Faint-Hearted Fidelity to the Common Law in Justice Scalia’s Confrontation Clause Trilogy

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ABSTRACT

In Giles v. California, 128 S.Ct. 2678 (2008), the Supreme Court issued the third Confrontation Clause opinion in its recent Crawford trilogy. 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.” 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 Sixth Amendment’s confrontation requirement when the defendant “engaged in conduct designed to prevent the witness from testifying.”

In this Article, I argue that this interpretation of Giles lacks a solid foundation in the common law and, notwithstanding Justice Scalia’s opinion (with which a majority of justices agreed in result), should not be followed by lower courts. The Article suggests that the historical sources do not point unequivocally to the conclusion Justice Scalia reaches in his majority opinion. Further, given the fragmented opinions among the justices in the case, even though a majority agree in the case’s result, it is argued that the reasoning of the case should be construed on the narrowest grounds, to allow courts to construe intent in a broad way in light of the common law, rather than in the rather narrow way Justice Scalia defines it. Especially in domestic violence and gang-related cases, a defendant’s conduct that knowingly leads to unavailability can and should still trigger forfeiture, even if there is no purposive intent.

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1 Giles, 128 S.Ct. at 2682. Justice Scalia wrote the opinion for the majority, but clearly there were distinct differences among the justices regarding the reasoning for the result. Justice Thomas and Justice Alito each filed a concurring opinion. Justice Souter filed an opinion concurring in part in which Justice Ginsburg joined. Justice Breyer filed a dissenting opinion in which Justices Stevens and Kennedy joined.
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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.” For many years, the Confrontation Clause was interpreted to protect against admission of unreliable evidence under Ohio v. Roberts. 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.’” 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.”

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 around Crawford’s unnecessarily (and self-admittedly) amorphous notion of “testimonial.”

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2 Sixth Amendment, U.S. Constitution.
5 Crawford, 541 U.S. at 61.
6 Id. at 53-54. But see id. at 69 (Rehnquist, C.J., concurring in the judgment) (“The Court’s distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine.”).
7 Crawford, 541 U.S. at 68 (“We leave for another day any effort to spell out a comprehensive definition
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 “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. 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. 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. 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. As in the exception to the hearsay exclusionary rule codified in Federal Rule of Evidence 803(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. Following Crawford, many courts also used the forfeiture by wrongdoing doctrine to admit testimonial statements, but did so inconsistently. For example, in homicide cases some courts required proof that the purpose of the homicide was to render the victim unavailable as a trial witness while other courts did not require such proof.

In Giles v. California, decided in 2008, the Supreme Court issued another Confrontation Clause 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.” Imposing that historical limitation on the scope of exceptions, the Court held that the “forfeiture by wrongdoing” doctrine was only an exception to Sixth Amendment’s

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9 See FED. R. EVID. 806(b)(6).
10 541 U.S. at 62 (citing Reynolds v. United States, 98 U.S. 145, 158-159 (1879)) (“[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.”).
14 Giles, 128 S.Ct. at 2682, citing Crawford, 541 U.S. at 54.
confrontation requirement when the defendant “engaged in conduct designed to prevent the witness from testifying.”

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 Crawford trilogy’s methodological preference for constitutional originalism -- particularly as reflected in Justice Scalia’s opinions (here as well as elsewhere) -- this Article analyzes whether the historical claim underlying the Court’s opinion in Giles is sound. An accurate assessment of the history requires an analysis of whether forfeiture of Sixth Amendment 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 areas 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 approach to forfeiture.

Part II will describe and discuss the recent line of Confrontation Clause cases culminating with Giles. Justice Scalia has taken the lead in directing the Court down a new path of Confrontation Clause interpretation. Beginning in Crawford, continuing in Davis, and most recently with Giles, Justice Scalia’s new framework has profoundly altered criminal trial procedure. However, beneath the surface of the Court’s most recent 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 endeavors to examine 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, the Part will provide a more broad-based, solid foundation based in the history of the common law for lower courts 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

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15 Giles, 128 S.Ct. at 2682. Justice Scalia wrote the opinion for the majority, but clearly there were distinct differences among the justices regarding the reasoning for the result. Justice Thomas and Justice Alito each filed a concurring opinion. Justice Souter filed an opinion concurring in part in which Justice Ginsburg joined. Justice Breyer filed a dissenting opinion in which Justices Stevens and Kennedy joined.

16 Of course, I can hardly claim to be the first to have critiqued Justice Scalia’s use of originalism in criminal procedure. See 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).
been litigated. Courts and litigants addressing forfeiture would be ill-advised to follow the approach of Justice Scalia’s majority opinion in Giles.

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.17 In the fifteen years following incorporation, the Court addressed several interpretation and application issues.18 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.19 To prove reliability, the Court determined that the evidence must either “fall[] within a firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.”20 Finding that the Confrontation Clause and the hearsay rule are “designed to protect similar values”21 and “stem from the same roots,”22 the Roberts Court constructed an analysis that used hearsay law 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.23 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’ rights to confrontation and for determining reliability with a standard that was vague, arbitrary, and subjective.24

A. Crawford v. Washington and Davis 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

18 See e.g., California v. Green, 399 U.S. 149 (1970) (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) (admission of an accomplice’s spontaneous comment that indirectly inculpated the defendant did not violate the Confrontation Clause).
20 Roberts, 448 U.S. at 66.
21 Id. at 66 (quoting California v. Green, 399 U.S. 149, 155 (1970)).
22 Id., quoting Dutton v. Evans, 400 U.S. 74, 86 (1970)).
23 White v. Illinois, 502 U.S. 346 (1992). The four-year-old child abuse victim did not testify at trial and the 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 Inadi, 475 U.S. at 394).
against unreliable evidence to operating as a procedural trial right.\textsuperscript{25} 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 \textit{ex parte} examinations as evidence against the accused.”\textsuperscript{26}

In \textit{Crawford}, the Court concluded that the Sixth Amendment barred “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.”\textsuperscript{27} While the rule appears strikingly simple, its application has been anything but simple and clear. \textit{Crawford} did not provide courts sufficient guidance in determining which statements are “testimonial” thus implicating the Confrontation Clause.\textsuperscript{28}

Furthermore, the \textit{Crawford} Court suggested some exceptions might apply to the testimonial rule. First, the Court acknowledged the long-standing exception to the hearsay rule for dying declarations.\textsuperscript{29} 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

