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Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement

Carolyn Zabrycki†

INTRODUCTION

The Constitution gives us the right to confront witnesses against us in a criminal trial. Referred to as the right to confrontation, it is often thought of as the right to face the people who accuse us of a crime. The right comes from the Confrontation Clause of the Sixth Amendment to the Constitution, which says, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." At a basic level, the right to confrontation ensures that a defendant is present at trial to confront the people who testify against him. But the right also protects a defendant from the government's use of statements made outside of court as evidence in trial without calling the witness to the stand.

Under Crawford v. Washington, an out-of-court statement may not be admitted at trial without confrontation if the statement is "testimonial" in nature. However, the Supreme Court did not adopt a definition of the term

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† Law Clerk, The Honorable Diane P. Wood, United States Court of Appeals for the Seventh Circuit, 2008-2009. J.D., University of California, Berkeley School of Law (Boalt Hall), 2008. Thank you to Professor David Sklansky, Professor Eleanor Swift and the Honorable Mark Simons for helping me to develop this Comment. Thank you to Caryn Lai and Miya Kang for editing early drafts; the kind of help only offered by true friends. I also wish to thank the members of the California Law Review whose careful review of this Comment advanced both the arguments and the level of writing—Justin Hoogs, Jiny Kim, Desiree Ramirez, Jayni Foley, Andy Gass and Lisa Stockholm. Particularly Jesse Solomon—I appreciate the time and care you took in making this piece what it is. Thank you.

1. U.S. CONST. amend. VI.
2. Id.
5. Id. at 59.
"testimonial," and courts currently rely on a variety of definitions and factors to determine if statements are "testimonial" or "not testimonial." Autopsy reports manifest a unique controversy: while many legal scholars insist autopsy reports are testimonial, every court that has decided this issue since Crawford has held that they are not. The analysis by these courts is often faulty. Nevertheless, the consensus among courts reflects an understanding that autopsy reports do not pose the danger against which the right of confrontation could reasonably have been designed to protect.

This Comment recognizes that consensus exists, and recognizes the wisdom in the collective instinct of judges that autopsy reports do not pose the danger guarded against by the Confrontation Clause. This paper seeks to use the existing consensus among courts to clarify the danger protected against "testimonial." After examining the logic of these courts and the qualities of autopsy reports against (1) the holdings of Crawford and a later Supreme Court case, Davis v. Washington, (2) the historical foundation of the Confrontation Clause, and (3) the possible dangers posed by various qualities of autopsy reports, this Comment concludes that only one definition of "testimonial" consistently makes sense. An out-of-court statement should be considered testimonial, and thus require confrontation, if it is produced by, or with the involvement of, adversarial government officials responsible for investigating and prosecuting crime. Because medical examiners are not adversarial government officials, and because autopsy reports are not produced in response to interrogation by adversarial government officials, autopsy reports are not testimonial.

This Comment begins with a basic introduction to Confrontation Clause jurisprudence, including an explanation of Crawford and Davis. Part I explains the difficulties created by the Supreme Court's failure to adopt a comprehensive definition of "testimonial," and how the consensus among courts can be used to determine the proper definition of "testimonial." Part II of this Comment examines the logic of those consensus courts, analyzing which factors and rationales conform to the holdings, principles and examples within Crawford and Davis. Part II identifies two factors considered by the courts which could conform to Crawford and Davis: (1) that autopsy reports are not prepared by law enforcement or adversarial officials, and (2) that autopsy reports are not prepared in anticipation of litigation. Part III.A explains why the first factor—statements "not prepared by law enforcement or adversarial

6. Id. at 68; see, e.g., Hammon v. Indiana, 829 N.E.2d 444, 456-57 (Ind. 2005) (defining a testimonial statement as one “given or taken in significant part for purposes of preserving it for potential future use in legal proceedings”); Massachusetts v. Verde, 827 N.E.2d 701, 705 (Mass. 2005) (defining a testimonial statement as one prepared as evidence against the accused during an ex parte examination); State v. Caulfield, 722 N.W.2d 304, 309 (Minn. 2006) (defining a testimonial statement as one prepared for litigation).
officials"—provides the most logical definition of a “testimonial” statement, as it (a) articulates a danger against which the Framers could have intended confrontation to protect, and (b) articulates a danger and a factor conforming to the historical foundation of the Confrontation Clause, as described by the Court in Crawford. Part III.A then defines a testimonial statement as an out-of-court statement produced by, or with the involvement of, adversarial government officials responsible for investigating and prosecuting crimes. Part III.A also explains why statements produced by adversarial government officials pose the danger of incomplete and biased statements, as a result of the competitive pressure on police and prosecutors to catch and prosecute criminals. This Part explores why that danger is consistent with the history of the Confrontation Clause as outlined by the Court in Crawford, and why it is a danger the Framers could reasonably have intended confrontation to protect against. Part III.B explains why an autopsy report is not testimonial under that definition, as the report is not produced by, or with the involvement of, adversarial government officials. Part IV considers the counter-arguments, and explains why the second factor of “not prepared for litigation” fails as a definition of “testimonial” in comparison with a definition based on the involvement of adversarial officials.

I

THE EVOLUTION OF THE CONFRONTATION REQUIREMENT: ROBERTS, CRAWFORD, AND DAVIS

A. Ohio v. Roberts: Confrontation and Hearsay Law

The Sixth Amendment gives us the right to confront “witnesses,” but it does not clarify when a person speaking outside of court qualifies as a witness. Courts facing this problem consider which statements sufficiently “bear witness” as to invoke the constitutional requirement that the declarant appear in court, and which statements can be admitted as evidence without confrontation.7 Until four years ago, courts relied on hearsay law to determine which out-of-court statements could be admitted. These courts determined admissibility based largely on the fact that exceptions to hearsay tend to depend on whether the circumstances make the statement seem trustworthy. Under the Ohio v. Roberts test, the Confrontation Clause did not bar the admission of statements bearing “adequate ‘indicia of reliability.’”8 A statement bore “adequate indicia of reliability” if it fell into a firmly rooted hearsay exception or exhibited factors providing “particularized guarantees of trustworthiness.”9

7. “Declarant” is used in the cases, and this Comment, to refer to a person making an out-of-court statement.
8. Ohio v. Roberts, 448 U.S. 56, 66 (1980); see also Crawford, 541 U.S. at 42 (citing standard from Roberts).
9. Crawford, 541 U.S. at 42; see also Roberts, 448 U.S. at 66.
Under this standard, a court had two justifications for admitting a statement without confrontation: (1) finding the statement admissible under a hearsay exception that was firmly rooted in history; or (2) holding that the circumstances under which the statement was made indicate its trustworthiness. Practically, if the hearsay rules did not bar a statement from being admitted, the courts generally held that the statement did not require confrontation. Thus, under the old Roberts test, the focus for admitting out-of-court statements was hearsay law and its exceptions.

B. Crawford v. Washington: Confrontation and Testimonial Statements

The Supreme Court abandoned this framework in 2004 with its decision in Crawford v. Washington. The Court changed the standard for statements requiring confrontation, expanding the category of statements that require a declarant to testify in court in order to be admissible. In Crawford, the Court held that the Confrontation Clause requires that a defendant have an opportunity to confront all witnesses making testimonial statements, unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. Under Crawford, if a court finds an out-of-court statement “testimonial,” the statement cannot be admitted unless the declarant testifies in court, or is both unavailable and has been previously subject to cross-examination. With this new confrontation requirement, whether the statement is admissible under hearsay law no longer matters. Admission into evidence now depends on whether the statement qualifies as “testimonial” under Crawford. If it qualifies, then the statement’s apparent trustworthiness, or qualification under a hearsay exception, is irrelevant.

In Crawford, Michael Crawford appealed from a conviction for assault and attempted murder, arguing that the admission of his wife’s statements to the police, without her testimony in court, violated his right to confrontation. Crawford claimed he stabbed the victim in self-defense. His wife, Sylvia, witnessed the stabbing. During formal questioning by police in the station...
house, Sylvia told the police she did not remember seeing a knife or other weapon in the victim's hand before Crawford stabbed him.\textsuperscript{18}

The prosecution could not compel Sylvia to testify at trial because under Washington's marital privilege law, a spouse cannot testify without the other spouse's consent.\textsuperscript{19} Instead, the prosecution replayed a tape of her statements to police.\textsuperscript{20} Sylvia's out-of-court statements were admissible under Washington law because they qualified for an exception to the hearsay rule, allowing statements made against penal interest.\textsuperscript{21} According to the trial court and the Washington Supreme Court, the Confrontation Clause did not bar admission under \textit{Roberts} because the statement "bore guarantees of trustworthiness."\textsuperscript{22}

The Supreme Court, in a unanimous decision, reversed the Washington Supreme Court and held that Sylvia's statements to the police required confrontation.\textsuperscript{23} Neither the statements' qualification under an exception to hearsay nor their trustworthiness because of "indicia of reliability" provided enough procedural protections to render the out-of-court statements admissible.\textsuperscript{24} The Court decided that the only guarantee of trustworthiness is the process of confrontation.\textsuperscript{25} The Constitution requires confrontation of any "testimonial" statement the prosecution seeks to admit at trial, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.\textsuperscript{26}

What makes a statement "testimonial" became the key to admissibility in \textit{Crawford}, but the \textit{Crawford} Court explicitly decided not to define the term.\textsuperscript{27} Although noting that "various formulations" of "testimonial" statements exist, the Court did not adopt any of the three examples it mentioned and declined to limit the possible formulations to those three examples.\textsuperscript{28} The decision sent courts and scholars into a tail spin; the Confrontation Clause became a distinct barrier to admission of any out-of-court statement, and admission depended on

\begin{footnotesize}
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\item\textsuperscript{18} \textit{Crawford}, 541 U.S. at 39-40.
\item\textsuperscript{19} \textit{Id.} at 40; \textit{see} \textit{WASH. REV. CODE} \$ 5.60.060(1) (1994).
\item\textsuperscript{20} \textit{Crawford}, 541 U.S. at 40.
\item\textsuperscript{21} \textit{Id.} at 40.
\item\textsuperscript{22} \textit{Id.} at 40-41.
\item\textsuperscript{23} \textit{Id.} at 68-69.
\item\textsuperscript{24} \textit{See id.} at 61, 68-69.
\item\textsuperscript{25} \textit{See Crawford}, 541 U.S. at 68-69.
\item\textsuperscript{26} \textit{See id.} at 59, 68.
\item\textsuperscript{27} \textit{Id.} at 68; \textit{see also} Davis v. Washington, 547 U.S. 813, 822 (2006) (noting the Court in \textit{Crawford} did not define "testimonial").
\item\textsuperscript{28} \textit{See Crawford}, 541 U.S. at 51-52 (listing the three formulations of (1) "\textit{ex parte} in court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," (2) "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial") (internal citations and quotations omitted; ellipses in original).
\end{enumerate}
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whether a court characterized a statement as “testimonial.” The decision affects the admissibility of a broad spectrum of evidence, from statements obtained in police interrogations to company records, to statements during a medical exam, and to certifications by police that a breathalyzer functioned properly when used. State and federal courts have adopted different definitions of “testimonial,” leading to conflicting classifications of statements as “testimonial” or “not testimonial.”

C. Davis v. Washington: Toward a Definition of Testimonial

In 2006, two years after Crawford, the Supreme Court provided some clarification by articulating when statements made during police interrogations are testimonial. In Davis v. Washington, and its companion case Hammon v. Indiana, the Court held that a statement to police is testimonial if the primary purpose is “to establish or prove past events,” and is not testimonial if the primary purpose is to enable the police to assist in an “ongoing emergency.”

In Davis, a woman called 911 to report domestic abuse while the man who had attacked her was still in the apartment. In response to questions by the operator, she said the man was “jumpin’” on her with his fists, and told the operator his name. The Court classified the woman’s statements as non-testimonial because they described an ongoing emergency and enabled the police to better respond to the crisis.

In Hammon, a woman spoke to a police officer in her living room after the police responded to a domestic violence call. She signed a short affidavit describing the violence while her husband spoke with a second police officer in the kitchen. The Court held the affidavit was testimonial, as it described past facts, not a present emergency. While the Davis decision clarifies when a statement made to police is testimonial, and provides examples of both testimonial and non-testimonial statements, the Court again failed to provide a comprehensive definition of the term.

