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THE SKY IS STILL NOT FALLING

*Richard D. Friedman**

*Crawford v. Washington*¹ dramatically transformed the law governing the Confrontation Clause of the Sixth Amendment to the Constitution, and much for the better. Under the old regime associated with *Ohio v. Roberts*,² the Clause was little more than a constitutionalization of the modern law of hearsay, incorporating its multiple particular oddities and also a general principle that the law poses no obstacle to admission of an out-of-court statement that is deemed by the courts to be reliable. This doctrine bore no relation to the text or history of the Confrontation Clause. It reflected no principle worthy of respect—and in part as a result, it was highly manipulable. *Crawford*, by contrast, articulated a simple and robust principle that is apparent on the face of the Clause and in its history, and is a central element of our system of criminal adjudication: A witness against an accused must (unless the accused waives or forfeits the right) give her testimony in the presence of the accused, subject to cross-examination. Ordinarily, she must do so at trial. If she is unavailable to testify then, however, the accused's confrontation right will be satisfied if she gave her testimony on some prior occasion at which he had the opportunity to be confronted by her and cross-examine her.

Crawford, by razing the old structure of Confrontation Clause doctrine, left many open questions. Chief among these was the standard for determining whether an out-of-court statement that is later offered against an accused should be deemed to be testimonial—that is, whether the person who made

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¹ *Crawford v. Washington*, 541 U.S. 36 (2004).

² *Ohio v. Roberts*, 448 U.S. 56 (1980).

the statement should be deemed to have been acting as a witness and so within the scope of the Confrontation Clause. I had no doubt that there would be decades of litigation, including numerous Supreme Court cases, before the new framework was completely filled in. But it appeared to me that the basic principle of *Crawford* was so obviously correct, so fundamental to our system, so easy to state and to understand, and so far superior to what had prevailed before, that prosecutors and judges as well as those on the defense side would quickly come to accept it.

Silly me. In the eight years since *Crawford*, many prosecutors have attempted at every turn to limit its holding. Lower courts have often used strained reasoning to reach results that undercut *Crawford*'s holding. And before the Supreme Court, most of the states, and sometimes the United States as well, have joined in, trying to scare the justices into believing that they will create enormous practical problems if they do not cut back on *Crawford*.

Cases since *Crawford* have mainly fallen into two categories. One involves accusations of crime, made by the apparent victim shortly after the incident. In *Michigan v. Bryant*,³ a majority of the Court adopted an unfortunately constricted view of the word "testimonial" in this context. That decision was a consequence of the Court having failed to adopt a robust view of when an accused forfeits the confrontation right.⁴ How the Court will deal

³ *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

⁴ In *Bryant*, Anthony Covington, suffering from severe gunshot wounds, told the police that Bryant had shot him half an hour before and several blocks away. *Id.* at 1150. There was no indication that Covington realized death was close, but he died several hours later. *Id.* In my view, the statement should clearly have been deemed testimonial. Covington did not make the statement in order to get medical help or stop a crime spree, but to finger the man who he claimed had shot him. But a holding that Covington's statement could not be admitted at a trial of Bryant seems singularly unappealing. *Id.* at 1167. Before *Giles v. California*, 554 U.S. 353 (2008), a court might have held that Bryant forfeited the confrontation right by engaging in serious, intentional misconduct that foreseeably rendered Covington unavailable to appear as a witness at trial. But *Giles* foreclosed a decision along those lines. In that case, the Court held that an accused does not forfeit the confrontation right unless he engaged in the misconduct *for the purpose* of rendering the witness unavailable. *Giles*, 554 U.S. at 368. As a

with this situation—one mistake made in an attempt to compensate for another—is a perplexing and important question. This Essay, though, concentrates on the other principal category of post-*Crawford* cases, involving forensic laboratory reports. In this context, the Supreme Court has, thus far at least, come to what I believe is the proper result, recognizing that such reports, prepared for use in investigation and prosecution of crime, are testimonial for purposes of the Confrontation Clause. But in the most significant cases, the Court has reached this result over the strenuous dissent of four justices, and over the objections of most of the states.

