In *Ice*, the Supreme Court chose to reinforce the historical practice rationale, a rationale that, read literally, scholars have suggested, could logically mean the end not only of prohibitions on jury nullification,[95] but also of plea bargaining and other basic tenets of modern sentencing law.[96] Strict adherence to *Ice*'s bright-line rule that the jury's traditional domain may not be encroached upon — that a "decision that . . . traditionally belonged to the jury"[97] must belong to the jury today — would force the Court either to change radically its Sixth Amendment jurisprudence or to explicate difficult distinctions between the *Apprendi* line's core concern and the core concerns of other jury-right considerations. Although it may be grounded in the *Apprendi* line's reasoning, the *Ice* Court's rule, based principally on the jury's Founding-era rights and practices, only perpetuates the incoherence drowning *Apprendi* because it does not explain how or when to apply originalism. In Sixth Amendment law, where often "the historical soil is absent or a morass,"[98] a bright-line originalist approach may be rare, and even when the original understanding is reasonably clear, the Court may not agree on its implications. In the sentencing law context, *Ice*'s originalism may have sullied the already muddied waters.

6. Sixth Amendment — Witness Confrontation — Testimony of Crime Lab Experts. — In its 2004 decision in *Crawford v. Washington*,[1] the Supreme Court refused to determine whether laboratory test results are testimonial evidence, which is subject to the requirements of the Confrontation Clause of the Sixth Amendment. Since this decision, confusion has plagued trial and appellate courts attempting to distinguish testimonial from nontestimonial evidence, as illustrated by the multitude of rationales used to justify admitting or excluding such evidence.[2] Last Term, in *Melendez-Diaz v. Massachusetts*,[3] the Court held that certificates of analysis (which state the results of state laboratory tests) are testimonial evidence that may not be admitted without

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[95] *See, e.g.*, Raoul Berger, *Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser*, 1990 BYU L. REV. 873, 889–90; Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 106–07 (2006); Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 434 (1998) (noting a "renaissance of academic support for jury nullification," including originalism-based argumentation).

[96] *See, e.g.*, Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 446 n.351 (2009) ("I believe that a fully recognized collective jury trial right would mandate major procedural changes in guilty pleas and plea bargaining."); Bibas, *supra* note 67, at 202 ("A radical originalist might have outlawed plea bargaining . . . .").

[97] *Ice*, 129 S. Ct. at 719.

[98] Bibas, *supra* note 67, at 204.

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

[2] *See* United States v. Left Hand Bull, No. CR 05-30106(01)-CBK, 2009 WL 2030544 (D.S.D. July 13, 2009); People v. Milner, No. B206735, 2009 WL 2025944 (Cal. Ct. App. July 14, 2009).

[3] 129 S. Ct. 2527 (2009).

accompanying live testimony by the analyst who conducted the tests.[4] Despite the outcry of law enforcement and laboratory directors that the decision will make criminal prosecutions more difficult or will lead to acquittals merely because analysts are too busy to appear in court, *Melendez-Diaz* was correctly decided. While the decision may burden prosecutors and create an additional hurdle to conviction, the values underlying the Confrontation Clause and the need to prevent automatic acceptance of laboratory results demand that courts treat test reports as testimonial evidence. Juries' ill-advised deference to test results threatens to undermine not only the essential values underlying the jury system, but also defendants' ability to receive a fair trial.

In 2001, police officers arrested Luis Melendez-Diaz for suspected drug trafficking.[5] The officers observed Melendez-Diaz making "furtive movements" during the drive to the station and later found several small bags of cocaine hidden in the police cruiser. At trial, the prosecution entered these bags into evidence along with certificates of analysis stating the results of forensic testing.[6] The certificates, which had been sworn before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, reported the weight of the bags and stated that they had "been examined with the following results: [t]he substance was found to contain: Cocaine."[7] Despite the defendant's Confrontation Clause objection, the court admitted the certificates pursuant to state law as prima facie evidence of the composition, quality, and net weight of the substance analyzed.[8] Melendez-Diaz was convicted.[9]

