the new sentencing regime. While there may be numerous explanations for the Court's approach, the Court could also be accused of ducking its responsibilities with regard to sentencing. To suggest that, in an ethereal sense, some policy judgments may lead to greater scrutiny is to inject still more uncertainty into the sentencing and reviewing processes than had existed in previous post-*Booker* sentencing cases. If the issue of varying review was worth mentioning, surely it was also worth clarifying. While judges looking at *Kimbrough* can find various justifications for decreasing sentences based on policy disagreements, the Court may have ensured that it will have to address the issue of sentencing based on policy disagreements in the future.

*6. Sixth Amendment — Witness Confrontation — Forfeiture by Wrongdoing Doctrine.* — In 2004, the Supreme Court transformed the face of constitutional evidence law, holding that the Sixth Amendment's Confrontation Clause required that testimonial evidence from an unavailable witness could only be presented in court if the defendant had previously had an opportunity to confront that witness.[1] Yet *Crawford v. Washington*[2] provided precious little elaboration on what statements should be considered "testimonial"[3] or whether there were any exceptions to the requirement of confrontation.[4] As a result, since *Crawford*, courts and scholars have been struggling to define the bounds of this newly rediscovered right, largely unaided by the Supreme Court.[5] One of many questions left unanswered after *Crawford* was whether, as in the context of hearsay,[6] a defendant forfeited his right to confrontation by intentionally making the witness unavailable.[7] Last Term, in *Giles v. California*,[8] the Court answered this

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

2 *Id.*

3 The Court expressly declined to "spell out a comprehensive definition of 'testimonial.'" *Id.*

4 The only exception *Crawford* appeared to recognize was for "dying declarations," which it intimated could be accepted on "historical grounds." *See id.* at 56 n.6. *See* Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1069 (2006) (noting that the "ultimate scope [of the Confrontation Clause after *Crawford*] remains unclear" and that "testimonial" is open to varying interpretations).

5 Since *Crawford*, the Court has decided only one other Confrontation Clause case, *Davis v. Washington*, 126 S. Ct. 2266 (2006), where it provided some further clarification on what constitutes a testimonial statement. *See id.* at 2274–79. The Court has also granted certiorari in *Melendez-Diaz v. Massachusetts*, 128 S. Ct. 1647 (2008), in order to determine whether a forensic analyst's laboratory report is testimonial. *See* Commonwealth v. Melendez-Diaz, No. 05-P-1213, 870 N.E.2d 676, 2007 WL 2189152, at *1 (Mass. App. Ct. July 31, 2007) (unpublished table decision), *review denied*, 874 N.E.2d 407 (Mass. 2007).

6 *See* FED. R. EVID. 804(b)(6).

7 *See* Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 450 (2006) ("The [*Crawford*] Court did not provide any discussion of forfeiture or provide guidance on the parameters of its 'acceptance' of the rule.").

8 128 S. Ct. 2678 (2008).

question in the affirmative, recognizing a forfeiture by wrongdoing exception to the Confrontation Clause when the defendant's *intention* in wrongfully causing the witness's absence was to prevent testimony.[9] However, in declining to specify the standard of proof judges should require to find intent, and in not clearly addressing the issue of evidentiary "bootstrapping," the Court promulgated a test without providing lower courts the guidance needed to apply it. Furthermore, although the Court purported to create a uniform test to be applied in all cases of forfeiture, both Justice Scalia's majority opinion and Justice Souter's concurrence seemed to approve of a virtual presumption of the requisite intent in cases involving domestic violence. This inconsistency may well be a result of the originalist theory of constitutional interpretation the Court has used in *Crawford* and its progeny: in situations such as *Giles*, for which there was no legal or factual analogue at the Founding, the Court espouses one set of rules, but then is forced to modify its application of those rules to reach a result that is palatable given contemporary notions of justice and equity.[10]

