

## HER LAST WORDS: DYING DECLARATIONS AND MODERN CONFRONTATION JURISPRUDENCE

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*Dying declarations have taken on increased importance since the Supreme Court indicated that even if testimonial, they may present a unique exception to its new confrontation jurisprudence. Starting with Crawford v. Washington in 2004, the Court has developed strict rules concerning the use of testimonial statements made by unavailable declarants. Generally, testimonial statements (those made with the expectation that they will be used to prosecute the accused) may be admitted only if they were previously subject to cross-examination. The only exceptions appear to be dying declarations and forfeiture by wrongdoing when the accused intentionally rendered the declarant unavailable.*

*This Article argues that the dying declaration merits examination for two important reasons. First, its status as an exception to the Court's new confrontation rules seriously undermines the Court's dramatic new interpretation of the Confrontation Clause and demonstrates the internal contradictions of the Court's originalist approach. Second, the dying declaration exception presents one of the few remaining ways in which testimonial statements by absent victims of domestic violence can be heard.*

*Remarkings on the prominence of women both in the Court's recent confrontation jurisprudence and in the dying declaration case law, this Article examines the role of women's voices and the means by which those voices are either excluded from or invited into the courtroom. The Article also explores the policy issues stemming from the admission of unopposed statements by victims of femicide. It attempts to balance respect and justice for victims with fairness to the*

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*accused and argues that dying declarations by victims of domestic violence possess unique qualities that justify a limited exception to the confrontation right.*

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#### INTRODUCTION

The dying declaration is the hearsay exception that everyone loves to hate.<sup>1</sup> It seems antiquated and parochial, depending, as it does, on religious beliefs in divine punishment for its reliability and policy justifications. In essence, the dying declaration exception admits statements by dying individuals about the cause of their death, so long as those making the statements know they are dying and have no hope of recovery. The traditional theory is that, because no one would dare face the wrath of

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1. For instance, *McCormick on Evidence* deems it “the most mystical in its theory and traditionally among the most arbitrary in its limitations.” 2 MCCORMICK ON EVIDENCE § 309, at 363 (Kenneth S. Broun ed., 6th ed. 2006); see also *Thurston v. Fritz*, 138 P. 625, 627 (Kan. 1914) (“We are confronted with a restrictive rule of evidence commendable only for its age, its respectability resting solely upon a habit of judicial recognition, formed without reason, and continued without justification.”).

God by dying with a lie on her lips,<sup>2</sup> dying declarations are particularly trustworthy.

What was perhaps the laughing stock of hearsay exceptions, the ultimate proof of Justice Holmes's observation that "a page of history is worth a volume of logic"<sup>3</sup> has taken on increased importance given the Supreme Court's recent dramatic rethinking of the confrontation right. Under the new jurisprudence, the Court, starting with *Crawford v. Washington*,<sup>4</sup> has required that all testimonial statements either be uttered in court by a live witness available for cross-examination or have been cross-examined at some earlier time if the witness is currently unavailable.<sup>5</sup> Some dying declarations fall within the Court's new definition of "testimonial statements"<sup>6</sup>—a murky term that at the very least includes statements made with the expectation that they will be used in a future prosecution. Nevertheless, the Court has also indicated, in dicta, that such dying declarations may present a unique exception to its new confrontation rules.<sup>7</sup> Thus, even though the deceased is not available to be cross-examined, the government may be able to use the dying statement against the accused.<sup>8</sup> Therefore, it is a propitious time to take a look at this old, but not necessarily venerated, hearsay exception and to question its continued viability as well as its relationship to the Sixth Amendment confrontation right.

This Article argues that the dying declaration merits examination for two important reasons. First, its exceptionality seriously undermines the Court's dramatic new interpretation of the Confrontation Clause and demonstrates the internal contradictions of the Court's originalist approach. Second, the dying declaration exception is not quite as silly as it first appears and may have some modern utility even in a secular age.<sup>9</sup> It presents one of the few remaining ways in which testimonial statements by absent victims of domestic violence can be heard.

Part I of this Article presents the history of the dying declaration exception, focusing on the crucial element of awareness by the speaker that death is imminent. This Part considers various critiques of the exception, many of which are valid, but it also finds justification for the ex-

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2. As noted by the Supreme Court, "[N]o person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips." *Idaho v. Wright*, 497 U.S. 805, 820 (1990) (quoting *Queen v. Osman*, 15 Cox Crim. Cas. 1, 3 (Eng. N. Wales Cir. 1881)).

3. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921); see Michael J. Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 MO. L. REV. 285, 285 (2006) (introducing his extensive critique of dying declarations with this famous quotation).

4. 541 U.S. 36 (2004).

5. *Id.* at 59.

6. See *id.* at 51–52 (discussing statements that are considered testimonial).

7. *Id.* at 56 n.6.

8. See *id.* ("Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are.").

9. One need not posit a godless modern society to maintain that the concrete medieval notions of divine judgment and eternal damnation on which the dying declaration exception is based do not figure prominently in modern secular society. See Polelle, *supra* note 3, at 300–01.

ception due to the trustworthiness of the statements, their necessity for prosecution, and the accused's quasi-forfeiture of the right to complain about lack of confrontation where the victim is dead.

Part II outlines the Court's new approach to confrontation, beginning with the 2004 *Crawford* case that lays out the new standard for "testimonial" statements—that is, statements made by a person with the intent to create testimony. This Part notes the significant impact the new confrontation jurisprudence has had in domestic violence prosecutions in which, for reasons of love, fear, shame, or distrust of the legal system, victims who made statements to police decline to participate in the prosecution of their intimate partners. To the extent that their statements were testimonial, they are lost, and the government's attempts to prosecute cases without the victim's testimony have been severely curtailed. Part II also looks at the Court's treatment, so far only in dicta, of the dying declaration. All indications are that when presented with the question directly, the Court will hold that dying declarations are admissible as an exception to the Confrontation Clause even when testimonial. The dying declaration exception existed at the time the Sixth Amendment right to confront witnesses was written, and the drafters clearly did not intend to abrogate its use.

Part III of this Article explores how the existence of the dying declaration as an exception to *Crawford* subverts the Court's categorical and originalist approach to confrontation. Part III advocates seeing the exception not as a regrettable historical anomaly, but rather as an indictment of the current wooden and unhelpful approach to Confrontation. The difficult policy questions raised by confrontation deserve more balance and nuance than the Court's approach has granted them. Ironically, the older dying declaration cases, on whose authority *Crawford* relies but whose methods *Crawford* eschews, exhibit the nuance, sense of policy, concern for society, and fairness that the current confrontation jurisprudence sorely lacks.<sup>10</sup>

Looking specifically at the role of women, Part IV finds important connections between *Crawford* and gender. The facts of *Crawford* and its progeny indicate that the dynamics of violence against women have played a key role in the development of the new confrontation jurisprudence. In a parallel inquiry, Part IV draws a connection between the dying declaration and women killed by their intimate partners. The prominence of women in both confrontation and dying declaration doctrine invites interesting questions about the role of women's voices and the means by which those voices—in this case, from the grave—are either excluded or invited into the courtroom.

Finally, Part V explores the issue of unfronted statements by victims of domestic violence, particularly when the violence ends in death.

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10. See *infra* notes 228–33 and accompanying text.

Such dying words raise very difficult questions about respect and justice for victims on the one hand, and fairness to the accused on the other. This Part strives to balance these concerns in light of the strictures of the dying declaration exception and argues that dying declarations by victims of domestic violence have unique qualities that justify a limited exception to the confrontation right.

## I. DYING DECLARATIONS

The dying declaration exception has served as a longstanding exception to the hearsay rule. It admits out of court statements for their truth when: (1) the declarant is unavailable;<sup>11</sup> (2) the statement concerns the cause of the declarant's impending death;<sup>12</sup> and (3) the statement is made while the declarant believes his death is imminent.<sup>13</sup> Generally, under the common law the dying declaration was limited to homicide cases, although some early case law applied dying declarations to prove wills and deeds.<sup>14</sup> Scholars attribute the limitation to homicide prosecutions to a misinterpretation of an English treatise.<sup>15</sup> If indeed dying declarations

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11. This factor is almost always met because he or she did in fact die, although technically under the Federal Rules of Evidence one can make a dying declaration, not die, and be unavailable for other reasons. See FED. R. EVID. 804(a). There is a split of authority among the states concerning whether mere unavailability is sufficient, and a minority require that the declarant be dead as opposed to asserting a privilege, such as too sick to testify, out of the jurisdiction, etc. This minority includes California, see CAL. EVID. CODE § 1242 (West 2010), and New York, see *People v. Nieves*, 492 N.E.2d 109, 113–14 (N.Y. 1986). This issue rarely arises, however. See 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1431, at 276 (1974) (“Conceivably, there might be still a necessity if the witness, though supposed to be dying had recovered and had since left the jurisdiction, but this case had never occurred, and the question never arose.”). It is, however, arguably significant for determining the scope of the dying declaration as it relates to the Confrontation Clause generally. See Peter Nicolas, “*I’m Dying to Tell You What Happened*”: *The Admissibility of Testimonial Dying Declarations Post-Crawford*, 37 HASTINGS CONST. L.Q. 487, 534–38 (2010). It is fair to assume that in the dying declaration cases discussed in the context of domestic violence homicides, the declarant has died. For policy reasons, the quasi-forfeiture argument in favor of dying declarations is much stronger if the declarant actually dies. See *infra* notes 120–22 and accompanying text.

12. FED. R. EVID. 804(b)(2).

13. The modern version found in the Federal Rules of Evidence expands the dying declaration's applicability beyond homicide to include civil matters, but the criteria are essentially the same as under common law. FED. R. EVID. 804(b). Rule 804(b) provides:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

*Id.*

14. There is precedent for applying dying declaration to civil cases such as property deeds, wills, and contracts. *Wilson v. Boerum*, 1858 Ant. N.P. Cas. 239, 239 (N.Y. Sup. Ct. 1816) (“The same principles which make dying declarations evidence in criminal cases, make them *a fortiori* evidence in civil cases.”). See 2 MCCORMICK ON EVIDENCE, *supra* note 1, § 311, at 368 (“[U]ntil the beginning of the 1800s . . . [dying] declarations were admitted in civil and criminal cases without distinction . . .”); Nicolas, *supra* note 11, at 514–21; Annotation, *Admissibility of Dying Declarations in Cases Not Involving Homicide*, 49 A.L.R. 1282, 1282 (1927), supplemented by 91 A.L.R. 560, 561–62 (1934).

15. See 2 MCCORMICK ON EVIDENCE, *supra* note 1, § 311, at 368 (tracing the error to the misreading of Sergeant East, Pleas of the Crown); 5 WIGMORE, *supra* note 11, § 1431, at 277 (making a similar observation).

are reliable, the argument goes, they should be extended beyond homicide to other crimes and to civil cases. As will be argued in Part IV, the extra factor of homicide strengthens the policy argument in favor of admitting dying declarations.

This hearsay exception is traceable to a famous 1789 English Case, *The King v. Woodcock*.<sup>16</sup> *Woodcock* admitted a dying statement by a woman blaming her husband for her severe injuries after being beaten.<sup>17</sup> The court justified admitting the unfronted statement on the grounds that such statements are “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.”<sup>18</sup> The court held that “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.”<sup>19</sup> This traditional justification of the dying declaration is, as words such as “awful” and “solemn” indicate, religiously based. Fear of heaven’s ultimate punishment for false testimony—a violation of one of the Ten Commandments<sup>20</sup>—prompts sincerity. The dying person would not dare depart this life and greet her maker with a lie on her lips.<sup>21</sup>

Professor Desmond Manderson observes that rather than being an exception to the hearsay rule, the dying declaration is, in some deeper sense, the embodiment of the rule itself.<sup>22</sup> The oath as part of regular in-

16. (1789) 168 Eng. Rep. 352 (P.C.). The earliest reported dying declaration case is *Rex v. Reason*, (1722) 1 Strange 499 (K.B.), in which a clergyman reported the dying words of a homicide victim. See Poyelle, *supra* note 3, at 290; Recent Case, *Dying Declarations*, 17 YALE L.J. 403 (1908).

17. *Woodcock*, 168 Eng. Rep. at 354.

18. *Id.* at 353. The court cites Loffit’s *Edition of Gilb. Evidence* and Shakespeare’s *King John*, WILLIAM SHAKESPEARE, KING JOHN act 5, sc. 6, l. 27. *Woodcock*, 168 Eng. Rep. at 353 n.2(b). Although the reporter’s footnote cites Act V, scene VI, which has nothing to do with dying statements, it is clear that the court meant to cite Act V, scene IV, lines 22–27 of *King John*, where the character Melun, who is dying, states:

Have I not hideous death within my view,  
Retaining but a quantity of life,  
Which bleeds away, even as a form of wax  
Resolveth from his figure ‘gainst the fire?  
What in the world should make me now deceive,  
Since I must lose the use of all deceit?

WILLIAM SHAKESPEARE, KING JOHN, act 5, sc. 4, ll. 22–27.

19. *Woodcock*, 168 Eng. Rep. at 353.

20. *Deuteronomy* 5:20 (King James) (“Neither shalt thou bear false witness against thy neighbour.”); *Exodus* 23:1 (King James) (“Thou shalt not raise a false report: put not thine hand with the wicked to be an unrighteous witness.”); see also *Psalms* 23:3–4 (King James) (“Who shall ascend into the hill of the LORD? or who shall stand in his holy place? He that hath clean hands, and a pure heart; who hath not lifted up his soul unto vanity, nor sworn deceitfully.”).

21. *Cf. Patterson v. Gaines*, 47 U.S. (6 How.) 550, 576 (1848) (noting that the “delirious ravings of a man *in extremis*” were fraudulent, and the testator, upon sober reflection, would not have been willing to adhere to a fraudulent will because such action, “to his conscience and his God, present him as dying with a falsehood on his lips”).

22. Desmond Manderson, *Et Lex Perpetua: Dying Declarations & Mozart’s Requiem*, 20 CARDOZO L. REV. 1621, 1630 (1999) (“The rule of dying declarations is therefore *not* an exception to

court testimony is meant to remind the witness of heaven's punishment or reward. How much more veracity can we expect from someone whose rendezvous with her creator and heavenly judge is coming much sooner? As the Supreme Court explained, dying declarations "are equivalent to the evidence of a living witness upon oath."<sup>23</sup> For the declarant, "every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth."<sup>24</sup>

### A. History

The dying declaration exception appears in some very early American case law. For instance, in *State v. Moody*,<sup>25</sup> a North Carolina case from 1798, the court explained that dying declarations may be received "of one so near his end that no hope of life remains, for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath."<sup>26</sup> The North Carolina court warned, however, "if at the time of making the declaration he has reasonable prospects and hope of life, such declarations ought not to be received; for there is room to apprehend he may be actuated by motives of revenge and an irritated mind, to declare what possibly may not be true."<sup>27</sup>

Thus, even early in this nation's history, dying declarations were met with some concern. The court in *Moody* is keenly aware of motives of "revenge" and the influences of an "irritated mind."<sup>28</sup> Indeed, a dissenting North Carolina justice challenged the admission of a written report of the dying declaration, querying, "how is it possible a man can be a witness to prove his own death?"<sup>29</sup> This skepticism is not aberrational in the case law, but constitutes a theme running throughout the development of the dying declaration that explains in part courts' rigid application of its doctrinal constraints.<sup>30</sup>

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the requirement of an administered oath, but rather its origin and its paradigm. . . . [T]he principle of dying declarations is no exception to the hearsay rule, but the grounds of its possibility."

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

24. *Id.* (citations omitted).

25. 3 N.C. (2 Hayw.) 50 (1798).

26. *Id.* at 50.

27. *Id.*

28. *Id.*

29. *Id.* at 51.

30. A law review note from 1897 asserts that "the tendency to restrict the scope of the exception known as 'Dying Declarations' has been practically universal." Note, *Contradiction of Dying Declarations*, 10 HARV. L. REV. 518, 518 (1897). The note dismisses the reliability of dying declarations and explains that "the reason usually assigned for this exception at present is rather the necessity which requires this evidence to convict murderers against whom, from the nature of the crime, other testimony is often lacking, than any intrinsic value in what is said in anticipation of death." *Id.*

The Supreme Court of the United States dealt with the dying declaration exception in *Mattox v. United States*,<sup>31</sup> which it heard twice. *Mattox I* concerned an appeal from a murder conviction in which the Court reversed for many procedural irregularities.<sup>32</sup> The issue of a dying declaration was also presented.<sup>33</sup> Interestingly, the declaration by the dying man was offered by the accused as exculpatory evidence and therefore could not trigger Sixth Amendment concerns.<sup>34</sup> The dying declarant is alleged to have said to the accused's mother, "I know Clyde Mattox, your son, and he was not one of the parties who shot me."<sup>35</sup> *Mattox I* held that the decedent's statement met the dying declaration's requirements, and the court emphasized that "it must be shown by the party offering them in evidence that they were made under a sense of impending death."<sup>36</sup>

Without outright reference to religion, *Mattox I* explained the policy of "a declaration *in articulo mortis*."<sup>37</sup> The Court opined that the "certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath could impose."<sup>38</sup> *Mattox I* also issued an important caveat that "the evidence must be received with the utmost caution" and counseled that it be rejected if any hope of recovery tainted "the awful and solemn situation."<sup>39</sup>

*Mattox II* returned to the Supreme Court after the accused was again convicted on retrial and concerned the prosecutor's use at the second trial of two witnesses' prior testimony.<sup>40</sup> These witnesses had been cross-examined at the first trial but had died, and were therefore unavailable for confrontation at the retrial.<sup>41</sup> The Court rejected an overly literal application of the Sixth Amendment Confrontation Clause that

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31. *Mattox v. United States (Mattox II)*, 156 U.S. 237 (1895); *Mattox v. United States (Mattox I)*, 146 U.S. 140 (1892).

