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A Response to The Sounds of Silence

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See Also

A Response to *The Sound of Silence*

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In his article, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, Tom Lininger attempts to "facilitate the effective prosecution of domestic violence cases, particularly domestic homicide, while complying with the new requirements announced [for forfeiture by wrongdoing] by the Supreme Court in *Giles* [*v. California*]."[1] In doing so, Lininger tackles a wide array of topics, including analyzing the "theoretical underpinnings" of forfeiture by wrongdoing;[2] explicating the *Giles* decision, criticizing Justice Scalia's originalist approach for its "selective historical research . . . conflation of evidentiary and constitutional forfeiture theories, and . . . vacillation between objective and subjective standards for assessing intent";[3] developing a "new jurisprudential framework" for forfeiture analysis;[4] and proposing amendments to Federal Rule of Evidence 804(b)(6)—the federal forfeiture by wrongdoing rule.

While many of these topics are interesting and worthy of scholarly response, I intend to limit my comments to Lininger's proposed solution to the conundrum created by the *Giles v. California*[5] decision. The Court in *Giles* held that forfeiture by wrongdoing is limited to when the prosecution can prove the defendant intended to prevent the victim from testifying against him.[6] Prior to *Giles*, many courts had held that the defendant's intent for forfeiture by wrongdoing could be inferred when the defendant killed his victim.[7] The *Giles* Court disagreed, finding it was inappropriate to infer the defendant's intent. Many contend that this decision creates a perverse

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1. 87 TEXAS L. REV. 857, 858 (2009).
2. *Id.* at 888.
3. *Id.* at 864.
4. *Id.* at 887.
5. 128 S. Ct. 2678 (2008).
6. *Id.* at 2693.
7. Lininger, *supra* note 1, at 872.

incentive for domestic violence defendants to kill their intimate partners in order to best capitalize on their confrontation rights.[8] As one who has viewed forfeiture by wrongdoing as a potential solution to the battering dynamics in domestic violence cases, I find myself intrigued by Lininger's efforts to create "bright-line" rules, even after *Giles*, for when it is appropriate to infer the defendant intended to prevent the victim from testifying. While I ultimately find Lininger's proposed "bright-line" rules incomplete, I wholeheartedly agree with his effort to create situations in which inferring intent is constitutionally appropriate. In this way, courts can address the reality of domestic violence and prevent the defendant benefitting from additional violence.

In its 2004 decision in *Crawford v. Washington*,[9] the U.S. Supreme Court revived a criminal defendant's right to confront witnesses in court.[10] Including *Crawford*, the Court's recent Confrontation Clause cases—*Crawford v. Washington*, *Davis v. Washington*,[11] and *Hammon v. Indiana*[12]—forced a dramatic shift in how domestic violence cases are prosecuted. Today, the state can largely only prosecute when the victim appears in court and provides in-court testimony.[13] As Lininger notes, however, domestic violence victims are subject to incredible pressure—through threats and violence—from their battering partners not to testify.[14] Unfortunately, the revived right of the defendant to confront the victim in court creates an increased incentive on the part of the defendant to prevent the victim from testifying against the defendant. As Lininger describes it, the Confrontation Clause creates an "obvious defense strategy: beating the charge by beating the accuser."[15]

Several commentators have looked to the doctrine of forfeiture by wrongdoing as a potential solution for domestic violence prosecutions after *Crawford*. Forfeiture by wrongdoing allows the prosecution to combat the defendant's incentive to prevent victims from testifying. Put simply, forfeiture by wrongdoing prevents a defendant from using the Confrontation Clause as both a sword and a shield: the defendant cannot cause the victim to be absent and then assert his right to confront the absent witness.[16] If the defendant is the reason for the victim's absence, under forfeiture by wrongdoing, the defendant waives his right to confront the missing witness.

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8. *Id.* at 863–64.
9. 541 U.S. 36 (2004).
10. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 755 (2005).
11. 547 U.S. 813 (2006).
12. *Id.* (consolidated with *Davis*).
13. Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1365 (2005).
14. Lininger, *supra* note 1, at 868–69.
15. *Id.* at 864.
16. *Id.* at 861.

