

GILES V. CALIFORNIA: A PERSONAL REFLECTION

by
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In this Essay, Professor Friedman places Giles v. California in the context of the recent transformation of the law governing the Confrontation Clause of the Sixth Amendment. He contends that a robust doctrine of forfeiture is an integral part of a sound conception of the confrontation right. One reason this is so is that cases fitting within the traditional hearsay exception for dying declarations can be explained as instances of forfeiture. This explanation leads to a simple structure of confrontation law, qualified by the principle that the confrontation right may be waived or forfeited but not subject to genuine exceptions. But this view of forfeiture now appears to be foreclosed by the decision in Giles that the accused does not forfeit the right unless his conduct was designed to render the victim unavailable as a witness. One justification offered for the result in Giles is the near circularity of holding that the accused forfeited the confrontation right on the basis of the same misconduct with which he is charged. This coincidence of issues should not be regarded as a genuine problem—any more than when, in a conspiracy prosecution, the judge admits a statement on the ground that it was made by a conspirator of the accused. Another justification offered by the majority was equity—an unpersuasive ground when the reason the accused cannot examine the witness is that he murdered her, albeit for some reason other than preventing her testimony at trial. And finally, the majority contends that the imminence requirement of the dying declaration exception would have been without force if forfeiture doctrine had been broad enough to apply to cases of statements by victims who did not appear to be on the verge of death at the time. Professor Friedman contends that the imminence requirement can be understood as marking the boundary of cases in which the prosecution has a duty of mitigation—that is, a duty to try to preserve so much of the confrontation right as reasonably possible given the situation created by the accused’s misconduct. He also argues that over the long term the decision in Giles may turn out to weaken the Confrontation Clause—by encouraging manipulation of existing doctrine, by discouraging adoption of a doctrine of mitigation, and by complicating the structure of the confrontation right.

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In *Giles v. California*,¹ the Supreme Court severely restricted the doctrine under which a criminal defendant may forfeit the right accorded him, under the Confrontation Clause of the Sixth Amendment of the Constitution, “to be confronted with the witnesses against him.”² This essay presents a personal reflection on *Giles*. Some of what I say will be self-referential. I recognize the potential hubris in this, and I apologize in advance. But I have been thinking about, and engaged in, issues related to the Confrontation Clause for many years now, and this approach will allow me to set the *Giles* case in context and show why I believe it to be a very unfortunate development.

Some years ago, I became convinced that the then-prevailing doctrine of the Confrontation Clause, as developed under *Ohio v. Roberts*, was in serious disrepair.³ The primary problem was that the doctrine, based on the supposed reliability of an offered statement, did not express a principle worthy of respect. Another problem was that the limitations on the right, based in large part on “firmly rooted” hearsay exceptions, were such poor guides to reliability.⁴ A favorite target of mine was the exception for dying declarations. Because the gates of heaven were opening when the declarant made such a statement, it was supposedly extremely reliable—no one would want to die “with a lie upon his lips.”⁵ I suspected that if I were in that position, I might have a very different response, that I might as well take advantage of the opportunity to settle an old score without suffering any adverse earthly consequence. The idea, endorsed by the Supreme Court in 1990 in *Idaho v. Wright*, that dying declarations were so reliable that cross-examination would be of “marginal utility,” struck me as particularly silly.⁶ Suppose defense counsel in a murder case were given a special opportunity, a one-day visa to heaven (or wherever) to take the deposition of the deceased murder victim. Would counsel really say, “No sense going. She knew she was on death’s door when she accused my client, so I couldn’t do anything with her on cross.” Not very likely. Even if counsel believed that the dying declarant’s sincerity was beyond challenge, the declarant often is not in a particularly good position to observe the assailant.⁷ And if the opening of the gates of heaven did operate as a virtual guarantee of truthfulness, why was the exception limited to statements made about the apparently

¹ 128 S. Ct. 2678 (2008).

² U.S. CONST. amend. VI.

³ 448 U.S. 56 (1980).

⁴ *Id.* at 66.

⁵ *Idaho v. Wright*, 497 U.S. 805, 820 (1990) (quoting *Regina v. Osman*, 15 Cox Crim. Cas. 1, 3 (N. Wales Cir. 1881) (Lush, L.J.) (“[N]o person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips.”)).

⁶ *Wright*, 497 U.S. at 820.

⁷ See, e.g., *People v. Taylor*, 737 N.W.2d 790 (Mich. Ct. App. 2007), *leave to appeal granted*, 741 N.W.2d 24 (2007), and *order granting leave vacated*, 752 N.W.2d 454 (2008) (allowing statement made by dying victim shot from outside bedroom window while in bed at night).

impending death, and so for practical purposes to statements by homicide victims⁸—why was it not applicable to any statement made by a person who knows she is on the edge of death?

