2011

Finding Nino: Mapping the (Glorious) Beginning and (Bitter) End of Justice Scalia’s Confrontation Clause Legacy

Joelle A. Moreno
Florida International University College of Law, joelle.moreno@fiu.edu

Follow this and additional works at: http://ecollections.law.fiu.edu/faculty_publications

Part of the Law Commons

Recommended Citation
Available at: http://ecollections.law.fiu.edu/faculty_publications/28

This Article is brought to you for free and open access by the Faculty Scholarship at eCollections @ FIU Law Library. It has been accepted for inclusion in Faculty Publications by an authorized administrator of eCollections @ FIU Law Library. For more information, please contact lisdavis@fiu.edu.
I. Introduction .......................................................................................................................... 1212
   A. The Impact of New and Upcoming Confrontation Cases ............................................. 1214
   B. Justice Thomas and the Future of the Confrontation Clause ..................................... 1220
   C. Testing the Boundaries of Traditional Legal Scholarship ......................................... 1222

II. Hearsay and Confrontation .............................................................................................. 1223
   A. The Shared Goal of Reliable Evidence ........................................................................... 1223
   B. The Futility of Confronting Reliable Evidence ................................................................. 1224
   C. Justice Thomas Objects .................................................................................................. 1225

III. Crawford v. Washington and a New Confrontation Rule 1225
   A. The Crawford Decision ...................................................................................................... 1226
   B. The Advent of the “Testimonial Statement” ................................................................... 1228
   C. Davis v. Washington: The Ongoing Emergency and Primary Purpose Criteria ........... 1230
   D. Giles v. California: Forfeiture of the Right to Confrontation by Wrongdoing .............. 1231
   E. Melendez-Diaz v. Massachusetts: Expert Witnesses and Testimonial Statements .......... 1232

   A. Facts and Legal History ...................................................................................................... 1234

* © 2010, Joëlle Anne Moreno, Professor of Law, Associate Dean for Faculty Research & Development, Florida International University College of Law. I am grateful to Dean R. Alexander Acosta for supporting this project with a research stipend. Thanks also to Ann, Debbie, and Ellen for their unwavering support. Because I am unlikely to ever produce a tolerable poem, painting, or song, they will need to settle for this and my love and friendship.
B. Bryant and the Objective Primary Purpose of the Investigation Standard .................................. 1237

V. The Post-Scalia Future of the Confrontation Clause ...... 1241
A. Insight from the Bryant Oral Arguments ............... 1241
B. Insight from the Court’s Decision in Bryant .......... 1244
C. Toward a New Confrontation Jurisprudence .......... 1247
D. A Two-Pronged Confrontation Standard ............ 1250

VI. Conclusion .................................................................. 1252

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

I. INTRODUCTION

What exactly does the Confrontation Clause mean? For the past seven years, Justice Antonin “Nino” Scalia has been the unlikely champion of the defense bar as the author of Crawford v. Washington2 and of the majority/plurality decisions in (almost) all of the post-Crawford confrontation cases. The Supreme Court’s recent dramatic resurrection of the Confrontation Clause has generated a flurry of activity in the federal and state courts and among legal scholars. The recent and rapidly evolving constitutional doctrine purports to protect a vital trial right and to enshrine core historical concerns. According to Justice Scalia in Crawford, “[w]here testimonial statements are at issue, 

the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”3

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

---

1. U.S. CONST. amend. VI.  
3. See id. at 68-69 (emphasis added).  
4. Id. at 68 n.10.  
5. Id. at 51.  
6. Id. at 61.
Court has repeatedly refused to provide clear or consistent criteria distinguishing testimonial statements from the infinite range of out-of-court statements made by victims and witnesses during criminal investigations.\(^7\) Without clear guidance, the lower courts have generated confused and inconsistent confrontation decisions.\(^8\)

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

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

---

8. See id. at 813 (noting that after the *Crawford* Court’s failure to define testimonial statements “it was not surprising that lower courts immediately employed a plethora of interpretations of ‘testimonial’ leading to conflicting results”).
10. *Id.* at 2543 (Thomas, J., concurring).
11. *Id.* at 2543-61 (Kennedy, J., dissenting).
12. *Id.* (Kennedy, J., dissenting).
13. *Id.* at 2543 (Kennedy, J., dissenting) (noting that the plurality “makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses”).
and to put[ting] prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician, now invested by the Court’s new constitutional designation as the analyst, simply does not or cannot appear.\[14\]

A. The Impact of New and Upcoming Confrontation Cases

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

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

---

14. Id. at 2549 (Kennedy, J., dissenting).
17. Id.
19. Id. at 1150 (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)).
frame the constitutional question as a determination of the objective primary purpose of the interrogation.\(^{21}\)

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

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

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

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

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

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

\(^{22}\) 546 U.S. 976 (2005).

\(^{23}\) *Davis*, 547 U.S at 822.

\(^{24}\) Id. at 819-20.

\(^{25}\) Id. at 822.

