A View from the Trenches: A Comment on Tom Lininger’s *Reconceptualizing Confrontation After Davis*

By Casey Gwinn*

Professor Lininger’s article on *Davis v. Washington* and *Hammon v. Indiana*¹ is an excellent overview of the journey traveled in recent years by the U.S. Supreme Court as it has redirected constitutional analysis and legal strategy related to the handling of cases where statements by hearsay declarants have been critical to the prosecution of crimes involving absent, recanting, or reluctant witnesses. Lininger’s historical review is thorough and in-depth regarding the journey from *Ohio v. Roberts*,² through *White v. Illinois*,³ to *Crawford v. Washington*,⁴ and now on to *Davis v. Washington* and *Hammon v. Indiana*. It provides a full historical understanding of the backdrop for analysis of issues related to the prosecution of domestic violence cases in America today.

Professor Lininger analyzes deontological, teleological, and Rawlsian approaches to the challenges now facing courts and legislatures in the new world created by the U.S. Supreme Court’s evolving view of Confrontation Clause issues. He calls for legislative action on five fronts related to domestic violence cases and related Confrontation Clause issues: Creation of comprehensive forfeiture statutes and related procedures; minimum levels of Confrontation Clause rights for defendants against whom prosecutors seek to introduce nontestimonial hearsay; revision and clarification of hearsay rules in revocation hearings; revamping of Federal Rule of Evidence 804; and protocols for law enforcement officers who interact with domestic violence victims.

His proposals are excellent and each can and should play a role in the shaping of the next phase in the evolution of Confrontation Clause analysis and policy. But we must not forget where we have come from in the prosecution of domestic violence cases. Many of the problems we now confront were created by prosecutors who pushed the envelope too far in their quest to convict offenders. The solutions should include Professor Lininger’s powerful analysis and approach, but we should also identify some key points that must be remembered as legislatures and policymakers pursue

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* Special Assistant to the District Attorney of San Diego County and Volunteer Chief Executive Officer, San Diego Family Justice Center Foundation.

Professor Lininger’s cogent and appropriate course of action. This Essay is written, not from the perspective of the classroom or the law professor, but from the perspective of a prosecutor and trainer in the trenches of the domestic violence intervention movement for the last twenty-two years.

Four points are crucial to supplement Professor Lininger’s analysis and recommendations. First, the origin of evidence-based prosecution of domestic violence and its original definition and approach need to once again be the focus for police and prosecutors instead of the simple, “lazy man’s approach” of using whatever hearsay we can find to convict someone in a criminal case. Second, we need to take a deep breath and understand that evidence-based prosecution is alive and well and will survive the judicial pendulum swing we are now experiencing. Third, we need to understand that a new service delivery model known as the Family Justice Center is reorienting our entire perspective about victim cooperation, recantation, and minimization that has driven prosecutors to the very strategies that are now imperiled. The Family Justice Center experience should inform everything we do in addressing the challenges faced by prosecutors. Finally, we should cheer loudly for the legislative action now advocated by Professor Lininger albeit with an acknowledgement that legislation alone should not substitute for the lessons and experience we have gained from the last twenty years of prosecuting domestic violence cases. The most important legislative action needed as soon as possible is his comprehensive forfeiture statute to guide prosecutors in addressing the classic intimidation and manipulation of victims by abusers.

I. The Origins of Evidence-Based Prosecution

In 1985, I first started prosecuting domestic violence cases as the prosecutor in charge of the San Diego City Attorney’s Domestic Violence Unit. At the time, few cases were being prosecuted. Most victims declined to “press charges” and, if asked, virtually no victims wanted to “prosecute” their abuser. The result was most cases, even if filed, were dismissed. Investigations were brief and very little evidence was ever gathered. Investigations and prosecutions relied completely on the statement of the victim at the scene of the crime and her ongoing cooperation from the