The Supreme Court, then, has twice considered the question of whether a particular statement was testimonial, but has twice neglected to adopt an

30. Davis, 547 U.S. at 822.
31. Id. at 817-18.
32. Id. at 817.
33. Id. at 827-28.
34. Id. at 819.
35. Id. at 819-820.
36. Davis, 547 U.S. at 830.
37. See id. at 822.
explicit definition or test in either Crawford or Davis to help lower courts find the answer.\textsuperscript{38} The Court also declined, in both Crawford and Davis, to explain clearly what principles are protected by the Confrontation Clause.\textsuperscript{39} The result has been four years of varying decisions, split circuits and much fodder for debate among the legal community. Yet, as courts struggle to decide what is "testimonial," one type of statement has, so far, garnered consensus: autopsy reports.\textsuperscript{40}

An autopsy report is prepared by a medical examiner detailing his or her findings during an autopsy, which is a medical examination of a dead body to determine the circumstances of the death.\textsuperscript{41} In most counties and cities, the medical examiner is a doctor trained to examine dead bodies.\textsuperscript{42} Prosecutors routinely use the reports in trial to support the testimony of the medical examiner as to cause and time of death.\textsuperscript{43} If a medical examiner is unavailable, the prosecution will rely on the autopsy report alone, admitting the report into evidence or asking another medical examiner to explain the unavailable facts.


\textsuperscript{39} See generally Davis, 547 U.S. 813; Crawford, 541 U.S. 36 (explaining the historical background of the Confrontation Clause and the Framers’ rejection of the civil-mode process of examination, but not expressly stating the harm confrontation mitigates or further elaborating on the purpose of confrontation).


I acknowledge that in Lackey and Rollins, the courts found that a portion of the autopsy reports were testimonial, but both courts admitted all of the factual findings within the report, and admitted the entirety of the report through testimony. In addition, the Alabama Court of Criminal Appeals, in Smith v. Alabama, excluded the autopsy report, but the court also held that the autopsy report was not testimonial. Smith, 898 So. 2d 907, 916. The court only excluded the report after analyzing the specific facts and situation of the case. No court since Crawford has found an autopsy report testimonial and excluded the report.


\textsuperscript{43} See De La Cruz, 514 F.3d at 133; Feliz, 467 F.3d at 233-34; Lackey, 120 P.3d at 350-52; Rollins, 897 A.2d at 840-43; Durio, 794 N.Y.S.2d at 868-69; Craig, 853 N.E.2d at 632; Moreno Denoso, 156 S.W.3d at 180-81.
examiner's findings based on the report. The potential Sixth Amendment problem is that if a court considers the autopsy report testimonial in nature, admitting the report without the courtroom testimony of the original medical examiner violates the defendant's right to confrontation under Crawford.

An extensive survey of the case law indicates that every court of last resort or intermediate court has held that autopsy reports are not testimonial. One might think this consensus indicates that autopsy reports could be the starting point for articulating the purpose of the Confrontation Clause and general characteristics of a testimonial statement. One could simply read the opinions and adopt the analyses of these courts. Indeed, that is what I originally hoped. But after reading the cases, I discovered that these courts rely on a variety of factors, and that most of the factors are inconsistent with the holdings of Crawford and Davis (as I discuss below in Part II). The courts have decided uniformly that autopsy reports are not testimonial and do not require confrontation. Yet the courts fail to articulate a comprehensive reason or definition consistent with Crawford and Davis to explain why. To further complicate the issue, Richard Friedman, a leading Confrontation Clause scholar cited by the Court in Crawford, disagrees with the consensus and insists autopsy reports must be considered testimonial statements.

But, despite any problem with the analysis or disagreement by scholars, the consensus exists. In a jurisprudence ostensibly defined by its debate and conflict, where courts and scholars fail to agree on the basics of a testimonial definition or the principles of confrontation, a point of consensus among courts should be built upon and supported. If we accept that these judges, experienced legal minds serving on state appellate and supreme courts, and federal courts of appeal, are correct in their interpretation, then the consensus becomes a clue rather than an obstacle. Like other, clearly identified testimonial or non-testimonial statements, the courts’ treatment of autopsy reports becomes a tool to understand the purpose of the confrontation right and the proper definition of the term “testimonial.” Using that tool, this Comment argues that the purpose of confrontation is to protect against dangers from the competitive pressure on law enforcement and adversarial officials to catch criminals. Therefore, the definition of “testimonial” should be a statement produced by, or with the involvement of, adversarial government officials responsible for investigating

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44. See De La Cruz, 514 F.3d at 133; Feliz, 467 F.3d at 233-34; Lackey, 120 P.3d at 350-52; Rollins, 897 A.2d at 840-43; Durio, 794 N.Y.S.2d at 866-69; Craig, 853 N.E.2d at 632; Moreno Denoso, 156 S.W.3d at 180-81; Steven Yermish, Crawford v. Washington and Expert Testimony: Limiting the Use of Testimonial Hearsay, 30 CHAMPION 12, 15 (2006).

45. See id.

46. See id.

and prosecuting crime.

II

CRAWFORD, DAVIS, AND THE LOGIC OF THE COURTS FINDING AUTOPSY REPORTS "NOT TESTIMONIAL"

The factors and logic used by courts to justify finding an autopsy report to be not testimonial generally fall into four frameworks: (1) autopsy reports fall under a per se business record exception; (2) autopsy reports, like business records, are not "by their nature" testimonial; (3) substantive qualities of autopsy reports, such as notions that reports are "descriptive" or "factual," render them not testimonial; or (4) autopsy reports are not testimonial because they are "not law enforcement," "not adversarial" and "not prosecutorial." The first three of these frameworks fail to properly conform to the holdings of Crawford and Davis, but the final method, the determination that autopsy reports are not testimonial because they are not produced by adversarial law enforcement officers, is entirely consistent with the standards and examples the Court provided.

A. The Mistaken Reliance on the Per Se Business Record Exception

While the Court in Crawford left unclear the definition of a testimonial statement, it did not leave uncertain its decoupling of Confrontation Clause protection from state-generated and flexible hearsay laws. Nevertheless, some courts still find in Crawford a per se exclusion from the Confrontation Clause for statements falling under the business record exception to hearsay. The logic for finding a per se business record exception to the Confrontation Clause relies on one sentence of dictum in Crawford: "Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." Some courts have interpreted this sentence as creating a per se exception for modern business records. But these courts ignore several major problems, including the statement's context and the central motivations behind the Court's rejection of the old Roberts reliability framework.

First, by finding a per se business rule exception, courts fail to recognize the reasons behind the Supreme Court's analytical shift from "indicia of reliability" to the "testimonial" distinction. The Court in Crawford rejected not only the Roberts factors for establishing reliability, but also the notion that any

50. Crawford, 541 U.S. at 56.
51. See, e.g., De La Cruz, 514 F.3d at 133; Durio, 794 N.Y.S.2d at 867; Craig, 853 N.E.2d at 638; Cutro, 618 S.E.2d at 898.
substance-based test can sufficiently substitute for the procedural test of confrontation. Confrontation is now the only method for establishing reliability, because the Court in Crawford held that the Confrontation Clause offers citizens a procedural protection, not a substantive one that can be altered by interpretation or application. The Court curtailed its power in Crawford by finding that neither the Supreme Court nor state courts have the authority to replace the procedural test with a substantive test of its own design. If the Court found itself without the power to interpret the Constitution in terms of a substantive test, it is fairly certain that state legislatures also lack the power to manipulate the procedural test through hearsay law.

The Court specifically rejected a test based on hearsay rules when it rejected the Roberts test establishing reliability through hearsay law. It noted that “[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.” One of the main reasons cited by the Court for rejecting the Roberts test was how it tied Confrontation Clause protection to the “vagaries of the rules of evidence.” Arguing for a per se business record exception is akin to asserting that the Court in Crawford severed the connection between the Confrontation Clause and hearsay law while simultaneously establishing a blanket and broad exception based on hearsay law—an inconsistent and highly unlikely assertion.

Moreover, the phrasing of the sentence in Crawford discussing business records does not necessarily state a blanket per se exception for all business records. The sentence provides that the business record exception “covered” statements that are not testimonial. Courts finding a per se exception necessarily interpret “covered” to mean “encompassing all,” but “covered” could equally refer to inclusion of some or part of the exception, and not the entire exception. One could interpret the statement to mean the business record exception includes some statements that by their nature are not testimonial, yet the exception also includes statements which are testimonial. The language in Crawford does not definitively state that every statement under the business record exception is, by its nature, not testimonial. That the

52. Crawford, 541 U.S. at 61-62.
53. See id.
54. Id. at 67 (“The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.”).
55. See id.
56. Id. at 51.
57. Id. at 61.
58. See Crawford, 541 U.S. at 61-62.
59. See id. at 56.
language is open to interpretation weakens any argument that the sentence creates a blanket exception to a constitutional right.

Second, even if an exception exists, when Justice Scalia wrote in Crawford that “[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial,” including “business records,”61 the context indicates that Justice Scalia was referring to the business records exception that existed in 1791. The sentence occurs in a discussion of the Confrontation Clause in 1791, and responds to Justice Rehnquist’s dissenting charge that, in the Framers’ time, exceptions to the Confrontation Clause existed.62 The “hearsay exceptions” in the sentence refer to hearsay exceptions that existed in 1791; the statement’s past tense confirms that the Court refers to past exceptions.63

In People v. Durio, a New York trial court interpreted this particular sentence of Justice Scalia’s opinion in Crawford, noting that hearsay exceptions “covered statements that by their nature were not testimonial.” The Durio court asserted that the phrase “by their nature” indicates the Court’s reference to the present-day exception.64 While one may admire the court’s efforts to justify its contention that Crawford created a per se business record exception,65 nothing in the meaning of “by their nature” implies a modern exception. Rather, the phrase “by their nature,” particularly given the context of a discussion of historical hearsay exceptions written in the past tense, more likely refers to the exception’s natural form, as in its pure, original form at the Framers’ time. Therefore, even if that single sentence in response to Justice Rehnquist’s dissent could be interpreted as establishing a per se business record exception, the exception would only apply to statements excepted as business records in 1791.

The business record exception that existed in 1791 did not admit the broad scope of records admitted under the modern exception, and it likely did not admit autopsy reports.66 The 1791 exception, known as the shop book rule, applied narrowly.67 It did not include records prepared for litigation, but arose by necessity in civil debt trials to admit a party’s regularly kept shop books as evidence of goods sold and services rendered.68 The exception applied to daily, mundane business recordings like the shop book or similar records created at a

61. Crawford, 541 U.S. at 56 (emphasis added).
62. See id. at 55-56.
63. See id. at 56.
65. See id.
67. See generally Wigmore, supra note 66.
68. Radtke v. Taylor, 210 P. 863, 867-70 (Or. 1922).
time when trial was not foreseeable. Whether one accepts that autopsy reports are created for trial, a debate discussed in Part III, it is undeniable that a medical examiner prepares the report knowing that its use at trial is possible. Under the shop book exception, such knowledge would preclude application of the exception to an autopsy report, as shown by the narrow description of the exception articulated in Palmer v. Hoffman and subsequently interpreted in State v. Miller. Even assuming the "business record" sentence in Crawford creates a per se exception based on the business record standard in 1791, that exception would not include autopsy reports.

B. The Mistaken Reliance on Business Record Qualities

The second analytical framework employed by courts is also founded on the business record exception. Instead of relying on a per se exception for business records, these courts consider the particular qualities of a business record that "by its nature" make the record non-testimonial. The courts focus on the business record characteristics of (1) "regular" preparation and (2) reports "not prepared for litigation."

Courts' reliance on specific qualities, rather than a per se exception, leads courts to analyze the testimonial distinction based on an out-of-court statement's characteristics instead of its classification under hearsay law. However, courts applying this framework do not sufficiently divorce the specific qualities from hearsay policy, and they further fail to justify the qualities as arising from Crawford and the purpose of the Confrontation Clause. The courts neglect to explain why these factors make an autopsy report non-testimonial, instead of just making it a business record.

