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## *Giles v. California: Avoiding Serious Damage to Crawford's Limited Revolution*

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GILES V. CALIFORNIA: AVOIDING SERIOUS DAMAGE TO  
CRAWFORD'S LIMITED REVOLUTION

by  
Robert P. Mosteller\*

*This Article endorses the result in Giles v. California, which limited the reach of the forfeiture through wrongdoing exception to those instances where “the defendant engaged in conduct designed to prevent the witness from testifying.” Largely for practical and policy reasons, I find this result important and proper. Given the apparently limited coverage of out-of-court statements by the confrontation doctrine under the testimonial statement approach, expansive application of the forfeiture doctrine could have gutted much of its already restricted protection.*

*I also briefly sketch where I believe the new confrontation doctrine that Crawford v. Washington produced stands in protecting the rights of defendants against problematic hearsay statements. My judgment is that these developments have been important and largely positive but limited in impact. Moreover, the mini-revolution that Crawford spawned appears to have largely run its course, and the more recent decision of the Court in Melendez-Diaz v. Massachusetts which concluded that forensic certificates are testimonial, does not change that assessment.*

*Finally, Giles adds further evidence of the limited power of originalism to determine specific applications for the Confrontation Clause doctrine in a modern world that differs, both in legal structure and values, from the Framing era. Fortunately, the splintered decisions and analysis suggest that this misguided approach is losing its hold on the Court's confrontation analysis and that pragmatic and policy concerns may play a stronger role on future developments in this area.*

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## I. INTRODUCTION

The decision of the United States Supreme Court in *Crawford v. Washington* has been accurately described as revolutionary.<sup>1</sup> As time passes, however, my sense is that it is more revolutionary in analytical method than in changed outcomes affording greater confrontation protection to defendants when the prosecution offers hearsay against them. I do not want to denigrate *Crawford's* significant impact. Clearly, protection in some extremely problematic areas, such as statements by criminal co-participants taken in police custody that incriminate both the person making the statement and the defendant, is markedly improved, and those statements are now uniformly excluded by *Crawford's* clear command absent confrontation. As to such statements and statements of witnesses to the police about past crimes, excluded by *Davis v. Washington*, the accused now has real protection.<sup>2</sup>

Nevertheless, I view the Confrontation Clause rulings under the "testimonial statement" approach sketched so far by the Supreme Court with a sense of regret. They appear to have left many unreliable, incriminating, and accusatory hearsay statements offered against a criminal defendant admissible and unregulated, despite the complete absence of confrontation.<sup>3</sup> As far as the results are concerned, rather than the analysis, most rulings under the testimonial statement approach are largely the same as they were under the vanquished system of *Ohio v. Roberts*, which admitted most hearsay and did so through an easily satisfied reliability assessment rather than requiring confrontation.<sup>4</sup>

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<sup>1</sup> 541 U.S. 36 (2004).

<sup>2</sup> 547 U.S. 813 (2006).

<sup>3</sup> Of course, those who find *Crawford's* testimonial approach clearly correct will respond that the Framers meant that none of these unreliable, incriminating, and accusatory statements should be covered by the Clause. I remain unconvinced that the Court's approach, which is certainly a plausible construction, applied in the narrow fashion that its decisions permit and the lower courts have generally employed, captures either the true meaning or the full power of the Sixth Amendment's right of the accused "to be confronted with the witnesses against him." U.S. CONST. amend. VI. I continue to hope that a more robust approach will be embraced that broadens the scope of protection and encourages confrontation of available declarants.

<sup>4</sup> 448 U.S. 56 (1980). An example of how under *Crawford* results have changed as to one class of statements but remained the same for others as they were under *Roberts* can be seen in cases involving children. The lower courts with a relatively high degree of uniformity exclude statements made by children to police officers, which

Although the new doctrine and its reach have not been fully spelled out, an outline of much of its perimeter appears to have taken shape.<sup>5</sup> Rather than producing a substantive revolution barring admission of unconflicted hearsay against the accused or producing more actual confrontation, *Crawford* presently appears to have been somewhat more of a fascinating paradigm shift in analysis that produces largely the same outcomes.

This Article has two major components and a new installment of an earlier made point. The first major Part sketches out roughly where the new confrontation doctrine stands as a protector of the accused against unconflicted hearsay. As stated above, my judgment is that the

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are virtually always made after an emergency has ended, but admit similar statements with regard to their accusatory content made to family members, teachers, and medical personnel. See Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 944–50 (2007) [hereinafter Mosteller, *Exceptions to Confrontation*]. See also *id.* at 937–43 (noting that the Supreme Court suggested these different results as to virtually identical accusatory statements in *Crawford* where it suggested that the decision in *White v. Illinois*, may have been in error but noting only the statement made to “an investigating police officer”). *White*, 502 U.S. 346 (1992). Indeed, in *Whorton v. Bockting*, the Court ruled that the testimonial statement approach offered even less protection than *Roberts*, freeing unreliable nontestimonial statements from any Confrontation Clause scrutiny. *Whorton*, 549 U.S. 406, 419–20 (2007). See discussion *infra* note 6.

<sup>5</sup> In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court held that forensic certificates prepared by government laboratories that established that the white powder possessed by the defendant was cocaine was testimonial and required the testimony of an analyst. How that case fits into this pattern of a serviceable but constrained doctrine is a little more difficult to assess, and its long-term impact on development of the doctrine is somewhat uncertain. Although Justice Scalia may have overstated the simplicity of the analysis given the strident disagreement of the dissent, he appeared largely accurate in terms of the logic of the testimonial approach in stating that “[t]his case involves little more than the application of our holding in *Crawford*.” *Id.* at 2542 (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

The certificates at issue were formal documents that stated that the substance found in the defendant’s possession was cocaine, which is the precise testimony the analysts would be expected to provide if called at trial. *Id.* at 2532. *Melendez-Diaz* is firm in its resolution that forensic certificates prepared by government laboratories are testimonial, which has important practical consequences for how the government must prove its case when such evidence is involved, but there are suggestions that the victory is precarious and could prove to be a narrow one. The case was decided by a five-to-four vote, and Justice Kennedy’s dissent voiced some skepticism of the entire testimonial concept in his protest that “[t]he Court’s reliance on the word ‘testimonial’ is of little help, of course, for that word does not appear in the text of the Clause.” *Id.* at 2544 (Kennedy, J., dissenting). Finally, the Court quickly granted certiorari in *Briscoe v. Virginia*, to examine the constitutionality of procedural limitations that may be imposed on the confrontation promised by *Melendez-Diaz*. *Briscoe*, 129 S. Ct. 2858 (2009). With the exception of Justice Scalia, its architect, the testimonial approach appears no longer to provide a broad animating mandate for the Court. The impact of *Melendez-Diaz* is not fully known, but its extension of the logic of the testimonial approach to forensic certificates does not promise an expansive reach to the testimonial doctrine.

developments have been important and largely positive, but limited. Moreover, it appears that the mini-revolution has basically run its course.

