

# BETWEEN SUBSTANCE AND PROCEDURE: A ROLE FOR STATES' INTERESTS IN THE SCOPE OF THE CONFRONTATION CLAUSE

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*This Note considers the constitutionality of state statutes establishing procedures that a criminal defendant must fulfill in order to assert his Sixth Amendment right to confront laboratory analysts who have prepared forensic reports introduced into evidence against him. These statutes—commonly known as “notice-and-demand” statutes—have become increasingly important in light of the Supreme Court’s recent decision in Melendez-Diaz v. Massachusetts, holding that in order to introduce a laboratory report into evidence, the prosecution must make the technician who prepared the report available at trial for the purpose of cross-examination. This opinion is the most recent in a line of cases, beginning with Crawford v. Washington, which have interpreted the Confrontation Clause to require courts to apply a bright line rule rather than a more flexible “reliability” standard when determining whether a particular statement triggers a defendant’s confrontation right. Critically, the doctrinal analysis driving the Court’s opinion in Melendez-Diaz did not permit the Court to take into account the significant implications of its holding for state forensic laboratories and criminal justice systems. Building on dicta in Melendez-Diaz suggesting that at least some notice-and-demand statutes are constitutional, this Note argues that the Court should take states’ interests into account when assessing the validity of these statutes. Finally, this Note urges the Court to recognize the important connection between substance and procedure, and to develop a framework for determining which state-imposed procedures impermissibly undercut the strong right to confrontation first established in Crawford and most recently confirmed in Melendez-Diaz.*

## INTRODUCTION

The Supreme Court’s decision in *Crawford v. Washington*<sup>1</sup> has been both applauded<sup>2</sup> and derided<sup>3</sup> for establishing a categorical rule in the field of constitutional criminal procedure—an area of constitutional ju-

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1. 541 U.S. 36 (2004).

2. See generally Jeffrey L. Fisher, Categorical Requirements in Constitutional Criminal Procedure, 94 Geo. L.J. 1493, 1496 (2006) [hereinafter Fisher, Categorical Requirements] (praising *Crawford* decision); Richard D. Friedman, Adjusting to *Crawford*: High Court Decision Restores Confrontation Clause Protection, Crim. Just., Summer 2004, at 4, 5 [hereinafter Friedman, Adjusting to *Crawford*] (same).

3. Cf. David A. Strauss, On the Origin of Rules (With Apologies to Darwin): A Comment on Antonin Scalia’s The Rule of Law as a Law of Rules, 75 U. Chi. L. Rev. 997, 998 (2008) (arguing that Justice Scalia’s commitment to originalism is inconsistent with rule adopted in *Crawford*, which was result of evolutionary, common law process). See generally Craig M. Bradley, Original Sin, Trial, Oct. 2008, at 52 (2008) (criticizing *Crawford* and its progeny).

risprudence historically filled with balancing tests.<sup>4</sup> Justice Scalia's opinion in *Crawford*, written on behalf of a unanimous court, held that the Sixth Amendment Confrontation Clause<sup>5</sup> requires that defendants have the opportunity at trial to confront "witnesses" who testify against them,<sup>6</sup> and defined "witnesses" as "those who 'bear testimony.'"<sup>7</sup> The Court, however, explicitly avoided any effort to define the full scope of what constitutes "testimony."<sup>8</sup> Thus, in the fallout of *Crawford*, courts across the country have struggled to determine which out-of-court statements require a declarant to be available at trial for purposes of cross-examination under the competing definitions of "testimonial" evidence set forth in *Crawford* and its progeny.<sup>9</sup>

Of the various categories of statements that may be testimonial under the *Crawford* line of cases, much has been written both by courts and academics in the debate over the status of forensic laboratory reports.<sup>10</sup> Prosecutors and the criminal defense bar are keenly aware of the

4. See, e.g., Fisher, *Categorical Requirements*, *supra* note 2, at 1498 (arguing that at least in criminal procedure there are strong arguments for adopting a categorical as opposed to a balancing approach).

5. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

6. *Crawford*, 541 U.S. at 53–54.

7. *Id.* at 51 (quoting 2 Noah Webster, *An American Dictionary of the English Language* 114 (1828)). Many scholars have characterized Justice Scalia's opinion as originalist. See, e.g., Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 *Geo. L.J.* 183, 184 (2005) (noting that in *Crawford*, Justice Scalia advocated for "originalist, formalist rethinking" of law); cf. Bradley, *supra* note 3, at 52–53 (criticizing Justice Scalia's use of "cases and treatises from the 19th century, which were not available to the framers," to distill the meaning of the Constitution).

8. See *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

9. Compare *People v. Geier*, 161 P.3d 104, 140 (Cal. 2007) (holding forensic reports are nontestimonial), and *Commonwealth v. Verde*, 827 N.E.2d 701, 706 (Mass. 2005) (same), with *Hinojos-Mendoza v. People*, 169 P.3d 662, 666–67 (Colo. 2007) (holding forensic reports are testimonial), and *Johnson v. State*, 929 So. 2d 4, 8 (Fla. Dist. Ct. App. 2005) (same).

10. See, e.g., Bradley Morin, Note, *Science, Crawford, and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports*, 85 *B.U. L. Rev.* 1243, 1255–69 (2005) (discussing conflicting state court decisions regarding status of laboratory reports); Matthew Yanovitch, Comment, *Dissecting the Constitutional Admissibility of Autopsy Reports After Crawford*, 57 *Cath. U. L. Rev.* 269, 287–91 (2008) (surveying state court decisions dealing with admissibility of laboratory reports post-*Crawford* and finding state holdings in tension with Supreme Court precedent); Paul C. Giannelli, *Admissibility of Lab Reports: The Right of Confrontation Post-Crawford*, *Crim. Just.*, Fall 2004, at 26, 27 (2004) [hereinafter Giannelli, *Admissibility of Lab Reports*] (discussing issues raised in lab report debate).

Due to both practical concerns and doctrinal considerations, this Note does not distinguish between the various forensic sciences. Thus, the term "laboratory report" encompasses all forensic reports without regard to the particular methods used. As the National Research Council of the National Academies explained in a recent report

significance of forensic reports in modern criminal trials.<sup>11</sup> Given the

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detailing major deficiencies in the “forensic science infrastructure” of the United States, the term forensic science covers a host of disciplines that vary widely

with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material. Some of the forensic science disciplines are laboratory based (e.g., nuclear and mitochondrial DNA analysis, toxicology and drug analysis); others are based on expert interpretation of observed patterns (e.g., fingerprints, writing samples, toolmarks, bite marks, and specimens such as hair).

Nat’l Research Council of the Nat’l Acads., Strengthening Forensic Science in the United States: A Path Forward 6–7, 39 (2009) [hereinafter National Academy Report]. The Committee that drafted the report concluded that it would be impracticable to address each discipline separately. *Id.* at 7. Similar concerns apply to this Note.

Moreover, to the extent that the Supreme Court’s current Confrontation Clause doctrine does not take into account the reliability of evidence when determining whether a witness must be available for purposes of cross-examination, the key difference between the various forensic sciences—their accuracy—is largely irrelevant. See *infra* Part I.B.1 (analyzing the Supreme Court’s decision in *Crawford v. Washington*, 541 U.S. 36, in which the Court jettisoned reliability as a criteria for determining whether a defendant has a right to confront a witness). The Supreme Court’s recent decisions considering whether laboratory reports trigger a defendant’s right to confrontation are consistent with this view. After the Court issued its decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), holding that a defendant had the right to confront a forensic analyst who prepared a report certifying that a seized substance was cocaine, the Court issued summary opinions in a number of cases dealing with other types of forensic evidence. See Steven N. Yermish, *Melendez-Diaz and the Application of Crawford in the Lab*, *The Champion*, Aug. 2009, at 28, 30 (arguing that Supreme Court’s decision to “issue[ ] summary dispositions, or “GVR” opinions, in several cases based upon *Melendez-Diaz*” confirms that the *Melendez-Diaz* holding “applies to other forensic evidence that is subject to lab analysis” including “DNA, ballistics, fingerprint, serology, toxicology, and alcohol testing”).

11. Jurors place a great deal of weight on forensic evidence, especially DNA evidence. See National Academy Report, *supra* note 10, at 48–49 (“Some [scholars] are concerned that the conclusiveness and finality of the manner in which forensic evidence is presented on television results in jurors giving more or less credence to the forensic experts and their testimony than they should, raising expectations, and possibly resulting in a miscarriage of justice.”); Pub. Defender Serv. for the District of Columbia, *Brady Poll Results 2* (2003), available at <http://www.pdsdc.org/Resources/SLD/Brady%20Poll%20Results,%20December%202003.pdf> (on file with the *Columbia Law Review*) (concluding that those surveyed found DNA evidence more persuasive than any other form of evidence considered in the survey); Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 *Yale L.J.* 1050, 1055 (2006) (concluding that while *CSI* effect is plausible it is unclear whom it benefits—prosecutors or defendants); Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 *Yale L.J.* Pocket Part 70, 70 (2006), available at <http://yalelawjournal.org/images/pdfs/32.pdf> (on file with the *Columbia Law Review*) (discussing survey showing “38% [of prosecutors] believed they had at least one trial that resulted in either an acquittal or hung jury because forensic evidence was not available”); see also Diane Boudreau, *CSI Effect: Not Guilty*, *Ariz. St. U. Res. Stories*, Mar. 24, 2008, at [http://researchstories.asu.edu/2008/03/csi\\_effect\\_gets\\_a\\_not\\_guilty\\_v.html](http://researchstories.asu.edu/2008/03/csi_effect_gets_a_not_guilty_v.html) (on file with the *Columbia Law Review*) (noting that even if in *CSI* episodes, forensics do not play significant role in determining whether a defendant is convicted, belief in the “*CSI* effect” may have affected the behavior of prosecutors and defense attorneys). Changes in science have also increased the significance of forensic reports. Cf. Brandon L. Garrett, *Judging Innocence*, 108 *Colum. L. Rev.* 55, 55 (2008) (presenting findings of first empirical study on “how the criminal system in the United States handled

importance of this evidence, prosecutors warned that if these reports are classified as testimonial, states—the primary sponsors and executors of criminal justice<sup>12</sup>—will be unable to bear the increased burden of ensuring that laboratory technicians who conduct forensic testing are also available at trial for the purposes of cross-examination.<sup>13</sup> This additional cost will fall on state forensic laboratory systems that are already severely underfunded and overburdened.<sup>14</sup> Of course, for criminal defendants the argument is equally, if not more, compelling. Organizations like the Innocence Project frequently provide shocking stories about the pervasiveness of outright misconduct and unintended human error in forensic laboratories.<sup>15</sup> Given the significance of forensic evidence in jury decisionmaking, it is not surprising that faulty laboratory reports figure prominently in many postconviction exonerations.<sup>16</sup> Although cross-examination will not fully remedy the problems associated with forensic reports, to the extent that in-court confrontation may help a defendant alert the jury to problematic laboratory practices, the additional cost to the state may be necessary.<sup>17</sup>

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the cases of people who were subsequently found innocent through postconviction DNA testing”).

12. Much has been written on the “federalization” of criminal law under statutes like RICO. See, e.g., Thane Rehn, Note, RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law, 108 Colum. L. Rev. 1991, 1991 (2008) (considering tension between the “rapid expansion of federal criminal law” and modern Court’s “limits on the scope of congressional commerce power”). The majority of criminal cases, however, still take place in state courts. See Roger A. Hanson & David B. Rottman, United States: So Many States, So Many Reforms, 20 Just. Sys. J. 121, 122 (1999) (“[S]tate general jurisdiction trial court judges resolve 416 criminal cases each year (more than five times the number of criminal cases handled by their federal counterparts).”).

13. Brief of the State of Alabama et al. as Amici Curiae Supporting Respondent at 24–29, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) [hereinafter Brief of the States].

14. Id.; see also National Academy Report, *supra* note 10, at 39 (discussing the “number of factors”—including “[i]nsufficient [r]esources”—that “have combined in the past few decades to place increasing demands on an already overtaxed, inconsistent, and underresourced forensic science infrastructure”).

15. See Innocence Project, *Understand the Causes: Unvalidated or Improper Forensic Science*, at <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php> (last visited Aug. 26, 2009) (on file with the *Columbia Law Review*) (providing examples of wrongful convictions based largely on misplaced trust in forensic evidence).

16. Id. See generally National Academy Report, *supra* note 10, at 14–16 (identifying numerous deficiencies in the forensic laboratory system, including a lack of scientific knowledge and inadequate resources and oversight); Solomon Moore, Science Found Wanting in Nation’s Crime Labs, N.Y. Times, Feb. 5, 2009, at A1 (discussing National Academy of Sciences report detailing “shoddy scientific practices” involved in creation of forensic evidence that has been used to convict “thousands of defendants for nearly a century”); John Solomon, FBI’s Forensic Test Full of Holes, Wash. Post, Nov. 18, 2007, at A1 (discussing “hundreds of defendants sitting in prisons nationwide [who] have been convicted with the help of an FBI forensic tool [bullet lead analysis] that was discarded more than two years ago” as “unreliable and potentially misleading”).

17. See Petition for Writ of Certiorari at 16, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591), 2007 WL 3252033 (arguing cross-examination exposes error and promotes integrity

In *Melendez-Diaz v. Massachusetts* the Supreme Court put to rest the primary issue raised in the laboratory report debate by holding that these documents are covered under the *Crawford* interpretation of the Confrontation Clause.<sup>18</sup> The effect of the decision on state criminal justice systems received significant attention in the briefing and the oral argument for the case, as well as in a dissenting opinion authored by Justice Kennedy.<sup>19</sup> However, in reaching its holding, the majority opinion stressed that under the testimonial analysis established by *Crawford* to govern which out-of-court statements trigger the defendant's right to confrontation, there is no doctrinal framework for the Court to take these state interests into account.<sup>20</sup>

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of forensic labs). Confrontation as defined in *Crawford* may be an inadequate remedy to the systemic deficiencies of forensic laboratories across the United States. After the Supreme Court's holding in *Melendez-Diaz*, however, defendants may have maxed out the potential of the Confrontation Clause to take on this larger problem—at least under the current *Crawford* framework (which is significantly more powerful than the right recognized under the previous doctrine, see *infra* Part I.A). Not only does *Crawford* create a right that is vested in the defendant for use as he sees fit, but it also creates a rule whose application is clear *ex ante*. See Fisher, Categorical Requirements, *supra* note 2, at 1518–19 (discussing the superior administrability and predictability of categorical rules). Criminal defendants can use their right to confront lab analysts as an additional bargaining chip in pretrial negotiations with the government. See Posting of Pamela Metzger, in Response to Lab Reports and a Notice-and-Demand Statute—A Significant Decision from Minnesota, The Confrontation Blog, at <http://confrontationright.blogspot.com/2006/10/lab-reports-and-notice-and-demand.html#comments> (Oct. 7, 2006, 00:13 EST) (on file with the *Columbia Law Review*) [hereinafter Metzger, Blog Post] (“[D]efense lawyers won’t routinely give something . . . for nothing.” (emphasis omitted)).

18. *Melendez-Diaz*, 129 S. Ct. at 2532.

19. For example, during the petitioner's argument, Justice Kennedy commented that \$1 billion out of the \$6 billion federal courts' budget is “spent under the Criminal Justice Act for experts and translators and counsels . . . . [T]his is a very, very substantial burden if we tell every State in the country that . . . in every drug case . . . the State must produce the expert.” Transcript of Oral Argument at 21–22, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591), 2008 WL 4892843 [hereinafter Transcript of *Melendez-Diaz* Oral Argument]. For discussion of states' interests identified in the *Melendez-Diaz* briefs, see *infra* notes 104–106 and accompanying text. In the opinion itself, both the majority and the dissent considered the effect of the Court's holding on state criminal justice systems. 129 S. Ct. at 2540–42 (discussing states' interests); *Id.* at 2549–50 (Kennedy, J. dissenting) (same). The majority disputed the extent to which its holding would actually burden laboratories but, more importantly, it stressed that the Confrontation Clause does not permit these considerations to be taken into account. *Id.* at 2540 (noting that “[i]t is not clear whence we would derive the authority to” modify the confrontation right to take into account states' interests).

