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### Autopsy Reports and the Confrontation Clause: A Presumption of Admissibility

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**AUTOPSY REPORTS AND THE CONFRONTATION CLAUSE: A  
PRESUMPTION OF ADMISSIBILITY**

*Daniel J. Capra\* and Joseph Tartakovsky\*\**

**ABSTRACT**

*Courts nationwide are divided over whether autopsy reports are “testimonial” under the Sixth Amendment’s Confrontation Clause. Resolving that split will affect medical examiners as dramatically as Miranda did police. This article applies the latest Supreme Court jurisprudence to the work of modern medical examiners in a comprehensive inquiry. It argues that autopsy reports should be presumed non-testimonial—a presumption overcome only by a showing that law enforcement involvement materially influenced the examiner’s autopsy report.*

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**INTRODUCTION: UNDER DEBATE  
IN COURTS NATIONWIDE**

In 2004, the Supreme Court, in *Crawford v. Washington*, restored the “original meaning” of the Sixth Amendment’s Confrontation Clause.<sup>1</sup> The framers of that clause—which guarantees a criminal defendant the right “to be confronted with the witnesses against him”—meant to outlaw the old-world practice of condemning men through ghost accusers who couldn’t be cross-examined at trial.<sup>2</sup> We get a vivid sense of the inquisitorial terror that doomed Sir Walter Raleigh in the political persecutions that persist in the lands of unliberty. In summer 2013, Russian oppositionist Aleksei Navalny was sentenced to five years’ imprisonment, largely on the testimony of a man named Opalev. “[D]uring the trial,” the *New York Times* reported, Opalev “gave contradictory evidence, and defense lawyers were not allowed to cross-examine him.”<sup>3</sup>

*Crawford* firmed up the right in favor of criminal defendants but, as with most major constitutional decisions, it raised as many questions as it answered.<sup>4</sup> One of the most important is whether the Confrontation

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<sup>1</sup> *Crawford v. Washington*, 541 U.S. 36, 60 (2004).

<sup>2</sup> *Id.* at 50 (“[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused”); *id.* at 56 (“Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar.”).

<sup>3</sup> David M. Herszenhorn, *Russian Court Convicts Opposition Leader*, N.Y. TIMES, July 18, 2013, available at <http://www.nytimes.com/2013/07/19/world/europe/russian-court-convicts-opposition-leader-aleksei-navalny.html?pagewanted=print>.

<sup>4</sup> Specifically, *Crawford* replaced the sometimes flimsy test of *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which held that the Confrontation Clause allowed admission of any out-of-court statement that fell within a “firmly rooted hearsay exception” or that possessed “particularized guarantees of trustworthiness.”

Clause applies with full rigor to autopsy reports offered for their truth.<sup>5</sup> There are two views. On one side is the argument that autopsy reports are prepared by neutral pathologists—highly trained specialists who are effectively separate from law enforcement, working under a statutory duty to determine the cause of unusual deaths.<sup>6</sup> Their reports *can* appear in prosecutions, but the vast majority do not. To require these impartial M.D.s to testify imposes a massive, pointless burden on them and serves to bar or undermine just prosecutions because autopsy evidence is soon lost and often impossible to recreate.

On the other side is the argument that autopsy reports are a formal record, created sometimes at police behest, by state agents who practically function as an arm of law enforcement. Autopsies, far from being a reading on some machine, are the product of human skill and judgment. The defendant, as with any other formalized testimony, should be able to test for fraud or incompetence. Pathologists are “witnesses” against the accused.

The issue here usually arises when an autopsy report is offered in evidence or testified to by a colleague who was not its author.<sup>7</sup> If the

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<sup>5</sup> See, e.g., *Euceda v. United States*, 66 A.3d 994, 1012-13 (D.C. 2013) (observing that courts “continue to be split on this question”); *People v. Lewis*, 806 N.W.2d 295 (Mich. 2011) (“[W]hether admission of the contents of an autopsy report through testimony of a medical examiner who did not prepare the report constitutes inadmissible testimonial hearsay . . . is a jurisprudentially significant question that has divided courts across the country.”). The Supreme Court has declined to grant cert petitions raising this question. E.g., *Craig v. Ohio*, 549 U.S. 1255 (2007) (denying certiorari where question presented was: “Is an autopsy report used in a murder prosecution a testimonial statement within the meaning of *Crawford*?”); see Pet. for Writ of Cert., *Craig v. Ohio*, 127 S. Ct. 1374 (Dec. 19, 2006) (No. 06-8490).

<sup>6</sup> We refer to “autopsies” or “examinations” interchangeably and mean for the discussion to apply to autopsies, external examinations, and medical file reviews alike. We refer variously to “pathologists,” “doctors,” and “medical examiners” with the same people in mind.

<sup>7</sup> See, e.g., *State v. Kennedy*, 735 S.E.2d 905, 917 (W. Va. 2012) (allowing a Dr. Sabet to give testimony based on autopsy report prepared by Dr. Livingston); *State v. Craig*, 853 N.E.2d 621, 637 (Ohio 2006) (allowing Dr. Lisa Kohler, Summit County

report is “testimonial,” it cannot be admitted into evidence unless the author testifies (or did so previously, under cross-examination). Depending on how you read recent Supreme Court cases, a different testifying expert may not even be able to rely on that report.<sup>8</sup> If the examiner dies or retires or moves away, the answer to this question often determines whether the case goes on. We think autopsy reports can be non-testimonial—and often are. As the studios say, it’s an issue coming soon to a supreme court near you.

## I. THE STATE OF CONFRONTATION CLAUSE JURISPRUDENCE

### A. *CRAWFORD* (2004)

*Crawford* is what is usually referred to as a “landmark” decision. That term once referred to a conspicuous object that guided wayfarers and ships at sea. For the intrepid adventurers at the bar, however, the more prominent theme since *Crawford* has been misdirection and confusion.<sup>9</sup> Justice Scalia wrote *Crawford* but a few years later pronounced Confrontation Clause jurisprudence “in a shambles.”<sup>10</sup> Or as the California

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medical examiner, to testify using autopsy report of Dr. Roberto Ruiz); *State v. Lackey*, 120 P.3d 332, 341 (Kan. 2005) (allowing Dr. Mitchell to testify using Dr. Eckert’s report); *People v. Dungo*, 286 P.3d 442, 445 (N.M. 2012) (allowing Dr. Lawrence’s to testify using Dr. Bolduc’s autopsy report).

<sup>8</sup> See *Williams v. Illinois*, 132 S. Ct. 2221, 2228 (2012), discussed below in II.C.

<sup>9</sup> See, e.g., *State v. Navarette*, 294 P.3d 435, 437 (N.M. 2013) (“What constitutes a testimonial statement is not easily discernable from a review of *Crawford*”); *Kennedy*, 735 S.E.2d at 916 (“[W]e believe *Williams* cannot be fairly read to supplant the ‘primary purpose’ test previously endorsed by the Court and as established in *Melendez-Diaz* and *Bullcoming*.”); *United States v. James*, 712 F.3d 79, 94 (2d Cir. 2013) (relying on *Melendez-Diaz*, *Bryant*, and *Bullcoming*, but finding *Williams* inconclusive enough to rely on for a clear principle); *State v. Shivers*, 280 P.3d 635, 637 (Az. Ct. App. 2012) (acknowledging the Clause’s “choppy waters”).

<sup>10</sup> *Michigan v. Bryant*, 131 S. Ct. 1143, 1168 (2011). In *Bullcoming* the majority claimed that the dissent “makes plain that its objection is less to the application of the

Supreme Court put it, with admirable delicacy, the Clause presents “complexities that are far from easy to resolve in light of the widely divergent views expressed by the justices of the United States Supreme Court.”<sup>11</sup>

In *Crawford*, the defendant was tried for assault and attempted murder; the state introduced an inculpatory tape-recording of his wife Sylvia (not present at trial) speaking to police in a station-house interrogation. The Court declared this impermissible, even though lower courts had found Sylvia’s statement reliable under the then-applicable constitutional jurisprudence. “[T]he Clause’s ultimate goal is to ensure reliability of evidence,” wrote the Court, “but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>12</sup> Only “testimonial” evidence triggered the Clause’s application—this was the key.<sup>13</sup> Justice Scalia continued:

We leave for another day any effort to spell out a comprehensive definition of “testimonial.” 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. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.<sup>14</sup>

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Court’s decisions in *Crawford* and *Melendez-Diaz* to this case than to those pathmarking decisions themselves.” *Bullcoming*, 131 S. Ct. at 2714 n.5.

<sup>11</sup> *People v. Dungo*, 286 P.3d 442, 447 (Cal. 2012), as modified on denial of reh’g (Dec. 12, 2012).

<sup>12</sup> *Crawford*, 541 U.S. at 61.

<sup>13</sup> *See, e.g., Davis v. Washington*, 547 U.S. 813, 821 (2006) (“A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase ‘testimonial statements.’ Only statements of this sort cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause.”).

<sup>14</sup> *Crawford*, 541 U.S. at 68.

B. *MELLENDEZ-DIAZ* (2009) AND *BULLCOMING* (2011)

The applicability of the *Crawford* regime to forensic reports was addressed in *Melendez-Diaz* in 2009. Could Massachusetts introduce three “certificates of analysis” from a state lab, created at police request, establishing that a trafficker’s seized substances were in fact cocaine?<sup>15</sup> The answer, wrote Justice Scalia, was “No”:

The documents at issue here, while denominated by Massachusetts law “certificates,” are quite plainly affidavits: declarations of facts written down and sworn to by the declarant before an officer authorized to administer oaths. . . . [They] are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.<sup>16</sup>

The certificates did not “directly accuse petitioner of wrongdoing,” but that was irrelevant.<sup>17</sup> What mattered was that they “provided testimony against petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine.”<sup>18</sup> The Court was not swayed by the claim that the analysts were not “typical” of the witnesses that most acutely concerned the framers.<sup>19</sup> The questions of autopsies came up—“whatever the status of coroner’s reports at common law in England,” the Court noted, “they were not accorded any special status in American practice.”<sup>20</sup> The autopsy issue was clearly in the offing.<sup>21</sup>

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<sup>15</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308 (2009).

<sup>16</sup> *Id.* at 310-11 (citations and brackets omitted).

<sup>17</sup> *Id.* at 313-14.

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

<sup>19</sup> *Id.* at 315.

<sup>20</sup> *Id.* at 322.

<sup>21</sup> The Court mentioned autopsies twice. It noted that there are other ways to test forensic evidence, but paused to add: “Though surely not always. Some forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated.” *Id.* at 557 U.S. at 318 n.5.

In *Bullcoming v. New Mexico*, two years on, the issue was whether a lab analyst's blood-alcohol report could be admitted, without confrontation, to convict Donald Bullcoming of drunk driving. "In all material respects," wrote Justice Ginsburg, it was *Melendez-Diaz* redux: "a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations."<sup>22</sup> This testimonial analysis could not be introduced by a "surrogate" from the lab who knew the procedures but did not "perform or observe the test."<sup>23</sup> The report had "information filled in by the arresting officer," like the "reason the suspect was stopped"<sup>24</sup> and an officer's affirmation that he "arrested Bullcoming and witnessed the blood draw."<sup>25</sup>

Carolyn Zabrycki, now a California prosecutor, claimed in an article written four years after *Crawford* that, despite the confusion created by the decision, "one type of statement has, so far, garnered consensus: autopsy reports."<sup>26</sup> *Melendez-Diaz* disrupted all that.<sup>27</sup> A number of federal and state courts have since found autopsy reports testimonial, usually reasoning, as did the Eleventh Circuit, that the reports do "precisely what a witness does on direct examination."<sup>28</sup>

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<sup>22</sup> *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011).

<sup>23</sup> *Bullcoming*, 131 S. Ct. at 2709-10.

<sup>24</sup> *Id.* at 2710 (citations omitted).

<sup>25</sup> *Id.* at 2710.

<sup>26</sup> Carolyn Zabrycki, *Toward A Definition of "Testimonial": How Autopsy Reports Do Not Embodiment the Qualities of A Testimonial Statement*, 96 CAL. L. REV. 1093, 1099 (2008). For this proposition she cited, *id.* at 1138, *United States v. De La Cruz*, 514 F.3d 121, 132 (1st Cir. 2008); *United States v. Feliz*, 467 F.3d 227, 229 (2d Cir. 2006); *Smith v. State*, 898 So. 2d 907, 916 (Ala. Crim. App. 2004); *State v. Lackey*, 120 P.3d 332, 351-52 (Kan. 2005); *Rollins v. State*, 897 A.2d 821, 844-45 (Md. 2006); *People v. Durio*, 794 N.Y.S.2d 863, 869 (N.Y. Sup. Ct. 2005); *State v. Craig*, 853 N.E.2d 621, 639 (Ohio 2006); *Moreno Denoso v. State*, 156 S.W.3d 166, 182 (Tex. App. 2005).

<sup>27</sup> *Melendez-Diaz*, 557 U.S. at 335, 339, 346 (Kennedy, J., dissenting).

<sup>28</sup> *United States v. Ignasiak*, 667 F.3d 1217, 1230 (citations and brackets omitted). In addition to the cases cited below, *see also* *State v. Locklear*, 681 N.E.2d 293, 304-305 (N.C. 2009); *Wood v. State*, 299 S.W.3d 200, 208-210 (Tex. Ct. App. 2009); *State v.*

C. *WILLIAMS* (2012)

Finally, in 2012 came *Williams v. Illinois*, a long, confusing exhibition involving a state expert who referred at trial to a DNA “profile” created by the private lab Cellmark that allowed her to match up defendant Sandy Williams’s blood and semen samples.<sup>29</sup> A plurality led by Justice Alito, with the Chief and Justices Kennedy and Breyer, held that the Cellmark “statements” weren’t the “sort of extrajudicial statements” that the Clause barred.<sup>30</sup> The statements were “sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose.”<sup>31</sup> (The Court also ruled that the Cellmark statements were related by the expert “solely for the purpose of explaining the assumptions on which that opinion rests,” and so were “not offered for their truth.”<sup>32</sup> This article argues that underlying reports themselves are usually admissible under the Confrontation Clause without resort to the “not-for-truth” device.)

