

## HISTORY REDUX: THE UNHEARD VOICES OF DOMESTIC VIOLENCE VICTIMS, A COMMENT ON AVIVA ORENSTEIN'S *SEX, THREATS AND ABSENT VICTIMS*

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Despite the optimistic belief that times have changed and that the battered womens' shelter movement<sup>1</sup> and the massive influx of \$4 billion in VAWA funding over the past fifteen<sup>2</sup> years has had a significant impact on the fight against domestic violence, it takes an article like Professor Orenstein's<sup>3</sup> to remind us that courts are still stuck in the past. Both the Confrontation Clause originalism of 1791 favored by Justice Scalia in *Davis v. Washington*<sup>4</sup> and *Giles v. California*<sup>5</sup> and the hearsay interpretation of the 1879 *Bedingfield* case analyzed by Professor Orenstein result in death permanently silencing women killed by their intimates inside as well as outside the courtroom, even when someone who has previously heard their voices is available to testify. As I have argued elsewhere, the dynamic nature of domestic violence should work in favor of admitting the victim's testimony in either an emergency or reliability based doctrinal regime.<sup>6</sup> Instead, courts ignore context and, while claiming domestic violence should follow the same rules as other cases, place femicide victims in a separate category that does not benefit from relaxed admissibility standards governing other emergencies.

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1. See Myrna S. Raeder, *Cultural Shifts: Addressing [Un]intended Consequences of the Fight Against Domestic Violence*, 30 CRIM. JUST. ETHICS 124 (2011) (providing general background about the movement and its impact).

2. Office of Violence Against Women, Violence Against Women Act Overview, U.S. DEPARTMENT OF JUSTICE, <http://www.ovw.usdoj.gov/overview.htm> (last visited April 29, 2011).

3. Aviva Orenstein, *Sex, Threats, and Absent Victims: The Lessons of Regina v. Bedingfield for Modern Confrontation and Domestic Violence Cases*, 79 FORDHAM L. REV. 115 (2011).

4. 547 U.S. 813 (2006).

5. 554 U.S. 353 (2008).

6. See, e.g., Myrna S. Raeder, *Being Heard After Giles: Comments on The Sound of Silence*, 87 TEX. L. REV. SEE ALSO 105, 111–13 (2009) [hereinafter *After Giles*]; Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL'Y 759, 774–66 (2007) [hereinafter *After Davis*]; Myrna S. Raeder, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1512–16 (1996) [hereinafter *Simpson and Beyond*] (pre-Crawford).

*Sex, Threats and Absent Victims* aptly opens with the voice of the victim, Eliza Rudd, whose throat had just been slashed: “Oh, aunt, see what Bedingfield has done to me.”<sup>7</sup> To say that this chilling rebuke is all too typical of the voices of women who remain unheard in the courtroom is not an exaggeration. Many of the women who are killed by their intimates have identified their abusers either at the time of their death or in relation to previous incidents of abuse. As Professor Orenstein relates the events, *Bedingfield* was complicated by the fact that the defendant’s own throat was also cut and at trial he claimed that the victim attempted to kill him before killing herself.<sup>8</sup> The decedent’s statement was rejected at trial as not fitting any hearsay exception because it did not occur at the very time her throat was slashed, but the defendant was convicted based on other evidence.<sup>9</sup> *Bedingfield* was not a classic domestic violence case: the defendant was married to someone else, though it was undisputed he had a sexual relationship with Rudd, and had previously threatened her, but the final dispute regarded the use of a pony and cart.<sup>10</sup> Indeed, in modern parlance this may have been more a function of situational violence rather than coercive control.<sup>11</sup> Yet, even here the case is clouded because a witness claimed the defendant’s threats the night before her death were in the classic vein of “If I can’t have you nobody can.”<sup>12</sup> The defendant claimed the death was a result of the victim’s jealous rage when he told her he had impregnated someone else, and steadfastly maintained his innocence.<sup>13</sup> Many apparently believed his claim and signed a petition unsuccessfully requesting commutation of his death penalty,<sup>14</sup> in part because they believed that while the victim’s dying statement had not been admitted, it was widely known.<sup>15</sup> Professor Orenstein finds support for the verdict in the medical evidence, though ironically she questions whether Rudd ever uttered the words that were excluded given the medical evidence regarding the condition of her throat.<sup>16</sup>

*Bedingfield* is used as the starting point to critique the *res gestae* exception to hearsay then in effect in England. Orenstein goes on to describe how Americans considered the decision as taking an overly narrow view of how contemporaneous a statement had to be to justify its admission.<sup>17</sup> Evidence luminaries Wigmore and Thayer both rejected the *Bedingfield* limitation, albeit for different reasons, and *res gestae* morphed

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7. Orenstein, *supra* note 3, at 116.

