Listening to *Crawford*

by Jeffrey L. Fisher, Richard D. Friedman, and Bridget M. McCormack*

Crawford v. Washington[1] transformed the law of the Confrontation Clause of the Sixth Amendment by holding that, if an out-of-court statement is "testimonial" in nature, it may not be introduced against an accused to prove the truth of what it asserts unless the accused has had an opportunity to "be confronted with" the maker of the statement. While *Crawford* declined to offer a comprehensive definition of the term "testimonial," we believe that the crabbed interpretation that Judges Karan and Gersten advance fails to come to grips with the decision's true impact.

Even a casual reading of the *Crawford* opinion should make clear that it works a dramatic change in the law of the Confrontation Clause, and this means that in many respects courts will not be able to continue doing business as they were immediately beforehand. In particular, while under *Ohio v. Roberts*,[2] an out-of-court statement could generally pass Confrontation Clause scrutiny if it fit within a "'firmly rooted' hearsay exception," under *Crawford* the applicability of the Clause is generally unaffected by the status of the statement under hearsay law. The basic idea of *Crawford* is that if a person acts as a witness -- that is, states information to a person of authority or otherwise makes a statement that a reasonable person would understand will likely be used for evidentiary purposes – the person is making a special kind of statement, a testimonial one. And when a person makes a testimonial statement, that statement may not be admissible against an accused unless the accused has had an opportunity to cross-examine her – preferably at trial or, if the witness is unavailable then, beforehand. As a rule, it makes no difference for constitutional purposes if the statement falls within an exception to the rule against hearsay.

The *Crawford* Court did allow for the possibility of recognizing exceptions to the common-law right of confrontation that were "established at the time of the founding."[3] In a footnote, the Court referred to the hearsay exception for spontaneous declarations and said:

> *It is questionable whether testimonial statements would ever have been admissible on that ground in 1791*; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own

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[1] 124 S.Ct. 1354 (2004).

[2] 448 U.S. 56 (1980).

[3] 124 S.Ct. at 1365.

advantage." *Thompson* v. *Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B.1694).[4]

We do not believe that this passage supports the conclusion drawn by Judges Karan and Gersten:

> *Trevanion* demonstrates that the spontaneous declaration, and by im[plication its twin brother the excited utterance, were established prior to the founding of the confrontation Clause. Under *Crawford* these long-standing and firmly rooted hearsay exceptions remain in effect.[5]

On the contrary, we believe that *Crawford* plainly says that *if* there was a hearsay exception at the time of the founding for spontaneous declarations, it was only for those that were genuinely spontaneous, made *immediately* after the incident and before any chance for contrivance, because otherwise a statement reporting a crime would likely be testimonial in nature. But even if such an exception existed at common law, the Court made it clear in the very next breath that simply labeling a statement a "spontaneous declaration" today does not exempt it from the Confrontation Clause, for the purpose of the testimonial rule "does not evaporate when testimony happened to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances."[6]

And this view squares closely with our review of the history. Friedman and McCormack have shown that at the time of the founding it was not clear that there was a hearsay exception for spontaneous declarations at all – as opposed to a doctrine that a statement that was in effect part of the incident being tried, and so characterized as part of the *res gestae*, might be introduced for whatever value it had in describing the incident. Even assuming there was a genuine exception at this time, for decades it was, as *Crawford* indicates, closely circumscribed, to prevent the admission of narratives of past events – and this containment, we believe, was precisely to prevent the exception from being the vehicle for introduction of testimonial statements against an accused.[7] For many years after the founding there was nothing at all resembling the vastly expanded "excited utterance" exception that many judges have recently invoked in allowing accusatory statements to be admitted against criminal defendants without affording the defendants an opportunity to confront the accusers.

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[4] 124 S.Ct. at 1368 n.8 (emphasis added).

[5] Amy Karan & David M. Gersten, *Domestic Violence Hearsay Exceptions in the Wake of* Crawford v. Washington, JUVENILE AND FAMILY JUSTICE TODAY, Summer 2004, at 22 (footnote omitted).

[6] 124 S.Ct. at 1367 n.7.

[7] Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 UNIVERSITY OF PENNSYLVANIA L. REV. 1171(2002)

While declining to define "testimonial," *Crawford* did offer illustrations of types of statements that unquestionably fit within the category. "*Whatever else the term covers*, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[8] It would be a mistake, however, to treat such an enumeration as an exhaustive list of testimonial statements, and nothing in *Crawford* – which did not have to go further, because the statements at issue there were in response to police interrogations – suggests that it should be. The fundamental idea, we believe, is to avoid the creation of a system under which a witness, without having to confront the person she accuses, can knowingly create evidence that will likely be used against the accused in a criminal trial. A statement may be testimonial even though it was not initiated by government officials, or made directly to officials; a witness should not be able to insulate herself from confrontation by, say, speaking to a rape crisis counselor, or calling a 9-1-1 operator employed by a private service. Friedman and McCormack have demonstrated, for example, that many 9-1-1 calls in domestic violence cases are made not merely for self-protection in an exigent situation but at least in significant part to initiate the machinery of criminal justice. Such calls should be regarded as testimonial.

We therefore believe that Judges Karan and Gersten have gone too far in trying to exclude from the category of testimonial the following broad categories of statements:

> a 9-1-1 call for help made by the victim or another; statements made by domestic violence victims to treating doctors; and spontaneous statements made by domestic violence victims to police officers first arriving at the scene.[9]

A more satisfactory analysis of 9-1-1 calls, we submit, is the one offered by Friedman and McCormack:

> To the extent the call itself is part of the incident being tried, the fact of the call presumably should be admitted so the prosecution can present a coherent story about the incident. But even in that situation, the need to present a coherent story does not necessarily justify admitting the contents of the call. And even if the circumstances do warrant allowing the prosecution to prove the contents of the call, those contents generally should not be admitted to prove the *truth* of what they assert. If the contents of the call are probative on some ground other than to prove the truth of the caller's report of what has happened, then admissibility should be limited to such other ground. To the extent that the contents of the call are significant only as the caller's report of *what has happened*, such a report usually should be considered testimonial.[10]

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[8] 124 S.Ct. at 1374 (emphasis added).

[9] Karan & Gersten, at 22.

[10] Friedman & McCormack, 150 U. PA. L. REV. at 1243 (emphasis added).

Similarly, we believe Judges Karan and Gersten unduly limit the Confrontation Clause in suggesting that in evaluating a 9-1-1 call or a statement to an officer responding on the scene the trial court should try to determine whether the statements were only necessary "to determine probable cause or to make an arrest," as opposed to "evidence gathered for prosecution or the product of interrogation."[11] The distinction, we believe, has no substance, and if it were elevated into law it would constitute an open invitation to ignore the confrontation right. The key is simply whether the statement was generated with an evidentiary purpose

We do not doubt the importance of facilitating domestic violence prosecutions. But it must be done in a way that preserves the accused's right to be confronted with the witnesses against him, which is one of the most central aspects of our criminal justice system. Since *White v. Illinois*[12] effectively removed Confrontation Clause scrutiny from statements that courts were willing to characterize as spontaneous declarations, courts have often allowed domestic violence prosecutions to proceed in violation of that right. *Crawford* insists that trial courts treat the right seriously. We believe they should listen.

[11] *Id.*

[12] 502 U.S. 346 (1992).