32. These irregularities included jury misbehavior in reading newspaper reports about the trial and thus learning of the defendant's alleged prior bad acts, *Mattox I*, 146 U.S. at 143, 150–51, and the statement by the bailiff to jurors that "[t]his is the third fellow he has killed," *id.* at 142 (quoting affidavit offered by defendant).

33. *See id.* at 151.

34. *Id.* at 142. The Court explained that "[d]ying declarations are admissible on a trial for murder as to the fact of the homicide and the person by whom it was committed, in favor of the defendant as well as against him." *Id.* at 151. In discussing *Regina v. Perkins*, (1840) 9 Car. & P. 395, the Court noted that "[t]here the declaration was against the accused, and obviously no more rigorous rule should be applied when it is in his favor." *Mattox I*, 146 U.S. at 152.

35. *Id.* at 142 (quoting counsel for the defendant).

36. *Id.* at 151. In *Mattox I*, the declarant knew he was dying; the physician who came to the house and stayed the night to care for the declarant informed him that he would soon die. *Id.* at 141–42 ("[C]hances are all against you; I do not think there is any show for you at all.") (quoting physician testimony). Another indication of the vintage nature of the case is the behavior of the doctor. Who makes house calls anymore and who stays for hours tending to the dying?

37. *Id.* at 152.

38. *Id.*

39. *Id.*

40. *Mattox II*, 156 U.S. 237, 240–44 (1895).

41. *Id.* at 240.

would have prohibited their former testimony.<sup>42</sup> Instead, after reviewing authorities in the various states and England, the Court concluded that prior confronted testimony was permissible.

*Mattox II* emphasized the need for practicality and flexibility in applying the Sixth Amendment. The Court conceded that there was a strong argument for an absolutist approach to the confrontation right.<sup>43</sup> The Court, however, consciously struck a balance between the constitutional command and the needs of public policy, noting that “however beneficent in their operation and valuable to the accused,” such rules “must occasionally give way to considerations of public policy and the necessities of the case.”<sup>44</sup> The Court objected to the notion that an accused “should go scot free simply because death has closed the mouth of that witness.”<sup>45</sup> According to the Court, this “would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.”<sup>46</sup>

The Court also indicated its own fidelity to an originalist interpretation of the Sixth Amendment that, in its view, had always included various exceptions. The Court explained, “We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen.”<sup>47</sup>

Although not directly at issue in *Mattox II*, the dying declaration was offered as an analogy to support what the Court perceived to be its flexible and sensible approach to the right of confrontation. The Court noted:

For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused, they are made without any opportunity for examination or cross-examination, nor is the witness brought face to face with the jury, yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. 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.<sup>48</sup>

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42. *Id.* at 243–44.

43. *Id.* at 243 (“There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness, and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection.”).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 243–44.

Interestingly, the *Mattox* cases, which are often cited as the proof-texts for the persistence and relevance of the dying declaration, raise the specific exception only in dicta. In *Mattox I*, the dying declaration was not used against the accused—rather, the accused wished to admit the statement; the question, therefore, was solely one of hearsay, not confrontation.<sup>49</sup> In *Mattox II*, the issue before the Court concerned the admissibility of former testimony.<sup>50</sup> *Mattox II* trotted out the dying declaration as proof that the Sixth Amendment could not really mean what it said.<sup>51</sup> The Court used the *reductio ad absurdum* argument that if a literal reading of the Sixth Amendment were used to ban former testimony, then dying declarations would also be banned by the right of confrontation—an interpretation that everyone agreed was incorrect.<sup>52</sup> At least, the Justices in *Mattox II* did not have the “hardihood” to do so.<sup>53</sup>

### B. Focus on Awareness of Imminent Death

Awareness of death’s imminence is central to the doctrine. Justice Cardozo’s 1933 opinion in *Shepard v. United States*<sup>54</sup> is the most famous dying declaration case and is commonly studied in evidence classes throughout America. Mrs. Shepard, lingering from a lethal arsenic dose, said regarding her husband, “Dr. Shepard has poisoned me.”<sup>55</sup> Justice Cardozo rejected her statement as not fitting within the dying declaration exception, explaining: “To make out a dying declaration the declarant must have spoken without hope of recovery and in the shadow of impending death. . . . The patient must have spoken with the consciousness of a swift and certain doom.”<sup>56</sup> Even though Mrs. Shepard lingered in agony for weeks, dying a gruesome Madame Bovary-type death,<sup>57</sup> at the time she made the statement she still “did not speak as one dying, announcing to the survivors a definitive conviction, a legacy of knowledge on which the world might act when she had gone.”<sup>58</sup>

One can accuse Justice Cardozo in *Shepard* of overscrupulousness. Ironically, such care in applying the dying declaration was not evident in

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49. *Mattox I*, 146 U.S. 140, 141–42 (1892).

50. *Mattox II*, 156 U.S. at 238.

51. *See id.* at 243.

52. *Id.*

53. *Id.* at 243–44. In *Carver v. United States*, yet another appeal the Supreme Court heard twice, the accused was charged with murdering his girlfriend, and the issue in the case was whether he shot her by accident or on purpose. *Carver v. United States (Carver II)*, 164 U.S. 694, 695 (1897). The Court held that some of the victim’s statements were “made under the impression of almost immediate dissolution” and hence were admissible as dying declarations. *Carver v. United States (Carver I)*, 160 U.S. 553, 554 (1896). The Court did, however, allow the accused to impeach the victim’s dying declaration without establishing the necessary foundation. *Carver II*, 164 U.S. at 697–98.

54. 290 U.S. 96 (1933).

55. *Id.* at 98.

56. *Id.* at 99–100.

57. *See id.*

58. *Id.* at 100.

the original case laying out its parameters, *The King v. Woodcock*, when the court acknowledged that “it seems impossible to find out, whether the deceased herself apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer before her Maker . . . .”<sup>59</sup> In light of this uncertainty, the court left the question for the jury to determine.<sup>60</sup> But it is fair to say that since *Woodcock*, courts have tended to apply the dying declaration narrowly, reflecting a fear that without this guarantee of reliability, too much unsworn hearsay untested by cross-examination would be admitted.<sup>61</sup>

The level of certainty required by the exception might at first seem daunting, and there are certainly numerous cases in which courts demand irrefutable evidence that the declarant knew she was dying.<sup>62</sup> The case law is rife with heart-wrenching examples in which no doubt is left that the declarant is aware of his or her imminent demise. For example, a New York court quoted a declarant as saying: “I am going to die. What are my children going to do after this?”<sup>63</sup> Another example: “I am very sick. I shall soon be with my mother. I shall see Jesus.”<sup>64</sup> Calling for the priest to administer last rites is another surefire indication of consciousness of death.<sup>65</sup> Additionally, many cases involve physicians who brutally deliver the unvarnished truth that the declarant had very little time left.<sup>66</sup> (Such cases indicate that any nostalgia we have for the bedside manners of the doctors of yesteryear seems misplaced.)

Although one could walk away with the impression that the dying declaration was very narrowly and rigorously construed, it appears that some dying declarations were more pro forma than *Shepard* and other famously strict cases would lead us to believe. It is important to realize

59. *The King v. Woodcock*, (1789) 168 Eng. Rep. 352, 353–54 (P.C.) (citation omitted).

60. *Id.* at 354.

61. In *State v. Belcher*, the South Carolina Supreme Court observed:

The only case in the whole range of the criminal law where evidence is admissible against the accused without an opportunity of cross-examination, is that of “*dying declarations*” in cases of homicide, and they are only admissible from the necessity of the case, and when made *in extremity*—when the party is at the point of death, and is conscious of it—when every hope of this world is gone, and every motive to falsehood is silenced by the most powerful considerations to speak the truth. For the reason that the admission of such statement is exceptional, they ought always to be excluded unless they come within the rule in every respect.  
13 S.C. 459, 462–63 (1880).

62. See, e.g., *Woodcock*, 168 Eng. Rep. at 353 n.a3 (citing *King v. Welbourn*, 1 East C.L. 359, 360 (1792) (holding that a woman who had been poisoned in an attempt to induce abortion did not know she was dying because she did not feel any pain and may have thought she was getting better, even though she had been told by an apothecary that she was going to die)).

63. *People v. Del Vermo*, 85 N.E. 690, 696 (N.Y. 1908).

64. *State v. Phillips*, 277 N.W. 609, 615 (N.D. 1938). The court explained that the declarant’s mother was dead. And, in case any doubt remained, when asked if she expected to get well, the declarant replied, “No.” *Id.*

65. See *Carver II*, 164 U.S. 694, 695 (1897) (“The fact that the deceased had received extreme unction had some tendency to show that she must have known that she was in *articulo mortis* . . .”).

66. See, e.g., *Commonwealth v. Hebert*, 163 N.E. 189, 191 (Mass. 1928) (quoting doctor to have said to decedent: “You know you are getting worse, don’t you?” and “We have been talking it over, and we don’t think you are going to get better”).

that many of the dying declarants lingered for weeks.<sup>67</sup> Their deaths were certain, but also slow, and provided plenty of time for the police to come and take a statement. Normally, statements by victims, even if sworn, were not admissible unless the accused was present and able to question the witness.<sup>68</sup> Dying declarations, however, did not require confrontation or the presence of the accused, and there is evidence that in some jurisdictions dying declarations were regularly committed to writing.<sup>69</sup> The benefits of written statements are obvious—they lead to certainty about what the decedent said.<sup>70</sup> But they come at a substantial cost. Such statements become highly formalized and, ironically, look exactly like the core testimonial statements—affidavits procured by law enforcement—that the new *Crawford* jurisprudence designated as the central concern of the confrontation right.

In 1915, the New York Court of Appeals sounded a warning, noting that “a new custom has come into vogue among coroners in reference to dying declarations of victims of crime.”<sup>71</sup> The form questions included: “Have you any hope of recovery from the effects of the injury that you have received?”<sup>72</sup> The court stated that if the questions were put “in a perfunctory manner” or received “a careless assent,” an “essential prerequisite to the admission of unsworn declarations of fact” would be missing.<sup>73</sup> The court noted with distress that the coroner who took the dying declaration testified that he regularly used a preprinted questionnaire, and had done so to generate at least twenty dying statements from different declarants in the six months preceding the trial.<sup>74</sup>

The court observed that if the declarant were not in the proper frame of mind and the strictures of the dying declaration were “disregarded in the slightest degree, the evidentiary value of the declaration is

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67. See, e.g., *State v. Stewart*, 186 S.E. 488, 489 (N.C. 1936) (stating that victim died three weeks after botched abortion); *State v. Vance*, 110 P. 434, 435 (Utah 1910) (“[On November 26, 1907, the perpetrator] with his fists, hands, and feet did strike, kick, beat, and bruise the said Mary Vance, and did then and there, and thereby, inflict upon the body of the said Mary Vance a mortal contusion, bruise, and wound, from which the said Mary Vance languished until the 8th day of December, 1907, when she died . . .”).

68. *Crawford v. Washington*, 541 U.S. 36, 46 (2004).

69. See, e.g., *Murphy v. People*, 37 Ill. 447, 452 (1865) (“I, William Shies, of the county of Kane, State of Illinois, having no hope of life, and having the fear of God before me, do declare this to be a true statement of facts of an occurrence hereinafter related . . .”); *Boyle v. State*, 97 Ind. 322, 327 (1884) (“Q. Have you given up all hope of life? A. I have, of course. Q. Is this declaration which you now make free from all malice? A. Yes, it is; I forgive him.”); *Hebert*, 163 N.E. at 191 (“Miss Fenton, a stenographer, testified that she was called to the Cooley Dickinson Hospital where Mrs. Lyman was a patient and took her statement in shorthand . . .”).

70. *People v. Callaghan*, 6 P. 49, 56 (Utah 1885) (“Where such declarations are taken down in writing at the time they are uttered, although not signed by the deceased, being more reliable and accurate than the memory of most men, they should be produced and read at the trial.”) (citation omitted).

71. *People v. Kane*, 107 N.E. 655, 659 (N.Y. 1915).

72. *Id.* at 660.

73. *Id.*

74. *Id.*

wholly destroyed.”<sup>75</sup> In fact, the attempts to generate dying declarations occasionally led to leading questions propounded upon people whose awareness and sharpness were fading.<sup>76</sup>

Modern courts particularly appreciate it when a declarant requests last rites, announces that she is going to die, or is so informed by a medical professional, but occasionally courts will infer the declarant’s knowledge of imminent death from dire medical circumstances.<sup>77</sup> Modern courts will sometimes allow the objective circumstances to serve as an indication that the declarant knew he or she was dying,<sup>78</sup> and it is not hard to find cases where the court merely extrapolates from the severity of the injury.<sup>79</sup> By and large, however, courts today still reject dying declarations if the declarant did not know death was imminent.<sup>80</sup>

### C. Cultural Features of Dying Declarations

Dying declarations reflect the ways of dying in each particular age. Today, deaths involving dying declarations are dominated by car wrecks and gun violence; historically, dying declarations commonly were made in shoot-outs in the Old West,<sup>81</sup> poisonings,<sup>82</sup> and deaths due to bank

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75. *Id.*

76. *See, e.g.,* *People v. Callaghan*, 6 P. 49, 56 (Utah 1885) (noting the deceased’s enfeebled state and the difficulty in obtaining answers but nevertheless holding that the declarations were admissible because they were “answers to leading questions”).

77. *See, e.g.,* *People v. Monterroso*, 101 P.3d 956, 971 (Cal. 2004) (holding that the requirement of knowledge of impending death was satisfied when the declarant had been shot and severely wounded, expressed a fear of dying, lay in a fetal position, and did not utter another word after making his statement).

78. *See* 2 MCCORMICK ON EVIDENCE, *supra* note 1, § 310, at 366 (“The belief may be shown circumstantially by the apparent fatal quality of the wound, by the statements made to the declarant by doctors or others of the hopelessness of the condition, or by other circumstances, but it must be shown.” (citation omitted)).

79. *See, e.g.,* *Wallace v. State*, 836 N.E.2d 985, 991 (Ind. Ct. App. 2005) (“We find that [declarant’s] second identification statement made to the EMT very shortly after he had been shot multiple times, established a reasonable inference that Wallace was still under the effect of the event. [Declarant’s] third identification statement to the nurses was made when he was ‘in extremis’ and within thirty minutes of being shot. The trial court may also consider the surrounding details of the declarant’s rapidly deteriorating condition when determining whether the statement is reliable as a dying declaration.”); *State v. Martin*, 695 N.W.2d 578, 583 (Minn. 2005) (“[T]he evidence suggests [the declarant] recognized the severity of his wounds and believed death was imminent. He had been stabbed in the neck, piercing his larynx, and shot in the chest, severing a major artery. His bleeding was severe, and he clutched his chest as he spoke.”).

80. *See, e.g.,* *James v. Marshall*, No. CV 06-3399-CAS(E), 2008 WL 4601238, at \*20 (C.D. Cal. Aug. 13, 2008) (finding on habeas in which prosecution did not seek admission of the victim’s statement as a dying declaration in the original trial that there was no evidence to prove that gunshot victim, who was being treated by paramedics and conversing with them in the ambulance, had a sense of impending death); *People v. Stiff*, 904 N.E.2d 1174, 1178, 1180 (Ill. App. Ct. 2009) (“[T]he record is devoid of evidence that [the declarant] believed that his death was imminent at the time he made the statement . . .”).

