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Adversarial Justice's Casualties: Defending Victim-Witness Protection

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ADVERSARIAL JUSTICE'S CASUALTIES: DEFENDING VICTIM-WITNESS PROTECTION

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Abstract: The U.S. Supreme Court and some state courts have constitutionalized an increasingly rigid and broad vision of adversarial adjudication's requirements. Commentators often celebrate this adversarial revolution as expanding defendants' rights of confrontation, cross-examination, and self-representation. Yet the adversarial revolution also has created an arsenal of tactics to retraumatize victims of sexual assault and general violent crime. The courts and legislatures are in disarray about what to do to protect vulnerable victim-witnesses. This Article is about adversarial adjudication's casualties and how to reduce the risk of harm. The Article defends a subset of protective measures that avert further injury to victims while remaining sensitive to defendants' rights. The Article also challenges the rigid application of adversarial ideals historically forged for adjudicating crimes against the sovereign, such as seditious libel, to crimes of sex and violence involving victims. A distinction must be made between the core category of crimes against the state, where protections are at their zenith because the victim and prosecution are identical and powerful, and crimes outside this paradigm, where restrictions should be less rigid. Recognizing this important difference clears some of the murk and doubt that chills protective measures for victim-witnesses who have experienced traumatic injury.

INTRODUCTION

The United States is among a minority of nations in the world with an adversarial criminal justice system.[1] The model gives partisan-lawyers the dominant role in selecting and challenging evidence through confrontation

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[1] Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 257 (2006); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2124 (1998); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 301 (1989).

of witnesses, cross-examination, and pretrial discovery to elicit information from opponents.[2] Over the last decades, the U.S. Supreme Court has enlarged confrontation, cross-examination, and self-representation rights.[3] State courts may go even further, for example, by requiring the victim to physically face the defendant "eyeball-to-eyeball" or by authorizing digging through private victim and witness information.[4] Commentators have celebrated advances in the adversarial revolution as fortifying defendant rights at the expense of prosecutorial power.[5] Yet the adversarial revolution also exacts severe costs on a crucial third player—victim-witnesses, especially in cases of traumatic crimes of sexual assault and violent crime generally.[6]

The courts are in disarray about what—if anything—should be done to protect at-risk victims.[7] The evidence is mounting that undergoing rituals of adversarial adjudication retraumatizes victims of violent and sexual assault crimes.[8] Sometimes the legal dilemmas make it into the case reporters.[9]

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[2] JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 309–10, 312–13 (A.W. Brian Simpson ed., 2003). *See generally* United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958) (explaining that discovery was meant to "make trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent").

[3] *See infra* notes 139–213 and accompanying text.

[4] *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (holding that the trial court's in camera review of the victim's medical records is a procedure that fully protects the interests of both the defendant and the State); People v. Phillips, 315 P.3d 136, 152–53 (Colo. App. 2012) (collecting "eyeball-to-eyeball" jurisdictions); Commonwealth v. Amirault, 677 N.E.2d 652, 656–57, 660 (Mass. 1997) (requiring the victim-witness to physically face the defendant while testifying); People v. Jovanovic, 676 N.Y.S.2d 392, 392–93 (Sup. Ct. 1997) (describing how, pursuant to a defendant's subpoena, Columbia University produced several computer disks consisting of 2400 pages of emails from a student rape victim's account for the court to review), *rev'd*, 700 N.Y.S.2d 156, 163–65, 167–70, 172 (App. Div. 1999) (reversing on grounds that portions of emails between the defendant and victim admitted at trial should not have been redacted).

[5] *E.g.*, Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1866–67 (2012); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 200–04 (2005); Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1496–97 (2006); Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 5 (2004); Miguel A. Méndez, Crawford v. Washington*: A Critique*, 57 STAN. L. REV. 569, 570–71, 607 (2004).

[6] *See infra* notes 84–138 and accompanying text.

[7] *Compare* State v. Folk, 256 P.3d 735, 744–47 (Idaho 2011) (reversing a conviction for lewd conduct with a child because the defendant was not allowed to personally cross-examine the victim), *and* Commonwealth v. Spear, 686 N.E.2d 1037, 1042–43 (Mass. App. Ct. 1997) (reversing a conviction because the victim was not forced to physically face the defendant while testifying), *with* United States v. Gigante, 166 F.3d 75, 81–82 (2d Cir. 1999) (allowing victim-witnesses to testify from another room through a two-way closed-circuit camera).

[8] *E.g.*, Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159–60 (2003) (explaining that the criminal justice system leaves crime victims exposed to a number of serious obstacles and risks); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RES. 313, 315–16, 321 (2002) (suggesting that criminal proceedings are frequently a "second victimization" for the crime victims involved). *See generally* Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the*

Sometimes they do not.[10] The dramas behind the legal questions are brutal, even after the crime.

D.G., for example, was a victim whose case did not make it into the reporters.[11] The man who raped her repeatedly chose to self-represent so he could personally question her on the stand.[12] Shortly before she was going to be trapped before him again for interrogation—legitimized as cross-examination by a self-representing defendant—D.G. tried to commit suicide by jumping off the courthouse building.[13] The intimidation by criminal procedure worked, and the prosecutors dropped her case.[14] Prior to D.G.'s attempted suicide, legislators introduced and debated a bill on multiple occasions that would have protected victims like her from such retraumatiza-

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Legal System: Police, Prosecutor, and Victim Perspectives, 20 LAW & HUM. BEHAV. 607, 620 (1996) (discussing data indicating that crime victims generally have negative attitudes towards the criminal justice system).

[9] *See, e.g.*, People v. Abel, 271 P.3d 1040, 1072–73 (Cal. 2012) (describing the lower court's review of a witness's mental health records at the defendant's behest and concluding that "there was nothing of particular value to the defense"); Appelgate v. Commonwealth, 299 S.W.3d 266, 273 (Ky. 2009) (holding that defendants may be restricted from personally cross-examining victims); Commonwealth v. Stockhammer, 570 N.E.2d 992, 999–1002 (Mass. 1991) (holding that the trial court's in camera review of the victim's medical records was insufficient and that defendant's conviction must be reversed because he was entitled to have access to the records before trial).

[10] *See, e.g.*, Diana Hefley, *Juror's 'Research' Forced Mistrial in Child Rape Case*, HERALD EVERETT, WASH. (Dec. 12, 2012, 12:01 AM), http://www.heraldnet.com/article/20121212/NEWS01/712129975/0/News, *archived at* http://perma.cc/7XF6-F2KD (describing the prosecutor's difficult decision to plead a case of rape and molestation of a six-year-old child by her father down to incest, carrying a significantly lesser penalty, because he did not want to subject the child to the trauma of testifying again); Jolayne Houtz, *When Children Face Attackers in Court—Advocates Say Victims' Trauma Weighs Heavily*, SEATTLE TIMES (Aug. 4, 1991), http://community.seattletimes.nwsource.com/archive/?date=19910804&slug=1298066, *archived at* http://perma.cc/R5MX-T6KW (detailing the trauma undergone by a 15-year-old rape victim when subjected to cross-examination by the self-representing rapist and discussing another case where a rapist questioned the woman he raped and was subsequently prosecuted for witness intimidation); Adam Tanner, *My Lawyer, Myself: Self-Defense Often Fails*, CHRISTIAN SCI. MONITOR (Feb. 10, 1995), http://www.csmonitor.com/1995/0210/10032.html, *archived at* http://perma.cc/VZL4-J9UL (describing the questioning of a victim who had been shot three times by a self-representing perpetrator).

[11] *See generally* Amended Information at 3–4, State v. Cruz, No. 00-1-04270-8 SEA (Wash. Sup. Ct. Dec. 2, 2010) (on file with author).

[12] *See* Jennifer Sullivan, *Rape Victim's Threat to Jump Off Courthouse Roof May Derail Case*, SEATTLE TIMES (Nov. 4, 2010, 9:14 PM), http://seattletimes.com/html/localnews/2013350378_trial05m.html, *archived at* http://perma.cc/59G6-84BK. *See generally* Information at 4–5, *Cruz*, No. 00-1-04270-8 SEA (Wash. Sup. Ct. May 4, 2000) (on file with author) (detailing the charges filed against the defendant).

[13] Sullivan, *supra* note 12.

[14] Jennifer Sullivan, *Guilty Verdicts in Rape Trial Interrupted by Suicide Attempt*, SEATTLE TIMES (Dec. 8, 2010, 1:25 PM), http://seattletimes.com/html/theblotter/2013629694_man_on_trial_for_sexual_assaul.html, *archived at* http://perma.cc/JJ63-FW99.

tion.[15] The bill faltered because of concerns over whether it would conflict with the rights of defendants to self-represent and confront witnesses.[16]

D.G.'s tragic story—and others like it—illustrate how the criminal justice system fails to protect survivors of attempted murder, rape, and other violent crimes from brutal rituals of adversarial adjudication, such as interrogation by the perpetrator or exposure to retaliation.[17] Courts and state legislatures are exploring protective measures to lessen this harm.[18] Efforts to reduce the risk of further injury are chilled, however, by doubts over potential conflict with murky criminal procedure protections.[19] Framed in reaction to controversial prosecutions for crimes against the sovereign, such as

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[15] *See* S.H.B. 2457, 61st Leg., Reg. Sess. (Wash. 2010); H.B. 2457, 61st Leg., Reg. Sess. (Wash. 2010).

[16] *See, e.g.*, H. Comm. Judiciary 2010-S.H.B. 2457, 61st Leg., at 2–3 (Wash. 2010) (noting constitutional concerns over the proposed bill); H. Comm. Judiciary 2010-H.B. 2457, 61st Leg., at 2–3 (Wash. 2010) (same); *see also* Wash. State Legislature, *Agenda: Executive Hearing*, TVW (Feb. 26, 2010, 8:00 AM), http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2010020175, *archived at* http://perma.cc/8YJG-JLSY [hereinafter Wash. State Legislature, *Public Hearing #2*] (providing archived webcasting regarding the proposed bill); Wash. State Legislature, *Agenda: Public Hearing*, TVW (Feb. 17, 2010, 3:30 PM), http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2010021106 [hereinafter Wash. State Legislature, *Public Hearing #1*] (same).

[17] *See* Sullivan, *supra* note 12 (reporting on a suicide attempt by a victim fearing cross-examination by her childhood rapist); *see also* Associated Press, *Victim to Confront Sniper Suspect*, GRAND RAPIDS PRESS, Oct. 21, 2003, at A4 (reporting on a sniper shooting victim's fear over having to face the defendant again during cross-examination and her statement that "[t]here's nothing worse than having to look at the man who tried to kill you"); Dionne Waugh, *Batterer Loses After Arguing His Own Case*, FT. WAYNE J.-GAZETTE, Sept. 22, 2006, at 1C (highlighting a case where a batterer examined a victim in court despite a protective order forbidding contact with her).

[18] *See, e.g.*, CONN. GEN. STAT. § 52-161b (2005 & Supp. 2011) (requiring court authorization before defendants convicted of a family violence crime may subpoena the victim); *Gigante*, 166 F.3d at 81–82 (allowing victim-witnesses to testify from another room through a two-way closed-circuit camera); Fields v. Murray, 49 F.3d 1024, 1034–36 (4th Cir. 1995) (en banc) (affirming the trial court's refusal to allow self-representing defendant to question children he sexually abused and the court's decision to appoint an attorney to pose the questions the defendant wished to ask); S.H.B. 2457 (proposing to protect sexual offense victims from defendant interrogation).

[19] *See, e.g.*, H. Comm. Judiciary 2010-S.H.B. 2457, *supra* note 16, at 2–3 (noting concern that a bill protecting rape victims from direct examination by perpetrators might conflict with defendants' rights to self-representation and confrontation); H. Comm. Judiciary 2010-H.B. 2457, *supra* note 16, at 2–3 (same); Cheryl Tucker, *Judges Can—and Should—Protect Rape Victims*, NEWS TRIBUNE (Jan. 15, 2011, 5:52 PM), http://blog.thenewstribune.com/opinion/2011/01/15/judges-can-–-and-should-–-protect-rape-victims/, *archived at* http://perma.cc/6P95-877P (noting that in a difficult financial climate, "the last thing the state needs is a lot of costly constitutional challenges from convicted rapists willing to exploit any technical error in their trials"); *infra* note 214 (collecting cases); *cf.* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 802–08 (1986) (critiquing rape shield statutes and suggesting that some forms raise constitutional and other problems); Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 545, 575–89 (1980) (expressing concerns regarding the constitutionality of certain rape shield laws).

treason and seditious libel, constitutional protections are fixated on the joust between defendant and state, and are cryptic about victim protections.[20] Judges with the courage to fashion procedures to reduce the harm to victims and witnesses risk reversal by appellate courts.[21] When in doubt, the incentives are to err on the side of the defendant.[22] It is easier to legitimize the harms as part of ordinary criminal process—how we have always done things—and avert our gaze.[23]

Yet the confrontation, discovery, and self-representation doctrines that suffocate protection today are *not* how we have always done things. For example, the landmark Confrontation Clause case allowing defendants to suppress statements by victims and witnesses who are unavailable for cross-examination, *Crawford v. Washington*, was decided merely one decade ago

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[20] *See, e.g.*, Faretta v. California, 422 U.S. 806, 821 (1975) (explaining that constitutional protections—like the right to self-representation—were fashioned in response to the tyrannical practices of the Star Chamber, which "specialized in trying 'political' offenses" and "has for centuries symbolized disregard of basic individual rights"); 150 CONG. REC. 7294–96 (2004) (statement of Sen. Diane Feinstein) (discussing the "dramatic disparity between the rights of defendants in our constitution and laws, and the rights of crime victims and their families"); *infra* notes 139–213 and accompanying text.

[21] *E.g.*, People v. Sammons, 478 N.W.2d 901, 905 n.2, 910 (Mich. App. 1991) (reversing and remanding for a new entrapment hearing due to protective measures that were given to the witness that the defendant allegedly sought to have killed and mutilated); *Jovanovic*, 676 N.Y.S.2d at 392–93 (describing how, pursuant to a defendant's subpoena, Columbia University produced several computer disks consisting of 2400 pages of emails from a student rape victim's account for the court to review), *rev'd*, 700 N.Y.S.2d at 163–65, 167–70, 172 (reversing on grounds that portions of emails between the defendant and victim admitted at trial should not have been redacted).

[22] *See, e.g.*, EDWARD J. IMWINKELRIED & NORMAN M. GARLAND, EXCULPATORY EVIDENCE § 2-6, at 79 (3d ed. 2004) (advising that "[d]oubts or borderline cases should be resolved in the accused's favor" in the context of deciding whether to admit defense evidence); Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413, 1474–75 (2002) (discussing how, as a normative matter, American criminal procedure "is calculated to give the accused the benefit of the doubt and to err, if at all, on the side of the criminal defendant").

[23] It is oft-noted that the rights to confront and cross-examine witnesses "have ancient roots" in Western civilization. *See* Greene v. McElroy, 360 U.S. 474, 496 (1959); *see also* FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 104 (1951) (noting that this right predated the Sixth Amendment as a common law right that "gained recognition as a result of the abuses in the trial of Sir Walter Raleigh"). Take, for example, the illustrative content of one footnote in the 1959 U.S. Supreme Court case *Greene v. McElroy*:

> When Festus more than two thousand years ago reported to King Agrippa that Felix had given him a prisoner named Paul and that the priests and elders desired to have judgment against Paul, Festus is reported to have stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him."

