriage. 118 She also testified that her husband had physically abused Nicole on more than one occasion. 119 In one such incident the father kicked Nicole and broke her finger. 120 When the mother took Nicole to the doctor, however, she lied about the source of Nicole’s injuries and directed Nicole to do the same because she was scared that Nicole would be placed in foster care if she told the truth. 121 The

114 Id.
118 Id. at *8–9.
119 Id. at *10–13, *16.
120 Id. at *12–13.
121 Id.
court stated that, while it “obviously does not condone Mother’s failure to tell the truth about how Nicole’s finger was injured, [it] does credit Mother’s testimony that Father told her that her children might well be removed if another incident was reported.”122 In 2003, the father was excluded from the home via an order of protection after the mother came home from work to find that her husband had beat Nicole “black and blue” for “telling on him.”123 Yet, the J.R. court does not mention the mother ever being investigated for neglect, despite her testimony that her husband had been physically abusive towards her and the children throughout their approximately sixteen year marriage.124

On the contrary, parties in family court do not seem to receive such sympathetic treatment. For example, in David G., the family court did not dismiss a neglect proceeding against a mother whose only potentially viable offense was not ensuring her children’s regular school attendance.125 Moreover, in In re Christopher B., the family court found a battered mother guilty of neglect for not being cognizant of the impact her batterer’s substance abuse had on her children.126 These cases serve as examples of the disparate treatment that may occur when neglect allegations arise in the context of neglect proceedings initiated by CPS versus those that arise in private divorce actions.127

In addition, fathers may be pardoned for situations that would ordinarily result in neglect proceedings against mothers. Professor Jane Murphy, of the University Of Baltimore School Of Law, argues that because mothers are more likely to be the primary caretakers of children, they are more likely than fathers to be indicated in child neglect reports.128 This is partly due to

122 Id. at *13.
123 Id. at *11.
125 In re David G., 909 N.Y.S.2d 891, 894, 901 (App. Div. 2010); see supra Introduction.
126 In re Christopher B., 809 N.Y.S.2d 202, 202 (App. Div. 2006); see infra Part IV.
127 See ROBERTS, supra note 113, at 26–27.
128 Jane C. Murphy, Legal Images of Motherhood: Conflicting Definitions
mothers’ increased visibility to schools, doctors, and others likely to report abuse, and the expectation that even if the father is the perpetrator, the mother should have done something to protect her child.\textsuperscript{129} Fathers, on the other hand, are not expected to be the primary caretakers of their children, and thus the quality of their parenting does not face as much scrutiny.\textsuperscript{130}

For example, in \textit{C.S. v. J.S.}, the husband brought a private divorce action against his wife in the Nassau County Supreme Court, on the grounds of cruel and inhuman treatment.\textsuperscript{131} He alleged that when his wife became pregnant for the second time, she began to engage in a pattern of physical, verbal, and psychological abuse against him, which caused him to feel frightened and humiliated.\textsuperscript{132} In addition, he alleged that his wife grabbed their oldest child by the neck, pinning her against the wall, and slapped their youngest child in the face, in his presence, causing him to feel “helpless [and] afraid.”\textsuperscript{133} After petitioning for an order of protection, child protective services filed neglect petitions on behalf of the children against their mother.\textsuperscript{134}

Although the husband in \textit{C.S.} admitted that he had witnessed his wife use physical violence against their children and that he had felt powerless to intervene, he does not appear to have been indicated for neglect.\textsuperscript{135} By contrast, in \textit{Green v. Mattingly}, the United States District Court for the Eastern District of New York largely dismissed the claims brought by a battered mother that her and her son’s constitutional rights were violated when


\textsuperscript{129} \textit{Id.} at 718; \textit{see also} Jeanne A. Fugate, Note, \textit{Who’s Failing Whom? A Critical Look at Failure-to-Protection Laws}, 76 \textsc{N.Y.U. L. Rev.} 272, 285–97 (discussing this phenomenon and the gender stereotypes which perpetuate it).

\textsuperscript{130} \textit{See Murphy}, \textit{supra} note 128 at 708; \textit{see also} Fugate, \textit{supra} note 129 at 287–300.

\textsuperscript{131} \textsc{C.S. v. J.S.}, 2009 \textsc{N.Y. Misc. LEXIS} 2697, at *1 (Sup. Ct. June 4, 2009).

\textsuperscript{132} \textit{Id.} at *2–3.

\textsuperscript{133} \textit{Id.} at *5–6.

\textsuperscript{134} \textit{Id.} at *6–7.

\textsuperscript{135} \textit{See id.} at *1, *7.
her son was placed in foster care for four days without her consent.\textsuperscript{136} In chronicling the family court case that served as the basis for the lawsuit, the court detailed how Ms. Green was charged with neglect because her husband had slapped their seven-month-old child in the face.\textsuperscript{137} Ms. Green was living in a homeless shelter at the time of the incident, and immediately notified the authorities upon learning of her husband’s actions.\textsuperscript{138} Despite the fact that her son was returned to her care after four days, Ms. Green remained under CPS supervision for more than one year while the neglect case against her remained open.\textsuperscript{139}

There are many reasons why cases like \textit{J.R.} and \textit{C.S.} are distinguishable from a CPS case, but if the previously mentioned cases are any indication, the mother in \textit{J.R.} and the father in \textit{C.S.} may very well have had their children removed from their care if they had entered the family court through a CPS investigation. In both cases, the nonviolent parents were victims of domestic violence who knew that their partners were physically abusing their children and yet did not immediately contact the authorities.\textsuperscript{140} These cases are examples of situations in which more affluent parents were not charged with neglect, although neglect charges may have been filed against lower-income families.

\textit{C. Persistent Issues in CPS Treatment of Domestic Violence Cases}

\textit{Nicholson} was an important first step for New York family courts and child welfare agencies to move away from a system

\textsuperscript{136} Green v. Mattingly, No. 07-CV-1790 (ENV) (CLP), 2010 U.S. Dist. LEXIS 99864 (E.D.N.Y. Sept. 22, 2010); see also infra Part IV.
\textsuperscript{137} Mattingly, 2010 U.S. Dist. LEXIS 99864, at *8; see also infra Part IV.
\textsuperscript{138} Mattingly, 2010 U.S. Dist. LEXIS 99864, at *8; see also infra Part IV.
\textsuperscript{139} Mattingly, 2010 U.S. Dist. LEXIS 99864, at *14–15; see also Part IV.
that labeled victims of domestic violence neglectful simply because they were abused in front of their children. Yet, the same problems of hasty removal by overburdened caseworkers that existed before Nicholson continue to be at issue today. These problems are particularly apparent in cases where failure to protect is a primary focus of a neglect case against a battered mother.

1. The Crucial Role Played by CPS Caseworkers and the Need for More Stringent Qualifications

Caseworkers have vast discretion in determining whether a child should be removed from his or her primary caretaker for neglect. Unlike child abuse, which can be substantiated by physical evidence, the perceived potential for harm is enough to commence neglect proceedings. Initially, it is entirely up to the investigating caseworker to determine whether such potential for harm exists. In certain situations, the caseworker can even remove the child from his or her home prior to obtaining a court order. Under these conditions, there is a very real danger that caseworkers will impose their subjective values of appropriate child rearing on the families they investigate.

Yet, many caseworkers are not particularly qualified to make these sensitive judgment calls. For example, in New York City, a CPS caseworker need only have a bachelor’s degree with twenty-

---

141 See supra Part II.
142 See ROBERTS, supra note 113, at 55; see also N.Y. COMP. CODES R. & REGS. tit. 18, § 432 (2012); see also supra Part II (detailing the path of child abuse and neglect cases in New York).
143 See N.Y. JUD. CT. ACTS LAW § 1012(f)(i) (McKinney 2009) (defining a neglected child as one “whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired . . . .” (emphasis added)); see also ROBERTS, supra note 113, at 55.
144 ROBERTS, supra note 113, at 55.
145 JUD. CT. ACTS § 1022; see also, e.g., Nicholson v. Williams, 203 F. Supp. 2d 153, 167 (E.D.N.Y. 2002); ROBERTS, supra note 113, at 55 (suggesting that this exception is widely abused by caseworkers).
146 ROBERTS, supra note 113, at 56.
147 Id.
four credits in “any combination of . . . social work, psychology, sociology, human services, criminal justice, education . . . nursing, or cultural anthropology.”148 Worker burnout and high turnover rates are commonplace in child welfare agencies, and as such many caseworkers are inexperienced recent college graduates.149

Moreover, overburdened caseworkers are incentivized to place children in foster care to avoid being held responsible for abuse that occurs after they have taken action to “protect” the child.150 Dorothy Roberts, a renowned expert on issues of race, gender, and the law, argues that “[r]isk-averse authorities are more afraid of making the wrong decision to return a child to an abusive home than of making the wrong decision to keep a child in state custody.”151 For example, while a caseworker that does not remove a child may be vulnerable to disciplinary sanction if the child is later discovered to be abused, caseworkers are rarely blamed for harm inflicted on children in foster care.152

2. The Detrimental Effects of Removing Children Exposed to Domestic Violence

Foster care is not necessarily a better alternative for children deemed to be abused or neglected.153 The act of removal in and of itself is particularly traumatic, even under the best of circumstances.154 Dorothy Roberts argues that removing a child from his or her parents is not only one of the most severe governmental intrusions into a parent’s life, but is also an

149 ROBERTS, supra note 113, at 56.
150 Id. at 122–23.
151 Id. at 122.
152 Id. at 123.
153 See id. at 223 (detailing how the foster care system is in a current state of crisis).
extremely frightening experience for a child.\textsuperscript{155} Children in foster care are often moved to multiple homes, which can negatively impact their sense of security, independence, and self-esteem.\textsuperscript{156} Common reactions to removal include feelings of abandonment and helplessness.\textsuperscript{157} To compensate for this lack of control, children may blame themselves for the separation in an effort to feel that they are still an important part of their parents’ lives or to avoid feeling angry with their parents.\textsuperscript{158} In addition, separated children are often fearful that they will be retaliated against, because they believe that removal is their fault and that they must be punished for it.\textsuperscript{159}

