THE STATE COURTS DON'T HAVE TIME FOR YOUR CRACKPOT ANTIQUARIANISM: A DECADE OF DOMESTIC HOMICIDES SINCE *GILES V. CALIFORNIA*

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INTRODUCTION

Julie Jensen was afraid. She wasn't sure, but she thought her husband Mark might be planning to kill her. He had been acting strange, and she had found a suspicious list on his business daily planner. So she wrote a letter, sealed it, and gave it to her neighbors asking them, if anything happened to her, to give it to the police.[1] Referring to the list, she wrote, "I don't know what it means, but if anything happens to me, he would be my first suspect. . . . I pray I'm wrong [and] nothing happens . . . but I am suspicious of Mark's behaviors [and] fear for my early demise."[2]

Julie Jensen died on December 3, 1998, of ethylene glycol poisoning, an ingredient in antifreeze.[3] Mark Jensen was charged with her murder; his defense was that Julie had killed herself and tried to frame him.[4] Ordinarily, in the absence of an opportunity to cross-examine Julie, admitting her letter would violate Mark's right "to be confronted with the witnesses against him" under the Sixth Amendment.[5] But the trial court allowed Julie's letter to be admitted on the basis that Mark Jensen had forfeited his right to confrontation by killing her.[6]

After Jensen was convicted, and while his case was still pending on collateral review, the Supreme Court decided *Giles v. California*, which reconsidered the doctrine of forfeiture by wrongdoing in the context of its reinvigorated Confrontation Clause jurisprudence.[7] The *Giles* Court held that forfeiture by wrongdoing only applies if the prosecution can prove that the defendant caused the victim's unavailability as a witness with the specific intent of preventing her from testifying.[8] And it was by no means clear that Jensen had wanted to eliminate Julie as

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1 I first came across this case in the forfeiture by wrongdoing section of George Fisher's Evidence book. *See* GEORGE FISHER, EVIDENCE 678 (3d ed. 2013). The problem Fisher posed was whether the letter was testimonial.

2 The full text of the letter appears in *Jensen v. Clements*, 800 F.3d 892, 895 (7th Cir. 2015) (alteration in original).

3 *Id.* at 896.

4 *Id.* at 896, 898.

5 U.S. CONST. amend. VI.

6 *See Jensen*, 800 F.3d at 898–99.

7 Forfeiture is an exception to the Sixth Amendment guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;" it provides that if the defendant has rendered the witness unavailable through his own wrongdoing, he forfeits his right to confront that witness. *See* Giles v. California, 554 U.S. 353, 357–58 (2008).

8 *See id.* at 361; *see also Jensen*, 800 F.3d at 899 (interpreting *Giles* to mean that "the forfeiture by wrongdoing exception . . . applies only when the defendant engaged in conduct designed to prevent the witness from testifying").

a witness, rather than as an obstacle to the affair he was having.

After *Giles* was decided, Jensen was granted habeas relief by a federal court because the prosecution had failed to prove that he had killed Julie to prevent her from testifying as a witness.[9] If Jensen receives a new trial, Julie's letter will most likely be kept out. And Jensen will be free to renew his defense that Julie killed herself out of spite and attempted to pin the blame on him.

While it might seem outlandish, this defense—the victim killed herself and is trying to frame a blameless man—has a centuries-old pedigree. In 1929, Zenana Shepard, the wife of a doctor named Charles Shepard, was taken violently ill.[10] As she lay in bed, she asked a nurse to hand her a bottle of whiskey from which she had had a drink before falling ill.[11] She thought the smell and taste were strange, and told the nurse, "Dr. Shepard has poisoned me."[12] Mrs. Shepard died a few weeks later.[13] At Dr. Shepard's murder trial, Shepard's defense was that she had committed suicide, but the prosecution introduced her statement as a dying declaration and obtained a conviction.[14]

Shepard's conviction was reversed in a famous opinion by Justice Cardozo. He squelched the idea that Mrs. Shepard's statement was a dying declaration, since she did not make the statement under the belief that she was imminently about to die.[15] The state then argued that her statement helped rebut the defense's claim that Mrs. Shepard had poisoned herself,

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9 Jensen v. Schwochert, No. 11-C-0803, 2013 WL 6708767, at *9, *17 (E.D. Wis. Dec. 18, 2013). The case only got more procedurally convoluted from there: instead of holding a second trial, the Kenosha County Circuit Court "determined that in light of recent Supreme Court precedent, the statements at issue were not testimonial and their admission at trial did not violate Jensen's Sixth Amendment confrontation right. The circuit court thereafter determined that its new ruling on Julie's statements . . . cured the constitutional defect in Jensen's first trial, and based upon this determination reinstated Jensen's conviction and sentence." Jensen v. Clements, No. 11-C-803, 2017 WL 5712690, at *1 (E.D. Wis. Nov. 27, 2017). Jensen thereupon petitioned the federal court again, and the district court sent the case back for him to exhaust his state remedies. *See id.* at *7. The district court's decision was affirmed by the Seventh Circuit Court of Appeals in 2019. Jensen v. Pollard, 924 F.3d 451, 455–56 (7th Cir. 2019) (affirming denial of new writ due to lack of jurisdiction). Jensen then filed a petition for certiorari, which was denied. *See* Jensen v. Pollard, 141 S. Ct. 165 (2020).

10 Shepard v. United States, 290 U.S. 96, 98 (1933).

11 *Id.*

12 *Id.*

13 *See id.* at 99.

14 *See id.* at 102–03.

15 *See id.* at 100.

and that the jury was entitled to consider her statement as evincing a will to live, rather than as proof that her husband had killed her.[16] Cardozo slapped them back, writing the now famous words: "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds."[17] So Mrs. Shepard's statement would be kept from the jury, lest its "reverberating clang" cloud their minds.[18]

One hundred years before that, the nearly frozen body of a pregnant Massachusetts mill worker named Sarah Cornell was found hanged from a pole supporting a haystack.[19] She had left an unpunctuated note in a trunk at her boarding house, dated the day of her disappearance, that read, "If I should be missing enquire of the Rev Mr Avery of Bristol he will know where I am."[20] Ephraim K. Avery, a Methodist minister who was alleged to be the father of her child, was charged with her murder. The defense claimed that Cornell had committed suicide; their strategy, simply put, was to portray Avery as "a man of unblemished moral character, and Sarah Cornell [as] a deranged whore."[21] Avery was acquitted.[22]

So there is a long and storied tradition of keeping out a dead woman's words on the basis that her statements might be part of an elaborate plot to punish her mate after death. The fact that this is the least likely possible outcome when a woman dies has done nothing to dampen the enthusiasm of the highest courts for the concept.[23] Nonetheless, until *Giles* was de-

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16 *Id.* at 104.

17 *Id.*

18 *Id.* Indeed, without the statement, Shepard was acquitted at retrial. *See Shepard Acquitted by Jury at Topeka*, N.Y. TIMES 22 (Feb. 12, 1935), https://timesmachine.nytimes.com/timesmachine/1935/02/12/93451587.html?pageNumber=22 [https://perma.cc/CG5M-ADYE].

19 *See* DAVID RICHARD KASSERMAN, FALL RIVER OUTRAGE: LIFE, MURDER, AND JUSTICE IN EARLY INDUSTRIAL NEW ENGLAND 5–7 (1986).

20 *Id.* at 9.

21 *Id.* at 101.

22 *See id.* at 211. Cornell's note was in fact produced in court, but the judge cautioned the jury to consider it "only as evidence to rebut the assertion of suicide" rather than as proof of Avery's guilt. *Id.* at 210.

23 While I face the familiar difficulty of proving a negative, the fact that there is almost no literature about suicides conducted to frame a loved one gives some indication of the rarity of that situation. *Cf.* Thomas W. Adair & Michael J. Dobersen, *A Case of Suicidal Hanging Staged as Homicide*, 44 J. FORENSIC SCI. 1307, 1307 (1999) (noting that "[s]taging of a suicidal hanging as a homicide may be rare as no other cases could be found in the forensic literature."). As a general matter, suicides staged as homicides "are rarely encountered by crime scene investigators." *Id.* Given the fact that suicide is the tenth leading cause of death in the United States, *see Fast Facts*, CDC, https://www.cdc.gov/violencepreven-

cided, most states allowed the statements of deceased victims to be admitted in evidence against their alleged killers under the equitable doctrine of forfeiture by wrongdoing.[24] But once the Supreme Court imposed a specific intent requirement on the forfeiture doctrine, those statements became much less likely to be admitted in domestic violence cases.

The change from a broad equitable rule to the requirement of a showing of specific intent to prevent the victim from testifying was premised on the Court's originalist conception of the Confrontation Clause.[25] Justice Scalia firmly anchored his analysis in his own view of how the forfeiture exception was treated at common law. But originalism, harking back as it does to eighteenth-century norms, is inherently slanted toward upholding patriarchal power structures.[26] And in the area of domestic homicides, the misogyny inherent in originalism really flowers.[27]

Not that this was the stated purpose of *Giles*. On the contrary, Justice Scalia refused to consider a special case rule for intimate partner violence. He reasoned, as if it were clearly absurd to contend otherwise, that there could not possibly be one Confrontation Clause for domestic violence perpetrators and a different one for everyone else.[28] The right of confrontation was absolute, and could only be displaced on a showing of specific intent that applied equally to all. Unfortunately, neither of those claims is true. The Confrontation Clause is not

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tion/suicide/fastfact.html [https://perma.cc/K474-TYX3] (last visited April 23, 2021), one would expect this to be more studied if it were a plausible possibility.

24 *See, e.g.*, United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985) ("In this case, Rouco waived his right to cross-examine Benitez by killing him."); People v. Stechly, 870 N.E.2d 333, 349 (Ill. 2007) (reviewing differing views across states on the intent requirement). *Cf.* Vasquez v. People, 173 P.3d 1099, 1101 (Colo. 2007) (requiring intent to prevent testimony); Commonwealth v. Edwards, 830 N.E.2d 158, 170 (Mass. 2005) (same).

25 *See* Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of* Giles*'s Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding,"* 13 LEWIS & CLARK L. REV. 605, 608 (2009).

26 *See* Donna J. King, *The War on Women's Fundamental Rights: Connecting U.S. Supreme Court Originalism to Rightwing, Conservative Extremism in American Politics*, 19 CARDOZO J. L. & GENDER 99, 105 (2012) ("Without the assistance of Supreme Court originalism, the war on women would not be possible.").

27 The misogyny is not surprising when you consider that the Framers declined to "Remember the Ladies" when drafting the Constitution and the Bill of Rights. *See* Letter from Abigail Adams to John Adams (Mar. 31, 1776), *in* 1 ADAMS FAMILY CORRESPONDENCE 370, 370 (L.H. Butterfield, Wendell D. Garrett, Marjorie E. Sprague eds., 1963) ("[I]n the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors.").

28 *See* Giles v. California, 554 U.S. 353, 376 (2008).

an absolute requirement because it already countenances an exception. The Court has strongly suggested, and the lower courts have taken as settled, that there is an exception to the confrontation requirement in the case of dying declarations.[29] The existence of this exception appears to rely solely on the fact that it was so in eighteenth-century common law.[30]

The second claim—that the rules apply equally to all—is also untrue when applied to real homicides where the victim has left relevant statements against the defendant. Confrontation issues only arise when a declarant makes a testimonial statement, which typically will be a statement made to law enforcement or to the courts.[31] There are only two likely scenarios in which a future homicide victim will have made a prior relevant testimonial statement: witness or informant killings, and domestic homicides.[32]

Of the two, domestic violence cases are the only ones where proving intent to silence is problematic.[33] Most homicides in

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29 Noting that it was not deciding in *Crawford* "whether the Sixth Amendment incorporates an exception for testimonial dying declarations," the Court nonetheless added that "[i]f this exception must be accepted on historical grounds, it is *sui generis*." Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004).

30 *See* Davies, *supra* note 25, at 636–38 (tracing the recognition of a dying declaration exception to the 1720s and concluding that it would have been part of "how framing-era Americans would have understood the confrontation right"); *see also* Richard D. Friedman, *Reflections on* Giles*, Part 2: Is* Giles *Bad for Defendants?*, CONFRONTATION BLOG (June 29, 2008), http://confrontationright.blogspot.com/2008/06/reflection-on-giles-part-2-is-giles-bad.html [https://perma.cc/7B8Z-H38G] (noting that *Giles* gives no rationale for recognizing a dying declaration exception to the confrontation requirement "other than that the exception existed at the time of the Framing").

31 *See Giles*, 554 U.S. at 395 (Breyer, J., dissenting) (noting that "[t]he defendant's state of mind only arises as an issue in forfeiture cases where the witness has made prior statements against the defendant"). There may be other homicides, whether they arise out of drug turf battles, gang warfare, or organized crime, that feature prior relevant statements by the victims, but those statements will rarely be made to law enforcement. Co-conspirator statements and statements to friends and family are usually seen as nontestimonial, and therefore raise no confrontation issue.

32 And the issue of motive will only be contested in domestic violence cases, where "there is a possible motive for the killing other than to prevent the witness from testifying." *Id.* "Where that motive is certain," observes Justice Breyer, "for example, where the defendant knows the witness only because she has previously testified against him—the prior statements would be admitted under the majority's purpose rule, and the question of intent would not come up." *Id.* at 395–96.

33 Of the hundreds of post-*Giles* murder cases that I read, only one presented a situation in which a victim had made a statement implicating the defendant in an attack that predated his murder, and the appellate court held that it had been improperly admitted. Zanders v. United States, 999 A.2d 149, 155 (D.C. Ct. App. 2010). In that case, the defendant, Thomas Zanders, and the victim, Allen Lancaster, were rival drug dealers and had a violent history: Lancaster had robbed Zanders at gunpoint in the past, and on another occasion they had a fight where

which the defendant forfeits his confrontation right by wrongdoing present clear cases of witness intimidation.[34] If an eyewitness to a crime is suddenly murdered before trial, there is little doubt that the defendant's primary goal in killing the eyewitness was to prevent their testimony at trial.[35] But as one scholar asked, "[w]hat kind of crime, other than domestic violence, would ever fail the test set out in *Giles*?"[36] As Justice Breyer noted in his dissent in *Giles*, questions about the defendant's purpose occur "almost exclusively in the domestic violence context, where a victim of the violence makes statements to the police and where it is not certain whether the defendant subsequently killed her to prevent her from testifying, to retaliate against her for making statements, or in the course of another abusive incident."[37] The only perpetrators who can silence their victims and not forfeit their Confrontation rights are domestic ones.

So while purporting to be an even-handed application of the Framers' intent, *Giles* indulges in its own arbitrary line-drawing, seemingly to the detriment of domestic violence victims.

How *Giles* would affect domestic violence cases was hotly debated within the case itself and in the literature that fol-

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shots were fired and Lancaster was stabbed. *Id.* at 153. The contested statements were made by Lancaster to the police after the stabbing; six weeks later, "four men wearing scarves over their faces came into a courtyard where Lancaster sat in front of 224 51st St., N.E., and unleashed a hail of bullets killing Lancaster and a bystander." *Id.* at 154. The court found that the government had "presented no evidence that appellant's purpose in murdering Lancaster was to prevent him from testifying about the stabbing" and that the error was not harmless, at least as to Zanders' assault conviction for the stabbing. *Id.* at 155–56. The court upheld his conviction for Lancaster's murder. *See id.* at 165.

34 *See, e.g.*, Dednam v. Norris, No. 5:06CV00076 WRW/BD, 2008 WL 4006997, at *6 (E.D. Ark. Aug. 25, 2008) (finding that defendant who murdered victim to prevent him from testifying at defendant's cousin's robbery trial had forfeited his right to confront him); State v. Miller, 316 P.3d 1219, 1227, 1234 (Ariz. 2013) (upholding admission of statements of victims implicating defendant in earlier arson where defendant blamed victims for his arson indictment and told several people he wanted to have them killed); Commonwealth v. Morales, 91 A.3d 80, 94 (Pa. 2014) (upholding admission of statements of victim "concerning his fear for his life or safety should Appellant learn that [he] had become a police informant against him").

35 *See, e.g.*, State v. Griffin, 169 So. 3d 473, 489–92 (La. Ct. App. 2015) (upholding admission of murdered witness's statements identifying defendants as perpetrators of another shooting); Winston v. Nagy, No. 2:13-cv-10155, 2018 WL 2984678, at *3–6 (E.D. Mich. June 14, 2018) (describing how murdered witness who told police she saw defendants run from scene of another shooting had been threatened repeatedly by the defendants and told "she would never make it to court").

36 Mark Egerman, *Avoiding Confrontation*, 84 TEMP. L. REV. 863, 889 (2012).

37 Giles v. California, 554 U.S. 353, 396 (2008) (Breyer, J., dissenting).

lowed. This article presents the first comprehensive review of the 114 domestic homicide cases since *Giles* in which there was an intimate relationship between the victim and the accused,[38] and the victim had made statements that were sought to be introduced against the defendant.[39] In general, the courts were not overtly critical of *Giles*, although they also seemed entirely uninterested in its originalist underpinnings. Yet they managed to overturn very few convictions. Whether they were simply tuning out what they perceived to be Supreme Court posturing and getting on with business as usual, or merely following the facts and the law where these took them, the lower courts' response to *Giles* makes for an interesting case study in what happens when the Supreme Court issues rules that the lower courts disagree with.

This Article proceeds in three parts. Part I reviews the reinvigorated Confrontation Clause jurisprudence launched by *Crawford v. Washington* and the new hurdles to proving forfeiture by wrongdoing.[40] Part II analyzes how the state courts and lower federal courts have resolved forfeiture issues in 114 domestic homicide cases since *Giles v. California*. Part III critiques the three foundational policies that support *Giles*, namely fairness to the defendant, evenhandedness among victims, and deference to history, and explores how these fared in the trial courts. It concludes that domestic homicides present a situation where the ideological commitments of the higher Court do not map comfortably onto the real-life situations faced by the trial courts.

I
FORFEITURE IN THE AGE OF *CRAWFORD* AND *GILES*

The past fifteen years have seen a sea change in Confrontation jurisprudence. After years of admitting statements by ab-

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38 The vast majority of the cases concerned couples, whether married or not, but a small minority involved matricide or other intra-family murders.

39 For a thoughtful review of non-fatal domestic violence cases that struggled with the forfeiture issue post-*Giles*, see Aviva Orenstein, *Forfeiture of Confrontation Rights and the Complicated Dynamics of Domestic Violence: Some Thoughts Inspired by Myrna Raeder*, 44 SW. L. REV. 466, 473–74 (2015) (reviewing "post-*Giles* domestic violence prosecutions that raised the issue of forfeiture, but did not involve the death of the witness").

40 Note that while I refer to these hurdles as "new," they are actually coterminous with the requirements of the Federal Rules of Evidence regarding forfeiture by wrongdoing. *See* FED. R. EVID. 804(b)(6) (defining a "Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability" as a "statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result").

sent declarants so long as they were reliable, the Supreme Court abruptly announced that any testimonial statements by unavailable declarants would be excluded if the defendant had not had a previous chance to cross-examine those declarants.[41] The only two exceptions to that requirement were in the case of dying declarations, or in situations where the defendant had caused the declarant's unavailability for the specific purpose of preventing their testimony at trial, thereby forfeiting their confrontation rights.