In 2002, Dwayne Giles shot and killed his ex-girlfriend Brenda Avie and fled the scene.[11] At trial, Giles argued that he had acted in self-defense, claiming that Avie was jealous and violent, and that she had "charged" him.[12] Claiming that he was afraid that Avie had something in her hand, Giles said that he had closed his eyes and fired, not intending to kill her.[13] To refute this claim, prosecutors sought to introduce statements made by Avie to a police officer who had responded to a domestic violence report three weeks prior to the shooting. Over Giles's objection, the trial court admitted statements in which Avie claimed that Giles had accused her of having an affair, choked her, punched her in the face and head, and threatened to kill her.[14] The jury convicted Giles of first-degree murder.[15]

While Giles's appeal was pending, the Supreme Court decided *Crawford*. Addressing the *Crawford* framework, the California Court of Appeal declined to rule on whether Avie's statements to the police were testimonial, holding instead that Giles was "barred from asserting a Confrontation Clause objection under the doctrine of forfeiture by

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[9] *Id.* at 2688.

[10] The problems that *Crawford* caused for domestic violence prosecutions have been well documented. *See, e.g.*, Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 749 (2005) ("[W]ithin days — even hours — of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past." (citations omitted)).

[11] *Giles*, 128 S. Ct. at 2681.

[12] *Id.*

[13] *Id.*

[14] People v. Giles, 152 P.3d 433, 436–37 (Cal. 2007).

[15] *Giles*, 128 S. Ct. at 2682.

wrongdoing."[16] The court held that forfeiture of the confrontation right occurs "whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable."[17]

The Supreme Court of California affirmed, holding that Giles had forfeited his right to confront Avie as a result of his intentional criminal acts, rendering unnecessary an inquiry into whether Giles had killed Avie specifically in order to prevent her from testifying.[18] Although recognizing that *Crawford* had "reshaped the confrontation landscape,"[19] the court was careful to note that *Crawford* only invalidated exceptions to the Confrontation Clause that "purported to assess the reliability of testimony."[20] The court emphasized that the doctrine of forfeiture by wrongdoing had nothing to do with reliability, but was rather rooted in the equitable principle that a defendant should not be able to profit from his criminal act of murdering a witness.[21]

The Supreme Court vacated and remanded. Writing for a fractured Court,[22] Justice Scalia held that the theory of forfeiture accepted by the California Supreme Court was not an exception to the confrontation right recognized at the Founding and was therefore invalid.[23] Rather, the majority concluded, the forfeiture by wrongdoing doctrine only abrogates the right of confrontation in situations where the defendant engaged in wrongdoing with the purpose of preventing testimony. In order to discern the state of the forfeiture doctrine at the Founding, the Court conducted an exhaustive analysis of the language in common law cases and treatises.[24] The majority observed that historical references to a witness's absence caused by the "means or procurement" of the defendant indicated that the forfeiture doctrine "applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying."[25]

Next, Justice Scalia ruled that the *lack* of any Founding-era cases admitting testimony when the defendant had caused the witness to be absent, but where prosecutors had not shown that the defendant had intended his actions to prevent testimony, proved that the doctrine had

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16 People v. Giles, 19 Cal. Rptr. 3d 843, 847 (Ct. App. 2004).

17 *Id.* at 848.

18 *Giles*, 152 P.3d at 447.

19 *Id.* at 440.

20 *Id.* at 437.

21 *Id.* at 438.

22 Justice Scalia's opinion was joined by Chief Justice Roberts and Justices Thomas and Alito. Justices Souter and Ginsburg joined in part.

23 *Giles*, 128 S. Ct. at 2693.

24 *Id.* at 2683–84.

25 *Id.* at 2683.

originally included an intent requirement.[26] Focusing particularly on "dying declaration" cases,[27] the majority noted that in the eighteenth and nineteenth centuries, courts admitted unconfronted statements only when it could be established that the victim was aware of his imminent death.[28] Justice Scalia found the "uniform exclusion of unconfronted inculpatory testimony by murder victims . . . in the innumerable cases in which the defendant was on trial for killing the victim . . . [to be] conclusive" evidence that the forfeiture doctrine did not apply absent proof of an intent to prevent testimony.[29]

In closing, Justice Scalia briefly addressed the domestic violence context in which many Confrontation Clause cases arise. Though emphatically rejecting the notion of having "a special, improvised, Confrontation Clause for those crimes that are frequently directed against women," Justice Scalia suggested that prior statements may be admissible when domestic violence culminates in murder because of "intent to isolate the victim."[30]

