FORFEITURE AFTER *GILES*: THE RELEVANCE OF "DOMESTIC VIOLENCE CONTEXT"

by
Deborah Tuerkheimer[*]

Giles v. California, *the United States Supreme Court's most recent pronouncement impacting the prosecution of domestic violence, has exposed deep judicial ambivalence about the newly transformed Confrontation Clause. This Article endeavors to guide lower courts in the task of implementation and to chart a course for the evolution of prosecutorial treatment of battering, concluding that* Giles *represents a significant opportunity for those concerned about the constraints* Crawford v. Washington *and* Davis v. Washington *had seemed to place on the prosecution of abuse. For the first time, the Court has identified "the domestic violence context" as a relevant construct, thereby compelling lower courts to grapple with the particularities of violence between intimates. This is a remarkable shift in relatively short order, and it allows us to glimpse the possibility of a jurisprudence informed by the realities of battering.*

I. INTRODUCTION

A trio of cases decided by the United States Supreme Court in the past five years has impacted the prosecution of domestic violence in an unprecedented manner. The cases—*Crawford v. Washington*,[1] *Davis v.*

[*] Professor of Law, DePaul University College of Law; A.B., Harvard College, 1992; J.D., Yale Law School, 1996. I am grateful to Christopher Knott and Joan Meier for their helpful comments on earlier drafts, and to Tina H. Nadeau for excellent research assistance.

[1] 541 U.S. 36 (2004).

Washington,[2] and *Giles v. California*[3]—have transformed a criminal defendant's right of confrontation, overturning decades of jurisprudence that co-existed peacefully with the evolution of a practice known as "victimless" or "evidence-based" prosecution.[4] *Crawford* and *Davis* left lower courts, prosecutors, and defense attorneys struggling mightily to understand and adapt to shifting paradigms. The latest word from the Court will do little to impose order on this chaotic universe.[5] Indeed, *Giles* reveals a Court deeply ambivalent about the newly interpreted Confrontation Clause, exposing fault lines both doctrinal and operational.

In this Article, I contemplate the future of domestic violence prosecution in what is sure to remain a period of uncertainty.[6] I first outline the state of flux that characterized the legal landscape before *Giles*.[7] After analyzing the holding,[8] I turn to its application, treating non-lethal[9] and lethal[10] domestic violence in turn. My focus is largely pragmatic, as it attempts both to guide lower courts in the task of interpretation and to map a course for the development of prosecutorial approaches to battering.[11] I conclude that, for the first time since *Crawford*, there is a meaningful opportunity for the law of confrontation to be shaped in a manner that comports with the realities of domestic violence.

II. THE ROAD TO *GILES*

As part of the historic movement to treat domestic violence as a crime, prosecutors in the 1970s began changing the way these cases were

[2] 547 U.S. 813 (2006).

[3] 128 S. Ct. 2678 (2008).

[4] I use "victimless" and "evidence-based" prosecution synonymously to refer to the prosecution of domestic violence in the absence of a victim's trial testimony. Each term has its limitations: victimless prosecution tends to obscure the fact that someone was in fact victimized by the battering conduct at issue in the case; evidence-based prosecution may incorrectly suggest that the testimony of a victim is something other than evidence. It seems to me that "victim absent" may be a better way of describing this type of prosecution, but in order to avoid unnecessary confusion, I will continue to employ the conventional terminology.

[5] The *Giles* case resulted in five opinions. Of the seventy-two cases decided in the 2007–2008 Term, only four others resulted in five or more opinions. (The others are Gall v. United States, 552 U.S. 38 (2007); Baze v. Rees, 128 S. Ct. 1520 (2008); Dep't. of Rev. of Ky. v. Davis, 128 S. Ct. 1801 (2008); and Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008)).

[6] Given the frequency with which the issues raised by *Gile*s arise and the inadequacy of the Court's guidance, a divergence in lower court implementation of the new forfeiture framework is likely.

[7] *See infra* Part II.

[8] *See infra* Part III.

[9] *See infra* notes 61–81 and accompanying text.

[10] *See infra* notes 82–95 and accompanying text.

[11] *See infra* Part IV.

handled.[12] No longer were victims routinely permitted to "drop charges." Domestic violence was now a crime "against the state" and, accordingly, decisions regarding charging and case outcome were as a matter of course made by prosecutors—not by victims.[13] At times, this translated into a policy that mandated victim participation in the criminal process.[14] Subpoenas and, where necessary, material witness orders were issued to ensure the victim's participation at trial. Yet, even with aggressive enforcement of these protocols, prosecutors encountered problems. Some victims disappeared. Others changed their stories and testified for the defense.[15] Still others were forced to testify for the prosecution, but not without repercussions: advocates charged that battered women were being revictimized by the state, and that successful prosecutions were undermining the autonomy and safety of women in an already vulnerable position.[16]

Prosecutors adapted.[17] Proving a crime without the victim was hardly a novel concept. Like homicides, domestic violence came to be viewed as raising the likelihood that the victim would not be a witness at trial, for

[12] Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1852 (1996).

[13] Discussing the phenomenon of the uncooperative domestic violence victim, I have previously written: "The dynamics of abuse put unique pressures on a battered woman to ally herself with the defendant, against the State. In domestic violence cases, cooperating with prosecutorial efforts may jeopardize a victim's financial resources, immigration status, children, living arrangements, employment, and relations with friends, family, and the larger community. A victim may also resist testifying against her batterer because of a 'continued emotional connection' that 'entrap[s]' her in the abusive relationship. Most likely, however, she is uncooperative because she fears—often rightly—that by assisting prosecutors she will cause more severe abuse." Deborah Tuerkheimer, *Forfeiture in the Domestic Violence Realm*, 85 TEX. L. REV. SEE ALSO 49, 49 (2007), http://www.texaslrev.com/seealso/pdfs/85TexasLRevSeeAlso49.pdf (quoting Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 479 (2003)).

[14] This development has generated considerable scholarly debate. For an overview of this debate, *see* Hanna, *supra* note 12.

[15] According to one expert: "Domestic violence victims, after describing the violence to the police, often later repudiate their description. There is typically 'anywhere between 24 and 48 hours where victims will be truthful about what occurred because they're still angry, they're still scared.' But 'after they have had time to think about it . . . it is not uncommon for them to change their mind.' About 80 to 85 percent of victims 'actually recant at some point in the process.' Some victims will say they lied to the police; almost all will attempt to minimize their experience." People v. Brown, 94 P.3d 574, 576 (Cal. 2004) (quoting testimony of Jeri Darr, Program Manager of the Antelope Valley Domestic Violence Council).

[16] *See generally* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237 (2005); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001).

