

# CONFRONTATION AFTER SCALIA AND KENNEDY

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# CONFRONTATION AFTER SCALIA AND KENNEDY

Michael S. Pardo\*

*"I write separately, however, to protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in Crawford v. Washington, 541 U.S. 36 (2004). . . . Crawford remains the law. . . . The author unabashedly displays his hostility to Crawford and its progeny, perhaps aggravated by inability to muster the votes to overrule them. . . . But the good news is that there are evidently not the votes to return to that halcyon era for prosecutors. . . ."*<sup>1</sup>

– Justice Antonin Scalia

*"It is remarkable that the Court so confidently disregards a century of jurisprudence. We learn now that we have misinterpreted the Confrontation Clause—hardly an arcane or seldom-used provision of the Constitution—for the first 218 years of its existence."*<sup>2</sup>

– Justice Anthony Kennedy

## INTRODUCTION

Justice Scalia's 2004 opinion in *Crawford v. Washington*<sup>3</sup> ushered in a revolution in the world of evidence and criminal prosecutions. The decision was remarkable in at least three respects. First, it had (and continues to have) a significant effect on the day-to-day realities of various aspects of the criminal justice system throughout the United States by rendering previously admissible prosecution evidence now potentially inadmissible.<sup>4</sup> Moreover, the decision's influence includes not only the admissibility of evidence at trial—its most visible impact—but also the behavior of actors throughout the system, including prosecutors, defense attorneys, police, forensic lab analysts, and virtually any actor involved in the gathering and processing of evidence for use in criminal prosecutions.<sup>5</sup> Second, as a theoretical matter, the decision was a striking victory for the interpretive methodology of originalism. On explicitly

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1. *Ohio v. Clark*, 135 S. Ct. 2173, 2184–85 (2015) (Scalia, J., concurring in the judgment).

2. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330 (2009) (Kennedy, J., dissenting).

3. 541 U.S. 36 (2004).

4. For criticism of the decision, see David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 56 ("The archaic, uncompromising version of the rule that the Supreme Court has now read into the Sixth Amendment excludes too much probative evidence with too little justification.")

5. There was some fear that *Crawford* and its progeny would produce disastrous consequences for the criminal justice system, but there seems to be little evidence that this has been the case. See Richard D. Friedman, *The Sky Is Still Not Falling*, 20 J.L. & POL'Y 427 (2012).

originalist grounds, the decision rejected the Court's then-extant doctrinal test, adopting a new test that purported to restore confrontation doctrine to one consistent with the historical evidence and original public meaning.<sup>6</sup> The third remarkable feature follows from a combination of the first two. Because of its significant pro-criminal-defendant consequences, the decision appeared to depart from the usual association of the methodology of originalism with politically conservative results.<sup>7</sup>

The decade following *Crawford*, however, produced sharp divisions and significant backlash within the Supreme Court's confrontation jurisprudence, as the Court struggled to implement further doctrinal details. As with the *Crawford* decision itself, the disagreements that arose among the Court cut across the usual political "conservative" and "liberal" assumptions.<sup>8</sup> The first fault line emerged in the Court's next look at the Confrontation Clause. In two consolidated cases, *Davis v. Washington* and *Hammon v. Indiana*,<sup>9</sup> Justice Thomas dissented in part and wrote separately to disagree with the test crafted by Justice Scalia in his opinion for the majority.<sup>10</sup> This disagreement is of course notable because Thomas shares Scalia's methodological commitment

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6. *Crawford*, 541 U.S. at 60 ("Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause."). For a critique of the decision's historical analysis, see Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005).

7. See Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 250–51 (2018) (stating that it is a "myth" that "originalism is an inherently conservative judicial ideology": "[o]riginalism commits us to the idea that we must follow the Constitution wherever it leads, whether the destination is conservative or libertarian, liberal or progressive"). The *Crawford* opinion is the likely reference in this story reported by Jeffrey Toobin: "[A]sked at a public forum his favorite of his opinions—a common question for the justices in such settings—he came up with an esoteric case interpreting the Confrontation Clause of the Sixth Amendment." JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 317 (2007). For a recent discussion of Justice Scalia's Confrontation Clause decisions against the backdrop of his other decisions in the area of criminal justice, see RICHARD L. HASEN, *THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION* 155–56 (2018) ("These decisions—most notably, but not only, in the Confrontation Clause area—do indeed suggest that Scalia was not motivated solely by conservative 'law and order' values and was sometimes willing to follow his jurisprudential commitments to places where, ideologically, he might have preferred not to go. But it is easy to exaggerate the extent to which he favored criminal defendants' rights. Outside of the areas just discussed, he was a reliable conservative vote on core criminal law issues . . ."). It is also important to note that the "conservative" and "liberal" labels are often too crude to capture some of the complex political dynamics involved in the cases. For example, one much-discussed effect of *Crawford* and its progeny was in the area of domestic violence prosecutions, where the decision slowed down, and in some instances stopped, reform efforts. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005); Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311 (2005).

8. Part II will discuss these disagreements in more detail. For a brief overview: Justice Breyer typically aligned with Justices Kennedy, Alito, and Roberts in siding with the government. Justices Ginsburg and Kagan typically joined Justice Scalia in siding with the defendant. Justices Sotomayor and Thomas sometimes sided with one of the above groups and sometimes with the other.

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

10. *Id.* at 842 (Thomas, J., concurring in the judgment in part and dissenting in part).

to originalism, more so than any other Justice at the time.<sup>11</sup>

A second, and more significant, division occurred in a trilogy of cases involving forensic laboratory reports. In two such cases, *Melendez-Diaz v. Massachusetts*<sup>12</sup> and *Bullcoming v. New Mexico*,<sup>13</sup> Justice Kennedy authored vigorous dissents on behalf of himself and three other Justices.<sup>14</sup> These four—Justices Kennedy, Alito, Roberts, and Breyer—would become a solid block consistently refusing to apply *Crawford* to exclude prosecution evidence, in these and subsequent cases the Court would consider.<sup>15</sup> This Article will at times refer to these four Justices as the “*Crawford* skeptics.” The Court’s post-*Crawford* division reached its most extreme in the 2011 case of *Williams v. Illinois*,<sup>16</sup> in which a plurality opinion by Justice Alito for the *Crawford* skeptics<sup>17</sup> was met with sharp disagreement by four other Justices (authored by Justice Kagan, and joined by Justices Scalia, Sotomayor, and Ginsburg).<sup>18</sup> Justice Thomas wrote separately to agree with the plurality in result only, while also agreeing with much of the dissent’s reasoning and explicitly rejecting the plurality’s rationales.<sup>19</sup> Exactly how to interpret the 4-4-1 *Williams* decision—the Court’s most recent statement on laboratory reports in the confrontation context—has been a continuing source of confusion for lower courts.<sup>20</sup>

Even when the Court agreed unanimously on the result in a subsequent confrontation case, the sharp divisions continued to reveal themselves. In *Ohio v. Clark*,<sup>21</sup> the Court held that the admission of statements made by a three-year-old boy to his teachers did not violate the Confrontation Clause.<sup>22</sup> Every Justice agreed with this result, and yet the majority’s opinion produced a sharply worded concurrence from Justice Scalia (joined by Justice Ginsburg)—an opinion from which one of the epigraphs for this Article is taken—in which Scalia chastised the majority for downplaying the significance of

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11. See Honorable Justice Clarence Thomas, Judging (Apr. 8, 1996), in 45 U. KAN. L. REV. 1, 6–7 (1996).

12. 557 U.S. 305 (2009).

13. 564 U.S. 647 (2011).

14. *Id.* at 674 (Kennedy, J., dissenting) (“Whether or not one agrees with the reasoning and the result in *Melendez-Diaz*, the Court today takes the new and serious misstep of extending that holding to instances like this one.”); *Melendez-Diaz*, 557 U.S. at 330 (Kennedy, J., dissenting).

15. In *Michigan v. Bryant*, 562 U.S. 344, 347–49 (2011), these four joined Justice Sotomayor’s majority opinion in holding that the statements admitted into evidence did not violate the Confrontation Clause.

16. 567 U.S. 50 (2012).

17. *Id.* at 56 (plurality opinion).

18. *Id.* at 118 (Kagan, J., dissenting).

19. *Id.* at 103–18 (Thomas, J., concurring in the judgment).

20. See, e.g., *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013) (asserting that *Williams* fails to “yield a single, useful holding”).

21. 135 S. Ct. 2173 (2015).

22. *Id.* at 2177–79.

*Crawford*.<sup>23</sup> This concurrence by Justice Scalia would be his last published opinion on the subject.

Thus was the state of things at the time of Justice Scalia's death. Four Justices appeared to be intent on overruling, or at least avoiding the implications of, *Crawford*. A fifth Justice—Justice Thomas—was consistently defending a doctrinal test that no other Justice had been willing to adopt. The arrival of Justice Gorsuch on the Court thus raised a number of possibilities for the future of confrontation doctrine. Perhaps he would join the four opposed to *Crawford* and thus overrule or limit its application. Perhaps, instead, Gorsuch (a self-identified originalist<sup>24</sup>) would replace Scalia's position and take on his role as a defender of *Crawford* and its progeny. Perhaps he would join with Justice Thomas and provide his approach with a second vote? Gorsuch thus arrived positioned to play a pivotal role in the future of confrontation doctrine. But the Court did not hear a confrontation case during his first term on the Court. And then, Justice Kennedy—one of the four *Crawford* skeptics and a principal dissenter in its applications—retired.

