

SELECTIVE ORIGINALISM: SORTING OUT WHICH  
ASPECTS OF *GILES*'S FORFEITURE EXCEPTION  
TO CONFRONTATION WERE OR WERE NOT  
"ESTABLISHED AT THE TIME OF THE FOUNDING"

by  
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*In Giles v. California (2008), as previously in Crawford v. Washington (2004), Justice Scalia's majority opinion purported to follow the Framers' design for the Confrontation Clause. Giles did comport with the framing-era right insofar as it limited the forfeiture exception to confrontation to instances in which a criminal defendant had engaged in deliberate witness-tampering (although the opinions in Giles endorsed a loose notion of deliberateness). However, a review of the history of the confrontation right and forfeiture reveals that Giles departed from the common-law right in fundamental ways.*

*In framing-era law, forfeiture applied only to the sworn testimony that a witness who was kept away from trial by the defendant had previously given under the Marian statutes. Moreover, only the sworn and confronted prior testimony of an unavailable witness was admissible under forfeiture during the nineteenth century and most of the twentieth century. Unsworn and unopposed hearsay statements of the sort at issue in Giles were never admissible under forfeiture until the latter part of the twentieth century—and then were allowed under the reliability formulation of confrontation that Crawford rejected as a totally inadequate formulation of the right. Thus, a genuine originalist analysis would have undermined the constitutionality of current Federal Rule of Evidence 804(b)(6).*

*Additionally, all of the opinions in Giles persisted in endorsing Crawford's completely fictional claim that the original confrontation right regulated only "testimonial" hearsay, but did not apply at all to "nontestimonial" hearsay—notwithstanding that Justice Scalia made several assertions in Giles that undercut that pretended distinction. For*

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As indicated in the notes, this Article builds upon the author's prior discussions of historical confrontation doctrine in Articles in the *Brooklyn Law Review* and the *Brooklyn Journal of Law and Policy*. Except when noted, quotations of passages from historical sources in this article are presented with the historical spelling, capitalization, and punctuation, but in modern typeface and with modern spacing.

*example, he acknowledged that the general ban against hearsay arose from the same roots as the confrontation right itself. Nevertheless, dicta in Giles indicates that the justices intend to narrowly confine “testimonial” hearsay, and thus the confrontation right itself, to only those hearsay statements made to government officers, but to exempt all other hearsay as “nontestimonial,” including even statements made to physicians or nurses involved in gathering evidence for domestic violence prosecutions. In sum, the purported originalism in Giles was so selective it did not amount to originalism at all.*

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*“We often prefer to pretend that something has stayed the same, when it has actually changed a great deal.”\*\**

## I. INTRODUCTION

“Originalism” seems to have taken hold in the Supreme Court as a preferred mode of justifying constitutional rulings. That is unfortunate because, among other shortcomings, the historical claims justices make under the rubric of originalism often suffer from serious defects.

One common defect is that the justices engage in selective originalism; that is, they recognize only the specific aspect or aspects of the actual historical doctrine that fit—or that can be made to seem to fit—the result they desire to reach, but they ignore or evade other significant aspects that do not. However, if authentic historical doctrine is reconstructed more comprehensively, it often turns out that the full story is quite different—so much so that the Court’s construction of the original understanding of a constitutional provision is either highly attenuated from the actual history or even at odds with the actual history. Selective originalism is readily evident in recent Supreme Court opinions that interpret the Sixth Amendment Confrontation Clause, including the construction in the 2008 decision in *Giles v. California* of what is now called the “forfeiture-by-wrongdoing” exception to the confrontation right.<sup>1</sup>

### A. *Giles v. California*

The specific issue argued and decided in *Giles* was whether this forfeiture exception applies whenever a defendant’s wrongful conduct in some way caused a hearsay declarant to be unavailable to testify at trial (for example, by killing the declarant), or whether it applies only when the defendant acted wrongly for the purpose of preventing the declarant from testifying—that is, deliberate witness-tampering. In the context of deciding the admissibility of a murder victim’s hearsay declarations about a previous episode of violence, the California Supreme Court had endorsed the former, broader conception of forfeiture on the ground that it was “equitable” to do so in light of the defendant’s wrongful killing of the victim-declarant.<sup>2</sup> The California justices based that formulation on a statement in the Supreme Court’s 2004 ruling in *Crawford v. Washington*

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\*\* DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE* 283 (2d ed. 2004).

<sup>1</sup> 128 S. Ct. 2678 (2008).

<sup>2</sup> *Id.* at 2682 (citing *People v. Giles*, 152 P.3d 433, 435 (Cal. 2007)).

that “the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.”<sup>3</sup>

However, on certiorari, a six-to-three majority of the federal justices reversed and remanded. In keeping with the deliberate witness-tampering requirement of Federal Rule of Evidence, 804(b)(6),<sup>4</sup> which the justices had only recently described as having “codifie[d] the forfeiture doctrine,”<sup>5</sup> Justice Scalia’s opinion for the Court in *Giles* concluded that the forfeiture exception applies only when the defendant engaged in wrongdoing “designed” to prevent the hearsay declarant from testifying at defendant’s trial.<sup>6</sup> Notably, Justice Scalia asserted that this interpretation was compelled by the content of the common-law confrontation right at the time of the founding.<sup>7</sup>

The adoption of an originalist approach in *Giles* comported with the approach that the Court had previously taken when it rejected the then-prevailing reliability formulation of the confrontation right in the 2004 ruling in *Crawford v. Washington*.<sup>8</sup> Justice Scalia’s majority opinion in *Crawford* purported to construe the Sixth Amendment Confrontation Clause according to “the Framers’ design.”<sup>9</sup> More specifically, it purported to read the Clause “as a reference to the right of confrontation at common law” and thus endorsed limiting exceptions to the confrontation right to only those that were “established at the time of the founding.”<sup>10</sup> The justices subsequently applied *Crawford*’s originalist formulation when they fleshed out the “testimonial” boundary of the confrontation right in the 2006 ruling in *Davis v. Washington*.<sup>11</sup> Notably, in *Giles* Justice Scalia’s opinion for the Court and Justice Breyer’s dissenting opinion also both explicitly reaffirmed the justices’ previous commitment in *Crawford* to limit exceptions to the confrontation right to only those “established at the time of the founding.”<sup>12</sup>

In previous Articles, I have argued that *Crawford* and *Davis* fundamentally misdescribed and understated the Framers’

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<sup>3</sup> *Crawford v. Washington*, 541 U.S. 36, 62 (2004), cited in *Giles*, 152 P.3d, at 437–38.

<sup>4</sup> In pertinent part, FED. R. EVID. 804(b)(6) provides that “(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . (6) *Forfeiture by wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”

<sup>5</sup> *Davis v. Washington*, 547 U.S. 813, 833 (2006).

<sup>6</sup> 128 S. Ct. at 2684, 2687.

<sup>7</sup> *Id.* at 2682; See also *id.* at 2688 (describing historical common law doctrine as “conclusive”).

<sup>8</sup> 541 U.S. at 36 (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)).

<sup>9</sup> *Id.* at 68.

<sup>10</sup> *Id.* at 54.

<sup>11</sup> 547 U.S. at 813.

<sup>12</sup> *Giles*, 128 S. Ct. at 2682 (opinion of the Court) (quoting *Crawford*, 541 U.S. at 54); *Giles*, 128 S. Ct. at 2696 (Breyer, J., dissenting) (quoting *Crawford*, 541 U.S. at 54).

understanding of the confrontation right.<sup>13</sup> In this Article, I assess the historical validity of the justices' treatment of forfeiture by wrongdoing in *Giles* and conclude that the justices again seriously understated the framing-era, common-law confrontation right. As in prior Articles, the purpose of my historical critique is not to argue for a different originalist agenda, but rather to show why originalism does not (and cannot) offer a valid method for deciding contemporary issues of constitutional criminal procedure.<sup>14</sup>

### B. *Selective Originalism in Giles*

With regard to the specific deliberateness issue argued in *Giles*, Justice Scalia's majority opinion plainly came closer to the framing-era confrontation right than Justice Breyer's dissenting opinion. As I explain below, both the circumstances in which pre-framing historical authorities addressed what we now call forfeiture by wrongdoing, as well as the language in which they set out the doctrine, indicate that the framing-era conception of forfeiture was limited to instances of deliberate witness-tampering.

However, in another equally important respect Justice Scalia and Justice Breyer both endorsed a much broader forfeiture exception than any that had existed in framing-era law. The framing-era version of the forfeiture rule allowed the admission of only *prior sworn testimony* that a witness who was unavailable to testify at trial had previously given about the crime being tried under the authority of the Marian statutes.<sup>15</sup> However, forfeiture by wrongdoing was never applied to admit an *unsworn* hearsay account about a previous event of the sort at issue in *Giles*. Indeed, if one accepts that the framing-era, common-law

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<sup>13</sup> See, in chronological order, 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 (2005) [hereinafter Davies, *Crawford's Originalism*]; Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford's "Cross-Examination Rule": A Reply to Mr. Kry*, 72 BROOK. L. REV. 557 (2007) [hereinafter Davies, *Revisiting Crawford*]; 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 (2007) [hereinafter Davies, *Not the Framers' Design*].

<sup>14</sup> See Davies, *Not the Framers' Design*, *supra* note 13, at 465–69; Davies, *Crawford's Originalism*, *supra* note 13, at 206–17. See also Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1, 219–23 (2007) [hereinafter Davies, *Correcting Search History*]; Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in Chavez v. Martinez*, 70 TENN. L. REV. 987, 1043–45 (2003); [hereinafter, Davies, *Self-Incrimination*]; 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 Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 418–37 (2002) [hereinafter Davies, *Arrest*]; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 734–50 (1999) [hereinafter Davies, *Fourth Amendment*].

<sup>15</sup> The Marian statutes are discussed *infra* notes 68–83 and accompanying text.

confrontation right included a blanket “cross-examination rule”—as *Crawford* claimed,<sup>16</sup> and as Robert Kry asserts in another Article in this symposium<sup>17</sup>—that would mean that the framing-era forfeiture doctrine would have applied to only prior sworn *and confronted* testimony.

Moreover, although I disagree with *Crawford* and Kry regarding the existence of a cross-examination rule at the time of the Framing,<sup>18</sup> that disagreement does not extend to nineteenth-century law. The historical evidence does show that the confrontation right had come to be understood to make a defendant’s prior opportunity for cross-examination a condition for admitting prior testimony of unavailable witnesses in criminal trials during the nineteenth century and most of the twentieth century. Thus, the traditional, post-framing understanding of what is now called forfeiture by wrongdoing plainly was limited to *prior sworn and confronted testimony*. As a result, the traditional understanding of forfeiture by wrongdoing involved only a limited inroad on the confrontation right: the defendant lost the right to insist on cross-examination in the view of the trial jury but at least had an opportunity for a recorded cross-examination at the time the out-of-trial testimony was taken.<sup>19</sup>

Thus, as Justice Breyer’s dissenting opinion in *Giles* explicitly recognized, the forfeiture by wrongdoing doctrine was never applied to admit unsworn, unopposed hearsay statements until that exception was drastically enlarged—Justice Breyer calls it an “elephant of change”<sup>20</sup>—during the latter decades of the twentieth century.<sup>21</sup> Significantly, it was that recent expansion, which involved a *total denial* of the defendant’s confrontation right, that turned forfeiture by wrongdoing into a full-fledged “exception” to the confrontation right.

A genuine originalist analysis could not have accepted the recent expansion of the forfeiture exception. Indeed, if the justices had taken seriously the limitation of confrontation exceptions to those “established at the time of the founding,”<sup>22</sup> they could not have affirmed the constitutionality of Rule 804(b)(6) because that rule incorporates the recently expanded scope of the forfeiture exception and plainly permits the admission of unsworn and unopposed hearsay statements.<sup>23</sup> Nor is

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<sup>16</sup> *Crawford*, 541 U.S. at 46 (ruling that a testimonial hearsay declaration by an unavailable declarant is admissible in a criminal trial only if the defendant had a prior opportunity to cross-examine the declarant).

<sup>17</sup> Robert Kry, *Forfeiture and Cross-Examination*, 13 LEWIS & CLARK L. REV. 577 (2009).

<sup>18</sup> My disagreement with *Crawford* and Kry is discussed *infra* notes 181–86 and accompanying text.

<sup>19</sup> See Kry, *supra* note 17, at 580–82.

<sup>20</sup> *Giles v. California*, 128 S. Ct. 2678, 2706–07 (2008).

<sup>21</sup> *Id.* See the discussion *infra* notes 198–221, 250–51 and accompanying text.

<sup>22</sup> *Crawford*, 541 U.S. at 54.

<sup>23</sup> See *infra* notes 222–23 and accompanying text.

that the only way in which the forfeiture exception endorsed in *Giles* departed from the robust framing-era confrontation right.

The opinions in *Giles* also fundamentally departed from the common-law confrontation right when they continued to embrace *Crawford's* foundational claim that the Framers' intended for that right to regulate only the admission of more formal, "testimonial" hearsay in criminal trials but did not intend for the right to limit the admission of "casual," "nontestimonial" hearsay at all.<sup>24</sup> Although *Crawford* asserted that that distinction was a feature of "the Framers' design," it did not present any historical evidence of such a limitation.<sup>25</sup> The reason was that the claim was pure fiction. As I have previously documented, the historical authorities demonstrate that framing-era doctrine forbade the admission of *all* "hearsay," which was then defined to include *any* unsworn statement, with the lone exception of the dying-declaration of a murder victim.<sup>26</sup> Indeed, despite having written three originalist opinions in *Crawford*, *Davis*, and *Giles*, Justice Scalia has yet to identify a historical reported case that admitted unsworn "nontestimonial" hearsay statements of an unavailable declarant.<sup>27</sup> The reason is that there are none.

Rather, framing-era doctrine carried virtually the opposite effect as *Crawford's* withdrawal of the confrontation right from nontestimonial hearsay. As I describe below, the only form of forfeiture recognized in framing-era evidence law was merely a facet of the Marian unavailability rule which permitted the admission of only the sort of formal, sworn prior testimony that plainly would constitute "testimonial hearsay" under *Crawford's* scheme. However, framing-era doctrine uniformly *prohibited* admission of the sort of casual, informal hearsay that *Crawford* now completely exempts from the confrontation right under its "nontestimonial hearsay" label. Indeed, framing-era doctrine treated the virtually total ban against hearsay as a facet of the confirmation right.<sup>28</sup> Hence, *Crawford's* testimonial definition of the scope of the confrontation right effectively stands the original understanding of that right on its head.

Despite the novelty of *Crawford's* restriction of the confrontation right to only "testimonial" hearsay statements, all of the opinions in *Giles* indicate that the justices intend to adhere to that recent and drastic curtailment of the historical confrontation right. Indeed, statements in both Justice Scalia's and Justice Breyer's opinions indicate that the

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<sup>24</sup> See *infra* notes 260–70 and accompanying text.

<sup>25</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>26</sup> *Davis*, *Not the Framers' Design*, *supra* note 13, at 391–92.

<sup>27</sup> See *infra* notes 268–69 and accompanying text.

<sup>28</sup> See *Davis*, *Not the Framers' Design*, *supra* note 13, at 369–72 n.50 (documenting the absence of any discussion of "testimonial" or "nontestimonial" hearsay, or any similar distinction, in historical sources); *Id.* at 425–34 (setting out evidence that the ban against admitting hearsay was understood to be required by the confrontation right).

justices intend to exacerbate this fundamental departure from the original confrontation right by defining “testimonial hearsay” so narrowly that the right will apply only to a subset of more formal hearsay statements made to government officers, but not to any form of hearsay statements made to anyone else. For example, statements in the *Giles* opinions would exempt hearsay statements which crime victims made to neighbors, friends, or even treating physicians or nurses, regardless of the accusatory nature of the statement.<sup>29</sup>

The overall result is that *Giles* implements a forfeiture exception to the confrontation right that far exceeds any exception “established at the time of the founding.” The originalist aspects of *Giles* are so highly selective that they do not amount to honest originalism at all.

### C. Overview of this Article

Part I briefly discusses how the requisites of the forfeiture exception became an issue in *Giles*, and then describes the treatment of the exception in the Supreme Court opinions in the case.

Part II steps back and provides what is missing from the *Giles* opinions themselves—an overview of the historical emergence, traditional understanding, and recent expansion of what is now called forfeiture by wrongdoing. I document that framing-era law permitted the admission of only prior sworn testimony under what is now called forfeiture by wrongdoing, and also that the traditional nineteenth-century formulation of forfeiture permitted only the admission of prior sworn and confronted testimony, but that forfeiture was given a drastically broader import when it was construed under the modern reliability formulation of confrontation, to permit even the admission of unsworn and unopposed hearsay statements. (At some points, the history I present converges with that discussed by Robert Kry, and at other points it diverges; to assist the reader I identify points of convergence and divergence.)

Part III assesses how well the opinions in *Giles* actually comported with historical doctrine. On the one hand, I conclude that Justice Scalia was essentially correct in asserting that the historical understanding of forfeiture was limited to deliberate witness-tampering and explain why Justice Breyer’s attempt to discredit the historical deliberateness requirement failed. On the other hand, I also describe how Justice Scalia unsuccessfully attempted to paper over the recent drastic expansion of forfeiture by wrongdoing—an “elephant of change” that Justice Breyer explicitly acknowledged (but then ignored).<sup>30</sup> I note that Justice Scalia repeatedly evaded the narrow limitation of the historical understanding of forfeiture to prior sworn and even confronted testimony and suggest

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<sup>29</sup> See *infra* notes 278–79 and accompanying text.

<sup>30</sup> *Giles v. California*, 128 S. Ct. 2678, 2706–07 (2008) (Breyer, J., dissenting).

that his evasions reflected the impossibility of mounting an originalist defense of the constitutionality of Federal Rule of Evidence 804(b)(6).

Part IV returns to the important issue of the scope of the confrontation right. I call attention to statements in the *Giles* opinions that indicate that the justices not only intend to persist in *Crawford*'s decidedly nonoriginalist restriction of the confrontation right to "testimonial" (as opposed to casual or "nontestimonial") hearsay, but even intend to define "testimonial hearsay" so narrowly as to limit it to more formal hearsay declarations made to government officers while completely exempting from the confrontational right all hearsay declarations made to friends, neighbors, and even treating physicians and nurses.

Finally, Part V briefly reiterates the deficiencies of originalism as a method for deciding or justifying constitutional interpretation.

## II. THE ROAD TO *GILES*

The Supreme Court has long recognized that modern evidence law exhibits a patent contradiction: the Confrontation Clause would seem to ban the use of out-of-trial statements as evidence in criminal trials; however, evidence doctrine routinely permits the admission of out-of-trial statements under a number of exceptions to the general ban against hearsay evidence. Modern confrontation doctrine has been shaped by judicial attempts to resolve this conflict.<sup>31</sup>

By the late twentieth century, courts had more or less resolved this conflict by minimizing the content of the confrontation right and subsuming it under the reliability formulation of hearsay analysis. The Supreme Court endorsed that resolution in the 1980 decision *Ohio v. Roberts*.<sup>32</sup> Under *Roberts*, all hearsay statements were theoretically subject to the confrontation right but were nonetheless admissible so long as they bore "adequate indicia of reliability" either by falling within a "firmly rooted hearsay exception" or by showing some other "particularized

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<sup>31</sup> See, e.g., *Maryland v. Craig*, 497 U.S. 836, 848 (1990) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), that a "literal reading of the Confrontation Clause would 'abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.'"); *Dutton v. Evans*, 400 U.S. 74, 86 (1970) ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now."); *Mattox v. United States*, 156 U.S. 237, 243 (1895) (noting, in connection with the Confrontation Clause, that "[a] technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused" and noting that "there could be nothing more directly contrary to the letter of the [Confrontation Clause] than the admission of dying declarations.").

<sup>32</sup> *Roberts*, 448 U.S. 56.

guarantees of trustworthiness.”<sup>33</sup> Thus, the protection of the confrontation right was “a mile wide and an inch deep.”<sup>34</sup>

A. Crawford’s *Reformulation of the Confrontation Right*

In the 2004 ruling in *Crawford*, a seven to two majority rejected *Roberts*’s reliability regime as a grossly inadequate treatment of the confrontation right. Instead, Justice Scalia’s majority opinion purported to return to “the Framers’ Design” for the confrontation clause.<sup>35</sup>

Specifically, Justice Scalia claimed that history mandated that the confrontation right be accorded a substantial content but only a narrow scope. With regard to the content of the right, Justice Scalia set out a two-prong “cross-examination rule” under which hearsay statements subject to the confrontation right were inadmissible unless (1) the hearsay declarant was unavailable to testify at trial, and (2) the defendant had had an opportunity to cross-examine the declarant at the time the hearsay declaration was made.<sup>36</sup> However, with regard to the scope of the right, Justice Scalia asserted that the Framers’ design was that the right would apply only to “testimonial” hearsay statements but would not apply at all to “nontestimonial” hearsay, which he also described as “casual” hearsay statements.<sup>37</sup>

Additionally, Justice Scalia’s *Crawford* opinion endorsed the principle that exceptions to the confrontation right should be limited to those “established at the time of the founding,”<sup>38</sup> and identified only two such exceptions under which “testimonial” hearsay could be admitted in a criminal trial without satisfying the “cross-examination rule.”<sup>39</sup> One such

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<sup>33</sup> *Id.* at 66.

<sup>34</sup> See Robert P. Mosteller, *Giles v. California: Avoiding Serious Damage to Crawford’s Limited Revolution*, 13 LEWIS & CLARK L. REV. 675, 679 (2009).

<sup>35</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>36</sup> *Id.* at 53–56.

<sup>37</sup> *Id.* at 50–53.

<sup>38</sup> *Id.* at 54.

<sup>39</sup> *Id.* at 56 n.6, 62. See also *Giles v. California*, 128 S. Ct. 2678, 2682–83 (2008). In *Crawford*, Justice Scalia also endorsed several other hearsay exceptions as exceptions that existed in framing-era law, including those for “business records or statements in furtherance of a conspiracy,” however, he noted that these exceptions would not involve “testimonial” statements and thus would be exempt from confrontation analysis in any event. 541 U.S. at 56. Actually, however, Justice Scalia grossly overstated the content of the hearsay exceptions recognized in framing-era law. There was no general exception for business records, but only a very narrow, statutory “shop book” exception. See *Davies, Not the Framers’ Design*, *supra* note 13, at 365–66 & n.43. Likewise, unlike the modern co-conspiratory hearsay exception, in framing-era law, hearsay statements could be used to prove the general existence of a conspiracy but not the involvement of the defendant in the conspiracy. *Id.* at 365–67, 401 n.126. Additionally, Justice Scalia ignored the fact that even the narrow hearsay exceptions that then applied in civil trials did not apply in criminal trials. *Id.* at 360–61 & n.33, 365–68, 418–19.

exception was for dying declarations,<sup>40</sup> the other was “the rule of forfeiture by wrongdoing.”<sup>41</sup>

Specifically, Justice Scalia noted that “the rule of forfeiture by wrongdoing” was not invalidated by the overruling of *Roberts* because that exception to the confrontation right was rooted in “equitable” rather than reliability considerations.<sup>42</sup> Likewise, in his 2006 majority opinion in *Davis v. Washington*, Justice Scalia again endorsed the continuing validity of the forfeiture exception, and described it as applying “when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims”—phrasing which implies deliberate witness-tampering.<sup>43</sup> Additionally, *Davis* stated that “Federal Rule of Evidence 804(b)(6) . . . codifies the forfeiture doctrine”<sup>44</sup>—and that rule limits forfeiture to instances in which the defendant “engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”<sup>45</sup> However, for purposes of the present discussion it should be noted that neither *Crawford* nor *Davis* actually examined the parameters of framing-era forfeiture doctrine.<sup>46</sup>

#### B. *The California Supreme Court’s Interpretation of “Equitable” Forfeiture*

Despite *Davis*’s characterization of forfeiture by wrongdoing as deliberate witness-tampering, several state and federal courts construed *Crawford*’s “equitable” characterization of forfeiture by wrongdoing as a license to broaden the construction of that exception.<sup>47</sup> In particular, in its 2007 ruling in *People v. Giles*, the California Supreme Court ruled that it was equitable to admit a murder victim’s hearsay account of a prior episode of violence by the defendant because the defendant had wrongfully caused the victim’s unavailability to testify at trial by killing

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<sup>40</sup> *Crawford*, 541 U.S. at 56 n.6.

<sup>41</sup> *Id.* at 62.

<sup>42</sup> *Id.* (stating that “[t]he *Roberts* [reliability] test . . . is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”).