81. *See, e.g.,* *State v. Nowells*, 109 N.W. 1016, 1017 (Iowa 1906) (explaining that after saloon hopping, victim was shot over a game of craps, his last words were “Tell mother goodbye,” and then he “immediately became convulsed in the final death struggle”); *State v. Foot You*, 32 P. 1031, 1031–32 (Or. 1893) (describing a fight at the “Temperance Saloon” over a Chinese gambling game called “Tan Tan”).

robberies and other criminal activity.<sup>83</sup> One factor common to both older and modern cases is the frequent scenario of death by the hand of an intimate partner.<sup>84</sup> The relationship between domestic violence and dying declarations is an important one, explored below.<sup>85</sup>

It is impossible to know how many dying declarations are actually uttered, but it is interesting to speculate about why dying declarations appear more prevalent in the eighteenth, nineteenth, and beginning of the twentieth century case law than they are now. Looking at the older cases, three explanations come to mind. First, given the state of medical knowledge and technology, there were simply more opportunities to make dying declarations than there are today. Before antibiotics and sophisticated surgeries under hygienic conditions, more people died of wounds that today would not kill them.<sup>86</sup> And, those folks in previous generations lingered for days or weeks before they died, giving them ample opportunities to make dying declarations.<sup>87</sup>

Second, the doctrine of dying declarations requires that the declarant have abandoned all hope of recovery. Whether it is our faith in modern medicine, our genuinely optimistic outlook,<sup>88</sup> or our denial of death,<sup>89</sup> it seems that this requirement is harder to fulfill in modern Western society. Although the power of the belief in imminent death to bring forth truthful statements is arguably diminished in modern, secular

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82. See *Nordgren v. People*, 71 N.E. 1042 (Ill. 1904) (reversing conviction based on dying declaration by wife who charged her husband with giving her whisky laced with poison because the good character of the husband, which was attested to by seventeen witnesses, created reasonable doubt as to his guilt); *Puryear v. Commonwealth*, 1 S.E. 512 (Va. 1887) (relating to a dying woman who made a charge that her husband had killed her with poison mixed in whisky). Mixing poison into whiskey was apparently a common mode of delivery. See, e.g., *Fults v. State*, 204 S.W. 108 (Tex. Crim. App. 1918).

83. See, e.g., *Simpson v. State*, 148 S.E. 511, 512–13 (Ga. 1929) (involving declarant who was a bank cashier and was shot in a robbery); *State v. Burns*, 33 Mo. 483, 485 (1863) (involving declarant who was a police officer shot while pursuing suspects in a burglary); *Commonwealth v. Roddy*, 39 A. 211, 211 (Pa. 1898) (explaining that burglars tortured declarant to force him to tell them where money was hidden).

84. Although there are undoubtedly murderous wives and girlfriends, see, e.g., *Weyrich v. People*, 89 Ill. 90, 92 (1878) (involving wife indicted for the murder of her husband by poisoning); *Fields v. Commonwealth*, 120 S.W.2d 1021, 1022 (Ky. 1938) (involving husband's dying declaration in regard to his wife who shot him), the vast majority of intimate partner victims are women.

85. See *infra* Part IV.B.

86. Surgery was extremely risky in the nineteenth century. Patients faced problems with hygiene, anesthesia and infection, shock, and blood loss. See Science Museum, Surgery, <http://www.sciencemuseum.org.uk/broughttolife/themes/surgery.aspx> (last visited July 25, 2010) (detailing the evolutionary progress of medicine).

87. See Digital History, Responses to Death in Nineteenth Century America, <http://www.digitalhistory.uh.edu/historyonline/usdeath1.cfm> (last visited July 25, 2010) (“A century ago it was impossible to evade the fact of death. Premature death remained commonplace. As late as 1900, the chance of a marriage lasting forty years was just one in three. Death typically took place in the home following a protracted deathbed watch.”).

88. Some famous examples of this optimism include: “Die? I should say not, my dear fellow. No Barrymore would ever allow such a conventional thing to happen to him,” John Barrymore, actor, died 1942, LAURA WARD, FAMOUS LAST WORDS: THE ULTIMATE COLLECTION OF FINALES AND FAREWELLS 44 (PRC Publ’g 2004); “Go away. I’m all right,” H.G. Wells, novelist, died 1946, *id.* at 15.

89. See ERNEST BECKER, THE DENIAL OF DEATH 20–21 (1973) (discussing people’s evasion of their own mortality).

society, the requirement still exists, and is less likely to be fulfilled where death is largely a stranger, relegated to hospitals or old age homes.<sup>90</sup>

Finally, when one focuses on dying declarations made by spouses, it is interesting to examine what choices the killer spouse felt he or she had to end a bad relationship. In modern America, divorce is easy to procure.<sup>91</sup> No-fault divorce did not exist until the 1970s,<sup>92</sup> and murder might have seemed like the only option to some unhappy spouses.

#### D. Critiques of Dying Declarations

Critiques of the dying declaration were expressed even in the nineteenth century. In a state court case of the same vintage as *Mattox I* and *II*, the Wisconsin Supreme Court heard argument about a dying declaration. The defense pointed out that “[t]his kind of evidence is not regarded with favor.”<sup>93</sup> In one persuasive (if run-on) sentence, the defense argued strongly against the reliability of dying declaration:

Physical or mental weakness consequent upon the approach of death, a desire of self-vindication, or a disposition to impute the responsibility for a wrong to another, as well as the fact that the declarations are made in the absence of the accused, and often in response to leading questions and direct suggestions, and with no opportunity for cross-examination: all these considerations conspire to render such declarations a dangerous kind of evidence.<sup>94</sup>

As the Supreme Court of the United States stated in *Carver II*, “[a] dying declaration by no means imports absolute verity.”<sup>95</sup> *Carver II* proceeded to explain that the “history of criminal trials is replete with instances where witnesses, even in the agonies of death, have through malice, misapprehension or weakness of mind made declarations that were inconsistent with the actual facts.”<sup>96</sup> And as the New York Court of Appeals explained: “Dying declarations are dangerous, because [they are] made with no fear of prosecution for perjury.”<sup>97</sup>

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90. See Digital History, *supra* note 87 (“Twentieth century Americans rarely have to directly confront the facts of mortality. Death in our society is largely confined to the elderly and most deaths take place not in homes but in hospitals. Professionals - doctors, nurses, and morticians - handle the dying and dead.”).

91. See Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 651 (1984) (discussing the rarity of divorce filings in early American history).

92. See LESLIE JOAN HARRIS, LEE E. TEITELBAUM & JUNE CARBONE, *FAMILY LAW* 310 (3d ed. 2005) (discussing the widespread adoption of no-fault divorce in the United States); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 82-91 (1991) (discussing the history of adoption of no-fault divorce laws).

93. *State v. Dickinson*, 41 Wis. 299, 303 (1877).

94. *Id.*

95. *Carver II*, 164 U.S. 694, 697 (1897).

96. *Id.*

97. *People v. Falletto*, 96 N.E. 355, 357 (N.Y. 1911).

An Oklahoma appellate court from 1908 compared the dying declaration unfavorably to spontaneous statements.<sup>98</sup> It acknowledged the necessity argument for dying declarations, but observed that: “Experience teaches us that men do not always speak the truth in the presence of certain death. There may be, and often is, premeditation in connection with a dying declaration. This opens the way to fabrication.”<sup>99</sup>

Similarly, it is not hard to find scholarly derision of the dying declaration.<sup>100</sup> Modern scholars do not question the historical pedigree of the dying declaration, but do challenge its wisdom.<sup>101</sup> As with the older cases, scholars’ critiques of the dying declaration concern its accuracy, and are alluded to in *Moody’s* comment about an “irritated mind”<sup>102</sup> and in the Wisconsin Supreme Court’s discussion of “[p]hysical or mental weakness consequent upon the approach of death.”<sup>103</sup> Assuming arguendo that knowledge of the imminence of one’s death encourages honesty, there may still be problems with perception, which tends to plummet when one is bleeding to death.<sup>104</sup> The problem is not only of physical capacity and blood loss, but the effect of stress on perception and memory as well.<sup>105</sup>

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98. See *Price v. State*, 98 P. 447, 454 (Okla. Crim. App. 1908). Spontaneous statements were deemed more reliable by the court because the lack of calculation rendered them more sincere and less likely to be fabricated. *Id.*

99. *Id.*

100. See, e.g., Stanley A. Goldman, *Not So “Firmly Rooted”: Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1, 1 (1987) (arguing that dying declarations are unreliable); Leonard R. Jaffee, *The Constitution and Proof by Dead or Unconfrontable Declarants*, 33 ARK. L. REV. 227, 363 (1979) (arguing that the dying declaration exception should not be kept merely because of its long, inflexible history); Bryan A. Liang, *Shortcuts to “Truth”: The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 230–43 (1998) (advocating for eliminating the dying declaration exception and citing scientific evidence indicating the unreliability of dying declarations); Polelle, *supra* note 3, at 289 (arguing that there is no longer any justification for the dying declaration exception); Charles W. Quick, *Some Reflections on Dying Declarations*, 6 HOW. L.J. 109, 109 (1960) (describing the dying declaration exception as being full of illogicalities and absurdities); Comment, *The Admissibility of Dying Declarations*, 38 FORDHAM L. REV. 509, 509 (1970) (discussing the rationale behind dying declarations and arguing that this rationale no longer has any foundation); Note, *Dying Declarations*, 46 IOWA L. REV. 375, 375–87 (1961) (discussing weaknesses of dying declarations and how they are countered by the required elements as well as the limiting factors applied by the courts, including jury instructions, and also recommending lifting some of the limitations, including its application only to criminal homicide cases and its scope being limited to facts and circumstances of death).

101. See sources cited *supra* note 100.

102. *State v. Moody*, 3 N.C. (2 Hayw.) 50, 50 (1798).

103. *State v. Dickinson*, 41 Wis. 299, 303 (1877).

104. See Wilbur Larremore, *Dying Declarations*, 41 AM. L. REV. 660, 660 (1907) (“[A] person whose dying declaration is offered was usually very unfavorably circumstanced for fairly apprehending the facts.”); Polelle, *supra* note 3, at 302–03 (discussing the effects of trauma and blood loss on people making dying declarations).

105. See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1374 (1985) (“Pain, catastrophic physical calamity, and anguish may characterize the circumstances under which a declarant makes such statements. Perception, memory, comprehension, and clarity of expression are likely to be impaired.”); Note, *supra* note 100, at 376 (The “declarant’s physical and mental state of mind at the moment of death may weaken the reliability of his statements.”). For a general discussion of the effect of stress on memory and perception, see Aviva Orenstein, *“MY GOD!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, 180–82 (1997).

Mostly, however, the modern scholarly critique focuses on the religious underpinnings of the dying declaration exception. It is the reliance on a constricted religious belief in heaven's reward and hell's punishment as the guarantor of reliability that is chiefly questioned in modern times.<sup>106</sup> Western religious attitudes upon which the exception depends have arguably lost their sway.<sup>107</sup> Moreover, there is no attempt to ascertain the belief system of the declarant.<sup>108</sup> Without the belief in eternal damnation, the main guarantor of trustworthiness is gone.

Many believe that the dying declaration exception reflects the worst of the categorical thinking and legal fiction that riddles evidence law. The best thing one can say for the dying declaration exception is that it mirrors our entire system of procedural truth. Arguably, evidence rules have nothing to do with accuracy, but their byzantine and formal nature shields us from that very fact, and from the greater insight that objective truth is unattainable.<sup>109</sup>

### *E. Justifications for the Dying Declaration Exception*

So, if no one actually believes the reasons for dying declarations, what are the justifications for maintaining this ancient, arguably out-of-date, and unreliable evidentiary exception as one of the only ways to admit statements of unopposed witnesses? Outside of the religious explanation, there are five potential reasons, four of which are traditional, one of which I suggest is a modern rethinking of the dying declaration.

A variation on the theme of fear of divine punishment is the futility of declarants' lying right before they have "shuffl[e]d off this mortal coil."<sup>110</sup> As the declarant slips away, he becomes disengaged with life on earth. This is reflected in the passage from *King John* that serves as the

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There are other objections as well, including the fact that courts tend to tolerate leading questions from police and others trying to generate evidence. See Polelle, *supra* note 3, at 303–04; see, e.g., *People v. Callaghan*, 6 P. 49, 56 (Utah 1885) ("In the enfeebled state in which the deceased then was, and the difficulty in obtaining answers, there was no ground for excluding the declarations because they were answers to leading questions.").

106. See, e.g., Liang, *supra* note 100, at 237–38 (explaining the possibility that not all dying declarants may be influenced by the "'threat' of divine punishment").

107. See *id.* at 238 & n.34.

108. *Id.* at 235 n.19; cf. *State v. Yee Gueng*, 112 P. 424, 425 (Or. 1910) (holding that there was no error in refusing requested jury instruction that dying person's lack of belief in future rewards or punishments might be considered in assessing credibility of dying declaration).

109. Desmond Manderson makes this point elegantly. Manderson, *supra* note 22, at 1638. He notes the role of formalism in protecting law from scrutiny: "A formal legal system conceals its origins and values behind an insistence on procedural requirements and supposed 'bright-line rules.' It does so in order to render impossible any substantive challenge to its legitimacy by pretending to an objectivity which is mythic." *Id.* at 1638 (citation omitted). Therefore, according to Manderson, "It is not the truth of evidence given under oath which maintains the legitimacy of the legal system, but the ritual incantation of formulae which reinscribe and reinforce the unchallengeable authority of the rules laid down." *Id.* at 1642; see also Nesson, *supra* note 105, at 1357–59 (explaining that the need to promote public acceptance of verdicts, rather than search for truth, can better explain many evidentiary rules and other aspects of the trial process).

110. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1, l. 67.

prooftext for *Woodcock*: “What in the world should make me now deceive, [s]ince I must lose the use of all deceit?”<sup>111</sup> Basically, lying is pointless and cannot benefit the person soon to depart this world. The problem with this justification is that people who are dying place great stock in leaving order and justice behind after death. That is why people make last wills and testaments. That is why people write final letters to family or create ethical wills. That is why famous people’s last words matter.<sup>112</sup> So, the disengagement theory is a weak one, and we still have concerns about malice and vengeance leading to false statements.<sup>113</sup>

A second justification for the dying declaration revolves around necessity. Traditionally, advocates of dying declarations asserted that the fear of heaven rendered dying declarations particularly trustworthy; however, that quality alone would have been insufficient. There are many forms of reliable, highly trustworthy hearsay statements that are not admissible. Paired with reliability is another key justification for admission: a strong need for the statement. By definition, those who make dying declarations are not around to be cross-examined later. These declarants frequently possess vital information.<sup>114</sup>

Courts have often emphasized this factor of necessity, but they clearly do not feel entirely comfortable with it. The Supreme Court in *Mattox I* observed that in addition to the reliability of dying declarations, “[t]he admission of the testimony is justified upon the ground of necessity.”<sup>115</sup> *Mattox II* continued this theme, emphasizing the flexibility of the Sixth Amendment and the importance of securing convictions.<sup>116</sup> In *Carver II*, the Court observed that “[d]ying declarations are a marked exception to the general rule that hearsay testimony is not admissible, and are received from the necessities of the case and to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present.”<sup>117</sup>

The problem with the necessity argument is that it proves too much. If necessity were the only criterion, a woman’s statement to police weeks before she was allegedly murdered by her lover would always be admissible. Necessity is clearly a factor, but it cannot by itself be an explanation

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111. WILLIAM SHAKESPEARE, *KING JOHN*, act 4, sc. 5, ll. 26–27; see *supra* note 18.

112. Hence, the famous last words of Francisco “Pancho” Villa, (1878–1923): “Don’t let it end like this. Tell them I said something.” WARD, *supra* note 88, at 92.

113. See Jaffee, *supra* note 100, at 228–33, 334–35, 340–41 (arguing that the dying declaration exception should not be preserved merely because of its long history, reviewing psychological disorders suffered by a percentage of the population, and citing to a survey indicating that, at least with respect to people they hate, some dying declarants will lie).

114. See Comment, *supra* note 100, at 375.

115. *Mattox I*, 146 U.S. 140, 152 (1892).

116. *Mattox II*, 156 U.S. 237, 243–44 (1895).

117. *Carver II*, 164 U.S. 694, 697 (1897); see also *Foley v. State*, 72 P. 627, 629 (Wyo. 1903) (“[I]n view of the fact that in many cases there are no eyewitnesses to the murder except the slayer and the deceased, they are made an exception to the rule, and admitted upon the ground of necessity.”).

for admission without eviscerating the hearsay rule and right to confront witnesses.

A third justification (directly in conflict with my first explanation of disengagement) is that dying words matter to people for reasons of integrity and solemnity. One does not have to believe in a deity or an after-life to see death as presenting a moment of moral seriousness and clarity. This is a position advanced by Wigmore<sup>118</sup> and acknowledged by the advisory committee notes to the Federal Rules, which observes that “[w]hile the original religious justification for the [dying declaration] exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present.”<sup>119</sup>

A fourth justification is one of quasi-forfeiture. The reason the accused cannot confront the declarant is that the declarant is dead. The reason the declarant is dead is because the accused allegedly killed him, and now has the *chutzpah*<sup>120</sup> to demand a live witness to cross-examine.<sup>121</sup> The problem with this broad view of forfeiture is that it ignores the presumption of innocence. Any accusation of homicide would trigger the forfeiture of rights, and voices from the grave, unsusceptible to confrontation, would be ushered into the trial process.<sup>122</sup>

A final justification—and, as we will see, the only one relied on by Justice Scalia in *Crawford*—is purely historical. We admit dying declara-

118. 5 WIGMORE, *supra* note 11, §§ 1438–43, at 289–303. “Even without such a belief [in divine punishment], there is a natural and instinctive awe at the approach of an unknown future—a physical revulsion common to all men, irresistible, and independent of theological belief.” *Id.* § 1443, at 302.

