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Thoughts About *Giles* and Forfeiture in Domestic Violence Cases*

Myrna S. Raeder†

INTRODUCTION

In choosing a topic for this festschrift celebrating Professor Berger's venerable career as an evidence professor and scholar, I decided that since there were likely to be many contributions in the field of scientific evidence, I would write instead about a recent Supreme Court pronouncement concerning the Confrontation Clause. Nearly twenty years ago, Professor Berger explicated a prosecutorial restraint model of Confrontation Clause analysis.¹ She has also authored Supreme Court *amici* briefs in *Idaho v. Wright*² and *Lilly v. Virginia*.³ While I am sure she will not agree with all of my views about *Giles v. California*,⁴ I know that she will enjoy reading about the topic.

*Crawford v. Washington*⁵ was a watershed case in Confrontation Clause jurisprudence, which rejected the reliability test articulated in *Ohio v. Roberts*⁶ in favor of a

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† 2008-2009 Justice Marshall F. McComb Professor of Law, Southwestern Law School. This essay is dedicated to Professor Margaret Berger, a mentor and friend, whose acuity of analysis permeates all of her writings.

¹ Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992).

² See Brief Amicus Curiae of the American Civil Liberties Union in Support of Respondent, *Idaho v. Wright*, 497 U.S. 805 (1990) (No. 89-260), 1989 WL 1127312. *Wright* held statements of a young child who did not testify and which were admitted pursuant to a state residual exception that mirrored what is now Federal Rule of Evidence 807 violated the Confrontation Clause because they lacked particularized guarantees of trustworthiness. 497 U.S. at 822-23.

³ See Motion for Leave to File and Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Virginia, in Support of Petitioner, *Lilly v. Virginia*, 527 U.S. 116 (1997) (No. 98-5881), 1998 WL 901782. *Lilly* held the admission of a nontestifying accomplice's confession as a declaration against the declarant's penal interest violated defendant's Confrontation Clause rights. 527 U.S. at 142.

⁴ 128 S. Ct. 2678 (2008).

⁵ 541 U.S. 56 (2004).

⁶ 448 U.S. 56 (1980).

“testimonial” approach. Justice Scalia’s originalist reading of the Confrontation Clause now requires exclusion of testimonial hearsay if the declarant does not testify at trial, unless the prosecution can demonstrate the declarant is unavailable and there was a previous opportunity to cross-examine her.⁷ In the wake of *Crawford’s* reshaping of Confrontation Clause analysis,⁸ 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.

The rub then, was to figure out what is testimonial and what is not in a domestic violence setting, a matter not inconsequential given that *Crawford* led to wholesale dismissals of domestic violence charges, and increased the number of trials of defendants who refused to plead guilty optimistically predicting that the absence of the complainant would result in their acquittal.⁹ The domestic violence advocacy community hoped the next major Confrontation Clause case, *Davis v. Washington*,¹⁰ would opt for a domestic violence exception to general Confrontation Clause analysis. Failing this, they urged a contextual view of domestic violence that recognized the patterned nature of such abuse, and, as Professor Tuerkheimer has suggested, its temporal aspects.¹¹ *Davis* consolidated two separate cases in which the complainants failed to testify at trial, one involving a 911 call introduced against Davis, and the other involving statements made to officers at the defendant Hammon’s home by his wife.

While *Davis* was supposed to fill in the blanks, its bright-line test for determining if a statement is testimonial has been criticized as unworkable by Justice Thomas,¹² and does not answer many of the hard questions posed when trying to define testimonial statements.¹³ *Davis’* circuitous definition

⁷ 541 U.S. 36 (2004).

⁸ *Id.* at 53-54.

⁹ See, e.g., Tom Lininger, *Prosecuting Batterers after Crawford*, 91 VA. L. REV. 747, 750, 820 (2005).

¹⁰ 547 U.S. 813 (2006).

¹¹ See, e.g., Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801, 823 (2007); Deborah Tuerkheimer, *Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later*, 75 GEO. WASH. L. REV. 613, 616 (2007); see also Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of “Domestic Violence Context”*, 13 LEWIS & CLARK L. REV. 711, 721-30 (2009).

¹² *Id.* at 842 (Thomas, J., concurring in part and dissenting in part).

¹³ See, e.g., Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL’Y 759 (2007) [hereinafter Raeder, *After Davis*].

of testimonial statements, essentially saying statements are testimonial, unless they are not, predictably led to even more confusion about applying the testimonial approach to dual purpose statements—statements in which the victim sought help from law enforcement, but which also arguably serve as after-the-fact descriptions of criminal behavior.

Unhappy with the mixed result in *Davis*, which reversed Hammon's conviction and affirmed the conviction of Davis,¹⁴ victims' advocates pinned their hopes on forfeiture by wrongdoing as a way to ensure the admission at trial of testimonial statements made by absent domestic violence victims. In other words, if the defendant's own conduct caused the absence of the declarant at trial, then the defendant had forfeited his right to object to the admission of her testimonial hearsay. *Crawford's* oblique reference to forfeiture was reiterated in *Davis*,¹⁵ emboldening advocates to argue that forfeiture was required when the defendant killed a victim who had previously made statements to the police identifying him as her abuser. A number of courts readily agreed and did not require any demonstration that the defendant actually intended to cause the victim to be absent as a witness at trial to establish forfeiture.¹⁶ Instead, they only required a preliminary fact showing that the defendant murdered the victim thereby causing her unavailability.

