

# What's Truth Got To Do With It? A Deontological Critique and Response to Tom Lininger's Article *Reconceptualizing Confrontation After Davis*.

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Let me begin by saying that I enjoyed Professor Lininger's article and found the recommendations aspirational and noteworthy. Let me also say that while I use the term "deontological" in my title, this Essay has nothing to do with ontological or deontological ideas or notions, in part because purely theoretical musings really *can't* have any bearing on what we do or how we do it. I employ the term so that the theorists who count thousand-dollar words will believe that I, and we, have the theoretical world under control.

We do not, nor should we.

In addressing the current Supreme Court decisions regarding the Confrontation Clause rights of defendants in domestic violence cases against unavailable battered women, Professor Lininger evaluates possible public policy initiatives against a theoretical backdrop constructed by Kant, Rawls, and Bentham. Yet theory, much like religion, is merely a hunch. Theory gains currency by moving from mere hunch to workable precept only when it is tested against the reality of a world inhabited by mortals—and, in the context of Professor Lininger's article, this means battered women's lives.

Conceptions of moral agency, good, and utility are contextual, and while I don't endorse relativism, I do recognize that one's cultural position shapes his or her notions of autonomy, good, and utility. As philosopher Diane Meyers reminds us, Kantian, Rawlsian, and Benthamite conceptions of the self are deeply flawed because they disconnect the self from what forms it. If the self is disaggregated from its social origins, invented, inauthentic theories of the self result. Race, gender, class, and sexual orientation configure the who, the how, and the what of selfhood, and one must constantly resist cultural imperatives that *misshape* one's identity.

Indeed, posing the perennial, misguided question of why battered women stay in abusive relationships implies that women remain in homes

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marked by terror out of either masochism or delusion. Yet women stay in such relationships in part because of cultural conceptions of the good mother or the good woman as someone who subordinates her needs, her desires, and at times her safety in order to “keep the family together.” Kant would tell us that such a response demonstrates moral immaturity. Rawls, while attempting to locate “the good,” would filter out cultural scripts, prodding battered woman and mother alike to rise above such pedestrian concerns. Bentham would not have a clue how to handle this reaction to cultural imperative.

Rather than attempt to shoe-horn public policy or juridical pronouncements into fundamentally flawed theoretical paradigms, it would have been better if Lininger had contested the Court’s fundamental beliefs regarding witness unavailability and social accountability. Instead, Professor Lininger accepts the terrain constructed by the Court and passes his recommendations through a (de)ontological/utilitarian prism; neither strategy produces *workable* solutions.

## I. The Terrain Constructed by the Court

### A. *The Trial as Truth-Seeking Enterprise*

In crafting *Crawford* and *Davis*, the Court invokes its own internal beliefs and values. One such value is that of truth, or rather truth-seeking. According to Lininger, the Court identities the search for truth as the “very nature of a trial.”<sup>1</sup> The Confrontation Clause is critical to the trial process because confrontation “furthers the goal of truth-seeking.”<sup>2</sup> In *Reconceptualizing Confrontation*, Professor Lininger uncritically accepts that a trial is in fact a search for the truth. But what is truth? This question has long tied philosophers, theologians, and law professors in knots.

My client’s truth was radically different from her assailant’s truth. In domestic violence cases and elsewhere, truth is shaped by who does and does not have power—much as the slave owner determined the “truth” of the slave on the block. Truth is as perspective does, and perspective is a consequence of where one is socially situated. Truth then is not only textured by but is a consequence of social situation, and the trier of fact, judge or jury, will invoke his or her truths in rendering a final verdict. Indeed, New York’s appellate courts have consistently held that a trial is *not* a search for the truth but rather a test of what the prosecution can prove and what reasonable doubt the defense can raise.<sup>3</sup> To test New York’s take on

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1. Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEXAS L. REV. 271, 295 n.138 (2006) (quoting *Nix v. Whiteside*, 475 U.S. 157, 166 (1986)).

2. *Id.* at 295.

