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DAVIS/HAMMON, DOMESTIC VIOLENCE, AND THE SUPREME COURT: THE CASE FOR CAUTIOUS OPTIMISM

Joan S. Meier^{*†}

The Supreme Court’s consolidated decision in *Davis v. Washington* and *Hammon v. Indiana* offers something for everyone: by “splitting the difference” between the two cases—affirming one and reversing the other—the opinion provides much grist for advocates’ mills on both sides of this issue. While advocates for defendants’ rights are celebrating the opinion’s continued revitalization of the right to confrontation, which began in *Crawford v. Washington*, advocates for victims have cause for celebration as well: the decision is notable for its reflection of the Court’s growing—albeit incomplete—awareness and understanding of the dynamics of domestic violence and their implications for justice. This acknowledgment is embodied in both the text of the opinion and in the Court’s jurisprudential compromise, which ensures that some victims at risk from testifying can still be protected by the criminal process. This Essay explains this perspective and suggests important avenues for advancing the jurisprudence to continue to better integrate the realities of domestic violence into constitutional standards.

I. CONFRONTATION AFTER CRAWFORD

In *Crawford*, the Court ushered in a sea change in confrontation jurisprudence, casting doubt on standard operating procedures in thousands of criminal courtrooms every day. No longer could prosecutors use “reliable” hearsay in prosecuting domestic violence cases where the victim was unwilling to testify: excited utterances, present sense impressions, and other traditionally accepted hearsay would now be excluded if the statements were “testimonial” and the defendant lacked the opportunity to cross-examine the speaker. The decision was greeted by many as a return to a principled approach truer to the original purpose of the Confrontation Clause. While the *Crawford* decision failed to define “testimonial” evidence, many advocates and courts saw the impassioned opinion as signaling that a defendant’s confrontation right was absolute: thus, defendants’ and their supporting *amici*’s briefs in *Hammon* and *Davis* argued that the only principled interpretation of the “new” confrontation right would require that *all accusatory statements* which are useful to the State for investigation or trial be treated as

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“testimonial” and not be admitted at trial unless the defendant had the opportunity to cross-examine the speaker.

II. DOMESTIC VIOLENCE 101—THE COURT BEGINS TO GET IT

The defense position was sympathetic when looked at in light of the paradigm of prosecutorial abuse that fueled adoption of the Confrontation Clause, best embodied by the infamous trial for treason of Sir Walter Raleigh, who was convicted largely based on statements made by his alleged co-conspirator, Lord Cobham, in out-of-court interrogations by the government. As noted by the *Crawford* Court, Sir Raleigh demanded the right to confront his accuser, but to no avail—and he was ultimately beheaded. In this context, few can doubt that some “right to confront” witnesses is an essential element of fairness and justice.

The situation in domestic violence cases, however, is quite the opposite from the Raleigh paradigm. Here, rather than the State preventing the defendant from confronting his accuser, typically the *defendant* prevents the *State* from *producing* the accuser, who is intimidated both by the history of abuse, and often by specific threats and intimidation aimed at silencing her and rendering prosecution impossible. Indeed, domestic violence cases are notoriously difficult to prosecute, precisely because the *defendant*, rather than the State, has functional control over the key witness. In many of these cases, then, the original paradigm for which the Confrontation Clause was designed is simply turned on its head. It is not the defendant’s “right” to confront that is truly at stake; it is the State’s ability to marshal the “evidence,” largely in the defendant’s control, that is in question. This is why, until *Crawford*, “evidence-based” prosecution had become the state of the art—prosecution based on evidence *other than the victim’s testimony*, such as excited utterances and 911 calls—and indeed, had established good success rates. And this is why those who care about holding batterers accountable were so troubled by the *Crawford* decision, which made no reference to the implications of the new jurisprudence for abuse cases.

Davis and *Hammon*—both themselves domestic violence prosecutions—forced the Court to, well, confront the problems domestic violence poses for an absolute version of the confrontation right. After all, the Court has never treated constitutional rights as absolute—both Sixth and Fifth Amendment decisions regarding, for example, the Compulsory Process Clause and Due Process rights, have repeatedly invoked the need to maintain the integrity of the judicial process and balance fairness for all parties, rather than treating defendants’ rights as absolute. Domestic violence is no longer an exception to “normal” cases in the criminal courts: these cases now constitute up to half of calls to police and form 20-50% of criminal dockets, and may well constitute a majority of the cases where confrontation rights are at issue. The Court’s response to domestic violence concerns demonstrates a willingness to engage, once again, in a degree of balancing where real justice so requires.