I began to argue that the confrontation right, instead of presumptively applying to all hearsay statements, should be limited to those made in anticipation of investigation or prosecution of a crime. After a time, I came to believe that a sound historical and theoretical justification for this limitation was that such statements—and only such statements—are testimonial in nature, and that the Confrontation Clause, which applies “[i]n all criminal prosecutions” to “the witnesses against” the accused, extends to, and is limited to, testimonial statements;⁹ testifying is what witnesses do. But as to testimonial statements, the Clause should be understood to articulate not merely a presumptive evidentiary rule but an absolute, categorical procedural right: Testimony may not be introduced against an accused unless he has had an opportunity to be confronted with and cross-examine the witness. (A historically supported subsidiary rule is that this opportunity must be afforded at trial unless that is not reasonably possible.) This right is absolute in the same way that its neighbors in the Sixth Amendment, the right to a jury trial and the right to counsel, are absolute: We do not decide in a particular case that the accused is so obviously guilty that it is silly or counterproductive to afford him counsel or a jury trial.

So I began trumpeting a theory of the Confrontation Clause as an absolute right, without exceptions.¹⁰ But I was brought up short on one point, first by a student whose name I am afraid I cannot remember. When I ridiculed the dying declaration exception, suggesting that these statements should be excluded, he objected—if the defendant murdered the victim then wouldn’t it be outrageous for the statement to be excluded on the basis that he had not had a chance to cross-examine her? I suppose I was slow to grasp the point because my former colleague Stewart Sterk later made it to me as well.

And they were right. I learned from them that, whatever the justification, one way or another most statements fitting within the traditional hearsay exception for dying declarations are going to be admitted. And I recognized that they had pointed to a very sound justification for admitting these statements that did not rely on the nonsense of the traditional exception for dying declarations. Under a longstanding doctrine that has come to be known as forfeiture, in at least some settings (I do not want to beg the question) if the accused renders a witness unavailable by wrongful means then the lack of an opportunity

⁸ See, e.g., FED. R. EVID. 804(b)(2) (limiting exception to certain statements “concerning the cause or circumstances of what the declarant believed to be impending death”).

⁹ U.S. CONST. amend. VI.

¹⁰ See, e.g., Richard D. Friedman, *Confrontation: The Search for First Principles*, 86 GEO. L.J. 1011 (1998).

for the accused to be confronted with the witness will not prevent the witness's testimonial statements from being admitted.¹¹ Intimidation, especially in the domestic violence context, and murder are the types of misconduct that most often justify a conclusion of forfeiture. I was reminded of the standard definition of *chutzpah*—the quality illustrated by the man who killed both his parents and then begged the court for mercy as an orphan. It seemed to me, and it still does, that nearly as flagrant an illustration of *chutzpah* is provided by the man who kills his victim and then contends that her statement made on the verge of death cannot be introduced against him because he did not have a chance to cross-examine her.¹² “Let me get this straight,” I imagine the trial judge asking, “You’re complaining that you didn’t get a chance to cross-examine her, right? But the reason you didn’t was that you murdered her, right?”

Of course, the conclusion that the admissibility of a dying declaration could be explained on the basis of forfeiture depends on the premise that in fact the accused murdered the victim—and that is precisely the proposition that the prosecution is attempting to prove to the jury. Some people are disturbed by the appearance of circularity but it really isn’t a problem at all. To secure a conviction, the prosecution must prove to the trier of fact (a jury if there is one) that the defendant committed the crime. As a separate matter, to justify the admission of a given piece of evidence, the prosecution must prove to the judge that the defendant committed misconduct rendering the witness unavailable. It so happens that the two acts are the same, but so what? The two fact-finding processes are held for different purposes, presumably before different fact-finders, on different bodies of evidence, and subject to different standards of persuasion. If the judge decides that in fact the accused did commit the forfeiting misconduct, she may simply admit the evidence but she need not announce her factual conclusion to the jury. The situation is exactly comparable to the one that has prevailed for many years with respect to conspiracy cases in which the prosecution seeks to admit evidence on the basis that it was made in furtherance of the very conspiracy being charged.¹³

If forfeiture doctrine accounts for the traditional receptivity to dying declarations, then a smooth, simple theory is possible. In the amicus brief I submitted in *Crawford v. Washington*,¹⁴ I wrote:

Like the right to counsel and the right to a jury trial, the right to confront witnesses is subject to waiver, and it is also subject to forfeiture, for the accused has no ground to complain if his own wrongdoing caused his inability to confront the witness. Like those

¹¹ See, e.g., *Reynolds v. United States*, 98 U.S. 145, 151–152 (1878).

¹² See, e.g., Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506 (1997).

¹³ See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 183 (1987).

¹⁴ 541 U.S. 36 (2004).

other rights, the right to confront adverse witnesses can and should be applied unequivocally. That is, if the statement is a testimonial one and the right has not been waived or forfeited, then the right should apply without exceptions.¹⁵

Crawford, of course, transformed the law governing confrontation. Justice Scalia has identified *Crawford* as his favorite among his opinions, and it is a good choice.¹⁶ The decision is a monumental achievement, practically a re-institution of the confrontation right as a central feature of our criminal justice system. *Crawford* spoke in strong, categorical terms. It indicated appropriately that the primary focus of the Confrontation Clause is on testimonial statements; subsequently, the Court has, quite properly, declared explicitly that the Clause does not extend beyond such statements. As to testimonial statements, *Crawford* made clear that there is a flat right to confrontation, and no judicial assessment that the statement is reliable will suffice as a replacement.