<sup>43</sup> *Davis v. Washington*, 547 U.S. 813, 833 (2006) (also stating, “We reiterate what we said in *Crawford*: that ‘the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.’” (quoting *Crawford*, 541 U.S. at 62)).

<sup>44</sup> *Id.* See also *Giles*, 128 S. Ct. at 2687.

<sup>45</sup> FED. R. EVID. 804(b)(6). The pertinent part of the rule’s text is set out *supra* note 4.

<sup>46</sup> The only American precedent regarding forfeiture by wrongdoing cited in *Crawford* and *Davis* was *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879).

<sup>47</sup> See, e.g., *State v. Meeks*, 88 P.3d 789 (Kan. 2004); *People v. Moore*, 117 P.3d 1 (Colo. Ct. App. 2004); *United States v. Mayhew*, 380 F. Supp. 2d 961 (S.D. Ohio 2005); *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005).

her, even if there was no evidence that the defendant had acted for the purpose of preventing her testimony.<sup>48</sup>

C. *The Supreme Court Opinions in Giles*

The Supreme Court then granted certiorari in *Giles* and reversed and remanded. Justice Scalia's opinion for the Court concluded that the forfeiture exception was applicable only when a defendant's wrongdoing was "designed" to prevent the appearance of the hearsay declarant at trial.<sup>49</sup> Moreover, Justice Scalia asserted that this construction was mandated by the original understanding of the confrontation right.<sup>50</sup> Justice Souter, joined by Justice Ginsburg, expressed doubts regarding the clarity of the relevant history, but nevertheless concurred in the judgment.<sup>51</sup> Justice Thomas wrote a separate concurring opinion,<sup>52</sup> as did Justice Alito.<sup>53</sup> Justice Breyer, joined by Justices Stevens and Kennedy, dissented and would have upheld the sweeping California formulation of forfeiture.<sup>54</sup> Justice Breyer's opinion challenged Justice Scalia's interpretation of historical doctrine<sup>55</sup> and also argued that a broader forfeiture exception would better serve important policy interests, especially with regard to facilitating domestic violence prosecutions.<sup>56</sup>

However, the practical distance between the majority and dissenting constructions of the exception does not appear to be as large as the rhetorical differences may initially suggest. Justice Breyer's dissenting opinion asserted that domestic violence should create a presumption that the defendant had acted with the intent to cause the nonappearance of the victim-declarant as a trial witness.<sup>57</sup> Likewise, Justice Souter's concurring opinion suggested that the requisite intentional witness-

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<sup>48</sup> 152 P.3d 433, 435 (Cal. 2007), *aff'g*, *People v. Giles*, 19 Cal. Rptr. 3d 843, 847 (Cal. Ct. App. 2004). The Court of Appeal ruling was decided after *Crawford*, but prior to the 2006 decision in *Davis*. See *Giles*, 128 S. Ct. at 2682. However, the California Supreme Court's decision was rendered after *Davis* was decided.

<sup>49</sup> *Giles*, 128 S. Ct. at 2683; See also *id.* at 2684 (stating that historical applications of forfeiture "makes plain that unconfrosted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying.").

<sup>50</sup> *Id.* at 2688 (stating that "the common law's uniform exclusion of unconfrosted inculpatory testimony by murder victims (except testimony given with awareness of impending death [that is, dying declarations]) in the innumerable cases in which the defendant was on trial for killing the victim, but was not shown to have done so for the purpose of preventing testimony" was the "conclusive" basis for the decision in *Giles*).

<sup>51</sup> *Id.* at 2694–95 (Souter, J., concurring).

<sup>52</sup> *Id.* at 2693–94 (Thomas, J., concurring). Justice Thomas's concurring opinion is discussed *infra* note 273 and accompanying text.

<sup>53</sup> *Id.* at 2694 (Alito, J., concurring). Justice Alito's concurring opinion is discussed *infra* note 274 and accompanying text.

<sup>54</sup> *Id.* at 2695 (Breyer, J., dissenting).

<sup>55</sup> *Id.* at 2695–707.

<sup>56</sup> *Id.* at 2699–700, 2707–09.

<sup>57</sup> *Id.* at 2708.

tampering could “normally” be “inferred” from a “classic abusive relationship,”<sup>58</sup> and Justice Scalia’s opinion for the Court noted that “[a]cts of domestic violence often” reflect an intention to prevent testimony and can be “highly relevant” to the forfeiture inquiry.<sup>59</sup> Thus, as Professor Tuerkheimer explains in another Article in this symposium, the *Giles* opinions left the door open for lower courts to broadly apply the forfeiture exception in domestic homicide or domestic violence prosecutions.<sup>60</sup> However, for current purposes, the notable point is that none of the *Giles* opinions offered any historical support for that broad interpretation of deliberateness.<sup>61</sup>

### III. A HISTORY OF THE “FORFEITURE EXCEPTION” TO THE CONFRONTATION RIGHT

The judicial-chambers history that appears in Supreme Court opinions suffers from the absence of a continuous historical tradition regarding the meaning of the criminal procedure provisions of the Bill of Rights.<sup>62</sup> Indeed, because the Supreme Court did not decide any criminal appeals until the latter nineteenth century,<sup>63</sup> the Court had no occasion to address the confrontation right until the 1879 ruling in *Reynolds v. United States*.<sup>64</sup> Thus, almost a century passed after the Framing before there was any significant judicial interpretation of those provisions. Discussions of history in judicial opinions also suffer from a tendency to focus narrowly on the particular issue raised in the case at hand. While

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<sup>58</sup> *Id.* at 2695.

<sup>59</sup> *Id.* at 2693.

<sup>60</sup> Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of “Domestic Violence Context,”* 13 LEWIS & CLARK L. REV. 711, 721–30 (2009).

<sup>61</sup> Justice Breyer did attempt to justify a broad interpretation of deliberateness by equating it with “intent,” and by asserting that knowledge of a consequence suffices to prove “intent” in criminal law. However, he did not identify historical treatments of forfeiture by wrongdoing that used “intent” terminology. *See infra* note 237.

<sup>62</sup> The judicial construction of several criminal procedure provisions, including the Self-Incrimination and Due Process Clauses of the Fifth Amendment as well as the Fourth Amendment, were also delayed because they were originally understood to restrain only legislation because unlawful conduct by officers was not viewed to be a form of government action. Thus, the conduct of ordinary officers was not directly subject to constitutional analysis. Instead, the modern application of constitutional standards to the conduct of ordinary officers dates back only to roughly the beginning of the twentieth century. *See* Davies, *Fourth Amendment*, *supra* note 14, at 660–67. However, that was not the case with the trial guarantees of the Sixth Amendment because court proceedings were always understood to constitute government actions.

<sup>63</sup> There generally was no federal appellate review of felony convictions until the late nineteenth century, including appeals to the Supreme Court. *See, e.g.*, ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 312–14 (2d ed. 2002). Indeed, it appears that *Reynolds* reached the Supreme Court in 1879 only because it arose in Utah, and an 1874 federal statute had created criminal appeals only from the Supreme Court of the Territory of Utah. *See id.* at 313.

<sup>64</sup> 98 U.S. 145, 158–59 (1879).

that may be understandable as a matter of judicial economy, the narrow focus often also tends to obscure other aspects of historical doctrine that the justices either overlook or choose to ignore.<sup>65</sup>

The discussion of forfeiture in recent commentary as well as in *Giles* exhibits these features. The discussion typically starts with *Reynolds* and then, because *Reynolds* relied heavily on the 1666 proceedings in the House of Lords in *Lord Morley's Case*, moves on to the latter.<sup>66</sup> However, that starting point omits an important part of the relevant history. Because *Lord Morley's Case* involved an application of the already well-established Marian unavailability rule, the better starting point is the Marian statutes themselves.<sup>67</sup>

#### A. *The Marian Unavailability Rule*

The Marian statutes—1 & 2 Philip & Mary, chapter 13, enacted in 1554, and 2 & 3 Philip & Mary, chapter 10, enacted in 1555—strengthened the requirements for bail and created and mandated a procedure for recording the pretrial testimony of witnesses in cases of “Manslaughter or Felony.”<sup>68</sup> The statutory prologue to the earlier statute indicates that the new procedures were intended to facilitate obtaining felony convictions of “the greatest and notablest Offenders.”<sup>69</sup> Thus, to make such prosecutions more effective, the Marian committal procedure required a justice of the peace to make a written record of the material aspects of the testimony of the complainant and witnesses when a felony arrestee was brought before him to be either bailed or committed to jail

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<sup>65</sup> The usual sobriquet of “law-office history” is inappropriate regarding constitutional history because it is more commonly formulated in the justices’ chambers after arguments and largely independent of the arguments of counsel; hence, I have suggested that “judicial-chambers history” is more apt. See Davies, *Arrest*, *supra* note 14, at 418; Davies, *Revisiting Crawford*, *supra* note 13, at 638.

<sup>66</sup> *Reynolds*, 98 U.S. at 158–59 (citing *Lord Morley's Case*, 6 How. St. Tr. 769 (H.L. 1666)).

<sup>67</sup> Of course, identifying the date when a doctrine emerged or became settled is problematic insofar as it depends both upon the historian’s familiarity with the published cases and other sources, and also upon the completeness of the published legal record itself. Because case reporting was quite unsystematic in earlier times, it is certainly possible that a doctrine could have developed in cases that were never reported and are now lost in time. Just as paleontologists’ attempts to reconstruct the evolution of life are limited by the fortuities of fossil preservation and discovery, so our knowledge of legal evolution is dependent on the happenstances of when doctrines were preserved in reported cases.

<sup>68</sup> 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 Phil. & M., c. 10 (1555). These two statutes are referred to as “Marian” because they were enacted during the first through third years of the reign of Queen Mary Tudor and her husband, Philip. The names of the monarchs are typically abbreviated as “Phil. & M.,” sometimes “Phil. & Mar.” For a description of Marian committal procedure, see Davies, *Crawford's Originalism*, *supra* note 13, at 126–29.

<sup>69</sup> 1 & 2 Phil. & M., c. 13, § I (complaining that existing criminal procedure permitted “the greatest and notablest Offenders” to escape conviction and go unpunished).

to await trial. Additionally, the statutes required the justice to “certify” the written record of this testimony to the felony trial court, as well as to place the witness under a recognizance to appear and testify at trial.<sup>70</sup> The same requirements were also imposed on coroners who took sworn testimony of witnesses during inquests into possible homicides.<sup>71</sup> The written record of such testimony was sometimes referred to as an “examination” or “deposition,” although the statutes did not actually use either term; rather, they simply referred to the “information” of the witnesses, which is probably why Marian witnesses were often referred to as “informers.” In this Article, I refer to the sworn information given by these witnesses as “Marian testimony.”

The Marian statutes did not say that the witnesses’ information had to be taken under oath and also did not say anything about the admission or use of such statements during felony trials. However, judging from William Lambard’s 1581 justice of the peace manual, both of these features were soon attributed to the statutory procedure.<sup>72</sup> Thus, Lambard concluded that Marian witness statements should be taken under oath so that they could be used in felony trials if witnesses had died prior to trial. Specifically:

[I]f [Marian] informers be examined under oath, then although it should happen them to die before the prisoner have his Triall, yet may their information be given in Evidence, as a matter of good credite: whereas otherwise it would be of little or no weight at all, and thereby offendours would the more easily escape.<sup>73</sup>

Later authorities also endorsed both the requirement that Marian testimony be under oath and the admissibility of such testimony in trials if the witness was dead. I refer to the latter as the “Marian unavailability rule.” Like Lambard, Michael Dalton’s 1618 justice of the peace manual, *The Country Justice*,<sup>74</sup> stated that:

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<sup>70</sup> 1 & 2 Phil. & M., c. 13. § IV (bail proceedings); 2 & 3 Phil. & Mar., c. 10, § II (committal proceedings).

<sup>71</sup> 1 & 2 Phil. & M., c. 13, § V.

<sup>72</sup> WILLIAM LAMBARD, *EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF PEACE* (London, Ralph Newbery 1588) (sometimes cited as “Lambert” in later works). The work was first published in 1581 and, although Lambard died in 1601, several additional editions were published until 1619. See 1 *A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS* 229 (W. Harold Maxwell & Leslie F. Maxwell eds., 2d ed. 1955) [hereinafter MAXWELL]. I have cited to a 1588 edition of Lambard’s *Eirenarcha* that is available online in Early English Books Online.

<sup>73</sup> LAMBARD (1588 ed.), *supra* note 72, at 216. Lambard, a barrister of Lincoln’s Inn, added that he subscribed to taking Marian witness examinations on oath “because I have heard some Justices of Assise deliver their minds accordingly, as also for that I have found by experience, that (without such an oath) many informers will speake coldly against a Felon before the face of the Justice, when as they have first made their bargaine with the offendor (or his friends) before the Justice shall heare of the cause.” *Id.*

<sup>74</sup> MICHAEL DALTON, *THE COUNTRY JUSTICE* (1618) (reprinted in facsimile by Law Book Exchange 2003). Although Dalton died circa 1648, several additional editions

[I]t seemeth convenient, in cases of Felony, especially, that the information (of the bringers, and others) which the Justice of peace doe take against the prisoner, bee upon Oath [and that] if the Informers bee examined upon oath, then though it happen they should die before the prisoner have his trial, yet may their information be given in evidence, as a matter of good credit.<sup>75</sup>

Dalton did not initially indicate that that Marian testimony could be admitted if the defendant interfered with the appearance of the witness at trial, although he did comment that the witness's prior sworn testimony could be used to urge the witness to tell the whole truth against the defendant at trial, even though it was "over common and usual" for "the offender and his friends" to "labour" the witnesses before trial.<sup>76</sup> However, a 1626 edition of Dalton's manual hints at a forfeiture-like expansion of the Marian unavailability rule—but stopped short of requiring proof of witness-tampering—by stating that the testimony of Marian witnesses could be admitted in evidence if they died prior to trial "or if they shall not appear upon the recognizance, and give evidence against the prisoner (being laboured perhaps to absent themselves)."<sup>77</sup>

Sir Matthew Hale, who served as chief baron of the Court of Exchequer and chief justice of the Court of King's Bench during the Restoration,<sup>78</sup> discussed criminal law, procedure and evidence in his two-volume *History of the Pleas of the Crown*, which was written sometime before his death in 1676 (but not published until 1736).<sup>79</sup> In that work, Hale

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were published to 1764. See 1 MAXWELL, *supra* note 72, at 227. Multiple editions are available online in Early English Books Online.

<sup>75</sup> *Id.* (1618 ed.) at 264.

<sup>76</sup> *Id.* (1618 ed.). Dalton also wrote, with regard to Marian witnesses, that "it is found by experience, that without oath, many Informers will speake coldly against a felon before the face of the Just[ice] of peace; yea and wil also speake very sparingly and coldly, upon their evidence given before the Judges of assise, as I have observed in some, had they not been urged with their former information taken upon oath: For the labouring (by the offender and his friends) to such as are to informe and give evidence (both before the matter cometh before the Justice of peace, and after) is now grown over common and usuall." *Id.*

<sup>77</sup> *Id.* (1626 ed.) at 299–300 (stating that "if the Informers be examined upon oath, then though it happen they should die before the prisoner have his triall, or if they shall not appear upon the recognizance, and give evidence against the prisoner (being laboured perhaps to absent themselves) yet may their information be given in evidence, as a matter of good credit"). The statement regarding a witness who "shall not appear" is not included in the 1622 edition, which simply repeats the statement set out *supra* note 75 and accompanying text. *Id.* (1622 ed.) at 273. See also *infra* note 80 (noting that Hale included a similarly loose reference to admitting Marian testimony on the basis of simply the absence of the witness from trial in one of his earlier writings).

<sup>78</sup> Hale was chief baron of the Court of the Exchequer from 1660 to 1671, and chief justice of the Court of King's Bench from 1671 to 1676. 7 EDWARD FOSS, *THE JUDGES OF ENGLAND* 111, 113 (1864, reprinted AMS Press Inc. 1966).

<sup>79</sup> MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* (Sollom Emlyn ed., two volumes, London, E. & R. Nutt & R. Gosling 1736) [hereinafter HALE, HISTORY]. Several subsequent editions were published to 1800. See 1 MAXWELL, *supra* note 72, at

recognized the Marian unavailability rule when he wrote that Marian witness “informations taken upon oath, as they ought to be” before justices of the peace “may be read in evidence against the prisoner [at trial], if the informant be dead, or not able to travel, and sworn so to be.”<sup>80</sup> He also stated that Marian testimony given before justices of the peace by unavailable witnesses was admissible at trial because justices of the peace “are judges of record, and the [Marian] statute enables and requires them to take these examinations.”<sup>81</sup> Similarly, he noted that Marian testimony before coroners was also to be “upon oath” and was admissible “if the informer be dead, or so sick, that he is not able to travel, and oath thereof made.”<sup>82</sup> Notably, however, Hale did not mention admitting Marian testimony on the ground that the defendant had prevented a witness from appearing at trial. That omission, as late as Hale’s writing, strongly suggests that no form of what we call “forfeiture” had been formally recognized prior to the 1666 proceedings in *Lord Morley’s Case*.<sup>83</sup>

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362. Hale’s treatise was still only in draft form when he died in 1676. The repetition of topics in the two volumes suggests that the second volume was largely a revision of the first.

<sup>80</sup> 1 HALE, HISTORY (1736 ed.), *supra* note 79, at 305. This passage was unchanged as late as the 1800 edition. *See* 1 *id.* (1800 ed.) at 305. For a more extensive treatment of the passages on Marian procedure and testimony in Hale’s treatise, *see* Davies, *Crawford’s Originalism*, *supra* note 13, at 129–32; Davies, *Revisiting Crawford*, *supra* note 13, at 584–85.

Hale also wrote a shorter summary regarding criminal law and procedure that was published somewhat earlier than his treatise itself. MATTHEW HALE, PLEAS OF THE CROWN OR, A METHODICAL SUMMARY OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT (London, Atkyns 1678) [hereinafter HALE, SUMMARY]. Several subsequent editions were published. *See* 1 MAXWELL, *supra* note 72, at 362. The 1678 edition, which is available in Early English Books Online, states that the Marian statutes empowered justices of the peace to take examinations of “Informer(s)” in cases of felony and that “[t]hese Examinations, if the party be dead or absent, may be given in Evidence” in a felony trial. HALE, SUMMARY, *supra* (1678 ed.) at 262–63. The passage is unchanged in the 1707 edition, available in The Eighteenth Century Collections Online (Thomson Gale, <http://www.gale.cengage.com>). *Id.* (1707 ed.) at 262–63.

The reference in Hale’s *Summary* to admitting Marian testimony simply because a witness was “absent” was comparable to the passage added to the 1626 edition of Dalton’s manual, *see supra* note 77, but statements in Hale’s treatise (which were presumably written later than his *Summary*) seem to repudiate it. One later entry stated that it was “questionable” if such testimony could be admitted simply because the prior witness “appear not,” 1 HALE, HISTORY (1736 ed.), *supra* note 79, at 305. Another, probably still later entry, stated that Marian witness examinations are admissible at trial “if the informer be dead, or so sick, that he is not able to travel, and oath thereof made; *otherwise not*.” 2 *id.* (1736 ed.) at 284 (emphasis added).

<sup>81</sup> 2 HALE, HISTORY (1736 ed.), *supra* note 79, at 52; 2 *id.* (1800 ed.) at 52.

<sup>82</sup> 2 HALE, HISTORY (1736 ed.), *supra* note 79, at 284; 2 *id.* (1800 ed.) at 284.

<sup>83</sup> There are two reports of *Lord Morley’s Case*. The most complete is 6 How. St. Tr. 769 (H.L. 1666). In addition, a “memorandum” reporting the deliberations of “all the judges of England” prior to the trial appears at Kel. 53, 84 Eng. Rep. 1079 (H.L. 1666). *See infra* note 85 and accompanying text. This latter report, by Chief Justice Sir John Kelyng, indicates that “Sir Matthew Hales, Chief Baron of the Exchequer”

B. *The “Kept Away” Prong of the Marian Unavailability Rule*

Lord Morley was accused of murdering another man with whom he had quarreled. Because Morley was a peer of the realm, he was tried before the House of Lords rather than before an ordinary criminal jury.<sup>84</sup> However, in anticipation of evidentiary issues that were expected to arise during the trial, the Twelve Judges of England<sup>85</sup> deliberated and then advised the House that testimony previously taken regarding the killing during a coroner’s inquest would be admissible if the prior witness was “dead or unable to travel” or was “detained by the means or procurement of the prisoner”<sup>86</sup> (or, in the other version of the case, “dead” or “withdrawn by the procurement of the prisoner”<sup>87</sup>). Pursuant to this somewhat expanded Marian unavailability rule, the testimonies of three prior witnesses against Morley who had died since the coroner’s inquest were admitted; however, that of a fourth witness who had “run away” was excluded from evidence because there was insufficient evidence that Morley had bribed the witness to be absent.<sup>88</sup>

Although it may be tempting to treat *Lord Morley’s Case* as the earliest mention of the “forfeiture exception,” that actually would be a prochronistic error. That is, it would impose not only modern terminology but also a modern conception on a much earlier historical doctrine that is distinct from current doctrine in significant ways. In particular, *Lord Morley’s Case* did not announce any general or free-standing “exception” or even “doctrine,” as the modern term “forfeiture exception” connotes. Rather, *Lord Morley’s Case* simply recognized an additional form of unavailability that would permit the admission into

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participated. Thus, the fact that Hale’s writings do not mention the “kept away” prong of the Marian unavailability rule that was discussed in that case suggests both that Hale had written his treatise sometime prior to the case, and that the “kept away” prong had not been recognized prior to that case.

<sup>84</sup> The right of peers to be tried by other nobles is the source of the alternative statement “by the lawful judgement of his peers or by the law of the land” in Magna Carta’s “law of the land” chapter. See Davies, *Correcting Search History*, *supra* note 14, at 68–69.

<sup>85</sup> The twelve judges who comprised the benches of the three common-law courts at Westminster, the Court of King’s Bench, the Court of Common Pleas, and the Court of the Exchequer, sometimes deliberated collectively to resolve unusually difficult or important legal issues. When they did, their highly authoritative rulings were described as those of the Twelve Judges. See JOHN H. LANGBEIN, *THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL* 212–13. (2003). The twelve judges were sometimes referred to as the Court of Exchequer Chamber. See DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE* 261–62 (2nd ed. 2004).

<sup>86</sup> *Lord Morley’s Case*, Kel. at 55, 84 Eng. Rep. at 1080. The twelve judges also concluded that prior testimony would not be admissible simply because the witness was absent and could not be found despite “endeavours” to do so. *Id.*

<sup>87</sup> 6 How. St. Tr. at 776–77.

<sup>88</sup> *Id.* There are also two reports of the trial of Morley’s accomplice, Brumwich, in which coroner’s testimony of two of the deceased witnesses was admitted. *King v. Brumwich*, 2 Keb. 19, 84 Eng. Rep. 12 (K.B. 1666), and *Bromwich’s Case*, 1 Lev. 180, 83 Eng. Rep. 358 (K.B. 1666).

evidence at trial of prior Marian testimony. The authority for that admissibility was the Marian statutory scheme, and the already developed Marian unavailability rule, not any generalized conception of “forfeiture.”

The detained-by-the-prisoner prong of the Marian unavailability rule was also discussed, and this time actually applied to admit prior Marian testimony, in the later 1692 murder trial in *Harrison’s Case*.<sup>89</sup> On that occasion, prior testimony before a coroner was admitted after the prosecution showed that the absent prior witness had been offered money if he would “be kind to Mr. Harrison”—thus, it appeared he had been bribed to stay away.<sup>90</sup> A similar reference to the absence-procured-by-the-prisoner prong of the Marian unavailability rule also appeared in the slightly later attainder proceeding in *Fenwick’s Case*.<sup>91</sup>

However, it should be noted that framing-era Americans were more likely to have consulted the common-law treatises and the summaries of treatise entries in secondary sources such as justice of the peace manuals, abridgements, and legal “dictionaries,” than the case reports of the cases discussed above.<sup>92</sup> Hence if one’s goal is to recover the American Framers’ understanding, the leading eighteenth-century treatises are among the most important sources of evidence.<sup>93</sup>

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<sup>89</sup> *Harrison’s Trial*, 12 How. St. Tr. 833, 851 (Old Bailey 1692).

<sup>90</sup> *Id.* at 851–52.