8. *Id.* at 117.

9. *Id.*

10. *Id.* at 121–22.

11. *See, e.g.*, Raeder, *supra* note 1, at 140–41.

12. *See* Orenstein, *supra* note 3, at 125 (describing the defendant’s jealousy, noting that Bedingfield reportedly said, “‘Before you shall have anybody come here in my place I’ll cut your — throat.’” (quoting *The Ipswich Tragedy*, *IPSWICH J.*, Sept. 20, 1879, at 7, available at Gale, Doc. No. Y3202579060)).

13. *Id.* at 122.

14. *Id.* at 123.

15. *Id.* at 124.

16. *Id.* at 125–26.

17. *Id.* at 131.

into excited utterances and eventually included present sense impressions.<sup>18</sup> Orenstein points out that the very statement rejected in *Bedingfield* still poses “significant problems for modern confrontation doctrine”<sup>19</sup> in domestic violence cases, which after *Davis* focuses on whether the statement addresses an ongoing emergency as opposed to relating past facts for prosecution.<sup>20</sup> She then turns to *Giles*, addressing forfeiture in a domestic violence context, which the court found required an intent to procure the declarant’s absence in order to prevent the witness from testifying.<sup>21</sup>

The article is rich in detail about how the feminist agenda switched domestic violence from a social to a criminal issue, but had difficulty overcoming patriarchal attitudes or the reluctance of women to testify.<sup>22</sup> Like her, I have commented on the fallout of our domestic violence policies that she highlights in the article.<sup>23</sup> These include the multitude of reasons that may result in women refusing to testify against their intimates, ranging from love to fear of either personal injury or of losing children to foster care, to embarrassment or economic reality; the inability of the criminal justice system to keep women and their children safe, in large measure because the typical outcome is a misdemeanor prosecution that may not even keep her abuser in jail for very long, while often diminishing his ability to get or keep a job; the mixed results from mandatory arrest and no drop policies, which have swelled the number of women as well as men caught up in the criminal justice system; the difficulty that *Crawford v. Washington*<sup>24</sup> and *Davis* has posed in prosecutions of batterers when women do not appear at trial; and the failure of *Giles* to provide an easy solution to the so-called “victimless” evidence based prosecutions that depend on hearsay to identify the defendant.

*Sex, Threats, and Absent Victims* makes a valuable contribution to the literature by revealing that the language used in *Bedingfield’s res gestae* analysis dovetails with *Davis’s* view of emergencies in that both are “in the moment” and ignore the dynamics of domestic violence which implicate a process rather than a finite event. Shortly after *Crawford*, I had predicted that courts might pull back on their expansive definitions of excited utterances since they evolved well after the adoption of the Constitution, and in an originalist approach, might prove more likely to be testimonial.<sup>25</sup> I based this on Justice Scalia’s reference in *Crawford* to the fact that in

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18. *Id.* at 133.

19. *Id.* at 134.

20. *Id.* at 135–40.

21. *Id.* at 141.

22. *Id.* at 144.

23. See generally *After Giles*, *supra* note 6; *After Davis*, *supra* note 6; Raeder, *supra* note 1; Myrna S. Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BKLYN L. REV. 311 (2005) [hereinafter *Remember the Ladies*]; *Simpson and Beyond*, *supra* note 6; Myrna S. Raeder, *Thoughts about Giles and Forfeiture in Domestic Violence Cases*, 75 BKLYN L. REV. 1329 (2010) [hereinafter *Giles and Forfeiture*].

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

25. *Remember the Ladies*, *supra* note 23, at 323–24.