Any exceptions? The Court pointed to two. It endorsed the doctrine of forfeiture by wrongdoing, without elaboration other than to note that the doctrine is based on “essentially equitable grounds” rather than on an assessment of reliability.¹⁷ It would have been better if the Court referred to forfeiture as a qualification on the exercise of the confrontation right, a circumstance estopping the accused from asserting the right, rather than as an exception to it. I don’t think the doctrine that a right might be waived should be considered an exception to the right. I believe the same is true of estoppel by forfeiture, but we should not put too much weight on terminology.

Second, the Court correctly noted that the only exception to the hearsay rule that was (1) generally articulated on the basis of reliability concerns, (2) widely recognized at the time the Sixth Amendment was adopted, and (3) applied broadly to testimonial statements introduced against an accused was the one for dying declarations. The Court was very careful in its treatment of this exception, saying, “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*.”¹⁸

So matters stood pretty well. The Court had recognized the existence of forfeiture doctrine, and it had not committed itself to the existence of a dying declaration exception to the confrontation right as such.

¹⁵ Motion for Leave to File and Brief Amicus Curiae of Law Professors Sherman J. Clark, et al., in Support of Petitioner, at 3, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410).

¹⁶ JEFFREY TOOBIN, *THE NINE* 317 (2007). Toobin speaks only of “an esoteric case interpreting the Confrontation Clause of the Sixth Amendment,” but the reference seems obvious, though *Crawford* seems esoteric only as judged by a standard of headline generation.

¹⁷ *Crawford*, 541 U.S. at 62.

¹⁸ *Id.* at 56 n.6.

Forfeiture played a more salient role in the Court's next encounter with the confrontation right, in the pair of cases decided under the name *Davis v. Washington*.¹⁹ These were both domestic violence cases in which the question was whether an accusation made to an agent of law enforcement shortly after the alleged incident was testimonial. I represented the accused in one of the cases, *Hammon v. Indiana*.²⁰ Amy Hammon made her accusation to a police officer in her living room, an indeterminate time after the alleged assault, while another officer kept her husband at bay. Immediately after the oral accusation, she signed an affidavit to similar effect.²¹ If her accusations were not deemed testimonial, it would have been not only an evisceration of *Crawford*, but the virtual death of the confrontation right: a prosecution witness could testify simply by speaking to a police officer in her living room. But fifty-eight organizations active against domestic violence appeared as amici on the side of the states. Much of their emphasis was on the detrimental impact on domestic violence prosecutions if statements like this were not admitted, in large part because domestic violence victims so often decline to testify because of intimidation.²² In reply, I argued: "[I]f wrongful conduct of the accused causes the complainant to be unable to testify, then the accused should be held to have forfeited the confrontation right. . . . Petitioner believes that a robust doctrine of forfeiture is an integral part of a sound conception of the right."²³

In resolving the *Hammon* case, the Court took the proper basic approach. While noting the fact that domestic violence "is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial," the Court declined to "vitiate" the constitutional guarantee of confrontation by interpreting it too narrowly.²⁴ But, the Court emphasized, the doctrine of forfeiture was available to protect "the integrity of the criminal-trial system."²⁵

The *Davis-Hammon* opinion raised some concern, though, that forfeiture doctrine might be construed so expansively as to subvert the confrontation right. Imagine this exchange in a domestic violence case:

Prosecutor: Judge, the complainant is not going to come in to testify at trial. I can tell you that, because of the way the accused has abused her, she is terrified that he would harm her badly if she testified against him at trial. So I ask you to hold that he has

¹⁹ 547 U.S. 813 (2006).

²⁰ *Id.* (No. 05-5705) (the *Hammon* case was argued in tandem with *Davis*).

²¹ The Indiana Supreme Court had recognized that the affidavit was testimonial, but it contended that admission of the affidavit was harmless error given admission of the oral accusation. *State v. Hammon*, 829 N.E.2d 444, 458-59 (2005).

²² Brief of Amici Curiae the Nat'l Network to End Domestic Violence, et al. in Support of Respondents, *Davis*, 547 U.S. 813 (No. 05-5224 and 05-5705).

²³ Reply Brief of Petitioner Hershel Hammon at 19-20, *Hammon v. Indiana*, *sub nom. Davis*, 547 U.S. 813 (No. 05-5705).

²⁴ *Davis*, 547 U.S. at 832-33.

²⁵ *Id.* at 833.

forfeited the confrontation right and to admit the statements she made to the arresting officer in her living room.

Judge: OK. Unless the defense gives me reason to conclude otherwise, I'll find that more likely than not the accused intimidated the complainant, and that she is therefore unavailable as a result of his own wrongdoing. Accordingly, I'll hold that he has forfeited the confrontation right.

Without deciding definitively, the Court's opinion contained broad hints on two issues that made this scenario seem more likely—though I do not believe that either of them addressed a means that could provide satisfactory and realistic constraints on forfeiture doctrine.

