Mandated Reporting and the Confrontation Clause: When are Teachers like Police Officers?

Phillip Trobaugh

All 50 states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have laws and policies that specify procedures for making and responding to reports of suspected child abuse or neglect. Professional groups designated as “mandated reporters” are required by most states to make an immediate report when they suspect or know of abusive or neglectful situations. Teachers are almost always listed as a category of professional that are mandated reporters.

A recent decision by the U.S. Supreme Court helped to further define the role and responsibilities of teachers as mandatory reporters. Ohio v. Clark, decided on June 18, 2015, involved preschool teachers who had reason to believe that a child was being abused. The child made an identifying statement to the teachers, which resulted in a criminal case. The child did not testify in the subsequent trial, which raised an objection from the alleged abuser that the admission of the statement violated his constitutional right to confront his accuser.

Known as the “Confrontation Clause” to the Sixth Amendment, this provision upholds that criminal defendants have the right to cross-examine (“confront”) their accusers in open court. As Justice
Samuel Alito wrote in the case decision, the issue at hand in Ohio v. Clark was “whether statements to persons other than law enforcement officers are subject to the Confrontation Clause,” and thus, whether the child’s statements to the teacher should be barred from the trial and not treated as evidence. Educators across the country anticipated this case’s decision, worrying whether teachers in their role as mandatory reporters of alleged abuse would be subject to many of the same criminal procedure requirements as police officers, such as issuing Miranda-type warnings, to schoolchildren.

**Confrontation Clause History**

The Confrontation Clause to the Sixth Amendment states: “in all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him.” This right only applies in criminal matters, and not civil (e.g., personal injury lawsuits). The Fourteenth Amendment makes the Confrontation Clause applicable to state proceedings as well as federal.

The origins of the Confrontation Clause are extensive, appearing in Roman law and British common law (a frequent forerunner to the foundations of American law). It is firmly embedded in Western culture. There are biblical references to this concept, including this example from Acts 25:16: “It is not the manner of the Romans to deliver any man and die, before that he which is accused have the accusers face to face, and have licen[s]e to answer for himself concerning the crime laid against him.” It is also mentioned at least twice in Shakespeare’s plays:

*Then call them to our presence; face to face,*
*And frowning brow to brow, ourselves will hear*  
The accuser and the accused freely speak: *High-stomached are they both, and full of ire,*  
*In rage deaf as the sea, hasty as fire.*  

*(Richard II, act I, scene 1, c. 1595)*

*...The great duke*  
*Came to the bar; where to his accusations*  
*He pleaded still not guilty and alleged*  
*Many sharp reasons to defeat the law.*  
*The king's attorney on the contrary*  
*Urged on the examinations, proofs, confessions*  
*Of divers[e] witnesses; which the duke desired*  
*To have brought viva voce to his face...*  

*(Henry VIII, act ii, scene 1, 1613)*

As Justice Stephen Breyer explained in a 1999 Supreme Court case, Lily v. Virginia:  
*The right was designed to prevent, for example, the kind of abuse that permitted the [British] Crown to convict*  
*Sir Walter Raleigh of treason on the basis of the out-of-court confession of … a co-conspirator.*
Because of this long history and tradition, the right to confront one’s accuser—along with the presumption of innocence and a trial by jury, among others—is a vital component of an American criminal justice system that protects the rights of the accused.

