

# FORFEITURE OF CONFRONTATION RIGHTS AND THE COMPLICATED DYNAMICS OF DOMESTIC VIOLENCE: SOME THOUGHTS INSPIRED BY MYRNA RAEDER

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Aviva Orenstein\*

Myrna was a great friend and a great scholar. What I admired most about her was the way she integrated her devotion to intellectual rigor with her commitment to justice. Both personally and in her scholarship, Myrna was constantly concerned with the less fortunate, those people, such as battered women or children of prisoners, who tend to be overlooked in standard legal analysis. But she was not an ideologue. Married to her desire for justice was Myrna's careful argumentation, intellectual integrity, and thoughtfulness. This approach was an important part of her legacy to me and others in the academy; it was most apparent when two treasured values came into conflict.

Such a conflict arises when a victim of domestic violence does not testify but the prosecution wishes to use her statement against the accused. We must balance the importance of prosecuting crimes of domestic violence, thereby holding batterers accountable, with the value of respecting the right of a criminal defendant to confront the witnesses against him.<sup>1</sup> Specifically, under what circumstances can a prosecutor offer into evidence an out-of-court statement by a victim of domestic violence, despite the victim's absence

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\* Aviva Orenstein is a Professor of Law and Val Nolan Fellow at the Indiana University Maurer School of Law. Thanks to Southwestern School of Law for inviting me to participate in this wonderful symposium. Thanks to Brian Hamilton for his research assistance. And as always, thanks to my mother, Sylvia Orenstein, a retired public defender, appellate division, for her excellent editing and commentary on this piece.

1. The right to confront witnesses comes from the Sixth Amendment's Confrontation Clause to the United States Constitution. It provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

and unavailability for cross-examination, on the grounds that the accused forfeited his confrontation right?<sup>2</sup>

In 2004, in *Crawford v. Washington*,<sup>3</sup> the Supreme Court changed the interpretation and the practical effect of the Confrontation Clause. Overruling twenty-five years of prevailing precedent, *Crawford* held that for a “testimonial statement” to be offered against the accused, the declarant must be available for confrontation, or if unavailable, subject to cross at some previous time.<sup>4</sup>

The practical effect of *Crawford* was to exclude many out-of-court statements against the accused that had until then been readily admitted under *Ohio v. Roberts*,<sup>5</sup> which allowed statements that fell within firmly rooted hearsay exceptions or that were particularly trustworthy to pass Confrontation Clause muster.<sup>6</sup> Nowhere was the effect of *Crawford* more striking than in domestic violence cases,<sup>7</sup> where victims often recant or refuse to testify.<sup>8</sup> Before *Crawford*, prosecutors had routinely relied on domestic

2. As will be evident throughout, Myrna was both prolific and insightful on the intersection of confrontation and domestic violence. See, e.g., Myrna S. Raeder, *Thoughts about Giles and Forfeiture in Domestic Violence Cases*, 75 BROOK. L. REV. 1329 (2010).

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

4. See *Davis v. Washington*, 547 U.S. 813, 821 (2006) (“In *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004), we held that this provision bars ‘admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’”). *Crawford*’s reference to evidence that was subject to cross-examination previously essentially ensured that evidence admitted under the former testimony hearsay exception would not violate the Confrontation Clause because the former testimony exception only admits evidence where the declarant was unavailable but had been cross examined in another hearing or proceeding. See *Crawford*, 541 U.S. 36. The reach of *Crawford* and its progeny transcends the interpretation of confrontation and has served as the vehicle for exploring theories of originalism interpretation and consideration of the role of policy in constitutional interpretation.

5. *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004).

6. See *Crawford*, 541 U.S. at 60–69 (describing, criticizing, and overruling *Roberts*).

7. See Myrna S. Raeder, *Domestic Violence, Child Abuse and Trustworthiness Exceptions after Crawford*, 20 CRIM. JUST. 24, 24 (2005–06) (“*Crawford*’s fallout is being felt throughout the criminal justice system, but it has had a unique impact on domestic violence, child abuse, and elder abuse cases where absent victims and witnesses had become commonplace.”).

8. By some calculations, as many as 80 percent of domestic violence victims recant their accusations at some point or simply refuse to testify. See Celeste E. Byrom, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After Crawford v. Washington*, 24 REV. LITIG. 409, 410 (2005) (citing EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 194 (3d ed. 2002)). Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse*, 71 BROOK. L. REV. 311, 329 (2005) (“It became obvious relatively quickly in the fight against domestic violence that the major impediment to obtaining convictions was that the majority of battered women did not want to testify. Even when they appeared at trial, they often recanted their accusations and generally were bad witnesses, resulting in relatively few convictions.”).

violence victims' excited utterances to admit the hearsay, which by definition passed the toothless confrontation test of *Roberts*. After *Crawford*, those statements, often the crux of the evidence (because police officers arrived after the violence had been inflicted and could not testify to the occurrence based on their personal knowledge), raise Confrontation Clause concerns.

