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Trimming Confrontation's Claws: Navigating the Uncertain Jurisprudential Topography of the Post-Melendez-Diaz Confrontation Clause

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Decades ago, the U.S. Supreme Court wrote that the Confrontation Clause "comes to us on faded parchment." Nevertheless, more than two hundred years after the adoption of the Bill of Rights, the Court has decreed not only what the clause means but also what constitutionally required procedure it demands and which witnesses are subject to those demands. In Melendez-Diaz v. Massachusetts, the U.S. Supreme Court held that the Confrontation Clause of the Sixth Amendment requires a state presenting a forensic lab report as evidence in a criminal trial to make the analyst who prepared the report available for cross-examination by the defense. This holding categorized scientific test results as testimonial evidence subject to Confrontation Clause demands because they are produced in order to prove a fact at a criminal trial. This categorization has presented various problems for prosecutions, especially when the analyst in a case is unavailable to testify or difficult to locate. Even when the analyst is available, this new understanding of the scope of the Confrontation Clause makes it much more time-consuming and expensive for a state to fulfill its obligations when prosecuting a criminal defendant. Essentially, the Court's holding in Melendez-Diaz makes prosecuting cases more difficult, more expensive, and, in some circumstances, impossible. The Court reached this result by analyzing the Confrontation Clause through a strict originalist lens and largely disregarding the practical problems that the ruling would inevitably create. In the wake of this decision, states have
wrestled with ways to preserve their ability to efficiently and successfully prosecute criminal defendants. This Note analyzes the constitutionality of states' efforts to alleviate this new burden, including various forms of notice-and-demand statutes, surrogate testimony, and live-video conferencing. Additionally, this Note contemplates and promotes the possibility that the Court may narrow the scope of the Confrontation Clause in future cases.
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I. INTRODUCTION

In 1991, eight-year-old Megan Ellison was raped and savagely beaten; her throat was slit, and she was left to die in a downtown Los Angeles dumpster.\(^1\) When the girl’s body was found, the responding police officers collected a semen sample from her clothing, which was analyzed by one of the department’s forensic laboratory analysts. However, despite the Los Angeles Police Department’s best efforts to find the perpetrator, a DNA match could not be identified within the available records.\(^2\) The case eventually went cold and the girl’s killer remained at large for eighteen years, until a police investigation of the disappearance of another young girl yielded a suspect. Investigators collected samples of the man’s DNA, which linked him to the 1991 murder. Nearly two decades after their little girl had been brutally taken from them, Megan’s parents were finally going to see the culprit face justice.

At trial, the state attempted to offer the DNA test results into evidence. Defense counsel immediately objected on the ground that the admission of the DNA test results without the ability to cross-examine the forensic analyst involved in the testing violated his client’s Sixth Amendment right to confrontation.\(^3\) He requested the opportunity to cross-examine the scientist who had analyzed the semen sample found on the girl in 1991.\(^4\) The trial court, bound by a recent line of U.S. Supreme Court cases, sustained the objection and ordered the prosecution to call the forensic analyst for cross-examination. However, the analyst who initially collected the DNA

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1. This is a fictional account created by the author.
2. DNA.gov, Statistics Behind a Match, http://www.dna.gov/statistics/statistics-otc/ (last visited July 30, 2010) ("To find a [DNA] match, forensic analysts compare the genetic profile obtained from crime scene evidence to the profile from a known individual (e.g., [a] suspect [or] victim). If the DNA profiles from the evidentiary and known samples are the same at each locus [the specific physical location of a gene on a chromosome], laboratory analysts can provide a determination of the statistical significance of the evidence. In some cases, no conclusive interpretation can be made. Typically there are three possible laboratory outcomes: (1) [i]f the DNA profiles from the evidentiary and known samples are consistent at each locus, laboratory analysts can interpret the finding as a "match," "inclusion," or "failure to exclude"[;] (2) [i]f the two profiles are not consistent at each locus, the finding can be interpreted as a "nonmatch" or "exclusion"[;] (3) [i]f there are insufficient data to support a conclusion, the finding is often referred to as "inconclusive." ").
3. See infra note 6.
4. The Supreme Court has held that a witness will be considered "subject to cross-examination" if the witness is "placed on the stand, under oath, and responds willingly to questions." United States v. Owens, 484 U.S. 554, 561 (1988).
sample eighteen years ago had since passed away, therefore rendering her testimony an impossibility. Despite the fact that the scientific evidence would prove that the defendant committed the heinous crimes,\textsuperscript{5} since it was impossible for the scientist to testify in court, if no other evidence were available, the rapist-murderer would remain free. This hypothetical illustrates one unfortunate repercussion of the U.S. Supreme Court’s recent paradigm shift regarding its interpretation of the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution reads, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”\textsuperscript{6} In \textit{Melendez-Diaz v. Massachusetts},\textsuperscript{7} the U.S. Supreme Court held that the Confrontation Clause of the Sixth Amendment requires a state presenting a forensic lab report as evidence in a criminal trial to make the analyst who prepared the report available for cross-examination by the defense.\textsuperscript{8} This holding categorized scientific test results as testimonial evidence subject to Confrontation Clause demands since they are produced in order to prove a fact at a criminal trial.\textsuperscript{9} This categorization has presented various problems for prosecutions, especially when the analyst in a case is unavailable to testify or difficult to locate.\textsuperscript{10} Even when the analyst is available, this new understanding of the reach of the Confrontation Clause makes it much more time-consuming and expensive for a state to fulfill its obligations when prosecuting a criminal defendant.\textsuperscript{11}

\begin{itemize}
  \item \textsuperscript{5} The likelihood that any two individuals (except identical twins) will share the same thirteen-locus DNA profile can be as low as one in one billion or greater. NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, USING DNA TO SOLVE COLD CASES 6 (2002), http://www.ncjrs.gov/pdffiles1/nij/194197.pdf.
  \item \textsuperscript{6} U.S. CONST. amend. VI. The full text of the Sixth Amendment is:

\begin{quote}
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
\end{quote}

\textit{Id.}

\item \textsuperscript{7} 129 S. Ct. 2527 (2009).
\item \textsuperscript{8} \textit{Id.} at 2532.
\item \textsuperscript{9} \textit{Id.}
\item \textsuperscript{10} David G. Savage, \textit{Supreme Court Ruling Shakes Up Criminal Trials}, L.A. TIMES, July 26, 2009.
\end{itemize}
Essentially, the Court’s holding in Melendez-Diaz makes prosecuting cases more difficult, expensive, and, in some circumstances, impossible.\(^\text{12}\)

This Note addresses the practical setbacks of the Crawford/Melendez-Diaz line of cases and the cases’ imposition on states’ efforts to prosecute criminal defendants. It argues that the states should be able to respond to the added burden in prosecuting cases imposed by the Crawford/Melendez-Diaz line of cases by making certain statutory changes that mitigate the windfall to defendants. This burden on state prosecutions may be addressed and alleviated through: (1) legislating notice-and-demand statutes; (2) allowing peer-review, surrogate, or video-conferencing testimony under certain circumstances; and (3) narrowing the scope of Crawford/Melendez-Diaz’s reach in upcoming Confrontation Clause cases. Part II will focus on the history and progression of the Court’s Confrontation Clause jurisprudence up to the present. Part III will follow with a survey of the current state of the law and will introduce some of the practical difficulties created by Melendez-Diaz. Part IV will then examine some of the manners in which state courts and legislatures have responded in the wake of Melendez-Diaz to deal with those burdens. This part will scrutinize those measures in light of the Court’s language to assess whether they might pass constitutional muster and will then explore which approaches are most effective at tempering some of the harsh consequences of Melendez-Diaz. It will also analyze the possibility that the Court, in light of its recently changed chemistry,\(^\text{13}\) may narrow the reach of the Confrontation Clause in its upcoming decisions.\(^\text{14}\) Part V will justify

\(^{12}\) Furthermore, the Court’s novel reinterpretation of the meaning and import of the Confrontation Clause comes more than 200 years after the adoption of the Bill of Rights. Writing for the Court in these Confrontation Clause cases, Justice Scalia adheres to a strict originalist interpretation of the clause and its history in a way that comports with his own judicial beliefs, whilst ignoring many of the practical complications it will create for state courts and prosecutions.

\(^{13}\) Justice Souter, who retired last term, cast his vote along with the 5-4 majority in Melendez-Diaz v. Massachusetts. Accordingly, his replacement, Justice Sotomayor, will likely provide the swing vote in the Court’s forthcoming Confrontation Clause cases.

\(^{14}\) Four days after deciding Melendez-Diaz, the Court granted certiorari in Briscoe v. Virginia. Magruder v. Commonwealth, 657 S.E.2d 113 (Va. 2008), cert. granted sub nom. Briscoe v. Virginia, 129 S. Ct. 2858 (2009). Because the facts and issues in the two cases were similar, many speculated that the decision to hear Briscoe would necessarily entail some narrowing of Melendez-Diaz. See, e.g., Federal Evidence Blog, http://federalevidence.com/blog (Jan. 8, 2010). Surprisingly, the Court vacated the judgment of the Supreme Court of Virginia in a
why these measures are desirable, both economically and to ensure the greatest degree of justice. Finally, Part VI will provide a brief summary and conclude.

II. BACKGROUND OF THE COURT'S CONFRONTATION CLAUSE JURISPRUDENCE

Until relatively recently, the Confrontation Clause was seldom litigated.\(^{15}\) Before 1965, the clause, as part of the Bill of Rights, only restricted the federal government from introducing certain evidence against a criminal defendant without providing him with an opportunity to confront and cross-examine the witness; it did not apply to the states.\(^{16}\) Because the Court controlled the way the clause was employed in the federal courts, there was little occasion for the Court to proffer any ruling on the scope of the right to confrontation.

In 1965, however, the U.S. Supreme Court held that the Confrontation Clause was a fundamental right incorporated via the Fourteenth Amendment and was thereby applicable to the states.\(^{17}\) This meant that state criminal trials would now have to comport with the strictures of their federal counterparts, specifically by ensuring a criminal defendant his Sixth Amendment right to confrontation.\(^{18}\) In the wake of this decision, states largely grappled with the ruling's impact on state prosecutions henceforth and independently attempted to define the circumstances that triggered a criminal defendant's right to confrontation.\(^{19}\) As a result, the Court was compelled to clarify the reach and meaning of the clause.

In 1980, sensing the need for a rule to provide guidance to the states,\(^{20}\) the Court developed a two-part test to define the circumstances under which a state could offer statements against a defendant without being required to make the declarant available for

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\(^{15}\) Richard A. Brisbin, Jr., Justice Antonin Scalia and the Conservative Revival 238 (1997).

\(^{16}\) See Pointer v. Texas, 380 U.S. 400 (1965).

\(^{17}\) Id. at 403.

