

Reconcilable Differences

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I congratulate the editors of the Texas Law Review for recruiting four great authors to write commentaries about issues relating to the confrontation of accusers in domestic violence cases. Sarah Buel, Casey Gwinn, Kristian Miccio, and Deborah Tuerkheimer all have done tremendously important work as prosecutors of domestic violence and as advocates for battered women. In their submissions for this colloquium, all of these authors have offered valuable insights about the challenges posed by the Supreme Court's rulings in *Davis* and *Hammon*. My occasional disagreement certainly does not undermine my general admiration for these four authors.

I will address here three subjects on which the colloquium seems to focus: (1) the wisdom of the *Davis* dichotomy between testimonial and nontestimonial statements; (2) the proper scope of forfeiture doctrine; and (3) the desirability of confrontation as a policy matter.

I agree with Professors Buel and Miccio that the bright line drawn in *Davis* is inappropriate for many cases, including cases of domestic violence. With a facile definition of "emergency," the *Davis* test ignores the fluidity of domestic abuse, and the complex ongoing nature of an abusive relationship. Rather than contrive an artificial temporal boundary, the Supreme Court perhaps should explore an alternative test that would classify statements to responding officers as nontestimonial unless one of two circumstances is present: (1) the evidence makes plain that the government's primary purpose was to elicit a statement for later use in a criminal prosecution; or (2) the evidence makes plain that the declarant's primary purpose was to give a statement for later use in a criminal prosecution. It is possible neither circumstance would exist after police have secured the scene, so the *Davis* test may be overinclusive. In addition, it is possible that one such circumstance could exist *before* officers have secured the scene, so the *Davis* test may be underinclusive.

On the subject of forfeiture, I applaud Professor Tuerkheimer's nuanced approach that accords broader meaning to the terms "wrongdoing" and "causation." I commend to all readers Professor Turkheimer's fantastic article, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*.¹ In codifying the doctrine of forfeiture, legislatures and

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1. 85 N.C. L. REV. 1 (2006).

rulemaking bodies need to strike a balance so that the rule permits a contextualized analysis in domestic violence cases, but also applies fairly and predictably in other categories of cases. I am not content with the present version of Federal Rule of Evidence Rule 804(b)(6), which seems limited to cases of obvious witness tampering. On the other hand, I would not favor a regime in which the mere charging of domestic violence could extinguish a defendant's confrontation rights. I think the best middle ground would be a rule that finds forfeiture where the defendant has specifically intended to procure the declarant's absence at trial, or where the defendant has purposefully engaged in wrongdoing that foreseeably and proximately caused the declarant's absence (construing these terms as Professor Tuerkheimer suggests).

Casey Gwinn's commentary makes a number of cogent points with which I strongly agree, but he and I disagree about my proposal to create a rule of preference for live testimony by accusers. Mr. Gwinn, who has much more expertise than I in the prosecution of domestic violence, seems concerned about the impediment that this rule could create for prosecutors. I feel that the proposed rule would not be too burdensome. The prosecution would be able to offer a wide range of reasons for the unavailability of the declarant; the list of acceptable reasons would not be coextensive with Federal Rule of Evidence Rule 804(a). Pretrial cross-examination would be sufficient to satisfy the new rule. A number of states—including Hawaii, New Mexico, and Oregon—have lived with such a rule for decades, and have found that it does not unduly hinder prosecutions of domestic violence. I am hopeful that innovations such as the San Diego Family Justice Center will help to reduce accusers' reluctance to testify, and I salute Mr. Gwinn for his leadership in this area.

In sum, I appreciate the insights of the commentators. They have pointed out some issues that I did not think through as carefully as I should have in my article. The advocacy community benefits from a spirited discussion about the best means of prosecuting domestic violence while respecting constitutional requirements. Once again, I am grateful to the Texas Law Review for providing us an online forum for this discussion.