

9. *Sixth Amendment — Witness Confrontation.* — In *Crawford v. Washington*,¹ the Supreme Court revolutionized Sixth Amendment jurisprudence by extending the application of the Confrontation Clause² to all “testimonial” statements, regardless of whether they were accompanied by indicia of reliability.³ However, the Court’s conspicuous failure to define the word “testimonial” left lower courts adrift on the precise application of the clause.⁴ Last Term, in the consolidated cases *Davis v. Washington* and *Hammon v. Indiana*,⁵ the Supreme Court clarified the boundaries of its nascent rule by holding that the Confrontation Clause required the exclusion of statements made in interrogations whose purpose was to collect evidence for future criminal prosecutions,⁶ but not of statements made in interrogations whose purpose was to address ongoing emergencies.⁷ The Court’s ruling, while pragmatically defensible, creates the risk of police abuse and manipulation, and the Court must thus carefully monitor police and lower courts and tailor its future Confrontation Clause decisions to minimize those risks. Such an approach would be both pragmatically effective and consistent with the Court’s originalist vision in *Crawford*.

On February 1, 2001, Michelle McCottry got into a fight with her ex-boyfriend, Adrian Davis.⁸ She contacted a 911 operator and described how Davis was “jumpin’ on me again” and “usin’ his fists.”⁹ After Davis ran out of McCottry’s house, the operator gathered further information about Davis and then sent the police.¹⁰ At trial, with McCottry not testifying, the State introduced the recording of the 911 call over Davis’s objection, and Davis was convicted of violating a restraining order.¹¹ The Court of Appeals of Washington affirmed the conviction.¹² The Supreme Court of Washington affirmed as well,¹³ concluding that the portion of the 911 conversation in which McCottry

¹ 124 S. Ct. 1354 (2004).

² “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” U.S. CONST. amend. VI.

³ See *Crawford*, 124 S. Ct. at 1374 (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution requires: confrontation.”).

⁴ See *id.* at 1374 & n.10 (declining “to spell out a comprehensive definition of ‘testimonial’” and “acknowledg[ing] . . . that [the] refusal to articulate a comprehensive definition . . . will cause interim uncertainty”).

⁵ 126 S. Ct. 2266 (2006).

⁶ See *id.* at 2278.

⁷ See *id.* at 2276–77.

⁸ *Id.* at 2270–71.

⁹ *Id.* at 2271.

¹⁰ *Id.*

¹¹ *Id.*

¹² *State v. Davis*, 64 P.3d 661, 663 (Wash. Ct. App. 2003). The court also held that McCottry’s statements were excited utterances and were thus admissible hearsay. See *id.* at 664–65.

¹³ *State v. Davis*, 111 P.3d 844, 851 (Wash. 2005).

identified Davis was nontestimonial under *Crawford*.¹⁴ Specifically, it held that 911 calls must be evaluated on a case-by-case basis, but that in this case, there was “no evidence McCottry sought to ‘bear witness’ in contemplation of legal proceedings.”¹⁵

On February 26, 2003, police responded to a reported domestic disturbance at the home of Hershel and Amy Hammon.¹⁶ Amy initially asserted that nothing had happened, but after an officer spoke with her privately, she told him that Hershel had been violent and she signed a battery affidavit.¹⁷ At Hershel’s trial for domestic battery and violating probation, Amy did not testify, but the State introduced Amy’s affidavit and the officer’s rendition of his conversation with Amy over Hershel’s objection.¹⁸ The trial court convicted Hershel,¹⁹ and the Court of Appeals of Indiana affirmed.²⁰ The Supreme Court of Indiana affirmed as well, holding that Amy’s statement was a non-testimonial excited utterance and that the admission of her affidavit, although testimonial, was harmless beyond a reasonable doubt.²¹ It concluded that whether a statement is testimonial depends on both the declarant’s and the interrogator’s intent that the statement be used at trial, and held that neither Amy nor the officer intended for her statements to be used at trial.²²

The Supreme Court affirmed Davis’s conviction and reversed Hammon’s. Writing for the Court, Justice Scalia²³ first restated the holding in *Crawford*: the Sixth Amendment bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”²⁴ He next stated a rule that had been

¹⁴ See *id.* at 850–51.