*Giles v. California*¹⁷ was typical of such cases. The defendant was charged with murdering his ex-girlfriend, Brenda Avie. No one saw the incident, although the defendant's niece heard the victim call "Granny" several times.¹⁸ Brenda's wounds were consistent with her having been the victim, rather than the assailant, but the defendant claimed she was insanely jealous, had threatened him, and had previously pulled a knife on someone else.¹⁹ The defendant further claimed he got a gun in self-defense and shot her accidentally.²⁰ To rebut this, the prosecution offered the victim's statements to an officer describing a previous incident of

¹⁴ *Davis*, 547 U.S. 813.

¹⁵ *Id.* at 833.

¹⁶ See *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005); *United States v. Mayhew*, 380 F. Supp. 2d 961 (S.D. Ohio 2005); *State v. Meeks*, 88 P.3d 789 (Kan. 2004); *People v. Moore*, 117 P.3d 1 (Colo. Ct. App. 2004).

¹⁷ 128 S. Ct. 2678 (2008).

¹⁸ *Id.* at 2681.

¹⁹ *Id.*

²⁰ *Id.*

domestic violence, where she claimed the defendant was jealous and threatened to kill her if she cheated on him.²¹ The court admitted these statements pursuant to a hearsay exception that allowed admission of threats of bodily harm, and the prosecution argued that the defendant forfeited his right to confront the victim.²²

Giles provided the Supreme Court with an opportunity to define the boundaries of forfeiture. Instead, like *Crawford* and *Davis*, *Giles* left open more questions than it answered, further muddying the waters in domestic violence cases, and offering no guidance about interpreting forfeiture in child abuse litigation. *Giles* explicitly held that constitutional forfeiture required an intent to deter a witness from testifying,²³ in essence viewing such forfeiture as a sanction for witness tampering, not simply an equitable remedy for preventing the victim from testifying. It reached this conclusion by delving into the historic record. Again, like *Crawford* and *Davis*, the majority decision was written by Justice Scalia. Again, he utilized an originalist approach, and again his reading of history was challenged by other Justices. While the holding appears to be a blow to prosecutors trying to admit statements of dead victims, dicta in three of the five opinions in *Giles* taken together implies that potentially all of the Justices are inclined to treat evidence of forfeiture flexibly in domestic violence murder cases. Moreover, the case offers a number of other hints about how individual judges think about the evolving testimonial framework. *Giles* also raises questions about the nature and function of originalism in constitutional analysis.

I. ORIGINALISM

Giles began with a reprise of *Crawford's* admonition that the Confrontation Clause was “most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”²⁴ I have previously argued that originalism is bound to silence voices that were not heard in 1791, when the Sixth Amendment was adopted. At that time, domestic violence was

²¹ *Id.* at 2681-82.

²² *Id.* at 2682.

²³ *Id.* at 2692.

²⁴ *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

neither understood, nor criminalized, and the power of chastisement was recognized by the rule of thumb.²⁵ Moreover, surviving wives would have been disqualified as witnesses against their husbands under the spousal disqualification doctrine. As the Court in *Trammel v. United States*²⁶ observed:

This spousal disqualification sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one. From those two now long-abandoned doctrines, it followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife.²⁷

Therefore, it is not surprising that the cases referred to in *Giles*' historic analysis are murder cases.

Generally, trials looked nothing like they do today: neither the defendant, nor the interested witnesses testified, there was virtually no hearsay, no police officers to investigate or testify, and the trials were typically very short.²⁸ Thus, using a historic approach towards confrontation, which has been described as a trial right,²⁹ is likely to produce incongruous results. While originalists commonly maintain that historic rights can be applied to unforeseen situations, it is somewhat different to untether the common law right of cross-examination from its 1791 context and then apply it to a world that not only uses substantially different evidentiary rules and investigative practices, but also reflects totally different social and political judgments about domestic violence.

Further, the focus on the historic record has not resulted in consensus about the common law jurisprudence. Not only have several justices argued with the majority's views about the nature of the confrontation right in 1791,³⁰ but academics and legal historians have also weighed in on

²⁵ Myrna S. Raeder, *Remember the Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 311-14 (2005) [hereinafter Raeder, *Remember the Ladies*]; Raeder, *After Davis*, *supra* note 13, at 774-75.

²⁶ 445 U.S. 40 (1980).

²⁷ *Id.* at 44.

²⁸ See Raeder, *Remember the Ladies*, *supra* note 25, at 312.

²⁹ *Davis v. Washington*, 547 U.S. 813, 832 n.6 (2006).