Scholars generally agree that abandoning the ineffective approach of *Roberts*, which merely collapsed the constitutional standard into the hearsay rule, was a good idea. However, there is much more debate about the wisdom and utility of the Court's focus on "testimonial statements," a category that has presented some serious interpretive difficulties.<sup>9</sup> Most of the confusion and the subsequent Supreme Court opinions applying (one could not rightfully say clarifying) *Crawford* entailed trying to distinguish testimonial versus non-testimonial statements. The distinction is crucial because, as it is now clear, the Confrontation Clause only applies to testimonial statements<sup>10</sup> – whatever those are. Because we need some working definition, I propose that we follow the suggestion of the National Association of Criminal Defense lawyers, cited in *Crawford*, that testimonial statements are those "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."<sup>11</sup> The Court explained that "at a minimum" the definition includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations."<sup>12</sup>

Cases exploring the definition of "testimonial statements" fall into two distinct categories. The first category includes cases of violence and mayhem (only one of which, the most recent, does not involve an assaulted woman).<sup>13</sup> The second category involves forensic laboratory reports, for example, statements by a lab concerning whether the white powder found on the

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9. In a series of narrow decisions that ducked difficult questions, *see, e.g., Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial'"), the Court has bequeathed confusion and illogical distinctions for the lower courts to puzzle out.

10. *See Whorton v. Bockting*, 549 U.S. 406, 420 (2007) ("[T]he Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability."); *Michigan v. Bryant*, 131 S. Ct. 1143, 1153 (2011) ("We . . . limited the Confrontation Clause's reach to testimonial statements.").

11. *Crawford*, 541 U.S. at 52.

12. *Id.* at 68.

13. *See Bryant*, 131 S. Ct. at 1143 (involving the identification of a shooter by his dying victim). Although *Crawford* itself did not involve domestic violence, it concerned an attempt by the accused to punish the victim for an attempted sexual attack on the accused's wife. The first line of the *Crawford* opinion reads: "Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia." 541 U.S. at 38.

accused was cocaine.<sup>14</sup> The lab analysis cases considered whether such reports are testimonial and if so, who in the process of generating such reports must be made available for cross-examination.<sup>15</sup> Remarkably, an odd combination of hysterical females and non-emotional, hyper-rational science techies constitute the out-of-court declarants who have provided the factual underpinnings for the Court's Confrontation Clause jurisprudence.

Two of the earliest and most important cases deciding what statements counted as "testimonial" involved domestic violence. The companion cases of *Davis v. Washington* and *Hammon v. Indiana*<sup>16</sup> decided in 2006, two years after *Crawford*, both concerned domestic violence victims who made statements to police at the scene of their beating. The issue in both cases was whether the victims' out-of-court statements constituted testimonial statements for confrontation purposes.<sup>17</sup> The Court concluded that in *Davis*, the victim's statements were nontestimonial because the threat of violence was still ongoing and "circumstances objectively indicat[ed] that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency."<sup>18</sup> By contrast, in *Hammon*, the majority concluded that the victim's statements were testimonial (and hence inadmissible) because there was "no such ongoing emergency, and that the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution."<sup>19</sup>

Because the focus here is on forfeiture, an exception to confrontation, rather than on the rule of when confrontation applies, I need not consider *Davis* and *Hammon* in detail. The cases are relevant to this analysis, however, in one important respect: they serve as cultural artifacts that provide insight into the Court's attitude towards domestic violence. Elsewhere, I and others have criticized the Court's facile dualism between seeking safety (a nontestimonial purpose) and reporting a crime (a quintessential testimonial purpose) in the domestic violence arena where reporting a crime may be the only way to seek safety and the threat is ongoing.<sup>20</sup> I will raise a similar

14. See, e.g., *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

15. See generally, Richard D. Friedman, *Confrontation and Forensic Laboratory Reports*, 45 TEX. TECH L. REV. 51 (2012) (discussing the lab report cases).

16. *Davis v. Washington*, 547 U.S. 813 (2006) (decided concurrently with *Hammon v. Indiana*, 546 U.S. 976 (2005)).

17. *Id.* at 817.

18. *Id.* at 822, 828.

19. *Id.* at 822, 829.

20. See Aviva Orenstein, *Sex Threats and Absent Victims: The Lessons of Regina v. Bedingfield for Modern Confrontation and Domestic Violence*, 79 FORDHAM L. REV. 115, 115 (2010); Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and Its Loss*,

concern about understanding and respecting women's experiences regarding forfeiture.

From the initial rollout of its new approach to confrontation, the Court indicated that two possible exceptions existed to the *Crawford* rule, both of which emanated from the common law at the time the Sixth Amendment was written. The first exception is the dying declaration, a vehicle for admitting evidence from absent declarants that the founders themselves recognized.<sup>21</sup> Testimonial dying declarations, such as those made by the dying victim to interrogators provided solely to convict the perpetrator, would be admissible even though the victim was never available for cross examination concerning her statements – a clear violation of the rule set out in *Crawford*.<sup>22</sup> The Supreme Court has never actually heard a dying declaration case, but has, in increasingly forceful dicta,<sup>23</sup> indicated that it is a “sui generis”<sup>24</sup> exception to its confrontation rule.

Similarly, an accused can forfeit confrontation rights by rendering a witness unavailable. *Reynolds v. United States*<sup>25</sup> involved an alleged bigamist who before his trial sent his (alleged) second wife away so that she could not testify against him.<sup>26</sup> The Court affirmed that as a matter of equity and respect for the trial process, a criminal defendant who makes a witness unavailable cannot later be heard to complain that he cannot confront her in court.<sup>27</sup> In dicta, *Crawford* indicated that forfeiture remains a viable exception to confrontation,<sup>28</sup> and in 2008, the Supreme Court decided *Giles*

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15 J.L. & POL'Y 725, 726 (2007) (arguing that the Court's understanding of domestic violence is “sufficiently inaccurate as to fatally undermine the coherence of both doctrine and theory”).