Justices Thomas and Alito both wrote separately, concurring in the application of the forfeiture principle, but questioning whether Avie's statements reporting the initial domestic violence incident should have been deemed testimonial in the first place.[31] Justice Thomas in particular reiterated the substantially narrower definition of "testimonial" that he first espoused in his partial dissent in *Hammon v. Indiana*.[32]

Justice Souter also wrote separately,[33] concurring with all parts of Justice Scalia's opinion except a portion accusing the dissent of attempting to overrule *Crawford*.[34] Though finding the historical record inconclusive, Justice Souter joined the Court's ruling because he was concerned that absent an intent test, the only barrier to the undesirable circularity of "evidence that the defendant killed . . . [being admitted]

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[26] *Id.* at 2684–86. *But see id.* at 2702 (Breyer, J., dissenting) ("I know of no instance in which this Court has drawn a conclusion about the meaning of a common-law rule *solely* from the absence of cases showing the contrary — at least not where there are other plausible explanations for that absence.").

[27] This common law exception, recognized by the Court in *Crawford* and codified in the hearsay context in Federal Rule of Evidence 804(b)(2), allows the introduction of hearsay statements by a witness who believes that his death is imminent. The rule is only invoked when, as poetically observed by Justice Cardozo, "[there is] a settled hopeless expectation . . . that death is near at hand, and what is said must have been spoken in the hush of its impending presence." Shepard v. United States, 290 U.S. 96, 100 (1933) (citations omitted) (internal quotation marks omitted).

[28] See *Giles*, 128 S. Ct. at 2684–86, and cases cited therein.

[29] *Giles*, 128 S. Ct. at 2688. Justice Scalia also argued that no exception to this rule has been "established in American jurisprudence *since* the founding." *Id.* at 2687.

[30] *Id.* at 2693.

[31] *See id.* (Thomas, J., concurring); *id.* at 2694 (Alito, J., concurring).

[32] *See* Hammon v. Indiana, 126 S. Ct. 2266, 2280–81 (2006) (Thomas, J., concurring in part and dissenting in part).

[33] Justice Souter was joined by Justice Ginsburg.

[34] *See Giles*, 128 S. Ct. at 2691–92 (opinion of Scalia, J.).

because the defendant probably killed," was the distinct roles of judge and jury — the former using a preponderance of the evidence standard, the latter requiring proof beyond a reasonable doubt.[35] Going slightly further than the majority, Justice Souter concluded his brief concurrence by noting that in most domestic violence situations, the requisite element of intent necessary for the forfeiture doctrine could be inferred by proof of a "classic abusive relationship."[36]

Justice Breyer dissented,[37] arguing that courts need not conduct a discrete inquiry into the specific motives of a defendant whose wrongful act caused a witness's absence from trial. Embracing the maxim that "no one shall be permitted to take advantage of his own wrong,"[38] Justice Breyer argued that the majority's rule would allow defendants to derive "great[] evidentiary 'advantage'" by preventing testimony from a witness they had murdered.[39] The dissent also emphasized that a defendant's knowledge that murdering a witness would prevent any future testimony was "sufficient to show the *intent* that law ordinarily demands."[40] Justice Breyer conducted a historical analysis similar to the majority's and concluded that from the common law onward, "the forfeiture rule would apply where the witness' absence was the *known consequence* of the defendant's intentional wrongful act."[41] Finally, Justice Breyer noted that the treatment of domestic violence by Justices Scalia and Souter "seem[ed] to say that a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim . . . [even if] the abuser may have had other matters in mind apart from preventing the witness from testifying."[42] Justice Breyer embraced this approach to domestic violence cases but asserted the need to do away with the majority's requirement of an additional showing of purpose in all cases. Otherwise, the majority "grants the defendant not fair treatment, but a windfall."[43]

In prescribing an intent-based doctrine and eschewing a rule that varies with the crime charged, the majority opinion might initially be read to provide lower courts with a test that carefully balances defendants' confrontation rights with the need to protect the integrity of criminal trials. However, in failing to answer crucial questions regard-

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[35] *Id.* at 2694 (Souter, J., concurring).

[36] *Id.* at 2695.

