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**FINDING NINO: JUSTICE SCALIA’S CONFRONTATION
CLAUSE LEGACY FROM ITS (GLORIOUS) BEGINNING TO
(BITTER) END**

*Professor Joëlle Anne Moreno**

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“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”¹

I. INTRODUCTION

What exactly does the Confrontation Clause mean? For the past seven years, Justice Antonin “Nino” Scalia has been the unlikely champion of the defense bar as the author of *Crawford v. Washington*² and of the majority/plurality decisions in (almost) all of the post-*Crawford* confrontation cases. The Supreme Court’s recent dramatic resurrection of the Confrontation Clause has generated a flurry of activity in the federal and state courts and among legal scholars. The recent and rapidly evolving constitutional doctrine purports to protect a vital trial right and to enshrine core historical concerns. According to Justice Scalia in *Crawford*, “[w]here *testimonial statements* are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”³

In 2004, *Crawford* seemed to change everything for all federal and state criminal defendants by replacing the pre-existing “*inherently*, and therefore *permanently* unpredictable”⁴ admissibility standards (borrowed from the rules of evidence) with a new categorical constitutional rule. After *Crawford*, prosecutors could no longer rely on state or federal rules of evidence.⁵ Instead, for all statements deemed *testimonial* by the trial court either the witness must be subjected to the “crucible of cross-examination,”⁶ or her statement excluded. *Crawford* created a new threshold confrontation requirement that lower courts identify “*testimonial statements*.” However, both in and after *Crawford*, the

1. U.S. CONST. amend. VI.
 2. 541 U.S. 36 (2004).
 3. *See id.* at 68-69 (emphasis added).
 4. *Id.* at 68 n.10.
 5. *Id.* at 51.
 6. *Id.* at 61.

Court has repeatedly refused to provide clear or consistent criteria distinguishing testimonial statements from the infinite range of out-of-court statements made by victims and witnesses during criminal investigations.⁷ Without clear guidance, the lower courts have generated confused and inconsistent confrontation decisions.⁸

Until very recently, Justice Scalia has steered the Court's modern confrontation jurisprudence. However, as discussed below, his leadership is increasingly threatened by deep divisions on questions of historical accuracy, constitutional interpretation, and the practical realities of twenty-first century criminal prosecutions. By June 2009, Justice Scalia could barely muster a plurality for his *Melendez-Diaz v. Massachusetts*⁹ decision that confrontation extends to expert forensic lab analysts relying on a razor-thin fifth-vote concurrence from Justice Thomas, explicitly limited to his own long-held view that the Confrontation Clause applies *only* to formalized statements.¹⁰ *Melendez-Diaz* also provoked a lengthy, vitriolic, and revealing dissent from Justice Kennedy who wrote for Chief Justice Roberts and Justices Alito and Breyer.¹¹

The four *Melendez-Diaz* dissenters, who (unlike half of the plurality) remain on the Court today, objected to this expansive interpretation of the Confrontation Clause on three grounds. First, the Court's post-*Crawford* focus on testimonial statements had lost sight of the fact that the question should be whether the declarant was a "witness" because that is "the word the Framers used in the Confrontation Clause."¹² Building on this argument, they argued that "witness" should be limited to the conventional/adversarial prosecution witnesses and not extended to prosecution experts who have "witnessed nothing to give them personal knowledge of the defendant's guilt."¹³ Finally, the dissenters predicted that *Melendez-Diaz* would have the practical effect of "disrupt[ing] forensic investigations across the country

7. See Michael H. Graham, *Crawford/Davis "Testimonial" Interpreted Removing the Clutter: Application Summary*, 62 U. MIAMI L. REV. 811, 813 (2008).

8. See *id.* at 813 (noting that after the *Crawford* Court's failure to define testimonial statements "it was not surprising that lower courts immediately employed a plethora of interpretations of 'testimonial' leading to conflicting results").

9. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

10. *Id.* at 2543 (Thomas, J., concurring).

11. *Id.* at 2543-61 (Kennedy, J., dissenting).

12. *Id.* (Kennedy, J., dissenting).

13. *Id.* at 2543 (Kennedy, J., dissenting) (noting that the plurality "makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses").

and to put[ting] prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician, now invested by the Court's new constitutional designation as the analyst, simply does not or cannot appear."¹⁴

A. *The Impact of New and Upcoming Confrontation Cases*

The Supreme Court is revisiting the scope of the Confrontation Clause and the definition of "testimonial statements" twice this term. On March 1, 2010, the Supreme Court granted certiorari in *Michigan v. Bryant*¹⁵ and the case was decided on February 28, 2011 (when this Article was in the final editing phase). As predicted and discussed below, the *Bryant* majority (which included all four of the *Melendez-Diaz* dissenters) has retreated from seven years of Scalia-lead post-*Crawford* confrontation expansion. The Court held oral argument in its second confrontation case, *Bullcoming v. New Mexico*,¹⁶ on March 2, 2011. In *Bullcoming*, the Court will explore the scope of *Melendez-Diaz* when it decides whether live trial testimony from a "surrogate" expert witness who did not prepare the defendant's certified (but unsworn) blood alcohol report, but worked in the same lab, satisfies the confrontation requirement.¹⁷

In *Bryant*, the Court addressed the question of whether police interrogation of a bleeding gunshot victim while he lay on the ground at a gas station just hours before died yielded "testimonial statements" under the Confrontation Clause.¹⁸ Justice Sotomayor, who wrote for a *Bryant* majority that included the Chief Justice and Justices Kennedy, Breyer, and Alito, (with Justice Thomas concurring in the result, Justices Scalia and Ginsburg dissenting separately, and Justice Kagan recused) found that admission of the victim's statement did *not* violate the Confrontation Clause because "the circumstances of the interaction between Covington and the police objectively indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency.'"¹⁹ In briefs and during oral argument, petitioner, respondent, and a range of amici, had relied on *Davis v. Washington*²⁰ to

14. *Id.* at 2549 (Kennedy, J., dissenting).

15. *Michigan v. Bryant*, 130 S. Ct. 1685 (2010).

16. *Bullcoming v. New Mexico*, 131 S. Ct. 62 (2010).

17. *Id.*

18. *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

19. *Id.* at 1150 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

20. 547 U.S. 813 (2006).

frame the constitutional question as a determination of the objective primary purpose of the interrogation.²¹

Five years earlier in *Davis v. Washington* (and its consolidated companion case *Hammon v. Indiana*²²), the Court explored two statements from opposite ends of the mid-investigation interrogation spectrum.

In *Davis*, Michelle McCottry made statements to the police during a frantic 911 call *while* she was being assaulted. The Court held that this statement was non-testimonial because it was made “under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency.”²³

In contrast, Amy Hammon prepared a written “battery affidavit” following a secured-scene kitchen table police interview.²⁴ Here, the circumstances objectively indicated that there was no contemporaneous ongoing emergency so the Court presumed that the statements were testimonial because “the primary purpose of the interrogation was to establish or prove past events potentially relevant to a later criminal prosecution.”²⁵

During the recent October 5, 2010 oral arguments in *Bryant*, Justice Scalia reiterated the constitutional significance of the two different circumstances noting that “[t]he crime was ongoing—in *Davis* when—when the woman was on the phone with the operator. . . . [and] she was seeking help from the emergency that was occurring to her at that moment.”²⁶ *Bryant*, like most mid-investigation interrogations, falls somewhere between the two extremes.

Stop for a minute and imagine the mental gymnastics of attempting to divine whether the reasonable about-to-bleed-to-death gunshot victim contemplates that identifying his assailant will: (1) help the police to resolve an ongoing emergency; or (2) provide evidence useful to the prosecution. The justices use oral argument for a range of analytic, rhetorical, and persuasive purposes. However, in *Bryant*, the illogical and inoperability of the *Crawford/Davis* standard were flagrantly displayed. Justice Alito called the objective primary purpose of the

21. See *infra* Section IV (discussing the briefs filed in *Michigan v. Bryant, cert. granted*, 130 S. Ct. 1685 (2010)).

22. 546 U.S. 976 (2005).

23. *Davis*, 547 U.S. at 822.

24. *Id.* at 819-20.

25. *Id.* at 822.

26. Transcript of Oral Argument at 24, *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (No. 09-150), 2010 WL 3907894.

interrogation standard “totally artificial” because the reasonable declarant may think “[m]y primary purpose in saying this is so that they can respond to an ongoing emergency. . . . [but] I also have the purpose of giving them information that could be used at trial.”²⁷ Justice Ginsburg opined that examining the actions of the police would not be enlightening because “if you want to know what happened, you’d ask the very same questions. . . . [because] the questions are relevant also to securing the situation.”²⁸ As the argument progressed, the manifold ambiguities of this standard continued to surface as the Court wrestled with questions that included: (1) whether all (or most) violent crimes committed by unapprehended perpetrators should be considered “ongoing emergencies;” (2) whose perception (that of the police or the victim/witness) should control; (3) how to reconcile or choose among dual or conflicting purposes; (4) whether all statements regarding past events (or even all questions phrased in the past tense) resulted in testimonial statements; and (5) whether the existence of an ongoing emergency (not mentioned in the statement itself) could properly be inferred from the facts.²⁹

Professor Richard D. Friedman, as *amicus* to the *Bryant* respondent, argued that the proposed “primary investigatory purpose standard” should be no problem for future courts because it parallels the constitutional standards used to determine custody (under *Miranda*) or reasonable expectations of privacy and reasonable stops and seizures (under the Fourth Amendment).³⁰ However, this argument does not withstand scrutiny. The *Miranda* and Fourth Amendment standards ask judges to pick between two mutually exclusive alternatives (i.e., a suspect *either* believes she is in custody, or believes she is not in custody; a person *either* has a reasonable expectation of privacy, or she does not). The fundamental problem with the “primary investigatory purpose standard” is that in many cases it will be logical and consistent for the victim/witness and the police officer to believe that a statement could help to resolve an ongoing emergency now and later prove useful at trial.

The *Bryant* decision has amplified the confrontation confusion. Justice Sotomayor employs a scattershot approach that careens among a range of possible confrontation factors including: (1) “the statements

27. *Id.* at 8.

28. *Id.* at 5.

29. See *infra* Section IV (discussing the October 5, 2010 *Bryant* oral argument).

30. See Brief of Richard D. Friedman, as Amicus Curiae in Support of Respondent at 11, *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (No. 09-150), 2010 WL 2565284.

and actions of both the declarant and interrogators;³¹ (2) whether the ongoing emergency posed a threat to the public at large;³² (3) the “informality in an encounter between a victim and police;”³³ (4) “the parties’ perception that an emergency is ongoing;”³⁴ (5) whether “the cause of the shooting was a purely private dispute”³⁵; (6) whether the assailant used a gun;³⁶ (7) whether, at the time of the interrogation, the police knew the location of the assailant;³⁷ and (8) whether the police asked the “type of questions necessary to allow the police to ‘assess the situation, the threat to their own safety, and possible danger to the potential victim’ and to the public.”³⁸ To add to the confusion, the *Bryant* majority suggests new, but undefined confrontation exceptions (beyond the *Davis* Court’s “ongoing emergencies” exception) noting that some out-of-court statements—where the objective primary purpose of the investigation was *not* to resolve an ongoing emergency—do not raise confrontation concerns.³⁹ Moreover, for the first time since *Crawford*, the Court seems to reconsider the reliability of the out-of-court statement, noting that, “[i]n making the primary purpose determination,

31. *Michigan v. Bryant*, 131 S. Ct. 1143, 1160 (2011). The *Bryant* Court actually recommended a “combined approach” to assessing the purpose of the declarant and interrogators suggesting that this could help to resolve the “[p]redominant . . . problem of mixed motives on the part of interrogators and declarants.” *Id.* at 1161. This “combined approach” is both difficult to apply (e.g., do the presumed objective intents of the witness/victim and the police have the same weight?) and would fail to resolve the frequent problem of dual or conflicting motives (i.e., the victim/witness and/or the police intend to respond to an ongoing emergency and develop evidence).