³⁰ See, e.g., *Giles v. California*, 128 S. Ct. 2678, 2700-05 (2008) (Breyer, J., joined by Stevens, & Kennedy, JJ., dissenting); *Davis*, 547 U.S. at 835-40 (Thomas, J., concurring in part in judgment, and dissenting in part); *Crawford v. Washington*, 541 U.S. 36, 72-74 (2004) (Rehnquist, C.J., and O'Connor, J., concurring in judgment).

opposite sides of the issue.³¹ Thomas Davies, a legal historian, has argued that hearsay exceptions other than dying declarations were invented only after the framing, and that the framers would likely have condemned the expansion of hearsay exceptions.³² Therefore, it is odd to posit a theory of forfeiture for hearsay that would not have been admitted. I have often wondered why this reality has not produced arguments that hearsay exceptions enacted legislatively after 1791 are per se testimonial, since they are creations of governmental action that admit uncross-examined statements, just like those created by law enforcement. Moreover, as Justices Souter and Ginsburg indicated in their concurrence in *Giles*, “today’s understanding of domestic abuse had no apparent significance at the time of the Framing, and there is no early example of the forfeiture rule operating in that circumstance.”³³ Despite Justice Scalia’s originalist view that intention to cause the witness’ absence at trial is necessary to establish forfeiture, he is willing to accept evidence of forfeiture based on a concept of isolation in the domestic violence context that is decidedly unoriginalist.

History also presents an alternative view of forfeiture requiring cross-examination. As I have discussed elsewhere, under a testimonial regime, *Reynolds* would have admitted the previous testimony of the defendant’s wife without any discussion of forfeiture, because it had been cross-examined.³⁴ Of course, as Justice Scalia recognized, if forfeiture could not occur without cross-examination, it would render the theory irrelevant in the modern testimonial context.³⁵ But, rather than viewing this disconnect as questioning his historic analysis,³⁶

³¹ Compare 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, 156-62 (2005), with Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 494 (2007).

³² Thomas Y. Davies, *Not “The Framers’ Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL’Y 349, 352 (2007).

³³ *Giles*, 128 S. Ct. at 2695.

³⁴ Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, CRIM. JUST. 24, 31 (Summer 2005).

³⁵ *Giles*, 128 S. Ct. at 2691 (“it amounts to self-immolation”).

³⁶ See *Leading Cases, Sixth Amendment—Witness Confrontation—Forfeiture by Wrongdoing Doctrine*, 122 HARV. L. REV. 336, 345 (2008) (arguing forfeiture applied to domestic violence is poor candidate for originalism).

Justice Scalia claims intentionality is a historic feature of forfeiture.³⁷

But the larger questions are why has originalism overtaken Sixth Amendment Confrontation Clause analysis at all, and does it have any significance for interpretation of other criminal procedural and trial rights? Arguably, if a strict originalist approach were applied to other constitutional guarantees it would likely strip away many of the rights criminal defendants now enjoy. For example, *Washington v. Texas*, which rejected the traditional witness disqualification rule under its interpretation of the Sixth Amendment right to compulsory process, quoted a Supreme Court decision from 1918 for the proposition that modern criminal procedure should not be governed by “the dead hand of the common-law rule of 1789.”³⁸ Would the present focus on originalism discount compulsory process or other rights bound up in the right to present a defense?³⁹ Similarly, Professor Dripps has suggested that the right to counsel could be affected by originalist reinterpretation.⁴⁰ The irony of originalism in the Confrontation Clause context is that the right sounds absolute and defense-oriented, but the historic approach narrowly construes the content of the right, making it inapplicable to accusatory nontestimonial hearsay where the defendant would want to cross-examine the unavailable declarant. In essence, originalism gives with one hand and takes away with the other.

This same type of push-pull is becoming more noticeable in Fourth Amendment analysis. Professor Davies has contended that under “law-and-order originalism, the expansive police powers endorsed in contemporary search and seizure rulings are foreign to the Framers’ understanding of criminal procedure.”⁴¹ In addition, in the Fourth Amendment

³⁷ *Giles*, 128 S. Ct. at 2683.

³⁸ 388 U.S. 14, 21-22 (1967) (internal quotation marks omitted) (quoting *Rosen v. United States*, 245 U.S. 467, 471 (1918) (affirming elimination of disqualification for felony conviction and reversing conviction for refusal to permit accomplice testimony)).

³⁹ See generally, e.g., Martin A. Hewitt, Note, *A More Reliable Right to Present a Defense: The Compulsory Process Clause After Crawford v. Washington*, 96 GEO. L.J. 273 (2007) (arguing for a narrower, bright-line test for the right to compulsory process informed by *Crawford*).

⁴⁰ See Donald A. Dripps, *Sixth-Amendment Originalism’s Collision Course with the Right to Counsel: What’s Titanic, What’s Iceberg?* 2, 4 (San Diego Legal Stud. Res. Paper Series, Paper No. 07-79, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952508.

⁴¹ Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in*

arena, originalists appear to accept that rights such as “knock and notice” existed at the founding, but then find that this does not require suppression of any evidence obtained in violation of that right, since the exclusionary rule is viewed as not constitutionally required,⁴² and subject to review for reasonableness.⁴³ Even if the historic approach provides inconclusive results, originalists tend to interpret reasonableness narrowly to reject an exclusionary remedy.⁴⁴ Thus, in the post-*Crawford* era, Justice Scalia has written two majority opinions concerning the Fourth Amendment using the historic approach that denied the application of the exclusionary rule.⁴⁵ Ironically, the reasonableness review depends on the same type of judicial balancing that Justice Scalia denigrated when rejecting the *Ohio v. Roberts*⁴⁶ reliability test in *Crawford*.⁴⁷ Certainly, in the Fourth Amendment context the resort to reasonableness has resulted in shrinking protection for violations, as most recently demonstrated in *Herring v. United States*,⁴⁸ where the Court asserted that it had “repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.”⁴⁹ A cynic might wonder if the resort to reasonableness as an end-run around the exclusionary rule evolved from the failure of Justices Scalia and Thomas to garner any support to jettison *Miranda*⁵⁰ in the Fifth Amendment context in *Dickerson v. United States*.⁵¹

Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 240 (2002) (“[N]ineteenth and twentieth centur[y] American courts abandoned the Framers’ commitment to rigorously accusatorial criminal procedure as they drastically expanded police power.”).