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

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

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

\(^{27}\) Id. at 8.  
\(^{28}\) Id. at 5.  
\(^{29}\) See infra Section IV (discussing the October 5, 2010 Bryant oral argument).  
and actions of both the declarant and interrogators;"\textsuperscript{31} (2) whether the ongoing emergency posed a threat to the public at large;\textsuperscript{32} (3) the "informality in an encounter between a victim and police;\textsuperscript{33} (4) "the parties' perception that an emergency is ongoing;"\textsuperscript{34} (5) whether "the cause of the shooting was a purely private dispute;\textsuperscript{35} (6) whether the assailant used a gun;\textsuperscript{36} (7) whether, at the time of the interrogation, the police knew the location of the assailant;\textsuperscript{37} and (8) whether the police asked the 'type of questions necessary to allow the police to 'assess the situation, the threat to their own safety, and possible danger to the potential victim' and to the public.'\textsuperscript{38} To add to the confusion, the \textit{Bryant} majority suggests new, but undefined confrontation exceptions (beyond the \textit{Davis} Court's "ongoing emergencies" exception) noting that some out-of-court statements—where the objective primary purpose of the investigation was \textit{not} to resolve an ongoing emergency—do not raise confrontation concerns.\textsuperscript{39} Moreover, for the first time since \textit{Crawford}, the Court seems to reconsider the reliability of the out-of-court statement, noting that, "'[i]n making the primary purpose determination,

\begin{itemize}
\item \textsuperscript{31} Michigan v. Bryant, 131 S. Ct. 1143, 1160 (2011). The \textit{Bryant} Court actually recommended a "combined approach" to assessing the purpose of the declarant and interrogators suggesting that this could help to resolve the "[p]redominant . . . problem of mixed motives on the part of interrogators and declarants." \textit{Id.} at 1161. This "combined approach" is both difficult to apply (e.g., do the presumed objective intents of the witness/victim and the police have the same weight?) and would fail to resolve the frequent problem of dual or conflicting motives (i.e., the victim/witness and/or the police intend to respond to an ongoing emergency and develop evidence).
\item \textsuperscript{32} \textit{Id.} at 1161. According to the \textit{Bryant} majority, "[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to first responders and to public may continue." \textit{Id.} at 1158. "[T]he duration and scope of an emergency may [also] depend in part on the type of weapon employed," \textit{id.}, and/or "[t]he medical condition of the victim," (to the extent that the victim's condition sheds light on the purpose for her statement or the magnitude of any ongoing safety threat). \textit{Id.} at 1159.
\item \textsuperscript{33} \textit{Id.} at 1160 (emphasis in original). According to Justice Sotomayor, the Michigan Supreme Court had "too readily dismissed the informality of the circumstances in this case," \textit{id.}, despite the fact that "the questioning in this case occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion." \textit{Id.} Moreover, "[t]he informality suggests that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements." \textit{Id.} at 1166.
\item \textsuperscript{34} \textit{Id.} at 1162 (emphasis added).
\item \textsuperscript{35} \textit{Id.} at 1163.
\item \textsuperscript{36} \textit{Id.} at 1164.
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Id.} at 1165 (quoting \textit{Davis v. Washington}, 547 U.S. 813, 832 (2006)).
\item \textsuperscript{39} \textit{Id.} at 1155 ("But there may be \textit{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."). \textit{Id.} (emphasis in original).
\end{itemize}
standard rules of hearsay, designed to identify some statements as reliable, will be relevant." Any return to an Ohio v. Roberts approach to confrontation would be an unwelcome development, especially for Crawford's author and champion.

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

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

40. Id.
41. Id. at 1168 (Scalia, J., dissenting).
42. Id. at 1174.
43. Id. at 1173.
for law enforcement and the lower courts." Bryant will almost inevitably exacerbate the problem of erratic and inconsistent decisions as our state and federal criminal courts continue to search for the sine qua non of the "testimonial statement."

A careful examination of the post-Crawford cases, including revelations from the recent Bryant briefs and oral argument, provides insight into possible future alternatives. With Justice Scalia’s role in the Court’s confrontation jurisprudence on the wane, there is a new opportunity for the Chief Justice and Justices Kennedy, Breyer and Alito to gain traction to reframe the confrontation inquiry. This reframed confrontation standard is also likely to focus less on the testimonial qualities of the out-of-court statement and more on the status of the declarant as a "witness[] against the accused." Clearly, a more textually accurate constitutional inquiry would appeal to the four Melendez-Diaz dissenters who remind us that "witness," rather than "testimonial statement" is "the word the Framers used in the Confrontation Clause."

In Melendez-Diaz these four justices adopted the rigid view that prosecution-sponsored experts were, by definition, not "witnesses against the accused" because they "witnessed nothing to give them personal knowledge of the defendant’s guilt." After Melendez-Diaz, this argument may be untenable, although this is debatable given Justice Thomas’s concurrence. However, if we assume as a general matter that the act of serving as a witness requires a measure of formality, this shift should gain purchase with Justice Thomas who, although he concurred in both Melendez-Diaz and Bryant, has been a long-standing, consistent, and prescient critic of the Court’s confrontation jurisprudence.

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

45. Bryant, 131 S. Ct. at 1167 (Thomas, J., concurring).
47. Id. (Kennedy, J., dissenting) (noting that the plurality "makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses—‘witnesses’ being the word the Framers used in the Confrontation Clause").
48. Id. at 2553 (quoting Dowdell v. United States, 221 U.S. 325, 330 (1911)).
shape the statement for use in a future criminal trial than they can discern the objective primary purpose of the investigation. However, textual accuracy and operational efficacy bring their own costs. There is strong evidence that an analytic shift towards the act of witnessing and away from the testimonial nature of the statement could be used to narrow the scope of confrontation. As discussed below, this could impact defendants’ ability to challenge the admission of evidence under Bruton v. United States, incentivize the creation of new law enforcement confrontation workarounds, and diminish the accuracy of a wide range of public records.

B. Justice Thomas and the Future of the Confrontation Clause

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

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

49. See Brief for the United States as Amicus Curiae Supporting Petitioner, infra note 175, at 17.
51. See infra Part VI.
54. White, 502 U.S. at 364 (Thomas, J., concurring in part).
no formality has nothing to do with it."\textsuperscript{56} However, the \textit{Bryant} decision suggests that Justice Scalia is now significantly outnumbered by Justices who view formality as a relevant confrontation criterion.