<sup>91</sup> The absence-procured-by-the-prisoner form of the Marian unavailability rule was again discussed during the 1696 attainder proceeding in the House of Commons in *Fenwick’s Case*, 13 How. St. Tr. 537, 594 (H.C. 1696) (statement by Lovel to the effect that prior testimony before a magistrate—presumably given under the Marian committal procedure—could be read into evidence “if it appears to the court that prisoner hath, by fraudulent and indirect means, procured a person that hath given information against him to a proper magistrate, to withdraw himself . . .”).

<sup>92</sup> If one’s goal is to assess how the American Framers understood a legal doctrine, it is important to pay close attention to how accessible a historical authority would have been in framing-era America. Treatises and summaries of the treatises in justice of the peace manuals and similar abridgements and “dictionaries” were widely available. That was not necessarily so with case reports. They were expensive and unsystematic, and there were no effective indexes or other finding aids other than the treatises and manuals. See, e.g., Davies, *Revisiting Crawford*, *supra* note 13, at 597–98.

Thus, framing-era Americans were more likely to be conversant with the statements of the “kept away” prong of the Marian unavailability rule that appeared in the treatises and manuals than with the discussion of that rule in the State Trials reports of *Lord Morley’s Case*, *Harrison’s Case*, or *Fenwick’s Case*. Access to the early English cases was greatly facilitated when Howell’s edition of State Trials was published during the early nineteenth century, and when the earlier nominal reporters were collected and reprinted in the English Reports toward the middle of the nineteenth century. Thus, the State Trials report of *Lord Morley’s Case* would have been more readily available to American lawyers when *Reynolds* was decided in 1879 than had been the situation in 1789.

<sup>93</sup> See Davies, *Not the Framers’ Design*, *supra* note 13, at 384–87; Davies, *Arrest*, *supra* note 14, at 276–82.

Serjeant William Hawkins's treatise, *Pleas of the Crown*, two volumes first published in 1716 and 1721, was the leading authority on common-law criminal law, procedure, and evidence.<sup>94</sup> The second volume dealt with criminal procedure. In the chapter on evidence in criminal cases, Hawkins wrote that "[i]t seems settled" that prior Marian testimony given during a coroner's inquest or before a justice of the peace during a bail or committal proceeding "may be given in Evidence at the Trial . . . [if the prior witness] is dead, or unable to travel, or kept away by the Means or Procurement of the Prisoner . . ." but that "it is not sufficient to authorize the Reading such an Examination, to make Oath that the Prosecutors have used all their Endeavours to find the Witness, but cannot find him."<sup>95</sup>

Hawkins's treatise is particularly important evidence of the Framers' understanding both because it was imported by Americans and because the more salient points were reiterated in a variety of secondary eighteenth-century English authorities,<sup>96</sup> such as Richard Burn's leading eighteenth-century English justice of the peace manual,<sup>97</sup> which were widely imported by Americans. Those secondary works were also widely copied in the principal justice of the peace manuals published in

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<sup>94</sup> WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (two volumes, London, E. Nutt 1716 & 1721) [hereinafter HAWKINS]. Several subsequent editions were published to 1771 with no significant changes in content or pagination. See 1 MAXWELL, *supra* note 72, at 362–63. For a discussion of the influential nature of Hawkins's treatise, see 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 361–62 (1938).

On the eve of the framing of the American Bill of Rights, Thomas Leach published a London edition of Hawkins's treatise to which he added substantial notes and some new textual material. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (Thomas Leach ed., two volumes, London, His Majesty's Law-Printers 6th ed. 1787) [hereinafter LEACH'S HAWKINS].

<sup>95</sup> 2 HAWKINS (1721 ed.), *supra* note 94, at 429–30; 2 LEACH'S HAWKINS (1787 ed.) *supra* note 94, at 605. Hawkins cited both *Lord Morley's Case* (giving only the citation "Kely. 55") and *Harrison's Case* as the authority for his statement of the "kept away" prong of the Marian unavailability rule. 2 HAWKINS (1721 ed.) at 429 n.(t); 2 LEACH'S HAWKINS (1787 ed.), *supra* note 94, at 605 n.(f). Hawkins's citations tend to confirm that these were the first reported cases in which Marian testimony was admitted on the basis of the defendant's wrongful conduct.

Additionally, Hawkins cited only *Lord Morley's Case* (giving only the citation "Kely. 55") as authority that Marian testimony could not be admitted simply because the prior witness could not be located. 2 HAWKINS (1721 ed.), *supra*, at 430 n.(a); 2 LEACH'S HAWKINS (1787 ed.), *supra*, at 605 n.(a). Thus, the recognition of the "kept away" prong of the Marian unavailability rule in *Lord Morley's Case* seems to have occurred in connection with a *strengthening* of the confrontation right itself. See *infra* note 129 and accompanying text.

<sup>96</sup> For example, Hawkins's statement of the Marian unavailability rule was included in the entry for "Deposition" in the eighteenth-century editions of Giles Jacob's legal dictionary. See Davies, Crawford's *Originalism*, *supra* note 13, at 149 n.144.

<sup>97</sup> 1 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 287–88 (London, Henry Lintot 1755) (citing "2 Haw. 429"); 1 *id.* (1764 ed.) at 336 (same); 1 *id.* (1785 ed.) at 516 (same). The prominence of Burn's manual is discussed in Davies, *Not the Framers' Design*, *supra* note 13, at 415.

framing-era America.<sup>98</sup> As a result, the passages in Hawkins's treatise offer particularly strong evidence of how the Framers of the Sixth Amendment understood the forfeiture prong of the Marian unavailability rule. In recognition of Hawkins's influence, I refer to this as the "kept away" prong of the Marian unavailability rule.

Baron Geoffrey Gilbert wrote his influential treatise *The Law of Evidence* roughly contemporaneously with Hawkins's work.<sup>99</sup> Unlike Hawkins, Gilbert was primarily concerned with evidence in civil lawsuits. Nevertheless, he described the Marian unavailability rule along the same lines as Hawkins. Specifically, he noted that prior testimony given during a coroner's inquest is admissible at trial if the witness is either "dead or so ill that he is not able to travel" because "the Examinations are in these Cases the utmost Evidence that can be procured, the Examinant himself being prevented in coming by the Act of God," and then added:

[M]uch more so are such Examinations Evidence and to be read on the Tryal when it can be proved on Oath, that the Witness is detained and kept back from appearing by the means and procurement of the Prisoner, for he shall never be admitted to shelter himself by such evil Practices upon the Witness, that being to give him Advantage of his own Wrong.<sup>100</sup>

Interestingly, Gilbert discussed only Marian testimony before a coroner in his text, but the marginal notes to this passage also refer to the admissibility of testimony during Marian committal proceedings following felony arrests.<sup>101</sup>

Several versions of a later treatise on the law of evidence derived at least partly from Gilbert's treatise also noted that prior Marian testimony given before a coroner or justice of the peace was admissible if the witness was "dead, or beyond Sea" when the case came to trial.<sup>102</sup>

<sup>98</sup> See Davies, Crawford's *Originalism*, *supra* note 13, at 182–86.

<sup>99</sup> GEOFFREY GILBERT, *THE LAW OF EVIDENCE* (Dublin, Dick's Coffee-House 1754) [hereinafter GILBERT] (written prior to his death in 1726 but published in 1754). Several later editions were published with little alteration except for pagination. See 1 MAXWELL, *supra* note 72, at 379. The 1777 London edition was reprinted in Philadelphia in 1788. See Davies, *Not the Framers' Design*, *supra* note 13, at 406 n.135. The title "Baron" connoted that Gilbert was a judge of the Court of Exchequer.

Shortly after the framing of the American Bill of Rights, Capel Lofft published a substantially enlarged London edition of Gilbert's treatise. GEOFFREY GILBERT, *THE LAW OF EVIDENCE* (Capel Lofft ed., four volumes, London, A. Strahan & W. Woodfall, 1791–1796) [hereinafter LOFFT'S GILBERT].

<sup>100</sup> GILBERT (1754 ed.), *supra* note 99, at 99–100.

<sup>101</sup> Gilbert included marginal citations to the discussions of the admissibility of Marian committal examinations in Hale's *Summary* and in Hawkins's treatise. See GILBERT, *supra* note 99, at 99–100, citing, *inter alia*, HALE, *SUMMARY*, *supra* note 80, at 263 (which Gilbert cited as "H.P.C."), and 2 HAWKINS, *supra* note 94, at 429 (which Gilbert cited as "*Hawk. P.C.*"). Gilbert also included marginal citations to *Lord Morley's Case* and *Bromwich's Case*.

<sup>102</sup> HENRY BATHURST, *THE THEORY OF EVIDENCE* 33–34 (Dublin, Dick's Coffee-House 1761); FRANCIS BULLER, *AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* 238 (London, W. Strahan & M. Woodfall, 1st ed. 1772); *id.* (New York,

However—and perhaps because this later work focused primarily on trials of civil lawsuits—it did not mention the “kept away” prong of the Marian unavailability rule at all.

These pre-framing treatments clarify three important features of the historical antecedent of what we now call the forfeiture exception. First, in framing-era common law, the admission of prior testimony by a witness who was kept away from trial by the defendant was simply one of the prongs of the Marian unavailability rule. There was no broader or generalized forfeiture exception to the confrontation right. In that connection, it should be noted that Gilbert’s rhetoric outran the practical scope of the forfeiture exception when he asserted that a criminal defendant “shall never be admitted to shelter himself by such evil Practices on the Witness.” As in the other authorities of the period, Gilbert referred only to prior testimony given before a coroner and thus referred to “the Witness” in the literal sense of a person who had already given sworn testimony regarding the crime being prosecuted.<sup>103</sup> Hence, his “never” was actually confined to instances of prior Marian testimony.

Second, the settings in which the forfeiture aspect of the Marian unavailability rule was applied and the language in which it was presented consistently connoted that the defendant had acted for the *deliberate purpose* of causing the absence at trial of a prior Marian witness. The most common setting seems to have involved bribery.<sup>104</sup> Likewise, with regard to language, the use of verbs such as “kept away,” “kept back,” and “detained” implied purposive conduct. Indeed, note the shift in Gilbert’s discussion, quoted above, of dead or ill witnesses who were “prevented” from appearing by an act of God and those who were “detained and kept back from appearing by the means and procurement of the Prisoner” so as “to shelter himself.”<sup>105</sup> Although the briefs and opinions in *Giles* focused on the meaning of the nouns “means” and “procurement,”<sup>106</sup> I think the more telling point is that the use of the verbs “detained,” “kept back,” and “shelter” connoted purposeful witness tampering. The use of the terms “means or procurement” (or “means and procurement”) may simply have reflected the legal inclination to use

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Hugh Gaine, 5th ed. 1788) at 242. For a discussion of the relationship between these treatises, see Davies, *Not the Framers’ Design*, *supra* note 13, at 409.

<sup>103</sup> Gilbert’s reference to the admissibility of “such Examinations” when a prisoner detained “the Witness” was a continuation of the discussion, in the prior paragraph, of “[a] Witness examined before the Coroner.” See GILBERT (1754 ed.), *supra* note 99, at 99–100.

<sup>104</sup> See *supra* note 88 and accompanying text (discussing the bribery accusation in *Lord Morley’s Case*); *supra* note 90 and accompanying text (discussing the bribery issue in *Harrison’s Case*).

<sup>105</sup> See *supra* notes 100–01 and accompanying text. See also *supra* note 91 (setting out language from *Fenwick’s Case* regarding the “fraudulent” conduct of the defendant).

<sup>106</sup> See, e.g., *Giles v. California*, 128 S. Ct. 2678, 2683–84 (2008) (majority opinion) and *id.* at 2701 (Breyer, J., dissenting).

redundant terminology,<sup>107</sup> or it may have served to connote the alternatives of the defendant's personal interference with a witness (that is, when the witness was kept away by the defendant's own "means") or his enlistment of the help of others to keep a witness away (by which the defendant "procured" the absence).<sup>108</sup>

Third, none of the discussions of the Marian unavailability rule in these pre-framing English authorities referred to the defendant's either having been present or having had an opportunity to cross-examine when the prior Marian testimony was taken.<sup>109</sup> The likely explanation for that silence seems to be that the confrontation right, and particularly the cross-examination aspect of the confrontation right, became firmly settled only *after* the Marian unavailability rule was already an entrenched aspect of common law. Moreover, because the Marian unavailability rule was rooted in statutory authority, and because Marian testimony met the basic requisite for legal evidence—the oath—the Marian unavailability rule was not easily altered or displaced even when the robust confrontation right did emerge.

### C. *The Emergence of the Confrontation Right*

The American Framers were fond of the so-called "Saxon myth," a vision of English history in which the English people gradually regained their "immemorial" birthright of Anglo-Saxon liberty following the Norman Conquest and the abuses of later monarchs.<sup>110</sup> That assertion of the continuity of common law rights served important political ends when it was formulated by Sir Edward Coke and others during the sixteenth century but it did not reflect valid history. Rather, the common law rights that the American Framers sought to preserve in the initial state declarations of rights and in the federal Bill of Rights actually emerged at different stages of English history.<sup>111</sup> Thus, although it is possible to identify early recognitions of a confrontation right in Roman

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<sup>107</sup> As, for example, in "cease and desist."

<sup>108</sup> Of course, English is so maddeningly flexible that, with the aid of a dictionary, one can often make out a claim for a variety of alternative and sometimes quite different meanings for any terms or phrases. As a result, it is a serious error to interpret terms without reference to the context in which they are used. My own sense, having waded through a good deal of seventeenth-century legal literature, is that the phrasing of the relevant part of the Marian unavailable witness rule, in the circumstances in which it was used, connoted the defendant's purposeful interference with the appearance of a witness. Had the authorities meant something broader than that, I think they would have said as much. But they did not.

<sup>109</sup> For a fuller discussion of this point, *see infra* notes 181–84 and accompanying text.

<sup>110</sup> *See, e.g.,* A. E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 108–12 (1968) (discussing the American Founders' acceptance of the Whig History of England).

<sup>111</sup> *See, e.g.,* Davies, *Correcting Search History*, *supra* note 14, at 69–70.

law, they should not be mistaken for evidence of an ancient or continuous confrontation right in English law.<sup>112</sup>

Instead, it seems doubtful there was any settled understanding of a confrontation right when the Marian statutes were enacted in the mid-sixteenth century or construed during the early seventeenth century. For one thing, it appears that the oath had been the paramount requisite for legal evidence at least since the Anglo-Saxon and Norman-Angevin periods. Over time, proof in criminal cases had evolved from “swearing contests” with “oath helpers,” to the sworn testimony of a jury of witnesses, and finally to the presentation of live sworn testimony before the trial or petit jury.<sup>113</sup> Thus, when the Marian statutes were enacted in the mid-sixteenth century, the oath was probably thought sufficient to justify the admission of prior testimony if the witness had become unavailable to appear in person.<sup>114</sup> Indeed, early seventeenth-century criminal trials were still so heavily biased against the defendant that a robust cross-examination right would seem to have been out of place.

The 1603 treason trial of Sir Walter Raleigh, in which Sir Edward Coke was the lead prosecutor, is instructive.<sup>115</sup> It looms large in historical accounts of the confrontation right because Raleigh complained about the admission of out-of-trial “hearsay” statements made by witnesses who were available but not produced by the prosecution.<sup>116</sup> However, it does not appear that Raleigh explicitly framed his objection in terms of his loss of the opportunity for cross-examination.<sup>117</sup> Additionally, he acknowledged that prior testimony could be admissible if the witness “is not to be had conveniently.”<sup>118</sup> Moreover, while Raleigh’s complaints indicate that there was at least some general sense that criminal evidence should be presented by a witness with direct knowledge in the presence of the defendant, the salient fact is that the judges overruled Raleigh’s protests and allowed unfronted hearsay statements, and even some unsworn statements, to be admitted in evidence against him.<sup>119</sup> At least in treason trials, being tried was virtually the same as being convicted in 1603, and whatever evidence served the Crown’s case seems to have been admissible.

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<sup>112</sup> See, e.g., *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (noting that “The right to confront one’s accusers is a concept that dates back to Roman times.”).

<sup>113</sup> For a useful introduction to this progression in modes of proof, see COQUILLETTE, *supra* note 85, at 39, 46, 69–71, 158–62.

<sup>114</sup> See, e.g. *supra* note 73 and accompanying text (quoting LAMBARD).

<sup>115</sup> *Raleigh’s Case*, 2 How. St. Tr. 1, 5 (1603) (identifying the prosecuting Attorney General as “Sir Ed. Coke”).

<sup>116</sup> *Id.* at 15–16 (complaining that about the admission of a letter from Cobham, Raleigh’s alleged accomplice, and demanding that Cobham testify in person).

<sup>117</sup> See Davies, *Crawford’s Originalism*, *supra* note 13, at 122 n.51.

<sup>118</sup> *Raleigh*, 2 How. St. Tr. at 19 (quoting Raleigh as saying “Indeed, where the Accuser is not to be had conveniently, I agree with you [that reading an examination would suffice as evidence]; but here my Accuser may [testify in person]; he is alive and in the house.”).

<sup>119</sup> *Id.* at 24.

Coke's treatment of evidence in criminal trials in his early seventeenth-century *Institutes*<sup>120</sup> essentially parallels that evident in Raleigh's trial. In particular, Coke wrote, in his famous discourse on the "law of the land" chapter of Magna Carta, that in trials of peers in the court of the king's steward all evidence and argument had to be presented "in the presence, and hearing of the prisoner."<sup>121</sup> However, although that may initially seem like a right to confrontation, the significant feature is that Coke did not mention any prohibition against the introduction of hearsay statements, and thus allowed the use of second-hand accounts such as those offered, over Raleigh's objection, in Raleigh's trial. The only limitation Coke imposed was that the hearsay statements be presented in the prisoner's presence. Beyond that, Coke does not seem to have written much about trial procedure or evidence in his discussion of the "law of the land" chapter, or elsewhere in the four volumes of his *Institutes*. That omission strongly suggests that few evidentiary standards had developed as of that period.<sup>122</sup> (However, other

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<sup>120</sup> EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND (four volumes, first published 1628–1644). See 1 MAXWELL, *supra* note 72, at 21, 258, 360, 449–52, 546.

<sup>121</sup> In his discussion of the "law of the land" protection in Magna Carta 29, Coke construed the term "*per legale iudicium parium suorum*" [by the lawful judgment of his peers] to refer to the right of a noble to be tried by a jury of lords in the court of the lord steward as distinguished from "an ordinary jury of twelve men." 2 COKE, *supra* note 120, at 49. (See also Davies, *Correcting Search History*, *supra* note 14, at 67–69). Specifically, Coke wrote the following regarding the legal requisites of a trial by peers: "1. That the lords ought to heare no evidence, but in the presence, and hearing of the prisoner. 2. After the lords be gone together to consider of the evidence, they cannot send to the high steward to aske the judges any question of law, but in the hearing of the prisoner, that he may heare, whether the case be rightly put, for *de facto jur oritur*; neither can the lords, when they are gone together, send for the judges to know any opinion in law, but the high steward ought to demand it in court in the hearing of the prisoner. 3. When all the evidence is given by the kings learned councill, the high steward cannot collect the evidence against the prisoner, or in any sort conferre with the lords touching their evidence, in the absence of the prisoner, but he ought to be called to it; and all this is implied in this word, *legale*. And therefore it shall be necessary for all such prisoners, after evidence given against him, and before he depart from the barre, to require justice of the lord steward, and of the other lords, that no question be demanded by the lords, or speech or conference had by any with the lords, but in open court in his presence, and hearing, or else he shall not take any advantage thereof after verdict, and judgment given . . ." 2 COKE, *supra* note 120, at 48–49.

<sup>122</sup> Of course, it is impossible to document the absence of such statements beyond saying that I think I have looked in the discussions in the *Institutes* where Coke might plausibly have discussed the topic of evidentiary standards but have found none. In particular, although Coke, at the end of the passage quoted in the preceding footnote referred the reader to his later discussion of "Treason" in the third volume, I do not find any discussion of hearsay or other evidentiary standards in that location.

Similarly, Coke wrote very little about trial procedure in his discussion of the "law of the land" provision of Magna Carta. That may seem odd today because Coke treated "due process of law" as a virtual synonym for the term "law of the land," and "due process" is now widely regarded as setting minimum standards for fair trial

commentators quoted statements Coke reportedly made in his judicial rulings as authority for the requirement that all criminal evidence be sworn.<sup>123</sup>)

Although the confrontation right was still only nascent as late as the early seventeenth century (that is, well over a half century after the enactment of the Marian statutes), English judges did elaborate trial processes and evidence standards later in that century, and confrontation, including cross-examination, seems to have become a settled right by the late seventeenth century. For example, Sir Matthew Hale, writing sometime after the Restoration in 1660 but prior to his death in 1676, endorsed the value of the “opportunity of confronting the adverse witnesses” as one of the virtues of common-law jury procedure.<sup>124</sup> Hale’s “confronting” phrasing, which was later repeated by Blackstone<sup>125</sup> (but otherwise does not appear to have been used by English authorities) is the likely impetus for the adoption of “confrontation” terminology in the initial American state declarations of rights.<sup>126</sup>

Additionally, Serjeant Hawkins discussed the salient aspects of what we now regard as the confrontation right in two entries in his 1721 chapter on criminal evidence. Notably, one of these passages seems to date the judicial recognition of the confrontation right to a 1640 case—although that ruling may have still left a substantial opening for reading

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procedure. However, “due process of law” did not carry that meaning in Coke’s time, and probably still did not carry that meaning when the state and federal framers formulated the American declarations and bills of rights, including the “due process of law” clause of the federal Fifth Amendment. Rather, as late as the Framing era, “due process of law” still connoted the requisites for initiating a valid criminal prosecution, including the standards for a legal arrest, and the requirement of a valid indictment as a precondition for a felony trial. *See* Davies, *Correcting Search History*, *supra* note 14, at 47–62. The notion that “due process of law” referred to fair trial procedure seems to have been introduced by nineteenth-century commentators such as Justice Joseph Story. *See id.* at 178–80.

<sup>123</sup> *See, e.g.*, DALTON (1618 ed.) *supra* note 74, at 264 (writing that “[S]o was the direction of Sir Edward Coke, late Lord Chiefe Justice . . . upon the triall of a felon; For (said he) in case of treapasse to the value of two pence, no Evidence shall bee given to the Jurie, but upon Oath, much lesse where the life of a man is in question.”).

<sup>124</sup> MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (London, J. Nutt 1713) (first published 1713; written sometime prior to Hale’s death in 1676). *See* 1 MAXWELL, *supra* note 72, at 239.

<sup>125</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (Oxford, Clarendon Press, 1st ed. 1768) (citing HALE, *supra* note 124, at 254–56, and endorsing the value of “the confronting of adverse witnesses” as a means of “clearing up of truth” in trials). For publication history, *see* 1 MAXWELL, *supra* note 72, at 27–29.

<sup>126</sup> George Mason included the criminal defendant’s right “to be confronted with the accusers and witnesses” when he drafted the criminal procedure provision of the 1776 Virginia Declaration of Rights, the first of the state declarations, and that formulation was followed in several other state declarations. *See* Davies, *Not the Framers’ Design*, *supra* note 13, at 388–89. However, some of the early American state declarations of rights stated the confrontation right in the alternative phrasing of a right to “meet” adverse witnesses “face to face.” *See id.* at 389.

depositions of unavailable witnesses regardless of whether they were taken under the Marian statutes:

There are many [\*] Instances in the Reigns of Queen Elizabeth and King *James* I, wherein the Depositions of absent Witnesses were allowed as Evidence in Treason and Felony, even where it did not appear but that the Witnesses might have been produced *viva voce*. And it was adjudged in [\*\*] the Earl of *Strafford's* Trial [in 1640], that where Witnesses could not be produced *viva voce*, by Reason of Sickness, &c. their Depositions might be read for or against the Prisoner on a Trial of High Treason, but not where they might have been produced in Person.<sup>127</sup>

In the other passage, Hawkins cited arguments in a 1696 case for the “settled Rule” which he treated as a “premise” for the entire discussion of evidence in felony trials that “no Evidence is to be given against a Prisoner but in his Presence.”<sup>128</sup> Thus, Hawkins’s analysis would place the

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<sup>127</sup> 2 HAWKINS (1721 ed.), *supra* note 94, at 430. There are two marginal notes in this passage, indicated by the inserted asterisks (Hawkins placed the note citations at the beginning, rather than end, of the relevant text).

The first marginal note (at \* in the quoted passage in the text) cites a number of cases reported in the State Trials reports, including “Sir Walter Raleigh’s Trial.” See 2 HAWKINS (1721 ed.), *supra*, at n.(c).

