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## Note

### Prosecutorial Use of Forensic Science at Trial: When Is a Lab Report Testimonial?

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Scientific evidence creates a unique opportunity for prosecutorial abuse.<sup>1</sup> Investigations of police crime laboratories have revealed widespread error and sloppiness—even corruption.<sup>2</sup> Even well-intentioned, conscientious crime-laboratory workers may be subject to “subconscious . . . pro-prosecution bias” and “confirmation bias,” which can color their interpretations or reporting of results.<sup>3</sup> The reports these forensic scientists generate play a powerful role in criminal prosecutions. According to the “CSI effect” theory, juror determinations increasingly rely on misunderstandings of the nature of scientific evidence spawned by forensic science television shows such as *CSI: Crime Scene Investigation*, which “portray[] forensic science as high-tech magic.”<sup>4</sup> At the same time, the use of scientific evidence at trials has increased significantly in recent years.<sup>5</sup>

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1. Cf. Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 499 (2006) (describing the case of a West Virginia state trooper and forensic serologist who “engage[d] in long-term, systematic, and deliberate falsification of evidence in criminal cases”).

2. See generally *id.* at 491–500 (discussing sources of error).

3. *Id.* at 496–97.

4. N.J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction About Forensic Science Affects the Public’s Expectations About Real Forensic Science*, 47 JURIMETRICS J. 357, 358 (2007). For a detailed treatment of the *CSI* effect, see generally Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050 (2006) (discussing the evidence for and against a “CSI effect” and exploring the potential implications of such an effect). Jurors, disappointed by evidence failing to live up to the standards developed from shows like *CSI*, could be more likely to find reasonable doubt. *Id.* at 1052. Or, they could be more likely

Meanwhile, constitutional law pertaining to the use of this science is in a state of turmoil. In 2004, the Supreme Court in *Crawford v. Washington*<sup>6</sup> dramatically reworked its Confrontation Clause<sup>7</sup> analysis, holding that testimonial hearsay is inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine that witness.<sup>8</sup> The Court expressly did not define “testimonial” beyond setting a minimum baseline;<sup>9</sup> it also failed to explicitly delineate a clear analytical framework.<sup>10</sup> The Court again failed to set forth a comprehensive definition of “testimonial” in *Davis v. Washington*.<sup>11</sup> Thus, while the confrontation right would offer a defendant meaningful protection from an analyst’s scientific report if that report is testimonial, the Court did not clearly set forth the concept of testimoniality.<sup>12</sup>

Because both *Crawford* and *Davis* were decided in the context of statements made to police officers or agents of the police by persons who had directly witnessed the crimes at issue,<sup>13</sup> lower courts have had to fend for themselves in attempting to figure out what to do with scientific evidence such as laboratory reports and coroner’s reports. Under cases such as *Ohio v. Ro-*

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to find the defendant guilty due to the combination of an overbelief in the probative value of science and the well-documented psychological desire to see wrongdoers punished. *See id.* at 1063–76.

5. See John M. Spires, Note, *Testimonial or Nontestimonial? The Admissibility of Forensic Evidence After Crawford v. Washington*, 94 KY. L.J. 187, 187 (2005).

6. *Crawford v. Washington*, 541 U.S. 36 (2004).

7. U.S. CONST. amend. VI.

8. *Crawford*, 541 U.S. at 68.

9. *See id.* (“[T]estimonial] applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”).

10. *See id.* (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

11. *See Davis v. Washington*, 547 U.S. 813, 813 (2006) (noting that the Court was not “attempting to produce an exhaustive classification of all conceivable statements [that are] . . . testimonial”).

12. *See id.*; cf. *California v. Green*, 399 U.S. 149, 192 (1970) (Brennan, J., dissenting) (“There is no way to test the recollection and sift the conscience of a witness regarding the facts of an alleged offense if he is unwilling or unable to be questioned about them; defense counsel cannot probe the story of a silent witness and attempt to expose facts that qualify or discredit it.”).

13. *Crawford*, 541 U.S. at 38 (“At [the defendant’s] trial, the State played for the jury [his wife’s] tape-recorded statement to the police . . . .”); *Davis*, 547 U.S. at 813 (“[A] 911 operator ascertained from [the victim] that she had been assaulted by her former boyfriend . . . [and] the court admitted the 911 recording . . . .”).

berts,<sup>14</sup> which considered factors such as the reliability of the evidence and articulated traditional constitutional balancing tests, such evidence typically withstood Confrontation Clause scrutiny.<sup>15</sup> State courts and the lower federal courts are currently struggling to determine if, and explain why, they are dealing with testimonial or nontestimonial evidence.<sup>16</sup> Courts are split on how to handle these cases, not due to distinguishable factual circumstances, but due to widely variant understandings of what the Supreme Court meant by “testimonial.”<sup>17</sup>

Part I of this Note explicates the Supreme Court’s Confrontation Clause doctrine and the shift from *Roberts* to *Crawford* and *Davis*. Part II looks at the scientific-evidence question and examines how the lower courts have addressed it. This Part also considers, and rejects, the developing case law holding that scientific evidence, if the product of a machine-based process, is not a statement of any person and therefore cannot constitute testimonial hearsay. Part III offers an analysis for courts to follow. In order to be faithful to *Crawford*, courts should apply a bright-line rule that covers the most common types of cases: lab reports prepared by or for the police to further the investigation or prosecution of a suspected crime are *per se* testimonial. Under the limited facts falling outside of such a rule—including cases involving autopsy reports, which present somewhat different constitutional considerations—courts should undertake fact-intensive, case-by-case inquiries, considering the criteria laid out more fully in Part III.

## I. SUPREME COURT CONFRONTATION CLAUSE JURISPRUDENCE

The Sixth Amendment to the U.S. Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”<sup>18</sup> Through the Fourteenth Amendment, the Confrontation Clause applies against the states.<sup>19</sup> Yet what it guaran-

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14. *Ohio v. Roberts*, 448 U.S. 56 (1980).

15. *Id.* at 66 (“[A] statement is admissible only if it bears adequate ‘indicia of reliability.’”).

16. See Cyrus P.W. Rieck, Note, *How to Deal with Laboratory Reports under Crawford v. Washington: A Question with No Good Answer*, 62 U. MIAMI L. REV. 839, 907 (2008) (explaining that courts are “desperate for an answer”).

17. See *id.* (noting that courts are reaching different conclusions on “essentially the same facts”).

18. U.S. CONST. amend. VI.

19. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

tees in practice has been the subject of considerable debate, in part, no doubt, because as the second Justice Harlan once noted, the text on its face leaves itself open to widely variant interpretations.<sup>20</sup> Judicial understanding of the Confrontation Clause has changed significantly through the years. This Note first considers the long-dominant *Roberts* paradigm, followed by the sudden shift to *Crawford* analysis and the *Davis* Court's addition to *Crawford*'s guidance.

#### A. ROBERTS RELIABILITY AND BALANCING

Following precedent, in 1980 the *Roberts* Court held that a defendant's confrontation right was not violated by the prosecution's use of hearsay statements made by an unavailable witness at a preliminary hearing at which the defendant functionally cross-examined the witness.<sup>21</sup> Apart from this narrow holding, the Court's opinion was important for its reasoning, which came to stand for two doctrinal propositions.

First, *Roberts* stood for the proposition that the Confrontation Clause was subject to a balancing test. Acknowledging in dicta that the Clause "reflects a preference for face-to-face confrontation at trial,"<sup>22</sup> the Court explained that "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial."<sup>23</sup> While the language of close examination suggests a difficult threshold for the government to pass, the Court noted that the government always has "strong" competing interests in two overarching areas: "effective law enforcement" and "development and precise formulation of the rules of evidence applicable in criminal proceedings."<sup>24</sup> This could be read as a signal to lower courts that the defendant's confrontation right is, on balance, really not all that weighty.

Second, the Court concluded that, for Confrontation Clause purposes, admissibility of the hearsay testimony of an unavailable declarant depended on the reliability of that hearsay.<sup>25</sup> As

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20. California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring in the judgment) ("[T]he clause may be read to confer nothing more than a right to meet face to face all those who appear and give evidence at trial. . . . [But] the clause is equally susceptible of being interpreted as a blanket prohibition on the use of any hearsay testimony.").

21. Ohio v. Roberts, 448 U.S. 56, 70–73 (1980).

22. *Id.* at 63.

