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Confrontation, the Legacy of Crawford, and Important Unanswered Questions

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CONFRONTATION, THE LEGACY OF *CRAWFORD*, AND IMPORTANT UNANSWERED QUESTIONS

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We leave for another day any effort to spell out a comprehensive definition of "testimonial."

–Justice Scalia, *Crawford v. Washington*[1]

I. INTRODUCTION

The right to confront has a long history.[2] In the United States, the Confrontation Clause provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"[3] One of the most troublesome areas of Confrontation Clause jurisprudence has been the Clause's application to statements made by someone out-of-court offered in court against a criminal accused through some exception to, or exemption from, the hearsay rule.[4] The Supreme Court's confrontation analysis in this situation once hinged on the reliability of the statement, with the traditional hearsay rule and its exceptions and exemptions as a guide.[5] But in *Crawford v. Washington*, the Court considered the right's historical background and concluded that the analysis should instead be focused on testimoniality: "Where testimonial evidence is at issue,[] the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[6]

Crawford intentionally eschewed defining "testimonial," perhaps because it would have been challenging to anticipate the consequences of its testimonial approach in various

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[1] *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

[2] Ronald J. Coleman & Paul F. Rothstein, *Grabbing the Bullcoming by the Horns: How the Supreme Court Could Have Used Bullcoming v. New Mexico to Clarify Confrontation Clause Requirements for CSI-Type Reports*, 90 NEB. L. REV. 502, 503-04 (2011) [hereinafter *Grabbing the Bullcoming*]; *Crawford*, 541 U.S. at 43-47 ("The right to confront one's accusers is a concept that dates back to Roman times.").

[3] U.S. Const. amend. VI.; *Grabbing the Bullcoming*, *supra* note 2, at 504; *Crawford*, 541 U.S. at 42 (noting the right "applies to both federal and state prosecutions.").

[4] *See, e.g.*, Paul F. Rothstein & Ronald J. Coleman, *Confronting Memory Loss*, 55 GA. L. REV. 95, 97-113 (2020) [hereinafter *Confronting Memory Loss*]; *see also* George Fisher, *The Crawford Debacle*, 113 MICH. L. REV. FIRST IMPRESSIONS 17, 17-27 (2014).

[5] *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980); David Alan Sklansky, *Confrontation and Fairness*, 45 TEX. TECH L. REV. 103, 107 (2012) ("Reliability was, of course, the touchstone of confrontation analysis under the approach rejected and overturned in the *Crawford* case—the approach of *Ohio v. Roberts*.").

[6] *See Crawford*, 541 U.S. at 68; *see also* Jeffrey L. Fisher, *Crawford v. Washington: The Next Ten Years*, 113 MICH. L. REV. FIRST IMPRESSIONS 9, 10-11 (2014) ("The testimonial approach starts from the premise that the Confrontation Clause is not a rule of evidence but rather one of criminal procedure."); Edward K. Cheng & G. Alexander Nunn, *Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law*, 97 TEX. L. REV. 1077, 1092 ("[The] Confrontation Clause,[] as currently interpreted, emphatically requires that accusatory evidence in criminal cases be presented by a live witness.").

circumstances without specific context.[7] Subsequent cases have sought to interpret *Crawford* and further define "testimonial," but many unanswered questions remain. The purpose of this short article is to highlight certain important such questions.

II. IMPORTANT CONFRONTATION QUESTIONS

For convenience, we have grouped the identified questions into four broad thematic categories: (a) primary purpose; (b) formality; (c) forensic reports; and (d) algorithms and artificial intelligence.[8]

A. Primary Purpose

After *Crawford*, the Court began to develop an objective "primary purpose" approach for determining testimoniality.[9] As articulated by the *Michigan v. Bryant* Court (involving statements made out-of-court in response to police questioning):

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[7] *See Crawford*, 541 U.S. at 68; Richard D. Friedman, *Who Said the Crawford Revolution Would Be Easy?*, 26 CRIM. JUST. 14, 15 (2012) ("But *Crawford* provided only a framework. It left unanswered many questions, most prominently how a court should determine whether a statement is testimonial."); *see also* Fisher, *supra* note 4, at 23 (suggesting that, even "[a] decade on [from *Crawford*], the Court still [had not] embraced a single, comprehensive definition of testimonial hearsay.").

[8] In setting out these unanswered questions, we offer certain caveats. First, since this short article is primarily for a symposium audience, we assume an advanced level of knowledge regarding relevant Confrontation Clause rules, concepts, and case law. For instance, we do not present detailed case law background here, although we have done so in several prior articles. *See, e.g.*, Ronald J. Coleman & Paul F. Rothstein, *A Game of Katso and Mouse: Current Theories for Getting Forensic Analysis Evidence Past the Confrontation Clause*, 57 AM. CRIM. L. REV. 27, 29-44 (2020) [hereinafter *Katso and Mouse*]; Paul F. Rothstein & Ronald J. Coleman, *Confrontation's Multi-Analyst Problem*, 9 TEX. A&M L. REV. 165, 168-190 (2021) [hereinafter *Confrontation's Multi-Analyst Problem*]; *Grabbing the Bullcoming*, *supra* note 2, at 506-23. Second, it is beyond the scope of this short article to treat all or even most of the unanswered Confrontation Clause questions. We instead focus on only some selected important such questions that we have grouped into a number of thematic categories. There are other important questions we are not treating here. For instance, we do not discuss the impact of memory impairment on confrontation, nor do we discuss the full implications of the related *U.S. v. Owens* case and whether *Owens* survives *Crawford*. *See generally Confronting Memory Loss*, *supra* note 4; *U.S. v. Owens*, 484 U.S. 554 (1988). Similarly, we do not consider whether confrontation necessarily need be face-to-face, live, and in-person (as opposed to by video, Zoom, or other electronic means), whether there may be some flexibility on confrontation form in certain situations or circumstances (such as during an emergency like the COVID-19 pandemic), or, more generally, what form confrontation must take in various differing contexts. *See generally* Andrea Roth, *The Fallacy of "Live" Confrontation: A Surprising Lesson From Virtual Courts*, U. ILL. L. REV. 1657 (2023). Related to the virtual confrontation issue, we also avoid treatment here of whether the *Coy v. Iowa* and *Maryland v. Craig* cases—seemingly allowing dispensing with certain aspects of live, in-person, face-to-face confrontation for special necessitous circumstances—survive *Crawford* (which seems to make the full confrontation right not subject to any balancing of competing needs). *Cf.* Roth, *supra* note 8, at 1662-63 (discussing *Coy* and *Craig*); *Coy v. Iowa*, 487 U.S. 1012, 1016-25 (1988); *Maryland v. Craig*, 497 U.S. 836, 859-60 (1990). Third, our purpose is largely to raise important questions for future consideration rather than to provide answers or detailed analyses. Fourth, we assume the continued vitality of the general framework established in *Crawford*. *See Confrontation's Multi-Analyst Problem*, *supra* note 8, at 196. We understand that the Court could theoretically overrule or severely limit *Crawford*, but consideration of such possibilities falls outside the scope of this short article. *See Confrontation's Multi-Analyst Problem*, *supra* note 8, at 196; *Confronting Memory Loss*, *supra* note 4, at 124 n.189; Paul F. Rothstein, *Unwrapping the Box the Supreme Court Justices Have Gotten Themselves Into: Internal Confrontations Over Confronting the Confrontation Clause*, 58 HOW. L.J. 479, 512-13 (2015); David Crump, *Overruling Crawford v. Washington: Why and How*, 88 NOTRE DAME L. REV. 115, 150 (2012).