21. The dying declaration requires that: (1) the declarant is unavailable (usually this is satisfied because the declarant actually did die); (2) the declarant had a sincere belief in her impending death; and (3) the statement concerned the cause of death. FED. R. EVID. 804(b)(2). It is available in homicide and civil cases only. *Id.*

22. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

23. *Giles v. California*, 554 U.S. 353, 358 (2008) (“We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unfronted. The first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying.”) (citations omitted).

24. *Crawford*, 541 U.S. at 36 n.6.

25. *Reynolds v. United States*, 98 U.S. 145, 158 (1879) (“The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege.”).

26. *Id.* at 160.

27. *Id.* at 158.

28. *Crawford*, 541 U.S. at 62 (“[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”).

*v. California*,<sup>29</sup> which confirmed that forfeiture did indeed constitute an exception to confrontation. The central issue in *Giles*, however, concerned intent.<sup>30</sup> The Court held that to qualify for the exception of forfeiture by wrongdoing, the prosecution must show not only that the accused made the witness unavailable, but must also prove that the accused “intended to prevent a witness from testifying.”<sup>31</sup> Mere knowledge of the consequences of the accused’s actions would not suffice to trigger forfeiture; otherwise, every voluntary homicide would also by necessity become a forfeiture case.

In *Giles*, the accused shot his unarmed ex-girlfriend, Brenda Avie, six times before fleeing the scene.<sup>32</sup> Despite a shot that appeared to be a defensive hand wound and one that appeared to have entered her back after she was already on the ground, at the murder trial Giles testified that he killed Avie in self-defense.<sup>33</sup> To rebut charges of Avie’s aggression, prosecutors introduced evidence that three weeks before her death, Avie had made a tearful, frightened complaint to the police at the stationhouse that Giles had injured her and threatened her life.<sup>34</sup> Because Giles killed Avie out of anger and not to prevent her testimony (no charges were pending), the majority deemed Avie’s prior out-of-court statement to police inadmissible.<sup>35</sup> Her statements were testimonial and did not fall under the forfeiture exception.<sup>36</sup>

In advocating a subjective intent requirement for forfeiture, Justice Scalia chided the dissent for making the practical point that an intent requirement would exclude vital evidence in domestic violence cases and, in fact, create a perverse incentive to kill a partner, rather than just injure her.<sup>37</sup> Justice Scalia distanced himself from and indeed mocked what he saw as identity politics, writing:

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29. *Giles*, 554 U.S. at 353.

30. *Id.* at 359-60.

31. *Id.* at 361-62.

32. *Id.* at 356.

33. *Id.*

34. *Id.* at 356-57.

35. *Id.* at 358, 377.

36. Avie’s statements to police did not fall under the dying declaration because she made them without consciousness of imminent death. See generally Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1141.

37. See *Giles*, 554 U.S. at 365. Breyer criticizes the majority’s approach, which “both creates evidentiary anomalies and aggravates existing evidentiary incongruities. Contrast (1) the defendant who assaults his wife and subsequently threatens her with harm if she testifies, with (2) the defendant who assaults his wife and subsequently murders her in a fit of rage. Under the majority’s interpretation, the former (whose threats make clear that his purpose was to prevent his wife from testifying) cannot benefit from his wrong, but the latter (who has committed what is undoubtedly the greater wrong) can. This is anomalous, particularly in this context where an equitable rule applies.” 554 U.S. at 388 (Breyer, J., dissenting).

The dissent closes by pointing out that a forfeiture rule which ignores *Crawford* would be particularly helpful to women in abusive relationships—or at least particularly helpful in punishing their abusers . . . [W]e are puzzled by the dissent’s decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women?<sup>38</sup>

Hectoring tone aside, Justice Scalia, in addition to dismissing the relevance of the real-world effects of his rulings,<sup>39</sup> expressed antipathy for any special rule in the domestic-violence context. Justice Scalia did, however, note one potential important factor about domestic violence cases, observing:

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 . . . Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.<sup>40</sup>

Although Justice Scalia rejected what he saw as the dissent’s championing of special rules for the ladies, he did concede that a violent family dynamic might indeed shed light on whether a chronic abuser rendered the victim-witness unavailable.

Justice Souter, who concurred in the judgment, providing a crucial fifth vote in the 5-4 *Giles* decision, added an even more direct statement that, though the forfeiture rules are the same for all types of cases, applying the intent requirement would be easy in domestic violence cases.<sup>41</sup> Justice Souter wrote that there was no

reason to doubt that the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the

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

39. Justice Scalia has proven stubbornly disinterested in the practical effects of his *Crawford* jurisprudence. This fact is notable in the lab analysis cases where Scalia has rejected arguments about the impractical and essentially hollow burden *Crawford* places on the state. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2008) (“The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.”).

40. *Giles*, 544 U.S. at 377.

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

evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.<sup>42</sup>

The context of domestic violence complicates the Court's analysis in two specific ways. First, as with most forfeiture cases in the domestic violence context, the witness is also the victim. Unlike a witness who unluckily happened to stumble upon a mafia hit in progress, the witness is herself the one who was the target of the criminal behavior. Second, it is not just a random person who perpetrated the crime against the witness, but an intimate partner, often someone whom the witness loves or once loved. The accused and the victim-witness know each other well and, based on their prior history and perhaps even current intimacy, can engage in subtle forms of communication without necessarily resorting to explicit threats, bribes, or promises. How does the fact of an abusive relationship inform the application of the intent requirement?

