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## Articles

### The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims

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*Under what circumstances does the accused forfeit the right to confront the accuser? In a domestic-homicide case, can the victim “testify from the grave” by means of hearsay statements preceding her death? Can the accused invoke the Sixth Amendment to insist upon cross-examination of a declarant whom he killed?*

*On June 25, 2008, the Supreme Court issued a ruling in *Giles v. California* that restricted the doctrine of forfeiture by wrongdoing. Prior to *Giles*, most lower courts had determined that the accused forfeits confrontation rights by killing the hearsay declarant—even if the motive for the homicide was not to silence the victim as a trial witness. In *Giles*, the majority held that the accused does not forfeit confrontation rights by murdering the declarant unless the accused specifically intended to thwart the declarant’s testimony. Merely killing the victim is no longer sufficient to extinguish the defendant’s right to cross-examine that victim. As a bewildered Chief Justice Roberts commented, the *Giles* ruling gives batterers “a great benefit” for killing their victims instead of merely injuring them.*

*This Article examines the landscape of confrontation rights after *Giles*. The Article considers the theoretical underpinnings of the forfeiture doctrine, and presents a framework within which courts can analyze claims of forfeiture by wrongdoing. The framework provides practical guidance for assessing a defendant’s intent to cause the unavailability of the declarant at trial, as required to prove forfeiture under *Giles*. This Article also proposes to amend*

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*Federal Rule of Evidence 804(b)(6), which codifies the doctrine of forfeiture by wrongdoing. The purpose of this Article is to facilitate the effective prosecution of domestic violence cases, particularly domestic homicide, while complying with the new requirements announced by the Supreme Court in Giles.*

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Howard Streeter assaulted the mother of his child in the parking lot of a Chuck E. Cheese restaurant.<sup>1</sup> He forced her to the ground.<sup>2</sup> He doused her with gasoline.<sup>3</sup> Then he ignited the gas with a cigarette lighter.<sup>4</sup> Their young son watched in horror as flames engulfed his screaming mother.<sup>5</sup> She sustained burns over 60% of her body.<sup>6</sup> When firefighters arrived, the victim begged them to kill her rather than prolong her suffering.<sup>7</sup> She died later in intensive care.<sup>8</sup> During Streeter's trial for murder and torture, the prosecution offered hearsay statements that the victim had made about the defendant when she applied for a restraining order four months before her death.<sup>9</sup> The defendant objected that the admission of this evidence would violate his rights under the Confrontation Clause. He insisted that he had a right to confront every one of his accusers, including the deceased declarant whom he had admittedly killed.<sup>10</sup> The trial court allowed the evidence over this objection.<sup>11</sup> Indeed, the defendant's own act was the very reason for the declarant's unavailability as a trial witness.<sup>12</sup>

Manuel Banos killed his ex-girlfriend by striking her repeatedly on the head with a hammer.<sup>13</sup> Shortly after her death, he boasted, "I got even with that whore."<sup>14</sup> During his trial for murder, he admitted to killing the victim, but he insisted that he had committed this act without the requisite mens rea.<sup>15</sup> The prosecution introduced hearsay statements that the victim had made when she reported prior incidents of domestic abuse by the defendant and obtained a restraining order against him.<sup>16</sup> The defendant objected under the Confrontation Clause.<sup>17</sup> The appellate court affirmed the trial court's

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1. Appellant's Opening Brief at 119–21, 136, *People v. Streeter*, No. S078027, 2008 WL 2805905 (Cal. June 30, 2008).

2. *Id.* at 120–21.

3. *Id.* at 121.

4. *Id.*

5. *Killer Gets Death Penalty*, FRESNO BEE, Apr. 2, 1999, at A15.

6. Appellant's Opening Brief, *supra* note 1, at 92.

7. *Id.* at 97.

8. *Id.* at 91.

9. *Id.* at 105–06. Among other statements, the application for the restraining order indicated that Streeter had threatened to beat the applicant, had attempted to rape her, and had pulled her hair out of her scalp. *Id.*

10. *Id.* at 106, 109.

11. *Id.* at 106.

12. *Id.* at 109.

13. *People v. Banos*, No. B194272, 2008 WL 223824, at \*1–2 (Cal. Ct. App. Jan. 29, 2008), *vacated*, 129 S. Ct. 163 (2008).

14. *Id.* at \*2.

15. *See id.* (noting that when Banos arrived at the victim's apartment "[h]e did not then know that she was with [another man] and he did not intend to kill her").

16. *Id.* at \*1; Eugene Tong, *Cop Recalls Bloody Crime Scene; Defense Admits Woman's Killing, Denies It Was Murder*, L.A. DAILY NEWS, Aug. 10, 2006, at N3. The victim had obtained this restraining order ten months before her death. *Id.* The defendant was on probation for the prior domestic violence at the time of the presently charged offense. *Id.*

17. *Banos*, 2008 WL 332824, at \*3.

decision to overrule this objection because “there was no dispute that [the] defendant rendered [the victim] unavailable to testify by killing her.”<sup>18</sup>

Mark Jensen also received a life sentence for murdering his wife.<sup>19</sup> The prosecution’s evidence indicated that the defendant had poisoned his wife and then suffocated her while she lay comatose.<sup>20</sup> Among the State’s exhibits was a letter written by the victim two weeks before her death.<sup>21</sup> This letter alerted police that her husband was preparing to poison her, and that he had already made a list of ingredients for poison.<sup>22</sup> When the prosecution offered this letter during Jensen’s trial, he objected under the Confrontation Clause.<sup>23</sup> The trial court sustained this objection, and the prosecution appealed the trial court’s ruling. The Wisconsin Supreme Court held that the letter should be admissible if the prosecution could prove that the defendant himself was to blame for the absence of the declarant at trial.<sup>24</sup>

Darrell Younger is serving a sentence of fifteen years to life for hanging his girlfriend from the showerhead in her bathroom.<sup>25</sup> At trial, the prosecution offered a written statement that the victim had given to police six months before her death.<sup>26</sup> The statement described other incidents of violence committed by Younger.<sup>27</sup> The defendant objected that this evidence was hearsay and that its admission would violate his right to confront his accuser.<sup>28</sup> The trial court admitted the statement, and the court of appeals affirmed, ruling that Younger had caused the unavailability of the declarant, so he had no basis to object under the Confrontation Clause.<sup>29</sup>

Moua Her received a life sentence following his conviction for murdering his wife.<sup>30</sup> The evidence at trial showed that the defendant had stabbed the victim sixty-three times, and had left the knife protruding from her neck.<sup>31</sup> Police later apprehended him when he tried to use his wife’s

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18. *Id.* at \*4.

19. Tom Kertscher, *Jensen Gets Life, No Parole*, MILWAUKEE J. SENTINEL, Feb. 28, 2008, at 1B.

20. Tom Kertscher, *Jensen Guilty of Homicide*, MILWAUKEE J. SENTINEL, Feb. 22, 2008, at 1A.

21. Carrie Antlfinger, *Dead Victim’s Letter is Key*, WIS. ST. J., Jan. 2, 2008, at B1.

22. *State v. Jensen*, 727 N.W.2d 518, 521–22 (Wis. 2007); Antlfinger, *supra* note 21, at B1.

23. *Jensen*, 727 N.W.2d at 521–22.

24. *Id.* at 536.

25. *People v. Younger*, No. A110031, 2007 WL 1848976, at \*1 (Cal. Ct. App. June 28, 2007), *vacated*, 128 S. Ct. 2994 (2008).

26. *Id.* at \*2.

27. *Id.* In this statement, she indicated that Younger had raped her, choked her, and threatened to kill her. *People v. Younger*, 101 Cal. Rptr. 2d 624, 627 (Cal. Ct. App. 2000).

28. *Younger*, 2007 WL 1848976, at \*2–3.

29. *Id.* at \*5.

30. Emily Gurmon, *Man Loses Appeal in Wife’s Murder*, ST. PAUL PIONEER PRESS, May 30, 2008, at B5.

31. *State v. Her*, 750 N.W.2d 258, 263 (Minn. 2008), *vacated*, *Her v. Minnesota*, 129 S. Ct. 929 (2009); Gurmon, *supra* note 30, at B5.

credit card to pay an escort service at a hotel.<sup>32</sup> In the ensuing murder trial, the prosecution introduced a hearsay statement that the victim had made to police four months before her death.<sup>33</sup> The statement indicated that the defendant had beaten her with a metal nightstick.<sup>34</sup> The trial court admitted this evidence over the defendant's objection that it violated his confrontation rights.<sup>35</sup> The Minnesota Supreme Court affirmed, reasoning that the defendant bore responsibility for the declarant's unavailability, so he could not benefit from her absence at trial.<sup>36</sup>

In each of these five cases, the prosecution overcame the defendant's objection by invoking the doctrine of forfeiture by wrongdoing. This doctrine allows the admission of hearsay statements against an opponent who has wrongfully procured the unavailability of a hearsay declarant.<sup>37</sup> The idea underlying the doctrine is simple: no one should profit from wrongful conduct.<sup>38</sup> When the accused complains that he cannot confront a witness whom he has intentionally kept away from court, the objection is disingenuous—akin to the patricide's appeal for mercy because he is an orphan.<sup>39</sup> The Confrontation Clause should be a shield, not a sword.

Prior to the summer of 2008, courts had generally applied the doctrine of forfeiture by wrongdoing in homicide cases without requiring proof that the purpose of the homicide was to render the victim unavailable as a trial witness.<sup>40</sup> After all, unavailability is a foreseeable consequence of homicide. A man who kills his wife or girlfriend must be aware that she will not later appear in court.<sup>41</sup> A minority of courts had conditioned forfeiture upon the specific intent to silence the victim as a witness, but the majority had rejected this approach.<sup>42</sup> Not only was the requirement of specific intent difficult to

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32. Stefano Esposito & Shamus Toomey, *Diligent Escort Service Leads Cops to Murder Suspect*, CHI. SUN-TIMES, July 26, 2004, at 24.

33. *Her*, 750 N.W.2d at 264–65.

34. *Id.* at 263.

35. *Id.* at 264–65.

36. *Id.* at 274.

37. The Supreme Court first articulated this doctrine in *Reynolds v. United States*, 98 U.S. 145, 158 (1878). There, the Court held, “[I]f a witness is absent by [a defendant’s] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.” *Id.*

38. *E.g.*, *State v. Sanchez*, 177 P.3d 444, 456 (Mont. 2008) (observing that the forfeiture doctrine “derives from the maxim that no person should benefit from the person’s own wrongdoing”).

39. Richard Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 506 (1997).

40. See Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL’Y 759, 779 (2007) (generalizing courts’ approval of “the use of forfeiture in murders implicating domestic violence without requiring any intent to prohibit [victims] from testifying at trial”). For more discussion of lower-court opinions on this subject preceding the Supreme Court’s ruling in *Giles*, see *infra* subpart I(C).

41. See *Sanchez*, 177 P.3d at 456 (“The natural result of a deliberate killing is *always* that the victim is unavailable to testify.”).

42. See *infra* subpart I(C).

apply<sup>43</sup>—few murderers make a record that their motive is to thwart testimony—but such a rule also could create an incentive for an assailant to kill, rather than merely injure, his victim in order to cover his tracks.<sup>44</sup>

When the U.S. Supreme Court took up this issue in the 2007 term, commentators expected that the Court would side with the majority position.<sup>45</sup> The basis for their prediction was language in prior Supreme Court opinions that seemed to endorse an expansive interpretation of the forfeiture doctrine.<sup>46</sup> But on June 25, 2008, the Court issued a surprising ruling in *Giles v. California*.<sup>47</sup> Justice Scalia, writing for the majority, remanded the California Supreme Court's ruling that upheld the defendant's conviction for murdering his ex-girlfriend.<sup>48</sup> Scalia chastised the trial court for finding forfeiture by wrongdoing based simply on evidence that the defendant had intentionally killed the victim.<sup>49</sup> According to Scalia, the "exception applie[s] only when the defendant engaged in conduct *designed*" to keep the witness from testifying, and the record did not indicate that the defendant killed the victim for the specific purpose of preventing her trial testimony, even if her inability to testify was a foreseeable consequence of her death.<sup>50</sup>

The Court's ruling in *Giles* provided a windfall for all five of the defendants discussed at the outset of this Article. Each of these defendants is very likely to receive a new trial as a consequence of *Giles*.<sup>51</sup> It is uncertain

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43. Brief for the States of Illinois et al. as Amici Curiae in Support of Respondent at 1, *Giles v. California*, 128 S. Ct. 2678 (2008) (No. 07-6053), 2008 WL 859391, at \*1 [hereinafter Illinois Amicus Brief] (indicating that, even when the accused has intimidated the complainant, the prosecution will often "be unable to demonstrate that the defendant acted with the specific aim of preventing future testimony").

44. See David G. Savage, *Justices Side with Accused*, L.A. TIMES, June 26, 2008, at A19 (noting concern of victims' advocates that an intent-to-silence requirement might create an "incentive to kill").

45. E.g., Linda Greenhouse, *Justices to Hear Case Testing Rule on Witness*, N.Y. TIMES, Jan. 12, 2008, at A12 (predicting that the Government would prevail in *Giles*).

46. See *Davis v. Washington*, 547 U.S. 813, 832–33 (2006) (discussing the importance of the forfeiture doctrine in domestic violence cases, and omitting any discussion of specific intent to silence); *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (mentioning the Court's acceptance of the forfeiture doctrine as an exception to the Confrontation Clause); *Reynolds v. United States*, 98 U.S. 145, 158 (1878); see also *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) ("The Supreme Court's recent affirmation of the 'essentially equitable grounds' for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive.").

47. 128 S. Ct. 2678 (2008).

48. *Id.* at 2693. On remand, the California Court of Appeals reversed *Giles*'s conviction. *People v. Giles*, No. B166937, 2009 WL 457832 (Cal. Ct. App. Feb. 25, 2009).

49. 128 S. Ct. at 2693.

50. *Id.* at 2683.

51. The U.S. Supreme Court has already vacated and remanded the *Banos*, *Younger*, and *Her* cases for reconsideration in light of *Giles*. *Banos v. California*, 129 S. Ct. 163 (2008) (mem.); *Younger v. California*, 128 S. Ct. 2994 (2008) (mem.); *Her v. Minnesota*, 129 S. Ct. 929 (2009) (mem.). There is widespread agreement that *Giles* necessitates a retrial of *State v. Jensen*, 727 N.W.2d 518 (Wis. 2007). See Carrie Antlfinger, *Case May Aid Jensen*, WIS. ST. J., Feb. 27, 2008, at B7 (quoting Phillip Koss, a Wisconsin district attorney, who said, "It would surprise me if he

whether the Government will be able to comply with the requirements of *Giles* on retrial of these five cases. Only by showing that the defendants specifically intended to procure the unavailability of witnesses will the Government be able to introduce the victims' hearsay statements under the doctrine of forfeiture by wrongdoing.<sup>52</sup>

The *Giles* ruling could affect a wide range of other cases.<sup>53</sup> Advocates for victims of domestic violence have expressed dismay about the impact of *Giles* and have predicted that it will hinder the prosecution of domestic abuse cases in which the assailants have killed or incapacitated the victims, or have otherwise caused the victims to be unavailable as trial witnesses.<sup>54</sup> The attorneys general for thirty-seven states indicated that the *Giles* decision could have "monumental implications for the conduct of state criminal trials."<sup>55</sup> One appellate court opined that a specific-intent rule "would effectively eliminate the use of victim statements in most domestic violence homicide

didn't get a new trial" based on the U.S. Supreme Court's ruling in *Giles*); Tom Kertscher, *Poison Case May Be Retried: Court Ruling May Exclude Letter by Woman Who Died*, MILWAUKEE J. SENTINEL, June 26, 2008, at B1 (quoting David Ziemer, news editor for the *Wisconsin Law Journal*, who opined, "I don't see any possibility that he will not get a new trial."); David Ziemer, *Supreme Court Upholds Right to Confront Witness*, WIS. L.J., June 20, 2008, at 7A (quoting a similar assessment by Wisconsin assistant attorney general Marguerite Moeller). While the trial judge in the *Jensen* case ruled that the victim's statements were separately admissible as dying declarations—and were therefore outside the scope of the Confrontation Clause—this ruling seems unlikely to withstand appeal because it distorts the dying-declaration rule, as noted by Professor Richard Friedman in his blog on the Confrontation Clause. The Confrontation Blog, <http://www.confrontationright.blogspot.com/2008/04/written-opinion-in-jensen-on-dying.html> (Apr. 12, 2008, 5:56 PM). Another case discussed at the outset of this Article also seems to be bound for retrial. See Appellant's Opening Brief, *supra* note 1, at 109–10 (citing *Giles* as support for a new trial).

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

53. See, e.g., *People v. Faz*, No. E043111, 2008 WL 4294946, at \*6 (Cal. Ct. App. Sept. 22, 2008); *In re Rolandis G.*, No. 99581, 2008 WL 4943446, at \*15 (Ill. Nov. 20, 2008); *People v. Gibbs*, No. 274003, 2008 WL 4149033, at \*2 (Mich. Ct. App. Sept. 9, 2008) (per curiam) (all citing *Giles* and rejecting government claims of forfeiture in domestic violence and child abuse cases); see also Terrie Morgan-Besecker, *High Court Ruling Could Impact Local Trial*, WILKES-BARRE TIMES LEADER, July 7, 2008, [www.timesleader.com/news/High\\_court\\_ruling\\_could\\_impact\\_local\\_trial\\_07-06-2008.html](http://www.timesleader.com/news/High_court_ruling_could_impact_local_trial_07-06-2008.html) (reporting that *Giles* might necessitate exclusion of the victim's hearsay statements in a domestic-homicide prosecution); E-mail from Nancy Lemon, Lecturer and Clinical Instructor, U.C. Berkeley Boalt Hall Sch. of Law (July 28, 2008) (on file with author) (sharing anecdotal evidence of dropped charges in reaction to the *Giles* ruling).

54. Carrie Johnson, *Right to Face Accusers Is Affirmed in Unusual Case*, WASH. POST, June 26, 2008, at A2 ("Officials at the Family Violence Prevention Fund warned the [*Giles*] decision could make it less likely that victims will reach out to authorities for help."); Savage, *supra* note 44, at A19 (citing predictions by advocates for domestic violence victims, who thought that "it would be hard, even impossible, to prove that a dead partner was killed in order to prevent testimony"); David G. Savage, *The Rights of Accused After Killing Accuser*, L.A. TIMES, June 15, 2008, at A16 (quoting Eve Sheedy, director of domestic violence policy for the Los Angeles city attorney's office, who stated that "[t]his is a terrifying moment for domestic violence prosecutors"); *id.* at A16 ("If *Giles* wins, it will be devastating. . . . Joan S. Meier, a George Washington University law professor [said it] would basically hand abusers the power to cripple the state's ability to protect [battered women]."). But see Savage, *supra* note 44, at A19 (quoting Meier after the *Giles* decision, when she was hopeful that the concurring and dissenting opinions might soften the impact of the decision).

