# Prosecuting child abusers just got easier

By Joan S. Meier

Associated Press

Justice Antonin Scalia, left, authored the opinion in *Crawford v. Washington*, which reshaped the U.S. Supreme Court's confrontation clause analysis in 2006.

Last week, in *Ohio v. Clark*, the U.S. high court both helped ensure child abusers may be successfully prosecuted and laid to rest several questions about the scope of a defendant's right to confront the witnesses against him. The decision also speeds the court's retreat from the stringent standard Justice Antonin Scalia sought to ordain in *Crawford v Washington* (2004).

In *Clark*, preschool teachers noticed injuries on 3-year-old L.P. and asked him where they came from. The child said "Dee" did it. Dee Clark was L.P.'s mother's pimp and was in charge of the children while he sent her several states away for prostitution. The next day, social workers tracked the children down at their grandmother's, identified more injuries on both, and took them into custody.

At trial L.P. was deemed incompetent to testify, but the teacher testified to his identification of Clark as the perpetrator of his injuries. Clark argued that use of the hearsay violated his Sixth Amendment right to confront the witnesses, drawing on *Crawford*'s ruling that no "testimonial" out-of-court statement may be used at trial unless the witness was unavailable and the defendant had a chance to cross-examine them. Clark's argument — that the statement was testimonial because the teacher, a "mandatory reporter," was gathering evidence for the state — was adopted on appeal by the state supreme court. But the U.S. Supreme Court reversed in a unanimous decision with two concurrences, in a decision that caused advocates for child victims to heave a sigh of relief. Had the Ohio Supreme Court's ruling been upheld, prosecution of child abuse would have become even harder than it is today. Indeed, children's disclosures to independent third parties (often mandated reporters) are particularly important pieces of evidence because such adults are not seen as having a personal bias when they report children's statements.

The decision is at least as important for its impact on confrontation clause jurisprudence, which has undergone a major sea change in the past 11 years.

In 2004, the court, led by Justice Scalia, reversed course and outlawed prior standard operating procedures: No longer would the confrontation clause permit the use of traditionally admissible "reliable" or "trustworthy" hearsay in lieu of live witnesses. If the hearsay was "testimonial" it would be excluded unless there had been an opportunity for cross-examination of the speaker. This decision was greeted by many as a return to a principled approach truer to the original purpose of the confrontation clause. While *Crawford* failed to fully define "testimonial," many saw the opinion as signaling that a defendant's confrontation right was virtually absolute, covering any out-of-court *accusatory statements.*

That *Crawford* was a radical shift was evident from the fact that, "within days … prosecutors were dismissing or losing hundreds of domestic violence cases that previously would have presented little difficulty." [Tom Lininger article] For the same reasons, some child abuse convictions were thrown out. Although family violence was not at issue in *Crawford*, the primary impact of the case was on domestic violence and child abuse cases — cases in which the victims are often not able or willing to testify. In subsequent cases, then, leading domestic violence and child abuse organizations urged the court not to define the new standard so as to make domestic violence and child abuse prosecutions yet more difficult.

Subsequently, in *Davis v. Washington* (2006) and *Hammon v. Indiana* (2006), both involving police interrogation, the court adopted a "primary purpose" test which allowed admission of statements seeking help in an "ongoing emergency" which were not made for the "primary purpose" of describing past events potentially for trial, based on an objective assessment of the circumstances. Thus, the 911 call from one domestic violence victim during and right after her assault was admissible; the affidavit prepared with a police officer at the house of another after the incident was testimonial and not admissible. In *Michigan v. Bryant* (2011), the court emphasized that the intents of both speaker and questioner, and the (in)formality of the conversation are relevant to determining primary purpose. Thus, the statements of a shooting victim to police identifying the shooter were characterized as part of an ongoing emergency, informal, and nontestimonial. While both these decisions indicated a willingness to find some accusatory statements to law enforcement not prohibited by the confrontation right, they did not provide a clear guide for future cases.

Remaining questions included: To what extent does the testimonial analysis apply to statements made outside the context of law enforcement? How are the purposes of speakers and questioners weighed, when potentially different? How is the "primary purpose" test applied to children who don't know what a prosecution is? Should a child's age matter? And finally, the *Clark* question: To what extent does a mandatory reporting obligation transform a "civil" adult into a state proxy?

Regarding children's statements, state courts gradually carved out their own paths. Applying the *Davis/Hammon* test, the majority of lower courts side-stepped the question of children's "purpose," focusing on the questioner's intent and the particular context. Many courts thus found young children's statements testimonial and not admissible, especially when law enforcement was involved.