Melendez-Diaz appealed to the Appeals Court of Massachusetts, claiming that he was entitled to required findings of not guilty, that the admission of the drug analysis certificates was inconsistent with *Crawford*, and that his trial counsel was ineffective because counsel failed to file a motion to suppress evidence.[10] The court affirmed the convictions.[11] It held that based on all the evidence, including the drug analysis certificates, there could be "no real question concerning the sufficiency of the Commonwealth's evidence,"[12] and it upheld the trial court's denial of Melendez-Diaz's motions for required findings of not

[4] *Id.* at 2542.
[5] *Id.* at 2530.
[6] *Id.* at 2530–31.
[7] *Id.* at 2531 (internal quotation mark omitted).
[8] *Id.* at 2530–31; *see* MASS. GEN. LAWS ch. 111, § 13 (2008).
[9] Commonwealth v. Melendez-Diaz, No. 05-P-1213, 2007 WL 2189152, at *1 (Mass. App. Ct. July 31, 2007).
[10] *Id.*
[11] *Id.*
[12] *Id.* at *3.

guilty.[13] In a footnote, it stated that "certificates of drug analysis [do] not deny a defendant the right of confrontation and [are], therefore, not subject to the holding in *Crawford v. Washington*."[14] The court mentioned *Crawford* nowhere else in its opinion. The court also rejected Melendez-Diaz's claim that his counsel had been ineffective because counsel failed to file a motion to suppress the retrieved drugs and failed to point out to the jury potential inaccuracies in the officers' descriptions of the suspect packages.[15] The Supreme Judicial Court of Massachusetts denied review.[16]

The Supreme Court reversed and remanded.[17] Writing for the Court, Justice Scalia[18] held that affidavits reporting the results of forensic analysis are testimonial evidence, and the affiants are therefore witnesses whom defendants can cross-examine under their Sixth Amendment right of confrontation. Justice Scalia focused on the *Crawford* assertion that affidavits are within the "core class of testimonial statements" covered by the Confrontation Clause.[19] He emphasized that the purpose of the affidavits was functionally identical to live, in-court testimony.[20] This classification means that, absent a showing that the analysts in question are unable to testify at trial and that the defendant has had the opportunity to cross-examine them, the defendant is entitled to confront the analysts at trial.[21] In so holding, the Court rejected three arguments. First, it rejected the contention that analysts were not accusatory witnesses,[22] because the analysts were clearly witnesses against the accused.[23] Second, it denied the contention that analysts were not direct eyewitnesses "of the sort whose *ex parte* testimony was most notoriously used at the trial of Sir Walter Raleigh,"[24] pointing out that "[i]f an affidavit submitted in response to a police officer's request to 'write down what happened' suffices to trigger the Sixth Amendment's protection . . . then the analysts' testimony should be subject to confrontation as well."[25] Justice Scalia stated that the dissent's argument that analyst certifications fell

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[13] *Id.* at *4.

[14] *Id.* at *4 n.3.

[15] *Id.* at *4.

[16] Commonwealth v. Melendez-Diaz, 874 N.E.2d 407 (Mass. 2007) (unpublished table decision).

[17] *Melendez-Diaz*, 129 S. Ct. at 2542.

[18] Justice Scalia was joined by Justices Stevens, Souter, Thomas, and Ginsburg.

[19] *Melendez-Diaz*, 129 S. Ct. at 2532 (citing Crawford v. Washington, 541 U.S. 36, 51–52 (2004)).

[20] *Id.*

[21] *Id.*

[22] *Id.* at 2533.

[23] *Id.* at 2533–34.

[24] *Id.* at 2534.

