

# Texas Law Review

## *See Also*

### Control Killings

Deborah Tuerkheimer\*

Until the day you die, you will always be Mrs. Tamiko Baker.

—Text message sent by Montez Delano Baker to his estranged wife the day before he killed her<sup>1</sup>

In heartbreaking numbers, batterers kill their victims.<sup>2</sup> A strange jurisprudential twist has made it newly important for judges to understand why.

As Professor Tom Lininger explains more fully in his important contribution to a rich scholarly discourse treating the Confrontation Clause,<sup>3</sup> a defendant on trial for murdering his intimate has forfeited his constitutional

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1. *People v. Baker*, No. 278951, 2008 WL 4762776, at \*1 (Mich. Ct. App. Oct. 30, 2008).

2. On average, three women are murdered by their husbands or boyfriends each day in this country. JOSEPH R. BIDEN, JR., SUBCOMM. ON CRIME, CORRECTION, AND VICTIMS' RIGHTS, TEN YEARS OF EXTRAORDINARY PROGRESS: THE VIOLENCE AGAINST WOMEN ACT 30 (2004). In 2006, nearly one third of female homicide victims were murdered by a spouse or boyfriend. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2006: EXPANDED HOMICIDE DATA 2 (2007), <http://www.fbi.gov/ucr/cius2006/documents/expandedhomicidemain.pdf>; *see also* VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2003 HOMICIDE DATA 3 (2005), <http://www.vpc.org/studies/wmmw2005.pdf> (“For victims who knew their offenders, 62 percent . . . of female homicide victims were wives or intimate acquaintances of their killers.”). The proportion of female murder victims killed by an intimate has generally increased since 1980. JAMES ALAN FOX & MARIANNA W. ZAWITZ, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES 55 (2007), <http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf>. These statistics were all cited in *Amicus Curiae Brief of the Battered Women’s Justice Project and Other Domestic Violence Organizations in Support of Respondent at 5–6, Giles v. California*, 128 S. Ct. 2678 (2008) (No. 07-6053), 2008 U.S. S. Ct. Briefs LEXIS 355, at \*11–\*12 [hereinafter *Battered Women’s Brief*].

3. Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEXAS L. REV. 857 (2009). For one collection of this scholarship, see 13 LEWIS & CLARK L. REV. (forthcoming 2009).

right to confront her as a witness, provided that, by taking her life, he intended to “isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution.”<sup>4</sup> This—the rule of forfeiture as announced last term by the U.S. Supreme Court in *California v. Giles*<sup>5</sup>—requires lower courts to consider the particularities of battering when inferring the defendant’s intent.<sup>6</sup> Yet, current legal conceptualizations of domestic violence homicide, while developing in important ways, are still inadequate.

This Comment is intended to advance a conversation about what I will call “control killings.” My hope is that this conversation will penetrate the law and, in particular, inform judicial inquiries into the *mens rea* of the batterer who murders his victim.

First, let us consider how the *Giles* Court views the relevance of “domestic violence context”<sup>7</sup> to the forfeiture question. Two passages are instructive. The first is from an opinion by Justice Scalia, writing for 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 an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.<sup>8</sup>

Justices Souter and Ginsburg, who joined most of Justice Scalia’s opinion (including the portion quoted above), concurred to make explicit their views on how the Court’s rule should be applied to the particularities of domestic violence. Since, without their votes, Justice Scalia’s opinion would not have commanded a majority, the concurrence has added legal significance.

The concurring Justices found:

[No] reason to doubt that the element of intention [to thwart the judicial process] would normally be satisfied by the intent inferred on

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

5. 128 S. Ct. 2678 (2008).

6. See generally Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of “Domestic Violence Context,”* 13 LEWIS & CLARK L. REV. (forthcoming 2009).