360 U.S. at 496 n.25.

by the Supreme Court.[24] Other major hazards in the post-*Crawford* minefield are even more recent, such as the Court's 2008 decision *Giles v. California*, which opened the door for defendants who kill or intimidate witnesses to argue that the victim's evidence is inadmissible because the witness cannot be cross-examined.[25] Another powerful source of intimidation tactics was created inadvertently in the 1975 Supreme Court case *Faretta v. California*, which created the right of self-representation—now used by perpetrators to personally interrogate their victims.[26] Moreover, technology-mediated lives yield new tactics of intimidation, such as perpetrators forcing victims to turn over thousands of pages of private emails from their inboxes for judicial scrutiny, as happened to a Columbia student who alleged rape.[27]

The landmark adversarial revolution cases upending practice and precedent are purportedly justified in the name of historical practice and original intent.[28] Yet the resulting rigid rules are more inflexible and harsh on victims and witnesses than historical practice.[29] As happens in regimes born of ideological revolutions, the resulting reign of rules is harsher in the name of fidelity to an imagined inflexible ideal.[30] Though draped in the mantle of tradition, the adversarial revolution is part of an invented tradition thought to be old, but that is actually neo-originalist.[31] Like other invented tradi-

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[24] 541 U.S. 36, 68–69 (2004).

[25] 554 U.S. 353, 366, 374 (2008). For a powerful critique of the perverse impact of *Giles* on domestic violence cases, see, for example, Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 859–64, 871, 873–74 (2009).

[26] 422 U.S. 806, 835–36 (1975).

[27] *See Jovanovic*, 676 N.Y.S.2d at 392–93 (describing how a Columbia University student was forced to produce 2400 emails as part of a rape case). Notably, after piercing the victim's privacy, the court found *nothing* directly relevant and material to the case. *Id.*

[28] *E.g.*, *Giles*, 554 U.S. at 358–66 (limiting the doctrine of forfeiture by wrongdoing by injecting into the analysis an element of intent and justifying this decision with a review of historical practices); Davis v. Washington, 547 U.S. 813, 824 n.3 (2006) (using an analysis of historical practices to hold that the Confrontation Clause does not apply to nontestimonial statements made to police during a 911 call); *Crawford*, 541 U.S. at 42–56 (imposing a new standard for admitting an unavailable witness's out-of-court statements based on whether the statements were testimonial and justifying this decision as more true to original intent); *Faretta*, 422 U.S. at 812–13, 816–17 (explaining that an absolute right to self-represent in criminal trials is compelled by contemporary practices at the time that the Sixth Amendment was ratified); *infra* notes 102–213 and accompanying text (illustrating how the implications of these cases have expanded greatly beyond the original scope of these defendant rights).

[29] *See infra* notes 102–138 and accompanying text.

[30] *Cf., e.g.*, JEREMY JENNINGS, REVOLUTION AND THE REPUBLIC: A HISTORY OF POLITICAL THOUGHT IN FRANCE SINCE THE EIGHTEENTH CENTURY 9 (2011) (discussing Maximilien de Robespierre's infamous French revolutionary regime and celebration of "inflexible justice"); Matthew Edwards, *The Rise of the Khmer Rouge in Cambodia: Internal or External Origins?*, 35 ASIAN AFFAIRS 56, 56–57 (2004) (discussing the suffering inflicted by Pol Pot's Khmer Rouge in the pursuit of ideological purity).

[31] *See infra* notes 139–213 and accompanying text.

tions, it cultivates acceptance for a relatively recent ritual or practice by implying fidelity with the venerable past.[32] The adversarial revolution clothes its extension of rigid procedures in cases of victim crimes by hearkening back to ideals that historically emerged in cases involving prosecutions for crimes against the sovereign.[33]

This Article challenges the rigid application of adversarial ideals grounded in a crimes-against-the-state paradigm to victim-crimes of sex and violence. The balance of interests, power, and the risk of overreaching are different between crimes against the state—at the core of adversarial protections—and crimes against victims at risk for retraumatization.[34] This crucial distinction is obscured because commentary on major shifts in the law of confrontation, cross-examination, and self-representation is largely focused on the joust between the defense and prosecution.[35] Concerns about putting the victim on trial or silencing the victim are generally expressed in literature concerning sexual assault and domestic violence.[36] These scholars have typically focused on how to get evidence admitted in domestic violence and sexual assault prosecutions, where victims frequently are unavailable or unwilling to testify.[37]

This Article illuminates the error and harms in rigidly applying principles historically forged for crimes against the sovereign to crimes against victims of sexual assault or general violent crime. When the conflict is not just between the defense and state power and there are at-risk victims and witnesses at stake, the constitutional calculus changes. As in other constitutional contexts—such as First or Fourth Amendment protections—there is a

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[32] *See* Eric Hobsbawm, *Introduction: Inventing Traditions*, *in* THE INVENTION OF TRADITION 1, 1–4, 8–9 (Eric Hobsbawm & Terence Ranger eds., 1983).

[33] *See infra* notes 139–213 and accompanying text.

[34] *See infra* notes 220–257 and accompanying text.

[35] *E.g.*, Bellin, *supra* note 5, at 1866–67; Bibas, *supra* note 5, at 186, 200–04; Fisher, *supra* note 5, at 1496–97; Friedman, *supra* note 5, at 4–5; Méndez, *supra* note 5, at 570–71, 607.

[36] *E.g.*, Kimberly D. Bailey, *The Aftermath of* Crawford *and* Davis*: Deconstructing the Sound of Silence*, 2009 BYU L. REV. 1, 31–38, 44–49; Michael H. Graham, *Fostering Domestic Violence Prosecutions After* Crawford/Davis*: Proposal for Legislative Action*, 44 CRIM. L. BULL. 871, 871 (2008); Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1358–59 (2006); Lininger, *supra* note 25, at 859–64, 871, 873–74; Deborah Tuerkheimer, Crawford*'s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 5–9, 20–33 (2006); *see also* I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 843–47 (2013) (discussing the federal rape shield and sword laws, which are designed to encourage sexual assault victims to bring cases against their assailants and to render a victim's past sexual history inadmissible at trial).

[37] *E.g.*, Bailey, *supra* note 36, at 43–54 (arguing for addressing root reasons why women are frightened to testify against batterers); Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 784–95 (2005) (arguing for the creation of pretrial opportunities for cross-examination); Tuerkheimer, *supra* note 36, at 5, 49–54 (arguing—before *Giles* foreclosed the argument—that evidence of battered victims should be admitted based on a forfeiture by wrongdoing theory).

core category of paradigmatic cases where protection is at its zenith. Outside the core countervailing restrictions should be less rigid about addressing weighty concerns.[38]

Although sexual assault and domestic violence cases have correctly roused concern, the harms to victims and witnesses in violent crime cases generally should not be overlooked or normalized for two reasons. First, both types of traumatic assaults present pronounced risks of retraumatization.[39] Averting further harm is an important interest that justifies procedural adaptations that reduce risk while still permitting fair adjudication.[40] Second, focusing on the impact upon victim-witnesses in violent crimes cases more generally creates interest linkage across genders. Violent crime can cause psychological injury to both men and women.[41] Although women are disproportionately the victims of sexual assault, men are disproportionately the victims of violent crime.[42]

Recognizing the important difference between crimes against the sovereign and crimes of sex and violence—where victims may be in need of protection—clears the quagmire of doubt facing courts and legislatures. Based on the crucial distinction elucidated, this Article defends the constitutionality of protective measures for at-risk victims and witnesses. Understanding the costs of adversarial process to victims and witnesses also widens the vision of possible solutions beyond protective measures embedded in adversarial procedure. This Article therefore also explores the promise and perils of bypassing adversarial adjudication altogether.[43] Contrary to the conventional view that restorative justice approaches are not suited for violent and sexual assault crimes,[44] this Article argues that an adapted model designed to reduce adver-

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[38] *See infra* notes 220–257 and accompanying text.

[39] *See infra* notes 59–83 and accompanying text.

[40] *See infra* notes 214–295 and accompanying text; *cf.* Maryland v. Craig, 497 U.S. 836, 853 (1990) ("[The] physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.").

[41] *See* Chris R. Brewin et al., *Fear, Helplessness, and Horror in Posttraumatic Stress Disorder: Investigating DSM-IV Criterion A2 in Victims of Violent Crime*, 13 J. TRAUMATIC STRESS 499, 506–07 (2000) (discussing findings in a study of men and women on the association between intense fear, helplessness, or horror at the time of traumatic violent crime and PTSD symptoms).

[42] *See* Janet L. Lauritsen & Karen Heimer, *The Gender Gap in Violent Victimization, 1973-2004*, 24 J. QUANTITATIVE CRIMINOLOGY 125, 133 & fig.1 (2008) (illustrating trends). Importantly, it has been noted that interest-convergence between the powerful and the subordinated is important in achieving lasting progress. Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

[43] *See infra* notes 258–295 and accompanying text.

[44] *See* James Ptacek, *Editor's Introduction*, *in* RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, at ix, ix–x (James Ptacek ed., 2010) (discussing the widespread prohibition against using restorative justice practices in crimes against women such as intimate partner violence, rape, and child sexual abuse); *see also* C. Quince Hopkins & Mary P. Koss, *Incorporating Feminist Theory*

sarial process-related costs may be preferable for some victims and defendants.

The Article is organized into three parts. Part I frames the nature of the problem with which courts are wrestling: whether and how to protect victims from retraumatization by adversarial process.[45] This Part discusses how laws meant to shield defendants in cases of crimes against the sovereign are now being wielded to attack and intimidate victim-witnesses.[46] Part II then delves into the murk of law that has emerged in recent decades that has provided cover for these attack strategies.[47] Finally, Part III shows how the crucial distinction between crimes against the sovereign and victim crimes preserves discretion to pursue protective measures for at-risk victims in cases involving traumatic injury.[48] This Part also explores a farther-reaching opt-out model requiring both defendant and victim consent to a non-adversarial system that averts some of the harshest costs of traditional criminal adjudication.[49] The goal is to offer justice and resolution in a way that reduces the risk of iatrogenic harm—that is, additional injury from the attempt to remedy the initial harm.[50]

I. ADVERSARIAL PROCESS AND VICTIM-WITNESS INTIMIDATION

Some crime survivors endure the indignities of adversarial adjudication, others flee, and others remember the pain of enduring.[51] The brutality is drained or often altogether invisible in the official case reporters.[52] And

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and Insights into a Restorative Justice Response to Sex Offenses, 11 VIOLENCE AGAINST WOMEN 693, 708–09 (2005) (discussing various criticisms of restorative justice generally, including its propensity to trivialize crime and failure to effect real change or prevent recidivism); Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?*, 42 BRIT. J. CRIM. 616, 618–20 (2002) (discussing critiques of applying restorative justice approaches to domestic, sexual, and racial violence).

[45] *See infra* notes 51–138 and accompanying text.

[46] *See infra* notes 51–138 and accompanying text.

[47] *See infra* notes 139–213 and accompanying text.

[48] *See infra* notes 214–295 and accompanying text.

[49] *See infra* notes 214–295 and accompanying text.

[50] Various scholars have already applied the concept of iatrogenic harm—injury introduced by the attempt to cure—in the criminological context. *E.g.*, Carl B. Clements et al., *Systemic Issues and Correctional Outcomes: Expanding the Scope of Correctional Psychology*, 34 CRIM. JUST. & BEHAV. 919, 922–24 (2007); Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173 176, 203 (2008); David P. Farrington & Brandon C. Welsh, *A Half Century of Randomized Experiments on Crime and Justice*, 34 CRIME & JUST. 55, 80 (2006); Michael Tonry, *Has the Prison a Future?*, *in* THE FUTURE OF IMPRISONMENT 3, 12 (Michael Tonry ed., 2004) ("Prison is iatrogenic, like a medicine that cures one ailment while causing another.").

[51] *See infra* notes 59–83 and accompanying text.

[52] *See, e.g.*, *supra* notes 11–16 and accompanying text (describing the tragic case of D.G., a victim whose rapist repeatedly chose to self-represent and who attempted to commit suicide by jumping off of a courthouse building to avoid facing her attacker).

even if the issues make it into an opinion, the legal framing is typically offered from the defendant's perspective.[53] After all, it is the defendant who has the right to appeal the denial of his asserted right to stare into the eyes of the child he raped while the victim undergoes cross-examination.[54] It is the defendant who wraps his claims in the rights of confrontation and self-representation.[55] It is not the victim who may appeal being trapped again before the violator in the legitimizing milieu of court. This Part discusses the arsenal of strategies that defendants can use to attack and intimidate victims under the cover of murky claimed constitutional rights.[56] This Part also discusses the growth spurt of confrontation, self-representation, and related rights over the last decades, leaving constitutional murk and unanswered questions with which courts now wrestle.[57] In turn, this uncertainty enveloping courts and legislatures chills attempts to create viable victim protections.[58]

A. Legitimated Assault and the Law

Scholars often and vigorously decry victim rights efforts.[59] In legal academic circles, the harms that victim-witnesses experience receive less at-

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[53] *E.g.*, Coy v. Iowa, 487 U.S. 1012, 1015–20 (1988) (discussing the claim that the use of a screen between the defendant and testifying sexual abuse victims violated the defendant's confrontation right); *Spear*, 686 N.E.2d at 1042–43 (holding that the defendant's confrontation right was violated when the child was not forced to face him and was instead allowed to face the jury).

[54] *E.g.*, *Spear*, 686 N.E.2d at 1042–43 (reversing a conviction and holding that the defendant's confrontation right was violated when a child was not forced to face him); *see also Phillips*, 315 P.3d at 152–53 (collecting "eyeball-to-eyeball" jurisdictions); *Amirault*, 677 N.E.2d at 656–57, 660 (requiring the victim-witness to physically face the defendant while testifying).

[55] *E.g.*, *Coy*, 487 U.S. at 1014; *Spear*, 686 N.E.2d at 1042–43.

[56] *See infra* notes 85–95 and accompanying text.

[57] *See infra* notes 96–138 and accompanying text.

[58] *See infra* notes 139–213 and accompanying text.

[59] *E.g.*, Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 749–50 (2007) (criticizing the victims' rights movement as using the symbol of the victim as cover to achieve "more liability and punishment for the defendant" and pursue "conservative tough-on-crime ideology"); Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1112–18, 1130–35 (2009) (arguing against victim rights in juvenile courts, contending that this imports a retributive impulse inappropriate in a rehabilitative context); Wayne A. Logan, *Confronting Evil: Victims' Rights in an Age of Terror*, 96 GEO. L.J. 721, 725, 766–75 (2008) (arguing that allowing the pathos of victims of mass violence to impact legal processes and decision making is perilous); Gregory P. Orvis, *The Evolving Law of Victims' Rights: Potential Conflicts with Criminal Defendants' Due Process Rights and the Superiority of Civil Court Remedies*, *in* CURRENT ISSUES IN VICTIMOLOGY RESEARCH 163, 170–71 (Laura J. Moriarty & Robert A. Jerin eds., 1998) (criticizing the results of the victims' rights movement); Danielle Levine, Comment, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 NW. U. L. REV. 335, 361 (2010) (expressing concern over giving victims participatory rights because of the worry that this would "elevate victims over the defendant" and "threaten the fair and just adjudication of a criminal case"). *But see, e.g.*, Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105

tention than needed. This Article parts ways with the dominant discourse in legal scholarship to call attention to the harms that victim-witnesses experience and how it is legitimated by the current confused state of the law.

Many studies have found that the very pursuit of criminal justice can aggravate the harms of suffering violent crime or sexual assault.[60] As one psychiatrist vividly explained: "If one set out intentionally to design a system for provoking symptoms of posttraumatic stress disorder, it might look very much like a court of law."[61] Although open physical violence and intimidation are forbidden, the adversarial process involves "aggressive argument, selective presentation of the facts, and psychological attack."[62] Several studies have found associations between victims having to testify and the development of post-traumatic stress symptoms, though there are contradictory findings too.[63] Even short of post-traumatic stress disorder

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NW. U. L. REV. COLLOQUY 164, 177–82 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/1/LRColl2011n1Cassell&Joffee.pdf, *archived at* http://perma.cc/S8H7-YHUW (arguing in favor of broadening victim participation in the criminal justice process); William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System,"* 1999 UTAH L. REV. 349, 364–65 (arguing about the import of victims' rights, particularly in the American system, where victims have many disadvantages not present in other trial systems and defendants have many advantages not present in other trial systems).