First, the Court suggested that the preponderance-of-the-evidence standard would be constitutionally adequate to demonstrate forfeiture.²⁶ Prior opinions of the Court do suggest that this is the standard that the Court would most likely adopt if it ever resolves the issue.²⁷ I believe there is considerable strength to the argument that a more stringent standard should be applied. But I doubt that the issue matters all that much. I suspect that if the Court said forfeiture required clear and convincing evidence, most courts would make the requisite finding that the evidence supporting forfeiture was clear and convincing.

Second, the Court noted that in determining whether there had been a forfeiture, trial courts would presumably be allowed to consider evidence not admissible on the merits.²⁸ That is in accordance with the usual procedure on threshold questions, and it seems appropriate here.²⁹

But if a judge can conclude on the basis of a preponderance of non-admissible evidence that the accused has forfeited the confrontation right, how might a scenario such as the one I have narrated be avoided? I believe the only effective and appropriate way would be through a doctrine of what I have called mitigation. The basic idea of mitigation is this: Even though an accused has engaged in wrongful conduct that presumptively rendered the witness unavailable to testify subject to

²⁶ *Id.*

²⁷ *See, e.g.,* *Lego v. Twomey*, 404 U.S. 477 (1972) (adopting preponderance as constitutionally required standard for determining voluntariness of confession). During my argument in *Hammon*, the discussion turned towards forfeiture. Chief Justice Roberts indicated that intimidation would be hard to prove. Justice Scalia, presumably attempting to aid me, asked, "Well, you wouldn't have to prove beyond a reasonable doubt, would you?" Before I got very far in answering, he asked, "Couldn't the judge just find it more likely than not that the defendant has intimidated a witness?" I did not want to reject a lifeline, but neither did I want to concede that this was the proper standard. So I answered, "Prior decisions of the Court suggest that that would most likely be the—the standard." I started to say that conceivably the Court could adopt a more demanding standard in this context, but the Chief Justice asked a question about the method of proof, and the argument went on from there. Transcript of Oral Argument at 22–23, *Hammon v. Indiana, sub. nom. Davis v. Washington*, 547 U.S. 813 (2006) (No. 05-5705).

²⁸ *Davis*, 547 U.S. at 833.

²⁹ *See, e.g.,* FED. R. EVID. 104(a).

confrontation, the state should not be able to invoke forfeiture doctrine to the extent that it could have preserved the confrontation right in whole or part by reasonable measures that were available to it but that it forsook. If the state does forsake such measures, then it cannot be said with sufficient clarity that the accused is the cause of his own inability to examine the witness. This is analogous to the last clear chance doctrine in torts: If the state has a good chance to preserve the confrontation right, notwithstanding the accused's wrongdoing, it should take advantage of that chance, rather than using the wrongdoing as a lever for wiping out the confrontation right.

How the mitigation concept should be applied in given cases would often be a matter of judgment. If the state claims that the accused forfeited the confrontation right with respect to a given testimonial statement by murdering the witness, but the witness lived for a considerable time after making the statement, then arguably the right should not be deemed forfeited if it would have been practical and humane to take a deposition. In the Framing era, it was not unusual to take the deposition of a dying victim in the presence of the suspect.³⁰

If the allegedly forfeiting conduct was intimidation, then I believe mitigation raises some very delicate issues. Should the court call the witness in to chambers? Should it offer the anonymity of a witness protection program? I do not have strong views on when, if ever, any one of these measures should be adopted as prerequisites to a ruling of forfeiture. But I believe that the courts should adopt some system of required procedures, and that procedural hoops of this sort would be far harder to evade than would some abstract evidentiary standard.

I have discussed some of the procedural questions surrounding forfeiture doctrine. There are critical substantive questions as well. In what settings should conduct by the accused that causes the witness to be unavailable give rise to forfeiture? I have found over the years that many people have an instinctive resistance to what I have called reflexive forfeiture, the idea that forfeiture can be based on the same misconduct for which the accused is being charged. And yet, as I have suggested, careful, lawyerly analysis indicates that the proper answer to this complexity is, "So what?"

For this reason, I believe that Dwayne Giles's lawyers, James Flanagan and Marilyn Burkhardt, did a very clever thing when they presented his case to the Supreme Court.³¹ They did not base their petition for certiorari on the contention that forfeiture was inappropriate because of a problem of circularity. Rather, they contended that forfeiture was

³⁰ See, e.g., *King v. Radbourne*, 1 Leach 457, 168 Eng. Rep. 330 (Old Bailey 1787); *Rex v. Forbes*, Holt 599, 171 Eng. Rep. 354 (1814); *Rex v. Smith*, Holt 614, 171 Eng. Rep. 357 (1817).