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

8. *Id.*

the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim.<sup>9</sup>

In certain important respects, these two passages evince a fairly sophisticated understanding of domestic violence as a *pattern of conduct*. Most significantly, *Giles* embodies a fundamental recognition that (i) this pattern of conduct is dependent on its non-physical components, and (ii) when the batterer kills, this pattern of conduct has escalated to murder.<sup>10</sup>

Although the Justices' portrayal of domestic violence is accurate (and surely a mark of progress), it is also incomplete. Since the homicide cannot be conceptually severed from what has come before,<sup>11</sup> the new forfeiture framework demands an answer—a more satisfying answer than what the Court was able to provide, albeit one fully consistent with its guidance—to the question of what battering entails.

Confronting the task of implementing *Giles*, lower courts are bound to struggle. Because domestic violence has not yet been *truly* criminalized—our incident-based approach overlooks the patterned nature of violence and the centrality of power and control to the batterer's design<sup>12</sup>—existing legal conceptions fail to capture the essence of battering. It comes as no surprise, then, that lower courts have generally rejected forfeiture findings where a “classic” battering relationship culminates in murder.<sup>13</sup> The tension that

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

10. Put differently, *Giles* makes explicit the connection between the defendant's “prior” abuse of the victim and his act of killing her.

11. “In nearly every case, domestic homicides are the final chapter in long histories of violence by the abusers/murderers against their victims.” Battered Women's Brief, *supra* note 2, at 7–8.

12. See Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004) (critiquing current approach to criminalizing domestic violence and proposing a “course of conduct” statute to more fully redress the harm of battering).

13. With little or no analysis, appellate courts have overturned forfeiture determinations. See, e.g., *People v. Luster*, No. B194825, 2008 WL 4571937, at \*8 (Cal. Ct. App. Oct. 15, 2008) (“[N]o evidence in the record establish[ed] any kind of linkage between [the killing] on the one hand, and any ‘testimony-related’ event of any kind on the other hand . . . .”); *People v. Suniga*, No. VCF152015, 2008 WL 3090622, at \*16 (Cal. Ct. App. Jul. 3, 2008) (“[T]here was no suggestion here that the homicide expressed [the defendant's] intent to stop [the victim] from reporting abuse or cooperating with a criminal prosecution . . . .”); *People v. Ramirez*, No. E043765, 2008 WL 4712822, at \*7 (Cal. Ct. App. Oct. 28, 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 . . . .”). These errors were deemed harmless with few exceptions. See *Crawford v. Commonwealth*, 670 S.E.2d 15 (Va. Ct. App. 2008); *People v. Giles*, No. B166937, 2009 WL 457832, at \*4 (Cal. Ct. App. Feb. 25, 2009) (reversing murder

results when *Giles*'s intent-to-silence requirement is juxtaposed against a decontextualized judicial view of domestic violence homicide is nicely captured by one court's expressed rationale for concluding that the defendant did not forfeit his confrontation right: "[T]he record indicates [the defendant] murdered [the victim] out of personal vengeance and to keep anyone else from 'having her.'"<sup>14</sup>

Appreciating this challenge facing the lower courts,<sup>15</sup> Professor Lininger has proposed a useful set of rules for inferring intent in domestic violence cases.<sup>16</sup> Assuming the defendant foreseeably caused the victim's trial absence, the following conduct would constitute the basis of a forfeiture finding: violation of a restraining order issued for the victim's protection;<sup>17</sup> the commission of a violent act against the victim during the pendency of judicial proceedings;<sup>18</sup> and a history of "abuse and isolation."<sup>19</sup> Professor Lininger's per se rules represent a sound approach to interpreting *Giles*'s dictates, providing judges a workable grounding for factual determinations in the forfeiture realm.

Lower courts should have little difficulty embracing the first<sup>20</sup> and second<sup>21</sup> of these suggestions. It is the third—inferring intent from a history

conviction because "the prosecutor presented no evidence that appellant killed [the victim] with intent to prevent her from testifying or cooperating in a criminal prosecution" and remanding case to trial court to "consider evidence of the defendant's intent"). In contrast, courts have affirmed forfeiture findings where a formal charge was pending when the victim was killed. *See, e.g.*, *State v. McLaughlin*, 272 S.W.3d 506 (Mo. Ct. App. 2008); *State v. Milan*, No. W2006-02606-CCA-MR3-CD, 2008 WL 4378172 (Tenn. Crim. App. Sept. 26, 2008); *People v. Gibbs*, No. 274003, 2008 WL 4149033 (Mich. Ct. App. Sept. 9, 2008). In these cases, the determination that the defendant intended to silence the victim was not dependent on an understanding of domestic violence as different from paradigmatic stranger violence.