[9] *See Davis v. Washington*, 547 U.S. 813, 822 (2006); *Michigan v. Bryant*, 562 U.S. 344, 358-59 (2011); *Ohio v. Clark*, 576 U.S. 237, 244-46 (2015).

> Whether formal or informal, out-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial. When . . . the primary purpose of an interrogation is to respond to an "ongoing emergency," its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.[10]

The Court's primary purpose analysis has been the subject of both judicial and academic criticism.[11] Despite the Court discussing its primary purpose test in several opinions, a number of unanswered questions exist, including:

- Where there are mixed purposes, what would make a given purpose "primary"?[12]

- When exactly will a statement's "primary purpose" be "to establish or prove past events potentially relevant to later criminal prosecution" as opposed to some other purpose, such as resolving "an ongoing emergency."[13] For instance, when, if ever, could statements made prior to identification of a specific suspect be deemed testimonial?[14]

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[10] *Bryant*, 562 U.S. at 358-59.

[11] *See, e.g.*, *Confronting Memory Loss*, *supra* note 4, at 121 n.181 (referencing judicial criticism of the test); *Bryant*, 562 U.S. at 379 (Thomas, J., concurring); *Bryant*, 562 U.S. at 383 ("The Court claims one affirmative virtue for its focus on the purposes of both the declarant and the police: It 'ameliorates problems that . . . arise' when declarants have 'mixed motives.'[] I am at a loss to know how.") (Scalia, J., dissenting); Crump, *supra* note 8, at 134 ("The trouble with this reasoning, as is borne out by the Court's analysis in *Hammon*, is that the allegedly objective factors are likely to be so mushy, and the primary purpose so mixed with other purposes, that the decision whether the statement is testimonial is likely to be arguable either way with equal validity.").

[12] *Confrontation's Multi-Analyst Problem*, *supra* note 8, at 177-78 n.79; Paul F. Rothstein, *A Comment on the Supreme Court's Decision in Ohio v. Clark*, CASETEXT (June 19, 2015), https://casetext.com/analysis/a-comment-on-the-supremecourts-decision-in-ohio-v-clark [hereinafter *Comment on Ohio v. Clark*]; Paul F. Rothstein, *Ambiguous-Purpose Statements of Children and Other Victims of Abuse Under the Confrontation Clause*, 44 SW. L. REV. 508, 548 (2015) [hereinafter *Ambiguous-Purpose Statements*].

[13] *Bryant*, 562 U.S. at 356-57; *Comment on Ohio v. Clark*, *supra* note 12; *Ambiguous-Purpose Statements*, *supra* note 12, at 548.

[14] *See Comment on Ohio v. Clark*, *supra* note 12; *Williams v. Illinois*, 567 U.S. 50, 58 (2012) ("The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose."); *see also Bryant*, 562 U.S. at 359 ("[W]e confront for the first time circumstances in which the 'ongoing emergency' discussed in *Davis* extends beyond an initial victim to a potential threat to the responding police and the public at large.").

- Whose purpose—that of questioner or declarant—should be deemed more significant if each's purpose is materially different?[15]

- What should it mean that the primary purpose must be determined "objectively," and from the perspective of a reasonable person who is in the same circumstances?[16] Should it be someone in the position of an objective declarant in the situation (e.g., victim), an objective questioner (e.g., police officer), or an objective disinterested observer?[17] Whatever perspective is adopted, how much in terms of experience, sophistication, particular circumstances, or other factors should be considered as part of the circumstances in which the objective person is acting?[18] Should an actually expressed purpose prevail over an "objectively appearing," presumed purpose?[19]

- Should courts break down statements into component parts such that the purpose of each individual segment might be separately scrutinized?[20]

- Even if not absolutely required, exactly how significant is varying degrees of connection to government or law enforcement on the part of the questioner, and should law enforcement and non-law-enforcement government workers (such as state social workers)

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[15] *Confrontation's Multi-Analyst Problem*, *supra* note 8, at 79 n.79; *Comment on Ohio v. Clark*, *supra* note 12; *Ambiguous-Purpose Statements*, *supra* note 12, at 548. The Court may avoid answering this question by analyzing the purposes of both or by speaking of the "'primary purpose' of the conversation[.]" *Ohio v. Clark*, 576 U.S. 237, 245 (2015); *Comment on Ohio v. Clark*, *supra* note 12 (noting the *Clark* Court "[f]udged" this question). Justice Scalia clearly believed that the declarant's purpose was what had primary relevance. *See Bryant*, at 562 U.S. at 381 ("*Crawford* and *Davis* did not address whose perspective matters—the declarant's, the interrogator's, or both—when assessing 'the primary purpose of [an] interrogation.' In those cases the statements were testimonial from any perspective. I think the same is true here, but because the Court picks a perspective so will I: The declarant's intent is what counts.").

[16] *Confrontation's Multi-Analyst Problem*, *supra* note 8, at 79 n.79; *Clark*, 576 U.S. at 245 ("In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'"); *Comment on Ohio v. Clark*, *supra* note 12; *Ambiguous-Purpose Statements*, *supra* note 12, at 548-49.