32. *Id.* at 1161. According to the *Bryant* majority, “[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to first responders and to public may continue.” *Id.* at 1158. “[T]he duration and scope of an emergency may [also] depend in part on the type of weapon employed,” *id.*, and/or “[t]he medical condition of the victim,” (to the extent that the victim’s condition sheds light on the purpose for her statement or the magnitude of any ongoing safety threat). *Id.* at 1159.

33. *Id.* at 1160 (emphasis in original). According to Justice Sotomayor, the Michigan Supreme Court had “too readily dismissed the informality of the circumstances in this case,” *id.*, despite the fact that “the questioning in this case occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion.” *Id.* Moreover, “[t]he informality suggests that the interrogators’ primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements.” *Id.* at 1166.

34. *Id.* at 1162 (emphasis added).

35. *Id.* at 1163.

36. *Id.* at 1164.

37. *Id.*

38. *Id.* at 1165 (quoting *Davis v. Washington*, 547 U.S. 813, 832 (2006)).

39. *Id.* at 1155 (“But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.”). *Id.* (emphasis in original).

standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”⁴⁰ Any return to an *Ohio v. Roberts* approach to confrontation would be an unwelcome development, especially for *Crawford*'s author and champion.

The recent *Bryant* decision infuriated Justice Scalia who has lost control of the Court's confrontation jurisprudence. With trademark vitriol, he accused the majority of accepting police lies “so transparently false that professing to believe . . . [them] demeans this institution,” joining in an “opinion [that] distorts our Confrontation Clause jurisprudence and leaves it in a shambles,” and “[i]nstead of clarifying the law, [making] the Court . . . itself the obfuscator of last resort.”⁴¹ Justice Scalia excoriated Justice Sotomayor for writing a decision that “is not only a gross distortion of the facts[,] . . . [but] a gross distortion of the law—a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned.”⁴² In his view, *Bryant* will also have serious and deleterious real world ramifications because the majority's “distorted view creates an expansive exception to the Confrontation Clause for violent crimes.”⁴³ *Bryant* is clearly a bitter pill for Justice Scalia, who according to Linda Greenwald, used his dissent to “administer . . . a public thrashing to a junior colleague” not just because “Justice Scalia doesn't like to lose,” but because he is “approaching his 25th anniversary as a Supreme Court justice [and] has cast a long shadow but has accomplished surprisingly little . . . [because n]early every time he has come close to achieving one of his jurisprudential goals, his colleagues have either hung back at the last minute, or feeling buyer's remorse, retreated at the next opportunity.”⁴⁴

The ramifications of *Bryant* will redound to both criminal practice and constitutional interpretation. In practice, Justice Scalia is likely correct that *Bryant* will lead to the admission of more prosecutor-sponsored statements that defendants cannot exclude from witnesses whom defendants cannot confront. However, as a constitutional standard, Justice Thomas is equally correct that the *Bryant* majority's objective primary purpose of the interrogation inquiry is an “exercise in fiction” that effectively “illustrates the uncertainty that this test creates

40. *Id.*

41. *Id.* at 1168 (Scalia, J., dissenting).

42. *Id.* at 1174.

43. *Id.* at 1173.

44. Linda Greenhouse, *Justice Scalia Objects*, OPINIONATOR, NEW YORK TIMES (Mar. 9, 2011, 8:40 PM), <http://opinionator.blogs.nytimes.com/2011/03/09/justice-scalia-objects/>.

for law enforcement and the lower courts.”⁴⁵ *Bryant* will almost inevitably exacerbate the problem of erratic and inconsistent decisions as our state and federal criminal courts continue to search for the *sine qua non* of the “testimonial statement.”

A careful examination of the post-*Crawford* cases, including revelations from the recent *Bryant* briefs and oral argument, provides insight into possible future alternatives. With Justice Scalia’s role in the Court’s confrontation jurisprudence on the wane, there is a new opportunity for the Chief Justice and Justices Kennedy, Breyer and Alito to gain traction to reframe the confrontation inquiry. This reframed confrontation standard is also likely to focus *less* on the testimonial qualities of the out-of-court statement and *more* on the status of the declarant as a “witness[] against the accused.” Clearly, a more textually accurate constitutional inquiry would appeal to the four *Melendez-Diaz* dissenters who remind us that “witness,” rather than “testimonial statement” is “the word the Framers used in the Confrontation Clause.”⁴⁶ In *Melendez-Diaz* these four justices adopted the rigid view that prosecution-sponsored experts were, by definition, not “witnesses against the accused” because they “witnessed nothing to give them personal knowledge of the defendant’s guilt.”⁴⁷ After *Melendez-Diaz*, this argument may be untenable, although this is debatable given Justice Thomas’s concurrence. However, if we assume as a general matter that the act of serving as a witness requires a measure of formality, this shift should gain purchase with Justice Thomas who, although he concurred in both *Melendez-Diaz* and *Bryant*, has been a long-standing, consistent, and prescient critic of the Court’s confrontation jurisprudence.

For the sound administration of justice in our criminal courts, it is vital that judges have a confrontation standard that they can understand and operate. It makes some sense that judges can more readily ascertain from the facts and circumstances whether an out-of-court declarant was acting as a “witnesses against the accused”⁴⁸ (e.g., from evidence of police control over the location, duration, and structure of the victim/witness interview or evidence of any attempt by the police to

45. *Bryant*, 131 S. Ct. at 1167 (Thomas, J., concurring).

46. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009).

47. *Id.* (Kennedy, J., dissenting) (noting that the plurality “makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses—‘witnesses’ being the word the Framers used in the Confrontation Clause”).

48. *Id.* at 2553 (quoting *Dowdell v. United States*, 221 U.S. 325, 330 (1911)).

shape the statement for use in a future criminal trial⁴⁹) than they can discern the objective primary purpose of the investigation. However, textual accuracy and operational efficacy bring their own costs. There is strong evidence that an analytic shift towards the act of witnessing and away from the testimonial nature of the statement could be used to narrow the scope of confrontation. As discussed below, this could impact defendants' ability to challenge the admission of evidence under *Bruton v. United States*,⁵⁰ incentivize the creation of new law enforcement confrontation workarounds, and diminish the accuracy of a wide range of public records.⁵¹

B. Justice Thomas and the Future of the Confrontation Clause

Almost twenty years ago, Justice Thomas predicted that a confrontation doctrine that “[a]ttempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties.”⁵² After *Crawford*, and especially after *Davis*, he has continued to oppose a confrontation standard that asked judges to reconstruct the objective primary purpose of the interrogation. According to Justice Thomas, this inquiry not only creates “uncertainty . . . for law enforcement,”⁵³ it is unnecessary. The Confrontation Clause, in his view, applies *only* to “formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions [because i]t was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefits of the adversary process.”⁵⁴

The *Crawford* and *Davis* Courts considered the formality of each out-of-court statement and these concerns also emerged in *Bryant*. During oral argument, petitioner’s counsel began by focusing on the informality of the police interview of Anthony Covington, which was conducted while he lay bleeding on the street.⁵⁵ At the time, Justice Scalia dismissed petitioner’s argument stating simply that “[f]ormality or

49. See Brief for the United States as Amicus Curiae Supporting Petitioner, *infra* note 175, at 17.

50. 391 U.S. 123 (1968).

51. See *infra* Part VI.

52. *White v. Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., concurring in part) (emphasis added).

53. *Michigan v. Bryant*, 131 S. Ct. 1160, 1167 (2011) (Thomas, J., concurring).

54. *White*, 502 U.S. at 364 (Thomas, J., concurring in part).

55. Transcript of Oral Argument, *supra* note 26, at 2.

no formality has nothing to do with it.”⁵⁶ However, the *Bryant* decision suggests that Justice Scalia is now significantly outnumbered by Justices who view formality as a relevant confrontation criterion.

The *Bryant* Court addressed formality in two ways. First, as a general matter, the Court found that “the most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a *formal*, out-of-court interrogation of a witness to obtain evidence for trial.”⁵⁷ Formal out-of-court interrogations are the most egregious confrontation violations because the “basic purpose of the Confrontation Clause was to ‘target[t]’ the sort of ‘abuses’ exemplified at the notorious treason trial of Sir Walter Raleigh.”⁵⁸ Second, more specifically, the Court concluded that the Michigan Supreme Court had “too readily dismissed the informality of the circumstances in this case,”⁵⁹ despite the fact that “the questioning . . . [had] occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion.”⁶⁰ The *Bryant* Court recognized the constitutional significance of the fact that “Covington interacted with the police under highly informal circumstances as he bled from a fatal gunshot wound.”⁶¹ According to Justice Sotomayor, this “informality suggests that the interrogators’ primary purpose was simply to address what they perceived to be an ongoing emergency”⁶² and “the circumstances [also] lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements.”⁶³

If a majority of the Court agrees that formal statements are the most egregious confrontation violations, this raises interesting questions about the durability of the Court’s adherence to its new objective primary purpose of the investigation standard. Perhaps, as Justice Sotomayor has suggested, the formality of an interrogation sometimes reveals something about what the reasonable victim/witness and the reasonable police office intended. However, formality emerges as a determinative confrontation criterion *only* if the inquiry shifts towards the textually accurate question of whether the out-of-court declarant was acting as a “witness[] against the accused” when she made her statement because

56. Transcript of Oral Argument, *supra* note 26, at 4.

57. *Bryant*, 131 S. Ct. at 1155 (emphasis added).

58. *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36 (2004)).

59. *Id.* at 1160.

60. *Id.*

61. *Bryant*, 131 S. Ct. at 1167 (Thomas, J., concurring).

62. *Id.* at 1166.

63. *Id.*

acting as a witness, as Justice Thomas has observed, requires “a solemnity to the process that is not present in a mere conversation.”⁶⁴

C. *Testing the Boundaries of Traditional Legal Scholarship*

The Court is in the midst of a dramatic exploration of the parameters of the Confrontation Clause and the pragmatics of its operation. Justice Scalia is no longer steering the confrontation ship, and *Crawford/Davis/Bryant* have created a new objective primary purpose of the interrogation standard that is difficult to comprehend and (probably) impossible to operate.

This Article is an attempt to respond promptly to these new developments and to predict some of the post-Scalia trajectory of the Court’s confrontation doctrine. In many ways, this project reflects a desire to challenge the more traditional law review process to respond more promptly to a dynamic area of legal development. I am grateful to the editors of the Akron Law Review for their indulgence in this effort, as we have worked hard over the past few months to incorporate new developments as soon as they occurred.

Roughly speaking, the introductory sections of the Article briefly set the stage for analysis of the new and future confrontation cases. Part II begins with the past, providing a brief analysis of the pre-*Crawford* cases to explain how confrontation was merged into the rules of evidence. Part III explores the importance of *Crawford* and the Court’s post-*Crawford* confrontation jurisprudence. Part IV examines the new constitutional framework created by *Michigan v. Bryant*. Part V anticipates the role of new and emerging perspectives on the Court. Part VI advances a two-pronged confrontation responsive to recent concerns but consistent with post-*Crawford* precedent. Finally, the conclusion of the Article evaluates the likely legal and social costs disadvantages of a clarified (more narrow) confrontation standard including a brief discussion of the growing threat to confrontation challenges under *Bruton v. United States*.⁶⁵

64. *Davis v. Washington*, 547 U.S. 813, 838 (2006).

