FORFEITURE AND CROSS-EXAMINATION

by
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The forfeiture exception to the confrontation right allows the admission of a witness's prior testimony where the defendant wrongfully procures the witness's absence from trial. But did the common-law forfeiture exception justify admitting any statements previously made by the witness? Or did it justify admitting only the witness's prior cross-examined testimony (thus denying the defendant only the opportunity to cross-examine the witness at trial)? Although not the principal issue decided by the Supreme Court in Giles v. California*, this question spawned a lively debate, with the majority taking the former view and the dissent the latter. I argue that, although some evidence supports the majority's position, other evidence supports the narrower view that forfeiture justified admitting only a witness's prior cross-examined testimony. I nonetheless argue that the dissent drew the wrong conclusion from that history. Forfeiture's arguable status as a narrow exception for prior cross-examined testimony was a further reason to reject the California Supreme Court's extension of the doctrine in* Giles.

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I. INTRODUCTION

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[1] Wigmore divided that right into two components. The "main and essential purpose" of confrontation, he declared, was to secure an opportunity to cross-examine the government's witnesses.[2] But a "secondary advantage" was the opportunity to cross-examine the witnesses *at trial*, where the jury could observe their demeanor in responding.[3] Like many constitutional provisions, the Confrontation Clause codifies a common-law right and is thus subject to common-law exceptions that existed at the time of its adoption. Wigmore's taxonomy applies equally to those exceptions. Some conditions justify dispensing with only the "secondary advantage" of confrontation. For example, where a witness has died or become too ill to attend trial, the prosecution can introduce his former testimony *provided that* the defendant had a prior opportunity to cross-examine. Other conditions justify dispensing with the right's "main and essential" component as well. For example, a dying declaration can be introduced even though the defendant had no opportunity to cross-examine at all. The consequences for the defendant being more severe, the set of conditions falling under that second category is predictably narrower.

Wigmore's taxonomy provides a helpful framework for the issue I address here. The common-law forfeiture exception to the confrontation right applies where a defendant wrongfully procures a witness's absence from trial. But just what sort of "exception" is the forfeiture exception? Does it justify dispensing with confrontation altogether? Or does it justify dispensing with only the secondary component of the right—the right to confront the witness *at trial*? Although not the principal issue decided by the Supreme Court in *Giles v. California*, this question spawned a lively debate between the majority and the dissent.[4] As I show below, that debate raises interesting questions about not only the content of Framing-era law but also its modern implications.

Part II below describes the treatment of this issue in *Giles*. Part III presents the historical evidence supporting the narrower conception of forfeiture as an exception only to the right to confront witnesses *at trial*. Part IV responds to the majority's and dissent's analyses in *Giles* and concludes that, although some evidence supports the majority's position, other evidence supports the narrower view. Part V argues that the dissent nonetheless drew the wrong conclusion from that history: Forfeiture's

[1] U.S. CONST. amend. VI.

[2] 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1395, at 94 (2d ed. 1923).

[3] *See* 3 *id.* § 1395, at 96.

[4] Giles v. California, 128 S. Ct. 2678 (2008).

arguable status as a narrow exception for prior *cross-examined* testimony was a further reason to *reject* California's extension of the doctrine, not to embrace it. Thus, the majority's decision in *Giles* was correct.

II. FORFEITURE AND CROSS-EXAMINATION IN *GILES*

The question presented in *Giles* was whether forfeiture applies whenever a defendant engages in wrongful conduct that happens to render a witness unavailable, or instead only to wrongful conduct designed to produce that result.[5] The California Supreme Court had adopted the broader view.[6] The National Association of Criminal Defense Lawyers filed an amicus curiae brief urging the U.S. Supreme Court to reverse that decision; the author of this article was also the principal author of that brief.[7]

Our submission made two primary points. First, we contended that the Framing-era treatment of dying declarations showed that California's version of forfeiture was historically unsupportable.[8] At the time of the Framing, courts admitted statements of dying witnesses accusing their alleged killers, but only if the witness knew he was dying when he made the statement (rendering it sufficiently trustworthy to dispense with the ordinary safeguards of oath and cross-examination).[9] Courts thus repeatedly excluded statements of alleged murder victims where their apprehension of imminent demise was not sufficiently shown.[10] California's version of the forfeiture rule would justify admitting such statements regardless of the witness's mental state; the fact that no court or lawyer even suggested admitting the statements on that ground is strong evidence against California's conception.[11] The *Giles* majority relied heavily on that rationale in rejecting the State's position.[12]

Our second contention was that the Framing-era forfeiture doctrine was a narrow rule that applied only to prior cross-examined testimony.[13] In other words, forfeiture was a species of unavailability like death or illness—it justified introducing the witness's prior *cross-examined* testimony, but not other prior statements the witness had made. We

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[5] *See id.* at 2682.

[6] *Id.* (citing People v. Giles, 152 P.3d 433, 435 (Cal. 2007)).

[7] *See* Brief of the Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curiae in Support of Petitioner, Giles v. California, 128 S. Ct. 2678 (2008) (No. 07-6053) [hereinafter NACDL Amicus Brief].

[8] *See id.* at 15–25.

[9] *See id.* at 16–22.

[10] *See id.* at 17–22.

[11] *See id.* at 22–25.

[12] *Giles*, 128 S. Ct. at 2684–87.

[13] *See* NACDL Amicus Brief, *supra* note 7, at 5–15.

argued that this narrow scope of forfeiture at common law was another reason to reject California's further extension of the doctrine.[14]

That issue also figured prominently in the opinions in *Giles*, but not in the manner we intended. The dissent accepted the historical claim that forfeiture applied only to prior cross-examined testimony, but argued that this was a reason to *affirm* the California Supreme Court's decision.[15] The argument was somewhat convoluted but ran as follows: (1) the *Giles* majority relied on the absence of cases applying forfeiture to statements of alleged murder victims that failed to qualify as dying declarations as evidence that forfeiture required an intent to prevent the witness from testifying; (2) that evidence does not necessarily support that conclusion because the absence of such cases could also be explained by the limitation of forfeiture to prior cross-examined testimony; (3) modern evidence law does not limit forfeiture to cross-examined testimony; therefore (4) forfeiture should be limited to neither witness-tampering nor cross-examined testimony.[16] Thus, while our brief had argued that the limitation of forfeiture to cross-examined testimony was a reason to *reject* California's position, the dissent co-opted that argument in support of its own position. The majority responded mainly by disputing the dissent's historical premise, arguing that forfeiture was *not* traditionally limited to prior cross-examined testimony.[17]

III. THE HISTORICAL EVIDENCE

Our amicus brief traced the origins and evolution of the forfeiture doctrine and argued that the historical evidence showed that the rule applied only to prior cross-examined testimony.

A. The Origins of Forfeiture

In England, pretrial proceedings in criminal cases were governed by the so-called Marian statutes.[18] According to those statutes, when witnesses believed someone had committed a felony, they were to bring him before a justice of the peace, who would examine both the witnesses and the suspect to decide whether to bail the suspect or commit him to

[14] *See id.* at 12–15.

[15] *Giles*, 128 S. Ct. at 2702–07 (Breyer, J., dissenting).

[16] *See id.*

[17] *See id.* at 2688–91 (majority opinion).

[18] 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 Phil. & M., c. 10 (1555). *See generally* JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 5–20 (1974); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 40–47, 273–77 (2003); J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660–1800, at 268–81 (1986).

jail to await trial.[19] The depositions from those "committal" hearings were then sent to the court.[20] The statutes also directed coroners to take depositions of witnesses during their pretrial homicide inquests.[21]

Those Marian pretrial depositions were an attractive source of evidence if a witness later became unavailable for trial. England's twelve judges laid down the rules governing their admissibility in 1666.[22] That year, Lord Morley was tried before the House of Lords for killing another man after a quarrel, and the twelve judges advised the House on the admissibility of depositions that had been taken by the coroner.[23] The judges resolved that the depositions were admissible if the witness was "dead or unable to travel," or—as relevant here—"detained by the means or procurement of the prisoner."[24]

At Lord Morley's trial, the Crown read the coroner's depositions of three witnesses who had died.[25] The court, however, excluded the deposition of a fourth witness who had "run away" after telling his friends that "Lord Morley's Trial was to be shortly but he would not be there."[26] That, the court ruled, was not sufficient to permit the testimony.[27] Consistent with that ruling, when Lord Morley's accomplice was later tried before the King's Bench, the Crown read the depositions of two of the witnesses who had died but apparently did not even offer the deposition of the witness who had merely run away.[28]

For centuries, *Lord Morley's Case* governed the admissibility of Marian depositions—both coroners' depositions and committal depositions before justices of the peace. In 1692, for example, a coroner's deposition was read at the murder trial of Henry Harrison after the Crown showed that a man had "asked [the witness], if he was not an evidence [i.e., witness] against Mr. Harrison," and then "pulled out a piece of money, and offered it [to] him, desiring him to be kind to Mr. Harrison."[29] Four years later, in Fenwick's parliamentary attainder proceeding, the Marian

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[19] 1 & 2 Phil. & M., c. 13, § 1 (1554); 2 & 3 Phil. & M., c. 10, § 1 (1555).

