SUPREME COURT OF THE UNITED STATES

No. 09–150

MICHIGAN, PETITIONER *v.* RICHARD PERRY BRYANT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[February 28, 2011]

JUSTICE SCALIA, dissenting.

Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort. Because I continue to adhere to the Confrontation Clause that the People adopted, as described in *Crawford* v. *Washington*, 541 U. S. 36 (2004), I dissent.

I

A

The Confrontation Clause of the Sixth Amendment, made binding on the States by the Fourteenth Amendment, *Pointer* v. *Texas*, 380 U. S. 400, 403 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy

the right . . . to be confronted with the witnesses against him." In *Crawford*, we held that this provision guarantees a defendant his common-law right to confront those "who 'bear testimony'" against him. 541 U. S., at 51. A witness must deliver his testimony against the defendant in person, or the prosecution must prove that the witness is unavailable to appear at trial and that the defendant has had a prior opportunity for cross-examination. *Id.,* at 53–54.

Not all hearsay falls within the Confrontation Clause's grasp. At trial a witness "bears testimony" by providing "'[a] solemn declaration or affirmation . . . for the purpose of establishing or proving some fact.'" *Id.,* at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). The Confrontation Clause protects defendants only from hearsay statements that do the same. *Davis* v. *Washington*, 547 U. S. 813, 823–824 (2006). In *Davis*, we explained how to identify testimonial hearsay prompted by police questioning in the field. A statement 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." *Id.,* at 822. When, however, the circumstances objectively indicate that the declarant's statements were "a cry for help [o]r the provision of information enabling officers immediately to end a threatening situation," *id.,* at 832, they bear little resemblance to in-court testimony. "No 'witness' goes into court to proclaim an emergency and seek help." *Id.,* at 828.

Crawford and *Davis* did not address whose perspective matters—the declarant's, the interrogator's, or both—when assessing "the primary purpose of [an] interrogation." In those cases the statements were testimonial from any perspective. I think the same is true here, but because the Court picks a perspective so will I: The declarant's intent is what counts. In-court testimony is more

than a narrative of past events; it is a solemn declaration made in the course of a criminal trial. For an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark; and he must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused.[1] See Friedman, Grappling with the Meaning of "Testimonial," 71 Brooklyn L. Rev. 241, 259 (2005). That is what distinguishes a narrative told to a friend over dinner from a statement to the police. See *Crawford*, *supra,* at 51. The hidden purpose of an interrogator cannot substitute for the declarant's intentional solemnity or his understanding of how his words may be used.

A declarant-focused inquiry is also the only inquiry that would work in every fact pattern implicating the Confrontation Clause. The Clause applies to volunteered testimony as well as statements solicited through police interrogation. See *Davis*, *supra*, at 822–823, n. 1. An inquiry into an officer's purposes would make no sense when a declarant blurts out "Rick shot me" as soon as the officer arrives on the scene. I see no reason to adopt a different test—one that accounts for an officer's intent—when the officer asks "what happened" before the declarant makes his accusation. (This does not mean the interrogator is irrelevant. The identity of an interrogator, and the content and tenor of his questions, can bear upon whether a declarant intends to make a solemn statement, and envisions its use at a criminal trial. But none of this means that the interrogator's purpose matters.)

In an unsuccessful attempt to make its finding of emer-

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[1] I remain agnostic about whether and when statements to nonstate actors are testimonial. See *Davis* v. *Washington,* 547 U. S. 813, 823, n. 2 (2006).

gency plausible, the Court instead adopts a test that looks to the purposes of both the police and the declarant. It claims that this is demanded by necessity, fretting that a domestic-violence victim may want her abuser briefly arrested—presumably to teach him a lesson—but not desire prosecution. See *ante,* at 22. I do not need to probe the purposes of the police to solve that problem. Even if a victim speaks to the police "to establish or prove past events" solely for the purpose of getting her abuser arrested, she surely knows her account is "potentially relevant to later criminal prosecution" should one ensue. *Davis*, *supra*, at 822.