[17] *See* Hanna, *supra* note 12, at 1860–65.

any of the reasons already described.[18] A corollary of this new prosecutorial willingness to consider forging ahead even absent victim cooperation was the realization that many of these cases could be proven without her testimony.

The evidence in "evidence-based" domestic violence prosecutions may consist of medical records, photographs, police officer observations of the crime scene, incriminating statements by the defendant and, on rare occasions, ear-witness or eye-witness testimony. But because domestic violence seldom occurs in the presence of adult witnesses, a victim's statements describing the crime—statements to a 911-operator, to neighbors who provided assistance in the aftermath, to responding police officers, or to treating medical professionals—are typically essential to completing the narrative. Provided these statements fall within an exception to the rule against hearsay, they were—before *Crawford*—generally admissible.[19]

Until 2004, the framework for Confrontation Clause challenges allowed the introduction of out of court statements provided they were deemed "reliable."[20] Thus, in many cases, even without the testimony of the victim, prosecutors could try and could convict defendants of domestic violence. Even more important, the ability to credibly represent that sufficient evidence existed to prove a defendant's guilt—absent victim notwithstanding—allowed for the pre-trial resolution (through plea agreements) of countless cases that would previously have been dismissed.[21]

When the Court decided *Crawford*, it upended this approach. With few exceptions, statements categorized as "testimonial" were now excluded. No longer was reliability the touchstone of the confrontation right. Instead, the question was one of classification, and one expressly left "for another day."[22] Abruptly, the evidence typically relied upon in

[18] *See supra* notes 13 to 15 and accompanying text.

[19] The hearsay admitted in victimless domestic violence prosecutions is most commonly classified as excited utterances or present sense impressions. FED. R. EVID. 803(1)–(2). Statements made for purposes of medical treatment or diagnosis are also frequently admitted in these cases. FED. R. EVID. 803(4). *See also* CAL. EVID. CODE §§ 1370(a)(1), (3) (West 2009); OR. REV. STAT. § 40.460(26)(a) (2005) (providing ad hoc hearsay exceptions for statements by domestic violence victims describing the infliction of injury).

[20] Ohio v. Roberts, 448 U.S. 56 (1980). A statement was considered reliable if it fell within a "firmly rooted hearsay exception" or was supported by "particularized guarantees of trustworthiness." *Id.* at 66.

[21] One "veteran domestic violence prosecutor" has asserted that, "[f]or every case that I can prosecute without the victim, I can get 100 more pleas from defendants." John M. Leventhal & Liberty Aldrich, *The Admission of Evidence in Domestic Violence Cases After* Crawford v. Washington*: A National Survey*, 11 BERKELEY J. CRIM. L. 77, 81 (2006) (citing Telephone Interview with Scott Kessler, Assistant District Attorney, Chief of Domestic Violence Bureau, Queens County District Attorney's Office (Oct. 5, 2005)).

[22] Crawford v. Washington, 541 U.S. 36, 68 (2004).

evidence-based prosecutions became subject to constitutional challenge. The immediate impact on the prosecution of domestic violence was profound.[23]

Just two years—and an emerging case law that was confused to the point of incoherence[24]—later, the *Davis* Court attempted to articulate a workable definition of "testimonial." At issue in the case (and in the consolidated case of *Hammon v. Indiana*) was the admissibility of various out of court statements made by victims of domestic violence to law enforcement during or immediately after an incident of acute physical violence: in *Davis*, the victim spoke with a 911 operator about the crime; in *Hammon*, she relayed information to a responding police officer at the scene.[25]

According to Justice Scalia, writing for the majority, a statement is nontestimonial if uttered "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."[26] Conversely, if the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"—i.e., if there is "no such ongoing emergency"—a resulting statement is testimonial.[27]

Applying this definition, the Court concluded that the *Davis* victim's statements were nontestimonial while the *Hammon* victim's statements were testimonial. The only Justice not to join the majority was Justice Thomas, who cautioned that "[t]he Court's standard is not only disconnected from history and unnecessary to prevent abuse; it also yields no predictable results to police officers and prosecutors attempting to comply with the law."[28] And, in large measure, this premonition has proven accurate. Since *Davis*, lower courts have struggled with the new "ongoing emergency" test and its inherent incompatibility with the realities of ongoing abuse. Further, prosecutors have confronted the

[23] "Almost overnight, *Crawford* spawned an entire cottage industry, including several hundred reported cases . . . ." Robert M. Pitler, Crawford *and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1, 14 (2005). Not surprisingly, prosecutors began dismissing a larger number of cases where victims were uncooperative or unavailable. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 750, 820–22 (2005) (stating seventy-six percent of prosecutors responding to survey of sixty offices reported a higher dismissal rate post-*Crawford*). Domestic violence defendants became more inclined to take their cases to trial. *See id.* 820, (stating fifty-nine percent of prosecutors surveyed indicated that defendants are less likely to plead guilty after *Crawford*).

[24] *See* Deborah Tuerkheimer, Crawford*'s Triangle: Domestic Violence and the Right of Confrontation,* 85 N.C. L. REV. 1, 20–22, 25–26 (2006) (summarizing and critiquing pre-*Davis* case law).

[25] Davis v. Washington, 547 U.S. 813, 817–20 (2006).

[26] *Id.* at 822. For a conceptual critique of the holding in *Davis*, see Tuerkheimer, *supra* note 24, at 26–32.

[27] *Davis*, 547 U.S. at 822.

[28] *Id.* at 838.

exclusion of a range of once admissible statements on the part of domestic violence victims—primarily statements to responding police officers akin to those at issue in *Hammon*, but also statements to treating medical professionals[29] and even to civilians.[30]

But, *Davis* gave those committed to the effective prosecution of domestic violence some reason for hope.[31] In dictum widely perceived as signaling an inclination to embrace a robust forfeiture doctrine, the Court noted as follows:

> [W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford:* that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.[32]

If forfeiture by misconduct were to become "the next frontier" of domestic violence prosecution, however, a number of important questions would need to be resolved. [33] In the last week of its 2007 Term, the *Giles* Court began the process of framing a forfeiture doctrine applicable to the battering context. Just four years after *Crawford* was decided, and two years after *Davis*, domestic violence prosecution was back before the Court.

III. A QUESTION OF INTENT

Dwayne Giles shot and killed Brenda Avie, his ex-girlfriend, and claimed self-defense.[34] At trial, to rebut Giles's testimony that she was the

---

[29] *See, e.g.*, State v. Romero, 156 P.3d 694, 697–99 (N.M. 2007) (affirming classification as testimonial of domestic violence victim's statement to Sexual Assault Nurse Examiner). This category of hearsay is especially critical in child abuse prosecutions where (in contrast to *Romero*'s approach) many courts have classified statements to medical professionals as nontestimonial. *See, e.g.*, State v. Vaught, 682 N.W.2d 284, 289–92 (Neb. 2004) (holding child's statements to doctor nontestimonial); State v. Fisher, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005) (same).

