

**THE CHILD DECLARANT, THE CONFRONTATION CLAUSE,
AND THE FORFEITURE DOCTRINE**

CLIFFORD S. FISHMAN*

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INTRODUCTION

The situation this Article¹ addresses arises under fairly narrow circumstances. Under this scenario, the child has important information about a crime and who committed the crime. All too often the child is the victim of the crime, sometimes the child has seen or heard the crime being committed,

* Professor of Law, The Columbus School of Law, The Catholic University of America. B.A. University of Rochester, 1966; J.D. Columbia Law School, 1969. From 1969 to 1977, Professor Fishman served as an Assistant District Attorney in the New York County District Attorney’s Office and as Chief Investigating Assistant District Attorney in New York City’s Special Narcotics Prosecutor’s Office.

1. Portions of this article are adapted from various chapters of CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE (7th ed., Supp. 2009), and from Clifford S. Fishman, *Confrontation, Forfeiture, and Giles v. California: An Interim User’s Guide*, 58 CATH. U. L. REV. 703 (2009). The previous sentence is an example of what is known in legal publishing circles as “shameless self-promotion.”

and occasionally the child was a participant in the crime.² For one reason or another, the child is unable to testify. During the investigative stage of the case, however, the child made one or more “testimonial” hearsay statements—usually, to a police officer, a counselor, or advocate affiliated with a prosecutor or the court system—that directly or indirectly implicated the defendant in the crime.

The Confrontation Clause of the Sixth Amendment³ normally precludes the state from offering the child’s “testimonial” hearsay statements into evidence if the child does not testify. An exception to that rule arises, however, if the defendant has engaged in misconduct that results in the forfeiture of the right to confront the child in court. In *Giles v California*,⁴ the United States Supreme Court attempted to clarify what a prosecutor must show in order to invoke the forfeiture doctrine. This Article examines the effect of *Giles* on the “testimonial” statement of a child declarant⁵ who does not testify at the defendant’s trial.

To explore this narrow issue, it is necessary to explain the underlying legal principles. This Article will do so briefly; otherwise that portion of the discussion would be many, many, times the length of the actual topic of this Article.⁶ Part I will briefly outline the Supreme Court’s recent decisions relating to the Confrontation Clause and “testimonial” statements. Part II will outline what we currently know about the meaning of “testimonial.” Part III

2. Consider “Balloon Boy” Falcon Heene’s comment to his father, while the family was being interviewed by Wolf Blitzer, explaining why he did not come out from hiding while his parents were supposedly searching for him: “You guys said . . . that, um, we did this for the show.” Interview by Wolf Blitzer with Richard Heene and the Heene Family, on *Larry King Live* (CNN television broadcast Oct. 15, 2009), available at <http://www.youtube.com/watch?v=wI6UONWCq7A>. Falcon’s revealing statement assuming a prosecutor had offered it in evidence against his parents—would not raise the problem that this Article addresses, because his statement clearly was not “testimonial,” a term whose meaning is discussed *infra* in Part II. I cite it here only as an example of a case in which the child who made the statement was, albeit innocently, a participant in the criminal scheme.

3. “[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI.

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

5. “A declarant is a person who makes a statement.” FED. R. EVID. 801(b).

6. More detailed examinations of the background issues can be found in other papers submitted for this symposium, see William Wesley Patton, *Viewing Child Witnesses Through a Child and Adolescent Psychiatric Lens: How Attorneys’ Ethical Duties Exacerbate Children’s Psychopathology*, 16 WIDENER L. REV. 369 (2010) (discussing the issues specific to children testifying in civil child abuse and neglect proceedings); Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don’t Die and Ways to Facilitate Child Testimony*, 16 WIDENER L. REV. 239 (2010) (discussing hearsay issues in criminal cases where a child is a witness or the victim); Amy Russell, *Documentation and Assessment of Children’s Forensic Interviewing Statements*, 16 WIDENER L. REV. 305 (2010) (discussing forensic interviews and assessments of children); Frank E. Vandervort, *A Search For the Truth or Trial By Ordeal: When Prosecutors Cross-Examine Adolescents How Should Courts Respond?*, 16 WIDENER L. REV. 335 (2010) (discussing the concerns raised by a prosecutor’s cross-examination of a child witness). See also FISHMAN & MCKENNA, *supra* note 1.

explains the forfeiture doctrine, and then attempts to set out the rule that emerges from the *Giles* decision—no easy task. Finally, Part IV will discuss how *Giles* and the forfeiture doctrine are likely to apply to a child witness who is unable to testify at trial.

I. THE CONFRONTATION CLAUSE AND “TESTIMONIAL” STATEMENTS

A. The Sixth Amendment’s Confrontation Clause

The Sixth Amendment provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The scope of the Confrontation Clause depends on how two of its terms are defined: “to be confronted,” and “witness.” American courts have long agreed that “to be confronted” means the right to have the witness present in the courtroom, to look at him face-to-face,⁷ and to cross-examine him.⁸ Thus, whenever a prosecutor offers a declarant’s out-of-court statement in a criminal case without calling the declarant to testify, the question arises whether the defendant’s right to “confront” the declarant has been violated. The Supreme Court has consistently held that some, but not all, out-of-court statements implicate the Confrontation Clause. However, defining which out-of-court statements are subject to that clause, and which are not, has been a persistent challenge.

B. Crawford, Davis, Bockting: “Testimonial” Statements

In the 2004 case *Crawford v. Washington*,⁹ the Supreme Court, per Justice Scalia, rejected the approach the Court had taken to the Confrontation Clause since 1980, an approach that admitted the hearsay¹⁰ statements of unavailable

7. “[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.” *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). The Supreme Court has recognized only one situation where something less than a witness’ actual presence in the courtroom qualifies as a “confrontation.” Where a child is to testify against his or her alleged abuser and the prosecutor persuades the judge that the child will be unable to do so in the defendant’s physical presence, or that the child will suffer considerable trauma by doing so, the child may testify in a separate room—so long as cameras and television screens are positioned so that the defendant, judge, and jury can all see the child, and the child can see the defendant—if the child chooses to look at the screen. *Maryland v. Craig*, 497 U.S. 836, 857 (1990). For an analysis of *Craig* and its progeny, see FISHMAN & MCKENNA, *supra* note 1, §§ 25A:52-56.

8. “[T]he Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

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

10. Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c). If a statement is offered for a non-hearsay purpose, i.e., if it is relevant independent of whether or not it is true or accurate, then the Confrontation Clause does not

declarants if the judge considered the statement sufficiently “trustworthy.”¹¹ In *Crawford*, the Court held that the Confrontation Clause applied primarily to “testimonial” hearsay statements.¹² Then, in two subsequent decisions, *Davis v. Washington*¹³ and *Whorton v. Bockting*,¹⁴ the Court made it clear that the Confrontation Clause applies *only* to testimonial hearsay statements.¹⁵

II. DEFINING “TESTIMONIAL”: STATEMENTS IN RESPONSE TO “POLICE INTERROGATION”

A. *Crawford*

In *Crawford*, although the Court did not attempt to provide a comprehensive definition of “testimonial,” it did offer the following:

The text of the Confrontation Clause . . . applies to “witnesses” against the accused—in other words, those who “bear testimony.” “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.¹⁶

The Court provided three examples of statements that are inherently testimonial: statements extracted during formal police interrogation; guilty plea

apply. *Tennessee v. Street*, 471 U.S. 409, 414 (1985). After Street’s confession to murder was introduced into evidence, Street testified at trial that the police had coerced him to repeat the statements made earlier by Peele, another alleged participant in the crime. *Id.* at 411. In rebuttal, the prosecutor introduced Peele’s statement, which, although incriminating to Street, differed from Street’s confession in some respects. *Id.* at 411-12. Affirming Street’s conviction, the Supreme Court held that no Confrontation Clause violation had occurred because Peele’s confession was introduced solely to rebut Street’s testimony and the trial judge so instructed the jury. *Id.* at 411-14. In *Crawford*, the Court explicitly endorsed the result and rule in *Street*. *Crawford*, 541 U.S. at 59-60 n.9.

11. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). For a discussion of why the Court rejected the *Roberts* approach in *Crawford*, see FISHMAN & MCKENNA, *supra* note 1, § 25A:5.

12. *Crawford*, 541 U.S. at 51.

13. *Davis v. Washington*, 547 U.S. 813 (2006). *Davis* actually decided two different cases, *Davis v. Washington* and *Hammon v. Indiana*. They are discussed briefly below. See *infra* Part II.B.

14. *Whorton v. Bockting*, 549 U.S. 406, 419-20 (2007). *Bockting* also held that *Crawford* applied only prospectively, i.e., to cases still on direct appeal when that case was decided, not retroactively. *Id.* at 409-21.

15. See *Davis*, 547 U.S. at 821. In *Melendez-Diaz v. Massachusetts*, the Court set forth how the Confrontation Clause applies to forensic laboratory reports. 129 S. Ct. 2527 (2009). That latter ruling appears to have had little, if any, impact on the subject of this Article.