[60] *See, e.g.*, Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 261, 269–70 (1999) (finding that eighty-one percent of mental health professionals who worked with rape victims indicated that reporting rape to criminal justice authorities "can be psychologically detrimental to rape victims"); Rebecca Campbell, *What Really Happened? A Validation Study of Rape Survivors' Help-Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 55, 56, 61–62, 66–67 (2005); Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. TRAUMATIC STRESS 182, 182–83 (2010).

[61] Herman, *supra* note 8, at 159.

[62] *Id.* The criminal justice system excuses these barbarities because of "the presumption that this ritualized, hostile encounter offers the best method of arriving at the truth." *Id.*

[63] *Compare* Rebecca Campbell et al., *Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239, 1253–55 (2001) (finding a positive association between legal secondary victimization and post-traumatic stress disorder (PTSD) symptoms), Rebecca Campbell & Sheela Raja, *The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences with Military and Civilian Systems*, 29 PSYCHOL. OF WOMEN Q. 97, 104 (2005) (finding—consistent with past studies—a significant relationship between PTSD symptomology and experiencing secondary victimization in legal system contacts), *and* Jeffery N. Epstein et al., *Predicting PTSD in Women with a History of Childhood Rape*, 10 J. TRAUMATIC STRESS 573, 583–84 (1997) (finding that testifying may be a predictor of PTSD among adult survivors of child rape), *with* Frazier & Haney, *supra* note 8, at 626 (finding no relationship between victims' attitudes toward the police or legal system and recovery nor between case outcomes and recovery, and suggesting that intrapersonal factors such as coping strategies may explain forty to fifty percent of variance in symptoms), *and* Ulrich Orth & Andreas Maercker, *Do Trials of Perpetrators Retraumatize Crime Victims?*, 19 J. INTERPERSONAL VIOLENCE 212, 222–25 (2004) (reporting findings from German test subjects suggesting that participation in trials in Germany is not retraumatizing). It is difficult to quantify the contribution of testifying to the development of PTSD because a person's susceptibility and resilience also

(PTSD), the adversarial process causes severe stress to victims and discourages them from engaging in the criminal justice system at all.[64]

Some of the most basic aspects of adversarial adjudication are associated with harmful consequences. Victims face revelation of intimate and painful details—together with their identity—as a matter of public record.[65] In addition, adversarial questioning of victims on the stand can aggravate self-blame and doubt.[66] A study of rape victims found that testifying in court was among the top five "fearful cues" for victims and was the central cause of anxiety a year after the crime.[67] Another study found that rape victims scored higher in distress measures *after* pursuing criminal prosecution of their cases than victims whose cases were not prosecuted.[68]

This gauntlet for victims who pursue justice continues despite rape law reforms beginning in the 1970s and state attempts at victim protections beginning in the 1980s.[69] A 2005 small-scale study of sexual assault victims found high rates of negative interactions with the legal system, resulting in disappointment (ninety percent) and reluctance to seek further help (eighty

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depends on a variety of other factors, including the circumstances of the traumatic exposure, what happens after, and individual biological and socioeconomic risk factors. *See, e.g.*, Jessica Bomyea et al., *A Consideration of Select Pre-Trauma Factors as Key Vulnerabilities in PTSD*, 32 CLINICAL PSYCHOL. REV. 630, 632–38 (2012); Chris R. Brewin et al., *Meta-Analysis of Risk Factors for Posttraumatic Stress Disorder in Trauma-Exposed Adults*, 68 J. CONSULTING & CLINICAL PSYCHOL. 748, 753 (2000); Sarah E. Ullman & Henrietta H. Filipas, *Predictors of PTSD Symptom Severity and Social Reactions in Sexual Assault Victims*, 14 J. TRAUMATIC STRESS 369, 383–87 (2001).

[64] *See* Rebecca Korzec, *Viewing North Country: Sexual Harassment Goes to the Movies*, 36 U. BALT. L. REV. 303, 314 (2007) (observing that the potential exposure of sexual harassment victims' private information during trial can deter them from utilizing the adversarial system); Orth & Maercker, *supra* note 63, at 213 (noting it is widely accepted that attending trials of perpetrators "frequently leads to severe psychological stress among victims"); *cf.* Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 401 (describing how victims perceive the adversarial system to benefit the defendant at their expense).

[65] Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCHOLOGIST 1332, 1335–36 (2000).

[66] *Id.*

[67] Parsons & Bergin, *supra* note 60, at 183.

[68] Patricia A. Cluss et al., *The Rape Victim: Psychological Correlates of Participation in the Legal Process*, 10 CRIM. J. & BEHAV. 342, 354–55 (1983).

[69] *See, e.g.*, DEAN G. KILPATRICK ET AL., NAT'L INST. OF JUSTICE, THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE? 10 (1998), *available at* https://www.ncjrs.gov/pdffiles/173839.pdf, *archived at* http://perma.cc/V7ET-BTUR (noting that although victim protection laws that required criminal justice officials to better inform and consult with victims generally improved satisfaction, victim dissatisfaction with experiences in the criminal justice system remained widespread); Campbell & Raja, *supra* note 60, at 262–63, 267–68 (noting persistent problems of secondary victimization despite the rape law reforms of the 1970s and 1980s); Frazier & Haney, *supra* note 8, at 621 (finding that despite improvements following legal reforms, victims report negative experiences with the legal system and widely perceive that defendants have more rights than victims and that victims are left unprotected).

percent).[70] A larger-scale study of sexual assault victim perspectives during the mid-1990s found that although perceptions of police were positive, every measure of views toward the legal system was negative.[71] To the victims surveyed, it seemed that "rapists [had] more rights than victims, that victims' rights [were] not protected, and that the system [was] unfair."[72] Similarly, although victims in states with victim protection laws tend to be better informed about their cases and have a more favorable impression of officials who are required to consult with them, many remain very dissatisfied with their experience in the criminal justice system.[73]

Even advances in protections in sexual assault law—such as rape shield laws preventing the introduction of a victim's sexual reputation or history—are sometimes criticized as going too far.[74] Yet, the reality is these protections are merely isolated islets of protections in the vast and tumultuous rapids of the adversarial process. First, these protections only tackle certain problems, such as preventing rape victims' sexual histories from being publicized at trial, keeping victims apprised of important developments (such as the release of a violent perpetrator), and preventing victims' voices from being shut out at adjudication.[75] Moreover, purported shields may function more like sieves because of gaps and loopholes in the rules.[76] Similarly, victims' rights laws may not be enforced or may be underenforced.[77] And more fundamentally, to the extent they exist, victim protection laws are focused heavily on certain narrow areas—such as rape shield laws or victim participation—while leaving other avenues of attack open.[78]

Adversarial procedure offers a host of other intimidation tactics as part of ordinary procedure.[79] For example, defendants assert the right to directly examine victims in close quarters, force victims to physically face them,

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[70] Campbell, *supra* note 60, at 61–62.

[71] Frazier & Haney, *supra* note 8, at 621.

[72] *Id.* at 620.

[73] KILPATRICK ET AL., *supra* note 69, at 10.

[74] *E.g.*, Galvin, *supra* note 19, at 812–902 (critiquing rape shield statutes and suggesting that some forms raise constitutional and other problems); Tanford & Bocchino, *supra* note 19, at 545, 575–89 (expressing concerns regarding the constitutionality of certain rape shield laws).

[75] *See* David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1199 (1997) (arguing that rape shield laws have "generally had little or no effect on the outcomes of rape cases" and that more needs to be done in order to adequately protect victims).

[76] *See, e.g.*, Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 131–41 (2002) (discussing how rape shield laws may function as sieves through which intimidation and attack can continue).

[77] *See, e.g.*, KILPATRICK ET AL., *supra* note 69, at 9–10 (reporting findings of underenforcement of victims' rights laws even in states that have enacted such legislation).

[78] *See* Anderson, *supra* note 76, at 131–41.

[79] *See infra* notes 85–95 and accompanying text (discussing three main strategies of attack from adversarial adjudication's arsenal of defendant prerogatives).

and engage in intrusive fishing expeditions through victims' emails and health records.[80] Studies have found that victims of violent crime view the legal system with anxiety because of the risk of incurring further trauma.[81] Overall, the data suggests that "victims who choose to seek justice may face serious obstacles and risks to their health, safety, and mental health."[82] Concerns over the harmful consequences of undergoing legal process likely contribute to low reporting rates for sexual assault and violent crimes as well as victims' hesitancy to seek justice in the legal system.[83]

B. Converting Protections Against the State into Swords Against Victims

The law of adversarial adjudication has converted historical protections forged to prevent abuses in prosecutions for crimes against the state into swords that can be used to attack victims again with impunity. Although defendants are not free to physically attack or threaten victim-witnesses in order to dissuade their pursuit of justice,[84] this Part shows how muscularly interpreted adversarial process rights provide an arsenal of tactics to retraumatize victims of sexual assault and general violent crime.

1. Attack Strategies

There are at least three main strategies of intimidation that defendants employ. First, as a matter of right in many jurisdictions, defendants may force victims—including those that were allegedly shot, raped, or stabbed by them—to physically face them while on the stand.[85] From just a simple lunge away, victims are required to testify and have their credibility judged, tested, and challenged on cross-examination. The defendant may even pack the room with others meant to intimidate—perhaps family members who

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[80] *See infra* notes 85–95 and accompanying text.

[81] *See, e.g.*, Parsons & Bergin, *supra* note 60, at 182–83 (collecting studies in meta-review).

[82] Herman, *supra* note 8, at 159.

[83] Parsons & Bergin, *supra* note 60, at 183.

[84] *See, e.g.*, 18 U.S.C. § 1512 (2012) (prescribing penalties for attempting to kill, killing, using physical force, threatening to use physical force, intimidating, or harassing another person to prevent the person from testifying); CAL. PENAL CODE § 136.1 (West 1999 & Supp. 2014) (prescribing penalties for knowingly or maliciously preventing or attempting to prevent any witness from testifying and higher penalties where force or threat of force or violence was used); N.Y. PENAL LAW §§ 215.15–.16 (McKinney 2010) (defining and prescribing penalties for three degrees of witness intimidation). For a discussion of victim and witness intimidation laws, see, for example, KERRY MURPHY HEALEY, NAT'L INST. OF JUSTICE, VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES 6, 10 (1995), *available at* https://www.ncjrs.gov/pdffiles/witintim.pdf, *archived at* http://perma.cc/6B6-WUKY.

[85] *See, e.g.*, *Phillips*, 315 P.3d at 152–53 (collecting "eyeball-to-eyeball" jurisdictions); *Spear*, 686 N.E.2d at 1042–43; Sarah M. Dunn, *"Face to Face" with the Right of Confrontation: A Critique of the Supreme Court of Kentucky's Approach to the Confrontation Clause of the Kentucky Constitution*, 96 KY. L.J. 301, 316–17 (2008).

are angry at the victim for revealing ugly secrets, gang members, or other hostile onlookers.[86] If the victim requests even a simple adjustment to ease some of the intense stress, such as to testify facing away from the defendant, the defendant can slap back, citing cases holding that this would violate the defendant's right of confrontation.[87]

Second, to enhance the intimidation effect, defendants may choose to self-represent and personally question victims.[88] Required to be on the stand, victims will be trapped again before their attackers and forced to obediently answer their questions.[89] The defendant may even wish to further enhance the intimidation effect by seeking pretrial contact with the victim, perhaps exposing the victim to retraumatizing material, such as videos of the assault.[90] Some defendants have openly admitted that the only reason they choose to self-represent is to be able to personally question their victim on the stand.[91]

Third, the perpetrator may seek to dredge through the victim's emails, mental health records, and medical records.[92] Even if the judge puts some limits on the fishing expedition by screening for relevance in camera before releasing the documents to the defendant, the privacy harm is already done.

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[86] *See* HEALEY, *supra* note 84, at 4 (discussing common courtroom intimidation tactics such as having the defendant's family and friends give intimidating looks or gestures at a witness during court proceedings or court-packing by gang members who may wear black to symbolize death, stare intently at the witness, or use threatening hand signals that judges, prosecutors, and court personnel do not understand or may be reluctant to forbid).

[87] *See, e.g.*, *Phillips*, 315 P.3d at 152–53 (collecting "eyeball-to-eyeball" jurisdictions); *Amirault*, 677 N.E.2d at 660, 623, 632 (holding that a procedure that allowed a child rape victims to testify with their backs facing the defendant violated the defendant's state constitutional right of confrontation); *Spear*, 686 N.E.2d at 1043 (same).

[88] *See Faretta*, 422 U.S. at 822 (constitutionalizing the right to self-represent).

[89] *See* Crime Victim's Petition for Review of a Special Action Decision of the Arizona Court of Appeals at 1, Doe v. Lee, No. 1 CA-SA 07-20063 (Ariz. June 19, 2007), 2007 WL 4939462, at *1 [hereinafter Crime Victim's Petition for Review] ("Now Jane Doe, . . . after being held captive for hours by the Defendant[,] . . . discovers that when the Defendant's criminal trial begins on June 19th, 2007—[he] will once again hold her captive, only this time he will do so with the sanction of the State.").

[90] *See* L.C. v. Gilbert, No. C09-5586 BHS, 2010 WL 1641533, at *1–2 (W.D. Wa. Apr. 21, 2010) (noting that the defendant plead guilty to charges of sexual exploitation of a minor in the production of child pornography); Alyssa Newcomb, *Washington Rape Suspect Wants Victims to View Videotapes Before Trial*, ABC NEWS (Aug. 1, 2012), http://abcnews.go.com/US/washington-rape-suspect-victims-view-videotapes-trial/story?id=16898831#.UBmGzPXmVNI, *archived at* http://perma.cc/4QL5-KB47 (reporting on the *L.C. v. Gilbert* defendant's attempt to conduct pretrial interviews with the boys he exploited to show them the pornographic videos that he took of them).

[91] *See Murray*, 49 F.3d at 1034 (noting such an admission by the defendant).

[92] *See, e.g.*, *Ritchie*, 480 U.S. at 52 (holding that the trial court's in camera review of the victim's medical records is a procedure that fully protects the interests of both the defendant and the State); United States v. Briggs, 48 M.J. 143, 145 (C.A.A.F. 1998) (considering a case where the defendant requested all of the victim's medical records, including any mental health records, and holding that trial judges should review such records in camera when the defendant makes such a request).

And even if certain details will be redacted from the documents before distribution to the defendant, victims may be hesitant to seek justice through the courts if doing so will subject them to such invasive review of their private lives.[93]

Such tactics may lead to dismissal or discounting of charges because a victim-witness may drop out in fear, or a prosecutor may give a lenient plea bargain to spare a vulnerable or reluctant victim-witness the ordeal of testifying.[94] Even if the victim denies the defendant these windfalls by suffering through the attacks and persisting, the defendant can nonetheless use such intimidation tactics to punish the pursuit of justice. The hidden nature of these harms makes their extent hard to quantify unless dramatic facts make it into newspapers.[95]

2. Sources of Law

These various intimidation tactics use federal and state constitutional protections for defendants to bludgeon victims who seek justice. At the overarching constitutional level, the Sixth Amendment is a key source of asserted entitlement by defendants to engage in aggressive tactics. The wellspring of rights "basic to our adversary system of justice,"[96] the Sixth Amendment provides:

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[93] Unfortunately, because certain state laws provide for in camera review, victim-witnesses who seek justice must nonetheless endure the humiliation of a court-sanctioned fishing expedition through their personal health information and emails. *See, e.g.*, *Abel*, 271 P.3d at 1072–73 (describing the court's review of a witness's mental health records at the defendant's behest and ultimately concluding that "there was nothing of particular value to the defense"); *Stockhammer*, 570 N.E.2d at 999–1002 (holding that the trial court's in camera review of the victim's medical records was insufficient and that defendant's conviction must be reversed because he was entitled to have access to the records before trial); *Jovanovic*, 676 N.Y.S.2d at 392–93 (describing how pursuant to a defendant's subpoena, Columbia University produced several computer disks consisting of 2400 pages of emails from the account of a student alleging rape for the court to review), *rev'd*, 700 N.Y.S.2d at 163–65, 167–70, 172 (reversing on grounds that portions of emails between the defendant and victim admitted at trial should not have been redacted); *see also* Wendy J. Murphy, *Minimizing the Likelihood of Discovery of Victims' Counseling Records and Other Personal Information in Criminal Cases: Massachusetts Gives a Nod to a Constitutional Right to Confidentiality*, 32 NEW ENG. L. REV. 983, 986–96 (1998) (detailing the tortured history of Massachusetts statutes and case law regarding defendant access to victim rape counseling records).