20. See *Melendez-Diaz*, 129 S. Ct. at 2540. The limited capacity of the *Crawford* testimonial analysis to capture other conflicting interests implicated by the Confrontation Clause has been documented elsewhere, most notably in domestic violence and child abuse contexts where prosecutors try to avoid forcing victims to undergo the traumatic experience of taking the stand. For discussion of domestic violence concerns, see, e.g., Tom Lininger, Prosecuting Batterers After *Crawford*, 91 Va. L. Rev. 747, 749–52 (2005) (noting *Crawford's* immediate deleterious impact on domestic violence prosecutions); Myrna S. Raeder, Domestic Violence Cases After *Davis*: Is the Glass Half Empty or Half Full?, 15 J.L. & Pol'y 759, 761–62 (2007) (discussing difficulty of applying the Court's post-

Despite the majority's emphasis on the categorical nature of the right to confrontation, the decision in *Melendez-Diaz* simultaneously hinted at a potential outlet for states' interests that have been excluded from post-*Crawford* Confrontation Clause jurisprudence. Specifically, the Court suggested that states may still be permitted to operationalize the confrontation right by implementing procedures that minimize unnecessary expenditures—so long as these procedures do not overly burden the defendant's right to confrontation.<sup>21</sup> Even before *Crawford*, many states passed legislation known as “notice and demand” statutes (N & D statutes).<sup>22</sup> These statutes vary greatly state to state, but in general they require prosecutors to provide criminal defendants with notice of their intent to introduce a forensic laboratory report at trial and to inform the defendant of his right to demand that the technician who prepared the report be present at trial for cross-examination.<sup>23</sup> Assuming the prosecution satisfies these preliminary steps, the defendant is obligated to conform to a prescribed procedure—which may be as simple as filing a written request that the analyst testify—to access his right to confrontation.<sup>24</sup>

In the aftermath of *Melendez-Diaz*, these statutes will assume even greater importance as states rely on them to limit the costs of the Court's decision by “decreas[ing] the likelihood that a defendant will actually confront the forensic examiner.”<sup>25</sup> State courts already have begun to assess the constitutionality of these statutes<sup>26</sup> and immediately after issuing its decision in *Melendez-Diaz*, the Supreme Court granted certiorari in *Briscoe v. Virginia* to consider the constitutionality of one of the more burdensome versions of these procedures.<sup>27</sup>

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*Crawford* holdings to statements of domestic violence victims to police immediately following episode of abuse).

21. *Melendez-Diaz*, 129 S. Ct. at 2541 & n.12 (recognizing authority of States to adopt the “simplest” forms of “procedural rules governing objections” but leaving open the question of whether more burdensome procedures are constitutional).

22. Paul C. Giannelli was the first person to coin the phrase “notice and demand” statutes. Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 481 n.20 (2006) [hereinafter Metzger, *Cheating*]; see also Paul C. Giannelli, *Expert Testimony and the Confrontation Clause*, 22 Cap. U. L. Rev. 45, 46, 84 (1993) [hereinafter Giannelli, *Expert Testimony*] (encouraging states to adopt N & D statutes).

23. Metzger, *Cheating*, supra note 22, at 481–82; see infra Part II.B (discussing N & D statutes).

24. Metzger, *Cheating*, supra note 22, at 482.

25. *Id.* at 516.

26. Many of the post-*Crawford* state court cases assessing the constitutionality of N & D statutes are reviewed and discussed infra Part II.C.1 & 2.

27. *Magruder v. Commonwealth*, No. 1982-05-4, 2007 WL 737552 (Va. Ct. App. Mar. 13, 2007), *aff'd* 657 S.E.2d 113 (Va. 2008), cert. granted sub nom *Briscoe v. Virginia*, 129 S. Ct. 2858 (2009). According to the petitioner in *Briscoe*, the question before the Court is:

If a state allows a prosecutor to introduce a certificate of forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?

This Note argues that certain types of N & D statutes should be constitutional and proposes a framework for determining whether a particular statute comports with the Confrontation Clause. This framework both secures the right to confrontation and provides state legislatures with sufficient flexibility to craft state-specific procedures controlling the exercise of this right. Part I analyzes the scope of the Confrontation Clause under *Crawford* and subsequent decisions that establish which out-of-court statements are covered by the confrontation right. It also examines the Supreme Court's decision in *Melendez-Diaz* and demonstrates how state interests are not accounted for in the Court's finding that laboratory reports are "testimonial." Part II argues that the categorical understanding of the Confrontation Clause adopted in *Crawford* may overly burden state criminal justice systems. Moreover, it describes the range of N & D statutes that states have passed to operationalize the Confrontation Clause right and provides a brief discussion of the current jurisprudence assessing the constitutionality of N & D statutes, including the Supreme Court's extensive dicta in *Melendez-Diaz* and numerous state court opinions. Part II concludes by arguing that while the Confrontation Clause should limit the ability of states to craft certain types of N & D statutes, there are strong legal and policy-based reasons why it should not function as an absolute bar. Finally, Part III assesses the various frameworks the Supreme Court could use to assess the constitutionality of N & D statutes and ultimately recommends a "constitutional ceiling" approach that would provide lower courts and state legislatures with clear guidelines for determining if a statute overly burdens a defendant's right to confrontation.

### I. *CRAWFORD V. WASHINGTON*: A CATEGORICAL RULE AND ITS IMPLICATIONS

This Part describes the interpretation of the Confrontation Clause established by *Crawford v. Washington* by providing an overview of the Supreme Court's Confrontation Clause jurisprudence prior to *Crawford* and then tracing the development of the meaning of "testimonial" after *Crawford*, especially in the context of laboratory reports.

#### A. *Ohio v. Roberts*

1. *Aligning the Scope of the Law of Hearsay and the Confrontation Clause.* — Confrontation Clause doctrine prior to *Crawford* was established by the Supreme Court in *Ohio v. Roberts*.<sup>28</sup> In *Roberts*, the Court adopted an interpretation of the Clause that harmonized the requirements of the Sixth Amendment with the limits on the admissibility of out-of-court statements

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Petition for a Writ of Certiorari at i, *Briscoe*, 129 S. Ct. 2858 (No. 07-11191), 2008 WL 6485425 [hereinafter *Briscoe* Petition]. For additional discussion of why the procedure at issue in *Briscoe* is more burdensome than other types of N & D statutes, see Part II.B.

28. 448 U.S. 56 (1980).

in the law of evidence (known as “hearsay”).<sup>29</sup> The Court’s decision to align these two bodies of law was not inevitable.<sup>30</sup> The text of the Confrontation Clause on its face appears categorical: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>31</sup> However, hearsay law—the rules of evidence governing the admissibility of statements made outside of court—is riddled with exceptions<sup>32</sup> that are intended to allow judges<sup>33</sup> to admit statements they consider to be “reliable.”<sup>34</sup> By holding that the underlying purpose of the Confrontation Clause was the same as the law of hear-

29. Not all states use the same rules as the Federal Rules of Evidence (FRE), but the basic concepts are generally consistent. David Alan Sklansky, *Evidence: Cases, Commentary, and Problems* 5 (2d ed. 2008). The argument in this Note is based on the Federal Rules of Evidence, which define hearsay 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.” Fed. R. Evid. 801(c).

30. See Thomas J. Reed, *Crawford v. Washington* and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule, 56 S.C. L. Rev. 185, 199, 216 (2004) (characterizing harmonization of law of hearsay with Confrontation Clause in *Roberts* as “shotgun wedding” and *Crawford* as “irreconcilable breakdown of the relationship”); see also Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1022–26 (1998) [hereinafter Friedman, *Basic Principles*] (making originalist argument that law of hearsay was not intended to be same as right to confrontation).

31. U.S. Const. amend. VI.

32. The first “exception” is built into the definition of hearsay itself. Out-of-court statements are not prohibited by the hearsay rule if they are not offered for their truth (e.g. for purposes of impeachment, theory of notice, etc.). Fed. R. Evid. 801(c). In Confrontation Clause jurisprudence, a similar not-for-the-truth “exception” seems to exist. See *Roberts*, 448 U.S. at 62 n.4, 63 (holding Confrontation Clause was “intended to exclude some hearsay” and defining hearsay as “‘testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein’” (citation omitted)). In *Crawford v. Davis*, the Court seemed to maintain the “exception” by mentioning that “[t]he [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” 541 U.S. 36, 59 n.9 (2004) (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). For an argument that dicta in *Crawford* does not capture the limits imposed on the use of out-of-court statements not for their truth, see Jeffrey L. Fisher, *The Truth About the “Not for Truth” Exception to Crawford*, *The Champion*, Jan./Feb. 2008, at 18, 18–19.

Beyond the not-for-its-truth exception, Federal Rule of Evidence 801 also establishes several categories of statements that are “not hearsay” even if they are offered for their truth. Rule 802 bars all hearsay unless its admission is “provided by these rules.” Rules 803 and 804 set out the hearsay “exceptions”—those circumstances when a statement that qualifies as hearsay under 801 is, nevertheless, admissible (e.g., statements of “present sense impression,” “public records,” and “former testimony”). Finally, Rule 807 creates a “residual exception,” allowing hearsay statements that do not fall into one of the 803 and 804 exceptions to be admitted if they have certain indicia of “trustworthiness.”

33. Judges determine the admissibility of hearsay. Fed. R. Evid. 104(a).

34. Fed. R. Evid. art. VIII advisory committee’s note (arguing that when forced to choose between “less than best [evidence] and no evidence at all” it would be unreasonable to adopt a policy that required all courts at all times to “do[ ] without” and that instead hearsay law is “subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness”).

say—to ensure the reliability of evidence at trial<sup>35</sup>—and that in-court confrontation was merely a *preferred* method of ensuring this reliability, the Court created a system in which a statement that could be admitted under the rules of hearsay was also likely to survive a challenge under the Confrontation Clause.<sup>36</sup> The Court further collapsed the distinctions between these two bodies of law by holding that “[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”<sup>37</sup> Furthermore, even if this type of calcified hearsay exception did not exist, courts confronted with an especially compelling set of facts were free to consider other “particularized guarantees of trustworthiness” before deciding if the “evidence must be excluded.”<sup>38</sup> Thus, decisions of admissibility under both the rules of hearsay and the Confrontation Clause hinged on a judicial assessment of reliability.

2. *States’ Interests*<sup>39</sup> and the *Justification for the Roberts Test*. — Another important feature of Confrontation Clause jurisprudence under *Roberts* was the Court’s willingness to take into account the interests of both criminal defendants and the states when determining to which statements the Confrontation Clause applied. Justice Blackmun’s majority opinion recognized that the accused’s interest in exercising the right to cross-examination is “so important that the absence of proper confrontation at trial ‘calls into question the ultimate “integrity of the fact-finding process.”’”<sup>40</sup> The Court, however, also acknowledged that “competing interests, if ‘closely examined’ may warrant dispensing with confrontation at trial.”<sup>41</sup>

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35. *Roberts*, 448 U.S. at 65 (“The focus of the Court’s concern has been to insure that there are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant . . . .” (citations omitted) (internal quotation marks omitted)).

36. *Id.* at 63 (“The Court has emphasized that the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial . . . .” (emphasis added)). But see Akhil Reed Amar, Foreword: Sixth Amendment First Principles, 84 *Geo. L.J.* 641, 690 (1996) [hereinafter Amar, *First Principles*] (arguing that Supreme Court holdings suggesting that Sixth Amendment requirement of confrontation is merely preference must be wrong, in part because “the word ‘preference’ nowhere appears in the Fourth and Sixth Amendments, or in their accompanying history”).

37. *Roberts*, 448 U.S. at 66. Another potential protection of the confrontation right under *Roberts* was a requirement that for the out-of-court statement to be introduced, the declarant had to be unavailable. *Id.* Over time, however, the Court seemed to move away from this requirement. See Miguel A. Méndez, *Crawford v. Washington: A Critique*, 57 *Stan. L. Rev.* 569, 576 (2004) (“Notions that the Confrontation Clause required the prosecution to produce or show the unavailability of the hearsay declarant in all cases were dispelled in *United States v. Inadi.*”); Reed, *supra* note 30, at 199–216 (tracing breakdown of this requirement).

38. *Roberts*, 448 U.S. at 66. This exception in *Roberts* echoes the residual hearsay exception in the Federal Rules of Evidence. See Fed. R. Evid. 807 (admitting reliable evidence outside of 803 and 804 categories).

39. The Sixth Amendment was incorporated to apply to the states via the Fourteenth Amendment in *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

40. *Roberts*, 448 U.S. at 64 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (citation omitted)).

41. *Id.*

In support of this claim, the Court pointed not only to specific prior cases but also the “common-law tradition” through which the Court has “sought to accommodate these competing interests.”<sup>42</sup>

It is telling that Justice Brennan, a strong proponent of defendants’ rights, who authored a dissent in *Roberts*, did not dispute the analytic framework put forth by Justice Blackmun’s majority. Rather than arguing that there was no place for states’ interests in defining the scope of the individual right to confrontation, Justice Brennan and his fellow dissenters merely objected to the application of the majority’s holding to the facts in the case.<sup>43</sup>

## B. *Crawford v. Washington*: *Replacing Reliability with Testimonial*

1. *The Holding in Crawford*. — In *Crawford v. Washington*, the Supreme Court upended close to a quarter century’s worth of jurisprudence linking the protection afforded criminal defendants by the Confrontation Clause to the reliability analysis of the hearsay rules of evidence.<sup>44</sup> Relying on an originalist reading of the Constitution,<sup>45</sup> Justice Scalia—writing for a Court unanimous in the judgment—looked to the status of the common law at the time of the founding to determine the original understanding of the Confrontation Clause. This led to two critical shifts in Confrontation Clause doctrine.<sup>46</sup>

First, Justice Scalia concluded that the “principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”<sup>47</sup> This purpose animates the text of the Clause, which is otherwise ambiguous: As Justice Scalia points out, without an understanding of the historical context, the term “witness” could refer solely to in-court declarants.<sup>48</sup> By applying the Confrontation Clause

42. *Id.*

43. *Id.* at 78–79 (Brennan, J., joined by Marshall & Stevens, JJ., dissenting). Justice Brennan stressed that the prosecution bears a “a heavy burden . . . to secure the presence of the witness or to demonstrate the impossibility of that endeavor,” but he did not challenge the majority’s basic claim that at some point the defendant’s interest should be considered in relation to the state interest in administering justice. *Id.*

44. See, e.g., Friedman, *Adjusting to Crawford*, *supra* note 2, at 5 (“In *Crawford v. Washington*, the U.S. Supreme Court radically transformed its doctrine governing the Confrontation Clause . . . .” (citation omitted)); Reed, *supra* note 30, at 216 (arguing that *Crawford* divorced Confrontation Clause from law of hearsay).

45. For analysis of originalism in *Crawford*, see Bibas, *supra* note 7, at 189–93; Bradley, *supra* note 3, at 54. As in most originalist decisions, the historical basis of the rule is disputed. For competing sides of the historical debate, see generally Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford’s “Cross-Examination Rule”: A Reply to Mr. Kry*, 72 *Brook. L. Rev.* 557 (2007); Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 *Brook. L. Rev.* 493 (2007).

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

47. *Id.* at 50.

48. *Id.* at 50–51.

right to “‘witnesses’ against the accused,”<sup>49</sup> the Framers created a right to confront not only in-court witnesses but all “those who ‘bear testimony’” against the defendant. “‘Testimony,’ in turn, is defined as ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”<sup>50</sup> In short, Justice Scalia’s analysis transforms the term “witness” in the Confrontation Clause into a place marker for the concept that criminal defendants have a right to confront any “testimonial” statement.<sup>51</sup> While Justice Scalia provides some hints as to what constitutes a testimonial statement, the analysis is overtly inconclusive.<sup>52</sup>

Second, the opinion made clear that the nature of the right embodied by the Confrontation Clause is a procedural constitutional requirement that cannot be dispensed with simply because a judge has decided that proffered evidence is reliable; thus, the fact that an out-of-court statement falls into a “firmly rooted hearsay exception” has limited relevance

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49. *Id.* at 51.

50. *Id.* (quoting Webster, *supra* note 7, at 114). For criticism of Justice Scalia’s selection of this definition of “witness,” see Randolph N. Jonakait, “Witnesses” in the Confrontation Clause: *Crawford v. Washington*, Noah Webster, and Compulsory Process, 79 *Temp. L. Rev.* 155 (2006).

51. Vague dicta in *Crawford* suggested that there might still be room for a *Roberts* analysis to limit the admissibility of nontestimonial statements. Justice Scalia commented that “[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*.” *Crawford*, 541 U.S. at 68. Post-*Crawford*, some scholars argued that *Roberts* or an alternative framework should grant defendants a right to confront certain nontestimonial statements. See, e.g., Robert P. Mosteller, Confrontation as Constitutional Criminal Procedure: *Crawford’s* Birth Did Not Require that *Roberts* Had to Die, 15 *J.L. & Pol’y* 685, 686 (2007) (noting author’s initial post-*Crawford* hope “that *Roberts* would be allowed to continue to provide supplementary protection for nontestimonial hearsay that was facially problematic”); The Supreme Court, 2003 Term—Leading Cases, 118 *Harv. L. Rev.* 316, 322 (2003) [hereinafter Supreme Court—Leading Cases] (“[T]he Court failed to instruct conclusively whether any nontestimonial statements receive the protection of the Confrontation Clause.”). Courts too were confused. See James J. Duane, The Cryptographic Coroner’s Report on *Ohio v. Roberts*, *Crim. Just.*, Fall 2006, at 37, 37 (describing post-*Crawford* uncertainty as to whether *Roberts* still applied to nontestimonial hearsay). Chief Justice Rehnquist, however, in his concurring opinion was quite clear that the majority was overruling *Roberts*: “I dissent from the Court’s decision to overrule *Ohio v. Roberts*.” 541 U.S. at 69 (Rehnquist, C.J., concurring in the judgment); see also W. Jeremy Counsellor & Shannon Rickett, The Confrontation Clause After *Crawford v. Washington*: Smaller Mouth, Bigger Teeth, 57 *Baylor L. Rev.* 1, 3 (2005) (“*Crawford* . . . narrows the scope of the Clause’s application to only . . . testimonial statements made to the government for use in a later proceeding.”). *Davis v. Washington* ended the debate, holding that “a limitation [to testimonial statements] so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter.” 547 U.S. 813, 824 (2006). Despite this clear statement, confusion persists in the lower courts. Duane, *supra*, at 38 (noting that “lower courts have thus far been almost completely unable to accurately decipher what *Davis*” meant for continuing validity of *Roberts*).