The second marginal note (at \*\* in the quoted passage in the text) consisted of the citation “Rushw. *Strafford*, fol. 231, 526 to 531.” 2 HAWKINS (1721, ed.), *supra*, at 430 n.(d). This citation was to the report of the Trial of Thomas Earl of *Strafford* in JOHN RUSHWORTH, HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE, WEIGHTY MATTERS IN LAW, REMARKABLE PROCEEDINGS IN FIVE PARLIAMENTS, 1618–1648 (there were several editions of multiple volumes of this work printed from 1659 to 1721; see 1 MAXWELL, *supra* note 72 at 106). I have not been successful in tracking down the specific edition, or passages, Hawkins referred to. There is a shorter report of *Strafford's Case* reported at 3 How. St. Tr. 1381, but a footnote, denoted by a dagger, in the title of that report indicates that it is not the same as “the larger Trial, which being an entire volume in Rushworth’s Collection, is purposely omitted, and this [account] inserted in the stead thereof.” *Id.*

<sup>128</sup> 2 HAWKINS (1721 ed.), *supra* note 94, at 428, n.(a); 2 LEACH’S HAWKINS (1787 ed.), *supra* note 94, at 602, n.(a). The only citation Hawkins gave in note “a” for the “premise” that all evidence be given in the presence of the defendant was “State Trials, Vol. 4 fol. 277, 310.” That citation is to *Fenwick's Case*, 4 St. Tr. 232, 277, 310 (1719 folio ed.) (attainder proceeding in the House of Commons, 1696), reprinted in 13 How. St. Tr. 537, 638, 711.

It should be noted that one of the passages that Hawkins cited from *Fenwick's Case* suggests that he thought (or perhaps hoped) that this premise should apply even to the taking of Marian witness examinations—that is, that Marian witness examinations should be taken only in the presence of the arrested defendant. However, it does not appear that Hawkins’s premise was widely understood to mean that because the secondary works that repeated this passage from Hawkins’s treatise did so only in discussions of evidence in criminal trials. See Davies, *Revisiting Crawford*, *supra* note 13, at 600–02. Moreover, the fact that Hawkins explicitly referred to the “seem[ingly] settled” admissibility of Marian testimony of unavailable witnesses in a later passage without mentioning any cross-examination requirement in that discussion (see *supra* note 95 and accompanying text) would seem to indicate that there was no authoritative ruling that he could cite in support of a clear statement to that effect. Hence, while Hawkins may have sought to raise the issue of confrontation in Marian

date of the resolution of the confrontation right substantially later than the adoption of the Marian statutes in the 1550s, and during roughly the same period as the articulation of the “kept away” prong of the Marian unavailability rule in the 1666 ruling in *Lord Morley’s Case*, which appears to have actually strengthened the confrontation right.<sup>129</sup>

Although Hawkins’s statement that all evidence was to be given in the defendant’s “presence” might not necessarily have indicated a defendant’s right to cross-examine as such, Hawkins clearly did identify a cross-examination right in another entry in which he set out the ban against hearsay evidence in criminal trials. In addition to stating that “[i]t hath always been agreed, That the Evidence for the King must in all Cases be upon Oath,”<sup>130</sup> Hawkins defined all unsworn out-of-trial statements as inadmissible “Hearsay”:

As to . . . How far Hearsay is Evidence: It seems agreed, That what a Stranger [that is, an out-of-trial declarant] has been heard to say is in Strictness no Manner of Evidence either for or against a Prisoner, not only because it is not upon Oath, but also because the other Side *hath no Opportunity of a cross Examination*; and therefore it seems a settled Rule, That it shall never be made use of but only by way of Inducement or Illustration of what is properly Evidence . . . .<sup>131</sup>

Thus, Hawkins indicated that *all* unsworn out-of-trial statements were inadmissible as proof of a felony defendant’s guilt, both because they were unsworn (and thus untrustworthy and insufficient for legal

witness examinations, the broad statement in his “premise” does not seem to have been understood to address Marian witness examinations, and plainly could not have been meant to apply to Marian testimony before coroners.

<sup>129</sup> The absence of a settled confrontation right as late as the early seventeenth century is also suggested by the statements in the 1626 edition of Dalton’s manual and in Hale’s early writing to the effect that Marian testimony from a felony committal examination could be admitted in a felony trial simply on the basis of the absence of the witness. *See supra* note 77 (Dalton), 80 (Hale) and accompanying text. However, Hawkins cited *Lord Morley’s Case* as having rejected the admission of prior Marian testimony simply because the witness was absent and could not be found. *See supra* note 95 and accompanying text. Thus it appears that *Lord Morley’s Case* marked a significant strengthening of the confrontation right insofar as the “kept away” prong of the Marian unavailability rule recognized in that case was more restrictive than the earlier allowance of the use of Marian testimony whenever the witness was simply absent.

<sup>130</sup> 2 HAWKINS (1721 ed.), *supra* note 94, at 434, n.(j) (citing “H.P.C. 264 [i.e., HALE SUMMARY, *supra* note 80, at 284]); 2 LEACH’S HAWKINS (1787 ed.), *supra* note 94, at 612, n.(m) (same). *See also supra* note 123.

<sup>131</sup> 2 HAWKINS (1721 ed.), *supra* note 94, at 431 (emphasis added); 2 LEACH’S HAWKINS (1787 ed.), *supra* note 94, at 606 (emphasis added). Hawkins’s reference to allowing hearsay “only by way of Inducement or Illustration” was to a rule that permitted use of hearsay evidence to prove the general existence of a conspiracy, but not the defendant’s personal culpability in the conspiracy. *See Davies, Not the Framers’ Design, supra* note 13, at 400–03.

evidence), and also “because the other Side hath no Opportunity of a cross-Examination.”<sup>132</sup>

Moreover, Hawkins’s statements regarding these aspects of the confrontation right are important evidence of the American Framers’ understanding of confrontation. Both Hawkins’s statement of the requirement that evidence in criminal trials be presented “in the presence” of the defendant and his linkage of the ban against hearsay to the right of cross-examination were reiterated in the eighteenth century editions of the leading English justice of the peace manual, and were also included in the prominent justice of the peace manuals published in framing-era America.<sup>133</sup> Thus, there is ample reason to think that the American Framers understood that the ban against hearsay was required by the confrontation right.<sup>134</sup> (Unfortunately, the linkage of the ban against hearsay to the right of cross-examination in Hawkins’s treatise and the repetition of that passage in justice of the peace manuals has been obscured by a commentary on the history of the hearsay rule by Professor Thomas P. Gallanis which may appear to date the appearance of the cross-examination rationale for the ban against hearsay to the end of the eighteenth century—that is, after the framing of the Bill of Rights. However, Gallanis examined only “evidence treatises” per se, and thus he did not take account of the discussion of criminal evidence in Hawkins’s 1721 criminal procedure treatise or in the numerous works that repeated Hawkins’s statements.<sup>135</sup> Unfortunately, that misunderstanding still distorts the history set out in *Giles*.<sup>136</sup>

The significant point for present purposes is that Hawkins did not identify any form of “hearsay” evidence that was admissible to prove the defendant’s guilt. Rather, the only form of admissible out-of-trial evidence of a criminal defendant’s guilt that Hawkins identified was the Marian unavailability rule—that is, the written record of sworn Marian testimony before a coroner or justice of the peace previously given by a witness who was “dead, unable to travel, or kept away by the Means or

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<sup>132</sup> 2 HAWKINS (1721 ed.), *supra* note 94, at 431.

<sup>133</sup> See Davies, *Not the Framers’ Design*, *supra* note 13, at 425–31.

<sup>134</sup> Chief Justice John Marshall also noted that the confrontation right precluded the use of hearsay evidence when he excluded such evidence during one of the 1807 trials regarding the Burr conspiracy. See Davies, *Not the Framers’ Design*, *supra* note 13, at 431–33 (discussing Chief Justice John Marshall’s invocation of the right to confrontation when he excluded hearsay statements from evidence in the trial of one of the defendants in *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694)).

<sup>135</sup> T. P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 533 (1999) (stating that the cross-examination rationale for the hearsay rule first appeared in *an evidence treatise* in 1791), discussed in LANGBEIN, *supra* note 85, at 245. I have previously noted the limitations of Gallanis’s study in my 2007 article. See Davies, *Not the Framers’ Design*, *supra* note 13, at 429 n.198.

<sup>136</sup> *Giles v. California*, 128 S. Ct. 2678, 2705 (2008) (Breyer, J., dissenting) (citing Gallanis, *supra* note 135, at 516–50).

Procurement of the prisoner.”<sup>137</sup> Gilbert’s treatise and other works of the period also identified only the Marian unavailability rule as a ground upon which out-of-trial statements could be admitted as evidence of a criminal defendant’s guilt.<sup>138</sup> Moreover, because Hawkins and Gilbert both defined “hearsay” to include *unsworn* statements, neither applied that term to Marian testimony.

Hawkins also made another point that is significant for the present discussion; namely, that oral accounts of testimony given by an unavailable witness in a prior trial were inadmissible as criminal evidence even though such prior testimony had been given under oath and even subject to cross-examination. The apparent reason was that, unlike Marian testimony, testimony given in a prior trial was not recorded in writing; hence, an oral account of prior trial testimony by another witness who had heard it was deemed to be too unreliable and subject to bias to constitute valid evidence.<sup>139</sup> Thus, the bottom line, when Hawkins and Gilbert wrote in the early eighteenth century, was that there was only one form of out-of-trial statement that was admissible in a criminal trial—the written record of the prior Marian testimony of a witness, given either during a coroner’s inquest or before a justice of the peace during a felony committal proceeding, who had become unavailable by the time of trial.

Of course, viewed from a modern perspective, the Marian unavailability rule would appear to have presented a patent conflict with the confrontation right. However, with only one exception, that conflict is not explicitly identified in pre-framing legal authorities.<sup>140</sup> Instead, it seems likely that the older Marian unavailability rule was effectively grandfathered-in when the confrontation principle finally hardened into a settled right in the late seventeenth century. Moreover, because the Marian unavailability rule was rooted in statutory authority, English judges would have hesitated to curtail it. It was one thing for judges to

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<sup>137</sup> 2 HAWKINS (1721 ed.), *supra* note 94, at 429. *See supra* note 95 and accompanying text.

<sup>138</sup> *See* Davies, *Not the Framers’ Design*, *supra* note 13, at 406–09.

<sup>139</sup> 2 HAWKINS (1721 ed.), *supra* note 94, at 430; 2 LEACH’S HAWKINS (1787 ed.), *supra* note 94, at 606. *See also* 1 LOFFT’S GILBERT, *supra* note 99, at 62 (noting that written depositions are superior evidence to live testimony regarding testimony given by another witness at a prior trial).

<sup>140</sup> The exception is 4 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 671 (London, H. Woodfall & W. Strahan, 9th ed. 1763) (stating that prior Marian witness examinations may be read as evidence if it is proved the defendant is dead, too ill to travel, or kept away by the defendant but then adding: “but Qu[ery] If the Defendant must not be present at the Time they are taken in order to make them good Evidence.”). This source is identified and discussed in Davies, *Revisiting Crawford*, *supra* note 13, at 604–05, n.172 (noting that the query was repeated in the final 1772 tenth edition of this work, but that no such query appeared in the earlier 8th edition). *See also supra* note 128 (noting that Hawkins may have meant to indirectly call attention to this conflict, although other commentators do not seem to have interpreted his statement that way).

strengthen the law of evidence by adopting a general “in the presence rule” for criminal evidence, but it would have been quite another for them to have undone the settled implication of a statute.

Indeed, the 1696 ruling in *King v. Paine* indicates that English judges viewed the Marian unavailability rule as a settled exception to the cross-examination aspect of the confrontation right.<sup>141</sup> The issue in *Paine* was whether a deposition of an unavailable witness, taken in the absence of the defendant, could be admitted in a *misdemeanor* criminal trial. The judges ruled that it could not, but the different reports give somewhat different reasons for the ruling. In *Crawford*, Justice Scalia discussed only the single report that indicated that the deposition could not be admitted because the defendant had not had an opportunity to cross-examine at the time the deposition was taken and, thus, he described *Paine* as though it had announced an across-the-board common-law “cross-examination rule” for the admission of evidence in criminal cases.<sup>142</sup> Robert Kry also has previously endorsed that interpretation.<sup>143</sup>

However, as I have previously discussed, Justice Scalia’s interpretation of *Paine* overlooked the fact that the other three versions of the case report gave another ground for the ruling. Those versions, as well as the arguments of counsel in the report Justice Scalia discussed, indicated that in contrast to the witness examinations, which were explicitly authorized and required by the Marian statutes in *felony* prosecutions, there was no statutory authority for a justice of the peace to ever take a deposition in a *misdemeanor* case.<sup>144</sup> The implication of the ruling was that a deposition could never constitute valid evidence in a misdemeanor prosecution, even if it met the standards for a deposition in a civil case, such as cross-examination. Instead, the judges in *Paine* effectively treated the Marian statutes, which applied only to felony prosecutions, as the *unique* ground for admitting the prior sworn testimony of an unavailable witness.<sup>145</sup>

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<sup>141</sup> There are five reports of this King’s Bench ruling, usually dated as 1696, which set out four versions of the ruling (one version was copied in a later reporter): [1] *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (first published 1711); [2] *Rex v. Paine*, 1 Salk. 281, 91 Eng. Rep. 246 (first published 1717); [3] *Rex v. Pain*, Comb. 358, 90 Eng. Rep. 527 (first published 1724); [4] *Rex v. Pain*, Holt 294, 90 Eng. Rep. 1062 (first published 1738) (essentially reprinting Comberbach’s report); [5] *Rex v. Payne*, 1 Ld. Raym. 729, 91 Eng. Rep. 1387 (first published 1743). For a more complete discussion of the reports and the slight variation as to the date assigned to the decision, see Davies, *Crawford’s Originalism*, *supra* note 13, at 135–37, 136 n.104.

<sup>142</sup> *Crawford v. Washington*, 451 U.S. 36, 45 (2003) (citing *Paine*, 87 Eng. Rep. at 585).

<sup>143</sup> See Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 505–08 (2007) (arguing that the *Paine* ruling rested both on the absence of cross-examination as well as on the absence of statutory authority for justices of the peace to take depositions in misdemeanor cases).

<sup>144</sup> See Davies, *Crawford’s Originalism*, *supra* note 13, at 140.

<sup>145</sup> I think this interpretation is evident in Gilbert’s summary of *Paine*: “[T]he Court would not allow the Examinations of [the deceased witness] to be given in

Thus, I think it is highly likely that *Paine* effectively limited the admission of out-of-trial statements in criminal trials to prior Marian testimony and that, in turn, meant that the witness-kept-away-by-the-prisoner rule could not apply to any kind of out-of-trial statements except *prior Marian testimony* validly taken in felony prosecutions. Moreover, *Paine's* effective limitation of what we now call forfeiture by wrongdoing to the admission of prior Marian testimony is also consistent with other, later aspects of framing-era evidence doctrine, including the restrictions that courts imposed on dying declarations of murder victims when they later recognized that as a unique exception to the ban against hearsay evidence.

#### D. *Recognition of the Dying Declaration of a Murder Victim Exception*

Neither Hawkins nor Gilbert mentioned a dying declaration exception to the ban against hearsay when they wrote around the outset of the eighteenth century. The reason appears to be that English judges first formally recognized such an exception in cases decided in the 1720s.<sup>146</sup> Specifically, they ruled that “[i]n the case of murder, what the deceased declared after the wound given, may be given in evidence”<sup>147</sup> but that, if the declaration had been reduced to writing the writing itself must be produced.<sup>148</sup>

Thomas Leach’s 1787 edition of Hawkins’s treatise also stated that the dying declaration exception was restricted to declarations made while

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Evidence, because *Paine* was not present to cross-examine, and tho’ tis Evidence in Indictments for Felony in such case by Force [of the Marian statutes], yet ‘tis not so in Informations for Misdemeanors in Civil Actions or Appeals [that is, private prosecutions] of Murder.” GILBERT, *supra* note 99, at 100. Gilbert’s “tho” [that is, “although”] seems to have indicated that the “Force of [the Marian statutes]” was such that a Marian witness examination of a deceased witness was uniquely admissible. See also Davies, Crawford’s *Originalism*, *supra* note 13, at 137–49 (setting out my analysis of why *Paine* recognized the unique statutory basis for admitting Marian testimony of an unavailable witness). But see Kry, *Confrontation*, *supra* note 143, at 505–08 (disagreeing with my interpretation that *Paine* recognized that the Marian statutes provided authority to admit Marian witness examinations of unavailable witnesses in felony trials even if the defendant had had no opportunity for cross-examination).

<sup>146</sup> See Davies, *Not the Framers’ Design*, *supra* note 13, at 412–14. Of course, the need for formal recognition of such an exception in the early eighteenth century may have been prompted by the recognition of a strict cross-examination right in the late seventeenth century; it seems likely that dying declarations of murder victims would have been admitted into evidence prior to the recognition of the confrontation right.

<sup>147</sup> 12 CHARLES VINER, GENERAL ABRIDGMENT OF LAW AND EQUITY \*118 (London, G.G.J. & J. Robinson, 2nd ed. 1792) (first published during the period 1741–1753) (summarizing an unreported 1720 Old Bailey ruling in *King v. Ely*, and a 1722 (“8 Geo.”) ruling of the King’s Bench (“B.R.”) in “Trowter’s Case” (that is, *King v. Reason & Tranter*, 16 How. St. Tr. 1 (K.B. 1722)). For a more complete discussion, see Davies, *Not the Framers’ Design*, *supra* note 13, at 413–14.

<sup>148</sup> 12 VINER, *supra* note 147, at 118–19.

the victim of a fatal attack was aware of his or her impending death.<sup>149</sup> The theory was that the victim-declarant's apprehension of imminent death would stimulate the same fear that a false accusation would result in eternal damnation as would a judicial oath.<sup>150</sup> Thus, the dying declaration exception was limited to circumstances that were thought to assure truthfulness and reliability to the same degree as a judicial oath.

The scope and rationale for the dying declaration exception—and the absence of any broad murder-victim hearsay exception—are also evident in an informal report of a 1785 trial in the Old Bailey in London (although I hasten to add that this case was not reported in a way in which framing-era Americans would have been familiar with it).<sup>151</sup> During the trial of William Higson, Justice Nares told a witness who was about to quote a statement by the allegedly murdered boy victim:

I think you are not to tell us what the boy said . . . [Y]ou see, gentlemen of the Jury, that declaration was not upon oath . . . nor was [the boy victim] in that sort of state, to enforce what he said to be true; as for instance, the declarations of dying people not expecting to recover, have that influence on their minds and consciences at that time, which makes them equal to an oath . . . .<sup>152</sup>

In the same case, Chief Baron Eyre also commented to the jury that:

[A]ll evidence against prisoners is to be on oath, with one exception, which is a declaration without oath, by a person who conceives himself to be in a dying condition, as to the author of the injury he has received; and that is upon this ground, that the situation of such a party creates an obligation upon his mind to speak the truth, equal to the sanction of an oath . . . .<sup>153</sup>

As suggested by these passages, it does not appear that the dying declaration exception was grounded on any notion of equity or fairness to the victim; rather, the rationale for the exception was necessity—the dying declaration of a murder victim was admitted such crucial information as “the author of the injury” (that is, the identity of the attacker) might be lost.<sup>154</sup> Moreover, the obvious conflict between the

<sup>149</sup> 2 LEACH'S HAWKINS (1787 ed.), *supra* note 94, at 619 n.10.

<sup>150</sup> 2 *Id.*

<sup>151</sup> The Old Bailey Sessions Papers are useful for understanding English common law, but there is no evidence they were imported or otherwise available in framing-era America, so they cannot be taken as evidence of the Framers' understanding of criminal procedure. See Davies, *Not the Framers' Design*, *supra* note 13, at 375–76 n.63.

<sup>152</sup> William Higson's Case, Old Bailey Sessions Papers (Apr. 6, 1785, #415) at 536, 539. This statement, as well as that accompanying the following note, is identified in LANGBEIN, *supra* note 85, at 238 n.267.

<sup>153</sup> *William Higson's Case*, Old Bailey Sessions Papers at 539. The title “Baron” connoted that Eyre was a judge of the Court of Exchequer.

<sup>154</sup> See also 2 LEACH'S HAWKINS (1787 ed.), *supra* note 94, at 619. It should be noted that criminal law was considerably simpler in the late eighteenth century, and murder was not yet subdivided into degrees; as a result, statements that might shed light on defendant's premeditation were of less importance.

dying declaration exception and the ban against hearsay and defendant's right to cross-examine was contained by limiting the dying declaration to instances in which the victim's awareness of impending death provided the necessary guarantee of truthfulness and by limiting the content to the essential facts of the crime. As a result, there was no shortage of reported cases in which even the declaration of a dying murder victim was ruled inadmissible at the murder trial because it did not satisfy the above requirements.<sup>155</sup> The exclusion of victim hearsay in those cases clearly proves that there was no general homicide-victim hearsay exception at common law.

*E. The Confrontation Right and Evidence Law at the Time of the Framing*

Thus, during the American Framing era, English common law recognized only two kinds of out-of-trial statements that could be admitted to prove a criminal defendant's guilt: (1) prior Marian testimony given by a witness who had become unavailable prior to trial, including a witness "kept away" or "detained" by the actions of the defendant; and (2) a dying declaration of a murder victim regarding the facts of the attack given while the victim was aware of impending death. These were the only kinds of admissible out-of-trial statements identified in the treatises and manuals that Americans would have had access to when the initial state declarations of rights and the federal Bill of Rights were framed.<sup>156</sup> Hence, this would appear to be how framing-era Americans would have understood the confrontation right.<sup>157</sup>

Moreover, two English rulings in Old Bailey trials that were roughly contemporaneous with the framing and adoption of the Federal Bill of Rights, *King v. Woodcock* (1789)<sup>158</sup> and *King v. Dingler* (1791),<sup>159</sup> corroborate the picture of evidence law that appears in the English treatises and manuals. However, I hasten to note that neither of these cases were published early enough to have come to the Framers' attention prior to the framing of the Sixth Amendment in the fall of

<sup>155</sup> See, e.g. the cases cited in *Giles v. California*, 128 S. Ct. 2678, 2685 (2008); Brief of the Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curiae in Support of Petitioner at 17–22, *Giles v. California*, 128 S. Ct. 2678 (2008) (No. 07-6053) [hereinafter NACDL Amicus Brief].

<sup>156</sup> See Davies, *Not the Framers' Design*, *supra* note 13, at 383–418.

<sup>157</sup> Of course, there is always the possibility that Americans could have developed some home-grown understandings of rights that differed from English common law. See, e.g., *id.* at 387 n.86; Davies, Crawford's *Originalism*, *supra* note 13, at 124 n.55. However, if so, documents that would shed light on such developments regarding the confrontation right have yet to come to light. See, e.g., Randolph N. Jonakait, *The (Futile) Search for a Common Law Right of Confrontation: Beyond Brasier's Irrelevance to (Perhaps) Relevant American Cases*, 15 BROOK. J.L. & POL'Y 471 (2007) (discussing post-framing American state cases).

<sup>158</sup> *King v. Woodcock*, Leach (1st ed. 1789) 437, 1 Leach (4th ed. 1815) 500, 168 Eng. Rep. 352 (Old Bailey 1789).

<sup>159</sup> *King v. Dingler*, 2 Leach (3rd ed. 1800) 683, 2 Leach (4th ed. 1815) 561, 168 Eng. Rep. 383 (Old Bailey 1791).

1789: *Woodcock* was published in London sometime later in 1789,<sup>160</sup> while *Dingler* was not published until 1800.<sup>161</sup> Thus *Crawford* erred in treating these cases as direct evidence of the Framers' understanding.<sup>162</sup> Nevertheless, they are relevant to the present discussion insofar as they confirm that framing-era English law recognized only two forms of admissible out-of-trial statements and that both involved statements that were given either under oath (that is, prior Marian testimony of an unavailable witness) or under circumstances that constituted the functional equivalent of an oath (that is, the dying declaration of a murder victim).