[37] Justice Breyer was joined by Justices Stevens and Kennedy.

[38] *Giles*, 128 S. Ct. at 2697 (Breyer, J., dissenting) (quoting Reynolds v. United States, 98 U.S. 145, 159 (1879)).

[39] *Id.*

[40] *Id.* at 2697–98.

[41] *Id.* at 2701.

[42] *Id.* at 2708.

[43] *Id.* at 2709.

ing the level and type of evidence required to find intent, the Court left lower courts ill-equipped to make the careful evaluations demanded of them in the wake of *Giles*. Further, the virtual presumption of intent in domestic violence–related prosecutions suggested in the opinions of Justices Scalia and Souter not only creates precisely the crime-specific test the Court derided but also demonstrates the broader difficulties caused by the search for original meaning in contexts that did not exist, and in fact were unimaginable, at the time of the Founding.[44]

Justice Scalia's opinion appears to require of judges a more searching and detailed inquiry, not allowing the mere fact that the judge suspects the defendant may be guilty of a witness's murder to precipitate application of the forfeiture doctrine. This test saves the defendant from a situation "repugnant to our constitutional system of trial by jury: that those murder defendants whom the judge considers guilty . . . should be deprived of fair-trial rights, lest they benefit from their judge-determined wrong."[45] However, when the *Giles* test is applied in practice, it may well fail to meaningfully cabin judicial determinations of guilt, at least partly because the Court does not provide enough specific guidance on how its rule will apply. Given that Justice Scalia abhors evidence being admitted based on "judge-determined wrong[s],"[46] the Court would have done well to specify the standard of persuasion by which judges should evaluate the evidence of forfeiture.[47] The question of whether a judge should determine that forfeiture has occurred by a preponderance of the evidence or by the higher standard of clear and convincing evidence[48] is a live issue for courts[49] and scholars.[50] Though there is no reason to believe that a lay jury would realize the judge had necessarily made a guilt determination in order to admit the evidence, requiring something more than a mere preponderance would force judges to closely scrutinize and clearly ar-

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[44] Though this comment only addresses the ways in which unclear evidentiary standards and an inconsistent application of the forfeiture doctrine could end up hurting defendants' interests, there are a number of other ways in which *Giles* might have disadvantageous consequences for defendants in the long term. *See* The Confrontation Blog, http://confrontationright.blogspot.com/2008/06/reflection-on-giles-part-2-is-giles-bad.html (June 29, 2008, 18:43).

[45] *Giles*, 128 S. Ct. at 2691.

[46] *Id.*

[47] Although Justice Souter mentioned in passing that "judges would find by a preponderance of evidence that the defendant killed," *id.* at 2694 (Souter, J., concurring), the majority never addresses this issue. Even if this demonstrates a presumption that the standard should be preponderance, the lower courts would have been well served by a clearer articulation.

[48] *See* People v. Giles, 152 P.3d 433, 445–46 (Cal. 2007).

[49] *See* United States v. Nelson, 242 F. App'x 164, 171 n.2 (5th Cir. 2007); United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).

[50] *See* King-Ries, *supra* note 7, at 455–56 (describing the standard of proof required for forfeiture by wrongdoing as an "[u]nsettled" area of law); Aaron R. Petty, *Proving Forfeiture and Bootstrapping Testimony After* Crawford, 43 WILLAMETTE L. REV. 593, 602–07 (2007).

ticulate their bases for believing that the defendant had the requisite intent at the time of the wrongdoing.

A second issue that the Court leaves unresolved is whether the finding of wrongdoing can be based purely on the statement itself or whether additional proof, so-called evidence *aliunde*, is required. In *Bourjaily v. United States*,[51] the Court approved of the conspirator exception to the hearsay rule, holding that a hearsay statement could be used as evidence to show the existence of a conspiracy, which in turn would justify the admission of the statement itself. Although the danger of evidentiary bootstrapping[52] was clear, Chief Justice Rehnquist's opinion for the Court declined to decide whether evidence *aliunde* is required in order to justify a statement's admission under the co-conspirator exception.[53] In *Giles*, Justice Scalia correctly distinguished *Bourjaily* on the grounds that co-conspirator statements will probably never be testimonial,[54] but he failed to address the critical question of what proof is required in order to give the Court's intent requirement real meaning. If the Court wants its subtle test to be followed by lower courts, it should provide specific guidance on how intent should be proven, and not simply rely on conflicting interpretations by lower courts to coalesce into a coherent, uniform application.

