

# Forfeiture in the Domestic Violence Realm

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She told the treating doctor that her boyfriend had tried to rip her tongue out.<sup>1</sup>

At the time of the trial, however, the prosecutor was unable to produce [her].<sup>2</sup>

## I. Forfeiture As The “Next Frontier” in Domestic Violence Prosecution<sup>3</sup>

More often than not, a victim of domestic violence is reluctant or unwilling to assist with the prosecution of her batterer. This phenomenon cannot be understood without reference to the abusive relationship, a relationship characterized by a continuing pattern of power and control.

The dynamics of abuse put unique pressures on a battered woman to ally herself with the defendant, against the State. In domestic violence cases, cooperating with prosecutorial efforts may jeopardize a victim’s financial resources, immigration status, children, living arrangements, employment, and relations with friends, family, and the larger community. A victim may also resist testifying against her batterer because of a “continued emotional connection” that “entrap[s]” her in the abusive relationship.<sup>4</sup> Most likely, however, she is uncooperative because she fears—often rightly—that by assisting prosecutors she will cause herself more severe abuse.<sup>5</sup>

Adjusting to these realities, prosecutors have shifted their response to battering in recent decades in order to successfully try cases in which the complaining witness becomes unwilling to testify against her abuser. Before

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1. *People v. Lugo*, E033252, 2004 Cal. App. Unpub. LEXIS 8498, at \*2 (Ct. App. Sept. 20, 2004).

2. *Id.* at \*3.

3. I first used this phrase in an article describing a fundamental disconnect between the dynamics of battering and traditional forfeiture paradigms and it articulates the theoretical underpinnings of a reconceived doctrinal framework. Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 37–49 (2006) [hereinafter *Crawford’s Triangle*]. This Essay represents an effort to further develop this framework.

4. Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL’Y & L. 465, 479 (2003) (“[A] victim may come to tolerate or rationalize the abuse out of a sense that she is too invested in the relationship to consider leaving it. The batterer’s own denial about the seriousness of the abuse and his promises that it will never happen again also may exert considerable influence, particularly if he has isolated her from others who might challenge this perspective.”).

5. *See id.* at 489 n.8 (citing research showing that the most common reason that victims refuse to cooperate in domestic violence cases is fear of retaliation).

the Supreme Court's reinterpretation of the Confrontation Clause, prosecuting domestic violence without the testimony of a victim (known as "victimless" prosecution) by using various hearsay exceptions to admit her out-of-court statements had become commonplace. The Court's decisions in *Crawford v. Washington*<sup>6</sup> and *Davis v. Washington*<sup>7</sup> have transformed this landscape. Because the designation of a statement as "testimonial" now subjects it to exclusion, the viability of a significant number of formerly prosecutable domestic violence cases has been undermined.

The rule of exclusion is not absolute, however. The equitable doctrine of forfeiture, which the Court affirmed most recently in *Davis*,<sup>8</sup> precludes a defendant from using his right to confrontation to bar the admission of a victim's statements when his wrongdoing caused her unavailability at trial. If the prosecution can prove that a declarant is absent because of misconduct on the part of the defendant, then he will be deemed to have forfeited his constitutional right to confront her in court.

The doctrine of forfeiture is only beginning to be applied in the domestic violence realm in the wake of the new Confrontation Clause jurisprudence. Because both the uncooperative abuse victim and the exclusion of her testimonial statements at trial are intractable realities, faithful adherence to the principles underlying the traditional doctrine of forfeiture is essential to the effective prosecution of batterers. Recognizing this, Professor Tom Lininger has proposed an innovative forfeiture statute that would define a new hearsay exception. The rule would clarify that the defendant need not specifically intend to procure the absence of a declarant if her unavailability was a foreseeable consequence of his conduct.<sup>9</sup> Noting the particular importance of "align[ing] the hearsay exceptions with the contours of the constitutional forfeiture doctrine," Lininger persuasively argues for the codifying of the common law doctrine of forfeiture into the evidence rules.<sup>10</sup> Because courts have tended to conflate evidentiary and constitutional forfeiture analyses and will likely continue to do so, Lininger's enlightened statutory approach—which recognizes that forfeiture in domestic violence cases is unique—has great potential to guide the development of similarly enlightened case law. Since courts are not bound by the evidence rules when interpreting the scope of the defendant's Confrontation Clause right,

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6. 541 U.S. 36, 69 (2004) (classifying battered spouse's statement as testimonial and noting that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation").

7. 126 S. Ct. 2266, 2273 (2006) (explaining that the Confrontation Clause requires testimonial statements of a witness to be admissible only if the witness is unavailable to testify, which bars testimonial statements where a battered spouse refuses to be present in the courtroom).

8. *See id.* at 2280 (reiterating the Court's previously established notion that "'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds'" (quoting *Crawford*, 541 U.S. at 62)).

9. Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEXAS L. REV. 271, 301–02 (2006).

10. *Id.* at 301.

however, a statute cannot dictate such guidance. The appropriate definition of the boundaries imposed by the Constitution on forfeiture therefore remains critical.