In Durio and Craig, the courts did not offer any justifications based on Crawford for finding business record qualities determinative of what is or is not testimonial, beyond quoting Justice Scalia's sentence designating some hearsay exceptions as "by their nature . . . not testimonial." The courts simply noted the qualities, asserted that an autopsy report has those qualities, and then

69. Id.
70. See Palmer, 318 U.S. at 113-14 ("Preparation of cases for trial by virtue of being a 'business' or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule . . . . Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability."); Miller, 144 P.3d at 1059 (citing Palmer 318 U.S. 109).
72. Feliz, 467 F.3d at 234.
73. Feliz, 467 F.3d at 233-34; Durio, 794 N.Y.S.2d at 867-69; Craig, 853 N.E.2d at 632.
74. Feliz, 467 F.3d at 233-34; Durio, 794 N.Y.S.2d at 867-69; Craig, 853 N.E.2d at 632.
75. See Feliz, 467 F.3d at 233-34; Durio, 794 N.Y.S.2d at 867-69; Craig, 853 N.E.2d at 632.
76. See Durio, 94 N.Y.S.2d at 868-69; Craig, 853 N.E.2d at 638-39.
concluded that the qualities make the report non-testimonial. In *Feliz*, the United States Court of Appeal for the Second Circuit asserted that these business record qualities are inconsistent with the historical cases and examples of testimonial statements in *Crawford*. But the Second Circuit failed to explain why, and it confused the analysis by highlighting the hearsay justifications of necessity and enhanced reliability.

By focusing on factors that define a hearsay exception, courts base the analysis too much on hearsay law and too little on *Crawford* and the principles of the Confrontation Clause. Autopsy reports' two qualities—that they are (1) "regularly" produced and (2) prepared in the course of business, and not in anticipation of litigation—justify admission under a hearsay exception because the federal government decided these qualities adequately substitute for testimony in court to determine sincerity and accuracy of narration. Given the difficulty of proving the facts contained in a business record without the written records, simple need justifies using the records as a substitute for testimony in court. But the Court in *Crawford* specifically discredited any substitutes for confrontation in order to determine reliability. Unlike hearsay law, the Confrontation Clause is a constitutional right, and necessity cannot justify reducing the absolute procedural protection guaranteed by the Constitution.

To justify the use of business record characteristics as the qualities of a testimonial statement, courts must look beyond hearsay policy to consider instead how relying on these characteristics conforms to the principles articulated in *Crawford* and the Confrontation Clause. Hearsay policy and the Confrontation Clause share overlapping goals, such as ensuring evidentiary truth and preventing the insulation of declarants from in-court scrutiny. But the two doctrines are not the same; both the approaches and the core concerns differ. Hearsay law excludes all out-of-court statements offered to prove the truth of a matter, and then admits broad categories of statements based on necessity and substantive and procedural qualities indicating trustworthiness. The Confrontation Clause, on the other hand, is an absolute bar to all "testimonial" statements, and the qualities that distinguish a "testimonial" statement from a statement that is not testimonial should address the features that make the "testimonial" statements dangerous enough to necessitate that

77. See *Durio*, 94 N.Y.S.2d at 868-69; *Craig*, 853 N.E.2d at 638-39.
78. *Feliz*, 467 F.3d at 223-34.
79. See id.
80. *Allen*, supra note 3, at 528.
81. Id.
83. See *Crawford*, 541 U.S. at 51 (noting "not all hearsay implicates the Sixth Amendment's core concerns" as an off-hand, overheard remark "might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted").
Qualities of certain hearsay exceptions may relate to that danger, but the logic for relying upon those qualities must be based on their ability to address the "core concerns" of the Confrontation Clause, and not hearsay policy.\(^{86}\)

The Second Circuit in *Feliz* at least attempted to base its choice of the qualities on *Crawford*, but *Feliz* simply asserted a series of factors ostensibly conforming to *Crawford* principles. Simply asserting that the court's factors conform to the *Crawford* principles does not make it so.\(^{87}\) The connection must be explained, and *Feliz*, *Durio* and *Craig* all lack this explanation.\(^{88}\) If we abandon any connection to hearsay law, do the two qualities—"regular" production and reports not prepared for litigation—conform to *Crawford*?

The factor of "regular" preparation is inconsistent with *Crawford*. Beyond implying that business records "by their nature" are not testimonial, *Crawford* contains no basis for using "regular" or "routine" preparation to define a testimonial statement.\(^{89}\) In *Crawford*, the Court listed several possible definitions of "testimonial," but none of the definitions mention routine or regularity.\(^{90}\) In addition, statements the Court held were testimonial could also be routine. For example, consider a police informant who regularly reports illegal activity to the police. In *Davis*, the Court held that statements made to the police for the purpose of discovering past facts, as opposed to dealing with an ongoing emergency, are testimonial.\(^{91}\) An informant's statements to police are considered testimonial under that definition, but if made regularly, such statements would also qualify as routine. None of the definitions or historical references in *Crawford* support finding a statement's regularity determinative of being testimonial, and the definitions the Court did provide suggest that regularity is irrelevant where a statement otherwise qualifies as testimonial.\(^{92}\)

That autopsy reports are "not prepared for litigation" does possibly conform to the principles expressed in *Crawford*. This factor rephrases a quality suggested by the Court in *Crawford* as a possible definition and used by many courts to define "testimonial"—that the declarant reasonably expected the statement to be used at trial.\(^{93}\) In addition, the "not prepared for litigation" factor correctly categorizes the examples of testimonial statements in *Crawford*

\(^{85}\) See *Crawford*, 541 U.S. at 51, 68.

\(^{86}\) See id. at 51.


\(^{89}\) See generally *Crawford*, 541 U.S. 36.

\(^{90}\) See id. at 51-52.


\(^{92}\) *Craig* v. Washington, 541 U.S. 36.

as "testimonial." For example, a statement to a grand jury (testimonial) is made in anticipation of litigation, and a statement to an acquaintance (not testimonial) is not made in anticipation of litigation. But although courts using this rationale to admit autopsy reports identify a conforming factor, they fail to fully analyze if "not prepared for litigation" fairly characterizes an autopsy report. In addition, these courts fail to explain how using the "not prepared for litigation" factor to define "testimonial" aligns with the historical foundation for the Confrontation Clause, and they fail to articulate a danger identified by the quality against which confrontation can protect. This Comment considers that question in Part III.D, ultimately arguing that "not prepared for litigation" is not a proper definition of "testimonial."

C. The Mistaken Reliance on Substantive Qualities of an Autopsy Report

The third analytical framework used by courts to classify autopsy reports as "not testimonial" assesses the substantive qualities of autopsy reports. A review of these cases reveals that the courts have developed two methods of using substantive qualities in their assessment of whether autopsy reports are or are not testimonial. The first method relies on substantive qualities to find the entire autopsy report non-testimonial, while the second method is an "opinion or fact"-based test used by two courts to admit the factual segments of autopsy reports as non-testimonial but exclude the reports' opinions as testimonial. Ultimately, both methods fail to conform to Crawford.

1. Method One: Reliance on General Substantive Qualities

To support the conclusion that autopsy reports are not testimonial, several courts have relied on the substantive qualities of autopsy reports. These courts describe the reports as descriptive, factual and non-analytical. For example, in Moreno Denoso v. Texas, the court relied upon the autopsy report's objectivity and scientific, factual nature in deciding that the autopsy report was...
not testimonial. However, relying on a statement’s substantive characteristics, such as its objectivity, fails to conform to the Crawford standard.

All three example definitions of “testimonial” mentioned by the Court in Crawford focus on the context of and motivation behind each statement. For example, a statement could be testimonial if created during a deposition or police interrogation. None of the three example definitions provided by the Court depend on the statement’s contents. That the examples do not mention the statement’s contents suggests the ultimate definition, whether one of those examples or not, should similarly not turn on the statement’s contents.

In addition, statements that the Court specifically held were testimonial could be characterized as substantively factual, non-analytical and descriptive. For example, consider an eyewitness’s formal statement to the police, elicited by interrogation in the station house. The eyewitness’s statement is testimonial under both Crawford and Davis, yet the statement is also likely to be a factual description of what the witness observed. A statement that the witness saw a tall white teenager wearing a red jacket enter the store immediately before a robbery is as descriptive, non-analytical and factual as a statement by a medical examiner that the victim’s eyes are cloudy. Because identical substantive qualities can be used to describe both testimonial and non-testimonial statements, those qualities fail to distinguish testimonial from not testimonial, and therefore should not be used by courts as a defining factor.

Instinctively, substantive factors, such as objectivity or scientific and factual bases, make an autopsy report appear more reliable, and therefore less dangerous to admit without confrontation. The identification of these substantive qualities also reflects society’s view of the medical examiner as a scientist, and the sense that science reflects truth immune from the subjectivity that colors an eyewitness observation. But despite how reliable these factors may make autopsy reports appear, Crawford makes clear that substantive factors cannot substitute for the absolute procedural protection of confrontation required by the Constitution.

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101. Moreno Denoso, 156 S.W.3d at 181.
102. Id. at 51-53.
103. Id.
104. See Davis v. Washington, 547 U.S. 813, 822 (2006) (holding that a statement during police interrogation is testimonial “when the circumstances objectively indicate that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution”).
105. See id. See also Crawford, 541 U.S. at 52 (holding “testimonial” applies to statements made in police interrogations).
106. See Crawford, 541 U.S. at 61.
2. Method Two: Application of the "Opinion or Fact"-Based Test

In Kansas and Maryland, the highest state court applied an "opinion or fact"-based test to classify different sections of autopsy reports as testimonial and non-testimonial, and admitted the non-testimonial sections without confrontation. The "opinion or fact"-based test ostensibly allows courts to admit objective factual descriptions in autopsy reports as non-testimonial and exclude conclusions and opinions as testimonial. But as applied, the test’s actual result is to admit the autopsy report with the conclusions redacted, and allow another medical examiner to testify to those redacted conclusions based on the admitted portions of the autopsy report, as demonstrated in Rollins and Lackey. Defining a statement as testimonial based on an "opinion or fact"-based test fails to conform to Crawford and impractically requires a court to distinguish between facts and opinions.

Classifying a statement as fact or opinion poses the fundamental problem of differentiating between fact and opinion. The Maryland Court of Appeals faced that problem in Rollins. In Rollins, the prosecution had the burden of proving that an elderly woman died from suffocation rather than natural causes. Although classifying the medical examiner’s conclusion about the cause of death as an opinion poses little difficulty, the descriptive elements of autopsy reports, such as "cloudy" eyes, "acute" and "chronic," pose more of a problem. The uncertainty that exists when deciding whether descriptions contained in autopsy reports are facts or opinions exposes the expansive overlap between fact and opinion and the lack of accuracy in the test's application. All descriptions contain some degree of opinion; therefore, the "opinion or fact"-based test requires a court to decide, for each description found in the autopsy report, whether the description contains sufficient opinion to be testimonial. The result is a subjective parsing of an autopsy report into admissible and inadmissible sections based on an uncertain and variable standard.

Besides being impractical to apply, the "opinion or fact"-based test retains

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108. Lackey, 120 P.3d at 350-52; Rollins, 897 A.2d at 840-43.
109. Lackey, 120 P.3d at 350-52; Rollins, 897 A.2d at 840-43.
112. See Rollins, 897 A.2d at 827, 840 (noting sections of autopsy report describing the victim’s corneas as “cloudy” and characterizing observations as “acute” and “chronic”).
113. See id. at 840.
the same uncertainty dilemma caused by the Roberts reliability test, which was overruled by Crawford.\textsuperscript{114} The Maryland and Kansas courts simply replaced one substantive test with another, ignoring the Supreme Court’s explicit rejection in Crawford of replacing the procedural test of confrontation with substantive factors.\textsuperscript{115}

Moreover, applying an opinion or fact-based test fails to conform to the specific holdings in Davis and Crawford.\textsuperscript{116} For example, consider applying the opinion or fact-based test to Sylvia Crawford’s statement that she did not see a weapon or to Amy Hammon’s description of the domestic altercation leading to her 911 call.\textsuperscript{117} The Court held that both of these statements are testimonial, yet both of these statements describe facts. Under Kansas or Maryland’s “opinion or fact”-based test, the statements would qualify as non-testimonial.\textsuperscript{118} The same is true for other types of statements that the Court held to be within the “core” of testimonial statements.\textsuperscript{119} Prior testimony to a grand jury, plea allocutions, prior testimony at a preliminary hearing and police interrogations are all testimonial according to Crawford, yet all of these categories of testimonial statements could easily include factual descriptions.\textsuperscript{120}

The Maryland and Kansas courts may have intended the “opinion or fact”-based test to apply only to autopsy reports or similar medical records with fact and opinion sections. Limiting the test’s application in this way would avoid contradicting the specific holdings of Crawford and Davis, but it would not resolve the fundamental problem that an “opinion or fact”-based test improperly relies on the substance of the statement, rather than its context or method of production, in direct conflict with Crawford. In addition, adopting a unique definition of “testimonial” for different categories of statements would add unnecessary complexity to an already confusing area of law.

