# MAKING CONSTITUTIONAL THE PERMISSIVE INFERENCE IN *GILES V. CALIFORNIA*: CHANGING THE INTENT TO SILENCE FROM "PURPOSELY" TO "KNOWINGLY"

*by*
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*It is suggested here that the element of "purposely" silencing a witness that is presently required by the* Giles *majority as a predicate to forfeiture by wrongdoing, be changed to "knowingly" silencing a witness. This solution resolves the equitable problem of "near circularity" identified by Justice Souter while resolving Justice Breyer's concerns about inferring "purpose" to silence from a classic abusive relationship.*



## I. INTRODUCTION

A majority of the Court in *Giles v. California* held that a trial court must find that a murder defendant had the "purpose" to silence the victim as a witness before the defendant forfeits his Confrontation Clause right concerning his out of court threats made to the victim.[1] In briefs filed before the Court, women's and victims' organizations argued against this result.[2] They were particularly concerned that the result would exclude vital inculpatory evidence in domestic violence cases. Justice Souter, in a concurrence which provided a majority, delivered a

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[1] 128 S. Ct. 2678 (2008).

[2] Brief of the Nat'l Ass'n to Prevent Sexual Abuse of Children's Nat'l Child Protection Training Center as Amicus Curiae in Support of Respondent, *Giles*, 128 S. Ct. 2678 (No. 07-6053); Amicus Curiae Brief of the Battered Women's Justice Project and Other Domestic Violence Org. in Support of Respondent, *Giles*, 128 S. Ct. 2678 (No. 07-6053); Brief of the Nat'l Ass'n of Counsel for Children and the Am. Prof'l Soc'y on the Abuse of Children as Amici Curiae in Support of Respondent, *Giles*, 128 S. Ct. 2678 (No. 07-6053); Brief of the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) et al. as Amici Curiae in Support of Respondent, *Giles*, 128 S. Ct. 2678 (No. 07-6053); Brief of Amicus Curiae the Nat'l Crime Victim Law Inst. In Support of Respondent, *Giles*, 128 S. Ct. 2678 (No. 07-6053).

ray of hope by suggesting a permissive inference.[3] This inference is that intent to silence the witness is normally inferred from a classic abusive relationship.

A permissive inference first must comport with constitutional standards. The constitutional test of permissive inferences is that they have a rational relation in common experience.[4] Justice Souter is unlikely to persuade a majority of the Court that in common experience a classic abusive relationship establishes the "purpose" to silence the witness. To achieve a majority, the inference must gain the support of three more justices—either the justices signing onto Scalia's opinion or the dissenters who joined with Justice Breyer. Justice Scalia is less likely to ultimately endorse Souter's inference than Justice Breyer because Justice Scalia's opinion focuses on specific acts, rather than a classic abusive relationship, as proof of intent to silence. However, Justice Breyer and the justices joining him in dissent might endorse the inference if the classic abusive relationship inferred the mental state of "knowingly," rather than "purposely" silencing the victim as a witness. Moreover, because Justice Souter bases the requirement of intent to silence on equity, rather than Justice Scalia's rigid historical interpretation, Justice Souter is free to adopt the mental state of "knowingly."

## II. BACKGROUND

*Giles* established the constitutionally required elements of forfeiture of Confrontation Clause rights by wrongdoing. Justice Scalia's majority opinion requires the element of "purpose" to silence the victim as a witness before the confrontation right is forfeited. If this element is proven, prior threats against the deceased victim can be admitted as evidence.[5] Justice Scalia's opinion bases the requirement of "purpose" on his interpretation of the history of forfeiture by wrongdoing.[6]

Justice Souter concurs in Justice Scalia's opinion, comprising a majority.[7] Presumably, Justice Souter adopts Justice Scalia's mental state requirement of "purpose."[8] However, Justice Souter creates ambiguity about this by making no reference to "purpose" in his concurrence.[9] Implicitly, he leaves room for a mental state other than "purpose" by

[3] *Giles,* 128 S. Ct. at 2695.

