

# Texas Law Review

## *See Also*

### Commentary

#### *Giles v. California*: Is Justice Scalia Hostile to Battered Women?

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##### I. Introduction

As a former professor of political science and women studies, I am well aware of the opinions of the U.S. Supreme Court that subordinated the rights and, quite frankly, the lives of women. One need only read *Muller v. Oregon*<sup>1</sup> and *Bradwell v. Illinois*<sup>2</sup> to understand the deeply hostile judicial environment created by the Court when it addressed constitutional protection of women. Perhaps we can excuse the Court for its 19th-century view of women since it reflected an overtly misogynistic culture. Indeed, the power of the patriarch was inscribed in both law and traditions which shaped the role of women in both the family and the body politic. And during this period, Supreme Court's decisions, not unlike its decisions concerning the humanity of Africans enslaved in America, were informed by cultural imperatives that placed women outside the care and concern of the community and the body politic. It is important to remember that when

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1. 208 U.S. 412 (1908).

2. 83 U.S. (16 Wall.) 130 (1872) (Bradley, J., concurring).

*Muller* and *Bradwell* were decided, women were (1) excluded from the body politic; (2) the sexual property of their husbands; and (3) consigned as beasts of burden in the home and in the factories that dotted the landscape of the Northeast.<sup>3</sup>

But it is 2009, and we have come a long way, have we not?

There is a trilogy of decisions that contest the “we’ve come a long way, baby,” anthem of the 1980s, specifically as it applies to women, the Constitution, and the U.S. Supreme Court. I am referring to *Giles v. California*,<sup>4</sup> *Davis v. Washington*,<sup>5</sup> and *Town of Castle Rock v. Gonzalez*.<sup>6</sup> Because of space limitations, this comment will focus on *Giles*, with an abbreviated analysis of *Davis* and *Castle Rock*.

*Giles* reveals two moral dilemmas: (1) whether a search for truth should be sacrificed to our notions of due process; and (2) whether *Giles*’s protection of the accused is premised on beliefs tainted by sexism. These two questions frame this commentary.

## II. Truth, Due Process and Conceptions of Fairness

In writing about *Giles*, Professor Lininger raises utilitarian concerns about truth seeking as a function of the trial process and its relationship to the Sixth Amendment Confrontation Clause.<sup>7</sup> Indeed, the Court in *Nix* identified the search for truth as the “very nature of a trial.”<sup>8</sup> The Confrontation Clause was critical to the trial process because confrontation “further[ed] the goal of truth-seeking.”<sup>9</sup>

I would argue that the Confrontation Clause is more about protecting the integrity of the trial process than a search for truth. The Sixth Amendment requirement of confrontation was crafted to protect the integrity

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3. See, e.g., Charlotte Perkins Gilman, *The Yellow Wallpaper*, in “THE YELLOW WALLPAPER” AND OTHER STORIES (Dover Thrift 1997) (1892); KATHERINE PATERSON, *BREAD AND ROSES, TOO* (2007) (drawing upon the historic 1912 labor strike by women in the Lawrence, Massachusetts textile mills); DAVID VON DREHLE, *TRIANGLE: THE FIRE THAT CHANGED AMERICA* (2004) (providing historical account of the March 11, 1911 Triangle Shirtwaist Factory fire that killed 146 workers, mostly immigrant Italian, Jewish, and Irish women garment workers in New York). This fire changed the topography of labor law and ushered in a new era for workers. I should also add that my grandmother, Maria Core Miccio, survived the fire and had the daunting task of identifying her friends who perished from the flames. Because the owners of the factory had locked the exit doors on the 9<sup>th</sup> floor, many of the women and girls were forced to jump or burn to death. This was the worst tragedy in New York history until September 11, 2001. See also VIRGINIA WOOLF, *A ROOM OF ONE’S OWN* (1929).

4. 128 S. Ct. 2678 (2008).

5. 547 U.S. 813 (2006).