The second major Part of the Article examines and endorses the result in *Giles v. California*, which limited the reach of the forfeiture through wrongdoing exception to those instances in which “the defendant engaged in conduct *designed* to prevent the witness from testifying.”<sup>6</sup> Largely for practical and policy reasons, I find this result important and proper. Given the apparently limited coverage of out-of-court statements by the confrontation doctrine under the testimonial statement approach, expansive application of the forfeiture doctrine could have gutted much of its already restricted protection.<sup>7</sup>

The Justices’ disagreement regarding analysis of Framing-era case-law adds a sub point that further illustrates my argument that originalism has limited power to point to, let alone mandate, specific applications for the Confrontation Clause in a modern world that differs both in legal structure and values. Of course, constitutional text and the history of the hearsay rule, its exceptions, and what that history might tell us about the understanding of the Confrontation Clause are points from which all who would speak to the proper scope of the right should take guidance. I believe we have once again seen that much interpretation is required from meager sources to determine what the state of the common law was, and this is just the first step.<sup>8</sup> The task, which is to determine what the legal history should mean for modern practice, becomes even more conceptually difficult.<sup>9</sup> Perhaps broad outlines are discernable through

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<sup>6</sup> 128 S. Ct. 2678, 2683 (2008) (describing the scope of the common law forfeiture rule).

<sup>7</sup> In addition, the Confrontation Clause now has no application to statements not considered testimonial. In *Whorton*, the Court stated: “[u]nder *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.” *Whorton*, 549 U.S. at 420 (citing *Roberts*, 448 U.S. at 56). Thus, the statements excluded by the Supreme Court in *Idaho v. Wright*, would now likely no longer be examined at all under the Confrontation Clause. *Wright*, 497 U.S. 805 (1990). See generally Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford’s Birth Did Not Require that Roberts Had to Die*, 15 J.L. & POL’Y 685, 722 (2007) [hereinafter Mosteller, *Constitutional Criminal Procedure*] (noting that *Wright* is quite likely no longer viable as a Confrontation Clause case because the statements would be considered nontestimonial, and that generally, the area of statements by children was one of the few situations where the reliability analysis of *Roberts* had resulted in the exclusion of unconflicted hearsay).

<sup>8</sup> See Mosteller, *Exceptions to Confrontation*, *supra* note 4, at 923–33 (discussing the difficulty of knowing what the Framers knew regarding English cases decided prior to the enactment of the Confrontation Clause but only available in America in their present form long afterward).

<sup>9</sup> See Mosteller, *Constitutional Criminal Procedure*, *supra* note 7, at 718–22 (discussing the difficulty of knowing and translating history into application in a very different environment).

this process, but specific results rarely can be determined by originalism. Instead, I believe it is usually an indirect form of value selection couched in the choice of historical construction of hearsay law.

One certainly finds discord in the multiple opinions in *Giles* and some evidence of frustration with the delegation of important policy issues to case analysis of a distant and only vaguely perceived age. The hopeful sign in these disparate opinions is that that the Confrontation Clause may in the future be shaped more directly by considerations of policy and doctrinal prudence.

## II. THE COVERAGE AND IMPACT OF *CRAWFORD'S* TESTIMONIAL CONCEPT

In contrast to *Ohio v. Roberts*, which provided protection that was figuratively “a mile wide and an inch deep,” *Crawford* establishes protection that is deep but apparently narrow. It provides real bite to the hearsay that it defines as covered by the Confrontation Clause, which are “testimonial” statements. If such hearsay has not been subject to confrontation in some earlier trial or trial-like hearing, or if the person who made the statement is not presently subject to confrontation, then it is excluded unless it falls within one of a quite limited number of exceptions.

The chief limiting factor on the scope of *Crawford's* reach is not whether it falls within an exception, because the exceptions are generally narrow. Rather, the limitation primarily flows from the apparently restrictive nature of the “testimonial” concept as that term is being developed by the Court. Even though an incriminating, unconfrosted statement is offered to convict the defendant, it is not covered at all by the Confrontation Clause unless the statement is deemed testimonial.

To date, the Court has held that two types of statements are definitely testimonial. First, in *Crawford*, it held that statements by co-participants in a crime made to the police in response to interrogation and while in custody are testimonial. Second, in *Davis v. Washington*, the Court ruled that statements made to the police in the field are testimonial if they concern past events and are not made during an ongoing emergency.<sup>10</sup> *Davis* also eliminated a number of possible formalistic requirements of *Crawford*, concluding that a testimonial statement need not be made while the witness is in custody,<sup>11</sup> or in

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<sup>10</sup> 547 U.S. 813 (2006). I mean generally to describe here the second category of statements within Confrontation Clause protection but without using the Court's technical detail, which requires that “the primary purpose of the interrogation [must be] to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* at 822.

<sup>11</sup> *Id.* at 830 (concluding the statement made by Amy Hammon to the police was formal enough even though not made after *Miranda* warnings at the station house).

response to police questioning,<sup>12</sup> and it need not be embodied in a witness statement, but could be contained in officer notes or memory.<sup>13</sup> However, the *Davis* Court did unequivocally state that “formality is . . . essential to testimonial utterance.”<sup>14</sup> Specifically, it concluded that “It imports sufficient formality . . . that lies to [police] officers are criminal offenses.”<sup>15</sup>

Although the issues have not been clearly addressed, the apparent direction of the Supreme Court is toward application of the Confrontation Clause primarily to statements made to investigative agents, likely with few exceptions. Statements of co-conspirators are not covered by the testimonial concept because they must be made “in furtherance of the conspiracy” and therefore “would probably never be . . . testimonial.”<sup>16</sup> Most business records clearly are not covered for similar reasons because their general purpose is not the production of testimony.<sup>17</sup>

In *Giles*, Justice Scalia stated that “[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment” would not be covered by the testimonial concept.<sup>18</sup> The sweep of Scalia’s statement may have been slightly too broad, but it reveals how the prime architect of the new Confrontation Clause doctrine presumes the law will develop. *Crawford*

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<sup>12</sup> *Id.* at 822 n.1 (“The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.”).

<sup>13</sup> *Id.* at 826 (concluding that the confrontation right could not be evaded by having a “note-taking policeman recite the unsworn hearsay testimony of the declarant” rather than presenting it in formal written statement form, and that the clause covered both a “writing signed by the declarant or embedded in the memory (and perhaps notes) of [a police] officer”).

<sup>14</sup> *Id.* at 830 n.5.