The Court also wrings its hands over the possibility that "a severely injured victim" may lack the capacity to form a purpose, and instead answer questions "reflexive[ly]." *Ante*, at 22. How to assess whether a declarant with diminished capacity bore testimony is a difficult question, and one I do not need to answer today. But the Court's proposed answer—to substitute the intentions of the police for the missing intentions of the declarant—cannot be the correct one. When the declarant has diminished capacity, focusing on the interrogators make less sense, not more. The inquiry under *Crawford* turns in part on the actions and statements of a declarant's audience only because they shape the declarant's perception of why his audience is listening and therefore influence *his purpose* in making the declaration. See 541 U. S., at 51. But a person who cannot perceive his own purposes certainly cannot perceive why a listener might be interested in what he has to say. As far as I can tell, the Court's substituted-intent theory "has nothing to be said for it except that it can sometimes make our job easier," *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L. P. A.*, 559 U. S. ___, ___ (2010) (SCALIA, J., concurring in part and concurring in judgment) (slip op., at 2).

The Court claims one affirmative virtue for its focus on

the purposes of both the declarant and the police: It "ameliorates problems that . . . arise" when declarants have "mixed motives." *Ante*, at 21. I am at a loss to know how. Sorting out the primary purpose of a declarant with mixed motives is sometimes difficult. But adding in the mixed motives of the police only compounds the problem. Now courts will have to sort through two sets of mixed motives to determine the primary purpose of an interrogation. And the Court's solution creates a mixed-motive problem where (under the proper theory) it does not exist—viz., where the police and the declarant each have one motive, but those motives conflict. The Court does not provide an answer to this glaringly obvious problem, probably because it does not have one.

The only virtue of the Court's approach (if it can be misnamned a virtue) is that it leaves judges free to reach the "fairest" result under the totality of the circumstances. If the dastardly police trick a declarant into giving an incriminating statement against a sympathetic defendant, a court can focus on the police's intent and declare the statement testimonial. If the defendant "deserves" to go to jail, then a court can focus on whatever perspective is necessary to declare damning hearsay nontestimonial. And when all else fails, a court can mix-and-match perspectives to reach its desired outcome. Unfortunately, under this malleable approach "the guarantee of confrontation is no guarantee at all." *Giles* v. *California*, 554 U. S. 353, 375 (2008) (plurality).

B

Looking to the declarant's purpose (as we should), this is an absurdly easy case. Roughly 25 minutes after Anthony Covington had been shot, Detroit police responded to a 911 call reporting that a gunshot victim had appeared at a neighborhood gas station. They quickly arrived at the scene, and in less than 10 minutes five different Detroit

police officers questioned Covington about the shooting. Each asked him a similar battery of questions: "what happened" and when, App. 39, 126, "who shot" the victim," *id.,* at 22, and "where" did the shooting take place, *id.,* at 132. See also *id.,* at 113. After Covington would answer, they would ask follow-up questions, such as "how tall is" the shooter, *id.,* at 134, "[h]ow much does he weigh," *ibid.* what is the exact address or physical description of the house where the shooting took place, and what chain of events led to the shooting. The battery relented when the paramedics arrived and began tending to Covington's wounds.

From Covington's perspective, his statements had little value except to ensure the arrest and eventual prosecution of Richard Bryant. He knew the "threatening situation," *Davis,* 547 U. S., at 832, had ended six blocks away and 25 minutes earlier when he fled from Bryant's back porch. See 483 Mich. 132, 135–136, 768 N.W. 2d 65, 67 (2009); App. 105. Bryant had not confronted him face-to-face before he was mortally wounded, instead shooting him through a door. See 483 Mich*.,* at 136–137, 768 N.W. 2d, at 67. Even if Bryant had pursued him (unlikely), and after seeing that Covington had ended up at the gas station was unable to confront him there before the police arrived (doubly unlikely), it was entirely beyond imagination that Bryant would again open fire while Covington was surrounded by five armed police officers. And Covington knew the shooting was the work of a drug dealer, not a spree killer who might randomly threaten others. *Id.,* at 135, 137, 768 N.W. 2d, at 67.

Covington's knowledge that he had nothing to fear differs significantly from Michelle McCottry's state of mind during her "frantic" statements to a 911 operator at issue in *Davis*, 547 U. S., at 827. Her "call was plainly a call for help against a bona fide physical threat" describing "events *as they were actually happening*." *Ibid.* She did

not have the luxuries of police protection and of time and space separating her from immediate danger that Covington enjoyed when he made his statements. See *id.,* at 831.