119. FED. R. EVID. 804(b)(2) advisory committee’s note.

120. Jack Achiezer Guggenheim, *The Evolution of Chutzpah as a Legal Term: The Chutzpah Championship, Chutzpah Award, Chutzpah Doctrine, and Now, The Supreme Court*, 87 KY. L.J. 417, 418 (1999) (noting Leo Rosten’s definition of “chutzpah” in *The Joys of Yiddish*, as “‘gall, brazen nerve, effrontery,’” and opining that the translation does not “fully capture[] the audacity simultaneously bordering on insult and humor which the word ‘chutzpah’ connotes”).

121. See Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 12 (2004) (“[I]f a defendant renders a witness unavailable by wrongful means, the accused cannot complain validly about the witness’s absence at trial.”).

122. It is for this reason, among others, that the Supreme Court in *Giles v. California* rejected a sweeping forfeiture theory in murder cases. See 128 S. Ct. 2678 (2008); *infra* Part II.B. Justice Souter explained the unfair circularity of forfeiting the right to confrontation based on an accusation of homicide alone:

If the victim’s prior statement were admissible solely because the defendant kept the witness out of court by committing homicide, admissibility of the victim’s statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence; evidence that the defendant killed would come in because the defendant probably killed. The only thing saving admissibility and liability determinations from question begging would be (in a jury case) the distinct functions of judge and jury: judges would find by a preponderance of evidence that the defendant killed (and so would admit the testimonial statement), while the jury could so find only on proof beyond a reasonable doubt. Equity demands something more than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying.

*Giles*, 128 S. Ct. at 2694 (Souter, J., concurring in part); see also Polelle, *supra* note 3, at 308 (“The argument for automatic forfeiture is essentially circular. It assumes that homicide defendants have committed the very crime of which they stand accused before they have been found guilty beyond a reasonable doubt.”).

tions because our Founding Fathers, the authors of the Sixth Amendment, clearly did so.<sup>123</sup> Citing *Mattox I*, the Court in *Kirby v. United States* explained in dicta the necessity justification, and mentioned the dying declaration's historical pedigree:

It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case. This exception was well established before the adoption of the Constitution, and was not intended to be abrogated.<sup>124</sup>

## II. THE SUPREME COURT'S NEW APPROACH TO CONFRONTATION

Since 2004, four major Supreme Court cases have reshaped our understanding of the applicability and protections offered by the right to confront witnesses.<sup>125</sup> The first case, which charted the Court's path-breaking reinterpretation of the Sixth Amendment Confrontation Clause, is *Crawford v. Washington*.<sup>126</sup> *Crawford* held that if an out-of-court "testimonial" statement is introduced against the accused, the declarant must be: (1) available for cross-examination; or (2) unavailable, and the prior testimonial statement was subject to cross-examination by the accused on a previous occasion.<sup>127</sup>

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123. *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004).

124. *Kirby v. United States*, 174 U.S. 47, 61 (1899) (requiring confrontation and noting the exception presented by dying declarations) (citing *Mattox I*, 146 U.S. 140, 151 (1892)).

125. The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Giles*, 128 S. Ct. 2678; *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford*, 541 U.S. 36.

126. *Crawford*, 541 U.S. 36.

127. *Id.* at 59 ("Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."). The Court recently restated its *Crawford* holding:

In *Crawford*, after reviewing the Clause's historical underpinnings, we held that it guarantees a defendant's right to confront those "who 'bear testimony'" against him. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.

*Melendez-Diaz*, 129 S. Ct. at 2531 (citations omitted).

Tom Lininger has explained that post-*Crawford* the prosecution has three options for satisfying the Confrontation Clause if it wishes to admit testimonial statements:

(1) produce the declarant for cross-examination; (2) prove that the accused has forfeited his right of confrontation by wrongfully procuring the absence of the declarant; or (3) offer the evidence pursuant to the hearsay exception for dying declarations, which prosecutors had used to admit testimonial hearsay back in 1791 when the Framers drafted the Sixth Amendment.

Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 278 (2006) (citations omitted).

### A. *Crawford and the Focus on Testimonial Statements*

The facts of *Crawford* involved a criminal defendant who was arguably avenging the attempted rape of his wife, Sylvia Crawford.<sup>128</sup> The prosecution wanted to admit Sylvia's statement to police at the stationhouse because it cast some doubt on whether the victim had a knife, undermining her husband's claim that he had killed in self-defense.<sup>129</sup> The trial court admitted Sylvia's statement because it found that the statement was trustworthy, and the Washington Supreme Court affirmed.<sup>130</sup> The United States Supreme Court reversed, holding that Sylvia Crawford's statement was "testimonial" and its admission violated the Confrontation Clause.<sup>131</sup>

The Court's focus on "testimonial" statements in *Crawford* represented an entirely new approach to confrontation. Previous confrontation jurisprudence, set out in *Ohio v. Roberts*,<sup>132</sup> emphasized reliability. According to *Roberts*, out-of-court statements could be used if they bore "adequate 'indicia of reliability.'"<sup>133</sup> This test was satisfied if the out-of-court statement fell within firmly rooted hearsay exceptions or otherwise demonstrated particularized guarantees of trustworthiness.<sup>134</sup> *Roberts* had essentially collapsed the standards for hearsay and confrontation.

*Crawford* rejected the focus on reliability and explicitly overruled *Roberts*, criticizing it because it did not protect core constitutional values: "The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one."<sup>135</sup> *Crawford* explained that the focus on reliability was flawed: "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."<sup>136</sup> The Court also faulted *Roberts* because it was "amorphous"<sup>137</sup> and unpredictable in its application. As *Crawford* em-

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128. See *Crawford*, 541 U.S. at 38. It is probably coincidental that the accused in the case seemed more righteous than most criminal defendants, but this fact may have made the opinion's pro-defendant slant easier to take for some of the law-and-order types on the Court.

129. See *id.* at 38–39. Sylvia had given a statement to the police at the police station that arguably fell within the State of Washington's hearsay exception for declarations against penal interest. See WASH. R. EVID. 804(b)(3) (2006). Although in-court testimony was covered by the marital testimonial privilege, the stationhouse statement by Sylvia Crawford was not. *Crawford*, 541 U.S. at 40.

130. *Crawford*, 541 U.S. at 40–41.

131. *Id.* at 36.

132. 448 U.S. 56 (1980).

133. *Id.* at 66.

134. *Id.*

135. *Crawford*, 541 U.S. at 62.

136. *Id.* at 61.

137. See *id.* at 63 ("Reliability is an amorphous, if not entirely subjective, concept.").

phasized, the “unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”<sup>138</sup> Justice Scalia, author of the *Crawford* majority, was emphatic that “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”<sup>139</sup>

A key question then arose: what constitutes a “testimonial statement”? The Court offered various, noncomprehensive definitions of this crucial term.<sup>140</sup> *Crawford* emphasized the intentions of the declarant and whether the speaker could reasonably expect the statement he was making to be used in a future legal proceeding against the person implicated.<sup>141</sup> As many commentators have noted, however, *Crawford* offered very little concrete guidance as to the crucial term “testimonial.”<sup>142</sup> The Court itself noted that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”<sup>143</sup> As Chief Justice Rehnquist predicted in his concurrence in the judgment, the immediate effect of *Crawford* was immense confusion as to what sorts of statements were “testimonial.”<sup>144</sup>

138. *Id.*

139. *Id.* at 61. *Crawford* found the *Roberts* approach both overinclusive in applying the Confrontation Clause to nontestimonial statements and underinclusive in applying a subjective reliability test as a substitute for the clear congressional command of confrontation. *Id.* at 60–61. The *Roberts* test was too broad because *Roberts* “applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause.” *Id.* at 60. *Crawford* observed that “not all hearsay implicates the Sixth Amendment’s core concerns. 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.” *Id.* at 51. On the other hand, the *Roberts* approach was too narrow because “[i]t admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.” *Id.* at 60.

140. The Court explained:

Various formulations of this core class of ‘testimonial’ statements exist: ‘*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,’ . . . ‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,’ . . . ‘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[.]’ . . . These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.

*Id.* at 51–52 (citations omitted).

141. *Id.* at 52.

142. See, e.g., Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L. REV. 2409, 2417–18 (2005); Tom Lininger, *Yes, Virginia, There Is a Confrontation Clause*, 71 BROOK. L. REV. 401, 402 (2005); Brian Fox, Note, *Crawford at Its Limits: Hearsay and Forfeiture in Child Abuse Cases*, 46 AM. CRIM. L. REV. 1245, 1248–50 (2009).

143. *Crawford*, 541 U.S. at 68.

144. Chief Justice Rehnquist observed:

The Court grandly declares that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial[.]’” But the thousands of federal prosecutors and the tens of thou-

Since *Crawford*, various lower courts have struggled with the definition of “testimonial” and have focused on different aspects of *Crawford*. They have alternatively relied on whether the declarant initiated contact with law enforcement authorities, the location of the interaction between the declarant and law enforcement agents, the structure and formality of the questioning, the declarant’s purpose for making the statements, and the law enforcement agents’ intent during the interaction.<sup>145</sup>

Of the many questions *Crawford* left open in its failure to set out what counts as “testimonial,” among the hardest issues posed by the new jurisprudence are those that arise in domestic violence cases. Prosecutors’ reliance on victims’ prior statements reflects the fact that victims of intimate violence often recant or refuse to testify. Before *Crawford*, many jurisdictions had a “no drop” or victimless prosecution policy that depended on the admissibility of the victim’s out-of-court-statements,<sup>146</sup> but such statements, at least those made to police or other law enforcement personnel, arguably fall within the definition of “testimonial” and cannot be admitted unless the victim testifies.

*B. Refinement of the Crawford Standard: Davis, Giles, and Melendez-Diaz*

The issue of the testimonial quality of statements made by domestic violence victims to police was squarely addressed by the Court in *Davis v. Washington* two years after *Crawford*.<sup>147</sup> *Davis* involved two cases, one from the state of Washington<sup>148</sup> and a companion case, *Hammon v. Indi-*

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sands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists, is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

*Id.* at 75–76 (Rehnquist, C.J., concurring in the judgment) (citations omitted).

145. See Gary M. Bishop, *Testimonial Statements, Excited Utterances and the Confrontation Clause: Formulating a Precise Rule After Crawford and Davis*, 54 CLEV. ST. L. REV. 559, 568–69 (2006); Josephine Ross, *Crawford’s Short-Lived Revolution: How Davis v. Washington Reins in Crawford’s Reach*, 83 N.D. L. REV. 387, 393–400 (2007) (“[R]eaders of *Crawford* should not assume that there is only one core definition of testimonial.”).

146. See Myrna S. Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 327 (2005).

147. *Davis v. Washington*, 547 U.S. 813 (2006).

148. *State v. Davis*, 111 P.3d 844 (Wash. 2005). *State v. Davis* involved a 911 emergency call placed by a victim during a domestic disturbance with her former boyfriend, Davis. During the call, the 911 operator learned that Davis had just run out the door after hitting the victim. The operator asked numerous questions, including Davis’s full name, birthday, his purpose for visiting the victim’s residence, and the context of the assault. *Davis*, 547 U.S. at 818. Upon arrival, the police observed the victim’s “shaken state,” fresh injuries on her body, and frantic efforts to grab her belongings and leave the residence along with her children. *Id.* Because the victim was unavailable at Davis’s trial, the State’s only witnesses were the two responding officers. *Id.* Over Davis’s objections, the trial court admitted the recording of the victim’s 911 call, and convicted Davis of a felony violation of a domestic no-contact order. *Id.* at 819. The Washington Court of Appeals and the Supreme Court of Washington affirmed, concluding that the portions of the 911 call in which the victim identified Davis were nontestimonial. See *Davis*, 111 P.3d at 852; *State v. Davis*, 64 P.3d 661, 669 (Wash. Ct. App. 2003).

*ana*.<sup>149</sup> These cases required the Court “to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are ‘testimonial’ and thus subject to the requirements of the Sixth Amendment’s Confrontation Clause.”<sup>150</sup> In neither case did the declarant appear at trial to testify; in both, the state courts admitted statements made out of court to 911 operators or police. The Court acknowledged that it had to refine its definition of “testimonial statements” and “determine more precisely which police interrogations produce testimony.”<sup>151</sup>

Again eschewing any efforts to “produce an exhaustive classification of all conceivable statements,”<sup>152</sup> the Court attempted to differentiate testimonial from nontestimonial statements. According to the Court in *Davis*, nontestimonial statements are “made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”<sup>153</sup> Statements are testimonial, however, “when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>154</sup> The Court also recognized the level of formality as a factor in determining whether a statement is testimonial. It contrasted the calm, formal police station statement of *Crawford* with the frantic impromptu nature of the 911 call in *Davis*.<sup>155</sup> The Court noted, however, that once the declarant started answering specific questions posed by the operator

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149. 829 N.E.2d 444 (Ind. 2005). *Hammon* involved statements made to law enforcement personnel while they responded to a reported domestic disturbance at the Hammon home. When the officers arrived they found the victim on the porch appearing “somewhat frightened,” even though she said nothing was wrong. *Davis*, 547 U.S. at 819. She allowed the police to enter her home, where they found evidence of a struggle in the living room and the accused in the kitchen. *Id.* The officers separated the victim and the accused and again asked the victim what had occurred. *Id.* Though the accused attempted to interrupt, the victim eventually described the domestic disturbance and filled out and signed a battery affidavit. *Id.* at 820. She did not appear at trial and the State called the officer who questioned her to describe what she told him and authenticate the affidavit. *Id.* Over the accused’s objections, the trial court admitted the victim’s affidavit as a present sense impression and the victim’s statements as excited utterances. *Id.* The trial judge found Hammon guilty of domestic battery; both the Indiana Court of Appeals and the Indiana Supreme Court affirmed, concluding that the victim’s oral statements were nontestimonial. *Id.* at 821. The courts agreed that the victim’s affidavit was testimonial but that its admission was harmless beyond a reasonable doubt. See *Hammon*, 829 N.E.2d at 459; *Hammon v. State*, 809 N.E.2d 945, 948 (Ind. Ct. App. 2004).

150. *Davis*, 547 U.S. at 817.

151. *Id.* at 822.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 827 (“[T]he difference in the level of formality between the two interviews [in *Davis* and *Crawford*] is striking.”).

regarding non-emergency matters, that part of the interview became a testimonial statement.<sup>156</sup>

Justice Thomas, in his dissent, argued that the line the majority tried to establish between emergencies and the reporting of past events was unsound and unworkable because it relies on motives.<sup>157</sup> Instead, he advocated for an even narrower definition requiring a formal police interrogation to trigger the “testimonial” status.<sup>158</sup>

The Court acknowledged that domestic violence is a “type of crime [that] is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial,”<sup>159</sup> noting that in cases where the accused makes the declarant unavailable through intimidation or other means, forfeiture of the confrontation right is an option.<sup>160</sup>

Just as *Davis* addressed a question left open in *Crawford, Giles v. California*<sup>161</sup> addressed the issue of forfeiture mentioned, but not delineated, in *Davis*.<sup>162</sup> The notion of forfeiting the right of confrontation—for instance, an accused who provides concrete overshoes for a witness to prevent him from testifying—has a longstanding history going back to old English case law and the American case of *Reynolds v. United States*.<sup>163</sup>

In *Giles*, the Court addressed whether by murdering someone—not with the intent to keep the person quiet per se but simply because the accused happened to want the person dead—the accused forfeited his confrontation rights concerning the victim’s prior statements. The case involved a charge of murder and a claim of self-defense by the accused.<sup>164</sup> The victim had no weapon, suffered some defensive wounds, and was shot while the defendant closed his eyes.<sup>165</sup>

The evidentiary question involved the admission of statements that the victim, Brenda Avie, made to police at the scene of a domestic violence call, weeks before the killing.<sup>166</sup> She reported the accused’s physi-

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156. *Id.* at 828–29. The 911 call involved spontaneous statements by the declarant as well as answers to questions regarding the alleged perpetrator’s date of birth, preceded by the injunction from the 911 operator to “[s]top talking and answer my questions.” *Id.* at 818.