16. *Crawford*, 541 U.S. at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). The Court added that it was unnecessary to define “testimonial” further because the statements at issue were obtained during formal interrogation by the police and were unquestionably “testimonial” in nature. See *id.* at 68.

allocutions in court, when offered against a codefendant at trial; and actual testimony at a former proceeding.¹⁷

B. The Davis v. Washington Test

In *Davis v. Washington*,¹⁸ the Court applied the *Crawford* view of the Confrontation Clause to two domestic violence cases. A nearly unanimous Court set out a clear line defining when the statements of witnesses or victims made in response to police questioning are testimonial, and when they are not:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.¹⁹

To decide whether “the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,”²⁰ the Court applied four factors:

- 1) Whether the primary purpose of the questioning was to determine past fact, or to ascertain ongoing events.
- 2) Whether the current situation could be described as an “emergency.”
- 3) Whether the nature of the questions asked or answers given focused on the present situation, or past events.
- 4) The “level of formality” involved in the questioning.²¹

In *Davis*, the defendant’s former girlfriend told a 9-1-1 operator that Davis was in her apartment, had beaten her, and was threatening to do so again.²² As the conversation continued, the complainant told the operator that Davis was leaving.²³ The Court held that her statements to the operator before Davis had left were nontestimonial, because they constituted a cry for help in an ongoing emergency.²⁴ However, it also determined that the statements made after he

17. *Id.* at 51-52.

18. *Davis v. Washington*, 547 U.S. 813 (2006).

19. *Id.* at 822 (emphasis added).

20. *Id.*

21. *Id.* at 827.

22. *Id.* at 817, 818.

23. *Id.* at 818.

24. *Davis*, 547 U.S. at 828-29.

had left were testimonial, because they related to past events after the emergency had ended.²⁵

In *Hammon v. Indiana*, the companion case decided with *Davis*, police responding to a domestic violence report arrived at the Hammon residence after the immediate emergency had ended.²⁶ Eight Justices concluded that all of Mrs. Hammon's statements to the police accusing her husband of assault were testimonial, and thus subject to the Confrontation Clause.²⁷ Because Mrs. Hammon did not testify at trial, the Court held that admitting her statements had violated Hammon's Sixth Amendment right to confront his "accuser."²⁸ The Court recognized that application of the Confrontation Clause to domestic violence cases often gave the assailant an undeserved windfall,²⁹ but, in dictum, explicitly noted that the "forfeiture doctrine" was still good law.³⁰ Under that rule, if a defendant wrongfully causes the declarant's unavailability as a witness, he forfeits the right to make a Confrontation Clause objection (or, for that matter, a hearsay objection) to the introduction of the declarant's testimonial statements against him.³¹

C. Giles v. California

In *Giles v. California*,³² the Court addressed what a prosecutor must establish in order to invoke the forfeiture doctrine.³³ In so doing, however, the Court introduced a considerable degree of uncertainty to the apparent clarity that *Davis* seemed to provide only two years before.³⁴

The facts in *Giles* were in many respects indistinguishable from those in *Hammon*.³⁵ Presumably, for this reason, the prosecutor in *Giles* conceded that the victim's statements in question were testimonial,³⁶ and, instead, argued that her statements fell within the forfeiture doctrine.³⁷ That is the issue on which

25. *Id.* at 828.

26. *Id.* at 819-20.

27. *Id.* at 830. The only holdout was Justice Thomas, who insisted that only formally sworn statements and statements elicited from suspects after *Miranda* warnings are given should be classified as testimonial. *Id.* at 836-38.

28. *Id.* at 832-34.

29. *Id.* at 833.

30. *Davis*, 547 U.S. at 833. The Court also pointedly endorsed the forfeiture doctrine, albeit likewise in dictum, in *Crawford v. Washington*. 541 U.S. 36, 62 (2004) ("[W]e accept" the "rule of forfeiture by wrongdoing").

31. For a discussion of the forfeiture doctrine, see *infra* Part III.

32. *Giles v. California*, 128 S. Ct. 2678 (2008).

33. See *infra* Part III.

34. *Davis* was decided on June 19, 2006, see 547 U.S. at 813, and *Giles* on June 25, 2008, see 128 S. Ct. 2678 (2008).

35. For the facts of *Giles*, see *infra* Part III.A.

36. I am not criticizing the prosecutor; I probably would have done the same thing.

37. *Giles*, 128 S. Ct. at 2682.

the Court granted certiorari, and that is the issue the Court decided.³⁸ Along the way, however, Justice Thomas stated flatly that he did not consider the statements to be testimonial;³⁹ Justice Alito strongly suggested that he agreed with Thomas's view;⁴⁰ and three Justices (Breyer, joined by Stevens and Kennedy) at least hinted that they would be willing to reconsider whether such statements should be classified as testimonial at all.⁴¹ Justice Scalia, writing for a fractured majority, complained that these opinions threatened to undermine *Crawford* and return the law to the discredited rule in which the judge often made his or her own assessment of whether a statement was sufficiently "trustworthy" to overcome a Confrontation Clause objection.⁴² Thus, on the fundamental question—"when are statements made in response to police questioning 'testimonial'"—*Giles* leaves us knowing less than we did before.⁴³

III. THE FORFEITURE DOCTRINE: *GILES V. CALIFORNIA*

In *Giles v. California*, the Supreme Court addressed what a prosecutor must prove in order to invoke the forfeiture doctrine.⁴⁴ The case arose when Giles killed his ex-girlfriend, Brenda Avie, by shooting her six times from close range.⁴⁵ He was charged with murder.⁴⁶ Although Avie had been unarmed at the time she was shot, Giles pleaded self-defense, claiming she had engaged in violent, assaultive behavior in the past and had threatened him, and his new girlfriend, earlier on the day that he shot her, and again at the beginning of their fatal encounter.⁴⁷

To rebut Giles' self-defense claim, the prosecutor offered evidence that, three weeks earlier, police, responding to a domestic violence complaint, had gone to the home Giles then shared with Avie.⁴⁸ An officer testified that Avie told them on that occasion that a few minutes before the officers arrived, Giles had assaulted, choked and threatened her with a knife.⁴⁹ By the time the police had arrived, however, the incident had ended and, although Giles was still in the house, he was no longer assaulting or threatening her.⁵⁰ The trial judge held in essence that by murdering Avie, Giles had forfeited the right to object to the admission of Avie's statements to the officers under the Confrontation Clause.⁵¹

38. *Id.* at 2681-82.

39. *Id.* at 2693.

40. *Id.* at 2694 (Alito, J., concurring).

41. *Id.* at 2695 (Breyer, J., dissenting).

42. *Id.* at 2691-92.

43. For a detailed discussion, see Fishman, *supra* note 1, at 742-47.

44. *Giles*, 128 S. Ct. at 2682.

45. *Id.* at 2681.

46. *Id.*

47. *Id.*

48. *Id.* at 2681-82.

49. *Id.* at 2681-82.

50. *Giles*, 128 S. Ct. at 2681.

51. *People v. Giles*, 19 Cal. Rptr. 3d 843, 846-47 (Ct. App. 2004).

None of the Justices disputed that invocation of the forfeiture exception required the prosecutor to persuade the trial judge, presumably by a preponderance of the evidence,⁵² that 1) the defendant had engaged in wrongful conduct and 2) that his wrongdoing in fact prevented the declarant from testifying.⁵³ The issue before the Court was whether the prosecutor also had to establish that the defendant engaged in that wrongdoing with the *intent or purpose* of preventing the declarant from testifying or reporting him to the authorities.⁵⁴ In other words, in the context of the stark facts before the Court in *Giles*, was it enough for the prosecutor to convince the judge that Giles in fact intentionally killed Avie, or did the state also have to prove that Giles did so, at least in part, with the intent or purpose of preventing her from testifying, or from otherwise cooperating with law enforcement officials in the case against him? By a six-to-three vote, the Court concluded that to satisfy the forfeiture exception to the Confrontation Clause, the prosecutor should have had to persuade the trial judge that when Giles killed Avie, his intent or purpose, at least in part, had been to prevent her from providing evidence against him.⁵⁵

In one sense, this result did not constitute a radical departure from existing law. For example, Rule 804(b)(6) of the Federal Rules of Evidence,⁵⁶ added in 1997, codifies such a requirement: “Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing *that was intended to, and did, procure the unavailability* of the declarant as a witness.”⁵⁷

52. *See infra* note 57.

53. Each of the opinions in *Giles* implicitly accepts these requirements. *See Giles*, 128 S. Ct. at 2683; *id.* at 2693-94 (Thomas, J., concurring); *id.* at 2694 (Alito, J., concurring); *id.* at 2694-95 (Souter, J., concurring); *id.* at 2695-96 (Breyer, J., dissenting).

54. *Id.* at 2681-81 (majority opinion).

55. *Id.* at 2693.