⁴² See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“[T]he rule is a judicially created [rule] designed to safeguard Fourth Amendment rights generally through its deterrent effect.”).

⁴³ See, e.g., *Hudson v. Michigan* 547 U.S. 586, 595-96 (2006) (Scalia, J., majority opinion); *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (Thomas, J., majority opinion).

⁴⁴ See *Virginia v. Moore*, 128 S. Ct. 1598, 1604 (2008) (no exclusion where arrest was based on a misdemeanor driving offense that should not have resulted in arrest under state law).

⁴⁵ See *id.* at 1608; *Hudson*, 547 U.S. at 600.

⁴⁶ 448 U.S. 56 (1980).

⁴⁷ *Crawford v. Washington*, 541 U.S. 36, 67-68 (2004).

⁴⁸ 129 S. Ct. 695, 700 (2009) (exclusionary rule did not apply to police recordkeeping error).

⁴⁹ *Id.*

⁵⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵¹ 530 U.S. 428, 464-65 (2000) (Scalia & Thomas, JJ., dissenting).

Similarly, although Justice Scalia's concurrence ostensibly favored the defense in *Arizona v. Gant*,⁵² which held the search of a defendant's car was unreasonable after he was handcuffed, arrested, and secured in a patrol car, Justice Scalia's view of reasonableness based on historical practices would actually allow searches not previously permitted. In other words, he would also consider it reasonable to search a vehicle not only when the object of the search is evidence of the crime for which the arrest was made, but also "of another crime that the officer has probable cause to believe occurred."⁵³

II. DEFINING THE BOUNDARIES OF "TESTIMONIALISM"

Giles provides glimpses into some of the Justices' views about the boundaries of what I call "testimonialism." The majority decision mentions that statements in furtherance of a conspiracy would probably never be testimonial,⁵⁴ repeating a similar pronouncement made in *Crawford*.⁵⁵ Professor Berger would not necessarily agree, since she suggested pre-*Crawford* that statements to undercover informants should be governed by her prosecutorial restraint model of confrontation to make the government's role in shaping evidence transparent to jurors.⁵⁶ Given the Court's current view of confrontation as restraining potential prosecutorial abuses, it is surprising that this issue has been summarily dismissed, albeit by dicta, in both *Crawford* and *Giles*, although this posture is consistent with a view of testimonialism that applies the confrontation right absolutely, but only to a very narrow range of statements.

Justice Scalia's opinion did suggest that domestic violence cases were not hampered by a non-intent-based forfeiture rule because "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing."⁵⁷ This reiterates *Crawford's* suggestion that the Confrontation Clause does not apply outside of the law enforcement or governmental sphere,

⁵² 129 S. Ct. 1710 (2009).

⁵³ *Id.* at 1725.

⁵⁴ *Giles v. California*, 128 S. Ct. 2678, 2691 n.6 (2008).

⁵⁵ *Crawford v. Washington*, 541 U.S. 36, 56 (2004).

⁵⁶ See Berger, *supra* note 1, at 597-600.

⁵⁷ *Giles*, 128 S. Ct. at 2692-93.

ignoring the realistic possibility that statements will be made to private individuals as conduits for the express purpose of repeating them to the authorities. Similarly, the reference to physicians ignores any recognition that some doctors may be mandated to report domestic abuse, or that they may in some cases act as agents of the police, or in the case of forensic nurses, have roles that are decidedly dual in nature. Yet, since all of these references are dicta, written in general terms without concrete examples, courts will likely continue to divide on how broadly or narrowly they should interpret testimonial statements.

While Justice Alito voted with the majority in *Davis*, he joined Justice Thomas in *Giles*, questioning whether the victim's statement was testimonial because of its lack of formality.⁵⁸ This appears to retreat from his vote to reverse Hammon's conviction, since lack of formality would result in virtually no statements made in field investigations or 911 calls being constitutionally protected because they were not considered the "equivalent of statements made at trial by 'witnesses.'"⁵⁹ At a minimum, under this rationale, the statements to the police in *Hammon* would be nontestimonial even if the victim's affidavit was not, suggesting its admission would have rendered the error harmless. To date, this is still a decidedly minority view, though Justice Scalia's cryptic reference that "we accept without deciding" that the statements were testimonial⁶⁰ leaves room to speculate whether anyone else will jump ship. Ironically, the most likely candidate would be Justice Scalia based on his pre-*Crawford* view in *White*.⁶¹ However, given that he authored *Davis*, such a result appears improbable.

Yet, there may be another way of arguing these statements are not testimonial. *Davis* explained that when the Court stated in *Crawford* "interrogations by law enforcement officers fall squarely within [the] class' of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the

⁵⁸ *Id.* at 2694.