<sup>15</sup> *Id.* at 831 n.5; *See also id.* at 826–27 (“The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood.” (citing examples of federal and state criminal punishment for false statements to investigators)); Robert P. Mosteller, *Softening the Formality and Formalism of the “Testimonial” Statement Concept*, 19 REGENT U. L. REV. 429 (2007) (discussing generally the effect of *Davis* to reduce the rigidity of the testimonial concept, certainly as suggested by the definition taken from Justice Thomas’s concurring decision in *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

<sup>16</sup> *Giles v. California*, 128 S. Ct. 2678, 2691 n.6 (2008).

<sup>17</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2539–40 (2009) (“Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.”); *Crawford v. Washington*, 541 U.S. 36, 56 (2004) (“Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.”).

<sup>18</sup> *Giles*, 128 S. Ct. at 2692–93.

suggests that statements to friends and neighbors typically would not be covered because they were not made with any thought to being used in court,<sup>19</sup> and *Davis* further suggests that in most situations, they also lack the formality required of testimonial statements.<sup>20</sup> Statements to doctors in the course of receiving treatment would not be covered by the testimonial statement concept because “the primary purpose of the interrogation” is not “to establish or prove past events potentially relevant to later criminal prosecution,”<sup>21</sup> and many of them lack formality.<sup>22</sup>

Of course, statements should be testimonial in some situations even if not made to investigative officers, but those will likely be extremely rare. One group would be “technically informal statements when used to evade the formalized process.”<sup>23</sup> Another relatively clear group, albeit likely a small one, would include written statements, which would possess the formality of the written form, given, for example, to a friend or neighbor with instructions that they be delivered to police investigators if anything should happen to the author.<sup>24</sup> Certainly some issues remain to be resolved regarding the circumstances that produce testimonial statements, but the numerous signals appear to point in a consistent direction: few statements, but clearly a few, will be found to be testimonial if made to persons other than police investigators.

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<sup>19</sup> *Crawford*, 541 U.S. at 51 (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”).

<sup>20</sup> See *Davis*, 547 U.S. at 822.

<sup>21</sup> *Id.* In order to be testimonial, investigating a possible crime does not have to be the exclusive purpose of the police obtaining the statement; “[o]bjectively viewed, [it must be] the primary, if not . . . the sole, purpose of the interrogation.” *Id.* at 830.

Whether *Davis* shifted the focus to the purpose of the questioner rather than the intent of the speaker is unclear, but it is clearly suggested by the Court’s language. See Mosteller, *Exceptions to Confrontation*, *supra* note 4 at 918–19, 938, 942–43, 947 (discussing the apparent shift of focus from *Crawford*, where the intent of the speaker was clearly dominant, to *Davis*, which appears to shift the focus to the intent of the questioner, and the impact of such a shift to the analysis of cases involving children).

<sup>22</sup> See *Giles*, 128 S. Ct. at 2700 (Breyer, J., dissenting) (“Where a victim’s statement is not ‘testimonial,’ perhaps because she made it to a nurse, the statement could come into evidence under this rule. But where the statement is made formally to a police officer, the majority’s rule would keep it out. Again this incongruity arises in part because of pre-existing confrontation-related rules.” (citing *Davis*, 547 U.S. at 830 n. 5 (“[F]ormality is indeed essential to testimonial utterance.”))).

<sup>23</sup> *Davis*, 547 U.S. at 838 (Thomas, J., dissenting). Although the majority did not explicitly embrace this formulation, its discussion indicates it would obviously adopt at least that much of an extension. *Id.* at 830 n.5. Concrete examples of such evasive statements are not clear to me, but the concept might cover a government official suggesting that a witness make statements to private citizens or preserve them in a personal document.

<sup>24</sup> See, e.g., *State v. Jensen*, 727 N.W.2d 518, 521, 527–28 (Wis. 2007) (concluding that written statements made by a murder victim to be delivered by a neighbor to the police if anything happened to her were testimonial).

In the child abuse area, I have identified a class of statements that should be somewhat problematic for courts to categorize and should be difficult to treat as uniformly nontestimonial using dispassionate analysis. They are mechanically recorded statements, typically videotaped interviews, made by children regarding alleged child abuse.<sup>25</sup> They obviously have the necessary formality. When those statements are made to a trained forensic interviewer for the sole purpose of prosecution, they are typically found to be testimonial by the trial court.<sup>26</sup> However, most statements are not single-purpose statements taken to aid the prosecution, but rather they serve multiple purposes. Moreover, if the recording is currently made exclusively for prosecution purposes, knowledgeable and sophisticated abuse investigative efforts presumably will change their practices once they recognize that the statement will be excluded if it remains a single-purpose statement. They may adopt, for example, medically oriented questioning protocols and/or utilize medical personnel to conduct the questioning. That will produce either mixed purpose statements, whose testimonial status is subject to judicial characterization, or statements that primarily serve a medical purpose rather than a prosecutorial one, which are automatically freed from Confrontation Clause scrutiny.

I predict that the end result will turn out to be relatively clear and consistent despite the uncertain character of some of these statements with regard to whether they rightfully should be within the protection of the Confrontation Clause. The key inquiry will be a factual one by the trial judge to determine the primary purpose of the questioning. That purpose may arguably be found to be medical in most situations despite creating highly effective evidence for the prosecution if jurisdictions structure the interview with a medical orientation. As a result, I suspect that the trend in future cases will be for trial courts to find most such recordings nontestimonial.<sup>27</sup> These videotapes will be admissible without any requirement of confrontation as very effective accusatory evidence in the criminal prosecution of the alleged perpetrator. Therefore, few of those mechanically recorded statements will be protected by the Confrontation Clause, and all that will be needed for admission of the videotaped statement is an applicable hearsay exception. The result

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<sup>25</sup> See Mosteller, *Exceptions to Confrontation*, *supra* note 4 at 965–75 (discussing statements that are typically videotaped and made for a variety of purposes).

<sup>26</sup> See *id.* at 963–65 (finding such statement the functional equivalent of police interrogation). In *In re Rolandis G.*, the Supreme Court of Illinois found that although the statement was taken by a child advocacy center interviewer as part of an interdisciplinary approach to the investigation of child sexual abuse, the objective evidence showed it was conducted at the behest of the police to gather evidence for prosecution. 902 N.E.2d 600, 613 (Ill. 2008).

<sup>27</sup> See, e.g., *State v. Krasky*, 736 N.W.2d 636, 641–43 (Minn. 2007) (concluding that multipurpose videotaped statement was not testimonial, despite the assessment being a joint decision of social services and law enforcement, where the court found the primary purpose of the interview was the child's health and welfare).

under *Roberts*,<sup>28</sup> admission of the statement, would thereby be replicated; but the Confrontation Clause interest would have received arguably even less protection, with attention given largely to formalisms such as the agency for which the person asking the questions worked rather than whether it was a questionable out-of-court statement particularly in need of testing by cross-examination.