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5. See Tom Lininger, Reconceptualizing Confrontation After Davis, 85 TEXAS L. REV. 271, 281 n.72 (2006). The citations in Professor Lininger’s article to “victimless” prosecution must be called out and discouraged. I urge all prosecutors, researchers, and writers to denounce and desist from using the phrase “victimless” prosecution. If ever there was a misnomer in criminal justice jurisprudence it is the use of “victimless” in the same sentence with the phrase “domestic violence prosecution.” Since 1989, the National College of District Attorneys Domestic Violence Conference faculty members have called for using only the phrase “evidence-based prosecution of domestic violence cases.” There is a victim in every domestic violence case and in over twenty years of leading the movement toward evidence-based prosecution in America, I have never used this phrase to describe our efforts to hold offenders accountable even if the victim is unable to participate in the prosecution’s case in chief.
beginning to the end. This was true in San Diego and across America in 1985. Judges would not even conceive of letting prosecutors go forward with cases without the domestic violence victim’s enthusiastic and cooperative testimony. And even with her testimony, domestic violence was not considered a serious crime and victims were often blamed for their own victimization. Without question, offenders had control of their victims and the criminal justice system and, as a result, faced little accountability for chronic and severe violence. But slowly, aggressive prosecutors in Massachusetts, California, Texas, Maryland, and elsewhere began successfully advocating for change.

By 1989, in San Diego and a handful of other jurisdictions, we had built protocols and procedures around the foundation of Ohio v. Roberts (and later White v. Illinois) to prosecute domestic violence cases with or without victim participation. Indeed, using common sense and existing law enforcement investigative techniques, we found convincing evidence of the defendant’s guilt even without the victim’s testimony at trial. To be sure, hearsay statements of the victim at the scene of the crime were important but not the singular most important evidence. Other powerful evidence included: apology notes from defendant’s to their victims, child witness statements, neighbor witness statements, crime scene evidence, blood evidence, injury pattern evidence, booking records, paramedic run sheets, witnesses to prior incidents, defendants’ statements to friends and relatives, injury photographs, responding officers’ eyewitness statements, videotaping of the crime scenes, 911 calls from abusers, body diagramming by the officer of observable injuries and complaints of pain by the victim, and expert testimony regarding battered women’s syndrome. Notably, most of this evidence did not depend

6. Sometimes forgotten in the debate over the evolutionary process we are experiencing is where we have come from—a day when trial courts dismissed most cases when the victim did not want to “press charges” or “prosecute” her offender. This classic pattern existed from the late 1970s until well into the 1990s in most jurisdictions in America. Even today, this pattern still exists in many rural communities across the United States.

7. One of the seminal rulings in California came in People v. Hughey, 240 Cal. Rptr. 269 (Ct. App. 1987), where a California appellate court endorsed an evidence-based prosecution approach by allowing the victim’s entire statement to police admitted into evidence while the victim sat in the courtroom during the trial but never took the witness stand. Soon, other courts followed and nationally recognized domestic violence prosecutors such as Sarah Buel (Quincy, MA), Stephen Bailey (Baltimore, MD), and Cindy Dyer (Dallas, TX) followed San Diego’s lead and began prosecuting without requiring victim participation or cooperation.

8. The first local protocol on evidence-based investigation and prosecution was published by the San Diego County Task Force on Domestic Violence in 1989. This protocol was disseminated by the National College of District Attorney’s later the same year to prosecutors across America as a model. Today, virtually every state in the nation has some version of this protocol that lays out all the available evidence that exists in domestic violence cases.

on Confrontation Clause analysis for its admissibility. While we did focus on identifying “excited utterances” from the victim at the scene of the crime, such hearsay statements were only one of many facets of the evidence to be gathered.10

We also found that letting the victim testify for the defense often kept her safer rather than attempting to compel her to testify against her abuser in the prosecutor’s case in chief.11 This approach also increased conviction rates at trial. Indeed, in San Diego the highest conviction rate in domestic violence jury trials during the 1990s was when the victim testified for the defense.12 The second highest conviction rate was when the victim was not present for any portion of the trial. We applied circumstantial evidence homicide prosecution strategies to misdemeanor domestic violence cases in order to succeed.13