Covington's pressing medical needs do not suggest that he was responding to an emergency, but to the contrary reinforce the testimonial character of his statements. He understood the police were focused on investigating a past crime, not his medical needs. None of the officers asked Covington how he was doing, attempted more than superficially to assess the severity of his wounds, or attempted to administer first aid.[2] They instead primarily asked questions with little, if any, relevance to Covington's dire situation. Police, paramedics, and doctors do not need to know the address where a shooting took place, the name of the shooter, or the shooter's height and weight to provide proper medical care. Underscoring that Covington understood the officers' investigative role, he interrupted their interrogation to ask "when is EMS coming?" App. 57. When, in other words, would the focus shift to his medical needs rather than Bryant's crime?

Neither Covington's statements nor the colloquy between him and the officers would have been out of place at a trial; it would have been a routine direct examination. See *Davis*, 547 U. S., at 830. Like a witness, Covington recounted in detail how a past criminal event began and progressed, and like a prosecutor, the police elicited that account through structured questioning. Preventing the

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[2] Officer Stuglin's testimony does not undermine my assessment of the officers' behavior, although the Court suggests otherwise. See *ante*, at 28, n. 18. Officer Stuglin first testified that he "asked something like what happened or are you okay, something to that line." App., 131. When pressed on whether he asked "how are you doing?," he responded, "Well, basically . . . what's wrong." *Ibid.* Other officers were not so equivocal: They admitted they had no need to "ask him how he was doing. . . . It was very obvious how he was doing." *Id.*, at 110; see also *id.,* at 19.

admission of "weaker substitute[s] for live testimony at trial" such as this, *id.,* at 828 (internal quotation marks omitted), is precisely what motivated the Framers to adopt the Confrontation Clause and what motivated our decisions in *Crawford* and in *Hammon* v. *Indiana*, decided with *Davis*. *Ex parte* examinations raise the same constitutional concerns whether they take place in a gas-station parking lot or in a police interrogation room.

C

Worse still for the repute of today's opinion, this is an absurdly easy case even if one (erroneously) takes the interrogating officers' purpose into account. The five officers interrogated Covington primarily to investigate past criminal events. None—absolutely none—of their actions indicated that they perceived an imminent threat. They did not draw their weapons, and indeed did not immediately search the gas station for potential shooters.[3] To the contrary, all five testified that they questioned Covington *before conducting any investigation at the scene*. Would this have made any sense if they feared the presence of a shooter? Most tellingly, none of the officers started his interrogation by asking what would have been the obvious first question if any hint of such a fear existed: Where is the shooter?

But do not rely solely on my word about the officers' primary purpose. Listen to Sergeant Wenturine, who candidly admitted that he interrogated Covington because he "ha[d] a man here that [he] believe[d] [was] dying [so

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[3] The Court cites Officer Stuglin's testimony that "I think [Brown and Pellerito] did a little bit of both" joining the interrogation and helping to secure the scene. *Id.*, at 135–136. But the point is not whether they did both; it is whether they moved to secure the area *first.* No officer's testimony suggests this. Pellerito testified that he, Stuglin, and Brown arrived at the scene at roughly the same time and all three immediately went to Covington. See *id.,* at 17–18. The testimony of Brown and McCallister corroborate that account. See *id.,* at 34–36, 79–82.

he was] gonna find out who did this, period." App. 112. In short, he needed to interrogate Covington to solve a crime. Wenturine never mentioned an interest in ending an ongoing emergency.

At the very least, the officers' intentions *turned* investigative during their 10-minute encounter with Covington, and the conversation "evolve[d] into testimonial statements." *Davis*, 547 U. S., at 828 (internal quotation marks omitted). The fifth officer to arrive at the scene did not need to run straight to Covington and ask a battery of questions "to determine the need for emergency assistance," *Ibid.* He could have asked his fellow officers, who presumably had a better sense of that than Covington—and a better sense of what he could do to assist. No, the value of asking the same battery of questions a fifth time was to ensure that Covington told a consistent story and to see if any new details helpful to the investigation and eventual prosecution would emerge. Having the testimony of five officers to recount Covington's consistent story undoubtedly helped obtain Bryant's conviction. (Which came, I may note, after the first jury could not reach a verdict. See 483 Mich., at 137, 768 N.W. 2d, at 67.)