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

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

\textsuperscript{56} Transcript of Oral Argument, \textit{supra} note 26, at 4.
\textsuperscript{57} \textit{Bryant}, 131 S. Ct. at 1155 (emphasis added).
\textsuperscript{58} \textit{Id.} (quoting \textit{Crawford v. Washington}, 541 U.S. 36 (2004)).
\textsuperscript{59} \textit{Id.} at 1160.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Bryant}, 131 S. Ct. at 1167 (Thomas, J., concurring).
\textsuperscript{62} \textit{Id.} at 1166.
\textsuperscript{63} \textit{Id.}
acting as a witness, as Justice Thomas has observed, requires "a solemnity to the process that is not present in a mere conversation." 64

C. Testing the Boundaries of Traditional Legal Scholarship

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

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

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

II. HEARSAY AND CONFRONTATION

A. The Shared Goal of Reliable Evidence

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

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

66. See Mattox v. United States, 156 U.S. 237, 244 (1895) (“The substance of the constitutional protection is preserved to the prisoner in the advantage . . . of seeing the witness face to face, and of subjecting him to the ordeal of cross-examination.”).
67. See id.
68. See id.
69. 448 U.S. 56 (1980).
70. Id. at 65.
71. Id. at 66 (quoting Dutton v. Evans, 400 U.S. 74, 86 (1970)).
72. Id. (quoting California v. Green, 399 U.S. 149, 155 (1970)).
73. Id.
74. Id.
75. Id.
inculpatory out-of-court statements whenever the evidence had survived defense hearsay challenges or was not challenged.

B. The Futility of Confronting Reliable Evidence

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

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


\(^{77}\) Id. at 350-58.

\(^{78}\) Id. at 357.

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

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

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

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

III. Crawford v. Washington and a New Confrontation Rule

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

81. White, 502 U.S. at 358 (Thomas, J., concurring in part).
82. Id. at 359.
83. Id.
84. Id. at 361-63.
85. Id. at 364.
86. Id. (emphasis added).
87. Id. at 365 (emphasis added).
Court’s dramatic reinterpretation of the Confrontation Clause in *Crawford v. Washington*...

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

A. The Crawford Decision

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

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

---

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 61.
94. *Id.* at 62 (“The unpardonable vice of the Roberts test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”).
95. *Id.* at 63.
For its textualist analysis, Crawford borrowed heavily from Justice Thomas’s concurring opinion in White, but with significant exceptions. In White, Justice Thomas had opined that “the critical phrase within the [Confrontation] Clause... is ‘witnesses against him.’... [Thus] any attempt at unraveling and understanding the relationship between the Clause and the hearsay rules must begin with an analysis of the meaning of that phrase.”

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

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

---

97. Crawford, 541 U.S. at 38.
98. Id. at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)).
99. Id.
100. Id.
102. Crawford, 541 U.S. at 50.
evidence because "the Framers would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." As Professor Robert Mosteller would observe shortly after Crawford was decided, "[t]he opinion in Crawford provides the Court's (Justice Scalia's) view of the historical purpose of the Confrontation Clause[] [and t]hese historical materials and the perspective adopted are obviously selective, but they are now the essential materials and the privileged perspective."

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

B. The Advent of the "Testimonial Statement"

Crawford replaced the Ohio v. Roberts reliability/evidence-based rule with the constitutional standard that the Confrontation Clause applies to all prosecution-sponsored "testimonial statements." The act of identifying which statements qualify as testimonial would now be of great constitutional and practical import. Twelve years earlier, Justice Scalia had shared Justice Thomas's view that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such affidavits, depositions, prior testimony or confessions." Formality was no longer determinative to Justice Scalia who was content to "leave for another day" any definition of testimonial statements beyond the observation that, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

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

---

103. Id. at 53-54 (emphasis added).
106. Crawford, 541 U.S. at 68.
107. Id.
Thomas’s view that confrontation should be limited to statements “‘contained in formalized testimonial materials, such as affidavits, custodial examinations, prior testimony, or confessions.’”¹⁰⁸ The second and third definitions left more room for interpretation. The second definition (which had been offered by the Crawford petitioner) expanded “testimonial statements” to the functional equivalent of ex parte in-court testimony such as “affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. . . .”¹⁰⁹ The third definition (which had been suggested in an amicus brief filed by the National Association of Criminal Defense Lawyers) defined as testimonial all statements “‘made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’”¹¹⁰

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

¹⁰⁸. Id. at 52 (quoting White, 502 U.S. at 365).
¹⁰⁹. Id. at 51 (quoting Brief of the Petitioner at 23, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410)).
¹¹¹. Id. at 51-52.
¹¹². Id. at 53 n.4.
¹¹³. White, 502 U.S. at 365 (including “extrajudicial statements . . . contained in formalized testimonial materials, such affidavits, depositions, prior testimony, or confessions’”).
C. Davis v. Washington: The Ongoing Emergency and Primary Purpose Criteria

Davis v. Washington and its consolidated companion case Hammon v. Indiana were two domestic violence cases decided by the Court in 2006. In an opinion that closely tracks the facts of the two cases; the Davis Court found that statements made by an alleged victim to a police 911 operator during a domestic emergency were non-testimonial because they were made "under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency." In contrast, a written and sworn battery affidavit prepared under the direction of the police following a secured-scene police interview were testimonial because they were made "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions."