For children exposed to domestic violence, “where the bond to the primary caretaker has already been made fragile by abuse, the trauma of placement can be particularly harsh, evoking powerful feelings of guilt and self-loathing that can leave lasting scars.”\textsuperscript{160} Children that have been exposed to domestic violence “often experience their immediate universe as unpredictable and unstable.”\textsuperscript{161} Children may also perceive their removal as a punishment.\textsuperscript{162} They may experience anxiety concerning the battered parent’s safety and guilt that their absence has left them unprotected.\textsuperscript{163} Thus, the negative effects removal has on a child must be considered along with the dangers of child maltreatment.\textsuperscript{164} Removing these children from their nonviolent parents often re-victimizes them; in addition to the trauma inflicted on them by

\begin{itemize}
  \item \textsuperscript{155} ROBERTS, supra note 113, at 17.
  \item \textsuperscript{156} Id. at 239.
  \item \textsuperscript{157} NER LITTNER, CHILD WELFARE LEAGUE OF AMERICA, SOME TRAUMATIC EFFECTS OF SEPARATION AND PLACEMENT 8 (1973).
  \item \textsuperscript{158} Id.
  \item \textsuperscript{159} Id. at 9.
  \item \textsuperscript{160} Stark, Battered Mother, supra note 154, at 118.
  \item \textsuperscript{161} Id.
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} ROBERTS, supra note 113, at 18; see also Zandra D’Ambrosio, Note, Advocating for Comprehensive Assessments in Domestic Violence Cases, 46 FAM. CT. REV. 654, 660 (2008).
\end{itemize}
their abusive parent, they are now thrust against their will into an unfamiliar situation that may not even be a safer alternative.165

IV. COURT DECISIONS AFTER NICHOLSON SUGGEST THAT ITS VISION HAS YET TO BE REALIZED

A review of neglect proceedings brought by CPS against battered mothers suggests that while CPS and New York family courts may technically be complying with the mandate of Nicholson, they have not fully embraced its underlying spirit.166 Although CPS may no longer bring neglect proceedings against a battered mother solely because she is a victim of domestic violence, there have been a number of post-Nicholson cases in which, despite the inclusion of various relatively minor allegations, the mother’s victimization appears to have been the primary charge.167 In addition, family courts continue neglect proceedings against battered mothers in cases where CPS fails to either meet the requisite “imminent risk” standard necessary for removal, or to provide an alternative ground for suspecting the mother of neglect.168 Usually, the mother is ordered to participate in domestic violence services, pending a final order of disposition, which may not happen for a significant amount of time.169 The following court decisions suggest that Nicholson’s vision has yet to fully be realized in New York family courts.170

David G. is an example of this phenomenon. In that case, the judge admonished CPS for violating Nicholson by conducting a removal from a victim of domestic violence.171 The court found that neither mere speculation that the mother might return to her batterer, nor the father’s violation of the order of protection were sufficient to establish that imminent risk was present,

165 The “Failure to Protect” Working Grp., supra note 49, at 856; see also D’Ambrosio, supra note 164, at 660.
166 See infra Part IV.
167 Id.
168 Id.
169 See, e.g., In re David G., 909 N.Y.S.2d 891, 901 (Fam. Ct. 2010); see also Mandel, supra note 162, at 1145; supra Part IV.
170 See infra Part IV.
171 David G., 909 N.Y.S.2d at 901.
warranting removal. Yet, the court did not articulate its reasoning for keeping the neglect proceeding open and conditioning the mother’s parental custody on her compliance with domestic violence services. While the court could have relied on the allegation that the children were not consistently attending school, the court did not articulate this. Moreover, every condition that the mother was ordered to comply with related to her victimization, despite the court having found that CPS violated Nicholson by removing the child solely because he was exposed to domestic violence. For example, the mother was not ordered to attend any parenting classes to teach her about the importance of sending her children to school. Thus, the primary focus of the neglect proceeding appears to have been the children’s exposure to domestic violence: the exact scenario prohibited by Nicholson.

Similarly, in In re Aiden L, a battered mother was found to have neglected her child by “allowing him to be exposed to an incident involving domestic violence” where the father ransacked the mother’s home looking for money he believed she had stolen from him. As additional evidence of the mother’s alleged neglect, CPS also blamed the mother for the unclean condition of her apartment. The court did not find the mother’s testimony that the apartment’s condition was temporary and due to the father’s rampage to be credible. While the unsanitary condition of the apartment may certainly have been a valid ground on which to find the mother neglectful, the court

172 Id. at 898–99.
173 Id. at 898–900.
174 Id.
175 Id. at 901.
176 See id. (enumerating a number of domestic violence related conditions for return of the children, but none addressing the mother’s parenting).
179 Aiden L., 850 N.Y.S.2d at 671.
180 Id. at 673.
fails to articulate any understanding of the possible connection between the domestic violence and the dirty apartment.\textsuperscript{181} For example, there is no mention in the opinion of whether the mother was unable to clean the apartment because her primary focus was on keeping her child and herself safe from the father’s abuse.\textsuperscript{182} Moreover, while the court faults the mother for allowing the father to have contact with the child, its opinion does not include any analysis of whether the mother reasonably could have concluded that this was a safer course of action for her child than refusing to allow the father into their home.\textsuperscript{183} Of course, it is entirely plausible that even after conducting this more detailed analysis the mother may still have been found neglectful. Yet, in order to further Nicholson’s goal of protecting battered mothers from being blamed for their abuse, it is crucial that the court articulate its consideration of the Nicholson factors when determining whether a battered mother has acted reasonably under the circumstances.\textsuperscript{184}

\textit{In re Aiden L.} shows that the New York courts have not yet embraced the full vision of Nicholson.\textsuperscript{185} \textit{In re Christopher B.} is another case that indicates that the underlying spirit of Nicholson has yet to be realized. In \textit{Christopher B.}, the court found a battered mother guilty of neglect because “the child was exposed to regular domestic violence and regular drug use by the father.”\textsuperscript{186} In addition, the court determined that the mother had no awareness of the impact of the father’s actions on her child.\textsuperscript{187} Yet, the court did not elaborate on the mother’s lack of “awareness”\textsuperscript{188} and did not consider the possibility that the father’s drug use may have either contributed to

\textsuperscript{181} Id.

\textsuperscript{182} See generally Aiden L., 850 N.Y.S.2d 671; see also Copps, supra note 178, at 515.

\textsuperscript{183} See generally Aiden L., 850 N.Y.S.2d 671.

\textsuperscript{184} See Copps, supra note 178, at 515 (“[C]ourts are failing to consider, or at least to articulate their consideration of, the ‘clearly attributable’ causation requirement and the ‘risk’ factors necessary to determine whether a domestic violence victim has provided a minimum degree of care to her children.”).

\textsuperscript{185} See supra Part IV.

\textsuperscript{186} In re Christopher B., 809 N.Y.S.2d 202, 202 (App. Div. 2006).

\textsuperscript{187} Id.

\textsuperscript{188} Id.
or have been an integral part of his physical abuse. The court may very well have been correct in its conclusion that the mother was ignorant of the impact of the father’s substance abuse on the child and that this made her a neglectful parent. However, the opinion was too conclusory, ignoring the analysis that Nicholson requires. Nicholson demands that the court specifically identify why it found the mother’s alleged lack of awareness to be enough to qualify as neglect, in order to ensure that she is not being charged with neglect solely based on her batterer’s actions.

Green v. Mattingly offers further evidence that New York courts fail to realize Nicholson’s vision by continuing neglect proceedings against battered mothers. In this case, a battered mother’s seven-month-old son, T.C., was removed from her care because her husband had slapped him in the face, despite the fact that the mother immediately reported his actions to the authorities. CPS initiated child neglect proceedings against both Ms. Green and her husband, alleging that Ms. Green was aware that her husband had hit their child in the past and that she had willfully not complied with an existing order of protection by living with her husband. Based on these claims, T.C. was removed from his mother’s home and placed in foster care. Ms. Green filed an application pursuant to Family Court Act section 1028 for an order returning T.C. to her custody. After four days in foster care, Family Court ordered that T.C. be returned to his mother immediately, but the neglect proceedings against her remained open for over one year.

Since the facts in Green are distinguishable from those in Nicholson, the Green court was able to avoid Nicholson’s important precedent. In Nicholson, the children had merely been

---

189 See Walker, supra note 73, at 53 (“Alcohol and drug abuse are other high risk factors for potential lethality.”).
192 Id. at *8.
193 Id. at *10–11.
194 Id. at *11–13.
195 Id. at *13.
196 Id. at *14–15.
exposed to domestic violence but had not been physically abused themselves. In contrast, the husband in \textit{Green} had slapped the child in the face, and there was evidence that he had spanked him in the past. Clearly, there is a difference between a child who has only been exposed to domestic violence and one who has actually been physically abused. Yet, in a case such as this, where the abusive partner is the only parent accused of violence and the mother immediately notified the authorities upon learning of her husband’s actions, an analysis of the \textit{Nicholson} factors would help to shed light on why the family court found that the mother had failed to act as “a reasonable and prudent parent” would under the circumstances. For example, it is possible that Ms. Green thought it would be safer for her and T.C. if she allowed her husband to live with them than if she reported him to the police, which might only enrage him. It is vital that New York courts clearly delineate their consideration of the \textit{Nicholson} factors in order to further \textit{Nicholson}’s policy of not blaming victims of domestic violence for their abuse.

