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Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing

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CONFRONTATION, EQUITY, AND THE MISNAMED EXCEPTION FOR “FORFEITURE” BY WRONGDOING

James F. Flanagan*

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INTRODUCTION

A. Crawford and “Forfeiture” by Wrongdoing

*Crawford v. Washington*¹ redefined the Supreme Court’s Confrontation Clause jurisprudence and has given unexpected prominence to the rule now known as “forfeiture” by wrongdoing. That doctrine holds that a criminal defendant responsible for a witness’s unavailability at trial cannot object to the admission of the absent witness’s hearsay testimony.² The “forfeiture” doctrine is the only broad exception to *Crawford*’s holding that an unavailable witness’s out-of-court “testimonial” statements do not satisfy the Sixth Amendment unless the defendant has the opportunity to cross-examine the declarant.³ Many excited utterances or statements against penal interest or for purposes of medical treatment that were admissible under *Ohio v. Roberts*⁴ now are inadmissible because the declarant was not subject to cross-examination. Prosecutions for domestic violence, child abuse, and criminal conspiracies often rely on the hearsay statements of absent and unavailable witnesses. These cases are particularly affected by *Crawford* because the victims often are unavailable, reluctant to testify, prone to recant prior statements, or, by reason of tender age, may be unlikely to testify.⁵

¹ 541 U.S. 36 (2004).

² James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems With Federal Rule of Evidence 804(b)(6)*, 51 *DRAKE L. REV.* 459 (2003). See also Leonard Birdsong, *The Exclusion of Hearsay Through Forfeiture by Wrongdoing — Old Wine in a New Bottle — Solving the Mystery of the Codification of the Concept into Federal Rule 804(b)(6)*, 80 *NEB. L. REV.* 891 (2001); Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 *ISR. L. REV.* 506 (1997) [hereinafter Friedman, *Chutzpa*]; John R. Kroger, *The Confrontation Waiver Rule*, 76 *B.U. L. REV.* 835 (1996); Alycia Sykora, *Forfeiture by Misconduct: Proposed Federal Rule of Evidence 804(b)(6)*, 75 *OR. L. REV.* 855 (1996); Enrico B. Valdez & Shelley A. Nieto Dahlberg, *Tales from the Crypt: An Examination of Forfeiture by Misconduct and Its Applicability to the Texas Legal System*, 31 *ST. MARY’S L.J.* 99 (1999); Paul T. Markland, Comment, *The Admission of Hearsay Evidence Where Defendant Misconduct Causes the Unavailability of a Prosecution Witness*, 43 *AM. U. L. REV.* 995 (1994); David J. Tess, Note, *Losing the Right to Confront: Defining Waiver to Better Address a Defendant’s Actions and Their Effects on a Witness*, 27 *U. MICH. J.L. REFORM* 877 (1994).

³ The Court read the Sixth Amendment as referring “to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.” *Crawford*, 541 U.S. at 54. The principal exception discussed in the opinion was for statements made as dying declarations; Justice Scalia may be willing to accept an exception for dying declarations on historical grounds. *Id.* at 56 n.6.

⁴ 448 U.S. 56 (1980), overruled by *Crawford*, 541 U.S. 36.

⁵ Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 28 *SEATTLE U. L. REV.* 301 (2005); Adam M. Krischer, “*Though Justice May Be Blind, It Is Not Stupid*”: Applying Common Sense to *Crawford* in Domestic Violence Cases, PROSECUTOR,

The full ramifications of *Crawford* depend on how the courts ultimately define two key terms in the opinion. The most critical issue is the definition of "testimonial," because only those statements must be subject to cross-examination at some point in order to be admissible.⁶ Justice Scalia cited three possible and overlapping definitions. The first was "'*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.'" ⁷ The second includes "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" ⁸ The third definition is "'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.'" ⁹ The courts are now grappling with how to define "testimonial" and how to apply it in many interactions with the police — from 911 calls to police inquiries upon arriving at the scene. Significantly, the first post-*Crawford* cases heard by the Supreme Court involve those issues.¹⁰ This issue is beyond the scope of the Article. However defined, *Crawford* establishes a categorical rule: testimonial statements must be subject to cross-examination at some point to be admissible, even though they might satisfy an exception to the rule against hearsay or otherwise be found reliable.¹¹ Prosecutors are seeking a narrow, and defense counsel a broader, definition of "testimonial."

Nov./Dec. 2004, at 14; Allie Phillips, *A Flurry of Court Interpretations: Weathering the Storm After Crawford v. Washington*, PROSECUTOR, Nov./Dec. 2004, at 37; Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, CRIM. JUST., Summer 2005, at 24.

⁶ There is substantial literature on *Crawford*. See Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439; Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington*, 50 S.D. L. REV. 41 (2004); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005); Miguel A. Méndez, Essay, *Crawford v. Washington: A Critique*, 57 STAN. L. REV. 569 (2004); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511 (2005) [hereinafter Mosteller, *Confrontation*]; Robert P. Mosteller, "Testimonial" and the Formalistic Definition — The Case for an "Accusatorial" Fix, CRIM. JUST., Summer 2005, at 14.

⁷ *Crawford*, 541 U.S. at 51 (quoting Brief for Petitioner at 23, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)).

⁸ *Id.* at 51–52 (omission in original) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and dissenting in part)).

⁹ *Id.* at 52 (quoting Brief for National Ass'n of Criminal Defense Lawyers as Amici Curiae at 3, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)).

¹⁰ See *Hammon v. Indiana*, 829 N.E.2d 444 (Ind. 2005) (discussing whether accusations made to a responding officer are "testimonial"), *cert. granted*, 126 S. Ct. 552 (2005); *Washington v. Davis*, 111 P.3d 844 (Wash. 2005) (discussing whether a 911 call is "testimonial"), *cert. granted*, 126 S. Ct. 547 (2005).

¹¹ *Crawford*, 541 U.S. at 68–69.

A similar process, with the roles reversed, is occurring with defining the forfeiture concept because it may override *Crawford*'s prohibition on the admission of testimonial statements by unavailable witnesses, however testimonial is defined. The lower federal courts have articulated a narrower version of the rule over the last thirty years. As embodied in case law, and as an evidentiary principle in Federal Rule of Evidence 804(b)(6), the loss of constitutional and evidence-based objections under the waiver doctrine requires proof that the defendant intended to prevent the witness from testifying.¹² After *Crawford*, a broader version of the rule is gaining currency in the courts. That version relies on a forfeiture rationale. The defendant loses any confrontation rights if he is responsible in any way for the absence of the witness at trial, regardless of his intent.¹³ The Supreme Court has not faced the issue yet, and the discussion in *Crawford* is scant. Justice Scalia mentioned "forfeiture" by wrongdoing only to differentiate *Crawford*'s reasoning from the reliability analysis of *Ohio v. Roberts*¹⁴ and to say, in passing, that the majority accepted the "essentially equitable" doctrine.¹⁵ The only case cited, *Reynolds v. United States*,¹⁶ relies principally on the defendant's deliberate concealment of the witness to justify the loss of his right to confrontation.¹⁷ As such, *Reynolds* is founded on waiver and is not a true "forfeiture."

I put "forfeiture" in quotes because my research establishes that the doctrine, as well as Federal Rule of Evidence 804(b)(6), are misnamed. The more appropriate name is "waiver by wrongdoing." The English and American precedents, including *Reynolds v. United States*, are all better understood as based on a waiver or implied waiver rationale and are grounded in the long established rule that a defendant waives his objections to hearsay statements when he deliberately keeps from testifying a person expected to testify.¹⁸ This rule, founded on long established waiver principles,

¹² See *infra* Part I.

¹³ See *infra* Part III.

¹⁴ 448 U.S. 56 (1980).

¹⁵ The complete statement is:

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. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternate means of determining reliability.

Crawford, 541 U.S. at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879)).

¹⁶ 98 U.S. 145 (1879).

¹⁷ See *infra* Part I.B and accompanying text.

¹⁸ See *infra* Part I and accompanying text.

reemerged in the last thirty years to counter witness intimidation by defendants.¹⁹ Prior to *Crawford*, the cases linked the loss of constitutional rights to proof that the defendant deliberately acted to prevent testimony, which supported the inference that the defendant implicitly waived the trial right to confront that witness. There were scattered discussions that argued for a broader rule in the pre-*Crawford* cases and some isolated commentary,²⁰ but no court adopted a forfeiture rule,²¹ and several courts specifically rejected it.²² Forfeiture does not appear in any of the formative

¹⁹ The focus on witness intimidation is the consistent theme of the waiver by misconduct rule found in the commentary, the minutes of the advisory committee drafting Federal Rule of Evidence 804(b)(6), and the case law. The first to comment on the subject was Michael H. Graham. MICHAEL H. GRAHAM, WITNESS INTIMIDATION: THE LAW'S RESPONSE 174–82 (1985). The advisory committee note to Federal Rule Evidence 804(b)(6) emphasized "the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'" FED. R. EVID. 804(b)(6) advisory committee's note (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984)). The rule was developed by the federal courts and almost all the cases involved witness statements in organized crime and drug prosecutions. See Flanagan, *supra* note 2; *infra* Part I.C (identifying the declarants' participation in criminal activities).

²⁰ See Friedman, *Chutzpa*, *supra* note 2, at 521–35 (arguing that statements of an absent declarant should be admissible whenever the defendant is responsible for the unavailability of the witness); Sykora, *supra* note 2, at 878–80 (arguing that intent to cause witness unavailability should be eliminated from proposed rule 804(b)(6)).

²¹ See, e.g., *People v. Johnson*, 673 N.Y.S.2d 755, 761–62 (N.Y. App. Div. 1998) (Peters, J., dissenting) (arguing that the defendant-pastor's use of position of authority and provider of counseling services to a child were responsible for the child's refusal to testify against him in sexual misconduct case), *aff'd*, 711 N.E.2d 967 (N.Y. 1999); *People v. Okafor*, 495 N.Y.S.2d 895, 899 (N.Y. App. Div. 1985) (using the misconduct exception to admit prior statements of decedent in rebuttal); *Commonwealth v. Laich*, 777 A.2d 1057, 1069 (Pa. 2001) (Castille, J. dissenting) (arguing that the misconduct exception should apply to domestic homicide); *cf.* *State v. Hinson*, No. M2000-02762-CCA-R3-CD, 2002 WL 31202134, at *6 (Tenn. Crim. App. Feb. 18, 2003) (interpreting TENN. R. EVID. 804(b)(6) to require intent to procure the witness's unavailability).

²² *Olson v. Green*, 668 F.2d 421, 430 (8th Cir. 1982) (stating that no case holds that participation in a crime waives right to confront adverse witness and to do so would destroy the right of confrontation), *cert. denied*, 456 U.S. 1009 (1982); *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979) (holding that an accessory who did not threaten the defendant did not waive confrontation rights); *Wyatt v. State*, 981 P.2d 109, 115 n.11 (Alaska 1999) (recognizing that forfeiture by misconduct does not apply to domestic homicide where the homicide was not committed for the purpose of preventing testimony); *Laich*, 777 A.2d at 1062 n.4 (rejecting misconduct exception in manslaughter prosecution); see also *United States v. Jordan*, No. Crim. 04-CR-229-B, 2005 WL 513501, at *6 (D. Colo. Mar. 3, 2005) (stating that no FED. R. EVID. 804(b)(6) case holds "that a murder whose *by-product* is the unavailability of a witness . . . is covered by the rule"); see also Kroger, *supra* note 2, at 854–57 (stating that none of the federal courts considered and rejected an intent requirement); *cf.* *State v. Jarzbek*, 529 A.2d 1245, 1253 (Conn. 1987) (stating that "[t]he constitutional right of confrontation would have little force, however, if we were to find an implied waiver of that right in every

case law. It is first mentioned as a rationale in a footnote in a 1982 case stating, without significant analysis or comparison, that forfeiture was a more appropriate rationale than waiver. Forfeiture again appeared in the title to Federal Rule of Evidence 804(b)(6), again without detailed analysis, when twenty years of federal case law on the topic was incorporated into that rule of evidence. In fact, the title of the rule was changed from “waiver by wrongdoing” to “forfeiture by wrongdoing.”²³

In light of this history, to refer continually to this rule as “forfeiture” by wrongdoing only emphasizes an inappropriate rationale for the doctrine — hence the use of quotation marks around “forfeiture.”²⁴ Terminology is important. It can create a self-fulfilling prophecy. Since *Crawford*, the arguments in favor of a true forfeiture theory have appeared.²⁵ More important, courts have begun to use forfeiture in some domestic homicide cases without requiring evidence of intent to prevent testimony.²⁶ There is little discussion of the meaning of forfeiture or its logical consequences in the recent case law, and one of the purposes of this Article is to fill the gap.

Part I introduces the topic and the issues and defines the critical terms of waiver and forfeiture. Part II reviews the evolution of the doctrine of waiver by wrongdoing and the promulgation of Federal Rule of Evidence 804(b)(6) and establishes that the courts have always required an intent to prevent testimony. Part III develops the

instance where the accused, in order to silence his victim, uttered threats during the commission of the crime for which he is on trial.”), *cert. denied*, 484 U.S. 1061 (1988); *State v. Hansen*, 312 N.W.2d 96, 104–05 (Minn. 1981) (finding that a waiver based only on the declarant’s refusal to testify without proof of threats would destroy the Confrontation Clause in crimes against the person); *People v. Maher*, 677 N.E.2d 728, 731 (N.Y. 1997) (holding that the exception does not apply to murder unrelated to testimony); *People v. Flowers*, 667 N.Y.S.2d 546, 547 (N.Y. App. Div. 1997) (same).

²³ See *infra* notes 121–22 and accompanying text.

²⁴ “Forfeiture” by wrongdoing or misconduct will be used when referring to the legal rule expressed in *Reynolds v. United States*, 98 U.S. 145 (1879), except when stating the formal title of Federal Rule of Evidence 804(b)(6) or when direct quotations require otherwise. Forfeiture, without quotes, refers to the legal rule that imposes a loss of rights without reference to the mental state of the person subject to the forfeiture.

²⁵ Friedman, *supra* note 6, at 466 (arguing that intent to prevent testimony is immaterial because the defendant is responsible for the declarant’s absence); Krischer, *supra* note 5, at 15–16 (arguing that the defendant’s traumatizing the domestic violence victim is sufficient to support forfeiture by wrongdoing). But see Lininger, *supra* note 6, at 811 n.278 (suggesting that intent to prevent testimony should be required).

²⁶ *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (adopting a true forfeiture rationale); *United States v. Mayhew*, 380 F. Supp. 2d 961 (S.D. Ohio 2005) (same); *People v. Giles*, 19 Cal. Rptr. 3d 843 (Cal. Ct. App. 2004) (admitting the statement of a domestic homicide victim despite lack of evidence of intent to prevent testimony); *People v. Moore*, 117 P.3d 1 (Colo. Ct. App. 2004) (same); *State v. Meeks*, 88 P.3d 789 (Kan. 2004) (admitting a statement of the decedent without consideration of the defendant’s intent to prevent testimony); *Gonzalez v. State* 155 S.W.3d 603, 610–11 (Tex. Ct. App. 2004) (specifically rejecting a requirement of intent to prevent testimony).

recent emergence of the forfeiture rationale and its post-*Crawford* expansion by state courts. The history is remarkable for the lack of analysis or consideration of other theories. Part IV examines the Supreme Court's jurisprudence on the loss of confrontation rights and concludes that the Court has not adopted the true forfeiture rationale that is being advanced in the state courts. The often-cited examples of forfeiture, in pleas and procedural defaults, are distinguishable from the forfeiture theory advanced here because the former is a collateral and inevitable consequence of trials and pleas. Part V identifies some of the problems that come from an essentially unrestrained forfeiture theory. Part VI analyzes "essentially equitable" aspects of the rule and finds that equitable considerations are consistent with a waiver analysis and inconsistent with a true forfeiture rationale. Part VII compares and contrasts the waiver and forfeiture-based theories and concludes that forfeiture is too broad a rationale and that waiver is more consistent with the history, precedent, and constitutional jurisprudence on the relinquishment of confrontation rights. The Article concludes with a short discussion of the difficult case of domestic homicide.

B. Choices and Consequences

The significance of a forfeiture-based rule cannot be overestimated. At the least, it would create an unusually broad exception to the Confrontation Clause in any case where there is any causal connection between the defendant and absence of a witness. It potentially impacts every homicide case as well as any case where the declarant is viewed as unavailable because of the trauma of the crime, as in domestic violence and child abuse cases. One advocate has argued that forfeiture should apply in almost all domestic violence cases.²⁷ A true forfeiture standard would radically change the analysis the Court uses to determine when constitutional rights are relinquished. The Supreme Court has always based the loss of constitutional rights on a waiver analysis. The forfeiture of constitutional rights is justified only by the interests of the state, which seems inconsistent with constitutional rights which are specifically intended to require the state to follow proper procedures to obtain a conviction. A forfeiture theory also undermines the redefined Confrontation Clause in at least two ways. *Crawford*'s central premise is that the Framers insisted on the protection of having a witness testify in person before the defendant and admitted hearsay only when the witness was unavailable and the hearsay had been subject to cross-examination.²⁸ The forfeiture rationale avoids this in a significant category of cases and permits conviction without the presence of key witnesses.²⁹ Moreover,

²⁷ Krischer, *supra* note 5, at 14–15.

²⁸ *Crawford v. Washington*, 541 U.S. 36 (2004).

²⁹ Cf. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171 (2002) (arguing, before *Crawford*, that a testimonial approach to the Confrontation Clause would properly limit the use of victimless prosecutions).

courts may find it easier to decide the forfeiture issue than to wrestle with whether the statement is “testimonial,” avoiding more difficult issues of the scope and applicability of the Confrontation Clause.³⁰ A forfeiture doctrine also may have a profound effect on whether other constitutional rights and procedural protections can be lost by unintended conduct.

C. Defining the Terms

1. Waiver

The waiver in the wrongdoing cases can be an express waiver, but more often it is an implied waiver.³¹ To use the traditional definition found in *Johnson v. Zerbst*,³² a waiver is “an intentional relinquishment or abandonment of a known right or privilege.”³³ The waiver standard looks to the defendant’s knowledge of the right as well as the deliberate intention to relinquish that right. The *Zerbst* standard is fully met when the courts require the defendant to be informed of the rights involved, have the capacity to make the decision, intend to forego those rights, and is asked on the record to forego the rights.³⁴ A guilty plea is the best example of the application of the strict waiver standard.

Waiver in law is not limited to decisions that are deliberate, informed, and specifically posed by the judicial process. Courts also find a waiver from a defendant’s acts.³⁵ The actual knowledge and intention to relinquish a right are inferred from

³⁰ Many of the post-*Crawford* cases avoided a testimonial issue by finding a forfeiture. See, e.g., *Garcia-Meza*, 403 F.3d at 370 (facing excited utterance as testimonial); *People v. Baca*, No. E032929, 2004 WL 2750083, at *10 (Cal. Ct. App. Dec. 2, 2004) (avoiding whether the identification was testimonial); *Giles*, 19 Cal. Rptr. 3d at 847 (avoiding the issue of whether casual statements to police are testimonial); *People v. Jiles*, 18 Cal. Rptr. 3d 790, 795 (Cal. Ct. App. 2004) (avoiding the issue of a dying declaration as testimonial); *Meeks*, 88 P.3d at 793–94 (avoiding the issue of whether a response to a police question was testimonial); *Gonzalez*, 155 S.W.3d at 609 (avoiding the issue of whether statements to police were testimonial).

³¹ Waiver has been the subject of substantial commentary, particularly in the context of constitutional rights. See, e.g., Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281 (2003); George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977); David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941 (1997); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801 (2003); Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981); Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978).

³² 304 U.S. 458 (1938).

³³ *Id.* at 464.

³⁴ See FED. R. CRIM. P. 11.