52. *Crawford*, 541 U.S. at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”). For a discussion of how to define testimonial, see *infra* Parts I.B.2 & I.C.

to determining whether the Confrontation Clause applies.<sup>53</sup> The text of the Constitution does not merely create a right to reliable evidence; it creates a right to a specific procedure to assess the reliability of evidence, “testing in the crucible of cross-examination.”<sup>54</sup> Indeed, the Court noted that as part of the *Roberts* reliability analysis, lower courts had mistaken for indicia of reliability the same factors that the Framers would have thought make a statement testimonial.<sup>55</sup>

The final result of Justice Scalia’s analysis in *Crawford* is a categorical rule: The Confrontation Clause applies to all testimonial statements.<sup>56</sup> Consequently, unless the declarant who made the out-of-court testimonial statement is present at trial,<sup>57</sup> the defendant can bar the admission of his statement unless the prosecution can demonstrate that the witness is

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53. *Crawford*, 541 U.S. at 60, 62. The Court, however, based its holding in part on the common law at the time of the founding and left open the possibility that statements falling into historic hearsay exceptions might not be covered by the Confrontation Clause. *Id.* at 43, 56 (identifying “common law” as “founding generation’s immediate source of the [confrontation] concept” and suggesting that statements, such as “business records or statements in furtherance of a conspiracy,” that fit within historic hearsay exceptions are not testimonial). In *Crawford*, it is unclear whether these statements do not trigger the confrontation right because of their status as historic hearsay exceptions or because these statements would not have been considered testimonial. *Id.* The Court resolved the question in *Melendez-Diaz*, holding that “[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.” 129 S. Ct. 2527, 2539–40 (2009).

54. *Crawford*, 541 U.S. at 61.

55. *Id.* at 65 (“[O]ne court relied on the fact that the witness’s statement was made to police while in custody on pending charges . . . . Other courts routinely rely on the fact that a prior statement is given under oath in judicial proceedings.” (citations omitted)).

56. *Id.* at 69. Arguably, *Crawford* also holds that the Confrontation Clause only applies to testimonial statements. See *supra* note 51 (surveying conflicting academic and judicial opinions about scope of *Crawford*’s holding). For praise of this rule, see Bibas, *supra* note 7, at 183 (“*Crawford* succeeded because it cleared away muddled case law, laid a strong foundation in the historical record, and erected a simple, solid, workable rule.”). But see Won Shin, Recent Development, *Crawford v. Washington: Confrontation Clause Forbids Admissions of Testimonial Out-of-Court Statements Without Prior Opportunity to Cross-Examine*, 40 Harv. C.R.-C.L. L. Rev. 223, 231 (2005) (arguing that testimonial is unstable category and noting that in other areas of criminal procedure, Supreme Court has struggled to establish “consistent definition of testimonial statements”); cf. *Crawford*, 541 U.S. at 74–76 (Rehnquist, C.J. concurring in the judgment) (arguing against categorical rule barring testimonial evidence and suggesting that predictability majority promises may prove illusory).

57. *Crawford*, 541 U.S. at 59 n.9 (“[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” (citing *California v. Green*, 399 U.S. 149, 162 (1970))). Scholars argue that this aspect of the *Crawford* decision and *California v. Green* should be changed to take into account situations where a witness’s failed memory or other exigent circumstances render cross-examination regarding an out-of-court statement at trial merely pro forma. See, e.g., Méndez, *supra* note 37, at 590–93.

unavailable *and* that the defendant had a prior opportunity to confront the declarant.<sup>58</sup>

2. *Defining Testimonial: Where Crawford Was Silent.* — In the wake of *Crawford*, many commentators assessed the case's significance not only in terms of what the Court had held, but also what it failed to say.<sup>59</sup> Most important to this Note is the Court's failure to fully define the contours of the concept embedded at the heart of the new Confrontation Clause framework: testimonial statements. Rather than adopting a single definition, Justice Scalia identified three potential meanings: (1) "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially";<sup>60</sup> (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions";<sup>61</sup> 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>62</sup> Notably, Justice Scalia also suggested that the testimonial category was designed to protect against government involvement in the creation of evidence "with an eye toward trial" as these situations "present[ ] unique potential for prosecutorial abuse."<sup>63</sup> The majority, however, declined to adopt any one of these potential meanings, holding instead that the statement at issue in *Crawford*—the outcome of a post-*Miranda* custodial interrogation<sup>64</sup>—was clearly testimonial under any of the proposed definitions.<sup>65</sup>

Despite Justice Scalia's claim that these "formulations all share a common nucleus" and merely differ to the extent that they define the scope of what is testimonial at "various levels of abstraction,"<sup>66</sup> scholars have argued that much is at stake depending on which (if any) of these

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58. *Crawford*, 541 U.S. at 54.

59. See Méndez, *supra* note 37, at 587 ("*Crawford's* principal contribution is its potential to halt the inevitable erosion of confrontation rights inherent in the *Roberts-Wright* line of cases . . . . But *Crawford* too has its costs. Chief among them is uncertainty about the definition of 'testimonial statements.'"); Supreme Court—Leading Cases, *supra* note 51, at 317 (2004) ("*Crawford* is as significant for the questions it raised and left unanswered as for those it resolved."). For identification and analysis of some of the issues left open in *Crawford*, see Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 *Cato Sup. Ct. Rev.* 439, 456–68.

60. *Crawford*, 541 U.S. at 51 (internal quotation marks omitted).

61. *Id.* at 51–52 (internal quotation marks omitted).

62. *Id.* at 52 (internal quotation omitted).

63. *Id.* at 56 n.7.

64. *Id.* at 38.

65. *Id.* at 68 ("Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.").

66. *Id.* at 52.

definitions is ultimately taken up by the Court.<sup>67</sup> Even within the *Crawford* decision itself, Justice Scalia cited approvingly to works by both Professors Richard D. Friedman and Akhil Reed Amar, despite key irreconcilable differences in the definitions of testimonial offered by their two approaches.<sup>68</sup>

### C. *Defining Testimonial in the Post-Crawford Era and Forensic Laboratory Reports*

1. *Davis v. Washington and the “Primary Purpose” Definition of Testimonial.* — In *Davis v. Washington*, the first Supreme Court case to revisit the broad definition of testimony introduced in *Crawford*, the Court considered whether statements made to the police in a domestic violence context triggered the Confrontation Clause.<sup>69</sup> Writing for an eight-Justice majority, Justice Scalia’s opinion expanded the testimonial category beyond “statements of the most formal sort—sworn testimony in prior judicial proceedings or formal depositions under oath.”<sup>70</sup> The opinion held that:

67. Perhaps the area that has received the most attention is domestic abuse. See *supra* note 20.

68. *Crawford*, 541 U.S. at 61 (citing Akhil Reed Amar, *The Constitution and Criminal Procedure* 125–31 (1997), and Friedman, *Basic Principles*, *supra* note 30). While Professor Friedman has argued for a definition of testimonial that is most in line with the third definition of testimonial laid out in *Crawford*, Professor Amar has advocated for an approach that is analogous to the first and second definitions. Compare Friedman, *Adjusting to Crawford*, *supra* note 2, at 9 (“I believe the third of these [definitions of testimonial in *Crawford*] is the most useful and accurate.”), with Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 *Geo. L.J.* 1045, 1045 (1998) (agreeing with Professor Friedman’s claim that Confrontation Clause only applies to those who are “witnesses” but arguing that definition of “witnesses” offered by Friedman is “a tad too broad” and suggesting that “the Clause encompasses only those ‘witnesses’ who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like”). Although Justice Thomas seems more concerned with formality than government involvement, Amar’s conclusions are largely in accord with the approach towards the Confrontation Clause articulated in Justice Thomas’s concurring opinion in *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring), and his partial dissent in *Davis v. Washington*, 547 U.S. 813, 836–37 (2006) (Thomas, J., concurring in judgment in part and dissenting in part).

69. 547 U.S. at 817. *Davis* was a consolidation of two cases concerning statements obtained by law enforcement in the domestic violence context—*Davis v. Washington* and *Hammon v. Indiana*. In *Davis*, the Supreme Court of Washington found that a domestic violence victim’s statements in response to a 911 operator’s questions were nontestimonial. *Id.* at 817–19. In *Hammon v. Indiana*, the Indiana Supreme Court held that statements made by a domestic violence victim to police officers who had arrived at the victim’s home in response to a “reported domestic disturbance” were nontestimonial. *Id.* at 819, 821 (internal quotation marks omitted). Critically, in *Hammon*, the defendant was in a separate room from the victim and under police surveillance at the time that the victim spoke with law enforcement. *Id.* at 819–20.

70. *Id.* at 826; see also Robert P. Mosteller, *Softening the Formality and Formalism of the “Testimonial” Statement Concept*, 19 *Regent U. L. Rev.* 429, 433 (2007) [hereinafter Mosteller, *Softening the Formality of “Testimonial”*] (“*Davis*’s most important clarification of a possible general interpretation of ‘testimonial’ as suggested in *Crawford* is negative. It

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>71</sup>

The application of this rule to the cases before the Court revealed four factors relevant to determining the “primary purpose” of the interrogation.<sup>72</sup>

First, the Court considered whether the declarant was describing events as they were occurring or whether the information was necessary to organize a police response to an ongoing situation.<sup>73</sup> Second, Justice Scalia assessed whether “[a] reasonable listener would recognize that [the declarant] . . . was facing an ongoing emergency.”<sup>74</sup> Third, the Court considered if the nature of both the questions and answers, when “viewed objectively was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past.”<sup>75</sup> Finally, the Court held that the relevance of formality to the testimonial analysis is the light it sheds on the purpose of statements.<sup>76</sup>

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rejects the definition centered on the formality and formalism of the Justice Thomas definition . . . . Moreover, it specifically rejects some of the more extreme amplifications of such a definition.” (footnote omitted).

71. *Davis*, 547 U.S. at 822. For criticism of the primary purpose test established in *Davis*, see *id.* at 839–40 (Thomas, J. concurring in judgment in part and dissenting in part) (arguing primary purpose test will yield unpredictable results because most acts have multiple purposes and any attempt to create “hierarchy of purpose . . . will inevitably be . . . an exercise in fiction”). Also, despite the reference to the purpose of the interrogator in the majority opinion’s broad definition of when a police interrogation is testimonial, the subsequent analysis is inconsistent as to whose intent matters. See, e.g., *id.* at 823 n.1 (“[I]t is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”). For an overview of issues, see Candice Chiu, *Convoluting the Confrontation Right: Davis v. Washington*, 30 *Harv. J.L. & Pub. Pol’y* 1059, 1066–69 (2007) (discussing deficiencies of police presence and existence of an ongoing emergency as “implicit foci” of the primary purpose test). Criticism of these factors, especially the emergency/nonemergency distinction, abound. See, e.g., Raeder, *supra* note 20, 788–89 (noting difficulty of applying “primary purpose” test in domestic violence situations); Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and its Loss*, 15 *J.L. & Pol’y* 725, 736–37 (2007) (discussing misfit between continuing/past events distinction and domestic violence).

72. *Davis*, 547 U.S. at 827.

73. *Id.* Even the name of an alleged attacker was relevant for this purpose as the responding officers needed to know whom to look for and what kind of threat the suspect posed.

74. *Id.*

75. *Id.* (emphasis omitted).

76. *Id.* at 827–28. But see *id.* at 837 (Thomas, J., concurring in judgment in part and dissenting in part) (arguing that meaning of testimonial is limited to statements that are “by their very nature, taken through a formalized process”). In response to Justice

2. *Melendez-Diaz and the Application of the Testimonial Framework to Laboratory Reports*. — Although the *Crawford* Court emphasized that its holding was required by the Confrontation Clause's historic meaning, the opinion also criticized the *Roberts* framework as being "so unpredictable that it fails to provide meaningful protection from even core confrontation violations."<sup>77</sup> Implicitly, then, the Court seemed to suggest that the testimonial analysis would provide more consistent and certain outcomes than the "reliability" doctrine it replaced.<sup>78</sup> At least in the context of laboratory reports, however, this improved predictability proved elusive. In the years following *Crawford* and *Davis*, by focusing on different aspects of the Court's competing definitions of testimonial statements, state courts and scholars reached disparate conclusions about the status of these reports under the new Confrontation Clause doctrine.<sup>79</sup> In light of this heated controversy, the Supreme Court's holding in *Melendez-Diaz v. Massachusetts*<sup>80</sup> is perhaps most striking for its brevity and simplicity. The Court itself characterized the case as a "rather straightforward application of [its] holding in *Crawford*."<sup>81</sup> Indeed, Justice Scalia's opinion for the five-justice majority easily dispensed with the question before the Court in just two and a half pages.<sup>82</sup>

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Thomas's dissenting argument that formality should be the sine qua non of identifying testimonial statements, Justice Scalia found that "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction." *Id.* at 831 n.5 (majority opinion). In keeping with the trend of explicit ambiguity regarding the meaning of testimonial statements, however, Justice Scalia also noted that "[i]t imports sufficient formality, in our view, that lies to such [police] officers are criminal offenses" thereby raising the question whether criminal penalties for lying are requisite for finding a statement to be testimonial. *Id.*; see Mosteller, *Softening the Formality of "Testimonial,"* *supra* note 70, at 437 (commenting on breadth of such limitation on testimonial category).

77. *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

78. For analysis suggesting that the *Crawford* rule is not more predictable than the *Roberts* doctrine, see *supra* note 56.

79. See *supra* notes 9–10 (referring to state court opinions and academic literature considering status of forensic reports under *Crawford*).

80. 129 S. Ct. 2527 (2009).

81. *Id.* at 2533.

82. *Id.* at 2531–32; see also Richard D. Friedman, *An Initial Reaction to the Melendez-Diaz Decision*, *The Confrontation Blog*, June 25, 2009, at <http://confrontationright.blogspot.com/search?q=initial+reaction> (on file with the *Columbia Law Review*) [hereinafter Friedman, *Initial Reaction*] (rejecting proposition that *Melendez-Diaz* provided no justification for its holding but agreeing that the "opinion makes the case . . . briefly because Justice Scalia believes . . . that this is an easy case"). The remaining twelve pages of the majority opinion are devoted to refuting arguments advanced by the dissent.

Critically, Justice Scalia's narrow majority included Justice Souter. Several commentators have suggested that if Justice Sotomayor's views on the Confrontation Clause differ from Justice Souter's, the *Melendez-Diaz* holding could be narrowed or even overturned in the near future. See Lyle Denniston, *Analysis: Is Melendez-Diaz Already Endangered?*, *SCOTUSblog*, June 29, 2009, at <http://www.scotusblog.com/wp/new-law-report-case-granted/> (on file with the *Columbia Law Review*) ("Judge Sonia Sotomayor, if confirmed as a Justice, may hold the deciding vote on the future of a controversial ruling that the present Court issued just last Thursday: the ruling in *Melendez-Diaz v. Massachusetts*."); Friedman, *Initial Reaction*, *supra* ("[T]he principal concern it [*Melendez-*

Rather than attempting to refine the meaning of testimonial, the *Melendez-Diaz* Court found that the contested statement—a “certificate of analysis” that included the “results of the forensic analysis performed on [ ] seized substances” and that was “sworn to before a notary public”—was the equivalent of an affidavit and therefore testimonial under all of the formulations of the category discussed in *Crawford*.<sup>83</sup> Preempting any effort to cabin its holding to sworn certificates, the majority stressed that laboratory reports without the indicia of formality required by Massachusetts law could still trigger the confrontation right under a primary purpose analysis.<sup>84</sup> This test was especially easy to apply to the facts in *Melendez-Diaz* since “under Massachusetts law the *sole purpose* of the affidavits was to provide ‘prima facie evidence of the composition, quality, and . . . net weight’ of the analyzed substance” and analysts who signed the certificates were presumably aware of their purpose since it was “reprinted on the affidavits themselves.”<sup>85</sup>

3. *Testimonial Nature of Laboratory Reports and States’ Interests.* — The above analysis is relevant not only insofar as it establishes that laboratory reports are testimonial under the Confrontation Clause, but also it reveals what factors “count” when the Court is determining whether the Confrontation Clause applies to a given statement. Similarly, by negative implication, these arguments illustrate what interests and concerns are *not* considered under the *Crawford* test. High on this “list” of unacknowledged interests are those of the states—a set of interests that were relevant to determining the scope of the Confrontation Clause under *Roberts*.<sup>86</sup>

A comparison of the questions raised by Chief Justice Roberts and Justice Breyer with those posed by Justice Scalia during the *Melendez-Diaz* oral argument illustrates this point.<sup>87</sup> After a series of questions by Chief

*Diaz*] raises is not anything it says, or doesn’t say, but that only five justices joined it, and one of those five is about to leave the Court.”).