Professor Tom Lininger suggests taking Scalia up on what Lininger deems Scalia's invitation to think about how forfeiture might work in domestic violence cases.<sup>43</sup> In a thought-provoking, practical, and savvy article, Lininger, a former prosecutor, proposes *per se* rules.<sup>44</sup> He advocates that courts should find the requisite intent where the defendant has done any of the following: violated a restraining order; committed any act of violence while judicial proceedings are pending; or engaged in a prolonged pattern of abusing and isolating the victim.<sup>45</sup> In providing this jurisprudential framework Lininger hopes to "allow trial courts to apply *Giles* faithfully" while still accounting for the special circumstances of a witness reporting violence received at the hands of her intimate partner.<sup>46</sup>

How have trial and appellate courts interpreted *Giles* and applied it in domestic violence cases? Have they quoted Justice's Souter's language or adopted Professor Lininger's *per se* standard? In attempting to figure out the legacy of *Giles*, I searched post-*Giles* case law, both federal and state.

In reviewing the case law, I made one additional distinction, setting aside the cases that, like *Giles*, ended in the death of the victim. So far unremarked

42. *Id.*

43. Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857 (2009).

44. *Id.* at 865.

45. *Id.*

46. *Id.*; see also Donald A. Dripps, *Controlling the Damage Done by Crawford v. Washington: Three Constructive Proposals*, 7 OHIO ST. J. CRIM. L. 521 (2010) (suggesting a rebuttable presumption that an otherwise unexplained unavailability of a witness previously injured or threatened by the accused is the result of improper pressure brought by the defendant).

is the additional wrinkle presented in *Giles* that complicates the forfeiture analysis: *Giles* falls within the gruesome subset of domestic violence cases that result in femicide. Because *Giles* killed his girlfriend, she was, by definition, unavailable to testify, and a per se rule arguably makes a lot of sense. In this essay I focus on cases where the witness was alive and refused to testify.<sup>47</sup> This distinction complicates the analysis prompting us to wonder whether we should also consider the motives of the absent witness, in addition to the motives of the criminal defendant who made her unavailable.<sup>48</sup>

In looking at the post-*Giles* domestic violence prosecutions that raised the issue of forfeiture, but did not involve the death of the witness, I found, unsurprisingly, that courts have employed many procedural mechanisms to duck the forfeiture questions entirely. For instance, Courts elide an analysis of forfeiture if the accused failed to make a timely confrontation objection at the time the out-of court statements were introduced.<sup>49</sup> Even if objected to, courts often determine that, given the other strong evidence in the case, admission of the uncontroverted statements constituted harmless error.<sup>50</sup> Many of the cases challenging forfeiture arose on habeas. *Giles*, however, does not apply retroactively because the absence of an intent requirement for forfeiture does not meet the habeas standard of violating a clear constitutional rule announced by the Supreme Court.<sup>51</sup>

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47. In terms of intent in cases of femicide, either the accused killed the witness to prevent her from appearing at another hearing (such as another incident of battery, or even something unrelated, such as a custody matter), or he began beating the victim and realized that she would tell police and needed to silence her entirely, so he decided in the course of the beating to kill her. See *People v. Zumot*, No. BB943863, 2013 WL 6507459, at \*10 (Cal. Ct. App. Dec. 12, 2013) (“[F]orfeiture by wrongdoing doctrine applies when a defendant purposely kills a witness to prevent the witness from reporting the defendant’s conduct to the police.”).

48. Special interpretive questions abound in femicide case, including whether there must be an “ongoing matter” at the time of the forfeiture and whether making the witness unavailable must be the accused’s primary purpose in killing her. See *Oregon v. Supanchick*, 323 P.3d 231 (Or. 2014).

49. See, e.g., *State v. Thaves*, 175 Wash. App. 1012 (2013) (noting that on appeal defendant did not challenge the lower court’s finding that the victim’s statements were properly admitted under forfeiture-by-wrongdoing).

50. See, e.g., *State v. Carr*, 331 P.3d 544, 644 (Kan. 2014) (“We need not settle this dispute because we are persuaded that answering the question of whether any error on this [forfeiture] issue was harmless is dispositive.”); *State v. Lahai*, 18 A.3d 630 (Conn. App. Ct. 2011) (noting that the State had met its harmless-error burden); *State v. Ivey*, 427 S.W.3d 854 (Mo. Ct. App. 2014) (choosing to not resolve the forfeiture-by-wrongdoing issue because even if admission of testimonial statements were error, the defendant cannot show manifest miscarriage of justice if the error went uncorrected).

51. A federal court can only grant an application for writ of habeas corpus if the original adjudication of the claim: (1) “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States;” or (2) “resulted in a decision that was based on an unreasonable determination

Courts also adopt substantive alternatives to forfeiture. For instance, courts will not reach prosecutors' forfeiture arguments because they accept the alternative argument that the statement was nontestimonial and therefore the confrontation right did not apply in the first place.<sup>52</sup>

In other cases, the *Giles* intent requirement for forfeiture is so easily met that there is nothing of doctrinal interest (though the human interest abounds).<sup>53</sup> In some of these cases, where the accused is as stupid as he is malicious, the prosecution introduces unassailable evidence of direct, violent threats to the victim transmitted during conversations on the jailhouse phone, which were, of course, recorded.<sup>54</sup> Although the contents of those conversations are chilling, they pose no interpretive issues and the fact of domestic violence does not influence the inquiry regarding the obvious intent of the criminal defendant to make the witness unavailable.