\(^{18}\) See id.


cross-examination. In *Ohio v. Roberts*,\(^{21}\) the Court held that a defendant’s right to confrontation did not bar admission of an unavailable witness’s statement against the defendant if the statement bore adequate “indicia of reliability,” which could be established if the evidence (1) fell within a firmly rooted hearsay exception, or (2) bore particularized guarantees of trustworthiness.\(^{22}\) A line of cases following this decision attempted to define the boundaries of the *Roberts* test.\(^ {23}\)

The resultant test was, in practice, very similar to the application of the hearsay rule and its exceptions. As law professor Miguel Méndez observed:

[T]he [pre-*Crawford*] confrontation analysis eventually adopted by the Court dispensed with the cross-examination of the hearsay declarant when the hearsay received against the accused was offered under a “firmly rooted” exception or, if offered under a novel exception, the prosecution took the additional step of demonstrating the reliability of the hearsay.\(^{24}\)

Beginning with the late Rehnquist Court, a movement toward a strict originalist interpretation and application of the Confrontation Clause, largely spearheaded by Justice Antonin Scalia, led to a considerable shift in the understanding of its meaning and boundaries.\(^{25}\) In *Crawford v. Washington*,\(^ {26}\) the Court held that a witness’s tape-recorded statements made during police interrogation were testimonial.\(^ {27}\) Justice Scalia, writing for the majority, traced the origins of the right to confrontation back to Roman times and

\(^{21}\) 448 U.S. 56.

\(^{22}\) Id. at 66.

\(^{23}\) See White v. Illinois, 502 U.S. 346 (1992) (holding that evidence is admissible if embraced within such firmly rooted exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment); Idaho v. Wright, 497 U.S. 805 (1990) (limiting the evidence a trial court may consider when deciding whether evidence offered had particularized guarantees of trustworthiness when it was not within a firmly rooted hearsay exception).

\(^{24}\) Méndez, *supra* note 19, at 575 (footnote omitted).


\(^{26}\) 541 U.S. 36.

\(^{27}\) Id. at 68–69.
presented a historical evolution of the right.28 In his view, the primary aim of the Framers of the Bill of Rights with respect to the Confrontation Clause was to eliminate the use of ex parte examinations as evidence against an accused. The Court stated that the Roberts test was "inherently, and therefore permanently, unpredictable."29 Justice Scalia wrote that it is both too broad (it applies the same analysis whether or not the hearsay consists of ex parte testimony, which leads to close scrutiny in instances where the clause was not meant to apply) and too narrow (it allows ex parte testimony to be admitted as long as it is deemed "reliable").30 Based on this unpredictability, and the belief that the Roberts approach strayed from the original understanding of the right to confrontation, the Crawford Court overruled the Roberts test and introduced a new approach.31

Channeling the Framers’ understanding, the Court affirmed that “[t]estimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”32 The Court declined the opportunity to provide a definition of what constitutes a testimonial statement, and it has not provided a comprehensive definition to date.33 This has naturally led to litigation, as states and defendants struggle to discern whether evidence being offered against a defendant is testimonial, and therefore subject to confrontation demands, or not testimonial, where the procedure to follow is less clear.34

28. Id. at 43–50.
29. Id. at 68 n.10.
30. Id. at 60.
31. Id. at 68.
32. Id. at 59.
33. The Court stated:
We leave for another day any effort to spell out a comprehensive definition of “testimonial.” ... [I]t 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.
Id. at 68 (footnote omitted).
34. In spite of the fact that the distinction between testimonial and nontestimonial statements has not been plainly defined, it seems as the latter category of statements need only to meet the demands of the Roberts test. See id. (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay
In *Davis v. Washington*, 35 two years after the *Crawford* decision, the Court again left the opportunity to spell out a comprehensive definition of “testimonial” for another day. Instead, it focused on the particular circumstances before it, and accordingly narrowed the universe of what was considered to be a testimonial statement. 36 *Davis* held that while a recorded 911 call made by an assault victim during the assault was not testimonial, statements made by an assault victim to the police shortly after the crime were testimonial. 37 The Court reasoned that a statement is not testimonial when the circumstances objectively indicate that it was made with the primary purpose of enabling law enforcement personnel to meet an ongoing emergency. 38

Alternatively, it held that a statement is testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the statement was made in order to prove past events relevant to a later criminal prosecution. 39 With the somewhat nebulous guidelines from *Crawford* and *Davis* in place, the stage was set for the Court to determine whether the results of a forensic lab analysis constitute testimonial hearsay, thus rendering their source subject to the conditions of the Confrontation Clause. With Justice Scalia again at the helm, the Court last year decided *Melendez-Diaz v. Massachusetts*. 40

In *Melendez-Diaz*, the defendant objected, on confrontation grounds, to the admission of lab certificates that stated that the substance found in baggies on the defendant’s person at the time of his arrest was cocaine. 41 The certificates of analysis showed the results of the forensic analysis performed on the substance, reported the weight of the seized bags, and stated that the substance was

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36. Id. at 822.
37. Id. at 829–30.
38. Id. at 828.
39. Id. at 829.
41. Id. at 2531.
found to contain cocaine.\textsuperscript{42} The certificates were also sworn to before a notary public by the analysts, as required by Massachusetts law.\textsuperscript{43}

The analysis employed by Justice Scalia in this case was exceptionally methodical. He first determined that the documents at issue fit within his chosen definition of an "affidavit."\textsuperscript{44} Next, he pointed to language from Justice Thomas’s concurring opinion in \textit{White v. Illinois}\textsuperscript{45}—subsequently relied upon in \textit{Crawford}—which stated that "[t]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."\textsuperscript{46}

Since there was little doubt, as far as the Court was concerned, that the certificates at issue were affidavits, they fell within this "core class of testimonial statements" and therefore required the analyst to be called for cross-examination per the Confrontation Clause.\textsuperscript{47} Moreover, because the certificates were unquestionably prepared to prove a fact at trial—that the substance in the baggies contained cocaine—the Court determined that they were functionally equivalent to live, in-court testimony.\textsuperscript{48} Citing his own reasoning from \textit{Davis}, Justice Scalia maintained that the certificates do "precisely what a witness does on direct examination" and are therefore inherently testimonial.\textsuperscript{49} Additionally, since the analysts provided this evidence in order to prove a fact necessary for the defendant’s conviction, they qualified as witnesses against him.\textsuperscript{50} Thus, the admission of the certificates in \textit{Melendez-Diaz} was held to violate the defendant’s Sixth Amendment right to confront the witnesses against him.\textsuperscript{51}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item "Declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths." \textit{Black’s Law Dictionary} 62 (8th ed. 2004).
\item \textit{Melendez-Diaz}, 129 S. Ct. at 2532 (quoting \textit{White}, 502 U.S. at 365).
\item \textit{Id.}
\item \textit{Id.}
\item Id. (quoting \textit{Davis v. Washington}, 547 U.S. 813, 830 (2006)).
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
III. PROBLEMS CREATED BY EXISTING LAW

The Melendez-Diaz Court wrote that the requirements of the Confrontation Clause may not be relaxed because they make the prosecution’s task burdensome. Despite this seemingly severe decree, state courts and legislatures have responded to Melendez-Diaz with an array of statutes and rulings aimed precisely at mitigating the increased burden on prosecutors. By restricting the admissibility of certified laboratory reports—as they are within the core class of testimonial statements—the Melendez-Diaz reasoning implicates several practical difficulties and seems to cast a much broader net than the Court may have intended.

First, consider the effect of this ruling on instances where the applicable forensic analyst is unavailable to testify. For example, as in the hypothetical that introduced this Note, a cold case could have been solved using DNA evidence, except that the analyst who collected and analyzed the DNA sample is deceased or no longer available. Now that forensic reports fall within the purview of the Crawford analysis, if the analyst is unavailable to testify, and the defendant did not have a prior opportunity to cross-examine him, the analyst’s test results or report will not be admissible. Where an analyst has relocated or is otherwise geographically removed from the location of the trial, the new demands will, at a minimum, force prosecutions to incur substantial financial burdens in order to accommodate the travel necessities of these witnesses.

52. Id. at 2540.
54. As recently as this past term, the Court has explicitly recognized the import of DNA testing. Chief Justice Roberts wrote:

Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR [Short tandem repeat] technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue.

55. In July 2009, a Massachusetts judge ruled in response to a Melendez-Diaz motion that she would bar crucial DNA evidence in a child rape case unless the analyst who performed the DNA analysis were made available for cross-examination. Another senior criminalist at the Boston Police Department crime lab who had not analyzed the evidence, but had reviewed it, was prepared to testify that there was a one in a quintillion chance that the DNA found on the girl’s underwear did not belong to the defendant. The District Attorney’s office paid $1,000 for a last
Additionally, by the letter of Melendez-Diaz, in instances where an analyst is deceased and the defendant had no prior opportunity for cross-examination, the court should exclude the pertinent evidence.\footnote{Melendez-Diaz, 129 S. Ct. at 2532.} If this reasoning is applied to the aforementioned cold-case hypothetical, the outcome is morally repulsive.\footnote{“When television news and newspaper headlines spotlight the release of someone accused of a particularly gruesome crime because of a ‘legal loophole,’ the public points its finger at the law and legal system. . . . Unpopular results like these inflame public opinion, skew the image of lawyers and the legal system and actually endanger the rule of law.” Eugene C. Thomas, The Challenge of Public Education, 69 A.B.A. J. 1932, 1932 (1983) (discussing ways to improve public opinion of the legal system).} Allowing a serial rapist to remain free on an unlucky technicality, premised on a self-entitled and originalist view of the Confrontation Clause, which ignores that the Framers had no possible foresight of the technological and scientific advances that could establish a criminal’s guilt in this day and age, seems excessive and ironically novel.\footnote{See generally H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985) (concluding that modern resort to the “intent of the framers” to interpret the constitution was not the framers’ expectation and that they did not consider such an interpretive strategy to be appropriate).} That it runs counter to decades of precedent,\footnote{For the twenty-four years preceding Crawford, state legislatures and courts were able to structure prosecutions and admission of scientific evidence as they saw fit, provided that they met the requirements of the Roberts test.} during which time the criminal justice system established certain expectations and practices that are now undermined, is an effective ambush on prosecutions. In light of the fact that the Melendez-Diaz ruling is so recent, it largely remains to be seen how stringently the confrontation requirement will be enforced in situations like this one.

The Law Professors as Amici Curiae in Support of Petitioner in Melendez-Diaz argued, and Scalia agreed, that the burdens on states would be slight if the case were decided as it was because “stipulations, notice-and-demand statutes, clever courtroom scheduling, video testimony, and (in some narrow circumstances) surrogate testimony [would] all reduce the impact of requiring cross-examination for forensic reports.”\footnote{David Mansfield, Comment, Melendez-Diaz v. Massachusetts: Laboratory Testing and the Confrontation Clause, 4 Duke J. Const. L. & Pub. Pol’y Sidebar 161, 172 (2008) (distilling the arguments contained within the Brief of Law Professors as Amici Curiae in Support}
wrote that proof "that the sky will not fall after today's decision is that it has not done so already." He referred to the fact that several states had already adopted the Confrontation Clause requirements made obligatory by Melendez-Diaz prior to its holding, and that those states had not been substantially impaired by the repercussions of those laws. After proposing several ways in which courts might be able to mitigate the onerous consequences of Melendez-Diaz, Amici offered the following caveat: "None of this is to say that these alternatives obviously pass constitutional muster." Indeed, although it is understood that courts have inherent authority to control their dockets and the manner in which they dispose of cases, the question of whether or not they will be permitted to utilize these particular types of measures to respond to Melendez-Diaz is unclear.

