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# PUTTING *MELENDEZ-DIAZ* ON ICE: HOW AUTOPSY REPORTS CAN SURVIVE THE SUPREME COURT'S CONFRONTATION CLAUSE JURISPRUDENCE

GEORGE M. TSIATIS<sup>†</sup>

*Taceant colloquia. Effugiat risus. Hic locus est ubi mors gaudet  
succurrere vitae.*<sup>1</sup>

## INTRODUCTION

Were the Medical Examiners (“MEs”) of the United States like Dr. House on a Tuesday,<sup>2</sup> we would have many things to be

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<sup>1</sup> This popular slogan that adorns morgues around the world, *see, e.g.*, Margaret Graham, *Morgue 2* (photograph), FLICKR (Apr. 10, 2006), <http://www.flickr.com/photos/drexelmedarchives/3404963652/> (belonging to DrexelMed Archives' Photostream), roughly translates from Latin to English as, “Let conversations be silenced. Let laughter take flight. This is the place where death takes joy in helping the living.” *Id.* (author's translation). The National Association of Medical Examiners uses the last sentence as its subtitle on its website, *see* NAT'L ASS'N OF MED. EXAM'RS, <http://thename.org/> (last updated Mar. 2, 2011), but the entire quote is used more often, *see, e.g.*, Thomas A. Godwin, *End of Life: Natural or Unnatural Death Investigation and Certification*, 51 *DISEASE-A-MONTH* 218, 219 (2005).

<sup>2</sup> Based on the following exchange between the popular television characters of Dr. Gregory House and Dr. Lisa Cuddy in the episode titled “Autopsy”:

Dr. Gregory House: Is it still illegal to perform an autopsy on a living person?

Dr. Lisa Cuddy: Are you high?

Dr. Gregory House: If it's Tuesday, I'm wasted.

Dr. Lisa Cuddy: It's Wednesday.

*Memorable Quotes for “House M.D.” Autopsy (2005)*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0606012/quotes> (last visited Apr. 3, 2011) (quoting *House: Autopsy*, (FOX television broadcast Oct. 7, 2005)). This serves to

concerned with, including their state of mind and adherence to procedure. As a group of professionals, though, MEs are organized<sup>3</sup> and have produced training, educational, and examination standards.<sup>4</sup> They have also produced performance standards outlining and defining the many important tasks they perform, especially forensic autopsies.<sup>5</sup> They are a highly trained subset of the population that performs the difficult but fulfilling task of providing an individual's final medical examination so that his or her survivors can have the closure that comes with learning, to the degree that medical certainty permits, how their relative, loved one, or colleague came to pass. When the death leads to the filing of criminal charges, MEs will often testify to their findings and share parts of their reports for the prosecution.

Like other professionals, though, many MEs move, change jobs, and change careers; like all people, they also die. A criminal investigation, the filing of charges and a trial can take months, even years, exponentially increasing the likelihood that the ME on a case will be unavailable to testify or will have had a significant change in circumstances.<sup>6</sup> The current legal landscape creates a zone of uncertainty for how the autopsy reports that MEs produce can be used in criminal trials at which they cannot be present, for any of the aforementioned ordinary occurrences in people's lives. The Supreme Court's Confrontation Clause jurisprudence, culminating in the recent decision of

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highlight the overexaggerated fictionalization of physicians and law enforcement agents our society has become acquainted with through television programs like *House*, *CSI*, *Bones*, and *NCIS*. The characters are presented in a way that drives drama and plot development, not in a way that presents the realities of medical and forensic work.

<sup>3</sup> See *General Information*, NAT'L ASS'N OF MED. EXAM'RS (Jan. 15, 2011), [http://thename.org/index.php?option=com\\_content&task=view&id=46&Itemid=29](http://thename.org/index.php?option=com_content&task=view&id=46&Itemid=29).

<sup>4</sup> For requirements to become board certified in both a primary specialty and a subspecialty see AM. BD. OF PATHOLOGY, BOOKLET OF INFORMATION 2011, 3–12, available at <http://www.abpath.org/2011BookletofInformation.pdf>. The requirements to become a board-certified forensic pathologist specifically include “[One] full year of additional training in forensic pathology in a program accredited for such training by the [Accreditation Council for Graduate Medical Education].” *Id.* at 7.

<sup>5</sup> See generally GARRY F. PETERSON & STEVEN C. CLARK, NAT'L ASS'N OF MED. EXAM'RS, FORENSIC AUTOPSY PERFORMANCE STANDARDS (2006), available at [http://thename.org/index.php?option=com\\_docman&task=doc\\_download&gid=18&Itemid=26](http://thename.org/index.php?option=com_docman&task=doc_download&gid=18&Itemid=26).

<sup>6</sup> This Note uses the term “unavailable” in the general sense and not in reference to the “unavailability” that the Federal Rules of Evidence require for certain hearsay exceptions. See FED. R. EVID. 804 (definitions of unavailability and hearsay exceptions requiring that the declarant is unavailable).

*Melendez-Diaz v. Massachusetts*,<sup>7</sup> has pressed a more exacting lens on such a situation by analyzing the constitutionality of admitting forensic evidence in the absence of the analyst who prepared the report.<sup>8</sup> While there is significant uncertainty about whether or not this applies to autopsy reports and about how to handle forensic evidence, with minor adjustments either by the MEs or by the courts, the majority of any autopsy report should be admissible without the testimony of the pathologist who performed the autopsy. Ideally, the ME would be present to testify, but in the event that he or she is unavailable—through change of job, relocation, sickness, or death—large portions of the report should still survive admission, because they fall outside the Court’s definition of the “core class of testimonial statements,”<sup>9</sup> and, if a court does not agree, it can always redact portions from the report to remove any “testimonial” characteristics.<sup>10</sup>

This Note examines how the Supreme Court’s holding in the *Melendez-Diaz* case has impacted autopsy reports as evidentiary tools in criminal cases. Part I offers some background on autopsy reports and forensic pathology, discusses key evidentiary rules, and the history of the Sixth Amendment’s Confrontation Clause leading up to *Melendez-Diaz*. Part II explores the breadth and consequences of *Melendez-Diaz*, particularly as they impact autopsy reports. Part III analyzes how autopsy reports differ fundamentally from many other types of forensic reports, notably because of policy issues they implicate. Finally, Part IV defines and presents the “lean rule” as an alternative for MEs and courts

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<sup>7</sup> 129 S. Ct. 2527 (2009). The Supreme Court has signaled that *Melendez-Diaz* is here to stay by granting certiorari to a Confrontation Clause case only one term after it decided *Melendez-Diaz*, vacated the judgment of the Virginia high court in that case and remanded it “for further proceedings not inconsistent with the opinion in *Melendez-Diaz v. Massachusetts*.” *Briscoe v. Virginia*, 130 S. Ct. 1316, 1316 (2010).

<sup>8</sup> To the author, this issue initially appeared to be hypothetical, but I attended a homicide trial in the course of my research and heard one City ME testify on behalf of a Fellow, who, after her year at the program elapsed, moved out of state to become an ME in another jurisdiction. Given the requirement of one year of “additional training,” this issue would seem to arise regularly. *See supra* note 4. This only heightens the importance of finding a solution that addresses the evidentiary, constitutional, and practical issues at play.

<sup>9</sup> *Melendez-Diaz*, 129 S. Ct. at 2532.

<sup>10</sup> *See People v. Freycinet*, 11 N.Y.3d 38, 42, 892 N.E.2d 843, 846, 862 N.Y.S.2d 450, 453 (2008) (holding an autopsy report with opinions redacted was not testimonial).

alike that does not implicate the defendant's Sixth Amendment interests, that provides the prosecution with facts and observations that can still be used should the particular ME be unavailable, and that allows MEs to continue performing their duties in a relatively uninterrupted fashion.

The interests at play here are fundamental to the preservation of constitutional liberties on the one hand, and to our system of justice, our understanding of the world, and our very humanity on the other hand. In crafting a solution, due consideration must be paid to both sides. Constitutional liberties necessarily run up against the interests of the State.<sup>11</sup> But those liberties were derived from an order of natural law,<sup>12</sup> which, in the case of an autopsy report, runs them up against individuals, that is, the families and loved ones of the deceased, who hope for the peace and closure of a final pronouncement on the matter. This tension—weighing the interests of individuals against one another rather than the individual's interest against that of the State—upends standard constitutional analysis and demands bespoke treatment. While this tension is not an issue for many outputs of forensic analysis, autopsy reports inhabit a liminal locus, between life and death, between science and art, and in that place, they require understanding and consideration as forensic reports, as public records, as evidence, and as the final punctuation on a person's life.

#### I. EXAMINING THE USE OF AUTOPSY REPORTS IN CRIMINAL CASES

An autopsy report and the testimony of the ME can serve as evidence for some of the more obvious parts of the prosecution's case, but because of the burden the prosecution must bear, the evidence that the report and the ME can provide for those elements is crucial. While MEs generally cannot speak to the *mens rea*, *actus reus*, or concurrence,<sup>13</sup> they can generally offer evidence of causation—that the *actus reus* lead to the decedent's

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<sup>11</sup> See David Lombard Harrison, *The USA Patriot Act: A New Way of Thinking, An Old Way of Reacting, Higher Education Responds*, 5 N.C. J. L. & TECH. 177, 179 (2004).

<sup>12</sup> See Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1, 8 n.46 (2008).

<sup>13</sup> This is qualified because it is possible that, outside of their capacity as MEs, they might witness the actual crime or have a relationship with the defendant that allows them to speak to her intent.

death—and of the ultimate harm—that the deceased is, in fact, deceased.<sup>14</sup> Taking the example of a basic shooting: The ME would not likely testify as to whether the defendant shot the decedent, whether the defendant intended to harm the decedent, or whether the defendant actually intended to shoot the decedent. The ME would likely testify to the fact that a bullet caused the trauma that led to the death of the decedent and that the decedent was dead. These seem to be obvious findings that any reasonable person could come to, but when the hypothetical becomes more complex and the decedent is in very frail health, falls down the stairs, hits his head, has a heart attack, and is shot by three shooters in different parts of his body, the entire case may hinge on the findings of the ME as to the paths of the various bullets and what actually brought his life to an end.<sup>15</sup> To better frame the important role that autopsy reports play, this section will explore the make-up of an autopsy report, the Federal Rules of Evidence as they apply to the characteristics of an autopsy report, and the history of the Supreme Court's Confrontation Clause jurisprudence.

#### *A. Anatomy of an Autopsy Report*

The National Association of Medical Examiners defines an autopsy as “[a]n examination and dissection of a dead body by a physician for the purpose of determining the cause, mechanism, or manner of death, or the seat of disease, confirming the clinical diagnosis, obtaining specimens for specialized testing, retrieving physical evidence, identifying the deceased or educating medical

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<sup>14</sup> For a review of the elements of a crime, see generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §§ 9, 10, 14, 15 (5th ed. 2009). A death certificate can also serve as evidence of the decedent's demise, see DEP'T OF HEALTH & HUMAN SERVS., NAT'L CTR. FOR HEALTH STATISTICS, MEDICAL EXAMINERS' AND CORONERS' HANDBOOK ON DEATH REGISTRATION & FETAL DEATH REPORTING 2 (2003) [hereinafter MED. EXAM'RS' & CORONERS' HANDBOOK], available at [http://www.cdc.gov/nchs/data/misc/hb\\_me.pdf](http://www.cdc.gov/nchs/data/misc/hb_me.pdf) (“[I]nformation in the record is considered as *prima facie* evidence of the fact of death . . .”), but the information on it is derived from the same source as the autopsy report and exists in a less contextual format, so it should be subject to the same criticisms and the same protections as the autopsy report.