6. 545 U.S. 748 (2005).

7. Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing their Victims*, 87 TEXAS L. REV. 857 (2009) [hereinafter Lininger, *The Sound of Silence*].

8. Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEXAS L. REV. 271, 295 n.138 (2006) (quoting *Nix v. Whiteside*, 475 U.S. 157, 166 (1986)).

9. *Id.* at 295.

of the trial process by insuring that this process was fundamentally fair. Safeguarding fairness would be insured through cross-examination of witnesses at trial. The introduction of statements by an unavailable witness, regardless of relevance or materiality, would be subject to constitutional scrutiny.

However, as currently structured, our adversarial process is many things, but it is not a search for truth. The adversarial process crafted by the Framers is concerned with “far more than a search for truth” because “the constitutional rights that are provided by our system of justice serve independent values that . . . outweigh the truth-seeking value, a fact made manifest when we realize that those rights, far from furthering the search for truth, *may well impede it.*”<sup>10</sup> Indeed, *if* a trial was a search for the truth, the right against self-incrimination would be subordinate to truth-seeking. Moreover, use of the Confrontation Clause to block introduction of statements when the accused has intentionally killed the declarant would be an affront to truth-seeking, regardless of motive.<sup>11</sup>

Unlike the U.S. Supreme Court, New York’s appellate courts recognize the tension between “truth” and our conceptions of “fundamental fairness.” The courts have consistently held that a trial is *not* a search for the truth, but rather a test of what the prosecution can prove and what reasonable doubt the defense can raise.<sup>12</sup> New York has laid bare the truth here, pardon the pun. A trial is really a search for reasonable doubt and truth may, indeed, be a casualty of this process. The salient question is whether “truth” and “fairness” are incompatible or discordant principles within our adversarial process. The tension between “truth” and “fairness” is evident in *Giles*.

In *Giles*, the accused killed his girlfriend by firing six bullets into her body. Three weeks prior to the shooting, Giles had beaten Ms. Avie, threatened to kill her, and punctuated his threat by brandishing a knife. Ms.

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10. Monroe H. Freedman, *Judge Frankel’s Search for Truth*, 123 U. PA. L. REV. 1060, 1063 (1975) (emphasis added); *see also infra* note 13 and accompanying text.

11. Use of the term “statements” refers to witnesses’ out-of-court statements made to police.

12. *See* *People v. Jackson*, 571 N.Y.S.2d 721, 724 (N.Y. App. Div. 1991) (finding that the defendant’s right to a fair trial was impaired by, among other things, “improper comments made by the prosecutor . . . that a trial is ‘the search for the truth’”); *People v. Rivera*, 501 N.Y.S.2d 817, 820 (N.Y. App. Div. 1986) (finding that a defendant was denied a fair trial because, among other things, the prosecutor “characterized a trial as ‘a search for the truth,’ thereby proposing that the jury might convict even in the absence of proof beyond a reasonable doubt so long as the jury concluded that its verdict represented the truth”); *People v. Sepulveda*, 481 N.Y.S.2d 870, 873 (N.Y. App. Div. 1984) (finding that a defendant was deprived of his rights to confrontation and to receive a fair trial because, among other things, the prosecutor remarked to the jury that “the trial was not a search for a reasonable doubt but a search for the truth”); *People v. Robinson*, 442 N.Y.S.2d 119, 11920 (N.Y. App. Div. 1981) (“[W]e view with disfavor the attempt by the prosecutor to subvert the law relative to reasonable doubt by [telling the jury]. . . ‘You are not here to search for reasonable doubt. You are here to search for the truth.’”).

Avie gave details of this attack to police. Twenty-one days later, Avie was dead.<sup>13</sup>

Giles's defense? Justification.<sup>14</sup>

Was Giles "justified"? Is not truth distorted through this defense, which renders Avie the attacker and Giles the innocent victim? If left unchallenged, Giles's account would be the only version heard by the jury—the cruelty and violence that *his* conduct created would be invisible. Her statements were necessary to refute Giles's claim of self-defense. If the defense invoked the Confrontation Clause to block admission of her statements, the trial, as a truth-seeking enterprise would be subordinate to conceptions of fairness.