55. Illinois Amicus Brief, *supra* note 43, at 1.

cases,” because “[f]ew defendants are capable of such far-reaching thinking at the moment they kill their victims.”<sup>56</sup> Chief Justice Roberts observed that under Justice Scalia’s restrictive interpretation of the forfeiture rule, the accused “gets a great benefit” for causing the victim’s death, and such a benefit increases the temptation to murder, rather than simply injure, victims of domestic violence.<sup>57</sup> In sum, *Giles* appears to tilt the balance of power in favor of the batterer.

Or does it? This Article analyzes the doctrine of forfeiture by wrongdoing in the aftermath of *Giles*. The purpose of the Article is not simply to complain about the Supreme Court’s mistaken ruling in *Giles*, but rather to suggest practical solutions that will enable effective prosecutions of domestic violence within the new parameters set by *Giles*. The Article’s thesis is that prosecutors can still hold domestic abusers accountable for silencing their victims after *Giles*, but a new jurisprudential framework and a new forfeiture rule are necessary to meet the challenges posed by the Supreme Court’s restrictive interpretation of the forfeiture doctrine.

Part I considers the importance of the forfeiture doctrine in prosecutions of domestic violence. This Part begins by noting that a large number of batterers commit violent acts precisely because they wish to exercise control over their intimate partners. It is not surprising that such batterers would coerce and intimidate—and in some cases kill—their victims when criminal proceedings are pending. The Supreme Court’s recent confrontation jurisprudence, beginning with *Crawford v. Washington*<sup>58</sup> in 2004, has exacerbated the plight of victims by making them indispensable as trial witnesses. Batterers have come to learn that without live testimony by the victim, the prosecution is likely to drop any charges. Thus *Crawford* has increased the temptation for batterers to tamper with witnesses.<sup>59</sup> Prior to *Giles*, lower courts recognized that the forfeiture doctrine held in check an obvious defense strategy: beating the charge by beating the accuser.<sup>60</sup>

Part II examines, and criticizes, the Supreme Court’s decision in *Giles*. This Part focuses on Scalia’s selective historical research, his conflation of evidentiary and constitutional forfeiture theories, and his vacillation between objective and subjective standards for assessing intent. The *Giles* ruling is also worrisome because of its inconsistent treatment of domestic violence prosecutions: it lurches in different directions on crucial questions such as the

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56. *People v. Costello*, 53 Cal. Rptr. 3d 288, 302 (Cal. Ct. App. 2007).

57. Transcript of Oral Argument at 18, *Giles*, 128 S. Ct. 2678 (No. 07-6052).

58. 541 U.S. 36 (2004).

59. See *infra* subpart I(B).

60. See *United States v. Gray*, 405 F.3d 227, 242 (4th Cir. 2005); *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999); *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997) (all recognizing that the forfeiture exception prevents defendants from benefiting from their wrongdoing by preventing a witness’s testimony).

testimonial character of victims' statements and the possibility of inferring intent to silence from a history of abusive conduct.<sup>61</sup>

Part III develops a new jurisprudential framework for lower courts to use in determining whether the accused has forfeited confrontation rights after *Giles*. This Part considers the tripartite theoretical basis for the forfeiture doctrine: utilitarian concerns about truth seeking, equitable concerns about accountability, and originalist concerns about the framers' intent.<sup>62</sup> While *Giles* erred by focusing excessively on the latter, this Part seeks to integrate all three elements into a comprehensive rationale for forfeiture. A broader based forfeiture theory provides the foundation for a practical framework that lower courts can use to adjudicate the prosecution's claims of forfeiture. Taking its cue from Scalia's declared preference for categorical rules, this Part proposes straightforward tests for evaluating the declarant's unavailability, the defendant's wrongful act, causation, and the defendant's intent. Most notably, this Part proposes per se rules that would find the requisite 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. Such a jurisprudential framework would allow trial courts to apply *Giles* faithfully and still find forfeiture in the five fact patterns noted at the outset of this Article.<sup>63</sup>

Finally, Part IV proposes a new forfeiture rule. This Part suggests amendments to Rule 804(b)(6) of the Federal Rules of Evidence and its state counterparts.<sup>64</sup> Among other changes, the revised rule would clarify the intent requirement for forfeiture, would expressly allow "reflexive forfeiture" (i.e., forfeiture based on the very acts charged in the indictment), would delete "acquiescence" as a ground for forfeiture, and would insist upon a minimal showing of reliability in order to admit hearsay in lieu of live testimony. A reexamination of Rule 804(b)(6) could not be more timely, given the significant momentum for reform at the federal<sup>65</sup> and state<sup>66</sup> levels.

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61. See *infra* subpart II(D).

62. See *infra* subpart III(A).

63. In three of these cases (*Banos*, *Her*, and *Streeter*), the Government's evidence indicated that the defendants killed victims who had applied for restraining orders shortly before their deaths. *People v. Banos*, No. B194272, 2008 WL 223824, at \*2–3 (Cal. Ct. App. Jan. 29, 2008); *State v. Her*, 750 N.W.2d 258, 262–63 (Minn. 2008); Appellant's Opening Brief, *supra* note 1, at 104–10. In the *Younger* case, the prosecution's evidence indicated that the victim had filed a complaint against the defendant and thereby initiated a prosecution six months before her death. *People v. Younger*, 101 Cal. Rptr. 2d 624, 627–32 (Cal. Ct. App. 2000). The *Jensen* case would provide the most difficult challenge for prosecutors using the framework proposed in this Article. Perhaps some evidence that the defendant had purposefully isolated the victim (e.g., by monitoring her phone calls) would be sufficient to extinguish his confrontation right. See *State v. Jensen*, 727 N.W.2d 518, 528–29 (Wis. 2007).

64. See *infra* subpart IV(B) and Appendix.

65. On January 6, 2009, Senator Diane Feinstein (D-CA) introduced Senate Bill 132, the Gang Abatement and Prevention Act of 2009, which included language in Title II, § 205, directing the Judicial Conference to "study the necessity and desirability of amending section 804(b) of the Federal Rules of Evidence to permit the introduction of statements against a party by a witness who

This Article focuses primarily on the context of domestic violence because that context illustrates most starkly the troubling implications of *Giles*, but the recommendations in this Article apply with equal force to other categories of prosecutions as well. Justice Scalia is correct that the Sixth Amendment will not abide special confrontation rules tailored to facilitate the prosecution of batterers.<sup>67</sup> But neither should the courts tolerate confrontation rules that are easily manipulable by batterers and other defendants who can easily coerce (or kill) their accusers. The very integrity of the criminal justice system is at stake. Courts must not ignore the sound of silence.

### I. The Urgent Need for a Forfeiture Exception in Domestic Violence Prosecutions

This Part sets the stage for the analysis of *Giles* in Part II. In order to appreciate the necessity for a robust forfeiture doctrine, it is necessary to explore the unique dynamics of relationships in which battering occurs and the impact of these dynamics on the willingness of victims to testify in prosecutions of their assailants.<sup>68</sup> The Supreme Court's confrontation jurisprudence preceding *Giles* increased the necessity for live testimony by victims—a fact that led to heightened coercion, intimidation, and sometimes murder by abusers wishing to escape accountability for their crimes.<sup>69</sup> Prior to the Supreme Court's ruling in *Giles*, lower courts construed the forfeiture doctrine expansively, fearing that a restrictive interpretation might reward witness tampering.<sup>70</sup>

#### A. *The Dynamics of Battering*

Statistics show the alarming prevalence of domestic violence in the United States. Male violence is the leading cause of injury to women in this

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has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable.” Gang Abatement and Prevention Act, S. 132, 111th Cong. § 205 (2009). The full text of the bill is also available at <http://www.govtrack.us/congress/billtext.xpd?bill=s111-132>.

66. Somewhat ironically, while *Giles* was pending before the U.S. Supreme Court, the Illinois Legislature considered a bill to establish a hearsay exception for forfeiture that would be more favorable to the prosecution than Federal Rule 804(b)(6). Even after the *Giles* ruling tightened the constitutional forfeiture doctrine to be more or less coextensive with Federal Rule 804(b)(6), the Illinois Legislature passed this bill, which became 725 ILL. COMP. STAT. 5/115-10.2a (2006). Erika Slife, *Allies of Stacy Peterson Hail Bill: Plan to Ease Hearsay Limits is Heading to Blagojevich*, CHI. TRIB., July 11, 2008, at 3. The California Legislature also considered a bill to codify the forfeiture doctrine. Assem. B. 268, 2007 Leg., Reg. Sess. (Cal. 2007), available at [http://info.sen.ca.gov/pub/07-08/bill/asm/ab\\_0251-0300/ab\\_268\\_bill\\_20070409\\_amended\\_asm\\_v98.html](http://info.sen.ca.gov/pub/07-08/bill/asm/ab_0251-0300/ab_268_bill_20070409_amended_asm_v98.html).

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

68. See *infra* subpart I(A).

69. See *infra* subpart I(B).

70. See *infra* subpart I(C).

country.<sup>71</sup> Violence committed by intimate partners accounts for 20% of all nonfatal crime experienced by women in the United States.<sup>72</sup> Each year domestic abuse results in two million injuries, mostly to women.<sup>73</sup>

The term “domestic homicide” most often refers to a homicide perpetrated against an intimate partner, such as a present or former spouse or girlfriend.<sup>74</sup> Each year approximately 1,300 to 1,500 domestic homicides occur in the United States.<sup>75</sup> Men are usually the perpetrators of these homicides, and women are usually the victims.<sup>76</sup> While the absolute number of domestic homicides has declined somewhat with the overall decline in violent crime, domestic homicides are actually increasing as a proportion of all homicides involving female victims.<sup>77</sup>

The motives behind domestic violence are manifold and sometimes difficult to discern. Chief among them is the motive to exercise control over the victim.<sup>78</sup> In an influential study, Richard Felson and Steven Messner demonstrated that the “control motive” plays a greater role as an impetus for domestic violence than for other categories of violence.<sup>79</sup> Felson and Messner quantified the extent to which threats preceded violent acts, and found a more conspicuous pattern in domestic violence cases than in other

71. Sharon G. Portwood & Julia Finkel Heany, *Responding to Violence Against Women: Social Science Contributions to Legal Solutions*, 30 INT’L J.L. & PSYCHIATRY 237, 237 (2007).

72. *Id.* at 237–38.

73. Johnson, *supra* note 54, at A2.

74. See, e.g., NEIL WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE 2–3 (1999) (defining “domestic homicide,” by reference to Florida law, as violence between “household members,” but also including violence between boyfriends and girlfriends who neither live together nor have a child in common).

75. Johnson, *supra* note 54, at A2; Jeffrey L. Todahl et al., *A Qualitative Study of Intimate Partner Violence Universal Screening by Family Therapy Interns: Implications for Practice, Research, Training, and Supervision*, 34 J. MARITAL & FAM. THERAPY 28, 28 (2008).

76. MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 1, 17–19 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf> (noting that 81% of all persons killed by their spouses were wives and that 83% of spouse murderers were men).

77. JAMES ALAN FOX & MARIANNE W. ZAWITZ, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES: INTIMATE HOMICIDES 55 (2007), <http://www.ojp.usdoj.gov/bjs/homicide/tables/intproptab.htm> (showing that homicides committed against “intimates” made up 26.1% of all homicides involving female victims in 1995, compared with 33.3% in 2005).

78. Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 569, 568–72 (2007) (citing empirical evidence and noting widespread agreement among social scientists that “domestic violence is about gaining control over another person”); Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 963–64 (2004) (identifying a desire for control as the primary motive behind domestic abuse); Jennifer Gentile Long, *Prosecuting Intimate Partner Sexual Assault*, PROSECUTOR, Apr.–May–June 2008, at 20, 21 (“All violent relationships include some level of control or attempt on the batterer’s part to control his partner.”).

79. Richard B. Felson & Steven F. Messner, *The Control Motive in Intimate Partner Violence*, 63 SOC. PSYCHOL. Q. 86, 91 (2000).

categories of cases.<sup>80</sup> Batterers desire to control their intimate partners for various reasons: sometimes to obtain certain outcomes in household disputes, at other times because the fact of control is gratifying to the batterers.<sup>81</sup>

Is all domestic violence attributable to the “control motive”? This question is difficult to answer. Modern social science posits a continuum along which domestic violence occurs. At one end of this spectrum is “common couple violence.”<sup>82</sup> While this violence is hardly benign, it is generally nonrecurring, it does not result in serious injuries, and it does not indicate an ongoing attempt to assert control over the victim through the use of force. At the other end of the spectrum is “patriarchal terrorism,” which is the deliberate imposition of “fear-based coercive control.”<sup>83</sup> Some legal scholars have noted the uniqueness of coercive domestic violence and have proposed new statutes that would criminalize this type of abuse in particular.<sup>84</sup>

The recurrence of domestic violence in the most troubled relationships is evident in a number of statistics. One study found that over 60% of men who battered their wives did so repeatedly.<sup>85</sup> The National Violence Against Women Survey found that approximately two-thirds of female victims who suffered assault by intimate partners experienced several such victimizations at the hands of the same partners.<sup>86</sup> In fact, a high proportion of defendants arrested for domestic violence are already on parole, probation, or pretrial release.<sup>87</sup>

Given the “control motive” and the persistence of domestic violence in many relationships, it is not surprising that batterers threaten reprisals if their victims testify or otherwise cooperate with law enforcement. Reprisals might include renewed violence, abduction of children, or economic retaliation. One study found that batterers threaten retaliatory violence in as many as half of all cases, and 30% actually assault their victims again during the

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80. *Id.*

81. *Id.* at 86.

82. Portwood & Heany, *supra* note 71, at 239.

83. Todahl et al., *supra* note 75, at 28.

84. Tuerkheimer, *supra* note 78, at 971 (arguing that criminal law misapprehends domestic violence due to its “narrow temporal lens” and “limited conception of harm”). Tuerkheimer has proposed a statutory scheme that would criminalize a “course of conduct” that the defendant “knows or reasonably should know” would likely “result in substantial power or control” over a family or household member. *Id.* at 1019–20.

85. DONALD G. DUTTON, *THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 112 (1995).

86. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 9–11* (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (presenting findings based on a telephone survey involving thousands of respondents).

87. Data from fifteen large urban counties indicate that 26.4% of domestic violence arrestees have a current criminal justice status. ERICA SMITH ET AL., BUREAU OF JUSTICE STATISTICS, *STATE COURT PROCESSING OF DOMESTIC VIOLENCE CASES 5* (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scpdvc.pdf>.

predisposition phase of prosecution.<sup>88</sup> Some evidence suggests that witness intimidation is increasing, particularly in prosecutions of domestic violence.<sup>89</sup> Victims of domestic violence are more vulnerable to witness tampering than victims of other crimes.<sup>90</sup> In fact, data show that the time when a victim decides to break free of a violent relationship is the most dangerous time; this is the time when the majority of domestic violence homicides take place.<sup>91</sup>

Batterers' ongoing manipulation of their victims is very effective in dissuading the victims from cooperating with police and prosecutors. Many victims are reluctant to report domestic violence in the first place due to fears of reprisals, as well as other considerations.<sup>92</sup> Even when victims do decide to report the violence they have suffered, the vast majority of these complainants later recant, refuse to testify, or fail to appear altogether at the time of trial.<sup>93</sup> In 1995, a nationwide survey found that prosecutors believed most domestic violence victims did not cooperate fully in the prosecution of their abusers.<sup>94</sup>

88. Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, CT. REV., Spring 2000, at 33.

89. See KELLY DEDEL, U.S. DEP'T OF JUSTICE, WITNESS INTIMIDATION 2, 5 (2006), available at [http://www.popcenter.org/problems/PDFs/witness\\_intimidation.pdf](http://www.popcenter.org/problems/PDFs/witness_intimidation.pdf) (indicating that witness intimidation is primarily associated with domestic violence and organized crime and discussing the increasing prevalence of such intimidation). Compare DUROSE, *supra* note 76, at 26 (reporting that nearly 10% of victims did not report domestic violence from 1998 to 2002 due to fear of retaliation), with LAURENCE A. GREENFIELD ET AL., BUREAU OF JUSTICE STATISTICS, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 19 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf> (reporting that this number was 7% for the period 1992 to 1996).

90. DEDEL, *supra* note 89, at 8 ("Victims of domestic violence appear to be at an elevated risk for retaliation . . .").

91. Tonya McCormick, Note, *Convicting Domestic Violence Abusers when the Victim Remains Silent*, 13 BYU J. PUB. L. 427, 433 (1999) ("Studies have shown that the time of greatest danger for an abused woman occurs when she leaves her husband or partner.").

92. Richard B. Felson et al., *Reasons for Reporting and Not Reporting Domestic Violence to the Police*, 40 CRIMINOLOGY 617, 640 (2002) (identifying fear of reprisals as an inhibitory factor, along with other concerns such as privacy and the desire to protect the offender); Richard B. Felson & Paul-Philippe Paré, *The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police*, 67 J. MARRIAGE & FAM. 597, 607 (2005) ("If the offender was a partner, victims were more likely to fear reprisal and to think that the police could not do anything to help.").

93. The California Supreme Court cited expert testimony that "[a]bout 80 to 85 percent of victims 'actually recant at some point'" in prosecutions of domestic violence. *People v. Brown*, 94 P.3d 574, 576 (Cal. 2004) (quoting Jeri Darr, program manager of the Antelope Valley Domestic Violence Council); accord Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3 (2002) (offering similar anecdotal evidence); Lisa Marie De Sancitis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367 (1996) (discussing the high rate of noncooperation by victims).

94. Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 176, 190 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

The reluctance of victims to report and testify about domestic violence makes domestic violence one of the hardest crimes to prosecute.<sup>95</sup> Because there are usually only two witnesses to domestic violence—the assailant and the victim<sup>96</sup>—the unavailability of the victim at trial greatly hampers the prosecution in proving its case. Some state legislatures have responded to this challenge by passing statutes that permit “evidence-based” prosecutions (i.e., prosecutions that rely on hearsay statements and physical evidence rather than depending solely on the victims’ live testimony).<sup>97</sup> States have also enacted mandatory prosecution laws to ensure that prosecutors do not drop cases with reluctant accusers.<sup>98</sup> These states have apparently determined that the reluctance to accuse is not necessarily an indication of a suspect’s innocence; rather, this reluctance may result from systematic intimidation that makes prosecution all the more urgent.

### B. *The Paradox of the Indispensable Witness*

In 2004, the U.S. Supreme Court significantly compounded the difficulty of prosecuting domestic violence.<sup>99</sup> The Court held in *Crawford v. Washington*<sup>100</sup> that the Confrontation Clause requires cross-examination whenever the prosecution offers a “testimonial” hearsay statement against the accused.<sup>101</sup> The term *testimonial* includes statements given to law enforcement personnel who are investigating past crimes.<sup>102</sup> Prosecutors quickly recognized that *Crawford* would not permit evidence-based prosecutions of domestic violence in a significant portion of cases.<sup>103</sup> An in-court appearance by the alleged victim became the *sine qua non* of an effective

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95. See Robert C. Davis, *Victim/Witness Noncooperation: A Second Look at a Persistent Phenomenon*, 11 J. CRIM. JUST. 287, 288 (1983) (reporting that the nonparticipation of victims resulted in the dismissal of 60% of domestic violence prosecutions in New York City’s criminal courts).