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Davidson, 242 S.W.3d 409, 417 (Mo. Ct. App. 2007) (finding an autopsy report testimonial because prepared at request of law enforcement in anticipation of murder prosecution and offered to prove cause of death); *Martinez v. State*, 311 S.W.3d 104, 111 (Tex. Ct. App. 2010) (concluding an autopsy report is testimonial when primary purpose is to establish past events, demonstrated by officer’s presence and picture-taking at autopsy and where statutory basis for autopsy was suspicion of death by unlawful means). Courts have also come out the other way. We cite the main cases below, but *see also* *Banmah v. State*, 87 So.3d 101, 103 (Fla. Dist. Ct. App. 2012) (asserting that autopsy reports are non-testimonial since prepared pursuant to statutory duty and not solely for use in prosecution); *People v. Hall*, 923 N.Y.S.2d 428, 431-432 (N.Y. App. Div. 2011) (holding that autopsy reports are not testimonial under Confrontation Clause).

<sup>29</sup> *Williams v. Illinois*, 132 S. Ct. 2221, 2227, 2229 (2012).

<sup>30</sup> *Id.* at 2228.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

Justice Breyer, in a separate opinion (clearly speaking for the rest of the plurality), said he would adhere to the dissent in *Melendez-Diaz*.<sup>33</sup> The Confrontation Clause worked to disallow *ex parte* accusations; the need for cross-examination is “considerably diminished” with a statement made by an “accredited laboratory employee operating at a remove from the investigation in the ordinary course of professional work.”<sup>34</sup> So anxious was Justice Breyer about the looming question of autopsies that he felt obliged to address it, though not part of the case. The majority’s rule, he said, could bar “reliable case-specific technical information like autopsy reports”:

Autopsies, like the DNA report in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial. Autopsies are typically conducted soon after death. And when, say, a victim’s body has decomposed, repetition of the autopsy may not be possible. What is to happen if the medical examiner dies before trial? Is the Confrontation Clause effectively to function as a statute of limitations for murder?<sup>35</sup>

A dissenting Justice Kagan, joined by Justices Scalia, Ginsburg, and Sotomayor—in a tense opinion that referenced Nazis and the plurality in the same breath<sup>36</sup>—argued that the Confrontation Clause, plain and

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<sup>33</sup> *Williams*, 132 S. Ct. at 2248 (Breyer, J., concurring). See also *Bullcoming*, 131 S. Ct. at 2723 (“Whether or not one agrees with the reasoning and the result in *Melendez-Diaz*, the Court today takes the new and serious misstep of extending that holding”) (Kennedy, J., dissenting).

<sup>34</sup> *Williams*, 132 S. Ct. at 2249 (Breyer, J., concurring).

<sup>35</sup> *Id.* at 2251 (Breyer, J., concurring) (citations omitted).

<sup>36</sup> Justice Kagan wrote that “*Melendez-Diaz* made yet a more fundamental point in response to claims of the *über alles* reliability of scientific evidence....” *Williams*, 132 S. Ct. at 2275. “Über alles” (“over all”) appeared in the opening line of the Nazi national anthem (“Deutschland, Deutschland, über alles”) and became a shorthand for the song,

simple, “applies with full force to forensic evidence of the kind involved” in the case.<sup>37</sup> After all, “[c]ross-examination of the analyst is especially likely to reveal whether vials have been switched, samples contaminated, tests incompetently run, or results inaccurately recorded.”<sup>38</sup> Given the lack of majority support for any particular line of reasoning in the slip opinions, the decisions in *Melendez-Diaz* and *Bullcoming*, in Justice Kagan’s view, remained the law.<sup>39</sup> Finally, for Justice Thomas—in the unwonted position of swing vote—the touchstone was *form*: a statement is testimonial only when it has the “solemnity of an affidavit or deposition,” even if “produced at the request of law enforcement.”<sup>40</sup>

## II. WHY AUTOPSIES ARE DIFFERENT

### A. THE CENTRALITY OF “PRIMARY PURPOSE”

After *Williams* all nine Justices agree on using *some* sort of “primary purpose” test to determine testimoniality, observed the California Supreme Court, but they split over “what the statement’s primary purpose must be.”<sup>41</sup> The Alito plurality in *Williams* says the primary purpose, to qualify as testimonial, must be “accusing a targeted

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which was sufficiently associated with Hitler that the postwar republic outlawed the verse.

<sup>37</sup> *Williams*, 132 S. Ct. at 2264-65 (Kagan, J., dissenting).

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

<sup>39</sup> *Id.* at 2277 (Kagan, J., dissenting). *See also id.* at 2265 (Kagan, J., dissenting) (“I call Justice Alito’s opinion ‘the plurality,’ because that is the conventional term for it. But in all except its disposition, his opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication.”); *see also Dungo*, 286 P.3d at 465.

<sup>40</sup> *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring).

<sup>41</sup> *People v. Lopez*, 286 P.3d 469, 477 (Cal. 2012).

individual.”<sup>42</sup> The Kagan dissenters insist that a statement is testimonial when it “establish[es] past events potentially relevant to later criminal prosecution.”<sup>43</sup> Justice Thomas dislikes the primary/non-primary distinction altogether, but agrees that a testimonial declarant “must primarily intend to establish some fact with the understanding that his statement may be used in a criminal prosecution.”<sup>44</sup>

In *Davis v. Washington* and *Hammon v. Indiana*,<sup>45</sup> police took statements from women beaten by their partners. In *Davis*, Michelle McCottry called 911 and reported an attack nearly as it happened: “He’s here jumpin’ on me again . . . He’s usin’ his fists.”<sup>46</sup> In *Hammon*, Amy Hammon told police who arrived on the scene that her husband “[h]it me in the chest and threw me down,” and, in a separate room, separated from her husband, signed an affidavit.<sup>47</sup> The first statement was non-testimonial because “circumstances objectively indicat[ed] that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency.”<sup>48</sup> But the second *was* testimonial because there was no such emergency and the primary purpose of the “interrogation” was to establish “past events potentially relevant to later criminal prosecution.”<sup>49</sup> The test made clear that in some cases, like Ms. McCottry’s, even inculpatory

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<sup>42</sup> *Williams*, 132 S. Ct. at 2243. Two paragraphs later there is a slight rephrasing: a statement is testimonial when it is the “equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial.” *Id.*

<sup>43</sup> *Id.* at 2273 (Kagan, J., dissenting, joined by Scalia, Ginsburg, and Sotomayor, JJ.) (quoting *Davis*, 547 U.S. at 822).

<sup>44</sup> *Williams*, 132 S. Ct. at 2261 (Thomas, J., concurring); *see also Bryant*, 131 S. Ct. at 1167 (Thomas, J. concurring).

<sup>45</sup> *Davis*, 547 U.S. 813 (2006).

<sup>46</sup> *Id.* at 817.

<sup>47</sup> *Id.* at 820.

<sup>48</sup> *Id.* at 822.

<sup>49</sup> *Id.* Judge Ethan Greenberg of New York put it most eloquently: “A testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call, it is the citizen who summons the government to her aid.” *People v. Moscat*, 777 N.Y.S.2d 875, 879 (Bronx Crim. Ct. 2004).

statements almost certain to come out at trial could nonetheless not constitute the sort of statement that implicates the Confrontation Clause.<sup>50</sup>

In *Michigan v. Bryant* the Court said that emergency was just one possible “factor” in the inquiry.<sup>51</sup> “[C]ourts making a ‘primary purpose’ assessment,” we were told, “should not be unjustifiably restrained from consulting all relevant information.”<sup>52</sup> Non-testimonial primary purposes so far recognized include seeking medical attention (*Bryant*),<sup>53</sup> requesting aid in a 911 call (*Davis*),<sup>54</sup> catching a dangerous rapist of unknown identity (*Williams* plurality),<sup>55</sup> promising aid in a conspiracy (*United States v. Farhane*, Second Circuit),<sup>56</sup> or requesting patient records (*United States v. Bourlier*, Eleventh Circuit).<sup>57</sup> Declarants may have *multiple* purposes, too.<sup>58</sup> You can report a body stuffed into a dumpster from sanitary motives, though not entirely without some suspicion of crime afoot.

A perceptive statement of the test (blending language from *Melendez-Diaz* and *Bryant*) was expressed by Judge Robert Sack in

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<sup>50</sup> *Davis*, 547 U.S. at 825, said that other “clearly nontestimonial” statements included unwitting statements to government informants, *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987), and statements from one prisoner to another, *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970).

<sup>51</sup> *Michigan v. Bryant*, 131 S. Ct. 1143, 1160 (2011) (“As *Davis* made clear, whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the ‘primary purpose’ of an interrogation.”). Justice Scalia had to concede that the *Crawford* analysis was “something of a multifactor balancing test,” using three undoubtedly hateful words to him. *Id.* at 1176 (Scalia, J., concurring).

<sup>52</sup> *Id.* at 1162.

<sup>53</sup> *Id.* at 1157.

<sup>54</sup> *Davis*, 547 U.S. at 822.

<sup>55</sup> *Williams*, 132 S. Ct. at 2243.

<sup>56</sup> *United States v. Farhane*, 634 F.3d 127, 131-32, 162-63 (2d Cir. 2011).

<sup>57</sup> *United States v. Bourlier*, 518 Fed.Appx. 848, 856 (11th Cir. 2013).

<sup>58</sup> See *Bryant*, 131 S. Ct. at 1161 (noting “problem of mixed motives on the part of both interrogators and declarants.”).

*United States v. James*: a “statement triggers the protections of the Confrontation Clause when it is made with the primary purpose of creating a record for use a later criminal trial.”<sup>59</sup> The Supreme Court has struggled to work out a definition of “testimonial,”<sup>60</sup> but it has given us a way of making that determination. Under that inquiry, modern autopsy reports, in our view, are usually non-testimonial. Our conclusion is not that there is an “autopsy exception,” but rather that when an autopsy report is written under conditions like those outlined in Part IV, it simply does not come within the prohibition. It’s not a matter of “indicia of reliability” or the evidence’s importance. It’s about the reasons we perform autopsies: the primary purpose is ordinarily not to create a record for use at a later criminal trial.

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<sup>59</sup> *James*, 712 F.3d at 96, citing *Melendez-Diaz*, 557 U.S. at 310–11; *Bryant*, 131 S. Ct. at 1155. In *Bryant*, the Court spoke of “a primary purpose of creating an out-of-court substitute for trial testimony.” *Id.* at 1155. In *Bullcoming*, the Court wrote that “[t]o rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.’” *Id.*, 131 S. Ct. at 2714, citing *Davis*, 547 U.S. at 82. State courts use different phrasings, often with subtle but crucial omissions. For instance, the West Virginia Supreme Court of Appeals, in *State v. Kennedy*, 229 W. Va. 756, 766 (W. Va. 2012), offered a similar test but omitting the “primary purpose” language in a way that echoes Justice Kagan’s dissent in *Williams*: “a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” The California Supreme Court said a “statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution.” *Dungo*, 286 P.3d at 449.

<sup>60</sup> We assume the battle is lost on the attempt by the *Melendez-Diaz* dissenters to put the focus not on the quality of being “testimonial” but on the “witness,” the word the clause actually uses. *Melendez-Diaz*, 557 U.S. at 343-44 (“Laboratory analysts are not ‘witnesses against’ the defendant as those words would have been understood at the framing . . . . Instead, the Clause refers to a conventional ‘witness’—meaning one who witnesses (that is, perceives) an event that gives him or her personal knowledge of some aspect of the defendant’s guilt.”).

## B. APPLYING THE “PRIMARY PURPOSE” TEST TO AUTOPSIES

In July 2013, San Mateo County Coroner Robert Foucrault announced that a 16-year-old girl on an Asiana Airlines flight that crashed in San Francisco died from blunt-injury trauma.<sup>61</sup> She was hit by a fire truck. It seems safe to conclude that Foucrault was not animated by a desire to flesh out a D.A.’s case for criminal negligence against firefighters or to supply facts for a federal air-safety indictment against the pilots. He was motivated by a duty he has under a California statute to determine cause of death. Police did not instigate his report and it may never be used in a criminal trial. It happens that police were involved in the creation of the challenged evidence in every Supreme Court confrontation case discussed above: *Crawford*, *Melendez-Diaz*, *Bullcoming*, *Davis*, *Bryant*, *Williams*. Many courts hold that police involvement is even a *prerequisite* to testimoniality.<sup>62</sup> So generally how involved are police with autopsies?

Pathologists today operate under statutes setting out their responsibilities. In Florida, for instance, twelve situations legally trigger autopsies, among them “criminal violence,” “accident,” “suicide,” death occurring “[s]uddenly, when in apparent good health,” or “disease constituting a threat to public health.”<sup>63</sup> The New York City Office of the

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<sup>61</sup> Robert Salonga & Joshua Melvin, *SFO crash: Coroner says Asiana crash victim died after firetruck ran over her*, SAN JOSE MERCURY NEWS, July 19, 2013, available at [www.mercurynews.com/bay-area-news/ci\\_23692596/coroner-reveal-cause-asiana-passenger-death](http://www.mercurynews.com/bay-area-news/ci_23692596/coroner-reveal-cause-asiana-passenger-death).

<sup>62</sup> See, e.g., *United States v. Jordan*, 509 F.3d 191, 195 (4th Cir. 2007) (“To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates.”).

<sup>63</sup> Fla. Stat. § 406.11(1)(a)-(c) (West 2006). Most states seem to have variations on this. New Mexico, for instance, provides: “When any person comes to a sudden, violent or untimely death or is found dead and the cause of death is unknown, anyone who becomes aware of the death shall report it immediately to law enforcement authorities or the office of the state or district medical investigator.” N.M. Stat. Ann. § 24-11-5 (West 1978).

