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## FORFEITURE OF THE CONFRONTATION RIGHT IN *GILES*: JUSTICE SCALIA'S FAINT-HEARTED FIDELITY TO THE COMMON LAW

ELLEN LIANG YEE\*

*In Giles v. California*<sup>1</sup> the Supreme Court issued a third Confrontation Clause opinion in its Crawford line of cases.<sup>2</sup> In an opinion written by Justice Scalia, the Giles Court reiterated its interpretive approach in Crawford that the Confrontation Clause is “most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”<sup>3</sup> The Court’s decision purports to hold that a defendant does not forfeit his Sixth Amendment confrontation right when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial, unless the judge finds that the defendant’s wrongful act was done with an intent to make the witness unavailable to testify. Justice Scalia’s majority opinion interprets intent to require purpose, only recognizing the forfeiture by wrongdoing exception to the Sixth Amendment’s confrontation requirement when the defendant “engaged in conduct designed to prevent the witness from testifying.”<sup>4</sup>

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<sup>1</sup> 128 S. Ct. 2678 (2008).

<sup>2</sup> In *Crawford v. Washington*, the Court articulated a new approach, holding that admission of an extrajudicial testimonial statement by an unavailable declarant-witness violated the Confrontation Clause unless the defendant had an opportunity to cross-examine the declarant. 541 U.S. 36, 53–54 (2004). In *Davis v. Washington*, the Court began to provide a more comprehensive definition of “testimonial” by delineating which police interrogations invoke the protection of the Confrontation Clause. 547 U.S. 813, 822 (2006).

<sup>3</sup> *Giles*, 128 S. Ct. at 2682 (quoting *Crawford*, 541 U.S. at 64).

<sup>4</sup> *Id.* at 2683.

*In this Article, I demonstrate that the historical sources do not point unequivocally to the conclusion Justice Scalia reaches in his majority opinion. Further, given the fragmented opinions of the Justices in the case, I argue that the reasoning of the case should be construed on the narrowest grounds of commonality among the Justices. In so doing, courts should examine intent in a more expansive way in light of the common law, rather than in the rigid way described in Justice Scalia's opinion. Especially in cases involving domestic violence, gangs, and other cases involving complex relationship dynamics between the defendant and the witness, a defendant's conduct that knowingly leads to the witness's unavailability can and should still trigger forfeiture, even if there is no overt purposive intent.*

### I. INTRODUCTION

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>5</sup> For many years, the Confrontation Clause was interpreted to protect against admission of unreliable evidence under *Ohio v. Roberts* and its progeny.<sup>6</sup> In *Crawford v. Washington*, a landmark opinion written by Justice Scalia, the Court denounced the unpredictability of the *Roberts* approach, which based the protection of the Sixth Amendment on the “vagaries of the rules of evidence” and “amorphous notions of ‘reliability.’”<sup>7</sup> *Crawford* concluded that the Sixth Amendment bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination.”<sup>8</sup>

During the six years following *Crawford*, unpredictability has plagued lower courts deciding evidence issues in criminal law cases. Much of this lack of predictability centers on *Crawford's* unnecessarily (and self-admittedly) amorphous notion of “testimonial.”<sup>9</sup> Widespread disagreement among lower courts in their application of *Crawford* has gradually required the Court to start outlining the contours of what kinds of statements are

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<sup>5</sup> U.S. CONST. amend. VI.

<sup>6</sup> *Ohio v. Roberts*, 448 U.S. 56 (1980). In *Roberts*, the Court established a two-pronged test to determine the admissibility of an unavailable declarant-witness's former statement offered against a criminal defendant. First, the prosecution must demonstrate the declarant's unavailability. Second, the hearsay statement may be admissible only if the statement bears adequate “indicia of reliability” by either falling within a “firmly rooted hearsay exception” or bearing “particularized guarantees of trustworthiness.” *Id.* at 65–66.

<sup>7</sup> *Crawford*, 541 U.S. at 61.

<sup>8</sup> *Id.* at 53–54.

<sup>9</sup> *Id.* at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

“testimonial.” For example, two years after *Crawford*, the Supreme Court offered some guidance in *Davis v. Washington* by defining more specifically which police interrogations invoke the protection of the Confrontation Clause.<sup>10</sup> But other important uncertainties have continued to plague the Court’s new framework under *Crawford*.

One such uncertainty relates to what is known as the “forfeiture by wrongdoing” doctrine. In evidence law, hearsay statements that are ordinarily excluded may be admissible if the declarant is rendered unavailable to be a trial witness due to the defendant’s wrongdoing.<sup>11</sup> This exception has particularly important consequences where a witness is also a victim, as is frequently the situation in domestic violence and child abuse cases. In the constitutional context, the *Crawford* court suggested there may be historical exceptions to the Confrontation Clause that are unrelated to the *Roberts* reliability rationale.<sup>12</sup> For example, if declarants are rendered unavailable by the defendant’s wrongdoing, their testimonial hearsay statements may be admissible under the equitable rule of forfeiture by wrongdoing.<sup>13</sup> As in the exception to the hearsay exclusionary rule codified in Federal Rule of Evidence 804(b)(6), the rationale for admitting such evidence is not based on the theory that it is more reliable, but on the grounds that the defendant should not benefit from his own wrongdoing.<sup>14</sup> Following *Crawford*, many courts also used the forfeiture by wrongdoing doctrine to admit testimonial statements, but did so inconsistently. For example, some courts required proof that the defendant intended to render

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<sup>10</sup> 547 U.S. 813 (2006); see also Ellen Liang Yee, *Confronting the Ongoing Emergency: A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729, 760–75, 785–92 (2008) (discussing how *Crawford* and *Davis* provide only partial guidance to lower courts on these issues).

<sup>11</sup> See FED. R. EVID. 804(b)(6). The rule applies to all parties in both civil and criminal proceedings. FED. R. EVID. 804(b)(6) advisory committee’s note (1997) (“The wrongdoing need not consist of a criminal act.”).

<sup>12</sup> *Crawford*, 541 U.S. at 62; see also *id.* at 55 n.6 (suggesting that testimonial dying declarations may be a *sui generis* exception).

<sup>13</sup> *Id.* at 62 (“[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”) (citing *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879)).

<sup>14</sup> *Id.* The rule “recognizes the need for a prophylactic rule to deal with abhorrent behavior ‘which strikes at the heart of the system of justice itself.’” FED. R. EVID. 804(b)(6) advisory committee’s note (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984)).

the victim unavailable as a trial witness, while other courts did not require such proof.<sup>15</sup>

In *Giles v. California*, the Supreme Court issued another Confrontation Clause opinion written by Justice Scalia.<sup>16</sup> The *Giles* Court reiterated its interpretive approach in *Crawford* that the Confrontation Clause is “most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”<sup>17</sup> Imposing that historical limitation on the scope of exceptions, the Court held that the forfeiture by wrongdoing doctrine was only an exception to the Sixth Amendment’s confrontation requirement when the defendant “engaged in conduct *designed* to prevent the witness from testifying.”<sup>18</sup> In other words, a defendant does not forfeit his Sixth Amendment confrontation right when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial, unless the judge finds that the defendant’s wrongful act was for the purpose of making the witness unavailable to testify.

Given the methodological preference for constitutional originalism in *Crawford*, *Davis*, and *Giles*—particularly as reflected in Justice Scalia’s opinions—this Article analyzes whether the historical claim underlying the Court’s opinion in *Giles* is sound.<sup>19</sup> An accurate assessment of the history requires an analysis of whether forfeiture of Sixth Amendment

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<sup>15</sup> Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 871–74 (2009). A majority of state courts did not require proof of specific intent to silence a witness for forfeiture if the prosecution could show that the defendant intentionally caused the death of the witness. However some courts did require the prosecution to prove the specific intent to silence a witness in non-homicide and homicide cases. *Id.*; see also Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL’Y 759, 779 (2007) (“After *Davis*, courts have continued to approve of the use of forfeiture in murders implicating domestic violence without requiring any intent to prohibit [victims] from testifying at trial.”).

<sup>16</sup> 128 S. Ct. 2678 (2008).

<sup>17</sup> *Id.* at 2682 (quoting *Crawford*, 541 U.S. at 54).

<sup>18</sup> *Id.* at 2683.

<sup>19</sup> Many scholars have analyzed and critiqued Justice Scalia’s use of originalism in criminal procedure. See, e.g., Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005). In his 1988 lecture at the University of Cincinnati, Justice Scalia himself discussed the merits and defects of originalism and nonoriginalism. Conceding that “public flogging and hand branding” would not be sustained in present-day courts under the Eighth Amendment even though these would not have been “cruel and unusual punishments” at the time of the founding, he acknowledged that such an interpretation would be “faint-hearted” originalism. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–62 (1989); see also Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7 (2006).

confrontation rights by wrongdoing requires proof of “intent” as understood at the time of the founding. Understanding that this issue involves not only constitutional law, but also evidence law and substantive criminal law, this Article analyzes how all three bodies of law inform the interpretive question presented by this issue. If the history is approached through the common law, properly assessed, *Giles*’ very methodology does not clearly support its outcome or the Court’s limited approach to forfeiture.

Part II will describe and discuss the recent line of Confrontation Clause cases including *Giles*. Justice Scalia has taken the lead in directing the Court down a new path of Confrontation Clause interpretation. Beginning in *Crawford* and continuing in *Davis* and *Giles*, Justice Scalia’s new framework has profoundly altered criminal trial procedure.<sup>20</sup> However, beneath the surface of the Court’s six to three ruling on the outcome, the *Giles* Court was more fractured in its reasoning than the vote tally indicates on its face.

Part III will briefly trace the development of the right of confrontation from English and American sources of law. This Part will focus on confrontation issues surrounding and including the forfeiture by wrongdoing exception.

Part IV examines the historic and contemporary legal resources regarding the mental state element. This Part will look not only at constitutional law, but also at evidence law and substantive criminal law to analyze the *Giles* Court’s interpretation of the forfeiture by wrongdoing doctrine. By referencing these other related areas of law, this Part will provide a more broad-based, solid foundation supported by the history of the common law for lower courts to use as they are deciding whether the prosecution has sufficiently shown that the defendant’s right to confrontation should be forfeited.

Part V concludes by warning that constitutional interpretation of criminal procedure cannot be divorced from a fair understanding of the common law. That understanding cannot be reached through an inference about the common law’s meaning based on assumptions about the legal system, especially based on the lack of cases addressing issues that were unlikely to have been litigated. Courts and litigants addressing forfeiture would be ill-advised to rigidly apply the rule set forth by Justice Scalia’s

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<sup>20</sup> During this period, the Court had also decided in *Whorton v. Bockting* that *Crawford* did not apply retroactively on collateral review. 549 U.S. 406, 409 (2007). Since *Giles*, the Court decided two cases on a related issue and two more cases are pending. See *infra* notes 43 and 45. Also, the composition of the Supreme Court has changed. Since *Crawford*, Chief Justice Rehnquist and Justice O’Connor are no longer on the Court, and since *Giles* and *Melendez-Diaz*, Justices Souter and Stevens are no longer on the Court.

majority opinion in *Giles* without taking into account the proper common law understanding of intent in the forfeiture context.

## II. JUSTICE SCALIA'S CONFRONTATION CLAUSE TRILOGY

The significance of the Confrontation Clause in American jurisprudence greatly expanded in 1965 when the Court incorporated the Sixth Amendment via the Due Process Clause of the Fourteenth Amendment and applied it to the states.<sup>21</sup> In the fifteen years following incorporation, the Court addressed several interpretation and application issues.<sup>22</sup> In the landmark case *Ohio v. Roberts*, the Court addressed recurring issues regarding the admissibility of hearsay evidence by creating a two-prong test requiring both unavailability and reliability as predicates to admission.<sup>23</sup> To prove reliability, the Court determined that the evidence must either “fall[] within a firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.”<sup>24</sup> Finding that the Confrontation Clause and the hearsay rule are “designed to protect similar values”<sup>25</sup> and “stem from the same roots,”<sup>26</sup> the *Roberts* Court constructed an analysis that used the rules of hearsay as a means of determining the constitutional admissibility of evidence. As the Court viewed the function of the Confrontation Clause primarily as a safeguard against unreliable evidence, it gradually diminished the unavailability requirement.<sup>27</sup> In the cases following *Roberts*, the Court continued to entwine the constitutional issue of confrontation with the evidentiary issue of hearsay reliability. As this doctrine developed, many criticized it for diminishing defendants’

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<sup>21</sup> See *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

<sup>22</sup> See e.g., *California v. Green*, 399 U.S. 149 (1970) (holding that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints on the use of his prior testimonial statements); *Dutton v. Evans*, 400 U.S. 74 (1970) (declaring that admission of an accomplice’s spontaneous comment that indirectly inculpated the defendant did not violate the Confrontation Clause).

<sup>23</sup> 448 U.S. 56, 65 (1980).

<sup>24</sup> *Id.* at 66.

<sup>25</sup> *Id.* (quoting *California v. Green*, 399 U.S. 149, 155 (1970)).

<sup>26</sup> *Roberts*, 448 U.S. at 66 (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970)).

<sup>27</sup> *White v. Illinois*, 502 U.S. 346 (1992). Where the four-year-old child abuse victim did not testify at trial, the trial court did not make any finding that she was unavailable. *Id.* at 350. The Court held that the admission of the child’s hearsay statements under the spontaneous declaration exception and the medical examination exception did not violate the defendant’s confrontation rights. *Id.* at 348–51. The Court restricted the *Roberts* holding to its facts stating: “*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.” *Id.* at 354 (citing *United States v. Inadi*, 475 U.S. 387, 394 (1986)).

rights to confrontation and for determining reliability with a standard that was vague, arbitrary, and subjective.<sup>28</sup> Beginning with *Crawford*, the Court has redirected the focus of its Confrontation Clause analysis to the common law. Claiming that the Confrontation Clause “is most naturally read as a reference to the right of confrontation at common law,” the Court has attempted to outline the scope of that common law right and admit “only those exceptions established at the time of the founding.”<sup>29</sup>

#### A. *CRAWFORD V. WASHINGTON*

In *Crawford v. Washington*, the Court reevaluated its approach to the Confrontation Clause and shifted the focus of the Clause from functioning as a judicially-determined safeguard against unreliable evidence to operating as a procedural trial right.<sup>30</sup> In reviewing the history of the Clause for clues to its intended meaning, the Court determined that “the principal evil at which the Confrontation Clause was directed was the civil law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.”<sup>31</sup>

In *Crawford*, the Court concluded that the Sixth Amendment barred “admission of testimonial statements of a witness who did not appear at

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<sup>28</sup> See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988); Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691; Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537 (2003).

<sup>29</sup> *Crawford v. Washington*, 541 U.S. 36, 54 (2004); see also *id.* at 43 (“The founding generation’s immediate source of the concept . . . was the common law.”).

<sup>30</sup> 541 U.S. at 42. Justice Scalia wrote for the majority. *Id.* at 38. Chief Justice Rehnquist, joined by Justice O’Connor, concurred with the judgment but disagreed with the reformation of the Court’s approach to the Confrontation Clause. *Id.* at 69 (“I dissent from the Court’s decision to overrule *Ohio v. Roberts*.”). The facts of *Crawford* are as follows: Michael Crawford was accused of stabbing a man who allegedly tried to rape his wife, Sylvia. *Id.* at 38. Michael and Sylvia were arrested, taken to the police station, and individually questioned. *Id.* Sylvia’s statement arguably suggested that Michael was the aggressor and that the victim did not reach for, or did not have, a weapon at the time of the stabbing. *Id.* at 39. At trial, Michael claimed the stabbing was in self-defense. *Id.* at 40. He asserted his evidentiary marital privilege and prevented Sylvia from testifying. *Id.* (citing WASH. REV. CODE § 5.60.060(1) (1994)). Unable to call her as a witness, the prosecution sought to use Sylvia’s tape-recorded statement to rebut the defense. *Id.* The trial court admitted Sylvia’s statement under the hearsay exception for statements against penal interest and held that it bore “particularized guarantees of trustworthiness” therefore it did not violate the Confrontation Clause as construed in *Roberts*. *Id.* (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

<sup>31</sup> *Id.* at 50.

trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”<sup>32</sup> While the rule appears strikingly simple, its application has been anything but simple and clear. *Crawford* did not provide courts sufficient guidance in determining which statements are “testimonial,” and thus implicate the Confrontation Clause.<sup>33</sup>

Furthermore, the *Crawford* Court suggested some exceptions might apply to the testimonial rule. First, the Court acknowledged the longstanding exception to the hearsay rule for dying declarations.<sup>34</sup> Conceding that they may be testimonial, the Court declined to make an explicit exception to the application of the Confrontation Clause for dying declarations in *Crawford*.<sup>35</sup> Nevertheless, it indicated that such a singular

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<sup>32</sup> *Id.* at 53–54. *But see id.* at 69 (Rehnquist, C.J., concurring) (“The Court’s distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine.”).