14. *People v. Tovar*, No. G040052, 2008 WL 3524614, at \*5 (Cal. Ct. App. Aug. 14, 2008).

15. *See* Lininger, *supra* note 3, at 897 ("The greatest challenge in the wake of *Giles* is to devise a test for evaluating whether a defendant had the requisite intent to silence when he committed the act that the Government now cites as the basis for forfeiture.").

16. *Id.* at section III(B)(4).

17. *Id.* at 898.

18. *Id.* at 900.

19. *Id.*

20. The logic of this rule is articulated as follows: "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." *Id.* at 898–99. As Lininger notes, this fact pattern arises in a large portion of domestic violence homicide prosecutions. *Id.* If, as I suspect, courts are persuaded that a restraining order violation is an "objective indication of [the defendant's] intent to thwart [the victim's future court appearance]," this is itself a significant contribution toward framing a coherent forfeiture doctrine. *Id.* at 899.

21. Indeed, in a development that reflects the power of Professor Lininger's argument, this factor has already proven dispositive in a number of cases. *See* Tuerkheimer, *supra* note 6 (noting that lower courts post-*Giles* have concluded that "if criminal proceedings were ongoing at the time of the killing—if 'he was charged'—the defendant's intent to silence can be inferred" (citing *State v. McLaughlin*, 272 S.W.3d 506, 509 (Mo. Ct. App. 2008)); *see also supra* note 13 (citing additional cases relying on this reasoning).

of abuse and isolation—that raises the thorny issues that I have been discussing. Because “the language in *Giles* does not provide an objective bright-line rule for lower courts to use in assessing whether past domestic violence cumulatively manifests an intent to silence the victim,”<sup>22</sup> Professor Lininger suggests a test to “quantify the amount of domestic violence that necessarily entails the intent to silence”<sup>23</sup> and calls upon social scientists to help calibrate the precise contours of this measure.<sup>24</sup>

I am intrigued by this effort to translate the Court’s generalities about abuse into a practicable standard. Without more, the language in *Giles* is of limited value if courts cannot, or will not, apply it to the facts before them. I share Professor Lininger’s view of the evidentiary value of domestic violence history.<sup>25</sup> And I am certainly persuaded that social science can help to inform these judicial decisions. But I am somewhat less convinced that a *per se* rule should aim toward quantifying the “amount” of violence sufficient to trigger a forfeiture finding. Instead, I would focus on the qualitative aspects of the inquiry—that is, on demystifying the connection between the killing and the past abuse, thus enabling judges to fully grasp the relevance of domestic violence history. For this to happen, lower courts must recognize (as the Justices have now done)<sup>26</sup> both that the central feature of domestic violence is power/control and that given a history of abuse, homicide is an act of domestic violence—indeed, the paramount act of control.<sup>27</sup> Accepting these maxims as necessary to effect the Court’s decree that forfeiture determinations be informed by context.

Since *Giles* was decided, I have read every domestic violence case in which the issue of forfeiture was raised. Almost without exception, control

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22. Lininger, *supra* note 3, at 901.