Chief Medical Examiner “performs autopsies where people died in unexpected circumstances, unnatural deaths.”<sup>64</sup> California’s code adds “unattended deaths” and enumerates modes of demise like a grim book of fate: “deaths due to drowning, fire, hanging, gunshot, stabbing, cutting, exposure, starvation, acute alcoholism, drug addiction, strangulation, aspiration, or . . . sudden infant death syndrome.”<sup>65</sup>

Autopsies, to be sure, can be the crux of a murder prosecution. In *People v. Dungo*,<sup>66</sup> Reynaldo Dungo claimed he strangled his girlfriend in the “heat of passion”<sup>67</sup>—voluntary manslaughter at most, argued his lawyer.<sup>68</sup> But the autopsy revealed that she was asphyxiated for “more than two minutes.”<sup>69</sup> The jury knew it was no sudden impulse.<sup>70</sup>

But most autopsies do *not* lead to criminal investigations. New York City’s medical examiner performs an average of 5,500 autopsies a year, but in 2010 only 533 city residents had homicide as their cause of death.<sup>71</sup> Not every homicide results in a criminal trial, moreover, so this means less than 10% of autopsy reports could *possibly* appear in a prosecution. In 2004 the Los Angeles Medical Examiner’s office took

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<sup>64</sup> *James*, 712 F.3d at 96 (citations omitted).

<sup>65</sup> Cal. Gov. Code § 27491 (West 1969).

<sup>66</sup> 55 Cal.4th 608, 286 P.3d 442 (2012).

<sup>67</sup> *Id.* at 446.

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

<sup>69</sup> *Id.* at 451.

<sup>70</sup> *Id.* at 446. This case has the perhaps the best full-throated statements of why autopsy statements are not testimonial. *Id.* at 451-55 (Werdegar, J., concurring).

<sup>71</sup> *James*, 712 F.3d at 99 n.10 (citing OCME, *General Information Booklet*, [http://www.nyc.gov/html/ocme/downloads/pdf/General% 20Information/OCME% 20General% 20Information% 20Booklet.pdf](http://www.nyc.gov/html/ocme/downloads/pdf/General%20Information/OCME%20General%20Information%20Booklet.pdf); *Deaths and Death Rates by Selected Causes New York City—2010*, [http://www.health.ny.gov/statistics/vital\\_statistics/2010/table33c.htm](http://www.health.ny.gov/statistics/vital_statistics/2010/table33c.htm)). For another use of statistics in the “primary purpose” inquiry, see *United States v. Orozco-Acosta*, 607 F.3d 1156, 1163-64, n.5 (9th Cir. 2010) (finding warrants of removal non-testimonial in part by noting that during a period 281,000 aliens were deported but only 17,000 federal immigrations were commenced).

9,465 cases and found that 1,121 died from homicide, 709 from suicide, 3,090 from accidents, and 4,256 from natural causes. In other words, some 90% of autopsies involved causes other than homicide.<sup>72</sup> In a small suburban county like Marin County, California, 289 investigations reported only two homicides.<sup>73</sup>

Autopsies are associated in the American mind with criminal investigations—think *Law & Order*, *Bones*, *NCIS*, etc.—and judicial discussion of autopsies is often in the context of a murder trial. But autopsies have significant purposes besides punishment.

In 2007 the Centers for Disease Control analyzed autopsies in 47 states and the District of Columbia and found them essential to monitor infant mortality; to gather statistics about Alzheimer's, meningitis, diabetes, or cirrhosis; to track prevalence of death from noxious fumes, allergies, or gun accidents.<sup>74</sup> Autopsies help us effectively direct clinical-research funds.<sup>75</sup> For instance, they taught us that HIV patients who died in hospitals could have been given antibiotics that would have extended their lives.<sup>76</sup> They taught us that prostate cancer is best detected by early screening.<sup>77</sup> State laws that obligate autopsies after deaths in prisons,

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<sup>72</sup> Zabrycki, *supra* note 26 at 1125.

<sup>73</sup> Marin County Sheriff's Office, Coroner Division Annual Report, 2011, 6, available at <http://www.marincounty.org/main/board-actions/2013/may/may-14/~media/Files/MarinGov/Board%20Actions/2013/20130514SOCoroner2011.pdf>.

<sup>74</sup> See, e.g., Donna L. Hoyert, Hsiang-Ching Kung, & Jiaquan Xu, *Autopsy Patterns in 2003*, 20(32) VITAL AND HEALTH STATISTICS, March 2007, at 3; see also, *FastStats Homepage*, CENTER FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/fastats/homicide.htm> (last visited Nov. 21, 2013).

<sup>75</sup> Hoyert, *supra* note 74 at 4.

<sup>76</sup> See generally Neil A. Martinson et. al, *Causes of Death in Hospitalized Adults With a Premortem Diagnosis of Tuberculosis: An Autopsy Study*, 21(15) AIDS 2043 (2007), available at <http://www.ncbi.nlm.nih.gov/pubmed/17885294>.

<sup>77</sup> RICHARD A. PRAYSON, *DIAGNOSES FROM THE DEAD: THE BOOK OF AUTOPSY* 30 (2009).

orphanages, or nursing homes serve to protect the vulnerable.<sup>78</sup> Pathologists are the unsung heroes of consumer safety; they revealed that polyethylene bags suffocate children<sup>79</sup> and that cyanide is a fatal fumigant.<sup>80</sup> And before there was Vitamin Water, there was Radithor, the “radioactive water” that sold wildly until examiners weighed in.<sup>81</sup> (“The Radium Water Worked Fine Until His Jaw Came Off” ran a newspaper headline.<sup>82</sup>)

Autopsies established that perhaps as many as 20% of hospital patients die each year from misdiagnoses<sup>83</sup>—and help reduce that percentage by teaching doctors that, say, what they thought was a gastric ulcer was in fact a stomach infection with sepsis.<sup>84</sup> Autopsies identify dangerous new street drugs—from “wood” alcohol in 1918-19<sup>85</sup> to “bath salts” in 2011.<sup>86</sup> Dr. Milton Helpern, the legendary New York City Chief

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<sup>78</sup> See, e.g., Kan. Stat. Ann. § 22a-242(a) (West 2013) (providing that “[w]hen a child dies, any law enforcement officer, health care provider or other person having knowledge of the death shall immediately notify the coroner of the known facts concerning the time, place, manner and circumstances of the death” (emphasis added)).

<sup>79</sup> MILTON HELPERN WITH BERNARD KNIGHT, *AUTOPSY: THE MEMOIRS OF THE MILTON HELPERN, THE WORLD’S GREATEST MEDICAL DETECTIVE* 66-71, 175-76 (1977).

<sup>80</sup> DEBORAH BLUM, *THE POISONER’S HANDBOOK: MURDER AND THE BIRTH OF FORENSIC MEDICINE IN JAZZ AGE NEW YORK* 66-67, 125-26 (2010).

<sup>81</sup> BLUM, *supra* note 80, at 179, 219 (recounting the FDA’s cease-and-desist order against Radithor’s manufacturer).

<sup>82</sup> Ron Winslow, *The Radium Water Worked Fine Until His Jaw Came Off*, *WALL ST. J.*, Aug. 1, 1990, at A1.

<sup>83</sup> PRAYSON, *supra* note 77, at 18.

<sup>84</sup> *Id.* at 23-24.

<sup>85</sup> BLUM, *supra* note 80, at 46-49.

<sup>86</sup> Jane M. Prosser & Lewis S. Nelson, *The Toxicology of Bath Salts: A Review of Synthetic Cathinones*, 8 *J. MED. TOXICOLOGY* 33, 37 (2011); Jason Jerry, Gregory Collins, & David Stroom, *Synthetic Legal Intoxicating Drugs: The Emerging ‘Incense’ and ‘Bath Salt’ Phenomenon*, 79(4) *CLEVELAND CLINIC J. OF MED.* 258, 262 (2012) (relating that autopsy showed “bath salts” were actually form of MDPV, a powerful stimulant with no FDA-approved medical use). See also *SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN*

Examiner, proved that, contrary to popular belief, heroin addicts in the mid-1930s were dying in epidemic proportions not from the opiate itself but from malaria-infected syringes.<sup>87</sup> In the 1950s, his office discovered that the subtle poison of household carbon monoxide was leaking from cooking ranges and refrigerators—a design flaw that caused many wrongful murder prosecutions—and saved hundreds of lives.<sup>88</sup> Autopsies reveal the that fatal cocktails took Heath Ledger<sup>89</sup> and Cory Monteith,<sup>90</sup> and these overdose reports almost never figure in a trial against a drug dealer. Nor does a quest for indictment instigate autopsies after deadly outbreaks of salmonella<sup>91</sup> or E. coli.<sup>92</sup>

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SERVICES, DRUG ABUSE WARNING NETWORK: DEVELOPMENT OF A NEW DESIGN (METHODOLOGY REPORT) 13-15 (2002) (describing the DAWN program of the Department of Health & Human Services gathers local information to “serve as a first indicator of the serious consequences of drug use” from sources that include “autopsy results”).

<sup>87</sup> HELPERN, *supra* note 79, at 66-71; United States v. Moore, 486 F.2d 1139, 1235 n.159 (D.C. Cir. 1973) (describing Hearings Before the House Select Committee on Crime, “Crime in America—Heroin Importation, Distribution, Packaging and Paraphernalia,” 91st Cong., 2d Sess., 184 (1970) (testimony of Dr. Milton Helpert, June 27, 1970)).

<sup>88</sup> HELPERN, *supra* note 79, at 176-83.

<sup>89</sup> James Barren, *Medical Examiner Rules Ledger’s Death Accidental*, N.Y. TIMES, Feb. 7, 2008, available at <http://www.nytimes.com/2008/02/07/nyregion/07ledger.html>.

<sup>90</sup> Stuart Oldham, *Cory Monteith Autopsy Reveals Heroin and Alcohol Caused Death*, VARIETY, July 16, 2013, available at <http://variety.com/2013/tv/news/cory-monteith-autopsy-reveals-heroin-and-alcohol-caused-death-1200563621>.

<sup>91</sup> See, e.g., *Salmonellosis, 2010*, 38(1) MINN. DEPT. OF HEALTH: DISEASE CONTROL NEWSLETTER 16 (2011) (“Salmonella was isolated at autopsy from the spleen of an 18-year-old case with sudden death”), available at <http://www.health.state.mn.us/divs/idepc/newsletters/dcn/sum10/salmonellosis.html>; E.R. Shipp, *Midwest Salmonella Cases Force Dairy to Halt Work*, N.Y. TIMES, April 11, 1985, available at <http://www.nytimes.com/1985/04/11/us/midwest-salmonella-cases-force-dairy-to-halt-work.html> (“[A]utopsy . . . confirmed that salmonella infection had contributed to the death of a 53-year-old man.”). See also James Randerson, *Lack of Autopsies Hampering Bird Flu Fight, Warns Doctor*, THE GUARDIAN, Jan. 2, 2006, available at <http://www.theguardian.com/science/2006/jan/03/infectiousdiseases.birdflu>.

The point is that these types of autopsies are self-evidently non-testimonial. We should not testimonialize the work of the same neutral examiner in the same examining room conducting the same objective procedure because his subject appears to have been killed by a human being instead of a bacterium or the poison of a meth lab. The CDC survey showed that some 7.7% of deaths led to autopsies.<sup>93</sup> Usually there was reason to suspect the naturalness of the death: 0.6% of deaths in nursing homes and 0.8% of deaths in hospice facilities prompted autopsies; so did 91.8% of apparent homicides.<sup>94</sup> The latter figure amounts to 15,388 cases—equal to the number of suicides—<sup>95</sup>out of a total of 173,745 autopsies that year.<sup>96</sup> This means that over 90% of autopsy reports lacked even the *possibility* of use in a criminal trial. Creating prosecution evidence is *not* the primary purpose of autopsies in America.

A proper autopsy can never itself establish someone's guilt.<sup>97</sup> An ancient physician may have found that Julius Caesar suffered 23 bodily wounds, but only an eyewitness or confession could prove tyrannicide. From the impartial examiner's view, the task is always the same: to show that a human being died from a particular cause.<sup>98</sup> There is an impressive

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<sup>94</sup> KNDO 23, *Autopsy Performed on Richland E. coli Victim*, <http://www.nbcrighnow.com/global/story.asp?s=6026797>; Tim Hay, *Autopsy on Woman, 95, Who May Have Died Due to E. coli*, OAKLAND TRIB., Nov. 2, 2003.

<sup>93</sup> Hoyert, *supra* note 74, at 2.

<sup>94</sup> *Id.* at 3.

<sup>95</sup> *Id.* at 13.

<sup>96</sup> *Id.* at 2.

<sup>97</sup> See, e.g., *Kennedy*, 735 S.E.2d at 917 (“[T]he autopsy report at issue does not, in and of itself, prove the guilt of Kennedy and is not inherently inculpatory.”) This is the error made by Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL’Y 791, 852 (2007). She writes that an autopsy report “really does squarely fit into the category of the testimonial. This cannot and should not be doubted. It is created as part of an ongoing investigation in order to produce evidence. It is prepared with an eye toward future criminal prosecution.” Not so.