1791, excited utterances were interpreted very narrowly as applying to *res gestae*, but not to after the fact descriptions,<sup>26</sup> and the decision of the New Jersey Supreme Court to cut back its interpretation of the excited utterance exception in light of the new constitutional regime.<sup>27</sup> Professor Orenstein observes that the timing approach has not worked for women in either the hearsay or confrontation context. To me, however, there are differences. Overall, I believe we have expanded hearsay exceptions unduly, devaluing cross-examination. While I would not return to a pre-*Bedingfield* view of *res gestae*, I would keep excited utterances confined to immediately surrounding circumstances, since I think that stress no longer eliminates the risk of fabrication once we get beyond the ten to fifteen minute range, or the responses are in answer to even gentle police questioning. In other words, some indication of trustworthiness beyond the rationale of excitement seems necessary to support a theory of admissibility.

Interestingly, *Michigan v. Bryant*,<sup>28</sup> the U.S. Supreme Court's latest foray into what I have dubbed "testimonialism,"<sup>29</sup> interjects reliability and hearsay analysis back into the Confrontation Clause mix by noting that "[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."<sup>30</sup> Similarly, *Bryant* cites *Davis* as implying that the likelihood of fabrication is "significantly diminished" for statements made with the primary purpose of resolving an emergency.<sup>31</sup> *Bryant* compares the rationale that excited utterances given under stress eliminate the possibility of fabrication to the fact that ongoing emergencies focus attention on the emergency and away from the use of such statements in a prosecution.<sup>32</sup>

This approach is curious because *Davis* clearly found that excited utterances had to be analyzed individually, and not as a category for Confrontation Clause purposes. In *Davis* and its companion case, *Hammon v. Indiana*,<sup>33</sup> both defendants appealed their convictions on the grounds that the statements admitted against them violated the Confrontation Clause—*Davis* argued that the victim's statements to a 911 operator were testimonial and *Hammon* argued that the victim's statements to a police officer memorialized in her affidavit were testimonial.<sup>34</sup> *Davis* split the baby, holding the statements introduced against *Davis* were nontestimonial, while those introduced against *Hammon* were testimonial. Is *Bryant* offering a nuanced suggestion that true excited utterances, i.e., *res gestae* should be viewed as more likely to be nontestimonial? Such an approach would be helpful in some domestic violence cases. Indeed, a long seemingly

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26. *Crawford*, 541 U.S. at 58 n.8.

27. *State v. Branch*, 865 A.2d 673, 690 (N.J. 2005).

28. 131 S. Ct. 1143 (2011).

29. *See, e.g., Giles and Forfeiture*, *supra* note 23, at 1337.

30. *Bryant*, 131 S.Ct. at 1155.

31. *Id.* at 1157.

32. *Id.*

33. *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom. Davis v. Washington*, 547 U.S. 813 (2006).

34. *Davis v. Washington*, 547 U.S. 813, 817, 819 (2006).

gratuitous footnote in *Bryant* indicates a number of other hearsay exceptions that appear to have purposes other than prosecution.<sup>35</sup> Again, the citation for this proposition is somewhat odd since the Court references *Melendez-Diaz v. Massachusetts* in support of business and public records, despite its holding that a sworn certificate indicating drug quantity was not a “traditional” record,<sup>36</sup> which again indicates that distinctions must be made that go beyond simple nomenclature.

While *Bryant* does not overtly cut away at *Davis*’s rejection of any substantive reliability test for nontestimonial hearsay, these references appear to surface reliability as a positive substantive value beyond the functional right of cross-examination that *Crawford* and *Davis* tells us is all the Confrontation Clause requires. This is particularly noticeable since the Court makes its first *Crawford* era reference to *Idaho v. Wright*,<sup>37</sup> a case that rejected a child’s statement to a pediatrician admitted under a residual exception, which in the modern regime poses problems because it is either a nontestimonial statement (because given to a private individual) that was rejected because it was unreliable, or a testimonial statement given to a private individual, unless the doctor is recharacterized as an agent of the police. If the former, its holding could still be justified on Due Process grounds, a route that is suggested in a footnote in which *Bryant* specifically resurrects the Due Process Clause of the Fifth and Fourteenth Amendments as alternative means of challenging the admissibility of unreliable evidence,<sup>38</sup> a view I have long held.