However, states have already begun to feel the effects of the Melendez-Diaz decision. Forensic labs' workloads have noticeably spiked and certain states have been having problems producing analysts at trial in the wake of Melendez-Diaz's increased demands. States are making efforts to temper the strain on prosecutions through statutory amendments; however, much like the constraints defining testimonial hearsay, the states lack guidance on what terms make these statutes constitutionally acceptable. Scalia writes that notice-and-demand statutes "[i]n their simplest form" are

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62. *Id.* at 2540–41. However, in Texas, a state that had previously adopted notice-and-demand procedures, fifty-five forensic chemists in Department of Public Safety crime laboratories examined evidence in a total of over 50,000 drug cases in 2004 (accounting for the majority of cases examined in the department’s crime labs). Tex. Dep’t of Pub. Safety, Forensic Testing Servs., Drug Analysis Section, http://www.txdps.state.tx.us/CrimeLaboratory/Drugs.htm (last visited July 30, 2010). This is an average of over 900 cases per analyst each year.


66. In Virginia, analysts in the drug section of the forensic department spent 369 hours in court in July 2009, compared with only 230 hours in the previous eleven months. The number of subpoenas the department received jumped from 144 in the week before the opinion came down to more than 400 in most of the following weeks. Alan Cooper, *Virginia General Assembly: The Fix Is In: Legislature Passes Remedy for Melendez*, VA. LAW. WKLY., Aug. 24, 2009.

constitutional because they shift no burden to the defendant; they simply govern the time within which he must raise his Confrontation Clause objection, and "[s]tates are free to adopt procedural rules governing objections." Essentially, the Court is saying that as long as the defendant is given a reasonable amount of time in which to object before trial, and the witness will appear as the prosecution’s witness, states may adopt notice-and-demand statutes to ease the burden on prosecutions and not have to produce a witness in every case.

However, there is an obvious conflict that follows from this proposition: if a defendant is given notice that a lab result is to be admitted, but the scientist who performed the test is deceased or unavailable, the defense will object as a matter of strategy. Scalia’s historical explanation of the purpose of the Confrontation Clause—to prevent prosecutions from being unfairly predicated on ex parte statements to the disadvantage of the defendant—does not comport with the practical consequences of Melendez-Diaz’s rule. Instead, as a consequence of Melendez-Diaz, the defendant is provided with an automatic default. If he objects and the state cannot produce the witness, the evidence will not get admitted and the defendant could elude conviction on a novel technicality. Although some courts have allowed surrogate witnesses to testify when the original analyst is unavailable, it remains to be definitively determined whether or not this approach comports with the Court’s requirements from Crawford and Melendez-Diaz.

In some states, prosecutors have relied on the state’s version of the Federal Rule of Evidence 803(6) (“Rule 803(6)”), which provides

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69. Id.; see also Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977) (holding that a Florida law did, consistently with the Constitution, require that respondent’s confession be challenged at trial or not at all).
70. “[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.” Crawford v. Washington, 541 U.S. 36, 50 (2004).
71. E.g., United States v. Richardson, 537 F.3d 951, 960 (8th Cir. 2008), cert. denied, 129 S. Ct. 2378 (2009) (deciding pre-Melendez-Diaz that the characterization of forensic certificates as non-testimonial was not in clear violation of law, and thus allowing a surrogate to testify was acceptable); United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008) (holding the data regarding DNA evidence is not testimonial); People v. Rutterschmidt, 98 Cal. Rptr. 3d 390, 413 (Ct. App. 2009) (relying on Richardson to allow surrogate testimony); State v. Crager, 116 Ohio St. 3d 369, 2007-Ohio-6840, 879 N.E.2d 745, at ¶ 79.
72. This topic will be explored in Section IV.B, infra.
a hearsay exception for business records for the admission of lab reports.\textsuperscript{73} The Pennsylvania Superior Court has held that a defendant’s confrontation right is not violated by the admission of the results of a blood alcohol test by way of the business records exception to the hearsay rule.\textsuperscript{74} Like the Virginia law at issue in Briscoe v. Virginia,\textsuperscript{75} Pennsylvania’s Rule of Evidence 803(6) places the burden on an opposing party to show that the lab report is untrustworthy and not entitled to admission as a business record.\textsuperscript{76} However, the Court made clear in Melendez-Diaz that forensic lab reports do not fall within the business records hearsay exception.\textsuperscript{77}

Consider again the hypothetical at the beginning of this Note, in which a crime occurs and the police collect forensic evidence. A lab analyst then tests the evidence and gets a DNA profile, and eighteen years later, the defendant is apprehended. Unfortunately, by this time the lab analyst is dead. Practically speaking, another scientist can retest the evidence, assuming the samples have been adequately preserved. However, whether this scenario—introducing the physical evidence when none of the individuals who collected it are still available to testify—would be acceptable under Melendez-Diaz is unknown.

Justice Scalia limited the holding in Melendez-Diaz: “[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case.”\textsuperscript{78} But arguably, cross-examination of the individuals who collected the evidence is even more important

\textsuperscript{73} The Pennsylvania Supreme Court, in a case deciding the admissibility of a lab report, held that a “state police lab chemist has no interest in the outcome of a trial and is employed specifically to determine whether a controlled substance is present. . . . The chemist is a professional, a scientist who is employed to be neutral and objective; thus, the potential for bias is very small.” Commonwealth v. Carter, 932 A.2d 1261, 1268 (Pa. 2007).


\textsuperscript{75} Magruder v. Commonwealth, 657 S.E.2d 113 (Va. 2008), vacated sub nom. Briscoe v. Virginia, 130 S. Ct. 1316 (2010); see infra notes 88–91 and accompanying text.

\textsuperscript{76} PA. R. EVID. 803(6).

\textsuperscript{77} “[T]he affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.” Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2538 (2009).

\textsuperscript{78} Id. at 2532 n.1 Justice Scalia goes on to state that not everyone who laid hands on the evidence must be called. “It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live.” Id.
than that of those who tested it, given that sloppy collection of evidence may lead to tampering or contamination.\textsuperscript{79} One need only think back to the O.J. Simpson murder case to be reminded of this point.\textsuperscript{80} It is imbalanced to simply categorize those who collected the evidence as non-testimonial witnesses because they collected the evidence, rather than evaluated it.

This exemplifies another troubling implication, created by \textit{Crawford} but certainly perpetuated by \textit{Melendez-Diaz}, which is that there is great uncertainty as to when and how to apply the Confrontation Clause demands.\textsuperscript{81} The analysis is largely unpredictable at this point because what constitutes \textit{testimonial} evidence remains undefined by the Court. In \textit{Crawford}, the Court concluded that the term “testimonial evidence” should “appl[y] at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”\textsuperscript{82} \textit{Melendez-Diaz} did not provide further guidance on the meaning of “testimonial” statements since the Court concluded that the certificates of analysis at issue were affidavits, and therefore within the “core class of testimonial statements.”\textsuperscript{83} The edges of what may be identified as a “testimonial” statement remain semi-fluid. Indeed, as one commentator noted, “\textit{Melendez-Diaz} is a criminal case, but the justice’s language is broad enough that a civil practitioner can invoke it to argue persuasively that an expert report prepared with a view to litigation ought not to qualify as either a business entry or an official record.”\textsuperscript{84}

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\item \textsuperscript{79} See, \textit{e.g.}, \textsc{John M. Butler}, \textit{Forensic DNA Typing: Biology, Technology, and Genetics of STR Markers} 36 (2d ed. 2005).
\item \textsuperscript{80} Responding to presumably damning DNA evidence in that case, the defense “mounted a vigorous counterattack, alleging samples were sloppily collected and poorly handled, rendering DNA results unreliable.” It also “raised [the] possibility that [the] blood was planted by someone who took it from a police crime lab vial that contained Simpson’s blood and a blood preservative.” \textit{List of the Evidence in the O.J. Simpson Double-Murder Trial, U.S.A. TODAY}, Oct. 18, 1996.
\item \textsuperscript{81} See United States v. Brito, 427 F.3d 53, 55 (1st Cir. 2005) (describing the Supreme Court’s failure to define the parameters of testimonial hearsay in \textit{Crawford} as producing a “miasma of uncertainty”). \textit{Melendez-Diaz} largely left this vagueness unresolved.
\item \textsuperscript{82} \textit{Crawford} v. Washington, 541 U.S. 36, 68 (2004).
\item \textsuperscript{83} \textit{Melendez-Diaz}, 129 S. Ct. at 2532.
\item \textsuperscript{84} Edward J. Imwinkelried, \textit{Ruling on Lab Reports Has Broad Implications: Decision That They Are Testimonial and That Analysts Should Be Cross-Examined Is Relevant to Civil Cases}, \textit{Nat’l L.J.}, Sept. 7, 2009, at 12.
\end{itemize}
Ohio v. Roberts was overruled because its test was arbitrary and difficult to apply. But if the Roberts test was arbitrary in its assignment of reliability, then it could be said that the Crawford test is arbitrary as to what is deemed testimonial. The subjective decision remains in the hands of the fact finder; only the subject of arbitrary decision-making has been shifted, from deciding whether evidence is reliable to discerning whether it is testimonial.

The ambiguities and practical burdens created and compounded by Melendez-Diaz may be even more perplexing than initially thought because the makeup of the Court has since changed. Lower courts are currently waiting on further guidance from the Court with respect to what comprises testimonial evidence, as well as what measures they may exercise and uphold when problems arise in cases with a Confrontation Clause issue. Scalia’s tenuous majority in Melendez-Diaz may have dissipated with Justice Sotomayor’s appointment, although the Briscoe decision does not bode well for those expectant of this result. The Court’s direction and thrust, in its upcoming Confrontation Clause cases, therefore, is unpredictable and perhaps in another state of flux.

IV. DISCUSSION

The burdens Melendez-Diaz imposed on state prosecutions, while especially challenging during these dismal economic times when state coffers are wanting, may be addressed and mitigated through the following approaches: (1) legislating notice-and-demand statutes; (2) allowing peer-review, surrogate, or live-video testimony under certain defined circumstances; and (3) narrowing the scope of Crawford/Melendez-Diaz’s reach both by lower courts through clever interpretation of those cases, and by the Supreme Court in upcoming Confrontation Clause cases.

85. Crawford, 541 U.S. at 68.
86. See, e.g., People v. Bradley, No. B202011, 2009 Cal. LEXIS 9889 (Cal. Sept. 17, 2009) (remanding the matter to the Court of Appeal with directions to vacate its decision and reconsider the cause in light of Melendez-Diaz and the recent per curiam decision by the United States Supreme Court in Briscoe v. Virginia, 130 S. Ct. 1316 (2010)).
87. Justice Scalia was joined by Justices Stevens, Souter, Thomas, and Ginsburg. Justice Thomas, however, wrote a separate concurring opinion in which he distanced himself from Justice Scalia’s reasoning, and Justice Souter has since retired and has been replaced by Justice Sotomayor, a former New York County Assistant District Attorney. Melendez-Diaz, 129 S. Ct. at 2530.
A. Notice-and-Demand and Burden-Shifting Statutes

In response to Melendez-Diaz, several state trial and appellate courts have made attempts to skirt the requirements it imposes. Briscoe v. Virginia, a case the Court granted certiorari to only four days after Melendez-Diaz was decided, addressed whether a state may avoid violating the Confrontation Clause by allowing a defendant the right to call the analyst as his own witness rather than be able to cross-examine him, essentially shifting the burden of producing the witness to the defendant. The Virginia law at issue in Briscoe allows a defendant to call a lab analyst as a defense witness. The Virginia Supreme Court ruled that since the defendants failed to utilize the defense-subpoena procedure provided in the statute, they waived any other challenges under the Confrontation Clause to the admissibility of the analyst’s certificates. States are split as to whether this type of burden-shifting statute satisfies the Confrontation Clause.