65. 391 U.S. 123 (1968).

II. HEARSAY AND CONFRONTATION

A. *The Shared Goal of Reliable Evidence*

By the end of the last century, the right to be “confronted” with a witness had long been settled to mean the right for defendant’s counsel to cross-examine the witness in the defendant’s presence.⁶⁶ The principal area of confrontation controversy involved the determination of which out-of-court statements (i.e., which hearsay that was otherwise admissible under federal/state evidentiary rules) must be excluded for lack of confrontation.⁶⁷ These decisions rested almost entirely on determinations of evidentiary reliability because, as the courts somewhat naively and wholly conveniently presumed, the defendant’s right to confrontation served this same goal.⁶⁸

By 1980, in *Ohio v. Roberts*,⁶⁹ the Confrontation Clause had become the handmaiden of the rules of evidence. The *Roberts* Court held that confrontation serves simply to “augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence.”⁷⁰ Thus, the Court found that the right is satisfied whenever the evidence proffered against the defendant is deemed reliable. According to the *Roberts* Court, since hearsay and the Confrontation Clause “stem from the same roots”⁷¹ and “are generally designed to protect similar values,”⁷² defendants have no independent constitutional right to confront reliable/trustworthy out-of-court statements made by unavailable prosecution witnesses.⁷³ After *Roberts*, a defendant’s right to confrontation was satisfied whenever the court found that the statement either: (1) fit within a “firmly rooted hearsay exception;”⁷⁴ or (2) had “particularized guarantees of trustworthiness.”⁷⁵ This decision entirely ignored the panoply of strategic defense goals served by the cross-examination of prosecution witnesses. It also ensured that federal and state prosecutors could continue to rely on a wide range of

66. *See* *Mattox v. United States*, 156 U.S. 237, 244 (1895) (“The substance of the constitutional protection is preserved to the prisoner in the advantage . . . of seeing the witness face to face, and of subjecting him to the ordeal of cross-examination.”).

67. *See id.*

68. *See id.*

69. 448 U.S. 56 (1980).

70. *Id.* at 65.

71. *Id.* at 66 (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970)).

72. *Id.* (quoting *California v. Green*, 399 U.S. 149, 155 (1970)).

73. *Id.*

74. *Id.*

75. *Id.*

inculpatory out-of-court statements whenever the evidence had survived defense hearsay challenges or was not challenged.

B. The Futility of Confronting Reliable Evidence

Twelve years later, the Court decided *White v. Illinois*,⁷⁶ the apotheosis of the subjugation of confrontation to evidence law. *White* was a sexual assault case involving out-of-court statements from a four-year-old alleged victim. The *White* Court found that the Confrontation Clause did not require that the prosecution produce the witness or establish her unavailability.⁷⁷ The Court also held that the defendant was not entitled to cross-examine the alleged victim because her statements fell within the “excited utterance” and “statements for the medical treatment” exceptions to the hearsay rule.⁷⁸ However, the most interesting and overlooked component of *White* decision was the Court’s conclusion that cross-examination of an alleged sexual assault victim is futile and unnecessary whenever the out-of-court “statement . . . qualifies for admission under a ‘firmly rooted’ hearsay exception [because it] is so trustworthy that *adversarial testing can be expected to add little to its reliability.*”⁷⁹

Even if we accept the *White* Court’s unrealistic premise that cross-examination is solely (or even principally) a truth-finding endeavor, the Court’s assertion that defense cross-examination of an alleged crime victim will do *nothing* to test the reliability of her allegations is patently absurd.⁸⁰ In effect, the *White* Court made explicit what had been implicit just two years earlier in *Ohio v. Roberts*—confrontation had devolved into an ephemeral right that could be denied whenever a criminal court judge deemed the out-of-court statement reliable or the defendant failed to object to the admission of the evidence. This near abolition of the right of confrontation by the *White* majority provoked rebuke from the newest member of the Court.

76. 502 U.S. 346 (1992).

77. *Id.* at 350-58.

78. *Id.* at 357.

79. *Id.* (quoting *Idaho v. Wright*, 497 U.S. 805, 820-21 (1990) (emphasis added)).

80. It is worth contrasting this with the Supreme Court’s earlier assertions that cross examination is “the greatest legal engine ever invented for the discovery of truth,” *California v. Green*, 399 U.S. 149, 158 (1970), and “the principal means by which the believability of a witness and the truth of his testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

C. Justice Thomas Objects

In a concurring opinion written more than a decade before *Crawford*, Justice Thomas (joined by Justice Scalia) politely warned that “our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and the history of the Clause itself . . . [which has] complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence.”⁸¹ Although Justice Thomas conceded that “[t]here is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean,”⁸² the “strictest reading” would limit confrontation to those witnesses who appear and testify at trial.⁸³ However, this interpretation of “witness” as limited to *trial witnesses* would, Justice Thomas conceded, conflict with the history of confrontation at common law which had long considered the defendant’s right to confront a range of out-of-court statements.⁸⁴

Justice Thomas’s most prescient observation was that the Court should consider the profound risk of creating a confrontation jurisprudence that requires judges to “[a]ttempt[] to draw a line between statements made in contemplation of legal proceedings and those not so made[, which] would entangle the courts in a multitude of difficulties.”⁸⁵ The United States (as *amicus curiae*) had argued “that the Confrontation Clause should apply *only* to those persons who provide in-court testimony or the functional equivalent, such as affidavits, depositions, or confessions that are made in contemplation of legal proceedings.”⁸⁶ Justice Thomas agreed, noting that “the Confrontation Clause is implicated by extrajudicial statements *only* insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”⁸⁷

III. *CRAWFORD V. WASHINGTON* AND A NEW CONFRONTATION RULE

“Among the biggest news in criminal procedure over the past few years—certainly the news with the largest impact on criminal trials in this country—has been the Supreme

81. *White*, 502 U.S. at 358 (Thomas, J., concurring in part).

82. *Id.* at 359.

83. *Id.*

84. *Id.* at 361-63.

85. *Id.* at 364.

86. *Id.* (emphasis added).

87. *Id.* at 365 (emphasis added).

Court's dramatic reinterpretation of the Confrontation Clause in *Crawford v. Washington*⁸⁸

It took the Supreme Court twelve more years to agree that Justices Thomas and Scalia were right about two things: (1) the centrality of the text and the history of the Confrontation Clause; and (2) the problem of tethering their constitutional jurisprudence to the federal and state evidence rules.

A. *The Crawford Decision*

In 2004, *Crawford v. Washington* resurrected the Confrontation Clause by cleanly severing its ties to “firmly rooted” hearsay exceptions and all other indicia of evidentiary reliability.⁸⁹ *Crawford* involved the admission of a tape-recorded, out-of-court statement obtained from the defendant's wife, Sylvia Crawford.⁹⁰ Sylvia Crawford's statement was made while she was a suspect/witness undergoing stationhouse custodial interrogation and after she had been given *Miranda* warnings.⁹¹ At trial, Sylvia Crawford invoked the state marital privilege and did not testify; her statement was admitted under the hearsay exception for statements against interest.⁹²

Justice Scalia, who wrote for a unanimous *Crawford* Court, emphasized that the Sixth Amendment guarantees the right to confrontation to all criminal defendants; yet for decades judges had routinely substituted their own ad hoc determinations of evidentiary reliability for the “crucible of cross-examination.”⁹³ This practice bore the full brunt of Justice Scalia's estimable ire. According to the *Crawford* Court, “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”⁹⁴ Thus, for the first time in decades, the Court ignored the rules of evidence and focused instead on the text and history of the Sixth Amendment.⁹⁵

88. David A. Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1636 (2009).

89. *Crawford v. Washington*, 541 U.S. 36, 40 (2004).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 61.

94. *Id.* at 62 (“The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”).

95. *Id.* at 63.

For its textualist analysis, *Crawford* borrowed heavily from Justice Thomas's concurring opinion in *White*, but with significant exceptions. In *White*, Justice Thomas had opined that "the critical phrase within the [Confrontation] Clause. . . . is 'witnesses against him.' . . . [Thus a]ny attempt at unraveling and understanding the relationship between the Clause and the hearsay rules must begin with an analysis of the meaning of that phrase."⁹⁶

Justice Scalia began his opinion for the *Crawford* Court with a similar approach that initially seemed designed to resolve the question of who serves as a "witness[] against" the accused.⁹⁷ The Court sought clarification on the relevant terminology from an 1828 edition of Webster's *American Dictionary of the English Language* which defined a "'witness[]' against the accused" as one who "'bear[s] testimony'" and defined "'testimony'" as "'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"⁹⁸ According to the *Crawford* Court, the Framers' reference to "witness" in the Confrontation Clause was not narrowly limited to witnesses who testify in court.⁹⁹ Nor could it properly be read as broad enough to encompass all out-of-court declarants. Instead, according to Justice Scalia, "witnesses" should be understood to include those who testify in courtrooms or by affidavit and those who bear testimony outside the courthouse by making "testimonial statements."¹⁰⁰ Four years later, this shift in focus—away from the *witness* and towards the *statement*—would be criticized by the *Melendez-Diaz* dissenters. In their view, it is a "fundamental mistake . . . to read the Confrontation Clause as referring to a kind of out-of-court statement—namely a testimonial statement—that must be excluded from evidence."¹⁰¹

Justice Scalia also examined the history of the Confrontation Clause. Following a lengthy disquisition of the treason trial of Sir Walter Raleigh along with other historical materials, the Court held that "the principal evil at which the confrontation clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* communications as evidence against the accused."¹⁰² Thus, the right to confrontation should be viewed as independent from the rules of

96. *White v. Illinois*, 502 U.S. 346, 359 (1992).

97. *Crawford*, 541 U.S. at 38.

98. *Id.* at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

99. *Id.*

100. *Id.*

101. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2550 (2009) (Kennedy, J., dissenting).

102. *Crawford*, 541 U.S. at 50.

evidence because “the Framers would not have allowed the admission of *testimonial statements* of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”¹⁰³ As Professor Robert Mosteller would observe shortly after *Crawford* was decided, “[t]he opinion in *Crawford* provides the Court’s (Justice Scalia’s) view of the historical purpose of the Confrontation Clause[] [and t]hese historical materials and the perspective adopted are obviously selective, but they are now the essential materials and the privileged perspective.”¹⁰⁴

After *Crawford*, federal and state criminal courts could no longer base their confrontation decisions on an assessment of evidentiary trustworthiness. Instead, judges would need new tools to distinguish “testimonial statements” from the infinite range of out-of-court statements from unavailable crime victims and witnesses that would inevitably be proffered by future state and federal prosecutors.

B. *The Advent of the “Testimonial Statement”*

Crawford replaced the *Ohio v. Roberts* reliability/evidence-based rule with the constitutional standard that the Confrontation Clause applies to all prosecution-sponsored “testimonial statements.” The act of identifying which statements qualify as testimonial would now be of great constitutional and practical import. Twelve years earlier, Justice Scalia had shared Justice Thomas’s view that “the Confrontation Clause is implicated by extrajudicial statements *only* insofar as they are contained in formalized testimonial materials, such affidavits, depositions, prior testimony or confessions.”¹⁰⁵ Formality was no longer determinative to Justice Scalia who was content to “leave for another day”¹⁰⁶ any definition of testimonial statements beyond the observation that, “[w]hatever 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.”¹⁰⁷

Crawford also contained dicta that (rather confusingly) identified, but did not endorse, three different alternative definitions of testimonial statements. The narrowest of the three definitions echoed Justice

103. *Id.* at 53-54 (emphasis added).

104. Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 514 (2005).

105. *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part) (emphasis added).

106. *Crawford*, 541 U.S. at 68.

107. *Id.*

Thomas's view that confrontation should be limited to statements "contained in formalized testimonial materials, such as affidavits, custodial examinations, prior testimony, or confessions."¹⁰⁸ The second and third definitions left more room for interpretation. The second definition (which had been offered by the *Crawford* petitioner) expanded "testimonial statements" to the functional equivalent of *ex parte* in-court testimony such as "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. . . ."¹⁰⁹ The third definition (which had been suggested in an amicus brief filed by the National Association of Criminal Defense Lawyers) defined as testimonial all statements "made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."¹¹⁰

The *Crawford* Court enumerated various types of "formalized testimonial materials" that invariably qualified as "testimonial statements" (i.e., prior testimony, depositions, and affidavits).¹¹¹ Oddly, Justice Scalia's list also included confessions, although clearly not all confessions are testimonial statements. In fact, the *Crawford* Court qualified its own reference to post-interrogation confessions noting that "we use 'interrogation' in its colloquial . . . sense" and because "one can imagine various definitions of 'interrogation' the Court need not select among them in this case [because] Sylvia's recorded statement, knowingly given in response to structured police questioning qualifies under any conceivable definition."¹¹² Here, the Court's emphasis on "structured police questioning" and a "recorded statement" suggests consonance with previous emphasis on the formality of the interrogation and resulting confession.¹¹³ However, as the Court would soon clarify, the third, broadest, and most ambiguous conceptualization of "testimonial statements" would soon become the new confrontation standard.

108. *Id.* at 52 (quoting *White*, 502 U.S. at 365).

109. *Id.* at 51 (quoting Brief of the Petitioner at 23, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)).

110. *Id.* at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae at 3, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)).

111. *Id.* at 51-52.

112. *Id.* at 53 n.4.

113. *White*, 502 U.S. at 365 (including "extrajudicial statements . . . contained in formalized testimonial materials, such affidavits, depositions, prior testimony, or confessions").

C. *Davis v. Washington: The Ongoing Emergency and Primary Purpose Criteria*

Davis v. Washington and its consolidated companion case *Hammon v. Indiana* were two domestic violence cases decided by the Court in 2006.¹¹⁴ In an opinion that closely tracks the facts of the two cases, the *Davis* Court found that statements made by an alleged victim to a police 911 operator *during* a domestic emergency were non-testimonial because they were made “under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency.”¹¹⁵ In contrast, a written and sworn battery affidavit prepared under the direction of the police following a secured-scene police interview *were* testimonial because they were made “when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions.”¹¹⁶

The *Davis* Court also found that “formality is indeed essential to testimonial utterance”¹¹⁷ and reiterated the *Crawford* Court’s conclusion that “[a]n accuser who makes a *formal* statement to government officers bears testimony in a sense that a person who makes a casual remark does not.”¹¹⁸ To emphasize this distinction, Justice Scalia compared Sylvia Crawford’s post-*Miranda* stationhouse custodial interrogation to Michelle McCottry’s mid-assault 911 call noting that “the difference in the level of formality [between the two interrogations] is striking.”¹¹⁹ According to the *Davis* Court, Sylvia Crawford “was responding calmly,

114. *Davis v. Washington*, 547 U.S. 813 (2006); *Hammon v. Indiana*, 546 U.S. 976 (2005).

115. *Davis*, 547 U.S. at 822.

116. *Id.*

117. *Id.* at 830 n.5.

118. *Id.* at 824 (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)). This conclusion is not undermined by the majority’s unpersuasive assertion that if the interrogation was “solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict the perpetrator)” the resulting victim/witness statement will be akin to a “solemn declaration or affirmation.” *Id.* (quoting *Crawford*, 541 U.S. at 51).

This dicta ignores the Court’s own detailed effort to distinguish Michelle McCottry’s informal 911 call where “she was not acting as a *witness*” from Sylvia Crawford’s formal stationhouse interview. *Id.* at 828 (emphasis in original). It is also effectively refuted by Justice Thomas, who argued that “[t]he possibility that an oral declaration of past fact to a police officer, if false, could result in legal consequences to the speaker may render honesty in casual conversations with police officers important. It does not, however, render those conversations solemn or formal in the ordinary meanings of those terms.” *Id.* at 838 n.3 (Thomas, J., concurring in part and dissenting in part).

119. *Id.* at 814.

at the station house, to a series of questions, with the officer interrogator taping and making notes of her answers”¹²⁰ while Michelle McCottry provided “frantic answers . . . over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.”¹²¹ Thus, as a constitutional matter Michelle McCottry “was not acting as a *witness*; she was not *testifying* . . . [and w]hat she said was not ‘a weaker substitute for live testimony’ at trial.”¹²²

Unlike *Crawford*, which had involved a suspect’s/witness’s structured and recorded post-*Miranda* stationhouse custodial interrogation, the *Davis* statements were taken from victims at the crime scene during or shortly after crimes of violence. Thus, *Davis* provided the Court with the opportunity to elaborate on the defining characteristics of a testimonial statement taken under common, if more complex, circumstances. However, Justice Scalia opted to forgo this opportunity with the (implausible) excuse that the Court cannot be expected to create “an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either a testimonial or non-testimonial”¹²³

D. Giles v. California: Forfeiture of the Right to Confrontation by Wrongdoing

In 2006, in *Giles v. California*,¹²⁴ the Supreme Court addressed the related question of forfeiture of confrontation by wrongdoing. During defendant’s murder trial, the prosecutor had introduced statements made by the victim (defendant’s former girlfriend) to the police during a domestic violence incident three weeks before the alleged murder.¹²⁵ On appeal, defendant argued that admission of the victim’s statements violated his right to confrontation under *Crawford*. The California Court of Appeals and the California Supreme Court both held that the defendant had forfeited his right to confront the victim by killing her.¹²⁶

When *Giles* reached the Supreme Court, Justice Scalia, once again writing for the majority, disagreed. According to the *Giles* Court, a defendant does not forfeit his right to confrontation by his own

120. *Id.* at 827.

121. *Id.*

122. *Id.* at 828 (quoting *United States v. Inadi*, 475 U.S. 387, 394 (1986)).

123. *Id.* at 822.

124. 554 U.S. 353 (2008).

125. *Id.* at 356-57.

126. See *People v. Giles*, 19 Cal. Rptr. 3d 843, 850 (2004); *People v. Giles*, 152 P.3d 433, 435 (Cal. 2007).

wrongdoing *unless* the prosecution can establish that the defendant intended through his actions to prevent the witness from testifying.¹²⁷ Any other intent will not suffice because, under the common law “the ‘wrong’ and ‘evil Practices’ to which . . . statements [defining forfeiture] referred was conduct *designed* to prevent a witness from testifying.”¹²⁸ Although the *Giles* Court acknowledged that “the absence of a forfeiture rule covering this sort of conduct would create an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them,”¹²⁹ it could not accept the “notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged [because that would be] akin . . . to ‘dispensing with jury trial because a defendant is obviously guilty.’”¹³⁰

Although *Giles* was focused on forfeiture, two members of the Court seized the opportunity to articulate their growing concerns about the trajectory of the confrontation doctrine. Justice Thomas’s concurring opinion reiterated his long-standing view “that statements like those made by the victim in this case do not implicate the Confrontation Clause” because “the police questioning was not ‘a formalized dialogue’ . . . because ‘the statements were neither *Mirandized* nor custodial, nor accompanied by any similar indicia of formality’”¹³¹ Similar concerns were expressed, for the first time, by Justice Alito who wrote a separate concurrence

to make clear that, like Justice Thomas, I am not convinced that the out-of-court statement at issue here fell within the Confrontation Clause in the first place [because] the Confrontation Clause does not apply to out-of-court statements unless it can be said that they are the equivalent of statements made at trial by ‘witnesses.’¹³²

E. Melendez-Diaz v. Massachusetts: Expert Witnesses and Testimonial Statements

Melendez-Diaz v. Massachusetts arose out of a Boston police investigation that resulted in the arrest of Luis Melendez-Diaz and the

127. *Giles*, 554 U.S. at 367-68; see FED. R. EVID. 804(b)(6).

128. *Giles*, 554 U.S. at 365 (emphasis in original).

129. *Id.*

130. *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 62 (2004)).

131. *Id.* at 377-78 (quoting *Davis v. Washington*, 547 U.S. 813, 840 (2006) (Thomas, J., concurring)).

132. *Id.* at 378 (Alito, J., concurring) (quoting U.S. CONST. amend. VI).

discovery of nineteen bags of white powder hidden in the back seat of a police patrol car.¹³³ The defendant was charged with distributing and trafficking in cocaine.¹³⁴ At his trial, the Commonwealth submitted three “certificates of analysis.”¹³⁵ These certificates reported the amount of white powder seized from the defendant and detailed how the powder had been “examined with the following results: The substance was found to contain: Cocaine.”¹³⁶ As required by state law, the three certificates had been sworn to before a notary public.¹³⁷ The Massachusetts statutory design was clear. Sworn and notarized certificates of analysis were intended to promote accurate crime laboratory analyses and to provide *prima facie* evidence of the composition, quality, and weight of the tested substance.¹³⁸ Thus, when certificates of analysis were offered at trial, prosecutors for the Commonwealth could, but need not, call the analyst to testify.

At trial, the defendant objected to admission of the certificates as a violation of his confrontation rights as construed by the Supreme Court in *Crawford*.¹³⁹ The defendant’s request was denied by the trial court and the decision to admit the certificates was affirmed by the Massachusetts Appellate Court.¹⁴⁰ The United States Supreme Court granted certiorari to resolve open questions about the impact of *Crawford* on defendant’s opportunity to cross-examine prosecutor’s *expert* witnesses.

In his June 2009 opinion for the Court in *Melendez-Diaz*, Justice Scalia wrote for an eclectic plurality that included Justices Stevens, Souter and Ginsburg. In the first few pages of the plurality opinion, Justice Scalia concluded that the lab certificates were testimonial statements because: (1) they were affidavits; (2) they were “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial;”¹⁴¹ and (3) because “we can safely assume that the analysts were

133. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530 (2009).

134. *Id.*

135. *Id.* at 2531.

136. *Id.*

137. *Id.*

138. *Id.* at 2532 (the “purpose of the affidavits was to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance”) (quoting MASS. GEN. LAWS, ch. 111, § 13).

139. *Id.* at 2531.

140. *Id.*

141. *Id.* at 2531 (citing *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004)).

aware of the affidavits' evidentiary purpose"¹⁴² The first rationale provides the only point of agreement with Justice Thomas whose concurrence was the essential fifth vote.¹⁴³

Justice Kennedy, who wrote for the four *Melendez-Diaz* dissenters (Chief Justice Roberts and Justices Alito and Breyer), argued that "witnesses against the accused" are limited to conventional/adversarial prosecution witnesses and cannot be extended to experts who have "witnessed nothing to give them personal knowledge of the defendant's guilt."¹⁴⁴ The length and tone of the dissent suggests that four members of the current Court have profound analytic and practical concerns about the Court's post-*Crawford* trajectory. In their view, this unwarranted expansion of the right to confront will "disrupt forensic investigations across the country and put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician, now invested by the Court's new constitutional designation as the analyst, simply does not or cannot appear."¹⁴⁵

On September 29, 2010, the United States Supreme Court granted certiorari in *Bullcoming v. New Mexico*¹⁴⁶ to address a question left open by *Melendez-Diaz*. In *Bullcoming*, the Court will decide whether trial testimony from a "surrogate" expert witness who did not prepare the defendant's certified blood alcohol report, but worked in the same lab and relied on the report for his own opinions, satisfied the Confrontation Clause.¹⁴⁷ *Bullcoming* will likely revive the *Melendez-Diaz* question of the nature and extent of expert witness confrontation.