[25] *Id.* at 2535 (citing Davis v. Washington, 547 U.S. 813, 819–20 (2006)).

under the classic copyist exception would prove too much: "the dissent's novel exception from coverage of the Confrontation Clause would exempt all expert witnesses — hardly an 'unconventional' class of witnesses."[26]

The Court pointedly refuted the third contention that scientific testing has guarantees of trustworthiness that make its results admissible without accompanying live testimony.[27] Justice Scalia noted that, "[c]ontrary to respondent's and the dissent's suggestion, there is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology."[28] Justice Scalia reiterated the Court's statement in *Crawford* that, while the Confrontation Clause's "ultimate goal is to ensure reliability of evidence . . . it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[29] The Court flatly rejected the idea that the requirements of the Confrontation Clause should be relaxed for prosecutorial convenience, stating that "[w]e do not have license to suspend the Confrontation Clause when a preferable trial strategy is available."[30] Justice Scalia paid considerable attention to the concern that "neutral scientific testing" may not be as neutral or reliable as many believe — "[f]orensic evidence is not uniquely immune from the risk of manipulation," especially since in many cases the laboratory administrator reports to the head of the law enforcement agency in question, as a National Academy of Sciences study pointed out.[31]

Justice Scalia made a number of other critiques of the dissent. First, he emphasized that confrontation is useful "to weed out not only the fraudulent analyst, but the incompetent one as well."[32] Second, because the affidavits were prepared specifically for trial, they also did not qualify as business or official records excepted from the hearsay rule.[33] Finally, Justice Scalia pointed out that, while the rule would place a burden on the prosecution, he expected defense counsel in many cases to avoid insisting on live testimony, the effect of which "w[ould] be merely to highlight rather than cast doubt upon the forensic analysis."[34]

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[26] *Id.*
[27] *Id.* at 2536.
[28] *Id.* at 2538.
[29] *Id.* at 2536.
[30] *Id.*
[31] *Id.* (citing NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009)).
[32] *Id.* at 2537.
[33] *Id.* at 2538.
[34] *Id.* at 2542.

Justice Thomas concurred in order to make clear that he considered the holding limited to the types of formalized testimonial materials described in his *White v. Illinois*[35] concurrence.[36] Relying on stare decisis and citing a long line of cases on the requirement of confrontation for extrajudicial statements in "formalized testimonial materials," Justice Thomas found that the analyses at issue were within the core class of testimonial statements governed by the Confrontation Clause.[37]

Justice Kennedy, joined by Chief Justice Roberts and Justices Breyer and Alito, dissented.[38] He was troubled by the majority's position that there was no real distinction between the scientific tests performed by laboratory analysts and conventional witnesses who fall under the mandates of the Confrontation Clause.[39] He was especially concerned about the ruling's potential to disrupt criminal procedures that already have ample protections against the misuse of scientific evidence.[40] The dissent also argued that the majority did not specify which participants in the scientific testing process the Confrontation Clause requires to appear at trial.[41] In the dissent's view, the majority's failure to draw a clear boundary delimiting the confrontation right "threatens to disrupt if not end many prosecutions where guilt is clear but a newly found formalism now holds sway."[42] Justice Kennedy pointed out the inefficiencies and practical impossibilities that would result from the Court's holding[43] and disputed the notion that forcing analysts to testify would reduce the risk of error or fraud.[44] He also posited that an analyst would have to wait "for days in a hallway outside the courtroom before being called to offer testimony that [would] consist of little more than a rote recital of the written report."[45]

The dissent also rejected the contention that laboratory test results qualify as witnesses against the defendant as that concept was understood at the Founding, arguing that test results involve neither recalling events observed in the past nor responding to questions under in-

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[35] 502 U.S. 346 (1992).

[36] *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring) (quoting *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment)).

[37] *Id.*

[38] *Id.* (Kennedy, J., dissenting).

[39] *Id.*

[40] *Id.* at 2544.

[41] *Id.* at 2544–46.

[42] *Id.* at 2544–45; *see also id.* at 2549–50.

[43] *Id.* at 2549–50.

[44] *Id.* at 2548 ("It is not plausible that a laboratory analyst will retract his or her prior conclusion upon catching sight of the defendant the result condemns. . . . [A]n analyst performs hundreds if not thousands of tests each year and will not remember a particular test or the link it had to the defendant.").