In Melendez-Diaz, Justice Scalia attempted to refute the concerns of Justice Kennedy and the rest of the dissenting justices, stating that generally, notice-and-demand statutes do not violate a


89. As already discussed, the Court in Melendez-Diaz noted that notice-and-demand statutes generally do not violate the Confrontation Clause: they do not shift any burden to the defendant to subpoena the witness, but rather only govern the time within which a defendant must assert his right to confrontation; furthermore, states are free to adopt procedural rules governing objections. As will be seen, there is more than one flavor of what the Court refers to as notice-and-demand statutes. By this statement, the Court ostensibly gave credence to the idea that no notice-and-demand statute will violate the Confrontation Clause, but the fact that it granted certiorari to Briscoe four days after it decided Melendez-Diaz suggests otherwise. The fact that the Virginia law in Briscoe requires the defendant to call the analyst as a defense witness is what may pose a problem. The timing and strategy of calling this witness is what was at issue in Briscoe and what may make the law violative of the Confrontation Clause.


92. Compare State v. Campbell, 2006 ND 168, 719 N.W.2d 374, cert. denied 549 U.S. 1080 (2007) (holding that a defendant’s failure to avail himself of the opportunity to confront the analyst waived any potential Confrontation Clause violation), State v. Hughes, 713 S.W.2d 58, 62 (Tenn. 1986) (same), and State v. Smith, 323 S.E.2d 316, 328 (N.C. 1984) (holding that a statute permitting the use of a chemical analyst’s affidavit, in lieu of the analyst’s live appearance, did not constitute a Confrontation Clause violation), with State v. Belvin, 986 So. 2d 516 (Fla. 2008) (holding that a breath-test affidavit prepared by a non-testifying technician constituted testimonial hearsay, and its admission absent the defendant’s prior opportunity to cross-examine the technician violated the defendant’s right to confrontation).
defendant’s right to confrontation since they do not shift any burden, but merely govern the time within which a defendant must assert his right to confrontation.93 This begs the question of what happens when notice-and-demand statutes either undoubtedly or even possibly shift the burden of producing a witness to the defense? The limits are unknown as to how restrictive a notice law may be so that prosecutors can bypass the burden of calling a witness if the defendant does not satisfy its requirements.94

To distinguish the defining features of these types of notice statutes, in an attempt to clarify this question, the Note adopts the naming conventions presented by scholar Pamela R. Metzger,95 who characterized these “ipse dixit statutes” as one of four types: notice-

93. To address the concerns of the dissent in Melendez-Diaz, Justice Scalia wrote:

In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst’s report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst’s appearance live at trial.

Melendez-Diaz, 129 S. Ct. at 2541. See, e.g., GA. CODE ANN. § 35-3-154.1 (2006); TEX. CODE CRIM. PROC. ANN. art. 38.41, § 4 (Vernon 2005); OHIO REV. CODE ANN. § 2925.51(C) (West 2006).

94. The Court, along with counsel for the petitioner touched on this question during oral argument in Melendez-Diaz:

JUSTICE GINSBURG: But you would say that what they call the notice-and-demand type statute, that that’s all right?

MR. FISHER: There is a variety of notice-and-demand type statutes, Justice Ginsburg, and I think the law professors’ brief lays it out the best of what we have before you. We agree with the Solicitor General that a plain notice-and-demand statute that requires the defense to do nothing more than assert his right in advance of trial to have the prosecution put a live witness on the stand would be constitutional, I think, under this Court’s jurisprudence. Under the Compulsory Process Clause, under the jury right, there are plenty of constitutional rights that, with fair notice, a Defendant can be required to assert in advance of trial.

Now, there are other types of statutes that other States call “notice and demand” that require something more of the defendant, whether it be that the defendant himself call the witness, whether it be the defendant himself make some kind of good faith or prima facie showing in order to have the prosecution call the witness. Those types of statutes, I think this Court, to the extent in this opinion it would mention notice-and-demand statutes, it would want to be careful to leave for another day, because, again, we would agree with the Solicitor General that those would raise more difficult constitutional questions.


95. Associate Professor of Law, Tulane Law School.
and-demand, notice-and-demand-plus, anticipatory demand, or defense subpoena procedures.\textsuperscript{96}

Under a simple notice-and-demand statute, a state must give timely notice to a defendant, before trial, that it intends to rely on certain forensic evidence.\textsuperscript{97} It may also have to provide the defense with a copy of the certificate to be admitted.\textsuperscript{98} The defendant must then timely object and demand that the prosecution produce the forensic witness at trial.\textsuperscript{99} This demand does not need to include any substantive allegations or specific fact-based objections.\textsuperscript{100} In other words, the defendant need only assert that he objects to the admission of the evidence without accompanying testimony from the analyst. Failure by the defendant to make a demand is considered a waiver of the defendant's objection to the hearsay and to whatever its statutory consequences, as they are defined by the state, may be.\textsuperscript{101}

Notice-and-demand-plus statutes generally utilize the same procedure as the notice-and-demand variety\textsuperscript{102} but also impose substantive requirements on the defendant's demand.\textsuperscript{103} Examples of this added element include requiring the defendant to show cause for wanting to confront the witness,\textsuperscript{104} requiring demonstration of a good faith basis for challenging the forensic conclusions,\textsuperscript{105} and requiring defense counsel to swear under oath that she intends to cross-examine the analyst at trial.\textsuperscript{106} After the defendant enters his substantive objection, the court determines whether the defense is

\textsuperscript{96} Pamela R. Metzger, Cheating the Constitution, 59 Vand. L. Rev. 475, 481–84 (2006) (discussing the characteristics and distinctions of the different categories of these statutes). *Ipse dixit* means "he himself said it." Black's Law Dictionary 905 (9th ed. 2009).

\textsuperscript{97} *E.g.*, MD. Code Ann. Cts. & Jud. Proc. § 10-306(b)(1)(ii) (West 2002) ("[I]f the State decides to offer the test results without [live testimony], it shall, at least 30 days before trial, notify the defendant . . . ").

\textsuperscript{98} *E.g.*, Mich. Comp. Laws § 600.2167(2) (2008) (requiring the prosecutor to give the defense a copy of the forensic report).

\textsuperscript{99} Timeliness may be defined by individual state statutes. *E.g.*, Del. Code Ann. tit. 10, § 4332(a)(1) (2009) (defining timeliness as a minimum of five days before the beginning of the trial).

\textsuperscript{100} Metzger, supra note 96, at 482.

\textsuperscript{101} Id.

\textsuperscript{102} Id.

\textsuperscript{103} Id.

\textsuperscript{104} Alaska Stat. § 12.45.084(d) (2006).


justified in demanding the analyst’s appearance.\textsuperscript{107} Although the defendant does not have the burden of actually producing the witness, common sense tells us that these types of laws clearly impose some burden on the defendant. At what point this burden crosses the line and becomes unconstitutional is the question that is currently of the utmost interest.

Under an \textit{anticipatory demand} statute, a state has no obligation to notify the defendant that it intends to rely on a forensic report in lieu of live, in-court testimony.\textsuperscript{108} Nevertheless, the defendant must make a timely pretrial demand that the State produce the analyst to be cross-examined or he is deemed to have waived any objection to the report.\textsuperscript{109} Some anticipatory demand statutes also require defense counsel to give substantive reasons for objecting to the admission of the evidence.\textsuperscript{110}

On its face, a provision like this seems to conflict with the new interpretation of the Confrontation Clause: a defendant would need to be able to predict the future to know what the evidence will say so that he may put forward a proper reason to object. Even if the defendant did have this foresight, such a provision could still raise Fifth Amendment implications.\textsuperscript{111} However, “[t]he defendant’s

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\textsuperscript{107} See, e.g., ALA. CODE § 12-21-302(b) (2006); NEV. REV. STAT. § 50.315 (2006).
\textsuperscript{109} Metzger, \textit{supra} note 96, at 483.
\textsuperscript{110} Id. at 484.
\textsuperscript{111} Imagine that a defendant in a murder prosecution objects to the admission of evidence that the defendant’s DNA matches DNA found on a dead eight-year-old girl’s underwear. By justifying his objection by saying that he may have had sexual intercourse with the girl but did not kill her, he is forced to concede his guilt in the rape to avoid conviction for the murder. The defendant is effectively compelled to be a witness against himself in a criminal case in violation of the Fifth Amendment. U.S. CONST. amend. V.
proper invocation of discovery rules may alleviate the [predicament]. Most states require that, upon request, the prosecution disclose to the defense any expert statements or reports that it plans to introduce at trial."\textsuperscript{112} This would seem to lessen the burden on the defendant; however, Justice Scalia indicated in \textit{Melendez-Diaz} that the simple notice-and-demand statutes were constitutionally acceptable because they shifted no burden whatsoever.\textsuperscript{113}

It seems that requiring the State to give a defendant notice that it intends to introduce forensic evidence is a reasonable minimum requirement. After all, forensic evidence is not introduced in a criminal prosecution to surprise an unsuspecting defendant with damning evidence that he will be unable to defend against, thereby possibly leading to undue prejudice and erroneous conviction. Rather, a state’s goal is to prosecute criminal defendants by presenting evidence in a way that is fair to both sides and is consistent with the Constitution and state law.\textsuperscript{114}

The fourth category of statutes categorized under the larger notice-and-demand umbrella is \textit{defense subpoena} provisions. In these situations, the defense must subpoena the forensic analyst to appear and testify rather than demand that the prosecution call a witness to be cross-examined.\textsuperscript{115} Some states statutorily prescribe that the defense may subpoena the analyst, who will then be called during the State’s case-in-chief.\textsuperscript{116} In the absence of such provisions, however, the defense may call the witness to testify as part of the defendant’s case-in-chief.\textsuperscript{117} This is the type of statute at issue in \textit{Briscoe}.

The \textit{Melendez-Diaz} majority held that the power conferred by defense subpoena statutes to subpoena analysts is no substitute for

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\textsuperscript{112} Metzger, supra note 96, at 484 n.32.
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\textsuperscript{113} Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2541 (2009).
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\textsuperscript{114} Bennett v. Commonwealth, 374 S.E.2d 303, 311 (Va. 1988) ("The aim of trials is to find the truth. Uncovering the truth is the paramount goal of the adversary system. All the rules of decorum, ethics, and procedure are meant to aid the truth-finding process. Ambush, trickery, stealth, gamesmanship, one-upmanship, [and] surprise have no legitimate role to play in a properly conducted trial. This is so whether the gamesman is the defendant or the Commonwealth.").
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\textsuperscript{115} Metzger, supra note 96, at 484.
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\textsuperscript{116} Id.
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\textsuperscript{117} The Compulsory Process Clause of the Sixth Amendment reads as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. Criminal defendants are guaranteed this right regardless of any statutory scheme.
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confrontation: such power is of no use to a defendant when the witness is unavailable or simply refuses to appear.\textsuperscript{118} Scalia reasons that "fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."\textsuperscript{119}

Similarly, petitioners in \textit{Briscoe} put forth a textual argument that the use of the passive voice in the Confrontation Clause—"the right to be confronted with the witnesses against him"\textsuperscript{120}—"imposes a burden of production on the prosecution, not on the defense."\textsuperscript{121} Essentially, one could imagine that the Court has provided us with two markers on a measuring cup. The lower line, or floor, corresponds to a state’s ability to enact statutes that govern the time in which a defendant must respond to notification that a lab report will be presented as evidence against him provided that the prosecution retains the burden of calling the witness. The upper line, or ceiling, represents the state’s inability to bypass Confrontation Clause procedure by forcing the defendant to subpoena the analyst as his own witness. What exists between those two lines is what is of interest to the states.