It is obvious that I have never been a fan of testimonialism, and agree with Professor Orenstein that the Court has demonstrated an undue insensitivity to the context of domestic violence.<sup>39</sup> The cues that Hammon’s wife, Amy Hammon, was still in danger permeated the facts described in the decision. Her fear, her husband’s interruptions, her statements about his breaking the phone and disabling her van were classic identifiers that suggested a pattern of coercive control or in current Confrontation Clause parlance signaled a continuing emergency. While coercive control of victims does not mean emergencies should never end in the domestic violence arena, it indicates why I think the current definition of emergencies doesn’t fit with what we know about the dynamics of most domestic violence cases. This approach makes no reasonable distinction between what we now classify as constitutionally acceptable or unacceptable, thus disadvantaging victims, but also lessening respect for the criminal justice system.

I had hoped that when someone other than Justice Scalia would be called upon to write a majority decision in a case defining emergencies, this disconnect might be addressed. I therefore find it ironic that although

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35. *Bryant*, 131 S.Ct. at 1157 n.9.

36. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2538 (2009).

37. 497 U.S. 805 (1990) (cited by *Bryant* for the rationale concerning excited utterances. *Bryant*, 131 S. Ct. at 1157).

38. *Bryant*, 131 S.Ct. at 1162 n.13.

39. Orenstein, *supra* note 3, at 150, 152.

Justice Sotomayor authored the decision in *Bryant*,<sup>40</sup> which broadly construed a medical emergency when the assailant had fled and the victim lay bleeding from a gunshot wound in a public place, the applicable analysis still disfavors battered women. Justice Sotomayor, herself a former prosecutor, faults the Michigan court for ignoring that “whether an emergency exists and is ongoing is a highly context-dependent inquiry,”<sup>41</sup> thereby downplaying Justice Scalia’s dismissive view that domestic violence could not be subject to separate Confrontation Clause rules.<sup>42</sup> She writes: “[a]s the context of this case brings into sharp relief, the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.”<sup>43</sup>

Despite her reliance on context, the opinion restates the *Davis* findings, and its analysis that domestic violence involves a “known and identified perpetrator”<sup>44</sup> and a “narrower zone of potential victims than cases involving threats to public safety”<sup>45</sup> makes it more likely that emergencies implicating domestic violence will be confined to the particular time and place of the incident. For example, *Bryant* explains that in *Davis* “we focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat to them.”<sup>46</sup> In other words, there is no “public” dimension to the crime which might suggest the threat of an ongoing emergency that could involve risk to additional individuals by an unknown assailant resulting in the statements being considered nontestimonial.<sup>47</sup> Thus, the Court differentiated the nature of the emergency in *Bryant* because it “extends beyond an initial victim to a potential threat to the responding police and the public at large.”<sup>48</sup>

*Bryant* also relied on the fact that a gun was used as indicating a continuing threat even though the assailant had fled.<sup>49</sup> Because virtually all domestic violence misdemeanors and many domestic violence felonies do not involve the use of guns, this too may justify a narrower definition of emergency in domestic violence cases. Thus, the dynamic nature of domestic violence still appears to be ignored in evaluating emergencies, and the facts that are common to domestic violence cases now have been characterized in a way that obviates their contribution to an ongoing emergency. Of course, in determining constitutionality, the emergency is only the starting point, since the focus is whether the primary purpose of the statement is to assist in an ongoing emergency as opposed to reporting a

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40. *Bryant*, 131 S. Ct. at 1143.

41. *Id.* at 1158.

42. *Giles v. California*, 554 U.S. 353, 374 (2008); *Davis v. Washington*, 547 U.S. 813, 832–33 (2006).

43. *Bryant*, 131 S. Ct. at 1162.

44. *Id.* at 1158.

45. *Id.*

46. *Id.* at 1158.

47. *Id.* at 1156.

48. *Id.*

49. *Id.* at 1164.

past event. But *Bryant* does not overtly back away from *Davis*, thereby reinforcing the likelihood that many statements made to the police in domestic violence situations will be testimonial, though it reiterates that informality is a factor favoring a statement being found nontestimonial,<sup>50</sup> which is often argued by prosecutors.

*Bryant's* clarification that statements must be considered from both the perspective of the declarant and the interrogator also appears likely to favor statements being found testimonial in domestic violence settings, since it means that there are two hoops to jump through before a finding of nontestimoniality. In addition, *Bryant* reaffirms the objective standard.<sup>51</sup> Professor Orenstein explains that an objective standard is not necessarily friendly to battered women<sup>52</sup> whose subjective cries for help in situations they know will reoccur may be viewed objectively as reports of past finite incidents, requested by police who want to solve crimes. In my view, however, an objective standard is probably easier to prove than a subjective one when deciding intent in cases where forfeiture is based on the failure of complainants to appear at trial since the mixed motives of uncooperative witnesses complicate the analysis.

