will require the Court to conduct essentially two tests in *Miranda* cases: a totality of the circumstances custody inquiry[93] and a totality of the circumstances voluntariness test. In doing so, the Court will make *Miranda* at least as complicated as the test it sought to replace.[94] Taken together with the various weaknesses that *J.D.B.* exacerbates, this problem undermines the rationale for the *Miranda* test.[95] If the Court follows this path, then it may need to consider a more efficient alternative: abandoning *Miranda* entirely and returning to the Court's traditional Fifth Amendment jurisprudence centered on voluntariness.[96] By exposing and aggravating *Miranda*'s inherent faults, *J.D.B.* could ultimately be a beneficial development, leading to the abandonment of an expensive test with dubious constitutional grounding.

D. Sixth Amendment

Confrontation Clause. — The Sixth Amendment's Confrontation Clause guarantees a criminal defendant "the right . . . to be confronted with the witnesses against him."[1] In *Crawford v. Washington*,[2] the Supreme Court changed the inquiry used to determine when the confrontation right arises, requiring the opportunity for confrontation when the prosecution introduces a testimonial statement at trial unless the witness is unavailable and the accused had a prior opportunity to cross-examine the witness.[3] The *Crawford* Court left a number of issues unresolved, however, including the definition of "testimonial" and the question of whom the prosecution must call as a witness, if anyone, when introducing laboratory reports into evidence. Last Term, in

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different," *id.*, because it is relevant and some other, undefined characteristics are not. The entire question is how age differs from a range of characteristics that *do* bear an "objectively discernible relationship to a reasonable person's understanding," not how it differs from, say, a person's favorite *Star Wars* character.

[93] *See id.* at 2415 (Alito, J., dissenting). Indeed, in the past, at least two members of the *J.D.B.* majority have supported such a test, which would consider all "objective circumstances that are known to both the officer and the suspect and that are likely relevant to the way a person would understand his situation." Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting, joined by Ginsburg, J.); *see also* Transcript of Oral Argument, *supra* note 76, at 7–8.

[94] Justice Kagan's statement at oral argument that *Miranda* "is already an incredibly complicated test," Transcript of Oral Argument, *supra* note 76, at 36, was likely intended to support a broader custody inquiry, but it also calls into question *Miranda*'s supposed primary benefit: "the ease and clarity of its application." Moran v. Burbine, 475 U.S. 412, 425 (1986).

[95] *Cf.* Weisselberg, *supra* note 90, at 1563 ("The extent to which courts make extensive, individualized assessments undermines the utility of a system that purports to give bright-line rules to police.").

[96] *See* Transcript of Oral Argument, *supra* note 76, at 43; Weisselberg, *supra* note 90, at 1592–94, 1599–1600. For a description of the traditional voluntariness test, see *supra* note 59.

[1] U.S. CONST. amend. VI.

[2] 541 U.S. 36 (2004).

[3] *Id.* at 68.

Bullcoming v. New Mexico,[4] the Supreme Court held that a blood alcohol content ("BAC") report is testimonial[5] and that cross-examination of a surrogate witness, who did not participate in testing the blood or preparing the report, does not satisfy the requirements of the Confrontation Clause.[6] While the testimonial holding follows precedent and the surrogate witness holding flows from the logic of *Crawford*, the different approaches of the majority and the concurrence suggest that the threshold question of when a statement is testimonial remains an open issue.

In *Ohio v. Roberts*,[7] the Supreme Court held that introducing evidence without affording the accused an opportunity to confront the witness satisfied the Confrontation Clause if the evidence bore "indicia of reliability,"[8] a standard that was met if the evidence fell within a well-established hearsay exception.[9] *Crawford* abrogated the *Roberts* standard, stating that the Confrontation Clause "is a procedural rather than a substantive guarantee" that "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[10] Since "witnesses" provide testimony, the Confrontation Clause applies to testimonial statements.[11] The Court failed to provide an exact definition of "testimonial," instead deriving the definition from the word "testimony," which "is typically '[a] solemn declaration or affirmation made for the purpose of establishing . . . some fact.'"[12] The Court also introduced the primary-purpose test, under which a statement is testimonial if the circumstances objectively indicate a prosecutorial purpose.[13] In *Melendez-Diaz v. Massachusetts*,[14] the Court refused to create a forensic-evidence exception to the primary-purpose test, holding that the ana-

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4 131 S. Ct. 2705 (2011).