¹⁵ *Id.* at 851. The court also held that the admission of any testimonial statements in the call was harmless beyond a reasonable doubt. *Id.* A vigorous dissent argued that the court should have used an objective, rather than subjective, test for whether McCottry intended “to provide information to be used in [a] prosecution.” *Id.* at 852 (Sanders, J., dissenting).

¹⁶ *Davis*, 126 S. Ct. at 2272.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2273.

²⁰ *Hammon v. State*, 809 N.E.2d 945, 953 (Ind. Ct. App. 2004).

²¹ See *Hammon v. State*, 829 N.E.2d 444, 449, 458–59 (Ind. 2005).

²² See *id.* at 457–58.

²³ Justice Scalia was joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, Breyer, and Alito.

²⁴ *Davis*, 126 S. Ct. at 2273 (quoting *Crawford v. Washington*, 124 S. Ct. 1354, 1365 (2004)) (internal quotation marks omitted). In *Crawford*, the Court held that the admission of a taped police interview of the defendant’s wife violated the Sixth Amendment. *Crawford*, 124 S. Ct. at 1356–57, 1374. In doing so, it overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), which focused on whether the statements were reliable. See *Crawford*, 124 S. Ct. at 1369–74; see also *id.* at 1374 (Rehnquist, C.J., concurring in the judgment) (characterizing the majority opinion as a “decision to overrule *Ohio v. Roberts*”).

“suggested in *Crawford*, even if not explicitly held”²⁵: the Confrontation Clause applies only to testimonial hearsay.²⁶ He then reviewed the history of Sixth Amendment case law and concluded that although the Confrontation Clause had historically applied to “testimony,” the definition of “testimony” encompasses more than formal depositions and sworn in-court statements.²⁷ Noting that the *Crawford* Court did not state a clear definition of “testimonial,” Justice Scalia announced the following new rule:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.²⁸

Justice Scalia then applied this rule to the cases at hand. In *Davis*’s case, he concluded that the 911 operator’s questioning was not intended to prove past events.²⁹ It occurred as events were actually happening; it was a call for help, rather than a narrative report of a crime; the goal was to resolve an emergency, rather than to prepare a report of the crime.³⁰ Thus, McCottry’s statements were nontestimonial and admissible under the Sixth Amendment. In contrast, in *Hammon*’s case, “[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime.”³¹ Moreover, although the statements were less formal than the interrogation in *Crawford*, they were still a substitute for live testimony.³² Justice Scalia distinguished *Davis*’s case by comparing “McCottry’s present-tense statements” with “Amy’s narrative of past events.”³³ He did, however, suggest that questions at the scene of a

²⁵ *Davis*, 126 S. Ct. at 2274.

²⁶ *See id.* (noting that the limitation to testimonial evidence “must fairly be said to mark out not merely [the Confrontation Clause’s] ‘core,’ but its perimeter”).

²⁷ *See id.* at 2274–76.

²⁸ *Id.* at 2273–74. Justice Scalia qualified this rule, however, by explaining that it was a limited holding that did not preclude the possibility that statements made in the absence of interrogation could be testimonial. He also stated that courts must evaluate “the declarant’s statements, not the interrogator’s questions.” *Id.* at 2274 n.1.

²⁹ *See id.* at 2276–77.

³⁰ *See id.* Justice Scalia left open the possibility, however, that McCottry’s statements later in the conversation *were* testimonial insofar as they were made to the operator after the operator had apparently turned from managing the emergency to obtaining a report of the crime. *Id.* at 2277–78.

³¹ *Id.* at 2278. Justice Scalia characterized *Hammon* as a “much easier” case. *Id.*

³² *Id.*

³³ *Id.* at 2279.

crime could in certain circumstances be nontestimonial, such as when they are “initial inquiries” in response to immediate exigencies.³⁴

Justice Scalia concluded by addressing the argument that domestic violence cases, in which the victim frequently refuses to testify, require a more flexible Sixth Amendment jurisprudence. To alleviate this concern, he endorsed the doctrine of forfeiture, according to which a defendant who coerces silence from a victim forfeits the right to confrontation, and invited the Indiana courts to determine whether Hammon had forfeited his confrontation right.³⁵