In cases such as *Giles*, the doctrine of Forfeiture by Wrongdoing (FBW) evens the playing field by allowing into evidence statements of a victim or witness unavailable to testify due to the conduct of the accused. But Justice Scalia restricted the FBW doctrine to situations where the accused acts with the specific intent to silence the witness/complainant. According to Justice Scalia, *intentionally* killing the witness is not evidence of intent to silence. The prosecutor must prove that the accused not only intended the natural and probable consequences of his act (death of the complainant), but killed the witness/complainant to silence her. This distorts not only the truth-seeking process, but also commonly held beliefs concerning intentionality.

To make matters worse, the test to determine motive is *wholly* subjective. As the court in *People v. Goetz*<sup>15</sup> noted, a wholly subjective standard is no standard at all.<sup>16</sup> Absent an objective prong to qualify one's subjective belief, the State must prove that the accuser's account was incredible as a matter of law. A subjective test is so particularized as to create a standard of one—and that one is the accused. While *The World According to Garp* standard may work in literature, it does not work in law because it creates a narrow, if not impossible, conduit through which facts must pass to reach jurors. And by restricting information that is critical to the fact-finding enterprise, it not only denies authenticity in the trial process, but fairness to the *people*.<sup>17</sup>

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13. *Giles v. California*, 128 S. Ct. 2678, 2681–82 (2008).

14. *Id.*

15. 68 N.Y.2d 96 (N.Y. 1986).

16. *See id.* at 113–15 (holding that because using a wholly subjective test to determine whether a defendant appropriately used deadly physical force would be very dangerous in that it would permit a jury to acquit every defendant who believed that his actions were reasonable, the defendant's subjective belief needed to be balanced against what a reasonable person in defendant's circumstances would have believed). The *Goetz* test, which subjectively qualifies the objective reasonable person, prevents a different reasonableness test being applied to every single defendant claiming justification. As such, the *Goetz* test mediates between particularity and generality.

17. *See generally* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007) (arguing that the current construct of our adversarial system sacrifices truth and is morally problematic).

Lininger correctly identifies a potential outcome if Scalia's take on the Confrontation Clause is allowed to stand. If proof of motive is narrowed to what the accused believes, desires, and then proffers at trial, the Court will have created an intolerable situation for women survivors of male intimate violence. Why not kill her, as opposed to beat, stab, rape, shoot, or suffocate her? All the accused needs to show is that his motive was anything but "to silence." Once this occurs, FBW is a nonissue, and the prior statements made by the survivor-now-decedent to police are excluded.<sup>18</sup> Scalia's limited view of FBW transforms the Confrontation Clause into a shield, frustrating the search for truth or locating individual accountability—a result I doubt that the founders would have applauded, much less countenanced. To state it quite bluntly, Justice Scalia has painted and pinned a bull's-eye on the backs of battered women.

Scalia does lob a bone to the liberal Justices. He opines that evidence of ongoing abuse "intended to dissuade the victim from resorting to outside help" would be relevant to establish the defendant's mental state.<sup>19</sup> Wonderful, but: (a) this is dicta, and (b) it does not comport with Scalia's use of a wholly subjective test to prove the specific intent to silence.<sup>20</sup> Rather, he has inserted an inference test which permits the use of objective evidence to refute the defendant's claim. For example, if I kill X by shooting him six times at close range then that act, within the context of FBW, may prove that I intended to cause X's unavailability in the world *and* at trial.<sup>21</sup> Not to further muddy the mental-state waters, but one could argue that I was being deliberately indifferent or willfully indifferent to the effect my conduct would have on the decedent's ability to testify. And where such indifference exists, it is equivalent to knowledge of the harm.<sup>22</sup>

Either Scalia reversed himself, or he has no intention of recognizing pattern or practice to defend against the Confrontation Clause's exclusion of testimonial statements to police by battered women. It strains credulity, however, that Scalia unwittingly did an about-face or that he can be trusted to use the caveat that I term as "the bone." During oral argument in the *Davis*

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18. In keeping with *Davis*, testimonial statements to police are excluded absent a finding of the specific intent to silence the declarant. Non-testimonial statements do not run into the Sixth Amendment, but they may be excluded as hearsay under the Federal Rules of Evidence.