<sup>33</sup> The *Crawford* Court decided that it would “leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Id.* at 68. Nevertheless, the Court described three formulations of “this core class of ‘testimonial’ statements.” First, “*ex parte* in-court testimony or its *functional equivalent*—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would *reasonably expect to be used prosecutorially*” is testimonial. *Id.* at 51 (emphasis added). Second, “‘extrajudicial statements . . . contained in *formalized* testimonial materials, such as affidavits, depositions, prior testimony, or confessions’” are testimonial. *Id.* at 51–52 (emphasis added) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)). Third, “statements that were made under circumstances which would lead an *objective witness* reasonably to believe that the statement would be available for *use at a later trial*” are testimonial. *Crawford*, 541 U.S. at 52 (emphasis added). In *Davis*, the Court noted that the *Crawford* Court had “found it unnecessary to endorse any of” those formulations. 547 U.S. at 822. Later, in *Melendez-Diaz v. Massachusetts*, the Court stated that the *Crawford* Court’s opinion “described the class of testimonial statements covered by the Confrontation Clause” in those three formulations. 129 S. Ct. 2527, 2531 (2009).

<sup>34</sup> *Crawford*, 541 U.S. at 56 n.6. Note some jurisdictions further limit the use of such statements in criminal cases to homicide prosecutions while others do not. *See e.g.*, FED. R. EVID. 804(b)(2) (“Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.”); CAL. EVID. CODE § 1242 (“Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.”); *see also* Peter Nicolas, ‘I’m Dying to Tell You What Happened’: The Admissibility of Testimonial Dying Declarations Post-Crawford, 37 HASTINGS CONST. L.Q. 487, 504–06 (2010) (analyzing the various definitions of dying declarations in both constitutional and evidentiary contexts).

<sup>35</sup> *Crawford*, 541 U.S. at 56, n.6.

exception might be accepted on historical grounds.<sup>36</sup> Second, the Court suggested that some testimonial statements may be admitted based on the equitable principle underlying the doctrine of forfeiture by wrongdoing.<sup>37</sup>

#### B. *DAVIS V. WASHINGTON*

Two years later, the Supreme Court offered some guidance in *Davis v. Washington* by outlining more specifically which police interrogations invoke the protection of the Confrontation Clause.<sup>38</sup> Under *Davis*, a court must determine the primary purpose of the police interrogation by objectively evaluating whether the circumstances indicate an “ongoing emergency.”<sup>39</sup> The Court in *Davis* held that “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”<sup>40</sup> In contrast, the Court found that “[statements] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>41</sup>

While it is now settled that the Confrontation Clause only applies to testimonial statements,<sup>42</sup> the Supreme Court continues to be called into the fray to settle differences among courts about where to define the contours of

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<sup>36</sup> *Id.* (“We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.”). Professor Friedman has offered a more theoretically sound basis for the admissibility of testimonial dying declarations that is based on the rule of forfeiture by wrongdoing. Richard Friedman, *Confrontation and the Definition of Chutzpa*, 31 *ISR. L. REV.* 506 (1997).

<sup>37</sup> *Crawford*, 541 U.S. at 62. The Court noted, “For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.” *Id.* (citing *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879)).

<sup>38</sup> 547 U.S. 813 (2006).

<sup>39</sup> *Id.* at 822.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> The *Crawford* Court acknowledged that, in *White v. Illinois*, it had rejected the theory that the Confrontation Clause was applicable only to testimonial statements. 541 U.S. at 61 (citing *White v. Illinois*, 502 U.S. 346, 352–53 (1992)). However, in a footnote in *Davis*, the Court expressed for the first time that it “overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.” 547 U.S. at 825 n.4. To reinforce its intentions, the Court in *Whorton v. Bockting* confirmed it intended to overrule *Roberts* in *Crawford*. 549 U.S. 406, 413 (2007) (holding that *Crawford* did not apply retroactively on collateral review).

testimonial statements.<sup>43</sup> In *Crawford*, Justice Scalia criticized the Court's reliability analysis in *Ohio v. Roberts* for being “inherently, and therefore permanently, unpredictable.”<sup>44</sup> Unfortunately, as Justice Thomas foresaw, the *Davis* majority's primary-purpose test is no more predictable than the *Roberts* reliability inquiry.<sup>45</sup> Police officers who report to a crime scene will investigate in order to “both to respond to the emergency situation and

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<sup>43</sup> For example, in *Melendez-Diaz v. Massachusetts* the Court recently held that a laboratory report is testimonial. 129 S. Ct. 2527, 2532 (2009). Four days later, the Court granted certiorari in *Briscoe v. Virginia* to resolve whether, “[i]f a State allows a prosecutor to introduce a certificate of forensic laboratory analysis without presenting the testimony of the analyst who prepared the certificate, . . . the state avoid[s] violating the confrontation clause of the Sixth Amendment by providing that the accused has the right to call the analyst as his own witness.” *Magruder v. Commonwealth*, 657 S.E.2d 113 (Va. 2008), cert granted sub nom., *Briscoe v. Virginia*, 77 U.S.L.W. 3701 (U.S. June 29, 2009) (No. 07-11191). The Court vacated and remanded *Briscoe* for “further proceedings not inconsistent with the opinion in *Melendez-Diaz v. Massachusetts*.” *Briscoe v. Virginia*, 78 U.S.L.W. 3434 (U.S. Jan. 25, 2010), vacating and remanding 657 S.E.2d 113 (Va. 2008) (citation omitted). On remand, the Virginia Supreme Court held that its statutory scheme was unconstitutional. *Cypress v. Commonwealth*, Record Nos. 070815, 070817, 2010 WL 3583988, at \*7 (Va. Sept. 16, 2010). Most recently, on September 28, 2010 the Supreme Court granted certiorari in *Bullcoming v. New Mexico*, which construes the Confrontation Clause in light of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). *State v. Bullcoming*, 226 P.3d 1 (N.M. 2010), cert granted sub nom *Bullcoming v. New Mexico*, 79 U.S.L.W. 3194 (Sep. 28, 2010). In *Bullcoming*, the Court will address “whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.” Petition for a Writ of Certiorari, *Bullcoming*, 79 U.S.L.W. 3158 (2010) (09-10876), 2010 WL 3761875, at \*i.

<sup>44</sup> 541 U.S. at 68 n.10.

<sup>45</sup> *Davis*, 547 U.S. at 834. “Today, a mere two years after the Court decided *Crawford*, it adopts an equally unpredictable test, under which district courts are charged with divining the ‘primary purpose’ of police interrogations” (Thomas, J., concurring in part and dissenting in part). Justice Thomas went on to note, “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.” *Id.* at 838.

Sure enough, to clarify an issue following *Davis*, the Court granted certiorari and heard oral argument on October 5, 2010 in *Michigan v. Bryant*. 130 S. Ct. 1685 (Mar. 1, 2010) (No. 09-150) (mem); Transcript of Oral Argument, *Bryant*, 130 S. Ct. 1685 (No. 09-150). In *Bryant*, the Court is addressing whether

preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because “made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,” that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual.

Petitioner’s Brief on the Merits, *Bryant*, 130 S. Ct. 2138 (2010) (09-150), 2010 WL 1776430, at \*i.

to gather evidence.”<sup>46</sup> It will rarely be possible to assign primacy to either “of these two ‘largely unverifiable motives.’”<sup>47</sup>

### C. GILES V. CALIFORNIA

Justice Scalia authored a third Confrontation Clause opinion in *Giles v. California*.<sup>48</sup> In a six to three decision, the Supreme Court sided with Giles in holding that the forfeiture by wrongdoing exception to the Confrontation Clause required proof that a defendant intended to silence the witness.<sup>49</sup>

In the case underlying the appeal in *Giles*, Dwayne Giles was convicted of first-degree murder for admittedly shooting his ex-girlfriend, Brenda Avie.<sup>50</sup> Giles unsuccessfully claimed the shooting was justified as self-defense.<sup>51</sup> At trial, both sides presented evidence of prior violence relevant to the self-defense issues. Defense witnesses described how Avie had shot at someone, threatened people with a knife, made verbal threats of harm, and vandalized Giles’ home and car.<sup>52</sup> Giles testified that on the day of the killing, Avie had threatened to kill both him and his new girlfriend.<sup>53</sup> To rebut the defendant’s self-defense claim, the prosecution presented evidence of Giles’ physical attack against Avie just weeks before the killing.<sup>54</sup>

An officer testified that weeks before the killing Avie said Giles accused her of having an affair, “grabbed her by the shirt, lifted her off the floor, and began to choke her . . . .” When she “broke free and fell to the

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<sup>46</sup> *Id.* at 839.

<sup>47</sup> *Id.* (quoting *New York v. Quarles*, 467 U.S. 649, 656 (1984)).

<sup>48</sup> 128 S. Ct. 2678 (2008). On remand, the California Court of Appeals reversed Giles’ conviction. *People v. Giles*, No. B166937, 2009 WL 457832 (Cal. Ct. App. Feb. 25, 2009).

<sup>49</sup> Justice Scalia wrote the opinion for the majority, but there were distinct differences among the Justices regarding the reasoning for the result. Justice Thomas and Justice Alito each filed a concurring opinion. *Giles*, 128 S. Ct. at 2693–94. Justice Souter filed an opinion concurring in part in which Justice Ginsburg joined. *Id.* at 2694. Justice Breyer filed a dissenting opinion in which Justices Stevens and Kennedy joined. *Id.* at 2695.

<sup>50</sup> *Id.* at 2682. Giles and Avie dated for several years. *People v. Giles*, 152 P.3d 433, 435 (Cal. 2007). Avie had been shot six times and was not carrying a weapon. *Giles*, 128 S.Ct. at 2681. “One wound was consistent with Avie’s holding her hand up at the time she was shot, another was consistent with her having turned to her side, and a third was consistent with her having been shot while lying on the ground.” *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2681–82; *see also Giles*, 128 S. Ct. at 2695 (Breyer, J., dissenting) (noting that the prosecutor introduced Avie’s unfronted statements to rebut the defendant’s affirmative self defense claim and impeach the defendant’s testimony).

floor, Giles punched her in the face and head.”<sup>55</sup> The officer testified that Avie described how “after she broke free again, [Giles] opened a folding knife, held it about three feet away from her, and threatened to kill her if he found her cheating on him.”<sup>56</sup>

On appeal, defendant argued that the admission of Avie’s hearsay statements describing the alleged previous attack violated his Sixth Amendment confrontation rights because the statements were testimonial and were not subject to cross-examination.<sup>57</sup> The California Court of Appeals sided with the State, holding that admission of Avie’s unconfrosted statements did not violate the Confrontation Clause because *Crawford* acknowledged exceptions that were recognized at the time of the founding, including the doctrine of forfeiture by wrongdoing.<sup>58</sup> The California Court of Appeals found that Giles had forfeited his right to confront Avie by wrongfully intentionally killing her, which made her unavailable to testify.<sup>59</sup> The California Supreme Court affirmed.<sup>60</sup>

The United States Supreme Court reversed. The *Giles* Court cited *Crawford* as precedential authority for establishing two common law exceptions to the Confrontation Clause requirement.<sup>61</sup> Using dicta from *Crawford*, the *Giles* majority solidified the parameters for exceptions to the confrontation requirement by restricting them to those “most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”<sup>62</sup>

The first exception the *Giles* Court asserted it had previously acknowledged was for dying declarations, which the Court described as “declarations made by a speaker who was both on the brink of death and

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<sup>55</sup> *Id.* at 2681–82.

<sup>56</sup> *Id.*

<sup>57</sup> *People v. Giles*, 19 Cal. Rptr. 3d 843, 846–47 (Cal. Ct. App. 2004). The United States Supreme Court accepted without analysis that Avie’s statements to the police were testimonial because the State did not dispute the issue. *Giles*, 128 S.Ct. at 2682. As a matter of evidence law, Avie’s statements were not admitted under a forfeiture by wrongdoing exception to the hearsay rule. Instead, California evidence law provided an exception to the hearsay exclusionary rule for statements describing the infliction or threat of physical injury on an unavailable declarant when the statements are deemed trustworthy. *Id.* (citing CAL. EVID. CODE § 1370 (West Supp. 2008)).

<sup>58</sup> *Giles*, 19 Cal. Rptr. 3d at 847.

<sup>59</sup> *Id.* at 850.

<sup>60</sup> *People v. Giles*, 152 P.3d 433, 435 (Cal. 2007), *vacated*, 128 S.Ct. 2678 (2008).

<sup>61</sup> *Giles*, 128 S. Ct. at 2682. *Crawford* did not actually decide these issues. See discussion *infra* notes 63–66.

<sup>62</sup> *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)). “We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfrosted.” *Id.* at 2682 (citing *Crawford*, 541 U.S. at 56 n.6., 62).

aware that he was dying.”<sup>63</sup> In truth, the *Crawford* Court explicitly avoided determining how it might apply the Confrontation Clause to dying declarations by stating, “We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.”<sup>64</sup> In any case, the Court found that Avie’s statements did not fall into this exception.

Next, the Court outlined a second common law exception, the forfeiture by wrongdoing doctrine, which “permitted the introduction of statements of a witness who was ‘detained’ or ‘kept away’ by the ‘means or procurement’ of the defendant.”<sup>65</sup> The Court in *Crawford* did not hold that forfeiture by wrongdoing was an exception to the constitutional confrontation requirement. Rather, forfeiture by wrongdoing is mentioned once in *Crawford*, but only as an example of an exception “to the Confrontation Clause that make[s] no claim to be a surrogate means of assessing reliability,” but instead is based on “essentially equitable grounds.”<sup>66</sup>

Consistent with the originalist interpretation method that Justice Scalia applied in *Crawford* and *Davis*, his opinion in *Giles* examined historical evidence to decipher the meaning and application of the forfeiture by wrongdoing doctrine at the time of the founding. His majority opinion approaches the historical analysis incrementally. Using language from cases decided in 1666, 1692, and 1851,<sup>67</sup> and other sources including treatises from 1762, 1791, and 1804,<sup>68</sup> the Court found evidence that courts

<sup>63</sup> *Giles*, 128 S. Ct. at 2682.

<sup>64</sup> *Crawford*, 541 U.S. at 56 n.6.

<sup>65</sup> *Giles*, 128 S. Ct. at 2683 (citations omitted).

<sup>66</sup> *Crawford*, 541 U.S. at 62 (“For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”) (citing *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879)).

<sup>67</sup> *Giles*, 128 S. Ct. at 2683 (citing *Lord Morley’s Case*, (1666) 6 How. St. Tr. 769, 771 (H.L.1666); *Harrison’s Case*, (1692) 12 How. St. Tr. 833, 851 (H.L.1692) (“made him keep away”); *Queen v. Scaife*, (1851) 117 Eng. Rep. 1271, 1273 (K.B.) (“kept away”).

<sup>68</sup> *Id.* at 2683 (citing WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 425 (4th ed. 1762); THOMAS PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 62 (2d ed. 1804) (“sent” away); 1 GEOFFREY GILBERT, LAW OF EVIDENCE 214 (1791) (“detained and kept back from appearing by the means and procurement of the prisoner”). The cited publication dates of these texts are relevant but not conclusive to prove that they reflect a contemporaneous statement of the law. For example, Gilbert’s treatise was first published in 1754, but was written earlier. He died in 1726, and other evidence suggests he wrote the treatise in the early 1700s. George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 617 n.161 (1997). The 1762 Hawkins treatise was first published in 1716 and 1721 and

had admitted testimonial statements previously made at a coroner's inquest<sup>69</sup> and at Marian bail and committal hearings<sup>70</sup> if the declarant was dead, unable to travel, or unavailable due to the defendant's wrongful procurement of the witness's absence.<sup>71</sup> The step-by-step shifts in Justice Scalia's opinion in *Giles* were so gradual, and span such a vast period of history, that they did not appear to change direction.

