DYING TO TESTIFY? CONFRONTATION VS. DECLARATIONS *IN EXTREMIS*

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INTRODUCTION

Declarations *in extremis* ("dying declarations") have long been a thorn in the side of legal purists. The Sixth Amendment Confrontation Clause provides that the accused in criminal prosecution shall enjoy the right "to be confronted with the witnesses against him."[1] When the Bill of Rights was ratified in 1791, the common law recognized that some statements taken from persons on their deathbeds were admissible in criminal trials even though they were not made in the presence of the accused.[2] American courts continued to admit dying declarations after ratification of the Bill of Rights without expressing any constitutional concerns.[3] The Supreme Court recently described dying declarations in *Crawford v. Washington* as "one deviation," which was not neatly explained by its ruling that the Confrontation Clause prohibits admission of out-of-court testimonial statements in criminal trials unless the defendant had a prior opportunity to cross-examine the maker of the statement.[4] The Court seemed aware that modern confrontation theory does not correspond with early evidentiary practices insofar as dying declarations were concerned, because it sought to isolate them, writing, "If this exception must be accepted on historical grounds, it is *sui generis*."[5] So, what is the foundation of the dying declaration rule, and how does one reconcile it with the right to confrontation enshrined in the Constitution? This Article first examines the scholarly debate over the

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[1] U.S. CONST. amend. VI.

[2] *E.g.*, The King v. Woodcock, 1 Leach 500, 501–04, 168 Eng. Rep. 352, 352–54 (K.B. 1789).

[3] *See, e.g.*, United States v. Veitch, 28 F. Cas. 367, 367–68 (C.C.D.C. 1803) (No. 16,614); United States v. McGurk, 26 F. Cas. 1097, 1097 (C.C.D.C. 1802) (No. 15,680).

[4] 541 U.S. 36, 56 n.6, 68 (2004).

[5] *Id.* at 56 n.6. *Sui generis* means "[o]f its own kind or class; unique or peculiar." BLACK'S LAW DICTIONARY 1475 (8th ed. 2004).

rationale supporting the dying declaration exception to the hearsay rule. It then discusses the U.S. Supreme Court's changing jurisprudence and the history of the dying declaration exception. Finally, this Article discusses the exception's post-founding acceptance and repeated vindication against constitutional challenge, and its post-*Crawford* future.

I. TWENTIETH CENTURY SCHOLARLY DEBATE—WIGMORE VS. FRIEDMAN

Scholars have attempted to reconcile this traditional hearsay exception with the confrontation requirement from both sides of the equation.[6] In the first edition of his legendary treatise published in the early twentieth century, Professor John Wigmore analyzed confrontation as an outgrowth of the development and enforcement of the hearsay rule, which incorporated exceptions.[7] Later, Professor Richard Friedman approached the issue from the opposite direction, positing that the right of confrontation is not dependent on the traditional hearsay doctrine, and that the dying declaration exception can be constitutionally justified under a confrontation forfeiture principle.[8] Neither explanation has entirely satisfied the Supreme Court. The Court has expressly rejected Professor Wigmore's hearsay-based hypothesis about the meaning of the Confrontation Clause.[9] The Court also recently rebuffed Professor Friedman's effort to unify the dying declaration and forfeiture exceptions for confrontation purposes.[10]

Professor Wigmore acknowledged arguments made by others that the Confrontation Clause's unqualified language could not be escaped even by a witness's death, but he asserted that the confrontation mandate must be construed by reference to the history of the cross-examination requirement developed through the hearsay rule.[11] Wigmore's monumental work on the history of the hearsay rule asserted

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[6] *See generally* Ohio v. Roberts, 448 U.S. 56, 66 n.9 (1980) (citations omitted) (listing pro-prosecution theories, pro-defense theories, and ambiguous theories), *abrogated by Crawford*, 541 U.S. at 60–69.

[7] 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 1754–55 (1st ed. 1904).

[8] Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 511, 526–27 (1997) [hereinafter Friedman, *Confrontation and the Definition of Chutzpa*].

[9] *Crawford*, 541 U.S. at 50–51 (citing Dutton v. Evans, 400 U.S. 74, 94 (1970) (Harlan, J., concurring); 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 101 (2d. ed. 1923)).

[10] *See* Giles v. California, 128 S. Ct. 2678, 2686–87 (2008) (rejecting the State's argument of forfeiture).

[11] 2 WIGMORE, *supra* note 7.

that hearsay was regularly received as evidence until the mid-1600s.[12] During the 1500s and early 1600s, a general awareness of the impropriety of hearsay usage arose.[13] By the mid-1700s, the exclusionary rule against hearsay became settled.[14] Wigmore reasoned that the primary requirement of the hearsay rule ensured that testimonial statements would be subjected to cross-examination and that this was also the essential object of confrontation.[15] He concluded that "so far as confrontation is an indispensable element of the [h]earsay rule, it is merely another name for the opportunity of cross-examination."[16]

Wigmore went on to say that the right to subject testimony to cross-examination was "not a right devoid of exceptions."[17] During the 1700s, there were both recognized hearsay exceptions and an understanding that other exceptions might be developed.[18] Therefore, Wigmore argued that the Confrontation Clause outlined a general principle that incorporated both existing hearsay exceptions and those later recognized.[19] Wigmore's analysis used deductive reasoning to reconcile the Confrontation Clause with the dying declaration and other hearsay exceptions, concluding:

> The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially—this depends on the law of evidence for the time being—, but only what mode of procedure shall be followed—*i.e.* a cross-examining procedure—in the case of such testimony as is required by the ordinary law of evidence to be given infra-judicially.[20]

Wigmore's position was never fully accepted by the Supreme Court, as evidenced by Justice John Marshall Harlan II's statement:

> Wigmore's more ambulatory view—that the Confrontation Clause was intended to constitutionalize the hearsay rule and all its exceptions as evolved by the courts—rests also on assertion without citation, and attempts to settle on ground that would appear to be equally infirm as a matter of logic. Wigmore's reading would have the

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[12] John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 444 (1904).

[13] *Id.* at 444–45; *see also* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 498–501 (Boston, Little, Brown & Co. 1898).

[14] Wigmore, *supra* note 12, at 448 (citing Trial of Captain William Kidd, 13 Will. 3, pl. 416 (1701), *reprinted in* 14 A COMPLETE COLLECTION OF STATE TRIALS 147, 177 (T.B. Howell comp., London, T.C. Hansard 1816)).

[15] 2 WIGMORE, *supra* note 7, § 1365, at 1695.

[16] *Id.*

[17] *Id.* § 1397, at 1754–55.

[18] *Id.* § 1397, at 1755; *see also* Snyder v. Massachusetts, 291 U.S. 97, 107 (1934) (noting that the "privilege of confrontation [has never] been without recognized exceptions" (citing Dowdell v. United States, 221 U.S. 325, 330 (1911))).

[19] 2 WIGMORE, *supra* note 7, § 1397, at 1755.

[20] *Id.*

> practical consequence of rendering meaningless what was assuredly in some sense meant to be an enduring guarantee. It is inconceivable that if the Framers intended to constitutionalize a rule of hearsay they would have licensed the judiciary to read it out of existence by creating new and unlimited exceptions.[21]

Harlan subsequently reconsidered his original stance and adopted the view espoused by Wigmore.[22] The majority in *Crawford*, however, wrote that the "principal evil" against which the Confrontation Clause was directed was the use of *ex parte* examinations in criminal prosecutions.[23] The Court therefore reasoned that the Clause could not be read in a manner which left it open to exceptions and powerless to prevent "flagrant inquisitorial practices."[24] The Court thus rejected Wigmore's view that the application of the Confrontation Clause "to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'"[25]

In contrast to Wigmore, Professor Friedman stated, "The Confrontation Clause does not speak of the rule against hearsay or of its exceptions."[26] Friedman did not exhibit the same reverence toward the hearsay rule as Wigmore, and wrote that most hearsay should be presumptively admissible.[27] Friedman opined that the history of English prosecutorial practices revealed the essential idea behind the Confrontation Clause that witness testimony offered by a prosecutor must be taken before an accused, subject to oath and cross-examination.[28] According to Friedman, those testimonial statements cannot be used at a criminal trial unless a defendant has been afforded an opportunity to cross-examine the statement's maker under oath.[29] There is some overlap with territory covered by the hearsay rule, because Friedman would not only limit the prohibition against *ex parte* "testimony" to formalized declarations, but he would also exclude

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[21] California v. Green, 399 U.S. 149, 178–79 (1970) (Harlan, J., concurring) (citation and footnote call number omitted).

[22] Dutton v. Evans, 400 U.S. 74, 94–95 (1970) (Harlan, J., concurring) (citation omitted) (endorsing Wigmore's view and eschewing his previous stance in *Green*).

[23] Crawford v. Washington, 541 U.S. 36, 50 (2004).

[24] *Id.* at 51.

[25] *Id.* at 50–51(quoting 3 WIGMORE, *supra* note 9, § 1397, at 101).

[26] Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1022 (1998) [hereinafter Friedman, *Confrontation: The Search for Basic Principles*].

[27] Richard D. Friedman, *Thoughts from Across the Water on Hearsay and Confrontation*, 1998 CRIM. L. REV. 697, 699, 706–07 [hereinafter Friedman, *Thoughts from Across the Water*].

[28] Friedman, *Confrontation: The Search for Basic Principles*, *supra* note 26, at 1025.

[29] Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1228–29 (2002); Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS L.J. 545, 563 (1998).

hearsay uttered in anticipation of its use in the investigation or prosecution of a crime.[30] His work, however, detached the Confrontation Clause from the hearsay rule and its exceptions. Friedman proposed that the confrontation right be subjected to one qualification: An accused should be deemed to have forfeited his or her right to confront a witness if the accused's own wrongful conduct prevented a witness from appearing at trial.[31]

The Supreme Court appears to endorse Professor Friedman's central thesis in *Crawford*, holding that, with limited exceptions established at the time of the founding, the Confrontation Clause prohibits the use of testimonial hearsay in criminal prosecutions unless the defendant against whom the hearsay is offered had an opportunity to cross-examine the missing witness.[32] Following *Crawford*, however, Friedman expressed concern that acceptance of a dying declaration exception on historical grounds would obscure the clarity of the confrontation principle that the Court adopted.[33] He advocated that his confrontation forfeiture doctrine could instead explain the exception.[34]

Professor Friedman asserted that "[t]he idea that the accused cannot claim the confrontation right if the accused's own misconduct prevents the witness from testifying at trial is a very old one."[35] In Friedman's view, "the admissibility of dying declarations . . . is best understood as a reflection of the principle that a defendant who renders a witness unavailable by wrongful means cannot complain about her absence at trial."[36] He reasoned that this principle is preferable to the

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[30] Friedman & McCormack, *supra* note 29, at 1246–52; Friedman, *Confrontation: The Search for Basic Principles*, *supra* note 26, at 1038–43; *see also* Friedman, *Thoughts from Across the Water*, *supra* note 27, at 706 (defining the term "testimonial"). Professor Friedman suggests that the capacity of a declarant should be considered when determining whether the declarant anticipated that it would be used for prosecutorial purposes. Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 249–52 (2002).

[31] Richard D. Friedman, *Confrontation as a Hot Topic: The Virtues of Going back to Square One*, 21 QUINNIPIAC L. REV. 1041, 1044 (2003); Friedman, *Confrontation: The Search for Basic Principles*, *supra* note 26, at 1031.

[32] Crawford v. Washington, 541 U.S. 36, 53–54, 56, 60–62 (2004).

[33] Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 SUP. CT. REV. 439, 466–67 [hereinafter Friedman, *The Confrontation Clause Re-Rooted*].

[34] *Id.* at 467.

[35] *Id.* at 464; *see, e.g.*, The King v. Archer, 2 T.R. 205, 100 Eng. Rep. 112 (K.B. 1786); Lord Morly's Case, Kelyng 53, 55, 84 Eng. Rep. 1079, 1080 (K.B. 1666). *See generally* Tim Donaldson, *Combating Victim/Witness Intimidation in Family Violence Cases: A Response to Critics of the "Forfeiture by Wrongdoing" Confrontation Exception Resurrected by the Supreme Court in* Crawford *and* Davis, 44 IDAHO L. REV. 643, 647–61 (2008) (tracing the history of the forfeiture by wrongdoing rule).

[36] Friedman, *The Confrontation Clause Re-Rooted*, *supra* note 33, at 467.

"fiction" that the veracity of a dying declaration dispenses with the need for cross-examination.[37] Friedman unified the dying declaration exception under his broader equitable forfeiture theory because it could be harmonized with his view that the confrontation right extends to almost all accusatory statements, subject only to possible loss by forfeiture.[38]

In *Giles v. California*,[39] the Supreme Court demonstrated greater reluctance than Professor Friedman to transform history. In that case, the Court stated that the wrongful conduct of a defendant that caused the death of a witness, alone, would not trigger confrontation forfeiture.[40] It further opined that a criminal defendant's right to confront an unavailable witness is forfeited only if it is shown that the defendant caused the absence of the witness for the purpose of making the witness unable to testify.[41] It was significant to the Court that separate rules existed at common law for dying declarations and forfeiture by wrongdoing.[42] The Court commented on the complete absence of forfeiture arguments in the early dying declaration cases.[43] It also wrote that the dying declaration rule would not have been necessary at common law if a decedent's statements had been admissible solely on the basis of a defendant's wrongdoing.[44] The Court therefore passed on the opportunity to unify the two exceptions under Friedman's forfeiture rationale.

The modern struggle and inability to reconcile the dying declaration rule with the right of confrontation stands in stark contrast to the complete absence of concern about any perceived conflict around the time of founding. The Tennessee Supreme Court encountered one of the earliest reported confrontation arguments against dying declarations in 1838—almost half a century after the founding—in the case of *Anthony v. State*.[45] In that case, the defendant insisted that dying declarations were inadmissible under a state constitutional mandate that read, "'[t]he

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[37] Richard D. Friedman, *'Face to Face': Rediscovering the Right to Confront Prosecution Witnesses*, 8 INT'L J. EVIDENCE & PROOF 1, 24 (2004) (citing McDaniel v. State, 16 Miss. (8 S. & M.) 401 (1847)).

[38] *See* Friedman, *Confrontation: The Search for Basic Principles*, *supra* note 26, at 1030–31, 1038–43; Friedman, *Confrontation and the Definition of Chutzpa*, *supra* note 8, at 527.

[39] 128 S. Ct. 2678 (2008).

[40] *See id*. at 2684.

[41] *See id*. at 2682–84, 2687–88.

[42] *Id.* at 2684–86.

[43] *Id.*

[44] *See id*. at 2685–86.