A. The Modern Confrontation Clause

The Sixth Amendment guarantees to all criminal defendants "the right . . . to be confronted with the witnesses against him."[42] But because most ordinary violent crime cases are heard in state court, the Supreme Court had little occasion to pay attention to the Confrontation Clause for close to 200 years. For a long time, hearsay statements by absent declarants were admitted against criminal defendants either if there had been a previous opportunity to examine the declarant,[43] or simply if the statements bore "adequate 'indicia of reliability.'"[44] Reliability, said the Court in *Ohio v. Roberts*, could "be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[45] This demoted the Confrontation Clause to a species of adjunct to the hearsay rules—if a statement satisfied those rules (often by falling within a "firmly rooted" exception), it probably satisfied the Confrontation Clause as well.

This reliability-based regime was upended in 2004, when the Supreme Court decided *Crawford v. Washington*.[46] Michael Crawford was charged with stabbing a man who allegedly tried to rape his wife, Sylvia.[47] Michael argued self-defense, claiming that he had seen a weapon in the victim's hands.[48] Sylvia, meanwhile, had given a tape-recorded state-

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41 *See* Crawford v. Washington, 541 U.S. 36, 61 (2004).

42 U.S. CONST. amend. VI.

43 *See* California v. Green, 399 U.S. 149, 165 (1970).

44 Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004). As the *Roberts* Court observed, to read the language of the Sixth Amendment literally, "would require, on objection, the exclusion of any statement made by a declarant not present at trial." *Id.* at 63.

45 *Id.* at 66. "In other cases," continued the Court, "the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*

46 *Crawford*, 541 U.S. at 68–69 (2004).

47 *Id.* at 38.

48 *Id.* at 40.

ment to the police in which she described the victim as empty-handed, undermining her husband's self-defense claim.[49] Sylvia did not testify at trial,[50] so the prosecution introduced the recording of her earlier statements to the police instead.[51] Michael petitioned the Supreme Court, claiming that his right to confront Sylvia had been violated.

Justice Scalia took the opportunity to clear the decks of *Roberts* and its reliability regime. He characterized the Confrontation Clause as focusing on "'witnesses' against" a defendant, in other words, "those who 'bear testimony.'"[52] From that point on, whether an out-of-court statement by an absent declarant violated the Confrontation Clause would depend, not on whether the statement was reliable, but whether it was "testimonial."[53] "Whatever else the term covers," wrote the Justice, "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[54] In the absence of an opportunity for Michael Crawford to cross-examine his wife, Sylvia's statement was inadmissible.

Over the next several years, the Court attempted to refine the concept of testimonial statements, with greater or lesser success. From the beginning, the Court drew one primary distinction between remarks made to friends, family, and the like, and those made to some source of authority, as well as between levels of formality: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[55] Statements to police officers and 911 calls, therefore, were gen-

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49 *Id.* at 38, 40.

50 Michael Crawford had apparently invoked the spousal testimonial privilege, which under Washington law prevented any spouse from testifying without the other spouse's consent. *See id.* at 40.

51 *Id.*

52 *Id.* at 51. "'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (alteration in original).

53 While the Court did not give a precise definition of testimonial, the general idea was that testimonial statements were those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52 (internal citations omitted). These included statements made in affidavits, custodial examinations, depositions, and prior testimony. *See id.*

54 *Id.* at 68.

55 *Id.* at 51.

erally considered testimonial unless they were made in response to an ongoing emergency.[56]

For the most part, if a statement was deemed to be testimonial, and the defendant had not had a previous opportunity to cross-examine the declarant, the statement could not be admitted against the defendant, with two possible exceptions.[57] One was if the statement was a dying declaration, that is, a statement made by an unavailable declarant while believing that their death was imminent.[58] The other was if the defendant had forfeited his confrontation rights through his own wrongdoing. The *Crawford* Court noted that "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."[59] If a declarant's absence was procured by the defendant, he could be said to have forfeited his right to complain.

B. Forfeiture by Wrongdoing

Until 2008, many states followed a forfeiture by wrongdoing rule that allowed the prosecution to introduce statements by domestic homicide victims that would ordinarily have been barred by the Confrontation Clause.[60] This approach employed a broad brush, allowing in the hearsay statements of an

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56 *See* Davis v. Washington, 547 U.S. 813, 827–28 (2006) (specifying that, when a domestic violence victim made a call to 911, an emergency existed while the aggressor was still in the apartment, but not once he had fled).

57 Giles v. California, 554 U.S. 353, 358–59 (2008); *Crawford*, 541 U.S. 36 at 68.

58 This exception owed its existence to history and tradition rather than to reasoning. *See Crawford*, 541 U.S. at 56 n.6. *Crawford* itself did not rule on the admissibility of dying declarations but observed in a footnote that these were likely to be considered an exception to the confrontation requirement. "Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are[.]" wrote the Court. "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*." *Id.* The Court reiterated the dying declaration's status as a founding era exception in *Giles*. *See* 554 U.S. at 358–59 (noting that dying declarations were admitted at common law "even though they were unconfronted" and that they constituted a "historic exception").

59 *Crawford*, 541 U.S. at 62.

60 *See* State v. Henry, 820 A.2d 1076, 1086–87 (Conn. App. Ct. 2003); *see also* United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996) (noting that "courts will not suffer a party to profit by his own wrongdoing"); United States v. Mastrangelo, 693 F.2d 269, 273–74 (2d Cir. 1982) (remanding case for trial court to determine whether defendant was involved in witness's murder, in which case he would have forfeited his right to object to introduction of that witness's grand jury testimony); State v. Gettings, 769 P.2d 25, 29 (Kan. 1989) (holding that defendant forfeited his right to confrontation by murdering eyewitness).

absent declarant simply on a showing, by a preponderance of the evidence, that the defendant had procured their absence.[61] This rested the exception on primarily equitable grounds, relying on "the maxim that no one shall be permitted to take advantage of his own wrong."[62] Therefore, if a judge determined by a preponderance of the evidence that the defendant had killed the victim, all relevant statements by the victim could be introduced over a confrontation objection, even when those statements were testimonial.

California followed the equitable rule, and in a murder case against a man named Dwayne Giles for shooting his girlfriend, Brenda Avie, it allowed previous statements by Avie to be admitted into evidence against him.[63] Three weeks before her murder, police had responded to a domestic violence call, and Avie had told one of the officers that Giles had choked her, punched her in the head, and threatened to kill her if she cheated on him.[64] The California Court of Appeals held that "a defendant may forfeit the ability to assert the constitutional right of confrontation as to hearsay statements by a victim he or she has killed."[65] In Giles's case, the court found that he could not "complain that he was unable to cross-examine Avie about her prior, trustworthy statements to law enforcement when it was his own criminal violence that made her unavailable for cross-examination."[66]

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61 *See, e.g.*, State v. Valencia, 924 P.2d 497, 498 (Ariz. Ct. App. 1996) ("If a defendant silences a witness by violence or murder, the defendant cannot then assert his Confrontation Clause rights in order to prevent the admission of prior testimony from that witness."); *Henry*, 820 A.2d at 1086–87 ("The defendant who has removed an adverse witness is in a weak position to complain about losing the chance to cross-examine him. And where a defendant has silenced a witness through the use of threats, violence or murder, admission of the victim's prior statements at least partially offsets the perpetrator's rewards for his misconduct."); Devonshire v. United States, 691 A.2d 165, 166 (D.C. 1997) ("Today we hold, consistent with every state and federal court that has considered the issue, that a defendant who kills a potential witness, who is expected to give damaging testimony against the killer in some future proceeding, waives the right under the Confrontation Clause of the Sixth Amendment to object to the admission of that witness's out-of-court statements.").

62 Reynolds v. United States, 98 U.S. 145, 159 (1878). The Court added, "[i]t is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one." *Id.*

63 *Giles*, 554 U.S. at 357.

64 *See id.* at 356–57.

65 People v. Giles, 19 Cal. Rptr. 3d 843, 850 (2004). "A defendant may reasonably be deemed to have forfeited the right to challenge reliable and trustworthy hearsay if his intentional and wrongful conduct makes the declarant unavailable." *Id.* at 851.

66 *Id.* at 851. In Giles' case, the violence may have gone both ways. Giles claimed he shot Avie in self-defense, and at retrial called a prior boyfriend of

The Supreme Court disagreed.[67] In an opinion by Justice Scalia, the architect of the Court's new Confrontation jurisprudence, the Court held that forfeiture by wrongdoing would only constitute an exception to the Confrontation Clause requirements if the prosecution could show that "the defendant intended to prevent a witness from testifying."[68] Effectively, the Court was adopting a specific intent requirement that tracked Federal Rule of Evidence 804(b)(6) and its state counterparts, which allowed hearsay statements to be offered against a party who "wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result."[69]

In keeping with the Court's approach since *Crawford*, Justice Scalia applied an originalist lens to the issue, asking "whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right."[70] Unsurprisingly, Justice Scalia found that California's equitable approach to forfeiture was not established at the time of the Founding. The Court therefore remanded the case for the court to determine whether Giles had intended, at least in part, to prevent Avie from testifying against him.[71]

Given the paucity of information about how the doctrine of forfeiture was actually applied in colonial times, many commentators were not convinced.[72] "The most fundamental prob-

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Avie's, who testified that Avie had shot him in the arm, and a former girlfriend of Giles', who testified that Avie had threated to kill her various times over the phone. *See* People v. Giles, No. B224629, 2012 WL 130659, at *6 (Cal. Ct. App. Jan. 18, 2012). Giles was retried without Avie's statements being introduced and was again convicted of first-degree murder. *Id.* at *10.

67 *Giles*, 554 U.S. at 361.

68 *Id.* After a lengthy disquisition on common law murder cases, Justice Scalia argued that these constituted conclusive proof that the exception "applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Id.* at 359 (emphasis in original). Justice Scalia's hostility toward the idea of forfeiture was apparent. "The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to 'dispensing with jury trial because a defendant is obviously guilty.'" *Id.* at 365 (quoting himself in Crawford v. Washington, 541 U.S. 36, 62 (2004)).

69 FED. R. EVID. 804(b)(6).

70 *Giles*, 554 U.S. at 358.

71 On retrial, the prosecution didn't attempt to make that showing, and refrained from introducing Avie's statements. *Giles*, 2012 WL 130659, at *1.

72 *See* Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 876 (2009) (noting that the *Giles* Court "cited only three cases and four treatises from the eighteenth century").

lem with Scalia's majority opinion," observed Tom Lininger, "is his selectivity in marshaling historical evidence. His opinion cited favorable authority and overlooked, or distinguished too readily, a substantial amount of contrary authority."[73] As Thomas Davies put it, originalism, "at least in criminal procedure . . . is not a sound mode of constitutional discourse. If the claimed original meaning is derived from the official history and the sources are made to fit, or made to seem to fit—as they were in *Crawford*—originalism is merely fiction posing as history."[74]

In dissent in *Giles*, Justice Breyer voiced the concern that in the domestic violence context, a "*constitutional* evidentiary requirement that insists upon a showing of purpose (rather than simply intent or probabilistic knowledge) may permit the domestic partner who made the threats, caused the violence, or even murdered the victim to avoid conviction for earlier crimes by taking advantage of later ones."[75]

Justice Breyer also pointed out that this new rule created evidentiary anomalies, particularly in a case where a murder defendant, like Giles, claims self-defense. "[The husband] may be allowed to testify at length and in damning detail about [the wife's] behavior—what she said as well as what she did—both before and during the crime," while the wife, "who is dead, cannot reply."[76] Far better to allow the jury to consider both sources of information. "And why not?" he demanded.[77] "What

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73 *Id.* at 877.

74 Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105, 216 (2005). For further entertaining critiques of the arbitrariness of originalism, see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1753 (2000) (describing how Justice Scalia's resort to originalism in interpreting the Fourth Amendment "flirts uncomfortably both with antiquarianism and with intellectual nostalgia"); David Alan Sklansky, *Confrontation and Kabuki*, 20 J.L. & POL'Y 501, 515 (2012) (observing that much of the Court's originalist discourse in confrontation cases "has taken the form of a kind of rhetorical kabuki, making the Court's reasoning harder to pin down, harder to argue with, harder—in a word—to confront"). *See also* Lininger, *supra* note 72, at 877 (critiquing Justice Scalia's "selectivity in marshaling historical evidence").

75 *Giles*, 554 U.S. at 405–06 (Breyer, J., dissenting). Justice Breyer argued that Giles' conduct did constitute forfeiture by wrongdoing because, under ordinary principles of criminal law, "the law holds an individual responsible for consequences known likely to follow just as if that individual had intended to achieve them." *Id.* at 386. Since Giles knew that killing Avie would prevent her from testifying, this was "sufficient to show the *intent* that law ordinarily demands." *Id.* at 385. Justice Breyer distinguished the ordinary legal understanding of intent with what he claimed Justice Scalia was looking for, purpose or motive.

76 *Id.* at 388.

77 *Id.* at 404.

important constitutional interest is served, say, where a prior testimonial statement of a victim of abuse is at issue, by a constitutional rule that lets that evidence in if the defendant killed a victim *purposely* to stop her from testifying, but keeps it out if the defendant killed her *knowing* she could no longer testify while acting out of anger or revenge?"[78] That is an important question, to which the *Crawford* confrontation jurisprudence has no answer.

Instead of taking up the question, Justice Scalia sneered, "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, [sic] Confrontation Clause for those crimes that are frequently directed against women?"[79]

The distinction is actually far less specious than Justice Scalia implied. In ordinary homicide cases, when witnesses are killed to prevent them from testifying or because of their cooperation with law enforcement, there is little ambiguity about the defendant's motivation to silence. Often the defendant would have had no other reason to kill the witness. Indeed, in many non-domestic homicides raising forfeiture issues, the contested statements are made after the fatal attack, and consist of the victim identifying their aggressor.[80] The non-domestic homicide cases when the victim made a possibly testimonial statement before the crime mostly concerned either eyewit-

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78 *Id.* Justice Breyer noted that the Court had previously acknowledged that cases of domestic violence were "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." *Id.* at 406. (quoting Davis v. Washington, 547 U.S. 813, 833 (2006)). In those situations, strict application of the Confrontation Clause would give the criminal a windfall. In *Davis*, the Court had declared that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Id.* (quoting *Davis*, 547 U.S. at 833). But the Court had backed away from that view, argued Breyer:

> To the extent that it insists upon an additional showing of purpose, the Court breaks the promise implicit in those words and, in doing so, grants the defendant not fair treatment, but a windfall. I can find no history, no underlying purpose, no administrative consideration, and no constitutional principle that requires this result.

Id.

79 *Id.* at 376 (majority opinion).

80 *See, e.g.*, Kennedy v. Coleman, No. 1:15-cv-684, 2016 WL 7475649, at *7–8 (S.D. Ohio Dec. 29, 2016) (statement of victim as to who shot him).

nesses to other crimes who feared for their safety[81] or government informants who were aware of their targets' suspicions.[82]

But intimate partner violence is different. There is usually a morass of confused and overlapping motives—jealousy, rage, revenge, the desire to isolate and control—which makes it very difficult to ascertain whether a man killed his partner at least in part to prevent her from testifying as a witness.

For reasons that remain unclear, immediately after mocking the idea of two Confrontation Clauses, Justice Scalia included a most curious paragraph, noting that "[t]he domestic-violence context is, however, relevant for a separate reason."[83] He continued:

> 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.[84]

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81 *See, e.g.*, Winston v. Nagy, No. 18-1829, 2018 WL 5099231, at *2 (6th Cir. Oct. 12, 2018) (upholding admission of murdered witness's statements placing defendants at scene of another shooting where trial court had found that defendant "engaged in or encouraged wrongdoing intended to prevent [the witness] from testifying" including telling her "you dead" and "you ain't going to make it to court"); Phillips v. States, 154 A.3d 1130, 1143 (Del. 2017) (upholding admission of deceased witness's statements identifying defendant as shooter in separate case where trial court "concluded that Otis [the defendant] killed Curry, that Otis was aware that Curry was a witness who would be able to testify about Palmer's [murder], and that when Otis shot Curry he was 'motivated at least *in part* by a desire to silence Curry as a witness to Palmer's murder'").

82 *See, e.g.*, United States v. Chester, No. 13CR00774, 2017 WL 3394746, *31–32 (N.D. Ill. Aug. 8, 2017) (upholding admission of deceased victim's statements under forfeiture theory where victim had been cooperating with law enforcement and was expected to be a witness in a gang case), *aff'd sub nom.* United States v. Brown, 973 F.3d 667 (7th Cir. 2020); Commonwealth v. Morales, 91 A.3d 80, 95 (Pa. 2014) (upholding admission of statements of victim under forfeiture theory where statements concerned victim's "fear for his life or safety should [defendant] learn that [he] had become a police informant against him").

83 *Giles*, 554 U.S. at 377.

84 *Id.* The Court added that "[e]arlier 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." *Id.* Justices Souter and Ginsburg, concurring in part, pounced on these words, writing:

> the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this

This language certainly hinted that domestic violence cases might be seen differently.[85] Both Justice Souter, concurring, and Justice Breyer, in dissent, explicitly interpreted it that way. "This seems to say 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," observed Justice Breyer.[86]

C. Critical Reactions to *Giles*

Giles v. California prompted a lot of commentary, much of it unflattering. Many commentators sided with Justice Breyer, pointing out, much as the dissents in the case did, how this new rule would end up silencing victims, even potentially giving batterers an incentive to kill their victims.[87] Some commentators argued that insisting on an "originalist" interpretation of the Confrontation Clause in domestic violence cases wasn't impartial in the slightest.[88]

> sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger.

Id. at 380 (Souter, J., concurring in part).

85 Tom Lininger suggested that it might have been merely "a brief passage to allay the critics." Lininger, *supra* note 72, at 886. As Lininger analyzed it,

> This passage seemed at odds with the preceding analysis in which Scalia had repeatedly insisted upon proof of specific intent to thwart testimony. . . . The dissent even conjectured that Scalia's discussion of the 'domestic violence context' signaled his agreement with some of the analysis in Souter's partial concurrence concerning inferred intent—a supposition that Scalia flatly denied. Perhaps Scalia's language about domestic violence was a grudging concession to the liberal Justices, one of whose votes he needed to gain a majority. In any event, Scalia provided a toehold for victims of domestic violence to claim a history of abuse could support a finding of forfeiture.

Id.

86 *Giles*, 554 U.S. at 404 (Breyer, J., dissenting).

87 *See, e.g.*, Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411, 1451 (2010) (citing Chief Justice Roberts' concern that the *Giles* ruling gives batterers a benefit for killing their victims instead of just injuring them, thus preventing them from testifying later); Richard D. Friedman, *Reflections on* Giles*, Part 1: History, Dying Declarations, and Forfeiture*, CONFRONTATION BLOG (June 27, 2008, 1:39 AM), http://confrontationright.blogspot.com/2008/06/reflections-on-giles-part-1-history.html [https://perma.cc/7HQJ-8VB8] (predicting that the opinion "will lead to some bad results").

