EXIGENCY

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Exigency has, with little notice, become central to judicial interpretations of both the Fourth Amendment Warrant Clause and the Sixth Amendment Confrontation Clause—particularly with regard to the policing and prosecution of domestic violence. In the Fourth Amendment setting, the Court has exhibited a factually nuanced understanding of the dynamics of abuse—an understanding that informs its analysis of exigency in domestic violence cases. By contrast, the Court's categorical approach to the Confrontation Clause has yielded a view of exigency that does not accommodate similarly contextualized determinations. The divergence is striking, and raises the question: why should empirical realities be understood differently depending on the particular legal framework applied to them? The answer exposes fundamental flaws in the Court's interpretation of the right of confrontation.

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INTRODUCTION

As the United States Supreme Court decides a greater number of cases involving battering and lower courts struggle to apply a jurisprudence of non-intimates, it becomes increasingly clear that legal constructs are colliding with the realities of domestic violence. As a result, tensions are surfacing in unlikely places. This Article examines one such place, a place that I will call the law of exigency.[1]

Exigency has, with little notice, become central to judicial interpretations of both the Fourth Amendment Warrant Clause and the Sixth Amendment Confrontation Clause—particularly with regard to the policing and prosecution of domestic violence. Last term in *Georgia v. Randolph*[2] and *Davis v. Washington*,[3] the Supreme Court elevated the concept to a new level of prominence in the discourse of privacy and confrontation rights. Each development has independent doctrinal significance; when they are considered in tandem, it becomes apparent that the Court's recent decisions have transcending theoretical implications.

Part I describes evolving conceptions of reasonable police conduct in the Fourth Amendment area. I first observe that *Georgia v. Randolph*,[4] conventionally viewed as a "consent" case, impacts the "exigent circumstances" exception to the warrant requirement. By restricting the applicability of consent as a rationale for warrantless police entry in domestic violence cases, the Court has placed added pressure on the justification of "exigency." Even more striking is how the various opinions in *Randolph* confront the problem of domestic violence and whether the doctrine of exigent circumstances, as currently formulated, is flexible enough to allow for effective policing of this distinct category of crime.[5]

This Part also discusses the Court's recent holding in *Brigham City, Utah v. Stuart*,[6] which embraced "community caretaking" as a core function of law enforcement,[7] and argues that this recognition has newly elevated the idea of police protection.[8] As doctrinally significant as this development may be, it portends an even greater conceptual shift. By giving the lie to the notion that policing crime and preventing imminent violence can and should be theoretically severed, the Court has enabled meaningful analysis of exigency in battering relationships, in which violence is ongoing and endemic.

Part II shifts from examining exigency in the Fourth Amendment context to evaluating exigency's relationship to the Sixth Amendment right of confrontation. Here, too, the construct of exigency has been transformed into a governing paradigm. The Justices' most recent pronouncement on the subject,

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1. Exigence may be defined as a "[s]tate of being urgent or exigent; pressing need or demand; also, case requiring immediate attention, assistance, or remedy; critical period or condition, pressing necessity." BLACK'S LAW DICTIONARY (6th ed. 1990).
2. 547 U.S. 103 (2006).
3. 126 S. Ct. 2266 (2006).
4. 547 U.S. 103.
5. *See infra* notes 42–47 and accompanying text.
6. 126 S. Ct. 1943 (2006).
7. *See infra* notes 58–62 and accompanying text.
8. *See infra* notes 62–63 and accompanying text.

Davis v. Washington,[9] addressed whether the admission of various out-of-court statements made by victims of domestic violence to law enforcement officers during or immediately after an incident of acute physical violence violated the defendant's right to confront witnesses against him. This inquiry depended on whether the statements were properly classified as "testimonial" (requiring exclusion) or "non-testimonial," providing the Court with an occasion to elaborate on the meaning of the terms it had deliberately left undefined in its 2004 decision in *Crawford v. Washington*. By announcing a standard that asks whether a statement was made in the course of an "ongoing emergency," *Davis* promulgated a decidedly exigency-based analysis. Suddenly, when determining whether a victim's statements were made during an "ongoing emergency," lower courts must engage in a factual inquiry which, in many respects, has its best corollary in the Fourth Amendment case law treating challenges to warrantless entry.

As Parts I and II reveal, exigency's emerging status in our constitutional landscape merits the development of a framework for understanding its meaning. The need for this type of conceptual treatment is especially urgent in the domestic violence realm, where the dynamics of abuse make exigency-related arguments under the Constitution most likely to arise.[10] Because these same dynamics create emergencies that are distinct for victims of domestic violence and the law enforcement officers who police it, the utility of analogizing domestic violence emergencies to emergencies created by other crimes is undermined.[11]

Part III asserts that, for battered women, exigency is deeply embedded in factual context. Whether circumstances are exigent cannot be understood without consideration of a relationship characterized by the ongoing exercise of power and control. To defend this contention, I describe how the involvement of law enforcement officers during, or immediately following, an acute physical attack typically impacts the dynamics of abuse. This temporal window frames the constitutionality of warrantless police entry in the home to investigate allegations of domestic violence, as well as of the introduction of an abuse victim's statement to police officers in the field. I show that, in the domestic context, an incident of physical violence and its aftermath have distinct meanings that an acontextual conception of exigency cannot capture.

Have the unique characteristics of battering been adequately embedded in the law of constitutional criminal procedure? In order to answer this question, Part IV compares two differing modes of judicial reasoning about domestic violence, as embodied by the recent Supreme Court jurisprudence discussed in Parts I and II. I conclude that the Court has manifested an occasional understanding of the dynamics of battering. More precisely, when elaborating on the standard applicable to claims of warrant violations, the Justices have adopted a definition of exigency that relies, at least in part, on the distinctive characteristics of abuse.[12]

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9. 126 S. Ct. 2266.

10. *See infra* Part III.

11. *Id.*

12. *See infra* Part I. While this characterization is generally true, it is not without exception. Moreover, courts justifying warrantless police entry in the home do not invariably articulate adequate conceptual grounds for their holdings, instead exhibiting what

The Court's most recent Confrontation Clause holding in *Davis*, by contrast, is characterized by the imposition of an unduly narrow view of exigency derived from a paradigm of crime to which battering cannot be fairly analogized.[13] The divergence is striking. Moreover, these disparate judicial accounts of the exigent fairly reflect a majority of lower court holdings with respect to both privacy[14] and confrontation,[15] suggesting more global implications of the critique.

Examining how exigency has been interpreted in disparate constitutional settings thus reveals the existence of a problem that cannot be attributed simply to judicial ignorance. Ignorance, after all, would necessarily characterize reasoning about exigency without regard to the constitutional challenge asserted. Instead, Part IV describes a discrepancy in judicial conceptions of what constitutes an emergency in battering cases that is determined more by doctrinal context than by factual context.[16]

While we would reasonably expect the doctrinal function served by the construct of exigency to differ across constitutional domains, as an empirical matter the concept has an existence independent of whatever legal significance it is given. Accordingly, Part V posits that cross-contextual variance in judicial treatment of the extra-legal life of exigency merits attention[17] and offers a theory of the divergence that exposes deep, fundamental flaws in the Court's interpretation of the Confrontation Clause.[18]

The moment has arrived for sustained reflection on how the legal construct of exigency is evolving in relation to the empirical realities underlying it. In this endeavor, domestic violence cases present an ideal focus for critical analysis, betraying the limitations of current jurisprudential aspirations while simultaneously shaping the development of a new law of exigency.

I. HER CASTLE TOO?:[19] THE POLICING OF DOMESTIC VIOLENCE

> [T]he Fourth Amendment protections afforded a dwelling and the unquestioned evils of domestic violence are powerful forces pulling a police officer standing on the threshold of a home in opposite directions: the Fourth Amendment pushing him toward a magistrate and a warrant, domestic violence drawing him through the door to

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seems an almost intuitive grasp of the meaning of exigency. *See infra* notes 152–153 and accompanying text (suggesting explanation for this insight when judges are regulating the policing of domestic violence).

13. *See infra* Part III.

14. *See infra* notes 104–112 and accompanying text.

15. *See infra* note 135 and accompanying text.

16. To be clear, I do not urge that constitutional challenges under the Fourth and Sixth Amendments be analyzed identically but, rather, that each be assessed with a proper understanding of the dynamics of domestic violence.

17. *See infra* notes 147–151 and accompanying text.

18. *See infra* notes 154–168 and accompanying text.

19. Georgia v. Randolph, 547 U.S. 103, 139 n.2 (2006) (Roberts, C.J., dissenting) (critiquing majority's rule as one which allows domestic violence victim "time to gather her belongings and leave, apparently putting to one side the fact that it is her castle, too" (citation omitted)).

> intervene in one of the most common and volatile settings for serious injury or death.[20]

Imagine that police officers, responding to what dispatch has classified a "call for help," discover a woman[21] standing outside her home, upset and crying. Visibly battered—her lip is swollen, along with one eye, and her nose is bleeding—she describes a recent assault by her husband and tells police that they can find him still inside their home.

Now suppose that the injured woman's husband, who has remained inside the home, refuses to allow police inside without a warrant. Officers, however, enter over his objection. Under these circumstances, which regularly confront law enforcement,[22] have the police acted unconstitutionally?[23]

This inquiry into whether, and how, the Constitution impedes the policing of domestic violence, has been given new urgency by the United States Supreme Court's recent decision in *Georgia v. Randolph*.[24] In *Randolph*, a sharply divided Court held that the consent of one occupant of a home does not permit the police to enter the premises over another occupant's objection.[25] With the effective demise

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20. Brigham City v. Stuart, 122 P.3d 506, 516 (Utah 2005).

21. In the vast majority of cases, women are the victims of domestic violence and men the perpetrators. Approximately eighty-five to ninety percent of heterosexual partner violence reported to law enforcement is perpetrated by men. *See, e.g.*, CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: INTIMATE PARTNER VIOLENCE 2 (2000); Demie Kurtz, *Physical Assaults by Husbands: A Major Social Problem*, *in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE 88, 89–90 (Richard J. Gelles & Donileen R. Loseke eds., 1st ed. 1993) [hereinafter CURRENT CONTROVERSIES]. The gendered terminology used throughout this Article is reflective of this reality, though it is not meant to suggest that men cannot be victims of domestic violence or that it does not occur in same-sex relationships.

22. I make this claim based both on my review of case law and on my experience as a prosecutor. For five years, I handled both misdemeanor and felony domestic violence cases in the New York County District Attorney's Office. During my last year in the office, I supervised all misdemeanor domestic violence cases, and assembled a more complete picture of the hundreds of arrests prosecuted each month by the office. For one of a countless number of cases (reported and unreported) involving facts similar to those described above, see *People v. Cyprien*, 695 N.Y.S.2d 681 (Crim. Ct. 1999).

23. Various procedural mechanisms exist for raising this claim. Most commonly, a criminal defendant moves to suppress physical evidence recovered from his home or statements he made while still on the premises, claiming that the police violated the Fourth Amendment's warrant requirement by entering the residence. "[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." Mincey v. Arizona, 437 U.S. 385, 393–94 (1978). A warrant is also generally required to effect an in-home arrest. *See* Payton v. New York, 445 U.S. 573, 590 (1980) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

24. 547 U.S. 103 (2006).

25. *See infra* note 35 (explaining constitutional equivalence of objection and failure to consent).

of victim consent as a justification for warrantless entry into a residence in situations routinely raised by the policing of abuse,[26] increasingly the existence of exigent circumstances will become the articulated rationale for police conduct in domestic violence cases. Before analyzing how the Court's understanding of exigency has evolved, I elaborate on the construct's newfound prominence.