In the end, Justice Scalia used these few sources to construct a forfeiture rule that requires the prosecution to prove the defendant had the specific mental state of purposely causing the witness's absence. His analysis began with the English common law doctrine that allowed statements of an unavailable witness to be introduced if the witness was "detained" or "kept away" by the "means or procurement" of the defendant.<sup>72</sup> While admitting that these terms only "suggest" that the forfeiture exception applied when the defendant engaged in conduct "*designed* to prevent the witness from testifying,"<sup>73</sup> this was the interpretation that Justice Scalia selected. In fact, each of the three alternatives: (1) detained, (2) kept away by means of the defendant, or (3) kept away by procurement of the defendant, could either be broadly construed to include all circumstances where the defendant merely caused the witness's resulting absence, or narrowly construed to only include circumstances when the defendant both caused the absence and intended the absence. Either interpretation, without more, is equally reasonable.

To resolve this ambiguity, Justice Scalia selectively gathered historic resources to tip the balance.<sup>74</sup> However, these resources have limited value as authority for determining the meaning of the language quoted to

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subsequent editions were published without significant changes. Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of the Giles Forfeiture Exception Were or Were Not "Established at the Time of the Founding,"* 13 LEWIS & CLARK L. REV. 605, 624 n.94 (2009).

<sup>69</sup> *Giles*, 128 S. Ct. at 2683 (citing *Lord Morley's Case*, 6 How. St. Tr. at 770–71).

<sup>70</sup> Criminal procedure statutes enacted during the reign of Queen Mary I of England required justices of the peace make written records of the sworn statements of witnesses of a felony at the time of an arrest. Those statements were later made available to the felony trial court. Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 128–29 (2005) (citing the Marian statutes 1 & 2 Phil. & M., c.13 (1554–1555) and 2 & 3 Phil. & M., c.10 (1555)).

<sup>71</sup> *Giles*, 128 S. Ct. at 2683 (citations omitted).

<sup>72</sup> *Id.* (citing *Lord Morley's Case*, 6 How. St. Tr. at 771; *Harrison's Case*, 12 How. St. Tr. at 851 ("made him keep away"); *Scaife*, 117 Q.B. at 242, 117 Eng. Rep. at 1273 ("kept away"))).

<sup>73</sup> *Id.*

<sup>74</sup> See Davies, *supra* note 68.

articulate the common law rule in the English opinions. None of the reference dictionaries are contemporaneous with the judicial opinions or treatise texts. To investigate the historical meaning of the term “procure,” for example, Justice Scalia referred to an edition of *Webster’s Dictionary* published in 1828, over one hundred and sixty years after the *Lord Morley* opinion was written.<sup>75</sup> Moreover, it is an American dictionary, rather than an English one. The subsequent reference to the *Oxford English Dictionary* is similarly limited in relevance. The *Giles* opinion used only one of several definitions of “procure” from the edition published in 1989, more than three hundred and twenty years after the *Lord Morley* opinion.<sup>76</sup>

Similarly, the term “means” could either be broadly construed to include circumstances where the defendant caused the witness’s resulting absence, or narrowly to only include a result that the defendant caused and intended to achieve. The Court conceded that either interpretation is equally reasonable by stating “while the term ‘means’ could sweep in all cases in which a defendant caused a witness to fail to appear, it can also connote that a defendant forfeits confrontation rights when he uses an intermediary for the purpose of making a witness absent.”<sup>77</sup> To support this second, narrower interpretation of the 1666 usage of the term “means,” the Court cited not only the 1989 edition of the *Oxford English Dictionary*, but also the first edition of *Webster’s American Dictionary*, which was published in 1869.<sup>78</sup>

Justice Scalia’s selective use of particular versions of dictionaries seriously undermined the credibility of any commitment to historical

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<sup>75</sup> *Giles*, 128 S. Ct. at 2683 (citing 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining “procure” as “to *contrive* and effect” and defining “procure” as “to get; to gain; to obtain; as by request, loan, effort, labor or purchase”).

<sup>76</sup> *Id.* (citing 12 OXFORD ENGLISH DICTIONARY 559 (2d ed.1989) (def.I(3)) (defining “procure” as “[t]o contrive or devise with care (an action or proceeding); to endeavour to cause or bring about (mostly something evil) *to* or *for* a person”). For example, the next entry defines “procure” as “[t]o bring about by care or pains; also (more vaguely) to bring about, cause, effect, produce.” 12 OXFORD ENGLISH DICTIONARY 559 (2d ed. 1989) (def.II(4)). This definition encompasses a broader scope of conduct, including conduct which could simply “bring about, cause, effect, [or] produce” a result. This range of conduct may be less motivated by the actor’s intent. More strikingly, Justice Scalia did not use definition II(6)(b) which is labeled as the entry specifically used in law. This entry defines “procure” as “[t]o induce privately, to suborn, to bribe (a witness, jurymen, etc.).” *Id.* at def. II(6)(b).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (citing 9 OXFORD ENGLISH DICTIONARY 516 (2d ed. 1989) (“[A] person who intercedes for another or uses influence in order to bring about a desired result”); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 822 (1869) (“That through which, or by the help of which, an end is attained”).

authority.<sup>79</sup> The dictionaries from 1828, 1868, and 1989 arguably allow for either broad or narrow definitions of “procurement” and “means.”<sup>80</sup> Yet Justice Scalia concluded the history of the terms pointed unequivocally to a narrow interpretation of the rule. This heavy and selective reliance on dictionaries is hardly a unique feature to Justice Scalia’s opinion in *Giles*; his use of dictionaries to reach controversial textual interpretations across a range of areas of the law is well-chronicled.<sup>81</sup>

In addition, Justice Scalia determined that cases and treatises purportedly contemporaneous with the founding “indicate that a purpose-based definition” of the terms governed.<sup>82</sup> Citing treatises from 1816 and 1814 and a case from 1819 that use the language “means and contrivance,” Justice Scalia gradually added the term “contrivance” into the analysis.<sup>83</sup> Then referring back to the 1869 and 1989 dictionaries, now with the word “contrivance” as a guide, Justice Scalia built his case for applying a purpose-based interpretation.<sup>84</sup> To bolster his position, he selected an 1858 treatise. This treatise stated that the forfeiture rule applied when a witness “had been kept out of the way by the prisoner, or by some one on the prisoner’s behalf, *in order to prevent him from giving evidence against*

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<sup>79</sup> A couple of decades earlier, Justice Scalia himself recognized the significant problem of originalism was accessing and analyzing sufficient relevant and reliable material to properly apply it as an interpretive method. Scalia, *supra* note 19, at 856–57.

<sup>80</sup> *Giles*, 128 S. Ct. at 2683 (citing 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); 12 OXFORD ENGLISH DICTIONARY 559 (2d ed. 1989) (def.I(3)); N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 822 (1869)).

<sup>81</sup> See Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 315–30 (1998) (arguing that Justice Scalia’s use of dictionaries conflicts with the goals of ordinary meaning textualism); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1439 (1994) (comparing Justice Scalia’s use of dictionaries with the Court’s); see also Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 363–73 (1994) (documenting Justice Scalia’s success in persuading the Court to rely less on legislative history and more on dictionaries and arguing that both trends have undermined the *Chevron* doctrine in administrative law).

<sup>82</sup> *Giles*, 128 S. Ct. at 2683–84.

<sup>83</sup> *Id.* at 2684 (citing *Drayton v. Wells*, 10 S.C.L. (1 Nott. & McC.) 409, 411 (S.C. 1819) (“kept away by the contrivance of the opposite party”); 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 81 (1816) (“kept away by the means and contrivance of the prisoner”); S. M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 165 (1814) (“kept out of the way by the means and contrivance of the prisoner”)).

<sup>84</sup> *Giles*, 128 S. Ct. at 2684, citing 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 47 (1869) (“inventing, devising or planning,”); 3 OXFORD ENGLISH DICTIONARY 850 (2d ed. 1989) (“ingeniously endeavoring the accomplishment of anything,” “the bringing to pass by planning, scheming, or stratagem,” or “[a]daption of means to an end; design, intention”).

him.”<sup>85</sup> Without evidence to the contrary, the Court reasoned that this is the correct interpretation.

Finally, the Court examined the “manner in which the rule was applied” and decided that this evidence “makes plain” that unconfrosted testimony would not have been admitted without a showing that “the defendant intended to prevent a witness from testifying.”<sup>86</sup> For support, the Court cited several cases where a victim’s statements were excluded because the dying declaration foundation was insufficient, or because the procedures for statements taken according to the Marian bail statutes were improperly followed. In each of these situations, the Court asserted that the prosecution failed to argue that forfeiture by wrongdoing was an alternative exception.<sup>87</sup> From this information, the Court deduced that the prosecution did not make the argument because the forfeiture by wrongdoing doctrine required a showing that “the defendant intended to prevent a witness from testifying,” which was clearly not present.<sup>88</sup>

The Court examined two English spousal homicide cases to reach this conclusion. First, a 1789 case in which the judge said dying declarations and depositions taken according to the Marian bail and committal statutes were admissible, but other out of court statements were not because “the prisoner [] had no opportunity of contradicting the facts [they] contain[.]”<sup>89</sup> Two years later, a court excluded a homicide victim’s sworn deposition because the defendant had not been present and thus did not “have, as he is entitled to have, the benefit of cross-examination.”<sup>90</sup> In both of these cases, the Court noted that the prosecution did not use forfeiture as a second line of argument for admission. In addition, the majority asserted that until 1985, the forfeiture by wrongdoing doctrine in American courts required “deliberate witness tampering.”<sup>91</sup>

In sum, the majority demonstrated that there were two established exceptions to the confrontation requirement—statements taken according to proper Marian depositions and dying declarations. The majority also cited

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<sup>85</sup> *Giles*, 128 S. Ct. at 2684 (citing EDMUND POWELL, *THE PRACTICE OF THE LAW OF EVIDENCE* 166 (1st ed. 1858)).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 2685–86 (citations omitted).

<sup>88</sup> *Id.* at 2684.

<sup>89</sup> *Id.* at 2684–85 (citing *King v. Woodcock*, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789)).

<sup>90</sup> *Giles*, 128 S. Ct. at 2685 (citing *King v. Dingler*, 2 Leach 561, 562, 168 Eng. Rep. 383, 384 (1791)).

<sup>91</sup> *Id.* at 2687 (referencing *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985)) (holding that a defendant who killed a peace officer while resisting arrest “waived his right to cross-examine [the peace officer] by killing him”).

authority to establish that there was a third exception to the confrontation requirement—forfeiture by wrongdoing. To establish the limited scope of the forfeiture doctrine, the majority attempted to show that forfeiture was not argued as an alternative in cases where the two established confrontation exceptions were at issue. Selectively using the language and facts of these cases, the majority asserted that forfeiture was not raised because the historical forfeiture doctrine required proof of the defendant’s purpose to prevent a witness from testifying. Surmising that such a purpose was not provable in these cases, the *Giles* Court concluded this is the reason the prosecution did not even attempt to pursue this route. While not a wholly unreasonable inference, the dissent later demonstrated that this was not a logical, singular conclusion based on the available information.<sup>92</sup>

Finally, the Court proceeded to turn its own logic on its head by using evidence law and the “modern view” of interpretation of evidence law to support its historical interpretation of the Confrontation Clause.<sup>93</sup> After vigorously asserting that the historical scope of the constitutional doctrine was determinative, the *Giles* Court confoundingly used these modern evidence references as authority.<sup>94</sup> Quoting the Federal Rule of Evidence forfeiture by wrongdoing exception to the hearsay rule, which was adopted in 1997, the Court claimed that the rule “codifies the forfeiture doctrine.”<sup>95</sup>

As the third major Confrontation Clause case, *Giles* revealed a highly fractured Court. Writing for the majority, Justice Scalia used historical research to interpret the meaning of the forfeiture doctrine at the time of the founding. Chief Justice Roberts and Justice Alito signed on to all aspects of Scalia’s opinion. Chief Justice Roberts was the only Justice who did not write separately. Justices Thomas and Alito each wrote separately to discuss whether the declarant’s statements were testimonial despite the clear exclusion of this issue by both parties. While Justice Thomas concurred in the result and, indirectly, in the rationale, he did so only

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<sup>92</sup> *Id.* at 2704–05 (Breyer, J., dissenting). “But the majority’s house of cards has no foundation; it is built on what is at most common-law silence on the subject.” *Id.* at 2705 (Breyer, J., dissenting).

<sup>93</sup> *Id.* at 2687–88.

<sup>94</sup> *Id.* at 2687 (citing 85 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:134 (3d ed. 2007); 5 JACK B. WEINSTEIN & MARGARET A BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 804.03[7][b] (Joseph M. McLaughlin ed., 2d ed. 2008); 2 KENNETH S. BROWN, MCCORMICK ON EVIDENCE 176 (6th ed. 2006)). The commentators come out this way because the dissent’s claim that knowledge is sufficient to show intent is emphatically *not* the modern view. See 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.2 (2d ed. 2003) (footnote omitted).

<sup>95</sup> *Giles*, 128 S. Ct. at 2687 (quoting *Davis*, 547 U.S. at 833). Evidence codes in twelve states contain a forfeiture by wrongdoing hearsay exception. *Id.* at 2688 n.2.

because the “opinion accurately reflects [the Court’s] Confrontation Clause jurisprudence where the applicability of that Clause is not at issue.”<sup>96</sup> Under Justice Thomas’ framework, the statement itself was not even testimonial. Consistent with his position in *Crawford* and *Davis*, he restated that only formalized statements should be testimonial, and Avie’s statements here were not.<sup>97</sup> Justice Alito similarly questioned whether Avie’s statements were testimonial under these circumstances, but given that the issue was not raised, agreed with the Court’s forfeiture doctrine analysis.<sup>98</sup>

Justices Souter and Ginsburg concurred in part, but grounded their support for the limit on the forfeiture exception based on the rationale rather than solely on the historical record. Describing the Court’s historical analysis as “sound” and both the Court’s and the dissent’s examination of the historical record as “careful,”<sup>99</sup> Justices Souter and Ginsburg concluded that history alone was not dispositive “when the crime charged occurred in an abusive relationship or was its culminating act . . . .”<sup>100</sup>

Their concurrence supported the interpretation that the forfeiture by wrongdoing exception requires an additional judicial determination by a preponderance of the evidence of defendant’s intent to prevent the witness from testifying.<sup>101</sup> Justice Souter argued that two aspects of the historical background supported the majority’s position. In his view, the historical sources substantially indicated that the Sixth Amendment was “meant to require some degree of intent to thwart the judicial process before thinking it reasonable to hold the confrontation right forfeited . . . .”<sup>102</sup> Further, these sources indicated that “the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process.”<sup>103</sup>

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<sup>96</sup> *Giles*, 128 S. Ct. at 2694 (Thomas, J., concurring).

<sup>97</sup> *Id.* at 2693.

<sup>98</sup> *Id.* at 2694 (Alito, J., concurring). This position is seemingly inconsistent with his former position in *Davis* where he joined the majority opinion which held in the *Hammon* case that a similarly situated victim statement to a responding police officer was testimonial. *Davis*, 547 U.S. at 815.

<sup>99</sup> *Giles*, 128 S. Ct. at 2694 (Souter, J., concurring in part).

<sup>100</sup> *Id.* at 2694–95.

<sup>101</sup> *Id.* at 2694. “Equity demands something more than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying. *Cf. Davis*, 547 U.S. at 833.” *Id.* (citation modified).

<sup>102</sup> *Giles*, 128 S. Ct. at 2695.

<sup>103</sup> *Id.* at 2695.