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  \item[25] 541 U.S. 36, 42 (2004). Justice Scalia wrote for the majority. 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. Since \textit{Crawford}, the composition of the Supreme Court has changed and Justices Rehnquist and O’Connor are no longer on the Court. The facts of \textit{Crawford} are as follows: Michael Crawford was accused of stabbing a man who allegedly tried to rape his wife, Sylvia. \textit{Id.} at 38. Michael and Sylvia were arrested, taken to the police station, and individually questioned. \textit{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 before the stabbing. \textit{Id.} at 39. At trial, Michael claimed the stabbing was in self-defense. \textit{Id.} at 40. He asserted his evidentiary marital privilege and prevented Sylvia from testifying. \textit{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. 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 \textit{Roberts}. \textit{Id.} (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)).
  \item[26] \textit{Id.} at 50.
  \item[27] \textit{Id.} at 53-54. \textit{But see id.} at 69 (Rehnquist, C.J., concurring in the judgment) (“The Court’s distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine.”).
  \item[28] The \textit{Crawford} Court decided that it would “leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’ ” \textit{Crawford}, 541 U.S. at 68. Nevertheless, the Court suggested three formulations that compose the “core class of ‘testimonial’ statements:” 1) “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” \textit{Crawford}, 541 U.S. at 51-52 (emphasis added) (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)). Justice Thomas again advocated this standard in his \textit{Davis} dissent. Davis v. Washington, 547 U.S. 813, 836-37 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part), and his \textit{Giles} concurrence \textit{Giles}, 128 S.Ct. at 2693.; 2) “\textit{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.’ ” \textit{Crawford}, 541 U.S. at 51 (emphasis added); and 3) “statements that were made under circumstances which would lead an \textit{objective witness} reasonably to believe that the statement would be available for use at a later trial.’ ” \textit{Id.} at 52 (emphasis added).
  \item[29] \textit{Crawford}, 541 U.S. at 56, n.6. Note, however, the Federal Rules of Evidence further limits the use of such statements in criminal cases to homicide prosecutions \textit{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.”
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Nevertheless, it indicated that such a singular exception might be accepted on historical grounds.\(^{31}\) Second, the Court suggested that some testimonial statements may be admitted based on the equitable principle underlying the doctrine of forfeiture by wrongdoing.\(^{32}\)

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.\(^{33}\) Under *Davis*, a court must determine the primary purpose of the police interrogation by objectively evaluating whether the circumstances indicate an “ongoing emergency.”\(^{34}\) *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.”\(^{35}\) In contrast, the *Davis* Court reasoned “[s]tatements 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.”\(^{36}\)

While it is now settled that the Confrontation Clause only applies to testimonial statements,\(^{37}\) the Supreme Court continues to be called into the fray to settle differences among courts about where to define the contours of testimonial statements.\(^{38}\) In *Crawford*, Justice Scalia criticized *Ohio v. Robert*’s “reliability” analysis for being “inherently, and therefore permanently, unpredictable.”\(^{39}\) Unfortunately, as Justice Thomas foresaw, the *Davis* majority’s

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30 *Crawford*, 541 U.S. at 56, n.6.
31 *Crawford*, 541 U.S. at 56 n.6 (“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 ISRAEL L. REV. 506 (1997).
32 *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.” *Id.* citing Reynolds v. United States, 98 U.S. 145, 158-159 (1879).
34 *Davis*, 547 U.S. at 822.
35 *Id.*
36 *Id.*
37 The *Crawford* Court acknowledged that in *White* it had rejected the theory that the Confrontation Clause was applicable only to testimonial statements. *Crawford*, 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.” *Davis*, 547 U.S. at 825 n.4. To reinforce its intentions, the Court in *Wharton v. Bockting* confirmed it intended to overrule *Roberts* in *Crawford*. 127 S. Ct. 1173, 1179 (2007) (holding that *Crawford* did not apply retroactively on collateral review).
38 For example, the Court recently held that a laboratory report is testimonial. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 557 U.S. __ (2009). Four days later, the Court granted certiorari in *Briscoe v. Virginia* (No. 07-11191), 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.” The Virginia Supreme Court had upheld a Virginia statute governing admission of lab technicians’ certificates against criminal defendants. On January 25, 2010, the Court vacated and remanded *Briscoe* for “further proceedings not inconsistent with the opinion in *Melendez-Diaz v. Massachusetts*, 557 U. S. ___ (2009).”) 130 S.Ct. 1316, 78 USLW 3434 (U.S. Va. Jan. 25, 2010) (NO. 07-11191).
39 541 U.S. 68 n. 10 (emphasis in original).
primary-purpose test is no more predictable than the Roberts reliability inquiry.\textsuperscript{40} Police officers who report to a crime scene will ask questions “both to respond to the emergency situation \textit{and} to gather evidence.”\textsuperscript{41} It will rarely be possible to assign primacy to either “of these two ‘largely unverifiable motives.’”\textsuperscript{42}

\section*{B. \textit{Giles v. California}}

Justice Scalia authored the third in his Confrontation Clause trilogy in \textit{Giles v. California}, decided in 2008.\textsuperscript{43} 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.

In the case underlying the appeal in \textit{Giles}, Dwayne Giles was convicted of first degree murder for admittedly shooting his ex-girlfriend, Brenda Avie.\textsuperscript{44} Giles unsuccessfully claimed the shooting was justified self defense.\textsuperscript{45} 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.\textsuperscript{46} Giles testified that on the day of the killing, Avie had threatened to kill both him and his new girlfriend.\textsuperscript{47} The prosecution presented evidence of Giles’ threatening behavior toward his former employer and of his physical attack against Avie just weeks before the killing.\textsuperscript{48}

An officer testified that on that date, Avie said Giles accused her of having an affair.

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  \item \textsuperscript{40} “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” \textit{Davis}, 547 U.S. at 834. (Thomas, J., concurring in the judgment in part and dissenting in part.) “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.” \textit{Id.} at 838.
  \item \textsuperscript{41} \textit{Davis}, 547 U.S. at 839. (Thomas, J., concurring in the judgment in part and dissenting in part.)
  \item \textsuperscript{42} \textit{Davis}, 547 U.S. at 839. (Thomas, J., concurring in the judgment in part and dissenting in part.) (quoting New York v. Quares, 467 U.S. 649, 656 (1984)). On March 1, 2010, the Court granted certiorari to settle the conflict of authority as to 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. \textit{People v. Bryant}, 768 N.W.2d 65 (2009), \textit{cert. granted sub nom} Michigan v. Bryant, 2010 WL 680519, 78 USLW 3082, 78 USLW 3491, 78 USLW 3498 (U.S. Mich. Mar. 01, 2010) (No. 09-150).
  \item \textsuperscript{44} \textit{Giles}, 128 S.Ct. at 2682. Giles and Avie dated for several years. \textit{People v. Giles}, 152 P.3d 433, 435 (Cal. 2007). Avie was shot six times and was not carrying a weapon. \textit{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.” \textit{Id.}
  \item \textsuperscript{45} \textit{Id.} at 2681.
  \item \textsuperscript{46} \textit{Id.}
  \item \textsuperscript{47} \textit{Id.}
  \item \textsuperscript{48} \textit{Id.} at 2681-82. Justice Breyer noted that the State only introduced the Avie’s un confronted statements to rebut the defendant’s affirmative self defense claim and impeach the defendant’s testimony. \textit{Giles}, 128 S.Ct. at 2695 (Breyer, J., dissenting).
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“grabbed her by the shirt, lifted her off the floor, and began to choke her.”