Thus is the state of current confrontation doctrine. Now, with two new Justices replacing both *Crawford*'s champion and one of its principal skeptics, respectively, confrontation jurisprudence is once again at a crossroads. This Essay discusses some of the possible futures for the confrontation doctrine. After first outlining the general issue in Part I—the relationship between hearsay and the Confrontation Clause—Part II discusses the attempt by *Crawford* and its progeny to specify the scope of the confrontation right. Part III then traces possible future paths for the doctrine, with an eye toward the potential roles taken by Justices Gorsuch and Kavanaugh. This Part distinguishes between statements by experts and by eyewitnesses, explaining why these areas likely face different futures in the short term. Along the way, this Part also discusses a number of issues the Court will likely need to address in the near future, including (1) whether and when the confrontation right applies to autopsy reports; (2) when one expert may testify based on the work of another; and (3) when, if at all, the confrontation right applies to hearsay based solely on the perspective of the audience, as opposed to the speaker. The Conclusion offers some possible explanations for the confusing current state of confrontation doctrine.

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23. *Id.* at 2184 (Scalia, J., concurring in the judgment). Justice Thomas wrote separately to explain that the result comported with his formal test. *Id.* at 2186 (Thomas, J., concurring in the judgment).

24. See Honorable Neil M. Gorsuch, Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia (Apr. 7, 2016), in 66 CASE W. RES. L. REV. 905, 908–09 (2016).

## I. CONFRONTATION AND HEARSAY: A BRIEF OVERVIEW OF THE PROBLEM

Imagine a criminal trial taking place anywhere in the United States.<sup>25</sup> No matter the crime and how the details are filled in, the following will be true: the prosecution will need evidence, and that evidence will consist of some mix of potential witnesses and physical evidence. The following will also be true: the defendant will have an array of constitutional rights, one of which is the Confrontation Clause of the Sixth Amendment. The Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him,”<sup>26</sup> and the core of this right is the opportunity for criminal defendants to cross-examine those who provide inculpatory statements against them.<sup>27</sup> A difficult interpretative problem arises in specifying how this right interacts with the law of hearsay.

Some of the evidence in our hypothetical prosecutor’s mix is likely to be hearsay: statements not made at the trial that are offered for their truth.<sup>28</sup> What is the relationship between the Confrontation Clause and hearsay statements? In other words, when is a hearsay declarant a “witness” for purposes of the Clause? There are three general possibilities. First, perhaps the Clause applies only to witnesses who testify at the trial.<sup>29</sup> Thus, it simply would not apply to hearsay statements from nontestifying declarants. Second, perhaps instead the Clause applies to all hearsay. In other words, a “witness” for purposes of the Clause would be anyone who makes a statement (in court or out of court) that is used for its truth against a criminal defendant. Third, the Clause might apply to some, but not all, hearsay statements. The Supreme Court has long maintained that this third general option is the correct one<sup>30</sup>—the difficult task has been where to draw the line between statements that are subject to the Clause and those that are not.

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25. The Confrontation Clause applies in both federal and state court. *See Pointer v. Texas*, 380 U.S. 400, 406 (1965).

26. U.S. CONST. amend. VI.

27. *See Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (“The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”).

28. FED. R. EVID. 801(c) (“‘Hearsay’ means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”). These statements may arise within the testimony of witnesses at trial or in exhibits.

29. *See* 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 101 (2d ed. 1923).

30. *See Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (“The historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay.”), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004); *Mattox*, 156 U.S. at 243–44.

## II. FROM “RELIABILITY” TO “TESTIMONIAL”: A BRIEF SUMMARY OF *CRAWFORD* AND ITS PROGENY

Prior to *Crawford*, the Court’s test for whether hearsay from a nontestifying declarant could be admitted against a criminal defendant depended on the evidence’s perceived “reliability.”<sup>31</sup> In short, hearsay could be admitted without violating the Confrontation Clause if the prosecution could show that it was reliable. The Court settled on a test for reliability in which either (1) the statement had to fall under “a firmly rooted hearsay exception” or (2) it had to have “particularized guarantees of trustworthiness.”<sup>32</sup> Over a series of cases, the Court held many hearsay exceptions to be “firmly rooted,” and thus hearsay analysis typically stood in for Confrontation Clause analysis.<sup>33</sup> In other words, the Clause did not do a lot of independent work excluding evidence.<sup>34</sup>

### A. *The Crawford Opinion*

*Crawford* revolutionized this area of law by effectively severing the ties between the Confrontation Clause’s requirements and modern hearsay law.<sup>35</sup> The defendant in *Crawford*, charged with assault and attempted murder, claimed self-defense at trial.<sup>36</sup> The evidence at issue concerned statements that the defendant’s wife made to police during interrogation about a fight be-

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31. *Roberts*, 448 U.S. at 66.

32. *Id.* The Court initially also required a showing that the declarant was unavailable to testify, *id.* at 65, but later abandoned this as a categorical requirement, *White v. Illinois*, 502 U.S. 346, 354 (1992).

33. See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 182 (1987). But see *Lilly v. Virginia*, 527 U.S. 116, 134 (1999) (“statements against penal interest” exception not firmly rooted); *Idaho v. Wright*, 497 U.S. 805, 817 (1990) (residual exception not firmly rooted).

34. Justice Scalia stated in his concurrence in *Ohio v. Clark*: “For several decades before [*Crawford*], we had been allowing hearsay statements to be admitted against a criminal defendant if they bore ‘indicia of reliability.’ Prosecutors, past and present, love that flabby test.” 135 S. Ct. 2173, 2184 (2015) (Scalia, J., concurring) (citation omitted).

35. *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (“Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence . . .”). *Crawford* did not come out of nowhere. In *Lilly*, in which a divided Court held that the hearsay exception for “statements against penal interest” was not firmly rooted, Justices Scalia, Thomas, and Breyer all wrote separately to suggest that the Court’s extant confrontation doctrine should be reconsidered. 527 U.S. at 133–34 (majority opinion); *id.* at 140 (Breyer, J., concurring); *id.* at 143 (Scalia, J., concurring in part and in the judgment); *id.* at 143–49 (Thomas, J., concurring in part and in the judgment). Academic commentators had also been arguing for a rethinking of confrontation doctrine. See Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 688–97 (1996); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998). Although *Crawford* severed confrontation analysis from current hearsay law, it did so by linking the right with the Court’s perception of an earlier version of hearsay law. For criticism of the opinion along these lines, see Sklansky, *supra* note 4, at 5 (“[T]he Court has woven the hearsay rule into the Sixth Amendment more tightly than ever, but it has done so with the rule in its eighteenth-century form, or at least in its eighteenth-century form as now reconstructed by the Court.”).

36. *Crawford*, 541 U.S. at 40.

tween her husband and the alleged victim.<sup>37</sup> The prosecution admitted these statements because some of the details about when and whether the alleged victim had a weapon contradicted the defendant's account.<sup>38</sup> The defendant's wife did not testify at trial because of the state's marital privilege law,<sup>39</sup> and the defendant challenged the prosecution's use of the hearsay statements as a violation of the Confrontation Clause, ultimately losing in the state supreme court.<sup>40</sup>

Rejecting an inquiry into the reliability of the out-of-court statements, the U.S. Supreme Court turned to the language of the amendment and focused on the word "witnesses."<sup>41</sup> Citing Noah Webster's 1828 dictionary, and discussing historical practices regarding witness statements, Justice Scalia's majority opinion explained that witnesses are those who "bear testimony."<sup>42</sup> In construing the Clause, however, Justice Scalia also explained that its scope is not limited to in-court testimony by witnesses at trial. Rather, he surveyed several historical sources to support a general conclusion that the Clause aims to remedy a "principal evil"—namely, the *ex parte* examination of a potential witness and the later use of that person's statements against a criminal defendant instead of in-court testimony.<sup>43</sup> In aiming to remedy this "evil," Scalia noted a second proposition supported by the historical sources: "[T]he Framers would not have allowed 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."<sup>44</sup> In elaborating on the relationship between confrontation and reliability, Justice Scalia further explained that the Clause reflects a procedural judgment about the best way to ensure the reliability of evidence: "testing in the crucible of cross-examination."<sup>45</sup>

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37. *Id.* at 38–40.

38. *Id.* at 40. The statements were admitted as statements against interest. *Id.*

39. *Id.*

40. *Id.* at 40–42.

41. *Id.* at 51.

42. *Id.* (citing Noah Webster, *Witness*, WEBSTER'S DICTIONARY 1828 – ONLINE EDITION, <https://webstersdictionary1828.com/Dictionary/witness>). In addition to this definition of "witness" (to "bear testimony"), Webster's 1828 dictionary also lists a broader definition of "witness" as "[t]hat which furnishes evidence or proof." See Noah Webster, *Witness*, WEBSTER'S DICTIONARY 1828 – ONLINE EDITION, <https://webstersdictionary1828.com/Dictionary/witness>. In the context of the Fifth Amendment, Justices Thomas and Scalia have endorsed this broader definition in interpreting the word "witness"—"[n]o person . . . shall be compelled in any criminal case to be a witness against himself"—suggesting that the right should extend to more than "testimonial" evidence (a current requirement under self-incrimination doctrine). See *United States v. Hubbell*, 530 U.S. 27, 49–50 (2000) (Thomas, J., concurring) (citing U.S. CONST. amend. V).

43. *Crawford*, 541 U.S. at 50. The historical evidence consisted largely of "notorious" practices likely to be known and decried by the Framers, including the 1603 trial of Sir Walter Raleigh for treason and the sixteenth-century Marian bail and committal statutes, along with analogous practices in the colonies. *Id.* at 43–50.

44. *Id.* at 53–54.

45. *Id.* at 61 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a



Accordingly, *Crawford* held that “testimonial” statements from an absent declarant cannot be admitted unless the prosecution shows that the declarant is unavailable and there was a prior opportunity for cross-examination.<sup>46</sup> Without such a showing, the evidence must be excluded, even if it would otherwise be admissible under current hearsay law. Given this significant consequence, a lot depends on which out-of-court statements qualify as testimonial and thus are potentially subject to exclusion under the Clause.<sup>47</sup> The Court noted a definition of “testimony” as a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>48</sup> As for a possible doctrinal test, the Court suggested various possible formulations but did not settle on one. At one end, a narrow doctrinal formulation would count as testimonial only “formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”<sup>49</sup> At the other end, a more encompassing doctrinal formulation would also count as testimonial any statements that “declarants would reasonably expect to be used prosecutorially”<sup>50</sup> or “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>51</sup> The Court concluded that regardless of the precise formulation, the statements at issue—which were made in response to police interrogation—qualify as testimonial.<sup>52</sup>

The shift from “reliability” to “testimonial” did not face much resistance in *Crawford*. A concurrence by Chief Justice Rehnquist, joined by Justice O’Connor, agreed with the result reached by the majority but dissented from the shift from reliability, arguing that it was unnecessary to decide the cases.<sup>53</sup> These two Justices would no longer be on the Court for the next confrontation cases, and their replacements (Chief Justice Roberts and Justice Alito)

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procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner . . . . The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.”).