### III. GILES'S FORFEITURE DECISION

As noted earlier, *Crawford* set out a small number of exceptions to the confrontation right for testimonial statements.<sup>29</sup> Most of them were either limited in scope or effectively guaranteed a form of confrontation.<sup>30</sup> The only exception denying all confrontation that had the capacity to expand elastically is forfeiture through wrongdoing. The extent of elasticity depends on how the intent element of the exception was interpreted. If intent to silence the witness is not required, I suggested that in child abuse cases, the commission of the crime would likely be found to be the reason a child was unable to testify. Moreover, if the hearsay exception employed to admit the statement does not require the declarant's presence and testimony, the prosecution would have little incentive to work to enable the child to take the stand and be a witness as opposed to securing testimony of a family member, caseworker, or psychologist that the child was unable to testify because of the trauma of the offense.<sup>31</sup> Forfeiture eliminates incentives to afford the defendant with present confrontation when powerful and persuasive hearsay statements have been made to non-law-enforcement questioners.

As I argued,<sup>32</sup> and Justice Scalia later observed,<sup>33</sup> dispensing with confrontation because the trial judge concludes the defendant is guilty

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<sup>28</sup> *Ohio v. Roberts*, 448 U.S. 56 (1980).

<sup>29</sup> See Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 516 (2005) [hereinafter Mosteller, *Confrontation of Witnesses*] (listing six exceptions: (1) statements not testimonial in nature; (2) testimonial statements which have not been previously confronted but where the declarant is available for confrontation at the current trial; (3) statements that have previously been confronted and the declarant is presently unavailable; (4) forfeiture through wrongdoing; (5) dying declarations (perhaps); and (6) statements not used for their truth).

<sup>30</sup> The second and third exceptions listed in the preceding note depend on confrontation being satisfied either earlier or presently.

<sup>31</sup> See Mosteller, *Exceptions to Confrontation*, *supra* note 4, at 987 (describing the process by which the prosecution can help children to be able to testify or can develop evidence that they are unavailable because of psychological trauma).

<sup>32</sup> See Richard D. Friedman, et al., *Crawford, Davis, & the Right of Confrontation: Where Do We Go From Here?*, 19 REGENT U. L. REV. 507, 527 (2007). During the panel discussion, I observed: "I thought the best rhetorical device of Justice Scalia in *Crawford* was that we do not deny the right to trial by jury because a judge makes the decision that the defendant is guilty. Similarly, under forfeiture, you shouldn't be able to deny the right to cross-examination and to confrontation, which might have

resembles the obviously ridiculous position that a judge could dispense with the entire trial after satisfying herself of the defendant's guilt. In *Giles*, an interestingly divided Court rejected the California Supreme Court's conclusion that forfeiture of the confrontation right as a consequence of the defendant's wrongdoing did not require an intention of the defendant to silence the witness' testimony. The United States Supreme Court ruled that, in murdering his ex-girlfriend, the defendant did not forfeit his right to object to a statement she had made to the police three weeks before the murder regarding acts of domestic violence committed by the defendant and a threat to kill her if he found her "cheating" on him.<sup>34</sup>

For me, the Supreme Court's decision to require intent is clearly proper because of its practical impact on the Confrontation Clause. Without the intent requirement, the protection of the confrontation right largely vanishes in whole classes of cases because of factors unrelated to the underlying values of the right. It is, of course, possible that the Framers meant for the right to be so narrow in scope. However, the broad general thrust of the Sixth Amendment in which the right is located and the general historical understanding of the purpose of the right suggests no such cramped application. Instead, it is a broad procedural right that generally guarantees a form of procedure that places the jury and adversarial testing between a citizen and denial of liberty by criminal prosecution and conviction.

#### IV. SOUTER'S PRACTICAL APPROACH

The six-Justice majority in *Giles* is made up of multiple parts. First, Scalia wrote an opinion with Roberts fully concurring. Justices Thomas and Alito concurred in separate opinions with Scalia regarding his forfeiture analysis.<sup>35</sup> However, both Justices concluded that, although the issue was not presented by the losing party, the victim's statement to the police was not within the purview of the Confrontation Clause because it

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been the essence of the defendant's jury trial, because a judge makes exactly the same kind of decision but just puts a different legal label on it. . . .

"The chief evil of *Roberts* was its unpredictability and its manipulability. If you have a forfeiture doctrine that has those same possibilities, I worry. I know it's a different doctrine, but the practical results are much the same, especially in child abuse and domestic violence cases where the alleged crime itself could be argued as the reason for the person's unavailability." *Id.*

<sup>33</sup> *Giles v. California*, 128 S. Ct. 2678, 2686 (2008) ("The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to 'dispensing with jury trial because a defendant is obviously guilty.'" (quoting *Crawford v. Washington*, 541 U.S. 36, 62 (2004))).

<sup>34</sup> *Giles*, 128 S. Ct. at 2681–82.

<sup>35</sup> *Id.* at 2693 (Thomas, J., concurring); *id.* at 2694 (Alito, J., concurring).

was not sufficiently testimonial in that it lacked formality.<sup>36</sup> Souter, with Ginsburg concurring in his opinion, joined Scalia's opinion except as to one subpart.<sup>37</sup>

I found Souter's opinion to present, perhaps, an element of the future of Confrontation Clause jurisprudence. Souter refused to concur in Part II-D-2 of Scalia's opinion. It is not obvious what precisely Souter found objectionable in that part of the opinion. Likely it is Scalia's trashing of the effort by Justice Breyer in his dissent to develop Confrontation Clause doctrine based on "policies underlying the confrontation guarantee, regardless of how that guarantee was historically understood."<sup>38</sup>

Souter's opinion seems itself to be based on a somewhat limited reverence for history and more on practicality and policy. He indicates at one point that he finds what appears to be Scalia's broad historical analysis sound. However, at another point, perhaps referring to the precise lessons of history for fatally abusive domestic relationships, he states that the contrast between Scalia's and Breyer's construction of the historical record indicates "that the early cases on the exception were not calibrated finely enough to answer the narrow question here."<sup>39</sup>

Overall what motivated Souter to embrace the intent requirement was fear of the alternative. He found an insufficient protection in a procedural rule that permits the "evidence that the defendant killed [to] come in because the defendant probably killed."<sup>40</sup> As he stated, it was this