More specifically, forfeiture doctrine must take account of the ways in which battering is different from paradigmatic crime. This does not require a “special rule” for judicial forfeiture determinations in domestic violence cases, but rather the evolution of case law that comports with the realities of battering. Unless courts understand the dynamics of abuse, forfeiture principles cannot be fairly implemented in domestic violence cases.

Put simply, in order to make decisions consistent with the equitable underpinnings of the rule, judges must have accurate conceptions of battering. To see how this proposition could be implemented, it is helpful to examine each element a prosecutor must prove at a forfeiture hearing: (1) that the defendant engaged in wrongdoing; and (2) that the wrongdoing caused the declarant’s unavailability as a witness.<sup>11</sup> It is my contention that, with respect to each inquiry, the dynamics of battering warrant an expanded conception of both wrongdoing and causation of a witness’s unavailability.<sup>12</sup>

## II. The Meaning of Wrongdoing

In a conventional witness tampering case, the “tampering behavior” is generally quite easy to identify. A defendant who threatens to harm a witness for testifying in a pending case, coerces false testimony, or pays a witness to disappear clearly engages in conduct wrongful for purposes of a forfeiture finding. In contrast, batterers often “tamper” with their witnesses in ways that fall outside of this paradigm, which raises the question of what qualifies as “wrongdoing” in the nonparadigmatic fact pattern.

In domestic violence cases, departures from the conventional tampering archetype may be characterized as temporal in nature. These departures subvert overly restrictive analysis of the relevant time frame. The following scenario illustrates this proposition: Prior to his arrest on current charges, the defendant frequently and explicitly threatened to harm the victim if she ever helped to put him in jail. Although the defendant lacked the specific intent to procure the victim’s unavailability as a witness at the particular trial at issue, it would be bizarre to contend that his conduct is any less wrongful simply because it did not occur in anticipation of his arrest in the instant case.

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11. Discussion of the victim “unavailability” requirement for proving forfeiture is beyond the scope of this Essay. I have previously suggested that in domestic violence cases, the reasonableness of prosecutorial efforts to procure a declarant’s trial testimony should be analyzed contextually. See Crawford’s *Triangle*, *supra* note 3, at 42 (explaining that “[i]n the classic forfeiture scenario, a person charged with a crime wrongfully procures the unavailability of a witness who would have testified to the accused’s involvement in the underlying (charged) crime”).

12. The inquiries discussed below would presumably also arise under Tom Lininger’s proposed forfeiture statute, under which prosecutors would be required to prove that the defendant’s conduct constitutes “wrongdoing” and that this wrongdoing “did in fact proximately cause” the declarant’s absence from trial.

The greater conceptual challenge is posed by a majority of victimless domestic violence prosecutions in which the batterer is able to effectively control the victim's decisionmaking without using explicit threats. In these cases, the relationship has been abusive for some period of time leading up to the defendant's arrest. Perhaps law enforcement has already intervened and perhaps not. Regardless, the victim has endured a pattern of violent behavior characterized by the defendant's exertion of power and control over her. The physical violence—most salient from a law enforcement perspective—does not fully encompass the “continuum of sexual and verbal abuse, threats, economic coercion, stalking, and social isolation”<sup>13</sup> that the battered woman has experienced. Because she is intimately familiar with the defendant's modus operandi, she concludes that it is in her best interest not to cooperate with prosecutors. Although an amalgam of concerns may animate her reluctance to testify against her abuser, her primary motivation is most often fear of further, escalating abuse.<sup>14</sup>

The important point is that the victim's fears regarding the collateral consequences of testifying are based on the totality of the abuse that she has suffered. There is no one “moment in time” that captures the tampering incident. Put differently, a transactional model of wrongdoing—an implicit judicial requirement that wrongdoing manifest as a discrete incident—necessarily overlooks much of the defendant's wrongdoing.

Inquiry into whether “wrongdoing” has occurred must, then, be temporally encompassing if the equitable function of forfeiture doctrine is to be served. By “temporally encompassing,” I mean taking into account both the multifaceted dimensions of domestic violence and its patterned nature—the very dynamics that distinguish battering from other types of violent crime. These dynamics exacerbate the moral wrong of domestic violence and surely do not diminish it. Judicial determinations of whether the defendant has engaged in misconduct that qualifies as grounds for forfeiture must take into account this reality.

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13. ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 65 (2000). For a more complete account of the dynamics of battering, see Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 962–69 (2004).

14. As the West Virginia Supreme Court has explained:

Battered women are at an extremely heightened risk of violence—and even death—at the moment they seek to separate from their abusers. Cooperation in a criminal prosecution is often meant and understood, by both the abuser and victim, as a means of formally separating from an abuser—and thus, presents increased danger to the victim. As a result, many individuals who have experienced domestic violence quite reasonably conclude that criminal prosecution of their abusers will leave them less, rather than more, safe.

State v. Mechling, 633 S.E.2d 311, 324–25 (W. Va. 2006) (internal citations omitted).