³⁵ See Berg, *supra* note 31, at 283 (defining waiver as “any action or decision by an individual to give up a right that is currently functioning (for example, constitutional protections in the Bill of Rights)” (footnotes omitted)); Rubin, *supra* note 31, at 481.

the defendant's actions and the context in which they are taken. A defendant who does not take the stand necessarily waives the right to testify when it is not used at the appointed time. That act, on a key point of trial strategy, taken in consultation with counsel, necessarily implies knowledge of the right to testify and a deliberate decision to forego it. Similarly, a defendant who voluntarily absents himself from the trial also waives his trial rights because the trial continues without him, and his absence is an election or choice not to be in court and exercise the trial rights. The exception to the rule against hearsay in Rule 804(b)(6) operates the same way.³⁶ The waiver is dependent on proof that the defendant acted with knowledge of and, in part, because of the victim's capability of testifying against him. Knowledge of the right of confrontation and the intention to relinquish that specific right are inferred from the defendant's intentional act aimed at preventing a *witness* from testifying. Intimidating a witness, rather than any other person, strongly supports the inference that the actor did not intend to exercise or to rely upon the right of confrontation at a possible or expected trial. The murder of a witness on the way to court to testify supports a very strong inference of waiver,³⁷ while a homicide alone does not support any such inference about trial rights. The murder does make it logically impossible for the victim to testify, but without more facts, there is nothing to connect that crime with the trial or testimony and nothing to support the inference that the act was a choice about trial rights.³⁸

The inference of knowledge and intent is measured by an objective standard. It cannot be avoided simply by a plausible claim that the party had neither knowledge of the right nor specific intent to waive it. George Reynolds apparently believed that he had not waived his right to compel the government to produce his wife as a witness against him.³⁹ William Allen continually insisted that he wanted to be in the courtroom, despite his disruptive behavior.⁴⁰ A defendant may miss the trial without necessarily agreeing to waive his rights to hear the witnesses testify. Nevertheless, the Court has held that the voluntary absence from trial necessarily means the loss of those rights and that the consequences were so obvious that a specific warning

³⁶ *Cf.* *United States v. Thompson*, 286 F.3d 950, 961 n.5 (7th Cir. 2002) (describing FED. R. EVID. 804(b)(6) as "really a waiver provision"), *cert. denied*, 537 U.S. 1134 (2003).

³⁷ *United States v. Mastrangelo*, 693 F.2d 269, 271 (2d Cir. 1982). The inference from the action is particularly strong under these facts, but the central issue in the case was whether the defendant, in custody at the time, could lose his rights even though he was not a participant in the murder.

³⁸ *United States v. Jordan*, No. 04-CR-229-B, 2005 WL 513501, at *6 (D. Colo. Mar. 3, 2005) (finding that the decedent's statement that he was assaulted over drug debts provided no evidence that the assault was meant to prevent testimony as required by FED. R. EVID. 804(b)(6)).

³⁹ *See Reynolds v. United States*, 98 U.S. 145 (1879).

⁴⁰ *Illinois v. Allen*, 397 U.S. 337, 339-42 (1970).

of the loss was not required.⁴¹ An objective standard is necessary, not only because the defendant's subsequently expressed intent may be inherently suspect but also because it is necessary for consistent application of the law.

That waivers may be implied using an objective standard does not mean that the defendant's actual knowledge or intent is irrelevant. There must be evidence of what the defendant did or said, or proof of the context in which he acted, to provide an objective basis for the court's legal conclusion that the defendant has relinquished his rights. The essential aspect of waiver, even an implied waiver, is that the loss of rights is dependent on the mental state of the defendant, not solely upon an arbitrary act identified by the state as triggering the loss of rights.

2. Forfeiture

A forfeiture is defined in *Black's Law Dictionary* as "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty."⁴² It is an unforeseen and unintended consequence to the actor of another action.⁴³ Forfeiture occurs by operation of law, regardless of the state of mind of the defendant.⁴⁴ In the context of constitutional rights, a forfeiture is justified only by the adverse consequences to the state that flow from the triggering event.⁴⁵ Here, the triggering event is the homicide or intimidation of the victim. Proof that the defendant was responsible for the witness's absence is sufficient to eliminate any right of confrontation under the Sixth Amendment. There are two broad arguments for forfeiture differing only in whether the issue is viewed from the perspective of the government or of the defendant. The former theory emphasizes the harm to the government, the court system

⁴¹ *Taylor v. United States*, 414 U.S. 17, 19–20 (1973).

⁴² BLACK'S LAW DICTIONARY 677 (8th ed. 2004).

⁴³ Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1214–15 (1977) [hereinafter Westen, *Away from Waiver*] (distinguishing between constitutional rights that may be unknowingly forfeited by a guilty plea from constitutional rights that can only be deliberately waived). This article sparked an exchange on the topic. See Stephen A. Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265 (1978); Peter Westen, *Forfeiture by Guilty Plea — A Reply*, 76 MICH. L. REV. 1308 (1978); see also Tess, *supra* note 2, at 898–901 (discussing Westen's theory in the context of waiver by misconduct).

⁴⁴ The irrelevance of intent or mental state is also present in civil forfeiture, an in rem action against property allegedly involved in a criminal action. *Bennis v. Michigan*, 516 U.S. 442 (1996) (holding that there was no constitutional requirement for the innocent owner defense to civil forfeiture). See generally David Benjamin Ross, Note, *Civil Forfeiture: A Fiction that Offends Due Process*, 13 REGENT U. L. REV. 259 (2000).

⁴⁵ Westen, *Away from Waiver*, *supra* note 43, at 1235–39 (arguing that some defenses are forfeited by a guilty plea because the government has relied upon the plea and subsequent assertion of the defenses would deprive the government of the ability to obtain a conviction).

or society caused by the loss of testimony.⁴⁶ The latter argues that the defendant should not benefit from his criminal act.⁴⁷

Perhaps the best exposition of the forfeiture rationale applied to criminal defendants was by the Iowa Supreme Court:

“The theory of the cases appears to be that the disclosure of relevant information at a public trial is a paramount interest, and any significant interference with that interest, other than by exercising a legal right to object at the trial itself, is a wrongful act.” . . . Thus, it is the fact that a defendant’s conduct interferes with the interest in having witnesses testify at a public trial that makes the defendant’s conduct wrongful. As a result, the nature of the defendant’s conduct is not as important as the effect of that conduct on the witness’s willingness to testify at trial.⁴⁸

I. THE DEVELOPMENT OF THE LOSS BY MISCONDUCT DOCTRINE

A. *English and American Antecedents*

The early English and American antecedents of the “forfeiture” cases do not specifically address the intention of the defendant, but the facts of the cases all involve witnesses rather than victims and acts occurring after the witness had been deposed or had testified — acts which are explained only by a desire to prevent

⁴⁶ See *United States v. Dhinsa*, 243 F.3d 635, 652 (2d Cir. 2001) (quoting *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997) (noting that admission partly offsets the perpetrator’s rewards for misconduct)), *cert. denied*, 534 U.S. 897 (2001); *White*, 116 F.3d at 913 (noting “[t]he government should be no worse off” than if the victim-witness had not been murdered), *cert. denied*, 522 U.S. 960 (1997); *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976) (noting the defendant should not be permitted to subvert the judicial process by witness intimidation), *cert. denied sub nom.*, *Hofstad v. United States*, 431 U.S. 914 (1977); *People v. Geraci*, 649 N.E.2d 817, 821 n.2 (N.Y. 1995) (noting that witness intimidation justifies forfeiture of constitutional rights), *cert. denied sub nom.*, *Geraci v. Senkowski*, 531 U.S. 1018 (2000).

⁴⁷ This rationale is found in *Reynolds v. United States*, 98 U.S. 145, 158 (1879) and is repeated in many confrontation loss cases. See, e.g., *United States v. Gray*, 405 F.3d 227, 242 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 275 (2005); *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005); *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996), *cert. denied sub nom.*, *Comer v. United States*, 519 U.S. 1033 (1996); *People v. Baca*, No. E032929, 2004 WL 2750083, at *10 (Cal. Ct. App. Dec. 2, 2004); *State v. Olson*, 291 N.W.2d 203, 207 (Minn. 1980).

⁴⁸ *State v. Hallum*, 606 N.W.2d 351, 356 (Iowa 2000) (quoting *Steele v. Taylor*, 684 F.2d 1193, 1201 (6th Cir. 1982)).

testimony. In *Lord Morley's Case*,⁴⁹ the court held that if there was proof "that the witness was detained by means or procurement of the prisoner, then the examination might be read."⁵⁰ The testimony was that the witness, Thomas Snell, disappeared after telling his colleagues that "Lord Morley's Trial was to be shortly but he would not be there."⁵¹ The motivation to disappear clearly was tied to the trial. The proof, however, failed to show that Lord Morley was responsible for Snell's absence, and his deposition was not admitted.⁵² Similarly, less than thirty years later in *Harrison's Case*, a statement to the coroner was read when there was proof that the witness was spirited away by associates of Harrison.⁵³ A witness testified that an apprentice, Andrew Bowsell, had told him that he was intercepted on an errand by a man who inquired whether Bowsell was to give evidence regarding Harrison and, upon answering yes, was offered money to be kind to Mr. Harrison.⁵⁴ Bowsell's master testified that subsequently three soldiers came for Bowsell and took him away, and that one returned the next day to retrieve his clothes, and that subsequent efforts to locate him had failed.⁵⁵

A third case involving the waiver principle is the *Proceedings in Parliament Against Sir John Fenwick*.⁵⁶ Fenwick was indicted and arraigned for treason but delayed his trial by promising to confess all.⁵⁷ In the interim, Goodman, one of the two necessary witnesses in a treason trial, escaped with the help of Lady Fenwick.⁵⁸ A bill of attainder was then brought against Fenwick in Parliament.⁵⁹ All parties agreed that Fenwick could not be tried at the Old Bailey without two live witnesses and that Goodman's prior sworn statement could not be admitted against him at a trial apparently because the acts of Lady Fenwick could not be attributed to her husband.⁶⁰ Nevertheless, Parliament, in its legislative capacity, heard Goodman's sworn statement, voted the bill of attainder, and Lord Fenwick lost his head.⁶¹

One late colonial case admitted the testimony of a witness who had been spirited away by a friend of the defendant, with the defendant's knowledge, to prevent the witness from testifying.⁶² The evidence texts available in the early nineteenth century

⁴⁹ 6 How. St. Tr. 770 (H.L. 1666) (Eng.).

⁵⁰ *Id.* at 771.

⁵¹ *Id.* at 777.

⁵² *Id.*

⁵³ 12 How. St. Tr. 834, 851 (Old Bailey 1692) (Eng.).

⁵⁴ *Id.* at 851–52.

⁵⁵ *Id.*

⁵⁶ 13 How. St. Tr. 538 (H.C. 1696) (Eng.).

⁵⁷ *Id.* at 538–40.

⁵⁸ *Id.* at 579.

⁵⁹ *Id.* at 538.

⁶⁰ *Id.* at 578–83.

⁶¹ *Id.* at 607–08, 758.

⁶² *Rex v. Barber*, 1 Root 76 (Conn. 1775).

also discuss the rule in the context of the defendant preventing the witness from testifying at trial.⁶³ An early case summarized the principle:

The books enumerate four cases only, in which the testimony of a witness who has been examined in a former trial, between the same parties, and where the point in issue was the same, may be given in evidence, on a second trial, from the mouths of other witnesses, who heard him give evidence: . . . 4th. Where the Court was satisfied that the witness had been kept away by the contrivance of the opposite party.⁶⁴

Thus, the early English and American cases that framed the rule involved post-crime attempts by the defendant, or those acting on his behalf, to prevent the testimony of the witness at a pending criminal proceeding. None of these cases or contemporary evidence texts remotely suggests that a murder victim's hearsay statements could be admitted solely because the defendant's crime had the by-product of causing his absence from a trial.

B. Reynolds and Its Progeny

Fittingly, the first Supreme Court decision to consider the Confrontation Clause was the seminal "forfeiture" by wrongdoing case, although that term does not appear in the opinion. *Reynolds v. United States* involved the defendant's second trial in the Utah territory for bigamy.⁶⁵ The defendant's second wife testified at the first trial, but the prosecution was unable to subpoena her for the second trial because the defendant, and others in his household, refused to reveal her location.⁶⁶ The prosecution then offered, and the trial court admitted, the second wife's prior sworn testimony from the first trial.⁶⁷ Before the Supreme Court, Reynolds asserted a violation of his

⁶³ See JOHN F. ARCHBOLD, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES; WITH THE STATUTES, PRECEDENTS OF INDICTMENTS, &C. AND THE EVIDENCE NECESSARY TO SUPPORT THEM 84–85 (1824) (noting that statements are admitted when the witness "is kept away by the means or procurement of the prisoner"); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 585–86 (Springfield, G.&C. Merriam 1841) (1836) (stating the rule as when the witness is "kept away by the defendant's contrivance"); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 64 (Phil., Abraham Small 1824) (1812) (stating that depositions are admitted "where there is reason to believe that the prisoner sent them away"); S. M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 275–77 (New York, Gould, Banks & Gould 1816) (stating the rule as when a witness "is kept away by the means and contrivance of the prisoner").

⁶⁴ *Drayton v. Wells*, 10 S.C.L. (1 Nott & McC.) 409 (S.C. Const. App. 1819).

⁶⁵ 98 U.S. 145 (1878).

⁶⁶ *Id.* at 159–60.

⁶⁷ *Id.* at 160.

Sixth Amendment rights as well as the failure to lay the foundation for introducing the prior testimony.⁶⁸ The Supreme Court resolved the constitutional claim by citing *Lord Morley's Case* and other cases that involved active efforts by the defendant or others to prevent the witness from testifying at trial.⁶⁹ The case merely applied the well-accepted English and American principle that active participation in the witness's absence allowed the admission of prior sworn testimony of that witness, albeit in this case, over a Confrontation Clause objection.

The *Reynolds* opinion can only be read to apply to the acts of the defendant that were intended to affect trial testimony. The key was the defendant's influence over the witness. The Court always refers to her as a "witness," emphasizing that all parties are acting in the context of a trial and the defendant's voluntary choice wrongly to procure her absence from the court.⁷⁰

The Constitution gives the accused the right to a trial, at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guaranty an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.⁷¹

After discussing *Lord Morley's Case* and the other early English and American precedents, the opinion restates the rationale. "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and,

⁶⁸ *Id.* at 161.

⁶⁹ The Court cited *Lord Morley's Case* and *Harrison's Case*. Also cited was a nineteenth century English case, *Regina v. Scaife*, (1851) 117 Eng. Rep. 1271, 1272 (Q.B.) (holding that witness's testimony before the magistrate could be admitted against Smith, who had kept her away from the trial, but not against other defendants who were not implicated in witness tampering). The American precedents were *Wells*, 10 S.C.L. 409, and *Williams v. State*, 19 Ga. 402 (1856).

⁷⁰ Justice Scalia in *Crawford* based his testimonial analysis of the Sixth Amendment on the term "witness." *Crawford v. Washington*, 541 U.S. 36, 51 (2004). The same logic applied to *Reynolds* necessarily limits that case and its holding to actions voluntarily directed against those who may testify.

⁷¹ *Reynolds*, 98 U.S. at 158.

consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony."⁷²

The opinion treats the various reiterations of the rule as equivalent. Having stated the rule, Justice Waite then considered the evidence:

The testimony shows that the absent witness was the alleged second wife of the accused; that she had testified on a former trial for the same offense under another indictment; that she had no home, except with the accused; that at some time before the trial a subpoena had been issued for her, but by mistake she was named as Mary Jane Schofield; that an officer who knew the witness personally went to the house of the accused to serve the subpoena, and on his arrival inquired for her, either by the name of Mary Jane Schofield or Mrs. Reynolds; that he was told by the accused she was not at home; that he then said, "Will you tell me where she is?" that the reply was "No; that will be for you to find out"; that the officer then remarked she was making him considerable trouble, and that she would get into trouble herself; and the accused replied, "Oh no; she won't, till the subpoena is served upon her[]"⁷³

A second attempt to serve the subpoena under a different name was discussed, and then the Court upheld the decision to admit the prior sworn testimony of the absent declarant.⁷⁴

In this we see no error. The accused was himself personally present in court when the showing was made, and had full opportunity to account for the absence of the witness, if he would, or to deny under oath that he had kept her away. Clearly, enough had been proven to cast the burden upon him of showing that he had not been instrumental in concealing or keeping the witness away. Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own.⁷⁵

⁷² *Id.* at 159.

⁷³ *Id.* at 159–60.

⁷⁴ *Id.* at 160.

⁷⁵ *Id.*

The Court's statement of the facts, particularly the last sentence, established an express waiver. Reynolds certainly was aware that the witness would testify against him because she had testified before. He did not provide her location, and more important, when provided the opportunity, did not offer any evidence that he was not responsible for her absence from the courtroom. The opinion correctly viewed his silence as an intentional, tactical choice to rely on a weak government case, rather than an active defense that cross-examined the prosecution's witness. Nothing in the opinion suggests that a true forfeiture of the right of confrontation was being considered. No statement remotely suggests that the defendant's responsibility for the witness's absence, in and of itself and without the context of expected testimony at the trial, would have supported the loss of the right. To argue that *Reynolds* established a true forfeiture is to ignore the facts that supported the decision and to eliminate all references to the defendant's intentional acts to prevent his second wife from being subpoenaed and forced to testify.

Reynolds was not an important precedent. The novel issue was not that the defendant deliberately kept his wife from appearing and thereby waived the right to confront her. The opinion made clear that this principle was already firmly established.⁷⁶ Rather, the important point was that prior trial testimony, subject to cross-examination, could be admitted.⁷⁷ After the point was clearly established in *Mattox v. United States*,⁷⁸ without reliance on any waiver analysis, *Reynolds* was of minor importance and perhaps better known as a religious freedom case.⁷⁹ The Court cited it only five times before *Crawford*. The Court's subsequent cites to *Reynolds* establish that the holding was limited to cases where the defendant's knowing acts barred his claim. The first citation of *Reynolds* by the Court occurred twelve years later in a civil case upholding service of process on a corporate agent who was avoiding the process server, obviously a case of knowing waiver of the traditional means of service of process.⁸⁰ The Court applied *Reynolds* in *Motes v. United States*,⁸¹ holding that the testimony of an absent witness could not be admitted against a defendant who had not procured the witness's absence.⁸² However, *Reynolds* was cited in *Diaz v. United States*⁸³ to support the holding that the defendant's voluntary absence from trial waived his Sixth Amendment right to be present at the trial. Two other cases

⁷⁶ *Id.* at 158–59 (citing English and American cases and texts that provide that one intentionally responsible for witness action waives objection to other testimony).

⁷⁷ As Justice Scalia pointed out in *Crawford*, some courts rejected the proposition that prior testimony could be introduced, even if subject to prior cross-examination. *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

⁷⁸ 156 U.S. 237 (1895).

⁷⁹ *Kroger, supra* note 2, at 866 n.196.

⁸⁰ *Eureka Lake & Yuba Canal Co. v. Superior Court*, 116 U.S. 410, 418 (1886).

⁸¹ 178 U.S. 458 (1900).

⁸² *Id.*

⁸³ 223 U.S. 442, 452 (1912).

of that era merely recited the holding in general discussions of the admissibility of prior sworn statements.⁸⁴ The two modern citations by the Court provide no support for an expansive "forfeiture" interpretation because they concerned only the scope of confrontation.⁸⁵ Significantly, *Reynolds* was not mentioned in *Snyder v. Massachusetts*, when Justice Cardozo said that "[n]o doubt the privilege [of personally confronting the witness] may be lost by consent or at times even by misconduct."⁸⁶ Nor was it cited in *Illinois v. Allen*,⁸⁷ which upheld the constitutionality of the forcible removal of a disruptive defendant from the courtroom. The facts of *Reynolds* and its subsequent citation in those six cases all limit it to its facts and did not create a true forfeiture rule.