Thus, evidence-based prosecution of domestic violence cases was a thoughtful, well-reasoned, comprehensive approach to offender accountability and victim safety. It was not a cunning strategy or a manipulation of the evidence to circumvent the Confrontation Clause rights of criminal defendants. It was an effort to acknowledge the complex emotional issues being faced by battered women in a confusing and unsafe criminal justice system, by identifying all the evidence that exists in many domestic violence cases if law enforcement officers and prosecutors will simply take the time to do their job well in each case. As noted below, only in the later years, as legislatures and courts began allowing more and more “statements” of victims without their testimony at trial, did the Confrontation Clause concerns begin to increase.

II. Evidence-Based Prosecution Will Survive Davis v. Washington

Professor Lininger establishes the detrimental impact of Davis v. Washington by reviewing a number of the rulings in its aftermath. He cites a series of law review articles and journal articles for the proposition that virtually all victims recant and few cases can be prosecuted without the use of testimonial hearsay statements in the prosecutor’s case in chief in the

10. In 1989, the National College of District Attorneys began training on “evidence-based” prosecution of domestic violence cases. By 1991, we were hosting the National Domestic Violence Conference and training prosecutors and investigators how to change protocols, policies, and procedures to hold offenders accountable even if the victim was not able or willing to participate. We stopped asking victims if they wanted to “press charges” or “prosecute,” because the criminal justice system is responsible for stopping criminal conduct, and is not responsible to individual witnesses to or victims of violent crime.

11. See CASEY GWINN & GAELE STRACK, HOPE FOR HURTING FAMILIES: CREATING FAMILY JUSTICE CENTERS ACROSS AMERICA ch. 7 (2006) for an overview of the early results from evidence-based prosecution techniques.

12. Id.

13. Most homicide cases do not rely on victim testimony or even hearsay statements of the deceased. They result in convictions because of thorough and meticulous crime scene investigation, the identification of other witnesses, and expert testimony.
wake of *Davis* and its progeny. But many of us in the trenches are not quite so skeptical. While it is true that the analysis has shifted from “reliability” of the statement (*Roberts*) to the “testimonial” nature of the statements (*Crawford*) to the “ongoing emergency” of the situation (*Davis*), the reality remains that statements of domestic violence victims in the immediacy of violence, fear, and trauma should be admissible if trial judges apply *Davis* properly. Though some judges may choose to ignore the changing analytical approach either by favoring admissibility or favoring exclusion of key statements from the victim, nontestimonial hearsay statements, uttered in the rush of an emergency situation, coupled with a wealth of other evidence that exists in cases even without live victim testimony should allow the successful prosecution of well-investigated domestic violence cases.

I am not one of those prosecutors crying that the sky is falling. In fact, I would argue that the cases that were overturned in the aftermath of *Davis v. Washington* deserved to be overturned. They were the result of lazy investigators and prosecutors who had begun building their entire cases on hearsay statements instead of the wealth of evidence that exists in most domestic violence cases. Even though empowered by some legislative schemes or court precedents, too many prosecutors and law enforcement investigators continue to depend entirely on hearsay statements of victims instead of doing the hard work of thorough investigations. More importantly, the traditional excited utterance that we depended on in San Diego in the mid-1980s had given way by the late 1990s to using any statement of the victim at the scene, using written statements of victims at the scene, and even using statements of the victim taken long after the crime was reported and the emotional events of the incident had subsided. Indeed, the very facts in *Hammon v. Indiana* involved a written affidavit of the victim that the prosecution offered into evidence for the truth of the matter asserted with no excited utterance foundation, no indicia of reliability, and no corroborating evidence. Such an approach should be considered an affront to the Confrontation Clause and deserved the rebuke it received by the Court. The pendulum had swung too far toward ignoring the Confrontation Clause rights of the accused, and Supreme Court intervention was understandable.