IV. THE CURRENT CONFRONTATION STANDARD: THE PRECARIOUS CONSTITUTIONAL FRAMEWORK OF *MICHIGAN V. BRYANT*

A. *Facts and Legal History*

On the night of April 29, 2001, five Detroit police officers responded to a report of a shooting and found Anthony Covington lying

142. *Id.* at 2532.

143. *Id.* at 2543.

144. *Id.* (Kennedy, J., dissenting) (noting that the plurality "makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses—'witnesses' being the word the Framers used in the Confrontation Clause").

145. *Id.* at 2549 (Kennedy, J., dissenting).

146. 131 S. Ct. 62 (2010).

147. *Id.*

on the ground next to his car in a gas station driveway.¹⁴⁸ The police officers could see that Covington had been shot and could see blood on the front of his shirt.¹⁴⁹ The officers asked about his wound and assured him that an EMS unit had been dispatched.¹⁵⁰ When they asked him, “What happened?” he responded, “I’ve been shot.”¹⁵¹ The officers asked Covington who shot him, and he told them it was Rick.¹⁵² Covington also told them that Rick has shot him through the door of a nearby house and that after he was shot he had driven himself a few blocks to the gas station.¹⁵³ EMS arrived and transported Covington to the hospital where he died from his wounds several hours later.¹⁵⁴

Richard Perry Bryant was arrested in March 2002.¹⁵⁵ At Bryant’s homicide trial, Covington’s statements were admitted as excited utterance exceptions to the hearsay rule.¹⁵⁶ Although the victim’s statements were also arguably dying declarations, the prosecutor failed to raise this argument at trial. Bryant was convicted of second degree murder and possession of a firearm.¹⁵⁷

On direct appeal to the Michigan Court of Appeals, the defendant’s conviction was affirmed.¹⁵⁸ The appellate court found that the admission of Covington’s statement did not violate the Confrontation Clause because they were not testimonial statements under *Crawford*.¹⁵⁹ After *Davis* was decided in 2006, the United States Supreme Court remanded the case to the state court of appeals.¹⁶⁰ However, *Davis* apparently had no impact, because the appellate court again concluded that Covington’s statements were non-testimonial because they had been made “in the course of a police interrogation under circumstances objectively indicating that its primary purpose was to enable police assistance to meet an ongoing emergency.”¹⁶¹

148. Brief for Respondent at 1, *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (No. 09-150), 2010 WL 2481866.

149. *Id.* at 2.

150. *Id.*

151. *Id.*

152. *Id.* at 1.

153. *Id.*

154. *Id.* at 2.

155. *Id.* at 6.

156. *Id.* at 3.

157. *Id.* at 6.

158. *Id.*

159. *People v. Bryant*, No. 247039, 2004 WL 188266 (Mich. Ct. App. Aug. 24, 2004) (per curiam).

160. *People v. Bryant*, 756 N.W.2d 50 (Mich. 2008).

161. *People v. Bryant*, No. 247039, 2007 WL 675471, at *2 (Mich. Ct. App. Mar. 6, 2007).

On June 10, 2009, the Michigan Supreme Court reversed the court of appeals.¹⁶² Using the same constitutional standard which they defined as “whether the victim’s statements were made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police to meet an ‘ongoing emergency,’”¹⁶³ the state supreme court reached the opposite conclusion.¹⁶⁴

The three dissenting Michigan Supreme Court judges strongly disagreed that the facts revealed that Covington’s primary investigatory purpose was to provide information “to enable the police to identify, locate, and apprehend the perpetrator.”¹⁶⁵ In a very brief dissent, Judge Weaver explained that the evidence suggested that “the declarant’s statements were made in the course of a police interrogation under circumstances objectively indicating that the interrogation’s primary purpose was to enable police assistance in an ongoing emergency.”¹⁶⁶ Judge Corrigan, who was joined in his dissent by Judge Young, agreed with Judge Weaver, adding that Covington’s evidentiary intent was clearly to resolve an emergency created by a shooting by an unapprehended suspect.¹⁶⁷ Because most mid-investigation statements from crime victims/witnesses occur *after* the crime has occurred, the dissenters accused the majority of “assum[ing] too much when it concludes that there was no ongoing emergency because the shooting necessarily occurred 30 minutes earlier.”¹⁶⁸

The state court history of *Bryant* effectively demonstrates that judges asked to divine whether the primary purpose of an interrogation was to: (1) help the police resolve an emergency; or (2) to provide evidence for later use, can reach inconsistent and contradictory conclusions. In many cases both purposes are plausible, either purpose can be supported by the facts, and the two purposes are neither mutually exclusive nor logically inconsistent. It did not help, that throughout the state court appellate process, the judges consistently failed to clarify *whose* primary purpose should control the analysis or to address the

162. *People v. Bryant*, 768 N.W.2d 65 (Mich. 2009).

163. *Id.* at 70 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

164. *Id.* at 71.

165. *Id.*

166. *Id.* at 79 (Weaver, J., dissenting).

167. *Id.* at 80 (Corrigan, J., dissenting).

168. *Id.*

inevitable complications of ambiguous, shifting, or conflicting purposes.¹⁶⁹

B. Bryant and the Objective Primary Purpose of the Investigation Standard

1. The Parties Begin with a Similar Approach

In briefs filed with the United States Supreme Court in April 2010, the state of Michigan (petitioner) argued that, after *Davis* and under the Confrontation Clause, “[s]tatements are non-testimonial when made in the course of police investigations under circumstances objectively indicating that the *primary purpose of the interrogation* is to enable police assistance to meet an ongoing emergency.”¹⁷⁰ Bryant’s counsel (respondent) similarly suggested that the victim’s “out-of-court statements . . . met the *Crawford* and *Davis* tests for testimonial statements, as they were made with a *primary purpose* of providing evidence relevant to past criminal behavior.”¹⁷¹ The only distinction between the two arguments was that the respondent urged the Court to focus on the reasonable declarant’s primary purpose, while the petitioner advanced a more ambiguous “purpose of the investigation” standard.

2. Petitioner’s Early Attempt to Integrate Formality Concerns

The *Bryant* petitioner’s argument focused almost exclusively on the question of whether “an interrogation’s primary purpose is to help police handle an ongoing emergency”¹⁷² However, petitioner also urged the Court to consider its own *Davis* conclusion that “testimonial statements” under the Confrontation Clause must “necessarily include some sense of formality or solemnity”¹⁷³ Although, neither petitioner’s brief nor petitioner’s oral argument mentioned Justice Thomas’s concurrence in *White*, petitioner reminded the Court that *Crawford* had defined “‘testimony’ to typically include ‘a solemn declaration or affirmation made for the purpose of establishing or

169. Professor Richard D. Friedman has consistently argued that the perspective must be that of the reasonable declarant. *See, e.g.*, Brief of Richard D. Friedman, as Amicus Curiae in Support of Respondent, *supra* note 30, at 7.

170. Petitioner’s Brief on the Merits at 8, *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (No. 09-150), 2010 WL 1776430 (emphasis added).

171. Brief for Respondent, *supra* note 148, at 26 (emphasis added).

172. Petitioner’s Brief on the Merits, *supra* note 170, at 8.

173. Petitioner’s Brief on the Merits, *supra* note 170, at 6.

proving some fact.”¹⁷⁴ A more detailed and persuasive argument for formality as a critical criterion of confrontation was advanced by (then) Solicitor General Elena Kagan as amicus for petitioner.¹⁷⁵

3. Elaboration on the Formality Argument from Petitioner’s Amicus

Solicitor General Kagan actually made two related arguments. First, after *Crawford*, “testimonial” applies only “to those modern practices most closely related to the historical use of *ex parte* examinations as evidence against the accused.”¹⁷⁶ As the *Crawford* Court had explained, attention to the formality of the making of the statement makes sense because the Confrontation Clause is “especially acute[ly] concerned” with “[a]n accuser who make a *formal* statement to government officers [and thus] bears testimony”¹⁷⁷ This argument, which was adopted by the *Bryant* Court,¹⁷⁸ effectively linked formality to consideration of the more textually precise and historically accurate question of whether the declarant had acted as a “witness[] against the accused.” The Solicitor General’s second argument was a practical elaboration on how judges might make the determination of whether a victim/witness made a formal statement equivalent to trial testimony including: (1) whether “[t]he police officers had . . . control over the location of the interview;”¹⁷⁹ (2) whether the police controlled the duration of the interview or “had only a few minutes to ask questions before the paramedics arrived;”¹⁸⁰ and (3) whether the police had the “opportunity to structure their questions, . . . [or to] attempt to shape . . . [the victim’s] testimony for use in a future criminal trial.”¹⁸¹ According to Solicitor General Kagan, this inquiry would facilitate adherence to the Court’s post-*Crawford* doctrinal focus on “modern practices with the

174. Petitioner’s Brief on the Merits, *supra* note 170, at 7 (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

175. Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (No. 09-150), 2010 WL 1848212. Of course, it is relevant that Elena Kagan is now a member of the Court, despite the fact that one cannot assume that, in her new role Justice Kagan will maintain these same views.

176. *Id.* at 8.

177. *Id.* at 11 (quoting *Crawford*, 541 U.S. at 51).

178. See *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

179. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 175, at 17.

180. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 175, at 17.

181. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 175, at 17.

closest kinship to the abuses at which the Confrontation Clause was directed.”¹⁸²

4. Respondent Addresses the Formality Argument

The *Bryant* respondent also (accurately) anticipated that the Court would include formality as a component of its confrontation analysis, but hoped to prevent this from happening by persuading the Court that *all* statements to the police are formal. To support this argument, respondent asserted that “[t]his court held in *Davis* that statements made to investigating police officers are sufficiently solemn and formal for the purposes of the Confrontation Clause because witnesses should be aware that giving a false statement to the police is itself criminal.”¹⁸³ Even Justice Scalia, who so dislikes formality as a criterion of confrontation analysis that he remarked during *Bryant* oral argument, “[f]orget about formality, in other words . . . Formality or no formality has nothing to do with it,”¹⁸⁴ should find this assertion implausible. In fact, it has already been persuasively refuted by Justice Thomas, who argued in *Davis* that a declarant’s knowledge that a false statement to the police “could result in legal consequences to the speaker, . . . may render honesty in casual conversations with police officers important. It does not, however, render those conversations solemn or formal in the ordinary meanings of those terms.”¹⁸⁵

5. Elaboration on the Formality Argument from Respondent’s Amicus

Respondent’s amicus also anticipated the Court’s interest in testimonial formality. The National Association of Defense Lawyers (“NACDL”) argued (without support) that formality should have no independent role in the Court’s confrontation analysis. Thus, the Court should simply adopt the “general principle that statements should not be exempted for lack of formality where evidentiary purpose is otherwise shown.”¹⁸⁶ In the alternative, NACDL argued that *all* testimonial

182. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 175, at 11 (quoting *Crawford*, 541 U.S. at 68).

183. Brief for Respondent, *supra* note 148, at 21-22 (citing *Davis v. Washington*, 547 U.S. 813, 826-27 (2006)).

184. Transcript of Oral Argument, *supra* note 26, at 4.

185. *Davis*, 547 U.S. at 838 n.3 (Thomas, J., dissenting).

186. Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent at 14, *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (No. 09-150), 2010 WL 2569158.

statements are formal because they have the capacity to engender a formal result by “provid[ing] a basis for official action, the arrest of the suspected offender.”¹⁸⁷

Professor Richard D. Friedman, a leading authority on confrontation jurisprudence whose work and advocacy before the Court has helped shape recent developments in the field, filed an *amicus* brief in favor of respondent. Professor Friedman argued that the Court should *not* consider any facts and circumstances relating to formality of the act of serving as a witness because “it would stand logic on its head to treat a statement as non-testimonial, even though it was made in anticipation of prosecutorial use, on the ground that it was made informally. . . . [because t]he very point of the Confrontation Clause is to ensure that testimony is given under required formalities.”¹⁸⁸ This argument deserves some attention.

It is inarguable that informal mid-investigation statements to the police can do just as much inculpatory damage as formal statements. There are also many compelling reasons to prefer a more expansive interpretation of the Confrontation Clause including a desire for fair trials, concerns about leveling the playing field, or disappointment with judges’ ability to accurately or consistently operate the relevant standards and rules; but Professor Friedman is making a different point. He has argued that *because* the Confrontation Clause guarantees certain trial formalities (cross-examination), it is illogical to limit “witnesses against the accused” to the subset of out-of-court declarants who qualify as “witnesses” because they have made out-of-court statements under more formal circumstances (in affidavits or during structured police interrogation).¹⁸⁹ The logic of Professor Friedman’s argument depends on a false conflation of the two “formalities.” The guaranteed “trial formality” of live witness cross-examination (“the very point of the Confrontation Clause”) serves a range of vital defense interests. In contrast, a “definitional formality” that sets forth factors that distinguish witnessing from talking would serve the entirely different goal of limiting the potentially infinite range of out-of-court declarants to those who must be subject to confrontation.

Finally, Professor Friedman rejected possible pragmatic concerns arguing that a primary investigatory purpose standard is analogous to the

187. *Id.* at 16.

188. Brief of Richard D. Friedman, as Amicus Curiae in Support of Respondent, *supra* note 30, at 16.

189. Brief of Richard D. Friedman, as Amicus Curiae in Support of Respondent, *supra* note 30, at 16.

constitutional standards routinely used by judges to determine custody (under *Miranda*) or reasonable expectations of privacy and reasonable stops and seizures (under the Fourth Amendment).¹⁹⁰

This second argument is not compelling. These other constitutional inquiries are not analogous because (unlike the objective primary purpose of the interrogation) they each involve a binary choice between mutually exclusive alternatives. A suspect *either* believes she is in custody, or believes she is not in custody. A person *either* has a reasonable expectation of privacy, or she does not. The fundamental problem with a confrontation standard that requires judges to determine the primary purpose of the reasonable victim/witness and police officer mid-investigation is that in many cases it will be logical and consistent for the victim/witness and the police officer to believe that a statement could help to resolve an ongoing emergency now and later prove useful at trial.

V. THE POST-SCALIA FUTURE OF THE CONFRONTATION CLAUSE

A. *Insight from the Bryant Oral Arguments*

1. Nailing Down the Objective Primary Purpose of the Interrogation

On October 5, 2010, the Court heard oral argument in *Bryant*. It was clear from the start that the objective primary purpose of the interrogation standard is difficult, if not impossible, to operate. As an initial matter, the Justices thoroughly disagreed about whose primary purpose should control. Justice Scalia supported respondent's argument that "it's the purpose of the declarant, not of the questioner."¹⁹¹ In contrast, the Chief Justice opined that "the focus seems to be on the purpose of the interrogation, which seems to be the question of what the police thought, not what the—the person dying thought."¹⁹²

Justice Ginsburg added to the confusion by contributing her realistic concern regarding dual purposes (to resolve an emergency *and* to provide evidence) which might coexist not only in the same person, but even in the same question or statement. According to Justice Ginsburg, "it seems to me, here, if you want to know what happened,

190. See Brief of Richard D. Friedman, as Amicus Curiae in Support of Respondent, *supra* note 30, at 11.

191. Transcript of Oral Argument, *supra* note 26, at 6.

192. Transcript of Oral Argument, *supra* note 26, at 11.

you would ask the very same questions. . . . [because] the questions are relevant also to securing the situation. . . . [so] what different questions would you ask if you wanted to find out what happened?”¹⁹³ Justice Alito echoed Justice Ginsburg’s concern questioning both the logic and operability of the proposed primary purpose standard:

In a situation like this, do you think it’s meaningful to ask what the primary purpose of the victim was when he responded to the police and said who shot him?

You have a man who has just been shot. He has a wound that’s going to turn out to be fatal, and he’s lying there on the ground bleeding profusely, and he says: My primary purpose in saying this is so that they can respond to an ongoing emergency? No, but I also have the purpose of giving them information that could be used at trial, but it’s a little less—that’s a little bit less my purpose than responding to the ongoing emergency.¹⁹⁴

Finally, the Court considered the important question of whether the primary purpose of the interrogation must be evident from the statement itself or could be inferred from the relevant facts. On this point, Chief Justice Roberts disagreed with respondent’s counsel’s assertion that the ongoing emergency must be clear from the statement. Using a school shooting hypothetical, the Chief Justice posited that if the witness said “the principal did it. It’s 10:00 in the morning, you assume the principal is at the school and he says the principal did it. You can infer from the circumstances that he’s referring to an ongoing emergency.”¹⁹⁵

2. Reconsidering Evidentiary Reliability

Some members of the Court used the *Bryant* oral argument to raise dormant questions about evidentiary reliability. This line of inquiry began with a nod to *Crawford* as Justice Kennedy noted that “*Crawford* rejects reliability as a criteria [sic]”¹⁹⁶ and was followed by Justice Scalia’s more precise observation that “there is no basis for saying . . . the Confrontation Clause pertains *only* to reliability.”¹⁹⁷ However, Justice Sotomayor wondered whether the assumption that a police interrogation had been aimed at risk assessment means “we’re back to the reliability test, really, . . . [because i]t goes to the very essence of

193. Transcript of Oral Argument, *supra* note 26, at 5.

194. Transcript of Oral Argument, *supra* note 26, at 7-8.

195. Transcript of Oral Argument, *supra* note 26, at 57.

196. Transcript of Oral Argument, *supra* note 26, at 15.

197. Transcript of Oral Argument, *supra* note 26, at 42 (emphasis added).

reliability.”¹⁹⁸ Later on Justice Kennedy seemed to share Justice Sotomayor’s concern when he commented that if “there was an emergency and the police were asking questions in order to mitigate the emergency,”¹⁹⁹ under these circumstances the “police likely have less motive to manipulate the—the statements and to ask loaded questions[.] That in itself, it seems to me, is . . . reliabil[ity].”²⁰⁰ Towards the end of the oral argument, after a series of questions to respondent’s counsel regarding the type of questions police ask to resolve ongoing emergencies, Justice Kennedy concluded: “Isn’t there a reliability component that underlies this whether we like it or not?”²⁰¹

3. Are all Statements about Past Events Testimonial?

The most significant and comical disagreements arose when the justices attempted to draw lines between testimonial and non-testimonial statements based on whether the statements related to past events. Justice Scalia began with the preposterous assertion that during ongoing emergencies people simply do not ask or speak about past events. According to Justice Scalia, “if it was an emergency, he [the police officer] wouldn’t have asked, What happened? He would ask, What is happening? [Because t]o ask what happened is to ask the declarant to describe past events, which is testimonial.”²⁰² Justice Alito was clearly not convinced and he sought clarification from respondent asking: “Is—can there be an ongoing emergency where the statement relates—where the statement recounts something that has occurred, not something that is occurring?”²⁰³ Respondent replied that “if the witness only gives a statement that relates to past, completed events, then it’s not a showing of—of an ongoing emergency.”²⁰⁴ At this point, the Chief Justice intervened to remind everyone that, of course, a statement could relate “something that happened in the past, he shot me, . . . [and] at the same time demonstrate[] an ongoing emergency because he’s right there and he might shoot you.”²⁰⁵

4. Operating the Objective Primary Purpose of the Investigation

198. Transcript of Oral Argument, *supra* note 26, at 15.

199. Transcript of Oral Argument, *supra* note 26, at 26.

200. Transcript of Oral Argument, *supra* note 26, at 27.

201. Transcript of Oral Argument, *supra* note 26, at 38.

202. Transcript of Oral Argument, *supra* note 26, at 13.

203. Transcript of Oral Argument, *supra* note 26, at 44.

204. Transcript of Oral Argument, *supra* note 26, at 44.

205. Transcript of Oral Argument, *supra* note 26, at 45.

Standard

Justice Thomas, as is his wont, did not participate in the *Bryant* oral argument. However, the spectacle of his colleagues' confusion confirmed the accuracy of his five-year-old *Davis* prediction that

[i]n many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence. Assigning one of these two “largely unverifiable motives,” primacy requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible. It will inevitably be, quite simply, an exercise in fiction.²⁰⁶

These increasingly obvious operational problems may have precipitated Justice Breyer's concern that the Court had gone too far. During oral argument, Justice Breyer (who had joined both the *Crawford* and *Davis* majorities) now sought a principled way to distinguish the following scenarios:

[p]eople going into a room and saying, “now write out your testimony,” and they write it out in the form of an affidavit, or they send in a letter, and they say “bye,” and then they walk next door to the trial and introduce it. I mean, that's Walter Raleigh, in my mind.

And on the other side of the line, is an evidentiary rules [sic] that are basically in State cases run by the State. And they sometimes let hearsay in, and they sometimes don't, and they make reliability et cetera judgments in developing their—their decision as to how hearsay exceptions will work.²⁰⁷

In Justice Breyer's view, if statements like Anthony Covington's required confrontation, the Court would be endowing the Confrontation Clause with the power to swallow a range of federal and state “exceptions to hearsay testimony, which have been well-established in the United States for 200 years.”²⁰⁸

206. *Davis v. Washington*, 547 U.S. 813, 839 (2006) (Thomas, J., concurring in part and dissenting in part).

207. Transcript of Oral Argument, *supra* note 26, at 47-48.

208. Transcript of Oral Argument, *supra* note 26, at 50.

B. Insight from the Court's Decision in Bryant

Although Justice Scalia called *Bryant* “an absurdly easy case,”²⁰⁹ the confused oral argument presaged an opinion that, as discussed above, ricochets among a range of possible confrontation criteria including:

1. “[T]he statements and actions of both the declarant and interrogators.”²¹⁰
2. Whether the ongoing emergency posed a threat to the public at large.²¹¹
3. The “*informality* in an encounter between a victim and police.”²¹²
4. “The parties’ *perception* that an emergency is ongoing.”²¹³
5. Whether “the cause of the shooting was a purely private dispute.”²¹⁴
6. Whether the assailant used a gun.²¹⁵
7. Whether, at the time of the interrogation, the police knew the location of the assailant.²¹⁶
8. Whether the police asked the “type of questions necessary to allow the police to ‘assess the situation, the threat to their own safety, and possible danger to the potential victim’ and to the public”²¹⁷

Justice Sotomayor makes little effort to prioritize these factors or to explain to the lower courts how conflicts should be resolved. To cite just a few likely areas of ongoing confusion: (1) Should the parties’ (or even the reasonable parties’) perception of an ongoing emergency control, if the facts indicate that the emergency has been resolved?; (2) What factors should courts use to determine the formality of a mid-investigation encounter between the police and a victim/witness?; (3) Does the use of a gun always create a non-private dispute and/or a threat

209. *Michigan v. Bryant*, 131 S. Ct. 1143, 1170 (2011) (Scalia, J., dissenting).