83. 129 S. Ct. 2531–32. The Court found it irrelevant that the Massachusetts legislature characterized the report as a “certificate of analysis” rather than an affidavit. *Id.* at 2532 (“The documents at issue here, while denominated by Massachusetts law “certificates,” are quite plainly affidavits.”).

84. *Id.* at 2532.

85. *Id.* By noting that the affidavits themselves contained notice of their purpose, the Court declined to decide whether the subjective intent of the declarant is the central inquiry for the primary purpose test. Perhaps the Court’s focus on the intent of the analyst may end the debate over *whose* intent is relevant (the declarant or the questioner’s) when assessing whether a statement is testimonial, a question created by inconsistent language in *Davis*. See *supra* note 71.

86. See *supra* Part I.A.2 (discussing Supreme Court’s recognition of significant state interests when crafting reliability doctrine articulated in *Roberts*).

87. Compare Transcript of *Melendez-Diaz* Oral Argument, *supra* note 19, at 19 (Roberts, C.J.) (questioning counsel for petitioner regarding potential for defense attorneys to make it appear to the jury that just because a technician does not remember a particular sample he is incompetent), and *id.* at 17 (Breyer, J.) (questioning counsel for petitioner to propose what a “workable rule” would be since “it seems most States have worked with a rule that has allowed the defendant to call the witness if he wants”), with *id.*

Justice Roberts and Justice Breyer highlighting the effect of various potential dispositions of the case on state criminal proceedings, Justice Scalia intervened.<sup>88</sup> Justice Scalia's questions focused exclusively on the testimonial nature of laboratory reports and the existence of hearsay exceptions at the time of the founding.<sup>89</sup> This line of interrogation served as a stark reminder that under the Court's controlling precedent, the proper inquiry for the Court is what the Framers would have found to be "testimony"—not what is practical for states in the twenty-first century.<sup>90</sup> Similarly telling is the treatment of states' interests by the *Melendez-Diaz* majority opinion. Put simply, the Court dismissed the dissent's argument that these interests weighed against finding laboratory reports to be non-testimonial, noting that "[i]t is not clear whence we would derive the authority to" take states' interests into account.<sup>91</sup> Part II provides a closer look at the state interests that are excluded from the testimonial analysis and suggests that there may be room for considering these interests when assessing the constitutionality of state procedures operationalizing the Confrontation Clause.

## II. WHAT *CRAWFORD* KEEPS OUT: STATE INTERESTS IN THE LABORATORY REPORT DEBATE

Part II.A provides an examination of state interests that are implicated by the debate over the application of the Confrontation Clause to laboratory reports but are not legally cognizable under the doctrinal framework established in *Crawford*. Part II.B introduces the range of N & D statutes that states have passed, at least in part, to mitigate the burden created by the application of the Confrontation Clause to forensic findings on the states' criminal justice systems. Part II.C examines federal and state court precedent considering the constitutionality of N & D statutes and argues that the Supreme Court should take state interests into account when assessing the constitutionality of notice and demand statutes.

### A. States' Interests in the Laboratory Report Debate

Public perception of forensic evidence can both help and harm defendants.<sup>92</sup> In cases where forensic evidence is not available, defendants

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at 23 (Scalia, J.) ("I am interested in the history since that's what the Court held in *Crawford*, that the content of the Confrontation Clause is not what we would like it to be, but what it historically was when it was enshrined in the Constitution.")

88. *Id.* at 24 (Scalia, J.) (asking counsel for petitioner if "business records would often or usually not be testimonial").

89. See *supra* note 87 (comparing Justice Scalia's questions with Chief Justice Roberts's and Justice Breyer's).

90. Transcript of *Melendez-Diaz* Oral Argument, *supra* note 19, at 23 (Scalia, J.).

91. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009).

92. A number of scholars have advanced a theory known as the "*CSI* effect"—the idea that jurors have unrealistic beliefs about the veracity and availability of forensic evidence

may enjoy a marginal advantage if jurors conclude that a lack of forensic evidence suggests the prosecution has failed to make its case.<sup>93</sup> If the prosecution introduces faulty forensic evidence, however, the defendant is likely to be prejudiced if jurors hold unsubstantiated beliefs about the veracity of these reports.<sup>94</sup> While *Crawford* is responsive to the concerns of criminal defendants by ensuring they have the opportunity to cross-examine the technicians who prepare these reports,<sup>95</sup> it is less accommodating to the needs of state criminal justice systems.<sup>96</sup>

The vast majority of criminal prosecutions in the United States take place in state courts.<sup>97</sup> Prosecutors are just as aware as defendants of the importance of forensic evidence to the success of their cases.<sup>98</sup> Thus, to the extent that forensic reports are found to be testimonial there will be an additional burden on laboratories to make technicians available for the purpose of cross-examination. The imposition of this additional expense will fall on systems that are already stretched beyond their capacity.<sup>99</sup> A 2005 Justice Department study found that the nation's public forensic crime labs "ended [2002] with more than 500,000 backlogged requests for forensic services—a more than 70% increase."<sup>100</sup> The same

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due to the depiction of forensic science on popular television shows. See *supra* note 11 (referring to relevant articles). Competing studies suggest that these distorted views may either help or harm defendants. See *supra* note 11. Regardless of whether the "effect" is real, practitioners may still take it into account. See National Academy Report, *supra* note 10, at 47–48 (describing "CSI effect" and concluding that while "the true effects of the popularization of forensic science disciplines will not be fully understood for some time, . . . it is apparent that it has increased pressure and attention on the forensic science community in the use and interpretation of evidence in the courtroom").

93. See Tyler, *supra* note 11, at 1053 ("[A]fter the recent, well-publicized acquittal of Robert Blake, jurors complained about the lack of fingerprints, DNA, and gunshot residue—evidence not often available in criminal trials but frequently used on television.").

94. See *id.* at 1068–70 (discussing juror tendency toward overbelief in probative value of evidence); see also *supra* note 11 (describing importance jurors place on forensic evidence).

95. See *supra* note 17 (stating benefits and limitations to criminal defendants' right to cross-examine technicians).

96. See *supra* Part I.C.3 (arguing that states' interests are unacknowledged under *Crawford* testimonial analysis).

97. See Hanson & Rottman, *supra* note 12, at 122 (noting disparity between number of criminal cases resolved in state versus federal court).

98. See Joseph L. Peterson, Nat'l Inst. of Justice, Research in Brief, NCJ No. 107206, Use of Forensic Evidence by the Police and Courts 3 (1987), available at <http://www.ncjrs.gov/pdffile1/pr/107206.pdf> (on file with the *Columbia Law Review*) ("Prosecutors believe that juries are quite impressed by scientific evidence . . ."); Thomas, *supra* note 11, at 70 (reporting a survey of 102 prosecutors where "38% believed they had at least one trial that resulted in either an acquittal or hung jury because forensic evidence was not available").

99. Joseph L. Peterson & Matthew J. Hickman, DOJ, Census of Publicly Funded Forensic Crime Laboratories, 2002, at 1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpffcl02.pdf> (on file with the *Columbia Law Review*) ("A typical laboratory in 2002 started the year with a backlog of about 390 requests, received 4,900 requests, and completed 4,600 requests.").

100. *Id.*

report found that the labs “received an additional 2.7 million requests” that year.<sup>101</sup> Requiring technicians to testify would exacerbate this situation, as the Alabama Criminal Appeals Court noted in its decision categorizing lab reports as nontestimonial:

To have forensic scientists traveling across [the state] to testify in every case involving forensic evidence, even in those cases in which the opposing party has no intention of challenging the forensic evidence, would greatly reduce the amount of time those scientists have to actually conduct the examinations and analyses and would cause even more delays in the criminal justice system.<sup>102</sup>

The obvious response to these arguments is that only a small percentage of forensic reports are ultimately used in a trial;<sup>103</sup> however, states have argued that forensic laboratories are so overworked that even if live testimony is required in five percent of the cases, the result will be “oppressive.”<sup>104</sup>

Thus, as the National District Attorneys Association argued in its amicus brief in support of the respondent in *Melendez-Diaz*, a categorical rule requiring states to make laboratory technicians available for purposes of cross-examination in order for forensic reports to be admissible could directly conflict with another constitutional right guaranteed to defendants: the right to a speedy trial.<sup>105</sup> A Supreme Court holding classifying

101. *Id.* at 6.

102. *Pruitt v. State*, 954 So. 2d 611, 615 (Ala. Crim. App. 2006) (quoting *Brown v. State*, 939 So. 2d 957, 960–61 (Ala. Crim. App. 2005)).

103. Brief of Law Professors as Amici Curiae Supporting Petitioner at 7–9, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) [hereinafter Brief of Law Professors] (noting that most cases are resolved by plea bargain rather than trial and even in those cases that go to trial, defendant “impairs rather than enhances his case by insisting upon an extended and substantially uncontroverted presentation of scientific evidence on a critical element of the government’s proof”). Writing on behalf of the dissenters in *Melendez-Diaz*, Justice Kennedy rejected this argument. Instead he emphasized that [i]f the analyst cannot reach the courtroom in time to testify . . . a *Melendez-Diaz* objection grants the defense a great windfall: The analyst’s work cannot come into evidence. Given the prospect of such a windfall (which may, in and of itself, secure an acquittal) few zealous advocates will pledge, prior to trial, not to raise a *Melendez-Diaz* objection.

129 S. Ct. at 2556–57 (Kennedy, J. dissenting).

104. Brief of the States, *supra* note 13, at 25. The Brief includes statistics from several states, but the most compelling is Alaska, where one crime lab is charged with processing requests from across the nation’s largest state in the service of fifty-seven courts.

In fiscal year 2008, twenty-two technicians performed 3,380 tests. That same year, these technicians appeared in approximately 157 courtrooms, costing the [lab] “102 days of productive lab time.” The reason is simple: Due to Alaska’s geography and weather, the [lab] “spends an average of 42 hours of travel/wait time for every five hours of testimony.” In other words “one hour of court testimony [costs] 8.4 hours in productive lab time.”

*Id.* at 28 (emphasis omitted) (citations omitted).

105. Brief for The National District Attorneys Ass’n et al., as Amici Curiae Supporting Respondent at 15–17, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591), 2008 WL 4185393.

laboratory reports as testimonial would add yet another reason for delay to the perennial challenges of ever changing schedules and overcrowded dockets.<sup>106</sup>

Finally, while defendants' rights advocates emphasize the cases in which cross-examination can have a meaningful effect on the outcome of the case, there are many more cases in which confrontation would be less useful, a point made repeatedly by lower courts in the aftermath of *Crawford*.<sup>107</sup> Specifically, these courts note that while juries may be shocked to learn that a technician does not remember the details of a test, this information is hardly probative given the number of tests conducted each day—a point that came up during the *Melendez-Diaz* oral argument as well.<sup>108</sup>

### B. Notice and Demand Statutes

In an effort to minimize the burden on the state created by requiring laboratory technicians to testify every time a forensic report is admitted into evidence, most United States jurisdictions have adopted some form of notice and demand statute.<sup>109</sup> Prior to *Crawford* some states had al-

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Unacknowledged by the National District Attorneys Association's amicus brief is what the Supreme Court has referred to as the "societal interest in providing a speedy trial." *Barker v. Wingo*, 407 U.S. 514, 519 (1972) ("There is a societal interest . . . which exists separate from . . . the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases . . . which, . . . enables defendants to negotiate more effectively for pleas of guilty to lesser offenses . . .").

106. Brief for The National District Attorneys Ass'n et al., *supra* note 105, at 15–17.

107. 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, 872 (2008) (surveying state court cases holding that laboratory reports are nontestimonial because cross-examination would be of limited utility to defendant); see also Brief for the Respondent in Opposition at 36–37, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591), 2008 WL 377677 (stressing that burden on state is unwarranted especially because—at least with respect to routine laboratory tests—the technician will often "be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action" (citation omitted)).

108. See Transcript of *Melendez-Diaz* Oral Argument, *supra* note 19, at 19, (Roberts, C.J.) (speculating as to what the interaction between a technician and defense counsel will sound like). Admittedly, to the extent that such testimony is surprising to a jury, it could still be useful to a defendant, even if it unfairly suggests some lack of diligence on the part of a technician. This argument is particularly compelling in the context of cold cases—where a long period of time has passed between the forensic analysis and an arrest—especially when the nature of the forensic test is such that the analysis cannot be repeated (i.e., an autopsy). See *People v. Durio*, 794 N.Y.S.2d 863, 869 (Sup. Ct. 2005) (holding autopsy report is admissible under business records exception to *Crawford* but emphasizing "practical implications" of alternative decision); see also Yanovitch, *supra* note 10, at 282 (discussing cold case dilemma and decision in *Durio*).

109. Metzger, *Cheating*, *supra* note 22, at 478–82 (noting that "[t]he vast majority of jurisdictions in the United States authorize the state to prove its forensic allegations by relying upon a forensic certificate in lieu of live testimony," but acknowledging variation between jurisdictions both in terms of which forensic tests are covered and what the process is for how certificates become admissible).

ready passed statutes providing for the admission of laboratory reports without live testimony to ensure that laboratory reports and similar science-based findings would not be excluded by the state's hearsay rules.<sup>110</sup> But until *Crawford*, the Confrontation Clause rarely barred the admission of these reports because they were likely to be found "reliable" under *Ohio v. Roberts*.<sup>111</sup> In the post-*Crawford* landscape, these statutes have taken on greater constitutional significance as a mechanism through which states can operationalize defendants' access to the confrontation right.<sup>112</sup>

N & D statutes share the basic characteristic of defining a procedure that the defendant must comply with in order to exercise his right to confront the author of a forensic report at trial.<sup>113</sup> N & D statutes differ, however, based on what type of reports they cover, what kind of notice they provide to the defendants, and what steps the defendant must take to exercise his confrontation right.<sup>114</sup> Additionally, N & D statutes vary in terms of the inferences they allow or require the jury to draw based on the laboratory findings.<sup>115</sup> This section will outline the four types of N & D statutes:<sup>116</sup> (1) "basic"; (2) N & D "plus"; (3) "anticipatory demand";

110. See, e.g., Kan. Stat. Ann. § 22-3437 (2007) (establishing N & D "plus" regime in 1996); see also *State v. Crow*, 974 P.2d 100, 108 (Kan. 1999) (noting that N & D "plus" statute creates "separate, legislatively created exception to the hearsay rule").

111. See *supra* Part I.A (arguing that *Roberts* reliability analysis permitted prosecutors to submit laboratory reports into evidence without making analyst who prepared report available for cross-examination). Compare *Miller v. State*, 472 S.E.2d 74, 78 (Ga. 1996) (holding that laboratory report was barred because of failure to make "requisite showing" of reliability, but leaving open possibility that reliability could be established on a different set of facts), with *State v. Sosa*, 800 P.2d 839, 843 (Wash. Ct. App. 1990) ("[A] certified copy of the lab report . . . is reliable evidence under *Roberts*").

112. See *infra* Part II.C.

113. See Giannelli, *Expert Testimony*, *supra* note 22, at 84 (describing basic N & D statute).

114. See Metzger, *Cheating*, *supra* note 22, at 481–84 (describing the "four common varieties" of N & D statutes).

115. Although Professor Metzger assesses the constitutionality of N & D statutes through a number of doctrinal lenses, this feature of certain N & D statutes is what drives Professor Metzger's strongest argument: that N & D statutes create unconstitutional mandatory presumptions. See Metzger, *Cheating*, *supra* note 22, at 522–27 (arguing that N & D statutes—what Metzger refers to as "ipse dixit statute[s]"—are, in effect, "mandatory presumptions" that relieve the prosecution of its constitutionally mandated burden of proof). This Note focuses on the constitutionality of N & D statutes exclusively under the Confrontation Clause and thus does not discuss the burden-shifting implications of certain procedures.

116. This Note adopts this useful typology from Professor Metzger's article. See Metzger, *Cheating*, *supra* note 22, at 481–84. Others, including the petitioners in *Melendez-Diaz*, also used this characterization of the various forms of N & D statutes. See Reply Brief for Petitioner at 26 n.8, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) (referring to "notice-and-demand-plus statutes"); Brief of Law Professors, *supra* note 103, at 15 n.3 (distinguishing "narrow" N & D statutes from those requiring "anything more extensive than mere objection"—those statutes which are referred to as "notice and demand-plus" (internal quotation marks omitted) (quoting Metzger, *Cheating*, *supra* note 22, at 482–83)).

and, (4) “defense subpoena.”<sup>117</sup>

1. *Basic Notice and Demand Statutes.* — Although basic N & D statutes are sometimes conflated with all types of N & D statutes,<sup>118</sup> they are actually one of the least utilized forms of N & D statutes.<sup>119</sup> However, because the three other types of N & D statutes are essentially variations on the structure set out in basic N & D statutes, the basic legislation receives extensive treatment here. Basic N & D statutes authorize the prosecution to proffer a laboratory report in lieu of live testimony from the technician who prepared the report if the prosecution satisfies certain conditions and the defendant fails to invoke his right to confrontation through a prescribed procedure.<sup>120</sup> In order to exercise this privilege, however, the prosecution must comply with a set of conditions imposed by basic N & D statutes.