### III. Perceiving Causation

For a defendant to forfeit his right to confrontation, his wrongful conduct must cause the unavailability of the declarant at trial. In domestic violence cases a victim may be absent for reasons clearly related to the defendant's actions, but her reasons may also be related to the prior abuse in ways more difficult to perceive (or even unrelated to it altogether).<sup>15</sup>

Causation is most readily identifiable in cases where, based on past abuse, the victim fears escalating violence should she cooperate with prosecutors. In these cases, it is quite apparent that the defendant's misconduct has resulted in the victim's unwillingness to testify for fear of further jeopardizing her safety. In this relatively large category of cases in which the primary motivating force is fear of future injury, proximate cause may be neatly analogized to the paradigmatic domain of witness tampering, and can be utilized to satisfy the causation requirement.

The scenarios that challenge conventional understanding are those in which victims are unwilling to testify for reasons less obviously related to the defendant's criminal conduct. A battered woman may distance herself from prosecutors' efforts because she feels that she deserves to be victimized,<sup>16</sup> because she still loves the defendant,<sup>17</sup> because she fears losing custody of her children to her batterer,<sup>18</sup> and so forth. Under these circumstances, how should a court assess whether the defendant's pattern of behavior has caused the victim's unavailability?

If the victim's decision not to testify may fairly be viewed as one that has not been substantially influenced by the defendant's pattern of abuse, his misconduct cannot be said to have caused her unavailability.<sup>19</sup> That said, the fact that a victim expresses motivations other than fear of further violence

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15. For purposes of this discussion, I am setting aside questions of proof in order to examine the conceptual framework underlying the issue of causation. For an analysis of how forfeiture may be proven, see Deborah Tuerkheimer, *A Relational Approach to Confrontation*, 15 J.L. & POL'Y (forthcoming 2007).

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

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

18. "In estranged relationships, threats against the children often become 'tools of terrorism' with which the abuser continues the intimidation, manipulation, and control of his former partner." See Epstein et al., *supra* note 4, at 480.

19. For example, a victim's noncooperation may be entirely motivated by a desire to ensure that her abuser remains at liberty so that he may continue to provide her with financial support. Unless the prosecution can prove that the defendant's criminal course of conduct resulted in the victim's financial dependence on him, a forfeiture finding under these circumstances would be unwarranted.

should not end the judicial inquiry.<sup>20</sup> If the defendant's misconduct created the abusive environment that led to the victim's unavailability, his actions may reasonably be viewed as "causal."<sup>21</sup> Indeed, a more restrictive interpretation of causation would effectively subvert the normative rationale for the rule of forfeiture.

In short, judicial forfeiture determinations predicated on the notion that fear is the sole *sequila* of abuse are inconsistent with by the realities of battering. A more expansive understanding of how domestic violence victims are affected by abuse allows courts to properly evaluate the relationship between a defendant's misconduct and a witness's unavailability.

#### IV. Conclusion

The approach to forfeiture that I have outlined requires courts to make highly contextualized determinations that take into account the dynamics of battering. The type of inquiry that I envision is fact-bound, which means—to be abundantly clear—that I am not advocating a categorical finding of forfeiture in domestic violence cases. The analysis in which courts must engage is concededly difficult, but it is necessary to evolve the doctrinal framework in accordance with documented realities.

Because domestic violence is fundamentally different from other types of crime, judicial reasoning that defaults to precedent and analogy fosters injustice in cases involving battering.<sup>22</sup> No separate rule of "domestic violence forfeiture" is needed; an adequate doctrinal framework would simply reject the notion that a template applied to violence between strangers

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20. For instance, a victim may be reluctant to cooperate with the prosecution because of concerns that her immigration status will be jeopardized, that her children will be removed from her custody, or a sense that she deserved to be victimized; each of these reasons for noncooperation may have resulted from the defendant's past battering conduct.

21. The forfeiture determination in *Santiago* exemplifies this mode of reasoning. The court was persuaded that "[t]he complainant's decision not to cooperate with [the] prosecution [was] . . . strongly, if not totally influenced" by a pattern of abuse. *Santiago*, 2003 WL 21507176, at \*16. After correctly observing that "the evidentiary consequences would be different in this case if the complainant's choice not to go forward [was] premised exclusively on feelings of love and loyalty to the defendant," the court, however, concluded that "the violent domestic history of these two people, and defendant's recent persistent importuning of the complainant to withdraw from this prosecution, have made clear that [the victim's] choice with respect to continuing this prosecution was not made without fear of the defendant and the complex mix of emotions one might expect to find in a person suffering from Battered Women's Syndrome. Indeed, abuse of the complainant by the defendant is the recurrent theme in the relationship between these two parties." *Id.*

It should be noted that this enlightened judicial analysis is extraordinary. In domestic violence cases similarly diverging from the classic tampering paradigm, courts unaware of the impact of abuse may not connect a victim's absence to the abuse she has suffered without expert testimony on battering and its effects.

22. See Crawford's *Triangle*, *supra* note 3, at 37 (observing that "[w]ithout an appreciation of how domestic violence is different from other types of crime, judicial decisionmaking—which tends to default to reason by way of precedent and analogy—will invariably fall short").

can effectively respond to the particularities of violence between intimates. This reconceived framework represents a commitment to an informed jurisprudence of forfeiture and an insistence that our law remediate all types of crime.