[4] Tot v. United States, 319 U.S. 463, 467–68 (1943).

[5] *Giles*, 128 S. Ct. at 2681. Scalia's opinion is joined by Justices Roberts, Thomas, and Alito. Justices Souter and Ginsberg concurred.

[6] *Id.* at 2688–91.

[7] *Id.* at 2694. Souter's concurrence is joined by Justice Ginsberg.

[8] Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).

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

opining that "*some degree of intent* to thwart the judicial process" is required.[10]

For Justice Souter, it is the equitable problem that he describes as "near circularity," rather than any historical requirement of "purpose," which leads him to conclude that "*some degree of intent*" is required.[11] Justice Souter explains that "near circularity" exists when admissibility is based upon a judicial determination to a preponderance of the evidence that the defendant acted with intent to cause the death of the victim.[12] Because the jury similarly determines the satisfaction of these same elements of the crime beyond a reasonable doubt there is "near circularity," or identity, in both the steps taken towards admissibility and criminal liability.[13] He reasons that, "The only thing saving admissibility . . . would be . . . distinct functions of judge and jury: judges would find by a preponderance of evidence that the defendant killed (and so would admit the testimonial statement), while the jury could so find only on proof beyond a reasonable doubt."[14] Furthermore, "Equity demands something more than this near circularity before the right to confrontation is forfeited . . . ."[15] The "something other" is some level of "intent to prevent the witness from testifying."[16] Within the framework of equity, Souter is clear that the historical cases did not grapple with the modern issue of domestic violence. Souter writes, "[T]he historical record tells me that the early cases . . . were not calibrated finely enough to answer the narrow question here. 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 . . . ."[17]

Justice Breyer reviews the same history as Justice Scalia, but reaches a contrary conclusion in dissent, opining that no intent to silence the witness is required to trigger forfeiture by wrongdoing.[18] Rather, only knowledge-based intent to kill is needed.[19] For Justice Breyer, anyone who knowingly kills also must know they are silencing the victim as a witness: "W's unavailability to testify at *any* future trial was a *certain* consequence of the murder. And any reasonable person would have known it."[20] Furthermore, Justice Breyer rejects Justice Souter's idea that

[10] *Id.* at 2695 (emphasis added).
[11] *Id.* at 2694–95(emphasis added).
[12] *Id.* at 2694.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 2694–95.
[18] *Id.* at 2697–98 (Breyer, J., dissenting). Breyer's dissent is joined by Justices Stephens and Kennedy.
[19] *Id.* at 2698.
[20] *Id.*

a "purposeful" mental state can be inferred from a classic abusive relationship. "Consequently," Justice Breyer writes, "I agree with [Souter's] formulation, though I would apply a simple [knowledge-based] intent requirement across the board."[21]

Justice Scalia's majority opinion makes no comment on Justice Souter's inference.[22] His description of relevant evidence to demonstrate "purpose" describes only *acts* as proof of purpose to silence a witness. Justice Scalia writes, "*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."[23] For Justice Scalia, "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."[24] Justice Scalia continues, "*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."[25]

Summing up the relevant opinions, Justice Scalia's majority opinion requires "purpose" to silence a witness, and "purpose" is proven by *acts*. Justice Scalia is silent about Justice Souter's inference.[26] Justice Souter's view, based on equity, is either that "purpose" or "some degree of intent" to silence a witness in a domestic violence case may be proven by acts or by inference through the existence of a classic abusive relationship.[27] Justice Breyer's interpretation of the same history is contrary to Justice Scalia's, urging that there is no requirement of any intent to silence a witness. Instead, Justice Breyer's dissent would require knowledge based intent to kill, which in Justice Breyer's view, necessarily establishes intent to silence a witness.[28] Justice Breyer seems to agree with Justice Souter's inference, with the significant qualification that the inference cannot establish "purposeful" intent.[29]