The *Giles* majority also eschewed the creation of two separate forfeiture doctrines: "a special, improvised, Confrontation Clause for those crimes that are frequently directed against women" and another Confrontation Clause "for all other crimes."[55] This perspective vindicates a critical value in criminal law: the notion that constitutionally protected rights should be applied consistently and equally regardless of the abhorrence of the crime charged or the likely guilt of the defendant. Indeed, the *Crawford* Court overruled *Ohio v. Roberts*,[56] which allowed courts to admit testimonial evidence from an unavailable witness if they determined it was reliable,[57] in part because of the unpredictable and inconsistent results produced by its test.[58] Therefore, unsurprisingly, Justice Scalia forcefully rejected any notion of creating

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[51] 483 U.S. 171 (1987).

[52] The Supreme Court first addressed the issue of evidentiary bootstrapping in *Glasser v. United States*, 315 U.S. 60 (1942), observing that for hearsay statements to be admitted under the then–common law co-conspirator exception, there must be some proof *aliunde* that the defendant was connected to the conspiracy. *Id.* at 74. Otherwise, the Court noted, "hearsay would lift itself by its own bootstraps to the level of competent evidence." *Id.* at 75.

[53] *Bourjaily*, 483 U.S. at 181. *But see id.* at 184–85 (Stevens, J., concurring) (arguing that the rule from *Glasser* does require additional evidence in order to prevent bootstrapping).

[54] *Giles*, 128 S. Ct. at 2691 n.6.

[55] *Id.* at 2693.

[56] 448 U.S. 56 (1980).

[57] *Id.* at 65–66.

[58] *See* Crawford v. Washington, 541 U.S. 36, 63 (2004), and cases cited therein.

two distinct constitutional confrontation requirements, to be applied depending on the crime charged.[59]

At the conclusion of his opinion, however, Justice Scalia singled out domestic violence as an instance where the mere evidence of an abusive relationship "may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse . . . rendering her prior statements admissible under the forfeiture doctrine."[60] Justice Souter went even further, finding that the "element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help."[61] Such statements from a Court determined not to create two separate Confrontation Clauses seem puzzling; why should intent not be inferred on the basis of conduct whenever a defendant murders or otherwise makes unavailable an informant who has recently met with police and given a damaging statement? The presumption that the Court employed seems eminently sensible from a practical standpoint given well-documented difficulties arising from prosecuting domestic violence post-*Crawford*[62] and the frequency with which forfeiture cases arise in the context of domestic abuse. Further, some scholars have argued that an accurate understanding of forfeiture by wrongdoing in the context of domestic violence requires a "temporally encompassing" view, seeing the relationship, and the continual physical and emotional abuse it involves, as a whole.[63] Yet regardless of the merits of the Court's approach, based on the language from both Justices Scalia and Souter, it is difficult to comprehend a situation in which a domestic violence victim's statements could not be introduced under the "isolation" theory. If this is so, then suddenly the judge's inquiry into intent seems at most a formality.[64]

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[59] Indeed, the idea of a special confrontation right that is more protective of women might well be condemned by certain feminist scholars, who argue that such special treatment under the law in fact perpetuates male-dominated stereotypes. *See* JANET HALLEY, TAKING A BREAK FROM FEMINISM 32 (2006).

[60] *Giles*, 128 S. Ct. at 2693.

[61] *Id.* at 2695 (Souter, J., concurring).

[62] *See supra* note 10.

[63] *See, e.g.*, Deborah Tuerkheimer, *Forfeiture in the Domestic Violence Realm*, 85 TEX. L. REV. SEE ALSO 49, 52 (2007), http://www.texaslrev.com/seealso/volume-85/issue-2/forfeiture.html; *see also* King-Ries, *supra* note 7, at 463 ("Since the power and control dynamic is designed to subjugate the victim and to prevent disclosure of the abuse, it seems appropriate to infer that a portion of the defendant's intent is to prevent the victim from testifying about the nature of the relationship.").