[45] *Id.* at 2549.

terrogation.[46] Justice Kennedy argued that the more apt Founding-era parallel would be to copyist affidavits, which certified copies of documents as correct and "were accepted without hesitation by American courts."[47] He concluded by attacking Justice Scalia's proposition that defense lawyers would choose not to exercise a newfound "*Melendez-Diaz* objection" to keep incriminating evidence out of court.[48]

The Court's holding in *Melendez-Diaz* is correct not only on constitutional grounds, but also for pragmatic reasons. While the dissent argued that the ruling will debilitate the criminal justice system by requiring analysts to testify regarding all of their tests,[49] its objections are outweighed by two countervailing arguments against overreliance on such reports. First, the strong tendency of jurors to accept scientific evidence as determinative despite its fallibility militates in favor of providing the defense an opportunity to point out the many sources of error in scientific testing and to level a playing field too easily tilted by the supposedly clear answers provided by science. Second, laboratory analysts are no more reliable than other witnesses — or even than other expert witnesses — and are often accountable to the state, with their reports created at the request of the prosecution, making overreliance on them all the worse.

Had the Court gone further in emphasizing the danger of overreliance on scientific evidence and its power to erode Confrontation Clause protections, it could have prevented lower courts' troubling recent attempts to limit the reach of the *Melendez-Diaz* right to confrontation. The District of South Dakota held in July 2009 that *Melendez-Diaz* and *Crawford* concern only the admission of testimonial evidence at trial, allowing the use of such evidence without confrontation in a supervised release revocation hearing.[50] Such a limited reading exalts the form of *Melendez-Diaz* over its skepticism toward assuming the veracity of such evidence in proceedings that may result in a deprivation of liberty. Other courts have attempted to interpret *Melendez-Diaz* by arguing that there is no Confrontation Clause violation if the underlying report is not admitted but merely relied upon by a prosecu-

[46] *Id.* at 2551.

[47] *Id.* at 2553.

[48] *Id.* at 2557.

[49] *Cf., e.g.*, Adam Liptak, *Justices Rule Crime Analysts Must Testify on Lab Results*, N.Y. TIMES, June 26, 2009, at A1; Harry Sandick & Justin Mendelsohn, *Divided Supreme Court Extends Reach of Confrontation Clause*, N.Y.L.J., July 20, 2009, at 2 (noting that the invalidation of hearsay exceptions "would complicate the trial of white-collar cases in which the government may be required to call records custodians from far-flung locations" and that, after *Melendez-Diaz*, "defense attorneys should be alert to efforts by prosecutors to offer evidence without live testimony").

[50] United States v. Left Hand Bull, No. CR 05-30106(01)-CBK, 2009 WL 2030544, at *1 (D.S.D. July 13, 2009).

tion witness.[51] Such efforts are perhaps even more detrimental than would be submitting the reports themselves, and they fail to solve the underlying problem of overreliance on laboratory evidence as the definitive truth. These distinctions illustrate trial courts' reluctance to require the testimony called for in *Melendez-Diaz*; they are also a response to the dissent's fear that the Court's holding would prove impossible to implement.

Before *Melendez-Diaz*, the Fourth, Seventh, and Eleventh Circuits held lab reports to be nontestimonial statements of machines or computers.[52] In Judge Easterbrook's view, while raw data produced by scientific instruments is not testimonial, the interpretation of those data may be testimonial — an important distinction.[53] However, it has been pointed out that "[t]he underlying chemical composition of cocaine, which the Seventh Circuit considers to be nontestimonial, is inseparable from the fact that the underlying chemical composition of cocaine is in fact simultaneously cocaine itself, which the Seventh Circuit considers to be testimonial."[54] Because "machine-generated laboratory reports are produced jointly by machines and the persons operating the machines," the reports must be considered statements of those persons.[55] Drug analyses are especially problematic because they "reach conclusions about the tests; the significance of the results of the drug tests are found within the four corners of the certificate."[56] Saliva and fingerprints too do not "reveal anything . . . until an expert uses sophisticated techniques to interpret them,"[57] so it is disingenuous to argue that forensic scientific evidence is not subject to the same dangers as any other type of accusatory statement from a government witness.