When she “broke free and fell to the floor, Giles punched her in the face and head.”

The officer testified 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.”

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.

The California Court of Appeals sided with the State, holding that admission of Avie’s unconfronted 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.

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. The California Supreme Court affirmed.

The U. S. Supreme Court reversed. The Giles Court cited Crawford as precedential authority for establishing two common law exceptions to the Confrontation Clause requirement. Crawford did not actually decide these issues. 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.”

The first exception the Giles Court asserted it “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 aware that he was dying.” 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.”

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 admitted statements of a witness who was “detained” or “kept away” by the

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49 Id. at 2681.
50 Id. at 2682.
51 Id. at 2682.
52 The Court accepted without deciding that Avie’s statements to the police were testimonial because the State did not dispute the issue. Id. at 2682. Note that 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. §1370).
55 Giles, 128 S.Ct. at 2682.
56 Giles, 128 S.Ct. at 2682, quoting Crawford, 541 U.S. at 54. “We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were un confronting.” Giles, 128 S.Ct. at 2682, citing Crawford, 541 U.S. at 56 n.6., 62.
57 Id. at 2682 (citations omitted).
58 Crawford, 541 U.S. at 56 n.6.
“means or procurement” of the defendant.\(^{59}\) Again, \textit{Crawford} did not in fact hold that forfeiture by wrongdoing was an exception to the constitutional confrontation requirement. Rather, forfeiture by wrongdoing is mentioned once in \textit{Crawford}, but only as an example of an exception to the Confrontation Clause that “makes no claim to be a surrogate means of assessing reliability” but instead is based on “essentially equitable grounds.”\(^{60}\)

Consistent with the originalist interpretation method he applied in \textit{Crawford} and \textit{Davis}, Justice Scalia’s opinion in \textit{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,\(^{61}\) and other sources including treatises from 1762, 1804, and 1791,\(^{62}\) the Court finds evidence that courts admitted testimonial statements previously made at coroner’s inquests,\(^{63}\) Marian bail hearings and Marin committal hearings if the declarant was dead, unable to travel, or unavailable due to the defendant’s wrongful procurement of the witness’ absence.\(^{64}\) The step-by-step shifts in Justice Scalia’s opinion in \textit{Giles} are so gradual, and scan such a vast period of history -- 1888 to 1957 -- they do not appear change 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’ absence. His analysis started with the English common law doctrine which 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.\(^{65}\) While admitting that these terms only “suggest” that the forfeiture exception applied when the defendant engaged in conduct “\textit{designed} to prevent the witness from testifying,”\(^{66}\) this is 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’ 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. However, these resources have limited value as authority for determining the meaning

\(^{59}\) \textit{Giles}, 128 S.Ct. at 2683 (citations omitted).

\(^{60}\) “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.” \textit{Crawford}, 541 U.S. at 62, citing Reynolds v. United States, 98 U.S. 145, 158-159 (1879).


\(^{62}\) \textit{Giles}, 128 S.Ct. at 2683, citing W. HAWKINS, PLEAS OF THE CROWN 425 (4th ed. 1762); T. PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 62 (2d ed. 1804) (“sent” away); 1 G. GILBERT, LAW OF EVIDENCE 214 (1791) (“detained and kept back from appearing by the means and procurement of the prisoner”).

\(^{63}\) \textit{Giles}, 128 S.Ct. at 2683 citing Lord Morley's Case, 6 How. St. Tr. 769, 770-771 (H.L.1666).

\(^{64}\) Id. (citations omitted).


\(^{66}\) Id. (emphasis in the original).
of the language quoted to articulate the common law rule in the English opinions. None of the reference dictionaries is 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. 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.

Similarly, the term “means” could either be broadly construed to include circumstances where the defendant caused the witness’ 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.” 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.

Justice Scalia’s selective use of particular versions of dictionaries seriously undermines the credibility of any commitment to historical authority. The dictionaries from 1828, 1868 and 1989 arguably allow for either broad or narrow definitions of “procurement” and “means.” Yet Justice Scalia concluded the history of the terms points 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.

In addition, Justice Scalia determined that cases and treatises purportedly contemporaneous with the founding “indicate that a purpose-based definition” of the terms

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67 Id., citing 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining “procure” as “to contrive and effect” (emphasis added)); ibid.(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”).

68 Giles, 128 S.Ct. at 2683 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”).

69 Giles, 128 S.Ct. at 268.

70 Id. at 2683 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”); N. Webster, An American Dictionary of the English Language 822 (1869) (“That through which, or by the help of which, an end is attained”).

71 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).

72 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 (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).
governed. Citing treatises from 1816 and 1814 and a case from 1819 which use the language “means and contrivance,” Justice Scalia gradually added the term “contrivance” into the analysis. 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. 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 him.” 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 unconfronted testimony would not have been admitted without a showing that “the defendant intended to prevent a witness from testifying.” 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 asserts that the prosecution failed to argue that forfeiture by wrongdoing was an alternative exception. From this information, the Court deduces 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.

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[].” 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.” In addition, the majority asserts that until 1985, the forfeiture by wrongdoing doctrine in American courts required “deliberate witness tampering.”

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 authority to establish that there was a third exception to the

confrontation requirement – forfeiture by wrongdoing. To establish the 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. For example, when a testimonial statement was not admitted because of an insufficient dying declaration foundation, the prosecution did not use forfeiture as a second line of argument for admission. Selectively using the language and facts of these cases, the majority asserts that the reason forfeiture was not raised is because the historical forfeiture doctrine required purpose to prevent witness from testifying. Surmising that such a purpose was not provable in these cases, the Giles Court concludes this is the reason the prosecution did not even try to pursue this route. While not a wholly unreasonable inference, the dissent later demonstrates that this is not a logical, singular conclusion based on the available information.83

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.84 After vigorously asserting that the historical scope of the constitutional doctrine is determinative, the Giles Court confoundingly used these modern evidence references as authority.85 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.”86

As the third case in the Court’s new Confrontation Clause trilogy, Giles revealed a highly fractured court on the issue, with the justices separated in their approach.87 Writing for the majority, Justice Scalia used historical research to interpret the meaning of the forfeiture doctrine at the time of the founding. Justices Alito and Roberts signed onto all aspects of Scalia’s opinion. Justice Roberts is the only justice who did not write separately. Justices Thomas and Alito 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 on other grounds: that the statement itself, under Thomas’ framework, was not even testimonial. Consistent with his position in Crawford and Davis, Justice Thomas restated that only formalized statements should be testimonial and Avie’s

83 Giles, 128 S.Ct. at 2704 (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.” Giles, 128 S.Ct. at 2705 (Breyer, J., dissenting)
84 Id. 2687-88.
86 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.
87 The Court had also decided in Wharton v. Bockting that Crawford did not apply retroactively on collateral review. 127 S. Ct. 1173, 1179 (2007). Since Giles, the Court has decided two cases on a related issue. In Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 557 U. S. ___ (2009), the Court held that a laboratory report is testimonial. That holding was reinforced in Briscoe v. Virginia (No. 07-11191), where the Court placed the burden of presenting the testimony of the analyst who prepared the laboratory report on the State. 559 U. S. ___ (2010). Note also, the composition of the Supreme Court has changed. Since Crawford, and Justices Rehnquist and O’Connor are no longer on the Court, and since Giles and Melendez-Diaz, Justice Souter is no longer on the Court. In April 2010, Justice Stevens announced his intention to retire at the end of the term.
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. Justices Souter and Ginsberg 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,” the Justices Souter and Ginsberg concluded that history alone is not dispositive “when the crime charged occurred in an abusive relationship or was its culminating act.”