The future, however, is not darkness and foreboding for domestic violence prosecutors in the wake of *Davis*. The challenge is to go back to the hard work of evidence-based investigation and prosecution along with advocating for the legislative forfeiture analysis that Professor Lininger proposes in his article.

14. For example, *Hammon v. Indiana* was a prosecutor’s attempt to use a written affidavit of a victim, not a blurted-out excited utterance in the midst of pain, fear, and immediate danger. A written affidavit was a long way from the early use of excited utterances that originally shaped our evidence-based prosecution strategies. Many other cases facing reversal after *Davis* suffered from the same malady: proffered hearsay statements of calm victims responding to questions from police officers after the scene was secure.
Evidence-based prosecution of domestic violence cases should not be dramatically impacted by *Davis* assuming that trial judges properly understand the ruling. The Court made very clear that 911 calls, particularly those where a domestic violence victim is in fear and in immediate danger should provide powerful evidence for the trier of fact to consider when evaluating an abuser’s culpability at trial. Using the *Davis* reasoning, a crying, hysterical victim at the scene of a domestic violence incident who blurts out that her husband has abused her when police first arrive is still producing a nontestimonial statement that is admissible in court even when she is later not willing to testify. The challenge is for officers to listen and more carefully assess the situation before asking questions or commencing a formal investigation at the scene. This is not manipulation nor will it endanger battered women. But it will acknowledge the reality that the Supreme Court does not seem to understand: Most domestic violence victims are in the middle of an emergency situation when they call the police and their safety is at immediate risk when the police officers arrive in most situations. We simply need to train officers accordingly given the Supreme Court’s clearly expressed preferences under the Confrontation Clause.

Though Professor Lininger critiques the appropriateness of strategic training approaches as motivated by *Davis v. Washington*’s “perverse incentive[s],”15 I would argue that investigators and prosecutors should focus on identifying and documenting emergency situations where victims are in immediate danger, listening more carefully at the scene of an incident when arriving (instead of simply commencing investigative questioning), and shortening their response times on domestic violence calls. This Essay cites no evidence, nor have I witnessed any that would cause me to conclude that victims or officers are in greater danger if officers listen more and talk less when first arriving at a domestic violence scene. What is critical is shortening response times. The sooner law enforcement arrives at the scene of an incident the more likely they are to arrive while there is still an emergency situation, while the offender is still present, and while the violence is still continuing. When arriving while the violence is still continuing, law enforcement officers become eyewitnesses to the crime, and hearsay statements of any kind become irrelevant.

III. The Family Justice Center Model Points the Way Forward

By announcing the apparent predicament of prosecutors in the wake of *Davis*, Professor Lininger makes the same assumptions and cites the same studies that have been used repeatedly for years to justify the use of evidence-based prosecution approaches. He cites the conclusion of many that “between 80% and 90%” of domestic violence victims “refuse to

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15. Lininger, supra note 5, at 285.
cooperate” with the prosecution in domestic violence cases. 16  Indeed, this apparent reality has driven the entire use of hearsay statements, excited utterances, and every other form of nontestamentary evidence used in the effort to prove the prosecutor’s case in chief without victim testimony.