[94] *See* Hefley, *supra* note 10 (describing a prosecutor's difficult decision to plead a case of rape and molestation of a six-year-old child by her father down to incest—carrying a significantly lesser penalty—because the prosecutor did not want to subject the child to the trauma of testifying again); Sullivan, *supra* note 12 (noting how an attempted suicide by a victim-witness on the eve of trial caused prosecutors to drop charges against one defendant).

[95] *See supra* notes 11–16 and accompanying text (describing the tragic case of D.G., a victim whose rapist repeatedly chose to self-represent and who attempted to commit suicide by jumping off of a courthouse building to avoid facing her attacker).

[96] *Faretta*, 422 U.S. at 818.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[97]

Defendants draw from three central rights grounded in the Sixth Amendment as useful cover for intimidation tactics. The first is the Confrontation Clause.[98] Second is the Compulsory Process Clause,[99] which is supplemented by the Due Process Clause of the Fourteenth Amendment in the context of discovery rights.[100] The third right—the entitlement to self-represent—is not explicitly in the text of the Sixth Amendment, but was nevertheless held to be implicitly protected by the Sixth Amendment by the Supreme Court in *Faretta*.[101]

3. Exceeding the Purpose and Origins of Adversarial Rights

Of course, none of these rights were crafted with the aim of giving the defendant a tactical advantage in retraumatizing their victims. Indeed, these rights were generally not crafted with victims in mind at all; instead, the Bill of Rights is focused on protecting defendants because of the concern over the balance of power between the State and the defendant.[102]

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[97] U.S. CONST. amend. VI.

[98] *See Amirault*, 677 N.E.2d at 656–57, 660 (requiring the victim-witness to physically face the defendant while testifying based on the defendant's confrontation right). *See generally Crawford*, 541 U.S. at 50–51 (explaining the history and construction of the Confrontation Clause).

[99] *See, e.g.*, *Ritchie*, 480 U.S. at 52 (holding that the trial court's in camera review of the victim's medical records is a procedure that fully protects the interests of both the defendant and the State); Washington v. Texas, 388 U.S. 14, 18–19 (1967) (holding that the right to compel the attendance of witnesses is "the right to present a defense" and that this right is "a fundamental element of due process law").

[100] *See Abel*, 271 P.3d at 1072–73 (noting ambiguity as to whether the Confrontation or Compulsory Process Clauses of the Sixth Amendment include pretrial discovery rights for defendants, but concluding that, at any rate, the Fourteenth Amendment Due Process Clause confers such a right).

[101] *See, e.g.*, 422 U.S. at 819 ("Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the amendment."); *see also* Crime Victim's Petition for Review, *supra* note 89, at *1 (describing how a defendant's former captive was essentially forced into further state-sanctioned captivity due to the defendant's self-representation at trial).

[102] *See, e.g.*, Frank B. Cross, *Institutions and the Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1607 (2000) (noting that unless and until a victims' rights amendment is adopted, "the Constitution is concerned with criminal defendants' rights but not those of victims"); Herman, *supra* note 8, at 160–63 (discussing the harms of the criminal justice focus on

The specific adoption history surrounding Sixth Amendment rights is scarce because the provisions were adopted with little debate or controversy.[103] Nevertheless, helpful intellectual histories of the evolution of the rights in key formative periods and central paradigm cases of concern have emerged and continue to influence Sixth Amendment doctrine.[104] The paradigmatic cases behind key constitutional criminal procedure protections involve controversial inquisitorial practices and crimes against the sovereign—such as treason, seditious libel, and customs violations—that foregrounded adversarial conflict between the sovereign and the accused.[105] The dangers of abuses in prosecutions for crimes against the State are particularly acute because the victim and prosecution are the same—and immensely powerful—rather than a humble individual harmed and hoping for justice.[106]

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defendant interests and lack of attention to processual harms to victims); *infra* notes 103–138 and accompanying text (discussing the historical concerns over this imbalance).

[103] *See, e.g.*, California v. Green, 399 U.S. 149, 176 (1970) (Harlan, J., concurring) (noting the lack of debate and scant record regarding the adoption of the Confrontation Clause, which "was apparently included without debate along with the rest of the Sixth Amendment package of rights—to notice, counsel, and compulsory process"); JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 20 (Jack Stark ed., 2002) ("While many other rights were the subjects of considerable discussion during the congressional formulation of and the states' ratifications of the Bill of Rights, there was very little mention of the right to counsel.").

[104] *E.g.*, *Crawford*, 541 U.S. at 44–45 (holding that the Confrontation Clause allows defendants to suppress statements by victims and witnesses who are unavailable for cross-examination); *Faretta*, 422 U.S. at 822–30 (identifying a Sixth Amendment right to self-representation); Mattox v. United States, 156 U.S. 237, 240–41, 243–44 (1895) (holding that the Confrontation Clause is not offended by the introduction of testimony by an unavailable witness so long as the defendant had a prior opportunity for cross-examination); HELLER, *supra* note 23, at 13–34, 109–38 (discussing the development of the Confrontation Clause and key cases); LANGBEIN, *supra* note 2, at 3–105, 233–305 (same).

[105] *See, e.g.*, *Crawford*, 541 U.S. at 44–45 (discussing the influence of the treason trial of Sir Walter Raleigh, who was denied the opportunity to confront his accuser); *Faretta*, 422 U.S. at 822–30 (explaining how the right to self-representation spawned as a response to the tyrannical practices of the Star Chamber, which "has for centuries symbolized disregard of basic individual rights"); *Mattox*, 156 U.S. at 240–41, 243–44 (employing a historical analysis to conclude that the Confrontation Clause is primarily concerned with ensuring an opportunity for cross-examination); *see also* J.A.C. GRANT, OUR COMMON LAW CONSTITUTION 12 (1960) (discussing the development of protections in response to the inquisitorial nature of criminal proceedings and the subsequent decline of such procedural abuses); 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE EVIDENCE § 6345 (2012) (discussing the influence of controversies over the inquisitorial practices of vice-admiralty courts); Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209, 220 (2005) (arguing that the American confrontation right is influenced by "hatred of the theologians who provided the doctrinal basis for heresy prosecutions" and "colonial objections to customs informers").

[106] *See* LANGBEIN, *supra* note 2, at 3 (explaining that adversarial criminal procedure was initially "a special-purpose procedure for cases of treason, meant to even up for the particular hazards that such prosecutions were thought to pose for defendants").

The cases that concerned the Founders involved far more ham-fisted inquisitorial practices than those covered by the highly technical doctrine today. Consider, for example, the Confrontation Clause, which restates an old common law rule that began crystallizing in the 1600s.[107] The right of confrontation developed in opposition to infamous cases in which defendants were convicted based on out-of-court statements taken by unseen witnesses—some of whom were subjected to torture.[108] A central and oft-noted example is the 1603 trial of Sir Walter Raleigh for treason.[109] The Crown's case against Raleigh was based on a signed confession secured from his alleged accomplice Baron Cobham—who later retracted his statement.[110] Protesting the procedure as trial "by the Spanish Inquisition," Raleigh argued: "The proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face."[111] Raleigh was convicted and sentenced to death without ever having a chance to face Cobham and challenge his account.[112] In the colonies, there was also outcry over the inquisitorial practices of vice-admiralty courts enforcing customs and taxation laws by relying on informers without opportunity for confrontation or trial by jury.[113]

Similarly, the right to compulsory process provides a correction for another severe historical imbalance between the State and defendant. The Compulsory Process Clause overturns the common law rule that defendants prosecuted by the Crown for felonies or treason had no right to compel witnesses to appear.[114] The roots of the Compulsory Process Clause trace to statutes beginning in 1701 permitting defense witnesses to testify under oath.[115] These reforms began eroding the common law rule so that within a

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[107] DAVID FELLMAN, THE DEFENDANT'S RIGHTS TODAY 94 (1976).

[108] GRANT, *supra* note 105, at 12.

[109] *See, e.g.*, *Crawford*, 541 U.S. at 44–45 (discussing the import of this infamous case); HELLER, *supra* note 23, at 104 ("The right of the accused in a criminal prosecution to be confronted with the witnesses against him did not originate with the . . . Sixth Amendment, but was a common law right which had gained recognition as a result of the abuses in the trial of Sir Walter Raleigh."); Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*, 17 HASTINGS CONST. L.Q. 383, 384 (1990) (noting the significance of this case). *But see* Graham, *supra* note 105, at 209, 213, 216 (arguing that the Supreme Court used "spurious history" in *Crawford* and that the oft-invoked influence of the Raleigh case is a "romantic myth").

[110] GRANT, *supra* note 105, at 12.

[111] *Crawford*, 541 U.S. at 43.

[112] *Id.*

[113] WRIGHT & GRAHAM, *supra* note 105, § 6345; PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 13 (Edmund S. Morgan ed., 1959).

[114] GRANT, *supra* note 105, at 4. For prosecutions initiated by private actors, the defendant could subpoena witnesses because these proceedings were considered civil in form, though criminal in effect. *Id.* at 4 n.13. Furthermore, although felons could not subpoena witnesses, misdemeanants retained this privilege. *Id.*

[115] FELLMAN, *supra* note 107, at 98; GRANT, *supra* note 105, at 4.

generation, compulsory process became available to felons.[116] At its core, the Sixth Amendment's Compulsory Process Clause—like the Confrontation Clause—is about the right to mount a defense and is intended to counteract a severe imbalance in the defendant's power to do so.[117]

The right to counsel also emerged to counteract historical imbalances of power between defendant and state.[118] The right to counsel is oft-celebrated as central to ensuring that the accused has aid against "the prosecutorial forces of organized society" in an adversarial system.[119] Historically, Anglo common law refused to allow people accused of felonies or treason to even *retain* counsel because of concern that the government was so weak and its enemies so strong that the government needed every advantage.[120] As an English judge and historian reported, the resulting criminal trial "was not unlike a race between the King and the prisoner, in which the King had a long start and the prisoner was heavily weighted."[121] Treason and felonies were considered a particular threat to the State because the former was directed against the sovereign and the latter caused social instability.[122]

Eventually, statutory reforms introduced the right to counsel for defendants charged with treason—but not felonies.[123] This shift resulted from the Whig Party's rise to power and its enactment of statutory reform in response to past experience with false treason charges brought by political

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[116] GRANT, *supra* note 105, at 4.

[117] ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 71, 115 (1992); Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 74 (1974). As Justice John Marshall Harlan II noted in his concurring opinion to *California v. Green*:

> If anything, the confrontation guarantee may be thought, along with the right to compulsory process, merely to constitutionalize the right to a defense as we know it, a right not always enjoyed by the accused, whose only defense prior to the late 17th century was to argue that the prosecution had not completely proved its case.

399 U.S. at 176 (Harlan, J., concurring).

[118] GARCIA, *supra* note 117, at 3–4.

[119] *See* Rothgery v. Gillespie Cnty., Tex., 554 U.S. 191, 198 (2008); *accord* Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012) (observing that "the right to counsel is the foundation for our adversary system" and that "[d]efense counsel tests the prosecution's case . . . while protecting the rights of the person charged"); Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). *See generally* TOMKOVICZ, *supra* note 103, at 2–21 (discussing the history of the right to counsel).

[120] *Faretta*, 422 U.S. at 823–24; 5 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 196 (2d ed. 1937).

[121] 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 397 (1883).

[122] TOMKOVICZ, *supra* note 103, at 3–4.

[123] GARCIA, *supra* note 117, at 3.

opponents.[124] The reform was likely limited to treason because the imbalance of power was particularly pronounced in treason cases, where trained lawyers for the State prosecuted the accused.[125] In contrast, there was a relatively less pronounced imbalance in power in most other criminal cases, where laypersons, rather than professionals, prosecuted the accused.[126]

Initially in the colonies, the imbalance of power between the State and the defendant was less pronounced because trials were informal and the parties were private laypersons.[127] Criminal justice practices around the time of the Founding were far less hyper-regulated and hypertechnical than the arcane constitutional criminal procedure doctrine today.[128] Most of the surviving records from the era do not address the everyday operation of criminal courts.[129] The court records that are available indicate that the vast majority of defendants "were dealt with in a great rush, and quite summarily."[130] The criminal justice system was far different than the modern system, with its professional forces of public defenders, probation officers, full-time prosecutors, and trained police forces.[131] Indeed, the State hardly had a monopoly on prosecution—with the practice of private prosecution of crimes persisting in Philadelphia, for example, until the 19th century.[132] Private citizens also assisted government officials posse-style, rendering the line "between riot and disorder on the one hand and law enforcement on the other . . . far from distinct."[133]

By the beginning of the 18th century, however, the colonies began using professional and trained public prosecutors, culminating in the right to counsel for the accused.[134] And by the time of the adoption of the Sixth Amendment, twelve of the thirteen colonies had rejected the English common law rule tilting the adversarial playing field in favor of the sovereign and recognized a right to counsel for the criminally accused.[135]

The abuses of the 16th and 17th centuries that shaped the development of the adversarial protections in the Sixth Amendment are phantoms of the

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[124] TOMKOVICZ, *supra* note 103, at 6.

[125] *Id.*

[126] *Id.* at 5; John H. Langbein, *The Criminal Trial Before Lawyers*, 45 U. CHI. L. REV. 263, 277–82 (1978).

[127] WILLIAM MERRITT BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 13–18 (1972).

[128] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 286 (2d ed. 1985).

[129] *Id.*

[130] *Id.*

[131] *Id.* at 286–87; *see* Hudson v. Michigan, 547 U.S. 586, 598–99 (2006) (noting "the increasing professionalism of police forces" over the last half-century).

[132] FRIEDMAN, *supra* note 128, at 287.

[133] *Id.*

[134] TOMKOVICZ, *supra* note 103, at 9–10.

[135] *See* Powell v. Alabama, 287 U.S. 45, 64–66 (1932) (discussing this history).

past. For much of the nation's history, the constitutional criminal procedural protections had little practical significance because they bound the federal government, rather than the states—where most criminal prosecutions occur.[136] The Court thus had little occasion for interpretation, keeping key provisions of the amendment essentially dormant.[137]

Since incorporation of the rights to the states beginning in the 1960s, the rights of confrontation, compulsory process, and self-representation have exploded in doctrinal complexity, ambiguity, and scope.[138] The next Part explores how these increasingly potent doctrines—especially the hugely expanded right to confront and the constitutionalized right to self-represent—chill attempts to prevent misuse of these rights when they are used as bludgeons against victims who choose to pursue justice.

II. CONSTITUTIONAL MURK AND THE CHILLING OF PROTECTION

The history behind the rights of confrontation, compulsory process, and counsel suggests that these provisions were meant to prevent "flagrant abuses, trials by anonymous accusers, and absentee witnesses."[139] Yet these constitutional provisions have expanded in scope and grown new limbs to govern more complex questions of how to balance the accused's interests alongside society's interests in justice and the protection of victims.[140] The questions today are no longer about blatant preclusion of defense counsel, trial by affidavits, or the inability to present witnesses in one's defense.[141] Rather, the expansion and constitutionalization of the adversarial process has put into doubt the ability of states and courts to protect victims after traumatic assaults.[142] The rapid growth in law has seemingly overlooked the

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[136] MICHAL R. BELKNAP, THE SUPREME COURT AND CRIMINAL PROCEDURE: THE WARREN COURT REVOLUTION 2–3 (2011); TOMKOVICZ, *supra* note 103, at 21–22.

[137] HELLER, *supra* note 23, at 139.

[138] *See infra* notes 143–213 and accompanying text; *see also* SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 230–40 (2010) (discussing the expansion of constitutional criminal procedure since the 1960s).

