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See Also

Being Heard After *Giles*: Comments on *The Sound of Silence*

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Professor Lininger's thoughtful article *The Sound of Silence*¹ begins not with a whimper, but a bang. He graphically details several domestic violence murders that are animalistic in their violence and demonstrate a total disregard for the sanctity of human life. While these female voices were permanently silenced by the savage brutality that resulted in their deaths, Professor Lininger's article suggests that batterers should not also succeed in rendering them mute in the courtroom. Besides critiquing the narrow originalist reasoning in *Giles*,² he posits three per se rules for proving inferred intent and suggests a revised forfeiture hearsay exception for nontestimonial hearsay. I agree with many, but not all of his suggestions, and also have a slightly different approach to some of these issues.

I. Originalism Will Never Protect Domestic Violence Victims

I completely agree that originalism is anathema to domestic violence victims, and like Professor Lininger I have previously argued that it is hardly surprising that a timeframe in which domestic violence was not criminalized would not provide answers for a world of zero tolerance for batterers.³ However, I do not think this difficulty is confined to Confrontation Clause analysis. Elsewhere I have explored how originalism might play out in

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

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

3. Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL'Y 759, 774-75 (2007); Myrna S. Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 311-14 (2005) [hereinafter Raeder, *Remember the Ladies*]; Myrna S. Raeder, *Thoughts About Giles and Forfeiture in Domestic Violence Cases*, J.L. & POL'Y (forthcoming 2009) [hereinafter Raeder, *Giles and Forfeiture*].

reevaluating other criminal procedural rights, typically in ways that disadvantage defendants.⁴ Moreover, I tend to agree with Professor Davies, a legal historian, that even when history provides information about trial practice in the Founding Era, that the Justices get it wrong.⁵ As noted by Professor Lininger, the irony of the Confrontation Clause originalism is that it superficially appears to make Justice Scalia a champion of the defense. However, given the Justice's narrow view of Confrontation in his concurrence in *White v. Illinois*,⁶ I never expected what I call testimonialism to support a robust pro-defense posture. I, too, have surmised that the broad language in *Crawford*⁷ and *Davis*⁸ was the quid pro quo cementing a majority for the testimonial approach. Thus, as I have suggested elsewhere, it should be no surprise that Justice Scalia is now suggesting that a narrow view of testimonial statements is still possible.⁹ I think, however, it would be difficult for Justice Scalia to back formalism given his authorship of *Davis*, and I do not believe that a majority of the Court could be found to support formalism as a requirement for testimonial statements.

Given various comments in *Giles* questioning whether the statements were testimonial, I have argued elsewhere for an alternative route to finding that previous statements of murder victims to law enforcement are nontestimonial. Because the evidence has not been gathered for the current case, it is not being offered to convict the defendant for the crime they discuss; indeed since the statements were uttered before the current crime, they could not have been obtained with an idea of such future use.¹⁰ In other words, given free will and the fact that only a very small percentage of domestic batterers kill their victims, it makes no sense to consider these statements testimonial when offered in a later murder trial. I view this as completely analogous to *Dowling v. United States*,¹¹ where evidence of an acquitted crime did not offend double jeopardy or due process because the preliminary fact determination is made pursuant to a lower standard of proof and offered to prove a different crime. Similarly, if the statement is offered to prove a different crime, and the evidence is offered for some Rule 404(b)¹² purpose that does not implicate the proof beyond a reasonable doubt standard, it should not be considered testimonial. I also suggest that in cases such as *Giles*, where the defense is based on accident, self-defense, or

4. Raeder, *Giles and Forfeiture*, *supra* note 3.

5. Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 156–62 (2005).

6. 502 U.S. 346, 364 (1992) (Scalia, J., concurring).

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

8. *Davis v. Washington*, 547 U.S. 813 (2006).

9. Raeder, *Giles and Forfeiture*, *supra* note 3.

10. *Id.*

11. 493 U.S. 342 (1990).