Even in a testimonial approach, many statements of absent domestic violence declarants should lend themselves to admission by forfeiture analysis. Yet *Giles's* focus on intention to keep the victim from testifying does limit the likelihood of admitting such testimony. I am not uncomfortable with this result when the conduct is a misdemeanor and the complainant not only is alive, but also indicates by words or conduct that she does not want to press charges. As I have written elsewhere, I think the complainant's wishes should be respected in most misdemeanor and some felony cases that do not involve "risky" offenders who have demonstrated a pattern of abuse.<sup>53</sup> In other words, in most misdemeanors, women should be able to access the police to stop the violence without buying into a criminal justice system response that has the potential of worsening their lives and the lives of their children without an assurance of safety.

Professor Orenstein finds favor with Professor Tom Lininger's approach to forfeiture<sup>54</sup> which would find intent "where the defendant has violated a restraining order, committed any act of violence while judicial proceedings are pending, or engaged in a prolonged pattern of abusing and isolating the victim."<sup>55</sup> In my previous comments on his article,<sup>56</sup> I too was impressed with his solutions, while suggesting that his rules be considered as rebuttable presumptions<sup>57</sup> and adding some additional types of evidence as supporting forfeiture, such as the existence of a protective order rather than

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50. *Id.* at 1160.

51. *Id.* at 1156.

52. Orenstein, *supra* note 3 at 152.

53. Raeder, *supra* note 1, at 144–46; *Remember the Ladies*, *supra* note 23, at 367–73.

54. Orenstein, *supra* note 3, at 157–58.

55. Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 865 (2009).

56. *After Giles*, *supra* note 6.

57. *Id.* at 110.

its violation. For example, in murder prosecutions the killing itself would violate the order, while in other domestic violence prosecutions obtaining the order gives the defendant notice of potential legal consequences and triggers behaviors such as isolating the victim, associated with the goal of coercive control.<sup>58</sup> As I have also argued, proof that the defendant has an abusive personality, and proof that the decedent suffered from Post Traumatic Stress Disorder should also be considered in the intent analysis since the forfeiture issues are preliminary facts for the judge and therefore are not subject to the rules of evidence which would prohibit character from being considered by jurors.<sup>59</sup>

When the victim's voice is silenced by death, I view the question of forfeiture differently than in other domestic violence cases. Pre-*Giles* I argued for a standard that did not require intent to keep the witness from testifying.<sup>60</sup> Like Professor Orenstein, I have written that when unavailability is a product of death rather than lack of cooperation with the authorities, the ambiguities surrounding their silence disappear and I agree that *Giles*'s view of forfeiture is too narrow. However, I have discussed elsewhere that while *Giles* ostensibly handed prosecutors and victims' advocates a defeat, reworking the votes obtains a supermajority for inferred intent in domestic violence murder cases, and at least a simple majority composed of the concurrers and dissenters for inferred intent all domestic violence cases.<sup>61</sup> After *Giles*, I also think flight should prompt a finding of forfeiture since it can be inferred that if the perpetrator flees, he is impeding the integrity of the judicial process, and intends to hinder justice.<sup>62</sup>

Elsewhere, I have also argued that beyond forfeiture, the defense opens the door to evidence that indicates the state of mind of a decedent when the defense is based on claims of suicide, accident, or self-defense.<sup>63</sup> In other words, trial strategy should be viewed as waiving any Confrontation Clause challenge concerning otherwise admissible evidence that rebuts the defendant's testimony about the decedent's state of mind. Thus, the statement to the victim's aunt in *Bedingfield* should have been admitted because it indicates that she was not likely to have attempted to kill the defendant, which makes her state of mind relevant to his theory of the case. Domestic violence prosecutions have been set back by the testimonial approach, but it may ultimately cause us to be smarter in how we fight domestic violence.

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58. *Id.* at 109–10.

59. *Id.* at 111–13.

60. *Remember the Ladies*, *supra* note 23, at 361–65.

61. *Giles and Forfeiture*, *supra* note 23, at 1345–46.

62. *After Giles*, *supra* note 6, at 109–10.

63. *Giles and Forfeiture*, *supra* note 23, at 1341–43.