Similarly, while a battered mother’s reluctance to leave an abusive relationship may be legitimate grounds for finding her neglectful, compliance with \textit{Nicholson} requires that courts delve beneath the surface in analyzing the mother’s reasons for not wanting her batterer to leave her home. In \textit{In re Angelique L.}, a battered mother was found guilty of neglect after a CPS caseworker discovered that her live-in boyfriend hit her in front of her children. The caseworker filed a neglect petition against the mother based on her alleged failure to protect her children from exposure to repeated incidents of domestic violence, and the children’s report to the caseworker that their mother’s

\begin{itemize}
  \item \textsuperscript{197} \textit{Nicholson} v. Scoppetta, 820 N.E.2d 840, 842-44 (N.Y. 2004); see also supra Part III.
  \item \textsuperscript{198} \textit{Green}, 2010 U.S. Dist. LEXIS 99864, at *11.
  \item \textsuperscript{199} \textit{Nicholson}, 820 N.E.2d at 846 (citing \textit{In re Jessica YY.}, 685 N.Y.S.2d 489, 491 (App. Div. 1999)).
  \item \textsuperscript{200} See supra Part III.A (discussing how a domestic violence victim may be behaving quite rationally, despite how illogical her actions may appear from the outside).
  \item \textsuperscript{201} See generally \textit{In re Angelique L.}, 840 N.Y.S.2d 811 (App. Div. 2007).
\end{itemize}
boyfriend had hit them in the past. The court distinguished this case from Nicholson because here the boyfriend had also hit the children, and the children were considered to be “extremely vulnerable.”

While Nicholson dictates that the children’s “special vulnerabilities” are a proper consideration for courts in determining neglect cases, Nicholson also requires the court to consider additional factors in determining the imminent risk to the child of remaining in the home versus the potential harm of removal. For example, in Angelique L., while the court briefly mentions that the mother did not wish to press criminal charges against her boyfriend and did not want him to leave the home because she depended on him for financial support, it does not integrate this into its analysis of whether the mother failed to exercise a minimal level of care towards her child. However, Nicholson demands that courts undertake this type of analysis in determining whether the mother’s psychological state has been so negatively impacted by the abuse that she cannot be trusted to properly care for her child, or whether providing her with practical services to help her become self-sufficient could alleviate the problem.

These cases serve as examples of the ways in which CPS continues to punish battered mothers for being victims of domestic violence, while technically staying within the parameters of Nicholson. Therefore, when exposure to domestic violence is the primary charge levied against a battered mother in a neglect proceeding, it is imperative that the family courts carefully examine the basis for the supplemental allegation, so as to avoid unfairly blaming victims of domestic violence for their batterers’ actions.

---

202 Id. at 813–15.
203 Id. at 815.
204 See supra Part III.
206 See supra Part III.
V. SUGGESTIONS FOR CHANGE

The Nicholson case was a significant beginning in the evolution of the child welfare system’s response to families affected by domestic violence; CPS may no longer charge battered mothers with neglect solely because they were abused in front of their children. However, more than mere compliance with the literal command of Nicholson is required to bring about real change. To fully achieve the policy vision of Nicholson, both CPS and the family courts must fully embrace its goal of ensuring that the system does not blame battered mothers merely for being victims. In addition, more funding must be dedicated to providing emergency housing to domestic violence victims so that every abused woman who makes the life changing decision to leave an abusive relationship has somewhere safe she can go.

When the primary reason for keeping a neglect proceeding against a nonviolent parent open is that her children have been exposed to domestic violence, CPS must prove that the child’s life or health is at imminent risk warranting removal from the battered mother’s care. Absent this showing, CPS must articulate a separate, credible ground for suspecting impairment or risk of impairment to the child. If CPS fails to meet this burden, family courts should not hesitate to dismiss these neglect proceedings in their entirety. Ordering battered women to comply with domestic violence services within the punitive context of neglect proceedings and to enforce orders of protection against their batterers under threat of losing their children is not the proper way to address the needs of domestic violence victims.

207 Id.
208 See infra Part V.
209 See supra Part II.
210 Id.
211 Id.
A. CPS- and Family Court-Based Solutions

Family courts fail battered women when they continue, post-
Nicholson, to hold them responsible for domestic violence. In
cases where CPS does not meet its burden of proving imminent
risk to the child, courts may still keep proceedings open
although they cannot articulate a separate ground for suspecting
neglect. This practice furthers CPS’s misguided response to
the Nicholson holding. For example, family courts typically
order battered mothers charged with neglect to comply with CPS
referrals for domestic violence shelters, leave their abusers, and
obtain domestic violence counseling. While such orders may
be intended to ensure the safety of the mother and her child,
Professor Justine Dunlap argues that charging battered women
with neglect “re-victimizes the mother by removing her children
and premising their return on her conformity with governmental
edict.” In reality, these orders are more punishing than
supportive because the battered mother is at risk of losing her
children if she does not comply.

In addition, maintaining a neglect proceeding against a
battered mother may reinforce the power and control dynamic
which is typical in abusive relationships. Despite having left
her batterer, the family court steps in and reinforces the
batterer’s control over the mother. The judge generally orders
her to comply with CPS supervision, including referrals for
domestic violence shelters, as well as announced and
unannounced visits to her home. In addition, she will usually
be ordered to enforce an order of protection against her abuser,
who may prevent her from calling the police or threaten to hurt

(2004).

214 See supra Part IV.
215 Id.
216 Dunlap, supra note 111, at 588.
217 Stark, Battered Mother, supra note 154, at 125.
218 Collins, supra note 212, at 755.
219 Id.
220 See supra Part IV.
her children if she reports his violation.\textsuperscript{221} She may even be charged with neglect if her batterer’s violation of the order of protection is the cause of her noncompliance with the court order.\textsuperscript{222}

While family courts may have the best of intentions in issuing these orders, they are nonetheless determined on the basis of the woman’s status as a victim of domestic violence.\textsuperscript{223} If the woman does not comply with these orders, she may lose custody of her children.\textsuperscript{224}

In this way, survivors of domestic violence are blamed for the abuse they have suffered.\textsuperscript{225} Instead, CPS caseworkers should be responsible for obtaining and enforcing orders of protection, rather than battered women.\textsuperscript{226} Batterers would presumably be more obedient to orders of protection likely to be enforced by CPS, as opposed to orders obtained by women who may be too frightened to report their abusers’ violations to the police.\textsuperscript{227} Furthermore, this practice would send a strong message to batterers that they are solely responsible for their actions and that domestic violence will not be tolerated.\textsuperscript{228}

In addition, collaboration between domestic violence advocates and CPS is crucial to adequately training CPS caseworkers to respond to families affected by domestic violence.\textsuperscript{229} Children’s welfare does not exist separate and apart

---

\textsuperscript{221} See supra Part III.A.

\textsuperscript{222} See, e.g.,\textsuperscript{225} In re David G., 909 N.Y.S.2d 891, 899 (Fam. Ct. 2010).

\textsuperscript{223} See supra Part IV.

\textsuperscript{224} Id.

\textsuperscript{225} Collins, supra note 212, at 754–55.

\textsuperscript{226} The “Failure to Protect” Working Grp., supra note 49, at 865 (“[W]here ‘imminent risk’ would be eliminated, ACS should request and the family court should issue an order of protection excluding the batterer from the home.”).

\textsuperscript{227} See Goodmark, supra note 109, at 630 (“Caseworkers should inform batterers that violations of these orders will be taken seriously and could subject them to criminal liability, even imprisonment. . . . [C]hild protection workers and probation officers can collaborate to ensure that batterers comply with the orders and that they face serious consequences when they do not.”).

\textsuperscript{228} The “Failure to Protect Working Grp.,” supra note 49, at 865.

\textsuperscript{229} Amanda J. Jackson, Note, Nicholson v. Scoppetta: Providing a Conceptual Framework for Non-Criminalization of Battered Mothers and
from the welfare of their parents. The child’s welfare is linked to the safety of his or her mother, just as in many ways, the mother’s well being depends on the safety of her child. Therefore, fostering improved communication between domestic violence advocates and child protection workers is a crucial step towards decreasing the number of child neglect cases that are unnecessarily brought against battered mothers, while ensuring the holistic support of the entire family.

B. Increased Emergency Housing Options

In addition, the availability of domestic violence shelters is indispensable in helping victims of domestic violence successfully escape their abusive relationships. Not only do these shelters provide battered women with safe and confidential housing, but they offer vital services such as counseling, legal advocacy, and job training to their residents. Instead of simply providing temporary housing to battered women, domestic violence shelters are intended to provide them with the tools they need to achieve independence. This is critical because battered women often face a catch-22 problem due to their common economic dependence and social isolation. If they leave, they will have nowhere to go and no way to support their children. If they stay, they will be subject to continued

Alternatives to Removal of Their Children From the Home, 33 CAP. U. L. REV. 821, 865 (2005); see also Collins, supra note 212, at 755.