<sup>15</sup> For a less complex, but equally demonstrative, situation, see Katie Zezima, *Death of Father of Ice Skater Is a Homicide*, N.Y. TIMES, Feb. 10, 2010, at A18 (explaining the ME's ruling of a homicide, despite his finding of a pre-existing cardiac condition, which the family blames for his death).

professionals and students.”<sup>16</sup> MEs approach their responsibilities at two levels: the jurisdictional question of whether they should investigate the death further, and the operational question of whether an autopsy ought to be performed. Investigations should be initiated in all cases where jurisdiction is granted “by statutes, rules, and regulations,” and in cases “[that] should receive further investigations to protect the public safety and health.”<sup>17</sup> Forensic autopsies ought to be performed for any of a dozen reasons, including if “the death is known or suspected to have been caused by apparent criminal violence . . . [, and] the body is unidentified and the autopsy may aid in identification.”<sup>18</sup> In these situations, “the public interest is so compelling that one must always assume that questions will arise that require information obtainable only by forensic autopsy.”<sup>19</sup>

For the purposes of this Note, several portions of an autopsy report are of particular interest: the identification of the deceased, the cause of death, the manner of death, and the addenda that often accompany the report—usually in the form of diagrams, photographs, and audio-video recordings.<sup>20</sup> While these merit additional consideration, it is important to note that the rest of the report is filled with background information like the time, date, and location of the autopsy, along with any medical history that can be compiled, and numerous descriptions,

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<sup>16</sup> PETERSON & CLARK, *supra* note 5, at 19.

<sup>17</sup> *Id.* at 2 (enumerating eight particular scenarios that require further investigation: “deaths due to violence[,] . . . known or suspected non-natural deaths[,] . . . unexpected or unexplained deaths when in apparent good health[,] . . . unexpected or unexplained deaths of infants and children[,] . . . deaths occurring under unusual or suspicious circumstances[,] . . . deaths of persons in custody[,] . . . deaths known or suspected to be caused by diseases constituting a threat to public health[,] . . . deaths of persons not under the care of a physician”).

<sup>18</sup> *Id.* at 3–4 (noting that the other ten reasons are: “the death is unexpected and unexplained in an infant or child[,] . . . the death is associated with police action[,] . . . the death is apparently nonnatural and in custody of a local, state, or federal institution[,] . . . the death is due to acute workplace injury[,] . . . the death is caused by apparent electrocution[,] . . . the death is by apparent intoxication by alcohol, drugs, or poison[,] . . . the death is caused by unwitnessed or suspected drowning[,] . . . the body is skeletonized[,] . . . the body is charred[,] . . . the forensic pathologist deems a forensic autopsy is necessary to determine cause or manner of death or collect evidence”).

<sup>19</sup> *Id.* at 3.

<sup>20</sup> For a complete list of the content and format of an autopsy report see *id.* at 18.

interpretations, and opinions qualified as necessary.<sup>21</sup> The discussion of these more basic pieces is limited because they are the building blocks that lead to the report's conclusions. The conclusions are what make autopsy reports so vital to families, to the public, and to prosecutors. The cause of death and manner of death are generally included on death certificates,<sup>22</sup> and are used as the basis for statistical reporting.<sup>23</sup> These rulings can impact insurance claims, settlement of the estate, and closure for the family of the decedent.<sup>24</sup> The rulings are a significant purpose of the autopsy, but their use in a criminal trial, at which the ME who performed the autopsy is not present, is questionable under the latest interpretation of the Confrontation Clause to come down from the Court. Therefore, a sound understanding of each element of an autopsy report is necessary to explore how it may fit into the Court's current regime.

Identification of the body is often achieved by a visual identification or by a comparison of dental records, fingerprints, X-rays, or DNA.<sup>25</sup> Throughout their examinations, MEs remain attentive to features, such as tattoos and scars, that can help confirm the identity of the deceased, even if there is a presumptive or visual identification.<sup>26</sup> MEs must also carefully preserve the evidence through photographs, X-rays,<sup>27</sup> and documentation of the deceased's "clothing and personal effects," all with the purpose of avoiding exhumation if the identification is challenged.<sup>28</sup> The thoroughness of this identification process, which applies with equal force to individuals found with their driver's licenses and to those found only as skeletal fragments in a swamp, ensures that presumptions are kept to a minimum.

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<sup>21</sup> See *id.*

<sup>22</sup> See NAT'L CTR. FOR HEALTH STATISTICS, U.S. STANDARD CERTIFICATE OF DEATH (1989), available at <http://www.cdc.gov/nchs/data/dvs/std-dcrt.pdf>.

<sup>23</sup> See MED. EXAM'RS' & CORONERS' HANDBOOK, *supra* note 14. Statistical reporting, besides providing a measurement of recent trends, "is used to determine which medical conditions receive research and development funding, to set public health goals, and to measure health status at local, State, national, and international levels." *Id.*

<sup>24</sup> See *id.* at 2, 24.

<sup>25</sup> See PETERSON & CLARK, *supra* note 5, at 5.

<sup>26</sup> See *id.* at 8.

<sup>27</sup> See *id.* at 5–6. X-rays are important to "document skeletal characteristics and radio-opaque foreign bodies such as bullets, pacemakers, and artificial joints." *Id.* at 6.

<sup>28</sup> *Id.* at 6.



While MEs will generally not expend efforts beyond what seems necessary to arrive at the conclusion, they will retain and document the evidence in their report that will allow them—or another party—to corroborate their conclusion should it be called into question after the body proceeds to its final resting place.<sup>29</sup>

Cause of death and manner of death are distinct conclusions that serve different purposes. Cause of death is “[t]he underlying disease or injury responsible for setting in motion a series of physiologic events culminating in death,”<sup>30</sup> for example, “cardiac arrest due to coronary artery atherosclerosis.”<sup>31</sup> Cause of death outlines a detailed mechanism and sequence by which the death occurred. Manner of death, on the other hand, is designed to simplify the result, “classifying deaths based in large part on the presence or absence of intent to harm, and the presence or absence of violence, the purpose of which is to guide vital statistics nosologists to the correct external causation code in the International Classification of Diseases.”<sup>32</sup> In contrast to cause of death, which covers expansive areas of medical science and has numerous permutations of sequence, the options for manner of death are limited to “natural, accident, homicide, suicide, undetermined, and in some registration districts for vital statistics, unclassified.”<sup>33</sup> Again, the details discovered through the autopsy and catalogued in significant detail throughout the report culminate in these two findings, with the goal of capturing in a summary what category the death falls into and the steps through which it occurred. That said, both of these pieces are of a different character than the rest of the report; the National Association of Medical Examiners distinguishes between “the objective forensic autopsy with its findings including toxicological tests, special tests, microscopic examination, etc., and . . . the interpretations of the forensic pathologist including cause and

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<sup>29</sup> See *id.* at 5–6 (“Careful preservation and archiving provide an objective basis for future identification and thereby avoid the need for exhumation.”).

<sup>30</sup> *Id.* at 19.

<sup>31</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, INSTRUCTIONS FOR COMPLETING THE CAUSE-OF-DEATH SECTION OF THE DEATH CERTIFICATE (2004), available at [http://www.cdc.gov/nchs/data/dvs/blue\\_form.pdf](http://www.cdc.gov/nchs/data/dvs/blue_form.pdf).

<sup>32</sup> PETERSON & CLARK, *supra* note 5, at 20. “Manner of death” specifically assists: “1) in determining accurate causes of death, 2) in processing insurance claims, and 3) in statistical studies of injuries and death.” CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 31.

<sup>33</sup> PETERSON & CLARK, *supra* note 5, at 20.

manner of death.”<sup>34</sup> This characterization is crucial in discussing the potential admissibility of autopsy reports without the presence of their preparers, and will be explored in greater detail below.

Finally, the numerous addenda that may accompany an autopsy report deserve mention. Diagrams, photographs, and/or audio-video recordings often accompany the report and serve as evidence at trial.<sup>35</sup> They provide important supporting evidence to corroborate the written descriptions and the ultimate findings of the report. Photographs and audio and visual recordings can also confirm procedure and reported observations. Together, these addenda perform several functions: “to support or refute interpretations, to provide evidence for court, and to serve as a record.”<sup>36</sup> As with the evidence amassed and preserved for the identification of the deceased, these additional pieces can retain detailed data that can preserve some level of independent review, although that review must be, in almost every case, short of actually performing a second autopsy.

This basic understanding of the key elements of an autopsy report permits a more comprehensive evidentiary and constitutional analysis of autopsy reports. Before arriving at the constitutional question of confrontation, it is important to take the pieces of the autopsy report that have just been introduced, plug them into the existing evidentiary framework, and explore their interaction with the justice system.

#### *B. The Federal Rules of Evidence*

In analyzing whether an autopsy report or a particular element of an autopsy report is testimonial, evidentiary underpinnings frame the analysis—although they ultimately operate in concert with the constitutional issues to be discussed below. In particular, the Federal Rules of Evidence regarding hearsay, expert testimony, and exceptions to hearsay are vital to any discussion of the Confrontation Clause questions that are raised.

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<sup>34</sup> *Id.* at 18.

<sup>35</sup> *Id.* at 10.

<sup>36</sup> *Id.*

The Federal Rules of Evidence devote an entire article to hearsay.<sup>37</sup> Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”<sup>38</sup> The Rules consider hearsay in such detail because it raises the judicial issue of trustworthiness,<sup>39</sup> and because it raises the constitutional issue embodied in the Confrontation Clause.<sup>40</sup> Because the declarant is not present on the witness stand, there is often no way to judge whether the statement reported by the witness was the declarant’s actual statement or whether the statement was actually a true and credible statement. Similarly, there is usually no way to confront the declarant when the witness speaks for him or her.

Although the hearsay rule and hearsay exceptions provide a foundational basis for understanding the Confrontation Clause’s place in gathering testimony as evidence, hearsay evidence does not always violate the Confrontation Clause. As the Court held in *California v. Green*, “merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.”<sup>41</sup> The converse holds as well: Confrontation rights are not exhaustively protected by hearsay exceptions, specifically because hearsay is not a constitutional principle and its definition and exceptions are based in statute.<sup>42</sup> *Green* identified the relationship between hearsay and violations of the Confrontation Clause as overlapping, but not completely,<sup>43</sup> therefore showing that just because a hearsay exception applies does not automatically prove that the right to confront has been satisfied. That said, the interplay between hearsay and the

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<sup>37</sup> See FED. R. EVID. 801–07.

<sup>38</sup> *Id.* 801(c).

<sup>39</sup> See *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973) (“The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact.”).

<sup>40</sup> See *Anderson v. United States*, 417 U.S. 211, 220 (1974) (“The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence.”).

<sup>41</sup> 399 U.S. 149, 156 (1970).

<sup>42</sup> Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1436 (1966).

<sup>43</sup> 399 U.S. at 156.

Confrontation Clause has led to the development of some of the hearsay exceptions. The long and intertwined history of the two provides a frame of reference for measuring evidentiary issues.<sup>44</sup>

The hearsay rule is notably porous; it has twenty-nine exceptions in the Rules.<sup>45</sup> Several of these exceptions might apply to an autopsy report or portions of the autopsy report, notably, as a record of regularly conducted activity,<sup>46</sup> as a public record or report,<sup>47</sup> as a record of vital statistics,<sup>48</sup> as a recorded recollection,<sup>49</sup> or under the residual exception.<sup>50</sup> These can be separated into three distinct groups: exception as a business, public, or medical record; exception as a recollection that captures the ME's impressions; and exception in the interest of justice.