³¹ *Giles v. California*, 128 S. Ct. 2678 (2008).

inappropriate because there was no proof that Giles had murdered Brenda Avie *for the purpose* of rendering her unavailable as a witness.³²

I remember a conversation with Jeff Fisher, who had argued for the defendants in *Crawford* and *Davis* in the Supreme Court, while the *Giles* petition was pending. Since before the *Crawford* decision, Jeff and I have had an ongoing conversation on confrontation issues, some of them immediately pending and some that we anticipate arising somewhere down the road. Jeff comes at these issues from the point of view of a defense lawyer. We agree on many things, but we disagree considerably in our approach to forfeiture. He told me he hoped that the first forfeiture case would not be a murder one. He wondered why I was eager for the Court to take *Giles*, and I said that it was precisely for the reason that it was a good, clean murder case. I thought the issues were much more complex in intimidation cases; in a murder case, the Court would find it virtually irresistible to conclude that the accused who had murdered a witness had forfeited the confrontation right. *Giles* was a relatively rare type of case in which, though the allegedly forfeiting deed was murder, there could be no plausible contention that a dying declaration exception applied. Obviously, the Court would not take a case in which the outcome was clear, merely to decide whether it was forfeiture or a dying declaration exception that warranted admissibility.

And so, even though I thought the decision below should be affirmed, I put in a solo amicus brief urging the Court to review the case,³³ and I was delighted when the Court granted certiorari. In fact, to tell the truth, I was feeling pretty cocky when I got e-mail messages congratulating me on the fact that the Supreme Court was taking my suggestion. I assumed the Supreme Court would affirm the decision and hold that a purpose to render the witness unavailable was not a prerequisite for forfeiture. I wasn't alone; Linda Greenhouse, as savvy an observer of the Court as there is, assumed the same thing.³⁴ My confidence was somewhat shaken when I saw the excellent amicus brief submitted by the National Association of Criminal Defense Lawyers (NACDL).³⁵ The principal author was Robert Kry, who had clerked for Justice Scalia when *Crawford* was decided. He is appropriately close-mouthed as to whether he participated in drafting the opinion, but he certainly has shown considerable interest in defending it. So I assumed

³² Petition for Writ of Certiorari, *Giles*, 128 S. Ct. 2678 (No. 07-6053).

³³ Brief of Richard D. Friedman as Amicus Curiae in Support of Petition for Certiorari, *Giles*, 128 S. Ct. 2678 (No. 07-6053).

³⁴ See Linda Greenhouse, *Justices to Hear Case Testing Rule on Witness*, N.Y. TIMES, Jan. 12, 2008, at A12. "It is . . . likely that the justices accepted the new case, *Giles v. California*, No. 07-6053, to make it clear that as long as the victim's unavailability as a witness was a foreseeable consequence of the murder, the Sixth Amendment does not require the state to prove the actual motive for the murder was to make the victim unavailable."

³⁵ Brief of the Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curiae in Support of Petitioner, *Giles*, 128 S. Ct. 2678 (No. 07-6053) [hereinafter NACDL Brief].

he might have Justice Scalia's ear, and with it the ears of much of the Court. But on the merits, I thought there were good counter-arguments, and put in another solo amicus brief, this time in favor of the respondent State.³⁶ I was still feeling pretty confident.

That is, until the first 30 seconds or so of the oral argument, when Justice Scalia did *not* jump down the throat of Giles' oral advocate, Marilyn Burkhardt. The rest of the argument also gave me grave concern, which was borne out in the end: only three justices—Stevens, Kennedy, and Breyer—supported a holding of forfeiture absent a demonstration of intent to render the witness unavailable.

As I see it, three arguments motivated the justices in the majority. One was what Justice Souter, concurring, called "near circularity."³⁷ This one, to be candid, drives me up a wall. Focusing on the reflexive case, Justice Souter wrote: "The only thing saving admissibility and liability determinations from question begging would be (in a jury case) the distinct functions of judge and jury"³⁸

My reaction is that this is like saying that the only thing saving noon from being dark is the sun. I have already given reasons why the supposed circularity problem really isn't any problem at all. That should have been obvious to all the justices.

Second was considerations of equity. But exactly what would be inequitable about holding that a defendant who murders a witness cannot complain about use of that witness's statement on the ground that he did not have a chance to cross-examine her? "Let me get this straight," the judge asks the candid defendant:

It's undisputed for purposes of this motion that the reason you couldn't be confronted with the witness is that you killed her. And it's equally clear that you intended to do so, and that you had no justification in doing so. And it's also quite plain that when you struck the fatal blow, ensuring that you killed rather than merely wounded her, had you been thinking of consequences, it would have been obvious that you were precluding the possibility that she would come to court to testify against you. But your contention is that you weren't thinking that way, and so your purpose wasn't to render her unavailable, and therefore it would be unfair to hold that you forfeited the confrontation right. No matter how evil your purpose was, *so long as it was not to prevent her from testifying in some proceeding*, it could not result in forfeiture. Do I have that right?

I believe there are some cases posing difficult questions as to whether forfeiture is equitable. Suppose the defendant engages in legal conduct that is designed to, and does, render the witness unavailable—friendly persuasion of a sibling, for example, or, in a more unusual case,

³⁶ Brief of Richard D. Friedman as Amicus Curiae in Support of Petition for Certiorari, *Giles*, 128 S. Ct. 2678 (No. 07-6053).

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

³⁸ *Id.*

marrying the witness. A reckless but unintentional homicide makes an interesting case. But murder? It does not strike me as a close call at all.