[20] *See* 1 & 2 Phil. & M., c. 13, § 1 (1554); 2 & 3 Phil. & M., c. 10, § 1 (1555).

[21] 1 & 2 Phil. & M., c. 13, § 1 (1554).

[22] *See* Lord Morley's Case, Kel. 53, 84 Eng. Rep. 1079, 6 How. St. Tr. 769 (H.L. 1666). For a discussion of earlier references to the evidentiary use of Marian depositions in justice-of-the-peace manuals, see Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of* Giles*'s Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding,"* 13 LEWIS & CLARK L. REV. 605, 619–20 (2009).

[23] *See Lord Morley's Case*, Kel. at 53–55, 84 Eng. Rep. at 1079–80, 6 How. St. Tr. at 769–71, 780–82.

[24] *Id.* at 55, 84 Eng. Rep. at 1080; *see also* 6 How. St. Tr. at 776–77 ("dead" or "withdrawn by the procurement of the prisoner").

[25] *Lord Morley's Case*, 6 How. St. Tr. at 776.

[26] *Id.* at 777.

[27] *Id.*

[28] *See* Bromwich's Case, 1 Lev. 180, 83 Eng. Rep. 358 (K.B. 1666).

[29] Harrison's Case, 12 How. St. Tr. 833, 851–52 (Old Bailey 1692).

forfeiture rule was invoked to justify admitting a witness's deposition before a justice of the peace, after the defendant's associates apparently bribed the witness to abscond:

> [W]here persons do stand upon their lives, accused for crimes, if it appears to the court that the prisoner hath, by fraudulent and indirect means, procured a person that hath given information against him to a proper magistrate, to withdraw himself, so that he cannot give evidence as regularly as they used to do; in that case his information hath been read . . . .[30]

Summarizing the law in 1721, Hawkins wrote:

> [T]he Examination of an Informer . . . either before a Coroner upon an Inquisition of Death in pursuance of [the Marian statutes] or before Justices of Peace in pursuance of [the Marian statutes] upon a Bailment or Commitment for any Felony, may be given in Evidence at the Trial . . . [if] such Informer is dead, or unable to travel, or kept away by the Means or Procurement of the Prisoner . . . .[31]

Other authorities stated the same rule.[32] Forfeiture was thus a species of unavailability—akin to death or illness—that justified admitting a witness's pretrial Marian deposition.

B. Evolving Conceptions of Marian Procedure

Marian committal hearings were normally conducted in the prisoner's presence—their purpose, after all, was to determine whether to commit the prisoner to jail.[33] Over the eighteenth century, the view emerged that those hearings offered the prisoner at least a theoretical opportunity to confront and cross-examine his accusers.[34] *Lord Morley's Case* and its progeny were then interpreted to mean that a witness's unavailability justified admitting only *properly taken* committal depositions—i.e., depositions taken in the prisoner's presence, affording an opportunity for cross-examination. That view was widely,[35] although

[30] Fenwick's Case, 13 How. St. Tr. 537, 594 (H.C. 1696) (Lovel).

[31] 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 429 (London, Eliz. Nutt & R. Gosling 1721) (footnotes omitted).

[32] *See, e.g.*, 1 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 287–88 (London, Henry Lintot 1755).

[33] *See* Robert Kry, *Confrontation Under the Marian Statutes*, 72 BROOK. L. REV. 493, 511–16 (2007).

[34] *See id.* at 516–41.

[35] *See* Fenwick's Case, 13 How. St. Tr. 537, 602 (H.C. 1696) (Musgrave) (stating that the rule of admissibility for Marian committal depositions "only related to felonies, and when depositions were taken in the presence of the party"); THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 671 (London, H. Woodfall & W. Strahan, 9th ed. 1763) (stating the rule of admissibility but querying "[i]f the Defendant must not be present at the Time they are taken in order to make them good Evidence"); JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN

not uniformly,[36] held around the time of the Framing, and was consistently followed in early American cases.[37]

COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776), at 634–35 (1944) (recounting a 1766 colonial protest complaining that "[d]uring the Course of the Examination of the Witnesses [a particular justice] would not admit any of the prisoners to ask or propose one Single Question to the Witnesses nor suffer anyone to do it in their Ste[a]d"); Ayrton v. Addington (1780), *in* 2 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 1023, 1024–26 (1992) (attorney at a committal hearing "insisted he had a right to ask the [witness] any questions"—"the right as an Attorney to put any question for the benefit of his client"—and then successfully sued the magistrate for refusing to allow such questions); 1 JOHN MORGAN, ESSAYS UPON THE LAW OF EVIDENCE, NEW TRIALS, SPECIAL VERDICTS, TRIALS AT BAR, AND REPLEADERS 431 (London 1789) (stating the rule of admissibility but adding that "[t]his shews the propriety and justice of permitting a prisoner by himself, or counsel to cross-examine any witness produced against him, before the magistrate, though some justices have strenuously contended against the right"); King v. Radbourne, 1 Leach 457, 460–61, 168 Eng. Rep. 330, 332 (Old Bailey 1787) (reported 1789/1800) (prosecution counsel argued that a "deposition was admissible in evidence . . . as an information taken by a regular magistrate, under the statutes of Philip & Mary; for it had been given in the presence and hearing of the prisoner"); King v. Woodcock, 1 Leach 500, 501–02, 168 Eng. Rep. 352, 352–53 (Old Bailey 1789) (reported 1789) (excluding a deposition because "[i]t was not taken, as the statute directs, in a case where the prisoner was brought before [the magistrate] in custody; the prisoner therefore had no opportunity of contradicting the facts it contains"); King v. Dingler, 2 Leach 561, 562–63, 168 Eng. Rep. 383, 383–84 (Old Bailey 1791) (reported 1800) (excluding a deposition after defense counsel argued that "[t]he Magistrate . . . is only authorized to take an examination of the person brought before him, and of those who bring him: this is the course which the law has prescribed to the Magistrate on these occasions; and when this course is pursued, the prisoner may have, as he is entitled to have, the benefit of cross-examination; but in the course which has been pursued by Mr. Abingdon, as the prisoner was not present, no judicial examination has been taken, as he could not have the benefit of cross-examination"); 4 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 423 (Thomas Leach ed., London, 7th ed. 1795) ("[A]n examination of a person murderously wounded, taken by a justice of the peace . . . in the absence of the prisoner, cannot be read in evidence on the subsequent trial of the prisoner for murder, for it is taken extrajudicially, and not as the statutes of *Philip and Mary* direct, in a case where the prisoner is brought before him in custody, and he has the opportunity of contradicting or cross-examining as to the facts alledged."); King v. Eriswell, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790) (reporter's note 1797) ("Nor [are Marian committal depositions admissible] since that statute, unless the party accused be present . . . ."); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 40–41 (London 1801) ("[I]f in a case of felony one magistrate takes the deposition on oath of any person in the presence of the prisoner, whether the party wounded, or even an accomplice; and the deponent dies before the trial, the depositions may be read in evidence; but if the prisoner be not present at the time of the examination, it cannot."); and other authorities cited in Kry, *supra* note 33, at 495–96 nn.11–12, 512–24, 530–41.

[36] *See, e.g.*, *Eriswell*, 3 T.R. at 713–14, 100 Eng. Rep. at 819 (Buller, J.) ("[D]epositions taken by a justice of a person who afterwards died, though taken in the absence of the prisoner, must be read.").

[37] *See* State v. Webb, 2 N.C. (1 Hayw.) 103, 104 (Super. Ct. L. & Eq. 1794) ("These authorities do not say that depositions taken in the absence of the prisoner

Coroners' depositions, by contrast, would not necessarily be taken in the defendant's presence, and English authorities thus had greater difficulty rationalizing their admissibility.[38] One rationale offered was that inquests were such notorious proceedings that everyone was presumed to have been aware of them, and thus to have had at least a constructive opportunity to cross-examine.[39] American authorities, however, refused to indulge that fiction for coroners' depositions and insisted on an actual opportunity for cross-examination.[40] One court, for example, excluded the coroner's deposition of a deceased witness because the defendant was not present at the inquest.[41] The court first described *Lord Morley's Case* as "quite uncertain, as to the precise point of the absence of the accused at the taking of the depositions."[42] Apparently not wholly satisfied by that distinction, the court then characterized *Lord Morley's Case* as a "precedent[], not to follow, but to deter," and opined that, "without disrespect to the twelve judges of England," their entire decision was "*obiter dicta*" entitled to no more weight than an earlier state-court decision.[43] Years later, the Supreme Court described that decision as if its holding were self-evident.[44]

C. Forfeiture and Cross-Examination

The rule of *Lord Morley's Case*—that prior testimony was admissible if the witness was dead, too sick to travel, or kept away by the accused—thus

shall be read, and our [committal statute] clearly implies the depositions to be read, must be taken in his presence: it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine . . . ."); State v. Moody, 3 N.C. (2 Hayw.) 31, 31–32 (Super. Ct. L. & Eq. 1798) (Haywood, J.) (conditioning admissibility on whether the deposition was "regularly taken pursuant to the act . . . ; more especially [i.e., more specifically] if the party to be affected by that testimony were present at the examination"); Johnston v. State, 10 Tenn. (2 Yer.) 58, 59–60 (1821) (admitting a deposition taken "under proper circumstances," i.e., "in the presence of the prisoner"); and other cases cited in Kry, *supra* note 33, at 496–97 n.13.