At the heart of the Court's Confrontation Clause jurisprudence, particularly in the context of scientific evidence, is a concern for maintaining the jury as the ultimate arbiter of guilt.[58] Despite jurors' crucial role as factfinders, however, they increasingly assume that forensic laboratory results contain some kind of absolute truth, as evidenced by

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[51] People v. Milner, No. B206735, 2009 WL 2025944, at *9 (Cal. Ct. App. July 14, 2009).

[52] Joe Bourne, Note, *Prosecutorial Use of Forensic Science at Trial: When Is a Lab Report Testimonial?*, 93 MINN. L. REV. 1058, 1079 (2009).

[53] *Id.* at 1081.

[54] *Id.*

[55] *Id.* at 1083.

[56] Josephine Ross, *What's Reliability Got To Do with the Confrontation Clause After* Crawford*?*, 14 WIDENER L. REV. 383, 419 (2009).

[57] Kenworthey Bilz, *Self-Incrimination Doctrine Is Dead; Long Live Self-Incrimination Doctrine: Confessions, Scientific Evidence, and the Anxieties of the Liberal State*, 30 CARDOZO L. REV. 807, 858 (2008).

[58] *Cf. id.* at 847–48 (describing criminal trial procedure as "a formal ritual of democracy," *id.* at 848 (emphasis omitted)).

what many call the "*CSI* effect."[59] Professor Tom Tyler, in analyzing the effect and its impact on trials, notes that television portrayals of science as the ultimate evidence may provide a mechanism for easier convictions: "People are already motivated to find ways to legitimate or justify their desire to convict. Science provides one way to do so, causing people to see within scientific evidence the level of certainty that makes them comfortable with a guilty verdict."[60] Yet while scientific evidence is increasingly reliable and relied upon, its error rate is still governed by laboratory and other human error.[61]

The more jurors are exposed to representations in popular culture that forensic reports are determinative evidence, the more they are likely to cede their crucial role as factfinders to machines.[62] This dynamic was borne out in a study conducted by Professor Kimberlianne Podlas, in which 254 jury-eligible adults responded to scenarios in a manner indicating that the *CSI* effect did not harm and possibly helped the prosecution.[63] Professor Podlas's data analysis suggests that, "if there is any effect of *CSI*, it is to exalt the infallibility of forensic evidence, favor the prosecution, or pre-dispose jurors towards findings of guilt."[64] According to another scholar, the concern this study raises is that "highly accurate, sophisticated and impressive scientific evidence doesn't aid juries so much as lead them around by the nose."[65] Professor Podlas notes that while "[o]n its own, scientific evidence can be rather seductive[, i]n conjunction with *CSI*, it becomes insurmountable."[66]

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[59] Some believe that the *CSI* effect could just as aptly be called the "Innocence Project" effect. *See id.* at 837. In either case, the point is the same — that jurors and the public in general are easily swayed by the seeming infallibility of forensic evidence and laboratory analysis. There are actually three tendencies to which the "*CSI* effect" can refer: first, jurors' unreasonable expectations for the evidence it is possible to gather, making convictions more difficult to obtain; second, the raising of scientific evidence to the level of infallibility, making it nearly impenetrable; and finally, an increase in the general population's interest in forensics and science. Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 433 (2006). This comment will use the second definition.

[60] Tom R. Tyler, *Viewing* CSI *and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1071 (2006) (footnote omitted). Professor Tyler also notes a study in which 19% of Americans expressed at least "a great deal of confidence" in courts and the legal system, but 40% had the same level of confidence in the scientific community. *Id.* at 1071–72. In his view, then, "[t]he linkage of evidence to science . . . enhances verdict legitimacy." *Id.* at 1072.

[61] Bilz, *supra* note 57, at 816.

[62] *See* Tyler, *supra* note 60, at 1084 ("People generally overvalue scientific evidence and engage in an active process of distortion to create justifications for decisions that they want to make. By providing increased legitimacy for scientific evidence, *CSI* may encourage people to make scientific evidence the focus of their justification efforts.").

[63] Podlas, *supra* note 59, at 461–62.

[64] *Id.* at 465.

[65] Bilz, *supra* note 57, at 865.