There is potential for common ground in Justice Souter's concurrence and Justice Breyer's dissent if Souter's concerns about equity and near circularity are resolved by requiring "knowingly," rather than "purposely" silencing the victim as a witness. Moreover, a choice of

[21] *Id.* at 2708.
[22] *Id.* at 2681–93.
[23] *Id.* at 2693 (emphasis added).
[24] *Id.* (emphasis added).
[25] *Id.* (emphasis added).
[26] *Id.* at 2681–93.
[27] *Id.* at 2695.
[28] *Id.* at 2699.
[29] *Id.*

"knowledge" over "purpose" may resolve Justice Breyer's concerns about Souter's inference.

## III. THE NATURE OF THE INFERENCE

Justice Souter's focus on equity leads him to suggest the inference for use by trial judges ruling on forfeiture by wrongdoing.[30] He writes, there is no "reason to doubt that the 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."[31]

Presumptions have been defined generally by Professor McCormick as "a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."[32] Professor LaFave has identified and nicely summarized the four types of presumptions recognized by the Court.[33] First, a "basic fact . . . must be allowed to go to the jury as some evidence of the presumed fact."[34] Second, LaFave describes the permissive inference as authorizing, but not requiring, the factfinder to "conclude that the presumed fact exists . . . if it finds that the basic fact exists."[35] Third, is a rebuttable "mandatory presumption," which LaFave describes as shifting "the burden of persuasion, so that the defendant will now be required to go forward with

[30] *Id.* at 2695. Souter articulates the presumption as follows: "the 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." A premise supporting Souter's presumption is that purpose to silence a witness can be concurrent with a fit of anger. Souter writes, "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." *Id.* This position has a strong foundation in criminal law. Homicide law recognizes that various levels of intent to kill can exist concurrently with a fit of rage. *See,* WAYNE R. LAFAVE, CRIMINAL LAW § 15.1, at 775 (4th ed. 2003). Heat of passion at common law, and extreme emotional disturbance under the Model Penal Code, provide a mitigation to reduce murder to manslaughter. *Id.* § 15.2(a), at 775–77, § 15.2(c), at 785. With the exception of a few jurisdictions, heat of passion does not operate to reduce the defendant's level of intent to kill. *Id.* Rather, heat of passion is a recognition that someone acting with intent to kill will, in certain limited circumstances, do so in a rage. The rage mitigates liability, but does not eliminate purpose to kill. Souter's premise that a killer could operate in a fit of rage and concurrently possess the purpose to silence someone as a witness has strong support in heat of passion doctrine.

[31] *Giles*, 128 S. Ct. at 2695.

[32] KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 342, at 572 (6th ed. 2006).

[33] LAFAVE, *supra* note 30, § 3.4, at 152–53.

[34] *Id.* at 153.

[35] *Id. See also* United States v. Ross, 92 U.S. 281, 284 (1875).

evidence negativing the presumed fact."[36] Finally, there is the conclusive mandatory presumption, which "remov[es] the presumed element from the case upon proof of the facts giving rise to the presumption."[37]

Justice Souter describes the inference as "normally," rather than *always* being appropriate.[38] Thus, the inference is not a conclusive mandatory presumption because it does not operate to establish conclusively that where there was a classic abusive relationship the purpose to silence always exists. The inference is also not a rebuttable mandatory presumption, both because "statutory presumptions in the criminal law have seldom been given this interpretation,"[39] and because Justice Souter's description of the inference as *normally satisfying intent*[40] means there are circumstances in which intent would not be inferred. Under such circumstances, proof of a classic relationship does not always shift the burden of persuasion to the defendant.[41]

An argument could be made that the inference is merely permission to trial judges to consider the classic abusive relationship as another piece of evidence. After all, Justice Souter's permissive inference is designed for judges ruling on admissibility, rather than juries determining criminal liability.[42] Because the federal constitutional case law regarding permissive inferences in criminal cases all involve inferences where juries determine criminal liability, the novelty of a permissive inference in this context might suggest that Justice Souter is identifying a mere piece of evidence.