The Supreme Court specifically rejected the use of substance-based tests to classify a statement as testimonial.\textsuperscript{121} In accordance with its rejection, the Court chose to identify categories of testimonial statements by the context and method of production rather than by the content of the statement.\textsuperscript{122} Therefore, any substance-based test will always fail to categorize a statement properly as

\textsuperscript{115} See id. at 61-62 (“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation . . . . [I]t is a procedural rather than a substantive guarantee.”); id. at 68-69; State v. Lackey, 120 P.3d 332, 350-52 (Kan. 2005), cert. denied, 547 U.S. 1056 (2006); Rollins, 897 A.2d at 840-43.
\textsuperscript{116} See Davis v. Washington, 547 U.S. 813, 817-32 (2006); Crawford, 541 U.S. at 50-61.
\textsuperscript{117} See Davis, 547 U.S. at 820 (quoting Hammon’s handwritten statement to the police describing the encounter: “[Hershel] Broke our Furnace & shoved me down on the floor into the broken glass”); Crawford, 541 U.S. at 39-40.
\textsuperscript{118} See Davis, 547 U.S. at 820; Crawford, 541 U.S. at 39-40.
\textsuperscript{119} See Crawford, 541 U.S. at 63-65, 68-69.
\textsuperscript{120} See id.
\textsuperscript{121} Id. at 50-51, 60-63, 68-69.
\textsuperscript{122} Id.
testimonial or non-testimonial. Under Crawford, a statement cannot be defined as testimonial based on its substantive content. Substantive tests fail in principle and application, and courts should resist any temptation to rely on a statement’s substantive characteristics to define it as testimonial.

D. The Legitimate Reliance on the Non-Adversarial Role of the Medical Examiner

The final analytic framework used by courts to determine that autopsy reports are not testimonial examines the medical examiner’s role. Because this role is not one of law enforcement and not adversarial to the criminal defendant, these courts have concluded that autopsy reports are non-testimonial and therefore admissible.123 This “not prepared by law enforcement or adversarial officials” inquiry is rooted in the law enforcement exclusion to the public records hearsay exception.124 Once again, the consensus courts are improperly relying on hearsay policy to determine what factors make a statement testimonial. However, unlike the business record analysis discussed previously, the “not prepared by law enforcement or adversarial officials” test conforms to the holdings of Crawford and Davis.

Under the law enforcement exclusion, a report prepared by law enforcement officers cannot be admitted under the public records exception to the hearsay rule.125 Courts generally do not consider autopsy reports to qualify for the exclusion, as a medical examiner is not a law enforcement officer.126 In Moreno Denoso, for example, the court found that a medical examiner is not a law enforcement officer under the law enforcement hearsay exclusion.127 Furthermore, in Moreno Denoso, the court characterized a medical examiner as not litigious or prosecution-oriented, and not adversarial like law enforcement officers.128 As a result, the court held that medical examiners lack the motive to fabricate or distort results.129

Other courts applied similar logic to classify a medical examiner as independent from the prosecution, and thus not law enforcement and not

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124. See Feliz, 467 F.3d at 233-34; Durio, 794 N.Y.S.2d at 868-69; Moreno Denoso, 156 S.W.3d at 180-81. Under Federal Rule of Evidence 803(8)(B), public records and reports are admissible as an exception to hearsay, but the exception specifically does not encompass public records prepared “by police officers and other law enforcement personnel.” FED. R. EVID. 803(8)(B). The state cases discussed above rely on state evidence rules, but those rules mimic the federal evidence rules. See, e.g., TEX. R. EVID. 803(8)(B).
125. ALLEN, supra note 3, at 539-540.
126. Id.
127. Moreno Denoso, 156 S.W.3d at 180-81.
128. Id.
129. Id.
adversarial toward the defendant. This instinctual return to hearsay law is understandable. Hearsay factors define qualities which make a statement more reliable—and therefore more acceptable to admit without confrontation. But defining a testimonial statement based on hearsay policy is inconsistent with Crawford. To conform to Crawford, courts must divorce the factors they use to define testimonial statements from hearsay law. Where a court identifies a hearsay factor as important for testimonial analysis, the court must explain why using the factor conforms to Crawford and defines the danger protected against by the Confrontation Clause.

Although the characteristic of “not prepared by law enforcement or adversarial officials” defines a hearsay exclusion, that fact does not preclude it from also being used as a factor to define a testimonial statement. As I hope to demonstrate in Part III.A, unlike the per se business record exception and tests based on substantive qualities, the “not prepared by law enforcement or adversarial officials” factor conforms to both the holdings of Crawford and Davis and the examples of testimonial statements within Crawford.

In Crawford, the Court stated that the “principal evil” the Confrontation Clause aims to address is the civil-law mode of procedure historically used in Europe, “particularly its use of ex parte examination.” The Court then characterized ex parte examinations as examinations by judicial officials or justices of the peace—government officials with investigative and prosecutorial functions similar to those of modern police. The Court also qualified more specific types of statements as testimonial: formal statements by an accuser to government officials, prior testimony at a preliminary hearing, testimony before a grand jury or at a previous trial, and statements made during police interrogations. The unifying feature of these statements is that they are either made under oath (traditional testimony) or are elicited by law enforcement and adversarial officials during the investigation or prosecution. In addition, the statements that the Court held were testimonial in both Crawford and Hammon were made in response to questioning by law enforcement officers. In Davis, the Court even acknowledged that it had not yet determined “whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’”

The determination that a statement is not testimonial because it is “not prepared by law enforcement or adversarial officials” captures the essence of what makes a statement sufficiently dangerous to require confrontation, and

132. Id. at 50.
133. Id. at 51-53.
134. Id. at 50-56; 61-62; 68.
136. Davis, 547 U.S. at 823 n.2 (emphasis added).
therefore is the proper testimonial characteristic to determine whether a declarant must be confronted. As I explain in Part III.A, this "not prepared by law enforcement or adversarial officials" definition also classifies an autopsy report as non-testimonial, the proper result according to the consensus among the courts.

E. Practical Concerns of Courts

In general, courts that have found autopsy reports to be non-testimonial have failed to employ detailed analyses consistent with Crawford when deciding whether autopsy reports require confrontation. Therefore, the question remains why courts consistently admit autopsy reports by finding them non-testimonial. Scholars argue that improper concerns for practical consequences motivate the courts. These scholars are not entirely wrong; practical concerns do motivate the consensus courts. That concern, however, is not necessarily improper. On one hand, a balancing test based on practical consequences is inappropriate to determine admissibility under the Confrontation Clause, as such a test would be counter to the Court’s requirement of an absolute procedural protection for testimonial statements. On the other hand, the Court has not yet adopted a definition of “testimonial,” and as previously discussed, the definition that is ultimately adopted should be based on the definition’s ability to distinguish dangerous statements protected by confrontation from statements not posing a danger or not posing the danger protected by confrontation. The Court has failed to articulate explicitly what that danger is, so we must consider each proposed definition and whether it depends on qualities we could reasonably expect confrontation to protect against, an analysis I discuss in Part III. That danger is based on practical concerns and problems arising from admitting statements without confrontation.

In this sense, while consideration of practical concerns is improper as a test itself, practical concerns are important to the development of a definition of “testimonial” that guards against dangerous statements, but admits statements not posing the practical danger guarded by confrontation. In that light, the focus on practical concerns is not inappropriate in the search for a definition of testimonial, as the purpose of the definition is to distinguish statements that require confrontation based on practical concerns. By taking into account the practical consequences of excluding autopsy reports, courts consider that confronting the medical examiner offers little benefit to balance the harsh consequences of excluding the report. The imbalance indicates autopsy reports do not pose a sufficient danger to necessitate an absolute constitutional procedural rule requiring confrontation.

In Lackey II, the Kansas Supreme Court admitted that practical problems motivated its decision to classify the substance of an autopsy report as not testimonial.\(^{138}\)

We believe the reason why these cases [Smith, Moreno Denoso, Durio and Rollins] have not adopted the arguments and reasoning set forth by the defendant is that it would have the effect of requiring the pathologist who performed the autopsy to testify in every criminal proceeding. If, as in this case, the medical examiner is deceased or otherwise unavailable, the State would be precluded from using the autopsy report in presenting its case, which could preclude the prosecution of a homicide case. We view this as a harsh and unnecessary result in light of the fact that autopsy reports generally make routine and descriptive observations of the physical body in an environment where the medical examiner would have little incentive to fabricate the results.\(^{139}\)

Lackey II demonstrates that the Kansas Supreme Court was unwilling to release a convicted murderer because the medical examiner died, and believed the same unwillingness motivated other courts to find autopsy reports non-testimonial.

In Feliz, the Second Circuit emphasized the importance of characterizing autopsy reports as non-testimonial in order to preserve the efficiency and integrity of the truth-seeking process.\(^{140}\) Often, years pass between an autopsy and a trial. The passage of time easily can result in the medical examiner moving to the other coast, leaving the profession, or dying. For example, flying a medical examiner across the country presents logistical problems and, as faced by the prosecution in Smith, can pose a non-logistical problem where the medical examiner refuses to leave a sick parent despite a subpoena.\(^{141}\) But these obstacles, while substantial, are surmountable. In contrast, no solution exists for the problem created by deceased medical examiner. An autopsy report, unlike a lab test, cannot be redone by another person. The body decomposes and exhumation poses multiple difficulties, such as objections by the deceased's family and limitations on county or city resources. If a medical examiner dies, and the court characterizes his report as testimonial, then the prosecution likely will lose the ability to convict a possible murderer.

Scholars recognize this practical problem but insist that solutions exist to minimize its effects.\(^{142}\) Yet the solutions they suggest, while creative, also

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\(^{139}\) Id.

\(^{140}\) United States v. Feliz, 467 F.3d 227, 236 (2d Cir. 2006), cert. denied, 127 S. Ct. 1323 (2007).


\(^{142}\) See Petition for Writ of Certiorari, supra note 137, at 17; Mnookin, supra note 137, at 854; Recent Case, 120 HARV. L. REV. 1707, 1714 (2007) (discussing United States v. Feliz, 467 F.3d 227, 229 (2d Cir. 2006), cert. denied, 127 S. Ct. 1323 (2007)).
present serious practical problems in their application. For example, Richard Friedman suggests appointing a lawyer to represent any potential defendant, whether identified or not, in a cross-examination of the medical examiner soon after the autopsy.\(^{143}\) Therefore, if the medical examiner dies before trial, Friedman’s approach would allow the admission of the autopsy report because it satisfies the *Crawford* requirements of unavailability of the witness and a previous opportunity for cross-examination.\(^{144}\) However, it seems unlikely that a cross-examination performed five or ten years before trial, by a lawyer who does not know the defendant’s identity or his defense theory, would (or should) qualify as a sufficient opportunity for confrontation.

A Harvard law student, who also considered this problem, presented the solution of having two medical examiners present at every autopsy.\(^{145}\) The student reasoned that if one medical examiner were to die, the other medical examiner could testify to his findings and be available for cross examination.\(^{146}\) The student admitted that costs could pose a barrier, but fell short of acknowledging that the cost of providing two medical examiners at every autopsy prevented the solution from being viable.\(^{147}\) Given the shortage of police, firefighters, and emergency room doctors because of municipal budget shortfalls, expecting a municipality to spend money on a second medical examiner for every autopsy, instead of on adding police, fighters, or doctors, seems unrealistic.\(^{148}\)

As no practical solution is immediately apparent, excluding the autopsy report where a medical examiner dies effectively functions as a statute of limitations for murder, at least in the many situations in which the use of autopsy reports is integral to obtaining convictions by establishing the time and cause of death. Judges, faced with releasing a convicted murderer, naturally lean toward admissibility of autopsy reports; however, the high cost of overturning a murder conviction alone insufficiently justifies reducing or eliminating a constitutional protection. Almost every constitutional procedural protection for criminal defendants can result in a convicted murderer’s release. But that harsh consequence is acceptable because it preserves the benefits derived from the constitutional right, such as protecting civil liberties, fairness and truth-seeking. Unlike most constitutional protections, however, the constitutional protection of confronting the medical examiner who wrote an autopsy report offers few benefits to justify the harsh consequences.