The business record, public record, and vital statistics exceptions touch on one another in the case of an autopsy report. An autopsy report satisfies the requirements of a business record as a report of opinions and diagnoses, "made at or near the time by . . . a person with knowledge, . . . kept in the course of a regularly conducted business activity, and . . . it was the regular practice of that business activity to make the . . . report."<sup>51</sup> This can be confirmed by the custodian, a qualified witness, or by certification under the Rules or a relevant statute.<sup>52</sup> The rule includes an expansive definition of "business,"<sup>53</sup> seemingly leaving this exception open to broad interpretation. The public records exception also seems to cover autopsy reports by excepting reports of public offices "setting forth . . . the activities of the office . . . [or] matters observed pursuant to duty imposed by law as to which matters there was a duty to report."<sup>54</sup> The rule does not allow law enforcement personnel's reports to escape categorization as hearsay under the public record exception,<sup>55</sup> but

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<sup>44</sup> See, e.g., *Kirby v. United States*, 174 U.S. 47, 61 (1899) (dying declaration exception).

<sup>45</sup> See FED. R. EVID. 803, 804, 807.

<sup>46</sup> See *id.* 803(6) (business record exception).

<sup>47</sup> See *id.* 803(8).

<sup>48</sup> See *id.* 803(9).

<sup>49</sup> See *id.* 803(5).

<sup>50</sup> See *id.* 807.

<sup>51</sup> *Id.* 803(6).

<sup>52</sup> See *id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* 803(8).

<sup>55</sup> See *id.* 803(8)(B).

it is a stretch to include MEs as law enforcement personnel.<sup>56</sup> The vital statistics exception could also support the admission of an autopsy report, excepting “[r]ecords or data compilations, in any form, of . . . deaths . . . if the report was made to a public office pursuant to requirements of law.”<sup>57</sup>

Several cases have explored the admissibility of autopsy reports within the framework of these hearsay exceptions. In *Sosna v. Binnington*, the Eighth Circuit held that an autopsy report qualified as a business record and that “the opinions of the pathologist contained in his autopsy report fit comfortably within Rule 803(6)’s confines.”<sup>58</sup> In *United States v. Feliz*, the Second Circuit also found that autopsy reports prepared by the Office of the Chief Medical Examiner fall under the business record exception.<sup>59</sup> In *United States v. Rosa*, the Second Circuit held that an autopsy report qualified as a public record under 803(8)(B), stating that, in contrast to the adversarial approach of law enforcement agents, “a medical examiner’s reported observations as to a body’s condition are normally made as part of an independent effort to determine a cause of death.”<sup>60</sup> The Second Circuit upheld the exclusion of the report’s conclusions while admitting the observations, and holding that 803(8)(C) only

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<sup>56</sup> Even if they were, the Senate Judiciary Committee found that the recorded observations of a law enforcement officer who was unavailable “should be admitted as the best available evidence.” S. REP. NO. 93-1277, at 17 (1974); see also *State v. Manocchio*, 497 A.2d 1, 7 (R.I. 1985) (declining to include MEs within the category of “police officers and other law-enforcement personnel”); cf. *United States v. Hansen*, 583 F.2d 325, 333 (7th Cir. 1978) (“We do not believe we are justified in broadening the interpretation of the rules phrase ‘police officers and other law enforcement personnel’ to include city building inspectors.”). *But cf.* *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2009) (“A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.”).

<sup>57</sup> FED. R. EVID. 803(9). It may only be intended to apply to the likes of death certificates, but the cause of death and manner of death appear on a death certificate as well. Since those are the less objective portions of an autopsy, it would seem to undermine the purpose of the exception to allow only the conclusions and not the supporting observations into evidence.

<sup>58</sup> 321 F.3d 742, 747 (8th Cir. 2003).

<sup>59</sup> See 467 F.3d 227, 236–37 (2d Cir. 2006) (holding that autopsy reports fall within the business record exception notably because the Office of the Chief Medical Examiner is an “independent office,” and the autopsies are performed and the reports are prepared “without regard to the likelihood of their use at trial”). For an additional opinion see *United States v. Feliz*, 201 F. App’x 814 (2d Cir. 2006).

<sup>60</sup> 11 F.3d 315, 332 (2d Cir. 1993).

applies to evidence presented against the Government.<sup>61</sup> The First Circuit, a decade later, held that a death certificate could not be redacted under 803(8)(C) unless its trustworthiness was called into question.<sup>62</sup> The First Circuit also analogized medical records and autopsy reports, holding that, so long as it seems reliable, an autopsy report, including its opinions and diagnoses, ought to be admissible under 803(6).<sup>63</sup> Against this backdrop, evidentiary exceptions seem to approach autopsy reports with flexibility, permitting their admission as business records and as public records.

Another route that can be explored to overcome the hearsay rule is based on the idea that when the report was written, it captured the testimony of the ME at that time. While the time between the autopsy and time of report is likely too long to satisfy the present sense impression exception, which is reserved for descriptions or explanations made while observing the event “or immediately thereafter,”<sup>64</sup> it is of great importance in terms of the recorded recollection exception, which allows a witness to use a recorded recollection to testify on a matter the witness once had knowledge of, but has insufficient recollection of while testifying.<sup>65</sup> Because MEs perform many autopsies, and the time between an autopsy and an ensuing trial can be months, even years, the recorded recollection exception can assist them in entering their findings as noted in the autopsy report into evidence. It also offers assistance to the supervising pathologist when a forensic pathologist in training, working under direct supervision, performs an autopsy that is pertinent to a criminal trial.<sup>66</sup> Particularly, in such a case, the supervising pathologist’s recollection may not be so strong, and the other pathologist will

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<sup>61</sup> *Id.* at 333. When the Second Circuit encountered this decision in ruling on *Feliz*, it sidestepped the issue on the grounds that the defendants did not challenge the report’s admission as a business record and that the report’s admission was harmless error because the witness who testified provided his own conclusions based on the observations in the report. *See Feliz*, 467 F.3d at 236 n.6.

<sup>62</sup> *See Blake v. Pellegrino*, 329 F.3d 43, 48–49 (1st Cir. 2003) (finding that a subjective valuation of its substantive conclusions, such as the cause of death, was insufficient to redact a death certificate).

<sup>63</sup> *See Manocchio v. Moran*, 919 F.2d 770, 780–81 (1st Cir. 1990).

<sup>64</sup> FED. R. EVID. 803(1).

<sup>65</sup> *See id.* 803(5).

<sup>66</sup> *See AM. BD. OF PATHOLOGY*, *supra* note 4, at 7.

likely have moved on after her fellowship, leaving the supervisor to step in and offer testimony. In such a case, the recorded recollection exception will serve the pathologist well.

Finally, the autopsy report may be entered under the catch-all residual exception. To fall within the residual exception, the statement must have “circumstantial guarantees of trustworthiness.”<sup>67</sup> The Rules require a showing that

the statement is offered as evidence of a material fact; . . . the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and . . . the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.<sup>68</sup>

In *Manocchio v. Moran*, the First Circuit did not expressly use Rule 807 in finding an autopsy report's admission constitutional, instead using the more concrete 803(6) and (8).<sup>69</sup> The court did seemingly use the analysis in seeking out “particularized guarantees of trustworthiness” to satisfy the Confrontation Clause.<sup>70</sup> The court held that because the autopsy report was “properly authenticated” and because there was no showing that the ME had any “motivation . . . to falsify the report,” any inclusion of double hearsay based on the police report was harmless error “because the accuracy of the included information was not in issue.”<sup>71</sup> The court also found that the report's ruling of “homicide” was “no more than a restatement of the examiner's medical conclusion that death resulted from the multiple injuries observed on the decedent's body.”<sup>72</sup> While this is in no way a complete accounting of how Rule 807 and autopsy reports interact, it provides a blueprint. Given the other considerations in the hypothetical of the unavailable ME,<sup>73</sup> and the demands of 807, the court lays out a path worth considering for introducing an autopsy report through Rule 807.

Another portion of the Federal Rules of Evidence that is important to the discussion of the introduction of autopsy reports into evidence is contained in Article VII, which covers opinions

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<sup>67</sup> FED. R. EVID. 807.

<sup>68</sup> *Id.*

<sup>69</sup> 919 F.2d 770, 775–76 (1st Cir. 1990).

<sup>70</sup> *Id.* at 777.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See *infra* Part II.B.

and expert testimony.<sup>74</sup> An expert witness is one “qualified . . . by knowledge, skill, experience, training, or education [to] testify . . . in the form of an opinion or otherwise,” generally in the field of science or technology.<sup>75</sup> The Rules insist on three criteria for expert testimony: that it be “based upon sufficient facts or data,” that it be “the product of reliable principles and methods,” and that the expert “appl[y] the principles and methods reliably to the facts of the case.”<sup>76</sup> MEs often qualify as expert witnesses and, in that capacity, can offer their opinions on the facts presented. This is important for cases where portions of a death certificate or autopsy report have been redacted. An expert witness, even without prior knowledge of the case, can provide her opinion of the observations included in the autopsy report, either to provide the defendant with a second opinion, or to provide the prosecution with expert testimony that fills the evidentiary gap created by the redaction.

While this Note has thusfar been concerned with the evidentiary issue of hearsay, these exceptions to the hearsay rule were introduced to the discussion to examine the trial court standard that has been applied to measure many Confrontation Clause issues. While these Rules are subject to judicial and congressional amendment, they were drafted by the Supreme Court and have survived with limited amendment since 1975.<sup>77</sup> Presumably, the Court accounted for the Confrontation Clause in drafting the Rules;<sup>78</sup> that also presumes, however, that courts have interpreted them according to their intent. So while the hearsay exceptions, as they have come to be understood, strongly support the introduction of an autopsy report if its creator is unavailable, that interpretation is “an adjunct to the confrontation right in constitutional areas.”<sup>79</sup> The dispositive

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<sup>74</sup> See FED. R. EVID. 702–05.

<sup>75</sup> *Id.* 702.

<sup>76</sup> *Id.* See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), for the Supreme Court’s lead case on the qualification of experts and the treatment of their testimony.

<sup>77</sup> See Glenn Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1319–21 (1992).

<sup>78</sup> Congress’s Advisory Committee extensively analyzed confrontation as it relates to hearsay while considering the 1987 Amendment. See FED. R. EVID. art. VIII advisory committee’s note.

<sup>79</sup> *Id.*



analysis in the Supreme Court's Confrontation Clause jurisprudence explores whether or not the nature of the evidence is "testimonial."<sup>80</sup>

### C. *Confrontation Under the Sixth Amendment*

Under the Sixth Amendment of the Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him."<sup>81</sup> This basic protection is designed to allow for the cross-examination of one's accuser on the testimony and evidence he or she presents.<sup>82</sup> Cross-examination grants the opportunity to the accused to expose inconsistent statements, witness bias, credibility issues, and other similarly important characteristics of the testimony so that the jury has all of the information it requires to weigh the testimony presented.<sup>83</sup> In a system that presumes innocence, it is paramount to allow the accused the maximum opportunity to cast doubt on guilt. The right to confront and cross-examine has existed since the earliest days of the Union,<sup>84</sup> and it was explicitly incorporated in 1965 to apply to the states through the Fourteenth Amendment in *Pointer v. Texas*.<sup>85</sup> From that was born a line of cases that developed and refined how courts and parties looked at the Confrontation Clause, that considered the

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<sup>80</sup> See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) and its predecessors for an analysis of testimonial evidence as it relates to the Confrontation Clause.