[64] There is an apparent tension between the two arguments in this comment: the Court does not provide enough guidance to lower courts to apply the test, while at the same time in the context of domestic violence, the Court provides too *much* guidance and reduces the test to a nullity. However, these two arguments can be understood together as evidence of the Court's lack of confidence in its test. Had the Court provided more guidance to lower courts, it might have been

The Court's creation of a special exception for domestic violence may well demonstrate a broader problem with the originalist method of constitutional interpretation embodied in *Crawford* and its progeny. Originalism, as commonly defined, "means that the judge must discern from the relevant materials . . . the principles the ratifiers understood themselves to be enacting . . . [and then] apply those principles to unforeseen circumstances."[65] There are well-worn debates as to how "original understandings" should be defined, with Justice Scalia — *Crawford*'s author — a strong advocate for looking to the "original meaning of the text."[66] In *Crawford*, Justice Scalia applied his form of textual originalism, "turn[ing] to the historical background of the Clause"[67] in order to discern its original meaning and, thereby, stay "faithful to the Framers' understanding."[68] This method of interpretation has been at the forefront of Confrontation Clause jurisprudence since *Crawford*,[69] and it is clearly on display in *Giles*.[70]

However, the application of originalist analysis has been criticized in the context of the Confrontation Clause because of the substantially different understanding of evidence law that existed — to the extent that evidence law was formally codified at all[71] — at the time of the Founding.[72] As Justices Breyer and Kennedy observed at oral argument, the panoply of Founding-era testimony restrictions on who could be a witness meant that a case such as Giles's would never even have arisen in the first place.[73] At the Founding, those disqualified from testifying included all "interested persons" in a case,[74] spouses,[75] chil-

more comfortable allowing them to reach their own results. However, because the Court did not provide enough specifics, at least in one critical area — domestic violence — it felt it necessary to preordain the outcome.

65 Robert H. Bork, *Slouching Towards Miers*, WALL ST. J., Oct. 19, 2005, at A12.

66 *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 38 (Amy Gutmann ed., 1997).

67 Crawford v. Washington, 541 U.S. 36, 43 (2004).

68 *Id.* at 59.

69 *See, e.g.*, Davis v. Washington, 126 S. Ct. 2266, 2274 (2006) (defining "testimony" in accordance with "early American case[s] invoking the Confrontation Clause [and] the common-law right to confrontation").

70 *Giles*, 128 S. Ct. at 2682 (considering "whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right").

71 *See* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1208 (2002) ("Hearsay doctrine, like evidentiary law more generally, was not well developed even at the time the [Confrontation C]lause was adopted . . . .").

72 *See generally* 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, 107 (2005) .

73 Transcript of Oral Argument at 10–11, *Giles*, 128 S. Ct. 2678 (2008) (No. 07-6053), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-6053.pdf.

74 Richard A. Nagareda, *Reconceiving the Right To Present Witnesses*, 97 MICH. L. REV. 1063, 1113 (1999).

75 *See* Trammel v. United States, 445 U.S. 40, 43–44 (1980).

dren, atheists, and convicted felons.[76] Furthermore, domestic violence was not conceived of as a crime, and therefore the typical Confrontation Clause case, where a battered spouse gives a statement to police but then is unavailable or unwilling to testify at trial, would not have been imagined.[77] The Court surely recognized the threat to domestic violence convictions posed by its conception of the forfeiture doctrine,[78] but was limited in its ability to resolve this problem within the constraints of eighteenth-century evidentiary and criminal law.

Professor Richard Primus has recently argued that sources of constitutional authority such as original intent, text, and nonoriginalist history should not be considered "as all in play at the same time"[79] in all cases, but rather should be viewed as tools in a judicial toolkit, allowing a judge to "ask which constitutional values are served by reasoning from that source and [then determine] in what kinds of cases reasoning from that source would actually serve those values."[80] Specifically, Professor Primus finds a role for originalist interpretation when courts construe constitutional provisions that were enacted recently enough so that they actually represent the will of the democratic populace,[81] and when the current operative meaning of a constitutional provision furthers public conceptions of the rule of law by closely mapping onto the original meaning.[82]

Along both of these metrics, the forfeiture by wrongdoing doctrine, at least as applied in the context of domestic violence, seems a poor candidate for originalism. The structure of the laws of evidence and widely held beliefs regarding domestic violence have changed significantly since the Founding, suggesting that looking to original meaning will neither vindicate democratic authority nor strengthen public conceptions of the rule of law. Rather than fashioning piecemeal exceptions to the originalist rules, the Court's project of defining a consistent

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[76] Transcript of Oral Argument, *supra* note 73, at 9.