[30] *See, e.g.,* State v. Jensen, 727 N.W.2d 518, 529 (Wis. 2007) (reiterating "that governmental involvement is not a necessary condition for testimonial statements" but concluding that under the particular circumstances of the case the victim's statements to a neighbor and teacher were nontestimonial).

[31] *See* Joan S. Meier, Davis/Hammon, *Domestic Violence, and the Supreme Court: The Case for Cautious Optimism*, 105 MICH. L. REV. FIRST IMPRESSIONS 22 (2006), http://www.michiganlawreview.org/firstimpressions/vol105/meier.pdf.

[32] *Davis*, 547 U.S. at 833 (quoting Crawford v. Washington, 541 U.S. 36, 62 (2004)).

[33] Tuerkheimer, *supra* note 24, at 33.

[34] Giles v. California, 128 S. Ct. 2678, 2681 (2008).

aggressor in the incident, prosecutors introduced statements that Avie had made three weeks before the shooting to a police officer responding to a report of domestic violence.[35] Crying while she spoke, Avie told the officer that Giles had accused her of having an affair, grabbed her by the shirt, lifted her off the floor, and began to choke and punch her. He then opened a folding knife and threatened to kill her if he found her cheating on him.[36]

Giles was convicted of murder. On appeal, he claimed that the admission of Avie's out of court statement violated his right to confront her. The intermediate court held that the defendant had forfeited this right because his intentional criminal act made Avie unavailable to testify.[37] The California Supreme Court affirmed, concluding that:

> [T]o protect the integrity of their proceedings, post-*Crawford* courts (including the Court of Appeal in this case) have correctly applied the forfeiture doctrine in a necessary, equitable manner. That is, courts should be able to further the truth-seeking function of the adversary process when necessary, allowing fact finders access to relevant evidence that the defendant caused not to be available through live testimony.[38]

The U.S. Supreme Court granted certiorari to decide whether the defendant's purpose in causing the witness's absence from trial is an essential component of proving forfeiture.[39] It answered in the affirmative. Writing for the majority, Justice Scalia held that an intentional criminal act causing the witness's absence is an insufficient basis for a forfeiture finding; without specific intent to procure her absence, a defendant cannot be said to have forfeited his confrontation right.[40] The Court vacated the judgment of the California Supreme Court and remanded the case for a determination of whether Giles possessed the requisite intent.[41]

Justice Scalia's opinion, joined in full by Chief Justice Roberts, Justice Thomas, and Justice Alito, is steeped in the rhetoric and methodology of originalism: the correct theory of forfeiture is the one embraced by the Founders. According to the Court, moreover, its understanding of the common law was "conclusive" on the interpretive

---

[35] *Id.* California allows the admission of 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 prior statements are deemed trustworthy. CAL. EVID. CODE. § 1370 (West 2009).

[36] *Giles*, 128 S. Ct. at 2681–82.

[37] People v. Giles, 19 Cal. Rptr. 3d 843, 845 (Ct. App. 2004).

[38] People v. Giles, 152 P.3d 433, 444 (Cal. 2007).

[39] Giles v. California, 128 S. Ct. 976 (2008).

[40] *Giles*, 128 S. Ct. at 2693.

[41] *Id.*

question.[42] Dissenting, Justice Breyer, joined by Stevens and Kennedy, emphatically disagreed with this reading of history.[43]

Perhaps most surprisingly, Justices Souter and Ginsburg joined in Justice Scalia's opinion except insofar as it treated the question of what equity would require, but wrote a concurrence wholly devoted to the particularities of domestic violence.[44] While generally convinced that "the Court's historical analysis is sound," Justice Souter disavowed Justice Scalia's insistence that history dictates a particular result in domestic violence cases:

> The contrast between the Court's and Justice BREYER's careful examinations of the historical record tells me that the early cases on the exception were not calibrated finely enough to answer the narrow question here. The historical record as revealed by the exchange 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.[45]

Accordingly, Justices Souter and Ginsburg—without whom Justice Scalia's opinion would not have commanded a majority—made this important observation about how the Court's rule should be applied to domestic violence:

> [There is an] absence from the early material of any reason to doubt that the element of intention [to thwart the judicial process] would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant

---

[42] *Id.* at 2688.

[43] Justice Breyer in dissent noted that it is "important to recognize the relevant history" but viewed that history as supporting a forfeiture doctrine that does not require a specific intent to cause the witness's absence. *Id.* at 2695–96 (Breyer, J., dissenting). The argument that "a specific intent requirement for forfeiture by wrongdoing is inconsistent with framing-era law and practice" was developed at some length—quite persuasively, in my view—by the national domestic violence amici curiae. *See* Brief of the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP), California Partnership to End Domestic Violence, Legal Momentum, et al. as Amici Curiae in Support of Respondent at 4–28, Giles v. California, 128 S. Ct. 2678 (2008) (No. 07-6053). I should acknowledge that I was consulted in the writing of this brief.

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

[45] *Id.* at 2694–95. Justices Souter and Ginsburg were persuaded to vote with the majority not by the historical argument but, rather, by their discomfort with the prospect of allowing a victim's out of court statement in evidence to prove guilt only after a judicial determination that the defendant committed the charged act. The concurrence concluded that "[e]quity 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." *Id.* at 2694. For a forceful response to the "near circularity" argument, see Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506 (1997).

> 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 miraculously abandoned the dynamics of abuse the instant before he killed his victim . . . .[46]

By recognizing that battering typically encompasses isolating behaviors and efforts to keep victims from realigning the balance of power in the relationship (as contacting law enforcement and cooperating with prosecutors surely does), the concurrence effectively insisted that forfeiture determinations be informed by an understanding of the dynamics of abuse.

Thus, as a practical matter, the defendant's intent to prevent a victim's testimony can be inferred where abuse is ongoing; five Justices say so.[47] At least in "the classic abusive relationship,"[48] the Court's rule effectively allows forfeiture to be presumed without a specific inquiry into the defendant's intent.[49]

While Justice Scalia did not adopt the inferred intent test,[50] his discussion of how forfeiture applies to domestic violence cases[51] reflects significant agreement with the concurrence.[52] When making forfeiture determinations, courts deciding what a defendant intended by his conduct *must consider* a context of abuse:

---

[46] *Id.* at 2695.