96. Johnson, *supra* note 54, at A2.

97. For examples of such statutes, see Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 752 n.31 (2005).

98. Cheryl Hanna has analyzed and critiqued “no-drop” policies in her influential article in the *Harvard Law Review*. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996).

99. Andrew King-Ries, *An Argument for Original Intent: Restoring Rule 801(d)(1)(A) to Protect Domestic Violence Victims in a Post-Crawford World*, 27 PACE L. REV. 199, 200 (2007) (noting that *Crawford v. Washington*, 541 U.S. 36 (2004), “dramatically hobbled prosecution of domestic violence offenses”).

100. 541 U.S. 36 (2004).

101. *Id.* at 53–54.

102. *Id.* at 50–52; Davis v. Washington, 547 U.S. 813, 822 (2006).

103. Matthew Mangino, *Protecting Victims of Abuse: Confrontation Right May Jeopardize Safety of Children, Domestic Violence Victims*, [http://www.mattmangino.com/passing/view\\_blog.cfm?id=8](http://www.mattmangino.com/passing/view_blog.cfm?id=8) (expressing the opinion of the author, a district attorney, that evidence-based prosecutions could be “obsolete” after *Crawford*); Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 318 (2005). Empirical evidence verifies that prosecutors’ use of testimonial hearsay in prosecutions of domestic violence decreased substantially after *Crawford*. *Id.* at 821.

prosecution.<sup>104</sup> In other words, the victim became indispensable in many, perhaps most, prosecutions of domestic violence.

Herein lies the paradox: the more the criminal justice system insists upon live testimony by the accuser, the less likely it is that she will actually appear in court. Manipulative defendants in domestic violence cases are aware that the prosecution cannot proceed without the victim, at least in the majority of cases.<sup>105</sup> This realization heightens the risk of witness tampering. Defendants know that, without live testimony by the victim or admissible hearsay statements, the prosecution must dismiss the charges.<sup>106</sup> The number of dismissals in domestic violence cases rose significantly after the Supreme Court's ruling in *Crawford*.<sup>107</sup> Accusers did not show up for trial, often due to pressure from the accused, who stood ready to invoke their confrontation rights if the prosecution refused to drop the charges.

Many advocates for victims of domestic violence believed that the *Crawford* ruling jeopardized the safety of complainants.<sup>108</sup> While an injured victim might potentially assist the prosecution, a deceased victim would be of no use, because the prosecution would not be able to introduce her hearsay statements in most trials. A survey of domestic violence prosecutors in three western states found that 65% believed *Crawford* had undermined the safety of battered women.<sup>109</sup> Prosecutors responded with various measures—including jailing victims on material-witness warrants before trial<sup>110</sup>—but the fact remained that the strengthened right to confront a hearsay declarant conferred a huge benefit on defendants when the hearsay declarant was no longer available to testify. By putting a premium on the accuser in court proceedings, the *Crawford* ruling may have put a target on her back outside of court.

### C. Lower Courts' Interpretation of Forfeiture Doctrine Before Giles

The crucial need for the forfeiture doctrine in domestic violence prosecutions became apparent in the years following *Crawford*.

104. Tom Lininger, *Bearing the Cross*, 74 *FORDHAM L. REV.* 1353, 1365 (2005).

105. *Id.* at 1366.

106. *Id.*

107. Lininger, *supra* note 97, at 749–50.

108. See King-Ries, *supra* note 99, at 230 (observing that *Crawford* has heightened the need for testimony of accusers while simultaneously diminishing the state's ability "to counter the defendant's intimidation and coercion of the victim"); Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 *S. CAL. L. REV.* 213, 242 (2005) (contending that *Crawford* endangered the safety of victims in domestic violence prosecutions by making the victims' testimony crucial); Michael Rips & Amy Lester, *When Words Bear Witness*, N.Y. *TIMES*, Mar. 20, 2006, at A23 (indicating that, in many jurisdictions, *Crawford* made victims less safe).

109. Lininger, *supra* note 97, at 821.

110. Lininger, *supra* note 104, at 1365 n.70 (discussing the example of a prosecutor jailing accusers before trial); Rips & Lester, *supra* note 108, at A23 (criticizing the practice of jailing accusers pending trial in domestic violence prosecutions).

Commentators noted that without strict enforcement of the forfeiture doctrine, *Crawford* would reward gamesmanship by the accused.<sup>111</sup> Given the natural tendency of batterers to manipulate their victims, the criminal justice system could not effectively prosecute domestic violence unless the forfeiture doctrine denied confrontation rights to defendants with unclean hands. Professor Richard Friedman, one of the nation's foremost experts on the Confrontation Clause, compared the value of the forfeiture doctrine in post-*Crawford* jurisprudence to the value of brakes on a car.<sup>112</sup>

The tremendous importance of the forfeiture doctrine led state courts to construe this doctrine expansively in the first four years following *Crawford*. In fact, until the Supreme Court's ruling in *Giles*, the majority of state courts reaching the issue did not require proof of specific intent to silence as a condition for applying the forfeiture doctrine.<sup>113</sup> The supreme courts of California,<sup>114</sup> Kansas,<sup>115</sup> Minnesota,<sup>116</sup> Montana,<sup>117</sup> Washington,<sup>118</sup> and Wisconsin<sup>119</sup> all found forfeiture where the Government proved, by a preponderance of the evidence in a pretrial hearing, that the accused had intentionally caused the death of the hearsay declarant, even if the primary intent of the accused had not been to prevent the witness from testifying at trial. A number of lower ranking state appellate courts had reached the same conclusion.<sup>120</sup>

Some state courts in the pre-*Giles* era did condition forfeiture upon the specific intent to silence a witness. For example, the Colorado Supreme

111. See Lininger, *supra* note 97, at 806–12 (2005) (urging prosecutors to invoke the forfeiture doctrine in domestic violence cases); Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 34–35 (2006) (stressing the importance of the forfeiture doctrine to the prosecution of domestic violence cases); Long, *supra* note 78, at 21 (“All violent relationships include some level of control or attempt on the batterer’s part to control his partner.”). *But see* James E. Flannagan, *Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing: Davis v. Washington and the Necessity of the Defendant’s Intent to Intimidate the Witness*, 15 J.L. & POL’Y 863, 885–903 (2007) (cautioning against an expansive interpretation of the forfeiture doctrine).

112. Brief of Richard D. Friedman as Amicus Curiae in Support of Petition for Certiorari at 11, *Giles v. California*, 128 S. Ct. 2678 (2007) (No. 07-6053), 2007 WL 4231058

113. See John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 856 (1996) (reporting, based on a survey of federal decisions shortly before the enactment of Federal Rule 804(b)(6) in the mid-1990s, that the specific intent requirement “appear[ed] to be the minority rule”); Raeder, *supra* note 40, at 778 (observing that “after *Crawford* most courts have applied the [forfeiture] doctrine to admit statements of murdered domestic violence victims, where witness tampering is not involved”).

114. *People v. Giles*, 152 P.3d 433, 438–44 (Cal. 2007), *vacated*, 128 S. Ct. 2678 (2008).

115. *State v. Meeks*, 88 P.3d 789, 793–94 (Kan. 2004), *overruled in part* by *State v. Davis*, 158 P.3d 317, 322 (Kan. 2006).

116. *State v. Her*, 750 N.W.2d 258, 270–74 (Minn. 2008), *vacated*, 129 S. Ct. 929 (2009).

117. *State v. Sanchez*, 177 P.3d 444, 454 (Mont. 2008).

118. *State v. Mason*, 162 P.3d 396, 403–05 (Wash. 2007).

119. *State v. Jensen*, 727 N.W.2d 518, 536 (Wis. 2007).

120. *E.g.*, *People v. Moore*, 117 P.3d 1, 5 (Colo. App. 2004); *Boyd v. State*, 866 N.E.2d 855, 856–57 (Ind. Ct. App. 2007); *People v. Bauder*, 712 N.W.2d 506, 506, 514–15 (Mich. Ct. App. 2005); *cf. Gonzalez v. State*, 195 S.W.3d 114, 125–26 (Tex. Crim. App. 2006).

Court and the Illinois Supreme Court refused to apply the doctrine in prosecutions of sexual assault where the Government had not demonstrated that the accused specifically intended to procure the absence of the witness.<sup>121</sup> Both of these courts left open the possibility, however, that the intent-to-silence requirement would not arise in a homicide case.<sup>122</sup> Only the New Mexico Supreme Court imposed an intent-to-silence requirement in order to find forfeiture in a homicide case.<sup>123</sup>

In sum, the pre-*Giles* jurisprudence relied on forfeiture doctrine as a counterbalance to *Crawford*. While *Crawford* heightened the importance of testimony by the alleged victim and tempted the accused to silence his accuser, the lower-court opinions interpreting forfeiture had ensured that homicide did not guarantee impunity. The lower courts' expansive construction of the forfeiture doctrine made sure that the Confrontation Clause remained a shield rather than a sword.

## II. The Supreme Court's Curious Ruling in *Giles*

At first glance, the facts of the *Giles* case seemed unlikely to evoke sympathy from the U.S. Supreme Court. The prosecution's evidence indicated that the defendant had shot his unarmed ex-girlfriend six times. Analysis of the bullet trajectories showed that the defendant had shot her while she lay prone on the ground.<sup>124</sup> At his trial, the defendant claimed self-defense. The prosecution introduced evidence that three weeks before her death, the victim had reported to the police that the defendant had choked her, brandished a knife, and threatened to kill her.<sup>125</sup> The jury rejected the defendant's claim of self-defense and found him guilty of murder.<sup>126</sup>

The primary issue presented by the *Giles* appeal was the admissibility of the victim's prior statements to police. The Government did not dispute that these statements were testimonial within the meaning of *Crawford*.<sup>127</sup> However, the Government contended that the defendant forfeited his right to

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121. *People v. Moreno*, 160 P.3d 242, 245–46 (Colo. 2007); *People v. Stechly*, 870 N.E.2d 333, 353 (Ill. 2007).

122. See *Moreno*, 160 P.3d at 246–47; *Stechly*, 870 N.E.2d at 352–53 (both noting a possible “murder exception” to the intent-to-silence requirement).

123. *State v. Romero*, 156 P.3d 694, 703 (N.M. 2007); cf. *Commonwealth v. Laich*, 777 A.2d 1057, 1062 n.4 (Penn. 2001) (noting that Pennsylvania's hearsay exception for forfeiture by misconduct, like Federal Rule 804(b)(6), includes an intent-to-silence requirement but not holding that constitutional forfeiture doctrine included such a requirement).

124. *Giles v. California*, 128 S. Ct. 2678, 2681 (2008). For excellent analysis of the *Giles* opinion, see the essays written by participants in the symposium organized by the Lewis and Clark Law Review on January 30, 2009. Symposium, *The Confrontation Clause*, 13 LEWIS & CLARK L. REV. (forthcoming 2009); see also Clifford S. Fishman, *Giles, the Confrontation Clause, and Domestic Violence Prosecutions: An Interim User's Guide*, 58 CATH. U. L. REV. (forthcoming 2009).

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

126. *Id.*

127. *Id.*

confront the hearsay declarant because his intentional act made her unavailable to testify. The defendant urged a narrower construction of the forfeiture doctrine, suggesting that it should only apply where the Government proves that the defendant specifically intended to silence a prospective witness.<sup>128</sup> The California Court of Appeals sided with the Government,<sup>129</sup> as did the California Supreme Court.<sup>130</sup>

When the case reached the U.S. Supreme Court, the duty of writing the majority opinion fell to Justice Scalia. He had previously authored the Court's opinions interpreting the Confrontation Clause in *Crawford* and *Davis v. Washington*,<sup>131</sup> and he had commented to a journalist that his opinions on the Confrontation Clause were his "favorite."<sup>132</sup> Presented with another opportunity to interpret the Sixth Amendment, he set about analyzing the historical record to determine whether "the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a Founding Era exception to the confrontation right."<sup>133</sup>

Scalia found that the framers of the Constitution did not intend for the accused to relinquish confrontation rights unless he committed a wrongful act that caused the unavailability of the witness and he specifically intended to silence that witness.<sup>134</sup> Scalia based this interpretation on a lengthy review of cases, treatises, and evidentiary rules spanning English and American history from the eighteenth century to the present.<sup>135</sup> Because the record did not show that Giles had the requisite intent, the Court remanded his case for a determination of his mental state.<sup>136</sup>

The most controversial topic in *Giles* was the notion that domestic violence, by its very nature, might amount to wrongful conduct sufficient to forfeit confrontation rights. While no Justice advocated such a blanket rule, a range of viewpoints emerged in the various opinions. Justice Scalia stated in his majority opinion that the Confrontation Clause would admit of no "special, improvised" rule for domestic violence cases,<sup>137</sup> but he also acknowledged that a pattern of domestic violence might possibly give rise to forfeiture under certain circumstances.<sup>138</sup> Justice Souter's concurrence and Justice Breyer's dissent seemed more inclined to infer forfeiture from a

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128. *Id.*

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

130. *People v. Giles*, 152 P.3d 433, 435 (Cal. 2007), *vacated*, 128 S. Ct. 2678 (2008).

131. 547 U.S. 813 (2006).

132. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 317 (2007).

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

134. *Id.* at 2687–88.

135. *Id.* at 2683–88.

136. *Id.* at 2693.

137. *Id.*

138. *Id.*

history of domestic violence.<sup>139</sup> Breyer even suggested that Scalia's discussion of domestic violence embraced a knowledge-based standard for intent<sup>140</sup>—a claim that Scalia himself denied.<sup>141</sup> While Scalia's historical analysis of the intent-to-silence requirement garnered the support of a 6–3 majority, the language on domestic violence in Souter's partial concurrence drew the support of Justice Ginsburg,<sup>142</sup> and Justice Breyer's dissent won the approval of Justices Kennedy and Stevens.<sup>143</sup> Thus a majority of the Court apparently endorsed the notion of “inferred intent” whereby a long-term abusive relationship might support a finding of forfeiture.

The balance of this Part will critique Justice Scalia's majority opinion in *Giles*. Subpart II(A) will focus on the selective, and sometimes myopic, originalism that Scalia employed to discern the intent of the framers. Subpart II(B) will examine Scalia's vacillation between objective and subjective standards of intent. Subpart II(C) will discuss Scalia's conflation of the distinct forfeiture doctrines in constitutional law and evidentiary rules. Subpart II(D) will pay particular attention to Scalia's inconsistent treatment of domestic violence in his opinions construing the Confrontation Clause. Following the critique of the majority opinion in *Giles*, Part II will closely examine the dicta that seem to allow forfeiture based on “inferred intent.” Part III will propose a jurisprudential framework that would enable lower courts to apply the forfeiture doctrine in domestic violence prosecutions after *Giles*.

#### A. *Selective Originalism*

At the end of the factual summary, the next paragraph of Scalia's opinion in *Giles* warned the reader that a history lesson was imminent.<sup>144</sup> Scalia declared that the Confrontation Clause “is most naturally read as a reference to the right of confrontation at common law.”<sup>145</sup> He indicated that the California Supreme Court's theory of forfeiture could withstand review only if it were an “exception[] established at the time of the founding.”<sup>146</sup> He then embarked on an analysis of court opinions and other references from which he sought to glean the common law of confrontation and forfeiture that was roughly contemporaneous with the Founding.

Scalia's originalism in *Giles*, while certainly ambitious, invites a number of objections. To begin with, the scant historical record provides

139. *Id.* at 2695 (Souter, J., concurring in part); *id.* at 2697–98, 2708 (Breyer, J., dissenting).

140. *Id.* at 2708.

141. *Id.* at 2693 (majority opinion).

142. *Id.* at 2694 (Souter, J., concurring in part).

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

144. *Id.* at 2682 (majority opinion).

145. *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)) (internal quotation marks omitted).

146. *Id.*

little basis from which to discern the interpretation of the forfeiture doctrine at the time of the Founding.<sup>147</sup> Courts in that era simply had very few occasions to apply the law of forfeiture.<sup>148</sup> Indeed, Scalia's majority opinion cited only three cases and four treatises from the eighteenth century.<sup>149</sup> Both Scalia and his detractors tried to use this paucity of evidence to their advantage, daring the other side to find examples of their favored interpretation.<sup>150</sup> Breyer wrote in his dissent that the dearth of contemporary authority provided "[a]ll the more reason . . . *not* to reach firm conclusions about the precise metes and bounds of a contemporary forfeiture exception by trying to guess the state of mind of 18th century lawyers when they decided *not* to make a particular argument, *i.e.*, forfeiture, in a reported case."<sup>151</sup>

Even if the forfeiture doctrine did attract attention in the Founding Era, the judges of that day surely did not apply the doctrine in a context analogous to modern prosecutions of domestic violence. In fact, the term "domestic violence" in the U.S. Constitution refers to violence between U.S. citizens, as distinguished from violence between U.S. citizens and foreign nationals.<sup>152</sup> The problem of domestic violence as understood in modern times—*i.e.*, violence against intimate partners—was virtually never the subject of criminal prosecutions in the eighteenth and nineteenth centuries.<sup>153</sup> Because the courts of that era did not address the uniquely coercive pressures that characterize a battering relationship,<sup>154</sup> authority from that era is

147. Professor John Langbein of Yale, one of the nation's foremost scholars on the history of evidence law, has lamented that the "continuing confusion about the very nature of the law of evidence at the end of the eighteenth century underscores how primitive and undertheorized the subject then was." JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 248 (2003).

148. *Giles*, 128 S. Ct. at 2691 (acknowledging that "the case law is sparse"); *id.* at 2694, 2694–95 (Souter, J., concurring) (expressing wariness of Scalia's originalist argument because "the early cases on the [forfeiture] exception were not calibrated finely enough to answer the narrow question here"); *id.* at 2704 (Breyer, J., dissenting) ("I also recognize the possibility that there are too few old records available for us to draw firm conclusions."). For an excellent discussion of the problems with Scalia's originalist confrontation jurisprudence, see Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford's "Cross-Examination Rule": A Reply to Mr. Kry*, 72 *BROOK. L. REV.* 557 (2007).

149. *Giles*, 128 S. Ct. at 2682–93.

150. *Id.* at 2686; *id.* at 2695–97 (Souter, J., concurring in part); *id.* at 2702 (Breyer, J., dissenting).

151. *Id.* at 2707.

152. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against *domestic Violence*." (emphasis added)).

153. *E.g.*, *State v. Rhodes*, 61 N.C. (Phil.) 445, 450 (1868) (per curiam) ("We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."); see also *Giles*, 128 S. Ct. at 2703–04 (Breyer, J., dissenting) (noting that "200 years ago, it might have been seen as futile for women to hale their abusers before a Marian magistrate").

154. See *supra* subpart I(A).

inapposite<sup>155</sup>—just as authority from an era of legalized slavery has scant value in modern interpretation of constitutional provisions relating to the civil liberties of African-Americans.