First, the state is required to provide the defendant with timely “notice” of its intent to introduce the report at trial. This notice may consist of as little as a copy of the report<sup>121</sup>—or the content of the report—and thus the quality of notice may vary.<sup>122</sup> Additionally, basic N & D statutes usually provide that notice must include language informing the defen-

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117. Metzger, *Cheating*, supra note 22, at 481.

118. See, e.g., Jimmy Chen, *Notice and Demand Statutes: A Constitutional Response to the Evidence Crisis*, 8 Kan. J.L. & Pub. Pol’y 241, 241–42 (1999) (discussing policy benefits of N & D statutes without distinguishing between various forms of statutes); John M. Spires, Note, *Testimonial or Nontestimonial? The Admissibility of Forensic Evidence After Crawford v. Washington*, 94 Ky. L.J. 187, 206 (2005) (describing basic N & D statute).

119. See Metzger, *Cheating*, supra note 22, at 482 (explaining that only twelve states rely on this N & D procedure). For example, in Delaware, a lab report created under certain conditions—including preparation under procedures approved by the state’s Chief Medical Examiner—may serve as prima facie proof of the report’s contents and the chain of custody. If, however, the defendant receives notice of the prosecutor’s intent to introduce the report and objects by writing in a timely manner, the prosecution is required to call the technician who conducted the test or anyone in the chain of custody. Del. Code Ann. tit. 10, §§ 4430–4432 (2009). Michigan adopts a similar statute, but with fewer procedural requirements with which the laboratory must comply in order for the report to qualify for admission into evidence. See Mich. Comp. Laws Ann. § 600.2167 (West 2008).

120. See sources cited supra note 22 and accompanying text (discussing basic N & D statutes).

121. See, e.g., Del. Code Ann. tit. 10, § 4332(a)(3).

122. Compare Mich. Comp. Laws Ann. § 600.2167 (imposing no requirements that report include information regarding education or laboratory standard operating procedures), with Ohio Rev. Code Ann. § 2925.51(A) (West 2009) (“Attached to that report shall be a copy of a notarized statement by the signer of the report . . . giving an outline of his education, training, and experience for performing an analysis of materials included under this section.”). The Delaware statute falls somewhere between these two extremes: While it limits the applicability of the N & D statutes to laboratories that meet certain criteria, it does not require that the accreditation of the individual responsible for conducting the test be included in the report that is submitted to the defendant (or the court). See tit. 10, §§ 4430–4432.

dant as to how he can “demand” that the prosecution call the technician to testify.<sup>123</sup>

The second important feature of basic N & D statutes is that they establish a relatively straightforward procedure by which the defendant can avail himself of his right to cross-examination.<sup>124</sup> Generally, after receiving proper notice, the defendant is granted a certain amount of time to make his demand, which usually must be in writing.<sup>125</sup> Following a timely demand, the prosecutor is no longer permitted to introduce the laboratory findings via report or certificate; instead he must provide live testimony or forgo the use of this potential evidence.<sup>126</sup> Significantly, the defendant need not assert reasons for exercising his right to demand confrontation.<sup>127</sup>

2. *Notice and Demand Plus Statutes.* — The notice requirements in N & D plus statutes are analogous to the provisions in basic N & D statutes.<sup>128</sup> The key distinction between basic N & D statutes and N & D plus legislation is that in order for a defendant to exercise his right to demand confrontation under a plus regime, he must offer substantive reasons that justify his demand. Even within the N & D plus category, there are variations between states as to what satisfies this substantive reason requirement. Some states require defendants to show “cause,”<sup>129</sup> while other states’ statutes call for more specific reasoning, such as “good faith” in-

123. See, e.g., Ohio Rev. Code Ann. § 2925.51(C)–(D) (providing that report shall not serve as prima facie evidence should defendant demand testimony of report’s signatory, and requiring that all “report[s] issued for use under this section shall contain notice of the right of the accused to demand, and the manner in which the accused shall demand, the testimony of the person signing the report”).

124. See Brief of Law Professors, *supra* note 103, at 13–14 (describing structure of “the typical notice-and-demand statute”).

125. See, e.g., Del. Code Ann. tit. 10, § 4332(a)(1) (providing that defense must submit written demand “at least 5 days prior to the trial”); Ohio Rev. Code Ann. § 2925.51(C) (granting defendant seven days from day when notice is received but providing that this timeframe can be extended should trial judge decide it is in the “interests of justice”).

126. See Brief of Law Professors, *supra* note 103, at 14 (“Upon timely demand by the defendant, live testimony is required in lieu of the certificate.”).

127. This is one of the features of basic N & D statutes that distinguishes them from N & D plus statutes. See Metzger, *Cheating*, *supra* note 22, at 482–83 (“‘Notice and demand-plus’ statutes mimic the structure of notice and demand statutes but impose substantive requirements on the defendant’s demand.”).

128. See Tenn. Code Ann. § 40-35-311(c)(1)(B)–(C) (West 2009) (creating N & D plus regime in which the prosecutor must provide defendant with a copy of the report which contains information regarding the technician’s qualifications and the procedures used to conduct the test).

129. See, e.g., Alaska Stat. § 12.45.084(d) (2009) (“The accused or the accused’s attorney may demand the testimony of the person signing the report, by serving a written demand showing cause upon the prosecuting attorney within seven days from receipt of the report.”). “Cause” is not defined. *Id.*

tent on the part of the defendant to “conduct the cross-examination.”<sup>130</sup> By requiring the defendant to justify his demand, plus statutes create a role for the judge in determining whether or not the defendant will be allowed to exercise his right of confrontation.<sup>131</sup>

3. *Anticipatory Demand Statutes.* — Anticipatory Demand statutes (“AD statutes”) are perhaps the most common type of N & D statute.<sup>132</sup> These statutes are distinguishable from the previously discussed N & D statutes because AD statutes eliminate the burden on the prosecutor to notify the defendant of his intent to introduce a laboratory report (or the defendant’s obligation to request that the technician be present for cross-examination).<sup>133</sup> Despite the lack of notice, under AD statutes, the burden is still on the defendant to demand the presence of the technician; absent a timely demand, the defendant has not properly exercised his right to confrontation.<sup>134</sup> A small group of statutes within the AD cate-

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130. See, e.g., La. Rev. Stat. Ann. § 15:501(B)(2) (2009) (“[T]he [demand] shall contain a certification that the attorney or the defendant intends in good faith to conduct the cross-examination.”).

131. See, e.g., Tenn. Code Ann. § 40-35-311 (“[T]he judge shall, upon reasonable objection and for good cause shown, require that the laboratory technician appear and testify.”); see also Metzger, *Cheating*, supra note 22, at 483 (“[N & D plus] statutes are not self-executing; a proper pleading of the requisite allegation does not, in itself, compel the prosecution to produce its witness. Instead, the trial court reviews the defense’s demand to determine whether its pleading justifies an order to produce the prosecution’s witness for cross-examination.”).

132. In her 2006 study, Professor Metzger found “fewer than half of the forensic ipse dixit statutes [what this Note refers to as N & D statutes] require that the prosecution give the defense formal pretrial notice of its intent to rely on the forensic report in lieu of live witness testimony.” Metzger, *Cheating*, supra note 22, at 483 n.30.

133. See, e.g., Ark. Code Ann. § 12-12-313(d)(2) (West 2009) (providing only that defendant must give “notice” should he want the technician to testify); Kan. Stat. Ann. § 22-2902a (2009) (providing that “the findings of the forensic examiner shall be admissible into evidence . . . with the same force and effect as if the forensic examiner who performed such examination . . . had testified in person” but failing to condition this provision on any requirements of notice to the defendant); see also *State v. Caulfield*, 722 N.W.2d 304, 313 (Minn. 2006) (holding section 634.15 of Minnesota Statutes unconstitutional because it did not provide defendant with notice regarding both the report itself and the consequences of failure to demand the presence of the technician at trial); Richard D. Friedman, *Lab Reports and a Notice-and-Demand Statute—A Significant Decision from Minnesota*, *The Confrontation Blog*, at [http://confrontationright.blogspot.com/2006\\_10\\_01\\_archive.html](http://confrontationright.blogspot.com/2006_10_01_archive.html) (Oct. 6, 2006) (on file with the *Columbia Law Review*) [hereinafter Friedman, *Notice and Demand*] (“The only notice for which [the Minnesota Statute] provides, so far as I can see, is notice of the demand by the defendant that the preparer testify.”).

134. See, e.g., Ark. Code Ann. § 12-12-313(d)(2) (requiring the defendant to “give at least ten (10) days’ notice prior to the proceedings that he or she requests the presence of the analyst of the laboratory . . . for the purpose of cross-examination”); Me. Rev. Stat. Ann. tit. 29-A, § 2431(2)(D) (1996) (requiring “10 days written notice to the prosecution” for the defendant to have access to a witness). Of course, the lack of notice may be mitigated to a certain extent by the availability of discovery procedures. See Metzger, *Cheating*, supra note 22, at 483–84 & n.32 (noting use of discovery to prevent “trial by ambush”).

gory also impose the substantive reason for demand requirement associated with N & D plus legislation.<sup>135</sup>

4. *Defense Subpoena Statutes.* — Defense subpoena statutes dispense with the notice requirements found in both basic N & D statutes and N & D plus statutes. Additionally, unlike the AD statutes, under a defense subpoena regime the burden is on the defendant to subpoena the technician.<sup>136</sup> Although some defense subpoena statutes authorize the defendant to subpoena the witness to testify in the prosecution's case-in-chief, absent this sort of provision, the technician will be called during the defendant's case.<sup>137</sup> Furthermore, most defense subpoena statutes include a substantive reason requirement, meaning that a defendant must show cause for his subpoena request to be granted.<sup>138</sup>

### C. *The Constitutionality of Notice and Demand Statutes Under the Confrontation Clause*

In *Crawford*, the Supreme Court held that the “testimonial” framework—required by the text and the Framers’ understanding of the Constitution—prevents the Court from taking state interests into account when determining to which evidence the Confrontation Clause applies.<sup>139</sup> There are no such markers, however, to limit what interests the Court can consider when assessing the constitutionality of the procedural burdens states impose on defendants who wish to exercise their confrontation right.<sup>140</sup> Key language in the majority opinion in *Melendez-Diaz* supports this approach.

135. See, e.g., Me. Rev. Stat. Ann. tit. 29-A, § 2431(2)(D) (requiring defendant to include in his demand topics on which he plans to cross-examine the witness); see also Metzger, *Cheating*, supra note 22, at 484.

136. See Metzger, *Cheating*, supra note 22, at 484 (defining “defense subpoena” procedures). For additional discussion of the practical and legal differences between a subpoena requirement and a “demand” procedure, see infra Part III.C.1.b.i.

137. Metzger, *Cheating*, supra note 22, at 484. Critically, then, defense subpoena statutes require defendants to put on a case-in-chief. *Id.* Thus, as Professor Metzger argues, “to exercise his confrontation rights, the defendant must relinquish his right to rely on the government’s failure of proof and exercise instead, his right to compulsory process.” *Id.* This consequence of defense subpoena statutes is central to Professor Metzger’s argument that these statutes are unconstitutional under the Fourteenth Amendment Due Process Clause because they impermissibly shift the burden of proof from the prosecution to the defendant. *Id.* at 524–25.

138. For the proposition that “most” of the defense subpoena statutes include a substantive reason requirement, see *id.* at 484. For an example of one such statute, see Ala. Code § 12-21-302 (LexisNexis 2005) (providing that in addition to requiring good faith, the court will only grant defendant’s subpoena request for “good cause,” which “shall not include a challenge to the findings contained in the certificate of analysis, unless the requesting party first establishes a legitimate basis for the challenge”).

139. See supra Part I.B.1.

140. Others have observed that there is no federal precedent assessing procedural requirements for the exercise of the confrontation right. See *State v. Smith*, No. 1-05-39, 2006 WL 846342, at \*5 (Ohio App. Apr. 3, 2006) (noting that “nothing in *Crawford* or in the text of the Sixth Amendment requires that the right of confrontation must occur at

As part of a larger argument rejecting the dissent's concern that the Court's holding would be overly burdensome on state criminal justice systems, the *Melendez-Diaz* majority found that N & D statutes, "in their simplest form," are constitutional and stated expressly that "[s]tatutes are free to adopt procedural rules governing objections [based on the Confrontation Clause]."<sup>141</sup> Although the majority's conclusions regarding N & D statutes are written in fairly authoritative language (i.e. "what we have referred to as the 'simplest form [of] notice-and-demand-statutes[ ]' . . . is constitutional"<sup>142</sup>), the binding authority of the majority's statements should not be overstated for two reasons: First, this section of the majority opinion is merely dicta, as it was not necessary to the disposition of the question before the Court—whether a laboratory report was testimonial in nature.<sup>143</sup> Second, the dissent did not adopt the majority's analysis of

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trial," but citing only *Crawford* and state court precedent in support of this conclusion); *Deener v. Quarterman*, No. 3-08-CV-0713-K, 2008 WL 4791473, at \*3 (N.D. Tex. Oct. 30, 2008) ("Not only has the Supreme Court not addressed this issue, but the court is unaware of any federal decision holding that a confrontation clause violation cannot be forfeited by failing to comply with state procedural rules.").

Professor George E. Dix has distinguished waiver of a right from the loss of a right due to a defendant's failure to fulfill certain procedural requirements. According to Professor Dix, there are three relevant questions: (1) Is a procedural right "available in the situation presented"? (2) Has the defendant "utilized the appropriate means of implementing a right"? And, (3) what "effect . . . [should] be given [to] evidence that at the time of infringement of the interests protected by a right a defendant experienced or articulated a conscious willingness to forgo exercise of the right?" George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 *Tex. L. Rev.* 193, 196 (1977).

141. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 & n.12 (2009). The statutes that the majority considered to be N & D statutes in their "simplest form," are essentially what this Note refers to as basic N & D statutes—those statutes which "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial" and provide "the defendant . . . a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial." *Id.* at 2541.

In support of its conclusions, the Court cited two cases affirming the constitutional validity of state procedures designed to implement the Compulsory Process Clause and a third case upholding a state procedure controlling when a defendant must raise a motion to suppress evidence based on a *Miranda* violation. *Id.* (citing *Taylor v. Illinois*, 484 U.S. 400, 411 (1988) (Compulsory Process Clause), *Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977) (*Miranda* objection), and *Williams v. Florida*, 399 U.S. 78, 81–82 (1970) (Compulsory Process Clause)). Significantly, both the Court and this Note's analysis are predicated on courts making a distinction between substance and procedure. As this Note argues *infra*, the line between these two "types" of law is often unclear and there must be a role for courts in policing the constitutionality of procedural rules in order for the substantive right defined by *Crawford* to have real meaning. See *infra* Part III.A.3. Nevertheless, this Note is consistent with the *Melendez-Diaz* majority's suggested doctrinal distinction between the substance of the Confrontation Clause and the procedures governing its use, largely due to the pragmatic concern that absent such a distinction, the Court's recently articulated understanding of the Confrontation Clause must be abandoned as impracticable. See *supra* Part II.A.

142. *Melendez-Diaz*, 129 S. Ct. at 2541 n.12 (internal citation omitted).

143. *Id.* at 2530 ("The question presented is whether th[e] affidavits are 'testimonial,' rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment.").

this issue. Instead, Justice Kennedy's opinion argued that "[e]ven what the Court calls the 'simplest form' of burden-shifting statutes do impose requirements on the defendant" and thus, "[i]n a future case, the Court may find that some of these more onerous burden-shifting statutes violate the Confrontation Clause because they 'impos[e] a burden . . . on the defendant to bring . . . adverse witnesses into court.'"<sup>144</sup>

Even assuming that the majority's analysis is not controlling in future cases, it is still significant to the argument advanced in this Note because it clearly signals that the doctrine used to determine whether a defendant has the right to confront a witness does not control the Court's assessment of procedural rules governing the use of the confrontation right. In the absence of the rigid constraints imposed by *Crawford*, the Supreme Court should adopt an approach that takes state interests into account when assessing the constitutionality of procedures to operationalize the right to confrontation.

In addition to the Supreme Court's dicta in *Melendez-Diaz* regarding the "simplest" N & D statutes, a number of state courts and one federal court have considered the constitutionality of N & D statutes after *Crawford*.<sup>145</sup> Even those courts that struck down an N & D statute have not suggested that *all* such statutes are impermissible. Instead, these courts have recognized that the constitutionality of the statute depends on both the state interest *and* the extent of the burden on the defendant. A brief survey of these cases demonstrates that courts differ in how they value the burdens imposed on defendants and in how much of a burden they are willing to permit. There is a general consensus, however, that some procedures should be allowed.<sup>146</sup>

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144. *Id.* at 2557 (Kennedy, J. dissenting).