D

A final word about the Court's active imagination. The Court invents a world where an ongoing emergency exists whenever "an armed shooter, whose motive for and location after the shooting [are] unknown, . . . mortally wound[s]" one individual "within a few blocks and [25] minutes of the location where the police" ultimately find that victim. *Ante*, at 27. Breathlessly, it worries that a shooter could leave the scene armed and ready to pull the trigger again. See *ante*, at 17–18, 27, 30. Nothing suggests the five officers in this case shared the Court's

dystopian[4] view of Detroit, where drug dealers hunt their shooting victim down and fire into a crowd of police officers to finish him off, see *ante*, at 30, or where spree killers shoot through a door and then roam the streets leaving a trail of bodies behind. Because almost 90 percent of murders involve a single victim,[5] it is much more likely—indeed, I think it certain—that the officers viewed their encounter with Covington for what it was: an investigation into a past crime with no ongoing or immediate consequences.

The Court's distorted view creates an expansive exception to the Confrontation Clause for violent crimes. Because Bryant posed a continuing threat to public safety in the Court's imagination, the emergency persisted for confrontation purposes at least until the police learned his "motive for and location after the shooting." *Ante*, at 27. It may have persisted in this case until the police "secured the scene of the shooting" two-and-a-half hours later. *Ante*, at 28. (The relevance of securing the scene is unclear so long as the killer is still at large—especially if, as the Court speculates, he may be a spree-killer.) This is a dangerous definition of emergency. Many individuals who testify against a defendant at trial first offer their accounts to police in the hours after a violent act. If the police can plausibly claim that a "potential threat to . . . the public" persisted through those first few hours, *ante*, at 12 (and if the claim is plausible here it is always plau-

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[4] The opposite of utopian. The word was coined by John Stuart Mill as a caustic description of British policy. See 190 Hansard's Parliamentary Debates, Third Series 1517 (3d Ser. 1868); 5 Oxford English Dictionary 13 (2d ed. 1989).

[5] See Federal Bureau of Investigation, Crime in the United States, 2009: Expanded Homicide Data Table 4, Murder by Victim/Offender Situations, 2009 (Sept. 2010), online at http://www2.fbi.gov/ucr/cius2009/offenses/expanded_information/data/shrtable_04.html (as visited Feb. 25, 2011, and available in Clerk of Court's case file).

sible) a defendant will have no constitutionally protected right to exclude the uncross-examined testimony of such witnesses. His conviction could rest (as perhaps it did here) solely on the officers' recollection at trial of the witnesses' accusations.

The Framers could not have envisioned such a hollow constitutional guarantee. No framing-era confrontation case that I know of, neither here nor in England, took such an enfeebled view of the right to confrontation. For example, *King* v. *Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202, 202–203 (K. B. 1779), held inadmissible a mother's account of her young daughter's statements "immediately on her coming home" after being sexually assaulted. The daughter needed to testify herself. But today's majority presumably would hold the daughter's account to her mother a nontestimonial statement made during an ongoing emergency. She could not have known whether her attacker might reappear to attack again or attempt to silence the lone witness against him. Her mother likely listened to the account to assess the threat to her own safety and to decide whether the rapist posed a threat to the community that required the immediate intervention of the local authorities. Cf. *ante*, at 29–30. Utter nonsense.

The 16th- and 17th-century English treason trials that helped inspire the Confrontation Clause show that today's decision is a mistake. The Court's expansive definition of an "ongoing emergency" and its willingness to consider the perspective of the interrogator and the declarant cast a more favorable light on those trials than history or our past decisions suggest they deserve. Royal officials conducted many of the *ex parte* examinations introduced against Sir Walter Raleigh and Sir John Fenwick while investigating alleged treasonous conspiracies of unknown scope, aimed at killing or overthrowing the King. See Brief for National Association of Criminal Defense Law-

yers as *Amicus Curiae* 21–22, and n. 11. Social stability in 16th- and 17th-century England depended mainly on the continuity of the ruling monarch, cf. 1 J. Stephen, A History of the Criminal Law of England 354 (1883), so such a conspiracy posed the most pressing emergency imaginable. Presumably, the royal officials investigating it would have understood the gravity of the situation and would have focused their interrogations primarily on ending the threat, not on generating testimony for trial. I therefore doubt that under the Court's test English officials acted improperly by denying Raleigh and Fenwick the opportunity to confront their accusers "face to face," *id.,* at 326.