MELENDEZ-DIAZ V. MASSACHUSETTS

The key case was *Melendez-Diaz v. Massachusetts*,⁵ which held that, at least as a general matter, forensic laboratory reports are testimonial for purposes of the Confrontation Clause. I regarded that basic holding as quite obvious—it was, as Justice Scalia’s opinion for the majority said, a “rather straightforward application” of *Crawford*. But four justices, led by Justice Kennedy, dissented, and they, together with Massachusetts and its supporting amici (including the United States, thirty-five states, the District of Columbia, the National District Attorneys Association, and numerous local prosecutors), raised a flurry of arguments in opposition. This gave Justice Scalia a chance to clear away a good deal of underbrush, as one by one—quite correctly—he set these arguments aside.

- A lab report is ordinarily not accusatory. That does not matter—the Confrontation Clause is not limited to accusatory statements. Such a limitation would eviscerate the right, because in many cases there is no witness who can testify that she observed the accused committing a crime.

result, the only way the Court could accommodate the powerful, and understandable, impulse to admit Covington’s statement was to hold that the statement was non-testimonial. This means that the Confrontation Clause would pose no obstacle to admission of the statement, even if Covington had survived and was living around the corner from the courthouse at the time of trial. *Bryant*, 131 S. Ct. at 1167–68.

⁵ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

- An analyst who prepares a lab report is not an “ordinary” or “conventional” witness. The dissent raised several points in support of this rather odd assertion. The analyst writing the report was reporting near-contemporaneous observations. Not really true, responded Justice Scalia—the report was completed almost a week after performance of the tests—and immaterial in any event: A witness can testify about contemporaneous observances. The analyst who completed the report did not observe the crime itself or “any human action related to it.” But again, so what? No one would deny, I suppose, that an observer who testifies to the state of the crime scene after the fact is a witness for Confrontation Clause purposes. She is reporting on information that may help the trier of fact determine whether a crime was committed and, if so, how. But the same is true of the lab analyst who testifies that a given substance contains cocaine. Finally, according to the dissent, the lab analyst is not testifying in response to police interrogation. That assertion is dubious at best: The lab analyst was responding to a police request. But the broader response is yet again, so what? The confrontation right is independent of, and much older than, the institutions of a police force or a public prosecutor. It is a right that the accused has with respect to the witness, and if the witness makes her statement on her own initiative that does not nullify the right.
- The lab report was, Massachusetts contended, a product of neutral, scientific testing, rather than an historical account subject to distortion. Once more, Justice Scalia challenged both the truth and the materiality of the premise. Lab testing, while usually accurate, is far from foolproof. Nor can agents of the government properly be called neutral in a criminal prosecution. But beyond that, *Crawford* forbids a court from trying to exempt species of evidence from the confrontation right on the ground that they are reliable and so cross-examination is unlikely to be productive.
- Massachusetts contended that the lab reports were akin to business records and so exempt from the Confrontation Clause. True, forensic lab reports are produced routinely—but to say that this is sufficient to guarantee admissibility

would only mean that the confrontation rights of the accused are routinely violated. Forensic laboratory reports are routinely produced *for use in prosecution*, and that is what makes them testimonial. Statements genuinely falling within the hearsay exception for business records are not prepared for litigation purposes.⁶ But beyond that, a statement cannot be exempted from the Confrontation Clause on the ground—part of the rejected *Roberts* doctrine—that it fits within a well-recognized hearsay exception. True, *Crawford* suggested that business records are typically not testimonial statements. But that was merely an empirical observation: If a statement satisfies the requirements for the hearsay exception, it will probably also be properly characterized as non-testimonial. That is not at all the same thing as saying that qualification as a business record *means* that the statement is not testimonial.

- Melendez-Diaz could have subpoenaed the lab analysts and made them his own witnesses. But, as the Court emphasized, that turns criminal procedure on its head. It is the prosecution's job, not the defense's, to produce the witnesses against the accused. The difference is not merely one of formality; it is far better for the defense if the prosecution produces its witness live and then the defense decides whether and how to cross-examine, than if the prosecution presents the testimony in written form and the defense can examine the witness only by calling her to the stand as part of his case.
- The practical burden on the courts of requiring lab analysts to testify, asserted those on the state side, would be intolerable. Once again, Justice Scalia challenged both the accuracy and the materiality of the premise. “[W]e may not disregard [the Confrontation Clause] at our convenience,” he wrote. Besides, he doubted the “dire predictions” of disaster: “Perhaps the best indication that the sky will not fall [as a result of the decision] is that it has not done so already.” That is, *Melendez-Diaz* had no impact on those states that

⁶ *E.g.*, *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943), *cited with approval by Melendez-Diaz*, 129 S. Ct. at 2538.

already complied with the constitutional rule it required, and those states had not been led to ruin.