Their concurrence supported the interpretation that the forfeiture by wrongdoing exception requires an additional judicial determination, by the preponderance of evidence, of defendant’s intent to prevent the witness from testifying. Justice Souter argued that two aspects of the historical background support the majority’s position. In his view, the history substantially indicates 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.” Further, history does not disagree 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.”

Justices Ginsburg and Souter did not join the portion 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.” In this portion of the opinion, Justice Scalia rejected the dissent’s approach to “reason from the ‘basic purposes and objectives’ of the forfeiture doctrine.” This section also criticizes the dissent’s approach for diminishing the defendant’s right to a confrontation by basing it on the court’s pretrial ruling based on the court’s concept of “fairness.”

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88 Giles, 128 S.Ct. at 2693 (Thomas, J., concurring).
89 Giles, 128 S.Ct. at 2694. (Alito, J., concurring). This position is seemingly inconsistent with his former position and Davis where 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 816.
90 Giles, 128 S.Ct. at 2694.
91 Giles, 128 S.Ct. at 2694-95 (Souter, J., concurring joined by Ginsburg).
92 Id. at 2694 (Souter, J., concurring joined by Ginsburg). “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 v. Washington, 547 U.S. 813, 833 (2006)”
93 Giles, 128 S.Ct. at 2695 (Souter, J., concurring in part).
94 Id. at 2695 (Souter, J., concurring in part).
95 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.
96 Giles, 128 S.Ct. at 2691.
97 Id. 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.
Justice Breyer wrote a sharp dissent that was joined by Justices Stevens and Kennedy. However, the dissent started with two important points of agreement. First, Justice Breyer fundamentally agreed with Crawford’s requirement that the Confrontation Clause must 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.” Second, reviewing the same history as the majority, Justice Breyer also determined that the forfeiture by wrongdoing exception was established at the time of the founding.

The crucial difference between the majority and the dissent lies in outlining the scope of the forfeiture by wrongdoing exception to the Confrontation Clause. Justice Breyer enumerated three reasons why Avie’s statements in this case should fall within the scope of the exception to the Confrontation Clause: the common law history, principles of criminal law and evidence, and the pragmatic need for a rule that can be fairly applied by courts. 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 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. Early evidence of the conceptual foundation of the confrontation right had been recognized as far back as in the Roman era. Scholars have noted that early English jurisprudence arguably recognized a form of the right of confrontation even before the right to a jury trial.

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98 *Giles*, 128 S.Ct. at 2695 (Breyer, J., dissenting). Quoting *Crawford*, 541 U.S. at 54.
99 *Id.* at 2696 (Breyer, J., dissenting).
100 *Id.* (Breyer, J., dissenting).
101 To analogize, Justice Breyer provided several examples of other areas of law that are based on equitable principles and treat wrongdoing similarly. However, these examples can be distinguished as fundamentally different because in each, the determination of the wrongdoing may be entirely separate and distinct.
Early American historical documents only rarely mention the right of confrontation. The historical record reflects that the right of confrontation was recognized first at the state level. Several states had adopted declarations of rights which guaranteed a right of confrontation before the Sixth Amendment was ratified in 1791. In addition, the Supreme Court has often recognized that a common law right of confrontation preceded the adoption of the Sixth Amendment. Beyond this, scholars have found little documentation of the Framers’ intended meaning and application of the Clause.

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. The Court explained that the right “must occasionally give way to considerations of public policy and the necessities of the case.”

Beginning with Crawford, 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, 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. While in theory this is a commendable approach, in practice it is much more difficult and complicated to implement. 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


106 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)).


108 Mattox v. United States, 156 U.S. 237, 250 (1895). (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.)


110 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, with whom Scalia, J. joins, concurring in part and concurring in the judgment).

111 See supra Part II.
Justice Scalia’s historical analysis leads 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.\(^{112}\) 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.”\(^{113}\) Justice Breyer also recognized the indeterminacy of the historical record, noting “the possibility that there are too few old records available for us to draw firm conclusions.”\(^{114}\)

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.”\(^{115}\) If 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 lead cases involving forfeiture doctrine are, in modern lingo, “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.”\(^{116}\) Conduct that is now criminally punishable may not have been criminal at the time, thus not even “wrongdoing” in some other sense.\(^{117}\)

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.”

Justice Scalia, however, narrows forfeiture to only acts “intended to dissuade,” or acts that have the purpose of thwarting criminal investigations and testimony. While Justice Scalia’s opinion in Giles asserts unequivocally that “[c]ases and treatises of the time indicate that a purpose-based definition of these terms “kept back,” “detained,” by “means or procurement” governed,” a more careful and complete examination of the law around 1791 reveals a 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.” 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.”

Important English cases on the law of forfeiture were decided in the period scanning 1666 to 1851, but do not lend clear support to Justice Scalia’s narrow definition of forfeiture. Lord Morley’s Case, decided in 1666, held that a prior testimonial statements would be admissible if the witness was “dead or unable to travel” or “detained by the means or procurement of the prisoner.” Similarly, other cases allowed such evidence when the defendant “[used] ill practice to take [the witness] out of the way,” “[by] fraudulent and indirect means, procured a [prior witness] to withdraw himself,” or “resorted to a contrivance to keep the witness out of the way.”

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.