[47] *See supra* notes 40 to 46 and accompanying text; *Giles*, 128 S. Ct. at 2693.

[48] *Giles*, 128 S. Ct. at 2695 (Souter, J., concurring). *See supra* note 13 (discussing dynamics of the classic abusive relationship).

[49] According to Justice Breyer, this "kind of presumption . . . will transform *purpose* into *knowledge-based* intent—at least where domestic violence is at issue." *Giles*, S. Ct. at 2708 (Breyer, J. dissenting). In the view of the dissent, the concurrence "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 the domestic abuse victim." *Id.* Justice Breyer criticized this approach: finding forfeiture under these circumstances "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.'" *Id.* For this reason, Justice Breyer "agree[d] with" the formulation articulated by Justice Souter, but would "apply a simple intent requirement across the board." *Id.*

[50] Nowhere does Justice Scalia's opinion address the concurrence or its inferred intent formulation of the doctrine, other than to summarily dismiss the dissent's charge that, in application, the Court's rule is "nothing more than 'knowledge-based intent.'" *Id.* at 2693.

[51] *Id.* at 2692–93. These cases are the ones where the bounds of forfeiture doctrine most matter. As the dissent rightly noted: "The defendant's state of mind only arises as an issue in forfeiture cases where the witness has made prior statements against the defendant and where there is a possible motive for the killing other than to prevent the witness from testifying. . . . We can see from modern cases that this occurs almost exclusively in the domestic violence context." *Id.* at 2703 (Breyer, J., dissenting). *See infra* note 54.

[52] It seems likely that this portion of the opinion was crafted to retain the votes of Justices Souter and Ginsburg, who joined the majority.

> 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 statement 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.[53]

Consider the commonalities found in the various approaches to mens rea offered by the three opinions—not in the abstract, but in practical application to domestic violence cases, "where the problem is most likely to arise."[54] According to the dissent, a defendant who acts in a manner that he knows will likely cause a result can be assumed to have intended the consequences of his actions.[55] According to the concurrence, intent can be inferred by the totality of a defendant's conduct in an abusive relationship.[56] And according to the majority, prior abuse or threats intended to "dissuade the victim from resorting to outside help" must be considered as part of the forfeiture inquiry.

One wonders whether, if claims on history had been subordinated to the task of deciding when defendants in domestic violence cases forfeit their confrontation rights, an opinion could have been drafted that all nine Justices would have been willing to join. At the very least, applying any of the three formulations to the facts of *Giles*, a lower court could readily determine that the defendant forfeited his right to confront Avie when he shot her dead.[57]

Victimless domestic violence prosecution has thus survived *Giles*, though it must continue to transform in response to the Court's dictates.

---

[53] *Giles*, 128 S. Ct. at 2693 (emphasis added).

[54] *Id.* at 2708 (Breyer, J., dissenting). *See supra* note 51; Tuerkheimer, *supra* note 24 at 14–18 (describing how a batterer's conduct causes the interests of victims and law enforcement to diverge, and concluding that "[t]he uncooperative complainant inheres in the dynamics of abuse; she is not going away").

[55] *Giles*, 128 S. Ct. at 2697–98.

[56] *Id.* at 2693–95.

[57] On remand from the California Supreme Court, the intermediate appeals court noted that the prosecutor "presented no evidence that appellant killed Avie with intent to prevent her from testifying or cooperating in a criminal prosecution," but also emphasized that on remand the trial court was "free to consider evidence of the defendant's intent." People v. Giles, No. B166937, 2009 WL 457832, at *4 (Cal. Ct. App. Feb. 25, 2009).

IV. ADAPTATIONS

A. The New Forfeiture

Giles not only allows, but demands, that judges making forfeiture determinations consider the context of domestic violence.[58] Again, with respect to *mens rea*, the Court instructed that a past pattern of abuse is "highly relevant" to whether the defendant possessed the requisite intent. However, the Court did not apply its new standard to the facts before it. Instead, the case was remanded in order for the state court to "consider evidence of the defendant's intent," leaving open the question of how its conceptual framework should be implemented.[59] Moreover, because the charge was murder, the Court was not forced to contend with a number of issues raised by the far greater number of prosecutions for non-lethal domestic violence.[60] Therefore, with somewhat scant guidance, it now falls to the lower courts to consider how the rule of forfeiture applies,

[58] While this discussion focuses on the legal arguments now available to domestic violence prosecutors, it bears mentioning that the evidentiary proof allowed by *Giles* will also impact law enforcement investigations. Prosecutors will likely rely more aggressively on phone records and taping of conversations initiated by incarcerated defendants, and will expand their investigations to include interviews with a wider circle of people with whom the victim may have discussed her reluctance to cooperate with prosecutors. (I suspect that this latter development will raise a number of difficult confidentiality issues and related concerns on the part of victim advocates.) Finally, greater use of expert testimony on the dynamics of domestic violence can be expected at forfeiture hearings. One important caveat: as litigation strategies become more complex, the prosecutorial resources which will be needed to prove forfeiture should not be underestimated. *See* Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK L. REV. 311, 364–65 (2005) (questioning "whether such resources would be available for misdemeanors, which encompass a large percentage of the domestic violence caseload").

[59] *Giles*, 128 S. Ct. at 2693.

[60] These issues may ultimately come before the Court. In the meantime, however, we can expect that some states will react to *Giles* by amending their evidentiary codes to add or modify the rule of forfeiture by wrongdoing. *See* Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEXAS L. REV. 857, 904 (2009) (proposing a new forfeiture rule for federal and state evidence codes). For instance, the California Law Revision Commission, after having studied various approaches to forfeiture, recommended in a February 2008 report that the legislature await the *Giles* decision before taking action. CAL. LAW REVISION COMM'N, RECOMMENDATION, MISCELLANEOUS HEARSAY EXCEPTIONS: FORFEITURE BY WRONGDOING 495 (2008), *available at* http://clrc.ca.gov/pub/Printed-Reports/REC-K600-Forfeiture.pdf. In the coming years, we may also see reform of the federal evidentiary code. On January 6, 2009, Senator Diane Feinstein (Democrat, Senior U.S. Senator for California) introduced a bill proposing in part that the Judicial Conference "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 has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable." Gang Abatement and Prevention Act of 2009, S. 132, 111th Cong. § 205 (2009).

both to fatal and non-fatal battering. Since the issues raised by the two types of case differ in important respects, I discuss each in turn—beginning with the more common factual predicate.