3. See *People v. Jackson*, 571 N.Y.S.2d 721 (App. Div. 1991) (holding that the defendant’s right to a fair trial was impaired by, among other things, “improper comments made by the prosecutor [that] . . . a trial is ‘the search for the truth’”); *People v. Rivera*, 501 N.Y.S.2d 817, 820

truth, one only need ask O.J. Simpson or Nicole Brown's parents whether the 1994 trial was a truth-seeking enterprise, or sit in a court where rape narratives are shaped by survivor and perpetrator. In other words, where I sit and what I bring to the table influences my take on life and my understanding of truth in general and my truth in particular.

The adversarial process is many things but it is not and cannot be a search for truth. Indeed the adversarial process crafted by the Framers is concerned with "far more than a search for truth" because "the constitutional rights that are provided by our system of justice serve independent values that . . . outweigh the truth-seeking value, a fact made manifest when we realize that those rights, far from furthering the search for truth, *may well impede it.*"<sup>4</sup> And while I am not a strict advocate for the primacy of individual rights over collective rights, as a criminal lawyer I am attentive to the fact that *if* a trial were solely a search for the truth, the right against self-incrimination and the presumption of innocence would be subordinate to truth-seeking. Thus from a purely formalistic position, the Supreme Court and Professor Lininger have muddied the waters by making truth-seeking not only a fundamental value but an overriding one.

#### B. *The Primacy of Confrontation*

Professor Lininger endorses the idea that confrontation *may* further the goal of truth-seeking. One need only consider the reality of battered women's lives to clearly see evidence belying the idea that confrontation *qua* confrontation furthers the truth.

Battered women's lives are marked by confrontation and, in a limited number of cases, by extreme confrontation. In each of the thousands of cases handled by my legal center, we set out to keep our clients and their children alive, by whatever means necessary. Prosecution of batterers was viable *only* if victims' and their children's safety would not be compromised. Thus confrontation was not in the mix or even on the radar screen; rather our primary goal was personal security, and our secondary goal was individual responsibility.

It is curious that empowering battered women has been equated with giving them a day in court. What empowers battered women is the cessation

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(App. Div. 1986) (holding that the defendant was denied a fair trial because, among other things, the prosecutor "characterized a trial as 'a search for the truth,' thereby proposing that the jury might convict even in the absence of proof beyond a reasonable doubt so long as the jury concluded that its verdict represented the truth"); *People v. Sepulveda*, 481 N.Y.S.2d 870, 873 (App. Div. 1984) (holding that the defendant was deprived of his rights to confrontation and to receive a fair trial because, among other things, the prosecutor remarked to the jury that "the trial was not a search for a reasonable doubt but a search for the truth"); *People v. Robinson*, 442 N.Y.S.2d 119, 119–20 (App. Div. 1981) ("[W]e view with disfavor the attempt by the prosecutor to subvert the law relative to reasonable doubt by [telling the jury] . . . 'You are not here to search for reasonable doubt. You are here to search for the truth.'").

4. Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1063 (1975) (emphasis added); *see also supra* note 3.

of violence. Achieving this demands a textured social, political, economic, and legal response. If confrontation is practicable, it is because it advances the dual goals of protection from harm and imposition of assailant accountability—not because confrontation leads to empowerment or justice, or approximates conceptions of care for the survivor.

For some advocates, state actors, judges, and scholars, confrontation is synonymous with resistance. Women who want to drop charges or who refuse to testify or otherwise cooperate with the state risk being viewed by prosecutor and court alike as failing to resist the batterer. But confrontation *qua* confrontation is a dangerous by-product of a masculinist culture where conflict, opposition, and defiance are tantamount to resistance. Courts have accepted the idea of confrontation-as-resistance, holding women to a standard that could compromise their lives and the lives of their children.