5 *Id.* at 2717.

6 *See id.* at 2716.

7 448 U.S. 56 (1980).

8 *Id.* at 65 (quoting Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)).

9 *Id.* at 66. Many academics disagreed with the *Roberts* approach. *See, e.g.*, Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 246 (2005) ("The right articulated by the Confrontation Clause predated the development of the hearsay rule, and it has existed in adjudicative systems that do not have a rule resembling our rule against hearsay.").

10 Crawford v. Washington, 541 U.S. 36, 61 (2004). Hearsay exceptions allow into evidence certain out-of-court statements. Even if a statement is nontestimonial and is not barred by the Confrontation Clause, it may still be inadmissible hearsay if it does not fall under a hearsay exception. A testimonial statement that falls under a hearsay exception must still meet the demands of the Confrontation Clause. *See id.* at 68.

11 *Id.* at 51.

12 *Id.* (first alteration in original) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

13 *See* Davis v. Washington, 547 U.S. 813, 822 (2006).

14 129 S. Ct. 2527 (2009).

lyst who conducted the testing was aware that the affidavits' "sole purpose" was evidentiary and that each affidavit was thus "incontrovertibly a 'solemn declaration.'"[15] Last Term, before oral argument in *Bullcoming*, the Court decided *Michigan v. Bryant*,[16] which expanded the primary-purpose test to include an objective inquiry into the primary purpose of not only the witness but also of the interrogator and to consider formality and applicable hearsay rules.[17]

While driving in New Mexico, Donald Bullcoming rear-ended a stopped pickup truck.[18] Bullcoming "exhibited signs of intoxication," failed all of the field sobriety tests, and refused a breath test.[19] A police officer arrested Bullcoming for driving while intoxicated ("DWI") and obtained a warrant to perform a BAC test.[20] Curtis Caylor, a forensic analyst at the New Mexico Department of Health, tested Bullcoming's blood with a gas chromatograph machine.[21] Caylor recorded the results of the test and certified that he had followed all procedures listed on the BAC report.[22] Bullcoming's BAC was 0.13 grams per hundred milliliters over New Mexico's legal limit.[23]

A jury convicted Bullcoming of aggravated DWI.[24] During the trial, the State introduced Bullcoming's BAC report, not through Caylor, but through the testimony of another analyst "who helps in overseeing the breath and blood alcohol programs throughout the state."[25] The State did not assert that Caylor was unavailable, but rather stated that Caylor had been placed on unpaid leave.[26] Despite the objections of Bullcoming's counsel that the introduction of the BAC report without Caylor's testimony would violate Bullcoming's confrontation right, the court admitted the report under the business records hearsay exception.[27]

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15 *Id.* at 2532 (quoting *Crawford*, 541 U.S. at 51).

16 131 S. Ct. 1143 (2011).

17 *See id.* at 1156, 1166. In *Davis*, the Court held that statements are not testimonial if they are given to the police during an ongoing emergency. *Davis*, 547 U.S. at 822. The Court in *Bryant* addressed the issue of how to determine when an emergency is ongoing. *Bryant*, 131 S. Ct. at 1166. Justices Scalia and Ginsburg dissented separately, each arguing that the objective primary-purpose inquiry looks to the primary purpose of the witness only. *See id.* at 1168–69 (Scalia, J., dissenting); *id.* at 1176–77 (Ginsburg, J., dissenting).

18 *Bullcoming*, 131 S. Ct. at 2710.

19 State v. Bullcoming, 226 P.3d 1, 5 (N.M. 2010).

20 *Id.*

21 *Bullcoming*, 131 S. Ct. at 2710–11.

22 *Id.*

23 *See Bullcoming*, 226 P.3d. at 5.

24 *Id.* at 4–5.

25 *Id.* at 5.

26 *Bullcoming*, 131 S. Ct. at 2711–12.

27 *Id.* at 2712. The business records hearsay exception allows into evidence out-of-court statements that are kept in the regular course of business under the assumption that an organization has an incentive to keep reliable and accurate records. *See* FED. R. EVID. 803(6).