<sup>98</sup> RICHARD A. PRAYSON, *DIAGNOSES FROM THE DEAD: THE BOOK OF AUTOPSY* 59 (2009); see, e.g., *People v. Washington*, 654 N.E.2d 967, 969 (N.Y. 1995) (agreeing that

Sherlockian specificity here: an examiner might be able to show strangulation from harm to “neck organs consistent with fingertips,” “pinpoint hemorrhages in her eyes” indicating lack of oxygen, and self-inflicted tongue biting.<sup>99</sup> Another pathologist might state that the “amount of pressure required to stop the flow of blood from the brain is ‘about 4.4 pounds’”<sup>100</sup> and that death resulted when this force was kept up for “three to six minutes.”<sup>101</sup> These discoveries disclose a great deal—but never the perpetrator’s identity. The report, moreover, can be used by *both* sides.<sup>102</sup> Indeed, pathologists’ work also often *terminates* a prosecution by, say, establishing a time of death that matches a suspect’s alibi<sup>103</sup> or by allowing the defense to show that the cause of death was a “ruptured congenital brain aneurysm” and that a fistfight “was *not* a contributing cause.”<sup>104</sup>

Each autopsy report must be considered individually, but most autopsies fall short of testimoniality as defined by the Supreme Court. Consider *Bullcoming* (“A document created solely for an ‘evidentiary

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the New York City’s Office of the Medical Examiner’s “mandate . . . is clear, to provide an impartial determination of the cause of death.”).

<sup>99</sup> *Dungo*, 286 P.3d at 446.

<sup>100</sup> *Leach*, 980 N.E.2d at 576.

<sup>101</sup> *Id.* at 595.

<sup>102</sup> *Dungo*, 286 P.3d at 453 (citation omitted). (“[A]n autopsy physician documents his or her observations of the decedent’s injuries partly to provide evidence for court, but detailed documentation of the pathologist’s observations is also important to support or refute interpretations and to serve as a record”).

<sup>103</sup> *See Williams*, 132 S. Ct. at 2244 (“When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation.”).

<sup>104</sup> *Leach*, 980 N.E.2d at 591 (emphasis added); *see also id.* (“[E]ven when the police suspect foul play and the medical examiner’s office is aware of this suspicion, an autopsy might reveal that the deceased died of natural causes and, thus, exonerate a suspect.”).

purpose’ . . . made in aid of a police investigation”<sup>105</sup>); *Bryant* (“a statement . . . procured with a primary purpose of creating an out-of-court substitute for trial testimony”<sup>106</sup>); *Melendez-Diaz* (“the sole purpose of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance”)<sup>107</sup>; and *Davis* (statements under formal police interrogation are an “obvious substitute for live testimony”).<sup>108</sup> Surely if a man bleeding to death in a parking lot can identify his shooter to police without “testifying”—the facts of *Bryant*—a pathologist can likewise relate conclusions about cause of death (not identity of suspect) without an intent to accuse. The pathologist, moreover, can deliver his statement without the medium of any police officer.<sup>109</sup>

The drug certificates in *Melendez-Diaz* and blood-alcohol analyses in *Bullcoming* were testimonial because the labs tested the powder or blood for one reason only: enforcing criminal laws on drugs and drunk driving.<sup>110</sup> Other people may have wanted the evidence for civil suits

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<sup>105</sup> *Bullcoming*, 131 S. Ct. at 2717.

<sup>106</sup> *Bryant*, 131 S. Ct. at 1155.

<sup>107</sup> *Melendez-Diaz*, 557 U.S. at 311 (citation omitted).

<sup>108</sup> *Davis*, 547 U.S. at 830.

<sup>109</sup> *Bryant*, 131 S. Ct. at 1173. The statement derived exclusively from the officers’ recollection at trial of what the victim said.

<sup>110</sup> *Melendez-Diaz*, 557 U.S. at 311 (“[U]nder Massachusetts law the sole purpose of the affidavits was to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance”); *Bullcoming*, 131 S. Ct. at 2720 (Sotomayor, J., concurring); *State v. Aragon*, 225 P.3d 1280, 1287 (2010) (“The chemical forensic reports at issue in this case are inadmissible absent confrontation, because although it is the ‘business’ of the Southern Crime Laboratory, a public agency, to analyze substances for narcotic content, the laboratory’s purpose for preparing chemical forensic reports is for their use in court, not as a function of the laboratory’s administrative activities.” See also *City of Las Vegas v. Walsh*, 91 P.3d 591, 593-96 (Nev. 2004) (finding a nurse’s affidavit about conditions of blood-drawing from drunk-driving suspect was testimonial since prepared solely for prosecution.). Cf. *United States v. DeLeon*, 678 F.3d 317, 325 (4th Cir. 2012) (“[O]urs is also not a case in which the social worker operated as an agent

(those injured by Donald Bullcoming's car, the K-Mart that employed Mr. Melendez-Diaz, etc.), but prosecution is the *state's* reason, and the drug and alcohol tests were specifically done at police request. In *Bullcoming*, the state didn't even *try* to suggest another purpose, like medical treatment.<sup>111</sup> So, too, in the case with forensic disciplines like fingerprinting, ballistics, and arson analysis—designed, one and all, to prove criminality. But as shown, autopsies are mostly *not* conducted with the primary motivation of generating evidence for a criminal trial.

### C. AUTOPSIES ARE GENERALLY NEUTRALLY PERFORMED

Forensic evidence sways juries because it is neutral-seeming and scientific. This is why flawed or misleadingly used forensic evidence often lies behind a false conviction. Judges know this. The *Wall Street Journal* reported last year that recent court decisions and law-enforcement policies increasingly cast doubt on evidentiary “staples” like “hair samples, burn patterns, bite marks, ballistics evidence and handwriting analysis.”<sup>112</sup> So are autopsies any better?

Yes—and the chief difference is that the pathologist who performs an autopsy is not an arm of law enforcement but a doctor under a civil-statutory duty to investigate mysterious deaths.<sup>113</sup> Most examiners are

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of law enforcement. . . . [She] did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke.”).

<sup>111</sup> *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring.).

<sup>112</sup> Jack Nicas, *Flawed Evidence Under a Microscope*, WALL ST. J., July 19, 2013, at A3. *See, e.g.*, *United States v. Glynn*, 578 F. Supp. 2d 567, 573-74 (S.D.N.Y. 2008) (Rakoff, J.) (stating that “ballistics examination not only lacks the rigor of science but suffers from greater uncertainty than many other kinds of forensic evidence” and contrasting it with the reliability of a “physician’s diagnosis.”).

<sup>113</sup> *See, e.g.*, *Davis*, 547 U.S. at 823 (“If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers.”).

actually private M.D.s under contract.<sup>114</sup> Yet *Crawford*'s concern was the "involvement of government officers in the production of testimonial evidence."<sup>115</sup> When Justice Scalia blasted the notion of "neutral" government officials, he was taking aim at Washington State's claim about neutral *police officers*.<sup>116</sup> Being on the government payroll—like a National Weather Service forecaster or Amtrak conductor—does not make you adversarial to criminals. *Crawford* had in mind officials with an "investigative and prosecutorial function."<sup>117</sup> But a pathologist's natural colleagues are not crime-lab technicians but dentists, radiologists, neurologists, and anatomists.<sup>118</sup> Even routine field-written statements of Border Patrol agents can be non-testimonial, regardless of whether they later are offered at a smuggling trial.<sup>119</sup>

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<sup>114</sup> See *Coroner Table Generator*, NATIONAL PUBLIC RADIO, available at <http://www.npr.org/buckets/news/2011/01/coroner-stats/county-table.php?year=2010>; See also COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCE COMMUNITY, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *Strengthening Forensic Science in the United States: A Path Forward* 248 (2009) [hereinafter "NAS Report"] ("[M]edical examiners are almost always physicians, are appointed, and are often pathologists or forensic pathologists.").

<sup>115</sup> *Crawford*, 541 U.S. at 51, 53.

<sup>116</sup> *Id.* at 66 ("The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers.").

<sup>117</sup> *Id.* at 53 ("That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function.").

<sup>118</sup> HELPERN, *supra* note 79, at 28.

<sup>119</sup> *United States v. Morales*, 2013 WL 3306395, No. 12-10069, \*4 (9th Cir. 2013) (citation omitted) ("[A] Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition. The Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally. The nature and use of the Field 826 makes clear that its primary purpose is administrative, not for use as evidence at a future criminal trial.").

Unlike *Crawford*'s interrogators,<sup>120</sup> pathologists do not ask leading questions or interpret vague answers. They have no stake in the competitive enterprise of ferreting out crime. They are not praised for successful prosecutions or blamed for acquittals. They do not carry guns or badges or deceive or cajole. They investigate causes of death, not crimes. They conclude on the conditions of a body, not on who bears guilt for it.<sup>121</sup> The National Association of Medical Examiners states that the “[p]erformance of a forensic autopsy is the practice of medicine.”<sup>122</sup> If we are told in *Giles v. California* (2008) that reports of “abuse and intimidation” during medical treatment *never* require confrontation,<sup>123</sup> what is the difference here, except *less* risk of falsity?<sup>124</sup> A routine autopsy report—cool, impartial, precise—is akin to a careful hospital record.<sup>125</sup>

Certainly the typical testimonial infirmities are absent. No issues of perception—foggy? dark? no glasses?—exist. Concerns about

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<sup>120</sup> *Crawford*, 541 U.S. at 53.

<sup>121</sup> See *Williams*, 132 S. Ct. at 2251 (Breyer, J., concurring) (“The declarant [in *Crawford*, *Davis*, and *Bryant*] was essentially an adverse witness making an accusatory, testimonial statement—implicating the core concerns of the Lord Cobham-type affidavits. But here the DNA report sought, not to accuse petitioner, but instead to generate objectively a profile of a then-unknown suspect’s DNA from the semen he left in committing the crime.”).

<sup>122</sup> NATIONAL ASSOCIATION OF MEDICAL EXAMINERS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 4 (2006), available at [www.mtf.org/pdf/name\\_standards\\_2006.pdf](http://www.mtf.org/pdf/name_standards_2006.pdf); see also NAS REPORT, *supra* note 114, at 252 (“The medical examiner is first and foremost a physician, whose education, training, and experience is in the application of the body of medicine”).

<sup>123</sup> *Giles v. California*, 554 U.S. 353, 376 (2008). See also *United States v. DeLeon*, 678 F.3d 317, 327 (4th Cir. 2012) (holding that statements by child victim of abuse, before his murder, to treatment manager of Air Force medical program were admissible under Rule 803(4) and non-testimonial).

<sup>124</sup> Cf. *Bryant*, 131 S. Ct. at 1161 n.12 (“[T]he severe injuries of the victim would undoubtedly also weigh on the credibility and reliability that the trier of fact would afford to the statements.”).

<sup>125</sup> Cf. *Dixon v. Superior Court*, 170 Cal.App.4th 1271, 1278 (2009) (holding that an autopsy report is a public record under California law).

deteriorating memory vanish because examiners dictate or take notes while they (as they put it) “cut their case.”<sup>126</sup> (The real memory problem can arise when prosecutors call examiners who perform dozens or hundreds of autopsies a year, months or years after the procedure.) Verbal ambiguity is rarely a problem when speaking of “drowning due to the effects of atherosclerotic heart disease and cocaine use” (Whitney Houston)<sup>127</sup> or a “[b]ullet wound of entrance at the level of the 6th cervical vertebra 5 cm. to the right of the midline” (John Dillinger).<sup>128</sup> Is there a risk of fabrication?<sup>129</sup> Professor Paul Giannelli wrote a paper on crime-lab error and fraud and offered precisely one example of a pathologist’s falsification.<sup>130</sup> If *Bryant* could say that people in mortal distress are

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<sup>126</sup> PRAYSON, *supra* note 77, at 45, 56-57; *Melendez-Diaz*, 557 U.S. at 345 (Kennedy, J., dissenting) (“A typical witness must recall a previous event that he or she perceived just once, and thus may have misperceived or misremembered. But an analyst making a contemporaneous observation need not rely on memory; he or she instead reports the observations at the time they are made.”).

<sup>127</sup> See Kristy McCracken, *Whitney Houston Autopsy Report 9*, AUTOPOSYFILES.ORG (Feb. 12, 2012), available at, [http://www.autopsyfiles.org/reports/Celebs/houston,%20whitney\\_report.pdf](http://www.autopsyfiles.org/reports/Celebs/houston,%20whitney_report.pdf).

<sup>128</sup> See Frank J. Walsh, *John Dillinger Autopsy Report 3*, AUTOPOSYFILES.ORG (July 23, 1934), available at [http://www.autopsyfiles.org/reports/Other/dillinger,%20john\\_report.pdf](http://www.autopsyfiles.org/reports/Other/dillinger,%20john_report.pdf).

<sup>129</sup> See *Bryant*, 131 S. Ct. at 1157 (finding that certain types of hearsay are non-testimonial because, produced for purposes other use at trial, they pose a significantly reduced “prospect of fabrication”).

<sup>130</sup> Paul C. Giannelli, in *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL’Y & L. 439, 449–53 (1997), tells the sordid story of pathologist Ralph Erdmann, convicted for falsified reports in the 1980s. His lies were just bizarre: at times they favored the prosecution (he said a child died from a blow but in fact it was drowning); at others the defense (he identified pneumonia as the cause when it was actually a gunshot to the head). Couldn’t the *absence* of fraud cases be the more remarkable fact? In *James*, 712 F.3d at 103–04 the defendant made an apparently implausible claim that the examiner was bribed to change a cause of death for a cut of the insurance money. In *People v. Beeler*, 891 P.2d 153, 168 (Cal. 1995), a pathologist testified that another pathologist named Dr. Bolduc “had caused

unlikely to “fabricat[e],”<sup>131</sup> we might observe that board-certified pathologists, too, have other things on their mind—namely, accuracy—and no inherent motive to lie.<sup>132</sup> As Lieutenant Bowers of the Alameda County Coroner’s Bureau told us, a pathologist’s livelihood is premised on “credibility,” and a “tainted” doctor will struggle to find a job in county offices or lucrative defense work.<sup>133</sup>

The best claim for cross-examination is to test competence. Pathologists may train for years but they are still humans exercising judgment.<sup>134</sup> Mistakes can be made and conclusions at times are subjective. Yet unlike a good deal of evidence at criminal trials, autopsy reports are carefully substantiated, allowing review by others inside an examiner’s office or opposing experts.<sup>135</sup> A pathologist’s tools are not interrogations but scalpels and microscopes. We draw no distinction between factual observation and judgment—which was ruled out in

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‘quite a bit of consternation’ in a prior murder case by basing his conclusion regarding the cause of death on a police report rather than on medical evidence.”