230 See Collins, supra note 212, at 755.
231 Id.
232 Id.
233 Jackson, supra note 229, at 265.
235 See id.
236 STARK, COERCIVE CONTROL, supra note 64, at 262; Stark, Good People, supra note 103, at 713.
237 Mandel, supra note 162, at 1157.
abuse.\footnote{Id. at 1146.} Thus, emergency housing is significant in helping domestic violence victims leave abusive relationships.\footnote{Id. at 1146.}

Unfortunately, there is a dire lack of emergency housing options in New York. Many women are turned away from domestic violence shelters that are at their maximum resident capacity.\footnote{The “Failure to Protect” Working Grp., supra note 49, at 858.} In New York City, if there is no space at domestic violence shelters, victims are referred to the Prevention Assistance and Temporary Housing (“PATH”) office, which will assign them to a regular homeless shelter.\footnote{Domestic Violence and Housing, supra note 234.} Prior to December 2009, the New York City Housing Authority’s (“NYCHA”) Section 8 program enabled victims of domestic violence to obtain rental assistance vouchers.\footnote{Victim Services: Housing, MAYOR’S OFFICE TO COMBAT DOMESTIC VIOLENCE, http://www.nyc.gov/html/ocdv/html/services/housing.shtml (last visited Apr. 4, 2012).} However, due to federal budget cuts, NYCHA has stopped accepting new applications to this program.\footnote{See Manny Fernandez, Thousands Lose Rent Vouchers in Cutback, N.Y. TIMES (Dec. 17, 2009), http://www.nytimes.com/2009/12/18/nyregion/18vouchers.html; see also Applying for Section 8, N.Y.C. HOUS. AUTH., http://www.nyc.gov/html/nycha/html/section8/applicant-info.shtml (last visited Apr. 4, 2012).} Furthermore, over 3,000 previously issued vouchers were revoked.\footnote{Jen Chung, Due to Funding Issues, City Cancels 3,000 Section 8 Vouchers, GOTHAMIST (Dec. 18, 2009, 9:10 AM), http://gothamist.com/2009/12/18/due_to_funding_issues_city_slashes.php; see also NYCHA Revokes More Than 3,000 Section 8 Vouchers, NY1 NEWS (Dec. 18, 2009, 8:51 AM), http://www.ny1.com/content/top_stories/110655/nycha-revokes-more-than-3-000-section-8-vouchers.} Thus, even if a woman enters a domestic violence shelter, she will likely face an uphill battle when she must eventually secure permanent housing.\footnote{Cindy Rodriguez, As Subsidies Dry Up, Homeless Families Struggle to Find Housing, WNYC NEWS (Nov. 1, 2011), http://www.wnyc.org/articles/wnyc-news/2011/nov/01/subsidies-dry-homeless-families-struggle-make-ends-meet/.

If the child welfare system expects battered mothers to successfully leave their abusive partners, it is imperative that the
resources necessary to accomplish this are available to them. Victims of domestic violence should not have to choose between staying with their batterers and becoming homeless.\textsuperscript{246} Therefore, more government funding must be directed to providing emergency housing to survivors of domestic violence in order to facilitate their safe transition into self-sufficiency.

VI. CONCLUSION

\textit{Nicholson} was an important first step in the child welfare system’s recognition that nonviolent battered mothers should not be charged with neglect solely because their children have been exposed to domestic violence.\textsuperscript{247} True change, however, requires more than technical compliance with \textit{Nicholson}’s holding. To fully embrace the underlying spirit of \textit{Nicholson}, family courts must consistently reinforce the \textit{Nicholson} holding by undergoing a comprehensive analysis of battered mothers’ behavior in determining whether they should be deemed neglectful.\textsuperscript{248}

In addition, CPS caseworkers must receive proper training in how to skillfully respond to families affected by domestic violence.\textsuperscript{249} In order to be effective, this training should encompass the complex interpersonal dynamics of an abusive relationship and emphasize that the psychological effects of domestic violence are often temporary and may be rectified in many cases by removing batterers from the home via an order of protection.\textsuperscript{250} Furthermore, there must be sufficient community support for domestic violence survivors who make the difficult decision to leave an abusive relationship.\textsuperscript{251} Increased funding to organizations and government resources providing domestic violence shelters and permanent housing to survivors is crucial in ensuring the safety of battered mothers and their children.\textsuperscript{252}

\textsuperscript{246} \textit{Id.}
\textsuperscript{247} \textit{See supra} Part III.
\textsuperscript{248} \textit{See supra} Part V.A.
\textsuperscript{249} \textit{See supra} Part V.A.
\textsuperscript{250} \textit{Id.}
\textsuperscript{251} \textit{See supra} Part V.B.
\textsuperscript{252} \textit{Id.}
In this way, New York child welfare agencies and family courts will be able to truly hold batterers accountable for their actions and support families affected by domestic violence in their quest towards safety and independence.
PADILLA V. KENTUCKY: BENDING OVER BACKWARD FOR FAIRNESS IN NONCITIZEN CRIMINAL PROCEEDINGS

Alison Syré*

INTRODUCTION

Zhong Lin was born in China, but has lived in the United States for most of his adult life. Until 2007, Mr. Lin lived with his wife and two children, ages eleven and nine, all three of whom are United States citizens. He had strong business interests in the United States, as well as family and community ties, but never became a U.S. citizen. Mr. Lin considers himself to be entirely American, and sees China merely his place of birth. In 2007, Mr. Lin was charged with one count of conspiracy to commit tax fraud. Upon the advice of his attorney, he entered into a plea agreement, under which he agreed to plead guilty in exchange for a sentence of one year of probation, restitution payments to the IRS, and a fine. Mr. Lin fulfilled each element of his sentence, but his attorney failed to

* J.D. Candidate, Brooklyn Law School, 2013; B.A. University of Wisconsin–Madison, 2008. The author would like to thank her family and friends for their support during the writing process. She also wholeheartedly thanks the members of the Journal of Law & Policy for their stellar efforts in preparing this Note for publication, and James Fox, Esq. for sparking her interest in this topic.

2 Id. at *1, *3.
3 Id. at *3.
4 See id.
5 Id. at *1.
6 Id. at *1, *3.
tell him one very important thing: his guilty plea would render him deportable.\(^7\)

Roselva Chaidez’s story has many similarities. Ms. Chaidez is a lawful permanent resident from Mexico, who entered the United States in 1971.\(^8\) She is a fifty-four-year-old grandmother of three, all United States citizens.\(^9\) In 2003, she had been living in northern Illinois for more than twenty-five years.\(^10\) That year, Ms. Chaidez was charged with multiple counts of mail fraud.\(^11\) With the advice of counsel, she pled guilty to two of the counts, and was sentenced to four years probation and ordered to pay restitution and a fine.\(^12\) In 2009, Ms. Chaidez’s citizenship petition was denied, and the Department of Homeland Security placed her in removal proceedings based on her mail fraud conviction.\(^13\) For her plea, Ms. Chaidez “forfeited her right to a trial and ultimately her privilege of remaining a free and lawful permanent resident, living in the only society she knows.”\(^14\) Like Mr. Lin, Ms. Chaidez’s attorney did not inform her that her plea would render her deportable.\(^15\)

Mr. Lin and Ms. Chaidez both challenged their guilty pleas following the Supreme Court’s 2010 decision in *Padilla v. Kentucky*,\(^16\) which held that the failure to inform a defendant of the potential immigration consequences of pleading guilty

\(^7\) See id. at *2 (crediting Lin’s testimony that he “entered into his plea agreement based upon mistaken legal advice only recently revealed”).

\(^8\) Brief of Defendant-Appellee at *3, Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011) (No. 10-3623).

\(^9\) Id.

\(^10\) Id.

\(^11\) Id.

\(^12\) Id.

\(^13\) Id.

\(^14\) Id. at *8–9.

\(^15\) Id. at *7–8.

constitutes ineffective assistance of counsel.\textsuperscript{17} Despite their nearly identical circumstances, however, the courts hearing their petitions came to vastly different outcomes due to a difference in opinion regarding whether \textit{Padilla} applied retroactively.\textsuperscript{18} Mr. Lin filed a writ of \textit{coram nobis} to challenge his federal conviction in the Western District of Kentucky.\textsuperscript{19} Judge Heyburn of that court determined that \textit{Padilla} applied retroactively and, accordingly, could provide relief for Mr. Lin, even though it was decided after Mr. Lin’s conviction became final.\textsuperscript{20} Judge Heyburn granted Mr. Lin’s petition for \textit{coram nobis}, and Mr. Lin is now free to continue living in the United States.\textsuperscript{21} Ms. Chaidez also filed a writ of \textit{coram nobis},\textsuperscript{22} which was initially granted by Judge Gottschall in the Northern District of Illinois.\textsuperscript{23} On appeal in the Seventh Circuit, however, a two-judge majority found \textit{Padilla} did not apply retroactively, making relief unavailable to individuals such as Ms. Chaidez, whose convictions had already become final.\textsuperscript{24} The ruling maintained Ms. Chaidez’s conviction, as well as her deportable status. One can imagine that, had Ms. Chaidez been living in Western Kentucky, rather than Northern Illinois, her case may have turned out very differently.

Deportation may be the most severe part of the penalty that can be imposed on noncitizen defendants.\textsuperscript{25} Yet, until \textit{Padilla},

\begin{itemize}
\item \textsuperscript{17} Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).
\item \textsuperscript{19} See generally Motion to Withdraw Plea, supra note 16.
\item \textsuperscript{20} Id. at *1–2.
\item \textsuperscript{21} Id. at *3.
\item \textsuperscript{22} United States v. Chaidez, 730 F. Supp. 2d 896, 898 (N.D. Ill. 2010), rev’d, 654 F.3d 684 (7th Cir. 2011).
\item \textsuperscript{23} Id. at 904.
\item \textsuperscript{24} Id. at 694. Judge Williams dissented, framing \textit{Padilla} as an application of an old rule (\textit{Strickland}) to new facts. Id. at 694–96 (Williams, J., dissenting). Since Judge Williams was one of only three judges considering Ms. Chaidez’ petition, the result was essentially dictated by the fact that one way of framing \textit{Padilla}’s rule got one more vote than another. See id.
\item \textsuperscript{25} Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).
\end{itemize}
most courts considered deportation a “collateral consequence” of a guilty plea, which an attorney had no duty to discuss with her client. 26 It is clear that, post- Padilla, defendants who do not receive immigration advice from counsel before entering a guilty plea have a viable claim with which they may challenge their conviction. 27 It is unclear, however, whether defendants whose convictions became final before Padilla (such as Mr. Lin and Ms. Chaidez), will also reap the benefit of the Padilla decision. The Supreme Court has yet to address the issue of the retroactive application of Padilla, and it appears unlikely that it will do so in the near future. 28 Thus, it is imperative that lower courts correctly interpret Padilla to apply retroactively, as this interpretation is most accurate and helps correct the injustice suffered by ill-informed and uninformed noncitizen defendants.