Bullcoming appealed, and the New Mexico Court of Appeals upheld his conviction.[28] Deciding the appeal before the Court issued the *Melendez-Diaz* decision, Judge Wechsler[29] cited the New Mexico Supreme Court case *State v. Dedman*[30] as controlling precedent in holding the BAC report nontestimonial[31] and properly admitted under the business records hearsay exception since it was "prepared routinely with guarantees of trustworthiness."[32]

The New Mexico Supreme Court affirmed. Justice Maes[33] explained that the intervening *Melendez-Diaz* decision clarified that BAC reports are not "immune from governmental abuse" and are testimonial.[34] However, the analyst Caylor "was a mere scrivener" who simply copied down the machine-produced results.[35] In addition, the BAC report contained mostly "chain of custody information" and a description of the "method used for testing the blood."[36] Therefore, the court concluded that Bullcoming's "true 'accuser' was the gas chromatograph machine" and that the opportunity to cross-examine an expert witness with knowledge of the machine and laboratory procedures satisfied the Confrontation Clause.[37]

The Supreme Court reversed and remanded.[38] Writing for the Court, Justice Ginsburg[39] opened with the holding of *Melendez-Diaz*: reports "created specifically to serve as evidence in a criminal proceeding" are testimonial and subject to the Confrontation Clause.[40] Despite New Mexico's contrary argument, *Melendez-Diaz* already resolved that the BAC report at issue in *Bullcoming* was testimonial.[41] Rejecting New Mexico's contention that the analyst was nonadversarial, Justice Ginsburg explained that the analyst completed the report in order to record the evidentiary results in connection with a police investigation.[42] Therefore, the analyst was a witness who pro-

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28 State v. Bullcoming, 189 P.3d 679, 681 (N.M. Ct. App. 2008).

29 Chief Judge Sutin and Judge Castillo joined Judge Wechsler.

30 102 P.3d 628 (N.M. 2004). *Dedman* held that a BAC report "is nontestimonial and satisfies the *Roberts* test." *Id.* at 639.

31 *Bullcoming*, 189 P.3d at 684.

32 *Id.* at 685.

33 Chief Justice Chávez and Justices Serna, Bosson, and Daniels joined Justice Maes.

34 State v. Bullcoming, 226 P.3d 1, 7–8 (N.M. 2010). Justice Maes declared, "*Dedman* is overruled." *Id.* at 8.

35 *Id.* at 9.

36 *Id.* at 6.

37 *Id.* at 9. Justice Maes urged the prosecution to admit the raw data, which does not implicate the Clause, in future cases. *Id.* at 10.

38 *Bullcoming*, 131 S. Ct. at 2719.

39 Justice Scalia joined Justice Ginsburg's opinion in full. Justices Sotomayor and Kagan joined all but Part IV, and Justice Thomas joined all but Part IV and note 6.

40 *Bullcoming*, 131 S. Ct. at 2709.

41 *See id.* at 2716.

42 *See id.* at 2717.

vided testimony under the Clause.[43] In addition, although New Mexico argued that the report was "unsworn" and thus nontestimonial, *Crawford* had explicitly rejected a requirement that testimonial statements be sworn.[44] The formalities of the BAC report, such as Caylor's signature, sufficed to render the report testimonial.[45]

Justice Ginsburg also held that surrogate testimony "of a scientist who did not sign the certification or perform or observe the test" documented in a forensic laboratory report does not satisfy the requirements of the Confrontation Clause unless the analyst who made the certification is unavailable and the accused has had the prior opportunity to cross-examine that analyst.[46] Justice Ginsburg described the BAC report, explaining that the analyst Caylor made several certifications on the report.[47] In addition, Justice Ginsburg noted that an analyst operating a gas chromatograph machine must have specialized skills.[48] Since Caylor did more than write down a number from a machine, the New Mexico Supreme Court was incorrect to describe him as a "mere scrivener."[49] Further, even if the machine results were "reliable" statements, *Crawford* held that reliability does not satisfy the right to confrontation.[50] The testimony of a surrogate witness did not provide a meaningful opportunity for cross-examination since a surrogate witness knowledgeable about laboratory procedures and reading "reliable" machine results still could not testify as to what Caylor knew or reveal why Caylor was placed on unpaid leave from his analyst position.[51] The opportunity to cross-examine the surrogate witness therefore violated Bullcoming's confrontation right.

Justice Ginsburg concluded by countering the concern that the holding would create an "undue burden on the prosecution."[52] First, New Mexico law requires laboratories to retain blood samples, which can be retested by an analyst who can testify.[53] Second, notice-and-

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[43] *Id.*

[44] *Id.* A requirement that a statement must be sworn to be testimonial would result in the "implausible" situation where sworn statements are inadmissible, but "formal, but unsworn statements" are admissible. *Id.*

[45] *Id.*

[46] *Id.* at 2710. Justice Ginsburg made no finding on whether the admission of the report was harmless error. *Id.* at 2719 n.11.