<sup>81</sup> U.S. CONST. amend. VI.

<sup>82</sup> See *Kirby v. United States*, 174 U.S. 47, 55 (1899) ("[A] fact which can be primarily established only by witnesses cannot be proved . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules . . .").

<sup>83</sup> 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 . . . in lieu of a . . . 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.").

<sup>84</sup> See *Kirby*, 174 U.S. at 55 ("One of the fundamental guaranties of life and liberty is found in the [S]ixth [A]mendment of the [C]onstitution of the United States . . .").

<sup>85</sup> 380 U.S. 400, 407–08 (1965) (reversing a defendant's conviction for a denial of his Sixth Amendment rights on the grounds that testimony from a preliminary hearing cannot be used if the declarant cannot be confronted in open court).

role of policy in confrontation matters, and that wholly redefined the type of evidence that required confrontation to survive introduction into evidence.

1. History Leading up to *Melendez-Diaz*

The Confrontation Clause's relationship to state policy interests was squarely addressed with the Court's ruling in *Davis v. Alaska*.<sup>86</sup> In *Davis*, the Court held that the Sixth Amendment overcomes even strong state policy considerations.<sup>87</sup> The key prosecution witness in this case was a juvenile delinquent who was on probation, but because Alaska had a law protecting juvenile delinquents from the release of this information, the defendant was not permitted to confront the witness and to attempt to impeach his credibility on his probationary status.<sup>88</sup> The Court held that the defendant must be allowed to cross-examine his accuser despite the State's interest in protecting the anonymity of juvenile offenders, and found no reason to allow the People to put forth any alternative to the actual accuser.<sup>89</sup> In weighing the interests, the defendant's opportunity to show bias and cast suspicions on a key identifying witness of the prosecution in an effort to avoid conviction far outweighed the embarrassment the witness and his family might feel.<sup>90</sup> With this decision, the Court made it clear that state policy interests alone cannot overcome the constitutional guarantee to confront.<sup>91</sup>

Confrontation Clause rights ebbed and flowed through the end of the millennium, reaching their low-water mark under *Ohio v. Roberts*.<sup>92</sup> In this case, the defendant, accused of, among other things, forgery, called a witness at a preliminary hearing, pressed her for information, and tried to elicit an admission from her that she had misled the defendant; when the case went to trial, she was subpoenaed but did not appear, and could not be found even by her mother.<sup>93</sup> At trial, the defendant claimed that

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<sup>86</sup> 415 U.S. 308 (1974).

<sup>87</sup> *See id.* at 319 ("We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender.").

<sup>88</sup> *Id.* at 309.

<sup>89</sup> *Id.* at 320.

<sup>90</sup> *Id.* at 319.

<sup>91</sup> *See id.* at 320.

<sup>92</sup> 448 U.S. 56 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004).

<sup>93</sup> *Id.* at 58–60.

the witness had misled him, so the State introduced the transcript from the preliminary hearing to counter that claim.<sup>94</sup> The defense objected, claiming a violation of the Confrontation Clause.<sup>95</sup> The Court held that prosecutors must only make a good faith effort to make witnesses available for cross-examination.<sup>96</sup> The Court found that the defense did effectively take advantage of an opportunity to cross-examine the witness during the preliminary hearing—even though it was a direct examination in form and purpose, it comported to a cross-examination.<sup>97</sup> The Court also found that the witness displayed the requisite “indicia of reliability” in her testimony.<sup>98</sup> The *Roberts* Court built its reasoning off of the maxim that “[t]he law does not require the doing of a futile act,” noting that a dead witness—or a live one that had run away to another state and could not be tracked down—cannot be expected to be cross-examined, and the prosecution’s efforts to locate any other unavailable witness will be judged by the standard of reasonableness.<sup>99</sup> In short, the Court presented the analysis along bifurcated lines: If the defendant had the opportunity to cross-examine the witness, the witness’s testimony must be reliable; and if the witness is unavailable, the prosecution must have made a good faith effort to locate her.<sup>100</sup> In this context, the Court makes it clear that hearsay evidence can satisfy the Confrontation issues it faces.<sup>101</sup> This analysis prevailed for over two decades, but with the new millennium came a revised outlook.<sup>102</sup>

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<sup>94</sup> *Id.* at 59.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 74.

<sup>97</sup> *Id.* at 66, 70–71, 73.

<sup>98</sup> *Id.* at 73 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972)).

<sup>99</sup> *Id.* at 74.

<sup>100</sup> *See id.* at 66, 74.

<sup>101</sup> *Id.* at 65 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934) (“[T]he [c]ause countenances only hearsay marked with such trustworthiness that ‘there is no material departure from the reason of the general rule.’”)); *see also id.* at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895) (“[C]ertain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’”)).

<sup>102</sup> *See Crawford v. Washington*, 541 U.S. 36, 69 (2004) (Rehnquist, C.J., concurring).

Under *Crawford v. Washington*, the Court overruled *Roberts* and set out in a completely new direction.<sup>103</sup> In *Crawford*, the Court unanimously decided that testimonial statements made out of court were inadmissible, regardless of the reliability of the statements, unless the witness was unavailable and the defendant had an earlier opportunity to cross-examine the witness.<sup>104</sup> In this case, the defendant was charged with assault and attempted murder for stabbing a man who allegedly tried to rape his wife.<sup>105</sup> The trial court admitted the tape of a police interrogation of his wife, in which she undercut the husband's self-defense claim, under a hearsay exception and deemed it reliable.<sup>106</sup> She did not testify at trial, claiming protection under a state spousal immunity law.<sup>107</sup> The Court held that while this satisfied a hearsay exception, it violated the Confrontation Clause because it fell within "this core class of 'testimonial' statements."<sup>108</sup> Testimonial statements are characterized as in-court testimony or the functional equivalent, made ex parte, not permitting an opportunity for cross-examination, and are reasonably expected by the declarant to be used at trial.<sup>109</sup> By shifting the Confrontation Clause jurisprudence to the testimonial or nontestimonial nature of the statements, the Court delivered an absolute right, independent of hearsay exceptions, to have the opportunity to cross-examine the declarant on testimonial statements.

The Court then went on to declare, also unanimously, in *Davis v. Washington*, that when the author of "testimony" offered it with the expectation that it would be used as evidence, it would be considered testimonial and would trigger the defendant's right to confront the author.<sup>110</sup> *Davis* was a domestic violence case, in

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<sup>103</sup> See *id.* From the Court's opinion, this is not immediately clear, because Justice Scalia never bluntly overrules *Roberts*. But the dissent leads with such a blunt statement, and, only weeks later, other courts began to proclaim the end of *Roberts*. See, e.g., *State v. Brown* 156 S.W.3d 722, 731 (Ark. 2004). It should be noted that other courts stated that the *Roberts* approach had instead been abrogated. See, e.g., *United States v. Saner*, 313 F. Supp. 2d 896, 898 (S.D. Ind. 2004). This fine distinction, however, has no bearing on the issues presented in this Note.

<sup>104</sup> *Crawford*, 541 U.S. at 59.

<sup>105</sup> *Id.* at 38.

<sup>106</sup> *Id.* at 40.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 51.

<sup>109</sup> *Id.* Please note that this is a characterization and not a definition.

<sup>110</sup> 547 U.S. 813, 822 (2006).

which the defendant was charged with violating a domestic no-contact order.<sup>111</sup> The State introduced a 911 transcript of the victim's call, because the victim would not testify.<sup>112</sup> Its companion case, *Hammon v. Indiana*, involved a domestic battery in which the State introduced the victim's affidavit and the officer who was on the scene gave hearsay evidence of what the victim said; again, the victim did not testify.<sup>113</sup> The Court held that "[s]tatements are nontestimonial when . . . the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."<sup>114</sup> The 911 transcripts were admitted without the victim's testimony or availability for cross-examination because they were prepared to respond to the emergency; but the affidavit and the victim's statements were ruled "inherently testimonial" as they served as a "substitute for live testimony."<sup>115</sup> Within this framework, the distinguishing feature is whether or not the statement is being offered for trial or for the matter at hand. Justice Thomas, however, has been very critical of the "testimonial" approach in his opinions, labeling it as "unpredictable."<sup>116</sup>

Prior to *Crawford* and *Davis*, prosecutors only had to show good faith in trying to secure the witness for cross-examination.<sup>117</sup> Good faith, in effect, created a safe harbor for using hearsay evidence. *Crawford* and *Davis*, though, combined to gut this safe harbor for prosecutors and law enforcement agents. The Court, in a short time, had changed the analysis from questions of availability, reliability, and good faith, to questions of the testimonial nature of the evidence and the presence or absence of an earlier opportunity to cross-examine. The abrogation of *Roberts* signified a new and significant check on prosecutors, setting aside questions of hearsay and placing it

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<sup>111</sup> *Id.* at 818.

<sup>112</sup> *Id.* at 817–19.

<sup>113</sup> *Id.* at 819–20.

<sup>114</sup> *Id.* at 822.

<sup>115</sup> *Id.* at 829–30.

<sup>116</sup> *Id.* at 834 (Thomas, J., concurring). Justice Thomas does not even consider it a Confrontation Clause issue, only finding it triggered when there is "solemnity" to the proceeding. *Id.* at 837–38.

<sup>117</sup> See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004).

squarely in the constitutional realm.<sup>118</sup> The preeminence of the Sixth Amendment seemed to have reached its apex, but this was only a new height, soon to be surpassed for the introduction of forensic reports.

## 2. *Melendez-Diaz v. Massachusetts*

*Melendez-Diaz* imposed an even more rigorous interpretation of the Confrontation Clause on prosecutors to introduce scientific findings on evidence. A coconspirator of the defendant had been engaged in suspicious activities to which a coworker had tipped off the police.<sup>119</sup> The police investigation led to the arrest of three men and to the seizure of several plastic bags containing a substance that appeared to be cocaine.<sup>120</sup> On the drive to the police station, the officers noticed the men “fidgeting and making furtive movements,” so they searched the cruiser after dropping the men at the station and found more plastic bags containing a substance that also appeared to be cocaine.<sup>121</sup> All of the seized evidence was sent to a state lab for analysis.<sup>122</sup> At trial, the bags were placed into evidence, along with three “‘certificates of analysis’” that reported the weight of the bags and identified their contents as cocaine.<sup>123</sup> In accordance with Massachusetts law, the certificates had been sworn to by state lab analysts before a notary public.<sup>124</sup>

Defendant’s counsel objected on the grounds that his client was denied the right to confront the analysts who had prepared the certificates of analysis, and while the objection was overruled at trial, a sharply divided Supreme Court came down on the side of *Melendez-Diaz* and a broader interpretation of confrontation.<sup>125</sup> When the Court issued its decision, many prosecutors were concerned with how this would impact their

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<sup>118</sup> See, e.g., *Crawford*, 541 U.S. at 61 (“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, much less to amorphous notions of ‘reliability.’”).

<sup>119</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530 (2009).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 2530–31 (quoting Petition For Writ of Certiorari at Appendix 24a, 26a, 28a, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591), 2007 WL 3252033).

<sup>124</sup> *Id.* at 2531.