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<sup>36</sup> Thomas referenced his dissenting position in *Davis* that the statement in the *Hammon v. Indiana* case (the companion case to *Davis*), which the Court found testimonial, lacked the degree of formality that he believed was required. *Id.* at 2693 (citing *Davis v. Washington*, 547 U.S. 813, 840 (2006) (Thomas, J., dissenting)). Alito took a similar substantive position, but did not explain either how the statement in this case differed from the statement in *Hammon*, where he concurred in the Court's determination that the statement had sufficient formality to be found testimonial. *See Davis*, 547 U.S. at 815 (noting that Alito joined Scalia's opinion). Although not directly announcing their disagreement with the testimonial determination, all other members of the Court declined to endorse the statements, which were made to a police officer who responded to a domestic violence complaint, as testimonial. Justice Scalia's opinion "accept[ed] without deciding" that the statement was testimonial. *Giles*, 128 S. Ct. at 2682. The dissent was somewhat more pointed in its reservation of decision on whether the statement was testimonial, stating "It is important to underscore that this case is premised on the assumption, not challenged here, that the witness' statements are testimonial for purposes of the Confrontation Clause." *Id.* at 2695 (Breyer, J., dissenting). Whether the Justices other than Thomas and Alito are questioning the testimonial character of statements that would appear rather clearly testimonial under *Davis*, or whether they were simply observing that the question was not being litigated is unclear. Nevertheless, the potentially restrictive attitude toward what should be a settled issue, that the statements were testimonial, is disconcerting.

<sup>37</sup> *Giles*, 128 S. Ct. at 2694 (Souter, J., concurring in part).

<sup>38</sup> *Id.* at 2691. *See also id.* (rejecting implicitly the dissent's reasoning "from the 'basic purposes and objectives' of the forfeiture doctrine").

<sup>39</sup> *Id.* at 2694 (Souter, J., concurring).

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

practical argument for limiting forfeiture “rather than a dispositive example from the historical record that persuades me that the Court’s conclusion is the right one in this case.”<sup>41</sup> Again, he repeated the practical and policy influence that went along with the historical record in causing him to reach his conclusion:

[T]he substantial indication 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; otherwise the right would in practical terms boil down to a measure of reliable hearsay, a view rejected in *Crawford* . . . .<sup>42</sup>

#### V. THE LIMITS OF ORIGINALISM’S CASE ANALYSIS AS A GUIDE TO CONFRONTATION CLAUSE CONSTRUCTION

I question the capacity of originalism to decide finely tuned issues. I begin with *Drayton v. Wells*,<sup>43</sup> a case the majority relies upon to support its conclusion,<sup>44</sup> but one that I find completely ambiguous and illustrative of the reality that claiming there is a settled common law meaning is largely an act of creation. The case was decided by the South Carolina Court of Constitutional Appeals in 1819, relatively soon after the adoption of the Sixth Amendment.<sup>45</sup> Justice Scalia cites this case as one of several authorities, but a quite limited number, that defined the forfeiture doctrine to involve the “contrivance of the opposite party,” which Scalia contended at least suggests intentional action meant to prevent the witness from testifying.<sup>46</sup>

However, the context of *Drayton v. Wells* seems to me to reveal more about the confusion of the common law by our modern standards than it tells us anything about the precise issue Scalia was examining. *Drayton* was a civil case, an action of assumpsit, on a verbal agreement between the plaintiff and the defendant regarding the plaintiff’s employment as

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

<sup>42</sup> *Id.* at 2695.

<sup>43</sup> 10 S.C.L. (1 Nott & McC.) 409 (Constitutional Ct. App. 1819).

<sup>44</sup> *Giles*, 128 S. Ct. at 2684.

<sup>45</sup> *Drayton*, 10 S.C.L. (1 Nott & McC.) at 409. I wish to thank Professor Collin Miller, who brought this case to my attention.

<sup>46</sup> *Giles*, 128 S. Ct. at 2684 (quoting *Drayton*, 10 S.C.L. (1 Nott & McC.) at 411). Scalia finds the explicit statement he supports in an 1858 treatise and the failure of cases to conclude there was forfeiture in the absence of such intentional action: “An 1858 treatise made the purpose requirement more explicit still, stating that the forfeiture rule applied when a witness ‘had been kept out of the way by the prisoner, or by someone on the prisoner’s behalf, *in order to prevent him from giving evidence against him* . . . .’ E. POWELL, THE PRACTICE OF THE LAW OF EVIDENCE 166 (1st ed. 1858) (emphasis added). The wrongful-procurement exception was invoked in a manner consistent with this definition. We are aware of no case in which the exception was invoked although the defendant had not engaged in conduct designed to prevent a witness from testifying, such as offering a bribe.” *Giles*, 128 S. Ct. at 2684.

overseer of a plantation and the compensation for that service.<sup>47</sup> The plaintiff prevailed at the initial trial of the matter, but the judgment was overturned on appeal.<sup>48</sup> At the retrial, the defendant called a witness who testified favorably to his position in the first trial, but who had a remarkable failure of memory when called as a witness at the retrial.<sup>49</sup> He testified that he had “totally dismissed the subject from his mind.”<sup>50</sup> The defendant then sought to introduce evidence in the form of the memory of witnesses who observed this testimony at the first trial, but the trial judge refused to admit their testimony.<sup>51</sup>

The case is thus not about confrontation at all because it was a civil case, not a criminal prosecution. Moreover, it was about the rejection of the failure of memory as a basis for unavailability applied to prior cross-examined testimony, not a separate hearsay or Confrontation Clause exception that is at issue with forfeiture through wrongdoing in *Giles*.

The South Carolina appellate court stated:

The books enumerate four cases only, in which the testimony of a witness who has been examined in a former trial, between the same parties, and where the point in issue was the same, may be given in evidence, on a second trial, from the mouths of other witnesses, who heard him give evidence: 1st. Where the witness was dead. 2nd. Where he was insane. 3rd. Where he was beyond seas; and 4th. Where the Court was satisfied the witness had been kept away by the contrivance of the opposite party.<sup>52</sup>

The court did not tell us what books were examined, but its understanding was that forfeiture constituted a basis for unavailability under what had to be the hearsay doctrine, along with death, for the admission of prior testimony. It is hard to see how this case provides much support for Scalia’s position since it lists death as also sufficient for the function performed here by “forfeiture.” It is equally difficult to see how this case supports the opposite position that forfeiture was at that historical moment anything more than an unavailability concept that applied to one specific type of hearsay—prior testimony. There is no indication that the court understood forfeiture to be a separate ground for admission of hearsay or an exception to the confrontation right, which was irrelevant to its decision. There is nothing in the opinion about any separate understanding that would distinguish hearsay and confrontation. Finally, and perhaps most importantly, if it were my

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<sup>47</sup> *Drayton*, 10 S.C.L. (1 Nott & McC.) at 409.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 410. The turnabout was so dramatic that one might wonder whether witness tampering—strict forfeiture conduct—by the plaintiff might have been involved. However, apparently the defendant did not think to pursue the issue. Thus, neither unavailability through forfeiture nor admission through forfeiture are part of the case.