C. The Modern Development of the Waiver by Wrongdoing Exception

What was originally described as waiver by misconduct but is now known as "forfeiture" by wrongdoing began to emerge in 1976, principally in the federal courts, to combat rising incidents of witness tampering found in drug and organized crime cases.⁸⁸ Initially, the federal courts used Federal Rule of Evidence 807, the residual exception to the rule against hearsay, to admit the prior testimony of the intimidated or dead witness. The federal courts addressed the Sixth Amendment issue by applying *Reynolds* and held that intimidating the witness to prevent testimony waived any Sixth Amendment rights to the admission of the witness's statements. The first modern federal circuit court to use the defendant's wrongdoing against a witness to resolve a Confrontation Clause argument was *United States v. Carlson*,⁸⁹ a typical witness intimidation case. The witness purchased drugs from the defendant but immediately before trial refused to testify despite having been granted immunity and subsequently having been held in contempt for his persistent refusal to testify.⁹⁰ The witness told the DEA agents that he feared reprisals but only indirectly implicated the defendant in the threats.⁹¹ The trial court found that the witness was unavailable within the meaning

⁸⁴ *West v. Louisiana*, 194 U.S. 258, 265 (1904) (finding that *Reynolds* is not inconsistent with upholding a defendant's convictions based upon testimony at a prior hearing at which the defendant was present); *Mattox v. United States*, 156 U.S. 237, 242 (1895) (reciting the holding in *Reynolds* in a general discussion of the admissibility of prior sworn testimony of now-deceased witnesses).

⁸⁵ *White v. Illinois*, 502 U.S. 346, 365 n.2 (1992) (Thomas, J., concurring) (citing *Reynolds* for the proposition that the right of confrontation applies only to formalized testimonial evidence); *California v. Green*, 399 U.S. 149, 179–80 (1970) (Harlan, J., concurring) (stating "early decisions that consider the confrontation right at any length all involved *ex parte* testimony submitted by deposition and affidavit.").

⁸⁶ 291 U.S. 97, 106 (1934).

⁸⁷ 397 U.S. 337 (1970).

⁸⁸ GRAHAM, *supra* note 19, at 172, 174–81 (describing the waiver doctrine).

⁸⁹ 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

⁹⁰ *Id.* at 1352–53.

⁹¹ *Id.*

of Federal Rule of Evidence 804(b) and that the requirements of the residual clause were met, including proof of the "circumstantial guarantees of trustworthiness."⁹² The statements were found reliable because they were made before the grand jury about an event in which the witness was personally involved and which he never recanted.⁹³ As to the right of confrontation, the court, citing Wigmore and other authorities, held that a defendant should not be afforded the protection of the Confrontation Clause when he silenced a witness.⁹⁴

Carlson and others in the first wave of federal cases involved the residual clause, and the courts made the finding that the hearsay statements had "equivalent circumstantial guarantees of trustworthiness" as those of the traditional exceptions.⁹⁵ Rather quickly, however, the courts collapsed the evidentiary and constitutional questions and asked only if the defendant was responsible for the witness's failure to testify. The Tenth Circuit in *United States v. Balano*⁹⁶ stated: "A valid waiver of the constitutional right is *a fortiori* a valid waiver of an objection under the rules of evidence."⁹⁷ Other circuits quickly adopted the *Balano* approach.⁹⁸ A similar evolution occurred in the state courts.⁹⁹

By the early 1990s, there was a substantial body of federal and state case law upholding the waiver of constitutional and evidentiary rights because of witness intimidation. The elements of the rule established in the case law are straightforward.¹⁰⁰

⁹² *Id.* at 1353–55.

⁹³ *Id.* at 1354.

⁹⁴ *Id.* at 1357–59.

⁹⁵ *United States v. Rouco*, 765 F.2d 983, 993–96 (11th Cir. 1985); *Steele v. Taylor*, 684 F.2d 1193, 1199–1200 (6th Cir. 1982) (noting that the state court found 804(b)(5) satisfied); *United States v. West*, 574 F.2d 1131, 1134–36, 38 (4th Cir. 1978); *Carlson*, 547 F.2d at 1354–55 (quoting FED. R. EVID. 804(b)(5)); *United States v. Mastrangelo*, 533 F. Supp. 389, 391 (E.D.N.Y. 1982); *cf.* *United States v. Thevis*, 84 F.R.D. 57, 63–66 (N.D. Ga. 1979), *aff'd. on other grounds*, 665 F.2d 616, 628–30 (5th Cir. 1982).

⁹⁶ 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980).

⁹⁷ *Id.* at 626.

⁹⁸ *United States v. Emery*, 186 F.3d 921, 926–27 (8th Cir. 1999); *United States v. White*, 116 F.3d 903, 911–12 (D.C. Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271, 1279–80 (1st Cir. 1996); *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *United States v. Mastrangelo*, 693 F.2d 269, 272–73 (2d Cir. 1982).

⁹⁹ *See, e.g., Steele*, 684 F.2d at 1199–1200 (noting an unreported Ohio Court of Appeals opinion that admitted evidence because of threats); *Devonshire v. United States*, 691 A.2d 165, 166 (D.C. 1997); *State v. Gettings*, 769 P.2d 25 (Kan. 1989); *State v. Magouirk*, 539 So. 2d 50, 64–66 (La. Ct. App. 1988) (on rehearing 1989); *State v. Black*, 291 N.W.2d 208, 213–14 (Minn. 1980), *overruled by State v. Jones*, 556 N.W.2d 903 (Minn. 1996); *State v. Sheppard*, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984) (applying waiver by threats to overcome the defendant's objections to use of video-taped testimony by a child witness); *Holtzman v. Hellenbrand*, 460 N.Y.S.2d 591, 597 (N.Y. App. Div. 1983).

¹⁰⁰ Flanagan, *supra* note 2, at 479–98 (discussing the elements and procedure used in the federal courts).

The declarant-witness must be unavailable because of wrongdoing done by the defendant that was intended to and did procure the witness's absence.¹⁰¹ Unavailability is defined broadly and is consistent with the standards of Federal Rule of Evidence 804 and includes the declarant's refusal to testify in court.¹⁰² "Wrongdoing" may be, but need not be, illegal conduct.¹⁰³ The defendant does not have to be under indictment or pending trial, and there is no requirement that the declarant be a scheduled witness¹⁰⁴ or even be cooperating with the government at the time of the intimidation.¹⁰⁵ The rule applies whenever the defendant acted against the declarant because of the declarant's *potential* to be a witness against the perpetrator.¹⁰⁶ The defendant's misconduct must cause the declarant's unavailability at trial. A declarant's refusal to testify for independent reasons prevents the rule's application to a defendant. In the majority of cases, there existed direct proof of the defendant's participation, either by orders, threats, or actual violence against the witness.¹⁰⁷ In a few cases, the defendant's

¹⁰¹ See, e.g., *Houlihan*, 92 F.3d at 1279 (stating that "intent to deprive the prosecution of testimony need not be the actor's sole motivation."); *Aguiar*, 975 F.2d at 47 (stating that the test is whether the defendant "procures a witness's absence"); *United States v. Potamitis*, 739 F.2d 784, 788 (2d Cir. 1984) (stating a defendant waives the confrontation right "when his own misconduct is responsible for a witness's unavailability at trial"); *Rice v. Marshall*, 709 F.2d 1100, 1101 (6th Cir. 1983) (stating the declarant was expected to be a witness against the defendant), *cert. denied*, 465 U.S. 1034 (1984); *Mastrangelo*, 693 F.2d at 271 (stating the declarant was murdered on the way to testify); *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. 1982) (stating that "a defendant who causes a witness to be unavailable for trial for the purpose of preventing that witness from testifying also waives his right to confrontation."); *Steele*, 684 F.2d at 1198–99 (stating that the defendant's wife was called to testify); *United States v. Balano*, 618 F.2d 624, 628–29 (10th Cir. 1979) ("[T]he law [should not] permit an accused to subvert a criminal prosecution by causing witnesses, not to testify at trial" (alterations in original) (emphasis added) (quoting *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976))); *Carlson*, 547 F.2d at 1358 (noting that the defendant acted only when he learned that the declarant was going to testify at his trial); see also *United States v. Jordan*, No. Crim. 04-CR-229-B, 2005 WL 513501, at * 6 (D. Colo. Mar. 3, 2005) (stating that no FED. R. EVID. 804(b)(6) case holds that "a murder whose by-product is the unavailability of a witness" is covered by the rule).

¹⁰² See, e.g., *Steele*, 684 F.2d at 1198–99 (refusal to testify after being held in contempt and having the marital privilege denied); *Carlson*, 547 F.2d at 1353 (witness held in contempt after refusal to testify).

¹⁰³ *United States v. Ochoa*, 229 F.3d 631, 639 & n.3 (7th Cir. 2000) (holding that giving permission for telephone calls was not wrongdoing and declining to reach the question of whether assisting a witness to leave town is misconduct); FED. R. EVID. 804(b)(6) Advisory Committee Note ("[W]rongdoing need not consist of a criminal act.").

¹⁰⁴ *United States v. Miller*, 116 F.3d 641, 668 (2d Cir. 1997) (holding that an ongoing criminal proceeding in which the declarant was to testify is not required), *cert. denied*, 524 U.S. 905 (1998).

¹⁰⁵ See *Crutchfield v. United States*, 779 A.2d 307, 331–32 (D.C. 2001).

¹⁰⁶ See *Houlihan*, 92 F.3d at 1279–81; *Crutchfield*, 779 A.2d at 332.

¹⁰⁷ See, e.g., *United States v. Scott*, 284 F.3d 758, 763–65 (7th Cir. 2002) (finding repeated conversations by the defendant and the declarant); *United States v. Dhinsa*, 243 F.3d 635,

responsibility was inferred from circumstantial evidence.¹⁰⁸ Finally, preventing the testimony does not have to be the defendant's sole or even major motivation. The element is satisfied if the defendant's desire to prevent the testimony was one reason for the defendant's act against the victim.¹⁰⁹ These elements were used to resolve the Confrontation Clause claims of defendants accused of making witnesses unavailable to testify at trial and consequently stated the constitutional standard applied in the federal appellate and trial courts and state courts.

D. The Adoption of Federal Rule of Evidence 804(b)(6)

The Advisory Committee on Federal Rules of Evidence began considering the adoption of a formal rule of evidence on the issue in 1992.¹¹⁰ Two cases were particularly important.¹¹¹ First, the text of the Rule was grounded on *United States v. Thevis*,¹¹² which identified two elements: "(1) the defendant caused the witness' unavailability (2) for the purpose of preventing that witness from testifying at trial."¹¹³ The second case, *United States v. Mastrangelo*,¹¹⁴ raised the question of who, beyond the direct perpetrators of the violence against the witness, would be subject to the rule.¹¹⁵ This case led the drafters to include those who "acquiesce" in the wrongdoing against the witness.¹¹⁶ The original draft of the rule was titled "waiver by misconduct."¹¹⁷

657 (2d Cir. 2001) ("The record amply demonstrates that Dhinsa murdered Manmohan and Satinderjit to 'depriv[e] the government of . . . potential witness[es].'" (alterations and omission in original) (quoting *Houlihan*, 92 F.3d at 1280)); *United States v. Johnson*, 219 F.3d 349, 352, 355 (4th Cir. 2000) (finding three witnesses observed the murder of the informant).

¹⁰⁸ *United States v. Mastrangelo*, 561 F. Supp. 1114 (E.D.N.Y. 1983) (inferring responsibility from prior statements and an obvious motive to kill the only witness, even where the defendant was in custody at the time of the murder), *aff'd*, 722 F.2d 13 (2d Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984); *People v. Cotto*, 642 N.Y.S.2d 790 (N.Y. Sup. Ct. 1996) (finding that threats were made by unidentified individuals, but only the defendant had motive and knew that the informant was a scheduled witness and that he lived in the neighborhood), *aff'd*, 699 N.E.2d 394 (N.Y. 1998).

¹⁰⁹ *Dhinsa*, 243 F.3d at 654; *Houlihan*, 92 F.3d at 1279.

¹¹⁰ See Flanagan, *supra* note 2, at 475–79; Birdsong, *supra* note 2, at 903–08.

¹¹¹ See Flanagan, *supra* note 2, at 476–77.

¹¹² 665 F.2d 616 (5th Cir. 1982).

¹¹³ *Id.* at 633 n.17. See also Flanagan, *supra* note 2, at 477.

¹¹⁴ 662 F.2d 946 (2d Cir. 1981) (denying an interlocutory appeal arguing that double jeopardy prevented prosecution of *Mastrangelo*), *cert. denied*, 456 U.S. 973 (1982), *on remand*, 533 F. Supp. 389 (E.D.N.Y. 1982) (ruling before trial that statements were admissible), *rev'd on other grounds*, 693 F.2d 269 (2d Cir. 1982) (remanding for hearing on knowledge and failure-to-warn standard), *on remand*, 561 F. Supp. 1114 (E.D.N.Y. 1983) (ruling that evidence supported waiver of hearsay and constitutional rights), *aff'd*, 722 F.2d 13 (2d Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

¹¹⁵ Flanagan, *supra* note 2, at 476.

¹¹⁶ *Id.* at 476–79.

¹¹⁷ *Id.* at 478.

The drafters never questioned the intent element in the rule.¹¹⁸ Records of the committee make clear that the rule was limited to witness tampering cases. In fact, the committee rejected a proposal that the rule refer to witness tampering because it believed that the text made clear that the exception applied only when the object was to procure the witness's absence.¹¹⁹ The Advisory Committee note stated that the rule "recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself,'" citing *Mastrangelo*, a clear case of violence against a testifying witness.¹²⁰ Two changes were made. "Wrongdoing" was substituted for "misconduct" because the former term was used in Rule 804(a).¹²¹ More importantly, the rule's title was changed from "Waiver by misconduct" to "Forfeiture by misconduct."¹²² Comments received after the initial draft of the rule was published suggested the change represented a more appropriate rationale.¹²³ Those comments were not detailed nor does it appear that there was any significant discussion about the meaning or the consequences of the change.¹²⁴ In the same comments, the drafts made clear that the specific intent to prevent the witness from testifying was an essential element of the rule.

The rule as promulgated reads as follows:

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

. . . .

(6) Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.¹²⁵

¹¹⁸ There was little discussion of intent by the commentators. One argued for compliance with all three elements of the *Zerbst* test, including the intent element for waiver. Kroger, *supra* note 2, at 870–81. Another author argued against an intent element because the expanded scope of the rule would reach domestic cases. Sykora, *supra* note 2, at 879–81.

¹¹⁹ Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 22, 1996, available at <http://www.uscourts.gov/rules/Minutes/ev4-2296.htm> (last visited Feb. 5, 2006) [hereinafter Minutes of the Meeting] (quoting *Mastrangelo*, 693 F.2d at 273).

¹²⁰ FED. R. EVID. 804(b)(6) advisory committee's note (quoting *Mastrangelo*, 693 F.2d at 273).

¹²¹ Flanagan, *supra* note 2, at 479.

¹²² *Id.* at 478.

¹²³ See Minutes of the Meeting, *supra* note 119.

¹²⁴ The public comments on the draft rule were perfunctory: Professor Myrna S. Raeder, on behalf of ten professors of evidence made a one-sentence statement on this issue which merely repeated part of the footnote in *Steele v. Taylor*, 684 F.2d 1193, 1201 n.8 (6th Cir. 1982). 2 MCCORMICK, TREATISE ON EVIDENCE app. A (5th ed. 1999) ("'Forfeiture' should be substituted for 'waiver' because the concept of knowing waiver in this context is a fiction."). Two other commentators made shorter statements to the same effect. *Id.*

¹²⁵ FED. R. EVID. 804(b)(6).

The developments in the states paralleled the federal rule. Several jurisdictions promulgated a comparable rule¹²⁶ or adopted it by judicial decision.¹²⁷ Significantly, all of these pre-*Crawford* formulations had a specific intent requirement.¹²⁸

The history and precedents of the “forfeiture” rule from seventeenth-century England to the date that *Crawford* was decided, all focused on witness tampering and all included an intent requirement. The rationale was waiver and not forfeiture. The modern cases used waiver to resolve the evidentiary and constitutional objections to the hearsay. When Justice Scalia noted that the majority approved of “forfeiture by misconduct,” he could only have been referring to the overwhelming prior case law, state and federal, that included a specific intent requirement. Only after *Crawford* did case law appear extending the rule beyond the precedents to include a true forfeiture.¹²⁹

¹²⁶ MIL. R. EVID. 804(b)(6); UNIF. R. EVID. 804(b)(5); CAL. EVID. CODE § 1350; DEL. R. EVID. 804(b)(6); HAW. R. EVID. 804(b)(7); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); OHIO R. EVID. 804(B)(6); PA. R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6) (deleting “acquiescence”). The governor of Maryland proposed a comparable provision in 2004, but it was not adopted. See Letter from the Editor-in-Chief, 35 U. BALT. L.F. 4 (2004); Paul W. Grimm & Jerome E. Deise, Jr., *Hearsay, Confrontation, and Forfeiture by Wrongdoing: Crawford v. Washington, A Reassessment of the Confrontation Clause*, 35 U. BALT. L.F. 6, 6, 41 (2004).

¹²⁷ *Steele*, 684 F.2d at 1199–1200 (noting an unreported Ohio Court of Appeals opinion that admitted evidence because of threats); *State v. Valencia*, 924 P.2d 497 (Ariz. Ct. App. 1996); *Devonshire v. United States*, 691 A.2d 165 (D.C. 1997); *State v. Hallum*, 606 N.W.2d 351 (Iowa 2000); *State v. Gettings*, 769 P.2d 25 (Kan. 1989); *State v. Magouirk*, 539 So. 2d 50, 64–66 (La. Ct. App. 1988) (on rehearing 1989); *State v. Black*, 291 N.W.2d 208, 213–14 (Minn. 1980); *State v. Sheppard*, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984) (applying waiver by threats to overcome the defendant’s objections to use of videotaped testimony by child witness); *Holtzman v. Hellenbrand*, 460 N.Y.S.2d 591, 597–98 (N.Y. App. Div. 1983).

¹²⁸ Oregon recently amended its version of the evidence rule to delete the intent requirement when the party caused the witness’s unavailability by criminal conduct. The new provisions defining “unavailability as a witness” read:

(f) A statement offered against a party who intentionally or knowingly engaged in criminal conduct that directly caused the death of the declarant, or directly caused the declarant to become unavailable as a witness because of incapacity or incompetence.

(g) A statement offered against a party who engaged in, directed or otherwise participated in wrongful conduct that was intended to cause the declarant to be unavailable as a witness, and did cause the declarant to be unavailable.

OR. REV. STAT. § 40.465 (2005).

¹²⁹ There are a few cases, taken in isolation, that may be viewed as supporting a true forfeiture theory. For example, one court held that a defendant’s slaying of a government agent in an exchange of gunfire during a bungled arrest was sufficient to avoid a Confrontation Clause claim. *United States v. Rouco*, 765 F.2d 983 (11th Cir. 1985). Interestingly, the court described it as a waiver of his right of confrontation. *Id.* at 995. There are also cases that speak of forfeiture without mentioning intent to prevent testimony. See, e.g., *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (convicting the defendant of intentionally tampering with the declarant/witness under the federal witness tampering statute).

II. THE ORIGINS OF THE FORFEITURE RATIONALE

A. *The Footnote*

The facts of *Reynolds* and the case law that led to the promulgation of Rule 804(b)(6), and the evidence rule itself, are not promising sources for arguing that responsibility, although unintended, for the witness's absence is enough to lose the right to confrontation. Whenever a strict liability approach was raised, it was rejected.¹³⁰ Nevertheless, the forfeiture argument has emerged from these cases. My explanation for this anomaly is, to use the words of Justice Cardozo, "the tyranny of labels."¹³¹ The forfeiture rationale became associated with the confrontation waiver rule rather early in its modern development. Forfeiture, with its connotation of a penalty, is inherently attractive because the loss of rights follows from wrongdoing, and in most cases, the wrongdoing is violent and often fatal. Moreover, it is an easy doctrine to apply, requiring only proof by a preponderance of the evidence that the defendant was responsible for the witness's unavailability to testify.