[45] 19 Tenn. (Meigs) 265, 277 (1838).

accused shall be confronted by witnesses, face to face.'"[46] The court rejected the claim on the grounds that the Bill of Rights was not intended to introduce a new principle, but to "preserve and perpetuate" rights as they were understood at the time of the country's founding.[47] The court was fortified by the apparent lack of prior confrontation complaints, stating:

> That our view of this question is correct, is made manifest by the fact, that after more than forty years from the adoption of our first constitution, this argument against the admissibility of dying declarations, on the ground of the bill of rights, is for the first time made, so far as we are aware in our courts of justice; and if made elsewhere it does not appear to have received judicial sanction in any state.[48]

The dying declaration rule was accepted both before and after adoption of the Confrontation Clause.[49] The future of a confrontation exception for dying declarations, however, remains in doubt. The U.S. District Court for Colorado asserted in *United States v. Jordan* that "there is no rationale in *Crawford* or otherwise under which dying declarations should be treated differently than any other testimonial statement."[50] The well-chronicled consent to usage of dying declarations in criminal prosecutions cannot be lazily harmonized with our modern understanding of the Confrontation Clause.[51]

II. SIGNIFICANT MILESTONES IN CONFRONTATION CLAUSE JURISPRUDENCE—*MATTOX* AND *CRAWFORD*

Before examining the history of the dying declaration exception and its relationship to the Confrontation Clause, this Part examines two cases that reflect a shift in jurisprudential thought regarding admissibility of dying declarations.

A. Mattox *vs. Declarations* in Extremis

Clyde Mattox was tried in 1891 for the murder of John Mullen.[52] The defense offered an exculpatory dying declaration at trial, but it was rejected by the trial court.[53] Mattox was subsequently granted a new

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[46] *Id.* at 274 (quoting TENN. CONST. art. I, § IX).

[47] *Id.* at 277–78.

[48] *Id.* at 278.

[49] *See supra* notes 2–3 and accompanying text.

[50] United States v. Jordan, 66 Fed. R. Evid. Serv. (West) 790, 793 (D. Colo. 2005).

[51] *See* Michael J. Polelle, *The Death of Dying Declarations in a Post*-Crawford *World*, 71 MO. L. REV. 285, 289–313 (2006) (discussing the historical underpinnings of the dying declaration exception and its application after *Crawford*).

[52] Mattox v. United States, 146 U.S. 140, 141 (1892).

[53] *Id.* at 142.

trial due to jury tampering, and the trial court's refusal to admit Mullen's dying declarations.[54]

By the time of the retrial, two of the witnesses against Mattox had died, and the court allowed their testimonies from the first trial to be read.[55] Mattox objected and argued on appeal that his confrontation right had been violated.[56] The Supreme Court rejected the argument, holding that the primary object of the Confrontation Clause was to prevent the use of *ex parte* affidavits, and that the purpose of the Clause had not been impaired because the witnesses from the first trial had been cross-examined in the presence of Mattox when the earlier testimony was given.[57] The Court wrote that it was "bound to interpret the Constitution in the light of the law as it existed at the time it was adopted," and not as reaching out for new rights beyond those inherited from the common law.[58] It acknowledged that exceptions were recognized at the time of the founding and held that they were obviously meant to be respected.[59]

In *Mattox*, the Court pointed to dying declarations as an example where technical adherence to the letter of the Confrontation Clause was not justified because it would take the Clause "farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant."[60] The Court acknowledged that dying declarations are rarely made in the accused's presence, but stated that their admissibility could not be questioned because they had been treated as competent testimony "from time immemorial."[61] Two years later, the Court stated in *Robertson v. Baldwin* that the Confrontation Clause did not prevent admission of dying declarations.[62] The *Mattox* holding has endured changes to Confrontation Clause jurisprudence over the years, and its continuing worth only recently came into question by virtue of the decision in *Crawford v. Washington*.[63]

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54 *Id.* at 150–53 (citations omitted).

55 Mattox v. United States, 156 U.S. 237, 240 (1895).

56 *Id.*

57 *Id.* at 240–44.

58 *Id.* at 243.

59 *Id.*

60 *Id.*

61 *Id.* at 243–44.

62 165 U.S. 275, 282 (1897).

63 *See* Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004) (stating that there is authority for dying declarations to be considered testimonial (citing The King v. Woodcock, 1 Leach 500, 501–04, 168 Eng. Rep. 352, 353–54 (K.B. 1789); Trial of Reason & Tranter, 8 Geo., Hil. 461 (1722), *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS 20, 24–38 (T.B. Howell comp., London, T.C. Hansard 1816); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 64 (London, Luke Hanfard & Sons 3d ed. 1808))).

B. Crawford *vs. Declarations* in Extremis

Crawford v. Washington marked a shift in confrontation jurisprudence toward originalism. During the quarter-century leading up to *Crawford*, hearsay could be admitted in a criminal trial, without violating a defendant's right to confrontation, if the declarant of a statement was unavailable and the out-of-court statement was reliable.[64] Reliability could be shown if the statement fell within a firmly-rooted hearsay exception, or if there were particular indicia of reliability.[65] Declarations *in extremis* satisfied the Confrontation Clause under the reliability test because the admission of dying declarations was a firmly-rooted hearsay exception.[66]

In *Crawford*, the Court held that the reliability test was contrary to the original intent of the Confrontation Clause.[67] There, the Court placed particular emphasis on the development of the law following the 1603 trial of Sir Walter Raleigh, in which the accused was condemned after being repeatedly denied the right to confront his principal accuser.[68] The Court concluded that, by the time of founding,

> the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.[69]

Crawford established a new test that distinguishes between nontestimonial and testimonial out-of-court statements.[70] On the one hand, the Court said that it is consistent with the intent of constitutional framers to afford flexibility to the states in developing hearsay law where the admissibility of nontestimonial hearsay is at issue.[71] On the other hand, when testimonial hearsay is involved, the Court held that the Sixth Amendment demands an opportunity for cross-examination

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[64] Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. at 60–69.

[65] *Id.*

[66] Lilly v. Virginia, 527 U.S. 116, 125–26 (1999) (plurality opinion) (citing *Mattox*, 156 U.S. at 243); *Roberts*, 448 U.S. at 66 (citing Pointer v. Texas, 380 U.S. 400, 407 (1964)).

[67] *Crawford*, 541 U.S. at 61–62.

[68] *Id.* at 44 (citing Trial of Sir Walter Raleigh, 2 James, pl. 74 (1603), *as reprinted in* 1 DAVID JARDINE, CRIMINAL TRIALS 400–01 (London, Charles Knight 1832)).

[69] *Id.* at 50.

[70] *Id.* at 68.

[71] *Id.*

before an out-of-court statement may be admitted against a defendant in a criminal trial.[72]

In *Crawford*, the Court identified various formulations that may describe a core class of testimonial statements:

> *[E]x parte* in-court testimony or its functional equivalent[,] . . . extrajudicial statements contained in formalized materials such as affidavits, depositions, prior testimony, or confessions, . . . [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[73]

Without adopting a precise articulation, the Court remarked, "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard."[74] The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial[,]'"[75] but it did hint that, "[a]lthough many dying declarations may not be testimonial, there is authority for admitting even those that clearly are."[76]

Two years after *Crawford* was decided, the Court further refined a formulation for testimonial statements in *Davis v. Washington*.[77] The Court held in *Davis* that responses to police questioning are not testimonial if the inquiry is conducted under circumstances "objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[78] Yet, such responses are testimonial if there is no ongoing emergency and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[79] Neither of the cases consolidated in *Davis* involved dying declarations, but the opinion significantly impacts how they are analyzed, because the Court confirmed that nontestimonial out-of-court statements do not trigger confrontation concerns: "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."[80]

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[72] *Id.* at 68–69.

[73] *Id.* at 51–52 (citations omitted); *see also* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009) (reiterating *Crawford* and holding that certificates of state laboratory analysts, too, are "testimonial statements" (citing *Crawford*, 541 U.S. at 54)).

[74] *Crawford*, 541 U.S. at 52.

[75] *Id.* at 68.

[76] *Id.* at 56 n.6 (citing The King v. Woodcock, 1 Leach 500, 501–04, 168 Eng. Rep. 352, 353–54 (K.B. 1789)).

[77] 547 U.S. 813 (2006).

[78] *Id.* at 822.

[79] *Id.*

[80] *Id.* at 821.

There are decisions from lower courts which have discussed, but have ultimately avoided, having to rule upon whether a dying declaration exception survives *Crawford*.[81] There are also cases that have upheld the use of nontestimonial dying declarations without having to reach the issue of whether an exception still exists for testimonial declarations.[82] There are judicial opinions that appear to generally endorse the constitutionality of a dying declaration but whose value may be limited by inclusion of alternative holdings that the statements at issue therein were nontestimonial.[83] The discussions in these cases warrant reference; yet, the Confrontation Clause does not squarely come into play when nontestimonial dying declarations are involved. As a Maryland court in *Head v. State* recognized: "*Davis* made explicit what had been strongly implied in *Crawford*, i.e., the [C]onfrontation [C]lause set forth in the Sixth Amendment to the United States Constitution applies only to testimonial hearsay."[84] Thus, the constitutional question will remain open until it is directly decided whether testimonial dying declarations may be admitted in criminal prosecutions post-*Crawford*.

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[81] *See* Miller v. Stovall, 573 F. Supp. 2d 964, 995–96 (E.D. Mich. 2008) (citing *Crawford*, 541 U.S. at 56 n.6) (finding it unnecessary to rule on the issue because a suicide note did not constitute a dying declaration); Williams v. State, 947 So. 2d 517, 521 (Fla. Dist. Ct. App. 2006) (citing *Crawford*, 541 U.S. at 68) (stating that the outcome of the case was not dependent upon resolution of the issue because the evidence was cumulative); State v. Meeks, 88 P.3d 789, 793–94 (Kan. 2004) (citing *Crawford*, 541 U.S. at 56 n.6) (noting the potential availability of the dying declaration exception, but ruling instead on forfeiture grounds), *overruled on other grounds by* State v. Davis, 158 P.3d 317, 322 (Kan. 2006).

[82] People v. Ingram, 888 N.E.2d 520, 525–26 (Ill. App. Ct. 2008) (citing *Davis*, 547 U.S. at 815); Head v. State, 912 A.2d 1, 11–13 (Md. Ct. Spec. App. 2006) (citing *Davis*, 547 U.S. at 822); People v. Ahib Paul, 803 N.Y.S.2d 66, 68–70 (App. Div. 2005); State v. Nix, 2004-Ohio-5502, No. C-030696, 2004 WL 2315035, ¶¶ 75–76 (citing *Crawford*, 541 U.S. at 56 n.6).

[83] *See, e.g.*, Commonwealth v. Nesbitt, 892 N.E.2d 299, 311–12 (Mass. 2008) (citing *Crawford*, 541 U.S. at 56 n.6) (addressing the survival of the dying declaration exception while alternatively holding that the statements at issue in the case were nontestimonial); People v. Taylor, 737 N.W.2d 790, 793–95 (Mich. Ct. App. 2007) (holding that nontestimonial dying declarations were alternatively admissible under a historical dying declaration exception to the Confrontation Clause (citing *Crawford*, 541 U.S. at 68; People v. Monterroso, 101 P.3d 956, 971–72 (Cal. 2004))); Commonwealth v. Salaam, 65 Va. Cir. 404, 409, 412 (Cir. Ct. 2004) (holding that both testimonial and nontestimonial statements fall under the hearsay exception of dying declarations incorporated by the Confrontation Clause, but alternatively holding that the dying declaration at issue in that case was nontestimonial (citing *Crawford*, 541 U.S. at 56 n.6; State v. Forrest, 596 S.E.2d 22, 27 (N.C. Ct. App. 2004), *vacated by* 636 S.E.2d 565 (N.C. 2006) (per curium))).

[84] 912 A.2d at 12 (citing *Davis*, 547 U.S. at 822–27).

III. HEARSAY RULE VS. DECLARATIONS *IN EXTREMIS*

It may be impossible to pinpoint the exact origin of the dying declaration rule, but it likely predates the hearsay rule.[85] Simon Greenleaf's mid-nineteenth century treatise on evidence traced the doctrine to a canon of Roman Civil Law.[86] Professor Wigmore later identified a literary contributor. He commented that the exception was so long understood that even Shakespeare recognized the trustworthiness of deathbed statements.[87] Wigmore additionally noted that the ill-fated Sir Walter Raleigh may have played a role in the rule's development by providing one of the first reported legal passages to explain this commonly-accepted rationale used to justify the admission of dying declarations.[88]

Raleigh was charged with conspiring to kill the King of England and tried principally by depositions given by an alleged fellow conspirator who had confessed his role.[89] After having already been repelled in every attempt to have his accuser made to personally appear,[90] Raleigh tried reverse-psychology and argued that the prosecution should want to have the confessed conspirator, Lord Cobham, brought forward because the confessor possessed no incentive to lie in Raleigh's favor.[91] In doing so, Raleigh analogized his accuser to a dying man, stating:

> [A] dying man is ever presumed to speak truth: now Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour. It is you, then, Mr. Attorney, that should press his testimony, and I ought to fear his producing, if all that be true which you have alleged.[92]

Early cases confirm that dying declarations were regularly admitted in criminal prosecutions, but those authorities did not expressly state

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[85] *See, e.g.,* Hoppeoverhumbr' v. Thomas, Y.B. 4 Hen. 3, Hil. 189 (1220), *reprinted in* 1 SELDEN SOCIETY 120 (1887) (considering evidence that the decedent "after the wound and while yet alive declared that [the accused] hit him as aforesaid and charged him with his death"); Geoffrey v. Godard, Y.B. 4 John, Linc. 27 (1202), *reprinted in* 1 SELDEN SOCIETY, *supra*, at 11 (admitting evidence that the decedent "said that [the accused brothers] thus wounded him, and that should he get well, he would deraign this against them, and should he not, then he wished that his death might be imputed to them").

[86] 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 156, at 225 n.1 (Boston, Little, Brown & Co. 10th ed. 1858) (citation omitted).

[87] 2 WIGMORE, *supra* note 7, § 1430, at 1798 n.1, § 1438, at 1804 & n.1 (citing WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF KING JOHN act 2, sc. 6).

[88] *Id.* (citing Trial of Sir Walter Raleigh, 2 James, pl. 74 (1603), *as reprinted in* 1 JARDINE, *supra* note 68, at 400–01).

[89] *Trial of Sir Walter Raleigh*, *as reprinted in* 1 JARDINE, *supra* note 68, at 401.

[90] *Id.* at 418 (raising legal defenses based upon three English statutes: 1554–1555, 1 & 2 Phil. & M., c. 10.; 1547, 1 Edw. 6, c. 12, § 22; 1551–1552, 5 & 6 Edw. 6, c.11, § 12).

[91] *Id.* at 434–35.

[92] *Id.* at 435.

why. In the 1678 murder trial of Philip Earl of Pembroke, for example, the court admitted statements which arguably could be considered dying declarations, but it did not discuss the legal basis for their admission.[93] The prosecution was allowed to introduce declarations *in extremis* during the 1692 trial of Charles Lord Mohun, but no evidentiary ruling was announced and the evidence appeared to be exculpatory.[94] Charles Viner's *General Abridgment of Law and Equity* indicated that the 1720 case of *The King v. Ely* stood for the rule,[95] but the report for the case does not evidence an outright holding on the subject.[96] Viner summarized *Ely* as saying: "*In the case of murder, what the deceased declared after the wound given*, may be given *in evidence*."[97] The report for *Ely*, however, only confirms, without explanation, that witnesses were permitted to testify that the last words of a decedent who had been run through by Ely's sword were: "*This Villia*[*i*]*n hath kill'd me before I drew my Sword*."[98] Cases similar to *Ely* admitted the last words of those who had received a mortal blow without explaining the grounds for their admission.[99]

The practice of admitting dying declarations collided with the Best Evidence rule in the 1722 trial of Hugh Reason and Robert Tranter.[100] In *Dominus Rex v. Reason*, Reason and Tranter were tried for the execution-style slaying of Edward Lutterell that occurred following a scuffle in which Lutterell struck Tranter with a cane.[101] The report for

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[93] Trial of Philip Earl of Pembroke & Montgomery, 30 Car. 2, pl. 241 (1678), *reprinted in* 6 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1309, 1336 (London, T.C. Hansard 1810).

