Law and the Public's Health

CRAWFORD V. WASHINGTON: IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE IN A DOMESTIC VIOLENCE CONTEXT

Deborah Weissman, JD

In this issue, Law and the Public's Health examines the United States Supreme Court's decision in Crawford v. Washington.1 This decision altered the law of evidence in criminal trials, as well as the meaning of the Sixth Amendment Confrontation Clause, which guarantees defendants the right to confront and cross-examine witnesses. (For an overview of the historical developments of the Sixth Amendment right to confront and cross-examine witnesses, see White PJ. Rescuing the Confrontation Clause. 54 S.C.L. Rev. 537; 2003.) At first blush, Crawford might seem unrelated to public health; in fact, however, the decision has extremely important public health ramifications in the context of domestic violence. This column begins with an overview of the decision and describes significant and subsequent legal developments. It then examines Crawford's implications for domestic violence prosecutions generally, addresses the major unanswered questions left in *Crawford*'s wake, and concludes with a discussion of the decision's implications for public health policy and practice.

BACKGROUND: THE SIXTH AMENDMENT CONFRONTATION CLAUSE AND THE CRAWFORD DECISION

The Sixth Amendment to the United States Constitution guarantees defendants the right to confront and cross-examine witnesses who testify against them. This right is referred to as the "Confrontation Clause," and courts have grappled with its meaning for more than 100 years. While acknowledging that the Sixth Amendment provides defendants the right to hear and confront witnesses' accusations in a face-to-face meeting before judges and juries, the courts have also developed a set of rules that have allowed into evidence certain types of out-of-court statements by witnesses who are unavailable at trial, but whose statements nonetheless appear reliable.² The need to balance the rights of defendants against the broader community interest of ensuring that juries are able to hear all reliable evidence in a case should be familiar to individuals

interested in public health policy, given the constant balancing of individual rights against the community interest that is the hallmark of public health policy making. But balancing efforts can be imperfect. In the context of the Confrontation Clause, the result has been a series of decisions that numerous experts consider "confusing and inconsistent."²

The development of standards governing when to permit out-of-court statements in a criminal prosecution is a complex issue. The problem is particularly complicated in a domestic violence context because of the unique nature of the crime in relation to in-court testimony: victims of domestic violence often fail to appear at trial, and if they do appear, it is often for the purpose of recanting earlier statements.

In 2004, the United States Supreme Court addressed Sixth Amendment confrontation issues in a case with major implications for domestic violence.³ The case involved an appeal by Michael Crawford, a Washington State resident, who was convicted of assault for having stabbed a man who allegedly had attempted to rape his wife, Sylvia. In an effort to undermine Crawford's claim of self-defense, prosecutors introduced into evidence an out-of-court statement from Sylvia that had been obtained by police investigators shortly after the attack. Sylvia did not testify at the trial because Crawford invoked the marital privilege against spousal testimony. (Crawford exercised his marital privilege under Washington State law. More than half the states recognize this privilege that allows a spouse to prevent the witness spouse from testifying against him or her.)

Relying on twenty-five years of U.S. Supreme Court precedent, especially its 1980 decision in Ohio v. Roberts,⁴ the Washington State Supreme Court upheld the use of Sylvia's statement and Crawford's conviction. The Roberts decision permitted the use, as evidence in court, of certain out-of-court statements if the evidence was deemed to possess "adequate 'indicia of reliability." 4 Crawford appealed his conviction to the United States Supreme Court, which departed from the Roberts precedent and reversed the conviction, holding that admission of Sylvia's out-of-court statement violated Crawford's Sixth Amendment right.⁵ In so ruling, the Court held that the Confrontation Clause applies to out-of-court statements that are testimonial in nature, that is, statements that are the type of evidence that normally would be offered in court as testimony. As such, these statements cannot be admitted by the prosecution unless: (1) the declarant is not available at trial,

and (2) the defendant has had a prior opportunity to cross-examine the declarant.

Although the Court left the full meaning of "testimonial statements" ambiguous, it also made clear that statements obtained by the government with an eye toward prosecution were testimonial, and thus inadmissible. The Court noted four exceptions where testimonial statements might be admissible: (1) where the declarant appears at trial and is available for cross-examination about prior statements, (2) where there was a prior opportunity for cross-examination, (3) where a defendant forfeits confrontation rights (e.g., killing or otherwise absenting a witness), and (4) where statements are used for a purpose other than the truth of the matter asserted. The Court also suggested that dying declarations may be admissible despite their testimonial nature. But the Court's failure to fully define the meaning of "testimonial" has once again resulted in uncertainty as to the meaning to the Confrontation Clause.