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

115. Davis, 547 U.S. at 822.
116. Id.
117. Id. at 830 n.5.
118. Id. at 824 (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)). This conclusion is not undermined by the majority's unpersuasive assertion that if the interrogation was "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict the perpetrator)" the resulting victim/witness statement will be akin to a "‘solemn declaration or affirmation.’" Id. (quoting Crawford, 541 U.S. at 51). This dicta ignores the Court's own detailed effort to distinguish Michelle McCottry's informal 911 call where "she was not acting as a witness" from Sylvia Crawford's formal stationhouse interview. Id. at 828 (emphasis in original). It is also effectively refuted by Justice Thomas, who argued that "[t]he possibility that an oral declaration of past fact to a police officer, if false, could result in legal consequences to the speaker may render honesty in casual conversations with police officers important. It does not, however, render those conversations solemn or formal in the ordinary meanings of those terms." Id. at 838 n.3 (Thomas, J., concurring in part and dissenting in part).
119. Id. at 814.
taping and making notes of her answers" while Michelle McCottry provided "frantic answers . . . over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." Thus, as a constitutional matter Michelle McCottry "was not acting as a witness; she was not testifying . . . [and w]hat she said was not a weaker substitute for live testimony" at trial.

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

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

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

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

120. Id. at 827.
121. Id.
122. Id. at 828 (quoting United States v. Inadi, 475 U.S. 387, 394 (1986)).
123. Id. at 822.
125. Id. at 356-57.
126. See People v. Giles, 19 Cal. Rptr. 3d 843, 850 (2004); People v. Giles, 152 P.3d 433, 435 (Cal. 2007).
intended through his actions to prevent the witness from testifying.\textsuperscript{127} Any other intent will not suffice because, under the common law "the 'wrong' and 'evil Practices' to which... statements [defining forfeiture] referred was conduct \textit{designed} to prevent a witness from testifying."\textsuperscript{128} Although the \textit{Giles} Court acknowledged that "the absence of a forfeiture rule covering this sort of conduct would create an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them,"\textsuperscript{129} it could not accept the "notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior \textit{judicial} assessment that the defendant is guilty as charged . . . . [because that would be] akin . . . to 'dispensing with jury trial because a defendant is obviously guilty.'"\textsuperscript{130}

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

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

\textbf{E. Melendez-Diaz v. Massachusetts: Expert Witnesses and Testimonial Statements}

\textit{Melendez-Diaz v. Massachusetts} arose out of a Boston police investigation that resulted in the arrest of Luis Melendez-Diaz and the discovery of nineteen bags of white powder hidden in the back seat of a

\textsuperscript{127} \textit{Giles}, 554 U.S. at 367-68; see FED. R. EVID. 804(b)(6).
\textsuperscript{128} \textit{Giles}, 554 U.S. at 365 (emphasis in original).
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.} (citing Crawford v. Washington, 541 U.S. 36, 62 (2004)).
\textsuperscript{131} \textit{Id.} at 377-78 (quoting Davis v. Washington, 547 U.S. 813, 840 (2006) (Thomas, J., concurring)).
\textsuperscript{132} \textit{Id.} at 378 (Alito, J., concurring) (quoting U.S. CONST. amend. VI).
police patrol car. The defendant was charged with distributing and trafficking in cocaine. At his trial, the Commonwealth submitted three "'certificates of analysis.'" These certificates reported the amount of white powder seized from the defendant and detailed how the powder had been "examined with the following results: The substance was found to contain: Cocaine." As required by state law, the three certificates had been sworn to before a notary public. The Massachusetts statutory design was clear. Sworn and notarized certificates of analysis were intended to promote accurate crime laboratory analyses and to provide prima facie evidence of the composition, quality, and weight of the tested substance. Thus, when certificates of analysis were offered at trial, prosecutors for the Commonwealth could, but need not, call the analyst to testify.

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

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

---

134. Id.
135. Id. at 2531.
136. Id.
137. Id.
138. Id. at 2532 (the "purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance") (quoting MASS. GEN. LAWS, ch. 111, § 13).
139. Id. at 2531.
140. Id.
141. Id. at 2531 (citing Crawford v. Washington, 541 U.S. 36, 51-52 (2004)).
142. Id. at 2532.
provides the only point of agreement with Justice Thomas whose concurrence was the essential fifth vote.\textsuperscript{143}

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

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

\section*{IV. THE CURRENT CONFRONTATION STANDARD: THE PRECAUOUS CONSTITUTIONAL FRAMEWORK OF \textit{MICHIGAN V. BRYANT}}

\subsection*{A. Facts and Legal History}

On the night of April 29, 2001, five Detroit police officers responded to a report of a shooting and found Anthony Covington lying on the ground next to his car in a gas station driveway.\textsuperscript{148} The police

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{143} \textit{Id.} at 2543.
\item \textsuperscript{144} \textit{Id.} (Kennedy, J., dissenting) (noting that the plurality "makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses—‘witnesses’ being the word the Framers used in the Confrontation Clause").
\item \textsuperscript{145} \textit{Id.} at 2549 (Kennedy, J. dissenting).
\item \textsuperscript{146} 131 S. Ct. 62 (2010).
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} Brief for Respondent at 1, Michigan v. Bryant, 131 S. Ct. 1143 (2011) (No. 09-150), 2010 WL 2481866.
\end{itemize}
\end{footnotesize}
officers could see that Covington had been shot and could see blood on the front of his shirt. The officers asked about his wound and assured him that an EMS unit had been dispatched. When they asked him, “What happened?” he responded, “I’ve been shot.” The officers asked Covington who shot him, and he told them it was Rick. Covington also told them that Rick has shot him through the door of a nearby house and that after he was shot he had driven himself a few blocks to the gas station. EMS arrived and transported Covington to the hospital where he died from his wounds several hours later.