23. *Id.* at 64 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

24. *Id.*

25. See *id.* at 66 (noting that hearsay of an unavailable witness may be admitted "if it bears adequate 'indicia of reliability'").

a per se matter, hearsay was deemed to exhibit sufficient “*indicia of reliability*” if it matched a “firmly rooted hearsay exception.”<sup>26</sup> Otherwise the prosecution would have to show that the hearsay bore “particularized guarantees of trustworthiness” to get it admitted at trial against the defendant without allowing the defendant a right to confront the declarant.<sup>27</sup> In other words, the *Roberts* Court construed the Clause to procedurally protect criminal defendants from substantively unreliable accusatory evidence.<sup>28</sup>

#### B. REJECTING *ROBERTS*-TYPE ANALYSIS: *CRAWFORD*'S “TESTIMONIAL” FRAMEWORK

In 2004 the Supreme Court overruled the *Roberts* test in *Crawford v. Washington*, finding reliability analysis “so unpredictable that it fails to provide meaningful protection from even core confrontation violations.”<sup>29</sup> The Court also rejected the use of a balancing test where a defendant’s confrontation right was violated.<sup>30</sup> *Crawford* instead issued a bright-line command: testimonial hearsay is only admissible if the witness is unavailable and the accused had “a prior opportunity for cross-examination.”<sup>31</sup> Since it was not necessary on the facts of the case to do so, the Court opted not to “spell out a comprehensive definition of ‘testimonial.’”<sup>32</sup> Consequently, the considerations that were important to the *Crawford* Court’s discussion of testimonial hearsay must be looked to for any future Confrontation Clause analysis.

The Court traced the common law origin of the confrontation right back to the famous 1603 treason trial of Sir Walter Raleigh, in which Raleigh was sentenced to death based on the out-of-court, co-conspiratorial confession of Lord Cobham.<sup>33</sup> Raleigh argued that Cobham was lying, and demanded that Cob-

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26. *Id.*

27. *Id.*

28. But cf. *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (explaining that the framers created a “procedural rather than substantive” constitutional protection in order “to ensure reliability of evidence,” and criticizing the *Roberts* test for allowing juries to hear evidence untested by adversarial cross-examination where a judge found the evidence to be *substantively* reliable).

29. *Id.* at 63.

30. See *id.* at 67–68 (“By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.”).

31. *Id.* at 68.

32. *Id.*

33. *Id.* at 43–44.

ham tell his story to Raleigh and the jury; the English court refused to recognize such a confrontation right.<sup>34</sup> The First Congress had in mind this type of abuse when it included the Confrontation Clause in the Sixth Amendment.<sup>35</sup> *Crawford* establishes that the “principal evil” at which the Clause is aimed is the “use of *ex parte* examinations as evidence against the accused.”<sup>36</sup>

The Court expressly rejected the theory that the constitutional right to cross-examination might be coterminous with hearsay rules:

An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.<sup>37</sup>

Thus, Confrontation Clause analysis should not look to hearsay law.<sup>38</sup> In dicta, however, the Court suggested that two hearsay exceptions are particularly noteworthy.<sup>39</sup> First, because the “dying declarations” hearsay exception existed at common law, it may have been incorporated into the Sixth Amendment, even where testimonial dying declarations are at issue.<sup>40</sup> Second, the “business records” exception was part of the common law by 1791 when the Sixth Amendment was passed, but significantly, these records “by their nature were not testimonial.”<sup>41</sup> The Court’s consideration of which exceptions were allowed in criminal cases by 1791, and its general emphasis on the historical backdrop to the Confrontation Clause, indicates that courts should look to history.<sup>42</sup>

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34. *Id.*

35. *See id.* at 49 (noting how the First Congress responded to an Antifederalist writing that “criticized the use of ‘written evidence’ without the ‘cross examining [of] witnesses’”).

36. *Id.* at 50.

37. *Id.* at 51.

38. *See id.* 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.’”).

39. *Id.* at 56 & n.6.

40. *Id.* at 56 n.6. The Court noted that “[i]f this exception must be accepted on historical grounds, it is *sui generis*.” *Id.*

41. *Id.* at 56.

42. *See id.* at 43–50. Justice Scalia’s opinion for the seven-Justice majority was a decidedly originalist opinion. Chief Justice Rehnquist, writing for himself and Justice O’Connor, while concurring in the overall judgment, dissented

Although the Court did not spell out a complete definition of “testimonial,” it set a minimum baseline that includes “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations.”<sup>43</sup> Additionally, the Court explained that statements made to police officers during the course of interrogations are testimonial “under even a narrow standard” because they “bear a striking resemblance to examinations by justices of the peace in England,” making clear that a statement is testimonial if it is the contemporary analogue of an abuse about which the First Congress was concerned.<sup>44</sup> The last piece of definitional guidance the Court offered was three potential articulations of testimonial hearsay: (1) “*ex parte* in-court testimony or its functional equivalent”; (2) “formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”; and (3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>45</sup> Because it was not necessary for the Court to adopt any of these various formulations, it did not expressly do so—but notably, it also did not reject any of them.<sup>46</sup> Lending support to the third, broadest formulation, the Court noted that “[i]nvolve[ment] of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar.”<sup>47</sup>

In sum, the Confrontation Clause bars the admission of testimonial hearsay in lieu of in-court confrontation either if the declarant is available or if the defendant lacked a prior opportunity for cross-examination of an unavailable declarant.<sup>48</sup> In deciding whether a statement is testimonial, a court should not look to modern hearsay rules, but rather to the historical context of the Sixth Amendment while considering what would be the contemporary analogues to the Framers’ concerns.<sup>49</sup> And

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on prudential and *stare decisis* grounds from the Court’s decision to overrule *Roberts*. See *id.* at 69 (Rehnquist, C.J., concurring in the judgment).

43. *Id.* at 68 (majority opinion).

44. See *id.* at 52.

45. *Id.* at 51–52.

46. See *id.* at 52 (“These formulations all share a common nucleus and then define the clause’s coverage at various levels of abstraction around it.”).

47. *Id.* at 56 n.7.

48. *Id.* at 68.

49. *Id.* at 67–68 (discussing how it is unlikely that the framers would be

anything which looks too much like prosecutorially elicited ex parte testimony will raise Confrontation Clause concerns.<sup>50</sup>

### C. THE DAVIS TIMING PRONG: ONGOING EMERGENCIES VS. INVESTIGATION OF PAST CRIMES

Two years later, the Court in *Davis* again opted not to “attempt[] to produce an exhaustive classification” of testimoniality.<sup>51</sup> It did, however, articulate an investigatory purpose test:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>52</sup>

The Court was careful to note that the totality of the circumstances test it articulated was no broader than necessary to resolve the cases before it.<sup>53</sup> Statements not made in response to police interrogation may also be testimonial.<sup>54</sup> The Court also noted that “even when interrogation exists,” ultimately “the declarant’s statements, not the interrogator’s questions,” are controlling for Confrontation Clause analysis.<sup>55</sup>

In determining whether statements made during a 911 call and a house call by the police in response to domestic violence were testimonial hearsay, the Court considered the following

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satisfied relying on modern “reliability factors”).

50. Cf. *id.* at 50 (“[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”).

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

52. *Id.* at 822. The Court was apparently unconcerned with the subjective intention of the police officer doing the investigating or interrogating. Justice Thomas, in a separate opinion, articulated the reason behind the objective nature of the Court’s test as follows:

The Court’s repeated invocation of the word “objectiv[e]” to describe its test . . . suggests that the Court may not mean to reference purpose at all, but instead to inquire into the function served by the interrogation. Certainly such a test would avoid the pitfalls that have led us repeatedly to reject tests dependent on the subjective intentions of police officers.

*Id.* at 839 (Thomas, J., concurring in the judgement and dissenting in part).

53. See *id.* at 822 n.1 (majority opinion) (explaining that the holding applies specifically to interrogations because the statements of the current case were the “products of interrogations”).

54. *Id.* (“This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial.”).

55. *Id.*

factors: contemporaneousness; the existence of an “ongoing emergency”; “the nature of what was asked and answered”; and formality or solemnity.<sup>56</sup> In the case of a 911 call where the declarant identified her assailant while she faced an ongoing emergency, the operator’s questions were objectively designed to “elicit[] statements . . . necessary to be able to *resolve* the present emergency,” and her answers were “frantic” and “provided over the phone” in a potentially dangerous situation, the Court held that her statements were nontestimonial.<sup>57</sup> Essentially, because “[n]o ‘witness’ goes into court to proclaim an emergency and seek help,” her “emergency statement” was insufficiently similar to the type of ex parte testimony on which Raleigh was convicted to create a Sixth Amendment problem.<sup>58</sup>

On different facts the Court reached the opposite conclusion.<sup>59</sup> Where the police arrived at the declarant’s home, were told by her “that things were fine,” she was not presently in danger, and the officers questioned her in a separate room from her husband for the purpose of obtaining better information about the crime that had occurred, the Court determined that the declarant’s statements were “an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination,” thus rendering the statements testimonial.<sup>60</sup> Such an inquiry is plainly fact-intensive. Further complicating a *Davis* inquiry is the Court’s encouragement of the use of *in limine* procedure to redact the testimonial portions of statements that began as nontestimonial statements made in response to an emergency.<sup>61</sup>

*Davis* does not contemplate scientific evidence. However, the analytical factors employed by the Court can be useful to lower courts attempting to determine whether such evidence is testimonial.