Finally, we come to history, the factor that dominated the lead opinion by Justice Scalia. The basic argument, in the opinion and in the briefs of *Giles* and the NACDL, takes as a premise that in the Framing era and earlier there were no cases in which forfeiture was applied absent a purpose to render the witness unavailable. The dying declaration exception would have been essentially superfluous, the argument goes, if forfeiture doctrine could be applied absent such a purpose; without such a requirement, forfeiture would apply to virtually all dying declaration cases and more because the dying declaration doctrine has an imminence requirement while forfeiture does not.³⁹ The NACDL and Robert Kry take the argument further. They contend that forfeiture was nothing but a basis for a determination of unavailability, and that it could not justify admission of a statement without cross-examination.⁴⁰

The argument, in both its basic and extended form, has been crafted as if through a microscope: with meticulous care and precision but with an unfortunately narrow focus. The argument is based on dicta and boilerplate language in treatises, rather than on holdings of cases. Cases fitting the mold of *Giles* simply were not presented in the Framing era. The reason is that a case in that mold requires a testimonial statement made before the crime being tried, and such a statement could only be made and be relevant at trial if there was a continuing relationship between the parties—but it was highly unlikely such a testimonial statement would ever be made, because non-fatal domestic violence was virtually never prosecuted.⁴¹

In addition, the argument has a more significant failing. It does not recognize that the dying declaration cases themselves, including their imminence requirement, can easily be explained as applications of sound forfeiture doctrine, bounded by a mitigation requirement, without a need for demonstrating purpose to render the witness unavailable, and without a prior opportunity for cross-examination. Suppose that in the Framing era a victim of a grievous assault lingered for a time and

³⁹ This assumes, as do I, that in most cases in which the dying declaration doctrine is invoked, the court could make a (nearly circular?) predicate finding that the accused committed the killing charged.

⁴⁰ See NACDL Brief, *supra* note 35, at 5–6.

⁴¹ Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996), summarizes the law and practice: “The Anglo-American common law originally provided that a husband, as master of his household, could subject his wife to corporal punishment or “chastisement” so long as he did not inflict permanent injury upon her. During the nineteenth century, . . . authorities in England and the United States declared that a husband no longer had the right to chastise his wife. Yet, for a century after, . . . [w]hile authorities denied that a husband had the right to beat his wife, they intervened only intermittently in cases of marital violence . . .” See generally, e.g., SOCIETY FOR THE SUPPRESSION OF VICE, THE CONSTABLE’S ASSISTANT (London, 2d ed. 1808) (manual giving no hint of the existence of domestic violence).

subsequently died. It was standard practice to take a formal, testimonial statement from her. If death appeared to be imminent at the time, then the statement could be admitted at the accused's murder trial, even though the accused had not had an opportunity for confrontation.⁴² But if death did not appear imminent at the time, then the statement was not admissible unless the authorities provided the accused with an opportunity for confrontation.⁴³

This set of holdings reflects very well a sound doctrine of forfeiture, limited by a mitigation requirement, as I have articulated it above. Of course, it was not generally expressed in those terms. Rather, the language used was that which we have come to associate with the dying declaration exception. But again, so what? *Crawford* was a great achievement in part because it transformed the law so that it reflected the *principle* expressed in the language of the Confrontation Clause. It is a more demanding form of originalism to say that a doctrine must be consistent with most of the *results* as of the time of the Framing—but the account I have given satisfies that standard as well. It goes a step too far, a step that I believe becomes a self-parody of originalism, to say that the Clause demands that cases of a type never addressed in the Framing era must be decided consistently with the *rationales* articulated in the framing-era cases.

Use of this extended form of originalism is particularly ironic given that *Crawford* itself explicitly did to recent cases precisely what I am saying *Giles* should have done to older ones—it crafted a doctrine that was consistent with the results of those cases even while rejecting the rationale articulated in them.⁴⁴ The rationales of framing-era cases are entitled to even less deference, in part because the evidentiary law of the

⁴² See, e.g., *King v. Woodcock*, 1 Leach 500, 168 Eng. Rep. 352, 354 (Old Bailey 1789).

⁴³ See *Rex v. Forbes*, Holt 599, 171 Eng. Rep. 354 (1814); *Rex v. Smith*, Holt 614, 171 Eng. Rep. 357 (1817); *King v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (Old Bailey 1791); *Thomas John's Case* (1790), reported in 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 357–58 (photo. reprint 2006) (1803); *Henry Welbourn's Case* (1792), reported in *id.* at 358–60. In *Forbes*, the accused was present for only part of the deposition—and only that part was held admissible. In *Smith*, also, the accused appeared when the proceeding was well under way—but the victim was re-sworn, the testimony already given was read back, the victim reaffirmed it, and all was held admissible.

THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE (London 1801), presents a nice juxtaposition, summarizing the law and showing the relation of the deposition and dying declaration rules. On pages 40–41, Peake asserts that a deposition taken under the so-called Marian statutes may be admitted at trial if the witness has died and the accused was present, but that if the accused was not present the deposition may not be admitted. A listing of Errata, p. xii, qualifies this by noting that the statement may yet be admitted if the witness was “apprehensive of, or in imminent danger of death.”