Richard Perry Bryant was arrested in March 2002. At Bryant’s homicide trial, Covington’s statements were admitted as excited utterance exceptions to the hearsay rule. Although the victim’s statements were also arguably dying declarations, the prosecutor failed to raise this argument at trial. Bryant was convicted of second degree murder and possession of a firearm.

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

On June 10, 2009, the Michigan Supreme Court reversed the court of appeals. Using the same constitutional standard which they defined

149. Id. at 2.
150. Id.
151. Id.
152. Id. at 1.
153. Id.
154. Id. at 2.
155. Id. at 6.
156. Id. at 3.
157. Id. at 6.
158. Id.
as "whether the victim's statements were made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police to meet an 'ongoing emergency,'" the state supreme court reached the opposite conclusion.  

The three dissenting Michigan Supreme Court judges strongly disagreed that the facts revealed that Covington's primary investigatory purpose was to provide information "to enable the police to identify, locate, and apprehend the perpetrator." In a very brief dissent, Judge Weaver explained that the evidence suggested that "the declarant's statements were made in the course of a police interrogation under circumstances objectively indicating that the interrogation's primary purpose was to enable police assistance in an ongoing emergency."

Judge Corrigan, who was joined in his dissent by Judge Young, agreed with Judge Weaver, adding that Covington's evidentiary intent was clearly to resolve an emergency created by a shooting by an unapprehended suspect. Because most mid-investigation statements from crime victims/witnesses occur after the crime has occurred, the dissenters accused the majority of "assum[ing] too much when it concludes that there was no ongoing emergency because the shooting necessarily occurred 30 minutes earlier."  

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

163. Id. at 70 (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)).
164. Id. at 71.
165. Id.
166. Id. at 79 (Weaver, J., dissenting).
167. Id. at 80 (Corrigan, J., dissenting).
168. Id.
169. Professor Richard D. Friedman has consistently argued that the perspective must be that of the reasonable declarant. See, e.g., Brief of Richard D. Friedman, as Amicus Curiae in Support of Respondent, supra note 30, at 7.
B. Bryant and the Objective Primary Purpose of the Investigation Standard

1. The Parties Begin with a Similar Approach

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

2. Petitioner’s Early Attempt to Integrate Formality Concerns

The Bryant petitioner’s argument focused almost exclusively on the question of whether “an interrogation’s primary purpose is to help police handle an ongoing emergency . . . .”172 However, petitioner also urged the Court to consider its own Davis conclusion that “testimonial statements” under the Confrontation Clause must “necessarily include some sense of formality or solemnity . . . .”173 Although, neither petitioner’s brief nor petitioner’s oral argument mentioned Justice Thomas’s concurrence in White, petitioner reminded the Court that Crawford had defined “‘testimony’ to typically include ‘a solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”174 A more detailed and persuasive argument for formality as a critical criterion of confrontation was advanced by (then) Solicitor General Elena Kagan as amicus for petitioner.175

172. Petitioner’s Brief on the Merits, supra note 170, at 8.
173. Petitioner’s Brief on the Merits, supra note 170, at 6.
175. Brief for the United States as Amicus Curiae Supporting Petitioner at 13, Michigan v. Bryant, 131 S. Ct. 1143 (2011) (No. 09-150), 2010 WL 1848212. Of course, it is relevant that
3. Elaboration on the Formality Argument from Petitioner’s Amicus

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

4. Respondent Addresses the Formality Argument

The *Bryant* respondent also (accurately) anticipated that the Court would include formality as a component of its confrontation analysis; but hoped to prevent this from happening by persuading the Court that

---

Elena Kagan is now a member of the Court, despite the fact that one cannot assume that, in her new role Justice Kagan will maintain these same views.

176. *Id.* at 8.
177. *Id.* at 11 (quoting *Crawford*, 541 U.S. at 51).
179. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 175, at 17.
182. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 175, at 11 (quoting *Crawford*, 541 U.S. at 68).
all statements to the police are formal. To support this argument, respondent asserted that “[t]his court held in *Davis* that statements made to investigating police officers are sufficiently solemn and formal for the purposes of the Confrontation Clause because witnesses should be aware that giving a false statement to the police is itself criminal.” Even Justice Scalia, who so dislikes formality as a criterion of confrontation analysis that he remarked during *Bryant* oral argument, “[f]orget about formality, in other words . . . Formality or no formality has nothing to do with it,” should find this assertion implausible. In fact, it has already been persuasively refuted by Justice Thomas, who argued in *Davis* that a declarant’s knowledge that a false statement to the police “could result in legal consequences to the speaker, . . . may render honesty in casual conversations with police officers important. It does not, however, render those conversations solemn or formal in the ordinary meanings of those terms.”

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

Respondent’s amicus also anticipated the Court’s interest in testimonial formality. The National Association of Defense Lawyers (“NACDL”) argued (without support) that formality should have no independent role in the Court’s confrontation analysis. Thus, the Court should simply adopt the “general principle that statements should not be exempted for lack of formality where evidentiary purpose is otherwise shown.” In the alternative, NACDL argued that all testimonial statements are formal because they have the capacity to engender a formal result by “provid[ing] a basis for official action, the arrest of the suspected offender.”

Professor Richard D. Friedman, a leading authority on confrontation jurisprudence whose work and advocacy before the Court has helped shape recent developments in the field, filed an *amicus* brief in favor of respondent. Professor Friedman argued that the Court should not consider any facts and circumstances relating to formality of the act

---

185. *Davis*, 547 U.S. at 838 n.3 (Thomas, J., dissenting).
187. *Id.* at 16.
of serving as a witness because "it would stand logic on its head to treat a statement as non-testimonial, even though it was made in anticipation of prosecutorial use, on the ground that it was made informally. . . . [because t]he very point of the Confrontation Clause is to ensure that testimony is given under required formalities."188 This argument deserves some attention.