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118 “The domestic-violence context is, however, relevant for a separate reason. 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. This is not, as the dissent charges, nothing more than “knowledge-based intent.” (Emphasis deleted.)” Giles, 128 S.Ct. at 2693.
119 Id.
119 Id. at 2683-84.
120 Giles, 128 S.Ct. at 2702 (Breyer, J., dissenting)
121 Id. at 2705 (Breyer, J., dissenting).
123 Harrison’s Case, 12 How. St. Tr. 833, 868 (H. & L. 1692).
126 Giles, 128 S.Ct. at 2703 (Breyer, J., dissenting).
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.\(^{128}\)

Early American cases in the area also do not 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,”\(^{129}\) “was detained by means or procurement of the prisoner,”\(^{130}\) or “is absent by [the defendant’s] ... own wrongful procurement.”\(^{131}\) In a fourth American case, the court admitted a witness’ prior statement where 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.”\(^{132}\) 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.\(^{133}\) However, the first Supreme Court case to address forfeiture was not until 1879, in *Reynolds v. United States*.\(^{134}\) *Reynolds* itself relied on leading common-law cases -- *Lord Morley’s Case, Harrison’s Case,* and *Scaife*.\(^{135}\) 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.\(^{136}\)

Nevertheless, it is useful to examine the defendant’s conduct in *Reynolds*. There is no evidence of “purposeful” wrongful conduct to keep the witness away. Rather, there is evidence

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129 Drayton v. Wells, 10 S.C.L. 409, 411 (1819).
130 Williams v. State, 19 Ga. 403 (1856).
131 Reynolds, 98 U.S. 145, 158 (1879).
132 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 Evidence, at 200, n. (a); T. 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).
133 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 unconfronted by the defendant, there is some evidence to suggest that the statements in Barber were confronted. Id., citing S. Beale, W. Bryson, J. Felman, & M. Elston, Grand Jury Law and Practice § 5.2 (2d ed.2005); see also 8 J. Wigmore EVIDENCE § 2360, pp. 728-735 (J. McNaughton rev.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. Best, THE PRINCIPLES OF THE LAW OF EVIDENCE 473, n. (e) (American ed. 1883); J. Stephen, A DIGEST OF THE LAW OF EVIDENCE 161 (1902); 2 J. Bishop, NEW CRIMINAL PROCEDURE § 1197, p. 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.”
134 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. *Illinois v. Allen*, 397 U.S. 337, 342-343 (1970).
135 98 U.S. 145 (1879).
from which one could reasonably infer that the defendant kept the witness away from the trial. The facts indicate 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’ location was to the officer. 137 When the defendant was told that the witness would get into trouble for being difficult to subpoena, the defendant replied that the witness would not be in trouble until the subpoena was served. 138 Upon these facts, the court decided to admit the witness’ former testimony in the trial. But importantly for the 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.” 139

Justice Scalia concludes that the fact that these 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. 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 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 domestic violence crimes against victims until relatively late in the nineteenth century. 140 Of course, especially if the law was inchoate in its protections of victims, the attorneys may have made poor tactical decisions not to go forward on a forfeiture theory.

In addition, it is an equally reasonable inference that there was no well established hearsay exception for forfeiture at the time. 141 In fact, the Federal Rules of Evidence did not adopt a forfeiture hearsay exception until 1997. 142 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 met, the statement was admissible for evidentiary hearsay and constitutional confrontation purposes. Now understood, the right to “confront” a witness is actually a bundle of rights, including the right to be present and observe the witness’ demeanor, the right to cross-examine, and the right that witnesses testify under oath. 143 Finally, these cases

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137 Reynolds, 98 U.S. at 158.
138 Reynolds, 98 U.S. at 159-60.
139 Reynolds, 98 U.S. at 158.
141 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, 541 U.S. at 61.
142 The proposed rule was approved by the Supreme Court on April 11, 1997, and became effective on December 1, 1997, as FRE 804(b)(6). Fed. R. Evid. 804 Advisory Committee’s Notes to the 1997 Amendment, 56 F.R.D. 183, 322, reprinted in, FEDERAL RULES OF EVIDENCE 198 (Thomson West, 2006) (1973) [Advisory Note]. 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.
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 one court’s explicit separation of evidence law issues from constitutional confrontation issues. In McDaniel v. State, the court held the declarant’s prior statement admissible as a 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. Recent examples of cases similarly holding that the Confrontation Clause was not violated when unconfronted statements were admitted under a forfeiture theory without evidence that the defendant had acted with the purpose of preventing the witness from testifying include cases from Minnesota in 1976 and Florida in 1985.

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. The Court uses its own opinion in Davis as a reference for the proposition that the 1997 FRE forfeiture hearsay exception in fact, codifies the forfeiture doctrine. Oddly -- and some might say hypocritically -- the Court is now using present day evidence law (determined by legislatures rather than common 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. 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.” 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 forfeited. However, in their concurrence, Justices Souter and Ginsburg seem to try to soften the impact of the majority’s

147 Crawford, 541 U.S. at 61. (“we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence.”).
148 Giles, 128 S.Ct. at 2
149 Giles, 128 S.Ct. at 2695 (Breyer, J., with whom Stevens, J., and Kennedy J., join, dissenting) citing Crawford, 541 U.S. at 62 and Davis, 547 U.S. at 833.
150 I. G. GILBERT, LAW OF EVIDENCE 214-215 (1791).
151 Giles, 128 S.Ct. at 2695 (Souter, J., with whom Ginsburg, J., joins, concurring in part.).
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.152 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 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 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 purpose in the excessively narrow manner Justice Scalia suggests in Giles. Courts would be ill-advised to follow the extremely narrow approach to defining forfeiture taken by the majority in Giles.

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’ absence, then the defendant has forfeited the right to confront that witness’ prior testimonial statements.153 Using the language from Lord Morley’s Case allowing forfeiture when the witness was absent or detained “by means or procurement of the prisoner,” 154 Justice Breyer argues that “[t]he phrase ‘by means of’ focuses on what the defendant did, not his motive for (or purpose in) doing it.”155

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’ 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’

152 Id.
153 Giles, 128 S.Ct. at 2701 (Breyer, J., dissenting).
154 Id. (Breyer, J., dissenting) citing Lord Morley’s Case, 6 How. St. Tr., at 771.
155 Id. (Breyer, J., dissenting) (emphasis in original) (In Diaz v. United States, 223 U.S. 442 (1912), 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); id. (“And in Motes v. United States, 178 U.S. 458, 473-474 (1900), 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.”).
unavailability, then all of a victim’s statements in homicide cases 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 get the witness to court. For example, if the defendant were involved in a car accident which caused the witness’ 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. If the state could establish cause in fact, also known at “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. Criminal law today continues to develop ways conceptualizing and implementing the connection between moral blameworthiness, culpability, and punishment. It is not surprising, therefore, to see a link between forfeiture and a mental state requirement. What is curious is to attribute it 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. The dissent, however, rejected the majority’s interpretation of “procurement” to require proof of defendant’s “purpose” or “motive” as unpersuasive. Citing nineteenth century dictionaries and a treatise, the dissent was not convinced by the majority’s interpretation of the terms “procurement” or “contrivance.” Both terms could be interpreted either to include only purposeful conduct, or more generally any conduct which causes a result. 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.

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 leads on in his majority opinion in *Giles*. Modern courts continue 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. To reinforce this notion, courts have often stated a variant of the

156 *Giles*, 128 S.Ct. at 2697 (Breyer, J., dissenting) ("[U]nder the circumstances presented by this case, there is no difficulty demonstrating the defendant’s intent.").
157 *Id.* at 2701 (Breyer, J., dissenting).
158 *Id.* at 2700-01 (Breyer, J., dissenting).
159 *Id.* at 2701-02 (Breyer, J., dissenting). See also E. POWELL, PRACTICE OF THE LAW OF EVIDENCE 166.
160 See Woodsides 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.
statement that “[T]he jury is entitled to presume that a person intends the natural and probable consequences of his acts.”161 This encompasses not only purpose, which is one of the highest levels of mental state, but lower levels of intent, including mental states such as recklessness and perhaps even negligence.