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

<sup>52</sup> *Id.* at 411.

choice, I would not turn the definition of the Confrontation Clause in the twenty-first century over to the perhaps mistaken understanding of the law by three South Carolina judges two hundred years ago or our mistaken interpretation of the meaning of their strange sounding analysis.

Justice Scalia cites several English and American cases that he contends demonstrate that the forfeiture doctrine operated at common law as a basis for admission of statements that had not been previously confronted.<sup>53</sup> The number of authorities is hardly impressive to demonstrate a clearly developed doctrine rather than either an aberration, a mistake, or a reflection of changing historical understanding. In reaching its conclusion, Scalia even notes that “the case law is sparse.”<sup>54</sup> Potentially of critical importance, the only Supreme Court decision, *Reynolds v. United States*,<sup>55</sup> involved prior cross-examined testimony, but Scalia argues that fact is not significant because the Court did not explicitly recognize prior confrontation as a necessary condition of the forfeiture exception’s application.<sup>56</sup> Obviously, the Supreme Court need not make the observation that other preconditions exist to decide the question of whether forfeiture occurred, but despite Scalia’s claim in *Giles*, *Reynolds* seems to have recognized and relied on the existence of prior cross-examination.<sup>57</sup>

I cannot make a directly contrary claim because the cases Scalia cites clearly do exist. What I do contend is that they do not clearly establish a strong forfeiture doctrine separate from the forfeiture ground for admission of previously confronted statements. In the recent Confrontation Clause cases, I believe too much weight is placed on a purpose driven reading of authorities of uncertain meaning. Moreover, no attention is given to the fact that the hearsay doctrine was changing throughout this period with little emphasis placed at times on prior confrontation in the sense of cross-examination and at times more on the importance of the hearsay being in writing; or that the declarant had been under oath or that the accused had been present.<sup>58</sup> Also, the cases

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<sup>53</sup> *Giles v. California*, 128 S. Ct. 2678, 2688–90 (2008) (citing principally *Harrison’s Case*, 12 How. St. Tr. 833 (Old Bailey 1692) (statement before coroner); *Rex v. Barber*, 1 Root 76 (Conn. Super. Ct. 1775) (statement before grand jury); and *State v. Lewis*, 1 Del Cas. 608 (Ct. Quarter Sess. 1818) (statement before grand jury)).

<sup>54</sup> *Giles*, 128 S. Ct. at 2691.

<sup>55</sup> 98 U.S. 145 (1879).

<sup>56</sup> *Giles*, 128 S. Ct. at 2690–91.

<sup>57</sup> As Robert Kry has carefully developed in his contribution to this symposium, the *Reynolds* Court’s description of the case and citations to other authorities indicate that it did indeed understand and assume that the prior statement had been subject to confrontation. See Robert Kry, *Forfeiture and Cross-Examination*, 13 LEWIS & CLARK L. REV 577, 600–01 (2009). See also *Reynolds*, 98 U.S. at 161 (“The accused was present at the time the testimony was given, and had full opportunity of cross-examination. This brings the case clearly within the well-established rules.”).

<sup>58</sup> See Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 737–42

are treated as if they are all correctly decided under a widely shared understanding of the common law hearsay doctrine of that time. This approach assumes a type of unerring omniscient understanding among jurists, which I do not believe can be accurately claimed for any set of judges or courts in modern history. I suspect there is more certainty in Justice Scalia's mind than there was in those of the jurists of the relevant period or in the actual status of the historical record rather than his construction of it.

There are two keys to Scalia's originalist position in *Giles*. The first is his position, initially stated in *Crawford* and now the central basis for shaping the Confrontation Clause application to modern practices: "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>59</sup> It does appear, however, that Scalia now interprets "is most naturally read" from *Crawford* to mean "is read." In his view, either the statement was historically treated as hearsay requiring confrontation or the Clause is inapplicable, but if applicable, the Clause operates absent a recognized historical exception.

In *Giles*, he adds a new element that the exceptions he is referring to are, of course, hearsay, rather than confrontation, exceptions. He states:

No case or treatise that we have found, however, suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights. And the distinction would have been a surprising one, because courts prior to the founding excluded hearsay evidence in large part *because* it was unfronted.<sup>60</sup>

This statement makes sense because, before the Bill of Rights was adopted, the confrontation concept had no real independent status. This acknowledgement is accurate and therefore devastating to Breyer's position that killing a witness automatically forfeits the confrontation right. The numerous cases that excluded dying declarations in homicide cases where the declarant was insufficiently aware he was about to die render untenable the broad position that intent to silence the witness was

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(describing the hearsay doctrine of the late eighteenth century as putting special emphasis on the oath and much less significance on cross-examination than was the view of the early nineteenth century). The emphasis on the oath could explain the admission of the sworn testimony, which was involved certainly in the two grand jury cases cited by Scalia and perhaps all three authorities, despite the absence of cross-examination, and as a result could undercut their power to support a separate forfeiture admissibility doctrine as opposed to its use to establish unavailability for statements that satisfied a different hearsay doctrine. The primacy of cross-examination developed somewhat in tandem with the expansion of the role of counsel at trial. *Id.* at 741.

<sup>59</sup> *Giles*, 128 S. Ct. at 2682 (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

<sup>60</sup> *Id.* at 2686.

historically understood to be unnecessary.<sup>61</sup> And Scalia explicitly and correctly interprets this as conclusive historical evidence demonstrating that without an intent to silence the witness an intentional killing was insufficient under the common law understanding of the Framing period to warrant forfeiture.<sup>62</sup> If intent was irrelevant, the killing of the declarant by itself would have warranted admission under the forfeiture doctrine regardless of the declarant's understanding of death's certainty and nearness.

Scalia's recognition that hearsay exceptions at the time of the Framing and Confrontation Clause formulation were largely identical is substantively an almost necessary position for an originalist. The historical materials give us no clear understanding of whatever separate meaning the Confrontation Clause was meant to have. The case materials only deal with hearsay developments. Because the Framers were silent on their intent, one recognizes the indeterminacy of the historical record, or relies on common law hearsay doctrine that one constructs from the sources, or necessarily moves to a determination of values, policy, and practical concerns. It is to those other sources that I have a sense from *Giles* that a number of the Justices are now turning.

This recognition of the fundamental linkage of the hearsay rule of the Framing era and the Confrontation Clause is, it seems to me, devastating theoretically to the idea that the Confrontation Clause was intended to cover only testimonial statements.<sup>63</sup> There was no such

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<sup>61</sup> *Id.* at 2685–86 (citing numerous English and American cases excluding dying declarations by the victim implicating the defendant in homicide cases where the declarant lacked the required understanding that death was near at hand).

<sup>62</sup> *Id.* at 2688.