157. *Id.* at 839–42 (Thomas, J., concurring in the judgment in part and dissenting in part). Many academics agree with Justice Thomas’s assessment. See, e.g., Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 881–82 (2009); Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half-Empty or Half-Full?*, 15 J.L. & POL’Y 759, 762 (2007).

158. *Davis*, 547 U.S. at 836–37.

159. *Id.* at 832–33 (majority opinion).

160. *Id.* at 833.

161. 128 S. Ct. 2678 (2008).

162. 547 U.S. at 833 (“We take no position on the standards necessary to demonstrate such forfeiture . . .”).

163. 98 U.S. 145, 148–50, 158–61 (1879) (admitting former testimony of wife after accused had kept her away from home so that she could not be subpoenaed to testify).

164. *Giles*, 128 S. Ct. at 2681.

165. *Id.* at 2681–82.

166. *Id.* at 2681.

cal abuse and murderous threats.<sup>167</sup> The issue was not raised at trial, and the Justices assumed that the victim's statements to the police were testimonial.<sup>168</sup> In *Giles*, the issue was whether by killing the victim, the accused forfeited his right to confront her regarding those statements. Reviewing old common-law cases, the Court ruled that to fall within the forfeiture doctrine, the accused had to intend to procure the declarant's absence to prevent him or her from testifying.<sup>169</sup> Without such intent, there is no forfeiture. Otherwise, every murder case could automatically open the door for former testimonial statements of the declarant under a forfeiture theory, thereby undermining the confrontation right.<sup>170</sup> To do so would ignore the intent requirement and would allow preliminary judicial determinations of ultimate guilt to vitiate a constitutional protection.<sup>171</sup> As a central part of his historical argument, Justice Scalia observed that arguments over the application of dying declarations seem pointless if every prior statement by a homicide victim is automatically admissible under a forfeiture theory.<sup>172</sup>

The Court was particularly adamant that public policy could not vitiate the constitutional command, and it rejected the creation of "exceptions that [the Court] thinks consistent with the policies underlying the confrontation guarantee, regardless of how that guarantee was historically understood."<sup>173</sup> *Giles* rejected an appeal to the forfeiture doctrine's purposes and objectives as a not-so-well disguised attempt to return to the world of the *Roberts* indicia-of-reliability test.<sup>174</sup> Apparently, the worst criticism Scalia could hurl at a dissenting argument was that the author was a secret *Roberts* lover who did not fully understand that the *Roberts* focus on reliability and policy was entirely passé.

*Giles* again emphasized the categorical nature of the confrontation right and observed in chiding the dissent that "the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.'"<sup>175</sup> The Court explained its categorical rather than reason-based approach: "It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values."<sup>176</sup> The Court argued that such

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167. *Id.* at 2681–82.

168. *See id.* at 2682.

169. *Id.* at 2683–84.

170. *See id.*

171. "The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury." *Id.* at 2686. The Court referred to the fact that in order to trigger a finding of forfeiture, the judge must make a preliminary finding by a preponderance of the evidence that the accused killed the victim and hence forfeited his confrontation right.

172. *See id.* at 2686.

173. *Id.* at 2691.

174. *Id.*

175. *Id.* at 2692.

176. *Id.*

policy rationale missed the point of a historical constitutional protection: “The Sixth Amendment seeks fairness indeed—but seeks it through very specific means (one of which is confrontation) that were the trial rights of Englishmen.”<sup>177</sup>

The majority was positively disdainful of a suggestion it attributed to the dissent, that “a forfeiture rule which ignores *Crawford* would be particularly helpful to women in abusive relationships—or at least particularly helpful in punishing their abusers.”<sup>178</sup> The Court observed that many statements of murder victims are not testimonial (in other words, they are made to friends, doctors, etc.).<sup>179</sup> More importantly, the majority expressed something close to outrage at the suggestion that domestic violence cases be treated differently:

In any event, we are puzzled by the dissent’s decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women?<sup>180</sup>

The last of the confrontation cases, *Melendez-Diaz v. Massachusetts*,<sup>181</sup> held that the prosecution’s admission of a lab analyst’s affidavit that a substance was cocaine violated the accused’s right to confrontation because the accused could not cross-examine the lab analyst who was never called as a witness by the government.<sup>182</sup> The Court found that the lab report fell within the “core class of testimonial statements,”<sup>183</sup> even though in some respects lab reports resemble business records that are generally nontestimonial.<sup>184</sup> According to Scalia, the case presented a “rather straightforward application of our holding in *Crawford*,”<sup>185</sup> triggering the strict confrontation right.

The appeal to neutral science as objective and reliable struck the majority as a return to *Roberts*-type reliability thinking. As in *Giles*, accusing the dissent of a covert return to *Roberts* is tantamount to accusing it of confusion, or even worse, subversion of the Constitution.<sup>186</sup> Besides, the Court observed that government forensic laboratories are not immune from pressure or bias, and the confrontation right “is designed to

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177. *Id.*

178. *Id.* To be fair, the dissent reads forfeiture more broadly but never intended to dispense with *Crawford*. See *id.* at 2696 (Breyer, J., dissenting).

179. *Id.* at 2692–93 (majority opinion).

180. *Id.* at 2693. This portion of the majority opinion was not joined by Justices Souter or Ginsburg.

181. 129 S. Ct. 2527 (2009).

182. *Id.* at 2532.

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

184. *Id.* at 2538.

185. *Id.* at 2533.

186. See *id.* at 2536.

weed out not only the fraudulent analyst, but the incompetent one as well.”<sup>187</sup>

The majority was unswayed by predictions of the practical effect of its rulings on the prosecution of cases. It rejected the prediction that the confrontation requirement would be burdensome, noting that many states already have such requirements and that strategically, “[i]t is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis.”<sup>188</sup> Ultimately, even if the holding in *Melendez-Diaz* is burdensome, the Court concluded it did not have the authority to relax the right of confrontation, and consequentially, like the jury right and the privilege against self-incrimination, that makes the prosecutor’s job harder and more complicated.<sup>189</sup>

The dissent in *Melendez-Diaz* presented a global critique of where *Crawford* and its progeny have led the court.<sup>190</sup> The dissent sarcastically noted that “[w]e learn now that we have misinterpreted the Confrontation Clause—hardly an arcane or seldom-used provision of the Constitution—for the first 218 years of its existence.”<sup>191</sup> The dissent also portrayed the entire *Crawford* jurisprudence as devolving into a “body of formalistic and wooden rules, divorced from precedent, common sense, and the underlying purpose of the Clause.”<sup>192</sup> At another juncture, the dissent remarked that the Court was “driven by nothing more than a wooden application of the *Crawford* and *Davis* definition of ‘testimonial,’” and had abandoned “any guidance from history, precedent, or common sense.”<sup>193</sup> It censured the majority’s “formalistic and pointless” reading of the Clause.<sup>194</sup>

The new Confrontation Clause jurisprudence, as laid out in *Crawford*, *Davis*, *Giles*, and *Melendez-Diaz*, has been justly criticized for its lack of guidance on what constitutes “testimonial” statements and its focus on motive, which is always difficult to ascertain.<sup>195</sup> Both the definition of testimonial statements and of forfeiture rely on slippery notions

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187. *Id.* at 2537.

188. *Id.* at 2542. The Court also made a less persuasive argument that defense attorneys would not raise *Crawford* issues in order to avoid irritating the judge. The dissent rightfully mocked that argument as entirely at odds with defense counsel’s ethical and professional obligations. *Id.* at 2556–57 (Kennedy, J., dissenting).

189. *Id.* at 2540 (majority opinion).

190. The dissent failed to convince the majority of “the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses,” or that laboratory analysts are not witnesses against the accused within the meaning of the Sixth Amendment. *Id.* at 2543 (Kennedy, J., dissenting). It justly criticized the majority for not clarifying who, among the many scientists, technicians, and engineers who generate a positive-for-cocaine result, must be available for confrontation. *Id.* at 2544–46.

191. *Id.* at 2543 (Kennedy, J., dissenting).

192. *Id.* at 2544.

193. *Id.* at 2547.

194. *Id.*

195. *See id.* at 2548–49 (Kennedy, J., dissenting); *supra* notes 142, 157 and accompanying text.

of intent, which seems like an odd way to enforce a categorical constitutional right.

Equally important, Justice Scalia has authored all four major confrontation decisions, thereby putting his personal imprint on the confrontation jurisprudence. The opinions are extremely long and heavy with history. The tone is sometimes strident and it is clear that the Justice has presented the confrontation right not only as an essentially misunderstood and neglected constitutional demand, but as a vehicle for espousing his theory of constitutional interpretation generally. Four important themes emerge from Justice Scalia's treatment of the confrontation cases, all of which have important implications for future cases, particularly those involving domestic violence. First is the indisputable focus on history and original practice of the Founders, spawning a cottage industry of legal history on the subject.<sup>196</sup> Second is Scalia's affirmative, one might almost say contemptuous, rejection of policy arguments or rationales in justifying his interpretation of the Confrontation Clause.<sup>197</sup> Third, Scalia rejects any appeals about the practicalities of prosecution; although he will sometimes debate the real-world consequences of *Crawford*, he ultimately finds them irrelevant, and they cannot defeat what Scalia determined to be the meaning of the Sixth Amendment confrontation right.<sup>198</sup> Finally, and closely related to the third point, Justice Scalia is positively hostile to the suggestion that domestic violence cases should receive any special treatment or consideration.<sup>199</sup>

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196. See, e.g., Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 *BROOK. L. REV.* 105 (2005); Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from King v. Brasier*, 15 *J.L. & POL'Y* 495 (2007); Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 *IND. L.J.* 917 (2007).

197. Cf. *Maryland v. Craig*, 497 U.S. 836, 869–70 (1990) (Scalia, J., dissenting) ("I have no need to defend the value of confrontation, because the Court has no authority to question it."). Justice Scalia's preference for rules rather than mushy policy-based standards is evident throughout his jurisprudence. See, e.g., *Burnham v. Superior Court of California*, 495 U.S. 604, 623 (1990) (bemoaning the "subjectivity, and hence inadequacy" of a "subjective assessment of what is fair and just" and advocating instead a reliance on tradition for assessing due process in personal jurisdiction).

198. *Melendez-Diaz*, 129 S. Ct. at 2540–41 ("The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."); cf. *Craig*, 497 U.S. at 864 (Scalia, J., dissenting) ("The 'necessities of trial and the adversary process' are irrelevant here, since they cannot alter the constitutional text.").

199. Justice Scalia's rejection of what he perceives to be special interest identity politics is evident in his dissent in *Craig*, where he decried the "subordination of explicit constitutional text to currently favored public policy." *Craig*, 497 U.S. at 861 (Scalia, J., dissenting). In *Craig*, Justice Scalia opposed special methods of confrontation to accommodate victims of child abuse and began his dissent with the observation: "Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion." *Id.* at 860.

C. *Application of the New Confrontation Jurisprudence to Dying Declarations*

New life, or at least renewed interest, has been breathed into the dying declaration exception after the Supreme Court's recent reinterpretation of the Confrontation Clause. Dying declarations seem to be one of only two exceptions to the rule announced in *Crawford*. (The other exception, forfeiture, is dealt with in *Giles* and is less of an exception than an equitable principle of waiver—if one kills someone to silence him, one cannot later complain that the witness is not there to cross-examine.) One could challenge the wisdom of elevating this particular hearsay exception to the status of an exception of the confrontation right, but it is very clear that dying declarations are treated specially.

*Crawford* opined that the text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right . . . to be confronted with the witnesses against him' 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.<sup>200</sup>

*Crawford* did indicate in a footnote that dying declarations might be an exception to its newly announced rule: "The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed."<sup>201</sup> The Court observed that it "need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*."<sup>202</sup>

Dicta in *Giles* would seem to settle the matter. Writing for the majority, Justice Scalia explained,

two forms of testimonial statements were admitted at common law even though they were unconfuted. The first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying. . . . A second common-law doctrine, which we will refer to as forfeiture by wrongdoing, permitted the introduction of statements of a witness who was "detained" or "kept away" by the "means or procurement" of the defendant.<sup>203</sup>

Many dying declarations will be nontestimonial.<sup>204</sup> They will be dying statements made to family and friends and seem like precisely the

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200. *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (citation omitted).

201. *Id.* at 56 n.6.

202. *Id.*

203. *Giles v. California*, 128 S. Ct. 2678, 2682–83 (2008) (citations omitted).

204. Post-*Crawford*, some courts have been able to avoid the issue of whether dying declarations are an exception to the confrontation right by finding such statements nontestimonial, and hence not covered by *Crawford*. See, e.g., *People v. Ingram*, 888 N.E.2d 520, 529 (Ill. App. Ct. 2008) (holding murder victim's statement to friend admissible as a dying declaration and nontestimonial); *State v.*

type of statements averred to in *Giles* as nontestimonial.<sup>205</sup> There is every reason to believe that courts, uncertain of the constitutional status of testimonial dying declarations, will try to avoid the issue by finding them nontestimonial or by finding that the statements do not meet the strictures of dying declarations.<sup>206</sup>

Some dying declarations that are made to police or other first responders, however, will clearly fall within the definition of “testimonial.” With few exceptions,<sup>207</sup> courts post-*Crawford* have held that dying declarations, even when they are testimonial, need not be confronted to be admissible.<sup>208</sup> Given the clarity of the Court’s dicta and the imperative of the originalist approach, it is safe to say that dying declarations will form an exception to the rule announced in *Crawford*.<sup>209</sup>

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Harper, 770 N.W.2d 316, 322 (Iowa 2009) (concluding that victim’s statements to hospital staff were admissible as dying declarations and were nontestimonial).

205. *Giles*, 128 S. Ct. at 2692–93 (“[O]nly testimonial statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules.”).

206. *James v. Marshall*, No. CV 06-3399-CAS(E), 2008 WL 4601238, at \*18 (C.D. Cal. Aug. 13, 2008) (“This Court need not decide whether the hearsay exception for testimonial dying declarations survive *Crawford*, because the record does not show that the victim’s statement constituted a dying declaration.”).

207. See *United States v. Mayhew*, 380 F. Supp. 2d 961, 964–66 (S.D. Ohio 2005) (considering and rejecting admissibility of declarant’s statement as a dying declaration because it was untrustworthy, but allowing it under a forfeiture theory later repudiated by *Giles*); *United States v. Jordan*, No. CRIM. 04-CR-229-B, 2005 WL 513501, at \*3 (D. Colo. Mar. 3, 2005) (“[T]here is no rationale in *Crawford* or otherwise under which dying declarations should be treated differently than any other testimonial statement.”). *Jordan* reaches this conclusion because it finds that “[w]hether driven by reliability or necessity or both, admission of a testimonial dying declaration after *Crawford* goes against the sweeping prohibitions set forth in that case.” *Jordan*, 2005 WL 513501, at \*3. *Jordan* is not persuasive because it states anomalously, “the dying declaration exception was not in existence at the time the Framers designed the Bill of Rights.” *Id.* at \*3–4.

208. See, e.g., *People v. Monterroso*, 101 P.3d 956, 972 (Cal. 2004) (“[T]he common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment.”); *Wallace v. State*, 836 N.E.2d 985, 996 (Ind. Ct. App. 2005) (“[W]e are convinced that *Crawford* neither explicitly, nor impliedly, signaled that the dying declaration exception to hearsay ran afoul of an accused [sic] right of confrontation under the Sixth Amendment.”); *State v. Jones*, 197 P.3d 815, 822 (Kan. 2008) (“[W]e are confident that, when given the opportunity to do so, the Supreme Court would confirm that a dying declaration may be admitted into evidence, even when it is testimonial in nature and is unopposed.”); *Commonwealth v. Nesbitt*, 892 N.E.2d 299, 310 (Mass. 2008) (noting that even if declarant’s statement had been testimonial, it would have been admissible as a dying declaration because both *Crawford*, though leaving the question undecided, indicated that there is authority for admitting them and Massachusetts law recognized dying declarations as an exception to the confrontation right); *State v. Martin*, 695 N.W.2d 578, 585–86 (Minn. 2005) (“We hold that the admission into evidence of a dying declaration does not violate a defendant’s Sixth Amendment right to confrontation within the meaning of *Crawford* because an exception for dying declarations existed at common law and was not repudiated by the Sixth Amendment.”); *Harkins v. State*, 143 P.3d 706, 711 (Nev. 2006) (“[I]t follows that because dying declarations were recognized at common law as an exception to the right of confrontation, they should continue to be recognized as an exception.”); *State v. Lewis*, 235 S.W.3d 136, 148 (Tenn. 2007) (“Because the admissibility of the dying declaration is also deeply entrenched in the legal history of this state, it is also our view that this single hearsay exception survives the mandate of *Crawford* regardless of its testimonial nature.”).