I found and will consider here a few truly fascinating post-*Giles* cases that raise important and nuanced questions about how to apply forfeiture in

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of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (2012); see *Woodford v. Visciotti*, 537 U.S. 19, 24–26 (2002). The Supreme Court held that *Crawford* is not retroactive. See *Whorton v. Bockting*, 549 U.S. 406 (2007). Lower courts have held that *Giles* is not either. See, e.g., *Ponce v. Felker*, 606 F.3d 596 (9th Cir. 2010); *Hand v. Houk*, No. 2:07-cv-846, 2013 WL 2372180, at \*18 (S.D. Ohio May 29, 2013).

52. See, e.g., *People v. Racz*, No. B203267, 2010 WL 3387145 (Cal. Ct. App. Aug. 30, 2010) (holding that murdered wife's statements were nontestimonial and thus confrontation did not apply and the forfeiture issue was moot); *People v. Corpuz*, No. A121199, 2011 WL 2412379 (Cal. Ct. App. June 16, 2011) (holding wife's phone call to police during a beating was nontestimonial and any admission of her statements constituted harmless error); *People v. Robles*, 302 P.3d 269 (Colo. App. 2011) (holding victim's statements to friends and neighbors were nontestimonial and therefore only excludable, if at all, by hearsay rules); *State v. Shackelford*, 247 P.3d 582 (Idaho 2010) (holding victim ex-wife's statements were admissible because they were nontestimonial and therefore did not violate defendant's confrontation rights).

53. See, e.g., *State v. Dobbs*, 320 P.3d 705, 706 (Wash. 2014) (noting that accused "engaged in a campaign of threats, harassment, and intimidation against his ex-girlfriend, C.R., that included a drive-by shooting at her home and warnings that she would 'get it' for calling the police and she would 'regret it' if she pressed charges against him.>").

54. See, e.g., *People v. Jones*, 207 Cal. Rptr. 3d 571 (Ct. App. 2012). Sometimes the threats are to the economic security of the victim or to the safety of her children. See *People v. Sanchez*, No. B246573, 2014 WL 3842889, at \*8 (Cal. Ct. App. Aug. 5, 2014) ("[T]here was substantial evidence appellant was engaged in repeated attempts to prevent Gonzalez from testifying, involving discussions of money and even potential harm to her children."). Sometimes both love and threats are mingled together. See, e.g., *People v. Smart*, 989 N.Y.S.3d 631, 634 (N.Y. 2014) (accused threatened on jailhouse telephone that if his girlfriend testified against him in a robbery case he would "wring" her "fucking neck" but also presented her failure to appear in court as an act of love).

the domestic violence context.<sup>55</sup> In *Commonwealth v. Szerlong*,<sup>56</sup> the accused allegedly entered his girlfriend's home, grabbed her by the throat while she was asleep, and held a knife to her throat.<sup>57</sup> The victim (who remained unnamed in the opinion) did not report the incident; her sister did, against the victim's express wishes.<sup>58</sup> The prosecutor moved in limine to admit hearsay statements made by the victim to the police.<sup>59</sup> When the prosecution attempted to call the victim-witness to testify at a dangerousness hearing, she refused on the grounds of spousal privilege.<sup>60</sup> After the assault, but before the trial, the victim married Szerlong.<sup>61</sup> The question before the court was whether by marrying the victim-witness, Szerlong intended to make her unavailable to testify against him.<sup>62</sup> The Supreme Judicial Court of Massachusetts concluded that he did and affirmed the conviction, which admitted the victim-witness' testimonial statements under the forfeiture doctrine.<sup>63</sup>

In the prosecutor's motion in limine in *Szerlong*, the government cited evidence from the victim's best friend that the victim explained to her "that marriage was the only way that she would not have to testify" against

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55. Cases involving child molestation present another difficult interpretative question. When the molester, as he abuses his victim, warns the child not to tell, is he also triggering forfeiture? See *People v. Burns*, 832 N.W.2d 738 (Mich. 2013) (not reaching the constitutional question and holding that abuser's warnings to child not to tell of sexual contact did not satisfy the Michigan hearsay exception for forfeiture by wrongdoing); Thomas D. Lyon & Julia Dente, *Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1181 (2012) (proposing a "forfeiture by exploitation" approach in cases of child abuse whereby "courts should hold that defendants have forfeited their confrontation rights if they exploited a child's vulnerabilities such that they could reasonably anticipate that the child would be unavailable to testify.").

56. *Commonwealth v. Szerlong*, 933 N.E.2d 633 (Mass. 2010).

57. *Id.* at 637.

58. *Id.* at 640.

59. *Id.* at 637.

60. *Id.* Massachusetts recognizes a spousal testimonial privilege owned by the (would be) testifying spouse. Massachusetts Guide to Evidence 504(a) provides that "[a] spouse shall not be compelled to testify in the trial of an indictment, complaint, or other criminal proceeding brought against the other spouse" and that "[o]nly the witness-spouse may claim the privilege. It does not apply in civil proceedings, or in any prosecution for nonsupport, desertion, neglect of parental duty, or child abuse, including incest. Traditionally, spousal privilege was owned by the accused spouse (the husband) who could force his wife to stand by her man. This ancient privilege derives from the unity of marriage (whereby the legal identity of the wife merged into the husband's); since the witness would not be forced to testify against himself, and legally, his wife was part of himself, she could not testify either. A more modern approach maintains the spousal testimonial privilege but renders it gender neutral and places the choice whether to testify into the hands of the spouse being asked to testify. See *Trammel v. United States*, 445 U.S. 40 (1980).

