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Laurence Busching

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# Rethinking Strategies for Prosecution of Domestic Violence in the Wake of *Crawford*

Laurence Busching<sup>†</sup>

The police receive a 911 call for assistance. The caller tells the operator that her neighbors are having a terrible fight. To the caller, it sounds like someone is breaking things and a very angry man is beating a woman. The caller refuses to identify himself, saying this happens all the time and he does not want to get involved.

The police respond to the apartment within minutes. They find an irate man and a distraught woman. The woman is injured and exclaims, “He hit me in the eye. Now I can barely see out of it.” The man is arrested and the woman is taken to the hospital.

This scenario, or one close to it, occurs thousands of times a day across the country. Domestic violence is an epidemic that costs hundreds of lives, injures millions, and leaves many more traumatized each year.<sup>1</sup> This essay will discuss the strategies used to prosecute batterers, and the impact that *Crawford v. Washington*<sup>2</sup> may have on those strategies.

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<sup>†</sup> Laurence Busching is Chief of the Family Court Division of the New York City Law Department and Adjunct Professor of Law, Cardozo Law School. He is former Chief of the Family Violence and Child Abuse Bureau of the New York County District Attorney’s Office. Mr. Busching wishes to thank New York County Assistant District Attorney Andrew Seewald and New York City Law Department Summer Honors Intern Jason Friedman for their assistance.

<sup>1</sup> Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 3 (1999). See also U.S. Department of Justice, Family Violence Statistics (2005), <http://www.ojp.usdoj.gov/bjs/pub/ascii/fvs.txt> (3.5 million violent crimes committed against family members from 1998-2002; 49% against spouses, 11% against sons and daughters, 41% against other family members).

<sup>2</sup> 541 U.S. 36 (2004).

## BEFORE CRAWFORD

For many years, prosecutors and the courts sat on the sidelines of the battles occurring within our nation's homes. Driven by opinions that domestic violence was a private matter and that victims would "drop the charges," prosecutors and courts routinely dismissed the vast majority of cases, allowing domestic violence to continue unchecked.<sup>3</sup>

At the urging of many victims' advocates, women's rights organizations, and others, Congress passed the Violence Against Women Act in 1994.<sup>4</sup> The Act invested vast resources, on a local level, to promote "pro-arrest" policies and effective court interventions. Police were encouraged to make arrests whenever probable cause existed, regardless of victims' wishes. Prosecutors were thus confronted with large numbers of cases with uncooperative victims and were nevertheless expected to obtain convictions.<sup>5</sup>

Relying primarily on victim testimony proved extremely problematic. A large percentage of victims either did not call the police or did so simply to stop the violence. Most did not want to have the perpetrator arrested and did not want to participate in the criminal justice system. They feared the negative consequences that might result from a conviction of the perpetrator, including loss of income, homelessness, and change of immigration status.<sup>6</sup> Many felt guilty about their own behavior and feared depriving their children of a father.

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<sup>3</sup> See Mary P. Koss, *Blame, Shame, and Community: Justice Response to Violence Against Women*, 55 AM. PSYCHOLOGIST 1332, 1334 (2000) (citing D.J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in LEGAL INTERVENTIONS IN FAMILY VIOLENCE 59-61 (American Bar Association & U.S. Department of Justice eds., 1998) (finding that a third of American jurisdictions report that more than half of victims of domestic violence refuse to participate in the prosecution of their abusers)).

<sup>4</sup> Violence Against Women Act, 42 U.S.C. § 13981 (1994).

<sup>5</sup> Donna D. Bloom, "Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive *Crawford v. Washington*, 36 ST. MARY'S L.J. 717, 727-28 (2005).

<sup>6</sup> *People v. Moscat*, 777 N.Y.S.2d 875, 878 (Crim. Ct. 2004) ("Prosecutors like to point out that some complainants in domestic *assault* cases are unwilling to testify at trial because they fear the defendant, because they are economically or emotionally dependent upon the defendant, or because they are reluctant to break up their own families."). For more information on domestic violence within an immigrant community, see Nimish R. Ganatra, *The Cultural Dynamic in Domestic Violence: Understanding the Additional Burdens Battered Immigrant Women of Color Face in the United States*, 2 J.L. SOC'Y 109, 110 (2001) (detailing the many barriers that immigrant women of color face in pursuing prosecution of their abusers, including "such factors as language and cultural differences, racial discrimination, and immigration laws").