⁵⁹ *Id.*

⁶⁰ *Id.* at 2682.

⁶¹ *White v. Illinois*, 502 U.S. 346, 364 (Scalia, J., concurring in judgment).

perpetrator.”⁶² Thus, *Davis* redefined testimonial statements in the 911 or field investigation context, typical in domestic violence prosecutions:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁶³

However, this definition arose in a context where the statements were being used in the prosecution of the crimes arising out of the incident in question. That is not how the evidence is used when domestic violence results in murder. In other words, the previous statements are not being used to convict the defendant of the earlier assault, but rather as circumstantial evidence linking the defendant to a later crime that was not committed at the time of the earlier statement. While such statements are accusatory, and the defendant would undoubtedly want to cross-examine the declarant about them, this is not the approach to testimonialism adopted by the Supreme Court.⁶⁴ Indeed, considering such statements to be testimonial in the murder case smacks of a science fiction approach to crime, suggested by *Minority Report*, a film in which individuals were apprehended for offenses before they committed them.⁶⁵ Assuming a free will approach to criminal responsibility, accusing someone of a past crime arguably does not qualify as testimonial when used as evidence of a future crime that has not yet occurred.

This view is consistent with the Court’s explanation that the right to confrontation only arises at trial: “[t]he Confrontation Clause in no way governs police conduct, because it is the trial use of, not the investigatory collection of, ex parte testimonial statements which offends that provision.”⁶⁶ The mere fact that statements arose out of a police investigation should not per se label them as testimonial when

⁶² *Davis v. Washington*, 547 U.S. 813, 826 (2006) (alteration in original) (quoting *Crawford v. Washington*, 541 U.S. 36, 53 (2003)).

⁶³ *Id.* at 822.

⁶⁴ See generally, e.g., Robert P. Mosteller, “*Testimonial*” and the Formalistic Definition—The Case for an “Accusatorial” Fix, 20 CRIM. JUST. 14 (Summer 2005).

⁶⁵ MINORITY REPORT (Twentieth Century-Fox File Corp. et al. 2002).

⁶⁶ *Davis*, 547 U.S. at 832 n.6 (emphasis omitted).

introduced at a trial for some other separate crime as a piece of circumstantial evidence to demonstrate motive or identity pursuant to Federal Rule of Evidence (“F.R.E.”) 404(b), or as evidence of the decedent’s state of mind, which is relevant as in *Giles* where the defendant claims the death was accidental or that he acted in self-defense.⁶⁷

This reasoning is analogous to that in *Dowling v. United States*, which held that neither double jeopardy nor due process were violated by the introduction of evidence relating to a crime for which the defendant had previously been acquitted.⁶⁸ Dowling was charged with a bank robbery in which the perpetrator wore a ski mask and carried a small gun.⁶⁹ At his third trial for the robbery, a woman testified that Dowling entered her home along with another individual, and he wore a ski mask and carried a small gun.⁷⁰ She was able to identify Dowling because she unmasked him during a struggle.⁷¹ The prosecution introduced this testimony on the theory that the mode of dress in both incidents occurring two weeks apart was similar, and the second man identified by the female witness was also involved in the robbery, thereby linking Dowling to him.⁷² However, Dowling had previously been acquitted of charges relating to the witness’ testimony. The Court reasoned that although the acquittal established that there was a reasonable doubt that the defendant was the masked man who entered the witness’ home two weeks after the bank robbery took place, that fact “did not determine an ultimate issue in the present case.”⁷³ The decision recognized that the “jury’s verdict in his second trial did not entail any judgment with respect to the offenses charged in his first.”⁷⁴ Moreover, under F.R.E. 404(b), similar act evidence is relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor, a standard satisfied by F.R.E. 104(b).⁷⁵ In other words, it does not have to meet the preponderance

⁶⁷ See Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1506-17 (1996) [hereinafter Raeder, *Simpson and Beyond*]; see also, e.g., *State v. DeRosier*, 695 N.W.2d 97, 105 (Minn. 2005).

⁶⁸ 493 U.S. 342, 343-44 (1990).

⁶⁹ *Id.* at 344.

⁷⁰ *Id.* at 344-45.

⁷¹ *Id.*

⁷² *Id.* at 345.

⁷³ *Id.* at 347-48.

⁷⁴ *Id.* at 353.

⁷⁵ *Huddleston v. United States*, 485 U.S. 681, 689 (1988).

standard that typically governs the admissibility of evidence, let alone satisfy proof beyond a reasonable doubt.

Similarly, in a domestic violence murder trial the victim's previous statement to the police is not being used to prove the offense that it describes, but simply constitutes evidence that is inferentially used to support a finding of proof beyond a reasonable doubt for a different crime, committed at a later time. Therefore, the statement should not be considered testimonial for that purpose. In a related vein, *Crawford v. Commonwealth* recently held that statements in an affidavit supporting a request for a civil protective order were not testimonial when the defendant is later charged with the declarant's murder, since her statements were not made for the primary purpose of reporting a past event for possible criminal prosecution.⁷⁶

Because *Giles* did not specifically address whether forfeiture applied to testimony initially obtained in one proceeding, but subsequently introduced at a second proceeding involving the same defendant charged with a different offense, courts are now being asked that question. For example, *United States v. Vallee*⁷⁷ interpreted *Giles*' "invitation . . . to the state court to explore defendant's intent on remand" as extending forfeiture to murder trials, "provided . . . that the defendant intended to prevent the witness from testifying at an earlier proceeding."⁷⁸ Similarly, the Missouri Supreme Court interpreted forfeiture to apply to both the ongoing proceeding as well as the murder.⁷⁹ This interpretation would be unnecessary if a reevaluation of such statements deemed them to be nontestimonial.