Consider, for example, what the presiding judge, Chief Baron Eyre, said to the jury regarding admissible evidence in *King v. Woodcock*:

The most common and ordinary species of legal evidence consists in the depositions [that is, trial testimony] of witnesses taken on oath before the Jury, in the face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give. But beyond this kind of evidence *there are also two other species which are admitted by law*: The one is the dying declaration of a person who has received a fatal blow; the other is the examination of a prisoner, and the depositions of the witnesses who may be produced against him, taken officially before a Justice of the Peace, by virtue of a particular Act of Parliament [that is, one of the Marian statutes], which authorizes Magistrates to take such examinations, and directs that they shall be returned to the Court of Gaol Delivery [that is, the felony trial court]. This last species of deposition, if the deponent should die between the time of examination and the trial of the prisoner, may be substituted in the room of that *viva voce* testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact.<sup>163</sup>

Eyre went on to rule that the deceased victim's statement about "the fact"—that is, about the crime being tried<sup>164</sup>—could not be admitted as

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<sup>160</sup> The first edition of Leach's Crown Cases, in which *Woodcock* was reported, was most likely published in London in late 1789. See Davies, *Revisiting Crawford*, *supra* note 13, at 563–64, 564 n.23. However, the Bill of Rights was debated in August and submitted to the states on September 25, 1789. See Agreed Resolution of September 25, 1789, *reprinted in* THE COMPLETE BILL OF RIGHTS 400, entry 12.1.1.28.a. (Neil H. Cogan ed. 1997).

<sup>161</sup> See Davies, *Revisiting Crawford*, *supra* note 13, at 612.

<sup>162</sup> In *Crawford*, Justice Scalia implicitly justified his treatment of the 1791 English decision in *Dingler* as evidence of the Framers' understanding by referring to 1791 as the year in which the Bill of Rights was ratified. *Crawford v. Washington*, 541 U.S. 36, 46 (2004). However, the more appropriate date for assessing original meaning is that of the framing of the Bill in September 1789. See Davies, *Crawford's Originalism*, *supra* note 13, at 157–59.

<sup>163</sup> *Woodcock*, Leach (1st ed. 1789) at 439; 1 Leach (4th ed. 1815) at 501–02; 168 Eng. Rep. at 352–53 (emphasis and bracketed explanations added).

<sup>164</sup> Eighteenth-century sources often used the term "fact" as a synonym for the commission of a crime. See, e.g., 4 BLACKSTONE (1st ed. 1769), *supra* note 125, at 301

prior Marian testimony because it had not been taken in accordance with Marian procedure, and thus the statement had been taken “extrajudicially” and was not legally sworn<sup>165</sup> (a point Justice Scalia misstated in *Giles*).<sup>166</sup> Eyre then either decided the statement met the requirement for a dying declaration or left it to the jury to decide whether it could be admitted as declaration made while the murder victim was “in fact under the apprehension of death,” and they concluded she was.<sup>167</sup>

The ruling in *Dingler* also confirms that only these two forms of out-of-trial statements could be admissible. As in *Woodcock*, the murder victim’s statement was ruled inadmissible as prior Marian testimony because it had not been taken in compliance with the requirements of Marian procedure.<sup>168</sup> In addition, the prosecution conceded the victim’s statement did not meet the requirement of a dying declaration because it had not been made while the victim was aware of her impending death. As a result, the victim’s statement was ruled inadmissible. Thus, there is no suggestion in the case report that there could have been any other basis upon which the victim’s statement could have been admissible.

The circumstances in *Woodcock* and *Dingler* are also significant insofar as they demonstrate that it would have been quite difficult to take valid Marian testimony about the fatal attack from a lingering murder victim. In particular, Marian procedure required at least that an examination of a witness be taken in connection with the committal to jail of the person arrested for the crime.<sup>169</sup> However, there obviously were limits to the

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(noting that the date and township “in which the fact was committed” must be included in an indictment). See also Davies, *Correcting Search History*, *supra* note 14, at 100–01 (discussing the use of the phrase “evidence of a fact committed” as the standard for valid warrants in the warrant provision of the 1776 Virginia Declaration of Rights).

<sup>165</sup> *Id.* (1st ed. 1789) at 440, 1 Leach (4th ed. 1815) at 502, 168 Eng. Rep. at 353.

<sup>166</sup> Justice Scalia described the victim’s statement in *Woodcock* as being “under oath.” *Giles v. California*, 128 S. Ct. 2678, 2684 (2008). That was incorrect. The justice of the peace attempted to take a sworn statement but the court ruled that it was not validly sworn.

<sup>167</sup> *Woodcock*, 1 Leach (4th ed. 1815) at 504, 168 Eng. Rep. at 354 (leaving issue to jury). Another account of the case suggests that the judge determined that the victim was “quietly resigned and submitting to her fate” and thus admitted her statements as a dying declaration. 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 356 (London, A. Strahan 1803).

<sup>168</sup> In *Dingler*, the court apparently ruled the victim’s statement inadmissible as a defective Marian examination on the basis of the precedent of the earlier ruling in *Woodcock*. *King v. Dingler*, 2 Leach (3d ed. 1800) 638, 641, 2 Leach (4th ed. 1815) 561, 563, 168 Eng. Rep. 383, 384. In *Giles*, Justice Scalia again stated that the victim’s statement in *Dingler* was “under oath.” *Giles*, 128 S. Ct. at 2685. However, that is incorrect because in *Woodcock*, which was relied upon in *Dingler*, the court had explicitly stated that the victim’s statement had not been made under a valid oath. See *supra* notes 165–66 and accompanying text.

<sup>169</sup> The Marian statutes directed that witness testimony be taken in the proceeding in which a felony arrestee was either committed to jail to await trial or bailed. See *supra* note 70 and accompanying text.

feasibility of moving a severely wounded victim to the place where the committal proceeding was held. Yet, the procedural requisites were not met if the justice of the peace instead went to the place where the victim had been taken and took the victim's statement separately, as happened in both *Woodcock* and *Dingler*.<sup>170</sup>

Indeed, there seems to be only one reported case that *might be* an instance in which a dying victim's statement was admitted under the Marian unavailability rule, the 1787 Old Bailey ruling in *King v. Radbourne*.<sup>171</sup> However, there are two versions of that case, and, at most, this case is the proverbial exception that proves the rule.<sup>172</sup> In the later, expanded case report of *Radbourne*, that was first published in 1800, the lingering victim, who had suffered a hatchet attack to the head, was carried to the public house and gave her statement there in the presence of the accused, her maid, who had been arrested for the crime. The victim's statement did not qualify as a dying declaration because the victim was apparently unaware of the severity of her condition, but was admitted as the prior Marian testimony of a dead witness.<sup>173</sup> However, the legal ground upon which the victim's statement was admitted is unclear because in the original, shorter case report published in 1789, there was no mention of the Marian statutes.<sup>174</sup> Whatever the explanation, the scenario in *Radbourne* must have been rare, at best.

Thus, there is little question but that a valid Marian witness examination would only rarely have been taken from the victim in a murder prosecution. Hence, the Marian unavailability rule would rarely have had any application to a murder case at all; instead, the dying

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<sup>170</sup> In *Woodcock*, the justice of the peace took the victim's statement at the poor house prior to the arrest of the defendant. 1 Leach (4th ed. 1815) 500, 502, 168 Eng. Rep. at 352, 353. In *Dingler*, the justice of the peace took the victim's statement at the infirmary a day after the defendant was already arrested. 2 Leach (4th ed. 1815) at 561, 168 Eng. Rep. at 383.

<sup>171</sup> There are two versions of the report of the 1787 rulings in the Old Bailey and by the Twelve Judges. The initial report was *Radbourne's Case*, Leach (1st ed. 1789) 399, *reprinted in* Leach (2nd ed. 1792) 363. An expanded report was published as *King v. Radbourne*, 2 Leach (3rd ed. 1800) 512, *reprinted in* 1 Leach (4th ed. 1815) 457, 168 Eng. Rep. 330.

<sup>172</sup> See *supra* note 171. See also Davies, *Revisiting Crawford*, *supra* note 13, at 605–09.

<sup>173</sup> *Radbourne*, 2 Leach (3d ed. 1800) at 518, *reprinted in* 1 Leach (4th ed. 1815) at 459, 168 Eng. Rep. at 332.

<sup>174</sup> The legal ground for admitting the victim's statement is mysterious for two reasons. One is that the issue was addressed by the twelve judges, who approved the admission without explanation. However, it is unclear why the issue would have been submitted to the twelve judges if the procedure had clearly complied with the Marian statute. Second, in an account of *Radbourne's* trial in the Old Bailey Sessions Papers, the prosecutor, Garrow, argued that the victim's statement should be admitted to show that, when *Radbourne* heard it, she did not deny the accusation as an innocent person would have. Again, it is unclear why the prosecutor had to resort to that argument if the statement comported with Marian procedure. See Davies, *Revisiting Crawford*, *supra* note 13, at 606 n.183.

declaration exception was the more important possibility for admitting a murder victim's statement, though it too, was significantly restricted. The bottom line is that there plainly was no framing-era doctrine that permitted the victim's hearsay statements to be admitted in a murder trial simply because the defendant had killed the victim.

Additionally, and at the risk of stating the obvious, it is evident that framing-era law did not provide any avenue at all by which a hearsay statement along the lines of that involved in *Giles* could have been admitted at trial. The unsworn hearsay statement at issue in *Giles* was a statement which the victim made three weeks prior to the fatal attack immediately after and about a prior episode of violence, rather than about the fatal attack itself.<sup>175</sup> Thus, had such a victim's statement been offered in a framing-era prosecution, it could not have constituted a dying declaration. Likewise, had a victim's statement along the lines of that in *Giles* been offered during the Framing era it could not have qualified as prior Marian testimony because it was not under oath and because it was not about the murder attack itself, but about a prior assault.

Moreover, the victim would not have had an opportunity to give Marian testimony directly about the prior episode itself either, because Marian committal procedure authorized the taking of testimony only in connection with an arrest made for a *felony* that had already been committed in fact. However, assault and battery were not classified as felonies in framing era law.<sup>176</sup> Hence, even if an assault or battery prosecution had been commenced and the defendant had been arrested in that regard (it does not appear any prosecution had been initiated or arrest made regarding the prior episode in *Giles*), there would not have been any legal authority for a justice of the peace to take or record sworn testimony about that nonfelony offense. Thus, a hearsay statement made by a battery victim—along the lines of what the *Giles* victim had previously said to a police officer—would never have been admissible under framing-era evidence doctrine. Rather, as noted above, the framing-era rule was that *any unsworn statement* was “hearsay” and, as such, was inadmissible because “hearsay is no evidence.”<sup>177</sup>

Indeed, in framing-era law, the Marian unavailability rule applied only to unavailable “witnesses” in the formal sense of that term; that is, it was limited to persons who had previously given sworn testimony in one of two forums authorized by the Marian statutes: a coroner's inquest or a felony committal proceeding before a justice of the peace. The victim in *Giles* was never a “witness” in any equivalent sense. At most she was only a *potential trial witness* (and only in a hypothetical sense at that because a

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<sup>175</sup> *Giles v. California*, 128 U.S. 2678, 2681–82 (2008).

<sup>176</sup> See 4 BLACKSTONE (1st ed. 1768), *supra* note 125, at 216 (stating that assaults, batteries, wounding, false imprisonment and kidnapping were “inferior offenses, or misdemeanors,” rather than felonies).

<sup>177</sup> See *supra* note 131 and accompanying text.

murder victim can never testify in person in the murder trial).<sup>178</sup> The distinction between a prior witness and a potential trial witness may seem like an inconsequential distinction today, but there is no reason to think it would have been thought inconsequential when the Confrontation Clause was framed in 1789.

Rather, during the Framing era an oath was still the essential requisite of legal evidence because “hearsay is no evidence.” The Marian testimony of an unavailable witness was admissible because, having been made under a judicial oath and recorded in writing, it at least met the basic standard for legal evidence. Likewise, the only other form of admissible out-of-trial statement, the dying declaration of a murder victim, was admissible only because the victim-declarant had been aware of impending death and thus was effectively under the same sanction as a judicial oath. But there was no doctrinal basis for admitting unsworn hearsay like the victim hearsay in *Giles*.<sup>179</sup>

#### F. The “Cross-Examination Rule” Controversy

I should stop at this point and discuss the major difference between my historical account and that which appears in Robert Kry’s Article in this symposium. Specifically, I have omitted any suggestion that framing-era Marian procedure included a cross-examination rule. Thus, I have contended that prior Marian testimony would have been *sworn*, but not

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<sup>178</sup> The victim in *Giles* became a “witness” in terms of modern evidence jargon only in the indirect, technical sense that her prior unsworn hearsay statement was admitted at trial. However, framing-era authorities do not seem to have used the term “witness” in that sense.

<sup>179</sup> Admittedly, the fact that forfeiture by wrongdoing was only a prong of the Marian unavailability rule is contrary to the expectations that one might have from familiarity with the current forfeiture exception. For example, in the amicus brief Professor Richard Friedman filed in support of the State of California in *Giles*, he noted that the NACDL Amicus Brief had argued that the historical forfeiture doctrine was applied in Marian examinations, but asserted that “this proves nothing at all, because there was no rule that forfeiture could be applied only to such statements.” Brief of Professor Richard Friedman as Amicus Curiae in support of Respondent at 22 n.22, *Giles*, 128 S. Ct. 2678 (No. 07-6053). Notably, however, Professor Friedman did not identify any historical application of forfeiture by wrongdoing other than those involving prior Marian testimony.

Professor Friedman appears to have erred by assuming that there had to be some other, broader, or free-standing forfeiture doctrine beyond the Marian admissibility rule itself. That error, in turn, may reflect a large difference in outlook between framing-era law and current doctrine. During the framing-era, the general understanding was that government or judicial authority existed only to the extent it was positively granted by the law. See, e.g., Davies, *Fourth Amendment*, *supra* note 14, at 737 n. 543. Hence, the appropriate question for assessing historical doctrine is not whether there was a rule prohibiting the application of forfeiture to other kinds of out-of-trial statements, but instead whether there was any positive authority for admitting any such statements other than the Marian statutes. A survey of the framing-era authorities reveals there was not. See Davies, *Not the Framers’ Design*, *supra* note 13, at 390–94, 424.

that it would have been confronted at the time it was taken. In contrast, Kry argues that Marian procedure incorporated a cross-examination rule and thus prior Marian testimony would have been *both sworn and confronted*.<sup>180</sup> We have previously hashed out this disagreement in considerable detail.

As noted above, Justice Scalia asserted in his 2004 *Crawford* opinion that a “cross-examination rule” had become a settled facet of the common-law confrontation right by the time the Confrontation Clause was adopted.<sup>181</sup> I criticized that claim in a 2005 Article in which I documented that framing-era authorities did not state that an opportunity for cross-examination was a requisite for admitting Marian testimony and also noted that Justice Scalia’s cross-examination claim depended heavily on his interpretation of several English cases (*Radbourne*, *Woodcock*, and *Dingler* discussed above) that were published too late to have come to the Framers’ attention, and that did not actually seem to support his interpretation, in any event.<sup>182</sup> In a 2007 Article, Robert Kry, who had clerked for Justice Scalia during the term in which *Crawford* was decided, argued that I had not given sufficient weight to historical evidence that indicated that, by the time of the Framing, at least a controversy had emerged in London regarding a cross-examination requirement.<sup>183</sup> In a reply to Kry, I adhered to my earlier criticisms because I did not find that he had offered significant evidence that the American Framers would have thought that Marian procedure (which was used in the American colonies and early states) required that the defendant be present and have an opportunity to cross-examine.<sup>184</sup> I persist in that view. However, because this debate regarding a framing-era cross-examination rule has already been set out in detail, I will not reiterate it here.

Two observations are in order. One is that it was entirely legitimate for the petitioner-defendant and the amici supporting petitioner-defendant in *Giles* to adopt *Crawford*’s claims regarding framing-era law, because *Crawford*’s history is the official history, even though it is unsound. The other is that my disagreement with Kry regarding the cross-examination rule is limited to the state of the law during the Framing era. I have never disputed that there is solid evidence that a cross-examination rule became part of the unavailable-prior-witness rule during the nineteenth century.<sup>185</sup> Thus, I agree with Kry that a cross-examination requirement was part of the post-framing, traditional understanding of the unavailable-prior-witness rule, including the

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<sup>180</sup> See Kry, *supra* note 17, at 586–87.

<sup>181</sup> *Crawford v. Washington*, 541 U.S. 36, 46–47, 53–54 (2004).

<sup>182</sup> See generally, Davies, *Crawford’s Originalism*, *supra* note 13, at 120–89.

<sup>183</sup> Kry, *supra* note 143, at 505–06.

<sup>184</sup> See generally, Davies, *Revisiting Crawford*, *supra* note 13.

<sup>185</sup> See, e.g., Davies, *Crawford’s Originalism*, *supra* note 13, at 172–76; Davies, *Revisiting Crawford*, *supra* note 13, at 625–26.

forfeiture by wrongdoing prong of that rule (though, as I discuss below, Justice Scalia now seems to disavow a uniform post-framing cross-examination rule). So let me move on to the post-framing forfeiture doctrine.

*G. Post-Framing Changes and the Traditional Forfeiture Exception*

Several substantial changes in confrontation doctrine occurred in the aftermath of the framing of the Confrontation Clause. For one thing, an opportunity for cross-examination became a requirement of the nineteenth-century Marian unavailability rule. In other words, the prior Marian testimony of an unavailable witness was admissible at trial only if there had been an opportunity for the defendant to cross-examine the witness when the Marian testimony was taken.<sup>186</sup>

That change led to a contraction of the Marian unavailability rule in one respect insofar as it meant that prior testimony given before a coroner's inquest, during which there would not have been a realistic opportunity for a defendant to cross-examine, ceased to be admissible. Thus, nineteenth-century American courts began to decline to admit prior testimony from unavailable witnesses that had been taken in coroner's inquests.<sup>187</sup> Indeed, by 1895 the Supreme Court would comment regarding an earlier state case that "the testimony of a deceased witness had been taken before a coroner, but in the absence of the accused, and *of course* it was held to be inadmissible [at the later trial]."<sup>188</sup>

However, during the nineteenth century the unavailable-witness rule was also extended beyond Marian testimony to other forms of prior sworn testimony that had been subject to cross-examination at the time of the testimony. For example, testimony an unavailable witness had given in a prior trial was admitted in *Reynolds* in 1879.<sup>189</sup> Likewise, when committal procedure under the Marian statutes was replaced with the modern institution of the adversarial preliminary hearing, prior

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<sup>186</sup> Early nineteenth-century English treatises indicated that prior Marian testimony of an unavailable witness was admissible in trial only if the defendant had had an opportunity to cross-examine during the Marian committal hearing. *See, e.g.*, the works cited in Kry, *supra* note 143, at 503–04. Those post-framing English works were widely imported by Americans. In addition, some American publications also began to recite the cross-examination requirement for admitting prior Marian testimony of unavailable witnesses. *See, e.g.*, RHODOM A. GREEN & JOHN W. LUMPKIN, *THE GEORGIA JUSTICE* 99 (Milledgeville, P.L. & B.H. Robinson 1835) (stating that magistrates' examinations of witnesses in Georgia were conducted in the presence of the defendant).

<sup>187</sup> *See Crawford v. Washington*, 541 U.S. 36, 47 n.2; Kry, *supra* note 143, at 547, and cases cited therein.

<sup>188</sup> *Mattox v. United States*, 156 U.S. 237, 241 (1895) (emphasis added) (commenting on *State v. Campbell*, 30 S.C.L. (1 Rich), 124 (Ct. App. 1844)).

<sup>189</sup> *Reynolds v. United States*, 98 U.S. 145, 158–59 (admitting testimony given in a prior trial by a witness the defendant kept away from the subsequent trial).

testimony in such proceedings also became admissible if the witness had become unavailable.<sup>190</sup> Thus, when the Supreme Court approved of admitting testimony a deceased witness had given in a prior trial in the 1895 decision *Mattox v. United States*, it was able to cite a number of state precedents for doing so.<sup>191</sup>

This broadening of the Marian unavailability rule into a more general unavailable-prior-witness rule seems to have occurred as a result of two different developments. One was that, as courts began to record testimony in writing, the framing-era objection to the unreliability of oral accounts of prior trial testimony disappeared.<sup>192</sup> The other, which was the subject of some controversy, was that oral accounts of prior sworn testimony by deceased witnesses came to be treated as valid evidence in civil cases and that rule was then transferred to criminal trials as well, as the distinction between civil and criminal evidence standards weakened.<sup>193</sup>

The notable point for present purposes is that *Reynolds* and *Mattox* both explicitly stated that *only sworn and confronted prior testimony* could satisfy the Confrontation Clause. In *Reynolds*, the Court's opinion expressly conditioned the admission of the prior trial testimony of a witness kept away by the defendant on the fact that "[t]he accused was present at the time testimony was given, and had full opportunity of cross-examination."<sup>194</sup> In *Mattox*, Justice Brown's opinion was even more emphatic:

The substance of the constitutional protection [of the Confrontation Clause] is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting

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<sup>190</sup> See, e.g., *United States v. Macomb*, 26 F. Cas. 1132 (C.C.D. Ill 1851) (No. 15,702) (admitting oral testimony as to the substance of what a deceased witness had testified during a preliminary hearing).

<sup>191</sup> *Mattox*, 156 U.S. at 241-44 (admitting testimony given in prior trial by deceased witness, and citing twenty lower court precedents).

<sup>192</sup> For the framing-era concern, see *supra* note 139. For an example of the acceptance of written records of testimony, see *Mattox*, 156 U.S. at 244 (commenting that many of the lower court decisions permitting the admission of prior testimony hold that "not the substance of his testimony only, but the very words of the witness, shall be proven" and commenting that "all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript" constitutes competent evidence of what the witness said).

<sup>193</sup> See, e.g., *Macomb*, 26 F. Cas. at 1135-37 (noting conflicting court rulings as to whether oral accounts of prior testimony were admissible, and as to how precise the oral accounts of prior testimony had to be, but admitting an oral account of prior testimony on the ground that it would be admissible in a civil trial and there should be no difference in criminal cases).

<sup>194</sup> *Reynolds*, 98 U.S. at 161. See also the discussion of *Reynolds* in Kry, *supra* note 17, at 600-01.

him to the ordeal of a cross-examination. This, the law says, he shall *under no circumstances be deprived of*. . . .<sup>195</sup>

Because this traditional unavailable prior witness rule was limited to sworn, confronted prior testimony, it not only carried the guarantee of truthfulness provided by the oath (and, often, the guarantee of reliability provided by a written record), but also at least partially accommodated the confrontation right; that is, although the defendant lost the opportunity to cross-examine the adverse witness in the view of the trial jury, he at least had the opportunity to cross-examine when the statement was made.<sup>196</sup> Moreover, as *Reynolds* indicates, the forfeiture prong of the more general unavailable-prior-witness rule was still confined to instances in which there was evidence the defendant had deliberately “kept away” the prior witness.<sup>197</sup>

Significantly, this traditional understanding that the forfeiture prong of the unavailable-prior-witness rule was limited to sworn and confronted testimony persisted until the latter part of the twentieth century. However, at that time the emergence of the “reliability” rationale for confrontation drained the confrontation right of its previous substance, and the forfeiture doctrine was drastically enlarged.

#### *H. The Recent Expansion of the Forfeiture Exception During the Roberts Reliability Regime*

During the nineteenth century, state courts broadened the opportunities for admitting out-of-trial evidence in civil and criminal trials by loosening the ban against hearsay evidence in several ways. One was that the definition of “hearsay” was itself limited to only those out-of-trial statements that were offered to prove the truth of what was said, but not for other purposes.<sup>198</sup> That change opened the way for courts to create new or expanded exceptions to the rule against hearsay evidence

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<sup>195</sup> *Mattox*, 156 U.S. at 244 (emphasis added). *Mattox* conceded, however, that “[t]here is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards [cross-examination in the view of the jury] even by the death of the witness, and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, 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.” *Id.* at 243.

<sup>196</sup> See Kry, *supra* note 17, at 586–87. (discussing Dean Wigmore’s characterization that some opportunity for cross-examination was “the main and essential purpose” of the confrontation right while the opportunity to cross-examine in the view of the trial jury was “a secondary advantage” of the right).

<sup>197</sup> *Reynolds*, 98 U.S. at 148–58 (defendant kept his wife away from trial).

<sup>198</sup> This limitation on the definition of hearsay does not appear in pre-framing authorities, but does appear in late nineteenth-century authorities. See Davies, *Not the Framers’ Design*, *supra* note 13, at 351 n.9, 462–66 & n.279.

for civil trials,<sup>199</sup> and then to break down the earlier distinction between criminal and civil evidence, and to import the new or expanded civil hearsay exceptions into criminal trials as well.<sup>200</sup> Indeed, because the rationale for hearsay exceptions was framed in terms of the trustworthiness or reliability of the hearsay statements, that rationale eventually supported even the recognition of the so-called “residual” hearsay exception under which any hearsay statement could be admitted, even in a criminal trial, if it could be said to exhibit some “particularized” indication of reliability.<sup>201</sup>

Although the Supreme Court had previously recognized that a conflict existed between the various hearsay exceptions and the confrontation right,<sup>202</sup> in the 1980 decision *Ohio v. Roberts* the justices endorsed the new reliability rationale for the confrontation right itself.<sup>203</sup> Thus, *Roberts* effectively reduced the Confrontation Clause to “a mere vestigial appendix of hearsay doctrine.”<sup>204</sup> The explanation for the doctrinal changes that culminated in *Roberts* would seem to be that judges and justices placed a higher value on the usefulness of inculpatory hearsay evidence in criminal trials than on the confrontation right itself.