<sup>131</sup> *Bryant*, 131 S. Ct. at 1161 (“[T]he victim’s injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution.”).

<sup>132</sup> See, e.g., *Lackey*, 120 P.3d at 351 (noting that circumstances of autopsy are such that “medical examiner would have little incentive to fabricate the results”).

<sup>133</sup> Interview with Lieutenant R. Bowers, Coroner’s Bureau Unit Commander, in Alameda County, Cal., (Aug. 7, 2013) (notes on file with author).

<sup>134</sup> See *Melendez-Diaz*, 557 U.S. at 321 (“Contrary to respondent’s and the dissent’s suggestion, there is little reason to believe that confrontation will be useless in testing analysts’ honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts.”); *id.* at 320 (observing that drug-testing “requires the exercise of judgment and presents a risk of error that might be explored on cross-examination”); *United States v. Ignasiak*, 667 F.3d 1217, 1232 (11th Cir. 2012) (“[T]he observational data and conclusions contained in the autopsy reports are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy.”).

<sup>135</sup> See, e.g., *Dungo*, 286 P.3d at 452.

*Bullcoming*<sup>136</sup>—but merely point out that even when discretion is required the work of an examiner is still almost entirely a matter of clinical recordation. Even Justice Scalia noted that although “reliability” alone does not determine non-testimoniality, it can certainly “supplement” such a finding.<sup>137</sup>

Pathologists do not become part of the prosecution as even a neutral witness does. A bystander to a crime may only want to relate what she saw, but by the time she is questioned by detectives and handed to the D.A. to be prepared for the stand, the risk of tilted testimony or one-side-only elicitation is obvious. Not with pathologists. Autopsy reports do not pose the dangers caused by custodial interrogation. Police and prosecutors—when kept appropriately separate from the doctor, as discussed below—cannot sway the report’s substance, or create a favorable record through suggestive questioning, or see to the omission of defendant-friendly evidence. They simply have no say. There is no risk that pathologist, preparing to make his “Y” incision in the body, will tell only one side of the story, because there *is* only one side: cause of death. “We are not interested in whodunit,” said Dr. Helpern. “All we want to know is *what* did it.”<sup>138</sup>

#### D. PATHOLOGISTS TODAY ARE NOT THE CORONERS OF THE COMMON LAW

A footnote in *Crawford* claimed that “several early American authorities flatly rejected any special status for coroner statements.”<sup>139</sup> It

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<sup>136</sup> *Bullcoming*, 131 S. Ct. at 2714–15; *Navarette*, 294 P.3d at 438. This in turn rules out the approach in cases like *Rollins*, 866 A.2d at 954 and *Lackey*, 120 P.3d at 351–52.

<sup>137</sup> *Bryant*, 131 S. Ct. at 1176 (Scalia, J., concurring). The majority agreed. *Id.* at 1155 (“In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”).

<sup>138</sup> HELPERN, *supra* note 79.

<sup>139</sup> *Crawford*, 541 U.S. at 47 n.2; *see also Giles*, 554 U.S. at 399–400 (Breyer, J., dissenting) (“Coroner’s statements seem to have had special status [in English

cited two antebellum decisions and the treatise of the great Michigan Justice Thomas Cooley.<sup>140</sup> The footnote has misled judges and commentators and in any event is wrong.<sup>141</sup> What Cooley actually wrote was closer to the reverse: he said there are “exceptions” to the rule that witnesses can be confronted in criminal cases, one being where a “witness was sworn . . . before a coroner.”<sup>142</sup> The example reminds us that pathologists, unlike coroners, do not “swear” anyone or take evidence from any place other than their examining table. In the cases cited by Justice Scalia (respectively, from 1844 and 1858) the “coroner statements” were statements *to* a coroner, during a deposition, which the coroner submitted directly to the court.<sup>143</sup> This is classic *ex parte* stuff—in a word, an inquest (which has the same root as “inquisition”).<sup>144</sup> It is the opposite of the practice of the modern clinical pathologist, who with at least eight

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precedents] that may sometimes have permitted the admission of prior unfronted testimonial statements despite lack of cross-examination. But, if so, that special status failed to survive the Atlantic voyage.”)

<sup>140</sup> *Crawford*, 541 U.S. at 47 n.2.

<sup>141</sup> *James*, 712 F.3d at 108 n.2 (Eaton, J., concurring); Mnookin, *supra* note 97, at 852 (“*Crawford* itself raises and then appears to reject the possibility of a special exception for coroner statements . . .”).

<sup>142</sup> THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 318 (1868).

<sup>143</sup> *State v. Campbell*, 30 S.C.L. 124, 124–25 (1844) (“The question is this. Is it indispensable, by the rules of legal evidence, that the defendant, Daniel Campbell, must have been present; or, at least, had an opportunity of hearing and examining R. Kelly, when his depositions were taken, upon the inquest holden over the body of the deceased, A. Defee, in order to render such depositions competent evidence against Daniel Campbell, upon his trial before the jury for the murder of Defee; when the witness died, after such depositions had been taken?”); *State v. Houser*, 26 Mo. 431, 440 (1858) (discussing coroner statements in England).

<sup>144</sup> *Campbell*, 30 S.C.L. at 126–132; *Houser*, 26 Mo. at 436 (“[S]uch testimony has never been permitted in this country, and in England its admissibility has been altogether placed upon the peculiar dignity and importance attached to the office of coroner; and no such reasons exist here.”).

years of medical training<sup>145</sup> starts with the premise that “‘I’m going to use my eyes, and I’m going to use my hands to figure out what caused the death.’”<sup>146</sup> This is true to the etymology of “autopsy,” a mid-17th-century derivation of the Greek *autopsia* (“seeing with one’s own eyes”), which first appears in Westlaw’s annals only in 1843.<sup>147</sup>

*Crawford* said, quite rightly, that applying a constitutional clause to a “phenomenon that did not exist at the time of its adoption . . . involves some degree of estimation.”<sup>148</sup> Doesn’t that require us to look into what a coroner did when John Marshall strode the earth? James Wilson, the wisest framer when it came to questions of criminal procedure, described coroners as elected laymen, complementary to sheriffs, whose duty it was to summon juries and accumulate evidence.<sup>149</sup> No founding-era coroner, wrote Dr. Helpern, actually “knew anything about the medical aspects of a case,” and when they bothered at all, their medical judgments were nothing more than crude layman’s guesses.<sup>150</sup> Fast-forward to the Louisiana Supreme Court describing the coroner’s duties at common law, circa 1852: to “hold an inquest on the body;” to “require, at the public expense, the services of physicians, to give their opinion on the subject”; to “institute a public prosecution against the supposed perpetrator of the

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<sup>145</sup> See, e.g., NAS REPORT, *supra* note 114, at 256 (“Forensic pathologists are physicians who have completed, at a minimum, four years of medical school and three to four years of medical specialty training in anatomical pathology or anatomical and clinical pathology, followed by an accredited fellowship year in forensic pathology.”).

<sup>146</sup> *Ignasiak*, 667 F.3d at 1232 n.19.

<sup>147</sup> *Fox v. Walsh*, 5 Rob. (LA) 222, 223 (1843). By contrast, “coroner” first appears in Westlaw in a case from 1723. *Robins’s Lessee v. Bush*, 1 H. & McH. 50, 53 (Md. Prov. 1723).

<sup>148</sup> *Crawford*, 541 U.S. at 36.

<sup>149</sup> KERMIT L. HALL AND MARK DAVID HALL, *THE COLLECTED WORKS OF JAMES WILSON VOL. 2* at 1017-18 (2007).

<sup>150</sup> HELPERN, *supra* note 79 (discussing the colonial and early American practice of coroners).

deed”; and to “cause [the guilty] to be arrested.”<sup>151</sup> This is all a far cry from the work of the medical examiner today.

In 1840 Charles Dickens was part of a coroner’s inquest into an infant’s death. A beadle assembled twelve men, brought them to a morgue, and, with the coroner (a surgeon and ex-Member of Parliament), exhibited the body.<sup>152</sup> Could the difference from modern-day practice be greater? A jury able to converse with a member of the prosecutorial apparatus and no defense presence to speak of? Jurors personally confronting (and recoiling at) ghastly evidence? What did the coroner or beadle say to these juror-witnesses, anyway? An English treatise from 1883 (the year the Brooklyn Bridge opened), cited by Justice Thomas in *Williams*, states that coroners were “charged with investigating suspicious deaths by asking local citizens if they knew ‘who [was] culpable either of the act or of the force.’”<sup>153</sup> Even in 1925 New York coroners still gathered evidence from witnesses and displayed bodies. In *The Great Gatsby*, Fitzgerald describes a coroner brought in by police; he shows George Wilson’s corpse to Myrtle’s sister and takes her sworn statement that Myrtle did not know Jay Gatsby—not exactly *medical* testimony.<sup>154</sup> Around this time New York City began to replace coroners with full-time pathologists—after the scandalizing 1915 Wallstein Report revealed that coroners, most of them bribe-hungry political hacks, were guilty of all the ineptitude one might expect of plumbers and saloonkeepers—literally—given the task of sophisticated medical evaluation.<sup>155</sup>

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<sup>151</sup> *State v. Parker*, 7 La. Ann. 83, 84 (1852).

<sup>152</sup> CLAIRE TOMALIN, *CHARLES DICKENS: A LIFE*, xxxix-xl Penguin 2011.

<sup>153</sup> *Williams*, 132 S. Ct. at 2262 (Thomas, J., concurring) (citing 1 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 217–218 (Routledge/Thoemmes Press 1883) (internal quotation marks omitted)).

<sup>154</sup> F. SCOTT FITZGERALD, *THE GREAT GATSBY* 163-64 (Scribner 1925).

<sup>155</sup> HELPERN, *supra* note 79 (describing the professionalization of autopsy work in the 20th century); Blum, *supra* note 80, at 19-21.

The triumph of science made the advancement possible.<sup>156</sup> In the early 1800s, we still tested for poison by feeding animals a victim's last meal.<sup>157</sup> Coroners still exist today, but they are largely elected officials who never undertake actual medical work. The word "coroner," some three centuries older than the word "autopsy," comes from the Anglo-French *corouner*, or keeper of the Crown's pleas.<sup>158</sup> In olde England, only the king examined corpses, just as he was the only man with knights enough to enforce the law. (Hence the two meanings of "court.") A common-law coroner was an inquisitor.<sup>159</sup> It was a different office in a different age.

#### E. POLICY CONSIDERATIONS

Our argument seeks only to apply Supreme Court precedent to autopsy reports. But many important policy considerations nonetheless loom, revolving around the notion (as one court wrote) that it is "against

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<sup>156</sup> For a short history of the development, see NAS Report, *supra* note 114, at 241-42 ("In 1877, Massachusetts became the first state to replace its coroners with medical examiners, who were required to be physicians.").

<sup>157</sup> Blum, *supra* note 80, at 1.

<sup>158</sup> See, e.g., "coroner," Dictionary.com, at <http://dictionary.reference.com/browse/coroner?s=t> (last accessed January 11, 2014). Some states distinguish between "coroner reports" and "autopsy reports," see *Lackey*, 120 P.3d at 203, or between "coroners" and "medical examiners," see *Dungo*, 286 P.3d at 453 ("A California county may choose to employ an appointed medical examiner in place of a coroner. In such a county, the medical examiner exercises the statutory powers and duties of the coroner."). Other states eschew these dichotomies. See N.M. Stat. Ann. § 24-11-4 (West 1978) ("As used in the New Mexico Statutes Annotated, 1978 Compilation, 'coroner' means the district medical investigator.").

<sup>159</sup> *Campbell*, 30 S.C.L. at 134 ("If the witnesses examined on a coroner's inquest be dead or beyond sea, their depositions may be read; for the coroner is an officer appointed, on the behalf of the public, to make inquiry about the matter within his jurisdiction."); see also NAS Report, *supra* note 114, at 241 ("The [coroner's] office originally was created to provide a local official whose primary duty was to protect the financial interest of the crown in criminal proceedings.").

society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case,"<sup>160</sup> especially with such reliable, non-accusatory evidence. The *Williams* plurality added another: a rule that operated to exclude neutral lab evidence would "encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable."<sup>161</sup>

Years can pass between an autopsy and a prosecution. The examiner might be unavailable by the time of trial. In one Illinois case, four gang members killed three teenagers in 1979: two were convicted soon thereafter; one was arrested in California in 1988 and pleaded guilty; the last was only convicted in 1992.<sup>162</sup> A right, too rigid, can harden into wrong, as the poet said, and we should look doubtfully on a misinterpreted right of confrontation that allows murderers to escape justice by avoiding arrest or delaying trial long enough.<sup>163</sup> This would effectively impose a "statute of limitations" on one of the few crimes that knows no time limit.<sup>164</sup>

Autopsy reports, unlike drug substance tests, cannot be replicated.<sup>165</sup> Disinterment or cold storage is sometimes an option but

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<sup>160</sup> *Dungo*, 286 P.3d at 457 (quoting *Durio*, 794 N.Y.S.2d at 869).

<sup>161</sup> *Williams*, 132 S. Ct. at 2228 (Alito, J.); *id.* at 2251 (Breyer, J., concurring) ("[T]o bar admission of the out-of-court records at issue here could undermine, not fortify, the accuracy of factfinding at a criminal trial. . . . An interpretation of the Clause that risks greater prosecution reliance upon less reliable evidence cannot be sound.").

<sup>162</sup> *Leach*, 980 N.E.2d at 592 (citing *People v. Caballero*, 794 N.E.2d 251 (Ill. 2002)). In *Bryant*, 131 S. Ct. at 1164, the shooter was arrested a year after the killing. In *Lackey*, 120 P.3d at 196, Lackey committed the crime in 1982 and fled to Canada and was only caught in Alabama in 2002.