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56. *Id.* at 827.

57. *Id.* at 814, 827.

58. *Id.* at 828.

59. Two different state supreme court cases were consolidated in *Davis v. Washington* and thus the Court was able to apply its interpretation of the Confrontation Clause to two entirely different sets of facts. *Id.* at 817–21.

60. *Id.* at 830.

61. *Id.* at 829.

## II. SCIENCE MEETS THE CONFRONTATION CLAUSE IN THE LOWER COURTS

Cases involving scientific evidence commonly occur where seized substances are tested for a composition analysis, where blood samples of suspected intoxicated drivers are tested for alcohol and narcotics content, where DNA analysis is performed in rape or homicide cases, and where medical examiners perform autopsies.<sup>62</sup> In such cases, *Roberts* reliability analysis was fairly easy to perform. But courts have struggled to apply the new testimoniality analysis prescribed by *Crawford* and *Davis*. This Part examines the cases that consider evidence such as laboratory reports to be per se testimonial, the cases that essentially render ad hoc decisions, the post-*Crawford* cases that are de facto *Roberts* analyses, and the machine-generated-statements rationale currently being developed in at least three of the circuits.

### A. COURTS HOLDING THAT A LABORATORY REPORT IS ALWAYS TESTIMONIAL

This Note now considers the various cases finding laboratory reports to be per se testimonial within the meaning of *Crawford* and *Davis*. Typical of these cases is *State v. Caulfield*,<sup>63</sup> in which the Minnesota Supreme Court held that a police laboratory report identifying a seized substance as cocaine constituted testimonial hearsay where the analyst who prepared the report did not testify at trial.<sup>64</sup> The court found that the laboratory report fit under “each of the three generic descriptions offered by the Supreme Court in *Crawford*” of what “testimonial” might mean.<sup>65</sup> First, it “functioned as the equivalent of testimony” by identifying the cocaine as cocaine.<sup>66</sup> Second, the report was an affidavit—a formalized testimonial material specifically identified in *Crawford*.<sup>67</sup> Third, it “was clearly prepared for litigation.”<sup>68</sup> The court considered the last—preparation for use at trial—to be the “critical determina-

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62. See, e.g., *Prater v. State*, 820 S.W.2d 429, 430 (Ark. 1991); *State v. Caulfield*, 722 N.W.2d 304, 306–07 (Minn. 2006); *State v. Kent*, 918 A.2d 626, 628–29 (N.J. Super. Ct. App. Div. 2007).

63. *Caulfield*, 722 N.W.2d at 304.

64. *Id.* at 306–07.

65. *Id.* at 309.

66. *Id.*

67. *Id.*; *Crawford v. Washinton*, 541 U.S. 36, 51 (2004).

68. *Caulfield*, 722 N.W.2d at 309.

tive factor" in its analysis.<sup>69</sup> Anticipating *Davis*, the Minnesota Supreme Court relied heavily on the circumstances surrounding the generation of the "statement" identifying the seized substance, concluding that the sole purpose of generating the laboratory report was to have it available for use at trial.<sup>70</sup> The court's determination was based on the facts that the police had already arrested Caulfield and that they had preliminarily determined that the seized substance was cocaine.<sup>71</sup>

A New Jersey appellate court in *State v. Kent*<sup>72</sup> reached a similar conclusion to *Caulfield* applying both *Crawford* and *Davis*.<sup>73</sup> Adam J. Kent had crashed his car, and when a police officer arrived at the scene at 1:40 a.m., he noted that Kent smelled of alcohol.<sup>74</sup> Kent acknowledged that he had been drinking.<sup>75</sup> The suspect was taken to a hospital, where the officer asked a nurse to draw a sample of his blood, which was then taken to a police laboratory for toxicology and gas chromatography analysis.<sup>76</sup> The laboratory report indicated that the defendant's blood alcohol content was above the legal limit.<sup>77</sup> While acknowledging that, under the New Jersey Rules of Evidence, a police chemist's laboratory report is a business record, the *Kent* court nonetheless found that admission of the chemist's report where the chemist did not testify at trial violated the defendant's Sixth Amendment right to cross-examine him.<sup>78</sup> Performing a *Davis* analysis, the court concluded that the defendant's blood was not analyzed to deal with an ongoing emergency, and that the primary purpose of the report was to prove at trial the past event that the defendant's blood alcohol concentration was high enough to expose him to criminal liability.<sup>79</sup> The court also concluded that under *Crawford* the nurse's signed blood sample certification was the functional equivalent

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69. See *id.* ("We have said the critical determinative factor assessing whether a statement is testimonial is whether it was prepared for litigation.").

70. See *id.* ("The . . . report was clearly prepared for litigation.").

71. *Id.*

72. State v. Kent, 918 A.2d 626 (N.J. Super. Ct. App. Div. 2007).

73. Cf. *id.* at 639–40 (citing *Caulfield* with approval).

74. *Id.* at 628–29.

75. *Id.* at 629.

76. *Id.* at 629–31.

77. *Id.* at 631.

78. *Id.* at 636–40.

79. *Id.* at 637.

of an affidavit because the nurse knew that falsifying its context would be unlawful, thereby rendering it testimonial.<sup>80</sup>

Courts in other jurisdictions have reached the same conclusion as the Minnesota and New Jersey courts did in *Caulfield* and *Kent*. The distilled analysis of these decisions consists of two major, interrelated points. First, laboratory reports do not fall within the business-records exception recognized in 1791, that is, the inherently nontestimonial sort of business record contemplated by Justice Scalia's dictum in *Crawford*.<sup>81</sup> As the District of Columbia Court of Appeals explained: "Traditionally, the historical business-records exception did not encompass records prepared for use in litigation, let alone records produced *ex parte* by government agents for later use in criminal prosecution."<sup>82</sup> The court explained that *Crawford* makes clear that the accused's confrontation right cannot have been diminished by expansions of the business-records exception under modern evidence law.<sup>83</sup>

Second, courts emphasize that these reports are being generated for the primary (or sole) purpose of facilitating criminal prosecution, and that as such they are testimonial statements implicating the Confrontation Clause.<sup>84</sup> The United States Army Court of Criminal Appeals provides a good example of this reasoning in *United States v. Williamson*.<sup>85</sup> The defendant's marijuana was seized, tested, and subsequently identified by a senior forensic chemist as marijuana.<sup>86</sup> The court concluded that because "the 'statement' [was] a *post-apprehension* laboratory report, requested *after* local police arrested [the defendant]," the statement—that scientific examination indicated that the seized substance was an illegal drug—was necessarily testimonial.<sup>87</sup> Courts have also reached this conclusion in the

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80. See *id.* at 637–39.

81. See *Crawford v. Washington*, 541 U.S. 36, 56 (2004); see also *Thomas v. United States*, 914 A.2d 1, 13 (D.C. 2006) ("As an historical matter, the exception in 1791 was a very narrow one.").

82. *Thomas*, 914 A.2d at 13.

83. *Id.* at 27.

84. See, e.g., *id.* at 14 ("[B]ecause DEA chemist's reports are created expressly for use in criminal prosecutions as a substitute for live testimony against the accused, such reports are testimonial, whether or not they happen to meet this jurisdiction's definition of a business record.").

85. *United States v. Williamson*, 65 M.J. 706 (A. Ct. Crim. App. 2007).

86. *Id.* at 707–10.