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.162 Thus, the Giles Court did not expand the rule any further than for those actions “designed” to prevent a witness from testifying.163

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 the co-conspirator exception to the hearsay rule.164 While the trial judge must make an initial assessment that there is sufficient evidence to prove the conspiracy by a preponderance of the evidence, it is the jury who ultimately decides whether all the evidence proves the conspiracy beyond a reasonable doubt.165 In the constitutional context, even by the rule of Giles itself, courts are required to make preliminary determinations based on the defendant’s culpability for the charged conduct.166 For example, the burden in proffering a

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161 Giles, 128 S.Ct. at 2698 (Breyer, J., with whom Stevens, J., and Kennedy J., join, dissenting), citing Allen v. United States, 164 U.S. 492, 496 (1896) (“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.”); United States v. Aguilar, 515 U.S. 593, 613 (1995) (Scalia, J., dissenting) (“The jury is entitled to presume that a person intends the natural and probable consequences of his acts”); see G. Williams, Criminal Law § 18, at p. 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”); ALI, Model Penal Code § 2.02(2)(b)(ii) (1962) (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”); 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”). See also Giles, 128 S.Ct. at 2704 (dissent) citing Williams, Criminal Law § 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)); LAFAVE, Substantive Criminal Law § 5.2(a), at 341 (“the 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”).

162 Giles, 128 S.Ct. at 2686. “It is akin, one might say, to ‘dispensing with jury trial because a defendant is obviously guilty.’” quoting Crawford, 541 U.S. at 62.

163 Giles, 128 S.Ct. at 2683-84.


165 FRE 104.

166 Justice Scalia concedes this point in Part II-D-2 of the majority opinion, which justices Roberts, Thomas, 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-
prior testimonial statement of an unavailable witness under the forfeiture doctrine would be on
the prosecution to meet the standard of the preponderance of the evidence, according to Federal
Rule of Evidence 104(a).\(^\text{167}\) Even so, Justices Souter and Ginsburg find this too close for
comfort, acknowledging the distinction, but calling it a “near circularity.”\(^\text{168}\)

2. **“Motive” vs. “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.”\(^\text{169}\) 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.”\(^\text{170}\)

Certainly, it is more difficult to prove the more specific mental state of “purpose” than
the broader mental state of “intent.”\(^\text{171}\) But the dissent goes even farther in suggesting that a
negligent state of mind may even be sufficient.\(^\text{172}\) As Justice Breyer states, “no case limits
forfeiture to instances where the defendant’s purpose or motivation is to keep the witness
away.”\(^\text{173}\) 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.”\(^\text{174}\) Justice Breyer
emphasized “the law does not often turn matters of responsibility upon motive, rather than

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\(^{167}\) Bourjaily v. United States, 483 U.S. 171,175 (1987). 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 FRE 806(b)(6) Advisory
Committee’s Note to 1997 Amendment.

\(^{168}\) Giles, 128 S.Ct. at 2694 (Souter, J., concurring, joined by Ginsburg, J.)

\(^{169}\) Giles, 128 S.Ct. at 2698 (Breyer, J., dissenting), referencing id. at 2683-84.

\(^{170}\) Id., citing State v. Romero, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694, 702-703 (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).

\(^{171}\) 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.”).

\(^{172}\) Id. at 2700 (Breyer, J., dissenting).

\(^{173}\) 128 S.Ct. at 2683-2684 (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”).
intent…. [a]nd there is no reason to believe that application of the rule of forfeiture constitutes an exception to this general legal principle.” 175 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. 176 Examining the language used by the historical cases, Justice Breyer concludes that the words actually suggest a focus on the defendant’s acts which cause the “consequence” of the witness’ absence. 179

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. 180 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., 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.” 181 By contrast, the Model Penal Code separates these concepts into two levels of mens rea, “purpose” and “knowing.” 182 Both are subjective determinations.

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 “general intent” crimes. 184 However, there is widely inconsistent usage of even these terms which 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

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175 Giles, 128 S.Ct. at 2698-99 (Breyer J., dissenting).
176 Id. at 2700 (Breyer, J., dissenting).
177 Id. at 2701 (Breyer, J., dissenting). ("The phrase "by means of" focuses on what the defendant did, not his motive for (or purpose in) doing it.").
178 Giles, 128 S.Ct. at 2701 (Breyer, J., dissenting), quoting Diaz v. United States, 223 U.S. 442, 452 (1912) (the witness was absent "by the wrongful act of" the accused).
179 Giles, 128 S.Ct. at 2701 (Breyer, J., dissenting), referring to Motes v. United States, 178 U.S. 458, 473-474, (1900) where the Court spoke of absence "with the assent of" the defendant.
180 See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 117-180 (5th Ed. 2009).
181 Id. at 121 citing Thornton v. state 919 A.2d 678 (Md. 2007).
182 MODEL PENAL CODE §§ 2.02(2)(a), 2.02(2)(b). Id. cmt.2 citing Walter Wheeler Cook, ACT, INTENTIONS AND MOTIVE IN CRIMINAL LAW, 26 YALE L. J. 645 (1917); Rollin M. Perkins, A RATIONALE OF MENS REA, 52 HARV. L. REV. 905, 910-11 (1939).
183 Dressler, supra note >>, at 121-122.
184 Id. at 137-139.
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.\(^{185}\)

There is no universally accepted meaning of the “general intent” and “specific intent.” There are, however, three 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. Under this application of *mens rea*, thus the prosecution must prove only that the *actus reus* of the crime was performed with a morally “blameworthy state of mind.”\(^{186}\) 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.\(^{187}\) Specific intent encompasses “purpose” – the term Justice Scalia has in mind in describing forfeiture.

The second approach is a 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.\(^{188}\)

The third approach is commonly used in modern criminal law. As criminal law has evolved and been codified by legislatures, many statutes expressly include and identifiable *mens rea* element term, or a particular state of mind is judicially implied, so the line between “general” and “specific” is more difficult. Many modern courts use the term “specific intent” to 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. 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 considered a specific intent crime.\(^{189}\) For example, many burglary statutes prohibit a person from, breaking and entering with intent to commit a felony therein.

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*.\(^{190}\) 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.\(^{191}\) For example, to be guilty of the crime of receiving stolen property, the defendant must know that the property is stolen property.

\(^{185}\) *Model Penal Code* §2.02 cmt 1 (1985).

\(^{186}\) Dressler, supra note >>, at 138.