For example, in most states, mandatory child-abuse reporting statutes, coupled with broad definitions of abuse, have made battered mothers vulnerable to charges of parental neglect for failure to stop the abuse to themselves.<sup>5</sup> The state has even threatened to file a child abuse petition against mothers to *compel* their cooperation in prosecuting (confronting) offenders.<sup>6</sup> In New York, rural women report that battered women who refuse to cooperate in the prosecution of their assailants risk *criminal* prosecution on child endangerment charges.<sup>7</sup> In at least one case, failure to confront the abuser was used as evidence of a mother's impaired judgment to support a neglect petition.<sup>8</sup>

By equating confrontation with resistance we marginalize the subtle acts of resistance to male violence that map the topography of women's lives. Such a restrictive view obscures the countless ways women resist terror in

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5. See, e.g., *In re Dalton*, 424 N.E.2d 1226, 1228–33 (Ill. App. Ct. 1981) (affirming the trial court's finding of neglect and termination of the mother's parental rights even though the mother presented evidence that the mother's attempts to leave were frustrated by the husband's threats to kill the children); *In re Glenn G.*, 587 N.Y.S.2d 464, 470 (Fam. Ct. 1992) (establishing that Mrs. G. did not have the mens rea to be convicted as an abuser but holding that her "actions were manifestly inadequate to protect the children from the father's ongoing abuse" and, therefore, finding her guilty under the strict liability neglect statute); cf. *In re Heather A.*, 60 Cal. Rptr. 2d 315, 322 (Ct. App. 1996) (affirming the removal of minors from the father's custody and finding that keeping a child in a home where domestic violence occurs may constitute secondary abuse, which can support a removal of minors from custody).

6. In 1996, I asked a high-ranking official in the New York County District Attorney's Office whether this strategy was used. I was told that it was—especially in cases where the battered woman recanted and reunited with the abuser. The practice was documented in FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1994: EVALUATION OF THE MANDATORY ARREST PROVISIONS, FINAL REPORT TO THE GOVERNOR AND LEGISLATURE 52 (2000), [hereinafter FINAL REPORT], available at <http://nysl.nysed.gov/uhtbin/cgiisirs/dNAWo8h07O/NYSL/91890058/523/15080>.

7. *Id.* at 8.

8. See *Nicholson v. Scopetta*, 820 N.E.2d 840 (N.Y. 2004) (reviewing, on certification from the Second Circuit, several questions in a class action case where, in each instance, at least one ground for the child's removal was that the custodial mother had been assaulted by her partner and failed to protect the child from exposure to that domestic violence).

the home, such as hiding their children to protect them from harm<sup>9</sup> and engaging in countless nonconfrontational acts that challenge the assailant's power. As Louise Fitzgerald notes in her study of women subjected to workplace sexual harassment, women employ a repertoire of indirect responses to harassment, from avoiding the perpetrator to leaving the room or changing the subject.<sup>10</sup> Fitzgerald found that women rejected objectification and alienation by challenging the paradigm constructed by the harasser. As Fitzgerald notes, women's conduct, although traditionally nonconfrontational, exhibited resistant self-direction.<sup>11</sup>

Likening confrontation to exercising personal autonomy marginalizes women's *lives*. When women do not conform to traditional confrontational norms of resistance, courts, state actors, and some advocates characterize them as "either weak, wholly compromised[,] . . . or inadequately assertive individuals" who should be "treated paternalistically . . . [and] compelled to . . . prosecute the batterer."<sup>12</sup> Yet the topography charted by women survivors belies this description. By flattening the topography of women's resistance, women's conception of themselves as something other than victim is extinguished.

### C. *The Question of Emergency*

Professor Lininger traces the evolution of the Confrontation Clause through *Crawford* and ending with *Davis*. What is at once instructive and dangerous about *Davis* is the way it distinguishes between hearsay statements that can be introduced at trial regardless of the speaker's availability and those that require live witness testimony in court. The *Davis* Court defines statements as testimonial when "circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal proceedings," whereas nontestimonial statements are "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."<sup>13</sup> How one determines the nature of a statement is left to the interpretative power of the police—a flaw Lininger identifies and brilliantly rebuts.

