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Michigan v. Bryant: Originalism Confronts Pragmatism

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MICHIGAN V. BRYANT: ORIGINALISM CONFRONTS PRAGMATISM

INTRODUCTION

The Confrontation Clause of the Sixth Amendment guarantees those accused of crimes the right to confront the witnesses against them.[1] The scope of that right, however, is still being calibrated. In fact, the Supreme Court's interpretation of the Confrontation Clause has undergone major revisions in recent decades, evolving from the "reliability" standard of *Ohio v. Roberts*[2] to the more rigid "testimonial" rule of *Crawford v. Washington*.[3] Recently, in *Michigan v. Bryant*,[4] the Supreme Court refined the analysis used to determine what constitutes testimony and thereby implicates the Confrontation Clause.[5] The application of this new analysis will inevitably affect the operation of the Confrontation Clause,[6] and the balance between the rights of victims and the rights of the accused in criminal law.

Part I of this Comment provides an overview of modern Confrontation Clause jurisprudence, with an emphasis on the watershed holding in *Crawford*. Part II summarizes the facts, holding, and reasoning of the majority opinion in *Bryant*, along with the reasoning of the concurring opinion and dissenting opinions. Part III explores the contours of the primary purpose analysis and the ongoing emergency exception articulated in *Bryant*, and argues that the combined effect narrows the scope of the Confrontation Clause while expanding judicial discretion. This Comment concludes that despite powerful pragmatic arguments for this shift away from emphasizing the rights of the accused, the *Bryant* decision ultimately subverts the aims of the Confrontation Clause. Lastly, this Comment proposes changes to narrow and define the ongoing emergency exception, and alterations to the primary purpose analysis to promote simplicity and objectivity in confrontation jurisprudence as it continues to evolve.

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1. U.S. CONST. amend. VI.
2. 448 U.S. 56, 66 (1980).
3. 541 U.S. 36, 51–53 (2004); *see* Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411, 1455–56 (2010) (describing the *Crawford* approach as a "wooden, categorical system").
4. 131 S. Ct. 1143 (2011).
5. *Id.* at 1157–63.
6. *See id.* at 1176 (Scalia, J., dissenting).

I. BACKGROUND

A. *Confrontation Clause Jurisprudence Before* Crawford

The Confrontation Clause of the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[7] This right applies to federal courts and to the states through the Due Process Clause of the Fourteenth Amendment.[8] The twin aims of the right to confrontation are (1) to provide the jury an opportunity to evaluate the trustworthiness of a witness's testimony and (2) to provide the accused a chance to cross-examine and test the recollection and conscience of a witness.[9] Infamous treason trials in England and the admiralty courts in the colonies spurred the Clause's inclusion in the Constitution.[10] The Framers' purpose was to target state manipulation and abuses against defendants in criminal trials; "thus, 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."[11]

The Confrontation Clause seemed inextricably interwoven with the hearsay rule for most of its history.[12] The two concepts were nearly merged in Justice Blackmun's analysis in *Ohio v. Roberts*,[13] which ushered in a quarter-century of confrontation jurisprudence that turned on the question of the reliability of the proffered hearsay evidence.[14] The language of the Confrontation Clause—"confronted with the witnesses against him" [15]—seems to demand one of two extreme interpretations, as articulated by Justice Harlan in his concurrence in *California v. Green*.[16] On one extreme, the Clause merely provides a procedural guide, "to confer nothing more than a right to meet face to face all those who appear and give evidence at trial."[17] On the other extreme, the Clause is "equally susceptible of being interpreted as a blanket prohibition on the use of any hearsay testimony."[18] Struggling to discern a middle path that he

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7. U.S. CONST. amend. VI.

8. Pointer v. Texas, 380 U.S. 400, 406 (1965).

9. *See* Roger W. Kirst, *Does* Crawford *Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 38–39 (2005) (citing Mattox v. United States, 156 U.S. 237, 242–43 (1895)).

10. Crawford v. Washington, 541 U.S. 36, 43–49 (2004). The trial of Sir Walter Raleigh, in particular, will be discussed more fully below. *See infra* Part I.B.

11. *Bryant*, 113 S. Ct. at 1155.

12. *See* Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 246 (2005) (arguing for the separation of the two concepts, because confrontation predates the hearsay rule and not all legal systems recognize both ideas).

13. 448 U.S. 56 (1980).

14. *Id.* at 66.

15. U.S. CONST. amend. VI.

16. 399 U.S. 164, 175 (1970) (Harlan, J., concurring); *see also* Kirst, *supra* note 9, at 42.

17. *Green*, 399 U.S. at 175.

18. *Id.*

deemed intellectually honest, Justice Harlan first decided confrontation demanded only that available witnesses testify,[19] then the next term landed on the extreme version of the Confrontation Clause that minimized the right to a procedural mandate of face-to-face examination of witnesses, thereby not affecting the admission of hearsay evidence.[20]

Justice Blackmun, however, found a middle path. The *Roberts* Court held that the Confrontation Clause is meant to exclude some hearsay evidence, but not all.[21] The test to discern admissible evidence became whether it exhibits "indicia of reliability."[22] In turn, reliability was assured by employing traditional hearsay exceptions.[23] Justice Blackmun justified this middle course by underscoring its pragmatic value. The reliability standard satisfied the "need for certainty in the workaday world of conducting criminal trials"[24] and relied on the "Court's demonstrated success in steering a middle course among proposed alternatives."[25] Many lower courts interpreted this decision to mean that Confrontation Clause protections were similar to hearsay rule protections requiring reliability, and subject to "considerable discretion."[26]

B. Crawford v. Washington

Crawford transformed the interpretation of the Confrontation Clause, making this question of criminal procedure one of the most dynamic constitutional questions in recent years.[27] The decision set aside the *Roberts* reliability test and the pragmatism behind it. Justice Scalia described the *Roberts* reliability framework as "so unpredictable that it fails to provide meaningful protection from even core confrontation violations."[28] Justice Scalia turned to an originalist approach to constitutional interpretation, examining the history surrounding the Confrontation Clause text and the Framers' probable meaning.[29] He concluded that state abuses in criminal trials—exemplified by the ex parte testimony that helped execute Sir Walter Raleigh, and largely left unchecked in the English colonies—inspired the Clause.[30]

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19. *Id.* at 179–83.
20. Dutton v. Evans, 400 U.S. 74, 94–96 (1970) (Harlan, J., concurring).
21. Ohio v. Roberts, 448 U.S. 56, 65–66 (1980).
22. *Id.* at 66.
23. *Id.*
24. *Id.*
25. *Id.* at 66 n.9.
26. *E.g.*, People v. Farrell, 34 P.3d 401, 406 (Colo. 2001); *see also* Crawford v. Washington, 541 U.S. 36, 64 (2004).
27. *See* G. Michael Fenner, *Today's Confrontation Clause (After* Crawford *and* Melendez-Diaz*)*, 43 CREIGHTON L. REV. 35, 35 (2009).
28. *Crawford*, 541 U.S. at 63.
29. *Id.* at 43–50. The question of whether one trusts this is a correct reading of the historical record is outside the scope of this comment.
30. *Id.* at 44, 47–50.

Raleigh's treason trial of 1603 has thus become a lodestar in contemporary confrontation jurisprudence, 400 years after the nobleman was beheaded.[31] The heroic and enigmatic Raleigh was accused of plotting to overthrow King James, and "[t]o be blunt, it is likely that [Raleigh] was guilty."[32] His guilt, though, is immaterial. The evidence against him was largely provided by ex parte testimony from his alleged co-conspirator Lord Cobham, who implicated Raleigh and then later recanted his testimony.[33] At trial, the prosecutor refused to produce Cobham for confrontation, despite Raleigh's repeated calls for the opportunity to confront his accuser.[34]

> All this is but one accusation of my Lord Cobham's, I hear no other thing; to which accusation he never subscribed nor avouched it. I beseech you, my lords, let Cobham be sent for, charge him on his soul, on his allegiance to the king; if he affirm it, I am guilty.[35]

In a colloquial sense, the question posed by a confrontation case today is whether the absent witness resembles Lord Cobham, as the focus of scrutiny shifted from the word "confrontation" to the word "witness."

The holding of *Crawford* can be reduced to a syllogism: the accused has a right to confront witnesses; witnesses are those who bear testimony; therefore, the accused must be allowed to confront anyone who bears testimony.[36] Thus, the reliability standard became a testimonial standard. The Court held that testimonial hearsay was not allowed unless (1) the witness was unavailable and (2) there was a prior opportunity to examine the testimony through cross-examination.[37] The strict, categorical separation of evidence into testimonial and nontestimonial strengthened the Confrontation Clause in one sense while reducing its scope in another sense. If evidence is deemed testimonial, it must be subjected to cross-examination or barred.[38] If evidence is nontestimonial, the Confrontation Clause simply does not apply.[39] As a result, the question of whether evidence is testimonial became paramount.

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31. *See* Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Precedent in* Crawford v. Washington, 50 S.D. L. REV. 41, 51 (2005).

32. Allen D. Boyer, *The Trial of Sir Walter Raleigh: The Law of Treason, the Trial of Treason and the Origins of the Confrontation Clause*, 74 MISS. L.J. 869, 872 (2005).

33. *Id.* at 885, 893.

34. *Id.* at 889–90.

35. *Id.* at 890.

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

37. *Id.* at 68.

38. *Id.* Two exceptions to this rule are forfeiture and possibly dying declarations. Forfeiture of the confrontation right by wrongdoing applies only if the defendant intended to deprive the court of the witness's testimony. *See* Giles v. California, 554 U.S. 353, 359-61 (2008). It remains an open question whether dying declarations are allowable testimonial hearsay as a historical exception to recent confrontation jurisprudence, a question that some members of the Court look forward to exploring more deeply. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1177 (Ginsburg, J., dissenting); Orenstein, *supra* note 3, at 1440–41.