145. The only federal case is *Deener*, 2008 WL 4791473. For the state decisions upholding N & D statutes, see *Hinojos-Mendoza v. People*, 169 P.3d 662, 668–69 (Colo. 2007); *State v. Cunningham*, 903 So. 2d 1110, 1121–22 (La. 2005); *City of Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005); *State v. Campbell* 719 N.W.2d 374, 378 (N.D. 2006); *Brooks v. Commonwealth*, 638 S.E.2d 131, 135 (Va. Ct. App. 2006); cf. *State v. Kent*, 918 A.2d 626, 628, 643–45 (N.J. Super. Ct. App. Div. 2007) (finding "blood test certificate" to be testimonial and calling on legislature or the "appropriate rule-making bodies of the judiciary" to enact a basic N & D statute to mitigate the practical consequences of the Court's holding); *State v. Christy*, No. 25520-4-III, 2008 WL 2623968, at \*5 (Wash. Ct. App. July 3, 2008) (avoiding decision on constitutionality of N & D statutes by emphasizing that "any error was harmless," but upholding trial court's admission of evidence under the statute). For the state decisions finding N & D statutes to be unconstitutional, see *State v. Laturner*, 163 P.3d 367, 377 (Kan. Ct. App. 2007); *State v. Caulfield*, 722 N.W.2d 304, 312–13 (Minn. 2006); *Smith*, 2006 WL 846342, at \*7; *State v. Birchfield*, 157 P.3d 216, 219–20 (Or. 2007). Finally, for further discussion of Supreme Court decisions upholding state created procedures governing the exercise of constitutionally protected rights other than the Confrontation Clause, see *infra* Part II.C.3.

146. To overcome these differences, this Note proposes a constitutional ceiling with explicit guidelines. See *infra* Part III.C.

1. *Cases Upholding Notice and Demand Statutes.* — Cases finding N & D statutes to be constitutional<sup>147</sup> are unified by three common themes: (1) categorization of the statutes as creating “procedural” requirements as opposed to affecting substantive rights; (2) minimal recognition of the burden imposed on defendants; and (3) emphasis on the practical effects of a right to confront laboratory technicians on state criminal justice systems. First, the opinions upholding N & D statutes are similar to the extent that they justify their decision in part by relying on a distinction between the substance of the right protected by the Confrontation Clause and the procedures through which this right is exercised.<sup>148</sup> While almost all of these cases include some language referring to the N & D statute (regardless of its requirements) as something akin to a mere procedure,<sup>149</sup> two cases are particularly illustrative.

In *State v. Campbell*, the North Dakota Supreme Court assessed the constitutionality of a defense subpoena statute requiring nonindigent defendants to pay the costs associated with calling a technician to testify.<sup>150</sup> The court did not consider this provision to be a burden on the exercise of the confrontation right by nonindigent defendants. Instead, the court praised the provision as a “*procedural safeguard*[ ]” of the Confrontation Clause, permitting defendants to subpoena the creator of the report and authorizing “indigent defendant[s] to subpoena the . . . employee of the state crime laboratory to testify at the . . . trial at no cost to the defendant.”<sup>151</sup> Of course, this analysis overlooks the fact that, absent the statute, the burden would remain on the prosecutor to issue subpoenas and bear the associated costs of confrontation in all cases. More common among the cases is the Virginia Appellate Court’s reasoning in *Brooks v. Commonwealth*, which considered the constitutionality of a defense subpoena scheme that required the state to bear the costs associated with calling a witness.<sup>152</sup> The *Brooks* court characterized this statute as a “reasonable procedure to be followed in order for a defendant to exercise his right to confront a particular limited class of scientific witnesses at trial.”<sup>153</sup>

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147. See supra note 145 (listing one federal case and several state cases upholding constitutionality of N & D statutes).

148. See e.g., *Deener*, 2008 WL 4791473, at \*3 (referring to N & D statute as “procedural rules”); *Hinojos-Mendoza*, 169 P.3d at 669–70 (analogizing defense subpoena statute to other permitted procedural requirements imposed by Colorado law for exercising other constitutionally protected rights); *Cunningham*, 903 So. 2d at 1115, 1119 (referring to defense subpoena statute as establishing procedure, and burden on defendant as “small procedural step”); *Brooks*, 638 S.E.2d at 136–37 (referring to AD statute as creating reasonable procedure).

149. See supra note 148.

150. 719 N.W.2d at 374.

151. *Id.* at 378 (emphasis added).

152. 638 S.E.2d at 131.

153. *Id.* at 136. The court in *Brooks* mischaracterizes the N & D statute as providing for a waiver of a constitutional right rather than assessing the statute as changing the mechanism through which the defendant can invoke the right. See *id.* (holding

Second, the cases upholding these statutes tend to minimize the burden a demand requirement imposes on defendants.<sup>154</sup> Interestingly, this feature of the decisions has not varied according to the type of demand mechanism in the statute at issue—there has been no effort to distinguish a statute that requires defendants to subpoena the laboratory technician from a statute that merely requires the defendant to request that the prosecutor make the analyst available for cross-examination during the state’s case-in-chief.<sup>155</sup>

For example, in *State v. Cunningham*, the Louisiana Supreme Court characterized as “featherweight” the burden imposed on defendants by a defense subpoena statute requiring defendants to demonstrate a “good faith” intent to cross-examine forensic technicians.<sup>156</sup> Similarly, in *City of Las Vegas v. Walsh*, the Supreme Court of Nevada upheld a statute requiring defendants seeking to preserve their right to confrontation to show both a “bona fide dispute” as to the contents of a blood report and that cross-examination would serve the “interests of justice.”<sup>157</sup> The court also found that these requirements somehow served “the interests of the accused.”<sup>158</sup> Unsurprisingly, the court was silent as to how this statute advanced defendants’ interests.<sup>159</sup>

Finally, state courts are keenly aware of the practical implications of imposing a burden on prosecutors to produce laboratory technicians to testify every time a report is introduced at trial.<sup>160</sup> While not directly considering the constitutionality of a N & D statute, perhaps the best articulation of these concerns comes from the New Jersey Appellate Division’s decision in *State v. Kent*.<sup>161</sup> First, the court held that laboratory reports

defendant’s “failure to follow th[e] procedure” in the state’s N & D statute “amounts to a waiver of the right to confront witnesses”); see also Dix, *supra* note 140, at 193 (proposing narrow definition of waiver).

154. For cases upholding N & D statutes, see *supra* note 145.

155. See, e.g., *State v. Cunningham*, 903 So. 2d 1110, 1120–22 (La. 2005) (upholding defense subpoena procedure and stressing minimal burden on defendant but relying, in part, on other state court decisions upholding basic N & D statutes).

156. *Id.* at 1122.

157. 124 P.3d 203, 208–09 (Nev. 2005)

158. *Id.*

159. *Id.*

160. See, e.g., *Cunningham*, 903 So. 2d at 1115–16 (“In enacting the above statutes, the legislature sought to establish a procedure to relieve the party desiring to introduce a certificate of the burden of having to produce the person who performed the tests on the evidence.”); *State v. Kent*, 918 A.2d 626, 642 (N.J. Super. Ct. App. Div. 2007) (noting practical considerations including “need to divert” hospital workers and laboratory technicians from their regular work, and distance between courts). Although it is a pre-*Crawford* decision, *State v. Crow* contains similar arguments. See 974 P.2d 100, 106 (Kan. 1999) (“[F]orensic experts testified in only 8% of cases where they were subpoenaed.”); see also Thomas F. Burke, *The Test Results Said What? The Post-Crawford Admissibility of Hearsay Forensic Evidence*, 53 S.D. L. Rev. 1, 29 (2008) (discussing *Kent* decision and noting that New Jersey court gave “voice to the sentiment underlying many of the . . . opinions [holding statutes to be constitutional]”).

161. 918 A.2d at 642.

are testimonial under both *Crawford* and *Davis*.<sup>162</sup> Next, it went on to note that this decision would require “[l]aboratory technicians . . . and hospital workers . . . to divert from their regular functions, in testing substances and treating sick people, and travel to courthouses to vouch for the contents of their certified reports”<sup>163</sup> even if the resulting testimony would be of little value to the defendant.<sup>164</sup> Based on these findings, the court concluded its opinion with extensive dicta, urging the “Legislature, or appropriate rule-making bodies of the judiciary” to require that defendants provide “reasonable advance notice to prosecutors that they wish to cross-examine the authors of [reports] at trial” in order to preserve their right to confrontation.<sup>165</sup> Thus, the court seemed to believe that some type of N & D statute would be constitutional.

2. *Decisions Holding Notice and Demand Statutes to Be Unconstitutional.* — State courts that have struck down N & D statutes have not argued that states cannot establish *any* procedures for exercising the confrontation right. Instead, these courts have found that the particular statutes before them imposed too great a burden on defendants. In reaching these holdings, courts striking down N & D statutes have differed from those upholding such statutes to the extent that they emphasize (1) the practical effect both notice and demand provisions have on defendants; (2) the belief that the scope of a right is inseparable from the procedure required to invoke it; and (3) the opinion that a judge’s ability to regulate access to the confrontation right should be constrained.

The first two common characteristics of these cases are inextricably linked. Once a court recognizes the practical effects of specific notice and demand procedures on criminal defendants, it is difficult to see these provisions as neutral procedure. Additionally, because these judges are aware of the practical implications of N & D statutes, they are more mindful of the distinctions between various N & D statutes.<sup>166</sup> For example, the dissents in *State v. Cunningham* attacked the state’s defense subpoena statute by considering the content of the laboratory report itself to determine if it provided the defendant with enough information to decide whether to subpoena the technician.<sup>167</sup> In light of the limited infor-

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162. *Id.* at 628.

163. *Id.* at 642.

164. *Id.* at 643–44.

165. *Id.* The court called on the legislature to execute this proposal. *Id.* at 644–45. The Nevada Supreme Court made a similar point in *City of Las Vegas v. Walsh*, emphasizing that in the absence of some showing that cross-examination will help the defendant, the exercise is likely to be meaningless and thus, the statute promotes “judicial economy.” 124 P.3d 203, 208–09 (Nev. 2005).

166. Compare *State v. Cunningham*, 903 So. 2d 1110, 1127 (La. 2005) (Johnson, J., dissenting) (emphasizing unreasonableness of requiring indigent defendants to subpoena witnesses to exercise their confrontation right), with *State v. Caulfield*, 722 N.W.2d 304, 313 (Minn. 2006) (concluding that lack of notice provision prevented defendant from “knowingly, intelligently, and voluntarily” waiving his confrontation right).

167. 903 So. 2d at 1126 (Calogero, C.J., dissenting); *id.* at 1127 (Johnson, J., dissenting).

mation available in the report, the dissenting Chief Justice found that the burden on the defendant to establish a good faith desire to cross-examine the technician will always be greater than the majority opinion recognizes.<sup>168</sup> Similarly, in *State v. Caulfield*, the Minnesota Supreme Court found an anticipatory demand statute to be unconstitutional because it did not require the state to provide the defendant with adequate information to determine whether to demand his right to confrontation.<sup>169</sup> The court, however, proceeded to suggest that the legislature could remedy the statute's deficiencies by requiring the prosecution to provide the defendant with notice of the contents of the report and the consequences of failing to demand that the technician testify.<sup>170</sup> Thus, the court distinguished between anticipatory demand statutes—which it found to be unconstitutional—and basic N & D statutes, which it hinted it would be willing to uphold.

Finally, the third unifying feature of state court decisions striking down N & D statutes is a concern that such statutes grant judges improper authority over defendants' access to the confrontation right. In *Crawford*, as part of its criticism of *Roberts*, the Supreme Court noted that the Confrontation Clause was not intended to turn judges into gatekeepers charged with ensuring that only "reliable" evidence be admitted.<sup>171</sup> Indeed, the Court held that this sort of judicial intervention interferes with the constitutionally prescribed process for promoting reliability: cross-examination of witnesses before a lay jury.<sup>172</sup> Several state courts have adopted this reasoning, finding that N & D statutes that require defendants to justify either their demand that a laboratory technician testify or their request to subpoena a technician impermissibly restore the judge to the gatekeeping role.<sup>173</sup>

The clearest articulation of this argument comes from *State v. Laturner*, where the Kansas Court of Appeals considered a Kansas N & D plus statute that "restrict[ed] the objections a defendant [could] assert to the admission of a lab report, require[d] the defendant to assert an objection . . . and [gave] the district court the authority to evaluate the defendant's objections."<sup>174</sup> In short, in order for a defendant to exercise

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168. *Id.* at 1124 (Calogero, C.J., dissenting).

169. 722 N.W.2d at 313.

170. *Id.*

171. *Crawford v. Washington*, 541 U.S. 36, 62 (2004); see *supra* Part I.B.1.

172. *Crawford*, 541 U.S. at 61–62.

173. This argument was articulated most clearly in *State v. Laturner*, 163 P.3d 367, 374 (Kan. Ct. App. 2007) ("Both [*Davis*] and *Crawford* prohibit the district court from acting as a gatekeeper . . . . [I]t is inconsistent with a criminal defendant's right of confrontation to admit testimonial evidence based on its reliability . . . ."), but it was also made in *Caulfield*, 722 N.W.2d at 312 ("*Crawford* removed the flexibility courts had to balance the state's interests, however legitimate, against the need for prior cross-examination and unavailability of the witness before testimonial evidence can be admitted.").

174. 163 P.3d at 376.

his confrontation right, a trial court first had to determine that the defendant's reason for asserting his right—his “objection”—had merit. Since the only valid objections under the statute were those challenging the reliability of evidence,<sup>175</sup> the judge was restored to his pre-*Crawford* gatekeeping role and defendants were forced to challenge the reliability of reports to preserve their right to confrontation.<sup>176</sup> Consequently, the court concluded that the burden on the defendant imposed by the statute was impermissible.<sup>177</sup>

3. *The Case Against a Ban on All Notice and Demand Statutes.* — Both Supreme Court jurisprudence and important concerns rooted in legal theory are inconsistent with a total ban on N & D statutes. The only direct doctrinal support for upholding the constitutionality of some procedures designed to implement the confrontation right comes from dicta in *Melendez-Diaz* suggesting that basic N & D statutes are constitutional.<sup>178</sup> Although the majority cited little precedent to support this finding, as a general matter, the view articulated in Justice Scalia's opinion is consistent with Supreme Court precedent in other areas of constitutional criminal procedure where the Court has upheld state-imposed rules governing the implementation of a constitutional right.<sup>179</sup> Critically, in these cases, the Court has explicitly taken into account states' interests when determining the constitutionality of the state rule.

For example, in *Taylor v. Illinois*, the Supreme Court held that the Compulsory Process Clause is not an absolute bar to the preclusion of a defense witness as a sanction for the defense's failure to comply with state discovery procedures.<sup>180</sup> The defendant in *Taylor* did not contest the “legitimacy of a rule requiring pretrial disclosure of a defense witness[ ].”<sup>181</sup> Instead, he “argue[d] that the sanction of preclusion of the testimony of a previously undisclosed witness is so drastic that it should never be imposed.”<sup>182</sup> In assessing this claim, the Court recognized the while lesser sanctions may be “adequate and appropriate in most cases . . . it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice to the State and the harm to the adversary process.”<sup>183</sup> While the Court declined to “draft a comprehensive set of standards” to

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175. See Kan. Stat. Ann. § 22-3437(3) (Supp. 2008) (“A [report] shall be admitted in evidence unless it appears from the notice of objection . . . that the conclusions of the [report], including the composition, quality or quantity of the substance submitted to the laboratory for analysis . . . will be contested at trial.”).

176. *Laturner*, 163 P.3d at 377.

177. *Id.*

178. 129 S. Ct. 2527, 2541 & n.12 (2009); see also *supra* notes 141–144.

179. 129 S. Ct. at 2541 (citing *Taylor v. Illinois*, 484 U.S. 400, 411 (1988), *Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977), and *Williams v. Florida*, 399 U.S. 78, 81–82 (1970)).

180. 484 U.S. at 416.

181. *Id.* at 413.

182. *Id.*

183. *Id.*

determine when a sanction of preclusion would be appropriate, the Court suggested a framework in which multiple considerations could be taken into account including the defendant's explanation for his "failure to comply with a request to identify his or her witnesses in advance of trial" and the "simplicity of compliance with the discovery rule."<sup>184</sup>

Similarly, in *Williams v. Florida*, the Court considered whether a "notice-of-alibi" rule in the Florida Rules of Criminal Procedure violated a defendant's Fourteenth Amendment rights to due process and a fair trial or his Fifth Amendment right against self-incrimination.<sup>185</sup> The rule at issue required a defendant—on written demand from the prosecution—to notify the government of his intent to raise an alibi defense at trial and to submit to limited discovery with respect to the defense.<sup>186</sup> The Court upheld the rule, emphasizing what it recognized as the "obvious and legitimate" interest of the state "in protecting itself against an eleventh-hour defense."<sup>187</sup> The Court also considered the practical effects of the statute on the defense, but ultimately concluded that "the pressures that bear on [the defendant's] pretrial decision are of the same nature as those that would induce him to call alibi witnesses at trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts."<sup>188</sup> Moreover, while the rule did require the defendant to make an initial decision about his defense prior to trial, "[nothing] . . . requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice."<sup>189</sup>

Legal theory provides additional support for the argument that the Confrontation Clause should not be interpreted to bar all N & D statutes. Imposing a categorical ban on N & D statutes would restrain state action beyond what is necessary to protect the confrontation right. Professor David A. Strauss has argued that courts should establish prophylactic rules when such a rule is necessary to accommodate "both the principles and values reflected in the relevant constitutional provisions *and* institutional realities."<sup>190</sup> Thus, these "relatively rigid" rules arise in situations where a court is hoping to "reduce the likelihood that the authorities," in this case state legislators, "will violate the law, and [are] designed to improve a reviewing court's chance of identifying violations where they occur."<sup>191</sup> Strauss's justification for prophylactic measures, however, can only support those rules that respond to the specific limitations within

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184. *Id.* at 414–15.