209. Professor Nicolas makes this point persuasively, noting that “[i]n footnote six, the Court took pains to point out that *Crawford* did not technically decide the issue of the admissibility of dying declarations vis-à-vis the Confrontation Clause.” Nicolas, *supra* note 11, at 491. Yet Nicolas documents incidents in which dicta in *Crawford* (relating to forfeiture or to nontestimonial statements) were

The elevation of the dying declaration to the status of one of only two exceptions to *Crawford's* command understandably worries civil libertarians who foresee prosecutors attempting to shoehorn all inculpatory remarks of dead victims into the dying declaration exception. There is a vigorous and active scholarship currently trying to narrow the definition of dying declarations to their common-law form and not the more expanded versions adopted by the states.<sup>210</sup> Predictably, those worried about the curtailment of prosecution, particularly of domestic violence cases, have also latched onto the dying declaration as one of the few remaining vehicles for admitting testimony when the witness is not available and was never cross-examined. Professor Lininger has recently argued for the expansion of dying declarations in light of *Crawford*, most notably to include criminal charges other than homicides.<sup>211</sup>

### III. QUESTIONING *CRAWFORD'S* CATEGORICAL APPROACH TO CONFRONTATION

*Crawford* ushered in a bold new approach to confrontation that has, at the very least, the benefit of finally untangling hearsay and confrontation. Unfortunately, though this new jurisprudence seems to finally take the Sixth Amendment seriously, it resorts to fixed and unhelpful categories of questionable historical accuracy,<sup>212</sup> devoid of any sensitivity to the harm to the accused, the needs of victims, or the practicalities of prosecution. *Crawford* engages in analysis by pigeonhole, with an unnuanced originalism and little respect for how the Confrontation Clause was designed to operate. As a functional matter, *Crawford* is overinclusive in that it protects out-of-court statements that would probably be outside the purview of what the Founders ever dreamed of protecting, such as the lab technician's report in *Melendez-Diaz*. *Crawford* is also arguably underinclusive, however, in admitting nontestimonial statements at trial without allowing the accused to confront the witnesses against him.<sup>213</sup>

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adopted in later opinions. *Id.* at 492 (“[T]he Court’s holding in *Giles v. California* four years later effectively assumes that a dying declaration exception to the Confrontation Clause exists.” (citation omitted)). Furthermore, the consistency and importance of the dicta is enhanced by the fact that Justice Scalia has authored every major confrontation case. See Thomas Y. Davies, *Not “the Framers’ Design”*: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause, 15 J.L. & POL’Y 349, 351 (2007).

210. See generally Nicolas, *supra* note 11 (attempting to define dying declarations as a constitutional matter as opposed to state law, and examining among other issues the requirements for unavailability, the limitation to homicide cases, and the requirement that the declaration concern the circumstances of impending death).

211. Lininger, *supra* note 127, at 315–19.

212. See *infra* notes 214–16 and accompanying text (discussing Professor Davies’s critique of Scalia’s originalism).

213. See Craig M. Bradley, *Melendez-Diaz and the Right to Confrontation*, 85 CHI.-KENT L. REV. 315, 315 (2010).

Professor Thomas Davies has convincingly argued that Justice Scalia's testimonial versus nontestimonial distinction does not accurately reflect the Founders' approach to confrontation.<sup>214</sup> Davies demonstrates how Scalia's approach is ahistorical and *Crawford's* approach to unsworn hearsay is inconsistent with the basic premise that "hearsay was 'no evidence,'"<sup>215</sup> which shaped the Framers' understanding of the confrontation right.<sup>216</sup>

There is also a question whether the correct date for interpreting original intent of the Confrontation Clause, at least when it is applied to state cases,<sup>217</sup> should be 1789, when the Sixth Amendment was ratified or 1868, the year the Fourteenth Amendment was adopted.<sup>218</sup> This issue has potentially serious consequences because the rules of evidence underwent vast changes and the understanding of what constituted fair procedure in criminal courts changed significantly with the expansion of various exceptions to hearsay.<sup>219</sup>

Even if Scalia were correct in his assessment of what the Founders believed and practiced regarding confrontation, there are many reasons to assail the originalist approach generally. Some argue that it is an impossible historical endeavor and that what the Founders believed is unknowable.<sup>220</sup> Beyond his historical critique, Davies concludes that originalism is a "fundamentally flawed approach to constitutional interpretation in criminal procedure issues because originalists fail to grasp—or to admit—the degree to which legal doctrine and legal institu-

214. See Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of Giles's Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding,"* 13 LEWIS & CLARK L. REV. 605, 605 (2009) (labeling Scalia's historical distinction between the treatment of testimonial and nontestimonial hearsay "completely fictional"). See generally Davies, *supra* note 209.

215. Davies, *supra* note 196, at 119.

216. See Davies, *supra* note 209, at 356 (explaining that Justice Scalia did not formulate an originalist claim based on common law but rather drew inferences).

217. *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (first case applying the Sixth Amendment right of confrontation to the states).

218. See Nicolas, *supra* note 11, at 504 ("[O]ne may nonetheless have a quibble with Justice Scalia's exclusive focus on the year 1791. After all, at issue in *Crawford* was the applicability of the Sixth Amendment's Confrontation Clause not to an arm of the federal government, but rather to the State of Washington. And of course, the Sixth Amendment does not apply of its *own* force to the states, but rather only by means of 'incorporation' via the Fourteenth Amendment.") (citation omitted); Raeder, *supra* note 146, at 311–12. *But cf.* Davies, *supra* note 196, at 117 ("[The correct date for the Framers was 1789 because] the relevant outside date for assessing original meaning is the date when the text was framed by the First Congress, not the date of ratification."); Randolph N. Jonakait, "Witnesses" in *the Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155, 188 (2006) (arguing that *Mattox* should not be persuasive authority because it came one hundred years after the Founding and implying but not stating that close to 1791 is the correct date).

219. See Davies, *supra* note 209, at 456–57 ("[J]udges began to recognize new doctrinal hearsay exceptions sometime during the first half of the nineteenth century—but well after the 1789 framing of the Confrontation Clause:").

220. See *California v. Green*, 399 U.S. 149, 173–74 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into [its] intended scope . . .") (quoted in Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 568 (1978)).

tions have changed since the framing.”<sup>221</sup> Others contend that originalist analysis subverts the constitutional plan because the Framers intended that the Constitution be interpreted as a living document and because the expectations of the Founders cannot be grafted onto modern society without leading to bad policy outcomes.<sup>222</sup> This last point is especially important in the context of domestic violence cases in which, as Professor Myrna Raeder observes, originalism is bound to silence voices that were unheard in 1791, a time when society misunderstood and even condoned domestic violence.<sup>223</sup>

Even if correct historically, and even if one believes in originalism as a legitimate form of constitutional interpretation, Justice Scalia’s exception for the dying declaration undermines the Court’s entire originalist approach.

As the *Mattox* cases make clear, dying declarations were elevated to a special status because they were deemed highly reliable and necessary.<sup>224</sup> That sort of analysis—a focus on reliability and necessity, perhaps augmented by something of a notion of fairness and forfeiture—reflects the thinking of the older cases. From the inception of the exception, the focus in applying and justifying dying declarations has been on policy rationales.<sup>225</sup> This was the understanding of dying declarations at the time of the Founders,<sup>226</sup> and at the time the right of confrontation was incorporated via the Fourteenth Amendment and applied to the states.<sup>227</sup>

Ironically, however, such attention to reliability and need is precisely the type of *Roberts* argument that *Crawford* excoriates and Justice Scalia despises.<sup>228</sup> Historically, dying declarations were often procured by

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221. Davies, *supra* note 209, at 355.

222. See generally Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009) (arguing that originalism is “not merely false but pernicious” and explaining classic objections to this form of constitutional interpretation).

223. See Raeder, *supra* note 146, at 311–14 (2005); see also Lininger, *supra* note 157, at 876–77 (“The problem of domestic violence as understood in modern times—i.e., violence against intimate partners—was virtually never the subject of criminal prosecutions in the eighteenth and nineteenth centuries. Because the courts of that era did not address the uniquely coercive pressures that characterize a battering relationship, authority from that era is inapposite . . .”) (citation omitted). Professor Davies coined the term “selective originalism” whereby some aspects of the Founding Fathers’ legal world are credited and others ignored. See generally Davies, *supra* note 196.

224. *Mattox II*, 156 U.S. 237, 243 (1895); *Mattox I*, 146 U.S. 140, 152 (1892). I recognize that *Mattox* is certainly later than the framing period, but there are three justifications for using this nineteenth-century case. First, the Court does not often opine on the dying declaration exception, and *Mattox* offers important insights into how this exception interacts with the Confrontation Clause. Second, there is a strong argument that the correct date for assessing the intent of the drafters for Confrontation Clause cases arising out of state criminal cases is the time of the Fourteenth Amendment. See *supra* note 218 and accompanying text. Finally, if it is an error in applying originalism, Scalia is the worst offender. As Professor Davies points out, in *Davis*, Scalia “cited twelve state cases, all but one of which were decided in the nineteenth century.” See Davies, *supra* note 209, at 374–75.

225. See, e.g., *Mattox II*, 156 U.S. at 243–44.

226. See *id.*

227. *Pointer v. Texas*, 380 U.S. 400, 400 (1965).

228. See Polelle, *supra* note 3, at 288 (“The alleged uniqueness of this exception would defy the clear logic of *Crawford*.”).

the government to create evidence for prosecution,<sup>229</sup> running afoul of every principle espoused by *Crawford*, except its alleged originalism. Justice Scalia is in the untenable position of making an exception for a type of hearsay that is designed to lead to highly formal evidence manufactured by the government in anticipation of prosecution—the quintessential definition of testimonial.

As a result of the current confrontation jurisprudence we are in the preposterous position of having one major categorical exception to the Confrontation Clause that modern authorities do not credit as rational or persuasive. Few believe in the policy justification of dying declarations, but we apply its limitations strictly, focusing on the imminence of death. Modern courts require the declarant's belief in his or her impending death not because they actually think this requirement promotes accuracy; rather, courts do so because they wish to apply dying declarations narrowly, to limit the reach of this highly questionable hearsay exception.

Ironically, the history of the dying declaration indicates that rather than being a categorical exception to confrontation, it served as a pragmatic, flexible instrument. Accordingly, modern evidence jurisprudence has taken what was perceived as a reliable exception meant to promote justice and has transformed it into a categorical exception based on principles no longer credited, but applied strictly to limit its use. Rather than cling to the unsound formalism of the dying declaration exception, we should perhaps think less in terms of history and more in terms of fairness and practical function.

Dying declarations were admissible at the time the Sixth Amendment was written. This is clearly enough justification for Justice Scalia, who neither demands nor provides any reasoned argument in favor of the exception, which to be fair, he mentions only in passing.<sup>230</sup> Dying declarations present an originalist conundrum. Such exception to the confrontation right clearly existed at the time the Sixth Amendment was written, and our Founding Fathers seemed to have expected it to continue. Some dying declarations, such as when the soon-to-be deceased person makes a statement about the cause of her death to a police officer or in such a manner as to implicate the accused for the purposes of future prosecution, clearly trigger *Crawford's* core concern. Under *Crawford*, unless the accused had an opportunity to cross-examine the dying declarant, the out-of-court unsworn statement violates the confrontation right.<sup>231</sup> Hence, dying declaration forms an outright refutation of *Crawford's* rule concerning testimonial statements.

The dying declaration exception makes a strong historical, logical, and policy argument against Justice Scalia's entire conceptualization and application of the Sixth Amendment confrontation right. Justice Scalia is

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229. See *The King v. Woodcock*, (1789) 168 Eng. Rep. 352, 352 (P.C.).

230. See *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004).

231. *Id.* at 36–37.

inflexible about the “constitutional command” of confrontation.<sup>232</sup> His originalist approach, however, requires him to make an exception for dying declarations. But that exception makes no sense except for its history and tradition. If viewed in its historical context, dying declarations, like former testimony, represent a practical compromise between the absolutist language of the Sixth Amendment and the underlying reasoning and policy of the Confrontation Clause.

The treatment of the dying declaration as a necessary exception to the Confrontation Clause represents more than a mere historical anomaly. It is very clear that in the mid to late nineteenth century the Court supported exceptions to the Confrontation Clause for the purposes of justice and fairness.<sup>233</sup> The dying declaration was just one exception (forfeiture, former testimony, and *res gestae* were others).<sup>234</sup>

One can still insist on an interpretation of the right to confrontation that is meaningful and has teeth without resorting to unhelpful, if historically inaccurate, categorical exceptions. Rather than slavishly tracking the requirements of the dying declaration or making fine distinctions between comments made to secure help versus those made to alert authorities, we should ask ourselves about the fairness and accuracy of the process. If there are to be exceptions to the constitutional command, they should be for good reason, not merely tradition.

In *Dowdell v. United States*,<sup>235</sup> the Court observed that “this general rule of law embodied in the Constitution, and . . . intended to secure the right of the accused to meet the witnesses face to face, and to thus sift the testimony produced against him, has always had certain well recognized exceptions.”<sup>236</sup> The *Mattox* cases make that clear.<sup>237</sup> Furthermore, as the Court observed in *Snyder v. Massachusetts*,<sup>238</sup> “[t]he exceptions are not

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232. See *id.* at 59–61.

233. See, e.g., *Mattox II*, 156 U.S. 237, 243–44 (1895); *Mattox I*, 146 U.S. 140, 140–41 (1892).

234. An ongoing debate runs regarding whether any hearsay exceptions other than dying declarations were recognized by the Founders. Scalia clearly believes so. See *Crawford*, 541 U.S. at 56, 58 n.8 (citing business records and spontaneous statements). Professor Polelle seems to agree. See Polelle, *supra* note 3, at 292 (“No legal historian has been found who would define dying declarations as the only criminal hearsay exception at common law.”). Professor Davies, however, argues just that. See Davies, *supra* note 209, at 392 (“[E]xcept for a dying declaration of a murder victim, there was no recognized exception to the ban against admitting unsworn hearsay as evidence of a defendant’s guilt in a felony trial.”). The historical record is scant and murky, but Professor Davies makes a compelling case that most if not all of the hearsay exceptions aside from dying declarations arose after the framing of the Sixth Amendment.

235. 221 U.S. 325 (1911).

236. *Id.* at 330; see also *Kirby v. United States*, 174 U.S. 47, 61 (1899) (“[The dying declaration exception] was well established before the adoption of the constitution, and was not intended to be abrogated.”).

237. See *supra* notes 31–53 and accompanying text; see also Raeder, *supra* note 157 (advocating a return to the flexibility of *Mattox*).

238. 291 U.S. 97 (1934).

even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule.”<sup>239</sup>

The actual approach of cases in the nineteenth and early twentieth century to the Confrontation Clause is at fundamental odds with Justice Scalia’s so-called historical view. As the cases above indicate, for long periods of our legal history, long before the much maligned *Roberts* case, confrontation was never as absolute a demand as Scalia would have us think. Ironically, *Crawford* and its progeny have entrenched the dying declaration as an exception to the Confrontation Clause—thereby making categorical what was previously flexible—and of course reflecting policy that no longer fully resonates with modern sensibilities.

Given Justice Scalia’s vehemence, and the recentness of *Crawford* and its progeny, it is obviously pointless to argue for a return to a rigorous *Roberts* test. It is also important to appreciate that *Crawford* has done some good in decoupling hearsay and confrontation. Nevertheless, it is useful to realize that dying declarations unmask the hollowness of the Court’s categorical approach. Although post-*Crawford* it is *outré* to ask about such things, it is fruitful to wonder how cases of intimate partner violence can be handled in a way that is fair to the accused and respectful of victims.

#### IV. THE REMARKABLE AND UNREMARKED ROLE OF WOMEN IN CONFRONTATION AND DYING DECLARATIONS

##### A. *Crawford and Gender*

In three out of the four modern Supreme Court confrontation cases, the declarants are women and the accuseds are the men they love or once loved.<sup>240</sup>

A feminist analysis of these three cases can begin with observations about how the various victims are harmed. The Court refers to the “declarant” to describe the person who makes the out-of-court statement. This abstract, bloodless term masks the humanity, drama, and gender of those who made key statements. As the jurisprudence has developed, particularly since *Crawford*, we are instructed not to care much about the contents of the declaration or the credibility of said declarant. Instead we are encouraged to focus on the facts and procedures surrounding the statements: when did the declarants make their declarations? to whom? under what state of mind? (about to die? fear of attack? wanting to report?). Procedurally, we are concerned with whether the declarants are

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239. *Id.* at 107–08 (“Nor has the privilege of confrontation at any time been without recognized exceptions, as for instance dying declarations or documentary evidence.”). *Snyder*’s discussion in dicta of the right to jury trial was overruled by *Duncan v. Louisiana*, 391 U.S. 145, 154–55 (1968).

240. *See supra* Parts II.A–B. The fourth, *Melendez-Diaz*, is a case involving scientific testimony at trial. The evidence there does not concern the major players or events, instead it relates to presentation of the post-indictment forensic evidence.

available to make these same claims in open court where the accused can challenge them. Issues of reliability or trustworthiness are the purview of hearsay law and almost entirely irrelevant to confrontation after *Crawford*.