The sentiments of state legislatures are apparent from the statutes and discovery rules that have been passed post-\textit{Melendez-Diaz}. Virginia House Bill 5007, passed in August of 2009 in response to \textit{Melendez-Diaz}, modified the procedure at issue in \textit{Briscoe}.\textsuperscript{122} Most importantly, it now requires the State to provide notice to the defendant of its intent to introduce a certificate of laboratory analysis, to which admission the defendant may then object.\textsuperscript{123} However, if he does not object, he waives his objection to

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\item \textsuperscript{118} \textit{Melendez-Diaz}, 129 S. Ct. at 2540 ("Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power—whether pursuant to state law or the Compulsory Process Clause—is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear.").
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} U.S. CONST. amend. VI.
\item \textsuperscript{121} Petition for a Writ of Certiorari at *11, Briscoe v. Virginia, 130 S. Ct. 1316 (2010) (No. 07-11191), 2008 WL 6485425 (quoting Thomas v. United States, 914 A.2d 1, 16 (D.C. 2006)).
\item \textsuperscript{122} H.D. 5007, 2009 Leg., 1st Spec. Sess. (Va. 2009).
\item \textsuperscript{123} If the defendant objects and the person who performed the analysis or examination or the custodian of the records is unavailable to testify in the State’s case-in-chief, the court will order a continuance not to exceed 180 days for a person who is not incarcerated and ninety days when the person is incarcerated. There is also a provision for a continuance if the defendant did not receive timely notice. This makes it easier for both the State and the analyst to respond to common
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the introduction of the certificate or affidavit, and it may be offered into evidence without the appearance and testimony of the analyst or custodian. Even so, the defendant would have the right to call the analyst as an adverse witness during the defense’s case at the State’s expense.

In this situation, there seems to be no problem with Virginia House Bill 5007 if the defendant objects in a timely manner. According to Scalia, the defendant’s ability to call the analyst during his own case-in-chief if he fails to object unfairly shifts the burden of producing the witness to the defendant. However, the State attempts to assuage this unfair shift in burden by requiring the state to pay for transporting the witness to testify. Thus, the defendant has one clearly constitutional option to compel the analyst to testify, as well as a hybrid option that may vacillate between constitutionality and unconstitutionality depending on the terms of the first option. For example, if the defendant is afforded a reasonable amount of time to object on the front end and fails to do so, the subpoena option is a superfluous alternative and should not be unconstitutional, regardless of who covers expenses because the defendant was already afforded a clear and constitutional opportunity to compel the analyst to testify at the outset.

However, if the Court finds the timing or manner in which a defendant must object is unreasonable, and therefore unconstitutional, the provision preserving the defendant’s right to call the analyst as an adverse witness will not save the statute from being held to violate his right to confrontation, as its individual constitutionality is highly questionable.

In essence then, the key seems to be how restrictive a protocol the Court will permit for the first option. The next sections explore

scheduling demands and should not pose any constitutional problems because “[s]tates are free to adopt procedural rules governing objections.” Melendez-Diaz, 129 S. Ct. at 2541.


125. Information on breath-test machine testing accuracy is also removed as a component of the DUI breath certificate of analysis. See id. This part of the bill is interesting as it is reminiscent of the Roberts test, which allowed hearsay to be admitted as long as it met certain “indicia of reliability.” Ohio v. Roberts, 448 U.S. 56, 66 (1980), abrogated by Crawford v. Washington, 541 U.S. 36 (2004).

126. Melendez-Diaz, 129 S. Ct. at 2540.

which elements of notice-and-demand-plus and anticipatory demand statutes are constitutionally acceptable tools to be used by the states.

1. How Long Before Trial Should a State Be Required to Provide Notice to a Defendant That It Intends to Introduce a Lab Report as Evidence?

The first question is whether a state is required to provide notice to the defendant that it intends to introduce a forensic lab report during the trial. As discussed above, Melendez-Diaz seems to require the provision of notice in situations where testimonial lab reports are offered into evidence. If so, then the next issues to settle are: (1) how long before trial must a state give notice; and (2) how long before trial must a defendant respond with his demand. The majority opinion in Melendez-Diaz makes clear that states are free to make laws governing this amount of time.\(^{128}\)

North Carolina’s governor signed Senate Bill 252 into law on August 26, 2009. The Bill’s drafters structured the Bill’s procedure to be compatible with the types of statutes Justice Scalia regarded as acceptable in Melendez-Diaz.\(^{129}\) Senate Bill 252 requires the prosecution to give notice of its intention to use a lab report at least fifteen days before trial and gives the defendant the right to file a written objection no fewer than five days before trial.\(^{130}\) If the defendant timely objects and the analyst is unavailable to testify, a continuance will be granted.\(^{131}\) If the defendant fails to timely object, then the analyst’s affidavit may be used in court without the analyst

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129. “The General Assembly revised several other statutes that govern the procedure for admitting lab reports, including G.S. §§ 8-58.20 and 90-95. [Senate Bill 252] . . . ‘makes them the kind of statutes that the court approved of in Melendez-Diaz as what it described as simple notice-and-demand statutes.’” Guy Loranger, North Carolina Confronts Melendez-Diaz Ruling, N.C. LAW. WKLY., Aug. 17, 2009, at 5 (citation omitted).

130. Prior to the recent revision, North Carolina’s law was a notice-and-demand-plus statute requiring the defense to submit an affidavit specifying the following: the facts to which the chemical analyst will testify; the factual grounds on which the defense believes the chemical analysis was not properly made; and that the necessity of the presence of the analyst to a proper defense. The court then had to determine whether there were grounds to believe that the presence of the analyst requested was necessary for the proper defense. JESSICA SMITH, MELENDEZ-DIAZ AND THE ADMISSIBILITY OF FORENSIC LABORATORY REPORTS AND CHEMICAL ANALYST AFFIDAVITS IN NORTH CAROLINA POST-CRAWFORD 4–5 (July 2, 2009), http://www.sog.unc.edu/programs/crimlaw/melendez_diaz.pdf.

131. N.C. GEN. STAT. § 20-139.1(e2) (2006). While a good vehicle for dealing with the majority of cases when an analyst is unavailable, this continuance provision does not resolve the hypothetical where the analyst is deceased or permanently unavailable.
having to testify.\textsuperscript{132} Presently, states employ a range of statutory time provisions for a defendant’s objections.\textsuperscript{133}

An Ohio state law requires prosecutors to give defense lawyers notice if drug lab reports will be introduced into evidence.\textsuperscript{134} Following notice, the defense lawyers have seven days to demand that the lab analyst testify as to the test results.\textsuperscript{135} This statutory window may be extended if the interests of justice so require.\textsuperscript{136} As long as the amount of time is reasonable—that is, it does not deprive the defendant of procedural due process—it appears that the states have the power to control the time by which defendants must state their objections.\textsuperscript{137}

Presumably, a state that really wanted to reduce the amount of \textit{Melendez-Diaz} objections it received could legislatively narrow the window in which the defendant could object. For example, a statute may pronounce that the State must give notice of its intent to introduce a forensic report as evidence no fewer than thirty days before trial and require the defendant to object no fewer than twenty-eight days before trial or he will have waived his statutory right to have the State call the witness. While this two-day window may not be considered reasonable, a state would need some guidance from the Court as to what would or would not be a constitutionally reasonable amount of time to allow defendants to object. As of this moment, that guidance does not exist.

At this point, one possible indicator may be to look to what the Court has stated regarding the amount of time required to give a party a chance to object so as not to violate procedural due process in other areas of the law.\textsuperscript{138} The basic function of due process is to

\textsuperscript{132} Id. § 20-139.1(e3), 20-139.1(e2).

\textsuperscript{133} Demand dates vary from state to state. \textit{Compare} ALA. CODE 12-21-302(a) (2006) (requiring the defendant to issue demand at least thirty days prior to trial) \textit{with} DEL. CODE ANN. tit. 10, § 4332(a) (2009) (requiring the defendant to issue demand at least five days prior to trial).

\textsuperscript{134} OHIO REV. CODE. ANN. § 2925.51 (West 2006).

\textsuperscript{135} \textit{See} State v. Smith, No. 1-05-39, 2006 WL 846342, at *6 (Ohio Ct. App. Apr. 3, 2006) ("[T]he actions required of the defendant are not burdensome; if he wishes to examine the technician he need only indicate that desire to the prosecutor within seven days. The statute even provides that the time period for notification can be extended beyond seven days if ‘the interests of justice’ so require.").

\textsuperscript{136} Id.

\textsuperscript{137} \textit{Melendez-Diaz} v. Massachusetts, 129 S. Ct. 2527, 2541 (2009).

\textsuperscript{138} The Fifth Amendment to the U.S. Constitution was applied to the states through the Fourteenth Amendment. The Due Process Clause ordinarily requires notice and an opportunity to
provide "an opportunity to be heard . . . at a meaningful time and in a meaningful manner." In Goldberg v. Kelly, a case that dealt with the deprivation of welfare benefits, the Court stated, "We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient per se, although there may be cases where fairness would require that a longer time be given." In Mathews v. Eldridge, the Court stated that due process requires case-by-case evaluation:

"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands. Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.

If these due process guidelines apply to notice-and-demand statutes, then the courts may decide whether defendants are given sufficient advance notice on a case-by-case basis. In such circumstances, the trial judge would balance the defendant's interest in the right to object and demand the witness's appearance against the State's interest in keeping its administrative and fiscal burdens reasonable. Although state legislatures may prefer clearer guidance on how to tailor their notice-and-demand statutes so as to avoid having the statutes struck down as unconstitutional, this type of case-

be heard when the government seeks to deprive a person of "life, liberty, or property." See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).
141. Id. at 268.
143. Id. at 334 (citations omitted). The Court further stated:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334–35.
by-case balancing may be all they have to rely upon until the Supreme Court rules with more specificity.

2. What Substantive Facts Must the Prosecution Include in Its Notice?

The Law Professors as Amici Curiae in Melendez-Diaz argued that the critical point in judging whether one of these notice statutes is acceptable or not rests upon the defendant’s ability to retain his opportunity to exercise his rights under the Confrontation Clause and to choose when and whether to waive those rights.\(^{144}\) Two of the professors who contributed to that amicus brief wrote separately to point out that “the waiver of a constitutional right typically requires the voluntary relinquishment of a known right. Defense counsel, however, cannot make an informed decision without adequate information, and lab reports often do not provide that information.”\(^{145}\) They explained that some lab reports contain only a bare conclusion, not even specifying the methods used in the test.\(^{146}\) In these circumstances, it would be difficult for a defendant to be able to provide an informed waiver of his constitutional right to confrontation, since he lacks the requisite information on which to object. This analysis leads us to inquire as to what type and how much information the notice to the defendant must contain.