And, of course, the offender was someone they once, and possibly still, loved. As a result, many, if not most, victims refused to testify, sign affidavits, or otherwise cooperate with the prosecution of their abusers.<sup>7</sup>

In addition, even if the victim were initially cooperative, strong incentives existed for batterers and their families to convince her not to testify. Through charm, threats, appeals to sympathy or a combination of all of these, batterers were highly successful in preventing the goals of the criminal justice system from being achieved. Worse still, the most brutal and manipulative batterers were the least likely to be convicted in a system based on victim cooperation.

Police and prosecutors saw the system fail time and again. Based on what police had seen and heard when first responding to the scene of a domestic violence incident, police and prosecutors felt certain that a high percentage of those arrested were, in fact, guilty of committing an act of domestic violence. Yet many were allowed to escape justice and potentially, given the cyclical nature of domestic violence,<sup>8</sup> cause yet more harm, sometimes even killing their victims.

Ironically, in those instances where batterers did kill their victims, cases were actually easier to prove. Such cases were no longer thought to be private matters, victim cooperation was neither expected nor required, and police and prosecutors aggressively sought alternative sources of evidence.

This made little sense. Why should police and prosecutors wait until victims were dead before taking steps to hold batterers accountable for their actions? Would not resources and efforts be better spent trying to protect victims while they were still alive?

With these questions in mind, police and prosecutors began focusing on building cases that would hold up even if victims were not cooperative. Using many of the methods and techniques employed in prosecuting domestic violence homicides, prosecutors focused on building evidence-based prosecutions.<sup>9</sup>

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<sup>7</sup> Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367-69 (1996).

<sup>8</sup> Mark Hansen, *New Strategy in Battering Cases*, 81 A.B.A. J., Aug. 1995, at 14 (“[D]omestic violence usually follows a cyclical pattern that progressively gets worse.”).

<sup>9</sup> *Id.*

This strategy involved relying on out-of-court statements of victims and witnesses. Since many of these cases appeared to be clear-cut to the police officers responding to the scenes and to the prosecutors handling the cases, the strategy focused on allowing judges and juries to review the same evidence relied upon by law enforcement officials in deciding to prosecute.

In the hypothetical case described at the beginning of this essay, the prosecutor would seek to introduce both the statements of the neighbor (“It sounds like someone is breaking things and a very angry man is beating a woman.”) and the victim (“He hit me in the eye. Now I can barely see out of it.”). Admission of this evidence would be sought regardless of whether the witness or victim was actually going to testify and be subject to cross-examination.

The prosecution would argue that the statement of the neighbor to the 911 operator should be admissible under the present sense impression exception to the hearsay rule, since it was a statement describing or explaining an event made while the declarant was perceiving it, or immediately thereafter.<sup>10</sup> Evidence of this nature has become widely available due to the widespread practice of recording 911 calls.<sup>11</sup> The callers are usually victims or witnesses reporting events as they unfold and urgently requesting police assistance. These out-of-court statements have proved to be compelling evidence in many instances. For example, what fact-finder would not be moved to hear the tape of a terrified young woman calling 911 to ask the police to protect her and her younger sister from her violent, gun-wielding boyfriend?<sup>12</sup>

Similarly, the prosecution would argue that the statement of the victim to the police should be admissible under the excited utterance exception to the hearsay rule, since it was a statement made contemporaneously or immediately after a startling event and asserting the circumstances of that event as observed by the declarant.<sup>13</sup> Many courts have allowed the admission of statements made to first responders

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<sup>10</sup> RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 8-603 (11th ed. 1995); *see also* FED. R. EVID. 803(1).

<sup>11</sup> *People v. Brown*, 80 N.Y.2d 729, 731 (1993) (adopting the present sense impression exception).

<sup>12</sup> *State v. Wright*, 686 N.W.2d 295 (Minn. 2004) (defendant convicted; tape of 911 call from victim admitted to evidence as non-testimonial under *Crawford*).

<sup>13</sup> FARRELL, *supra* note 10, § 8-604; *see also* FED. R. EVID. 803(2).

such as police officers. Police officers hear these types of statements every day and they use them to evaluate a variety of situations. They arrive at the scene within minutes of the event. They see someone who is extremely upset and often injured. They have the opportunity to evaluate the demeanor of the declarant and determine whether he or she would have had sufficient time and opportunity to fabricate a story.