12. FED. R. EVID. 404(b).

suicide, rather than identity of the perpetrator, that the defendant opens the door to relevant testimonial evidence of the victim's state of mind as a matter of his trial strategy in order to prevent the defendant from misleading characterization of decedent's conduct.¹³

Unlike Professor Lininger, I was not surprised when Justice Scalia returned to originalism in interpreting forfeiture, despite his earlier hints that this would solve the domestic violence problem. Again, I had viewed such references simply as dicta that solidified a majority for testimonialism. In fact, prior to *Giles*, I suggested that *Reynolds*¹⁴ was less than a ringing endorsement for forfeiture in domestic violence murder cases since it fit the witness tampering model. Moreover, *Reynolds* would not have had to rely on a forfeiture theory in today's hearsay-friendly environment because the declarant's previous statement had been cross-examined.¹⁵ Thus, to me *Giles* does not contradict Justice Scalia's earlier views of originalism. Instead, it is his willingness in *Davis* to abandon formalism as a requisite for testimonialism in the police context that better fits any claim of selective originalism.

Generally, I view originalism as a thin reed for interpreting the Confrontation Clause given the need to compare the use of Marian magistrates with procedures in our current criminal justice system where crime is investigated by the police, defendants are tried by public prosecutors, and every defendant has access to counsel. Thus, I was glad to see that Professor Lininger wondered why 1791 was chosen as the year of comparison rather than 1868 when the Fourteenth Amendment incorporated the rights in the Sixth Amendment and applied them to the states. That timeframe provides a meaningful comparison to present criminal practice, unlike comparison to the underdeveloped practice during the Founding Era. As I have noted elsewhere, Justice Scalia once actually addressed trial practice in 1868 in a different Confrontation Clause context.¹⁶ Yet the 1868 comparison would defeat a narrow view of originalism since it is difficult to argue that the rights being incorporated were only those that existed at the founding, given that the abolition of slavery was the impetus for the amendment.

13. Raeder, *Giles and Forfeiture*, *supra* note 3 (analogizing to strategic choice denying confrontation in *Michigan v. Lucas*, 500 U.S. 145, 152 (1991)).

14. *Reynolds v. United States*, 98 U.S. 145 (1878).

15. Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, *CRIM. JUST.*, Summer 2005, at 24, 31.

16. See Raeder, *Remember the Ladies*, *supra* note 3, at 311 (discussing *Portuondo v. Agard*, 529 U.S. 61, 65 (2000), which held the Confrontation Clause did not prohibit a prosecutor's comments about a testifying defendant's presence in the courtroom during founding or when the "strictures" of the Sixth Amendment were extended to the states).

II. Proving Forfeiture

While I agree that bright line rules are easier to apply when cast in an objective framework, Professor Lininger is much more favorable to the *Davis* test than I am. I tend to view it as a tautology: statements are testimonial, except when they are not. Ultimately, how one views an ongoing emergency determines whether this is a workable standard. For example, the standard leaves open too many issues in deciding whether an emergency exists after perpetrators have left the crime scene. In this regard, many advocates for domestic violence victims argue for a broad contextual framework for evaluating emergencies that accords better with the nature of the crime, and thereby renders most disputed statements as nontestimonial. Thus, Professor Lininger's view of the workability of the *Davis* standard may implicitly reflect his acceptance of a broader view of emergencies than I hold. Similarly, when he discusses dual purpose statements as support for forfeiture, he explains that they currently can support a finding of emergency. Again, I do not disagree with his premise, but think the problem with the standard is that it gives no guidance for determining the primary motivation for the statement, which is the ultimate question in categorizing it for Confrontation Clause purposes.

I do agree that a subjective standard for forfeiture is usually more difficult to prove than an objective one and that Justice Scalia applies forfeiture "only if the defendant has in mind the particular purpose of making the witness unavailable."¹⁷ However, in other instances in which the state of mind of the defendant must be established to satisfy a specific intent requirement such as malice, that evidence rarely comes solely or even primarily from the defendant's statements. Instead, jurors typically evaluate the defendant's acts and surrounding circumstances that may include the statements of the victim. Practically, all questions of witness tampering involve similar difficulties. What is more problematic here is that in the overwhelming number of domestic violence cases, there will be a live victim whose mixed motives in not appearing will be quite different from the more typical witness tampering case where the essence of the crime is not rooted in the relationship between the defendant and his victim. In contrast, when the victim is dead, we do not have to worry about her mixed motives in not appearing. The only issue is whether there is circumstantial evidence that her murder was intended to keep her from testifying, or if not, whether there is evidence of inferred intent to isolate the victim and keep her from obtaining help.