[94] Trial of Charles Lord Mohun, 4 W. & M., pl. 371 (1692), *reprinted in* 12 A COMPLETE COLLECTION OF STATE TRIALS 949, 987–88 (T.B. Howell comp., London, T.C. Hansard 1816).

[95] 12 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY § A.b.38(11), at 118 (London, Robinson et al. 2d ed. 1792).

[96] *See* The King v. Ely, 7 Geo. 1 (1720), *reprinted in* THE PROCEEDINGS ON KING'S COMMISSION 5–6 (London, Jonsur 1721).

[97] 12 VINER, *supra* note 95 (citing *Ely*, *reprinted in* THE PROCEEDINGS ON KING'S COMMISSION, *supra* note 96, at 5–6); *see also* 1 THOMAS WALTER WILLIAMS, THE WHOLE LAW RELATIVE TO THE DUTY AND OFFICE OF A JUSTICE OF THE PEACE 773 (London, W. Clarke & Sons et al. 2d ed. 1808) (citing 12 VINER, *supra* note 95); THE CONDUCTOR GENERALIS 153 (James Parker comp., Philadelphia, Charless 1801) (citing 12 VINER, *supra* note 95).

[98] *Ely*, *reprinted in* THE PROCEEDINGS ON KING'S COMMISSION, *supra* note 96, at 6.

[99] *E.g.*, Trial of William Lord Byron, 5 Geo. 3, pl. 545 (1765), *reprinted in* 19 A COMPLETE COLLECTION OF STATE TRIALS 1177, 1191, 1197, 1201–02, 1205–07 (T.B. Howell comp., London, T.C. Hansard 1813); Trial of Major John Oneby, 12 Geo. 1, pl. 468 (1726), *reprinted in* 17 A COMPLETE COLLECTION OF STATE TRIALS 29, 33 (T.B. Howell comp., London, T.C. Hansard 1816).

[100] Dominus Rex v. Reason, 1 Strange 499, 499–500, 93 Eng. Rep. 659, 659–660 (K.B. 1722).

[101] *Id.* at 501, 93 Eng. Rep. at 660–61.

the case indicates that the court admitted several of Lutterell's deathbed statements "without much hesitation."[102] The case does not explain a legal foundation for the dying declaration rule, but the decedent reportedly legitimized his last words as dramatically as a Shakespearean character. A witness testified that he admonished Lutterell that great weight would be given to his final statements and that Lutterell needed to be truthful and to avoid implicating innocent persons.[103] To this warning, the witness reported that Lutterell replied, "As a dying man, as he expected to be tried for this very fact at the bar in heaven, as well as the persons who had injured him, he assured me he was murdered in a barbarous manner."[104]

It came out during the testimony in *Reason* that one of Lutterell's final statements had been taken before justices of the peace and reduced to writing.[105] When the original writing could not be produced, debate ensued whether all of the dying declarations should be excluded or only the one that had been transcribed but not produced.[106] By the time Reason and Tranter were tried, a separate deposition rule had developed that applied in instances where a deponent had died.[107] Certain examinations taken on oath before a justice of the peace or coroner under statutory authority were admissible in evidence in some types of criminal cases if a declarant was dead or absent at the time of trial.[108] It

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[102] *Id.* at 499, 93 Eng. Rep. at 659.

[103] Trial of Reason & Tranter, 8 Geo., Hil. 461 (1722), *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 24.

[104] *Id.* Compare Lutrell's response with Shakespeare's wounded character Melun in the play *King John*:

> Have I not hideous death within my view
> Retaining but a quantity of life,
> Which bleeds away, ev'n as a form of wax
> Resolveth from its figure 'gainst the fire?
> What in the world should make me now deceive,
> Since I must lose the use of all deceit?
> Why should I then be false, since it is true
> That I must die here, and live hence by truth?

WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF KING JOHN act 5, sc. 6, lines 23–30, *reprinted in* III THE WORKS OF MR. WILLIAM SHAKESPEARE 180–81 (London, Knapten et al. 1745).

[105] *Reason*, 1 Strange at 499, 93 Eng. Rep. at 659–60.

[106] *Id.* at 500, 93 Eng. Rep. at 660.

[107] *See* 2 GILES DUNCOMBE, TRIALS PER PAIS 617 (Dublin, Rice 9th ed. 1793) (citations omitted).

[108] *E.g.*, Lord Morly's Case, Kelyng 53, 55, 84 Eng. Rep. 1079, 1080 (K.B. 1666) (detailing the importance of coroner examinations before admitting a dying declaration); 2 DUNCOMBE, *supra* note 107, at 481 (describing the acceptance of coroner depositions); MATTHEW HALE, PLEAS OF THE CROWN 263 (London, Richard & Edward Atkyns 1707) (allowing magistrate examinations). *See generally* An Act to Take Examination of Prisoners Suspected of Any Manslaughter or Felony, 1555, 2 & 3 Phil. & M., c. 10

is arguable that only coroner inquisitions could be taken *ex parte*.[109] It had become settled, however, that depositions taken from an informer by a coroner or a justice of the peace could be given in evidence at trial if it was established that "such informer is dead, or unable to travel, or kept away by the means or procurement of the prisoner, and that the examination offered in evidence is the very same that was sworn before the coroner or justice, without any alteration whatsoever."[110] In cases of death or illness, the prior examinations were considered the "utmost Evidence that can be procured, the Examinant himself being prevented in coming by the Act of God."[111]

The Lord Chief Justice in *Reason* restated the Best Evidence rule that examinations reduced to writing must be produced unless a legally sufficient excuse accounted for the absence of the transcript.[112] The Chief Justice was of the opinion that the examination taken before the justices of the peace was inseparable from an earlier unrecorded deathbed statement and that the failure to produce the transcript disqualified testimony about either declaration.[113] Yet other justices expressed their opinions that the missing transcript stood distinctly by itself,[114] and the

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(expanding the types of cases in which justices of the peace were allowed to take depositions); An Act Touching Bailment of Persons, 1554, 1 & 2 Phil. & M., c. 13, §§ IV, V (establishing statutory authority for justices of the peace to conduct preliminary examinations and for coroners to make inquisitions).

[109] 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 402–03 (Philadelphia, Edward Earle 1819) (citations omitted); *see also* The King v. Dingler, 2 Leach 561, 561–62, 168 Eng. Rep. 383, 383–84 (K.B. 1791) (holding that the statutes authorizing magistrate examinations required the prisoner to be present); Trial of the Lord Morley, 18 Car. 2, pl. 222 (1666), *reprinted in* 6 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS, *supra* note 93, at 769, 770 para. 4, 776 (admitting coroner depositions of deceased witnesses despite objection that evidence must be given face-to-face). *But see* The King v. Westbeer, 1 Leach 12, 168 Eng. Rep. 108, 109 (K.B. 1739) (admitting a deposition taken under the magistrate statutes despite loss of the benefit of cross-examination).

[110] 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 46, § 15, at 592 (John Curwood ed., London, Sweet 8th ed. 1824).

[111] GEOFFREY GILBERT, THE LAW OF EVIDENCE 141 (London, Henry Lintot 1st ed. 1756); *see also* HENRY BATHURST, THE THEORY OF EVIDENCE 30 (Dublin, Cotter 1761) (commenting that such depositions were the best available evidence).

[112] Trial of Reason & Tranter, 8 Geo., Hil. 461 (1722), *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 1, 31; *see also* 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN ch. 5, § 124, at 356–57 (London, A. Strahan 1803) (stating that, "[i]n Trowter's Case[,] the court would not admit parol evidence of the declarations of the deceased which had been reduced to writing"); 12 VINER, *supra* note 95, § A.b.38(12), at 118 (restating the Best Evidence rule as applied to dying declarations in Trowter's Case).

[113] *Trial of Reason & Tranter*, *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 31–33, 34–35.

[114] *Id.*, *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 35–36.

court allowed testimony regarding dying declarations made by Lutterell before and after the examination by the justices of the peace.[115]

The debate between the Justices in *Reason* exposes the lack of unanimity at that time regarding the status of dying declarations. During the debate, Justice Eyre argued that Lutterell's unwritten first dying declaration might deserve less credit than the later transcribed declaration, but that it was still evidence that would have been regularly admitted by itself at the Old Bailey criminal courts.[116] But Justice Powis disagreed, stating:

> If they were both of equal validity you say something, but it is confessed on all hands, that the second examination was more solemn and valid, because two justices of the peace were present, and there was the awe of magistracy over the person; and the second examination relates to the first.[117]

The Chief Justice similarly commented that even the witness who heard the original dying declaration thought that it might not be good enough and therefore sought to perfect it by having the statement retaken before the justices of the peace.[118]

The statements by Justice Powis in *Reason* illustrate the importance of the oath requirement at common law. When it came to hearsay, lack of cross-examination was a secondary concern to the absence of oath.[119] In the mid-1700s, both Gilbert and Bathurst explained in their treatises on evidence that the principal objection to hearsay was that bare speaking was not allowed in courts of justice.[120] A witness would not be allowed to testify in court without first taking an

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[115] *Id.*, *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 36–38.

[116] *Id.*, *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 35–36.

[117] *Id.*, *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 36. *But see* Douglas v. Duke of Hamilton, [1769] (H.L.) (appeal taken from Scot.) (U.K.), *reprinted in* 2 THOMAS S. PATON, REPORTS OF CASES DECIDED IN THE HOUSE OF LORDS, UPON APPEAL FROM SCOTLAND, FROM 1757 TO 1784, at 143, 169 (Edinburgh, T. & T. Clark 1851) (arguing that a sworn statement was "of no force, when opposed to the dying declarations").

[118] *Trial of Reason & Tranter*, *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 34–35.

[119] *See* 2 HAWKINS, *supra* note 110, ch. 46, § 44, at 596–97. The oath requirement played an important role in the development of the hearsay rule; however, it must be recognized that *Crawford v. Washington* degrades the importance of the oath requirement in relation to its confrontation test. 541 U.S. 36, 52 (2004) (citing Trial of Sir Walter Raleigh, 2 James, pl. 74 (1603), *as reprinted in* 1 JARDINE, *supra* note 68, at 430).

[120] BATHURST, *supra* note 111, at 111; GILBERT, *supra* note 111, at 152.

oath, and unsworn out-of-court statements therefore had even less value.[121]

Despite absence of an oath, deathbed statements were accepted as evidence. During the 1730 trial on appeal of Thomas Bambridge for the death of a prisoner left in his care, an objection was made against admitting what had been said by the deceased, but the court overruled the objection and held, "what is declared as an actual fact" constituted evidence.[122] By 1760, a clear distinction emerged between deathbed statements and other hearsay uttered by deceased witnesses. Numerous declarations *in extremis* were admitted against the Earl of Ferrers in his trial for killing John Johnson.[123] The Earl attempted to counter the prosecution's proof by introducing other prior statements made by Johnson showing a bias against him, but the prosecution objected, explaining:

> My lords, though the declarations of the deceased, whilst a dying man, and after the stroke is given, are to be admitted as legal evidence, yet a deposition of what he or any other person said before the accident, is clearly hearsay evidence, upon the same foundation with all other hearsay evidence; and, with submission to your lordships, ought not to be admitted.[124]

The Earl waived the question in response to the objection,[125] and the relationship between the dying declaration rule and the hearsay rule was not fully resolved.

The 1761 case entitled *Wright v. Littler*,[126] reported by Burrow, became recognized as the leading early case on dying declarations.[127] *Wright* involved a property ownership dispute over land that had been repeatedly transferred in reliance upon title obtained through a will

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[121] BATHURST, *supra* note 111, at 111; GILBERT, *supra* note 111, at 152–53; *see also* Gray v. Goodrich, 7 Johns. 95, 96 (N.Y. Sup. Ct. 1810) (discussing the oath requirement in relation to declarations *in extremis*); FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT *NISI PRIUS* 289–90 (London, W. Strahan & M. Woodfall 1772) (restating the common law oath requirement). *See generally Crawford*, 541 U.S. at 69–71 (Rehnquist, C.J., concurring) (discussing the common law oath requirement).

[122] Trial of Thomas Bambridge, 4 Geo. 2, pl. 481 (1730), *reprinted in* 17 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 99, at 397, 417.

[123] Trial of Lawrence Earl Ferrers, 33 Geo. 2, pl. 538 (1760), *reprinted in* 19 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 99, at 885, 911, 913, 916–18.

[124] *Id.*, *reprinted in* 19 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 99, at 936–37; *see also* State v. Ridgely, 2 H. & McH. 120, 120 (Md. 1785) (holding that declarations made by a decedent before receipt of a fatal blow were inadmissible).

[125] *Trial of Lawrence Earl Ferrers*, *reprinted in* 19 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 99, at 885, 937.

[126] Wright v. Littler, 3 Burr. 1244, 97 Eng. Rep. 812 (K.B. 1761), *overruled by* Stobart v. Dryden, 1 M. & W. 615, 624–25, 150 Eng. Rep. 581, 585 (A.C. 1836).

[127] *E.g.*, 2 WIGMORE, *supra* note 7, § 1430, at 1798 (citing *Wright*, 3 Burr. at 1244, 97 Eng. Rep. at 812).

witnessed by a William Medlicott.[128] On his deathbed, Medlicott admitted to his sister that he had forged the will.[129] Counsel for a party in the chain of title derived from the suspect will argued during a motion for a new trial that the deathbed statements were inadmissible unsworn hearsay and that there had been no opportunity to cross-examine Medlicott.[130] Counsel for the heir who had been deprived of the property by the allegedly fraudulent will argued that Medlicott's dying declarations were admissible evidence, reasoning as follows:

> This evidence is admissible; because it was the solemn declaration of a dying man to his nearest relation; which is equal to an oath: for such declarations of dying men have been admitted as evidence even in cases of murder. So that it ought not to be called "mere hearsay evidence."[131]

Burrow reported that Lord Mansfield found that the dying declarations were properly admitted, writing:

> The declaration of Medlicott in his last illness . . . is allowed to be competent and material evidence. . . . The account he gave of it in his last moments is equally proper . . . . [A]s the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience[,] I am of opinion "the evidence was proper to be left to the jury."[132]

Despite Burrow's account, it is doubtful that *Wright* established a general hearsay exception at the time it was decided.[133] In addition to Burrow, William Blackstone reported the case.[134] Blackstone announced that the court found certain dying declarations were admissible, but he asserted that no rule was adopted, writing:

> As to the fact, the admissibility or competence of evidence must result from the particular circumstances of the case. No rule can be general. Here the testator died in 1746. Both wills [were] in the custody of Medl[i]cott: the other subscribing witness [is] dead: his wife [is] to be benefitted under it. He, on his death-bed, sends the lessor of the plaintiff his title; which is inconsistent with that under which the defendant claims. Under all these circumstances, I think it admissible evidence. No general rule can be drawn from it.[135]

The cases leading up to, and including, *Wright* demonstrate that it had become common practice to admit dying declarations as evidence, but in light of repeated admonitions in Blackstone's report that the case

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[128] *Wright*, 3 Burr. at 1247–48, 97 Eng. Rep. at 814.