[17] *Ambiguous-Purpose Statements*, *supra* note 12, at 549; *Comment on Ohio v. Clark*, *supra* note 12. Again, the Court may prefer to simply discuss both rather than enunciate a rule. *See Bryant*, 562 U.S. at 381; *Comment on Ohio v. Clark*, *supra* note 12; *Clark*, 576 U.S. at 245.

[18] *See Ambiguous-Purpose Statements*, *supra* note 12, at 549; *Comment on Ohio v. Clark*, *supra* note 12; *see also* Maggie Wittlin, *Theorizing Corroboration*, 108 CORNELL L. REV. (forthcoming 2023) (suggesting a child's hearsay statement regarding abuse may be "an important piece of evidence . . . but it also [may] raise[] important reliability concerns). It seems that at least an objective adult and objective child would be treated differently. *Clark*, 576 U.S. at 247-48 ("Statements by very young children will rarely, if ever, implicate the Confrontation Clause. . . . [I]t is extremely unlikely that a 3–year–old child in L.P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all."); *Comment on Ohio v. Clark*, *supra* note 12.

[19] *Ambiguous-Purpose Statements*, *supra* note 12, at 549; *Comment on Ohio v. Clark*, *supra* note 12. Express purposes might include the desire to receive medical treatment or to inculpate someone. *Ambiguous-Purpose Statements*, *supra* note 12, at 549; *Comment on Ohio v. Clark*, *supra* note 12. It would seem that express purposes would prevail, since the *Clark* Court spoke in terms of actual conversation participants. *See Comment on Ohio v. Clark*, *supra* note 12.

[20] *Confrontation's Multi-Analyst Problem*, *supra* note 8, at 79 n.79; *Ambiguous-Purpose Statements*, *supra* note 12, at 549; *Comment on Ohio v. Clark*, *supra* note 12.

be distinguishable?[21] Would a separate test apply if the statement's recipient is unconnected to law enforcement or even to government more generally?[22]

- Should volunteered statements that lack any interrogation or questioning implicate the Confrontation Clause?[23]

- The testimonial purpose has been described in Supreme Court opinions in various ways, e.g., statements "taken for use at trial"; or "procured with a primary purpose of creating an out-of-court substitute for trial testimony"; or "to establish or prove past events potentially relevant to later criminal prosecution". Other "definitions" have referred to knowledge that a statement might be used "prosecutorially". Other variants of language have been used. Each can have different implications for certain fact situations. For example, suppose the statement is intended to be used to scout out further evidence against an accused, but is not intended to be used at trial (perhaps it is even thought—reasonably but maybe mistakenly—that it would be inadmissible there). What if its purpose is only for probable cause for arrest or for further investigation of the defendant? Or to trigger a private or government civil proceeding, or a welfare proceeding, against defendant?

B. Formality

In determining testimoniality, "formality" of the offered statement has been considered, at least to some extent and in certain confrontation cases. In *Crawford* itself, for instance, the Court stated:

> The text of the Confrontation Clause . . . applies to "witnesses" against the accused—in other words, those who "bear testimony."[] "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[] *An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.* The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.[24]

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[21] *Ambiguous-Purpose Statements*, *supra* note 12, at 549-50; *Comment on Ohio v. Clark*, *supra* note 12; *Clark*, 576 U.S. at 246 ("Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers."). For instance, would it be sufficient that police officers often refer individual victims to a given professional for treatment? *Ambiguous-Purpose Statements*, *supra* note 12, at 549-50; *Comment on Ohio v. Clark*, *supra* note 12.

[22] *Ambiguous-Purpose Statements*, *supra* note 12, at 550; *Comment on Ohio v. Clark*, *supra* note 12. It is unlikely that a separate test would apply, but this would likely be a factor in determining application of the Confrontation Clause to the statement. *Comment on Ohio v. Clark*, *supra* note 12.

[23] *Confrontation's Multi-Analyst Problem*, *supra* note 8, at 79 n.79; *Ambiguous-Purpose Statements*, *supra* note 12, at 550; *Comment on Ohio v. Clark*, *supra* note 12.

[24] *Crawford*, 541 U.S. at 51 (emphasis added).

Similarly, the Court in *Ohio v. Clark* recognized that:

> One additional factor is "the informality of the situation and the interrogation."[] A "formal station-house interrogation," like the questioning in *Crawford,* is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused.[25]

Justice Thomas, in particular, appears to have relatively consistently required certain "formality" or "solemnity" in finding the Clause applicable to a given statement.[26] On the other hand, the *Melendez-Diaz* dissent discussed certain "principles [that] have weaved in and out of the *Crawford* jurisprudence[,]" including solemnity, which they noted "has sometimes been dispositive . . . and sometimes not[.]"[27] With the salience of "formality" or "solemnity" currently unclear, several questions remain, including:

- What role should formality play in the confrontation analysis? For instance, should informal statements be deemed presumptively or even conclusively nontestimonial, or should informality be just one of several factors to consider in determining testimoniality? Is formality an argument that's value is limited to persuading Justice Thomas and, to a lesser extent, other selected Justices?[28]

- What makes a statement "formal" and what categories of statements are sufficiently formal such that confrontation rights are triggered?[29]

- Is the formality test easily evadable by manipulating the form in which statements or reports are made or labelled? Should there be a "bad-faith" exception? Justice Thomas has suggested that requiring "formality" and "solemnity" would "not result in a prosecutorial conspiracy to elude confrontation by using only informal extrajudicial statements against an accused" since "the Confrontation Clause reaches bad-faith attempts to evade the formalized process."[30] If this is so, when and how should any such exception apply?