[38] *See, e.g.*, THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 64 n.(m) (London, Luke Hansard & Sons, 3d ed. 1808) (questioning the rule but acknowledging that the practice was to admit coroners' depositions "without inquiry whether the party was present or not").

[39] *See* 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 492 (London, J. & W. T. Clarke 1824); *Eriswell*, 3 T.R. at 722, 100 Eng. Rep. at 824 (Kenyon, C.J.); *see also infra* text accompanying notes 68–71.

[40] *See* State v. Campbell, 30 S.C.L. (1 Rich.) 124, 131–32 (Ct. App. 1844); State v. Hill, 20 S.C.L. (2 Hill) 607, 610 (Ct. App. 1835); People v. Restell, 3 Hill 289, 297 (N.Y. Sup. Ct. 1842); State v. Houser, 26 Mo. 431, 436 (1858); *see also infra* text accompanying notes 72–73.

[41] *Campbell*, 30 S.C.L. at 131–32.

[42] *Id.* at 127.

[43] *Id.* at 127, 131.

[44] *See* Mattox v. United States, 156 U.S. 237, 241 (1895) ("[O]f course it was held to be inadmissible.").

evolved from a set of conditions justifying admission of prior testimony into a set of conditions justifying admission of prior *cross-examined* testimony. Or, to use Wigmore's framework, from a set of conditions justifying dispensing with confrontation entirely into a set of conditions justifying dispensing with only the "secondary advantage" of confrontation—cross-examination *at trial*. The authorities cited above, however, involved witnesses who were unavailable through no fault of the accused. Did the forfeiture prong follow a similar evolutionary path?

Substantial evidence suggests so. Early nineteenth-century treatises addressing committal depositions continued to treat forfeiture as a species of unavailability akin to death or illness while also stating a cross-examination requirement. Archbold, for example, wrote that committal depositions were admissible if the witness was "dead, or unable to travel, or . . . kept away by the means or procurement of the prisoner"—but added that, "to be thus given in evidence, [the depositions] must have been taken in the presence of the prisoner, so that he might have had an opportunity of cross examining the witness."[45] Chitty wrote that committal depositions were admissible if the witness was "dead, or not able to travel, or . . . kept away by the means and contrivance of the prisoner"—but must also be "done in the presence of the party accused, in order that he may have the advantage of cross-examining the witnesses."[46] Phillipps agreed: Committal depositions were admissible if the witness was "dead, or not able to travel, or . . . kept away by the means and contrivance of the prisoner"—but only if taken "in the presence of [the] prisoner."[47]

Later nineteenth-century authors treated forfeiture the same way, and stated the principle in more general terms not limited to committal depositions. Greenleaf, for example, wrote that testimony of a deceased witness was admissible provided the other party "had the power to cross-examine," and added: "It is also received, if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick and unable to testify, *or has been summoned, but appears to have been kept away by the adverse party.*"[48] Taylor listed forfeiture among other types of unavailability—"death, [or] . . . being, either out of the jurisdiction of the Court, or, it seems, unable to be found after diligent inquiry, or insane, or permanently sick, *or kept out of the way by the*

[45] JOHN FREDERICK ARCHBOLD, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES 85 (London 1822) (citation omitted).

[46] 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 79–81 (London, A. J. Valpy 1816) (footnotes omitted).

[47] S. M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 162 (London, A. Strahan 1814) (footnotes omitted); *see also* Queen v. Scaife, 17 Q.B. 238, 238–39, 242–44, 117 Eng. Rep. 1271, 1271, 1273 (Q.B. 1851) (admitting a committal deposition taken "in the presence of the prisoners" against one defendant on forfeiture grounds).

[48] 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 163, at 193 (Boston, Charles C. Little & James Brown 1842) (emphasis added).

contrivance of the opposite party, or subsequently . . . interested in the event of the cause"—but added with regard to all those conditions: "[I]t seems almost needless to observe, that in order to render admissible secondary evidence of the testimony of a witness, it must be proved that the witness was *duly sworn* in some judicial proceeding . . . [at which the other party] might have exercised the *right of cross-examination* . . . ."[49] And Wharton listed being "corruptly kept from court by the [other] party" along with death, illness, absence from the jurisdiction, inability to attend trial, and incompetence as grounds for admitting prior testimony, *provided that* the other party "had the power to cross-examine."[50]

Courts adopted the same approach. In the 1819 decision in *Drayton v. Wells*, for example, a court listed being "kept away by the contrivance of the opposite party"—along with death, insanity, and absence overseas—as grounds for admitting prior trial testimony, *provided that* the earlier trial was "between the same parties" and "the point in issue was the same."[51] Those conditions mattered, of course, only because they ensured that the opposite party had an adequate opportunity to cross-examine.

The Supreme Court's decision in *Reynolds v. United States* supports the same view.[52] *Reynolds* involved a witness's testimony from a former trial for the same offense.[53] The defendant concealed the witness so she could not be found for the second trial.[54] The Court reviewed the precedents supporting the forfeiture rule and found sufficient evidence of witness-tampering.[55] But it also specifically relied on the fact that the defendant was "present at the time the testimony was given, and had full opportunity of cross-examination."[56]

Authorities adhered to that view even into the twentieth century. Wigmore, for example, stated that depositions and prior trial testimony were admissible "supposing, of course, that in each case there has been cross-examination."[57] He went on in succeeding sections of his treatise to discuss the types of unavailability that justified admission, including death, illness, and—as relevant here—wrongful procurement by the

[49] 1 JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE §§ 343, 347, at 327, 331 (London, Maxwell & Son 1848) (first emphasis added); *see also* 1 *id.* § 353, at 334–35.

[50] 1 FRANCIS WHARTON, A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES §§ 177–179, at 180–86 (Philadelphia, Kay & Bro. 1877). Despite its title, the treatise expressly extends the rule to criminal cases as well. *See* 1 *id.* § 177, at 181 (citing committal depositions as an illustration of the rule).

[51] Drayton v. Wells, 10 S.C.L. (1 Nott & McC.) 409, 411 (Constitutional Ct. 1819).

[52] Reynolds v. United States, 98 U.S. 145 (1879).

[53] *Id.* at 158.

[54] *Id.* at 159–60.

[55] *Id.* at 158–60.

[56] *Id.* at 161.

[57] 3 WIGMORE, *supra* note 2, § 1401, at 111.

opposing party.[58] Thus, Wigmore also viewed forfeiture as a type of unavailability akin to death or illness that justified admitting only *cross-examined* testimony.

IV. THE COURT'S ANALYSIS

The *Giles* majority read the historical record differently, citing several sources to support its conclusion that forfeiture applied without regard to opportunity for cross-examination. Some of the sources support its conclusion; others are more ambiguous.

A. Coroners' Depositions

The majority first relied on the practice concerning coroners' depositions. *Lord Morley's Case* held that coroners' depositions were admissible if the witness was kept away by the accused,[59] and in 1692, *Harrison's Case* applied that rule to admit such a deposition.[60] As the *Giles* majority observed, because *Harrison's Case* involved a coroner's inquest, "there was no reason to think the defendant would have been present at the prior examination."[61] The dissent responded that English law's special solicitude for coroners' depositions "failed to survive the Atlantic voyage," but it relied on cases involving witnesses unavailable for reasons other than tampering.[62] The majority accordingly rejoined that, "[w]hile American courts understood the admissibility of statements made at prior proceedings (including coroner's inquests like the one in *Harrison's Case*) to turn on prior opportunity for cross-examination as a general matter, no such limit was applied or expressed in early wrongful-procurement cases."[63]

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[58] 3 *id.* §§ 1401–1410, at 111–26. Wigmore states in full: "If the witness has been by the *opponent procured* to absent himself, this ought of itself to justify the use of his deposition or former testimony,—whether the offering party has or has not searched for him, whether he is within or without the jurisdiction, whether his place of abode is secret or open; for any tampering with a witness should once for all estop the tamperer from making any objection based on the results of his own chicanery." 3 *id.* § 1405, at 120 (footnote omitted). Some might construe the last portion of that sentence to condone admission without regard to cross-examination, but that does not strike me as a persuasive interpretation given the context. The "any objection" remark seems more likely directed to the immediately preceding point that forfeiture excuses the other party from showing a diligent search or the like.

[59] *See supra* text accompanying notes 22–27.

[60] Harrison's Case, 12 How. St. Tr. 833, 851–52 (Old Bailey 1692).

[61] Giles v. California, 128 S. Ct. 2678, 2688–89 (2008).

[62] *See id.* at 2706 (Breyer, J., dissenting) (citing Crawford v. Washington, 541 U.S. 36, 47 n.2 (2004) (in turn citing State v. Campbell, 30 S.C.L. (1 Rich.) 124, 124, 130 (Ct. App. 1844) (witness deceased); and State v. Houser, 26 Mo. 431, 433, 436 (1858) (witness beyond the court's jurisdiction; deceased witnesses discussed in dicta))).