Forfeiture was first suggested as a rationale in the 1982 opinion *Steele v. Taylor*,¹³² an early misconduct case. The witness, defendant Owen Kilbane's common-law wife or paramour (depending on one's view of the facts),¹³³ overheard conversations among the defendants accused of a murder for hire.¹³⁴ She refused to testify at the murder trial and the trial court found that her decision was attributable to the husband's improper influence over the witness.¹³⁵ The court identified two theories to support the loss of the hearsay objection and the right of confrontation. The loss was based on "either a concept of implicit waiver of confrontation or the principle that a person should not profit by his own wrong"¹³⁶ The latter comes directly from *Reynolds*, where the Court said, "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong."¹³⁷ In footnote 8, the *Steele* majority explained its preference for the forfeiture theory:

¹³⁰ See *supra* notes 21–22.

¹³¹ *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934).

¹³² 684 F.2d 1193 (6th Cir. 1982).

¹³³ The witness, Ms. Braun, was a prostitute living with Owen Kilbane when she overheard him and others planning a murder for hire in 1968. *Id.* at 1197. Seven years later she left Kilbane and reported the conversations to the police. *Id.* At the time of the trial, she was reunited and living with the defendant and recently had given birth. *Id.* at 1198. The trial court rejected self-incrimination and husband-wife privilege claims and ordered her to testify. *Id.* The close personal relationship between the two was insufficient to support the claim of common-law marriage, but, somewhat inconsistently, the same factors were used to conclude that she was under his influence. *Id.* at 1199, 1208.

¹³⁴ *Id.* at 1197.

¹³⁵ *Id.* at 1199.

¹³⁶ *Id.* at 1201 (footnote omitted).

¹³⁷ *Reynolds v. United States*, 98 U.S. 145, 159 (1878).

It should be noted that the "waiver" concept is not applicable, strictly speaking, to procurement [of a witness's unavailability], and its use is somewhat confusing. It is a legal fiction to say that a person who interferes with a witness thereby knowingly, intelligently and deliberately relinquishes his right to exclude hearsay. He simply does a wrongful act that has legal consequences that he may or may not foresee. The connection between the defendant's conduct and its legal consequence under the confrontation clause is supplied by the law and not by a purposeful decision by the defendant to forego a known constitutional right. But see *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982) holding that procurement of witness unavailability is a "waiver question."¹³⁸

The court went astray in the comparison of the alternatives. In the main text, the court recognized implied waiver as one of two theories supporting the loss of confrontation. In the footnote, however, the court used the *Zerbst* standard for an actual waiver, which requires a knowing, intelligent waiver. Finding that "strictly speaking," the standard for an actual waiver was not met, the court defaulted to the forfeiture rationale but also noted that the Fifth Circuit disagreed with that conclusion.

The footnote was not a careful analysis of the issue and did not consider implied waiver founded on intentional conduct toward a testifying witness. The court, however, also noted that the rule was based on "protecting the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness,"¹³⁹ which emphasizes its relationship to witness tampering. At the same time, the court stated, "The rule is also based on a principle of reciprocity similar to the equitable doctrine of 'clean hands.'"¹⁴⁰ The facts, of course, were not a forfeiture, but an implied, if not express, waiver. The defendant paid for the witness's counsel, and in fact, his counsel acted as her co-counsel, until forced to withdraw by the court.¹⁴¹ Counsel for the defendant also objected to the government's request for protective custody and further raised the marital privilege as a basis for the refusal to testify.¹⁴² It was clear that the defendant deliberately adopted a trial strategy aimed at keeping her from the stand and that he did not want to cross-examine her.

¹³⁸ 684 F.2d at 1201 n.8.

¹³⁹ *Id.* at 1202.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1198.

¹⁴² *Id.* at 1198-99.

After *Steele*, some courts referred to the forfeiture language,¹⁴³ while others read *Steele* as a waiver case.¹⁴⁴ Waiver or forfeiture appeared in the opinions seemingly at random and without much analysis or justification and sometimes interchangeably.¹⁴⁵ Nonetheless, the "forfeiture" rationale gained prominence in the opinions from repetition, although the courts consistently applied the rule only when there was evidence that the defendant intended to prevent the witness's testimony. A second reason for the ready acceptance of the "forfeiture" rationale, rather than waiver, was that the courts tended to quote the language in *Reynolds* that the defendant should not be permitted to benefit from his own wrong.¹⁴⁶ Freed from the constraints of the facts of *Reynolds* and read broadly, the maxim makes no reference to intent or to the mental state of the defendant and eliminates it by omission. Moreover, it has strong tones of public policy emphasizing the interests of the state.

The same process occurred in the states. State courts adopting the confrontation waiver rule also found evidence of intent to prevent testimony.¹⁴⁷ Several states adopted the language of the federal rule requiring intent.¹⁴⁸ At the same time, forfeiture was also mentioned in the cases. For example, the Supreme Court of Iowa found that the defendant intended to prevent his brother from testifying but concluded that it was a forfeiture, rather than waiver, because the principle was based on the defendant's wrongdoing, not on intentional relinquishment of a known right.¹⁴⁹ A similar evolution in terms occurred during the drafting of Federal Rule of Evidence 804(b)(6).

¹⁴³ *United States v. Rivera*, 292 F. Supp. 2d 827, 830 (E.D. Va. 2003), *aff'd*, 412 F.3d 562 (4th Cir. 2005) (upholding the district court's determination that the defendant acquiesced in the murder to prevent the witness from testifying); *United States v. Houlihan*, 887 F. Supp. 352, 358 & n.10 (D. Mass. 1995) (referring to other cases finding waiver); *Devonshire v. United States*, 691 A.2d 165, 169 (D.C. 1997); *State v. Hallum*, 606 N.W.2d 351, 355 (Iowa 2000); *People v. Geraci*, 649 N.E.2d 817, 821 (N.Y. 1995).

¹⁴⁴ *United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000); *United States v. Gomez-Lemos*, 939 F.2d 326, 334 n.3 (6th Cir. 1991); *United States v. White*, 838 F. Supp. 618, 621 (D.D.C. 1993), *aff'd*, 116 F.3d 903, 911–12 (D.C. Cir. 1997) (referring to the forfeiture principle); *Devonshire*, 691 A.2d at 169.

¹⁴⁵ See *United States v. Dhinsa*, 243 F.3d. 635, 650–52 (2d Cir. 2001) (discussing the waiver-by-misconduct doctrine forfeiting confrontation rights); *Black v. Woods*, 651 F.2d 528, 531–32 (8th Cir. 1981); *United States v. Carlson*, 547 F.2d 1346, 1358 n.11 (8th Cir. 1976) (stating "the question in all waiver cases is whether the defendant forfeited his right to confront his accusers personally."); *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004) (speaking of forfeiture of confrontation rights but waiver of evidence objection to the same hearsay).

¹⁴⁶ *Dhinsa*, 243 F.3d. at 652; *Cherry*, 217 F.3d at 815; *United States v. Mastrangelo*, 693 F.2d 269, 272 (2d Cir. 1982); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979); *Houlihan*, 92 F.3d. at 1279; *Hallum*, 606 N.W.2d at 355.

¹⁴⁷ See, e.g., *State v. Valencia*, 924 P.2d 497, 504 (Ariz. Ct. App. 1996) (approving the trial court's reasoning that the pattern of intimidation of the witness was sufficient to support a confrontation waiver).

¹⁴⁸ See *supra* note 126.

¹⁴⁹ *Hallum*, 606 N.W.2d at 354–56.

The first title to the draft rule was “Waiver by misconduct,”¹⁵⁰ but the drafters later changed it to “Forfeiture by misconduct” without any discussion of eliminating the intent requirement in the rule of evidence.¹⁵¹

The pre-*Crawford* development of the rule reveals an odd dichotomy. The courts, in fact, applied the rule only when the defendant intended to, and did, tamper with an actual or potential witness¹⁵² so that there was sufficient proof of an implicit waiver of the constitutional right. While many, if not most, cases viewed the rule as founded on waiver principles, the maxim of depriving the defendant of his confrontation right as an ill-gotten benefit of his wrongdoing was equally prominent. Although some courts gave reasons for selecting forfeiture, generally based on quotes from *Reynolds*, there were no discussions about the differences between waiver and forfeiture and there was no analysis of either option.

B. The Post-Crawford Cases and Their Analysis of the “Forfeiture” Rule

Crawford reshaped the confrontation landscape. Now testimonial evidence that previously had been admitted under “firmly rooted” hearsay exceptions, or that met comparable reliability standards, was inadmissible unless the defendant had the opportunity to cross-examine the witness. The ruling immediately affected domestic homicide prosecutions, and the response was to focus on the forfeiture rationale which could eliminate the need for evidence of witness tampering and broaden the scope of the rule to all homicide cases.

The first post-*Crawford* case was *State v. Meeks*,¹⁵³ decided six weeks after *Crawford*. Meeks shot James Green after an argument escalated into a fist fight and then homicide.¹⁵⁴ The state introduced the victim’s statement identifying the defendant

¹⁵⁰ Advisory Comm. on Evidence Rules, Minutes of the Meeting of May 4–5, 1995, available at <http://www.uscourts.gov/rules/Minutes/min-ev5.htm> (last visited Mar. 26, 2006).

¹⁵¹ See *supra* notes 122–24.

¹⁵² See, e.g., *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992) (stating that the test is whether the defendant procures a witness’s absence); *United States v. Potamitis*, 739 F.2d 784, 788 (2d Cir. 1984) (stating a defendant waives the confrontation right “when his own misconduct is responsible for a witness’s unavailability at trial”); *Rice v. Marshall*, 709 F.2d 1100, 1101 (6th Cir. 1983) (stating the declarant was expected to be a witness against the defendant); *United States v. Mastrangelo*, 693 F.2d 269, 271 (2d Cir. 1982) (stating the declarant was murdered on the way to testify); *Steele v. Taylor*, 684 F.2d 1193, 1198–99 (6th Cir. 1982) (stating that the defendant’s common-law wife was called to testify); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979) (“[T]he law [should not] permit an accused to subvert a criminal prosecution by causing witnesses not to testify at trial . . .” (emphasis added) (alterations in original) (quoting *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976))); *Carlson*, 547 F.2d at 1358 (noting that the defendant acted only when he learned that the declarant was going to testify at his trial).

¹⁵³ 88 P.3d 789 (Kan. 2004).

¹⁵⁴ *Id.* at 791.

to an officer at the scene.¹⁵⁵ The court treated the issue as governed by its earlier precedent, *State v. Gettings*, where the court had ruled that the defendant in a burglary prosecution had waived his right of confrontation by murdering an eyewitness to the burglary and arson.¹⁵⁶ The court simply extended that precedent to *Meeks*, in which the defendant was on trial for the crime that made the witness unavailable.¹⁵⁷

Meeks has been cited by subsequent cases as supporting the admission of statements without evidence that the defendant intended to prevent the witness from testifying.¹⁵⁸ This is surprising because the Kansas Supreme Court neither addressed the role of intent to procure the witness's absence nor analyzed the difference between the waiver and forfeiture theories nor explicitly ruled on that issue.¹⁵⁹ In fact, the precedent and language of the opinion are a mixture of both theories. *Gettings* was a typical murder of a witness implicating the defendant in another crime with substantial evidence that the victim was murdered to prevent the testimony.¹⁶⁰ *Gettings*, in turn, relied on an earlier Kansas case, *State v. Corrigan*,¹⁶¹ with facts similar to *Reynolds*. Corrigan's wife told investigators that he had committed insurance fraud.¹⁶² She had left the defendant and been induced by threats to return to him, and then she disappeared before the trial in circumstances that clearly indicated that Corrigan

¹⁵⁵ *Id.* at 792.

¹⁵⁶ 769 P.2d 25, 27 (Kan. 1989).

¹⁵⁷ *Meeks*, 88 P.3d 789. The extension of the rule to admit the absent declarant's statements in a witness tampering or murder case was not a significant development. Many courts already had permitted it. *See, e.g.*, *United States v. Thai*, 29 F.3d 785, 814 (2d Cir. 1994) (murder as part of extortion); *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992) (conspiracy to import heroin and witness tampering); *United States v. Houlihan*, 887 F. Supp. 352, 355–56 (D. Mass. 1995) (drug conspiracy and murder in furtherance of racketeering), *aff'd*, 92 F.3d 1271 (1st Cir. 1996); *see also* *United States v. White*, 838 F. Supp. 618, 625 (D.D.C. 1993) (holding the declarant's statement admissible as if the declarant was testifying in court), *aff'd*, 116 F.3d 903 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 960 (1997). Moreover, in those cases the jury would be aware of the reasons for the declarant's absence. When the hearsay is admitted in a case unrelated to witness tampering, the court may face the issue of whether to inform the jury of the reason for the unavailability of the witness. At least initially, it appears that the reason would be irrelevant and prejudicial so that the better practice would be to admit the hearsay without explaining why the witness is unavailable. *See, e.g.*, *United States v. Mayhew*, 380 F. Supp. 2d 961, 968 (S.D. Ohio 2005) (noting that the jury would not learn that the judge admitted testimony because of the defendant's acts toward the witness).

¹⁵⁸ *People v. Taylor*, No. A095412, 2005 WL 715973, at *4 (Cal. Ct. App. Mar. 30, 2005); *People v. Giles*, 19 Cal. Rptr. 3d 843, 848 (Cal. Ct. App. 2004); *People v. Baca*, No. E032929, 2004 WL 2750083, at *10 (Cal. Ct. App. Dec. 2, 2004); *People v. Moore*, 117 P.3d 1, 5 (Colo. Ct. App. 2004); *Gonzalez v. State*, 155 S.W.3d 603, 611 n.6 (Tex. Ct. App. 2004).

¹⁵⁹ *Meeks*, 88 P.3d 789.

¹⁶⁰ *Gettings*, 769 P.2d at 27–28.

¹⁶¹ 691 P.2d 1311 (Kan. Ct. App. 1984).

¹⁶² *Id.* at 1313.

knew where she was living because he had received recent information about his children.¹⁶³ The facts in both cases established the intent to prevent testimony.

Moreover, the principal precedent in *Gettings* was *United States v. Thevis*,¹⁶⁴ the Fifth Circuit opinion that specifically required proof that the defendant intended to prevent testimony.¹⁶⁵ Thus, the facts and the supporting case law had an intent requirement. At the same time, the opinions in *Meeks* and *Gettings* relied on the maxim that “[t]he law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him.”¹⁶⁶ The distinction between forfeiture and waiver was not relevant to the court. In *Meeks*, the court continually referred to the defendant’s waiver of confrontation, although it concluded by applying different terms to the evidentiary and constitutional grounds: “*Meeks forfeited* his right of confrontation and *waived* any hearsay objections. Green’s statement was properly admitted.”¹⁶⁷ *Meeks* is not a reasoned analysis of the forfeiture rationale, nor did the court clearly adopt it. The cited precedents all had evidence of the intent to intimidate or prevent the witness from testifying. Significantly, the Kansas Court of Appeals does not believe that *Meeks* requires a true forfeiture.¹⁶⁸ That court subsequently listed intent to prevent testimony as an element of the rule.¹⁶⁹

The other post-*Crawford* opinions did not discuss the issue of intent to prevent testimony. In *People v. Moore*, the Colorado Court of Appeals admitted the victim-wife’s statement in a domestic homicide case without mentioning or considering the intent issue.¹⁷⁰ The only discussion of the doctrine was a citation to *Crawford*’s approval of forfeiture by wrongdoing and a recitation that the defendant should not benefit from his wrongdoing.¹⁷¹

The California Court of Appeals for the Second District did discuss the issue in *People v. Giles*,¹⁷² a domestic homicide case where it was conceded that there was no evidence that the defendant killed the victim to prevent her testimony.¹⁷³ The defendant argued that such proof was required, and the court noted that the defendant’s principal precedent, *United States v. Houlihan*, supported his position, as did Federal Rule of Evidence 804(b)(6), but the court peremptorily rejected the argument.¹⁷⁴

¹⁶³ *Id.* at 1316.

¹⁶⁴ 665 F.2d 616 (5th Cir. 1982).

¹⁶⁵ *Id.* at 633 n.17.

¹⁶⁶ *State v. Meeks*, 88 P.3d 189, 794 (Kan. 2004) (quoting *State v. Gettings*, 769 P.2d 25, 28 (Kan. 1989)); *Gettings*, 769 P.2d at 28 (quoting *Thevis*, 665 F.2d at 630).

¹⁶⁷ 88 P.3d at 795 (emphasis added).

¹⁶⁸ *See State v. Henderson*, 129 P.3d 646, 654 (Kan. Ct. App. 2006).

¹⁶⁹ *Id.*

¹⁷⁰ 117 P.3d 1, 5 (Colo. Ct. App. 2004).

¹⁷¹ *Id.*

¹⁷² 19 Cal. Rptr. 3d 843 (Cal. Ct. App. 2004), *cert. granted*, 102 P.3d 930 (Cal. 2004).

¹⁷³ *Id.* at 848.

¹⁷⁴ *Id.* at 848 & n.3.

Although the [*Houlihan*] opinion contains language suggesting that a killing must be motivated by a desire to silence the victim to trigger a forfeiture of the right to confrontation, we see no reason why the doctrine should be limited to such cases. Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness’s unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable. Other courts have applied forfeiture in cases where the defendant is charged with the same homicide that rendered the witness unavailable, rather than with some underlying crime about which the victim was going to testify.¹⁷⁵

Again, there is no significant analysis of the reasons for the intent to prevent testimony, but rather an acceptance of the argument that a defendant should not benefit from wrongdoing. This is particularly interesting because California Evidence Code section 1350 mirrors Federal Rule of Evidence 804(b)(6), and provides that the statement of an unavailable declarant is admissible if

[t]here is clear and convincing evidence that the declarant’s unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant.¹⁷⁶

Thus, there was an indication that the legislature intended a narrower application of the rule of evidence.¹⁷⁷ The court did place some restrictions on it, holding that

¹⁷⁵ *Id.* at 848.

¹⁷⁶ CAL. EVID. CODE § 1350(a)(1). The court was aware of this provision but did not discuss it, although it did note that it was not subject to the constraints of an evidence rule comparable to Federal Rule of Evidence 804(b)(6). *Giles*, 19 Cal. Rptr. 3d at 848 n.3.

¹⁷⁷ California Evidence Code section 1350 is an evidence provision, as is Federal Rule of Evidence 804(b)(6), and the issue is the constitutional standard for the waiver of the right to confrontation. Nevertheless, these rules of evidence are important. The same standards found in those rules initially were developed to address the constitutional claims, and then they were used to resolve evidence issues before being promulgated as rules of evidence. *See supra* notes 88–99 and accompanying text. In this case, the constitutional standard became the rules of evidence, and the latter are relevant precisely because they state the constitutional standard used by the federal appellate and trial courts, at least until *Crawford*’s ambiguous reference to the doctrine.

the forfeiture of the right of confrontation did not automatically waive an otherwise applicable evidence objection, that the defendant's criminal act resulting in the unavailability of the witness must be intentional, that forfeiture as an equitable doctrine should not be applied when it would be inequitable, and that the jury should not be advised of the court's finding of an intentional act.¹⁷⁸ The Court of Appeals of Texas also adopted the forfeiture rationale in *Gonzalez v. State*.¹⁷⁹ The Texas court's opinion on the issue of intent simply adopted the reasoning in *People v. Giles*.¹⁸⁰ A federal circuit court has recently adopted a true forfeiture rationale,¹⁸¹ and other courts have followed its lead.¹⁸² The trend is not universal. Other post-*Crawford* decisions have not adopted the forfeiture rationale.¹⁸³

The commentators also are beginning to examine whether the intent to prevent testimony is necessary to apply the "forfeiture" doctrine. One recent article by a California Superior Court judge primarily views the issue from its equity origins. The author concludes that the loss of constitutional and hearsay objections is a remedial response to deliberate wrongdoing. Thus, equity and the history of the doctrine require intent to prevent testimony.¹⁸⁴

Another argues that a true forfeiture should be applied regardless of the defendant's motive because there is no principled way to limit it to witness tampering cases.¹⁸⁵ The argument that the intent requirement limiting the doctrine to witness tampering cases is unprincipled is, in my view, fatally flawed. Only one hypothetical

¹⁷⁸ *Giles*, 19 Cal. Rptr. 3d at 850–51. See Joan Comparet-Cassani, *Crawford and the Forfeiture by Wrongdoing Exception*, 42 SAN DIEGO L. REV. 1185, 1202–05 (2005) (criticizing the *Giles* court's restrictions as ineffective).