A. Consent's Demise, Exigency's Rise

Before the Supreme Court decided *Randolph*, the constitutionality of police entry into a non-consenting suspect's residence—provided a co-occupant was amenable—was relatively settled in most jurisdictions,[27] and warrantless entry in domestic violence cases was often justified on grounds of victim consent.[28]

The factual circumstances implicated by *Randolph* involve a scenario often confronted by police: a complaining witness is, at least momentarily,[29] cooperative with law enforcement efforts, but the suspect does not consent to police entry into his home. For instance, in one pre-*Randolph* case representative of these facts,[30] sheriff's deputies responded to a woman's complaint that her boyfriend had just punched her in the face, threatened to kill her, and shot a rifle through the back window of the truck while she was escaping from him.[31] Suspecting that her boyfriend had returned to the mobile home they shared, the victim consented to its entry and search. Without seeking or obtaining the

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26. For an effort to qualitatively assess *Randolph*'s impact on the policing of domestic violence, see *infra* note 35 and accompanying text.

27. The *Randolph* majority, while suggesting that its grant of *certiorari* was necessitated by what it characterized as a "split of authority on whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search," 547 U.S. at 108, conceded, "All four Courts of Appeals to have considered this question have concluded that consent remains effective in the face of an express objection. Of the state courts that have addressed the question, the majority have reached that conclusion as well." *Id.* at 108 n.1 (citations omitted). Notwithstanding this apparent consensus, the Court in *Randolph*, as I have already noted, reached the opposite result.

28. This is unsurprising, both because consent was, as a general proposition, the largest and most easily satisfied exception to the warrant requirement, *see* RICHARD VAN DUIZEND ET AL., NATIONAL CENTER FOR STATE COURTS, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 21 (1984), and because, as I will argue, conventional exigency analysis requires adaptation to the battering context.

29. Many victims become reluctant or unwilling to assist with prosecutorial efforts after a batterer's arrest, creating the need for prosecution without reliance on a victim's testimony, or so-called "victimless prosecution." I use this term advisedly, as it may tend to obscure the fact that someone was indeed victimized by the conduct at issue in the case, notwithstanding her absence from the trial. Indeed, it seems to me that "victim absent" would be a preferable way of describing prosecutions now referred to as "victimless." Nevertheless, to adhere to convention and avoid unnecessary confusion, I will continue to use the accepted term. For a more extended discussion of the dynamics of victimless prosecution, see Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 10–18 (2006).

30. People v. Sanders, 904 P. 2d 1311 (Colo. 1995).

31. Deputies observed a gunshot hole in the rear window of the truck. *Id.* at 1312.

suspect's consent,[32] police entered the premises and placed him under arrest, later seizing a rifle and ammunition.

The Colorado Supreme Court upheld the constitutionality of the warrantless search, concluding that the physical presence of the non-consenting defendant did "not vitiate the co-occupant's consent."[33] Because the victim had common authority to consent to a search of the residence she shared with her boyfriend, law enforcement acted lawfully when—even without his consent—they proceeded to enter the home, arrest the suspected abuser, and search the premises for evidence.[34]

The policing of domestic violence frequently raises facts involving what I will call "split authority."[35] Though this observation may be intuitive, it is helpful

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32. While two concurring justices suggested that, had the defendant objected to the search (as opposed to simply not affirmatively consenting to it), the proper result may have been different, the majority—in accordance with the prevailing view—treated a failure to consent as constitutionally analogous to an objection. *Id.* at 1315–16; *see infra* note 35.

33. *Id.* at 1313. The Colorado Supreme Court disagreed with the lower court's application of *United States v. Matlock*, 415 U.S. 164 (1974), which held generally that a person assumes the risk that a fellow occupant will consent to a search of their shared premises. In *Matlock*, however, the consenting co-occupant was present and the defendant absent; the trial court in *Sanders* focused on these facts in order to distinguish the case before it. (The *Randolph* majority similarly drew an admittedly "fine line" in making the objector's physical presence the critical factor which invalidates a co-occupant's consent. 547 U.S. 103, 121 (2006)). For one implementation of this distinction, see United States v. DiModica, 468 F.3d 495 (7th Cir. 2006) (where non-consenting spouse was arrested prior to police searching the house, his failure to consent was distinguished from facts of *Randolph* and analogized to *Matlock*).

34. Other courts treating this issue before *Randolph* was decided reached similar results. *See, e.g.*, United States v. Hendrix, 595 F.2d 883 (D.C. Cir. 1979). In *Hendrix*, the defendant beat and threatened his wife and fired a shotgun out the window. The victim escaped to her sister's apartment, which was downstairs from her own, and the police were called. After arriving at the scene, officers convinced Hendrix to come out of his apartment, where he was arrested only after he "continued threatening his wife (in front of the police)." *Id.* at 885. Acting on the victim's request to remove the shotgun from the house, officers entered the premises and seized the weapon, along with four spent shells. Despite the defendant's objection to police entry in his home, the *Hendrix* court held that the victim had common authority over their apartment, and that her consent therefore provided "sufficient authorization for the police to conduct the search." The constitutionality of the search was upheld on both consent and exigency grounds. *Id.* at 885–86.

35. By "split authority," I am referring to a disagreement among co-occupants regarding their willingness to consent to sought-after police action. *See, e.g.*, United States v. Donlin, 982 F.2d 31 (1st Cir. 1992); People v. Cyprien, 695 N.Y.S.2d 681 (Crim. Ct. 1999).

The following matrix of possible scenarios confronting officers responding to residential crime scenes in domestic violence cases helps to illustrate the relationship between consent, exigency, and the impact of *Randolph*. Because the prosecution has the burden of proving valid consent, a suspect's express objection to police entry and a mere unwillingness to consent to it (unless his silence can reasonably be interpreted as implied consent) are constitutionally synonymous, and are categorized below as "uncooperative." Uncooperative victims, for purposes of this matrix, include those who are present at the scene but do not consent to police entry, and those who are absent from the scene or whose

to articulate the factors which explain it. Often when battering occurs, victim and perpetrator are connected not only by an intimate relationship, but by shared living quarters and so-called "common authority" over the quarters[36] as well. The home is most commonly the crime scene in domestic violence cases and, as a consequence, the location to which law enforcement responds. And because a victim is typically "cooperative" immediately after an acute episode of violence—at least to the extent that she needs police assistance to protect her from further injury[37]—intervening law enforcement officers may fairly easily secure her consent to pursue their investigation and/or an arrest.[38] Batterers, in contrast, are generally less willing to consent to police action for fairly self-evident reasons. It is predictable, then, that the policing of domestic violence would tend to rely heavily on victim consent in a regime that recognized it as a legitimate exception to the Fourth Amendment's warrant requirement.

We are no longer living under such a regime. After *Randolph*, consent analysis has been dramatically transformed in the majority of jurisdictions that previously recognized the validity of one co-occupant's consent in cases of split authority.[39] If we return to the "split authority" scenario described earlier—where police responding to the scene of a recent crime of domestic violence are permitted by the victim to enter the shared home but are refused consent by the suspect—*Randolph* forecloses the most obvious justification for the warrantless police entry: victim consent. Unless another exception to the warrant requirement applies, the police violate the defendant's constitutional rights if they enter the home.

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location is unknown when police arrive. Here, too, the constitutional significance of either permutation is the same for purposes of analyzing the validity of consent. (The victim's physical location when officers arrive on the scene may be relevant to the justification of exigency).

	VICTIM UNCOOPERATIVE	**VICTIM COOPERATIVE**
SUSPECT UNCOOPERATIVE	Litigated as exigency even before *Randolph*	Formerly litigated as consent; litigated as exigency after *Randolph*
SUSPECT COOPERATIVE	Somewhat unlikely scenario; in theory, would implicate *Randolph* and require justification on exigency grounds	Police may enter pursuant to joint consent, before and after *Randolph*

36. *See* United States v. Matlock, 415 U.S. 164, 170 (1974) ("[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.").

37. *See infra* notes 88–97 and accompanying text.

38. A victim's unwillingness to consent to police entry often results from a realistic appraisal of the danger she faces if she facilitates police involvement, and may in essence be a manifestation of the batterer's power. This reality raises important theoretical challenges to the notion of agency. Yet, in spite of the conceptual challenges that suggest a victim's nonconsent may have its roots in the dynamics of battering, if a battered woman does not consent to police entry, it will be deemed nonconsent.

39. *See supra* note 27.

By applying *Randolph* to facts typically presented to officers responding to domestic violence, I mean to suggest the importance of asking the next question: does another exception to the warrant requirement allow the police to take action when confronting similar facts? In domestic violence cases, an "exigent circumstances" argument—in essence, that the consequences of police inaction while a warrant is obtained are sufficiently intolerable so as to justify warrantless entry—is often the obvious default. In order to evaluate the applicability of the exigent circumstances doctrine to domestic violence cases, it is critical to examine the Supreme Court's latest guidance on this point. As we will see, these cases reveal a new conception of the function of police officers responding to ongoing violence and provide glimpses of a distinctive approach to domestic violence in particular.

B. The Shifting Parameters of Exigency

In its most recent term, the Supreme Court decided two cases—*Randolph*[40] and *Brigham City, Utah v. Stuart*[41]—that provoked comment on the doctrine of exigent circumstances, outlining the Fourth Amendment law of exigency in its most current incarnation.

In *Randolph*, the majority took pains to stress that its consent-related holding left intact the "authority of the police to enter a dwelling to protect a resident from domestic violence."[42] Seemingly mindful of the potential impact of its holding vis-à-vis consent on the policing of domestic violence, the Court emphasized that law enforcement would continue to be permitted warrantless entry to "provide any protection that might be reasonable"[43] to victims of abuse.

In this context, the exigency exception was explained as follows:

> [S]o long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected. . . . Thus, the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes.[44]

Whether the majority's description of exigency fairly characterizes the existing state of the law or, instead, expands doctrinal parameters,[45] one way of

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40. 547 U.S. 103 (2006).

41. 126 S. Ct. 1943 (2006).

42. *Randolph*, 547 U.S. at 118; *see also id.* at 123 (implying that exigent circumstances were not present in *Randolph* because "[t]he State does not argue that [the defendant's wife] gave any indication to the police of a need for protection inside the house").

43. *Id.* at 118.

44. *Id.*

45. Dissenting, Chief Justice Roberts asserted that, in order to justify its decision to effectively invalidate a domestic violence victim's consent,

understanding the Court's formulation of the exigent circumstances exception is that it represents tacit acknowledgement that policing domestic violence is unlike the enforcement of other types of crime. As Chief Justice Roberts observed in his dissent, "it is far from clear that an exception for emergency entries suffices to protect the safety of occupants in domestic disputes."[46] We might, then, employ *Randolph*'s stated view of exigency as a tentative move toward constructing a framework that accounts for these differences.[47]

Randolph was not the Court's most recent word on exigency. In *Brigham City, Utah v. Stuart*, *certiorari* was granted to resolve the question of "the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation."[48] Reversing the Utah Supreme Court's finding that police officers violated the Fourth Amendment when they entered a home after observing an ongoing fracas between party-goers, *Stuart* announced that a warrantless entry is permissible when officers have "an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury."[49]

Beyond reiterating established doctrinal contours, the Court articulated several propositions that help to illuminate and, I will argue, recast the norms underlying the emergency circumstances exception to the warrant requirement. First, addressing the divergence in lower court approaches with respect to the relevance of law enforcement officers' subjective motivations, the Court stressed that the proper inquiry is whether circumstances, objectively viewed, justify warrantless entry.[50] Rejecting subjective tests defining the "emergency doctrine"—tests requiring that an officer be primarily motivated, not by intent to arrest or

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> the majority spins out an entirely new framework for analyzing exigent circumstances. Police may now enter with a "good reason" to believe that "violence (or threat of violence) has just occurred or is about to (or soon will) occur." And apparently a key factor allowing entry with a "good reason" short of exigency is the very consent of one co-occupant the majority finds so inadequate in the first place.