However, both the context in which the inference is promoted and the plain language of his opinion are persuasive that Justice Souter's inference is a permissive inference. That it is a permissive inference is confirmed by the limitation in Justice Souter's inference that the presumed fact (intent to silence) may "*normally*" (thus, not always) be proven by the predicate fact (classic abusive relationship). This language preserves the judges' ability to ignore or reject the inference, while giving it greater significance than just any other piece of evidence. Thus, the inference promoted by Justice Souter is a "permissive inference."

## IV. "KNOWING" RATHER THAN "PURPOSE"

In *Tot v. United States,* the Supreme Court set the standard for the constitutionality of a jury's use of permissive inference in a criminal case: "a statutory presumption cannot be sustained if there be no rational

[36] LAFAVE, *supra* note 30, § 3.4, at 153. *See also*, Francis v. Franklin, 471 U.S. 307, 315 (1985).

[37] LAFAVE, *supra* note 30, § 3.4, at 153. *See also Francis*, 471 U.S. at 315.

[38] Giles v. California, 128 S. Ct. 2678, 2695 (2008).

[39] LAFAVE, *supra* note 30, § 3.4, at 153.

[40] *Giles*, 128 S. Ct. at 2695.

[41] County Ct. of Ulster County v. Allen, 442 U.S. 140, 156–57 (1979).

[42] *Giles*, 128 S. Ct. at 2694–95.

connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary *because of lack of connection . . . in common experience*."[43] The Court continued, "[t]his is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is [unconstitutional]."[44] The Court affirmed this approach in *County Ct. of Ulster County v. Allen*, where it held that the application of the "beyond a reasonable doubt standard" was affected "only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference."[45]

While the Supreme Court case law on permissive inferences in criminal cases involves the use of such inferences by juries (or judges sitting as juries) determining criminal liability, the same standard should apply to Justice Souter's judicial inference.[46] First, the standard of a rational connection in common experience is already a relaxed one. Judges should not be granted the unique authority to conjure up rational relationships outside common experience. Such a unique standard would provide the opportunity for uncommon inferences, potentially undermining the credibility of the courts. Ultimately, convictions would be facilitated by uncommon inferences.

On the other hand, the standard for judicial inferences should not be more restrictive than the standard for juries. Judicial inferences used for judicial decisions of admissibility of evidence are a function one step removed from and, arguably less critical than, determinations of criminal liability. Thus, a rational relationship in common experience standard should provide the basis for judicial, as well as jury, permissive inferences.

Assuming the constitutional standard governing permissive inferences applies equally to judges, the constitutional test of the inference is a rational connection in common experience between a classic abusive relationship and the batterer's intent to silence the victim as a witness.

There are at least two ways to determine whether a rational relationship exists in common experience. First is to simply declare that the relationship is rational. If something is plainly obvious in our common experience, perhaps that should be enough. The second approach is to rely on empirical evidence to establish the rational relationship. Where empirical evidence would be useful to an inquiry, the absence of it has made a difference to the Court. For example, in determining the proper scope of the attorney-client privilege, the Court ruled that the privilege generally survives the death of the client.[47] In

[43] 319 U.S. 463, 467–68 (1943) (emphasis added).

[44] *Id.* at 468.

[45] *Allen*, 442 U.S. at 157.

[46] *Id.*

[47] Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998).

light of the absence of empirical information persuading it to the contrary, the Court upheld the established common law rule, noting that "there is little empirical evidence" as to whether "the impact of a posthumous exception would be insignificant."[48]

In the context of whether a classic abusive relationship infers "purpose" to silence as a witness, it is at least debatable whether empirical information would be useful. The thing to be proven is the "purpose" in the mind of *this particular defendant* to silence the victim. It may be challenging to gather the quantity or quality of empirical evidence needed to establish that the "purpose" to silence a victim as a witness is normally in the heads of individual batterers whenever a homicide is committed against the domestic violence victim.