[129] *Id.*

[130] *Id.* at 1248, 97 Eng. Rep. at 814.

[131] *Id.* at 1253, 97 Eng. Rep. at 817.

[132] *Id.* at 1255, 97 Eng. Rep. at 818.

[133] *See* Stobart v. Dryden, 1 M. & W. 615, 625–26, 150 Eng. Rep. 581, 585 (A.C. 1836).

[134] Wright v. Littler, 1 Black. W. 345, 96 Eng. Rep. 192 (K.B. 1761).

[135] *Id.* at 349, 96 Eng. Rep. at 193–94.

was limited to its facts, it is debatable whether the relationship between the hearsay and dying declaration rules had been settled. Yet, a rapid reconciliation took place over the next few decades. The 1768 edition of *Blackstone's Commentaries* stated that in some cases, "the courts admit . . . *hearsay* evidence, or an account of what persons deceased have declared in their life-time: but such evidence will not be received of any particular facts."[136] By the time the 1794 edition was published, it had been resolved that the dying declaration rule had survived the emergence of the prohibition against hearsay, and the earlier passage from *Blackstone's Commentaries* included a footnote that confirmed the following:

> In criminal cases, the declarations of a person, who relates *in extremis*, or under an apprehension of dying, the cause of his death, or any other material circumstance, may be admitted in evidence; for the mind in that awful state is presumed to be as great a religious obligation to disclose the truth, as is created by the administration of an oath.[137]

The presumed sanctity accorded to dying declarations was mentioned in *Margaret Tinckler's Case*.[138] In that case, Tinckler was tried for murder in 1781 for a death that arose out of a botched abortion.[139] The judges "were unanimously of [the] opinion that the[ ] declarations of the deceased were legal evidence."[140] The judges did not agree, however, upon the weight to be given to the decedent's statements because she had been a willing participant in the criminal commission of the abortion.[141] Some judges were of the opinion that the dying declarations were alone sufficient evidence to sustain conviction, because the decedent knew she was dying "and had no view or interest to serve in excusing herself, or fixing the charge unjustly on others[,]" but others thought that additional confirmatory evidence was needed.[142]

In the 1784 case of *The King v. Drummond*, a defendant charged with robbery sought to introduce evidence that another man had confessed to the crime shortly before he was hung for a similar offense.[143] The court rejected the evidence because an attainted convict would not have been permitted at that time to give testimony on oath if alive; but the court unquestionably accepted that dying declarations were not

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[136] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 368 (Oxford, Clarendon Press 1768).

[137] 3 WILLIAM BLACKSTONE, COMMENTARIES *368 n.11 (Edward Christian ed., London, A. Strahan & W. Woodfall 12th ed. 1794).

[138] Margaret Tinckler's Case, (K.B. 1781), *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 354.

[139] *Id.*

[140] *Id.*, *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 355–56.

[141] *Id.*, *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 356.

[142] *Id.*

[143] 1 Leach 337, 337, 168 Eng. Rep. 271, 272 (K.B. 1784).

merely bare speaking, writing, "The principle upon which this species of evidence is received is, that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath."[144]

Some courts did not, however, easily dispense with the oath requirement. In *Thomas John's Case*, Rachael John was beaten by her husband and later fell ill.[145] The trial court admitted testimony about deathbed conversations in which Rachael accused her husband of causing her condition.[146] Thomas John was convicted, but a divided court held on review that an adequate foundation had not been laid for admission of a dying declaration, because Rachael John had not shown any apprehension of death.[147] The court explained: "If a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence."[148] These courts adhered to the notion that a mental component secured the solemnity of a dying declaration, and the rule did not apply if a decedent thought she would recover at the time a statement was made.[149]

By this time, the dying declaration rule ripened into an alternative to the deposition rule. The prosecutor in *The King v. Radbourne* argued that an examination taken by a magistrate from a stabbing victim shortly before her death was admissible as either a dying declaration or a qualifying deposition.[150] The court upheld the admission of the evidence in *Radbourne* without stating its grounds,[151] but the 1789 case of *The King v. Woodcock* firmly established that defective depositions might be admitted under the dying declaration rule.[152] In *Woodcock*, a magistrate's examination of a decedent was not taken during the committal of the defendant, as required by statute, and Chief Baron Eyre therefore held that "the Justice was not authorized to administer

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[144] *Id.* at 337–38, 168 Eng. Rep. at 272; *see also* Douglas v. Duke of Hamilton, (H.L. 1769), *reprinted in* 2 PATON, *supra* note 117, at 178 (explaining that a dying person would not rush to meet her maker with "a lie in her mouth and perjury in her right hand").

[145] Thomas John's Case (1790), *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 357, 357; *see also* The King v. Woodcock, 1 Leach 500, 504, 168 Eng. Rep. 352, 354 n.(*a*) (K.B. 1789) (summarizing the holding in *Thomas John's Case* in support of the court's own ruling).

[146] *Thomas John's Case*, *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 358.

[147] *Id.*

[148] *Id.*

[149] Henry Welbourn's Case, (K.B. 1792), *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 358, 360 (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352).

[150] 1 Leach 456, 460–61, 168 Eng. Rep. 330, 332 (K.B. 1784).

[151] *Id.* at 462, 168 Eng. Rep. at 333.

[152] 1 Leach at 500, 168 Eng. Rep. at 352.

an oath."[153] The deposition was consequently stripped of its statutory sanction, but the court held that it might still be admitted as a dying declaration if it qualified as such, because:

> [T]he general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.[154]

Irregular depositions, therefore, became eligible for admission as dying declarations if "the deceased, at the time of giving those depositions, was impressed with the fear of immediate death."[155]

Woodcock demonstrates why Professor Friedman cannot claim historical accuracy in his attempt to re-categorize dying declarations under the banner of forfeiture.[156] Death, illness, and forfeiture were each grounds upon which qualifying depositions could be admitted.[157] As the Supreme Court correctly surmised in *Giles v. California*, the dying declaration exception was not included within the forfeiture prong of the deposition rule.[158] *Woodcock* reveals that the dying declaration rule presented an independent ground for admitting irregular examinations in addition to those, such as forfeiture, under which depositions would have been normally allowed in English courts.[159]

Woodcock also stands in contrast to *The King v. Paine*, decided almost a century earlier.[160] In *Paine*, depositions had been taken before a mayor, but not in the presence of Paine.[161] By the time of trial the

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[153] *Id.* at 502, 168 Eng. Rep. at 353.

[154] *Id.*

[155] The King v. Callaghan, 33 Geo. 3, (1793), *as reprinted in* LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 385 (Dublin, H. Fitzpatrick 1802); *cf.* The King v. Dingler, 2 Leach 561, 563, 168 Eng. Rep. 383, 384 (K.B. 1791) (excluding a defective deposition after the prosecution admitted that the deceased declarant did not speak under an apprehension of immediate death (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352)).

[156] *See supra* notes 8, 26–38.

[157] *See* 2 HAWKINS, *supra* note 110, ch. 46, § 15, at 592; *cf.* 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 585 (Sollom Emlyn et al. eds., London, E. Rider 1800) (recognizing death and inability to travel as grounds for admission of magistrate examinations).

[158] 128 S. Ct. 2678, 2684–86 (2008).

[159] *See Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352; *Callaghan*, 33 Geo. 3, *as reprinted in* MACNALLY, *supra* note 155, at 385.

[160] 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1695).

[161] *Id.*; *see also* Dominus Rex v. Paine, 1 Salkeld 281, 91 Eng. Rep. 246 (K.B. 1695); Rex v. Payne, 1 Ld. Raym. 729, 91 Eng. Rep. 1387 (K.B. 1695); Rex v. Pain, 1 Comberbach 358, 90 Eng. Rep. 527 (K.B. 1695).

deponent had died, and it was determined that the depositions were inadmissible for two reasons[162]: (1) they did not qualify under the deposition rule, which the judges refused to extend;[163] and (2) the defendant had lost the opportunity for cross-examination.[164] *Woodcock* likewise held that an examination taken by a justice of the peace did not qualify under the deposition rule.[165] Yet, in deviation from *Paine*, it held that the examination might be admitted, despite the fact that the decedent's statement was taken in the absence of the defendant, if the statement constituted a dying declaration.[166]

It does appear, however, that *Woodcock* did not extend very far. Shortly after *Woodcock* was decided, the court in *The King v. Dingler* refused to recognize a catch-all best evidence exception for decedent statements that failed to meet the requirements under either the deposition rule or the dying declaration rule.[167]

It would be an oversimplification to conclude that eighteenth-century judges had determined through the acceptance of dying declarations that the cross-examination requirement enunciated in *Paine* was satisfied by "reliable" hearsay. *Woodcock* stated that statutorily-authorized depositions and dying declarations were types of admissible evidence in addition to "[t]he most common and ordinary species of legal evidence [that] consists in the depositions of witnesses taken on oath before the Jury, in the face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give."[168] The presumptive credibility of deathbed statements, however, was mentioned only as a substitute for the oath requirement.[169] The other cases that elaborated on the trustworthiness rationale similarly linked the presumption to the oath requirement, and none appeared to create a general reliability exception.[170]

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[162] *Pain*, 1 Comberbach at 359, 90 Eng. Rep. at 527.

[163] *Paine*, 1 Salkeld at 281, 91 Eng. Rep. at 246 (citing 1 & 2 Phil. & M. c. 13(b) (1554–1555)); *Payne*, 1 Ld. Raym. at 730, 91 Eng. Rep. at 1387; *Pain*, 1 Comberbach at 359, 90 Eng. Rep. at 527 (citing 1 & 2 Phil. & M. c. 13 (1554–1555)).

[164] *Paine*, 5 Mod. at 165, 87 Eng. Rep. at 585; *Pain*, 1 Comberbach at 359, 90 Eng. Rep. at 527.

[165] The King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789).

[166] *Id.*

[167] The King v. Dingler, 2 Leach 561, 562–63, Eng. Rep. 383, 384 (K.B. 1791) (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352).

[168] *Woodcock*, 1 Leach at 501, 168 Eng. Rep. at 352.

[169] *Id.* at 502, 168 Eng. Rep. at 353.

[170] The King v. Drummond, 1 Leach 337, 337–38, 168 Eng. Rep. 271, 272 (K.B. 1784); *see also* The King v. Radbourne, 1 Leach 457, 460–61, 168 Eng. Rep. 330, 332 (K.B. 1787) (detailing remarks by the prosecutor that a declaration made when one's life is in danger should be considered equivalent to a statement made under oath); Wright v. Littler,

The apprehension of death requirement has survived,[171] but the reliability justification for dying declarations was not universally accepted around the time of founding.[172] Justice Powis stated in *Reason* that he did not regard dying declarations as standing on the same footing as statements made under oath.[173] Blackstone believed that the reliability considerations accepted in *Wright* were limited to its facts and did not establish a general rule of admissibility.[174] Some of the judges in *Margaret Tinckler's Case* thought that additional confirmatory evidence was needed for conviction despite the admission of compelling inculpatory dying declarations against the defendant.[175] The court in *Drummond* held that the reliability presumption did not overcome incompetency to testify.[176] Many of the concerns regarding the presumption were summarized by Pothier's *Treatise on the Law of Obligations*:

> Much consideration also should be given to the state of mind of the party whose declarations are received. Strongly as his situation is calculated to induce the sense of obligation, it must also be recollected, that it has often a tendency to obliterate the distinctness of his memory and perceptions; and therefore, whenever the accounts received from him are introduced, the degrees of his observation and recollection is a circumstance which it is of the highest importance to ascertain. Sometimes the declaration is of a matter of judgment of inference and conclusion, which however sincere may be fatally erroneous; the circumstances of confusion and surpri[s]e, connected with the object of the declaration, are to be considered with the most minute and scrupulous attention; the accordance and consistency of the fact related, with the other facts established by evidence, is to be examined with peculiar circumspection, and the awful consequences of

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3 Burr. 1244, 1253, 97 Eng. Rep. 812, 817 (K.B. 1761) (stating the equivalency of a "solemn declaration of a dying man . . . to an oath").

171 *See* Mattox v. United States, 146 U.S. 140, 151–52 (1892) (citing 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE §§ 156–58, at 228–29 (Boston, Little, Brown & Co. 15th ed. 1892)); FED. R. EVID. 804(b)(2).

172 *See infra* Part IV.A.

173 Trial of Reason & Tranter, 8 Geo., Hil. 461 (1722), *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 36.

174 Wright v. Littler, 1 Black W. 345, 349, 96 Eng. Rep. 192, 193–94 (K.B. 1761); *see also* The King v. Mead, 2 B & C. 605, 607–08, 107 Eng. Rep. 509, 510 (K.B. 1824) (ruling that the holding in *Wright* was limited); Doe v. Ridgway, 4 B. & Ald. 54, 54–55, 106 Eng. Rep. 858, 858 (K.B. 1820) (ruling that *Wright*, *inter alia*, were "only exceptions to the general rule").

175 Margaret Tinckler's Case, (1781) (K.B.), *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 356.

176 The King v. Drummond, 1 Leach 337, 338, 168 Eng. Rep. 271, 272 (K.B. 1784); *cf.* Jackson v. Vredenburgh, 1 Johns. 159, 163 (N.Y. Sup. Ct. 1806) (rejecting dying declarations made by an interested party because she would have been incompetent to testify if living).

> mistake must add their weight to all the other motives, for declining to allow an implicit credit to the narrative, on the sole consideration of its being free from the suspicion of wilful misrepresentation.[177]

Despite the uncertainty about the importance of the mental element to the dying declaration rule, the pre-founding cases do address some of the questions that arise from *Crawford v. Washington*.[178] It seems evident that the *Crawford* majority correctly severed cross-examination requirements from reliability considerations.[179] Reliability was discussed in the early dying declarations cases, but it was a factor in relation to the oath requirement.[180] Inability to cross-examine was a separate issue. However, the confrontation requirement was not absolute. The pre-founding cases recognized both a deposition rule and a dying declaration rule which applied in criminal cases.[181] The extent to which the deposition rule permitted use of *ex parte* examinations is open to debate,[182] but it is clear that the dying declarations were admitted even if they were made in the absence of an accused.[183] It is also certain that the dying declaration rule was not limited to informal remarks.[184]

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[177] 2 ROBERT POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS § 11, at 293 (William David Evans trans., London, A. Strahan 1806); *see also* 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE *460–62 (Boston, Wells & Lilly et al. 1826) (adding to the remarks made in *A Treatise on the Law of Obligations, or Contracts*, *supra*).

[178] *See supra* Part II.B.

[179] *See* Crawford v. Washington, 541 U.S. 36, 55–56, 60–65 (2004).

[180] *E.g.*, The King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789). *But see* SAMUEL M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 200 (London, A. Strahan 2d ed. 1815) (suggesting that the presumed solemnity of dying declarations dispensed with the necessity for cross-examination).