46. The Court mentioned two possible exceptions to this rule: forfeiture by wrongdoing and dying declarations. *Id.* at 56 n.6, 62. The Court later recognized the forfeiture exception in *Giles v. California*, 554 U.S. 353, 368 (2008).

47. The Court technically left open the question of whether the “reliability” inquiry (or other confrontation analysis) might still apply to nontestimonial hearsay. In a subsequent case, *Davis v. Washington*, 547 U.S. 813 (2006), the Court clarified that nontestimonial statements are outside the scope of the Confrontation Clause, *id.* at 821.

48. *Crawford*, 541 U.S. at 51.

49. *Id.* at 52. This is the test that Justice Thomas suggested in *White v. Illinois*, 502 U.S. 346, 364–66 (1992) (Thomas, J., concurring in part and concurring in the judgment), and one that he will stick with going forward in subsequent cases. See *infra* note 63.

50. *Crawford*, 541 U.S. at 51.

51. *Id.* at 52.

52. *Id.* at 68.

53. *Id.* at 69–76 (Rehnquist, C.J., concurring in the judgment).

would join Justice Scalia's majority in the next case.<sup>54</sup> The *Crawford* revolution appeared to be on its way. As the doctrine developed, however, significant disagreements and rifts began to emerge. In the discussion below, these developments are organized around three topics: the Court's initial attempt to construct a doctrinal test for testimonial statements, statements involving experts, and subsequent cases involving eyewitness statements.

### B. "Primary Purpose"

Two years after *Crawford*, in two consolidated cases, the Court clarified the doctrinal test for whether a statement is "testimonial" for purposes of the Confrontation Clause. One case, *Davis v. Washington*, involved statements made during a 911 call in which the declarant identified the defendant as her alleged attacker.<sup>55</sup> In the second, *Hammon v. Indiana*, the declarant made statements to police investigating a "domestic disturbance" call that were later used against the defendant, her husband, at trial.<sup>56</sup> Neither declarant testified.<sup>57</sup> Without offering an "exhaustive classification" of all testimonial statements, Justice Scalia, again writing for a majority of the Court, explained:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They 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.<sup>58</sup>

Applying these considerations, the Court held that (1) the statements in the 911 call in *Davis* are not testimonial because their primary purpose was to meet an ongoing emergency but that (2) the statements to police in *Hammon* are testimonial because there was no ongoing emergency—and the statements described "past events potentially relevant to later criminal prosecution."<sup>59</sup> In other words, as the Court put it, the declarant in *Hammon* was acting like a witness, but the declarant in *Davis* was not.<sup>60</sup>

These cases gave rise to the first major division among the Justices about how to apply *Crawford*. Justice Thomas concurred in part and dissented in

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54. See *Davis v. Washington*, 547 U.S. 813 (2006). Justices Kennedy and Breyer (who also joined the majority in *Crawford*) would as well.

55. *Id.* at 817–19.

56. *Id.* at 819–21.

57. *Id.* at 819–20.

58. *Id.* at 822.

59. *Id.* at 828–30.

60. *Id.* at 830 ("Such statements . . . are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination[.]"); *id.* at 828 ("[The declarant in *Davis*] was not acting as a witness; she was not *testifying*.").

part.<sup>61</sup> Most importantly, he disagreed with the majority's adoption of the "primary purpose" test as both "unworkable" and as going "far beyond" the abuses the Clause "was intended to prevent."<sup>62</sup> Construing "testimony" to require some degree of "solemnity," Justice Thomas argued in favor of a narrower doctrinal test that would apply only to "formalized" statements (such as affidavits, depositions, prior testimony, and confessions).<sup>63</sup> He therefore agreed with the majority that the 911 statements in *Davis* are not testimonial, but he dissented regarding the oral statements to the police in *Hammon*.<sup>64</sup> We thus see a sharp division in the Court's first confrontation case following *Crawford* between the Court's two originalists on how to construct the doctrine going forward.<sup>65</sup>

Larger, and starker, divisions would continue to emerge in subsequent cases. Rather than proceeding chronologically, the discussion below separates the cases based on whether the statements at issue are from experts or eyewitnesses. This separation allows greater analytical clarity as well as a better understanding of where current doctrine sits and the possible paths forward.

### C. Experts

Following *Crawford* and *Davis*, the Court decided a trilogy of cases dealing with forensic laboratory reports: *Melendez-Diaz*, *Bullcoming*, and *Williams*.

In *Melendez-Diaz*, the defendant was charged with distributing and trafficking cocaine.<sup>66</sup> The evidence at issue was three "certificates of analysis," which stated that a substance, found in bags in the defendant's possession,

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61. *Id.* at 834–42 (Thomas, J., concurring in part and dissenting in part).

62. *Id.* at 840.

63. *Id.* at 836–37. Not quite: Justice Thomas also hedged by suggesting that deliberate attempts to evade the Clause's requirement by substituting less formal evidence could be remedied on a case-by-case basis. *Id.* at 838 (asserting that the Clause should also apply to "the use of technically informal statements when used to evade the formalized process" and should exclude evidence "if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation"). In the majority opinion, Justice Scalia responded to the formality issue. *See id.* at 826 (majority opinion) ("[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."); *id.* at 830 n.5 ("Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction."). He also argued that Justice Thomas's proposed test was not "workable." *Id.* ("The dissent . . . has not provided anything that deserves the description 'workable'. . . . [T]he dissent even qualifies that vague distinction [between formal and informal statements] by acknowledging that the Confrontation Clause 'also reaches the use of technically informal statements when used to evade the formalized process'. . . . It is hard to see this as much more 'predictable'. . . .").

64. *Id.* at 842 (Thomas, J., concurring in part and dissenting in part).

65. Conceptually, the disagreement between Justices Scalia and Thomas may best be characterized as one concerning "construction" as opposed to "interpretation." *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010). In other words, the two Justices appear to share an interpretation of the Clause's language, but they are having an essentially normative disagreement about how best to construct the legal doctrine to protect the right expressed by this language.

66. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308 (2009).

was cocaine.<sup>67</sup> The documents were admitted into evidence pursuant to a state statute without testimony from their authors.<sup>68</sup> Justice Scalia, again writing for a majority of the Court, concluded that the certificates were testimonial and thus that their introduction into evidence violated the Confrontation Clause.<sup>69</sup> This conclusion, the Court explained, followed from the fact that the certificates “are functionally identical to live, in-court testimony.”<sup>70</sup> Moreover, the “sole purpose” of the documents was to provide evidence of the composition, quality, and weight of the substance—a purpose of which the analysts were well aware because “that purpose . . . was reprinted on the [certificates] themselves.”<sup>71</sup> Justice Thomas, who joined the majority, wrote a separate concurrence to explain that the certificates satisfied his test of “formalized testimonial materials.”<sup>72</sup>

It is at this point that the most significant post-*Crawford* division emerged. Justice Kennedy, joined by three other Justices, dissented, challenging the foundational premises of Justice Scalia’s majority opinion. According to the dissent, the “fundamental mistake” is to construe the Confrontation Clause as applying to a particular type of statement—i.e., one that is “testimonial.”<sup>73</sup> Rather, Justice Kennedy argued, the text refers to a type a person (“witnesses”) not to a type of statement.<sup>74</sup> Moreover, Justice Kennedy reasoned, laboratory analysts were not the type of “witness” that the Framers envisioned.<sup>75</sup> The type of “witness” referred to in the Clause, he argued, is a “conventional” eyewitness: “one who witnesses (that is, perceives) an event that gives him or her personal knowledge of some aspect of the defendant’s guilt.”<sup>76</sup> Justice Kennedy then noted three “significant ways” in which laboratory analysts differ from conventional witnesses: (1) they often describe near-contemporaneous, rather than past, events; (2) analysts do not observe the crime and may not even know the defendant’s identity; and (3) the analyst’s statements are subject to scientific protocols and are less adversarial.<sup>77</sup> Beginning with this dissent, these four *Crawford* skeptics would continue to push back on future applications of *Crawford*.

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67. *Id.* As the Court explained, the certificates were “quite plainly affidavits.” *Id.* at 310.

68. *Id.* at 308–09.

69. *Id.* at 310.

70. *Id.* at 310–11.

71. *Id.* at 311.

72. *Id.* at 329.

73. *Id.* at 343 (Kennedy, J., dissenting).

74. *Id.* at 343–44.

75. *Id.*

76. *Id.*

77. *Id.* at 345–46. Justice Kennedy also argued that requiring analysts to testify will impose “enormous costs on the administration of justice.” *Id.* at 341; *see also id.* at 342 (“The Court purchases its meddling with the Confrontation Clause at a dear price, a price not measured in taxpayer dollars alone. Guilty defendants will go free, on the most technical grounds, as a direct result of today’s decision, adding nothing to the truth-finding process.”).