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9. See *In re Glenn G.*, 587 N.Y.S.2d at 468 (explaining that the mother and her child went to the home of the mother's sister after an incident of abuse, but that the father was able to locate them by phoning hospitals in the area).

10. Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117 (1995).

11. *Id.*

12. Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 842 (1999).

13. *Davis v. Washington*, 126 S. Ct. 2266, 2273–74 (2006); see also Lininger, *supra* note 1, at 279–80 (discussing the *Davis* case).

In *Davis*, however, the Court concluded that once the batterer-defendant was no longer on the scene the emergency had abated, and any statements made by the complainant were thus testimonial.<sup>14</sup> This finding exhibited gross ignorance of domestic violence generally and male intimate violence in particular, and it should have been contested by Professor Lininger.

Professor Lininger merely accepts the Court's definition and writes, "How long after the arrival of police does an emergency abate? . . . [T]he new temporal test in *Davis* creates a perverse incentive for . . . responding officers to prolong the emergency phase of an investigation."<sup>15</sup>

What Lininger overlooks is the fact that male intimate violence is ongoing unless the (alleged) perpetrator is in custody, confined in some meaningful way, or both. Indeed, data show that violence continues even when the assailant has been arrested, imprisoned, and sentenced to a state penitentiary. While I am willing to concede that attempts to threaten, intimidate, or harass from the "big house" would constitute a new and separate crime, I am not willing to ignore the reality that male intimate violence continues after the initial punch, gunshot, stabbing, or baseball bat clubbing. Therefore emergency is an elastic concept when male intimate violence is at play.

Advocates for survivors know all too well that male intimate violence is random and unpredictable. We also know that the violence continues after 911 is contacted or the police respond. In *Benavidez v. San Jose Police Department*, Adela Benavidez's attacker returned shortly after the police left her apartment.<sup>16</sup> One need not be a rocket scientist to figure out that he was waiting in the wings until the police left in order to continue his attack.

And return he did, with a vengeance.

Richard came back to Adela's home, climbed through a window he had shattered during the first attack, picked up a shard of glass, and slit Adela's throat while her eleven-year-old son watched in horror.<sup>17</sup> Unfortunately this case was not an aberration; I have seen this scenario repeated over and over again in the cases I have handled. Consequently, the concept of emergency in male intimate violence cases is more complex than in stranger-to-stranger crimes, the category which appears to drive the Court's understanding of abated or ongoing emergency.

"Emergency" should not be defined by what constitutes a crime or subsequent criminal behavior; the nature of male intimate violence defies this view and Professor Lininger's work should challenge it. It could be argued that *Reconceptualizing Confrontation's* focus was not on the nature of emergency and that therefore my criticism falls outside the author's universe.

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14. *Davis*, 126 S. Ct. at 2278.

15. Lininger, *supra* note 1, at 280, 285.

16. 84 Cal. Rptr. 2d 157, 160 (Ct. App. 1999).

17. *Id.*

But—at the expense of being pedantic—an article critiquing the Court's view of confrontation *must* address the Court's definition of emergency, since this is the very core of *Davis* and will resonate in countless cases that implicate male intimate violence either directly or indirectly. Accordingly, the Court's crabbed notion of emergency leaves battered women open to further harm<sup>18</sup> by failing to adequately situate the Court's inquiry within the context of their lives.

## II. Misplaced Trust

Professor Lininger's recommendations demonstrate thoughtfulness and an obvious belief in the efficacy and workability of the system. His suggestions are framed by trust in the justice system, in law enforcement, and in the adversarial process. But this trust is misplaced and therefore weakens the thoughtful recommendations articulated in both his article and the appendices.

Professor Lininger repeatedly uses the word "shall" in setting out his suggestions for police behavior in securing a scene, taking information, and evaluating the existence of an emergency. For example, he suggests that in responding to a domestic violence call, police *shall* videotape statements and video the scene. He writes, "[b]ecause protocols would *mandate* videotapes in every response to a domestic violence complaint," law enforcement would have to videotape at each scene absent a pending emergency elsewhere.<sup>19</sup>

There are two problems with this recommendation. First, videotaping does nothing to challenge either the faulty definition of emergency or police attitudes toward intimate partner violence perpetrated by men. Nothing illustrates the latter more than police studies which call into question the efficacy of mandatory arrest laws.