Id. at 140–41 (citations omitted).

Whether *Randolph* represents the dramatic change of course depicted by the dissent is open to competing interpretations. In my view, lower court opinions treating exigency before *Randolph*—and the Court's less-than-developed dicta regarding the doctrine—make it difficult to say that the *Randolph* majority announced an "entirely new framework," as opposed to steering the evolution of an unsettled and highly fact dependent body of law in a particular direction. *See infra* note 64 (describing confusing state of case law).

46. *Id.* at 140 (Roberts, C.J., dissenting). Implicit in Roberts' argument is that this reality created pressure on the Court to craft a "new rule" regarding exigency. *See supra* note 45.

47. For further discussion of how the various opinions are premised on a view of battering as a distinct crime paradigm, see *infra* notes 113–119 and accompanying text.

48. 126 S. Ct. 1943, 1947 (2006).

49. *Id.* at 1946. The "odd flyspeck of a case" resulted in a unanimous opinion "so clearly persuasive that it is hard to imagine the outcome was ever in doubt." *Id.* at 1949–50 (Stevens, J., concurring).

50. *Id.* at 1948 (majority opinion).

seize evidence, but by the provision of "emergency aid" to a victim[51]—the Court stated in no uncertain terms that "*the* appropriate" standard applicable to warrantless entry in an "emergency situation" is whether police officers acted objectively reasonable.[52]

Elaborating on this notion of reasonableness, the Court defined "the need to assist persons who are seriously injured or otherwise threatened with such injury" as "[o]ne exigency obviating the requirement of a warrant."[53] Quite clearly, however, no threshold level of injury is required: officers confronting "*ongoing* violence occurring *within* the home"[54] may enter the premises regardless of the severity of the violence.[55]

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51. *See, e.g.*, People v. Mitchell, 347 N.E.2d 607, 608–09 (N.Y. 1976), *quoted in Stuart*, 126 S. Ct. at 1947.

52. 126 S. Ct. at 1947–49 (emphasis added). In the domestic violence realm, the Court seems to have accepted the proposition that "reasonable" police action must take account of the distinctive dynamics of battering. *See Randolph*, 547 U.S. at 118 ("No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence."); *infra* notes 113–115 and accompanying text.

53. 126 S. Ct. at 1947. Traditionally, the presence of exigent circumstances has not dispensed with the requirement of probable cause for warrantless entry. However, as one court has observed, "in domestic violence cases, the probable cause and exigent circumstances inquiries often collapse because the suspected crime and exigency arise from the same events." United States v. Wilder, No. 98-30215, 1999 U.S. App. LEXIS 14063, at *4 n.3 (9th Cir. June 22, 1999).

It is worth noting that the Court's recent decisions in *Randolph* and *Stuart* may portend a shift in the relationship between exigency and the probable-cause requirement. Dicta in *Randolph*, which crafted what the dissent refers to as "an entirely new framework for analyzing exigency" in the domestic violence realm, *see supra* note 52, as well as *Stuart*'s incorporation of the police caretaking role into a general "reasonableness" rubric, *see infra* notes 58–64 and accompanying text, may suggest the weakening of a strict probable cause requirement under particular circumstances. *Cf. Randolph*, 547 U.S. 103, 125 (Breyer, J., concurring). Justice Breyer, concurring in *Randolph*, stated:

> [T]he Fourth Amendment does not insist upon bright-line rules. Rather, it recognizes that no single set of legal rules can capture the ever changing complexity of human life. It consequently uses the general terms "unreasonable searches and seizures." And this Court has continuously emphasized that "[r]easonableness . . . is measured . . . by examining the totality of the circumstances."

Id. (quoting Ohio v. Robinette, 519 U.S. 33, 34 (1996)). At the very least, the Court's recent decisions in this area would support the contention that probable cause determinations must be appropriately contextualized.

54. *Stuart*, 126 S. Ct. at 1949 (emphasis in original). In *Stuart*, police officers responding in the early morning hours to a loud party observed four adults attempting to restrain a juvenile, who "broke free, swung a fist and struck one of the adults in the face. . . . The other adults continued to try to restrain the juvenile, pressing him up against a refrigerator with such force that the refrigerator began moving across the floor." *Id.* at 1946.

55. The defendant in *Stuart* analogized the conduct observed by Brigham City police to the disappearance of blood-alcohol evidence at issue in the driving-while-intoxicated investigation held unconstitutional in *Welsh v. Wisconsin*, 466 U.S. 740 (1984). Dismissing the argument that the exigency confronting police was insufficiently grave to

As further support for this contention, the Court observed that it was reasonable for police to believe that an injured party "might need help and that the violence in the kitchen was just beginning."[56] The opinion continues:

> Nothing in the Fourth Amendment required them to wait until another blow rendered someone "unconscious" or "semi-conscious" or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.[57]

Before *Stuart*, courts and commentators tended to view traditional policing (*i.e.*, investigations into and arrests for criminal conduct)[58] and the less historically entrenched category of "community caretaking" functions[59] as dichotomous, or at the very least, divisible.[60] *Stuart* represents a challenge to the universal applicability of this conception, as it goes a considerable way toward collapsing any distinction between what the Court referred to as "the so-called 'emergency aid doctrine'"[61] and the exigent circumstances exception to the

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warrant the intrusion, the Court strongly implied that violence within the home presents an emergency to which a warrantless police response is *per se* reasonable. *Stuart*, 126 S. Ct. at 1948–49.

56. *Stuart*, 126 S. Ct. at 1949.

57. *Id.* Chief Justice Roberts added that "an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided." *Id.*

58. *See infra* note 59.

59. Community caretaking principles have generally been applied to situations involving a threat to a particular person in need of assistance (the application relevant to this discussion) or to the safety of the public, as well as to police inventories. *See* John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 J. CRIM. L. & CRIMINOLOGY 433, 448–53 (1999) (discussing these most common applications of the community caretaking rationale); *see also* Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (describing community caretaking function as "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute").

60. *See, e.g.*, Decker, supra note 59, at 441–45. Discussing what he terms "a question of nomenclature," Decker observes that "various courts have characterized as an 'exigency' or the 'exigent circumstances' concept" what he—and many courts—refer to as the "emergency doctrine." *Id.* at 441. According to Decker, "when police act in response to an emergency, this action is within their community caretaking function"; accordingly, their conduct "is not a variant of exigent circumstances, but . . . a separate exception to the Fourth Amendment." *Id.* at 445.

While many lower courts have adopted the distinction urged by Decker, the Court's decision in *Stuart* seems to undermine it—at least under circumstances in which the "emergency" is reasonably perceived as stemming from conduct that is criminal in nature. Moreover, while Decker's framework seems to characterize an implicit majority view, the state of the case law in this area is remarkably confused. The Utah Supreme Court's decision in *Stuart* provides the clearest discussion of the doctrinal differences assumed (normally without articulation) by most courts recognizing a distinction between the two. 122 P.3d 506 (2005). In some cases, the emergency doctrine has been characterized, not as embodying its own test, but as one subcategory of exigent circumstances. *See, e.g.*, People v. Thompson, 770 P.2d 1282, 1285 (Colo. 1989); State v. Menz, 880 P.2d 48, 49 (Wash. Ct. App. 1994).

61. *Stuart*, 126 S. Ct. at 1946.

warrant requirement[62]—at least in the significant subset of cases where exigency derives from the risk of physical harm to a person.[63] In this subset of cases, law enforcement and "community caretaking" functions have been officially married. Similarly, to the extent that "exigent circumstances" and "emergency" were previously viewed as corresponding to a binary differentiation of law enforcement and community caretaking, respectively, this doctrinal divide has also eroded.

Thus, after *Stuart*, one fundamental aspect of what might previously have been classified as a quintessential police caretaking role—specifically, preventing violent crime that is imminent—has been indisputably incorporated into the Fourth Amendment rubric of reasonableness. Just as preventing the destruction of evidence or the escape of a suspect falls within the purview of officers engaged in the enforcement of our criminal laws, so, too, should these same officers be attending to the injured as well as the potential victim; that is, she who may become a victim (or be victimized again) if police fail to act. The ideal of police *protection* as a core aspect of what law enforcement does has suddenly been accorded new power; this development has tremendous potential particularly for battered women.

Apart from the doctrinal shift portended by *Stuart*,[64] the Court's emphatic move to define the function of law enforcement officers as it has here was animated by underlying principles that are themselves extremely powerful. I will return to this observation, and to an examination of these principles in a larger constitutional context, after exploring the ascendancy of the exigency paradigm in recent Confrontation Clause jurisprudence.

II. "ONGOING EMERGENCIES" AND THE RIGHT OF CONFRONTATION

The right of confrontation was radically transformed in 2004, when the Court in *Crawford v. Washington*[65] held that the Confrontation Clause[66] generally

62. *See id.* at 1946–48 (discussing lower court's attempt to distinguish the two doctrines).

63. Exigent circumstances may also be created by hot pursuit of a felon, imminent destruction of evidence, or the need to prevent a suspect's escape. Minnesota v. Olson, 495 U.S. 91 (1990). These scenarios are not obviously implicated by *Stuart*.

64. It is difficult to assess the practical significance of *Stuart*, given the lower courts' confusion in this area, *see supra* note 60, and considerable question about whether judicial application of an "exigent circumstances" versus an "emergency aid" framework has practical consequences. Again, as a technical matter, the doctrines apply two different standards and, as we have seen, their underlying normative rationales diverge. Nevertheless, the imposition of an "exigent circumstances" exception versus an "emergency exception" rubric has not generally dictated outcomes. That is, regardless of whether the applied doctrine is called exigency or emergency, lower courts have tended to uphold the challenged warrantless entry.

65. 541 U.S. 36 (2004).

66. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

requires the exclusion of out-of-court statements deemed "testimonial."[67] In *Davis v. Washington*,[68] decided two years later, the Court elaborated on a definition of "testimonial" applicable to the context in which post-*Crawford* challenges frequently arise: in domestic violence cases proceeding without the testimony of a victim,[69] the prosecution offers into evidence statements made by domestic violence victims to 911 operators and to law enforcement officers responding to the crime scene[70] and the defendant subsequently objects that admission of these statements would violate his constitutional right to confront witnesses against him.[71]

According to Justice Scalia, writing for the *Davis* majority, a statement is nontestimonial if uttered "in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[72] Conversely, if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"—*i.e.*, there is "no ongoing emergency"—a resulting statement is testimonial.[73]

Applying this binary standard, the Court affirmed in *Davis* after determining that the "primary purpose" of the victim's call to 911 "was to enable police assistance to meet an ongoing emergency."[74] In *Davis*'s consolidated companion case,[75] however, the Court reversed Hershel Hammon's conviction for domestic battering and violating probation, based on its conclusion that statements

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67. Provided the declarant is deemed "unavailable" at trial, testimonial statements may be admitted if the defendant was given an opportunity to cross-examine the declarant when the statement was made. *Crawford*, 541 U.S. at 68. The defendant may also forfeit his right to challenge the admission of testimonial hearsay if his misconduct resulted in the declarant's unavailability at trial. *Id.* at 62. For an effort to develop the doctrine of forfeiture in the domestic violence context, see Deborah Tuerkheimer, *Forfeiture in the Domestic Violence Realm*, 85 TEX. L. REV. (forthcoming 2007).

68. 126 S. Ct. 2266 (2006).