[77] *See* Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 312 (2005). *See generally* Brief for the Domestic Violence Legal Empowerment and Appeals Project et al. as Amici Curiae Supporting Respondent at 20–23, *Giles*, 128 S. Ct. 2678 (2008) (No. 07-6053), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-6053_RespondentAmCu3DomViolenceLegalOrgs.pdf.

[78] Numerous organizations filed briefs to the Court making clear the potential domestic violence consequences of its decision, and the academic literature since *Crawford* has been clear on this point. *See* sources cited *supra* note 77.

[79] Richard Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. (forthcoming 2008) (manuscript at 1, *available at* http://ssrn.com/abstract=1021779).

[80] *Id.* at 54.

[81] *Id.* at 2.

[82] *Id.* at 4. Justice Scalia would naturally disagree with Professor Primus's theory, as for Justice Scalia originalism must always be applied regardless of the challenges posed in its application. *See, e.g.*, Scalia, *supra* note 66, at 38. An adequate response to Justice Scalia is beyond the scope of this comment. *But see, e.g*, RONALD DWORKIN, LAW'S EMPIRE 359–69 (1986).

and modern Confrontation Clause might be better served by first determining how the clause should be applied today, and then fashioning opinions to reach those ends.

As the Court continues to define the metes and bounds of the Confrontation Clause, it should craft a doctrine that combines modern-day mores with fidelity to the values and rights the doctrine is meant to protect. At the same time, it should also be mindful of the need to provide clear guidance to the lower courts. In *Giles*, the Court appears to have done neither, and thus will protect neither the victims of abuse nor the constitutional rights of their abusers.

### *C. Equal Protection*

*1. Jury Selection —* Batson *Challenges. — Batson v. Kentucky*[1] provides a three-step test designed to ferret out racially motivated peremptory strikes. The test's third step asks a trial judge to determine whether she believes a strike is racially motivated, or whether she is convinced by a litigant's asserted race-neutral explanation.[2] In this scheme, trial judges receive special deference, particularly when they base their rulings on the demeanor of particular attorneys or potential jurors.[3] But how reviewing courts should treat a *Batson* ruling where the trial judge considered multiple explanations, some pretextual and others based on demeanor, is an open question. Indeed, some of the biggest questions surrounding *Batson* are unsettled, including precisely what constitutional interests *Batson* protects,[4] and how courts should confront mixed and unconscious motivations.[5] Last Term, in *Snyder v. Louisiana*,[6] the Supreme Court had an opportunity to clarify these and other questions. Instead, the Court *presumed* that a trial judge was impermissibly convinced by pretext rather than by demeanor, holding that the strike of a potential juror was racially motivated. Consistent with the Chief Justice's goal of narrow decisions for greater consensus,[7] the presumption in *Snyder* allowed the Court to avoid the

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[1] 476 U.S. 79 (1986).

[2] *See id.* at 98 ("The trial court [has] the duty to determine if the defendant has established purposeful discrimination.").

[3] *See* Hernandez v. New York, 500 U.S. 352, 365 (1991) (plurality opinion) ("[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" (quoting Wainwright v. Witt, 469 U.S. 412, 428 (1985))).

[4] *See generally* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992).

[5] For an introduction to the problem of "unconscious racism" in the equal protection domain, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

[6] 128 S. Ct. 1203 (2008).

[7] *See* Cass R. Sunstein, *The Minimalist: Chief Justice Roberts Favors Narrow Court Rulings That Create Consensus and Tolerate Diversity*, L.A. TIMES, May 25, 2006, at B11. In his confirmation hearings, the Chief Justice said that "one of the things that the Chief Justice should have