<sup>125</sup> *Id.* at 2531–32.

ability to use forensic evidence at trial.<sup>126</sup> The Court held that “[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error.”<sup>127</sup> In other words, a defendant must be afforded the constitutional opportunity to cross-examine the particular state-employed analyst responsible for a laboratory report for the report to be introduced into evidence at trial. Within this “straightforward application of . . . *Crawford*,”<sup>128</sup> however, there is a large degree of ambiguity explored in Part II below. The Court’s division also limits the reach of the decision.

Justice Thomas’s concurrence in particular, as the fifth vote in *Melendez-Diaz* and as a past critic of the Court’s approach in *Davis*,<sup>129</sup> limits the Court’s ruling. While he joined the majority, his concurrence clarified that his stance in this case was motivated by the nature and format of the forensic report.<sup>130</sup> He reiterated his stance from *White v. Illinois*<sup>131</sup> and from *Davis* that “‘the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’”<sup>132</sup> Since the forensic report was in the form of an affidavit, Justice Thomas came to the same conclusion as the majority;<sup>133</sup> as the deciding vote in a 5-4 decision, however, he limited the scope of the decision to the narrowest grounds of his concurrence.<sup>134</sup> This raises a significant question of whether the Court divided along the lines of form or substance. Justice Scalia’s opinion in *Davis* focused on the

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<sup>126</sup> See Adam Liptak, *Justices Rule Crime Analysts Must Testify on Lab Results*, N.Y. TIMES, June 26, 2009, at A1.

<sup>127</sup> *Melendez-Diaz*, 129 S. Ct. at 2542 (reiterating that *Melendez-Diaz* is only an application of *Crawford*).

<sup>128</sup> *Id.* at 2533.

<sup>129</sup> See *Davis v. Washington*, 547 U.S. 813, 834 (2006) (Thomas, J., concurring in part and dissenting in part) (quoting majority, 547 U.S. at 822) (“Today, a mere two years after the Court decided *Crawford*, it adopts an equally unpredictable test, under which district courts are charged with divining the ‘primary purpose’ of police interrogations.”).

<sup>130</sup> *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring).

<sup>131</sup> 502 U.S. 346 (1992).

<sup>132</sup> *Id.* (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment)); see also *Davis*, 547 U.S. at 836 (Thomas, J., concurring in part and dissenting in part).

<sup>133</sup> See *Melendez-Diaz*, 129 S. Ct. at 2532.

<sup>134</sup> See *Marks v. United States*, 430 U.S. 188, 193 (1977).

primary purpose of the interrogation, suggesting that substance is most important to him,<sup>135</sup> while Justice Thomas, in *Melendez-Diaz*, continued to require formalized testimonial materials.<sup>136</sup> It remains an open question as to whether the information, delivered in another format—for example, a computer print out of the lab results—without “formalized testimonial material” of the analyst that ran the test, would steer clear of Justice Thomas’s proscription. Likewise, his stance on autopsy reports—which are prepared for many deaths, not only for criminal matters—remains undefined. As a result, prosecutors, MEs, and courts are left to wonder how they must manage autopsy reports in criminal matters.

## II. UNDERSTANDING HOW *MELENDEZ-DIAZ* APPLIES TO AUTOPSY REPORTS

The majority opinion of *Melendez-Diaz* only mentions autopsies once, in the Court’s fifth footnote.<sup>137</sup> The dissent uses the admission of autopsy reports in half a dozen cases as evidence of a historical trend against considering forensic analysis testimonial.<sup>138</sup> In each of these instances in which autopsy reports are mentioned, they are lumped in with other forensic analyses and never addressed as a unique matter. At no point does the Court consider the distinctions between general lab reports and autopsy reports. Autopsy reports, however, are a different type of forensic report, prepared regardless of criminal activity<sup>139</sup> and often in its absence at a hospital or at the request of a family. Autopsy reports are not prepared in anticipation of trial, and their use at trial, just like the use of medical records at trial, is incidental.<sup>140</sup> Autopsy reports also involve different

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<sup>135</sup> See *Davis*, 547 U.S. at 822.

<sup>136</sup> See *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring).

<sup>137</sup> The text and footnote read, respectively: “Respondent and the dissent may be right that there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test,” *Melendez-Diaz*, 129 S. Ct. at 2536; “Though surely not always. Some forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated, and the specimens used for other analyses have often been lost or degraded.” *Id.* n.5.

<sup>138</sup> See *id.* at 2554–60 (Kennedy, J., dissenting).

<sup>139</sup> So long as other criteria are met. See PETERSON & CLARK, *supra* note 5, at 3–4.

<sup>140</sup> See *United States v. Feliz*, 467 F.3d 227, 236 (2d Cir. 2006) (“[T]he Office of the Chief Medical Examiner of New York conducts thousands of routine autopsies every year, without regard to the likelihood of their use at trial.”).



policy implications, as their primary functions are to serve public health officials in prioritizing health risks and to stand as the final medical record for the individual.<sup>141</sup> The status of autopsy reports unaccompanied by the testimony of the MEs that prepared them is uncertain in criminal cases under *Melendez-Diaz*, and courts have recently grappled with this and come down on opposite sides.<sup>142</sup> The argument that autopsy reports are different and should not be considered as formalized testimonial material carries some weight. As that argument has been foreclosed in some jurisdictions,<sup>143</sup> barring a Supreme Court reversal, it requires a more creative solution. So with minor adjustments, either by the MEs or by the courts, to separate observations from rationales and conclusions, the majority of any autopsy report should be admissible without the testimony of the pathologist who performed the autopsy.<sup>144</sup> Ideally, the ME would be present; but if the ME were unavailable—through change of job, relocation, sickness, or death—large portions of the report should still survive admission.<sup>145</sup> Particularly because of the uncertainty of the opinion's breadth, and the difficulties that courts have had in applying *Melendez-Diaz*, the question remains open.

#### A. *Interpreting Melendez-Diaz*

Along with the restrictions placed on the opinion by Justice Thomas's concurrence,<sup>146</sup> the Court wrestled with the breadth of its opinion, the determination of the actual analyst, the testimonial—or nontestimonial—nature of the evidence, and the

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<sup>141</sup> See MED. EXAM'RS' & CORONERS' HANDBOOK, *supra* note 14.

<sup>142</sup> See, e.g., *Wood v. State*, 299 S.W.3d 200, 215–16 (Tex. App. 2009) (holding that an expert witness testifying on an autopsy report he did not prepare violated the Confrontation Clause); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009) (holding that while the autopsy report itself was not admissible, a substitute ME could testify as an expert and provide his opinions based on a review of the autopsy report).

<sup>143</sup> See, e.g., *State v. Locklear*, 681 S.E.2d 293, 304–05 (N.C. 2009) (using *Melendez-Diaz* to define an autopsy report as testimonial).

<sup>144</sup> Cf. *Manocchio v. Moran*, 919 F.2d 770, 778–84 (1st Cir. 1990) (describing the four different categories of information in an autopsy report as they relate to admissibility).

<sup>145</sup> Cf. *People v. Freycinet*, 11 N.Y.3d 38, 42, 892 N.E.2d 843, 846, 862 N.Y.S.2d 450, 453 (2008) (holding that an autopsy report with opinions redacted was admissible even though the ME who performed it was not available to testify).

<sup>146</sup> See *supra* Part I.C.2.

consequences of its decision. There are several ways to interpret *Melendez-Diaz*: as an application of *Crawford*,<sup>147</sup> as an extension of *Crawford*,<sup>148</sup> or merely as a fact pattern that survived a *Crawford* and *Davis* analysis.<sup>149</sup> While the third approach accounts for Justice Thomas's tenuous vote and likely is the most accurate reflection of the Court, the battle in state courts has been between the first two interpretations.<sup>150</sup> Should the third interpretation accurately reflect the Court's sentiment, it should be expected that the Court will grant certiorari when the appropriate case arises to clarify its stance and correct the rulings below.<sup>151</sup> The other two interpretations create different results.

The Court claimed that its ruling was merely an application of *Crawford*.<sup>152</sup> It certainly satisfies the *Crawford* analysis as the certificates stated “[t]he substance was found to contain: Cocaine,”<sup>153</sup> and were prepared and notarized for the purpose of serving as evidence.<sup>154</sup> *Crawford* seems satisfied because these certificates were the functional equivalent of in-court testimony reasonably expected by the declarant to be used at trial, and the declarant was not available for cross-examination.

The dissent, however, found it to be a broad-sweeping extension of *Crawford*, touching on many evidentiary issues, impacting numerous fields of science and forensics beyond drug identification, and creating more confusion than clarity.<sup>155</sup> If the

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<sup>147</sup> The majority opinion stated this in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2533 (2009) (stating that its decision was a “rather straightforward application of our holding in *Crawford*”).

<sup>148</sup> The dissenting opinion viewed it this way. *Id.* at 2552 (Kennedy, J., concurring) (“The Court assumes, with little analysis, that *Crawford* and *Davis* extended the Clause to any person who makes a ‘testimonial’ statement.”).

<sup>149</sup> The concurring opinion suggested as much. *See id.* at 2543 (Thomas, J., concurring).

<sup>150</sup> *See, e.g.,* State v. Locklear, 681 S.E.2d 293, 304–05 (N.C. 2009) (using *Melendez-Diaz* to define an autopsy report as testimonial); Commonwealth v. Avila, 912 N.E.2d 1014, 1029 (Mass. 2009) (using *Crawford* to permit a substitute ME to testify as an expert and provide his opinions based on a review of the autopsy report, even though the autopsy report itself was not admissible).

<sup>151</sup> The Court may have been looking for something like that in *Briscoe v. Virginia*, but the facts must have ultimately proven uninspiring. *See* 130 S. Ct. 1316, 1316 (2010).

<sup>152</sup> *See Melendez-Diaz*, 129 S. Ct. at 2542.

<sup>153</sup> *Id.* at 2537 (quoting Petition For Writ of Certiorari at Appendix 24a, 26a, 28a, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591), 2007 WL 3252033).

<sup>154</sup> *See id.* at 2531.

<sup>155</sup> *See id.* at 2543–58 (Kennedy, J., dissenting).

Court's most expansive approach were to apply, every analysis, every scientific fact, even the laws of physics would seem to be up for cross-examination.

Similarly, there is a great deal of confusion over who is the actual analyst, especially as many of these analyses are performed by teams.<sup>156</sup> The Court only noted that "it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case,"<sup>157</sup> but the dissent astutely pointed out the following simple question: If not everyone, then who must be made available for cross-examination?<sup>158</sup>

Also, while the majority built its rationale on the *Crawford* definition of "testimonial," the dissent found that to be of little assistance in limiting the impact of *Melendez-Diaz*.<sup>159</sup> The dissent accused the majority of introducing an approach that is " 'disconnected from history and unnecessary to prevent abuse' " by including experts and atypical witnesses within the matrix of witnesses that can provide testimonial materials.<sup>160</sup> Justice Thomas was also wary, and specified that his definition of "testimonial" is narrower and more formal than the definition employed by the majority.<sup>161</sup>

Finally, as the Court so often does when it is sharply divided, the majority and dissent argued over the impact of the decision.<sup>162</sup> If the courts continue to interpret *Melendez-Diaz* as they had interpreted *Crawford*, then adjustments to statements for form would seem to satisfy most confrontation issues. If, however, there is more to this decision, as the dissent vehemently stressed, the results will be grave for the justice

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<sup>156</sup> *See id.* at 2544.

<sup>157</sup> *See id.* at 2532 n.1 (majority opinion).

<sup>158</sup> *See id.* at 2544–46 (Kennedy, J., dissenting).