[181] *E.g.*, *Woodcock*, 1 Leach at 501–502, 168 Eng. Rep. at 352–53 (citing The King v. Ely, 7 Geo. 1, (1720), *reprinted in* THE PROCEEDINGS ON KING'S COMMISSION, *supra* note 96, at 5–6).

[182] *See* The King v. Inhabitants of Eriswell, 3 T.R. 707, 722–23, 100 Eng. Rep. 815, 823–24 (K.B. 1790) (citing The King v. Pain, 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1695); Dominus Rex v. Paine, 1 Salkeld 281, 91 Eng. Rep. 246 (K.B. 1695)); 2 WILLIAM O. RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS ch. 2, § 3, at 659–62 (London, Joseph Butterworth & Son 2d ed. 1828) (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352).

[183] The King v. Callaghan, 33 Geo. 3, (1793), *as reprinted in* MACNALLY, *supra* note 155, at 385; *Woodcock*, 1 Leach at 501–02, 168 Eng. Rep. at 352–53; *cf.* Thomas John's Case (1790), *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 357–58 (holding that declarations made in a prisoner's absence might be admitted under the dying declaration exception, but finding that an inadequate foundation had been laid for its application to that case).

[184] *Callaghan*, 33 Geo. 3, *as reprinted in* MACNALLY, *supra* note 155, at 385; *Woodcock*, 1 Leach at 502–04, 168 Eng. Rep. at 353–54; *cf.* The King v. Dingler, 2 Leach 561, 561–63, 168 Eng. Rep. 383, 383–84 (K.B. 1791) (excluding an *ex parte* deposition, but commenting that it would have been admissible if it had qualified as a dying declaration).

IV. CONFRONTATION CLAUSE VS. DECLARATIONS *IN EXTREMIS*

A. The Enshrinement Approach

The 1838 term of the Tennessee Supreme Court was not the first time that an American appellate court heard confrontation arguments against the admissibility of dying declarations; courts in Massachusetts and Mississippi heard and rejected confrontation objections in the years immediately preceding.[185] *Anthony v. State*, however, remains one of the earliest known reported cases to address the subject, and the Tennessee Supreme Court was not the only court to find it odd that confrontation claims had arisen so late.[186] The General Court of Virginia also commented in 1845:

> We come now, to the exceptions to the admissions of the declarations of the deceased as evidence.
>
> 1st. Is such evidence contrary to the bill of rights? If his question is to be answered affirmatively, then for nearly 70 years past, the Courts of this Commonwealth have been in the constant practice of violating the bill of rights in a most important particular.[187]

Dying declarations were regularly used in criminal cases in the post-founding period. A Pennsylvania county court admitted dying declarations during a 1796 murder trial.[188] A North Carolina court recognized the rule in 1798, but it felt that it would be improper to allow statements taken six to seven weeks prior to a declarant's death because the rule applied only to statements made by a dying man "so near his end that no hope of life remains."[189] In 1799, the unsigned deposition of a

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[185] Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 436–37 (1836) (citing MASS. CONST. pt. 1, art. XII); Woodsides v. State, 3 Miss. (2 Howard) 655, 664–65 (1837) (citing MISS. CONST. of 1832, art. I, § 10). Note that, in the foregoing cases, the courts are addressing their respective state constitutions' versions of the Federal Confrontation Clause. Yet, because these clauses bear such striking resemblance to the Federal Confrontation Clause, the state courts' analyses are relevant to this discussion. *Compare* MASS. CONST. pt. 1, art. XII ("[E]very subject shall have a right . . . to meet the witnesses against him face to face . . . ."), *and* MISS. CONST. of 1832, art. I, § 10 ("[I]n all criminal prosecutions, the accused hath a right . . . to be confronted by the witness against him . . . ."), *with* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

[186] Anthony v. State, 19 Tenn. (Meigs) 265, 278 (1838).

[187] Hill v. Commonwealth, 43 Va. (2 Gratt.) 594, 607 (1845); *see also* Green v. State, 66 Ala. 40, 46–47 (1880) (remarking that dying declarations had been accepted for more than half a century without constitutional challenge); State v. Price, 6 La. Ann. 691, 694 (1851) (commenting on forty years of acquiescence); State v. Houser, 26 Mo. 431, 438–39 (1858) (noting that dying declarations had been frequently admitted without any suggestion of constitutional conflict).

[188] Pennsylvania v. Lewis, Add. 279, 281 (1796).

[189] State v. Moody, 3 N.C. (2 Hayw.) 31, 31 (1798); *see also* Respublica v. Langcake, 1 Yeates 415, 416–17 (Pa. 1795) (recognizing rule but finding no need to apply it in an assault case).

deceased wife was admitted during the murder trial against her husband in *Pennsylvania v. Stoops*, where the court rhetorically asked and affirmatively answered the question: "If the declarations of the dying person had not been written nor sworn to, would they not have been admissible?"[190] The U.S. Circuit Court of the District of Columbia permitted the use of dying declarations in 1802 during *United States v. McGurk*.[191] It also admitted declarations *in extremis* the following year in *United States v. Veitch*.[192] In 1817, the General Court of Virginia held in *Gibson v. Commonwealth* that declarations *in extremis* were admissible in murder cases.[193] In the 1821 case of *State v. Poll*, the North Carolina Supreme Court upheld the admission of dying declarations.[194] A New Hampshire court also recognized the rule in 1821, but the court declined to admit statements made by the deceased because it was not convinced that an apprehension of death had been adequately shown.[195] A New York court admitted some statements as dying declarations during an 1824 murder trial in *People v. Anderson*, but rejected others that were not made under an apprehension of death.[196] As late as 1834, a Pennsylvania county court explained "[t]hat declarations of a person who has received a mortal injury, made under apprehension of death, are admissible in evidence, as well to establish the fact itself, as the party by whom it was committed, is unquestioned and unquestionable."[197] None of these early cases raised a confrontation concern.[198]

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[190] Add. 381, 382 (Allegheny County Ct. 1799).

[191] 26 F. Cas. 1097, 1097 (C.C.D.C. 1802) (No. 15,680).

[192] 28 F. Cas. 367, 367–68 (C.C.D.C. 1803) (No. 16,614).

[193] 4 Va. (2 Va. Cas.) 111, 121 para. 7 (1817); *see also* Vass v. Commonwealth, 30 Va. (3 Leigh) 786, 800–801 (1831) (upholding the admission of a dying declaration into evidence); King v. Commonwealth, 4 Va. (2 Va. Cas.) 78, 80–81 (1817) (admitting dying declaration evidence).

[194] 8 N.C. (1 Hawks) 442, 444 (1821).

[195] ARTEMAS ROGERS & HENRY B. CHASE, TRIAL OF DANIEL DAVIS FARMER FOR THE MURDER OF WIDOW ANNA AYER AT GOFFSTOWN, ON THE 4TH OF APRIL, A.D. 1821, at 9–14, 54–55 (Concord, Hill & Moore 1821).

[196] (N.Y. Sup. Ct. 1824), *reprinted in* 2 JACOB D. WHEELER, REPORTS OF CRIMINAL LAW CASES 390, 399–400 (Albany, Gould, Banks & Gould 1851); *see also* United States v. Woods, 4 D.C. (4 Cranch) 484, 484–85 (1834) (recognizing the rule but refusing to admit declarations that were not made *in extremis*).

[197] Commonwealth v. Murray (Pa. 1st Jud. Dist. 1834), *reprinted in* 2 JOHN W. ASHMEAD, REPORTS OF CASES ADJUDGED IN THE COURTS OF COMMON PLEAS, QUARTER SESSIONS, OYER AND TERMINER, AND ORPHANS' COURT, OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA 41, 49 (Philadelphia, John Campbell 1871).

[198] *See supra* notes 188–197 and accompanying text; *see also* United States v. Taylor, 4 D.C. (4 Cranch) 338 (1833); Moore v. State, 12 Ala. 764, 766 (1848) (citation omitted) (admitting dying declarations without mentioning confrontation concerns); People v. Green, 1 Denio 614, 614–15 (N.Y. 1845) (citing The King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789)); Commonwealth v. Williams (Ct. Oyer & Terminer, Pa. 1st Jud. Dist. 1839), *reprinted in* 2 ASHMEAD, *supra* note 197, at 69, 73–75; State v.

What was not said in those early cases may be as important as what was announced. The U.S. Supreme Court rejected arguments in *Giles v. California* that a defendant should equitably forfeit his right of confrontation any time the defendant wrongfully caused the unavailability of a witness.[199] The Court reckoned that there would have been no need for the common law to develop a dying declaration exception if statements made by a decedent had been admissible any time a defendant wrongfully caused the declarant's death.[200] The Court placed particular emphasis upon the absence of forfeiture arguments in the early dying declaration cases, stating:

> In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying-declaration exception. Prosecutors do not appear to have even *argued* that the judge could admit the unconfronted statements because the defendant committed the murder for which he was on trial.[201]

The Court later drove home the point, explaining:

> Judges and prosecutors also failed to invoke forfeiture as a sufficient basis to admit unconfronted statements in the cases that did apply the dying-declarations exception. This failure, too, is striking. At a murder trial, presenting evidence that the defendant was responsible for the victim's death would have been no more difficult than putting on the government's case in chief. Yet prosecutors did not attempt to obtain admission of dying declarations on wrongful-procurement-of-absence grounds before going to the often considerable trouble of putting on evidence to show that the crime victim had not believed he could recover.[202]

In accordance with the reasoning employed by the Supreme Court in *Giles*, the noticeable absence of confrontation arguments in the post-founding dying declaration cases may play a prominent role in future cases that attempt to retrospectively determine original intent.

The absence of confrontation objections in the early post-founding cases lays bare Professor Friedman's assertion that the Confrontation Clause was meant to exclude accusatory statements made to persons outside the legal system.[203] Nearly all dying declarations would fit within

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Ferguson, 20 S.C.L. (2 Hill) 619, 624 (1835); *cf.* Montgomery v. State, 11 Ohio 424, 425–26 (1842) (remanding, without comment on any constitutional issue or worry, to determine whether the dying declaration exception applied).

[199] 128 S. Ct. 2678, 2684, 2687–88 (2008).

[200] *See id.* at 2684–86.

[201] *Id.* at 2684.

[202] *Id.* at 2686.

[203] Friedman & McCormack, *supra* note 29, at 1251–52; Friedman, *Confrontation: The Search for Basic Principles*, *supra* note 26, at 1040, 1043.

Friedman's formulation. For example, the decedent in *King v. Commonwealth* exclaimed that "*King* had shed innocent blood."[204] In *Poll*, the victim "said he was poisoned, and, as he believed, by Poll."[205] The deceased declarant in *Commonwealth v. Murray* declared "the man (or men) who took away the stuff had murdered him."[206] The dying declarations allowed in *Vass v. Commonwealth* resulted from leading questions propounded to the dying declarant by a person who was allegedly "performing the part, of a prosecutor, so far as to collect evidence of the prisoner's guilt, to be used in the prosecution for the offence which he anticipated as certain."[207] Each of these statements appears to have been made, as Friedman puts it, under "circumstances a person in the declarant's position should be deemed to have made the statement with the anticipation that it would be presented at trial."[208] Yet, constitutional confrontation arguments were not even mentioned in the reports of those cases.

The absence of confrontation arguments is striking because the dying declaration rule was criticized and disfavored in some quarters. New York courts repeatedly refused to allow usage of dying declarations in civil cases during the early post-founding period, because "the right of cross-examining is invaluable, and not to be broken in upon."[209] A party in *Wilson v. Boerem* sought to introduce dying declarations in a civil case related to a promissory note.[210] The court acknowledged and reviewed criminal cases that admitted declarations *in extremis*, but it refused to extend the rule, writing:

> [D]eclarations *in extremis* were inadmissible evidence, except in the single case of homicide. Having an opportunity to cross-examine a witness is a high and important right, and ought not to be violated, except from the most imperious necessity; and I am persuaded, that neither principle nor policy requires the adoption of any such rule of evidence in civil cases.[211]

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[204] King v. Commonwealth, 4 Va. (2 Va. Cas.) 78, 79 (1817).

[205] State v. Poll, 8 N.C. (1 Hawks) 442, 443 (1821).

[206] (Pa. 1st Jud. Dist. 1834), *reprinted in* 2 ASHMEAD, *supra* note 197, at 49.

[207] 30 Va. (3 Leigh) 786, 788 (1831).

[208] Friedman, *Confrontation: The Search for Basic Principles*, *supra* note 26, at 1040.

[209] Jackson v. Kniffen, 2 Johns. 31, 35 (N.Y. Sup. Ct. 1806) (Livingston, J., concurring).

[210] 15 Johns. 286, 286 (N.Y. Sup. Ct. 1818).

[211] *Id.* at 292. This view, however, was not unanimous. *See* M'Farland v. Shaw, 4 N.C. (Car. L. Rep.) 187, 189–91 (1815), *overruled by* Barfield v. Britt, 47 N.C. (2 Jones) 41, 42–44 (1854); Aveson v. Kinnaird, 6 East 188, 195–96, 102 Eng. Rep. 1258, 1261–62 (K.B. 1805) (Lord Ellenborough, C.J.) (proffering the idea that, in limited circumstances, dying declarations could be expanded beyond homicide); PHILLIPPS, *supra* note 180, at 201 (stating that dying declarations are "admissible in civil cases, as well as in trials for murder").

The New York cases demonstrate that courts were concerned that the admission of dying declarations in civil cases would deprive cross-examination, but the absence of confrontation arguments in the post-founding criminal cases shows that judges and lawyers did not equate the concepts.

Virginia cases also indicate that the right of confrontation was not synonymous with a right to cross-examine the deceased maker of a dying declaration. For example, a specific objection was made on behalf of the defendant in *Gibson* that a deceased's declarations should not be admitted because "they [were] not . . . made in the petitioner's presence[,]" but, no constitutional argument was offered.[212] The defendant similarly argued in *Vass* that he had been deprived of the opportunity to cross-examine the decedent, but no state or federal Confrontation Clause argument was made.[213] "Confrontation" and the cross-examination requirements of the hearsay rule were not used interchangeably insofar as dying declarations were concerned.

At the time when confrontation complaints began to arise, some courts upheld the admissibility of dying declarations on historical grounds. Most of these courts provided a theoretical basis beyond mere acquiescence; they construed the constitutionalization of confrontation as part of the continuing development of the law.[214] The Tennessee Supreme Court held in *Anthony* that the confrontation right was an extension of English law on the subject, writing:

> The provision in the bill of rights was intended only to ascertain and perpetuate a principle in favor of the liberty and safety of the citizen, which, although fully acknowledged and acted upon before and at the time of our revolution, had been yielded to the liberal or popular party in Great Britain after a long contest, and after very strenuous opposition from the crown, from crown lawyers, and if I may so speak, crown statesmen. In this case, as in that of libels and some others, the object of the bill of rights was not to introduce a new principle, but to keep ground already gained, and to preserve and perpetuate the fruits of a political and judicial victory, achieved with difficulty, after a violent and protracted contest.[215]

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[212] *See* Gibson v. Commonwealth, 4 Va. (2 Va. Cas.) 111, 118 (1817).