88 Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 311 (2005) (pointing out that "[a] purely historic approach to confrontation ignores the significant societal changes that have resulted in the criminalization of domestic violence and child abuse.").

Excluding the statements of domestic violence victims as testimonial, wrote Myrna Raeder, functionally "silences the voices of women and children by regressing to a world that typically treated them as chattel."[89] At the dawn of the Republic, there was no conception of domestic violence the way we understand it today—physically punishing his wife was a husband's right.[90] Therefore, it was worse than pointless to look to the Framers' intent in describing the bounds of forfeiture by wrongdoing; it was to privilege patriarchal power. As Professor Raeder put it, "[o]riginal intent focusing exclusively on 1791 retreats to a time when voices of outsiders, including women and children[,] were not included in creating evidentiary or constitutional policy."[91]

After *Crawford*, observed Raeder, "lower courts were left reading tea leaves to discern how to apply this new framework, particularly in domestic violence cases where the complainant typically refuses to testify, or has been permanently silenced by her abuser."[92] But given the fact that five justices seemed to support some kind of forfeiture exception in the case of a "classic abusive relationship," Raeder wrote that she expected "the only forfeiture problem in murder cases will be when no classically abusive relationship can be established."[93]

Some scholars predicted that "future courts will likely circumvent *Giles* to prevent criminals from benefiting by their wrongdoing."[94] Marc McAllister predicted that courts would evade *Giles* either by lowering the burden of proving intent to prevent the victim from testifying or by broadening the universe of nontestimonial statements. Similarly, Richard Friedman predicted at the time that *Giles* was decided that courts would

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89 *Id.* at 314.

90 *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2123 (1996) ("As master of the household, a husband could command his wife's obedience, and subject her to corporal punishment or 'chastisement' if she defied his authority."); *see also* Orenstein, *Her Last Words, supra* note 87, at 1444 (noting that "originalism is bound to silence voices that were unheard in 1791, a time when society misunderstood and even condoned domestic violence").

91 Raeder, *supra* note *88, at 311.*

92 Myrna S. Raeder, *Thoughts About* Giles *and Forfeiture in Domestic Violence Cases*, 75 BROOK. L. REV. 1329, 1330 (2010).

93 *Id.* at 1344–46.

94 Marc McAllister, *Down but Not Out: Why* Giles *Leaves Forfeiture by Wrongdoing Still Standing*, 59 CASE W. RES. L. REV. 393, 398 (2009). McAllister discussed six ways in which he anticipated courts would lower the bar to allow more ways in which to prove intent. *Id.* at 426. He also predicted that courts would likely broaden the range of statements that it considered to be "nontestimonial." *Id.* at 437.

likely react by taking a narrow view of what was testimonial and a broad view of what constituted a dying declaration, because most courts would be "strongly inclined to admit statements made by a witness who was precluded form [sic] testifying in court by the defendant's own wrongful conduct."[95]

On the other hand, at least one commentator defended *Giles* as an "effective procedural protection[ ]" for criminal defendants.[96] James Flanagan, who was Dwayne Giles's counsel in the Supreme Court, characterized the California rule as violating the rights of homicide defendants.[97] Echoing Justice Scalia, he stated, "[t]here cannot be one Confrontation Clause for domestic violence and another for all other crimes."[98]

Flanagan characterized the concerns of domestic violence prosecutors as overblown.[99] "Now that prosecutors understand the requirements of *Crawford* and *Giles*," he argued breezily, "they can easily satisfy them."[100] But most warned that the new, post-*Giles* "Confrontation Clause doctrine cannot coexist with effective domestic violence prosecution."[101] How these predictions fared is the focus of the study described in the next Part.

II
HOW THE COURTS HAVE INTERPRETED THE *GILES* REQUIREMENTS

Now that *Giles* has been operative for more than a decade, we have the opportunity to evaluate how the courts have actually applied or evaded *Giles* when dealing with murder cases in which the victim's earlier statements implicated the defendant. This Part analyzes how the lower federal and state courts have

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95 Friedman, *supra* note 30; *see also* Ralph Ruebner & Eugene Goryunov, Giles v. California*: Sixth Amendment Confrontation Right, Forfeiture by Wrongdoing, and a Misguided Departure from the Common Law and the Constitution*, 40 U. TOL. L. REV. 577, 611 (2009) (opining that, "in practice, trial courts will fulfill the *Giles* test by focusing on the defendant's conduct and then infer intent, particularly in cases of domestic violence").

96 James F. Flanagan, *In Defense of* Giles*—A Response to Professor Lininger*, 87 TEX. L. REV. SEE ALSO 67, 78 (2009).

97 California's rule, he wrote, meant that "whenever a defendant was charged with homicide, the defendant had no right of confrontation as to any relevant hearsay statement of the victim." *Id.* at 68.

98 *Id.* at 75.

99 *See id.* at 73 ("The claim that *Giles* will have a devastating effect on domestic violence prosecutions is premature, at best.").

100 *Id.* at 74. It was simply a matter of prosecutors introducing nontestimonial statements or, alternatively, "develop[ing] evidence that is sufficient to support the defendant's intent to prevent the witness from testifying." *Id.*

101 Egerman, *supra* note 36, at 867.

implemented the requirement in *Giles* that specific intent to silence be proven before a defendant forfeits his confrontation rights.

A. Methodology

To determine the number of cases of domestic homicide in which the victim made statements implicating the defendant, I checked the citing references for *Giles v. California* on Westlaw and isolated the number of cases that cited *Giles*. I then narrowed the search to all state and federal cases decided between June 25, 2008, the date the *Giles* opinion was issued, and January 3, 2020.[102]

This yielded a total of 683 results. I then searched within those results for all cases that contained the words "murder," "homicide," "manslaughter," or "killing." This yielded 482 cases, which I then reviewed individually, separating them into domestic homicides, "other" homicides, non-fatal domestic violence cases, and other non-fatal cases. Of the 379 homicide cases, 175 were domestic homicides,[103] and 204 were other

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102 One limitation of this survey is the fact that, relying as it does on reported cases, it does not reach cases that did not go further than the trial court. Therefore, there may be a small universe of cases in which trial courts followed *Giles*, excluded the victim's testimonial statements, and acquitted the defendant. But while statistics are hard to come by, anecdotal evidence seems to indicate that these cases are relatively rare. *See, e.g.*, Chris Anderson, *Judge Issues Rare Acquittal Ruling in Manatee County Murder Trial*, HERALD-TRIB. (Nov. 15, 2019, 4:57 PM), https://www.heraldtribune.com/news/20191115/judge-issues-rare-acquittal-ruling-in-manatee-county-murder-trial [https://perma.cc/8SLE-FQ2D] (citing a public defender who "said she does not remember a [judgment of acquittal] issued in a murder case in Manatee County in nearly the last two decades"); Douglass Dowty, *Syracuse Man Acquitted of Murdering 12-Year-Old Boy in 'Almost Perfect Crime,'* SYRACUSE.COM (Oct. 22, 2019), https://www.syracuse.com/crime/2019/10/syracuse-man-found-not-guilty-of-murdering-12-year-old-boy.html [https://perma.cc/A8CT-V7XN] (reporting that a defendant who faced more than sixty-five years in prison for a random shooting that killed a child was acquitted of all charges); Jack Highberger, *Acquitted of Capital Murder, Mesquite Man Walks Free*, NBCDFW (Mar. 9, 2020), https://www.nbcdfw.com/news/local/acquitted-of-capital-murder-mesquite-man-walks-free/2327226/[https://perma.cc/LC2Z-5CSQ] (last updated Mar. 10, 2020) (noting that the defendant's acquittal was "the first in a capital murder case in Dallas County in over a decade"); Jim Walsh, *Murder Acquittal in Case of Man Shot 11 Times*, NEWS BREAK (Apr. 18, 2018), https://www.newsbreak.com/news/734386264004/murder-acquittal-in-case-of-man-shot-11-times [https://perma.cc/R3SA-CKFN] (reporting that the defendant was acquitted of murder but convicted of reckless manslaughter). In addition, none of these cases involved domestic homicides.

103 The vast majority of these cases were intimate partner homicides, with a small minority involving matricide or other intra-family murders.

homicides.[104] After weeding out the cases in which the out-of-court statements were made by someone other than the homicide victim, I was left with a total of 132 homicide cases in which (1) there was an intimate relationship between the victim and the accused, and (2) the victim had made the contested statements.[105]

I then read each case to determine whether it actually presented a forfeiture by wrongdoing issue. Eighteen cases were discarded as inapposite, either because the trial and direct review predated *Giles*, the defendant waived or defaulted on the confrontation arguments, or the case only raised hearsay issues. I then considered whether the court had found the victim's statements to be testimonial or nontestimonial. If the statements were deemed to be nontestimonial or a dying declaration, the Confrontation Clause did not apply, and courts had

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104 These included all other murders, from gang killings to robberies gone wrong, and approximately half concerned an out-of-court statement by the murder victim. Fifty-four of the cases involved the murder of a witness to a different crime by the defendant. *See, e.g.*, U.S. v. Chester, No. 13CR00774, 2017 WL 3394746, at *2 (N.D. Ill. Aug. 8, 2017) (murder of confidential informant in drug case against defendants); United States v. Jimenez-Bencevi, 934 F. Supp.2d 360 (D.P.R. 2013) (murder of federal witness in drug case against defendant); People v. Hoskins, No. 329897, 2017 WL 358727, at *2 (Mich. Ct. App. Jan. 24, 2017) (victim had identified defendant as the shooter in another, nonfatal shooting)).

In forty-four of these cases, the victim had just been shot or attacked by the defendant and identified their attacker either immediately at the scene or in the hospital, and their statements were admitted as dying declarations. *See, e.g.*, Lynch v. Hall, No. CV416-079, 2017 WL 2486082, at *1 (S.D. Ga. June 8, 2017) (victim identified defendant as the man who shot him while lying mortally wounded in an alley); People v. Cockrell, No. 14CA0960, 2017 WL 4413766, at *1 (Colo. App. Oct. 5, 2017) (victim, shot eleven times, identified defendant as the shooter to a police officer while he was being transported by ambulance); State v. Woods, No. C-130413 & C-130414, 2014 WL 4437733, at *2 (Ohio Ct. App. Sept. 10, 2014) (victim, who was shot by drug dealer to whom he owed money, identified the defendant as the shooter from a photo array while in the hospital on a ventilator).

In only three cases were statements of the dead victim found to be inadmissible. *See* Zanders v. United States, 999 A.2d 149, 155 (D.C. 2010) (statements by victim about being stabbed six weeks before his murder by the defendant, in the context of a number of assaults and robberies between them, should not have been admitted under forfeiture doctrine); Hayward v. State, 24 So. 3d 17, 31–32 (Fla. 2009) (victim's statements to police after having been shot during a robbery did not qualify as dying declarations); Commonwealth v. Ross, No. CR12000494-00 & CR13000016-00, 2013 WL 11025828, at *3, *6 (Va. Cir. Ct. Apr. 5, 2013) (finding no forfeiture since there was no preexisting relationship between the victim and the defendant, and the statement did not qualify as a dying declaration).

105 It would probably be more accurate to say 132 homicides, since a number of incidents generated more than a single court opinion. But no matter how many court opinions there were regarding the same murder, I counted it as a single case.

no reason to reach the forfeiture question.[106] But if the statements of the victim were found to be testimonial, then the courts had to apply the new *Giles* standard to the forfeiture question, or the statements would be excluded. My working hypothesis was that the lower courts were making end-runs around *Giles* because it was simply too hard to prove that men (usually) murdered their wives or girlfriends at least in part to prevent them from testifying against them.

Of the 114 cases that fit the criteria, seven of the cases did not reach the forfeiture issue because the courts found the victim's statements to be dying declarations. An additional thirty-seven cases did not address forfeiture because the courts found the statements to be nontestimonial, therefore the Confrontation Clause did not apply (there were an additional two in which the determination was unclear). In the sixty-eight remaining cases where the out-of-court statements were deemed to be testimonial, the courts advanced to the issue of forfeiture.

B. Demographics

When women are murdered by men, ninety-three percent of victims are killed by someone they know.[107] Data indicate that "[i]ntimate partner homicides make up 40 to 50 percent of all murders of women in the United States, according to city- or State-specific data-bases."[108] Accordingly, the vast majority of

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106 *See* Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004) (noting that dying declarations likely constitute an exception to the Confrontation Clause).

107 *See* VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2016 HOMICIDE DATA 3 (2018) (providing statistical analysis of all homicides committed by males against females in the United States in single victim/single offender incidents). In 2016, 1,809 females were killed by males; 1,537 of these women were killed by someone they knew. *Id.* Of these 1,537 women, 962, or sixty-three percent, were wives or girlfriends of their killers. *See id.* For general data on homicide rates, see generally Emiko Petrovsky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014*, 66 CDC MMWR 741 (2017) (providing expansive homicide statistics by various demographics); James Alan Fox & Emma E. Friedel, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976–2015*, 4 VIOLENCE & GENDER 37 (2017) (reviewing homicide differences by gender).

108 Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 2003 NIJ J. 14, 18 (2003) [hereinafter Campbell, *Intimate Partner Homicide*]; *see also* Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1089 (2003) [hereinafter Campbell, *Femicide*] (reporting that "American women are killed by intimate partners (husbands, lovers, ex-husbands, or ex-lovers) more often than by any other type of perpetrator" (citations omitted)).

victims in my sample were women[109]—there were 101 female victims and twelve male victims, as well as one transgender victim.[110] Conversely, the vast majority of defendants were men, with 106 male defendants and eight female defendants.[111]

The cases make for grim reading: victims were stabbed, shot, strangled, beaten to death and set on fire.[112] In virtually none of the cases was the violence a surprise. Indeed, some reports show that in seventy to eighty percent of intimate partner homicides, physical abuse by the man preceded the murder.[113] The victims had sought help—from police, courts and social workers, from neighbors, family and friends. Most of them knew that the defendant wished to harm them. Each case reads like its own inevitable tragedy, where you keep hoping that this time, the victim will escape, or if attacked, will recover from her injuries. You silently urge them not to answer the door, not to go to the store, not to get in the car. And every time, it plays out in the same horrible way.

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109 I coded these according to who appeared to be the "primary" victim, so that if a man murdered his wife and kids, I filed the case under "female victim." Several of these cases were multiple homicides, usually involving close family members or the victim's new partner. If all of the actual murder victims, including children, were counted, the numbers would be 106 female and eighteen male.

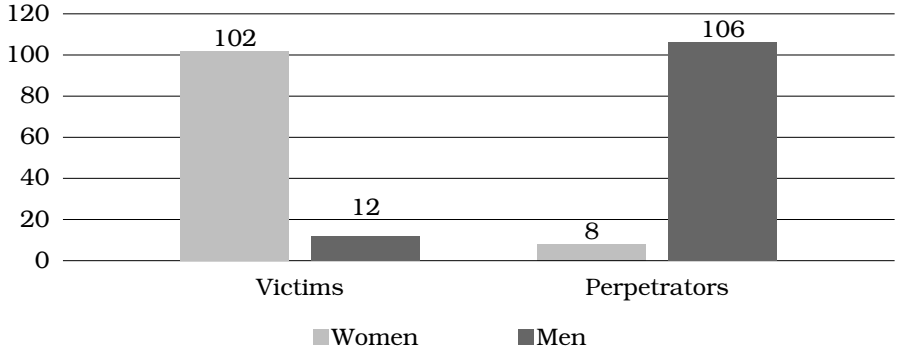
110 *See* People v. Garces, No. D045022, 2007 WL 4384935, at *4 (Cal. Ct. App. Dec. 17, 2007) (victim, Yamile Lee, was a transgender woman).

111 In cases in which there was more than one victim, such as children or other family members, I coded the cases according to the gender of the primary victim, understanding the primary victim as the person who was the focus of the perpetrator and who made the out-of-court statements.

112 Overwhelmingly though, victims of domestic homicide are shot. *See, e.g.*, GA. COMM'N ON FAMILY VIOLENCE & GA. COALITION AGAINST DOMESTIC VIOLENCE, GEORGIA DOMESTIC VIOLENCE: FATALITY REVIEW PROJECT 23 (2018) [hereinafter GA. COMM'N] (noting that in all cases of domestic homicide it reviewed since 2004, fifty-nine percent of victims "were killed by firearms, outnumbering all other means combined").

113 *See* Campbell, *supra* note 108, at 18; *see also* Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUD. 300, 309 (1999) (finding in a study of 141 femicide victims that sixty-seven percent had been physically assaulted by their intimate partners within the previous year); Jacquelyn C. Campbell, *"If I Can't Have You, No One Can": Power and Control in Homicide of Female Partners*, *in* FEMICIDE: THE POLITICS OF WOMAN KILLING 99, 102 (Jill Radford & Diana E. H. Russell eds., 1992) (reporting that, in a study of twenty-eight women killed by a spouse, eighteen had been physically abused by the man before their murder).

GENDER BREAKDOWN OF VICTIMS AND PERPETRATORS



C. Decisions of the Lower Courts

For the purposes of this analysis, I separated the 114 cases that fit my criteria into three categories: (1) cases in which the courts found the statements to be nontestimonial, (2) cases in which the courts found the statements to be dying declarations, and (3) cases in which the courts found the statements to be testimonial. The testimonial statement cases were further divided into the following sub-categories: (1) cases in which proof of forfeiture by wrongdoing met the *Giles* standard, (2) cases in which forfeiture by wrongdoing had not met the *Giles* standard, but the court held that the error was harmless, and (3) cases in which forfeiture by wrongdoing had not met the *Giles* standard and the conviction was remanded or reversed.

1. *Nontestimonial Statements*

There were thirty-seven cases in which the courts found that the victim's statements were nontestimonial, so the Confrontation Clause did not apply. Finding that an absent victim's statements were nontestimonial presents an obvious temptation to courts who do not want to exclude victim statements, because the forfeiture question does not even need to be reached.[114]

A number of these were uncontroversial, statements to family, friends and co-workers, which are well understood to be

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114 The murder of Julie Jensen is a case in point—after the conviction was vacated on habeas review because the prosecutor had been unable to meet the *Giles* standard for forfeiture, the trial court, affirmed by the state Supreme Court, simply reinstated the conviction on the basis that the definition of "testimonial" had been narrowed and Julie's statements would now be deemed nontestimonial. *See* Jensen v. Clements, No. 11-C-803, 2017 WL 5712690, at *1 (E.D. Wis. Nov. 27, 2017) (citing Kenosha County Circuit Court decision).

nontestimonial;[115] as Justice Scalia decreed, "a person who makes a casual remark to an acquaintance does not" bear testimony.[116] There were signs, however, of a modest expansion in the definition of nontestimonial statements. The Supreme Court has defined and kept redefining "testimonial" statements as those that "are an obvious substitute for live testimony."[117] Some courts appeared to take the speaker's purpose—whether they were making the statement in order to establish past facts or to get help prospectively—as the touchstone, deeming some statements even to lawyers and police officers to be nontestimonial.