\(^{143}\) See Petition for Writ of Certiorari, [*supra* note 137, at 17 n.15.]

\(^{144}\) *Id.*

\(^{145}\) Recent Case, [*supra* note 142, at 1714.]

\(^{146}\) *Id.*

\(^{147}\) *Id.*

Confronting a medical examiner offers substantially fewer benefits than confronting other types of witnesses, such as an eyewitness. First, medical examiners rarely remember the details of an individual autopsy by the time of trial. Unlike an eyewitness to a crime, an autopsy is not an unusual or impacting event; a medical examiner regularly performs autopsies as part of his job.\textsuperscript{149} A typical medical examiner in Los Angeles, for example, performs between two to three hundred autopsies a year.\textsuperscript{150} One such medical examiner stated that he rarely remembers the individual details of an autopsy from independent recollection.\textsuperscript{151} Rather, when he testifies, he almost always relies entirely on his autopsy report.\textsuperscript{152} Since medical examiners generally rely on the autopsy report to testify to the autopsy, live testimony offers little beyond a verbal recitation of the autopsy report. Frequently, a medical examiner's testimony at trial is limited to the autopsy report, so the medical examiner's appearance in person offers little to the truth-seeking process.

Commentators argue that confrontation does further the goal of truth-seeking; medical examiners, after all, can make mistakes, and confrontation provides the best method for exposing these mistakes to the jury.\textsuperscript{153} Mistakes in medical examiners' offices, even if rare, do occur, as demonstrated by news stories about inadvertently switched eyeballs and bodies.\textsuperscript{154} In addition, juries give considerable weight to scientific testimony, especially after the popularity of television programs, like C.S.I., which show forensic scientists solving crimes.\textsuperscript{155} But requiring confrontation of the actual examiner is unlikely to reveal abnormalities in a specific case.

Realistically, if a medical examiner varies from standard procedure in an individual autopsy, he is not likely to remember if he accidentally varied from procedure, and is not likely to admit deliberately varying from procedure.\textsuperscript{156} A deviation from the medical examiner's standard procedure can be exposed by confronting another examiner from the office. Similarly, any experienced medical examiner can explain the susceptibility of physical descriptions to characterization, and how a different characterization could affect the conclusion. Confronting the chief medical examiner is arguably more effective

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149. Forensic Autopsy Performance Standards, supra note 41, at 1-3.
150. Telephone Interview with Pedro Cortiz, Medical Examiner, in L.A., Cal. (June 10, 2007).
151. Id.
152. Id.
156. Telephone Interview with Pedro Cortiz, Medical Examiner, in L.A., Cal. (June 10, 2007).
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for revealing any ambiguity in the findings, variations in standard procedure, or problems in the office, as the chief medical examiner is in the best position to know the standard procedures, ambiguities within those procedures, and any past problems with the office or the unavailable medical examiner.

It is the lack of benefit obtained from requiring confrontation of the medical examiner, coupled with the harsh consequence of releasing a possibly dangerous defendant, which differentiates the autopsy report from a key eyewitness's statement to police. Just like the death of a medical examiner, the death of a key eyewitness can derail a prosecution; however, courts do not try to alleviate that similarly harsh consequence by finding some eyewitness statements non-testimonial. Confronting an eyewitness offers substantial benefits to justify the harsh consequences of excluding the witness statement, unlike confronting a medical examiner.

Professor Friedman argues that courts' focus on practical considerations is inappropriate under *Crawford* and demonstrates their unreasonable resistance to the new standard for confrontation.\textsuperscript{157} Furthermore, Professor Friedman argues that analyzing practical problems undermines the consensus courts' theory that autopsy reports do not pose the dangers that the Confrontation Clause guards against.\textsuperscript{158} However, Professor Friedman is incorrect on both points.

The practical problem courts face is that requiring confrontation of medical examiners results in harsh consequences without any substantial benefit from confrontation. The benefits of cross-examination are minimal precisely because autopsy reports do not present the kind of danger that can be refuted by confrontation. Courts recognize this, and have decided that the danger, if any, posed by autopsy reports does not justify the absolute procedural rule of confrontation required by the Confrontation Clause. While the logic of the opinions is sometimes problematic, often relying on hearsay factors and their justifications, courts' decisions that autopsy reports are not testimonial generally reflect the understanding that autopsy reports do not embody the danger that the Confrontation Clause was designed to address.

III
THE USE OF AUTOPSY REPORTS TO DEFINE "TESTIMONIAL" AND TO UNDERSTAND THE PURPOSE OF THE CONFRONTATION CLAUSE

As I explained in Part II, courts have identified two factors indicating when a statement is non-testimonial that conform to the holdings of *Crawford* and *Davis*: (1) that autopsy reports are not adversarial because they are not prepared by law enforcement; and (2) that autopsy reports are not prepared for

\textsuperscript{157} See Petition for Writ of Certiorari, *supra* note 137, at 16-17.

\textsuperscript{158} See id.
litigation.159 Both of these factors are possible definitions of "testimonial" statements; however, the quality of "not adversarial as not prepared by law enforcement" also (a) articulates a danger against which the Framers may have intended the Confrontation Clause to protect, and (b) articulates a danger consistent with the historical foundation of the Confrontation Clause described in Crawford. In addition, defining a testimonial statement as a statement produced by the involvement of adversarial government officials would classify autopsy reports as non-testimonial, in accordance with the consensus among courts.

A. The Proper Definition of "Testimonial":
Involving Adversarial Government Officials

To be consistent with Crawford, any proposed definition of "testimonial" must reflect the purpose of the Confrontation Clause, as made evident by the historical foundation set forth in Crawford, and shield a defendant from the dangers against which confrontation could reasonably have been designed to protect.160 By developing tests and identifying factors to define "testimonial," the courts are creating a framework and rationale for decision-making, as well as protecting the principles underlying a defendant's constitutional rights. To reflect properly the principles behind the right to confrontation, any definition of "testimonial" must consider which dangers arising from a lack of confrontation reasonably could have motivated the Framers to include the right as a fundamental constitutional protection.161 Based on a consideration of the harms that the Confrontation Clause prevents, I propose the following definition of "testimonial": out-of-court statements are testimonial and thus require confrontation if they are produced by, or with the involvement of, adversarial government officials responsible for investigating and prosecuting crime.

The Supreme Court made it difficult to determine what the Confrontation Clause guards against by failing to articulate that danger in either Crawford or Davis.162 In Crawford, the Court discussed the history of the Confrontation Clause, and relied on the historical development of the clause to illuminate the purpose and principles of confrontation.163 For example, the Court discussed Sir Walter Raleigh's trial for treason, the civil-law mode of ex parte


161. See id. at 43, 50 (noting the Court must rely on the "historical background of the Clause to understand its meaning" and the Clause must be interpreted with its intention to stop the evil of civil-law mode of criminal procedure in mind).


examinations, and the Stamp Act. But the history, outlined by the Court, provided examples without clearly stating precisely what dangers, common to these cases, caused the Framers to make confrontation a constitutional requirement.

This section examines the suitability of defining as "non-testimonial" statements that are "not adversarial as not prepared by law enforcement," by separating the analysis into two parts. First, any factors used to define a testimonial statement must reflect a specific and reasonable danger against which confrontation can protect. Second, the articulated danger to the defendant and any testimonial quality that triggers the proposed danger must be consistent with the historical background of confrontation, as provided by the Court in Crawford, and the Framers' likely intent.

One of the qualities of autopsy reports identified by courts is that medical examiners are not classified as law enforcement officers. Courts relying on this rationale found that medical examiners are independent from both the prosecutor's office and the police department, and have no responsibility for prosecuting or investigating suspects. Therefore, courts reason, medical examiners lack the motivation to manipulate the results of the autopsy report. Because medical examiners do not take an adversarial "side" in the case, they lack the motivation to manipulate the results and do not create a danger to the defendant which confrontation could reasonably be designed to address. Courts that use the "not prepared by law enforcement or adversarial officials" factor, which is rooted in the law enforcement exclusion to the public records hearsay exception, come to conclusions that are logical, compelling, and consistent with the purposes of the Confrontation Clause.

1. Understanding the Purpose and Object of the Confrontation Clause

The Supreme Court has long recognized the dangers posed to the criminal defendant from adversarial government officials. Justice Jackson's famous
line in *Johnson v. United States*, a Fourth Amendment search and seizure case, warned of the danger from "the competitive enterprise of ferreting out crime." Justice Jackson was specifically referring to the adversarial relationship between police, prosecutors and a criminal defendant that arises from the competitive nature of investigating and prosecuting crime—a competitive structure that encourages adversarial officials to push the limits and do whatever it takes to get a conviction. Society relies on this competitive drive to motivate police officers and prosecutors to utilize every available tool to identify and convict individuals who commit crimes.

However, as articulated in the Constitution, and analyzed by the Supreme Court, that competitive drive must also be restrained and limited. The law imposes restraints to prevent law enforcement officials from using practices that compromise the fairness of our criminal justice system and endanger the defendant’s individual rights. As demonstrated by Justice Jackson’s opinion in *Johnson* and the Court’s continued reference to it, the notion that courts and legislatures are charged with restraining the zeal of police and prosecutors underlies many of the constitutional protections afforded the defendant through our laws of criminal procedure.

The Confrontation Clause is specifically designed to protect the defendant from dangers arising from the adversarial and competitive structure of our criminal justice system. The competition between a defendant and law enforcement can motivate an official to pressure a witness into making statements that favor conviction. Adversarial pressure can also decrease the sincerity of a witness’s statement. Insincerities in a witness’s statement can result from her fear of the official or her desire to appease or please the official.

A second possible danger is that adversarial pressures can motivate an official to shape his or her questioning of the witness to focus on the facts favoring conviction and ignore the facts casting doubt on the suspect’s guilt. For example, in *Crawford*, the police asked Sylvia Crawford whether she saw a knife in the victim’s hands before her husband stabbed the victim. The police, in seeking evidence to convict Sylvia’s husband, focused on Sylvia’s statement that she did not see anything, and did not question Sylvia about a prior statement in which she said that she shut her eyes for part of the encounter. Moreover, the police did not question Sylvia about her location,

173. *See*, e.g., U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); U.S. CONST. amend. VI (providing the right "to have the Assistance of Counsel for his defence").
176. *Id.*
177. *Id.*
her line of sight, or the quality of her memory. Motivated by their adversarial role to gather facts supporting Crawford’s conviction, the police lacked the incentive to gather a full and complete picture of what happened during the stabbing, or to test Sylvia’s memory and perception.

The Confrontation Clause is designed to alleviate these dangers of insincerity and incomplete presentation of facts. Confrontation reduces the danger of witness insincerity by insulating the witness from adversarial pressure during her testimony. During private law-enforcement questioning, police officers or prosecutors can exert pressure on the witness without a high risk of being discovered. Courtroom questioning, in contrast, is public and performed in front of the jury, judge and defendant. Pressure is therefore harder to exert in court. Furthermore, the pressure to tell the truth, imposed by the atmospherics of the courtroom, can counteract any lingering adversarial pressure. Taking an oath to tell the truth immediately before testifying and the solemnity of the courtroom are examples of courtroom atmospherics that impress on a witness the importance of honesty. The problem of the incomplete presentation of facts is also mitigated by cross-examination, which gives the defendant’s attorney the opportunity to complete the story and challenge a witness’s perception and memory.

My interpretation of the Confrontation Clause as guarding against specific abuses of the adversarial process rests upon a pragmatic notion of how criminal trials actually play out. To the contrary, one could argue the purpose of the Confrontation Clause is to prevent the dignitary harm of excluding the defendant from the trial process. Indeed, such an element may be an intended result of requiring confrontation of witnesses. However, Crawford compels a pragmatic—rather than a dignitary—understanding of the Confrontation Clause for two reasons. First, the Court does not mention a dignitary aspect in Crawford, and the historical background of the Confrontation Clause as related by the Court in Crawford does not suggest that avoiding dignitary harm was the main purpose. Furthermore, even if one recognizes a dignitary element to confrontation, that consideration fails to advance the search for a definition of “testimonial.” The purpose of labeling statements testimonial or non-testimonial is to determine which statements require confrontation and which do not. The dignitary harm would attach to all statements made out-of-court yet offered as evidence in trial, and therefore offers little to advance the analysis of what makes certain statements sufficiently dangerous to require confrontation.