III. OPENING THE DOOR TO STATE OF MIND TESTIMONIAL STATEMENTS

Several of the statements in *Giles* and other domestic violence femicides are relevant to the decedent's state of mind, which would be admissible under F.R.E. 803(3) when the defendant claims that the killing was in self-defense or the death was an accident or suicide.⁸⁰ In such instances, the

⁷⁶ 686 S.E.2d 557, 568-69 (Va. Ct. App. 2009).

⁷⁷ 304 F. App'x 916 (2d Cir. 2008).

⁷⁸ *Id.* at 920-21 & n.3.

⁷⁹ See *State v. McLaughlin*, 265 S.W.3d 257, 271-73 (Mo. 2008) (en banc).

⁸⁰ See, e.g., *People v. Abordo Espinosa*, No. A102886, 2005 WL 941454, at *5 (Cal. Dist. Ct. App. Apr 25, 2005) ("[E]vidence of domestic violence . . . was relevant to rebut the defense's theory that the shooting occurred in heat of passion in response to

decedent's state of mind, typically fear of the defendant, is a window to her likely conduct in regard to the defendant. For example, the majority in *Giles* detailed the statements made to the police in the previous incident by Brenda Avie, the decedent and Giles' ex-girlfriend, that Giles had accused her of having an affair, grabbed her, lifted her off the floor, choked her, punched her in the face, opened a folding knife, and "threatened to kill her if he found her cheating on him."⁸¹ Brenda's wounds, which were described as consistent with defensive motions,⁸² would more likely be viewed as defensive if there was evidence that she feared the defendant. Similarly, the dissent characterized the defendant's description of the victim as "jealous, vindictive, aggressive, and violent."⁸³ Evidence of her fear would cast doubt on the defendant's claim that she was jealous and threatened him.

In this capacity, such statements should not be barred as testimonial, even if they were made to a police officer. First, the victim's statements are not being used to prove the crime that the police were then investigating, so, as previously mentioned, the decedent did not expect the statements to be used in relation to the murder. Second, fear is not used to prove an element of the current crime, but only to explain the decedent's behavior, in evaluating the defendant's version of the facts. Third, as I have argued elsewhere, by raising a defense that makes the decedent's state of mind relevant to the case, the defendant's trial strategy should be viewed as waiving any confrontation challenge concerning otherwise admissible evidence that rebuts the defendant's testimony about the decedent's state of mind.⁸⁴ On occasion, such state of mind may be nonhearsay, which clearly escapes *Crawford's* mandate. However, even if admitted via a hearsay exception, the statements would not typically be expected by the declarant to be used at a trial involving a different incident. Of course, F.R.E. 803(3) cannot be used to prove the underlying conduct producing the declarant's state of mind,⁸⁵ so such statements are viewed as prejudicial even if instructions are given as to

[victim's] nagging, instead of as the culmination of a pattern of abuse."); see also Raeder, *Simpson and Beyond*, *supra* note 67, at 1506-17.

⁸¹ *Giles v. California*, 128 S. Ct. 2678, 2681-82 (2008).

⁸² *Id.* at 2681.

⁸³ *Id.* at 2695 (Breyer, J., joined by Stevens & Kennedy, JJ., dissenting).

⁸⁴ See Raeder, *Remember the Ladies*, *supra* note 25, at 358-60.

⁸⁵ See FED. R. EVID. 803(3).

their limited use. However, if the defendant offers to stipulate to the decedent's state of mind, this factor can be analyzed by the judge in determining if admission is unduly prejudicial under the F.R.E. 403 balancing test.

Moreover, it is arguable that defenses based on accident, suicide, and self-defense should make otherwise admissible evidence of the defendant's state of mind admissible as well. For example Giles claimed Brenda was jealous, and described her alleged threats and jealous statements. In contrast, she described his threats and jealousy. In this context, not only should his claim of accident and self-defense open him to admission of her statements even if testimonial, but it should also open him to the statements she made concerning his state of mind, again assuming a basis for admission other than F.R.E. 803(3). No reliance needs to be given to forfeiture hearsay exceptions to cover her statement to the police officer, since most of them would be excited utterances or fit ad hoc trustworthiness exceptions. Thus, the testimonial ban is the only barrier to their admission. If the defendant opens the door with such a defense posture, I view it no differently than any other hard strategy decision that opens the door to otherwise inadmissible evidence. For example, *Michigan v. Lucas* held that excluding evidence of defendant's past sexual conduct with the victim for failure to comply with a rape shield's notice provision is not a per se violation of the Sixth Amendment.⁸⁶ If trial strategy could result in the loss of a constitutional right pre-*Crawford*, there is no reason to require a different result post-*Crawford*.⁸⁷

IV. INFERRED INTENT

The justices disagreed about the role of intent in the forfeiture analysis as well as how to evaluate intent in the domestic violence setting. Obviously, the majority opinion will be much cited in future domestic violence forfeiture cases to evaluate the type of evidence justifying forfeiture:

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

⁸⁶ 500 U.S. 145, 152-53 (1991).