⁴⁴ See *Crawford v. Washington*, 541 U.S. 36, 60 (“Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales.”).

time was primitive and undeveloped. Edmund Burke said, with some hyperbole, that a parrot could quickly be trained to recite the rules of evidence in five minutes.⁴⁵ I understand that we must pay respect to the text of the Constitution, and to the principles that the text reflects, but the Constitutional text contains no hint of the issues at stake in *Giles*. The idea that, in deciding those issues, we are nevertheless bound by the rationales of cases from that era that do not square with the facts of the case currently being decided is quite startling to me.

It is a fair summary to say I don't like the decision in *Giles*. So, will it do any harm? I think it will in several respects. And, another irony, I think the result may well be that defendants come out worse as a result.

First, if the Court had decided the case under the theory I advocated, then it would necessarily have adopted the principle of a mitigation requirement. That would be enormously important. In domestic violence cases, it would put pressure on prosecutors and other state officials to do what they reasonably could to persuade the complainant to testify in a manner preserving the confrontation right at least in part. In murder cases in which the victim lingers for a considerable time, it would give the state agents a strong incentive to take a deposition, unless it would be unfeasible or inhumane. Perhaps the Court eventually will adopt a mitigation requirement. As a matter of principle I believe it should do so, but given the result in *Giles*, there is no momentum whatsoever in favor of such a requirement.

Second, the decision in *Giles* will increase the temptation courts already have to construe the key term "testimonial" too narrowly. One can see this on the face of the *Giles* opinions itself. Justice Alito, who had concurred in *Hammon*, expressed grave doubts as to whether Avie's statement was testimonial, though he made no attempt at all to distinguish the cases.⁴⁶ Presumably because no plausible distinction was available. Perhaps even more troubling is a passage in the Court's opinion. Responding to the dissent's contention that if forfeiture doctrine were not confined by the incorporation of an intent requirement it could be helpful in punishing domestic abusers, the Court said that the doctrine would not be "as helpful as the dissent suggests, since only *testimonial* statements are excluded by the Confrontation Clause."⁴⁷ And, the Court indicated, "Statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment," are not testimonial.⁴⁸ Wow. Did the Court really mean to determine so casually that, say, if a victim makes an accusation to a physician, knowing that the physician will relay the accusation to the police in fulfillment of a statutory duty to do so, the accusation is not testimonial so long as there is some therapeutic

⁴⁵ 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 509 n.7 (1938).

⁴⁶ *Giles v. California*, 128 S. Ct. 2678, 2694 (Alito, J., concurring).

⁴⁷ *Id.* at 2692 (majority opinion).

⁴⁸ *Id.* at 2692–93.

aspect to their meeting? I hope not. I hope the Court's statement will be treated as obiter dictum. But it certainly indicates the extra incentive that *Giles* creates to construe the term "testimonial" very narrowly.

Third, and similarly, the decision will increase the temptation to construe the dying declaration exception more broadly. The recent *Jensen* case is a prime example.⁴⁹ Mark Jensen was tried for the murder of his wife Julie.⁵⁰ A key piece of evidence was a letter written by Julie several weeks before her death and to be opened in the event of her death. Before the Supreme Court took the *Giles* case, the Wisconsin Supreme Court, in an opinion I thought was basically well reasoned, held that there was sufficient evidence to conclude that Mark had forfeited the confrontation right with respect to the letter by killing Julie.⁵¹ After the grant of certiorari, the trial judge predicted correctly (to my chagrin) that the decision in the *Giles* case would render the forfeiture theory untenable in the *Jensen* case. By that time, the trial was well under way, and the letter had been admitted. So the judge, quite remarkably in my view, held that the letter was a dying declaration.⁵² Say what? It was written while Julie was perfectly fit, without any imminent threat of death. The theory the judge first enunciated was that the letter did not speak until the moment of death. That, it seems to me, would make it not a dying declaration but a dead declaration. Apparently recognizing the problem, the judge filed a formal opinion stating a different theory, that the letter could be withdrawn until the moment of death, so it spoke as of the time immediately before.⁵³ The principal problem with that theory is that there is no good basis for concluding that there was ever a time at which Julie both realized that death was imminent and was in a position to withdraw the letter. Plainly, the impulse to admit a statement like Julie's does not arise from the existence of the dying declaration exception; rather, it arises from recognition of the fact that Mark should not be able to require exclusion of her statement on the ground that he had no opportunity to cross-examine her if his wrongdoing rendered such an opportunity impossible. Anticipating that *Giles* would preclude this sensible theory, the trial judge manipulated the dying-declaration

⁴⁹ State v. Jensen, 727 N.W.2d 518 (Wis. 2007).

⁵⁰ *Id.* at 521.

⁵¹ *Id.* at 536. That I thought the opinion was basically well reasoned may be related to the court's statement that "in a post-*Crawford* world the broad view of forfeiture by wrongdoing espoused by Friedman and utilized by various jurisdictions since *Crawford*'s release is essential." *Id.* at 535.

⁵² Links to a recording of the oral opinion and argument related to it may be found in the commentary to my post "*If anything happens to me . . .*," <http://confrontationright.blogspot.com/2008/03/if-anything-happens-to-me.html> (Mar. 1, 2008).