1. Non-Lethal Domestic Violence

Ironically, *Giles* may make it easier for prosecutors to prove forfeiture when an unavailable victim is alive than when she has been killed by the defendant. This is not because the perceived problem of "near circularity" is absent in non-lethal cases, though typically it is.[61] Rather, it is because in many or even most of these cases, specific evidence connects the defendant's misconduct to the victim's decision not to cooperate. Even without any categorical presumption or resort to a "special, improvised" rule,[62] prosecutors will often be able to prove that the defendant intended "to dissuade a victim from resorting to outside help . . . . [and] to isolate the victim and stop her from reporting abuse to the authorities."[63] Put differently, intent can be inferred—as invariably it must be whenever the issue of intent arises—from evidence pertaining to the particular relationship between the defendant and the absent witness.

Within the universe of non-fatal domestic violence, it is helpful to distinguish between cases involving post-incident conduct and those involving exclusively pre-incident conduct.[64] Put simply, the former will lend themselves to relatively easy forfeiture findings, while the latter will tend to present more complicated issues of proof.

What I am calling "post-incident conduct" adheres closely to the traditional witness tampering template.[65] The defendant's acts are designed to persuade the victim—by threats or emotional appeals—to change her story, drop charges, absent herself, or otherwise become unavailable as a prosecution witness.[66] Most often, the conduct that

[61] *Giles*, 128 S. Ct. at 2694 (Souter, J., concurring). *See supra* note 45.

[62] *Id.* at 2693 (deriding what Justice Scalia characterized as 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").

[63] *Id.*

[64] I use "incident" to refer to the act that constitutes the basis of the current prosecution.

[65] For a description of this template and its limits, *see* Tuerkheimer, *supra* note 24, at 41–48.

[66] When the tampering conduct occurs subsequent to an arrest, a criminal court order of protection typically prohibits contact between the defendant and the victim. Such an order effectively forecloses any defense argument that non-violent conduct is not wrongful. Even in the absence of such an order, however, courts have correctly recognized that where a defendant's seemingly non-violent conduct occurs in the context of an abusive relationship, it is fair and accurate to conclude that his wrongdoing is causal in procuring the victim's unavailability. *See, e.g.*, People v. Jernigan, 838 N.Y.S.2d 81, 82 (App. Div. 2007) (stating that where defendant left phone messages on victim's answering machine "in which he implored her not to testify against him," the prosecution was not required to prove that any threats were

undermines a victim's willingness to cooperate with prosecutors occurs when she is already a "witness," according to any reasonable definition of the word. In cases involving this fact pattern, prosecutors have successfully moved forward with forfeiture hearings (which may become known as *Giles* hearings in jurisdictions where this type of procedure was not already governed by case law).[67]

In one such hearing, the prosecutor's evidence included the defendant's phone and visitor records from jail, voice mail messages left by the victim for the Assistant District Attorney assigned the case, and the victim's recantation letter (faxed by the defendant's attorney).[68] Perhaps most powerfully, the prosecution presented the testimony of the assigned Assistant District Attorney, to whom the victim had related a history of abuse and expressed her fear of the defendant if she continued to cooperate.[69] Although this case did not result in a written opinion,[70] similar hearings have generated forfeiture findings and unpublished decisions favorable to the prosecution.[71] In general, prosecutors should have little difficulty proving forfeiture under these circumstances.

Somewhat more complicated are cases involving pre-arrest conduct that is the functional equivalent of witness tampering—but occurs in the absence of a pending formal charge. For instance, assume that in the course of their relationship, but prior to his arrest on current charges, the defendant (as is typical) explicitly threatens to harm the victim if she ever helps put him in jail (e.g., "if you ever call the cops or press charges,

made; the defendant's intent "was manifest . . . especially when viewed in a backdrop of his several acts of violence" against the victim); *see also* People v. Byrd, 855 N.Y.S.2d 505, 508 (App. Div. 2008); United States v. Montague, 421 F.3d 1099, 1103–04 (10th Cir. 2005).

[67] In New York, for instance, resolution of the forfeiture question is determined by a *Sirois* hearing, where the prosecution's burden is proof by clear and convincing evidence. *See* Holtzman v. Hellenbrand, 460 N.Y.S.2d 591, 597 (App. Div. 1983); People v. Geraci, 649 N.E.2d 817, 819 (N.Y. 1995).

[68] *See* Transcript of *Sirois* Hearing, People v. Atiles, Indictment No. 3170-2007 (Nov. 3, 2008) (on file with author).

[69] *Id.* at 31, 55, 60, 64.

[70] After the first day of the hearing, which was continued, the victim reappeared. Based on her subsequent grand jury testimony, the defendant was indicted on additional charges of coercion and witness tampering, to which he pleaded guilty. Telephone Interview with Scott Kessler, Domestic Violence Bureau Chief, Queens County Dist. Attorney's Office, in Queens, N.Y. (Jan. 26, 2009).

[71] *See, e.g.*, Indictment Memorandum at 24 n.6, 26, People v. Ali, Indictment No. 2400/2006 (Feb 7, 2008) (on file with author) ("[S]pecific threats are not a necessary tool to improperly influence a witness. Evidence that a defendant simply used his relationship with a witness to pressure her to refrain from testifying provides enough of a basis to conclude that the defendant caused a witness's unavailability. . . . The only logical inference that follows from all of the 'concrete facts from which . . . conclusions naturally and reasonably could be drawn' that were elicited during the hearing in the case at bar, is that the defendant's illegal involvement in the complainant's life caused the complainant to be unavailable as a witness in his prosecution.") (citation omitted).

I'll kill you"). Although the defendant lacks the specific intent to procure the victim's unavailability as a witness at the particular trial at which forfeiture ultimately becomes an issue, it would be bizarre to contend that his conduct is any less wrongful simply because it did not occur in anticipation of his arrest in the instant case. And indeed, the Court's decision in *Giles* would seem to allow for a forfeiture finding under these circumstances.[72]

The greater conceptual challenge to forfeiture analysis is raised when the defendant's conduct over a prolonged period causes the victim's absence from trial. In most domestic violence cases, the relationship has been abusive for some period of time leading up to the defendant's arrest.[73] The victim, who has endured a course of conduct characterized by the defendant's exertion of power and control over her, is intimately familiar with the defendant's modus operandi and concludes that he will likely be moved to violence by her cooperation.[74]

Here, unlike the preceding scenario, the batterer is able effectively to control the victim's decision-making without explicit threats regarding prospective trial testimony; her fears of the consequences of testifying are based on the totality of the abuse that she has suffered. In these cases, because the "tampering" cannot be captured by a moment in time, application of the traditional (stranger violence) paradigm—involving an explicit threat that is articulated at an identifiable instant—fails.[75] Judicial inquiries into a defendant's intent must be sufficiently contextualized to account for this reality.[76]

Apart from mens rea is the question of causation, which—as in the typical domestic violence fatality—was not an issue in *Giles*: Avie was

[72] By asserting that "evidence of ongoing criminal proceedings at which the victim would have been expected to testify" would be "highly relevant" to the forfeiture inquiry, Justice Scalia acknowledged that this type of evidence is not *necessary* to prove forfeiture. Giles v. California, 128 S. Ct. 2678, 2693 (2008).