185. 399 U.S. 78, 79 (1970).

186. *Id.* at 79–80.

187. *Id.* at 81.

188. *Id.* at 85.

189. *Id.* at 84.

190. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 *U. Chi. L. Rev.* 190, 207 (1988) [hereinafter Strauss, *Prophylactic Rules*].

191. *Id.* at 200. In constitutional law, "[p]rophylactic rules are, in an important sense, the norm, not the exception." *Id.* at 195.

which they operate. It does not justify *any* rule that could enforce the constitutional principle.<sup>192</sup>

For example, Strauss argues that the *Miranda* rights created by the Supreme Court in *Miranda v. Arizona*<sup>193</sup> are legitimate protections of the Fourth and Fifth Amendments because custodial interrogation in the “the absence of relatively clear rules creates a danger of impermissible official action and makes it more difficult for a reviewing court to detect such action.”<sup>194</sup> This rule is prophylactic because in some situations where a court finds a violation of the *Miranda* rule, the defendant might not have felt coerced. It would strain Strauss’s reasoning, however, to suggest that the same combination of institutional competence and constitutional values could support an alternative rule barring custodial interrogation altogether. The argument does not extend this far because, as Strauss himself would point out, “[j]udges do not have a general authority to implement their visions of the best world.”<sup>195</sup> Courts can choose between alternative solutions that minimize “administrative costs” and “error costs,” but a decision barring custodial interrogation altogether would presumably increase error costs beyond a tolerable level by unnecessarily excluding important evidence in too many cases.<sup>196</sup>

In applying Strauss’s theory to the questions raised by N & D statutes, both the constitutional value that can be burdened by N & D statutes and courts’ competence to assess these injuries support a narrower rule. Unless the Supreme Court holds that state interests are irrelevant in determining whether a procedure for implementing the confrontation right is permissible, how could the Court hold that *none* of the various N & D statutes are constitutional? At least in theory, an N & D statute providing a great deal of information regarding the laboratory report and requiring the defendant to merely submit a written statement requesting that the technician be available for purposes of cross-examination several days before trial<sup>197</sup> is only marginally more burdensome than the default procedure for exercising the confrontation right without an N & D statute: objecting to the admission of evidence based on the Confrontation

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192. See *id.* at 194 (“Judges do not have a general authority to implement their visions of the best world, unless, of course, those visions are validated by the Constitution. But judges do, necessarily, consider institutional concerns when they apply the Constitution in specific cases.”).

193. 384 U.S. 436, 444 (1966) (“Prior to any question, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”); see also *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (“*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both federal and state courts.”).

194. Strauss, *Prophylactic Rules*, *supra* note 190, at 195–96.

195. *Id.* at 194.

196. *Id.* at 193–94.

197. This is, in essence, a basic N & D statute. See *supra* Part II.B.1.

Clause during the trial itself.<sup>198</sup> In this situation, *any* concern for a state's interest in prescribing procedures for the exercise of a constitutional right would seem to warrant the limited burden on defendants. Under Strauss's theory of the legitimacy of prophylactic rules, however, this is not the end of the analysis—if institutional competency concerns would prevent the court from determining whether a particular statute overburdened a defendant, perhaps an across-the-board ban would be warranted.<sup>199</sup>

While courts may have difficulty assessing whether a particular custodial interrogation was coercive,<sup>200</sup> they can more easily assess the burdens created by various N & D statutes both in theory and in application. Of course, the effect of a given statute on defendants may vary based on an individual defendant's circumstances. Even a basic N & D procedure could have the effect of denying a pro se defendant his "opportunity" for confrontation, while a more sophisticated attorney might knowingly forgo the confrontation right but use this decision as a bargaining chip during pretrial settlement negotiations.<sup>201</sup> Courts, however, can distinguish between the varying requirements imposed by the four types of N & D statutes and still create a rule that is broad enough to account for the concerns of individual defendants without imposing a total bar on N & D statutes.<sup>202</sup> In short, the problem calls for a scalpel, not a hatchet. What this discriminating rule might look like will be taken up in Part III.

### III. FRAMEWORK FOR ASSESSING THE CONSTITUTIONALITY OF NOTICE AND DEMAND STATUTES

Aside from a total ban,<sup>203</sup> there are three approaches the Supreme Court could take toward assessing the constitutionality of N & D statutes: (1) leave the question entirely to the states; (2) rely on an ad hoc balancing test; or (3) prescribe a constitutional ceiling—the maximum proce-

198. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009) ("The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so.").

199. See *supra* notes 190–192 and accompanying text.

200. See *Miranda v. Arizona*, 384 U.S. 436, 445–49 (1966) (noting that "[t]he difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado" and also indicating profound concerns about law enforcement officers' tendency to use psychologically and physically coercive tactics). An alternative example offered by Strauss is the challenge facing courts deciding whether a particular statute was passed with a racially discriminatory intent. Strauss, *Prophylactic Rules*, *supra* note 190, at 204.

201. See *State v. Cunningham*, 903 So. 2d 1110, 1127 (Johnson, J., dissenting) (expressing concern regarding effect of defense subpoena statute on indigent defendants); see also *supra* Part II.C.2. For a discussion of consequences of using the confrontation right as a bargaining chip, see Transcript of *Melendez-Diaz* Oral Argument, *supra* note 19, at 21 (Breyer, J.); Metzger, *Blog Post*, *supra* note 17.

202. See *supra* Part II.B. The content of what this rule might look like will be taken up *infra* Part III.C.

203. This possibility is discussed *supra* Part II.C.3.

dural burden a state can impose on a defendant who wishes to confront the witnesses against him. This section will assess the advantages and disadvantages of each of these potential frameworks and argue that the third option—a “constitutional ceiling”<sup>204</sup>—offers the best accommodation of the states’ interest in promoting the efficient administration of justice and defendants’ interest in preserving the right to confrontation as a mechanism for ensuring the fairness and quality of the adversarial process.

A. *The “Laissez Faire” Approach: Leaving the Issue to the States*

1. *The Supreme Court Has Not Yet Decided this Issue.* — This is the approach the Supreme Court has de facto adopted.<sup>205</sup> While one could read the lack of jurisprudence on this question as an indication that the Court has historically intended to leave these questions to the states, this argument overlooks *Crawford’s* transformation of both the meaning of these statutes and the importance of procedures regulating the use of the confrontation right.<sup>206</sup> Given such a sea change, it is hard to impute this intent to the Court, at least until more challenges have been raised to the statutes post-*Crawford*.<sup>207</sup>

2. *The Advantages of a “Laissez Faire” Approach.* — Although the Court has not yet adopted a “laissez faire” approach, an argument can be made that this is the path the Court should take moving forward. The text of the Constitution does not seem to dictate any particular procedure,<sup>208</sup> and thus a Supreme Court opinion dictating which procedures are acceptable unnecessarily interferes with state control over the administration of criminal justice.<sup>209</sup> Furthermore, not only have states historically

204. This could also be characterized as a “constitutional floor”—the minimum amount of process a state must provide to avoid depriving defendants of their right to confrontation. A “ceiling,” however, seems to be more appropriate in this context as the state is increasing the burden on the defendant rather than giving him something he did not have before.

205. See supra notes 139–140 and accompanying text (noting that Supreme Court has not decided what procedures can be constitutionally imposed on defendant who wishes to assert his confrontation right).

206. See supra notes 109–112 and accompanying text (arguing that N & D statutes took on increased importance after *Crawford* because prior to *Crawford* defendants often did not have a right to confront analysts).

207. The Supreme Court recently granted certiorari on a petition filed by Professor Friedman on behalf of two defendants charged with drug-related offenses. See *Briscoe* Petition, supra note 27; see also Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & Pol’y 553, 572 (2007) (identifying constitutionality of N & D statutes as one of the “important and controversial [issues that] will need to be resolved in coming years”).

208. Cf. *State v. Smith*, No. 1-05-39, 2006 WL 846342, at \*5 (Ohio Ct. App. Apr. 3, 2006) (noting that although we typically think of the right to confrontation arising at trial, the Sixth Amendment “merely states that the defendant has the right to confrontation during the course of the prosecution”).

209. When assessing the burden on the compulsory process right created by discovery rules, the Supreme Court noted that “[t]he State’s interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not

been granted autonomy to order their own affairs in this area, but the experimentation and diversity of approaches that results from this freedom is also itself a social good.<sup>210</sup>

3. *Arguments Against the “Laissez Faire” Approach.* — There are two flaws in the “laissez faire” approach. First, the legal argument is based on an unsustainable distinction between substance and procedure.<sup>211</sup> All N & D statutes impose some degree of burden on the defendant, making it somewhat less likely that the defendant will exercise his opportunity to cross-examine.<sup>212</sup> Thus, the N & D statutes directly affect the substance of the right.<sup>213</sup> Whether this burden is justified is a separate question, but it is disingenuous to suggest that simply because the statutes “create procedure” (as opposed to outright limitations on what statements the Confrontation Clause applies to) they are outside the scope of what the Confrontation Clause itself should regulate.

Second, while state experimentation is desirable, it cannot be used as an excuse for eviscerating the meaning given to federal rights by the Supreme Court.<sup>214</sup> For example, defense subpoena statutes effectively deprive defendants of the entire benefit secured to them by the

always inflexible, rules relating to the identification and presentation of evidence.” Taylor v. Illinois, 484 U.S. 400, 411 (1988) (upholding state rule barring defendant from calling witnesses who were not identified to state during discovery).

210. This is the basic states as laboratories for experimentation argument. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . .”).

211. Compare Fleming James, Jr. et al., *Civil Procedure* 1–4 (5th ed. 2001) (explaining distinction between “substance” and “procedure”), with William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29, 119 (exploring value judgments bound up in debates over procedure).

212. See Metzger, *Cheating*, supra note 22, at 528 (“[N & D statutes] illustrate a fundamental legislative assumption of system failure. Lawmakers assume that the criminal justice system minimizes costs and maximizes efficiency when defense counsel must initiate adversary procedures by filing labor and fact-intensive claims of entitlement.”). The centrality of the notion of an opportunity to cross-examine to the *Crawford* decision cannot be overstated—throughout the opinion the Court repeatedly states that short of the opportunity to cross-examine a witness at trial, the confrontation right is only satisfied by a prior opportunity to cross-examine. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (holding that admissibility of absent witness’s examination was conditioned on “unavailability and a prior opportunity to cross-examine”).

213. The argument that the core of the Confrontation Clause right is this “opportunity” is further substantiated by the relatively low standards that the Court has created for assessing whether the confrontation itself is anything more than superficial, i.e., if the witness is available for cross-examination but claims lack of memory, the requirement is likely to be satisfied. See supra note 57 (discussing *Crawford*’s acceptance of *California v. Green* precedent, holding that as long as witness “appears,” confrontation right is satisfied).

214. Per the Supremacy Clause, state laws that violate the U.S. Constitution cannot be upheld. See U.S. Const. art. VI, cl. 2. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), the Supreme Court asserted its authority to decide whether statutes comport with the Court’s interpretation of the Constitution.

Confrontation Clause, leaving them with a “right” that is already given to them by the Compulsory Process Clause.<sup>215</sup> Furthermore, to the extent that subpoena requests will only be granted if a defendant demonstrates that there is reason to question the report’s findings, the Confrontation Clause is no longer protecting the opportunity to cross-examine adverse witnesses but rather it is promoting reliability.<sup>216</sup> Finally, it is possible that diversity in the realm of individual rights is less desirable than in other areas of constitutional law. As Professor Henry P. Monaghan has argued, “[g]iven the limited and important nature of the rights involved” the argument that federal uniformity will “undermine the values inherent in having fifty different laboratories for social experimentation” seems “unconvincing.”<sup>217</sup>

### B. *Ad Hoc Balancing Approach*

An ad hoc balancing approach has the benefit of ensuring the kind of individualized review that promotes the proper balance of interests in a particular case while allowing future action by the more democratic branches of government.<sup>218</sup> However, even one of the most ardent supporters of a “minimalist” judiciary, Professor Cass R. Sunstein, has recognized that “[w]hen planning is important, and when judges can devise

215. The Compulsory Process Clause, independent of the Confrontation Clause, protects a defendant’s right to call witnesses to testify. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .”). Several scholars have argued that the Confrontation Clause should be interpreted to preserve a right that is distinct from the interest guarded by the Compulsory Process Clause. See Amar, *First Principles*, supra note 36, at 689 (discussing distinct but overlapping functions of Compulsory Process Clause and Confrontation Clause); Richard D. Friedman, *Crawford and Davis: A Personal Reflection*, 19 Regent U. L. Rev. 303, 311 (2007) (arguing that defense subpoena statutes are impermissible under the Confrontation Clause because they do not “do anything more than the Compulsory Process Clause”). Notably, some N & D statutes “add” to the right protected by the Compulsory Process Clause by providing defendants with further benefits, such as the right to call the analyst to testify during the prosecution’s case-in-chief. See supra Part II.B.4 (discussing defense subpoena statutes).

216. See supra notes 171–177 and accompanying text.

217. Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 19 (1975).

218. See generally Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, at ix–x (1999) (encouraging courts to “avoid[ ] clear rules and final resolutions” thereby allowing them to be “[a]lert to the problem of unanticipated consequences” and to “promote the democratic ideals of participation, deliberation, and responsiveness”). Traditionally, criminal procedure has been a field of constitutional law in which courts have exercised substantial discretion. Fisher, *Categorical Requirements*, supra note 2, at 1502–04 (discussing proliferation of balancing tests in realm of constitutional criminal procedure). Some have argued that this is the approach that the Court has taken in defining the meaning of testimonial. But see Edward J. Imwinkelried, *The Treatment of Prosecution Hearsay Under Crawford v. Washington: Some Good News, But . . .*, *Champion*, Sept./Oct. 2004, at 16, 18 (encouraging courts to adopt ad hoc approach towards applying then-new testimonial framework).

decent rules, [rule-based law] is all to the good.”<sup>219</sup> Criminal procedure presents a unique challenge to the court system because of the large number of criminal prosecutions that spawn constitutional litigation.<sup>220</sup> Furthermore, a large number of people need to coordinate their activities in response to holdings on criminal procedure.<sup>221</sup> Indeed, the Supreme Court’s decision to overturn *Roberts* was driven, at least in part, by the “unpredictability” of the “reliability” standard.<sup>222</sup>

In addition to the arguments that criminal procedure generally benefits from bright line rules, laboratory reports, in particular, create issues that demand an analytic approach that provides lower courts with firm guidance. In the aftermath of *Crawford*, a number of courts have been reluctant to recognize the burdens that even the most onerous N & D statutes place on defendants.<sup>223</sup> These decisions evince concerns about conserving the state’s limited resources to conduct forensic analysis,<sup>224</sup> but they are also based on the belief that, because these reports are reliable, the defendant cannot have a strong interest in cross-examining the analyst.<sup>225</sup> Thus, under a balancing framework, it seems likely that states would continue to overly discount defendants’ interests. Indeed, Justice Black argued that a failure to adequately account for the individual’s interest against the state’s is a common characteristic of balancing tests.<sup>226</sup>

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219. Sunstein, *supra* note 218, at 209. Thus, Sunstein is a supporter of the holding in *Miranda*. *Id.* at 30; see also Fisher, *Categorical Requirements*, *supra* note 2, at 1519 (discussing benefits of bright line rules in criminal procedure).

220. Fisher, *Categorical Requirements*, *supra* note 2, at 1519 & n.153 (stating that nineteen of twenty-seven constitutional cases before the Supreme Court in 2003 term arose from criminal cases—including habeas corpus petitions (citing *The Supreme Court, 2003 Term—The Statistics*, 118 *Harv. L. Rev.* 497, 509 (2004))).

221. *Id.* at 1519.

222. *Crawford v. Washington*, 541 U.S. 36, 68 n.10 (2004) (“[T]he *Roberts* test is *inherently*, and therefore *permanently*, unpredictable.”); see also Fisher, *Categorical Requirements*, *supra* note 2, at 1520 (noting role of “unpredictability” in Court’s holding in *Crawford*).