87. *Id.* at 717–18.

context of laboratory reports identifying seized substances,<sup>88</sup> tests of a rape victim's blood alcohol content where her intoxication level affected her ability to consent,<sup>89</sup> and tests of the suspect's blood in drunk driving cases such as *Kent*.<sup>90</sup>

#### B. SCIENTIFIC EVIDENCE IS NONTESTIMONIAL—BUT ONLY SOMETIMES

While many courts have conducted fairly fact-intensive inquiries, a rare occurrence in which the outcome truly seems dependent on the unique facts of the case is *United States v. Magyari*.<sup>91</sup> In *Magyari*, the United States Court of Appeals for the Armed Forces held that a laboratory report identifying a positive test for methamphetamine during the course of regular, randomized urinalysis screening was nontestimonial.<sup>92</sup> The court admitted the technician's report under a business-records hearsay exception.<sup>93</sup> It emphasized that the urinalysis was "routine" and randomized, and that the "vast majority" of such tests are negative for illegal substances.<sup>94</sup> In the *Magyari* court's view, the technicians simply "were not engaged in a law enforcement function, a search for evidence in anticipation of prosecution or trial. . . . Because the lab technicians were merely cataloging the results of routine tests, the technicians could not reasonably expect their data entries would 'bear testimony' against Appellant at his court-martial."<sup>95</sup>

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88. See, e.g., *Hinojos-Mendoza v. People*, 169 P.3d 662, 667 (Colo. 2007) (en banc) ("There can be no serious dispute that the sole purpose of the report was to analyze the substance found in Hinojos-Mendoza's vehicle in anticipation of criminal prosecution."); *State v. Laturner*, 163 P.3d 367, 376 (Kan. Ct. App. 2007) ("The forensic scientist who prepared Laturner's lab report was a witness; the statements in her lab report were testimony; and she knew when preparing her report that it would be used by the State at Laturner's trial to prove he committed the crime of possessing methamphetamine."); *State v. March*, 216 S.W.3d 663, 666 (Mo. 2007) ("A laboratory report, like this one, that was prepared solely for prosecution to prove an element of the crime charged is 'testimonial' because it bears all the characteristics of an *ex parte* affidavit.").

89. See *People v. Rogers*, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004) ("Because the test was initiated by the prosecution and generated by the desire to discover evidence against defendant, the results were testimonial.").

90. See *State v. Kent*, 918 A.2d 626, 637–40 (N.J. Super. Ct. App. Div. 2007).

91. *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006).

92. *Id.* at 124–25.

93. *Id.* at 127; see *MIL. R. EVID.* 803(6).

94. *Magyari*, 63 M.J. at 126.

95. *Id.* at 126–27.

In concluding that the technicians could not have reasonably expected the results of their tests to be used for prosecution, the court also stressed the importance of the following facts: many people tested Magyari's urine sample and recorded data entries in his records; his sample was distinguishable only by an anonymous number; and there was no reason to think that anyone was pressured to reach a particular conclusion.<sup>96</sup> However, the court expressly rejected the theory that laboratory reports are never testimonial.<sup>97</sup> It was quick to point out that laboratory reports or similar records might be prepared "at the behest of law enforcement in anticipation of prosecution," which would likely compel a finding of testimoniality.<sup>98</sup> It concluded merely that the relevant *Crawford* considerations were not in play under the unique facts with which it was presented.<sup>99</sup> Importantly, the situation lacked both the potential and the incentive for prosecutorial abuse.

#### C. NONTESTIMONIALITY AND THE TENDENCY TOWARD *ROBERTS* ANALYSIS DRESSED IN *CRAWFORD* AND *DAVIS* CLOTHING

This Note now examines the line of cases holding that laboratory reports, and similar examples of scientific evidence, are not testimonial. Five considerations run thematically throughout these cases: the contemporaneous recordation of a presently observable event; the fit of a business-records or similar hearsay exception; the objective facticity of the evidence; the value of cross-examination for the defendant; and society's competing interests. Notably, such considerations are all derived from a misreading of *Davis*, a misunderstanding of *Crawford*, or a latent *Roberts* analysis.

##### 1. Contemporaneous Recordation of Observations

An example of misplaced reliance on contemporaneousness is the California Supreme Court's opinion in *People v. Geier*.<sup>100</sup> *Geier* involved a DNA report in a rape-homicide case.<sup>101</sup> The

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96. *Id.* at 127.

97. *Id.*

98. *Id.*

99. *Cf. id.* ("This conclusion is consistent with the *Crawford* Court's policy concerns that might arise where government officers are involved 'in the production of testimony with an eye toward trial' and where there is 'unique potential for prosecutorial abuse' and overreaching." (quoting *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004))).

100. *People v. Geier*, 161 P.3d 104 (Cal. 2007).

101. *Id.* at 110, 131.

court concluded that, based on *Crawford* and *Davis*, a DNA report would be testimonial only if it “describes a past fact related to criminal activity.”<sup>102</sup> That is, under the court’s interpretation of *Davis*, “the crucial point is whether the statement represents the contemporaneous recordation of observable events.”<sup>103</sup> That the DNA report was requested by the police and the testing scientist could have anticipated its later use at a criminal trial was more or less irrelevant, since the court rendered these factors insufficient to implicate the Confrontation Clause.<sup>104</sup>

The *Geier* court’s application of its rule to the facts before it was straightforward: the state’s DNA analyst recorded her observations at the time they occurred.<sup>105</sup> The things she wrote in her report therefore “constitute a contemporaneous recordation of observable events rather than the documentation of past events.”<sup>106</sup> The court accordingly held that the DNA report was nontestimonial.<sup>107</sup>

Other jurisdictions have undertaken similar inquiries. The Supreme Court of New Hampshire in *State v. O’Maley*<sup>108</sup> agreed with *Geier*’s focus on “contemporaneous recordation,” proclaiming it a “crucial point.”<sup>109</sup> At issue in *O’Maley* was a laboratory report of a drunk driving suspect’s blood alcohol content where the workers who actually collected and tested O’Maley’s blood did not testify at trial.<sup>110</sup> The court held that the blood sample collection form filled out by the blood-drawing technician “constituted the technician’s contemporaneous recordation of observable events” and did not “describe any of the defendant’s past conduct.”<sup>111</sup> Rather than continuing this line of thought, the court disposed of the question of the analyst’s report on the theory that the report was never offered into evidence.<sup>112</sup>

This strain of analysis is fatally flawed. The argument that a laboratory report used to prove a DNA match to prosecute a

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102. *Id.* at 138.

103. *Id.* at 140.

104. *See id.* at 139.

105. *See id.*

106. *Id.*

107. *Id.* at 140.

108. *State v. O’Maley*, 932 A.2d 1 (N.H. 2007).

109. *Id.* at 11 (quoting *Geier*, 161 P.3d at 140).

110. *Id.* at 4.

111. *Id.* at 13.

112. *See id.* at 13–14.

rape-homicide is not used to prove past events and is merely a present-sense recording is conceptually specious.<sup>113</sup> But apart from the argument's conceptual incoherence, it is constitutionally incorrect—it is based on a substantial misreading of *Davis*. *Davis* was a fact-intensive inquiry made in the context of a police response to domestic violence.<sup>114</sup> The Court focused on contemporaneity to determine whether the circumstances surrounding the statements made to the police objectively indicated that the primary purpose of the interrogation was to respond to an ongoing emergency or whether it was to gather evidence pertaining to the past event (domestic violence) to be proved at a subsequent criminal trial.<sup>115</sup> In considering the contemporaneity of the *Davis* declarant's statements to the 911 operator, the court in *Geier* ignored the existence of the ongoing emergency in *Davis* which the declarant was contemporaneously describing to the police.<sup>116</sup> *Geier*'s DNA analyst was certainly not analyzing DNA, and at the same time recording that analysis, in response to any ongoing emergency; and removed from the requirement of an ongoing emergency, all recording of testimonial hearsay statements would qualify as contemporaneous recording.

## 2. *Crawford's Business-Records Exception*

The vast majority of cases finding scientific evidence non-testimonial misread the language in *Crawford* suggesting that business records are inherently nontestimonial. The Second Circuit, for example, held in *United States v. Feliz*<sup>117</sup> that a business record within the meaning of the Federal Rules of Evidence is "fundamentally inconsistent" with the Supreme Court's idea of testimonial hearsay.<sup>118</sup> The Second Circuit's rationale was that since business records by definition are not made in anticipation of litigation and do not include observations of police officers, they necessarily do not raise the sorts of concerns the First Congress had in mind when it authored the

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113. *Cf. State v. Kent*, 918 A.2d 626, 637 (N.J. Super. Ct. App. Div. 2007) ("Nor can it reasonably be argued that the 'primary purpose' of the lab certificate was anything other than to prove past events, specifically defendant's blood alcohol concentration, relevant to his DWI prosecution.").

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

115. See *id.* at 827.

116. See *People v. Geier*, 161 P.3d 104, 138 (Cal. 2007).

117. *United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006).

118. *Id.* at 233–34; see FED. R. EVID. 803(6).