69. *See supra* note 29 (introducing concept of victimless prosecution). As I have previously observed, "[t]he uncooperative complainant inheres in the dynamics of abuse; she is not going away." Tuerkheimer, *supra* note 29, at 18. Thus, it is entirely predictable that Confrontation Clause claims after *Crawford* have disproportionately (albeit not exclusively) impacted the prosecution of domestic violence. *See infra* note 171.

70. Before *Crawford*, these types of statements were generally admissible as excited utterances or present sense impressions. *See* Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 332 (2005).

71. In victimless domestic violence prosecutions, defense motions to exclude victims' out-of-court statements tend to be case-dispositive in nature. While a victim's account is usually corroborated by other evidence, a case is rarely viable without the admission of her hearsay statements. Of course, in order to be admissible, hearsay must satisfy an evidentiary exception, in addition to comporting with Confrontation Clause requirements.

72. *Davis*, 126 S. Ct. at 2273.

73. *Id.* at 2273–74.

74. *Id.* at 2277.

75. Hammon v. State, 829 N.E.2d 444 (Ind. 2005), *rev'd*, *Davis*, 126 S. Ct. 2266 (2006).

his wife, Amy Hammon, made to police officers on the scene were testimonial and, therefore, improperly admitted.[76] Because the Court could see "no emergency in progress," it emphatically asserted: "[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct."[77]

I have written at length about the conceptual tension underlying this area of law and the ways in which *Davis* reifies scholarly and judicial reliance on an inapt dualism.[78] For purposes of this discussion, it is critical to see that exigency has now become the governing construct in evaluating Confrontation Clause challenges.[79] In evaluating whether a victim's statement is "testimonial"—and, thus, whether it requires exclusion—courts are to determine whether "events" are past or ongoing[80] in order to decide if circumstances are sufficiently exigent to render a victim's statement something other than the equivalent of "testimony." *Davis*'s "ongoing emergency" language is predictably echoed in lower court opinions applying the new framework: challenged statements are deemed testimonial based on a finding that "there was no ongoing emergency at the time

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76. *Davis*, 126 S. Ct. at 2278. The Court did, however, leave open the possibility of a forfeiture finding on remand. *See id.* at 2280 ("We have determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon's affidavit. The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious."). *See supra* note 67.

77. *Davis*, 126 S. Ct. at 2278. Apparently because the responding officer "heard no arguments or crashing and saw no one throw or break anything" and "there was no immediate threat" once officers arrived, it was evident to the Court that "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." *Id.*

78. Tuerkheimer, *supra* note 29, at 26–32.

79. This characterization is generally true with respect to analyzing statements made to 911 operators and police officers in the field. The paradigm may be less applicable to the categorization of statements to non-governmental agents, which typically arise in the context of child abuse prosecutions. I thank Professor Robert Mosteller for sharing this helpful insight and for alerting me to a state court holding that contradicts it. *See* State v. Buda, 912 A.2d 735 (N.J. Super. Ct. App. Div. 2006) (deeming child declarant's statement to child protective worker testimonial because declarant "was no longer in danger and there was no 'ongoing emergency'").

80. I have elsewhere critiqued the Court's use of "event" as follows:

> Passage of an "event" thus becomes one proxy for the resolution of exigency. Yet tensions within the opinion regarding what counts as an "event" are left unresolved by the majority's unwillingness to concede that the concept is subject to interpretation. The Court leaps to an analysis premised on whether the "event" is past or present—without pausing to consider *what* must have passed for a statement to be considered testimonial. In this way, the Court's employment of a seemingly neutral term ("event") functions to conceal its outcome-determining effect. The assumption that "events" have either happened or "are actually happening" obscures the utter subjectivity of this determination, begging the question of what qualifies as an "event."

Tuerkheimer, *supra* note 29, at 28.

that [the victim] spoke to [police];"[81] and statements are designated non-testimonial where "[a]ny reasonable observer would understand that [the victim] was facing an ongoing emergency."[82]

But how are courts engaging in these analyses conceiving the dynamics of abuse? And, even more central to our inquiry, what understanding of these dynamics are revealed by the Court's opinion in *Davis*? If circumstances tend to be uniquely exigent in cases involving intimates, as I posit below,[83] reasoning predicated on an unarticulated equation of domestic violence with other crimes inevitably fails in the battering context. After elaborating on a contextualized approach to exigency, I return to this argument.

III. DOMESTIC VIOLENCE AND THE MEANING OF EXIGENCY

In significant respects, domestic violence diverges from other categories of crime.[84] Put simply, battering is an *ongoing pattern* of physical and non-physical conduct.[85] It is non-transactional, meaning that its harm cannot be captured by reference to discrete or isolated episodes, and it is defined by violence

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81. Raile v. People, 148 P.3d 126, 133 (Colo. 2006); *see also* Cook v. McGrath, No. C 03-2719 JSW (PR), 2006 U.S. Dist. LEXIS 64271, at *15 (N.D. Cal. Aug. 28, 2006) (finding "no emergency in progress"); State v. McKenzie, 2006 Ohio 5725 (Ct. App.) ("[A]ny need to meet an existing or an ongoing emergency had passed.").

82. State v. Alvarez, 143 P.3d 668, 674 (Ariz. Ct. App. 2006); *see also* United States v. Clemmons, 461 F.3d 1057, 1060 (8th Cir. 2006) ("[T]he primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."); *In re* German F., 821 N.Y.S.2d 410, 415 (Fam. Ct. 2006) ("[T]he officer's interrogation was to enable him to assist the victim in an emergency situation.").

83. *See infra* Part IV and accompanying text.

84. A historical understanding of the criminalization of domestic violence suggests that these "other categories of crime," in general, crimes perpetrated by non-intimates, as well as the doctrinal and conceptual frameworks derived from them, may fairly be described as paradigmatic. *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 969–71 (2004) (summarizing criminalization efforts in socio-historical context). For thorough scholarly accounts critiquing the historical response to domestic violence, see generally LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE (Univ. of Ill. 2002) (1988); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

85. As psychologist Mary Ann Dutton has explained:

> Abusive behavior does not occur as a series of discrete events. Although a set of discrete abusive incidents can typically be identified within an abusive relationship, an understanding of the dynamic of power and control within an intimate relationship goes beyond these discrete incidents. To negate the impact of the time period between discrete episodes of serious violence—a time period during which the woman may never know when the next incident will occur, and may continue to live with ongoing psychological abuse—is to fail to recognize what some battered women experience as a continuing "state of siege."

Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (1993) (quoting Telephone Interview with Sue Osthoff, Dir., Nat'l Clearinghouse for the Def. of Battered Women (Jan. 2, 1991)).

that goes beyond the purely physical.[86] Moreover, the course of conduct that is battering often escalates when a victim attempts to increase control over her life.[87]

Escalations in battering become particularly intense when victims act to involve law enforcement in the abusive relationship.[88] A battered woman's call to police—or even her willingness to speak to responding officers called to the scene by a concerned witness—represents a direct threat to her abuser.[89] By invoking the protective apparatus of law enforcement, a victim continues to exert her own will; thus proving to her batterer that the domain of his control is not infinite.

Beyond the significance of this immediate act, a woman's assertion—however fleeting—of the unacceptability of the violence she has endured foreshadows further perceived insubordination. In a relationship characterized by the batterer's quest to dominate,[90] the balance of power has shifted, even if only for the moment. So it is foreseeable that, when the opportunity presents itself, he will do what he can to reconfigure that balance.

These dynamics help to explain why, in domestic violence cases, the investigation of crime and ensuing arrest of the criminal is often the best, if not the only, way of preventing further injury to the victim.[91] I am referring here not to the specific deterrent effects of arrest; that is, the prospect that arrest will decrease the

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86. For a more thorough discussion of these dynamics, see Tuerkheimer, *supra* note 84, at 962–69. In this Article, I critique "the disconnect between battering as it is practiced and battering as it is criminalized," *id.* at 988, and propose a course of conduct battering statute to more accurately define the harm of domestic violence, *id.* at 1019–23.

87. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6 (1991) (defining concept of "separation assault" to mean the "assault on a woman's body and volition that seeks to block her from leaving, retaliate for her departure, or forcibly end the separation"); *infra* note 88.

88. *See* Mahoney, *supra* note 87, at 5–6 ("At the moment of separation or attempted separation—for many women, the first encounter with the authority of law—the batterer's quest for control often becomes most acutely violent and potentially lethal."); *cf.* Brief of National Network to End Domestic Violence et al. as Amici Curiae Supporting Respondent § I.A & n.20, Davis v. Washington, 126 S. Ct. 2266 (2006) (Nos. 05-5224 and 05-5705), 2006 U.S. S. Ct. Briefs LEXIS 198 ("Pursuing prosecution, thus, is not only an assertion of autonomy, it directly defies the abuser's control, exposing the victim to considerable risk of violence."). These insights are consistent with what I observed as a domestic violence prosecutor.

89. Although I am speaking here about dynamics associated with the battering realm in particular, I do not mean to overlook concerns related to arrest that are more universally shared by suspects—*i.e.*, potential criminal sanctions, including the prospect of incarceration.

90. Mahoney, *supra* note 87, at 5 ("[T]he struggle for power and control—the batterer's quest for control of the woman—[lies at] the heart of the battering process.").

91. This is not to suggest that victim protection is the exclusive rationale for a law enforcement response to battering. As is true of all other types of crime, arrest is the most common gate of entry to the criminal justice system, which of course serves important functions beyond immediate incapacitation. *See, e.g.*, Deborah Tuerkheimer, *Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later*, 75 GEO. WASH. L. REV. 613, 621 (2007) (articulating expressivist value of criminalizing domestic violence).

likelihood that a suspect will batter again in a future that is not imminent.[92] Rather, I am asserting that, often when police are called to the scene of a "domestic," failure to take a suspect into custody[93] will result in the *continuation* of conduct that triggered the involvement of law enforcement.[94] Obviously the likelihood that battering will resume absent the abuser's arrest derives, in part, from the physical realities of shared premises.[95] Yet the realities of domestic violence are themselves central to understanding why circumstances may be uniquely exigent in these cases.

The period of time immediately following the incident that precipitated law enforcement involvement, but preceding the batterer's arrest is, from the woman's perspective, dangerous. With the passage of time and, in many instances, the infliction of further injury,[96] it is possible for a situation to become less exigent, even without police action. But in the vast majority of cases confronting law enforcement, the emergency has not yet dissipated and some law enforcement conduct is required for the exigency to be resolved.[97] Typically, then, it is an abuser's arrest—and not the temporary suspension of his physical attack that likely resulted from a victim's call to police—that brings about a "resolution" of the immediate crisis confronting a battered woman. In short, the indicia typically used to determine whether circumstances are exigent tell an incomplete story.

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92. There is considerable controversy regarding the deterrent effects of arrest in battering relationships. *See, e.g.*, Eve S. Buzawa & Carl G. Buzawa, *The Scientific Evidence is Not Conclusive: Arrest is No Panacea*, *in* CURRENT CONTROVERSIES, *supra* note 21, at 337; Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929 (1994); *see also* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 184–88 (2000) (discussing broader implications of mandatory arrest and no-drop prosecution policies).

Accepting that a constant danger characterizes the lives of many battered women does not, however, require that the period of exigency relevant to constitutional analysis be understood to extend indefinitely. As is true of most difficult criminal law questions, lines must be drawn. *See* Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 274 (2002) ("There are many line-drawing dilemmas throughout the criminal law.").

93. Of course, probable cause to believe that a suspect committed a crime is required before the police may make a lawful arrest.

94. This is one important way in which domestic violence is distinguishable from crime against non-intimates. As Professor Kristian Miccio has remarked while discussing the primary justification for enacting mandatory arrest laws, in the domestic violence context, the "immediacy of the harm, increased violence and intimidation, require[s] *direct* action." G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 195 (2005).