Souter makes no empirical case for the inference in *Giles*. Instead, his argument concerning the rational relationship is brief: "the classic abusive relationship . . . is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process."[49] From this, Justice Souter moves directly to his conclusion that a trial court may infer intent to silence the victim as a witness. Perhaps, Justice Souter is making an intermediate assumption that a batterer normally intends to silence the victim for all reasons that are desirable to him, as an effort to control the victim. This, in turn, infers the narrower purpose to silence a victim as a witness against the batterer.[50] In any event, Justice Souter's inference is a declaration of common experience that is not empirically based.

Common experience may change over time where free of empirical grounding. Thus, an irrational connection in one era is rationally related in the next. To fully appreciate this it is useful to analogize to another recent change in common experience, the relevance of a woman's prior sexual history to prove the credibility and consent of the prosecutrix in a rape case. In the law's recent past, a woman's prior sexual history was admissible to prove credibility and consent. The logic went that if a woman had sex out of wedlock, it surely was relevant to both whether she lied and consented.

This debate played out in the federal Eighth Circuit cases of *Packineau v. United States*[51] and *United States v. Kasto*,[52] decided 25 years apart. In *Packineau*, decided in 1953, a woman alleged rape by two men.[53] She was injured and bruised and her clothing was torn. There was evidence of a scuffle. The evidence sought to be introduced was that five months before, she had spent a week with a man, not either of the

[48] *Id.* at 409.
[49] Giles v. California, 128 S. Ct. 2678, 2695 (2008).
[50] *Id.*
[51] 202 F.2d 681 (8th Cir. 1953).
[52] 584 F.2d 268 (8th Cir. 1978).
[53] *Packineau*, 202 F.2d at 682–84.

accused, and lived in the same bedroom with him for a week.[54] Operating in the common law, before the Federal Rules of Evidence, the court majority opined: "[t]hat her story of having been raped would be more readily believed by a person who was ignorant of any former unchaste conduct on her part than it would be by a person cognizant of the unchaste conduct defendants offered to prove against her *seems too clear for argument*."[55] The *Packineau* majority declared this a fact that was "too clear for argument" in the common experience of the time. No empirical evidence was referenced by the court.

The dissent in *Packineau* held a contrary view: "Personally, I think that the proffered evidence was incompetent, irrelevant and immaterial and had no bearing whatever upon any issue in the case."[56] Ultimately, in 1978, the dissent's view was vindicated in the *Kasto* case. Under facts remarkably similar to *Packineau*, a unanimous panel wrote that the *Packineau* "dissent has withstood the test of time and is supported both in logic and in human experience."[57] The court held that "evidence of a rape victim's unchastity . . . is ordinarily insufficiently probative either of her general credibility as a witness or of her consent to intercourse with the defendant on the particular occasion charged to outweigh its highly prejudicial effect."[58] As in *Packineau*, no empirical evidence was referenced in *Kasto*. Nevertheless, our common experience changed, the result being that prior sexual history was no longer probative of whether the victim was credible or had consented.

Souter's presumption may be a similar phenomenon playing itself out in the context of domestic violence. That is to say, the rational connection that a killer in a classic abusive relationship has the intent to silence the victim as a witness is founded upon a modern and evolving common experience of who batterers are. If so, the permissive inference is constitutional because the inference is rationally related to modern common experience.

Borrowing a phrase from *Kasto*, for Justice Souter in *Giles* it is too clear for argument that a classic abusive relationship normally infers "some degree of intent" to silence a witness.[59] Nevertheless, Breyer does argue with him about it.[60] Admittedly, Breyer's reasons for disputing the inference are not transparently clear. He opines,

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[54] *Id.* at 684–85.

[55] *Id.* at 685 (emphasis added).

[56] *Id.* at 688–89.

[57] *Kasto*, 584 F.2d at 271.