Seemingly, the defendant should at least be given information sufficient to render him able to appreciate the consequences of his failure to object to the state’s notice.\(^{147}\) In particular, it is argued he

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144. Brief of Law Professors as Amici Curiae in Support of Petitioner, supra note 60, at 15.
145. 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 6.04[c], at 382 (4th ed. 2007).
146. Id. at 382 n.276.
147. See State v. Smith, No. 1-05-39, 2006 WL 846342, at *7 (Ohio Ct. App. Apr. 3, 2006) (“The State’s notification . . . makes no mention . . . that failure to make the demand will permit the laboratory report to serve as prima facie evidence of the conclusions in the report without the testimony of the technician. . . . The demand requirement . . . does not indicate to the defendant that the report will serve as prima facie evidence unless a written demand for the technician’s testimony is made. This notice is insufficient to fully inform the defendant of the consequences of failing to demand the witness’s testimony, and without such notice the defendant cannot be said to have knowingly, intelligently, and voluntarily waived his constitutional rights.”); see also State v. Caulfield, 722 N.W.2d 304, 313 (Minn. 2006) (“At a minimum, any statute purporting to admit testimonial reports without the testimony of the preparer must provide adequate notice to the defendant of the contents of the report and the likely consequences of his failure to request the testimony of the preparer. Otherwise, there is no reasonable basis to conclude that the defendant’s failure to request the testimony constituted a knowing, intelligent, and voluntary waiver of his confrontation rights.” (emphases added)).
must understand that by failing to act, he waives one of his constitutional rights.\footnote{148}

Depending on the substantive requirements of the demand, the notice may have to include specifics about the scientific process used in the test in addition to spelling out the consequences of the defendant’s failure to object.\footnote{149} For example, a defendant would need to have some idea of the procedures used so that he could effectively challenge them if a state requires the defendant to show cause for wanting to confront the witness as part of his demand, then presumably the defendant would need to have some idea of the procedures used so that he could effectively challenge them. It would otherwise seem to cut against the prohibitory tradition against unfair trials by ex parte statements championed by Justice Scalia.

3. Is a State Allowed to Require Substantive Elements as Part of a Defendant’s Demand?

Is it constitutional to require that a defendant include anything other than a plain demand to confront a witness? Does requiring the defendant to show good faith when objecting to the admission of a report shift the burden go too far?\footnote{150} Is it fair to compel the defendant to disclose how he plans to cross-examine the witness? Amici in\textit{Melendez-Diaz} opposed any type of statute more rigorous than a simple notice-and-demand type when they asserted that “[o]nly statutes that unambiguously guarantee the defendant the opportunity to cross-examine forensic experts upon a simple demand to do so satisfy\textit{Crawford’s} admonition that no law shall deprive a defendant ‘of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.’”\footnote{151} However, requiring a defendant to

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\begin{itemize}
\item\footnote{148}{Smith, 2006 WL 846342, at *7.}
\item\footnote{149}{See supra note 144 and accompanying text.}
\item\footnote{150}{The Louisiana Supreme Court addressed this question in\textit{State v. Cunningham}, 04-2200, p.18 (La. 06/13/05); 903 So. 2d 1110, 1122, stating that:

\begin{quote}
Because the good-faith certification . . . is imposed only on the defendant, it must be construed so as not to be an unconstitutional violation of the confrontation clause. Consequently, the burden to demonstrate good faith must be featherweight so as not to adversely impact the defendant’s right to confrontation. The defendant can satisfy the good-faith requirement by merely indicating a preference for live testimony by requesting a subpoena [be] issued for the preparer of the certificate of analysis.
\end{quote}
\textit{Id.}

\item\footnote{151}{Brief of Law Professors as Amici Curiae in Support of Petitioner, \textit{supra} note 60, at 15–16 n.3 (quoting Crawford v. Washington, 541 U.S. 36, 57 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895))).}}
\end{itemize}
show cause, pledge a good-faith basis for demanding an appearance, and promise to cross-examine the demanded witness if he is forced to appear hardly deprives a defendant of his procedural rights—if anything, such requirements merely prevent abuse by wily attorneys. On the other hand, because the State bears the burden of proof in all criminal trials, there is a convincing argument that the defendant should not have to assert any effort to produce witnesses for the benefit of the State.152

As we did when determining the scope of the statutory window in which to pose a Melendez-Diaz objection, it may be helpful to analyze whether substantive elements may be required as part of a defendant’s demand by applying the due process balancing test set forth in Mathews v. Eldridge. Under this system, a state could legitimately require substantive elements, such as a stated basis for wanting to cross-examine an analyst, as long as the state’s logistical interest in doing so could be shown to outweigh the defendant’s interest in being able to make a simple demand.153 As mentioned previously, this balancing process would have to be applied in a case-by-case manner to accommodate the varying interests in any given case. It would seem that states could validly require substantive demands as part of their statutory schemes, and allow their courts to invalidate certain applications on an ad hoc basis in individual cases where the due process interests favor the defendant. Until the Court sets forth a clear standard describing what states may or may not require of a defendant in his demand to be confronted with the witnesses against him, states will remain able to tailor their notice-and-demand laws with minimal restraint.

152. In State v. Laturner, 218 P.3d 23 (Kan. 2009), the Kansas Supreme Court held that sections 22-3437 and 53-601 of the Kansas Statutes, which governed the admissibility of forensic laboratory certificates of analysis, imposed too heavy a burden on a defendant’s Confrontation Clause rights and thus were unconstitutional when applied in a criminal case. The statutes required that a defendant state grounds for an objection to the use of the certificate and provided that a proffered certificate would be admitted in evidence unless it meets the narrowly defined, permissible objection. The court relied on State v. Miller, 790 A.2d 144, 153, 154–55 (N.J. 2002), in which the New Jersey Supreme Court stated that the State has the burden to prove guilt beyond a reasonable doubt and that a defendant should not be required “to vault a legal hurdle” in order to exercise his or her right to confront state witnesses.

153. See id.
4. At What Point During a Trial Should a Witness Appear?

Petitioners in Briscoe advanced several different points as to why the Virginia defense subpoena law and its brethren should be deemed unconstitutional. Interpreting the Constitution textually, they first argued the use of the passive voice in the Confrontation Clause imposes the burden to produce the witness on the prosecution, not the defense.\(^\text{154}\)

Next, they made several advocacy-based arguments that having to call a witness during the defense’s case is strategically disadvantageous to the defendant.\(^\text{155}\) First, petitioners argued that the difference in timing between when the evidence is presented and when the analyst is questioned is inequitable when the witness must appear as part of the defense’s case.\(^\text{156}\) Essentially, they maintained that when the written report is admitted during the first part of the trial, with the defense only able to call the analyst to be questioned during its own case, the jury is made to consider the evidence twice. This leaves a stronger impression of it in the jury’s collective mind\(^\text{157}\) and allows the jury to form an initial opinion of the evidence during the prosecution’s case that may be difficult for the defendant to overcome. Furthermore, such repetition may prejudice the defendant if the trier of fact thinks the defense is harassing the witness by making him rehash his statement.\(^\text{158}\) It is to be inferred that this irritation could then adversely affect the way the trier of fact

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154. See Thomas v. United States, 914 A.2d 1, 16 (D.C. 2006) ("The Confrontation Clause guarantees the accused the right 'to be confronted with the witnesses against him.' This language, employing the passive voice, imposes a burden of production on the prosecution, not on the defense."); State v. Snowden, 867 A.2d 314, 332 n.22 (Md. 2005) (rejecting the theory that the defendant could call his accusers to the stand because the "[b]urden of production . . . is placed on the State [by the Confrontation Clause] to produce affirmatively the witnesses needed for its prima facie showing of the defendant’s guilt").

155. See Petition for a Writ of Certiorari, supra note 121, at 13.

156. Id. ("[S]ome time, perhaps substantial, has passed since the witness’s (written) testimonial statement has been presented to the trier of fact, and presumably a much greater time since the witness made that statement. The time gap may be critical, as explained in the offtextual language of State v. Saporen, 285 N.W. 898, 901 (Minn. 1939): ‘The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot.’").

157. Right of Confrontation: Admissibility of Declaration by Co-Conspirator, 85 HARV. L. REV. 188, 195 (1971) (stating that "even a direct examination successful from the defendant’s perspective is less effective than cross-examination because . . . the damaging hearsay will have to be repeated during the examination, thereby increasing its impact").

158. Petition for a Writ of Certiorari, supra note 121, at 14.
perceives the defendant and weighs the evidence against him. Additionally, forcing the defendant to call a prosecution-friendly witness in the middle of his own case may disrupt the strategy that his attorney would otherwise employ. 159

Judging from the Court’s statements in Melendez-Diaz and its inertia with respect to the Confrontation Clause in general, it was foreseeable that the Court would agree with these points in deciding Briscoe and maintain that a state cannot avoid violating the Confrontation Clause by merely providing the accused the right to call the analyst as his own witness. Rather, testimonial witnesses such as lab analysts must be called during the prosecution’s case-in-chief. However, the argument that defense subpoena provisions may disadvantage a defendant from an advocacy perspective, and should thus be deemed unconstitutional, is somewhat less than convincing considering that the Court disregarded its inverse in Melendez-Diaz. 160 To be sure, the burdens imposed on prosecutions by the ruling in that case certainly disadvantage the state in its ability to advocate successfully; however, they were not held to be unconstitutional. Nevertheless, it would seem that, based on the strong dicta in Melendez-Diaz, 161 the Court, or at least Justice Scalia,

159. "[The defense] must disrupt its own case if it wishes to examine the technician, and give the prosecution an opportunity to examine a witness friendly to it in the middle of the defense case." Brief of Petitioners at 20, Briscoe v. Virginia, 130 S. Ct. 1316 (2010) (No. 07-11191), 2009 WL 2861541; see also Janeen Kerper, The Art and Ethics of Direct Examination, 22 AM. J. TRIAL ADVOC. 377, 411 (1998) ("Because the witness is unfriendly and because your opponent will have the opportunity to cross-examine a favorable witness in the middle of your case-in-chief, you will not want to call an adverse witness unless absolutely necessary.").

160. The Court wrote in Melendez-Diaz that "[t]he Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience." Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2540 (2009).

161. In Melendez-Diaz, the Court stated:

Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power—whether pursuant to state law or the Compulsory Process Clause—is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the defendant to subpoena the affiants if he chooses.
is not open to argument with respect to when an analyst or witness must be called.

B. Peer-Review and Surrogate Testimony

Where an analyst is unavailable due to death, illness, relocation, or any other conflict, courts must determine when an analyst’s peer may testify about the results of a lab test in lieu of the original analyst taking the stand, and who may act as the surrogate.\textsuperscript{162}

The Law Professor Amici in \textit{Melendez-Diaz} proposed a framework for determining when surrogate testimony is acceptable just as they did for evaluating the constitutionality of notice-and-demand statutes.\textsuperscript{163} They derive their reasons for allowing surrogate testimony from language in \textit{Crawford} that permitted prior testimony to be entered into evidence where the defendant had a previous opportunity to cross-examine a witness who is unavailable to testify in court.\textsuperscript{164} Based on this acquiescence, it may be inferred that \textit{"Crawford . . . indicates that [when] there is a meaningful but imperfect substitute for contemporaneous cross-examination, the Constitution does not command wholesale exclusion."}\textsuperscript{165} Also, the expert on the stand would be subject to cross-examination by the defense, and would thus be prone to exposing any deficiencies in the reliability of the testimony.

\textsuperscript{162} A petition for a writ of certiorari has been filed in \textit{Pendergrass v. Indiana}, 913 N.E.2d 703 (Ind. 2009). The question presented is \textit{"[w]hether the Confrontation Clause permits the prosecution to introduce testimonial statements of a non-testifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements."} Brief of the National Ass’n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at i, Pendergrass v. Indiana, 913 N.E.2d 703 (Ind. 2009) (No. 09-866), 2010 WL 666233.