Sixth Amendment.<sup>119</sup> In *Feliz*, the court dealt with the admissibility of autopsy reports of nine murder victims.<sup>120</sup> It acknowledged that a reasonable medical examiner should anticipate that an autopsy report might be used at trial, but stated, “this practical expectation alone cannot be dispositive on the issue of whether those reports are testimonial.”<sup>121</sup> It then held on other grounds that autopsy reports are nontestimonial business records.<sup>122</sup>

Citing its own pre-*Crawford* precedent, the Massachusetts high court in *Commonwealth v. Verde*<sup>123</sup> asserted that a chemist’s report identifying a seized substance as cocaine was admissible as *prima facie* evidence without the chemist’s testimony under the public-records hearsay exception.<sup>124</sup> The court noted that the public-records exception was a “well-recognized” one.<sup>125</sup> The court’s analysis ultimately came down to its view that the laboratory report was nontestimonial because it expressed objective scientific facts rather than conclusory opinions.<sup>126</sup> An Illinois appellate court voiced a similar theory, explaining, “*Crawford* specifically disclaims any intention to restrict traditional hearsay exceptions.”<sup>127</sup>

To the extent that courts rely on the theory that *Crawford* permits the introduction of hearsay insofar as it falls within a traditional hearsay exception, they seem to have confused current Confrontation Clause jurisprudence—*Crawford*—with the old rule—*Roberts*—which is no longer good law.<sup>128</sup> In other

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119. *Feliz*, 467 F.3d at 234; see also *Crawford v. Washington*, 541 U.S. 36, 42–50 (2004) (discussing the original intent behind the Sixth Amendment’s Confrontation Clause).

120. *Feliz*, 467 F.3d at 229.

121. *Id.* at 235.

122. See *id.* at 236–37. Those “other grounds” are competing interests which effectively constitute a *Roberts* balancing test. See *Roberts v. Ohio*, 448 U.S. 56, 65–66 (1980).

123. *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005). *Verde* was the precursor to *Commonwealth v. Melendez-Diaz*, the latest Confrontation Clause case taken up by the Supreme Court. See *Commonwealth v. Melendez-Diaz*, 870 N.E.2d 676 (Mass. App. Ct. 2007) (unpublished table decision), cert. granted, 128 S.Ct. 1647 (Mar. 17, 2008) (No. 07-591).

124. *Verde*, 827 N.E.2d at 704–05.

125. *Id.* at 705 n.3.

126. See *id.* at 705–06.

127. *People v. So Young Kim*, 859 N.E.2d 92, 94 (Ill. App. Ct. 2006).

128. In 2007, Justice Alito, writing for a unanimous Court, explained that “*Roberts* had held that the Confrontation Clause permitted the admission of a hearsay statement made by a declarant who was unavailable to testify if the statement bore sufficient indicia of reliability . . . because the statement fell

words, such opinions apply *Roberts* under the nominal guise of applying *Crawford*.

The Second Circuit argued that the limitations on the business-records exception function to weed out testimonial evidence.<sup>129</sup> Certainly if a record is not testimonial in nature, the Confrontation Clause does not restrict its admission—the Clause only applies to testimonial statements.<sup>130</sup> But as the New Hampshire Supreme Court explained, “[t]he *Crawford* dicta related to the business record exception that existed when the Federal Constitution was drafted, not that which currently exists.”<sup>131</sup> The Second Circuit, after acknowledging a factor that might render an autopsy report testimonial in spite of the court’s interpretation of the hearsay exception—reasonable anticipation of prosecutorial use—then failed to explain why the evidence was nonetheless nontestimonial.<sup>132</sup>

### 3. The Objective Facticity of Science

Some courts have concluded that objective facts in a scientific report are nontestimonial. The Supreme Court of Kansas, for example, drew a distinction in *State v. Lackey*<sup>133</sup> between objective factual observations and opinions or disputed conclusions. The “factual, routine, descriptive, and nonanalytical findings” contained in an autopsy report are, according to the court, not testimonial, whereas “conclusions drawn from the objective findings” are testimonial. *Lackey* rejected a distinction between autopsy reports prepared for homicide investigations and those where criminal litigation was not expected,<sup>134</sup> instead premising its rule on the theory that “routine and descriptive observations” where the “examiner would have little incentive

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within a firmly rooted hearsay exception . . . .” *Whorton v. Bockting*, 127 S. Ct. 1173, 1178 (2007). This approach is now defunct: “[t]he *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled.” *Id.* at 1181.

129. See *United States v. Feliz*, 467 F.3d 227, 233–34 (2d Cir. 2006).

130. See *Davis v. Washington*, 547 U.S. 813, 821 (2006).

131. *State v. O’Maley*, 932 A.2d 1, 11 (N.H. 2007).

132. See *Feliz*, 467 F.3d at 234–36.

133. *State v. Lackey*, 120 P.3d 332 (Kan. 2005), *overruled on other grounds by* *State v. Davis*, 158 P.3d 317, 321–23 (Kan. 2006). *Davis* overruled *Lackey* with respect to hearsay evidence other than the autopsy report. See *Davis*, 158 P.3d at 321–23.

134. *Lackey*, 120 P.3d at 351.

135. *Id.* at 349.

to fabricate the results" do not implicate the concerns expressed in *Crawford*.<sup>136</sup>

The Massachusetts Supreme Judicial Court also drew a line around records of "primary fact."<sup>137</sup> It explained: "[c]ertificates of chemical analysis are neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance."<sup>138</sup> Based on similar theories, other courts have concluded that to the extent that reports contain "objective" data, they cannot be testimonial because they are not accusatory.<sup>139</sup>

Such arguments are circular and depend on reliability considerations.<sup>140</sup> Because "routine factual findings in an autopsy report are generally reliable," courts reason, "therefore, evidence of routine factual findings is not testimonial."<sup>141</sup> A Kansas appellate court explained the potential consequences of adopting a "scientific facts are nontestimonial" rule on the facts of the narcotics possession case before it:

A *sine qua non* for guilt is the possession of methamphetamine, proof of which is only found in a report, the accuracy of which has not been tested in the courtroom. To overcome the presumption of innocence and convict Laturner of this charge, the jury had to be convinced beyond a reasonable doubt that the lab report was correct. Thus,

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136. See *id.* at 351.

137. Commonwealth v. Verde, 827 N.E.2d 701, 705 (Mass. 2005) (quoting Commonwealth v. Slavski, 140 N.E. 465, 469 (Mass. 1923)).

138. *Id.*

139. See, e.g., People v. Geier, 161 P.3d 104, 140 (Cal. 2007) ("Records of laboratory protocols followed and the resulting raw data acquired are not accusatory."); State v. O'Maley, 932 A.2d 1, 13 (N.H. 2007) ("The second factor we believe is important is whether the statement is an accusation."); see also Michael H. Graham, *Crawford/Davis "Testimonial" Interpreted, Removing the Clutter*, 62 U. MIAMI L. REV. 811, 836–37 (2008) (arguing that forensic laboratory reports are nontestimonial because they "do not themselves accuse an identified or identifiable person of having committed a crime").

140. See, e.g., Hinojos-Mendoza v. People, 169 P.3d 662, 666 (Colo. 2007) (en banc) (accusing courts of "erroneously focus[ing] on the reliability of [laboratory] reports"); State v. Caulfield, 722 N.W.2d 304, 309 (Minn. 2006) (en banc) ("The state refers us to cases from other states that, after *Crawford*, hold that lab reports are not testimonial. But these cases seem to wrongly focus on the reliability of such reports."); State v. March, 216 S.W.3d 663, 665 (Mo. 2007) ("[G]enerally these cases seem to incorrectly focus on the reliability of such reports."); cf. Metzger, *supra* note 1, at 510 ("The misapprehension about the testimonial nature of the crime laboratory reports seems to be this: because the affidavits are 'provided according to scientific procedures and analysis,' they are not testimonial.").

141. State v. Laturner, 163 P.3d 367, 375 (Kan. Ct. App. 2007) (criticizing this "circular" reasoning).

proof of guilt becomes *ipse dixit*: it is so because the State says it is so.<sup>142</sup>

Admission of otherwise testimonial statements merely because they consist of “neutral” facts—raw data rather than interpreted data—flies in the face of the Court’s reasoning in *Crawford*.<sup>143</sup> The “accusatory” angle, imagining that facts contained in a laboratory or autopsy report do not accuse the defendant of anything, also fails to withstand scrutiny—if a fact is nonaccusatory, then in a typical DUI case, a defendant could be convicted on the sole basis of two nonaccusatory, *ex parte* affidavits: (1) a police officer’s statement that she saw the defendant driving a car, then had the defendant’s blood drawn; and (2) a laboratory technician’s statement that the defendant’s blood contained a certain amount of an intoxicating substance. Yet that would commit the “principal evil” that *Crawford* attempts to eradicate.<sup>144</sup>

#### 4. Evidentiary Value to the Accused

In finding scientific evidence nontestimonial, courts tend to point out that cross-examination would probably have been of little value to the defendant in any event. In admitting a DNA analysis report, the Supreme Court of California explained that the analyst’s *supervisor*’s testimony “could reconstruct what the analyst who processed the samples did at every step” because laboratory regulations required the analyst to follow a set protocol.<sup>145</sup> The Supreme Court of New Hampshire noted that if the technician had testified at trial, she merely would have said that her report was accurate.<sup>146</sup> And in any event, “she ‘would almost certainly not remember’ at trial how that exact test had been performed.<sup>147</sup> The Second Circuit posited that the fact that “medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue”<sup>148</sup> constitutes a “practical difficult[y]”

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142. *Id.* at 376.