Assuming, *arguendo*, that the historical record were thorough and on point, another problem remains: what should be the temporal boundaries of the originalist inquiry? Scalia's research considered cases that predated the Founding by over one-hundred years, and he also took account of authorities that postdated the Founding by over two-hundred years.<sup>156</sup> He deemed this temporally distant evidence to be "highly persuasive."<sup>157</sup> To suggest that a three-century survey probes the framers' intent strains credulity. Furthermore, one might reasonably debate Scalia's premise that the crucial date for the originalist analysis is 1789. After all, the framers of the Fourteenth Amendment, not the framers of the Sixth Amendment, imposed the confrontation requirement on the states. Why should the seventeenth-century common law control the interpretation of a constitutional amendment passed in the following century?

The most fundamental problem with Scalia's majority opinion is his selectivity in marshaling historical evidence. His opinion cited favorable authority and overlooked, or distinguished too readily, a substantial amount of contrary authority. A helpful passage from a treatise factored prominently in the majority opinion,<sup>158</sup> while an unhelpful excerpt from a treatise received short shrift until the dissent.<sup>159</sup> Scalia noted that eighteenth-century prosecutors preferred to use the dying-declaration exception rather than the forfeiture exception in murder cases, but he paid little attention to the obvious explanations for this preference.<sup>160</sup> Scalia cited modern state evidence codes as proof that the Confrontation Clause imposes an intent-to-

155. As Justice Souter correctly observed:

The historical record . . . simply does not focus on what should be required for forfeiture when the crime charged occurred in an abusive relationship or was its culminating act; today's understanding of domestic abuse had no apparent significance at the time of the Framing, and there is no early example of the forfeiture rule operating in that circumstance.

*Giles*, 128 S. Ct. at 2694–95 (Souter, J., concurring).

156. *Id.* at 2683–93 (majority opinion).

157. *Id.* at 2688.

158. *Id.* at 2683.

159. *Id.* at 2697 (Breyer, J., dissenting).

160. The dying-declaration exception was preferable, where applicable, for at least two reasons. First, it had greater appeal to contemporary sensibilities because of its religious basis: the declarant did not want to meet his maker with a lie on his lips. Second, the dying-declaration exception sufficed to overcome both constitutional confrontation objections and hearsay objections, while the forfeiture exception could only overcome the former. *Id.* at 2686. Scalia dismissed this second point quickly by quoting *Dutton v. Evans*, 400 U.S. 74 (1970), in which the plurality noted that "the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots." *Giles*, 128 S. Ct. at 2686. Scalia omitted the next sentence in *Dutton*, however: "But this Court has never equated the two, and we decline to do so now." *Dutton*, 400 U.S. at 86.

silence requirement,<sup>161</sup> but he omitted to mention that the preponderance of modern state-supreme-court decisions have found that the Confrontation Clause does not require the intent to silence as a condition for forfeiture in homicide cases.<sup>162</sup> Scalia appeared to be less interested in genuine historical research than advocacy.<sup>163</sup>

One conspicuous example of Scalia's selective originalism is his analysis of *Lord Morley's Case*,<sup>164</sup> the seminal ruling that enunciated the forfeiture doctrine. In that case, the judges concluded that an accused could not object to the admission of hearsay statements if the declarant had been "detained by the means or procurement" of the accused.<sup>165</sup> Scalia consulted dictionaries published more than one hundred years after *Lord Morley's Case* to determine the meaning of the terms "procure" and "means."<sup>166</sup> Neither of these definitions was particularly clear in specifying the degree of intent required, and the term "means" seemed to focus more on causation than on the mental state of the actor.<sup>167</sup> Notwithstanding the imprecision of these definitions, Scalia announced that the phrase "means or procurement" must necessarily denote a specific intent to cause the unavailability of a potential witness.<sup>168</sup> Scalia insisted that the phrase "means *or* procurement" must be read as "means *and* procurement"<sup>169</sup>—as if the term "or" had a different, conjunctive meaning in the seventeenth century. His basis for replacing "or" with "and" was, in large part, a treatise published in 1858, nearly two centuries after *Lord Morley's Case*; the treatise did not purport to interpret *Lord Morley's Case* in particular.<sup>170</sup> Given the lack of clarity in the historical record, and the need to cobble together authority spanning hundreds of years, it is difficult indeed to say that an originalist interpretation compels only one conclusion.

Perhaps the flaws in the originalist analysis of the *Giles* opinion are inherent in the very enterprise of originalist jurisprudence. Scalia once confessed that he is only a "faint-hearted originalist" because a historical inquiry might lead to conclusions that are impractical and at odds with

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161. *Giles*, 128 S. Ct. at 2687–88.

162. *See supra* notes 112–19 and accompanying text.

163. *See generally* David Savage, 'Original Intent' Matter of Opinions, L.A. TIMES, July 13, 2008, at A14 (quoting law professor Mark Tushnet of Harvard, who indicated that Supreme Court Justices "share the natural human tendency to exaggerate the case that can be made for the side they ultimately favor," and this tendency skews the originalist interpretation of the framers' intent).

164. *Giles*, 128 S. Ct. at 2683 (citing *Lord Morley's Case*, (1666) 6 How. St. Tr. 769 (H.L.)).

165. *Lord Morley's Case*, 6 How. St. Tr. at 770–71.

166. *Giles*, 128 S. Ct. at 2683.

167. *Id.* at 2683 ("[T]he term 'means' could sweep in all cases in which a defendant caused a witness to fail to appear . . ."); *id.* at 2701–02 (Breyer, J., dissenting) (suggesting that the term "means" could refer to causing the absence of the declarant without specifically intending to cause this absence).

168. *Id.* at 2683–84 (majority opinion).

169. *Id.* at 2684 n.1.

170. *Id.* at 2684.

modern precedent.<sup>171</sup> Yet in the *Giles* case, he ignored this instinct and revamped the originalist analysis in *Reynolds v. United States*,<sup>172</sup> which had surveyed many of the same cases and declined to impose an intent-to-silence requirement.<sup>173</sup> Scalia's fealty to originalism raises the ire of those scholars and judges who favor the notion of a "living Constitution,"<sup>174</sup> and who resent tethering constitutional interpretation to the sometimes misguided sensibilities of colonial America.<sup>175</sup> Finally, originalism is an inexact science,<sup>176</sup> and Supreme Court Justices are hardly experts in historical research.<sup>177</sup> Like the Supreme Court's blockbuster decision in *District of Columbia v. Heller*,<sup>178</sup> issued on the same day as *Giles*, the *Giles* ruling exemplifies the hopeless multiplicity of earnest, but contradictory, interpretations that tend to result from an originalist inquiry into the framers' intent.

### B. *Shift from an Objective to a Subjective Standard for Assessing Intent*

A second significant flaw in Scalia's *Giles* opinion is his departure from the objective standard he had previously used to assess state of mind in his opinions interpreting the Confrontation Clause. Scalia has declared on many occasions that he prefers objective, easy-to-apply tests.<sup>179</sup> He is perhaps the Court's most famous advocate of such bright-line rules. The test he

171. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989); see also Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 12–13 (2006) (expressing disappointment that Scalia does not adhere more rigidly to an originalist approach).

172. 98 U.S. 145 (1878).

173. *Id.* at 158–59 (examining authorities approximately contemporaneous with the Founding, including *Lord Morley's Case*, and omitting any mention of an intent-to-silence requirement).

174. See, e.g., Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1749–50 (2007) (arguing that the Constitution is not necessarily consonant with modern values).

175. For example, in the oral argument of the *Giles* case, Breyer wondered aloud if originalist constitutional interpretation would require modern courts to follow the colonists' practice of drowning suspected witches and inferring guilt from the suspects' survival. Transcript of Oral Argument, *supra* note 57, at 8. But see Scalia, *supra* note 171, at 864 (declaring that he would shrink from originalist interpretation if it yielded absurd results and that he could not imagine himself, "any more than any other federal judge, upholding a statute that imposes the punishment of flogging").

176. See, e.g., Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (discussing the difficulty of ascertaining and aggregating the framers' intentions).

177. Academics including history professor Jack Rakove of Stanford University, constitutional law professor Sanford Levinson of the University of Texas, and constitutional law professor Mark Tushnet of Harvard have derided the Supreme Court Justices' capacity for accurate historical research. Savage, *supra* note 163, at A14.

178. 128 S. Ct. 2783 (2008); Linda Greenhouse, *Defining Opinions*, N.Y. TIMES, July 13, 2008, at WK4 (noting the 5–4 split in *Heller* and that the two "sides came to opposite conclusions but proceeded on the premise that original understanding of [the Second Amendment's] framers was the proper basis for decision").

179. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989) (arguing that open-ended tests such as the "totality of the circumstances" test are inferior to those with a heightened amount of predictability).

ultimately adopted in *Giles* seems to betray his past insistence on an objective basis for discerning state of mind.

Sixteen years before *Giles*, Scalia joined a partial concurrence in *White v. Illinois*<sup>180</sup> that advocated the use of an objective test to fix the parameters of the confrontation right.<sup>181</sup> This concurrence would have extended the coverage of the Confrontation Clause to “any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”<sup>182</sup> The concurrence warned that standards interpreting the Confrontation Clause must be “carefully formulated” and should not be “difficult to apply.”<sup>183</sup>

In *Crawford*, Scalia once again favored an objective test for determining intent. His majority opinion considered three alternate formulations for the definition of the term “testimonial,”<sup>184</sup> all of which relied to some degree on objective indicia of the declarant’s mental state. The first formulation included “statements that declarants would reasonably expect to be used prosecutorially.”<sup>185</sup> The second formulation, derived from the concurrence in *White*, extended to formal statements “such as affidavits, depositions, prior testimony, or confessions to police,”<sup>186</sup> because a reasonable person in such settings would be able to foresee later prosecutorial use. The third formulation covered “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>187</sup> All of these formulations shared the common denominator that they relied on objective circumstances, rather than subjective mental state, to determine whether the declarant was giving a testimonial statement. Scalia heaped invective on the less predictable standards that the Court had used in *Ohio v. Roberts*,<sup>188</sup> which he characterized as “amorphous” and “subjective.”<sup>189</sup>

Scalia’s majority in *Davis* was perhaps his clearest endorsement of an objective standard. His majority opinion in that case distinguished testimonial from nontestimonial statements by alleged victims to law

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180. 502 U.S. 346 (1992).

181. *Id.* at 365 (Thomas, J., concurring in part and concurring in the judgment).

182. *Id.*

183. *Id.* at 364.

184. *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004).

185. *Id.* at 51 (quoting Brief for Petitioner at 23, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21939940, at \*23).

186. *Id.* at 52, 51–52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

187. *Id.* at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner at 3, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754961, at \*3).

188. 448 U.S. 56 (1980).

189. *Crawford*, 541 U.S. at 63; see also *id.* (“The [*Roberts*] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.”).

enforcement personnel. The dispositive consideration was whether the police were genuinely investigating an emergency at the time of the statement.<sup>190</sup> Scalia decided to assess the intentions of the police by examining the objective circumstances:

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.<sup>191</sup>

In response to criticism of this test by Justice Thomas, Scalia insisted that his test was “objective and quite ‘workable.’”<sup>192</sup>

Against the backdrop of *White*, *Crawford*, and *Davis*, the majority opinion in *Giles* seems to be an aberration. If Scalia had continued to follow the approach he had used in the prior cases, he could have easily ascertained Giles’s intent by examining the objective circumstances.<sup>193</sup> Scalia could have utilized a test of knowledge-based intent—that is, intent inferred from the plain certainty that homicide would procure the unavailability of the victim as a witness at trial.<sup>194</sup> Surprisingly, Scalia broke from his past pronouncements on this issue and insisted that the Government prove specific and subjective intent on the part of the accused to thwart testimony by the witness.<sup>195</sup> Scalia plainly indicated that he was rejecting a knowledge-based intent standard in *Giles*.<sup>196</sup> His refusal to embrace the doctrine of knowledge-based intent in *Giles* contradicted his explicit support for this

190. See *Davis v. Washington*, 547 U.S. 813, 827 (2006) (listing four reasons why statements made to police during an ongoing emergency are meaningfully and materially different from statements made to police about past events).

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

192. *Id.* at 830 n.5 (quoting *Davis*, 547 U.S. at 842 (Thomas, J., concurring in the judgment in part and dissenting in part)).

193. See *Giles v. California*, 128 S. Ct. 2678, 2697–98 (2008) (Breyer, J., dissenting) (“[U]nder the circumstances presented by this case, there is no difficulty demonstrating the defendant’s intent . . . because the defendant here knew that murdering his ex-girlfriend would keep her from testifying; and that knowledge is sufficient to show the *intent* that law ordinarily demands.”).

194. *Id.* at 2698 (“A ‘man who performs an act which it is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it.’” (quoting *Allen v. United States*, 164 U.S. 492, 496 (1896))); see also *Allen*, 164 U.S. at 496 (“[E]very man is presumed to intend the natural and probable consequences of his own act.”).

195. See *Giles*, 128 S. Ct. at 2687–88 (“[T]he requirement of intent ‘means that the [forfeiture by wrongdoing] exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.’” (citation omitted)).

196. See *id.* at 2693 (rejecting the dissent’s claim that, as applied in the domestic violence context, the majority’s holding amounts to “nothing more than ‘knowledge-based intent’” (quoting *id.* at 2708 (Breyer, J., dissenting))).

doctrine in the past.<sup>197</sup> Scalia's opinion in *Giles* represented a major shift from an objective-intent standard to a subjective-intent standard.<sup>198</sup>

This point is not simply of academic interest. A subjective-intent requirement is much harder for prosecutors to satisfy than an objective-intent requirement.<sup>199</sup> It is difficult for any witness other than the accused to state conclusively what he was thinking when he caused the death or unavailability of a hearsay declarant.<sup>200</sup> Unless the accused is forthright with this information—which seems unlikely, given that such an admission would effect a forfeiture of his confrontation rights—the Supreme Court's new preference for a subjective-intent test will significantly constrain prosecutors.

### C. *Shift from Objective to Subjective Standards for Assessing Intent*

Scalia's opinion in *Giles* erred by assuming that the constitutional forfeiture doctrine is coextensive with the evidentiary rule that creates a hearsay exception for forfeiture by wrongdoing.<sup>201</sup> The latter generally requires that the opponent of the evidence had a specific intent to prevent testimony, while the former does not. Because Scalia conflated these two distinct bodies of law, he based his conclusions in *Giles* on a mistaken assumption, and he misapprehended the true boundaries of the constitutional forfeiture doctrine.

On many occasions prior to *Giles*, Scalia had stated that the constitutional confrontation rules are distinct from the hearsay rules in the evidence codes. In *White*, Scalia joined a concurrence by Justice Thomas expressing the view that “neither the language of the Clause nor the historical evidence appears to support the notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions.”<sup>202</sup> In *Crawford*, Scalia similarly indicated that the rights secured by the Sixth Amendment do not depend on “the vagaries of the rules of evidence.”<sup>203</sup>

197. See *United States v. Aguilar*, 515 U.S. 593, 613 (1995) (Scalia, J., dissenting) (“[T]he jury is entitled to presume that a person intends the natural and probable consequences of his acts.”).

198. See *Atkins v. Virginia*, 536 U.S. 304, 341 (2002) (Scalia, J., dissenting) (insisting on the use of an objective rather than a subjective test in determining whether society considers the death penalty for a particular class of defendants to be cruel and unusual).

199. Illinois Amicus Brief, *supra* note 43, at 1 (“[I]n many cases . . . the prosecution will be unable to demonstrate that the defendant acted with the specific aim of preventing future testimony.”).

200. See *id.* at 28 (“[A]lthough witness unavailability may be a reasonably foreseeable result of the defendant's misconduct, he may not have acted with an intent to prevent testimony, or, if such intent existed, it may be impossible to prove.”).

201. See *Giles v. California*, 128 S. Ct. 2678, 2687 (2008) (“In 1997, this Court approved a Federal Rule of Evidence, entitled ‘Forfeiture by wrongdoing’ . . . . We have described this as a rule ‘which codifies the forfeiture doctrine.’” (quoting *Davis v. Washington*, 547 U.S. 813, 833 (2006))).

202. *White v. Illinois*, 502 U.S. 346, 366 (1992) (Thomas, J., concurring in part and concurring in the judgment).

203. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

Conversely, the hearsay rules are not merely a reflection of constitutional confrontation requirements. The Court stated in *Dutton v. Evans*<sup>204</sup> that while “the Sixth Amendment’s Confrontation Clause and the evidentiary hearsay rule stem from the same roots . . . this Court has never equated the two.”<sup>205</sup> In *California v. Green*,<sup>206</sup> the Court emphasized that “[o]ur decisions have never established such a congruence.”<sup>207</sup> Hearsay exceptions for excited utterances and statements against interest have no basis in the Constitution,<sup>208</sup> nor do constitutional rules regulating testimonial hearsay find their analogs in the evidence codes.

As a practical matter, trial courts address separately the requirements of the evidentiary hearsay rules and the constitutional confrontation rules. The Government needs to clear two different hurdles when it introduces hearsay against the accused in a criminal prosecution.<sup>209</sup> First, the Government needs to show that the evidence is not hearsay, or that it falls within a hearsay exception recognized within the jurisdiction. Second, if the statement is testimonial, the Government needs to show that the declarant is available for cross-examination, or that some exception to the confrontation right is applicable.<sup>210</sup>

Rule 804(b)(6) of the Federal Rules of Evidence and its state counterparts<sup>211</sup>—referred to collectively hereafter as “Rule 804(b)(6)” —codified the doctrine of forfeiture by wrongdoing,<sup>212</sup> but these rules are not as broad as the constitutional forfeiture doctrine. Congress adopted the federal version of Rule 804(b)(6) to address the problem of witness

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204. 400 U.S. 74 (1970).

205. *Id.* at 86.

206. 399 U.S. 149 (1970).

207. *Id.* at 155.

208. The Supreme Court has reversed convictions when the Government’s evidence fell within an applicable hearsay exception but nonetheless offended the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 829–32 (2004) (vacating one petitioner’s conviction because the statement at issue, while properly admitted under the hearsay rules as an excited utterance, was testimonial under the Confrontation Clause and therefore could not be admissible without cross-examination); *Crawford*, 541 U.S. at 68–69 (reversing the admission of a statement because it was testimonial, even though no party disputed that the statement fell within the ambit of the statement-against-interest hearsay exception); *see also* *Lilly v. Virginia*, 527 U.S. 116, 139–40 (1999) (plurality opinion) (holding that the admission of a statement against interest was unconstitutional under the Confrontation Clause where the defendant lacked an opportunity for cross-examination).

209. *Giles v. California*, 128 S. Ct. 2678, 2700 (2008) (Breyer, J., dissenting) (observing that the absence of confrontation concerns does not guarantee admission of hearsay evidence because the rule against hearsay still presents a separate hurdle for the proponent to surmount); *Fishman*, *supra* note 124.

210. *Crawford*, 541 U.S. at 59.

211. *E.g.*, CAL. EVID. CODE § 1350 (West 1995); DEL. R. EVID. 804(b)(6); GA. R. EVID. 804(b)(7); 725 ILL. COMP. STAT. 5/115-10.2a (2006); MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (LexisNexis 2006); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); OHIO R. EVID. 804(b)(6); OR. REV. STAT. § 40.465(3)(f)–(g) (2007); PA. R. EVID. 804(b)(6); S.D. R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6); VT. R. EVID. 804(b)(6).