[47] *See id.* at 2710–11.

[48] *See id.* at 2711.

[49] *Id.* at 2714–15. Justice Ginsburg noted that the Court had made clear in *Davis v. Washington*, 547 U.S. 813 (2006), that a witness with knowledge of police department procedures cannot introduce the testimonial statement of the observing officer. *Bullcoming*, 131 S. Ct. at 2715.

[50] *Bullcoming*, 131 S. Ct. at 2715.

[51] *Id.* at 2715–16.

[52] *Id.* at 2717; *see id.* at 2717–19.

[53] *Id.* at 2718. The State bears the burden of initiating retesting, and the defendant does not lose his confrontation right by failing to ask for retesting. *Id.*

demand statutes allow forensic reports into evidence if the defendant decides not to request that the analyst testify when notified of the prosecution's intent to introduce a report.[54] Third, few cases go to trial, and in those cases, defendants prefer to stipulate to the admission into evidence of forensic reports in order to avoid emphasizing the results.[55] In contrast, prosecutors often want to call as a witness the analyst who performed the testing to strengthen their case.[56] Finally, jurisdictions where analysts testify have found workable solutions.[57]

Justice Sotomayor concurred in part and wrote separately to clarify her view of the testimonial inquiry.[58] While agreeing that the BAC report is testimonial and acknowledging that *Melendez-Diaz* previously held laboratory reports to be testimonial,[59] Justice Sotomayor emphasized that the "primary purpose" inquiry she had explained in *Bryant* led to the Court's conclusion: the BAC report has "a primary purpose of creating an out-of-court substitute for trial testimony" and therefore is testimonial.[60] Justice Sotomayor agreed with the majority that Caylor prepared the BAC report as evidence for use in a prosecution.[61] In contrast to the majority, however, she added that hearsay rules are "relevant"[62] to the primary-purpose inquiry and that the formality of a statement "can shed light on" its evidentiary purpose.[63] Although the business records hearsay exception allows into evidence records "kept in the course of a regularly conducted business activity,"[64] the exception does not apply if the records are prepared for use as evidence at trial.[65] The hearsay exception reveals that business records have an administrative primary purpose while forensic reports have an evidentiary primary purpose.[66] In this case, Caylor's certification demonstrated that he testified or affirmed that the statements were true, indicating the report's evidentiary purpose and testimonial nature.[67]

Justice Sotomayor also emphasized the limited nature of the Court's surrogate-witness holding by describing a number of issues the

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[54] *Id.*

[55] *Id.* at 2718–19.

[56] *Id.* at 2718.

[57] *Id.* at 2719.

[58] *Id.* at 2719 (Sotomayor, J., concurring in part).

[59] *Id.*

[60] *Id.* at 2720 (quoting Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011)) (internal quotation marks omitted).

[61] *Id.* at 2720–21.

[62] *Id.* at 2720 (quoting *Bryant*, 131 S. Ct. at 1155) (internal quotation marks omitted).

[63] *Id.* at 2721.

[64] FED. R. EVID. 803(6).

[65] *Bullcoming*, 131 S. Ct. at 2720 (Sotomayor, J., concurring in part).

[66] *Id.*

[67] *Id.*

holding did not resolve.[68] First, New Mexico did not argue that the BAC report had a nonprosecutorial primary purpose.[69] Second, the surrogate witness lacked any connection to the BAC test, so the holding does not apply to a case where "a supervisor who observed an analyst conducting a test testified about the results."[70] Third, the surrogate witness did not testify as an expert on the report without admitting the report into evidence.[71] Finally, the State did not introduce only the machine-generated raw data.[72]

Justice Kennedy dissented.[73] While he disagreed entirely with the *Crawford* approach, his dissent emphasized that the surrogate witness holding disrupts "the sound administration of justice."[74] He began by calling the majority's holding "the new and serious misstep of extending [*Melendez-Diaz*]."[75] The surrogate witness satisfied the Confrontation Clause because the gas chromatograph machine did not require specialized knowledge to operate,[76] the anonymity of the testing process removed the potential for bias,[77] and the witness put on by the prosecution was a "knowledgeable representative of the laboratory"[78] who "was qualified to answer questions" about the process.[79] Given these circumstances, Justice Kennedy called the majority's holding "a hollow formality" that credits in-court testimony over the reliability of the testing process.[80] In addition, Justice Kennedy took issue with the "persistent ambiguities" in the majority opinion's and other Confrontation Clause cases' descriptions of what constitutes a testimonial statement.[81] He asserted that this lack of a "common set of principles in applying the holding of *Crawford*"[82] is the result of an unworkable rule.[83] Further, Justice Kennedy argued that *Crawford* does not com-

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[68] *Id.* at 2721–22.