Justice Thomas concurred in the judgment in Davis’s case and dissented in Hammon’s.³⁶ He agreed that the Confrontation Clause covers more than just in-court statements, but after reviewing the history surrounding the right to confrontation, he concluded that testimonial evidence “require[s] some degree of solemnity.”³⁷ By this analysis, he determined that the clause should apply to exclude only affidavits, depositions, prior testimony, confessions, and other interactions with the police extracted by means of a formalized proceeding.³⁸ He characterized the majority’s test as unpredictable and unworkable, and he noted the impossibility of determining the primary purpose of an interrogation that might have multiple motives.³⁹ In response to the Court’s concern that the Confrontation Clause could “readily be evaded” if limited to formal questioning, he agreed that the clause “also reaches the use of technically informal statements when used to evade the formalized process.”⁴⁰ He then indicated that the word “objectively” might suggest an inquiry that examines the function of the interrogation rather than the officer’s motivation, but concluded that such a test would be “even more disconnected from the prosecutorial abuses targeted by the Confrontation Clause.”⁴¹

Applying this principle to the two cases, Justice Thomas determined that neither McCottry’s 911 call nor the questioning of Amy Hammon was sufficiently formal to be covered by the Sixth Amendment.⁴² He also questioned whether *Hammon* was correctly decided

³⁴ *Id.* (internal quotation marks omitted).

³⁵ *See id.* at 2279–80.

³⁶ *Id.* at 2281 (Thomas, J., concurring in the judgment in part and dissenting in part).

³⁷ *Id.* at 2281–82.

³⁸ *See id.* at 2282.

³⁹ *See id.* at 2283–84.

⁴⁰ *Id.* at 2283 (quoting *id.* at 2276 (majority opinion)) (internal quotation marks omitted). Justice Scalia suggested that the distinction between formal and informal statements might be unworkable as well, particularly when accompanied by Justice Thomas’s exception for statements meant to evade the Confrontation Clause. Justice Scalia noted that under this approach, “it is eminently arguable that the dissent should agree . . . with our disposition in *Hammon v. Indiana*.” *Id.* at 2279 n.5 (majority opinion).

⁴¹ *Id.* at 2283–84 (Thomas, J., concurring in the judgment in part and dissenting in part).

⁴² *Id.* at 2284.

even under the majority's test: it was quite possible that "the primary purpose of [the officer's] inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife."⁴³ He concluded that in "many similar cases, pronouncement of the 'primary' motive behind the interrogation calls for nothing more than a guess by courts."⁴⁴

The Supreme Court's new rule creates perverse incentives for police officers to engage in abusive practices to elicit nontestimonial evidence. The Court's apparent refusal to consider the police officer's actual, subjective purpose for the investigation creates additional opportunities for police officers to act in bad faith to evade the Sixth Amendment. Nevertheless, the rule may have been the most reasonable resolution of a difficult doctrinal problem. Thus, rather than redefining "testimonial" or otherwise altering its nascent doctrine, the Court should carefully monitor proceedings in lower courts and permit its definition of "testimonial" to evolve to preclude such abuses. Such doctrinal evolution, despite being based on facts on the ground rather than practices at the Founding, would be fully consistent with the Court's originalist view in *Crawford*.

By holding that the Confrontation Clause applies only to a particular subset of police interrogation techniques, the Court created the obvious risk that police officers will mold their techniques to elicit statements defined as nontestimonial. Rather than resolving emergencies before conducting an investigation, police officers might be inclined to gather as much information as possible during a pending emergency in order to evade the Confrontation Clause. 911 operators, for instance, might be instructed to press callers for information about their assailants during the emergency rather than guide them to safety and then ask questions. The Court's decision thus creates the incentive for police officers to put victims in increased danger by encouraging police to delay the resolution of an emergency. Even worse, because domestic violence victims are thought to be the least likely victims to testify against their assailants,⁴⁵ police have an incentive to be particularly unhelpful to and manipulative of a group of victims that historically has been uncomfortable coming to the police. To be sure, this conclusion is speculative. It is impossible to know how police officers and judges will react to the Court's new rule. Perhaps police officers' in-

⁴³ *Id.*

⁴⁴ *Id.* at 2285.