Justices Ginsburg and Souter did not join the section of the opinion that characterized the dissent as “a thinly veiled invitation to overrule *Crawford* and adopt an approach not much different from the regime of *Ohio v. Roberts* under which the Court would create the exceptions that it thinks consistent with the policies underlying the confrontation guarantee, regardless of how that guarantee was historically understood.”<sup>104</sup> In this section, Justice Scalia rejected the dissent’s approach of “reason[ing] from the ‘basic purposes and objectives’ of the forfeiture doctrine.”<sup>105</sup> This section further criticized the dissent for diminishing a defendant’s right to confrontation because the defendant’s ability to exercise the right would be determined according to a trial court’s concept of what is “fair.”<sup>106</sup>

Justice Breyer wrote a sharp dissent that was joined by Justices Stevens and Kennedy. However, the dissent started with one important point of agreement. Justice Breyer agreed that the historical sources “make clear that ‘forfeiture by wrongdoing’ satisfies *Crawford*’s requirement that the Confrontation Clause be ‘read as a reference to the right of confrontation at common law’ and that ‘any exception’ must be ‘established at the time of the founding.’”<sup>107</sup> Reviewing the same historical sources as the majority, Justice Breyer determined that the forfeiture by wrongdoing exception was in fact established at the time of the founding.<sup>108</sup>

The crucial difference between the majority and the dissent lies in outlining the scope of the forfeiture by wrongdoing exception to the Confrontation Clause.<sup>109</sup> Justice Breyer enumerated three reasons why Avie’s statements should fall within the scope of the exception to the Confrontation Clause: (1) the common law history, (2) the principles of criminal law and evidence, and (3) the pragmatic need for a rule that can be fairly applied by courts.<sup>110</sup> The dissent effectively dismantled the majority’s logic and reasoning, but offered a somewhat unsatisfying approach to the problem. Concluding that the history was too sparse or unclear to determine what the scope of the forfeiture doctrine was at the

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<sup>104</sup> *Id.* at 2692. Justice Souter, joined by Justice Ginsburg concurred with the *Giles* opinion, but did not join Part II.D.2. *Giles*, 128 S. Ct. at 2694.

<sup>105</sup> *Id.* at 2691.

<sup>106</sup> *Id.* at 2692. Justice Scalia warned that if the forfeiture doctrine is not narrowly construed, it would risk depriving a defendant of a fair jury trial because the court’s pretrial ruling on admissibility of the testimonial statement is based on a judicial determination of the defendant’s wrongdoing. *Id.*

<sup>107</sup> *Id.* at 2696 (Breyer, J., dissenting) (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

<sup>108</sup> *Giles*, 128 S. Ct. at 2696.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 2695–2709.

time of the founding, the dissent simply attempted to demonstrate why a broad forfeiture doctrine would be reasonable and desirable in the present.

### III. FORFEITURE AND ITS HISTORY

Many legal historians have researched the origins of the Confrontation Clause.<sup>111</sup> Early evidence of the conceptual foundation of the confrontation right has been recognized as far back as the Roman era.<sup>112</sup> Scholars have noted that early English jurisprudence arguably recognized a form of the right of confrontation even before the right to a jury trial.<sup>113</sup>

Early American historical documents only rarely mention the right of confrontation.<sup>114</sup> The historical record reflects that the American right of confrontation was recognized first at the state level. Several states had adopted declarations of rights that guaranteed a right of confrontation before the Sixth Amendment was ratified in 1791.<sup>115</sup> In addition, the Supreme Court has often recognized that a common law right of

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<sup>111</sup> See, e.g., William H. Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529, 532 (1974); Davies, *supra* note 68; Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 483–84 (1994); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995); Robert Kry, *Forfeiture and Cross-Examination*, 13 LEWIS & CLARK L. REV. 577 (2009); Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH. L. REV. 67 (1969); Peter Tillers, *Legal History for a Dummy: A Comment on the Role of History in Judicial Interpretation of the Confrontation Clause* (Benjamin N. Cardozo Sch. of Law Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 110, 2005).

<sup>112</sup> *Coy v. Iowa*, 487 U.S. 1012, 1015–16 (1988) (quoting *Acts* 25:16).

<sup>113</sup> Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384–87 (1959) (cited in *Coy*, 487 U.S. at 1016).

<sup>114</sup> Jonakait, *supra* note 111, at 77 n.4 (“Congressional intent is virtually impossible to determine since ‘[t]he clause was debated for a mere five minutes before its adoption.’”) (quoting Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 332 n.181 (1981)).

<sup>115</sup> See *Crawford v. Washington*, 541 U.S. 36, 48 (2004) (citing Virginia Declaration of Rights § 8 (1776); Pennsylvania Declaration of Rights § IX (1776); Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch. I, § X (1777); Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783), all reprinted in 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 235, 265, 278, 282, 287, 323, 342, 377 (1971)). In addition, scholars have questioned the Court’s focus on 1791 as the relevant date given that the Sixth Amendment did not apply to the states until it was incorporated via the Fourteenth Amendment in 1868. See, e.g., Lininger, *supra* note 15, at 877; Nicolas, *supra* note 34, at 504–06; Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 311–12 (2005).

confrontation preceded the adoption of the Sixth Amendment.<sup>116</sup> Beyond this, scholars have found little documentation of the Framers' intended meaning and application of the Clause.<sup>117</sup>

Furthermore, in the years following the ratification of the federal Confrontation Clause, the Court was infrequently petitioned to interpret and apply the right. The first major case arose in 1895, more than a hundred years after ratification. In *Mattox v. United States*, the Court held that the confrontation right is not absolute.<sup>118</sup> The Court explained that the right "must occasionally give way to considerations of public policy and the necessities of the case."<sup>119</sup>

Beginning with *Crawford*,<sup>120</sup> Justice Scalia has taken hold of the reins of Confrontation Clause interpretation and led the Court steadily in a new direction. Rather than using or building on the existing doctrine developed in *Ohio v. Roberts* and its progeny,<sup>121</sup> Justice Scalia has advanced an interpretation based on the history and origins of the Clause and used this "original" meaning to interpret the Clause's application to the present day facts. Using the "right of confrontation at common law" to guide his interpretive analysis,<sup>122</sup> Justice Scalia has attempted to ground the Court's Confrontation Clause jurisprudence in historical authority.

While in theory this is a reasonable approach, in practice it is much more difficult and complicated to implement.<sup>123</sup> Certainly one logical method to determine the meaning of a text is to interpret it according to what the text meant at the time it was written. However, when there is little relevant data available to analyze, the resulting determination is less reliable. Scholars have critiqued the Court's historical research and analysis in Justice Scalia's Confrontation Clause trilogy: *Crawford*,<sup>124</sup> *Davis*,<sup>125</sup> and *Giles*.<sup>126</sup>

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<sup>116</sup> *Salinger v. United States*, 272 U.S. 542, 548 (1926). See *Crawford*, 541 U.S. at 54.

<sup>117</sup> See *Davies*, *supra* note 70, at 120–206.

<sup>118</sup> *Mattox v. United States*, 156 U.S. 237, 250 (1895) (finding no Confrontation Clause violation to admit the reporter's stenographic notes of two deceased witnesses' cross-examined prior testimony at defendant's retrial for murder).

<sup>119</sup> *Id.* at 243.

<sup>120</sup> Evidence of Justice Scalia's viewpoint can be found earlier in his concurrence with Justice Thomas in 1992, where he suggested that the Court's Confrontation jurisprudence "has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself." *White v. Illinois*, 502 U.S. 346, 358 (1992) (Thomas, J., concurring in part).

<sup>121</sup> See *supra* Part II.

<sup>122</sup> *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

<sup>123</sup> *Davies*, *supra* note 70, at 105–07.

<sup>124</sup> The *Brooklyn Law Review* published several articles in its seventy-first volume from a symposium held in 2005 entitled "*Crawford* and Beyond: Exploring the Future of the

Justice Scalia's approach to the forfeiture doctrine—the notion that defendants may forfeit the protections of the Confrontation Clause to the extent they intend to render a witness unavailable to testify at trial—illustrates the limits of his constitutional methodology and its unintended consequences for criminal procedure.

#### A. JUSTICE SCALIA'S CURIOUS DESCRIPTION OF THE COMMON LAW OF FORFEITURE

Justice Scalia's historical analysis led him to the firm conclusion that the evidence points to only one interpretation of the forfeiture doctrine: that the State must prove the defendant's purposive intent to keep the declarant from testifying at trial.<sup>127</sup> Beneath this conclusion, however, is a deep analytical flaw. Justice Scalia's interpretation of the forfeiture doctrine is simply not clearly supported by the historical sources, as the only critical cases he references are silent rather than determinative on the issue of forfeiture. Furthermore, the evidence he presents to support his interpretation of the common law forfeiture doctrine is incomplete and overbroad, and as a result his analysis of the doctrine is arbitrarily selective.

Both Justice Scalia's majority opinion and Justice Breyer's dissent mine the history of the forfeiture doctrine in the context of the Confrontation Clause for nuggets of evidence to analyze the scope and applicability of the doctrine. The same historical record, however, leads Justice Scalia and Justice Breyer to reach differing conclusions. As Justices Souter and Ginsburg observe in their concurrence, "early cases on the exception were not calibrated finely enough to answer the narrow question here."<sup>128</sup> Justice Breyer also recognized the indeterminacy of the historical

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Confrontation Clause in Light of Its Past—Can History Define the Structure of the Confrontation Clause?" See e.g., Davies, *supra* note 70; Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219 (2005); Roger W. Kirst, *Does Crawford Provide A Stable Foundation For Confrontation Doctrine?* 71 BROOK. L. REV. 35, 77–83 (2005).

<sup>125</sup> Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford–Davis Testimonial Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y 349, 352–53 (2007); see also Randolph N. Jonakait, *The (Futile) Search for a Common Law Right of Confrontation: Beyond Brasier's Irrelevance to (Perhaps) Relevant American Cases*, 15 J.L. & POL'Y 471, 474–77 (2007) (analyzing the Court's incorrect use of *Brasier* in *Crawford* and *Davis* to discuss the common law right of confrontation).

<sup>126</sup> Davies, *supra* note 68, at 624 n.94.

<sup>127</sup> See *supra* Part II.C.

<sup>128</sup> *Giles v. California*, 128 S. Ct. 2694 (2008) (Souter, J., concurring in part).

record, noting “the possibility that there are too few old records available for us to draw firm conclusions.”<sup>129</sup>

The legal historian John Langbein has previously cautioned, “continuing confusion about the very nature of the law of evidence at the end of the eighteenth century underscores how primitive and undertheorized the subject then was.”<sup>130</sup> If the historical meaning of common law doctrine were determinative, an accurate interpretation would not only require dictionary definitions—as Justice Scalia draws on—but would require an assessment of the rules and the context of their application in the legal system. For example, many of the leading cases involving forfeiture doctrine are, in modern terms, “domestic violence” cases. This type of conduct was regarded substantially differently by the justice system at the time of the founding. As Justice Breyer recognizes, “200 years ago, it might have been seen as futile for women to hale their abusers before a Marian magistrate where they would make such a statement.”<sup>131</sup> Conduct that is now criminally punishable may not have been criminal at the time, and thus not even “wrongdoing” in some other sense.<sup>132</sup>

Even Justice Scalia seemed to acknowledge in his majority opinion that acts of domestic violence may “dissuade a victim from resorting to outside help,” including “prevent[ing] testimony to police officers or cooperation in criminal prosecutions.”<sup>133</sup> Justice Scalia, however, narrows forfeiture to only acts “intended to dissuade,” or acts that have the purpose of thwarting criminal investigations and testimony.<sup>134</sup> In *Giles*, Justice Scalia asserts unequivocally that “[c]ases and treatises of the time indicate that a purpose-based definition of the terms ‘kept back,’ ‘detained,’ by

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<sup>129</sup> *Id.* at 2704 (Breyer, J., dissenting).

<sup>130</sup> JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 248 (2003); *see also Giles*, 128 S. Ct. at 2704 (Breyer, J., dissenting).

<sup>131</sup> *Giles*, 128 S. Ct. at 2703–04; *see, e.g., State v. Rhodes*, 61 N.C. 453 (Phil. Law), 459 (1868) (per curiam) (“We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.”).

<sup>132</sup> *See generally* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000) (discussing the history of the common law marital rape exemption). Some physical violence towards wives was also not punishable. “[T]he old writers say that a husband may chastise his wife with a rod no thicker than this thumb . . .” *Id.* at 1389 n.43 (citing 9 THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 815 (John Houston Merrill ed., 1888)); *see also* Raeder, *supra* note 115, at 312 n.6 (2005) (citing 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 444 (1765)). *But see e.g.,* Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 U. COLO. L. REV. 101 (2006) (showing that men who killed their intimate partners were often more severely punished than women who did the same).

<sup>133</sup> *Giles*, 128 S. Ct. at 2693.

<sup>134</sup> *Id.*

‘means or procurement’ governed.”<sup>135</sup> However, a more careful and complete examination of the law around 1791 reveals that the meaning of these terms was much less clear and was not as narrow as he suggests.

#### B. PLACING THE HISTORY OF FORFEITURE DOCTRINE IN CONTEXT

As Justice Breyer states in his *Giles* dissent: “I know of no instance in which this Court has drawn a conclusion about the meaning of a common-law rule *solely* from the absence of cases showing the contrary—at least not where there are other plausible explanations for that absence. And there are such explanations here.”<sup>136</sup> The limited historical record examined by both the majority and dissent is insufficient to concretely define the contours of the doctrine. But ultimately, Justice Breyer is correct on the essential point: “[T]he majority’s house of cards has no foundation; it is built on what is at most common-law silence on the subject.”<sup>137</sup>

Important English cases on the law of forfeiture were decided in the period spanning 1666 to 1851, but do not lend clear support to Justice Scalia’s narrow definition of forfeiture. For example, *Lord Morley’s Case*, decided in 1666, held that a prior testimonial statement would be admissible if the witness was “dead or unable to travel” or “detained by the means or procurement of the prisoner.”<sup>138</sup> While the court did not admit the absent witness’s statement, the court did not do so based on an inquiry into the defendant’s intent regarding the absence. The court simply found there was an insufficient connection between the defendant and the witness’s absence based on evidence that the witness had run away and told others that he would not attend the trial.<sup>139</sup>

In *Harrison’s Case*, the court did not require proof of the defendant’s purpose to prevent the witnesses from testifying. The court admitted the absent witness’s former statement even when it was not firmly proven that the defendant himself was responsible for the witness’s absence. The court attributed the witness’s absence to two occurrences, that “a gentleman” had come to offer the witness money “to be kind to Mr. Harrison” and that the witness “was inticed [sic] away by three soldiers” and had not since

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<sup>135</sup> *Id.* at 2683–84.

<sup>136</sup> *Id.* at 2702 (Breyer, J., dissenting).

<sup>137</sup> *Id.* at 2705.

<sup>138</sup> *Lord Morley’s Case*, (1666) 6 How. St. Tr. 769, 770 (H. L.) (discussing coroner’s out-of-court “examinations” of witnesses).

<sup>139</sup> *Id.* at 777.

returned.<sup>140</sup> On this evidence, the court found sufficient evidence to show that the defendant used “ill practice to take [the witness] out of the way.”<sup>141</sup>

Similarly in *Lord Fenwick’s Case*, the court admitted an absent witness’s prior statement because the defendant or others had “by fraudulent and indirect means, procured a [prior witness] to withdraw himself . . . .”<sup>142</sup> However, again, because the court could not determine whether the defendant was directly responsible for the witness’s absence, the court did not require proof of the defendant’s specific intent to cause the absence.<sup>143</sup>

By contrast, in *Queen v. Scaife*, the court did not admit an absent witness’s prior statement without a minimum connection between the defendant and the person who “resorted to a contrivance to keep the witness out of the way . . . .”<sup>144</sup> Because evidence showed that only the third co-defendant was connected to the witness’s absence, the court did not enquire into the defendant’s specific intent.<sup>145</sup>

As Justice Breyer emphasized in his dissent, other cases used by the majority, such as *Woodcock* and *Dingler* are not relevant to assessing the requisite mental state of the defendant for forfeiture, as they were analyzed as improper Marian depositions or dying declarations.<sup>146</sup> Since mental state was not the touchstone of the application of forfeiture to these cases, it is a serious stretch to read them, as does Justice Scalia, as requiring a purposive mental state on the part of the defendant to make the witness unavailable as a predicate to forfeiture.<sup>147</sup>

Early American cases similarly do not clearly support Justice Scalia’s interpretation of the common law as recognizing only a narrow forfeiture doctrine. Three American cases decided between 1819 and 1879 held that prior testimonial statements would be admissible if the witness “had been kept away by the contrivance of the opposite party,”<sup>148</sup> “was detained by means or procurement of the prisoner,”<sup>149</sup> or “is absent by [the

<sup>140</sup> *Harrison’s Case*, (1692) 12 How. St. Tr. 833, 851–52 (H. L.).

<sup>141</sup> *Id.*

<sup>142</sup> *Lord Fenwick’s Case*, (1696) 13 How. St. Tr. 537, 594 (H.C.).

<sup>143</sup> *Id.* “[N]o such thing [that Fenwick had tampered with the witness] hath been proved . . . .” *Id.* at 606.

<sup>144</sup> *Queen v. Scaife*, (1851) 17 Ad. E. 238, 242, 117 Eng. Rep. 1271, 1273 (Q.B.).