\(^{187}\) *Id.*

\(^{188}\) *Id.*

\(^{189}\) *Id.*

\(^{190}\) *Id.*

\(^{191}\) *Id.*
The 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 solely to the acts that constitute the criminal offense. More simply, after identifying that this is not a “specific intent” or “strict liability” offense, courts often categorize all other offenses as “general intent” crimes. For example, common law rape is often considered a general intent offense because no mens rea term is expressed, however the actus reus must be committed in a morally blameworthy fashion. The actor must, for example, engage in the intercourse with a mental state of consciousness, not accident.

b. The Model Penal Code

In 1952, the American Law Institute met to create a model code which 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 section 2.02 of the Code, the writers identify and classify four levels of mental state: purposely, knowingly, recklessly or negligently.

§2.02 General Requirements of Culpability. ***

(2) Kinds of Culpability Defined.
(a) Purposely.
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.
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.
(c) Recklessly.
A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. 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.

192 Model Penal Code §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.”
(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 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.

Each mens rea element is defined to apply to the circumstance in which the actor “acts”… with respect to a material element of an offense.” In other words, the mens rea applies specifically to a conduct, result, or attendant circumstance material element.

“Purposely” encompasses a person’s mental state when it is one’s “conscious object” to engage in conduct of that nature, or “conscious object” to cause a result, or “aware[ness] of the existence of such [attendant] circumstances” or “believe[f] or hope[f] that [the attendant circumstances] exist.” “Knowingly” encompasses “aware[ness] that [one’s] conduct is of that nature,” or “aware[ness] that it is practically certain that [one’s] conduct will cause such a result, or “aware[ness] that such [attendant] circumstances exist.” Both purposely and knowingly appear to 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

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193 Model Penal Code §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[.]

194 Model Penal Code §2.02. § 1.13. General Definitions. 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;
(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) negates an excuse or justification for such conduct; or
(d) negates 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;

195 See §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.

196 Model Penal Code §2.02(a) See also MPC§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.”)

197 Model Penal Code §2.02(b)
simply “believes or hopes that [the attendant circumstances] exist.” A distinction which between purpose and knowledge is clarified, in part, by section §2.02(7), which allows the requirement of knowledge is satisfied by the knowledge 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 a person is aware of a high probability of its existence, unless he actually believes that it does not exist.”

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.” 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.’” 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.” 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’ 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. As in a guilty plea, a knowing, voluntary, and intelligent waiver effectively waives the right of confrontation. 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 or their constitutional right to vote. Similarly, the forfeiture of a right to confrontation by wrongdoing is an implied, or imputed waiver. The right of confrontation is

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198 § 2.02(2)(a)(ii) Emphasis added.
199 Model Penal Code §1.13(12).
imputedly waived when a defendant is voluntarily absent from trial or is so disruptive to the court proceedings that removal from the courtroom is necessary. The forfeiture by wrongdoing exception relies 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.” Given that there is no clear precedent which 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. Indeed, Justice Breyer finds the majority’s requirement of purpose or motive to be inconstant with the “basically ethical objective” of the forfeiture exception. If the defendant is able to keep the witness from testifying in court, he has “take[n] advantage of his own wrong” whether 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. According to Justice Breyer, requiring “evidence that [the defendant] was focused on his future trial” produces “incongruous” results.

In contrast, focusing on intent, the dissent argues for also applying forfeiture to a defendant with knowledge of the result of his wrongdoing conduct. Most importantly, the dissent argues that “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.” Thus, the dissent asserts that the requisite intent is, in fact, established on the facts of Giles: The

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206 Giles, 128 S.Ct. at 2699 (Breyer, J., dissenting).
207 Id. at 2702 (Breyer, J., dissenting), citing J. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 248 (2003).
208 Id. at 2699 (Breyer, J., dissenting). Justice Breyer highlights that the State only introduced the unconfronted statements to rebut the defendant’s affirmative self defense 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 (Breyer, J., dissenting). 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 which prompted the prosecution to use the testimonial evidence.
209 Id. (Breyer, J., dissenting) quoting Reynolds, 98 U.S., at 15.9
210 Id. at 2698 (Breyer, J., dissenting).
211 Id. at 2699 (Breyer, J., dissenting). 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 (Breyer, J., dissenting).
212 Id. at 2705 (Breyer, J., dissenting).
213 Id. at 2701 (dissent) “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.”
intent to procure the absence of the witness is established by proof of knowledge that the defendant’s wrongdoing actions will cause the witness’ absence.\textsuperscript{214}

2. CLARIFYING MUDDY FORFEITURE WATERS

Justice Breyer’s dissent takes the position that unconfronted testimonial statements may not have been admissible under the forfeiture doctrine at the time of the founding, but are admissable today.\textsuperscript{215} 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 discreet, 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 in the Confrontation Clause.

At the time of the founding, courts discussed three legally sufficient ways to establish a witness’ unavailability to testify in person, in court at a criminal defendant’s trial.\textsuperscript{216} Proving a witness was dead demonstrated that it was factually impossible for the witness to appear and testify at trial.\textsuperscript{217} Courts could have decided that a witness’ death would be the only circumstance in which courts would admit alternative forms of evidence from the witness, 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.”\textsuperscript{218} 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 was alive and able to travel may still be legally unavailable to testify at trial because the witness was “kept away by the means or procurement of the prisoner.” 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.

\textsuperscript{214} Id. at 2697-98 (Breyer, J., with whom Stevens, J., and Kennedy J., join, dissenting)

\textsuperscript{215} Giles, 128 S.Ct. at 2706. (Breyer, J., dissenting).

\textsuperscript{216} For hearsay purposes in evidence law, other circumstances also satisfy the unavailability requirement. See e.g., Fed. R. Evid. 804. Hearsay Exceptions; Declarant Unavailable


\textsuperscript{218} Id.
Historically the preferred form of evidence from a witness was live, in court, sworn testimony. However, if a witness had made 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 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. There were, however, exceptions.

Three exceptions are particularly relevant to our discussion here. First, an exception was made for the witness’ prior testimony. While perhaps not as informative as live testimony, prior testimony was sworn and considered sufficiently reliable. Second, an exception was made for a witness’ dying declaration. The rationale was that the witness would have no motive to lie if he were about ready to meet his maker. Third, an exception was made for a witness’ prior statement, regardless of the content or the circumstances of the statement, if the witness was unavailable for the third reason only, if he were “kept away by the means or procurement of the prisoner.” All the other exceptions to the 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. The underlying reasoning for this exception is completely different. What has come to be known as the forfeiture by wrongdoing exception to the hearsay rule is based not on assumptions 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 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. While the constitutional right to confrontation may be valued more highly that the evidentiary issue of reliability, it does not compel a more restrictive standard. 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. 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 stating that they “stem from the same roots.”

In Crawford, the Court reoriented its perspective of the Confrontation Clause back to the era of the founding. In doing so, the Court determined that the focus of the Confrontation Clause

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219 Giles, 128 S.Ct. at 2705 (Breyer, J., dissenting) (at 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).
220 Mattox v. United States, 156 U.S. 237, 250 (1895). (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.)
222 J. Archbold, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES 85 (1822).
223 Giles, 128 S.Ct. at 2700 (Breyer, J., dissenting).
224 Giles, 128 S.Ct. at 2687-88.
225 Id. at 2686 quoting Dutton v. Evans, 400 U.S. 74, 86 (1970).
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 which 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.