223. See *supra* Part II.C.1 (discussing cases upholding N & D statutes).

224. For a discussion of the focus on practical concerns, see *supra* notes 160–165 and accompanying text.

225. This argument is made in state court decisions assessing the constitutionality of N & D statutes. See *State v. Kent*, 918 A.2d 626, 643 (N.J. Super. Ct. App. Div. 2007) (suggesting that in some situations, decisions to invoke right to confront laboratory technician could be mere “adversarial gamesmanship”); *supra* Part II.C.1. A similar argument has been made by courts holding laboratory reports to be nontestimonial. See *Napier v. State*, 820 N.E.2d 144, 149 (Ind. Ct. App. 2005) (classifying test as nontestimonial because it was unclear how admission of test would “preclude any meaningful cross-examination”); *State v. O’Maley*, 932 A.2d 1, 13 (N.H. 2007) (holding report to be nontestimonial because cross-examination would not be helpful). Of course, this line of reasoning is explicitly barred by *Crawford*. See *supra* Part I.B.1.

226. *Rochin v. California*, 342 U.S. 165, 177 (1952) (Black, J., concurring) (“[T]he accordion-like qualities [of the majority’s balancing test] must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights.”).

C. *An Alternative: Creating a Constitutional Ceiling*

A prophylactic rule holding *all* N & D statutes unconstitutional is unnecessary and therefore unjustified because states have a significant interest in the administration of criminal justice that the Supreme Court should take into account when assessing the constitutionality of N & D statutes.<sup>227</sup> However, a decision by the Court to leave the question entirely to the states or to adopt an *ad hoc* approach would provide inadequate protection of a defendant's right to confrontation.<sup>228</sup> A third option—a constitutional ceiling approach—integrates the legitimate concerns of both states and defendants while providing states with flexibility to provide greater protections for defendants than the Constitution requires.<sup>229</sup> Additionally, this ceiling could be constructed with enough specificity to ensure the “predictability” of outcome that is so important in a criminal procedure setting.<sup>230</sup>

1. *The Content of the Ceiling.* — The Supreme Court should hold that procedures designed to implement the defendant's right to confront the author of a laboratory report are overly burdensome and thus constitute an unconstitutional interference with a defendant's right to confrontation unless three conditions are met: (1) the defendant must be provided with notice<sup>231</sup> of the contents of the report, the conditions under which it was prepared, the consequences of failure to demand his right to confrontation, and the procedure through which he can make this demand;<sup>232</sup> (2) the defendant cannot be obligated to request a subpoena in order to exercise his right to confrontation, he cannot be required to provide a substantive basis for his demand, and he must be afforded reasonable time to make this demand; and (3) failure to demand cannot result in forfeiture of the right to confrontation if the defendant can demonstrate, by a preponderance of the evidence, that he did not under-

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227. See *supra* Part II.A (identifying state interests at stake) and II.C.3 (considering legitimacy of prophylactic rules).

228. See *supra* Part III.A–B.

229. One of the most discussed constitutional ceilings imposed by the Supreme Court is in the area of punitive damages for tort liability. Cf. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *Yale L.J.* 524, 589–90 (2005) (discussing “revival” of “nineteenth-century idea of a due process ceiling on states’ ability to impose liability on an actor under the guise of providing redress”).

230. For a discussion of the value of predictability in the criminal procedure context, see *supra* Part III.B. In its punitive damage jurisprudence, the Supreme Court has “refused to adopt a mechanical test or bright-line formula, instead setting ‘guideposts’ that reference the nature of the defendant’s wrong and the way in which states have regulated similar misconduct.” Goldberg, *supra* note 229, at 590. The rule this Note proposes is more rigid.

231. An interesting question that is outside the scope of this Note is whether notice should be directed to defendant or defense counsel.

232. These requirements are similar to those proposed by the Minnesota Supreme Court in *State v. Caulfield*, 722 N.W.2d 304, 313 (Minn. 2006) (discussing need for “knowing, intelligent, and voluntary waiver” of the confrontation right).

stand the procedure to exercise his right *or* that after the time for his demand had expired, he came across new information that caused him to exercise his right. The reasoning behind each requirement will be explained in turn.

a. *The Notice Requirement.* — The notice requirement serves three purposes: (1) alerting the defendant that “default” procedural rules have been turned “off”; (2) providing the defendant with the information he needs to decide whether or not to invoke the confrontation right; and (3) providing enough information to understand the process for exercising the confrontation right.

i. *Turning Off the Default.* — In many cases the prosecution might want the analyst who prepared a forensic report to testify, especially if he believes that the analyst who prepared the report will appear competent before the jury.<sup>233</sup> Thus, it is often reasonable for a defendant or, more importantly, defense counsel, to assume that the author of a report that is central to the prosecution’s case will be available for purposes of cross-examination. Of course, a defendant could request the forensic report during discovery,<sup>234</sup> assess the contents of the document to determine if cross-examination would be useful and then check to see if the prosecution planned on calling the analyst.<sup>235</sup> However, since it is the prosecution rather than the defense that is electing to move away from the default procedure in which the defendant simply exercises his right to confrontation at trial, it should be incumbent upon the prosecutor to notify the defendant of this choice, especially since providing this notification would require little cost on the part of the state (and is clearly much less expensive than actually calling the witness to testify).<sup>236</sup>

ii. *Providing a Basis for Decision.* — Notice alerts the defense that it needs to make a decision as to whether or not live testimony will be useful, but to effectively make this decision, the defendant must have adequate information about the report and the procedures under which it

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233. Because the testimony of the technician is likely to harm the defendant, it is reasonable to assume that in most cases the attendance of the analyst is at the prosecution’s behest. Cf. Brief of Law Professors, *supra* note 103, at 8–9 (“[A] defendant impairs rather than enhances his case by insisting upon an . . . uncontroverted presentation of scientific evidence on a critical element of the government’s proof . . . Experienced defense counsel do not insist on the live presentation unless there is some reason to believe the evidence is susceptible to challenge.”).

234. A full analysis of the problems with this alternative is beyond the scope of this Note but it is important to note that the power of the defendant during discovery is limited. See Giannelli, *Expert Testimony*, *supra* note 22, at 61–62, 66–68.

235. See *State v. Smith*, No. 1-05-39, 2006 WL 846342, at \*7 (Ohio Ct. App. Apr. 3, 2006) (holding “notice” that did not adequately inform defendant about prosecution’s intent to introduce report without live testimony imposed too great a burden on defendant).

236. The situation in which a disparity in cost could lead to the use of the confrontation right as bargaining chip is discussed *supra* notes 17, 19, 201, and accompanying text.

was created.<sup>237</sup> The Court cannot possibly spell out what information should be required in the various types of forensic reports, nor does it need to, largely because this is an area where relieving the burden on defendants is relatively cheap.<sup>238</sup> Currently, N & D statutes vary to the extent that they require reports to include information beyond the outcome of forensic tests, but it would be easy for laboratories to include additional information.<sup>239</sup> Presumably, they would have a form regarding their standard operating procedures and accreditation. Furthermore, the more compelling the report, the less likely the defendant will want to focus the jury's attention on it by calling the technician to explain it to them yet again.<sup>240</sup>

iii. *Informing Defendants About the Process.* — Professor Richard Friedman has argued that there is little need for the government to inform an experienced defense attorney regarding the consequences of failure to demand the presence of a forensic report's author at trial.<sup>241</sup> Admittedly, when a defendant has the representation of competent counsel, this aspect of the notice requirement may be more prophylactic than the other elements.<sup>242</sup> This precaution, however, is almost cost free and will help prevent situations that will be difficult for the court to assess ex post—cases ranging from a young attorney who is unfamiliar with the state rules of criminal procedure<sup>243</sup> to a pro se defendant without legal training.<sup>244</sup>

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237. See *Caulfield*, 722 N.W.2d at 313 (laying out various elements of adequate notice). Professor Paul Giannelli has actually advocated the use of N & D statutes as a mechanism to guard against laboratory misconduct. According to Giannelli, “[i]f pretrial discovery is sufficient to permit the defense to make an informed judgment, then the failure to demand the examiner’s presence . . . ease[s] the government’s ‘burden’ while at the same time protect[ing] defendants’ right of confrontation.” Giannelli, *Expert Testimony*, supra note 22, at 84.

238. Cf. Giannelli, *Expert Testimony*, supra note 22, at 51 (arguing that requiring laboratories to provide documentation in support of their work should not be overly burdensome, since most of the relevant information should be recorded by analysts as a matter of standard operating procedure).

239. For a discussion of the variety of notice requirements, see supra Part II.B (discussing varying notice requirements in basic N & D statutes and lack of notice requirement for other types of N & D statutes).

240. See supra note 233.

241. Friedman, *Notice and Demand*, supra note 133.

242. Prophylactic in the sense that it provides more protection than is necessary to protect the underlying constitutional principle. See supra notes 190–196 and accompanying text (discussing views on prophylactic measures).

243. This is essentially the procedure the court called for in *State v. Kent*, 918 A.2d 626, 643–44 (N.J. Super. Ct. App. 2007) (“[W]e deem it appropriate prospectively to require, as a condition of our treatment of lab reports and blood sample certificates as ‘testimonial’ documents, that defense counsel provide reasonable advance notice to prosecutors that they wish to cross-examine the authors of those documents at trial.”).

244. For an analysis of the Court’s power to prescribe prophylactic rules based on institutional competence concerns, see supra Part II.C.3.

b. *The Demand Requirement.* — The Supreme Court should permit N & D statutes that serve state interests by providing a procedure through which defendants can indicate to the prosecution, prior to trial, their intent to invoke the confrontation right with respect to specific testimony. Once the defendant indicates his decision to invoke the confrontation right, however, the state's interest in the efficient administration of justice cannot relieve the prosecution of the burden of making its case within constitutional limits. This includes providing for defendants' right to confrontation by securing the attendance of the technician.<sup>245</sup> Additionally, to prevent the judge from resuming the role of gatekeeper to the Confrontation Clause, the defendant cannot be required to demonstrate a substantive basis for his desire to exercise his confrontation right.<sup>246</sup> While this concern regarding the allocation of power between judge and jury has already been addressed,<sup>247</sup> some subtle distinctions between subpoenas and simple demands merit further discussion here.

i. *Subpoenas v. Simple Demand.* — A key difference between a subpoena requirement and a simple demand provision is that subpoenas shift the burden to the defendant to secure the attendance of the technician.<sup>248</sup> This shift is legally significant. As the United States Supreme Court noted in *Taylor v. Illinois*, Sixth Amendment provisions including the rights "to be assisted by counsel, and to be confronted by adverse witnesses are designed to restrain the prosecution by regulating the procedures by which it presents its case against the accused."<sup>249</sup> These rights "apply in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own."<sup>250</sup> While this statement does not support the conclusion that states cannot impose any burden on the

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245. See *infra* Part III.C.1.b.i (distinguishing simple demand provisions from subpoenas).

246. See *supra* notes 171–177 and accompanying text (discussing decisions striking down N & D statutes requiring defendants to justify demand to exercise confrontation right).

247. *Id.*

248. In a case assessing the constitutionality of a defense subpoena statute under the Oregon Constitution, the Supreme Court of Oregon emphasized that a subpoena requirement cannot be equated with a "requirement that [the] defendant notify the state that the defendant will insist on the right to cross-examine the state's witness . . ." *State v. Birchfield*, 157 P.3d 216, 219 (Or. 2007). According to the court, a subpoena overly burdens the defendant by forcing him to "secure the attendance of [a] witness . . . [when] [i]t is the state that seeks to adduce the evidence as to which the criminalist will testify." *Id.* at 220.

249. 484 U.S. 400, 410 n.14 (1988) (internal quotation marks omitted) (quoting Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 74 (1974)). This point has been made by Professors Gianelli and Friedman, who also believe that at least some N & D statutes are constitutional. See, e.g., Gianelli, *Admissibility of Lab Reports*, *supra* note 10, at 32 ("[T]he Confrontation Clause is self-executing; the accused cannot be required to invoke it."); Friedman, *Notice and Demand*, *supra* note 133 (distinguishing between "justifiable" provisions requiring early assertion and others that force defendant to subpoena witnesses).

250. *Taylor*, 484 U.S. at 410 n.14.

defendant to invoke these rights,<sup>251</sup> it does establish that once the defendant indicates his desire to enjoy the benefit of the right, the burden is on the state to act accordingly—the defendant cannot be required to put on a case in order to exercise his right to confrontation.<sup>252</sup> Additionally, if a defendant wishes to exercise his right to confrontation and the witness cannot be secured, *Crawford* requires that unless the defendant has had a prior opportunity to cross-examine the witness, the testimony must be excluded.<sup>253</sup> The prosecution cannot escape this outcome by shifting the burden to the defendant to find the witness.<sup>254</sup>

c. *The “Residual” Exception.* — The final component of the proposed constitutional ceiling responds to the concern that any rule short of a total ban on N & D statutes will underprotect a defendant’s right to confrontation in situations where a defendant is unaware or unable to comply with the procedural requirements.<sup>255</sup> While the limits regarding what constitutes permissible notice and what types of demand may be required ensure that most defendants will face little difficulty using their right to confrontation,<sup>256</sup> even the simplest procedure may be overly burdensome when applied to a particular person.<sup>257</sup> The residual exception is designed to address those situations where a defendant simply could not comply with the required procedure, however minimal.<sup>258</sup> In these circumstances, the defendant should be called upon not to explain why he wishes to invoke the confrontation right<sup>259</sup> but rather why he was unable

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251. For example, while *Miranda* requires the interrogating police officers to inform the defendant of his right to counsel, the defendant may choose not to invoke that right. *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

252. See *Briscoe* Petition, supra note 27, at 11–12 (stressing both legal and practical consequences of requiring defendants to subpoena witnesses against them).

253. *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (“Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”).

254. *State v. Birchfield*, 157 P.3d 216, 220 (Or. 2007); see also *Briscoe* Petition, supra note 27, at 20–21 (arguing that, in practice, states with “defense subpoena[ ]” N & D statutes undermine much of the value of the right to confrontation and that any incremental saving to the state comes at too great a price to defendants).

255. See supra note 201 and accompanying text (discussing how differently situated defendants will experience the burden imposed by a given procedure to a varying degree).

256. Even overworked public defenders should have little difficulty sending a simple form letter if they think cross-examination will be useful. Since the vast majority of criminal cases do not proceed to trial, this issue will rarely come up. See Brief of Law Professors, supra note 103, at 7 (“Live forensic testimony is likely to be unnecessary in most cases, because very few criminal prosecutions actually proceed to trial.”).

257. See *State v. Cunningham*, 903 So. 2d 1110, 1127 (La. 2005) (Johnson, J., dissenting) (focusing on unreasonableness of requiring indigent defendants to subpoena witnesses).

258. See *id.* (describing subpoena requirement as “impossible burden” for many indigent defendants).

259. This would create the same issue regarding reliability discussed in the context of N & D plus and defense subpoena statutes. See supra notes 171–177, 246–247, and accompanying text.

to comply with the authorized procedure for exercising the right.<sup>260</sup> This inquiry is warranted because the *actual* burden in these cases is greater and thus may exceed the constitutionally prescribed ceiling.

Furthermore, the proposed ceiling limits the residual exception to situations where the defendant will be found to have forfeited his right for failure to comply with the procedure. This language suggests that should the state adopt a less punitive remedy to promote compliance with the notice and demand protocol, i.e., the defendant must cover the costs of securing the witness or the witness will no longer testify in the prosecution's case-in-chief, it will face fewer objections under the residual exception.<sup>261</sup>

#### CONCLUSION

The Supreme Court's transformation of the Confrontation Clause in *Crawford v. Washington* did not take into account states' practical concerns regarding the administration of their criminal justice systems. The result was a rule that, when applied to laboratory reports, can have a deleterious effect on states' ability to use forensic evidence in criminal prosecutions. Thus, in an effort to minimize instances where a laboratory technician is needlessly called into court, states have increasingly relied on N & D statutes designed to force defendants to declare, before trial, their decision to invoke the right to confront these witnesses. The challenge posed by these statutes—what procedures (if any) a state can constitutionally require a defendant to comply with to exercise the confrontation right—was not addressed in *Crawford*.

This Note recognizes that procedural burdens necessarily affect the ability of a defendant to exercise his substantive right. States' interests, however, should also be taken into account when determining what procedural burdens can constitutionally be imposed on defendants. The best way to achieve this balance between the interests of the states and the defendants is for the courts to employ a constitutional ceiling approach. Of course, how the Supreme Court will actually proceed remains to be seen, but what is clear is that the challenge presented by notice and demand statutes is one of the next questions the Court must answer.

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260. This is analogous to the type of inquiry Justice Stevens proposed in *Taylor v. Illinois*, 484 U.S. 400, 415 (1988) (holding when determining if forfeiture of right to call witness is an appropriate remedy for failure to comply with discovery disclosure rules, “[a] trial judge [may] insist on an explanation for a party’s failure to comply . . . in advance of trial”).

261. At the time of writing, there appear to be no N & D statutes that provide for any penalty other than forfeiture. The majority in *Taylor* upheld a state court decision finding that defendant forfeited his right to compulsory process due to his failure to disclose the identity of a witness during discovery. Justice Brennan authored a dissent suggesting that states should use alternative sanctions. *Taylor*, 484 U.S. at 425 (Brennan, J., dissenting).