[63] *Id.* at 2689 (majority opinion) (citation omitted). The majority did not cite any American case admitting a coroner's deposition on forfeiture grounds, but rather

The history on that point can be argued both ways. English cases admitted coroners' depositions if the witness was dead, sick, or kept away by the accused; early American cases rejected that rule, but it is unclear whether their rejection extended to all three types of unavailability or only the first two (the "no-fault" categories). For example, the leading American case—*Campbell*—excluded the coroner's deposition of a dead witness, stating that "such depositions are *ex parte*, and, therefore, utterly incompetent."[64] "[O]ne of the indispensable conditions of . . . due course of law," the court stated, was that "prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination."[65] The implications are unclear: On the one hand, the court's language about the evils of *ex parte* depositions was categorical and would seem to apply regardless of *why* the *ex parte* testimony was necessary. On the other hand, there was no suggestion in the facts of the case that the accused was responsible for the witness's death; perhaps the court would have said something different had there been. That same ambiguity runs through the early American case law: Courts criticized the English rule for admitting coroners' depositions because they were *ex parte*, often in categorical terms,[66] but since there do not appear to have been any reported early American cases involving

segued into its discussion of *Rex v. Barber*, 1 Root 76 (Conn. Super. Ct. 1775), a case whose implications are unclear for reasons discussed below. *See infra* text accompanying notes 100–118.

[64] State v. Campbell, 30 S.C.L. (1 Rich.) 124, 125 (Ct. App. 1844).

[65] *Id.*; *see also id.* at 132 ("I should so expound the resolves of the twelve judges [in *Lord Morley's Case*], as not to infract the privilege of the cross-examination in any case; and, emphatically, in the unavoidable and hasty examinations before coroners, *super visum corporis*.").

[66] *See* People v. Restell, 3 Hill 289, 297 (N.Y. Sup. Ct. 1842) ("It is said that depositions taken by the coroner on holding an inquest are evidence, although the defendant was not present when they were taken. This doctrine has been gravely questioned, and I am strongly inclined to the opinion that it cannot be maintained. The great principle that the accuser and accused must be brought face to face, and that the latter shall have the opportunity to cross-examine, can never be departed from with safety. Neither life nor liberty should ever be put in peril by listening to *ex parte* depositions. . . . It is not, however, necessary at this time to pass upon the admissibility of depositions taken before the coroner in the absence of the accused . . . ."); State v. Hill, 20 S.C.L. (2 Hill) 607, 610 (Ct. App. 1835) ("Depositions taken upon a coroner's inquest in pursuance of the [Marian statutes] seem generally to have been admitted as an exception to this rule on the ground of the publicity and importance of the proceeding; but I incline to think with Mr. Starkie, that even this is not warranted, and that it will deserve grave consideration when the question arises, whether it ought to be supported."); State v. Houser, 26 Mo. 431, 436 (1858) ("[T]here may be a few cases in which depositions, taken before coroners in England without any opportunity of cross-examination, have been used against the accused, where the witness subsequently died; but the authority of such cases is questioned, even in that country, by their ablest writers on common law . . . and it is doubtful whether such testimony would be now received. At all events, such testimony has never been permitted in this country . . . .").

coroners' depositions of witnesses kept away by the accused, it is not clear that courts would have extended their critique that far.[67]

Even assuming American courts would have limited their rejection of the English rule to cases of no-fault unavailability, it is unclear how far the rule of admissibility would extend. As noted above, one frequently expressed rationale for the admissibility of coroners' depositions was that inquests afforded at least a constructive opportunity for cross-examination.[68] As Starkie explained: "[A] proceeding before the coroner is a matter so notorious, that every one may be presumed to have notice of it, and consequently to have had an opportunity of cross-examining the witness."[69] Lord Kenyon offered a similar justification in 1790: "The examination before the coroner is an inquest of office; it is a transaction of notoriety, to which every person has a right of access . . . ."[70] Indeed, there is evidence of cross-examination at a coroner's inquest as early as 1742.[71] American courts understood that rationale, even while finding it insufficient. An 1835 case stated that coroners' depositions were admissible in England "on the ground of the publicity and importance of the proceeding."[72] And *Campbell* asked rhetorically:

> [S]hall [defendants] all be assumed *per leges* [i.e., by operation of law], to have neglected, though absent, the time of cross-examination? Because our Act is general for all inquests, the examination public, and of high respectability? On the contrary, is there not too much of mere formula, if not fiction, in such a notion?[73]

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[67] The date of *Harrison's Case*, 1692, raises additional concerns. Harrison's Case, 12 How. St. Tr. 833 (Old Bailey 1692). Confrontation principles evolved substantially over the eighteenth century; the earliest source I am aware of suggesting that admissibility of *any* Marian deposition (from a committal hearing or a coroner's inquest) depended on a prior opportunity for cross-examination under *any* circumstances (forfeiture or any other sort of unavailability) is from 1696. *See* Fenwick's Case, 13 How. St. Tr. 537, 602 (H.C. 1696) (Musgrave); *supra* note 35. The absence of any mention of a cross-examination requirement in *Harrison's Case* is thus not very remarkable.

[68] *See supra* note 39 and accompanying text.

[69] 2 STARKIE, *supra* note 39, at 492 (stating this rationale but finding it "far from satisfactory").

[70] King v. Eriswell, 3 T.R. 707, 722, 100 Eng. Rep. 815, 824 (K.B. 1790) (Kenyon, C.J.); *see also* PHILLIPPS, *supra* note 47, at 165–66 (quoting this rationale).

[71] *See* Trial of James Annesley, Old Bailey Sessions Papers 1, 25 (July 15, 1742) ("[O]n the 4th of *May*, I went to *Staines* to attend the Coroner's Jury; though, as I had not Time to enquire into the Fact, and prepare for Mr. *Annesley*'s Defence, I could do him but little Service more, than by cross examining the Witnesses for the Crown, and making Observations on their Evidence . . . .").

[72] State v. Hill, 20 S.C.L. (2 Hill) 607, 610 (Ct. App. 1835).

[73] State v. Campbell, 30 S.C.L. (1 Rich.) 124, 129 (Ct. App. 1844). Admittedly, notoriety was not the only justification for the special treatment of coroners' depositions. Another (dubious) one was that the depositions were trustworthy because the coroner was a respectable public officer who could be presumed to take

Although American courts did not think a constructive opportunity for cross-examination was sufficient, a constructive opportunity was still presumably better than no opportunity at all. And that opportunity necessarily existed whether a witness at the coroner's inquest later became unavailable due to misconduct by the accused or for unrelated reasons. As a result, the rules of admissibility governing coroners' depositions would not necessarily have applied to truly *ex parte* testimony where the defendant lacked even a constructive opportunity for cross-examination (like the private police interview in *Giles*).

The majority in *Giles* invoked articulations of the rationale for the coroner's-deposition rule.[74] Gilbert justified the rule on the ground that the defendant "shall never be admitted to shelter himself by such evil Practices on the Witness, that being to give him Advantage of his own Wrong."[75] *Harrison's Case* seemingly alludes to the same rationale.[76] Those articulations support the majority's argument in one important respect: Gilbert's clear statement of an additional rationale for admitting coroners' depositions in witness-tampering cases makes it more likely that the American rejection of the English rule did not extend to forfeiture. Those articulations do not, however, prove that either the English or American rule extended beyond coroners' depositions to truly *ex parte* testimony where the defendant lacked even a constructive opportunity to cross-examine. Neither Gilbert nor *Harrison's Case* claimed that the *scope* of the forfeiture rule was defined by whether the accused would derive an advantage from his own wrong; they simply identify that maxim as a *rationale* for a rule that governed coroners' depositions. Gilbert, for example, did not say that *any* witness's statement was admissible if necessary to prevent the defendant from deriving an advantage from his own wrong. Rather, in the course of discussing "Witness[es] examined before the Coroner," he stated:

> *[S]uch* Examinations [are] 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

the depositions impartially. *See, e.g.*, 2 STARKIE, *supra* note 39, at 489–90 (identifying this rationale but criticizing it on the ground that inability to cross-examine is "a defect which cannot be remedied by any care or attention on the part of the coroner, for he is not privy to the facts to which the cross-examination might be directed, and which may be known to the prisoner alone"); State v. Houser, 26 Mo. 431, 436 (1858) ("[I]n England [the] admissibility [of coroners' depositions] has been altogether placed upon the peculiar dignity and importance attached to the office of coroner; and no such reasons exist here.").

[74] Giles v. California, 128 S. Ct. 2678, 2689 (2008).

[75] GEOFFREY GILBERT, THE LAW OF EVIDENCE 99–100 (Dublin 1754).

[76] Harrison's Case, 12 How. St. Tr. 833, 835–36 (Old Bailey 1692) (stating that, if Harrison's associates had procured the absence of the witness before the coroner, "it will no way conduce to Mr. Harrison's advantage").