Personally, I have always distinguished murder from other domestic violence cases, and pre-*Giles* argued for simple forfeiture without intent in

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

murder cases.¹⁸ As I have written elsewhere, I find it ironic that while *Giles* ostensibly handed prosecutors and victims' advocates a defeat, reworking the votes obtains a super majority for inferred intent in domestic violence murder cases, and at least a simple majority composed of the concurers and dissenters for inferred intent in all domestic violence cases.¹⁹

I applaud Professor Lininger's attempt to create per se rules to guide the courts and simplify the forfeiture determination. He identifies three forms of evidence that would be sufficient to prove forfeiture. Before discussing them specifically, it is important to note the evidentiary context. Forfeiture is a decision for the court under Rule 104(a).²⁰ While some jurisdictions provide for a clear and convincing evidence standard, this applies only to decisions about the forfeiture hearsay exception. The constitutional forfeiture decision is based on a preponderance standard that has been applied in virtually all other contexts.²¹ Moreover, in deciding such preliminary fact questions, the court may consider otherwise inadmissible evidence.²² In this regard, testimonial statements may be considered as evidence proving forfeiture, though as in *Bourjaily*²³ it is unclear whether the statement alone is sufficient to demonstrate forfeiture. Thus, it would seem to me that not only can hearsay be considered but also evidence that would violate Rule 404(b) or otherwise implicate character prohibitions. In addition, this would permit the judge to decide the forfeiture foundation based on a proffer of what the evidence would show, although the court has discretion to require an evidentiary hearing at which the actual supporting evidence would be presented.

With this in mind, the initial question for the judge in evaluating the evidence would be its relevance to the issues of inferred and actual intent. In this regard, I think Professor Lininger's view of foreseeability is too generous to defendants. To me, if the perpetrator flees after committing the crime, he should forfeit his right to complain about the absence of cross-examination if the declarant is unavailable when he is later captured and prosecuted. For example, most claims by defendants that they were denied a speedy trial are denied when the reason for the delay was caused by their flight. Unlike committing a murder which may be completely unrelated to any desire to tamper with witnesses or impede the judicial process, the act of flight appears directed at hindering prosecution. Once the criminal act has

18. Raeder, *Remember the Ladies*, *supra* note 3, at 361–65.

19. Raeder, *Giles and Forfeiture*, *supra* note 3.

20. FED. R. EVID. 104(a).

21. *See* *Davis v. Washington*, 547 U.S. 813, 833 (2006) (referring to preponderance without deciding issue); Raeder, *Remember the Ladies*, *supra* note 3, at 365 (discussing preponderance standard applied in various constitutional settings).

22. *Bourjaily v. United States*, 483 U.S. 171, 179–80 (1987).

23. *Id.* at 181.

occurred, it can be inferred that if the perpetrator flees, he is impeding the integrity of the judicial process, bringing into play the rationale underlying *Giles*.

Undoubtedly, the three types of evidence that Professor Lininger suggests would be relevant to finding inferred intent. The real issue is whether they would be sufficient as his per se rules mandate. While I think these bright line rules will help simplify forfeiture decisions and believe they should provide sufficient evidence of forfeiture, I would add the clarification that the rules should be viewed as rebuttable presumptions. In other words, the defendant should be able to rebut whether in the individual case they actually prove the existence of the inferred or actual intent supporting forfeiture. Other evidence may defeat the inference in a specific case. Rebuttal may be implicit in Professor Lininger's formula, but I think making it explicit is helpful. This would also help alleviate my qualms about applying such expansive rules to nonfatal domestic violence cases.