Aside from the historical aspects, the logical objection to statements made out of court by accusers is that these statements are “hearsay.” So, for example, if an out-of-court statement asserted that the accused had pulled the trigger in a murder case—that proving the accused committed murder—that would be hearsay. Hearsay is generally excluded because it helps one side prove its case without allowing the other side a full and fair opportunity to test the statement for truth and reliability. But not all out-of-court statements are automatically excluded; there are a number of exceptions to the hearsay rule, including an exception for exclamations made under stress during a startling event (e.g., “The building is on fire!”), declarations made by an individual while he or she is dying (e.g., “Joe did it!”), and statements made by people that run against their own interests (e.g., “I am involved in a criminal enterprise”). Although both the Confrontation Clause and hearsay rule involve providing parties with the opportunity to challenge adverse testimony brought in against them, the connection in the case law has not always been close. In the Lily case, Justice Breyer observed, “The Court’s effort to tie the Clause so directly to the hearsay rule is of fairly recent vintage, … while the Confrontation Clause itself has ancient origins that predate the hearsay rule.” Here, in the Ohio v. Clark case, the out-of-court statement was made by a three-year-old child, to a preschool teacher. Until Ohio v. Clark, the U.S. Supreme Court had refused to consider whether the Confrontation Clause applied to out-of-court statements made to those who were not in law enforcement, such as doctors or teachers.

**Testimonial Statements**

The Court has, however, historically attempted to define what types of out-of-court statements violate the Clause. In a 2004 case, Crawford v. Washington, the Supreme Court stated that out-of-court statements violate the Confrontation Clause if they are “testimonial” in nature—“a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Subsequent cases elaborated on what constitutes “nontestimonial” statements, under a test known as “primary purpose.” If the primary purpose of eliciting information is to respond to an ongoing emergency, as opposed to creating an out-of-court substitute for trial testimony, then the statement does not violate the Confrontation Clause.

The Crawford ruling marked a shift from a previous standard, set forth in a 1980 ruling, Ohio v. Roberts. In Roberts, the Court decided that out-of-court statements did not violate the Confrontation Clause, and could be used in trial, if they bore “indicia of reliability.” Reliability, the Court reasoned, could be assumed if statements had “particularized guarantees of trustworthiness.” Thus, Crawford marked a shift from a standard of “reliability” to “primary purpose.”

In the recent case, Clark, the Court considered not only the role of statements made to reporters not in law enforcement, but, ultimately, the testimonial nature and primary purpose of the child’s statement made to the teacher.

**Case Decision**

Justice Alito issued the 9-0 decision in Ohio v. Clark (three justices filed independent analyses). For the majority, the factual combination of the child’s young age, and to whom he was speaking (his teachers) was critical. Very young children cannot be said to have the full understanding that they are making a
testimonial statement, the Supreme Court stated. Further, the primary role of teachers, unlike that of police officers, is not to uncover and prosecute criminal behavior. There was an ongoing emergency here, the Supreme Court found, given that a young child had recently been abused and might soon be again. The teachers’ questions were aimed at identifying the abuser and ending it.

Thus, in this instance, the Supreme Court refused to extend the protections of the Confrontation Clause to the defendant. The statements made by the child to the teachers were then allowed and admitted into evidence, and the case was sent back down to the trial court for further handling.

As for the larger question, the Supreme Court declined to state categorically that the Confrontation Clause could never be extended in cases involving teachers as mandated reporters. There could be a fact pattern in which the child is sufficiently mature, for example, to show that he or she was making a testimonial statement. The situation could further involve facts in which the teachers were not spontaneously reacting to evidence of abuse but rather are conducting their own “investigation,” for purposes of criminal justice as opposed to averting an emergency.

But there was a reason the Supreme Court took up this particular matter after years of declining to expound on out-of-court statements made to non-law enforcement. Most likely, it was to provide some measure of assurance that teachers, in their mandatory reporting role, are not expected to follow the same criminal justice requirements as police officers. In addition, certain out-of-court statements would be allowed as evidence in trials, despite the normal prohibitions of the same.

Practical Effects
Teachers, and other mandated reporters working with young children, can probably breathe a sigh of relief. They do not typically conduct police-style interrogations. Young children do not usually, if ever, make statements in a formalistic “testimonial” sense. These two factors combined make it very close to impossible that the statements made to them would violate the Confrontation Clause. Teachers need not worry that their jobs are being turned into criminal investigators, à la Lieutenant Columbo, and are not required to follow standard criminal procedures when asking a young child about suspected abuse.

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