19. *Giles v. California*, 128 S. Ct. 2678, 2693 (2008).

20. *See id.* at 2701 (Breyer, J., dissenting).

21. One could also argue that I am willfully indifferent to the outcomes which flow from my act, including silencing the accuser or witness. While this commentary can not examine fully the conceptual basis of "knowledge" and "willful indifference," these two ideas are important when ascribing guilt or locating intent. *See* LUBAN, *supra* note 18, at 209–36; Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 37–38 (1994).

22. *See generally* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990) (citing several interpretations of willful indifference as knowledge).

case, Scalia ridiculed Ginsburg's concern that Confrontation Clause jurisprudence could result in violence against battered women by replying, "Maybe we should just . . . suspend the Confrontation Clause in spousal abuse cases . . ." <sup>23</sup> Then, in *Giles*, Scalia repeated his admonition by asking whether the Court should cater to battered women by creating an exception to the specific intent-to-silence requirement he had just imposed. From where I sit, his bone to the liberal Justices does just that. Rhetoric aside, I suspect that Scalia's crafting of an "intent by inference" exception was an attempt to reel in the more liberal Justices. It defies logic that Scalia would abandon the narrow interpretation of "unavailability" for a rule that produces the opposite result.

The factual context of *Giles* raises the question of whether Scalia's interpretation of FBW is an affront to both truth-seeking and our conceptions of fairness. Introduction of Avie's prior statements to the police, regardless of their testimonial character, was critical to whether Giles's act was justified or criminal. Further, admitting her statements at trial would not have violated notions of fundamental fairness because Giles's act of killing her ultimately silenced her, forever. Thus, an unquestionable consequence of Giles's act was Avie's absence at trial, unable to testify and insinuate her voice into the proceedings.

Finally, a major justification for our theory of fairness is to curtail the power of the state over its citizens, or as Luban observes, "[t]o handicap the state in its power even legitimately to punish us."<sup>24</sup> As practiced, however, fairness is more about keeping the state honest than achieving justice. And when the defendant kills his intimate partner, use of the Confrontation Clause to exclude the victim's statements to police at trial does little to advance notions of justice, truth, or morality. As Tracey Meares notes, under the Warren Court, "fundamental fairness jurisprudence . . . was replete with references to . . . a 'public-regarding' vision of fairness. This notion . . . includes the public, as well as the defendant, in the articulation of constitutional values relevant to the fair operation of criminal justice."<sup>25</sup> While safeguarding the rights of defendants is critical to the fairness of our criminal justice system, "promoting the interests of the defendant to the exclusion of the public's"<sup>26</sup> harms both individual rights and the rights of the collective "we." Scalia has missed this point entirely, to the detriment of battered women.

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23. See Lininger, *The Sound of Silence*, *supra* note 7, at 885 (quoting Transcript of Oral Argument, *Davis v. Washington*, 547 U.S. 813 (2004) (No.05-5224), 2006 WL 766735).

24. LUBAN, *supra* note 17, at 30.

25. Tracey L. Meares, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105 (2005) [hereinafter Meares, *Fundamental Fairness*]; see also Tracey L. Meares, *What's Wrong with Gideon*, 70 U. CHI. L. REV. 215 (2003).