143. *Cf. Crawford v. Washington*, 541 U.S. 36, 66 (2004) (“The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by ‘neutral’ government officers.”).

144. *See id.* at 50.

145. *People v. Geier*, 161 P.3d 104, 132 (Cal. 2007). The court also noted that “DNA extraction is not a difficult procedure.” *Id.*

146. *See State v. O’Maley*, 932 A.2d 1, 13 (N.H. 2007).

147. *Id.* at 14 (quoting *State v. Coombs*, 821 A.2d 1030, 1033 (N.H. 2003)).

148. *United States v. Feliz*, 467 F.3d 227, 236 (2d Cir. 2006) (quoting *People v. Durio*, 794 N.Y.S.2d 863, 869 (N.Y. Sup. Ct. 2005)).

avoided by its conclusion.<sup>149</sup> But what is the practical difficulty? Putting the analyst on the stand to say “I don’t remember this particular examination, but I always follow protocol and I stand behind what I put in my report” allows the jury to make an informed decision, and provides the defendant a fair opportunity to inquire about bias and sloppy work habits.

Notably, the Second Circuit’s admonition about the likely low value of cross-examination came in the context of its discussion of the dangers, from a policy perspective, of holding that an autopsy report is a testimonial statement.<sup>150</sup> In other words, value-to-the-defendant analysis is a factor in a judicial balancing test, which the Supreme Court overruled in *Crawford*.<sup>151</sup> Even if not used as part of a *Roberts*-type balancing test, judicial inquiry into the usefulness of potential cross-examination is inapposite.<sup>152</sup> Cross-examination is a “strategic decision” that the defendant may choose to exercise where she believes it will be useful or valuable<sup>153</sup>—such as where there is reason to suspect there were problems with the testing.<sup>154</sup>

##### 5. The Competing Interests of Society

Courts worry that applying broadly the right to cross-examination will hamper the efficient and effective administration of justice. The Supreme Court of Kansas expressed its fear that requiring the in-court testimony of a medical examiner who performed the autopsy relevant to a murder prosecution would waste public resources and, as in the case before it, preclude prosecutorially valuable evidence—or even prosecution itself—where the medical examiner had died or otherwise become unavailable.<sup>155</sup> The court considered this to be a “harsh and unnecessary result,” since autopsy reports are generally re-

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149. *Id.*

150. *See id.*

151. *See Crawford v. Washington*, 541 U.S. 36, 67–68 (2004).

152. *Cf. United States v. Washington*, 498 F.3d 225, 235 (4th Cir. 2007) (Michael, J., dissenting) (“A defendant’s right to confront witnesses against him does not depend on whether a court believes that cross-examination would be useful.”).

153. *Id.*

154. *Cf. Metzger, supra* note 1, at 499 (describing a case in which a state crime laboratory worker “engage[d] in long-term, systematic, and deliberate falsification of evidence in criminal cases”).

155. *State v. Lackey*, 120 P.3d 332, 351 (Kan. 2005), *overruled on other grounds by State v. Davis*, 158 P.3d 317, 322 (Kan. 2006).

liable and probably not fabricated.<sup>156</sup> Other courts have voiced similar concerns.<sup>157</sup>

Practical consequences to the public, however, are no longer a legitimate judicial consideration in deciding Confrontation Clause cases.<sup>158</sup> The Court's emphatic, uncompromising language in *Crawford* makes clear that the Clause conveys upon the defendant an absolute right and that the determination of whether a statement is testimonial cannot be driven by policy considerations.<sup>159</sup>

#### D. MACHINE WITNESSES: A DEVELOPING TWIST

A new Confrontation Clause rule is developing in some of the U.S. Courts of Appeals. Already the Fourth, Seventh, and Eleventh Circuits have held lab reports to be nontestimonial statements of machines or computers. This section examines this theory, ultimately rejecting it as inconsistent with Supreme Court Confrontation Clause jurisprudence.

In August 2007 a divided panel for the Fourth Circuit issued an opinion deciding *United States v. Washington*,<sup>160</sup> a routine drunk driving case, on both typical and unique grounds. The court issued three alternative holdings to dispense of the defendant's Confrontation Clause claim: (1) the "raw data" that the expert witness relied upon or introduced were not statements of the laboratory technicians; (2) the data were not hearsay; and (3) the data were nontestimonial.<sup>161</sup> All three holdings rely on the court's conclusion that the reports were solely computer-generated statements, which is an analytical angle from

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156. *Id.*

157. See, e.g., *United States v. Feliz*, 467 F.3d 227, 236 (2d Cir. 2006) (noting that an "autopsy cannot be replicated by another pathologist" and indicating that it would be "against society's interests to permit the unavailability of the medical examiner . . . to preclude the prosecution of a homicide case" (quoting *People v. Durio*, 794 N.Y.S.2d 863, 869 (N.Y. Sup. Ct. 2005))); *People v. Geier*, 161 P.3d 104, 136–37 (Cal. 2007) (quoting with approval the factors that the Kansas Supreme Court assigned to society's competing interests in the balancing test performed in *Lackey*).

158. Compare *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (articulating a balancing test that would allow for competing interests such as "effective law enforcement" to outweigh the defendant's right to confront witnesses at trial), with *Crawford v. Washington*, 541 U.S. 36, 67–68 (2004) (overruling *Roberts* and rejecting the use of a balancing test in place of the "constitutional guarantee[]" of the Confrontation Clause).

159. See *Crawford*, 541 U.S. 36 *passim*.

160. *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007).

161. *Id.* at 227–32.

which no other court had approached a *Crawford* issue pertaining to forensic science.

The relevant facts follow: Dwonne A. Washington was convicted of driving under the influence after testing positive for both phencyclidine (PCP) and alcohol above the legal limit.<sup>162</sup> The forensic laboratory's machines produced data indicating the amount of these substances in Washington's blood.<sup>163</sup> The laboratory's manager, who did not operate the machines, testified at trial as an expert witness to the test results and the implications for Washington's driving.<sup>164</sup> In Washington's view, he was entitled to confront the lab technicians who actually saw his blood and placed it in the testing machines.<sup>165</sup> The magistrate judge overruled Washington's objections and admitted the lab manager's testimony.<sup>166</sup>

The Fourth Circuit reasoned first that the data generated by the laboratory's machines were based on the machines', rather than the technicians', viewing and analysis of Washington's blood sample.<sup>167</sup> "The raw data generated by the diagnostic machines are the 'statements' of the machines themselves, not their operators."<sup>168</sup> Second, because Rule 801 of the Federal Rules of Evidence defines hearsay as a "statement," which "is (1) an oral or written assertion or (2) nonverbal conduct of a person,"<sup>169</sup> the court reasoned that there was no hearsay—computers are not persons.<sup>170</sup> Third, "the reports generated by the machines were not testimonial in that they were not relating past events but the current condition of the blood in the machines."<sup>171</sup> Since the machine had no way of knowing that the blood sample it was analyzing was going to be used for evidence at trial, the evidence could not be considered testimonial under the *Davis* purpose test.<sup>172</sup> The court also noted that the possibility of cross-examining the technicians was of "no value" to the defendant, since the statements indicating that the blood

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162. *Id.* at 227–28.

163. *Id.* at 228.

164. *Id.* at 228–29.

165. *Id.* at 229.

166. *Id.*

167. *Id.* at 230.

168. *Id.*

169. FED. R. EVID. 801(a), (c) (emphasis added).

170. *Washington*, 498 F.3d at 231.

171. *Id.* at 232.