In *Bullcoming*, the Court considered a forensic report stating the defendant's blood alcohol content.<sup>78</sup> Although the analyst who conducted the test and signed the report did not testify, the prosecution called another laboratory analyst to explain the report and to provide the defendant with an opportunity for cross-examination.<sup>79</sup> A majority of the Court again concluded that, as in *Melendez-Diaz*, the laboratory report was testimonial.<sup>80</sup> Moreover, the Court held that the "surrogate" testimony from an analyst who did not participate in or supervise the testing at issue was insufficient for confrontation purposes.<sup>81</sup> This time Justice Ginsburg wrote for the majority, joined in full by Justice Scalia and joined in most parts by the two new Justices on the Court (Kagan and Sotomayor). Justice Thomas also joined most of the majority opinion. Led by Justice Kennedy, the four skeptics again dissented, arguing once again that the analyst at issue was not a "witness" for confrontation purposes and that, even if so, the surrogate testimony should have been sufficient.<sup>82</sup>

In contrast to *Melendez-Diaz* and *Bullcoming*, the third case, *Williams v. Illinois*, held that evidence of the results from a forensic report did not violate the Confrontation Clause.<sup>83</sup> No rationale supporting this conclusion, however, was adopted by a majority of the Court, and the decision continues to confound federal and state courts. The defendant was charged with rape and convicted at trial.<sup>84</sup> The report at issue concerned a DNA report prepared by a private lab, Cellmark, providing a DNA profile of the alleged perpetrator, after analyzing swabs from the victim that were sent to Cellmark by the state crime lab.<sup>85</sup> The report itself was not admitted into evidence at trial.<sup>86</sup> But a prosecution witness—an analyst with the state crime lab—testified as an expert witness that the profile produced in the Cellmark report (from the crime samples sent to them) "matched" a DNA profile in a sample taken from the defendant.<sup>87</sup>

A four-Justice plurality of the *Crawford* skeptics (this time authored by Jus-

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78. *Bullcoming v. New Mexico*, 564 U.S. 647, 651 (2011).

79. *Id.*

80. *Id.* at 652.

81. *Id.*

82. *Id.* at 674–84 (Kennedy, J., dissenting).

83. 567 U.S. 50, 56–58 (2012).

84. *Id.* at 60, 64.

85. *Id.* at 56–57.

86. *Id.* at 58.

87. *Id.* at 56 ("[T]he prosecution called an expert who testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state police lab using a sample of petitioner's blood."). The plurality further summarized the testimony of the expert (Lambatos) as follows: "[B]ased on her own comparison of the two DNA profiles, she 'concluded that [petitioner] cannot be excluded as a possible source of the semen identified in the vaginal swabs,' and that the probability of the profile's appearing in the general population was '1 in 8.7 quadrillion black, 1 in 390 quadrillion white, or 1 in 109 quadrillion Hispanic unrelated individuals.' Asked whether she would 'call this a match to [petitioner],' Lambatos answered yes, again over defense counsel's objection." *Id.* at 62 (plurality opinion) (internal citations omitted).

tice Alito) concluded that the references to the Cellmark report did not violate the Confrontation Clause for two reasons.<sup>88</sup> First, the Court argued that the contents of the Cellmark report were not offered for “the truth of the matter asserted” and thus were outside the scope of the Clause.<sup>89</sup> In reaching this conclusion, the plurality appeared to rely on an aspect of modern evidence doctrine that allows expert witnesses to rely on otherwise inadmissible information.<sup>90</sup> In certain circumstances, such information may sometimes be admissible for the limited purpose of evaluating the expert’s opinion.<sup>91</sup> The plurality, arguing that something like this had occurred at trial, insisted that the references to the report’s contents were offered “not to prove the truth of the matter asserted in the report, *i.e.*, that the report contained an *accurate* profile of the perpetrator’s DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner’s blood.”<sup>92</sup> Although there are limited circumstances in which such “basis evidence” is not offered for its truth, this case does not present such an example, and indeed, a majority of the Court rejected this argument.<sup>93</sup>

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88. *Id.* at 57–59 (plurality opinion).

89. *Id.* at 57–58. In *Crawford*, the Court explained that the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2009) (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). The defendant in *Street* claimed that his confession was coerced and that he was forced to repeat a previous confession given by an alleged accomplice. *Street*, 471 U.S. at 411. The government introduced the accomplice’s confession to illustrate the differences between that confession and the defendant’s (and not for the truth of the accomplice’s confession). *Id.* at 412. The Court held that this non-hearsay use of the evidence did not violate the Confrontation Clause. *Id.* at 417.

90. *Williams*, 567 U.S. at 69–70 (plurality opinion). The analysis on this point is not entirely clear because, at other times, the plurality opinion suggests that the expert was not following this practice but was instead engaged in an older evidentiary practice of testifying in terms of a “hypothetical” premise (which is precisely what the modern practice embodied in Federal Rule of Evidence 703 was designed to replace). *Id.* at 72 (“[I]t is clear that the putatively offending phrase in Lambatos’ testimony was not admissible for the purpose of proving the truth of the matter asserted—*i.e.*, that the matching DNA profile was ‘found in semen from the vaginal swabs.’ Rather, that fact was a mere premise of the prosecutor’s question, and Lambatos simply assumed that premise to be true when she gave her answer indicating that there was a match between the two DNA profiles. There is no reason to think that the trier of fact took Lambatos’ answer as substantive evidence to establish where the DNA profiles came from.”).

91. See FED. R. EVID. 703; ILL. R. EVID. 703. Federal Rule of Evidence 703 allows experts to base an opinion on facts and data that might otherwise be inadmissible at trial when “experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.” FED. R. EVID. 703. The rule also states that, when such “facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.” *Id.* This potential disclosure thus has allowed some courts to suggest that otherwise inadmissible hearsay evidence is not being admitted for its truth but instead to help the jury evaluate an expert’s opinion (based on the inadmissible hearsay). The problem with this approach, however, is that it will often not be possible to use the evidence to justify the opinion without using the statement for its truth. See *In re Melton*, 597 A.2d 892, 907 (D.C. 1991) (“[Y]ou cannot believe that the testimony about the punch tends to show that Melton is dangerous [the expert’s opinion] unless you first believe that he actually punched his mother [the hearsay].”).

92. *Williams*, 567 U.S. at 79 (plurality opinion) (emphasis added).

93. *Id.* at 126 (Kagan, J., dissenting) (“[W]hen a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion, . . . the statement’s utility is then dependent on its truth. If the

The plurality offered a second ground for its conclusion by arguing that, even if offered for its truth, the Cellmark report was not testimonial under the “primary purpose” test.<sup>94</sup> According to Justice Alito, the primary purpose of the Cellmark report “was not to accuse petitioner or to create evidence for use at trial.”<sup>95</sup> Moreover, he insisted, when the state “lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time.”<sup>96</sup> As with the first rationale, a majority of the Court rejected this argument as well.<sup>97</sup>

A four-Justice dissent, authored by Justice Kagan, argued that references to the contents of the Cellmark report violated the Confrontation Clause.<sup>98</sup> The dissent argued that this conclusion followed directly from *Melendez-Diaz* and *Bullcoming*.<sup>99</sup> Justice Kagan’s dissent also provided arguments directed at the plurality’s two rationales. According to the dissent, the statements were admitted for their truth.<sup>100</sup> Moreover, the dissent noted that the primary purpose need not target or accuse a particular individual, and the facts belie the suggestion that the state lab was responding to an ongoing emergency (as in

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statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness’s conclusion, the factfinder must assess the truth of the out-of-court statement . . . .”); *id.* at 106 (Thomas, J., concurring in the judgment) (“[S]tatements introduced to explain the basis of an expert’s opinion are not introduced for a plausible nonhearsay purpose.”). For a careful analysis of why the nontruth argument is implausible given the facts in *Williams*, as well as a discussion of when the nontruth rationale may be more plausible, see Jennifer Mnookin & David Kaye, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2012 SUP. CT. REV. 99, 117–38. The plurality also made much of the fact that the case involved a bench trial rather than a jury trial, suggesting that this reduced the danger of the factfinder using the evidence for an illegitimate purpose (truth) as opposed to a legitimate Rule 703 nontruth purpose. *Williams*, 567 U.S. at 72–74 (plurality opinion). This fact, however, is of limited if any relevance to the confrontation issue, for two reasons. First, as the plurality acknowledges, the confrontation right is the same regardless of whether the case involves a jury or bench trial. *Id.* at 73 n.4. Second, the issue is not about being able to appreciate and understand the subtleties of the “basis” evidence’s limited and legitimate purpose—the issue is that, given the facts of the case, there does not appear to be any legitimate, nontruth use of the evidence. See Mnookin & Kaye, *supra*, at 124 (“Cellmark did not simply send back *swabs* to the [Illinois State Police lab]. It also sent back *graphs and a table of DNA alleles* it claimed to have generated from the semen found on those swabs.”).

94. *Williams*, 567 U.S. at 84 (plurality opinion).

95. *Id.*

96. *Id.*

97. As the dissent pointed out, there is no requirement that to be “testimonial” the statement must accuse or target an individual. *Id.* at 135 (Kagan, J., dissenting). Moreover, the state’s own expert testified that the reports were prepared to generate evidence for investigation and litigation, not to respond to an emergency situation. *Id.* at 136. Furthermore, the samples from the victim were not sent to Cellmark until nine months after the crime occurred, and the results were not received for another four months. *Id.* at 137. Justice Thomas likewise rejected the plurality’s “primary purpose” analysis. *Id.* at 113–17 (Thomas, J., concurring in the judgment).

98. *Id.* at 119 (Kagan, J., dissenting).

99. *Id.* at 124. In particular, Justice Kagan argued that the testimony was similar to the “surrogate testimony” rejected in *Bullcoming*. See *id.* (Kagan, J., dissenting) (“Have we not already decided this case?”).

100. *Id.* at 126.

*Davis*).<sup>101</sup> Writing separately, Justice Thomas agreed with the dissent that the statements were offered for their truth.<sup>102</sup> He also rejected the plurality's "primary purpose" analysis.<sup>103</sup> Nevertheless, he argued that the Cellmark report was not sufficiently formal to meet his test for being a "testimonial" statement.<sup>104</sup> Thus, his separate conclusion, combined with the plurality, leads to the outcome that no confrontation violation occurred.