Interestingly, it was the Court's decisions in *Crawford*, *Davis*, and *Hammon*, that propelled commentators, courts, and county attorneys to look to forfeiture by wrongdoing.[17] As Lininger notes, the Court appeared to recognize an expansive doctrine of forfeiture by wrongdoing as a vital counterbalance to enhanced confrontation rights.[18] In his compelling discussion of a series of brutal domestic violence murder prosecutions, Lininger describes how most courts were willing to find forfeiture by wrongdoing when the defendant killed the victim, regardless of whether the murder was for the intent of preventing the victim from testifying. Prior to *Giles*, most courts were willing to *infer* the defendant's intent to prevent the victim from testifying when the defendant killed the victim, thus opening the door to admission of the deceased victim's hearsay statements.[19]

In *Giles*, the Supreme Court disagreed with the majority of lower courts and found that forfeiture by wrongdoing can only be established when the prosecution proves the defendant's intent to prevent the victim from testifying.[20] While Lininger acknowledges that *Giles* was a "setback for prosecutors of domestic violence," he contends that the opinion "also gave hope that a carefully crafted forfeiture argument could prevail even when the accused has not expressly threatened reprisals for testimony."[21] Lininger then sets out to explicate what he refers to as "*Giles*'s inferred-intent standard."[22] Lininger's efforts in this area are important and compelling: he seeks to provide lower courts with a "new jurisprudential framework" to assist with application of forfeiture by wrongdoing.

According to Lininger, the "best way to facilitate lower courts' interpretation of the forfeiture doctrine exception after *Giles* is to adopt bright-line rules."[23] Lininger proposes "bright-line" rules to address five critical post-*Giles* questions:

> First, what showing of unavailability is sufficient to invoke the forfeiture doctrine? Second, what types of wrongful conduct could support a finding of forfeiture? Third, how should courts assess causation? Fourth, what evidence is sufficient to show that the accused intended to silence a prospective witness within the meaning of *Giles*? Fifth, can the prosecution show the requisite mental state if

17. Since the *Crawford* decision, many states have either legislatively or judicially adopted forfeiture by wrongdoing.

18. Lininger, *supra* note 1, at 872–73.

19. *Id.* at 861.

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

21. Lininger, *supra* note 1, at 887.

22. *Id.* at 888.

23. *Id.* at 892.

> the defendant had mixed intentions, such as the desire for revenge coupled with the intent to silence?[24]

Lininger identifies the fourth question as the "greatest challenge" after *Giles*.[25] Drawing support from language in Justice Scalia's opinion and Justice Souter's concurrence, which Lininger contends "suggests the possibility of inferring intent from a pattern of past conduct, even conduct that did not seem motivated in an immediate sense by an intent to make the victim unavailable for testimony at trial,"[26] Lininger advocates "an expansive interpretation of the intent-to-silence requirement."[27] To this end, Lininger proposes three per se inferred-intent situations: violation of a restraining order; defendant's violence toward the accuser after she made a police report or initiated any judicial proceedings; and defendant's history of repeated abuse against the accuser "over a long period [of time]."[28] According to Lininger, if the prosecution can establish one of these three situations, then the intent element of forfeiture by wrongdoing is satisfied, regardless of whether the defendant's conduct expressly made any reference to keeping the victim from testifying. Lininger's three per se inferred-intent situations are a critical component of his article and demand further exploration.