[139] *See* California v. Green, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) (surveying the history of the Confrontation and Compulsory Process Clauses); *supra* notes 103–138 and accompanying text (describing this history).

[140] *See infra* notes 143–213 and accompanying text.

[141] *See generally infra* notes 142–213 and accompanying text (discussing paradigmatic concerns prompting the evolution of the rights to confrontation, compulsory process, and counsel).

[142] *See supra* notes 9–16 and accompanying text (discussing one particularly tragic tale of legislative inaction leading to an attempted suicide); *infra* notes 143–213 and accompanying text (discussing hurdles to protecting victim-witnesses from being forced to endure face-to-face questioning at trial); *infra* note 214 (collecting cases). In fact, sometimes, not even protection orders can spare victims and witnesses from legitimized retraumatization. *See* Waugh, *supra* note 17 (reporting on a case where a batterer was allowed to personally cross-examine the victim he beat and whose clothes he sliced off with a knife despite a protective order forbidding him to approach her).

important difference between crimes against the State and crimes against victims. In determining the scope of protections for defendants and victim-witnesses, this distinction is important in finding a way through the murky quagmire of law.

A. The Rather Embarrassing Right to Self-Represent

The Supreme Court constitutionalized the right to self-represent in 1975 in *Faretta v. California*.[143] Though in theory the right romanticizes the freedom to personally battle the prosecution, self-representation in practice is a bit of an embarrassment. Attorneys and judges with trial experience are acutely aware of the excruciating inefficiency of self-represented litigants. In fact, these litigants have been reported by judges to be "an increasing problem," "very time-consuming," "clogging the system," "kooky," "nuts," and "pests."[144] Even the *Faretta* Court admitted that "the right of an accused to conduct his own defense seems to cut against the grain" of the Court's holding that "the help of a lawyer is essential to assure the defendant a fair trial."[145] *Faretta* also conceded that "in most criminal prosecutions[,] defendants [can] better defend with counsel's guidance than by their own unskilled efforts."[146] The Court later remarked: "No one, including . . . the *Faretta* majority, attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient."[147] Thus, even the decision conferring a right of self-representation to defendants expressed misgivings.

The historical peculiarities of early colonial self-representation, its questionable basis in the Constitution, and the modern abuses of this privilege by criminal defendants all point towards limiting the right to self-representation. As a purely textual matter, the Sixth Amendment never mentions a right to self-represent.[148] A defendant stubbornly declining a free professional defense attorney is a luxurious modern-day legal challenge. In contrast, in early American colonial history, people often self-represented as a matter of necessity because of the scarcity of lawyers and because of the English common law prohibition on having counsel in felony cases.[149] Self-reliant early colonists also mistrusted "professional" lawyers, who were

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[143] 422 U.S. 806, 823–24 (1975).

[144] JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 59, 60, 121 (1998) (reporting the experience of state court judges with time-consuming and burdensome pro se litigants).

[145] 422 U.S. at 832–33.

[146] *Id.* at 834.

[147] Martinez v. Court of Appeal, 528 U.S. 152, 161 (2000).

[148] *See* U.S. CONST. amend. VI; *Faretta*, 422 U.S. at 823–24 (admitting the right to self-represent constitutionalized by the case is "not stated in the [Sixth] Amendment in so many words").

[149] *See, e.g.*, *Faretta*, 422 U.S. at 823–24; GARCIA, *supra* note 117, at 3–4; TOMKOVICZ, *supra* note 103, at 14.

identified with the Crown, the upper-class, and the reek of dependence.[150] Furthermore, because of animosity toward lawyers in theocratically influenced colonies, some colonies even prohibited the practice of law and appointed judges without legal training.[151] Finally, self-reliance in one's defense was more feasible then because the nonprofessional prosecution rendered the match more even.[152]

As the colonies advanced and developed, however, the value of professional legal advice became better appreciated and attitudes toward the import of having counsel changed.[153] State constitutions—and finally, the Sixth Amendment—codified the right to have counsel, definitively rejecting the old English common law rule.[154] The impetus for the right to counsel was the *unavailability* of counsel that previously made self-representation a *necessity*.[155] Thus, by the time the Sixth Amendment was adopted, the need to assure self-representation had faded in light of the availability of outside counsel.

Moreover, when legislators wanted to spell out a right to self-represent around the time of the framing of the Bill of Rights, they certainly knew how to do so explicitly, as evidenced by new state constitutions also framed around the time. For example, the Pennsylvania Frame of Government of 1682, one of the "most influential of the Colonial documents protecting individual rights," provided that "in all courts[,] all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves."[156] Several state constitutions also specifically guaranteed a defendant "the right to be heard by himself" as well as through his counsel.[157]

No such reference is found in the U.S. Constitution and Bill of Rights, including the Sixth Amendment's provision protecting right to counsel and other adversarial process rights. Of course, the fact that the right to self-

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[150] DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 195–02 (1958); TOMKOVICZ, *supra* note 103, at 9–10; CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 4–8 (1911); Robert F. Boden, *The Colonial Bar and the American Revolution*, 60 MARQ. L. REV. 1, 3 (1976).

[151] Boden, *supra* note 150, at 2.

[152] *See* BEANEY, *supra* note 127, at 13–18; *supra* notes 127–133 and accompanying text (discussing the nonprofessional prosecutorial system more fully).

[153] TOMKOVICZ, *supra* note 103, at 9–10; Boden, *supra* note 150, at 3.

[154] *See* Powell v. Alabama, 287 U.S. 45, 64–66 (1932) (discussing the history of the right to counsel); *cf.* U.S. CONST. amend. VI.

[155] *See generally* People v. Sharp, 499 P.2d 489, 492–96 (Cal. 1972) (providing a historical analysis of the access to and use of counsel), *overruled by Faretta*, 422 U.S. at 833–34.

[156] 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 130 (1971); *see* PA. FRAME OF GOV'T art. VI (1682).

[157] *E.g.*, DEL. CONST. art. I, § 7 (ratified 1792); GA. CONST. art. LVIII (ratified 1777); MASS. CONST. art. XII (ratified 1780); N.H. CONST. art. XV (ratified 1783); PA. CONST. of 1776, art. IX.

represent is nowhere in the Sixth Amendment does not mean the Framers did not think it was a good idea. Clearly some did—the right was explicitly guaranteed by federal law signed the day before the Sixth Amendment was proposed, showing again that the Framers explicitly guaranteed self-representation when they meant to do so.[158] Still, the concise and elegant Constitution and Bill of Rights is not a massive index of every good idea. Legislation and individual state constitutions can promulgate good ideas without putting the nation into a constitutional straitjacket. The absence of a right to self-representation in the Sixth Amendment indicates that the decision to grant or deny defendants this right was left in the hands of the political branches and state governments.

It is not surprising, then, that the most celebrated and cited Sixth Amendment cases have been about people needing and wanting counsel—not the odd bird who declines the benefit people have fought so hard to obtain.[159] Clarence Gideon, of the 1963 Supreme Court case *Gideon v. Wainwright*, and the Scottsboro Boys, of the 1932 Supreme Court case *Powell v. Alabama*, have been memorialized in movies, documentaries, and popular books.[160] In contrast to this pantheon, *Faretta*'s Anthony Faretta seems to present a mildly peculiar and perhaps rather anomalous case.[161]

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[158] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93 ("[I]n all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law . . . .").

[159] *See, e.g.*, GERALD HORNE, POWELL V. ALABAMA: THE SCOTTSBORO BOYS AND AMERICAN JUSTICE *passim* (1997) (discussing the major import of the case for U.S. criminal justice); Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 432 tbl.1 (2010) (listing *Gideon v. Wainwright* among the top fifteen most-cited cases by the Supreme Court); Sidney B. Jacoby, *Legal Aid to the Poor*, 53 HARV. L. REV. 940, 941 (1940) (discussing the "celebrated case of *Powell v. Alabama*"). *See generally* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (holding that the right to counsel is a fundamental right that must be extended to the states by the Due Process Clause of the Fourteenth Amendment); *Powell*, 287 U.S. at 64–66 (holding that in a capital trial, defendants have a right to counsel upon request as a matter of due process).

[160] *See, e.g.*, ANTHONY LEWIS, GIDEON'S TRUMPET (1964) (popular book by Pulitzer Prize-winning author); CLARENCE NORRIS & SYBIL D. WASHINGTON, THE LAST OF THE SCOTTSBORO BOYS: AN AUTOBIOGRAPHY (1979) (surviving defendant account); GIDEON'S TRUMPET (Hallmark 1980) (starring Henry Fonda as Gideon); *Scottsboro: An American Tragedy* (PBS television broadcast 2000) (winner of a daytime Emmy and nominated for an Oscar Award).

[161] *Cf.* 422 U.S. at 807–08. A closer look at the *Faretta* case highlights its peculiarity. Charged with grand theft, Faretta wanted to represent himself rather than use the Los Angeles County public defender assigned to him. *Id.* He told the judge that he had represented himself before in a criminal case and had then secured a plea bargain. *See* Respondent's Brief, *Faretta*, 422 U.S. 806 (No. 73-5772), 1974 WL 174862, at *6. The judge in Faretta's case was well aware of the problems of self-representation, explaining that in his experience, self-representing defendants become "bogged down in making motions" to the point that they "completely neglect the problem of trying the lawsuit." *See id.* at *7. He warned Faretta, "I have seen more people who represent themselves convict themselves, where if they just sat down and let somebody who knew what they were doing do it, could well have won it." *Id.* Faretta still wanted to self-represent, and

In *Faretta*, the Court acknowledged that self-representation is "not stated in the [Sixth] Amendment in so many words."[162] Nonetheless—though it was "not an easy question"—the Court ultimately reversed the state court and constitutionalized the right of self-representation.[163] The Court was persuaded by the widespread popularity of the right—reflected in state constitutions, federal statutory law, circuit court decisions, and past dicta of the Court seeming to assume there was such a privilege.[164] The Court also read the history of the widespread practice of self-representation as evidence that self-representation was a default right, with the right to counsel being merely "an 'assistance' for the accused, to be used at his option, in defending himself."[165]

The Court constitutionalized the right to self-representation, making it rigidly applicable to every state, out of "respect for the individual" and "to affirm the dignity and autonomy of the accused."[166] This judicial policy choice might be defensible as long as it is just the defendant who "will bear the personal consequences of a conviction."[167] It may even be defensible despite the costs of disruption and delay that judges and court personnel

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the judge preliminarily accepted his waiver of the right to counsel while reserving the ability to further evaluate whether Faretta was capable of effective self-representation. *Id.* at *7–8.

Several weeks later, the judge quizzed Faretta, who showed a remarkably good grasp of complicated concepts such as hearsay and voir dire, but was stumped by tough questions about the number of exceptions to the hearsay rule and what specific code section governed challenges to jurors for cause. *Faretta*, 422 U.S. at 810–11. After the quiz, the trial judge noted for the record that there was no right to self-represent under California law, found that Faretta had not knowingly and validly waived his right to counsel, and appointed a public defender. *Id.* The California Supreme Court affirmed the decision because it had already ruled that there was no right to self-represent under the state or federal constitutions. *Sharp*, 499 P.2d at 491–93.

[162] 422 U.S. at 819.

[163] *Id.* at 806.

[164] *Id.* at 812–17 (citing, inter alia, 28 U.S.C. § 1654 (2012)) ("In all courts of the United States the parties may plead and conduct their own cases personally . . . ."); Price v. Johnston, 334 U.S. 266, 285 (1948) (rejecting the argument that the defendant has an absolute right to argue his own appeal, but contrasting this with the "recognized privilege of conducting his own defense at the trial"); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (holding that the defendant has a Confrontation Clause right to be present at stages of proceedings where fundamental fairness requires his presence, noting that "defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself"). *See generally supra* notes 156–157 and accompanying text (referencing pertinent state constitutions).

[165] *Faretta*, 422 U.S. at 832.

[166] McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984) (dignity and autonomy); *Faretta*, 422 U.S. at 834 (respect).

[167] *Faretta*, 422 U.S. at 834.

have borne.[168] But those interests must be balanced against defendants who leverage this right to bludgeon and intimidate victims.[169]

Not only is the constitutionalized right to self-representation an atextual embarrassment, it has also impeded and chilled judges and legislatures from acting to redress these harms.[170] For example, legislation that may have spared D.G. from the brutality of having to be interrogated by the man who raped her as a child twice faltered on fears of unconstitutionality.[171] The legislation would authorize courts to restrict self-representing defendants from directly interrogating victims of certain sex offenses on the stand.[172] Instead, it would allow courts to appoint counsel to pose the defendant's questions if the court "finds by substantial evidence . . . that requiring the victim to be questioned directly by the defendant will cause the victim to suffer serious emotional or mental distress that will prevent the victim from reasonably communicating at the trial."[173]

The goal of this bill was to balance confrontation rights with the state's "compelling interest in the physical and psychological well-being of victims of sex offenses."[174] Unfortunately, however, the legislation remains stalled. Impeding concerns include a perceived conflict with the right to self-represent and confront accusers and the lack of a "court case which has sanctioned the Legislature instructing a court how to proceed in these types of situations."[175] Doubt and confusion over potential constitutional conflict have thus chilled attempts to avert the harms that D.G. and other victims have experienced.[176]

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[168] *See* GOLDSCHMIDT ET AL., *supra* note 144, at 59–60, 121 (reporting problems borne by courts).

[169] *See supra* notes 9–16 and accompanying text (discussing one particularly tragic tale of legislative inaction leading to an attempted suicide); *supra* notes 85–95 and accompanying text (elaborating on defendants' abuse of certain constitutional rights).

[170] *See supra* notes 139–169 and accompanying text (discussing paradigmatic concerns prompting the evolution of the rights to confrontation, compulsory process, and counsel); *infra* notes 171–213 and accompanying text (same); *infra* note 214 (collecting cases).

[171] *See, e.g.*, H. Comm. Judiciary 2010-S.H.B. 2457, *supra* note 16, at 2–3 (noting concern that a bill protecting rape victims from direct examination by perpetrators might conflict with defendants' rights to self-representation and confrontation); H. Comm. Judiciary 2010-H.B. 2457, *supra* note 16, at 2–3 (same); *see also* Wash. State Legislature, *Public Hearing #2*, *supra* note 16 (providing archived webcasting regarding the proposed bill); Wash. State Legislature, *Public Hearing #1*, *supra* note 16 (same). As already discussed, just the thought of facing her assailant in court prompted D.G. to attempt suicide. *See* Sullivan, *supra* note 12. *See generally supra* notes 11–16 (discussing D.G.'s story).

[172] S.H.B. 2457, 61st Leg., Reg. Sess. § 2(1) (Wash. 2010).

[173] *Id.* § 2(2)(c).

[174] *Id.* § 1(3).

[175] S. Comm. Judiciary 2010-S.H.B. 2457, 61st Leg., at 3 (Wash. 2010).

[176] *Compare* Christine Clarridge, *Rape Victim Empathizes with Woman Who Fled from Testifying*, SEATTLE TIMES (Nov. 8, 2010, 9:16 PM), http://seattletimes.com/html/localnews/2013381490_rapevictim09m.html, *archived at* http://perma.cc/SW7W-TR8F (detailing harms by victim

B. Confrontation, Cross-Examination, and the Tyranny of Absolutism

The right to face one's accuser, as provided by the Confrontation Clause, is a powerful confederate in providing cover for intimidation tactics and casting constitutional doubt over attempts to protect victims. The hardening of Confrontation Clause cases in recent decades has created an air of hypertechnical and complicated absolutism that adds murk to whether courts and legislatures may balance harms to victims with defendant prerogatives.[177] Though a powerful sword for defendants today, the Confrontation Clause did not have much independent import until it was made applicable to the states in 1965.[178] And for decades after, Confrontation Clause rights were generally conflated with the rules of ordinary hearsay doctrine, drawing influential critique from scholars.[179]

In recent years, the pendulum has swung sharply in an overcorrection that has cast doubt on attempts to protect vulnerable victims. The Confrontation Clause today covers far more than the "particular abuse common in 16th- and 17th-century England [of] prosecuting a defendant through the presentation of *ex parte* affidavits."[180] The scope of coverage has widened, and the mandate has hardened. In 2004, in *Crawford v. Washington*, the Supreme Court rejected its former rule that an unavailable witness's out-of-court statement may be admitted as long as it has sufficient indicia of relia-

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who endured questioning by self-representing rapist), *supra* notes 139–175 and accompanying text (discussing paradigmatic concerns prompting the evolution of the rights to confrontation, compulsory process, and counsel), *infra* notes 177–213 and accompanying text (same), *and* Newcomb, *supra* note 90 (discussing self-representing defendant's request to force child molestation victims to view videotapes of his sexual acts with them), *with supra* notes 171–175 and accompanying text (describing a failed Washington bill designed to restrict self-representing defendants from directly interrogating victims of certain sex offenses on the stand).