⁴⁵ See Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 330 (2005) ("[P]rosecutors estimate that approximately 80% of [domestic violence] victims are uncooperative."); see also Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 213, 234–37 (2005) (predicting *Crawford*'s effects on domestic violence prosecutions). Notably, both Michelle McCottry and Amy Hammon were domestic violence victims.

terests in successfully resolving emergencies will outweigh their interests in collecting hearsay testimony, or perhaps lower courts will be vigilant in restricting officers' actions. But regardless of the reactions of police officers and courts, this incentive, which did not exist before *Davis*, now looms.

Exacerbating this problem is the Court's apparent unwillingness to consider the police officer's actual, subjective purpose for conducting an investigation in deciding whether an interrogation is testimonial. As a result, lower courts may not be fully able to consider evidence of intentional police abuse or manipulation. Admittedly, the precise nature of the Court's "purpose" requirement is somewhat ambiguous. The Court artfully formulated its rule in terms of "the primary purpose of the interrogation,"⁴⁶ but the rule appears to leave open a crucial question: whose purpose, the declarant's or the police officer's? A purpose cannot merely *exist*; someone must *have* one. However, there are strong indications throughout the opinion that the Court intended to focus on the interrogator's purpose. For instance, Justice Scalia stated that in *Hammon*, "[w]hen the officer . . . elicited the challenged statements, *he was not seeking* to determine . . . 'what is happening,' but rather 'what happened.' Objectively viewed, the primary . . . purpose of the interrogation was to investigate a possible crime."⁴⁷ The words "he was not seeking" suggest that the purpose inquiry applies to what the *police officer* was seeking. Elsewhere, Justice Scalia noted that "*any reasonable listener* would recognize that McCottry . . . was facing an ongoing emergency,"⁴⁸ suggesting again that the listener's perspective is what counts. Such an interpretation makes semantic sense. Interrogations are conducted by police officers, not by witnesses. It thus seems textually most reasonable to interpret the "purpose of the interrogation" as meaning "the purpose of the agent conducting the interrogation."⁴⁹ This interpretation also makes sense

⁴⁶ *Davis*, 126 S. Ct. at 2273.

⁴⁷ *Id.* at 2278 (emphasis added).

⁴⁸ *Id.* at 2276 (emphasis added).

⁴⁹ However, the argument that the Court's rule focuses on the police officer's purpose is far from impregnable. Justice Scalia's assertion that "it is . . . the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires [the Court] to evaluate," *id.* at 2274 n.1, suggests that the declarant's intent might play a role: a declarant's statements are likely to shed more light on a declarant's intent than on a police officer's intent. *Crawford* also strongly indicated that the declarant's perspective is relevant: it suggested that testimonial statements might emerge when made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004) (quoting Brief of Amici Curiae Nat'l Ass'n of Criminal Def. Lawyers et al. in Support of Petitioner at 3, *Crawford* (No. 02-9410), available at [http://www.nacdl.org/public.nsf/newissues/amicus_attachments/\\$FILE/crawford.pdf](http://www.nacdl.org/public.nsf/newissues/amicus_attachments/$FILE/crawford.pdf)) (internal quotation mark omitted). For a pre-*Davis* defense of the view that the witness's perspective should be what counts, see Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L.

from a policy perspective. *Crawford* provided a procedural rule specifically designed to prevent abuses by the government. It would therefore be sensible to focus on the interrogator's purpose and thereby direct the rule toward instances in which the government intends to effectuate the abuse.⁵⁰

However, even though the Court's rule appears to focus on the police officer's purpose, it is not tailored to consider the officer's *subjective* purpose. The rule is that nontestimonial statements are those made "under circumstances *objectively* indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."⁵¹ The word "objectively" may denote an evidentiary restriction: courts can consider only the observable circumstances of an incident and determine a reasonable police officer's purpose on the basis of those observable circumstances, and cannot focus on the mental state of that particular police officer. Equivalently, the rule could be said to focus on what a reasonable third party would perceive as the police officer's purpose. Either way, however, it seems to preclude an inquiry into the officer's possibly abusive motivation as long as the motivation was not objectively observable. The Court's unexplained declaration that statements to an undercover officer do not trigger the Sixth Amendment illustrates this conclusion.⁵² Clearly, undercover officers are motivated by the purpose of gathering evidence for use in a later proceeding. If such statements are nevertheless nontestimonial, then the officer's actual, subjective purpose cannot alone be the basis of the Court's rule.⁵³ As a result, courts will ignore the subjective bad faith intent of a police officer trying to elicit confessions

REV. 241, 255–59 (2005). Regardless of the frame of reference, however, the Court's rule cannot fairly be construed to focus on the subjective purpose of the police officer.