212. *Davis*, 547 U.S. at 833.

tampering by defendants involved with organized crime in large cities,<sup>213</sup> a problem that did not exist at the time of the Founding. Several lower courts and commentators have noted that Rule 804(b)(6) is much narrower than the constitutional forfeiture rule, so that interpreting the latter based on the language of the former would be “untenable.”<sup>214</sup>

When Scalia cited the language of Rule 804(b)(6) as “highly persuasive” proof that the constitutional forfeiture doctrine includes an intent-to-silence requirement,<sup>215</sup> he should have known better. Legislatures have no need to limit the admissibility of evidence in a manner that precisely matches the contours of the Constitution. Such a rule would be redundant. The Sixth Amendment surely does not need a legislative “backstop.” In fact, given the instability of the Supreme Court’s confrontation jurisprudence in the last three decades, it is no surprise that state legislatures have gone in their own direction with their evidence codes. Scalia’s own opinions have encouraged state legislatures to regulate hearsay more stringently than does the Confrontation Clause.<sup>216</sup> After promoting this divergence in the two regulatory schemes, he should not have suggested in *Giles* that the hearsay rules mirror the constitutional doctrine.

#### D. *Inconsistent Approach to Domestic Violence Cases*

In 2004, 2006, and again in 2008,<sup>217</sup> Scalia was on unfamiliar ground as he tried to persuade his colleagues to enforce the Confrontation Clause more strictly. Typically a reliable vote for the prosecution, Scalia has become the Court’s most ardent supporter of confrontation rights—a position that allies him with the accused.<sup>218</sup> Ironically, the left wing of the Court tends to swing in favor of the Government in confrontation cases, because the plight of

213. James F. Flanagan, *Confrontation, Equity, and the Mismnamed Exception for “Forfeiture” by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193, 1197 n.19 (2006) (indicating that 804(b)(6) was developed in organized-crime and drug cases).

214. *Morales v. Campbell*, No. C06-06645, 2008 WL 413746, at \*13 (N.D. Cal. Feb. 13, 2008) (“Petitioner’s forfeiture argument, although superficially logical, is untenable because petitioner errs by conflating the common law rule of equitable forfeiture of the right of confrontation with the more recently developed and distinct FRE 804(b)(6).”); see also *United States v. Johnson*, 495 F.3d 951, 971 (8th Cir. 2007) (“We observe first that the scope of the forfeiture by wrongdoing doctrine under common law may differ from the version of the doctrine established by Rule 804(b)(6).”); *United States v. Natson*, 469 F. Supp. 2d 1243, 1251–52 (M.D. Ga. 2006) (“It is correct that for Confrontation Clause purposes a defendant who eliminates a witness forfeits any constitutional right to confront that witness later regardless of the defendant’s motive. However, Federal Rule of Evidence 804(b)(6) is narrower than this Confrontation Clause exception.”).

215. *Giles v. California*, 128 S. Ct. 2678, 2687–88 (2008).

216. *Crawford v. Washington*, 541 U.S. 36, 67–69 (2004).

217. Scalia wrote for the majority in the three most important cases interpreting the Confrontation Clause since 1980: *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); and *Giles v. California*, 128 S. Ct. 2678 (2008).

218. See Erwin Chemerinsky, *When It Matters Most, It Is Still the Kennedy Court*, CAL. BAR J., August 2008, <http://calbar.ca.gov/calbar/2cbj/cbjndx.htm> (click the *August 2008* link; then click the link to the article title) (noting that Scalia, generally a conservative on the Court, is leading the charge to vindicate the confrontation rights of the accused).

battered women has particular resonance for the left-leaning Justices.<sup>219</sup> This 180-degree realignment of the Court in domestic violence cases has put Scalia in the odd position of courting “liberal law-and-order” votes. In order to win these votes, he must persuade the leftist Justices that his proposed rulings will not unduly constrain prosecutors in domestic violence cases.

The necessity for coalition building in the confrontation cases may explain why Scalia’s opinions sometimes take inconsistent positions with respect to domestic violence. Scalia has seemed impatient with the clamor for special treatment of domestic violence cases, yet he has also mollified his critics with language that softened the confrontation requirements so that prosecutions of domestic violence could proceed in certain circumstances.<sup>220</sup> These two instincts—the purist and the political—have resulted in an incohesive, and occasionally contradictory, jurisprudence.

On the one hand, Scalia has been unapologetic about the adverse impact of *Crawford* and its progeny on the prosecution of batterers. He has insisted upon uniform enforcement of the Confrontation Clause. His rigidity on this point became evident during the oral argument in the *Davis* case when Ginsburg protested that the new confrontation jurisprudence could create hardships for battered women. Scalia gave a facetious reply: “Maybe we should just . . . suspend the Confrontation Clause in spousal abuse cases . . . .”<sup>221</sup> In his *Davis* opinion a few months later, he explicitly acknowledged the likelihood that the Court’s new confrontation requirements might allow batterers to walk free, but he defended this outcome.<sup>222</sup> He was even more emphatic in his *Giles* opinion. He ridiculed what he perceived to be the dissent’s suggestion that “we should have one Confrontation Clause (the one the framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women.”<sup>223</sup>

On the other hand, for all his pugnacious adherence to principle, it is remarkable that Scalia’s opinions in *Crawford*, *Davis*, and *Giles* always

219. In *Giles*, the four Justices who supported the majority opinion in its entirety were Alito, Roberts, Scalia, and Thomas—the four most conservative judges on the Court. The two Justices who joined the majority opinion only in part were the liberal Ginsburg and the liberal-to-moderate Souter. The dissenting Justices included the liberal Breyer, the liberal-to-moderate Stevens, and the moderate Kennedy. Thus the willingness of the Justices to support strict enforcement of procedural rights for the accused in *Giles* varied inversely with the Justices’ general tendency to support leftist causes. See generally Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 879 (2008) (categorizing Alito, Roberts, Scalia, and Thomas as conservatives; Breyer, Ginsburg, Souter, and Stevens as liberals; and Kennedy as the moderate-conservative); Chemerinsky, *supra* note 218 (pointing out that “ideology does not predict outcomes” in the Court’s recent confrontation jurisprudence).

220. See *infra* notes 221–34 and accompanying text.

221. Transcript of Oral Argument, *Davis v. Washington*, 547 U.S. 813 (2004) (No. 05-5224), 2006 WL 766735.

222. *Davis*, 547 U.S. at 832–33.

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

included at least a brief passage to allay the critics. In *Crawford*, Scalia acknowledged the dissent's concerns that the new confrontation requirements might hinder prosecutors, but he noted that the forfeiture doctrine survived *Crawford*.<sup>224</sup> Two years later, Scalia suggested more strongly that the forfeiture doctrine could provide a safety valve to reduce the pressures created by the Court's revised definition of "testimonial."<sup>225</sup> Yet in 2008, when the *Giles* ruling restricted the forfeiture doctrine, Scalia offered the opposite advice. He suggested that the solution to prosecutors' difficulties lay in a narrow definition of the term "testimonial."<sup>226</sup> The hydraulic relationship between the definition of "testimonial" and the forfeiture doctrine in Scalia's jurisprudence has been curious indeed. If the forfeiture doctrine was to be the panacea for the expansive definition of "testimonial" in *Crawford* and *Davis*, how could a narrow definition of "testimonial" now be the panacea for the Court's restrictive interpretation of forfeiture doctrine?

Similarly perplexing was the brief passage toward the end of the *Giles* opinion in which Scalia addressed the "domestic violence context."<sup>227</sup> He indicated here that prosecutors might satisfy the intent-to-silence requirement by pointing to a history of violence perpetrated by the accused against the accuser.<sup>228</sup> This passage seemed at odds with the preceding analysis in which Scalia had repeatedly insisted upon proof of specific intent to thwart testimony.<sup>229</sup> Newspaper coverage treated this portion of the *Giles* opinion as "puzzling" and "complicated."<sup>230</sup> The dissent even conjectured that Scalia's discussion of the "domestic violence context" signaled his agreement with some of the analysis in Souter's partial concurrence concerning inferred intent—a supposition that Scalia flatly denied.<sup>231</sup> Perhaps Scalia's language about domestic violence was a grudging concession to the liberal Justices, one of whose votes he needed to gain a majority. In any event, Scalia provided a toehold for victims of domestic violence to claim a history of abuse could support a finding of forfeiture.

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224. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

225. *Davis*, 547 U.S. at 832.

226. *Giles*, 128 S. Ct. at 2692–93 (hinting in dicta that prosecutors could sidestep the definition of "testimonial" by relying more heavily on victims' statements to friends, neighbors, and medical personnel). This suggestion engendered a lengthy discussion on the evidence professors' e-mail listserv in the summer of 2008. A number of professors believed that Scalia's comment had significantly narrowed the scope of the term "testimonial." Copies of this e-mail correspondence are on file with the author.

227. *Id.* at 2693.

228. *Id.*

229. *Id.* at 2683–92.

230. Susan Nielsen, *The Other Gun Ruling: Court Favors Abusers by Living in the Past*, PORTLAND OREGONIAN, July 6, 2008, at E1 (discussing the Court's "[m]ultiple opinions about how to enforce suspects' rights in the context of domestic abuse"); Savage, *supra* note 44, at 19 (quoting Professor Joan Meier, who commented that the *Giles* opinions were "puzzling" on the topic of forfeiture in domestic violence prosecutions).

231. *Giles*, 128 S. Ct. at 2703 (Breyer, J., dissenting).

In sum, Scalia's recent opinions on the Confrontation Clause follow a pattern. The first 90% of the opinions set forth originalist analysis about the intent of the framers. The last 10% then seeks to assure the liberal Justices that more confrontation in court will not mean more confrontation at home. This formula may be effective in building a coalition, but the final paragraphs contrast starkly with the foregoing analysis, complicating the interpretation of the opinions by practitioners and lower court judges. One has the impression that, but for the political exigencies of marshalling a majority, Scalia would prefer to be less conciliatory and (pardon the pun) more confrontational.

### III. A Proposed Framework for Assessing Forfeiture After *Giles*

This Part looks to the future after *Giles*. Justice Scalia's ruling was, in many respects, a setback for prosecutors of domestic violence. Yet *Giles* also gave hope that a carefully crafted forfeiture argument could prevail even when the accused has not expressly threatened reprisals for testimony. The purpose of Part III is to develop a new jurisprudential framework that will guide lower courts in applying the forfeiture doctrine after *Giles*.

The majority opinion in *Giles* included the following language, which drew the support of six Justices:

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.<sup>232</sup>

The concurrence by Justice Souter also included language addressing forfeiture in the context of domestic violence, and a total of five Justices endorsed this language:

[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 oppressing defendant mira-

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232. *Id.* at 2693. Four Justices—Alito, Roberts, Scalia, and Thomas—supported the majority opinion in its entirety. Ginsburg and Souter concurred in most of the majority opinion, including the quoted language. *Id.* at 2694 (Souter, J., concurring in part).

culously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.<sup>233</sup>

Commentators have noted that the above-cited language in the *Giles* opinions could possibly permit forfeiture arguments in a wide range of domestic violence cases,<sup>234</sup> but the devil is, as always, in the details. Courts will need to develop a framework for interpreting *Giles*'s inferred-intent standard.<sup>235</sup> The following subparts offer guidance for judges and advocates interpreting *Giles*'s forfeiture test in domestic violence prosecutions. Subpart A takes account of the various rationales for the forfeiture doctrine. Subpart B presents a set of bright-line rules, including per se rules that support a finding of subjective intent to silence in three circumstances: (1) when the accused has violated a restraining order; (2) when the accused has committed violence after the victim has filed a police report or initiated judicial proceedings; and (3) when the accused has engaged in a minimum number of violent or threatening acts within a specified period.

#### A. *The Theoretical Underpinnings of the Forfeiture Doctrine*

Taken collectively, the *Giles* opinions indicate that a majority of the Supreme Court is interested in considering the various rationales that underlie the forfeiture doctrine. Scalia declared in subpart II(D) of his opinion that the only relevant consideration was the intent of the framers, and that the Court had no business considering theoretical and policy questions relating to forfeiture.<sup>236</sup> Five Justices disagreed with this portion of Scalia's opinion. Souter's concurrence, in which Ginsburg joined, indicated that

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233. *Id.* at 2695 (Souter, J., concurring in part). Souter authored this concurring opinion, and Ginsburg joined in the opinion. The three dissenters—Breyer, Kennedy, and Stevens—expressly supported the language quoted here. *Id.* at 2708 (Breyer, J., dissenting). Souter wrote that his “inferred-intent” standard was consistent with Scalia’s majority opinion, and Scalia did not refute this representation. *Id.* at 2695 (Souter, J., concurring).

234. Brooks Holland, a law professor at Gonzaga University, noted that Scalia’s majority opinion “did not leave prosecutors helpless” in domestic violence cases. Indeed, Scalia left open the possibility that “wrongful intent may be established inferentially.” Brooks Holland, *Confrontation Forfeiture*, NAT’L L.J., Aug. 6, 2008, at 11. Similarly, Professor Joan Meier of George Washington University, who had authored an amicus brief supporting the respondent in *Giles*, opined after the Court’s ruling that “there is good reason to hope that on remand, this [defendant] will remain convicted. . . and that many future batterers and abusers will still be capable of being convicted.” Savage, *supra* note 44, at 19 (alteration in original).

235. This Article will use the term *inferred-intent standard* to refer to a test whereby a judge infers the defendant’s intent to silence a potential witness based on the defendant’s past conduct vis-à-vis that victim, even if the conduct did not involve an explicit threat of reprisals for testimony or cooperation with law enforcement. As used herein, the term *inferred-intent standard* refers not only to the language in Souter’s concurrence, but also the similar language in Scalia’s opinion. See *supra* notes 220–33 and accompanying text. After all, Souter said that his formulation of the test was consistent with Scalia’s opinion, and Scalia did not contradict this representation by Souter. See *supra* note 232.

236. See *Giles*, 128 S. Ct. at 2692 (stating that it is not the role of the courts to extrapolate the values behind the words of the Sixth Amendment).

those two Justices did not join in subpart II(D) of Scalia's opinion.<sup>237</sup> The three dissenters did not join in any part of Scalia's opinion.<sup>238</sup> All five of these Justices gave their support to opinions that included wide-ranging discussions of the rationales for forfeiture.

A survey of the underlying themes in forfeiture law is appropriate here for several reasons. First, this inquiry will set the stage for the formulation of precise rules setting the boundaries of forfeiture and will ensure that the rules take account of all the concerns that necessitate forfeiture. Second, as in the case of all evidentiary rules, lawyers are more likely to succeed in their courtroom advocacy if they can cite the theoretical and policy considerations that favor their proposed interpretation.<sup>239</sup> Third, the composition of the Supreme Court will inevitably change in the coming years, and originalism could fall from favor;<sup>240</sup> thus, a set of forfeiture rules grounded solely in originalism may collapse as abruptly as the *Roberts* rule, which the Court based solely on utilitarianism.<sup>241</sup> To borrow an oft-used metaphor, the sturdiest stool has several legs.

What, then, are the considerations animating the forfeiture doctrine? Three concerns are most important. First is the utilitarian imperative that trials must function efficiently and the jury must see as much relevant evidence as possible in order to facilitate the truth-seeking goal. Second, equity requires that courts hold defendants accountable for their misdeeds. The third important consideration is the original intent of the framers, which ascribes to certain court procedures an intrinsic value that does not always align with utilitarian or equitable values. These three considerations—which

237. *Id.* at 2694 (Souter, J., concurring) (agreeing, in a concurrence joined by Justice Ginsburg, with the majority's analysis on all but section II(D)(2) of the majority's opinion).

238. *Id.* at 2695 (Breyer, J., dissenting) (asserting, in a dissent joined by Justices Stevens and Kennedy, that the defendant had forfeited his Confrontation Clause right through his own wrongdoing).

239. *E.g.*, FED. R. EVID. 102 (listing general considerations that influence interpretation).

240. According to Professor Lawrence Tribe, who formerly taught Barack Obama at Harvard Law School:

[I]f Obama were to be elected, he would appoint justices who share his view that the Constitution is a living document . . . . They would not be justices who fool themselves into thinking they know what the Constitution's original meaning was, and they can apply it as if nothing has happened in the last 200 years.

Shira Schoenberg, *Law Expert: Obama Will Preserve Constitution*, CONCORD MONITOR, Nov. 14, 2007, <http://www.cmonitor.com/apps/pbcs.dll/article?AID=/20071114/NEWS01/711140429/1217/NEWS98> (quoting comments that Tribe made while campaigning for Obama in New Hampshire). History may remember the 2007 term of the U.S. Supreme Court as a high-water mark for originalism. See Savage, *supra* note 163, at A14 ("This year the Supreme Court relied more than ever on history and the original meaning of the Constitution in deciding its major cases.")

241. *Crawford v. Washington*, 541 U.S. 36, 62–65 (2004) (chiding the *Roberts* Court for basing its decision on (and ridiculing the decision because it rested on) consequentialist conceptions of the confrontation right rather than fealty to the framers' intent).

are also the primary rationales for the confrontation rule itself<sup>242</sup>—will be discussed in turn below.

Forfeiture of confrontation rights serves utilitarian goals.<sup>243</sup> It aids the truth-seeking process. Jeremy Bentham, perhaps the most famous exponent of utilitarian philosophy, emphasized the importance of providing the jury with all relevant information about the alleged crime.<sup>244</sup> Strict enforcement of the Confrontation Clause, without a robust forfeiture exception, could potentially deprive the jury of relevant evidence when a hearsay declarant is unavailable for cross-examination. Further, the forfeiture rule advances the utilitarian goal of convicting criminals and thereby protecting the public.<sup>245</sup> The forfeiture rule ensures that the Confrontation Clause does not free criminals who scare their victims away from the witness stand. Without the forfeiture exception, the Confrontation Clause would greatly hinder the prosecution of violent crime and would jeopardize public safety.<sup>246</sup>

Equitable principles also underlie the forfeiture doctrine.<sup>247</sup> A defendant who intentionally commits a wrongful act that keeps his victim away from trial has no moral standing to protest the absence of this

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242. Confrontation advances utilitarian objectives because it aids in the discovery of the truth. 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (J. Chadbourn ed., rev. 1974) (characterizing cross-examination as “the greatest legal engine ever invented for the discovery of truth”); 3 WILLIAM BLACKSTONE, COMMENTARIES \*373 (indicating that the “open examination of [witnesses] . . . is much more conducive to the clearing up of truth”); MATTHEW HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (Lawbook Exchange 2000) (1713) (noting that adversarial testing “beats and bolts out the Truth much better”); cf. *Crawford*, 541 U.S. at 61–62 (discussing the utility of cross-examination, but emphasizing that cross-examination is crucial for its own sake, not for its apparent utility in each particular case). There is also an equitable rationale for confrontation: the accuser must be accountable in court for his accusation, and face-to-face confrontation assures accountability. According to David Feige, “[I]f you are going to make an allegation, the person you are accusing has a right to look you in the face and challenge what [you] are saying.” Savage, *supra* note 44, at 16. Finally, the originalist rationale for confrontation has been documented thoroughly by the majority opinion in *Crawford*. 541 U.S. at 43–62.