This Note argues that an accurate application of Padilla requires courts to properly frame the rule of Padilla so as to apply the decision retroactively. Part IA provides an overview of recent changes to the relationship between criminal and immigration law, as well as a summary of the Supreme Court’s decision in Padilla v. Kentucky. 29 Part IB explores the question of Padilla’s retroactive applicability and the potentially substantial consequences of the slight variation in courts’ framing of Padilla’s rule. 30 Part IC examines the reasoning of courts that have arrived at contradictory interpretations of the rule. 31 Part II recommends two ways for courts to properly apply Padilla to ensure that defendants whose convictions became final

26 See infra Part I.
29 See infra Part IA.
30 See infra Part IB.
31 See infra Part IC.
before the decision realize the benefits of Padilla. Part IIA gives several reasons why it is more appropriate for courts to frame Padilla’s rule as “the right to effective counsel”; Part IIB discusses state courts’ unique ability to give broader effect to Padilla, even if it is deemed “nonretroactive” under federal standards; and Part IIC assures that neither option will greatly disrupt interests of finality. The Note concludes that it is incumbent upon courts to apply Padilla retroactively and to correct the harm to noncitizens whose lives have been upended by their counsels’ failure.

I. THE PADILLA LANDSCAPE AND THE QUESTION OF RETROACTIVITY

Before 2010, most courts recognized a distinction between the criminal and civil consequences of criminal convictions in the case of a non-citizen defendant. The specific elements of a defendant’s sentence were considered criminal or “direct” consequences, whereas the deportation implications of a criminal conviction were considered civil or “collateral” consequences. The latter were considered outside the scope of representation required by the Sixth Amendment. Thus, the failure of a defense attorney to advise his or her client of any civil consequence of a criminal conviction was not grounds for an ineffective counsel claim.


---

32 See infra Part II.
34 Id.
35 United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003).
36 Id.
—created even more overlap between criminal law and civil immigration law. Both dramatically expanded the list of deportable criminal offenses and eliminated judicial discretion over certain types of deportation orders.\textsuperscript{39} In the wake of this legislation, deportation is often a virtually automatic result of criminal conviction.\textsuperscript{40} Additionally, AEDPA and IIRIRA apply retroactively, rendering deportable countless noncitizens that were charged and convicted at a time when deportation was less than a remote possibility.\textsuperscript{41} These results have led many to complain that the laws are unduly harsh.\textsuperscript{42}

\textbf{A. Padilla v. Kentucky}

In its 2010 decision in \textit{Padilla v. Kentucky},\textsuperscript{43} the United States Supreme Court took a significant step in addressing the overlap between criminal and civil consequences, acknowledging the unworkable nature of the “direct” versus “collateral”


\textsuperscript{41} See Morawetz, supra note 39, at 97, 99; see also Andrew Moore, \textit{Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity}, 22 GEO. IMMIGR. L.J. 665, 708–09 (2008) (“[D]ue to the retroactive nature of the grounds of deportation expanded in 1996, noncitizens who pled guilty many years ago will now face immigration consequences if the government becomes aware of their past offenses.”).


\textsuperscript{43} Padilla v. Kentucky, 130 S. Ct. 1473 (2010).
distinction.\textsuperscript{44} In that case, Jose Padilla, a native of Honduras and a Vietnam War veteran, who had been a lawful permanent resident of the United States for more than forty years, pled guilty to drug charges.\textsuperscript{45} As a result, Padilla faced mandatory deportation under U.S. immigration law.\textsuperscript{46} In post-conviction proceedings, Padilla alleged that his counsel had “not only failed to advise him of [deportation consequences] prior to entering his plea, but also told him that he ‘did not have to worry about immigration status since he had been in the country so long.’”\textsuperscript{47} Padilla claimed that, were it not for his counsel’s erroneous advice, he would have insisted on going to trial,\textsuperscript{48} and he thereby challenged the plea’s validity under the ineffective counsel test of \textit{Strickland v. Washington}.\textsuperscript{49} According to \textit{Strickland}, a defendant may challenge the validity of his guilty plea on the basis of ineffective assistance of counsel by showing “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. . . . [And] that the deficient performance prejudiced the defense.”\textsuperscript{50}

The Supreme Court found that, under \textit{Strickland}, the failure of Padilla’s counsel to inform Padilla of the immigration consequences of pleading guilty rendered counsel’s performance constitutionally deficient.\textsuperscript{51} The Court found the distinction between “direct” and “collateral” consequences ill suited for the case because of the close connection between deportation and the criminal process.\textsuperscript{52} Writing for the majority, Justice Stevens explained that defense counsel had an obligation to inform

\begin{itemize}
\item \textsuperscript{44} See \textit{id.} at 1482.
\item \textsuperscript{45} \textit{Id.} at 1477.
\item \textsuperscript{46} \textit{Id.;} see also Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i) (2006).
\item \textsuperscript{47} \textit{Padilla,} 130 S. Ct. at 1478 (citing Padilla v. Kentucky, 253 S.W.3d 482, 483 (Ky. 2008)).
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{50} \textit{Id.} at 687.
\item \textsuperscript{51} \textit{Padilla,} 130 S. Ct. at 1482–83.
\item \textsuperscript{52} \textit{Id.} at 1482.
\end{itemize}
clients of the possible deportation consequences of their plea.\textsuperscript{53} Failure to do so, the Court held, provided the defendant the basis for a claim of ineffective counsel under \textit{Strickland}.\textsuperscript{54} In arriving at this conclusion, the Court considered the changing landscape of federal immigration law over the last ninety years, and noted that

\begin{quote}
[w]hile once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.\textsuperscript{55}
\end{quote}

In light of these changes, the Court considered deportation consequences to be “an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”\textsuperscript{56}

The Court further noted that professional norms already supported the view that defense counsel was obligated to inform her client of the risk of deportation.\textsuperscript{57} These professional standards strongly indicated that counsel’s failure to inform her client rendered her performance ineffective, since, under \textit{Strickland}, the evaluation of whether counsel’s performance is

\textsuperscript{53} Id. at 1483.

\textsuperscript{54} See id. at 1482.

\textsuperscript{55} Id. at 1478 (citing Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

\textsuperscript{56} Id. at 1480.

constitutionally deficient is “necessarily linked to practice and expectations of the legal community.”

B. Retroactivity and the Problem of Framing

Padilla has been lauded by many in the legal community as a great step towards preventing avoidable and wrongful deportations. The decision provides a new avenue of post-conviction relief for noncitizen criminal defendants. Many courts are now struggling, however, with the question of whether the relief secured by Padilla is available to a defendant whose conviction became final before Padilla, but who is still awaiting the deportation resulting from that conviction. Courts are greatly divided on the issue of retroactivity.

Under Teague v. Lane—the seminal case on the retroactive application of new decisions dealing with constitutional criminal

---

58 Id.
procedure—“an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review.”

A new rule may apply retroactively, however, if “(1) the rule is substantive or (2) the rule is a ‘watershed rule’ of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.”

*Padilla* did not place “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,” and therefore did not create a substantive rule. A watershed decision is one that “requires the observance of ‘those procedures that . . . are implicit in the concept of ordered liberty.’” The exception is based on the idea that “time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will [at times] properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.” This exception, however, is very narrow and neither the courts nor this Note advocate its application to *Padilla*. The Court in *Teague* admitted the difficulty in determining whether a case announces a new rule but gave limited guidance, explaining that “a case announces a new rule when it breaks new ground or imposes a new

---

64 Id. (citing Saffle v. Parks, 494 U.S. 484, 495 (1990)).
66 *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 693 (1971)).
67 Id. (quoting Mackey, 401 U.S. at 693–94) (internal quotation marks omitted).
obligation on the States or the Federal Government,” or “if the result was not dictated by precedent existing at the time the defendant’s conviction became final.”

Courts faced with petitions for post-conviction relief relying on a retroactive application of Padilla are all faced with the same question: Does Teague prohibit retroactive application of Padilla? Although the question is the same, courts are coming to starkly different answers; much of the variation may be attributed to a difference in rule framing. In the course of their Teague analyses, courts are framing Padilla’s rule one of two ways—the right to effective counsel or counsel’s requirement to inform clients of the potential immigration consequences. A court’s choice as to how to frame Padilla’s rule effectively determines whether a defendant will be permitted to stay in the country or be removed.

Courts rarely announce a rule in explicit terms; in fact, courts determining whether Padilla created a new rule for Teague purposes appear hesitant to directly identify what exactly Padilla’s rule is. Even in the absence of a clear announcement, however, the way these courts frame Padilla’s rule can be deduced from the language and reasoning they use.