For example, in *Commonwealth v. Kunkle*, a man involved in a child custody dispute—one of the rare male victims—confided in the attorney he had retained for a conciliation conference that he was afraid of his children's mother and that if he ended up dead it would be her fault.[118] The court nonetheless

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115 *See, e.g.*, Doan v. Carter, 548 F.3d 449, 458 (6th Cir. 2008) (earlier physical abuse described to friends and family); Rhinehart v. Spearman, No. 2:15-cv-00122-JKS, 2017 WL 3284819, at *9 (E.D. Cal. Aug. 2, 2017) (victim telling her sisters defendant was bothering her); Franklin v. Curtin, No. 07-10548, 2014 WL 1091744, at *7 (E.D. Mich. Mar. 18, 2014) (fear of defendant and prior incidents of violence confided to friends and family); Rush v. Tucker, No. 4:09-cv-470-MP-GRJ, 2012 WL 7808121, at *5 (N.D. Fla. Nov. 13, 2012) (statements to sisters and bartender about relationship with defendant); [Gary] Laine v. Yates, No. SACV 08-1367-DSF (DTB), 2010 WL 986768, at *2 (C.D. Cal. Jan 13, 2010) (victim told boyfriend that defendant was stalking her and that she feared him); People v. Racz, No. B203267, 2010 WL 3387145, at *1, *31 (Cal. Ct. App. Aug. 30, 2010) (victim told friends and relatives that defendant had threatened to kill her if she left him); People v. Posey, No. A118361, 2009 WL 151335, at *2 (Cal. Ct. App. Jan 22, 2009) (victim's fear of defendant confided to her divorce lawyer, her mother, and six friends); People v. Hernandez, No. B196877, 2008 WL 3984220, at *7 (Cal. Ct. App. Aug. 29, 2008) (victim's statements to her daughters); People v. Robles, 302 P.3d 269, 278 (Colo. App. 2011) (statements to friends and family); Roberts v. State, 894 N.E.2d 1018, 1023 (Ind. Ct. App. 2008) (statements by victim to three of her friends that defendant had threatened to kill her); People v. Cleary, 1 N.E.3d 1160, 1171 (Ill. App. Ct. 2013) (statements to friends and family); People v. Richter, 977 N.E.2d 1257, 1284 (Ill. App. Ct. 2012) (victim made statements to friends, family members and co-workers); People v. Stenberg, No. 290918, 2010 WL 3984639, at *3 (Mich. Ct. App. Oct. 12, 2010) (statements to neighbor); [Brett] Laine v. State, 786 N.W.2d 635, 639 (Minn. 2010) (prior acts of domestic abuse described to friends and co-workers); State v. Ash, 108 N.E.3d 1115, 1135 (Ohio Ct. App. 2018) (statements to mother, aunt, and sister-in-law); Payne v. State, No. 12-10-00027-CR, 2011 WL 1662856, at *6 (Tex. App. Apr. 29, 2011) (statements to father and sister-in-law), *rev'd*, PD-1214-11, 2013 WL 765578 (Tex. Crim. App. Feb. 27, 2013); Sanders v. State, No. 05-09-01337-CR, 2011 WL 1843508, at *10, *12 (Tex. App. May 16, 2011) (statements to friend over the telephone); Gray v. Ballard, No. 11-1327, 2012 WL 5834938, at *9 (W.Va. Nov. 16, 2012) (prior incidents of domestic violence disclosed to friends).

116 Crawford v. Washington, 541 U.S. 36, 51 (2004).

117 Davis v. Washington, 547 U.S. 813, 830 (2006).

118 79 A.3d 1173, 1188 (Pa. Super. Ct. 2013).

held that this statement was nontestimonial.[119] In *Hughes v. State*, the Minnesota Supreme Court upheld a finding that a wife's statements not only to her divorce attorney but also to police officers who had come to do a welfare check on her were not testimonial.[120] Equally, in *People v. Turner*, a husband's declaration in support of a restraining order against his wife was not found to be testimonial.[121]

The courts also made robust use of the narrowing definition of "testimonial" that had begun with the Supreme Court's decision in *Michigan v. Bryant*.[122] In *Bryant*, a man was shot in the stomach, drove to a gas station a mile away, and collapsed there.[123] The Court, in an opinion written by Justice Sotomayor, held that the statements he made to the police as to who shot him were nontestimonial because they were made with the primary purpose of "enabl[ing] police assistance to meet an ongoing emergency."[124]

Lower courts were therefore able to classify a wider range of statements as nontestimonial. An emergency exception for testimonial statements to the police was invoked in several cases,

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119 *See id.* at 1190. The *Kunkle* court added that his statements "would have been properly admitted under the forfeiture by wrongdoing exception set forth under [the state's hearsay rules]" although it did not specify why it reached this conclusion. *Id.* On habeas review, the District Court found that the victim's statements were erroneously admitted, but that the error was harmless in view of the multiple times the defendant had admitted to the killing herself. *See* Kunkle v. Pennsylvania, No. 4:17-cv-898, 2019 WL 2341630, at *8 (M.D. Pa. Apr. 18, 2019). The District Court did not discuss the state court's reference to forfeiture. *See also* Hughes v. State, 815 N.W.2d 602, 608 (Minn. 2012) (holding that a wife's statements to her divorce attorney discussing control problems in the marriage were not testimonial).

120 *See Hughes*, 815 N.W.2d at 609 (noting that "there is nothing in the record suggesting that the questions the officers asked of Hughes's wife were aimed at anything other than assessing the situation and determining whether she needed any assistance"). In Hughes's case, the trial court had admitted his wife's statements under a forfeiture by wrongdoing theory using a pre-*Giles* standard; the reviewing court had subsequently deemed the error harmless because it found the statements to be nontestimonial. *See id.* at 606.

121 No. H039304, 2015 WL 753312, at *26 (Cal. Ct. App. Feb. 20, 2015). The victim had also made statements to his secretary, his housekeeper, and his wife's sister that he was afraid of his wife and that "if anything happened to him" it would be caused by her. *Id.* at *23. The court did not specifically discuss whether the victim's written statements in support of a restraining order were testimonial but found the other statements not to be. *See id.* at *26.

122 *See* 562 U.S. 344, 378 (2011).

123 *Id.* at 347, 349.

124 *Id.* at 349 (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)). For a thoughtful analysis of how, with *Bryant*, the Court "erected a framework for analyzing 'primary purpose' that appears just as malleable as the *Roberts* [reliability] test," see Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1868 (2012).

particularly where, as in *Bryant*, mortal injuries had already been inflicted on the victim.[125]

Some cases on their facts lent themselves easily to a finding of emergency, particularly if there was a danger to others in addition to the victim. In *Commonwealth v. Williams*, the victim, who had been severely burned, called 911 begging for help. The court found that this was an emergency, because there was a risk that defendant's arson would spread to other row houses.[126] Similarly, in *State v. Largo*, the victim told the police that the defendant had shot her and was on his way to school to shoot their children.[127] These would be classified as emergencies under any standard.

Sometimes the extent of the injury to the victim appeared to be a deciding factor in a court's finding of emergency. In *Brooks v. Dormire*, for example, the defendant hit Bonnie Sue Hawkins, his girlfriend, with a baseball bat.[128] She ran over to a neighbor's house, covered in blood, and was taken to the hospital.[129] The court ruled that her statements to the neighbor, the officer who responded to the scene and to medical personnel that the defendant had struck her were nontestimonial because they were made in response to an ongoing emergency.[130]

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125 *See, e.g.*, Brooks v. Dormire, No. 4:05-CV-1144 (CEJ), 2008 WL 3159331, at *1, *4 (E.D. Mo. Aug. 4, 2008) (victim's statements to her neighbor, police, and medical personnel that defendant had hit her with a baseball bat); Commonwealth v. Williams, 103 A.3d 354, 363 (Pa. Super. Ct. 2014) (victim's statements to police after defendant had set her on fire).

126 *Williams*, 103 A.3d at 363 (concluding that "the primary purpose of Serrano's statements during the 911 call was to seek medical assistance and assist first responders in addressing an ongoing emergency").

127 278 P.3d 532, 534 (N.M. 2012). The court found the "relevant circumstances in this case nearly identical to those in *Bryant*" and therefore held that the victim's statements "were nontestimonial, and did not violate defendant's right to confrontation." *Id.* at 538.

128 *Brooks*, 2008 WL 3159331, at *1.

129 *Id.*

130 *Id.* at *4 (observing that "[t]he victim had suffered a severe head injury and was in need of emergency medical attention. Her statements to the paramedics and emergency room employees regarding the cause of her injuries were nontestimonial. Likewise, her statements to her neighbor and the police officer who responded to the scene were also nontestimonial, in that they were in response to an ongoing emergency"). *See also* Frederick v. State, 400 P.3d 786, 807 (Okla. Crim. App. 2017) (finding that the circumstances indicated that "the primary purpose of the interrogation was to enable medical assistance to the victim and police assistance to meet an ongoing emergency"), *overruled by* Williamson v. State, 422 P.3d 752 (Okla. Crim. App. 2018). In *Frederick*, the victim (who was the defendant's 85-year-old mother) identified the defendant to the police as the person who attacked her and the court still found it to be nontestimonial. *Id.* at 806–07.

But other cases seemed more idiosyncratic. In *Sain v. Thaler*, the victim asked a state trooper to accompany her to her house so she could recuperate her belongings while her husband was away.[131] The court found that these statements were not testimonial because "[g]enerally, statements that are made to police while the declarant believes that she is in personal danger are not made with consideration of their legal ramifications because the declarant speaks out of urgency and a desire to obtain a prompt response."[132]

Overall, the cases seemed to show courts eager to find a variety of statements to be nontestimonial and simply sidestep the knottier issues of intent raised under a forfeiture theory.

2. *Dying Declarations*

Dying declarations are statements made by an unavailable declarant who, believing their death to be imminent, describes the cause or circumstances of their death.[133] Although the Supreme Court has not yet explicitly held that dying declarations escape Confrontation Clause requirements, it has strongly hinted that it would consider these statements to be admissible based on their acceptance at common law.[134]

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131 No. 4:10-CV-314-Y, 2010 WL 6032812, at *5 (N.D. Tex. Dec. 27, 2010).

132 *Id.* at *6 (following same reasoning as state court). At least one case, strangely, treated the victim's statements about earlier abuse as not hearsay at all. *See* Luna v. Commonwealth, 460 S.W.3d 851, 872 (Ky. 2015). Rather mystifyingly, the court held that the victim's statements about the defendant's physical abuse and coercion were "not offered for the truth of the matter asserted," for example, "whether Luna actually abused her or made her drive him to Illinois at knifepoint. By introducing the statements, the Commonwealth was not seeking to prove Luna actually did abuse Hendrickson. The statements were offered, instead, to paint a picture of why Luna may have been motivated to kill Hendrickson or how he planned to commit insurance fraud." *Id.*

133 *See, e.g.*, FED. R. EVID. 804(b)(2) ("In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances."); CAL. EVID. CODE § 1242 (West 2021) ("Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of imminently immediate death."); KAN. STAT. ANN. § 60-460(e) (West 2021) (defining dying declaration as a statement "made: (1) Voluntarily and in good faith; and (2) while the declarant was conscious of the declarant's impending death and believed that there was no hope of recovery"); N.J. R. EVID. 804(b)(2) ("In a criminal proceeding, a statement made by a victim unavailable as a witness is admissible if it was made voluntarily and in good faith and while the declarant believed in the imminence of declarant's impending death.").

134 *See* Giles v. California, 554 U.S. 353, 358 (2008) (noting that "two forms of testimonial statements were admitted at common law even though they were unconfronted" and that one of them was "declarations made by a speaker who was both on the brink of death and aware that he was dying"); Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004) (noting that "[t]he one deviation we have

This seemed to be enough for the lower courts, which were unanimous in finding that dying declarations escaped the requirements of confrontation. "The admission of dying declarations," wrote the Texas Court of Appeals, in a representative passage, "does not infringe upon a criminal defendant's right of confrontation."[135] This view was shared by the other courts in the sample, with the results that in all seven cases in which courts found the victim's statements to be a dying declaration, they simply upheld admission of the evidence on that basis.[136]

Possibly because it assumed that dying declarations were automatically admissible, at least one court declined to find that a mortally wounded victim's words were dying declarations.[137] In *James v. Marshall*, the court found that a woman's statements that her husband had shot her were not a dying declaration—even though she had been shot in the face and died four days later—because she did not say "I think I'm dying"[138] or otherwise indicate that she was speaking, as Justice Cardozo put it, "with the consciousness of a swift and certain doom."[139]

But for most of the cases in which the courts did find that the victim had made a dying declaration, the statements were admitted without reference to forfeiture by wrongdoing.[140]

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found [from the rule against allowing testimonial statements] involves dying declarations").

135 Denson v. State, No. 04-11-00292-CR, 2012 WL 3025845, at *2 (Tex. App. July 25, 2012) (citing Giles v. California, 554 U.S. at 358–59).

136 *See* Austin v. Howes, No. 08-11364, 2011 WL 3862349, at *9 (E.D. Mich. Sept. 1, 2011); People v. Webb, No. B195702, 2008 WL 3906837, at *8 (Cal. Ct. App. Aug. 26, 2008); State v. Plauche, 32 So. 3d 852, 864, 868 (La. Ct. App. 2010); State v. Largo, 278 P.3d 532, 538–39 (N.M. 2012); *Denson*, 2012 WL 3025845, at *2; Gardner v. State, 306 S.W.3d 274, 288 n.20 (Tex. Crim. App. 2009); State v. Price, 228 P.3d 1276, 1281–82 (Wash. Ct. App. 2009). In all of the cases, the victims were shot and subsequently identified their killers before they died. For an interesting discussion of why admitting declarations by murder victims is particularly important in cases of femicide, see Orenstein, *supra* note 87, at 1452–55.

137 James v. Marshall, No. CV-06-3399-CAS(E), 2008 WL 4601238, at *18–21 (C.D. Cal. Aug. 13, 2008). The *Marshall* court found that although the "victim was bloody, in pain, and having trouble breathing," she "was conversing with paramedics concerning her condition, and asked for a pen to write down a phone number." *Id.* at *20.

138 *See, e.g.*, *Webb*, 2008 WL 3906837, at *7–8 (victim, who had been shot, grabbed police officer by the wrist, said, "Please help me. I'm dying," then identified the defendant as the shooter).

139 *James*, 2008 WL 4601238, at *1, *20–21; Shepard v. United States, 290 U.S. 96, 100 (1933) (Cardozo, J.).

140 *See Austin*, 2011 WL 3862349, at *7–9; *Plauche*, 32 So. 3d at 862–68; *Largo*, 278 P.3d at 538–39; *Denson*, 2012 WL 3025845, at *2; *Gardner*, 306 S.W.3d at 288–92; *Price*, 228 P.3d at 1281–82. In *Webb*, 2008 WL 3906837, at *5, the court acknowledged that the trial court had applied the wrong forfeiture

3. *Testimonial Statements: Forfeiture by Wrongdoing Found*

Only in the sixty-eight cases where the courts found the victim's statements to be testimonial was the forfeiture issue triggered. The most frequently recurring scenario was when victims spoke to the police following earlier incidents of domestic assault.[141] Courts usually determined that those statements constituted testimonial evidence, and in a large proportion of those cases, the courts advanced to the prosecution's forfeiture arguments.

Surprisingly, the courts found that the prosecution had proven the specific intent required by *Giles* in twenty-five cases out of the sixty-eight—a rate of nearly thirty-seven percent, well above what might have been anticipated. The factors considered by the courts included: (1) the existence of ongoing court proceedings,[142] (2) if litigation had not yet been initiated, whether it was "reasonably anticipated,"[143] and (3) whether the defendant had explicitly threatened the victim not to talk to authorities.[144]

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standard but decided the case on the basis of the victim's statements not being testimonial.

141 *See, e.g.*, McLaughlin v. Steele, 173 F. Supp. 3d 855, 900 (E.D. Mo. 2016), *rev'd and remanded sub nom.* McLaughlin v. Precythe, 9 F.4th 819 (8th Cir. 2021) (victim's statements to the police reporting "Petitioner's threatening and assaultive actions"); People v. Kerley, 233 Cal. Rptr. 3d 135, 172–75 (Cal. Ct. App. 2018) (victim's statements to police during two separate domestic violence calls); People v. Perkins, 163 N.E.3d 148, 176–77 (Ill. Ct. App. 2018) (victim's statements to the police at the hospital); People v. Zumot, No. H037652, 2013 WL 6507459, at *8 (Cal. Ct. App. Dec. 12, 2013) (victim's statements to the police during a domestic violence call and when filing a police report); Ridgeway v. Conway, No. 10-CV-6037(MAT), 2011 WL 3651147, at *9–10 (W.D.N.Y. Aug. 18, 2011) (victim's testimony before the grand jury regarding defendant's "escalating acts of violence against her.").

142 *See, e.g.*, *McLaughlin*, 173 F. Supp. 3d at 901 (burglary and abuse cases); People v. Girgis, No. D070461, 2017 WL 1505926, at *17 (Cal. Ct. App. Apr. 27, 2017) (domestic assault case); *Kerley*, 233 Cal. Rptr. 3d at 175 (pending domestic violence charges); State v. Minor, No. W2010-01677-CCA-R3-CD, 2012 WL 3055776, at *10–11 (Tenn. Ct. App. Jul. 26, 2012) (multiple criminal complaints against defendant for vandalism, domestic abuse and harassment).

143 People v. Peterson, 106 N.E.3d 944, 963 (Ill. 2017) (divorce proceeding contemplated by fourth wife). *See, e.g.*, State v. Moran, 218 So. 3d 749, 757 (La. Ct. App. 2017) (rejecting argument that there had to be a case pending against the defendant to find forfeiture when defendant's intent to prevent victim from bringing domestic abuse charges was clear); People v. Coleman, 24 N.E.3d 373, 405–06 (Ill. App. Ct. 2014) (potential dissolution hearing); *Perkins*, 163 N.E.3d at *4, *19 (potential criminal damage case).

144 *See, e.g.*, State v. McKelton, 70 N.E.3d 508, 546 (Ohio 2016) (evidence indicated that defendant was "trying to isolate [the victim] and prevent her from talking to authorities"); State v. Fry, 926 N.E.2d 1239, 1262 (Ohio 2010) (defendant had been pressuring victim to drop assault charges and "fix this, fix this.");

Using a similar approach as in hearsay cases under Rule 804(b)(6), all of the courts that considered the question held that intent to prevent the victim from appearing as a witness only had to be one of the reasons for the murder; it did not have to be the sole motivation.[145] As one California court of appeals put it, "nothing in *Crawford*, *Davis*, *Giles I* or *Giles II* suggests that the defendant's *sole* purpose in killing the victim must be to stop the victim from cooperating with authorities or testifying against the defendant."[146] On the contrary, continued the court, "[i]t strikes us as illogical and inconsistent with the equitable nature of the doctrine to hold that a defendant who otherwise would forfeit confrontation rights by his wrongdoing (intent to dissuade a witness) suddenly regains those confrontation rights if he can demonstrate another evil motive for his conduct."[147]

a. *Ongoing Litigation*

Justice Scalia had already flagged the existence of ongoing criminal proceedings in *Giles* as "highly relevant" to the forfeiture inquiry.[148] While it was not a prerequisite for a finding of forfeiture,[149] it was a persuasive factor in many

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People v. Banos, 100 Cal. Rptr. 3d 476, 491 (Cal. Ct. App. 2009) (holding that forfeiture by wrongdoing applies to "acts intended to dissuade a witness from cooperating with law enforcement authorities").