[66] Podlas, *supra* note 59, at 437.

The tendency of forensic evidence to convince a jury of guilt too easily is dangerous. It is well established that "jurors overweigh the probative value of science, putting greater weight on such evidence than its statistical value warrants."[67] This effect is damaging to defendants given the tendency of television-viewing jurors to presume guilt from the fact of prosecution: "a *CSI*-viewing juror may fill in gaps in the prosecution [sic] case with television-cultivated beliefs that: (a) arrests are based on forensics; (b) forensics proves guilt; and therefore, (c) anyone arrested (and on trial) is guilty."[68] In *Crawford*, Justice Scalia wrote, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[69] Although courts and jurors unblinkingly see forensic data as the truth, many forensic techniques have not been proven by the larger scientific community, crime labs lack accreditation requirements, and forensic experts are subject to no professional standards.[70]

Some courts see a distinction between "mechanical" testing and more complex testing, suggesting that "a defendant cannot effectively cross-examine statements in the former 'mechanical' category even when the technician is present, whereas the complex, conclusion-heavy tests in the later [sic] category often require explanation from the person responsible for the procedure."[71] The problem with this argument is that the defendant has an interest in cross-examining a technician not just on the conduct of a particular test but on the methodology in general.[72] While jurors expect science to lead to a single correct answer, "in real life, forensic conclusions are only as good as the technicians who retrieve the evidence, test it, and draw conclusions from it."[73] Had Justice Scalia pointed out, as Professor Podlas does, that DNA can be interpreted differently by different technicians,[74] the dissent's view that such evidence is highly reliable would have lost much of its force.

The second pragmatic argument against overreliance on scientific evidence that the *Melendez-Diaz* majority should have pointed out is

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[67] Tyler, *supra* note 60, at 1063; *see also id.* at 1068–69; Joseph Sanders, *The Merits of the Paternalistic Justification for Restrictions on the Admissibility of Expert Evidence*, 33 SETON HALL L. REV. 881, 901 (2003).

[68] Kimberlianne Podlas, *Impact of Television on Cross-Examination and Juror "Truth,"* 14 WIDENER L. REV. 483, 509 (2009).

[69] Crawford v. Washington, 541 U.S. 36, 62 (2004).

[70] Podlas, *supra* note 59, at 439–40.

[71] Thomas F. Burke III, *The Test Results Said What? The Post-*Crawford *Admissibility of Hearsay Forensic Evidence*, 53 S.D. L. REV. 1, 16 (2008).

[72] *Id.*

[73] Podlas, *supra* note 59, at 438.

[74] *Id.*

that "[n]umerous forensic technicians, crime scene investigators, and crime-reconstruction experts have lied under oath, faked their credentials, and fabricated evidence."[75] Forensic science is guided by few standards; Congress has now asked the National Academy of Sciences to determine ways to improve the quality of forensic science.[76] The federal government has also required states to create an entity and process for independent investigations of alleged misconduct, but that legislation has not been enforced and many states have failed to comply.[77] While "cross-examination may not be the best vehicle for bringing out the deficits in the report and raising issues of reasonable doubt,"[78] and may even give the scientific testimony greater power,[79] the reminder to juries that humans, with all of their fallibility and ability to err,[80] were involved in running scientific tests and reaching conclusions from results should not be undervalued.

Given these concerns with juror overreliance on science, the Court's decision in *Melendez-Diaz* is an essential return to the concept that the Confrontation Clause protects the reliability of the evidence on which jurors rest their decisions. As Professor Josephine Ross pointed out before the decision, the Court's prior willingness "to jettison reliability as a concern of the Confrontation Clause appears at odds with [the] long history linking the Clause to reliability."[81] The perceived reliability of drug certificates, in fact, strengthens the Court's holding that admitting them without question is a core abuse and is similar to the abuses that were historically the focus of the clause.[82] Courts rely on cross-examination as a way to test evidence if

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[75] *Id.* at 441; *see, e.g.*, Moldowan v. City of Warren, 573 F.3d 309, 322–23 (6th Cir. 2009); Pierce v. Gilchrist, 359 F.3d 1279, 1283–84 (10th Cir. 2004); *see also* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 5 (2009) (noting scandals involving faulty work at forensic laboratories). Professor Josephine Ross points out that other discussions of such abuses, like those of Pamela Metzger, do not explain "whether cross-examination helped uncover the falsifications, or whether confrontation rights would have made a difference in any of the examples she gives." Ross, *supra* note 56, at 420. Nonetheless, the focus should be on the power of confrontation rights to reduce juries' reliance on such reports, whether or not they are the products of abuse or misdeeds.