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

Finally, Professor Friedman rejected possible pragmatic concerns arguing that a primary investigatory purpose standard is analogous to the constitutional standards routinely used by judges to determine custody (under Miranda) or reasonable expectations of privacy and reasonable stops and seizures (under the Fourth Amendment).190 This second argument is not compelling. These other constitutional inquiries are not analogous because (unlike the objective primary purpose of the interrogation) they each involve a binary choice between mutually exclusive alternatives. A suspect either believes she is in

188. Brief of Richard D. Friedman, as Amicus Curiae in Support of Respondent, supra note 30, at 16.
189. Brief of Richard D. Friedman, as Amicus Curiae in Support of Respondent, supra note 30, at 16.
190. See Brief of Richard D. Friedman, as Amicus Curiae in Support of Respondent, supra note 30, at 11.
custody, or believes she is not in custody. A person either has a reasonable expectation of privacy, or she does not. The fundamental problem with a confrontation standard that requires judges to determine the primary purpose of the reasonable victim/witness and police officer mid-investigation is that in many cases it will be logical and consistent for the victim/witness and the police officer to believe that a statement could help to resolve an ongoing emergency now and later prove useful at trial.

V. THE POST-SCALIA FUTURE OF THE CONFRONTATION CLAUSE

A. Insight from the Bryant Oral Arguments

1. Nailing Down the Objective Primary Purpose of the Interrogation

On October 5, 2010, the Court heard oral argument in *Bryant*. It was clear from the start that the objective primary purpose of the interrogation standard is difficult, if not impossible, to operate. As an initial matter, the Justices thoroughly disagreed about whose primary purpose should control. Justice Scalia supported respondent's argument that "it's the purpose of the declarant, not of the questioner."9 In contrast, the Chief Justice opined that "the focus seems to be on the purpose of the interrogation, which seems to be the question of what the police thought, not what the—the person dying thought."9

Justice Ginsburg added to the confusion by contributing her realistic concern regarding dual purposes (to resolve an emergency and to provide evidence) which might coexist not only in the same person, but even in the same question or statement. According to Justice Ginsburg, "it seems to me, here, if you want to know what happened, you would ask the very same questions. . . . [because] the questions are relevant also to securing the situation. . . . [so] what different questions would you ask if you wanted to find out what happened?"193 Justice Alito echoed Justice Ginsburg's concern questioning both the logic and operability of the proposed primary purpose standard:

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

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

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

2. Reconsidering Evidentiary Reliability

Some members of the Court used the Bryant oral argument to raise dormant questions about evidentiary reliability. This line of inquiry began with a nod to Crawford as Justice Kennedy noted that “Crawford rejects reliability as a criteria [sic]”196 and was followed by Justice Scalia’s more precise observation that “there is no basis for saying . . . the Confrontation Clause pertains only to reliability.”197 However, Justice Sotomayor wondered whether the assumption that a police interrogation had been aimed at risk assessment means “we’re back to the reliability test, really, . . . [because i]t goes to the very essence of reliability.”198 Later on Justice Kennedy seemed to share Justice Sotomayor’s concern when he commented that if “there was an emergency and the police were asking questions in order to mitigate the emergency,”199 under these circumstances the “police likely have less motive to manipulate the—the statements and to ask loaded questions[.] That in itself, it seems to me, is . . . reliabil[ity].”200 Towards the end of the oral argument, after a series of questions to respondent’s counsel

197. Transcript of Oral Argument, supra note 26, at 42 (emphasis added).
regarding the type of questions police ask to resolve ongoing emergencies, Justice Kennedy concluded: "Isn't there a reliability component that underlies this whether we like it or not?" 201

3. Are all Statements about Past Events Testimonial?

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

4. Operating the Objective Primary Purpose of the Investigation Standard

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

[i]n many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are both to respond to the emergency situation and to gather evidence. Assigning one of these two

201. Transcript of Oral Argument, supra note 26, at 38.
203. Transcript of Oral Argument, supra note 26, at 44.
204. Transcript of Oral Argument, supra note 26, at 44.
205. Transcript of Oral Argument, supra note 26, at 45.
"largely unverifiable motives," primacy requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible. It will inevitably be, quite simply, an exercise in fiction.206

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

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

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

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

**B. Insight from the Court’s Decision in Bryant**

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

1. “[T]he statements and actions of both the declarant and interrogators.”210

2. Whether the ongoing emergency posed a threat to the public at large.211

---

208. Transcript of Oral Argument, supra note 26, at 50.
210. Id. at 1148.
3. The “informality in an encounter between a victim and police.”

4. “The parties’ perception that an emergency is ongoing.”

5. Whether “the cause of the shooting was a purely private dispute.”

6. Whether the assailant used a gun.

7. Whether, at the time of the interrogation, the police knew the location of the assailant.

8. Whether the police asked the “type of questions necessary to allow the police to ‘assess the situation, the threat to their own safety, and possible danger to the potential victim’ and to the public . . . .”

Justice Sotomayor makes little effort to prioritize these factors or to explain to the lower courts how conflicts should be resolved. To cite just a few likely areas of ongoing confusion: (1) Should the parties’ (or even the reasonable parties’) perception of an ongoing emergency control, if the facts indicate that the emergency has been resolved?; (2) What factors should courts use to determine the formality of a mid-investigation encounter between the police and a victim/witness?; (3) Does the use of a gun always create a non-private dispute and/or a threat to the public at large?; or (4) If the police do not know the location of the suspect, when is the emergency no longer ongoing?