243. For a cogent counterpoint, see the scholarship of Professor James Flanagan, who is the nation’s foremost advocate for narrowing the forfeiture rule. E.g., James F. Flanagan, *Forfeiture by Wrongdoing and Those who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(B)(6)*, 51 DRAKE L. REV. 459 (2005).

244. 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 302–04, 309–11 (Garland Publ’g 1978) (1827).

245. *Id.* at 303 (“The conviction and punishment of the defendant, he being guilty, is by the supposition an act the tendency of which, upon the whole, is beneficial to society.”).

246. *Giles v. California*, 128 S. Ct. 2678, 2691 (2008) (observing that the “common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them” in order to thwart prosecution); *Davis v. Washington*, 547 U.S. 813, 834 (2006) (noting that the forfeiture rule is necessary to protect the functioning of courts).

247. *Crawford*, 541 U.S. at 62 (indicating that “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds”).

witness.<sup>248</sup> The law must hold the defendant accountable for this misconduct.<sup>249</sup> It is a timeless equitable maxim that no one should be able to profit from his wrongdoing.<sup>250</sup> This principle finds expression in many contexts, such as the denial of insurance benefits to those who kill the insured,<sup>251</sup> the denial of any inheritance under a will to one who has killed the testator,<sup>252</sup> and the denial of damages to plaintiffs who incurred injury as a result of engaging in intentional criminal conduct.<sup>253</sup> Notions of equity factor prominently in the law of evidence as well. For example, defendants must be accountable for the statements of their co-conspirators,<sup>254</sup> and parties who abuse the attorney–client privilege to further crimes or frauds must forfeit the privilege.<sup>255</sup> “Equity” is a fancy term for fairness, and fairness requires a zero-tolerance approach to the intimidation or incapacitation of witnesses.

The third basis for the forfeiture doctrine is the framers’ intent to deny confrontation rights to any accused whose intentional wrongdoing caused the absence of the accuser as a trial witness. The seminal ruling in *Lord Morley’s Case*,<sup>256</sup> which predated the Founding, made the framers aware of the need to establish boundaries for the confrontation right. While the framers may very well have considered the utilitarian and equitable bases for

248. *Reynolds v. United States*, 98 U.S. 145, 158 (1879) (“[I]f a witness is absent by [defendant’s] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.”).

249. *Giles*, 128 S. Ct. at 2697 (Breyer, J., dissenting) (declaring that the accused “shall never be admitted to shelter himself by such evil Practices on the Witness, that being to give him Advantage of his own Wrong” (quoting G. GILBERT, *LAW OF EVIDENCE* 214–15 (1791))).

250. *E.g.*, *State v. Sanchez*, 177 P.3d 444, 456 (Mont. 2008) (observing that the forfeiture doctrine “derives from the maxim that no person should benefit from the person’s own wrongdoing”); *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889) (describing the “general, fundamental maxims of the common law” providing that “[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his crime”). See generally *Friedman, supra* note 38, at 506 (calling the assertion of a confrontation right by a criminal defendant who renders the victim unable to testify “outlandish”).

251. *Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886) (“It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken.”). Interestingly, this rule bars recovery of insurance benefits whether or not the specific purpose of the homicide was to recover the benefits. See *Nat’l Life Ins. Co. v. Hood’s Adm’r*, 94 S.W.2d 1022, 1023 (Ky. 1936).

252. *PAGE ON WILLS* § 17.19, 999–1001 (3d ed. 2003). This disqualification does not depend on “whether the crime was committed for that very purpose or with some other felonious design.” *Van Alstyne v. Tuffy*, 103 Misc. 455, 459 (N.Y. Sup. Ct. 1918).

253. *E.g.*, *Oden v. Pepsi Cola Bottling Co. of Decatur, Inc.*, 621 So. 2d 953, 954 (Ala. 1993) (denying damages to the estate of a minor killed when a vending machine from which he was trying to steal fell on him); *Manning ex. rel. Manning v. Brown*, 689 N.E.2d 1382, 1384–85 (N.Y. 1997) (denying damages to a passenger injured in an accident while riding in a stolen vehicle).

254. *FED. R. EVID.* 801(d)(2)(E).

255. EDNA SELAN EPSTEIN, *THE ATTORNEY–CLIENT PRIVILEGE AND THE WORK–PRODUCT DOCTRINE* 416–22 (2001) (discussing the rationale for the crime–fraud exception).

256. (1666) 6 How. St. Tr. 769, 771 (H.L.).

the forfeiture doctrine, a true originalist would insist that the framers' adoption of the doctrine has intrinsic importance. In other words, the original understanding of the doctrine is enforceable simply because of its historical pedigree, regardless of whether it aligns with modern notions of expedience or equity. Those who subscribe to originalist constitutional interpretation stress the need for a static, predictable interpretation of constitutional rights and their limits.<sup>257</sup> Bending or disregarding the framers' original intent jeopardizes all constitutional rights, argue the originalists.

In sum, the forfeiture doctrine rests on three separate rationales: utilitarian, equitable, and originalist. The narrow focus on one rationale could jeopardize the longevity of the doctrine, and in the short term could also circumscribe it so that it does not achieve the full breadth of its objectives. So, for example, Scalia's exclusively originalist conception of forfeiture, for example, leads to results that offend utilitarian or equitable sensibilities, such as the exclusion of hearsay statements from victims whom the accused has admittedly killed. The harm of this narrow-minded conception of the forfeiture doctrine mirrors the harm resulting from Scalia's narrowly originalist interpretation of the Confrontation Clause: he has limited its application to testimonial hearsay, a boundary that may make sense from an originalist perspective, but that seems untenable from a utilitarian or equitable perspective.<sup>258</sup> Only by acknowledging the full breadth of the rationale for the forfeiture doctrine is it possible to fashion a comprehensive set of rules for the application of this doctrine.

### *B. Translating Theory into Requirements for Invoking Forfeiture*

The best way to facilitate lower courts' interpretation of the forfeiture exception after *Giles* is to adopt bright-line rules. Scalia has frequently extolled the merit of this approach.<sup>259</sup> In his *Crawford* ruling, he discussed the value of objective rather than subjective rules.<sup>260</sup> He indicated that finite, discrete tests are far better than amorphous standards.<sup>261</sup> Justice Rehnquist's concurrence in *Crawford* echoed this sentiment; he urged his colleagues to move quickly in providing concrete guidance to practitioners and judges who would have to ascertain the boundaries of the Court's new confrontation jurisprudence.<sup>262</sup> Scalia's next opinion interpreting the Confrontation Clause in the *Davis* case gave prosecutors and defense attorneys an easy-to-discern rule that distinguished testimonial from nontestimonial statements.<sup>263</sup>

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257. Barnett, *supra* note 171, at 18 (arguing in favor of strict originalism).

258. Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEXAS L. REV. 271, 306 (2006).

259. Scalia, *supra* note 179, at 1179–80.

260. *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

261. *Id.* at 61.

262. *Id.* at 75–76 (Rehnquist, J., concurring).

263. See *Davis v. Washington*, 547 U.S. 813, 822 (2006) (“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the

Indeed, the fine-tuning of confrontation law from *Crawford* to *Davis* provides a model for the precise demarcation of the forfeiture doctrine that should follow *Giles*.

Bright-line rules have tremendous practical value. They are easier for courts to apply consistently. They signal more clearly to the public which conduct is sanctionable, and they thereby enhance the expressive function of the law. Furthermore, predictable rules enable practitioners to assess the strengths and weaknesses of their cases, and to determine which cases should go to trial. Predictable forfeiture rules might embolden a prosecutor to charge a domestic violence case in which the availability of the accuser at the time of trial is questionable. Accordingly, predictable forfeiture rules would diminish the temptation for defendants to attempt to avoid charges by intimidating witnesses in advance of the charging decision; the prosecutor would be less dependent on the enthusiasm of the witness to testify at trial if the prosecutor could gauge the potential applicability of the forfeiture doctrine at the outset of the prosecution.

The lower courts need bright-line rules to address five questions that arise after *Giles*. First, what showing of unavailability is sufficient to invoke the forfeiture doctrine? Second, what types of wrongful conduct could support a finding of forfeiture? Third, how should courts assess causation? Fourth, what evidence is sufficient to show that the accused intended to silence a prospective witness within the meaning of *Giles*? Fifth, can the prosecution show the requisite mental state if the defendant had mixed intentions, such as the desire for revenge coupled with the intent to silence? Each of these questions will be discussed in turn.

*1. Actual Unavailability.*—The utilitarian, equitable, and originalist rationales for the forfeiture doctrine all demand that courts limit the application of the doctrine to cases in which the hearsay declarant is dead, incapacitated, or unavailable to testify despite the best efforts of the prosecution to summon her. Without a fairly strict unavailability requirement, prosecutors and courts might be too willing to substitute hearsay for live testimony, forgoing the utilitarian benefits of cross-examination. Indeed, the utilitarian argument for forfeiture presumes that evidence of the facts at issue is otherwise unavailable. Similarly, the equitable argument for forfeiture is far less compelling if the declarant is not truly beyond the Government's reach, and if the Government has not made earnest efforts to procure her attendance.<sup>264</sup> Originalist analysis of the Founding Era decisions shows that

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primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”). In response to criticism, Scalia defended the *Davis* test as “objective and quite ‘workable.’” *Id.* at 831 n.5.

264. *Cf.* *Barber v. Page*, 390 U.S. 719, 724–25 (1968) (holding that a witness incarcerated in federal prison was not unavailable because the state prosecution made no effort to produce the witness at trial).

courts usually required actual unavailability as a condition for forfeiting confrontation rights.<sup>265</sup>

Courts should find unavailability only when the declarant is permanently unavailable, or when her present unavailability seems substantially unlikely to change in the future. So, for example, if the declarant is in the hospital recovering from injuries from an incident of witness tampering, postponement of trial is preferable to resorting immediately to hearsay statements. On the other hand, if the declarant has fled the jurisdiction due to her fear of reprisals by the defendant, the court should not postpone trial based on the speculative possibility that she might return at a future time.

Does the unavailability requirement impose a “duty to mitigate” on prosecutors? In other words, if a prosecutor can foresee that the defendant’s wrongdoing might result in the unavailability of the alleged victim at trial, does the prosecutor have a duty to schedule a deposition or otherwise enable pretrial confrontation of the declarant? Professor Richard Friedman would impose a duty on prosecutors to mitigate the harm of the declarant’s foreseeable unavailability, and would exclude hearsay offered by a prosecutor who has neglected this duty.<sup>266</sup> In effect, Friedman’s rule would be a mirror image of the forfeiture doctrine, whereby the failure to mitigate would itself constitute wrongdoing. For present purposes, the line is easy to draw. Prosecutors should not be able to invoke the forfeiture doctrine if they have taken affirmative steps to limit access by the defense to declarants whose hearsay the Government wishes to offer at trial.<sup>267</sup> Yet if the Government’s “wrongdoing” consists solely of neglecting to schedule depositions in order to spare the defendant the consequences of his unilateral wrongful conduct, the unavailability requirement does not prevent the Government from offering hearsay in lieu of live testimony.

2. *Wrongful Act*.—Only a crime, fraud, or morally blameworthy act can provide the basis for forfeiture. This requirement finds support in the utilitarian, equitable, and originalist rationales for the forfeiture doctrine. The utilitarian benefits of the doctrine diminish when it sanctions defendants who do not intend to engage in wrongful conduct; deterrence does not necessitate such a rule because people without wrongful intent are not

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265. See, e.g., *Crawford*, 541 U.S. at 53–54 (“[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable . . .”).

266. The Confrontation Blog, <http://confrontationright.blogspot.com/2007/12/duty-to-mitigate-with-respect-to.html> (Dec. 29, 2007, 11:56 PM). As usual, Professor Friedman makes a persuasive case. While such a rule might present practical challenges (e.g., in determining the degree of foreseeability that necessitates mitigation), Professor Friedman’s proposal deserves further discussion; one can imagine extreme cases in which death is foreseeable and an opportunity to cross-examine the declarant in advance of trial would be appropriate.

267. See generally FED. R. EVID. 804(a)(5) (mandating that a declarant is not an unavailable witness if his unavailability is caused by the wrongdoing of the proponent of the declarant’s statement).

contemplating the sanction. Equity would not abide a forfeiture rule that covered innocent acts because the equitable rationale for forfeiture presumes that the defendant has unclean hands. And the historical record offers no record of forfeiture based on acts that are neither criminal nor morally objectionable.

What sorts of conduct could qualify as “wrongful” for purposes of the forfeiture rule? The clearest examples are violent reprisals or threats of violent reprisals. Denial of child support for the complainant, initiation of vindictive legal proceedings against the complainant, false allegations of child abuse by the complainant—all qualify as wrongful conduct sufficient to justify forfeiture of confrontation rights.<sup>268</sup> Affirmative inducements such as bribes, gifts, or bus tickets to faraway places could also qualify.<sup>269</sup> The wrongfulness need not be inherent in the actus reus, but could lie in the mens rea. In other words, a defendant who undertakes or threatens an otherwise lawful act for the purpose of coercing the declarant into absenting herself from trial could forfeit his confrontation rights as a result.<sup>270</sup>

Acts by others generally cannot effect a forfeiture of the defendant’s confrontation rights. If a sympathizer of the defendant tries to procure the absence of a key witness without any involvement of the defendant in this effort, the defendant has not engaged in wrongful conduct simply because he is the passive beneficiary of another’s wrongful conduct.<sup>271</sup> On the other hand, the accused would be accountable for unavailability resulting from foreseeable acts by a co-conspirator that further the conspiracy.<sup>272</sup> The crucial issue is the agency of the accused, either through direct involvement or through complicity in a conspiracy.

3. *Causation/Foreseeability.*—Utilitarian, equitable, and originalist considerations all favor a causation test for forfeiture. From a utilitarian

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268. For example, in *Reynolds v. United States*, 98 U.S. 145 (1879), a polygamy trial, the defendant’s noncriminal act of refusing to reveal the location of his wife was a sufficient basis for forfeiture. *Id.* at 159–60.

269. *E.g.*, *United States v. Scott*, 284 F.3d 758, 763 (7th Cir. 2002) (noting in dictum that “giving something of value to a potential witness could constitute as wrongdoing” for purposes of the forfeiture rule). See generally Timothy M. Moore, *Forfeiture by Wrongdoing: A Survey and an Argument for Its Place in Florida*, 9 FLA. COASTAL L. REV. 525, 555–60 (2008) (discussing the wrongdoing requirement in the forfeiture rule).

270. This rule should not extend, however, to the assertion of an evidentiary privilege as to which the defendant has standing. *E.g.*, *Crawford v. Washington*, 541 U.S. 36, 42 n.1 (2004).

271. *E.g.*, *Perkins v. Herbert*, 537 F. Supp. 2d 481, 496–97 (W.D.N.Y. 2008) (finding that admission of the victim’s hearsay statement under forfeiture theory was an error where the defendant himself didn’t intimidate the witness or cause others to do so and was rather the unintended beneficiary of misconduct by a co-defendant); see also Richard D. Friedman, *Forfeiture of the Confrontation Right After Crawford and Davis*, 19 REGENT U. L. REV. 489, 496 (2006).

272. *United States v. Carson*, 455 F.3d 336, 363–64 (D.C. Cir. 2006) (holding that a defendant forfeits his right to confront a witness if the defendant’s co-conspirators have caused the unavailability of the witness through misconduct; their actions were within the scope and in furtherance of the conspiracy; and the effects of their actions were reasonably foreseeable).

perspective, the forfeiture of confrontation rights without proof that the defendant caused unavailability would not make sense, because the unavailability of the evidence would not be attributable to the wrongful conduct, and the imposition of sanctions for the misconduct would not remedy the problem. Equity also demands some proof of causation: the “no harm, no foul” rule is cognizable in the realm of equity. Originalists would be hard pressed to find a Founding Era case in which a court imposed forfeiture without proof of causation.

Calibrating the causation test is more difficult than discerning the necessity for causation. Tort law provides a useful model with its test for proximate causation. It would be inequitable to impose forfeiture based on a wrongful act that was very remote in the causal chain from the ultimate impetus for the declarant’s unavailability. On the other hand, the defendant does not deserve a windfall if his wrongful act, which at the time of its commission seemed likely to cause the unavailability of a witness, was actually only the penultimate link in the causal chain due to the fortuitous intervention of another causal factor.

A requirement of foreseeability should supplement the requirement of proximate causation. Contract law provides another useful model here, allowing recovery for all losses that were foreseeable at the time the parties formed the contract.<sup>273</sup> Foreseeability should also set the outward limits of causation for purposes of the forfeiture doctrine. A defendant should not be accountable when his misconduct unforeseeably complicates the prosecution’s efforts to bring witnesses to trial. For example, a defendant who flees the jurisdiction has not “caused” the unavailability of a prospective witness who unforeseeably died between the time of the defendant’s flight and the time of trial.<sup>274</sup> A defendant who claims that a third party committed a murder with which the defendant has been charged, but who did not report the third party’s alleged crime promptly, does not forfeit the right to confront that third party when the Government offers the third party’s hearsay statement; the defendant’s failure to report the third party promptly, even if technically a violation, did not foreseeably cause the absence of the third party as a trial witness.<sup>275</sup> Yet an accused rapist whose victim commits sui-

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273. Melvin Aron Eisenberg, *The Principle of Hadley v. Baxendale*, 80 CAL. L. REV. 563, 580–81 (1992) (comparing the foreseeability standard for contractual damages with a slightly different standard for damages in tort law).

274. See *People v. Melchor*, 841 N.E.2d 420, 435–36 (Ill. App. Ct. 2005) (holding that the defendant’s flight alone did not establish the required intent for forfeiture to apply and further that flight did not cause the witness to be unavailable), *vacated*, 871 N.E.2d 32 (Ill. 2007); *State v. Weaver*, 733 N.W.2d 793, 800 (Minn. Ct. App. 2007) (rejecting an assertion of forfeiture by wrongdoing because the doctrine is “usually applied in cases involving witness tampering or some other type of threats to witnesses to procure their unavailability”).

275. This fact pattern is similar to the facts asserted in the appellate brief filed by the convicted defendant in Brief for Appellant at \*5–23, *People v. Brownlow*, No. 06CA1342, 2008 WL 2959345 (Colo. App. July 1, 2008). The Colorado Court of Appeals affirmed without opinion. *People v. Brownlow*, No. 06CA1342, 2009 WL 147007 (Colo. App. Jan. 22, 2009).

cide two days after the alleged crime cannot claim that the nexus between rape and suicide is unforeseeable.<sup>276</sup>

4. *Intent to Silence Possible Witness.*—The greatest challenge in the wake of *Giles* is to devise a test for evaluating whether a defendant had the requisite intent to silence when he committed the act that the Government now cites as the basis for forfeiture. Language in Scalia’s majority opinion and in Souter’s concurrence<sup>277</sup>—endorsed, in pertinent part, by a majority of the Court—suggests the possibility of inferring intent from a pattern of past conduct, even conduct that did not seem motivated in an immediate sense by an intent to make the victim unavailable for testimony at trial.