⁸⁷ *United States v. Lopez-Medina*, 596 F.3d 716, 733 (10th Cir. 2010) (finding waiver and citing other post-*Crawford* cases finding no Confrontation Clause violation when defendant opens the door to inadmissible hearsay).

prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.⁸⁸

The majority separates its reference to the defendant's dissuading the victim to obtain help from its mention of the existence of ongoing criminal proceedings. This disjunction appears to eliminate any requirement for an ongoing prosecution, generally implying that there need not be a current case pending to find forfeiture. However, the dicta is directed to abuse that culminates in murder, leaving open whether the majority would infer intent in other types of prosecutions, or whether felonies would be treated differently than misdemeanors.

The concurrence of Justices Souter and Ginsburg includes the following view of domestic violence evidence of forfeiture:

[T]he element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.⁸⁹

This language does not limit inferred intent to murder cases, and the rationale provided describing the dynamics of domestic violence extends to all manner of domestic violence prosecutions. The broad language suggests that proof of the abusive relationship is all that is needed for transferred intent. Indeed, the dissent interprets Justice Souter's concurrence as meaning "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."⁹⁰ In contrast, the majority indicates such evidence "may" support a finding, inferring that some specific acts or statements of the defendant

⁸⁸ *Giles*, 128 S. Ct. at 2693.

⁸⁹ *Id.* at 2695 (Souter, J., joined by Ginsburg J., concurring).

⁹⁰ *Id.* at 2708 (Breyer, J., joined by Stevens & Kennedy, JJ., dissenting).

are required to indicate an intent to isolate or dissuade the victim from obtaining help.⁹¹

The dissent of Justices Breyer, Stevens, and Kennedy would not require any witness-tampering intent at all for forfeiture.⁹² Thus, it is clear that they will interpret this requirement flexibly. They specifically note:

[e]ven the majority appears to recognize the problem with its “purpose” requirement, for it ends its opinion by creating a kind of presumption that will transform purpose into knowledge-based intent—at least where domestic violence is at issue; and that is the area where the problem is most likely to arise.⁹³

Justice Scalia rejects the dissent’s characterization that this is “nothing more than ‘knowledge-based intent,’”⁹⁴ but his disclaimer appears to be one of degree, rather than kind. Thus, all of the justices would accept a flexible view of inferred intent in domestic violence cases, but the nuances of how to establish such intent, and how broadly to apply it is open to disagreement. Professor Lininger has recently proposed presumptive bright-line rules to govern claims of domestic violence forfeiture and provide some consistency in application.⁹⁵

I have always been of the view that murder is different in the domestic violence context because the victim’s death is often accomplished in ways that are aimed at frustrating prosecution. Previous violence and threats instill fear in the victims who downplay their risk of continuing danger, and their murders are often accomplished at home without witnesses. Thus, prior to *Giles*, I argued that previous statements of the victim should be viewed akin to dying declarations of individuals who are not isolated,⁹⁶ relying on *Mattox v. United States*.⁹⁷ *Mattox* recognized that rules of law, “however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.”⁹⁸ Ironically, while Justice

⁹¹ *Id.* at 2693 (majority opinion).

⁹² *Id.* at 2707-08 (Breyer, J., joined by Stevens. & Kennedy, JJ., dissenting).

⁹³ *Id.* at 2708 (emphasis omitted).

⁹⁴ *Id.* at 2693 (majority opinion).

⁹⁵ See Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 892-93 (2009); see also Myrna S. Raeder, *Being Heard After Giles: Comments on The Sound of Silence*, 87 TEX. L. REV. 105, 105 (2009) [hereinafter Raeder, *After Giles*].

⁹⁶ See, e.g., Raeder, *After Davis*, *supra* note 13, at 778-79.

⁹⁷ 156 U.S. 237 (1895).

⁹⁸ *Id.* at 243.

Scalia's opinion adopts the rationale that abusive relationships may support inferred intent, the two concurrers and three dissenters appear to form a different majority who adopt this rationale as proof of inferred intent without more. Thus, I expect the only forfeiture problem in murder cases will be when no classically abusive relationship can be established.

In contrast, I have been more hesitant to substitute evidence of an abusive relationship as evidence of forfeiture without more when the complainant is alive but refuses to testify, since so many complexities about the relationship confound an automatic finding that the defendant is the cause of her unavailability. In other words, that approach ignores reasons as to her unavailability that cannot be attributed to acts of the defendant.⁹⁹ Pre-*Giles*, I assumed specific evidence would be required, though "patterns of abuse and any posttraumatic stress disorder symptoms [w]ould be factored into the analysis."¹⁰⁰ Yet, in future cases, the dissenters and concurrers could form a majority that would neither confine forfeiture to murder cases, nor require any evidence other than that of an abusive relationship. Paradoxically, grafting the modern view of the dynamics of domestic violence onto an originalist framework may eliminate not only the traditional requirement of any intent to witness tamper, but also the requirement of any specific showing of inferred intent beyond evidence of the abusive relationship in all cases, not just murder.