The majority opinion in *Melendez-Diaz* was quite wonderful. Point by point, it swept aside potential obstructions to the confrontation right that should never have been erected. But I confess that I found it disappointing in two respects. One was that the opinion secured only five votes—and the four dissenters seemed so ready to undercut *Crawford* severely, largely because of misguided concern that the practical consequences of the decision would be intolerable.

The other respect was perhaps less to my credit. At the time, I had a petition for *certiorari* pending in *Briscoe v. Virginia*. The petition contended that Virginia did not satisfy the Confrontation Clause in providing that a lab certificate could be admissible but the accused could present the analyst as his own witness. The *Melendez-Diaz* decision, it appeared clear, had just resolved this issue in our favor—great news for my clients, but apparently precluding my hopes of arguing the issue in the Supreme Court. I, like most observers, expected that the Court would, as a matter of course, remand *Briscoe* to the Virginia Supreme Court for reconsideration in light of *Melendez-Diaz*. It was startling, therefore, when four days later the Court instead simply granted *certiorari*. There was widespread speculation that the four dissenters had decided to take *Briscoe* in hopes of undercutting *Melendez-Diaz*. The speculation gained credence from the fact that Justice David Souter, a member of the majority, had announced his retirement and his prospective successor, Sonia Sotomayor, was a former prosecutor.⁷ Once again, state-side amici—including the United States, a majority of the states, and the District of Columbia—raised the catastrophic consequences that would occur if the defendant's position prevailed. But at the argument, it became quite clear that Justice Sotomayor was not about to undermine a seven-month-old precedent. Two weeks later, the Court did what

⁷ During oral argument in *Briscoe*, Justice Scalia lent additional force to the speculation, suggesting that the Court had taken the case for no reason other than to consider overruling *Melendez-Diaz*. Transcript of Oral Argument at 58, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191).

observers had expected it to do in the first place, remanding the case for proceedings consistent with *Melendez-Diaz*.⁸

But, of course, the matter did not rest there. Nine months later, the Court granted *certiorari* in *Bullcoming v. New Mexico*. The Court's makeup had shifted again—Justice Kagan had replaced Justice Stevens, a member of the *Melendez-Diaz* majority. In *Bullcoming*, unlike *Melendez-Diaz* and *Briscoe*, the prosecution had presented a live witness from the laboratory, rather than simply the report. But the witness was not the analyst who had performed the test and prepared the report, for he had been placed on unpaid administrative leave. I thought this case was extremely easy—after all, in his *Melendez-Diaz* dissent, Justice Kennedy noted that the Court had made clear that it “will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second”⁹ Perhaps for that reason, the United States did not appear as amicus in support of the state. But thirty-three states did, as well as organizations of prosecutors and medical examiners, and once again they focused on the practical consequences that would follow if the author of the report had to testify live. Nevertheless, I hoped that some or all of the *Melendez-Diaz* dissenters would acknowledge that the Court had decided that forensic lab reports are testimonial statements, and that it obviously followed that a surrogate witness could not testify as to the contents of a lab report stating events and results that the surrogates had not observed. In the end, Justice Kagan stayed with the majority, which once again—this time in an opinion by Justice Ginsburg—treated the case as virtually a foregone conclusion. But the bloc of four dissenters remained intact. Once again, Justice Kennedy took the lead, and this time some of his language seemed to indicate that he was ready to throw out the entire *Crawford* framework and return to something like that of *Roberts*.

⁸ *Briscoe*, 130 S. Ct. at 1316.

⁹ *Melendez-Diaz*, 129 S. Ct. at 2546 (Kennedy, J., dissenting).