Under my approach, in contrast, those English trials remain unquestionably infamous. Lord Cobham did not speak with royal officials to end an ongoing emergency. He was a traitor! He spoke, as Raleigh correctly observed, to establish Raleigh's guilt and to save his own life. See 1 D. Jardine, Criminal Trials 435 (1832). Cobham's statements, when assessed from his perspective, had only a testimonial purpose. The same is true of Covington's statements here.

II

A

But today's decision is not only a gross distortion of the facts. It is a gross distortion of the law—a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned.

According to today's opinion, the *Davis* inquiry into whether a declarant spoke to end an ongoing emergency or rather to "prove past events potentially relevant to later criminal prosecution," 547 U. S., at 822, is *not* aimed at answering whether the declarant acted as a witness. Instead, the *Davis* inquiry probes the *reliability* of a declarant's statements, "[i]mplicit[ly]" importing the excited-

utterances hearsay exception into the Constitution. *Ante*, at 14–15. A statement during an ongoing emergency is sufficiently reliable, the Court says, "because the prospect of fabrication . . . is presumably significantly diminished," so it "does not [need] to be subject to the crucible of cross-examination." *Id.,* at 14.

Compare that with the holding of *Crawford:* "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U. S., at 68–69. Today's opinion adopts, for emergencies and faux emergencies at least, the discredited logic of *White* v. *Illinois*, 502 U. S. 346, 355–356, and n. 8 (1992), and *Idaho* v. *Wright*, 497 U. S. 805, 819–820 (1990). *White* is, of course, the decision that both *Crawford* and *Davis* found most incompatible with the text and history of the Confrontation Clause. See *Davis*, *supra*, at 825; *Crawford*, *supra*, at 58, n. 8. (This is not to say that that "reliability" logic can actually justify today's result: Twenty-five minutes is plenty of time for a shooting victim to reflect and fabricate a false story.)

The Court announces that in future cases it will look to "standard rules of hearsay, designed to identify some statements as reliable," when deciding whether a statement is testimonial. *Ante*, at 11–12. *Ohio* v. *Roberts*, 448 U. S. 56 (1980) said something remarkably similar: An out-of-court statement is admissible if it "falls within a firmly rooted hearsay exception" or otherwise "bears adequate 'indicia of reliability.'" *Id.*, at 66. We tried that approach to the Confrontation Clause for nearly 25 years before *Crawford rejected* it as an unworkable standard unmoored from the text and the historical roots of the Confrontation Clause. See 541 U. S., at 54, 60, 63–65, 67–68. The arguments in Raleigh's infamous 17th-century treason trial contained full debate about the reliability of Lord Cobham's *ex parte* accusations, see *Raleigh's Case*,

2 How. St. Tr. 1, 14, 17, 19–20, 22–23, 29 (1603); that case remains the canonical example of a Confrontation Clause violation, not because Raleigh should have won the debate but because he should have been allowed cross-examination.

The Court attempts to fit its resurrected interest in reliability into the *Crawford* framework, but the result is incoherent. Reliability, the Court tells us, is a good indicator of whether "a statement is . . . an out-of-court substitute for trial testimony." *Ante*, at 11. That is patently false. Reliability tells us *nothing* about whether a statement is testimonial. Testimonial and nontestimonial statements alike come in varying degrees of reliability. An eyewitness's statements to the police after a fender-bender, for example, are both reliable and testimonial. Statements to the police from one driver attempting to blame the other would be similarly testimonial but rarely reliable.