[58] *Id.* at 271–72. In *Packineau*, unlike *Kasto*, the court was operating now under the federal rules of evidence concerning relevance. However the decision was not a result of the innovation of the rules because concepts of relevance existed at common law. Rather, the opinion represents a shift, but a shift of what was in our common experience.

[59] Giles v. California, 128 S. Ct. 2678, 2695 (2008).

[60] *Id.* (Breyer, J., dissenting).

> [Justice Souter] seems to say that a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of a domestic abuse victim. Doing so when, in fact, the abuser may have had other matters in mind apart from preventing the witness from testifying, is in effect not to insist upon a showing of "purpose."[61]

"Consequently," Justice Breyer writes, "I agree with this formulation, though I would apply a simple [knowledge-based] intent requirement across the board."[62]

At least three interpretations of Justice Breyer's statement suggest themselves. The first is that Justice Breyer means that you cannot hold two "purposes" simultaneously. But the law allows this. The best example of this is that intentionally silencing the victim as a witness is an aggravating factor that raises liability for murder to capital murder.[63] Thus, the separate intents of killing and killing to silence may lawfully exist simultaneously. Second, if he is saying that the inference cannot establish "purpose" where "purpose" is not actually in the mind of the defendant, he is right. However, that problem is resolved by the nature of a permissive inference. With a permissive inference, courts are free to reject the inference and to find no purpose to silence the witness.

Finally, is the possibility assumed here—that Justice Breyer does not believe that a classic abusive relationship establishes "purpose" to silence the victim as a witness. Assuming this latter explanation, then the two opinions disagree about whether there is a rational relationship in common experience between a classic abusive relationship and "purpose" to silence the victim as a witness. This disagreement is of constitutional significance because whether a permissive inference is rationally related in common experience is the very measure of its constitutionality.

There are at least three ways Justice Souter might persuade Justice Breyer that the inference is rationally related in common experience and therefore constitutional. The first is by providing empirical evidence that supports the inference. However, as mentioned above, it may prove challenging to find persuasive empirical evidence, that a classic abusive relationship establishes, that normally any given batterer who kills has the "purpose" (the conscious desire) to silence the victim as a witness.

A second approach is to persuade Justice Breyer that his assessment of common experience is mistaken, just like the majority opinion on the relevance of women's prior sexual relationships to credibility and consent in the 1953 *Packineau* rape case was overruled 25 years later in *Kasto*. In short, Justice Breyer would need to be persuaded that his view of common experience is outmoded.

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[61] *Id.* at 2708.

[62] *Id.*

[63] *Id.* at 2691–92 n.6 (acknowledging the capital crime when intent to kill exists concurrently with intent to silence a witness).

The third solution, urged in this essay, is to modify the inference itself—that "knowingly," rather than "purposely," silencing a witness should be the threshold for establishing forfeiture by wrongdoing.

The shift in mental state is appropriate within Justice Souter's equitable framework. It is near circularity that underlies Justice Souter's opinion: "Equity demands something more than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying."[64] Justice Souter urges that equity demands some level of "intent to prevent the witness from testifying."[65] Near circularity could alternatively be cabined by "knowing." Like "purpose" to silence, "knowingly" silencing is an element to be considered by the judge in determining forfeiture by wrongdoing; an additionally required element beyond the elements of the crime of murder considered by the jury, thus resolving Justice Souter's near circularity problem.

Moreover, Justice Souter opines, "the historical record tells me that the early cases . . . were not calibrated finely enough to answer the narrow question here. 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."[66] If Justice Souter is serious that in equity there must be room to accommodate the modern understanding of domestic violence, then equity must be flexible enough to accommodate a "knowing" mental state. Thus, in addition to satisfying Justice Souter's equitable "near circularity" concern, "knowing" accommodates Justice Souter's determination not to allow ambiguous historical cases to prevent an equitable result in the domestic violence context.