WILLIAMS V. ILLINOIS

Five days after the *Bullcoming* decision, the Court took one more case involving forensic lab reports. *Williams v. Illinois* is the first in the line that involves DNA testing, one of the most complex types of forensic testing. It is also different from the prior cases in two respects. First, an in-court witness used the report in question, by a Cellmark lab, in part to formulate her opinion that the DNA profile indicated on that report—taken from a vaginal swab of the victim of a sexual assault—matched that of the accused. Second, the Cellmark report was never formally introduced into evidence. I do not believe that either of these facts should make a difference. The Cellmark report transmitted information that was important to link the accused to the crime; the in-court expert's opinion that the two profiles matched would be worthless for the case if the Cellmark report were inaccurate. And the essential substance of the Cellmark report was conveyed to the trier of fact. *Williams* is pending as I write this. I worry that if the state prevails, the Court will have opened a broad path for manipulation around the Confrontation Clause—not only in the context of forensic lab reports, but generally. Any person whom a state is willing to designate as an expert may be allowed to testify to her conclusions, and in doing so she may convey to the trier of fact the substance of testimonial statements on which she relied.

In *Williams*, the United States has returned as an amicus favoring the state—as have forty-two other states, the District of Columbia, Guam, and various prosecution-related agencies and associations. This Essay focuses on the brief submitted by the New York County District Attorney's Office and the New York City Office of the Chief Medical Examiner¹⁰—what I will call the New York brief—because it makes the most detailed and aggressive assertions of impractical consequences that would follow from a holding for *Williams*. Indeed, it appears to me

¹⁰ Brief for New York County District Attorney's Office and New York City Office of Chief Medical Examiner as Amici Curiae Supporting Respondents, *Williams v. Illinois*, 131 S. Ct. 3090 (2011) (No. 10-8505), 2011 WL 5125054 [hereinafter New York Brief].

that the brief is in large part an attempt to scare the Supreme Court into thinking that if Williams wins this case, prosecution use of DNA and some other types of forensic evidence will become unfeasible. That is simply not true.¹¹

The New York brief builds on the fact that DNA testing involves several different stages. It suggests that if Williams prevails, a prosecutor wishing to present DNA evidence would have to bring to court one witness for each stage. But that is not so. At the outset, bear in mind that the Confrontation Clause requires the presence at trial only of those persons who make testimonial statements that are in some way conveyed to the trier of fact. I use this phrasing because the Clause may be invoked even if the prosecutor does not formally introduce the statement. Consider the stages of DNA testing as described in the New York brief:

(a) *Examination*: A technician “examines the sample and takes cuttings for DNA extraction.”¹² There is no testimonial statement—or any statement at all—in this process; examining and cutting do not constitute a statement.

(b) *Extraction*: A technician adds reagents to the sample. Again, the process does not involve a statement.

(c) *Quantitation*: A technician measures the amount of DNA. Presumably this technician reports that amount. But even assuming for purposes of argument that this report is a testimonial statement, there is no need for it to be presented to the trier of fact. The witness who reports on the profile found in the later part of the process does not have to convey it to the trier of fact, or even rely in her own testimony on the results of this stage. We know from the fact that, by hypothesis, a DNA profile was ultimately found that there was enough DNA to perform

¹¹ The discussion here is drawn in large part from an entry I posted on the Confrontation Blog. Richard D. Friedman, *Thoughts on the Brief of the New York DA and OCME in Williams*, CONFRONTATION BLOG (Dec. 5, 2011, 3:27 PM), <http://confrontationright.blogspot.com/2011/12/thoughts-on-brief-of-new-york-da-and.html>.

¹² New York Brief, *supra* note 10, at 7.

the analysis. Put another way: The quantitation stage is a screen, used to determine whether the process should continue; once the process does continue, neither subsequent analysts nor the trier of fact need rely on the results of this stage.

(d) *Amplification*: A technician copies specific portions of the DNA to raise them to sufficient levels for testing. Once more, performance of this test is not a statement, let alone a testimonial statement.

(e) *Electrophoresis*: Here, at last, we have the performance of the test that yields the numbers and graph from which a DNA profile may be deduced. The printout of the machinery used to perform the test is not in itself a testimonial statement. But presumably the printout bears identifying information that was entered by a human, and (assuming the test was clearly performed for forensic purposes) that should be a testimonial statement. If, as in *Williams*, an analyst at the lab deduces the profile of interest and prepares a report presenting that profile, that report is a testimonial statement, and thus provides the essential information that the prosecution needs.¹³

Even assuming *Williams* wins and some labs continue to adhere to the procedure described by the New York brief, the Confrontation Clause would, at least presumptively, say nothing about most of the technicians involved in that procedure. As a check on this, try this thought experiment: Assume for the moment that *Williams* wins his case. Would the signatories to the New York brief contend in subsequent cases that all the technicians in the procedure they have described have to testify for DNA test results to be admissible? Not very likely.