By suggesting that battering conduct will likely continue absent some action on the part of law enforcement, I do not mean to suggest that arrest will, in all or even most cases, bring about a permanent cessation of violence. *See supra* note 92 (noting uncertainty regarding deterrent effects of arrest in domestic violence cases). My point, rather, is that arrest provides battered women a reprieve that is of value—regardless of whether optimal deterrence is achieved for all time.

95. *See supra* notes 36–37 and accompanying text (observing that home is the most common crime scene in domestic violence cases).

96. *See supra* notes 93–95 and accompanying text.

97. *See infra* note 147 (acknowledging "line-drawing" dilemma).

Battering conduct creates exigencies not associated with other types of crime. This deviation from the standard paradigm[98] has implications both for law enforcement officers and for those who experience abuse. Accordingly, accurate judicial resolution of inquiries involving interactions between domestic violence victims and the police is contingent on recognition of the distinct nature of these types of emergencies.

IV. DIVERGENCE: TWO VIEWS OF THE EXIGENT

In domestic violence cases, the immediate aftermath of a physical attack tends to be the factual focus of the two main constitutional criminal procedure doctrines that have been discussed.[99] As we have seen, in each area of jurisprudence, with respect to the circumstances under which constitutional claims most frequently arise in domestic violence prosecution, exigency has become the governing construct.[100] The new law of exigency thus provides a rare opportunity to evaluate courts' reasoning about domestic violence.

As a general proposition, we would expect that judicial inquiry into whether an emergency is ongoing would *either* take into account the dynamics of abuse *or* presume a model of paradigmatic crime. Whichever the correct hypothesis, its truth should reach across jurisprudential boundaries, given that empirical realities underlying the construct of exigency remain unaffected by the application of different doctrinal frameworks to these realities. Put differently, we should anticipate that judicial understandings of domestic violence (or lack thereof) would be relatively fixed, notwithstanding that the doctrinal outcomes dictated by these understandings would vary by constitutional context.[101] In fact, as this discussion already suggests, the picture is far more complex.

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98. *See supra* note 84 (elaborating on concept of "paradigmatic crime").

99. *See supra* Parts I and II.

100. In addition to the Warrant Clause and the Confrontation Clause, challenges pursuant to the Fifth Amendment Self Incrimination Clause may also trigger an exigency-based analysis. *See* New York v. Quarles, 467 U.S. 649, 659 n.8 (1984) (justifying police interrogation in the absence of *Miranda* warnings where there exists an "exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime"). What has come to be known as the "public safety" exception to *Miranda*'s requirement arises relatively infrequently in domestic violence cases. When it does, courts are generally applying the exception for reasons substantively unrelated to the "domestic" nature of the call. *See, e.g.*, United States v. McBride, No. 05-40083-01-SAC, 2006 U.S. Dist. LEXIS 60787, at *6–7 (D. Kan. Aug. 15, 2006) (questioning regarding missing firearm); State v. Boretsky, 894 A.2d 659, 664–67 (N.J. 2006) (questioning to assess location and needs of unconscious victim); Jackson v. State, 146 P.3d 1149, 1157–59 (Okla. Crim. App. 2006) (questioning regarding whereabouts of child of deceased victim); Benton v. Commonwealth, 578 S.E.2d 74, 76–77 (Va. Ct. App. 2003) (questioning regarding missing firearm). Judicial reasoning in this context is therefore of limited heuristic value for our purposes.

101. *See supra* note 16 (urging not "that constitutional challenges under the Fourth and Sixth Amendments be analyzed identically but, rather, that each be assessed with a proper understanding of the dynamics of domestic violence").

A. Interpreting the Warrant Clause

Judicial reasoning about battering is, in the Warrant Clause context, remarkably contextualized, meaning that it is largely informed by the dynamics of abuse and their impact on the policing of domestic violence. We have seen that law enforcement officers typically arrive at a crime scene while the exigency triggered by earlier battering conduct is still ongoing.[102] Without explicitly articulating this premise, a majority of lower courts (even before *Randolph* and *Stuart* were decided) seem—perhaps somewhat surprisingly[103]—inclined to accept it.[104] Deciding whether circumstances qualify as exigent in battering cases, judges have tended to proceed on accurate generalizations regarding the dynamics of abuse.[105] Examples from case law illustrate: "the fact that the occupants appeared to be unharmed when the officers entered did not guarantee that the disturbance had cooled to the point where their continued safety was assured";[106] "it was reasonable for the officers to conclude [the victim's] re-entry into the home or even her continuing presence on the premises outside the home would spark further violence by defendant";[107] "[t]hese calls commonly involve dangerous situations in which the possibility for physical harm or damage escalates rapidly";[108] "[t]o require an officer to obtain a search warrant before entering a dwelling in response to a domestic violence call would be a meaningless delay that could lead to the occurrence of otherwise preventable violence";[109] "the exigencies of domestic abuse cases present dangers that, in an appropriate case, may override

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102. *See supra* notes 88–97 and accompanying text.

103. *See infra* notes 151–153 and accompanying text (positing explanation for judicial openness to appropriately broad conception of exigency in the Fourth Amendment context).

104. As one court remarked, "[c]ourts have recognized the combustible nature of domestic disputes, and have accorded great latitude to an officer's belief that warrantless entry was justified by exigent circumstances when the officer had substantial reason to believe that one of the parties to the dispute was in danger." United States v. Lawrence, 236 F. Supp. 2d 953, 962 (D. Neb. 2002); *see infra* notes 106–112 and accompanying text (quoting from representative lower-court opinions).

105. There are, of course, exceptions to this categorization. *See, e.g.*, United States v. Davis, 290 F.3d 1239, 1244 (10th Cir. 2002) (no exigency where officers responding to "possible domestic disturbance" entered home after suspect claimed that wife was out-of-town, and wife subsequently came into view); United States v. Meixner, No. 00-CR-20025-BC, 2000 WL 1597736, at *2, *8–10 (E.D. Mich. Oct. 26, 2000) (police responding to 911 "hang-up call, possibly a domestic dispute" and encountering "belligerent" male and upset female were not justified in entering home without warrant), *reconsideration denied*, 128 F. Supp. 2d 1070 (2001); *cf.* Wuerfel v. City of Seattle, No. C03-3660JLR, 2006 WL 27207, at *6–7 (W.D. Wash. Jan. 5, 2006) (on motion for summary judgment, court held that reasonable jury could conclude there was no exigency where police responded to neighbor's report of possible domestic violence and threats to kill, but apparent victim answered door and stated that she was "fine").

106. State v. Raines, 778 P. 2d 538, 542–43 (Wash. Ct. App. 1989).

107. People v. Wilkins, 17 Cal. Rptr. 2d 743, 749 (Ct. App. 1993).

108. State v. Greene, 784 P.2d 257, 259 (Ariz. 1989).

109. *Id.*

considerations of privacy";[110] "exigent circumstances do not end merely because the victim indicates that she is no longer in danger";[111] and so forth.[112]

Recent guidance from the Supreme Court evinces a similar mode of reasoning about domestic violence, at least in some circumstances. The opinions in *Randolph* suggest that the Justices, to varying degrees, are cognizant that the dynamics of battering create a category of exigency that is distinct.[113] By emphasizing that the "capacity of the police to protect domestic victims" should not be impaired by its holding, and accordingly formulating its understanding of exigency in a manner that suggests considerable deference to the protective functions of law enforcement,[114] the majority seems to contemplate that domestic violence qualitatively differs from other types of violence.[115]

The concurring and dissenting opinions, representing the perspectives of four of the eight *Randolph* Justices,[116] go even further in the direction of acknowledging that battering departs in fundamental ways from paradigmatic crime. For instance, Justice Breyer points to a "victim's fear about being left alone with an abuser" and to her "immediate willingness to speak [to police] that might

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110. United States v. Brooks, 367 F.3d 1128, 1136 (9th Cir. 2004).

111. Maggnuson v. Cassarella, 813 F. Supp. 1321, 1324 (N.D. Ill. 1992). In the Fourth Amendment context, courts seem generally willing to accept this proposition. *See, e.g.*, United States v. Lawrence, 236 F. Supp. 2d 953, 963 (D. Neb. 2002) ("Even when the possible victim of domestic abuse assures the officer that she is in no danger, an officer is entitled to consider all the facts and is not required to take her statement at face value in assessing the potential threat of physical harm.").

112. This type of judicial reasoning is important not only because it is accurately premised on the dynamics of battering but also because it does not attempt to fit domestic violence into a conventional crime mold. Yet the descriptive framework is still incomplete. Perhaps because, in the policing context, judicial intuitions regarding the nature of exigency are largely accurate, judges are able to justify their decisions on a level of generality that, to the uninformed, may be less than persuasive. For this reason, fuller development of the conceptual underpinnings of exigent circumstances should ideally characterize the next phase of this jurisprudential progression. *See infra* note 147 (predicting added pressure on doctrine).

113. While *Randolph* announced a rule directly related to the "consent" exception to the warrant requirement, the various opinions contain significant discussion of how the Court's holding potentially impacts the doctrine of "exigent circumstances." *See supra* notes 42–47 and accompanying text.

114. *See supra* notes 42–47 and accompanying text (noting that the *Randolph* majority "took pains to stress that its consent-related holding left intact the 'authority of the police to enter a dwelling to protect a resident from domestic violence'"); *see also* Georgia v. Randolph, 547 U.S. 103, 119 n.7 (2006) (acknowledging the fearful occupant). The accompanying suggestion that a domestic violence victim is "within the protective custody of law enforcement officers" simply because she is "outside of the apartment when police arrive" is far less informed by the realities of abuse. *Id.*; *see infra* note 147 (predicting that the factual predicate involving a victim who has left shared premises will place added pressure on doctrinal contours).

115. The majority opinion was authored by Justice Souter and joined by Justices Stevens, Kennedy, Ginsburg, and Breyer (who also wrote a concurring opinion).

116. Justice Alito did not participate in the proceedings.

not otherwise exist."[117] In a similar vein, dissenting Justices Roberts, Scalia, and Thomas observe that "Mrs. Randolph did not invite the police to join her for dessert and coffee; the officer's precise purpose in knocking on the door was to assist with a dispute between the Randolphs—one in which Mrs. Randolph felt the need for the protective presence of the police."[118] And Justice Scalia, in a separate dissent, cites the "usual patterns of domestic violence" in criticizing a rule that "gives men the power to stop women from allowing police into their homes."[119]

These relatively contextualized, albeit under-conceptualized,[120] views of the exigencies created by domestic violence stand in striking contrast to the inherently flawed analytic framework advanced by recent Confrontation Clause jurisprudence. Here, as we have seen, the construct of exigency has also become paramount: when assessing whether an out-of-court utterance is "testimonial" and, therefore, subject to exclusion, courts are now to ask whether an emergency was "ongoing" at the time the statement was made.[121] Unlike judicial reasoning characteristic of the Warrant Clause cases,[122] and evinced by *Randolph*,[123] we will see that the Court in *Davis* entirely disregards the dynamics of battering and how they shape the construct of exigency.[124]

B. Interpreting the Confrontation Clause

In the Confrontation Clause context, the Court has overlooked the meaning of exigency in domestic violence cases.[125] Recall that *Davis* defined a statement as nontestimonial if uttered "in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation

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117. *Id.* at 127 (Breyer, J., concurring).

118. *Id.* at 139 (Roberts, C.J., dissenting). Interestingly, the dissent cites to one of a handful of cases finding no exigent circumstances in a battering case in support of its admonition that "it is far from clear that an exception for emergency entries suffices to protect the safety of occupants in domestic disputes." *Id.* at 140. More generally, the dissent seems well-aware of the implications of the Court's holding for the policing of domestic violence. *See id.* at 139 ("Perhaps the most serious consequence of the majority's rule is its operation in domestic abuse situations, a context in which the present question often arises.").