This lower court landscape suggests that the *Clark* decision is more significant than might be apparent at first glance. There is no question that *Clark* resolved whether children's statements at school to teachers who are mandatory reporters are per se testimonial: They are not. But it did more than that. Both the majority opinion and the oppositional concurrence by Justice Scalia (joined by Justice Ruth Bader Ginsburg) contain substantial text suggesting (1) that many state courts have been more protective of the confrontation right in cases involving children than is constitutionally required; and (2) that new parameters are now available to limit the application of the confrontation right in both law enforcement and other settings.

First, both the majority and Scalia's concurrence emphasize the impossibility of a 3-year-old's having a testimonial intent. In stark contrast, it appears not one state court has previously made a child's intent or purpose the linchpin of a decision. The *Clark* court's language (and its unanimity) now indicates that *prosecutors in future child abuse cases may be able to cite* Clark *to dismiss confrontation claims raised regarding young children's statements.*

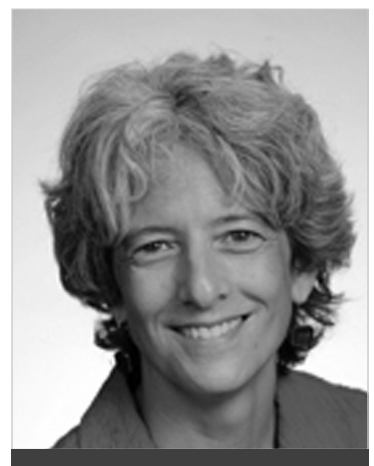
Further, the majority goes out of its way to assert *"statements to persons other than law enforcement officers … are much less likely to be testimonial* than statements to law enforcement officers" (emphasis added). This is a more restrictive reading of the confrontation right than that of many lower courts which applied *Davis/Hammon* to child abuse cases. At minimum, this dictum creates a strong presumption for prosecutors to invoke in future such cases (both children's and adults').

Lastly, both the majority and Scalia seem to be moving significantly closer to Justice Clarence Thomas' longstanding argument, repeated in his concurrence in *Clark*, that fidelity to the historical view should limit the confrontation right's application to statements bearing "sufficient indicia of solemnity … to qualify as testimonial." Both opinions emphasize the importance of "the informality of the situation and the interrogation."

All of this begs the question: Why have lower courts been so much more restrictive than the Supreme Court in construing confrontation rights to child abuse cases? Having watched the Supreme Court's oral arguments in both the prior domestic violence cases and in *Clark*, it seems clear to me that the high court's stomach for excluding critical evidence is greater in the adult abuse cases. Going forward, it will be interesting to see whether the loosening in *Clark* helps expand admission of hearsay in adult abuse cases.

In the end, the *Clark* decision has unquestionably improved the state's ability to prosecute and convict abusers of child and even adult victims, while, in dicta, putting a thumb on the scale on several previously open questions. Whether the decision is the beginning of the end of the *Crawford* revolution, as Justice Scalia seems to fear, remains to be seen.

**Joan S. Meier** *is professor of clinical aw at the George Washington University Law School and legal director, Domestic Violence Legal Empowerment Appeals Project (DV LEAP). She co-authored an amicus brief in* Clark *on behalf of DV LEAP.*



JOAN MEIER
*George Washington University*

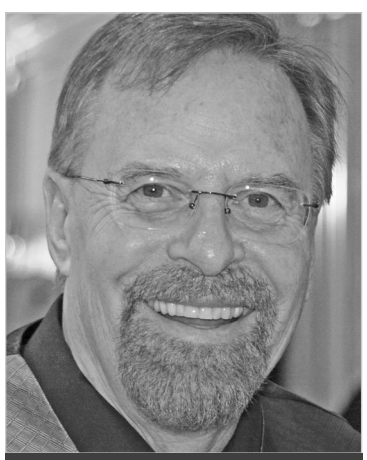
# Déjà vu for disability rights at the Justice Department

By Thomas F. Coleman

One year ago I stood with other disability rights advocates outside of the federal courthouse in Los Angeles to announce the filing of a voting rights complaint against the Los Angeles County Superior Court. After the press conference, we walked to the office of the U.S. attorney where we delivered evidence that the court had been stripping conservatees of the right to vote in violation of federal laws.

In May, the Department of Justice notified the chief justice and the secretary of state that a formal investigation was being conducted, but instead of focusing on Los Angeles, the inquiry was broadened to the entire California judiciary. The state has until June 30 to turn over scores of records about the policies and practices of the court in disqualifying conservatees from voting.

Today we returned to the same spot on the sidewalk across from the federal courthouse to make two new announcements. The first is a follow up to the voting rights complaint. The second concerns ongoing violations of the Americans with Disabilities Act by court-appointed attorneys who represent people with developmental disabilities in limited conservatorship cases.



THOMAS COLEMAN
*Spectrum Institute*

> A class action filed Friday with the DOJ alleges that the court has been failing miserably in fulfilling its duty to provide litigants with developmental disabilities access to justice.