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

The facts of *Crawford* made this distinction fairly straightforward. Michael Crawford allegedly stabbed another man to avenge the attempted rape of his wife, Sylvia Crawford.[40] When Sylvia Crawford submitted to an interrogation at the police station, she made statements that could have damaged her husband's claim of self defense; specifically, she said the decedent did not have a weapon in his hand, contrary to her husband's claim.[41] At trial, Sylvia Crawford chose not to testify against her husband, but the prosecution wanted to use her earlier statements.[42] The Court found that a declarant's statements during a formal police interrogation several hours after the event were testimonial, and thus admission of the evidence without the opportunity to cross examine the witness violated the Confrontation Clause.[43] In his concurrence, Chief Justice Rehnquist predicted that by swapping the reliability test for the testimony test, the Court had simply created a new area of confusion.[44]

C. Davis v. Washington *and the Primary Purpose Test*

Later Confrontation Clause cases required a more nuanced distinction between testimonial and nontestimonial evidence.[45] The Court began to refine its definition of "testimony" in *Davis*. There, the Court issued one decision consolidating two domestic violence cases, finding that one involved testimonial evidence while the other did not.[46] In *Davis*, the declarant's statements came during a 911 call; Michelle McCottry called while she was being attacked, identifying her attacker as her former boyfriend, Adrian Davis.[47] When she did not appear at trial, the prosecution sought to introduce the statements made during the 911 call.[48] In *Hammon*, the declarant's statements came after the police had arrived at the scene of a domestic disturbance.[49] Police responded to a reported domestic disturbance after Hershel Hammon allegedly punched Amy Hammon and pushed her into broken glass.[50] One police officer questioned Amy Hammon regarding what had transpired, and the other officer remained with her husband, who repeatedly tried to interrupt the questioning.[51] Subsequently, Ms. Hammon was subpoenaed to testify at her husband's trial, and when she did not appear, the interviewing of-

40. *Id.* at 38.
41. *Id.* at 38–40.
42. *Id.* at 40.
43. *Id.* at 61, 68.
44. *Id.* at 69 (Rehnquist, C.J., concurring).
45. *See, e.g.*, Davis v. Washington, 547 U.S. 813, 823 (2006) ("The *Davis* case today does not permit us this luxury of indecision.").
46. *Id.* at 829–30 (finding the statements nontestimonial in *Davis*, but testimonial in *Hammon v. Indiana*).
47. *Id.* at 817–18.
48. *Id.* at 819.
49. *Id.* at 819–20.
50. *Id.*
51. *Id.*

ficer, over defense counsel objections, proceeded to testify as to her prior statements.[52]

Davis introduced the objective "primary purpose test" to determine what statements are testimonial.[53] If the primary purpose of an interrogation is to generate evidence for later use at trial, then it is testimonial; if the primary purpose is to resolve an ongoing emergency, then it is nontestimonial.[54] Applying this new test, the Court found that the statements in *Davis*—made during a 911 call while the victim was being attacked and seeking help—had the primary purpose of resolving an ongoing emergency.[55] In contrast, statements in *Hammon*—made after the police had taken control of the scene and resolved the immediate threat—were no longer meant to resolve an emergency, and were indeed testimonial.[56] Thus, McCottry's statements made during Davis's attack were admissible under the Confrontation Clause, while Amy Hammon's statements about her husband's attack were barred.[57]

II. *MICHIGAN V. BRYANT*

A. Facts

Anthony Covington lay dying of a gunshot wound in a gas station parking lot when the police were summoned on April 29, 2001.[58] Officers questioned Covington while waiting for paramedics to arrive, and Covington told them "Rick" shot him.[59] Covington also told police that he spoke to Richard Bryant through Bryant's back door, and then was shot through the door as he turned to leave at about 3 a.m.[60] Covington did not disclose the contents of the conversation, but it was later revealed that Covington regularly bought cocaine from Bryant at Bryant's back door.[61] After being shot, Covington drove his car to a gas station six blocks away, where police found him roughly twenty-five minutes after the shooting.[62]

Covington died a few hours later.[63] By the time police arrived at Bryant's home in Detroit, Michigan, he had fled, and he was not arrested until a year later in California.[64]

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52. *Id.* at 820.
53. *Id.* at 822.
54. *Id.*
55. McCottry's statements became testimonial after the attacker fled and the 911 operator began to concentrate on identifying information about the attacker, such as his middle name, but only her early identifying statements were challenged. *Id.* at 828-29.
56. *Id.* at 829–30.
57. *Id.* at 829, 834.
58. Michigan v. Bryant, 131 S. Ct. 1143, 1150 (2011).
59. *Id.*
60. *Id.*
61. People v. Bryant, 768 N.W.2d 65, 67 (Mich. 2009).
62. *See Bryant*, 131 S. Ct. at 1150; *see also People v. Bryant*, 768 N.W.2d at 67.
63. *Bryant*, 131 S. Ct. at 1150.

B. Procedural History

Police officers testified at trial, repeating the statements Covington made to them that implicated Bryant in the shooting.[65] The statements were admitted into evidence under the *Roberts* reliability standard and Bryant was convicted, *inter alia*, of second-degree murder.[66] The Michigan Court of Appeals subsequently affirmed the conviction months after the Supreme Court's decision in *Crawford* instituted the testimonial standard.[67] Bryant then appealed to the Michigan Supreme Court, contending that Covington's declarations to police should not have been admitted at trial; the Michigan Supreme Court remanded the case to the Michigan Court of Appeals for further consideration in light of *Davis*.[68] On remand, the Michigan Court of Appeals again affirmed the conviction in an unpublished opinion; the Michigan Supreme Court reversed this decision, concluding that Covington's statements were indeed testimonial hearsay and should not have been admitted at trial because it violated the Confrontation Clause.[69] The state of Michigan petitioned for certiorari on the issue of whether Covington's statements were testimonial, and the Supreme Court granted certiorari.[70]

C. Majority Opinion

Justice Sotomayor wrote the opinion of the Court, joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Alito. The majority held that Covington's statements were not testimonial because the primary purpose of the declarations was to resolve an ongoing emergency.[71] To reach this conclusion, the Court refined and expanded the primary purpose test used to determine what statements are considered testimonial.

As a threshold issue, the Court acknowledged that Covington was (1) unavailable to testify at trial, and (2) the accused did not have a chance to cross-examine the witness.[72] Therefore, if the declarant's statements were found to be testimonial, admitting them at trial would violate the Confrontation Clause. Then, the Court turned to the principal issue: were Covington's statements to police testimonial?

First, the Court reiterated that the primary purpose test is an objective inquiry.[73] This means that the relevant inquiry is not the actual, sub-

64. *Id.* at 1164.
65. *Id.* at 1150.
66. *Id.*
67. People v. Bryant, No. 247039, 2004 WL1882661, at *1 (Mich. Ct. App. Aug. 24, 2004) (per curiam).
68. People v. Bryant, 722 N.W.2d 797 (Mich. 2006).
69. People v. Bryant, 768 N.W.2d 65, 73 (Mich. 2009).
70. Michigan v. Bryant, 130 S. Ct. 1685 (2010).
71. Michigan v. Bryant, 131 S. Ct. 1143, 1166–67 (2011).
72. *Id.* at 1151.
73. *Id.* at 1156.

jective purpose of the actors, but rather "the purpose that reasonable participants would have had."[74] Second, Justice Sotomayor expanded the framework of the primary purpose test and concluded that it is incorrect to interpret *Davis* as asking whether the primary purpose is testimonial or to resolve an ongoing emergency.[75] Instead, the proper inquiry is whether the primary purpose of the interrogation is testimonial or for *any other purpose*.[76] Thus, an ongoing emergency is properly understood as one factor—albeit an important one—that reflects on the primary purpose of an interrogation.[77] If the interrogation primarily serves any purpose other than producing testimony, then it falls outside the scope of the Confrontation Clause.[78]

Third, the chief factors that help elucidate the primary purpose include (1) the presence of an ongoing emergency, (2) the formality of the interrogation, and (3) the statements and actions of the actors.[79] Evaluating these factors is a context-dependent inquiry that must take into account the particular circumstances of the interrogation and balance the multiple factors.[80] Hence, the presence of an ongoing emergency is the first factor to consider, but it is not dispositive.[81] Justice Sotomayor asserted that a court should consider the circumstances of the emergency and how they weigh upon the purpose of the actors, such as the weapon used, the medical condition of the victim, and the range of victims at risk.[82]

The second factor—the evaluation of the formality of the interrogation—is more straightforward. A court should consider whether the interrogation was at the police station or the crime scene, how organized the questioning seemed, and whether there were signs of formality such as a written affidavit.[83] The third factor to weigh is how the statements and actions of the actors reflect on the intent of the interrogation. The majority held that because the purpose of the entire exchange is at issue, a court should consider the behavior of the declarant as well as the behavior of the interrogator.[84] Finally, the majority drew an analogy between the ongoing emergency factor and the excited-utterance exception to hearsay. Just as the excited-utterance is considered reliable because the declarant's attention is riveted on the present moment, statements made

74. *Id.*
75. *See id.* at 1160.
76. *Id.*
77. *Id.*
78. *Id.* at 1153 ("We therefore limited the Confrontation Clause's reach to testimonial statements . . . .").
79. *Id.* at 1157–61.
80. *Id.* at 1158.
81. *Id.* at 1160.
82. *Id.* at 1158–59.
83. *Id.* at 1154, 1160.
84. *Id.* at 1160–61.

during an ongoing emergency are less likely to be testimonial because the declarant's attention is captured by the emergency.[85]

Applying this analysis, the Court found that Covington's interrogation in the gas station parking lot was informal and disorganized, and that the behavior of the actors indicated their primary purpose was to resolve an emergency.[86] Further factors militated for the finding of an ongoing emergency, including the use of a gun,[87] the grave medical condition of the victim,[88] and that the offender was still at large, potentially putting others at risk.[89] Therefore, the Court concluded that the primary purpose of Covington's statements was not testimonial hearsay, and the statements were not within the scope of the Confrontation Clause.[90]

D. Concurring Opinion

Justice Thomas wrote a concurring opinion in which he argued the proper inquiry is not the primary purpose test, but the bright-line rule of formality.[91] The only relevant question, in his view, was whether the declarant's statements were formal and solemn enough to be considered testimonial hearsay.[92] Justice Thomas's concept of formality includes indicia of solemnity such as affidavits, depositions, or organized interrogations in police custody,[93] as occurred in *Crawford*.[94] These formal law enforcement actions mirror the historical practices that the Confrontation Clause was designed to defeat.[95] In turn, Justice Thomas criticized "the primary-purpose test as 'an exercise in fiction' that is 'disconnected from history' and 'yields no predictable results.'"[96]

Justice Thomas concurred in the judgment because the interrogation was informal—as the police arrived at a gas station parking lot to find the declarant bleeding from a fatal gunshot wound—and thus did not implicate the Confrontation Clause.[97]

E. Dissenting Opinion: Justice Scalia

Justice Scalia wrote a dissenting opinion that sharply criticized the majority's analysis. Justice Scalia, who authored the majority opinions in *Crawford* and *Davis*, argued that the *Bryant* majority betrayed *Crawford*

85. *Id.* at 1157.
86. *Id.* at 1160, 1165–66.
87. *Id.* at 1164.
88. *Id.* at 1165.
89. *Id.* at 1163–64.
90. *Id.* at 1167.
91. *Id.* at 1167 (Thomas, J., concurring).
92. *Id.*
93. *Id.*
94. Crawford v. Washington, 541 U.S. 36, 65 (2004).
95. *Bryant*, 131 S. Ct. at 1167.
96. *Id.* (citing Davis v. Washington, 547 U.S. 813, 838–39 (2006)) (Thomas, J., concurring in part and dissenting in part)).
97. *Id.* at 1167–68.