26. Meares, *Fundamental Fairness*, *supra* note 25, at 116.

### III. Sexism: The Root of This Evil

*Giles* is important from a moral perspective because what passes for legal reasoning is really sexist in its tenor and consequence. Indeed, if we read *Giles* with *Davis* and *Castle Rock*, the misogynist voice of Justice Scalia is overwhelming. I am very aware that my characterization of a Supreme Court Justice as misogynist or sexist will not win points with the formalists among us. But I would argue that Justice Scalia's formalism is inconsistent, at best, but his adherence to misogynist belief is a constant—at least as his beliefs shape his opinions of and about battered women.

#### A. *Castle Rock*

In *Castle Rock*, Justice Scalia, writing for the majority, held that the Colorado legislature failed to create a Fourteenth Amendment property interest in the enforcement of an order of protection.<sup>27</sup> Scalia asserts, “we do not believe that these provisions of Colorado law truly made enforcement of restraining orders mandatory” because “a well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.”<sup>28</sup> In thirty-two words, Justice Scalia invalidated not only the findings of the Judiciary Committee of the U.S. Senate, but the legislative history of thirty-two states.<sup>29</sup> With the stroke of a pen, he wiped out the history of police arrest avoidance which characterized law enforcement conduct for over forty years.<sup>30</sup>

To add insult to injury, Scalia engaged in a tortured analysis of the word “shall” in Colorado's mandatory arrest law. According to Scalia, “shall” means “maybe” or “maybe not.” According to his interpretation, the Ten Commandments are really the Ten Suggestions. While the latter characterization may bring a smile, the outcome of *Castle Rock* is anything but amusing. The *cultural* rule that migrates from the decision has left the impression with some prosecutors that the “mandatory” in mandatory arrest has been expunged.<sup>31</sup> At the very least, it places such statutes at risk of being ignored and unenforceable.

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27. *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 760–62 (2005).

28. *Id.* at 760 (emphasis omitted).

29. S. COMM. ON THE JUDICIARY, REPORT ON THE VIOLENCE AGAINST WOMEN ACT OF 1993, S. REP. NO. 103-138, at 38 (1993) [hereinafter VAWA SENATE REPORT 1993].

30. See G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111 (2005); G. Kristian Miccio, *A Cruel Deception: Castle Rock, Constitutional Protection and State Accountability*, 10 GEO. J. GENDER & L. (forthcoming 2009); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237 (2005) [hereinafter Miccio, *A House Divided*].

31. Shortly after *Castle Rock*, the Aurora Colorado District Attorney opined that due to the decision in *Castle Rock*, police were no longer under a mandate to arrest.

In deciding how to rule, Scalia had a choice. He could have relied on the legislative history of Colorado, the plain meaning of the word “shall,” the findings of the Judiciary Committee,<sup>32</sup> the U.S. Commission on Civil Rights Report, or the analysis of mandatory arrest statutes in the myriad amicus briefs filed on behalf of Jessica Gonzalez.<sup>33</sup> Alternatively, he could rely on a 1980 ABA Report that was issued before mandates in domestic violence cases were part of any statutory scheme. Scalia chose the latter.

### B. *Davis*

*Davis* incorporated two cases involving battered women attacked by their paramours. In both cases, the women made statements to either the police or agents of the police. Justice Scalia created two categories to determine whether statements are admissible or whether the Confrontation Clause bars admissibility. The two categories are testimonial and non-testimonial statements. Thus, if statements are testimonial and the witness is unavailable, the State is barred from introducing the statements at trial.

What determines the testimonial quality of statements is whether they were made to police during or after the “emergency.” Justice Scalia ignores

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32. See generally VAWA SENATE REPORT 1993, *supra* note 29; U.S. COMM’N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 20–22 (1978) (“Perhaps the most serious problem for the individual who has suffered from assault is the failure of the police to respond to [a] call for help.”).