<sup>159</sup> *See id.* at 2544.

<sup>160</sup> *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 838 (2006) (Thomas, J., concurring in part and dissenting in part)).

<sup>161</sup> *Compare id.* at 2543 (Thomas, J., concurring) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)), *with id.* at 2531–32 (majority opinion) (quoting *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004)). The expansive, example-filled definition from *Crawford* contrasts with the limited and concise definition from *White*.

<sup>162</sup> *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 827 (2008) (Scalia, J., dissenting) ("Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today.").

system, going against decades of statutory and judicial law,<sup>163</sup> unnecessarily increasing the burden on prosecutors, and undermining forensic analysis and the role of science in the courthouse.<sup>164</sup> For the purposes of this Note, and whether courts interpret *Melendez-Diaz* as an application of *Crawford* or as a broad extension of *Crawford*, it is important to recognize that autopsy reports are now precariously positioned, and must be extracted from the general lump of forensic reports—as the dissent did in its appendices.<sup>165</sup>

The soundest course is to take the Court at its word and continue to apply *Crawford* with regard to autopsy reports. *Crawford* is still good law—decided recently by a unanimous Court—and offers a rule with which both Justice Thomas and the majority agree.<sup>166</sup> Pressing beyond the limits of *Crawford* invites great uncertainty, and the courts that have done so have found other grounds on which to avoid the outcomes that the dissent has described.<sup>167</sup> In this legal atmosphere, the distinctions between lab reports and autopsy reports, and the unique interests at play with autopsy reports, make autopsy reports worthy of special consideration under *Melendez-Diaz* as an application of *Crawford*.

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<sup>163</sup> The long history and the many states that had rules, cases, and policies affording lab reports unique admissibility included three state supreme courts, *Melendez-Diaz*, 129 S. Ct. at 2554 (Kennedy, J., dissenting) (noting the decisions of the supreme courts of Massachusetts, Connecticut, and Virginia; as opposed to Montana, which distinguished its constitution from the U.S. Constitution, and Oregon, which suggested notice might suffice), all circuit courts that considered it before *Crawford*, *id.* (noting cases in the First, Second, Fourth, Fifth, Eighth, and Tenth Circuits), twenty-four state courts that followed suit, *id.* at 2554, 2558–60 (pointing out decisions in California, Indiana, and Louisiana specifically excusing the results of autopsies from confrontation), and eleven states that upheld burden-shifting statutes, *id.* at 2554. Sixteen state courts also upheld evidentiary rules permitting scientific test results without in-court testimony, *id.* at 2554, 2560 (noting cases in California, New Jersey and New York, in particular), and the Seventh, Ninth, and Eleventh Circuits came to similar results for federal hearsay rules, *id.* at 2554–55 (as distinguished from a Second Circuit case that law enforcement reports cannot be similarly admitted).

<sup>164</sup> See *id.* at 2547 (“There is nothing predictable here, however, other than the uncertainty and disruption that now must ensue.”).

<sup>165</sup> See *id.* at 2559–60.

<sup>166</sup> See *id.* at 2532 (majority opinion); *id.* at 2543 (Thomas, J., concurring).

<sup>167</sup> See, e.g., *State v. Locklear*, 681 S.E.2d 293, 304–05 (N.C. 2009) (finding a violation of the Confrontation Clause in the introduction of an autopsy report where the forensic pathologist did not testify, but ruling the error harmless).

B. *Applying Melendez-Diaz to Autopsy Reports*

While the Court in *Melendez-Diaz* was largely silent on autopsy reports, the fifth footnote made an offhand reference<sup>168</sup> that has already been used as authority for ruling against admission of an autopsy report.<sup>169</sup> While the dissent carefully carved out some extra space for autopsy reports and noted that they are among the wide range of scientific activities that may be impacted by the decision,<sup>170</sup> the majority made its stance less clear. The issue under *Crawford* hinges on whether or not it is testimonial, and thus unexcused.<sup>171</sup> For this Court, that rested the decision squarely on Justice Thomas. For the sake of analysis, let us consider the facts of the following hypothetical. A suspect is brought to trial on murder charges, and the evidence against him includes an autopsy report prepared by an ME who died two weeks after performing this autopsy alone. The ME left photographs of the body and the wounds, an audio recording narrating what she observed, a simultaneous video recording capturing her actions and the same narration, and the blood and toxicology reports that she had used in preparing her report before she passed.

In analyzing this hypothetical, there are several important factors to consider: what portions of this autopsy report can survive a hearsay objection; who could testify as to their validity; how do these forms of evidence differ from other laboratory analyses; and what potential pieces of evidence, if any, are testimonial. The hearsay issue is an important threshold question, because the constitutional issue will not arise if the evidence is excluded on the basis of hearsay.<sup>172</sup> As discussed above, the autopsy report and its various addenda—not including the audio and video recordings, unless they were standard procedure—would likely survive admission under the business

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<sup>168</sup> See *Melendez-Diaz*, 129 S. Ct. at 2536 n.5.

<sup>169</sup> *Locklear*, 681 S.E.2d at 305 (“The Court specifically referenced autopsy examinations as one such kind of forensic analyses.”).

<sup>170</sup> See *Melendez-Diaz*, 129 S. Ct. at 2546 (Kennedy, J., dissenting).

<sup>171</sup> See *id.* at 2530–31 (majority opinion).

<sup>172</sup> This is a matter of pure logic—if evidence is excluded on evidentiary grounds, the court will not reach a potential constitutional issue. A violation of the Confrontation Clause cannot be claimed on evidence that was not admitted.

record exception or another 803 exception.<sup>173</sup> The audio and video recordings could potentially be admitted as evidence of the ME's present sense impression.<sup>174</sup>

Regardless of whether the report was admitted as a whole, an expert who had reviewed the files would likely be called to testify, and after years had passed, her independent review would likely be just as sound as the review of the ME who had initially performed it. These factors already highlight one distinction of autopsy reports—because autopsies are only performed once,<sup>175</sup> any independent review is based on the information that the ME gathers during that initial investigation. The ME is, therefore, charged with gathering enough supporting data to allow for independent review.<sup>176</sup> Autopsies are also much more complex than the identification of a narcotic, and are more prone to shades of gray, as their outcome is a diagnosis, not a chemical compound match. Similarly, while other forensic analyses may yield drug charges, rape charges, and a host of other unsavory activity, autopsy reports usually arise in situations where someone has died, so only permitting an autopsy report to survive as evidence for as long as its creator survives, would essentially create a statute of limitations for murder.<sup>177</sup>

The issue of which potential pieces of evidence prepared by our hypothetical ME are testimonial, if any, remains. Under a *Crawford* analysis, these all provide the functional equivalent of in-court testimony, but even though the ME likely realized the documents would be used in a trial, they were not prepared for the primary purpose of serving as criminal evidence—instead they were prepared as a record of the state of the body, mandated by law for the purposes of public health and safety. Introduction of the report through an expert, even if it is another ME, allows

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<sup>173</sup> See *supra* Part I.B.

<sup>174</sup> See *supra* Part I.B.

<sup>175</sup> See *Melendez-Diaz*, 129 S. Ct. at 2536 n.5.

<sup>176</sup> See PETERSON & CLARK, *supra* note 5, at 5–6, (requiring the gathering of enough supporting data for independent review in matters involving identification); see also *id.* at 10–11, 13–14 (setting the bare minimum standard for cases involving firearm injuries, sharp-force injuries, patterned injuries, and penetrating injuries, including gunshot and sharp-force injuries, and blunt-impact injuries).

<sup>177</sup> See Carolyn Zabrycki, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embodiment the Qualities of a Testimonial Statement*, 96 CAL. L. REV. 1093, 1115 (2008).

for cross-examination on the facts in the report and the conclusions the expert has drawn. This reinforces a point that will be returned to below: In this hypothetical, the prosecution does not need the conclusions of the report—including those that would potentially upset the Confrontation balance—because the author of those conclusions could not be cross-examined. At the same time, if those observations and facts can survive, an expert can provide the conclusions and can be cross-examined on them, satisfying one of the core goals of the Sixth Amendment. It is important to note here that prior to *Melendez-Diaz*, including under *Crawford*, no court had found an autopsy report to be testimonial.<sup>178</sup> While an autopsy report would not seem to fall within the core class of testimonial statements, it is very unlikely that Justice Thomas would find an autopsy report to fall within the limited criteria he lays out for “formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”<sup>179</sup> Autopsy reports are not gathered with the same formalities common to those other documents and are not specifically designed for the courtroom, so while the decision should not be so close, the Supreme Court, in its current composition,<sup>180</sup> would likely declare an autopsy report to be nontestimonial.

While policy is not dispositive,<sup>181</sup> the interests involved make a strong case for protecting autopsy reports in their current format. The human needs that autopsies serve, the significant role they play in people’s lives, and the incentives at play for an ME are all persuasive when considering the importance of leaving the format of autopsy reports relatively undisturbed, as compared with other forms of forensic analysis. The dissent in *Melendez-Diaz* suggested that, even for the certificates of analysis, this was a more appropriate topic for the legislature in promulgating rules of evidence.<sup>182</sup> If the introduction of

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<sup>178</sup> See *id.* at 1094.

<sup>179</sup> *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment).

<sup>180</sup> The departure of Justice David Souter and the arrival of Justice Sonya Sotomayor did not impact the Court’s thinking on *Melendez-Diaz*. See *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010).

<sup>181</sup> See *Davis v. Alaska*, 415 U.S. 308, 319 (1974).

<sup>182</sup> See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2555 (2009) (Kennedy, J., dissenting).

certificates of analysis were protected as a policy matter, the introduction of autopsy reports, with their unique policy implications, should be protected many times over.

Autopsies touch on our humanity in a way that many other scientific analyses do not approach. Autopsies are required for many, many deaths, and reports are not prepared only for suspected victims of criminal activity.<sup>183</sup> Often they happen at the ME's office, but they can also occur in private hospitals or in private practices.<sup>184</sup> Those autopsies happening through the ME's office are public services and produce public records.<sup>185</sup> The conclusions of the physicians are open to interpretation by and challenge from the entire medical community—their professional reputations are forever on the line.

At the same time, autopsies are performed on human bodies just before they are prepared for their funerals and whatever religious rights they may be afforded. Accordingly, the dead person's humanity and dignity ought to be respected. This is not simply another piece of evidence or the contents of a plastic bag, but something closer to a final medical report. In considering what the Court should require in the unfortunate hypothetical in which our ME dies just after performing the autopsy and writing up the report, the Court must be sensitive, substantively, to our societal needs for a thorough review, for appropriate access to the report, and for a sense of closure for the family and for the State provided there were no improprieties in the autopsy or its reporting.

It is also important to consider that MEs' only incentives are to provide objective and accurate reports.<sup>186</sup> Their jobs are to provide closure to people and to identify foul play when it is at work.<sup>187</sup> Court appearances are incidental to the performance of their job.<sup>188</sup> In *Melendez-Diaz*, Justice Scalia questioned the

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<sup>183</sup> See *United States v. Feliz*, 467 F.3d 227, 236 (2d Cir. 2006) (discussing how the Office of the Chief Medical Examiner in New York performs thousands of routine autopsies annually without considering if or how they might be used at trial).

<sup>184</sup> See Ron Shinkman, *Autopsies R Us*, MOD. HEALTHCARE, Feb. 5, 2001, at 58.