With this caveat, I would also support the admission of additional forms of evidence as sufficient to prove forfeiture. For example, while violation of a protective order indicates awareness of consequences related to future testimony, in murder cases the killing by itself is a violation of the protective order and, therefore, supports forfeiture in every case in which one was ordered. Professor Lininger indicates the protective order could be imposed in the current case or in any previous case. This is where rebuttal evidence could be significant if the order was several years old and no intervening acts had occurred.

Similarly, in nonfatal cases it should be sufficient that the protective order was obtained without evidence of later violation since that is usually the first step to the victim leaving her batterer, which triggers other controlling behavior by the abuser aimed at isolating her. It is not the content of the order that is in issue for forfeiture but the fact that enough evidence was present to obtain one, and this gave notice to the defendant that his actions had potential judicial consequences. Indeed, this may be contemplated by Professor Lininger's second category, which includes "initiation of judicial proceedings." While he does not define the nature of the proceedings, I assume they include civil as well as criminal actions. Obtaining the protective order puts the defendant on notice that his actions may impact judicial proceedings. Generally, the statistics appear to indicate that protective orders may exist in less than 50% of the cases,²⁴ so even considering such evidence as sufficient for forfeiture would not necessarily be a panacea.

24. ERICA L. SMITH ET AL., U.S. DEP'T OF JUSTICE, STATE COURT PROCESSING OF DOMESTIC VIOLENCE CASES 4 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scpdvc.pdf> (in 2002 less than 50% of cases imposed protective orders during proceedings or as part of sentence).

Other types of civil proceedings, such as filing for divorce, may be more problematic in nonfatal cases, but as Professor Lininger indicates, the empirical data makes clear that the most dangerous time for women is when they leave their batterers. Thus, this is the timeframe during which batterers will typically try to prevent their victims from escaping their control. Similarly, filing a police report may either trigger an investigation that puts the batterer on notice of a potential criminal charge or indicate conduct that is associated with the control used by batterers to isolate their victims. Again, I agree that such evidence should be sufficient, subject to rebuttal. Of course, in some nonfatal cases there may be unintended consequences for women who are criminally charged as a result of mandatory arrest policies because of the tendency of some judges to order joint protective orders rather than determining the primary aggressor.

The third category of evidence that Professor Lininger suggests as appropriate for a *per se* rule involves coercive control practiced by individuals sometimes described as patriarchal or intimate terrorists. The *Giles* majority would appear to permit such evidence in murder cases given its discussion of inferred intent arising from conduct aimed at isolating the victim and preventing her from attaining help. A few courts have questioned whether inferred intent applies in the murder case itself or only in criminal cases pending at the time of the murder, but view the remand in *Giles* to consider the issue of forfeiture in the murder case as settling this point.²⁵ Again, the forfeiture issue is not dependent on the admissibility of inferred intent evidence at trial, but its admissibility (and sufficiency) to prove the preliminary fact of forfeiture before the judge. Professor Lininger is somewhat vague about defining the number and severity of the acts that would demonstrate abuse and the appropriate timeframe to trigger his *per se* rule. However, he notes that the prosecution will have the burden of proving causation. The recent enactment of 18 U.S.C. § 117, which criminalizes domestic assault by a habitual offender, requires at least two separate prior convictions to trigger its application. Again, with the caveat of a rebuttable presumption, I would actually expand Professor Lininger's *per se* rules to include two other categories: proof that the defendant has an abusive personality and proof that the decedent suffered from Post Traumatic Stress Disorder (PTSD).

As Professor Lininger discusses, it is common for batterers to be repeat offenders. This is particularly true of abusers for whom domestic violence itself is not the goal, but rather is instrumental to the actual goal of controlling the victim's life. After O.J. Simpson was acquitted of murdering his ex-wife, I wrote several articles exploring evidentiary issues concerning

25. *E.g.*, *State v. McLaughlin*, 265 S.W.3d 257, 271–73 (Mo. 2008) (en banc).