A national study concerning intimate violence in police families found that forty percent of police officers reported at least one episode of physical aggression during a marital conflict in the previous year, a rate higher than that in the civilian population.<sup>20</sup> The only study conducted by a state six years after the imposition of mandatory arrest determined that police were engaging in arrest avoidance not unlike the practices that triggered the mandatory–discretionary arrest debate of the 1970s and 1980s. Indeed the

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18. I am using an expansive definition of harm that includes traditional notions such as physical harm but also includes emotional and psychic harms not contemplated by criminal codes or cultural prohibition.

19. Lininger, *supra* note 1, at 324.

20. Peter H. Neidig et al., *Interspousal Aggression in Law Enforcement Families: A Preliminary Investigation*, 15 POLICE STUD. 30, 37 (1992). See also Michael G. Aamodt et al., *Is the "Police Personality" Predisposed to Domestic Violence?*, presented at FBI CONFERENCE ON DOMESTIC VIOLENCE BY POLICE OFFICERS 1, 4 (1998) (concluding, based on comparing the personality profiles of police officers with that of batterers, there was nothing that would predispose officers to domestic violence).

New York study, conducted by the New York State Office for the Prevention of Domestic Violence, found that in suspect-absent cases, arrests were not being made despite legislation enacted in June of 1994.<sup>21</sup>

Advocates learned a hard lesson: mandates do not result in cultural change. Only accountability can provide that outcome, and the new arrest laws merely mandate conduct. Since state governmental immunity provisions shield police from liability, noncompliance abounds with impunity. Thus, the second problem with Professor Lininger's recommendations is his reliance and faith in the obligatory effect of the word "shall." Nothing could be further from the truth.

The customary common use and statutory meanings of the word "shall" have run into a wall named *Castle Rock*. In *Town of Castle Rock v. Gonzales*,<sup>22</sup> the U.S. Supreme Court redefined "shall" to mean "maybe, or maybe not." The Court held that Colorado's use of the word in its arrest statutes neither created an obligation on the part of the police to arrest nor removed discretion.<sup>23</sup> The Court believed that the Colorado Legislature didn't really mean "must" when it inserted the word "shall" thirty-two times in its "mandatory" arrest statutes and that the word should be subject to a fluid and flexible interpretation. Under the Court's logic, the Ten Commandments become the Ten Suggestions.

I am willing to forget for a moment that the majority opinion is tortured. I am also willing to forget that even for a Scalia opinion it reflects a truly hardened and calloused heart. What I am not willing to forgive is the fact that with the stroke of a pen, Justice Scalia distorted the history of mandatory arrest in thirty-two jurisdictions.<sup>24</sup> Prior to *Castle Rock*, no one believed for

21. FINAL REPORT, *supra* note 6, at 31–32.

22. 545 U.S. 748 (2005).

23. *Id.* at 760–61.