In various ways, the women of *Crawford*, *Davis*, *Hammond*, and *Giles* respectively are officially silenced. In *Crawford*, the prosecutor was prohibited from using the stationhouse statement of Sylvia Crawford, the accused's wife. Sylvia Crawford's statement satisfied hearsay concerns,<sup>241</sup> although it failed Confrontation Clause analysis.<sup>242</sup> Under Washington State law, Sylvia Crawford could not be compelled to take the stand against her husband.<sup>243</sup> It forbids a spouse from testifying against the other spouse without the latter's consent. Hence, in Washington, each spouse could enforce the other's testimonial silence.<sup>244</sup>

The facts do not indicate whether Sylvia Crawford wanted to testify, but there are strong indications that she did not. Sylvia's statement to the police included her belief that her husband Michael was "'one of the most fair people you'll ever meet' and that he was her 'best friend.'"<sup>245</sup> After all, he was vindicating her honor, albeit unadvisedly, using vigilante justice. Additionally, Sylvia, who assisted her husband and was on the scene for the stabbing, was a potential accused, and would have probably invoked her Fifth Amendment right against self-incrimination.<sup>246</sup> In Crawford's brief to the Supreme Court, he attributed

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241. Her stationhouse statement was admissible as a declaration against interest under Washington law, and no marital privilege attached to it (as opposed to in-court testimony). See *supra* note 128 and accompanying text.

242. See *supra* Part II.A.

243. Under Washington state spousal-privilege law, "Crawford invoked the marital privilege, RCW 5.60.060, to keep his wife from testifying against him at trial." *State v. Crawford*, 54 P.3d 656, 658 (Wash. 2002). At the time, the spousal privilege in Washington stated, in relevant part: "A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband." *Id.* (citing WASH. REV. CODE § 5.60.060(1) (amended 2006)).

244. Cf. *Trammel v. United States*, 445 U.S. 40, 52–53 (1980) (holding that the federal common law of spousal privilege belongs to the testifying spouse, not the accused spouse, and observing that the former rule, which is still followed by the State of Washington, had roots in the sexist concept of women's legal status merging with their husbands). The Supreme Court of Washington explained that the privilege statute "specifically denies Sylvia the ability to testify either for or against her husband, rendering her unavailable as a witness. Although Michael, not Sylvia, invoked the privilege, the result is the same—Sylvia was unavailable to testify . . ." *Crawford*, 54 P.3d at 659. As the Washington Appellate Court explained: "Michael had a statutory right to keep his wife from testifying against him." *State v. Crawford*, No 25307-1-II, 2001 WL 850119, at \*2 (Wash. Ct. App. July 30, 2001).

245. *Crawford*, 2001 WL 850119, at \*3. Sylvia Crawford also said of her husband Michael that he was "'infuriated,' 'enraged,' and 'past tipsy'"; Sylvia also acknowledged that Michael stabbed the victim, and that Michael said Lee, the victim who was stabbed, "'deserves a ass whoopin.'" *Id.* This, and the fact that she contradicted Michael's account and did not see a knife in the victim's hands, is undoubtedly why the prosecutor wished to introduce her stationhouse statement.

246. This argument was made by the accused in his Petition to the Supreme Court, and the petitioner noted that, after his trial, Sylvia was also charged with a crime based on the stabbing incident. Brief for Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21939940, at \*5 n.1.

the choice to invoke the privilege to both husband and wife.<sup>247</sup> Therefore, it is fair to assume that Sylvia was happy to assist her husband and did not wish to testify.

Technically, however, the Washington statutory privilege scheme did not permit her to make the choice; the privilege belonged to Sylvia's husband, Michael, and it allowed him unilaterally to decide whether Sylvia would be forced to "stand by her man."<sup>248</sup> It is crucial to note, however, that the declarant in *Crawford* was not also the victim. The man Sylvia stood by did not try to harm her (although his impetuous, drunken desire for revenge may have embroiled her in legal troubles). Sylvia, the declarant, certainly had a romantic relationship with the accused (her husband), yet there is nothing to indicate that it was an abusive one. In addition, her statement was not about a hurt received from the accused, but rather concerned the tangle between the accused and another man. Issues of gender figure significantly in the *Crawford* drama, and the law of privilege does silence Sylvia; nevertheless, we may not be too concerned about squelching her voice or our failure to hear what she had to say in open court, because she apparently had affirmatively chosen not to speak.

In *Davis* and its companion case, *Hammon*,<sup>249</sup> there is uncertainty about what the victim wants and confusion about issues of agency and empowerment. The statements of Michelle McCottry, the victim in *Davis*, to the 911 dispatcher were found to be excited utterances by Washington State and deemed nontestimonial under *Crawford* and thus were admitted.<sup>250</sup> The accused in *Davis* was convicted of violating a no-contact order, indicating that the victim had previously tangled with the accused and sought help from the legal system.<sup>251</sup> McCottry hung up when she originally called 911 and only spoke to the dispatcher when the dispatcher called back.<sup>252</sup> McCottry also covered her face when the police attempted to take pictures of her injuries.<sup>253</sup> According to the police officer who answered the call, McCottry's main concern involved "frantic efforts to gather her belongings and her children so that they could leave the

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247. *Id.* at \*5 ("[T]he State and Petitioner stipulated that Washington's marital privilege statute rendered her unavailable to do so because she and Petitioner wanted to invoke the privilege.")

248. "Stand by Your Man," is a country-western song co-written, performed, and made famous by Tammy Wynette. TAMMY WYNETTE, *Stand By Your Man*, on TAMMY WYNETTE'S GREATEST HITS (Epic Records 1989). It encourages women to stick by their men even when they have been wronged by them. It is an odd mixture of subordination on the one hand with disdain on the other. The song counsels: "You'll have bad times and he'll have good times/ Doin' things that you don't understand/ But if you love him you'll forgive him/ Even though he's hard to understand." But also explains in mitigation that "after all, he's just a man." *Id.*

249. *Davis v. Washington*, 547 U.S. 813 (2006).

250. *See State v. Davis*, 64 P.3d 661, 664-65 (Wash. Ct. App. 2003).

251. *Id.* at 663.

252. *Id.* As the Supreme Court of Washington once noted, "a hang-up call often signals that the caller is in grave danger." *State v. Davis*, 111 P.3d 844, 850 (Wash. 2005).

253. *Davis*, 64 P.3d at 663.

residence.”<sup>254</sup> The Washington Supreme Court noted that, “[a]lthough she initially cooperated with the prosecutor’s office, the State was unable to locate McCottry at the time of trial.”<sup>255</sup>

Amy Hammon, the victim in the companion case, remained married to the accused.<sup>256</sup> Although she was subpoenaed by the prosecutor, she did not appear at trial.<sup>257</sup> In fact, she wrote the court regarding the accused’s sentencing:

In answer to your letter there has been no damages or bills. As for sentencing, I would like my husband, Hershel Hammon, to receive counseling [sic] and go to AA, because it has helped him in the past. I would like to see him put on probation to ensure that it happens and where he can still work to help financially and be here to help with our children. I also need his help around the house for we’re remodeling the house and plan to sell it so we can move out of town. I love my husband, I just want to see him stop drinking. I do not feel threatened by his presence.<sup>258</sup>

The victims in *Davis* and *Hammon* refused to testify but the prosecutors chose to use their statements anyway. In fact, those statements were vital to securing the convictions because, as is often the case, the victims were the only eye witnesses to the actual battery. Before *Crawford*, using such statements with or without the victim’s permission was standard procedure; many statements were admissible even if the declarant did not show up to testify and was therefore not subject to cross-examination. The prosecutorial “no drop” strategy is significantly harder post-*Crawford* and *Davis*.<sup>259</sup> If the statement is testimonial, then the woman has to testify. And if she will not, the prosecutor does not have a case.

Why did the victims in *Davis* and *Hammon* fail to testify? Had they made up with their lovers? This seems to be the case with Amy Hammon. Did they want to prevent their intimate partners from having legal problems? Did they want to spare themselves the hassle or their children the agony? This is also a possibility. Were they disgusted with the jus-

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254. See *Davis*, 111 P.3d at 847.

255. *Id.* Because the Washington courts were applying the *Roberts* test, which focuses on reliability, see *supra* Part II.A, the motive of the declarant in not appearing in court was not deemed relevant, and there was little information about why McCottry did not testify.

256. *Hammon v. State*, 829 N.E.2d 444, 447 (Ind. 2005).

257. *Id.*

258. *Id.* at 448 n.3.

259. As Tom Lininger noted:

In a survey of over 60 prosecutors’ offices in California, Oregon, and Washington, 63 percent of respondents reported the *Crawford* decision has significantly impeded prosecutions of domestic violence. Seventy-six percent indicated that after *Crawford*, their offices are more likely to drop domestic violence charges when the victims recant or refuse to cooperate. Alarming, 65 percent of respondents reported that victims of domestic violence are less safe in their jurisdictions than during the era preceding the *Crawford* decision.

Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 750 (2005) (citations omitted).

tice system?<sup>260</sup> Were they ashamed? Or were they frightened off? Did the accuseds intimidate them from testifying? If the women in *Davis* and *Hammon* were indeed intimidated by their partners, *Giles* might apply.

Courts and commentators have been struggling with what constitutes intimidation within the context of a violent intimate relationship.<sup>261</sup> Clearly one of the challenges confrontation jurisprudence must address is what counts as making a witness unavailable. Things get murky once we leave the world of express threats and one-way tickets out of town. And, in particular, what counts as making someone unavailable in the context of an ongoing relationship with a history of violence?<sup>262</sup>

It is worthwhile to note the potential real-world harm of *Giles*. As Chief Justice Roberts observed, the *Giles* ruling gives batterers a benefit for killing their victims instead of just injuring them by allowing them to testify later.<sup>263</sup> Professor Lininger cites the paradox of *Giles* in which “the more the criminal justice system insists upon live testimony by the accuser, the less likely it is that she will actually appear in court.”<sup>264</sup> The accused, who is already in a struggle for dominance and control over his partner, will become aware that the prosecution cannot proceed without the victim’s testimony. Lininger argues that this will increase witness tampering.<sup>265</sup> Justice Scalia, however, has made perfectly clear that any such practical concerns about the ability to prosecute, the potential dangers witnesses might face, or the cost-benefit analysis of insisting that the accused show up are out of bounds when it comes to the command of the Confrontation Clause.

Is such use of the victim’s statements respectful of the woman’s interest, preserving her voice, or is it subversive of her choices? There is a rich literature on the “no drop” prosecution policy, in which prosecutors

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260. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (“Women of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile.”); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1880–81 (1996) (“African-American women may be very suspicious of the criminal justice system because it has historically ignored violence against black women and perpetrated violence against black men.”).

261. See, e.g., Raeder, *supra* note 146, at 364–65; Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and Its Loss*, 15 J.L. & POL’Y 725, 746–47 (2007).

262. Tom Lininger has written a thoughtful and useful piece outlining criteria that courts should use in assessing forfeiture. “Taking its cue from Scalia’s declared preference for categorical rules,” the article provides practical guidelines for assessing the accused’s intent to cause unavailability, finding “the requisite intent where the defendant has violated a restraining order, committed any act of violence while judicial proceedings are pending, or engaged in a prolonged pattern of abusing and isolating the victim.” Lininger, *supra* note 157, at 865. Intimidation can take many forms, and courts will need to be aware that not only physical force, but credible threats to harm the victim, harm the victim’s children, or to separate the victim from her children will count as the type of intimidation that should trigger forfeiture. See *id.* at 895.

263. Lininger, *supra* note 157, at 864.

264. *Id.* at 871.

265. *Id.*

try cases with a woman's statement from the crime scene even if she later chooses not to cooperate.<sup>266</sup>

Some feminists have even hailed *Davis* as an end to the disrespect of the victims represented by "no drop" prosecutions.<sup>267</sup> So in weighing the social benefits of such testimony, one must include not only the damage done to the accused's ability to mount a defense, but the damage done to the witness who has chosen not to participate in the prosecution.

The final confrontation case that raises gender issues, *Giles*, involves femicide of an intimate partner. We know that Brenda Avie, the ex-girlfriend of the accused, was shot and killed.<sup>268</sup> The confrontation issue posed in *Giles* concerned Avie's statements made to police, who responded to a domestic violence incident between Avie and the accused three weeks prior to the homicide.<sup>269</sup> Those statements, assumed by the Court to be testimonial,<sup>270</sup> arguably elucidated the nature of the relationship, belying the accused's assertions that he feared Avie and memorializing or chronicling a pattern of brutality of the accused towards her.<sup>271</sup> We do not know what Avie would have liked done with her statement to police. Unlike the victims in *Davis* and *Hammon*, who were able to vote with their feet, Avie was murdered and unable to participate in the prosecution of her batterer. She spoke to police and indicated some willingness at that time to assist in the prosecution of the accused, but she was silenced by the accused as well as by the legal system.

What about dying declarations by victims of femicide? If Avie had lived long enough to make a dying statement to the police surrounding the events of her murder, we would know at least one thing for sure: she intended to have her statement used to prosecute the accused. Ironically, the very thing that makes the statement problematic from a confrontation perspective—its testimonial quality—is what makes it respectful of the victim and allows us, with no conflict regarding her agency or choice, to let her be heard.

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266. See, e.g., Hanna, *supra* note 260, at 1899–1906 (arguing that prosecutors should reduce their reliance on victim testimony by gathering other types of evidence, but advocating for mandatory victim participation if necessary); Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 187–91 (1997) (arguing that blanket "no drop" policies do not promote battered women's safety, and suggesting a more flexible approach to prosecution).

267. See, e.g., Kimberly D. Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 B.Y.U. L. REV. 1, 28 ("[A] limitation on victimless prosecutions is not necessarily a setback . . .").

268. *Giles v. California*, 128 S. Ct. 2678, 2681 (2008).

269. *Id.* at 2681–82.

270. See *id.* at 2682. Justices Thomas and Alito expressed doubts whether Avie's statement to police was testimonial. Justice Thomas, consistent with his opinion in *Davis*, thought Avie's statement lacked the requisite formality. *Id.* at 2692–94 (Thomas, J., concurring). Justice Alito did not provide a specific reason, but opined that "I am not convinced that the out-of-court statement at issue here fell within the Confrontation Clause in the first place." *Id.* at 2694. Because the issue was never contested, both reached the forfeiture question and joined the majority.

271. See *id.* at 2681–82.

Where there is no evidence that the victim was subject to intimidation, and she is still alive, however, we may choose to rely on the victim's perspective and choices. Her desire not to testify is a willful silence that many argue should be respected. Women who suffer violence from intimates also suffer loss of control over their movements and choices as well. Once we have determined that women are not withholding their testimony out of fear, or even if they are afraid, they have made the calculated choice that their silence will protect them better than the legal system, it is arguably intrusive and paternalistic to use their statements where they have chosen not to testify.

In contrast to the women who hesitate to testify in *Davis* and *Hammmon*, a murdered woman who makes her accusations as she slips out of life, knowing full well that she is dying, has not chosen silence. Quite the opposite: she has used her dying breaths to give evidence against the accused. (Moreover, it hardly seems to matter whether she speaks formally and gives what would otherwise look like a testimonial statement, or delivers her dying declarations to family, friends, or casual bystanders.) Generally, the effect of the evidence rules in combination with the Confrontation Clause and the strict definition of testimonial statements would exclude such remarks to police—though arguably courts will admit similar statements made informally to others. If dicta in *Crawford* and *Giles* are to be believed, however, they are admissible as dying declarations.

#### B. *Dying Declarations and the Plight of Intimate Partners*

The relationship between dying declarations and domestic violence goes way back. A D.C. Circuit Court case from 1802, notable for its brevity, holds in its entirety: “THE COURT permitted her dying declarations to be given in evidence.”<sup>272</sup> The accused McGurk was convicted of the “murder of his wife, by beating her, while pregnant with twins, so as to produce a miscarriage and consequent death.”<sup>273</sup> There has always been a significant and intriguing subset of dying declarations, both now and in the past, made by women, naming their intimate partners as their murderers. Other interesting dying declaration cases that overtly involve gender surround issues of abortion<sup>274</sup> or seduction.<sup>275</sup> Women play an im-

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272. *United States v. McGurk*, 26 F. Cas. 1097, 1097 (C.C.D.C. 1802).