[177] *See, e.g.*, Lininger, *supra* note 25, at 859–64, 871, 873–74 (discussing how the hardening Confrontation Clause cases have exacerbated confusion and harm to victims and heightened the incentives of batterers to intimidate victims into silence); Myrna S. Raeder, *Being Heard After* Giles*: Comments on* The Sound of Silence, 87 TEX. L. REV. SEE ALSO 105, 115 (2009), http://www.texaslrev.com/wp-content/uploads/Raeder-87-TLRSA-105.pdf, *archived at* http://perma.cc/MK5A-9EHK (discussing problems with seeming constitutional absolutism in Confrontation Clause cases).

[178] *Cf.* Pointer v. Texas, 380 U.S. 400, 403 (1965) (holding that the Confrontation Clause applies to the states because of the Fourteenth Amendment).

[179] *See* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1013–15 (1998) (arguing for a Confrontation Clause that is both less extensive and more intensive in its coverage). *But see, e.g.*, AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 124–47 (1997) (arguing for a more narrowly tailored Confrontation Clause doctrine); Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1047 (1998) (same).

[180] White v. Illinois, 502 U.S. 346, 352 (1992) (observing this historical abuse); *infra* notes 181–213 and accompanying text (illustrating the expansion of the Confrontation Clause).

bility.[181] Writing for the majority, Justice Antonin Scalia created a bright-line bar against the admission of "testimonial" statements unless the defendant had the prior opportunity to cross-examine the declarant.[182] Despite this change in approach, identifying Confrontation Clause violations remains a murky endeavor because determining what qualifies as "testimonial" has spawned a convoluted, hypertechnical series of cases.[183]

To further complicate matters, the Supreme Court in 2008 in *Giles v. California* controversially cut back the widely recognized doctrine of forfeiture by wrongdoing.[184] This doctrine holds that defendants cannot render witnesses unavailable—for example, by murdering them—and then argue that their prior statements must be excluded because they are unavailable for cross-examination.[185] In *Giles*, the defendant murdered his ex-girlfriend Brenda Avie by shooting her three times outside his grandmother's house.[186] He claimed self-defense—though Avie was unarmed—and tried to portray her as jealous and unstable.[187] At trial, prosecutors introduced testimony that three weeks before Giles killed her, Avie had called the police crying and explained that Giles had accused her of cheating on him, punched her in the face and head, brandished a knife, and threatened to kill her if he caught her cheating on him.[188] Giles argued that admitting these statements violat-

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[181] 541 U.S. 36, 42 (2004). Under the Court's prior approach, reliability could be established by showing "particularized guarantees of trustworthiness" or that the statement fell within a "firmly rooted hearsay exception." Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. 36.

[182] *Crawford*, 541 U.S. at 55–56.

[183] For example, hidden problems lurk in even mundane things such as lab reports stating the identity of a controlled substance or a blood alcohol level. *See* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710 (2011) (requiring the analyst who made the blood-alcohol determination to testify and not a surrogate familiar with the lab testing procedures); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318–25 (2009) (upending the longstanding practice of sworn notarized reports relaying laboratory findings on the identity of substances tested and requiring lab technicians to personally testify on this routine matter). *But see, e.g.*, Williams v. Illinois, 132 S. Ct. 2221, 2228–30, 2241–42 (2012) (plurality opinion) (fracturing and holding that an expert may opine about a DNA match based on a comparison of vaginal swabs taken by another lab, and concluding that a DNA report produced before any suspect was identified is not testimonial). Even the use of court reporter transcripts of prior testimony may be jeopardized by *Crawford*'s shift in emphasis. *See* Peter Nicolas, *But What If the Court Reporter Is Lying? The Right to Confront Hidden Declarants Found in Transcripts of Former Testimony*, 2010 BYU L. REV. 1149, 1155–68.

[184] 554 U.S. 353, 377 (2008).

[185] *See, e.g.*, United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (rejecting under the doctrine of forfeiture by wrongdoing the defendant's argument that statements of an informant he killed could not be used because he killed her and thus she was unavailable for cross-examination); State v. Jensen, 727 N.W.2d 518, 529–33 (Wis. 2007) (rejecting the defendant's claim that his wife's prior voicemail messages and letters about his plan to kill her could not be admitted since she was unavailable to testify because he succeeded in killing her).

[186] 554 U.S. at 356.

[187] *Id.*

[188] *Id.* at 357.

ed his Confrontation Clause rights because he could not cross-examine Avie at trial because she was dead and, thus, unavailable to testify.[189]

Writing for a majority in *Giles*, Justice Scalia reversed the conviction, refusing to recognize the forfeiture by wrongdoing doctrine as it was then widely applied. Instead he required an additional showing that the defendant "intended to prevent a witness from testifying" as well as rendered her unavailable to testify.[190] Another baroque extreme in the fetishization of confrontation, *Giles* essentially forces the criminal justice system to bear the expense and delay of a mini-trial on the defendant's intent in rendering a witness unavailable to testify.[191] Perhaps better pragmatically attuned to the folly and waste of such an outcome, both Justices Samuel Alito and Clarence Thomas separately concurred to offer prosecutors an alternative route—arguing that prior statements of domestic abuse victims to police are not testimonial because they are not formalized communications nor statements constructed in order to evade the Confrontation Clause.[192]

Confrontation cases have become so convoluted that Justice Thomas—formerly a co-adventurer in Justice Scalia's confrontation doctrine revolution—has expressed concern.[193] In *Davis v. Washington*, Justice Thomas wrote that "the Court's standard is not only disconnected from history and unnecessary to prevent abuse; it also yields no predictable results to police officers and prosecutors attempting to comply with the law."[194]

In this highly unstable and convoluted domain, past important cases that have not been officially overruled now bear the stigma of doubt. For example, the murk has enshrouded the Court's pre-*Crawford* decision in the 1990 case *Maryland v. Craig*.[195] By providing for testimony through closed-

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[189] *Id.*

[190] *Id.* at 361, 368, 372, 375. Accordingly, the Court vacated the conviction and remanded for a determination of intent. *Id.* at 377.

[191] Although expressly ruling in the domestic violence context, *Giles*'s newfound intent requirement may similarly limit the protections afforded to victim-witnesses in the context of violent criminal conspiracies. Adrienne Rose, Note, *Forfeiture of Confrontation Rights Post*-Giles*: Whether a Co-Conspirator's Misconduct Can Forfeit a Defendant's Right to Confront Witnesses*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 281, 285, 315–18 (2011) (concluding that the intent requirement imposed by *Giles* limits the applicability of forfeiture by wrongdoing doctrine in the co-conspirator context). *But see* Nathaniel Koslof, Note, Cherry *Still On Top: How* Pinkerton *Concepts Continue to Govern Co-conspirator Forfeiture of Confrontation Rights Post*-Giles, 55 B.C. L. REV. 301, 307–27 (2014) (arguing that the *Cherry* doctrine—which provides for expansive forfeiture by wrongdoing in the co-conspirator context—remains viable despite the newfound intent requirement imposed by *Giles*).

[192] *Giles*, 554 U.S. at 377–78 (Thomas, J., concurring); *id.* at 378 (Alito, J., concurring).

[193] *Compare Crawford*, 541 U.S. at 36 (Thomas, J., joining majority), *with* Davis v. Washington, 547 U.S. 813, 838 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part).

[194] 547 U.S. at 838 (Thomas, J., concurring in the judgment in part and dissenting in part).

[195] *See infra* notes 196–216 and accompanying text.

circuit television, *Craig* is a crucial imprimatur for federal and state laws that authorize carefully calibrated protections for victims at risk for retraumatization.[196] The procedure permits the defendant or his counsel to face and cross-examine the victim-witness on the screen, but spares the victim-witness from being forced to appear physically before the perpetrator in a highly stressful environment.[197]

Craig rendered more humane the Court's balance between confrontation and the need to protect victims from further harm. Just two years before, in *Coy v. Iowa*, the Court, in an opinion by Justice Scalia, invalidated an Iowa law allowing sexual assault victims—in Coy's case, the two thirteen-year-old girls he sexually assaulted—to testify behind a screen.[198] *Coy* invalidated the procedure because the screen protected the young victims from having to see their assailant again.[199] In the Court's view, besides conferring the right to cross-examine witnesses, the Confrontation Clause also gives defendants the right to physically face those who testify against them—and to force those witnesses to face them.[200] Nevertheless, *Coy* left open the possibility that states may protect vulnerable witnesses if there were individualized findings of special need for protection.[201]

That's exactly what happened in *Craig*; the trial court made individualized findings of special need to protect six-year-old girls who were sexually abused by the defendant.[202] Accordingly, the children were permitted to testify in a closed-circuit television procedure in which the child-witness, prosecutor, and defense counsel were in a separate room while the jury, defendant, and judge remained in the courtroom.[203] The jury and defendant

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[196] *Cf.* 497 U.S. 836, 851–57 (1990). *See generally* 18 U.S.C. § 3509(b) (2012) (providing for closed-circuit television testimony by certain vulnerable witnesses); UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT §§ 4–8 (2002) (providing a uniform code on alternative procedures for vulnerable child witnesses); CAL. PENAL CODE § 1357 (West 2004) (prescribing procedures for contemporaneous examination and cross-examination by closed-circuit television); COLO. REV. STAT. § 18-3-413 (2013) (prescribing procedures for videotape depositions to be admitted if "the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable"); GA. CODE ANN. § 17-8-55 (2013) (prescribing procedures for children to testify by two-way closed-circuit television); 725 ILL. COMP. STAT. 5/106B-5 (2013) (prescribing procedures allowing vulnerable child or disabled persons to testify by closed-circuit television).

[197] *Craig*, 497 U.S. at 851–57 (explaining the testimony by closed-circuit television procedure and discussing the Court's important interest in protecting vulnerable victim-witnesses from further traumatic injury).

[198] 487 U.S. 1012, 1014–15 (1988).

[199] *Id.* at 1020.

[200] *Id.* at 1018–20.

[201] *Id.* at 1021–22.

[202] 497 U.S. at 842.

[203] *Id.* at 841.

could watch the child witness by one-way closed-circuit television, but the child was not forced to see the perpetrator who sexually abused her.[204]

Upholding the procedure over Justice Scalia's dissent,[205] Justice Sandra Day O'Connor—writing for the majority—underscored that the Confrontation Clause does not confer to defendants "the absolute right to a face-to-face meeting with witnesses against them at trial."[206] Instead, she explained that the adversarial procedure may be adjusted when "necessary to further an important public policy."[207] The Court in *Craig* concluded that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."[208]

After Justice Scalia's massive shake-up of Confrontation Clause doctrine in *Crawford*, the continued viability of *Craig*—and thus the ability of courts and state legislatures to protect victims—is unclear.[209] When *Craig* was decided, the framework for confrontation analysis was the more flexible approach of *Ohio v. Roberts*, which *Crawford* disrupted.[210] For now, though, most courts that have considered the question have continued to follow *Craig* because the Supreme Court has not explicitly overruled its precedent.[211] Moreover, there is a strong argument that *Craig* remains good law because it is sound and compatible with *Crawford*: whereas "*Crawford* addresses the question of *when* confrontation is required; *Craig* addresses

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[204] *Id.*

[205] *Id.* at 860 (Scalia, J., dissenting) (decrying the Court's failure "to sustain a categorical guarantee of the Constitution").

[206] *Id.* at 844 (majority opinion).

[207] *Id.* at 845.

[208] *Id.* at 853.

[209] *See, e.g.*, Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 511 n.178 (2006) ("It is unclear whether *Maryland v. Craig* survives *Crawford*."); Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1015 (2007) (arguing that *Craig* should survive after *Crawford*); David M. Wagner, *The End of the "Virtually Constitutional"? The Confrontation Right and* Crawford v. Washington *as a Prelude to Reversal of* Maryland v. Craig, 19 REGENT U. L. REV. 469, 473 (2007) ("There are several holdings in *Crawford* that throw the continuing validity of *Maryland v. Craig* into grave doubt.").

[210] *See* People v. Phillips, 315 P.3d 136, 151 (Colo. App. 2012) (noting that "[b]ecause much of *Craig* was based on the reliability test in *Ohio v. Roberts*," defendants may plausibly argue *Craig* is no longer valid—but ultimately declining to so rule unless and until the Court "explicitly overrules its own precedent"). *See generally Roberts*, 448 U.S. at 66 (providing for a reliability test that allowed admission of an unavailable witness's out-of-court statement as long as it had sufficient indicia of reliability).

[211] *See, e.g.*, Horn v. Quarterman, 508 F.3d 306, 319 (5th Cir. 2007) ("[W]e are not at liberty to presume that *Craig* has been overruled *sub silentio*."); United States v. Sapse, No. 2:10-CR-00370-KJD, 2012 WL 5334630, at *3 (D. Nev. Oct. 26, 2012) ("While the Supreme Court may revisit *Craig*, this Court is bound to follow directly applicable Supreme Court precedent until it is clearly overruled."); *Phillips*, 315 P.3d at 151 (collecting cases).

the question of *what* procedures confrontation requires."[212] As Richard Friedman observes, however, although *Crawford* doesn't overtly undermine the holding in *Craig*, Justice Scalia's *Crawford* opinion is more consistent with his dissent in *Craig*.[213] If *Craig* is eliminated, however, the Court would entrench the Confrontation Clause as a dangerous weapon for witness intimidation by defendants.

III. TWO PATHS THROUGH THE MORASS

Courts and legislatures seeking to protect victims of serious violent crime and sexual assault from further attack by defendants during adversarial adjudication face a quandary. The very unstable constitutional terrain that gives defendants cover to pursue intimidation and retaliation tactics also imperils protective measures.[214] If adapted procedures are subsequently deemed unconstitutional, then, perversely, their use may expose victims to even greater harm. A post-conviction reversal forces vulnerable victim-witnesses to endure not only the crushing disappointment of a vacated conviction, but also another round of harmful adversarial adjudication.[215]

This brutal dilemma, however, should not deter protection and innovation. First, this Part discusses how practices that reduce the traumatic toll for justice (the "mid-range solution") can and should withstand constitutional challenge.[216] Second, this Part explores a farther-reaching approach that offers victims and defendants the opportunity to opt out of the harms

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[212] Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 454 (2004); *see also* Coronado v. State, 351 S.W.3d 315, 335 (Tex. Crim. App. 2011) (quoting Andrew W. Eichner, Note, *Preserving Innocence: Protecting Child Victims in the Post-*Crawford *Legal System*, 38 AM. J. CRIM. L. 101, 115 (2010) (quoting Friedman, *supra*, at 454)).

[213] Friedman, *supra* note 212, at 454.

[214] *Cf., e.g.*, State v. Folk, 256 P.3d 735, 744–47 (Idaho 2011) (reversing a conviction for lewd conduct on a child because of the utilization of certain protective measures, including closed-circuit camera testimony and prohibiting the defendant from directly interrogating the child—instead requiring the use of standby counsel); Commonwealth v. Conefrey, 570 N.E.2d 1384, 1389–91 (Mass. 1991) (reversing an indecent assault on a child conviction because of the judge's protective measure of having standby counsel question the victim instead of the defendant out of concern that the defendant was trying to intimidate the victim); Commonwealth v. Spear, 686 N.E.2d 1037, 1042–43 (Mass. App. Ct. 1997) (reversing a conviction because of a protective measure for the child-victim that allowed the child to testify facing the jury with either side profile or back to the defendant); S. Comm. Judiciary 2010-S.H.B. 2457, *supra* note 175, at 3 (reporting constitutional concerns surrounding a bill designed to protect sexual assault victims from interrogation by defendants).