<sup>145</sup> *Id.*

<sup>146</sup> *Giles v. California*, 128 S. Ct. 2694, 2703 (2008) (Breyer, J., dissenting).

<sup>147</sup> See *King v. Dingler*, (1791) 2 Leach 561, 168 Eng. Rep. 383; *King v. Woodcock*, (1789) 1 Leach 500, 168 Eng. Rep. 352.

<sup>148</sup> *Drayton v. Wells*, 10 S.C.L. 409, 411 (1819).

<sup>149</sup> *Williams v. State*, 19 Ga. 403 (1856).

defendant's] . . . own wrongful procurement."<sup>150</sup> In a fourth American case, the court admitted a witness's prior statement where the witness had testified before a justice and grand jury and was "sent away" by a friend of the defendant "so that he could not be had to testify before the petit jury."<sup>151</sup> None of these cases explicitly required a purpose-based mental state.

The *Giles* majority asserted that the forfeiture doctrine applied only in cases of deliberate witness tampering from the "time of the founding" until 1985.<sup>152</sup> However, the first Supreme Court case to address forfeiture was not until 1879, in *Reynolds v. United States*.<sup>153</sup> *Reynolds* itself relied on leading English common law cases—*Lord Morley's Case*, *Harrison's Case*, and *Scaife*.<sup>154</sup> However, given that the statement at issue in *Reynolds* was former trial testimony that had been confronted, *Reynolds'* analysis of the statement was primarily a discussion of evidence law, not constitutional law.<sup>155</sup>

Nevertheless, it is useful to examine the defendant's conduct in *Reynolds*. There is no direct evidence of "purposeful" wrongful conduct to

<sup>150</sup> *Reynolds v. United States*, 98 U.S. 145, 158 (1878).

<sup>151</sup> *Rex v. Barber*, 1 Root 76 (Conn. Super. Ct. 1775). Two leading evidentiary treatises and a Delaware case reporter cite that case for the proposition that grand jury statements were admitted on a wrongful-procurement theory. *Giles*, 128 S. Ct. at 2689 (citing PHILLIPPS, TREATISE ON THE LAW OF EVIDENCE, at 200, n.(a); THOMAS PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 91, n.(m) (American ed. 1824); *State v. Lewis*, 1 Del. Cas. 608, 609 n.1 (Ct. Quarter Sess. 1818)).

However, it is unclear whether the admitted statement was previously confronted or not. *Giles*, 128 S. Ct. at 2689–90, *see also* 2706 (Breyer, J., dissenting). While generally grand jury proceedings were secret and thus the statements made were unopposed by the defendant, there is some evidence to suggest that the statements in *Barber* were confronted. *Id.* (citing SARA SUN BEALE, ET AL., GRAND JURY LAW AND PRACTICE § 5.2 (2d ed. 2005)); *see also* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2360, pp. 728–35 (John T. McNaughton ed., rev. ed. 1961)); *see also Giles*, 128 S. Ct. at 2690 n. 4. ("Three commentators writing more than a century after the *Barber* decision, said, without explanation, that they understood the case to have admitted only confronted testimony at a preliminary examination."); W. M. BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE 473, n.(e) (American ed. 1883); JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE 161 (1902); 2 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE § 1197, at 1024 (2d ed. 1913) ("We know of no basis for that understanding. The report of the case does not limit the admitted testimony to statements that were confronted.").

<sup>152</sup> *Giles*, 128 S. Ct. at 2687. In other circumstances, the Supreme Court has held a defendant "forfeits" his Sixth Amendment confrontation right to be present at trial by engaging in noncriminal disruptive conduct. *See, e.g., Illinois v. Allen*, 397 U.S. 337, 342–43 (1970).

<sup>153</sup> 98 U.S. 145 (1879).

<sup>154</sup> *Id.* at 158.

<sup>155</sup> *Id.* at 161 (citing 1 FRANCIS WHARTON, A COMMENTARY ON THE LAW OF EVIDENCE, § 177, at 160–62).

keep the witness away. Rather, there is evidence from which one could reasonably infer that the defendant kept the witness away from the trial. The facts indicate that when an officer went to the defendant's home to serve a subpoena on the witness who also resided there, the defendant said the witness was not home and did not reveal the witness's location to the officer.<sup>156</sup> When the defendant was told that the witness would get into trouble for making it difficult to subpoena her, the defendant replied that the witness would not be in trouble until the subpoena was served.<sup>157</sup> Upon these facts, the court decided to admit the witness's former testimony in the trial. At most, the defendant did not help the government serve the subpoena. But such an omission, without an affirmative duty to assist the officer, is not sufficient evidence to find the defendant purposely kept the witness away. One could only speculate that the defendant had done something to purposefully prevent the witness from being subpoenaed. But as analysis of the defendant's "intent," the *Reynolds* Court only uses the term "voluntarily" to describe the defendant's mental state in "keep[ing] the witnesses away."<sup>158</sup>

Justice Scalia concludes that the fact that the older common law cases did not address forfeiture must mean that forfeiture required proof that the defendant acted with the purpose of preventing the witness from testifying, and such proof was not present.<sup>159</sup> However, there are other inferences that can be drawn from the lack of attention to forfeiture in these cases. To begin, it may have been that the law was sufficiently undeveloped at the time that the attorneys did not consider forfeiture as an alternative; this may have been a particular barrier given that courts did not widely begin to acknowledge many domestic violence crimes until relatively late in the nineteenth century.<sup>160</sup> Especially if the law was inchoate in its protections of victims, the attorneys may have made tactical decisions not to go forward on a forfeiture theory.

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<sup>156</sup> *Id.* at 159–60.

<sup>157</sup> *Id.* at 160.

<sup>158</sup> *Id.* at 158.

<sup>159</sup> *Giles v. California*, 128 S. Ct. 2678, 2684–86 (2008) (discussing *King v. Woodcock*, (1789) 168 Eng. Rep. 352 (K.B.); *King v. Dingler*, (1791) 168 Eng. Rep. 383 (K.B.)).

<sup>160</sup> See Reva B. Siegel, "The Rule of Love": *Wife Beating as a Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2118, 2124 (1996). Prior to reforms in the nineteenth century, laws in England and the United States gave husbands the right to "chastise," or corporally punish, their wives. *Id.*

In addition, it is an equally reasonable inference that there was no well-established hearsay exception for forfeiture at the time.<sup>161</sup> In fact, the Federal Rules of Evidence did not adopt a forfeiture hearsay exception until 1997.<sup>162</sup> Importantly, at the time of the framing, there was little or no distinction between confrontation law and hearsay law in common law. Thus, if dying declaration requirements are met, the statement was admissible for evidentiary hearsay and constitutional confrontation purposes. As it is now understood, the right to “confront” a witness is actually a bundle of rights, including the right to be present and observe the witness’s demeanor, the right to cross-examine, and the right that witnesses testify under oath.<sup>163</sup> Finally, cases discussed in *Giles*, including *Woodcock* and *Dingler*,<sup>164</sup> are distinguishable in that the statements are only directly related to the killing at issue, whereas in *Giles*, the statements are relevant to prior potentially criminally punishable conduct, prior assault, and threats.

One early American case demonstrates a court’s explicit separation of evidence law issues from constitutional confrontation issues. In *McDaniel v. State*,<sup>165</sup> the court held the declarant’s prior statement admissible as a

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<sup>161</sup> It was Justice Scalia who in *Crawford* asserted that “we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence.” *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

<sup>162</sup> Evidence law was primarily common law and only partly statutory before the Federal Rules of Evidence were enacted. See Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 909 (1978).

The Federal Rules of Evidence became effective in 1975. For a discussion of this history of the development of the Rules, see Glen Weissenberger, *Evidence Myopia: The Failure to See The Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539, 1567–76 (1999).

The proposed forfeiture rule was approved by the Supreme Court on April 11, 1997, and became effective on December 1, 1997, as FED. R. EVID. 804(b)(6). Amendments to the Federal Rules of Evidence, 171 F.R.D. 694, 708 (1997). There is one major distinction between the evidentiary forfeiture by wrongdoing doctrine and the constitutional confrontation doctrine. Any and all parties may invoke the evidentiary hearsay exception—not only criminal prosecutors, but also criminal defendants, civil plaintiffs, and civil defendants. By contrast, the Sixth Amendment right to confrontation resides solely with a criminal defendant. Thus, while it is possible for the evidentiary rule to codify precisely how the rule must apply when used against a criminal defendant, it is just as likely that the rule reflects considerations regarding common law application of the forfeiture doctrine in all contexts. The Advisory Committee supports this by noting that the wrongdoing not need to be a criminal act to be sufficiently “wrong” and that forfeiture applied to all parties, even the government. *Id.*

<sup>163</sup> See, e.g., *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J, dissenting); *California v. Green*, 399 U.S. 149, 158 (1970).

<sup>164</sup> *Giles*, 128 S. Ct. at 2684–86 (discussing *King v. Woodcock*, (1789) 168 Eng. Rep. 352 (K.B.); *King v. Dingler*, (1971) 168 Eng. Rep. 383 (K.B.)).

<sup>165</sup> *McDaniel v. State*, 8 Smedes & M. 401 (Miss. Err. & App. 1847).

dying declaration. The defendant's subsequent objection that admission of the statement would nonetheless violate his confrontation right was rejected. The court expressly held that the defendant's confrontation rights were not violated based on the forfeiture by wrongdoing principle.<sup>166</sup>

The *Giles* majority smoothly transitions from a discussion of the common law's narrow definition of forfeiture to the 1997 adoption in the Federal Rules of Evidence. This seems a necessary and logical source of information to examine. However, the Court's legerdemain brings us back to the very intertwining of evidentiary hearsay law and constitutional confrontation analysis that it so boldly denounced in *Crawford v. Washington*.<sup>167</sup> The Court uses its own opinion in *Davis* as a reference for the proposition that the 1997 Federal Rules of Evidence forfeiture hearsay exception in fact, codifies the forfeiture doctrine.<sup>168</sup> Oddly—and some might say hypocritically—the Court is now using present day evidence law to support an interpretation of the meaning of the constitutional Confrontation Clause doctrine at the time of either the founding or the adoption of the Sixth Amendment.

The entire Court, including those joining Justice Breyer's dissent, acknowledged that in both *Crawford* and *Davis*, the Court had “recognized” the exception of forfeiture by wrongdoing.<sup>169</sup> Indeed, a 1791 evidence law treatise noted that prior testimonial statements would be admitted if a witness is “kept back from appearing by the means and procurement of the prisoner.”<sup>170</sup> But a majority of the members of the Court did not agree with Justice Scalia in *Giles* that this entails proof of a high level mental state, such as purpose, as a predicate to forfeiture. Justices Souter and Ginsburg's concurrence concludes that the historical sources provide “substantial indication” that the Confrontation Clause required “some degree of intent to thwart the judicial process” before its protection would reasonably be

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<sup>166</sup> *Id.* at \*8; see also *Woodside v. State*, 2 Howard 655 (Miss. Err. App 1837). Recent cases demonstrate how courts have continued to find no Confrontation Clause violation when unfronted statements were admitted under a forfeiture theory without evidence that the defendant acted with the purpose of preventing the witness from testifying. See, e.g., *United States v. Rouco*, 765 F.2d 983 (11th Cir. 1985); *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976), *cert. denied* 431 U.S. 914 (1977).

<sup>167</sup> *Crawford*, 541 U.S. at 61. (“[W]e do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . .”).

<sup>168</sup> *Giles*, 128 S. Ct. at 2680.

<sup>169</sup> *Id.* at 2695 (Breyer, J., dissenting) (citing *Crawford*, 541 U.S. at 62; *Davis*, 547 U.S. at 833).

<sup>170</sup> 1 GEOFFREY GILBERT, THE LAW OF EVIDENCE 214–15 (1791); see also Fisher, *supra* note 68.

forfeited.<sup>171</sup> However, they seem to soften the impact of the majority's strict specific intent requirement by commenting that the "absence from the early material of any reason to doubt that the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship" who means to isolate the victim and prevent the victim's ability to reach out for help.<sup>172</sup> Equity would require, and the historical record would support, such a finding and a far more flexible approach to forfeiture than Justice Scalia advances in his majority opinion.

#### IV. THE DIFFICULTY WITH "PURPOSE" IN THE MODERN FORFEITURE INQUIRY

In effect, the *Giles* majority holds that the prosecution must show that a defendant had the "purpose" to prevent the witness from testifying in order to assert forfeiture. At best, however, an examination of the history of the common law is inconclusive regarding whether, and how, the defendant's purpose, or even arguably any mental state, matters to forfeiture. Moreover, current understandings of "intent" in both criminal law and evidence law would suggest that linking purpose to forfeiture leads courts down a troubling path, especially if they construe intent in the excessively narrow manner Justice Scalia suggests in *Giles*. Instead of following only Justice Scalia's restricted approach, lower courts should take into account the proper common law understanding of intent in the forfeiture context, as well as equity, especially as they apply the Confrontation Clause.

##### A. WHY REQUIRE ANY MENTAL STATE FOR FORFEITURE?

Justice Breyer's dissent in *Giles* argues that one reasonable interpretation of the cases suggests that mere causation may be sufficient for forfeiture. That is, if the defendant's wrongful act caused the witness's absence, then the defendant has forfeited the right to confront that witness's prior testimonial statements.<sup>173</sup> Using the language from *Lord Morley's Case* allowing forfeiture when the witness was absent or detained "by means or procurement of the prisoner,"<sup>174</sup> Justice Breyer argues that "[t]he

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<sup>171</sup> *Giles*, 128 S. Ct. at 2695 (Souter, J., concurring in part).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 2701 (Breyer, J., dissenting).

<sup>174</sup> *Id.* (citing *Lord Morley's Case*, 6 How. St. Tr., at 771).

phrase ‘by means of’ focuses on what the defendant *did*, not his *motive for (or purpose in) doing it*.<sup>175</sup>

As the *Giles* dissent highlights, it is not at all clear why forfeiture should be linked to any mental state. On several occasions within his dissent, Justice Breyer focuses on the “causation” component of the forfeiture by wrongdoing requirements. If the defendant could be shown to have caused the witness’s unavailability to testify at trial, the causal link may be sufficient to require him to forfeit his opportunity to confront. Interestingly, however, Justice Breyer never extends his argument to its logical conclusion: strict liability in the sense of automatic forfeiture where a defendant’s conduct or activities makes a witness unavailable.

The primary objection to mere causation as a standard for forfeiture stems from the same principle as the exception itself: it would not be equitable to admit the evidence in some circumstances. If the only requirement were that the defendant caused the witness’s unavailability, then all of a homicide victim’s statements would be admissible, subject only to the jurisdiction’s hearsay rules. In other cases, where the wrongdoing consists of threats or bribes, this broad causation rule may not provide the prosecution sufficient incentive to try to get the witness to court. Or, for example, if the defendant were involved in a car accident that caused the witness’s unavailability, it would not promote equitable principles to use the unfortunate, but not culpable situation against the defendant.

Indeed, early English criminal law based liability on essentially strict liability, with no explicit requirement of a mental state.<sup>176</sup> If the state could establish cause in fact, also known as “but for” causation, it was sufficient to impose liability. But as the common law developed, it began to incorporate concepts regarding moral wrongdoing and blameworthiness.<sup>177</sup> Criminal law today continues to develop ways of conceptualizing and implementing the connection between moral blameworthiness, culpability, and punishment. It is not surprising, therefore, to see a link between

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<sup>175</sup> *Id.* “In *Diaz v. United States*, which followed *Reynolds*, this Court used the word ‘by’ (the witness was absent “by the wrongful act of” the accused), a word that suggests causation, not motive or purpose . . . . And in *Motes v. United States*, the Court spoke of absence ‘with the assent of’ the defendant, a phrase perfectly consistent with an absence that is *a consequence of*, not *the purpose of*, what the assenting defendant hoped to accomplish.” *Id.* (citations omitted).

<sup>176</sup> See Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 977–80 (1932) (tracing the historical development of mental state requirements in criminal law).

<sup>177</sup> See *id.* at 988–94 (1932) (discussing the influence of Roman and canon law on the common law of crimes).

forfeiture and a mental state requirement. What is curious is to attribute the connection retroactively to the common law, as does Justice Scalia.