210. *Id.* at 1148.

211. *Id.* at 1156.

212. *Id.* at 1160 (emphasis in original).

213. *Id.* at 1162 (emphasis added).

214. *Id.* at 1163.

215. *Id.* at 1164.

216. *Id.* at 1163.

217. *Id.* at 1166 (quoting *Davis v. Washington*, 547 U.S. 813, 832 (2006)).

to the public at large?; or (4) If the police do not know the location of the suspect, when is the emergency no longer ongoing?

In fact, the threshold question of *whose* objective primary purpose controls, which was front and center in both the *Bryant* briefs and oral argument, has not even been resolved. In his dissent, Justice Scalia posited that “[t]he declarant’s intent is what counts.”²¹⁸ However, in her decision for the majority, Justice Sotomayor concluded that “*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator.”²¹⁹ In the view of the *Bryant* majority, a “combined inquiry” will “ameliorate[] problems that could arise from looking solely to one participant.”²²⁰ This is unlikely given the inevitable complexities of real life crime scenes along with the increase in shifting, dual, and conflicting purposes among victims, witnesses, and police officers. As Justice Scalia observed, “[s]orting out the primary purpose of a declarant with mixed motives is sometimes difficult. But adding in the mixed motives of the police only compounds the problem.”²²¹

It is worth noting that *Bryant*’s dual purpose standard is not supported by the relevant case law. In fact, Justice Sotomayor specifically rejected clear language from *Davis* identifying “the declarant’s statements, not the interrogator’s questions [as the statement] that the Confrontation Clause requires us to evaluate.”²²² According to the *Bryant* majority, the *Davis* Court did not mean (what it said) that the primary purpose of the victim/witness should control, but was instead “merely acknowledg[ing] that the Confrontation Clause is not implicated when statements are offered ‘for purposes other than establishing the truth of the matter asserted.’”²²³

218. *Id.* at 1168 (Scalia, J., dissenting).

219. *Id.* at 1160.

220. *Id.* at 1161.

221. *Id.* at 1170 (Scalia, J., dissenting). On this point, Justice Scalia argues with undeniable logic that:

The Court claims one affirmative virtue for its focus on the purposes of both the declarant and the police: It “ameliorates problems that . . . arise” when declarants have “mixed motives.” I am at a loss to know how. . . . Now courts will have to sort through two sets of mixed motives to determine the primary purpose of an interrogation. And the Court’s solution creates a mixed-motive problem where (under the proper theory) it does not exist—viz., where the police and the declarant each have one motive, but those motives conflict. The Court does not provide an answer to this glaringly obvious problem, probably because it does not have one.

Id. (Scalia, J., dissenting) (internal citations omitted).

222. *Id.* at 1161 n.11 (quoting *Davis v. Washington*, 547 U.S. 813, 822-23 & n.1 (2006)).

223. *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004)).

Justice Sotomayor's interpretation ignores the fact that the quoted language from *Davis* appears, not within a discussion of hearsay as she has implied, but as support and elaboration for the Court's holding that statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."²²⁴ Even more problematic is the *Bryant* majority's selective omission of relevant introductory language. When the sentence is quoted in full, it becomes obvious that the *Davis* Court was not discussing hearsay, but was instead explaining that "[a]nd of course even when interrogation exists, it is in the final analysis the declarant's statement, not the interrogator's questions that the Confrontation Clause requires us to evaluate."²²⁵ The *Davis* Court clearly intended that the declarant's statement and her intent when she made the statement provide the focus for the analysis.

Finally, the *Bryant* Court further obfuscates the confrontation inquiry by reviving reliability concerns in two ways. First, the Court reads into *Davis* the "implicit . . . idea that because the process of fabrication in statements given for the primary purpose of resolving an ongoing emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination."²²⁶ Thus, for the first time since *Crawford*, the Court has suggested that confrontation is not required, in part, because there was no time for a reasonable victim/witness to fabricate her statement. Second, the Court finds that "some out-of-court statements—where the objective primary purpose of the investigation was *not* to resolve an ongoing emergency—do not raise confrontation concerns"²²⁷ and that for these statements, when "making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."²²⁸ Unless the majority is making a vague reference to all non-testimonial statements, this dictum suggests an undefined class of mid-investigation out-of-court victim/witness statements not made to resolve a *Davis/Bryant* "ongoing emergency," but not subject to confrontation.

224. *Davis*, 547 U.S. at 822.

225. *Id.* at 822 n.1 (emphasis added).

226. *Bryant*, 131 S. Ct. at 1157.

227. *Id.* at 1155 ("But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.") (emphasis in original).

228. *Id.* at 1155.

C. *Toward a New Confrontation Jurisprudence*

It is clear that numerous important confrontation questions have not been resolved. With Justice Scalia's leadership waning, the Chief Justice and Justices Kennedy, Breyer and Alito are likely to gain traction to reframe the confrontation inquiry in the near future. Their *Melendez-Diaz* dissent lays the foundation for a revised approach focused on the question of whether the out-of-court declarant was a "witness[] against the accused."²²⁹ To the extent that this determination includes greater consideration of the formality of the circumstances of "witnessing," these Justices will gain purchase with Justice Thomas.

There is also significant textual and doctrinal support for reframing the confrontation standard to focus on the distinction between "witnessing" and speaking. Obviously, the text of the Sixth Amendment refers only to "witnesses." As the *Crawford* Court explicitly recognized, not all declarants whose statements are proffered by the prosecution at trial are witnesses because "not all hearsay implicates the Sixth Amendment's core concerns."²³⁰ Confrontation is principally guaranteed for those who serve as witnesses by making "*formal* statement[s] to government officers"²³¹ because, for example, a "recorded statement knowingly given in response to structured police questioning qualifies [for confrontation] *under any conceivable definition*."²³² Moreover, "[a]n accuser who makes a *formal* statement to government officers"²³³ is a witness because she "bears testimony in a sense that a person who makes a casual remark does not."²³⁴ Similarly, in *Davis* when the victim made statements to the police during her mid-assault 911 call she "was not acting as a *witness*; she was not testifying. . . . [and w]hat she said was not a 'weaker substitute for live testimony' at trial"²³⁵ Finally, the *Bryant* Court found that "the most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a *formal*, out-of-court interrogation of a witness to obtain evidence for trial."²³⁶

229. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Kennedy, J., dissenting) (quoting *Dowdell v. United States*, 221 U.S. 325, 330 (1911)).

230. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

231. *Id.* (emphasis added).

232. *Id.* at 53 n.4 (emphasis added).

233. *Davis v. Washington*, 547 U.S. 813, 824 (2006) (quoting *Crawford*, 547 U.S. at 51).

234. *Id.* (quoting *Crawford*, 547 U.S. at 51).

235. *Id.* at 828 (quoting *United States v. Inadi*, 475 U.S. 387, 394 (1986)).

236. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) (emphasis added).

Further analytic support for a confrontation inquiry focused on the act of witnessing can be found in the seminal work of Professor Akhil Reed Amar. Indeed, Professor Amar had long argued that “the obvious solution” to understanding what the Framers meant when they wrote the Confrontation Clause “is to heed the word ‘witness[]’ and its ordinary everyday meaning.”²³⁷ Professor Amar’s interpretation of the Confrontation Clause (which was cited by the *Crawford* Court)²³⁸ is based on the sensible assumption that “[a] Constitution that speaks in the name of the people and that draws its legitimacy from ratification by the people—ordinary citizens—should be presumed to use words in their ordinary sense”²³⁹ Thus, to borrow his persuasive yet simple example, “[i]f I tell my mom what I saw yesterday, and she later testifies in court, I am not the witness; she is.”²⁴⁰

These arguments are consistent with Professor Amar’s “intratextualist” interpretation of constitutional text which reads “a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or very similar word) or phrase.”²⁴¹ Thus, the definition of “witness” in the Confrontation Clause must be consistent with the three other constitutional clauses that use the word “witness,”²⁴² the Treason Clause,²⁴³ the Fifth Amendment Self-Incrimination Clause,²⁴⁴ and the Compulsory Process Clause.²⁴⁵ Using both the “ordinary everyday meaning” and the intertextualist approaches, Professor Amar has repeatedly concluded that the Confrontation Clause “encompasses only those ‘witnesses’ who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like.”²⁴⁶

Finally, by focusing on the witness, rather than the testimonial nature of a statement, courts are likely to make more reliable and consistent confrontation decisions. Although constitutional determinations inevitably involve ambiguity and uncertainty, we must

237. Akhil R. Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 647 (1996).

238. *Crawford*, 541 U.S. at 61.

239. Akhil R. Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1048 (1998).

240. Amar, *supra* note 237, at 647.

241. Akhil R. Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

242. Amar, *supra* note 237.

243. U.S. CONST. art. III, § 3, cl. 1.

244. U.S. CONST. amend. V.

245. U.S. CONST. amend. VI.

246. Amar, *supra* note 239, at 1045.

start from the analysis proposed in *Bryant* which would force the federal and state criminal courts to evaluate: (1) “the statements and actions of both the declarant and interrogators;”²⁴⁷ (2) whether the ongoing emergency posed a threat to the public at large;²⁴⁸ (3) the “*informality* in an encounter between a victim and police;”²⁴⁹ (4) “[t]he parties’ *perception* that an emergency is ongoing;”²⁵⁰ (5) whether “the cause of the shooting was a purely private dispute;”²⁵¹ (6) whether the suspect used a gun;²⁵² (7) whether, at the time of the interrogation, the police knew the location of the suspect,²⁵³ and (8) whether the police asked the “type of questions necessary to allow the police to ‘assess the situation, the threat to their own safety, and possible danger to the potential victim’ and to the public”²⁵⁴

It will not always be easy to determine which out-of-court declarants have acted as “witnesses against the accused.” However, to the extent that assessing the act of “witnessing” shifts attention away from a multifactor guessing game on the objective primary purpose of the interrogation and towards more readily ascertainable external circumstances (e.g., efforts by the police to shape or control the victim’s/witness’s statement and/or facts that would indicate to a reasonable victim/witness that her statement implicating the suspect could have a trial purpose), this would enhance the legitimacy and consistency of future confrontation decisions.

D. *A Two-Pronged Confrontation Standard*

Although *Bryant* hints of a possible return to the bad old pre-*Crawford* days when confrontation decisions were based on evidentiary reliability, a full retreat to this approach seems unlikely.²⁵⁵ In the future, the Court may build a variety of confrontation structures on its *Crawford/Davis/Bryant* foundation. For example, the Court could adopt a rebuttable two-pronged confrontation standard that might hew more

247. *Michigan v. Bryant*, 131 S. Ct. 1143, 1148 (2011).

248. *Id.* at 1156.

249. *Id.* at 1160 (emphasis in original).

250. *Id.* at 1162 (emphasis added).

251. *Id.* at 1163.

252. *Id.* at 1164.

253. *Id.* at 1163.

254. *Id.* at 1166 (quoting *Davis v. Washington*, 547 U.S. 813, 832 (2006)).

255. *Id.* at 1155 (“In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”).

closely to the relevant text, clarify the process, and yet remain consistent with the post-*Crawford* doctrine.

This approach would guarantee defendants the opportunity to confront all out-of-court “witness against the accused” whose status as a “witness” was established by the defense either:

- (1) by ascertainable facts and circumstances demonstrating that the making of the statement was the functional equivalent of providing trial testimony; or in the alternative
- (2) by ascertainable facts and circumstances demonstrating that the making of the statement was the functional equivalent of providing testimony because the police and/or the crime victim/witness understood and intended, or should have understood and intended, that the victim/witness was making a record that could be used to prosecute the defendant.