In the last five years, however, a new service delivery model pioneered in San Diego has begun to debunk this notion that a lack of victim “cooperation” is perpetually endemic to domestic violence cases. In 2002, we opened the San Diego Family Justice Center, a “one-stop shop” for victims of domestic violence and their children. 17  Many of the services for victims—including police officers, prosecutors, community-based advocates, doctors, nurses, chaplains, counselors, child trauma therapists, civil attorneys, child support professionals, transportation advocates, and shelter intake workers—are housed in one location. Now, a victim can come to one place to get most of her services when she needs help. Already the Family Justice Center model is being hailed as a national and international model. President Bush created the President’s Family Justice Center Initiative in 2003, creating an additional fifteen centers modeled after San Diego. Congress has now created a Family Justice Center purpose area in Title I of the Violence Against Women Act of 2006. Today, there are more than twenty-five such centers in operation in the United States, Canada, Mexico, Australia, New Zealand, and Great Britain. The initial evaluations, focus groups, and client feedback are establishing a revolutionary truth relevant to the entire debate over Confrontation Clause issues in domestic violence cases: When the victim is safe and wrapped in services and support, she does not recant her original statement to the police nor does she view the criminal justice system as a terrifying, dangerous place to seek assistance and safety. 18  Imagine! Twenty years into the tortuous journey through the use of evidence-based prosecution strategies to “get around” the need for live-victim testimony, we have realized that if we simply provide the advocacy, safety, support, and services that victims need, they are much less likely to recant or refuse to cooperate in the effort to hold their abusers accountable. Once supported and protected, she can and will testify truthfully and accurately at trial.

16. Id. at 281 & n.70.
17. For more historical information, visit www.familyjusticecenter.org.
18. See GWINN & GAEL, supra note 11. In our book, Professor Gael Strack and I document the overwhelming evidence from working with over 20,000 clients since the Center has opened that recantation has dropped from 70% to 30% in less than four years. Id. Clients at the Center no longer see the police and prosecutors as enemies. Police and prosecutors are able to refer their victims to the Center for lethality assessment, clinical assessments, safety planning, and comprehensive services. Once receiving such services, clients see the criminal justice system intervention as only one small part of their lives instead of viewing it as a dangerous and callous effort to assert the power of government to control and manage the lives of victims and their abusive partners.
Notably, San Diego has not felt the same impacts of *Davis v. Washington* in cases handled by police and prosecutors working out of the Family Justice Center.\(^{19}\) This is unquestionably because of the support that clients of the Center receive in the process of criminal justice system intervention. And it should not surprise us. Victims of domestic violence do not recant their story when in crisis and under the stress of the actual violent event; they do not recant their story when safe in the confines of battered women’s shelters; and they do not recant their story when all their physical, emotional, spiritual, and safety needs are met by a supportive community system that offers protection and compassionate accountability for offenders.

Any state legislature looking at creating a new statutory scheme to address the problems created by recanting domestic violence victims would be well advised to study the efficacy and effectiveness of the Family Justice Center service delivery model. It is going to revolutionize the way communities and criminal justice systems provide services to victims of domestic violence and their children in the next twenty years. And in the process, it will resolve many of the chronic problems created by a failed criminal justice approach to victim safety and support.

IV. Legislative Action Can Assist in Setting Standards

The proposed statutory scheme in Professor Lininger’s article is an excellent road map for legislatures in the coming months and years. The proposed Rule 804 language on hearsay exceptions and unavailability will restore a balance to the effort to use hearsay statements by requiring a good faith effort to procure the declarant’s presence at trial. This will allow prosecutors to make a good faith effort to find and subpoena the declarants without requiring the failure to serve declarants or get them to court to act as a bar to the use of hearsay statements.

I would recommend that a provision be included that allows the prosecution to make the declarant available to the defense before trial for service, interview, or both. If the victim is available pretrial or at trial to the defense, even if the prosecution chooses not to put her on the witness stand, I fail to see how Confrontation Clause issues are implicated. If a procedure is created that allows the defense to request her testimony and take her testimony on voir dire during the prosecution’s case, the defendant’s Confrontation Clause rights are vindicated. The jury, however, would be instructed that the defense requested her testimony in order to cross-examine her hearsay declarations at the scene of the crime.

The reason for this proposed approach is straightforward: No prosecutor should be required to suborn perjury in an effort to comply with vague notions of the Confrontation Clause. The recanting, lying victim who changes her story for her own safety or the safety of her children, once put on

\(^{19}\) *Id.* at 161.
the witness stand becomes a hostile witness and, more importantly, now appears to be placed on the stand by the prosecution even though she is often testifying falsely as to the original incident. In reality, most defendants have access to their victims, particularly if the victim is still in the relationship at the time of trial. This procedure would vindicate constitutional protections while honoring the prosecutor’s right to put on the State’s case in the way they believe will produce the just result at trial.