CRAWFORD'S IMPLICATIONS FOR DOMESTIC VIOLENCE CASES

Domestic violence is a major public health threat. Statistics about domestic violence vary because of the lack of uniformity in collecting data, but the National Center for Injury Prevention and Control estimates that nearly 5.3 million incidents of intimate partner violence occur annually.⁶ Domestic violence is associated with significant public health consequences, including two million injuries and 1,300 deaths nationwide every year.⁶ Women suffer physical, psychological, social, and economic harms that prevent them from engaging productively in most realms of daily life.

In addition to efforts to reduce the risk of violence through a range of preventive programs, there has also been a focus on criminal prosecution of perpetrators as a means to deter future violence. There are a number of obstacles to prosecution, however, including victims' fear of providing testimony. For this reason, over the past twenty-five years advocates for battered women have sought to develop innovative prosecutorial protocols to allow criminal cases to go forward without the necessity of the victim's in-court testimony. In developing these protocols, referred variously as "mandatory," "no-drop," and "evidence-based prosecutions," domestic violence advocates have sought to rectify the criminal justice system's historic failure to prosecute batterers for violence against women. In order to avoid the necessity of calling victims to testify, prosecutors typically introduce evidence obtained at the scene of the domestic violence crime, including photographs,

crime scene descriptions, as well as transcripts of 911 calls and victim statements to police arriving to the scene. If collected properly and successfully introduced at trial, the prosecution may go forward on the basis of such evidence alone.

Crawford carries major implications for these prosecutorial techniques, which some commentators view as unable to survive the decision.7 For example, the Brooklyn, NY, Office of the District Attorney reports that 911 emergency calls are no longer being routinely admitted under the "excited utterance exception" to the hearsay rule, which allows the use of an out-of-court statement made while the declarant is under the stress or excitement caused by the event.8 (See Federal Rules of Evidence 803(2) Defining Excited Utterance. The rationale behind the exception is that a statement made as a result of the excitement caused by an external startling event will be spontaneous and trustworthy because the declarant lacks the time or capacity required for fabrication.) In a survey of more than 60 prosecutors' offices in three states, 63% of respondents observed that Crawford had created significant obstacles to the prosecution of domestic violence cases.7 Sixty-seven percent of the respondents indicated that their offices were more likely to dismiss domestic violence charges if victims were unavailable or unwilling to testify at trial.⁷ Indeed, Crawford has been used to overturn convictions in several gruesome domestic violence crimes, thereby heightening concerns that prosecutors will abandon evidence-based prosecutions or even initiate contempt of court procedures against victims who refuse to testify.

Other commentators, however, have suggested that concerns regarding Crawford's impact are overblown, and that Crawford should have little effect on domestic violence prosecutions. (See Krischer AM. Though Justice May Be Blind, It Is Not Stupid. 38-DEC Prosecutor 14 November/December, 2004.) Some judges report little difficulty characterizing statements as non-testimonial (and thus admissible) when such statements, rather than being the result of developed testimony, are made spontaneously and in the context of seeking protection from danger.9 In addition, courts appear to consider other types of out-of-court statements regularly used in domestic violence prosecutions as falling outside of Crawford's scope. Key examples are reports made to medical providers and certain statements that fall within well-established hearsay exception categories, such victims' declarations regarding their state of mind at the time of an attack. Some commentators have suggested that domestic violence victims' statements related to prosecution should routinely be treated as falling within Crawford's third category of "forfeiture," given the defendant's alleged role in causing the witness to be unavailable for testimony. Still others anticipate that states will amend their evidentiary laws to explicitly recognize domestic violence victim statements as non-testimonial and thus falling within the hearsay exception for such statements.¹⁰

CLARIFYING CRAWFORD: DAVIS V. WASHINGTON AND HAMMON V. INDIANA

The United States Supreme Court will return to the task of defining testimonial statements in two domestic violence cases that involve confrontation clause issues. Davis v. Washington was argued on March 20, 2006, and is expected to be decided sometime in June. In this case, the Court will consider whether statements made by a victim of domestic violence during a 911 call are admissible as non-testimonial excited utterances or whether they are precluded as testimonial statements that are inadmissible unless the defendant has an opportunity to cross-examine the declarant.¹¹ Similarly, in *Hammon v. Indiana*, the Court will decide whether a domestic violence victim's oral statements to a police officer's initial inquiries upon arriving at the scene are admissible as excited utterances or precluded as testimonial statements.12 These cases will refine further the character of domestic violence prosecutions and promise to have significant impact bearing on the public response to domestic violence crimes.