<sup>63</sup> See generally 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). In summary, Davies states: "the framing-era authorities indicate that admission of hearsay statements would have violated basic principles of common-law criminal evidence. In particular, the framing-era sources indicate that the confrontation right itself prohibited the use of hearsay statements as evidence of the defendant's guilt. The condemnations of hearsay that appeared in prominent and widely used framing-era authorities typically recognized that the admission of a hearsay statement would deprive the defendant of the opportunity to cross-examine the speaker in the presence of the trial jury, and that opportunity to cross-examine was understood to be a salient aspect of the confrontation right. Thus, the framing-era sources actually suggest that the Framers would not have approved of the hearsay exceptions that were later invented because the Framers would have perceived such exceptions to violate a defendant's confrontation right.

"Hence, *Crawford's* testimonial formulation of the scope of the confrontation right does not reflect 'the Framers' design.' Rather, *Crawford's* permissive allowance of unsworn hearsay is inconsistent with the basic premises that shaped the Framers' understanding of the right. Thus, whatever might be said for or against *Crawford's* formulation as a matter of contemporary constitutional policy, the fictional character of the historical claims made in that opinion constitute further evidence that originalism is a defective approach to constitutional decision-making." *Id.*

concept in common law hearsay doctrine as a testimonial statement doctrine. Instead, the common law's general position was that, whenever hearsay was actually recognized, it was excluded absent confrontation. Many of the recognized types of hearsay at the time of the Bill of Rights's enactment were in documentary form, but not all, and if the theory of hearsay exclusion rested on our modern sense of personal confrontation and cross-examination, testimonial formalism is not the defining feature that might have spurred creation of the Sixth Amendment's confrontation right.<sup>64</sup>

Moreover, maintaining the testimonial restriction is to give our modern practices over to the accidental state of the law at the time of the Framing rather than to the values that the right conveyed in the historical period when the amendment was enacted. If the historical understanding is imprecise, as I contend it is, positions asserted regarding the contours of the historical record will likely reflect value judgments that motivate the specific interpretation given to historical sources rather than an independent historical reality.

#### VI. THE FORFEITURE DOCTRINE AND THE CONFRONTATION DOCTRINE MOVING FORWARD

Those who supported a broad forfeiture rule, which would have a significant effect in homicide, domestic violence, and child sexual abuse cases, did not get the result they hoped for in *Giles*. However, there is some substantial room left for forfeiture to operate occasionally in homicide prosecutions and more frequently in domestic violence and child abuse cases. The forfeiture doctrine would have its impact despite *Giles's* intent requirement through trial court findings of intent to discourage testimony by the witness, who is most often the crime victim in forfeiture cases.

*Davis* drew a distinction between statements that are covered by the testimonial concept because they are efforts by the police to gather facts about past events in a nonemergency situation and those excluded from Confrontation Clause coverage because they were made during an ongoing emergency.<sup>65</sup> On the facts in *Davis*, the Court ruled that the emergency had ended when the accused left the victim's home.<sup>66</sup>

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<sup>64</sup> Indeed, in his contribution to this symposium, Professor Davies notes that the focus on testimonial statements gets the understanding of the law at the time of the framing backward. Non-formal statements were even more clearly rejected than were those which would be categorized as testimonial today. See Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of Giles' Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding,"* 13 LEWIS & CLARK L. REV. 605, 664–66 (2009).

<sup>65</sup> *Davis v. Washington*, 547 U.S. 813, 822 (2006).

<sup>66</sup> *Id.* at 828–29. “In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears

However, the Court did not fault the nontestimonial treatment of statements identifying the perpetrator when made as part of a communication that was otherwise focused on the emergency.<sup>67</sup> It ruled that the fact that the perpetrator left the victim's location together with the investigative-type questions that were being asked by the 9-1-1 operator at that point rendered the statements testimonial.<sup>68</sup> However, there is no definitive indication that the Court established the perpetrator's departure as a rigid litmus test of when the emergency ended, nor did it rule that testimonial status depended on any particular fact.

As a consequence, substantial discretion has been given to trial judges to determine by factual construction of the emergency or nonemergency nature of the situation the testimonial character of statements, particularly when the statements are made shortly after a domestic assault. I have no definitive data, but I believe trial courts have taken the opportunity to rule nontestimonial a substantial number of statements made after the domestic violence has ended by finding that the period of the emergency was on-going.<sup>69</sup> While *Davis* clearly made

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to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the 'structured police questioning' that occurred in *Crawford*." *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 53 n.4 (2004)).

<sup>67</sup> *Id.* at 827. "[T]he nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon." *Id.*

<sup>68</sup> *Id.* at 828–29.

<sup>69</sup> See, e.g., *Vinson v. State*, 221 S.W.3d 256 (Tex. Crim. App. 2006) (finding ongoing emergency on facts quite similar to those in *Hammon v. Indiana*, the companion case to *Davis* (citing *Davis*, 547 U.S. at 826–27)); Andrew Dylan, Note, *Working Through the Confrontation Clause After Davis v. Washington*, 76 *FORDHAM L. REV.* 1905, 1926 (2007). "One commentator has argued for an aggressive expansion of the emergency concept: '*Davis* can easily be interpreted to make every single surrounding circumstance, known or unknown, possibly associated with the statement itself relevant in deciding emergency versus prosecutorial.' No court has explicitly announced its support for such an expansive view of the ongoing emergency concept, but under the open-ended language of *Davis*, the trial courts seem to have wide leeway in determining the scope of the ongoing emergency test.

"Rather than taking a clear theoretical stand, most courts applying the ongoing emergency test simply delve directly into some form of fact-intensive inquiry and then announce their results. Often, despite *Davis*'s admonition that the existence of the ongoing emergency must be determined objectively, the lower courts will base their determinations on the subjective perceptions of either the declarant or the interviewer who was at the scene." *Id.*

Professor Deborah Tuerkheimer has argued for a systemically broad concept of emergency in the domestic violence context because of the character of the abusive relationship. See Deborah Tuerkheimer, *Exigency*, 49 *ARIZ. L. REV.* 801 (2007);

domestic violence cases more difficult to prosecute successfully by excluding some 9-1-1 calls and many communications with first responders, the Supreme Court gave lower courts some flexibility in shaping the dimensions of testimonial statements through their role as fact finder, and this authority has resulted in fact-based contraction of the scope of Confrontation Clause coverage.

Similarly, in *Giles*, the Supreme Court recognized that a pattern of abuse might support a finding that the defendant did intend by his violence to silence the victim. The Court stated:

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>70</sup>

Justice Souter stated in his concurring opinion that:

[the historical materials demonstrate no]. . . 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, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.<sup>71</sup>

Given Breyer's statement for three other Justices that forfeiture exists automatically in the homicide case, every Justice adopted at least the position that a pattern of abuse can result in a finding of intent to silence the victim as a witness in homicide cases.<sup>72</sup>

Although the Supreme Court's discussion focused on an abusive situation that ended in homicide, nothing in the Court's rationale would prohibit its application where a pattern of violence ends in a violent assault and the living victim fails to cooperate in the prosecution or to appear at trial. Evidence of a pattern of conduct that prompts the loss of

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Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1 (2006).