¹⁷⁹ 155 S.W.3d 603 (Tex. Ct. App. 2004).

¹⁸⁰ *Id.* at 610–11.

¹⁸¹ *United States v. Garcia-Meza*, 403 F.3d 364, 370–71 (6th Cir. 2005). The opinion noted that Federal Rule of Evidence 804(b)(6) did include an intent requirement, but rejected intent because rules of evidence do not determine constitutional standards. *Id.* at 370. This argument, however, ignores the fact that the same standard was used to resolve constitutional claims for the last thirty years. See *supra* notes 88–99, 176 and accompanying text.

¹⁸² *People v. Bauder*, 269 Mich. App. 174 (Mich. Ct. App. 2005).

¹⁸³ *State v. Wiggins*, No. 99-CRS-46567, 2005 WL 857109, at *2, 4 (N.C. Super. Ct. Mar. 18, 2005) (finding no motive to prevent testimony, but the error, if any, was harmless); *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 (Mass. 2005) (holding intent to prevent testimony a requirement); *People v. Baca*, No. E032929, 2004 WL 2750083, at *10–12 & n.6 (Cal. Ct. App. Dec. 2, 2004) (finding intent to prevent testimony but questioning the requirement); *State v. Wright*, 701 N.W.2d 802, 814–15 (Minn. 2005) (requiring intent to prevent testimony); *State v. Fields*, 679 N.W.2d 341, 347 (Minn. 2004) (finding intent to prevent testimony).

¹⁸⁴ Comparet-Cassani, *supra* note 178, at 1188–89, 1206–08 (2005).

¹⁸⁵ Joshua Deahl, Note, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford*, 104 MICH. L. REV. 599 (2005). The note is largely devoted to arguing that the forfeiture doctrine should be used in cases in which the defendant is charged with the criminal act that made the witness unavailable, that is the so-called reflexive application of the doctrine. The courts have had little difficulty on this point. See *supra* note 157.

is posed and it assumes that a defendant would lose the right of confrontation when he kills a witness to prevent the witness from cooperating with the police, but would retain the right to confrontation if he killed the same witness in revenge for cooperating with the police after being told not to do so.¹⁸⁶ In fact, it is the defendant's objective intent, not his subjective intent, that controls.¹⁸⁷ Courts have easily found that a murder in those circumstances was committed, at least in part, to prevent testimony.¹⁸⁸ The declarant's testimony would be admitted in both cases, and the false conflict disappears. The student note also ignores that intent has been a significant requirement of confrontation waiver from the beginning.¹⁸⁹ A comparison of a true witness tampering case, with that of domestic homicide, clearly shows the significant and principled factual differences. Witness tampering is intended to undermine the proof available to the government, and the act establishes the intent to forgo the trial right of confrontation. The latter, committed without a connection to expected testimony, supports no inference about trial rights. Moreover, the primary factor in constitutional analysis is the Supreme Court's jurisprudence on the relinquishment of constitutional rights, including confrontation. Recent commentary has not addressed this issue. The next section develops more fully the thesis that the Court has always relied on a waiver analysis, and has always required proof of intent to forgo a constitutional right. Thus, history, precedent, and constitutional analysis require express or implied intent.

III. THE SUPREME COURT AND THE LOSS OF CONFRONTATION RIGHTS

A. The Supreme Court Analyzes the Loss of Confrontation Rights as a Waiver

The right of confrontation may be relinquished, and the Court has consistently required that it be waived. The traditional definition of waiver found in *Johnson*

¹⁸⁶ Deahl, *supra* note 185, at 609.

¹⁸⁷ See *supra* notes 39–41 and accompanying text.

¹⁸⁸ See *United States v. Houlihan*, 92 F.3d 1271, 1279–80 (1st Cir. 1996) (finding forfeiture when the defendant, leader of a drug conspiracy with strict rules against talking to police, killed the declarant co-conspirator after learning that the declarant was cooperating with the police).

¹⁸⁹ The fundamental premise of the note is that courts, beginning with the Court in *Reynolds v. United States*, have been indifferent to the motivation of the declarant. Deahl, *supra* note 185, at 608–09. On the contrary, Justice Waite specifically found that Reynolds failed to reveal the witness's location because he preferred to defend a weaker government case rather than cross-examine her in court. See *supra* note 75 and accompanying text. To argue that courts have ignored the intent to prevent testimony, is to ignore the development of the rule in witness tampering cases, and to ignore the fact that, before *Crawford*, courts consistently refused to apply the rule when the reason for the witness's absence was not witness tampering. See *supra* notes 107–09 and accompanying text. That argument also ignores the fact that the codification of the doctrine in Federal Rule of Evidence 804(b)(6) and state codes specifically included the intent to prevent testimony requirement, which had been established in the cases. See *supra* notes 110–28.

v. *Zerbst* is “an intentional relinquishment or abandonment of a known right or privilege.”¹⁹⁰ *Reynolds* and its progeny fit easily into this definition. Reynolds knew his wife had testified in his previous trial, knew that the government was seeking her testimony, and from his silence in court must be presumed to have known where she was located.¹⁹¹ The Court rested its decision on his deliberate refusal to assist or explain her absence.¹⁹²

The other cases that cite *Reynolds* involved defendants who were aware of their Sixth Amendment right and who chose to forego the right.¹⁹³ In *Diaz v. United States*, the Court held that the defendant’s voluntary absence waived his Sixth Amendment right to be present at the trial.¹⁹⁴ The principle that voluntary absence from a trial in progress was a waiver of the Sixth Amendment was subsequently reaffirmed in *Taylor v. United States*, which held that it was so obvious that a specific warning to the defendant about the loss of his rights was not required.¹⁹⁵ *Illinois v. Allen*¹⁹⁶ was a true loss by misconduct case, although it did not cite *Reynolds* as precedent. There, the Court upheld the forcible removal of a disruptive defendant from the courtroom.¹⁹⁷ The defendant was repeatedly warned that his conduct would result in removal from the courtroom, and that if he behaved he would be permitted to return.¹⁹⁸ He did so and was returned to the courtroom.¹⁹⁹ According to the Court:

[W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.²⁰⁰

¹⁹⁰ 304 U.S. 458, 464 (1938).

¹⁹¹ *Reynolds v. United States*, 98 U.S. 145, 160 (1878).

¹⁹² See *supra* notes 65–76 and accompanying text.

¹⁹³ *West v. Louisiana*, 194 U.S. 258, 265 (1904) (finding that *Reynolds* is not inconsistent with upholding a defendant’s convictions based upon testimony at a prior hearing at which the defendant was present), *overruled in part by* *Pointer v. Texas*, 380 U.S. 400 (1965); *Mattox v. United States*, 156 U.S. 237, 242 (1895) (reciting the holding in *Reynolds* in a general discussion of the admissibility of prior sworn testimony of now-deceased witnesses).

¹⁹⁴ 223 U.S. 442, 455 (1912).

¹⁹⁵ 414 U.S. 17, 19–20 (1973) (*per curiam*).

¹⁹⁶ 397 U.S. 337 (1970).

¹⁹⁷ *Id.* at 343.

¹⁹⁸ *Id.* at 339–40.

¹⁹⁹ *Id.* at 341.

²⁰⁰ *Id.* at 343 (footnote omitted).

Justice Cardozo did make a reference to the loss of Sixth Amendment rights by misconduct in *Snyder v. Massachusetts*: "No doubt the privilege [of being present in the court] may be lost by consent or at times even by misconduct. Our concern is with its extension when unmodified by waiver, either actual or imputed."²⁰¹ The last sentence makes clear that the issue was when the right applied, rather than how it could be lost. The precise issue in *Snyder* was whether the defendant had a right to be present when the jury viewed the crime scene, and received information through the prosecutor.²⁰² The citation to *Diaz v. United States*, which involved the defendant's voluntary absence from trial,²⁰³ also suggests that an implied, if not actual, waiver is necessary to justify the loss of confrontation rights.

The Court has consistently emphasized that Sixth Amendment rights are special, which implies additional protections to protect against loss. Justice Black, in *Zerbst*, also stated that every reasonable presumption should weigh against the loss of "fundamental" rights.²⁰⁴ The case was remanded for a determination of whether the defendant "did not competently and intelligently waive his right to counsel."²⁰⁵ Moreover, the Court has stated that waiver and its additional protections particularly apply to those rights that protect a fair trial and the reliability of the truth-determining process.²⁰⁶ Sixth Amendment rights traditionally have required more elaborate procedures to waive the key rights to counsel²⁰⁷ or right to a trial by jury, and in particular, in entering a plea of guilty, which relinquishes all of the procedural protections of a jury trial, including the right to confront the witnesses against the defendant. The general mode of analysis for the formal loss of the right of confrontation always has been framed as a waiver, requiring proof of knowledge and intent to relinquish the right, or sufficient facts that, in context, support an implied waiver of the right.

B. The Role of Forfeiture in the Loss of Constitutional Rights

There are two circumstances when a defendant may be held truly to forfeit a right without knowledge or intent to waive it. Defendants may be held to have forfeited some rights by pleading guilty or by procedural default, that is, by failing to raise a constitutional claim at the appropriate time or in the appropriate manner. Both losses take place in judicial procedures, are monitored by the court, and are

²⁰¹ 291 U.S. 97, 106 (1934) (citing *Diaz v. United States*, 223 U.S. 442, 445 (1911)).

²⁰² *Id.* at 104–05. The opinion does not discuss waiver, although Justice Cardozo noted later in the opinion that the defendant conceded he was present during the crime and did not object to diagrams and other evidence about the view. *Id.* at 109. These facts apparently were recited to establish that the defendant suffered no harm by being kept from attending the view.

²⁰³ *Diaz*, 223 U.S. 442.

²⁰⁴ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

²⁰⁵ *Id.* at 469.

²⁰⁶ *Schneekloth v. Bustamonte*, 412 U.S. 218, 236–37 (1973).

²⁰⁷ *Faretta v. California*, 422 U.S. 806, 835–36 (1975).

situations where the defendant and counsel, in the exercise of constitutional rights, are bound by the elections they make. The forfeiture in these circumstances is a collateral consequence of the deliberate and knowing waiver, or exercise, of rights that are more central to the defendant's concerns. Neither situation provides any support for applying true forfeiture principles to eliminate a defendant's constitutional right based on pre-arrest conduct.

1. Forfeiture of Rights Incident to a Plea of Guilty

A guilty plea is the classic example of a knowing and voluntary waiver of constitutional rights. Substantial resources are devoted to insuring that the defendant and his counsel have the opportunity for obtaining the most complete knowledge before making the choice between trial and plea. The defendant is represented by counsel who has obligations to investigate and advise the client.²⁰⁸ The government must provide exculpatory material in its possession²⁰⁹ as well as the means of further investigating and presenting the defense.²¹⁰ The plea is a formal judicial proceeding. The court has an independent duty to advise the defendant of his rights and to make specific inquiries about the voluntariness and basis for the plea. In the federal system, the defendant is specifically advised about the right to confront the witnesses.²¹¹ Necessarily, the focus of the defense and the defendant will be on those issues of most importance to the pending case, be it the law, the expected testimony, or the viability of identified defenses. There is no doubt that the defendant is aware of his choices and their consequences. The plea process and the court's supervisory role are intended to make clear these options so that the plea is a knowing voluntary waiver of all the rights available at a trial.

Despite these efforts, knowledge is imperfect, and the future is unpredictable. Counsel's reasonable advice may be incomplete and questionable in hindsight.²¹² The statute may subsequently be declared unconstitutional or case law changed. A more extensive investigation may reveal a viable defense. The evidence may have been seized in violation of the Fourth Amendment, so it may be suppressed. The key witness may have moved, or testimonial hearsay may be excluded. In sum, reasonable predictions may not be confirmed by experience. A plea, however, relinquishes all defenses known and unknown, and generally, they may not subsequently be asserted. It is those unknown rights which are said to be forfeited because the defendant may not have been aware of or have specifically waived them.

²⁰⁸ *Strickland v. Washington*, 466 U.S. 668 (1984).

²⁰⁹ *Brady v. Maryland*, 373 U.S. 83 (1963).

²¹⁰ "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

²¹¹ FED. R. CRIM. P. 11(b)(1)(E).

²¹² *McMann v. Richardson*, 397 U.S. 759, 772 (1970) (holding that a plea based on reasonably competent evidence is not open to collateral attack simply because counsel may have misjudged the admissibility of a confession).

This forfeiture of unknown issues or defenses, however, is a special situation. It is precisely because of the availability of counsel with resources to prepare a defense, and the detailed procedures for insuring that the plea is an informed decision, that the forfeiture of unknown constitutional rights can be accepted. If there are defects in the formal plea procedure,²¹³ misrepresentations to the defendant or a failure of the defendant to appreciate the nature of the plea,²¹⁴ or inadequate counsel,²¹⁵ the plea may be set aside and all constitutional claims resurrected. Even without these defects, the Supreme Court has held that some unknown defenses are not waived by a guilty plea.²¹⁶ The true, voluntary, and knowing waiver of the right to trial is an essential prerequisite to the forfeiture of unknown constitutional claims. This forfeiture of unknown defenses and issues is an inevitable consequence of an informed decision and is entirely different from a forfeiture declared unilaterally by the state as punishment for an act of wrongdoing.

2. Forfeiture Incident to a Procedural Default

Procedural default is the failure to assert a right in a timely or proper manner, usually by the defense counsel, and perhaps without the defendant's knowledge or consent, that prevents the subsequent assertion of that right.²¹⁷ Although procedural default lacks the formality of a plea, it shares many of its characteristics. Counsel represents the defendant and has an obligation to investigate and to advise the client. The government must provide counsel to indigents and the right to obtain witnesses through subpoenas. Exculpatory material must be provided to the defendant. The procedural decision points are established by statute, rule, or practice and must serve a valid procedural purpose. Many of these are clearly set, as the time for post-trial motions or the time to appeal, and others have procedural protections, such as the waiver of a jury or the right to counsel at trial. These decisions can be anticipated, preparations made, options identified and evaluated, and a reasoned choice made at the appointed time.

Hearings and trials, however, present difficult legal and tactical decisions. Counsel must quickly weigh the cost and benefit in an ambiguous situation and decide, often without direct participation by the defendant. Many of these decisions are know-

²¹³ *McCarthy v. United States*, 394 U.S. 459 (1969) (discussing the failure of the judge to inquire whether the defendant understood the charges or to establish voluntariness of the plea).

²¹⁴ *Henderson v. Morgan*, 426 U.S. 637 (1976) (discussing the issue where the defendant was unaware of an element of the crime).

²¹⁵ *Strickland v. Washington*, 466 U.S. 668 (1984) (per curiam).

²¹⁶ *See Menna v. New York*, 423 U.S. 61 (1975) (holding that a double jeopardy claim is not lost by a guilty plea); *Blackledge v. Perry*, 417 U.S. 21 (1974) (holding that the right to challenge a reindictment on a felony charge after the defendant appealed the misdemeanor conviction is not waived by a plea to the felony).

²¹⁷ *Spritzer*, *supra* note 31, at 475.

ingly taken and are express waivers; however, not all such decisions are made with adequate preparation or knowledge. The judge generally does not supervise them as in a plea. For these reasons, there is a greater potential for error or inadvertence by counsel and, at the same time, substantial leeway for hindsight about the efficacy of a reasoned choice that fails to achieve its goal. Once a choice has been made, however, the trial moves on, and these choices can rarely be reconsidered or withdrawn. Thus, the road not taken and the rights not asserted are forfeited.

Even so, the decision to assert or waive a constitutional claim is made by counsel with access to, or the ability to investigate and obtain, relevant information to make the decision, and almost all of these decisions can be anticipated before trial so that preparations can be made. As with a plea, forfeiture by procedural default is a necessary consequence of the exercise of other trial rights, and it is acceptable only because there are established procedures to obtain sufficient information for counsel and the defendant to make the decisions. The choice of one option necessarily forecloses others. There is no way to explore every option to its conclusion. Even so, these risks are mitigated by other procedures intended to prevent a miscarriage of justice. The counsel must meet at least minimal standards for the profession, appellate courts may reverse on plain error,²¹⁸ and on collateral review, the Supreme Court may permit a procedural default to be excused when cause for the default and prejudice from it are established.²¹⁹ The forfeiture of unknown rights pursuant to a plea is ameliorated in practice.

The difference between the forfeiture articulated in the post-*Crawford* cases and forfeiture by plea or procedural default is apparent and significant. The former is based solely on the pretrial, and often pre-investigation or indictment, conduct of the defendant, which, it is argued, necessarily forfeits a constitutional right. No knowledge or intent to relinquish a right is necessary. The forfeiture of unknown rights in pleas and procedural defaults occurs in judicial proceedings that are structured to provide the defendant with the substantial opportunity for knowledgeable choices. Moreover, it is in knowingly exercising these rights to plead or to present a defense, that choices made necessarily preclude other rights. The forfeiture of unknown rights and issues is an inevitable consequence of prior voluntary choices, and it is acceptable only because of the prior knowing and voluntary exercise of other rights. Moreover, the forfeiture that occurs in pleas and procedural defaults occurs *after* a plea or trial in which full rights have already been provided. Forfeiture in these situations is necessary to give finality to criminal convictions, with some limited exceptions. Forfeiture of constitutional rights in the trial process creates concerns about the trial itself. Neither the plea nor procedural default provides any support for forfeiture by wrongdoing.

²¹⁸ FED. R. CRIM. P. 52(b).

²¹⁹ *Wainwright v. Sykes*, 433 U.S. 72 (1977) (establishing the cause and prejudice standard for avoiding procedural default).

Moreover, a fundamental aspect of forfeiture is the idea of penalty for conduct deemed detrimental to the state. But the Court does not use the charged criminal conduct to trigger the loss of rights. Part of the reason is that approach would effectively eliminate any constitutional rights. If a charge of murder, based on probable cause, is sufficient to eliminate confrontation, why is it not sufficient to eliminate other rights that the defendant enjoys under the Sixth Amendment? There are, however, two situations where it could be argued that the defendant's charged conduct may have an effect on the defendant's constitutional right. They are the admission of dying declarations and procedures limiting the defendant's face-to-face confrontation with child victims.²²⁰

The admission of dying declarations has a long lineage in English law.²²¹ The Supreme Court recognized it as an exception to the Confrontation Clause based on its history. The Court in *Mattox v. United States* referred to dying declarations being admitted from "time immemorial" and said, "no one would have the hardihood at this day to question their admissibility."²²² As a principle of evidence, the dying declaration is based on the declarant's knowledge of impending death and not the defendant's actions.

The principle of this exception to the general rule is founded partly on the awful situation of the dying person, which is considered to be as powerful over his conscience as the obligation of an oath, and partly on the supposed absence of interest on the verge of the next world, which dispenses with the necessity of cross-examination. But before such declarations can be admitted in evidence against a prisoner, it must be satisfactorily proved, that the deceased, at the time of making them, was conscious of his danger, and had given up all hope of recovery.²²³

²²⁰ The Eighth Amendment might be considered another example. That amendment does not provide a right to bail, only that any bail set must not be excessive. See *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952). The amount of bail must appropriately further the purposes of bail. See *Stack v. Boyle*, 342 U.S. 1, 5 (1951). The most significant factor is the seriousness of the crime which is relevant to the risk of flight. In these cases, however, the seriousness of the charge does not forfeit the right to reasonable bail, although a reasonable bail for a serious charge may make it too expensive to obtain.