56. The hearsay exceptions codified in Rule 804(b) apply only if the offering party can establish that the declarant is unavailable, as that term is defined in Rule 804(a). FED. R. EVID. 804(b). Of the definitions provided in Rule 804(a), three are particularly pertinent to cases involving a child declarant:

(a) Definition of unavailability. “Unavailability as a witness” includes situations in which the declarant—

...

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant’s statement;

or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; . . .

FED. R. EVID. 804(a).

57. FED. R. EVID. 804(b)(6) (emphasis added). The Advisory Committee’s Note to this provision directs that the party seeking to invoke the exception must prove the predicate facts (wrongdoing which was intended to, and did, cause the declarant’s unavailability) to the judge’s satisfaction by a preponderance of the evidence. FED. R. EVID. 804(b)(6) advisory

That same year, a provision identical to the federal rule was added to the Uniform Rules of Evidence.⁵⁸ Further, numerous states have codified similar forfeiture provisions.⁵⁹ But a number of courts, including California's Supreme Court in *Giles*, had held that where a defendant was charged with killing the declarant, and the prosecutor had proven the defendant's culpability to the judge's satisfaction, that the forfeiture doctrine was automatically satisfied, thus depriving the defendant of the right to make a Confrontation Clause objection when the prosecution offered the declarant's testimonial statements against him.⁶⁰

Thus, the issue before the Court in *Giles* was a contentious one. It took four separate opinions to establish a majority for endorsing the intent or purpose requirement as a constitutional mandate. In fact, the majority was so fractured that Justice Scalia's majority opinion never uses the phrase "we hold."

Justice Thomas concurred in the result only because the prosecutor conceded that the statements were testimonial, a position Justice Thomas vehemently rejected.⁶¹ Justice Alito filed a separate concurrence, tentatively endorsing Justice Thomas' view.⁶²

Justice Souter, writing also for Justice Ginsberg, concurred in the result, but offered the following suggestion as to how a prosecutor might satisfy the requirement:

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

committee's note. The Supreme Court has not explicitly ruled on the prosecutor's burden of persuasion at the hearing for Confrontation Clause purposes, but in *Davis*, it noted approvingly that lower federal and state courts, in applying the forfeiture by wrongdoing hearsay exception, have required the prosecutor to prove the foundational facts by a preponderance of the evidence. *Davis v. Washington*, 547 U.S. 813, 833 (2006). State decisions applying the preponderance standard are plentiful. *See, e.g.*, *State v. Valencia*, 924 P.2d 497, 502 (Ariz. Ct. App. 1996); *State v. Hallum*, 606 N.W.2d 351, 355-56 (Iowa 2000); *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004), *overruled on other grounds by State v. Davis*, 158 P.3d 317 (Kan. 2007); *Commonwealth v. Edwards*, 830 N.E.2d 158, 172 (Mass. 2005); *State v. Byrd*, 967 A.2d 285, 304 (N.J. 2009); *State v. Alvarez-Lopez*, 98 P.3d 699, 704 (N.M. 2004).

58. *See* UNIF. R. EVID. 804(b)(5).

59. Since 1997, twelve states have added a corresponding provision to their own evidence codes. *See* CAL. EVID. CODE § 1350(a)(1) (West 2010); DEL. R. EVID. 804(b)(6); HAW. R. EVID. 804(b)(7); KY. R. EVID. 804(b)(5); MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (LexisNexis 2009); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); OHIO R. EVID. 804(b)(6); OR. REV. STAT. § 40.465 (2007); PA. R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6); VT. R. EVID. 804(b)(6). At least eleven others have adopted the exception through case law. *See* Anthony Bocchino & David Sonenshein, *Rule 804(b)(6)—The Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 MO. L. REV. 41, 79-80 (2008).

60. *See, e.g.*, *People v. Giles*, 152 P.3d 433, 446-47 (Cal. 2007), *vacated*, 128 S. Ct. 2678 (2008).

61. *Giles*, 128 S. Ct. at 2693-94 (Thomas, J., concurring).

62. *Id.* at 2694 (Alito, J., concurring).

oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.⁶³

Souter's phrase, "the classic abusive relationship," presumably refers to "battered woman syndrome" (BWS). Sociological and psychological studies describe this as a relationship in which a man, by threats and violence, attempts, and often succeeds, in frightening and cowing a woman to the point where she is afraid to leave him, afraid to seek help and afraid to follow through if she does seek help.⁶⁴ Justice Souter appears to have suggested, in other words, that if the prosecutor in a case like *Giles* can establish that the defendant and the homicide victim were in a "classic abusive relationship," that, without more, could permit the judge to conclude, by a preponderance of the evidence, that the defendant killed the victim, at least in part to prevent her from testifying or cooperating with the authorities with regard to his *previous* abuse of her.

The importance of Justice Souter's approach is particularly clear in a case like *Giles*, where the defendant has killed the declarant. But its logic is equally applicable in cases like *Davis* and *Hammon*, where the defendant is charged with assaulting the declarant, or violating a stay-away order or the like, and the complainant refuses to testify. In these situations, evidence of the defendant's "classic abusive relationship" with the complainant supports the inference that the complainant's refusal to testify was a result of the defendant's prior assaults, threats, coercion and, inferentially, the likelihood that the defendant subjected the complainant to similar conduct regarding the pending case.⁶⁵

Justice Souter's suggestion is particularly significant in domestic violence cases—and, perhaps, in child abuse cases as well⁶⁶—because it was endorsed by Justice Ginsberg, who signed Justice Souter's concurrence, and by the three

63. *Id.* at 2695 (Souter, J., concurring). Justice Ginsberg joined this opinion, and the three dissenting Justices explicitly endorsed it. *Id.* at 2708 (Breyer, J., dissenting).

64. Experts have subsequently recognized that such relationships exist in other contexts. A battered person relationship can exist in a homosexual relationship. It can also exist where the batterer is a parent, and the victim is a child and sometimes the other way around. Occasionally, it can even exist where the woman in a domestic partnership is the batterer and the man is the victim. In such cases it is usually referred to as "battered person syndrome." See FISHMAN & MCKENNA, *supra* note 1, § 541:13.

65. Evidence from prior interactions with the declarant or interactions with law enforcement concerning the declarant may provide an inference that the defendant intended to prevent testimony, as was the case when the Supreme Court first announced the forfeiture doctrine in *Reynolds v. United States*, 98 U.S. 145 (1878). Reynolds appealed his conviction for bigamy, arguing that the prosecutor's introduction of his supposed second wife's statements, without calling her as a witness, violated his rights under the Confrontation Clause. *Id.* at 150-52. The Court held that a defendant who procured a declarant's unavailability to prevent the declarant from testifying forfeited his rights under the clause, and that the defendant's refusal to assist a federal officer to serve a subpoena on that woman permitted the inference that he had in fact procured her unavailability. *Id.* at 158.

66. See *infra* Parts IV.B.2.b. & c.

dissenting Justices.⁶⁷ Thus, at least five of the nine Justices on the Court⁶⁸ agreed that a trial judge may infer that the defendant had the required intent to prevent the complainant from testifying, where the prosecutor could show that the defendant and the victim were in a “classic abusive relationship.”⁶⁹ This, in turn, would open the door to the introduction of the declarant’s testimonial statements against the declarant, even though the declarant’s refusal to testify deprived the defendant of the opportunity to confront her in court.⁷⁰

IV. FORFEITURE AND THE CHILD DECLARANT

A. Defining the Situation

Criminal cases in which children play a significant role generally fall into one of three fact patterns: 1) the defendant is accused of sexually abusing or molesting the child; 2) the defendant is accused of physically abusing the child; 3) the defendant is accused of assaulting or murdering someone, and the child allegedly witnessed the crime. The Confrontation Clause is satisfied if the child is able to testify in the courtroom and be cross-examined.⁷¹ If the child is unavailable to testify at trial, but testified at a previous proceeding in the case at which the defendant had an adequate opportunity to cross-examine the

67. *Giles*, 128 S. Ct. at 2708 (Breyer, J., dissenting). Justice Breyer, joined by Justices Stevens and Kennedy, dissented, arguing that it should suffice that the prosecutor show that the defendant *knew* that by killing Avie, he was preventing her from ever testifying against him, whether that was one of his purposes, or not; but, given the majority’s insistence on imposing the “purpose” requirement, the three dissenters explicitly endorsed the Souter-Ginsberg suggestions as to how the requirement could be satisfied. *Id.* at 2701 (Breyer, J., dissenting).

68. Justice Souter has since retired and has been replaced by Justice Sotomayor, whose position on such matters is as yet unknown.

69. Justice Scalia also acknowledged something along these lines, although he would demand a bit more than Justice Souter:

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

Giles, 128 S. Ct. at 2693.

70. Although this approach may allow the prosecutor to satisfy the state’s burden in many cases, there will be cases, such as *Giles*, in which a prosecutor will not be able to make the necessary showing, and the declarant’s statements will therefore be excluded.