<sup>163</sup> ALEXANDER POPE, *ESSAY ON MAN, THIRD EPISTLE* 193-94 (Mark Pattison ed., 6th ed. 1878).

<sup>164</sup> *Williams*, 132 S. Ct. at 2251 (Breyer, J., concurring).

<sup>165</sup> See *Crawford*, 541 U.S. at 318 n.5 ("Some forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated."); *Dungo*, 286 P.3d at 457 (quoting *Durio*, 794

another complete autopsy never is. It is true that evidence can also be lost forever with, say, an eyewitness who never testifies and then dies. The difference is that with most witnesses testimonial infirmities are usually important, whereas with autopsies, they almost never are. This is a policy argument, but the Supreme Court has not been above indulging in them itself. *Melendez-Diaz*, for one, said that the “prospect of confrontation” would “deter fraudulent analysis,”<sup>166</sup> but fraud is a problem quite separate from testimoniality.

A wealthy county like Marin in the San Francisco Bay Area may have two homicides a year, but across the water in Alameda County—home to Oakland—examiners might perform one or two homicide autopsies a *day*. Dr. Thomas Beaver, that county’s chief pathologist, estimates that he is under subpoena to appear in court every single day.<sup>167</sup> He told us that a rule finding autopsy reports to be testimonial would force examiners’ offices like his to choose between time on their work and letting prosecutions fail.<sup>168</sup>

Finally, the rule of the *Williams* dissenters—a statement is testimonial if made primarily to prove events “potentially relevant to later criminal prosecution”<sup>169</sup>—is simply too diffuse.<sup>170</sup> What *wouldn’t* be

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N.Y.S.2d at 869) (“Unlike other forensic tests, an autopsy cannot be replicated by another pathologist.”).

<sup>166</sup> *Melendez-Diaz*, 557 U.S. at 318-19.

<sup>167</sup> Author interview with Dr. Thomas Beaver, Chief Forensic Pathologist, Alameda County, California, August 6, 2013 (notes on file with author).

<sup>168</sup> *Id.* The *Melendez-Diaz* majority made clear that even relatively insignificant evidence, if testimonial, cannot avoid confrontation. *Id.*, 557 U.S. at 314. “For the sake of these negligible benefits,” replied the dissent, “the Court threatens to disrupt forensic investigations across the country.” *Id.* at 340-41 (Kennedy, J., dissenting). The majority’s position seems short-sighted: the evidence’s significance at trial should matter, just like it did for the framers concerned about the sure damnation of secret accusations.

<sup>169</sup> *Williams*, 132 S. Ct. at 2273 (Kagan, J., dissenting). Justice Thomas’s statement of this part of the rule is similar, but he adds the formality requirement. *Id.* at 2261 (“[T]he declarant must primarily intend to establish some fact with the understanding that his statement may be used in a criminal prosecution.”).

“potentially” relevant? (This article, we hope, is potentially relevant to prosecutions.) *Melendez-Diaz* and *Bullcoming* affirmed that business records are ordinarily admissible without confrontation, even though potentially relevant to a later criminal prosecution.<sup>171</sup> For Fortune 500 companies, *most* business records are potentially relevant to criminal charges; multinational corporations keep due-diligence inquiries for FCPA subpoenas, compliance-mad hedge funds catalog emails to fend off insider-trading charges, etc. Or a pharmacist may know that her legally mandated logs of pseudoephedrine purchases will be used against meth dealers; the logs are still non-testimonial business records.<sup>172</sup> The dissenters’ test really turns on the “primary purpose” and not the “potentially relevant” part. The inquiry is into the totality of circumstances under which the record was prepared.<sup>173</sup>

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<sup>170</sup> *United States v. Morales*, 2013 WL 3306395, at \*4 (9th Cir. 2013) (quotations omitted) (stating that a Border Patrol’s field-written statement is not “‘testimonial’ due to the ‘mere possibility’ that it could be used in a later criminal prosecution”); *United States v. Mendez*, 514 F.3d 1035, 1046 (10th Cir. 2008) (“That a piece of evidence [a drug ledger] may become ‘relevant to later criminal prosecution’ does not automatically place it within the ambit of ‘testimonial,’ otherwise ‘any piece of evidence which aids the prosecution would be testimonial’”).

<sup>171</sup> *Melendez-Diaz*, 557 U.S. at 324; *Bullcoming*, 131 S. Ct. at 2720. Some state courts relied on the business and public records hearsay exception in allowing the admission of autopsy reports or their use by experts. These exceptions are contiguous with the primary purpose test: if a report is created primarily for use in a prosecution it is inadmissible under Fed. R. Evid. 803(6) or 803(8) or state analogues.

<sup>172</sup> *United States v. Towns*, 718 F.3d 404, 410-11 (5th Cir. 2013).

<sup>173</sup> *Bryant*, 131 S. Ct. at 1162 (“In determining whether a declarant’s statements are testimonial, courts should look to all of the relevant circumstances.”); *Williams*, 132 S. Ct. at 2243 (Alito, J.); *Dungo*, 283 P.3d at 458 (Chin, J., concurring).

### III. WHEN AN AUTOPSY REPORT IS NON-TESTIMONIAL

#### A. FORMAL SEPARATION

Before *Melendez-Diaz*, courts regularly held that autopsy reports were admissible as non-testimonial business or public records.<sup>174</sup> Since that decision the most important factor for judges undertaking the primary-purpose inquiry with autopsy reports has been the degree of police involvement in the report's creation.<sup>175</sup> For that reason the best way to avoid a confrontation problem is to ensure that an examiner's work is maximally independent of police and prosecutorial influence. We looked at federal circuit and state supreme courts that ruled on this issue since *Melendez-Diaz*. Most of them declined, properly in our view, to set out a categorical rule about whether autopsies are testimonial.<sup>176</sup>

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<sup>174</sup> *State v. Craig*, 853 N.E.2d 621, 638 (Ohio 2006) (holding that autopsy reports are admissible non-testimonial public or business records); *United States v. Feliz*, 467 F.3d 227, 236-37 (2d Cir. 2006) (holding that autopsy reports are admissible as business records and are non-testimonial "even where the declarant is aware that [the report] may be available for later use at trial"); *People v. Durio*, 794 N.Y.S.2d 863 (N.Y. Sup. Ct. 2005) (exempting autopsy report from *Crawford* under business-record exception); *Rollins v. State*, 866 A.2d 926, 954 (Md. App. 2005) (holding that autopsy reports are non-testimonial under business records exception provided findings reported are "routine, descriptive and not analytical" and do not report "contested conclusions"); *State v. Cutro*, 618 S.E.2d 890 (S.C. 2005) (holding that autopsy reports are non-testimonial public records).

<sup>175</sup> *See Dungo*, 286 P.3d 442 at 454 ("[T]he court's *Crawford* jurisprudence suggests that testimonial character depends, to some extent, on the degree to which the statement was produced by or at the behest of government agents for use in a criminal prosecution"). This specific factor has also been determinative in post-*Melendez-Diaz* confrontation cases outside the autopsy context. In *Connors v. State*, 92 So.3d 676, 684 (Miss. 2012), the defendant claimed he couldn't have shot two people in his trailer since he was unconscious under heavy drugs. At trial the state disproved it in part with blood-toxicology tests, but the court found that the tests were "performed at the request of the Pike County Sheriff's Department with the results to be used in the prosecution." *Id.* at 684.

<sup>176</sup> *See, e.g., James*, 712 F.3d at 88 ("[E]ven if these cases cast doubt on any categorical designation of certain forensic reports as admissible in all cases, the autopsy

In *United States v. Moore*, drug conspirators got life for a spate of crimes including murder.<sup>177</sup> The then-Chief D.C. Medical Examiner testified about autopsy reports placed into evidence.<sup>178</sup> The D.C. Circuit saw testimonial reports, “document[s] created solely for an evidentiary purpose made in aid of a police investigation.”<sup>179</sup> For instance, observed the court:

- The Office of the Medical Examiner was “required” by the D.C. Code to investigate deaths when requested by the Metropolitan Police Department or U.S. Attorney’s Office.<sup>180</sup>
- “Law enforcement officers . . . not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports,” i.e., they were “present” at several examinations and they supplemented one report with a “crime diagram” and wrote in another: “Should have indictment re: John Raynor for this murder.”<sup>181</sup>

In *United States v. Ignasiak*, a doctor was convicted for overprescribing deadly pain medications.<sup>182</sup> Prosecutors introduced seven autopsy reports, two of which their expert Dr. Minyard had performed

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reports in this case are nevertheless not testimonial”); *Moore*, 651 F.3d at 72 n.16 (concluding it was “unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent”); *Ignasiak*, 667 F.3d at 1232-33 (leaving open possibility that if evidence had a non-testimonial ‘primary’ purpose it could avoid confrontation problem); *but see Kennedy*, 735 S.E.2d at 917 (determining that because examiner was obligated to contribute to judicial proceedings under West Virginia statute, “autopsy reports are under all circumstances testimonial”); *Navarette*, 294 P.3d at 441 (finding that “autopsy reports regarding individuals who suffered a violent death are testimonial.”).

<sup>177</sup> *United States v. Moore*, 651 F.3d 30, 39 (D.C. Cir. 2011).

<sup>178</sup> *Id.* at 72 n.15.

<sup>179</sup> *Id.* at 72 (citations, quotations, and ellipsis omitted).

<sup>180</sup> *Id.* at 73.

<sup>181</sup> *Id.*

<sup>182</sup> *Ignasiak*, 667 F.3d at 1219.

herself, as business records (not through her capacity as an expert).<sup>183</sup> The Eleventh Circuit found the reports testimonial. They were prepared “for use at trial” under a “statutory framework” in which “medical examiners worked closely with law enforcement”.<sup>184</sup>

- “Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Fla. Stat. § 406.02.”<sup>185</sup>
- The Commission “must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members.”<sup>186</sup>
- The examiner “relied upon information collected by ‘deputies on the scene.’”<sup>187</sup>

In *United States v. James*, conviction in a creepy conspiracy to murder for insurance cash turned on toxicology reports and autopsies that showed whether the deaths were accidental or caused by malicious poisoning.<sup>188</sup> The Second Circuit found the reports non-testimonial: the “circumstances under which the analysis was prepared” didn’t “establish that the primary purpose of a reasonable analyst in the declarant’s position would have been to create a record for use at a later criminal trial.”<sup>189</sup> The

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<sup>183</sup> *Id.* at 1229 n.14.

<sup>184</sup> *Id.* at 1232.

<sup>185</sup> *Id.* at 1231-32.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 1232 n.17.

<sup>188</sup> *James*, 712 F.3d at 85.

<sup>189</sup> *Id.* at 94, 96, 102. The court did not believe it was entitled to rely on the *Williams* plurality’s statement of the test since five Justices disagreed with it and it seemed to “conflict directly with *Melendez-Diaz*.” *Id.* at 95.

“key,” said the court, was the “particular relationship between [the medical examiner’s office] and law enforcement”.<sup>190</sup>

- “[N]either the government nor defense counsel elicited any information suggesting that law enforcement was ever notified that Somaipersaud’s death was suspicious, or that any medical examiner expected a criminal investigation to result from it.”<sup>191</sup>
- “There is no indication in Brijmohan’s testimony or elsewhere in the record that a criminal investigation was contemplated during the inquiry into the cause of Sewnanan’s death,” especially since the facts at the time suggested “accidental ingestion or suicide.”<sup>14</sup>

In *State v. Kennedy*,<sup>192</sup> an autopsy report showed that the victim’s head had been bashed in. Prosecutors actually conceded that the report was testimonial,<sup>193</sup> but the West Virginia Supreme Court of Appeals nonetheless proceeded to apply the “primary purpose” test to find testimoniality.<sup>194</sup>

- “[M]ost compellingly, the autopsy and required report’s use in judicial proceedings is one of its statutorily defined

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<sup>190</sup> *James*, 712 F.3d at 97. But Judge Eaton, concurring, noted that OCME had a “long history of cooperation with law enforcement” and “all autopsy reports would remain statements made directly to law enforcement insofar as they are statutorily required to be available to law enforcement officers and prosecutors.” *Id.* at 110, citing N.Y.C. Admin. Code § 17–205 (1998).

<sup>191</sup> *James*, 712 F.3d at 99. It distinguished *Ignasiak* on this ground: “the Florida Medical Examiner’s Office was created and exists within the Department of Law Enforcement,” where the “OCME is a wholly independent office.” *James*, 712 F.3d at 99 (citations omitted). See also *United States v. Feliz*, 467 F.3d 227, 237 (2d Cir. 2006), a pre-*Melendez-Diaz* case, citing *People v. Washington*, 654 N.E.2d 967, 969 (N.Y. 1995), which noted that N.Y.C.’s medical examiners “are, by law, independent of and not subject to the control of the office of the prosecutor, and that OCME is not a law enforcement agency.”

<sup>192</sup> *State v. Kennedy*, 735 S.E.2d 905 (W.Va. 2012).

<sup>193</sup> *Id.* at 905, 912.

<sup>194</sup> *Id.* at 916.

purposes.”<sup>195</sup> The examiner is obligated to assist in the “formulation of conclusions, opinions or testimony in judicial proceedings.”<sup>196</sup>

- “Kennedy was under suspicion and in fact, in custody, when the autopsy was conducted and therefore the autopsy report could arguably be said to have been prepared to ‘accuse a targeted individual.’”<sup>197</sup> In a subsequent footnote “arguably” became “necessarily”: “Kennedy was arrested the day Viars’ body was discovered; therefore, the autopsy report necessarily became part of the case being assembled against him.”<sup>198</sup>
- “Dr. Sabet testified that law enforcement officers [were] present during the autopsy, providing a ‘detailed history’ and engaging in a dialogue with the medical examiner about cause of death,” which “suggests a collaborative investigative effort in making the case against a suspect.”<sup>199</sup>

In *People v. Leach*, a husband strangled his wife to death.<sup>200</sup> Could the pressure on her neck have been an accident in a heated argument?<sup>201</sup> The Illinois Supreme Court found the autopsy report non-testimonial: it was neither “prepared for the primary purpose of accusing a targeted individual” nor “for the primary purpose of providing evidence in a criminal case.”<sup>202</sup>

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 917, citing W. Va. Code § 61–12–3(d).