> evil Practices on *the* Witness [i.e., the witness before the coroner], that being to give him Advantage of his own Wrong.[77]

Elsewhere in its opinion, the majority rejected a similar attempt to expand the common-law forfeiture rule based on this equitable rationale. The State had argued that forfeiture should apply to any wrongful conduct that causes a witness's inability to testify, even if not designed to accomplish that result, because Gilbert had justified the rule on the ground that "a defendant 'shall never be admitted to shelter himself by such evil Practices on the Witness, that being to give him Advantage of his own Wrong' "—a rationale that does not depend on the purpose behind the wrongful conduct.[78] The Court rejected that argument, responding that, "as the evidence amply shows, the 'wrong' and the 'evil Practices' to which these statements referred was conduct *designed* to prevent a witness from testifying."[79] That response is persuasive, and it seems equally applicable here: The "Witness" to whom Gilbert's statement referred was a witness who testified before the coroner.[80] Gilbert relied on an equitable maxim, but he did so to justify a rule that applied in a particular context—one that afforded at least a constructive opportunity for cross-examination.

Limiting forfeiture to prior cross-examined testimony does not vitiate its equitable rationale. The defendant is still prevented from taking advantage of his own wrong with respect to the category of witnesses covered by the rule—those the defendant had an opportunity to cross-examine. That category is obviously narrower than the one covered by the majority's rule, but there are good reasons why the common law might have limited the scope of the doctrine. Forfeiture does not merely prevent the defendant from taking advantage of his own wrong in the sense of undoing the consequences of his purported wrongdoing. It leaves the defendant worse off because the prosecution can introduce out-of-court accusations rather than live testimony that the defendant can cross-examine at trial. That might seem unobjectionable if we knew for a fact that the accusations were reliable and that the defendant had kept the witness away, but both facts are routinely disputed. Because of the risk of error on either point, forfeiture imposes meaningful costs on the fairness of criminal trials. It is perfectly rational to conclude that the equitable justification for the forfeiture rule is weighty enough to overcome those costs where the defendant is merely being denied his "secondary advantage" of cross-examining the witness *at trial*, but not weighty enough to justify denial of cross-examination altogether.

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[77] GILBERT, *supra* note 75, at 99–100 (emphasis added).

[78] *Giles*, 128 S. Ct. at 2686 (quoting GEOFFREY GILBERT, THE LAW OF EVIDENCE 141 (London, Henry Lintot 1756)).

[79] *Id.*; *see also id.* at 2687 (rejecting a similar argument on analogous grounds).

[80] *See* GILBERT, *supra* note 75, at 99–100.

Nor does the limitation of forfeiture to cross-examined testimony demean the equitable rationale by assigning the same consequences to witness-tampering as to no-fault unavailability. Nowadays it may be common to conceive of unavailability of any sort as sufficient to justify admitting prior cross-examined testimony,[81] but that was not always the rule. *Lord Morley's Case*, for example, required that the witness be dead, too ill to travel, or kept away by the accused; it specifically rejected the argument that the Crown's mere inability to locate a witness sufficed.[82] There was thus a dispositive difference between a witness kept away by the accused and a witness who merely could not be found. Even today, forfeiture matters because, for example, it excuses the other party from showing a diligent search for the witness.[83] Thus, the equitable policies underlying the forfeiture rule continue to have force even if the doctrine is limited to cross-examined testimony.

B. Fenwick's Case

The majority in *Giles* also relied on a statement made during Fenwick's parliamentary attainder proceeding.[84] One of the prosecuting counsel, Lovel, urged Parliament to admit a witness's information on forfeiture grounds despite its having been taken in Fenwick's absence.[85] He argued:

> [W]here persons do stand upon their lives, accused for crimes, if it appears to the court that the prisoner hath, by fraudulent and indirect means, procured a person that hath given information against him to a proper magistrate, to withdraw himself, so that he cannot give evidence as regularly as they used to do; in that case his information hath been read . . . .[86]

The *Giles* dissent responded by noting that Lovel's statement referred to testimony before a "proper magistrate," i.e., a committing magistrate who would have both the witness and the defendant before him at the hearing.[87] The majority replied: "Perhaps so, but the speaker was arguing

[81] *See, e.g.*, *Giles*, 128 S. Ct. at 2691 ("Prior *confronted* statements by witnesses who are unavailable are admissible whether or not the defendant was responsible for their unavailability.").

[82] *See* Lord Morley's Case, Kel. 53, 55, 84 Eng. Rep. 1079, 1080 (H.L. 1666) ("[I]f a witness who was examined by the coroner be absent, and oath is made that they have used all their endeavours to find him and cannot find him, that is not sufficient to authorize the reading of such examination.").

[83] *See* 3 WIGMORE, *supra* note 2, § 1405, at 120.

[84] *Giles*, 128 S. Ct. at 2689 n.3.

[85] Fenwick's Case, 13 How. St. Tr. 537, 594 (H.C. 1696) (Lovel).

[86] *Id.*

[87] *Giles*, 128 S. Ct. at 2705 (Breyer, J., dissenting).

that the wrongful-procurement exception applied in 'this case'—*Fenwick's Case*, in which the testimony was unconfronted."[88]

The majority was correct to conclude that Lovel's own views supported its position. Nonetheless, there is reason to question whether his views would have been broadly shared by the framing generation a century later. As noted above, the rules of *Lord Morley's Case* were understood (by Hawkins and others) to apply to Marian committal depositions no less than Marian coroners' depositions.[89] That principle was no doubt what Lovel had in mind when he referred to testimony taken by a "proper magistrate," and his statement of that general rule was likely noncontroversial because committal hearings were normally conducted in the prisoner's presence.[90] The same cannot be said, however, of Lovel's contention that the rule justified admitting the *ex parte* testimony at issue in *Fenwick's Case*.

The evidentiary question in *Fenwick's Case* was hotly contested: 218 Members voted to admit the deposition; 145 to exclude it.[91] Fenwick's counsel argued categorically that the testimony should be excluded because it was *ex parte*,[92] insisting this was true even if Fenwick had a hand in the witness's absence:

> [W]e oppose it at present, for that we were not present, nor privy, nor could have cross-examined him; it is only an information before a private justice; . . . and then if so, . . . if [the witness] had died it had not been evidence; in case he had been sick, or withdrawn without our privity, they could not have read it; *nay, if he were withdrawn by our privity, it could not be read*: it is true, the inciting him to withdraw had been punishable in another man, but [it] could not have been read to have convicted the party . . . .[93]

One speaker objected specifically on the ground that the rules of admissibility governing Marian depositions were "not applicable to this business before the House; but only related to felonies, *and when*

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[88] *Id.* at 2689 n.3 (majority opinion) (citing *Fenwick's Case*, 13 How. St. Tr. at 591–92, 594).

[89] *See supra* text accompanying notes 31–32.

[90] *See* Kry, *supra* note 33, at 511–16.

[91] *Fenwick's Case*, 13 How. St. Tr. at 607.

[92] *See id.* at 591–92 (Powys) ("[T]hat which they would offer is something that Mr. Goodman hath sworn when he was examined by Mr. Vernon; sir J. F. not being present or privy, and no opportunity given to cross-examine the person; and I conceive that cannot be offered as evidence; for if that should be allowed for evidence, then what is sworn behind a man's back, in any case whatsoever, may as well be produced as evidence against him . . . ."); *id.* at 592 (Shower) ("[N]o deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him . . . . [I]t was never attempted in any court of justice, that the examination of witnesses behind a man's back, could be read in any place whatsoever. . . . [O]ur constitution is, that the person shall see his accuser.").

[93] *Id.* at 592–93 (Shower) (emphasis added; footnote omitted).

depositions were taken in the presence of the party."[94] As the *Giles* majority acknowledged, moreover, "many speakers argued for admission of [the] unconfronted testimony simply because Parliament was not bound by the rules of evidence for felony cases."[95] Had Lovel's position been noncontroversial, those speakers likely would not have felt the need to invoke Parliament's authority to ignore the common-law rules of evidence.

Lovel, of course, was ultimately on the winning team. But courts have usually assumed that the Framers sympathized with the losers. In *Crawford*, the Court quoted the (losing) arguments of Fenwick's counsel to illustrate the type of abuse at which the Confrontation Clause was aimed.[96] In *Carmell v. Texas*, the Court relied on the result in *Fenwick's Case* to illustrate one of the evils at which the Ex Post Facto Clause was aimed.[97] The case's abuses were also likely in part responsible for at least two other constitutional provisions, the Treason Clause's two-witness rule and the Bill of Attainder Clause.[98] The *Giles* majority assumed that, although the Framers generally viewed *Fenwick's Case* as a precedent to eschew rather than to emulate, they would have endorsed the position of one of the counsel responsible for bringing about Fenwick's conviction. That is possible, but far from certain.[99] For that reason, although Lovel's

[94] *Id.* at 602 (Musgrave) (emphasis added). Musgrave was responding to an earlier comment by another speaker who had stated: "No less a man than my L. C. Justice Hales . . . says; First, by the [Marian statutes], the justice hath power to examine the offender and informer; and . . . these examinations, if the party be dead or absent, may be given in evidence." *Id.* at 596 (Sloane) (apparently quoting MATTHEW HALE, PLEAS OF THE CROWN: OR, A METHODICAL SUMMARY OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT 262–63 (London, Assigns of Richard Atkyns & Edward Atkyns 1678)). Hale was one of the judges who had presided at *Lord Morley's Case*, and his discussion in the quoted treatise may derive from that decision. *See* Lord Morley's Case, Kel. 53, 53, 84 Eng. Rep. 1079, 1079 (H.L. 1666). Unlike later authors such as Hawkins, however, Hale referred in this treatise to witnesses "dead or absent" generally rather than witnesses kept away by the accused. HALE, *supra*, at 263. It is therefore conceivable that Musgrave thought the "taken in the presence of the party" requirement applied only in cases of no-fault death or absence, not forfeiture. That seems unlikely, however, since Musgrave opposed admission and did not deny the witness-tampering evidence. *See Fenwick's Case*, 13 How. St. Tr. at 602–03.