The 4-4-1 structure of *Williams* has confounded lower courts and introduced chaos into this particular area of law. According to one approach, *Williams* has no precedential value because no rationale was supported by a majority of the Justices, and thus *Melendez-Diaz* and *Bullcoming* remain the controlling law.<sup>105</sup> Instead of looking for an underlying rationale, a second possibility is to apply *Williams* by focusing on how the Justices would be likely to vote given the facts of a case.<sup>106</sup> According to this predictive model, Justice Thomas's test would control, despite the fact that eight other Justices on the Court rejected this test, because Justice Thomas is likely to vote with the plurality when the statements are not formalized enough and with the dissent when they are contained in formalized materials. *Williams* is the Court's most recent foray into this area, and thus considerable doctrinal confusion exists regarding experts and confrontation.<sup>107</sup>

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101. *Id.* at 135–37.

102. *Id.* at 104 (Thomas, J., concurring in the judgment).

103. *Id.* at 113–17.

104. *Id.* at 111 ("The Cellmark report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. The report is signed by two 'reviewers,' but they neither purport to have performed the DNA testing nor certify the accuracy of those who did. And, although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation." (internal citations omitted)).

105. *See, e.g.,* *United States v. James*, 712 F.3d 79, 95–96 (2d Cir. 2013) ("We think it sufficient to conclude that we must rely on Supreme Court precedent before *Williams* . . .").

106. *See, e.g.,* *People v. Dungo*, 286 P.3d 442, 448–50 (Cal. 2012) (concluding that statements were not testimonial based on the combination of the plurality opinion and Justice Thomas's concurrence in *Williams*); *State v. Hutchison*, 482 S.W.3d 893, 914 (Tenn. 2016) ("[W]hile the autopsy report prepared by Dr. Elkins meets the broad standard advocated by the dissent in *Williams*, it meets neither the standard under Justice Thomas's concurrence nor the standard of the *Williams* plurality. We hold, therefore, that the autopsy report is not testimonial . . .").

107. Although not a confrontation case, there was a possibility that *Hughes v. United States*, 138 S. Ct. 1765 (2018), would provide some guidance on how to interpret fractured opinions such as *Williams*. But the Court decided the case without reaching this issue. *Id.* at 1772. The often-relied-upon approach of searching for the "narrowest" opinion necessary for the judgment, *see Marks v. United States*, 430 U.S. 188, 193–94 (1977), does not really work in this context because no rationale is shared by the plurality and Justice Thomas, and it is not clear which opinion is "narrowest." Nevertheless, courts frequently appeal to *Marks* in trying to make sense of *Williams*. *See* Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. (forthcoming 2019) (manuscript at 16), c ("[T]he two Supreme Court decisions that are most often *Marks*'d in the state courts, *Seibert* and *Williams*, are responsible for almost a third of all state court citations to *Marks*.").



*D. Eyewitnesses*

The current doctrine regarding eyewitness statements is less chaotic than the expert context, but as in the expert context, similar divisions in the Court emerged following *Crawford* and *Davis*. In two cases, *Michigan v. Bryant*<sup>108</sup> and *Ohio v. Clark*,<sup>109</sup> the Court attempted to clarify and elaborate on the “primary purpose” test.

In *Bryant*, the defendant was tried and convicted of second-degree murder.<sup>110</sup> The statements at issue were made by the alleged victim to police shortly before he died.<sup>111</sup> Police, responding to a radio-dispatch call that someone had been shot, found the victim in a gas station parking lot, lying on the ground next to his car, with a gunshot wound to his abdomen.<sup>112</sup> While waiting for an ambulance to arrive, the police questioned the victim, who then identified the defendant as the shooter and stated where the shooting occurred (the defendant’s house).<sup>113</sup> The victim later died at the hospital, and his statements to police were admitted at the defendant’s trial.<sup>114</sup> Applying the “primary purpose” test, the Michigan Supreme Court concluded that the statements were testimonial, and thus, their use as evidence violated the Confrontation Clause.<sup>115</sup>

The U.S. Supreme Court reversed, concluding that the statements were not testimonial.<sup>116</sup> Justice Sotomayor, joined by the four *Crawford* skeptics, wrote the majority opinion and argued that the statements were nontestimonial under the “primary purpose” test.<sup>117</sup> Elaborating on the mechanics of the “primary purpose” test, Justice Sotomayor explained that the inquiry is an “objective one” in which the surrounding circumstances, and both the speaker’s and police officers’ perspectives, are all relevant for determining the “primary purpose” of the conversation.<sup>118</sup> Taking these considerations into account, the majority concluded that the circumstances “objectively indicate” that the primary purpose was to meet an ongoing emergency, rather than to

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108. 562 U.S. 344 (2011).

109. 135 S. Ct. 2173 (2015).

110. 562 U.S. at 348.

111. *Id.*

112. *Id.* at 349.

113. *Id.*

114. *Id.* at 349–50.

115. *Id.* at 350–51.

116. *Id.* at 378.

117. *Id.* at 370–78.

118. *Id.* at 360 (“[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.”).

gather evidence for prosecutorial purposes.<sup>119</sup> Justice Thomas concurred on the ground that the statements were not sufficiently formal to count as testimonial.<sup>120</sup> Justice Scalia dissented, taking issue with the majority's statement of the facts and the open-endedness of the Court's construction of the "primary purpose" test.<sup>121</sup>

In the Court's most recent confrontation opinion, *Ohio v. Clark*, the Court held that statements made by a three-year-old boy to his preschool teachers were not testimonial.<sup>122</sup> The boy described his mother's boyfriend (the defendant) as the source of his injuries.<sup>123</sup> The boy was later determined to be incompetent to testify at trial, and his statements were admitted.<sup>124</sup> All the Justices agreed that the statements in this case were nontestimonial.<sup>125</sup> In addition to the rare agreement among the Justices as to the outcome, the opinion is notable for several reasons. First, the majority opinion acknowledged that statements not made by or to police or other government agents might never-

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119. *Id.* at 377–78. Justice Sotomayor also suggested that there is a relationship between the statement's reliability and the fact that it was nontestimonial. *See id.* at 361 ("Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination. This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements . . . are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood."). In dissent, Justice Scalia challenged this link to reliability. *See id.* at 392 (Scalia, J., dissenting) ("Reliability, the Court tells us, is a good indicator of whether 'a statement is . . . an out-of-court substitute for trial testimony.' That is patently false. Reliability tells us *nothing* about whether a statement is testimonial. Testimonial and nontestimonial statements alike come in varying degrees of reliability." (citations omitted)).

120. *Id.* at 378 (Thomas, J., concurring).

121. *Id.* at 379 (Scalia, J., dissenting) ("Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution."); *id.* at 386 ("Neither Covington's statements nor the colloquy between him and the officers would have been out of place at a trial; it would have been a routine direct examination. Like a witness, Covington recounted in detail how a past criminal event began and progressed, and like a prosecutor, the police elicited that account through structured questioning. Preventing the admission of 'weaker substitute[s] for live testimony at trial' such as this, is precisely what motivated the Framers to adopt the Confrontation Clause . . ." (citations omitted)). One possible explanation for the majority's characterization of the statements as non-testimonial concerns the fact that in *Giles v. California*, 554 U.S. 353 (2008), the Court significantly limited the scope of the forfeiture-by-wrongdoing exception to the Confrontation Clause. Thus, it was not possible to conclude, given the facts of *Bryant*, that the statements were testimonial but nevertheless admissible because the defendant was responsible for the declarant's unavailability. *See* Richard D. Friedman, *Come Back to the Boat, Justice Breyer!*, 113 MICH. L. REV. FIRST IMPRESSIONS 1, 3 (2014) ("[O]ne of the most predictable consequences of *Giles* was that, in compensation for undue narrowing of forfeiture doctrine, the term 'testimonial' would be given a constricted reading. And that is just what happened in *Bryant*."). Similarly, Justice Ginsburg, who agreed with Justice Scalia's conclusion that the statements were testimonial, noted in dissent that a possible exception to the Confrontation Clause for dying declarations was not before the Court. *Bryant*, 562 U.S. at 395–96 (Ginsburg, J., dissenting).

122. 135 S. Ct. 2173, 2183 (2015).

123. *Id.* at 2178.

124. *Id.*

125. *See id.* at 2182; *id.* at 2183–84 (Scalia, J., concurring in the judgment); *id.* at 2186 (Thomas, J., concurring in the judgment).

theless be testimonial.<sup>126</sup> Second, the opinions confirmed the continued relevance of historical sources for constructing the scope of confrontation doctrine.<sup>127</sup> Finally, Justice Scalia's concurrence was his last published opinion on the topic. Although he agreed with the result, he explicitly called out the dismissive attitude the majority appeared to express toward *Crawford*.<sup>128</sup> In addition to the language quoted in the first epigraph, he took issue with the majority's reference to *Crawford* as "another approach" to the confrontation issue and to the "primary purpose" test as merely one consideration:

[W]hen else has the categorical overruling, the thorough repudiation, of an earlier line of cases [i.e., *Roberts* and its progeny] been described as nothing more than "adopt[ing] a different approach,"—as though *Crawford* is only a matter of twiddle-dum twiddle-dee preference, and the old, pre-*Crawford* "approach" remains available? . . .

But snide detractions do no harm; they are just indications of motive. Dicta on legal points, however, can do harm, because though they are not binding they can mislead. Take, for example, the opinion's statement that the primary-purpose test is merely *one* of several heretofore unmentioned conditions ("necessary, but not always sufficient") that must be satisfied before the Clause's protections apply. That is absolutely false, and has no support in our opinions. The Confrontation Clause categorically entitles a defendant *to be confronted with the witnesses against him*, and the primary-purpose test sorts out, among the many people who interact with the police informally, *who is acting as a witness and who is not*. Those who fall into the former category bear testimony, and are therefore acting as "witnesses," subject to the right of confrontation. There are no other mysterious requirements that the Court declines to name.<sup>129</sup>

*Clark* is the Court's most recent statement on the scope of the Confrontation Clause. Even in this relatively "easy" case—"easy" in the sense that all the Justices converged on the same result from their different perspectives—the fault lines that have emerged in the decade following *Crawford* could not be missed.<sup>130</sup>

126. *Id.* at 2181 (majority opinion) ("Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach.").