In addition, Justice Breyer's suggestion that states may accept broader forfeiture views in a nontestimonial context¹⁰¹ has already borne fruit in Indiana, where *Roberts v. State*¹⁰² held that a defendant forfeited any objection under the rules of evidence. Obviously, evidence of the abusive relationship is much less costly for the prosecution to obtain than specific evidence of witness tampering, unless the victim is uncooperative from the outset. Even without cooperation, previous complaints by the victim to the police can be evaluated by the court, since forfeiture would be decided under

⁹⁹ Raeder, *Remember the Ladies*, *supra* note 25, at 363-64.

¹⁰⁰ Myrna S. Raeder, *Confrontation Clause Analysis After Davis*, 22 CRIM. JUST. 10, 19 (Spring 2007) [hereinafter Raeder, *Confrontation Clause*].

¹⁰¹ *Giles v. California*, 128 S. Ct. 2678, 2681-82 (2008) (Breyer, J., dissenting).

¹⁰² 894 N.E.2d 1018, 1024-25 (Ind. Ct. App. 2008) ("[A] party who has rendered a witness unavailable for cross-examination through a criminal act, including homicide, may not object to the introduction of hearsay statements by the witness . . . under the Indiana Rules of Evidence.").

F.R.E. 104(a), which permits consideration of hearsay.¹⁰³ As I have argued elsewhere, the F.R.E. 104(a) standard permits the judge to consider character evidence including prior acts and expert testimony concerning the defendant's abusive personality in determining the existence of forfeiture.¹⁰⁴

As I have also previously argued elsewhere, to the extent that an abusive relationship cannot be shown, in misdemeanors cases where the defendant is already on probation, parole, or supervised release, the better course may be simply to argue for the most severe penalty at revocation, since the Confrontation Clause is not implicated at such hearings, and the standard of proof is typically by a preponderance.¹⁰⁵ Moreover, the absence of cross-examination satisfies due process when a sufficient explanation exists.¹⁰⁶ The victim's failure to cooperate or incompetency should supply good cause, and the statements would usually be found reliable because most of them would be admitted as excited utterances or through ad hoc exceptions that require trustworthiness. Ironically, while Hammon's conviction was voided on Confrontation Clause grounds, he was also found guilty of a probation violation, and given his relatively short criminal sentence, the same penalty might have been reached via the revocation alone. The major difficulty with this approach is that it downplays the significance of the current crime, unless the defendant has previously committed a felony, which still offers the possibility of a substantial penalty.

CONCLUSION

Where has my foray into testimonialism and forfeiture taken me? Some may be surprised by my willingness to interpret testimonialism narrowly, since it results in a diminishment of cross-examination, something I have railed against for many years. However, I have always favored a balancing approach. And as this essay demonstrates, I have never been a fan of testimonialism because it disregards the core value of confrontation in relation to large quantities of

¹⁰³ See FED. R. EVID. 104(a).

¹⁰⁴ Raeder, *After Giles*, *supra* note 95, at 113.

¹⁰⁵ Raeder, *Confrontation Clause*, *supra* note 100, at 19.

¹⁰⁶ See *Black v. Romano*, 471 U.S. 606, 612 (1985) (“[P]robationer is entitled [under due process] to cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation.”).

nontestimonial hearsay offered against the defendant, while at the same time dramatically impacting the prosecution for events outside the government's control, even when the hearsay is reliable and critical to conviction.

Not surprisingly, courts have attempted to evade the testimonial ban by finding the admission of testimonial evidence to be harmless error. This has been particularly evident in cases where the claim of forfeiture is rejected.¹⁰⁷ The Supreme Court recently noted, “[w]here a decision has ‘been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,’ these factors weigh in favor of reconsideration.”¹⁰⁸ One wonders whether the Court will one day reject *Crawford* and its progeny like it previously rejected *Ohio v. Roberts*,¹⁰⁹ to return to a more balanced Confrontation Clause approach as suggested by *Mattox v. United States*.¹¹⁰

¹⁰⁷ See, e.g., *People v. Byron*, 88 Cal. Rptr. 3d 386, 400 (Cal. Dist. Ct. App. 2009); *People v. Moran*, No. BA204002, 2009 WL 162293, at *7-10 (Cal. Dist. Ct. App. Jan. 26, 2009); *People v. Luster*, No. B194825, 2008 WL 4571937, at *8 (Cal. Dist. Ct. App. Oct. 15, 2008); *People v. Tovar*, No. G040052, 2008 WL 3524614, at *5 (Cal. Dist. Ct. App. Aug. 14, 2008); *People v. Baker*, No. 278951, 2008 WL 4762776, at *2 (Mich. Ct. App. Oct. 30, 2008); *Davis v. State*, 268 S.W.3d 683, 706-08 (Tex. Crim. App. 2008); see also *In re Rolandis G.*, 902 N.E.2d 600, 616-17 (Ill. 2008) (similar result in a child abuse case).

¹⁰⁸ *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (alterations in original).

¹⁰⁹ 448 U.S. 56 (1980); see *supra* note 46 and accompanying text.

¹¹⁰ 156 U.S. 237 (1895); see *supra* notes 97-98 and accompanying text.