To be sure, this Article advocates an expansive interpretation of the intent-to-silence requirement. Such an interpretation finds support in the utilitarian rationale for forfeiture. A narrow interpretation, insisting upon explicit threats of reprisals, would limit the scope of the forfeiture doctrine significantly.<sup>278</sup> It would allow more furtive defendants to evade the scope of the forfeiture rule. A narrow interpretation would deprive juries of relevant evidence, and would create intolerable incentives for the mistreatment of the accuser by the accused. Moreover, utilitarian concerns favor an easy-to-administer rule that promotes judicial efficiency and allows parties to assess the strengths and weaknesses of their positions before deciding on whether to go to trial.

Equitable considerations also demand a broad interpretation of the intent-to-silence requirement. Principles of equity have long barred a wrongdoer from reaping a benefit for his misconduct, even without clear proof that the sole point of the misconduct was to obtain the benefit.<sup>279</sup> The sanction for witness tampering must not depend for its enforcement on the obviousness of the scheme, or the cleverest defendants will be able to manipulate witnesses with impunity. Equity does not simply disapprove of blatant intimidation; equity disapproves of all intimidation.

Originalism can abide an expansive interpretation of the intent-to-silence requirement. While the historical record admits of many conclusions about the precise contours of forfeiture doctrine, a fair number of Founding Era authorities seem to have extended forfeiture to schemes in which defendants sought to deter testimony through means other than explicit threats of

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276. See *People v. Herring*, No. A104624, 2005 WL 958220, at \*12–15 (Cal. Ct. App. Apr. 27, 2005) (ruling hearsay evidence was inadmissible while making no mention that the nexus between rape and suicide might be unforeseeable).

277. See *supra* notes 230–34 and accompanying text.

278. See Illinois Amicus Brief, *supra* note 43, at 1 (arguing that a narrow interpretation would have “monumental implications” for state criminal trials, undermining prosecutions or even making them impossible in many cases).

279. See *supra* notes 246–49 and accompanying text.

reprisals.<sup>280</sup> Even Scalia, the Court's most ardent originalist in the area of confrontation rights, somehow concluded that certain evidence of past domestic violence might reveal an intent to "isolate" such that forfeiture would be a proper remedy.

This Article proposes three per se rules that will aid lower courts in applying the inferred-intent test in *Giles*. Each of the three rules will be discussed in the subsections that follow.

*a. Intent Inferred from Violation of Restraining Order.*—Lower courts should adopt a per se rule that a defendant's violation of a restraining order issued for the protection of the accuser, either in the present case or an unrelated case, manifests the required intent for forfeiture under *Giles*. In other words, if the accused violated a restraining order prior to his trial for the instant offense, and if the violation resulted proximately and foreseeably in the absence of the accuser at trial, then hearsay statements by the accuser—particularly statements in connection with the application for the restraining order—would be subject to the forfeiture doctrine.

This fact pattern arises in a substantial portion of prosecutions for domestic homicide.<sup>281</sup> A defendant's decision to murder his intimate partner typically culminates a pattern of prior crimes against that partner, including crimes that may have led that partner to obtain a restraining order before her death.<sup>282</sup> Further, while a homicide trial is pending, a judge may issue a restraining order to protect the accuser from the accused, and a violation of that restraining order could provide a basis for forfeiture if the violations caused the absence of the accuser at trial.

There can be no doubt that violation of a restraining order evinces the intent required by *Giles*. The restraining order is confirmation that the history of mistreatment exceeds acceptable or excusable levels, and has become so egregious that the petitioner's own efforts cannot vindicate her autonomy. A restraining order is a lifeline connecting the petitioner to a court system that can protect her. Defendants who violate such restraining orders are seeking to sever that lifeline, interposing themselves between the petitioner and the court system. In a word, the defendant is seeking to "isolate" the

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280. See *Giles v. California*, 128 S. Ct. 2678, 2683–84 (recounting a number of early authorities that recognized forfeiture in a broad array of situations where the defendant had sought to prevent testimony of a witness by "means or procurement"); see also *id.* at 2695–96 (Breyer, J., dissenting) (noting that historically a defendant could forfeit his right to confrontation by "procurement" of the witness's unavailability).

281. If a defendant has previously been convicted of assaulting the same victim, chances are good that a restraining order is pending. Courts issue restraining orders at sentencing in approximately 40% of domestic aggravated assault cases. ERICA L. SMITH ET AL., BUREAU OF JUSTICE STATISTICS, STATE COURT PROCESSING OF DOMESTIC VIOLENCE CASES 4 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scpdvc.pdf>.

282. This pattern was evident in the *Banos*, *Her*, and *Streeter* cases discussed at the outset of this Article. Each case involved a homicide following the issuance of a restraining order.

petitioner from the legal system. This conduct plainly meets both Scalia's and Souter's requirements for intent.

The precise reason why violations of restraining orders show intent to silence is that the violation follows notice to the defendant that the petitioner may likely seek to testify against him. Court hearings often follow the issuance of preliminary restraining orders.<sup>283</sup> Even after a preliminary restraining order becomes final, the court may not be willing to extend the order without holding a hearing to find out the urgency of the petitioner's need for further protection. Restraining orders are commonly the first step taken by a battered woman who is preparing to resort to the legal system in many other ways: filing divorce proceedings, seeking sole custody of her children, initiating a criminal prosecution of the batterer, etc.<sup>284</sup> The fact that half of all restraining orders require subsequent enforcement underscores the foreseeability that petitioners will be witnesses against respondents.<sup>285</sup> In sum, the filing of a restraining order is a warning to the defendant that the petitioner may soon be a witness against him, and his violation of that restraining order is an objective indication of his intent to thwart her from appearing in court.

Precedent exists for ascribing such significance to a violation of a restraining order. Two courts have relied on such violations as conclusive evidence that a defendant intended to tamper with the accuser.<sup>286</sup> In addition, the United States Sentencing Guidelines recommend a sentencing enhancement for "obstruction of justice" when a defendant has violated a restraining order issued in connection with the prosecution.<sup>287</sup> Since restraining orders are the primary means by which the court itself protects vulnerable witnesses, it would be surprising indeed if the violation of a

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283. 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2951 (2d ed. 1995).

284. Richard A. Lingg, Note, *Stopping Stalkers: A Critical Examination of Anti-stalking Statutes*, 67 ST. JOHN'S L. REV. 347, 357–58 (1993).

285. Cf. Andrew R. Klein, *Re-abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 192, 199 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (finding that 49% of abusers "re-abused their victims within 2 years" of being placed under a restraining order).

286. See *United States v. Montague*, 421 F.3d 1099, 1101, 1104 (10th Cir. 2005) (finding forfeiture and admitting the grand jury testimony of the defendant's abused spouse because the prosecution's evidence showed that the defendant violated a court order by speaking to his wife on the phone and meeting with her on at least five occasions); *State v. Turner*, No. A04-1799, 2005 WL 2850315, at \*3 (Minn. Ct. App. Nov. 1, 2005) (upholding a district court's decision that the defendant had forfeited his right to confront a hearsay declarant because he had violated a no-contact order by calling the declarant, and that this call was the reason for her unavailability at trial).

287. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2008) (recommending an enhanced sentence if the prosecution's evidence indicates that the defendant has obstructed justice). The commentary to this Guideline lists several examples of such obstruction, including violation of a restraining order. *Id.* at cmt. 4(j).

restraining order did not raise the same concerns about preserving judicial integrity that animate the forfeiture doctrine itself.<sup>288</sup>

*b. Intent Inferred from Abuse While Judicial Proceedings Are Pending.*—Courts should also find that a defendant had the specific intent to silence the accuser if the defendant committed any act of violence against that accuser after she had made a police report or initiated any judicial proceedings. This per se rule should apply whether the police report or judicial proceedings were connected with the instant prosecution, or whether they were entirely separate.<sup>289</sup>

Again, the crucial question is the batterer's knowledge that the accuser was preparing to testify against him. Scalia noted in his majority opinion that "evidence of ongoing criminal proceedings at which the victim would have been expected to testify" would be "highly relevant" to the assessment of the defendant's mental state for purposes of the intent-to-silence requirement.<sup>290</sup> On the other hand, evidence of pending proceedings would not be helpful to show the defendant's intent to silence if the defendant did not have knowledge of these proceedings.

Data indicate that a high proportion of defendants arrested for domestic violence are already on pretrial release or some other criminal justice status.<sup>291</sup> One study found that 30% of batterers assaulted their victims again during the predisposition phase of the prosecution.<sup>292</sup> Data also indicate that the most severe domestic violence, including domestic homicide, is more likely to occur shortly after the victim has reported some other domestic violence to the police.<sup>293</sup> These statistics suggest the urgent need for—and the potential efficacy of—a per se rule finding intent to silence when a defendant has committed an act of violence following notice that the victim has either made a police report or initiated some judicial proceedings.

*c. Intent Inferred from a History of Abuse and Isolation.*—Courts should allow the Government to satisfy *Giles*'s intent-to-silence requirement by proving that the defendant has repeatedly abused the declarant over a long period even if the declarant never filed a complaint or applied for a restraining order. Scalia's majority opinion indicated that such conduct might provide the basis for forfeiture. Scalia wrote that if 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

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288. *Davis v. Washington*, 547 U.S. 813, 833–34 (2006) (noting that the forfeiture doctrine is necessary to protect the integrity of the justice system).

289. *State v. Ivy*, 188 S.W.3d 132, 147–48 (Tenn. 2006) (finding forfeiture where the defendant murdered his victim shortly after she had filed a police report indicating that he had assaulted her).

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

291. *See supra* note 86.

292. *Fritzler & Simon*, *supra* note 88, at 28, 33.

293. *See supra* note 91.

the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine.”<sup>294</sup> According to Scalia, the “[e]arlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry.”<sup>295</sup>

Souter’s concurrence was even more emphatic in indicating that a prolonged history of domestic violence could provide the basis for inferring the intent required by *Giles*. According to Souter, “[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.”<sup>296</sup> Indeed, Souter believed that no other inference from this evidence would be reasonable: “If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.”<sup>297</sup>

The reasonableness of inferring the intent to silence from a prolonged pattern of violence is clear. A defendant who repeatedly batters his intimate partner does not do so by mistake. The repetition of the violence belies any defense that the violence is attributable to abrupt provocation or “the heat of the moment.” The defendant has had an opportunity to reflect on his ongoing pattern of violence and to reflect on whether he should halt or continue this pattern. He has observed the effects of terrorizing his intimate partner—including her acquiescence, her unwillingness to break from the relationship, and her refusal to bring charges against him—and the persistence of his violence indicates that he intends to perpetuate these effects. He thus “intends” to cause her isolation from the criminal justice system within the meaning of *Giles*.

Unfortunately the language in *Giles* does not provide an objective bright-line rule for lower courts to use in assessing whether past domestic violence cumulatively manifests an intent to silence the victim. The lack of such a rule may inhibit lower courts from applying *Giles*’s inferred-intent test. Just as the Supreme Court simplified the *Crawford* holding with an easy-to-apply test in *Davis*,<sup>298</sup> a new bright-line rule is necessary to aid lower courts in applying *Giles*.

The best test would quantify the amount of domestic violence that necessarily entails the intent to silence. The involvement of social scientists would be necessary to calibrate this test precisely. Perhaps the rule could indicate a minimum number of acts involving severe domestic violence

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

295. *Id.*

296. *Id.* at 2695 (Souter, J., concurring).

297. *Id.*

298. See *supra* note 262 and accompanying text.

causing injury, or perhaps the rule could specify a minimum number of violent acts, irrespective of their severity, occurring within a two-year period preceding the victim's unavailability for testimony in the instant prosecution. A fixed number of acts might seem unduly rigid, but it would reflect the reality that no defendant innocently commits domestic violence on multiple successive occasions.<sup>299</sup>

Critics might argue that the rule suggested here is overbroad. Indeed, some statistics indicate that a majority of women who suffer severe domestic violence have suffered such violence on multiple occasions in the past.<sup>300</sup> Yet this fact does not automatically necessitate applying the forfeiture doctrine in more than half of all domestic violence prosecutions. The rule contemplated here would be limited by objective standards of severity or frequency to a smaller minority of cases involving the most extreme violence. The Government would still need to prove that the history of domestic violence caused the victim's present unavailability to testify,<sup>301</sup> and the causation requirement would likely necessitate some showing of temporal proximity and a credible likelihood of recurrence. The critics of this proposal should also bear in mind that it might have deterrent value, imposing a serious sanction for long-term abusers, and it might also have expressive value, declaring society's intolerance for the category of domestic violence that social scientists describe as "patriarchal terrorism."

*d. Mixed Motives.*—Should *Giles* prohibit a finding of intent to silence where the defendant had dual motives, only one of which qualifies under the *Giles* test? Originalist analysis reveals no on-point authority contemporaneous with the Founding, but utilitarian and equitable considerations dictate that mixed motives should not thwart the application of the forfeiture doctrine. A more restrictive rule would be difficult to enforce, would exempt a significant category of defendants from accountability for their purposeful

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299. Cf. Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances*, CRIM. JUST., Fall 1992, at 16, 18–19 (discussing the doctrine of chances in evidence law, whereby courts can admit evidence of past uncharged misconduct similar to the presently charged offense, based on the theory that the reoccurrence rules out an innocent explanation); see also, e.g., *People v. Santiago*, No. 2725-02, 2003 WL 21507176 (N.Y. Sup. Ct. Apr. 7, 2003) (finding forfeiture based on a recurring pattern of domestic violence, even where the prosecution had not identified a single instance of an act that plainly violated the witness-tampering statute). Deborah Tuerkheimer has written an insightful analysis of the *Santiago* decision. Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 10–18, 49–55 (2006). Tuerkheimer also has collected interesting examples of lower courts' interpretation of *Giles*, and her analysis suggests that at least some lower courts are inclined to interpret the forfeiture doctrine expansively where defendants in criminal cases have caused the unavailability of hearsay declarants through domestic violence. Deborah Tuerkheimer, *Forfeiture after Giles: The Relevance of "Domestic Violence Context"*, 13 LEWIS & CLARK L. REV. (forthcoming 2009).

300. See Burke, *supra* note 78, at 567 (reporting statistical evidence indicating that a substantial majority of domestic violence victims experience multiple incidents of domestic violence).

301. See *supra* section IV(B)(3).

mistreatment of witnesses, and would intolerably reward wrongdoers who could identify an alternative (even vindictive) explanation for their conduct.

Consider the example of a defendant who violently assaults his victim six weeks before trial. He might argue that his primary intent was to punish the victim for dating one of his rivals despite his insistence that she not do so. But if the evidence also shows that he was aware that she might be on the Government's witness list in his pending trial, his multiplicity of motives does not spare him from accountability for what is plainly witness tampering.

The Supreme Court has considered the question of dual motives in the past, particularly in the context of police officers' motives for investigative activities. The Court has generally ruled that the fact of dual motives does not defeat a finding that one of the two motives is sufficient to satisfy the test in question.<sup>302</sup> For example, an officer who stops a vehicle for violation of a minor traffic law, but who also seeks an opportunity to question the driver about a more serious, unrelated crime, does not violate the Fourth Amendment.<sup>303</sup> An officer who responds to the scene of domestic violence, and who asks the apparent victim for basic information as the officer secures the scene, does not necessarily convert the victim's statements into testimonial hearsay merely because the officer is aware that the statements could be useful in the investigation of a past crime.<sup>304</sup>

Lower courts have addressed the question of mixed motives in the particular context of applying the forfeiture doctrine. These courts have generally found that dual motives do not prevent application of the doctrine, provided that one of the motives, standing alone, would be sufficient under the doctrine.<sup>305</sup> There is no reason why the post-*Giles* jurisprudence should

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302. See, e.g., *Davis v. Washington*, 547 U.S. 813, 828–29 (2006) (holding that questions asked by a police officer for the dual purposes of securing a crime scene and eliciting testimonial evidence are admissible); *Whren v. United States*, 517 U.S. 806, 818–19 (1996) (applying the same logic in finding that a vehicle search was reasonable when a police officer had probable cause to justify an initial traffic stop).

303. *Whren*, 517 U.S. at 818–19.

304. *Davis*, 547 U.S. at 828–29.

305. In *United States v. Martinez*, 476 F.3d 961 (D.C. Cir. 2007), for example, the defendant sought to circumvent the forfeiture doctrine even though he had killed a known informant. *Id.* at 965–66. The defendant claimed that one motivation for the killing was punishment for his loss of a huge cocaine shipment. *Id.* at 966. The D.C. Circuit rejected the argument that dual motives frustrate the application of the forfeiture doctrine:

Martinez's argument is based on a false either-or dichotomy. It is surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying. The two purposes often go hand-in-glove, and this case is just another good example. Martinez's argument would have the perverse consequence, moreover, of allowing criminals to murder informants and thereby prevent admission of the informants' statements—just so long as the criminal could show that the intent was retaliation (which the criminal almost always could do).

*Id.* (citations omitted). Similarly, in *State v. Ivy*, 188 S.W.3d 132 (Tenn. 2006), the court ruled that the defendant forfeited his confrontation right by killing the victim after she had filed a police report

be any more restrictive. Forfeiture should simply depend on the existence of the required motive, not the proportion of the required motive among other motives.

#### IV. A New Forfeiture Rule in Federal and State Evidence Codes

Contemporaneously with the Supreme Court's ruling in *Giles*, Congress<sup>306</sup> and several state legislatures<sup>307</sup> have been considering possible revisions to Rule 804(b)(6), which creates a hearsay exception for circumstances in which the opponent of hearsay has intentionally procured the absence of the hearsay declarant as a trial witness. This Article proposes one possible rule, the full text of which appears in the Appendix. The following subparts discuss the rationale for and specific provisions of the proposed amendment.

##### A. *Why Giles Invites a Broader Hearsay Exception for Forfeiture*

Some commentators might urge that the *Giles* ruling, which restricted the scope of the constitutional forfeiture doctrine, counsels caution in framing the hearsay exception for forfeiture. According to this logic, the evidentiary rule should be no broader than the constitutional doctrine, because constitutional law always trumps an evidentiary rule. Adherents of this view would point out that Scalia's majority opinion seemed to chide, while not overruling, those state legislatures that had deviated from the federal model in framing expansive versions of Rule 804(b)(6).<sup>308</sup>

A better view is that *Giles* should not constrain state legislatures in their drafting of hearsay exceptions for forfeiture. Indeed, by imposing a constitutional intent-to-silence requirement as a condition for forfeiture of the defendant's right to confront declarants of testimonial hearsay, the *Giles* ruling actually permits Congress and state legislatures to *lower* the bar for the forfeiture exception in their evidence codes. After all, the Sixth Amendment is forceful authority that requires no codification in evidence codes. States may prefer to set different requirements for the forfeiture exception, recognizing that *Giles* requires no legislative backstop to ensure its application to the category of cases addressed in that opinion.<sup>309</sup>

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accusing him of assault, even though he cited motives other than the intent to tamper. The court could not discern any "requirement that Ivy's *sole* intention had to be preventing [the victim] from testifying against him in a proceeding based on the aggravated assault." *Id.* at 147.

306. *See supra* note 64.

307. *See supra* note 65.