119. *Id.* at 145 (Scalia, J., dissenting).

120. *See supra* note 112.

121. *See supra* Part II.

122. *See supra* notes 105–111 and accompanying text.

123. *See supra* notes 113–119 and accompanying text.

124. Interestingly, *Davis* was decided in the same term as *Randolph* by the very Justices who, in a separate context, seemed aware of the unique nature of exigency in domestic violence cases. (It should be noted that the lone dissent of Justice Thomas in *Davis* far more aptly conceives the dynamics of battering than does the majority opinion, which was joined by the other eight Justices.) *Davis*, the later holding, does not mention the portion of *Randolph* discussing exigency, despite analogizing to *Terry* stops and exceptions to the *Miranda* rule. I will return shortly to these observations and their possible significance. *See infra* Part V.

125. As is true in the Fourth Amendment context, *see supra* Part I, the most recent Supreme Court pronouncement on exigency seems fairly to reflect a substantial body of lower-court decisions on point. *See infra* note 135 (citing representative cases).

is to enable police assistance to meet an ongoing emergency."[126] Conversely, a statement is testimonial if the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"—*i.e.*, there is no "ongoing emergency."[127] In announcing and applying this standard, the Court unduly constricted the temporal borders of "ongoing emergency" and misconstrued the measures required to alleviate it, wholly disregarding the realities of battering.

The Court's understanding of the facts presented by *Hammon v. Indiana*, the companion case to *Davis*, is revealing. At issue was the admissibility of Amy Hammon's statements to law enforcement officers responding to her 911 call. As already noted,[128] the Court reversed the defendant's conviction, concluding that the challenged statements to police were "part of an investigation into possibly criminal past conduct."[129] By incanting the language of crisis—"ongoing emergency," "imminent danger," "call for help against bona fide physical threat," "present emergency," "frantic answers," "environment that was not . . . safe"—the Court easily[130] designated the victim's statements as testimonial; she, according to the Court, was "telling a story about the past";[131] not "seeking aid."[132] Thus, because "Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation,"[133] their admission at trial constituted a violation of the defendant's Confrontation Clause rights.[134]

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126. Davis v. Washington, 126 S. Ct. 2266, 2273 (2006).

127. *Id.* Professor Jeff Fisher's interpretation of the Court's decision in *Davis* requires that emphasis be placed on the word "ongoing," as opposed to "emergency." E-mail from Jeffrey L. Fisher, Associate Professor of Law, Stanford Law School, to author (Jan. 8, 2007, 18:23:00 EST) (on file with author); *see also* Jeffrey L. Fisher, *What Happened—and What is Happening—to the Confrontation Clause*, 15 J.L. & POL'Y 587 (2007).

128. *See supra* notes 74–77 and accompanying text.

129. *Davis*, 126 S. Ct. at 2269.

130. *Id.* at 2278.

131. *Id.* at 2279.

132. As I have written elsewhere, "[t]he portion of *Davis* treating *Hammon* may well be criticized for its application of the Court's newly articulated definition to the facts. But the important point is that Amy Hammon could not 'seek aid' without 'telling a story about the past.'" Tuerkheimer, *supra* note 29, at 32.

133. 126 S. Ct. at 2279.

134. *Id.* at 1279–80. To see the limits of the *Davis* Court's understanding of battering, assess this proclamation in factual context (as culled from the opinions of the Indiana appellate court, the Indiana Supreme Court, and the United States Supreme Court):

> Police respond promptly to a "reported domestic disturbance" and find a "timid" and "frightened" woman, and a man who admits to arguing with her but claims—despite a living room in a state of "disarray" with "broken objects littering the . . . floor" and shards of glass in front of a shattered gas heating unit with "flames coming out of the . . . partial glass front"—that it "never became physical." After police separate the two, the woman tells police that her husband had thrown her into the shattered glass and punched her in the chest, and that she is in pain. Despite the efforts of police to keep the man away, he makes "several attempts" to enter the room where the woman is speaking to an officer

According to the dominant mode of judicial reasoning[135] now endorsed by *Davis*, if a declarant is providing information to aid an "investigation,"[136] the exigency confronting her must necessarily have been relieved or "ended,"[137] and thus she cannot possibly be "crying for help."[138] But in the domestic violence context, this sharp dichotomy proves false:[139] a battered woman's safety often depends entirely on the intervention of law enforcement.[140] This insight severely

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> about the episode, becoming "angry" when the officer "insist[s] that [he] stay separated from [the woman]" so that the police can investigate the situation.

Tuerkheimer, *supra* note 29, at 30–31 (citations omitted).

135. Representative of this body of lower court case law is *People v. Kilday*, No. A099095, 2004 Cal. App. Unpub. LEXIS 6290 (June 30, 2004). In *Kilday*, police responding to a hotel crime scene found the victim visibly injured, "upset, frightened, and initially unwilling to speak." *Id.* at *5. She told the officers that her boyfriend—who had left the scene—had cut her with glass and burned her legs, and that she was "afraid that [he] would come back and get her." *Id.* When police informed her that the suspect was indeed returning to the hotel, the victim "became extremely frightened and withdrawn." *Id.* She later "clutch[ed]" the detective's hand as she watched her boyfriend drive away in a patrol car. *Id.* The victim then disclosed a history of violent abuse: the defendant had in recent months cut her hand with glass, requiring emergency medical treatment; given her a "fat lip" and then "held her down and burned her on the right leg with a hot clothing iron"; "grabbed her by the hair and thrown her against a wall"; and, on a separate occasion, pulled out some of her hair. *Id.* at *6–8. The most recent episode provoked a nearby guest to report the disturbance to a hotel manager, resulting in the police involvement leading to Kilday's arrest. *Id.* at *8. The victim's account was corroborated by her injuries, which included a scar on her wrist, bumps on her head, multiple burns, and "the imprint of a clothing iron with the steam holes visible on the back of her right calf." *Id.* at *7–8. Holding that the victim's statements to officers upon their arrival—*i.e.*, *before* the defendant's arrest—were testimonial, the *Kilday* court noted that questions to which the victim responded were "part of a police investigation," and that this "investigative questioning" was "directly analogous to the police interrogation involved in *Crawford*." *Id.* at *20, *21 n.9.

For other cases demonstrating similarly flawed reasoning, see for example People v. Ruiz, No. B169642, 2004 WL 2383676, at *9 (Cal. Ct. App. Oct. 26, 2004) (deeming domestic violence victim's statement to police that boyfriend had just threatened her with gun testimonial because conduct alleged "was illegal and so dangerous that [the victim] reasonably was aware that her complaint to the officers would lead to [the suspect's] arrest and prosecution"); People v. Adams, 16 Cal. Rptr. 3d 237, 243 (Ct. App. 2004) (classifying pregnant victim's statement to responding police officers that her boyfriend had just cut her face by throwing a glass as testimonial); State v. Powers, 99 P.3d 1262, 1266 (Wash. Ct. App. 2004) (deeming 911 call testimonial where distressed-sounding domestic violence called to report violation of protection order, because call was made "to report" the violation and "assist" in the suspect's apprehension, "rather than to protect herself or her child from his return").

136. *Davis*, 126 S. Ct. at 2278 ("[T]he interrogation was part of an investigation into possibly criminal past conduct . . . .").

137. *Id.* at 2277 ("[A]fter the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended . . . .").

138. *Id.* at 2279 ("Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation . . . .").

139. *See supra* notes 85–97 and accompanying text.

140. *See* Tuerkheimer, *supra* note 29, at 25. As I previously stated:

undermines *Davis*, which equates the past commission of crime with the resolution of exigency. By failing to account for the ongoing, patterned nature of battering—and the uniquely exigent circumstances these dynamics create—the Court implicitly analogizes it to a conventional crime paradigm characterized by discrete, isolated violence.[141]

Davis's indifference to the distinct dynamics of abuse is so absolute as to make this limitation seem preordained.[142] Yet, as we and the court have seen, it is not. Five of the Justices, analyzing "the capacity of the police to protect domestic violence victims"[143] had earlier the same term, in *Randolph*, explicitly acknowledged that circumstances are exigent where "violence (or threat of violence) has just occurred or is about to (or soon will) occur."[144] Of the three Justices who did not join the *Randolph* majority,[145] three dissented in part due to a concern that traditional exigency analysis would not "suffice[] to protect the safety of occupants in domestic disputes."[146]

The Court's flawed approach to the Confrontation Clause thus cannot be dismissed as reflective of a categorical resistance to contextualized exigency determinations. Rather, it is a puzzle demanding a deeper, more intricate solution.

V. THEORIZING THE DIVERGENCE

The Supreme Court's recent holdings regarding the warrantless policing of battering and the lower court decisions preceding them demonstrate that the judiciary is not impervious to the notion that exigency differs when violence is inflicted by an intimate. As a general proposition, judges have been able to discern the ongoing nature of the emergency where a call is domestic and have upheld the police action needed to resolve it. In this jurisprudence, then, we see largely informed exigency analyses, notwithstanding judicial reliance on an account of battering that remains incomplete.[147]

> The "cry for help" may sound . . . much like a narration of events because it is: a victim is describing battering that will, in all likelihood, continue in the absence of some action by law enforcement. From her perspective, if she does not describe the crime to police, it is simply not "over," nor is she safe. . . . The exigency she experiences requires a narration of past events in order to resolve the immediate danger they precipitated.

Id. (citations omitted).

141. *See id.* at 23 ("To posit a clean divide between the crime and the exigency it creates, and the crime's aftermath, is to import a model of crime . . . incompatible with the realities of battering.").

142. *See supra* note 135 (majority of lower courts deciding cases after *Crawford* and before *Davis* engaged in similar reasoning).

143. Georgia v. Randolph, 547 U.S. 103, 118 (2006).

144. *Id.*

145. Again, Justice Alito did not participate in consideration or decision of the case.

146. *Id.* at 140 (Roberts, C.J., dissenting); *see also supra* note 118.

147. *See supra* note 112 (noting the under-conceptualized state of the case law). After *Randolph*, courts may be challenged to more fully explain how domestic violence

In the Confrontation Clause area, the problem I have identified is of a qualitatively different nature. Here, the Court and a majority of lower courts are not simply lacking an adequate conceptual framework for grounding accurate assessments regarding exigency in the domestic violence sphere. Rather, implicit default to a definition of exigency that derives from paradigmatic crime results in utter disregard for the realities of battering.

These dual modes of reasoning about exigency in domestic violence cases demand explanation. I will briefly defend this contention before offering a theoretical framework that helps to explain the divergence we have seen.

At first glance, the obvious reason to question the significance of the duality we have seen is that very distinct norms underpin the Fourth and the Sixth Amendments.[148] As Justice Scalia observed in *Davis*, "[t]he Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision."[149] The Warrant Clause, by contrast, regulates police conduct exclusively and protects different interests. Given these unrelated normative functions and separate governing domains, the argument goes, the right of privacy and the right of confrontation should be interpreted entirely independently of one another.

The logic of this premise seems unassailable, unless one recalls that underlying the relevant doctrine and its judicial development lies an empirical reality that does not mutate across constitutional divides.[150] Why should this reality be differently understood depending on the particular legal framework applied to

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departs in significant ways from paradigmatic crime, given that facts raising clear consent but less evident exigency (cases easily decided before *Randolph*) will place added pressure on doctrinal contours. I am contemplating, in particular, situations where a victim has left shared premises, and her batterer inside, at the time she communicates with police. Under these circumstances, line drawing may be most difficult and require a more amplified conceptual framework. Courts confronting this factual predicate may or may not appreciate that exigency has both temporal and spatial distinctions in the domestic violence realm. The extent to which the battered woman's realities are considered in relation to these inquiries will ultimately dictate whether, as a practical matter, the home is her castle, too. *Cf. Randolph*, 547 U.S. at 119 (describing a "victimized individual . . . outside of her apartment when police arrived" as, "for all intents and purposes, within the protective custody of law enforcement officers"). For Chief Justice Roberts' critique of the majority, see *supra* note 19.