A. Forfeiture

That the Court appreciated the domestic violence context is evident in its opinion. The Court, for the first time, expressly acknowledged the realities of the coercive dynamic in domestic violence cases. In a section of the opinion devoted entirely to *dicta* discussing domestic violence, the Court said, in part:

This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. . . . But when 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. . . . ‘the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.’

By expressly acknowledging the coercion and intimidation of victims that undermine criminal prosecution of batterers, the Court has made use of its “bully pulpit” to educate and encourage lower courts to take seriously the dark realities with which domestic violence victims and their advocates contend every day. By expressly linking this awareness to the forfeiture doctrine, which was not actually at issue in the cases before it, the Court calls attention to the importance and centrality of this doctrine in domestic violence criminal prosecutions. Indeed, the Court does one better and effectively invites lower courts to utilize liberal burdens of proof and evidentiary standards in making forfeiture determinations, specifically mentioning the preponderance of the evidence standard and the admissibility of hearsay as common (though not universal) and appropriate standards.

The forfeiture doctrine is now front and center in domestic violence criminal prosecutions, and several open questions remain. Some of these include:

- Whether conduct pre-dating the arrest can be used against the defendant in a forfeiture hearing (e.g., statements to the effect of “if you ever call the police, I’ll kill you”).
- Whether conduct that causes the victim to fear testifying, but cannot be proven to be explicitly aimed at that result, is sufficient for forfeiture (e.g., a history of extremely traumatizing abuse).
- How liberally courts will construe inferences of forfeiture from circumstantial evidence without the victim’s testimony.
- Whether conduct that is not *on its face* “wrongful” (e.g., sending flowers, or a birthday card)—but which in context of the abusive relationship sends a warning message to the victim, thus deterring her from testifying—will merit forfeiture.

Insofar as all of these involve some degree of wrongful conduct by defendants, which results in the victim's unwillingness or inability to testify, a good case can be made that forfeiture should apply. The *Davis* Court's *dicta* on forfeiture and domestic violence sets the stage for lower courts to address these issues with an appreciation of the real dynamics of abuse. However, full development of the facts of each case by prosecutors and education of individual courts about the dynamics of abuse will be critical to enable courts to connect the dots.

B. *The Good and Bad News about the Primary Purpose Test*

First, the good news: The Court's holding in *Davis*, defining what statements are "testimonial" and therefore subject to the confrontation right, unanimously *rejected* the test advocated by the defendants which would have made all "accusatory" statements testimonial, and instead adopted a far more moderate "primary purpose" test: statements made in police interrogations "under circumstances objectively indicating that the primary purpose" is "to enable police assistance to meet an ongoing emergency" are not "testimonial," and statements made where the "primary purpose" is "to establish or prove past events potentially relevant to later criminal prosecution" are testimonial. Importantly, the Court expressly declined to reach statements made to *non-law* enforcement personnel, which often provide critical evidence in adult and child abuse cases, and which remain relatively unconstrained by *Crawford* and *Davis*.

The primary purpose test has a superficial logic and appeal, but it is actually a legal fiction, particularly as applied to the *Hammon* facts. Police responding to emergency calls inevitably have multiple purposes: to ensure the safety of the caller and themselves, to assess the propriety of prosecution, and to gather evidence. Indeed, an outside "objective" assessment of the purpose of the statements would have to take into account the speaker's as well as the State's purpose (the Court's statement that "it is . . . the declarant's statements, not the interrogator's questions" that are at issue will undoubtedly fuel many a prosecutor's brief on this point). There can be little doubt that the *speaker's* intent, in domestic violence cases, is almost always primarily—if not only—to obtain protection, and *not* to further prosecution. The reluctance of battered women to prosecute their batterers is notorious; our domestic violence *amicus* brief cited multiple studies finding that 80-90% of victims recant or refuse to cooperate with the prosecution. In short, if an "objective" understanding of purpose weighs both the purposes of the police and of the witness, in first responder situations their combined purposes weigh far more heavily in the direction of protection than prosecution.