145 *See, e.g.*, *Banos*, 100 Cal. Rptr. 3d at 504 (accepting mixed motives); Shepherd v. State, 489 S.W.3d 559, 573 (Tex. App. 2016) (same).

146 *Banos*, 100 Cal. Rptr. 3d at 504 (holding that once the prosecution has shown that the defendant "harbored the requisite motive," the fact that he "may have simultaneously intended revenge for Cortez, or to stop what he believed was her supernatural control over him, is of no assistance to him"). *See also Shepherd*, 489 S.W.3d at 573 (holding that "forfeiture by wrongdoing applies even when the defendant has multiple reasons for harming the witness, as long as one of the reasons is to prevent her from testifying"). In that case, the court upheld a trial court's ruling that the crime itself expressed a desire to prevent the victim from testifying: the defendant was attempting to kidnap the victim, shot her when she tried to escape, and then finished her off when he realized she wasn't dead but was still alive and screaming. "We find that it is within the zone of reasonable disagreement that . . . when Shepherd shot Green, he was motivated (at least partially) by his desire to prevent her from testifying against him." *Id.* at 575.

147 *Banos*, 100 Cal. Rptr. 3d at 504.

148 *See* Giles v. California, 554 U.S. 353, 377 (2008) (noting that "[e]arlier 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").

149 Conversely, there were a small number of cases in which a court found an insufficient showing of intent even when there was ongoing litigation. *See, e.g.*, People v. Martinez, No. A136817, 2014 WL 1465729, at *3 (Cal. Ct. App. Apr. 15, 2014) (hearing on restraining order scheduled, but prosecution had conceded that defendant had not been served with papers); Bibbs v. State, 371 S.W.3d 564, 570 (Tex. App. 2012) (hearing on protective order).

cases.[150]

In *State v. McLaughlin*, the Missouri Supreme Court upheld the trial court's finding that the statements of the victim, Beverly Guenther, to police were testimonial but admissible under the forfeiture by wrongdoing exception.[151] Guenther had obtained restraining orders against McLaughlin, who had been arrested and charged with burglarizing her home.[152] The trial court found "by clear and convincing evidence that the defendant intended to make Ms. Guenther unavailable as a witness, both in the burglary and in the abuse cases."[153] The Missouri Supreme Court concluded that "the trial court having found that Mr. McLaughlin's intent was to procure the victim's unavailability as a witness, evidence of her statements about Mr. McLaughlin's attacks on her and comments to her comes squarely within the type of evidence *Giles* states is admissible under the forfeiture by wrongdoing doctrine."[154]

Similarly, in *Ridgeway v. Conway*, Lanerra Streeter had appeared before the grand jury on burglary charges against Ridgeway and had testified to numerous prior acts of abuse.[155] The New York court found clear and convincing evidence of intent to prevent her from testifying as a witness because Streeter had an order of protection against Ridgeway, he had offered her money not to testify, and he attempted to kill one of

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150 *See, e.g.*, McLaughlin v. Steele, 173 F. Supp. 3d 855, 901 (E.D. Mo. 2016) (ongoing burglary and abuse cases), *rev'd and remanded sub nom.* McLaughlin v. Precythe, 9 F.4th 819 (8th Cir. 2021); People v. Girgis, No. D070461, 2017 WL 1505926, at *17 (Cal. Ct. App. Apr. 27, 2017) (domestic assault case); People v. Kerley, 233 Cal. Rptr. 3d 135, 175 (Cal. Ct. App. 2018) (pending domestic violence charges); People v. Reyes, 2017 WL 2686500, at *10–11 (Cal. Ct. App. June 22,2017) (restraining order); Commonwealth v. Kunkle, 79 A.3d 1173, 1190 (Pa. Super. Ct. 2013) (child custody proceedings); State v. Minor, No. W210-01677-CCA-R3-CD, 2012 WL 3055776, at *10–11 (Tenn. Crim. App. July 26, 2012) (multiple criminal complaints against defendant for vandalism, domestic abuse, and harassment). The showing of forfeiture was even more persuasive when the murder was committed on the eve of a court appearance. *See, e.g.*, State v. Milan, No. W2006-02606-CCA-MR3-CD, 2008 WL 4378172, at *14 (Tenn. Crim. App. Sept. 26, 2008) (murder occurred two days before preliminary hearing in assault case against defendant, where victim was the complainant). *But see Bibbs*, 371 S.W.3d at 574 (inexplicably finding that that the prosecution did not prove intent under *Giles* despite the fact that the jury had convicted the defendant of the statutory offense of killing a victim in retaliation for their being a prospective witness).

151 265 S.W.3d 257, 271–73 (Mo. 2008) (en banc). McLaughlin's petition for habeas was granted only as to his sentence of death in *McLaughlin*, 173 F.Supp. 3d at 855.

152 *See McLaughlin*, 265 S.W.3d at 260.

153 *Id.* at 272 (quoting trial court's findings).

154 *Id.* at 272–73.

155 No. 10-CV-6037(MAT), 2011 WL 3651147, at *1 (W.D.N.Y. Aug. 18, 2011).

her friends who was present at the time of Streeter's fatal shooting.[156]

But the courts did not require that the defendant be facing criminal charges in another case, finding that even ongoing civil litigation could be enough to support an inference that the defendant had killed the victim, at least in part, to prevent her testimony.[157] Despite concerns from domestic violence advocates, the courts were refreshingly pragmatic in recognizing how a bitter custody battle could provide just as much motivation to silence the victim as pending criminal charges.[158] The courts therefore expanded the "ongoing . . . proceedings" language in *Giles* to include civil proceedings, such as dissolution proceedings or custody hearings.[159]

Possibly the paradigmatic case of forfeiture was *People v. Peterson*, where the evidence showed that the defendant killed his third wife, Kathleen Savio, to keep her from testifying at their divorce proceeding, then killed his fourth wife, Stacy Cales, to keep her from testifying at *their* divorce proceedings and in his murder trial for the death of Kathleen.[160]

Kathleen and Peterson were involved in an acrimonious divorce, and they had an upcoming hearing on issues of child custody, maintenance and support. The court found that it was unquestionable that Kathleen would have testified at the hearing, and that she would have been Peterson's "primary adversary:"

> Accordingly, the inference that defendant murdered Kathleen to prevent her from testifying is much stronger in this case, where a party to the litigation is murdered, than in a case

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156 *Id.* at *8, *11. Another blatant case of witness tampering was in Wyoming, where the defendant sexually assaulted his stepson, threatened to kill him if he talked, then murdered him before he could testify in the sexual assault case. *See* Proffit v. State, 191 P.3d 963, 965–67 (Wyo. 2008).

157 *See, e.g.*, People v. Peterson, 106 N.E.3d 944, 961–62 (Ill. 2017) (divorce proceeding); White v. State, 978 N.E.2d 475, 481–82 (Ind. App. Ct. 2012) (contested custody hearing).

158 *See, e.g.*, People v. Girgis, No. D070461, 2017 WL 1505926, at *17 (Cal. Ct. App. Apr. 27, 2017) (defendant, who had hired two gang members to kill his wife to prevent her from testifying against him in a domestic violence case and to avoid the financial impact of a divorce, had forfeited his right to confrontation).

159 *See, e.g.*, *White*, 978 N.E.2d at 481–82 (defendant shot victim the day before contested custody hearing).

160 *Peterson*, 106 N.E.3d at 963. The prosecution sought to introduce statements by both Kathleen and Stacy. The court held that the state "was not required to demonstrate that preventing Kathleen from testifying was defendant's sole intent when he murdered her. The State was only required to prove that her murder was motivated 'at least in part' by an intent to prevent her from testifying." *Id.* Peterson's first and second wives appeared to have survived their marriages to him.

where the person murdered had only a tangential relationship to the litigation, or would have been, at most, a minor witness.[161]

b. *Litigation "Reasonably Anticipated"*

Even if no legal proceedings had been instituted, courts were often willing to draw the inference of an intent to silence so long as the surrounding circumstances indicated that litigation seemed likely. In cases where the couple was on the verge of separation or one party wanted a divorce, courts had little problem deeming reasonable anticipation of litigation to be a sufficient motivation to trigger forfeiture.[162]

For example, when Peterson's fourth wife, Stacy Cales, disappeared, there were no pending proceedings between her and Peterson.[163] But the Illinois Supreme Court read *Giles* as allowing the inference "that a defendant's intent to prevent testimony might be inferred from the surrounding circumstances."[164] The court found that whether Stacy's statements could be introduced should not depend on the fortuity of whether a legal action had been filed or not.[165] "Equity demands that a defendant who silences a witness, or a potential witness, through threats, physical violence, murder, or other wrongdoing should not be permitted to benefit from such conduct based solely on the fact that legal proceedings were not pending at the time of his wrongdoing[,]" wrote the court.[166]

Therefore, the prosecution was not precluded from presenting evidence that Stacy was murdered to "prevent her from reporting to police defendant's involvement in Kathleen's death or testifying at a reasonably anticipated divorce hearing or a murder trial."[167] There was ample evidence that Stacy was

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161 *Id.* at 962. The court found that admission of statements by absent declarants was dependent on whether "the trial court finds, by a preponderance of the evidence, that the defendant engaged in wrongdoing that was intended to, and did, procure the witness's unavailability." *Id.* at 960. It also rejected Peterson's contention that the state was required to "identify the specific testimony from the absent witness that the defendant wished to avoid." *Id.* at 961.

162 *Id.* at 963.

163 *Id.* at 952, 963.

164 *Id.* at 964. The Supreme Court, concluded the *Peterson* court, "expressly contemplated that the forfeiture doctrine could apply not only where the defendant's efforts were designed to prevent testimony at trial, but also where the defendant's efforts were designed to prevent testimony to police, i.e., reporting criminal conduct." *Id.*

165 *Id.* at 964.

166 *Id.* at 965.

167 *Id.* at 963.

contemplating divorce, that Peterson knew it, and that she was aware that he had murdered Kathleen.[168]

In *People v. Coleman*, neither the defendant nor his wife, Sheri Coleman, had instituted divorce proceedings, but the court rejected the contention that the preexistence of legal proceedings was necessary to trigger forfeiture.[169] Instead, the court found that "if Sheri had not been killed by defendant, she could have testified about defendant's desire to obtain a divorce, but [that he] feared losing his job if he did so."[170] Therefore, the court concluded "the state [had] met its burden that defendant murdered Sheri and the murder was intended to cause her unavailability at a dissolution proceeding."[171]

In *People v. Perkins*, Teresa Iacovetti had filed complaints of a violation of an order of protection and of criminal damage to property, although neither proceeding was pending at the time she was shot.[172] During a hearing on remand, the trial court had found that the State had shown by a preponderance of the evidence that Perkins had shot Iacovetti at least in part to prevent her from testifying against him in either potential case.[173] The appellate court noted that the Illinois Supreme Court, in *Peterson*, did not "condition the [forfeiture] doctrine's application on the existence of a pending legal proceeding."[174] Therefore, it found no error in the admission of Iacovetti's statements at the defendant's murder trial.[175]

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168 The Court noted that:

> Based on evidence that Stacy was planning to file for divorce, defendant's acknowledgment of their marital difficulties and Stacy's desire for a divorce, defendant's concerns about the financial impact of a divorce, and Stacy's knowledge about defendant's involvement in Kathleen's death, we cannot say that the trial court's finding . . . was against the manifest weight of the evidence.

Id. at 968.

169 24 N.E.3d 373, 405–06 (Ill. App. Ct. 2014).

170 *Id.* at 406. Coleman worked as the chief of security for Joyce Meyer, a televangelist who maintained "a strict no-divorce policy among her employees, in keeping with her understanding of Scripture." Jack Hitt, *Words on Trial*, NEW YORKER (July 16, 2012), https://www.newyorker.com/magazine/2012/07/23/words-on-trial [https://perma.cc/NHG2-3QUP]. Coleman was having an affair with a cocktail waitress, and he knew that if he left Sheri, "he would have risked losing his salary of a hundred thousand dollars a year." *Id.* To avoid that unfortunate outcome, he murdered his wife and their two sons instead. *See id.*

171 *Coleman*, 24 N.E.3d at 405.

172 163 N.E.3d 148, 155 (Ill. Ct. App. 2018).

173 *Id.* at 157.

174 *Id.* at 176.

175 *Id.* at 177 (holding that "the trial court properly admitted all three of Teresa's statements under the forfeiture-by-wrongdoing doctrine"); *see also* State v. Pickens, 25 N.E.3d 1023, 1059–60 (Ohio 2014) (forfeiture standard met where victim had reported that defendant had raped her, and he knew police were

On the other hand, there were a substantial number of cases that found that the reasonable anticipation of litigation was not enough to support an inference of specific intent in the absence of ongoing proceedings.[176] In *People v. Martinez*, the victim had made a declaration in support of a restraining order, which the defendant learned she had obtained on the day he killed her.[177] But the court concluded that "there was no substantial evidence to support the trial court's attribution of [a] motive" to prevent her from testifying or cooperating with law enforcement.[178] So even though the victim had obtained a restraining order, the defendant was aware of that order, and there was a scheduled court hearing (though the defendant was unaware of it), that was not enough, and the court only upheld the conviction because it found the error to be harmless.[179]

But overall, the courts did not make formalistic distinctions, nor did they require papers to be filed or a court date set for them to find forfeiture.

c. *Intent to Prevent Reporting of Abuse*

Justice Scalia's observation in *Giles* that "[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testi-

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looking for him before he killed her), *overruled by* State v. Bates, 149 N.E.3d 475 (Ohio 2020); Samuelson v. State, No. 03-12-00837, 2014 WL 4179440, at *4 (Tex. App. Aug. 21, 2014) (defendant mowed down his mother with his pickup truck when he saw her talking to police after he had assaulted her).

176 *See, e.g.*, People v. Martinez, No. A136817, 2014 WL 1465729, at *3 (Cal. Ct. App. Apr. 15, 2014) (noting that, even though there was a scheduled hearing on a restraining order against defendant at the time of the murder, defendant had not been served with restraining order documents and there was no evidence he was aware of the pending hearing); People v. Martin, No. 302071, 2012 WL 1758723, at *2 (Mich. Ct. App. May 17, 2012) (finding that victim's statements to police "did not fall within a valid forfeiture-by-wrongdoing theory" because at the time he was murdered, "there was no possible or existing case against defendant in which [the victim] was expected to testify.").

177 *Martinez*, 2014 WL 1465729, at * 1–2.

178 *Id.* at *3. The court added that "because it is undisputed defendant was never served with the restraining order documents, there is no evidence he was even aware of the hearing scheduled for November 24, let alone that he killed Maria to prevent her from appearing there." *Id.*

179 *See id.* at *5. *See also Martin*, 2012 WL 1758723, at *1 (finding that statements victim made to police two years before his murder about the defendant stalking him were not enough to establish that he was killed "in order to prevent him from testifying"). The court held that "[w]hen Silverlight was murdered, there was no possible or existing case against defendant in which Silverlight was expected to testify," therefore that the defendant had not forfeited her confrontation rights. *Id.* at 2.

mony to police officers or cooperation in criminal prosecutions"[180] did provide the basis for several findings of forfeiture.

Some courts held that the forfeiture by wrongdoing "doctrine applies to evidence the defendant intended to dissuade the victim from reporting the abuse to law enforcement authorities as well as from testifying at trial."[181] Indeed, the California courts determined that there were two separate showings that could give rise to a finding of forfeiture by wrongdoing—not only preventing testimony, but also cooperation with law enforcement in general.[182]

Taking Justice Scalia's language about "conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions,"[183] a California appellate court found that:

> [t]he use of the disjunctive 'or,' in our view, reflects the [U.S. Supreme] Court's intent to designate two alternative ways of satisfying the factual predicate for application of the forfeiture by wrongdoing doctrine: evidence that the defendant (1) intended to stop the witness from reporting abuse to the

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180 Giles v. California, 554 U.S. 353, 377 (2008). "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." *Id.* The Court added that "[e]arlier 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." *Id.*

181 People v. Kerley, 233 Cal. Rptr. 3d 135, 168 (Cal. Ct. App. 2018). While there was a pending criminal case against Kerley for assaulting the victim, Danna Dever, and even a court date five days before she disappeared, the court also relied on the considerable evidence that Kerley had beaten and isolated Dever from her friends and family, threatened to kill her, and on at least one occasion when she tried to call 911, he said he would kill her "if anyone from the police department came to the house." *Id.* at 174. Therefore, the court found that:

> [s]ubstantial evidence supports the trial court's implied finding that Kerley murdered Dever at least in part to keep her from reporting him to the police and testifying against him in his pending domestic violence case Kerley therefore forfeited his right to object to Dever's unconfronted testimonial statements.

Id. at 175 (citations omitted).

182 *See* People v. Banos, 100 Cal. Rptr. 3d 476, 491 (Cal. Ct. App. 2009) (subtitling section E.3. of the opinion "Forfeiture by Wrongdoing Applies Not Only to Acts Intended to Prevent a Witness From Testifying but Also to Acts Intended to Dissuade a Witness From Cooperating With Law Enforcement Authorities."). This rule was followed in multiple other California appellate cases. *But see* People v. Quintanilla, 259 Cal. Rptr. 3d 431, 444 (Cal. Ct. App. 2020) (reaching opposite conclusion in applying state hearsay forfeiture rule, where defendant had abused and frightened victim into not seeking police assistance).

183 *Giles*, 554 U.S. at 377.

> authorities; or (2) intended to stop the witness from testifying in a criminal proceeding.[184]

Therefore, cases in which the prosecution could prove that the defendant had attempted to prevent the victim from even contacting the police were found to satisfy the standard for forfeiture.[185] In *People v. Banos*, Mary Ann Cortez reported Banos's violent behavior several times, resulting in Banos being arrested three times in the ten months preceding Cortez's death.[186] The prosecution introduced a 911 recording in which Banos could be heard asking Cortez, "Do you want to speak to the police?" "Are you going to talk?" "Are you going to speak to the cops? Are you going to speak?" "Are you going to shut up or am I going to kill you?"[187] The court therefore had no trouble concluding that there was substantial evidence that Banos had killed Cortez "both to prevent her from cooperating with authorities and to prevent her from testifying at trial."[188]

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184 *Banos*, 100 Cal. Rptr. 3d at 491.

185 For example, in *State v. Fry*, 926 N.E.2d 1239, 1262 (Ohio 2010), the defendant, who faced criminal charges for earlier assaults on the victim, pressured the victim to drop the charges and "fix this, fix this." *Id.* The Court held that "[t]he jury also found Fry guilty of Specification Two of Count One for purposely killing Hardison to prevent her testimony in another criminal proceeding or killing her in retaliation for her testimony in any criminal proceeding under R.C. 2929.04(A)(8)." *Id.* Other uncontroversial cases include *State v. Moran*, 218 So. 3d 749 (La. Ct. App. 2017), where the defendant choked his wife, told her he'd kill her if she called the police, waited until the police left after she did call the police, and then killed her. *See id.* at 758. *See also* State v. Supanchick, 323 P.3d 231, 237 (Or. 2014) (defendant admitted that he shot his wife as police came through the door because he knew he was violating a restraining order and would go to jail). Another straightforward case was when the defendant's girlfriend was also a DEA informant, and he killed her after he found out that she had been helping make a case against him. United States v. Burgos-Montes, 786 F.3d 92, 115 (1st Cir. 2015) ("Our finding that the evidence was sufficient to convict Burgos of murdering Semidey to make sure she did not share further her knowledge of his criminal activity readily dispose[d] of this evidentiary challenge.").