rather than following the decision, and got *Bryant* wrong on the facts as well as the law.[98] On the facts, the ruling that the interrogation of Covington by five police officers was for the purpose of resolving an emergency rather than producing testimony was, in Justice Scalia's opinion, "transparently false" and "patently incorrect."[99] Nevertheless, Justice Scalia saved his most fiery criticism for what he saw as the mistakes of the majority on the law of confrontation.[100] He agreed with the majority opinion that the primary purpose test is an objective one,[101] but on little else.[102]

First, he departed from the majority on whose perspective should be considered. While the majority found the purpose of both the declarant and the interrogator relevant, Justice Scalia contended "[t]he declarant's intent is what counts."[103] By blending the motives of the declarant and the police, both of whom might have mixed motives, the Court complicated the inquiry instead of clarifying it.[104] However, even under the majority's rubric of taking the officers' intent into account, Justice Scalia would have found the statements testimonial.[105]

Second, Justice Scalia argued that the majority set a dangerously broad precedent for what constitutes an ongoing emergency.[106] By implying the emergency may continue until an armed shooter is apprehended, "[t]he Court's distorted view creates an expansive exception to the Confrontation Clause for violent crimes."[107]

Third, Justice Scalia contended that the reintroduction of reliability is incompatible with the framework the Court built in *Crawford*, and mused that the Court might intend to overrule *Crawford* by degrees if not explicitly.[108] Specifically, the majority opinion analogized the ongoing emergency factor to the excited-utterance exception to hearsay, implying that cross-examination is unnecessary if the information is reliable, and reigniting the relationship between the Confrontation Clause and the reliability test rejected in *Crawford*.[109] The author of *Crawford* was not pleased by this development. Fourth, the multi-factor balancing test concocted by the majority is too complex, according to Justice Scalia, and

98. *Id.* at 1168 (Scalia, J., dissenting).
99. *Id.*
100. *Id.* ("Instead of clarifying the law, the Court makes itself the obfuscator of last resort.").
101. *Id.*
102. *See id.* at 1168–76. Justice Scalia argued the majority was wrong on whose purpose matters, wrong on its finding of a primary purpose of emergency, wrong on its expansive view of an ongoing emergency, wrong to resurrect indicia of reliability, wrong to foster an open-ended balancing test, and, mostly, wrong to enfeeble the Confrontation Clause. *Id.*
103. *Id.* at 1168.
104. *Id.* at 1170.
105. *Id.* at 1171–72.
106. *Id.* at 1173.
107. *Id.*
108. *Id.* at 1175.
109. *Id.* at 1174.

will lead to an unpredictable, open-ended inquiry.[110] In sum, the majority's opinion results in "an enfeebled view of the right to confrontation."[111]

F. Dissenting Opinion: Justice Ginsburg

Justice Ginsburg wrote a separate, dissenting opinion. Justice Ginsburg agreed with Justice Scalia that (1) Covington's statements were testimonial hearsay because they involved a past crime and (2) the declarant's point-of-view, rather than that of the interrogator, is the proper factor to weigh.[112] Justice Ginsburg argued that the Court's majority opinion not only creates an overly broad exception to the Confrontation Clause, but also "confounds our recent Confrontation Clause jurisprudence" by reintroducing reliability into the analysis of what statements are testimonial.[113]

Justice Ginsburg added that the question of whether dying declarations should be barred by the Confrontation Clause remains unanswered. Although not preserved for appeal in *Bryant*, Justice Ginsburg indicated that she would like to "take up the question whether the exception for dying declarations survives [the Court's] recent Confrontation Clause decisions."[114]

III. ANALYSIS

Confrontation Clause jurisprudence has shifted dramatically in recent years, from the loose reliability test of *Roberts* to the categorical testimony approach of *Crawford*.[115] Although *Bryant* was ostensibly a refinement of Confrontation Clause jurisprudence following *Crawford*, the Court's analysis effectively pushed the pendulum back in the direction of the unfettered discretion of pre-*Crawford* decisions.[116] The primary purpose test articulated by the Court in *Bryant* is extremely elastic and difficult to apply predictably.[117] The tension between the analysis in *Crawford* and *Bryant* squarely pits the more idealistic rule of the former

110. *Id.* at 1175–76.
111. *Id.* at 1173.
112. *Id.* at 1176 (Ginsburg, J., dissenting).
113. *Id.* at 1176–77.
114. *Id.* at 1177.
115. *Compare* Ohio v. Roberts, 448 U.S. 56, 72–73 (1980) (finding that preliminary hearing testimony of a witness who was unavailable at the trial was permissible where the witness' testimony bore significant "indicia of reliability"), *with* Crawford v. Washington, 541 U.S. 36, 51–52 (2004) (holding that out-of-court "testimonial" statements, including prior testimony at preliminary hearing, before a grand jury, at a former trial, or statements elicited during police interrogation, are inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross examine witness).
116. Richard D. Friedman, *Preliminary Thoughts on the* Bryant *Decision*, THE CONFRONTATION BLOG (Mar. 2, 2011, 12:42 AM), http://confrontationright.blogspot.com/search?updated-max=2011-06-15T14%3A49%3A00-04%3A00 ("[T]his decision strikes me as a giant step backwards towards a morass like that of *Ohio v. Roberts* . . . .").
117. *See Bryant*, 131 S. Ct. at 1175–76 (Scalia, J., dissenting).

against the pragmatic standard of the latter. While the pragmatism of allowing more judicial discretion in criminal prosecutions is appealing, neutering the Confrontation Clause in the face of strong state interests runs contrary to the meaning of the Framers.[118]

A. Critique of the Bryant *Test*

Perhaps the two most transparent ramifications of *Bryant* are the broader ongoing emergency exception to testimony and the expanding elasticity of the primary purpose test. This Comment argues that the Court muddied the water by transforming the narrow emergency exception into a broad and indeterminate factor within the primary purpose analysis. Then, this Comment turns to the primary purpose analysis itself, arguing that the changes wrought in *Bryant* render the test too malleable, and thereby defeat the policy of *Crawford*.

1. Parameters for Ongoing Emergency Are Too Broad

In *Bryant*, the situation was deemed an ongoing emergency six blocks away from the crime scene and a half hour after the shooting, with no indication of an ongoing threat.[119] The Court set up a clear demarcation in *Davis/Hammon* between a police officer seeking to know what *is happening* during an ongoing emergency and an officer seeking to know *what happened* to preserve testimony.[120] In *Davis*, a frantic call to 911 while an attack was occurring was declared an ongoing emergency, while in *Hammon* an interrogation just after an attack was not.[121]

In *Bryant*, the Court erased this line, as several officers specifically asked "what happened?" in the wake of an attack, displaying no worry of a continuing threat, and yet the situation was deemed an ongoing emergency.[122] Justice Sotomayor prescribed a mix of factors in the context-dependent evaluation of whether an emergency is ongoing, including the choice of weapon, medical condition of actors, and the range of victims at risk.[123] This mix of factors suggests broad discretion in the ongoing emergency inquiry. In a case like *Bryant*, the presence of a gun increased the duration and scope of the emergency,[124] the dire medical condition of the victim expanded the emergency,[125] and the range of potential victims was hard to determine because it was not a domestic attack.[126] The Court reasoned that an emergency continues when an armed shooter with an unknown motive is still on the loose, even with no other indication of an

118. *See id.* at 1174.
119. People v. Bryant, 768 N.W.2d 65, 67 (Mich. 2009).
120. Davis v. Washington, 547 U.S. 813, 829–30 (2006).
121. *Id.* at 827, 29–30.
122. *Bryant*, 131 S. Ct. at 1163-64 (majority opinion).
123. *Id.* at 1158–59.
124. *Id.*
125. *Id.* at 1159.
126. *Id.* at 1163–64.

ongoing threat: "This is not to suggest that the emergency continued until Bryant was arrested in California a year after the shooting. We need not decide precisely when the emergency ended . . . ."[127] It is difficult to know whether the Court *need not* make that distinction or *cannot* make that distinction, because under the reasoning of *Bryant* there is no explicit principle to limit the duration of the emergency, allowing it to stretch over many months and miles.

The uncertainty created by the Court is precisely the problem. Lower courts are left with little guidance as to when an ongoing emergency might end after the destruction of the logic in *Davis/Hammon*. Hewing close to those decisions, the emergency in *Bryant* would have ended after Covington fled and his attacker failed to follow.[128] By extending the scope of the emergency indefinitely, the Court created yet another guessing game about how the choice of weapon, medical condition, and relationship to the victim might expand the emergency.[129] Richard Bryant was an armed shooter with an unknown motive, on the loose until he was caught in California.[130] He had killed once, so the majority concluded that others were at risk until he was apprehended.[131] Under *Bryant*, statements made in police interviews during this year-long period about what happened during the crime, whether with Bryant's girlfriend, Covington's brother, or a host of other witnesses, could conceivably be admitted with no right to cross-examine their testimony.[132]

Or, take the example of a serial rapist, armed with a gun, who is terrorizing a city with random attacks. The attacker has a gun, leaves his victims seriously injured, and is still on the loose. Based on the *Bryant* Court's analysis, this emergency is ongoing. The entire city is at risk for a possible attack. As the city's police force works overtime canvassing the city, would all of its interrogations related to the serial rapist be to serve an ongoing emergency? If a citizen rushes to divulge the suspicious sexual proclivities of his neighbors, or a relative of a convicted sex offender reveals that she thinks he has violated probation in some way, can those statements be introduced in separate trials without cross-examination because they were gathered for the primary purpose of resolving an ongoing emergency? The *Bryant* Court threw the door open to never-ending emergencies with no instructions on how to close it again.

The effect of broadening the ongoing emergency exception is to narrow the scope of what is considered testimonial for purposes of the

127. *Id.* at 1164–65 (citation omitted).
128. *See id.* at 1170–71 (Scalia, J., dissenting).
129. *See id.* at 1173.
130. *Id.* at 1163–64 (majority opinion).
131. *See id.*
132. *See id.* at 1173 (Scalia, J., dissenting).

Confrontation Clause.[133] The Court also adjusted the framework of the inquiry from *testimonial versus ongoing emergency* to *testimonial versus any other purpose*, thereby greatly increasing the territory of nontestimonial statements.[134] These changes invite judicial creativity in trying to understand what the Court might intend by *any other purpose*. Also, as lower courts attempt to apply *Bryant*, they must do so with no guidance or analytical justification to decide when an emergency involving an armed attacker on the loose might be deemed complete.