61. *Szerlong*, 933 N.E.2d at 637.

62. *Id.* at 641.

63. *Id.* at 638.

Szerlong.<sup>64</sup> The victim told her friend that “she had discussed the matter with the defendant and they had decided to marry because they knew that, if they were married, she would not have to testify against him.”<sup>65</sup> Similarly, the victim’s sister was prepared to testify that when she reported the violent incident to the police, approximately one week after the violence had occurred, she “knew of no plans for the victim and the defendant to marry.”<sup>66</sup> The victim did not tell her family that she and Szerlong had married, and only informed her sister so that she would not be surprised when the victim invoked the spousal privilege in open court at the accused’s trial.<sup>67</sup>

I have deep concerns about the use of forfeiture in *Szerlong*. Perhaps the marriage was merely a sham and, as the prosecution argued, the accused only married the victim-witness to prevent her from testifying. If the accused threatened the victim-witness with more violence if she did not marry him, then such a forced marriage, like the forced exile in *Reynolds*, 185 years earlier, would certainly constitute forfeiture. But nothing in the facts of *Szerlong* indicate that the victim was intimidated into marrying her batterer. It looks more like a choice made out of misguided loyalty and unhealthy attachment than force or duress. Alternatively, perhaps she wanted to marry him all along and the prospect of testimony prompted Szerlong’s proposal.

How can the law address the uncertain sway of emotional blackmail and appeals to love? This question has arisen twice recently in New York trial courts. In *People v. Smith*,<sup>68</sup> a Kings County court applied forfeiture when defendant had violated a court no-contact order, and called his girlfriend, the victim-witness, over 300 times from jail, even though the prosecution could present no evidence that Smith had threatened her with any harm. The court explained that “[t]he power, control, domination and coercion exercised in abusive relationships can be expressed in terms of violence certainly, but [is] just as real in repeated calls sounding expressions of love and concern.”<sup>69</sup> It further noted: “Orders of protection are therefore issued by courts as much to prevent assaults on the psyche of a vulnerable victim as to prevent assaults on her person.”<sup>70</sup> Two years later, in *People v. Turnquest*<sup>71</sup> the court, citing *Smith* (but oddly not mentioning *Giles*), held that the accused forfeited his right to confront the statements of his wife, the victim-witness at his trial for

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64. *Id.* at 640.

65. *Id.*

66. *Id.*

67. *Id.*

68. *People v. Smith*, 907 N.Y.S.2d 860 (App. Div. 2010).

69. *Id.* at 861.

70. *Id.*

71. *People v. Turnquest*, 938 N.Y.S.2d 749 (Sup. Ct. 2012).

assaulting her, including pushing her out of a moving vehicle.<sup>72</sup> The court found that the evidence demonstrated “quite convincingly that defendant’s misconduct—his two surprise visits to Ms. Turnquest’s home, his barrage of telephone calls to Ms. Turnquest, and his use of various third parties to contact Ms. Turnquest, all in violation of the extant orders of protection—caused the once completely cooperative complainant to become unavailable.”<sup>73</sup> Ms. Turnquest was actually willing to testify, but she planned to recant her statements to police, saying that she voluntarily jumped from the car going forty miles per hour.<sup>74</sup> Through third parties, the accused tried to “get Ms. Turnquest to prepare a document or ‘affidavit’ that defendant intended to then submit to the ‘judge’ to get the charges ‘tossed’ out.”<sup>75</sup> Notably both *Smith* and *Turnquest* involved breaches of a protective order, one of Lininger’s three criteria for per se forfeiture.<sup>76</sup>

Similarly, in *Garcia v. State*,<sup>77</sup> a Texas Court of Appeals affirmed forfeiture, despite the Garcia’s arguments (conceded by the State during trial), that he made no direct threats to his girlfriend, Cooper, to prevent her testimony.<sup>78</sup> Cooper had been assaulted, bound, choked, gagged with a plastic bottle and hit in the back of her head.<sup>79</sup> At the time of the beating, Cooper exhibited fear of Garcia and great reluctance to report the incident.<sup>80</sup> Garcia (who kept on encouraging Cooper to deal with his attorney and not the prosecutor or police)<sup>81</sup> never issued any threats. Instead Garcia told Cooper, “Do whatever you have to do,” and warned her not to trust the

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72. *Id.* at 752, 762.

73. *Id.* at 760.

74. *Id.* at 754.

75. *Id.* at 761.

76. Applying Professor Lininger’s approach, I find treating a history of domestic violence as *per se* forfeiture even in the absence of actual threats or coercion both interesting and troubling. Violation of a protective order seems to me the best case for per se application of forfeiture because it demonstrates that accused would be willing to break the law. Again, however, a breach to apologize or to check on the welfare of their children is different from a threat or leaving disturbing messages on the witness’s phone.

77. *Garcia v. State*, No. 03-11-00403-CR, 2012 WL 3795447, at \*1 (Tex. Ct. App. Aug. 29, 2012).

78. *Id.* at \*10-11.

79. *Id.* at \*2.

80. *Id.* at \*2-3.