186 *Banos*, 100 Cal. Rptr. 3d at 480.

187 *Id.*

188 *Id.* at 492. The *Banos* court interpreted *Giles* as holding that "forfeiture by wrongdoing is implicated not only when the defendant intends to prevent a witness from testifying in court but also when the defendant's efforts were designed to dissuade the witness from cooperating with the police or other law enforcement authorities." *Id.* at 491. In Banos' case, the court found that it could reasonably infer that he had "killed Cortez to stop her from reporting his assaultive behavior to the police . . . from the statements defendant is heard making on the tape of Cortez's June 7, 2003, call to 911." *Id.* at 492. The court was unmoved by the fact that the killing occurred ten months after that phone call, as "[t]he evidence suggests during the entire period defendant had the intent to dissuade Cortez from cooperating with police." *Id.* In addition, there was a hearing pending on Banos' violation of a restraining order at which Cortez was expected to testify. *See id.*

In *People v. Reyes*, the victim, Veronica Reyes, had called the police to report that Reyes had vandalized her car and on another occasion had robbed her of her purse.[189] Reyes knew that she had reported him, and had spoken to a police officer on Veronica's phone, which he had stolen, and been warned he would be arrested.[190] The court found that "there was evidence supporting a reasonable inference that appellant had cause for concern about [Veronica] Reyes going to the police."[191] Indeed, the court continued, "the record shows appellant knew [Veronica] Reyes had *already* gone to the police, because during his conversations with Deputy Hernandez he acknowledged he was in 'big trouble' and that Hernandez intended to arrest him."[192]

On the other hand, occasionally a court would demand a showing of intent that was almost impossible to satisfy. In *People v. Little*, the defendant killed his girlfriend, Deborah Ann Treptor, who had reported six increasingly violent incidents of abuse by Little before he killed her.[193] There was evidence at trial that, after an assault by Little two weeks before the killing, Treptor, who could not find her cellphone, went to a pay phone to call the police.[194] "Little followed her and, while she was on the phone, he took the receiver out of her hand and attempted unsuccessfully to disable the phone by pulling out the cord."[195] Almost every other court, faced with similar facts, would have found them to be amply sufficient to establish an intent to prevent the victim from seeking outside help. The California Court of Appeals, however, appeared to blame Treptor for refusing to obtain a restraining order and for "return[ing] to Little after each instance of abuse."[196]

The court simply ignored the fact that, as state domestic violence guidelines frequently make clear, "[m]any victims of domestic violence never file a report with law enforcement, get a restraining order/injunction, or connect with a domestic vio-

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189 No. B266696, 2017 WL 2686500, at *1–2 (Cal. Ct. App. June 22, 2017).

190 *Id.* at *2.

191 *Id.* at *10.

192 *Id.*; *see also* People v. Zumot, No. H037652, 2013 WL 6507459, at *8 (Cal. Ct. App. Dec. 12, 2013) ("[T]he forfeiture by wrongdoing doctrine applies when the defendant's wrongful act is intended to stop the victim 'from reporting abuse to the authorities.' There is no requirement that there be a formal ongoing legal proceeding at the time of the defendant's wrongful acts." (citations omitted)).

193 No. 265699, 2018 WL 1466668 at *1, *8 (Cal. Ct. App. Mar. 26, 2018).

194 *Id.* at *4–5, *13.

195 *Id.* at *5.

196 *Id.* at *16. "We find there is not substantial evidence to show by a preponderance of the evidence that . . . Little murdered Treptor for the purpose of preventing her from reporting his abuse or testifying against him." *Id.*

lence program."[197] The court acknowledged that Treptor had reported six incidents of abuse and told a social worker that "she was not prepared to point Little out in a police lineup because she did not feel safe."[198] It recounted how, a few months before her murder, after assaulting her, "Little stood over her and told her he would kill her if she called the police."[199]

But the judge, Gail Ruderman Feuer, seemed incapable of putting the pieces together and taking into account the fact that domestic violence victims frequently fear reprisals if they attempt to leave, may not have anywhere to go, or may believe that the criminal justice system will not be effective in preventing the violence and protecting them and their children.[200] Instead, the judge concluded that "[t]he fact that Little attempted to prevent Treptor from calling 9-11 by disabling the pay phone is not sufficient to show that he killed her two weeks later to prevent her from reporting his abuse."[201]

There were surprisingly few cases, however, where the courts inferred an intent to prevent the victim from contacting authorities simply from a pattern of domestic violence. One was *People v. Weems*, where the court found "ample evidence [that the] defendant sought to isolate [the victim]."[202] But the apparent foothold that the *Giles* language seemed to suggest might obtain in domestic violence cases was not exploited very often. It might simply be that most cases provided enough evidence of defendants overtly trying to interfere with the victims' communication with law enforcement that this particular avenue was not needed.

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197 CHARLES D. BAKER, KARYN E. POLITO & DANIEL BENNETT, THE COMMONWEALTH OF MASS. EXEC. OFFICE OF PUB. SAFETY & SEC., DOMESTIC VIOLENCE LAW ENFORCEMENT GUIDELINES 16 (2017).

198 *Little*, 2018 WL 1466668, at *3.

199 *Id.* at *4.

200 *See, e.g.*, Cape and Islands Dist. Attorney's Office, *Domestic Violence*, MASS.GOV, https://www.mass.gov/service-details/domestic-violence-0 [https://perma.cc/C7QT-V337] (last visited Oct. 10, 2020) (listing reasons why victims of domestic violence may be reluctant to testify or seek help from the court system, including fear of retaliation, feelings of shame or guilt, having nowhere to hide from the abuser, fear of losing children, uncertain immigration status, and believing that the criminal justice system will not be effective at stopping the violence); *see also* BAKER, POLITO & BENNETT, *supra* note 197, at 16 (cautioning that a "lack of understanding of the complexities of these dynamics [between victim and abuser] may result in blaming the victim for the violence and manipulation of the criminal justice system by the abuser").

201 *Little*, 2018 WL 1466668, at *16.

202 No. C082142, 2020 WL 36048, at *4 (Cal. Ct. App. Jan. 3, 2020).

4. *No Forfeiture by Wrongdoing*

In a majority of cases where the victim's statements were testimonial,[203] the courts found that the prosecution had not met the *Giles* standard. Yet only a small fraction of cases were reversed outright. There were forty-four cases in which the courts found the victim's statements to be testimonial, and the courts did not find that the state proved that the defendant killed the victim to prevent them from testifying. In over seventy-five percent of the cases where the trial court was found to have erred in allowing the statements, the appellate court found the error to be harmless. In the remaining nine cases, the conviction was reversed, or remanded for an evidentiary hearing.

a. *Harmless Error*

In thirty-five cases, the courts found that testimonial statements had been admitted into evidence at trial without meeting the *Giles* standard, but that the error was harmless. In the majority of those cases, the courts found that the prosecution had not met the specific intent standard mandated by *Giles*, either because the prosecutor had not attempted to prove intent, or had simply used an outdated, pre-*Giles* standard. Many of the cases stemmed from trials taking place before *Giles* was decided, under a standard simply requiring proof by a preponderance that the defendant had caused the victim's unavailability, without any showing of specific intent.[204]

In some cases, the appellate courts found that the anticipation of litigation was not enough or were not satisfied with

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203 *See supra* notes 102-105 and accompanying text (describing Westlaw search parameters).

204 *See, e.g.*, People v. Baker, No. 278951, 2008 WL 4762776, at *3 (Mich. Ct. App. Oct. 3, 2008) ("Because the trial court failed to require a showing that defendant intended to prevent [the victim] from testifying . . . the trial court erred in concluding that defendant forfeited his right to confront" her); Davis v. State, 268 S.W.3d 683, 706 (Tex. App. 2008) ("[I]n the absence of evidence that Davis killed Latarsha specifically to prevent her from testifying, we cannot hold that Davis forfeited his right to confront Latarsha by killing her."); Luster v. Swarthout, No. 10-02681 CAS (SS), 2012 WL 5347838, at *9 (C.D. Cal. Aug. 30, 2012) ("It does not appear, however, that Petitioner here killed Barbara to prevent her testimony."); Nguyen v. Felker, No. C07-2479 MHP (pr), 2009 WL 1246693, at *5 (N.D. Cal. May 5, 2009) ("There is no evidence that the killing or any other action taken by Nguyen was done with the intent to prevent Bui from appearing as a witness against him."); People v. Corpuz, No. A121199, 2011 WL 2412379, at *25 (Cal. Ct. App. June 16, 2011) (state conceded that trial court used wrong standard for forfeiture); People v. Gibbs, No. 274003, 2008 WL 4149033, at *2 (Mich. Ct. App. Sept. 9, 2008) ("No evidence indicated that defendant engaged in any wrongdoing with the intent to make Dubay unavailable as a witness at trial.").

the proof of interference with the victim's attempts to seek outside help. In the case of *People v. Little*, although the court arguably applied too high a standard to the proof of intent, it promptly found the error of admitting the victim's statements to be harmless.[205] And in many cases, the proof against the defendant was so persuasive that the statements about prior abuse or present fear by the victim didn't seem to make much difference.[206]

Finding a *Giles* error and then disposing of it as harmless is a hedge-your-bets option, where appellate courts could find fault with application of the doctrine, but not disturb the convictions. Disposing of forfeiture cases under the harmless error doctrine lets both the trial courts and the appellate courts off the hook, but it is not a sustainable strategy. At a certain point, not proving specific intent to silence can no longer be an inadvertent error arising from the use of outdated standards. Whether the courts continue to use this avenue over the next ten years remains to be seen.

b. *Case Remanded or Reversed*

Outright reversal of a conviction was the least common outcome, happening in just nine cases, a rate of just around eight percent. So for all the angst *Giles* has caused, it has not turned out, at least in its first decade, to have been of much help to defendants.[207]

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205 *See supra* notes 193–196 and accompanying text.

206 *See, e.g.*, Bibbs v. State, 371 S.W.3d 564, 571 (Tex. App. 2012) (error in introducing victim's statements was harmless since there was video of the murder, and the jury was "able to actually watch appellant chase Candy down and shoot her multiple times"); People v. Logan, No. 303269, 2012 WL 3194222, at *2 (Mich. Ct. App. Aug. 7, 2012) (admission of victim's written statements was harmless when defendant had sent her text messages four days before the murder saying "he was going to kill her and go to jail for murder"); People v. McFee, 412 P.3d 848, 860 (Colo. App. 2016) (admission of victim's written note was harmless when defendant's DNA was on the murder weapon, victim had told numerous people that she feared the defendant would kill her, and other witnesses had heard the defendant threatening to kill her or the defendant had told them directly he wanted to kill her); Sanchez v. State, 285 P.3d 540, 546–47 (Mont. 2012) (admission of victim's note that she was afraid defendant would kill her harmless when defendant admitted to shooting her and told a co-worker of his intention to do so).

207 In a few cases defendants got their convictions reversed, then pled guilty to lesser charges. In *State v. Her*, the appellate court remanded the case for an evidentiary hearing, where the judge found the state had failed to prove specific intent. *See* 781 N.W.2d 869, 877 (Minn. 2010) The defendant then pled guilty to second-degree murder, despite having stabbed his estranged wife, Sheng Vang, sixty-four times. *See St. Paul Man Convicted of Stabbing Wife 64 Times in '04 Wins New Murder Trial*, GRAND FORKS HERALD (April 8, 2011), https://www.grandforksherald.com/news/2152063-st-paul-man-convicted-stabbing-

In some of these cases, the familiar "reverberating clang of those accusatory words"[208] sensibility seemed to reemerge. In *Payne v. State*, for example, the defendant was convicted of shooting his wife and son; the reviewing court found the victim's statements to be critical to the conviction.[209] Nichole Payne had confided in a friend that Payne had threatened to kill her, that he had threatened to burn her alive in her house, and Payne "begged [her friend] to 'avenge' her death if anything happened to her."[210] An eight-judge panel of the Court of Criminal Appeals in Texas noted the supposedly "indelible" nature of the dead victim's voice,[211] describing the friend's testimony as allowing "Nichole to testify 'from the grave' and relay

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wife-64-times-04-wins-new-murder-trial [https://perma.cc/F7XU-ZKGG]. In *People v. Younger*, Younger was granted a second trial, had that conviction reversed, and pled guilty to voluntary manslaughter instead of facing a third trial; he received time served, 14 years. NO. A110031, 2010 WL 338962, at *1 (Cal. Ct. App. Jan. 29, 2010); *see* Paul Payne, *Santa Rosa Man Will Go Free Instead of Facing Third Murder Trial*, PRESS DEMOCRAT (May 12, 2010), https://www.pressdemocrat.com/news/2249254-181/santa-rosa-man-will-go [https://perma.cc/LNQ6-4EX5]; *see also* Hunt v. State, 218 P.3d 516, 518 (Ok. Crim. App. 2009) (reversing conviction because it found "no argument or evidence at trial that Appellant killed the victim with the intent to prevent her from testifying against him"). The Oklahoma Court of Criminal Appeals reversed Hunt's conviction because the state had introduced a 911 call the victim had made two and a half hours after defendant had assaulted her, an error it found not to be harmless. Rather than face a second trial and risk the death penalty, Hunt pled guilty after his conviction was reversed. *See* Nolan Clay, *Former Oklahoma Death Row Inmate Returns to Prison for Valentine's Day 2004 Stabbing*, OKLAHOMAN (March 17, 2011, 12:00 AM), https://oklahoman.com/article/3549319/former-oklahoma-death-row-inmate-returns-to-prison-for-valentines-day-2004-stabbing [https://perma.cc/QGY9-U9GJ].

208 Shepard v. United States, 290 U.S. 96, 104 (1933).

209 No. PD-1214-11, 2013 WL 765578, at *10 (Tex. Crim. App. Feb. 27, 2013). The court was not impressed with the prosecutor's case. "The jury's verdict was primarily supported by the cumulation of arguably weak circumstantial evidence. There were no eyewitnesses; nor was there forensic or direct evidence clearly linking Payne to the deaths," wrote the court. *Id.* at *9. In contrast, "Hawthorne's testimony that Payne threatened to kill Nichole in the past, that Nichole asked her to 'avenge' her should anything happen, and that Payne again threatened Nichole's life the night before her death were among the most inculpatory pieces of the State's evidence." *Id.* Payne received a new trial in which Nichole's statements were not disclosed to the jury but was convicted a second time and sentenced to life without the possibility of parole. *See* Melissa Greene, *Wood County Man's Second Trial, Conviction Upheld Nearly 10 Years After Double Murder*, KLTV (Apr. 28, 2017, 9:06 PM), https://www.kltv.com/story/35280830/wood-county-mans-second-trial-conviction-upheld-nearly-10-years-after-double-murder/ [https://perma.cc/4P9S-A6ZX] (last updated Aug. 12, 2017, 11:15 AM).

210 *Payne*, 2013 WL 765578, at *8.

211 *Id.* at *10.

her belief that, if something were to happen, Payne would be responsible."[212]

The concurring judge went a step further, writing: "The jury hears the victim's Cassandra-like voice rising from the grave predicting her own death, detailing past abuses, and pointing the finger of blame at the defendant."[213] At that point, a judge is no longer conducting legal analysis, but indulging in Gothic horror pastiche. It is hard to write as well as Cardozo, and there does seem to be a whiff of showing off in the scholars and judges trying to match a phrase as memorable as "reverberating clang." But it's also a form of intellectual laziness—a legendary judge said something a 100 years ago, he was cited by other prominent jurists, and it simply becomes an accepted fact.

In a Kansas case, the state convicted Christopher Belone of beating his girlfriend, Linda Begay, to death, and the statements that Begay made to the police after the attack were admitted under the wrong forfeiture theory.[214] The Kansas Supreme Court reversed his conviction, noting that "[t]he State did not show that Belone killed Begay for the purpose of preventing her from testifying at trial. At most, the evidence suggested that the killing was motivated by jealousy."[215] "Moreover," continued the court, "the State's attempt to carve out a different rule for domestic violence cases is unavailing."[216]

Occasionally, courts would issue a dizzying array of contradictory opinions as the case bounced back and forth between different levels of review. For example, in *Crawford v. Commonwealth* (*Crawford II*), the prosecution introduced an affidavit made by the victim, Sarah Crawford, in support of a protection order against her husband.[217] In the affidavit, she described several previous instances of abuse, and stated, "I am afraid of [Crawford]. I fear he may physically hurt me or even kill me. I want him to stay away from me and my fam-

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212 *Id.* at *10. The concurring judge agreed that admitting Nichole's statements was "devastating" to the defense's theory, that Nichole's son had killed his mother then shot himself. *Id.* at *11 (Cochran, J., concurring).

213 *Id.* at *10 (Cochran, J., concurring).

214 State v. Belone, 285 P.3d 378, 382 (Kan. 2012).

215 *Id.* On remand, Belone was tried again without the victim's statements to the police—although the court admitted Begay's nontestimonial statements to the nurses at the hospital—and Belone was again convicted. *See* State v. Belone, 343 P.3d 128, 145–46 (Kan. Ct. App. 2015).

216 *Belone*, 285 P.3d at 382.

217 686 S.E.2d 557, 560 (Va. Ct. App. 2009) (en banc).

ily."[218] The trial court used a pre-*Giles* standard to find that Crawford was responsible for Sarah's unavailability and therefore had forfeited his right to confrontation.[219] On appeal, the Commonwealth conceded that Crawford had not killed Sarah "in order to prevent her from testifying," therefore the appellate court reversed his conviction.[220]

At rehearing *en banc*, the full Virginia court of appeals reversed again. While it referred to the "domestic violence" language in *Giles*—saying that it could have remanded the case to the trial court to determine whether "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"[221]—the court chose instead to take the rather surprising position that the affidavit was not testimonial.[222] Applying the "primary purpose" test, the court determined that the statements in the affidavit were made, not to prove "'past events potentially relevant to later criminal prosecution,' but rather to obtain a civil, preliminary protective order."[223] In those circumstances, Sarah Crawford's statements were not testimonial and did not implicate the Confrontation Clause.[224] The Virginia Supreme Court, when it reviewed the case, disagreed with the *en banc* decision, but affirmed Crawford's convictions because it found that the *en banc* court's error was harmless.[225]

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218 *Id.* (alteration in original).

219 *Id.* at 563–64.

220 Crawford v. Commonwealth (*Crawford I*), 670 S.E.2d 15, 21 (Va. Ct. App. 2008) (concluding that "the trial court committed constitutional error by admitting Mrs. Crawford's affidavit to prove the truth of its contents under an improper formulation of the concept of forfeiture by wrongdoing.").