Satisfying Justice Breyer may prove somewhat more difficult. First, Justice Breyer would have to move from his view that the elements of intentional homicide alone establish forfeiture by wrongdoing. Justice Breyer would accept Justice Souter's view that "some degree of intent" to silence is required. However, because Justice Breyer's focus is that forfeiture occurs whenever a killing is "knowing," he may accept the need for an additional mental-state element to satisfy equity and to establish forfeiture by wrongdoing if the element was "knowingly" rather than "purposely" silencing the witness. Justice Breyer made what may be read as an overture towards adopting Justice Souter's inference. Justice Breyer writes,

> [Justice Souter] seems to say that a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of a domestic abuse victim. Doing so when, in fact, the abuser may have had other matters in mind apart from preventing the witness from testifying, is in effect not to insist upon

[64] *Id.* at 2694.
[65] *Id.*
[66] *Id.* at 2694–95.

a showing of "purpose."[67]

"Consequently," Justice Breyer writes, "I agree with this formulation, though I would apply a simple [knowledge-based] intent requirement across the board."[68] Thus, a central disagreement between Justice Breyer and Justice Souter in *Giles* is that the inference does not properly prove "purpose."

The second challenge is Justice Breyer's position that awareness of the risk of silencing a murder victim as a witness is *always* known to every intentional killer. For him, the only element needed to forfeit by wrongdoing is that the batterer, or any other type of killer, "knowingly" killed the victim. Because, for Justice Breyer, in every homicide case intent to silence would automatically be proven by intent to kill; the elements of murder alone conclusively establish forfeiture by wrongdoing.

If Justice Breyer is on target, forming a majority with Justice Souter is problematic. This is because the element of knowingly silencing a witness has no additional elemental significance under Breyer's formulation in which all intentional killers necessarily "knowingly" silence the witness because they "knowingly" kill. If there is no elemental distinction, then Justice Souter's near circularity problem is unresolved.

However, Justice Breyer is off target. He writes, "W's unavailability to testify at *any* future trial was a *certain* consequence of the murder. And any reasonable person would have known it."[69] To the contrary, an intentional killing does not automatically translate into actual awareness to a near certainty (knowing) that the victim is silenced as a witness. Indeed, as mentioned above, intent to silence is an additional element elevating murder to capital murder.

Justice Breyer's error is based on his problematic description of the mental state. Actually, the mental state of "knowledge" is not about, as Justice Breyer characterizes it, whether a reasonable person would "know" it. Rather, the measure of "knowledge" is whether *this particular defendant* was actually aware to a near certainty that the victim was being silenced as a witness at the time of the killing. As Professor LaFave writes,

> [A] defendant, to be guilty [of knowing], must know in his own mind (i.e., subjectively) that the property he receives is stolen. If he does not know but ought to know—that is, if a reasonable man in his position would know . . . his objective fault in not knowing what he should know is insufficient for guilt.[70]

Once Justice Breyer's mental state analysis is corrected, his concern that a classic abusive relationship does not establish "purposely" silencing can be overcome by substituting the element of "knowingly" silencing.

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[67] *Id.* at 2708.

[68] *Id.*

[69] *Id.* at 2698.

[70] LAFAVE, *supra* note 30, § 5.1(a), at 240.

The difficulties in the rational relationship between a classic abusive relationship normally establishing the "purpose" to silence largely disappear when the more modest inference is made that a batterer in a classic abusive relationship is normally aware of a risk to a substantial certainty (i.e., "knows") that he is silencing the victim as a witness.

## V. CONCLUSION

Because equitable requirements, rather than any categorical historical requirements, define the appropriate constitutional standard for Justice Souter, the shift to "knowingly" silencing meets Justice Souter's requirement of "some degree of intent" to silence and addresses his concern about near circularity. At the same time, Justice Breyer's objection that a classic abusive relationship cannot infer "purpose" to silence is overcome. The constitutional requirement for permissive inferences, that there be a rational connection in common experience, is readily met with "knowledge."