After the O.J. Simpson case, states passed legislation permitting the admission of statements by alleged victims to law enforcement personnel or medical providers as to the identity and actions of the perpetrator of an act of domestic violence regardless of whether they were present sense impressions or excited utterances.<sup>14</sup> This further allowed prosecutors to try cases without relying on victims to testify at trial.

This strategy proved highly successful in obtaining convictions. Many more guilty verdicts were delivered after trials. In fact, in some jurisdictions, the conviction rate for trials where the victim did not testify was higher than those where the victim did. These convictions also helped to convince many other batterers to plead guilty.<sup>15</sup>

In the view of many prosecutors and victim advocates, these strategies helped keep victims safe.<sup>16</sup> Replacing a system dependent on victim cooperation with one based on evidence from a broader range of sources reduced incentives for batterers to try to influence victim cooperation and testimony.

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<sup>14</sup> See, e.g., CAL. EVID. CODE § 1370 (West Supp. 2005). For information on the motivation of the legislature, see *Evidence Law – Hearsay Rule – California Adopts Hearsay Exception Making Written Statements by Unavailable Witnesses That Describe Past Physical Abuse Admissible in Civil and Criminal Cases*, 110 HARV. L. REV. 805, 805 (1997).

<sup>15</sup> See Luisa Bigornia, *Alternatives to Traditional Criminal Prosecution of Spousal Abuse*, 11 J. CONTEMP. LEGAL ISSUES 57, 58 (2001).

The success of aggressive prosecution generally in San Diego is indicated by a decrease of nearly 70 percent in domestic homicides since 1985, and in an increase in the spousal-abuse docket load from 20 cases in 1986 to 1,500 cases in 1996. In 1995, 33 percent of misdemeanor cases against batterers went to trial without a witness. The victim testified for the defense in 19 percent of the cases, and recanted favorable information initially given to the prosecution in 15 percent of the cases.

*Id.*

<sup>16</sup> Celeste E. Byrom, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After Crawford v. Washington*, 24 REV. LITIG. 409, 412 (2005) (“The criminal justice system can assist in stopping the violence, making victims safer, and holding abusers accountable by pursuing domestic violence cases with or without victim participation.” (quoting San Diego District City Attorney Casey Gwinn)).

It also helped shift batterers' focus from victim-blaming to system-blaming. This was especially noted when victims would come to court specifically to testify on behalf of their batterers in order to rebut the proof presented in an evidence-based prosecution. In fact, some jurisdictions found the highest conviction rate of all pertained to those cases where the victim testified on her batterer's behalf.<sup>17</sup> Increasing the number of batterers held accountable was widely viewed as important in removing dangerous batterers from society, promoting deterrence, and showing victims that the system would help to protect them even if powerful forces were working against them.

#### THE IMPACT OF *CRAWFORD*

With the Supreme Court's announcement of *Crawford*, commentators and defense attorneys foresaw the demise of this strategy.<sup>18</sup> Because *Crawford* characterized cross-examination as a "bedrock procedural guarantee,"<sup>19</sup> lawyers expected that out-of-court statements previously admitted would now be excluded. A practice viewed by many defense attorneys as prosecutorial over-reach would be stopped in its tracks.

This has not happened to the extent many had predicted.<sup>20</sup> *Crawford*'s prohibition is against "testimonial" statements, such as depositions or responses to formal interrogations. Present sense impressions and excited utterances admitted in typical domestic violence cases lack the formality and self-awareness on the part of the declarants that

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<sup>17</sup> Bigornia, *supra* note 15, at 59.

[P]rosecution may be more successful without the victim. Because the jury tends to have a mental stereotype of a domestic violence victim, the victim may be considered less credible if she does not fit the stereotype. Furthermore, if the victim who has recanted is called as a defense witness, the prosecutor can impeach using the victim's spontaneous statements to police officers and detectives, 911 statements, and the victim's answers to standard questionnaires.

*Id.*

<sup>18</sup> Tom Lininger, *Prosecuting Batterers after Crawford*, 91 VA. L. REV. 747, 752 n.27 (2005) (referring to Phil Studenberg, *Midlife America's Midlife Crisis*, OR. DEF. ATT'Y, Apr.-May 2004, at 2; David Feige, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution*, SLATE, Mar. 12, 2004, <http://www.slate.com/id/2097041>).