71. This is so because the defendant would have precisely the opportunities the Confrontation Clause was designed to assure.

child, this satisfies the Confrontation Clause.⁷² If the child, for reasons of emotional or mental health, is unable to testify in the courtroom, but is able to testify by two-way closed-circuit television, this *may* satisfy the Confrontation Clause.⁷³ In other circumstances, where the child is unable to testify, the admissibility of his or her statements against the defendant depends on whether the prosecutor can overcome the defendant's hearsay and Confrontation Clause objections.⁷⁴

The Confrontation Clause poses no barrier to admissibility if the statement is not offered for a hearsay purpose⁷⁵ or if the statement was not "testimonial."⁷⁶ Many hearsay statements in such cases are in fact nontestimonial. If someone catches the defendant in the act of physically or sexually abusing a child and asks the child "what was X just doing to you?" courts are likely to treat any statement made by the child as a "cry for help" and therefore as nontestimonial.⁷⁷ Even when a young child's statement is related hours or days or more after the abuse, as is usually the case, it will not be considered "testimonial" if it is made to a parent or parent-equivalent.⁷⁸ Likewise, as a general rule, a young child's statement to medical personnel or counselors, whose main concern is to treat the child for physical injuries, emotional trauma or both, are not considered "testimonial."⁷⁹

However, a statement made by a young child to a police officer, or to a child advocate or counselor who works with the police, prosecutor or court system, generally is considered "testimonial" and therefore is subject to exclusion at trial on Confrontation Clause grounds.⁸⁰ And, the older the child

72. In *Crawford*, the Court reiterated its prior holdings and held that if the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant about his or her statement, then the requirements of the Confrontation Clause were satisfied. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

73. See discussion of *Maryland v. Craig*, *supra* note 7.

74. The hearsay issue was addressed during another presentation at the Symposium and will not be addressed here. See Raeder, *supra* note 6.

75. See discussion of *Tennessee v. Street*, *supra* note 10.

76. See *supra* Part I.B.

77. See, e.g., *People v. Vigil*, 127 P.3d 916, 928 (Colo. 2006); *Purvis v. State*, 829 N.E.2d 572, 579 (Ind. Ct. App. 2005); *In re N.D.C.*, 229 S.W.3d 602, 605-06 (Mo. 2007).

78. See, e.g., *Herrera-Vega v. State*, 888 So. 2d 66, 69 (Fla. Dist. Ct. App. 2004); *Bishop v. State*, 982 So. 2d 371, 375 (Miss. 2008); *State v. Buda*, 949 A.2d 761, 777-78 (N.J. 2008); *State v. Shafer*, 128 P.3d 87, 89, 92 (Wash. 2006).

79. See FISHMAN & MCKENNA, *supra* note 1, § 30:11.

80. See, e.g., *People v. Cage*, 155 P.3d 205, 217-18 (Cal. 2007) (holding that a fifteen year old's statements made to police in a hospital emergency room indicating that his mother had pushed him onto a glass table, breaking the table, and had then cut him with a piece of the broken glass was testimonial); *Wright v. State*, 673 S.E.2d 249, 253 (Ga. 2009) (concluding that the statement, "Daddy did it," made by a child to a police officer responding to a domestic dispute after the officer had observed a woman with a badly bruised face, was testimonial where, a year or so after the statement was made, the child's father was on trial for killing the child); *State v. Siler*, 876 N.E.2d 534, 538, 541 (Ohio 2007) (disallowing the recitation of a child's statement by a "trained child interviewer[s]" to be admitted at trial where the statement

is, the more likely a court will consider the child's initial report to be "testimonial," particularly if the statement is made to a teacher, guidance counselor, or other non-family authority figure. This is so because an older child would probably be sophisticated enough to realize that his or her complaint might be used as evidence in a prosecution.⁸¹

B. Applying the Forfeiture Doctrine to the Child Declarant

The prosecutor can nevertheless secure the admission of a "testimonial" statement made by a child who is unable to or refuses to testify by invoking the forfeiture doctrine. Under the forfeiture doctrine, this can be accomplished by showing that the defendant engaged in wrongful conduct with the intent or purpose of preventing the child from testifying at a trial. This may prove comparatively easy or virtually impossible, depending on circumstances.

1. Procedural Setting

Before discussing how *Giles* might apply to various scenarios, it is useful to consider how and where these issues are litigated.⁸² It would be best to litigate the issue before the trial has begun, via a pretrial motion in limine.⁸³ Otherwise, the issue will be raised when 1) the prosecutor offers a

was made by the child after his mother's body had been found hanging in the garage of their home and, in the statement, the child described seeing his father hang his mother. The court reasoned there had been no ongoing emergency when the child made the statement because, in light of the fact that the matter had to be viewed from the perspective of the interviewer and not the child, admission of the statements would violate defendant's Confrontation Clause rights).

81. Recall in *Crawford*, Justice Scalia stated: "'Testimony' in turn is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

82. See Fishman, *supra* note 1, at 732-42.

83. An in limine motion is one brought before evidence has been offered—often, before the trial itself has begun. Many codified evidence codes explicitly acknowledge the validity of such motions. See, e.g., FED. R. EVID. 103(a)(2). Kentucky's Supreme Court explained why such issues should be litigated prior to trial:

From a purely procedural standpoint, we believe a trial court promotes justice and judicial economy by engaging any forfeiture-by-wrongdoing issues before trial begins so that the parties and the court can be fully cognizant of the evidence that likely will be presented to the jury. Otherwise, the trial judge and the parties will face a recess in mid-trial to conduct an evidentiary hearing outside the jury's presence on whether the requirements of [a forfeiture by wrongdoing hearsay exception] and *Giles* have been met, with neither party knowing beforehand what evidence it must be prepared either to offer or rebut.

Parker v. Commonwealth, 291 S.W.3d 647, 669 (Ky. 2009). However, *Parker* was a murder case and does not raise the issues addressed in this Article.

nontestifying complainant's out-of-court statement, and 2) the defense objects on hearsay and Confrontation Clause grounds. The jury should be sent out of the courtroom at that point.⁸⁴

As to the Confrontation Clause, the prosecutor may argue that a statement is not testimonial,⁸⁵ or that it is not being offered for a hearsay purpose.⁸⁶ If the court concludes that the statement is both hearsay and testimonial, the prosecutor should then cite to the appropriate hearsay exception⁸⁷ and assert that the defendant's wrongdoing procured the child's unavailability and thereby forfeited his rights under the Confrontation Clause. If the prosecutor's argument has at least superficial plausibility, the trial judge will then hold a hearing—again, out of the jury's presence.

At the hearing, the prosecutor may call witnesses and offer documents, recordings, and the like. The prosecutor may rely, in part, on the contested statements themselves, and on other evidence, including hearsay that would not be admissible at trial.⁸⁸ The defense can cross-examine the state's witnesses and call its own witnesses and offer its own evidence. The judge then decides whether the prosecutor has shown forfeiture, as defined in *Giles*, by a preponderance of the evidence.

2. Factors Supporting the Forfeiture Doctrine

Professionals who specialize in combating and prosecuting child sexual abuse have stressed a variety of factors to support invoking the forfeiture doctrine. This Article will address three factors: the special vulnerability of the abused child; the nature of the abusive relationship itself; and further efforts by the defendant, or by others on the defendant's behalf, to dissuade the child from testifying after the child has reported the abuse and has made testimonial statements.

84. For example, the Federal Rules of Evidence dictate that hearings on the admissibility of a defendant's confession must be conducted out of the jury's hearing and that "[he]arings on other preliminary matters shall be so conducted when the interests of justice require . . ." FED. R. EVID. 104(c). Whenever a court conducts a hearing to determine whether specific evidence should be presented to or withheld from a jury, the "interests of justice" require that the jury be absent while that issue is litigated; otherwise the jury would hear the evidence regardless of the judge's ruling. *Id.*

85. Given the uncertainties raised by *Giles*, see *supra* Part II.C, a prosecutor should be wary about conceding the "testimonial" of a child's initial, informal statement to a police officer or other public official.

86. See *supra* note 10.

87. See Raeder, *supra* note 6.

88. See, e.g., FED. R. EVID. 104(a) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court. . . . In making its determination, it is not bound by the rules of evidence"); UNIF. R. EVID. 104(a) (substantively identical provisions to what is found in FED. R. EVID. Rule 104(a)); see also *Commonwealth v. Edwards*, 830 N.E.2d 158, 174 (Mass. 2005).

a. The Child's Vulnerability

In *Giles*, all nine Justices signed opinions that acknowledged the vulnerability of the adult victim in an abusive relationship, and that the victim who is under pressure from the abuser may refuse to report the abuse or cooperate with prosecution if the abuse has been reported.⁸⁹ A child victim of an adult's abuse is even more vulnerable to such pressure. This is one of the main reasons why legislation has been enacted mandating that medical, school, and other professional personnel report alleged child abuse when they uncover evidence of such behavior.⁹⁰

Accordingly, many have argued that “[i]f a defendant abuses a child who is too young to testify, then the defendant [should not be permitted to] complain that he is unable to cross-examine the witness at trial,” because even if “the defendant’s crime did not cause the victim’s unavailability,” by choosing so young a victim, the defendant “took advantage of the victim’s unavailability.”⁹¹ The difficulty with this argument is that it presupposes the defendant’s guilt, i.e., it requires the trial judge to “find” the defendant guilty by a preponderance of the evidence⁹² as a prerequisite to admitting evidence to establish guilt to a jury. A majority of the Supreme Court in *Giles* rejected this approach as violating a defendant’s right to trial by jury.⁹³ And, even before *Giles*, at least one state supreme court had held that a prosecutor cannot satisfy the forfeiture doctrine by merely showing that the defendant apparently chose a victim who was too young to testify.⁹⁴

89. See *Giles v. California*, 128 S. Ct. 2678, 2693 (2008) (Justice Scalia’s opinion, which was joined, in this regard, by Chief Justice Roberts and Justices Thomas and Alito); *id.* at 2695 (Justice Souter’s concurring opinion, which was joined by Justice Ginsberg); *id.* at 2708 (Justice Breyer’s dissenting opinion, which was joined by Justices Stevens and Kennedy, explicitly endorsing the passage from Souter’s concurrence).