[69] *Id.* at 2722.

[70] *Id.* Justice Sotomayor declined to indicate how much involvement a supervisory witness would need to satisfy the Confrontation Clause. *See id.*

[71] *Id.*

[72] *Id.*

[73] Chief Justice Roberts and Justices Breyer and Alito joined Justice Kennedy in dissent.

[74] *Bullcoming*, 131 S. Ct. at 2728 (Kennedy, J., dissenting).

[75] *Id.* at 2723.

[76] *Id.* at 2724.

[77] *Id.*

[78] *Id.* at 2723.

[79] *Id.* at 2724. The witness acknowledged during cross-examination that he had no direct participation in testing Bullcoming's blood, leaving to the jury whether to credit his testimony. *Id.*

[80] *Id.* Justice Kennedy also admonished the majority for "once more assum[ing] for itself a central role in mandating detailed evidentiary rules." *Id.* at 2725.

[81] *Id.* at 2726.

[82] *Id.* at 2725.

[83] *Id.* at 2725–26. Justice Kennedy noted the inconsistent use of reliability and "the elusive distinction" between statements in an ongoing emergency and those with an evidentiary primary purpose. *Id.* at 2725.

pel the majority's holding.[84] As a result, the states will have to respond to this "intrusive federal regime" with "long-term" solutions, which Justice Kennedy argued will do little to relieve the undue burden on the prosecution the Court's holding will create.[85]

While the majority reached the correct outcome in its narrow holding that surrogate witnesses with no connection to the testimonial statement do not satisfy the requirements of the Confrontation Clause, the Court has yet to settle the threshold question of how to determine whether a statement is testimonial. Explicitly disallowing surrogate witnesses with no relation to the testimonial statement is the logical extension of *Crawford*, and the majority resisted pragmatic concerns to ensure criminal defendants retain this procedural right. However, although *Melendez-Diaz* already held that statements such as Bullcoming's BAC report are testimonial, the majority opinion and Justice Sotomayor's concurrence provided two different analyses of the testimonial nature of the BAC report. These analyses draw into question whether there is a majority on the Court for any given approach used to determine whether a statement is testimonial.

The Court's holding will undoubtedly impact criminal procedure; however, the holding flows directly from its precedents[86] and has limited additional application. The Court reaffirmed *Melendez-Diaz*'s refusal "to create a 'forensic evidence' exception to [the *Crawford*] rule."[87] Since the Confrontation Clause is a procedural guarantee, the knowledge of a surrogate witness and the presumed reliability of evidence[88] cannot substitute for the right to cross-examine either the actual witness who made the statement or "the analyst who made the certification."[89] However, since whether a supervisory analyst who certified the report would satisfy the Clause remains an open ques-

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[84] *Id.* at 2726–27.

[85] *Id.* at 2727–28.

[86] Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J.L. & POL'Y 791, 832–33 (2007) ("[I]f the basis for the expert's testimony is 'testimonial,' then substituted cross-examination cannot be constitutionally adequate."); *see* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532, 2542 (2009).

[87] *Bullcoming*, 131 S. Ct. at 2713. "The Court's holding [in *Melendez-Diaz*] was consistent with virtually all of the available scholarship on th[e] issue." Brief of Law Professors as Amici Curiae in Support of Petitioner at 7, *Bullcoming*, 131 S. Ct. 2705 (No. 09-10876) [hereinafter Brief of Law Professors].

[88] The confrontation right has increased importance as it relates to forensic evidence because juries "increasingly assume that forensic laboratory results contain some kind of absolute truth, as evidenced by what many call the 'CSI effect[,]'" despite reported incidents of laboratory analysts fabricating reports. *The Supreme Court, 2008 Term — Leading Cases*, 123 HARV. L. REV. 202, 208–09 (2009); *see* Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 HARV. J.L. & PUB. POL'Y 45, 51 & n.39 (2011) (discussing potential fabrication); Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 475, 494–500 (2006).