2. The Primary Purpose Test Is Unnecessarily Elastic and Open-ended

The majority in *Bryant* acknowledged that its multi-factor balancing approach is complex, but argued that the complexity will engender accuracy: "Simpler is not always better, and courts making a 'primary purpose' assessment should not be unjustifiably restrained from consulting all relevant information . . . ."[135] However, it appears more likely that the complexity of the primary purpose test will yield unpredictability and confusion for at least four reasons, considered below.

a. The Attempt to Measure Subjective Motives with the "Objective" Primary Purpose Test

The Court's repeated assertions that the primary purpose test is objective cannot stop the analysis from bleeding into subjectivity and guesswork. In *Davis*, the Court created the primary purpose test to determine which statements are testimonial by discerning the purpose of a police interrogation.[136] Justice Thomas, concurring in part and dissenting in part, correctly opined that unpredictability was among the chief criticisms leveled at the reliability inquiry, and yet Justice Scalia and the Court adopted an equally unpredictable inquiry with the primary purpose test.[137] "[P]ronouncement of the 'primary' motive behind the interrogation calls for nothing more than a guess by courts."[138] The irony is that the primary purpose test was put forth by a jurist who ridicules the idea of discerning the purpose of legislators, and yet seems to believe it easier to discern the purpose of a battered spouse just after a traumatic incident.[139] As Justice Scalia has convincingly argued, "[t]he number of pos-

133. *See id.* at 1158–59 (majority opinion) (listing factors to consider during an "ongoing emergency" analysis, thus expanding the exception and narrowing the definition of "testimonial" statements).

134. *Id.* at 1160.

135. *Id.* at 1162.

136. Davis v. Washington, 547 U.S. 813, 822 (2006).

137. *Id.* at 834 (Thomas, J., concurring in part and dissenting in part).

138. *Id.* at 841-42.

139. *Compare* Edwards v. Aguillard, 482 U.S. 578, 637 (1987) (Scalia, J., dissenting) ("To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist."), *with Davis*, 547 U.S. at 830 (majority opinion) ("Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime . . . .").

sible motivations, to begin with, is not binary, or indeed even finite,"[140] because myriad human motivations are always in play and shifting in primacy by the moment. The quest for a primary purpose, as Justice Scalia argued in other contexts, is a search for "something that does not exist."[141]

Attempting to follow *Davis*, the Court in *Bryant* devised an awkward formulation, trying to apprehend "the purpose that reasonable participants would have had."[142] The thin membrane separating the objective primary purpose test from a subjective free-for-all was thus further eroded by *Bryant*. In the majority opinion, the Court made a subtle but important shift from the purpose of the *interrogation* to the purpose of the *participants*.[143] Necessarily then, the test no longer looks solely at the external facts of the interrogation, but now seeks to discover the reasonable purpose of each actor.

This shift dramatically changes the meaning of the word "purpose" in the primary purpose test. When the word "purpose" is applied to something like an interrogation, it is understood to mean the function or use of that encounter.[144] The interrogation has no internal purpose; rather, it serves a purpose. However, in this context, when the word "purpose" is applied to a participant, the meaning changes to include internal motivations and that person's "conscious object."[145] Examine the question offered by the Court: What purpose would a reasonable participant have had?[146] Do we still mean: What was the participant's function and use? Or do we instead mean: What would motivate the reasonable participant in this situation?[147] The latter is the only sensible meaning. Thus, the purpose test has evolved from an inquiry into function to a far more uncertain inquiry into motive.[148]

The natural question is whether an inquiry into human purpose can truly be objective or even ascertainable. A test to decipher human purpose is fundamentally different than an objective test to discern the function of an interrogation. Turning to familiar objective tests, a contract is

140. *Edwards*, 482 U.S. at 636–37.

141. *Id.* at 637.

142. Michigan v. Bryant, 131 S. Ct. 1143, 1156 (2011).

143. *Compare* Davis, 547 U.S. at 822 ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose of the interrogation* is to enable police assistance to meet an ongoing emergency." (emphasis added)), *with Bryant*, 131 S. Ct. at 1156 ("[T]he relevant inquiry is . . . the *purpose that reasonable participants* would have had . . . ." (emphasis added)).

144. *See, e.g.*, BLACK'S LAW DICTIONARY 1356 (9th ed. 2009) ("An objective, goal, or end . . . the business activity that a corporation is chartered to engage in.").

145. *See* MODEL PENAL CODE § 2.02(2)(a)(i) (2001).

146. *Bryant*, 131 S. Ct. at 1156.

147. The crux of the inquiry is motive rather than intent, as we are trying to discover why the participant is speaking rather than his resolve to speak. *See* BLACK'S LAW DICTIONARY, *supra* note 144, at 881 ("While motive is the inducement to do some act, intent is the mental resolution or determination to do it.").

148. *Bryant*, 131 S. Ct. at 1160-61; *see also supra* note 147.

formed when external behavior indicates offer and acceptance, and courts explicitly reject evidence of internal motivations.[149] The tort of negligence occurs when external behavior is unreasonable, a standard that Judge Learned Hand even reduced to a mathematical calculation that ignores internal motivation.[150] The primary purpose test no longer bears any resemblance to these objective tests. Instead, the primary purpose test asks, given a set of external stimuli, what *internal* purpose would a reasonable person have had? As Professor Wigmore has explained, determining motive is a slippery enterprise because it requires leaps in logic from external circumstances, to emotion, to action.[151] Now transfer that slippery enterprise from the context of criminal guilt to the primary purpose test. Imagine not only trying to determine whether A killed B, but why A killed B, and what percentage of A's internal motivation can be ascribed to various desires. That is the formidable and sometimes impossible analytical task the Court has assigned itself and lower courts. Thankfully, an accused may be convicted with no evidence of motive; however, under the primary purpose test, the arduous determination of motive is the very heart of the test, as the trial judge attempts to determine what purpose a reasonable participant would have had.[152]

The problem, of course, is that every actor is invested with mixed, contradictory, and unverifiable motives that a trial judge must now sift through and rank. A court in this case might plausibly have found that one of several purposes were, in fact, primary. For example, the Court treated Covington's medical condition as evidence that his motivation was to get immediate help and his statements were thus nontestimonial.[153] However, a grievous wound might also excite a desire for revenge in a reasonable victim, and it is plausible to treat his statements as a solemn declaration meant to condemn his attacker at trial, undoubtedly leading to a determination that the victim's declaration is testimonial. A trial judge might also reasonably conclude that a drug addict who witnesses a crime, when surrounded by inquisitive police officers, has the primary purpose of revealing as little as possible that could send him to prison, and his statements are thus nontestimonial. Because the declarant in a Confrontation Clause case is necessarily unavailable, gathering the pieces of these primary purpose puzzles will be difficult if not impossible.

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149. *See* Lucy v. Zehmer, 84 S.E.2d 516, 521–22 (1954) (explaining that Zehmer's internal motivation to pull a joke was irrelevant; only external behavior was considered).

150. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (explaining B<PL, or whether the burden is less than the probability of injury multiplied by the likely gravity of a resulting injury).

151. JOHN H. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE 76 (1935) ("The term 'motive' is unfortunately ambiguous. That feeling which internally urges or pushes a person to do or refrain from doing an act is an emotion, and is of course evidential towards his doing or not doing the act.").

152. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1156 (2011).

153. *Id.* at 1165.

The inquiry "will inevitably be, quite simply, an exercise in fiction."[154] Summoning the term "objective" will not allow courts to separate the indivisible or discern what simply cannot be known. The Court in *Bryant* repeatedly mentioned objectivity while shuffling toward subjectivity.[155] The practical impact is that lower courts must now make inquiries based on guesswork and without the benefit of a discernible animating principle. Thus, the resulting opinions will be unpredictable and contradictory, undermining the legitimacy of the enterprise.

b. Many Purposes, No Guidance: Combining the Declarant's Purpose and the Interrogator's Purpose

The Court exacerbated the purpose problem in *Bryant* by blending the intent of the declarant and the intent of police officers into a single analysis.[156] Because the Court shifted its focus to the internal motivation of each actor rather than the external facts of an interrogation, it was forced to answer the question of whose purpose will be considered.[157] Faced with this choice, the Court chose everybody involved.[158] This adds confusion, not clarity.[159]

In *Bryant*, the Court weighed the purposes a reasonable participant would have had while in Covington's situation dying in a gas station parking lot[160] and the purposes a reasonable participant would have had as she stepped into the form of each of five police officers.[161] A participant in Covington's shoes could have at least four plausible purposes: medical help, revenge through prosecution, concealing information, or no conscious motive.[162] Then the picture gets murkier. Police officers in particular must "act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect."[163] Thus, the ambiguity of the primary purpose test grows more profound because a police officer's motives will almost always be mixed between handling an emergency situation and creating evidence for trial.[164] Not only is the Court attempting to probe the elusive concept of motive, but

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

155. The majority opinion summoned the word "objective" or "objectively" in relation to the relevant inquiry at least twenty times. *Bryant*, 131 S. Ct. at 1150-67.

156. *Id.* at 1160–61.

157. *See id.* at 1160–62.

158. *See id.* at 1160 ("[T]he statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.").

159. *Id.* at 1170 (Scalia, J., dissenting) ("But adding in the mixed motives of the police only compounds the problem.").

160. *Id.* at 1161–62 (majority opinion).

161. *Id.* at 1163–64.

162. *See id.* at 1161.

163. New York v. Quarles, 467 U.S. 649, 656 (1984).

164. *Bryant*, 131 S. Ct. at 1161 ("Their dual responsibilities may mean that [police officers] act with different motives simultaneously or in quick succession.").

in this case the uncertainty was multiplied to include the mixed motives of six separate actors. The Court offered few clues as to how to weigh the purposes of various participants. All are to be considered, but the importance of each is unknown.[165]

c. Reintroduction of Hearsay Reliability Rules

Justice Sotomayor and the Court explored the link between the ongoing emergency exception to testimonial evidence and the excited utterance exception to hearsay evidence, noting that both rest on the idea of added reliability because the exciting event does not allow the declarant time to fabricate a lie.[166] This is a startling reversion in Confrontation Clause jurisprudence; the Court merged principles of hearsay rules with Confrontation Clause protections in *Roberts*,[167] and then forcefully ripped them apart in *Crawford*.[168] The Court made clear in *Whorton v. Bockting*[169] that the *Crawford* rule both strengthened and narrowed the Confrontation Clause, restricting testimonial statements by removing reliability exceptions, but also allowing unreliable nontestimonial statements.[170] Quite simply, reliability was no longer part of Confrontation Clause analysis, and cross-examination became the only relevant indicia of reliability.[171]

Then, in *Bryant*, reliability was reintroduced as one of the many factors relevant to the consideration of testimonial versus nontestimonial statements.[172] Justice Scalia argued adamantly that this reincarnation of *Roberts* reliability made no sense: "The Court attempts to fit its resurrected interest in reliability into the *Crawford* framework, but the result is incoherent."[173] He shared his suspicion that perhaps this was an at-

165. The consideration of each actor's intent also enlivens the question of whose purpose prevails when the interrogator's intent and the declarant's intent are starkly at odds, such as when a co-conspirator's statement is told to a government agent. From the declarant's perspective, the conversation is not testimonial whatsoever; from the interrogator's perspective, the sole intent is to produce testimony. As Justice Scalia noted sarcastically in his dissent: "If the dastardly police trick a declarant into giving an incriminating statement against a sympathetic defendant, a court can focus on the police's intent and declare the statement testimonial." *Id.* at 1170 (Scalia, J., dissenting).