⁵³ Memorandum Regarding the Dying Declaration, State v. Jensen, No. 02 CF 0314 (Wis. Cir. Ct. April 7, 2008), available at <http://www-personal.umich.edu/~rdfrdman/JensenDyingDec.pdf>.

exception to reach the same result. Other judges may well respond in a similar way.

Fourth, the decision takes away a good basis for challenging the rule of *United States v. Owens*, one of the most damaging decisions to the Confrontation Clause on the books.⁵⁴ *Owens* held that it satisfies the Clause to put the witness on the stand even though he has virtually no memory of the event his prior statement describes.⁵⁵ In that case, Foster, a prison guard, was the victim of a brutal assault for which Owens was charged. Foster had severely impaired memory because his head had been bashed in during the assault. During an interval of relative lucidity, he made a statement identifying Owens as the assailant. But at the time of trial, he was able to remember virtually nothing. The idea that Owens had a satisfactory opportunity for cross-examination is nearly ludicrous. True, the attempt at cross may have revealed that Foster had a bad memory as of the time of the trial. But surely the jury would likely—or at least might plausibly—conclude that Foster’s inability to remember at the time of trial was a lingering effect of the assault, and that his prior statement was not a product of faulty memory but rather an accurate report made during a transient period when his damaged condition allowed it. Whatever questions Owens was able to pose at trial would do little or nothing to undermine the persuasive impact of Foster’s statement—even if in fact the statement was based on an inaccurate perception or reflected mere speculation by Foster. But, though the holding that Owens had an adequate opportunity to examine Foster is unfortunate and unjustified, the result of the case can easily be defended. There was ample evidence that Owens had been the assailant and therefore that his wrongdoing was the cause of his inability to examine Foster. Owens therefore could easily be held to have forfeited the right to be confronted with Foster—that is, if *Giles* had not incorporated a purpose requirement into forfeiture doctrine. But, given that requirement, this explanation for *Owens* is no longer a possibility because there was no evidence that Owens assaulted Foster for the *purpose* of preventing him from testifying at trial.

Finally, and perhaps most importantly, *Giles* undercuts the basic theory of the Confrontation Clause. If *Giles* had come out the other way, then the doctrine of the Clause might have been quite simple: Prosecution testimony must be subject to an opportunity for confrontation, at trial if reasonably possible, but the right might be waived or forfeited. But now there clearly is a dying declaration exception to the confrontation right—an exception that probably made little sense on its own terms at the time of the Framing, that makes even less sense now, and that does not square at all with the theory of *Crawford*. Will the Court hold fast to the line that this exception, bizarre as it is, is

⁵⁴ 484 U.S. 554 (1988).

⁵⁵ *Id.* at 559.

the only one, *sui generis* on historical grounds? Perhaps, but I wonder. I worry about long term corrosion of the Clause.

And in the end, I wonder how closely the courts will adhere to the restrictive aspect of *Giles*. I suspect that over time courts will seize aggressively the rather generous opening provided by the opinions of the justices in the majority and find that the intent requirement is virtually *per se* satisfied in a case of domestic violence. Both Justice Scalia's opinion for the Court and Justice Souter's concurrence, joined by Justice Ginsburg, emphasized the presumed intent of the abuser "to isolate the victim."⁵⁶ At least to the two concurring justices—who were crucial to form a majority—this presumed intent appears to be sufficient to support a finding of the intent that is necessary for a holding of forfeiture: intent to render the witness unavailable to testify in court. That approach leads to sound results, but the logic is shaky. The essence of the Court's decision is that forfeiture is proper only if unavailability results from conduct that was designed to render the witness unavailable; that the defendant knew or should have known that this would be the result does not suffice.⁵⁷ But intent to isolate the victim is very diffuse. Even if one could say that this intent was a primary factor motivating the abuser's conduct, which is hardly universally self-evident, it is a stretch to jump from that premise to the conclusion that the abuser was motivated by the particular desire to render the victim unavailable as a witness. And when the abuser murders the victim, the problem is compounded. True, as Justice Souter wrote, "it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger."⁵⁸ But the accused who, having engaged in a longstanding abusive relationship, then kills his victim has clearly undergone a change of intent. It trivializes the act of murder to say that it is intended to "isolate" the victim, and thus to infer—absent particularized evidence—that the accused was motivated by a desire to render the victim unavailable as a witness.

It may be in the end that the internal inconsistencies in *Giles* will be a partial saving grace of the decision, limiting the damage that the decision causes because trial courts in domestic violence cases can avoid it simply by reciting the "isolate the victim" rationale. But the permanent damage

⁵⁶ See *Giles*, 128 S. Ct. at 2693 ("Where . . . 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.") (majority opinion), and at 2695 ("[T]he 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.") (Souter, J., concurring in part).

⁵⁷ See *id.* at 2688 (majority opinion) (rejecting the dissent's contention "that knowledge is sufficient to show intent.").

⁵⁸ *Id.* at 2695 (Souter, J., concurring in part).

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to the structure of Confrontation Clause doctrine will not be easily remedied.