C. Forensic Reports

Another issue not addressed by *Crawford*, but which has caused a great deal of confusion in the years since, has been the status of scientific analysts as confrontable witnesses and the

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[25] *Clark*, 576 U.S. at 245.
[26] *See Katso and Mouse*, *supra* note 8, at 53-54; *Compare Bullcoming v. New Mexico*, 564 U.S. 647, 664-65 (2011) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329 (2009) (Thomas, J., concurring) *with Williams*, 567 U.S. at 103-04 (Thomas, J., concurring).
[27] *Bullcoming*, 564 U.S. at 678; *Katso and Mouse*, *supra* note 8, at 38.
[28] *See Katso and Mouse*, *supra* note 8, at 53-54.
[29] *Ambiguous-Purpose Statements*, *supra* note 12, at 550; *Comment on Ohio v. Clark*, *supra* note 12.
[30] *Williams*, 567 U.S. at 113; *Katso and Mouse*, *supra* note 8, at 54.

confrontation of forensic analyses and reports more generally.[31] In *Melendez-Diaz v. Massachusetts*, the Court considered the admissibility of what were basically affidavits from forensic analysts asserting that the substance tested by them was cocaine and was of a certain amount.[32] (The police testified, among other things, that such substance had been seized from a police cruiser into which the defendant and others had been placed.)[33] The Court held:

> The documents at issue here, while denominated by Massachusetts law "certificates," are quite plainly affidavits . . . . [and] functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination. . . . We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves.[] In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be confronted with the analysts at trial.[34]

The *Melendez-Diaz* Court rejected several arguments against this conclusion, including that the analysts were not "accusatory" or "conventional" witnesses.[35] Beginning with the dissent in *Melendez-Diaz*—and continuing through the subsequent cases of *Bullcoming v. New Mexico* and *Williams v. Illinois*—the Court has been fiercely divided on confrontation of forensic analysis.[36] As we have previously noted, *Williams* "did not produce a usable majority" and "there has been a change in the [Court's] makeup" since *Williams*.[37] In view of the current uncertainty, questions requiring answers include:

- When is a supporting substantive witness (as opposed to an authenticating, etc., witness) required by the Confrontation Clause for a forensic report or communicated forensic

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[31] *See, e.g.*, *Katso and Mouse*, *supra* note 8, at 27-28; *Confrontation's Multi-Analyst Problem*, *supra* note 8, at 167-68; *Grabbing the Bullcoming*, *supra* note 2, at 504-06; *see also* Erin Murphy, *The Mismatch Between Twenty-First-Century Forensic Evidence and Our Antiquated Criminal Justice System*, 87 S. CAL. L. REV. 633, 657 (2014) ("The Supreme Court's recent revival of the Confrontation Clause has electrified the field of forensic evidence.").

[32] *Melendez-Diaz*, 557 U.S. at 308.

[33] *Id.*

[34] *Id.* at 309-11 (certain internal quotation marks omitted).

[35] *Id.* at 313-15.

[36] *See generally id.*; *Bullcoming*, 564 U.S. 647; *Williams*, 567 U.S. 50; *Confrontation's Multi-Analyst Problem*, *supra* note 8.

[37] *See Confrontation's Multi-Analyst Problem*, *supra* note 8, at 188-89 (noting "the current state of the law in this area remains unclear."); *see also* Edward J. Imwinkelried, *The Gordian Knot of the Treatment of Secondhand Facts Under Federal Rule of Evidence 703 Governing the Admissibility of Expert Opinions: Another Conflict Between Logic and Law*, 3 U. DENV. CRIM. L. REV. 1, 4 (2013) (referring to the "fragmented nature" of *Williams*); Edward K. Cheng & Cara C. Mannion, *Unraveling Williams v. Illinois*, 95 N.Y.U. L. REV. ONLINE 136, 137 (2020) (stating *Williams* "has baffled the evidence community as well as courts around the country"); Jennifer Mnookin & David Kaye, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2012 SUP. CT. REV. 99, 115 (2012) ("[In *Williams*,] at the end of the day, there were three arguments in support of the holding . . . . But not one of them mustered a majority; and they push in different directions in terms of what statements ought to be excluded as testimonial.").

analysis? Although *Melendez-Diaz* shows forensic analysts can be required to be subjected to confrontation similar to other experts and lay witnesses,[38] there may be some instances where no confrontation is required, such as:

- A report prepared for medical or mental health treatment, without the thought of its ever being used at any trial (say before there even was a crime), would probably be found nontestimonial with no need to produce a supporting witness.[39] However, how should forensic statements with ambiguous or multiple purposes be treated?[40] For instance, what rule should apply to autopsy reports or statements by victims to sexual assault nurses?[41] Autopsy reports may be written for prosecutorial purposes, non-prosecutorial purposes such as public health, or both. Or, they may be ambiguous as to purpose. Further, they may be written to trigger deeper investigation or to trigger criminal proceedings, but not necessarily to be used themselves as trial evidence. Are these "testimonial" purposes?[42] A sexual assault nurse might collect and preserve evidence from an alleged victim, treat the victim medically, and help support the alleged victim by, for instance, advising them on available social services.[43] What rules should govern confrontation in these multiple or ambiguous purpose cases? Does each individual statement have to be scrutinized separately for purpose? Need there be a detailed look at multifarious facts of each particular situation? Would these things really significantly simplify the multiple purpose problem? What role is to be played by the statute or regulation authorizing the performance of autopsies or the function of sexual assault nurses?

- The prosecution may seek to use a forensic analysis (made in a report out of court) as the basis for another expert witness's in-court testimony.[44] This report itself may be introduced or just mentioned, recounted, or relayed by the expert witness to the fact-finder. When if ever should this out-of-court material be considered not offered "for its truth" and therefore admissible without confrontation of the maker?[45] More generally, what is the interplay between confrontation rights and Federal Rule of Evidence 703 (or state analogues)?[46] If the "not for truth" theory

[38] *See, e.g.*, *Melendez-Diaz*, 557 U.S. at 313-15.
[39] *Katso and Mouse*, *supra* note 8, at 52.
[40] *See supra* Part II.A.
[41] *See Katso and Mouse*, *supra* note 8, at 52; *Ambiguous-Purpose Statements*, *supra* note 12, at 541-48.
[42] *See Katso and Mouse*, *supra* note 8, at 52; *see also Grabbing the Bullcoming*, *supra* note 2, at 545-46 (discussing potential additional complication with requiring production of autopsy report analyst).
[43] *See Ambiguous-Purpose Statements*, *supra* note 12, at 541-48.
[44] *See, e.g.*, *Katso and Mouse*, *supra* note 8, at 52-53.
[45] *See id.* at 40-42, 52-53; *see also Confrontation's Multi-Analyst Problem*, *supra* note 8, at 200. The *Williams* plurality believed no confrontation was required in this context, at least under the circumstances in *Williams*. *See Williams*, 567 U.S. at 69-80; *see also Katso and Mouse*, *supra* note 8, at 53 (discussing items that might "strengthen this approach" for admissibility without confrontation).
[46] *See* FED. R. EVID. 703; *Grabbing the Bullcoming*, *supra* note 2, at 538-39 ("Rule 703 allows an expert to give an opinion based on otherwise inadmissible underlying material (such as [a forensic] report []), if that kind of material is found by the judge to be reasonably relied upon by experts in the field in their practice. In addition, the Rule allows disclosure of that underlying material to the jury if the judge finds that the probative value of disclosure in explaining the basis of the expert's opinion outweighs its prejudicial effect (the tendency of the jury to credit the truth of the underlying material).").