127. *Id.* at 2182 ("As a historical matter, moreover, there is strong evidence that statements made in circumstances similar to those facing L.P. and his teachers were admissible at common law.").

128. *Id.* at 2184 (Scalia, J., concurring in the judgment).

129. *Id.* at 2184–85 (citations omitted). Justice Thomas wrote a separate concurrence to explain that the statements were nontestimonial under his formal test. *Id.* at 2186 (Thomas, J., concurring in the judgment).

130. The discussion above has focused on the scope of the Confrontation Clause under *Crawford*'s "testimonial" test. The Court's one case involving an exception to the *Crawford* rule, *Giles v. California*, 554 U.S. 353 (2008), also produced major disagreements among the Justices. In a case that produced five separate opinions, the Court held (in an opinion by Justice Scalia) that the "forfeiture by wrongdoing" exception requires the prosecution to show that the defendant engaged in conduct with an intent to prevent the declarant from testifying. *Id.* at 359, 361–65. In response to a dissent by Justice Breyer (joined by Justice Kennedy and Justice Stevens), Justice Scalia commented: "[T]he dissent issues a thinly veiled invitation to over-

## III. PATHS FORWARD

The replacement of Justices Scalia and Kennedy with Justices Gorsuch and Kavanaugh presents several possible paths by which future confrontation doctrine may develop. Painting with a broad brush, the two new Justices may each step into one of three roles: (1) a strong defender of confrontation rights (à la Justice Scalia); (2) a *Crawford* skeptic (à la Justice Kennedy); or (3) a fellow advocate of Justice Thomas's formalist approach.<sup>131</sup> Their votes on confrontation issues—particularly if they vote together—have the potential to clarify and in some instances transform confrontation doctrine. This Part discusses the possible pathways, again distinguishing experts and eyewitness.

In tracing the possibilities, the discussion will focus primarily on the law rather than on speculation about the thought processes of Justices Gorsuch or Kavanaugh. Nevertheless, it will be helpful to note a few details about each that may be relevant for predicting the likelihood of the various possibilities. With regard to Justice Gorsuch, his general commitment to originalism suggests an endorsement of *Crawford* and an approach in line with Justice Scalia's (or perhaps Justice Thomas's).<sup>132</sup> As for the Confrontation Clause in particular, however, his views when he joined the Court were largely a blank slate.<sup>133</sup> This state continued through his first term, as the Court did not hear a confrontation case. In a recent dissent from a denial of certiorari, however, Justice Gorsuch expressed strong support for the Confrontation Clause.<sup>134</sup> The case involved an arrest for driving under the influence of alcohol.<sup>135</sup> The evidence at issue concerned the results of a blood alcohol test.<sup>136</sup> The analyst who performed the test did not testify; rather, similar to the surrogate practice in *Bullcoming*, a different analyst was allowed to testify.<sup>137</sup> Justice Gorsuch, lamenting the confusion created by *Williams*, argued that the Court should grant the cer-

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rule *Crawford* and adopt an approach not much different from the regime of *Ohio v. Roberts*, under which the Court would create the exceptions that it thinks consistent with the policies underlying the confrontation guarantee, regardless of how that guarantee was historically understood." *Id.* at 374 (citation omitted); see also *supra* note 121.

131. More nuanced positions are of course possible as well—for example, one similar to the position of Justice Sotomayor, who sometimes joins the *Crawford* skeptics and sometimes its defenders.

132. See Honorable Neil M. Gorsuch, *supra* note 24. In Justice Gorsuch's first term on the Court, he and Justice Thomas, while each expressing a commitment to originalism, reached different conclusions in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (compare Justice Gorsuch's concurring opinion with Justice Thomas's dissenting opinion), and *Oil State Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365 (2018) (compare Justice Thomas's majority opinion with Justice Gorsuch's dissent).

133. See Abbee Cox & Katherine Moy, Essay, *Restraint and the Rights of Criminal Defendants: Judge Gorsuch on the Sixth Amendment*, 69 STAN. L. REV. ONLINE 140, 146 (2017) ("[Justice Gorsuch] has yet to weigh in on the ongoing debate about the reach of [the] Confrontation Clause.").

134. See *Stuart v. Alabama*, 139 S. Ct. 36, 37 (2018) (Gorsuch, J., dissenting from the denial of certiorari).

135. *Id.* at 36.

136. *Id.*

137. *Id.*

tiorari petition, reverse the conviction, and clarify this area of law.<sup>138</sup> In particular, he rejected the State's argument that the report was not admitted for its truth, and he accepted that the report was testimonial under the "primary purpose" test.<sup>139</sup> Compared with Justice Gorsuch, the views of Justice Kavanaugh are more of an open question. In general, he also at times has expressed originalist views,<sup>140</sup> and nothing in his opinions on the appellate court suggests a hostility to *Crawford* or its progeny.<sup>141</sup> But which path he will follow at the Supreme Court level appears to be more of an open question than is the case with Justice Gorsuch.<sup>142</sup>

### A. Experts

Justices Gorsuch and Kavanaugh will likely play decisive roles in the future of confrontation doctrine with regard to evidence from experts. One possibility—which seems unlikely given Justice Gorsuch's recent dissent<sup>143</sup>—is that the two will join the *Crawford* skeptics, overruling or at least severely limiting the confrontation rights of defendants with regard to forensic-science evidence.<sup>144</sup> A second possibility is that both will join Justice Thomas in his formalist approach. This would in effect continue the doctrinal confusion generated by the split opinions in *Williams*: at the Supreme Court level, the

138. See *id.* ("The engine of cross-examination was left unengaged, and the Sixth Amendment was violated. To be fair, the problem appears to be largely of our creation."); *id.* at 37 ("I believe we owe lower courts struggling to abide our holdings more clarity than we have afforded them in this area.").

139. *Id.* at 37.

140. See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 688 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("[I]t is always important in a case of this sort to begin with the constitutional text and the original understanding, which are essential to proper interpretation of our enduring Constitution."), *aff'd in part, rev'd in part, and remanded*, 561 U.S. 477 (2010).

141. See, e.g., *United States v. Smith*, 640 F.3d 358, 362–64 (D.C. Cir. 2011). Writing for the panel, Judge Kavanaugh, relying on *Melendez-Diaz*, concluded that letters from a county clerk describing the defendant's prior convictions were testimonial and should not have been admitted at the defendant's trial. *Id.* at 364 ("Because the clerk's letters were testimonial, their admission into evidence at Smith's trial—without an opportunity for Smith to cross-examine the clerk—violated the Confrontation Clause. The Government presented no evidence other than the clerk's letters to show that Smith was a felon in possession of a firearm. Therefore, we vacate Smith's conviction on that count." (footnote omitted)). Moreover, Judge Kavanaugh was on a panel that held, in a per curiam opinion, that an autopsy report was testimonial. *United States v. Moore*, 651 F.3d 30, 73 (D.C. Cir. 2011); see *infra* notes 148–49 and accompanying text.

142. See generally Rory Little, *Judge Kavanaugh's Record in Criminal Cases*, SCOTUSBLOG (Aug. 27, 2018, 1:53 PM), <http://www.scotusblog.com/2018/08/judge-kavanaughs-record-in-criminal-cases/>.

143. See *Stuart v. Alabama*, 139 S. Ct. 36, 36–37 (2018) (Gorsuch, J., dissenting from the denial of certiorari).

144. Whether the doctrine would return to something like the *Roberts* reliability approach, or something else, would be an open question. Justice Breyer has been advocating for the Court to reconsider the application of *Crawford* to experts because of the realities of modern forensic science evidence (for example, a lab result may involve input from several different analysts or technicians). See *Williams v. Illinois*, 567 U.S. 50, 86–102 (2012) (Breyer, J., concurring); see also Mnookin & Kaye, *supra* note 93, at 142–59 (discussing issues with applying confrontation doctrine to the collective activities of scientists). Should the new Justices join the skeptics, issues of how to adapt confrontation doctrine to current forensic science practices may take on more significance.

formal test would control outcomes because the Justices adopting this approach would join with either the plurality or the dissenters in *Williams* to form a majority.<sup>145</sup> A third possibility is that Justice Gorsuch replaces Justice Scalia's position with the *Williams* dissenters,<sup>146</sup> and Justice Kavanaugh joins either the skeptics or Justice Thomas's position. Regardless of which one Justice Kavanaugh chooses, his choice would also cause the *Williams* confusion to persist and for the formalist position to control outcomes at the Supreme Court level. Finally, the two may adopt Justice Scalia's position and join the *Williams* dissenters. This would likely bring some clarity to the confusion created by *Williams* by solidifying the application of *Crawford* to this type of evidence, reaffirming *Melendez-Diaz* and *Bullcoming*, and putting to rest implausible invocations of the not-for-its-truth rationale.

One important area, strongly in need of clarification from the Supreme Court, involves autopsy reports.<sup>147</sup> Conclusions regarding the cause and manner of an alleged victim's death, for example, as well as other potentially incriminating details, can be highly probative prosecution evidence in a variety of cases. Courts around the country have divided sharply on the question of whether autopsy reports are testimonial and thus subject to confrontation requirements. In doing so, courts have offered a host of conflicting rationales. Courts holding (at least some) autopsy reports to be testimonial have reasoned that under the "primary purpose" test, the author would reasonably be aware that the report could be used as evidence in a criminal prosecution.<sup>148</sup> Some factors affecting this conclusion include the particular conclusions as to the cause of death,<sup>149</sup> whether the autopsy was performed at the request of law

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145. At the lower court levels, the fractured rationales would persist, and the current confusion would be likely to continue. *See* cases cited *supra* notes 105–07. If formality continues to play an important role, we are also likely to see more litigation focused on Justice Thomas's suggestion that deliberate attempts to evade the formality requirement should also result in the exclusion of the evidence. *See* *Davis v. Washington*, 547 U.S. 813, 838 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part). The formality test obviously creates an incentive for the government to substitute informal statements for more formal ones that would be excluded by the Clause. But if admissibility were to depend on the line between "formal" and "informal" statements, it seems somewhat strange to then have a doctrinal test that looks to whether the government is trying to comply with the line set by the Court. Is proffering an informal statement "evading" the confrontation requirement, *id.* at 830 n.5 (majority opinion), or is it producing evidence in the form the Court says it must be to be admissible? In any event, exactly how the doctrine on this issue would develop is a complicated, and open, question.