23. *Id.*

24. *Id.*

25. According to Professor Lininger:

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

*Id.*

26. See *supra* notes 7–11 and accompanying text.

27. See Battered Women’s Brief, *supra* note 2, at 6 (“Batterers commit murder as final expressions of control and mastery over their intimate partners.”) (citing NEIL WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE 207 (1999); EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 276–77 (2007)).

is the unifying theme: control manifested as physical violence; as possession; as isolation; as psychological abuse.<sup>28</sup> In one case, the defendant attacked his girlfriend because she had been talking to another man; on another occasion, he told her that she “was never going to leave him and that if he could not have her, nobody could.”<sup>29</sup> In another case, the defendant would remove the victim’s underwear and inspect it every time she returned home from an errand.<sup>30</sup> When she mentioned the prospect of divorce, he threatened to give her one she would “never forget.”<sup>31</sup> One defendant hit his girlfriend in the head with a baseball bat because “she was trying to end their relationship and had refused to have sex with him.”<sup>32</sup> Another defendant, on multiple occasions, “punched [the victim], dragged her through a bedroom, smashed her face into a steering wheel, held her by the hair after kicking out the window of a car in which she was riding, and picked her up and slammed her against a car trunk.”<sup>33</sup> Yet another defendant threatened his ex-girlfriend and her friends and “showed up at her job and watched ‘everything’ that she did.”<sup>34</sup> One victim, so afraid of what her husband would do to her, “chose the location of her desk at work because it overlooked the parking lot and she wanted to be able to see” if he drove up to the building.<sup>35</sup>

The facts become grimly familiar. In all of these cases, the victim was killed by her abuser.

In what may well have influenced the Court’s treatment of the particularities of battering, two amicus curiae briefs in *Giles* were submitted by national domestic violence organizations. These briefs included the following documented empirical data:

- Femicides “typically culminate a long history of domestic abuse aimed at dominating and silencing the victim.”<sup>36</sup>

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28. An accurate description of battering is “premised on an understanding of coercive behavior and of power and control—including a continuum of sexual and verbal abuse, threats, economic coercion, stalking, and social isolation—rather than ‘number of hits.’” ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 65 (2000); see also Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2126–32 (1993); Deborah Tuerkheimer, *The Real Crime of Domestic Violence*, in 1 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS: THE CRIMINAL JUSTICE RESPONSE (Evan Stark & Eve Buzawa eds., forthcoming 2009).

29. *People v. Tovar*, No. G040052, 2008 WL 3524614, at \*1 (Cal. Ct. App. Aug. 14, 2008).

30. *People v. Ramirez*, No. E043765, 2008 WL 4712822, at \*1 (Cal. Ct. App. Oct. 28, 2008).

31. *Id.*

32. *Brooks v. Dormire*, No. 4:05-CV-1144 (CEJ), 2008 WL 3159331, at \*1 (E.D. Mo. Aug. 4, 2008).

33. *Doan v. Carter*, 548 F.3d 449, 454 (6th Cir. 2008).

34. *State v. McLaughlin*, 272 S.W.3d 506, 509 (Mo. Ct. App. 2008).

35. *Crawford v. Commonwealth*, 670 S.E.2d 15, 17 (Va. Ct. App. 2008).

36. 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 32, *Giles v. California*, 128 S. Ct. 2678 (2008) (No. 07-6053), 2008 U.S. S. Ct. Briefs LEXIS 353 at \*48–49 (citing JACQUELYN C. CAMPBELL, *ASSESSING*

- Batterers “commonly threaten their victims never to report their abuse.”<sup>37</sup>
- “The chance of murder is at its peak upon separation.”<sup>38</sup>

The “single most important risk factor for gendered homicide is the level of entrapment established when physical domination through beatings and sexual assault (rape) is supported by intimidation, isolation, and control over money, food, sex, work, and access to family and friends.”<sup>39</sup>

In *Giles*, the Court expressly acknowledged the connection between a pattern of abuse and domestic violence homicide. It also made clear that non-physical manifestations of power and control are hallmarks of battering. What the Justices did not explicitly articulate is this critical insight:<sup>40</sup> an abuser “entraps”<sup>41</sup> his victim to him *through a variety of mechanisms*,<sup>42</sup> including, but not limited to, fear, emotional abuse, and (as the majority and

DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS (2d ed. 2007); G.W. WILT ET AL., DOMESTIC VIOLENCE AND THE POLICE: STUDIES IN DETROIT AND KANSAS CITY (Police Foundation 1976)).

37. *Id.* (citing JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM 145–46 (1999)).