<sup>185</sup> Cf. *SeaWorld Trainer's Family Wants To Prevent Release of Video Footage of Accident*, FOXNEWS.COM (Mar. 9, 2010), <http://www.foxnews.com/us/2010/03/09/seaworld-trainers-family-wants-prevent-release-video-footage-accident/>.

<sup>186</sup> See PETERSON & CLARK, *supra* note 5, at 1.

<sup>187</sup> *Id.* at 1–2.

<sup>188</sup> *What Does a Forensic Pathologist Do?*, NAT'L ASS'N OF MED. EXAM'RS (Nov. 8, 2006), [http://thename.org/index.php?option=com\\_content&task=view&id=39&Itemid=42](http://thename.org/index.php?option=com_content&task=view&id=39&Itemid=42).



motives of the forensic analysts as state employees,<sup>189</sup> and, perhaps, he is right to do so because forensic analysts have very limited job opportunities beyond state-run laboratories.<sup>190</sup> That said, by adjusting results to conform with the prosecution's case, they risk the certification of the lab and their careers.<sup>191</sup> On the other side, pathologists acting in a similar way would risk their licenses and their careers.<sup>192</sup> Those careers cost hundreds of thousands of dollars and a decade, at least, to create.<sup>193</sup> They always have the alternative to work in private practice or in a hospital, so taking this job is hardly a "default" decision for them. Moreover, judges and MEs share several features, in being highly-trained state-employed professionals, at the pinnacle of their careers, greatly respected for their independent analysis and professional ability to be objective. If Justice Scalia's opinion is meant to reach as far as MEs, he indicts nearly every public servant, himself included. Although the Court has moved away from issues of trustworthiness, leaving those for hearsay analysis, if we, as a society, were to allocate trust, much would be placed with our physicians, making the policy decision of protecting this work product that much more important.

### III. TAKING THE "TESTIMONIAL" OUT OF AUTOPSY REPORTS

Autopsy reports are unlike the impersonal analysis of a bag of narcotics. A person, whose story—whether tragic, heroic, or unremarkable—awaits a conclusion, lays bare on a cold table to have the question mark at the end of her life changed to a period. Most people will lay on that table one day, and pathologists will make routine examinations, much like the other check-ups experienced over the course of their lives. This will allow families, friends, and loved ones to continue to live with the

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<sup>189</sup> See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536–37 (2009).

<sup>190</sup> MEs' other opportunities lay largely in academics and in the military. See Randy Skelton, *So You Want To Be a Forensic Anthropologist?*, <http://www.nakedscience.org/foranth.htm> (last revised May 24, 1996).

<sup>191</sup> See *Sanctions*, AM. SOC'Y OF CRIME LAB. DIR., LAB. ACCREDITATION BD., <http://www.ascl-d-lab.org/monitoring/sanctions.html> (last visited Apr. 5, 2011).

<sup>192</sup> For an example of the consequences of incompetence, let alone malicious tampering, see Carol Marbin Miller & Marc Caputo, *Autopsy Uproar Not M.E.'s First*, MIAMI HERALD, Feb. 21, 2006.

<sup>193</sup> Tuition at Johns Hopkins Medical School was \$39,500 for the 2009–2010 academic year. *Student Billing Information*, JOHNS HOPKINS MED., <http://www.hopkinsmedicine.org/som/offices/finaffairs/billing> (last visited Apr. 5, 2011).

answers they have received and the closure they have been granted. Autopsies are an important part of our social fabric and any adjustment to them must be weighed carefully.

Some legal thinkers consider them testimonial,<sup>194</sup> and it is more difficult, after the Court found in *Melendez-Diaz* that an affidavit stating that cocaine was cocaine was testimonial, to think a court would not find an autopsy report to be testimonial and to implicate the Confrontation Clause. Although Justice Thomas and the Court may obviate the need for this if the right case arises, there is a solution in finding an exception to meet the needs of our society and the standards of our Bill of Rights. In approaching the issue, it is important to understand why action must be taken.

To begin, the long history of scientific evidence's admissibility presented by the dissent of *Melendez-Diaz* applies with equal force as to why autopsies deserve special exception. Within the history of lab reports presented, there is a dividing line between general lab reports and autopsy reports. The dissent subdivided the cases referenced in its appendices to treat autopsy and medical records cases as a separate subdivision.<sup>195</sup> Similarly, there is post-*Crawford* precedent for courts to find autopsy reports to be nontestimonial or, if testimonial, not prohibited from introduction because they are subject to a hearsay exception.<sup>196</sup> In fact, every court that has decided this issue since *Crawford* has held that they are not testimonial,<sup>197</sup> until recently, when the Supreme Court of North Carolina pronounced its holding in *State v. Locklear*.<sup>198</sup> By applying *Melendez-Diaz* to find an autopsy report testimonial, the high court of North Carolina sounded a warning bell.

The court in *Locklear* passed over many of the nuances of the issue and treated the autopsy report as "testimonial," because it considered an autopsy report to be a forensic analysis and because the Court had referenced autopsy reports in the fifth footnote of *Melendez-Diaz*.<sup>199</sup> The court ultimately found the

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<sup>194</sup> See, e.g., Zabrycki, *supra* note 177, at 1094.

<sup>195</sup> See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2558–61 (2009).

<sup>196</sup> See, e.g., *United States v. De La Cruz*, 514 F.3d 121 (1st Cir. 2008); *United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006).

<sup>197</sup> *Melendez-Diaz*, 129 S. Ct. at 2546 (Kennedy, J., dissenting).

<sup>198</sup> 681 S.E.2d 293, 304–05 (N.C. 2009).

<sup>199</sup> See *State v. Locklear*, 681 S.E.2d 293, 304–05 (N.C. 2009).

error harmless,<sup>200</sup> but the brief and abridged analysis shows how wide open the issue is.<sup>201</sup> A full *Crawford* analysis, rather than an abridged *Melendez-Diaz* analysis that ignores Justice Thomas's concurrence, shows the flaws in this logic. In *Crawford*, the Court specifically refused to define "testimonial,"<sup>202</sup> but it had fleshed it out earlier in the decision to illustrate where it clearly existed.<sup>203</sup> Testimonial is not a clear term that can be applied without qualification to all forensic analyses, especially in light of Justice Thomas's concurrence in *Melendez-Diaz*.<sup>204</sup> *Locklear*'s pro forma analysis skipped the vital step of determining whether the report was or was not testimonial, finding that an autopsy report, which was referenced only in a footnote, was immediately comparable to the certificate of analysis in *Melendez-Diaz*.<sup>205</sup> By not discussing its testimonial or nontestimonial nature, the court missed an opportunity to focus on the real issue.

But other courts that have approached the issue more thoroughly have reached different conclusions. The Michigan Court of Appeals found autopsy reports, exclusive of their opinions and conclusions, can be used at trial without opportunity to cross-examine the ME, and that another expert witness can testify based on the observations embodied in the report.<sup>206</sup> The court also found that autopsy reports survived as business records, which are expressly excused under *Crawford*.<sup>207</sup> The reasoning behind this is that the factual descriptions contained in an autopsy report provide for an accurate independent review—much as photos do—and do not constitute the type of testimony that is given in court.<sup>208</sup> They

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<sup>200</sup> *See id.* at 304.

<sup>201</sup> *Id.*

<sup>202</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004) ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

<sup>203</sup> *See id.* at 51–52.

<sup>204</sup> *Melendez-Diaz*, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring).

<sup>205</sup> *See Locklear*, 681 S.E.2d at 304–05.

<sup>206</sup> *People v. King*, No. 282533, 2010 WL 98693, at \*3 (Mich. Ct. App. Jan. 12, 2010) (per curiam).

<sup>207</sup> *See id.* at \*5; *see also* *People v. Cortez*, 931 N.E.2d 751, 756 (Ill. App. Ct. 2010) ("Defendant suggests that the autopsy report admitted in this case is similar to the certificates admitted in *Melendez-Diaz*. However, defendant overlooks the fact that this court has previously held that autopsy reports are business records and do not implicate *Crawford*.").

<sup>208</sup> *King*, 2010 WL 98693, at \*4–\*5.

distinguished the case from *Melendez-Diaz* by pointing out that these were not “purely ‘bare-bones’ conclusory statements” and that autopsy reports were not actually singled out as violative of the Confrontation Clause.<sup>209</sup> As a result, the court was comfortable in affirming the lower court and finding no violation of the Confrontation Clause.<sup>210</sup>

Other appellate courts have danced around the issue by looking at the standard for reversal and finding that, even if it were testimonial, it was not prejudicial.<sup>211</sup> In short, this issue is still open and there is still a strong argument that unless the Court expressly includes autopsy reports among testimonial documents, autopsy reports are admissible without the testimony of their authors. Given the guidance the Judiciary has prescribed recently, it may be more effective to take proactive steps to trim and organize autopsy reports to meet their important objectives, while also paying mind to judicial trends, thus leaning them away from the testimonial label.<sup>212</sup>

#### IV. TOWARDS A “LEAN RULE” TO PROTECT CONFRONTATION RIGHTS AND THE SUBSTANCE OF AUTOPSY REPORTS

While autopsy reports are prepared in the ordinary course of business, and are a matter of public record, they only fulfill their valuable public service if they contain the inferences and conclusions that the MEs draw. If the Court were to make them inadmissible in court when they are so trusted and so common, this would not comport with the value generally assigned to them. So the question remains, how can the results of an autopsy survive their author, if they cannot be preserved under the business records exception—a result which is in question after *Melendez-Diaz*.<sup>213</sup>

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<sup>209</sup> *Id.* at \*3 (quoting *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009)).

<sup>210</sup> *Id.* at \*11.

<sup>211</sup> See, e.g., *Mungo v. United States*, 987 A.2d 1145 (D.C. 2010); *State v. Locklear*, 681 S.E.2d 293, 304–05 (N.C. 2009).

<sup>212</sup> Cf. *People v. Freycinet*, 11 N.Y.3d 38, 42, 892 N.E.2d 843, 846, 862 N.Y.S.2d 450, 453 (2008) (autopsy report with opinions redacted was held not to be testimonial). While *Freycinet* was decided before *Melendez-Diaz*, its *Crawford* analysis would seem to conform with the Court’s approach in *Melendez-Diaz*.

<sup>213</sup> See *Pendergrass v. State*, 913 N.E.2d 703, 709–10 (Ind. 2009) (Rucker, J., dissenting). *Contra King*, 2010 WL 98693, at \*5.

*Melendez-Diaz* challenges are being brought in many cases that involve lab reports, charging that the reports are testimonial and violate the defendant's confrontation rights.<sup>214</sup> They will continue to arise as a standard matter when forensic data is involved and the analyst or ME is not present for testimony. While the courts resolve the uncertainty surrounding how exactly to apply *Melendez-Diaz*, the information contained in these reports is simply too important to wait for the next landmark decision. As a result, there are two main questions to address: (1) should MEs adjust the format by which they report a thorough human autopsy—which is generally the last word on how someone found his or her end, and (2) should courts adjust the approach used when accepting autopsy reports into evidence? One or the other must be answered affirmatively, but ideally both would.

By adjusting their practices, MEs and courts can hopefully help autopsy reports survive *Melendez-Diaz*—should it be interpreted to impact evidence to the level that the dissent fears—while also protecting the important civil liberties promised by the Sixth Amendment. MEs must stay true to their duty to diagnose, and cannot shift formats to a checklist or to a simple list of detailed information. They also must retain some flexibility in the style in which pathologists can produce reports, so they can address all matters completely and adequately and so that the reports can be useful for public records, for the families and loved ones, and as evidence admissible in court.<sup>215</sup> While autopsy reports are not particularly uniform, partly because each case has the potential to be very unique, they do generally include certain measurements and findings.<sup>216</sup> They all also contain opinions and conclusory statements, for example the cause of death.<sup>217</sup> These parts of the report are what families look to for a sense of closure and finality; they are also the pieces

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<sup>214</sup> See, e.g., *Pendergrass*, 913 N.E.2d at 708.