<sup>197</sup> *Kennedy*, 735 S.E.2d at 917.

<sup>198</sup> *Id.*, at 917 n.10.

<sup>199</sup> *Id.*

<sup>200</sup> *People v. Leach*, 980 N.E.2d 570, 572 (Ill. 2012).

<sup>201</sup> *Id.* at 595 (highlighting defendant’s suggestion that “some undiagnosed heart or other ailment” may have caused victim to die “more quickly than a healthy individual would have died from strangulation.”).

<sup>202</sup> *Id.* at 590.

- “[A]lthough the police discovered the body and arranged for transport, there is no evidence that the autopsy was done at the specific request of the police. The medical examiner’s office performed the autopsy pursuant to state law, just as it would have if the police had arranged to transport the body of an accident victim.”<sup>203</sup>
- “Although [Dr. Choi] was aware that the victim's husband was in custody and that he had admitted to ‘choking’ her, his examination could have either incriminated or exonerated him, depending on what the body revealed about the cause of death . . . . Dr. Choi was not acting as an agent of law enforcement, but as one charged with protecting the public health by determining the cause of a sudden death that might have been ‘suicidal, homicidal or accidental.’”<sup>204</sup>
- “Unlike a DNA test which might identify a defendant as the perpetrator of a particular crime, the autopsy finding of homicide did not directly accuse defendant. Only when the autopsy findings are viewed in light of defendant’s own statement to the police is he linked to the crime. In short, the autopsy sought to determine how the victim died, not who was responsible, and, thus, Dr. Choi was not defendant’s accuser.”<sup>205</sup>

In *People v. Dungo*, Dungo admitted to choking his girlfriend after a fight.<sup>206</sup> The California Supreme Court held that the expert’s testimony about the autopsy report did not require confrontation of the report’s author.<sup>207</sup>

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<sup>203</sup> *Id.* at 591.

<sup>204</sup> *Id.* at 591-92 (citations omitted).

<sup>205</sup> *Id.* at 592.

<sup>206</sup> *People v. Dungo*, 286 P.3d 442, 446 (Cal. 2012).

<sup>207</sup> *Id.* at 450.

- “Criminal investigation...[is] only one of several purposes” for autopsies: “the decedent’s relatives may use an autopsy report in determining whether to file an action for wrongful death. And an insurance company may use an autopsy report in determining whether a particular death is covered by one of its policies . . . . Also, in certain cases an autopsy report may satisfy the public’s interest in knowing the cause of death, particularly when (as here) the death was reported in the local media. In addition, an autopsy report may provide answers to grieving family members.”<sup>208</sup>
- “The presence of a detective at the autopsy and the fact that the detective told the pathologist about defendant’s confession” did not make the report testimonial because the report itself was “simply an official explanation of an unusual death.”<sup>209</sup>

Finally, in *Navarette*, a man was shot from a car.<sup>210</sup> At issue was whether the shooter was the car’s driver or passenger Navarette.<sup>211</sup> Dr. Zumwalt, New Mexico’s Chief Medical Examiner, testified using a colleague’s report that the bullet wound and its lack of soot were consistent with Navarette’s position in the car.<sup>212</sup> This was testimonial, said the New Mexico’s Supreme Court:

- Dr. Zumwalt “conceded that it was immediately clear that this autopsy was part of a homicide investigation” and said two police officers had attended the autopsy.<sup>213</sup>

Examiners were under a statutory duty to report about individuals who “die suddenly and unexpectedly,” so there was “no reason” an examiner should not “anticipate[] that criminal litigation would result.”<sup>214</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> *Dungo*, 286 P.3d at 450.

<sup>210</sup> *State v. Navarette*, 294 P.3d 435, 436 (N.M. 2013).

<sup>211</sup> *Id.* at 436.

<sup>212</sup> *Id.* at 437.

<sup>213</sup> *Id.* at 44-41.

The court concluded that the pathologist's findings "went to the issues of whether Reynaldo's death was a homicide and, if so, who shot him. These issues reflected directly on Navarette's guilt or innocence."<sup>215</sup> This was declared a bright-line rule: murder autopsies are always testimonial.<sup>216</sup>

But if an examiner has a decedent and nothing more, how could her findings possibly reflect directly on Navarette's guilt or innocence? How would the pathologist know who Navarette even was? A drowning could be a crime or a poolside tragedy; a heart attack could be caused by obesity or arsenic. It is only when a cause-of-death finding is linked to evidence *extraneous* to the report that a conviction happens. A body alone is never enough.

*Melendez-Diaz* noted that the drug analyst's job existed "under Massachusetts law."<sup>217</sup> Courts have followed suit in examining the terms of autopsy-authorizing statutes, which vary considerably.<sup>218</sup> California, for instance, has three different models among its counties, and a statute providing that a pathologist's "[i]nquiry . . . does not include those investigative functions usually performed by other law enforcement agencies."<sup>219</sup> In Kansas, a pathologist can obtain "law enforcement background information" or perform an "examination of the scene of the cause of death."<sup>220</sup> Statutory provisions are just one element in the totality inquiry and probably lack the significance courts ascribe to them. A separate examiner's office could be muscled by a sheriff, while an

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<sup>214</sup> *Id.* at 441.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* (holding that "autopsy reports regarding individuals who suffered a violent death are testimonial.").

<sup>217</sup> *Melendez-Diaz*, 557 U.S. at 311.

<sup>218</sup> For a summary of the variety of systems, see NAS Report, *supra* note 114, at 243-50.

<sup>219</sup> CAL. GOV'T CODE § 27491 (West 2012).

<sup>220</sup> KAN. STAT. ANN. § 22a-231 (West 2000).

examiner with a lab in a police basement could still maintain perfect neutral integrity. Statutes say little about what actually happens, such as the extent to which a pathologist confers with police or family members to get the facts before an exam. A neutral-sounding name, like “State Laboratory Institute, a division of the Massachusetts Department of Public Health” (*Melendez-Diaz*) or “New Mexico Department of Health, Scientific Laboratory Division” (*Bullcoming*), won’t prevent a finding of testimoniality. Conversely, the fact that the medical examiner is administratively connected to the police should not automatically render all of its autopsy reports testimonial—no matter how far they are removed from police manipulation in practice. Such a rule would put form over substance.

*Melendez-Diaz* observed that the “majority of [labs producing forensic evidence] are administered by law enforcement agencies.”<sup>221</sup> Not so with pathologist operations: 43% of Americans are served by independent coroner or examiner offices and another 14% by offices within health departments.<sup>222</sup> Some medical examiners are even part of a university’s school of medicine.<sup>223</sup> Most autopsies occur in mortuaries or hospital pathology wings.

A third of doctors work within law-enforcement bailiwicks, but not because their work is primarily related to law enforcement—it isn’t—but for administrative reasons.<sup>224</sup> Many rural or suburban counties simply

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<sup>221</sup> *Melendez-Diaz*, 557 U.S. at 318 (“[W]hat respondent calls ‘neutral scientific testing’ is as neutral or as reliable as respondent suggests. . . . A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.”). For instance, the Sonoma County, California, Sheriff’s Office website describes its Coroner Unit’s mission as “to provide competent and timely law enforcement and scientific investigations of all deaths [under statutory criteria].” *Law Enforcement Division*, SONOMA COUNTY SHERIFF’S OFFICE, [http://www.sonomasheriff.org/about\\_law\\_enforcement.php](http://www.sonomasheriff.org/about_law_enforcement.php) (last visited Nov. 2, 2013).

<sup>222</sup> NAS Report, *supra* note 114, at 249.

<sup>223</sup> *New Mexico v. Navarette*, U.S. Supreme Court, Cert. Pet., No. 12-1256, 17-18.

<sup>224</sup> NAS Report, *supra* note 114, at 249.

can't afford to separately fund or house examiners and law enforcement. Mortuaries are costly; insurers don't cover autopsies. Marin County saved \$500,000 a year by merging its coroner and sheriff's offices.<sup>225</sup> In real cost-benefit terms, such a structure probably outweighs confrontation problems, especially in peaceful places where homicide is rare. The fact is that when corpses are involved, both law enforcement and examiners must be too. Federal judges might observe that for similar administrative reasons their courthouses also host U.S. attorneys, ATF agents, or federal marshals without compromising the judiciary's integrity. In any event, structure is only one factor in a broad-ranging totality inquiry. The *Crawford* question is whether any particular statement is primarily motivated for use in a criminal trial; *Bryant* shows that even statements made to law enforcement officers investigating a crime can be non-testimonial. It cannot be that a mere administrative structure tying medical examiners to law enforcement would make every examiner's report testimonial.

We hesitate to suggest that examiners should have *no* contact with law enforcement. Pathologists want all available information. Everything helps. This can mean acquiring police reports—or the reports of paramedics or firemen, or medical histories and hospital records. Sometimes it means a pre-autopsy conference with police or a talk with the victim's family. New York's Dr. Helpern—who estimated that he performed some 20,000 autopsies and supervised 60,000 more over 45 years<sup>226</sup>—wrote that in cracking the famous Coppolino murders a witness's tip that a victim had been injected with succinylcholine, a nearly undetectable muscle relaxant, was essential. "Had I been doing this autopsy without knowing the history of the case," he wrote, he might have

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<sup>225</sup> Nels Johnson, *Marin's Sheriff-Coroner Consolidation Saves \$41,000 a Month*, MARIN INDEPENDENT JOURNAL (May 5, 2013), available at [http://www.marinij.com/ci\\_23166940/marins-sheriff-coroner-consolidation-saves-41-000-month](http://www.marinij.com/ci_23166940/marins-sheriff-coroner-consolidation-saves-41-000-month) (noting that merger of county coroner into sheriff's department saves country a half-million annually and that Marin was 48th county in California county to do so).

<sup>226</sup> HELPERN, *supra* note 79, at 39.

missed the “tiny pink spot” on the left buttock that marked the needle’s point of entry.<sup>227</sup> His resourceful toxicologist then proceeded to *invent* a method to trace the substance in the victim’s organs.<sup>228</sup> Confrontation Clause jurisprudence cannot be so hyper-technical as to impose a rule that might make medical examiners’ reports thorough and reliable.

In another case, Dr. Helpern explained why he believed Ms. Carolee Bidy, in her day a noted murder defendant, was wrongly convicted.<sup>229</sup> Her step-daughter had gotten into a powerful drain cleaner. The pathologist, unaware of this fact, gave the cause of death as asphyxia, which it was. But the jury saw it as Ms. Bidy’s doing, when Dr. Helpern, after studying photos of the girl’s epiglottis, was sure that her throat had swollen shut from the chemical. Bluntly put, a wall between examiner and the case’s known facts, besides being pointless in non-criminal cases, will allow murderers to escape and innocents to suffer. If there remains a concern about law-enforcement involvement, a solution is to require pathologists to keep a record of contact with police, so that defense counsel can later look for improper influence or misrepresentation. If impropriety is found, a judge can rule on the record that the report carries the danger of a testimonial statement. But one is more likely to find a pathologist influencing law enforcement—especially in invalidating a theory of the detectives or prosecutors—than the other way around.<sup>230</sup>

There may be other routine and unavoidable involvement by adversarial officials, such as in delivering the body, but this activity alone

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<sup>227</sup> HELPERN, *supra* note 79, at 29, 168, 184, 205-06.

<sup>228</sup> HELPERN, *supra* note 79, at 31.

<sup>229</sup> HELPERN, *supra* note 79, at 79-83.

<sup>230</sup> Interview with Lieutenant R. Bowers, Coroner’s Bureau Unit Commander, in Alameda Cnty., Cal. (August 7, 2013) (notes on file with author); Interview with Dr. Thomas Beaver, Chief Forensic Pathologist, in Alameda Cnty., Cal. (August 6, 2013) (asserting that “pathologists won’t listen to anyone without at least an M.D.”) (notes on file with author).

cannot make the autopsy report testimonial.<sup>231</sup> Nor should a state law like that in Illinois, which requires an examiner in homicide cases to deliver specimens from the decedent to the State Police's Division of Forensic Services, warrant a finding of testimoniality in all cases.<sup>232</sup> A pathologist's obligation to report a homicide finding to police or a district attorney,<sup>233</sup> or, conversely, *be* informed of suspected homicide by police,<sup>234</sup> says precious little about testimoniality. So, too, with laws that allow a state attorney to *request* an autopsy.<sup>235</sup> A pathologist's sense that a decedent with six gunshot wounds will arouse suspicion cannot alone make her report testimonial. If a vague consciousness on the examiner's part that a report could one day show up in criminal prosecution was enough, all examinations would be testimonial—and that test, of mere anticipation that a statement might conceivably be used at trial, has already been rejected by the Supreme Court in *Bryant* and *Davis*.<sup>236</sup>

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<sup>231</sup> *James*, 712 F.3d at 102 n.13 (“police were unquestionably involved in the Guyanese autopsy process, including, for example, transporting forensic samples for testing. As five Justices in *Williams* made clear, however, the involvement of ‘adversarial officials’ in an investigation is not dispositive as to whether or not a statement is testimonial. In this case, it appears that was simply the routine procedure employed by the Guyanese medical examiner in investigating all unnatural deaths, and does not indicate that a criminal investigation was contemplated.”).

<sup>232</sup> *Leach*, 980 N.E.2d at 591 (citing 55 ILCS 5/3–3013 (West 2010)).

<sup>233</sup> *See, e.g., Navarette*, 294 P.3d at 440-41 (“A medical examiner obligated to report her findings to the district attorney should know that her statements may be used in future criminal litigation.”) (referencing N.M. Stat. Ann. § 24-11-8 (West 1973)).