The adversarial nature of America’s criminal justice system heightens the dangers to a criminal defendant on trial. It increases the risk of incomplete, misleading, and insincere witness statements made under conviction-motivated questioning by police. In practice, confrontation mitigates those dangers and

178. Id.
179. See Crawford, 541 U.S. at 61 (noting that “the Clause’s ultimate goal is to ensure reliability of evidence”).
protects the criminal defendant from those risks. Therefore, to reflect those dangers and the purpose of the Confrontation Clause, the definition of "testimonial" should be based on the adversarial role of the person involved in obtaining or generating the statement. For this reason, I propose a functional definition of "testimonial" that is a statement produced by, or with the involvement of, adversarial government officials responsible for investigating and prosecuting crime.

2. Consistency with Crawford's Discussion of the History of the Confrontation Clause

All of the historical cases discussed by the Court in Crawford involved questioning by government officials who were investigating the crime or preparing for the defendant's prosecution. The Court demonstrated that statements obtained by these officials in private should not be used against the defendant at trial without confrontation. Through its discussion of case history, the Court made clear that involvement of law enforcement officials participating in the defendant's prosecution is a factor that must be considered in defining a testimonial statement.

Throughout its analysis in Crawford, the Court defined the history of the Confrontation Clause by its opposition to the civil-law mode of examination, which the Court in turn defined as the acceptance of "examination in private by judicial officers." When the Court noted that England sometimes adopted elements of the civil-law practice, it described the practice of justices of the peace or other government officials questioning people before trial. For example, the Court discussed the notorious trial of Sir Walter Raleigh, in which accusations of treason were elicited by the Privy Council, a government body collecting evidence for the trial. In King v. Paine, another case the Court discussed in Crawford, the mayor elicited the statement at issue during his investigation in preparation for trial. The Court also discussed how the cross-examination rule applied by courts in 1791 was a precursor to the Confrontation Clause and applied to examinations by justices of the peace, and discussed how colonists rebelled against the Stamp Act because it allowed admiralty courts to establish bodies to take testimony in private in order to collect evidence for trial, just like the civil-law procedure.

All of the historical examples described in Crawford are of conduct that society has viewed as dangerous to a defendant's right to a fair trial. In

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180. Id. at 43-51.
181. Id. at 43.
182. Id. at 44.
183. Id. at 44.
184. Id. at 45.
185. Crawford, 541 U.S. at 45, 54-55.
186. Id. at 47-48.
providing these examples, the Court explicitly focused on the investigative and prosecutorial functions of the officials conducting these private examinations.\textsuperscript{187} Furthermore, in justifying its classification of statements obtained through police interrogation as testimonial, the Court reasoned that police officers perform the same investigative and prosecutorial functions as justices of the peace, the officials who frequently elicited the statements in the historical examples.\textsuperscript{188} The \textit{Crawford} Court's selection of these two qualities for discussion reflects the importance the Court placed on the investigative and prosecutorial functions of the government official producing the statement that required confrontation. The Court could have analogized justices of the peace to police because of their similar roles as government officials, but instead it focused on the more specific qualities of the investigative and prosecutorial functions these officials perform.

In addition, the Court explained that the involvement of police officers presents the "same risk" as the involvement of justices of the peace.\textsuperscript{189} Although the Court did not specifically describe the risk, the implication is that the "risk" posed by the police and justices of the peace arises from the shared qualities of investigative and prosecutorial functions. That the risk posed by police questioning arises from their investigative and prosecutorial function becomes further evident by the Court's labeling of the abuse as "prosecutorial" and its explanation that the risk arises from officials producing testimony "with an eye toward trial."\textsuperscript{190} Again, the Court did not assert that testimony produced by government officials in general posed a threat to defendants, but rather chose to characterize dangerous testimony as that produced for trial by an official performing a prosecutorial function.\textsuperscript{191} Designed to prevent the civil-law mode of examination, the Confrontation Clause is intended to protect the defendant from statements generated during private questioning by adversarial government officials. To reflect that purpose and danger, the definition of "testimonial" should be based on the involvement of those adversarial officials.

\textbf{B. Application: Autopsy Reports Are Not "Testimonial" Because Medical Examiners Are Not Adversarial Government Officials}

After concluding that the Confrontation Clause is designed to protect criminal defendants from adversarial government officials responsible for investigating and prosecuting criminals, the question becomes whether medical examiners share this role and therefore pose similar dangers. The courts said no; they held that medical examiners act independently, are not law enforcement officials, and do not assume the responsibility for investigating

\begin{itemize}
\item \textsuperscript{187} \textit{Id.} at 43-50, 53.
\item \textsuperscript{188} \textit{Id.} at 53.
\item \textsuperscript{189} \textit{Id.} at 53.
\item \textsuperscript{190} \textit{Id.} at 56 n.7.
\item \textsuperscript{191} \textit{Crawford}, 541 U.S. at 53, 56 n.7.
\end{itemize}
and prosecuting criminals. The courts thus concluded that medical examiners are not adversarial to criminal defendants and therefore do not pose the danger the Framers intended confrontation to limit. This characterization must align with the actual role of medical examiners—that medical examiners perform a function distinct from police and prosecutors.

The natural place to begin is to consider whether the purpose of a medical examiner is law enforcement, or something else. The San Francisco Medical Examiner’s Office describes itself as a department responsible for public health. The National Association of Medical Examiners describes the forensic pathology profession as “preventative medicine and public health by making the study of the dead benefit the living.” As a society, we want to keep track of deaths. We keep records, such as death certificates, because the information not only advances our knowledge about death and how to prevent it, but it also reveals characteristics of our society. We use the information, for example, to identify disease outbreaks, casualty dangers, and societal health risks. We also use the information to compose statistics to help us monitor trends, such as infant mortality rates and average life span, which in turn help us design government programs and plan for retirement.

Medical examiners, as the officials who determine what causes deaths, are part of the system keeping track of deaths for the public health. Medical examiners perform autopsies not only on victims of crime, but also in cases of suicide, accidents or unusual deaths. Indeed, as the court noted in Feliz, the New York City Charter requires medical examiners to conduct autopsies when presented with a person dying from “casualty, by suicide, suddenly...when unattended by a physician, in a correctional facility or in any suspicious or unusual manner” as well as in cases of criminal violence. The purpose of an

193. See Durio, 794 N.Y.S. 2d at 868-72; see also Moreno Denoso, 156 S.W. 3d at 180-81.
195. How Do You BECOME A FORENSIC PATHOLOGIST?, supra note 42.
199. See Forensic Autopsy Performance Standards, supra note 41, at 1, 2 (listing various situations, besides homicide, requiring an autopsy).
autopsy cannot be homicide investigation, because medical examiners perform autopsies in cases where death was not the result of a homicide. If a medical examiner's purpose was homicide investigation, then the Charter would only require autopsies for suspicious deaths. Because the Charter provides for autopsies to be performed under a broad range of circumstances, the medical examiner's purpose is necessarily broader.

The data support a broader purpose for performing autopsies. In 2004, the Los Angeles Medical Examiner's office conducted 4,180 complete autopsies out of 9,465 cases taken by the office. Of the 9,465 total cases, 1,121 died from homicide, 709 from suicide, 3,090 from accidents, and 4,256 from natural causes. Even assuming every homicide underwent a complete autopsy, the office still performed at least 3,059 complete autopsies where death was the result of a cause other than homicide—over 70% of autopsies conducted. If the investigation of homicide was the main role and purpose of medical examiners, the Los Angeles Medical Examiner's office likely would not spend over two-thirds of its time performing autopsies on non-homicide victims.

Even when a medical examiner conducts an autopsy on a homicide victim, his role differs from the role of the police and prosecutor. The police and prosecutor bear the responsibility of identifying the perpetrator, collecting evidence to prove his guilt, and convicting him at trial. The medical examiner performs an autopsy to determine the cause and time of death without considering who caused the death or how to prove who caused the death. Once the medical examiner finishes an autopsy, he notifies the police of his findings if necessary. The medical examiner's job, however, ends after that notification. His findings may activate an investigation or confirm an investigation is necessary, but he does not participate in the actual investigation or prosecution. Pedro Cortez, a medical examiner in Los Angeles, noted that real medical examiners do not resemble the role portrayed on popular television shows that depict medical examiners solving cases and confronting suspects.

201. L.A. COUNTY DEP'T OF CORONER, 2004 ANNUAL REPORT 27 (2004), http://coroner.co.la.ca.us/Docs/2004%20ANNUAL%20REPORT.pdf. The definition of a complete autopsy may vary by office, but generally a complete autopsy refers to an autopsy which includes an external examination, an internal examination, dissecting and examining the internal organs, and a laboratory analysis of fluids and other specimens. Autopsycam.com, Autopsy Technique, http://www.autopsycam.com/Autopsy_technique.html (last visited Mar. 18, 2008). It may also refer to an examination of the entire body, including the head, chest and abdomen.


203. See id.

204. See FORENSIC AUTOPSY PERFORMANCE STANDARDS, supra note 41, at 1-3.

205. See id.

206. Telephone Interview with Pedro Cortiz, Medical Examiner, in L.A., Cal. (June 10, 2007).
"When I conduct an autopsy," he said, "catching the perpetrator is far from my mind." 207

Although initiating an investigation and determining the cause of death are important to an investigation, the medical examiner's role more closely resembles reporting a crime than investigating the criminal. The medical examiner's role shares more similarities with a medical doctor than a police officer. Like a doctor, a medical examiner assesses different types of injuries to determine what caused them. After an examination, both medical examiners and doctors write reports detailing their findings in every case. If a doctor suspects child abuse after an examination, many states require that the doctor notify the police so the police can investigate the allegations. 208 A medical examiner similarly notifies the police, often as required by law, when he suspects death by homicide after performing an autopsy. 209

Just as the police may use a doctor's report as evidence in a child abuse case, the police may use an autopsy report as evidence in a homicide case. 210 And just as a doctor is not a law enforcement official because he activates a criminal investigation, a medical examiner is not a law enforcement officer because he activates a homicide investigation. 211 A medical examiner does not qualify as an adversarial government official, as his role and purpose is not investigating and prosecuting homicide. Autopsy reports therefore do not involve and are not prepared by adversarial government officials, and do not qualify as testimonial under its proper definition.

IV CONSIDERING THE COUNTER-ARGUMENTS

As discussed in Part III, defining the danger that confrontation addresses as arising from adversarial government officials identifies a logical danger consistent with the historical foundation of the Confrontation Clause, crafts the proper definition of testimonial based on characteristics causing that danger, and provides for admission of autopsy reports as non-testimonial in accordance

207. Id.
208. See, e.g., CAL. PENAL CODE §§ 11165.1-11165.7 (West 2000); N.Y. SOC. SEV. LAW § 413 (McKinney 2003); TEXAS FAM. CODE ANN. § 261.101 (Vernon 2002).
209. For example, Ohio law requires the medical examiner to report criminal deaths justifying investigation to the police. See OHIO REV. CODE ANN. § 313.09 (LexisNexis 2003).
210. See, e.g., United States v. Ellis, 460 F.3d 920, 925-26 (7th Cir. 2006) (finding a medical record of a blood test for drugs and alcohol not testimonial as the test was performed, and report created, during ordinary course of hospital business of treating patients); United States v. Garner, 148 Fed. App'x 249 (6th Cir. 2005) (finding medical records of defendant in disability fraud case non-testimonial as doctor had no reason to anticipate the report would be used at trial); People v. Cage, 155 P.3d 205, 220 (Cal. 2007) (admitting statements from child abuse victim to doctor as not "testimonial"); Mnookin, supra note 137, at 804-05 (noting the medical records are not testimonial under any plausible definition).
211. See Cage, 155 P.3d 205, 220 (holding that the mandatory reporting requirement does not transform doctors "into investigative agents of law enforcement").
with the consensus among courts. Several scholars, however, offer arguments against this analysis. Professor Friedman, for example, believes that autopsy reports are testimonial and should not be admitted at trial unless the defendant has the opportunity to confront the medical examiner. Friedman and others respond to arguments similar to those set forth in this Comment using four main counter-arguments, which I address in this Part.