⁵⁰ For a defense of such a model of the Confrontation Clause, see Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992).

⁵¹ *Davis*, 126 S. Ct. at 2273 (emphasis added).

⁵² The Court referred to the statements in *Bourjaily v. United States*, 483 U.S. 171 (1987), which were made unwittingly to a government informant, as "clearly nontestimonial." *Davis*, 126 S. Ct. at 2275.

⁵³ One might say that statements to undercover officers do not fall under the Court's rule in this case because the Court limited its rule to "interrogations," and unwitting statements to undercover officers do not qualify as such. However, this formulation would be counterintuitive. First, it does not seem to comport with the definition of "interrogation"; a police officer asking questions is conducting an interrogation regardless of whether he is wearing plain clothes. Second, the boundaries of such a rule would be difficult to determine. Would it apply only if the purpose of the police officer were to be undercover, and if so, would it still apply if the witness were aware he was speaking to an informant and deliberately sought to incriminate someone else? Would it apply only if the witness were unaware that she was speaking to a police officer, and if so, would it apply in cases in which the witness may have been unaware that the 911 operator was a police officer? It is unclear what historical or legal basis, or practical benefit, such doctrinal contortions would have.

during an emergency and focus only on the observable indications of an emergency. The Court's rule therefore appears to create the possibility of police abuse.

Nevertheless, it is not clear the Court could have done better. The Court's refusal to consider a police officer's subjective purpose makes sense: it eliminates the prospects of police officers passionately reiterating in court that their "true purpose" was to resolve an emergency and of judges being forced to psychoanalyze them. Also, any alternative rule would face different drawbacks. Indeed, as Justice Scalia pointed out, a narrower rule like Justice Thomas's would permit police officers to skirt the Sixth Amendment by conducting interrogations in informal settings.⁵⁴ A hypothetical broader rule that might require confrontation for any statement made to a police officer under any circumstances would exclude mountains of evidence that have been unquestionably admissible in American courts for over two hundred years. The Court was thus forced to choose a middle ground in which some police interrogations are testimonial and others are not. But classifying interrogations in this manner inevitably permits police officers to frame their interrogations to fit the Court's definition of "nontestimonial." In short, the potential for police abuse may have been unavoidable. Furthermore, the concerns about police abuse are merely speculative: abuses may turn out to be sporadic or nonexistent. The Court may have been more comfortable creating a possibility for abuse than the certainty of either an overbroad or overly narrow rule.

The Court's decision in *Davis* was therefore eminently sensible. However, the Court should be vigilant. It undoubtedly will be called upon to clarify its fledgling Confrontation Clause jurisprudence. If the Court empirically determines that police officers are acting abusively and lower courts are not applying sufficient checks, it should alter its doctrine. In particular, if it observes that police officers are systematically attempting to evade the Confrontation Clause, it should instruct lower courts to exclude evidence based on indicia of such abuse. Doing so would foster a coherent definition of "testimonial" while suppressing abuses that may arise. Importantly, a catch-all statement by the Court that the Confrontation Clause does not permit admission of hearsay elicited by abusive police practices would not be sufficiently specific to constrain lower court judges. Faced with such a rule, judges who prefer to admit hearsay evidence, especially in domestic violence cases,⁵⁵ could simply declare that police practices were not

⁵⁴ See *Davis*, 126 S. Ct. at 2279 n.5 ("Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.")

⁵⁵ A commentator remarking on one judge's narrow view of *Crawford* stated that "judges are encouraged to consider themselves active opponents against domestic violence" and are thus "influenced by the desire to maintain the viability of [hearsay] evidence based prosecutions." David

abusive and admit testimony wholesale. Conversely, judges sympathetic to criminal defendants could characterize almost anything, even the 911 operator's questions in *Davis*, as abusive and exclude it. Rather than make such a general statement, the Court should watch for indicia of abuse — which are, at present, difficult to predict — and develop rules tailored to exclude hearsay in such cases.⁵⁶