166. *Id.* at 1157 (majority opinion).

167. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

168. Crawford v. Washington, 541 U.S. 36, 63 (2004).

169. 549 U.S. 406 (2007).

170. *Id.* at 419–20 ("Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.").

171. *Crawford*, 541 U.S. at 61. The Court put it most colorfully, while describing the need to confront forensic analysts: "[W]e would reach the same conclusion if all analysts always possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa." Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2537 n.6 (2009).

172. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1157 (2011) (discussing the probability of fabrication as relevant to the primary purpose inquiry).

173. *Id.* at 1175 (Scalia, J., dissenting).

tempt to kill *Crawford* through a thousand cuts rather than overruling it directly.[174]

The confusion caused by reintroducing reliability into the testimonial standard became evident almost immediately in the subsequent Confrontation Clause case considered by the Court, *Bullcoming v. New Mexico*.[175] Justice Kennedy wrote in his dissent that reliability is an "essential part of the constitutional inquiry" after the *Bryant* decision,[176] while Justice Sotomayor retorted in her concurrence that *Bryant* deemed reliability relevant but not essential.[177]

Justice Scalia is correct that marrying reliability to the testimonial standard is simply illogical. The reliability standard is entirely separate from the testimonial standard; in fact, the two standards often have an inverse relationship.[178] In *Bullcoming*, for example, the formal certification of lab tests added reliability, thereby facilitating admissibility under hearsay rules, while the formal certification also made the evidence more clearly testimonial, blocking admissibility without confrontation.[179] Holding that reliability is a factor that argues for evidence being nontestimonial is a bald contradiction to the logic of *Crawford* and does nothing but add another layer of analytical confusion for lower courts to attempt to unscramble.

d. Malleable Multi-Factor Balancing Test

The Court in *Bryant* created a multi-factor balancing test, but the weight and relationship of the many factors is unclear. An ongoing emergency can be considered in light of at least three sub-factors;[180] the formality of the interrogation can be considered in light of several sub-factors;[181] the statements and actions of all actors can be considered, as they indicate the balance of purposes at play;[182] and, finally, even the traditional exceptions to hearsay might be considered as indications of reliability.[183] The majority approach "requires judges to conduct 'open-ended balancing tests' and 'amorphous, if not entirely subjective,' inquir-

174. *Id.*
175. 131 S. Ct. 2705 (2011).
176. *Id.* at 2725 (Kennedy, J., dissenting).
177. *Id.* at 2720 n.1 (Sotomayor, J., concurring).
178. Crawford v. Washington, 541 U.S. 36, 51 (2004) ("[E]*x parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.").
179. *Bullcoming*, 131 S. Ct. at 2725 ("*Crawford* . . . line of cases has treated the reliability of evidence as a reason to exclude it.").
180. Michigan v. Bryant, 131 S. Ct. 1143, 1158-59 (2011) (weapon used, medical condition, range of possible victims).
181. *Id.* at 1160 (level of organization, public or private, while waiting for medical treatment).
182. *Id.* at 1160-62 (statements of all participants, along with the physical state of victim, existence of emergency, and "all relevant information").
183. *Id.* at 1157, 1162 n.12.

ies into the totality of the circumstances bearing upon reliability."[184] The Court seemed to follow the advice of Yogi Berra: "When you come to a fork in the road, take it."[185]

The majority in *Bryant* catalogued many factors that are not dispositive—not even an ongoing emergency settles the matter—but did not give clues about what should be dispositive.[186] Instead, trial courts must weigh the choice of weapons, the details of medical conditions, and the scope of risk to evaluate emergency,[187] then look for indications of formality that one might analogize to ancient British trials,[188] then conduct a deep-dive into the psychology of internal human motivations for each of several actors,[189] and then finally consider how the reliability conferred by hearsay exceptions might help determine whether statements are testimonial.[190] After all this, trial judges must weigh possibly competing conclusions on emergency, formality, purpose, and reliability against each other in an abstruse and mysterious calculus.

3. Effects of *Bryant*'s Defects: Confounding the Policy of *Crawford*

The Court must clarify its Confrontation Clause jurisprudence after the *Bryant* decision, and until it does, lower courts will be left trying to decipher its meaning. Not even the Supreme Court employed the *Bryant* analysis in the subsequent *Bullcoming* decision.[191] Justice Ginsburg, writing for the majority, relegated the ideas in *Bryant* to a passing reference that quoted *Crawford*.[192] Although it is plausible that the *Bryant* analysis was unnecessary to decide whether the lab tests in *Bullcoming* were testimonial, especially given *Melendez-Diaz*,[193] this view does not square with Justice Sotomayor's concurrence that reads as an effort to rehabilitate and apply the *Bryant* analysis to the context of documents.[194] Her attempt to display the functionality of the *Bryant* analysis was not convincing: if the other members of the Supreme Court are unable or unwilling to employ *Bryant*, how are lower courts going to make practical use

184. *Id.* at 1175 (Scalia, J., dissenting) (citing Crawford v. Washington, 541 U.S. 36, 63, 68 (2004)).

185. YOGI BERRA, WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT! INSPIRATION AND WISDOM FROM ONE OF BASEBALL'S GREATEST HEROES (2001).

186. *Bryant*, 131 S. Ct. at 1160 (majority opinion) ("[O]ur discussion . . . should not be taken to imply that the existence *vel non* of an ongoing emergency is dispositive of the testimonial inquiry.").

187. *Id.* at 1157–60.

188. *Id.* at 1160.

189. *Id.* at 1160–62.

190. *Id.* at 1157.

191. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2713 (2011).

192. *Id.*

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

194. *Bullcoming*, 131 S. Ct. at 2719-20 (Sotomayor, J., concurring) ("I write separately first to highlight why I view the report at issue to be testimonial—specifically because its 'primary purpose' is evidentiary . . . . ").

of the decision? The *Bryant* analysis is too amorphous and convoluted to be a useful tool unless pieces of it are merely employed to reach the conclusion that one has already decided upon.[195]

The *Bryant* decision reduces the guarantee of the Confrontation Clause to a suggestion.[196] *Bryant* weakens the Confrontation Clause because it fosters unfettered judicial discretion, allowing for a variety of results in many cases.[197] Lower courts should consider "all relevant information" in the analysis as the Court intends,[198] but may not know what to do with it. Conscientious efforts to apply such a confused, multi-tiered approach will inevitably yield unpredictable results in cases potentially involving the Confrontation Clause.[199] As Justice Thomas wrote, this merely repeats the main mischief of the reliability test and undermines the central policy of *Crawford*.[200] The Court argued in *Crawford* that the "principal evil" the Confrontation Clause was meant to prohibit was the use of ex parte examinations against defendants because of the danger of "prosecutorial abuse."[201] The Court reasoned that if the policy goal is to protect criminal defendants from the possibility of government abuse, then government agents must not be given wide latitude in the application of the protection.[202] "The Framers . . . knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people . . . . They were loath to leave too much discretion in judicial hands."[203] Thus, the Framers intended to limit judicial discretion in application of the Confrontation Clause, and honoring this intent was fundamental to the holding in *Crawford*. The amorphous, multi-factored balancing test forwarded in *Bryant* significantly loosens the reins on judicial discretion and, thereby, does violence to the guiding policy of *Crawford*.

B. Originalism Confronts Pragmatism

If *Bryant* indeed weakens and narrows the Confrontation Clause, as argued here, then it begs another question: is that result desirable or not?

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195. *Bryant*, 131 S. Ct. at 1170 (Scalia, J., dissenting) ("And when all else fails, a court can mix-and-match perspectives to reach its desired outcome.").

196. *See id.*

197. *Id.* at 1170 ("The only virtue of the Court's approach (if it can be misnamed a virtue) is that it leaves judges free to reach the 'fairest' result under the totality of the circumstances.").

198. *Id.* at 1162 (majority opinion).

199. An apt analogy might be the *Lemon* purpose test for statutes under the Establishment Clause, with its three prongs: first, that the statute possesses a secular legislative purpose; second, that its primary effect neither enhances nor inhibits religion; and third, it does not foster excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). Courts and scholars have criticized the *Lemon* test. *See* Edwards v. Aguillard, 482 U.S. 578, 582–83 (1987); *see also* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680–81 (1980).

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

201. Crawford v. Washington, 541 U.S. 36, 50, 56 (2004).

202. *See id.* at 67–68.

203. *Id.* at 67.

After all, Richard Bryant was an alleged cocaine dealer who probably shot a man on his back porch,[204] so what harm is there in allowing the admission of evidence that puts him behind bars? Strong practical and emotional arguments support expanding judicial discretion to find the fairest result in criminal prosecutions.[205] Nevertheless, these are the very impulses that the Confrontation Clause is meant to guard against.[206]

This section will set out a framework explaining why a strong Confrontation Clause is essential, and why it is preferable to have a strong rule to protect the confrontation right rather than a fuzzy standard. Next, under this framework, I will suggest ways that the primary purpose test articulated in *Bryant* might be clarified as Confrontation Clause jurisprudence continues to evolve.[207]

1. Framework: Textual Fidelity Trumped by Practical Ends

The distinction in the reasoning that motivated Justice Scalia's dissent and Justice Sotomayor's majority opinion could hardly be more stark. In *Bryant*, the two Justices embodied the familiar dialectic between rules and standards.[208] The arguments were also familiar,[209] as Justice Scalia argued for a rule promoting certainty and predictability,[210] while Justice Sotomayor argued for a standard allowing flexibility and fact-specific application.[211] However, the rules versus standards debate was the *result* of their divergent thinking, not the cause of it.

The reasoning in *Crawford* began with a quest for what the words of the Sixth Amendment's Confrontation Clause meant to the Framers.[212] Whether one feels that quest was successful or not, the majority of the Court agreed on a meaning: the Confrontation Clause demands cross-examination of those who bear testimony.[213] Next, the Court decided that the reliability test of *Ohio v. Roberts* violated that intended meaning by introducing an unacceptable degree of judicial discretion: "By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable . . . ."[214] So,

204. *See Bryant*, 131 S. Ct. at 1170 (Scalia, J., dissenting); *See also* People v. Bryant, 768 N.W.2d 65, 67 (Mich. 2009).

205. *See* Orenstein, *supra* note 3, at 1442–45.

206. *See Crawford*, 541 U.S. at 67–68.

207. The Supreme Court has already granted certiorari to hear a Confrontation Clause case in its next term. Williams v. Illinois, 131 S. Ct. 3090 (2011).