273. *Id.*

274. The issue of abortion presented a conundrum for dying declarations. If a man was charged with procuring an abortion for a woman who died and made statements about the cause of her death implicating the accused, courts disagreed whether the dying declaration could apply if the charge was not homicide. See *State v. Fuller*, 96 P. 456, 457 (Or. 1908) (“The dying declarations of a woman, upon whom an abortion had been performed, were not originally admissible, on the ground that her death was not an essential ingredient of the offense which was complete without it; but when her demise, as a result of a premature delivery produced by another person, is made by statute an indispensable constituent of the crime as charged, her dying declarations are receivable in evidence.”); Nicolas, *supra* note 11, at 525 (“U.S. courts were divided on the question of whether dying declarations were admissible in

portant role in the new confrontation jurisprudence; they have an unheralded niche in dying declarations, and it is more timely than ever to ask how these swirling factors of confrontation rights, dying declarations, and gender operate together.

If the policy goal were to admit all prior statements of women who have been killed by their batterers (a goal attempted via a forfeiture theory and defeated by the majority in *Giles*), dying declarations as the only exception would be underinclusive. Not all statements made by a victim of intimate violence would qualify. The statement must not only concern the cause of death, but the victim must know that death is imminent. Statements of fear by women who anticipate well in advance that they will suffer violence from a specific individual do not qualify for the dying declaration. As the Supreme Court of California explained over a hundred years ago:

The declarations of the deceased, made to various persons and at different times prior to his death, to the effect that he was going to leave the country, because he was afraid [the defendant] would murder him; that [the defendant] was engaged with others in holding meetings, and conspiring to take his life . . . were not admissible under any known principle or rule of evidence.<sup>276</sup>

In truth, such predictions that someone plans to kill you have enormous emotional power at the murder trial. We see them in modern cases—Nicole Simpson’s letters left in a safety deposit box that O.J. was out to kill her,<sup>277</sup> as well as letters left by less famous victims predicting their

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prosecutions for illegal abortion under the common law dying declaration exception.”). The abortion cases form a fascinating subset of the larger dying declaration question. Because doctors would often withhold treatment until the woman named her lover and the procurer of her abortion, the actual strictures of the exception did not seem to be met. The women were led to believe there would be some hope of recovery if they named names. See Leslie J. Reagan, “*About to Meet Her Maker*”: *Women, Doctors, Dying Declarations, and the State’s Investigation of Abortion, Chicago, 1867–1940*, 77 J. AM. HIST. 1240, 1254–55 (1991).

275. In *M’Farland v. Shaw*, an action was “brought by the father, for an injury done to him, by the loss of his daughter’s service, in consequence of her seduction by the defendant, and incidental illness.” 4 N.C. (Car. L. Rep.) 187, 189 (1815). The court was aware that it was extending the reach of the dying declaration in applying it to a civil lawsuit for support, but the court argued forcefully that a dying declaration must serve as competent evidence in this case as well: “Can the practice of receiving it to destroy life, and rejecting it where a compensation is sought for a civil injury, derive any sanction from reason, justice, or analogy? And though no direct precedent may exist to guide the court, yet it must be recollected that the law consists of principles, which precedents only tend to illustrate and confirm.” *Id.* at 190.

276. *People v. Irwin*, 20 P. 56, 57 (Cal. 1888).

277. See Ruling, *People v. Simpson*, No. BA097211, 1995 WL 21768, at \*5 (Cal. Super. Ct. Jan. 18, 1995) (“To the man or woman on the street, the relevance and probative value of [diary entries and statements to others] is both obvious and compelling, especially those statements made just days before the homicide.”); Lenora Ledwon, *Diaries and Hearsay: Gender, Selfhood, and the Trustworthiness of Narrative Structure*, 73 TEMP. L. REV. 1185, 1186 n.12 (2000) (discussing Nicole Brown Simpson’s diary and the California hearsay statute that was passed in part because of the exclusion of the diary from the O.J. Simpson criminal trial); Andrea Ford & Jim Newton, *Simpson Jury Hears 911 Calls of ‘93 Incident*, L.A. TIMES, Feb. 3, 1995, at A7 (“[The safe deposit box held] photographs showing [Nicole Brown Simpson] with injuries, letters from [O.J.] Simpson apologizing and taking responsibility for a 1989 fight, and a copy of her will.”).

own murders.<sup>278</sup> Such statements are wrenching as well as eerie in their prescience. The person who is ultimately a murder victim shares his deepest and, it seems, well-founded fears. But such cases fail the strictures of the dying declaration exception because although they anticipate death, death is not certain or imminent. *Giles*, the case in which the victim made a statement to police about threats several weeks before she was killed, including the allegation that the accused threatened her life, fits this pattern of voices from the grave that fail the dying declaration requirement.<sup>279</sup>

Reliance on the dying declaration exception seems to undervalue women's understanding of the arc of their relationships. The imminence requirement is a mismatch with women's experience. Imminence means the declarant has to know that she is just about to die. But what if, like Avie in *Giles*, the woman can tell that she is going to die by the hand of her lover? Her experience with escalating violence and his moods inform her that he will soon kill her. The law does not recognize that way of knowing. The dying declaration covers only a subset of cases involving women killed by intimate partners, and even then, it is not a perfect fit. Nevertheless, dying declarations do seem like one small way of hearing the victims of domestic violence—not all of them of course—but those who were killed, knew they were about to die, and made statements concerning their imminent deaths.

Which voices of victims get to be heard at trial? The only way we can hear the testimonial statement of a dead woman is if the declarant forfeited his confrontation right (by killing the victim in order to shut her up, as required by *Giles*) or if she made a valid dying declaration.

#### V. CONCERN FOR THE RIGHTS OF THE ACCUSED: SEARCHING FOR A FAIR BALANCE IN THE ADMISSION OF UNCONFRONTED STATEMENTS BY VICTIMS OF FEMICIDE

If dying declarations serve as an exception to the confrontation rule and present a partial way in which victims of femicide can be heard, we need at least acknowledge the burden on the accuseds and see whether it is a tolerable diminution of their constitutional rights.<sup>280</sup> By adopting a wooden, categorical system, in which dying declarations are a separate, historically anomalous category, Justice Scalia has spared himself and the

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278. See, e.g., *Commonwealth v. Levanduski*, 907 A.2d 3, 8–10 (Pa. Super. Ct. 2006) (discussing letter left by murder victim about discovering his wife's plan to murder him and outlining how she and her lover would commit the crime).

279. *Giles v. California*, 128 S. Ct. 2678, 2681–82 (2008).

280. Professor Myrna Raeder has modeled candor and compassion in her search for a balance. See Raeder, *supra* note 146, at 313–14 (“As a feminist who is also concerned about the defendant's right to confrontation, I have long pondered the proper balance to ensure that the voices of women and children are heard, without eviscerating the ability of the defendant to confront live complainants, and not just second hand witnesses.”).

rest of us the bother of thinking about the fairness of admitting such evidence. In fact, in *Giles*, Scalia mocks the concept of being “fair,” actually putting the word in quotation marks.<sup>281</sup> Even if his originalist and absolutist approach is correct, it is worthwhile to examine and acknowledge the costs of admitting statements by a victim who can never be confronted. What is the harm to the accused? How might the strictures of the dying declaration exception mitigate those harms somewhat?

As tough as it is to ignore an abused woman’s final words, it may also be dangerous to allow them in. Beyond the issue of accurate transcription, we must worry about the power of this dying voice, which could be mistaken, vengeful, or conniving. Without confrontation, there is no way for the jury to distinguish. As important as it is to listen to abused women’s voices, we have to be equally concerned about the accused, who must be presumed innocent, but whose denials perhaps could not be heard over a powerful voice from the grave. In short, we must worry, in the famous words of Justice Cardozo, about the “reverberating clang”<sup>282</sup> of words that are desperate, damning, and not subject to cross-examination.

Admitting some statements of domestic violence killings if they happen to fall within the strictures of the dying declaration may appear like a preposterous standard, defensible only on the grounds Justice Scalia presents: that’s how our Founding Fathers did it.<sup>283</sup> Admissibility seems based not on the rights of the accused or some policy that reflects accuracy or reliability, but upon a historical yet currently disfavored doctrine. It presumes a world that we modern folks no longer recognize, replete with doctors who tell it to the patient straight and a rigid belief system in an afterlife and a personal, vengeful God.

However, the unique limitations of dying declarations, at least as applied to domestic violence killings, make some sense. Although the following observations cannot fully rehabilitate the contradictions and absurdities inherent in the dying declaration exception or restore an interest in fairness to confrontation analysis, they can offer some comfort to those frustrated with the odd and dissatisfying results of the Supreme Court’s new approach.

Setting aside any religious justifications, it is worthwhile to examine the critiques and potential justifications of the dying declaration excep-

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281. *Giles*, 128 S. Ct. at 2692 (“The larger problem with the dissent’s argument, however, is that the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider ‘fair.’ It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts’ views) those underlying values.”); *cf.* *Burnham v. Superior Court of California*, 495 U.S. 604, 623–24 (1990) (also putting “fair” in quotation marks to emphasize his distance from the term and question its legitimacy).

282. *Shepard v. United States*, 290 U.S. 96, 104 (1933).

283. See *Giles*, 128 S. Ct. at 2687 (“Not only was the State’s proposed exception to the right of confrontation plainly not an ‘exceptio[n] established at the time of the Founding,’ it is not established in American jurisprudence since the Founding.”) (emphasis in original) (citation omitted).

tion to see how they play out in the context of a trial for homicide of an intimate partner.

Some of the criticisms of the dying declaration exception do not seem to apply to women killed by their partners. The concern that accuracy of perception and memory may affect a dying declaration seems more apt in describing a mortal wound by a stranger than a declaration describing a deadly blow inflicted by a lover. The case law, however, makes absolutely no distinction between statements about strangers and statements about lovers. But we can be fairly confident that at the very least in the latter case, the identification is unlikely to be mistaken. Problems with accuracy are less likely in dying declarations made by intimate partners.

Arguably, there is an increased chance of a “sincerity” problem in intimate partner cases. One could raise the concern that as the woman is dying, she acts out of revenge or bitterness against her lover who has hurt her in the past. Killed by another person, by the accused in self-defense, or by her own hand, the woman might make a dying statement about her partner and wrongfully implicate him in her homicide. Although such last-minute retribution with false charges is certainly possible, this concern seems minimal given what we know about the psychological dynamics of battering relationships.

Abused women often stick with their abusers and make excuses for them.<sup>284</sup> Many battered women behave as did Amy Hammon, who asked the court to show the assailant leniency.<sup>285</sup> It is unlikely that a woman with a track record of tolerating or managing violence in her relationship would, just at the moment of death, seek unfair payback. In fact, the case law reveals multiple occasions where women killed by their intimate partners actually use their last statements to attempt to exonerate the clearly guilty accuseds. For instance, in *Sims v. State*,<sup>286</sup> the declarant said before she died: “Well, I don’t want him arrested. I was as much to blame as he was, and I want him here to take care of the children.”<sup>287</sup> Similarly, in *Spicer v. State*,<sup>288</sup> forensic evidence clearly pointed to the husband as the shooter, but the dying declarant falsely blamed a “negro” and told her doctor that it was good that she, not her husband, was shot by the negro because her husband “could take so much better care of the children than she.”<sup>289</sup> This unwillingness, even in the last moments of life, to name her intimate partner as her assailant is also a modern phenome-

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284. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1224–25 (1993) (discussing the psychological dynamics of the battered woman's attachment to her abuser, citing the initial love, and later dependence and lack of self-worth).

285. See *id.* (describing the intense emotional attachments that develop, often clouding victims' judgment).

286. 263 S.W. 289 (Tex. Crim. App. 1924).

287. *Id.* at 290.

288. 65 So. 972 (Ala. 1914).

289. *Id.* at 974.

non displayed in *State v. Townsend*.<sup>290</sup> In *Townsend*, the woman who died from a beating by her live-in boyfriend repeatedly claimed to police as she was dying that she was hit by a car.<sup>291</sup>

Although it is not demonstrable empirically, the psychology of abuse victims points to truthfulness when a dying woman names her intimate partner. Much more likely than a vengeance hypothesis is the notion that abused women will finally reveal the truth about who's hurting them because they have nothing left to lose. Based on the psychological profile and life circumstances of domestic battery victims, perhaps what animates the victim to finally report her abuse with her dying breath—knowing (as the exception requires) that she is actually going to die imminently—is that she has nothing left to fear from her violent partner.

The sense of futility and defeat that is another classical explanation for the dying declaration's trustworthiness—that the declarant has no stake left among the living—arguably makes more sense in the context of someone who has lost a long battle trying to outwit her tormenter. But a stronger argument might be that the nearness of death has induced a moral clarity: that the wrongful nature of the relationship and the futility of trying to live with and outwit the danger prompt an attempt to speak the truth, and perhaps provide some warning to others.

The quasi-forfeiture theory also makes sense in the domestic violence context, in which the defense is rarely mistaken identity but instead justification or intent. If the accused raises self-defense or mistake as the reason for the homicide, he thereby acknowledges that some action of his caused his partner's death. Even if that action was ultimately justifiable or truly a mistake, it does not presuppose guilt to find the accused responsible for making the declarant unavailable. One could imagine a principle of predictable consequences whereby, if an accused acknowledges that he rendered his partner unavailable to testify, it opens the door to her dying words.<sup>292</sup> This does not meet the *Giles* standard for intentionally procuring the witness's absence, but it is not an unfair presumption of guilt based solely on the accusation either.

In sum, one need not subscribe to a belief in heaven and hell to think that the final words of an abused partner are more reliable than prior hearsay statements made when not believing death was imminent. This provides some justification for the result of the special exception for dying declarations. At least in cases of domestic violence ending in death, the strictures of the doctrine provide some checks on the unfairness to the accused.

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290. 897 A.2d 316 (N.J. 2006).

291. *Id.* at 321. In *Townsend* the court permitted expert testimony about battered women's syndrome to explain that women who are abused by intimate partners lie about the source of their injuries to protect the batterers or to protect themselves from further abuse. *Id.* at 328.

292. See Friedman, *supra* note 121, at 12.

There is one final, obvious point about fairness to the accused and the use of dying declarations. The *Crawford* reinterpretation of confrontation limits the doctrine to testimonial statements only.<sup>293</sup> Nontestimonial statements are left to the vagaries and vicissitudes of hearsay doctrine. Apparently, there is no longer any constitutional protection against those. The Court argues as consolation for the evidence lost in domestic violence cases that many excited utterances and dying declarations will not be testimonial at all, and will therefore be admissible without concern about confrontation. Thus, after *Crawford*, the problem for the accused goes beyond odd historical exclusions of what are clearly core testimonial statements. *Crawford* is also troubling for what it does not cover within the narrow (if strictly applied) category of testimonial statements. If one were to ask the forbidden fairness question so derided by Justice Scalia, it would be hard from the accused's point of view to see a distinction.

#### CONCLUSION

Given that the dying declaration is one of only two exceptions to the constitutional command of confrontation—the other, forfeiture, is more a matter of equity and clean hands than an actual exception—the role of dying declarations takes on vastly increased importance. This is true even though the exception is self-contradictory and limited. Running through the jurisprudence is an absolute insistence on the declarant's apprehension of imminent death, with an undercurrent of skepticism about the entire enterprise.

*Giles* clearly indicates that dying declarations form a categorical exception to the confrontation right.<sup>294</sup> Yet, dying declarations themselves present a challenge to Justice Scalia's confrontation jurisprudence. It is simply not sufficient to label them, as Justice Scalia does in a footnote, "sui generis" and be done with them.<sup>295</sup> The Court, in advocating an approach to the Sixth Amendment that enshrines the dying declaration exception, ignores the policy-driven and nuanced approach to confrontation. Justice Scalia refuses to entertain a policy discussion, yet the dying declaration exception clearly arose from the very policy concerns he will not address.

The statements of women killed by their intimate partners present an excellent point of departure for discussing the value of dying declarations. It is worth noticing the prominent role that women, and the acts of violence against them, play behind the scenes in the new Confrontation Clause jurisprudence. Therefore, in addition to looking at the problem doctrinally, it is important to realize that many of the confrontation cases

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293. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

294. *Giles v. California*, 128 S. Ct. 2678, 2682–83 (2008).

295. *Crawford*, 541 U.S. at 56 n.6 (emphasis omitted).

involve social phenomena where the women are nameless and, because of evidence rules, voiceless. We can rightfully question the ability of courts to understand the complicated dynamics of domestic violence as they try to pigeonhole the declarations of victims.

We want to hear the voices of victims, particularly if they have been killed and cannot testify. But we are also aware of the power of those voices and the potential unfairness to the accused. The formal requirements of dying declarations seem to offer the worst of both worlds. An exception for dying declarations makes little sense in a modern secular society, but Justice Scalia and those who signed on to his opinions have made clear that any discussion of policy or context is prohibited. Instead, we are stuck with an illogical historical exception that courts will apply narrowly, limiting its reach but nevertheless highlighting the bankruptcy of *Crawford's* wooden, categorical approach.

Ironically, however, there is some comfort to be found in the operation of the dying declaration exception. At least in the case of women killed by their intimate partners, the dying declaration—through historical accident rather than any sound policy—may present a reasonable balance between the rights of the accused and the needs of society.