24. By 1992, Connecticut, Maine, New Jersey, North Carolina, Oregon, Utah, and Wisconsin passed legislation mandating arrest for domestic violence. R. EMERSON DOBASH & RUSSELL P. DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE* 169 (1992). The following state statutes mandate arrest when there is probable cause to believe that a violation of a protection order has occurred: ALASKA STAT. § 18.65.530(a)(2) (2004); CAL. PENAL CODE § 836(c) (West Supp. 2005); COLO. REV. STAT. § 18-6-803.5(3)(b) (2001); KY. REV. STAT. ANN. § 403.760(2) (LexisNexis 1999); LA. REV. STAT. ANN. § 14:79(E) (Supp. 2005); MD. CODE ANN., FAM. LAW § 4-509(b) (LexisNexis Supp. 2004); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 1998); MICH. COMP. LAWS ANN. § 764.15b (West 2000); MINN. STAT. ANN. § 518B.01, subdiv. 14(e) (West Supp. 2005); MO. ANN. STAT. § 455.085(2) (West 2003); NEV. REV. STAT. ANN. § 33.070(1) (LexisNexis Supp. 2002); N.J. STAT. ANN. § 2C:25-21(a)(3) (West 2005); N.M. STAT. ANN. § 40-13-6(C) (West 2003); N.Y. CRIM. PROC. LAW § 530.12(8) (McKinney 1995); N.D. CENT. CODE § 14-07.1-11(1) (1997); OHIO REV. CODE ANN. § 2935.03(B)(1) (LexisNexis 2003) (suggesting but not mandating arrest); OR. REV. STAT. § 133.310(3) (2001); 23 PA. CONS. STAT. ANN. § 6113(a) (West 2001); S.D. CODIFIED LAWS § 23A-3-2.1 (2004); TENN. CODE ANN. § 36-3-611(a) (Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 14.03(a)(3), (b) (Vernon Supp. 2005); UTAH CODE ANN. § 77-36-2.4(1) (2003); WASH. REV. CODE ANN. § 10.31.100(2)(a) (West 2002); W. VA. CODE ANN. § 48-27-1001(a) (LexisNexis Supp. 2001); WIS. STAT. ANN. § 813.12(7)(b) (West Supp. 2004); *see* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1855 n.42 (2002).

a moment that “shall arrest” meant anything other than “must arrest.”<sup>25</sup> Forty years of police arrest avoidance in male intimate violence cases forced legislatures to remove police discretion in these cases because of its consistent and flagrant abuse. Just ask Tracy Thurman, Adela Benavidez, Stacy Hart, and now Jessica Gonzales. In crafting this opinion as he did, Justice Scalia made a mockery of the law, of justice, and of conceptions of accountability.

Finally, the *Castle Rock* legacy requires that advocates, scholars, practitioners, and public policy analysts craft legislation incorporating accountability, if mandates are to mean anything at all. *Castle Rock* teaches that words alone do not create change, foster justice, or insinuate care and accountability into law. That must be our work—and it must be explicit, unambiguous, and unyielding.

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The following state statutes currently mandate arrest when there is a finding of domestic violence, regardless of whether a protection order has been violated: ALASKA STAT. § 18.65.530(a)(1) (2004); ARIZ. REV. STAT. ANN. § 13-3601(B) (2001); CONN. GEN. STAT. ANN. § 46b-38b(a) (West 2004); D.C. CODE ANN. § 16-1031(a) (LexisNexis 2001); IOWA CODE ANN. § 236.12(2) (West 2000) (requiring actual or intended injury to the victim before mandating arrest); LA. REV. STAT. ANN. § 46:2140(1) (West Supp. 2005); ME. REV. STAT. ANN. tit. 19-A, § 4012(6)(D) (1998); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 1998) (characterizing arrest as a “preferred response” in the absence of a protection order); N.J. STAT. ANN. § 2C:25-21(a)(1) (West 2005); OHIO REV. CODE ANN. § 2935.03(B)(3)(b) (LexisNexis 2003) (preferring arrest in response to domestic violence); OR. REV. STAT. § 133.310(6) (2001); S.D. CODIFIED LAWS § 23A-3-2.1(2) (2004); TEX. CRIM. PROC. CODE ANN. § 14.03(a)(4) (Vernon Supp. 2004–2005) (allowing, but not mandating, arrest); UTAH CODE ANN. § 30-6-8(2)(f) (1998); WASH. REV. CODE ANN. § 10.31.100(2)(c) (West 2002); and W. VA. CODE ANN. § 48-27-1002 (LexisNexis 2001) (allowing, but not mandating, arrest). See also Epstein, *supra*, at 1855 n.42.

25. I speak from first-hand experience. I co-authored New York’s mandatory arrest law and took part in numerous debates, discussions, and symposia with other scholars and lawyers from across the United States. As a result, I am very aware of what framed our understanding of “shall” and “may,” and it bears no relationship to Justice Scalia’s. I dare say that we were, and are, correct.