81. *Id.* at \*10. “In a letter written to Cooper in March 2011, approximately two months before his trial was scheduled to begin, Garcia discussed the charges pending against him:

I’ve done my part. Now all that’s left is for you to do yours. You make sure you do everything through my lawyer and not through your lawyer or the D.A. She will advise you on everything. So once again do everything through my lawyer ( [name of defense counsel], my criminal lawyer). F\*\*k what your lawyer or the D.A. has to say. If they try and threaten you with anything. You run to and talk about it with my lawyer.”

*Id.*

prosecutors because they will “twist your words.”<sup>82</sup> Garcia reminded her that “what you do can affect my life.”<sup>83</sup> In discussing the upcoming trial, Garcia told her, “I just need to know where you stand; you don’t need to go at all” and informed her that he was “pretty anxious about the trial.”<sup>84</sup> Garcia also told Cooper that their life together would be different based on whether he “gets out soon” or “gets out later.”<sup>85</sup> In their final conversation before trial, Garcia asked Cooper about her thoughts regarding the prosecutors, telling Cooper, “They’re out to screw us,” and, “I’m trying to shield you from . . . these people.”<sup>86</sup> The court, citing Justice Souter’s concurrence in *Giles*, concluded that Garcia, through his persistent contact via mail and jailhouse phone calls, persuaded Cooper to fail to appear in court to testify, even though he did not directly threaten her.<sup>87</sup> In this case, although I would reject a *per se* finding of forfeiture, the facts support that Garcia, having issued threats in the past was, per his attorney’s coaching, carefully issuing his threats in code. This is different from an appeal to love.

The harder question is whether asking for the victim to preserve a relationship or requesting a victim’s hand in marriage should always constitute forfeiture. Is there any room for love and forgiveness so that a victim might choose to marry her one-time abuser and might of her own independent volition choose not to testify? If we treat all victims of domestic violence who refuse to testify as necessarily intimidated, we deny their agency and experience. By ignoring her sincere wishes, the law in some cases may be complicit in the power dynamic that belittles and silences victims of domestic violence.<sup>88</sup>

The facts of *Szerlong* underscore that the sole focus in forfeiture doctrine is on the behavior of the accused, and not the experience and choices of the witness. This focus on the accused makes sense given that the central question of forfeiture revolves around the equity of preventing the accused from benefiting from his bad behavior that rendered the witness unavailable. But solely looking at the accused’s behavior and intent is also undesirable because it gives no value, credence, or even consideration to the behavior, intent, voice, and personhood of the victim-witness. No one inquires what

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at \*9-11.

88. Cf. Tamara L. Kuennen, *Love Matters*, 56 ARIZ. L. REV. 977, 979 (2014) (“Although feminist legal scholars have unearthed the many rational reasons women experiencing abuse may choose to preserve, rather than sever, their intimate relationships, we (feminist legal scholars) have ignored love as a reason for staying.”).

the witness-victim actually desires. Instead, her identity is reduced to her status as a battered woman, one who apparently does not know her own mind or act in her own best self-interest. She is *per se* deemed a sap or a masochist.<sup>89</sup> She does not realize that her marriage is a cruel joke.

In cases of outright physical threats and intimidation, one has little trouble believing that analyzing the forfeiture question from the perspective of the accused and the perspective of the witness-victim will lead to the same result (though even in cases of violence, fear and love may mingle in a soup of emotions). The case for forfeiture becomes murkier, however, where there is love, forgiveness, or concern about who will support the family in the batterer's absence, and the accused has not acted to interfere directly with the witness's right to testify. What are the right questions to ask when a woman simply refuses to testify because she loves the man who assaulted her or she worries whether she and her kids can make it without him? Certainly, jailing the woman as a material witness or holding her in contempt or otherwise coercing her testimony seems abusive, a point that Myrna herself raised.<sup>90</sup> The less intrusive approach, adopted in *Szerlong*, whereby the victim's prior statements are admitted under a combination of hearsay exceptions and forfeiture, is also problematic and echoes some old debates.

As noted above, before *Crawford*, the prior statements of a witness-victim were routinely admitted without the victim's testimony because such statements satisfied a firmly-rooted hearsay exception (usually the excited utterance) and then, by definition satisfied the Confrontation Clause under *Roberts*.<sup>91</sup> Scholars debated whether trying such victim-absent cases<sup>92</sup> was in the best interests of women.<sup>93</sup> In some respects, the issue is more pointed and poignant when considering forfeiture. Pre-*Crawford* prosecutors with non-drop policies simply did not care what the victim thought, and determined, as keepers of the peace if not paternalistic know-it-alls, that prosecuting the batterer was essential. However, in the area of forfeiture, when a battered woman claims it is her own independent decision not to testify because she loves the accused, we essentially tell her that she is experiencing a false emotion and that, really, she has been intimidated and

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89. *Id.* at 991-92 ("Women experiencing abuse are considered blameworthy or masochistic when they want to preserve their intimate relationships. Particularly when their desire is based, even partially, on love, it is viewed as maladaptive and even pathological.")

90. Raeder, *supra* note 8, at 328-29 (noting that women who refuse to testify have faced threats of imprisonment and criminal charges for child endangerment; some women have been jailed as material witnesses).

91. *Id.* at 328.