208. Justice Scalia acknowledged that he prefers a strong rule governing Confrontation Clause jurisprudence, but not for its own sake. *Bryant*, 131 S. Ct. at 1176 ("In any case, we did not disavow multifactor balancing for reliability in *Crawford* out of a preference for rules over standards. We did so because 'it d[id] violence' to the Framers' design." (alteration in original) (quoting *Crawford*, 541 U.S. at 68)).

209. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 383–85 (1985).

210. *See Bryant*, 131 S. Ct. at 1176.

211. *See id.* at 1162 (majority opinion).

212. *Crawford*, 541 U.S. at 42–50.

213. *Id.* at 68–69.

214. *Id.* at 67–68.

the Court adopted a new test, the bright-line testimonial rule of *Crawford*.[215] Thus, the textual meaning of the Sixth Amendment was the motivating force, and the strong rule was the result.[216] That approach is what allowed the bold stroke of *Crawford* and its single-minded goal of deciphering the constitutional meaning despite the many questions it left unanswered.[217] Justice Scalia has proved obstinate in his dedication to this idealistic path of constitutional interpretation, even when it leads him to the edge of a policy abyss.[218]

Compared to *Crawford*'s idealism, the Court's opinion in *Bryant* worked backwards. The motivating logic began with extreme factual scenarios, such as snipers on the loose, to justify a broad ongoing emergency exception.[219] Then the Court set about forging paths that might allow courts many avenues to reach the right conclusion—such as the weapon used, the victims wounded, the range of people at risk, the purposes involved, the informality of the investigation, or even reliability of the evidence.[220] Thus, the practical consequences were the motivating force, and the standard was the result. The *Bryant* decision did not just remodel the analytical framework of *Crawford*; it compromised the foundation.

Bryant's multi-factor balancing act expressly pushed the primary purpose test in the direction of a flexible standard.[221] On a deeper level, *Bryant* also shifted from the idealism of Justice Scalia's originalist arguments to a brand of pragmatism that holds that the practical ends dictate the analytical means, and that truth is determined not in the abstract but by its consequences.[222] This is a plausible view, but it should be recog-

215. *See id.* at 68.

216. *See Bryant*, 131 S. Ct. at 1176 (Scalia, J., dissenting).

217. For example, the *Crawford* Court left "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Crawford*, 541 U.S. at 68.

218. *See, e.g.*, Cheek v. United States, 498 U.S. 192, 207–09 (1991) (Scalia, J., concurring) (stating that "failure to pay a tax in the good-faith belief that it is not legally owing is not 'willful'" even if the belief is based on the erroneous assumption that the tax is unconstitutional). Even if Justice Scalia's position was logically superior, the policy ramifications of allowing every citizen who erroneously believes a tax is unconstitutional to refuse to pay it with no legal consequence is staggering. And yet, the practical consequences seemed to play no overt part in his reasoning.

219. *See Bryant*, 131 S. Ct. at 1164, 1168 (majority opinion).

220. *Id.* at 1150–67. This search is reminiscent of the open-ended search for indicia of reliability that was criticized by Justice Marshall long before it was criticized by Justice Scalia. *See* Dutton v. Evans, 400 U.S. 74, 109–10 (1970) (Marshall, J., dissenting) ("I am troubled by the fact that the plurality . . . begins a hunt for whatever 'indicia of reliability' may cling to Williams' remark . . . . If 'indicia of reliability' are so easy to come by, and prove so much, then it is only reasonable to ask whether the Confrontation Clause has any independent vitality at all in protecting a criminal defendant against the use of extrajudicial statements not subject to cross-examination and not exposed to a jury assessment of the declarant's demeanor at trial.").

221. *Bryant*, 131 S. Ct. at 1162.

222. I refer here not to the common definition of pragmatism as a broad term for utility and flexibility, but to the older philosophical definition of pragmatism as a method of evaluating the truth of competing notions by weighing their practical consequences. *See* WILLIAM JAMES, PRAGMATISM AND THE MEANING OF TRUTH, 28 (1996) ("The pragmatic method . . . . is to try to interpret each notion by tracing its respective practical consequences. What difference would it practically make to anyone if this notion rather than that notion were true?").

nized that it is at odds with the reasoning that it purported to follow. The *Crawford* rule began with the meaning of the Constitution and allowed for some flexibility; the *Bryant* standard began with a pragmatic eye toward consequences and allowed for constitutional protections.[223] The effect is similar results, reached by different paths.[224]

The modest task presented by the *Bryant* case was to apply the reasoning of *Crawford* and *Davis* to the facts of a possible emergency and, thereby, fill one of the gaps in this evolving jurisprudence. The Court's decision failed in this task by creating a broad exception giving life to never-ending emergencies,[225] and consequently, widened the gap of unanswered questions rather than narrowing it. More importantly, the Court departed from the guiding principles of *Crawford*, killing its motivating logic without bothering to bury the corpse.

a. Viewing the Dialectic on a Spectrum

A dialectic is nearly always a helpful oversimplification, an attempt to divide the world in half along a clean line. So it is with the division of rules versus standards. And so it is with the idealism versus pragmatism that motivated the competing primary purpose tests. In reality, these distinctions are never so clean. Legal thinking, in particular, can never be wholly idealistic.[226] Pragmatic considerations are bound up with the task of responding to specific cases and controversies; even the originalist must apply his understanding of the Constitution's text to the facts at hand. The legal mind must concern itself with the consequences on other case law and the real world, rather than building Kantian castles in the air. A relevant example is Justice Thomas's formality test for testimonial evidence,[227] which is the clearest bright-line rule on the Confrontation Clause yet articulated. Nevertheless, the other Justices have rejected this option as an empty exercise that would encourage informal police procedure to obviate the Confrontation Clause rather than protecting the right to confrontation,[228] a purely pragmatic argument built around potential consequences. Unlike a philosopher, a judge must peer over the bench and watch his decisions change the lives before him. On the other hand,

223. *Compare* Crawford v. Washington, 541 U.S. 36, 68–69 (2004), *with Bryant*, 131 S. Ct. at 1162–67.

224. Perhaps no one is more aware of this gulf than the Justices themselves, as evidenced by the curious split of the majority in *Bullcoming* in part IV of that decision. Justice Ginsburg argued that the claims of catastrophic practical consequences for prosecutors are dubious, and that even if they were true these practical concerns would not change the Constitutional interpretation. In other words, consequences be damned, because idealism animates our Confrontation Clause decisions under *Crawford*. She was joined only by Justice Scalia in part IV, and lost the rest of the coalition, including Justice Sotomayor. *See* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2717–20 (2011).

225. *See Bryant*, 131 S. Ct. at 1164–65.

226. *See* Iredell Jenkins, *The Matchmaker or Toward a Synthesis of Legal Idealism and Positivism*, 12 J. LEGAL EDUC. 1, 1 (1960).

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

228. *See id.* at 1160 (majority opinion) (arguing that informality "does not necessarily indicate the presence of an emergency or the lack of testimonial intent").

even the most pragmatic judge must be idealistic enough to respect the rule of law and the doctrine of stare decisis, even if she does not think it always yields the "best results."[229]

Likewise, most law does not fall cleanly within the camps of rules or standards.[230] Instead, there is a spectrum: at one end is a rigid rule like a speed limit, and at the other end is a flexible standard meant to introduce discretion, such as Federal Rule of Evidence 403.[231] Most law falls somewhere in between. Yet, legal tests can lean toward rule or standard; and the thinking behind the test can begin with the absolutes of idealism or the consequences of pragmatism.[232] *Crawford* and its progeny exemplify this idea. *Crawford* established a categorical rule that if evidence is testimonial it must be subjected to cross-examination,[233] but avoided the messiness of defining testimony.[234] In *Davis*, the Court began defining testimonial[235] and was forced to move across the spectrum from rule toward standard with the primary purpose test.[236] Then, in *Bryant*, the Court slid much further across the spectrum toward a loose standard with its additions to the primary purpose test.[237]

b. Whether a Rule or a Standard Is Superior Depends on Context

The advantage of viewing rules and standards as intermingled is that one need not choose which is right in the abstract. They are both right, and which one should be emphasized depends on the legal context. Scholars have noted that rules and standards each have their own vices and virtues.[238] Professor Schlag listed many of these familiar attributes,[239] describing rules as certain and uniform yet rigid and intransigent, while standards are flexible and open-ended while being indeterminate and more easily manipulated.[240] Judge Posner argued that judicial pragmatism is neutral on the debate between rules and standards in the abstract.[241] A conceptual analysis of whether rules or standards are superior is a needless debate, not only because they are inseparable, but also be-

229. Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 17 (1996).
230. *See* Schlag, *supra* note 209, at 404–06.
231. FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").
232. *See* Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 998–99 (1994).
233. *See* Boyer, *supra* note 32, at 870 ("Remarkably, *Crawford v. Washington* rejected the familiar modern approach, the balancing test, choosing instead a hard-and-fast categorical rule.").
234. Crawford v. Washington, 541 U.S. 36, 68 (2004).
235. Davis v. Washington, 547 U.S. 813, 822 (2006).
236. *Id.*
237. Michigan v. Bryant, 131 S. Ct. 1143, 1150–67 (2011).
238. *E.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).
239. Schlag, *supra* note 209, at 400.
240. *Id.*
241. Posner, *supra* note 229, at 16.

cause they only have value within a particular legal context.[242] If most agree that rules are valuable because of their rigidity, and standards are valuable because of their flexibility, then the operative question is whether the instant legal context would benefit from rigidity or flexibility.

c. Confrontation Clause Demands Rigidity

Powerful practical arguments buttress the view that the Confrontation Clause should be weakened. There are obvious advantages, such as speeding up prosecutions and saving money by not calling so many witnesses to the stand.[243] Avoiding confrontation would also protect victims of crime who might be traumatized by facing their tormentors in open court.[244] In this regard, the Confrontation Clause affects domestic violence and child abuse cases most profoundly.[245] Many victims refuse to testify, either out of fear or loyalty, and the Confrontation Clause becomes a shield for abusers.[246] For example, when Amy Hammon decided to stand by the man who had punched her, attacked her daughter, and pushed her into broken glass, the Confrontation Clause ultimately blocked the testimony she gave on the night of the violence and protected her abuser.[247]

Nonetheless, constitutional protections shield not only the righteous and sympathetic, but the despicable and unsympathetic. Returning to the infamous case of Sir Walter Raleigh that is said to have inspired the constitutional Framers, Raleigh was being tried for treason to the king, and treason against the monarch was the most dangerous form of national security threat.[248] Thus, the state interest was compelling, and yet this was the example that inspired the Framers to include the Confrontation Clause in the Sixth Amendment.[249] Therefore, we must conclude that the Confrontation Clause was designed for those situations when the state is most driven to secure a conviction, when sacrificing the rights of the accused seems irresistible.[250] The Confrontation Clause was created to protect the unsympathetic defendant—the traitor, the drug dealer, and the abuser. In the end, it makes little sense to limit the Confrontation Clause based on pragmatic policy concerns. The Clause is designed to slow the