[73] Women rarely call the police to report the very first incident of violence by an intimate.

[74] *See generally* Deborah Tuerkheimer, *The Real Crime of Domestic Violence*, *in* 3 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS: THE CRIMINAL JUSTICE RESPONSE 1 (Evan Stark & Eve Buzawa eds., 2009).

[75] *See supra* note 65.

[76] This would accord with what I have called a "relational" analysis of the confrontation right. *See infra* note 110 and accompanying text. The alternative is to implicitly define wrongdoing as a discrete incident, in order to associate that incident with a particular mental state. *See* Gerald E. Lynch, *Rico: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 933 (1987) (observing that the incident-focused criminal law contemplates an "act or omission . . . taking place in an instant of time so precise that it can be associated with a particular mental state of intention"). Default to this transactional model of crime, however, overlooks the ongoing pattern of abuse. *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 985–86 (2004).

indisputably unavailable as a witness because the defendant killed her.[77] Similarly, where a live victim absents herself from trial, causation is easily identified in cases where, based on past abuse, she is fearful of escalating violence should she cooperate with prosecutors.[78] Here, it is quite apparent that the defendant's misconduct has resulted in the victim's unwillingness to further jeopardize her safety. In this relatively large category of cases, where the primary motivating force is a battered woman's fear of future injury, the causation requirement should be readily satisfied.

The cases that challenge conventional understandings of causation are those in which victims are unwilling to testify for reasons less evidently related to the defendant's criminal conduct. A battered woman may distance herself from prosecution efforts because she feels that she deserves to be victimized;[79] she may still love the defendant or be emotionally dependant on him;[80] she may be wary of a loss of custody of her children to her batterer should she cooperate with prosecutors;[81] and so forth.[82] The realities of battering thus undermine judicial forfeiture

[77] The fact that the defendant's conduct caused the victim's absence is generally not contested in domestic violence fatalities (unless, for instance, the defense is mistaken identity). Only in the subset of non-lethal domestic violence cases described below will the issue tend to arise.

[78] My point here is conceptual, rather than practical (i.e., related to issues of proof). Regarding the latter, I anticipate that this type of case will often require substantial evidence on the causation question.

[79] *See, e.g.*, People v. Kilday, 20 Cal. Rptr. 3d 161, 165 (Ct. App. 2004), *review granted*, 105 P.3d 114 (Cal. 2005) (noting victim's expressed belief that she "deserved" to be cut with glass and burned with a hot iron).

[80] *See, e.g.*, People v. Santiago, No. 2725-02, 2003 WL 21507176, at *13 (N.Y. Sup. Ct. Apr. 7, 2003) (finding that the victim's "current attitude toward testifying is a classic example of a battered woman's reaction to what has been described as the honeymoon phase of the abusive relationship. [She] is frightened that separation will leave her isolated and without help in caring for her child and her home.").

[81] "In estranged relationships, threats against the children often become 'tools of terrorism' with which the abuser continues the intimidation, manipulation, and control of his former partner." Epstein et al., *supra* note 13, at 480.

[82] In many cases, a victim is financially dependent on her abuser—and thus unwilling to cooperate with prosecutorial efforts—because he has forced her to quit her job or made it practically impossible for her to continue working. "Economic insecurity is one of the biggest obstacles to safety for domestic violence victims and their families. The inability to survive financially without the abuser—due to loss of income, a place to live, childcare, and other money and resources—is the reason that survivors most often give for why they have to return to their abusers." Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669, 678 (2008) (quoting Georgia Coalition Against Domestic Violence, What We Do: Economic Justice Project, http://www.gcadv.org/html/what/economic_justice.html). *See also id.* at 675–80 (providing empirical and anecdotal support for the proposition that "it is extremely common for perpetrators of domestic violence to purposefully interfere with victims' ability to work by harassing them at work, limiting their access to cash or transportation, or sabotaging their childcare arrangements").

determinations predicated on the notion that fear of the defendant is the sole *sequela* of abuse. A more expansive understanding of how domestic violence victims are impacted by abuse allows courts to properly evaluate the causal relationship between a defendant's misconduct and a witness's unavailability.

With respect to both mens rea and causation, then, *Giles* represents an invitation to prosecutors to make salient the full spectrum of abuse that resulted in a live victim's absence from trial.

2. Lethal Domestic Violence

Domestic violence homicide would seem to present the strongest case for operation of a robust forfeiture doctrine. Particularly given the rule's equitable foundations, wrongdoing of the most egregious nature—murder—should most clearly fall within the doctrinal boundaries. Yet the converse may be true: counter-intuitively, the Court's adoption of a specific intent requirement may prove more problematic in a subset of homicide prosecutions than in cases of non-lethal domestic violence.

With respect to fatalities, a critical variable has become whether a criminal case was pending at the time of the murder. If so, the argument for forfeiture is a relatively straightforward one. Indeed, since *Giles*, lower courts have embraced the proposition that if criminal proceedings were ongoing at the time of the killing—if, quite simply, "he was charged"[83]—the defendant's intent to silence can be inferred.[84] In contrast, if no charge was pending when the victim was murdered (usually because the incident precipitating the victim's testimonial statement did not result in an arrest or, if it did, the case was resolved by plea[85]), proving forfeiture is more difficult. Under these circumstances, courts have generally found no evidence that the defendant intended to cause the victim's absence as a witness.[86]

I am troubled by this application of *Giles* to factual predicates involving homicides, since I view as largely fictional the notion that a batterer who kills his victim while a case is pending intends to silence her in a way that the "case-free defendant" does not.[87] In both situations, the

[83] State v. McLaughlin, 272 S.W.3d 506, 509 (Mo. Ct. App. 2008).

[84] *See, e.g., id.*; People v. Milan, No. W2006-02606-CCA-MR3-CD, 2008 WL 4378172, at *14 (Tenn. Crim. App. Sept. 26, 2008); People v. Gibbs, No. 274003, 2008 WL 4149033, at *2 (Mich. Ct. App. Sept. 9, 2008).

[85] In *Giles*, the defendant was apparently never arrested for the earlier assault involving Avie.