38. *Id.* (citing AMERICAN PSYCHOLOGICAL ASSOCIATION, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 39 (1996); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991)); see also Lininger, *supra* note 3, at 867 (“[D]ata show that the time when a victim decides to break free of a violent relationship is the most dangerous time; this is the time when the majority of domestic violence homicides take place.”).

39. Battered Women’s Brief, *supra* note 2, at 7 (quoting EVAN STARK & ANNE FLITCHCRAFT, WOMEN AT RISK: DOMESTIC VIOLENCE AND WOMEN’S HEALTH 146 (1996)).

40. Notwithstanding this deficiency, what follows is fully consistent with the opinions in *Giles* and, indeed, may provide the expressed reasoning with more substantial theoretical underpinnings.

41. See STARK, COERCIVE CONTROL, *supra* note 27 (employing construct of entrapment to explain the “durability,” or enduring quality, of abusive relationships).

42. According to sociologist Evan Stark:

At the center of coercive control is an array of tactics that directly install women’s subordination to an abusive partner. These tactics affect dominance by three means primarily: exploiting a partner’s capacities and resources for personal gain and gratification, depriving her of the means needed for autonomy or escape, and regulating her behavior to conform with stereotypic gender roles. Control is effective because it provides the material basis for differences in personal power, actualizes sexual inequality in concrete behaviors, and constrains the sphere where independent action is possible, depriving women of the objective basis for resistance or escape.”

*Id.* at 271; see also Fischer, *supra* note 28, at 2132. Control is also maintained, and fear is intensified, through the extensive use of humiliation, ridicule, criticism, and other forms of emotional abuse; financial abuse; and social isolation. It is undoubtedly easier to control someone if they think less of themselves. It is difficult for victims to leave their abusers when they do not have access to money. Similarly, limiting victims’ interactions with other people enhances the batterers’ domination over the family by both cutting off potential sources of support and by making the boundary between the family culture of battering and the outside world more defined. *Id.*

concurring opinions repeatedly noted) social isolation.<sup>43</sup> In all manner of ways, batterers deprive their victims of the means necessary for escaping the relationship,<sup>44</sup> and this component of battering is essential to its effectiveness.

Given these realities, what we should be concerned with in the forfeiture context is this: has the defendant, through his battering conduct, acted to reinforce the victim's connection to him, thereby fortifying her reluctance to ally herself with the state against him in a prosecution?<sup>45</sup> For purposes of analyzing the defendant's right of confrontation, this is the inquiry that best effectuates *Giles*.

From these fundamental propositions, a framework for proving forfeiture in cases of domestic violence homicide may be derived. Evidence of a pattern of battering conduct in the relationship establishes that the defendant's homicidal act expressed the culmination of his efforts to control his victim; this aim encompasses the requisite intent. Where there is a domestic violence history, lower courts should discern the control in the killing.

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43. See STARK, *supra* note 27, at 262 ("Controllers isolate their partners to prevent disclosure, instill dependence, express exclusive possession, monopolize their skills and resources, and keep them from getting help or support.").

44. *Id.* at 271.

45. See Deborah Tuerkheimer, Crawford's *Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 56–62 (2006) (describing and advocating a "relational" approach to confrontation). I have previously observed that the meaning of confrontation is

largely dependent on the configuration of relationships between accuser, state, and accused—a variable scarcely noticed by courts or commentators. Theories of confrontation do not remark on this triangle (accused/accuser/state), which implicitly frames the conceptual analysis. Rather, Confrontation Clause jurisprudence and scholarship tend to presume particular alliances: accuser with state, against accused.

*Id.* at 56–57 (footnote omitted). In contrast to the paradigmatic prosecution, domestic violence cases present as a default the opposite arrangement: "the accuser is metaphorically, and often physically, in the house with the accused." *Id.* at 57. This inversion of allegiances underlying the relational triad has real consequences for the functioning of the confrontation right. In particular, with respect to forfeiture, I have argued that "the default mandate of state production of the 'accuser' makes little sense where the accused's own misbehavior is responsible for perverting the paradigmatic relational structure." *Id.* at 59.