242. *See id.*
243. Fenner, *supra* note 27, at 78.
244. *See id.* at 80–84.
245. *See* Ellen Liang Yee, *Confronting the "Ongoing Emergency": A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729, 775–79 (2008).
246. *See* Orenstein, *supra* note 3, at 1414.
247. *See* Davis v. Washington, 547 U.S. 813, 820–21, 832–34 (2006).
248. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1173 (2011) (Scalia, J., dissenting).
249. Crawford v. Washington, 541 U.S. 36, 44, 50 (2004).
250. *Id.* at 68 ("Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear.").

government machine, not hasten it.[251] Likewise, the stirring emotional arguments that focus on victims of crime are irrelevant reasons to block the confrontation rights of those presumed innocent.[252]

The reasons to lean toward a more rigid rule are stronger within the context of constitutional interpretation than other situations. There is more reason to look to the past and the weight of the text, as it is the supreme law of the land.[253] Also, there is more reason to protect a constitutional right with absolutism because it is foundational to our society, and any decision repugnant to the text is void.[254] The need for a strong rule is particularly acute in the context of the Confrontation Clause. Because confrontation is meant to protect citizens from government abuse, it is dangerous to then establish a malleable standard and hand government agents unlimited discretion over when to apply the protection.[255] A loose standard will not do. As the Framers saw it, the members of the legal profession are the foxes in a henhouse full of criminal defendants, and we must exercise the self-control to build a strong barrier for their sake. The foxes cannot wait until we are hungry and the chickens are at hand to decide whether we will dine. After *Bryant*, though, the unsympathetic criminal defendant will find little protection in the form of the Confrontation Clause. "And what has been taken away from him has been taken away from us all."[256]

2. Solution: Ruling the Standard

Given the framework above, this section provides two proposals to push the determination of what constitutes testimonial evidence across the spectrum from flexible standard toward a more rigid rule. First, the ongoing emergency exception should be narrower and more definite. Second, the primary purpose test should be made as simple and objective as possible.

a. Narrowing and Strengthening the Ongoing Emergency Exception

The ongoing emergency exception need not be so broad; rather, an exception to confrontation should indeed require exceptional circumstances.[257] The appropriate scope of the emergency exception lasts while the alleged criminal act is occurring, and courts should require positive

251. *See* Fenner, *supra* note 27, at 79–80.

252. *See Crawford*, 541 U.S. at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.").

253. Marbury v. Madison, 5 U.S. 137, 177 (1803).

254. *Id.*

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

256. Michigan v. Bryant, 131 S. Ct. 1143, 1176 (2011) (majority opinion).

257. As mentioned above, other possible exceptions include the narrow categories of forfeiture and dying declarations, but after the *Bryant* decision, the ongoing emergency exception will likely be implicated most frequently. *See* Giles v. California, 554 U.S. 353, 358–60, 62 (2008); *Bryant*, 131 S. Ct. at 1176–77 (Ginsburg, J., dissenting).

evidence of a continuing threat to extend the emergency.[258] Even within the narrow scope of an ongoing emergency thus construed, trial judges should require that the content of the statements be reasonably related to the goal of resolving the emergency. However, if an ongoing emergency does yield statements reasonably calculated to resolve the emergency, the emergency exception should be dispositive, because the hearsay is necessarily nontestimonial.[259] The *Bryant* decision effectively reduced an ongoing emergency from an exception to a factor, and then broadened the definition of an emergency.[260] A move toward a clear rule demands the opposite: (1) narrow the definition of an emergency, (2) give it a definite end-point, and then (3) restore to an ongoing emergency the force of an exception. This solution fosters predictability and certainty.

The simple distinction between a present-tense danger and a past-tense crime offers some guidance. Is the interrogation focused on "what is happening" or "what happened"?[261] Is it more like Michelle McCottry's 911 call *while* being attacked,[262] or more like Amy Hammon's conversation with police *after* being attacked?[263] The Court made an even finer distinction in *Davis*, reasoning that the 911 call was nontestimonial during the criminal act, but the conversation turned testimonial seconds later once the attacker fled and the interrogator began to collect evidence.[264] The 911 operator did not need to know the attacker's middle name, for example, to respond to the emergency.[265] The transition from nontestimonial to testimonial thus hinged on two factors: (1) the end of the criminal act, even though the attacker was still on the loose, and (2) the content of the statements were no longer reasonably related to ending the emergency. The Court should return to that narrow understanding of an ongoing emergency.

Likewise, courts should draw a line between the alleged criminal act and the consequences of the act. The emergency continues while the alleged criminal act is ongoing, not because the consequences of the action are ongoing. Michelle McCottry's injuries did not extend the duration of the emergency once her attacker fled;[266] Kenneth Lee's stab wounds did not extend the duration of the emergency to include Sylvia Crawford's interrogation hours later.[267] Anthony Covington's medical condition, likewise, was a consequence of the attack but not part of the attack; in-

258. *But see Bryant*, 131 S. Ct. at 1164 (majority opinion).
259. *But see id.* at 1157, 1160.
260. *See id.* at 1157–60, 63–67.
261. Davis v. Washington, 547 U.S. 813, 827, 830 (2006).
262. *Id.* at 817–18.
263. *Id.* at 819–21.
264. *Id.* at 818, 828–29.
265. *See id.* at 818, 828.
266. *See id* at 818, 828–29.
267. *See* Crawford v. Washington, 541 U.S. 36, 38, 68 (2004).

deed, his critical medical condition persisted for hours, until his death.[268] Consequences of a crime—such as a critical medical condition—can persist for hours, days, or years, providing no end to the emergency and allowing for organized interrogations under the guise of emergency response. Such circumstances lead to the type of mistake that occurred in *Bryant*, where the Court concluded that statements such as "Rick shot me" and a physical description of Rick were somehow essential to the purpose of receiving medical care.[269]

The paradigm should not start with the vision of a rooftop sniper terrorizing a city and then render a loose standard accordingly. Yes, a gun could make an emergency more far-reaching. Yes, a killer on the loose could threaten many lives. But there is no need for relying on conjecture or a lack of evidence indicating that an assailant has not been arrested to assume an emergency is ongoing and widespread destruction is nigh.[270] Courts should require specific, positive evidence of an ongoing threat in order to extend the scope of the emergency.[271] As the Court noted in *Bryant*, this determination should not be based on the wisdom of hindsight.[272] If an attacker was holding hostages during a stand-off with police, the emergency would be ongoing, even if unbeknownst to police the attacker had killed himself hours ago.[273] Nevertheless, absent positive evidence that a threat is ongoing, it should not be presumed to continue because of imagined scenarios and needless factors. Courts should not necessarily assume that an abuser who killed his wife is less dangerous than a man who killed an acquaintance, or that a knife-wielding maniac is less dangerous than a shooter.[274] The facts should guide the inquiry. The reliance on imagined scenarios is the flaw that leads to never-ending emergencies, and that is why the Court could not conclude with certainty that the ongoing emergency ended at any point before Bryant was arrested a year later in California.[275] Requiring positive evidence of an ongoing criminal act gives the emergency a definite end-point.

Significantly, this requirement also prevents the Court from subtly shifting the burden of persuasion from the state to the defendant. The state must prove the evidence was nontestimonial;[276] by allowing conjecture to extend emergencies indefinitely, the Court instead forces defendants to prove when the threat ended and the hearsay became testimonial.

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268. Michigan v. Bryant, 131 S. Ct. 1143, 1150 (2011).

269. *Id.* at 1160–62, 1165.

270. *But see id.* at 1164.

271. *See* DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 56 (2009) (explaining the pitfalls of relying on negative evidence).

272. *Bryant*, 131 S. Ct. at 1157 n.8.

273. *See id.*

274. *But see id.* at 1158–59 (assuming that domestic violence and non-firearm violence poses a smaller circle of risk).

275. *Id.* at 1164–65.

276. United States v. Jackson, 636 F.3d 687, 695–96 (5th Cir. 2011).

Must Richard Bryant now prove that if he once posed a threat, he no longer posed a threat during the interrogation, and that the content of the exchange was meant to prosecute him? That is an unfair burden.

In *Bryant*, the Court broadened the ongoing emergency definition, but at the same time insisted that "the existence *vel non*" of an emergency is only one more factor in the primary purpose inquiry rather than an exception.[277] In this way, the Court widened and weakened the analytical effect of an ongoing emergency, leading to increased discretion and unpredictability. The proposed solution is to reverse this development, making the application of the exception narrower by requiring the statements to be reasonably related to ending an alleged criminal act that is occurring, and then making the effect of the exception conclusive.[278]

Applying these changes to the facts of *Bryant*, the emergency was ongoing while Anthony Covington was shot and continued while he was fleeing from Richard Bryant's property to his car. There is no evidence to indicate that Bryant followed Covington or posed a continuing threat to Covington or anyone else.[279] Therefore, the emergency ended when Covington successfully got away from Bryant. Of course, the consequences of the attack continued until Covington's death hours later from the gunshot wound,[280] but the emergency itself did not. Police officers arrived at the gas station after the conclusion of the emergency,[281] and therefore, the interrogation did not fall within the ongoing emergency exception. Even though the consequences of the attack were more dire than those found in *Davis* or *Hammon*, the interrogation of Covington by several police officers while waiting for medical personnel more closely resembles the questioning of Amy Hammon than it does Michelle McCottry's frantic call for help.[282] The criminal act was completed with no evidence of a continued threat, and the content of the interrogation was not limited to responding to an emergency.

This approach may be criticized as too narrow, as common sense might indicate that a man bleeding from a gunshot wound constitutes an emergency. While it is an emergency in a general sense, it is not an ongoing emergency in the sense that one suffering from a gunshot wound cannot possibly be trying to communicate testimony against the shooter.

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277. *Bryant*, 131 S. Ct. at 1160.

278. In this way, the emergency exception follows the path of the forfeiture exception explored in *Giles*. There, the Court made the forfeiture exception narrow by requiring the intent of the defendant to eliminate the testimony of the unavailable witness, but when the narrow exception applies it is dispositive. *See* Giles v. California, 554 U.S. 353, 359–60, 367–68 (2008).

279. See *Bryant*, 131 S. Ct. at 1170 (Scalia, J., dissenting) ("[Covington] knew the threatening situation had ended six blocks away and 25 minutes earlier when he fled from Bryant's back porch." (internal quotation marks and citations omitted)).

280. *Id.* at 1150 (majority opinion).

281. *See id.*

282. *Compare* Davis v. Washington, 547 U.S. 813, 817–18 (2006), *with Davis*, 547 U.S. at 819–21.