The Court suggests otherwise because it "misunderstands the relationship" between qualification for one of the standard hearsay exceptions and exemption from the confrontation requirement. *Melendez-Diaz* v. *Massachusetts*, 557 U. S. ___, ___ (2009) (slip op., at 18). That relationship is not a causal one. Hearsay law exempts business records, for example, because businesses have a financial incentive to keep reliable records. See Fed. Rule Evid. 803(6). The Sixth Amendment also generally admits business records into evidence, but not because the records are reliable or because hearsay law says so. It admits them "because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not" weaker substitutes for live testimony. *Melendez-Diaz*, 557 U. S., at ___ (slip op., at 18). Moreover, the scope of the exemption from confrontation and that of the hearsay exceptions also are not always coextensive. The reliability logic of the

business-record exception would extend to records maintained by neutral parties providing litigation-support services, such as evidence testing. The Confrontation Clause is not so forgiving. Business records prepared specifically for use at a criminal trial are testimonial and require confrontation. See *ibid.*

Is it possible that the Court does not recognize the contradiction between its focus on reliable statements and *Crawford*'s focus on testimonial ones? Does it not realize that the two cannot coexist? Or does it intend, by following today's illogical roadmap, to resurrect *Roberts* by a thousand unprincipled distinctions without ever explicitly overruling *Crawford?* After all, honestly overruling *Crawford* would destroy the illusion of judicial minimalism and restraint. And it would force the Court to explain how the Justices' preference comports with the meaning of the Confrontation Clause that the People adopted—or to confess that only the Justices' preference really matters.

B

The Court recedes from *Crawford* in a second significant way. It requires judges to conduct "open-ended balancing tests" and "amorphous, if not entirely subjective," inquiries into the totality of the circumstances bearing upon reliability. 541 U. S., at 63, 68. Where the prosecution cries "emergency," the admissibility of a statement now turns on "a highly context-dependent inquiry," *ante*, at 16, into the type of weapon the defendant wielded, see *ante*, at 17*;* the type of crime the defendant committed, see *ante*, at 12, 16–17; the medical condition of the declarant, see *ante*, at 17–18; if the declarant is injured, whether paramedics have arrived on the scene, see *ante*, at 20; whether the encounter takes place in an "exposed public area," *ibid.*; whether the encounter appears disorganized, see *ibid.*; whether the declarant is capable of forming a purpose, see *ante*, at 22; whether the police have secured the scene of

the crime, see *ante*, at 28; the formality of the statement, see *ante*, at 19; and finally, whether the statement strikes us as reliable, see *ante*, at 11–12, 14–15. This is no better than the nine-factor balancing test we rejected in *Crawford*, 541 U. S., at 63. I do not look forward to resolving conflicts in the future over whether knives and poison are more like guns or fists for Confrontation Clause purposes, or whether rape and armed robbery are more like murder or domestic violence.

It can be said, of course, that under *Crawford* analysis of whether a statement is testimonial requires consideration of all the circumstances, and so is also something of a multifactor balancing test. But the "reliability" test does not replace that analysis; it supplements it. As I understand the Court's opinion, even when it is determined that no emergency exists (or perhaps before that determination is made) the statement would be found admissible as far as the Confrontation Clause is concerned if it is not testimonial.

In any case, we did not disavow multifactor balancing for reliability in *Crawford* out of a preference for rules over standards. We did so because it "d[id] violence to" the Framers' design. *Id.,* at 68. It was judges' open-ended determination of what was reliable that violated the trial rights of Englishmen in the political trials of the 16th and 17th centuries. See, *e.g., Throckmorton's Case*, 1 How. St. Tr. 869, 875–876 (1554); *Raleigh's Case*, 2 How. St. Tr., at 15–16, 24. The Framers placed the Confrontation Clause in the Bill of Rights to ensure that those abuses (and the abuses by the Admiralty courts in colonial America) would not be repeated in this country. Not even the least dangerous branch can be trusted to assess the reliability of uncross-examined testimony in politically charged trials or trials implicating threats to national security. See *Crawford*, *supra*, at 67–68; cf. *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 576–578 (2004) (SCALIA, J., dissenting).

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Judicial decisions, like the Constitution itself, are nothing more than "parchment barriers," 5 Writings of James Madison 269, 272 (G. Hunt ed. 1901). Both depend on a judicial culture that understands its constitutionally assigned role, has the courage to persist in that role when it means announcing unpopular decisions, and has the modesty to persist when it produces results that go against the judges' policy preferences. Today's opinion falls far short of living up to that obligation—short on the facts, and short on the law.

For all I know, Bryant has received his just deserts. But he surely has not received them pursuant to the procedures that our Constitution requires. And what has been taken away from him has been taken away from us all.