<sup>19</sup> *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

<sup>20</sup> See Lininger, *supra* note 18, at 768-82 (discussing the avenues of prosecution post-*Crawford*); see also Bloom, *supra* note 5, at 748-52; Byrom, *supra* note 16, at 423-28 (discussing whether *Crawford* effectively ends the excited utterance exception).

the *Crawford* court was concerned about.<sup>21</sup> In fact, rules of evidence allow for the admissibility of such statements specifically because they are made prior to any opportunity to fabricate. Logic dictates that declarants would not have given thought to potential in-court uses of the statements. In post-*Crawford* decisions, courts have often referred to statements made to 911 operators and responding police officers as cries for help rather than as formal accusatorial statements.<sup>22</sup>

Of course, not all of the evidence-based strategy survived *Crawford*. Many broad-based hearsay exceptions created by state legislatures to admit a wider range of statements to law enforcement personnel and medical providers fell on *Crawford* grounds.<sup>23</sup> In jurisdictions where such provisions have been struck down, prosecutors have experienced a significant drop in their conviction rates.<sup>24</sup>

The self-examination that has taken place in the aftermath of *Crawford* may, in fact, prompt the implementation of even more aggressive prosecutorial strategies with regard to domestic violence cases. Many police agencies and prosecutors' offices have given increased attention to recovery of physical evidence and memorialization of injuries. Police may begin reading arrestees their *Miranda* warnings and taking statements, as is often done with homicide and other felonies. In the experience of many prosecutors, a thorough interview of a suspected batterer can often lead to as much useful evidence as a 911 call, excited utterance, or even a victim's testimony.

Additionally, *Crawford* explicitly maintained the status quo regarding forfeiture of the right of confrontation.<sup>25</sup> This is

<sup>21</sup> See *People v. Moscat*, 777 N.Y.S.2d 875, 879-80 (Crim. Ct. 2004) (addressing the issue of the admissibility of a 911 call made by a domestic violence victim).

<sup>22</sup> *Id.* at 880. Some courts distinguish between different circumstances occurring during the 911 call. See, e.g., *People v. Cortes*, 781 N.Y.S.2d 401, 406-07 (Sup. Ct. 2004) (determining the questioning during an anonymous 911 call to be akin to police interrogation proscribed under *Crawford*).

<sup>23</sup> *People v. Adams*, 16 Cal. Rptr. 3d 237, 238 (Ct. App. 2004) (reversing defendant's conviction and finding that the trial court violated his constitutional rights by admitting the out-of-court statements of the victim under CAL. EVID. CODE § 1370 in lieu of her trial testimony); see also *People v. Kilday*, 20 Cal. Rptr. 3d 161, 163 (Ct. App. 2004).

<sup>24</sup> Lininger, *supra* note 18, at 820 (providing a detailed survey in Appendix 1 of the effects of *Crawford* on prosecutions in California and Oregon).

<sup>25</sup> *Crawford v. Washington*, 541 U.S. 36, 68 n.10 (2004) (stating that "[O]ur refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo.>").

especially important in domestic violence cases. As police and prosecutors continue pursuing prosecution in the face of victim non-cooperation, they find that they often have very effective evidence in prior statements, depositions and grand jury testimony. For example, prosecutors are reluctant when seeking an indictment to allow compelling grand jury testimony to go to waste at trial because the victim has ceased to participate in the proceedings. In response, domestic violence prosecutors have begun drawing some lessons from their colleagues who prosecute organized crime. Just as “crime families” have mechanisms in place to punish disloyalty and enforce a code of silence, so have many families in which domestic violence takes place. It was decided to draw on these parallels to have prior testimony and other statements of coerced and intimidated victims admitted into evidence under a *Mastrangelo*<sup>26</sup> or a *Sirois*<sup>27</sup> theory that the defendant has forfeited the right of confrontation. For example, prosecutors bringing motions to admit prior statements and testimony can often present a history of domestic violence through statements by police witnesses, family members, friends, victim advocates and medical providers. They can then demonstrate through telephone records, recorded voice-mail and other messages, and testimony of other witnesses that the batterer has been communicating with the victim, often in violation of an order of protection, in order to ensure that she not cooperate with prosecutors.<sup>28</sup> With *Crawford* casting some doubt on the admissibility of some types of out-of-court statements, there is likely to be an increase in the number of requests for *Mastrangelo* hearings.