The proposed inquiry would also remain fact-specific and somewhat arbitrary as to when the emergency ends. Did the action end when the bullet entered Covington's body, when he reached his car, or when the car reached the gas station? The line should perhaps be drawn when he reached his car, because Bryant apparently did not follow him out of the house. The criticism is correct, though; this is not an exact science. However, the proposed changes improve on *Bryant* because the end of an emergency should be drawn more narrowly.[283] If the test errs, it is better to err on the side of preserving the right to confrontation than it is to err on the side of denying the Sixth Amendment rights of defendants.[284] The *Bryant* Court was correct that the analysis of an emergency must be context-dependent,[285] but that reasoning is more cogent if we rely on the facts in the context presented rather than worst-case scenarios when deciding the point at which the emergency exception ended.

A final question is why the ongoing emergency exception is being treated separately from the primary purpose test. The Court presented the analysis as an either-or test: the purpose of the hearsay is either testimonial or for another purpose like an ongoing emergency.[286] As explained below, perhaps the question should be reduced to whether the evidence was testimonial or not. An ongoing emergency should be a narrow exception to the rule, not part of the main inquiry. Thus, the ongoing emergency exception, when presented by the particular facts of a case, may be considered. If the interrogation occurred within the narrow slice of an ongoing criminal act, and the statements are reasonably related to ending the emergency, then the evidence is not testimonial and the inquiry is done.

b. Turning the Primary Purpose Standard into a Rule

Guided by the idea that protecting the constitutional right to confrontation is best served by the application of a rigid but functional rule, the goal is to make the test as simple and objective as possible without sacrificing accuracy. The test has gathered some unnecessary ornamentation that can be removed, and the analysis of "purpose" should be simplified. Therefore, the suggested solution is to begin by removing the unnecessary factors of reliability and formality, and then focusing the analysis on the objective function of the interrogation.

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283. Another possible, although, in my opinion, less optimal, solution would be to redact segments of the interrogation that occurred after the purpose had clearly become testimonial. Justice Scalia suggested that even if the emergency was ongoing when the first police officer arrived at the scene, the primary purpose of the interrogation had evolved into gathering testimony by the time a fifth police officer was asking redundant questions. *Bryant*, 131 S. Ct. at 1172 (Scalia, J., dissenting); *see also Davis*, 547 U.S. at 828–29 (recommending redaction after the function of the interrogation quickly evolved from resolving the emergency to producing testimony).

284. *Cf.* Dutton v. Evans, 400 U.S. 74, 109 (1970) (Marshall, J., dissenting).

285. *Bryant*, 131 S. Ct. at 1158 (majority opinion).

286. *See id.* at 1155–57, 1165.

i. Jettison Reliability

The most straightforward improvement is to remove the reliability factor that the Court included in its *Bryant* analysis.[287] Not only does this analogy make little sense under the reasoning of *Crawford*, it threatens to confuse the holding of *Crawford* by reanimating the overruled reliability reasoning of *Roberts*.[288] "Reliability" and "testimonial" are not analogous terms, and they often have an inverse relationship.[289] Reliability should be ignored in a testimonial analysis.

ii. Jettison Formality as an Independent Factor

The next unnecessary bauble to remove from the testimonial analysis is the independent factor of formality. This factor sticks around, it seems, to ensure Justice Thomas's support in 5-4 decisions.[290] Putting aside the realities of cobbling together a majority, the testimonial analysis would be improved without treating formality as an independent factor. As Justice Sotomayor wrote in *Bryant*, formality supports the argument that evidence is testimony, but lack of formality tells us little.[291] The danger of this independent factor has been borne out in state courts that cling to the bright-line rule of formality while ignoring the meat of the testimonial inquiry,[292] thereby finding the evidence to be nontestimonial because it lacks formality, a basis that the majority of the Court has deemed meaningless. When lower courts are finding evidence nontestimonial on the basis of a meaningless distinction, then the test has led them astray.

iii. Examine the Function of the Encounter

The difficulty of reforming the primary purpose test is that its development in *Bryant* was more akin to mission creep than an abrupt change of course. Many of the necessary changes are semantic, but may yield important results as Confrontation Clause jurisprudence continues to evolve.

First, the term "purpose" should be replaced with "function," making it the "primary function test." This change would make the goal of the test clear and avoid the ambiguity of the word "purpose," as its meaning shifts between function and motive.[293] This semantic slip clouded the

287. *Id.* at 1174 (Scalia, J., dissenting).
288. *Id.* at 1174–75.
289. *See* Crawford v. Washington, 541 U.S. 36, 51, 61–64, 65 (2004).
290. *See* Fenner, *supra* note 27, at 39–40.
291. *Bryant*, 131 S. Ct. at 1160 (majority opinion).
292. *See* Ware v. State, No. CR-08-1177, 2011 WL 1088724, at *13 (Ala. Crim. App. Mar. 25, 2011) ("[W]e agree with the State's argument that the Melendez-Diaz definition of testimonial was limited to formalized testimonial materials, i.e., affidavits.").
293. *See* Davis v. Washington, 547 U.S. 813, 841–42 (2006) (Thomas, J., concurring in part and dissenting in part).

Court's reasoning in *Bryant* and threatens to cause the same confusion for other courts.

Second, the test should be framed as the "primary function of the encounter," rather than the primary purpose of a reasonable participant. The Court in *Bryant* shifted back and forth between stating the test as an inquiry into the purpose of the interrogation and an inquiry into the purpose of participants,[294] and thereby shifted between meanings of the term "purpose" throughout the opinion. An examination of the "function of the encounter" further clarifies that the test is not probing intent or internal motivations, and puts the test on more objective ground. The Court's analysis should be limited to external facts in an objective test, excluding subjective wanderings such as whether a wounded man can form a purpose and the intent of each actor. Focusing on the encounter instead of participants forwards that goal.

The Court's test probing the purpose of the participants also led it to ask: Whose purpose matters? The majority reasoned that the purpose of each participant matters,[295] while the dissent, when forced, argued that it is the "declarant's *intent* that counts."[296] The only useful part of this exchange is that it strips off the final veneer of objectivity in the primary purpose test, as the Justices acknowledge they have moved into the subjective territory of intent. Frankly, the Court is asking the wrong question. Examining the function of the encounter need not separate each individual's purpose because they are indeterminate and, in the end, irrelevant. Never mind the shifting purposes of the declarant or the crowd of interrogators. Never mind the futile attempt to suss out what internal motivations were present and perhaps primary. The test should discern the function of an encounter based on external statements, behavior, and context, explicitly ignoring the internal motivations sparked by the external stimuli. Just as courts do not care if a contracting party was secretly joking, they should not care if a declarant harbored a secret purpose. The proper question is not whose purpose matters, but whether the external facts indicate that the function of the encounter was to produce testimony.[297]

Applying this rule to the facts of *Bryant*, the central question is whether the external facts indicate that the primary function of the en-

294. *Bryant*, 131 S. Ct. at 1156–57.

295. *Id.* at 1160–61.

296. *Id.* at 1168 (Scalia, J., dissenting) (emphasis added).

297. This solution—like the majority solution in Bryant—has implications for co-conspirator statements elicited through undercover operations. Although the function of that encounter seems to be testimonial (otherwise it would never have occurred), the ramifications of such a finding would be significant. The topic is explored thoughtfully by Professor Seigel. Michael L. Seigel & Daniel Weisman, *The Admissibility of Co-Conspirator Statements in a Post-*Crawford *World*, 34 FLA. ST. U. L. REV. 877, 890-91, 901-04 (2007); *see also* Sheila K. Hyatt, *Telling Lies to Sylvia Crawford*, DULR ONLINE (Mar. 17, 2011 9:16 AM), http://www.denverlawreview.org/practitioners-pieces/2011/3/17/telling-lies-to-sylvia-crawford.html.

counter was testimonial. None of the possible exceptions apply: forfeiture is eliminated because there is no evidence Bryant shot Covington to stop his testimony; the dying declaration, if preserved, would probably not apply as Covington eagerly anticipated medical help, presumably in the hope he might live;[298] and, as argued above, the emergency had already concluded even though the consequences of the emergency continued.

The encounter occurred by happenstance, so it was not planned or created to produce testimony. Police officers simply responded to a call for assistance.[299] However, the words and behavior of the participants paint a different picture. The questions of who shot Covington, the attacker's height and weight, and where and how it happened serve a testimonial function.[300] The questioning was phrased in the past tense as recounted by police officers,[301] hence investigating a past crime rather than a present danger. Five separate officers questioned Covington as he waited for medical help,[302] indicating that the primary function was to elicit information from the declarant, not perform emergency aid—surely one officer would be enough to gather vital information in a life-threatening situation, while others faced the danger. If the primary function of the encounter had been to respond to a present danger, the police officers would probably have behaved differently. If the primary function of the encounter had been to render aid to Covington, questions seeking a physical description of his attacker need not have been asked. Police officers were doing their job admirably, trying under difficult circumstances to gather pertinent information to help them get the bad guy. That was the primary function of this encounter between Covington and police officers. Of course, getting the bad guy means catching him and then putting him behind bars with evidence at trial. Therefore, the objective evidence—words, behavior, and context—indicates that the primary function of the encounter was testimonial, and the testimonial hearsay implicated the right to confrontation.

This is not a perfect solution. The proposed changes rely largely on semantic rather than substantive changes to the rule. However, words matter. In *Bryant*, an ambiguous word (purpose) gave way to a faulty question (whose purpose?). That, in turn, led the test to focus on internal motivations instead of external facts. Relying on external facts to determine the primary function of an encounter should allow courts to approach the question in a more objective fashion. Also, the framing of a simpler, yes-or-no test eliminates the open-ended, multi-factor analysis that *Bryant* invited. The test is still fact-specific, to be sure, but not so

298. *Bryant*, 131 S. Ct. at 1171.
299. *Id.* at 1150 (majority opinion).
300. *Id.* at 1171 (Scalia, J., dissenting).
301. *Id.* at 1170.
302. *Id.* at 1168, 1170–71.

amorphous. That change slides the test across the spectrum toward a strong rule. A strong rule is preferable in the context of constitutional interpretation, particularly when the policy is to restrain government abuse against citizens.

CONCLUSION

The bewildering primary purpose test employed by *Bryant* seems likely to lead to unpredictable outcomes in the lower courts and nearly unfettered judicial discretion to decide what qualifies as testimonial hearsay. Conscientious efforts to follow the *Bryant* analysis could yield contradictory results, as courts attempt to navigate the maze of sub-factors informing emergency, formality, purpose, and reliability, and then balance the four main factors without clear guidance. The expansion of the ongoing emergency definition necessarily narrows the scope of the Confrontation Clause, while the unnecessarily elastic primary purpose test renders the application of the confrontation right a suggestion rather than a predictable guarantee.

While there are powerful pragmatic and emotional arguments for limiting the application of the Confrontation Clause, the history of the Clause suggests that it was designed to guard the accused against state interests precisely when the state's concerns seem most compelling.

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