Two of the four counter-arguments assume a definition of "testimonial" based on production by adversarial government officials and attack the characterization of autopsy reports as non-testimonial under that definition. These arguments assert either that medical examiners are law enforcement officials and pose a danger due to adversarial pressures or, alternatively, that medical examiners write autopsy reports in response to police "interrogation," as defined in Davis, and therefore their reports are testimonial even if medical examiners are not law enforcement officials. The other two counter-arguments attack the articulation of the danger and definition of "testimonial" based on production by adversarial government officials. These arguments assert that the danger actually arises from either government officials in general, not just officials responsible for investigating and prosecuting perpetrators, or alternatively, the declarant's anticipation that his statement will be used for trial, regardless of government involvement.

A. Counter-Argument One: Medical Examiners Are Adversarial Government Officials

Professor Friedman argues that medical examiners are not truly independent from law enforcement. He describes medical examiners as cooperating closely with the police and prosecution, collecting evidence, and providing crucial information about the time and cause of death. Although medical examiners do not directly investigate a defendant or determine who committed a homicide, the counter-argument is that medical examiners play an important role on the law enforcement team comprised of adversarial government officials. To support his point, Friedman asserts that medical
examiners consider themselves law enforcement. The National Association for Medical Examiners' ("NAME") website, for example, refers to members as "physician death investigators" and "medical detectives." The symbol of NAME incorporates the scales of justice, suggesting that medical examiners view themselves as part of the justice system. In addition, scholars who assert that medical examiners are part of a law enforcement team note that police officers are often present during an autopsy. This, they argue, demonstrates the close relationship between medical examiners and the police. Medical examiners may also collect crucial pieces of evidence used by the police in proving their case against an alleged perpetrator, including bullets remaining in the corpse, hairs or fibers on the skin or under the fingernails, and semen.

Friedman and others are correct that medical examiners may collect dispositive pieces of evidence, and that the determination of cause and time of death often helps identify and ultimately convict a perpetrator. But the fact that a medical examiner's autopsy report and examination sometimes helps the investigation and eventual prosecution of an alleged perpetrator does not mean medical examiners are members of a law enforcement team. As discussed in Part III, a medical examiner's primary purpose is not to solve crimes, but to serve the public health by determining why and how people die. While medical examiners sometimes determine exactly how homicide victims die, and may even collect the single fiber tying a defendant to a body, this does not alter the fact that medical examiners bear no formal responsibility for identifying or prosecuting the perpetrator as part of the law enforcement team. Medical examiners are like the doctor who supplies important information when, in the course of doing his job, he discovers a crime. Just as discovering evidence and identifying a crime does not change the role of a doctor from health-care provider to law enforcement officer, it does not change the role of a medical examiner from public health officer to law enforcement officer.

B. Counter-Argument Two: Autopsy Reports Are Testimonial Statements in Response to Police Interrogation

In Davis, the Court held that statements made in response to police questioning with the primary purpose of establishing past facts are testimonial. This definition focuses on the danger arising from the police as

218. See id. at 13-14.
220. Id.
222. See SO YOU WANT TO BE A MEDICAL DETECTIVE, supra note 42.
223. Davis v. Washington, 547 U.S. 813, 822 (2006) (holding that statements are testimonial if "circumstances objectively indicate that . . . the primary purpose of the interrogation
adversarial government officials, consistent with defining the danger confrontation protects against as arising from adversarial government officials with investigative and prosecutorial functions. Under this definition, however, the counter-argument can be made that if a medical examiner writes an autopsy report in response to police interrogation, the report is testimonial and the medical examiner's own status as a law enforcement officer is irrelevant.224 The argument—made by at least one court for lab reports—depends on whether the government produces a report in response to police inquiries and interrogation.225

Specifically, the argument relies on a footnote in Davis that expands the definition of "interrogation" beyond a basic question-and-answer format to include volunteered statements to police and responses to open-ended questions.226 It asserts that a medical examiner writes an autopsy report either as a volunteered statement to the police, or in response to the police directly or implicitly asking the open-ended question, "How did the victim die?"227 Of course, any statement made by a medical examiner in direct response to an explicit question by the police qualifies as testimonial under Davis and the proper definition of testimonial generally. Autopsy reports, however, are not written in response to direct questions made by the police. A medical examiner writes a report for every complete autopsy performed, regardless of the cause of death.228 In Los Angeles, over 70% of the autopsy reports written in 2004 did not list the cause of death as homicide.229 As it is unlikely the police read non-homicide autopsy reports, it is difficult to argue that medical examiners wrote these reports in response to implicit questioning by the police.

Moreover, even if an autopsy report is read by police, this does not mean the report is created for the police or in response to a police interrogation. The ultimate use is not determinative of the original purpose. Otherwise, every statement the prosecution seeks to admit at trial would qualify as written for the police or prosecution, as any statement admitted at trial was likely read or

is to establish or prove past events").

224. See, e.g., Oregon v. Miller, 144 P.3d 1052, 1058 (Or. Ct. App. 2006) (holding lab reports testimonial under Davis because the lab produced the report in response to police inquiry, and the lab provided the report to the police because the police wanted to know the information).


226. See Davis, 547 U.S. at 822 n.1 (noting that the Framers were not any more "willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation"); Miller, 144 P.3d at 1058.

227. See, e.g., Miller, 144 P.3d at 1058; Petition for Writ of Certiorari, supra note 137, at 21.

228. L.A. COUNTY DEP’T OF CORONER, supra note 201, at 24.

229. Id. The office performed 4180 complete autopsies in 2004. The office accepted 9465 cases, and of those cases, 1121 died from homicide. Even if the office performed a complete autopsy for every homicide case (1121/4180), over 70% of the complete autopsies were on non-homicide cases.
relied on by the police or prosecution during the investigation. The definition of testimonial should not be based on a statement's ultimate use, but the statement's original circumstances and the motives, purpose and function of the declarant.

Rather, medical examiners write autopsy reports for public records to record their findings and to document cause of death.\textsuperscript{230} Many people read autopsy reports for a variety of reasons, including, for example, insurance companies to determine benefit payouts, medical doctors to learn about diseases and improve treatments, and psychiatrists to study suicide and death.\textsuperscript{231} Medical examiners thus do not write autopsy reports for the police directly or exclusively, so reports are not properly characterized as statements in response to police questioning, either direct or open-ended.

Similarly, because reports are not written for or to the police, they are also not properly characterized as volunteered statements to the police. This quality distinguishes autopsy reports from the hypothetical situation in which a written eyewitness statement is mailed to the police. Such an eyewitness statement may qualify as testimonial under \textit{Davis} as "volunteered testimony" depending on whether the Court intends "volunteered testimony" to include any statement, or only volunteered statements within the context of a two-person dialogue with the police.\textsuperscript{232} Even if "volunteered statement" means any statement to police, an autopsy report, unlike the written eyewitness statement, is not made to the police. Whereas the eyewitness writes the letter for the primary purpose of communicating with the police, the medical examiner writes the autopsy report for the primary purpose of documenting cause of death for public records and public health. Therefore, autopsy reports are not made in response to police interrogation as understood in \textit{Davis}, implicitly, volunteered, or otherwise.\textsuperscript{233}

\section*{C. Counter-Argument Three: The Definition of Testimonial Should Focus on Government Officials Generally, Not Adversarial Government Officials Specifically}

The third counter-argument asserts that the danger confrontation protects against stems from the government in general, and not just the adversarial relationship between a criminal defendant and the police and prosecutors. Specifically, some courts reason that the entire government operates to convict; thus any statement produced by a government official poses the danger that the

\begin{itemize}
\item \textsuperscript{230} See Paul C. Giannelli, \textit{Admissibility of Lab Reports: The Right of Confrontation Post-Crawford}, CRIM. JUST., Fall 2004, at 28 (noting that medical examiners perform autopsies for "nonadvocacy reasons" and "[t]hey are charged by law with the job of producing public documents relating to deaths").
\item \textsuperscript{231} See \textit{NAT'L CTR. FOR HEALTH STATISTICS}, \textit{supra} note 196.
\item \textsuperscript{233} See \textit{id}.
\end{itemize}
TOWARD A DEFINITION OF "TESTIMONIAL"

official may alter the truth in order to support a conviction. This counter-argument points to language in Crawford stating, "[t]he Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." The argument necessitates interpreting this statement to mean that no government official is neutral. To argue that no justification exists for distinguishing investigative and prosecutorial officials from any other government official, however, reads more into the Crawford language than either the context of the statement or the entire opinion can justify.

First, the Court made this statement to explain why the Washington Supreme Court erred when it held that Sylvia Crawford's statements to police officers were reliable under the old Roberts test because she made the statements to "neutral" police officers. The Court's reference to "neutral" government officials mocks the notion that a government official, and in particular a police officer, is neutral simply because he is a government official. Indeed, the statement does not assert that a government official is never neutral, but rather attacks the idea that a government official is inherently neutral.

Second, as previously discussed in Part II, Crawford repeatedly distinguished between types of government officials. The Court, for example, compared the investigative and prosecutorial roles of the police and justices of the peace, and identified dangerous government officials as those preparing statements "prosecutorially." If the Court considered that any government official, regardless of his function, posed a danger requiring confrontation, the Court would not have bothered to identify government officials by their prosecutorial and investigative characteristics, but would have instead focused on the common factor of government office generally.

In a Petition for Writ of Certiorari on behalf of Donald L. Craig to the Supreme Court, which was denied, Professor Friedman attacked courts' focus on the independence of the medical examiner. He argued that independence from prosecution is irrelevant, as ordinary witnesses are independent, yet still subject to the Confrontation Clause, and the police are traditionally considered independent from the prosecutor. Furthermore, Friedman contended that a

234. See, e.g., State v. Caulfield, 722 N.W.2d 304 (Minn. 2006); Petition for Writ of Certiorari, supra note 137, at 14-15.
236. See Crawford, 541 U.S. at 66.
237. See id.
238. See id.
239. Id. at 51, 53, 56.
240. See id.
242. See id. at 14.
focus on independence would allow states to create "investigation bureaus" independent from the police and admit statements made by these "independent" investigative officers without confrontation. These arguments, however, misunderstand why a medical examiner's independence from the police and prosecutor's office is important for courts to acknowledge as, for example, the Second Circuit acknowledged in *Feliz*.

First, the Second Circuit did not hold that independence from the prosecutorial function obviates the requirement of confrontation. Indeed, an "independent" eyewitness becomes subject to confrontation when he or she interacts with an adversarial government official, and the same is true for an independent medical examiner. Independence merely indicates that a medical examiner is not an adversarial government official, and is thus not subject to confrontation without a finding that his statement is made in response to an interrogation by an adversarial official. Second, independence does not simply refer to the formal or technical independence of the medical examiner's office, but refers to the function and role of a medical examiner as independent from the function and role of the prosecutor. Because a formally independent police office would still employ police officers whose function and role is to collect evidence to enable prosecution, the police could not be characterized as independent from law enforcement in the same way as a medical examiner.

**D. Counter-Argument Four: The Definition of Testimonial Should Depend on Whether a Declarant Anticipates His Statement Will Be Used at Trial—The "Anticipation Factor"**

The main counter-argument offered by Friedman, other scholars and courts analyzing other government reports is that the danger confrontation protects against is not limited to the one posed by adversarial government officials. Rather, these scholars and courts argue that the danger arises from the declarant's anticipation that his statement will be used during trial. The focus on the declarant's expectation reflects a focus similar to the business

243. See id.
246. See, e.g., Cromer, 389 F.3d at 675; Caulfield, 722 N.W.2d at 310; Campbell, 719 N.W.2d at 376; Crager, 844 N.E.2d at 395-96; Petition for Writ of Certiorari, *supra* note 137, at 5-9; Holland, *supra* note 213, at 281, 285, 289; Mnookin, *supra* note 137, at 831-32; Crawford and Autopsy Reports, *supra* note 245.
record analysis that emphasizes that business records are not prepared in anticipation of litigation—a quality identified by courts that possibly conforms to *Crawford* as discussed in Part II.B.