[95] Giles v. California, 128 S. Ct. 2678, 2689 n.3 (2008); *see, e.g.*, *Fenwick's Case*, 13 How. St. Tr. at 603–05.

[96] Crawford v. Washington, 541 U.S. 36, 45–46 (2004).

[97] Carmell v. Texas, 529 U.S. 513, 526–30 (2000).

[98] *See id.* at 528 (noting that Parliament had proceeded against Fenwick by bill of attainder in order to circumvent the two-witness requirement of the English treason statute); U.S. CONST. art. I, §§ 9–10; *id.* art. III, § 3.

[99] Some speakers in *Fenwick's Case* complained that the evidence that Fenwick had engaged in witness-tampering was insufficient. *See Fenwick's Case*, 13 How. St. Tr. at 606 (Wyvell); *id.* at 606–07 (Price). It is thus possible that some speakers thought the use of *ex parte* testimony objectionable in that case only because a factual basis for applying the forfeiture rule did not exist.

own views support the majority's position, it is questionable whether his views reflect any broader Framing-era consensus.

C. Barber

The majority next relied on a 1775 colonial Connecticut case, *Rex v. Barber*.[100] The report of that case is brief:

> Information for counterfeiting, etc. One White, who had testified before the justice and before the grand jury against Barber, and minutes taken of his testimony, was sent away by one Bullock, a friend of Barber's, and by his instigation; so that he could not be had to testify before the petit jury.
>
> The court admitted witnesses to relate what White had before testified.[101]

On its face, the report is ambiguous because it does not state *what* the court let in when it admitted "what White had before testified"—his testimony "before the justice," his testimony "before the grand jury," or both. It makes a big difference because the witness's testimony "before the justice"—most likely a reference to the witness's testimony to the justice of the peace at the committal hearing—would ordinarily have been taken in the defendant's presence,[102] whereas his testimony before the grand jury would not.[103]

One respect in which the Court's historical analysis in *Giles* improved significantly upon the briefing was in examining how subsequent American authorities understood *Barber*. The majority identified three early authorities that interpreted the case to stand for the proposition that *grand jury* testimony was admissible if the witness was kept away by the accused.[104] John Dunlap, the editor of the 1816 New York edition of Phillipps's evidence treatise, inserted a note stating: "Where a prisoner had procured a witness to go away, evidence of what he had testified

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[100] *Giles*, 128 S. Ct. at 2689 (citing Rex v. Barber, 1 Root 76 (Conn. Super. Ct. 1775)).

[101] *Barber*, 1 Root at 76.

[102] *See supra* text accompanying notes 33–37. The case report does not elaborate on the circumstances in which the testimony "before the justice" was taken, but since bail and committal hearings before justices of the peace were a routine feature of founding-era criminal prosecutions, that seems like the most probable reference. *See supra* text accompanying notes 18–20; *cf.* State v. Hurlbut, 1 Root 90, 90 (Conn. Super. Ct. 1784) (another counterfeiting prosecution, in which the defendant "was out upon bail"). It is not entirely clear whether *Barber* was a felony or a misdemeanor prosecution; if the latter, testimony at any bail or committal hearing would not strictly have been a Marian examination, although it still presumably would have been taken in the defendant's presence. *See* Rex v. Pain, Comb. 358, 359, 90 Eng. Rep. 527, 527 (K.B. 1697) (noting the Marian statutory distinction between felonies and misdemeanors).

[103] *See Giles*, 128 S. Ct. at 2689–90.

[104] *Id.* at 2689.

before the grand jury was admitted. *Rex* v. *Barber*, 1 *Root* 76."[105] Some time thereafter, a Delaware lawyer, John Middleton Clayton, inserted an annotation in his private notes of an 1818 Delaware case that cited Dunlap's earlier statement: "Note the case of *Rex v. Barber*, 1 Root 76, where a prisoner had procured a witness to go away, evidence of what he testified before the grand jury was admitted. Phill. Ev. 200, n. a."[106] Those notes were published as a case report over a century later, in 1943.[107] Finally, Joseph Norris, the American editor of the 1824 Philadelphia edition of Peake's treatise, inserted a note virtually identical to Dunlap's.[108] Because the wording is nearly identical, it seems likely that Norris simply copied Dunlap's note.

The dissent cited three authorities for its contrary view, but all are much later.[109] Charles Chamberlayne, in his 1883 edition of Best's treatise, cited *Barber* as a case where a "preliminary investigation before a magistrate . . . [was] admitted, there having been a right of cross-examination."[110] George Beers, in his 1902 edition of Stephen's treatise, cited *Barber* for the "rule allow[ing] the admission of evidence at a preliminary examination if the party against whom it is offered was present."[111] Finally, the dissent relied on a 1913 edition of Bishop's criminal procedure treatise, which cited *Barber* for the point that "a preliminary examination before a committing magistrate" of an unavailable witness could be admitted "in the circumstances we are considering," i.e., where "the defendant had the opportunity to cross-examine the witnesses against him."[112] (That same point actually appears in much earlier editions of Bishop's treatise as well.[113])

The majority's early American authorities interpreting *Barber* offer important support for its position. They constitute unambiguous evidence of the view that forfeiture applied to *ex parte* testimony. Although the dissent's authorities indicate some disagreement over the

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[105] S. M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 200 n.(a) (John A. Dunlap ed., New York, Gould, Banks & Gould, 1st Am. ed. 1816).

[106] 1 DELAWARE CASES, at xiv, 608–09 & n.1 (Daniel J. Boorstin ed., 1943) (reporting State v. Lewis, 1 Del. Cas. 608 (Ct. Quarter Sess. 1818)).

[107] *See id.*

[108] THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 91 n.(m) (Joseph P. Norris ed., Philadelphia, Abraham Small, Am. ed. 1824) ("Where a prisoner had procured a witness to go away, evidence of what he had testified before a grand jury was admitted. *Rex v. Barber*, 1 *Root. Rep.* 76.").

[109] *Giles*, 128 S. Ct. at 2706 (Breyer, J., dissenting).

[110] W. M. BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE 473 n.(e) (Charles F. Chamberlayne ed., Boston, Soule & Bugbee, Am. ed. 1883).

[111] JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE 161 n. (George E. Beers ed., Dissell Publ'g Co., Am. ed. 1902).

[112] 2 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE §§ 1195, 1197, at 1022, 1024 & n.49 (H. C. Underhill ed., T. H. Flood & Co., 2d ed. 1913).

[113] *See, e.g.*, 1 JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE §§ 1195, 1197, at 709, 711 & n.3 (Boston, Little, Brown & Co., 3d ed. 1880).

proper construction of *Barber*, they are less persuasive evidence of Framing-era law because they are so much later.

Nonetheless, one important piece of evidence is missing from that exchange. The body of the *Barber* case report is set forth above.[114] But Jesse Root's original 1798 edition of his reports also includes marginal notes, apparently supplied by Root himself, that appear next to each case and summarize the holdings. Root's marginal note for *Barber* states: "Where a prisoner procured a witness to go away, evidence of *what he had testified before the justice* admitted."[115] The note contains no mention of admitting the witness's grand jury testimony.[116]

Root's marginal note is significant because it suggests that Root, at least, understood the case he was reporting to have admitted only the witness's testimony before the justice of the peace—testimony that, under normal Marian committal procedure, would have been taken in the defendant's presence.[117] Root's understanding is entitled to special weight, not only because his report was published in 1798—quite close to the Framing—but also because Root was a judge on the same court whose case he was reporting (albeit not at the same time) and thus was presumably especially well positioned to interpret the court's precedents.[118]

By all appearances, Dunlap simply overlooked or ignored Root's marginal note when he cited *Barber*, and Clayton and Norris repeated his oversight when they copied Dunlap's annotation. Dunlap, Clayton, and Norris remain important evidence that some early American lawyers thought forfeiture extended to *ex parte* testimony. But the possibility that they misunderstood the case diminishes the importance of their views.

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[114] *See supra* text accompanying note 101.