According to Lininger, courts should find that the defendant's intent to prevent the victim from testifying is established when the defendant violates a restraining order issued for the protection of the victim.[29] The violation can occur in the case for which the defendant is on trial or in an unrelated case. In support of his position, Lininger argues that:

> A restraining order is a lifeline connecting the petitioner to a court system that can protect her. Defendants who violate such restraining orders are seeking to sever that lifeline, interposing themselves between the petitioner and the court system. In a word, the defendant is seeking to "isolate" the petitioner from the legal system.[30]

In addition, Lininger suggests that the defendant's violation of a restraining order is particularly important because the victim's obtaining the restraining order indicates that she may testify against the defendant.[31] Finally, Lininger argues that a violation of a restraining order raises the same concerns about preserving the integrity of the judicial system that underlie forfeiture by wrongdoing.[32]

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24. *Id.* at 893.
25. *Id.* at 897.
26. Lininger, *supra* note 1, at 895.
27. *Id.*
28. *Id.* at 900.
29. *Id.* at 898–900.
30. *Id.* at 898–99.
31. *Id.* at 899.
32. *Id.* at 899–900.

Lininger would also find inferred intent when the defendant commits "any act of violence against that accuser after she had made a police report or initiated any judicial proceedings."[33] In support of this proposed rule, Lininger points to studies documenting high rates of violence against domestic violence victims during the pendency of the prosecution and showing that victims experience the most severe violence after reporting some other domestic violence incident. According to Lininger, these studies "suggest the urgent need for—and the potential efficacy of"—his per se rule.[34]

Lininger's third proposed per se rule to infer intent is when the government can establish that the defendant has "repeatedly abused the declarant over a long period."[35] Both Justice Scalia's opinion for the Court and Justice Souter's concurrence support the notion that repeated acts of violence are relevant to a finding of forfeiture. According to Justice Souter, "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."[36] Lininger observes that repeated violence over a period of time refutes any suggestion that the violence is attributable to provocation rather than to an intent to isolate the victim from the criminal justice system.[37]

Lininger proposes a per se rule for a pattern of abuse, but acknowledges the difficulty in creating the boundaries of such a rule:

> The best test would quantify the amount of domestic violence that necessarily entails the intent to silence. The involvement of social scientists would be necessary to calibrate this test precisely. Perhaps the rule could indicate a minimum number of acts involving severe domestic violence causing injury, or perhaps the rule could specify a minimum number of violent acts, irrespective of their severity, occurring within a two-year period preceding the victim's unavailability for testimony in the instant prosecution. A fixed number of acts might seem unduly rigid, but it would reflect the reality that no defendant innocently commits domestic violence on multiple successive occasions.[38]

As someone who has also advocated for an expansive interpretation of forfeiture by wrongdoing in the domestic violence context, I applaud Lininger's efforts to highlight the importance of forfeiture to successful

33. *Id.* at 900.
34. *Id.*
35. *Id.*
36. Giles v. California, 128 S. Ct. 2678, 2695 (2008) (Souter, J., concurring).
37. Lininger, *supra* note 1, at 901.
38. *Id.* at 901–02.

domestic violence prosecutions. Lininger contends that bright-line rules should make courts less "inhibit[ed] . . . from applying *Giles*'s inferred-intent test."[39] Lininger's desire for bright-line rules for domestic violence cases is understandable. Bright-line rules of inferred intent can assist the prosecution to overcome the paucity of evidence of the defendant's intent to prevent the victim's testimony. It may seem particularly appropriate to infer intent when the paucity of evidence stems from the defendant's actions and from the nature of the defendant's criminal conduct: domestic violence is a crime that typically occurs in private with no witnesses other than the victim and that involves complex social and personal dynamics that inhibit disclosure of the violence. In addition, bright-line rules for inferred intent seem most appropriate in homicide cases. While Lininger suggests his rules could apply more broadly, the need for inferred intent is clearest in homicide cases, and this is where Lininger casts his arguments. Homicide simplifies the equation because it eliminates issues of the victim's choice not to participate in the prosecution and erases the primary source of evidence of the defendant's intent.