In Doan v. United States, the Eastern District of Virginia considered Justice Alito’s suggestion in his concurrence that defense counsel merely be required to inform clients that a conviction may have immigration consequences, without attempting to explain what those consequences may be. The Doan court described Justice Alito’s recommendation as a “different rule than the one adopted by the majority.” From this, it can be inferred that the Doan court interpreted Padilla’s

---

70 Teague, 489 U.S. at 301.
71 See Wright v. West, 505 U.S. 277, 311 (1992) (“The crux of the analysis when Teague is invoked . . . is identification of the rule on which the claim for [post-conviction] relief depends.”).
74 Id. (emphasis added).
majority rule as requiring counsel to inform clients of the potential immigration consequences of a conviction. After framing the rule as such, the Doan court found that Padilla created a new rule, and was therefore not retroactive.75

The District Court of New Jersey was clearer about what it determined Padilla’s rule to be in U.S. v. Gilbert.76 The Gilbert court concluded that the “Padilla decision requiring counsel to advise a non-citizen client of deportation consequences is a new constitutional rule and should not be applied retroactively to Plaintiff’s 2006 sentence.”77 Like the Doan court, the Gilbert court framed Padilla’s rule in a narrow, fact-specific way. The rule, as characterized by the Gilbert court, was a departure from prior case law and professional norms and was worthy of the “new rule” label.78

Courts applying Padilla retroactively, on the other hand, have framed the rule very differently. In Commonwealth v. Clarke, for instance, the Supreme Court of Massachusetts found guidance in previous United States Supreme Court decisions explaining that the Strickland test “is one which of necessity requires a case-by-case examination of the evidence,”79 and that “application of Strickland in [a] novel context [does] not create [a] new rule.”80 The Clarke court concluded, “Padilla is not a ‘new rule’ but merely an application of Strickland,”81 and consequently applied retroactively under Teague.82 Other courts applying Padilla retroactively use similar reasoning, demonstrating a common choice in framing.83

75 Id. at 605–06.
77 Id. at *3 (emphasis added).
78 See id. (ruminating on the lack of Third Circuit or Supreme Court rulings on whether “an attorney must make a client aware of possible future immigration proceedings . . . ”).
80 Id. (quoting Osagiede v. United States, 543 F.3d 399, 408 n.4 (7th Cir. 2008)).
81 Id. at 901.
82 Id. at 904.
83 See, e.g., People v. Garcia, 907 N.Y.S.2d 398, 404 (Sup. Ct. 2010)
The framing in Doan and Gilbert is typical of courts that have declined to apply Padilla retroactively. These courts framed Padilla’s rule as counsel’s duty to inform clients of deportation consequences of pleas. Since this rule was not “dictated by precedent existing at the time the defendant’s conviction became final,” it is necessarily a new rule and may not be applied retroactively unless it qualifies for one of Teague’s very narrow exceptions. In contrast, courts that have applied Padilla retroactively, such as the Clarke court, frame the rule as the right to effective counsel, as explained in Strickland. According to those courts, the right to counsel does not “break[] new ground or impose[] a new obligation on the State or Federal Government”; rather, it is an old rule and must apply retroactively. As these cases demonstrate, the way that a particular court frames Padilla’s rule effectively dictates the eventual outcome of its retroactivity analysis.

C. Split Among the Courts

Following Padilla, various courts have applied the Teague doctrine to allegations involving plea deals entered into pre-Padilla, and have come to opposite conclusions regarding the retroactive application of the Padilla decision. This variation

(concluding Padilla merely “applied its Strickland precedents to a new set of facts”).


86 Although a few writers advocate application of Teague’s “watershed rule” exception to Padilla, this view is not generally supported. See infra Part I.C.


88 Teague, 489 U.S. at 301.

89 See cases cited supra note 61 (listing cases applying Padilla retroactively and cases not applying Padilla retroactively, all using the Teague retroactivity analysis).
may be due to a difference in framing. Through an examination of specific reasons courts have provided in their retroactivity analysis, it is apparent that the difference in rule framing pervasively dictates results.

Courts that have applied Padilla retroactively have identified Padilla’s rule as the right to effective counsel, as explained in Strickland. Such framing produces an “old rule” for Teague purposes, and therefore requires retroactive application. Some courts have found further support for this conclusion in language from the Padilla opinion. Courts that have declined to apply Padilla retroactively have identified Padilla’s rule as counsel’s requirement to inform clients of the potential immigration consequences of a guilty plea. Such framing produces a “new rule” for Teague purposes, and therefore prohibits retroactive application. These courts have found that neither of the exceptions to Teague’s rule that new rules of criminal procedure do not apply retroactively apply to Padilla.

The majority of opinions applying Padilla retroactively have found that the decision did not create a new rule. The Third Circuit took this approach in United States v. Orocio. In Orocio, the court held that Padilla recognized “that a plea agreement’s immigration consequences constitute the sort of information an alien defendant needs” in order to make decisions “affecting the outcome of the plea process.” Thus, according to the Orocio court, the requirement that counsel inform his or her client of immigration consequences provides nothing new, as “the Court had long required effective assistance of counsel on all ‘important decisions,’ in plea bargaining that could ‘affect[]’ the

---

90 See supra Part I.B.
92 Orocio, 645 F.3d at 638.
outcome of the plea process." The court further noted, “[e]very Strickland claim requires a fact-specific inquiry, but it is not the case that every Strickland ruling on new facts requires the announcement of a ‘new rule.’” Similarly, in United States v. Hubenig, the Eastern District of California noted that “[w]hen the Supreme Court applies a well-established rule of law in a new way based on the specific facts of a particular case, it does not generally establish a new rule.” The Supreme Court of Massachusetts, in Commonwealth v. Clarke, similarly reasoned that Padilla did not create a new rule, but rather had applied “an established constitutional standard on a case-by-case basis, incorporating evolving professional norms (on which the standard relies) to new facts.” In other words, these courts considered Padilla to have simply “applied an old rule in a new context.”

Courts that have found that Padilla did not create a new rule have, in some instances, also had to grapple with the fact that Padilla overruled precedent in their jurisdiction, which opponents of Padilla’s retroactive application argue shows that “the result [of Padilla] was not dictated by precedent existing at the time the defendant’s conviction became final,” and is therefore a new rule under the limited guidance of Teague. Addressing that argument in Hubenig, the Eastern District of California found the existence of conflicting precedent “not dispositive of whether [Padilla] established a new rule for Teague purposes,” because “the standard for determining when a case establishes a new rule is ‘objective,’ and the mere

---

93 Id. (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985); Strickland v. Washington, 466 U.S. 668, 688 (1984)).
94 Id. at 640.
98 See Chaidez v. United States, 655 F.3d 684, 690 (7th Cir. 2011) (“Prior to Padilla, the lower federal courts, including at least nine Courts of Appeals, had uniformly held that the Sixth Amendment did not require counsel to provide advice concerning any collateral (as opposed to direct) consequences of a guilty plea.”).
99 See id. at 688–91.
existence of conflicting authority does not necessarily mean a rule is new.”

Other courts have responded in a similar fashion. Courts that have found that Padilla relief should not be made retroactively available to defendants whose conviction pre-dates Padilla have argued that the decision created a new rule. In United States v. Chapa, the Northern District of Georgia found that Padilla’s result “was not dictated by precedent existing at the time [that a pre-Padilla defendant’s] conviction became final,” because existing precedent nation-wide “dictated the opposite result.” Additionally, in United States v. Perez, the District of Nebraska pointed out that it was not the “prevailing professional norm” to inform a defendant of immigration consequences of his guilty plea.

Other courts have cited Alito’s concurrence and Scalia’s dissent in Padilla as support for classifying Padilla as having announced a new rule. For instance, in Mendoza v. United States, the Eastern District of Virginia pointed to the very existence of Padilla’s concurrence (by Justice Alito) and dissent (by Justice Scalia) as evidence of a new rule. The court highlighted language from Justice Alito’s opinion, noting that the majority “effectively overruled ‘the longstanding and unanimous position of the federal courts . . . that reasonable defense counsel generally need only advise a client about the direct

100 Hubenig, 2010 WL 2650625, at *7 (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000)).


104 Perez, 2010 WL 4643033, at *2 (citing Wiggins v. Smith, 539 U.S. 510, 521 (2003)).

105 Mendoza, 774 F. Supp. 2d at 797.
consequences of a criminal conviction.” Similarly, in United States v. Chang Hong, the Tenth Circuit determined that Padilla created a new rule, finding support for their conclusion in Justice Scalia’s argument that, before Padilla, the Supreme Court “had limited the Sixth Amendment to advice directly related to defense against criminal prosecutions,” and does not require advice on collateral consequences of convictions. These separate opinions, these courts argue, show that “reasonable jurists did not find the rule in Padilla compelled or dictated by the Court’s prior precedent.”

A few academics have taken the position that Padilla created a new rule, but that it qualifies for retroactive application under the “watershed decision” exception to Teague. They reason that, without Padilla’s requirement to inform a defendant of the deportation consequences of his guilty plea, innocent defendants who are pessimistic about their chances at trial will be more likely to submit false guilty pleas in exchange for favorable plea bargains. Thus, “the likelihood of an accurate criminal conviction is seriously diminished.” The watershed exception is extremely narrow, however, and the majority of courts that have found that Padilla created a new rule have refused to classify it as watershed rule.

108 Id.; Mendoza, 774 F. Supp. 2d at 797.
110 See Holahan & Kieffer, supra note 109.
111 Id. at 27.
112 See Beard v. Banks, 542 U.S. 406, 407 (2004) (“[The Supreme Court] has repeatedly emphasized the limited scope of the . . . exception—for ‘watershed rules of criminal procedure . . .’—which ‘is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty.’” (citations omitted) (quoting O’Dell v. Netherland, 521 U.S. 151, 157 (1997))).
113 E.g., United States v. Chang Hong, No. 10-6294, 2011 WL 3805763,
Courts that have held that Padilla created a new rule, before declining to apply it retroactively, have had to determine that it is not a “watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings.” In Chang Hong, the court pointed out the narrowness of the “watershed” exception, and noted that “the [Supreme] Court has rejected every attempt to fit a case within the exception.” In Llanes v. United States, the Middle District of Florida found that Padilla’s requirement that counsel provide immigration advice is less significant than what the Supreme Court envisioned as qualifying as a watershed rule. These courts, and many others, have found that Padilla does not “alter [the Court’s] understanding of bedrock procedural elements essential to the fairness of a proceeding,” and, therefore, does not qualify for Teague’s exception to the general rule that new rules of criminal procedure do not apply retroactively.

Although the Padilla Court did not make an explicit holding on retroactivity, many lower courts interpreting Padilla have pointed to certain language in the Supreme Court’s opinion to

---


116 Llanes, 2011 WL 2473233, at *2 (noting Padilla’s notification requirement is “far different from Gideon’s establishment of the right to counsel”).