<sup>215</sup> Demanding a restricted format would be akin to handing a judge a law student's brief template and asking her to write all future opinions in that format. There is a point at which simplification becomes counterproductive, despite perceived efficiency.

<sup>216</sup> See *supra* Part I.A.

<sup>217</sup> See *supra* notes 30–34 and accompanying text.

that go on the death certificate.<sup>218</sup> At the same time, mistakes in those conclusions are riskier as evidence because they can be mistaken for fact.

To resolve this issue, a “lean rule” should be adopted by both MEs and the courts. MEs should adopt a lean format of autopsy reporting that they use in all cases;<sup>219</sup> likewise, courts should look to accept autopsy reports into evidence in a lean format.<sup>220</sup> This idea of “leanness” would be designed to comply with the Court’s Confrontation Clause jurisprudence, segregating information based on its questionably testimonial or clearly nontestimonial characteristics. The lean portion would contain clearly nontestimonial matter, for example a description of the procedures used, sizes, weights, measurements, observations of items of interest with matching photographs, etc. The more testimonial identification of the deceased—cause of death, manner of death, and other similar statements based on opinion and conclusion—would be separated out. An autopsy report designed for lean reporting would have, for example, on the left hand side of the page, the objective observations and measurements; on the right hand side, the opinions and conclusions alongside the objective details that triggered those diagnoses. Another example of how to set up a lean report would be to have a separate form that covers all nontestimonial matter and is attached as an addendum to the full report.<sup>221</sup>

In both of these formats, the complete report is still prepared and still available,<sup>222</sup> but in the unfortunate event that the ME is unavailable, the prosecution can easily offer the lean autopsy report, stripped of its opinions and conclusions, to be analyzed by an expert who can be cross-examined at trial. This also provides

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<sup>218</sup> See *supra* note 22 and accompanying text.

<sup>219</sup> While there are standards for defining potentially criminal activity, see PETERSON & CLARK, *supra* note 5, at 3–4, adjusting reporting in anticipation that the document would be used at trial would throw this immediately within the testimonial category of the entire line of cases culminating in *Melendez-Diaz*. See, e.g., *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)).

<sup>220</sup> For an example of how this was accomplished successfully, and a rationale supporting it, see *People v. Freycinet*, 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 (2008).

<sup>221</sup> These are a couple of examples that illustrate how content could be arranged. The mechanics of implementing such a new style of report and its precise format ought to be left to the operational experts in the field.

<sup>222</sup> And still useful as a public record!

a court with a format that it can easily redact should it run into a properly-posed Confrontation Clause challenge. Some care would have to be taken for the report not to slip into a format like the core class of testimonial statements, because if it took on an affidavit structure or that of a notarized certificate of analysis, it would almost certainly run afoul of the Confrontation Clause.

This lean format creates much greater flexibility for the use of autopsy reports in the current legal landscape, while still protecting their many important non-legal uses. It also allows MEs to retain all of their substantive responsibilities, without sacrificing the potential to use the report should the case be part of a trial and the ME is unavailable. Organizing the report in such a way that allows the two sections to be easily separated is a minor inconvenience, but can greatly speed the redaction process to move the lean portion of the report, that is, the nontestimonial observations and measurements, into evidence to be analyzed and opined on by an expert.

Courts can similarly apply the “lean rule” to redact autopsy reports that do not conform to the proposed structure. By trimming the questionably testimonial segments from an autopsy report, the court can allow the defendant to confront the facts that accuse him by calling his own expert to testify as to false or objectionable conclusions or flawed process, or by cross-examining an expert the prosecution calls to discuss the report.<sup>223</sup>

If we take our hypothetical where the ME performs an autopsy and dies two weeks later,<sup>224</sup> and explore the outcomes, this seems to be the only logical conclusion. MEs generally testify, so this is a safeguard against their unavailability through death, a change of job, or a move. The additional burden to MEs is minor, especially if they structure the lean portion so it is simply a part of the larger report. While the loss of opinion and conclusion to the lean portion of the report is noticeable, what remains is sufficient to allow both the prosecution and the

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<sup>223</sup> While the defense in *Freycinet* did not bring its own expert in, it did have the opportunity to question the prosecution's expert who linked the report to the defendant. See *Freycinet*, 11 N.Y.3d at 42, 892 N.E.2d at 846, 862 N.Y.S.2d at 453 (“[The autopsy] report did not directly link defendant to the crime. The report is concerned only with what happened to the victim, not with who killed her.”).

<sup>224</sup> See *supra* Part II.B.

defendant with the opportunity to confront the facts; and the full version includes those opinions and conclusions for the benefit of the family and public health officials.

There are many benefits to adopting the “lean rule” into practice. For a task that ought not be replicated, it allows experts to analyze the information that the ME gleaned from the autopsy in a format that does not excite the rules of evidence. Similarly, it allows the evidence and the report to survive the ME and allows it to be used particularly in homicide cases—thus preventing the formation of an artificial statute of limitations.<sup>225</sup> At the same time, it allows the ME to continue working in a way that is relatively unimpeded with only a slight format change to the reporting, as compared to a complete gutting of the report or absolute inadmissibility, both of which raise fiery policy issues.<sup>226</sup>

The “lean rule” has its challenges as well. There still is no full-scale confrontation of the individual, because it is impossible. At the same time, it does its best to restrict the kinds of things that the ME can say from beyond the grave. Also, because the task cannot be replicated, the results might not satisfy Justice Scalia.<sup>227</sup> That said, he discarded the ability to verify results as irrelevant because confrontation by cross-examination is the only constitutionally valid method of testing the reliability of evidence, so it may simply be impossible to satisfy him on this point.<sup>228</sup> Finally, because MEs are on state payroll, Justice Scalia expressed the idea that the State, by virtue of paying for services, might influence the outcomes of those services, so the specter of corruption or an uneven playing field must continue to loom.<sup>229</sup>

Another important matter to consider is the idea that any logical framework that considers the “substantive qualities of autopsy reports, such as notions that reports are ‘descriptive’ or ‘factual,’ render[ing] them not testimonial,” cannot conform with

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<sup>225</sup> See Zabrycki, *supra* note 177.

<sup>226</sup> Gutting the report would impede the collection of vital statistics and inadmissibility would show a lack of trust for a process that is so trusted.

<sup>227</sup> See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2535–36 (2009).

<sup>228</sup> See *id.* at 2536 (“[T]he Constitution guarantees one way [to challenge or verify results]: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.”).

<sup>229</sup> Unsurprisingly, and likely because he was discussing analysts and meant to exclude autopsy reports, Justice Scalia never explicitly considered that doctors might share the same independence as, for example, judges.



*Crawford*.<sup>230</sup> As an autopsy report stands currently, if it falls down, it falls down on substantive concepts; however, in this modified format, it can be reduced to a factual level that is open for interpretation, which should survive challenges both from *Crawford* and from *Melendez-Diaz*.

In short, the lean format permits the greatest flexibility for all parties, and it relieves MEs from the concern that they will not be able to testify on a case because of something far beyond their control, without imposing a tremendous burden on top of their already weighty responsibilities. While autopsy reports should continue to be treated differently from other lab reports and survive under the Federal Rules of Evidence, in the event that the parade of horrors described by the dissent in *Melendez-Diaz*<sup>231</sup> begins to march down Main Street, the lean report can stand by to turn it away at the courthouse steps.

#### CONCLUSION

Evidentiary rules have provided an avenue for the introduction of autopsy reports for many years. The Confrontation Clause challenge raised in *Melendez-Diaz*, while not directly applicable to autopsy reports, has raised the issue that they may be testimonial. Because of the sharp division of the Court, and the narrow concurrence in the deciding vote, courts should be cautious in their application of *Melendez-Diaz*. Autopsy reports were only mentioned in footnote five but given no specific consideration; Justice Thomas concurred on narrow grounds and mentioned no document that analogizes with them. This dearth of specific reference should give courts pause before thrusting autopsy reports into a testimonial and inadmissible light in the case of the unavailability of the ME. It is far more preferable and certain to apply *Crawford*, under which autopsy reports have been found to be nontestimonial prior to *Melendez-Diaz*, and to carefully measure the analysis performed by the Court of Appeals of Michigan in *King*. Under *Crawford* and in consideration of confrontation rights, prosecutors should also be

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<sup>230</sup> Zabrycki, *supra* note 177, at 1101.

<sup>231</sup> See *Melendez-Diaz*, 129 S. Ct. at 2544 (Kennedy, J., dissenting) ("Its ruling has vast potential to disrupt criminal procedures that already give ample protections against the misuse of scientific evidence.").

encouraged to call forward experts to draw opinions and conclusions from the autopsy reports and to be subject to cross-examination on those matters.

The unique nature of autopsy reports and the unique policy interests at play for autopsies require unique treatment. Autopsies and autopsy reporting are considered public priorities for health and safety reasons, and also for social reasons. One of the blessings and the difficulties of an autopsy is that it can only be performed once. Considerations of humanity for both the deceased and the survivors are vital to any decision. Our social policies insist that a body must not be yanked around like a piece of meat to have the results replicated and confirmed.<sup>232</sup> Similarly, many persons are entitled to an autopsy, paid for by the state,<sup>233</sup> to allow their survivors closure and to allow their bodies to be laid to rest without doubt over their passing. Autopsies are uniquely important and require unique treatment.

For these reasons, MEs throughout the United States should consider adopting a lean autopsy report structure. MEs can structure their autopsy reports to divide potentially testimonial opinions from clearly nontestimonial measurements and observations. By doing so, in the unfortunate case of an ME's demise, the nontestimonial lean portions of the report can be admitted into evidence and interpreted by an expert, whom the defendant can confront as to the expert's testimony and opinions. Courts can similarly use these guidelines to redact autopsy reports in the case that the report was not prepared in such a lean format.<sup>234</sup> This structure preserves the substantive integrity of autopsy reports for their other uses, permits the ME some degree of freedom of style, respects the dignity of the deceased, and honors the constitutional legacy of the Confrontation Clause.

The legal climate surrounding the Confrontation Clause is uncertain right now, and *Melendez-Diaz* has played a large role in muddying the waters. While immediate action may not be the most prudent step to take, unless the Court responds in drastic

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<sup>232</sup> This would also pose a practical difficulty because pieces are gruesomely adjusted in the process, so the results of a second autopsy would be colored by the process of the first.

<sup>233</sup> This is the case for all of the death scenarios outlined above. *See supra* note 14.

<sup>234</sup> For an effective pre-*Melendez-Diaz* example, see *People v. Freycinet*, 11 N.Y.3d 38, 42, 892 N.E.2d 843, 846, 862 N.Y.S.2d 450, 453 (2008).

fashion to confusion over *Melendez-Diaz*,<sup>235</sup> prosecutors, MEs and courts will have to think fast to resolve the difficult challenges they might face. The proposed approach will hopefully contribute to the dialogue on this issue and help medicine adapt to today's legal realities, while also helping law understand today's medical realities.

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<sup>235</sup> Despite the recent shifts in the composition of the Court, this seems unlikely after the Court's recent non-ruling in *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010).