[215] *See, e.g.*, *Folk*, 256 P.3d at 750 (remanding for further proceedings); *Conefrey*, 570 N.E.2d at 1390–91 (remanding for a new trial); *Spear*, 686 N.E.2d at 1045 (setting aside the guilty verdicts and reversing the judgments).

[216] *See infra* notes 220–257 and accompanying text.

and risks of adversarial adjudication altogether.[217] The mid-range solution is designed to prevent some of the worst harms and misuses of the adversarial process by clarifying the constitutional murk and establishing best practices for minimizing witness retraumatization.[218] The farther-reaching approach goes beyond adversarial adjudication to offer victims and defendants an opt-out from the costs of traditional adversarial adjudication and another avenue toward justice.[219]

A. Against Absolutism: Defending Protective Measures

The basic problem chilling judicial and legislative attempts to protect victims is mistaken absolutism in regards to adversarial rights. The applicability of defendant confrontation, self-representation, or discovery rights is not an automatic stop sign for victim protection measures. It is important to distinguish the threshold question of *whether* confrontation, self-representation, or discovery rights apply in a situation from the separate question of *what is required* if the rights do apply.[220] Constitutional rights—even venerated rights at the cornerstone of a free society, such as First Amendment freedoms—are not absolute such that if they apply they must prevail.[221] Thus, asserting that a defendant has adversarial process rights in a situation does not end the inquiry because these rights are correspondingly not abso-

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[217] *See infra* notes 258–295 and accompanying text.

[218] *See infra* notes 220–257 and accompanying text.

[219] *See* William Schma et al., *Therapeutic Jurisprudence: Using the Law to Improve the Public's Health*, 33 J.L. MED. & ETHICS 59, 60–61 (2005) (emphasizing the benefits of therapeutic justice and the need for changes to the current criminal justice system to reduce jurigenic harm to victims); *cf.* Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, *in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 763, 767 (David B. Wexler & Bruce J. Winick eds., 1996) (discussing various dilemmas faced by the therapeutic justice movement, but concluding that a measured interdisciplinary approach to law would serve public interest). *But see* Bill Buzenberg, Commentary, *A Litany of Barriers . . . A Culture of Secrecy*, *in* SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE 8 (Gordon Witkin & David Donald eds., 2010), http://cloudfront-files-1.publicintegrity.org/documents/pdfs/Sexual%20Assault%20on%20Campus.pdf, *archived at* http://perma.cc/Z5E3-UGJB (arguing that "closed, school-run proceedings" offered by many colleges and universities fail to provide an adequate alternative avenue towards justice).

[220] *See* Coronado v. State, 351 S.W.3d 315, 335 n.17 (Tex. Crim. App. 2011) (distinguishing between the different issues of whether the Confrontation Clause applies to a situation and what is required if the rights do apply (quoting Friedman, *supra* note 212, at 454)).

[221] *See, e.g.*, Cohen v. California, 403 U.S. 15, 19 (1971) ("[T]he First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses."); Konigsberg v. State Bar, 366 U.S. 36, 49 (1961) ("At the outset we reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are 'absolutes . . . .'"); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 995 (1987) ("The Court and commentators routinely remind us that constitutional rights and provisions are not absolutes.").

lute. Indeed, especially in criminal procedure, "interest balancing takes center stage."[222]

So, what is required? A crucial yet overlooked point is the distinction between crimes against the sovereign—the paradigmatic core context for strong adversarial process rights—and crimes against victims. As already elucidated, adversarial rights emerged to address the risk of abuse in prosecutions for crimes against the sovereign.[223] Adversarial protections for defendants should therefore be at the zenith in the core context of prosecutions for crimes against the State while less restrictive—and thus better able to address countervailing needs—outside this core context. The heightened adversarial process requirements in the core category of cases should not be mechanically transposed in full rigidity and demanding restrictions to cases outside the paradigmatic category.

Constitutional criminal procedural rights for defendants are frequently limited and counterbalanced with societal interests in preventing harm, facilitating effective law enforcement, and ensuring that systemic costs are manageable.[224] Criminal rights doctrine openly discusses policy concerns, which influence decisions about both whether a constitutional protection applies and the breadth of governmental power to protect important societal interests if the right indeed applies. For example, the Court has acknowledged that concerns about overburdening states with costs have influenced its interpretation of the scope of the right to counsel for the indigent.[225] Although this is an example of policy influence on *whether* a right applies, there are myriad examples of policy influence on the ambit of governmental power to protect societal interests even if a right applies.

Indeed, the default Fourth Amendment requirement of a warrant for searches and seizures is riddled with exceptions because of policy concerns, such as the societal need for effective law enforcement and special safety concerns.[226] For example, Fourth Amendment protections are strongest in

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[222] Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1350 (2002).

[223] *See supra* notes 102–138 and accompanying text.

[224] *See, e.g.*, Sonja B. Starr, *Rethinking 'Effective Remedies': Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 759–60 (2008) (citing as examples how "the rights to bail, appointed counsel, and 'equality of arms' . . . are limited in ways that accommodate the public's legitimate interest in punishing and deterring crime as well as other interests, such as keeping the justice system operating at reasonable expense").

[225] *See, e.g.*, Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (refusing to extend the right to counsel for the indigent to cases involving sanctions or threat of imprisonment because this would "create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse states").

[226] *See, e.g.*, Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985) (listing at least twenty exceptions to the requirement of a warrant); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 18–28 (1991) (dis-

the home, forming the heart of privacy protections against the state.[227] In contrast, Fourth Amendment protections are less rigid and more flexible when applied outside the home, such as in automobiles.[228] The rights still *apply*, but they do not apply in full force and rigidity, allowing more flexible balancing alongside other important social considerations.[229] These exceptions are the result of the Court's express recognition of important counterbalancing policy concerns, not just a reflection of the Fourth Amendment's perceived lower position in the hierarchy of judicial protections for constitutional criminal procedural rights.[230]

Even First Amendment law, which enjoys a privileged position in the constitutional hierarchy, distinguishes between the core zone of protected speech—where safeguards are at their height—and the periphery.[231] The First Amendment strongly safeguards political speech from regulation while

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cussing the various exceptions to the warrant requirement); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 580–89 (1992) (discussing policy balancing against defendant constitutional rights).

[227] *See, e.g.*, Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) (explaining that the home is at the Fourth Amendment's "very core" and "first among equals"); Kyllo v. United States, 533 U.S. 27, 31 (2001) (reiterating that the home is at the core of Fourth Amendment protections); Payton v. New York, 445 U.S. 573, 585 (1980) ("[T]he 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" (quoting United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972))).

[228] *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 302–03 (1999) (discussing the reduced expectation of privacy in cars); South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (recognizing that "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office"); Chambers v. Maroney, 399 U.S. 42, 52 (1970) ("[F]or the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.").

[229] *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 74–75 & n.7 (2001) (tracing the genealogy of "special needs" cases where the Court has permitted flexible balancing of Fourth Amendment privacy interests and other important societal concerns); Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1427–65 (2010) (discussing reduced privacy protections for containers because of a myriad of countervailing societal interests).

[230] *Cf.* Stuntz, *supra* note 226, at 580–89. For discussions of the Supreme Court's seemingly implicit hierarchical ordering of constitutional criminal procedural protections in order of protection, see, for example, Donald L. Doernberg, *"Can You Hear Me Now?": Expectations of Privacy, False Friends, and the Perils of Speaking Under the Supreme Court's Fourth Amendment Jurisprudence*, 39 IND. L. REV. 253, 305 (2006); Charles H. Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471, 478–83 (1985).

[231] *See, e.g.*, Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2673 (2011) (Breyer J., dissenting) ("[T]his Court has distinguished for First Amendment purposes among different contexts in which speech takes place."); R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) (observing that the Supreme Court's "First Amendment decisions have created a rough hierarchy in the constitutional protection of speech" and that "[c]ore political speech occupies the highest, most protected position"); Meyer v. Grant, 486 U.S. 414, 420–21 (1988) (distinguishing limitations on core political speech).

imposing less restrictive constraints on regulating other forms of speech, such as commercial speech or the speech of government employees.[232]

Sixth Amendment rights are also not absolute. Take, for example, the right of self-representation inferred from the Sixth Amendment.[233] The State retains power to protect important policy interests even if this means limiting—or even terminating—the right to self-represent.[234] For example, courts may require defendants to make a timely as well as a voluntary and intelligent election to self-represent themselves.[235] In addition, a court may choose to appoint standby counsel to help the defendant even over a defendant's objection.[236] This court-appointed standby counsel may assist in the defense even without the self-representing defendant's express consent as long as the appearance of self-representation before the jury is not "seriously undermined."[237] Finally, if a defendant engages in "serious and obstructionist misconduct," trial courts have discretion to terminate self-representation altogether.[238]

Likewise, the right to face one's accuser—provided by the Confrontation Clause—is also not absolute. For example, disruptive defendants can be removed from the courtroom—and thus rendered unable to face witnesses or be present for trial—in the interest of courtroom decorum.[239] Even Justice Scalia, the lead proponent of the Court's Confrontation Clause revolution, wrote that exceptions to the core confrontation right might exist if "necessary to further an important public policy."[240] He seemed to diverge from this position in his furious *Maryland v. Craig* dissent, which was clearly colored by his frustration over the particular facts of the case.[241] Time—and the responsibilities of being a leader in a successful Confrontation Clause revolution—may have returned Justice Scalia to consistency with his prior caveat. Despite unabashed and vigorous overruling of other long-settled cases, nowhere did *Crawford* or its progeny disturb *Craig*'s

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[232] *Sorrell*, 131 S. Ct. at 2673 (Breyer, J., dissenting); *see also* Morse v. Frederick, 551 U.S. 393, 403 (2007) ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" (citing Virginia v. Black, 538 U.S. 343, 365 (2003))).

[233] Faretta v. California, 422 U.S. 806, 834 & n.46, 835 (1975) (constitutionalizing this right).

[234] Martinez v. Court of Appeal, 528 U.S. 152, 162 (2000).

[235] *Id.*

[236] *Faretta*, 422 U.S. at 834 & n.46, 835.

[237] McKaskle v. Wiggins, 465 U.S. 168, 187 (1984).

[238] *Faretta*, 422 U.S. at 834 & n.46, 835; *accord Martinez*, 528 U.S. at 162.

[239] Illinois v. Allen, 397 U.S. 337, 343 (1970).

[240] Coy v. Iowa, 487 U.S. 1012, 1021 (1988).

[241] *Cf.* 497 U.S. 836, 861 (1990) (Scalia, J., dissenting). Justice Scalia opened his dissent by vividly decrying that a young daughter in the exclusive custody of an estranged wife for several months may accuse a father of sexual abuse and testify against him without having to be in the same room looking at him. *Id.*

holding.[242] Justice Scalia's statement that even core Confrontation Clause rights may yield if "necessary to further an important public policy" also still stands.[243]

Courts and legislatures seeking to protect victims thus should not quail in concern whenever a remedy may raise Confrontation Clause, self-representation, or other constitutional issues. Rather, it is important to make a record regarding the need for the protective measures that justify adaptation of adversarial procedures. The findings that must be made before pursuing a protective measure depend on the constitutional provision implicated. To follow the originalist framework of Justice Scalia, the ambit of power to protect will depend on whether the right is an implied atextual extension—like the right to self-represent—or an explicitly specified core right, like confrontation.[244]

Thus, for example, courts and legislatures should proceed with caution on the use of protective measures that remove the testifying witness to another room. Justice Scalia's Confrontation Clause cases explain that face-to-face confrontation is a core constitutional right.[245] Even under Justice O'Connor's pre-*Crawford* victim protection case of *Craig*, there must be individualized findings of special need in the particular victim's case to warrant curtailing the defendant's Confrontation Clause right.[246]

Where possible and sufficient to protect a victim in need of special safeguards, it would be wiser to use a two-way closed-circuit television procedure rather than the one-way closed-circuit television procedure used in *Craig*. In the two-way system, the victim can see the perpetrator and the perpetrator can see the victim. Although courts are split on whether two-way closed-circuit television testimony requires findings of special need or

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[242] *See, e.g.*, Horn v. Quarterman, 508 F.3d 306, 319 (5th Cir. 2007) ("[W]e are not at liberty to presume that *Craig* has been overruled *sub silentio*."); United States v. Sapse, No. 2:10-CR-00370-KJD, 2012 WL 5334630, at *3 (D. Nev. Oct. 26, 2012) (observing that the court was still bound by *Craig* until "it is clearly overruled"); People v. Phillips, 315 P.3d 136, 151 (Colo. App. 2012) (observing that the Supreme Court had not yet explicitly overruled *Craig*); Michael R. Dreeben, *Prefatory Article: The Confrontation Clause, the Law of Unintended Consequences, and the Structure of Sixth Amendment Analysis*, 34 GEO L.J. ANN. REV. CRIM. PROC., at iii, xxxii (2005) ("*Craig*, not *Crawford*, is in the mainstream of Sixth Amendment analysis."); Friedman, *supra* note 212, at 454 (observing that "nothing in *Crawford* suggests that *Craig* is placed in doubt").

[243] *See* 487 U.S. at 1021.

[244] *See, e.g.*, *Craig*, 497 U.S. at 861–64 (Scalia, J., dissenting) (distinguishing between extensions of the Sixth Amendment beyond its text and rights literally inscribed in the text); *Coy*, 487 U.S. at 1021 (suggesting a distinction between protections for "implications of the Confrontation Clause, as opposed to its most literal application").

[245] *See, e.g.*, *Crawford*, 541 U.S. at 44–45; *Craig*, 497 U.S. at 860 (Scalia, J., dissenting); *Coy*, 487 U.S. at 1017.

[246] 497 U.S. at 844.

not,[247] at least one court has recognized that because two-way closed-circuit television testimony preserves face-to-face confrontation—albeit via television screens—there is no cutback on the confrontation right that would require special need.[248] Regardless of whether or not this procedure is constitutionally mandated, the two-way approach better preserves the ideal of confrontation and thus would be less vulnerable to attack.

Where the conflicting defendant right is an implied atextual extension, such as the right to self-representation, then protections against victim harm should be more readily available. An important best practice is the appointment of standby counsel in cases of violent crime or sexual assault where the defendant insists on self-representation. This approach preserves the right to self-represent with a limited adaptation to protect victims of violent crimes and sexual assault. The defendant would still have the right to self-represent generally and to pose questions for standby counsel to ask the victim. Moreover, standby counsel should be appointed from the start so that the defense attorney is not put in the untenable position of having to prepare for a key witness without having been present for the whole case.[249] Fortunately, this practice already has gained traction; courts have generally upheld appointment of standby counsel to question victims in order to avoid having victims endure questioning from their alleged attacker.[250]

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[247] *Compare, e.g.*, United States v. Yates, 438 F.3d 1307, 1313 (11th Cir. 2006) (en banc) (requiring individualized findings of special need for two-way closed-circuit testimony), *and* United States v. Bordeaux, 400 F.3d 548, 555 (8th Cir. 2005) (holding that testimony through a two-way closed-circuit television system violated the defendant's Confrontation Clause right because the victim-witness did not show a sufficient particularized fear of facing the defendant), *with* United States v. Gigante, 166 F.3d 75, 81–82 (2d Cir. 1999) (holding that because two-way television permits face-to-face confrontation, individualized findings of special need are not required for the procedure).

[248] *See Gigante*, 155 F.3d at 81–82.

[249] *See* Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 684–87 (2000) (discussing concerns with effective representation by standby counsel given insufficient time and exposure to the case to prepare).