[89] *Bullcoming*, 131 S. Ct. at 2710.

tion,[90] the Court left it to the states to determine who certifies reports and must testify.[91] Allowing surrogate supervisory witnesses in limited circumstances would mitigate the demands of the Clause and improve forensic evidence since supervisors would require more detailed reports in order to testify.[92] Finally, because the Clause is not a structural right,[93] a violation may result in harmless error.[94]

Although the Court's testimonial holding was a straightforward application of *Melendez-Diaz*, *Bullcoming* demonstrates the lack of agreement on how to determine whether or not a statement is testimonial. Two of the five Justices in the *Melendez-Diaz* majority have since left the Court.[95] While Justice Sotomayor provided the fifth vote for the *Bullcoming* majority, both her majority opinion in *Bryant* and her concurrence in *Bullcoming* took a different approach to the testimonial inquiry than did previous Confrontation Clause opinions. Three open issues remain in determining whether a statement is testimonial, the first two of which *Bullcoming* addressed: (1) the role of solemnity and formality, (2) the role of hearsay exceptions, and (3) the exact contours of the primary-purpose test.

Crawford defined testimony as a "solemn declaration," emphasizing that while a testimonial statement need not be formal,[96] it must have a degree of solemnity to separate it from "a casual remark."[97] But in *Bryant*, instead of looking for solemnity in the witness's statements,[98] Justice Sotomayor used informality to argue that the police did not have an evidentiary primary purpose.[99] Neither Justice Ginsburg nor Justice Sotomayor mentioned solemnity in *Bullcoming*.[100] While both

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[90] *Id.* at 2722 (Sotomayor, J., concurring in part).

[91] *Cf. Melendez-Diaz*, 129 S. Ct. at 2532 n.1 (discussing how prosecutors decide which witnesses must be called to establish chain of custody).

[92] Brief of Law Professors, *supra* note 87, at 20.

[93] *See* David H. Kwasniewski, Note, *Confrontation Clause Violations as Structural Defects*, 96 CORNELL L. REV. 397, 416 (2011) (arguing that harmless error review renders the *Crawford* approach a meaningless change from the *Roberts* approach).

[94] *See Bullcoming*, 131 S. Ct. at 2719 n.11. Since numerous witnesses testified to Bullcoming's intoxicated state at the accident, *see* State v. Bullcoming, 226 P.3d 1, 4–5 (2010), the BAC report may have been cumulative evidence and therefore harmless error.

[95] *See Melendez-Diaz*, 129 S. Ct. at 2530. Justices Stevens and Souter have retired.

[96] A statement can be solemn because it is formal, but not every solemn statement is formal. *See* Crawford v. Washington, 541 U.S. 36, 51 (2004). In contrast, Justice Thomas believes that only "formalized testimonial materials" display the necessary "degree of solemnity." Davis v. Washington, 547 U.S. 813, 836 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part).

[97] *Crawford*, 541 U.S. at 51.

[98] *Cf. Davis*, 547 U.S. at 826 ("The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood.").

[99] Michigan v. Bryant, 131 S. Ct. 1143, 1166 (2011).

[100] In contrast to every other majority opinion on the Clause since *Crawford*, Justice Ginsburg removed the word "solemn" when using the quoted definition of testimony from *Crawford*. *Bull-*

addressed the formalities of the report, Justice Sotomayor addressed formality as another means of ascertaining a statement's primary purpose instead of demonstrating a statement's solemnity,[101] leaving open the possibility that a statement can have an evidentiary primary purpose and thus be testimonial without being solemn.[102]

The role that hearsay exceptions play is now unclear. The Court had rejected the use of hearsay exceptions in determining whether a statement is testimonial,[103] noting that hearsay exceptions typically admit into evidence testimony that implicates the Clause while not admitting into evidence testimony that does not require confrontation.[104] In *Bryant*, Justice Sotomayor reintroduced hearsay exceptions, arguing that hearsay exceptions are "relevant" to the primary-purpose inquiry because the logic behind the exception can reveal a statement's purpose.[105] In *Bullcoming*, she reiterated this argument.[106] The *Bullcoming* majority split in *Bryant* over examining hearsay exceptions: Justice Sotomayor analogized an ongoing emergency to the excited utterance hearsay exception, stating that both situations make statements reliable since they "focus[] an individual's attention on responding to the emergency."[107] Justice Scalia called this approach "patently false" since "[r]eliability tells us *nothing* about whether [a witness's] statement is testimonial."[108]