[86] *See infra* note 90–91; People v. Baker, No. 278951, 2008 WL 4762776, at *3 (Mich. Ct. App. Oct. 30, 2008). In this scenario, talk of intent to cause the victim's unavailability makes most sense if "witness" is conceived of broadly. There is ample room for this interpretation in the language of the majority opinion and Justice Souter's concurrence (and perhaps, oddly enough, in the *Davis* approach to defining "testimonial"). Even so, the fit between the intent requirement and homicide cases is an uneasy one.

[87] *See supra* notes 85–86 and accompanying text.

underlying dynamics of the relationship are generally the same.[88] Moreover, in each circumstance, these dynamics provide the context essential to understanding the defendant's motivation for the murder—the final and ultimate expression of the impulse to *control* that animates the course of battering conduct.[89]

In *Giles*, the Court expressly acknowledged the connection between a pattern of abuse and domestic violence homicide. It also made clear that nonphysical manifestations of power and control are hallmarks of battering. What the Justices did not explicitly articulate, however, is this critical insight: an abuser binds his victim to him *through a variety of mechanisms*, including, but not limited to, physical threats, emotional abuse, and (as the majority and concurring opinions repeatedly noted) social isolation. In all manner of ways, batterers deprive their victims of the means necessary for escaping the relationship, and this component of battering is essential to its effectiveness.

In short, since domestic violence homicide cannot be conceptually severed from what has come before, the new forfeiture framework demands an answer—a more satisfying answer than what the *Giles* Court was able to provide, albeit one entirely consistent with its guidance—to the question of what battering entails. Until a more sophisticated understanding of the abusive dynamic is incorporated into law, lower courts are bound to struggle with the task of implementation. And indeed, as already mentioned, a survey of post-*Giles* case law[90] reveals that, unless a criminal case was ongoing at the time, lower courts have rejected forfeiture findings where a "classic" battering relationship culminates in murder.[91]

---

[88] Justice Souter alluded to this reality in remarking that, if the evidence shows a "classic" battering relationship, "it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim." Giles v. California, 128 S. Ct. 2678, 2695 (2008) (Souter, J., concurring).

[89] *See* Deborah Tuerkheimer, *Control Killings: Death From Domestic Violence*, 87 TEX. L. REV. SEE ALSO 117 (2009), http://www.texaslrev.com/seealso/pdfs/87TexasL.Rev.SeeAlso117.pdf (advancing concept of "control killings" to explain domestic violence homicide).

[90] It should be noted that case law in this area is still in the early stages of development.

[91] With little or no analysis, appellate courts have reversed forfeiture determinations because, for instance: "[N]o evidence in the record establishing any kind of linkage between [the victim's] killing on the one hand, and any 'testimony-related' event of any kind on the other hand," People v. Luster, No. B194825, 2008 WL 4571937, at *8 (Cal. Ct. App. Oct. 15, 2008); "[T]here was no suggestion here that the homicide expressed appellant's intent to stop [the victim] from reporting abuse or cooperating with a criminal prosecution," People v. Suniga, No. F052710, 2008 WL 3090622, at *16 (Cal. Ct. App. Jul. 3, 2008); "[W]hile there was certainly evidence that defendant killed [the victim] and that he thereby made her unavailable to testify against him, there was no evidence that he killed her with that particular intent," People v. Ramirez, No. E043765, 2008 WL 4712822, at *7 (Cal. Ct. App. Oct. 28, 2008). These errors were deemed harmless with few exceptions. *See* Crawford v.

It is important to emphasize that, notwithstanding its failure to fully develop the point, a majority of the Justices has recognized that a history of abuse "intended to dissuade a victim from resorting to outside help" is sufficient to infer the requisite intent on the part of the batterer. Perhaps the lower courts are rejecting the Court's effective presumption, or misunderstanding it. Alternately, prosecutors may not be introducing sufficient evidence of past abuse, or may not be advancing arguments that explicitly connect this history to the *Giles* framework.[92] Because courts rejecting forfeiture findings under this factual scenario have done so with limited (or no) discussion, it is difficult to discern the source of the disconnect. What can be said, however, is that the lower courts have yet to grapple with the Court's observations—however fragmented and however inadequate—regarding the evidentiary significance of the relationship between batterer and victim. Instead, what we have seen is the tension that results when *Giles*'s intent to silence requirement is juxtaposed on a decontextualized judicial view of domestic violence homicide. This tension is nicely captured by one court's expressed rationale for concluding, in a case involving past physical abuse, stalking, and threats to kill, that there was no forfeiture of the confrontation right: "the record indicates [the defendant] murdered [the victim] out of personal vengeance and to keep anyone else from 'having her.'"[93]

Of course, the majority in *Giles* contemplated that in "no case pending" homicides, the defendant's intent *could* be discerned from a history of battering.[94] While evidence of ongoing proceedings is relevant to this inquiry, the Court's rejection of a *sine qua non* test[95] means that prosecutors and judges may locate the requisite intent elsewhere, in the abuse itself. What this inquiry requires, however, is a deep understanding of "the domestic violence context."

Commonwealth, 670 S.E.2d 15, 22 (Va. Ct. App. 2008); People v. Giles, 152 P.3d 433 (Cal. 2007) *rev'd sub nom.* Giles v. California, 128 S. Ct. 2678 (2008).

[92] *See, e.g.*, *Crawford*, 670 S.E.2d at 21 (noting that "[h]ere, the Commonwealth concedes" that the defendant did not kill the victim to prevent her from testifying); People v. Baker, No. 278951, 2008 WL 4762776, at *3 n.1 (Mich. Ct. App. Oct. 30, 2008) ("The prosecutor conceded at oral argument that *Giles* 'cuts a major hole in our argument on appeal.'"); *Suniga*, 2008 WL 3090622, at *16 (stating "[T]here was no suggestion here that the homicide expressed appellant's intent to stop [the victim] from reporting abuse or cooperating with a criminal prosecution . . . .").

[93] People v. Tovar, No. G040052, 2008 WL 3524614, *5 (Cal. Ct. App. Aug. 14, 2008).

[94] *See supra* note 85 (noting that Giles was never arrested for the earlier incident).

[95] *See supra* note 72; Giles v. California, 128 S. Ct. 2678, 2693 (2008) ("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.").