Now, I have included the “at least presumptively” qualification in the last paragraph because I have not yet said anything about chain of custody. So long as a witness speaks only about what she knows from personal knowledge, chain of custody is not a confrontation problem per se. *Melendez-Diaz* makes clear that, as an initial matter, it is up to the prosecution to decide what witness’s statements it wishes to present to

¹³ Friedman, *supra* note 11.

establish the chain of custody.¹⁴ If the gaps in the chain are too great, there may be insufficient proof, and at some point that could be a due process violation. It may be, depending on what procedures the laboratory used to tag the sample and maintain identification throughout the procedure, that to prevent such a violation, the prosecution would have to present one or more additional witnesses. But reasonable inferences can bridge even some substantial gaps. I do not believe the sample needs to have been sitting still during those gaps; technicians may have performed procedures on it other than letting it change naturally over time.

Consider also that, given the sensitivity of modern methods of DNA testing, in most cases if the prosecution would have difficulty bringing to court the lab witnesses necessary to prove the results of a given test, it can simply ask for the sample to be retested. This could be done perhaps by a single witness who can easily come to court. Note, for example, that only one technician from the Illinois State Police lab did the test on the blood sample taken from *Williams*. Retesting would not be necessary in the vast majority of cases, because so few cases go to trial, but the availability of this option reduces the overall burden on the state enormously.

The Illinois test in *Williams* serves as a reminder that the Sixth Amendment does not incorporate the Cellmark protocol. Much of the New York brief seems to suggest that Confrontation Clause jurisprudence must take as given procedures such as those used by Cellmark in *Williams* and described by the brief. But other labs, like the one in Illinois, use different procedures. For example, the Michigan State Police lab rarely involves more than three people in a given DNA test.¹⁵ Is such vertical integration less efficient than an assembly-line procedure? Perhaps. But the standard for constitutionality cannot be the procedure that would be optimal when the constitutional rights of the accused are disregarded.

¹⁴ See *Melendez-Diaz*, 129 S. Ct. at 2532 n.1.

¹⁵ Interview with John Collins, Director, Mich. State Police Lab. (Jan. 2011).

THE PRACTICAL CONCERNS OF LIVE TESTIMONY

I do not mean to suggest—and I do not believe—that it is inappropriate for the Supreme Court, in considering the bounds of the Confrontation Clause, to pay some attention to the practical consequences of its decision. *Crawford* has compelled the Court to build a new structure, and I think it is fitting for the Court to subject its tentative conclusions to a reality check. If the result of its doctrines were to be a practical disaster, the Court should think again; “the Constitution . . . is not a suicide pact.”¹⁶ But disaster avoidance does not require optimal efficiency. And the fact is that states that—like my own state of Michigan—use more integrated procedures do not suffer unduly on that account.¹⁷

Indeed, in conjunction with *Bullcoming*, I supervised a study of Michigan cases to determine how many lab witnesses actually testify at trials. In rape cases in which DNA evidence was presented, we found that an average of 1.24 lab witnesses testified per trial.¹⁸ This strikes me as a very tolerable number, given that DNA is a particularly complex form of laboratory evidence. In drug cases, we found an average of .46 live lab witnesses per trial, and about .55 live lab witnesses per test presented. No more than one witness testified live with respect to a given test.¹⁹ In driving-under-the-influence cases, an average of about .55 lab witnesses per trial, and about .67 per test presented, testified live.²⁰

¹⁶ Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

¹⁷ I made this point in a related context in an exchange with Justice Scalia in the *Briscoe* argument. Transcript of Oral Argument at 21–22, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191).

¹⁸ Richard D. Friedman, *Is There a Multi-Witness Problem with Respect to Forensic Lab Tests?*, CONFRONTATION BLOG (Dec. 7, 2010, 10:11 AM), <http://confrontationright.blogspot.com/2010/12/is-there-multi-witness-problem-with.html>.