*Crawford* may also prompt prosecutors to re-examine the strategy of compelling victims to testify. In response to the fear that some formerly admissible statements may now be inadmissible, prosecutors may feel forced to compel victims’ appearances, through subpoenas or material witness orders, to

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<sup>26</sup> U.S. v. *Mastrangelo*, 693 F.2d 269, 272-73 (2d Cir. 1982) (“[I]f [the] witness’ silence [was] procured by defendant himself, whether by chicanery, by threats, or by actual violence or murder, defendant [could] not . . . assert his confrontation clause rights in order to prevent prior grand jury testimony of that witness from being admitted against him.” (citations omitted)).

<sup>27</sup> *Holtzman v. Hellenbrand*, 460 N.Y.S.2d 591, 597-98 (App. Div. 1983) (offering guidelines for future cases involving issues of witness tampering by defendants). *Sirois* was the original defendant in this case, although the action was brought by the district attorney seeking a writ of mandamus.

<sup>28</sup> See, e.g., *People v. Santiago*, No. 2725-02, 2003 WL 21507176, at \*13 (N.Y. Sup. Ct. Apr. 7, 2003).

avoid dismissal. This situation could potentially create great risk to victims and inadvertently promote the incidence of perjurious testimony. Unfortunately, prosecutors may feel this is sometimes the only way to protect a victim where the defendant's release would put her safety at risk.

To protect against the risk of unexpected recantations by frightened witnesses, policy-makers and legislators should consider changing evidentiary rules to permit more effective cross-examination. Some jurisdictions have very restrictive statutes limiting a party's ability to impeach its own witnesses. For example, under New York's Criminal Procedure Law, section 60.35(1), a party may impeach its own witness only when (1) the testimony on direct pertains to a material issue of the case and tends to disprove the position of the party calling the witness; and (2) the witness has previously made a written and signed, or sworn, statement contradicting the testimony.<sup>29</sup> Under this rule, in the hypothetical case given at the beginning of this essay, if the victim were to be called to the stand by the people and were to deny that the incident occurred in the way she initially described, the prosecutor would not be able to impeach her with any oral statements made to the police, other than excited utterances. The prosecutor would only be able to challenge her trial testimony if she had signed a written statement, had been deposed or had testified in the grand jury.

And the New York rule is yet more restrictive. If a New York prosecutor is able to impeach a victim using prior written and signed or sworn statements, the prior statements are admissible only to impeach the witness' credibility, not as evidence in chief.<sup>30</sup> This can lead to the improbable result of a case being dismissed for failure to present a legally sufficient case-in-chief, even though a prosecutor has proven, through effective cross-examination of a coerced, intimidated, or simply untruthful victim that the crime charged did occur. Legislation abolishing these overly technical and restrictive rules would result in fairer trial outcomes, and would help to protect victims by holding offenders accountable.

To go one step further, prosecutors may want to use *Crawford* as a starting point to advocate for more liberal hearsay exceptions. *Crawford* restricts the use of prior testimonial statements made without an opportunity for the

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<sup>29</sup> N.Y. CRIM. PROC. LAW § 60.35(1) (McKinney 2005).

<sup>30</sup> *Id.* § 60.35(2).

defense to cross-examine. Can this then mean that prior testimonial statements can be made admissible, without violating a defendant's Sixth Amendment rights, if there is an opportunity to cross-examine? If so, then perhaps prosecutors may be able to present such prior testimonial statements and then simply make the witness available for cross-examination. This could present an even greater opportunity for cases to be proven using the evidence initially gathered at the scene. It also could be a means of restoring some of the newer statutory hearsay exceptions limited by *Crawford*. But, of course, any efforts to employ this tactic would again have to be tempered by considered reflection of its eventual impact on victim safety.

#### CONCLUSION

The future of domestic violence prosecution will depend largely on how these various issues get decided. *Crawford* has changed the playing field when it comes to efforts to prosecute domestic violence against non-cooperative victims, but not as much as some had predicted. Some of the more far-reaching efforts over the last decade have been reined in. But the more conservative efforts, which rely on evidence collection and traditional hearsay exceptions, have not suffered much at all. *Crawford* also presents opportunities to again think creatively. By focusing on proving forfeiture of the right of confrontation, or by promoting more opportunities for cross-examination, prosecutors of domestic violence may be able to use strategies developed in response to *Crawford* to hold offenders accountable, and, ultimately, to protect victims.