<sup>234</sup> *James*, 712 F.3d at 97-98 (“While the OCME is an independent agency, the police are required to notify it when someone has died ‘from criminal violence, by accident, by suicide, suddenly when in apparent health, when unattended by a physician, in a correctional facility or in any suspicious or unusual manner or where an application is made pursuant to law for a permit to cremate a body of a person.’”).

<sup>235</sup> *Ignasiak*, 667 F.3d at 1231-32 (holding that a medical examiner is obligated to perform autopsies “as shall be requested by the state attorney,” among other circumstances).

<sup>236</sup> *See also Leach*, 980 N.E.2d at 593 (“[A]n autopsy report prepared in the normal course of business of a medical examiner’s office is not rendered testimonial merely

To assure that autopsy reports avoid the Confrontation Clause's prohibition, statutes and protocols should provide that pathologists receive no guidance from police beyond the receipt of basic facts and no specifics about the identity of possible perpetrators. Examiners should have no responsibility for gathering evidence or discovering perpetrators. A report might properly reference a "subarachnoid hemorrhage," as one did, but it should not have mentioned the beating at the parking lot.<sup>237</sup> (If a reference to outside facts creeps in, redact it.) Pathologists should be cautious about visiting a murder scene—uncommon anyway once "medical investigators" assumed this role—an act that risks police-doctor contact. Reports should be non-accusatory and devoid of legal conclusions. As put by the National Association of Medical Examiners, the task is to produce a "neutral and objective medical assessment of the cause and manner of death."<sup>238</sup> The concern is accuracy guided by the best professional standards.<sup>239</sup> Following these standards helps an examiner's report avoid being entrapped in *Bryant*'s "primary motive" test.

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because the assistant medical examiner performing the autopsy is aware that police suspect homicide and that a specific individual might be responsible.").

<sup>237</sup> *Manocchio v. Moran*, 919 F.2d 770, 772 (1st. Cir 1990).

<sup>238</sup> NATIONAL ASSOCIATION OF MEDICAL EXAMINERS, *supra* note 122 at A1, 1. *See also* *United States v. Rosa*, 11 F.3d 315, 332 (2d Cir. 1993) (A "medical examiner, although often called a forensic expert" should "bear[] more similarity to a treating physician than he does to one who is merely rendering an opinion for use in the trial of a case.") Or, as the California Supreme Court put it, "statements describing the pathologist's anatomical and physiological observations," by contrast to "conclusions as to the cause of the victim's death" are "comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment." *Dungo*, 286 P.3d at 449 (citing *Melendez-Diaz*, 557 U.S. at 312 n.2 ("medical reports *created for treatment purposes* . . . would not be testimonial under our decision today") (emphasis added)).

<sup>239</sup> Especially, perhaps, if the result requires a division of labor. *Williams*, 132 S. Ct. at 2244 ("When the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures.).

## B. CERTIFY OR SEAL THE REPORT WITH AN OATH?

A report's formality came up in *Melendez-Diaz* and *Bullcoming*—the cases discussed the certified character of the lab reports<sup>240</sup>—but in *Williams* whether the Cellmark data was formally presented seemed chiefly of interest to Justice Thomas. Eight *Williams* votes viewed Thomas's single-factor "formality" test an overtechnical basis upon which to decide testimoniality—"label[ing]," according to Justice Kagan, that made "(maybe) a nickel's worth of difference."<sup>241</sup> Justice Thomas would allow admission even of accusatory statements so long as they lack solemnity.<sup>242</sup> In *Melendez-Diaz*, he felt the certificates indicating cocaine were "quite plainly affidavits,"<sup>243</sup> as he did in *Bullcoming* with the lab's "certificate of analyst."<sup>244</sup> Yet in *Williams* he found the lab statements "neither a sworn nor a certified declaration of fact."<sup>245</sup>

If Justice Thomas's test were accepted, a prosecutor might be able to admit autopsy reports that were signed but not formally certified. In California,<sup>246</sup> four justices seemed to find it significant that although a pathologist "signed and dated his autopsy report, it was not sworn or

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<sup>240</sup> *Bullcoming*, 131 S. Ct. at 2710 ("question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification").

<sup>241</sup> *Williams*, 132 S. Ct. at 2276 (Kagan, J., dissenting).

<sup>242</sup> *Id.* at 2261 (Thomas, J., concurring).

<sup>243</sup> *Melendez-Diaz*, 557 U.S. at 329-30 (Thomas, J., concurring).

<sup>244</sup> *Bullcoming*, 131 S. Ct. at 2710.

<sup>245</sup> *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring).

<sup>246</sup> *Dungo*, 286 P.3d at 450 ("the presence of a detective at the autopsy and the fact that the detective told the pathologist about defendant's confession do not make the statements of objective fact in the autopsy report into formal and solemn testimony; but those circumstances do support defendant's argument that the primary purpose of the autopsy was the investigation of a crime. Similarly, the fact that the autopsy was mandated by a statute that required public findings and notification of law enforcement does not imply that the statements of objective fact in the report are formal and solemn testimony, but it does imply that the primary purpose of the autopsy was forensic.").

certified in a manner comparable to the chemical analyses in *Melendez–Diaz* and *Bullcoming*.<sup>247</sup> The Illinois Supreme Court (the other high court to find autopsy reports generally non-testimonial) noted that unlike the *Melendez–Diaz* certificates, the autopsy report it considered “was not certified or sworn in anticipation of its being used as evidence; it was merely signed by the doctor who performed [it].”<sup>248</sup> Still, a factor rejected by eight justices as significant (let alone controlling) counsels caution in preparing unformalized autopsy reports in the expectation that they will thereby avoid confrontation problems. The best that can be hoped for by the government is that a lack of formality would support a finding of non-testimoniality. This should be far less significant (and *is* in the case law) than the question of whether the medical examiner was influenced by law enforcement to make the autopsy report a document for litigation.

### C. EXPERT TESTIMONY

If an autopsy report is testimonial, can one doctor testify using the work of another? This practice is a real problem for defendants. In *Ignasiak*, for instance, “Dr. Minyard indicated she lacked enough information to agree or disagree with Dr. Kelly’s conclusion that patient S.P.’s death was a suicide”<sup>249</sup> and “could not testify from direct knowledge about the condition of a particular patient’s heart, lungs or brain and, as a result, whether that patient may have actually died from a

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<sup>247</sup> *Dungo*, 286 P.3d at 452. The court further noted that the autopsy report “contrasts in this respect with the coroner’s or attending physician’s “[c]ertification and signature” on a death certificate, by which the declarant “attest[s] to [the] accuracy” of “the portion of the certificate setting forth the cause of death (citing Health & Saf. Code, § 102875, subd. (a)(7)). . . . [T]he two documents, autopsy report and death certificate, are distinct, and only the latter bears a formal certification mandated by statute.” *Id.* at 452.

<sup>248</sup> *Leach*, 980 N.E.2d at 592. *See also Hall*, 923 N.Y.S.2d at 431 (“the autopsy report, which was unsworn, cannot fairly be viewed as ‘formalized testimonial material.’”).

<sup>249</sup> *Ignasiak*, 667 F.3d at 1225.

heart attack, stroke, or some cause other than drug overdose.”<sup>250</sup> A non-autopsying expert will be able speak to procedure, highlighting an office’s diligence and expertise, but not about the one-off errors and oversights that are precisely what the defense seeks to uncover.

Justice-counting in *Williams* leads to the conclusion that unadmitted autopsy reports, if testimonial, cannot serve as the basis for the opinion of an expert who played no role in the autopsy,<sup>251</sup> even if the testimony is the expert’s *own* independent conclusion and he can be cross-examined about it.<sup>252</sup> The New Mexico Supreme Court believes this was decided<sup>253</sup> by Justices Thomas and Kagan in *Williams*, the latter rejecting

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<sup>250</sup> *Id.* at 1234.

<sup>251</sup> The viability of using Federal Rule of Evidence 703 or state analogues was still an open question after *Bullcoming*. See *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring) (“We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others’ testimonial statements if the testimonial statements were not themselves admitted as evidence.”); *Moore*, 651 F.3d at 72 (“*Bullcoming* . . . only considered a testifying lab technician who had ‘no involvement whatsoever in the relevant test and report.’”). Courts certainly approved of this route before *Melendez-Diaz*. *Craig*, 853 N.E.2d at 637 (determining that there was no unavailability requirement with expert autopsy testimony).

<sup>252</sup> *Kennedy*, 735 S.E.2d at 921 (“[A]s to the opinions regarding the non-fatal stab wounds and tire markings, it is equally clear that these are original observations and opinions developed by Dr. Sabet himself. Dr. Sabet unequivocally testified that these were additional opinions he derived from inspection of the clothing and autopsy photographs; they are mentioned nowhere in the autopsy report itself”); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009) (“*Crawford* forbids the introduction of testimonial hearsay as evidence in itself, but it in no way prevents expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence”); *Lackey*, 120 P.3d at 352 (“Dr. Mitchell based his opinions and conclusions upon photographs, a toxicology report, and the death certificate which was prepared by the coroner who provided corroborating testimony at trial.”).

<sup>253</sup> *Navarette*, 294 P.3d at 441 (“[T]he autopsy report was not admitted into evidence. Thus, the issue here is whether an expert can relate out-of-court statements to the jury that provide the basis for his or her opinion, as long as the written statements themselves are not introduced.”).

such testimony as a “neat trick.”<sup>254</sup> Precedents already disallow “surrogate” testimony<sup>255</sup> or testimony that is a “mere conduit” for inadmissible evidence.<sup>256</sup> The logic, per *Melendez-Diaz*, is that confrontation lets a defendant test “honesty, proficiency, and methodology”<sup>257</sup>—even when examiners boast the “scientific acumen of Mme. Curie and the veracity of Mother Theresa.”<sup>258</sup> Justices Alito, Kennedy, and Breyer, and Chief Justice Roberts disagree: expert statements made “solely for the purpose of explaining the assumptions on

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<sup>254</sup> *Williams*, 132 S. Ct. at 2259 (Thomas, J., concurring); *id.* at 2272 (Kagan, J., dissenting) (“[U]nder the plurality’s approach, the prosecutor could choose the analyst-witness of his dreams (as the judge here said, “the best DNA witness I have ever heard”), offer her as an expert (she knows nothing about the test, but boasts impressive degrees), and have her provide testimony identical to the best the actual tester might have given (“the DNA extracted from the vaginal swabs matched Sandy Williams’s”)—all so long as a state evidence rule says that the purpose of the testimony is to enable the factfinder to assess the expert opinion’s basis.... What a neat trick—but really, what a way to run a criminal justice system. No wonder five Justices reject it.”).

<sup>255</sup> *Bullcoming*, 131 S. Ct. at 2710.

<sup>256</sup> *Kennedy*, 735 S.E.2d at 920-22, *Bullcoming*, 131 S. Ct. at 2710; *Ignasiak*, 667 F.3d at 1234. *See also Davis*, 126 S. Ct. at 2276 (“[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition.”); *United States v. Pablo*, 625 F.3d 1285, 1292 (10th Cir. 2010) (“If an expert simply parrots another individual’s testimonial hearsay, rather than conveying her independent judgment that only incidentally discloses testimonial hearsay . . . then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay”); *State v. Aragon*, 225 P.3d 1280, 1290 (N.M. 2010) (“Young’s testimony was a restatement of Champagne’s conclusory opinion regarding the narcotic content of the substance, its weight, and its purity as stated in her hearsay report. . . . [Aragon] had a right to challenge the judgment and conclusions behind Champagne’s opinion.”).

<sup>257</sup> *Ignasiak*, 667 F.3d at 1233 (citing *Melendez-Diaz*, 557 U.S. at 320).

<sup>258</sup> *Melendez-Diaz*, 557 U.S. at 319 n.6.; *Bullcoming*, 131 S. Ct. at 2714 (holding that only testimony by person who actually prepared the forensic report has the insight needed to “expose any lapses or lies on [the certifying analyst’s] part.”).

which that opinion rests are not offered for their truth.”<sup>259</sup> That’s only four votes. The better path is to admit autopsy reports directly, as non-testimonial report under the “primary motive” test, after assuring that law-enforcement involvement is not so pervasive as to prevent a finding that the report was prepared for purposes unrelated to use as evidence in a criminal trial.

#### IV. CONCLUSION: THE PROPER TEST

There is no “autopsy” exception to the Confrontation Clause. We think, rather, that the vast majority of autopsy reports are just outside the clause’s scope—presumptively non-testimonial in light of a medical examiner’s actual work. Reliability can’t justify unconfrosted admission; nor can neutrality, or the state’s need for the evidence, or the fact the autopsies cannot be recreated. What *is* enough are statistics showing that at least 90% of autopsy reports in fact do not have a primary purpose in furnishing evidence for a prosecution. The primary purpose, the *predominating* purpose, is public health. Even in the fraction of cases where a report is eventually *used* in a prosecution, that doesn’t mean the report was *prepared* for such a purpose.

Courts should presume that autopsy reports are non-testimonial because they are written independently by neutral doctors concerned with accuracy, not police officers seeking conviction. The presumption isn’t overcome by the fact that the examiner and the police might be administratively conjoined. The proper test for the Confrontation Clause, fairly applied, is:

*Has been specific and pervasive involvement by law enforcement in the preparation of the autopsy report, such as to change the basic character of the document from one serving pathological purposes to one serving prosecutorial purposes?*

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<sup>259</sup> *Williams*, 132 S. Ct. at 2228.

Only when that line is crossed does a medical examiner become a “witness” against the accused. Defense allegations that this happened should be litigated in light of a record of contacts kept by the medical examiner.

Of course the state cannot generate evidence against the accused without the right of confrontation. The Founders removed that damnable weapon from the arsenal. But to demand confrontation of every autopsy report in a prosecution would be to misinterpret a noble principle and would very likely subvert justice before promoting it. This is an exceedingly unstable area of law. The proper application of the Confrontation Clause does not command a majority in the Supreme Court or consensus in the states. Which means there is still time to do the right thing.