Moreover, the Court's inclusion of Ms. McCottry's identification of Adrian Davis as her attacker as within the "emergency purpose" suggests a relatively broad construction of that standard—after all, the identification of the perpetrator is only minimally relevant to providing emergency assistance, notwithstanding the opinion's feeble claim that it is necessary to determine if the accused is a "violent felon." In cases such as this, it is al-

ready known—from the 911 call itself—that the perpetrator is violent. In the typical case, identity of the perpetrator is clearly far more relevant to the development of a criminal case than to rendering aid.

In short, given the lack of a coherent principled basis for the primary purpose distinction, the opinion can best be understood as a significant compromise—presumably forced on Justice Scalia, who at oral argument appeared to seek reversals in both cases, by a majority of the Court—intended to ensure that domestic violence remains subject to prosecution. It is a clear step back from the trajectory initiated in *Crawford* and the position advocated by the defense bar, which would have treated the “accusation” in *Davis* as every bit as testimonial as the statements in *Hammon*.

III. DOMESTIC VIOLENCE 201: WHAT THE HIGH COURT DIDN'T GET THE LOWER COURTS CAN

The bad news for victims, of course, is that the Court applies its new test in a highly questionable manner to hold that Ms. Hammon's statements to the police officer on the scene, unlike those of Ms. McCottry to the 911 operator, *were* testimonial because they were not needed to provide aid in an “emergency.” What is an “emergency” and when it begins and ends likely will provide litigants fodder for years to come. (Indeed, there might be a third category of “primary purpose,” e.g., “reducing identifiable danger,” which arguably fits neither of the two categories identified by the Court, but should be grouped with “emergency aid” for purposes of Confrontation Clause analysis.) The Court reasoned that the violence was a “past” event, and that Ms. Hammon told the police she was “fine.” One need not look far—indeed, no further than Justice Thomas's dissent—to find critics pointing out that Amy Hammon was not in fact “fine,” that Mr. Hammon was still trying to control and intimidate her while the officer interviewed her (they had to physically restrain him to keep him out of the room), and that, regardless of what she said, the reality of domestic violence is that even when a single incident is “over,” the danger is still ongoing. This “disconnect between battering as it is practiced and battering as it is criminalized” is eloquently articulated by Deborah Tuerkheimer's recent scholarship.

While the Court's distorted interpretation of the *Hammon* situation is frustrating, it need not unduly constrain lower courts. Their job will be to construe the particular facts before them, which will inevitably differ in many specific ways from the *Hammon* facts as portrayed by the Supreme Court. Answers to first responders' questions after a specific attack has halted are often every bit as necessary to furthering immediate safety as—and no more a form of “evidence-gathering” than was—Michelle McCottry's identification of her attacker in response to the operator's question. For instance, suppose:

a woman calls the police and reports that her husband is threatening her with a gun. When the police arrive the husband has left and the woman describes the incident, in evident fear and agitation, stating that she is

terrified that he will return and make good on his threat to kill her. The officer takes a report and gives her information about how to obtain protection orders and shelters in her area. He returns to check on her the next morning and finds her gone.

In this scenario it is clear that the dominant concern, appropriately, for both police and victim, is to keep the victim safe. In future cases, the central task for prosecutors will be to advance courts' understanding of the realities of domestic violence situations: to bring out precisely those facts that demonstrate that in *their* particular case, the danger was not over and the victim's statements should properly be understood—in a reasonable “objective” assessment—as being directed primarily at achieving immediate safety rather than “evidence-gathering.”

In short, while the Court's unstable rule and debatable application thereof may appear to be poor jurisprudence, the rule may actually provide lower courts an opportunity to develop the jurisprudence in a variety of contexts. If prosecutors do a decent job of providing evidence about the realities of the ongoing danger and if courts apply the new standard objectively and fairly, it is possible that a growing body of jurisprudence will emerge, demonstrating what many of us already know: that most first responders in these cases are indeed primarily trying to address safety and victims' need for protection—and most, if not all, speakers in these cases are motivated purely by the need to get protection. If this leads many domestic violence cases to be swept out from under the strictures of *Crawford*, that will not be a failure of the *Davis* test. It may simply reflect the realities of domestic violence—realities with which the Supreme Court has finally begun to grapple.