92. These were sometimes called "evidence based" or "victimless" prosecutions. See Raeder, *supra* note 7, at 24, in which Raeder aptly termed it "the witness lite/hearsay heavy approach." *Id.*

93. See Orenstein, *supra* note 20, at 145-47.

has not made a free choice even when there has been no threat of violence. The Court in *Szerlong* essentially announced to the victim-witness that her husband did not really love her and that his motive in marrying her was just to (or primarily to – this point is unclear) prevent her testimony.<sup>94</sup>

From perspectives of safety and respect, legitimate and heart-wrenching questions persist about whether to press a domestic violence prosecution where the victim-witness adamantly does not want to testify or to send her man to jail. Arguments in favor of respecting the victim's wishes include the fact that the victim may be in the best position to evaluate her own safety, and that not testifying may be the safer choice for her and her children in the long run.<sup>95</sup> Also, from a safety perspective, there is cause to worry about a system that uses statements made in emergencies against the accused (many of which will not be testimonial at all). The victim's willingness to call 911 to stop the beating may be very different from her willingness to send the batterer to jail. A policy of using the victim's statement without her participation in the trial may simply result in fewer calls seeking help, even when the victim is in grave danger. Finally, even if prosecutors have a legitimate case against the accused, some women may not trust the efficacy or fairness of the justice system, nor wish to participate in it, particularly if the accused is a member of a minority group that tends to receive harsher sentences and is overrepresented in the prison population.<sup>96</sup>

Aside from respecting the victim, other concerns arise about a broad application of forfeiture in the domestic violence context, particularly where the accused has not tried to dissuade the woman from testifying with violence or threats. We cannot dismiss the valid civil libertarian concern that the accused is deprived of cross-examining the statements of his accuser. If courts adopt the per se rule that a history of intimate-partner violence equals forfeiture, there is no way to confront statements that are false or exaggerated. The accused's status as a batterer and his past bad behavior forecloses a precious constitutional right. We must allow for the possibility that one reason a witness refuses to testify is that she does not stand by her original statement to police. Although I doubt this happens often, we cannot construct a system that presumes alleged victims of domestic violence never lie.

A categorical approach to domestic violence that treats all cases where there is an established history of violence as forfeiture can in some cases deny

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94. *Commonwealth v. Szerlong*, 933 N.E.2d 633, 641 (Mass. 2010).

95. *See Raeder, supra* note 8, at 329 (“A few researchers concluded that the empirical evidence indicated that some classes of women were put at greater risk by aggressive prosecution, particularly in misdemeanor cases where defendants were released pretrial, or received probation or short sentences.”) (citations omitted).

96. *See Orenstein, supra* note 20, at 144-45.

a woman her legitimate agency and deprive an accused of a fair trial. I agree that the wheedling, cajoling, and contrition on the part of the accused may seem false and just appear to be part of the cycle of violence between the accused and the victim-witness, but I am not ready to say in the absence of threats or bribes (overt or coded) that an offer to marry constitutes forfeiture.

My final question of course, is something I ask myself often in multiple contexts: What would Myrna do? First, Myrna drew a stark distinction between femicide cases and those where the victim-witness is alive and chooses not to testify.<sup>97</sup> Second, from the very beginning of *Crawford's* unfolding, because of her civil rights concerns, Myrna refused to expand forfeiture too broadly where the victim-witness was indeed available. In 2005 she wrote, presciently: "While forfeiture is likely to be a factor in a number of domestic violence cases, and prosecutors are correct to worry that the testimonial approach gives defendant more incentive to keep women from testifying, forfeiture cannot be assumed without specific evidence linking the defendant to the witness's failure to testify in cases where the victim is alive, since there are so many potential reasons for her absence at trial."<sup>98</sup> In commenting on *Giles*, Myrna enlarged upon with this reasoning, writing:

I have been more hesitant to substitute evidence of an abusive relationship as evidence of forfeiture without evidence of duress or bribe 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.<sup>99</sup>

Finally, Myrna commented directly on Professor Lininger's per se approach, which she "applauded"<sup>100</sup> but did not fully endorse. She observed that "[u]ndoubtedly, the three types of evidence that Professor Lininger suggests would be relevant to finding inferred intent," but nevertheless rejected a "per se rules mandate," in favor of a "rebuttable presumption."<sup>101</sup> Once the bright line approach of per se rules is rejected, we must, as Myrna indicated, wrestle with the hard cases where love and psychological influence, rather than force or bribes affect the witness-victim's behavior.

I do not know how Myrna would have come out in *Szerlong* or in the two New York cases where no force was used but instead the accused

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97. See Myrna S. Raeder, *Being Heard After Giles: Comments on the Sound of Silence*, 87 TEX. L. REV. 105, 108-09 ("I have always distinguished murder from other domestic violence cases, and pre-*Giles* argued for simple forfeiture without intent in murder cases.").

98. Raeder, *supra* note 7, at 31-32.

99. Raeder, *supra* note 2, at 1346.

100. Raeder, *supra* note 97, at 109.

101. *Id.* at 110-11.

resorted to cajoling and appeals to love. On the one hand, Myrna was keenly aware of the dynamics of domestic violence that center on control, and could rightly see the behavior of the accused as part of intimate partner violence dynamic. On the other hand, she was cautious about overextending forfeiture and denying the accused the right to confront the statement of witnesses who so love the accused they refuse to testify. Myrna modeled candor and compassion in her search for balance between the various rights involved. She wrote: “As a feminist who is also concerned about the defendant’s right to confrontation, I have long pondered the proper balance to ensure that the voices of women and children are heard, without eviscerating the ability of the defendant to confront live complainants, and not just second hand witnesses.”<sup>102</sup> Although I do not know how Myrna would have resolved this tough and interesting question, I can say with certainty that I would have loved to talk about it with her, and miss her deeply as a scholar, colleague, and friend.

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102. Raeder, *supra* note 8, at 313-14.