146. *See* *Stuart*, 139 S. Ct. at 36–37 (Gorsuch, J., dissenting from the denial of certiorari).

147. *See generally* Daniel J. Capra & Joseph Tartakovsky, *Autopsy Reports and the Constitution: A Presumption of Admissibility*, 2 VA. J. CRIM. L. 62, 62 (2014) (positing that this issue "will affect medical examiners as dramatically as *Miranda* did police"); Michael H. Graham, *Autopsy Reports Under the Confrontation Clause: "Significant Confusion" Indeed!!!*, 53 CRIM. L. BULL. 1041 (2017); Carolyn Zabrycki, Comment, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 CALIF. L. REV. 1093 (2008).

148. *See, e.g.,* *United States v. Ignasiak*, 667 F.3d 1217, 1232 (11th Cir. 2012); *United States v. Moore*, 651 F.3d 30, 73 (D.C. Cir. 2011); *State v. Navarette*, 294 P.3d 435, 441 (N.M. 2013); *Commonwealth v. Brown*, 185 A.3d 316, 329 (Pa. 2018).

149. *See, e.g., Moore*, 651 F.3d at 73 ("[Report found] manner of death to be a homicide caused by gunshot wounds . . ."). Courts have also held the results of autopsies to be testimonial when the connec-

enforcement,<sup>150</sup> mandatory reporting requirements,<sup>151</sup> and the statutory structure of the medical examiner's office.<sup>152</sup> By contrast, courts holding (at least some) autopsy reports to be nontestimonial under the "primary purpose" test<sup>153</sup> have reasoned that autopsies are performed for reasons other than criminal prosecution, including public health or emergency reasons;<sup>154</sup> that they are performed before a suspect had been identified;<sup>155</sup> and that medical examiners are independent and not a part of law enforcement.<sup>156</sup> In some cases, courts have held reports to be nontestimonial even though law enforcement was involved, a suspect had been identified, and the examiner knew the report could be used as evidence in a prosecution.<sup>157</sup> In applying the "primary purpose" test, courts have focused on case-specific details, including the "formality" of the report at issue, and they have typically refrained from drawing bright-line rules.<sup>158</sup>

Given the paths outlined above, the two most likely outcomes appear to be either that the two new Justices will join the *Williams* dissenters and hold some autopsy reports (or some aspects of autopsy reports) are testimonial, or they will split, with Justice Gorsuch joining that group and Justice Kavanaugh joining the skeptics or Justice Thomas. The first scenario would bring some clarity to this area by solidifying the application of *Melendez-Diaz* and *Bullcoming* to autopsy reports.<sup>159</sup> Some conclusions will depend on case-specific details, but the contours of the "primary purpose" test will be clearer by eliminating

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tion to a crime may be less obvious at the time of the autopsy. See, e.g., *Ignasiak*, 677 F.3d at 1229–35 (autopsy reports of former patients held to be testimonial when offered against doctor in prosecution for health-care fraud and illegally dispensing controlled substances).

150. See, e.g., *Navarette*, 294 P.3d at 440.

151. See, e.g., *Ignasiak*, 667 F.3d at 1232.

152. *Id.* at 1231.

153. See, e.g., *United States v. James*, 712 F.3d 79, 99 (2d Cir. 2013); *People v. Dungo*, 286 P.3d 442, 450 (Cal. 2012); *People v. Leach*, 980 N.E.2d 570, 593–94 (Ill. 2012); *State v. Hutchison*, 482 S.W.3d 893, 911–12 (Tenn. 2013).

154. See, e.g., *James*, 712 F.3d at 97–99; *State v. Medina*, 306 P.3d 48, 63 (Ariz. 2013) (holding autopsy report following murder was not testimonial because it was performed "to catch a dangerous [murderer] who was still at large" and not to "accuse" the defendant (citing *Williams v. Illinois*, 567 U.S. 50, 136 (2012))).

155. *Medina*, 306 P.3d at 63.

156. *James*, 712 F.3d at 97–98.

157. See, e.g., *Leach*, 980 N.E.2d at 591–94; *Hutchison*, 482 S.W.3d at 911–14.

158. See, e.g., *Leach*, 980 N.E.2d at 592; *Hutchison*, 482 S.W.3d at 912.

159. Holding some reports to be testimonial, of course, has the potential to exclude highly probative prosecution evidence in cases involving homicides and other serious crimes through no fault of the government (e.g., when an examiner has died or is retired and unavailable to testify). This concern, no doubt, looms large for courts faced with this issue. It is important to note, however, that the underlying practices are not static and, like other primary behavior, are capable of responding to changes in evidentiary rules and practices. In short, holding autopsy reports to be testimonial may prompt changes to ensure compliance with the Confrontation Clause (e.g., by having more than one examiner present or by preserving some evidence via video or photograph so another expert may be able to offer an independent opinion). See Dana Amato, Comment, *What Happens If Autopsy Reports Are Found Testimonial?: The Next Steps to Ensure the Admissibility of These Critical Documents in Criminal Trials*, 107 J. CRIM. L. & CRIMINOLOGY 293 (2017).

confusing attempts to comply with *Williams*.<sup>160</sup> The second scenario would continue the *Williams*-caused confusion with regard to this highly contested and frequently occurring issue.<sup>161</sup>

If the Court holds that some autopsy reports are testimonial under the “primary purpose” test, the Court will also be in a position to clarify and put to rest the not-for-its-truth argument in cases in which a second expert—not involved in performing the autopsy or creating the report—seeks to rely upon and testify to the content of the underlying report. For example, suppose a medical examiner not involved with an autopsy seeks to testify in the form of an independent opinion as to cause of death, relying on an autopsy report created by the performing examiner and testifying to its content.<sup>162</sup> Although some courts, applying Federal Rule of Evidence 703 or its state equivalent, may admit the evidence on the theory that such “basis” evidence is being admitted to assist in the evaluation of the testifying expert’s opinion and not for its truth, such a fiction should not be used to evade a constitutional right.<sup>163</sup> Applying the confrontation right to autopsy reports will no doubt create additional doctrinal and practical challenges, but the importance of the issue requires more transparency and open discussion of the tradeoffs.<sup>164</sup> Removing this fiction from the doctrinal arsenal of prosecutors and courts would be a salutary step in clarifying confrontation doctrine.

### B. Eyewitnesses

The path forward in nonexpert, eyewitness cases is, perhaps surprisingly, even less certain than in the expert context. This is so for two reasons. First, the “primary purpose” analysis in this context is a highly fact-bound determination (even more so than in the expert context), depending on the different perspectives of the participants and the surrounding circumstances.<sup>165</sup> The

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160. See *Williams v. Illinois*, 567 U.S. 50, 118–20 (2012) (Kagan, J., dissenting); see also *supra* text accompanying notes 119–21. For a discussion of issues that may affect the reliability of autopsy evidence, see Chapter 9 of NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 264 (2009) (“[Medical-examiner and coroner offices] function at varying levels of expertise, often with deficiencies in facilities, equipment, staff, education, and training. And, unfortunately, most systems are under budgeted and understaffed.”).

161. In this scenario, formality would also likely continue to play a role for some courts and perhaps lead to more litigation exploring Justice Thomas’s suggested test. See *supra* text accompanying note 145.

162. See, e.g., *United States v. Ignasiak*, 667 F.3d 1217, 1229–35 (11th Cir. 2012).

163. See *supra* notes 90–93 and accompanying text. This would not apply to situations in which an expert rendered an independent opinion based on evidence that does not violate the Confrontation Clause. See, e.g., *Commonwealth v. Brown*, 185 A.3d 316, 333 (Pa. 2018) (independent opinion based, in part, on “properly admissible autopsy photos”). A more complicated scenario occurs when the expert also based the opinion, in part, on nonadmissible testimonial statements. See *generally id.*

164. See Mnookin & Kaye, *supra* note 93, at 142–59; see also *supra* note 159 and accompanying text.

165. *Michigan v. Bryant*, 562 U.S. 344, 359 (2011) (“To determine . . . the ‘primary purpose’ of an interrogation . . . we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.”).



analysis thus far has resisted general categories in sorting testimonial from nontestimonial statements.<sup>166</sup> Even in the context of police interrogation broadly, the Court has resisted general categories.<sup>167</sup> Therefore, it is harder to predict where the doctrine will develop without knowing the details of the cases at issue.<sup>168</sup> Second, unlike in the expert context, Justice Sotomayor, in particular, has been more sympathetic to the position of the *Crawford* skeptics. She wrote the majority opinion in *Bryant*, holding that the statements were nontestimonial and thus properly admitted against the defendant and even suggested, after *Crawford*, that reliability might have some role to play in the analysis after all.<sup>169</sup>

For these reasons, in future eyewitness cases that generate disagreements among the Court, the two new Justices may end up playing a less pivotal role. Other examples of recurring scenarios the Court may consider involve statements to doctors or other medical personnel;<sup>170</sup> statements made to employers, to school officials (involving declarants older than in *Bryant*), or in anticipation of civil litigation;<sup>171</sup> and statements describing abuse to friends and family.<sup>172</sup> Because these disagreements are likely to arise in the context of informal statements, Justice Thomas is likely to conclude they are nontestimonial.<sup>173</sup> The three remaining skeptics (Justices Alito, Roberts, and Breyer), along with Justice Sotomayor, have also expressed a willingness to admit statements under the “primary purpose” test that others on the Court thought plainly fell on the testimonial side.<sup>174</sup> Thus, even if both Justice Gorsuch and Justice Kavanaugh come down strongly on the side of a confrontation right in this con-

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166. *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015) (“Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment’s reach.”).