172. *Id.*

tested positive for alcohol and PCP were statements of the machines, not of the technicians.<sup>173</sup>

In January 2008 Chief Judge Easterbrook, writing for a unanimous panel of the Seventh Circuit in *United States v. Moon*, cited with approval the Fourth Circuit's *Washington* decision.<sup>174</sup> In the Seventh Circuit, "raw data produced by scientific instruments" are now nontestimonial, "though the interpretation of those data may be testimonial."<sup>175</sup> The underlying reasoning is much the same: "If the readings are 'statements' by a 'witness against' the defendants, then the machine must be the declarant. Yet how could one cross-examine a gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one's interests."<sup>176</sup>

The logic of *Moon* is self-defeating. The Seventh Circuit conceded that "[a] chemist's assertion that 'this substance was cocaine'" is testimonial within the meaning of *Davis*.<sup>177</sup> In drawing its data-interpretation distinction, the court explained by way of analogy that if a physician tests a patient's blood, the conclusion that the patient has diabetes would be testimonial, but her insulin and blood sugar levels would be nontestimonial "raw results."<sup>178</sup> But in this example, the amount of insulin in the patient's blood would be analogous to the amount of cocaine in the defendant's blood; the conclusion that the patient has diabetes is closer to the conclusion that the defendant violated the law. The underlying chemical composition of cocaine, which the Seventh Circuit considers to be nontestimonial, is inseparable from the fact that the underlying chemical composition of cocaine is in fact simultaneously cocaine itself, which the Seventh Circuit considers to be testimonial.

In part, the Fourth Circuit's decision in *Washington* is merely another example of the *Roberts*-type analysis. That Rule 801 defines hearsay as a statement of a person (and not of a machine)<sup>179</sup> is irrelevant for constitutional purposes—because "hearsay" for Confrontation Clause purposes is not necessarily identical to "hearsay" as defined by subject-to-

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173. *Id.* at 230.

174. *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008).

175. *Id.*

176. *Id.*

177. *Id.*

178. *See id.*

179. FED. R. EVID. 801(a), (c).

change evidence rules.<sup>180</sup> Instead, the relevant question should be whether the statement is offered to prove the truth of the matter asserted.<sup>181</sup> The Fourth Circuit's theory that the tests were a mere contemporaneous recordation of the state of the suspect's blood is based on the misreading of *Davis* explained above.<sup>182</sup> And the court's reliance on the idea that the defendant would not have gleaned anything of value from an opportunity for cross-examination is completely out of line with current Confrontation Clause doctrine.<sup>183</sup>

The Fourth Circuit's twist on the problem—categorizing the laboratory reports as statements of the machines only—functions as an attempt to cheat *Crawford* and *Davis*.<sup>184</sup> Most importantly, this classification is conceptually bizarre. As the dissent explained, “[t]he test results, although computer-generated, were produced with the assistance and input of the technicians and must therefore be attributed to the technicians.”<sup>185</sup> Traditionally, only if “the assertion is produced without *any* human assistance or input” have federal courts considered computer-generated assertions not to be statements of persons.<sup>186</sup> Here, the technician played a “significant role” in running the tests and creating and documenting the results.<sup>187</sup>

One implication of the *Washington* majority's classification is that the defendant has no right to confront the laboratory technician—there is no statement of the technician to cross-examine.<sup>188</sup> Because the court found that the report was not testimonial hearsay, it did not address the question of how the accused might enforce his right to confront a machine. Technol-

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180. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

181. Cf. *id.* at 59 n.9.

182. See *Davis v. Washington*, 547 U.S. 813, 827–28 (2006) (discussing contemporaneity as only one of many factors to be considered in determining whether evidence is testimonial).

183. See *Crawford*, 541 U.S. at 67–69 (rejecting the *Roberts* balancing test in favor of a bright line approach to Confrontation Clause analysis).

184. This approach has also gained traction in the Eleventh Circuit. See *United States v. Lamons*, 532 F.3d 1251, 1263 (11th Cir. 2008) (“In light of the constitutional text and the historical focus of the Confrontation Clause, we are persuaded that the witnesses with whom the Confrontation Clause is concerned are *human* witnesses, and that the evidence challenged in this appeal does not contain the statements of human witnesses.” (citing *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) and *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007))).

185. *Washington*, 498 F.3d at 231–32 (Michael, J., dissenting).

186. *Id.* at 233 (emphasis added).

187. *Id.*

188. See *id.* at 230 (majority opinion).

ogy is not yet at the point where a computer is capable of taking the stand and answering questions in response to counsel's cross-examination. Yet while *Crawford* and *Davis* would accordingly render the machine's statement inadmissible, the Fourth Circuit explained that "reliability concerns" could be addressed "through authentication" of the underlying technological processes, thereby suggesting that machine-generated testimonial hearsay statements are admissible even though the witness is not subject to cross-examination.<sup>189</sup>

Ultimately, machine-generated laboratory reports are produced jointly by machines and the persons operating the machines. The reports must be considered statements of those persons. Although the analysis in this section indicates that the laboratory reports at issue in *Washington* and *Moon* should have been held to be testimonial, more important is the understanding that such reports must be deemed either testimonial or nontestimonial on the same grounds as any other laboratory report. The machine-generated-statement theory is not persuasive.

### III. AN ANALYSIS FOR COURTS TO FOLLOW

In light of the split among lower courts, this Note proposes that courts should, in order to apply *Crawford* and *Davis* faithfully, start analyzing Confrontation Clause cases pertaining to scientific evidence in a consistent manner, set forth below. Two generalized groups of cases need to be treated differently. For dealing with laboratory reports, in most instances a bright-line rule declaring the reports testimonial statements of the persons who generated them will be appropriate. Autopsy reports should be considered on a case-by-case basis, while adhering to the principles outlined below.

#### A. LABORATORY REPORTS: A (NEARLY) BRIGHT-LINE RULE

Most laboratory reports used by prosecutors against the accused are prepared for criminal prosecution. Frequently occurring examples include blood tests of persons suspected of driving while intoxicated and chemical analyses of seized substances suspected of being illegal narcotics. In such cases, courts should hold that the reports are *per se* testimonial. However, there will be rare cases in which such a ruling is in-

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189. See *id.* at 231. The court's consideration of reliability is, of course, misplaced. See *Crawford v. Washington*, 541 U.S. 36, 67–69 (2004).

appropriate—this “*Magyari* exception” should be approached in an ad hoc manner.

### 1. Many Laboratory Reports Are Testimonial Per Se

*Caulfield* is, in all relevant factual aspects, typical of drug seizure cases. Police observed Scott Caulfield behaving suspiciously in and outside of a bar in Rochester, Minnesota.<sup>190</sup> In short, he was behaving like a drug dealer.<sup>191</sup> The police lawfully<sup>192</sup> took six plastic bags from Caulfield, which contained what the suspect identified as cocaine.<sup>193</sup> The police recorded a positive field test and sent the drugs to a crime laboratory, where an analyst produced a report identifying the substance as cocaine.<sup>194</sup> The prosecution introduced the analyst’s report without putting the analyst on the stand.<sup>195</sup>

For Confrontation Clause purposes, the facts of *Kent* are analogous to those of *Caulfield*. Late at night, Adam J. Kent crashed his car; he hit the curb and his car wound up upside-down on somebody’s front yard.<sup>196</sup> A police officer arrived and noticed that Kent smelled like alcohol.<sup>197</sup> Kent’s speech was slurred and, when questioned, he admitted that he had consumed five beers that evening.<sup>198</sup> The officer concluded that Kent was intoxicated and arrested him, taking him to the hospital because of the crash.<sup>199</sup> At the request of the police, a hospital worker drew a sample of Kent’s blood and signed a certificate indicating that he had followed protocol.<sup>200</sup> The police sent the blood sample to their forensic laboratory, which issued a report concluding that Kent’s blood alcohol content was above the legal limit.<sup>201</sup>

*State v. Crager*<sup>202</sup> was a murder case in which the DNA analysis conducted also fits the pattern of *Caulfield* and

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190. *State v. Caulfield*, 722 N.W.2d 304, 307 (Minn. 2006) (en banc).

191. *Id.*

192. Had the police behaved unlawfully, that would be a Fourth Amendment question outside of the scope of this Note.

193. *Caulfield*, 722 N.W.2d at 307.

194. *Id.*

195. See *id.* at 306.

196. *State v. Kent*, 918 A.2d 626, 628 (N.J. Super. Ct. App. Div. 2007).

197. *Id.* at 629.

198. *Id.*

199. *Id.*

200. *Id.* at 629–30.

201. *Id.* at 630–31.

202. *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840, 879 N.E.2d 745.