148. One might similarly observe that the Fourth Amendment's reference to reasonableness and the balancing approach that it entails is sufficiently distinct from the Confrontation Clause's categorical requirement of confrontation so as to dictate distinctive judicial analyses in the two realms. For a response to this proposition, see *infra* notes 150–151 and accompanying text. I will turn momentarily to critique the claim that judicial approaches to interpreting the meaning of these amendments are in fact bimodal. *See infra* notes 154–168 and accompanying text.

149. Davis v. Washington, 126 S. Ct. 2266, 2279 n.6 (2006).

150. Again, I am not suggesting that the doctrinal role played by exigency should be the same in both the Fourth Amendment and the Sixth Amendment contexts. Because the two Amendments serve very different functions, the legal significance of the construct is appropriately bound to each area.

it?[151] More precisely, why are courts more likely to engage in reasoning that is predicated on the characteristics of battering when resolving claims of unconstitutional policing than when deciding challenges to the admission at trial of a victim's out-of-court statement? With the inquiry framed in this manner, the Warrant Clause case law—which is able to accommodate empirical realities—can be seen as a "control"; the Confrontation Clause cases—which both reflect and compel a judicial suppression of known facts—is the variable in need of explanation.

To make sense of this odd jurisprudential disconnect, then, consider that the two general approaches to exigency that we have seen are dependent on whether the relevant analytic focus is on policing as opposed to prosecution. In the Fourth Amendment context, judicial inclination to apply a robust, reality-based, understanding of exigency reflects a conscious preoccupation with how the law in this area regulates police conduct.[152] When exigency analysis is framed by the question of how domestic violence should be policed, courts take account of the dynamics of battering because the alternative—constraining the efforts of law enforcement to respond to these very prototypical facts—is perceived as untenable. If circumstances are not recognized as "exigent," the police need a warrant, forcing courts to engage in the following thought experiment: if the officer leaves, *then what*? The answer vividly dramatizes the ongoing emergency confronting victims of domestic violence, mediating the space between legal construct and empirical reality.

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151. This inquiry is even more pressing when placed in historical context. Given that the criminal justice system is in a relatively nascent stage of transforming its response to battering, identifying collisions between legal constructs and the realities of domestic violence is particularly critical. *See* Tuerkheimer, *supra* note 84 at 969–71 (defending contention that "the evolution of criminal law's response to battering is incomplete").

152. It is important to emphasize that, when deciding Warrant Clause challenges, judges are self-consciously regulating police conduct. *See* New York v. Belton, 453 U.S. 454, 458 (1981) ("Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities." (citing Wayne R. LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141)).

Even where evidence that is recovered as a result of the warrantless entry results in prosecutions for offenses other than domestic violence (which often occurs), these cases nonetheless dictate how police may lawfully respond to domestic violence. *See, e.g.*, United States v. Brooks, 367 F.3d 1128 (9th Cir. 2004) (recovery of marijuana); United States v. Hendrix, 595 F.2d 883 (D.C. Cir. 1979) (recovery of shotgun); United States v. Gwinn, 46 F. Supp. 2d 479 (S.D.W. Va. 1999) (recovery of firearms); Unites States v. Guarante, 810 F. Supp. 350 (D. Me. 1993) (recovery of rifle); State v. Greene, 784 P.2d 257 (Ariz. Ct. App. 1989) (recovery of Hawaiian leis connecting suspect to unrelated sexual assault); State v. Tressler, 765 P.2d 1007 (Ariz. Ct. App. 1988) (recovery of knives); People v. Mascarenas, 972 P.2d 717 (Colo. Ct. App. 1998) (cocaine); State v. Gilbert, 942 P.2d 660 (Kan. Ct. App. 1997) (recovery of marijuana); State v. Raines, 778 P.2d 538 (Wash. Ct. App. 1989) (recovery of cocaine).

By contrast, the Confrontation Clause does not regulate police conduct,[153] allowing judges to maintain considerable distance from the unmediated realities of abuse. This fact alone, however, does not dictate the acontextualized judicial reasoning characteristic of this doctrinal context. Rather, the explanation for what we have seen is more complicated, implicating the essence of the recently transformed right of confrontation.

The Court's expressed view of exigency suppresses the realities of battering because a true account of battering would undermine the formalistic foundations upon which *Crawford* and *Davis* were erected.[154] Evaluation of this claim requires attention to how the Court in these cases reenvisioned the function of the Confrontation Clause in modern criminal prosecutions.

Until 2004, the parameters of a defendant's right of confrontation were defined by *Ohio v. Roberts*,[155] which held that an out-of-court statement could be admitted provided that it possessed adequate "indicia of reliability."[156] The opinion in *Roberts* explicitly embraced a functional approach to the confrontation right, following a line of precedent it characterized as follows:

> The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that "a primary interest secured by [the provision] is the right of cross-examination." . . . The Court, however, has recognized that competing interests, if "closely examined," may warrant dispensing with confrontation at trial. Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings. This Court, in a series of cases, has sought to accommodate these competing interests. True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions.[157]

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153. *See Davis*, 126 S. Ct. at 2279 n.6 ("The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision.").

154. *See infra* notes 155–162 and accompanying text.

155. 448 U.S. 56 (1980).

156. *Id.* at 66. According to *Roberts*, evidence was considered reliable if it either fell within a "firmly rooted hearsay exception" or demonstrated "particularized guarantees of trustworthiness." *Id.*

157. *Id.* at 63–64 (citations omitted) (emphasis added). The *Roberts* Court further noted:

> [W]e have found no commentary suggesting that the Court has misidentified the basic interests to be accommodated. Nor has any commentator demonstrated that prevailing analysis is out of line with the intentions of the Framers of the Sixth Amendment. Convinced that "no rule will perfectly resolve all possible problems," we reject the invitation to overrule a near-century of jurisprudence. Our reluctance to begin anew is heightened by the Court's implicit prior rejection of principal alternative proposals; the mutually critical character of the commentary;

Crawford, as we have seen, wholly upended this interpretive approach,[158] supplanting the "flexible" framework governing the admissibility of hearsay[159] with a seemingly bright-line rule.[160] Per Justice Scalia, the Court's rejection of "open-ended balancing tests" and its resurrection of "categorical constitutional guarantees" was cloaked in the language of absolutes.[161] Indeed, it is this emphatic

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> and the Court's demonstrated success in steering a middle course among proposed alternatives.

Id. at 66 n.9 (citations omitted).

158. While the continued vitality of *Roberts* with respect to the admissibility of non-testimonial hearsay remained open to debate after *Crawford*, *Davis* has seemingly resolved the matter. *Davis*, 126 S. Ct. at 2275 n.4 ("We overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.").

159. *See* Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 751 (asserting that the *Roberts* rule, which applied to all hearsay, "had to be minimal and flexible, or the impact on criminal litigation would have been entirely too substantial and costly").

160. For a thoughtful discussion of how *Crawford* represents a move away from a expressed commitment to balancing competing values, see Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493 (2006). Professor Fisher has described *Roberts* as "a quintessential balancing test. It abstracted the Confrontation Clause to its background purpose—'to advance the accuracy of truth-determining process in criminal trials'—and posited that the Clause's specific command could be overlooked when it did not appear to further this purpose." *Id.* at 1507 (citation omitted). According to Fisher, *Crawford* replaced *Roberts* with a "categorical rule barring the admission of testimonial statements when the declarant has not been, and cannot be, subjected to full cross-examination. Instead of establishing an evidentiary principle enforced by a general, case-by-case standard, the Confrontation Clause now erects a nonnegotiable tenet of trial procedure that is enforced by a bright-line exclusionary rule." *Id.* at 1508–09. While I will argue that *Crawford* did not announce a test that is, in substance, the "categorical" or "bright-line" rule that Professor Fisher posits, his analysis provides a helpful way of understanding the significance of *Crawford*'s "break" from an unabashed commitment to balancing. *Id.* at 1506.

161. Crawford v. Washington, 541 U.S. 36, 67–68 (2004) The Court stated:

> We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people. . . . They were loath to leave too much discretion in judicial hands. By replacing *categorical constitutional guarantees* with open-ended balancing tests, we do violence to their design.

Id. (emphasis added) (citations omitted); *see also id.* at 61 (characterizing approach adopted by Court as "impos[ing] an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine"); *id.* at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."); *id.* at 65 ("It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one that Confrontation Clause demands."); *id.* at 67 ("The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising."); *id.* at 68 ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required:

interpretive move to a Confrontation Clause that tolerates no qualifiers that seemingly animated the Court.[162] And yet, with regard to the concept most critical to implementation of this new confrontation right, the Court chose not to define the contours of "testimonial" hearsay.[163]

Though any one of the definitions of testimonial suggested by the opinion in *Crawford*[164] presented an arguably plausible way of framing the scope of

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unavailability and a prior opportunity for cross-examination."); *id.* at 68–69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

162. *See supra* note 161. Competing conceptions of the proper interpretive approach to the Confrontation Clause were expressly advanced by the litigants in *Crawford*. Professor Fisher has summarized these arguments as follows:

> In Crawford . . . I asked the Court to abandon the *Roberts* framework in favor of a bright-line rule barring the admission of "testimonial" statements when cross-examination is impossible. . . . The federal government pounced on the categorical nature of the proposed testimonial approach, apparently believing it to be a great weakness. Courts, the United States contended, could not always insist upon cross-examination because "Sixth Amendment rights must yield on occasion" to a higher "truth-seeking" goal. Justice O'Connor (one of the architects of the *Roberts* framework) echoed this theme at oral argument, questioning why there was a need to change to a categorical rule when judges could still exclude most testimonial statements under *Roberts*'s balancing approach, reserving their discretion to admit such statements for exceptional cases. The Supreme Court responded, however, that the very nature of the right to confrontation is a prohibition against trusting judges to use discretion wisely.

Fisher, *supra* note 161, at 1507–08 (citations omitted).

163. The Court explained its reasoning as follows:

> We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford, 541 U.S. at 68 (citation omitted).

164. The Court described various possible formulations of the definition of testimonial:

> 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," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," White v. Illinois, 502 U.S. 346, 365, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); "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," Brief for National Association of Criminal Defense Lawyers

Confrontation Clause applicability, each is also somewhat arbitrary.[165] For our purposes, however, it is critical to see that the *Davis* Court announced a definition that would exclude the vast majority of statements admissible in victimless domestic violence prosecutions. This result, it seems to me, is quite deliberate. Despite its apparent adherence to formalism and neutral principles, *Davis* represents a balancing of interests. Though it masks its value judgments in the language of categorical imperatives,[166] the opinion in *Davis* advances a selected policy approach to confrontation[167] (albeit one that is obscured by the rhetoric of text and originalism). Why this approach, achieved at the substantial cost of fidelity to empirical realities?[168]

One answer is that the ideological commitment promised by *Crawford* could not be fully realized if the Court decided *Davis* differently. As I have already described, *Crawford* purported to revive a confrontation right that is absolute, while leaving undefined the very concept upon which *Crawford*'s practical import would ultimately depend.[169] Even if the Court was not fully aware of the impact its holding would have on the prosecution of domestic violence at the time the decision was issued,[170] this rather quickly became apparent.[171]

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et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it.

Id. at 51–52.