¹⁹ There were 71 live lab witnesses in 154 trials. *Id.* In 116 of the cases lab results were presented, accounting for at least 128 tests—meaning that an average of .55 lab witnesses per test testified at trial. *Id.*

²⁰ There were 55 trials, in 41 of which lab results were presented, and a total of 30 lab witnesses testified live. *Id.* There was a total of at least 45 lab tests, meaning an average of .67 lab witnesses per test testified live at trial. *Id.*

This means that—despite the fears expressed by the *Melendez-Diaz* dissenters—many Michigan defendants stipulate to the admissibility of forensic lab evidence without the need for the prosecution to bring in live testimony. Why is that so?²¹ The plus side of demanding confrontation may appear minimal. Experience may compel counsel to recognize that the lab reports will not be excluded; the prosecution will ensure that any necessary lab witnesses appear.²² Also, in some cases, the defense does not see much likelihood of any worthwhile gains from cross-examination. The negative side of demanding confrontation may appear substantial. For example, the defense's chance of reaching an acceptable plea bargain may be substantially impaired if counsel is perceived as game-playing in hopes of imposing costs on the prosecution.²³ The defense may regard a live, perhaps very credible, prosecution witness as far worse than introduction of a piece of paper or reading of a stipulation.

States that are concerned about cost can use other mechanisms as well. *Melendez-Diaz* expressly approved simple notice-and-demand statutes, under which a prosecutor may give advance notice of intent to introduce lab evidence, and the accused then

²¹ Some of the following discussion is drawn from my article, Richard D. Friedman, *Potential Responses to the Melendez-Diaz Line of Cases*, 90 Crim. L. Rep. (BNA) 396 (Dec. 21, 2011).

²² It sometimes happens that defense counsel will demand that the lab witness appear, believing that doing so is cost-free, and then stipulate to admissibility of the report when the witness does appear. But this type of game playing does not appear to be an insuperable problem, in part for the reason stated in the text. A prosecutor concerned about it can further limit its effect by announcing a policy—or simply informing counsel in the given case—that if the accused demands that the witness appear live, and the witness does in fact appear at trial prepared to testify, the prosecution will then not stipulate to admissibility of a lab report but instead will insist that the witness testify live. By hypothesis, the accused prefers admission of the report to live testimony of the witness. Accordingly, such a policy might make the accused hesitant to make the demand, especially where it appears very probable that the witness would indeed appear if required to do so.

²³ In his *Melendez-Diaz* dissent, Justice Kennedy argued that it would be unprofessional for counsel to waive a client's rights for fear of incurring judicial displeasure. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2556 (2009) (Kennedy, J., dissenting). I am putting aside the possibility that counsel would act in that way.

waives objections to introduction of the lab report if he does not make a timely demand for live testimony.²⁴ These statutes are valid because, if the defense makes the demand, it is the prosecution that (a) bears the risk that the witness does not appear at trial, and (b) presents the witness's live testimony as part of its case. Indeed, in some contexts, a demand-only statute should also be held constitutional. Under such a statute, the prosecution does not have to give the accused notice of intent to offer a lab report in prosecuting one of a prescribed list of crimes, such as those involving drug possession. The use of such reports in prosecutions of this type is so common that the accused is deemed to be on notice from the fact that he is being prosecuted. As under a notice-and-demand statute, if the accused wishes a live witness to testify, he must make a timely demand, and if he does, the prosecution must either present the live witness or forgo use of the evidence. So long as (1) the statute is sufficiently clear as to the consequences of failure to make a demand, and (2) the crime is one for which use of a forensic lab report would not be surprising, this type of statute should not be constitutionally troublesome. Moreover, in my view, the legislature could validly add to either a notice-and-demand or a demand-only statute a requirement that the accused assert that he is not making the demand simply to impose costs on the prosecution.

States might also ease the burden by adopting two procedures for taking testimony of lab witnesses.²⁵ First, at least on consent of the accused, they might—as Michigan has begun to do²⁶—take an analyst's testimony by televideo. Such a procedure offers great efficiency, for the analyst could testify from a studio adjoining her laboratory. Whether use of such a procedure would be allowed over the objection of the accused is doubtful.²⁷ But, given that the accused often willingly does

²⁴ See *id.* at 2541 (majority opinion).