²²¹ See, e.g., *King v. Reason*, 16 How. St. Tr. 1, 24–38 (K.B. 1722) (Eng.). The early evidence texts refer to it. See, e.g., ARCHBOLD, *supra* note 63, at 72 ("[U]pon an indictment for murder, the dying declarations of the deceased are receivable in evidence, if it appear that he was conscious of his being in a dying state at the time he made them."); 1 CHITTY, *supra* note 63, at 569 (stating that the dying declaration is the "one great and important exception" to the hearsay rule); PEAKE, *supra* note 63, at 14–16 (stating that a dying declaration is admissible "for murder where the deceased, while in the declared apprehension of death, or in such imminent danger of it as must necessarily have raised that apprehension in his mind"); PHILLIPPS, *supra* note 63, at 200 ("The dying declarations of a person, who has received a mortal injury, are constantly admitted in criminal prosecutions . . .").

²²² 156 U.S. 237, 243–44 (1895).

²²³ ARCHBOLD, *supra* note 63, at 200–01.

Moreover, the exception is limited to homicide cases and only to explain the cause of the homicide. The history of the dying declaration exception, the rationale, and the scope are separate from the recently emerging forfeiture rationale. It was never based on any forfeiture analysis, and it does not provide any historical support for the forfeiture principle.²²⁴

*Maryland v. Craig*²²⁵ established that a defendant's right to face-to-face confrontation with an accuser can be limited when there is an individualized showing that it is necessary to prevent trauma to a child witness in sexual abuse cases that might affect the child's ability to testify.²²⁶ The Court made clear that the trauma must be caused by the defendant's presence, rather than any anxiety arising from the courtroom setting.²²⁷ Because most children are abused by persons in the family or persons whom they know,²²⁸ the trauma must be from the defendant's alleged acts, rather than merely from facing a stranger or the tensions of the courtroom.

The forfeiture rationale holds the defendant responsible for the witness's vulnerable condition and argues that the right was lost by his own action. The Court, of course, has not adopted that approach. Rather, the Court starts from the proposition that the defendant does have the right to direct confrontation with the witness. The right, however, is not absolute and is subject to some modification when special and individualized circumstances are shown. The state's special interest in the protection of children can overcome the defendant's right to direct confrontation when it will cause trauma that affects the witness's ability to testify. In *Craig*, the Court upheld the use of one-way closed circuit television for the witness's testimony.²²⁹ Particularly important to the decision is that other aspects of confrontation were present: the witness testified under oath; the judge, jury, and defendant observed the demeanor of the witness; and counsel was present and able to cross-examine the accuser.²³⁰ Thus, all of the other truth-enhancing features of confrontation were present except the witness's ability to actually see the defendant.

²²⁴ Professor Richard Friedman suggests that dying declarations may be better rationalized as an example of the forfeiture principle. He argues that this approach preserves the clarity and simplicity of the "testimonial" approach and avoids an exception based originally on the traditional, and unpersuasive, argument for the reliability of dying declarations. Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, CRIM. JUST., Summer 2004, at 4, 12. Certainly, a true forfeiture principle would subsume dying declarations. But it is important to note that viewing dying declarations as forfeitures today does not eliminate the long history of dying declarations which was not based on forfeiture, and it does not provide justification for viewing forfeiture as well-established.

²²⁵ 497 U.S. 836 (1990).

²²⁶ *Id.* at 858.

²²⁷ *Id.* at 856.

²²⁸ The victims in *Craig* attended a day school operated by the defendant. *See id.* at 840. The victims in *Coy v. Iowa*, 487 U.S. 1012, 1014 (1988) (striking down the use of a screen between the victims and the defendant), were the next-door-neighbors of the defendant.

²²⁹ *Craig*, 497 U.S. at 852.

²³⁰ *See id.* at 857.

A review of the Supreme Court's cases on confrontation clearly indicates that waiver and implied waiver have been the only method of analyzing the loss of constitutional rights. Forfeiture is not used by the Court to justify the loss of a constitutional right. To be sure, a defendant exercising some constitutional rights or making some trial decisions may be considered to have forfeited some constitutional rights as a collateral consequence of entering a knowing, intelligent, and voluntary plea or when trial decisions emphasizing some constitutional rights necessarily preclude others. But there the loss of constitutional rights is part of the judicial process, depending upon constitutionally acceptable decision-making by counsel and client, and it only applies to rights that are necessarily precluded by a knowing and deliberate choice. A forfeiture in this context provides no support for forfeiture of a specific constitutional right by conduct unrelated to the trial process. Moreover, the Court has not considered a criminal act as sufficient to forfeit a right, as illustrated by both the dying declaration and the restrictions on the face-to-face confrontation with child victims.

IV. THE FORFEITURE RATIONALE IS UNDEFINED AND UNLIMITED

A. Problem Cases

The easy application of forfeiture is its principal advantage, but also its principal disadvantage. The forfeiture rationale inherently has few limits. The logic is linear and inexorable. If the defendant can be connected with a witness's unavailability *for any reason*, the loss of confrontation rights is automatic. The justification for forfeiture of constitutional rights — harm to the government — places no limits on its application because there are no countervailing considerations to balance. Harm to the government seems to flow automatically from the loss of a live witness.

Any theory justifying the loss of constitutional rights that does not consider the intent of the actor inevitably will produce unacceptable and excessive results. Logically, if the harm to the government is the only factor, and the intent of the actor irrelevant, then a party who accidentally collides with and kills a person who could testify would lose the right to confront that witness, specifically the right to object to testimonial hearsay. Similarly, a defendant who correctly advises a potential witness that the latter may invoke a valid privilege would also lose any Sixth Amendment right, if the witness asserted the privilege at the defendant's trial.²³¹

²³¹ Professor Friedman argued that both situations did not necessarily prevent the operation of the forfeiture. Friedman, *Chutzpa*, *supra* note 2, at 518 n.25 (defendant's accidental collision affecting witness on way to court); *id.* at 519 n.30 (legitimate advice to claim a privilege may avoid forfeiture only if witness is a close relative). *But see* *People v. Giles*, 19 Cal. Rptr. 3d 843, 850 (Cal. Ct. App. 2004) (requiring the defendant's act to be intentional and criminal but not necessarily directed to preventing testimony).

The legal advice scenario is not far fetched.²³² The federal witness tampering statute²³³ has been construed to reach legal advice intended to prevent testimony of a witness,²³⁴ and there have been prosecutions against persons who provided non-intimidating advice to other defendants.²³⁵ The forfeiture principle asks only if the defendant's act of providing the advice prevented the witness's testimony.²³⁶ If so,

²³² See *People v. Hampton*, 842 N.E.2d 1124, 1130–31 (Ill. App. Ct. 2006) (remanding for factual findings on the forfeiture issue where the defendant advised the witness to assert the Fifth Amendment privilege).

²³³ 18 U.S.C. § 1512 was enacted in 1982 to replace 18 U.S.C. § 1503 and to expand coverage to potential witnesses and those that provided inadmissible evidence. See Teresa Anne Pesce, Note, *Defining Witness Tampering Under 18 U.S.C. Section 1512*, 86 COLUM. L. REV. 1417, 1418–21 (1986). A person who “corruptly persuades” or attempts to persuade another person to withhold testimony or avoid subpoena violates the statute. 18 U.S.C. § 1512(b) (2000). The statute provides an affirmative defense when “the conduct consisted solely of lawful conduct and . . . the defendant’s sole intention was to encourage, induce, or cause the other person to testify truthfully.” 18 U.S.C. § 1512(d) (2000). This covers attorneys, and perhaps clergy and close relatives.

²³⁴ *Cole v. United States*, 329 F.2d 437 (9th Cir. 1964). In *Cole*, the court framed the question as:

whether advice to claim the constitutional privilege, which advice does not have and was not designed to have any consequence in the way of influencing the witness to violate any of his duties as a witness or in the way of bringing about an effect upon the administration of justice that is undue, corrupt or unlawful, can be as a matter of law the crime defined by section 1503 [the predecessor to 1512].

Id. at 438–39. The court answered the question affirmatively. “[O]ne who bribes, coerces, forces or threatens a witness to claim [the Fifth Amendment], or advises with corrupt motive the witness to take it, can and does himself obstruct or influence the due administration of justice.” *Id.* at 443 (emphasis added).

²³⁵ *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997) (defendant acquitted when court found advice not “corruptly” given). The result would be different under the forfeiture rule which has no “corrupt” intent element.

²³⁶ The Department of Justice argued essentially for a forfeiture principle in its prosecution of Arthur Andersen LLP for destruction of evidence as the Enron scandal unfolded. *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129 (2005). The federal witness tampering statute also prohibits “‘knowingly . . . corruptly persuad[ing] another’ . . . to ‘withhold’ [testimony or destroy records] for use in, an ‘official proceeding.’” *Id.* at 2131 (quoting 18 U.S.C. §§ 1512(b)(2)(A) & (B) (2000)). The Department of Justice argued, despite the “knowingly” and “corruptly” language, that the statute should be interpreted to reach document destruction even if the defendant honestly believed that the conduct was proper, and obtained jury instructions that allowed a conviction if the destruction simply impeded the government investigation. *Id.* at 2134, 2136. The Supreme Court unanimously reversed the conviction finding that the statutory language required proof of consciousness of wrongdoing. *Id.* at 2136, 2137. The case is an important reminder of the consequences that flow from ignoring the intent element and the potential for harm when a forfeiture principle, which only looks to the interests of the government, is applied.

the loss of confrontation rights follows automatically. It seems obvious that this result is wrong, and, in fact, the courts reach a different conclusion when the issue arises as the result of the government's conduct. Prosecutors often advise potential defense witnesses of their right to avoid self-incrimination, and this advice often results in the loss of a defense witness. Currently the issue is analyzed under the Due Process Clause. The cases distinguish between the prosecutor providing generic information about rights and the consequences of false testimony, and conduct that threatens government retaliation for providing defense testimony.²³⁷ Occasionally this conduct rises to a violation of the due process rights of the defendant.²³⁸ Federal Rule of Evidence 804(b)(6) applies to the government,²³⁹ and the same result should be reached under that rule, depending on whether the advice was "wrongdoing" intended to prevent the witness from testifying for the defense or merely the prosecutor discharging an educational function. In any event, the federal witness tampering statute, the Due Process standard, and Federal Rule of Evidence 804(b)(6) reach appropriate results only by considering the intent of the prosecutor. Analyzing the forfeiture principle from the point of view of the government establishes the breadth of the forfeiture rule because it would penalize conduct the courts have previously found acceptable. If the forfeiture rule produces these unacceptable results when applied to the government, it will produce unacceptable results when applied to defendants, suggesting that the forfeiture principle itself should not be adopted.²⁴⁰

²³⁷ See *United States v. Pierce*, 62 F.3d 818, 832 (6th Cir. 1995) (stating that the test is whether the substance of the communication is a threat over and above what is necessary); *United States v. Simmons*, 670 F.2d 365, 369 (D.C. Cir. 1982) (citing a case where the prosecutor's actions were an improper threat to the deprive defense of a witness); *United States v. Gloria*, 494 F.2d 477, 484–85 (5th Cir. 1974) (finding no misconduct when the witness was advised only of the possibility of prosecution if testimony differed from prior plea).

²³⁸ *Webb v. Texas*, 409 U.S. 95 (1972) (per curiam); *United States v. Vavages*, 151 F.3d 1185, 1191 (9th Cir. 1998) (finding that threatening withdrawal of a plea agreement was impermissibly intimidating); *United States v. Hammond*, 598 F.2d 1008, 1012–13 (5th Cir. 1979) (finding threats by an FBI agent deprived the defendant of due process rights); *United States v. Thomas*, 488 F.2d 334, 336 (6th Cir. 1973) (finding a threat to prosecute a defense witness violated the due process rights of the defendant); *United States v. Aguilar*, 90 F. Supp. 2d 1152, 1166–70 (D. Colo. 2000) (finding improper a threat to withdraw a plea agreement of a witness, but finding the defendant's constitutional claim procedurally barred).

²³⁹ See FED. R. EVID. 804(b)(6) advisory committee's note; *United States v. Foster*, 128 F.3d 949, 956–57 (6th Cir. 1997) (Merritt, J., concurring) (stating that forfeiture by wrongdoing applied to government misconduct regarding witnesses); Minutes of the Meeting, *supra* note 119; cf. *Commonwealth v. Santiago*, 822 A.2d 716, 729–31 (Pa. 2003) (finding that a state statute comparable to 804(b)(6) did not apply to an assumed *Brady* violation because there was no intent to deprive the defendant of a witness), *cert. denied*, 542 U.S. 942 (2004).

²⁴⁰ The Due Process analysis applied to the government limits the effect of the government's action by requiring a strong connection between the act and the refusal to testify. There must be a "substantial interference" with the decision not to testify. See, e.g., *Williams v. Woodford*, 306 F.3d 665, 700 (9th Cir. 2002) (citing *United States v. Emuegbunam*, 268 F.3d 377, 400

Another example of the importance of individual intent in the loss of constitutional rights occurs when the rule is applied in conspiracy prosecutions. Federal Rule of Evidence 804(b)(6) reaches those who “acquiesce” in the intimidation of the witness, although they may not have directly participated in the act. By extension, the courts have held that members of a conspiracy may lose their right to object to hearsay evidence and to the loss of confrontation, even though they did not participate, know, or approve of the intimidation of the witness. The court in *United States v. Cherry*²⁴¹ held that the principles of co-conspirator liability expressed in *Pinkerton v. United States*²⁴² were applicable to forfeiture by misconduct.²⁴³ *Pinkerton* held that a member of a conspiracy did not have to participate in a crime to be held criminally responsible for it if the crime was in furtherance of the conspiracy.²⁴⁴ By analogy, all the conspirators did not have to act with the murderer of a witness to lose their rights, so long as the murder was in furtherance of the conspiracy. The Seventh Circuit also adopted the *Pinkerton* rationale for the evidence rule.²⁴⁵

The present witness intimidation rule, even with *Pinkerton*, may not be as broad as it appears. There is some suggestion that *Pinkerton* liability is generally applied only to the leadership of the conspiracy, and there are hints that the courts are sensitive to the issue.²⁴⁶ In the evidence cases, the courts apparently accepted the principle, but they did not apply it to other members of the conspiracy for lack of proof that the witness intimidation was in furtherance of the conspiracy,²⁴⁷ and, of course, there

(6th Cir. 2001); *United States v. Pinto*, 850 F.2d 927, 932 (2d Cir. 1988)) (“The prosecution’s conduct must amount to a substantial interference with the defense witness’s free and unhampered determination to testify before the conduct violates the defendant’s right to due process.”). Likewise, the courts often conclude that the witness had independent reasons for asserting a privilege and refusing to appear. *See United States v. Hooks*, 848 F.2d 785, 801–02 (7th Cir. 1988) (finding that the witness’s decision was made on the advice of counsel); *United States v. Hoffman*, 832 F.2d 1299, 1305 (1st Cir. 1987) (finding no causal connection between the prosecutor’s ill-advised comments and the refusal to testify). Fairness suggests that there should be comparable proof when Federal Rule of Evidence 804(b)(6) and the comparable constitutional rule are applied to the defendant.

²⁴¹ 217 F.3d 811 (10th Cir. 2000).

²⁴² 328 U.S. 640 (1946).

²⁴³ *Cherry*, 217 F.3d at 818. *But see* *Olson v. Green*, 668 F.2d 421, 428–29 (8th Cir. 1982) (rejecting the state court’s theory that the defendant was bound by threats of coconspirators).

²⁴⁴ *Pinkerton*, 328 U.S. 640.

²⁴⁵ *United States v. Thompson*, 286 F.3d 950, 964–65 (7th Cir. 2002); *see also* *United States v. Rivera*, 292 F. Supp. 2d 827, 832 (E.D. Va. 2003) (applying *Pinkerton* to a gang member who knew the witness was cooperating with the government, and also knew of, and approved of, plans to kill the witness), *aff’d*, 412 F.3d 562 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 670 (2005).

²⁴⁶ *See, e.g., United States v. Alvarez*, 755 F.2d 830, 851 (11th Cir. 1985) (limiting *Pinkerton* to those who played more than a minor role in the conspiracy). However, there are exceptions, and *Pinkerton* provides no clear demarcation line in applying the rule.

²⁴⁷ *Cherry*, 217 F.3d at 816–18 (involving an interlocutory appeal and remanding the case for consideration of whether the hearsay statements could be admitted against the other members of the conspiracy). The conviction of Joshua Price, the murderer, was affirmed in a subsequent opinion without mentioning the other defendants. *United States v. Price*, 265

would have to be proof that the crime against the witness was intended to prevent testimony.

The forfeiture rationale eliminates any requirement to prove witness intimidation and allows the admission of hearsay on a broader range of issues. Forfeiture also argues for reducing or eliminating the other limitations found in the current law. Membership in a conspiracy is certainly wrongdoing. Harm to the government is established by the loss of a live witness. Forfeiture makes the individual’s intent irrelevant, so the lack of any knowledge or ability to influence other members of the conspiracy regarding witness intimidation would have no bearing on the application of the rule. Their limited role in the conspiracy should not be a consideration. The sole issue would be whether the person intimidating the witness was acting in furtherance of the conspiracy, which focuses on factors unrelated to any individual defendant except the perpetrator of the violence. The result would be an open door to the loss of confrontation rights of all defendants in a conspiracy and the admission of substantial hearsay. The greatest potential for harm would be to the minor members who have no connection with the acts of others, and no way to challenge evidence that is unrelated to their activities.

B. The Tyranny of the “Forfeiture” Label

The post-*Crawford* development of the forfeiture rationale is notable for the lack of analysis, the apparent rote citation of language, and a disinclination to examine the facts of the precedents. It could be that forfeiture is so obvious that no counter-arguments are possible, but enough has been presented to suggest the need for a more searching waiver analysis. The reason for the uncritical acceptance to date is that forfeiture is a powerful word which makes intent irrelevant, and wrongdoing suggests a justified penalty for a crime. Both are emotionally satisfying factors because criminal defendants are not a favored group, and hinging the loss of rights on a criminal act that makes it more difficult to prosecute the crime seems appropriate at first glance. Additionally, the crimes most affected — domestic violence and child sexual assault — often have problems with complaining witnesses. These circumstances can lead to unwarranted extensions simply because forfeiture has few restraints and encourages arbitrary action and results.

F.3d 1097 (10th Cir. 2001), *cert. denied*, 126 S. Ct. 731 (2005). In *Thompson*, the court of appeals held that the other three conspirators could not have reasonably foreseen the informant’s murder because there had been no similar witness intimidation or murder before, and the random violence experienced during the conspiracy was insufficient to put them on notice. *Thompson*, 286 F.3d at 963. Despite the improper introduction of the hearsay, the circuit court sustained all convictions finding harmless error because of overwhelming evidence of their participation in the drug conspiracy, which made the hearsay unimportant and cumulative to other testimony. *Id.*

The forfeiture rationale has the potential to be applied when there is a tenuous connection between the defendant's act and the loss of a witness's testimony. This potential for abuse is shared with Federal Rule of Evidence 804(b)(6), but it is ameliorated by that Rule's element of intent to prevent testimony. For example, prosecutors in two jurisdictions have argued that a defendant, who did not appear for trial, forfeited any right to object to the hearsay statements of witnesses who were unavailable when the trial was rescheduled.²⁴⁸ Failing to appear is wrongdoing, and, the prosecution argued, by so doing the government lost an opportunity to present the witness when first scheduled. The connection is weak, at best.²⁴⁹ The defendant did not act against the witness. Moreover, the witness's unavailability at the rescheduled trial date is due to factors that are unrelated to the defendant, including death from unrelated causes,²⁵⁰ the witness's own decision to move, the government's decision to deport the witness,²⁵¹ or other intervening causes. Interestingly, in both cases, the hearsay was not admitted because both jurisdictions found that the defendants lacked the intent to prevent testimony.²⁵² The result is not necessarily the same under a forfeiture rationale, where only the harm to the government is considered. This suggests that fairness requires a strong connection between the defendant's act and the witness's unavailability when the witness asserts independent reasons for refusing to testify.