[250] *See, e.g.*, Fields v. Murray, 49 F.3d 1024, 1034–36 (4th Cir. 1995) (en banc) (affirming the trial court's refusal to allow the self-representing defendant to question children that he sexually abused as well as the decision to appoint an attorney to pose the questions that the defendant wished to ask); Applegate v. Commonwealth, 299 S.W.3d 266, 273 (Ky. 2009) ("Even if a defendant is granted the right to cross-examine witnesses, there is no constitutional right to personally cross-examine the victim of his crimes."); Partin v. Commonwealth, 168 S.W.3d 23, 28–29 (Ky. 2005) (approving the refusal to allow the self-representing defendant to personally cross-examine his wife, twenty-year-old son, and other adult victims whom the defendant held at gunpoint). As discussed above, however, courts are mixed. *See supra* notes 166–176 and accompanying text; *see also Folk*, 256 P.3d at 744–47 (reversing because the defendant was denied the opportunity to directly question the victim).

The protection is still not consistently applied, however, resulting in severe distress for unprotected victims.[251] For consistent protection across courts, and to ensure that a victim is not exposed to harm because of an oversight in requests for protective measures, it would be wise for legislatures to enact guidance for courts in such cases. For example, after controversial incidents of victims suffering through cross-examination directly by their attackers, Washington legislators proposed the following guidance for courts in sex offense cases:

> When a defendant has waived his or her right to counsel and is representing himself or herself in a criminal trial, the court, on a motion by the prosecuting attorney . . . may restrict the defendant from directly questioning a victim and instead require that the defendant question the victim through a court-appointed attorney.[252]

Under this legislation, the trial court must find "by substantial evidence, . . . that requiring the victim to be questioned directly by the defendant will cause the victim to suffer serious emotional or mental distress that will prevent the victim from reasonably communicating at the trial."[253] If the standard is not met, and the defendant cross-examines the victim, then the legislation authorizes courts to pursue "reasonable procedures" such as "prohibiting the defendant from approaching the victim during the defendant's questioning or ordering that the defendant remain seated the entire time the defendant is questioning the victim."[254]

In framing protections, it is important to avoid sexual assault or child exceptionalism. Victims of violent crime also undergo severe traumatic stress and may be in need of protection from further revictimization by the criminal process.[255] Adults as well as children and men as well as women who have been violently attacked can all be at risk for retraumatization and require protection.[256] Adult women and men do not shed their interests in

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[251] *Cf. Folk*, 256 P.3d at 744–47; *supra* notes 9–16 and accompanying text (discussing one particularly tragic tale of legislative inaction leading to an attempted suicide).

[252] S.H.B. 2457, 61st Leg., Reg. Sess. § 2(1) (Wash. 2010).

[253] *Id.* § 2(2)(c).

[254] *Id.* § 3(2).

[255] *See, e.g.*, Philippe Birmes et al., *Peritraumatic Disassociation, Acute Stress, and Early Posttraumatic Stress Disorder in Victims of General Crime*, 46 CAN. J. PSYCHOL. 649, 650 (2001) (reporting findings on risk factors for PTSD after violent crime); Jonathan I. Bisson & Jonathan P. Shepherd, *Psychological Reactions of Victims of Violent Crime*, 167 BRIT. J. PSYCHOL. 718, 718–19 (1995) (discussing findings regarding the adverse psychological impacts on victims of violent crime).

[256] *See, e.g.*, Brewin et al., *supra* note 41, at 506–07 (discussing findings in a study of men and women on the association between intense fear, helplessness, or horror at the time of traumatic violent crime and PTSD symptoms). Admittedly, women may be more vulnerable to developing PTSD after violent crime than men, but both genders may be at risk depending on other back-

protection nor vulnerabilities to severe psychological and physical harm from serious assault. Interest-linking across diversely impacted victim groups better ensures robust protections rather than detrimental exceptionalism for a particularly vulnerable group.[257]

B. Opting Out: Beyond the Adversarial Process

Although adversarial adjudication has long been the default in criminal procedure, it is not the only way. Recall that the procedures and constitutional protections in adversarial adjudication were shaped by a history of concern with political prosecutions, such as seditious libel or treason, and the contest between the defendant and the state.[258] When it comes to serious violent or sexual assault crimes, however, the adversarial contest is between the victim and the perpetrator rather than merely the defendant and the State as in political crimes. In the contest between the victim and perpetrator in adversarial adjudication, there is a gross inequality of rights and protections that pose the risk of further harm to the victim due to defendant tactics.[259]

Rather than using adversarial procedures shaped by the legacies of prosecutions for a different type of crime, it would be salutary to have a system for achieving justice that takes into consideration victim protection as well as defendant interests. Such a model would incorporate public health insights about how to ameliorate further victim harm. This approach is not mere unrealized fantasy. Rather, it has been piloted for a subset of sexual assault crimes. Psychologist Mary Koss has pioneered and tested a groundbreaking model of resolving sexual assault cases that is victim-centered and offers excellent incentives for defendants to consent to participation.[260] The procedure involves restorative justice-style methods, such as a conference run by a convener who works with the perpetrator and victim to develop a redress plan.[261]

The customary wisdom is that restorative justice procedures are useful for addressing minor or middling crimes, such as theft, but that they are ill-

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ground factors. Bernice Andrews et al., *Gender, Social Support, and PTSD in Victims of Violent Crime*, 16 J. TRAUMATIC STRESS 421, 425–26 (2003).

[257] *Cf.* Bell, *supra* note 42, at 523 (discussing the import of interest-convergence between the powerful and the subordinated to achieve lasting progress).

[258] *See supra* notes 102–138 and accompanying text.

[259] *See, e.g.*, 150 CONG. REC. 7294–96 (2004) (statement of Sen. Diane Feinstein) (discussing the "dramatic disparity between the rights of defendants in our constitution and laws, and the rights of crime victims and their families"); Herman, *supra* note 8, at 160–63 (discussing the harms of the imbalance).

[260] Mary P. Koss et al., *Expanding a Community's Justice Response to Sex Crimes Through Advocacy, Prosecutorial, and Public Health Collaboration: Introducing the RESTORE Program*, 19 J. INTERPERSONAL VIOLENCE 1435, 1436, 1439–45 (2004).

[261] *Id*. at 1450–51.

suited for serious violent crimes or sexual assault crimes.[262] The face-to-face mediation-style meeting between perpetrator and victim typically associated with restorative justice practices seems downright dangerous.[263] Furthermore, the use of informal mediation-style procedures and a softer-edged focus on reparations risks minimizing the crime, offering what one scholar powerfully termed "cheap justice," and failing to properly denounce the violence.[264] As a victim participant in one Nova Scotia program poignantly put it, "I think that by taking it out of the courtroom, [it's saying] it's not a crime, let's deal with it in a nice way so that everyone is 'happy.'"[265]

Cognizant of these critiques, Koss and a collaborative team of public health experts, law enforcement officers, prosecutors, and sexual assault advocates designed and adapted a pilot program for selected sex crimes.[266] Funded by the Centers for Disease Control as a violence prevention program, the pilot program was named "RESTORE," an abbreviation for Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience.[267] A secondary prevention strategy, the goal of RESTORE is to reduce the after-effects of harm that has already happened.[268] Rather than adversarial adjudication, the RESTORE model provides procedures that take into consideration the interests of victims as well as the perpetrator—termed the responsible party.

Both the victim and the defendant must consent to the RESTORE procedure to get off the adversarial adjudication track.[269] For victims, RESTORE offers a confidential, less intimidating, and more supportive process to tell their story without interruption or distortion, to obtain an acknowledgment of responsibility from the perpetrator, and to redress the harm

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[262] *See, e.g.*, Harry Mika et al., *Listening to Victims—A Critique of Restorative Justice Policy and Practice in the United States*, 68 FED. PROBATION 32, 34 (2004) (discussing concerns of applying restorative justice procedures to such crimes); Ptacek, *supra* note 44, at ix–x (noting widespread non-inclusion of crimes against women such as intimate partner violence, rape, and child sexual abuse in restorative justice programs).

[263] *See, e.g.*, Kathleen Daly & Julie Stubbs, *Feminist Theory, Feminist and Anti-Racist Politics, and Restorative Justice*, *in* HANDBOOK OF RESTORATIVE JUSTICE 62, 70–75 (Gerry Johnstone & Daniel W. Van Ness eds., 2007) (discussing safety concerns); Mika et al., *supra* note 262, at 34 (same).

[264] Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 85 (1999).

[265] Pamela Rubin, *A Community of One's Own? When Women Speak to Power About Restorative Justice*, *in* RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 44, at 79, 83 (alteration in original).

[266] Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, *in* RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 44, at 218, 218.

[267] Koss et al., *supra* note 260, at 1448; Koss, *supra* note 266, at 219.

[268] Koss, *supra* note 41, at 219.

[269] Koss et al., *supra* note 260, at 1449.

without forever being linked to the crime in public records.[270] Victims also have the option of not being forced to appear before the defendant again by having a family member or friend read their impact statement at the RESTORE conference.[271] Defendants also have excellent incentives to participate in RESTORE because the program delivers a powerful quadruple benefit: successful participation and completion removes the risk of incarceration, sex offender registration, civil suit, and a criminal record.[272]

RESTORE began accepting victims and perpetrators in 2003, but was limited to acquaintance rape and non-penetration sex crimes.[273] Exclusion criteria included repeat offenders, sexual assaults that were part of a pattern of ongoing intimate partner violence, crimes using violence beyond unconsented-to penetration, and persons under the age of eighteen.[274] Potentially eligible cases were identified and referred by prosecutors before any criminal charges were brought.[275] To enter the RESTORE program, the perpetrator must acknowledge that the sexual act occurred and pay a sliding-scale fee that varies depending on ability to pay.[276] In misdemeanor cases, the defendant must enter a guilty plea, though penalties are held in abeyance.[277]

After intake and consent, there are three main stages to the RESTORE model of redress: (1) preparation for the RESTORE conference; (2) conferencing and redress plan generation; and (3) supervision, reparation, and reintegration.[278] During the preparation stage, the victim prepares an impact statement and the perpetrator prepares a statement of responsibility.[279] The case manager works with the perpetrator to ensure that he or she does not gloss over the crime and works with the victim to "discourage ad hominem statements such as pervert, [or] scumbag" to avoid potentially dangerous or counterproductive shaming.[280] The case manager also works with the parties to begin developing a redress plan, which generally includes community service, payment plans for reparations, treatment plans, and other protections, such as supervision and no-contact agreements.[281]

The RESTORE conference is held at a police station for security and moderated by a trained facilitator.[282] Protocols govern arrivals, room entry,

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[270] *Id.* at 1449–50; Koss, *supra* note 266, at 221–23.
[271] Koss, *supra* note 266, at 230.
[272] Koss et al., *supra* note 260, at 1449; Koss, *supra* note 266, at 225.
[273] Koss et al., *supra* note 260, at 1443; Koss, *supra* note 266, at 230.
[274] Koss, *supra* note 266, at 230.
[275] *Id.*
[276] Koss et al., *supra* note 260, at 1449.
[277] Koss, *supra* note 266, at 234.
[278] Koss et al., *supra* note 260, at 1449–53.
[279] Koss, *supra* note 266, at 231.
[280] *Id.*
[281] *Id.* at 231–33.
[282] *Id.* at 232.

and seating arrangements—including the barrier of a conference table wide enough to preclude bodily contact and to shield the victim's body from the perpetrator's gaze.[283] Typically, the offender makes a statement acknowledging the wrongful act.[284] The victim then gives an impact statement and the responsible party will restate his or her understanding of what was said.[285] Thereafter, family and friends of the victim and perpetrator are given the opportunity to speak.[286] Finally, the redress plan is finalized.[287]

After the conference, the perpetrator is supervised by a professional case manager and overseen by a Community Accountability and Re-Integration Board of community volunteers.[288] Supervision "represents a commitment to the [victim] of sexual assault to not retraumatize her with promises that are not kept," and the community board helps ensure community safety.[289] The traditional criminal justice system operates as a back-up and incentive for success; if perpetrators fail to fulfill the rehabilitative and reparative requirements, those who committed a felony offense are liable for prosecution, and misdemeanants may be sentenced based on their guilty plea.[290]

The early promise of the RESTORE approach has led to similar pilot programs in other jurisdictions, such as Auckland, New Zealand, which reports promising results.[291] The innovation is an important and inspiring first step, though limited to just a subset of sexual assault crimes.

Considering traditional adversarial adjudication's extensively-documented harms for victims, much more needs to be done in developing appropriate alternatives.[292] For more serious violent and sexual assault crimes, some of the sanctions taken off the table in RESTORE might need to remain an option, depending on the type of crime and the risk of recidivism. Other inducements, such as alternatives to incarceration or exemption from sex offender registration for certain offenses, could still offer sufficient in-

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[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.* at 233.
[288] *Id.*
[289] *Id.*
[290] *Id.* at 234.
[291] *See* SHIRLEY JÜLICH ET AL., AUT UNIV., PROJECT RESTORE: AN EXPLORATORY STUDY OF RESTORATIVE JUSTICE AND SEXUAL VIOLENCE 17–56 (2010), *available at* http://www.academia.edu/274691/Project_Restore_An_Exploratory_Study_of_Restorative_Justice_and_Sexual_Violence, *archived at* http://perma.cc/FAH6-PXJ8.
[292] *See* Mary P. Koss, *Restoring Rape Survivors: Justice, Advocacy, and a Call to Action*, 1087 ANNALS N.Y. ACAD. SCI. 206, 225–26 (2006) (observing these harms and issuing a call to action).

centive to participate. There is wide room to innovate and build on the groundbreaking work of RESTORE.

Further developing alternative adjudication procedures for a wider range of crimes involving at-risk victims may better provide redress while reducing the risk of further iatrogenic retraumitization. Studies indicate that seeking justice can be beneficial to the mental health of crime victims.[293] Participation in the criminal justice process can give a sense of empowerment that might be protective against the adverse mental health effects of suffering the crime in the first place—potentially mitigating PTSD symptoms.[294] But enduring the intense stress and inequality in protections of adversarial adjudication may cause victims more fear, anxiety, and depression than those who stay silent and forego justice.[295] Simply put, our criminal justice system should not tolerate a process that deters victims from seeking justice.

CONCLUSION

Rights originally associated with the integrity of the adversarial process have billowed beyond the historical reasons for their framing and even beyond their text. Thus, untethered from the customary markers for the metes and bounds of constitutional entitlements, the limits of adversarial rights have grown murky. The swamp of uncertainty is a perilous ground for victims and a fertile ground for defendants who seek to use intimidation tactics against their previously assaulted victims.

Legislatures and courts are forced to proceed hesitantly in this uncertain domain, lest protections for victims of traumatic assaults be deemed transgressions against the defendant's asserted constitutional entitlements. The murk, however, should not chill protection and innovation. And this is particularly true when defendants' rights are stretched beyond the core category of cases for which they were initially forged. As elucidated in this Article, the paradigmatic cases prompting the emergence of adversarial process rights involved prosecutions for crimes against the sovereign, where concerns about adversarial parity and protections are at their zenith. Outside this core category of crimes, restrictions can—and should—be less rigid to accommodate important countervailing concerns, as similarly reflected in First and Fourth Amendment jurisprudence. Like other constitutional rights, adversarial procedural rights are not absolute.

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[293] *See* Herman, *supra* note 8, at 160 (collecting studies).
[294] *Id.*
[295] *Id.*

As the Supreme Court has recognized, "in the administration of criminal justice, courts may not ignore the concerns of victims."[296] The need to protect victims from the misuse of adversarial protections is an important value that can justify protective measures, such as appointing standby counsel in lieu of permitting defendants to directly interrogate at-risk victims of traumatic crimes on the stand. Clarifying the murk of law to encourage wider use of victim-protective procedures is a mid-range solution to ameliorate some of the worst harms for the most vulnerable. A farther-ranging approach is to offer victims and defendants an opt-out from adversarial adjudication altogether. An alternative resolution system designed with serious crimes in mind and with consideration of public health insights about reducing secondary harms can help reduce the current traumatic costs of justice.

[296] Morris v. Slappy, 461 U.S. 1, 14 (1983).