Finally, Justice Sotomayor reiterated her definition of testimonial from *Bryant* in her *Bullcoming* concurrence: "a primary purpose of creating an out-of-court substitute for trial testimony" renders a statement testimonial.[109] The Court originally introduced the primary-purpose test in the context of police questioning,[110] but has used it in every Confrontation case since then. Justice Sotomayor expanded the primary-purpose inquiry in *Bryant* to look to the purposes of all parties involved, a point with which Justices Scalia and Ginsburg dis-

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coming, 131 S. Ct. at 2716 (quoting *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford*, 541 U.S. at 51)).

101 *Id.* at 2721 (Sotomayor, J., concurring in part).

102 The lack of a formality or solemnity requirement could be beneficial to defendants. *Cf.* Friedman, *supra* note 9, at 248 ("If certain characteristics are deemed crucial for treating a statement as testimonial, then repeat players involved in the creation or receipt of prosecution evidence will have a strong incentive, and often ready means, to escape that treatment . . . .").

103 *See Melendez-Diaz*, 129 S. Ct. at 2539–40; *Davis*, 547 U.S. at 821; *Crawford*, 541 at 56.

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

105 Michigan v. Bryant, 131 S. Ct. 1143, 1157 (2011).

106 *Bullcoming*, 131 S. Ct. at 2720 (Sotomayor, J., concurring in part) (quoting *Bryant*, 131 S. Ct. at 1155).

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

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

109 *Bullcoming*, 131 S. Ct. at 2720 (Sotomayor, J., concurring in part) (quoting *Bryant*, 131 S. Ct. at 1155).

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

agreed, arguing that "[t]he declarant's intent is what counts."[111] Since the issue of whose purpose matters does not arise in the forensic-analyst context, the Court did not address the issue directly in *Bullcoming* and the breadth of the primary-purpose test remains an open question. Expanding the scope of the primary-purpose test to include the purpose of the interrogator increases the possibility of future disputes between members of the *Bullcoming* majority.

After *Bullcoming*, no clear majority position exists on the definition of "testimonial." Justices Scalia and Ginsburg are committed to the logic of *Crawford*. They are often joined by Justice Thomas (except when the statement at issue lacks strict formality).[112] The two newest members of the Court, Justices Sotomayor and Kagan, joined the *Bullcoming* majority, but Justice Kagan's views remain largely unknown[113] and Justice Sotomayor's views do not completely align either with the views of Justices Scalia and Ginsburg or with those of the *Bullcoming* dissenters. Due to this lack of consensus and to the fact-intensive nature of the testimonial inquiry, the Court may take varied positions before a consistent doctrine emerges.

E. Eighth Amendment

Prison Population Reduction Order. — Critics of judicial activism have condemned politically driven Supreme Court opinions at least since the era of the Warren Court.[1] Justifiable concerns about sweeping judicial proclamations on political issues, however, occasionally may conflate politically liberal results with judicially liberal modes of interpretation.[2] In hesitating to implement a costly or intrusive remedy, for example, courts may alter their approach to the recognition of substantive rights[3] — but this avoidance of politically unpopular rem-

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[111] *Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting) (arguing that other inquiries "cannot substitute for the declarant's intentional solemnity or his understanding of how his words may be used"); *id.* at 1176 (Ginsburg, J., dissenting); *see* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009) ("[T]he analysts were aware of the affidavits' evidentiary purpose . . . .").

[112] *See Bryant*, 131 S. Ct. at 1167 (Thomas, J., concurring in the judgment); *Melendez-Diaz*, 131 S. Ct. at 2543 (Thomas, J., concurring).

[113] Justice Kagan took no part in the consideration or decision of *Bryant*.

[1] *See* J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society — Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 1 (1968) (noting that "the apostles of restraint warn that even though we may approve the results that the Warren Court has decreed, we still must chastise the Court for assuming an activist role"); *see also* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1139–40 (2002).

[2] Of course, judicial activism need not be limited to politically liberal judges. *See* Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 121 (1987); *see also* William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1217 (2002) (noting that "the subjects (and the originators) of the activism charge have continually shifted with changes in political and judicial power").

[3] Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635 (2006).