308. *Giles v. California*, 128 S. Ct. 2678, 2688 n.2 (2008).

309. *Cf.* FED. R. EVID. 801(d)(2) (allowing statements by a party opponent, but omitting any mention of longstanding constitutional rules that circumscribe this doctrine, such as the Supreme Court's holdings in *Bruton v. United States*, 391 U.S. 123 (1968), and *Doyle v. Ohio*, 426 U.S. 610 (1976)).

*Giles* has left interstices in which states are free to legislate. These include such contexts as the introduction of hearsay in civil cases, the introduction of hearsay by the accused himself, or the introduction of non-testimonial hearsay against the accused. Scalia himself has recently encouraged states' innovation of hearsay rules, so long as the new rules do not facially violate the Confrontation Clause (i.e., by admitting nothing other than hearsay that the Clause must exclude).<sup>310</sup>

It is important to bear in mind that Federal Rule of Evidence 804(b)(6) has not been coextensive with constitutional forfeiture doctrine in the past,<sup>311</sup> nor are the two coextensive after the *Giles* ruling.<sup>312</sup> Even though Scalia seemed to cite Rule 804(b)(6) with approval in his *Giles* opinion,<sup>313</sup> the differences between this rule and the constitutional forfeiture rule are conspicuous. First, the constitutional doctrine applies only to testimonial hearsay,<sup>314</sup> while Rule 804(b)(6) applies both to testimonial and nontestimonial hearsay.<sup>315</sup> Second, the constitutional doctrine seems to require direct complicity in wrongdoing by the defendant, while Rule 804(b)(6) allows the admission of hearsay based on the defendant's "acquiescence" in the wrongdoing of others.<sup>316</sup>

There are important practical reasons why states should update their evidence codes to admit hearsay statements where opponents have wrongfully caused the absence of a declarant. First, it is important to remember that the constitutional requirement of confrontation is only one hurdle for the admission of a hearsay statement against the accused. Even where the forfeiture doctrine extinguishes the confrontation rights of the accused, the Government will still need to surmount a second hurdle: the rule against

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310. *E.g.*, *Crawford v. Washington*, 541 U.S. 36, 68 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . .").

311. *E.g.*, *Morales v. Campbell*, No. C 06-06645, slip op. at 13 (N.D. Cal. Feb. 13, 2008) ("Petitioner's forfeiture argument, although superficially logical, is untenable because petitioner errs by conflating the common law rule of equitable forfeiture of the right of confrontation with the more recently developed and distinct FRE 804(b)(6)."); *see also* *United States v. Johnson*, 495 F.3d 951, 971 (8th Cir. 2007) ("We observe first that the scope of the forfeiture by wrongdoing doctrine under common law may differ from the version of the doctrine established by Rule 804(b)(6)."); *United States v. Natson*, 469 F. Supp. 2d 1243, 1251-52 (M.D. Ga. 2006) ("It is correct that for Confrontation Clause purposes a defendant who eliminates a witness forfeits any constitutional right to confront that witness later regardless of the defendant's motive. However, Federal Rule of Evidence 804(b)(6) is narrower than this Confrontation Clause exception.").

312. *United States v. Wright*, 536 F.3d 819, 823 n.3 (8th Cir. 2008) (observing in dictum that "the common law exception at issue in *Giles* is not necessarily co-extensive with the forfeiture-by-wrongdoing hearsay exception codified in Rule 804(b)(6)").

313. *Giles*, 128 S. Ct. at 2688 n.2.

314. *Crawford*, 541 U.S. at 68.

315. FED. R. EVID. 804(b)(6).

316. *Id.* (allowing forfeiture if a defendant has "engaged or acquiesced in wrongdoing" (emphasis added)).

hearsay that exists in all evidence codes.<sup>317</sup> It would be lamentable indeed if the prosecution succeeded in demonstrating wrongful conduct sufficient to effect a forfeiture of confrontation rights, but the defendant still excluded the evidence because it was hearsay under the evidence code. Such a scenario would allow the defendant to profit from his wrongdoing in coercing the witness to stay away from trial. This problem could exist in many states because only thirteen have created hearsay exceptions based on wrongdoing by the opponent.<sup>318</sup>

Consider a straightforward example. A woman suffers recurring domestic abuse at the hands of her husband. He threatens to kill if she ever reports the violence to police or testifies against him. One day she walks next door to tell the neighbors what has happened. She speaks calmly and does not show evidence of recent trauma, so that her statements to the neighbors do not qualify as excited utterances.<sup>319</sup> Two months later, the defendant kills her once he learns that she has discussed her victimization with the neighbors. In a prosecution for her murder, the defendant would have no constitutional right to exclude the statements to the neighbors, because the statements were nontestimonial in nature. But the lack of a hearsay exception for forfeiture by wrongdoing might allow the defendant to profit from making the victim unavailable as a witness at trial. If the Government were unable to introduce the hearsay evidence describing the pattern of violence, the defendant might very well win acquittal.

Consider a slight variation of this fact pattern. Instead of talking with the neighbors, the victim talks with a police officer about her long-term victimization at the hands of her husband. Her statements to the officer are calm and do not qualify as excited utterances.<sup>320</sup> The defendant later finds out about this conversation and kills his wife as a reprisal. In the ensuing murder prosecution, the constitutional forfeiture doctrine would extinguish the defendant's right to confront the hearsay declarant, assuming that the Government could prove that the defendant had the requisite intent to silence. And yet the hearsay might still be inadmissible if the state has not created a specific hearsay exception for forfeiture by wrongdoing. Again, the defendant would profit from his witness tampering.

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317. As the California Supreme Court noted when it considered the *Giles* case, "The forfeiture by wrongdoing doctrine, as adopted by us, only bars a defendant's objection under the *confrontation clause of the federal Constitution* and does not bar statutory objections under the Evidence Code." *People v. Giles*, 40 Cal. 4th 833, 854 (2007) (emphasis added), *vacated*, 128 S. Ct. 2678; *see also Giles*, 128 S. Ct. at 2700 (Breyer, J., dissenting) (noting that even where the Government satisfies the requirements of the constitutional forfeiture doctrine, the doctrine does not "require" the admission of hearsay statements by the declarant: "State hearsay rules remain in place[,] and those rules will determine when, whether, and how" the hearsay statements are admitted, if at all).

318. For a listing of such rules, see *supra* note 211.

319. FED. R. EVID. 803(2) (allowing admission of the hearsay statement of a declarant who, while under the influence of an exciting stimulus or event, makes a statement relating to that stimulus or event).

320. *Id.*

The criminal justice system cannot reward such abuses. All states should adopt a hearsay exception for forfeiture by wrongdoing, and Congress should update the federal version of this rule. The following subpart and the Appendix at the end of this Article set forth model language for use in a hearsay exception based on forfeiture by wrongdoing.

*B. Specific Proposals for New Forfeiture Rules*

1. *Required Intent.*—Prior Parts of this Article have discussed the importance of an expansive intent requirement,<sup>321</sup> and have proposed to base forfeiture on a finding of foreseeable and proximate causation.<sup>322</sup> In order to implement this conception of forfeiture, Rule 804(b)(6) would need to delete the present requirement that the opponent of the hearsay must have “engaged or acquiesced in wrongdoing that was intended to, and did procure, the unavailability of the declarant as a witness.”<sup>323</sup> In its place, the new rule should add language requiring that the opponent of the hearsay must have “engaged in wrongdoing that foreseeably could cause, and did in fact proximately cause, the unavailability of the declarant as a witness.”<sup>324</sup>

2. *Required Act.*—There are two problems with the act requirement in the present version of Rule 804(b)(6). First, the rule does not make clear that forfeiture could operate “reflexively,” that is, the very act charged in the indictment could be the basis for forfeiture of confrontation rights.<sup>325</sup> Courts have sometimes declined to recognize reflexive forfeiture because neither Rule 804(b)(6) nor its commentary explicitly acknowledges that such an application of the rule would be possible.<sup>326</sup> The refusal to apply forfeiture based on the conduct charged in the indictment could lead to unconscionable results. For example, a man who assaulted his wife while warning her not to testify against him might be immune from prosecution for that assault, or if charged for this crime, might insist that it not provide the basis for admitting her hearsay statements when she is unavailable at trial. The model rule proposed in the Appendix expressly approves of reflexive forfeiture: “Proof of forfeiture may consist, in whole or in part, of the same proof that the

321. See *supra* subparts II(C) and III(C), and section IV(B)(4).

322. See *supra* section IV(B)(3).

323. FED. R. EVID. 804(b)(6).

324. See *infra* Appendix.

325. The rule contemplated here would be limited by objective standards of severity or frequency to a smaller minority of cases involving the most extreme violence.

326. *E.g.*, *State v. McCarley*, No. CR04051674(A), slip op. at 3 (Ohio Ct. App. Feb. 13, 2008) (interpreting an Ohio rule identical to Federal Rule of Evidence 804(b)(6), and determining that the legislative history of the federal rule indicates that the rule should not apply reflexively). *But see* *United States v. Stewart*, 485 F.3d 666 (2d Cir. 2007); *Doan v. Voorhies*, No. 1:00-CV-727, 2007 WL 894559, at \*17–18 (S.D. Ohio Mar. 21, 2007); *Carillo v. State*, No. 03-05-00844-CR, 2007 WL 541598, at \*6 (Tex. App.—Austin Feb. 23, 2007, no pet.) (all applying Rule 804(b)(6) after finding that the crime charged in the indictment was the basis for forfeiture).

proponent offers in order to establish one or more elements of a criminal offense, civil claim, or affirmative defense at issue in the trial itself.”<sup>327</sup>

Another problem with the present version of Rule 804(b)(6) is that it allows forfeiture based on the opponent’s mere “acquiescence” in misconduct by others.<sup>328</sup> The breadth of this standard, at least when applied to the accused, seems inconsistent with the Supreme Court’s ruling in *Giles*. The Court’s insistence upon specific intent to cause the unavailability of the declarant seems to point to a more basic concern that the accused should not lose important trial rights unless he was directly and intentionally involved in wrongful conduct akin to witness tampering. The amended version of Rule 804(b)(6) covers the conduct of co-conspirators—which, after all, is a crime by the accused himself under the *Pinkerton* rule<sup>329</sup>—but the amended rule omits “acquiescence” as a possible basis for forfeiture.<sup>330</sup>

3. *Minimal Reliability*.—One of the principal criticisms leveled against the present version of Rule 804(b)(6) concerns its lack of a reliability predicate. While most of the hearsay rules include requirements that ensure the trustworthiness of the evidence that the rules admit, Rule 804(b) has no such requirement.<sup>331</sup> Nor does constitutional law police the reliability of such evidence: The demise of *Roberts* has ended constitutional scrutiny of reliability,<sup>332</sup> and the Supreme Court noted in *Crawford* that the constitutional forfeiture doctrine does not require a showing that the evidence is trustworthy.<sup>333</sup> The new dearth of constitutional requirements for reliability heightens the need for Rule 804(b)(6) to include a reliability predicate.

The rule proposed simply imports the reliability predicate that begins Rule 807, the residual hearsay exception: “A statement not specifically covered by Rule 803 or 804, but having equivalent circumstantial guarantees of

327. See *infra* Appendix.

328. FED. R. EVID. 804(b)(6) (allowing forfeiture if a defendant has “engaged or *acquiesced* in wrongdoing” (emphasis added)).

329. See *Pinkerton v. United States*, 328 U.S. 640, 645–46 (1946) (holding that so long as a criminal conspiracy continues, the members of the conspiracy “act for each other in carrying it forward”).

330. See *infra* Appendix.

331. 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, 41–42 (2008); Flanagan, *supra* note 243, at 519–25; John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 879–85 (1996) (all criticizing Rule 804(b)(6) on the ground that it fails to require reliability).

332. See *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004) (holding that judicial scrutiny of reliability under *Roberts* is manipulable, and therefore deciding: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

333. See *id.* at 62 (noting the Court’s acceptance of forfeiture doctrine as an exception to the Confrontation Clause and indicating that the constitutional forfeiture doctrine “does not purport to be an alternative means of determining reliability”).

trustworthiness, is not excluded by the hearsay rule . . . .”<sup>334</sup> It is noteworthy that many novel hearsay exceptions on the state level have a reliability predicate, especially those enacted recently to admit statements by victims of domestic violence.<sup>335</sup> Such requirements ensure that the salutary *Roberts* reliability analysis will outlive *Roberts* itself,<sup>336</sup> at least with respect to hearsay exceptions that do not by their very nature guarantee the trustworthiness of the evidence they admit.

#### V. A Proposal for VAWA Grants to Assist with Implementation

After the *Giles* ruling, Cindy Dyer, the director of the U.S. Office on Violence Against Women (OVW), issued a press release declaring that the office “will collaborate with key partners, experts in the field, law enforcement and others in the criminal justice system to address [the *Giles* ruling] so that offenders are held accountable.”<sup>337</sup> This resolve is commendable. Perhaps the most valuable role that OVW can play at this time is advocating that Congress and the U.S. Department of Justice make grants available under the Violence Against Women Act (VAWA) to enable field training related to the challenges posed by the *Giles* ruling.

Precedents exist for such a campaign. The first version of VAWA in 1994 included an appropriation to provide training for judges.<sup>338</sup> The drafters of the legislation worried that stereotypes about accusers in sexual assault cases were skewing judges’ rulings.<sup>339</sup> While it is hard to quantify the effectiveness of judicial training, some studies have suggested that the VAWA programs were efficacious in promoting understanding of violence against women.<sup>340</sup>

334. See *infra* Appendix.

335. E.g., CAL. EVID. CODE § 1370 (West 1995) (admitting out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify at trial and the court finds that the statements meet reliability requirements similar to those in FED. R. EVID. 807); OR. REV. STAT. § 40.460(26) (2007) (admitting the hearsay statements of domestic violence victims made to police or other official personnel within twenty-four hours of the incident if the statements comport with reliability requirements).

336. For an excellent discussion of *Roberts*’s value—along with an acknowledgment of *Roberts*’s limitations—in policing the reliability of hearsay after *Crawford*, see Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford’s Birth Did Not Require that Roberts Had To Die*, 15 J.L. & POL’Y 685 (2007).

337. Statement of Cindy Dyer, Dir., Office on Violence Against Women, Dep’t of Justice, Reaction to the Supreme Court’s Decision in *Giles v. California* (July 8, 2008), available at <http://www.justice.gov/archive/ovw/docs/cindydyer-reaction-supreme-court.pdf>.

338. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40411, 108 Stat. 1796 (codified as amended at 42 U.S.C. § 13991).

339. See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 627–28 (2001) (analyzing the effectiveness of VAWA).

340. See Hyunkag Cho & Dina J. Wilke, *How Has the Violence Against Women Act Affected the Response of the Criminal Justice System to Domestic Violence?*, 32 J. SOC. & SOC. WELFARE 125, 137–38 (2005) (analyzing the effectiveness of VAWA).

A similar initiative is necessary to train judges, prosecutors, and police in the aftermath of the *Giles* ruling. Because the language of *Giles* itself does not provide clear guidance about the application of forfeiture principles in prosecutions of violence against women, training of judges and prosecutors would be appropriate to ensure that they understand the dynamics of battering relationships and the potential applicability of forfeiture principles to these relationships. Police also need training to ensure that they collect the right evidence and ask the right questions of victims and other witnesses. As with the original VAWA, the efficacy of efforts to protect victims of domestic violence must depend on the dissemination of accurate information to court and law enforcement personnel.

## VI. Conclusion

The courts must not allow defendants in criminal cases to profit from silencing their accusers. The justice system cannot survive if it rewards witness tampering. The challenge is to fashion a test for forfeiture of confrontation rights that reaches the full range of intentional, wrongful acts through which the accused could foreseeably cause the absence of the accuser. An underinclusive rule will hamstring prosecutions and threaten the safety of victims. An overinclusive rule will deny important trial rights to the accused.

How can courts assess the intent required for forfeiture? The Supreme Court's ruling in *Giles* missed an opportunity to simplify this inquiry by imposing the same test of "knowledge-based intent" that the law uses in many other contexts. Instead, the Court required the prosecution to demonstrate that the accused specifically intended to cause the unavailability of the victim as a witness at trial. It is not enough, according to the *Giles* Court, for the prosecution simply to show that the accused killed the victim. As a practical matter, the connection between homicide and unavailability could not be more plain, but Scalia's originalist analysis does not countenance such a straightforward approach.

Fortunately, the majority and concurring opinions in *Giles* do leave an opening for prosecutors to argue for forfeiture based on "inferred intent." Though undertheorized in *Giles*, the inferred-intent standard could prove valuable in domestic violence cases if lower courts can develop a predictable, coherent jurisprudential framework that comports with the requirements of *Giles* while acknowledging the realities of abusive relationships.

This Article has proposed one possible framework for post-*Giles* jurisprudence interpreting the forfeiture doctrine. The Article analyzed the various rationales that should animate the forfeiture rules. After setting forth tests for evaluating unavailability, wrongful conduct, and causation, this Article focused on the test for determining whether the accused has the requisite intent to silence under *Giles*. The best solution is a per se rule that would find the required intent in three circumstances: (1) when the accused

has violated a restraining order; (2) when the accused has committed acts of violence after a police report or the initiation of any judicial proceedings; and (3) when the accused has engaged in a minimum number of violent acts within a specified period. A defendant who commits any of this misconduct, and who has thereby procured the absence of the accuser as a trial witness, has no more standing to protest the loss of his confrontation rights than does the patricide who begs the court for mercy because he is an orphan.

A proposed amendment to Rule 804(b)(6) would improve the rule in several respects. The amended version would clarify both the intent requirement and the act requirement, and would make clear that forfeiture can operate reflexively. The amended version would delete language in the present version of Rule 804(b)(6) that allows forfeiture based on mere “acquiescence” by the accused in the misconduct of others, but the amended version would retain the *Pinkerton* standard of liability for foreseeable acts of co-conspirators. Finally, the new version of Rule 804(b)(6) would add a reliability predicate, so that this rule is more consonant with other hearsay exceptions.

In the end, the topic of forfeiture boils down to one crucial question: Who should control the viability of a criminal prosecution? Should the law confer on the accused the ability to “veto” a prosecution by causing the unavailability of a crucial witness? Should the law provide a windfall to an accused batterer who resumes his violence in order to cover his tracks?

The law must declare emphatically that two wrongs do not make a right. Defendants with unclean hands should not be able to invoke the constitutional confrontation doctrine and the hearsay rules in their defense. Silent victims must have a voice in court.

## Appendix: Proposed Rule of Evidence

## Rule 804(b)(6). Forfeiture by Wrongdoing

A statement not specifically covered by Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the statement is offered against a party that has engaged in wrongdoing that foreseeably could cause, and did in fact proximately cause, the unavailability of the declarant as a witness. Proof of forfeiture may consist, in whole or in part, of the same proof that the proponent offers in order to establish one or more elements of a criminal offense, civil claim, or affirmative defense at issue in the trial itself. Except with respect to evidence that is separately admissible, evidence offered to establish forfeiture shall be heard outside the presence of the jury. The court may consider all available information except privileged matters, and the court shall employ the same standard of proof as set forth in Rule 104(a).