Despite this argument, however, the difference of opinion between the majority and dissent was not whether intent is required. Justice Breyer ultimately seemed to concede that some level of intent is required.<sup>178</sup> The dissent, however, rejected the majority's interpretation of "procurement" to require proof of defendant's "purpose" or "motive" as unpersuasive.<sup>179</sup> Citing nineteenth century dictionaries and a treatise, the dissent was not convinced by the majority's interpretation of the terms "procurement" or "contrivance."<sup>180</sup> Both terms could be interpreted either to include only purposeful conduct, or more generally any conduct which causes a result.<sup>181</sup> The dissent emphasized that the only source which supported the majority's position was an evidence treatise which was written almost seventy years after the founding.<sup>182</sup> Unlike other treatises cited in the opinion that, at minimum, existed before the founding, the Powell treatise was first published in 1858.<sup>183</sup>

#### B. PARSING THE REQUISITE INTENT FOR FORFEITURE

Even if it were to be conceded that intent was, in some manner, the touchstone of the common law of forfeiture, mental states in modern criminal law are simply far more complicated than Justice Scalia suggests in *Giles*. Modern courts continue to struggle with mental state issues, both in analyzing an intangible concept, as well as in using language to express that analysis. Commonly used lay words, such as "intent" or "knowing," become terms in legal analysis with very particular meanings. To add even more complexity, courts, and now legislatures, continue to use these terms inconsistently.

Proof of mental state is commonly established through inferences drawn from circumstantial evidence.<sup>184</sup> To reinforce this notion, courts

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<sup>178</sup> *Giles*, 128 S. Ct. at 2708 (Breyer, J., dissenting) ("I would apply a simple intent requirement across the board.").

<sup>179</sup> *Id.* at 2701.

<sup>180</sup> See *supra* notes 74–85 and accompanying text.

<sup>181</sup> *Giles*, 128 S. Ct. at 2700–01 (Breyer, J., dissenting).

<sup>182</sup> *Id.* at 2701–02; see also POWELL, *supra* note 85, at 166.

<sup>183</sup> See *supra* note 85 and accompanying text.

<sup>184</sup> See *Woodside v. State*, 2 Howard 655, 1837 WL 1084 (Miss. Err. & App 1837).

Evidence applied to proceedings in courts of justice consists of those facts or circumstances connected with the legal proposition which establish its truth or falsehood. The use of the weapon in the case supposed, is the fact or circumstance which establishes or manifests the criminal intention. In a case where the declarations of the deceased are offered to the jury, they constitute facts or circumstances to which the law imparts verity, and tend to establish the truth

have often articulated a variant of the statement that “the jury is entitled to presume that a person intends the natural and probable consequences of his acts.”<sup>185</sup> This encompasses analysis of evidence sufficient to prove not only purpose, which is one of the highest levels of mental state, but also a lower level of intent, such as knowing.

### *1. Standard of Proof*

The equitable rationale for the forfeiture rule is to prevent defendants from benefiting from their own wrongdoing. The Court was wary, however, of a broad rule of admissibility. If the preliminary admissibility threshold is based on the defendant’s wrongdoing, which is the alleged criminal conduct at issue in the case, the preliminary judicial evidence determination could unduly impinge on the jury’s guilt determination.<sup>186</sup> Thus, the *Giles* Court did not expand the rule any further than for those actions “designed” to prevent a witness from testifying.<sup>187</sup>

However, courts make preliminary determinations of admissibility regularly without commenting on the relative weight or credibility of the evidence. In the evidence context, the most clearly analogous example is

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of the matter to which they relate. The position, therefore, that the declarations of the deceased, in prosecutions for murder, are not admissible as evidence to establish the murder, is wholly without foundation.

*Id.* at 665–66.

<sup>185</sup> *Giles*, 128 S. Ct. at 2698 (Breyer, J., dissenting) (citing *United States v. Aguilar*, 515 U.S. 593, 613 (1995) (Scalia, J., dissenting) (“[T]he jury is entitled to presume that a person intends the natural and probable consequences of his acts.”); *Allen v. United States*, 164 U.S. 492, 496 (1896) (“[A] man who performs an act which it is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it.”); see GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 18, 38 (2d ed. 1961) (“There is one situation where a consequence is deemed to be intended though it is not desired. This is where it is foreseen as substantially certain.”); MODEL PENAL CODE § 2.02(2)(b)(ii) (1962) (stating that a person acts “knowingly” if “the element involves a result of his conduct” and “he is aware that it is practically certain that his conduct will cause such a result”); see also *Giles*, 128 S. Ct. at 2704 (citing WILLIAMS, *supra* § 18, at 39) (relying on sources at common law for the proposition that the accused “necessarily intends that which must be the consequence of the act” (internal quotation marks omitted)); RESTATEMENT (SECOND) OF TORTS § 8A (1977) (“The word ‘intent’ is used throughout . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”); WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.2(a), at 341 (“[T]he traditional view is that a person who acts . . . intends a result of his act . . . when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.”).

<sup>186</sup> *Giles*, 128 S. Ct. at 2686. The Court noted, “It is akin, one might say, to ‘dispensing with jury trial because a defendant is obviously guilty.’” *Id.* (quoting *Crawford*, 541 U.S. at 62).

<sup>187</sup> *Id.* at 2683–84.

the co-conspirator exception to the hearsay rule.<sup>188</sup> While the trial judge must make an initial assessment that there is sufficient evidence to prove the conspiracy by a preponderance of the evidence,<sup>189</sup> it is the jury who ultimately decides whether all the evidence proves the conspiracy beyond a reasonable doubt.<sup>190</sup> In the constitutional context, even by the rule of *Giles* itself, courts may be required to make preliminary determinations based on the defendant's culpability for the charged conduct.<sup>191</sup> For example, in a judge's pretrial admissibility determination, the burden for proffering a prior testimonial statement of an unavailable witness under the forfeiture doctrine would be a preponderance of the evidence, according to Federal Rule of Evidence 104(a).<sup>192</sup> Even though a jury would apply the beyond a reasonable doubt burden at trial, Justices Souter and Ginsburg found this too close for comfort, acknowledging the distinction, but calling it a "near circularity."<sup>193</sup>

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<sup>188</sup> FED. R. EVID. 801(d)(2); *Bourjaily v. United States*, 483 U.S. 171 (1987), cited in *Giles*, 128 S. Ct. at 2691 n.6, 2707 (Breyer, J., dissenting).

<sup>189</sup> In making the preliminary admissibility determination, the Federal Rules of Evidence require the court to consider the contents of the statement. However, the contents of the statement are "not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." FED. R. EVID. 801(d). The court must also consider "the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement . . . ." Amendments to the Federal Rules of Evidence, 171 F.R.D. 694, 710 (1997).

<sup>190</sup> FED. R. EVID. 104.

<sup>191</sup> Justice Scalia concedes this point in Part II.D.2 of the majority opinion, which Chief Justice Roberts and Justices Thomas and Alito joined:

We do not say, of course, that a judge can never be allowed to inquire into guilt of the charged offense in order to make a preliminary evidentiary ruling. That must sometimes be done under the forfeiture rule that we adopt—when, for example, the defendant is on trial for murdering a witness in order to prevent his testimony. But the exception to ordinary practice that we support is (1) needed to protect the integrity of court proceedings, (2) based upon longstanding precedent, and (3) much less expansive than the exception proposed by the dissent.

*Giles*, 128 S. Ct. at 2691 n.6.

<sup>192</sup> *Bourjaily*, 483 U.S. at 175. There is a split in the federal circuits and the states; some apply the preponderance standard while other apply a clear-and-convincing standard. See Amendments to the Federal Rules of Evidence, 171 F.R.D. 694, 719 (1997). In fairness to prosecutors and victims who may be unavailable, however, some courts have not held that the defendant's intent be the sole purpose of the conduct. For example, the Second Circuit has held that "[t]he government need not, however, show that the defendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant 'was motivated *in part* by a desire to silence the witness.'" *United States v. Dhinsa*, 243 F.3d 635, 654 (2d Cir. 1996) (citations omitted).

<sup>193</sup> *Giles*, 128 S. Ct. at 2694 (Souter, J., concurring).

## 2. “Motive” v. “Intent”

Justice Breyer’s dissent in *Giles* characterizes the majority as incorrectly expanding the requirement for proof of mental state for forfeiture from a simple “intent” to prevent the witness from testifying to a “purpose” to keep the witness from testifying, in other words that the defendant “acts from a particular *motive*, a *desire* to keep the witness from trial.”<sup>194</sup> In describing forfeiture and its predicates, Justice Scalia’s majority opinion uses terms such as “*designed* to prevent the witness from testifying” or that a “purpose-based definition . . . governed.”<sup>195</sup>

Certainly, it is harder to prove the more specific mental state of “purpose” than the broader mental state of “intent.”<sup>196</sup> But the dissent goes even farther in suggesting that a negligent state of mind may even be sufficient.<sup>197</sup> As Justice Breyer states, “no case limits forfeiture to instances where the defendant’s *purpose* or *motivation* is to keep the witness away.”<sup>198</sup> The majority tries to overcome this elementary legal logic by claiming that the “forfeiture rule” applies, not where the defendant *intends* to prevent the witness from testifying, but only where that is the defendant’s *purpose*, i.e., that the rule applies only where the defendant “acts from a particular *motive*, a *desire* to keep the witness from trial.”<sup>199</sup> Justice Breyer emphasized “the law does not often turn matters of responsibility upon *motive*, rather than *intent*. . . . [a]nd there is no reason to believe that application of the rule of forfeiture constitutes an exception to this general legal principle.”<sup>200</sup> The dissent also emphasized how not one single case affirmatively holds that the Constitution limits the application of the forfeiture doctrine by requiring proof that the defendant’s purpose or motivation was to keep the witness from testifying at trial.<sup>201</sup> Examining

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<sup>194</sup> *Id.* at 2698 (Breyer, J., dissenting) (referencing *id.* at 2683–84).

<sup>195</sup> *Id.* at 2698–99.

<sup>196</sup> *Id.* (citing *State v. Romero*, 156 P.3d 694, 702–03 (N.M. 2007) (finding it “doubtful that evidence associated with the murder would support a finding that the purpose of the murder was to keep the victim’s earlier statements to police from the jury”).

<sup>197</sup> *Giles*, 128 S. Ct. at 2699 (Breyer, J., dissenting) (“And he does so whether he killed her *for the purpose of* keeping her from testifying, with *certain knowledge* that she will not be able to testify, or with a *belief* that rises to a *reasonable level of probability*. The inequity consists of his being able to *use* the killing to keep out of court her statements against him.”).

<sup>198</sup> *Id.* at 2700.

<sup>199</sup> *Id.* at 2683–84 (asserting that the terms used to describe the scope of the forfeiture rule “suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying” and that a “purpose-based definition . . . governed”).

<sup>200</sup> *Id.* at 2699.

<sup>201</sup> *Id.* at 2700.

the language used by the historical cases, Justice Breyer concludes that the words actually suggest a focus on the defendant's acts<sup>202</sup> that cause<sup>203</sup> the "consequence" of the witness's absence.<sup>204</sup>

### 3. *The Development of Mens Rea in Criminal Law*

As punishment theory and ideas about criminal culpability have developed and evolved over the past several hundred years, legislatures and courts have begun to examine more carefully what mental state is required for a defendant's guilt.<sup>205</sup> Early in the development of criminal common law, courts used several terms, often inconsistently, to describe the mental state element—or *mens rea*—that the law required for culpability. For example, courts used terms such as "malicious," "willful," "deliberate," or "intentional." In addition, courts began to use categorical terms such as "specific intent" or "general intent." Today in modern American criminal law, these terms are still used throughout all penal codes and many of them are still used inconsistently.

Common law "intent" encompassed a broad range of mental states. At common law, a person "intentionally" caused the social harm if "(1) it is his desire (i.e., his conscious object) to cause the social harm; or (2) he acts with knowledge that the social harm is virtually certain to occur as a result of his conduct."<sup>206</sup> By contrast, the Model Penal Code separates these concepts into two levels of *mens rea*, "purpose" and "knowing."<sup>207</sup> Both are subjective determinations.<sup>208</sup>

#### a. Concepts of *Mens Rea*

In criminal law, the term "intent" is often used to functionally distinguish between what some courts call "specific intent" crimes and

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<sup>202</sup> *Id.* at 2701. Justice Breyer noted, "The phrase "by means of" focuses on what the defendant *did*, not his *motive for (or purpose in) doing it.*" *Id.* (referring to *Lord Morley's Case*, (1666) 6 How. St. Tr. 769, 771 (H.L.)).

<sup>203</sup> *Giles*, 128 S. Ct. at 2701 (quoting *Diaz v. United States*, 223 U.S. 442, 452 (1912)). The witness was absent "by the wrongful act of" the accused. *Id.*

<sup>204</sup> *Id.* at 2701 (Breyer, J., dissenting), referring to *Motes v. United States*, 178 U.S. 458, 473–74 (1900), where the Court spoke of absence "with the assent of" the defendant.

<sup>205</sup> See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 117–80 (5th ed. 2009).

<sup>206</sup> *Id.* at 121 (citing *Thornton v. State*, 919 A.2d 678 (Md. 2007)).

<sup>207</sup> MODEL PENAL CODE §§ 2.02(2)(a)-(b) (1985); see also *id.* at cmt. 2 (citing Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L. J. 645 (1917); Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 910–11 (1939)).

<sup>208</sup> DRESSLER, *supra* note 205, at 121–22.

“general intent” crimes.<sup>209</sup> However, widely inconsistent usage of these terms has caused, and continues to cause, confusion and lack of clarity in the interpretation and application of criminal law. Despite the imprecision of this terminology, many jurisdictions continue to use this language to discuss *mens rea*.<sup>210</sup> In part because of the problematic nature of this terminology, the Model Penal Code does not use these words and jurisdictions that have adopted the Model Penal Code’s *mens rea* terminology similarly do not typically use these terms.<sup>211</sup>

There is no universally accepted meaning of “general intent” or “specific intent.” There are, however, a few common approaches. The first could be characterized as the relatively traditional or historical approach. Traditionally, courts used the term “general intent” to describe the requisite *mens rea* when no particular mental state is set out in the definition of the crime.<sup>212</sup> Under this application of *mens rea*, the prosecution must prove only that the *actus reus* of the crime was performed with a morally “blameworthy state of mind.”<sup>213</sup> By contrast, traditionally courts used the term “specific intent” to describe a mental state which is expressly set out in the definition of the crime.<sup>214</sup> Specific intent encompasses “purpose”—the term Justice Scalia has in mind in describing forfeiture.

The second approach is more hierarchical and elemental in its interpretation and application of these terms. Under this approach, courts use the term “specific intent” to describe an offense with a higher level *mens rea* term, such as purpose, while using the term “general intent” to refer to offenses that permit conviction on less culpable mental states such as knowledge, recklessness, or negligence.<sup>215</sup>

The third approach is commonly used in modern criminal law. As criminal law has evolved and been codified by legislatures, many statutes expressly include an identifiable *mens rea* element term, or a particular state of mind is judicially implied, so the line between “general” and “specific” is more difficult.<sup>216</sup> Many modern courts use the term “specific intent” to

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<sup>209</sup> *Id.* at 137–39.

<sup>210</sup> See Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 341 (2001) (stating that a majority of states and the federal system continue to use the distinction between general and specific intent in analyzing criminal culpability).

<sup>211</sup> MODEL PENAL CODE § 2.02 cmt 1 (1985); see also Batey, *supra* note 210 at 400–01.

<sup>212</sup> DRESSLER, *supra* note 205, at 138.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

refer to any mental element which is required to be proven above and beyond any mental state required with respect to the *actus reus*, or conduct, of the crime.<sup>217</sup> Here are three descriptive examples. First, if the statute “includes an intent or purpose to do some future act,” separate from the requisite *actus reus* of the crime, it may be considered a specific intent crime.<sup>218</sup> For example, many burglary statutes prohibit a person from entering a structure with intent to commit a felony therein.<sup>219</sup>

Another example includes statutes where the defendant is to “achieve some further consequence beyond the conduct or result that constitutes the *actus reus* of the offense,” that is to say, a special motive or purpose for committing the *actus reus*.<sup>220</sup> For example, to be culpable for larceny, one must take property with intent to permanently deprive the owner of that property. Finally, a statute may be considered a specific intent offense if it provides that the actor must be aware of the statutory attendant circumstance.<sup>221</sup> For example, to be guilty of the crime of receiving stolen property, the defendant must know that the property is stolen property.

This third approach uses the term “general intent” to describe a *mens rea* element for *any* mental state, whether express or implied, in the definition of the offense that relates to the acts that constitute the criminal offense.<sup>222</sup> More simply, after identifying that a “specific intent” or “strict liability” offense is not at issue, courts may categorize all other offenses as “general intent” crimes.