[115] 1 JESSE ROOT, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS 76 n. (Hartford, Hudson & Goodwin 1798) (emphasis added). Root's description of his reporting process appears at pages xliii–xliv. I see no indication that anyone other than Root supplied the marginal notes. In the later 1898 edition, the marginal notes are moved to text at the beginning of each case, as if they were headnotes or syllabi. *See* 1 JESSE ROOT, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS 76 (Waterbury, Dissell Publ'g Co. 1898).

[116] *See* 1 ROOT (1798), *supra* note 115, at 76 n.

[117] *See supra* text accompanying notes 33–37.

[118] *See* 1 ROOT (1798), *supra* note 115, at title page, 76; *see also* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. Doc. No. 108-222, at 1836 (2005) (noting that Root was "appointed a judge of the superior court in 1789 and served as chief justice from 1796 to 1807").

D. Williams

The majority next invoked the Georgia Supreme Court's 1856 decision in *Williams v. State*.[119] That case involved testimony "before the committing Magistrate."[120] As the *Giles* dissent noted, committal examinations normally afforded an opportunity for cross-examination.[121] The dissent cited an 1835 Georgia manual for justices of the peace that makes that point explicitly: "The accuser and witnesses [at the committal hearing] must be ready to confront the prisoner, in whose presence the evidence must be given. . . . All the proceedings had in the examination must be in the presence of the accused, in order that he may have the advantage of cross-examining the witnesses."[122] The majority nonetheless claimed support from *Williams* because, in giving its rationale, the court stated:

> It was resolved, upon the trial of Lord *Morley*, for murder, that in case oath should be made that *any witness who had been examined by the Crown*, and was then absent, was detained by the means or procurement of the prisoner, and the Court should be satisfied from the evidence, that the witness was detained by means or procurement of the prisoner, then the examination should be read . . . .[123]

The *Williams* court's language about "*any witness* who had been examined by the Crown" is broad enough to support the majority's interpretation. But it is also susceptible to a narrower reading. In *Lord Morley's Case*, several witnesses had testified before the coroner,[124] and the twelve judges met before trial to render an essentially advisory opinion about what circumstances would justify admission.[125] For that reason, their resolves are phrased in generic terms about "any witness" in the case, rather than particular individual witnesses. For example, their forfeiture resolve stated:

> It was resolved by us all, . . . [t]hat in case oath should be made that *any witness* who had been examined by the coroner, and was then absent, was detained by the means or procurement of the

[119] Giles v. California, 128 S. Ct. 2678, 2690 (2008) (citing Williams v. State, 19 Ga. 402 (1856)).

[120] *Williams*, 19 Ga. at 402; *see also id.* at 403.

[121] *See Giles*, 128 S. Ct. at 2706 (Breyer, J., dissenting).

[122] RHODOM A. GREENE & JOHN W. LUMPKIN, THE GEORGIA JUSTICE 99 (Milledgeville, P. L. & B. H. Robinson 1835); *see also* Gavan v. Ellsworth, 45 Ga. 283, 288 (1872) (admitting testimony from a committal hearing in a subsequent civil action because "[t]he authorities seem to make the matter turn upon the opportunity for cross-examination" and "[t]his the defendant . . . had fully, on the commitment trial").

[123] *Williams*, 19 Ga. at 403 (citation omitted; second emphasis added).

[124] *See* Lord Morley's Case, 6 How. St. Tr. 769, 776–77 (H.L. 1666).

[125] *See* Lord Morley's Case, Kel. 53, 53–54, 84 Eng. Rep. 1079, 1079, 6 How. St. Tr. 769, 769 (H.L. 1666).

> prisoner, and the opinion of the Judges asked whether such examination might be read, we should answer, that if their Lordships were satisfied by the evidence they had heard, that the witness was detained by means or procurement of the prisoner, then the examination might be read . . . .[126]

The *Williams* court's reference to "*any witness* who had been examined by the Crown" could be read as merely repeating that formulation—i.e., as observing that *Lord Morley's Case* had held that witness-tampering would justify admitting the examination of *any of the witnesses who had been examined by the Crown in Lord Morley's Case*, not any witness in general.[127] Given that *Williams* was describing a case about coroners' depositions (which afforded a constructive opportunity for cross-examination) and applying that precedent to a case involving a committal deposition (which afforded an actual opportunity for cross-examination), an interpretation that conveys no view as to *ex parte* testimony seems especially plausible.

One last aspect of *Williams* bears mention. After describing *Lord Morley's Case* and finding it inapplicable because the evidence of witness-tampering was inadequate, the court responded in dicta to a Confrontation Clause argument. It stated:

> We do not think that [the Confrontation Clause] . . . has any bearing upon this point. The practice intended to be prohibited by that provision, was the secret examinations, so much abused during the reign of the Stuarts, and [the Clause] was not intended to disturb any great rule of criminal evidence.[128]

Had the court intended its earlier discussion of *Lord Morley's Case* to suggest that forfeiture justified admitting even *ex parte* testimony, this last paragraph would seem misworded. The court would have said something to the effect that the Confrontation Clause's bar on "secret examinations" was subject to a forfeiture exception—not that it had "[no] bearing upon this point."

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[126] *Id.* at 55, 84 Eng. Rep. at 1080, 6 How. St. Tr. at 770–71 (emphasis added).

[127] The *Williams* court's subsequent reference to "the Court . . . be[ing] satisfied from the evidence, that the witness was detained by means or procurement of the prisoner," is consistent with either interpretation because "Court" could mean either the particular court in *Lord Morley's Case* or any court in general. *See Williams*, 19 Ga. at 403; *cf. Lord Morley's Case*, 6 How. St. Tr. at 776–77 (referring to the body trying Lord Morley as a "court"). The *Williams* court's description of the holding of *Lord Morley's Case* goes on, however, to state that "whether the witnesses was [*sic*] so detained, was matter of fact of which the Jury and not the Court, were the judges." *Williams*, 19 Ga. at 403. Those references to "Jury" and "Court" suggest a more general statement of the law rather than a description of *Lord Morley's Case* in particular. (Lord Morley was tried before his peers, not a jury.) To the extent that portion of the description suggests the earlier reference to "any witness who had been examined by the Crown" was also a general statement of the law, it supports the *Giles* majority's reading. *See Williams*, 19 Ga. at 403.

[128] *Williams*, 19 Ga. at 403.

E. Reynolds

The *Giles* majority also claimed support from the Court's own prior decision in *Reynolds v. United States*.[129] It noted that *Reynolds* relied on the coroner cases—*Lord Morley's Case* and *Harrison's Case*—which contained no reference to cross-examination.[130] And it claimed that *Reynolds*'s "description of the forfeiture rule is likewise unconditioned by any requirement of prior confrontation," quoting from the first substantive paragraph of the case's discussion and observing that "[t]here is no mention in this paragraph of a need for prior confrontation."[131]

Elsewhere, however, the *Reynolds* Court did address that issue. After reviewing the history of the forfeiture rule and finding the evidence of tampering sufficient, the Court stated:

> This brings us to the consideration of what the former testimony was, and the evidence by which it was proven to the jury.
>
> It was testimony given on a former trial of the same person for the same offence, but under another indictment. It was substantially testimony given at another time in the same cause. *The accused was present at the time the testimony was given, and had full opportunity of cross-examination*. This brings the case clearly within the well established rules. The cases are fully cited in 1 Whart. Evid., sect. 177.[132]

The authority that *Reynolds* cites, section 177 of Wharton's treatise, states that testimony of a deceased witness is admissible provided the other party "had the power to cross-examine on the former trial," and elaborates on that cross-examination requirement.[133] The next section of Wharton's treatise (cited earlier in *Reynolds*) states that the same rule applies to witnesses who are out of the jurisdiction, unable to attend trial, newly incompetent, or "corruptly kept from court" by the other party.[134] Wharton thus viewed forfeiture as a type of unavailability like death or illness that justified admitting only cross-examined testimony; *Reynolds*'s citation to his treatise suggests that the Court shared his view.

Other statements in *Reynolds* corroborate that interpretation. The Court cited *Queen v. Scaife*,[135] which involved a committal deposition, for the point that, "if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a

[129] Giles v. California, 128 S. Ct. 2678, 2690 (2008) (citing Reynolds v. United States, 98 U.S. 145 (1879)).

[130] *Id.* (citing *Reynolds*, 98 U.S. at 158).

[131] *Id.* (citing *Reynolds*, 98 U.S. at 158).

[132] *Reynolds*, 98 U.S. at 160–61 (emphasis added).

[133] 1 WHARTON, *supra* note 50, § 177, at 180–83.

[134] 1 *id.* § 178, at 183–84, *cited in Reynolds*, 98 U.S. at 159.

[135] Queen v. Scaife, 17 Q.B. 238, 117 Eng. Rep. 1271 (Q.B. 1851).

magistrate *and in the presence of the prisoner*, might be read."[136] It cited treatises by Greenleaf, Taylor, and Wharton for the point that, "if a witness is kept away by the adverse party, his testimony, taken on a former trial *between the same parties upon the same issues*, may be given in evidence."[137] The italicized portions of those statements are merely different ways of expressing the cross-examination requirement.