[76] Garrett & Neufeld, *supra* note 75, at 6.

[77] *Id.* at 94. In addition, "[n]o federal legislation regulates the quality of non-DNA forensic disciplines or the content of reports or testimony, which is significant because the overwhelming majority of crime lab work involves techniques other than DNA analysis." *Id.* at 94–95.

[78] Ross, *supra* note 56, at 423; *see also* Garrett & Neufeld, *supra* note 75, at 97 (suggesting that "the adversary system cannot be depended upon as an adequate safeguard").

[79] *See* Podlas, *supra* note 68, at 510.

[80] *E.g.*, Garrett & Neufeld, *supra* note 75, at 97 ("Though the technology has changed over time, the sources of human error, misinterpretation, and misconduct have not.").

[81] Ross, *supra* note 56, at 411.

[82] *Id.* at 418.

an expert overstates it or discusses it in a misleading way.[83] But judges often deferentially admit expert testimony, leaving it to the jury to assess[84] — making cross-examination essential to defense efforts to prevent improper reliance. Professor Podlas notes that "cross-examination can reveal the biases, distortions, and 'falsehoods of mendacious witnesses,' as well as mistakes and failures of perception" and often serves as "the lynchpin of the case."[85] It is thus a powerful tool to counter juries' tendency to believe scientific data that is presented in the manner that television has led them to expect.

A number of courts and prosecutors have noted the degree to which the increase in reliance on forensic evidence and juries' familiarity with it have changed trial practice. In *Delaware v. Cooke*[86] the prosecution "contend[ed] that it want[ed] to demonstrate to the jury that it conducted a thorough investigation," and "assert[ed that] being able to produce this evidence before a jury addresse[d] concerns the State ha[d] that jurors have or may have . . . heightened expectations of what the prosecution must do or show in order to meet its burden of proof."[87] In a similar vein, the Fifth Circuit recently upheld a trial court's admission of crime scene photographs showing the victim's decomposing body over the defendant's objection that they were more prejudicial than probative because "[t]hey helped explain why little physical evidence was found," a significant concern because, "[i]n this age of the supposed '*CSI* effect,' explaining to the jury why the Government had little in the way of physical or scientific evidence was arguably critical to the Government's case."[88] *Melendez-Diaz* ought to have recognized more explicitly that the import of forensic testing cuts both ways: scientific evidence can both exonerate and condemn, and fairness requires that it be subject to live testimony to ensure that juries give it the proper weight — and no more.

B. Due Process

1. Peremptory Challenges — Harmless Error Doctrine. — Provided since at least the sixteenth century[1] and historically lauded as showing mercy to criminal defendants,[2] peremptory challenges are

[83] Garrett & Neufeld, *supra* note 75, at 33; *see also* Erica Beecher-Monas, *Reality Bites: The Illusion of Science in Bite-mark Evidence*, 30 CARDOZO L. REV. 1369, 1390 (2009) (noting judicial reliance "on the adversary system to challenge suspect expert testimony").

[84] Garrett & Neufeld, *supra* note 75, at 90.

[85] Podlas, *supra* note 68, at 485 (footnotes omitted).

[86] 914 A.2d 1078 (Del. Super. Ct. 2007).

[87] *Id.* at 1082.

[88] United States v. Fields, 483 F.3d 313, 355 (5th Cir. 2007).

[1] *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 509 (4th ed. 2007).

[2] *See* Lewis v. United States, 146 U.S. 370, 376 (1892) (reciting Blackstone's views).