I agree wholeheartedly with Lininger that courts can, and should, make the connection between battering behavior and forfeiture:

> There is congruence between behaviors by defendants to prevent testimony and behaviors of batterers to prevent disclosure about the true nature of the relationship. At bottom, batterers and defendants often seek the same thing: to avoid responsibility for their criminal conduct. Defendants want to avoid conviction. Batterers want to preserve the relationship, by definition a relationship established and maintained by criminal conduct. Therefore, it is possible to describe a battering relationship as a form of forfeiture by wrongdoing: a fundamental pillar of many battering relationships is procuring the absence (inability to disclose) of the recipient of the criminal conduct and the primary witness to the true nature of the relationship.[40]

Therefore, I am of the opinion that when the prosecution can establish a battering relationship, it is appropriate to infer the defendant's intent to prevent the victim from testifying for purposes of forfeiture by wrongdoing.[41]

To be clear, I see a battering relationship as one that is built on violence, but which can involve other "non-violent" power and control tactics. Physical or emotional isolation, economic control, repeated invasions of privacy, and threats of violence can all be effective means of maintaining the

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39. *Id.* at 901.

40. Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 460 (2006).

41. *Id.* at 467.

power imbalance in the relationship.[42] I see the "abusive" relationship as more than merely a collection of violent acts perpetrated against the same victim.

For this reason, while I applaud Lininger's bright-line rules that make it easier for courts to find a "pattern of abuse," I fear that those same rules may artificially limit findings of forfeiture. For instance, a defendant's confiscation of the victim's credit cards after the victim's reporting of a violent incident might be far more persuasive than a punch, but it would fall outside the per se rule regarding acts of violence during the pendency of the prosecution. The per se rule regarding violations of restraining orders poses another example. When a domestic violence victim obtains a restraining order, it may be a "warning to the defendant that the petitioner may soon be a witness against him." It is even more accurate to view a restraining order as a signal to the defendant that he is losing power and control over the victim and that the victim is willing to depart from the underlying rule of the relationship: reluctance to disclose the true nature of that relationship. But what about when a defendant violates a no-contact order? Many courts issue no-contact orders during a prosecution to protect the victim and to preserve the integrity of the proceeding. Often, the court will issue the no-contact order over the objection of the victim. In these situations, it cannot be said that the victim is signaling a willingness to testify against the defendant. The defendant's nonviolent violation of the no-contact order would not satisfy either the per se rule against violence during the pendency of the proceedings or the per se rule against violations of a restraining order. The defendant's violation of the no-contact order, however, would demonstrate the defendant's intent to undermine the integrity of the proceedings—the very type of conduct forfeiture by wrongdoing is designed to prevent.

I recognize that my discussion of Lininger's bright-line rules can be conceived as categorical: every bright-line rule can be challenged for being drawn in the wrong place. I am not as concerned about where the line is drawn, as opposed to the line being drawn at all. I fear that the creation of bright-line rules will turn a nonexhaustive concept into an exclusive list. This has the potential to constrain the conception of the courts as to the true nature of domestic violence, impede prosecutors in their presentation of forfeiture, restrict police investigation of forfeiture, and limit the primary public discourse—the criminal trial—about domestic violence.

Also, I question the appropriateness of Lininger's rules beyond the domestic homicide context. I agree with Lininger that courts should broadly construe the elements of forfeiture by wrongdoing in domestic violence relationships, particularly the element of the defendant's intent to prevent the

42. Andrew King-Ries, Crawford v. Washington*: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 304 (2005).

victim from testifying. But do we have the same confidence in bright-line rules inferring intent when the victim is not dead, but still refuses to testify? I suggest that the answer is "no," and that this appropriately causes a different weighting of the defendant's confrontation rights.[43]

In this light, as opposed to per se rules, I would prefer that courts be willing to engage in a full discussion of the relationship—with particular sensitivity to the dynamics of domestic violence relationships—as the prosecution seeks to establish forfeiture by wrongdoing. In my opinion, a broader discussion of domestic violence dynamics, and a broader application of inferred intent based upon those dynamics, will provide prosecutors the tools needed to combat domestic violence and will deter domestic violence defendants from acting on the perverse incentive to absent their victims and then assert their confrontation rights to avoid accountability for their conduct. To this end, Lininger and I concur that courts can combat domestic violence and do what Lininger seeks: give silent victims a "voice in court."[44]

43. King-Ries, *supra* note 40, at 470–72.

44. Lininger, *supra* note 1, at 911.