90. Ben Mathews & Donald C. Bross, *Mandated Reporting is Still a Policy with Reason: Empirical Evidence and Philosophical Grounds*, 32 CHILD ABUSE & NEGLECT 511-12 (2008).

91. Thomas D. Lyon & Raymond LaMagna, *The History of Children’s Hearsay: From Old Bailey to Post-Davis*, 82 IND. L.J. 1029, 1058 (2007).

92. For a discussion of the preponderance of the evidence standard, see *supra* note 57.

93. *Giles*, 128 S. Ct. at 2686. As has been discussed, this portion of Justice Scalia’s opinion was endorsed by Chief Justice Roberts and Justices Souter, Ginsberg and Alito.

94. In *State v. Henderson*, the court held that the defendant, who was accused of sexually molesting his ex-girlfriend’s three year old daughter, whereby he gave her gonorrhea, had not forfeited his Confrontation Clause rights merely because the child was too young to testify. 160 P.3d 776, 793 (Kan. 2007). The state acknowledged that there was no evidence that the defendant threatened the child before or after the assault, which apparently involved a single incident, rather than serial abuse. *Id.* Thus, the child’s statements to a social worker and a detective during a forensic interview were testimonial, see *id.* at 787, and should not have been admitted at trial. *Id.* at 792. Although other circumstantial evidence existed of defendant’s guilt, the court concluded that admitting the statements was reversible error. *Id.*

b. The Nature of the Abuse Itself

A plausible argument exists that the nature of the abuse may itself support a finding of forfeiture,⁹⁵ but this is difficult to reconcile with the result or reasoning in *Giles*. Where the assault is a one-time event, evidence that the defendant forced the child to promise not to relate what happened lends support to the argument that coercing this promise constitutes wrongdoing which procured the child's later inability to testify.

The only reported post-*Giles* case to address this, however, rejected this argument.⁹⁶ That case is atypical because the alleged abuser was an eleven year old boy charged with forcing an eight year old to commit fellatio. The Illinois Supreme Court held that the older child's possession of a stick during the incident, and his making the younger boy "pinkie-swear" not to tell anyone, did not constitute forfeiture under *Giles*.⁹⁷ In a pre-*Giles* decision, involving a single incident of molestation of a five year old girl by an adult who allegedly threatened to hurt the child if she told her mother, the same court was unwilling to resolve the issue, which had not been fully litigated below.⁹⁸

95. "Intimidation, threats and warnings not to report abuse is often a recurring aspect of an ongoing abusive relationship [and] will continue to have a residual effect on a victim even after the abuse is reported." E-mail from Jeffrey Greipp, Nat'l Prosecutor Att'y Advisor, AEquitas: The Prosecutor's Resource on Violence Against Women, to author (Dec. 30, 2009) (on file with *Widener Law Review*).

96. *In re Rolandis G.*, 900 N.E.2d 600 (Ill. 2008).

97. *See id.* At trial Von, the complainant, was unable to answer questions about the incident and the trial judge allowed a tape of Von's prior forensic interview with a child advocate to be admitted. *Id.* at 603-05. Applying *Giles*, the court noted the absence of evidence that Rolandis "ever committed any wrongdoing with the intended purpose that Von be unavailable to testify at trial." *Id.* at 616. The court recognized that "sexual abusers sometimes select children as their victims because children are generally more vulnerable to threats and coercion due to their age and immaturity," but observed that "there is no indication that when respondent sexual assaulted Von, his assault was motivated in any way by a desire to prevent Von from bearing witness against him at trial." *Id.* Nor did the record "indicate that . . . [Rolandis] extracted the promise from Von . . . in contemplation of some future trial." *Id.* Hence, the court ruled, it did not matter whether Von's refusal to testify at trial was due to his embarrassment or because of his "pinkie swear" to Rolandis, because "there [was] no evidence that respondent intentionally committed any wrongdoing for the purpose of procuring Von's unavailability at trial." *Id.* In the absence of evidence that Rolandis "intentionally committed any wrongdoing for the purpose of procuring Von's unavailability at trial, the forfeiture by wrongdoing doctrine [was] inapplicable . . ." *Id.* This is perhaps more than *Giles* would require because Rolandis' insistence that Von "pinkie swear," coupled with the fact that (according to Von) Rolandis held a stick in his hand while forcing Von to commit fellatio, *see id.* at 605, certainly qualifies as "wrongdoing for the purpose of" dissuading Von from telling anyone under any circumstances. And, presumably an eleven year old is sophisticated enough to foresee the possibility of a prosecution. In any event, the court held that the error in admitting Von's testimonial statement to a child advocate during a forensic interview was harmless. *Id.*

98. *See People v. Stechly*, 870 N.E.2d 333 (Ill. 2007). In this case, the defendant was accused of sexually molesting his girlfriend's five year old daughter. *Id.* at 338. Prior to trial, a clinical child psychologist who examined and treated the girl concluded that she was not capable

Now consider the all-too-frequent situation in which the adult's abuse of the child was a recurring event—typically, where the abuser lived in the same household or was someone with frequent, private access to the child, such as a school, church or scouting official. The recurring nature of the abuse, by itself, is not enough to satisfy *Giles* and secure admissibility of the child's testimonial statements about the abuse.⁹⁹ But, in such cases, dissuading the child from

of testifying about the abuse without serious risk of psychological damage, and therefore, the court concluded that the child was unavailable. *Id.* at 340-41. The girl's nontestimonial statements to her mother and testimonial statements to various state-affiliated officials comprised a substantial part of the evidence against the defendant. *Id.* at 341-43. On appeal, Illinois' Supreme Court anticipated *Giles* by concluding that to show forfeiture, the State had to show that the defendant had intended to prevent the child from testifying. *Id.* at 350. In response, the State argued that the defendant had shown that intent because, according to the girl's nontestimonial statements made to her mother and her testimonial statement made to one of the officials, the defendant threatened to hurt her if she told her mother. *Id.* at 353. "[T]he State argues that defendant's threats and warnings were intended to and did intimidate the victim generally, as evinced by the victim's statements to [the psychologist] that she did not want to testify because, in part, she was 'scared.'" *Id.* The court acknowledged that "[t]here is sufficient evidence here that we cannot dismiss this argument out of hand," and remanded the matter for factual determinations. *Id.*

99. Colorado's Supreme Court, anticipating the rule announced in *Giles*, held that to satisfy the forfeiture rule the prosecutor had to establish that the defendant's wrongdoing was "designed, at least in part, to subvert the criminal justice system by depriving that system of the evidence upon which it depends." *People v. Moreno*, 160 P.3d 242, 247 (Colo. 2007). B.B., an eight year old girl, had visited her friend A.P., the defendant's nine year old stepdaughter. *Id.* at 243. After returning home, B.B. told her mother that the defendant had touched her inappropriately and that A.P. had told her that the defendant had previously done likewise to her. *Id.* During a videotaped interview with a court-affiliated counselor, A.P. related that the defendant and fondled her numerous times. *Id.* The defendant was charged with abusing both girls, and at trial, B.B. was able to testify, but the judge concluded that A.P. could not, because the experience would likely re-traumatize her. *Id.* at 243-44. So the videotape of A.P.'s interview was played a trial. *Id.* at 244. While the case was on direct appeal, the United States Supreme Court issued its opinion in *Crawford v. Washington*, 541 U.S. 36 (2004) and Colorado's intermediate appellate court reversed the conviction, *People v. Moreno*, No. 04CA0074, 2005 WL 3313168, at *1 (Colo. App. Dec. 8, 2005), concluding that A.P.'s videotaped statement was testimonial and its admission violated the Confrontation Clause. *Moreno*, 160 P.3d at 244. Affirming, the state supreme court rejected the State's argument that the defendant had forfeited his right to assert the Confrontation Clause. *Id.* at 247. One passage in the intermediate appellate decision is particularly telling:

[T]he trial court made no finding (and in fact there was no clear evidence) that wrongdoing by the defendant—because of, for example, the manner in which he chose his victim, the nature of his criminal acts against her, or subsequent threats he made to her—was intended, even in part, to subvert the criminal process by preventing or dissuading the victim from testifying at trial. Whether or not a finding of such intent would be sufficient in itself, in the absence of any finding beyond the risk of re-traumatization of the victim, the record is inadequate to support a finding of forfeiture by wrongdoing.