119 Absence of an explicit holding of retroactivity by the Supreme Court does not indicate the Court does not intend retroactive application, as the Court may “[establish] principles of retroactivity and [leave] the application of those principles to lower courts.” Tyler, 533 U.S. at 663.
support its retroactive application. 120 Most persuasive, perhaps, has been the Court’s response to the Solicitor General’s concern that its decision would open the “floodgates.”121 The Court stated:

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.122

According to the court in Hubenig, the Supreme Court’s “floodgates” discussion “signaled that it understood its holding in Padilla would apply retroactively.”123 If the Supreme Court did not intend retroactive application of Padilla, the Hubenig court reasoned, the “floodgates” discussion would have been unnecessary.124 Likewise, in People v. Garcia, the Kings County Supreme Court noted the Supreme Court’s treatment of the “floodgate” issue was “reason[] in [itself] to apply Padilla retroactively.”125

II. THE NEED FOR RETROACTIVE APPLICATION

Defendants have very few feasible options following a denial of collateral post-conviction relief; thus, collateral proceedings become paramount. In cases where courts determine that Padilla may not be applied retroactively to finalized convictions, petitioners may theoretically still have recourse through a petition for habeas corpus.126 In reality, however, the “great

122 Id.
125 Garcia, 907 N.Y.S.2d at 402.
“writ” is unlikely to provide relief in these cases. In order to obtain habeas relief, except in extraordinary cases, a petitioner must first exhaust all remedies available in state court. This may include a variety of collateral attacks available through state statutes. Additionally, AEDPA imposes a one-year statute of limitations for filing habeas petitions. The statute begins running when a defendant’s judgment becomes final by the conclusion of direct review. Furthermore, individuals may be deported before their habeas petitions are reviewed, and in such cases, are often barred from habeas relief. Thus, “few

---


128 See, e.g., Lee v. Stickman, 357 F.3d 338, 343–44 (3d Cir. 2004) (exhaustion requirement excused because unresolved petition challenging conviction pended in state court for eight years). But see, e.g., Williams v. Sims, 390 F.3d 958, 963 (7th Cir. 2004) (exhaustion requirement not excused though state delayed because petitioner’s habeas petition was untimely).

129 § 2254(b)(1)(A).

130 See, e.g., N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2005) (motion to vacate judgment).

131 § 2244(d)(1). AEDPA additionally greatly restricts habeas relief by limiting it to cases that have been adjudicated in state court “contrary to, or [in] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” See generally Ursula Bentele, The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents, 14 LEWIS & CLARK L. REV. 741 (2010).

132 § 2244(d)(1). If a defendant unsuccessfully petitions for certiorari in the highest state court or the Supreme Court of the United States, his petition becomes “final by the conclusion of direct review” on the day certiorari is denied, with that day counting as the first day of the one-year limitation. Lisa L. Bellamy, Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations, 32 AM. J. CRIM. L. 1, 13 (2004).


134 Some courts find petitions from deported individuals are moot. See,
will navigate this procedural minefield successfully.”

Therefore, for defendants seeking the protection of *Padilla*, post-conviction challenges may provide the last chance to avoid deportation.

Additionally, there may be a substantial length of time between when a noncitizen’s criminal conviction becomes final and the time he or she is removed. There is a tremendous backlog of cases in immigration courts. In September 2011, 297,551 cases were pending in immigration courts, of which involved individuals rendered deportable by criminal convictions. The average length of time criminal immigration cases had been pending was 403 days. The wait in some courts, however, is significantly longer. The time courts take to render decisions is also very long. Courts took, on average, 166 days to render removal decisions issued in September 2011.

---

138 *Id.* (select “Pending Cases” under “What to graph”; then select “Criminal/Nat. Sec./Terror” under “Charge Type”). The number of pending criminal immigration cases also includes individuals allegedly deportable on national security or terrorism grounds. *Id.*
139 *Id.* (select “Average Days” under “What to tabulate”; then select “Criminal/Nat. Sec./Terror” under “Charge Type”).
140 In Los Angeles, for example, criminal immigration cases pending in September 2011 had been pending, on average, for 699 days. *Id.*
141 *Immigration Court Processing Time by Outcome*, TRAC IMMIGR.,
of 623 days to process removal decisions. This data reveals that criminal immigration proceedings often involve convictions finalized more than a year and a half earlier, and in some cities, such as New York and Los Angeles, three or more years earlier. Thus, the potential class of claimants affected by the retroactivity of Padilla remains huge.

The following section explains why an accurate application of Padilla requires courts to frame its rule as the right to effective counsel. Courts inaccurately framing the rule as counsel’s requirement to inform clients of the potential immigration consequences improperly deny petitioners access to Padilla’s benefits.

A. Courts Must Frame Padilla’s Rule as the Right to Effective Counsel, as explained in Strickland

A proper application of Padilla requires courts to frame Padilla’s rule as the right to effective counsel, and thereby apply the decision retroactively. Strickland is a rule of general application, which is seldom likely to create a “new rule” for Teague purposes. While application of Strickland to new facts may yield a novel result, as was the case in Padilla, such a result does imply creation of a “new rule.” Rather, a case’s fact-specific novel result may be its holding, which courts should not mistake for the case’s broader rule.

1. A Rule of General Application

In his concurring opinion, Justice Alito claimed that the imposition of a duty to inform clients of immigration consequences “marks a major upheaval in Sixth Amendment
law," and pointed out an absence of precedent “holding that criminal defense counsel’s failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant’s Sixth Amendment right to counsel.” Several courts have pointed to this language as evidence that _Padilla_ created a new rule. This reasoning, however, ignores the nature of _Strickland_’s inquiry into whether counsel’s performance was constitutionally effective.

_Strickland_ calls for a fact-centered analysis, requiring “a case-by-case examination of the evidence . . .” It created a rule of general application, “establish[ing] a broad and flexible standard for the review of an attorney’s performance in a variety of factual circumstances.” In his concurring opinion in _Wright v. West_, Justice Kennedy explained the unlikelihood of a rule of general application creating a new rule for _Teague_ purposes: “If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule . . ..” Justice Kennedy made it clear that, in the application of such rules, “it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.” Therefore, rules that rely on case-by-case examinations, such as _Strickland_, may be applied in a variety of circumstances without establishing a new rule for _Teague_ purposes.

---

144 _Id._
147 _Newland v. Hall_, 527 F.3d 1162, 1197 (11th Cir. 2008).
148 _Wright_, 505 U.S. at 308 (Kennedy, J., concurring).
149 _Id._ at 309.
150 _Id._ at 308–09.
Justice Kennedy’s point is well illustrated by several Supreme Court decisions applying *Strickland* to various fact patterns, none of which have been deemed to have created a new rule for *Teague* purposes. In *Williams v. Taylor*, the Court applied *Strickland* to determine that counsel’s failure to introduce known evidence regarding defendant’s borderline mental retardation and troubled childhood constituted ineffective assistance of counsel. Three years later, in *Wiggins v. Smith*, the Court applied *Strickland* to counsel’s failure to investigate their defendant’s dysfunctional background, finding such conduct to constitute ineffective assistance. Yet again, in *Rompilla v. Beard*, the Court applied *Strickland* to find that defense counsel’s failure to sufficiently investigate aggravating factors in the sentencing phase of a defendant’s capital murder trial constituted ineffective assistance, despite suggestions by the defendant’s family that mitigating factors were not present. Despite the fact that these cases created or imposed on defense counsel a set of increased obligations, not one of the cases has been found to have created a new rule. They are, rather, applications of *Strickland*’s articulation of the right to effective counsel, which “can hardly be said [to] . . . ‘break[s] new ground or impose[s] a new obligation on the States.’”

*Padilla* is another in a long line of *Strickland* cases applying an old rule of general application to new circumstances: counsel’s failure to inform a client of deportation consequences following significant changes in immigration law. *Padilla*’s

---

154 *Id.* at 523–27.
156 *Id.* at 383.
157 *Williams*, 529 U.S. at 391 (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)).
158 *See supra* Part I (discussing the changes to immigration law brought by *AEDPA* and *IIRIRA*); *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010) (“*[AEDPA and IIRIRA’s] changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction.”).
pronouncement that an attorney’s failure to inform his or her client of a plea’s deportation consequences constitutes ineffective counsel may have differed from any previous applications of Strickland, but considering the nature of Strickland inquiries, did not establish a new rule. Some courts have argued that Padilla’s application of Strickland is exceptional, as it imposes a duty on defense counsel to advise on collateral consequences. As the Court noted in Padilla, however, “[w]e . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under Strickland.” Padilla simply involved another instance of the familiar pattern of a rule of general application: an old rule applied to new facts, yielding new results.

2. Wide Rules, Narrow Holdings

Courts framing Padilla’s rule as counsel’s requirement to inform clients of immigration consequences of a conviction may be failing to distinguish the case’s “rule” from its holding. Black’s Law Dictionary defines a “legal ruling” as “a ruling on a point of law . . . reached by the judge as a necessary step in the decision,” and a holding as “1. A court’s determination of a matter of law pivotal to its decision,” and “2. A ruling on evidence or other questions presented at trial.” Although these may sound similar, there are meaningful differences between the two. A holding is attached to a particular case, and is often fact-specific. Rules, on the other hand, can be synthesized...

159 Padilla, 130 S. Ct. at 1483.
161 Padilla, 130 S. Ct. at 1481 (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)).
163 Id. at 331.
165 Bentele, supra note 131, at 744 (“[D]efining the holding of a case is less straightforward; those seeking to expand the reach of a precedent will characterize the decision broadly, while one who disapproves of the previous
from multiple cases, and, therefore, often have wider or more general application than holdings. Particularly in the context of Teague’s retroactivity analysis, “rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule.”

With this framework in mind, it appears reasonable, if not necessary, to characterize Padilla’s rule as the more general principle of “the right to counsel,” and its holding as the more fact-specific principle that counsel’s failure to inform clients of deportation consequences constitutes ineffective assistance.