can be employed—i.e., that the expert witness is using the facts in the report only as hypothetical facts—will the Court say the Confrontation Clause requires substantial independent evidence of those facts to be given somewhere in the case, to corroborate that they were only hypothetical when the expert witness used them? And, if they are really just hypothetical with the expert, why does the fact they were in a report from forensic experts need to be made known to the fact-finder by the expert witness or the prosecution? Is the only function of *that* to suggest the facts are credible (true)? Should the "not for truth" theory disallow introducing the report (as distinct from mentioning the facts in it) and disallow any mentioning or evidencing that the facts were in a report? Is this whole "not for truth" theory regarding expert testimony in the confrontation context, an unjustifiable import into Constitutional law, of a dubious evidentiary doctrine?

- If the report is not "specifically accusatory"—for instance, where it provides a DNA profile from matter found in the rape victim which profile is later matched by others (law enforcement) to an individual not previously suspected of the crime who thereby becomes charged as defendant in the rape—would confrontation still be required in order to introduce this report? A plurality in *Williams,* above, said "No" on these exact facts, but as yet there has been no majority on the Court to support this and the majority in *Williams* rejected that notion.[47] But the makeup of the Court has changed since then.[48] And, anyway, the plurality left unanswered much about its notion of what "specifically accusatory" means. What if Mr. Williams *had been* previously suspected by police and prosecutors but the outside analyst and lab doing the report did not know this? Or, they did know but did not know whether the crime scene DNA profile they were reporting would match his DNA profile or would exonerate him when reported to police for later comparison with a sample of defendant's DNA that police had taken and profiled themselves (but not made known to the lab and its analysts/reporters)? What if the reporters did know his DNA profile but were honestly testing to see if the crime scene sample matched his or exonerated him? The Justices (or some of them) may feel the confrontation right respecting the analyst or reporter should not hinge on any of these states of knowledge of the analyst/reporter because the right exists to reveal those states of knowledge *vel non* and test their bona-fides. Justices may feel we should not have to accept what they knew or did not know without cross-examination of them. Contrary to *Williams,* Justices may say the confrontation of the analyst/reporter is needed to test even whether or not the defendant was a suspect at the time of the analysis and report. And Justices may believe that not only is defendant's status as suspect (at the time of the analysis/report) relevant to possible motive for falsification of the report, but so also is whether the analyst (or reporter) knew of his existence then. Arguably that requires their confrontation. But the Court may not see any of this that way. So the question is, what exactly might "specifically accusatory" mean? Is it knowledge (at the time) that the report *will be,* or that it *might be,* used to incriminate *him,* or alternatively *someone?* Or that it *does actually* incriminate? And how "specifically" accusatory must it be, not only with

[47] *See Williams*, 567 U.S. at 56-86.
[48] *See, e.g.*, *Confrontation's Multi-Analyst Problem*, *supra* note 8, at 189 n.170.

respect to what person and what crime, but also with respect to how completely or directly indicating or dispositive of guilt it is? And at what point in the process must there be this supposedly accusatory purpose: during the analysis, on the part of the analyst(s); or at the time of the report when the result and its destination and use might be clearer? Does accusatory *intent* matter or is it just knowledge of abstract purpose, i.e., what the report or analysis will or might be used for? Further, can we safely assume that a report is *not* "specifically accusatory" if the analysts/reporters do not know whether the testing is for criminal legal use as opposed to, e.g., other non-criminal-non-forensic uses such as disease prediction or civil paternity?[49]

- If a supporting analyst is needed, which analyst(s) must testify?[50]
    - For instance, should all involved analysts be required to appear?[51] Or, if only a subset of analysts need appear, what rules or guidelines determine exactly who must be confronted?[52]

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[49] On our questions of what "specifically accusatory" might mean, recall that the *Williams* plurality (which had no majority) found that no confrontation was required in the *Williams* context because Mr. Williams was not yet a suspect in the case and therefore the report could not have been "specifically accusatory." They did not definitively address any of these further questions about what *would* be specifically accusatory, though they did address multiple factors about the analysis and report done in that particular case that they thought contributed to the conclusion that the report was not specifically accusatory. This left open the question if not all the factors were present. *See Williams*, 567 U.S. at 81-86; *Katso and Mouse*, *supra* note 8, at 42, 53; *cf. U.S. v. Lynn*, 851 F.3d 786, 788-99 (7th Cir. 2017) (National Precursor Exchange System logs are not testimonial because the logs are meant to track people buying certain components of illegal drugs to help detect and prevent future crimes and therefore the logs' preparation is not connected to any particular case and especially not this particular defendant; thus the logs could be used against him at his trial; case has implications for many tracking systems). The whole notion of "non-accusatory" and "not prepared for the particular case" is reminiscent of the "non-adversary routine records" judicial exception to the ban on use of certain law enforcement records under the public records hearsay exception in Federal Rule of Evidence 803(8). *See, e.g.*, *U.S. v. Grady*, 544 F.2d 598 (2d Cir. 1976). It is also reminiscent of the doctrine in *Bryant*, above, that statements to help catch a criminal at large are not testimonial. *See Bryant*, 562 U.S. at 359-78. The plurality in *Williams* states: "The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose." *Williams v. Illinois*, 567 U.S. at 58. In all our scenarios in the text and here, perhaps it is more credible that a lab's purpose is to discover *who* committed the crime rather than to accuse someone, if the lab is not aligned in any way with police and prosecutors.

[50] *See, e.g.*, *Melendez-Diaz*, 557 U.S. at 332-33 (Kennedy J., dissenting); *Confrontation's Multi-Analyst Problem*, *supra* note 8, at 167; *Grabbing the Bullcoming*, *supra* note 2, at 532.