\textsuperscript{163} The framework suggests that:

In narrowly circumscribed circumstances—(1) conducting another test is infeasible; (2) the original test was conducted in accordance with regularized procedures and documented in sufficient detail for another expert to understand, interpret, and evaluate the results[;] and (3) the original expert is now unavailable—a plausible argument exists that surrogate testimony by another qualified expert ought to be constitutionally permissible.

Brief of Law Professors as Amici Curiae in Support of Petitioner, supra note 60, at 23.

\textsuperscript{164} Indeed, \textit{Crawford} explicitly recognized that the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004).

\textsuperscript{165} Brief of Law Professors as Amici Curiae in Support of Petitioner, supra note 60, at 21.
During oral argument in \textit{Melendez-Diaz}, counsel for appellants suggested that an expert would not be a legitimate substitute for the analyst who prepared the report appearing for cross-examination.\textsuperscript{166} However, there is no clear rule, and state and federal courts have thus far allowed this method to be used when an analyst is unavailable.\textsuperscript{167}

The Federal Rules of Evidence set forth the bases upon which an expert may testify.\textsuperscript{168} Although Federal Rule of Evidence 703 permits

\begin{footnotesize}
\begin{enumerate}
\item[166] The following statements were made during oral argument:
\begin{quote}
CHIEF JUSTICE ROBERTS: You say . . . “the analyst.” I suppose it doesn’t have to be the analyst but whoever they decide to call. So if you had a supervisor who runs the cocaine testing lab and he is the one whose report is submitted, I take it he is the one who would have to show up.

MR. FISHER: That’s right. Our position . . . is that whoever the Commonwealth wants to use to prove the fact that they are trying to prove is the person that needs to take the stand. In this case, it would be the analyst.
\end{quote}

\item[167] See State v. Cannady, No. COA07-274, 2007 N.C. App. LEXIS 2537, at *10–13 (Ct. App. Dec. 18, 2007) (holding that expert testimony based on analysis conducted by someone other than the testifying expert does not violate a defendant’s right to confrontation under \textit{Crawford}); State v. Pettis, 651 S.E.2d 231, 234 (N.C. Ct. App. 2007) (stating that an expert testifying based on contents of DNA report prepared by a nontestifying agent is not a Confrontation Clause violation and noting, “[I]t is well established that there is no violation of a defendant’s right of confrontation under the rationale of \textit{Crawford} when an expert . . . base[s] an opinion on tests performed by others in the field and [d]efendant was given an opportunity to cross-examine [the testifying expert] on the basis of his opinion”) (citation omitted); State v. Delaney, 613 S.E.2d 699, 700 (N.C. Ct. App. 2005) (holding that an analyst who did not prepare a laboratory report but relies on it as a basis for expert opinion at trial is not a Confrontation Clause violation because “[t]he admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination”) (citation omitted). \textit{But see} United States v. Williams, 431 F.2d 1168, 1172 (5th Cir. 1970) (“If the witness has gone to only one hearsay source and seeks merely to summarize the content of that source, then he is acting as a summary witness, not an expert. Since he is introducing the content of the extrajudicial statements or writings to prove truth, his testimony, like its source, is hearsay and is inadmissible unless the source qualifies under an exception to the hearsay rule. When, however, the witness has gone to many sources—although some or all be hearsay in nature—and rather than introducing mere summaries of each source he uses them all, along with his own professional experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as an attempt to introduce hearsay in disguise.”).
\item[168] Federal Rule of Evidence 703 states:
\begin{quote}
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.
\end{quote}
\end{enumerate}
\end{footnotesize}
an expert to testify and give his opinion regarding information or a report in a particular case, it seems that in order to legitimately be able to have an expert testify and give his conclusions about an unavailable analyst's report, that report must contain something more than bare conclusions. More specifically, the report should contain sufficient facts or data on which the analyst may base his conclusion.

In United States v. Moon, the Seventh Circuit held that a reviewing scientist "was entitled to analyze the data that [the first scientist] had obtained," noting that "the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself." Similarly, in United States v. Richardson, the Eighth Circuit determined that an expert did not violate the Confrontation Clause by testifying about a peer's analysis confirming a match of the defendant's DNA with the DNA found on a firearm because the expert was cross-examined about her own conclusions. The court reasoned that "[a]lthough [the testifying expert] did not actually perform the tests, she had an independent responsibility to do the peer review. Her testimony concerned her independent conclusions derived from another scientist's tests [sic] results and did not violate the Confrontation Clause." A California court of appeal relied on Moon and Richardson in deciding People v. Rutterschmidt, determining that peer-review testimony did not violate the defendant's right to confrontation since the unavailable analyst's report was not admitted into evidence. Instead, an

169. See Williams, 431 F.2d at 1172; supra note 145 and accompanying text; cf. Davis v. Washington, 547 U.S. 813, 826 (2006) ("[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 unworn hearsay testimony of the declarant, instead of having the declarant sign a deposition.").

170. See Williams, 431 F.2d at 1172 (stating that a witness may offer his own opinion, which was reached after analyzing and synthesizing several sources). This suggests that the material relied upon would need to contain adequate detail from which a surrogate witness could derive a reliable opinion. In the case of laboratory reports, these specificsthey may include the sample size, the type of test used, the number of times the test was performed on the sample, and the degree of accuracy of the type of test utilized.

171. 512 F.3d 359 (7th Cir. 2008).
172. Id. at 362.
173. 537 F.3d 951 (8th Cir. 2008).
174. Id. at 961.
175. Id. at 960.
176. 98 Cal. Rptr. 3d 390 (Ct. App. 2009).
177. Id. at 408.
expert’s opinions based on that report were given as live testimony, subject to cross-examination.178

Melendez-Diaz has left uncertain whether the results of a forensic test—or, at a minimum, an expert’s opinion of the test results—may still be admitted into evidence when extraordinary circumstances render an analyst unavailable.

Despite the Law Professor Amici’s suggestion that surrogate testimony should be allowed under Crawford in certain circumstances, there are already signs that the practice may be considered problematic. In 2007, the Supreme Court of Ohio decided State v. Crager,179 which held that allowing one expert to testify on another’s lab results did not violate the defendant’s rights.180 Crager was a murder case in which a lab analyst testified regarding DNA tests conducted by another analyst who was unavailable because she was on maternity leave at the time of the trial.181 The Supreme Court granted certiorari, then vacated the judgment and remanded the case to the Supreme Court of Ohio for further consideration in light of the freshly minted Melendez-Diaz holding.182

However, the Ohio Court does not seem to have any more guidance to sensibly decide this question than it did prior to Melendez-Diaz. Furthermore, this issue was not resolved by the

178. Id. The Court of Appeal endorsed this peer-review approach, stating that:
   The Federal Rules of Evidence are in accord. Rule 703 of the Federal Rules of Evidence provides: “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

   Id. at 413 (emphasis added).

179. 116 Ohio St. 3d 369, 2007-Ohio-6840, 879 N.E.2d 745.

180. The court stated:
   A criminal defendant’s constitutional right to confrontation is not violated when a DNA analyst testifies at his trial in place of the DNA analyst who conducted the DNA testing. Neither records which are admissible under the business records exception to the rule against hearsay nor expert testimony, are testimonial under Crawford v. Washington, 541 U.S. 36 (2004).

   Id. at ¶ 37.

181. Id. at ¶ 8.

Court’s decision in Briscoe. Therefore, it could be a while before lower courts are given uniform instruction on how to handle tactics such as offering peer-review testimony, formed in response to Melendez-Diaz’s expansion of the Confrontation Clause. This collateral uncertainty and heterogeneity among the courts appears to be another unfortunate effect of putting one’s interpretivist philosophy ahead of pragmatism and thereby issuing undeveloped rules,\(^{183}\) rather than allowing a trial court the discretion to decide whether circumstances warrant allowing secondary solutions like admission of surrogate testimony.

For the time being, it appears that surrogate expert testimony that meets the requirements of the state’s version of Federal Rule of Evidence 703 may constitutionally be used to introduce into evidence the substance of an unavailable analyst’s findings when it would otherwise be unfeasible to transmit that information to the finder of fact.

**C. Is Testimony Via Video-Conferencing a Legitimate Substitute for Live, In-Court Testimony?**

Like surrogate testimony, video-conferencing has been proposed as an alternative to live, in-court testimony by the analyst who completed the report in question.\(^{184}\) However helpful this method may prove to be in terms of lessening the burdens on state prosecutions, similar attempts to test the stringency of the right to confrontation have been met with Constitutional disapproval by the Court.\(^{185}\) In *Coy v. Iowa*,\(^{186}\) where a large screen was placed between

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184. See Brief of Law Professors as Amici Curiae in Support of Petitioner, *supra* note 60, at 18; Tom Jackman, *Virginia Rushes to Address Ruling on Analysts: Drug-Case Demands Have Strained State Lab*, WASH. POST, Aug. 18, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/08/17/AR2009081702302.html (“Legislators last week also considered allowing videoconferencing so that forensic scientists could testify from their offices and allowing field-testing of heroin and cocaine by police to be admitted as evidence. Those ideas did not make it into the final bills, which legislators hope will emerge identical from the House and Senate committees Tuesday and be approved by both houses Wednesday without the need for a conference committee.”).

185. See *Coy v. Iowa*, 487 U.S. 1012 (1988); see also Anthony Garofano, *Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials*, 56 CATH. U. L. REV. 683, 702 (2007) (“The jury’s inability to see the entire witness may limit its ability to evaluate that witness’ credibility and value as evidence—impairing an important function of the jury in criminal trials.”).

186. 487 U.S. 1012.
the witnesses—two young girls who had allegedly been sexually assaulted by the defendant—and the accused, the Court held that the use of the screen violated Coy’s right to confront the witnesses against him. Justice Scalia, writing for the majority, stated that the Confrontation Clause “confers at least ‘a right to meet face to face all those who appear and give evidence at trial.” This proclamation strongly suggests that video-conferencing will not be a constitutional substitute for live, in-court testimony. Two years after Coy, however, the Court declared that the guarantees of the Confrontation Clause “may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.” Whether allowing video testimony to ease Melendez-Diaz’s burden on prosecutors constitutes a public policy more important than physical confrontation will likely depend upon how much clout Justice Scalia commands within the Court’s new lineup.

D. Narrowing the Reach of the Confrontation Clause

State courts may be able to cleverly apply Melendez-Diaz’s ruling to minimize its burden on prosecutors. Justice Thomas’s separate concurring opinion explains that he voted with the majority because the Melendez-Diaz reports were also affidavits, and affidavits are among the testimonial materials that clearly trigger the Confrontation Clause. Where forensic evidence does not so clearly fit within this core class of testimonial statements, a creative state judge could view Melendez-Diaz as a plurality opinion of four votes from the Court that is therefore persuasive but not binding.

187. Id.

188. Id. at 1016 (quoting California v. Green, 399 U.S. 149, 175 (1970)).

189. Maryland v. Craig, 497 U.S. 836, 850 (1990). In determining the assurance of the reliability element, the Court focused on the “elements of confrontation”: The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.