It could be objected, especially by Justice Scalia — the author of the majority opinions in both *Davis* and *Crawford* — that tailoring the *Davis* rule to modern police practices does not sit comfortably with *Crawford*'s originalist framework. *Crawford*, after all, rejected a doctrine that pragmatically assessed whether statements were reliable. Instead, it held that because the Framers were concerned about admission of out-of-court statements, such evidence must be excluded today, regardless of whether it is reliable.⁵⁷ One might argue in response that it would be illogical to establish the *class* of excludable statements — testimonial statements — by referring to the Framers' view of the Sixth Amendment, but then mold the *boundaries* of that class of statements by incorporating contemporary concerns about police abuse. By this argument, the Court should not shape the Confrontation Clause to prevent abusive police behavior because, as Justice Scalia noted, “[t]he Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision.”⁵⁸ Rather, according to this argument, the Court should ignore concerns about police abuse because its sole task is to define “testimonial” in a way that is most similar to the definition at the time of the Founding, not to establish a rule that promotes optimal police behavior.

This analysis, however, should be rejected for three reasons. First, it is self-contradictory. *Davis* is already inconsistent with literal originalism in the sense that it requires exclusion of statements elicited

Jaros, *The Lessons of People v. Moscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford v. Washington*, 42 AM. CRIM. L. REV. 995, 1008 (2005). Such bias might also cause judges to look away from abusive practices meant to elicit hearsay testimony.

⁵⁶ Cf. *Missouri v. Seibert*, 124 S. Ct. 2601 (2004). In *Seibert*, the Court confronted a practice through which Missouri police officers extracted confessions without giving *Miranda* warnings, then gave *Miranda* warnings, and then extracted the confessions *again* from the confused suspects. See *id.* at 2605–06 (plurality opinion). Although this practice technically satisfied the Court's then-existing *Miranda* rules, *id.* at 2613; *id.* at 2614 (Kennedy, J., concurring in the judgment), five Justices agreed that such confessions must be suppressed, and Justice Kennedy's narrow concurrence — the controlling opinion in the case — suggested that he was specifically motivated by the problem of police abuse. See *id.* at 2614–15.

⁵⁷ See *Crawford v. Washington*, 124 S. Ct. 1354, 1370 (2004) (“Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”); see also *id.* at 1359–67 (analyzing the historical roots of the Confrontation Clause).

⁵⁸ *Davis*, 126 S. Ct. at 2279 n.6.

by police officers, which was not required at the time of the Founding. The Court justified its departure from literal originalism by observing that times have changed and that a new rule was necessary to implement the Sixth Amendment's purpose: "[W]e no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers — who perform investigative and testimonial functions once performed by examining Marian magistrates."⁵⁹ It thus would be inconsistent for the Court to claim a broad, purposive view of originalism in order to expand the clause to include police testimony, but then return to a narrow, literal view of originalism in order to preclude incorporating pragmatic considerations arising out of its new rule into its jurisprudence. Second, the argument is unfair. By expanding the reaches of the Confrontation Clause to include police testimony, the Court is *creating* the perverse incentives for police officers. If the Court is going to deviate from the original view of the clause, it must take responsibility for the consequences of its decision and address the abuses caused by that deviation. Third, the argument does not hew to the Framers' vision. When the Framers restricted the Sixth Amendment to the confrontation of "witnesses," they did not account for the potential for police manipulation. Police officers did not even *exist* in the same way. It would not be faithful to the original view of the Confrontation Clause for the Court to create an incentive for police officers to delay the resolution of emergencies, when such an incentive did not exist at the time of the Founding. Accordingly, the originalist objection to a pragmatic rule is misplaced: even a Court concerned with an originalist vision of the Confrontation Clause should decide cases with an eye toward preventing police abuse.

The Supreme Court in *Davis* was compelled to create a rule declaring that certain police interrogations would elicit "testimonial" evidence and that other police interrogations would yield "nontestimonial" evidence. By instructing police officers that only certain types of hearsay will be admissible, the Court effectively created an incentive for police to shape their practices to yield the latter. Unfortunately, this incentive may result in the unintended consequence of police officers' delaying the resolution of emergencies and thereby placing victims — especially domestic violence victims — in unnecessary danger. To curb these practices, the Court should create a series of rules intended to address emerging instances of police abuse. Such rules would both ensure effective policing and be faithful to the Framers' vision.

⁵⁹ *Id.* at 2279 n.5 (citations omitted).