I would recommend that the proposed Rule 804(b)(4) Statement of Personal or Family History include the ability of the declarant to identify her husband or partner through statements to the officer at the scene of the crime. One of the silliest results of Crawford and Davis has been courts disallowing the use of a hearsay statement to prove that Mr. Smith is Mrs. Smith’s husband after she said “My husband hit me.”20 The declarant’s family history exception should include the ability of a declarant to identify his or her spouse.

Professor Lininger’s recommendation for Rule 808 regarding forfeiture is excellent in including applying the standard of “equivalent circumstantial guarantees of trustworthiness” to potentially admissible evidence. My only recommendation would be that legislatures consider broadening the procedure to include a “totality of the circumstances” test regarding intimidation and coercion of a witness’ absence and specifically allowing expert testimony regarding the reasonably foreseeable impact of the defendant’s conduct on the victim of domestic violence in a particular set of provable circumstances. Most abusers do in fact intimidate their victims and leave victims fearful of coming forward and telling the truth about their victimization. The Davis Court endorsed such an approach and recognized that a domestic violence case is “notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.”21 When this occurs, the Court said that the Confrontation Clause gives the criminal a windfall.22 Any statutory scheme should create a broad approach that allows prosecutors to show the reality that even the Supreme Court acknowledged explicitly in Davis.

As to Professor Lininger’s recommendation for Rule 809, I do not support, nor would most prosecutors support a statutory preference for live testimony. Forensic evidence and other circumstantial evidence is often more reliable than live testimony and should be evaluated based on its merits without a statutory preference for live testimony. Homicide cases have been prosecuted for decades without the benefit of the live testimony of the victim,

20. Identity is rarely at issue in domestic violence cases and only arises because of the application of strict Confrontation Clause analysis post-Davis with no application of common sense when the intimate partners are the only actors involved in the case and the traditional criminal defense that “Some other dude did it” is not even proffered by the abuser.
22. Id.
and I see no basis for creating a statutory preference to benefit domestic violence offenders already interested in intimidating their victims into lying under oath in order to help them evade accountability for their criminal conduct.

The proposed protocols for 911 operators and investigators are excellent and should include more guidance on investigating cases using an evidence-based approach. Often, an evidence-based approach will identify evidence that makes a singular hearsay statement far less important in establishing an abuser’s guilt beyond a reasonable doubt.

V. Conclusion

Professor Tom Lininger is one of the leading Confrontation Clause scholars in the country. His analysis of the issues inherent in domestic violence cases in the post-*Davis* era deserves great respect. Balanced with this analysis should be the realization of life in the trenches for dedicated prosecutors seeking justice for battered women and their children. Most victims of domestic violence fear the criminal justice system and even after initially calling 911 for help, do not find the safety and support they need in a system more focused on the rights of criminals than the rights of domestic violence victims. The system’s historic effort to put the onus on domestic violence victims to “press charges,” “prosecute,” or serve as “the accuser” are all reminders that evidence-based prosecution has been one small mitigating factor against the bias of the system against recanting or “uncooperative” victims.

Evidence-based prosecution can and will survive the recent pendulum swing of the U.S. Supreme Court regarding Confrontation Clause issues, and we should follow the Court’s lead in creating procedures that recognize the sophistication of most abusers in intimidating and coercing their victims away from finding justice in the courts. In the words of former Nashville Metro Police Department detective Mark Wynn, the court system is where the “law keeps its promise” to battered women and their children. So, we must continue to advocate for balance in protecting the Confrontation Clause rights of offenders while ensuring that all possible resources, including Family Justice Centers, are made available to victims of domestic violence and their children in the process of seeking safety, support, and ultimately, freedom from violence and abuse.