²⁵ Other techniques states may adopt, such as videotaping autopsies and ensuring that a second examiner is present, are discussed in Friedman, *supra* note 21.

²⁶ *State Police Receives Innovation Award*, MICH. ST. POLICE (Dec. 9, 2008), http://www.michigan.gov/msp/0,4643,7-123-1586_1710-204770,00.html.

²⁷ For a brief analysis, see Friedman, *supra* note 21.

without live testimony altogether, there is good reason to suppose that he would often be willing to consent to testimony by video transmission, so long as the quality of the transmission is good enough to allow an opportunity for cross-examination that is not significantly impaired.

Second, states may take depositions for the purpose of preserving testimony. Ideally, the deposition should be video-recorded. If the witness is then unavailable to testify at trial, the deposition may be admitted. Given that the accused has had an opportunity to be confronted with the witness at the deposition, courts should be rather lenient in declaring witnesses unavailable, either because of their distance from the courthouse or because of lack of memory of a test performed long before.

The laws of most states are extremely restrictive concerning the circumstances when depositions may be taken. But those laws can be changed, and they should be, because depositions offer several advantages. A deposition may be scheduled to suit the convenience of the witness and of the parties; the witness need not wait through unpredictable trial proceedings to give her testimony. Indeed, a lab witness can feasibly schedule several depositions in one day, minimizing travel time—an important consideration if the witness's lab is some distance from the courthouse. A deposition may also be held close to the time when the test was performed, meaning that the witness will be testifying with a memory that is fresher than at the time of trial. A deposition also ensures against the possibility that the lab analyst will be dead or otherwise unable to appear at trial.

Of course, if a deposition is held too early, it might be wasteful, because the case probably would plead out before trial (though the scheduling of the deposition might accelerate negotiations). Also, early on, the defense might not know enough about the case to conduct cross-examination adequately. With respect to many types of lab reports, however, this will not usually be a serious problem; defense counsel does not need to know much about the case to know that it hurts the accused if the prosecution can prove that a substance allegedly found in his possession is high-quality cocaine. An accused should be allowed to argue that in the particular circumstances of the case the deposition was too early to satisfy his confrontation right—

but, though occasionally such arguments are meritorious,²⁸ courts should generally approach them with considerable skepticism.

Even putting aside such relatively innovative responses as remote testimony and greatly expanded use of depositions, the bottom line remains: States that have conscientiously protected the accused's confrontation rights—allowing him to demand that a lab witness must testify subject to confrontation if she has made a testimonial statement that is conveyed to the trier of fact—have not found the burden intolerable. There is no reason to suppose that the other states would find adherence to the *Melendez-Diaz* line so much more difficult if they tried it. Instead of putting their energy into trying to undercut the *Melendez-Diaz* doctrine, attorneys general, local prosecutors, and other prosecution-related government agencies should do what they can to make the doctrine work effectively. Some good prosecutors have taken this approach virtually from the beginning.²⁹ I hope many more now join them.

²⁸ In a recent case not involving a lab witness, the Illinois Supreme Court held that a prior opportunity for cross-examination was inadequate in the circumstances because defense counsel lacked sufficient information. *People v. Torres*, No. 111302, 2012 WL 312119, at *14 (Ill. Feb. 2, 2012).

²⁹ See, e.g., Patrick M. Haggan, Chief Trial Counsel, Suffolk Cnty. Dist. Attorney's Office, Remarks at the New England School of Law Symposium: Confronting Forensic Evidence: Implications of *Melendez-Diaz v. Massachusetts* and *Briscoe v. Virginia* (Nov. 13, 2009), available at http://www.nesl.edu/students/ne_journal_symposia_audio_2009.cfm.

Many of you may expect me to get up here today and say that, "the sky is falling, this is horrible, this is horrible, we cannot do justice." Well, I'm here to say quite the opposite . . . [B]ased upon the efforts that have been made since the *Melendez-Diaz* decision, I can say that I think it's going to work out, and I think especially . . . when it comes to drug cases, I'm quite confident that our state and hopefully all states in the country are going to be able to deal with *Melendez-Diaz* in an efficient, appropriate and just way, to hold those accountable but also to afford the constitutional rights to all defendants.

Id. Suffolk County includes the city of Boston, where *Melendez-Diaz* itself arose.