#### b. The Model Penal Code

In 1952, the American Law Institute met to create a model code that would help guide lawmakers, both legislators and judges, to develop their criminal jurisprudence. The Model Penal Code has endeavored to provide a coherent structure to the analysis of *mens rea*. Clearly, one of the most influential aspects of the Model Penal Code has been the sections related to *mens rea*. In § 2.02 of the Code, the writers identify and classify four levels of mental state: purposely, knowingly, recklessly, or negligently.<sup>223</sup> Each *mens rea* element is defined to apply to the circumstance in which the actor

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<sup>217</sup> *Id.* (citing *United States v. Bailey*, 444 U.S. 394, 405 (1980); *United States v. Blair*, 54 F.3d 639, 642 (10th Cir. 1995); *Harris v. State*, 728 A.2d 180, 183 (Md. 1999)).

<sup>218</sup> *Id.*

<sup>219</sup> *See e.g.*, CAL. PENAL CODE § 459 (West Supp. 2009); IOWA CODE § 713.1 (2003).

<sup>220</sup> DRESSLER, *supra* note 205, at 138.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 139.

<sup>223</sup> MODEL PENAL CODE § 2.02 (1985).

“acts”<sup>224</sup> with respect to a “material element of an offense.”<sup>225</sup> In other words, the *mens rea* applies specifically to a material element of conduct, result, or attendant circumstance.<sup>226</sup>

§2.02 General Requirements of Culpability.

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(2) Kinds of Culpability Defined.<sup>227</sup>

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<sup>224</sup> *Id.* at § 1.13 (“General Definitions. In this Code, unless a different meaning plainly is required: . . . (2) ‘act’ or ‘action’ means a bodily movement whether voluntary or involuntary; (3) ‘voluntary’ has the meaning specified in Section 2.01; (4) ‘omission’ means a failure to act[.]”).

<sup>225</sup> *Id.* at § 1.13, § 2.02.

In this Code, unless a different meaning plainly is required:

(5) “conduct” means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions;

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(9) “element of an offense” means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as

- (a) is included in the description of the forbidden conduct in the definition of the offense; or
- (b) establishes the required kind of culpability; or
- (c) negatives an excuse or justification for such conduct; or
- (d) negatives a defense under the statute of limitations; or
- (e) establishes jurisdiction or venue[.]

(10) “material element of an offense” means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct[.]

<sup>226</sup> *See id.* at § 2.02(4) (“Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.”).

<sup>227</sup> *See also id.* at § 2.02(2)(c) and (d) defining “recklessly” and “negligently,” respectively.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from

(a) *Purposely*.<sup>228</sup>

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) *Knowingly*.<sup>229</sup>

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

To compare, “purposely” focuses on the actor’s “conscious object” to engage in conduct or to cause a result, whereas “knowingly” focuses on the actor’s “aware[ness].” Both the “purposely” and “knowingly” categories use similar language to define the requisite mental state regarding an attendant circumstance: that the actor is “aware” of the existence of such circumstances. However, “purposely” seems to broaden the definition of awareness to include instances where the actor simply “*believes or hopes* that [the attendant circumstances] exist.”<sup>230</sup> The distinction between purpose and knowledge is clarified, in part, by § 2.02(7), which allows the requirement of knowledge to be satisfied by the awareness of a high probability. The Code states, “when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if

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his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

<sup>228</sup> See also *id.* § 1.13(11) (“General Definitions. In this Code, unless a different meaning plainly is required: (11) ‘purposely’ has the meaning specified in Section 2.02 and equivalent terms such as ‘with purpose,’ ‘designed’ or ‘with design’ have the same meaning.”).

<sup>229</sup> See also *id.* § 2.02(8) (“Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.”).

<sup>230</sup> *Id.* at § 2.02(2)(a)(ii) (emphasis added).

a person is aware of a high probability of its existence, unless he actually believes that it does not exist.”<sup>231</sup>

Even though the Model Penal Code has limited the mental state terms to a hierarchy of four levels—purposely, knowingly, recklessly, and negligently—it accommodates, in part, a variety of mental state terms that preceded it. Thus, according to the Model Penal Code, “‘intentionally’ or ‘with intent’ means purposely.”<sup>232</sup> Two quotes from the *Giles* majority seem to incorporate this view. For example, Justice Scalia states, “Every commentator we are aware of has concluded the requirement of intent ‘means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.’”<sup>233</sup> Further the majority writes, “The commentators come out this way because the dissent’s claim that knowledge is sufficient to show intent is emphatically *not* the modern view.”<sup>234</sup> Indeed, it is not the “modern” view. But this point is in complete contradiction to Justice Scalia’s insistence that the scope of the confrontation right and its exceptions are defined by parameters in place at the time of the founding.

### C. INFERRING INTENT

For a justice system to deprive a criminal defendant of a constitutional right, fairness requires an adequate justification. To that end, all the Justices agree that something more than merely causing the witness’s absence is required before a defendant is held to have forfeited the right of confrontation. Closely examining each of the five opinions in *Giles*, one can cobble together common ground from the differing viewpoints. Although the reasoning for establishing the boundaries of this common ground differ, the diversity of rationales actually reinforce one another, giving more stable guidance to lower courts.

The constitutional right grants the right to a procedure: confrontation. As with other constitutional rights, the confrontation right can be waived.<sup>235</sup>

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<sup>231</sup> *Id.* at § 2.02(7).

<sup>232</sup> *Id.* at § 1.13(12).

<sup>233</sup> *Giles v. California*, 128 S. Ct. 2694, 2687–88 (2008) (citing 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:134 (3d ed. 2007); 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 804.03[7][b] (J. McLaughlin ed., 2d ed. 2008); 2 KENNETH S. BROWN, MCCORMICK ON EVIDENCE 176 (6th ed. 2006)).

<sup>234</sup> *Giles*, 128 S. Ct. at 2688 (citing 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.2 (2d ed. 2003)).

<sup>235</sup> *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (holding that a valid waiver is “ordinarily an intentional relinquishment or abandonment of a known right or privilege” by the accused).

As in a guilty plea, a knowing, voluntary, and intelligent waiver effectively waives the right of confrontation.<sup>236</sup> However, as with other constitutional rights, a criminal defendant's constitutional rights may be impliedly waived, or forfeited. For example, those convicted of a felony may lose their Second Amendment right to carry guns<sup>237</sup> or their right to vote.<sup>238</sup> Similarly, the forfeiture of a right to confrontation by wrongdoing is an implied or imputed waiver. The right of confrontation is imputedly waived when a defendant is voluntarily absent from trial<sup>239</sup> or is so disruptive to the court proceedings that removal from the courtroom is necessary.<sup>240</sup> The forfeiture by wrongdoing exception relies upon a similar rationale for depriving the defendant of the confrontation right—that the defendant's own conduct justifies the forfeiture.

### *1. The Problem with Purpose*

Justice Breyer's dissent correctly observes that basing the forfeiture rule on proof of the defendant's purpose rather than intent "creates serious practical evidentiary problems."<sup>241</sup> Given that there is no clear precedent that compels the Court to require purpose rather than intent, the dissent criticizes the inference the majority draws from an absence in the history of cases. Put simply, there is too little precedent to draw firm conclusions.<sup>242</sup> Indeed, Justice Breyer finds the majority's requirement of purpose or motive to be inconsistent with the "basically ethical objective" of the forfeiture exception.<sup>243</sup> If the defendant is able to keep the witness from testifying in court, he has "take[n] advantage of his own wrong"<sup>244</sup> whether

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<sup>236</sup> *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969).

<sup>237</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008).

<sup>238</sup> *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974); see also Angela Behrens, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231 (2004).

<sup>239</sup> *Taylor v. United States*, 414 U.S. 17, 19 (1973).

<sup>240</sup> *Illinois v. Allen*, 397 U.S. 337, 342–43 (1970); see also *Faretta v. California*, 422 U.S. 806, 837 (1975) (holding that Sixth Amendment rights are personal to the accused).

<sup>241</sup> *Giles v. California*, 128 S. Ct. 2694, 2699 (2008) (Breyer, J., dissenting).

<sup>242</sup> *Id.* at 2704 (citing LANGBEIN, *supra* note 130, at 248).

<sup>243</sup> *Id.* at 2699. Justice Breyer highlights that the State only introduced the unfronted statements to rebut the defendant's affirmative defense of self-defense: "To rebut the defendant's claim of self-defense and impeach his testimony, the State introduced into evidence the witness' earlier uncross-examined statements (as state hearsay law permits it to do) to help rebut the defendant's claim of self-defense." *Id.* at 2695. While not an actual factor in the forfeiture analysis, Justice Breyer seems to consider the broader context of equity in the case as a whole. It was the defendant who raised the very issue that prompted the prosecution to use the testimonial evidence.

<sup>244</sup> *Id.* at 2696. (quoting *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879)).

the act was done purposely, knowingly, or even with a reasonable belief. Using the killing to exclude the victim's statement from trial constitutes an inequity, if done with any of these mental states.<sup>245</sup> According to Justice Breyer, requiring "evidence that [the defendant] was focused on his future trial" produces "incongru[ous]" results.<sup>246</sup>

In contrast, focusing on intent, the dissent argues for also applying forfeiture to a defendant with knowledge of the result of his wrongful conduct.<sup>247</sup> Most importantly, the dissent argues that "the relevant cases suggest that the forfeiture rule would apply where the witness's absence was the *known consequence* of the defendant's intentional wrongful act."<sup>248</sup> Thus, the dissent asserts that the requisite intent is, in fact, established on the facts of *Giles*: The intent to procure the absence of the witness is established by proof of knowledge that the defendant's wrongdoing actions will cause the witness's absence.<sup>249</sup>

## 2. Clarifying Muddy Forfeiture Waters

Justice Breyer's dissent takes the position that unconfrosted testimonial statements may not have been admissible under the forfeiture doctrine at the time of the founding, but are admissible today.<sup>250</sup> He offers several alternative explanations for the absence of forfeiture arguments in dying declaration cases. As he suggests, courts have failed to explicitly separate three discrete, but interrelated, issues that continue to muddy the analytical waters of forfeiture: (a) unavailability of a witness; (b) evidence law and its hearsay exceptions, and (c) the constitutional issues presented by the Confrontation Clause.

At the time of the founding, courts discussed three legally sufficient ways to establish a witness's unavailability to testify in person, in court at a criminal defendant's trial.<sup>251</sup> Proving a witness was dead demonstrated that

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<sup>245</sup> *Id.* at 2698.

<sup>246</sup> *Id.* at 2699. Setting a lower constitutional barrier for the admission of this evidence does not replace the opportunity for jurisdictions to limit the admissibility even further through evidence law. *Id.* at 2700.

<sup>247</sup> *Id.* at 2705.

<sup>248</sup> *Id.* at 2701. Justice Breyer went on to note, "Rather than limit forfeiture to instances where the defendant's act has absence of the witness as its *purpose*, the relevant cases suggest that the forfeiture rule would apply where the witness' absence was the *known consequence* of the defendant's intentional wrongful act." *Id.*

<sup>249</sup> *Id.* at 2697–98.

<sup>250</sup> *Giles*, 128 S. Ct. at 2706.

<sup>251</sup> At the time of the founding, courts also recognized certain evidentiary privileges that rendered the witness legally unavailable to testify. *See Note, Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1455–58 (1985) (citations omitted).

it was factually impossible for the witness to appear and testify at trial.<sup>252</sup> Courts could have decided that a witness's death would be the only circumstance in which alternative forms of evidence from the witness would be admitted, but they did not. In addition to death, courts were willing to consider evidence other than live testimony from a witness who was either "unable to travel" or "kept away by the means or procurement of the prisoner."<sup>253</sup> The scope of what circumstances rendered the witness sufficiently "unable to travel" at the time of the founding would likely be very different from what modern courts would find now. Finally, even a witness who is alive and able to travel may still be legally unavailable to testify at trial because the witness was "kept back from appearing by the means and procurement" of the defendant.<sup>254</sup> Thus, even though it may be physically possible for the witness to appear, the witness is practically absent and courts found that a legally sufficient reason to characterize the witness as unavailable to testify.

Historically, the preferred form of witness evidence was live, in court, sworn testimony. However, if a witness had previously made statements out of court and the statements were being offered to prove the truth of the matter asserted within the statements, evidence law generally excluded the

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For hearsay purposes in modern evidence law, other circumstances also satisfy the unavailability requirement. *See e.g.*, FED. R. EVID. 804.

Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

<sup>252</sup> *See Giles*, 128 S. Ct. at 2683 (citing *Lord Morley's Case*, 6 How. St. Tr. 769, 770 (H.L. 1666); 2 WILLIAM HAWKINS, *A TREATISE ON THE PLEAS OF THE CROWN* 425, 429 (4th ed. 1762)).

<sup>253</sup> *Giles*, 128 S. Ct. at 2683.

<sup>254</sup> *See GILBERT*, *supra* note 170, at 214–15.

reiteration of those statements at trial. The rationale for exclusion was based on assumptions about the credibility and reliability of such statements. Given that such statements were likely not made under oath and subject to cross-examination, the information was considered less reliable.<sup>255</sup> There were, however, exceptions.

Three exceptions are particularly relevant to our discussion here. First, an exception was made for the witness's prior testimony. While perhaps not as informative as live testimony, prior testimony was sworn and considered sufficiently reliable.<sup>256</sup> Second, an exception was made for a witness's dying declaration.<sup>257</sup> The rationale was that the witness would have no motive to lie if he were about ready to meet his maker.<sup>258</sup> Third, an exception was made for a witness's prior statement, regardless of the content or the circumstances of the statement, if the witness was unavailable because he was "kept away by the means or procurement of the prisoner."<sup>259</sup>

All the other exceptions to the modern hearsay rule are based on the assumption that circumstances make the statement sufficiently reliable to be fairly considered in accurately determining the defendant's culpability.<sup>260</sup> The underlying reasoning for the forfeiture by wrongdoing exception to the hearsay rule is completely different.<sup>261</sup> It is based not on assumptions of the

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<sup>255</sup> *Giles*, 128 S. Ct. at 2705 (Breyer, J., dissenting). "[A]t common law, there existed both oath-based and cross-examination-based rationales for the hearsay rule, with the latter only becoming dominant around the turn of the 19th century." *Id.* (citing LANGBEIN, *supra* note 130, at 245–246, nn. 291–92).

<sup>256</sup> *Mattox v. United States*, 156 U.S. 237, 250 (1895) (finding no Confrontation Clause violation to admit the transcribed copy of the reporter's stenographic notes of the prior testimony of two deceased witnesses at defendant's retrial for murder because the witnesses were sworn and cross-examined).

<sup>257</sup> *King v. Woodcock*, 1 Leach 500, 501, 168 Eng. Rep. 352, 352–53 (1789).

<sup>258</sup> See *Mattox*, 156 U.S. at 243–44. The Court noted, "[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath." *Id.* at 244.

<sup>259</sup> JOHN FREDERICK ARCHBOLD, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES 85 (1822).

<sup>260</sup> Anthony Bocchino & David Sonenshein, *Rule 804(B)(6)—The Illegitimate Child Of The Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 MO. L. REV. 41, 41–53 (2008).

<sup>261</sup> Other types of statements, which fall within the definition of hearsay as defined by FED. R. EVID. 801(a)–(c), are expressly excluded from the definition. Certain prior statements by a witness who testifies at trial and admissions by a party-opponent are excluded. *Id.* at 801(d). Admissions by a party-opponent are admissible "on the theory that their admissibility in evidence is the result of the adversary system." *Id.* at 801 advisory committee note. Like the forfeiture by wrongdoing exception, the rationale of the

reliability of the content of the statements, but rather on the overarching concept of equity—that it would be unfair to allow a defendant to benefit from the defendant’s own effort to interfere with the judicial process.