Scholars and courts justify defining “testimonial” with regard to the declarant’s anticipation his statement will be used at trial because the Court included the factor in two of the three possible definitions of “testimonial” it listed in *Crawford.* The Court listed three definitions articulated previously in other sources, including the dissent by Justices Scalia and Thomas to *White v. Illinois* and the defendant’s brief in *Crawford.* One definition limited itself to common examples of *ex parte* examinations, and the other two included the quality of a declarant’s anticipation his statement would be used at trial. Specifically, a statement might be testimonial if the declarant could either “reasonably expect [it] to be used prosecutorially,” or reasonably believe it “would be available for use at a later trial.” As a result, some courts have adopted the anticipation factor as a characteristic of a testimonial statement.

While the Court listed possible definitions of “testimonial,” it did not conclusively adopt any of the definitions and specifically did not adopt the “anticipation factor” as a testimonial characteristic. The Court reaffirmed this decision in *Davis.* The anticipation factor ultimately fails as a definition of testimonial because it fails to reference a compelling danger mitigated by confrontation and thus does not connect the definition of testimonial with the purpose of the Confrontation Clause.

A declarant’s expectation that his statement will be used at trial does not pose a unique risk mitigated by confrontation. In theory, knowing a statement might be used at trial could motivate a declarant to alter the truth to help the police and prosecution convict the alleged perpetrator. But unless one assumes that people typically are biased toward conviction, the anticipation factor relies on a declarant having a pre-existing motive to alter her statement against the defendant. The anticipation factor itself fails to provide a reason the declarant would manipulate the truth, as the knowledge that a statement may be used at trial does not itself provide a reason. Rather, the anticipation factor describes a situation where a declarant *already possessing the motive to lie* might be more likely to make false statements. In contrast, the “adversarial factor” actually

248. Id.
249. Id.
250. Id.
251. *See,* e.g., *Cromer,* 389 F.3d at 675; *Caulfield,* 722 N.W.2d at 311; *Campbell,* 719 N.W.2d at 376; *Crager,* 844 N.E.2d at 395-96.
252. *See Crawford,* 541 U.S. at 51-52. “Anticipation factor” will be used as shorthand for a definition of testimonial that relies on the declarant’s anticipation the statement will or might be used at trial.
encompasses the reason a statement may not be sincere or complete, and therefore describes the actual danger against which confrontation protects.254 Because the anticipation factor assumes the declarant has a motive to lie, without explaining why, any definition of testimonial dependent on the anticipation factor fails as overbroad.

To illustrate why the anticipation factor fails to provide a proper definition of testimonial, consider the example of Person A making a statement indicating the guilt of Person Z. What motivates Person A to make the statement? Person A might want revenge against Person Z, might dislike Person Z, or might believe Person Z is a bad person. If any of these motivations affect the truthfulness of a statement made by Person A to the police, the same motivations will affect Person A's sincerity when talking to friends or colleagues. In other words, if Person A would lie to the police about Person Z's guilt, then Person A is just as likely to tell the same lie to her colleagues, friends and casual acquaintances—statements the Court explicitly held were not testimonial in Crawford.255

In fact, it seems more likely Person A would repeat the lie to an acquaintance rather than the police, as telling a lie to a friend results in fewer negative consequences for both Person A and Person Z. The motivation to lie, which constitutes the danger underlying the anticipation factor, is the general danger of insincerity existing in every statement made by a declarant and guarded against by hearsay law.256 Hearsay law provides procedural safeguards to protect against the danger of insincerity present in every statement offered for the truth of the matter asserted.257 In contrast, the protection of the Confrontation Clause does not extend to every statement offered for the truth of the matter asserted.258 If this were not the case, every statement would necessitate confrontation, hearsay law would be superfluous, and articulating a definition of "testimonial" would be irrelevant.

Another problem with defining dangerous statements requiring confrontation in terms of a declarant's anticipation his statement will be used at trial is deciding what level of anticipation justifies the constitutional right to confrontation. Courts have considered various degrees of anticipation to be sufficient under this analysis. For example, courts finding autopsy reports and lab reports non-testimonial describe the necessary degree of anticipation a declarant would need to have to provide "testimony" as "sole purpose,"

254. "Adversarial factor" refers to a definition of testimonial based on the involvement of adversarial government officials, the definition of testimonial advocated by this Comment.
255. See Crawford, 541 U.S. at 50.
256. See ALLEN, supra note 3, at 416-17.
257. Id.
258. See Crawford, 541 U.S. at 51 (noting "not all hearsay implicates the Sixth Amendment's core concerns" as an off-hand, overheard remark "might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted").
"express purpose," or not merely knowing use at trial is probable or possible, but exclusively preparing the report for trial.\textsuperscript{259} In contrast, courts finding autopsy and lab reports testimonial articulate the degree of anticipation as "intended to be used in a criminal prosecution," "prepared for litigation," "acting, to a substantial degree, in order to produce a statement for trial," or that a "reasonable person could conclude that the report would later be available for use at trial."\textsuperscript{260} Describing the degree of anticipation as "express" or "primary purpose" changes the characterization as "testimonial or not testimonial" in comparison with a test describing the degree of anticipation as a "reasonable expectation" a statement might be used at trial, because the former seems to require a more central or stringent form of anticipation than the second, which would render statements “testimonial” under a lower bar. Autopsy reports exemplify the effect of differing degrees of anticipation on the testimonial outcome, as they would qualify as testimonial under a definition merely requiring a “reasonable expectation” that use at trial is possible, but would not qualify as testimonial under a definition requiring use at trial as the “primary” or “sole purpose”\textsuperscript{261} for the reasons discussed in Parts III and IV. Articulating the purpose of the Confrontation Clause as protecting against any statement made by a declarant who reasonably expects his statement might be used at trial likely would qualify autopsy reports as testimonial. Although medical examiners do not perform autopsies in order to investigate or prosecute perpetrators, they certainly know that an autopsy report on a homicide victim might be used at trial to prove cause and time of death. But knowing their report might be used in this way does not mean medical examiners perform autopsies and write reports detailing their findings because of this possible outcome, and it does not alter the primary function of an autopsy report.

In contrast, autopsy reports do not qualify as testimonial under tests requiring a higher degree of expectation, such as "express purpose," "sole purpose," or "substantially prepared for litigation." As previously discussed in Parts III.B and IV.A, investigating and documenting the death for the public health is the primary purpose of the autopsy and the subsequent report, not investigating homicide. To further illustrate this point, consider the fact that the connection between a medical examiner and trial would not satisfy the “but

\textsuperscript{259} Rollins v. State, 897 A.2d 821, 830 (Md. 2006) (quoting State v. Snowden, 867 A.2d 314 (Md. 2005)), cert. denied, 127 S. Ct. 392 (2006); People v. Durio, 794 N.Y.S.2d 863, 872 (N.Y. Sup. Ct. 2005) (quoting People v. Foster, 27 N.Y.2d 47, 52 (N.Y. 1970)); State v. Forte, 629 S.E.2d 137, 143 (N.C. 2006) (“Although we acknowledge that the reports were prepared with the understanding that eventual use in court was possible or even probable, they were not prepared exclusively for trial . . . .”)

\textsuperscript{260} See State v. Caulfield, 722 N.W.2d 304, 309 (Minn. 2006) (holding that the critical factor is whether the statement was prepared for litigation, and quoting the court’s earlier holding in State v. Scacchetti, 711 N.W.2d 508, 513 (Minn. 2006)); State v. Crager, 844 N.E.2d 390, 396 (Ohio Ct. App. 2005); State v. Miller, 144 P.3d 1052, 1058 (Or. Ct. App. 2006).

for” legal test for causation. But for the use of the autopsy report at trial, would the medical examiner conduct the autopsy and write the autopsy report? The short answer is “Yes.” Medical examiners write reports for every complete autopsy they perform, and they conduct autopsies for deaths that are not homicides.262 If a medical examiner writes a report when there is no chance the report will be used at trial, then use at trial cannot “cause” the report and cannot accurately be characterized as the “primary,” “express,” or “sole purpose.” It would not even qualify under the somewhat lesser level of “substantially prepared for litigation,” as that standard still requires the report be prepared for litigation.

Professor Friedman asserts that intent to be used at trial is sufficient to qualify a statement as testimonial.263 In his petition for certiorari, Friedman repeatedly argues that an autopsy report is testimonial because, at some point during the autopsy, before writing the report, the medical examiner knows that the victim died from homicide.264 The medical examiner necessarily knows an investigation will result, and thus also knows that any written report will be used during the investigation and in any subsequent trial. Friedman asserts that the medical examiner intends the report to be used at trial as soon as he knows the victim died from homicide.265 While the medical examiner knows the prosecution will use the report if there is a trial, he writes reports for every autopsy he performs according to a standardized procedure, whether or not the victim died from homicide, and whether or not it will be used at trial. That a person takes action knowing it might produce a given result does not necessarily mean, as Professor Friedman argues, he intends the result, particularly if he will act even if he knows that result will not occur. Purpose, rather than knowledge, best indicates intent, and the purpose of the medical examiner is to serve the public health and keep public records, not to prepare records for use at trial.

The fact that a declarant anticipates a statement might be used at trial should not be the basis for a definition of “testimonial;” it fails to describe a danger justifying a constitutional right to confrontation and it admits statements courts believe are not testimonial—autopsy reports. Requiring a higher degree of anticipation to define “testimonial” can describe situations where the statement is produced by an investigative and prosecutorial official and lead to a determination that autopsy reports are not testimonial. But such a basis for a definition of testimonial ultimately fails as it does not define an appropriate danger against which confrontation effectively protects. A definition of testimonial focused on adversarial government officials not only properly determines the status of autopsy reports, but properly identifies the danger

262. See, e.g., L.A. COUNTY DEP’T OF CORONER, supra note 201, at 24.
263. See Petition for Writ of Certiorari, supra note 137, at 5-9.
264. See id. at 14.
265. See id.
TOWARD A DEFINITION OF "TESTIMONIAL" against which confrontation is designed to protect as discussed in Part III.

Logically, for a statement to qualify as produced for the primary, sole or exclusive purpose of trial, the statement must be produced by a government official responsible for investigating and prosecuting the perpetrator. Courts focusing on this definition are inherently focusing on the dangers that arise from the adversarial pressures affecting government officials responsible for prosecuting and investigating crime. Finding that a statement is testimonial because of those dangers more directly and accurately identifies the type of statements which should not be admitted at trial without confrontation. Courts should thus define "testimonial" based on the source of the danger, namely adversarial government officials responsible for the investigation and prosecution of criminal defendants.

CONCLUSION

The Framers of the Constitution required confrontation in order to protect against the danger posed by adversarial government officials eliciting statements from witnesses in private—the danger of insincerity and the incomplete story. These dangers exist in the historical cases that lead to the drafting of the Confrontation Clause, are identified by the Court in Crawford, and are consistent with the examples of testimonial and non-testimonial statements described in Crawford and Davis.\(^{266}\) The focus on adversarial government officials provides a principled and logical basis for a definition of testimonial, which future courts should rely upon in finding that autopsy reports are non-testimonial.

In Crawford, the Court held that the Constitution requires confrontation of any testimonial statement, unless the declarant is unavailable and the defendant had a previous opportunity to cross-examine the declarant.\(^{267}\) A statement's testimonial nature became the key to determining whether a statement should be admitted at trial, but the Court in Crawford did not adopt a general definition of "testimonial." Since Crawford, courts have struggled to find a definition, and have adopted various articulations in an attempt to capture the essence of what makes a statement dangerous enough to require confrontation.

Autopsy reports are one type of statement that garners consensus. Courts agree that autopsy reports do not pose the danger against which confrontation protects and are therefore not testimonial. The opinions by these courts contain a variety of justifications, many of which fail to conform to Crawford and fail to comprehend the purpose of the Confrontation Clause. These courts, however, implicitly and sometimes explicitly identify the factor that makes a statement dangerous enough to require confrontation, which is the involvement

\(^{267}\) Crawford, 541 U.S. at 59, 68.
of adversarial government officials responsible for the prosecution and investigation of a defendant. The danger posed by the adversarial relationship is the danger against which confrontation protects; identifying this adversarial context as the primary danger conforms to the holdings of *Crawford* and *Davis*. It is consistent with the historical background of the Confrontation Clause, and it identifies statements posing a specific danger that confrontation can mitigate. While other justifications courts have used must be abandoned, the ultimate finding should remain: autopsy reports are not testimonial.