167. *Davis v. Washington*, 547 U.S. 813, 822 (2006) (“Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows . . .”).

168. For example, the agreement as to outcome in *Ohio v. Clark* suggests that other factual scenarios (on either side of the testimonial line) may produce more agreement than in some of the more contested scenarios such as *Williams* and *Bryant*.

169. See *supra* text accompanying notes 117–19.

170. See, e.g., *People v. Cage*, 155 P.3d 205, 218–20 (Cal. 2007); *State v. S.P.*, 215 P.3d 847 (Or. 2009).

171. In each of these scenarios, under the primary purpose test, a declarant may reasonably believe that the statements may be used for criminal prosecution. For example, assume that the statements describe abuse or assault and are made to an employer’s human resources representative, a university’s Title IX director, or an insurance investigator, respectively.

172. See, e.g., *Doan v. Carter*, 548 F.3d 449, 457–59 (6th Cir. 2008).

173. Absent a majority intent of overruling *Crawford*, it is difficult to see how there could be disagreements in this context among the Justices as to whether a formal statement (e.g., an affidavit or a deposition) offered for its truth was testimonial. Compare this with the expert context, where some Justices may continue to press the not-for-its-truth argument even with formal statements. See *supra* text accompanying notes 91–93.

174. See *Michigan v. Bryant*, 562 U.S. 344, 358–59 (2011); see also *supra* text accompanying note 121.

text (along with Justices Ginsburg and Kagan), they may still end up in the minority. If one or both join the skeptics, it will weaken the application of *Crawford* in this context, at least for certain types of statements.<sup>175</sup>

One important, related issue the Court will need to clarify is the role played by the different participants' perspectives under the "primary purpose" test. Although *Bryant* tells us that both the speaker's and listener's perspectives are relevant for determining the "objective" primary purpose of the conversation,<sup>176</sup> the Court's language in *Clark* suggests that whether the statement is testimonial from the speaker's perspective should be a necessary condition for finding the statement to be testimonial.<sup>177</sup> In particular, the Court will need to clarify when, if ever, a statement is testimonial for confrontation purposes when the speaker is not aware that the statement may be used as evidence in a criminal prosecution but the listener is aware (and indeed may be gathering the statement for that purpose). This may not be an uncommon occurrence in situations in which crime victims (including children) are making statements to doctors, school administrators, or members of law enforcement.<sup>178</sup> The "principal evil" at which *Crawford* tells us the Confrontation Clause was directed—the *ex parte* gathering of evidence to be used against a criminal defendant without the opportunity for cross-examination—also applies when the listener is gathering such evidence without the speaker's awareness.<sup>179</sup> How the Court decides this issue in clarifying the primary purpose test will have important implications for which eyewitness statements are and are not testimonial.<sup>180</sup>

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175. If the Court goes down this path, one important issue will be the extent to which reliability reemerges as a reason to admit or exclude the statements. *See supra* text accompanying note 119; *see also* sources cited *supra* note 160.

176. *See Bryant*, 562 U.S. at 360.

177. *See Ohio v. Clark*, 135 S. Ct. 2173, 2182 (2015) ("Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system."). Justice Scalia also stated that the primary purpose test should focus on the speaker. *See Bryant*, 562 U.S. at 381 (Scalia, J., dissenting) ("*Crawford* and *Davis* did not address whose perspective matters—the declarant's, the interrogator's, or both—when assessing 'the primary purpose of [an] interrogation.' In those cases the statements were testimonial from any perspective. I think the same is true here, but because the Court picks a perspective so will I: The declarant's intent is what counts.").

178. *See, e.g., Hernandez v. State*, 946 So. 2d 1270, 1280–85 (Fla. Dist. Ct. App. 2007) (holding statements by child to nurse were testimonial because "there is no doubt that [the nurse] reasonably expected that she would be appearing in court to testify against Mr. Hernandez about the results of her examination and the statements made by the child"); *State v. S.P.*, 215 P.3d 847, 856–66 (Or. 2009) (holding statements of child made during sexual-abuse examination to be testimonial because of the examining organization's close relationship with law enforcement). For an illuminating discussion of the issues raised by statements made in multipurpose contexts, see Paul F. Rothstein, *Ambiguous-Purpose Statements of Children and Other Victims of Abuse Under the Confrontation Clause*, 44 SW. L. REV. 508 (2015).

179. *See Michael S. Pardo, Testimony*, 82 TUL. L. REV. 119, 172–74 (2007) (arguing that either perspective could be sufficient to make a statement testimonial).

180. Exactly how much weight to give the listener's perspective, and how it interacts with other relevant facts, would no doubt involve difficult doctrinal line-drawing. For example, when, if ever, would statements to undercover agents be testimonial? Does it matter whether the agent is not merely attempting to gather evidence for an investigative purpose but is also attempting to gather evidence for use in court?

## CONCLUSION

Whither confrontation? As the discussions above suggest, the confrontation right seems to be moving in different directions for experts and eyewitnesses. If Justices Gorsuch and Kavanaugh both emerge as defenders of Justice Scalia's position, then this would shore up a robust right for defendants to confront forensic-lab analysts and similar declarants.<sup>181</sup> By contrast, regardless of the positions of these two new Justices, the right to confront eyewitness declarants will be much more uncertain, fact-dependent, and subject to judicial discretion, at least in the short term.<sup>182</sup> On one hand, this state of affairs is highly ironic: a line of cases that began with a triumphant victory for originalism has ended up giving less protection to the type of evidence that was the Confrontation Clause's original focus—accusatory statements from potential witnesses—and potentially more protection to evidence unheard of at the time—a DNA analyst. This essentially turns the debate between Scalia and Kennedy in *Melendez-Diaz* on its head.<sup>183</sup> On the other hand, problems with forensic science evidence are well-known,<sup>184</sup> with new scandals appearing regularly.<sup>185</sup> These concerns were evident in *Melendez-Diaz*,<sup>186</sup> *Bullcoming*,<sup>187</sup> Justice Kagan's dissent in *Williams*,<sup>188</sup> and, more recently, in Justice Gorsuch's dissent from the denial of certiorari.<sup>189</sup> Thus, a partial explanation for this state of

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What is the significance of deliberate attempts to mislead speakers regarding the extent to which their statements could be used in court? For example, suppose the police had misled Sylvia Crawford into believing that her statements could not be used against her husband; should this fact have any bearing on whether her statements were testimonial? This issue could also interact with Justice Thomas's suggestion that attempts by the government to evade confrontation requirements should also be excluded. See *supra* notes 63, 145. When the *questioner* is attempting to gather statements to use as incriminating evidence in court and the *speaker* is unaware of that possibility, is that a deliberate attempt to "evade" the confrontation requirement, is that an attempt to comply with the constitutional line set by the Court's precedents, or both? See *supra* notes 63, 145.

181. See *supra* Subpart III.A.

182. See *supra* Subpart III.B.

183. This debate was initially about whether to extend the right identified in *Crawford* from "conventional witnesses" to forensic analysts. See *supra* notes 73–77 and accompanying text.

184. See NATIONAL RESEARCH COUNCIL, *supra* note 160.

185. For a collection of links to recent news stories, see *Crime Lab Scandal: A Curated Collection of Links*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/records/4146-crime-lab-scandal> (last updated Feb. 12, 2019, 9:19 AM).

186. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009).

187. See *Bullcoming v. New Mexico*, 564 U.S. 647, 654 n.1 (2011) ("Nor is the risk of human error so remote as to be negligible. *Amici* inform us, for example, that in neighboring Colorado, a single forensic laboratory produced at least 206 flawed blood alcohol readings over a three-year span, prompting the dismissal of several criminal prosecutions.").

188. See *Williams v. Illinois*, 567 U.S. 50, 118–19 (2012) (Kagan, J., dissenting) (discussing case in which cross-examination caught error with DNA analysis).

189. See *Stuart v. Alabama*, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from the denial of certiorari) ("More and more, forensic evidence plays a decisive role in criminal trials today . . . To guard against such mischief and mistake and the risk of false convictions they invite, our criminal justice system depends on adversarial testing and cross-examination.").

affairs may be that some Justices are responding to what they perceive as the “felt necessities of the time.”<sup>190</sup> Although this may explain some of the development in this area, it is also important to note that problems with eyewitness evidence are also well-known,<sup>191</sup> and thus concerns about evidentiary problems should arise along both doctrinal paths.

Another part of the explanation for this current state of affairs begins with recognizing that multimember courts are more than their individuals.<sup>192</sup> This is a particularly important point to keep in mind with symposia such as this one that are focused on the views of individual Justices. Like any decision-making body, the judgments and decisions of individual Justices may aggregate into collective results that none of its individuals intended and which all may reject.<sup>193</sup> The doctrine that has emerged from *Crawford* and its progeny, and that will continue to develop, is not merely the intentional action of individual Justices but also a product of the various rules, mechanisms, and practices by which their actions result in the agency of a group that is distinct from the agency of its members.<sup>194</sup> In other words, we should keep in mind that the Supreme Court is not only a “they”; it is also an “it.”

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190. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

191. See Samuel R. Gross, *What We Think, What We Know and What We Think We Know About False Convictions*, 14 OHIO ST. J. CRIM. L. 753, 772 & tbl.3 (2017) (documenting mistaken identifications and perjury or false accusations as factors for different types of false convictions).

192. See generally Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1 (1993).

193. For a discussion of the conditions that may produce such results, see generally CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* (2011). For an application to jury decision-making, see Michael S. Pardo, *Group Agency and Legal Proof; Or, Why the Jury Is an “It,”* 56 WM. & MARY L. REV. 1793 (2015).

194. See LIST & PETTIT, *supra* note 193.