33. See, e.g., Brief Amicus Curiae of the National Ass’n of Women Lawyers and the National Crime Victims Bar Ass’n in Support of Respondent at 8–10, *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278), 2005 WL 328201 (discussing the consequences of domestic violence and failure of police to enforce mandatory arrest statutes); Brief Amicus Curiae of the American Civil Liberties Union et al. in Support of Respondent at 17–22, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 328202 (explaining how the police further endanger victims of domestic violence when they fail to enforce protection orders); Brief of National Black Police Ass’n et al. as Amici Curiae Supporting Respondent at 27–30, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 328203 (discussing police protocol with respect to domestic violence); Brief Amicus Curiae of National Network to End Domestic Violence et al. in Support of Respondent at 19–30, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 353608 (discussing pervasiveness of domestic violence and the likely increase in such violence that results from failure to enforce protection orders); Brief Amicus Curiae of AARP in Support of Respondent at 4–10, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 353692 (discussing domestic violence in the specific context of elder abuse); Brief of Amicus Curiae The Family Violence Prevention Fund et al. in Support of Respondent at 4–10, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 353693 (discussing domestic violence and its consequences for children); Brief of Peggy Kerns, Former Member of the House of Representatives of the State of Colorado, and Texas Domestic Violence Direct Service Providers, as Amici Curiae in Support of Respondent at 12–14, 19–21, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 353694 (discussing the societal impact of domestic violence and the danger of allowing police too much discretion in enforcing protection orders); Brief of National Coalition Against Domestic Violence and National Center for Victims of Crime as Amici Curiae in Support of Respondent at 12–17, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 353985 (explaining police procedure and the increased danger to domestic violence victims that results from failure to enforce protection orders); Brief of Int’l Law Scholars et al. as Amici Curiae in Support of Respondents at 27–28, *Castle Rock*, 545 U.S. 748 (No. 04-278), 2005 WL 328200 (discussing the impact of police failure to enforce protection orders on U.S. treaty obligations).

an important distinction between stranger and domestic violence crimes. While stranger crimes may be finite in duration, as opposed to episodic, this is not the reality for battered women.<sup>34</sup> As Deborah Tuerkheimer notes, “[T]he meaning of ‘exigency’ to a victim of domestic violence is different than it is to victims of other types of crime. This reality fatally undermines judicial reasoning predicated on the ‘crying for help’ [(non-testimonial)] versus ‘providing information to law enforcement’ rubric [(testimonial)].”<sup>35</sup>

In order to determine whether the emergency has ended or is ongoing, Scalia employs an objective test.<sup>36</sup> He shifts the focus from what the victim believes to what a reasonable person would conclude.<sup>37</sup> In domestic violence cases, the survivor’s perception of harm is critical in assessing emergency. An objective test eliminates her perception of harm. Additionally, the emergency standard deployed by the majority requires immediacy, instead of imminence, which undermines truth in battered-women cases. The effect of hearsay rules and *Davis* may end the prosecutorial practice of trying domestic violence cases in the absence of survivor testimony. Requiring that the survivor testify at trial may well compromise her safety and that of her family.

And Justice Scalia? He is unapologetic about the harmful effect of *Davis* on battered women.<sup>38</sup>

### C. *Giles*

*Giles* is the third case in this trilogy. Again, Scalia could have crafted a decision which protected the rights of defendants while acknowledging the reality of battered women’s lives. Instead, he chose to construct a rule that would adversely impact the prosecution of batterers, placing women at further risk.<sup>39</sup> It should be noted that a broader interpretation of “unavailability” would not have destroyed conceptions of fairness or due process. But how Scalia arrives at his decision in *Giles* speaks volumes about his attitude toward women, in general, and battered women, in particular.

In support of his position, Justice Scalia cites English cases from the 1700s that addressed the issue of *ex parte* statements. His reliance on three cases from the eighteenth century is problematic because during that period

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34. See Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1 (2006) (“Battering—a course of conduct that is ongoing, patterned, and characterized by control—is qualitatively different from violence against strangers.”).

35. *Id.* at 25.