B. Testimonial, Redux

Although the issue before the Court in *Giles* was the scope of forfeiture doctrine, the various opinions raise questions, once again, about the meaning of "testimonial."[96]

Justice Thomas wrote separately to emphasize that he "adhere[s] to [his] view that statements like those made by the victim in this case do not implicate the Confrontation Clause."[97] He observed that "The contested evidence is indistinguishable from the statements made during police questioning in response to the report of domestic violence in *Hammon v. Indiana*,"[98] where he dissented from the Court in characterizing the hearsay as testimonial.[99] Justice Alito also concurred to voice his doubt about whether Avie's out of court statements were the equivalent of statements made by a witness.[100]

In addition to these express reservations, the three dissenting Justices "underscore[d] that this case is premised on the assumption, not challenged here" that the statement was testimonial,[101] and even the majority observed that the state "does not dispute here, and we accept without deciding" that the statement is testimonial[102]—curious, indeed, given how *Hammon* (also involving a crying domestic violence victim's statements to responding police officers while her attacker was being questioned in a separate room) was resolved. If the Court is implying or asserting that there is a disputable question here, might the continued vitality of the portion of *Davis* treating *Hammon* have been undermined?

All of this suggests, at the very least, that lower courts should be extremely cautious about overgeneralizing from the *Hammon* ruling. The case law that develops must be nuanced: small factual variations may dictate classification of statements to responding officers as nontestimonial, and prosecutors may now be able to more effectively exploit deviations from *Hammon*'s facts.[103]

---

[96] A defendant's confrontation right is not implicated by the admission of nontestimonial statements. Davis v. Washington, 547 U.S. 813, 823–24 (2006) ("'The text of the Confrontation Clause reflects this focus' [on testimonial hearsay]. . . . A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter." (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)). As a practical matter, then, the meaning of testimonial hearsay and the scope of the forfeiture rule cannot be severed. Given the Court's rulings in *Davis* and *Giles*, it seems fair to tentatively characterize the relationship between the two constructs as hydraulic in nature.

[97] *Giles*, 128 S. Ct. at 2693 (Thomas, J., concurring).

[98] *Id.*; Hammon v. Indiana, 546 U.S. 976 (2005) (No. 05-5705) (argued in tandem with *Davis*, 547 U.S. 813).

[99] *Davis*, 547 U.S. at 834 (Thomas, J., concurring in part and dissenting in part).

[100] *Giles*, 128 S. Ct. at 2694 (Alito, J., concurring).

[101] *Id.* at 2695 (Breyer, J., dissenting).

[102] *Id.* at 2682.

[103] *See, e.g.*, Brooks v. Dormire, No. 4:05-CV-1144, 2008 WL 3159331, at *4 (E.D. Mo. Aug. 4, 2008) (holding victim's statements to responding police officers

Finally, in dictum, the Court stated unequivocally that "statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment" are nontestimonial.[104] Unexpectedly,[105] in an area of law left unsettled by *Davis*, *Giles* gives prosecutors seeking to admit this important type of evidence a compelling argument for admission.[106]

C. Securing Cooperation

Because evidence-based prosecution has undoubtedly become more difficult in this post-*Crawford* era, it is fair to predict that the Court's rulings will compel prosecutors to secure victim testimony in a greater number of cases. To the extent that this translates into policies designed to strengthen the victim's position *vis-à-vis* her batterer, thus empowering her to cooperate with the prosecution because it is truly in her best interest, this development should be viewed as positive.[107]

Yet one should not overestimate the influence of enhanced prosecutorial support on the decision-making processes of battered women. Victimless prosecution evolved for a reason that is just as powerful today as it was decades ago: a batterer's conduct often causes the interests of victims and law enforcement to diverge. Until this is no longer true, domestic violence prosecution must, at times, go forward without the cooperation of the victim. The Court's most recent word on the subject preserves this option, ensuring that domestic violence prosecution will continue its evolution.

---

nontestimonial because victim "had suffered a severe head injury and was in need of emergency medical attention" at the time she spoke).

[104] *Giles*, 128 S. Ct. at 2692–93.

[105] Writing after *Davis*, Richard Friedman, the leading architect of the "testimonial" approach to confrontation, considered whether statements other than those made to law enforcement personnel should be classified as testimonial. Professor Friedman answered the question as follows: "*Davis*, like *Crawford*, does not resolve the matter definitively. But a rule that only statements to law enforcement personnel or only to government agents could be considered testimonial would be a disaster." Richard D. Friedman, Crawford, Davis *and Way Beyond*, 15 J. LAW & POL'Y 553, 573 (2007). *See supra* note 30 and accompanying text.

[106] *See, e.g.,* Doan v. Carter, 548 F.3d 449, 458 (6th Cir. 2008) (citing *Giles* dicta in support of nontestimonial classification of "statements to friends and neighbors about abuse and intimidation"); State v. Harper, No. 07-0449, 2009 WL 277087, at *5 (Iowa Feb. 6, 2009) (same).

[107] In my experience prosecuting and supervising domestic violence cases in New York County, the support provided by the social services and counseling departments of the Witness Aid Services Unit was often the critical factor in securing victim cooperation. For a summary of the types of services provided by the office, *see* Witness Aid Services Unit, N.Y. County Dist. Attorney's Office, http://manhattanda.org/victimservices/WASU/index.shtml.

V. CONCLUSION

Giles represents a significant opportunity. For the first time, the Court has explicitly identified "the domestic violence context" as a relevant construct.[108] This is a remarkable shift in relatively short order, and it allows us to glimpse the possibility of a jurisprudence informed by the realities of battering.[109] I have in the past called this approach to the confrontation right "relational" insofar as it explicitly attends to the context of relationship essential to battering.[110] The promise of *Giles* is that this approach may someday come to characterize the Confrontation Clause case law.

The receptivity of lower courts—and ultimately, of course, of the Justices—to arguments premised on the distinct dynamics of domestic violence remains to be seen. But *Giles* has erected a new framework for future advocacy, and it is grounded in the particularities of violence between intimates.

[108] Until *Giles*, the term only appeared in one other decision—*Town of Castle Rock v. Gonzalez*—and there, it was used by the dissenters to refer not to the dynamics of abuse but to the category of domestic violence cases. 545 U.S. 748, 779 (2005) (Stevens, J., dissenting) ("[T]he Court gives short shrift to the unique case of 'mandatory arrest' statutes in the domestic violence context.").

[109] As this law develops, it may draw upon greater understandings of domestic violence evinced in other doctrinal areas. For instance, judicial reasoning about battering is, in the Fourth Amendment Warrant Clause context, "remarkably contextualized, meaning that it is largely informed by the dynamics of abuse and their impact on the policing of domestic violence." Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801, 820 (2007).

[110] Tuerkheimer, *supra* note 24, at 56. My use of the word "relational" in this context is not derived from the scholarly tradition of relational feminism. Rather, it is a way of characterizing an understanding of the Confrontation Clause that views the alignment of relationships between accuser, accused, and state as central to its descriptive and normative aspirations.