<sup>70</sup> *Giles v. California*, 128 S. Ct. 2678, 2693 (2008).

<sup>71</sup> *Id.* at 2695 (Souter, J., concurring).

<sup>72</sup> *Id.* at 2696–97 (Breyer, J., dissenting).

the victim's testimony would also qualify under the forfeiture requirement of *Giles* since that showing would satisfy the intent requirement. Although this is a more limited fact-based exception than the continuing emergency of *Davis*, it is a real and potentially significant one.

In child abuse cases, a showing of intent to silence the witness is also possible if caused by threats that victims sometime report abusers have made to them. As I noted in an earlier Article, occasionally one finds in published cases that "the perpetrator has warned the child not to reveal the information, and occasionally children will understand that 'telling on' the perpetrator will get him into trouble."<sup>73</sup> Some scholars contend that such threats are frequent in child sexual abuse cases.<sup>74</sup> It may be that forfeiture will rarely be at issue because most statements in sexual abuse cases will be considered nontestimonial under a narrow construction of the doctrine that includes virtually only those statements made to law enforcement investigators. However, if the statements are found to be testimonial,<sup>75</sup> this fact-based forfeiture argument that the child was intimidated into silence will be available, if established by the facts,<sup>76</sup> to support forfeiture of confrontation rights.<sup>77</sup>

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<sup>73</sup> Mosteller, *Exceptions to Confrontation*, *supra* note 4, at 946.

<sup>74</sup> See Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1068-70 (2000) (discussing threats and inducements that perpetrators use in an attempt to discourage the child from reporting the abuse (citing JUDITH LEWIS HERMAN, FATHER-DAUGHTER INCEST 88 (1981) (noting that many of the incest victims interviewed reported threats that included the warning that their fathers would be put in jail if it were reported); and BARBARA E. SMITH & SHARON GORETSKY ELSTEIN, THE PROSECUTION OF CHILD SEXUAL AND PHYSICAL ABUSE CASES: FINAL REPORT 93 (1993) (describing threats not to reveal abuse included both warnings of physical violence against the child or others and "pleas that the abuser would get into trouble if the child told"))).

<sup>75</sup> Under these circumstances, the statement should be admitted because of forfeiture but not because it is a nontestimonial statement if the trial court properly considers the child's purpose in making the statement. The threat by the perpetrator should cement the child's understanding that reporting the information will have serious consequences, such as prosecuting the perpetrator, and establishes a testimonial intent by the child. See Mosteller, *Exceptions to Confrontation*, *supra* note 4, at 946. However, many courts almost categorically exclude statements made to private individuals or focus on the primary purpose of the questioner, which with most early conversations will usually be the welfare of the child when the person asking the question is not a government investigator.

<sup>76</sup> Not all such evidence will be sufficient. In *In re Rolandis G.*, the Illinois Supreme Court found that a "pinky swear" not to tell anyone else about the oral sex act obtained by an eleven-year old accused by a six-year old male victim was not sufficiently directed at a future trial to constitute forfeiture under *Giles*. *In re Rolandis*, 902 N.E.2d 600, 616 (Ill. 2008). Whether the result would have been different in this court's opinion if an adult abuser had threatened physical violence if the abuse were revealed is unclear. My point is not that the evidence will always be sufficient, but promises of this sort or threats as part of the sex act provide a basis for argument regarding *Giles* forfeiture that is distinct from the rejected position that forfeiture

## VII. CONCLUSION

In my first article after *Crawford* was decided, I took the position that the confrontation right should be broadly interpreted and the forfeiture right should be narrowly construed.<sup>78</sup> My point was not that the new right should or could become a “get-out-of-jail-free card” for the defendants. My response to the prospect of massive jail delivery and a windfall to guilty defendants in the exclusion of testimony was to encourage confrontation rather than to avoid it by finding a forfeiture of the right. I am particularly supportive of that result with children, where I believe successful efforts to make children comfortable in the courtroom leads to fulfillment of the confrontation right, often to successful testimony, and sometimes to empowered children.

Certainly the result in *Davis's* companion case *Hammon v. Indiana* was a blow to domestic violence prosecutions, but had it decided that an interview one hour after the violence, with police officers on the scene and the situation secure, was not testimonial, the blow to the confrontation right would have been devastating across a broad range of criminal cases. I believe similarly that, although *Giles* is also a blow to domestic violence prosecutions, the opposite—that forfeiture did not require an intent to silence the witness, which would not have been confined to the limited class of homicide cases—would have been devastating to maintaining the integrity of the new Confrontation Clause system. Pressures are great to find exceptions to its rigors. Easy forfeiture could gut the right in entire classes of cases and statements. Such a result could be particularly unfortunate given how narrowly the testimonial statement concept is being interpreted.

My clear perception is that lower courts are generally interpreting the new confrontation right quite narrowly under the testimonial concept.<sup>79</sup> I assume that rather consistent pattern of conservative interpretation of scope of the right will continue. We are well on our way to developing a useful, if unnecessarily narrow, Confrontation Clause.

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cannot be found simply by a judicial decision that the defendant committed a violent crime or sexual abuse against the victim-declarant.

<sup>77</sup> Of course, the prosecution must overcome the defense argument that forfeiture is illogical because the child was obviously not intimidated from reporting by the perpetrator's threat. Given that fact, the argument goes, there is no reason to believe the victim failed to testify because of that ineffectual threat. Any renewed threats would clearly overcome this argument, and perhaps expert psychological testimony could provide another basis for finding that the much earlier threat ultimately had its intended effect.

<sup>78</sup> See Mosteller, *Confrontation of Witnesses*, *supra* note 29, at 519 (describing an approach that favors a broad definition of the testimonial concept, limits forfeiture, and encourages confrontation rather than exclusion).

<sup>79</sup> See generally Josephine Ross, *After Crawford Double-Speak: "Testimony" Does Not Mean Testimony and "Witness" Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 166 (2006) (finding lower court opinions consistently conservative in interpreting the potentially expansive testimonial statement doctrine).

*Giles*, like *Davis*, avoided certain grave injury to the right, but nothing in those opinions renews the revolutionary feel of *Crawford* in the heady days immediately after the decision when its scope was potentially quite broad and retrenchment had not yet begun.<sup>80</sup>

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<sup>80</sup> The testimonial concept was then so potentially broad that one possible definition was “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” and so undefined that the Court listed three possible general definitions. *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004) (quoting Brief of Amici Curiae the Nat’l Ass’n of Criminal Def. Lawyers et al. in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02-9410)).