The courts have a duty to restore the voting rights of thousands of conservatees who lost those rights due to an illegal literacy test used by court investigators, appointed attorneys, and judges.

Consider the case of Gregory Demer, an autistic 28-year-old who was disqualified from voting 10 years ago. Although a court investigator filed a report in 2012 stating that Demer's voting rights should be restored, neither the court-appointed attorney nor the judge on the case responded to that recommendation. They read the report but did not take remedial action. A similar report was filed last year when Judge Daniel Murphy was assigned to the case. Again, neither he nor the court-appointed attorney followed their legal duty to have Demer's voting rights restored. As a result of these failures, Demer was deprived of his right to vote for president, governor, mayor and county supervisor.

There are about 12,000 people with developmental disabilities who have open conservatorship cases in Los Angeles County alone, not to mention the rest of the state. Thousands of them may need to have their voting rights restored.

But reform must go beyond voting rights. More fundamental rights, such as the right to having a competent attorney, are at stake. The superior court does not properly train these attorneys on the basics of disabilities and how to effectively interact with clients who have cognitive and communication difficulties. Training programs have not included segments on the legal requirements of the ADA. The court has not adopted performance standards for these attorneys, thus leaving them to comply with the ADA or not, as they wish. Many attorneys are putting in five hours or less on a case, when it would take 20 or more hours to do a proper job.

Title II of the ADA gives public agencies, including state and local courts, an obligation to use affirmative measures to ensure litigants with disabilities receive access to justice. Courts must take proactive steps to ensure that involuntary litigants such as proposed limited conservatees, can participate in their cases in a meaningful way. These cases are critical for these litigants since a judgment may take away the right to control their finances, make medical decisions, choose their friends, marry or have intimate relations with a romantic partner.

A class action filed Friday with the DOJ alleges that the court has been failing miserably in fulfilling its duty to provide litigants with developmental disabilities access to justice. An independent investigation by the DOJ should confirm those allegations.

During the Watergate scandal, "deep throat" famously told a reporter with the Washington Post to "follow the money" to get to the bottom of the matter. Here, the trail of money that funds the court-appointed attorneys leads to the Los Angeles County Board of Supervisors. State judges appoint the attorneys and run the legal services program, but the county funds it. These supervisors should attach strings to the funding to stop ADA violations. As the funding source for the program, the county also has a duty under Title II of the ADA to make sure that the program complies with the requirements of federal law.

County officials and state judges must explore ways to overcome the deficiencies in the limited conservatorship system, including potentially having the public defender represent these clients and eliminating private attorneys from the picture altogether.

We have only gone to the door of the Department of Justice, now twice, because the state and local doors to political power and the machinery of justice would not open for us. Perhaps those in positions of judicial power in California will open the door when the feds come knocking again.

**Thomas F. Coleman** *is the legal director of the Disability and Abuse Project of Spectrum Institute.*

Daily Journal

**Charles T. Munger**
Chairman of the Board
**J.P. Guerin**
Vice Chairman of the Board

**Gerald L. Salzman**
Publisher / Editor-in-Chief
**Robert E. Work**
Publisher (1950-1986)

**David Houston**
Editor

**Ben Armistead**
Legal Editor

**Brian Cardile**
Rulings Editor

**Alexandra Schwappach**
Associate Editor
*Los Angeles*

**Jean Yung**
Associate Editor
*Los Angeles*

**Craig Anderson**
Associate Editor
*San Francisco*

**Dominic Fracassa**
Associate Editor
*San Francisco*

**Connie Lopez**
Verdicts & Settlements Editor

**Los Angeles Staff Writers**
Kibkabe Araya, Matthew Blake, Melanie Brisbon, Ashley Cullins, America Hernandez, Laurinda Keys, Jason Pafundi, Hetert-Qebu Walters, L.J. Williamson

**San Francisco Staff Writers**
Philip Johnson, John Roemer, Joshua Sebold, Fiona Smith, Saul Sugarman

**Bureau Staff Writers**
Banks Albach, Alison Frost, Kevin Lee, *Palo Alto*
Don J. DeBenedictis, Deirdre Newman, *Santa Ana*

**Legal Writers**
Karen Natividad, Maeda Riaz

**Designers**
Ari Goldstein, Sepideh Nia

**Wes Marsh**, *Video Editor*
**Marites Santiago**, *Rulings Department Clerk*
**Andy Serbe**, *Editorial Intern*
**Nicolas Sonnenburg**, *Rulings Intern*

**Advertising**
Audrey L. Miller, *Corporate Display Advertising Director*
Monica Smith, *Los Angeles Account Manager*
Len Auletto, *San Francisco Account Manager*

**Art Department**
Kathy Cullen, *Art Director*

**The Daily Journal is a member of the Newspaper Association of America, California Newspaper Publishers Association, National Newspaper Association and Associated Press**