*Kent*.<sup>203</sup> The police found a woman lying murdered in the bedroom of her home.<sup>204</sup> They identified Lee Crager as a suspect, and upon finding his clothes covered in blood, submitted it for DNA testing; it was a match for the victim's DNA.<sup>205</sup> Crager's DNA also matched that found on cigarettes at the crime scene.<sup>206</sup> The prosecution offered the DNA report into evidence without having the DNA analyst who performed the tests testify at trial.<sup>207</sup>

In each case—*Caulfield*, *Kent*, and *Crager*—the police suspected the defendant of having committed a crime, and in order to prove that crime, had scientific tests run at a laboratory. In each case, a court can determine under a straightforward *Davis* analysis that the laboratory report is a testimonial statement of the person who authored it. It is difficult, perhaps impossible, to imagine any circumstances under which these tests would have been run in which law enforcement was not attempting to establish the facts relevant to the potential prosecution of a crime. It is similarly difficult or impossible to imagine any circumstances under which ordering a laboratory analysis of a seized substance believed to be illegal narcotics, a blood screening of a suspected drunk driver, or a DNA or other analysis matching a suspected criminal to evidence found at a crime scene, could possibly be for the purpose of enabling the police to meet an ongoing emergency.

In short, where the police request a laboratory analysis of what seems to be evidence, that analysis will always be testimonial. In order to promote adherence to the Supreme Court's presentation of the Confrontation Clause in *Crawford* and *Davis*, courts should therefore articulate a bright-line rule announcing that such evidence is *per se* testimonial.

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203. Courts in *Kent* and *Caulfield* and the appellate court in *State v. Crager*, 164 Ohio App. 3d 816, 2005-Ohio-6868, 844 N.E.2d 390, found that laboratory reports are testimonial under *Crawford*. The Supreme Court of Ohio, however, reversed the appellate court's decision in *Crager*, finding that under *Crawford*, the reports were "non-testimonial." See 116 Ohio St.3d 369, 2007-Ohio-6840, 879 N.E.2d 745, at ¶ 78.

204. 116 Ohio St.3d 369, 2007-Ohio-6840, 879 N.E.2d 745, at ¶ 2.

205. *Id.* ¶ 2–4.

206. *Id.* ¶ 4.

207. *Id.* ¶ 8 (the DNA analyst who prepared the two DNA reports was on maternity leave at the time of trial).

## 2. The *Magyari* Exception

In *Magyari*, the Court of Appeals for the Armed Forces encountered the issue of an employer's regularly conducted, randomized urine testing which had the potential to trigger criminal prosecution.<sup>208</sup> The laboratory technicians had no way of knowing whose sample they were working with; it was identical to the other 199 samples in the batch.<sup>209</sup> A civilian analogue to the facts of *Magyari* may not even presently exist.<sup>210</sup>

The facts of this case are extremely important, and a totality of the circumstances test was appropriately applied. The technicians knew or should have known that a positive test could trigger prosecution. The tests were serving a law enforcement function.<sup>211</sup> But no person whose sample was tested should be considered a suspect, and in the case of each sample, it was far more likely than not that no crime had been committed.<sup>212</sup> When sufficiently similar cases arise, courts ought to look at the facts of each case, apply the rules articulated in *Crawford* and *Davis* where possible, and consider the aims of the Confrontation Clause and the spirit in which the two cases were decided. Courts should keep in mind that the Sixth Amendment expresses a preference for face-to-face confrontation at trial. In asking whether the circumstances surrounding the request for the scientific analysis indicate that the purpose is to prove facts potentially relevant to a subsequent prosecution, the particularity of the request is relevant—the existence of a suspect or criminal investigation makes it more likely that the scientific analysis will be testimonial. And civilian law enforcement should be given less leeway than the military because the military deals only with the members of its own or-

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208. See *United States v. Magyari*, 63 M.J. 123, 127 (C.A.A.F. 2006) (applying the Confrontation Clause analysis framework of *Crawford* and *Roberts*, civilian criminal proceedings, to court-martial proceedings).

209. *Id.* at 126.

210. The closest analogous situation might be employer drug testing. A nonmilitary employer's sanctions for a failed drug test, however, do not include criminal or equivalent proceedings. Absent an employer working in cooperation with law enforcement, there is not even the potential for criminal proceedings—an obvious requirement for application of the Confrontation Clause.

211. *But see Magyari*, 63 M.J. at 126 ("In this context, the better view is that these lab technicians were not engaged in a law enforcement function, a search for evidence in anticipation of prosecution or trial.").

212. *See id.*

ganization, in what the Supreme Court has long recognized as “the unique nature of . . . the military society.”<sup>213</sup>

#### B. AUTOPSY REPORTS

An autopsy report is not “prepared for use at trial,” but “any medical examiner preparing such a report must expect that it *may* later be available for use at trial.”<sup>214</sup> An autopsy report records the medical examiner’s observations and announces a cause of death.<sup>215</sup> Rather than being prepared at the request of law enforcement officers, it is frequently ordered by statute and performed by a nonadversarial medical examiner.<sup>216</sup> However, the fact that the medical examiner is not supposed to be in an adversarial relationship with the suspect is not a valid constitutional consideration.<sup>217</sup>

Courts will have to weigh the relevant constitutional considerations under the surrounding circumstances of each case. To what extent does using an autopsy report as evidence against a criminal defendant resemble the use of *ex parte* evidence against the accused? How much potential is there for prosecutorial abuse, especially in highly political cases? To what extent should the medical examiner anticipate that the autopsy will prove past events relevant to use at a criminal trial?

On a general level, one commentator has suggested that “the Confrontation Clause should allow a defendant to confront the crucial piece of hearsay that directly establishes an element of the crime.”<sup>218</sup> More particularly, it is clear that an autopsy report is at least functionally equivalent to one type of formalized statement—an affidavit—about which the Court expressed concern.<sup>219</sup> Whether the police have identified a suspect

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213. See *United States v. Rankin*, 63 M.J. 552, 555 (N.M. Ct. Crim. App. 2006) (citing *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

214. See *United States v. Feliz*, 467 F.3d 227, 235 (2d Cir. 2006).

215. See *id.* at 236 n.6; BLACK’S LAW DICTIONARY 145 (8th ed. 2004).

216. Bradley Morin, Note, *Science, Crawford, and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports*, 85 B.U. L. REV. 1243, 1264 (2005).

217. Cf. *Crawford v. Washington*, 541 U.S. 36, 66 (2004) (explaining this in the context of “neutral” government officers). *Contra Carolyn Zabrycki*, Comment, *Toward a Definition of “Testimonial”: How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 CAL. L. REV. 1093, 1111 (2008) (arguing that autopsy reports should be deemed nontestimonial because medical examiners are nonadversarial and are not government officers).

218. Morin, *supra* note 216, at 1264.

219. See *Crawford*, 541 U.S. at 51–52 (setting forth the three potential de-

should be a significant factor in a court's decision. If there is a suspect, there is an ongoing criminal investigation *and* a medical examiner has a reason to reach a certain result. At the moment it becomes clear that foul play was likely involved in the subject's death, whether because there is an ongoing criminal investigation or because the body itself so indicates, an objective observer would think that the report is reasonably likely to be used at trial.<sup>220</sup> While these factors indicate that there is a good chance an autopsy report used by the prosecution in a criminal trial will be testimonial, there are imaginable circumstances in which it will be nontestimonial—such as where there are no identified suspects and there is low potential for abuse.<sup>221</sup>

### CONCLUSION

Due to a sharp split among the lower courts in the wake of *Crawford* and *Davis*, criminal defendants in a significant number of jurisdictions are being denied their constitutional right to confront the witnesses against them. In cases involving forensic science, many courts are applying federal constitutional law correctly. Many others, however, are still analyzing the evidence under a now-defunct *Roberts* test and reaching the wrong result, thereby preventing a large number of defendants from cross-examining the forensic scientists who function as powerful witnesses against them. Courts should announce that where the police request a forensic laboratory analysis of what seems to be evidence, that analysis is a *per se* testimonial statement of the person who played a significant role in conducting the scientific testing. Courts should undertake fact-intensive case-

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finitions of "testimonial," one of which deals with formalized statements such as affidavits).

220. The "what an objective person would reasonably think" standard has been used frequently in constitutional law, particularly in constitutional criminal procedure. See Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of Sexually Violent Predators*, 93 MINN. L. REV. 670, 713–19 (2008). With respect to the Confrontation Clause, the text of the Court's jurisprudence creates the foundation for such a test. See *Crawford*, 541 U.S. at 51–52 (discussing the "objective witness" formulation of a "testimonial" statement).

221. Somewhat paradoxically, there might be as much potential for prosecutorial abuse where the circumstances indicate that foul play might—but might not—have been involved, because in this situation the medical examiner's statement has the ability to propel or stall prosecution of any eventual suspect. This further supports the idea that autopsy reports will require fact-intensive analysis under the Confrontation Clause.

by-case analyses where autopsy reports are at issue, applying a totality of the circumstances test in which the identification of a suspect in a criminal investigation is an especially weighty factor.