Id. The opinion provides no indication of whether the interviewers asked A.P. whether the defendant made any threats, promises or other efforts to secure her silence. Notably, the case was tried prior to *Crawford*, at a time when the interviewer and prosecutor might not have

reporting the abuse is of course essential to the abuser's ability to continue the abuse. Studies indicate that abusers engage in a variety of wrongful conduct to secure the child's silence.¹⁰⁰ The abuse may consist of violence, or may involve sexual abuse accompanied by violence.¹⁰¹ Often, the abuser will bribe, admonish, or threaten the child:

An offender with a close relationship to the victim may admonish the child by saying, "If you tell, I won't love you anymore" or "I won't be able to see you anymore." An offender who is an authority figure, for example a priest, may warn the child that "God won't love you if you tell." Older children who are abused by a pedophile, who has befriended children, may be told that disclosure will mean that he can't help other children or continue to help the victim. Some offenders threaten to kill the victim, harm the victim, harm the victim's pets, destroy the victim's valued property, or injure or kill the child's parents.¹⁰²

The abuser may also foster the child's fear that no one will believe his or her accusation,¹⁰³ or that reporting the abuse would break-up the family and might leave the child, and perhaps the child's mother and siblings, homeless.¹⁰⁴

anticipated the need to create such a record.

100. Some seek to disguise the abuse as a game, a legitimate form of childcare and the like, so the child will not realize that the adult is doing anything wrong. Kathleen Coulborn Faller, *Disclosure in Cases of Sexual Abuse*, NAT'L CHILD ADVOC., Fall 2002, at 1.

101. It is difficult to evaluate statistics regarding how frequently sexual abusers of children use violence. See, e.g., Judith V. Becker, *Offenders: Characteristics and Treatment*, 4 FUTURE CHILD. 176, 179 (2004) (relating that some studies identify physical violence as part of child molestation at rates ranging from forty-two to fifty-nine percent while another study concluded that fifty percent of sexually abused children experienced physical force); David Finkelhor et al., *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors*, 14 CHILD ABUSE & NEGLECT, 19, 21-22 (1990) (relating that one survey reported that force accompanied abuse in fifteen to nineteen percent of the abusive relationships and that another study reported the figure at forty-one percent and attributing the widely differing results to the different wording in the questions used in the two surveys).

102. See Faller, *supra* note 100, at 7-8; see also ANGELO P. GIARDINO & RANDELL ALEXANDER, *CHILD MALTREATMENT: A CLINICAL GUIDE AND REFERENCE* 232 (3d ed. 2005). ("The perpetrator's use of threats, coercion, or bribes, even when the promised consequences seem unrealistic or minimal to adults, can deter a child from coming forward about abuse."). Similarly, the National Center for Victims of Crime reports: "Child abusers coerce children by offering attention or gifts, manipulating or threatening their victims, using aggression or employing a combination of these tactics." National Center for Victims of Crime, *Child Sexual Abuse*, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32315> (citing a 1994 study reporting that of 250 child victims studied, fifty percent experienced physical force, "such as being held down, struck, or shaken violently"); see also *id.* ("Children may resist reporting sexual abuse because they are afraid of angering the offender. . .").

103. Telephone Interview with Victor Vieth, Director of Child Abuse Programs, National Child Protection Training Center (Dec. 21, 2009); see Faller, *supra* note 100, at 8.

104. Telephone Interview with Victor Vieth, *supra* note 103; Faller, *supra* note 100, at 8; see also Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983) (reporting that abusers use numerous tactics to assure compliance and silence, such as warning that otherwise the abuser will turn his attention to a younger sibling;

Cases involving an adult's frequent abuse of a child generally come to light when, despite the threats and warnings, the child reports the abuse. Typically, the child then makes one or more testimonial statements describing the abuse and the force, threats, or other pressure the defendant used to secure the child's cooperation and silence. Often, however, the child is unable to, or refuses to, testify at trial, or recants the accusation. In the absence of evidence that the defendant engaged in any further wrongdoing with the child *after* the testimonial statements were made, is the child's *previous* recitation of the abuse, threats, warnings and other pressure enough to establish that the defendant "procured" the child's unavailability, and did so with the required intent?

A child's inability to testify may be attributed to a variety of factors. The trauma caused by the abuse itself, and the threats or blandishments that accompanied it, no doubt play a significant part.¹⁰⁵ Add to that the emotional stress and turmoil that resulted once the child reported the abuse. This stress and turmoil may have many sources. First, there is the obligation to describe the abuse to parents, counselors, doctors and the like. Second, having learned that the adult's conduct was shameful, the child may feel shame or guilt because he or she permitted, and perhaps for a time even enjoyed, the abuse.¹⁰⁶ And, sadly, the abuser's warnings and predictions often turn out to be accurate: adults may refuse to believe the allegations; the defendant's arrest may cost him his job, which could cost the family its home; and child protection officials may seek to have the child removed from the family to prevent the defendant from having further access to the child.¹⁰⁷ Indeed, a sophisticated abuser is likely to know that if the child does report the abuse, the impact of doing so may render the child unable to testify about it at trial.

In such a case, the "classic abusive [adult] relationship," about which Justice Souter wrote in *Giles*,¹⁰⁸ is an attractive argument that can be applied by analogy in child abuse prosecutions. The issue in *Giles*, where a man was accused of killing a woman, was whether her testimonial statements about his prior abuse are admissible over a Confrontation Clause objection. Justice Souter suggested that where the defendant had a "classic abusive relationship" with the victim, the fact that he had threatened or assaulted the woman on prior occasions in order to dissuade her from reporting his abuse or to force her not to testify, strongly supported the inference that he had a similar motive

advising the child that it would "kill" the child's mother if she found out, and "most vitally, [threatening] the security of the home ('If you ever tell, they could send me to jail and put all you kids in an orphanage')"; GIARDINO & ALEXANDER, *supra* note 102, at 232 ("[T]he degree to which the child feels responsible for the negative consequences to the offender or family may also affect the child's decision to report abuse.").

105. See E-mail from Jeffrey Greipp, *supra* note 95.

106. Faller, *supra* note 100, at 7; National Center for Victims of Crime, *supra* note 102 ("Children may resist reporting sexual abuse because they . . . [may] blame themselves for the abuse or feel guilty and ashamed.").

107. See Telephone Interview with Victor Vieth, *supra* note 103.

108. *Giles v. California*, 128 S. Ct. 2678, 2695 (2008) (Souter, J., concurring).

when he killed her.¹⁰⁹ Applying this concept to child sexual abuse prosecutions, an expert witness could testify at a *Giles* hearing that a “classic abusive relationship” between an adult and a child includes similar threats and blandishments.

Query, though, whether this analogy can withstand scrutiny. In the typical domestic violence case, the defendant continues to have access to his victim even after the violence has been reported and the defendant has been arrested or has received a stay-away order. The fact of his continued access to her, coupled with the woman’s subsequent recantation or refusal to testify, support the inference that the defendant used subsequent violence, threats, or promises to procure her refusal.¹¹⁰ In a child abuse prosecution, the analogy to the “classic abusive [adult] relationship” is questionable unless evidence exists that the defendant threatened or cajoled the child *after* the child initially reported the abuse, or at least had opportunities to do so. In *Giles*, after all, the Court held that the impact of the underlying crime on the declarant, which in that case involved the declarant’s death, couldn’t, by itself, satisfy the forfeiture doctrine.¹¹¹ Thus, *Giles* strongly indicates that, regardless of how badly the defendant abused and threatened the child before the child reported the abuse, pre-reporting abuse cannot, by itself, satisfy the forfeiture doctrine. Moreover, the defense can argue that, even assuming the defendant had threatened or cajoled the child not to report the abuse, ultimately the child *did* report it, or there would be no case to prosecute. Thus, those threats or blandishments, in the end, were ineffective, and therefore could not have “procured” the child’s subsequent inability to testify.