[51] *Melendez-Diaz*, 557 U.S. at 332-33 (Kennedy J., dissenting). We find it unlikely that all analysts would need to appear. *See Confrontation's Multi-Analyst Problem*, *supra* note 8, at 196.

[52] *Melendez-Diaz*, 557 U.S. at 334 (Kennedy J., dissenting) ("The Court offers no principles or historical precedent to determine which of these persons is the analyst."). We have previously offered some possible solutions to this "multi-analyst problem," including considering "express or implied statements by interim analysts in a forensic process chain [] nontestimonial." *Confrontation's Multi-Analyst Problem*, *supra* note 8, at 195-207 ("Under this approach, for instance, the analyst asserting a match between the DNA of the accused and the DNA that was found at the crime scene would normally need to testify. Similarly, the initial analyst or analysts in the chain—who, for instance, can more easily testify as to the source of the samples—would need to testify. In contrast, interim analysts merely making oral or written statements to a subsequent analyst in the forensic process chain would normally not be required to testify.").

- Relatedly, *Bullcoming* suggests "surrogate" witnesses are generally insufficient, meaning that some other expert witness than the analyst who did the actual analysis in the actual case would not be a sufficiently confrontable witness to support introduction of the report of the analysis.[53] But *Bullcoming* arguably leaves open the question of whether a witness with a substantial degree of supervisory authority, involvement, and/or knowledge—concerning either the general kind of procedure or its specific deployment in the individual case—might be deemed sufficient (i.e., be considered more than a "surrogate").[54] The Court does seem to want some compromise way to let in forensic reports more easily than extremely full implementation of *Melendez-Diaz* would suggest. And in *U.S. v. Owens*—a pre-*Crawford* Confrontation Clause case not involving forensic evidence—the Court emphasized that "only an *opportunity* for effective cross-examination" was guaranteed by the Clause, "not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[55] Might a "surrogate-plus" witness afford such an opportunity for "effective cross-examination"?[56]

    - If some kind of surrogate witness is permissible to support a report, does anything depend on how much of her own work is reflected in her opinion? For example is a police DNA identification expert witness who compares a DNA profile of the defendant that the witness has produced in her own police lab, with a DNA profile (reported by an outside analyst) of traces found in the rape victim, more favored for our purposes than if both profiles were done by the outside lab and the witness merely compares them?[57] In the latter case, will the testifying expert be deemed merely a conduit for introducing the outside expert's unexaminable statements? Will this testimony violate the Confrontation Clause?

    - Do the Confrontation Clause requirements in the "surrogate witness" situation differ depending on how the forensic report with its contents are made known to the jury: through being stated in the expert's testimony versus the report itself being introduced into evidence?

- What is the relevance of a defendant's ability to subpoena the analyst?[58] *Melendez-Diaz* suggested that this ability to subpoena may have no relevance, since it shifts the

[53] *See Grabbing the Bullcoming*, *supra* note 2, at 534.
[54] *Id.*; *Katso and Mouse*, *supra* note 8, at 54-55; *Confrontation's Multi-Analyst Problem*, *supra* note 8, at 201.
[55] *Owens*, 484 U.S. at 559.
[56] It is plausible that a "surrogate-plus" witness could be sufficient in certain cases, depending on factors such as: (i) the report's prominence in the case (e.g., was it admitted or how extensively was it used?); (ii) the independence of the expert opinion offered (e.g., how involved was she in actual test, the relevant laboratory, and other similar tests, and how thorough was her review of the analysis or report in question?); and (iii) the extent to which the analysis might be sufficiently cross-examined through appearance of the testifying expert. *See Katso and Mouse*, *supra* note 8, at 54; *Confrontation's Multi-Analyst Problem*, *supra* note 8, at 201.
[57] *See Williams*, 567 U.S. at 59-64; *cf. State v. Smith*, No. 1 CA-CR 21-0451, 2022 WL 2734269 (Ariz. App. Div. 2022), *cert. granted sub nom.*, *Smith v. Arizona*, 2023 WL 6319655 (Mem).
[58] *Grabbing the Bullcoming*, *supra* note 2, at 543.

prosecution's responsibility to the defendant.[59] However, if a certain degree of knowledgeable expert testimony (e.g., a somewhat helpful surrogate or one of the several experts involved in the analysis) were offered by the prosecution, could that be combined with the defendant's ability to call additional analysts, to satisfy the Confrontation Clause?[60]

- Should the confrontation analysis be different if forensic report evidence is offered in a jury trial as opposed to a bench trial?[61] The plurality in *Williams*—a bench trial—suggested the rules might be different for jury trials: that the "not for truth" analysis may apply differently or not at all in a jury trial.[62] Would the Court set a separate rule for jury trials or simply adopt a new uniform rule applicable to both types of trials?

D. Algorithms & Artificial Intelligence

Artificial intelligence ("AI") and algorithms are becoming pervasive and are currently employed in numerous societal contexts.[63] While ChatGPT has, for instance, become one of the

[59] *Melendez-Diaz*, 557 U.S. at 324-25 ("Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power—whether pursuant to state law or the Compulsory Process Clause—is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear.[] Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses."); *Grabbing the Bullcoming*, *supra* note 2, at 543-44.

[60] *See Grabbing the Bullcoming*, *supra* note 2, at 544-45 (discussing options for "allowing defendants' subpoena ability to play a more limited role in confrontation analysis."). It should be noted that the prosecution's responsibility to produce a witness may be more limited where a "notice and demand law" is applicable. *See Katso and Mouse*, *supra* note 8, at 55 ("Pursuant to such a law, the accused has the right to confront a witness sufficient to support admission of the forensic report, but must demand that right after receiving notice from the prosecution of the prosecution's intention to utilize the forensic report. If such law were applicable and if the accused did not make the demand within the required period, the prosecution would be free to introduce the report without the need for a supporting witness."); *Melendez-Diaz*, 557 U.S. at 325-26 (noting "many [states] permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report[.]").

[61] *Katso and Mouse*, *supra* note 8, at 40-42; *Williams*, 567 U.S. at 72-74.

[62] *Katso and Mouse*, *supra* note 8, at 40-42; *Williams*, 567 U.S. at 72-74 (discussing that the case was a "*bench trial*" and noting area where "[t]he dissent's argument would have [had] force if petitioner had elected to have a jury trial.").