Justice Breyer argues for a broader, more permissive constitutional rule and then suggests that jurisdictions can adopt a narrower hearsay rule.<sup>262</sup> While the constitutional right to confrontation may be valued more highly than the evidentiary issue of reliability, it does not compel a more restrictive standard.<sup>263</sup> The dissent’s firm reminder to disentangle the constitutional and evidentiary issues is essential. While related, they must be considered separately. Such separation proves difficult, as even the *Giles* majority reverted back to using evidence law to comment on the constitutional question.<sup>264</sup> The *Giles* majority, surprisingly in light of *Crawford’s* directive to separate evidentiary concerns from constitutional concerns, attempts to rebut the State’s explanation that the standard for a constitutional confrontation forfeiture exception may have been a different standard than the evidentiary hearsay forfeiture exception standard, by reconnecting the two and stating that they “stem from the same roots.”<sup>265</sup>

In *Crawford*, the Court reoriented its perspective on the Confrontation Clause back to the founding. In doing so, the Court determined that the focus of the Confrontation Clause was on the procedural guarantee rather than the substantive result of reliability. In conferring a right to a criminal defendant to “confront the witnesses against him,” the Confrontation Clause was meant to provide the defendant an opportunity to cross-examine the witness. Again, courts could have decided that this rule was absolute but they did not. In *Crawford*, the Court acknowledged that exceptions existed at the time of the founding. One exception was for dying declarations. Another was for circumstances that satisfied a constitutional “forfeiture by wrongdoing” standard. The scope of this exception, in the context of constitutional interpretation, is what is at issue in *Giles*.

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admissions by a party-opponent rule is based on principles of fairness and equity rather than trustworthiness. *See id.*

<sup>262</sup> *Giles v. California*, 128 S. Ct. 2694, 2700 (2008) (Breyer, J., dissenting).

<sup>263</sup> The Confrontation Clause does not protect a defendant from unreliable but constitutionally-admissible nontestimonial hearsay if it is admissible according to the applicable rules of evidence. This allows the rules of evidence, which are determined by a more democratic political process, to set the boundaries of admissibility. Structurally, this allows the courts interpreting the Constitution to set the minimum requirements and the legislatures and rule-making bodies have the ability to develop further requirements. Justice Scalia’s own preference for judicial restraint would arguably point him toward a standard that would allow the democratic political process to decide these issues.

<sup>264</sup> *Giles*, 128 S. Ct. at 2687–88.

<sup>265</sup> *Id.* at 2686 (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970)).

Justice Breyer characterizes the practice of admitting unconflicted statements under the forfeiture exception as a recent evidentiary development.<sup>266</sup> However, some may argue that even Justice Breyer's position does not go far enough to protect victims. Justice Breyer consistently refers to the severe circumstances when a defendant has rendered the witness unavailable by killing the witness, stating "the relevant circumstances . . . are likely to arise almost exclusively when the defendant murders the witness"<sup>267</sup> and "[o]rdinarily a murderer would know that his victim would not be able to testify at a murder trial."<sup>268</sup> Justice Breyer quotes Justice Souter's concurrence which considered the application of the forfeiture exception within the domestic violence context and hypothesized using evidence of a "classic abusive relationship" to infer the requisite purposive intent for the forfeiture doctrine.<sup>269</sup>

### 3. *The Forfeiture Exception in Domestic Violence Cases*

At its core, forfeiture's equitable roots are designed to protect against wrongdoing. While all the Justices recognize this goal, the *Giles* opinions place different emphasis on the types of wrongdoing and the consequences of each type. The allegedly criminal conduct at issue at trial may or may not be the wrongdoing that constitutes grounds for forfeiture. There are several possible scenarios. First, a witness's testimonial statements can describe allegedly criminal conduct that is the basis for a criminal charge. If followed by the defendant's subsequent wrongdoing that procures the witness's absence for a court proceeding on the issue of the criminality of that prior conduct, the question before the trial court is whether the testimonial statements relevant to the initial criminal conduct can be admissible. In a second scenario, the testimonial statements describe allegedly criminal conduct that is precisely the conduct claimed to be the defendant's wrongdoing that procures the witness's absence. The court would need to make a preliminary determination regarding the wrongdoing as grounds for admitting the testimonial statement for the culpability of the defendant for the same conduct. Third, like *Giles*, prior testimonial statements can describe a prior, uncharged incident. If the defendant then engages in allegedly criminal conduct that also constitutes the wrongdoing which procures the witness's absence, the issue is the admissibility of the

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<sup>266</sup> *Id.* at 2706 (Breyer, J., dissenting).

<sup>267</sup> *Id.* at 2707.

<sup>268</sup> *Id.* at 2708.

<sup>269</sup> *Id.*

prior statements which relate indirectly to the defendant's culpability for the charged conduct.

The forfeiture exception is concerned with and related to the obstruction of the judicial process. As the majority fairly emphasizes in *Giles*, the wrongdoing is limited to conduct "designed to prevent a witness from testifying."<sup>270</sup> At the core of the forfeiture exception, therefore, is the purpose of protecting the integrity of court proceedings. However, Justice Scalia's narrowing of forfeiture, based on a misreading of the common law, goes too far. Justice Souter's concurrence adopted a broader approach to forfeiture, emphasizing equity. Similarly, the dissent cited cases in other areas of law that illustrate the underlying equitable principle of forfeiture: that regardless of the purpose of the defendant's killing, the result is that the defendant is denied any benefit associated with killing.<sup>271</sup>

In each of the three scenarios described above, the prosecution would use the testimonial hearsay to help prove the charged conduct. Proving the defendant had any intent to prevent the declarant from future testimony is an easier inference to make in the first two scenarios, and perhaps more difficult to make in the third. However, when the subsequent wrongdoing is killing, as in *Giles*, and both incidents are related to an ongoing relationship of violence, the inference of the defendant's mental state could be equally compelling. As the majority describes, the purpose of a forfeiture rule is to prevent "an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them."<sup>272</sup>

Especially in contexts involving complex relationship dynamics between the defendant on the witness, such as domestic violence and gang-related cases,<sup>273</sup> courts should not strictly adopt Justice Scalia's

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<sup>270</sup> *Giles*, 128 S. Ct. at 2686 (Souter, J., concurring). "But as the evidence amply shows, the 'wrong' and the 'evil Practices' to which these statements referred was conduct *designed* to prevent a witness from testifying." *Id.*

<sup>271</sup> To analogize, Justice Breyer referenced other areas of law that are based on equitable principles and treat wrongdoing similarly. For example, neither the life insurance proceeds nor the assets of the inheritance is given to the killer, irrespective of the finding that the killer killed for the insurance or inheritance assets. *Id.* at 2697 (Breyer, J., dissenting).

<sup>272</sup> *Id.* at 2686 (Souter, J., concurring).

<sup>273</sup> In *United States v. Miller*, a gang-related case, the court stated that "although a 'finding that [defendants'] purpose was to prevent [a declarant from] testifying,' is relevant, such a finding is not required." 116 F.3d 641, 668 (2d Cir. 1997). For further discussion of this issue, see Yee, *supra* note 10. See also Donald A. Dripps, *Controlling the Damage Done by Crawford v. Washington: Three Constructive Proposals*, 7 OHIO ST. J. CRIM. L. 521, 522 (2010) (citing *Witness Intimidation: Showdown in the Streets—Breakdown in the Courts, Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103d Cong. 25 (1994) (statement of Gerald Shur, Senior Associate Director, Office of Enforcement Operations, Criminal Div., U.S. Dep't of Justice)).

unjustifiably rigid approach to forfeiture but should use an approach that is more flexible and considers intent and equity in the context of institutional factors that might motivate a defendant to make a witness unavailable. This would ultimately suggest that a defendant's knowing conduct that leads to unavailability can still trigger forfeiture, even if there is no overt purpose or specific intent.

For example, Professor Tom Lininger has attempted to bring some coherence to this area and its implication for domestic violence cases, where witnesses are frequently unavailable to testify due to some conduct of the defendant. He proposes that intent be inferred in the following three circumstances: violation of a restraining order issued for the victim's protection;<sup>274</sup> the commission of a violent act against the victim during the pendency of judicial proceedings;<sup>275</sup> and when there is a history of "abuse and isolation."<sup>276</sup> These factors provide a much more useful approach to addressing forfeiture than focusing on a singular assessment of purpose. However, given that the confrontation right applies in all criminal cases, not just domestic violence,<sup>277</sup> the Court has rightly strived to set a standard clear enough to be applied, yet flexible enough to address unforeseen circumstances.<sup>278</sup>

Although six Justices joined the majority and three joined the dissent, the nine Justices of the *Giles* Court actually impliedly share some common ground in requiring proof of some mental state for forfeiture by wrongdoing. It is this narrow common ground that lower courts should

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<sup>274</sup> Lininger, *supra* note 15, at 898.

<sup>275</sup> *Id.* at 900.

<sup>276</sup> *Id.*; see also Deborah Tuerkheimer, *Control Killings*, 87 TEX. L. REV. 117 (2009) (urging courts to focus on the connection between the pattern of past domestic violence and present killing in considering the defendant's intent to silence the witness).

<sup>277</sup> *Giles*, 128 S. Ct. at 2693. As Justice Scalia caustically accuses the dissent, "Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women?"

<sup>278</sup> Contrast the more severe proposal recommended by Professor Donald Dripps who suggests revising the forfeiture by wrongdoing exception to the hearsay rule to provide a presumption of forfeiture when the defendant previously assaulted the witness or the witness's family. The amended Federal Rule of Evidence 804(b)(6) would provide:

In a criminal case, upon proof by a preponderance of the evidence that the accused, at any time, assaulted an unavailable witness, or threatened to inflict physical harm upon an unavailable witness or any member of the witness's immediate family, the court may presume forfeiture of both hearsay and Confrontation Clause objections. This presumption may be rebutted by proof by a preponderance that the accused did not engage in, and did not acquiesce in, wrongdoing intended to cause the witness not to testify.

Dripps, *supra* note 273, at 557.

look to in interpreting and applying *Giles*' forfeiture by wrongdoing analysis.<sup>279</sup> While Justice Scalia's opinion makes a case for interpreting the intent required to be purposive intent only, a fair reading of the common law at the time of the founding construes intent to encompass both purposive and knowing mental states.<sup>280</sup> Such a reading is not inconsistent with the analysis by Justices Souter and Ginsburg in their concurrence, which acknowledged that the historical evidence was not clear.<sup>281</sup> However, as Justice Souter stated, "Equity demands something more than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying."<sup>282</sup> Moreover, the three Justices joined in the dissent share this common ground: that the forfeiture doctrine requires the prosecution to prove the defendant's intent.<sup>283</sup> But the dissent broadly outlines the government's burden, stating "that the prosecution in such a case need show no more than intent (based on knowledge) to do so."<sup>284</sup>

The common ground among a majority of the Justices in *Giles* becomes even firmer in the domestic violence context.<sup>285</sup> Importantly, the

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<sup>279</sup> In *Giles*, four of the six Justices who joined the majority wrote or joined concurring opinions. One scholar has suggested that a simple concurrence "should be granted precedential weight to the extent that it is numerically necessary to procure a majority and that it is compatible with the majority opinion." Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2805 (1995). Justices Souter and Ginsburg were necessary to form a majority in *Giles* and the equitable approach discussed in their concurrence is compatible with Justice Scalia's majority opinion.

Note also, as is well-established, an opinion of the Supreme Court with no clear majority on both result and reasoning should, at a minimum, be read narrowly. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [the majority], the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotations omitted)). For a normative defense of this "narrowest grounds" approach to constitutional interpretation see Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321 (2000) (using social choice theory to explain why the narrowest-ground approach to interpreting plurality and fragmented vote cases is desirable).

<sup>280</sup> See *supra* notes 205–222 and accompanying text.

<sup>281</sup> See *supra* notes 99–103 and accompanying text.

<sup>282</sup> *Giles*, 128 S. Ct. at 2694 (Souter, J., concurring).

<sup>283</sup> *Id.* at 2701–02 (Breyer, J., dissenting).

<sup>284</sup> *Id.* at 2705 (Breyer, J., dissenting).

<sup>285</sup> *Id.* at 2695 (Souter, J., concurring joined by Ginsburg) (supporting Part II.E of the majority opinion); see Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552 (2007); Tuerkheimer, *supra* note 276; Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of "Domestic Violence Context"*, 13 LEWIS & CLARK L. REV. 711 (2009).

majority decision itself specifically addresses the application of its interpretation of the forfeiture by wrongdoing rule in the domestic violence context.<sup>286</sup> Justice Scalia himself observed:

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.<sup>287</sup>

Although the majority quibbles with the dissent, denying that such an analysis is “nothing more than ‘knowledge-based intent,’”<sup>288</sup> the semantic differences cannot overshadow the fundamental agreement demonstrated by this description. Whether one calls it inferred intent or knowledge-based intent, practically this includes a mental state that is broader than explicit purpose, but excludes a mental state that is only objectively negligent. As the concurrence further describes the level of intent required in a domestic abuse case, the Sixth Amendment simply requires “some degree of intent to thwart the judicial process[.]”<sup>289</sup>

To illustrate what evidence would suffice to prove that requisite level of intent the concurrence suggests that “the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process.”<sup>290</sup> The three Justices joined in the dissent quote this language in agreement,<sup>291</sup> commenting further that

a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim. Doing so when, in fact, the abuser may have had other matters in mind apart from preventing the witness from testifying, is in effect not to insist upon a showing of “purpose.”<sup>292</sup>

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<sup>286</sup> *Giles*, 128 S. Ct. at 2692–93.

<sup>287</sup> *Id.* at 2693. The Court sent the case back to allow the trial court to consider the intent of the defendant on remand. *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 2695 (Souter, J., concurring).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 2708. (“Consequently, I agree with this formulation, though I would apply a simple intent requirement across the board.”).

<sup>292</sup> *Id.* (Breyer, J., dissenting).

## V. CONCLUSION

Judicial philosophies are based in part on the degree to which the judge's interpretive method gives weight to the extra-textual sources of information and the degree to which the judge is dedicated to preserving the application of the original meaning in the present context. As a textualist and an originalist, Justice Scalia works to identify the original meaning of the constitutional text and then attempts to apply that historical meaning to the present-day issue before the Court. Other Justices on the Court have been less reliant on history as a primary source for information about the meaning of the Confrontation Clause.<sup>293</sup> For example, Justice Breyer's jurisprudence is founded on the idea that the Constitution is a document that was written to adapt to the present circumstances of an issue before the Court by the Court's consideration of the purposes of the law and the likely consequences of its interpretation.<sup>294</sup>

Elsewhere, Justice Scalia has revealed that, in a crunch, he may be a "faint-hearted" originalist.<sup>295</sup> This label has generated much criticism, particularly within the originalist camp of constitutional interpretation. Whatever one's larger views of constitutional methodology, however, to the extent constitutional interpretation relies on descriptions of the common law it should make every effort to describe it fairly and accurately. In the case of forfeiture, the common law foundations of Justice Scalia's constitutional interpretation are based on an absence of cases, not on well-established common law principles. That is not a very solid foundation for any originalist method to discern constitutional meaning.

As I have argued in this Article, the common law principles, best understood through the history, do not support Justice Scalia's inference about how the common law of forfeiture applies. In this recent opinion in the *Crawford* line of cases, Justice Scalia may have revealed himself as not only a faint-hearted originalist, but as a faint-hearted scholar of the common

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<sup>293</sup> For example, Justice Thomas wrote, "There is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean." *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring) (citing *California v. Green*, 399 U.S. 149, 176 n.8 (1970) (Harlan, J., concurring)). In *Green*, Justice Harlan noted, "[T]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into [its] intended scope . . ." *Green*, 399 U.S. at 173-74 (Harlan, J., concurring).

<sup>294</sup> See, e.g., JUSTICE STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) (describing an interpretive approach based on the principle of "active liberty" which endeavors to enable democracy); Stephen Breyer, *On Handguns and the Law*, N.Y. REVIEW OF BOOKS, Aug. 19, 2010 (excerpt from STEVEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010)) (discussing how history is an insufficient resource for interpreting the Constitution)).

<sup>295</sup> Scalia, *supra* note 19.

law. In the context of longstanding legal processes, like the criminal law, if these premises are not an accurate basis for an originalist interpretation of the Confrontation Clause, that interpretation is left with a shifting and weak foundation. In fact, the forfeiture doctrine has a long history and its common law foundations are not nearly as narrow as Justice Scalia suggested. Given that the Court's decision in *Giles* is itself highly fragmented on its reasoning, lower courts and litigants have a firm ground for reading the decision on the narrowest grounds and interpreting forfeiture more expansively than Justice Scalia's majority opinion in *Giles* appears to invite. Considering Justice Scalia's own example regarding domestic violence cases,<sup>296</sup> it would seem especially important that courts be aware that "design" or "purpose" can be established by circumstantial evidence that the witness's absence is a known consequence of the defendant's acts.

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<sup>296</sup> See *supra* note 287.