36. See *Davis v. Washington*, 547 U.S. 813, 822.

37. See *id.* at 822.

38. See *supra* text accompanying note 24.

39. See Lininger, *The Sound of Silence*, *supra* note 7, at 866–70 (providing an excellent discussion of the dynamics of male intimate violence).

husbands were granted the right to beat their wives.<sup>40</sup> John Stuart Mill recognized that marriage gave husbands a license to physically and sexually abuse their wives. Writing in 1859, Mill noted:

The State, while it respects the liberty of each in what specially regards himself, is bound to maintain a vigilant control over his exercise of any power which it allows him to possess over others. This obligation is almost entirely disregarded in the case of the family relations . . . . The almost despotic power of husbands over wives needs not be enlarged upon . . . .<sup>41</sup>

British common law protection of patriarchal power extended to control over women's wages, if she was permitted to work, over her children, and over her body. Violence in the home was invisible and legally non-cognizable.<sup>42</sup> Therefore, domestic violence cases in eighteenth-century English courts were non-existent.

As for America, even if the forfeiture doctrine gained currency during the Founding Era, its application in trials involving male intimate violence would have been out of the question since husbands were legally and culturally permitted to beat and rape their wives.<sup>43</sup> To rely on "authority" from an era when domestic violence was hidden and legally condoned is akin to using authority from an era of legalized slavery to interpret civil rights laws in claims of race discrimination by African Americans.<sup>44</sup> Yet I doubt that Scalia's use of such "authority" was a consequence of ignorance. Not unlike *Davis* and *Castle Rock*, amicus briefs that detailed the history and extent of male intimate violence in the United States were filed with the Court. Surely, Justice Scalia had unfettered access to these briefs. But, as in *Castle Rock*, Scalia chose to disregard this information and rely on antediluvian opinions from eighteenth century England.

Finally, Scalia not only instituted a subjective test, but also a requirement that the State prove motive. Remember that in *Davis* he shifted the focus from the survivor's subjective belief to a wholly objective test. In

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40. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 432 (Univ. of Chi. Press 1979) (1765); see also *Muller v. Oregon*, 208 U.S. 412, 421–23 (1908) (justifying protective legislation for women because of their weaker physical structure); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (agreeing with the affirmance of an Illinois law barring women from practicing law and reiterating the subservient role of women confirmed by "nature herself").

41. JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 116 (John Gray ed., Oxford Univ. Press 1998) (1859).

42. See Miccio, *A House Divided*, *supra* note 30, at 116–17.

43. See R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 59–62 (1979) (chronicling the legal history of chastisement, whereby a woman surrendered her legal rights and distinct existence in marriage); see generally JULIET MITCHELL, WOMAN'S ESTATE (1971) (examining the politics behind female oppression by the Patriarchy).

44. See Lininger, *The Sound of Silence*, *supra* note 7, at 876–77 (making the analogy).

*Giles*, a domestic violence case, Scalia crafts a test that is so restrictive as to make it nearly impossible for the state to introduce the survivor's statements to the police at trial. Scalia could have crafted a hybrid test so that intent to silence could be inferred through the defendant's conduct. He did not. And this result will most likely endanger battered women. Here, contempt is deadly.

#### IV. Conclusion

Deconstructing *Giles* reveals its moral paucity. And when *Giles* is analyzed along with *Davis* and *Castle Rock*, it is clear that its moral paucity derives from Justice Scalia's contempt for women. This contempt is neither inadvertent nor unintentional. It is neither indiscriminate nor inconsequential, but a deliberate and significant part of Scalia's jurisprudence. And it is powerful in its replication of attitudes that relegated women's experience outside common concern and collective care. Scalia's opinions do not misapprehend women's experience in homes marked by terror; they ignore, trivialize and marginalize this experience. In 2009, such unabashed neglect is unacceptable. When it is a product of juridical opinions, it is offensive. When it is a consequence of Supreme Court decisions, it is intolerable.

For battered women, Justice Scalia has exiled care and justice from the province of judging.