[63] *See, e.g.*, Ronald J. Coleman, *Big Data Policing Capacity Measurement*, 53 N.M. L. REV. 305, 309 (2023) [hereinafter *Big Data Policing Capacity Measurement*] ("Algorithms may be used by a social media company to analyze accumulated data, predict what content a user might find interesting, and populate that user's feed with such interesting content. Similarly, algorithms might be used by a video streaming service to recommend programs for future viewing or by a search engine to understand what individuals wish to know."); Paul W. Grimm et al., *Artificial Intelligence as Evidence*, 19 NW. J. TECH. & INTELL. PROP. 9, 10-12 (2021) ("Software applications, powered by seemingly omniscient and omnipotent 'artificial intelligence' algorithms, are used to diagnose and treat patients, evaluate applicants for employment or promotion, determine who is a good risk for a bank loan or credit card, determine where police departments should deploy officers to most effectively prevent and respond to crime, recognize faces in a photograph or video and match them to a real person, forecast which offenders will recidivate, and even predict an attorney's chance of winning a lawsuit by analyzing data gathered about the presiding judge and opposing counsel.").

most popular current examples of AI, sources also discuss dangers, such as those associated with flawed algorithmic determinations and AI-generated "deepfakes."[64] As President Biden stated in his recent Executive Order relating to AI:

> Artificial intelligence (AI) holds extraordinary potential for both promise and peril. Responsible AI use has the potential to help solve urgent challenges while making our world more prosperous, productive, innovative, and secure. At the same time, irresponsible use could exacerbate societal harms such as fraud, discrimination, bias, and disinformation; displace and disempower workers; stifle competition; and pose risks to national security. Harnessing AI for good and realizing its myriad benefits requires mitigating its substantial risks. This endeavor demands a society-wide effort that includes government, the private sector, academia, and civil society.[65]

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[64] *See, e.g.*, Kevin Roose, *The Brilliance and Weirdness of ChatGPT*, N.Y. TIMES (Dec. 5, 2022), https://www.nytimes.com/2022/12/05/technology/chatgpt-ai-twitter.html ("ChatGPT is, quite simply, the best artificial intelligence chatbot ever released to the general public."); Krystal Hu, *ChatGPT Sets Record for Fastest-Growing User Base - Analyst Note*, REUTERS (Feb. 2, 2023, 10:33 AM), https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/ ("ChatGPT, the popular chatbot from OpenAI, is estimated to have reached 100 million monthly active users in January, just two months after launch, making it the fastest-growing consumer application in history[.]"); Karen Hao, *AI is Sending People to Jail—and Getting It Wrong*, MIT TECH. REV. (Jan. 21, 2019), https://www.technologyreview.com/2019/01/21/137783/algorithms-criminal-justice-ai/ ("[P]opulations that have historically been disproportionately targeted by law enforcement—especially low-income and minority communities—are at risk of being slapped with high recidivism scores. As a result, the algorithm could amplify and perpetuate embedded biases and generate even more bias-tainted data to feed a vicious cycle."); Rob Toews, *Deepfakes Are Going To Wreak Havoc On Society. We Are Not Prepared*, FORBES (May 25, 2020, 11:54 PM), https://www.forbes.com/sites/robtoews/2020/05/25/deepfakes-are-going-to-wreak-havoc-on-society-we-are-not-prepared/?sh=7f3cc4957494 (discussing risks and noting "[d]eepfake technology enables anyone with a computer and an Internet connection to create realistic-looking photos and videos of people saying and doing things that they did not actually say or do."); Grimm et al., *supra* note 63, at 75 ("Other than spam, perhaps the most well-known adversarial attacks are deepfakes, synthetic media in which a person in an existing image or video is replaced with someone else's likeness. While faking content is not new, deepfakes leverage powerful machine-learning techniques to manipulate or generate visual and audio content with a high potential to deceive. AI-powered deepfakes are already being used in everyday attacks such as fraud."); *Big Data Policing Capacity Measurement*, *supra* note 63, at 321-23; Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1153 (2018) ("The Algorithmic Society features the collection of vast amounts of data about individuals and facilitates new forms of surveillance, control, discrimination and manipulation, both by governments and by private companies."); Chinmayi Arun, *AI and the Global South: Designing for Other Worlds*, *in* THE OXFORD HANDBOOK OF ETHICS OF AI 588-606 (Markus D. Dubber et al., eds., 2020) (discussing risks); *see also* Jonathan H. Choi et al., *ChatGPT Goes to Law School*, 71 J. LEGAL EDUC. 387, 387 (2022) ("ChatGPT is an AI language model produced by OpenAI and released in late 2022. GPT models, including ChatGPT, are 'autoregressive,' meaning that they predict the next word given a body of text. For example, given the phrase 'I walked to the,' a GPT model might predict that the next word is 'park' with five percent probability, 'store' with four percent probability, etc. The model can then repeatedly predict subsequent words (for example, 'and') to compose indefinitely long bodies of text."); Compliance & Legal Risk, *Episode 3: Law, Technology, and Emerging Technology*, *Season 2*, GEORGETOWN UNIVERSITY LAW CENTER (Nov. 16, 2023), https://podcasts.apple.com/us/podcast/season-2-episode-3-law-compliance-and-emerging-technology/id1572680750?i=1000635017172 (discussing AI and deepfakes).

[65] The White House, Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-

Technologies such as algorithms and AI are already utilized in law enforcement and it is likely that this use will continue to grow.[66] When evidence derived from algorithms and AI is offered "against" an accused, however, this could greatly complicate the right to confront.[67] Several confrontation-related questions arise, including:

- What constitutes sufficient confrontation of statements derived from algorithms and artificial intelligence?
    - Does the technology itself make the relevant statement or does the human who designed, programmed, or maintains it? What if statements made by humans are amalgamated or intertwined with algorithmic or artificial intelligence-generated statements?[68]
    - Should defendants have the right to confront an engineer or programmer who designed or maintains the specific technology utilized in a case? If so, which and how many engineer(s) or programmer(s)?
    - If there is eventually limited human involvement in algorithms and artificial intelligence, might there become a way to confront the artificial intelligence or technology itself? Should algorithmic or AI statements be considered inadmissible as effectively unconfrontable? Or, should they be considered analogous to a computer or apparatus print-out (and potentially require no confrontation)? And, if the work of algorithms and artificial intelligence needs no confrontation, and if such technologies become increasingly utilized over time, could the right to confront effectively disappear in a vast number of cases?
- Pursuant to the Confrontation Clause (or the Due Process Clause), should a defendant have some type of special process right to "transparency," "explanation," or "information," in

order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/ (referencing, also, "algorithmic discrimination" several times).