In fact, the threshold question of whose objective primary purpose controls, which was front and center in both the Bryant briefs and oral argument, has not even been resolved. In his dissent, Justice Scalia posited that “[t]he declarant’s intent is what counts.” However, in her decision for the majority, Justice Sotomayor concluded that “Davis requires a combined inquiry that accounts for both the declarant and the interrogator.” In the view of the Bryant majority, a “combined inquiry” will “ameliorate[] problems that could arise from looking solely

211. Id. at 1156.
212. Id. at 1160 (emphasis in original).
213. Id. at 1162 (emphasis added).
214. Id. at 1163.
215. Id. at 1164.
216. Id. at 1165.
217. Id. at 1166 (quoting Davis v. Washington, 547 U.S. 813, 832 (2006)).
218. Id. at 1168 (Scalia, J., dissenting).
219. Id. at 1160.
to one participant." This is unlikely given the inevitable complexities of real life crime scenes along with the increase in shifting, dual, and conflicting purposes among victims, witnesses, and police officers. As Justice Scalia observed, "[s]orting out the primary purpose of a declarant with mixed motives is sometimes difficult. But adding in the mixed motives of the police only compounds the problem."  

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

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

220. Id. at 1161.

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

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

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

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

224. Davis, 547 U.S. at 822.
Confrontation Clause requires us to evaluate.” The Davis Court clearly intended that the declarant’s statement and her intent when she made the statement provide the focus for the analysis.

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

C. Toward a New Confrontation Jurisprudence

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

225. Id. at 822 n.1 (emphasis added).
226. Bryant, 131 S. Ct. at 1157.
227. Id. at 1155 (“But there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.”) (emphasis in original).
228. Id. at 1155.
There is also significant textual and doctrinal support for reframing the confrontation standard to focus on the distinction between “witnessing” and speaking. Obviously, the text of the Sixth Amendment refers only to “witnesses.” As the Crawford Court explicitly recognized, not all declarants whose statements are proffered by the prosecution at trial are witnesses because “not all hearsay implicates the Sixth Amendment’s core concerns.”

Confrontation is principally guaranteed for those who serve as witnesses by making “formal statement[s] to government officers” because, for example, a “recorded statement knowingly given in response to structured police questioning qualifies [for confrontation] under any conceivable definition.” Moreover, “[a]n accuser who makes a formal statement to government officers” is a witness because she “bears testimony in a sense that a person who makes a casual remark does not.”

Similarly, in Davis when the victim made statements to the police during her mid-assault 911 call she “was not acting as a witness; she was not testifying. . . . [and w]hat she said was not a ‘weaker substitute for live testimony’ at trial . . . .” Finally, the Bryant Court found that “the most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.”

Further analytic support for a confrontation inquiry focused on the act of witnessing can be found in the seminal work of Professor Akhil Reed Amar. Indeed, Professor Amar had long argued that “the obvious solution” to understanding what the Framers meant when they wrote the Confrontation Clause “is to heed the word ‘witness[]’ and its ordinary everyday meaning.” Professor Amar’s interpretation of the Confrontation Clause (which was cited by the Crawford Court) is based on the sensible assumption that “[a] Constitution that speaks in the name of the people and that draws its legitimacy from ratification by the people—ordinary citizens—should be presumed to use words in their

231. Id. (emphasis added).
232. Id. at 53 n.4 (emphasis added).
234. Id. (quoting Crawford, 547 U.S. at 51).
235. Id. at 828 (quoting United States v. Inadi, 475 U.S. 387, 394 (1986)).
238. Crawford, 541 U.S. at 61.
Thus, to borrow his persuasive yet simple example, "[i]f I tell my mom what I saw yesterday, and she later testifies in court, I am not the witness; she is." Thus, the definition of "witness" in the Confrontation Clause must be consistent with the three other constitutional clauses that use the word "witness," the Treason Clause, the Fifth Amendment Self-Incrimination Clause, and the Compulsory Process Clause. Using both the "ordinary everyday meaning" and the intertextualist approaches, Professor Amar has repeatedly concluded that the Confrontation Clause "encompasses only those 'witnesses' who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like.

Finally, by focusing on the witness, rather than the testimonial nature of a statement, courts are likely to make more reliable and consistent confrontation decisions. Although constitutional determinations inevitably involve ambiguity and uncertainty, we must start from the analysis proposed in Bryant which would force the federal and state criminal courts to evaluate: (1) "the statements and actions of both the declarant and interrogators;" (2) whether the ongoing emergency posed a threat to the public at large; (3) the "informality in an encounter between a victim and police;" (4) "[t]he parties' perception that an emergency is ongoing;" (5) whether "the cause of the shooting was a purely private dispute;" (6) whether the suspect

---

240. Id. at 1156.
241. Id. at 1160 (emphasis in original).
242. Id. at 1162 (emphasis added).
used a gun;\textsuperscript{252} (7) whether, at the time of the interrogation, the police knew the location of the suspect;\textsuperscript{253} and (8) whether the police asked the “type of questions necessary to allow the police to ‘assess the situation, the threat to their own safety, and possible danger to the potential victim’ and to the public . . . \textsuperscript{254}"

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

**D. A Two-Pronged Confrontation Standard**

Although Bryant hints of a possible return to the bad old pre-Crawford days when confrontation decisions were based on evidentiary reliability, a full retreat to this approach seems unlikely.\textsuperscript{255} In the future, the Court may build a variety of confrontation structures on its Crawford/Davis/Bryant foundation. For example, the Court could adopt a rebuttable two-pronged confrontation standard that might hew more closely to the relevant text, clarify the process, and yet remain consistent with the post-Crawford doctrine.