[213] *See* Vass v. Commonwealth, 30 Va. (3 Leigh) 786, 790–91 (1831).

[214] *E.g.*, Lambeth v. State, 23 Miss. 322, 357–58 (1852); *cf.* Commonwealth v. Carey, 66 Mass. (12 Cush.) 246, 249 (1853) (overruling an objection that the right of confrontation barred use of a dying declaration); Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437 (1836) (stating in dictum that dying "declarations, made when the accused was not present, are admissible evidence . . . and were not intended to be excluded or touched by the [confrontation] provision cited from the [state] bill of rights" (citations omitted)).

[215] Anthony v. State, 19 Tenn. (Meigs) 265, 277–78 (1838); *see also* Hill v. Commonwealth, 43 Va. (2 Gratt.) 594, 614–16 (1845) (Baker, J., concurring) (writing that the constitutionalization of confrontation was an affirmation of the common law that accepted the dying declaration rule).

In *Hill v. Commonwealth*, the Virginia General Court likewise concluded that confrontation had been derived from the Magna Charta and acknowledged in colonial Virginia, but that it was never supposed that the admission of dying declarations violated the right.[216] The overwhelming weight of authority subscribed to the view that the constitutional provision must be read as a product of the common law and not as a rejection of it.[217] As the Louisiana Supreme Court explained in *State v. Price*, "[the Confrontation Clause] has always been regarded as a Constitutional declaration of a great common law right, and to have the full effects of the common law principle, but no more."[218]

The early American cases support this incorporation idea. A 1796 Pennsylvania county court in *Pennsylvania v. Lewis* instructed a jury in accordance with *The King v. Woodcock*.[219] Likewise, a Pennsylvania court in *Stoops* relied upon *Dominus Rex v. Reason*, *Woodcock*, and *The King v. Radbourne* in 1799.[220] In 1803, the U.S. Circuit Court of the District of Columbia admitted declarations *in extremis* in *Veitch* after considering *The King v. Drummond* and *Woodcock*.[221] It also permitted use of dying declarations a year earlier in *McGurk* upon citation to *Woodcock* and

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[216] *Hill*, 43 Va. (2 Gratt.) at 607–08.

[217] *See* Salinger v. United States, 272 U.S. 542, 548 (1926) (citations omitted); Green v. State, 66 Ala. 40, 46–47 (1880); State v. Oliver, 7 Del. (2 Houst.) 585, 589 (1863); Campbell v. State, 11 Ga. 353, 373–74 (1852); State v. Canney (Me. 1846), *reprinted in* 9 THE LAW REPORTER 408, 409 (Peleg W. Chandler ed., Boston, Bradbury & Guild 1847); Woodsides v. State, 3 Miss. (2 Howard) 655, 664–65 (1837); State v. Houser, 26 Mo. 431, 438–39 (1858); State v. Tilghman, 33 N.C. (11 Ired.) 363, 378–79 (1850); State v. Saunders, 12 P. 441, 442–43 (Or. 1886), *overruled on other grounds by* State v. Marsh, 490 P.2d 491, 502 n.47 (Or. 1971); State v. Waldron, 14 A. 847, 849–50 (R.I. 1888) (citations omitted); Miller v. State, 25 Wis. 384, 387–88 (1870); *cf.* People v. Restell, 3 Hill 289, 294–95 (N.Y. Sup. Ct. 1842) (commenting that the admission of dying declarations in homicide trials was the one exception to the right of confrontation); Burrell v. State, 18 Tex. 713, 730–31 (1857) (citations omitted) (following the uniform weight of authority that indicate the admissibility of dying declarations without additional discussion); State v. Baldwin, 45 P. 650, 651 (Wash. 1896) (holding that the issue of the admissibility of dying declarations was so well-settled that the question was no longer open). *But see* 14 GEORGE P. SANGER, THE MONTHLY LAW REPORTER 221 (Boston, Little, Brown & Co. 1852) (detailing an unreported Georgia murder case in which the judge rejected dying declarations on Confrontation Clause grounds).

[218] State v. Price, 6 La. Ann. 691, 694 (1851).

[219] Pennsylvania v. Lewis, Add. 279, 282 (Washington County Ct. 1796) (citing The King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789)).

[220] Pennsylvania v. Stoops, Add. 381, 382–83 (Allegheny County Ct. 1799) (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352; The King v. Radbourne, 1 Leach 457, 168 Eng. Rep. 330 (K.B. 1787); Dominus Rex v. Reason, 1 Strange 499, 93 Eng. Rep. 659 (K.B. 1722)).

[221] United States v. Veitch, 28 F. Cas. 367, 367–68 (C.C.D.C. 1803) (No. 16,614) (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352; The King v. Drummond, 1 Leach 337, 168 Eng. Rep. 271 (K.B. 1784)).

other common law authorities.[222] In 1821, the North Carolina Supreme Court cited *Thomas John's Case* in support of its ruling in *Poll*.[223] A New Hampshire court relied upon *Reason* and *Woodcock* during the 1821 trial of Daniel Farmer.[224] These cases appear to carry over the holdings from the English cases without impediment and corroborate the following conclusion reached by the Georgia Supreme Court in *Campbell v. State*:

> The admission of dying declarations in evidence, was never supposed, in England, to violate the well-established principles of the Common Law, that the witnesses against the accused should be examined in his presence. The two rules have co-existed there certainly, since the trial of Ely, in 1720, and are considered of equal authority.
>
> The constant and uniform practice of all the Courts of this country, before and since the revolution, and since the adoption of the Federal Constitution, and of the respective State Constitutions, containing a [confrontation] provision, has been to receive in evidence, *in cases of homicide*, declarations properly made, *in articulo mortis*.[225]

B. The Woodsides *Approach*

Campbell v. State and other cases from the mid-1800s advanced a straightforward construction of the Confrontation Clause. In *Campbell*, the court acknowledged the inviolability of the rule of confrontation, but it did not accept arguments that the rule gave a defendant the right to insist on meeting a deceased declarant face-to-face.[226] The court wrote, "The argument for the exclusion of the testimony, proceeds upon the idea that the deceased is the witness, when in fact it is the individual who swears to the statements of the deceased, who is the witness."[227] Many other courts analyzed the confrontation right in a comparable manner.[228]

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[222] United States v. McGurk, 26 F. Cas. 1097, 1097 (C.C.D.C. 1802) (No. 15,680) (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352).

[223] State v. Poll, 8 N.C. (1 Hawks) 237, 239 (1821) (citing Thomas John's Case (1790), *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 357).

[224] ROGERS & CHASE, *supra* note 195, at 11 (citing *Woodcock*, 1 Leach at 501, 168 Eng. Rep. at 352; *Reason*, 1 Strange at 500, 93 Eng. Rep. at 660).

[225] 11 Ga. 353, 374 (1852).

[226] *Id.* at 373–75.

[227] *Id.* at 374.

[228] *E.g.*, Green v. State, 66 Ala. 40, 46–47 (1880); Walston v. Commonwealth, 55 Ky. (16 B. Mon.) 15, 35–36 (1855); Robbins v. State, 8 Ohio St. 131, 163 (1857); State v. Murphy, 17 A. 998, 999 (R.I. 1889); *see also* Brown v. Commonwealth, 76 Pa. 319, 339 (1874) (affirming the use of a woman's dying declaration in an appeal of the defendant's conviction for her murder); *cf.* Walker v. State, 39 Ark. 221, 229 (1882) (writing that dying declarations are admissible despite the defendant's inability to cross-examine the decedent, because he is confronted by the witnesses who prove the declarations); State v. Price, 6 La. Ann. 691, 693 (1851) (holding that a deceased declarant ceased to be a witness on death); People v. Corey, 51 N.E. 1024, 1029 (N.Y. 1898) (citations omitted) (holding that a deceased declarant was not considered a witness under a statutory confrontation clause); Brown v.

This approach appears to have been originated by the Mississippi High Court of Errors and Appeals in the 1837 case of *Woodsides v. State*, where it wrote that dying declarations themselves "are regarded as facts or circumstances connected with the murder, which, when they are established by oral testimony, the law has declared to be evidence."[229] Shortly thereafter, the Virginia court in *Hill* similarly compared the allowance of dying declarations to the accepted usage of admissions against interest, writing, "It is analogous to that which authorizes the admissions of the prisoner to be given in evidence against him. In that case, he is not the witness; neither is the dead man. His declarations are facts to be proved by witnesses, who must be confronted with the accused."[230]

These authorities held, "The right secured applied to the witness, and not the subject-matter of his testimony."[231] The cases focused directly upon the "witnesses against" terminology used in the Confrontation Clause. The Ohio Supreme Court explained, in *State v. Summons*, that untenable results would occur if the focus of the Confrontation Clause was shifted from witnesses to the content of their testimony:

> [I]f the right secured by the bill of rights applies to the *subject matter of the evidence*, instead of the *witness*, it would exclude, in criminal cases, all narration of statements or declarations made by other persons, heretofore received as competent evidence. The construction insisted on for the plaintiff in error, treats the person whose statements or declarations are narrated, as the witness, rather than the person who testifies on the trial. This construction would exclude all declarations *in articulo mortis*, by confounding the identity of the dying man with that of the witness called upon in court to testify to such declarations. Precisely the same objection would exclude all declarations by co-conspirators statements made in the presence of the accused in a criminal case, and not denied by him; and the statements by the prosecutrix in prosecutions for rape, made immediately after the commission of the offense. And, by a parity of reasoning, the

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Commonwealth, 73 Pa. 321, 327–29 (1873) (citations omitted) (holding that the rule did not allow use of a wife's dying declaration in a defendant's trial for the murder of her husband, but writing that nothing barred use of a wife's dying declaration at the defendant's trial for her murder).

[229] Woodsides v. State, 3 Miss. (2 Howard) 655, 665 (1837).

[230] Hill v. Commonwealth, 43 Va. (2 Gratt.) 594, 608 (1845); *see also* State v. Nash, 7 Iowa 347, 377 (1858) (citations omitted) (analogizing use of dying declarations to the admission of *res gestae* hearsay); State v. Tilghman, 33 N.C. (11 Ired.) 363, 378 (1850) (stating witnesses were regularly allowed to testify about the content of statements made by a defendant in a deed or letter and the practice of allowing dying declaration testimony was the same).

[231] State v. Canney (Me. 1846), *reprinted in* 9 THE LAW REPORTER, *supra* note 217, at 409.

> admissions or confessions of the accused, and, in prosecutions for perjury, the very testimony of the accused on which the perjury may be assigned, would be excluded by the provision in the bill of rights forbidding that any person shall be compelled, in any criminal case, to be a witness against himself.[232]

It is doubtful that the current U.S. Supreme Court will embrace this line of reasoning from *Woodsides*, *Summons*, or similar cases. The Supreme Court cited the *Woodsides* holding in *Crawford v. Washington*, characterizing it as a decision that limited the "witnesses against" language in the Confrontation Clause to persons who actually testify at trial.[233] The Supreme Court did not directly criticize *Woodsides*, but, after reviewing the history of the right of confrontation, it wrote, "we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony."[234]

Further examination is nonetheless warranted when the issue of the constitutionality of admitting dying declarations is squarely before the Supreme Court, because the reasoning of *Woodsides* and its adherents is not as broad as suggested in passing by *Crawford*. "Witnessing" was not a concept considered in a vacuum. In *Lambeth v. State*, the Mississippi court elaborated upon its earlier ruling in *Woodsides*, explaining, "The general principle of the common law, on the subject of evidence, with few exceptions, has always been, that 'hearsay evidence' could not be admitted."[235] The court in *Lambeth* also explained, though, that this rule was juxtaposed against the dying declarations rule that was "almost coeval" with the origins of the law and involved a particular type of out-of-court statement that qualified as proof.[236]

The court's view concerning the coexistence of the rules is substantiated by the admission of dying declaration evidence in 1722 during the trial of Reason and Tranter,[237] which was made despite the earlier announcement during the trial of Richard Langhorn: "what another man said is no evidence against the prisoner, for nothing will be evidence against him, but what is of his own knowledge."[238] Both were

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[232] Summons v. State, 5 Ohio St. 325, 341–42 (1856).

[233] Crawford v. Washington, 541 U.S. 36, 42–43 (2004) (citing *Woodsides*, 3 Miss. (2 Howard) at 664–65).

[234] *Id. at* 50.

[235] Lambeth v. State, 23 Miss. 322, 357 (1852) (citing *Woodsides*, 3 Miss. (2 Howard) at 665); *see also* The King v. Inhabitants of Eriswell, 3 T.R. 707, 709, 100 Eng. Rep. 815, 816 (K.B. 1790) (describing the common law rule on hearsay and its presumptive inadmissibility).

[236] *Lambeth*, 23 Miss. at 357.

[237] Dominus Rex v. Reason, 1 Strange 499, 500, 93 Eng. Rep. 659, 660 (K.B. 1722).

[238] Trial of Richard Langhorn, 31 Car. 2, pl. 252 (1679), *reprinted in* 14 A COMPLETE COLLECTION OF STATE TRIALS 417, 441 (T.B. Howell comp., London, T.C. Hansard 1816); *see also* Trial of William Lord Russell, 35 Car. 2, pl. 297 (1683), *reprinted in* 9 COBBETT'S

accepted principles of law. Each of the major treatises on evidence from the mid-eighteenth century explained that hearsay wasn't proof, because bare speaking wasn't considered testimony.[239] Yet, it was resolved by the time of founding that dying declarations still constituted an acceptable species of evidence in criminal cases.[240]

The court in *Lambeth* ascertained that the framers of the U.S. Constitution were familiar with this history and adopted it into American jurisprudence.[241] The Confrontation Clause was not intended to "specify the nature, character, or degree of evidence" that could be admitted.[242] It was instead a reassertion of "a cherished principle of the common law, which had sometimes been violated in the mother country[ ] in political prosecutions."[243] Determinations regarding the nature and kinds of evidence that a witness may give were left "to the courts to decide according to the rules of law, upon the nature and kind of evidence which a witness, when confronted with the accused, might be permitted to give."[244]

The special proof characteristics of dying declarations in the context of this paradigm were described by the Rhode Island Supreme Court in *State v. Murphy* as follows: "The deceased is not the witness; nor are his statements, merely as statements, reproduced in evidence. What he said and did, in natural consequence of the principal transaction, become original evidence, concerning which the witnesses are produced."[245] When it came to dying declarations, "[t]he objection, if there be one, is to the competency of the evidence, and not to the want of the personal presence of the witness."[246] The Mississippi court in *Lambeth* explained that "[t]he dying declarations are not the witness against the accused.

COMPLETE COLLECTION OF STATE TRIALS 577, 608 (London, R. Bagashaw 1811) (instructing a jury to disregard hearsay because it wasn't evidence).

[239] BATHURST, *supra* note 111, at 111; BULLER, *supra* note 121, at 289–90; GILBERT, *supra* note 111, at 152–53.

[240] *See* The King v. Woodcock, 1 Leach 500, 501, 168 Eng. Rep. 352, 352–53 (K.B. 1789); *see also* JOHN F. ARCHBOLD, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES 72–73 (London, R. Pheney 1822) (citations omitted) (documenting the longstanding history of dying declarations as an exception to the hearsay rule); *cf.* Gray v. Goodrich, 7 Johns. 95, 96 (N.Y. Sup. Ct. 1810) ("What a deceased person has been heard to say, except upon oath, or *in extremis*, when he came to a violent end, never has been considered as competent evidence.").