[66] *See, e.g.*, *Big Data Policing Capacity Measurement*, *supra* note 63, at 306-19; ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT 2-6 (2017); Grimm et al., *supra* note 63, at 10-12; Rebecca Wexler, *When a Computer Program Keeps You in Jail*, N.Y. TIMES (June 17, 2017), https://www.nytimes.com/2017/06/13/opinion/how-computers-are-harming-criminal-justice.html.

[67] *See* Andrea Roth, *Machine Testimony*, 126 YALE L.J. 1972, 2039-48 (2017) (discussing "whether a machine source might ever be a 'witness[] against' a criminal defendant under the Sixth Amendment's Confrontation Clause" and stating "the subject deserves Article-length treatment[.]"); *Big Data Policing Capacity Measurement*, *supra* note 63, at 323 n.108 (stating "'Big data policing,' as used in this Article, generally refers to the use of large datasets, algorithms, computing, and related technology in policing and law enforcement" and noting "Big data policing . . . might have implications for the confrontation rights of criminal defendants."); *see also* Jeffrey Bellin, *Applying Crawford's Confrontation Right in a Digital Age*, 45 TEX. TECH L. REV. 33, 38-48 (2012) (discussing certain challenges for *Crawford* connected to digital communications); *Commonwealth v. Weeden*, No. 19 WAP 2022, 2023 WL 7870560, at *14-22 (Pa. Nov. 16, 2023) (discussing the Confrontation Clause in connection with ShotSpotter's gunshot-detection technology) (Wecht, J., and Brobson, J., concurring).

[68] It might be helpful here, for instance, to think of an analog clock. When we rely on a glance at the clock to say it is currently 4:00 p.m., we are relying on the accuracy, credibility, and truthfulness of the human who set the clock, that it was indeed, say, 8:00 a.m. when she originally set the clock at 8:00 a.m. Yet we have not been able to confront her.

connection with the algorithm or artificial intelligence-related process involved in the offered statement?[69]

III. CONCLUSION

Twenty years after *Crawford*, the right to confront remains deeply unclear in several important respects. We have raised certain issues in this short article that we believe will ultimately require Supreme Court clarification.

We note that *Smith v. Arizona*—another case in the forensic analysis line of cases—is currently pending before the Supreme Court.[70] At a minimum, *Smith* affords the Court an opportunity to offer greater guidance in the forensic reports area.[71] We have been calling for such additional guidance for over a decade, and Justice Gorsuch also recently suggested that the Court "owe[d] lower courts . . . more clarity[.]"[72] The *Smith* Court could also go further and opine on other questions we have raised, such as certain of those within the primary purpose and formality categories above. The Court's opinion might even permit inferences on the current Court's overall view of *Crawford*'s testimonial approach and that approach's vitality going forward.[73]

Whether or not in the context of *Smith* specifically, in the coming years, we believe the Court may be invited or required to answer several questions we have raised here. Broadly speaking, we anticipate that the Court will prefer to set bright-line confrontation rules where possible and will generally disfavor multi-factor balancing tests applied by lower courts.[74] *Crawford* referred to the Confrontation Clause as a "bedrock procedural guarantee[,]" and in order

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[69] *See* Margot E. Kaminski, *The Right to Explanation, Explained*, 34 BERKELEY TECH. L.J. 189, 190-93, 209-17 (2019) (discussing the European Union's "General Data Protection Regulation" and "[t]he debate over the right to explanation[.]"); Charlotte A. Tschider, *Beyond the "Black Box"*, 98 DENV. L. REV. 683, 688-89 (2021) ("While it may be relatively straightforward to notify individuals of the presence of automated decision-making or profiling activities and even offer a human-based alternative decision, providing a right to explanation may be impractical, exceedingly difficult, or even impossible depending on the technology involved. The more complex the AI algorithm is, the more difficult it is to explain."); *Big Data Policing Capacity Measurement*, *supra* note 63, at 321 (discussing the "black box" and citing sources); Hannah Bloch-Wehba, *Algorithmic Governance from the Bottom Up*, 48 BYU L. REV. 69, 88 (2022) ("AI is frequently used in the context of law enforcement and national security programs that have only grown more secretive and less transparent over time.").

[70] *State v. Smith*, No. 1 CA-CR 21-0451, 2022 WL 2734269 (Ariz. App. Div. 2022), *cert. granted sub nom.*, *Smith v. Arizona*, 2023 WL 6319655 (Mem).

[71] *Id.*

[72] *See generally Grabbing the Bullcoming*, *supra* note 2; *Stuart v. Alabama*, 139 S. Ct. 36 (2018) (Gorsuch J., dissenting).

[73] *See generally Crawford*, 541 U.S. 36.

[74] *See Confronting Memory Loss*, *supra* note 4, at 121 n.181 ("We believe the Court would prefer a bright-line approach due to its criticism of the subjectivity of the *Roberts* reliability approach.[] We recognize that the primary purpose test used in the Confrontation Clause context incorporates some degree of subjectivity, but that test has been accordingly criticized."); *see also* Richard D. Friedman et al., *Crawford, Davis, & the Right of Confrontation: Where Do We Go From Here?*, 19 REGENT U. L. REV. 505, 506 (2007) ("I do agree that there is a value to having a functional approach to what is testimonial, but I think, and Justice Scalia has addressed this, we have to be aware of excess functionality. In other words, I think what we really need to avoid is asking case by case, does the function of the Confrontation Clause get advanced by keeping this out or by letting this piece of evidence in. If it's a case-by-case determination, I think we've thrown the whole thing away, and that I think is what happened under *Roberts*.").

to give fuller effect to that guarantee, litigants and lower courts need greater clarity.[75]

[75] *Crawford*, 541 U.S. at 42. We, of course, recognize that there may be circumstances where judicial restraint militates against answering one or more of our outstanding question in a given case. *See Grabbing the Bullcoming*, *supra* note 2, at 505 ("[T]here is an argument of judicial restraint that counsels against a court taking on issues unnecessary to the particular decision—issues that are not specifically raised, briefed, and argued in the case before it—on the grounds that such excursions are likely to be poorly thought out.").