Justice Breyer characterizes the practice of admitting unconfronted statements under the forfeiture exception as a recent evidentiary development.\(^{226}\) 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.”\(^{227}\) and “[o]rdinarily a murderer would know that his victim would not be able to testify at a murder trial.”\(^{228}\) 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.\(^{229}\)

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’ testimonial statements can describe allegedly criminal conduct. If followed by the defendant’s subsequent wrongdoing which procures the witness’ absence for a court proceeding on the issue of the criminality of the 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 which is precisely the conduct claimed to be the defendant’s wrongdoing which procures the witness’ 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 which also constitutes the wrongdoing which procures the witness’ absence, the issue is the admissibility of the 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

\(^{226}\) Id. at 2706 (Breyer, J., dissenting).
\(^{227}\) Id. at 2707 (Breyer, J., dissenting).
\(^{228}\) Id. at 2708 (Breyer, J., dissenting).
\(^{229}\) Id. at 2708 (Breyer, J., dissenting).
“designed to prevent a witness from testifying.” 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. The concurrence adopts a broader approach to forfeiture and the dissent cites cases in other areas of law which 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.

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 the 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.”

Especially in the context of domestic violence and gang-related cases, courts should not strictly adopt Justice Scalia’s unjustifiably narrow approach to forfeiture but should use an approach that is more flexible and considers intent 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 purpose or specific intent.

For example, Professor Tom Lininger has attempted to project some coherence onto this analysis and its implication for domestic violence cases, where witnesses are frequently unavailable to testify due to some conduct of the defendant. His analysis proposes that intent would be inferred in the following three circumstances: violation of a restraining order issued for the victim’s protection; the commission of a violent act against the victim during the pendency of judicial proceedings; and a history of “abuse and isolation.” These factors provide a much more useful approach to addressing forfeiture than focusing on a narrow assessment of purpose. However, given that the confrontation right applies in all criminal cases, not just domestic violence, the Court has rightly strived to set a standard clear enough to be applied, yet flexible enough to address unforeseen circumstances.

230 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.”
231 For example, neither the life insurance proceeds or 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)
232 Id. at 2686.
233 For discussion of this issue, see Yee, supra note >>.
234 Tom Lininger, supra note >>, at 898.
235 Id. at 900.
236 Id. See also Deborah Tuerkheimer, Control Killings, 87 TEX. L. REV. 117 (2009).
237 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?”
Analyzing the count according to reasoning, rather than result, the nine justices of the 
*Giles* court actually impliedly share common ground. It is this narrow common ground -- rather
than the result of the case -- that lower courts should use in applying the forfeiture by
wrongdoing analysis.\(^\text{238}\) History shows that common law intent was a more amorphous term
which encompassed what is now often called purposive or knowing mental states. As the
concurrence suggests, this is an appropriate standard. This common, middle ground is laid out in
broad strokes by Justices Souter and Ginsburg. As Justice Ginsburg 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.”\(^\text{239}\)

The three justices joined in the dissent also stand firmly on this common ground, that the
forfeiture doctrine requires the prosecution to prove the defendant’s intent.\(^\text{240}\) But the dissent
clearly outlines the government’s burden saying “that the prosecution in such a case need show
no more than intent (based on knowledge) to do so.”\(^\text{241}\) And ultimately, the remaining four
justices who joined the majority opinion, should share this common ground. 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.

The common ground among a majority of the justices in *Giles* becomes even firmer in
the domestic violence context.\(^\text{242}\) Importantly, the majority decision itself specifically addresses
the application of its interpretation of the forfeiture by wrongdoing rule in the domestic violence
context.\(^\text{243}\) 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

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\(^{238}\) 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. U.S., 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.”). 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).

\(^{239}\) *Giles*, 128 S.Ct. at 2694 (Souter, J., concurring joined by Ginsburg).

\(^{240}\) *Giles*, 128 S.Ct. at 2701-02 (Breyer, J., dissenting).

\(^{241}\) *Giles*, 128 S.Ct. at 2705 (Breyer, J., dissenting).

\(^{242}\) *Giles*, 128 S.Ct. at 2695 (Souter, J., concurring joined by Ginsburg) (supporting Part II –E of the majority
opinion). Alafair S. Burke, Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization,
75 GEO. WASH. L. REV. 552 (2007); Deborah Tuerkheimer, Control Killings, 87 TEX. L. REV. 117 (2009); Deborah
711 (2009)

\(^{243}\) *Giles*, 128 S.Ct. at 2692-93. Section II E.
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.\textsuperscript{244}

Although the majority quibbles with the dissent, denying that such an analysis is “nothing more than “knowledge-based intent,””\textsuperscript{245} their 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[.]”\textsuperscript{246}

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.”\textsuperscript{247} The three justices joined in the dissent quote this language in agreement,\textsuperscript{248} 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.’”\textsuperscript{249}

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 and originalist, Justice Scalia works to identify the Framers’ intent and then attempts to preserve the original meaning the in application of the constitutional text to the issue before the court. Other justices on the Court have been less reliant on history as a source for information about the meaning of the Confrontation Clause.\textsuperscript{250} By contrast, Justice Breyer’s jurisprudence is founded on the idea that the Constitution is a living document that was written

\textsuperscript{244} Giles, 128 S.Ct. at 2692-93. Section II E. The Court sent the case back to allow the trial court to consider the intent of the defendant on remand.

\textsuperscript{245} Giles, 128 S.Ct. at 2693.

\textsuperscript{246} Giles, 128 S.Ct. at 2695 (Souter, J., concurring joined by Ginsburg).

\textsuperscript{247} Giles, 128 S.Ct. at 2695 (Souter, J., concurring joined by Ginsburg).

\textsuperscript{248} Giles, 128 S.Ct. at 2708. “Consequently, I agree with this formulation, though I would apply a simple intent requirement across the board.”

\textsuperscript{249} Giles, 128 S.Ct. at 2708 (Breyer, J., dissenting).

with the intent that it would be interpreted to adapt to the present circumstances of the issue before the court.\footnote{See, e.g., \textsc{Justice Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (2005)} (laying out the vision for a living constitution).}

Elsewhere, Justice Scalia has revealed that, in a crunch, he may be a “faint-hearted” originalist.\footnote{Justice Antonin Scalia, \textit{Originalism: The Lesser Evil}, 57 Cin. L. Rev. 849 (1989).} 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 based 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. Justice Scalia’s most recent opinion in his \textit{Crawford} trilogy may have revealed himself as not only a faint-hearted originalist, but as a faint-hearted scholar of the common 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 suggests. Given that the most recent decision by the Court in \textit{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 broadly than Justice Scalia’s majority opinion in \textit{Giles} appears to invite.