[241] *Lambeth*, 23 Miss. at 357.

[242] *Id.*

[243] *Id.*

[244] *Id.* at 357–58.

[245] State v. Murphy, 17 A. 998, 999 (R.I. 1889) (citing State v. Waldron, 14 A. 847, 850 (R.I. 1888)); *see also* Woodsides v. State, 3 Miss. (2 Howard) 655, 665 (1837) ("[T]he murdered individual is not a witness . . . .").

[246] Robbins v. State, 8 Ohio St. 131, 163 (1857).

They are only evidence against him, which the witness confronted with him is permitted to introduce."[247]

At first glance, *Woodsides* might leave the misimpression that courts are left free to contrive evidentiary rules that circumvent the right of confrontation. But, such a reading would inaccurately detach the court's conclusion from its reasoning. The cases that followed the *Woodsides* line of reasoning recognized that the inclusion of a confrontation provision in "the Constitution was intended for the two-fold purposes of giving it prominence and permanence."[248] *Woodsides* left open the development of the law of evidence, but the cases that followed it refused to tolerate the abuses perpetrated in the political trial of Sir Walter Raleigh.[249] Likewise, the court in *Woodsides* expressly limited its holding, confirming: "If [the murdered individual] were, or could be a witness, his declaration, upon the clearest principle, would be inadmissible."[250]

Both *Crawford* and the *Woodsides* line of cases agree in significant areas. They read the post-Raleigh common law history in a similar way, and see the Confrontation Clause as a curb against past prosecutorial abuses.[251] They separate the hearsay rule from the confrontation right.[252] Despite agreement on these points, *Woodsides* and *Crawford* may still be difficult to reconcile on the general question of "witnessing," because they approach the Confrontation Clause from different directions. *Woodsides* examined who the law considered a witness for certain species of proof.[253] *Crawford* focuses on whether particular proof defines its maker as a witness.[254]

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[247] *Lambeth*, 23 Miss. at 358.

[248] Campbell v. State, 11 Ga. 353, 374 (1852).

[249] *See Lambeth*, 23 Miss. at 358 (stating that the credibility of the dying declaration, and of the person who testified to its utterance, should be weighed by the jury); *Waldron*, 14 A. at 849 (distinguishing the right of confrontation, violated in the trial of Sir Walter Raleigh, from the dying declaration exception to the hearsay rule).

[250] *Woodsides*, 3 Miss. (2 Howard) at 665.

[251] *Compare Waldron*, 14 A. at 849 ("We think there is no doubt that the primary purpose of the declaration of right was to secure the exclusion . . . of *ex parte* affidavits or depositions, or the written examinations of coroners and committing magistrates."), *with* Crawford v. Washington, 541 U.S. 36, 50 (2004) ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.").

[252] *Compare Waldron*, 14 A. at 849 ("'[T]he witnesses against' an accused person, are, in customary speech, the persons who testify against him, not those who merely make or repeat remarks about him."), *with Crawford*, 541 U.S. at 51 ("An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.").

[253] *See Woodsides*, 3 Miss. (2 Howard) at 664–65.

[254] *See Crawford*, 541 U.S. at 51–52.

C. The Necessity Approach

Ultimately, necessity is the common thread running through the authorities on dying declarations that sets the rule apart from other hearsay exceptions. For example, in *State v. Oliver*, the Court of Errors and Appeals of Delaware wrote that the right of confrontation "was not designed and was never understood" to exclude dying declarations "which were admissible even in our own courts long before any constitution was framed and adopted."[255] In addition, the court recognized that "[t]hey are also in part admitted from necessity."[256] The Virginia court in *Hill* held that a deceased declarant wasn't a "witness"; but, it also acknowledged that the "rule is one of necessity[,] . . . analogous to that which authorizes the admissions of the prisoner to be given in evidence against him."[257] The Georgia court in *Campbell* similarly wrote that the rule may be justified by "urgent necessity."[258] Those courts also used the presumed solemnity of dying declarations to bolster their positions;[259] yet, the California Supreme Court candidly assessed that necessity was truly the reason for dispensing with cross-examination, writing:

> The reasons for the admission of hearsay testimony in the shape of dying declarations, in trials for murder, are very fully stated in the treatises upon criminal law. The most substantial ground upon which the admission of such testimony can be placed, is that of *necessity*. It is true that the condition of the person making the declaration in the last sad hours of life, under a sense of impending dissolution, may compensate for the want of an oath; but it can never make up for the want of a cross-examination. This was very clearly shown in the case of Reason and Tranter.
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> But, however unsatisfactory such evidence may be, the necessity of the case has always induced the Courts to admit it; and this exception to the general rule of testimony has been too firmly established to be overthrown. There would be the most lamentable failure of justice, in many cases, were the dying declarations of the victims of crime excluded from the jury.[260]

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[255] 7 Del. (2 Houst.) 585, 589 (1863).

[256] *Id.*

[257] Hill v. Commonwealth, 43 Va. (2 Gratt.) 594, 608 (1845).

[258] Campbell v. State, 11 Ga. 353, 374 (1852).

[259] *See Oliver*, 7 Del. (2 Houst.) at 589; *Campbell*, 11 Ga. at 374; *Hill*, 43 Va. (2 Gratt.) at 608–11; *cf.* Mattox v. United States, 146 U.S. 140, 152 (1892) (stating, without addressing constitutionality, that the "admission of the testimony is justified upon the ground of necessity" and presumed solemnity).

[260] People v. Glenn, 10 Cal. 32, 36 (1858) (citing Dominus Rex v. Reason, 1 Strange 499, 500, 93 Eng. Rep. 659, 660 (K.B. 1722)); *see also* Morgan v. State, 31 Ind. 193, 198–201 (1869) (stating that the rule is, of necessity, an exception to the right of an accused to meet an accuser face-to-face, and that abuse must be therefore guarded against with minute

Necessity meant something more than unavailability to these courts and was derived from either the circumstances of the crime committed or the situation in which the decedents uttered their last words. The Court of Appeals of Kentucky, in *Walston v.* Commonwealth, balanced the confrontation right against the "public necessity to preserve the lives of the community, by bringing the manslayer to justice."[261] It explained that justice could not allow murderers to escape their crimes by committing them in secret "where no third person witnessed the transaction."[262] Necessity, however, need not have always been found solely in the circumstances of the crime; it could be supplied by the condition of the victim. The Supreme Judicial Court of Massachusetts, in *Commonwealth v. Casey*, recognized that "[w]here a person has been injured in such a way that his testimony cannot be had in the customary way, the usual and ordinary rules of evidence must from the necessity of the case be departed from."[263]

In the first edition of his treatise, Professor Wigmore criticized the necessity principle. In his view, necessity meant unavailability at common law, and the principle developed in the 1800s was a "heresy" spawned from a misconstruction of comments made in Edward East's *Pleas of the Crown*.[264] East had written that dying declarations were admitted on the basis of fullest necessity "for it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness on occasion of other felonies, namely, the party injured himself, is gotten rid of."[265] Wigmore believed that it was natural for East to pay special attention to the subject of secret murders because his passage on

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particularity); State v. Eddon, 36 P. 139, 140–43 (Wash. 1894) (writing that the rule is tolerated only by necessity).

[261] Walston v. Commonwealth, 55 Ky. (16 B. Mon.) 15, 34 (1855) (citation omitted); *see also* Provisional Gov't of the Hawaiian Islands v. Hering, 9 Haw. 181, 189 (1893) (writing that the dying declaration rule is a necessity exception that does not contravene the state constitutional right to meet witnesses face-to-face).

[262] *Walston*, 55 Ky. (16 B. Mon.) at 34; *see also* Commonwealth v. Murray (Pa. 1st Jud. Dist. 1834), *reprinted in* 2 ASHMEAD, *supra* note 197, at 49 (writing that "artificial distinction and scholastic refinements" should not overcome public necessity); State v. Ferguson, 20 S.C.L. (2 Hill) 619, 624 (1835) (stating that secret assassins commit their deeds in darkness, thereby establishing necessity).

[263] 65 Mass. (11 Cush.) 417, 421 (1853); *cf.* Vass v. Virginia, 30 Va. (3 Leigh) 786, 792, 799–801 (1831) (allowing use of dying declarations uttered in response to leading questions that were asked out of necessity because the declarant's physical condition prevented him from giving narrative).

[264] 2 WIGMORE, *supra* note 7, § 1431, at 1799–1800 (citing 1 EAST, *supra* note 112, ch. 5, § 124, at 353).

[265] 1 EAST, *supra* note 112, ch. 5, § 124, at 353; s*ee also* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 156, at 254 (Boston, Charles C. Little & James Brown 3rd ed. 1846) (stating that the public necessity justification limited the doctrine to cases of homicide).

dying declarations appeared in a chapter about homicide, but he argued that East cited no authority for the proposition and believed that later cases took East's explanation out of context to develop some unacceptable doctrinal limitations.[266]

Professor Wigmore's learned criticism notwithstanding, the necessity principle did not originate with East. It was known around the time of founding. Years before East published his treatise, the Supreme Court of Pennsylvania, in the 1795 case of *Respublica v. Langcake*, refused to admit dying declarations in an assault case due to lack of necessity, resolving:

> The general rule was, that hearsay was inadmissible, but there were some exceptions in particular cases, and, among others, the declarations of the deceased person on an indictment for murder, founded principally on the necessity of the case. No such necessity could be pretended here, there having been several witnesses present at the different transactions.[267]

The New York Supreme Court, in *Jackson v. Kniffen*, similarly acknowledged in 1806, without reference to East:

> If the declarations of dying persons are ever to be received, (on which, if *res integra*, much might be said) it will be best to confine them to the cases of great crimes, where frequently the only witness being the party injured, the ends of public justice may otherwise, by his death, be defeated.[268]

Wigmore was correct in that East did not cite authority for the necessity rationale.[269] Yet, as the authorities quoted above demonstrate, East's treatise most likely restated a familiar proposition.

The other aspect of the necessity principle can be seen in the handling of the exception's mental element. Some judges used a declarant's state of mind in a gatekeeping fashion and refused to admit dying declarations unless the court was satisfied that the declarant had demonstrated some apprehension that death was near.[270] Others, however, applied the element with less rigor.[271] The extent to which

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[266] 2 WIGMORE, *supra* note 7, § 1431, at 1800 n.3 (citing 1 EAST, *supra* note 112, ch. 5, § 124, at 353).

[267] 1 Yeates 415, 416–17 (Pa. 1795).

[268] 2 Johns. 31, 35 (N.Y. Sup. Ct. 1806) (Livingston, J., concurring).

[269] *See* 1 EAST, *supra* note 112, ch. 5, § 124, at 353.

[270] Henry Welbourn's Case, (1792) (K.B.), *as reprinted in* 1 EAST, *supra* note 112, at ch. 5, § 124, at 358, 360; Thomas John's Case, (1790), *as reprinted in* 1 EAST, *supra* note 112, at ch. 5, § 124, at 358; *cf.* The King v. Dingler, 2 Leach 561, 563, 168 Eng. Rep. 383, 384 (K.B. 1791) (refusing testimony after the prosecution admitted that the decedent's examination was not given under an apprehension of immediate death (citing The King v. Woodcock, 1 Leach 500, 501, 168 Eng. Rep. 352, 352–53 (K.B. 1789))).

[271] *See, e.g.*, Commonwealth v. Stoops, Add. 381, 383 (Allegheny County Ct. 1799) ("Nor does it seem absolutely necessary for the competency of [dying declarations] that such declarations should be made under an immediate apprehension of death . . . .").

courts insisted upon satisfaction of the mental element related directly to the severity of a decedent's injury. The courts appear to have relaxed the mental element in cases where the declarant was left in an extreme condition that made inquiry into the decedent's subjective state of mind impractical. The court in *Woodcock* acknowledged that the maker of dying declarations had not appeared to apprehend herself in danger, but it still allowed her statements to go to the jury with instructions that they could consider the statements if they determined that the circumstantial evidence satisfied the element.[272] The court in *Mrs. Trant's Case* similarly overruled an objection made against admission of a dying declaration, holding:

> [T]he declarations of a person who has received a mortal wound, are evidence in almost every case *to go to a jury*: and are to receive credit from the peculiar circumstances of the case. But while the jury turn such declarations in their mind, they are also to take into their contemplation the motive which produced such declarations; and the situation in which the party making such declarations conceives himself to be at the time of making them, is also a material object for their consideration.[273]

The 1794 edition of *Blackstone's Commentaries* indicated that the exception applied to statements made by a person "who relates *in extremis*, *or* under an apprehension of dying."[274] These authorities illustrate that courts considered the necessities presented by a declarant's physical condition in relation to his or her ability to relay information in a preferred manner.

A potential failure of justice, alone, may be inadequate to establish necessity in the post-*Crawford* environment. The Supreme Court wrote in *Davis v. Washington* that it was cognizant of proof difficulties presented by certain types of cases, but that it could not "vitiate constitutional guarantees when they have the effect of allowing the guilty to go free."[275] In addition, the Supreme Court rejected arguments in *Melendez-Diaz v. Massachusetts* that it should relax confrontation requirements to allow use of laboratory reports to accommodate the "'necessities of trial and the adversary process.'"[276] Necessity was, however, the principal reason cited by the Court's prior decisions to

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[272] *Woodcock*, 1 Leach at 502–04, 168 Eng. Rep. at 353–54; *see also* The King v. Minton, 40 Geo. 3 (1800), *as reprinted in* MACNALLY, *supra* note 155, at 386, 386 (leaving the point of mental impression for the jury to decide).

[273] Mrs. Trant's Case, 33 Geo. 3, (1793), *as reprinted in* MACNALLY, *supra* note 155, at 385, 385–86.

[274] 3 WILLIAM BLACKSTONE, COMMENTARIES *368 (emphasis added).

[275] 547 U.S. 813, 833 (2006).

[276] 129 S. Ct. 2527, 2540 (2009) (quoting Brief for Respondent at 59, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (No. 07-591)).

sustain the use of declarations *in extremis*.[277] The Supreme Court took notice in *Mattox v. United States* of the historical allowance of dying declarations in criminal prosecutions and upheld their continued usage, writing: "They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice."[278]

The Supreme Court wrote in *Crawford* that the Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."[279] A New York court wrote, "By citing *Mattox*, with its reference to the well-settled 'rule of necessity', the *Crawford* Court recognized that a defendant's right of confrontation is not absolute."[280] Courts in North Carolina and Ohio have also recognized, post-*Crawford*, that the public necessity of preventing secret murders justifies continuance of the dying declaration exception.[281]

Both *Davis* and *Crawford* accepted that the right of confrontation may be forfeited by a defendant's wrongdoing.[282] The Supreme Court noted in *Giles* that the dying declaration rule and the forfeiture prong of the deposition rule were separate doctrines at common law.[283] Yet they did coalesce when considering case necessities. The Delaware Superior Court wrote in *Oliver* that dying declarations were "in part admitted from necessity, and the party who by his own act has put it out of the power of his victim to appear in evidence against him, cannot justly complain."[284] In *McDaniel v. State*, the Mississippi High Court of Errors and Appeals similarly recognized that "[i]t would be a perversion of [the] meaning [of the Confrontation Clause] to exclude the proof, when the prisoner himself has been the guilty instrument of preventing the

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[277] *E.g.*, Kirby v. United States, 174 U.S. 47, 61 (1899).