221 *Crawford II*, 686 S.E.2d at 565.

222 "Although the Supreme Court of the United States recently stated that affidavits 'fall within the "core class of testimonial statements"' subject to the Confrontation Clause, we find it significant that the Court did not go as far as to hold that all affidavits are *per se* testimonial," it wrote. *Id.* at 567 (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009)). In fact, the court continued, "we see no principled reason to conclude that a hearsay statement obtained for a purpose *other than* criminal prosecution should be treated differently with respect to the Confrontation Clause *solely* because it takes the form of an affidavit." *Id.* at 568.

223 *Id.* at 568–69.

224 *See id.* at 569. There were two concurrences in the decision. The first found that the majority was mistaken in determining that the affidavit was not testimonial, and that its introduction was not harmless as to the murder conviction. *See id.* at 577 (Elder, J., concurring in part). The second concurrence also found that the majority was mistaken in viewing the affidavit as nontestimonial, but that the error was harmless. *See id.* at 581, 584 (Beales, J., concurring in part).

225 Crawford v. Commonwealth, 704 S.E.2d 107, 117 (Va. 2011).

In *State v. Miller*,[226] the North Carolina court of appeals reversed Miller's conviction because the state had introduced statements the defendant's girlfriend, Lakeshia Wells, had made to the police when they responded to a domestic violence call without proving the specific intent required for forfeiture. But the North Carolina Supreme Court reversed that decision on the basis that Wells' statements were not testimonial, despite the fact that they were made in almost identical circumstances to the companion case in *Davis v. Washington* that the Supreme Court had found to be testimonial.[227] Whether this reflects an apparent discomfort with what the lower courts perceive to be an unjust outcome, or simply a doctrine in severe need of clarity and logic isn't easy to say. It does suggest that when the *Giles* standard produces a reversal, the lower courts seem open to nearly any theory in order not to let the defendant escape unpunished.

III
QUI BONO?

Despite all of the concerns about creating a windfall for defendants, none of this seems to have amounted to very much. A few defendants have had their convictions reversed and then pled guilty to lesser charges. A few defendants were retried and reconvicted even without the victim's statements. And a few cases are still in limbo. But when all is said and done, the impact of *Giles* has not turned out to be all that dramatic, at least in its first decade. So what was really achieved by this constitutional rule that admits a victim's testimonial statement "if the defendant killed a victim *purposely* to stop her from testifying, but keeps it out if the defendant killed her *knowing* she could no longer testify while acting out of anger or revenge?"[228]

Three arguments could potentially be made for an absolute requirement of confrontation that only yields to a showing of specific intent to silence. The first is that it is necessary, in

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226 814 S.E.2d 93, 100 (N.C. 2018).

227 In *Hammon v. Indiana*, decided with *Davis v. Washington*, the police responded to a domestic dispute at Hershel and Amy Hammon's house. *See* Davis v. Washington, 547 U.S. 813, 819–20 (2006). Finding that the altercation was over, the police took Amy's statement in her kitchen, with Hershel in the next room. *Id.* In *Miller*, the victim, Lakeshia Wells, spoke to the police in the street near her apartment, and then in her apartment. *Miller*, 814 S.E.2d at 97, 100. But the North Carolina Court focused on the fact that Miller's whereabouts were unknown at the time Wells spoke to the police. *Id.*

228 Giles v. California, 554 U.S. 353, 404 (2008) (Breyer, J., dissenting).

fairness to defendants. The second is that it is even-handed, treating all cases the same and not making any special rules. The third is that it is what is owed to history. But none of these reasons truly holds up to scrutiny or answers Justice Breyer's question: "What important constitutional interest is served" by this requirement?[229]

A. The Fairness Theory

A concern for fairness to defendants certainly seems like a legitimate foundation on which to base a Confrontation Clause that stakes everything on reliability determined "in the crucible of cross-examination."[230]

Back in 1603, when Sir Walter Raleigh was tried for treason, he was famously unable to confront his accuser, Lord Cobham, who had given a written confession implicating Raleigh in a plot to assassinate the King.[231] When one reads the case now, it seems obviously unfair to have tried Sir Walter on the basis of Cobham's written confession, while Cobham was locked up close by.[232] The Crown had only obtained that confession through torture, and Cobham had subsequently penned a retraction letter to Raleigh, swearing "So God have mercy upon my soul, as I know no Treason by you."[233] In those circumstances, the arguments that a defendant could not fairly be convicted without confrontation could scarcely be more powerful.

But that is not the case in domestic homicide trials. The witnesses here are not being deliberately withheld by an autocratic state; the only reason they are absent is because they are dead. So all we are really left with is a mechanism that suggests mistrust both of juries and victims. Justice Scalia emphasized in *Giles* how important it was that guilt be determined by a jury rather than a judge. Allowing a victim's statements to

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229 *Id.*

230 Crawford v. Washington, 541 U.S. 36, 61 (2004).

231 *See* 2 T.B. HOWELL, *The Trial of Sir Walter Raleigh, Knt. at Winchester, for High Treason (1603)*, *in* A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783: WITH NOTES AND OTHER ILLUSTRATIONS, 1, 28–29 (1816) [hereinafter *Trial of Sir Walter Raleigh*].

232 Jeffrey Bellin makes the point that one of the most compelling aspects of Sir Walter's trial was that Lord Cobham was literally steps away. *See* Bellin, *supra* note 124, at 1899 (noting that "Raleigh even concedes that a trial by affidavit might be palatable were his accuser 'not to be had conveniently' because 'dead or abroad'"). "To Raleigh," observes Bellin, "Cobham's ready availability to testify was a critical component of the Crown's injustice." *Id.*

233 *Trial of Sir Walter Raleigh*, *supra* note 231, at 1.

be admitted under a theory of forfeiture would usurp the jury's role, because a judge would have to determine that the defendant had caused the victim's absence by a preponderance of the evidence, which Scalia characterized as "a prior *judicial* assessment that the defendant is guilty as charged."[234] But his solution, that juries not be allowed to hear statements by unavailable victims in the absence of a showing of specific intent to prevent their testimony, hardly puts much faith in the juries.

It also put Justice Scalia in an awkward position, since he had to acknowledge that judges routinely determine whether a conspiracy exists before it has been proven beyond a reasonable doubt, in order to decide whether to admit co-conspirator statements.[235] Worse, he was forced to admit that under his own forfeiture rule, a judge would be "allowed to inquire into guilt of the charged offense in order to make a preliminary evidentiary ruling."[236] But that was okay, he hastened to assure his audience, because it wouldn't happen very often, only when it was "(1) needed to protect the integrity of court proceedings, [and] (2) based upon longstanding precedent."[237]

Under this reasoning, testimonial statements by victims of intimate partner violence could be excluded because their admission was not usually needed to protect the integrity of court proceedings and was not based on longstanding precedent. But the reason there is so little chance of an attack on the integrity of court proceedings is because so few domestic violence cases proceed to adjudication, as victims frequently abandon their claims, fear facing their abuser, or do not believe

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234 *Giles*, 554 U.S. at 365. Scalia did not address the fact that a prior judicial assessment by a judge that a defendant is guilty of conspiracy by a preponderance of the evidence may allow in statements by co-conspirators, although the reasoning is identical. *Cf.* Crawford v. Washington, 541 U.S. 36, 74 (2004) (Rehnquist, C.J., concurring) (noting that co-conspirator statements are proper exceptions to the confrontation requirement "due to the circumstances under which they were made").

235 Scalia answered it in a footnote: "The dissent identifies one circumstance—and only one—in which a court may determine the outcome of a case before it goes to the jury: A judge may determine the existence of a conspiracy in order to make incriminating statements of co-conspirators admissible against the defendant under Federal Rule of Evidence 801(d)(2)(E)." *Giles*, 554 U.S. at 374 n.6. But he shrugged off the inconsistency by pointing out that "an incriminating statement in furtherance of [a] conspiracy would probably never be" testimonial. *See id.* Since that didn't solve the problem of judicial factfinding—a judge would still be predetermining issues of fact yet to be decided by a jury, regardless of whether the statements implicated a constitutional right or not—he simply ignored it for the rest of the opinion.

236 *Id.* at 375 n.6.

237 *Id.*

that the system will be able to help them.[238] And since domestic violence was not recognized as a wrong at the time of the founding (or even in 1868) there is no tradition of allowing these statements at trial. Neither of these reasons address the "basically ethical objective" of the forfeiture exception, which is aimed at redressing the essential inequity of excluding the statements.[239] "The inequity," wrote Justice Breyer, "consists of [the defendant's] being able to use the killing to keep out of court her statements against him. That inequity exists whether the defendant's state of mind is purposeful, intentional (i.e., with knowledge), or simply probabilistic."[240]

There is also a tension between the Court's celebration of the moral authority of the jury in making the determinations of fact and its concern that jurors might not be capable of weighing the trustworthiness of evidence simply because it comes "from beyond the grave." It is true that many of the rules of evidence are based on the idea that some information, even though relevant, may be too compelling or may speak too deeply to jurors' emotions to be safely handed over to them.[241] And indeed, much of the time, the decision whether to exclude certain evidence too susceptible to misuse is left to the trial judge's discretion, as she is closer to the facts and to the jurors. But the victim statements in these particular cases, unless the state can meet a highly unlikely showing of purpose, are kept not only out of the jury's hands, but beyond the discretionary judgment of the trial court.

A motivating factor may be that these fairness concerns dovetail with two myths that appear to have lasting purchase on the minds of (mostly male) judges. One is that suicide for spite is enough of a real problem that all statements from now-dead witnesses should be deemed unreliable or suspect.[242] The second, more deeply rooted, assumption is that the voice of the dead victim would simply be too powerful for the jury to evaluate fairly. It is as if women's power of enchantment is so strong that juries, like Odysseus' sailors, must stuff wax in

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238 GA. COMM'N, *supra* note 112, at 39. Out of 254 reviewed cases where there was contact with law enforcement, there was follow-up information for 199. *Id.* at 68. Of those, arrests were made in ninety-eight cases. *Id.* Subsequent to arrest, twenty cases were dismissed without charge, and of the seventy-seven cases charged, only twenty-eight proceeded to adjudication. *See id.* at 68.

239 *Giles*, 554 U.S. at 387 (Breyer, J., dissenting).

240 *Id.* at 388 (Breyer, J., dissenting) (emphases omitted).

241 *See* FED. R. EVID. 403 advisory committee's notes to 1972 proposed rules.

242 Or, as Orenstein put it, "vengeful, or conniving." Orenstein, *supra* note 87, at 1456.

their ears so they can keep rowing the ship, deaf to the sirens' song.[243]

First, there is an almost complete absence of empirical data showing that people do in fact commit suicide and attempt to frame their significant others. One study, specifically of suicides as a form of social control, in other words, "the aggressive aspect of suicide, particularly how self-killers use their death to strike back at those they regard as wrongdoers," found no examples of such deaths.[244] In that study, the researchers reviewed 1,114 cases of recorded suicides over fifteen years in a large U.S. city. Less than ten percent of those cases "displayed evidence of interpersonal aggression on the part of the self-killer,"[245] and when they did, that aggression manifested itself either as verbal aggression (expressing hostility or condemnation, typically in a suicide note) or as "confrontational suicide."[246]

The researchers described confrontational suicide as the suicide choosing "the location, manner, and timing of their death in such a way as to maximize the guilt, shame, or trauma that their death will inflict on another."[247] These were extremely rare, comprising only twenty-six cases out of the 1,114, and mostly involved people going to a loved one's place of work and shooting themselves in the head.[248] But even in this paper specifically analyzing aggressive forms of suicide, the possibility of suicide disguised as murder for the purpose of framing another was not even mentioned, let alone discussed as a plausible occurrence.[249]

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243 HOMER, THE ODYSSEY 234, bk. 12, ll. 36–54 (Barry B. Powell trans., 2015). The theme of women wielding powers of enchantment and persuasion akin to witchcraft still obtains today. The former Vice President of the United States is said to avoid the company of women who aren't his wife unless he has a protective entourage. *See* Emma Gray, *Why it Matters That Pence Won't Have Dinner With a Woman Who Isn't His Wife*, HUFFPOST (Mar. 30, 2017, 4:00 PM), https://www.huffpost.com/entry/why-it-matters-that-pence-wont-have-dinner-with-a-woman-who-isnt-his-wife_n_58dd1740e4b05eae031d949c [https://perma.cc/K4KS-MDS4] (last updated Aug. 14, 2017) (noting that, "[i]n this worldview, men have no self-control, and women are either temptresses or guardians of virtue").

244 *See* Jason Manning, *Aggressive Suicide*, 43 INT. J. L. CRIME & JUST. 326, 327, 331 (2015).

245 *Id.* at 330–31.

246 *Id.* at 331.

247 *Id.* at 335.

248 *Id.* at 332, 335.

249 *See, e.g.*, Joseph A. Prahlow, Scarlett Long & Jeffery J. Barnard, *A Suicide Disguised as a Homicide: Return to Thor Bridge*, 19 AM. J. FORENSIC MED. & PATHOLOGY 186 (1998) (referencing the Sherlock Holmes story by ARTHUR CONAN DOYLE, THE PROBLEM OF THOR BRIDGE). While musing that "[s]ome suicidal individuals may even stage a homicide for revenge or to gain notoriety as a victim," *id.* at 187, the

Second, as far as the compelling nature of the voice from beyond the grave, the fact that a statement is made by a dead declarant has yet to bother any judge in the dying declaration context.[250] Instead, in the through-line from Justice Cardozo to Justice Scalia, there's a sense of a more visceral suspicion, one that recalls the skepticism that often greeted the claims of rape victims. As Susan Estrich succinctly identified in that context, "the underlying theme is distrust of women."[251] The striking thing is how these women's words are seen as being potentially both so powerful and so false. "The voice of the dead wife was heard in accusation of her husband, and the accusation was accepted as evidence of guilt," intoned Justice Cardozo.[252]

With these oft-cited words, judicial sympathies slant towards the husband, unable to defend himself against the accusatory voice from the grave.[253] The philosopher Kate Manne has identified this phenomenon as "himpathy," the "inappropriate and disproportionate sympathy powerful men often enjoy in cases of sexual assault, intimate partner violence, homicide and other misogynistic behavior."[254] According to

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authors described any occurrence of suicide disguised as homicide as rare. *See id.* at 188. Indeed, their review had only disclosed four such cases—one a military police officer who staged his own death to appear as if he had been killed while attempting to make an arrest, two cases involved an individual rigging up a gun with a heavy rubber band so that it would be "pulled to a hiding place after discharge," and one in which a man shot himself near a creek with a gun attached by a rope to a dumbbell weight so it would end up underwater. *See id.* at 188–89. None of the reported cases involved wives poisoning themselves and framing their husbands.

Ultimately, the idea of the vengeful, self-destructive female ruining the life of a blameless man by killing herself seems to be the stuff of fiction and pulp movies. And it's not even that common in the movies. In the film FATAL ATTRACTION, Michael Douglas has a brief fling with an increasingly unhinged Glenn Close. The original ending was to have Glenn Close's character frame her ex-lover by killing herself with a kitchen knife that had his fingerprints on it. Test audiences disliked that ending, and it was changed to become the more crowd-pleasing "kill the monster" ending that helped the film gross 320 million dollars worldwide. *See* Yohana Desta, *Inside the Fight to Keep* Fatal Attraction's *Original Ending*, VANITY FAIR (Mar. 29, 2017), https://www.vanityfair.com/hollywood/2017/03/glenn-close-fatal-attraction-ending [https://perma.cc/2YCW-DV7S].

250 *See* FED. R. EVID. 804 advisory committee's notes to 1972 proposed rules.

251 SUSAN ESTRICH, REAL RAPE 42–43 (1987).

252 Shepard v. United States, 290 U.S. 96, 98 (1933).

253 *See, e.g.*, Payne v. State, No. PD-1214-11, 2013 WL 765578, at *10 (Tex. Crim. App. Feb. 27, 2013) (Cochran, J., concurring) ("The jury hears the victim's Cassandra-like voice rising from the grave predicting her own death, detailing past abuses, and pointing the finger of blame at the defendant.").

254 Kate Manne, *Brett Kavanaugh and America's "Himpathy" Reckoning*, N.Y. TIMES (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/opinion/brett-kavanaugh-hearing-himpathy.html [https://perma.cc/L3V9-NDYE]. Admittedly,

Manne, what makes himpathy so difficult to counter is that "the mechanisms underlying it are partly moral in nature: Sympathy and empathy are pro-social moral emotions."[255] This, she argues, makes it particularly hard "to convince people that when they skew toward the powerful and against the vulnerable, they become a source of systemic injustice."[256]

Even thoughtful scholars like Aviva Orenstein can sound like Cardozo when they caution courts against "the power of this dying voice, which could be mistaken, vengeful, or conniving" and urge us to worry about "the 'reverberating clang' of words that are desperate, damning, and not subject to cross-examination."[257] But the oft-repeated admonition to be on

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Manne was speaking of socially powerful men, which is often not the case with lethal domestic abusers. *See* Campbell, *Femicide*, *supra* note 108, at 1092 (finding that the abuser's unemployment was the most important demographic risk for homicide). But even if the power of the domestic abuser only resides in his size, strength, or possession of a weapon, he still has more power than his victim.

255 Manne, *supra* note 254.

256 *Id.*

257 Orenstein, *supra* note 87, at 1456 (quoting Shepard, 290 U.S. at 104). She writes:

> As tough as it is to ignore an abused woman's final words, it may also be dangerous to allow them in. Beyond the issue of accurate transcription, we must worry about the power of this dying voice, which could be mistaken, vengeful, or conniving. Without confrontation, there is no way for the jury to distinguish. As important as it is to listen to abused women's voices, we have to be equally concerned about the accused, who must be presumed innocent, but whose denials perhaps could not be heard over a powerful voice from the grave. In short, we must worry, in the famous words of Justice Cardozo, about the 'reverberating clang' of words that are desperate, damning, and not subject to cross-examination.

Id.

There's something interestingly gendered about the adjectives even a feminist scholar like Orenstein chooses to describe the dead woman's voice. "Conniving" is a word rarely attributed to men. To the contrary, in the political realm, "[d]epictions of female candidates as calculating or conniving are political mainstays." Reid J. Epstein, Sydney Ember & Alexander Burns, *Warren Told Sanders After Debate, 'I Think You Called Me a Liar on National TV'*, N.Y. TIMES (Jan. 15, 2020), https://www.nytimes.com/2020/01/15/us/politics/sanders-warren-debate-handshake.html [https://perma.cc/4H3K-H953] (last updated Jan. 16, 2020).