The adoption of the reliability rationale for the confrontation right also opened the way for a drastic expansion of forfeiture by wrongdoing. Indeed, it was only during this recent reliability period that forfeiture came to be treated as a complete “exception” to the confrontation right. Although the traditional understanding of forfeiture by wrongdoing had been restricted to the admission of prior sworn and confronted judicial testimony, courts and state legislatures began to eliminate those protections under the rubric of the reliability rationale. They first took back the cross-examination requirement that had become a settled part of forfeiture by wrongdoing, then also took away the requirement of an oath, and then finally removed even the usual requirement of a reliable record of the hearsay statement.

The initial departure from the traditional conception of forfeiture seems to have occurred in the Eighth Circuit’s 1976 decision in *United*

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<sup>199</sup> Although some hearsay exceptions regarding evidence in civil litigation had emerged by the time of the framing of the Sixth Amendment, they were still so few in number and so highly restricted in scope that they bear little resemblance to the variety of hearsay exceptions found in modern evidence law. For statements of the framing-era civil hearsay exceptions, see the historical authorities quoted in *id.* at 410–12 n.145. See also *id.* at 361 n.33, 366 n.43.

<sup>200</sup> The civil hearsay exceptions that existed at the time of the framing of the Sixth Amendment were understood to be inapplicable to criminal trials. See 2 LOFFT’S GILBERT (1791 ed.), *supra* note 99, at 889; Davies, *Not the Framers’ Design*, *supra* note 13, at 418–20. However, American courts began to apply hearsay exceptions in criminal trials sometime toward the middle of the nineteenth century. See *id.* at 456–62.

<sup>201</sup> See, e.g., FED. R. EVID. 807.

<sup>202</sup> See *supra* note 31 and accompanying text.

<sup>203</sup> 448 U.S. 56, 66 (1980).

<sup>204</sup> Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 575 (1988).

*States v. Carlson*.<sup>205</sup> The Court of Appeals invoked a “waiver” rationale when it ruled that the record of the grand jury testimony of an absent witness could be admitted at trial where there was evidence that the reason for the absence was that the defendant had “intimidated” the witness, but the court acknowledged that it could not identify any previous federal or state case that allowed the admission of grand jury testimony because of witness-tampering.<sup>206</sup> Although the defendant could not have had any opportunity to cross-examine the witness in the grand jury context, the court upheld the admission of the grand jury testimony because it exhibited indicia of reliability insofar as it was under oath and subject to the sanction of perjury. The court also opined that a defendant should not benefit “if he achieves his objective of silencing a witness” and thus “subvert[s] a criminal prosecution by causing witnesses not to testify at trial who have, at the pretrial stage, disclosed information which is inculpatory as to the accused.”<sup>207</sup> Thus, *Carlson* still involved deliberate interference with a formal witness and admitted only prior testimony that was recorded and sworn; however, it relaxed the traditional parameters of forfeiture by wrongdoing by eliminating the requirement that the prior testimony be confronted. Thereafter, several other federal courts also admitted prior grand jury testimony of unavailable witnesses where there was evidence that defendants had deliberately prevented the appearance of the witnesses at trial.<sup>208</sup>

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<sup>205</sup> 547 F.2d 1346 (8th Cir. 1976).

<sup>206</sup> *Id.* at 1358. There might be an earlier instance of the admission of grand jury testimony of a kept-away witness at a criminal trial, but it is the subject of conflicting interpretations. In 1775, the Connecticut colonial supreme court in *Rex v. Barber*, 1 Root 76 (Conn. Super. Ct. 1775) permitted the admission of prior testimony by an absent witness under a forfeiture by wrongdoing ruling. In *Giles*, Justice Scalia gave weight to nineteenth-century sources that interpreted *Barber* as having admitted grand jury testimony which would have been unopposed. *Giles v. California*, 128 S. Ct. 2678, 2689–70 (2008) (citing *Barber*, 1 Root at 76. However, the report of *Barber* actually indicated that the absent and presumably bribed witness had testified “before the justice and before the grand jury against Barber, and minutes taken of his testimony.” *Barber*, 1 Root at 76. Noting the extreme brevity of the case report, Justice Breyer commented in his *Giles* dissent that he could not tell whether the testimony that was admitted was that before the grand jury, or from a Marian witness examination by the justice of the peace that he presumed would have been confronted. *Giles*, 128 S. Ct. at 2706 (Breyer, J., dissenting). There does not seem to be any way to tell with any certainty, but it seems most likely that the case involved Marian witness testimony (though I do not presume the testimony was confronted, see *supra* notes 182–84 and accompanying text) because that is how Jesse Root, the editor of the case report, described it in a marginal note when the report was published in 1798. Being a judge on the same court, Root was in a better position to assess the case than any of the later commentaries. For a fuller discussion of this point, see Kry, *supra* note 17, at 595–97.

<sup>207</sup> *Carlson*, 547 F.2d at 1359.

<sup>208</sup> See *United States v. Balano*, 618 F.2d 624, 626, 628–30 (10th Cir. 1979) (admitting prior grand jury testimony where defendant waived confrontation right by coercing witness to stay away from trial); *United States v. Thevis*, 665 F.2d 616, 627–30 (5th Cir. 1982) (admitting prior grand jury testimony and interviews with FBI where

However, the “reliability” rationale for confrontation also suggested the possibility of a broader forfeiture or waiver exception to the confrontation right. In particular, the “reliability” approach provided a basis for crafting a forfeiture exception that could reach beyond prior formal testimony and extend to an informal, unsworn hearsay statement made by a person who would have been a *potential* adverse witness at trial except for the defendant’s deliberate interference. Thus, in the aftermath of *Roberts* and in response to the difficulties of prosecuting drug gangs, lower federal courts invoked the “reliability” approach to confrontation analysis to extend what they then termed the “waiver” doctrine to admit even unsworn hearsay statements made by a police informant during a police investigation.<sup>209</sup> This change jettisoned the oath requirement that had *always* been a feature of the “kept away” prong of the Marian unavailability rule and of the traditional unavailable prior witness rule, and, for the first time, simply based admissibility of hearsay statements on the defendant’s having deliberately prevented the appearance of the hearsay declarant as a trial witness.

States also expanded the forfeiture exception under the *Roberts* formulation of the confrontation right. In fact, the California legislature adopted a forfeiture exception applicable to unsworn, unopposed hearsay as early as 1985 when it added section 1350 (titled “Unavailable

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defendant engaged in pornography racketeering waived confrontation right by murdering the government’s principal witness to prevent his testifying at trial); *United States v. Mastrangelo*, 693 F.2d 269, 271–73 (2d Cir. 1982) (stating that prior grand jury testimony could be admissible if evidence showed that defendant charged with drug distribution charges had waived confrontation right by murdering witness to prevent testimony, and remanding for evidentiary hearing); *United States v. Potamitis*, 739 F.2d 784, 788–89 (2d Cir. 1984) (admitting grand jury testimony where defendants charged in armored car robbery waived confrontation right by threatening to kill witness if he cooperated with authorities thus causing witness to flee country).

<sup>209</sup> See *United States v. Aguiar*, 975 F.2d 45, 46–48 (2d Cir. 1992) (admitting corroborated hearsay statements made to narcotics officers by declarant who entered plea agreement and cooperated in heroin importation prosecution but then withdrew plea and ceased to cooperate on the ground that defendant waived confrontation right by preventing testimony by threatening witness and concluding that such waiver was not confined to the admission of grand jury testimony but could also apply to interview statements); *United States v. Houlihan*, 92 F.3d 1271, 1278, 1279–89 (1st Cir. 1996) (ruling that unsworn but recorded statements which a drug gang member had made to police prior to his murder by the gang were admissible in the subsequent drug and murder trial because gang members had “successfully conspired to execute [the informant] for the express purpose of preventing his cooperation with the authorities” and concluding that, although previously reported “waiver-by-misconduct” federal cases “all appear to involve actual witnesses” who had previously given formal sworn testimony, “the waiver-by-misconduct doctrine should . . . apply with equal force if a defendant intentionally silences a *potential* witness . . . in order to prevent him from assisting an ongoing criminal investigation. . . . as long as it is reasonably foreseeable that the investigation will culminate in the bringing of charges . . . [because] it is the intent to silence [the informant] that provides [the waiver of the confrontation right].” (emphasis in original).

declarant; hearsay rule”) to the state evidence code.<sup>210</sup> Notably, however, that provision still set out several, fairly rigorous criteria, including strong proof of deliberate witness-tampering. Under section 1350:

(a) In a criminal proceeding charging a serious felony, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and . . .

(1) There is *clear and convincing evidence* that the declarant’s unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered *for purpose of preventing the arrest or prosecution* of the party and is the result of the death by homicide or the kidnapping of the declarant.<sup>211</sup>

Subsection 1350(a)(3) also required that, to be admissible, the statement had to be memorialized in a tape recording made by a law enforcement official or in a writing signed and notarized in the presence of a law enforcement official “prior to the death or kidnapping of the declarant,” and subsection 1350(a)(4) further conditioned admissibility on the statement having been “made under circumstances which indicate its trustworthiness and [show it] was not the result of promise, inducement, threat, or coercion.”<sup>212</sup>

Of course, in the absence of any evidence that Giles murdered his victim for the purpose of preventing her from testifying, the victim’s hearsay statements could not have been admitted against Giles in his state court trial under section 1350. Instead, the trial court admitted her statements under section 1370, a 1996 provision permitting the admission of hearsay statements pertaining to “[t]hreat of infliction of injury” that, unlike section 1350, did not involve forfeiture at all because it did not require that the hearsay declarant’s unavailability be caused by or traceable to an act by the defendant.<sup>213</sup> Instead, Section 1370 appears

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<sup>210</sup> Section 1350 was, and still is, the only provision in California Evidence Code Chapter 2 (“Exceptions to the Hearsay Rule”), Article 15 (“Declarant Unavailable as Witness”). CAL. EVID. CODE § 1350.

<sup>211</sup> CAL. EVID. CODE § 1350(a)(1) (emphasis added).

<sup>212</sup> CAL. EVID. CODE § 1350. In the 1985 enactment, the word “notarized” in subsection (a)(3) was misspelled as “notorized.” The spelling was corrected in a 2001 amendment. That appears to have been the only amendment of the provision.

<sup>213</sup> CAL. EVID. CODE § 1370. Notably, section 1370, titled “Threat of infliction of injury,” appears in Article 17 (“Physical Abuse”) of Chapter 2 (“Exceptions to the Hearsay Rule”). Under subsection 1370(a), a statement is not inadmissible under the hearsay rule if: “(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. (2) The declarant is unavailable [death being one form of unavailability]. (3) The statement was made at or near the time of the infliction or threat of physical injury. . . . (4) The statement was made under circumstances that would indicate its trustworthiness. (5) [And] [t]he statement was made in writing, was electronically recorded, or made to a . . . law enforcement official.” The fifth requirement was expanded in a 2000 amendment to include a statement made to a “physician, nurse, paramedic, or to a law enforcement official.” CAL. EVID. CODE, § 1370(a) (2009).

to have been enacted to facilitate “evidence-based” domestic violence prosecutions for assault or battery.<sup>214</sup>

Remarkably, the California Supreme Court never mentioned the state forfeiture exception in section 1350 in its *Giles* opinion, and the briefs filed in the U.S. Supreme Court, including *Giles*’s, also omitted any mention of it. Perhaps for that reason, it appears in the U.S. Supreme Court’s opinion in *Giles* only as one of a string of citations in a footnote on state statutory forfeiture provisions.<sup>215</sup> Nevertheless, section 1350 is relevant here both as an example of the recent expansion of the reach of the forfeiture exception to unsworn hearsay and as a demonstration of the novelty of the sweeping victim-hearsay confrontation exception that the California Supreme Court endorsed in *Giles*.<sup>216</sup> Likewise, the fact that the California justices chose to ignore the seemingly relevant statutory requirement in section 1350, of “clear and convincing evidence” that a declarant was murdered for the purpose of preventing testimony,<sup>217</sup> would seem to undercut the notion that elected state judges can be expected to enforce state hearsay rules more restrictively than is required by the U.S. Supreme Court’s interpretation of the Confrontation Clause.<sup>218</sup>

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<sup>214</sup> Evidence-based domestic violence prosecutions are used when the victim declines to prosecute. For a description of such prosecutions, *see, e.g.*, Tuerkheimer, *supra* note 60, at 721–30.

<sup>215</sup> *Giles v. California*, 128 S. Ct. 2678, 2688 n.2 (2008).

<sup>216</sup> Because the only statutory forfeiture exception in section 1350 required clear and convincing evidence that the defendant murdered the declarant “for the purpose” of preventing the declarant from testifying at trial, the sweeping victim-hearsay forfeiture by wrongdoing formulation endorsed by the California Supreme Court had no precedent in California law.

<sup>217</sup> On its face, it is difficult to see how the more recent domestic assault provision in section 1370 could have trumped the more restrictive requirements of section 1350 in the *Giles* litigation. *Giles*’s trial for first degree murder would appear to have been a “criminal proceeding charging a serious felony,” which is the category of case that 1350 explicitly applies to. CAL. EVID. CODE § 1350(a). The victim’s hearsay statements were evidently offered either to prove the element of premeditation for the first degree murder charge or to refute the defendant’s claim of self-defense regarding the killing, and the allegation was that *Giles* murdered the hearsay declarant, which was one of the two forms of unavailability (murdered and kidnapped) explicitly addressed in section 1350. In contrast, section 1370 would appear to have applied to evidence in assault and battery prosecutions. Of course, the construction of California statutory law by the California courts would not usually be subject to review by the U.S. Supreme Court. Query, however, whether a criminal defendant would be accorded “due process of law,” as required by the Fourteenth Amendment, if a state judiciary were to place a patently strained construction on state statutes in order to facilitate his conviction.

<sup>218</sup> *See, e.g., Giles*, 128 S. Ct. at 2700 (Breyer, J., dissenting) (observing that “State hearsay rules remain in place” even if a broad forfeiture exception to the confrontation right were adopted); *id.* at 2702 (commenting that “an exception from the general constitutional bar [against admitting unconfrosted statements] does not automatically admit the evidence. Rather, it leaves the State free to decide, via its own hearsay rules and hearsay exceptions, which such statements are sufficiently reliable to admit”); *id.* at 2708 (commenting that even if the forfeiture exception to

Ultimately, of course, the expansion of the forfeiture exception during the *Roberts* reliability regime was incorporated in Federal Rule of Evidence 804(b)(6) when it was adopted in 1997. This “forfeiture by wrongdoing” exception comported with the historical “kept away” formulation<sup>219</sup> insofar as it was expressly limited to instances in which a defendant “engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”<sup>220</sup> However, Rule 804(b)(6) reflected the recent expansion of the forfeiture exception insofar as it was not limited to the admission of prior sworn and confronted judicial testimony, but instead extended to any hearsay declaration made by an unavailable declarant.

Thus, *Crawford* asserted a false dichotomy when it characterized the current forfeiture by wrongdoing exception as being based on “equitable” rather than *Roberts*-reliability grounds.<sup>221</sup> Although the requirement of deliberate witness-tampering in Rule 804(b)(6) can be said to have equitable roots, the long reach of the current forfeiture by wrongdoing exception is very much a product of the now-rejected *Roberts* regime.

Plainly, the expansion of the forfeiture by wrongdoing exception during the *Roberts* regime far exceeded any exception to confrontation that could be said to have been “established at the time of the founding.” As described above, common law never permitted the admission of anything less than *sworn prior testimony* under the “kept away” prong of the Marian unavailability rule. Hence, one would be hard-pressed to defend the constitutionality of Rule 804(b)(6) if one actually used framing-era common-law doctrine as the standard. The unconstitutionality of Rule 804(b)(6) would seem to be even clearer if one accepts *Crawford*’s claim—which *Kry* and, presumably, the justices do (though I do not)—that a prior opportunity for cross-examination had become a requisite for admitting prior Marian testimony of an unavailable witness by the time of the adoption of the Confrontation Clause.<sup>222</sup> As noted above, there was no framing-era forfeiture “exception”; rather there was only the “kept-away” prong of the Marian unavailability rule. Thus, under *Crawford*’s official history, the framing-era antecedent of the current forfeiture

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confrontation were relaxed, “The States will still control admissibility through hearsay rules and exceptions”).

<sup>219</sup> It does not appear that deliberate witness-tampering was deemed unnecessary for forfeiture by wrongdoing prior to *United States v. Rouco*, 765 F.2d 983 (11th Cir. 1985) (statements by murdered undercover ATF agent admitted regarding defendant’s drug dealing after defendant killed agent during gun battle when agent was trying to arrest defendant). Justice Scalia described this 1985 case as “[t]he earliest case identified by the litigants and *amici curiae* [in *Giles*] which admitted unfronted statements on a forfeiture theory without evidence that the defendant had acted with the purpose of preventing the witness from testifying . . . .” *Giles*, 128 S. Ct. at 2687.

<sup>220</sup> See *supra* note 4 (setting out text of rule).

<sup>221</sup> See *supra* note 42 and accompanying text.

<sup>222</sup> See *supra* notes 181–85 and accompanying text.

exception permitted the admission of *only* prior sworn *and confronted* testimony.<sup>223</sup>

Of course, there was never any serious possibility in *Giles* that the justices of the Supreme Court would actually enforce *Crawford's* limitation of confrontation exceptions to those “established at the time of the founding.” Rather, like prior justices and lower court judges, the current justices plainly prefer the usefulness of the inculpatory hearsay that is admissible under Federal Rule of Evidence 804(b)(6) to the robust confrontation right that existed at the time of the Framing. Indeed, the justices had already endorsed the validity of current forfeiture doctrine in *Crawford*—and even the “codifi[cation]” of that doctrine in Rule 804(b)(6) in *Davis*—without bothering to demonstrate any continuity with historical doctrine.<sup>224</sup> The disparity between history and current doctrine also is indirectly evident in *Giles* in the form of the justices’ attempts to obfuscate the distance that actually separates Rule 804(b)(6) from the framing-era confrontation right.

#### IV. SELECTIVE ORIGINALISM IN THE *GILES* OPINIONS

The resolution of the central issue in *Giles*, whether proof of deliberate witness-tampering was required for the application of the forfeiture exception, should have been straightforward as a historical matter. As explained above, the “kept away” prong of the Marian unavailability rule had *always* been understood to require deliberate witness-tampering. This also was the case with the post-framing, traditional formulation of the forfeiture prong of the unavailable prior witness rule—that is until lower court judges construed *Crawford's* 2004 reference to the “equitable” basis for the forfeiture exception as a license to do away with the deliberateness requirement.<sup>225</sup>

However, the historical treatment in the *Giles* opinions was anything but straightforward. Indeed, if a reader of this Article has read the historical claims in the *Giles* opinions without finding them at least strange, I suggest they reread *Giles*. Justice Breyer’s dissenting opinion was peculiar insofar as it charged headlong into an originalist dead-end. Yet, his dissent provoked Justice Scalia into making statements that were both inconsistent with the formulation of the original Confrontation Clause that he previously asserted in *Crawford* and peculiar in their own right.<sup>226</sup>

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<sup>223</sup> This point was clearly argued in the NACDL Amicus Brief, *supra* note 155, at 5–15 (of which Robert Kry was the principal author).

<sup>224</sup> See *supra* notes 180–81 and accompanying text.

<sup>225</sup> See *supra* notes 47–48 and accompanying text.

<sup>226</sup> My own best guess—and I stress it is only speculation—is that the strangeness in the *Giles* opinions arose from the three dissenters’ belated recognition that the endorsement of originalism as the primary mode for confrontation analysis in the majority opinion in *Crawford*—which they all joined—had unnecessarily hamstrung the discussion of the serious policy issues raised in *Giles*. Hence, it appears that Justice

In the hope of at least not adding to the confusion, let me begin by describing the justices' competing treatments of the deliberateness requirement, and then their acknowledgment or evasion of the recent and decidedly non-originalist expansion of the forfeiture exception.

A. *Forfeiture as Deliberate Witness-Tampering*

Writing for the Court in *Giles*, Justice Scalia concluded that the forfeiture exception applies only to deliberate witness-tampering; that is, it applies "only when the defendant engaged in conduct *designed*" to keep a person from testifying.<sup>227</sup> In large measure, Justice Scalia justified that conclusion by noting both positive and negative evidence of the historical understanding of the forfeiture exception.

On the positive side, he noted that the historical cases that are now viewed as the source of the forfeiture exception had involved allegations of deliberate witness-tampering (for example, bribery or hiding a witness)<sup>228</sup> and also had employed language that connoted deliberate witness-tampering (for example, referring to a witness having been "detained" or "kept away" by "the means or procurement" of the defendant).<sup>229</sup> On the negative side, Justice Scalia called attention to the restrictions that were imposed on the historical dying declaration exception to confrontation (for example, the restriction of the exception to a statement made by a murder victim while the victim was aware of impending death) and noted that those restrictions would have been inexplicable if there had been any broad murder-victim forfeiture exception such as that endorsed by the California Court.<sup>230</sup> Additionally, Justice Scalia also noted the absence of any historical forfeiture ruling that had admitted a homicide victim's prior hearsay statement simply because the victim was dead.<sup>231</sup> All of that was sound enough.

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Breyer's opinion essentially set out to mock *Crawford's* originalism with an *ad absurdum* historical argument. If so, it succeeded, because the dissenters' unsuccessful assault on the deliberateness requirement ultimately exposed the vast distance that separates Federal Rule of Evidence 804(b)(6) from the forfeiture prong of the framing-era Marian unavailability rule.

<sup>227</sup> *Giles v. California*, 128 S. Ct. 2678, 2683 (2008).

<sup>228</sup> *Id.* at 2684 (referring to "conduct designed to prevent a witness from testifying, such as offering a bribe").

<sup>229</sup> *Id.* at 2683–84.

<sup>230</sup> *Id.* at 2685–86 (citing cases in which statements of murder victims were excluded from evidence because they did not satisfy the requirement of the dying declaration exception that the declarant be aware he was about to die).

<sup>231</sup> *Id.* at 2687 (commenting that "If the State's rule had an historical pedigree in the common law or even in the 1879 decision in *Reynolds*, one would have expected it to be routinely invoked in murder prosecutions like the one here, in which the victim's prior statements inculpated the defendant. It was never invoked this way [prior to 1985]."); *id.* at 2684 (observing that "We are aware of no case in which the exception was invoked although the defendant had not engaged in conduct designed to prevent a witness from testifying . . .").

In contrast, the actual history of the deliberateness issue presented a serious obstacle for the dissenters. Justice Breyer had no positive evidence of a broad victim-hearsay exception to work with (because there never was any historical formulation along that line), so he instead had to settle for an attempt to explain away the absence of any useful historical example. In the course of that undertaking, he correctly identified the soft spot of Justice Scalia's analysis when he called attention to the fact that framing-era forfeiture by wrongdoing was confined to the admission of *only prior Marian testimony*, and noted that the Marian unavailability rule applied to prior witnesses who were "dead" as well as those "kept away" by the defendant. Thus he argued:

In a murder case, the relevant witness, the murder victim, was dead; and historical legal authorities tell us that, when a witness was dead, the common law admitted a Marian statement. . . . Because the Marian statements of a deceased witness were admissible simply by virtue of the witness' death, there would have been no need to argue for their admission pursuant to a forfeiture rule.<sup>232</sup>

Although Justice Breyer's analysis did offer a superficially plausible explanation for why there is no record of a historical example of anyone even arguing that forfeiture provided a basis for admitting a victim's statement in a murder prosecution, it was premised on a fundamental historical error. Justice Breyer described a murder victim as "the relevant witness" in the context of admitting Marian testimony. However, as explained above, it was actually almost impossible that a murder victim would have been able to be a Marian "witness" in a murder prosecution. That was so because the victim would have had to testify at the time of the defendant's committal proceeding for the victim's statement to comport with Marian committal procedure, but it would rarely have been feasible to transport a severely wounded victim to that forum even on those occasions when the victim survived for a time after the infliction of the mortal wound. Indeed, there appears to have been only one reported historical case that might fit that scenario, and, as described above, it is less than clear whether it actually did.<sup>233</sup> Of course, the murder victim never gave testimony in the other Marian setting, a coroner's inquest into a death.