To accomplish the end he sought in deciding Melendez-Diaz, Justice Scalia relied on language from Justice Thomas’s concurrence in White v. Illinois: “The Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”191 Once Justice Scalia concluded that the analyst’s report was an affidavit,192 Justice Thomas had no option but to vote with the majority.193 However, in his short concurrence, Justice Thomas distanced himself from Justice Scalia’s certitude by reiterating his position from his concurrences in White194 and Davis.195

In White, Justice Thomas attempted to strike a balance between opposing views of how the Confrontation Clause should be interpreted.196 Its most strict interpretation, he said, “would be to construe the phrase ‘witnesses against him’ to confer on a defendant the right to confront and cross-examine only those witnesses who actually appear and testify at trial. This was Wigmore’s view.”197 Justice Thomas stated his belief that the difficulty with the Wigmore view is its tension with the history and evolution of the right of confrontation.198 He delved into the common-law history of the Confrontation Clause and discussed the 1603 treason trial of Sir Walter Raleigh, where ex parte affidavits were used as the Crown’s primary evidence against Raleigh.199 He explained that the right to confrontation began to develop in response to cases like this, and that the Sixth Amendment codified this pre-existing common law

192. Supra note 44 and accompanying text.
193. In his concurrence, Justice Thomas states, “I join the Court’s opinion in this case because the documents at issue in this case ‘are quite plainly affidavits.’ As such, they ‘fall within the core class of testimonial statements’ governed by the Confrontation Clause.” Melendez-Diaz, 129 S. Ct. at 2543 (Thomas, J., concurring).
195. Davis v. Washington, 547 U.S. 813, 840 (2006) (Thomas, J., concurring in part and dissenting in part) (characterizing statements within the scope of the Confrontation Clause to include those that are “sufficiently formal to resemble the Marian examinations”).
197. Id. at 359.
198. Id. at 360.
199. Id. at 361.
tradition. He asserted that there is little, if any, historical evidence that this tradition was meant to limit exceptions to the hearsay rule, and that “[t]he standards that the Court has developed to implement its assumption that the Confrontation Clause limits admission of hearsay evidence have no basis in the text of the Sixth Amendment.”

Justice Thomas then considered a broader view, posited by the United States in *White*, that “the Confrontation Clause should apply only to those persons who provide in-court testimony or the functional equivalent, such as affidavits, depositions, or confessions that are made in contemplation of legal proceedings.” He found this view more in line with the history and spirit of the right of confrontation, but he also foresaw the possibility that its application “might develop in a manner not entirely consistent with the crucial ‘witnesses against him’ phrase.” Much like the dissenting justices in *Melendez-Diaz*, Justice Thomas foresaw and discussed some of the practical concerns in applying this rule henceforth.

After finding the Wigmore view too narrow and the United States view too broad, Justice Thomas proposed a middle-ground approach to interpreting the Confrontation Clause: “The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” He intentionally limited the field of materials that trigger the clause to those that were historically abused by prosecutors as a means used to deprive criminal defendants of the benefits of the adversary process. As forensic test results do not squarely fit within that category of materials used to deprive defendants of the benefits of the adversary process, it seems that extending the right of confrontation to these types of evidence runs counter to the spirit and purpose of the tradition. It is likely that

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200. *Id.* at 361–62.
201. *Id.* at 363 (referring to the Ohio v. Roberts “indicia of reliability” test).
202. *Id.* at 364.
203. *Id.*
204. *Id.*
205. *Id.* at 365.
206. *Id.*
this is why Justice Thomas felt compelled to write a separate concurrence in Melendez-Diaz, voting with the majority only because the evidence in that case fell within the core class of testimonial statements governed by the Confrontation Clause, and may be a crucial point in future Confrontation Clause cases.

Similarly, in Davis, Justice Thomas presented a historical narrative of the right to confrontation, and explained that it was developed to target particular practices that occurred under the English bail-and-committal statutes passed during the reign of Queen Mary, namely the “civil-law mode of criminal procedure, and . . . its use of ex parte examinations as evidence against the accused.” He explained that “[t]he predominant purpose of the [Marian committal] statute was to institute systematic questioning of the accused and the witnesses.” These examinations came to be used as evidence in some cases, in lieu of a personal appearance by the witness. Justice Thomas maintained that the Framers intended the Confrontation Clause to prevent these kinds of statements from being introduced as evidence as they would constitute “overly broad exceptions to the hearsay rule.”

State courts are already cleverly exploiting this chink in the Melendez-Diaz holding. In California, for example, a court of appeal recently upheld a conviction for forcible oral copulation based partially on a report prepared by a non-testifying nurse practitioner. The court read Davis in a way that rendered Melendez-Diaz inapplicable, since the report in Davis constituted a contemporaneous recordation of observable events. The court followed the reasoning from People v. Geier, which held that there was no Confrontation Clause violation because the observations of the non-testifying nurse practitioner were retranscribed.

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208. Id. (emphasis omitted). The statute required an oral examination of the suspect and the accusers, transcription within two days of the examinations, and physical transmission to the judges hearing the case.
209. Id. at 836.
210. Id. (citing Dutton v. Evans, 400 U.S. 74, 94 (1970) (Harlan, J., concurring in result)) (rejecting the “assumption that the core purpose of the Confrontation Clause of the Sixth Amendment is to prevent overly broad exceptions to the hearsay rule”).
212. Id.
technician were a contemporaneous recordation of observable events rather than the documentation of past events and thus were not testimonial.\textsuperscript{214} In discussing whether the U.S. Supreme Court had "disapproved" of \textit{Geier} since \textit{Melendez-Diaz}, the court considered a recent California case\textsuperscript{215} that "held that laboratory reports of the type presented in \textit{Geier}" are testimonial\textsuperscript{216} and responded as follows: "We disagree, because \textit{Melendez-Diaz} did not involve 'laboratory reports of the type presented in \textit{Geier}—\textit{Melendez-Diaz} involved 'near-contemporaneous' affidavits that were completed nearly a week after the tests were performed, whereas \textit{Geier} involved contemporaneous recordation of observable events."\textsuperscript{217} Such meticulous reading of \textit{Melendez-Diaz} enables state courts to avoid compelling lab analysts to testify unless the records at issue fit squarely within the core class of testimonial materials thus far recognized by the Court.

Justice Thomas's reasoning and Justice Sotomayor's replacement of Justice Souter may lead the Court to narrow the application of the Confrontation Clause. It is unlikely that another opportunity like \textit{Briscoe} will arise any time soon. When it does, however, the Court should take the opportunity to finally define what a testimonial statement is and, more urgently, to overrule \textit{Melendez-Diaz}'s overreaching classification of lab analysts as testimonial witnesses to ease the states' burden and allow them to prosecute criminal defendants the way they choose.

\section*{V. JUSTIFICATION}

The meaning, import, and application of the Confrontation Clause have not been static over the course of Western legal history.\textsuperscript{218} In the words of the 1970 U.S. Supreme Court, the language of the Confrontation Clause "comes to us on faded parchment."\textsuperscript{219} Nevertheless, more than two hundred years after the Bill of Rights was adopted, the Court has decreed not only what the clause means but also what constitutionally required procedure it

\begin{thebibliography}{99}

\bibitem{214} Id. at 607.
\bibitem{216} Id.
\bibitem{217} Gutierrez, 177 Cal. App. 4th at 664 n.3.
\bibitem{218} Cornelius M. Murphy, \textit{Justice Scalia and the Confrontation Clause: A Case Study in Originalist Adjudication of Individual Rights}, 34 AM. CRIM. L. REV. 1243, 1244 (1997).
\end{thebibliography}
demands and which witnesses are subject to those demands. Although the originalist method used to decipher and proclaim the resolution of these ambiguities provides some rule to follow henceforth, it simultaneously leaves another batch of ambiguities to be resolved in its wake.

The Court long ago addressed the possibility of exceptions to these Confrontation Clause guarantees stating that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." Indeed, strict originalism may not be the school of constitutional interpretation that provides the most reasonable result in this area in light of the last two hundred years' advances in technology and forensic science and of the public interest in judicial and general efficiency. As the late Justice Brennan noted,

[T]he ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time.

The accuracy and mechanical nature of contemporary forensic testing affords results of a type that could not have been foreseen by the Framers of the Bill of Rights. Scientific test results are, in their purpose, completely distinct from the ex parte affidavits that convicted Raleigh of treason. They are not motivated by any animus or drive to convict; instead, they report the outcomes of scientific tests that may or may not lead to unfavorable results for the accused. If the test results do, however, contribute to conviction, it is not for the animus of the lab analyst, but for the transgression of the accused.

To argue that the increased stress on state prosecutions could be alleviated, the petitioners in Briscoe asserted that "states are free to hire more lab technicians. They are a very small part of the criminal justice system, and would remain so even if their numbers were massively increased." In 2010, with all that has recently transpired in the domestic economy, this is a ridiculous attempt to rationalize the new direction of the Court's Confrontation Clause jurisprudence. Suggesting that the burdens that will be imposed on the states are curable by states hiring more analysts, whose job descriptions will typically consist of testifying to satisfy Melendez-Diaz objections, both puts the cart before the horse and is completely detached from fiscal reality.

Although the Court declined the opportunity to use Briscoe to shape the method by which states enact notice-and-demand statutes, another suitable case will come about in due time. Then, through careful determination of acceptable statutory and judicial approaches to temper Melendez-Diaz's new burden, the Court may at once promote the fundamental purpose of the Confrontation Clause and allow the states to prosecute criminal cases efficiently and fairly.

VI. CONCLUSION

The Confrontation Clause is doubtless an essential component of our criminal justice system and, like many constitutional provisions, it has been subject to differing interpretations over the course of American history. However, when a contemporary interpretation of a somewhat enigmatic constitutional clause implies novel and serious complications on a judicial system that has grown to rely on certain efficient and trustworthy practices such as forensic lab analysis over the years, then perhaps we should step back and consider whether strict adherence to a school of constitutional philosophy at the

223. Brief of Petitioners, supra note 159, at 34.


expense of efficient criminal prosecutions is worth it.\textsuperscript{226} It is largely a
normative question involving the predominance of judicial
philosophy versus practicality, which this Note suggests should be
answered with a preference for pragmatism.

In state courts throughout America, trial judges are currently
facing—and will likely continue to face—uncertainty regarding the
propriety of state statutes and procedures used to offset the new
burdens imposed by Melendez-Diaz.\textsuperscript{227} Only by providing clear,
uniform guidance to these courts, will the consistent effect of the
originalists’ Confrontation Clause be felt evenly throughout the
states. At present, minimal guidance exists as to what types of
notice-and-demand statutes and other means of limiting Melendez-
Diaz states may use, and thus the states seem to be left somewhat
uninhibited to tailor their approaches as they respectively see fit.\textsuperscript{228}

Through practices such as enacting carefully tailored notice-and-
demand statutes, allowing surrogate and video-conferencing
testimony, and shrewdly interpreting the ambiguous language of
prior opinions, states will rightly maintain the ability to prosecute
cold and ordinary criminal cases as they see fit, despite the somewhat
clumsy ruling handed down in Melendez-Diaz.

\textsuperscript{226} Cf. Alan Brownstein, The Reasons Why Originalism Provides a Weak Foundation for
196, 200 (explaining that it is much easier to determine the original understanding of a
constitutional provision designed to serve one primary purpose than it is to determine the original
understanding of a provision that weaved its way through a maze of conflicting and overlapping
goals and values).

\textsuperscript{227} Twenty-six states and the District of Columbia filed an amicus brief in Briscoe v.
Virginia urging the Court to overrule or limit Melendez-Diaz’s holding. Brief of the States of
Indiana, Massachusetts, Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho,
Iowa, Kansas, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Dakota, Ohio,
Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Washington, Wisconsin, Wyoming,
and the District of Columbia as Amici Curiae Supporting Respondent, Briscoe v. Virginia, 130 S.

\textsuperscript{228} The individuality among states’ approaches with respect to notice-and-demand statutes
seems to be constitutionally acceptable, provided the approaches comport with due process.