"Vengeful," too, seems to attach more easily to a woman than a man. For example, in a highly unscientific Google search, the term "vengeful woman" returned a news story about a woman running over teenager, see Austl. Associated Press, '*Vengeful' Woman, 22, 'Deliberately Ran Over and Killed a Teenager Because He Beat Up Her Little Brother*', DAILY MAIL (Jan. 29, 2020, 9:01 AM), https://www.dailymail.co.uk/news/article-7942899/Vengeful-woman-22-deliberately-ran-killed-teenager.html [https://perma.cc/XK44-XYZ2], a 1966 Western entitled SEVEN VENGEFUL WOMEN, and a "22 Films about Vengeful Women" list, *see* Josh Modell et al., *Hell Hath No Fury: 22 Films About Vengeful Women*, AV CLUB (Nov. 2, 2008, 11:02 PM), https://film.avclub.com/hell-hath-no-fury-22-films-about-vengeful-women-1798215193 [https://perma.cc/QFM2-9KY7]. A search

guard against a dead victim's statements, the assumption that the accused's "denials perhaps could not be heard over a powerful voice from the grave,"[258] are based on a kind of popular mythology, rather than evidence. The stereotypes are so deeply rooted that we almost cease to notice them. Manne identifies this as a misogyny so infused into our culture as to seem not like misogyny at all, but instead an urge towards righteousness, an urge that "pursue[s] its targets not in the spirit of hating women but, rather, of loving justice."[259]

The concerns about affording a fair trial to the accused are undeniably important. But for the victims, the signaling of untrustworthiness comes through in a particularly gendered way.

B. The Even-Handedness Theory

If asked, Justice Scalia would not have countenanced the idea that he was being anything other than scrupulously fair in his reasoning in *Giles*. But the adherence to originalism, while purporting to be neutral and non-policy-driven, does tend to come out on the side of men. One commentator even argues that the originalist view of the Confrontation Clause so emphasizes male interests that it ceases to be an appropriate vehicle to evaluate domestic violence, at least in nonlethal cases.[260] Rather than being concerned with fairness or accuracy, confrontation simply provides "a way that historical values about class, gender, and status [can] survive[ ] into the present by burrowing themselves under a veneer of neutrality."[261]

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for "vengeful man" only returned a page about a character known as The Vengeful Man in a game called Daymare Town, *see Vengeful Man*, FANDOM, https://daymaretown.fandom.com/wiki/Vengeful_Man [https://perma.cc/HHX2-7M34] (last visited May 1, 2020), and an article about Donald Trump, *see* Charles P. Pierce, *Donald Trump is a Vengeful Man*, ESQUIRE (Feb. 6, 2019), https://www.esquire.com/news-politics/politics/a26166388/donald-trump-state-of-the-union-revenge/ [https://perma.cc/TQL7-HJG5].

258 Orenstein, *supra* note 87, at 1456.

259 KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY 20 (2018). Misogyny, she notes, "can . . . be a purely structural phenomenon, instantiated via norms, practices, institutions, and other social structures." *Id.* And, I would add, in constitutional interpretations of the Confrontation Clause.

260 *See* Egerman, *supra* note 36, 891–92 (arguing that confrontation doctrine is "based on a series of assumptions that make it incapable of addressing domestic violence"). Egerman contends that forcing women to confront their abuser in court simply replicates the power imbalance in abusive relationships and ignores the reasons why many victims of domestic violence recant their stories or choose not to testify. *Id.* at 893.

261 *Id.* at 866.

The stakes are different when the witness is dead, because the imbalance of power between the defendant and the witness can no longer be replicated in court. But the androcentrism identified by others in the nonlethal context still operates here. Victim statements are more likely to be admissible under a forfeiture theory if there was a pending case, or at least a fair possibility of future litigation. But this semi-requirement does not really consider the barriers to that kind of action experienced by most victims of domestic abuse. State domestic fatality reviews indicate that while the vast majority of victims of domestic homicide reported prior incidents of abuse, only a fraction ever sought temporary orders of protection or other court-authorized assistance.[262] Therefore courts that read the *Giles* mandate of preventing the victim's testimony "as a witness"[263] will likely be taking forfeiture off the table in most cases.

The criminal law has historically had an uneasy relationship with intimate partner violence, preferring to go no farther than the bedroom door. The rights of a woman not to be assaulted, if it were by a stranger, did not operate if the assault was unleashed by her husband.[264] So applying a formalistic, originalist framework to confrontation issues is necessarily to take us back to a time when women did not have the autonomy or the bodily integrity they are supposed to have today.

Reva Siegel noted insightfully that status law doesn't change, it simply gets "modernized,"[265] with the result that, "over time, status relationships will be translated from an older, socially contested idiom into a newer, more socially ac-

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262 *See, e.g.*, GA. COMM'N, *supra* note 112, at 9–10 (reporting that there was a known history of domestic violence between the victim and the perpetrator in ninety-one percent of cases, contact with law enforcement in seventy-five percent of cases, and temporary orders of protection sought in only twenty-four percent of cases).

263 *See* Giles v. California, 554 U.S. 353, 367 (2008) (quoting FED. R. EVID. 804(b)(6)).

264 *See* Siegel, *supra* note 90, at 2120. Siegel traced the way the legal response to wife beating morphed from being acceptable under the common law right of chastisement to being regrettably beyond the law's reach, at least in the case of middle- and upper-class white couples, due to the need to preserve the privacy of the marriage. She refers to this as "preservation through transformation." *Id.* at 2119.

265 *Id.* at 2119, 2178–79. Modernization of a status regime, she writes:

> occurs when a legal system enforces social stratification by means that change over time. . . . While the American legal system continued to distribute social goods and privileges in ways that favored whites and males, it now [in the Reconstruction era] began self-consciously to disavow its role in doing so.

Id. at 2178–79.

ceptable idiom."[266] But the status disparities remain undisturbed. The justifications change from the common-law, women-as-property idea to the sacred privacy of the marital relationship, just as they change from "women have been lying since Eve" to paeans to the truth-finding magic of the "crucible of cross-examination." The beat may change, but the song remains the same.

Except in the rarest cases, confrontation jurisprudence is most likely not fueled by gender animus, or a deliberate attempt to undermine women. But as Siegel notes, even assuming good faith on the part of the judges, "it also seems clear that, as educated, propertied men, judges reasoned about this question within certain legal traditions and from a certain social position that predisposed them to certain legal conclusions."[267]

The requirement of specific intent to prevent the victim from testifying as a witness, or cooperating with law enforcement, is unlikely to be contested anywhere other than in domestic violence cases. For a case to raise a confrontation forfeiture issue, there need to be testimonial statements by the victim implicating the defendant.[268] Those cannot exist without some sort of prior relationship between the victim and the defendant, and without the victim knowing of some wrongdoing by the defendant. In all other cases of forfeiture by wrongdoing, the defendant has killed or threatened someone identified as a witness—it's usually their sole reason for killing them.[269] But only in domestic violence cases, unlike in witness intimidation or elimination cases, could there be more than one motive for the killing.[270] And precisely because of that complexity and

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266 *Id.* at 2179.

267 *Id.* at 2180.

268 *See* Giles v. California, 554 U.S. 353, 395 (2008) (Breyer, J., dissenting) ("The defendant's state of mind only arises as an issue in forfeiture cases where the witness has made prior statements against the defendant."). As noted above at note 33, I only found a single case out of hundreds in which a non-domestic murder victim's statements did not satisfy the forfeiture standard. *See* Zanders v. United States, 999 A.2d 149, 155 (D.C. Ct. App. 2010).

269 *See, e.g.*, United States v. Chester, No. 13 CR 00774, 2017 WL 3394746, at *31–32 (N.D. Ill. Aug. 8, 2017) (upholding admission of deceased victim's statements where victim had been cooperating with law enforcement and was expected to be a witness in a gang case).

270 In comparison, the motive would be unambiguous "where the defendant knows the witness only because she has previously testified against him." *Giles*, 554 U.S. at 395–96 (Breyer, J., dissenting). In those cases, Breyer concludes, "the prior statements would be admitted under the majority's purpose rule, and the question of intent would not come up." *Id.*

ambiguity, the statements of domestic victims are more easily excluded.

Manne posits that the essence of misogyny "lies in its social function, not its psychological nature."[271] The *Giles* opinion is willfully blind to the fact that, though purporting to treat all murders the same way, it only burdens victims of domestic violence. It's a misogynistic decision in the sense that it adheres to a power structure that reflexively privileges men. It doesn't feel like it is motivated by a particular animus—"[i]f it feels like anything at all, it will tend to be righteous: like standing up for oneself or for morality, or—often combining the two—for the 'little guy.'"[272] But even-handedness in an unequal world merely propagates inequality.

C. The Respect of History Theory

Certainly, a central piece of Justice Scalia's confrontation project was a return to history. Because confrontation was understood in a particular way at the time the Bill of Rights was ratified, courts of today need to seek guidance from those original understandings.[273] But he was less interested in interrogating his assumptions.

Oliver Wendell Holmes, one hundred years ago, counseled caution in the face of a too-slavish adherence to history. History was important, he wrote, to understand "the practical motive" behind the adoption of a rule and to be able to know enough to consider the rule critically.[274] History was a starting

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271 MANNE, *supra* note 259, at 20.

272 *Id.*

273 It is mystifying that courts are supposed to look back to the Founding rather than to the time of the Reconstruction Amendments, as none of the protections of the Bill of Rights were applicable to the states until they were incorporated by the Fourteenth Amendment due process clause. *See* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012) (observing that "[a]n originalist who believes that the Fourteenth Amendment incorporated against state governments some or all of the rights protected by the Bill of Rights should, in adjudicating cases under incorporated provisions, be concerned primarily (if not exclusively) with determining how the generation that ratified that amendment understood the scope and substance of the rights at issue"). But even if Scalia had looked to 1868 rather than 1791, it is not clear how much this would have helped.

274 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). He wrote:

> At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. We follow it into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a dominant class, in

point, "the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules."[275] Simply accepting a rule because it had always been thus, said Holmes, was nothing short of monstrous. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV," he wrote. "It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[276]

But that is exactly what the Supreme Court is suggesting when it countenances a dying declaration exception and repels a domestic violence exception because the first was accepted at common law and the other was not. If we are to have a sui generis exception to the Confrontation Clause for dying declarations on the basis of history, we ought as well to have one based on data for statements made in the context of domestic violence complaints.

The common law exception to the hearsay rule for dying declarations, which made its way into the Federal Rules of Evidence and all state rules of evidence, holds that a statement made by an unavailable declarant while under the belief of imminent death, about the causes of their impending death, will be admissible for its truth.[277] The exception rests on the Judeo-Christian notion that one would not wish to go to his maker with a lie upon his lips.[278] As an eighteenth-century English case put it:

> when the party is at the point of death, and when every hope of this world is gone . . . the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an

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> the absence of generalized ideas, we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it.

275 *Id.*

276 *Id.*

277 *E.g.*, Fed. R. Evid. 804(b)(2); ARK. R. EVID. 804(b)(2); COLO. REV. STAT. ANN. § 13-25-119 (West 2021); N.C. GEN. STAT. ANN. § 8C-1, 804 (West 2020); S.D. CODIFIED LAWS § 23A-22-12 (2021).

278 Or in the original Latin, nemo moriturus praesumitur mentiri (those about to die cannot be presumed to lie). This is an idea as old as Shakespeare, as George Fisher points out, quoting Richard II, Act II, i, 1–8:

> O, but they say the tongues of dying men
> Enforce attention like deep harmony.
> Where words are scarce they are seldom spent in vain,
> For they breathe truth that breathe their words in pain.

FISHER, *supra* note 1, at 498.

> obligation equal to that which is imposed by a positive oath administered in a Court of Justice.[279]

The belief therefore was that the fear of death would function as a safeguard against lying as powerful as swearing an oath[280]—a claim that Bryan Liang describes as resting on "an amalgam of religious idealism and amateur psychology."[281] In fact, scientific research seems to indicate that the cognitive impairment resulting from extreme loss of blood might result in rather less reliable statements, as victims of penetrative trauma occasioned by gunshot or stab wounds may experience delirium and degraded cognition.[282]

What is interesting is how the courts have resolved the issue of unreliability in this context. It cannot be argued that the statements from beyond the grave are any less dramatic and indelible when they are said while the declarant believes that she is about to leave this life as opposed to when she calls the police to report abuse. But the possible unreliability of the dying declaration is cast as an issue for the jury, while the unreliability of a non-dying woman's statements is seen as too dangerous to the defendant to be allowed before the jury.

This does not make a lick of sense. While in the eighteenth century, there might have been grounds to allow dying declarations based on a more homogeneous and widespread Christianity, these beliefs no longer have universal currency. In a secular, multi-cultural society, there is no principled basis to distinguish dying declarations from any other statement by a victim, and the Court's arguments that somehow history imbues this exception with "*sui generis*" magic are specious.[283]

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279 Rex v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789).

280 *See* Rex v. Drummond, 1 Leach 337, 338, 168 Eng. Rep. 271, 272 (1784) (observing that "[t]he mind impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath. The *declarations* therefore of a person dying under such circumstances are considered as equivalent to the *evidence* of the living witness upon oath." (emphasis added)).

281 Bryan A. Liang, *Shortcuts to "Truth": The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 232 (1998).

282 *See id.* at 240–42 (noting that an extremely wide range of misperceptions of reality and hallucinations can result from blood loss and lack of oxygen to the brain). Timothy Lau, on the other hand, supports the reliability of dying declarations based on his study of suicide notes, concluding that "the fear that dying persons have a general wish to falsely incriminate is simply not substantiated by research." Timothy T. Lau, *Reliability of Dying Declaration Hearsay Evidence*, 55 AM. CRIM. L. REV. 373, 398–99 (2018). But since suicide notes are usually penned before the person sustains the mortal injury, Liang and Lau's findings might not be contradictory.

283 It can also be argued that holding the door open to a dying declaration exception also undermines Scalia's argument. As Orenstein puts it, "Even if

The Wisconsin Supreme Court, grappling with this conundrum in a dying declaration case, had a much better reason for admitting a dying declaration, one that could apply equally to allegations of abuse from battered partners: Trust the jury. "The reliability of evidence is an issue for the trier of fact," wrote the court, "and the assertion that some dying declarations may be unreliable can not justify the per se exclusion of such potentially valuable evidence."[284]

In the Wisconsin court's view,

> The fairest way to resolve the tension between the State's interest in presenting a dying declaration and a defendant's concerns about its potential unreliability is not to prohibit such evidence, but to continue to freely permit, as the law does, the aggressive impeachment of the dying declaration on any grounds that may be relevant in a particular case.[285]

Indeed, scholars have argued that dying declarations should be admitted on the basis of necessity—in his treatise, Wigmore declared that "[w]here the test of cross-examinatio[n] is *impossible of application*, by reason of the declarant's death or some other cause rendering him now unavailable as a witness on the stand, we are faced with the alternatives of receiving his statements without that test, or of leaving his knowledge altogether unutilized."[286]

Conversely, these arguments gesturing to necessity are rejected out of hand in the case of statements by a victim of domestic violence. The claim that the dying declaration should survive the *Crawford* revolution because it was so at common law has no more justification than the forfeiture exception—and arguably has much less.[287] The only tangible difference between a dying declaration allowed because of the solemnity of the moment of death and the claims to the police by a bat-

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correct historically, and even if one believes in originalism as a legitimate form of constitutional interpretation, Justice Scalia's exception for the dying declaration undermines the Court's entire originalist approach." Orenstein, *supra* note 87, at 1444.

284 State v. Beauchamp, 796 N.W.2d 780, 799 (Wisc. 2011).

285 *Id.*

286 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF THE UNITED STATES 1791 (1904). Wigmore was dealing only with dying declarations as an exception to the hearsay rule and not as exceptions to the Confrontation Clause, but the arguments in favor of admission are equally conclusory.

287 *See* Holmes, *supra* note 274, at 469 (decrying rules followed in "blind imitation of the past" and describing the practice as "revolting"). Then again, he also wrote, when interpreting a tax provision twenty-odd years later, "a page of history is worth a volume of logic," so who knows how much help that really is. New York Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921).

tered woman in an abusive relationship seems to be the mistrust of women. To adhere to an exception only because it was allowed by the men who administered the justice system at common law is simply to entrench views of female conniving that have flourished since the days of Merrie Olde Englande when men wore tights.

D. The Path Forward

If the doctrine itself seems retrograde, the more hopeful side of the story is that state courts and lower federal courts, closer as they are to people's lives, have not seemed particularly swayed by these appeals to history and originalism. They have in the main revealed themselves to be more psychologically astute than our highest court. It is they, after all, who have taken the dual motivation argument as settled, and who have acknowledged the fact that losing custody of one's children or losing a significant amount of money in a contested divorce can be as powerful a motivating factor as the desire to avoid prison.

Without making any particular waves, the courts have been able to use whatever salient aspects of the cases before them lent themselves to the purpose: a generous understanding of the meaning of nontestimonial statements, frequent resort to the harmless error doctrine, an assumption that dying declarations are admissible. In the end, most cases of domestic homicide are not all that ambiguous and do not lend themselves to defenses that the victim committed suicide and is attempting to frame the defendant. But simply relying on the fact that the *Giles* intent requirement will only really create difficulty in the types of cases where the manner of death is susceptible to being self-inflicted, and there was no "classic history of abuse," is not a satisfactory solution.

There already are two Confrontation Clauses. One operates to prevent the statements of women who fear their partners in the absence of a showing that they were viewed as potential witnesses. The other applies in all other situations, where this showing presents no difficulty. In all other homicides, it is hard to think of scenarios where the prosecution could not prove intent to silence. In non-domestic murders, the dead victim will not have made any statements implicating the defendant unless it is to identify the defendant as the person who mortally injured them, to identify the defendant as the perpetrator in some other crime, or to provide cooperation with law enforcement implicating the defendant.

Even after all this time, I'm still haunted by the thought of Julie Jensen, terrified, racked with self-doubt, desperately trying to ensure that those who loved her would know that she had not left them voluntarily. How much worse would she have felt if she had known that a handful of judges, and the weight of male-dominated legal history, would deem it "too easy" to make these accusations, so much so that a jury would never even have the chance to hear them? The "reverberating clang," it turns out, is not the whispery, soon-to-be extinguished voices of the deceased. It's the sound of the courtroom doors slamming shut.

CONCLUSION

Modern Confrontation Clause jurisprudence has carved out a particularly onerous hurdle applicable only in domestic violence cases: that of proving that the defendant killed the victim, at least in part, to prevent her from testifying as a witness. In no other violent crime is the combination of statements by the victim and motives other than preventing testimony likely to occur. Therefore, we already have two Confrontation Clauses as far as the forfeiture rule goes: one for witness intimidation cases, where it will always be possible to prove that the murder was committed with the specific intent to silence the witness, and one for domestic violence cases, where it will often be difficult to prove that the murder was committed for that purpose. The experience of the lower courts in the decade following *Giles* has shown that almost no courts are moved by originalist fervor. To the contrary, they have found creative ways of expanding the universe of nontestimonial statements, wielding the harmless error rule, or inferring intent based on facts that, while reasonably foreseeable, have not yet happened.

My guess is that this is because the courts are not convinced that the *Giles* rule is good law. It removes an important source of information from the jury on the assumption that the jury would be incapable of handling such dangerous evidence. It reimposes an archaic view of perfidious women and vulnerable men on an area already rife with emotion. Despite the growing recognition of the particular difficulties faced by women living in a male-dominated society, the Supreme Court has chosen this specific instance, that of the ultimate abuse of power by men over women, to impose an antiquarian view of the Confrontation Clause in the name of originalism. I am happy to report that, in this endeavor, they have been less than successful.