As of December 30, 2009, not a single reported post-*Giles* decision has addressed this issue.¹¹² Indeed, research has only uncovered a few cases decided prior to *Giles* that even discussed the issue. The case most directly on point is *State v. Waddell*,¹¹³ a pre-*Giles* unreported decision in which Kansas’ intermediate appellate court held that an abuser’s threats to a child during the

109. See *supra* pp. 287-89.

110. For the discussion of *United States v. Reynolds*, see *supra* note 65.

111. See *supra* Part III.

112. A Westlaw search performed on December 31, 2009 ((database: allcases), “110K662.80 /P FORFEIT”) produced 119 “hits.” My search focused on the cases decided from the beginning of 2004 through the end of 2009. I chose this time period because *Crawford*, the Supreme Court’s first Confrontation Clause decision to focus on issues involving the testimonial nature of a declarant’s statements, was decided on March 8, 2004. My study of each of these cases revealed that most of them involved domestic violence against adults, organized crime violence, and other contexts unrelated to child abuse. No post-*Giles* opinion available on Westlaw involves an adult charged with frequent abuse of a child in which the prosecutor argued that the nature of the abuse itself satisfied the forfeiture rule announced in *Giles*. I also conducted two other Westlaw searches: (database: allcases), “da(aft 2003) 211(infants)k207 /p forfeit!”, and “da(aft 2003) 211(infants)k248 /p forfeit!”. Each produced the same, single post-*Crawford* post-*Giles* case: *In re Rolandis G*, 902 N.E.2d 600, 602-06 (Ill. 2008), which involved a single incident of an eleven year old’s sexual abuse of an eight year old.

113. *State v. Waddell*, No. 92-378, 2006 WL 1379576 (Kan. Ct. App. May 19, 2006).

period of the abuse could not, by themselves, establish forfeiture.¹¹⁴ The other cases that address the issue at all are summarized elsewhere in this Article.¹¹⁵

Forfeiture case law generally, moreover, provides little support for a prosecutor's argument that a defendant's abuse of a child before the child reported the matter, without more, satisfies the forfeiture rule as defined in *Giles*. In every decision after *Giles*, and every pre-*Giles* decision applying a *Giles*-like purpose or intent requirement in which a court found that the defendant had forfeited his rights under the Confrontation Clause, charges were already pending against the defendant, or suspicion had already focused on the defendant for an already-committed crime, at the time the defendant committed the "wrongdoing" that triggered the forfeiture rule.¹¹⁶

114. The defendant was charged with sexually abusing J.M.J., a seven year old neighbor. *Id.* at *1. In a forensic interview, the child told her interviewers that Waddell threatened to kill her if she told anyone, and told several witnesses she was scared of Waddell. *Id.* at *2. At the hearing on her availability to testify, however, she said that although she was "scared," she "was not afraid that anyone in the room would do anything to her," and that she "remembered what happened, but she did not want to talk about it." *Id.* at *9. The court specifically noted that "there was no evidence Waddell had any contact with J.M.J. after his detention." *Id.* J.M.J. had several contacts with Waddell's adult daughter and grandchildren while Waddell was in jail awaiting trial, but it is highly unlikely that they attempted to persuade J.M.J. not to testify. *Id.* In fact, Waddell's daughter testified at the trial that Waddell had sexually molested her from the time she was three-years-old until she left his home at age fourteen. *Id.* at *10. The court concluded that the State had failed to establish that Waddell had forfeited his right to confront J.M.J., noting that it had recently reviewed other jurisdictions' forfeiture case law, and that "[o]ther than homicide cases involving the murder of the declarant, the causative factor has consistently been some act independent of the crime charged. For example, in forfeiture cases involving threats or coercion, the threats or coercion occurred *after* the events giving rise to the criminal charges." *Id.* at *9 (internal quotations omitted).

115. *See In re Rolandis G.*, 902 N.E.2d 600 (Ill. 2008); *People v. Stechley*, 870 N.E.2d 333 (Ill. 2007).

116. There are many cases that discuss the intent to prevent a witness from testifying about previously existing charges. *See, e.g.*, *United States v. Stewart*, 485 F.3d 666, 671-72 (2d Cir. 2007) (holding that circumstantial evidence can suffice to establish that while the defendant faced drug charges, he procured or acquiesced in the murder of a witness who was scheduled to testify, for the purposes of preventing that testimony); *People v. Banos*, 100 Cal. Rptr. 3d 476, 491-92 (Ct. App. 2009) (finding *Giles* was satisfied by the testimonial statements of the defendant's ex-girlfriend, whose murder he was being tried for, because the evidence showed that the defendant killed her out of jealousy and to prevent her from testifying in pending cases and from cooperating with authorities); *People v. Hagos*, No. 05CA2296, 2009 WL 3464284, at *25 (Colo. App. Oct. 29, 2009) (remanding the case to determine whether the State could satisfy the *Giles* standard where the defendant had been convicted of hiring others to kill an erstwhile partner-in-crime who had testified against him in a pending criminal case because the case was tried before *Giles* and the trial judge had failed to anticipate the result in *Giles*); *United States v. Roberson*, 961 A.2d 1092, 1096-97 (D.C. 2008) (concluding that the trial court had not abused its discretion in admitting testimonial statements by a witness implicating the defendant in a murder where another witness told police that he had seen the defendant's friend kill the first witness before the trial had commenced); *Gatlin v. United States*, 925 A.2d 594, 599-600 (D.C. 2007) (finding no error in the admission of grand jury testimony by a witness indicating that he had seen the defendant commit the murder for which he was on trial); *Parker v. Commonwealth*, 291 S.W.3d 647, 670 (Ky. 2009) (holding that there was ample evidence established that one of the defendant's motives for murdering the victim was to prevent him

from testifying against him about a prior murder); *People v. Decosey*, No. 283051, 2009 WL 1068878, at *3 (Mich. Ct. App. Apr. 21, 2009) (concluding that the requirements laid out in *Giles* were satisfied where the prosecutor provided recordings of phone calls, made by the defendant while in jail, where the defendant asked the complainant not to testify against him); *State v. McLaughlin*, 265 S.W.3d 257, 272-73 (Mo. 2008) (concluding that a murder victim's testimonial statements about defendant's stalking of her, threats to her, and abusive conduct were properly admitted per the forfeiture doctrine at his murder trial); *Commonwealth v. King*, 959 A.2d 405, 411-16 (Pa. Super. Ct. 2008) (concluding that statements by Giles, the victim, to police indicating that Giles had purchased a gun for King that matched the type of gun that had been used in a crime were properly admitted at King's trial for murdering Giles); *State v. Fallentine*, 215 P.3d 945, 949 (Wash. Ct. App. 2009) (finding the trial court did not abuse its discretion by admitting the statement of a witness made to a social worker whereby the witness indicated that his recantation of an accusation that implicated the defendant was due to a threat made by the defendant); *State v. Mason*, 162 P.3d 396, 399-400, 405 (Wash. 2007) (promulgating a forfeiture hearsay exception, and concluding that the State had proven that the defendant was responsible for the victim's disappearance and that the defendant was motivated by a desire to prevent the victim from testifying against him in a previous and pending case); *State v. Rodriguez*, 743 N.W.2d 460, 466 (Wis. Ct. App. 2007) (concluding, in a domestic violence and witness intimidation prosecution, that defendant's statements to complainant, where he threatened to harm her if she called the police again, and his numerous phone calls from jail to his brother, urging him to instruct the complainant not to testify, satisfied the forfeiture doctrine); *Proffit v. State*, 191 P.3d 963, 967 (Wyo. 2008) (finding the State satisfied the forfeiture rule at defendant's trial for conspiracy to commit murder of B.C. thereby justifying admission of an investigator's testimony relating B.C.'s testimonial statements to him, which indicated that Proffit had threatened him if he testified in a pending prosecution).

In *United States v. Martinez*, 476 F.3d 961 (D.C. Cir. 2007), the court dealt with whether the defendant had intended to prevent a witness from cooperating with authorities in a matter already under investigation, but which had not yet become the subject of formal charges. "[T]he District Court [had] concluded that Martinez's co-conspirators murdered [the informant] to procure his unavailability as a witness and Martinez was aware that his co-conspirators were willing to engage in murder to protect the conspiracy." *Id.* at 966. That the murder might also have been motivated out of anger because a multimillion dollar cocaine shipment had been seized by the authorities did not undercut this finding, so long as preventing the informant from further cooperation was a significant, though perhaps not only, motive for the killing. *Id.*; see also *United States v. Carson*, 455 F.3d 336, 360-64 (D.C. Cir. 2006).

In one case, a court found that the evidence connecting a murder was insufficient to establish forfeiture. *United States v. Taylor*, 622 F. Supp. 2d 693 (E.D. Tenn. 2008). Taylor and others had burglarized Luck's home on several occasions. *Id.* at 695. A police officer, apprehending Taylor in possession of certain property, asked Luck over the phone, without telling him who possessed it, whether the property was his. *Id.* at 695-96. Luck replied that it was, and that it had been stolen from him. *Id.* at 696. Thereafter, Taylor and others broke into Luck's home again and, on finding papers indicating that he had been in contact with the police, abducted Luck, and took him for a lengthy drive through various rural areas. *Id.* at 695. Eventually, Luck tried to get away, and, in the ensuing struggle, was shot and killed. *Id.* The court held that this evidence did not satisfy the forfeiture exception to the Confrontation Clause, because it did not sufficiently show that the killing was motivated by a desire to prevent Luck from testifying against Taylor. *Id.* at 697-99. The court stressed that if Taylor had planned to kill Luck to prevent his testimony, he could have done so when he encountered Luck in his home, or at various points during the meandering two-hour drive. *Id.* at 698-99. "There are multiple possible inferences that can be drawn from this lengthy trip, but none of them show conclusively that Defendant intended to kill Luck to prevent him from being a witness." *Id.* at 698. This holds the government to an erroneously rigid standard because, to satisfy the

c. Subsequent Wrongdoing

A prosecutor's job is a lot easier if he can produce evidence that a defendant threatened, cajoled, or pleaded with the child to withhold cooperation from law enforcement officials *after* the abuse was first reported. In such a case, a judge could readily and easily conclude that the wrongdoing¹¹⁷ played a significant role in "procuring" the child's unavailability, and, thus, that the defendant had forfeited his right to confront the child in court.