batterers whose final act of control is to murder.²⁶ While the more recent literature on intimate partner violence (IPV) divides domestic violence into several distinct categories,²⁷ the type of batterer described by *Giles*, whose actions would isolate his victim, is composed overwhelming by males who engage in coercive controlling violence. They mix a variety of tactics identified on the familiar Duluth power and control wheel,²⁸ such as emotional and financial abuse, coercion and threats, isolation, destruction of property, minimization, blaming, denial, using children and male privilege, as well as physical and sexual abuse to maintain their domination. Often, when such a batterer discovers that his intimate is serious about leaving, and that he can no longer dominate her by sublethal violence, murder becomes his final act of control. In other words, the violence is instrumental, rather than the actual objective. While the murder is undoubtedly counterproductive to the batterer's long-term goal, it may be “the dysfunctionally extreme manifestations of violent inclinations whose lesser manifestations are effective in coercion.”²⁹ It is not surprising that the remark most frequently attributed to male spousal murder defendants is, “If I can’t have her, no one else can.”

The personality of men who exert coercive control has been described by several psychologists, and while such typologies are not identical and have flexible definitions they have enough similarities to be sufficient to establish forfeiture under *Giles*. For example, Dr. Donald Dutton describes these batterers as having an “abusive personality” whose “abiding elements (anger, jealousy, blaming, recurring moods, and trauma symptoms) are generally present in all cyclical abusers.”³⁰ This personality evidence may be important in establishing forfeiture when the abuser’s conduct does not include physical abuse because the psychologically coercive actions alone had previously been successful in maintaining control.³¹ Similarly, it is well documented that women who separate from such men have a dramatically increased chance of being murdered. In many cases there will not be any

26. Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463 (1996) [hereinafter Raeder, *Simpson and Beyond*]; Myrna S. Raeder, *The Better Way: The Role of Batterers’ Profiles and Expert “Social Framework” Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147 (1997); Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome by and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789 (1996).

27. E.g., Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476 (2008).

28. National Center on Domestic and Sexual Violence, Power and Control Wheel, <http://www.ncdsv.org/images/PowerControlwheelNOSHADING.pdf>.

29. Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE & VICTIMS 3, 12 (1993).

30. DONALD G. DUTTON WITH SUSAN K. GOLANT, *THE BATTERER: A PSYCHOLOGICAL PROFILE* 140 (1995).

31. See Kelly, *supra* note 27, at 481.

prior law enforcement interventions or reports that were IPV related.³² For example, a detailed study in New Mexico of domestic violence homicide cases found that only nine cases (30%) had a documented history of IPV identified through either law enforcement or medical records.³³ However, the report also found that “in almost every case we discovered that some combination of friends, neighbors, family members, children, and coworkers were aware of some form of abusive dynamics between the victim and perpetrator.”³⁴ Thus, some of these cases would also appear to support the typology of an abusive personality. Because evidence of a controlling personality by itself demonstrates that the defendant intended to isolate the victim and keep her from obtaining police or judicial assistance, if proven, it should be sufficient to establish forfeiture.

Typically such character evidence would not be permitted at trial, but because forfeiture rests on a preliminary fact determination of inferred intent under Rule 104(a), there appears to be no prohibition on establishing such forfeiture by reference to the batterer’s personality. Since the evidence would not be presented to the jury, its potential prejudice in that context would not be a factor in the judge’s use of the evidence in determining forfeiture as a preliminary fact. In addition, in cases where the defendant had been ordered to attend a batterers’ program as a condition of a previous domestic violence conviction, any evidence supporting the existence of an abusive personality should be admissible in the forfeiture decision. In other words, usually privilege will not apply when the therapeutic program is required as a condition of probation or in a correctional setting.³⁵

Conversely, women who have been subjected to coercive control often suffer from depression, low self-esteem, and post traumatic stress disorder.³⁶ Thus, if there is medical or expert evidence that would support such diagnoses of the decedent they too should be relevant to the preliminary fact determination even if they would not otherwise be admissible. Indeed, I would also posit that evidence that the victim suffered from PTSD also should be sufficient to prove a rebuttable presumption of inferred intent because it indicates the nature of the control over the victim that would stop her from seeking assistance.