The most insidious aspect is that once it is accepted that a defendant's wrongdoing forfeits rights, it necessarily affects how all subsequent decisions are viewed. One aspect is the potential for circular reasoning under the rule. To prove the defendant

²⁴⁸ *People v. Melchor*, No. 1-03-3036, 2005 WL 1522715 (Ill. App. Ct. June 28, 2005), *modified*, 2005 WL 3041536 (Ill. App. Ct. Nov. 14, 2005); *State v. Alvarez-Lopez*, 98 P.3d 699 (N.M. 2004), *cert. denied*, 125 S. Ct. 1334 (2005).

²⁴⁹ The pre-*Crawford* cases did not specifically address whether the defendant's act had to be the sole cause, the predominant cause, or only one cause of the witness's unavailability. This is particularly important when the witness is present but does not want to testify. The courts are skeptical of the witness's statements of independent reasons for refusing to testify. *United States v. Scott*, 284 F.3d 758, 765 (7th Cir. 2002) (rejecting a declarant's statements about religious and moral reasons for refusing to testify); *Steele v. Taylor*, 684 F.2d 1193 (6th Cir. 1982) (rejecting a declarant's marital privilege claim, but evidence of cohabitation supported the finding that she was under control of the defendant); *State v. Pierce*, 364 N.W.2d 801, 807-08 (Minn. 1985) (rejecting a declarant's statements that the motive for not testifying was not the defendant's threats but that the declarant did not want to be known as a snitch); *People v. Serrano*, 644 N.Y.S.2d 162 (N.Y. App. Div. 1996) (finding a witness's disclaimers of intimidation by the defendant "incredible"). Courts considering whether prosecutors have violated the due process rights of defendants, by advice or warnings to potential defense witnesses, often find intervening causes to avoid violations. *See Flanagan, supra* note 2, at 538-39.

²⁵⁰ *Melchor*, 2005 WL 3041536, at *1 (sole witness subsequently died of drug overdose and codefendant deported).

²⁵¹ *Alvarez-Lopez*, 98 P.3d at 703 (witness deported after serving sentence).

²⁵² *Melchor*, 2004 WL 3041536, at *8; *Alvarez-Lopez*, 98 P.3d at 705. The result should be the same even under a true forfeiture theory because the defendant's act did not cause the witness's unavailability.

guilty of the murder, the state must admit the victim's statement, which is contingent on proof that the defendant killed the victim.²⁵³ The counterargument is that there is no circular reasoning because these are two separate decisions,²⁵⁴ and in a jury trial, each is committed to a different factfinder. The decision to admit the hearsay is a preliminary finding by the court, based upon a preponderance of the evidence that the defendant was responsible for the witness's unavailability. The jury determines guilt or innocence of the crime by proof beyond a reasonable doubt based on all the evidence, including the hearsay, but without knowing of the judge's preliminary finding on the defendant's responsibility for the homicide. A different problem of circularity, or "bootstrapping," comes when the hearsay itself may be considered in determining its admissibility. The Supreme Court has approved of the latter practice,²⁵⁵ although there are sometimes requirements that the hearsay must be corroborated.²⁵⁶ Notwithstanding these arguments, there is a potential for more subtle effects. One court, in deciding not to rule before trial on the request to admit a victim's statement, stated:

Allowing otherwise inadmissible evidence to prove a defendant's guilt in a capital case based upon a judge's pretrial conclusion that the defendant is in fact guilty of that very crime appears to us to be a slippery slope. The resulting erosion of a defendant's right to a trial of the issues by a jury of his peers could be significant. The relaxation of the rules of evidence based upon the Court's pretrial determination of the defendant's probable guilt carries with it the very real possibility of someday substantially eroding the defendant's right to be presumed innocent.²⁵⁷

²⁵³ United States v. Houlihan, 887 F. Supp. 352, 358 n.12 (D. Mass. 1995).

²⁵⁴ Friedman, *Chutzpa*, *supra* note 2, at 521–22.

²⁵⁵ FED. R. EVID. 104(a); *Bourjaily v. United States*, 483 U.S. 171 (1987).

²⁵⁶ FED. R. EVID. 801(d)(2) (providing that a coconspirator's statement can be considered but is not alone sufficient to determine admissibility). It is unclear whether the same standard applies to statements admitted under the wrongdoing rationale. *See* United States v. Emery, 186 F.3d 921, 927 (8th Cir. 1999) (expressing doubt that foundation requires evidence independent of the hearsay and finding sufficient independent evidence); United States v. White, 116 F.3d 903, 914 (D.C. Cir. 1997) (leaving undecided whether foundation can rest exclusively on hearsay). The testimony sometimes includes double hearsay. *See* Steele v. Taylor, 684 F.2d 1193, 1207 (6th Cir. 1982) (Taylor, J., dissenting) (noting that a declarant's statements were of what she had heard other defendants say); *People v. Cotto*, 699 N.E.2d 394, 396–97 (N.Y. 1998) (noting that officers testified to the defendant's statements that he had heard that his family was threatened and to the statements of the defendant's mother and sister about threats they received).

²⁵⁷ United States v. Mikos, No. 02 CR 137-1, 2004 WL 1631675, at *5 (N.D. Ill. July 16, 2004) (declining to approve, upon proffer, admission of evidence of the victim allegedly murdered by the defendant, but admitting some non-testimonial statements under Federal Rule

The court was obviously concerned that the pretrial allegations and preliminary proof would be insufficient when all the evidence was considered at trial. The statement also reflects concern about prejudging a case.

Secondly, the forfeiture principle eliminates rights based solely on proof of other criminal conduct, which weakens other protections simply because guilt is presumed. Perhaps the most questionable result has been that reached by the New York Court of Appeals. The court let stand lower court rulings that the forfeiture by misconduct rationale led not only to the loss of the right to object to the hearsay, but also the right to challenge the hearsay testimony itself. In *People v. Geraci*, the court held that the defendant forfeits “the right to cross-examine about the substance of those statements.”²⁵⁸ That case involved an intimidated declarant who was prepared to testify at trial that he had misidentified the defendant before the grand jury. The court held that the government did not have to call the declarant in their case-in-chief and that the grand jury testimony was sufficient proof linking the defendant to the crime.²⁵⁹ The jury never learned that the declarant had recanted his prior testimony.²⁶⁰ The New York appellate opinions did not address the government’s failure to call an available witness or the denial of cross examination. The federal courts reviewing the decision via habeas corpus concluded that there was no constitutional violation because the defendant could have called the declarant to solicit the testimony had he desired.²⁶¹

A subsequent New York trial court went further when the intimidated declarant was prepared to testify favorably for the defendant. There the court precluded any cross-examination of the declarant for any purpose.²⁶² The declarant apparently was called and testified about events immediately before the murder but refused to identify the perpetrator.²⁶³ The jury was removed, and after an evidentiary hearing, the court

of Evidence 807). *See also* 30B MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 7033, at 94 (2006) (suggesting that forfeiture in the case that led to the witness’s unavailability “completely alters the judge/jury relationship and arguably effectively denies the accused of the jury trial”).

²⁵⁸ *People v. Geraci*, 649 N.E.2d 817, 822 (N.Y. 1995).

²⁵⁹ These rulings appear in the subsequent federal habeas corpus proceeding. *Geraci v. Senkowski*, 23 F. Supp. 2d 246, 250 (E.D.N.Y. 1998), *aff’d*, 211 F.3d 6 (2d Cir. 2000).

²⁶⁰ *See id.* at 263.

²⁶¹ *Id.* The issue before the federal courts was whether there were constitutional violations in finding the declarant “unavailable” although present and ready to testify (albeit recanting his prior testimony) and whether the defendant’s trial and appellate counsel were constitutionally ineffective for not calling the declarant at trial. *Id.* at 261–63. The federal courts found that there was no constitutional requirement that the declarant be actually unavailable to justify the admission of the hearsay, and that the trial counsel made a strategic decision not to call the declarant who then would be subject to examination about the defendant’s threats. *Id.*

²⁶² *People v. Cotto*, 699 N.E.2d 394, 397 (N.Y. 1998).

²⁶³ *Id.*

admitted the witness's pre-trial statements identifying the defendant as the murderer.²⁶⁴ The witness did not return to the stand, and the defendant was barred from cross-examining and possibly impeaching the declarant on his motives for implicating the defendant in the grand jury.²⁶⁵ The New York Court of Appeals held that the scope of cross-examination was not preserved for appeal but implied in a footnote that it was not endorsing loss of cross-examination as a general principle, only that special circumstances justified the limitation of cross-examination in this case.²⁶⁶ The Second Circuit granted the defendant's petition for habeas corpus and found that the limitation violated the right to confrontation.²⁶⁷

There are sound reasons for limiting the misconduct exception to cases of witness tampering, based on precedent and the modern history of the rule. Moreover, linking the loss of confrontation rights to witness tampering provides an inherently understandable and acceptable justification for the loss of confrontation rights. At the same time, there are sound reasons to reject a true forfeiture principle as inherently unlimited as well as inconsistent with precedent and the concept of constitutional rights. There is something unsettling about a theory that provides that constitutional protections against the government can be forfeit merely because an act, albeit a criminal act, may make it more difficult for the government to convict a defendant. That difficulty is part of the balance that the Founders established in the Bill of Rights. In my view, the forfeiture rationale is not a legitimate way to resolve the question because constitutional rights, which are personal rights, should not be subject to loss under a theory that looks only to the interests of the state. Additional reasons for rejecting the true forfeiture rationale are found in its essentially equitable nature.

V. THE ESSENTIALLY EQUITABLE GROUNDS OF FORFEITURE BY WRONGDOING

Justice Scalia's brief reference to forfeiture by wrongdoing characterizes it as based on "essentially equitable grounds."²⁶⁸ Besides the explicit waiver on which the decision was based,²⁶⁹ *Reynolds v. United States* can be read to state two justifications for the loss of confrontation. The most often cited language of *Reynolds*, taken in isolation, states a principle of forfeiture: "The rule has its foundation in the

²⁶⁴ *Id.* at 396–97.

²⁶⁵ *Id.* at 403 (Smith, J., dissenting).

²⁶⁶ *Id.* at 399 n.2.

²⁶⁷ *Cotto v. Herbert*, 331 F.3d 217 (2d Cir. 2003).

²⁶⁸ *Crawford v. Washington*, 541 U.S. 36, 62 (2004) ("For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternate means of determining reliability.").

²⁶⁹ See *Reynolds v. United States*, 98 U.S. 145, 160 (1878); *supra* notes 65–76 and accompanying text.

maxim that no one shall be permitted to take advantage of his own wrong.”²⁷⁰ Estoppel is the second principle: “[B]ut if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.”²⁷¹

Professor Friedman argues that “forfeiture” by wrongdoing should not be based on the first maxim because the loss of confrontation is neither sufficient nor necessary to prevent the wrongdoer from benefiting from the wrong. It is not sufficient to prevent a benefit in those cases where the sanctions for the crime being tried are greater than the sanctions of admitting the uncrossed hearsay. A defendant facing a high penalty crime might deliberately engage in witness intimidation when the hearsay is less persuasive than the live testimony. The defendant may actually benefit by preventing the live testimony, lessening the possibility of conviction on the more serious crime. Likewise, the loss of confrontation is not necessary when the defendant is being tried for murder of a potential witness because that crime has a far greater sanction than the loss of one constitutional right.²⁷²

There is a more fundamental objection to the use of this maxim. It is often used in civil law to prevent the beneficiary of an insurance policy or a will from taking when the beneficiary caused the death of the insured or testator.²⁷³ The financial proceeds from a policy or an estate are benefits of the crime, and greed provides the motive for many murders. Constitutional rights, however, are not “benefits” of a crime in that sense.²⁷⁴ They do not derive from the crime at all, and certainly no one commits crimes in order to obtain constitutional rights in a criminal trial. Rather, confrontation and the other constitutional rights are the personal rights of the individual, inherent

²⁷⁰ *Id.* at 159.

²⁷¹ *Id.* at 158. Courts have recognized the equitable aspect of the rule. *See* United States v. Thompson, 286 F.3d 950, 962 (7th Cir. 2002) (citing United States v. White, 116 F.2d 903, 911 (D.C. Cir. 1997), for view that person who has removed a witness is in a weak position to complain about the loss of confrontation of that witness), *cert. denied*, 537 U.S. 1134 (2003).

²⁷² Friedman, *Chutzpa*, *supra* note 2, at 516–17.

²⁷³ *E.g.*, *Cheatle v. Cheatle*, 662 A.2d 1362, 1365 (D.C. 1995) (citing common law barring a murderer from receiving insurance proceeds of the victim); *Price v. Hitaffer*, 165 A. 470 (Md. 1933) (citing the common law prohibition precluding a murderer from inheriting an estate); *Ahmed v. Ahmed*, 817 N.E.2d 424, 426 (Ohio App. 2004) (stating that federal common law prohibits a murderer from receiving proceeds of an insurance policy on the victim).

²⁷⁴ There is an assumption that the defendant benefits from the victim-witness’s unavailability, which is unjustified in many cases. Premeditated murders aside, many homicides are assaults gone horribly wrong, and in those cases the defense has lost live testimony, which loss adversely affects the defense, particularly when there is a claim of self-defense, accident, or provocation that the victim may corroborate in part. Moreover, a defendant, responsible for a witness’s unavailability, cannot use that fact to admit other hearsay of the victim. *See* FED. R. EVID. 804(a) (stating that a witness is not unavailable if the absence is procured by the defendant); *Sweet v. United States*, 756 A.2d 366, 379 (D.C. Cir. 2000) (holding that a defendant responsible for a witness’s absence may not admit the absent witness’s exculpatory statement); *United States v. White*, 838 F. Supp. 618, 625 n.10 (D.D.C. 1993), *aff’d*, 116 F.3d 903 (1997), *cert. denied*, 522 U.S. 960 (1997); *Wisconsin v. Frambs*, 460 N.W.2d 811 (Wisc. 1990) (same).

in citizenship and accorded defendants tried in our courts.²⁷⁵ They are the fundamental law of the land, and specifically limit the government's power to obtain convictions. Confrontation, in particular, is a procedural right deemed necessary to ensure the fairness of the criminal process. To treat a constitutional right as a benefit of the crime, particularly one that can be lost because it is a benefit, is to ignore the fundamental nature of constitutional rights. This "benefits" argument proves too much because it can be used to eliminate all constitutional rights. The same logic makes all Sixth Amendment rights forfeitable "benefits" of the crime.

The second, significantly different rationale is estoppel. Professor Friedman distinguishes the two in these terms:

In other words, the forfeiture principle does not say to the accused, "You have done wrong, and so we will put you in a position no better for you than that in which you would have been had you done no wrong." Rather, it says in effect, "You have no valid complaint about the loss of a right that, as a natural and desired result of your own conduct, it is impossible to afford you."²⁷⁶

An estoppel-based theory produces the same results as waiver and is fundamentally inconsistent with a true forfeiture rationale. This can be seen by examining the elements of equitable estoppel. Traditionally, there are six prerequisites to equitable estoppel: (1) conduct, including silence "amounting to a representation or a concealment of material facts"; (2) the truth of the facts must be known or should have been known to the party at the time of the conduct; (3) the truth must be unknown to the party claiming estoppel; (4) the conduct must have been done with the knowledge or expectation that it would be relied upon; (5) the conduct must have been relied upon; and (6) the party claiming estoppel must have been acted upon it to his detriment.²⁷⁷

These elements express three fundamental characteristics. First, equitable estoppel is based on a knowing and intentional act done in circumstances where the actor

²⁷⁵ *Faretta v. California*, 422 U.S. 806, 819, 829–30 (1975) (identifying notice, confrontation, and compulsory process as personal rights).

²⁷⁶ Friedman, *Chutzpa*, *supra* note 2, at 518. See also Friedman, *supra* note 224, at 12 (stating that the "appropriate response" to lack of confrontation claim, even when homicide not directed at potential testimony, is: "And whose fault is that? You murdered him.").

²⁷⁷ 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 805, at 191–92 (Spence W. Symons ed., 1941). There are several definitions of estoppel, often with slightly different elements. One concise formulation is that estoppel has "three elements: (1) an act or statement inconsistent with the right later asserted; reliance on such act or statement; and (3) injury." *Central Microfilm Serv. Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1218 (8th Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983).

knew, or should have known, that it would mislead others.²⁷⁸ The estoppel arises because the actor has knowingly and deliberately created a situation in which it would be unfair for him to subsequently change position. As applied to the loss of confrontation rights, estoppel requires more than an act against a person. It mandates that the one to be estopped has deliberately and knowingly created the situation in which it would be unfair for him to claim confrontation.²⁷⁹ This requires the actor to know that his act is inconsistent with the right of confrontation, which, in turn, demands that he be acting against a witness and not a person. This is consistent with the implied waiver analysis used by the Court. Estoppel is also similar to waiver in that estoppel is an equitable defense which defeats a claim of a Sixth Amendment violation. Estoppel places the burden of proof on the prosecution to establish the elements for the rule, as does waiver. Forfeiture ignores intent and is not a defense, but a theory that affirmatively divests a constitutional right if its requirements are met.

The other significant characteristics of equitable estoppel also provide depth to the waiver-by-misconduct rule and address some of the problems with a true forfeiture rationale. The second characteristic of equitable estoppel is that it requires proof of a strong connection between the act and the detrimental reliance. This aspect is a necessary consequence of the strict requirements imposed on the party estopped as well as the party seeking estoppel. For example, the party estopped is not responsible for statements not known to be false, nor misrepresentations in circumstances where reliance would be unreasonable.²⁸⁰ Similarly, estoppel is unavailable if the claimant knew, or had the means to know that the statement was false,²⁸¹ or if the claimant acted for other reasons, or if the misrepresentation did not produce a detriment in fact. Thus, intervening causes, or reasons for acting unrelated to the misrepresentation, are insufficient to support estoppel.

As applied to waiver by wrongdoing, equity suggests that the court should carefully consider the causal connection between the act of the defendant and the witness's unavailability. This is particularly important when the witness can appear in court but other reasons are asserted to prevent testimony. For example, the assertion of a valid

²⁷⁸ 3 POMEROY, *supra* note 277, § 809, at 216.

²⁷⁹ The estoppel is "essentially" equitable because equitable estoppel has two elements that are not applicable to the witness tampering scenario. The defendant's wrongdoing does not mislead the prosecution in this sense, nor does the prosecution rely on the defendant's wrongdoing to its detriment. Nevertheless, the theory is essentially equitable because the core of estoppel, as well as of the rule applied here, is that one's act may preclude the actor's ability to have something inconsistent with that act.

²⁸⁰ *See id.*

²⁸¹ *Id.* § 810, at 219.

privilege, regardless of how suggested, should not be charged against a defendant.²⁸² Others have noted the particularly difficult questions of causation that arise when child witnesses are involved.²⁸³ Then, the question is whether the crime caused the inability to testify or whether it is due to the child's tender age, to the child's condition, or the concerns of a parent, or in fact, due to a tactical decision that the case may be more effectively tried by introducing the hearsay. Equity, with its requirement of proof of causation, argues that the wrongdoing must be the predominant cause of the inability to testify, not just one of several factors.

The third important characteristic of estoppel is that the party claiming estoppel independently must satisfy some requirements before taking advantage of equitable estoppel. The equitable maxims of "unclean hands," "equity favors the vigilant," and "he who seeks equity must do equity," all focus on the movant's role and may disqualify him from relief if his conduct was responsible for the harm.²⁸⁴ Equitable estoppel, for example, requires that the movant must not have been negligent in relying on the misrepresentation. If the movant unreasonably failed to use available means for discovering the truth, then estoppel is denied.