Additionally, the scenario Justice Breyer discussed was not at all equivalent to the one actually involved in *Giles*. The murder victim's hearsay statement in *Giles* involved a statement made long before the fatal attack regarding a prior episode of domestic violence. However, as

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<sup>232</sup> *Id.* at 2702 (Breyer, J., dissenting) (citations omitted). Justice Breyer subsequently restated this analysis as follows: "There is a simpler explanation, however, for the fact that the parties did not argue forfeiture in 'dying declaration' cases. And it is the explanation I have already mentioned. The forfeiture exception permitted admission only of a properly taken Marian deposition. And where death was at issue, the forfeiture exception was irrelevant." *Id.* at 2704.

<sup>233</sup> *See supra* notes 171–74 and accompanying text (discussing the 1787 *Radbourne* case).

explained above, no Marian testimony could have been taken regarding that earlier event because domestic violence did not constitute a felony and thus would have fallen outside of Marian authority, even if the previous assault had been prosecuted<sup>234</sup> (which, in *Giles*, it apparently had not<sup>235</sup>). Additionally, at the time of the Framing there was no authority other than Marian authority for taking legal testimony prior to a criminal trial.<sup>236</sup> Thus, as a practical matter, it was highly unlikely that a murder victim's hearsay declaration could have been admissible in a framing-era trial unless it met the criteria for a dying declaration—and the victim's hearsay statement at issue in *Giles* plainly did not meet them.

Hence, in the end, Justice Breyer failed to explain away the absence of any historical example of the broad victim-hearsay exception to the confrontation right, and he also failed to account for the stringent restrictions imposed on the dying declaration exception. So, Justice Scalia plainly prevailed on the issue of the historical deliberateness requirement. However, Justice Breyer's analysis did open another can of originalist worms that Justice Scalia was unable to contain.

#### B. *The Historical Requisite of Prior Judicial Testimony*

The most peculiar aspect of Justice Breyer's dissenting opinion (putting aside its lamentable persiflage regarding "intent"<sup>237</sup>) was that his historical explanation for the absence of useful precedents on the deliberateness issue ran head-on into an originalist dead-end. As noted above, Justice Breyer asserted (correctly) that framing-era forfeiture was limited to the admission of prior Marian testimony,<sup>238</sup> and thus (erroneously in my view, but in conformity with *Crawford's* analysis<sup>239</sup>) it was limited to prior "confronted" testimony.<sup>240</sup> However, that excluded

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<sup>234</sup> See *supra* note 145 and accompanying text (discussing the import of the various reports of the 1696 ruling in *Paine*). See also, *supra* note 141.

<sup>235</sup> I say "apparently" because there does not appear to be any statement in the briefs or opinions in *Giles* indicating that any charge had been filed regarding the previous episode of violence.

<sup>236</sup> See *supra* note 145 and accompanying text.

<sup>237</sup> Justice Breyer insisted that if the defendant could be said to have "known" that his conduct would cause the unavailability of the victim as a witness, that would suffice "to show the *intent* that the law ordinarily demands," even if there was no evidence he acted for the purpose of preventing the appearance of the victim as a witness. *Giles*, 128 S. Ct. at 2698. The loose discussion of "intent" was lamentable insofar as it ignored the refinements of criminal law doctrine made during roughly the last century, but it was also irrelevant insofar as none of the historical formulations of forfeiture by wrongdoing were expressed in terms of "intent."

<sup>238</sup> *Id.* at 2704 (Breyer, J., dissenting) ("The forfeiture exception permitted admission only of a properly taken Marian deposition.").

<sup>239</sup> See *supra* notes 181–84 and accompanying text.

<sup>240</sup> *Giles*, 128 S. Ct. at 2702 (stating that "Historical authorities" say that only properly taken Marian depositions were admissible under the forfeiture exception "meaning that the [Marian] statement was given in the presence of the defendant thereby providing an opportunity to cross-examine the witness.").

the victim's hearsay declaration in *Giles* which plainly constituted neither sworn nor confronted testimony. Justice Breyer did not flinch from this predicament; rather he simply brushed it aside by writing that:

Of course, *modern courts have changed* the ancient common-law forfeiture rule—in my view, for the better. They now admit unopposed prior testimonial statements pursuant to such a rule. . . . But, . . . the admission of unopposed statements under a forfeiture exception *is a fairly recent evidentiary development*. The majority evidently finds *this elephant of a change* acceptable—as do I. Without it, there would be no meaningful modern-day forfeiture exception.<sup>241</sup>

To paraphrase: “we don’t do that anymore, but who cares?” But that is hardly originalism. Indeed, Justice Breyer’s position in this passage seems to be that, as long as there was some framing-era doctrine that he now can call a “forfeiture doctrine,” then anything in current law that he now can call a “forfeiture doctrine”—regardless of whether there is any similarity in its “metes and bounds” with the earlier doctrine—is sufficient to satisfy *Crawford’s* criterion of an exception “established at the time of the founding” criterion.<sup>242</sup>

Justice Breyer’s commitment to serious originalist analysis obviously evaporated when history got in the way of the desired result. Perhaps because he has not defined himself as an originalist, Justice Breyer was not inhibited from admitting as much. But Justice Scalia, who clearly has defined himself as an originalist, hardly could be as flippant as Justice Breyer about this “elephant of a change.” Yet, as Justice Breyer noted, Justice Scalia had no desire to condemn the recent expansion. Instead, it appears that Justice Scalia structured his opinion so as to simply detour around and avoid acknowledging the elephant of change.

Justice Scalia’s attempt to paper over the elephant in *Giles* is evident in several notable silences and evasions. One is that he departed from valid history by repeatedly evading the salient fact that there was no framing-era form of forfeiture by wrongdoing other than the “kept away” prong of the Marian unavailability rule. For example, at the outset of his historical analysis in *Giles*, Justice Scalia noted that “two forms of testimonial statements were admitted at common law even though they

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<sup>241</sup> *Id.* at 2706 (emphasis added).

<sup>242</sup> The latter parts of Justice Breyer’s opinion shed light on an earlier passage. After stating that “I believe it important to recognize the relevant history,” Justice Breyer briefly surveyed *Lord Morley’s Case* and the other leading forfeiture cases. *Id.* at 2695–96. He then wrote “These sources make clear that ‘forfeiture by wrongdoing’ satisfies *Crawford’s* requirement that the Confrontation Clause be ‘read as a reference to the right of confrontation at common law’ and that ‘any exception’ must be ‘established at the time of the founding.’ . . . The remaining question concerns the precise metes and bounds of the forfeiture by wrongdoing exception. We ask how to apply that exception in the present case.” *Id.* at 2696. Apparently Justice Breyer did not think that the “importan[ce]” of history extended to the “precise metes and bounds” but only to the existence of something that could now be labeled a “forfeiture by wrongdoing exception.” *Id.* at 2695–96.

were unfronted.”<sup>243</sup> He correctly described the first category, dying declarations, as “declarations made by a speaker who was both on the brink of death and aware that he was dying,” and also noted that it was inapplicable to the victim’s statement in *Giles*.<sup>244</sup> He then wrote that “A second common-law doctrine, which we will refer to as forfeiture by wrongdoing, permitted the introduction of statements of a witness who was ‘detained’ or ‘kept away’ by the ‘means or procurement’ of the defendant.”<sup>245</sup> With regard to this “second common-law doctrine,” Justice Scalia then stressed that forfeiture by wrongdoing permitted the admission of unfronted “statements” made in coroners’ inquests. Notably, he did not mention Marian procedure in this passage, but simply referred to a “doctrine.”

Additionally, Justice Scalia’s heavy reliance in *Giles* on the admissibility of *unfronted* testimony before coroners, and even before grand juries,<sup>246</sup> was nothing short of remarkable given his prior insistence in *Crawford* that there was a settled framing-era “cross-examination rule” that uniformly prohibited the admission of such testimony. His description of the forfeiture “doctrine” in *Giles* plainly demonstrates that his claim in *Crawford* regarding a supposed across-the-board, common-law “cross-examination rule”—in which he brushed aside the admissibility of unfronted Marian testimony in coroner’s inquests—was at least overblown.<sup>247</sup>

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<sup>243</sup> *Id.* at 2682.

<sup>244</sup> *Id.* at 2682–83 (citing English and American cases).

<sup>245</sup> *Id.* at 2683 (citing English and American cases and treatises).

<sup>246</sup> *See supra* note 206 (discussing *Rex v. Barber*, 1 Root 76 (Conn. Super. Ct. 1775)).

<sup>247</sup> In his 2004 opinion in *Crawford*, Justice Scalia insisted that common-law had long limited the Marian unavailability rule to instances in which the defendant had had an opportunity to cross-examine when the Marian testimony was taken, and asserted that “any doubts” on that score were settled by several late eighteenth-century English rulings. *See supra* notes 181–82 and accompanying text (discussing Justice Scalia’s reliance on the Old Bailey rulings in *Radbourne*, *Woodcock*, and *Dingler*). Although the admissibility of prior Marian testimony taken in coroners’ inquests, where there plainly was no systematic opportunity for cross-examination, was plainly inconsistent with that claim, Justice Scalia brushed that fact aside in an evasive footnote in his *Crawford* opinion that suggested that “[t]here [was] some question whether the requirement of a prior opportunity for cross-examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes”—but cited only post-framing sources for that “question.” *Crawford v. Washington*, 541 U.S. 36, 47 n.2.

Four years later in *Giles*, Justice Scalia no longer perceived any question regarding this subject. Rather, he repeatedly asserted that testimony in a coroner’s inquest was *not confronted* and that this proved that the historical forfeiture exception was not limited to confronted testimony. For example, Justice Scalia characterized Justice Breyer’s position as being “that wrongful procurement was understood to be a basis for admission of Marian depositions—which the defendant would have had the opportunity to confront—but not for the admission of unfronted testimony.” *Giles*, 128 S. Ct. at 2688. To refute that position, Justice Scalia cited the admission of the prior testimony a bribed, absent witness had given before a coroner in *Harrison’s*

Even more significantly for the present discussion, however, Justice Scalia's discussion of the forfeiture "doctrine" also followed a path that seemed designed to sidestep Justice Breyer's acknowledgement of the "elephant" of the recent enlargement of the forfeiture. Justice Scalia did not confront that recent expansion; rather he did his best to direct the reader's attention away from it.

One way that Justice Scalia misdirected attention was by writing as though prior testimony before a coroner was admitted under a general "doctrine" of "forfeiture by wrongdoing," even though, as explained above, there was no free-standing forfeiture exception. Rather, prior testimony before a coroner was admitted only under the Marian unavailability rule.<sup>248</sup> Justice Scalia obfuscated that point by writing of the

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*Case* as evidence to the contrary because "there was no reason to think the defendant would have been present at the prior examination." *Id.* at 2688–89 (citing Harrison's Trial, 12 How. St. Tr. 833 (Old Bailey 1692)). Likewise, he cited Gilbert's statement, that prior testimony given before a coroner could be admitted if the witness was "detained" by the defendant as evidence that the exception applied to unfronted testimony, *id.* at 2689; and he cited a 1775 Connecticut case that purportedly indicated that unfronted grand jury testimony could be admitted under a forfeiture rationale, *id.* at 2689–90 (citing *Rex v. Barber*, 1 Root 76 (Conn. Sup. Ct. 1775)) (*but see supra* note 207); and also claimed that an 1856 Georgia case endorsed the application of the forfeiture exception not just to "Marian examinations carrying a confrontation requirement, but coroner's inquests that lacked one." *Id.* at 2690, (citing *Williams v. State*, 19 Ga. 402, 403 (1856)).

From Justice Scalia's discussion in *Giles*, it might appear that he was asserting that unfronted testimony before a coroner was admissible because, but only because, it fell within the *forfeiture exception* to the confrontation right. However, because the recording of testimony in a coroner's inquest was authorized by the Marian statutes (*see supra* note 80 and accompanying text), the unfronted testimony in that setting was actually admissible *under any of the forms of unavailability* covered by the Marian unavailability rule—that is, it was just as admissible where death or illness prevented the witness's appearance at trial as where the witness was kept away by the defendant. For example, Gilbert plainly stated that prior testimony before a coroner was just as admissible in a later trial if the witness had died or become too ill to travel as if he were "detained" by the defendant. *See supra* notes 99–103 and accompanying text. So had Hawkins. *See supra* note 95 and accompanying text.

Hence, Justice Scalia's recognition of the admissibility of unfronted Marian testimony before a coroner in *Giles* crashed headlong into his claim in *Crawford* that even the Marian unavailability rule was subject to a blanket "cross-examination rule" at the time of the framing of the Confrontation Clause. The admissibility of prior testimony given before a coroner by dead or ill or "kept away" unavailable witnesses disproves any such cross-examination rule.

However, Justice Scalia's *Giles* opinion sidestepped this conflict with his claims in *Crawford* by the simple expedient of refusing to mention the basic fact that, in framing-era law, the admissibility of prior testimony in coroners' inquests, like prior testimony in committal proceedings, was simply a facet of *the Marian unavailability rule*. Instead, if one read only Justice Scalia's *Giles* opinion one could easily come away with the mistaken notion that testimony before a coroner was different from Marian testimony and that there was some unique forfeiture exception for prior testimony before a coroner other than the Marian unavailability rule. But that simply was not the case.

<sup>248</sup> *See supra* notes 95 (Hawkins), 99–103 (Gilbert) and accompanying text.

admissibility of “statements” made before a coroner, rather than of “testimony” given before a coroner.<sup>249</sup> However, the only “statements” that were admissible at the time of the Framing were those that constituted *recorded, sworn prior testimony in one of the two forums provided for in the Marian statutes*.<sup>250</sup> Indeed, Justice Scalia’s discussion of prior “statements” downplayed the fact that *all* of the historical authorities he cited applied what he calls the forfeiture “doctrine” to only prior sworn Marian testimony—but *never to any kind of unsworn “statement.”*<sup>251</sup>

Along the same lines, Justice Scalia had correctly emphasized in *Crawford* that American courts, during the nineteenth century, applied a cross-examination rule as an “indispensable condition” for the admission of prior testimony by an unavailable witness.<sup>252</sup> However, he omitted to mention in *Giles* that, during the nineteenth century, forfeiture by wrongdoing actually applied to *only sworn and confronted* prior testimony. In particular, he omitted to mention in *Giles*—as he had noted in *Crawford*—that nineteenth-century American courts refused to admit prior testimony in coroner’s inquests precisely because of the lack of an opportunity for cross-examination in such proceedings.<sup>253</sup> Indeed, although Justice Breyer correctly noted that “every Supreme Court case to apply the forfeiture rule has done so in the context of previously confronted testimony,”<sup>254</sup> Justice Scalia even omitted to mention that the Court’s initial recognition of forfeiture by wrongdoing in *Reynolds* was

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<sup>249</sup> See, e.g., *Giles*, 128 S. Ct. at 2687 (referring to the admission of “prior confronted statements” in *Reynolds* and the earlier forfeiture by wrongdoing cases). *Id.* at 2689 (referring to “the witness’s prior statements before the coroner,” “statements made at prior proceedings,” and “grand jury statements”).

<sup>250</sup> For example, when Justice Scalia initially discussed the “common-law doctrine” of “forfeiture by wrongdoing,” he first mentioned that the issue in *Lord Morley’s Case* involved “testimony previously given at a coroner’s inquest” and then subsequently stated that other authorities “also concluded that wrongful procurement of a witness’s absence was among the grounds for admission of statements made at bail and committal hearings conducted under the Marian statutes,” and that “[t]his class of confronted statements was also admissible if the witness who made them was dead or unable to travel.” *Id.* at 2683. But his description was noteworthy insofar as it did not call attention to the fact that testimony before a coroner also was *a form of Marian testimony* and, hence, was also part of the “class” of statements that was admissible if the witness was dead or unable to travel. Similarly, when Justice Scalia discussed Gilbert’s statement that a defendant “shall never be admitted to shelter himself” by interfering with a witness, he did not mention that Gilbert was referring to Marian testimony. *Id.* at 2686. The same is true of his discussion of prior testimony before a coroner in *Harrison’s Case*. *Id.* at 2689 (citing *Harrison’s Case*, 12 How. St. Tr. 833 (Old Bailey 1692)). The basic fact that framing-era testimony before a coroner was Marian testimony is never mentioned in Justice Scalia’s *Giles* opinion.

<sup>251</sup> See *infra* notes 268–69 and accompanying text.

<sup>252</sup> *Crawford v. Washington*, 541 U.S. 36, 49–50 (2004) (quoting *State v. Campbell*, 30 S.C.L. (1 Rich.) 124, 125 (Ct. App. 1844)).

<sup>253</sup> *Id.* at 47 n.2, 49.

<sup>254</sup> *Giles*, 128 S. Ct. at 2706 (Breyer, J., dissenting).

explicitly premised on the fact that the defendant had had the opportunity to cross-examine when the prior trial testimony was taken.<sup>255</sup>

Why did Justice Scalia structure his discussion in *Giles* so as to avoid acknowledging these salient facets of historical confrontation doctrine? The obvious answer is that it was the only way he could avoid confronting Justice Breyer's "elephant of a change." As Justice Breyer candidly admitted, the reach and import of forfeiture by wrongdoing (what Justice Breyer called its "metes and bounds"<sup>256</sup>) were drastically expanded in the 1980s when courts discarded the traditional restriction of forfeiture by wrongdoing to sworn and confronted prior testimony. As noted above, the long reach of forfeiture by wrongdoing under Federal Rule of Evidence 804(b)(6) is a product of that decidedly non-originalist, reliability-based expansion.<sup>257</sup> Hence, if an originalist acknowledged the recent and drastic expansion of forfeiture by wrongdoing, he could not defend the constitutionality of Rule 804(b)(6). So, because the historical facts were undeniable, Justice Scalia simply refused to talk about them.<sup>258</sup>

At bottom, *Giles* presented the justices with a choice: they could conform to historical doctrine or they could uphold Rule 804(b)(6). Unsurprisingly, they *all* chose the latter. But, because the majority justices were also unwilling to give up *Crawford*'s originalist posturing, they could not afford to acknowledge that framing-era law had not recognized any general "forfeiture exception" to the confrontation right.<sup>259</sup> So they focused on the one aspect of the history they wanted to talk about, and refused to talk about the historical restriction of forfeiture to the admission of only prior sworn, confronted testimony. That was *selective* originalism! And it is not the only manifestation of selective originalism in *Giles*.

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<sup>255</sup> See *supra* note 194 and accompanying text.

<sup>256</sup> *Giles*, 128 S. Ct. at 2696, 2707.

<sup>257</sup> See *supra* notes 219–221 and accompanying text.

<sup>258</sup> There are other indicia of evasion in Justice Scalia's opinion in *Giles*. For example, he stated the issue rather oddly and narrowly as "whether the *theory* of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era *exception* to the confrontation right." *Giles*, 128 S. Ct. at 2682 (emphasis added). However, an "exception" to the Confrontation Clause would involve more than just a "theory."

<sup>259</sup> Of course, there was never any likelihood that the justices would roll back the recent expansion of the forfeiture exception. Quite the contrary; as noted above the justices had telegraphed their approval of the recent enlargement of the forfeiture exception in dicta in *Crawford* and had endorsed the codification of the exception in Rule 804(b)(6) in *Davis*, without ever offering any historical justification for that endorsement in either of those decisions. See *supra* notes 42–46 and accompanying text.

V. HOW *GILES* EXACERBATES THE NONHISTORICAL  
RESTRICTION OF THE CONFRONTATION RIGHT TO  
“TESTIMONIAL” HEARSAY

The largest discrepancy between the justices’ treatment of the confrontation right in *Giles* and the robust framing-era conception of the right was that all of the *Giles* opinions continued to endorse *Crawford*’s restriction of the scope of confrontation right. Specifically, *Crawford* effectively held that the confrontation right applies only to so-called “testimonial hearsay,”<sup>260</sup> notwithstanding that the framing-era confrontation right actually was understood to ban *all* unsworn hearsay. Let me briefly review the purely fictional character of *Crawford*’s purportedly originalist claim regarding the testimonial/nontestimonial hearsay distinction, and then review how the justices exacerbated that fictional restriction of the confrontation right in *Giles*.

A. *Crawford*’s Restriction of Confrontation to “Testimonial Hearsay”

Although it may not be readily evident on a first reading, Justice Scalia’s *Crawford* opinion did not actually present historical evidence for its foundational claim that the confrontation right applied only to testimonial hearsay but did not limit the use of nontestimonial hearsay at all. The citation of historical authorities in Justice Scalia’s *Crawford* opinion was concentrated on the purported “cross-examination rule” that *Crawford* applied to testimonial hearsay—but that Justice Scalia ignored in *Giles*.<sup>261</sup> In contrast, the claim that the confrontation right was limited to only “testimonial” hearsay was justified primarily by a mere “new-originalist” textual parsing of the use of the word “witnesses” in the Confrontation Clause.<sup>262</sup>

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<sup>260</sup> *Crawford v. Washington*, 541 U.S. 36, 50–53, 61, 68 (2004). I say *Crawford* “effectively” held this because language in the opinion indicated that the point was not squarely before the Court (*see, e.g., id.* at 61), and also left open the possibility that the Confrontation Clause “is not solely concerned with testimonial hearsay.” *Id.* at 53. However, any doubt on that score was settled by the 2006 ruling in *Davis*. *Davis v. Washington*, 547 U.S. 813, 823–24 (2006). For a discussion of the recent emergence of the claim that the confrontation right is limited to only testimonial hearsay, see Davies, *Not the Framers’ Design*, *supra* note 13, at 358–60.

<sup>261</sup> *See supra* note 247 and accompanying text.

<sup>262</sup> *Crawford*, 541 U.S. at 42–43, 51. *See also* U.S. CONST. amend. VI (“to be confronted with the witnesses against him”). The so-called “new originalism” purports to derive the “original public meaning” of a provision by parsing the meaning of the words in a constitutional provision with the aid of an old dictionary—without any significant consideration of the implications of the framing-era legal doctrine that actually shaped the Framers’ understanding of constitutional rights. *See, e.g.* John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL’Y 83 (2006); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545 (2006).

Because English has long been a rather flexible language, such selective and un-contextual parsing can produce “readings” of constitutional provisions that framing-

While the inclusion of the term “witnesses” in the Clause surely did indicate that the Framers were concerned with restricting the use of prior formal testimony such as depositions, there is no logical basis for treating that explicit reference as though it were an indication that they would have approved of admitting informal or casual unsworn hearsay. Rather, *Crawford’s* textual analysis ignored two salient facts: first, that the settled framing-era doctrine that “Hearsay is no Evidence” meant that all unsworn hearsay statements (except functionally sworn dying declarations) were inadmissible;<sup>263</sup> and second, that the Framers were undoubtedly aware of that doctrinal ban. Indeed, it would have been bizarre for the Framers to restrict the use of out-of-trial statements that at least had the protections associated with the oath and a written record but leave the use of unsworn, unrecorded hearsay completely unrestricted. The only plausible reason the Framers did not explicitly restrict “casual,” unsworn hearsay in the Confrontation Clause was that it was unimaginable in 1789 that courts would ever treat such statements as admissible criminal evidence.<sup>264</sup>

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era Americans could never have imagined, let alone intended or expected. Hence, new-originalist textual parsing often amounts to nothing more than judicial fiat posing (to the uninitiated) as though the analysis was uncovering something to do with the historical original understanding.

For another example of word parsing that produced an original public meaning that would surprise the Framers, see Justice Thomas’s construction of the Fifth Amendment Self-Incrimination Clause in *Chavez v. Martinez*, 538 U.S. 760, 766–67 (2003) (claiming that the phrasing of “be a witness” in a “criminal case” in the Self-Incrimination Clause meant that a violation of that right could not occur unless and until compelled statements are actually introduced in a court proceeding). The historical support offered for that textual interpretation was trivial. *See* Davies, *Self-Incrimination*, *supra* note 14, at 1009–18. Of course, the limitation of “witness” to trials in *Chavez* is also inconsistent with the application of that term to pretrial statements in the recent confrontation cases.

<sup>263</sup> *Crawford*, 541 U.S. at 70 n.2. (Rehnquist, C.J., concurring) (quoting GILBERT (London, W. Owen, 3rd ed. 1769), *supra* note 99, at 152).