32. THE NEW MEXICO INTIMATE PARTNER VIOLENCE DEATH REVIEW TEAM, GETTING AWAY WITH MURDER IV: INTIMATE PARTNER VIOLENCE DEATHS 2001–2002, at 12, *available at* <http://www.cvrc.state.nm.us/pdf/GAWMIV.pdf>.

33. *Id.*

34. *Id.*

35. *See* *McKune v. Lile*, 536 U.S. 24 (2002).

36. *Kelly*, *supra* note 27, at 483–84.

III. Additional Exceptions for Nontestimonial Hearsay

The remainder of Professor Lininger's article focuses on redefining the forfeiture hearsay exception. When the rule was first adopted, many of us noted that it should be confined to witness tampering because it lacked the reliability that then was required by the *Ohio v Roberts*'³⁷ approach to confrontation. Personally, I still would prefer this approach because I believe that domestic violence hearsay can be more directly dealt with by other hearsay exceptions. In other words, when the hearsay does not fit into a traditional category, such as excited utterances or statements for medical purposes, there are other types of exceptions that would be better suited to admitting victim statements. The most obvious exception is the residual or catch-all exception that exists in federal court and at least half of the states. However, the amount of discretion inherent in this exception argues for the adoption of a response better suited to domestic violence evidence. Pre-*Crawford*, both California and Oregon adopted exceptions that were more focused on domestic violence cases.³⁸ While neither would apply to testimonial hearsay, this same problem exists for any forfeiture exception that lacks a witness tampering motivation. In my view, a trustworthiness exception, requiring a finding of unavailability that permits narration, description, or explanation of physical injuries or threats to the declarant made at or near the time of the incident would equally solve this problem. In contrast, turning a witness tampering exception into a forfeiture exception for any statement uttered by a declarant whose unavailability at trial was caused by the defendant is likely to be much broader than a domestic violence hearsay exception.

The need for a domestic violence hearsay exception is not new. Some thirteen years ago, after Simpson's acquittal, I proposed the following exception, which still appears viable today in the nontestimonial context:

Decedent's statements. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant who is now deceased concerning the declarant's relationship with the defendant, if (A) the circumstances surrounding its making indicate the trustworthiness of the statement; and (B) on at least three occasions prior to the declarant's death, the defendant was the primary aggressor in one or more of following behaviors directed at the declarant: sexual assault, physical assault, stalking, threats of physical or sexual assault or any other conduct characterized as domestic violence. Upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court

37. *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004).

38. Cal. Evid. Code § 1370 (2001); Or. Rev. Stat. § 40.460 (2002).

excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.³⁹

Even if this were broadened beyond the murder context in criminal cases, I would rather limit the exception to the domestic violence context and constrain its scope than support a virtually unlimited forfeiture exception that is uncoupled from its rationale as a witness tampering exception. While I recognize that an expanded forfeiture exception may garner advocates given Justice Scalia's backhanded support for such an approach,⁴⁰ its reach is virtually limitless, even though Professor Lininger attempts to constrain its reliance on acquiescence and would impose a reliability requirement. Paradoxically, if such forfeiture exceptions are adopted, Justice Scalia may regain his standing among victim advocates who view his Confrontation Clause analysis as pro-defense. However, as I have discussed elsewhere,⁴¹ constitutional absolutism is not necessarily a pro-defense posture, particularly when it is coupled with a narrow view of the content of the right and when inferred intent is added to the forfeiture mix.

IV. Conclusion

Professor Lininger's article makes another important contribution in the effort to obtain justice for victims of domestic violence by suggesting per se rules that I would interpret as rebuttal presumptions. While I might suggest a different hearsay approach, I agree with his view that additional hearsay exceptions should be adopted to give voices back to otherwise silenced victims.

39. Raeder, *Simpson and Beyond*, *supra* note 26, at 1516.

40. *Giles v. California*, 128 S. Ct. 2678, 2693 (2008) (explaining that states "are free to adopt the dissent's version of forfeiture by wrongdoing" for nontestimonial hearsay).

41. Raeder, *Giles and Forfeiture*, *supra* note 3.