Analysis of the facts under the first prong would be fairly straightforward and should result in more predictable and consistent judicial decisions. For example, the first prong could be satisfied: (1) under all of the specific circumstances described in *Crawford*, (i.e., “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations”²⁵⁶); (2) with Professor Amar’s list of “affidavits, depositions, videotapes, and the like,”²⁵⁷ or (3) if, as (then) Solicitor General Kagan suggested in her *Bryant* brief, with evidence of police control over the location, duration, and structure of the victim/witness interview or evidence of any attempt by the police to shape the statement for use in a future criminal trial.²⁵⁸

If the defendant lacked evidence to satisfy the first prong, confrontation would be guaranteed *only* if the defense proffered relevant and reliable evidence that the police or the victim/witness understood and intended (or that a reasonable police officer or victim/witness in the same circumstances would have understood and intended) that the statement provided by the victim/witness could be used as inculpatory evidence by the prosecutor at trial.

256. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

257. Amar, *supra* note 239, at 1045.

258. See Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 175, at 17.

Like the current *Crawford/Davis/Bryant* inquiry, this two-pronged analysis would require the Court to carefully consider dynamic mid-investigation facts and circumstances. However, the inquiry would be cabined by the Court's focus on evidence indicating that the out-of-court declarant was effectively serving as a witness. In this context, formality that does not rise to the level required by the first prong (along with any of the seven other *Bryant* factors) would be considered *only* if this evidence shed light on the question of whether the crime victim/witness understood and intended, or should have understood and intended, that she was making a record that could be used to prosecute the defendant.

This two-pronged approach is just one possible first step towards a more consistent analytic process focused on the fundamental objective of barring prosecutors from using *ex parte* testimony against the accused. In many cases, this approach would yield results consistent with the recent confrontation doctrine. For example, Sylvia Crawford's written and *Mirandized* stationhouse statement, Amy Hammon's sworn "battery affidavit," and the Commonwealth of Massachusetts' "certificates of analysis" would all satisfy both prongs. Michelle McCottry's mid-assault 911 call would not satisfy either prong. Finally, Anthony Covington's identification of the defendant would clearly not satisfy prong one and, given the limited police opportunity to develop, structure, or control the victim's statement, under these circumstances neither Mr. Covington, nor a reasonable victim, would have understood and intended that by identifying his unapprehended assailant, he was making a record that would be used at trial. However, as discussed below, there are both legal and social costs to this approach.

VI. CONCLUSION

With the recent decision in *Bryant*, Justice Scalia has lost control of the Court's confrontation jurisprudence. However, his rancorous view that *Bryant* is an "opinion [that] distorts our Confrontation Clause jurisprudence and leaves it in a shambles,"²⁵⁹ may prove prescient. He may also be correct that *Bryant* will "create[] an expansive exception to the Confrontation Clause for violent crimes"²⁶⁰ that will be exploited by future police and prosecutors. As new cases arise, criminal courts will need to adapt to avoid fulfilling Justice Scalia's prediction that pre-*Crawford* "reliability . . . [will return] to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are

259. *Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting).

260. *Id.* at 1173.

concerned.” This can and should be avoided, and some of the *Bryant* “uncertainty . . . for law enforcement and the lower courts”²⁶¹ corrected.

However, this Article concludes with an honest acknowledgment that any effort to narrow the confrontation focus to enhance analytic and operational consistency could have significant legal and social costs.

The first legal cost (which I raise here, but will elaborate on in future work) is to defense challenges under *Bruton v. United States*.²⁶² In *Bruton*, the Supreme Court interpreted the Confrontation Clause to bar the admission of a codefendant's confession implicating the other defendant at a joint trial. Prior to *Bruton*, federal and state criminal courts had generally assumed that confessions by one defendant that implicated a codefendant (i.e., an interlocking confession) could be admitted without violating the Confrontation Clause *if* the judge instructed the jury that the confession was admissible only against the confessing codefendant.²⁶³ The *Bruton* Court recognized the naivety of this solution: “[t]he fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors.”²⁶⁴ After *Bruton*, federal and state prosecutors can only admit a non-testifying codefendant's interlocking confession, if it has been effectively redacted or if the defendants trial are severed and the confession is introduced only against the defendant who made it. Over the past forty years, the Court has further distinguished confessions that explicitly and directly incriminated co-defendants from those that incriminated co-defendants *only* inferentially when combined with other evidence.²⁶⁵ The Court has also clarified that the Confrontation Clause is violated even when the defendant's own confession (reciting

261. *Id.* at 1174.

262. 391 U.S. 123 (1968).

263. *See, e.g.*, *Delli Paoli v. United States*, 352 U.S. 232, 238 (1957) (holding that it is possible for jurors to follow jury instructions to disregard inculpatory references to a non-confessing co-defendant).

264. *Bruton*, 391 U.S. at 129. The *Bruton* Court clarified the scope of their decision noting that “in many cases the jury can and will follow the trial judge's instructions to disregard such information. . . . [however,] there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” *Id.* at 135.

265. In *Richardson v. Marsh*, the Court found that when a confession “was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony)[.]. . . it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence.” 481 U.S. 200, 208 (1987). *See also* *United States v. Spagnola*, 632 F.3d 981, 988 (7th Cir. 2011) (“A *Bruton* violation occurs only if the confession of a non-testifying co-defendant facially incriminates the non-confessing co-defendant.”).

essentially the same information) was introduced at trial²⁶⁶ or if the nontestifying codefendant's confession was ineffectively redacted.²⁶⁷

However, over the past seven years, federal and state criminal courts have increasingly found that it is now "necessary to view *Bruton* through the lens of *Crawford* and *Davis*."²⁶⁸ To the extent that a clarification of the confrontation standard is used to limit its scope, defendants will be increasingly barred from raising *Bruton* challenges to inculpatory (but non-testimonial) out-of-court statements made by nontestifying codefendants whenever this evidence survives hearsay challenges (e.g., statements against interest, coconspirator statements).²⁶⁹

A second legal predictable cost is that law enforcement could respond with new strategies and practices designed to prevent the formalization (and thus enhance the admissibility) of crime victim/witness statements.²⁷⁰ Presumably blatant police efforts to evade confrontation would not be tolerated. As the *Davis* Court noted, it would not be acceptable if "the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the

266. See *Cruz v. New York*, 481 U.S. 186, 193 (1987) ("We hold, where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him.").

267. See *Gray v. Maryland*, 523 U.S. 185, 193 (1998) ("Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that, in our view, the law must require the same result."). See also *United States v. West*, No. 08 CR 669, 2011 WL 1313706 (N.D. Ill. Mar. 10, 2011) (finding that a court "can and should consider the surrounding circumstances in determining whether the redacted statement impermissibly identifies a non-testifying co-defendant").

268. *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010). See also *United States v. Dale*, 614 F.3d 942 (8th Cir. 2010) (holding that after *Crawford* the admission of a nontestifying codefendant's interlocking confession recorded by a jail house informant did not violate the defendant's right to confrontation because it was non-testimonial); *United States v. Johnson*, 581 F.3d 320, 326 (6th Cir. 2009) ("the *Bruton* rule, like the confrontation clause itself, does not apply to non-testimonial statements"); *People v. Arceo*, 195 Cal. App. 4th 556 (2011) (same). But see *United States v. Williams*, No. 1:09cr414 (JCC), 2010 WL 3909480 (E.D. Va. Sept. 23, 2010) (rejecting the argument that, after *Crawford*, *Bruton* should be limited to testimonial statements).

269. See, e.g., *United States v. Dale*, 614 F.3d 942 (8th Cir. 2010) (holding that after *Crawford* the admission of a nontestifying co-defendant's interlocking confession recorded by a jail house informant did not violate the defendant's right to confrontation).

270. Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763, 811 (2000) (noting that "to distinguish between statements made in formalized testimonial setting versus informal investigative setting, as Justice Thomas proposes . . . may encourage police and prosecutors shift the emphasis of their investigation in more informal settings so as to avoid confrontation clause problems").

unsworn testimony of the declarant, instead of having the declarant sign a deposition.”²⁷¹ Law enforcement agents would also be forced to weigh the confrontation implications of formalization against a range of competing investigatory and evidentiary benefits and concerns (e.g., preserving evidence, obtaining sworn statements). However, any shift in police practices that enables police to insulate victims/witnesses who provide inculpatory evidence from cross-examination would undermine what Professor Andrew Taslitz has identified as “the primary, although not necessarily sole, purpose of the Confrontation Clause [which] is preventing governmental misconduct in the creation of evidence.”²⁷²

A social cost, which would transcend state and federal law enforcement, is the resulting diminished reliability of a wide range of federal, state and local public records. The paradox of formality is that under normal circumstances we require that certain statements be formalized (e.g., affidavits, sworn statements, depositions) to ensure their accuracy and reliability. For example, in *Melendez-Diaz*, state law required that each of the three certificates of analysis be sworn to before a notary public.²⁷³ The Massachusetts statute was designed to serve *two* purposes: (1) to help ensure the accuracy of state forensic laboratory analyses; and (2) to provide *prima facie* evidence of the composition, quality, and weight of the tested substance that could be admitted in lieu of live testimony.²⁷⁴ By requiring analyst confrontation, the *Melendez-Diaz* Court focused solely on the second goal. However, over the past few years *Melendez-Diaz* has been applied to an increasingly broad range of government records formalized via affidavits, notarization, certification or other processes.²⁷⁵ This creates powerful incentives for a

271. *Davis v. Washington*, 547 U.S. 813, 826 (2006) (emphasis in original).

272. Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process after Crawford v. Washington*, 20 CRIM. JUST. MAG. 39 (2005) (citing the pre-*Crawford* work of Margaret Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992); Dickinson, *supra* note 270, at 803-07; Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1246-52 (2002)), available at http://www.americanbar.org/publications/criminal_justice_magazine_home/crimjust_cjmag_20_2_taslitz.html.

273. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009).

274. *Id.* at 2532 (providing that the “purpose of the affidavits was to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance” (quoting MASS. GEN. LAWS, ch. 111, § 13)).

275. Stephen N. Yermish, *Melendez-Diaz and the Application of Crawford in the Lab*, THE CHAMPION, Aug. 29, 2009, at 28, 32 (“The decision in *Melendez-Diaz* has the potential to impact a host of criminal cases beyond the drug possession case to which it was specifically directed.”) available at

wide range of government agencies to reduce or eliminate formalization requirements, which presumably will diminish the accuracy of public records and make it more difficult to penalize fraud and negligence.

No confrontation solution is perfect. When Justice Scalia wrote for a unanimous Court in *Crawford*, his purported goal was to replace the “*inherently*, and therefore *permanently* unpredictable”²⁷⁶ rules of evidence with a new confrontation inquiry that would better reflect the constitutional text, the framer’s intent, legal history, and core fair trial principles. However, Justice Scalia’s valiant seven-year effort to prevent the admission of “statements that do consist of *ex parte* testimony upon a mere finding of reliability”²⁷⁷ is increasingly threatened by the Court’s own confusing and ambiguous doctrine. The *Crawford* Court was clearly correct that a defendant’s right to confront must trump federal and state evidence rules under many circumstances. But the fair administration of justice demands that confrontation have a sensible meaning and consistent effect so that these interests will be protected in future criminal trials.

<http://www.nacdl.org/public.nsf/01c1e7698280d20385256d0b00789923/ed3658d5274f862d85257643005f5780?OpenDocument>.

276. *Crawford v. Washington*, 541 U.S. 36, 68 n.10 (2004) (emphasis in original).

277. *Id.* at 60 (emphasis in original).