These requirements have important ramifications in a post-*Crawford* environment. Previously, the primary purpose of the Confrontation Clause was only to prevent the introduction of unreliable hearsay that fell outside a firmly-rooted hearsay exception and that did not otherwise satisfy the reliability standards of *Idaho v. Wright*.²⁸⁵ *Crawford*, with its finding that confrontation was an essential aspect of a fair trial, and its categorical requirement of confrontation when testimonial statements are used, implies a government obligation to present direct testimony and confrontation by requiring the opportunity to cross-examine testimonial statements.²⁸⁶ *Crawford* is clearly changing the way evidence will be developed and presented.²⁸⁷ Thus, there should be a preference

²⁸² For example, in *Crawford*, the defendant, Michael Crawford, had a right under Washington law to prevent his wife from testifying. 541 U.S. 36 (2004). Had he invoked this right, a forfeiture theory would argue that he lost his claim to confrontation. However, Sylvia Crawford instigated the assault, was present during the assault, and had a valid right against self-incrimination. See *id.* at 38–40. Had both asserted their respective rights, Michael should have retained his right to confrontation to the extent it applied to testimonial hearsay. Threats or pressure to assert an invalid privilege, however, lead to a different result. See *Steele v. Taylor*, 684 F.2d 1193 (6th Cir. 1982).

²⁸³ Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 253–54 (2002).

²⁸⁴ For a list of the traditional equitable maxims, see KENNETH H. YORK ET AL., CASES AND MATERIALS ON REMEDIES 30–31 (5th ed. 1992).

²⁸⁵ 497 U.S. 805, 815 (1990) (approving introduction of hearsay under exceptions that are not "firmly rooted" if there are "particularized guarantees of trustworthiness" in the statement itself).

²⁸⁶ Friedman & McCormack, *supra* note 29 (arguing before *Crawford* that a testimonial approach to the Confrontation Clause would properly limit the use of victimless prosecutions).

²⁸⁷ Mosteller, *supra* note 6, at 514.

for having the government present live testimony when admitting the witness's prior statements.²⁸⁸ Similar arguments have been made for creating evidentiary rules that encourage the live testimony of child witnesses.²⁸⁹ Other commentators have proposed expanding the opportunity for pretrial cross-examination. Read affirmatively, *Crawford* requires the use of live witnesses whenever possible.

Similarly, in applying the major exception to testimonial hearsay, *Crawford*, as well as the equitable principles, argue for considering the government's need for uncontroverted testimonial hearsay in lieu of live testimony. There are often situations where the government may establish a point either by direct evidence of a witness or through hearsay under the forfeiture analysis. When either option is viable, equity and *Crawford* argue for live testimony rather than the use of estoppel.²⁹⁰

A related aspect is the comparative harm suffered and whether it merits relief, even if the elements of estoppel are met. Ultimately, the question is the admissibility of certain evidence. Testimonial statements, however, often are not of equal importance. The hearsay statements in the post-*Crawford* cases roughly divide between hearsay statements regarding the defendant's involvement in the crime charged and the admission of prior conduct evidence.²⁹¹ Testimonial statements describing the crime charged

²⁸⁸ See *id.* at 578–86; Friedman, *Chutzpa*, *supra* note 2, at 529–30, 530 n.52 (arguing for a government obligation to preserve confrontation to the extent possible).

²⁸⁹ Mosteller, *supra* note 6, at 591–94 (discussing an Oregon law which permits the introduction of victim hearsay statements on testimony of the victim at trial).

²⁹⁰ The obligation of the government to use witnesses rather than hearsay was a subsidiary in the *Mastrangelo* case. *Mastrangelo*'s participation in illegal drugs could be proved through the grand jury testimony of the murdered James Bennett and also through the testimony of his nephew, Joseph Bennett, who had already pled guilty. *United States v. Mastrangelo*, 561 F. Supp. 1114, 1121 (E.D.N.Y. 1983), *aff'd*, 722 F.2d 13 (2d Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984). In 1982, the grand jury hearsay was admissible only under the residuary provision Federal Rule of Evidence 807 (then denominated as FED. R. EVID. 804(b)(5)) which required proof that the hearsay was more probative than other available evidence. See *id.* In moving to admit James Bennett's grand jury testimony, the government did not reveal the existence of Joseph Bennett and, in fact, had promised him that he would not be called to testify against his uncle if he provided an off-the-record proffer of his knowledge. See *id.* at 1122. When this information became known, *Mastrangelo* argued that James Bennett's grand jury testimony was inadmissible because the government had failed to establish that the more probative testimony of Joseph Bennett was unavailable, and that it had failed to use reasonable efforts to procure it. *Id.* The trial judge ultimately rejected the argument, but was critical of the government for its lack of candor, and noted that government promises to a potential witness that he would not have to testify did not necessarily make him an unavailable witness. *Id.* at 1123.

²⁹¹ See *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (the victim's statement to police describing the defendant's assault five months before murder); *People v. Baca*, No. E032929, 2004 WL 2750083, at *2 (Cal. Ct. App. Dec. 2, 2004) (the victim's identification of the defendant); *People v. Giles*, 19 Cal. Rptr. 3d 843, 846 (Cal. Ct. App. 2004) (the victim's statements to the police describing a previous assault); *People v. Jiles*, 18 Cal. Rptr. 3d

obviously are more important (and the harm greater when excluded) than propensity evidence based on prior bad acts, which is both indirect and carries with it some concern for the prejudicial aspects. Similarly, the availability of other witnesses on the same or similar points also argues for a rule of preference that when the prosecution can achieve the same goal by other forms of evidence, the testimonial hearsay statements should not be admitted.²⁹² An additional factor to consider is the general assumption that hearsay is a less useful form of evidence, but that is not always the case. Testimonial statements, unlike live testimony, are not subject to modification, qualification, and recantation, which may provide an advantage to the movant. *Crawford* and equity argue that the prosecution cannot automatically rely on testimonial hearsay in these circumstances, but has to use the direct testimony when available, or at least justify the decision not to do so before resorting to testimonial hearsay under the "forfeiture" doctrine. Equitable principles suggest that the court should consider at least the following factors: the strength of the causal link between the defendant's acts and the witness's unavailability; whether the testimonial statement is direct evidence or propensity evidence; the importance of testimonial statement to the prosecution; the availability of alternate forms of proof subject to confrontation; and the availability of alternate means of providing confrontation for that statement. In effect, equitable principles require greater analysis and support before overriding a constitutional protection.

VI. WAIVER, FORFEITURE, EQUITY, AND HOMICIDE AND ITS UNINTENDED EFFECT ON TESTIMONY

A. *Waiver Versus Forfeiture*

The waiver rationale has the significant advantages of being consistent with the case law as well as the Court's traditional approach to an individual's surrender of constitutional rights. The case law has always viewed the loss of confrontation rights as driven by concerns about the defendant's acts affecting trial testimony. Certainly the modern development by the federal courts after 1976, and the adoption of Federal Rule of Evidence 804(b)(6), was aimed exclusively at witness intimidation. Second, the waiver analysis is consistent with the Court's traditional approach to analyzing the individual's relinquishment of a constitutional right. Constitutional rights are

790, 794 (Cal. Ct. App. 2004) (the victim's statement identifying her husband as the perpetrator); *People v. Pantoja*, 18 Cal. Rptr. 3d 492, 496–97 (Cal. Ct. App. 2004) (the victim's statements about her husband in application for a restraining order); *People v. Moore*, 117 P.3d 1, 3 (Colo. Ct. App. 2004) (the victim's statements of prior assaults); *State v. Meeks*, 88 P.3d 789, 793–94 (Kan. 2004) (the victim's statement to police identifying the defendant); *Gonzalez v. State*, 155 S.W.3d 603, 605 (Tex. Crim. App. 2004) (the victim's statement identifying the defendant).

²⁹² *But see* *La Torres v. Walker*, 216 F. Supp. 2d 157, 160 (S.D.N.Y. 2000) (holding that the hearsay was admissible although other witnesses were called and could have testified in person about the events described in the hearsay).

personal rights, and the waiver rationale examines whether the individual has actually or implicitly waived his rights. The Court has continuously cited the waiver standard of *Johnson v. Zerbst*²⁹³ and at least given lip service to the idea that a presumption exists against the waiver (loss) of a constitutional right. Moreover, all of the major confrontation cases have involved situations where the knowledge and intent were inferred from acts taking place in the context of the judicial process. The forfeiture, rather than waiver, of constitutional rights is an entirely new concept. There is no comparable tradition finding that an individual had lost a significant trial right because of conduct taking place outside the judicial process. Forfeiture of constitutional rights, to the extent that it occurs, takes place only as a necessary consequence of the defendant's informed decisions to enter a plea or to select among procedural alternatives during a trial. In both a plea and procedural default situations, the forfeiture of remaining rights is acceptable only to the extent that the initial decision satisfied constitutional standards for a knowing, voluntary decision.

The waiver analysis, and its focus on the individual's knowledge and intent, is a well-established doctrine that the courts have always applied. By focusing on proof of the individual's intentional conduct directed at the judicial process, a waiver analysis has a compelling and unquestionable rationale. A defendant who acts with intent to prevent *testimony* has no argument against the loss of any constitutional right arising out of that act. Perhaps more important, the intent requirement gives it well-defined contours. The waiver analysis, and its intent requirement, necessarily means that the waiver will apply in the most appropriate cases. Fewer situations will arise where the rule can lead to errors of law, and fewer wrongful convictions will result. The waiver analysis draws the line so that the benefit of the doubt is given the individual, which is appropriate when the issue is the application of constitutional rights. The waiver analysis is more consistent with our view of constitutional rights. These fundamental, personal rights are protections against arbitrary actions by the state. If they are to be relinquished, it is more appropriate to do so based upon intentional acts related to the trial process than upon a theory that emphasizes the interests of the state.²⁹⁴

²⁹³ 304 U.S. 458, 464 (1938).

²⁹⁴ There are two other justifications for the intent standard. First, it may have the advantage of admitting more reliable hearsay. Proof that the defendant intended to prevent a witness from testifying supports the inference that the testimony is reliable. This is true of the inference from the destruction of evidence, which also requires proof of more than the act of destruction. No inference can be drawn from an act which has as one of its unintended consequences the prevention of testimony. The inference is not infallible. The defendant has the same incentive to act regardless of whether it is true or not, since the effect, if it is introduced is to create the risk of a conviction, wrongful or not. Another rationale that often appears in the opinions is the argument that the rule is necessary to protect witnesses and to remove the incentives to murder witnesses. Second, to the extent that rules of evidence or constitutional standards deter more than existing criminal sanctions, a rule directed specifically to witness tampering will be more effective than one that relates only to the trial process.

The arguments for a waiver-based theory are enhanced by the essentially equitable nature of the misconduct exception. Equitable estoppel has a strong knowledge or intent requirement. Only if the person estopped knows that the misrepresentation is false and likely to mislead others is the rule satisfied. Similarly, waiver by misconduct requires knowledge of the defendant, of the judicial process, and of potential testimony. In addition, equitable considerations also emphasize the need for a strong connection between the defendant’s act and the actual loss of testimony. Strong proof preserves confrontation rights when the decision not to testify is due to other intervening causes, including the witness’s individual choices. The advantages of waiver are also the disadvantages of forfeiture. Forfeiture is not supported by the cases nor by the Court’s previous approach to the problem; it is inconsistent with the purpose of constitutional rights; and it is inherently expansive, with many uncertain applications in criminal and constitutional law.

B. The Hard Case — Domestic Homicide

The waiver-by-misconduct rule of evidence and constitutional law has been successfully applied for more than thirty years. It reaches the most egregious case of violence against witnesses and, because of its limitations and inherent rationality, has generated little criticism. The most difficult case for the constitutional standard of waiver is the domestic homicide case such as *California v. Giles*,²⁹⁵ where the crime was unrelated to potential testimony. The waiver standard excludes it. The forfeiture standard admits it. How can this exclusion be justified in light of the strong case for admissibility? Unquestionably, the defendant attacked the victim, although without intent to prevent testimony. The homicide prevents any face-to-face confrontation, and the hearsay may be the next best evidence on a relevant point. In addition, confrontation may be different from other Sixth Amendment rights. The other Sixth Amendment rights can be met by the government through its resources, but only confrontation may be precluded by acts of the defendants and others beyond the government’s control. How can the defendant take advantage of a situation he created, albeit unintentionally? This point of view is captured by Professor Friedman’s colorful title, *Confrontation and the Definition of Chutzpa*,²⁹⁶ in which he compared a defendant’s assertion of confrontation rights to the person who murdered his parents and then claimed sympathy for being an orphan. Like “forfeiture” and the maxim that no one should benefit from his own wrongdoing, the title has emotional weight, but a proper assessment requires a deeper look.

There is no unusual nerve or chutzpa in claiming the right to confrontation. Asserting the right in these circumstances is the same as a factually guilty defendant pleading innocent, or a defendant caught with contraband asserting Fourth Amendment

²⁹⁵ 19 Cal. Rptr. 3d 843 (Cal. Ct. App. 2004), *cert. granted*, 102 P.3d 930 (Cal. 2004).

²⁹⁶ *Supra* note 2.

rights. The Constitution requires that the prosecution prove the defendant guilty in a manner consistent with constitutional procedure, and the defendant may require the state to conform to those requirements. The appropriate mental state is a key issue in many constitutional rights, including the Fourth and Fifth Amendments.²⁹⁷ Second, forfeiture and the chutzpa designation carry connotations of blame for the act against the declarant. The issue is not whether the defendant should be punished for that crime. The issue is one of constitutional procedure, whether the government should be held to the Framers' view, articulated in *Crawford*, that "testimonial" statements of unavailable witnesses should be subject to cross examination by the defendant at some point.²⁹⁸ While the defendant's act is relevant, it is not necessarily decisive.

The Court's categorical approach to the Confrontation Clause also reduces or eliminates other arguments. Claims that the hearsay is needed or that it is more reliable are not persuasive in the application of the rule because they do not create exceptions to testimonial statements. That the homicide prevents any face-to-face confrontation also is not decisive. The Court has consistently held that the Confrontation Clause applies beyond witnesses who appear and testify and includes hearsay statements.²⁹⁹ Its application to hearsay is essential to an effective Confrontation Clause.³⁰⁰ Finally, the categorical approach necessarily means that some hearsay deemed testimonial will be excluded and other hearsay will be admitted, so the fact that the waiver-based rule provides a narrower exception than forfeiture is not decisive, and is what appropriate constitutional standards are expected to do.³⁰¹

Stripped to its essentials, the issue is whether the defendant's act alone is sufficient to lose confrontation rights. The waiver rationale makes the act alone insufficient;

²⁹⁷ The relinquishment of constitutional rights is always dependent upon the appropriate mental state. The standards are different in the pre-arrest or pre-indictment situations, from the waivers required of trial rights. For example, a person must voluntarily consent to a search. Formal notice of the right to refuse consent is not required, but may be considered in determining whether the consent was voluntary. *See* *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Similarly, no warnings of rights are required when a person is asked questions by the police. Once in custody, however, the accused must be warned of his *Miranda* rights and must voluntarily consent to the questioning. *See* *Moran v. Burbine*, 475 U.S. 412 (1986) (finding that the defendant must make a voluntary choice with full awareness of the rights and of the consequences of the decision to waive the rights). A consent to interrogation, however, does not mean that a subsequent confession may not be coerced. *See, e.g.,* *United States v. Syslo*, 303 F.3d 860 (8th Cir. 2002) (stating that a *Miranda* waiver is insufficient when the defendant was coerced by the police holding her children at the station until she confessed).

²⁹⁸ *See supra* notes 3–11 and accompanying text.

²⁹⁹ *See supra* notes 3–15 and accompanying text.

³⁰⁰ *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004).

³⁰¹ The effect of the waiver and forfeiture rationales on prosecutions may be less than anticipated. Many statements will not be "testimonial." Proof of intent to prevent testimony is relative low. *See supra* notes 100–09 and accompanying text. Others may be dying declarations, and in many others, the point may be established by other admissible evidence. After all, prosecutions were successful for centuries without a general exception admitting homicide victims' statements.

intent is necessary for two major reasons. First, intent, or implied intent, provides the essential connection between the defendant's act and the loss of the confrontation rights that supports and justifies the loss of confrontation. Intent satisfies our view of constitutional rights as personal rights, and how they may be relinquished by personal decision. Second, intent is a necessary limiting factor in the application of the rule. This is supported by the essentially equitable nature of the tenet, as well as other rules that apply when a party is implicated in the loss of evidence.

Ultimately, the decision is who has the burden if the witness is unavailable. Generally the government bears this risk because of its obligation to prove guilt beyond a reasonable doubt. The witness-intimidation rule properly shifts that risk to the defendant when there is proof of intent to prevent testimony. Between those extremes are the cases where the defendant's act of homicide prevents the witnesses from testifying, but it was an un contemplated consequence of that act. In any homicide case where future testimony is not a motivation, the effect of the loss of testimony will not be known at the time of the crime. Forfeiture assumes that it favors the defendant, but this is not true. Many homicides, other than deliberate and premeditated murders, are assaults gone horribly wrong. Consider what would happen if the victims had survived and the charge was assault with a deadly weapon, which carries a comparable sentence. Universally, defendants would cross-examine the victim precisely because of the seriousness of the crime, and its motivation. Alternatively, provocation or mitigation may be exposed and perhaps corroborated by the victim. Defendants lose significantly when a witness is not present at the trial. Moreover, the prosecution may gain by keeping a highly impeachable or unlikeable witness from being seen by the jury and instead hearing the evidence via a more presentable witness repeating more sanitized, and unalterable, hearsay. Because the consequences of the homicide on a trial are unknown or not considered at the time it is committed, and may fall either on the prosecution or defendant, then perhaps the rule for the more difficult case is to leave the burdens where they originally lay.

CONCLUSION

A fertile source of perversion in constitutional theory is the tyranny of labels. . . . [A] court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.³⁰²

Justice Cardozo's quotation sums up the misnamed "forfeiture"-by-wrongdoing doctrine. The case law on waiver-by-misconduct up to *Crawford*, almost without exception, was based on an express or implied waiver of the right to confrontation caused

³⁰² *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934), *overruled by* *Mallow v. Hogan*, 378 U.S. 1 (1964).

by the defendant's attack on the person because of his status as a *witness*. Had Justice Scalia relied on history and said that the majority accepted the rule of *waiver* by wrongdoing, the case law and constitutional standard for loss of the right of confrontation would have continued to develop as before and continued to consider the knowledge and intent of the defendant, as implied by his act against a witness. Justice Scalia, instead, wrote forfeiture-by-wrongdoing, and that label altered the rationale of the rule, changed the focus from the defendant to the interests of the state, and potentially expanded it to reach every case where the defendant could be connected to the witness's unavailability by some chain of logic. These changes cannot be supported by any of the pre-*Crawford* precedents, either of the doctrine or of the Court's Confrontation Clause jurisprudence. Precedent argues for waiver and not forfeiture.

Precedent, of course, will not always carry the day when constitutional standards are determined. Any principle must be justified by argument and analysis — and there are significant differences between waiver and forfeiture — and a full appreciation of the consequences of either approach. One compelling reason for the waiver standard is our conception of constitutional rights as belonging to the individual and requiring some knowing and intentional act to relinquish them. A second is the lack of any inherent limitations of the forfeiture rationale, particularly when it looks only to the interests of the state. A third reason is found in equitable principles, which support a waiver of rights when aimed at witness tampering, but not otherwise, and which also provide contours to the doctrine. To date there has not been this debate, either in the courts or in the commentary, about the consequences of either option. Since *Crawford*, it has largely been a matter of labeling. It truly would be a "tyranny of labels" if the forfeiture theory is accepted solely because of its name.