165. A literal reading of the Confrontation Clause would seem to allow for the admission of one of two categories of statements: either all hearsay, if "witnesses" include only persons giving in-court testimony, *cf. Crawford*, 541 U.S. at 42–43 ("One could plausibly read 'witnesses against a defendant' to mean those who actually testify at trial.") (citing Woodsides v. State, 3 Miss. (2 Howard) 655, 664–65 (1837)); or no hearsay, if "witnesses" include all persons whose words are ultimately used in court against an accused, *cf.* Ohio v. Roberts, 448 U.S. 56, 63 (1979) ("If one were to read this language [of the Confrontation Clause] literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial." (citing Mattox v. United States, 156 U.S. 237, 243 (1895))), *overruled by Crawford*, 541 U.S. 36. The Court's creation of a distinction between "testimonial" and "non-testimonial" hearsay represents a tacit concession that the confrontation right is located somewhere in the vast terrain between these two extremes; a terrain unmarked by unequivocal guideposts. *Cf.* Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105, 106–07 (2005) ("The historical claims regarding the original meaning of the Confrontation Clause in the 2004 decision *Crawford v. Washington* provide the latest installment of fictional originalism." (citation omitted)). In this respect, *Crawford*'s "testimonial" approach is inherently policy-bound; a characteristic that is irredeemably in tension with its categorical aspirations.

166. *See supra* note 161.

167. *See supra* note 165.

168. *See supra* Part IV.B (describing *Davis*'s failings).

169. *See supra* note 163 and accompanying text.

170. *Crawford*'s impact on the prosecution of domestic violence was entirely predictable and was, in certain respects, predicted. In 2002, Professors Bridget McCormack and Richard Friedman, a prominent architect of the testimonial approach ultimately adopted in *Crawford*, criticized what they identified as the increasingly common occurrence of "dial-in testimony," which they described as involving "the developing practice in which

By the time the Court decided *Davis*, the Justices undoubtedly realized that the classification of hearsay as testimonial or non-testimonial arises quite typically in domestic violence cases, where prosecutors must often proceed without the testimony of a victim.[172] Unless the Court in *Davis* announced a framework that would dictate the exclusion of a sizeable universe of hearsay previously admissible under the test of *Ohio v. Roberts*, the absolutist fallacy of *Crawford*—upon which the "new" Confrontation Clause rests—would be exposed. In *Davis*, the need to account for empirical realities is sacrificed[173] to allow for

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statements made in 911 calls or in follow-up conversations with police officers are often admitted at trial to prove the truth of the caller's narration of a crime allegedly committed against him or her." Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1173 (2002). Friedman and McCormack aptly observed that victimless domestic violence prosecutions represented "a dramatic change in the way criminal cases have traditionally been tried." *Id.* at 1180. To remedy what the authors viewed as the problematic admission of victims' out-of-court statements, Professors Friedman and McCormack argued for a reconceived Confrontation Clause which would "apply only to a limited category of out-of-court statements, but as to those it should be deemed categorical, not subject to balancing or ringed with exceptions." *Id.* at 1172.

171. In an article published shortly before *Davis* was decided, Professor Mosteller summarized the immediate and massive impact of *Crawford* on the prosecution of domestic violence: "*Crawford* has disrupted domestic violence prosecutions to a degree not seen in any other area. It erected a 'stop sign' in front of most of this evidence, which combined with its reluctance to treat excited utterances as a historic exception to confrontation, has caused massive disruption and great uncertainty." Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 608 (2004) (citations omitted). Tom Lininger showed that:

> In a survey of over 60 prosecutors' offices in California, Oregon, and Washington [conducted in late 2004 and early 2005], 63 percent of respondents reported the *Crawford* decision has significantly impeded prosecutions of domestic violence. Seventy-six percent indicated that after *Crawford*, their offices are more likely to drop domestic violence charges when the victims recant or refuse to cooperate.

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

172. *See* Tuerkheimer, *supra* note 29, at 14–18.

173. One consequence of this sacrifice is that lower courts must struggle to apply an incoherent framework to cases presenting facts incompatible with *Davis*'s approach. Given the disconnect between the "ongoing emergency" framework and the dynamics of domestic violence, it is hardly surprising that courts confronting similar facts have reached disparate conclusions regarding the testimonial nature of challenged statements. *Compare, e.g.*, State v. Mechling, 633 S.E.2d 311 (W. Va. 2006) (finding that an emergency was not in progress, despite fact that victim was "crying" and "really shook up", when officers arrived within fifteen minutes of incident), *with* Vinson v. State, 221 S.W.3d 256 (Tex. App. 2006) (officer's "asking only what had happened was tantamount to his having asked whether an emergency existed or whether [the victim] needed assistance," given his arrival within ten to fifteen minutes of the 911 call, victim's "bloodied appearance," the "disarray" of the apartment, and the officer's knowledge that a woman in the apartment had recently yelled for help). In an effort to make sense of this post-*Davis* landscape, I have hypothesized that "a perpetrator's presence at the crime scene at the time the challenged statements are made might generally become accepted as a proxy for an 'ongoing emergency,' and the perpetrator's absence from the scene viewed as presumptive evidence

adherence to the pretense that the Court is engaged in an endeavor that involves no balancing and embodies "pure" interpretation of constitutional text.

Compounding the Court's ideologically-based motivations for deciding *Davis* as it did is a skepticism of victimless domestic violence prosecution.[174] In no other category of crime has the widespread development of prosecutorial policies addressing the "uncooperative" victim been necessary.[175] It is hardly surprising—particularly when the criminal justice system's response to domestic violence is viewed in socio-historical perspective—that this departure from the conventional crime template would provoke suspicion directed both at law enforcement and at women alleging abuse.[176]

There is reason, moreover, that a generalized hostility to victimless domestic violence prosecution would be particularly acute in the Confrontation Clause context: when a defendant is tried in the absence of testimony from the crime victim, the Clause's core value is seemingly implicated.[177] But this intuition

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that a crisis has been resolved." Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and its Loss*, 15 J.L. & POL'Y 725, 740–41 (2007).

174. This skepticism is not confined to any one level of the judiciary and may help to explain lower court opinions similarly dismissive of dynamics of domestic violence that are relied upon by these same courts in other legal contexts.

175. *See* Tuerkheimer, *supra* note 29, at 14–18.

176. It is worth observing the endurance of many of the informal structures upon which legal constructs legitimating domestic violence once rested. For instance, because domestic violence cases occur within a sphere still demarcated as "private," the prospect of "family disputes" resulting in a criminal conviction may provoke considerable judicial resistance to victimless prosecutions where the victim's own "complicity" is less readily assessed. Elaboration of these suggestions is, however, outside the scope of this discussion.

177. In a discussion of *Crawford*'s impact on contemporary domestic violence prosecutions, Professor Mosteller has suggested that "[i]f we are to imagine the Framers' reaction to practices that did not exist at the time, we could imagine few practices that would have been more abhorrent to their values than the concept of a prosecution through the out-of-court accusations of a victim who was not compelled, even if available, to take the stand and make those charges in person to the defendant." Mosteller, *supra* note 171, at 608 n.548 (2004).

I have a somewhat different perspective on the hypothetical posed by Professor Mosteller. In my view, to fully engage the historical counterfactual, one must necessarily confront the Framers' conception of wife battering as lawful. It is this belief structure which would certainly have motivated objection to the prosecution of domestic violence, regardless of whether the victim testified. In an imagined world, were the conduct of battering to have been perceived by the Framers as criminal, it is not at all clear to me that the "victimless" aspect of domestic violence prosecution would have proven problematic, since the law enforcement practices that have evolved in response to the realities of the uncooperative victim do not seem analogous to those condemned by the Framers. Indeed, in another context, I have noted the conceptual difficulty of "somehow extrapolat[ing] from the treason trial of Sir Walter Raleigh—which the Court has characterized as "a paradigmatic confrontation violation"—a confrontation right with meaning in the context of domestic violence prosecution." Tuerkheimer, *supra* note 29, at 6 (internal citations omitted). Put simply, "if Raleigh's accuser, Lord Cobham, is the 'paradigmatic' absent accuser, and women who were battered at the time of the amendment's passage could not even be accusers, how should we make sense of victimless domestic violence prosecution and the right of confrontation?" *Id.*

rests on a fundamentally flawed understanding of what the right of confrontation entails. The limitations of judicial reasoning that we have observed may derive from this conceptual failure.

An incomplete normative model underlies the Court's view of confrontation. As I have previously argued, "[t]he meaning of confrontation . . . is largely dependent on the configuration of relationships between accuser, state, and accused—a variable scarcely noticed by courts."[178] Until now, Confrontation Clause jurisprudence and scholarship have presumed an alliance between accuser and state, against accused; indeed this particular alignment of what I have called "*Crawford*'s Triangle" has always been the natural and invisible default. While in prosecutions for paradigmatic crime this conventional understanding fairly depicts the alignment, domestic violence turns the triangle on its head: in cases where the prosecution is proceeding without a victim, "allegiances underlying the relational triad are essentially inverted."[179] But because the existence of an accuser-accused-state triad lies outside the realm of judicial consciousness, so, too, the consequences of its inversion are overlooked.

Animating the Confrontation Clause cases is a deficient paradigm for understanding the meaning of confrontation. Uncritical acceptance of this paradigm distinguishes this area of constitutional criminal procedure from others, distorting judicial reasoning in domestic violence cases and, more generally, thwarting the evolution of a coherent jurisprudence.

CONCLUSION

If domestic violence is to be effectively policed and prosecuted, exigency must be defined accurately—*i.e.*, in a manner that comports with human experience.[180] This insight has been largely missing from scholarly discourse and judicial commentary, to the detriment of both doctrinal and conceptual coherence.

This Article represents a first effort to articulate how domestic violence creates circumstances that are distinctly exigent. Apart from the theoretical implications of this project,[181] what practical consequences are likely to be derived from it?

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178. Tuerkheimer, *supra* note 29, at 56–57.

179. *Id.* at 57.

180. Embedded in this Article is a normative claim that the realities of battering should be taken into account by law—a premise that is not radical, and may even be uncontroversial, but is nevertheless deserving of emphasis. Powerful expressivist functions are served by the incorporation of battered women's lives into legal reasoning. *See* Tuerkheimer, *supra* note 91, at 621. As well, informing law with an account that accords with the realities of domestic violence is likely to have a substantive effect on outcomes, which, to the extent that correspondence between life and law is optimal, should be viewed as a positive development.

181. Describing the meaning of exigency in the domestic sphere may be viewed as part of a larger endeavor to reform constitutional criminal procedure so that it accounts for the realities of abuse. Indeed, if the criminal law is to reach the next phase of its unfolding response to the practice of battering, legal constructs that remain unyielding to the ways in which domestic violence is unlike other violence must be confronted, one by one.

In the Fourth Amendment area, greater understandings of empirical realities underlying the construct of exigency should lead to a more informed jurisprudence. While judges deciding challenges to warrantless police conduct have been generally inclined to accept that domestic violence is different from paradigmatic violence and to decide suppression motions in a manner that takes this fact into account, the case law reflects an appropriately contextualized view of exigency that is more instinctive than reasoned. A fuller description of *why* circumstances may be uniquely exigent in domestic violence cases should enhance judicial reasoning and may even affect outcomes,[182] refining and enriching the law of exigency.

Today's Confrontation Clause jurisprudence cannot similarly incorporate greater understandings of the meaning of exigency in the domestic violence sphere. The Court's approach to the confrontation right is itself in tension with empirical realities. Asking why this is so reveals a fundamentally flawed framework. In this area of constitutional criminal procedure, then, the problem of domestic violence exposes more deeply embedded normative failings: failings unconfined to the cases that most starkly illuminate them.

182. *See supra* note 147 (positing factual circumstances that will place new pressure on doctrine of exigent circumstances).