<sup>264</sup> One shortcoming of new originalist parsing (*see supra* note 262), is that it ignores the obvious point that the Framers did not attempt to set out a comprehensive statement of rights in the Bill of Rights, but rather addressed what James Madison termed “all those essential rights, which have been thought in danger.” Letter from James Madison to Thomas Mann Randolph (Jan 13, 1789), in 11 THE PAPERS OF JAMES MADISON, 415–16 (Robert A. Rutland, et al. eds., 1977). Thus, the Framers addressed aspects of legal rights and proceedings that they had reason to think might be problematic or that had been or might be expected to be subject to abuse, but not those that seemed so settled as to be taken for granted. *See, e.g.*, Davies, *Correcting Search History*, *supra* note 14, at 19 (noting that the Fourth Amendment specified the standards for warrants, but not the requirement of a warrant for entering a house, because the former had been the subject of a then-recent general warrant controversy, but the latter was taken as settled and noncontroversial); *id.* at 97–98 (noting that the Eighth Amendment bans excessive bail, but does not specify a right to bail, because the historical controversies had concerned the former, not the latter); *id.* at 128 n.406 (noting that the Habeas Corpus Suspension Clause in the Constitution implicitly assumed fixed arrest standards, but that historical controversies had involved the availability of habeas corpus to enforce those

The actual parameters of the framing-era confrontation right are readily apparent if one surveys the legal authorities that actually shaped the Framers' understanding of the right. As briefly discussed above, and as I have previously documented in some detail, no distinction between testimonial and nontestimonial hearsay was ever recognized in framing-era law.<sup>265</sup> To the contrary, because the ban against hearsay was understood to be required by the confrontation right, any use of hearsay—that is, of any unsworn out-of-trial statement—to prove a criminal defendant's guilt would have been deemed a violation of the right.<sup>266</sup> As a result, framing-era doctrine recognized only the two kinds of admissible out-of-trial statements regarding the defendant's guilt discussed above: (1) the prior sworn Marian testimony given by a witness who had become genuinely unavailable prior to the trial (which, to the extent it conflicted with the right was grandfathered-in by the Marian statutes); and (2) the dying declaration of a murder victim made when aware of impending death and thus under effectively the same sanction as an oath.<sup>267</sup>

Indeed, Justice Scalia's opinions in recent Confrontation Clause decisions have indirectly confirmed the historical inadmissibility of casual, unsworn hearsay of the nontestimonial variety. The salient fact is that his opinions in *Crawford*, *Davis*, and *Giles* have *never identified a single historical case in which a court ruled that casual, unsworn hearsay of the "nontestimonial" variety constituted legally admissible evidence.*<sup>268</sup> Thus, when jousting with Chief Justice Rehnquist in *Crawford*, he was unable to identify any unsworn hearsay that would have been admissible in framing-era law.<sup>269</sup> And in *Davis*, every historic American case Justice

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standards, rather than the common-law arrest standards themselves, which appeared to be settled and noncontroversial in 1787).

<sup>265</sup> See Davies, *Not the Framers' Design*, *supra* note 13; see especially *id.* at 425–34 (documenting that the Framers understood that the ban against hearsay was required by the confrontation right).

<sup>266</sup> See *e.g.*, the statement of Chief Justice John Marshall, discussed *supra* note 134.

<sup>267</sup> Of course, the enforcement of the doctrinal rule against hearsay was imperfect in eighteenth century trials (as it is today), so some hearsay did come in. However, it appears that English judges increasingly either prevented hearsay testimony or directed juries that it was “no evidence” as the eighteenth century progressed. Thus, Professor Langbein has concluded from Old Bailey sources that “by the end of the eighteenth century the hearsay rule was firmly in place in criminal practice.” LANGBEIN, *supra* note 85, at 242. See also Davies, *Not the Framers' Design*, *supra* note 13, at 453–56.

<sup>268</sup> English judges explicitly noted that dying declarations were the *only* form of unsworn statement that could be admitted as evidence of a criminal defendant's guilt. See *supra* notes 153, 164 and accompanying text. See also Davies, *Not the Framers' Design*, *supra* note 13, at 377, 443–44, 448–52.

<sup>269</sup> In *Crawford*, Chief Justice Rehnquist, dissenting from the new testimonial/nontestimonial hearsay distinction, correctly noted that under common law, “[w]ithout an oath, one usually did not get to the second step of whether confrontation was required.” *Crawford v. Washington*, 541 U.S. 36, 71 (2004) (Rehnquist, J., concurring). In response, Justice Scalia insisted that unsworn hearsay

Scalia identified that admitted an out-of-trial statement actually admitted only sworn, confronted, prior testimony.<sup>270</sup>

*Crawford*'s restriction of the confrontation right to only "testimonial" hearsay simply does not reflect history at all. Indeed, it actually operates to produce the *opposite* effect to that of framing-era doctrine. The two kinds of out-of-trial statements that could be admitted in criminal trials at the time the Sixth Amendment was framed (dying declarations and prior Marian testimony of unavailable witnesses) would clearly fall within *Crawford*'s "testimonial hearsay" category, but framing-era law never admitted the sort of casual hearsay that *Crawford* freely admits under its "nontestimonial" label. *Crawford* is effectively backward to the Framers' understanding. Why would the Framers have been concerned only with controlling the use of prior testimony that was subject to protections such as the oath and a written record, but unconcerned with the use of casual hearsay that was subject to no protections at all?

### B. *The Visibility of Crawford's Fictional History in Giles*

Indeed, *Crawford*'s testimonial/nontestimonial distinction ultimately rests on the premise that the general rule against hearsay evidence is

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could still comprise the sort of "testimonial" hearsay that the Framers were concerned with. *Id.* at 52 n.3. The notable feature of his reply, for the present discussion, is that he did not identify any instance of unsworn hearsay being lawfully admitted in framing-era sources. He mentioned the admission of unsworn hearsay in *Raleigh's case*, but that was, in Justice Scalia's words, "a paradigmatic confrontation violation." *Id.* at 52 (emphasis added). Additionally, he noted that a defendant's unsworn Marian confession could only be admitted against the defendant himself, but not against anyone else. *Id.* However, the articulation of that specific rule was necessary because unsworn statements were *inadmissible* if they were not the personal statements of the defendant himself (and statements made by a defendant were never permitted to be given under oath). The only kind of unsworn hearsay that was admissible during the Framing era that Justice Scalia identified in *Crawford* was a dying declaration, which he described as "*sui generis*." *Id.* at 56 n.6. However, as explained above, the rationale for admitting the dying declaration of a murder victim was that it was made in circumstances that were the functional equivalent of an oath. *See supra* notes 149–52 and accompanying text. Thus, Justice Scalia's response in *Crawford* effectively confirmed Chief Justice Rehnquist's point that all statements that were either unsworn or not made as dying declarations were inadmissible hearsay.

<sup>270</sup> *Davis v. Washington*, 547 U.S. 813, 824 n.3 (2006) (identifying only four "early American case(s)" which admitted out-of-trial statements, none of which involved unsworn hearsay; rather all involved sworn, confronted testimony: "[1] *Johnson v. State*, 10 Tenn. 58, 59 (Err & App. 1821) (admitting written deposition of deceased deponent, because defendant had the opportunity to cross-examine); . . . [2] *Bostick v. State*, 22 Tenn. 344 (1842) (admitting deposition of deceased where defendant declined opportunity to cross-examine); . . . [3] *State v. Valentine*, 29 N. C. [sic] 225 (1847) (*per curiam*) (admitting preliminary examination testimony of decedent where defendant had opportunity to cross-examine); [4] *Kendrick v. State*, 29 Tenn. 479, 491 (1850) (admitting testimony of deceased witness at defendant's prior trial) . . . ." *See also id.* at 824–25 (noting the admission of testimony from prior trials in *Reynolds v. United States*, 98 U.S. 145, 158 (1879), and *Mattox v. United States*, 156 U.S. 237, 240–44 (1895)).

distinct from, and disconnected from, the confrontation right, and vice versa. Yet that is so obviously implausible that Justice Scalia all but conceded that that premise is fictional in *Giles*. The State of California had made the somewhat far-fetched argument in its *Giles* brief that the absence of historical examples of the broad victim-hearsay exception it sought reflected the operation of only the historical hearsay rule but not the operation of the historical confrontation right itself. In response, Justice Scalia wrote:

No case or treatise that we have found, however, suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights. And the distinction would have been a surprising one, because courts prior to the founding *excluded hearsay evidence in large part because it was unconfro*nted. . . . As the plurality said in *Dutton v. Evans*, . . . “[i]t seems apparent that the Sixth Amendment’s Confrontation Clause and the evidentiary hearsay rule stem from the same roots.”<sup>271</sup>

This recognition of the strong linkage between the confrontation right and the ban against hearsay—which is fundamentally inconsistent with *Crawford*—is the closest Justice Scalia has come to the actual history.<sup>272</sup> However, neither Justice Scalia nor any other justice admitted that their belated acknowledgment of the linkage between the confrontation right and the hearsay rule in *Giles* undercut *Crawford*’s foundational originalist claim.

Instead, the justices expressed their continuing intention to exempt nontestimonial hearsay from the confrontation right. Indeed, in his individual opinion Justice Thomas still adhered to the groundless historical fiction that the Framers aimed the Confrontation Clause only

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<sup>271</sup> *Giles v. California*, 128 S. Ct. 2678, 2686 (2008) (emphasis added) (citing 2 LEACH’S HAWKINS (1787 ed.), *supra* note 94; 2 M. BACON, A NEW ABRIDGMENT OF THE LAW 313 (1736); *Dutton v. Evans*, 400 U.S. 74, 86 (1970)). I previously identified the passages Justice Scalia cited in Hawkins’s treatise and in Bacon’s abridgement as evidence that the ban against hearsay was understood to be required by the confrontation right at the time of the framing. See Davies, *Not the Framers’ Design*, *supra* note 13, at 425 n.182 (Hawkins), 428 n.195 (Bacon). See also *infra* note 273.

<sup>272</sup> However, the confrontation right and the rule against hearsay did not just share the same “roots,” rather, in framing-era doctrine the former required the latter. The treatment of the ban against hearsay as an offshoot of the right of cross-examination appeared in the framing-era works Americans were most likely to have consulted. See Davies, *Not the Framers’ Design*, *supra* note 13, at 425–34 (noting, among other evidence, that all of the editions of Hawkins’s treatise beginning in 1721 stated that the right of cross-examination was one of the reasons for the ban against hearsay, and also noting that Hawkins’s statement to that effect not only appeared in the copies of his treatise and in Burn’s leading English justice of the peace manual that were imported by Americans, but also appeared in all four of the prominent justice of the peace manuals that were published in framing-era America itself, as well as in a variety of other works that were widely imported and used in framing-era America). See also *supra* note 134 (discussing Chief Justice Marshall’s 1807 statement recognizing that the confrontation right required the ban against hearsay evidence).

at prior Marian testimony,<sup>273</sup> and Justice Alito, in his individual opinion, expressed a similar inclination to limit the confrontation right to only formal out-of-court statements that “are the equivalent of statements made at trial by ‘witnesses.’”<sup>274</sup> Thus, those two justices will rarely find that the Confrontation Clause carries any practical significance.

Additionally, Justice Scalia noted that the Court “accept[ed] without deciding” that the victim’s statements in *Giles* were “testimonial,”<sup>275</sup> while Justice Breyer “underscore[d]” that there was only an unchallenged “assumption” that the victim’s statements in *Giles* were “testimonial” and thus subject to the Confrontation Clause, at all.<sup>276</sup> These latter statements are noteworthy because the scenario in *Giles* closely matched that in which the Court, in the companion case to *Davis*, had held that a domestic-violence victim’s nonemergency statements to police were “testimonial.”<sup>277</sup> Thus, these latter statements raise some question as to whether the Justices might backtrack on that understanding of “testimonial hearsay” in the future.

### C. *The Restrictive Definition of “Testimonial Hearsay” in Giles*

Moreover, a pregnant passage in Justice Scalia’s opinion for the Court—from a practical standpoint I think it may well be the most significant passage in *Giles*—strongly implied that the justices intend to define “testimonial” hearsay so narrowly as to completely exclude statements made to anyone other than law enforcement or judicial officers.<sup>278</sup> Specifically, Justice Scalia responded as follows to the dissenters’ claim that their formulation of the forfeiture exception would be more helpful in facilitating domestic violence prosecutions:

Not as helpful as the dissent suggests, since only *testimonial* statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation, and

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<sup>273</sup> *Giles*, 128 S. Ct. at 2693–94 (Thomas, J., concurring).

<sup>274</sup> *Id.* at 2694 (Alito, J., concurring).

<sup>275</sup> *Id.* at 2682 (majority opinion).

<sup>276</sup> *Id.* at 2695 (Breyer, J., dissenting).

<sup>277</sup> The scenario in which the victim’s statements were made in *Giles* appear equivalent to those in *Hammon v. Indiana* (the companion decision to *Davis*) in which the Court, including Justice Breyer, concluded that a victim’s statements to police officers about an episode of domestic violence, shortly after the emergency was over, were “testimonial” and thus subject to the confrontation right. *Davis v. Washington*, 547 U.S. 813, 829–32 (2006).

<sup>278</sup> *Crawford* previously identified prior testimony in preliminary hearings, before grand juries or during a former trial, and statements made during police “interrogation” as “testimonial” statements subject to the confrontation right. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Statements made during police interrogation were included on the ground that police interrogation bears “a striking resemblance” to framing-era Marian committal proceedings conducted by justices of the peace. *Id.* at 52. However, in *Davis*, the Court explicitly declined to decide whether the 911 operator who took the emergency call in *Davis* was necessarily a “law enforcement officer.” *Davis*, 547 U.S. at 823 n.2.

statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules . . . .<sup>279</sup>

Justice Breyer suggested a similarly minimalist definition of “testimonial hearsay” when he wrote that hearsay statements a domestic violence victim made to “a nurse” would not be testimonial, in contrast to statements “made formally to a police officer.”<sup>280</sup>

These indications that statements made to treating physicians and nurses will be deemed “nontestimonial” and exempt from the confrontation right are especially significant because the justices were surely aware that such professionals are often involved in law enforcement programs aimed at facilitating evidence gathering for domestic violence prosecutions.<sup>281</sup> Indeed, the justices appear to have informed law enforcement how to assure the admissibility of hearsay—simply have the victim or witnesses make their statements to someone other than police or prosecutors, such as a nurse or physician or even a family member, and then the prosecutor can call that person to introduce second-hand hearsay at trial, and effectively blunt the defendant’s ability to cross-examination the victim or witness themselves. Thus, the justices have effectively freed lower courts to completely exempt a wide range of highly material and accusatory hearsay statements from confrontation analysis. In sum, the justices seem intent on exacerbating rather than correcting *Crawford’s* denigration of the historical confrontation right.

Overall, *Giles* exhibits the same rhetorical posture as that which the Court adopted in *Crawford*. On the surface, the Court’s endorsement of the deliberative witness-tampering requirement for the forfeiture exception may seem to bolster the confrontation right and restore it to the robustness of the historical right. On the surface, it may appear to be an unusually pro-defendant ruling for a law-and-order leaning Court. But the pro-defendant slant is largely an illusion. In actuality the justices have exempted the large mass of potential hearsay evidence that would have been inadmissible under the historical formulation by defining it to be “nontestimonial” (an outcome that was previously latent in *Crawford’s*

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<sup>279</sup> *Giles*, 128 S. Ct. at 2692–93 (majority opinion). It should be noted that this passage does not conform to framing-era law insofar as hearsay accounts of a victim’s statements made to “friends and neighbors” would have been inadmissible at common law, probably even in the difficult case of a child victim who was too young to take an oath and thus to testify in person. See *Davies, Not the Framers’ Design*, *supra* note 13, at 438–48 (discussing *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (Old Bailey 1779), a case also discussed in *Davis*, 547 U.S. at 828).

<sup>280</sup> *Giles*, 128 S. Ct. at 2700 (Breyer, J., dissenting) (“Where a victim’s statement is not ‘testimonial,’ perhaps because she made it to a nurse, the statement could come into evidence under [California’s hearsay] rule. But where the statement is made formally to a police officer, the majority’s [constitutional] rule would keep it out.”).

<sup>281</sup> See *Tuerkheimer*, *supra* note 60, at 713–14 (discussing role of nurses and physicians in obtaining evidence of domestic abuse). See also CAL. EVID. CODE, § 1370, discussed *supra* notes 213–14 and accompanying text.

scheme but not explicit until *Giles*),<sup>282</sup> and they have also given an expansive meaning to the forfeiture-by-wrongdoing exception by watering down the definition of deliberateness itself.<sup>283</sup> Contrary to its rhetoric, the narrow operational confrontation right that remains after *Giles* bears little resemblance to the robust right the Framers thought they had preserved.

However, my purpose in this Article has not been to assess the wisdom of the *Giles* formulation as a matter of policy. Rather, my point is that, whatever one might think of the formulation of the forfeiture exception in *Giles* as a matter of policy, that formulation plainly does not reflect an honest originalist commitment to construe the confrontation right according to framing-era common-law and to limit exceptions to the right to those “established at the time of the founding.”<sup>284</sup>

## VI. CONCLUSION

I titled this Article “Selective Originalism.” However, I hope that the preceding discussion has made it evident that that phrase is an oxymoron. Selective originalism is not really originalism at all. Indeed, although advocates of originalism often present it as a way to inject more discipline into constitutional interpretation, originalism actually has the opposite effect. At least as practiced in the Supreme Court, originalism is merely a rhetorical pretense under which justices justify their personal predilections by falsely claiming fidelity to historical meaning, while actually ignoring or altering the historical meaning.

In normal English discourse, terms like “the Framers’ design” and “original meaning” connote the way the persons involved in the adoption of a constitutional provision actually understood the provision at the time of the adoption. In normal English discourse, those terms are interchangeable with the historical concept of the Framers’ intention. However, that is not what originalism means in the Supreme Court

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<sup>282</sup> I previously predicted the justices would restrict the confrontation right by narrowly defining “testimonial” hearsay to include only relatively formal statements made to law enforcement officers, and thus exempt the bulk of hearsay statements from confrontation analysis. See Davies, *Not the Framers’ Design*, *supra* note 13, at 468–69 n.291. As I noted there, Justice Scalia laid the foundation for assigning an extremely limited scope to the confrontation right in *Crawford* when he claimed that modern police interrogations are the equivalent of the Marian witness examinations conducted by framing-era justices of the peace. *Crawford*, 541 U.S. at 52. When that claim is combined with the fictional historical claim that the Framers were concerned only with limiting the admission of Marian testimony in criminal trials, but had no concerns regarding the use of “nontestimonial hearsay,” it provides the justices with an originalist excuse for severely restricting the scope—and practical significance—of the confrontation right. However, the comparison of current police investigations to Marian witness examinations is itself bogus in a variety of ways. See Davies, *Crawford’s Originalism*, *supra* note 13, at 202–04.

<sup>283</sup> See *supra* notes 57–61 and accompanying text.

<sup>284</sup> See *supra* note 12 and accompanying text.

(though justices who purport to be originalist sometimes present it that way<sup>285</sup>).

“Originalism” in practice is only weakly connected, if connected at all, to historical meaning. That is so because originalists tend to reject the significance of the meaning the Framers intended and instead assign importance to what they term the “original public meaning” of a provision—that is, the meaning that the words of the provision would have carried in ordinary everyday discourse.<sup>286</sup> Under this guise originalist justices discard inquiry into how constitutional provisions were actually understood at the time of their adoption, and instead substitute their own selective textual parsing of the specific words of a provision. Then, by choosing among the words in the text and various definitions that appear in historical dictionaries, the justices effectively impose their own personally preferred meaning on the terms in a provision—as with their construction of “witnesses,” and the supposed implications of that term, in the Confrontation Clause.<sup>287</sup> Using that nonhistorical formulation of “original public meaning,” they then present their personal predilection as though it were the Framers’ directive. In doing so, they ignore the settled meanings that the invocative language used in the texts actually carried during the Framing-era—meanings that were often derived from the common law and English history that were well known to the Framers’ generation<sup>288</sup> but that have often been lost since.<sup>289</sup> Indeed, by reading constitutional texts as though they were modern statutes, they even disregard the overall character of constitutional provisions.<sup>290</sup>

To the extent that originalists consider the actual historical meaning—which is usually only to back up the results of their textual parsing, or when the text is too cryptic for effective parsing—they do so quite selectively. They seize on what they like (for example, a formulation of deliberate witness-tampering that accords with modern rules of evidence<sup>291</sup>), ignore what they do not (for example, the restriction of the historical unavailable witness rule to sworn prior testimony<sup>292</sup>), and even

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<sup>285</sup> *How to Read the Constitution*, WALL ST. J., Oct. 20, 2008, at A19 (excerpt of lecture by Justice Clarence Thomas) (stating that “there are really only two ways to interpret the Constitution—try to discern as best we can what the framers intended or make it up.”).

<sup>286</sup> Originalists often distinguish between the Framers’ intention and what they term the original public meaning of a provision. *See, e.g.*, Harrison, *supra* note 262. However, that distinction amounts to false history. The Framers did not undertake to deceive the people. They did not use novel arcane formulations. Rather, they adopted traditional formulations of constitutional language that invoked commonly understood rights and principles.

<sup>287</sup> *See supra* note 262.

<sup>288</sup> *See, e.g.*, Davies, *Correcting Search History*, *supra* note 14, at 20–21, n.35.

<sup>289</sup> *See, e.g., id.* at 173–81 (documenting the loss of the original understanding of “due process of law”).

<sup>290</sup> *See supra* note 264.

<sup>291</sup> *See supra* notes 257–59 and accompanying text.

<sup>292</sup> *See supra* notes 249–51 and accompanying text.

invent what they wish the historical record would show, but does not (for example, the purely fictional distinction between “testimonial” and “nontestimonial” hearsay that is the fulcrum for all off the recent “originalist” confrontation rulings<sup>293</sup>).

Judge Posner has previously offered a nice summation of the character of originalism:

Originalism is not an analytic method; it is a rhetoric that can be used to support any result a judge wants to reach. . . .

. . . . Some of the most activist judges, whether of the right or the left . . . have been among the judges most drawn to the rhetoric of originalism. For it is a magnificent disguise. The judge can do the wildest things, all the while presenting himself as the passive agent of the sainted Founders—don’t argue with me, argue with Them.<sup>294</sup>

However, the problem with originalism is not simply that the justices perform originalism badly or dishonestly. Rather, the deeper problem is that even the historically valid original meanings of constitutional provisions cannot provide a sound basis for answering contemporary constitutional issues. The difficulty is not so much that it is impossible to discover the historical original meanings of constitutional provisions. There is actually a fairly rich historical record from which a great deal (though admittedly not all) of the original meanings can be recovered. Instead, the problem is that historically valid renditions of original meaning do not connect well with the modern issues that arise from modern doctrine and modern concerns. Too much has changed.

For one thing, the Supreme Court has been effectively revising the Constitution for more than two centuries—often by inventing novel treatments of the original meaning of the provision in question.<sup>295</sup> Thus, two centuries of doctrinal innovations separate modern doctrine from the Framers’ understanding. For example, one cannot easily return to the Framers’ understanding of a robust confrontation right because judges, during the intervening two centuries, have invented an entire edifice of hearsay exceptions that collide with the historical right.

For another, our society, our culture, and our institutions have changed drastically. We no longer take the oath as seriously as it was taken during the Framing era. We are far more attuned to probabilistic evidence. We have different and larger expectations of government and public safety. The Framers still adhered to the accusatory criminal

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<sup>293</sup> See *supra* notes 261–70 and accompanying text.

<sup>294</sup> RICHARD A POSNER, *OVERCOMING LAW* 251 (1995).

<sup>295</sup> The justices have been revising the Constitution almost from the beginnings of the Supreme Court. I hope to soon publish an article that will document that the Marshall Court concocted the claim of unconstitutionality in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), by deliberately evading the then-settled understanding that mandamus was an inherent superintending power of a supreme court and thus giving a meaning to the limits on the Supreme Court’s “original jurisdiction” in Article III of the Constitution that the Framers would not have imagined.

procedure that English judges had developed to blunt the oppressions of the royal prerogative in earlier times.<sup>296</sup> In contrast, we have embraced an investigatory criminal procedure that depends heavily on the initiative of professional police and prosecutors.<sup>297</sup> We take domestic violence far more seriously than it was taken in the Framers' day.

Given all those changes, a sound assessment of the place of the confrontation right in current criminal procedure should be grounded in a better pragmatic assessment of the myriad good and bad effects that the present confrontation regime exerts. Knowledge of the historical confrontation right may sometimes provide a useful insight or two in that assessment. However, authoritative assertions of historically fictional original meanings merely obscure what is actually at stake.

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<sup>296</sup> See, e.g., Davies, *Arrest*, *supra* note 14, at 421–33.

<sup>297</sup> See, e.g. *id.* at 421–22.