Even if, as is often the case, the defendant himself¹¹⁸ is denied access to the child after the abuse has been reported,¹¹⁹ his family members often have continued access to the child, and it is not unknown for relatives to urge the child to recant or refuse cooperation.¹²⁰ But, such efforts by others cannot justify a finding that the *defendant* forfeited his right to confront the child, unless the prosecutor can establish that those efforts were made at the defendant's urging or, at least, with his knowing "acquiescence."¹²¹ In other contexts, courts have held that circumstantial evidence suffices to establish the

forfeiture doctrine, the government need not "conclusively" prove that testimony-prevention was a significant motive; that need only be proven by a preponderance of the evidence. *See supra* note 57.

117. If the defendant subsequently threatens the child or in some other way attempts to dissuade her from testifying, this clearly constitutes wrongdoing. But unless the adult has been served with a no-contact order, one can imagine circumstances when such contact might not be categorized as "wrongdoing." Suppose a young child accuses her father of sexual abuse. A few days later he tells her, "You know I did not do the things they made you say I did, but I'm sorry if I did things to upset and scare you. I love you and I promise I won't do anything to upset or scare you ever again." He records this conversation, to substantiate precisely what it is he did and did not say. Notice first that he has denied, not admitted, his guilt, so his comments do not help the prosecutor. Second, he has not explicitly asked his daughter to refuse to testify. All he has done, overtly, is apologize to his daughter for "scaring" her, and tell her he loves her. As lawyers, we can plausibly read this as a carefully designed ploy to dissuade her from testifying; but a judge might be hard-pressed to categorize as "wrongdoing," a father telling his child, "I'm sorry and I love you."

118. Cases exist, of course, where the alleged abuser is a woman, but in the substantial majority of cases, the alleged abuser is male.

119. Often the defendant is in jail awaiting trial. If he has made bail, his release may be conditioned on having no further contact with the child, and in some cases, at least, child welfare officials and irate family members are diligent in enforcing that ban.

120. The relative might not believe the child; or, might seek to avoid the public embarrassment that a trial would bring to the family; or might fear for the family's financial well-being, if the defendant is sent to jail; or simply might place the defendant's welfare above that of the child.

121. The "forfeiture by wrongdoing" exception to the hearsay rule found in the Federal Rules of Evidence provides that a declarant's statement is admissible against a party over a hearsay objection if the party "has engaged *or acquiesced* in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." FED. R. EVID. 804(b)(6) (emphasis added). Proof that a defendant acquiesced in such wrongdoing likely will suffice to satisfy the constitutional, as well as the statutory, forfeiture rule.

defendant's involvement or acquiescence,¹²² and a prosecutor may, in appropriate child abuse cases, plausibly argue defendant acquiescence as well.

3. Responses

To the extent possible, when investigators and counselors interview a child who has reported abuse, in addition to obtaining information about the abuse itself, the interviewer should try to get the child to recount any violence, force, threats, blandishments, or warnings that the alleged abuser used to secure the child's participation and silence.¹²³ Many professionals in the field are aware of this necessity.¹²⁴ Although such information alone probably will not satisfy the forfeiture rule,¹²⁵ it will, in all likelihood, be quite helpful to a prosecutor who hopes to invoke that rule.

Forfeiture case law¹²⁶ and common sense both suggest that those who investigate and prosecute child abuse allegations, and those responsible for the child's welfare, should do whatever they can to protect the child from subsequent improper efforts by, or on behalf of, the defendant to dissuade the child from testifying, and should attempt to establish safeguards to document any improper contacts with the child.¹²⁷ Sometimes, relatively simple measures can make a difference. When investigators tell domestic violence complainants that it is a crime for the abuser to threaten or cajole her to drop the charges or refuse to testify, the complainants have a greater tendency to report such

122. See *United States v. Stewart*, 485 F.3d 666, 671 (2d Cir. 2007). Also, in many cases, courts have held that a defendant at least "acquiesces" in forfeiture-type wrongdoing if he knows that the co-conspirators will intimidate witnesses. See, e.g., *United States v. Martinez*, 476 F.3d 961, 966 (D.C. Cir. 2007); *United States v. Carson*, 455 F.3d 336, 360-64, 372 (D.C. Cir. 2006); *Gatlin v. United States*, 925 A.2d 594, 599-600 (D.C. 2007).

123. This often will not be easy, as the interviewers must take care to avoid improperly influencing what a child tells them, or to give the impression that they attempted to influence the child.

124. During an interview, Victor Vieth told the author that his staff now urges investigators to seek information from child complainants about threats and other efforts the defendant made to secure the child's silence while the abuse was ongoing. Telephone Interview with Victor Vieth, *supra* note 103.

125. See *supra* Part IV.B.2.b.

126. See *supra* notes 116 & 122.

127. One expert commented:

Traditionally, the criminal justice system's approach to domestic violence and child abuse cases has been too much incident-based, rather than focusing on the entire dynamic of the relationship between the complainant and the accused. *Giles* and the forfeiture by wrongdoing doctrine [may prove] to be a positive development for criminal justice because [they motivate] communities to reform their justice systems to improve the disclosure, detection and accountability of a high volume intimidation. An important component of that change is to devote far more attention and greater resources to the complainant's circumstances once the abuse has been reported to the authorities.

See E-mail from Jeffrey Greipp, *supra* note 95.

incidents and often are more willing to testify.¹²⁸ Similarly, in a child sexual abuse prosecution, if the child's parent, custodian, or guardian believes the child's allegations and supports the prosecution of the case, it may prove equally useful to provide information to the adult about the impropriety of such dissuasion.¹²⁹ Indeed, it may also prove useful to give this information to the child as well, albeit in an age-appropriate way.¹³⁰ If the child is placed with a foster family, it may be possible to ensure that a neutral party or electronic recording device is present during all contacts between the child and anyone who knows the accused, so any improper communications with the child can be documented and addressed.¹³¹ On the other hand, doing so may isolate the child from everyone he knows and has relied on, which itself may aggravate the child's sense of loss and vulnerability.

CONCLUSION

The consensus among those who seek to protect children from abuse, and those who prosecute the predators who perpetrate such abuse, is that *Giles* will in many cases require exclusion of children's statements, which often are the best, and sometimes only, evidence of a defendant's guilt.¹³² This is enormously frustrating to everyone who is concerned with children's welfare—particularly given the widely held belief that the substantial majority of abuse allegations are true.¹³³ Even though most children who say they have been abused are likely telling the truth, the law cannot assume such truthfulness in any individual defendant's case, because to do so would directly contradict the presumption of innocence. *Giles* will prevent prosecutors from introducing a child's "testimonial" accusations into evidence without providing the defendant with an adequate opportunity to confront and cross-examine the child. No doubt this will allow some child abusers to win acquittals or dismissals they do not deserve. But, it may also prevent some defendants from being convicted of truly heinous crimes that they did not commit.

The solution—to the extent that one exists—is to provide children who say they have been abused with greater protection from subsequent wrongdoing intended to dissuade or disable them from testifying, and to monitor closely their contacts with the defendant and others who may be sympathetic with the

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Everyone in the field with whom I have spoken expressed that expectation.

133. This is of course a matter of some dispute. For discussions of statistical studies seeking to determine the frequency of false reports versus false denials or recantations, see Thomas D. Lyon, *False Denials: Overcoming Methodological Biases in Abuse Disclosure Research*, *Child Sexual Abuse Disclosure: Disclosure, Delay and Denial*, in CHILD SEXUAL ABUSE: DISCLOSURE, DELAY, AND DENIAL 41 (Margaret-Ellen Pipe et al. eds., 2007); Lindsay C. Malloy & Thomas D. Lyon, *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 162 (2007).

defendant. Unfortunately, many jurisdictions lack the necessary resources and expertise; but *Giles* makes it even more important to find those resources. “Any society, any nation, is judged on the basis of how it treats its weakest members—the last, the least, the littlest.”¹³⁴ We must do a better job of protecting children who have been abused from continued threats, harassment, and hectoring once the abuse has been disclosed. Doing so will not only limit or eliminate the evidentiary problems created by *Giles* but, more importantly, it will help victims of abuse recover from the harm that has been inflicted upon them.

134. Press Release, Cardinal Roger Mahony, Archbishop of Los Angeles, Creating a Culture of Life (Nov. 12, 1998), available at <http://www.losangelesmission.com/ed/news/0299news.htm>.