[278] 156 U.S. 237, 244 (1895).

[279] 541 U.S. 36, 54 (2004) (citing *Mattox*, 156 U.S. at 243; State v. Houser, 26 Mo. 431, 433–35 (1858)); *see also* Giles v. California, 128 S. Ct. 2678, 2682 (2008) (citing *Crawford*, 541 U.S. at 54).

[280] People v. Durio, 794 N.Y.S.2d 863, 867 (N.Y. Sup. Ct. 2005).

[281] State v. Bodden, 661 S.E.2d 23, 29 (N.C. Ct. App. 2008); Ohio v. Nix, 2004-Ohio-5502, No. C-030696, 2004 WL 2315035, ¶ 72 (Ohio Ct. App. 2004).

[282] Davis v. Washington, 547 U.S. 813, 833–34 (2006); *Crawford*, 541 U.S. at 62 (citing Reynolds v. United States, 98 U.S. 145, 158–159 (1879)).

[283] *Giles*, 128 S. Ct. at 2684–86 (citing The King v. Woodcock, 1 Leach 500, 500–01, 168 Eng. Rep. 352, 352–53 (K.B. 1789)).

[284] State v. Oliver, 7 Del. (2 Houst.) 585, 589 (Del. Super. Ct. 1863); *cf.* Roberson v. State, 49 S.W. 398, 399 (Tex. Crim. App. 1899) (allowing a rape victim to testify by nodding her head in response to leading questions where her physical disability was caused by the defendant's misconduct).

production of the witness, by causing his death."[285] Although the forfeiture doctrine was limited in *Giles* to cases in which a defendant eliminated a witness for the purpose of making the witness unable to testify,[286] a majority of the members of the Court indicated that there may be instances in which purpose can be inferred.[287] Committing a murder in a manner to avoid detection or which eliminates the only direct witness to a crime both seem to be good candidates to infer an intent-to-silence. These types of circumstances differentiate the necessity justification underlying the dying declaration rule from bare inadequacy of other proof.[288] It is difficult to naïvely ignore that the defendant has created the "overruling public necessity" in such cases by purposefully destroying proof of the crime.[289]

D. The Future Approach?

With the uncertainty surrounding the viability of the necessity justification and the current Court's dissatisfaction with the construction that *Woodsides* and similar cases placed upon the "witnesses against" language, the fate of the dying declaration exception may rest upon returning to its indisputable historical acceptance. *Crawford*, *Davis*, *Giles*, and *Melendez-Diaz* all resorted to the development of the common law and its state at the time of the founding to define the parameters of the Confrontation Clause.[290] The California Supreme Court, holding similarly to how most states' courts have held, stated in *People v. Monterroso* that "it follows that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment."[291]

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[285] McDaniel v. State, 16 Miss. (8 S. & M.) 401, 416 (1847) (citing Woodsides v. State, 3 Miss. (2 Howard) 655, 656 (1837)).

[286] *Giles*, 128 S. Ct. at 2683–84, 2688.

[287] *See Giles*, 128 S. Ct. at 2695 (Souter, J., concurring in part); *id.* at 2708 (Breyer, J., dissenting). *See generally* Tim Donaldson & Karen Olson, *"Classic Abusive Relationships" and the Inference of Witness Tampering in Family Violence Cases After* Giles v. California, 36 LINCOLN L. REV. 45, 49–79 (2008) (reviewing the intent-to-silence requirement adopted by *Giles*).

[288] *See e.g.*, Commonwealth v. Casey, 65 Mass. (11 Cush.) 417, 421 (1853); Lambeth v. State, 23 Miss. 322, 357 (1852).

[289] *Lambeth*, 23 Miss. at 357; *cf.* People v. Durio, 794 N.Y.S.2d 863, 867 (N.Y. Sup. Ct. 2005) (writing that the admissibility of dying declarations "must be considered in the context of the overwhelming interest of public policy").

[290] Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2534–35 (2009); *Giles*, 128 S.Ct. at 2682–85, 2688–91 (2008); Davis v. Washington, 547 U.S. 813, 825–26, 828 (2006); Crawford v. Washington, 541 U.S. 36, 43–47, 52–56, 62 (2004).

[291] People v. Monterroso, 101 P.3d 956, 972 (Cal. 2004) (citing *Crawford*, 541 U.S. at 54); *see also* People v. Gilmore, 828 N.E.2d 293, 301–02 (Ill. App. Ct. 2005) (citing *Crawford*, 541 U.S. at 56 n.6); Wallace v. State, 836 N.E.2d 985, 996 (Ind. Ct. App. 2005) (citing *Crawford*, 541 U.S. at 56 n.6); Commonwealth v. Nesbitt, 892 N.E.2d 299, 311

In *United States v. Jordan*, a federal court in Colorado held that dying declarations did not escape scrutiny under *Crawford* and deserved no special consideration.[292] That court claimed that the historical underpinnings for the rule failed to justify it.[293] The court reasoned that popular belief in the credibility of dying declarations was contrary to *Crawford*'s rejection of a reliability test.[294] The court additionally denied the exception's history, asserting that "the dying declaration exception was not in existence at the time the Framers designed the Bill of Rights."[295] According to the court in *Jordan*, necessity and an opportunity for cross-examination were required under *Crawford* before admission of any testimonial out-of-court statement was permitted by the Confrontation Clause.[296]

Other courts have disapproved *Jordan*'s reinterpretation of the historical record. The Illinois Court of Appeals in *People v. Gilmore* has stated that it believes "the reasoning of *Monterroso* represents the sensible approach and [chose] to follow it instead of *Jordan*."[297] The Massachusetts Supreme Judicial Court explained in *Commonwealth v. Nesbit* that *Jordan* incorrectly focused on what the Colorado court thought "*ought*" to be excluded as a matter of policy rather than addressing whether dying declarations actually were excluded as a matter of preratification common law.[298]

(Mass. 2008) (citing *Crawford*, 541 U.S. at 56 n.6); State v. Martin, 695 N.W.2d 578, 585–86 (Minn. 2005) (citing *Monterroso*, 101 P.3d at 972), *abrogated on other grounds by* State v. Moua Her, 750 N.W.2d 258, 265 n.5 (2008); Harkins v. State, 143 P.3d 706, 710–11 (Nev. 2006) (citing *Crawford*, 541 U.S. at 54); *Durio*, 794 N.Y.S.2d at 866–67; State v. Lewis, 235 S.W.3d 136, 147–48 (Tenn. 2007) (citing *Crawford*, 541 U.S. at 56 n.6); Gonzalez v. State, 195 S.W.3d 114, 126 (Tex. Crim. App. 2006) (Johnson, J., concurring) (citing *Crawford*, 541 U.S. at 56 n.6); Commonwealth v. Salaam, 65 Va. Cir. 405, 406–09 (Cir. Ct. 2004) (citing *Crawford*, 541 U.S. at 56 n.6).

[292] United States v. Jordan, 66 Fed. R. Evid. Serv. 3d (West) 790, 792–93 (D. Colo. 2005) (citing *Crawford*, 541 U.S. at 56, 68).

[293] *Id.* at 793–94 (citing Howard L. Smith, *Dying Declarations*, 3 WIS. L. REV. 193, 203 (1925)).

[294] *Id.* at 794–95; *cf.* United States v. Mayhew, 380 F. Supp. 2d 961, 965–68 (S.D. Ohio) (citations omitted) (rejecting arguments that the dying declaration exception survives *Crawford*, because the court doubted the inherent reliability of such statements, but holding that a deceased victim's statements were admissible under the forfeiture by wrongdoing exception).

[295] *Jordan*, 66 Fed. R. Evid. Serv. 3d (West) at 795.

[296] *Id.*

[297] People v. Gilmore, 828 N.E.2d 293, 302 (Ill. App. Ct. 2005) (citing People v. Monterroso, 101 P.3d 956, 972 (Cal. 2004); *Jordan*, 66 Fed. R. Evid. Serv. 3d (West) at 794); *see also* State v. Calhoun, 657 S.E.2d 424, 428 (N.C. Ct. App. 2008) (agreeing with *Gilmore* in its rejection of *Jordan*).

[298] Commonwealth v. Nesbitt, 892 N.E.2d 299, 311 (Mass. 2008) (citing *Jordan*, 66 Fed. R. Evid. Serv. 3d (West) at 790)).

Crawford acknowledged the existence of authority for admitting testimonial dying declarations.[299] The Supreme Court left no doubt in *Giles* about its understanding of the status of the dying declaration exception at the time of founding when it confirmed: "We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted. . . . The first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying."[300] There is no foundation for the assertion that the dying declaration exception was nonexistent at the time that the Bill of Rights was designed.[301]

The Court's citation to *State v. Houser* in *Crawford* is noteworthy.[302] *Houser* shared *Crawford*'s concern about *Woodsides*'s construction of the "witnesses against" language, writing that it is a "mere evasion" to say that a person is the witness against an accused when he or she is acting as a "conduit pipe" to repeat what someone else said.[303] The court in *Houser* nonetheless acknowledged that courts are not free to rewrite history.[304] Whatever construction a court places on the Confrontation Clause, it is irrefutable that dying declarations were admitted at common law before and after ratification of the Bill of Rights. If something must yield when reconciling theory and history in this area, the permanence of history should withstand the winds of changing thought. The court in *Houser* explained the relationship between confrontation and the dying declaration rule as follows:

> The admissibility of dying declarations has not been questioned. They have been frequently resorted to in this state, as well as elsewhere, without any suggestion ever having been made of a conflict with this constitutional provision. To exclude them on this ground would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitably set at nought. But dying declarations, made under certain circumstances, were admissible at common law, and that common law was not repudiated by our constitution in the clause referred to, but adopted and cherished.[305]

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[299] Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004).

[300] Giles v. California, 128 S. Ct. 2678, 2682 (2008) (citations omitted).

[301] *See, e.g.*, The King v. Woodcock, 1 Leach 500, 501–02, 168 Eng. Rep. 352, 352–53 (K.B. 1789).

[302] *Crawford*, 541 U.S. at 54 (citing State v. Houser, 26 Mo. 431, 433–35 (1858)).

[303] *Houser*, 26 Mo. at 437–38.

[304] *Id.* at 438.

[305] *Id.*

CONCLUSION

The fate of the dying declaration rule tests the integrity of the methodology of originalism. The dying declaration rule might appear inconsistent with some of the sweeping generalizations made in *Crawford* about the right of confrontation,[306] however, it is entirely consistent with the *Crawford* methodology. *Crawford* recognized that "[o]ne could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, . . . those whose statements are offered at trial, . . . or something in between."[307] It therefore turned to the historical background of the Confrontation Clause and the development of the common law up until the time of founding to define the parameters of the Confrontation Clause.[308] The pre-founding and post-ratification acceptance of the dying declaration rule cannot be erased from that history.

From the mid- to late-nineteenth century, state appellate courts repeatedly rejected claims that a defendant's confrontation right was violated by admission of dying declarations.[309] The dying declaration rule was accepted on a variety of grounds. It was upheld based upon its historical pedigree.[310] It was vindicated by necessity.[311] It was recognized as a rule that preserved a restricted species of proof that was heard by a witness but was nonetheless considered direct evidence of the facts or circumstances of a crime.[312] At the end of that century, the Supreme Court acknowledged in *Mattox v. United States* that the dying declaration rule constituted an exception recognized "from time immemorial" that the Bill of Rights respected,[313] and also acknowledged that the rule withstood confrontation objections "from the necessities of the case, and to prevent a manifest failure of justice."[314]

The dying declaration rule has survived previous major shifts in confrontation jurisprudence.[315] The Supreme Court was careful to note in *Pointer v. Texas*, which applied the Confrontation Clause directly to the

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[306] *See* United States v. Jordan, 66 Fed. R. Evid. Serv. 3d (West) 790, 791–95 (D. Colo. 2005).

[307] *Crawford*, 541 U.S. at 42–43 (citations omitted).

[308] *Id.* at 43–47, 52–56, 62 (citations omitted).

[309] *E.g.*, Woodsides v. State, 3 Miss. (2 Howard) 655, 664–65 (1837); State v. Baldwin, 45 P. 650, 651 (Wash. 1896).

[310] *E.g.,* Anthony v. State, 19 Tenn. (Meigs) 265, 277–78 (1838).

[311] *E.g.*, People v. Glenn, 10 Cal. 32, 36 (1858).

[312] *E.g.*, *Woodsides*, 3 Miss. (2 Howard) at 665–66.

[313] Mattox v. United States, 156 U.S. 237, 243 (1895).

[314] *Id.* at 244.

[315] *See* Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36, 60–69 (2004); Pointer v. Texas, 380 U.S. 400, 407 (1965) (citing *Mattox*, 156 U.S. at 240–44; Mattox v. United States, 146 U.S. 140, 151 (1892)).

states through the Fourteenth Amendment, that "[t]his Court has recognized the admissibility against an accused of dying declarations, . . . and of testimony of a deceased witness who has testified at a former trial . . . . Nothing we hold here is to the contrary."[316] The rule endured until its future was called into doubt by a footnote in *Crawford v. Washington* that acknowledged the rule's historical pedigree but said that "[w]e need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations."[317] The Court subsequently acknowledged in *Giles v. California* that dying declarations were a form of testimonial statement "admitted at common law even though they were unconfronted."[318] The Supreme Court, however, has not yet definitively ruled upon the future of the confrontation exception.

Declarations *in extremis* were admitted in criminal prosecutions for over half a century prior to adoption of the Confrontation Clause.[319] There is nothing in the Clause's history to indicate that the rule was concocted to promote political trials or to deprive a defendant from confronting his or her accusers. The usage of the rule was not disavowed by the time of founding and was instead expanded to encompass defective depositions, provided, however, that such testimony was given under circumstances that satisfied the dying declaration rule.[320] American courts continued to admit dying declarations in criminal prosecutions for almost half a century before confrontation objections began appearing in reported case law.[321] "This exception was well established before the adoption of the Constitution, and was not intended to be abrogated."[322] Thus, the inability of a particular confrontation theory to accommodate the dying declaration rule reveals only deficiencies in the theory itself.

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316 *Pointer*, 380 U.S. at 407 (citations omitted).

317 *Crawford*, 541 U.S. at 56 n.6.

318 Giles v. California, 128 S. Ct. 2678, 2682 (2008) (citing *Crawford*, 541 U.S. at 56 n.6).

319 *See, e.g.*, Dominus Rex v. Treason, 1 Strange 499, 93 Eng. Rep. 659 (K.B. 1722).

320 The King v. Callaghan, 33 Geo. 3, (1793), *as reprinted in* MACNALLY, *supra* note 155 at 385; The King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789).

321 *See, e.g.*, Anthony v. State, 19 Tenn. (Meigs) 265, 278 (1838); *cf.* Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437 (1836) (reporting the first known appearance of a passage in reported case law which addressed the relationship between confrontation and the admission of dying declarations).

322 Kirby v. United States, 174 U.S. 47, 61 (1899).