The difference between a case’s holding and its rule for Teague purposes is well illustrated in Lewis v. Johnson. In 1987, Charles Lewis pled guilty to six counts of robbery and nine other criminal offenses in the Pennsylvania Court of Common Pleas, and was sentenced to thirty to sixty years in prison. In the eight years following his conviction, Lewis filed two petitions in Pennsylvania state court for post-conviction relief, alleging that his court-appointed trial counsel was ineffective on a number of grounds, including for failing to file a direct appeal. Both petitions were denied. The court found that relief was precluded by Pennsylvania case law that had held “trial counsel cannot be found ineffective for failing to file a direct appeal when not requested to do so.” In August 2000, Lewis filed a petition for writ of habeas corpus in the District Court for the Western District of Pennsylvania, but his petition was denied. Lewis appealed, relying on Roe v. Flores-Ortega, decided by the Supreme Court two months before he had filed his habeas petition, in which the Court used the outcome will narrow it to its specific facts.”

166 Tennant, supra note 164, at 72.
169 Id. at 649.
170 Id. at 650–51.
171 Id.
172 Id. at 650.
173 Id. at 651.
175 Lewis, 359 F.3d at 651.
Strickland test to find that “counsel had a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal . . . or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.”

Since Flores-Ortega was decided after Lewis’ conviction became final, the Third Circuit conducted a Teague analysis to determine whether the decision applied retroactively. The court framed Flores-Ortega’s rule as “the Strickland standard,” and, thus, found it to be an “old rule,” which applied retroactively. Applying the Flores-Ortega decision to Lewis’ case, the Third Circuit reversed and remanded, instructing the district court to grant Lewis’ petition conditioned upon the Commonwealth’s reinstatement of his right of first appeal. The court characterized Flores-Ortega as holding that “criminal defense attorneys have a constitutional duty to consult and advise defendants of their appellate rights.” Although this holding was contrary to state case law, the court properly recognized that Strickland, as a rule of general application, may produce novel results, but is, by no means, a new rule. It further noted that “case law need not exist on all fours to allow for a finding under Teague that the rule at issue was dictated by Supreme Court precedent.” Had the court mistaken Flores-Ortega’s holding (criminal defense attorneys have a constitutional duty to advise defendants of their appellate rights) for its rule (the right to effective counsel), Lewis would probably not have found habeas relief.

In the last fifteen years, it has become even more important that courts differentiate between rules and holdings during Teague retroactivity inquiries. In addition to imposing a one-
year statute of limitations on habeas filing, AEDPA has greatly limited the claims on which relief may be granted. AEDPA included an amendment to the habeas corpus statutes providing:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

In recent years, “clearly established Federal law, as determined by the Supreme Court” has been interpreted as Supreme Court holdings, and often in a manner narrowly tailored to the facts of the case. Thus, unless a habeas petitioner presents a claim with a substantially similar fact pattern as a case previously decided by the Supreme Court, district courts will likely find that the state court conviction was not “contrary to” or “an unreasonable application of, clearly established federal law” and that habeas relief, therefore, cannot be granted.

However, a small oasis in this restricted habeas jurisprudence may be found for petitioners relying on decisions announced after their convictions became final. In Williams v. Taylor, the Supreme Court stated, “whatever would qualify as an old rule under our Teagle jurisprudence will constitute ‘clearly established Federal law, as determined by the Supreme

---

183 See supra Part II (discussing AEDPA’s statute of limitations for filing petitions for habeas corpus).
186 Bentele, supra note 131, at 741.
187 See id. at 751–54.
188 § 2254(d)(1)–(2).
189 Bentele, supra note 131, at 746.
Court of the United States’ under [AEDPA].”190 According to this instruction, if a habeas petitioner relies on a Supreme Court decision announced after his conviction became final, and if the court entertaining the petition finds the rule of the relied upon case is old, the petitioner may reap the benefits of the case even if the facts of his case are not substantially similar. In contrast, if the same petitioner relied on the same Supreme Court case, but the case had been decided before his conviction became final, he could only realize the protections of its holding, which might require the facts of the two cases to be substantially similar. It appears that retroactively applied decisions may offer wider habeas relief. When a court mistakes a holding for a rule in its Teague analysis, however, it extinguishes this opportunity.

Courts that have declined to apply Padilla retroactively failed to appreciate Strickland’s nature as a rule of general applicability. These courts inaccurately identified Padilla’s rule, perhaps confusing it with the case’s holding. Their incorrect application of Padilla deprived petitioners of what may have been their last opportunity to maintain their lives in the United States.

B. Alternatively, State Courts Should Use Their Power Under Danforth v. Minnesota to Give Broader Effect to New Rules

A proper appreciation for the Strickland rule’s nature as a rule of general application, as well as for the distinction between Padilla’s “rule” and its “holding,” compel courts to frame Padilla’s rule as the right to effective counsel—an old rule which thus requires retroactive application.191 State courts that remain unconvinced, however, have an alternative means by which they may give Padilla retroactive effect. Even after concluding that Padilla created a new rule, and that it therefore does not apply retroactively under Teague, state courts may give Padilla retroactive effect through their power under Danforth v. Minnesota.192

---

190 Williams v. Taylor, 529 U.S. 362, 412 (2000) (quoting § 2254(d)(1)).
191 See supra Part II.A.
The Supreme Court’s 2008 decision in *Danforth v. Minnesota* greatly altered retroactivity jurisprudence. The Court examined “whether *Teague* constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion.” The majority concluded that it did not; instead, according to the Court, *Teague* “limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ‘nonretroactive’ under *Teague*.” Thus, under *Danforth*, a state may design its own retroactivity standards for federal constitutional rules in excess of the federal minimum set by *Teague*. State courts have already begun using their power under *Danforth* to design their own retroactivity principles.

In the *Padilla* context, if the highest state court determines that *Padilla* created a new rule, and is thus not retroactively applicable under *Teague*, the court may apply its own retroactivity principles in a manner allowing for retroactive application of *Padilla*. *Padilla* applications provide a perfect opportunity for state courts to revise their retroactivity principles in a way that provides greater post-conviction relief in the wake of AEDPA’s constriction of federal habeas relief.

---


194 *Danforth*, 552 U.S. at 266.

195 *Id.* at 282.

196 *Id.* at 288.


198 See supra Part II.
C. Finality Interests

Since “retroactive application may affect defendants whose trials are long since over,” it involves important finality concerns.199 These concerns are especially relevant in the retroactive application of Padilla, which may affect a large number of final convictions. In Barrios Cruz v. State, the court concluded that a retroactive application of Padilla “would undermine the perceived and actual finality of criminal judgments,” and declined to apply Padilla retroactively.200 Many other courts express similar finality concerns.201

However, applying Padilla retroactively will not significantly hamper interests of finality, because defendants permitted to benefit from Padilla still face a significant hurdle. A successful claim of ineffective counsel under Strickland requires that a defendant prove not only that his counsel’s performance was deficient, but also that he was prejudiced by the deficient performance.202

In Padilla, the majority “[gave] serious consideration to the concerns . . . regarding the importance of protecting the finality of convictions obtained through guilty pleas,” but explained, “[s]urmounting Strickland’s high bar is never an easy task . . . . [T]o obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.”203 The majority predicted that “lower courts—now quite experienced with applying Strickland—[could] effectively and efficiently use its framework to separate specious claims from those with substantial merit.”204 This prediction appears to have been

204 Id. at 1485.
accurate, as some courts have applied Padilla retroactively, but found that claims did not warrant relief because defendants failed to show prejudice. Other courts avoided the retroactivity analysis altogether by first determining that a defendant was not prejudiced. Accurate application of Strickland’s prejudice requirement ensures that retroactive application of Padilla will only disturb the finality of meritorious claims.

CONCLUSION

Certain criminal acts render a lawful permanent resident deportable in an instant. Even misdemeanors, such as possession of thirty-one grams of marijuana or distribution of obscene material, can lead to removal. The Padilla Court carefully considered the “[changing] landscape of federal immigration law” and recognized that “deportation is an integral part . . . of the penalty that may be imposed on noncitizen defendants.” Based on these considerations, it found that an attorney has a duty to advise her client of deportation consequences of a guilty plea, and failure to do so is grounds for a claim of ineffective counsel.

Padilla was a victory for many, but that victory was diminished by some jurisdictions’ refusal to apply Padilla retroactively. The stark division among courts as to whether


208 See, e.g., N.Y. PENAL LAW § 221.10 (McKinney 2008).

209 See, e.g., N.Y. PENAL LAW § 235.05 (McKinney 2008).


212 Id. at 1484.

213 See Naima Said & Laila Said-Alam, Preserving Right to U.S.
Padilla created a new rule for Teague purposes, and thus could not be applied retroactively, effectively leaves a noncitizen defendant’s fate to the happenstance of his or her location of conviction. Courts that have found that Padilla created a new rule did so because they framed Padilla’s rule as an attorney’s duty to provide immigration advice. Framing the rule in this way, however, ignores Strickland’s nature as a rule of general application, as well as the distinction between Padilla’s rule and holding. By mischaracterizing Padilla’s rule, courts not only apply Padilla inaccurately, but they also miss an opportunity to correct great harm to uninformed or ill-informed noncitizen defendants and the families and communities from which they are removed. In contrast, framing Padilla’s rule as the right to effective counsel allows courts to address these harms without greatly disturbing interests of finality. State courts have the additional option of giving Padilla retroactive effect, even if they find it “nonretroactive” under Teague. Padilla has the potential to be a victory for accuracy and fairness in criminal proceedings, but it is up to the courts to fulfill its promise.


214 See supra Introduction (demonstrating the impact of different jurisdictions’ opposite conclusions on the issue of Padilla’s retroactivity).

215 See supra Part I.B.

216 See supra Part II.A.

217 See Said & Said-Alam, supra note 213, at 13 (“By narrowly construing Padilla, the Maryland Court of Appeals missed an opportunity to correct egregious harm to Maryland’s youngest citizens facing the unquantifiable social cost of permanent separation from what could be the sole breadwinning parent.”).

218 See supra Part II.C.

219 See supra Part II.B (discussing states’ power under Danforth v. Minnesota to give broader effect to new rules).