Reynolds's initial description of the forfeiture rule, which the *Giles* majority quotes, is not inconsistent with that interpretation. That descriptions states:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. . . . [The Constitution] grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.[138]

This paragraph does not state that witness-tampering justifies admitting *any* evidence; only that it justifies admitting "*competent* evidence" or "evidence . . . supplied *in some lawful way*."[139] When read in conjunction with the later references to cross-examination and the concluding paragraph citing Wharton, the most natural reading of the Court's logic is that forfeiture justifies admitting "competent" evidence, and that prior testimony is "competent" only if the defendant had an opportunity to cross-examine.[140] For that reason, I remain convinced that *Reynolds* more strongly supports the narrower view of the forfeiture rule.

F. The Negative Evidence

Finally, in its concluding paragraph, the *Giles* majority relied on the "absence of even a single case *declining* to admit unconfronted statements of an absent witness on wrongful-procurement grounds when the defendant sought to prevent the witness from testifying."[141] Such

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[136] *Reynolds*, 98 U.S. at 158 (emphasis added).

[137] *Id.* at 158–59 (emphasis added) (citing 1 GREENLEAF, *supra* note 48, § 163; 1 WHARTON, *supra* note 50, § 178; and 1 JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE § 446 (London, William Maxwell & Son, 6th ed. 1872)). Taylor's discussion in the edition the Court apparently cites is comparable to his discussion in the original 1848 edition cited above. *Compare* 1 TAYLOR, *supra*, §§ 434–446, at 455–65, *with* 1 TAYLOR, *supra* note 49, §§ 343–353, at 327–35.

[138] *Reynolds*, 98 U.S. at 158.

[139] *Id.* (emphasis added).

[140] *See id.* at 158–61.

[141] Giles v. California, 128 S. Ct. 2678, 2691 (2008).

"negative" evidence—the proverbial "dog that didn't bark"—can be a powerful indicator of original meaning, as the majority's dying-declaration analysis demonstrates.[142] On this point, however, the evidence is inconclusive.

First, the negative evidence cuts both ways. While there may be no case that excluded an *ex parte* statement despite a forfeiture claim, there also is no case that clearly admitted a truly *ex parte* statement on forfeiture grounds. *Harrison's Case* involved a constructive opportunity for cross-examination;[143] *Fenwick's Case* lacked any agreed-upon rationale;[144] *Barber* is ambiguous;[145] and *Reynolds*[146] and *Scaife*[147] involved actual opportunities for cross-examination. Second, the absence of any case excluding an *ex parte* statement despite a forfeiture claim is equally consistent with two hypotheses: (1) courts believed that such statements were admissible; or (2) prosecutors understood that such statements were *not* admissible and so did not even ask courts to admit them. Given the absence of cases applying the forfeiture rule outside the contexts discussed above, the second hypothesis seems a reasonable possibility.

V. IMPLICATIONS

To summarize, the *Giles* majority's position finds clear support in the early American authorities interpreting *Barber*[148] and in one potentially unrepresentative statement in *Fenwick's Case*.[149] It also finds arguable, but not clear, support in the coroner cases and ambiguous language in *Williams*.[150] Evidence supporting the contrary view includes several nineteenth-century English and American treatises (the earlier ones addressing committal depositions; the later ones addressing prior testimony generally) and the decisions in *Drayton*[151] and *Reynolds*.[152] Reasonable minds can disagree about the conclusion to be drawn.

That does not mean, however, that the proper outcome in *Giles* was unclear. After making its case that forfeiture applied to *ex parte* testimony, the majority observed:

> [T]he parsing of cases aside, the most obvious problem with the dissent's theory that the forfeiture rule applied only to confronted

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[142] *See id.* at 2684–87.

[143] Harrison's Case, 12 How. St. Tr. 833, 851–52 (Old Bailey 1692).

[144] Fenwick's Case, 13 How. St. Tr. 537 (H.C. 1696).

[145] Rex v. Barber, 1 Root 76 (Conn. Super. Ct. 1775).

[146] Reynolds v. United States, 98 U.S. 145, 160–61 (1879).

[147] Queen v. Scaife, 17 Q.B. 238, 238, 117 Eng. Rep. 1271, 1271 (Q.B. 1851).

[148] *Barber*, 1 Root 76.

[149] *Fenwick's Case*, 13 How. St. Tr. at 594 (Lovel).

[150] Williams v. State, 19 Ga. 402, 403 (1856).

[151] Drayton v. Wells, 10 S.C.L. (1 Nott & McC.) 409, 411 (Constitutional Ct. 1819).

[152] Reynolds v. United States, 98 U.S. 145, 160–61 (1879).

> testimony is that it amounts to self-immolation. . . . If the forfeiture doctrine did not admit unconfronted prior testimony at common law, the conclusion must be, not that the forfeiture doctrine requires no specific intent in order to render unconfronted testimony available, but that unconfronted testimony is subject to no forfeiture doctrine at all.[153]

The majority's reasoning on that point is unassailable.

The dissent's contrary argument was essentially that (1) the cross-examination limitation supplied an alternative explanation for why no one invoked forfeiture in cases involving murder-victim statements that failed to qualify as dying declarations (as opposed to the majority's explanation that forfeiture applied only in cases of purposeful witness-tampering); (2) no one thinks forfeiture is limited to cross-examined testimony today; and hence (3) forfeiture should be limited neither to witness-tampering *nor* to cross-examined testimony.[154] That reasoning is unpersuasive. One can assume for the sake of argument that principles of stare decisis or widespread and longstanding acquiescence would justify departing from original meaning, but those justifications do not exist here. Although the modern understanding is that forfeiture is not limited to cross-examined testimony, the modern understanding (or at least the overwhelming weight of it) is that forfeiture *is* limited to purposeful witness-tampering. That requirement is prescribed in the Federal Rules of Evidence and nearly every relevant state rule, and until recently was uniformly followed by the courts.[155] There is thus no basis in either precedent or practice for ignoring original meaning in cases not involving witness-tampering, such as *Giles*. The statement in *Giles* was inadmissible under the generally accepted modern forfeiture rule, and it was inadmissible at common law—whether because the statement was *ex parte*, the witness was not purposefully tampered with, or both. Those two results cannot reasonably be combined in a way that produces admissible evidence.

Moreover, the witness-tampering limitation and the cross-examination limitation are not unrelated. The practical effect of limiting forfeiture to cross-examined testimony is also to limit it to witness-tampering. The cross-examination requirement effectively limits forfeiture to contexts where the crime has already been completed, the prosecution is already underway, and the witness has already accused the defendant in a formal proceeding. In those circumstances, the possibility that a defendant would engage in misconduct that rendered the witness unavailable for some reason *unrelated* to his testimony seems remote.[156]

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[153] Giles v. California, 128 S. Ct. 2678, 2691 (2008).

[154] *See id.* at 2702–07 (Breyer, J., dissenting).

[155] *See id.* at 2687–88 & n.2 (majority opinion).

[156] One can imagine situations where a defendant injures a victim, the victim lingers long enough to testify at the pretrial hearing, but the victim then dies or

Thus, even if the *Giles* dissent were correct that there was no express witness-tampering limitation at common law—a dubious claim at best[157]—its historical account would amount only to a modest change in the *rationale* for exclusion in cases not involving witness-tampering. Under the original rule, the statements would be inadmissible because the cross-examination limitation had the practical effect of rendering forfeiture inapplicable in cases not involving witness-tampering. Under the modern rule, the statements would be inadmissible because of the express witness-tampering requirement. Given that close relationship in rationales, it is especially hard to justify admitting statements that qualify under neither the common-law rule nor its modern counterpart.

VI. CONCLUSION

Critics of originalism will doubtless cite the ambiguous historical evidence on the cross-examination limitation to the forfeiture rule as proof that historical evidence is useless in interpreting the Constitution and that judges should abandon the endeavor. I think it proves a more modest point: that ambiguities in history do not always translate into ambiguities in how cases should be decided. The other historical evidence the majority relied on, particularly the dying-declaration cases, makes clear that Framing-era courts would not have admitted statements of the sort at issue in *Giles*, and thus amply supports the Court's judgment—whether or not the cross-examination limitation provides the additional support our amicus brief contended. *Giles* was thus a victory for both fairness in criminal trials and fidelity to constitutional meaning.

succumbs to incapacity before trial. *See, e.g.*, King v. Radbourne, 1 Leach 457, 458–60, 168 Eng. Rep. 330, 331–32 (Old Bailey 1787). In those cases, however, the evidence would be admissible as cross-examined testimony of a deceased or incapacitated witness, without regard to forfeiture. When limited to cross-examined testimony, the forfeiture doctrine matters only if the defendant prevents the witness from testifying by means short of killing or injuring him (by threats, bribery, kidnapping, or the like).

[157] As the majority pointed out, several historical sources stated the forfeiture rule in terms that plainly connoted witness-tampering. *See Giles*, 128 S. Ct. at 2683–84 (citing 1 CHITTY, *supra* note 46, at 81; PHILLIPPS, *supra* note 47, at 165; and Drayton v. Wells, 10 S.C.L. (1 Nott & McC.) 409, 411 (Constitutional Ct. 1819)). For further development of this point, see Davies, *supra* note 22, at 626–27.