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

(1) by ascertainable facts and circumstances demonstrating that the making of the statement was the functional equivalent of providing trial testimony; or in the alternative

(2) by ascertainable facts and circumstances demonstrating that the making of the statement was the functional

\textsuperscript{252} \textit{Id.} at 1164.

\textsuperscript{253} \textit{Id.} at 1163.

\textsuperscript{254} \textit{Id.} at 1166 (quoting Davis v. Washington, 547 U.S. 813, 832 (2006)).

\textsuperscript{255} \textit{Id.} at 1155 ("In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.").
equivalent of providing testimony because the police and/or the crime victim/witness understood and intended, or should have understood and intended, that the victim/witness was making a record that could be used to prosecute the defendant.

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

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

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

This two-pronged approach is just one possible first step towards a more consistent analytic process focused on the fundamental objective of barring prosecutors from using *ex parte* testimony against the


\(^{257}\) Amar, *supra* note 239, at 1045.

\(^{258}\) *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 175, at 17.
accused. In many cases, this approach would yield results consistent with the recent confrontation doctrine. For example, Sylvia Crawford’s written and Mirandized stationhouse statement, Amy Hammon’s sworn “battery affidavit,” and the Commonwealth of Massachusetts’ “certificates of analysis” would all satisfy both prongs. Michelle McCottry’s mid-assault 911 call would not satisfy either prong. Finally, Anthony Covington’s identification of the defendant would clearly not satisfy prong one and, given the limited police opportunity to develop, structure, or control the victim’s statement, under these circumstances neither Mr. Covington, nor a reasonable victim, would have understood and intended that by identifying his unapprehended assailant, he was making a record that would be used at trial. However, as discussed below, there are both legal and social costs to this approach.

VI. CONCLUSION

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

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

The first legal cost (which I raise here, but will elaborate on in future work) is to defense challenges under Bruton v. United States. In Bruton, the Supreme Court interpreted the Confrontation Clause to bar the admission of a codefendant's confession implicating the other defendant at a joint trial. Prior to Bruton, federal and state criminal courts had generally assumed that confessions by one defendant that

259. Bryant, 131 S. Ct. at 1168 (Scalia, J., dissenting).
260. Id. at 1173.
261. Id. at 1174.
implicated a codefendant (i.e., an interlocking confession) could be admitted without violating the Confrontation Clause if the judge instructed the jury that the confession was admissible only against the confessing codefendant. The Bruton Court recognized the naivety of this solution: “[t]he fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors.”

After Bruton, federal and state prosecutors can only admit a non-testifying codefendant’s interlocking confession, if it has been effectively redacted or if the defendants trial are severed and the confession is introduced only against the defendant who made it. Over the past forty years, the Court has further distinguished confessions that explicitly and directly incriminated co-defendants from those that incriminated co-defendants only inferentially when combined with other evidence. The Court has also clarified that the Confrontation Clause is violated even when the defendant’s own confession (reciting essentially the same information) was introduced at trial or if the nontestifying codefendant’s confession was ineffectively redacted.

However, over the past seven years, federal and state criminal courts have increasingly found that it is now “necessary to view Bruton

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

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

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

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

267. See Gray v. Maryland, 523 U.S. 185, 193 (1998) (“Redactions that simply replace a name with an obvious blank space or a word such as ‘deleted’ or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble Bruton’s unredacted statements that, in our view, the law must require the same result.”). See also United States v. West, No. 08 CR 669, 2011 WL 1313706 (N.D. Ill. Mar. 10, 2011) (finding that a court “can and should consider the surrounding circumstances in determining whether the redacted statement impermissibly identifies a non-testifying co-defendant”).
To the extent that a clarification of the confrontation standard is used to limit its scope, defendants will be increasingly barred from raising Bruton challenges to inculpatory (but non-testimonial) out-of-court statements made by non-testifying codefendants whenever this evidence survives hearsay challenges (e.g., statements against interest, coconspirator statements).\(^\text{269}\)

A second legal predictable cost is that law enforcement could respond with new strategies and practices designed to prevent the formalization (and thus enhance the admissibility) of crime victim/witness statements.\(^\text{270}\) Presumably blatant police efforts to evade confrontation would not be tolerated. As the Davis Court noted, it would not be acceptable if “the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn testimony of the declarant, instead of having the declarant sign a deposition.”\(^\text{271}\) Law enforcement agents would also be forced to weigh the confrontation implications of formalization against a range of competing investigatory and evidentiary benefits and concerns (e.g., preserving evidence, obtaining sworn statements). However, any shift in police practices that enables police to insulate victims/witnesses who provide inculpatory evidence from cross-examination would undermine what Professor Andrew Taslitz has identified as “the primary, although not necessarily sole, purpose of the Confrontation Clause [which] is preventing governmental misconduct in the creation of evidence.”\(^\text{272}\)

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

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

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


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

No confrontation solution is perfect. When Justice Scalia wrote for a unanimous Court in *Crawford*, his purported goal was to replace the "inherently, and therefore permanently unpredictable"\(^ {276}\) rules of evidence with a new confrontation inquiry that would better reflect the constitutional text, the framer’s intent, legal history, and core fair trial principles. However, Justice Scalia’s valiant seven-year effort to prevent the admission of “statements that do consist of *ex parte* testimony upon a mere finding of reliability”\(^ {277}\) is increasingly

---


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

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


\(^{277}\) *Id.* at 60 (emphasis in original).
threatened by the Court's own confusing and ambiguous doctrine. The 
Crawford Court was clearly correct that a defendant's right to confront 
must trump federal and state evidence rules under many circumstances. 
But the fair administration of justice demands that confrontation have a 
sensible meaning and consistent effect so that these interests will be 
protected in future criminal trials.