CRAWFORD, DAVIS, AND HAMMON: IMPLICATIONS BEYOND DEFINING TESTIMONIAL STATEMENTS

The dilemma posed by the circumstances of domestic violence cases provides an opportunity to consider concerns outside the precise scope of defining testimonial evidence. The first such issue is the larger question as to why a majority of domestic violence cases proceed without victims willing or available to testify. The second concern relates to the need to reconcile public health policy and practice that recognizes the obligation to provide defendants with fair legal process with the necessity for vigorous criminal justice strategies to address the problem of domestic violence.

Reducing the victim impact of domestic violence prosecution

As many as 80% of domestic violence victims do not appear at trial. This phenomenon is related to several issues. Some studies have noted that mandatory prosecutions may not reflect the wishes of victims, many of whom call the police as a (reasonable) strategy for

ending the violence at hand without necessarily wishing to enter the criminal justice system. Women may seek to avoid the system for many reasons, including fear of retribution and a desire to remain in the relationship (particularly where financial dependence is a consideration). Battered lesbians, gay men, and transgendered people often fear discriminatory treatment by the legal system and are unwilling to endure the sensationalism frequently attending same-sex couples in public trials. African American women, Latinas, and poor women from communities that have experienced racism and disparate treatment by the criminal justice system are frequently reluctant to turn to prosecutors for safety concerns. Undocumented battered immigrants are similarly disinclined to cooperate with prosecution at the risk of exposing their immigration status to government officials.

Fear of entering the system may be further reinforced by evidence of adverse consequences experienced by women who have pursued criminal remedies, such as intervention by state child protective services. (See Magen RH. In the Best Interests of Battered Women: Reconceptualizing Allegations of Failure to Protect. 4 Child Maltreatment 127, 128; 1999.) Women wish to avoid the anguish of disclosing personal details about their relationship at trial and the diminution of their reputation by prosecutors who may interpret victims' unwillingness to testify as weakness in character and deficiency of judgment, and who may even threaten arrest and prosecution for contempt and perjury, an ordeal on a par with the abuse itself.14,15 Indeed, in low-income and minority communities that have experienced the criminal justice system's adverse impact on families and individuals disproportionately, any sort of criminal justice intervention perceived as contributing to an already disturbing rate of incarceration and that further impairs their ability to develop internal means of social control is likely to be viewed as undesirable.

Reconciling domestic violence protection with procedural justice for defendants

Prosecutorial protocols that rely on out-of-court statements can be thought of as a societal response to the demands of domestic violence advocates who have long challenged the culture of marginalization of crimes against women. However, such demands conflict with other social justice concerns related to the increasingly harsh consequences of the criminal justice system and fears over the erosion of constitutional protections afforded under the Bill of Rights. The right to confront an accuser and cross-examine witnesses is not only integral to the Sixth Amendment's Confrontation Clause and essential for a fair trial, but it is also a concept

central to our notions of a fair and just society. 16,17 The challenge, thus, is to ensure that the needs of victims are met without undermining defendants' constitutional rights.

The importance of ensuring both fair prosecution and fair process to defendants does not rest on respect for constitutional matters alone. Social science evidence also suggests that fair and respectful treatment by the courts is likely to result in greater compliance with the law. A growing body of research supports the view that fair process is associated with greater levels of compliance by domestic violence offenders with domestic violence protection orders. Per In other words, the reasons for respecting the rights of the accused go beyond the critical issue balancing constitutional rights against victims rights. Finding the right balance may be a public health imperative if greater safety flows from criminal justice systems that accord fair process to accused individuals.

Public health professionals may play a critical role in reconciling the dilemma illuminated by *Crawford*. Regardless of the outcome in *Davis* and *Hammon*, the public health community can help victims to document the abuse they suffer properly, so that such statements may be useful whether they are considered testimonial or non-testimonial. Furthermore, public health advocates can engage in efforts to challenge and eradicate those law enforcement practices that have an adverse impact on domestic violence victims. Finally, the public health community can support victims of domestic violence in the choices they make to achieve safety and stability, recognizing that it is most often the victims themselves who are in the best position to determine how to achieve their goals.

Deborah M. Weissman is Professor of Law and Director of Clinical Programs at the University of North Carolina School of Law in Chapel Hill, NC.

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